

# **NATIONAL HUMAN RIGHTS CONSULTATION**

## **REPORT**

September 2009

## National Human Rights Consultation

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The National Human Rights Consultation was supported by a Secretariat in the Attorney-General's Department.

The views expressed herein are those of the National Human Rights Consultation Committee and do not necessarily represent the views of the Australian Government.

**WARNING:** The National Human Rights Consultation seeks to treat Indigenous cultures and beliefs with respect. Indigenous readers are warned that the following document may contain images of and/or references to deceased persons.

30 September 2009

The Hon Robert McClelland MP  
Attorney-General  
Parliament House  
CANBERRA ACT 2600

Dear Attorney-General

We are pleased to present to you the Report on the Consultation into Human Rights in Australia.

The Consultation was conducted in accordance with the Terms of Reference issued on 10 December 2008.

Yours sincerely



Father Frank Brennan AO  
Chair



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## Foreword

Mary Kostakidis, Tammy Williams, Mick Palmer and I spent four months traversing this land, from Christmas Island to Palm Island, from Yirrkala to Devonport. Neither did we miss the Centre, attending community roundtables in Coober Pedy, Mintabie, Kalgoorlie, Charleville, Alice Springs and Santa Teresa. Thousands of concerned citizens came and spent time with us, sharing their views on how we might better protect human rights in Australia.

People with wildly divergent opinions about social, moral, political and legal questions came and had their say. Only once did a participant harangue the audience. The respect and tolerance we show each other in the public domain is one of the great things about Australia. I doubt there are many other countries where these community roundtables could have been conducted so peacefully.

Our three days of public hearings in the Great Hall of Parliament House in Canberra featured a diverse range of Australians agitating the big questions of this National Human Rights Consultation—including whether we need an Australian Human Rights Act. Never before has a public consultation generated so much interest: the Committee received more than 35 000 submissions.

Mary, Tammy, Mick and I had obviously been chosen because we are Australians with very different backgrounds and perspectives. We started with our differences, and we still have some. The government entrusted us to feed back what we heard from the Australian community. This we have tried to do. We came to the task confident that Australia is a nation that prides itself on ‘the fair go’ but knowing that much could be done to improve human rights—especially the human rights of people who ‘fall between the cracks’ in our egalitarian society.

We also knew our task was politically charged because many citizens wanted to focus on the question of whether we should have an Australian Human Rights Act. The Coalition parties were opposed. The Labor Party was divided. In this regard we were attentive to those who sought us out—at a community roundtable, on the online forum, on Facebook, at the public hearings or through submissions. We also commissioned detailed research with focus groups, a national telephone survey, and devolved consultations with some of Australia’s most vulnerable people.

The clearest finding from our work is that Australians know little about their human rights—what they are, where they come from and how they are protected. They need and want education. They need and want to create a better culture of human rights in those organisations that deliver public services to the community.

We hope that this detailed report, which is available at <[www.ag.gov.au](http://www.ag.gov.au)> and <[www.humanrightsconsultation.gov.au](http://www.humanrightsconsultation.gov.au)>, the consultation website <[www.humanrightsconsultation.gov.au](http://www.humanrightsconsultation.gov.au)>, the commissioned research, the thousands of submissions received and published (available on the consultation website) and the online forum will be useful educational resources for years to come.

Many Australians would like to see our national government and parliament take more notice of human rights as they draft laws and make policies. Ultimately, it is for our elected politicians to decide whether they will voluntarily restrict their powers or impose criteria for law making so as to guarantee fairness for all Australians, including those with the least power and the greatest need.

Our elected leaders could adopt many of the recommendations in this report without deciding to grant judges any additional power to scrutinise the actions of public servants or to interpret laws in a manner consistent with human rights. Alternatively, they could decide to take the extra step, engaging the courts as a guarantee that our politicians and the public service will be kept accountable in respecting, protecting and promoting the human rights of all Australians.

If they do choose to take that extra step, we have set out the way we think this can best be done—faithful to what we heard, respectful of the sovereignty of parliament, and true to the Australian ideals of dignity and a fair go for all. Our suggestions are confined to the Federal Government and the Federal Parliament. The states and territories will continue to make their own decisions about these matters. But we hope they will follow any good new leads given by the Federal Government and the Federal Parliament.

The Committee was privileged to make this journey. Along the way, we were joined by many dedicated helpers, among them Philip Flood, who assisted with community consultations, a hard-working Secretariat, and a wonderful team of writers led by Gaby Carney. The Committee, of course, accepts responsibility for any shortcomings in our procedures or findings.

Even if all our recommendations were implemented tomorrow, there would still be vulnerable Australians missing out, especially on the essential economic and social rights of greatest concern to the community—health, housing and education. Responsibility for meeting these needs cannot rest solely with government and the vulnerable themselves. We need to take responsibility for each other.

A free and confident Australia has always been on the path to better human rights protection. At times our leaders—such as HV Evatt and Jessie Street—have taken great strides on this path, showing the world a way forward. The Australian community's fabulous response to this Consultation suggests that the time is right for our elected leaders to take new steps to protect and promote human rights. Each step for human rights can take us further on the path to dignity and fairness.

Frank Brennan

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# Summary

On 10 December 2008 the Federal Government asked the Committee to conduct a nationwide Consultation with the aim of finding out which human rights and responsibilities should be protected and promoted in Australia, whether human rights are sufficiently protected and promoted, and how Australia could better protect and promote human rights.

The Committee travelled the length and breadth of the country to seek the community's views. Thousands of people participated in the Consultation, by attending community roundtables, by presenting submissions, by appearing at public hearings, and in other ways.

This report sets out the primary points the community raised in relation to the protection and promotion of human rights and identifies a number of options for the Federal Government to consider. The advantages and disadvantages of these options are examined, and the Committee makes findings and recommendations in relation to what it learnt during the Consultation.

After 10 months of listening to the people of Australia, the Committee was left in no doubt that the protection and promotion of human rights is a matter of national importance. Human rights touch the lives of everyday Australians.

## Part One Introduction

### 1 The Consultation: an overview

Chapter 1 describes how the Committee went about consulting broadly with the people of Australia.

The Committee called for submissions and received 35 014 written responses—the largest number ever for a national consultation in Australia. These submissions were analysed to extract information and for statistical purposes. In addition, about 6000 people registered to attend the 66 community roundtables, which were held in 52 locations around Australia.

The Consultation website <[www.humanrightsconsultation.gov.au](http://www.humanrightsconsultation.gov.au)> and a Facebook page allowed the Committee to further engage with the public. And an online forum facilitated by legal experts provided another opportunity for people to respond to the Consultation questions.

Colmar Brunton Social Research was commissioned to carry out two research projects. The first involved focus group research followed by a national telephone survey to ascertain attitudes towards human rights and their protection among a random sample of Australians. The second task was to conduct focus group research in order to cast light on the experiences and opinions of marginalised and vulnerable groups who might otherwise not participate in the Consultation. The Committee also commissioned The Allen Consulting Group to provide an economic analysis of options for the protection and promotion of human rights in Australia.

In early July 2009 the Committee held three days of public hearings in Canberra; over 60 speakers took part in panel discussions and debates.

Finally, throughout the Consultation the Committee met with a broad range of individuals and organisations, among them parliamentarians, senior public servants, police commissioners, judges and former judges, anti-discrimination commissioners and representatives of non-government organisations.

## **2 The community's views**

Chapter 2 gives a voice to some of the many individuals who participated in the Consultation. It records stories and experiences that were shared during community roundtables and in submissions and provides evidence that for many people human rights are not an abstract concept but are instead relevant to actual, everyday life.

The Committee heard from individuals and groups whose rights are most under threat, among them Indigenous Australians, the homeless, people with disabilities, people with mental illness, people living in rural and remote parts of Australia, the ageing, and children. The question of access to justice was often raised, and it was apparent that the right to a clean environment was a central concern.

Three recent developments in law and government policy were repeatedly referred to as giving rise to human rights concerns: the Northern Territory Emergency Response (also known as the Intervention), the treatment of asylum seekers, and national security legislation. Many who participated in the Consultation felt that in these instances a balance between individual liberty and the public interest might not have been struck.

Finally, four controversial subjects often raised during the Consultation—same-sex marriage, euthanasia, abortion and religious freedom—are discussed.

## **3 Rights and responsibilities**

Chapter 3 deals with the preliminary question of what rights and responsibilities are. The two concepts were crucial to the Consultation process, and it is important to recognise that there are different interpretations of human rights and responsibilities.

First, the chapter looks at the concept of human rights. It traces historical discussions about the nature and origin of human rights and touches on more recent philosophical debates about rights. It then examines the origins of international human rights law in the Universal Declaration of Human Rights in 1948. This is followed by discussion of a community perspective on human rights that emerged during the Consultation. Finally, the relationship between different human rights and the extent to which they can legitimately be limited are examined.

The chapter then moves on to the concept of responsibilities, looking at the philosophical notion of responsibilities that correspond to rights and the way international law has dealt with responsibilities. A community perspective on responsibilities, drawn from the Consultation, is acknowledged. Finally, there is discussion of how responsibilities have been dealt with in other jurisdictions.

## **Part Two      Rights and responsibilities in Australia**

### **4 Which rights and responsibilities?**

Chapter 4 draws on the views of the Australian community to provide an overview of which human rights and responsibilities should be protected and promoted. A common response to this question was that Australia should protect and promote all the human rights reflected in its obligations under international human rights law.

Most people who responded to the question supported the protection and promotion of civil and political rights in Australia. Some argued that only civil and political rights should be protected; others contended that civil and political rights do require protection but not to the exclusion of other rights.

Many Consultation participants argued that economic, social and cultural rights (such as the right to the highest attainable standard of health) should be protected and promoted on the basis that these rights are most important to Australians and are justiciable and that all rights are interrelated and interdependent. The research the Committee commissioned demonstrated that economic, social and cultural rights are at the top of the list of rights that are considered most important to the Australian community. On the other hand, a considerable number of people contended that economic, social and cultural rights should *not* be given legal protection in Australia because parliament alone should make decisions about social and fiscal policy and these rights are not amenable to judicial determination.

There was among Consultation participants disagreement on whether the rights of particular groups in the Australian community deserve special attention. Among

these groups are Indigenous Australians; children and young people; women; people with disabilities; people with mental illness; asylum seekers and refugees; ethnic, religious and linguistic minorities; the elderly; gay, lesbian, bisexual, transgender and intersex people; and workers.

Some participants proposed that new and emerging rights should be protected and promoted in Australia. Among these rights, those that received most attention were the right to an environment that is not harmful to health or wellbeing and the related right to have the environment protected.

Finally, Chapter 4 considers the question of which responsibilities should be protected and promoted in Australia. Many who participated in the Consultation recognised that all human rights entail responsibilities. The idea that individuals should be encouraged to act responsibly towards each other was considered important, but many opposed the recognition, protection or promotion of responsibilities on the basis that they are not legally enforceable, are not reflected in international law, and raise the dangerous prospect of rights being contingent on responsibilities. A number of people proposed that responsibilities should be recognised but not protected or promoted in the same way as rights.

## **5 Are human rights adequately protected and promoted?**

Chapter 5 outlines the main existing mechanisms for protecting and promoting human rights in Australia and evaluates their effectiveness.

International human rights law requires Australia to respect, protect and fulfil human rights. Australia must report regularly on compliance with its treaty obligations, and optional protocols to some treaties allow individuals to lodge complaints against Australia for human rights violations. Many of Australia's human rights treaty obligations have, however, not been incorporated in domestic law. In addition, although federal governments have at times responded positively to the findings of treaty bodies, they have sometimes failed or refused to accept their recommendations.

Australia has strong democratic institutions that function to protect and promote human rights—among them the Constitution, representative democracy, the federal system, the separation of powers, responsible government, bicameral parliaments, parliamentary committees, and a free press. But these institutions do not always ensure that human rights are considered and debated before the passage of legislation and do not always ensure that the rights of minority groups are protected.

The Constitution contains express and implied rights. These rights are, however, limited in scope and have generally been interpreted narrowly by the courts. In addition, the remedies available for breaches of the rights are limited.



Legislative protections of human rights exist, primarily in the form of anti-discrimination legislation at both the federal and state and territory levels. These protections are difficult to understand and apply, though, and are vulnerable to amendment or suspension. There are also weaknesses in and inconsistencies between existing anti-discrimination laws.

Administrative law provides a framework for challenging the decisions of government and its agencies. There is, however, no general right to have a decision reviewed, and there is no general legal onus on decision makers to consider the human rights implications of a decision.

Over time, the common law has come to recognise specific human rights. It has also developed rules relating to the interpretation of legislation that function to protect human rights. But the common law can be overridden at any time by legislation.

Various independent oversight mechanisms, such as the Australian Human Rights Commission and the Commonwealth Ombudsman, contribute to maintaining the transparency and accountability of government and protecting and promoting human rights. Their powers are, however, limited.

Finally, access to justice is a primary concern when it comes to the adequacy of the existing protections. Individuals who are unable to gain access to the protections described will ultimately be unable to enforce their rights.

## **Part Three   Reform options**

### **6   Creating a human rights culture**

Chapter 6 considers options the community identified for promoting an improved human rights culture in Australia.

The Committee heard that human rights can be protected and promoted effectively only if an understanding of and commitment to human rights have become a part of everyday life for all in the community, as well as for government, the private sector and non-government organisations.

The Committee found a lack of understanding among Australians of what human rights are and that support for an improved human rights culture was strong. Many submissions referred to the need for greater human rights education or the development of a human rights ethos in the community. The overwhelming majority of community roundtables reflected the community's desire to gain a better understanding of human rights; this was supported by focus group research, comments on the online forum, and experts speaking at the public hearings.

Calls for an improved human rights culture came from both those in favour of an Australian Human Rights Act and those against. The options the Committee puts forward for improving Australia's human rights culture can be implemented regardless of whether a Human Rights Act is introduced.

The first of these options concerns education. Calls for increasing human rights education in schools and the community were made in submissions and at community roundtables. If this was done as part of a national human rights education plan, it would ensure that human rights education is delivered strategically and meaningfully and would help with coordinating a central, high-quality repository of human rights education resources. There was in the community a strong sentiment that human rights education should also reflect the importance of responsibilities.

A community desire for human rights to be considered by the public sector in policy, practice and decision making was evident. Creating a human rights culture in the public sector would extend to improving engagement between government and Indigenous Australians, as well as having regard to human rights in the context of national security. Incorporation of a human rights approach in the government's social inclusion agenda was also seen to be important, and many non-government organisations pointed to the need for improved collaboration between government and organisations working in the human rights area.

Finally, it was submitted that encouraging corporate responsibility and a private sector environment in which human rights come to be seen as core business is an important part of creating a broader human rights culture in Australia. Many organisations put forward specific proposals relating to public-private partnerships.

## **7 Human rights in policy and legislation**

Chapter 7 discusses the options identified during the Consultation for improving the protection and promotion of human rights in policy and legislation. All these options could be implemented regardless of whether a Human Rights Act is introduced.

The Federal Government could review all federal legislation, policies and practices with a view to identifying any gaps in and inconsistencies between Australia's international human rights obligations and their domestic implementation. Priority areas could be legislation, policies and practices associated with anti-discrimination, national security and immigration and the policies and practices of Australian agencies that could result in Australians being denied their human rights when overseas.

The government could also implement measures to ensure that human rights are taken into account in the development of policy and legislation. There was a high level of community support for such measures: 90 per cent of respondents to the

Colmar Brunton telephone survey supported the proposition ‘Parliament to pay attention to human rights when making laws’ and 85 per cent supported ‘Governments to pay more attention to human rights when they are developing new laws and policies’.

Further, the government could require all Cabinet submissions to contain ‘human rights impact statements’, which would outline the effect of the proposal on human rights and justify any limitations on rights. Experience in Victoria and the Australian Capital Territory suggests that such statements can help with early identification of human rights shortcomings and result in amendments to policies before they reach Cabinet.

Statements of compatibility could be required for all Bills introduced into the Federal Parliament—setting out whether the Bill is compatible with human rights and justifying any limitations on rights. They could also be required for all proposed amendments to legislation and for subordinate legislation. The submissions of the Victorian and ACT Governments described the positive impact of such statements on the human rights dialogue in parliament and in the public service. Other submissions argued that statements of compatibility would foster better informed debate inside and outside parliament, reduce the likelihood of rights being infringed inadvertently, and increase the transparency and accountability of government.

Finally, a parliamentary committee could be charged with reviewing Bills and regulations to determine their compliance with human rights. The powers of existing parliamentary committees could be expanded (as in Victoria and the ACT) or a new committee dedicated to human rights could be established (as in the United Kingdom). The latter option was supported by a number of submissions, including that of the Federal Opposition.

In the absence of a Human Rights Act, it would be necessary to assess new laws and policies by reference to all of Australia’s international human rights obligations or a consolidated list of those obligations.

## **8 Human rights in practice**

Chapter 8 discusses the options identified during the Consultation for improving the protection and promotion of human rights in practice. All these options could be implemented regardless of whether a Human Rights Act is introduced.

There was support for the Federal Government adopting a more coordinated approach to the protection and promotion of human rights, including by adopting a strategic framework within which human rights legislation, policy and practice could be developed and implemented. Australia’s National Action Plan for human rights, which was last updated in 2004, could be revised. A whole-of-government framework would ensure that human rights are better integrated into public sector

policy and legislative development, decision making, service delivery, and practice more generally.

A number of submissions expressed support for adopting measures designed to promote a human rights culture in the public sector. Among the suggestions were incorporating respect for human rights in public sector values and codes of conduct; amending the *Administrative Decisions (Judicial Review) Act 1977* (Cth) to make human rights a relevant consideration in government decision making; requiring public sector agencies to develop human rights action plans, conduct or comply with annual human rights audits, and prepare annual reports on human rights compliance; and amending the *Acts Interpretation Act 1901* (Cth) to require that, as far as it is possible to do so consistently with an Act's purpose, federal legislation is to be interpreted consistently with human rights.

In the absence of a Human Rights Act, it would be necessary to implement such measures by reference to Australia's international human rights obligations or a consolidated list of those obligations.

A number of submissions argued that these measures could be made more effective if independent oversight mechanisms were reinforced. It was suggested that the jurisdiction of the Commonwealth Ombudsman could be expanded to review administrative action for human rights compliance, although the Commonwealth Ombudsman himself noted that he already had sufficient power to investigate human rights matters.

There was also support for augmenting the powers of the Australian Human Rights Commission. It was proposed that the commission's jurisdiction should include all the human rights in relation to which Australia has assumed international obligations; that the same enforcement remedies should be available for human rights and anti-discrimination complaints; and that the Federal Government should be required to table in parliament the commission's reports, and a response to those reports, within six months of receiving them.

Finally, the community repeatedly mentioned the need to improve access to justice. Among the suggestions for improving access to legal representation were increasing funding to legal aid and community legal centres and encouraging pro bono work in the private sector. Submissions also highlighted other means of reducing the cost of access to justice—for example, encouraging the use of alternative dispute resolution services, using protective costs orders or making human rights a 'no costs' jurisdiction, and establishing a fund for disbursement costs.

## **9 Human rights and Indigenous Australians**

Chapter 9 examines options for better protecting and promoting the rights of Indigenous Australians.

In the context of universal human rights, there is continuing debate about how to accommodate the particular rights of minority groups and indigenous peoples. Some Consultation participants took the view that Indigenous Australians should be treated in the same way and enjoy the same rights as non-Indigenous Australians. A number of submissions pointed out that many Indigenous Australians do not enjoy basic civil, political, economic, social and cultural rights, including the right to adequate housing and the right to a fair trial. Others considered that particular measures are needed to respond to Indigenous disadvantage: Indigenous-specific rights including self-determination, rights recognising land ownership and cultural rights. Many submissions referred to the Declaration on the Rights of Indigenous Peoples.

The Committee outlines a range of options for achieving social equality for Indigenous Australians and the degree of community support for each option.

Indigenous-specific rights could be recognised in various legal instruments, among them a Human Rights Act, the Constitution or a treaty. In addition, limitations could be placed on parliament's ability to enact legislation that would be to the detriment of Indigenous people. Various proposals were made in relation to the status of the *Racial Discrimination Act 1975* (Cth), including that it should be constitutionally entrenched or strengthened. Submissions also expressed concern about the 'race power': some suggested it should be amended to ensure that it cannot be used to pass laws that are 'detrimental' to Australian people.

The right to self-determination could be recognised, ensuring that Indigenous Australians are free to determine their internal and local affairs. Statutory acknowledgment could be made of Indigenous Australians as the original inhabitants of Australia, along with acknowledgment of their right to practise and observe their own customs and traditions.

There are also a number of additional reform options for consideration: inclusion of Indigenous Australians in the development and delivery of a national campaign in relation to human rights education and awareness; improving governments' methods of collecting data from Indigenous Australians; and improving access to accredited interpreters for Indigenous Australians.

## **Part Four    A Human Rights Act?**

### **10 Bills of rights debates: a historical overview**

Chapter 10 discusses the previous attempts at the federal level to formally protect human rights, through either constitutional amendment or the passage of new legislation. It also outlines the findings and outcomes of recent inquiries into the desirability of human rights Acts at the state and territory level.

The drafters of the Australian Constitution considered whether they should include a list of rights and ultimately settled on including a small number of limited rights. Since then, two attempts have been made to include human rights in the Constitution by referenda—in 1944 and 1988. Both failed. Four major attempts have also been made to pass human rights legislation at the federal level—by Senator Lionel Murphy in 1973, by the Fraser Government in 1981, by Senator Gareth Evans in 1984, and by Senator Lionel Bowen in 1985. Only the Fraser Government’s attempt met with success: it resulted in enactment of the *Human Rights Commission Act 1981* (Cth).

What is common to the failed proposals is the impact they had on state power. The constitutional amendments sought to constrain states’ power by reference to rights. The legislative attempts either imposed obligations on state authorities or affected the operation of state legislation. In addition, the proposals were seen as efforts to transfer power from a democratically elected parliament to an unelected judiciary.

In recent years five states and the Australian Capital Territory have conducted inquiries into how human rights can be better protected. In Victoria, Tasmania, Western Australia and the ACT the inquiries were conducted by independent committees, all of which recommended the adoption of a human rights Act for their jurisdiction. The ACT and Victoria have taken action, passing the *Human Rights Act 2004* (ACT) and the *Charter of Human Rights and Responsibilities Act 2006* (Vic). Tasmania and Western Australia have deferred action until this National Human Rights Consultation is finalised. In Queensland and New South Wales inquiries were conducted by parliamentary committees, both of which rejected a human rights Act and recommended the adoption of other measures to protect and promote human rights.

## **11 Statutory models of human rights protection: a comparison**

Chapter 11 describes and compares the various human rights Acts that have been implemented overseas and in Victoria and the ACT. It focuses on jurisdictions that have adopted statutory bills of rights and a ‘dialogue’ model of human rights protection. Such a model sets out a list of human rights and accords the three branches of government—the executive, the legislature and the judiciary—specific roles in relation to protection and promotion of those rights.

In 1990 New Zealand passed the *Bill of Rights Act 1990*. This legislation applies to acts done by the legislative, executive or judicial branches of government and those performing public functions, and it protects both natural persons and legal persons. Civil and political rights are protected, and there is a general limitation clause that allows all the listed rights to be limited in specific circumstances. The New Zealand Attorney-General is required to bring legislative provisions that are inconsistent with

human rights to the attention of parliament. Courts are required to interpret legislation consistently with human rights but are not expressly empowered to issue a declaration of incompatibility. There is no free-standing right to bring a court action for a breach of human rights, and there is no express provision for remedies. The courts have, however, held that damages may be awarded against public authorities that commit human rights breaches.

In 1998 the United Kingdom passed the *Human Rights Act 1998*, which prohibits public authorities from acting in a way that is incompatible with human rights. The rights protected—those recognised in the European Convention on Human Rights—are mainly civil and political rights. There is no general limitation clause, but specific rights can be limited. The Minister introducing legislation must make a statement that the Bill is compatible with convention rights or that, despite the Bill's incompatibility, the government wishes to proceed with its enactment. The Joint Committee on Human Rights routinely scrutinises Bills for human rights compatibility. Courts are required to read legislation and give effect to it in a way that is compatible with human rights. Where this is not possible, a court may issue a declaration of incompatibility. The relevant Minister may then amend the legislation if necessary. The Act allows individuals to bring claims against public authorities that act incompatibly with human rights, and courts may grant just and appropriate remedies, including damages.

The ACT's *Human Rights Act 2004* prohibits public authorities from acting in a way that is incompatible with human rights and applies only to individuals. The rights protected are civil and political rights, and there is a general limitation clause allowing all the listed rights to be limited in particular circumstances. The Act requires the ACT Attorney-General to state whether a Bill introduced into the Legislative Assembly is consistent with human rights. The Scrutiny of Bills and Subordinate Legislation Committee must report to the assembly on human rights concerns raised by Bills. So far as it is possible to do so consistently with their purpose, ACT laws must be interpreted in a way that is compatible with human rights, and the Supreme Court may issue a declaration of incompatibility where this is not possible. An individual who feels he or she is a victim of a breach of human rights by a public authority may bring a claim and, with the exception of damages, the Supreme Court may grant the relief it considers appropriate.

The Victorian *Charter of Human Rights and Responsibilities Act 2006* makes it unlawful for a public authority to act in a way that is incompatible with human rights and applies only to natural persons. The rights protected are civil and political rights, including the cultural rights of Indigenous peoples. There is a general limitation clause allowing all the listed rights to be limited in particular circumstances. A member of parliament introducing a Bill must make a statement explaining how the Bill is compatible or incompatible with human rights, and all Bills must be examined by the Scrutiny of Acts and Regulations Committee for

compatibility with human rights. In exceptional circumstances the charter allows parliament to declare that an Act or legislative provision applies despite incompatibility. So far as it is possible to do so consistently with their purpose, all statutory provisions must be interpreted in a way that is compatible with human rights. If this is not possible, the Supreme Court may issue a declaration of inconsistent interpretation. The charter does not establish an independent cause of action against public authorities for human rights breaches, and remedies are available only in the context of a related claim.

## **12 The case for a Human Rights Act**

The most contested option for better protection and promotion of human rights was the introduction of comprehensive legislative protection, variously referred to as a ‘bill of rights’, a ‘charter of rights’ or a ‘human rights Act’. Of the 35 014 submissions the Committee received, 32 091 discussed the option of a charter of rights or a human rights Act. Of these, 27 888 were in favour and 4203 were opposed.

Chapter 12 outlines the main arguments put to the Committee in favour of an Australian Human Rights Act.

A Human Rights Act would redress the inadequacy of existing human rights protections. There are in the current human rights framework gaps that would be filled by a comprehensive statement of the fundamental rights and freedoms of all Australians and a mechanism for ensuring compliance with those rights and freedoms. Other improvements to the existing human rights protections would continue to be defective in the absence of a Human Rights Act. Such an Act would also serve as an important symbolic statement of Australian values and would reinforce our national identity.

It was also argued that a Human Rights Act would ensure greater protection of the rights of minorities and other marginalised people. As well as providing a set of human rights against which proposed laws and policies could be assessed, a Human Rights Act would assist in educating individuals and groups about their rights and empowering them to call for better promotion and protection of them.

A Human Rights Act would improve the quality and accountability of government. The ‘dialogue’ model would generate between the judiciary, the executive and the legislature a conversation about human rights and would encourage public debate on the subject. This would improve government policy, legislation, government service delivery and judicial decisions.

A culture of respect for human rights would be engendered if a Human Rights Act was introduced. Over time, implementation of such an Act by politicians, public sector agencies and the courts would lead to greater awareness of human rights in



the community and greater consideration of and adherence to human rights principles by all sectors of the community.

Australia's international standing in relation to human rights would be improved if a Human Rights Act was introduced. Domestic implementation of Australia's international human rights obligations would limit future criticism for non-compliance, would reduce the number of complaints made to international treaty bodies, and would bolster Australia's credibility when commenting on human rights abuses in other jurisdictions.

A Human Rights Act would bring Australia into line with other democracies. As the only Western democracy that does not have some form of national charter or bill of rights, Australia could be at risk of becoming isolated from developments in other similar legal systems. Australia's ability to take part in discussions about human rights in the international arena might also be adversely affected.

Finally, a Human Rights Act could generate economic benefits, reducing the economic costs associated with policies that do not protect the lives and safety of Australians.

### **13 The case against a Human Rights Act**

Chapter 13 outlines the main arguments put to the Committee against a Human Rights Act.

It was argued that human rights are already adequately protected in Australia. A Human Rights Act is unnecessary because Australia provides adequate protection of human rights through democratic institutions, constitutional protections, legislation and the common law. Australia enjoys greater social equity than other countries that do have a human rights Act.

There would be an unacceptable shift of power from the legislature to the judiciary if a Human Rights Act was introduced. Such an Act would require judges to make policy decisions, could result in courts 'rewriting' legislation, and would ultimately lead to the politicisation of the judiciary, undermining public confidence in the independence of the courts.

A Human Rights Act would not result in better human rights protections. Nor would it result in better laws, since parliament either would focus on pre-empting negative judicial consequences or would abdicate its duty in relation to difficult policy questions, leaving them to the courts. It would not result in better government policies and services, and it would impose further costs on government agencies.

A Human Rights Act might actually limit human rights or lead to other negative consequences for human rights protection. The very process of identifying and

defining rights can limit them, and unintended or adverse consequences could flow from the protection of certain rights.

If a Human Rights Act was introduced it would generate excessive and costly litigation, and the legal profession would be the main beneficiary. Such an Act could have adverse effects on the court system.

Any further protection of rights can and should be achieved through democratic processes and institutions, without the creation of a Human Rights Act. Rights are best protected through a healthy democracy, a strong civil society and strong democratic institutions. It is the customs, attitudes and culture of a people, as expressed through their institutions, that determine the strength of a commitment to democratic values.

The economic costs of introducing a Human Rights Act would outweigh any particular benefits the Act might have to offer.

A Human Rights Act would legalise human rights unnecessarily. It would transform social and political questions into legal ones, and this would turn moral debates about rights into technical debates about statutory interpretation, undermining the potential for cultural change.

## **14 Practical considerations for a Human Rights Act**

Chapter 14 discusses the form a Human Rights Act could take, given the various legal and practical considerations associated with its application.

The majority of submissions that broached this subject proposed that any Human Rights Act introduced should adopt the ‘dialogue’ model, which has been implemented in New Zealand, the United Kingdom, the ACT and Victoria. Alternative models were, however, also proposed, among them the Canadian legislative model (which would allow courts to declare legislation inoperative if it is found to be inconsistent with human rights), a ‘parliamentary’ model (which would seek to protect human rights through democratic institutions and independent oversight mechanisms, rather than through judicial review) and an ‘entrenched’ model (which would involve amending the *Australia Act 1986* to include a list of rights).

The submissions raised numerous questions to be considered in the development of a Human Rights Act, among them the following:

- *The jurisdictional scope of the Act.* Should the Act apply only at the federal level or also at the state and territory level? And should it apply extraterritorially?
- *Compliance with the Act.* Should the Act bind both public authorities and private entities? And what test should be adopted for determining whether an authority exercises a ‘public function’?

- *Who should be protected?* Should the Act protect natural persons only? Should it protect groups as well as individuals? Should it protect citizens only or all people in Australia's jurisdiction? And should it protect all people within Australia's jurisdiction overseas?
- *What rights and responsibilities should be included?* Should the Act protect all the human rights for which Australia has international legal obligations? Should it include rights for particular groups? Should it protect civil and political rights only? And should it protect economic, social and cultural rights, the rights of Indigenous peoples, and new and evolving rights?
- *Should responsibilities be included?* Should substantive responsibilities be included in the Act or are they best left to the preamble or limitations clauses?
- *What limitations should apply?* Should the Act contain a general limitations provision allowing rights to be limited in specific circumstances? Should limitations be included in specific rights provisions? And should a limitations clause apply to 'absolute' rights?
- *Human rights in legislation and policy development.* Should human rights impact statements be required for all Cabinet submissions? Should statements of compatibility be required for new laws? Should a parliamentary committee be charged with reviewing new laws for their compliance with human rights? And should an Act contain an 'override provision' that allows parliament to specify that the Act will not apply to a particular piece of legislation?
- *Interpreting and applying the Act.* Should legislation be interpreted—so far as it is possible to do so consistently with its purpose—compatibly with human rights? Should the Act specify that courts can consider foreign and international jurisprudence in construing human rights? Should courts be empowered to make declarations of incompatibility where they are not able to interpret legislation consistently with human rights, and how would such a mechanism operate? Should the government be required to respond to such declarations and, if so, how should it do that? And should the interpretative provision and declarations of incompatibility also apply to subordinate legislation?
- *The role of public authorities.* Should public authorities be required to act compatibly with and give proper consideration to human rights? And should this be supported by measures to instil human rights in public sector culture?
- *A cause of action.* Should there be a free-standing cause of action for the violation of human rights? And should human rights claims be raised only in the context of other proceedings?
- *Remedies.* Should remedies be available for human rights breaches? If so, should there be a range of both judicial (for example, injunctions, declarations and damages) and non-judicial (for example, investigation and conciliation by

the Commonwealth Ombudsman or the Australian Human Rights Commission) remedies for human rights breaches?

- *Who can bring human rights claims?* Should only victims of human rights breaches be able to bring claims? Should others be able to bring a claim on their behalf? And should the federal Attorney-General and the Australian Human Rights Commission be able to intervene in human rights cases as of right?
- *A review provision.* Should the Act provide for review of its operation within a particular time frame? And should it specify the matters for review and by whom the review should be conducted?

## **Part Five      The way forward**

### **15 The Committee's findings**

Chapter 15 provides an overview of and a context for the recommendations the Committee makes in the light of the various options it considered, their advantages and disadvantages, and the level of community support each attracted. It also sets out the Committee's recommendations in relation to a Human Rights Act; these recommendations are based on the discussion in Chapters 10 to 14. When read in conjunction with the report's summary, Chapter 15 reveals the Committee's thinking behind the primary recommendations.

# Recommendations

## Creating a human rights culture

### Recommendation 1

The Committee recommends that education be the highest priority for improving and promoting human rights in Australia.

### Recommendation 2

The Committee recommends as follows:

- that the Federal Government develop a national plan to implement a comprehensive framework, supported by specific programs, of education in human rights and responsibilities in schools, universities, the public sector and the community generally
- that human rights education be based on Australia's international human rights obligations, as well as those that have been implemented domestically (whether in a Human Rights Act or otherwise), and the mechanisms for enforcement of those rights
- that the Federal Government publish a readily comprehensible list of Australian rights and responsibilities that can be translated into various community languages
- that any education and awareness campaign incorporate the experiences of Indigenous Australians—with a particular focus on recent and historical examples of human rights concerns
- that the Federal Government collaborate with non-government organisations and the private sector in developing and implementing its national plan for human rights education.

### Recommendation 3

The Committee recommends that its proposed readily comprehensible list of Australian rights and responsibilities include commitments such as the responsibility:

- to respect the rights of others

- to support parliamentary democracy and the rule of law
- to uphold and obey the laws of Australia
- to serve on a jury when required
- to vote and to ensure to the best of our ability that our vote is informed
- to show respect for diversity and the equal worth, dignity and freedom of others
- to promote peaceful means for the resolution of conflict and just outcomes
- to acknowledge and respect the special place of our Indigenous people and acknowledge the need to redress their disadvantage
- to promote and protect the rights of the vulnerable
- to play an active role in monitoring the extent to which governments are protecting the rights of the most vulnerable
- to ensure that we are attentive to the needs of our fellow human beings and contribute according to our means.

## **Human rights in policy and legislation**

### **Recommendation 4**

The Committee recommends as follows:

- that the Federal Government conduct an audit of all federal legislation, policies and practices to determine their compliance with Australia's international human rights obligations, regardless of whether a federal Human Rights Act is introduced. The government should then amend legislation, policies and practices as required, so that they become compliant
- that, in the conduct of the audit, the Federal Government give priority to the following areas:
  - anti-discrimination legislation, policies and practices
  - national security legislation, policies and practices
  - immigration legislation, policies and practices
  - policies and practices of Australian agencies that could result in Australians being denied their human rights when outside Australia's jurisdiction.

### **Recommendation 5**

The Committee recommends that the Federal Government immediately compile an interim list of rights for protection and promotion, regardless of whether a Human

Rights Act is introduced. The list should include rights from the International Covenant on Civil and Political Rights as well as the following rights from the International Covenant on Economic, Social and Cultural Rights that were most often raised during the Consultation: the right to an adequate standard of living (including food, clothing and housing); the right to the highest attainable standard of health; and the right to education.

The government should replace the interim list of rights with a definitive list of Australia's international human rights obligations within two years of the publication of the interim list.

### **Recommendation 6**

The Committee recommends that a statement of compatibility be required for all Bills introduced into the Federal Parliament, all Bills before the third reading (so as to allow scrutiny of amendments) and legislative instruments as defined by the *Legislative Instruments Act 2003* (Cth). The statement should assess the law's compatibility with the proposed interim list of rights and, later, the definitive list of Australia's human rights obligations.

### **Recommendation 7**

The Committee recommends that a Joint Committee on Human Rights be established to review all Bills and relevant legislative instruments for compliance with the interim list of rights and, later, the definitive list of Australia's human rights obligations.

## **Human rights in practice**

### **Recommendation 8**

The Committee recommends as follows:

- that the Federal Government develop a whole-of-government framework for ensuring that human rights—based either on Australia's international obligations or on a federal Human Rights Act, or both—are better integrated into public sector policy and legislative development, decision making, service delivery, and practice more generally
- that the Federal Government nominate a Minister responsible for implementation and oversight of the framework and for annual reporting to parliament on the operation of the framework.

## **Recommendation 9**

The Committee recommends that the Federal Government incorporate human rights compliance in the Australian Public Service Values and Code of Conduct.

## **Recommendation 10**

The Committee recommends that the Federal Government require federal departments and agencies to develop human rights action plans and report on human rights compliance in their annual reports.

## **Recommendation 11**

The Committee recommends that the *Administrative Decisions Judicial Review Act 1975* (Cth) be amended in such a way as to make the definitive list of Australia's international human rights obligations a relevant consideration in government decision making.

## **Recommendation 12**

The Committee recommends that, in the absence of a federal Human Rights Act, the *Acts Interpretation Act 1901* (Cth) be amended to require that, as far as it is possible to do so consistently with the legislation's purpose, all federal legislation is to be interpreted consistently with the interim list of rights and, later, the definitive list of Australia's human rights obligations.

## **Recommendation 13**

The Committee recommends that the functions of the Australian Human Rights Commission be augmented to include the following:

- to expand the definition of 'human rights' in the *Australian Human Rights Commission Act 1986* (Cth) to include the following instruments:
  - the International Covenant on Civil and Political Rights
  - the International Covenant on Economic, Social and Cultural Rights
  - the Convention on the Elimination of All Forms of Racial Discrimination
  - the Convention on the Elimination of All Forms of Discrimination against Women
  - the Convention against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment
  - the Convention on the Rights of the Child
  - the Convention on the Rights of Persons with Disabilities
  - the Declaration on the Rights of Indigenous Peoples.



- to examine any Bill at the request of the federal Attorney-General or the proposed Joint Committee on Human Rights for the purpose of ascertaining if any provision in the Bill is inconsistent with or contrary to any human right in the interim list and, later, the definitive list of Australia's human rights obligations
- to inquire into any act or practice of a federal public authority or other entity performing a public function under federal law that might be inconsistent with or contrary to any obligation in the interim list of human rights and, later, the definitive list of Australia's human rights obligations
- to provide the same remedies for complaints of human rights violations and International Labour Organization Convention 111 complaints as for unlawful discrimination, permitting determination by a court when settlement cannot be reached by conciliation—except in relation to complaints of violations of economic, social and cultural rights, in which case there should be no scope to bring court proceedings where conciliation has failed.

The Federal Government should be required to table a response to any Australian Human Rights Commission report on complaints within six months of receiving that report.

#### **Recommendation 14**

The Committee recommends that the Federal Government develop and implement a framework for improving access to justice, in consultation with the legal profession and the non-government sector.

### **Human rights and Indigenous Australians**

#### **Recommendation 15**

The Committee recommends that a 'statement of impact on Aboriginal and Torres Strait Islander peoples' be provided to the Federal Parliament when the intent is to legislate exclusively for those peoples, to suspend the *Racial Discrimination Act 1975* (Cth) or to institute a special measure. The statement should explain the object, purpose and proportionality of the legislation and detail the processes of consultation and the attempts made to obtain informed consent from those concerned.

#### **Recommendation 16**

The Committee recommends that, in partnership with Indigenous communities, the Federal Government develop and implement a framework for self-determination, outlining consultation protocols, roles and responsibilities (so that the communities

have meaningful control over their affairs) and strategies for increasing Indigenous Australians' participation in the institutions of democratic government.

## **A Human Rights Act**

### **Recommendation 17**

The Committee recommends that the Federal Government operate on the assumption that, unless it has entered a formal reservation in relation to a particular right, any right listed in the following seven international human rights treaties should be protected and promoted:

- the International Covenant on Civil and Political Rights
- the International Covenant on Economic, Social and Cultural Rights
- the Convention on the Elimination of All Forms of Racial Discrimination
- the Convention on the Elimination of All Forms of Discrimination against Women
- the Convention against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment
- the Convention on the Rights of the Child
- the Convention on the Rights of Persons with Disabilities.

### **Recommendation 18**

The Committee recommends that Australia adopt a federal Human Rights Act.

### **Recommendation 19**

The Committee recommends that any federal Human Rights Act be based on the 'dialogue' model.

### **Recommendation 20**

The Committee recommends that any federal Human Rights Act protect the rights of human beings only and that the obligation to act in accordance with those rights be imposed only on federal public authorities—including federal Ministers, federal officials, entities established by federal law and performing public functions, and other entities performing public functions under federal law or on behalf of another federal public authority.

## **Recommendation 21**

The Committee recommends that any federal Human Rights Act protect the rights of all people in Australia and all people who are overseas but subject to Australian jurisdiction.

## **Recommendation 22**

The Committee recommends that, if economic and social rights are listed in a federal Human Rights Act, those rights not be justiciable and that complaints be heard by the Australian Human Rights Commission. Priority should be given to the following:

- the right to an adequate standard of living—including adequate food, clothing and housing
- the right to the enjoyment of the highest attainable standard of physical and mental health
- the right to education.

## **Recommendation 23**

The Committee recommends that a limitation clause for derogable civil and political rights, similar to that contained in the Australian Capital Territory and Victorian human rights legislation, be included in any federal Human Rights Act.

## **Recommendation 24**

The Committee recommends that the following non-derogable civil and political rights be included in any federal Human Rights Act, without limitation:

- *The right to life.* Every person has the right to life. No one shall be arbitrarily deprived of life. The death penalty may not be imposed for any offence.
- *Protection from torture and cruel, inhuman or degrading treatment.* A person must not be
  - subjected to torture
  - or
  - treated or punished in a cruel, inhuman or degrading way
  - or
  - subjected to medical or scientific experimentation without his or her full, free and informed consent.

- *Freedom from slavery or servitude.* A person must not be held in slavery or servitude.
- *Retrospective criminal laws.*
  - A person must not be found guilty of a criminal offence as a result of conduct that was not a criminal offence when the conduct was engaged in.
  - A penalty imposed on a person for a criminal offence must not be greater than the penalty that applied to the offence when it was committed.
  - If a penalty for an offence is reduced after a person committed the offence but before the person is sentenced for that offence, the reduced penalty should be imposed.
  - Nothing in the foregoing affects the trial or punishment of any person for any act or omission that was a criminal offence under international law at the time the act or omission occurred.
- *Freedom from imprisonment for inability to fulfil a contractual obligation.* A person must not be imprisoned solely on the ground of inability to fulfil a contractual obligation.
- *Freedom from coercion or restraint in relation to religion and belief.* No person will be subject to coercion that would impair his or her freedom to have or to adopt a religion or belief of his or her choice.

The right to a fair trial should also not be limited.

## **Recommendation 25**

The Committee recommends that the following additional civil and political rights be included in any federal Human Rights Act:

- the right to freedom from forced work
- the right to freedom of movement
- the right to privacy and reputation
- the right to vote
- the right to freedom of thought, conscience and belief
- freedom to manifest one's religion or beliefs
- the right to freedom of expression
- the right to peaceful assembly
- the right to freedom of association
- the right to marry and found a family

- the right of children to be protected by family, society and the State
- the right to take part in public life
- the right to property
- the right to liberty and security of person
- the right to humane treatment when deprived of one's liberty
- the right to due process in criminal proceedings
- the right not to be tried or punished more than once
- the right to be compensated for wrongful conviction.

### **Recommendation 26**

The Committee recommends that any federal Human Rights Act require statements of compatibility to be tabled for all Bills introduced into the Federal Parliament, all Bills before the third reading (so as to allow scrutiny of amendments) and legislative instruments as defined by the *Legislative Instruments Act 2003*.

### **Recommendation 27**

The Committee recommends that any federal Human Rights Act empower the proposed Joint Committee on Human Rights to review all Bills and the relevant legislative instruments for compliance with the human rights expressed in the Act.

### **Recommendation 28**

The Committee recommends that any federal Human Rights Act contain an interpretative provision that is more restrictive than the UK provision and that requires federal legislation to be interpreted in a way that is compatible with the human rights expressed in the Act and consistent with parliament's purpose in enacting the legislation. The interpretative provision should not apply in relation to economic, social and cultural rights.

### **Recommendation 29**

The Committee recommends that any federal Human Rights Act extend only to the High Court the power to make a declaration of incompatibility.

(Should this recommendation prove impractical, the Committee recommends alternatively that any federal Human Rights Act not extend to courts the formal power to make a declaration of incompatibility.)

### **Recommendation 30**

The Committee recommends that any federal Human Rights Act require Commonwealth public authorities to act in a manner compatible with human rights (other than economic and social rights) and to give proper consideration to relevant human rights (including economic and social rights) when making decisions.

### **Recommendation 31**

The Committee recommends that under any federal Human Rights Act an individual be able to institute an independent cause of action against a federal public authority for breach of human rights and that a court be able to provide the usual suite of remedies—including damages, as is the case under the UK Human Rights Act. The independent cause of action should not be available in relation to economic, social and cultural rights.

# **PART ONE**

## **Introduction**

The National Human Rights Consultation was announced on 10 December 2008. This part of the report provides an overview of how the Consultation was conducted and the matters the Committee was asked to consider.

Chapter 1 outlines the various strategies the Committee adopted in order to consult the Australian community. Chapter 2 offers a selection of what the Committee heard during the Consultation, and Chapter 3 discusses rights and responsibilities and provides an Australian context for the discussion in the remainder of the report.





# 1 The Consultation: an overview

On 10 December 2008 the Commonwealth Attorney-General, the Hon. Robert McClelland MP, launched the National Human Rights Consultation, honouring the Australian Labor Party's 2007 election commitment to 'initiate a public inquiry about how best to recognise and protect the human rights and freedoms enjoyed by all Australians'<sup>1</sup> and to 'establish a process of consultation which will ensure that all Australians will be given the chance to have their say on this important question for our democracy'.<sup>2</sup>

A National Human Rights Consultation Committee was appointed to conduct the Consultation—academic and human rights advocate Father Frank Brennan (Chair), former broadcaster Ms Mary Kostakidis, former Australian Federal Police Commissioner Mr Mick Palmer, and barrister Ms Tammy Williams. Mr Philip Flood, a former senior public servant and diplomat, was subsequently appointed from late March 2009 to 30 June 2009 as an alternate for Mr Palmer, who was unable to attend some of the community roundtables because of his involvement in other government inquiries.

## 1.1 The Committee's brief

In launching the Consultation, the Attorney-General issued terms of reference asking the Committee to consult the community on three primary questions:

- Which human rights (including corresponding responsibilities) should be protected and promoted?
- Are these human rights currently sufficiently protected and promoted?
- How could Australia better protect and promote human rights?

In conducting the Consultation, the Committee was asked to do the following:

- consult broadly with the community, particularly those who live in rural and regional areas;
- undertake a range of awareness raising activities to enhance participation in the consultation by a wide cross section of Australia's diverse community;

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<sup>1</sup> Australian Labor Party, *ALP National Platform and Constitution* (2007) 7 <[http://www.alp.org.au/platform/chapter\\_13.php](http://www.alp.org.au/platform/chapter_13.php)> at 3 September 09.

<sup>2</sup> *ibid.*, 9.

- seek out the diverse range of views held by the community about the protection and promotion of human rights; and
- identify key issues raised by the community in relation to the protection and promotion of human rights.

The Committee was asked to report to the Federal Government on ‘the issues raised and the options identified for the Government to consider to enhance the protection and promotion of human rights’. It was also asked ‘to set out the advantages and disadvantages (including social and economic costs and benefits) and an assessment of the level of community support for each option it identifies’. The terms of reference further directed the Committee to ensure that the options identified ‘preserve the sovereignty of parliament and [do] not include a constitutionally entrenched bill of rights’. Appendix A presents the Committee’s terms of reference.

Initially, the Committee was to report to the government on 31 July 2009. This date was later changed to 31 August 2009 and subsequently—as a result of the overwhelming response to the call for public submissions—to 30 September 2009.

The Committee received secretariat support from officers in the Human Rights Branch of the Commonwealth Attorney-General’s Department.

## 1.2 The Consultation

The Committee resolved to seek out the views and experiences of the broadest possible range of community members interested in human rights—the mainstream public as well as vulnerable and marginalised groups. It was particularly concerned to hear from Indigenous Australians, the homeless, people with disabilities, people with mental illness, refugees, new migrants, prisoners, and individuals and organisations involved in the protection and promotion of rights, among them non-government organisations and advocacy groups. Additionally, the Committee sought the views of lawyers, academics, parliamentarians, judges, senior public servants and senior police. It also considered it important to seek views on the effects of human rights legislation in Victoria, the Australian Capital Territory and overseas—in particular, in the United Kingdom and New Zealand.

In brief, throughout its seven months of public consultations the Committee did the following:

- invited written submissions
- held 66 community roundtables—‘town hall’-style meetings—in 52 locations around the country, in metropolitan and regional areas and in remote communities

- held an online forum for discussion of the three primary consultation questions and the question of whether or not Australia needs a Human Rights Act
- held many meetings with a broad range of interested organisations and individuals
- commissioned a national phone survey and focus group research in order to gain a better understanding of the views of the wider Australian community
- commissioned social research in order to gain a better understanding of the views of members of particular marginalised groups
- commissioned an analysis of the economic and social costs and benefits of a number of options for better protecting and promoting human rights
- held three days of public hearings in Canberra to discuss matters emerging from the submissions, roundtables and meetings
- contributed to the national conversation on human rights in a range of mainstream media as well as hosting Facebook pages. The Department of Education, Employment and Workplace Relations also organised an online discussion of human rights for younger Australians on the Australian Youth Forum website.

Throughout the Consultation the Secretariat drafted and distributed a range of printed materials, maintained the Consultation website and staffed a 1800 telephone hotline. Among the printed materials were the *National Human Rights Consultation Background Paper* and a document outlining the consultation process, entitled *About the National Human Rights Consultation*. These materials were available in a variety of formats, among them in large print and as PDFs.

The Committee's work began in earnest in early 2009. It held a press conference on 4 February in Parliament House in Canberra to officially launch the public consultation phase of its work.

## **Submissions received**

People were able to lodge submissions from the day the Consultation was launched until 15 June 2009. In total, the Committee received 35 014 written submissions—by far the largest response to a national consultation in Australia.

The Committee asked that submissions be posted, emailed or presented using an online submission form on the website, where people could type in free-text responses as well as send documents as attachments. By 15 June 2009 the Committee had received 26 650 submissions electronically; the remainder arrived by post.

A substantial number of the submissions received appeared to have been facilitated by campaigns run by lobby groups. In particular, the Committee received 14 604 submissions as part of a campaign run by GetUp! and 10 488 as part of a campaign run by Amnesty International Australia. A number of petitions incorporating hundreds of signatures were also received.

The subject that generated the greatest amount of discussion in the submissions was whether or not Australia *needs* a Human Rights Act. Of the 35 014 submissions received, 32 091 raised the question, there being 27 888 in favour of a Human Rights Act and 4203 against. Other reform options were raised in 11 per cent of submissions, most of them favouring an increase in human rights education in the community.

Individual topics discussed in submissions ranged from mental illness and the human rights implications of homelessness to problems with aged care and the discrimination faced by people in same-sex relationships. The human rights aspects of disabilities, racism, sex discrimination and religious freedom were the most frequently discussed subjects.

Examples of the submissions are available on the Consultation website <<http://www.humanrightsconsultation.gov.au>>. (The authors gave permission for them to be published.)

## **Submission analysis**

Every submission received during the Consultation was analysed in order to identify the following:

- the number of submissions supporting the different options for the human rights and responsibilities that should be protected and promoted
- the number of submissions arguing that human rights are already sufficiently protected and promoted or expressing the contrary view
- the number of submissions supporting each of the reform options identified through the Consultation process
- the number of submissions raising specific human rights concerns—for example, in relation to homelessness, mental illness, asylum seekers, aged care, euthanasia, prisoners, young people, and national security.

Committee members each read a large number of the submissions. They considered it important to ensure that they had read enough submissions to gain a clear sense of the variety of subjects being discussed, the responses to the specific questions asked, the variety of people who felt strongly enough to make submissions (and their reasons for doing so), the various legal, economic and social arguments put forward, and the very many personal stories that were shared.

Accordingly, Committee members read a broad range of submissions from members of the public, experts, human rights advocates, and various organisations. Some of these submissions contained a paragraph only; others ran to more than 100 pages.

## Community roundtables

Sixty-six community roundtables were held between February and June 2009. Figure 1 shows the 52 locations at which they were held.

Chaired by a Committee member and running for two hours, the roundtables varied in size depending largely on the size of the community: in major metropolitan centres up to 250 people attended; in smaller towns groups of about 25 were common.

The format of the roundtables varied somewhat, according to the interests of the participants, but typically involved an introduction and overview of the Consultation by a Committee member, then participants being asked to respond to the terms of reference for the Consultation. Participants generally worked in their table groups to respond to the three primary consultation questions and reported back to the whole meeting.

About 6310 people registered to attend the roundtables; many more attended without registration. The responses to the three primary consultation questions were recorded by participants at each roundtable, both individually and in small groups, and were provided to the secretariat members present. The material provided to secretariat members was later analysed. As with the written submissions, the question of whether a Human Rights Act is needed received a great deal of attention, and the overwhelming number of participants recorded their support for such an Act. Increased human rights education and development of a stronger human rights culture were also an important focus of the roundtable discussions.



One of three Brisbane community roundtables

Figure 1 The location of the community roundtables



Throughout Australia participants were generally appreciative of having the opportunity to participate in a national debate on human rights. As one participant said, 'The one thing ... at this forum that I've really found uplifting is the right we have to challenge and voice our concerns about things that we feel strongly about'.<sup>3</sup> Some participants felt they had 'learnt a lot'<sup>4</sup> about human rights, and a few said they had changed their minds about the best way to protect human rights.<sup>5</sup>

### **The Consultation website and Facebook pages**

The Consultation website <[www.humanrightsconsultation.gov.au](http://www.humanrightsconsultation.gov.au)>, which the secretariat managed, provided, among other things, background information as well as a 'Hold your own community roundtable' kit for people who were unable to attend one of the Committee's community roundtables. Using the website, people could subscribe to receive email updates on the Committee's activities and could send emails with inquiries. The website also provided regular updates from the Committee, enabled people to register to attend roundtables, provided summaries of each of the roundtables, and offered answers to frequently asked questions and links to other useful human rights resources.

The Committee established a Facebook page that gave background information about the Consultation and provided links to the website and the online forum. The Chair of the Committee also had a personal Facebook page.

### **The online forum**

The online forum ran from 19 May 2009 until 26 June 2009. It was hosted on behalf of the Committee by Global Access Partners on its Open Forum website <<http://www.openforum.com.au/NHROC>>. The primary aim of the online forum was to gather public responses to the three primary questions set out in the Committee's terms of reference and to facilitate public debate on an important



Tammy Williams and secretariat members en route to Charleville community roundtable

<sup>3</sup> Tweed Heads, Community Roundtable.

<sup>4</sup> Wollongong, Community Roundtable.

<sup>5</sup> Burnie, Community Roundtable.

question emerging from the community roundtables and submissions—‘Does Australia need a charter or bill of rights?’

The debates on the online forum were led by the Chair of the Committee and facilitated by respected legal academics Professor George Williams and Professor Tom Campbell.<sup>6</sup> In its six weeks of operation the forum received 12 622 visits from 8932 people. There was unanimity among the users about the importance of human rights, but no overwhelming majority emerged for or against a statutory bill or charter of rights.

On 16 January 2009 the Australian Youth Forum launched an online discussion board on human rights <<http://www.youth.gov.au/ayf/>>. The discussion board gave its audience the opportunity to put forward their ideas on human rights. In the two months the discussion board was active on the Australian Youth Forum website it received 45 posts and over 600 votes from young people.

The ideas submitted through the online discussion were compiled and presented as a submission to the Consultation from the young people of Australia. The posts made focused on things such as the right to equality and non-discrimination for people under 18 years of age, the rights of Indigenous Australians, and the rights of people in developing countries.

### **Additional meetings**

At the beginning of the Consultation the Chair wrote to all federal members of parliament, all premiers and chief ministers, all attorneys-general, and the chief justices of all courts in Australia, seeking submissions and offering to meet. The Committee then met with a range of individuals and organisations throughout the Consultation. Among them were parliamentarians, senior public servants, police commissioners, judges and retired judges, anti-discrimination commissioners, and many others. The Committee also met with prominent individuals who were visiting Australia, including Baroness Scotland (Attorney General for England and Wales and Northern Ireland), a visiting South African judge, and a number of New Zealand politicians, public servants and judges. The Chair also visited Christmas Island to meet people in immigration detention and to conduct a community roundtable with Christmas Island residents.

The Committee met with representatives of various community groups, non-government organisations and other bodies involved in the protection and promotion of human rights or working with people for whom human rights are a particular concern. This included a visit to a New South Wales prison to meet a

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<sup>6</sup> Professor George Williams and Professor Tom Campbell have expressed differing views on whether Australia should have a Human Rights Act.



group of prisoners and discuss their experiences; a visit to schools in Alice Springs, among them one that has introduced a range of initiatives aimed at improving educational outcomes for Indigenous children living in the town camps; a visit to the Matthew Talbot Hostel in Sydney's Woolloomooloo; and a meeting at the Wayside Chapel with providers of services to the homeless in the Kings Cross area.

The Chair also addressed the Australian Council of Social Service National Congress, the executive of the Law Council of Australia, the Sydney Institute, the Medico-Legal Society of Victoria, the annual meeting of Australia's police commissioners, the annual seminar of Queensland Supreme Court judges, and the annual conference of the Queensland District Court. The Committee met members of the Human Rights Roundtable convened by the Australian Human Rights Commission. And the Chair addressed the General Synod of the Anglican Church of Australia as well as two meetings convened by the Australian Christian Lobby.

Keen to learn about the experiences of the two jurisdictions in Australia with human rights legislation, the Committee also held meetings with a range of people involved in implementation of the ACT Human Rights Act and the Victorian Charter of Human Rights and Responsibilities Act. Among these people were the Victorian Solicitor-General and representatives of the Victorian Department of Justice; the Victorian Police Commissioner; Victorian Supreme Court judges; representatives of the Victorian Department of Human Services, the Victorian Equal Opportunity & Human Rights Commission and the ACT Department of Justice and Community Safety; the Australian Federal Police Commissioner; ACT Supreme Court judges; and representatives of the ACT Human Rights Commission.

Additionally, the Chair addressed the Commonwealth Attorney-General's annual non-government organisation forum on human rights and met three times with members of a Commonwealth interdepartmental committee established by the Attorney-General's Department.

## **Public hearings**

In early July 2009 three days of public hearings were held at Parliament House in Canberra to conclude the consultation process. In this way the Committee was able to invite some of those who had made submissions to discuss aspects of human rights emerging from the community roundtables and submissions.

These discussions gave the Committee further insights into the views of domestic and international commentators on human rights protection. They also gave the public an opportunity to hear prominent human rights advocates, as well as individuals who might have experienced human rights problems in our community.

Over 70 speakers took part in panel discussions and debates, and several British speakers appeared in interviews on video, among them Lord Thomas Bingham,

former Law Lord; and Michael Wills MP, the Minister for Human Rights. Geoffrey Robertson QC, now based in the United Kingdom, also appeared.

These public hearings were subsequently televised on the Australian Public Affairs Channel.



The Committee at the conclusion of the public hearings

### **Phone survey and focus group research**

The Committee engaged Colmar Brunton Social Research to develop a two-pronged research project, the main purpose of which was to allow the Committee to gain an appreciation of the level of interest in and knowledge of and attitudes about human rights and their protection among a random sample of Australians who had not attended the community roundtables or made a submission.

The project involved convening 15 small focus groups—one metropolitan and one regional group in each state and territory (except for the ACT, where no regional focus group was convened)—and this was followed by a national telephone survey of 1200 people. The research team used the focus groups to obtain a qualitative understanding of the community's views about human rights and identify questions for use in the telephone survey, which quantified attitudes and preferences. Appendix B summarises the resultant report.

## **Devolved consultation**

Colmar Brunton Social Research was also commissioned to conduct a focus group study in order to cast light on the experiences and opinions of marginalised and vulnerable groups—individuals who are thought to be especially at risk of having their rights threatened or violated.

This devolved consultation research project entailed nine small-group and individual discussions and nine interviews with representatives of non-government organisations working with these groups. The groups involved were homeless people; people with mental illness and people with physical disabilities; recently arrived refugees, immigrants and people recently released from immigration detention; ex-prisoners; the aged; and people with drug or alcohol dependencies. The discussions focused on understanding the practical, day-to-day experiences of members of these groups. Appendix C summarises the resultant report.

## **Social and economic cost–benefit analysis**

The Committee commissioned The Allen Consulting Group to provide a cost–benefit analysis of options for the protection and promotion of human rights in Australia. The options put forward to the consultants had been developed by the Secretariat before the closing of the submission and community roundtable phases of the Consultation, so they are more limited than the full spectrum of options that were identified throughout the Consultation. They covered various statutory models of a Human Rights Act, increased human rights education, greater parliamentary scrutiny, an increased role for the Australian Human Rights Commission, reforms to the federal anti-discrimination framework, the development of a new National Action Plan for human rights, as well as the option of maintaining the current system of human rights protections (that is, a ‘do nothing’ approach).

The consultants developed common criteria against which to compare and evaluate each option—benefits to stakeholders, implementation timeliness and costs, and risks. Appendix D presents the consultants’ report.

## **Advice from the Solicitor-General**

The Committee sought from the Solicitor-General advice on the constitutional implications of various aspects of a potential Human Rights Act. Appendix E presents the Solicitor-General’s advice.

## **Broader community discussion**

In addition to each initiative just outlined, the Committee was pleased to note the strong interest in the ‘human rights debate’ that was demonstrated throughout the Consultation process. For example, several books on the subject were published during the Consultation period, among them *A Statute of Liberty* by Geoffrey

Robertson; *Bills of Rights in Australia* by Andrew Byrnes, Hilary Charlesworth and Gabrielle McKinnon; and *Don't Leave Us with the Bill: the case against an Australian bill of rights*, edited by Julian Leaser and Ryan Haddrick. Opinion pieces appeared regularly in the print media, as did articles covering the development and progress of the Consultation.

## 2 The community's views

Many stories were shared in written submissions and during the 66 community roundtables the Committee held around Australia, and it was clear that for many people human rights are not an abstract concept but are relevant to actual, everyday experience. This chapter gives a voice to some of the individuals who participated in the Consultation. Subsequent chapters deal more analytically with gaps in human rights protection and options for promoting and increasing the protection those rights afford.

Most of the people who attended the community roundtables and presented written submissions to the Committee wanted to see greater protection and promotion of human rights and responsibilities. Only a minority believed our current protections are adequate. This division was not, however, reflected in the results of the research the Committee commissioned: in a random sample of 1200 Australians and in 15 focus groups held around the country it was found that most participants gave little thought to their human rights because they believed those rights to be adequately secured.

### 2.1 Themes

The Committee heard that there have been serious breaches of human rights during the past decade—the setting aside of the *Racial Discrimination Act 1975* (Cth) in order to implement the Northern Territory Emergency Response (the so-called Intervention); the lengthy, and potentially indefinite, mandatory detention of asylum seekers; and the increase in law enforcement agencies' powers as a result of the new national security laws. There was a sense that the power of the executive arm of government needs to be checked.

Although we live in one of the world's greatest democracies, vulnerable groups—such as Indigenous Australians, homeless people, the mentally ill, people with disabilities, the elderly and children in care—often miss out. In particular, we have failed dismally in seeking to redress the Third World disadvantage of our Indigenous peoples and to acknowledge them in the Constitution.

The Committee heard that 'survival' rights—basic rights such as the right to freedom from violence, the right to the highest attainable standard of health, and the right to sufficient food, clothing and water—are pivotal for Australians. In the case of health and other basic services, the gap between metropolitan and rural and remote areas is a reality for many who live outside our cities.

Impassioned voices spoke on both sides of controversial subjects such as same-sex marriage, euthanasia, the rights of the unborn, and religious groups who feel their rights have been curtailed by a lack of legislation to protect them.

A great many participants rued the lack of understanding of human rights, how they apply in daily life and the provisions and mechanisms for their protection, and there were overwhelming calls for improved civic education. Support for better protection of the environment and for a greater acknowledgment of individual responsibility in this regard was also evident.

There was majority support for the implementation of a Human Rights Act, and at a number of community roundtables powerful arguments for going further and constitutionally entrenching rights were put forward. On the other hand, there was substantial opposition to a Human Rights Act because it would transfer power to ‘unelected judges’ and create a ‘lawyers’ picnic’. There was also concern about achieving the right balance between respecting the rights of individuals and placing limits on rights for the public good and about balancing conflicting rights.

Barriers to access to justice—including the complexity of the legal system and the high cost of going to court—were another source of concern. The majority of participants supported increased scrutiny of proposed legislation that might impinge on human rights and greater accountability and transparency in the mechanisms of government once legislation is passed. There were strong calls for governments at all levels to honour their responsibility to respect human rights and for the court system to play a role in the enforcement of those rights.

On the other hand, a considerable number of people said they think human rights are sufficiently protected and promoted in Australia. One can assume that this attitude is a natural consequence of the fact that Australia is a country where most people live with a sense that their freedom, equality and dignity are not threatened. It is widely acknowledged that Australia does not have the human rights problems apparent in many other countries and that Australia is, in general, a wonderful country to live in. The majority of people living here feel the system is not broken, and they do not foresee their human rights ever being curtailed. This situation leads many Australians to be sceptical about human rights and to calls for human rights legislation. John McCarthy is typical of this group:

I have 3 questions which this consultation should answer: 1. Name a ‘fundamental right’ that isn’t currently protected in Australia; 2. Name a situation in which that ‘right’ has been abused in Australia, with no recourse available to law; 3. Explain how a bill of rights (or charter) will protect that ‘right’ to any greater extent, without

limiting others. So far I have seen nothing meeting these criteria to justify any change to the status quo.<sup>1</sup>

Throughout the Consultation, however, the Committee heard from thousands of Australians who are troubled by human rights problems—whether affecting themselves or others. There were reports of deprivation of liberty through police and immigration detention and of routine problems such as lack of access to health care, disability support services, housing and education. All such problems, dramatic or otherwise, can have crippling effects on the people who experience them. Often, when discussing which rights need better protection, people focused on groups in society that miss out and are on the margins; they wanted clarity about how governments and the courts could play a role in redressing disadvantage.

Australian of the Year and prominent Indigenous leader Professor Mick Dodson said:

In general, notwithstanding the limited and patchwork legal protection of a very limited range of rights, rights are not sufficiently protected and promoted in Australia ... The system of protection is far from comprehensive in the rights it protects, and far from robust in the legal protection it affords even the meagre list of rights protected.<sup>2</sup>

Although the current framework for human rights protection and gaps in that protection were apparent to lawyers and advocacy groups, for the average person the extent of the various protections was not always clear. People said they did not know how our democracy worked to protect what we assume to be our rights. One resident of Mount Isa said, 'I couldn't even tell you what's in the Constitution'.<sup>3</sup> It was recognised that knowledge is a crucial element of our empowerment as citizens. A roundtable participant in Sydney said, 'Education is critical if we are to affect a cultural shift—for people to gain a real sense of sovereignty, not a contrived sense, but in a structured sense'.<sup>4</sup>

Although many participants felt that government and its agencies need to respect citizens' rights, treat people with dignity and be mindful of individual circumstances, others were concerned that we risk developing a more selfish and individualistic culture if we focus on rights. They said we need to be more considerate and to develop a culture of 'we, not I'<sup>5</sup>—to move away from 'looking after your own backyard to the exclusion of others'.<sup>6</sup>

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<sup>1</sup> J McCarthy, Submission.

<sup>2</sup> ANU National Centre for Indigenous Studies (M Dodson), Submission.

<sup>3</sup> Mt Isa, Community Roundtable.

<sup>4</sup> Sydney (3), Community Roundtable.

<sup>5</sup> Ballarat, Community Roundtable.

<sup>6</sup> Broome, Community Roundtable.

People often expressed a feeling that governing institutions and systems were a force to be reckoned with—not necessarily malign but sometimes blind and clumsy. This brought acknowledgment that, although rights might not always be breached deliberately or maliciously, there must be protections against breaches resulting from bad process, bureaucratic bungling and other unintentional miscarriages of justice:

For the last 20 years of my working life, I was employed as a front-line welfare worker with NGO agencies. During those years I worked with very disadvantaged people in the western suburbs of Sydney. The client group included physically and intellectually disabled people, drug and alcohol affected people, the mentally ill, the unemployed, families living in poverty, and families living in domestic violence and child abuse situations. Many families were faced with the prospect of homelessness on a regular basis. During those years, much time was spent advocating on behalf of people who were unable to speak up for themselves, and were unaware of assistance available to them. Clients were regularly treated with disrespect, given incorrect information, or received deceptive and sometimes threatening letters from people in positions of authority.<sup>7</sup>

This theme was echoed in many locations; for example, a roundtable participant in Ballarat said, ‘It’s the information poor who aren’t having their rights protected’.<sup>8</sup> Another submission stated:

There needs to be more focus on the vulnerable, those people who are unable to voice their needs and those whose voices are ignored. Government needs to actively seek their opinions and requests, as they too often slip through the cracks. These people are our elderly, our children, our disabled, our mentally ill, our immigrants and asylum seekers, and especially our Indigenous peoples. When these people are not heard, our nation continues to suffer.<sup>9</sup>

The majority of Consultation participants linked the protection of human rights with a Human Rights Act: ‘We need a charter of inspiration’.<sup>10</sup> They also saw such an Act as central to education and the promotion of rights and responsibilities:

I think what we are doing is creating not just a piece of paper, but a culture. When you produce a charter, that’s only the first step. You need an education system that goes with it from school up—a dissemination procedure, so that people have continuing access to it. Some sort of facility that acknowledges that people’s understanding of rights will change as society changes, and this means we should keep looking at questions as they arise.<sup>11</sup>

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<sup>7</sup> C Brenton, Submission.

<sup>8</sup> Ballarat, Community Roundtable.

<sup>9</sup> S Willett, Submission.

<sup>10</sup> Darwin (2), Community Roundtable.

<sup>11</sup> Wodonga, Community Roundtable.



A community roundtable participant referred to the plight of ‘vulnerable people who struggle to get food on the table, to have a place to live and to get out of bed in the morning’<sup>12</sup>, saying there should be recognition that these people need help to engage in everyday life in the way other people can and that the ACT’s Human Rights Act fails in this regard because it deals only with civil and political rights.<sup>13</sup>

Many participants called for a ‘living document’ that could evolve as social values change. In contrast—and notwithstanding the Committee’s terms of reference—at numerous community roundtables there was considerable support for constitutional entrenchment of rights: ‘We need constitutional protection of rights. If we don’t have constitutional rights, the government giveth and the government taketh away’.<sup>14</sup> The value of a document in plain English was also emphasised—a document that is ‘distinctly Australian, that includes reference to Indigenous values such as sharing, inclusion and care for the land’.<sup>15</sup>

One Brisbane roundtable participant captured the popular view that legislation is required in order to protect rights: ‘A right that can’t be enforced isn’t a right. It’s just a good idea’.<sup>16</sup> Many proposed that more power be given to the Australian Human Rights Commission: ‘The Australian Human Rights Commission needs more teeth’, ‘Give the HRC teeth’.<sup>17</sup> Others did not support legislation: ‘It’s possible to be pro human rights and anti charter ... my concern is that a charter would be handing over too much power to the judges’.<sup>18</sup> Still others thought it inappropriate to expect the government to solve every problem with a law—‘Is it the government’s role to enforce morality?’<sup>19</sup>—and that this would lead to a litigious culture and be a burden on the public purse—‘I’m suspicious about this whole human rights issue. I’m worried it will become a lawyers’ picnic at great cost to the community’.<sup>20</sup>

A few participants saw no need for action; for example, ‘I’m a businessman. In all the years I’ve been dealing with the community no one has ever told me they have had their human rights breached’.<sup>21</sup> And in Brisbane it was remarked that the roundtables were attracting ‘the human rights industry’.<sup>22</sup>

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<sup>12</sup> Canberra, Community Roundtable.

<sup>13</sup> Canberra, Community Roundtable.

<sup>14</sup> Melbourne (3).

<sup>15</sup> Newcastle, Community Roundtable.

<sup>16</sup> Brisbane (1), Community Roundtable.

<sup>17</sup> Melbourne (3), Community Roundtable.

<sup>18</sup> Melbourne (2), Community Roundtable.

<sup>19</sup> Dandenong, Community Roundtable.

<sup>20</sup> Melbourne (3), Community Roundtable.

<sup>21</sup> Bendigo, Community Roundtable.

<sup>22</sup> Brisbane (2), Community Roundtable.

## 2.2 Lives in the balance

Participants in community roundtables identified particular groups of people whose human rights require greater protection. These people were often considered vulnerable or marginalised.

### Indigenous Australians

One of the most frequently raised subjects throughout the entire Consultation was living conditions for Indigenous Australians.

It is widely acknowledged that some Indigenous communities face longstanding and intractable problems. Compared with the rest of the Australian population, Indigenous communities experience lower levels of access to housing, health care, education, support services, and community development and employment opportunities. These problems are often exacerbated by poverty, lack of education, substance abuse, feelings of powerlessness, depression, higher levels of reported domestic violence and abuse in some cases, widespread disillusionment with government, and sometimes a loss of hope.

There was, however, a view among some in the general community that Australia's Indigenous peoples have been given more than enough; one specific complaint was that they are not looking after the homes the government has provided for them.<sup>23</sup>

Many acknowledged the difficulty of improving the lives of Indigenous Australians. Within the Indigenous community there was a strong sense of a 'top-down' mentality in the delivery of services and assistance at the expense of comprehensive consultation and discussion with the communities themselves—for example, 'Let's ask Aboriginal Australians what ways we can assist them to lift their standard of living. Only then will we begin to change the mentality that we are helping them, but rather start to empower them for themselves'.<sup>24</sup>

A community leader in Wadeye offered a clear message about a better way forward: 'Talk to people, go slowly, develop relationships, explain things, monitor development'.<sup>25</sup> To date, most approaches have been undermined by a lack of appreciation of the importance of establishing trust: 'The most successful approach is when you build relationships first'.<sup>26</sup> In evaluating results against expectations, one community member in the remote north of Queensland highlighted the fact that

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<sup>23</sup> Colmar Brunton Social Research, *National Human Rights Consultation—community research report* (2009). The research is discussed in Chapter 1; Appendix B presents a summary of the report.

<sup>24</sup> S Willett, Submission.

<sup>25</sup> Wadeye, Community Roundtable.

<sup>26</sup> Weipa, Community Roundtable.

for some Indigenous people it is only a short time since first contact with white people: 'Think about it. It's been 74 years'.<sup>27</sup>

Perhaps the most widespread complaint in relation to Indigenous Australians was the lack of access to services in remote areas. The recent non-government organisation 'Close the Gap' campaign has made people more aware of the Indigenous health crisis and the shocking difference in life expectancy between Indigenous and non-Indigenous Australians:

I was motivated to take part in this consultation process due to the lack of human rights protection afforded to Indigenous Australians. Having lived and worked in the Northern Territory and Western Australia for a number of years, I have had the opportunity to experience first-hand the atrocious conditions for many Indigenous people. Access to inadequate education, health care, housing and other basic rights is in many cases afforded at third-world standards.<sup>28</sup>



Frank Brennan and Tammy Williams with Mr Percy Neal, Mayor of Yarrabah Aboriginal Shire

This was reflected in the research the Committee commissioned: 57 per cent of respondents felt that Indigenous people in remote areas need more human rights protection.<sup>29</sup> Some Indigenous roundtable participants felt this problem was in part caused by the inaccuracy of census data: 'The census is a problem for us. It doesn't count people properly. The consequence of the census not being reflective is that the community gets a small percentage of funding'.<sup>30</sup>

The Committee heard how Indigenous Australians with a disability were further marginalised: 'People with disability of Aboriginal descent have very little access to quality disability services. Here in [South Australia] their advocates are also their service providers. What a conflict of interest!'<sup>31</sup> Others were further disadvantaged by being a minority within a minority. During the community roundtable on Thursday Island the Committee was told the status of Torres Strait Islander peoples as 'Indigenous Australians' tended to be overlooked.<sup>32</sup>

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<sup>27</sup> Wadey, Community Roundtable.

<sup>28</sup> S Cools, Submission.

<sup>29</sup> Colmar Brunton Social Research, *National Human Rights Consultation—community research report* (2009).

<sup>30</sup> Coober Pedy, Community Roundtable.

<sup>31</sup> M Baker, Submission.

<sup>32</sup> B Hodges, Public Hearings.

There was widespread frustration with the lack of progress on promised new housing. One participant from Wadeye said, 'There needs to be more continuity. Everything is start-stop. With more stops. Twelve or 13 new houses have been built here. Eleven are for white people'.<sup>33</sup> Another disappointment is intervention, by both government and non-government organisations, that results in visits by teams from big southern cities to implement inappropriate programs that often do not come to fruition and often lack the cooperation of Indigenous people. One Indigenous NGO worker said, 'Indigenous people watch them blow into town like plastic bags and just wait for the wind to blow them out again'.<sup>34</sup>

The experience of the Stolen Generations was a common theme running through the Consultation:

In my own experience, I was taken from my people in 1959 at one day old. I was fortunate to be adopted by a family who were working in Arnhem land, but so many of my people went through their lives not knowing who they were or where they belonged, many turning to alcohol and drugs to ease their suffering. After 33 years of searching, I found my mum and had 15 years with her before she passed away 1.5 years ago. Despite doing a lot of community work in Byron Bay, where I have lived for over 20 years, I still get racially abused and arrested by heavy handed and somewhat corrupt police who are young enough to be my son or daughter. They show no respect to the traditional owners of the area. They still have the power and the guns to intimidate, arrest and incarcerate anyone they wish, and they do so every day.<sup>35</sup>

There was also unease about the effect on coming generations: 'How do we empower Aboriginal men to be good fathers, good husbands, when they've never had a father figure and therefore no model to learn from? A whole way of life that's been missing from peoples' lives'.<sup>36</sup>

The community roundtable in Bourke provided an example of the exclusion Indigenous Australians experience. The roundtable was to take place at the Bourke Bowling Club, but a large number of Indigenous residents had been banned from the club and so were not able to attend. An impromptu second consultation was held in a different location, so that Indigenous people could have their say. A mother spoke of her anger at the repeated suspension of her 11-year-old son from a local school, expressing frustration that options other than suspension were not given sufficient consideration and saying Indigenous school children suffer as a result of this approach. In her opinion, teachers often lack experience in working with Indigenous children and have received no cultural awareness training. A health

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<sup>33</sup> Wadeye, Community Roundtable.

<sup>34</sup> Katherine, Community Roundtable.

<sup>35</sup> P Jangala, Submission.

<sup>36</sup> Mt Isa, Community Roundtable.

professional spoke of the difference in her colleagues' treatment of Indigenous patients and said non-Indigenous patients in the maternity ward sometimes asked not to be placed in a bed next to an Indigenous patient.

People commented that the Prime Minister's formal apology to the Stolen Generations was 'a good start', but the goodwill appears to be giving way to impatience and a desire to see meaningful policy reform and reconciliation action.

There was widespread recognition of the enabling power of education, and there were pleas for the retention of Indigenous culture and language in order to preserve heritage and identity. People also wanted school to be made relevant for Indigenous children:

It's just making it more difficult for our people to live in this country that is rightfully ours. People have come here from wherever and try to change our people into white people. I'd like to see these children understand, know, appreciate to live in both worlds.<sup>37</sup>

In Darwin teacher Yalmay Yunupingu pleaded for the right to teach culture, heritage and values through language: 'Please, please, we want our rights back'.<sup>38</sup> In Weipa there was resentment that little had changed over time: 'We're still colonising people's souls'.<sup>39</sup>

On the question of the central importance of education, an elder said, 'It's a very bad history but some of us can get out of it ... education is the key'.<sup>40</sup> Other people said, 'White folk are educated, they have other options'<sup>41</sup>; 'Does everything hang on literacy? It really does'<sup>42</sup> and 'We're a wealthy country. Why do we have children who can't read and write?'<sup>43</sup>

Many commented that the income-management measures forming part of the Intervention had resulted in money for food for children, but others who had previously managed their money responsibly spoke of humiliation. An Indigenous woman from Santa Teresa in the Central Desert spoke of a sign at the entrance to her community; it reads 'Prescribed area: prohibited material',



Sign at the entrance to Santa Teresa community

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<sup>37</sup> Wadeye, Community Roundtable.  
<sup>38</sup> Darwin (1), Community Roundtable.  
<sup>39</sup> Weipa, Community Roundtable.  
<sup>40</sup> Charleville, Community Roundtable.  
<sup>41</sup> Mt Isa, Community Roundtable.  
<sup>42</sup> Mt Isa, Community Roundtable.  
<sup>43</sup> Mt Isa, Community Roundtable.

referring to pornography. ‘How would you like that if the government put that up on your front door?’ she asked.<sup>44</sup>

In the public hearings the Committee was reminded of the human rights of Indigenous prisoners. Two presenters spoke of the multiple disadvantages Indigenous women in custody experience, referring to the disproportionately high number of Indigenous females in prison (over 25 per cent of the total population of women prisoners) and the large number of women classified as ‘high security’ (65 per cent of classified imprisoned women in Queensland).<sup>45</sup> Debbie Kilroy, from Sisters Inside, submitted there was a lower likelihood of Indigenous women prisoners being ‘placed on a community-based order than non-Indigenous women’ and:

It is not uncommon for Indigenous female inmates from the Far North Queensland prison to be transferred to Brisbane, away from their traditional country, children and families. They have limited contact with their children because of the vast geographical distances.<sup>46</sup>

Sisters Inside also referred to the trauma of strip searches, which are sometimes carried out by male officers: ‘The women in Brisbane’s Women’s Prison are subjected to a full strip search including a cough and squat after every visit. If the woman is menstruating she is required to remove her tampon or pad and hand it to the screw for disposal’.<sup>47</sup>

Elizabeth Langdon, Magistrate at Kalgoorlie Courthouse, said that in remote communities far fewer options are available for sentencing and prison is often the only option, rather than the last resort.<sup>48</sup> Sisters Inside noted that some of the recommendations of the Royal Commission into Aboriginal Deaths in Custody have not been implemented and that the recommendations of all inquiries into Indigenous dispossession and disadvantage need to be implemented.<sup>49</sup>

Other Consultation participants drew attention to specific instances such as the death of Mr Ward inside an overheated prison van compartment in Western Australia<sup>50</sup>, the death in custody of Mulrunji Doomadgee at Palm Island<sup>51</sup>, and the solitary confinement of Corey Brough in a New South Wales prison:

A 16 year old aboriginal boy who was moved to Parklea prison in 2003 and whose treatment was reported to the UN Human Rights Committee, who found for him in

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<sup>44</sup> Santa Teresa, Community Roundtable.

<sup>45</sup> V Roach, Public Hearings; D Kilroy, Public Hearings. See also Sisters Inside, Submission.

<sup>46</sup> Sisters Inside, Submission.

<sup>47</sup> *ibid.*

<sup>48</sup> E Langdon, Public Hearings.

<sup>49</sup> Sisters Inside, Submission.

<sup>50</sup> Kalgoorlie, Community Roundtable.

<sup>51</sup> Palm Island, Community Roundtable.

2006. The NSW government said it would do it again! The Optional Protocol to the [UN Convention Against Torture] should be adopted and enforced ...<sup>52</sup>

The cycle of consultations followed by lack of action or the implementation of ineffective policies has resulted in many Indigenous people feeling disappointed and angry and suffering from ‘consultation fatigue’. This was encapsulated in the statement that governments only ‘deal with Aboriginal problems, not Aboriginal *people*’.<sup>53</sup>

Indigenous people cited the Queensland Government’s alcohol restrictions in Indigenous communities, the Northern Territory Government’s ‘homelands’ policy, reforms to the Community Development Employment Program, and the Northern Territory Intervention legislation as examples of government policy decisions that have impinged on their rights. It was argued that before the Intervention the Federal Government ‘should have sat down with each community and asked “What are the problems that we face here and [can we] work on them together?”’<sup>54</sup>

Many Consultation participants had little hope that either the Federal Parliament or the public service would implement recommendations that would lead to substantial protection and promotion of the human rights of Indigenous Australians. This despair was evident in a community roundtable at which an elder and a younger person spoke of their anguish at living in deplorable conditions in their remote community and yet feeling ill-equipped to leave their country and family.<sup>55</sup>

Most Indigenous people who spoke to the Committee held the view that, in order to move forward, reference to Indigenous people and their rights had to be enshrined in the Constitution or in a treaty. A participant on Thursday Island said, ‘What the Government gives you today by statutory right, they will quite quickly take away tomorrow’<sup>56</sup> and that ‘Sovereignty is for us to live and breathe the heritage of our elders’.<sup>57</sup> Another participant noted, ‘The Inquiry recommends that Northern Territory Intervention is a reflection of the government’s inability to effectively deal with problems over the past 200 years’.<sup>58</sup>

The disillusionment many Indigenous people throughout the country feel in relation to substantive change in their quality of life cannot be overstated. At the end of an informative and engaging community roundtable on Thursday Island, a respected elder from Torres Strait stood up and addressed the Committee: ‘Thank you for

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<sup>52</sup> B Collins, Submission.

<sup>53</sup> Weipa, Community Roundtable.

<sup>54</sup> Yirrkala, Community Roundtable.

<sup>55</sup> Broken Hill, Community Roundtable.

<sup>56</sup> Coober Pedy, Community Roundtable.

<sup>57</sup> Thursday Island, Community Roundtable.

<sup>58</sup> Darwin, Community Roundtable.

coming all of this way to hear our concerns, but the truth is it has been a waste of our time and a waste of yours'.<sup>59</sup>

## Homeless people

Not having proper accommodation is very often linked to other problems such as family breakdown, addiction, mental illness, unemployment and other serious vulnerability factors. In Australia there is arguably no group more stigmatised and dehumanised than homeless people:

There is a homeless man who lives in the park near my house, who got his legs smashed to pieces by two young boys one morning. He was treated like something or someone worthless. Homeless people are human beings, and they should not be treated as anything less, or as 'creatures'. They need assistance and representation.<sup>60</sup>

Homelessness often exacerbates other disadvantages people face. It means not having a fixed address, which can preclude a person from access to welfare support, employment, education and other means of engaging with society. This in turn deprives the person of the opportunity to find a way out of homelessness by finding paid work and permanent accommodation and enjoying the protection these things afford:

The practical reality of homeless people accessing Australia's social security system is very difficult. Something as simple as having a birth certificate in order to be eligible to apply results in many homeless people being left out of the social security system.<sup>61</sup>

At community roundtables the Committee heard participants express disbelief and anger that a country as prosperous as Australia is not capable of helping its (relatively small) homeless population.

The Matthew Talbot Hostel and the nearby Wayside Chapel offer limited crisis accommodation for homeless men in Sydney. The Committee visited the hostel; it has been refurbished and has some very dedicated staff, but it, like the other similar facilities, struggles to obtain sufficient funding.

People who are homeless face a further barrier to the securing of their human rights. Sections of the community hold the view that homelessness is a 'choice'—a product of laziness, substance abuse and a person's lack of will to pull himself or herself out of their situation. This is simplistic, and it fails to do justice to the complexity of the difficulties homeless people confront.

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<sup>59</sup> Thursday Island, Community Roundtable.

<sup>60</sup> C Glab, Submission.

<sup>61</sup> W Nunn, Submission.



Homeless people struggle to have their voices heard. Agencies and advocates working with them complain of a lack of resources and a media that pays little heed to the problem, despite the increase in homelessness resulting from the current economic crisis.

The lack of an address can be a barrier to escaping homelessness. The Illawarra Legal Centre submitted:

Our client was homeless, living in the street and dropping into a shelter every week or so. He was on the list for housing. A letter came for him telling him he had to contact the Housing Department to confirm that he would take a vacant flat. He didn't receive the letter in time to respond and lost the flat and his place on the list.<sup>62</sup>

The centre argued that a Human Rights Act might be used to obtain a different outcome: 'The right to housing could be used to influence Housing NSW to allow this man to access the flat that had been offered to him or, at the very least, not to lose his position on the waiting list'.<sup>63</sup>

Although most people would agree that the right to adequate housing is a fundamental human right—as recognised in the International Covenant on Economic, Social and Cultural Rights—this right is not protected in Australia. In its efforts to help former prisoners 'successfully exit the justice system, [provide] space and support to a young person overcoming abuse or mental illness, or [help] someone find a job' Jesuit Social Services has become aware of numerous instances in which this right to housing is violated.<sup>64</sup> A staff member at Gateway Homelessness Services submitted, 'I have worked with a number of clients whose human rights have been violated in respect to housing. They can't get emergency housing and have to sleep rough as a result or they have been inappropriately housed in unsafe conditions'.<sup>65</sup>

The availability of housing for people on low incomes is further reduced in a tight real estate market. As John, a young person, said, 'Trying to pay the rent a lot of people ask on Youth Allowance is impossible. Besides, putting Centrelink on an application for rental housing is the kiss of death'.<sup>66</sup> A staff member at Connexions Direct, a service that provides information to young people at risk of homelessness, also spoke of the scarcity of proper accommodation:

There is a lot of adequate housing around if you can afford three hundred dollars a week, if you can afford a mortgage. There is no adequate model of housing around

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<sup>62</sup> Illawarra Legal Centre, Submission.

<sup>63</sup> *ibid.*

<sup>64</sup> Jesuit Social Services, Submission.

<sup>65</sup> Staff member, Gateway Homelessness Services, cited in Jesuit Social Services, Submission.

<sup>66</sup> John, cited in Jesuit Social Services, Submission.

for people who live on a very low income, or are unemployed and have a substance abuse problem.<sup>67</sup>

Jesuit Social Services reported that the only alternative to homelessness for many young people is rooming houses:

There has been a growth in rooming house-style accommodation run [on] a 'for profit' basis by operators who take on rental properties and then sub-lease individual rooms. Some rooms often have more than one tenant, and Jesuit Social Services is aware of 'hot bedding', a practice when more than one person shares the same bed but sleep at different times. Many of these rooming houses are not legally registered, have poor amenities, and are dangerous. As highlighted by recent newspaper articles, these for profit rooming houses are a totally unsuitable housing option for vulnerable young people.<sup>68</sup>

This was echoed by a Connexions Direct staff member:

We had a kid living in one of these rooming houses in the outer suburbs. It was a dreadful situation. This kid should not have been living there. The place was filthy and stank, there was no kitchen, and lots of the other tenants had extensive criminal records. It was a long way from employment opportunities and public transport. How can you wake up in the morning and look at what you will do with your life when you live in conditions like this?<sup>69</sup>

Another option for many low-income families is accommodation in overcrowded public housing estates, where the number of actual residents is often much higher than the official figures would suggest: 'I know one Sudanese family living seven in a house and the mother has been sleeping on the floor for two years because there is not enough room. There is a lot of overcrowding, seven people in a two bed room house'.<sup>70</sup>

## People with disabilities

The Committee heard from people with disabilities and their advocates many anecdotes about the challenge of negotiating everyday needs and their right to participate in society as fully as possible. There appears to be a gulf in the mainstream community's appreciation of the difficulties faced by the families of adults and children with disabilities. Faye Galbraith, a mother of two boys aged 6 and 8 submitted:

They have very few rights ... to education, to inclusion in society, to services required to help them live daily at home. This situation is getting worse. Their class sizes

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<sup>67</sup> Staff member, Connexions Direct, cited in Jesuit Social Services, Submission.

<sup>68</sup> Jesuit Social Services, Submission.

<sup>69</sup> Staff member, Connexions Direct, cited in Jesuit Social Services, Submission.

<sup>70</sup> Staff member, Communities Together, cited in Jesuit Social Services, Submission.

were recently increased. As the mother of two disabled children, I have no right to earn a living. There are no after school or vacation care places, so I was forced to give up work. My family is deemed as earning too much (just over \$70K) to receive decent help from the government. The cost involved in raising 2 children with disabilities (special food, equipment etc) is not considered. Other developed countries support those with disabilities. Australia does not. My children have no right to inclusion in society, to a decent education, or to therapy to help them reach their potential. They have to wait years for funding for a wheelchair and other equipment.<sup>71</sup>

There were pleas to reduce the ignorance about the cost of living with a disability and the cost of living for many elderly members of society:

We need more community education on people with disabilities. And more independent living facilities for aged & people with disabilities. And do these people in high places understand how hard it is for aged people and people with disabilities to afford to live?<sup>72</sup>

The Committee was surprised to receive from disability support agencies a large number of submissions dealing with ‘forced co-tenancy’. This situation appears to arise when, as a consequence of financial constraints or decisions made by the bureaucracy, a person with a disability is forced into a tenancy with an entirely unsuitable housemate or co-tenant. There were many such stories:

John is a young man who has an acquired brain injury. He received a payout of \$2million. With this money, the Public Trust bought him a house and paid for his support which was provided by a non-government agency. After approximately 10 years, the Public Trust told him that he could not continue to be supported individually and he must take in 2 co-tenants. One person had a degenerative disability, which was terminal. John found living with this person emotionally stressful and he was very unwell for most of this time. The other co-tenant had a mental illness and had difficulty controlling his emotions and caused considerable damage to John’s home. John was left with a bill of \$8000 to repair the damage to his home. He is again living on his own but has been advised that he will probably have to get other people to move into his home to make his funding last, or he may have to move into a nursing home. John’s family does not feel that the co-tenants that were identified ... to share his home were compatible, and they have left him feeling depressed and financially disadvantaged.<sup>73</sup>

Consultation participants expressed disappointment that we have come so far as a society but that often, in town planning and construction, scant regard is had for people with disabilities. One person commented that her council built ‘a top-class

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<sup>71</sup> F Galbraith, Submission.

<sup>72</sup> K Thompson, Submission.

<sup>73</sup> Community Safeguards Coalition, Submission.

facility (50m swimming pool) and has not provided access for disabled people—zero disability access’.<sup>74</sup>

The Law Institute of Victoria submitted that, because Australia has ratified the Convention on the Rights of Persons with Disabilities, government should be protecting and promoting the rights of people with a physical or mental disability, ensuring that they have opportunities, freedoms and a standard of living equivalent to those enjoyed by people without a disability. Access is crucial to helping people with disabilities gain an education and participate in the workforce and in community life. Failure to protect the rights of these people not only reduces their quality of life but is also inconsistent with our perception of social responsibility and values, the institute argued.<sup>75</sup>

## **People living with mental illness**

The rights of people living with mental illness were important to many who participated in the Consultation. People living with mental illness were seen to be among the most vulnerable members of society and among those most at risk of ‘falling through the cracks’:

My concern is for those who are vulnerable within our society, particularly those suffering from a mental sickness. A number of years ago many institutions were closed down and I know some of these institutions left a lot to be desired. Unfortunately nothing has been put in their place. Many mentally sick people are living on the streets and are found in prisons. These people need to be protected.<sup>76</sup>

Eva Kaufman described her disappointment at the fact that, although there have been some improvements in the mental health system, there remain gaping holes in service provision:

Over the last decade, the Australian mental health system has commenced a new move in support and treatment for individuals with mental illness. This change has brought about the closure of countless institutions that were responsible for treatment and care of such individuals. The emphasis on treatment has shifted to the community sector. However, as a social worker, and sister of an individual with a mental illness, it has become devastatingly obvious that there is a complete lack of support, resources, and infrastructure to replace the closure of these support and treatment centres. Thus, a *huge* amount of support for care and treatment has fallen onto families, not the community sector. Families do *not* have the resources, capacity and professional skills to ethically treat an individual suffering mental illness. Put simply, the mental health area is in desperate need of attention. We need to replace and update this system, otherwise individuals with mental illness

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<sup>74</sup> T Banks, Submission.

<sup>75</sup> Law Institute of Victoria, Submission.

<sup>76</sup> M Moskof, Submission.

are at a great risk of harm, whether it be from themselves, lack of care, or another violation of their human rights.<sup>77</sup>

A mother wrote of her despair that her two sons' mental illnesses are preventing them from realising their potential in society:

I have two sons with schizophrenia. One is also addicted to street drugs. The other has Asperger's Syndrome. Both are/were highly intelligent young men when they became ill. Neither is currently able to work to their potential, or to contribute to Australian society. What a sad and terrible loss for them and for Australia.<sup>78</sup>

In Geelong a young man expressed anguish that the community has too little regard for the human rights of people struggling with mental health problems. He said he was forced to undergo medical treatment that had irrevocably damaged his health and he was angry at this intrusion on his bodily integrity.<sup>79</sup>

Another person with a mental illness spoke of her experience with compulsory medication, involuntary admission to hospital and community-based orders. She acknowledged that sometimes the rights of people with mental illness must be limited for their own good and to facilitate treatment, but she implored service providers and medical practitioners to be mindful of the dignity of the patient:

For those who experience mental illness, myself included, to have our rights removed must be only done with the utmost respect and acknowledgement that this is a human rights breach and that this is honoured, and the dignity of those incarcerated is respected, and that this is the driving force behind their care.<sup>80</sup>

Another submitter said she had worked 'for over 20 years with people with intellectual disability, mental illness and serious offenders. Human rights abuses in institutions are ongoing'.<sup>81</sup> Others emphasised the importance of seeking instructions and approval for care and treatment when the individual concerned is well.

In Brisbane a woman spoke about her brother, who had been diagnosed with schizophrenia. She said that when she thinks about Cornelia Rau, whom the government held in immigration detention, she fears for her brother:

The mental health system and the health system do not cater for the person suffering from an illness and the family and caretakers. I live in constant fear of my brother becoming that person on TV after having a psychotic episode, that he will be

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<sup>77</sup> E Kaufman, Submission.

<sup>78</sup> S Pipitone, Submission.

<sup>79</sup> Geelong, Community Roundtable.

<sup>80</sup> E Willoughby, Submission.

<sup>81</sup> A Birdgen, Submission.

that 30-something-year-old man who the police have shot because he's having a psychotic episode and he is not himself'.<sup>82</sup>

Jesuit Social Services highlighted the complexity of the problem, noting that people with mental illness often end up in prison:

We work with young people who have co-existing mental health and drug or alcohol problems, a group largely ignored by society. This discrimination can include the way they are treated in the health and welfare system. A lot of our clients are excluded from services because their needs are too complex or their behaviours are too challenging. They often end up with us because other services refuse to work with them. Sometimes they will end up in prison because there is nowhere else to go.<sup>83</sup>

## People living in rural and remote areas

In country towns and remote communities across the nation many participants spoke of poorer access to services and the differences in the adequacy of the services provided by the states and territories. A participant in Wodonga said:

I suffered as a child from polio and living in Victoria I get a fine service looking after me. People I know that live across the border get nothing. I think it's time this balance, not just in these two states but in the whole Commonwealth, is sorted out, so we get a fair crack of the whip.<sup>84</sup>

For example, Whyalla and Mount Gambier lack emergency or crisis shelters. Much hardship was caused by the lack of health services in many centres, it was said, and as a result of the fact that the closest major hospital might well be interstate. The impact of this situation was greatest for people with disabilities or mental illness, elderly people, cancer sufferers and others with serious illness.

Roundtable participants in Mount Isa, a town that has contributed much to Australia's wealth, pointed out the irony—'resource rich, service poor'.<sup>85</sup> Elsewhere, participants spoke of the consequence of physical isolation—'They don't call it the Great Dividing Range for nothing; the Great Dividing Range is dividing us from services'.<sup>86</sup>

Many participants felt there should be mechanisms for ensuring equality of treatment across state borders and that this right to equivalent treatment should be enforceable. Many also made the point that there was no common-sense approach to bureaucratic border problems (such as the red tape associated with filling

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<sup>82</sup> Brisbane (2), Community Roundtable.

<sup>83</sup> Jesuit Social Services, Submission.

<sup>84</sup> Wodonga, Community Roundtable.

<sup>85</sup> Mt Isa, Community Roundtable.

<sup>86</sup> Broken Hill, Community Roundtable.

medical prescriptions interstate), particularly in urgent situations.<sup>87</sup> Others went further, urging not only a strong enforcement mechanism to ensure equitable delivery of services in a way that protects basic human rights nationwide but also proposing that the states and territories be abolished because they are ineffective and give rise to great disparities.<sup>88</sup>

Among the most disadvantaged people living in rural and remote areas are people with mental illness, it was said.<sup>89</sup> Mt Gambier exemplified the country–city divide and the state-by-state differences in service delivery. A lawyer whose daughter has been ‘sectioned’ many times called for a rethinking of the way resources are allocated, saying that a person with mental illness who is picked up by the police is taken to a hospital in Adelaide and, when discharged, is left at the bus stop with no money and without their family being notified. He was dismayed at the great difference in service provision in a town a few hundred kilometres away across the border: ‘Warrnambool has excellent services. Mt Gambier has nothing’.<sup>90</sup>

## The ageing

Many people are becoming increasingly concerned about the inadequacy of services for the ageing, the conditions inside retirement hostels and nursing homes, and the general vulnerability of people who become invisible because they are elderly.

In one regional centre a woman shared her story. She had been working in a nursing home but resigned after less than a month because she was horrified by the human rights abuses she witnessed: ‘I worked there for a while and it changed my life. When you are old you are ... tossed on the hay and forgotten’.<sup>91</sup> Another participant wrote of two incidents:

An elderly woman in a ‘well run and well appointed’ residential care facility was told she wasn’t to leave her chair without assistance from a staff member as her insurance would not cover any treatment required if she fell. Her family could not understand why she wouldn’t get up using her frame, and walk around. It took several attempts to understand why.

... an elderly man recovering in hospital from minor surgery who hadn’t had his personal cleanliness attended to for several days. His son offered to wash his hair and shave him—he was refused. His son offered to bring in a professional barber—he was refused. The basis for these refusals seemed to relate to potential lawsuits or similar if there was an accident. Where do our voices go as we age—have we no

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<sup>87</sup> For example, Broken Hill, Community Roundtable; Mt Gambier, Community Roundtable.

<sup>88</sup> Dubbo, Community Roundtable.

<sup>89</sup> Mt Gambier, Community Roundtable; Whyalla, Community Roundtable; Bourke, Community Roundtable.

<sup>90</sup> Mt Gambier, Community Roundtable.

<sup>91</sup> Confidential, Community Roundtable.

choices about our personal privacy, preferences and care? How do we ensure that each person has a voice and is heard? How are our choices constrained by red tape, policy and other people's fear? Where do our voices go as we age?<sup>92</sup>

Many participants told the Committee more attention must be paid to the needs and care of people as they age and that mechanisms must be introduced to alert responsive, responsible authorities if conditions fail to meet expectations:

I believe the hospitalised elderly is an extremely vulnerable group, and the public hospitals are not meeting their needs. Also, there is no responsive mechanism/process in place to improve care. People like me [an occupational therapist] who continually try to speak about problems are silenced.<sup>93</sup>

There was often a call for greater awareness of the difficulties associated with ageing—including the physical, social, mental and financial circumstances that tend to deteriorate with age. In the case of the financial affairs of the ageing, there was sometimes resentment at the inflexible application of rules and regulations. For example, Geraldine Gillen lamented that, because she chooses to work more than 20 hours a week, she cannot obtain a seniors card, which is available to people over 60 years of age who work less than 20 hours a week. This means that, unlike her friends who have retired fully, she has no access to seniors card benefits. She made the point that the 20-hour restriction applies regardless of total income:

In South Australia, a person over 60 who works more than 20 hours cannot get a state seniors card, as they work too much. It is not means tested! So I am discriminated against because I choose to keep working more than 20 hours, but I have friends who have the card—but earn more from their allocated pensions that I get from working!<sup>94</sup>

The ACT Disability, Aged and Carer Advocacy Service commented, 'Advocacy groups concerned with the rights of frail older people and people with disabilities say protections existing in Australian law in relation to their rights [are] woefully inadequate'.<sup>95</sup>

The right to be free from degrading treatment is especially pertinent to older people living in aged care facilities and nursing homes. This is because they are entirely dependent on facility staff and their carers. Seniors Rights Victoria echoed a commonly expressed fear: 'Older people have limited ability to protect themselves and assert their rights in an environment where efficiency is often the main priority of caregivers'.<sup>96</sup>

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<sup>92</sup> K Morris, Submission.

<sup>93</sup> P Upham, Submission.

<sup>94</sup> G Gillen, Submission.

<sup>95</sup> ACT Disability, Aged and Carer Advocacy Service, Submission.

<sup>96</sup> Seniors Rights Victoria, Submission.



## Children

The subject of the rights of children arose in various contexts, among them disability, homelessness, asylum seekers, and life in Indigenous communities.

Josephine Frankland briefly catalogued what she believes are breaches of the rights of children in Australia:

Children's human rights must be included and protected. Children in detention centres. Children taken from a safe environment and put into danger and trauma is one of the greatest human rights abuses this country has committed, starting with the stolen generation and continuing with children behind razor wire with Australians acting as concentration camp guards.<sup>97</sup>

Bev Schimke wrote of her fears for children, and their mothers, living in situations of domestic violence:

I have worked at the Rockhampton Women's Shelter for almost four years with women and children escaping domestic violence. Every day I enter a high security facility where closed circuit cameras monitor the perimeter and I wear a duress alarm around my neck so I can alert security if a situation arises. All of this security is to protect women and children who in many cases have been kept as prisoners in their own homes and who have been subjected to horrific physical, sexual and verbal abuse while the men who have committed violence against them freely go about their daily lives with very little disruption. This is a violation of so many human rights including children's rights.<sup>98</sup>

Neil Price believes the welfare of children is sufficiently important to warrant a designated commissioner: 'We need a federal youth commissioner to enforce the Rights of the Child'.<sup>99</sup> In one of the community roundtables, however, an Indigenous elder said that children already have more than enough rights and that it is parents' rights that are often compromised.<sup>100</sup>

## Access to justice

Lack of access to justice is a serious concern for many people living in Australia. The availability of access to legal aid and assistance in ordinary legal proceedings is at crisis point, private and government-funded public legal services being overburdened and under-resourced. This has dire consequences for many people and limits the possibility of people having real equality before the law: 'Equality before the law is not practised in the case of many Australians because they cannot

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<sup>97</sup> J Frankland, Submission.

<sup>98</sup> B Schimke, Submission.

<sup>99</sup> N Price, Submission.

<sup>100</sup> Charleville, Community Roundtable.

afford relevant representation and cannot get legal aid. Australian governments must provide suitable resources to enable legal aid access'.<sup>101</sup>

This inability to afford legal services means that many people cannot gain access to the remedies that guarantee rights through the legal system. Many community lawyers who attended community roundtables said their clients are often people with disabilities, mental illness or other vulnerability factors and require more time and special attention.<sup>102</sup>

In the community there is also much anxiety for friends and relatives who are caught up in the criminal justice system:

I write to a relative in prison who is in solitary confinement. He is locked in a small cell with no windows and no social contact (for the last 8 years). He is losing his mind—this is torture. There is a strong emphasis on punishment rather than rehabilitation. The prison system, I believe, is in chaos—mostly poor who can not afford to defend themselves.<sup>103</sup>

In rural areas particularly people were worried that police abused their powers and did not follow due process:

Police brutality. Abuse of a power in which you are supposed to protect civilians, but as a result of racism or assumption, police may decide to take 'justice' into their own hands. Because people can also be charged for filming police, they [the police] also frequently go unrebuked.<sup>104</sup>



Mr Mustafa Najib tells his story. Rescued by the *Tampa* and then held in detention on Nauru, he is now a graduate of an Australian university.

## A clean and healthy environment

At almost all the roundtable discussions right to clean air and clean water was raised, as was our responsibility to hand on to future generations a sustainable environment. There was consternation about environmental damage and anger at failure to enforce measures to protect the environment from further destruction:

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<sup>101</sup> W Senderson, Submission.

<sup>102</sup> Burnie, Community Roundtable; Wodonga, Community Roundtable; Mildura, Community Roundtable.

<sup>103</sup> M Faulkner, Submission.

<sup>104</sup> C Glab, Submission.

Today, 16 April 2009, is one of the dirtiest days I have seen for a long time. It is a still day with no clouds, but the air inversion has trapped masses of dust and other unknown air emissions. The smog is grey and tinted with brown; possibly nitrogen from the three local power stations. The air is not clean, and how dangerous it is to breathe is unknown. According to a call to Graham Clarke at [the Department of Environment and Climate Change] this morning, the danger is unascertainable, or at least too 'cumbersome' to ascertain. Who is protecting our basic human right to clean air and clean water? Are they less valued than the revenue to the state government from coal royalties? Our frequent calls for action continue to be ignored. What can we do??<sup>105</sup>

Many participants made the point that, in the absence of clean air, water and food and a sustainable environment, there is no point to having any other rights since survival itself is at stake: 'We need to ensure that environmental rights are protected, so our children, and children's children have an ecologically sustainable future'.<sup>106</sup>

In some centres environmental concerns were regional in their focus: 'Access to clean drinking water is a human right and a lot of the time we don't get it here ... the Murray is a really big issue for South Australia and it's going to get bigger'.<sup>107</sup>

In Cairns roundtable participants spoke of the need to protect their environment from state laws, stressing the importance of not excluding environmental rights from federal protection: 'We ask for a prohibition on cherry-picking rights. Rights must at all times be treated as a whole'.<sup>108</sup>

## 2.3 Contested areas

Consultation participants often questioned whether some recent laws and policies had struck a balance between individual liberty and the public interest.

### The Northern Territory Intervention

There were strong objections to the suspension of the *Racial Discrimination Act 1975* (Cth), which was done in order to facilitate the Commonwealth Government's Northern Territory Emergency Response and imposed restrictions on Aboriginal communities in particular parts of the territory:

The intervention assumed that one solution could be found for all. Many mistakes were made such as sending in the army, stopping 'work for the dole' schemes and

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<sup>105</sup> C Russell, Submission.

<sup>106</sup> Jess, Submission.

<sup>107</sup> Whyalla, Community Roundtable.

<sup>108</sup> Cairns, Community Roundtable.

giving people in remote areas with no transport food vouchers that could only be used in certain places. There was a feeling that Aborigines should all be punished, instead of the government realizing there were some problems in some communities and with co-operation solutions could be found.<sup>109</sup>

Rather than focus on the broad treatment of Indigenous people under the Intervention, Consultation participants often focused specifically, and with vehemence, on the suspension of the Act. One participant submitted:

I came tonight with a major concern about Indigenous people's human rights protection, and the fact that the *Racial Discrimination Act* was suspended to enact legislation surrounding the Northern Territory intervention. There is no legislative voice for Indigenous Australians, and thus no legislative mechanism in place to protect their relationships to land and their cultural and spiritual practices.<sup>110</sup>

Other participants praised aspects of the Intervention, noting that in some communities shopping trolleys were full for the first time and there was additional funding for much-needed infrastructure. Most people thought that if special laws are to be applied to Indigenous communities this should occur only after adequate consultation and serious attempts at developing partnerships in policy development and service delivery.

## Asylum seekers

For 20 years successive Australian governments have adopted strong border protection policies that have removed some of the rights that people arriving on our shores and seeking refugee status were able to exercise. Governments have sought to justify their policies in terms of the need for 'non-porous' borders and an immigration policy that is controlled by government, rather than by people smugglers.

Research the Committee commissioned showed that public opinion is divided on asylum seekers: 28 per cent of survey respondents felt asylum seekers need more protection and 30 per cent wanted to reduce their level of protection.<sup>111</sup>

In Australia's recent history few questions have been as divisive and inflammatory as the asylum seeker one. Political and media activity was frenzied in the wake of the *Tampa* affair, the SIEV-X maritime tragedy, and the 'children overboard' incident.

Although Australia accepts only a small proportion of the world's refugees, the matter has become highly politicised. Many who raised the question of asylum

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<sup>109</sup> A Geihie, Submission.

<sup>110</sup> F McAllan, Submission.

<sup>111</sup> Colmar Brunton Social Research, *National Human Rights Consultation—community research report* (2009).

seekers felt Muslim asylum seekers in particular have been demonised. There has been a sense that Muslims present a ‘threat to our way of life’ and a desire to curb the number of Muslims arriving in Australia. Some have sought to link people fleeing Afghanistan’s Taliban and Saddam Hussein’s regime in Iraq with those very regimes. But many sympathise with the plight of asylum seekers: ‘People aren’t getting on a boat for any other reason than to escape from really terrible conditions that we can’t even imagine’.<sup>112</sup> They point to a lack of compassion and an inability to identify with traumatised people:

I feel saddened. There’s something going wrong here. People are arriving here traumatized. Australia managed to whip up \$320 million for bushfire victims, but asylum seekers are just as traumatized. Australia doesn’t have an embassy in Kabul, so people have to leave the country without documentation.<sup>113</sup>

The difficulties facing people arriving in Australia by boat were highlighted in submissions. Often the first hurdle is the treacherous journey, typically through Southeast Asia and then by boat to an Australian reef. If they are intercepted at sea, these people are usually returned to Indonesia or placed in detention on Christmas Island.

Numerous asylum seekers, among them children, have languished in Indonesia for years:

We know there are asylum seekers in total limbo on the Indonesian island of Lombok. Of the 400 refugees turned back by Australia in 2001 and placed there, 200 refugees remain there after 7 years. They have no status there, the children have no right to an education and they are left to wither. If this continues, Australia may as well be described as using Indonesia as another Nauru—out of sight, out of mind, and with no access to Australian law.<sup>114</sup>

Many Consultation participants stridently criticised the use of offshore detention facilities to house asylum seekers—Nauru in particular—or facilities at inaccessible locations on the Australian mainland, such as Woomera.<sup>115</sup> The length and conditions of detention drew particular censure from many, who felt that detention centres, including Christmas Island, should be closed on the ground that they are ‘insupportable ... of human dignity and rights’.<sup>116</sup>

Perhaps the greatest outrage was provoked by the detention of children, often for years. Well-publicised cases such as the Bakhtiari children aside, there are many cases of children who are already traumatised by their experiences being unable to

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<sup>112</sup> Mt Gambier, Community Roundtable.

<sup>113</sup> *ibid.*

<sup>114</sup> R Nairn, Submission.

<sup>115</sup> Whyalla, Community Roundtable.

<sup>116</sup> J Bell, Submission.

cope with detention where they repeatedly witness adults trying to harm themselves:

Children held in Woomera typically developed enuresis [involuntary urination]: a colleague of mine described the haunting image of a 12 year old Afghan girl wandering around aimlessly in the dust at Woomera, wearing a nappy ... Desperate acts of self-harm were common, among children as well as adults.<sup>117</sup>

In one instance the refusal, after repeated requests, of assistance for a troubled child in detention meant 'the eleven-year-old took a bed sheet and hanged herself. She had not tied the knot properly and was still strangling when they found her. She then tried to swallow shampoo, as she had seen adults kill themselves that way in Woomera'.<sup>118</sup>

One of the most controversial aspects of Australia's immigration detention system is the fact that it allows for indefinite detention. The name Al-Kateb is synonymous with this policy at its most egregious: in 2004 the High Court of Australia held that a man not accused of any offence could be kept in administrative immigration detention indefinitely:

Speed up the refugee process! No-one should be left for years in a refugee centre. Instead of spending money keeping refugees behind barbed wire, let them out into the community where they can work (which is what they want). Don't deny refugees human rights.<sup>119</sup>

In addition to the length of detention, the standard of treatment in detention centres is disturbing for many people:

I am particularly concerned about the abuse of human rights of refugees over the last decade or so. [The Department of Immigration] and detention centre management frequently seem to treat people with contempt rather than respect. Our lack of constitutional or legislative protection required the High Court to uphold as valid a system of mandatory arbitrary indefinite detention of asylum seekers.<sup>120</sup>

The harshness of conditions in detention centres was illustrated in a case described by Julian Burnside QC. When a Muslim man refused to strip in front of his young daughter:

... the guards beat him up, handcuffed him, and took him to the 'Management Unit'. The Management Unit is a series of solitary confinement cells. Officially, solitary confinement is not used in Australia's detention system. Officially, recalcitrant

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<sup>117</sup> J Burnside, Submission.

<sup>118</sup> *ibid.*

<sup>119</sup> N Reece, Submission.

<sup>120</sup> A Mayer, Submission.

detainees are placed in the Management Unit. The truth is that the Management Unit at Baxter is solitary confinement bordering on total sensory deprivation.<sup>121</sup>

Since the 2005 discovery that Cornelia Rau, an Australian permanent resident with mental illness, was erroneously held in immigration detention, the question of detention has gained prominence. At that time even people who might not normally be concerned about immigration detainees began talking about protecting the rights of people in detention: 'I come from a privileged background and therefore cannot say that my rights have ever been breached. Nevertheless, I do not think that human rights are adequately protected in immigration detention'.<sup>122</sup>

There was also concern about scant provision of services and assistance for new settlers in Australia, especially those dealing with trauma:

Children and adults coming from warzones are not being adequately supported on arrival, and are being left to deal with great trauma and grief alone. The schools do not understand what the children have experienced, and nor does the rest of the community. The children are often put into classes by age at school, even when they have no curriculum readiness. So a child who has never been to school can be placed in Year 10. Nobody can succeed in this, and he or she is destined to 'fail' and lose confidence completely. The parents cannot understand why the child is having problems at school, as they are not familiar with this system and may be uneducated. The school may contact the parents to complain about the child's progress or behaviours. The parents think this is a disciplinary matter and the school wants them to punish the children. Schools are not presenting [them] with solutions; just with problems that seem to be poorly articulated to already very stressed families. The children become the meat in the sandwich between home and school, both blaming the child. However, the child often has serious untreated refugee trauma, and may be being bullied at school, or given work that is impossibly hard, as he or she has never had the school preparation before. All of these things have been discussed in many forums over a number of years. However, it persists in the same patterns, severely impairing the human rights and futures of many refugees and their children.<sup>123</sup>

In one country town with a relatively large population of (mostly African) refugees the Committee heard there were inadequate settlement services to help the refugees integrate into the community.<sup>124</sup>

It is widely acknowledged that conditions for refugees have improved under the Rudd Government, but there remains a feeling that we have a long way to go and

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<sup>121</sup> J Burnside, Submission.

<sup>122</sup> R Briese, Submission.

<sup>123</sup> D Clement, Submission.

<sup>124</sup> Wagga Wagga, Community Roundtable.

that something should be done to ensure that asylum seekers will not be treated inhumanely in the future.

## **National security laws**

After the 11 September 2001 attacks on the World Trade Center in New York there was bipartisan support for the introduction of stringent national security legislation. Citizens concerned about civil liberties were outraged by the legislation. The legislated mechanisms—such as the use of adverse security findings, control orders, closed courts, secret evidence, and detention without charge—attracted strident criticism. The government claimed that this interference with individual rights and liberties was justified in the public interest because there was a need for robust measures to protect the community and to detect and deal with anyone who might be involved in terrorist activity.

One Consultation participant was worried about the most draconian aspects of these new laws and mentioned two high-profile examples:

ASIO can state that someone is a security threat, as occurred with two refugees Mohammad Sagar and Mohammad Faisal, held for many years on Nauru. But, apparently, nobody was entitled to know what the accusations were, or who had made them. Therefore, they could not be challenged. This was also the case with Scott Parkin, a peace activist from the US who, as a result of adverse assessments, was incarcerated and deported. On the grounds of ‘the national interest’, a certificate from the Attorney General barred both lawyer and client from hearing the government’s evidence, or from being in the courtroom when it was being presented.<sup>125</sup>

Charles Knight, a roundtable participant and an expert in counter-terrorism studies, drew a link between increased acknowledgment of human rights and prevention of violence:

It seems clear to me that an enabling factor in political violence is a perceived lack of access to mechanisms of justice (ie, ‘I had no other option’). From this it follows that strong mechanisms to address ‘injustice’ and particularly procedural justice are vital. Human rights mechanisms have a place in diverting individuals from violence.<sup>126</sup>

Many Consultation participants were disquieted by the case of Dr Mohamed Haneef, in which, after courts found the authorities had made erroneous assumptions about his connection with terrorism, the Minister responsible for immigration nevertheless cancelled Dr Haneef’s visa and he was removed from Australia.

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<sup>125</sup> R Nairn, Submission.

<sup>126</sup> C Knight, Submission.



David Hicks was also cited as an Australian whose right to a fair trial had not been upheld by his government.

Finally, there was unease at the possibility that the introduction of national security legislation had put free expression at risk:

The introduction of the *Anti Terrorism Act 2005 (No 2)* provoked widespread public debate about whether or not a person should be charged with sedition for rhetorical statements, parody, artistic expression or other communications the person does not intend anyone to act upon. While these criteria raise issues within themselves, it is sedition through artistic expression that particularly concerns me as a creative practitioner. It is imperative that all Australians, especially those young people who express themselves through the creative arts (whether it be creative writing, music, visual arts, drama, dance etc) are afforded the right to freedom of expression, even (and I would argue especially) when that right is exercised in a challenging, alternative, or ‘unpopular’ manner.<sup>127</sup>

## 2.4 ‘Hot button’ topics

Throughout the Committee’s consultations participants kept raising four topics—same-sex marriage, euthanasia, abortion, and religious concerns with the Victorian Charter of Human Rights and Responsibilities—that give rise to intense debate in the community. At the community roundtables, discussion often turned to whether a Human Rights Act would be a help or a hindrance in efforts to improve laws and policies in these areas without polarising the community.

### Same-sex marriage

The Committee received moving submissions from people in same-sex relationships who are struggling under the weight of discrimination. In particular, many submissions from people in committed long-term same-sex relationships expressed a desire for the legal and social recognition afforded by marriage and the public declaration of commitment: ‘How can we have anti-discrimination laws that



The ‘hot issues’—the Right Reverend Robert Forsyth, Rodney Croome AM, Rita Joseph and Neil Francis

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<sup>127</sup> K Cantrell, Submission.

recognize the rights of gay and lesbian people and then not let them get legally married?’<sup>128</sup>

Others wrote of the central position of marriage in family life:

My partner and I have been in a lesbian relationship for nearly 10 years. During that time, we have established a warm home in which both our families have enjoyed many happy and joyous events. We both hold senior jobs in education and research fields, and contribute as much as we can to our community by volunteering our time, donating to charities, paying our taxes and behaving in a lawful manner. Sadly, Australian governments both past and present continue to discriminate against us by not recognising our relationship as being of the same quality and sincerity as a marriage. Although many legal aspects of discrimination against us have been removed now, one of the most obvious discriminatory pieces of legislation still holds—that my partner and I cannot marry, despite our many years of happy partnership.<sup>129</sup>

But in the general community views vary. Some people oppose any marriage other than that between a man and a woman on either religious or other grounds.<sup>130</sup>

Same-sex marriage was raised at many community roundtables and was the subject of a considerable number of submissions, which often made the point that in a secular society a civil marriage should be the right of all humans. The Committee was urged to phrase any right to marriage as a right of ‘persons’ because the wording ‘men and women’ in the International Covenant on Civil and Political Rights is sometimes construed as excluding same-sex marriage.<sup>131</sup>

Among other things, marriage brings with it legal consequences relating to taxation, property, family and other matters. Dennis Moran remarked that, even though he is in a long-term relationship, he cannot gain access to benefits granted to married heterosexual couples simply because his is in a same-sex relationship: ‘As a gay male in a committed relationship of 29 years, I have been treated as a single person in Australia’.<sup>132</sup>

Another submission dealt with the question of same-sex partnerships and family migration laws:

I am a Melbournian living overseas with my American partner of seven years. In December 2008, Victoria implemented a de-facto partnership registry to include same-sex partners. For immigration purposes, this partnership certificate can be

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<sup>128</sup> M Feeney, Submission.

<sup>129</sup> H Wang, Submission.

<sup>130</sup> Colmar Brunton Social Research, *National Human Rights Consultation—community research report* (2009).

<sup>131</sup> Australian Marriage Equality, Submission.

<sup>132</sup> D Moran, Submission.

used as evidence to sponsor my partner. However, I am unable to register our relationship in Victoria because the registry will only accept Victorian residents. This is despite the fact that I have a residential property in Victoria, and have lived there for 21 continuous years prior to living overseas. As for my American partner, how is he supposed to be a Victorian resident before he has migration rights?<sup>133</sup>

Broader aspects of discrimination featured regularly in discussions about sexual orientation and sexuality. Paolo Polimeri wrote about applying to work for a church-based non-government organisation in Sydney:

It is against human rights to discriminate against someone's sexual orientation. I recently couldn't apply for a job in an international NGO based in Sydney because of my sexual orientation, and that is because it is a church organization. This is (unfortunately) legal in Australia, but it should no longer be.<sup>134</sup>

If the definition of civil marriage in Australia were extended to include a union between two men or between two women, is that best done by a vote of the Federal Parliament to amend the *Marriage Act 1961* or is it best done by judges interpreting various Commonwealth laws according to a general human rights law invoking equality and non-discrimination? The Federal Opposition submitted:

An example of the desirability of protecting human rights by specific enactment is afforded by the reform of the law concerning sexuality discrimination. Last year, the Parliament dealt with a suite of bills which amended 84 pre-existing Commonwealth statutes which discriminated against same-sex couples. The legislation had bipartisan support. After detailed consideration by a Senate Committee, the Opposition proposed a number of amendments which were accepted by the Government and welcomed by the gay community. The bills were passed by the Parliament on 26 November. The rights of those affected are on a much surer footing, having those specific and detailed statutory protections, than they would be were their rights merely dependent upon vague, aspirational statements in a bill of rights, unaccompanied by any specific protections or legal remedies.<sup>135</sup>

At the public hearings Rodney Croome, from Australian Marriage Equality, said:

The right to marry one's chosen partner is one of the most important rights conferred by our society. It recognises that the partners concerned are equal before the law and enjoy freedom of choice, that they belong in, and are embraced by, their families and their communities. Given the decision to marry is arguably the most important choice most of us are ever called on to make, the right to marry our partner is a potent symbol that we are considered fully adult, fully citizens, fully human.<sup>136</sup>

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<sup>133</sup> C Hii, Submission.

<sup>134</sup> P Polimeri, Submission.

<sup>135</sup> G Brandis, Submission.

<sup>136</sup> R Croome, Public Hearings.

Turning to the question of a Human Rights Act, he asked, ‘If a charter can’t deal effectively with the hard issues what’s the point?’

## Euthanasia

The question of voluntary or physician-assisted suicide elicited passionate pleas at community roundtables across Australia. The Committee heard a number of mature voices calling for reforms to the law in this regard, to ensure that people who try to end their lives because of terminal illness or insufferable pain, and the people helping them, do not suffer criminal consequences. Many roundtable participants pointed out that an assurance of dying with dignity would prevent people ending their lives prematurely.

Numerous written submissions appealed to reason. Others reflected exasperation: ‘If I become terminally ill, too old and feeble, or incapacitated (by any means) to care for myself, I want the *right* to *choose* where, when and how I die. And the *right* of any *chosen* assistant if needed, to *aid* me with this endeavour *without fear of prosecution*’.<sup>137</sup> At the public hearings, Neil Francis, from Dying with Dignity Victoria, said:

Just as there is sometimes medical futility, there is sometimes *palliative* futility, despite best practice and envied resources. So what is a society to recognise in human rights for those suffering intolerably at the end of life without adequate relief? What if a sufferer voluntarily makes a rational and considered request for medical assistance to die peacefully? Surely we don’t believe that the furrowing of brow and wringing of hands is a sufficiently compassionate stance? Ought we respect the right to choose?<sup>138</sup>

A medical practitioner affiliated with the Voluntary Euthanasia Society of New South Wales highlighted the number of elderly people who take their own lives, something that receives little media attention:

Because Australia lacks such humane and compassionate legislation based on this recognition of a human right, we have the current shameful situation of 3 suicides a week from Australians 75 years or older, by hanging, fire arms, carbon monoxide, drowning, suffocation, jumping from high places, electrocution and so on.<sup>139</sup>

People attending community roundtables spoke calmly and articulately of a right to a peaceful and dignified death and urged the Committee to consider the plight of those who face a traumatic end after great suffering. The right to die peacefully, surrounded by friends and family and on one’s own terms, appears to be a right that is gaining importance for the community.

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<sup>137</sup> M Cartmill. Submission.

<sup>138</sup> N Francis, Public Hearings.

<sup>139</sup> Voluntary Euthanasia Society of NSW, Submission.

Research the Committee commissioned showed that ‘dignity in death’ was a right Australians felt should be protected and promoted, with qualifications.<sup>140</sup> If there were to be a recognised right to assistance with suicide, the law would need to restrict that right to people with particular characteristics. For instance, it could apply to people who are experiencing extreme pain, whose condition is declining and for whom death is imminent, provided they have the mental competence to make the decision. It would also be necessary for law makers, be they politicians or judges, to consider the effects the granting of such rights would have on others—including people who might feel pressured to avail themselves of such a right in the interests of others inconvenienced by their continued living—and on the common good.

## Abortion

At many community roundtables there was discussion of the unborn’s right to life and a woman’s right to choose. In a debate about a charter of rights there are few subjects more controversial than abortion.

Jessica Lenehan was emphatic about her desire to keep religion and medical treatment separate: ‘Keep your church out of my clinic!’<sup>141</sup> In Wodonga an interesting view was put:

There is value in there being a level of vagueness so that there’s room for independent judicial interpretation. As much as I feel that women have the right to choose, there shouldn’t be a restriction on Catholic hospitals opting out of that. There needs to be a mechanism that allows leeway rather than a dogmatic approach.<sup>142</sup>

At the public hearings Rita Joseph, author of *Human Rights and the Unborn Child* (published in 2009), referred to the statement made in international human rights instruments: ‘The child, by reason of his physical and mental immaturity, needs special safeguards and care, including appropriate legal protection, before as well as after birth’.<sup>143</sup> She asked, ‘So why in Australia today, do we continue the routine destruction of the lives of some 90% of children detected before birth to have Down syndrome? Where is the promised legal protection for these children?’<sup>144</sup>

Some people argued that the human foetus, especially once viable, ought to have the right to life and that that right should be protected and promoted by

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<sup>140</sup> Colmar Brunton Social Research, *National Human Rights Consultation—community research report* (2009).

<sup>141</sup> J Lenehan, Submission.

<sup>142</sup> Wodonga, Community Roundtable.

<sup>143</sup> UN Declaration of the Rights of the Child (1959); also cited in the preamble to the Convention on the Rights of the Child (1990).

<sup>144</sup> R Joseph, Public Hearings.

government. Others were strongly of the view that the fate of an unborn child should be the prerogative of the mother and her doctor.

In view of the moral divide in the community on this fundamental question, the Committee considers that, regardless of human rights legislation, any amendment to the laws affecting the status of an unborn child should be debated by the federal, state and territory parliaments, rather than rest on the interpretation of judges. Experience in the United States—particularly the continuing debate following the US Supreme Court’s 1978 decision in *Roe v Wade*<sup>145</sup>—provides evidence that such contested matters are not often resolved to the satisfaction of the community by judges alone.

### **Religious concerns about the Victorian charter**

Many Victorians with church affiliations were worried about three distinct aspects of the state’s *Charter of Human Rights and Responsibilities Act 2006*.

First, it was suggested that the outcome of proceedings launched in 2005 under the *Racial and Religious Tolerance Act 2001* (Vic) by the Islamic Council of Victoria against Catch the Fire Ministries for alleged religious vilification of Muslims could have impinged on freedom of religious speech. Had the Victorian charter been in effect at that time, it could have provided additional protection for religious freedom of expression.

Second, concern was expressed about the parliamentary review of exemptions to the *Equal Opportunity Act 1995* (Vic), including exemptions for religious schools. This is a timely re-evaluation, regardless of the existence of the charter.<sup>146</sup> The exemptions have been a source of concern for many members of faith communities. At the Committee’s public hearings Bishop Robert Forsyth said the exercise of the right to freedom of religion, conscience and belief by faith communities conducting educational and social works:

... will inevitably involve being discriminating as to who is employed in such institutions and ministries so as to maintain their character, ethos and integrity. This in principle is not controversial even though it does mean that religious bodies appear to be involved in what otherwise are exceptions to the general obligation to respect the right not to be discriminated against. This is why there are exemption provisions in anti-discrimination laws for religious bodies. These exemptions are usually framed with the intention of allowing what is genuinely required for the exercise of the right of the freedom of religion while excluding unnecessary discrimination by the use of such categories as ‘the inherent requirements of the

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<sup>145</sup> *Jane Roe et al. v. Henry Wade District Attorney of Dallas County* 410 U.S. 113 (1973).

<sup>146</sup> Scrutiny of Acts and Regulations Committee, *Inquiry into Exceptions and Exemptions in the Equal Opportunity Act: options paper* (2009). The inquiry is yet to be finalised.

job’ and ‘made in good faith to avoid injury to the religious susceptibilities of the adherents’.<sup>147</sup>

Third, the Committee heard that the Victorian charter’s usual scrutiny mechanisms, including a compatibility statement, were not applied to the *Abortion Law Reform Act 2008* (Vic). The Act provided for abortion on demand, but the Victorian Parliament went one step further. The law requires that any medical practitioner with a conscientious objection to abortion refer the patient to another medical practitioner known not to have the same objection. The referral clause was not supported by the Australian Medical Association, whose code of ethics imposes no such obligation to refer.

At the time of the parliamentary debate, some portrayed the objections to the law as simply emanating from a group of zealots. The objectors could see, however, that such a law would needlessly violate the consciences of some medical practitioners. The Victorian Parliament’s Scrutiny of Acts and Regulations Committee raised questions about the new law, but parliament failed to act, the government declined to provide a statement of compatibility, and some lawyers said no such scrutiny or statement of compatibility was necessary. The Victorian Equal Opportunity & Human Rights Commission stated, ‘[The committee’s] interpretation of the Charter is preferable and ... the bill should have been accompanied by a statement of compatibility’.<sup>148</sup>

Since the Victorian debate on the compulsory referral clause the Australian Medical Council has been consulting on a national code of ethics for all Australian doctors. It has reported, ‘There was a request for clear guidance in relation to conscientious objection’. The new code provides such guidance:

Good medical practice involves: ... [2.4.6] Being aware of your right to not provide or directly participate in treatments to which you conscientiously object, informing your patients and, if relevant, colleagues, of your objection, and not using your objection to impede access to treatments that are legal. [2.4.7] Not allowing your moral or religious views to deny patients access to medical care, recognizing that you are free to decline to personally provide or participate in that care.<sup>149</sup>

Despite the strong concerns religious groups expressed in relation to these three matters, it is arguable that the Victorian charter did not give rise to any of these problems, uncertainties or disputes for religious Victorians. Faithful application of the charter might even help protect the right to freedom of thought, conscience, religion and belief, which is provided for in the charter.

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<sup>147</sup> R Forsyth, Public Hearings.

<sup>148</sup> Victorian Equal Opportunity & Human Rights Commission, *The 2008 Report on the Operation of the Charter of Human Rights and Responsibilities* (2008) 103.

<sup>149</sup> Australian Medical Council, *Good Medical Practice: a code of conduct for doctors in Australia* (2009).

## 2.5 Conclusion

A majority of the thousands who responded to the Consultation sought to draw the Committee's attention to the plight of society's most vulnerable. Most of the participants felt that the protections afforded by majoritarian rule do not necessarily adequately take account of those who 'fall through the cracks'. The written submissions and the voices of participants sought to harness our collective imagination as a civilised nation, to imagine ourselves in the shoes of others, and to respond with the compassion that is ultimately the measure of our humanity.

Some of the most challenging questions and problems—whether it is the wellbeing of remote Indigenous communities, the security of our national borders, or protection of the community from terrorism—require decision makers to strike a balance between the human rights of the individual and the welfare of society. Some of the calls for law reform and policy change relate to rights such as the right to die, the right to life and the right to religious freedom being accommodated with the competing rights and interests of others. Much of the disagreement in the Consultation focused on three questions:

- When ought the State be limited in exercising power?
- When ought the State limit the choices of individuals?
- When the State does act, should the balance be struck by parliament or the courts?

A Human Rights Act might help both parliaments and courts in resolving conflicting claims; it might also help communities make decisions on contentious social and moral questions. There is always a risk that groups unhappy with legislative or policy outcomes will claim that a Human Rights Act is applied selectively or ideologically.



## 3 Rights and responsibilities

The concepts of rights and responsibilities were crucially important to the Consultation process. There are different ways of interpreting these concepts, among them in philosophical, legal and community terms.

### 3.1 Rights

#### Philosophical perspectives

Australia is a robust democracy in which the people elect their parliamentary representatives and make decisions about changes to the Constitution. Parliament and the courts make and apply laws that, it is to be hoped, pay due regard to everyone's best interests. Striking a balance between conflicting rights and between rights and the public interest can be difficult. Nowadays much of the discussion about the best interests of all people—including members of unpopular or marginalised groups—is couched in the language of human rights.

In the Boyer Lectures in 2000 the Hon. Chief Justice of Australia, Murray Gleeson, asked, 'How then does a democracy, which functions on the basis of majority rule, institutionalise protection of legitimate minority interests? This is the essential problem underlying debate about human rights'.<sup>1</sup> Debate about human rights serves two purposes: it can help shape the processes and lines of argument in parliament, the courts and government when decision makers are determining what rights should be granted to and obligations imposed on people, especially in relation to minority groups and strongly contested matters; and it can encourage discussion in the public domain about what rights and what limits on rights should be recognised in law. In a well-functioning democracy, human rights are often recognised as legal rights. There may, however, be some human rights that continue to be insufficiently recognised and protected in law.

Legal rights are individual entitlements recognised and protected by governments, courts and parliaments. A person who enjoys a legal right is able to enforce others' obligation to uphold the right. If someone has a legal right to property, others have a duty to respect that right by not interfering with the right-holder's possession and use of the property. If that duty is breached, the right-holder can seek assistance

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<sup>1</sup> A Gleeson, 2000 *Boyer Lectures: the rule of law and the Constitution* (2000) 69.

from the State to uphold and enforce their right. Legal rights and legal duties are defined and enforced by law.

These days people often speak of human rights—rights that are important to them, regardless of whether those rights are set down in law. These are rights people think the State ought to recognise and protect. But what is the source of such rights? And how do we define them? Are there human rights that we can claim with moral authority or coherent political argument against the State, demanding that instruments of the State affirm and protect them even though they are not dealt with in any domestic law of the State? Philosopher Alasdair MacIntyre has boldly claimed, ‘There are no such rights, and belief in them is one with belief in witches and in unicorns’.<sup>2</sup> There is a long history of philosophical musing about the reality of human rights.

Precedents exist in a range of religious and secular philosophies. For example, Confucius’s *Analects* (compiled after his death in the 5th century BCE) promoted a society founded on respect, tolerance and generosity towards others<sup>3</sup>; the Indian emperor Asoka advocated non-violence and religious tolerance in the 3rd century BCE<sup>4</sup>; and Cicero (106–43 BCE) established the foundations of natural law, a concept closely connected to the modern idea of human rights.<sup>5</sup>

For centuries many thinkers who considered questions to do with justice and rights took as their starting point the idea that all human beings were created by God and were thus endowed with particular gifts and divinely commanded to live in a particular way. Such thinking holds little sway in the public domain today, even if some religious people still find it convincing.

Disgusted by the religious wars of the Reformation period, Dutch lawyer Hugo Grotius (1583–1645) was convinced that disputes about rights were the main cause of war. He defined a natural right to be ‘a moral quality pertaining to a person to possess or do something justly’.<sup>6</sup> Reflecting on the human person in the community, he set down the demands for a peaceful and rational life lived in community and said, ‘What we have spoken about would carry some weight even if we were to suppose that God does not exist or that God takes no interest in human affairs’.<sup>7</sup>

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<sup>2</sup> A MacIntyre, *After Virtue: a study in moral theory* (3rd edn, 2007) 69.

<sup>3</sup> Confucius, ‘On fair distribution and education’ in *The Analects*, cited in M Ishay, *The Human Rights Reader* (2nd edn, 2007) 45.

<sup>4</sup> Asoka, ‘Against religious intolerance and discrimination within the community’ in *The Edicts*, cited in M Ishay, *The Human Rights Reader* (2nd edn, 2007) 29.

<sup>5</sup> Cicero, *The Laws*, cited in M Ishay, *The Human Rights Reader* (2nd edn, 2007) 15.

<sup>6</sup> H Grotius, *De Jure Belli et Pacis* (1625), quoted in J Mahoney, *The Challenge of Human Rights: origin, development and significance* (2007) 12.

<sup>7</sup> *ibid.* 10.

Across the Channel, Thomas Hobbes (1588–1679) also spoke of natural rights. He was troubled by the English Civil War and parliament’s execution of Charles I. Two years after the execution, and anxious that people be able to avoid the state of nature in which life would be brutish and short, he published his *Leviathan*.<sup>8</sup> He thought the natural human condition was a state of war in which ‘every man has a right to everything; even to one another’s body’<sup>9</sup>, and he proposed the social contract, whereby all individuals would give up their right to govern themselves in exchange for security and peace guaranteed by a State able to provide ‘peace at home and mutual aid against their enemies abroad’.<sup>10</sup>

John Locke (1632–1704) had a less jaundiced view of the state of nature than did Hobbes:

Man being born, as has been proved, with a Title to perfect Freedom, and an uncontrolled enjoyment of all the Rights and Privileges of the Law of Nature, equally with any other Man or Number of Men in the World, hath by Nature a Power ... to preserve his Property, that is, his Life, Liberty and Estate, against the injuries and Attempts of other Men.<sup>11</sup>

Locke thought the laws enacted by the State needed to reflect this law of nature, which stood as ‘an eternal rule to all men’.<sup>12</sup> This thinking on natural rights was central to much of the political ferment in England, what was to become the United States of America, and France. The founding fathers of the United States declared, ‘We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain inalienable Rights’.<sup>13</sup> Nowadays these truths are perhaps more contested: they are definitely not self-evident. People are more likely to speak about human rights rather than natural rights.

Some philosophers continue to claim that human rights can derive from the nature of the human being. They look to what is needed for the flourishing of the individual living in the community. But, even if they were to agree on specific facts about human nature, their critics say it is impossible to logically argue from how things are to how things ought to be. You cannot just slip from ‘is’ to ‘ought’. Other philosophers claim there are very few uncontested facts about human nature. They question whether there is any such thing as an essential human nature, arguing that ‘the only lesson of either history or anthropology is our extraordinary malleability’.<sup>14</sup> Pragmatists such as Richard Rorty see a human rights culture

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<sup>8</sup> T Hobbes, *Leviathan* (1651), quoted in J Mahoney, *ibid.* 20.

<sup>9</sup> *ibid.* 12.

<sup>10</sup> *ibid.* 13.

<sup>11</sup> J Locke, *Two Treatises of Government* (1689), quoted in J Mahoney, *ibid.* 19–20.

<sup>12</sup> *ibid.* 20.

<sup>13</sup> US Declaration of Independence (1776).

<sup>14</sup> R Rorty, ‘Human rights, rationality and sentimentality’, in S Shute and S Hurley (eds), *On Human Rights: the Oxford Amnesty Lectures* (1993) 115.

emerging not from any increased moral knowledge but from our being attentive to moving and shocking stories about the violation of people's human rights.<sup>15</sup>

Kantians do not find much moral guidance in emotion; rather, they seek universal rules or maxims. Immanuel Kant (1724–1804) propounded his famous maxim 'Act in such a way that you treat humanity, whether in your own person or in the person of any other, never merely as a means, but always at the same time as an end'.<sup>16</sup>

Some philosophers admire the thinking of Professor John Rawls, who posited the thought experiment of people standing behind a veil of ignorance, knowing little about their future prospects and agreeing on principles of justice such as 'Each person has an equal right to a fully adequate scheme of equal basic liberties compatible with a similar scheme of liberties for all'.<sup>17</sup> Finally, a deconstructionist critique of human rights has emerged in recent years, destabilising the idea that human rights will always lead to better outcomes.<sup>18</sup>

People disagree about what to include in the list of basic liberties, and they often seek assistance in the catalogues that have been drawn up by the community of nations in the formal human rights instruments promulgated since the United Nations was formed in 1945. In the words of Professor Louis Henkin, 'Ours is the age of rights. Human rights is the idea of our time'.<sup>19</sup>

## International law perspectives

The watershed in the world's awareness of human rights was the calamity of World War 2. After the war the world's leaders responded to the horror and destruction by establishing, by charter, the United Nations. They spoke in the name of 'We the peoples of the United Nations determined to reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small'.<sup>20</sup>

Three years later the UN General Assembly adopted the Universal Declaration of Human Rights, stating that 'recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world' and that 'it is essential, if man is not to be compelled to have recourse, as a last resort, to rebellion against tyranny and oppression, that

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<sup>15</sup> *ibid.* 118–19.

<sup>16</sup> I Kant, *Groundwork for the Metaphysics of Morals* (1785) 4:429.

<sup>17</sup> Reformulated by John Rawls in *Political Liberalism: expanded edition* (2005) 291.

<sup>18</sup> See, for example, D Kennedy, *The Dark Sides of Virtue: reassessing international humanitarianism* (2004); C Douzinas, *The End of Human Rights: critical legal thought at the fin-de-siècle* (2000).

<sup>19</sup> L Henkin, *The Age of Rights* (1990) xvii.

<sup>20</sup> Charter of the United Nations, preamble.

human rights should be protected by the rule of law'.<sup>21</sup> Human dignity, equality and human rights are fundamental to freedom, justice and peace in the world.

Australia was among the countries closely involved in drafting the Universal Declaration of Human Rights. The thinkers who contributed to the drafting brought a diversity of cultures, philosophies and faiths to the table. From the United States Eleanor Roosevelt, Frenchman René Cassin, Chilean Hernan Santa Cruz, Lebanese Christian Charles Habib Malik and Chinese Confucian Peng-chun Chang were great contributors to this truly international undertaking. They consulted religious and philosophical greats such as Pierre Teilhard de Chardin, Mahatma Gandhi and Aldous Huxley. It was Teilhard de Chardin who counselled the drafters to focus on 'man in society' rather than the human being as an individual.<sup>22</sup> Dr HV Evatt, Australian Minister of External Affairs at the time and later President of the UN General Assembly, welcomed the declaration as a 'step forward in a great evolutionary process'.<sup>23</sup>

Eleanor Roosevelt saw the Universal Declaration of Human Rights to represent 'a common standard of achievement for all peoples and all nations'.<sup>24</sup> Marking the 60th anniversary of the declaration, Irish poet Seamus Heaney said:

Since it was framed, the Declaration has succeeded in creating an international moral consensus. It is always there as a means of highlighting abuse if not always as a remedy: it exists instead in the moral imagination as an equivalent of the gold standard in the monetary system.

The articulation of its tenets has made them into world currency of a negotiable sort. Even if its Articles are ignored or flouted—in many cases by governments who have signed up to them—it provides a worldwide amplification system for the 'still, small voice'.<sup>25</sup>

When binding international legal instruments were developed on human rights, it was highlighted that certain rights are so important they can never be suspended (or 'derogated from'), even in times of public emergency. Thus the International Covenant on Civil and Political Rights states that no derogation can be made from the right to life, freedom from torture, freedom from slavery, the prohibition on imprisonment for failure to fulfil a contractual obligation, the prohibition on retrospective operation of criminal laws, the right to recognition as a person before

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<sup>21</sup> Universal Declaration of Human Rights, preamble.

<sup>22</sup> M Glendon, *A World Made New: Eleanor Roosevelt and the Universal Declaration of Human Rights* (2001) 76.

<sup>23</sup> Cited in A Devereaux, *Australia and the Birth of the International Bill of Human Rights* (2005) 1.

<sup>24</sup> 'Statement by Mrs Franklin D. Roosevelt', *Department of State Bulletin*, 19 December 1948, 751, quoted in Glendon, *ibid.* 176. These words are also in the preamble to the declaration.

<sup>25</sup> S Heaney, 'The poetic redress', *The Irish Times* (Dublin) <<http://www.irishtimes.com/indepth/amensty/introduction.html>> at 10 September 2009.

the law, and the right to freedom of thought, conscience and religion.<sup>26</sup> Similarly, the Convention against Torture states, ‘No exceptional circumstances whatsoever, whether a state of war or a threat or war, internal political instability or any other public emergency, may be invoked as a justification of torture’.<sup>27</sup>

In addition, some rights in the International Covenant on Civil and Political Rights have been recognised as ‘absolute’, meaning they cannot be limited in any way. Among these rights are freedom from torture and freedom from slavery.<sup>28</sup> Most absolute rights are also non-derogable, but not all non-derogable rights are absolute. For example, the freedom to manifest one’s religious belief is non-derogable, yet it can in certain circumstances be limited. In contrast, the freedom to hold a religious belief is both non-derogable and absolute.<sup>29</sup>

Rights that are not absolute can be limited, either by the inclusion of specific limitations in the terms of the right itself<sup>30</sup> or by a general limitations clause.<sup>31</sup> The Universal Declaration of Human Rights recognised that certain limitations on rights might be necessary in order to recognise and respect the rights and freedoms of others and to meet the just requirements of morality, public order and the general welfare in a democratic society.<sup>32</sup> Sixty years later, these concepts of ‘public order’, ‘general welfare’ and ‘morality’ seem a little strained. In any democracy professing to uphold the dignity of all, there is still a need for public debate and decisions by governments, parliaments and courts about the justifiable limits to be placed on human rights other than those that are considered to be absolute. We also need concepts to set limits on laws and policies designed to provide the greatest good for the greatest number when such a calculus interferes with the dignity of the most vulnerable and the liberty of the most despised. Although democratically elected governments might try to justify an interference with the rights of a few people on the basis that the proposed law or policy assists a large segment of society, they need to be held to account for the rights and interests of the disadvantaged minority.

The concept of human rights has real work to do whenever those with power justify their solutions to social ills or political conflicts only on the basis of majority support or by claiming the solutions will lead to an improved situation for the mainstream majority. Even if a particular solution is popular or maximises gains for the greatest number of people, it might still be wrong and objectionable. There is a need to have

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<sup>26</sup> International Covenant on Civil and Political Rights art. 4(2).

<sup>27</sup> Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment art. 2(2).

<sup>28</sup> S Joseph, J Schultz and M Castan, *The International Covenant on Civil and Political Rights: cases, materials and commentary* (2nd edn, 2004) 31.

<sup>29</sup> Human Rights Committee, *General Comment 29: State of Emergency (Article 4)* (31 August 2001).

<sup>30</sup> See, for example, the limitations permitted in relation to freedom of movement in the International Covenant on Civil and Political Rights art. 12.

<sup>31</sup> See, for example, the International Covenant on Civil and Political Rights art. 4.

<sup>32</sup> Universal Declaration of Human Rights art. 29(2).

regard to the wellbeing of all members of the community. By invoking human rights, we affirm that ‘each and everyone’s well being, in each of its basic aspects, must be considered and favoured at all times by those responsible for co-ordinating the common life’.<sup>33</sup>

Professor Henkin neatly summarises the varying perspectives on the origin and basis of human rights, espousing the centrality of the idea in any society committed to freedom, justice and peace for all:

Although there is no agreement between the secular and the theological, or between traditional and modern perspectives on human beings and on the universe, there is now a working consensus that every man and woman, between birth and death, counts, and has a claim to an irreducible core of integrity and dignity. In that consensus, in the world we have and are shaping, the idea of human rights is an essential idea.<sup>34</sup>

‘Human rights’ is the contemporary language for embracing, and the modern means of achieving, respect and dignity for all.

## Community perspectives

As it travelled around Australia, the Consultation Committee heard people associate human rights with dictatorships in places such as Zimbabwe, the former Soviet Union and Myanmar or with high-profile cases such as those of David Hicks, Cornelia Rau and Dr Mohamed Haneef.

But human rights are not just about people in extraordinary circumstances.<sup>35</sup> Too often they are concerned with people in very ordinary circumstances. During the community roundtables examples emerged of people being discouraged from reporting crime or being ignored when they did so, being turned away from hospitals, or being refused other basic services. In Alice Springs two members of the Committee saw in the city centre a public toilet where an admission fee was charged and attendants were present: the main purpose of the fee seemed to be to deny some members of the community access to the facility. At



Community leader Boniface Perdjert and secretariat members with Frank Brennan and Mary Kostakidis at Wadeye

<sup>33</sup> J Finnis, *Natural Law and Natural Rights* (1980) 214.

<sup>34</sup> L Henkin, ‘Religion, religions, and human rights’, in EM Bucar and B Barnett (eds), *Does Human Rights Need God?* (2005) 145, 155.

<sup>35</sup> Mary Kostakidis, National Human Rights Consultation opening speech.

the Tennant Creek community roundtable examples were provided of pregnant Indigenous women who required medical treatment or were preparing for childbirth being told to present themselves for treatment but with no, or grossly inadequate, public transport arrangements being made to facilitate their attendance when it was obvious they had no access to other means of travel. At a Canberra community roundtable a participant remarked that the vulnerable, the aged, the frail and people with disabilities were often left without sufficient help to afford them the opportunity to experience even the basic enjoyments of life.

The Consultation Committee concluded that those who find themselves marginalised are not few; indeed, each one of us, if fortunate, will one day be part of a very large but often marginalised group, the elderly. It might be then that we worry about our right to the highest attainable standard of health, our right to live or die with dignity, and our rights to family and to equality.

During the community roundtables the Committee continually heard people speak of human rights in terms of 'a fair go' for all. Participants were often upset by instances of unjustified discrimination against themselves or people they knew. They would demand equality for all, especially those who are different or disadvantaged. They would ask when is it fair to treat people differently and when is it unfair to treat them similarly.

In the terms of reference for this Human Rights Consultation the Australian Government states its commitment 'to the protection and promotion of human rights—a commitment that is based on belief in the fundamental equality of all persons'. When becoming an Australian citizen, a person takes the following pledge:

From this time forward, (under God)  
I pledge my loyalty to Australia and its people,  
whose democratic beliefs I share,  
whose rights and liberties I respect, and  
whose laws I will uphold and obey.

The new citizen is given a booklet, *Australian Citizenship: our common bond*. Although the booklet does not list our rights and liberties, it does list the privileges of citizenship—to apply for work in the Australian Public Service and the Australian Defence Force, to seek election to parliament, to apply for an Australian passport and to enter Australia freely, to receive help from an Australian official while overseas, and to register children born overseas as Australian citizens by descent. There is no listing of Australian human rights, but there is a list of 'our democratic beliefs', 'our freedoms' and 'our equalities'. During its consultations the Committee became aware of a deep resonance between human rights and the following beliefs, freedoms and equalities expressed in the guide for new citizens:



- parliamentary democracy
- the rule of law
- living peacefully
- respect for all individuals regardless of background
- compassion for those in need
- freedom of speech and freedom of expression
- freedom of association
- freedom of religion and secular government
- equality in Australia
- equality of men and women
- equality of opportunity.

The Committee adds three more values to this list:

- access to justice
- respect for diversity and difference
- respect for the place and needs of Indigenous Australians.

The Committee's Consultation helped improve many participants' understanding of what human rights are. They found the concept of 'human rights' helpful in working out what constitutes a fair go for everyone.

Human rights can be enjoyed or adversely affected in many day-to-day interactions people have with public authorities. They can affect the way victims interact with the criminal justice system. Defined human rights can be useful criteria for assessing immigration laws and policy. And they can be good yardsticks for decisions about access to education and the dignified treatment of the elderly.

In this way human rights become a part of our lives and the lives of our friends and loved ones. Whether we are aware of it or not, human rights affect each one of us each day, and when these rights are denied, trampled on or unduly limited we justifiably want greater respect for our dignity and acknowledgment of our entitlements. The right to education entails guaranteed access to good schooling for our children. The right to housing requires that affordable housing be accessible even to someone without a job at the onset of winter and in the midst of an economic crisis. Being able to go to a hospital to seek medical treatment regardless of whether we can afford private health insurance is an aspect of the right to the highest attainable standard of health. Our fundamental right to freedom of speech means we should be able to feel safe when speaking out against injustice.

Many of the submissions the Committee received took the seven primary international human rights instruments ratified by Australia as the foundation documents setting out the human rights that should be recognised, respected and honoured in Australia. Chapter 5 describes those instruments, the main two of which are the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights. An examination of the structure of these two covenants is useful when considering how human rights relate to each other and how they can be limited.

## **How human rights relate to each other and how they can be limited**

In 1993 the World Conference on Human Rights in Vienna declared that ‘all human rights are universal, indivisible and interdependent and interrelated’ and ‘the international community must treat human rights globally in a fair and equal manner, on the same footing and with the same emphasis’.<sup>36</sup> No particular set of human rights is more important than another. There is no hierarchy of human rights. All such rights should be enjoyed without discrimination.

As noted, in the international instruments some human rights are considered so important that they cannot be derogated from, even in a time of emergency. Sometimes, however, interference with human rights is considered



**The Taree community roundtable**

justified in order to re-establish the conditions in which human rights might be better enjoyed by everyone. For example, in times of national emergency States that are party to the International Covenant on Civil and Political Rights are permitted to suspend certain human rights so as to deal with the emergency. They can suspend their obligations under the ICCPR provided they limit their actions to those strictly required to respond to the exigencies of the situation, provided they act in a non-discriminatory way and provided they do not breach their other obligations under international law. They are not, however, permitted to derogate from their obligation to respect specific fundamental rights such as the right to life, freedom from torture,

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<sup>36</sup> UN General Assembly, World Conference on Human Rights, Vienna, 14–25 June 1993, Vienna Declaration and Programme of Action art. I(5).

freedom from slavery, and freedom of thought, conscience and religion ('non-derogable rights').<sup>37</sup>

When there is no situation of national emergency, States parties are required to respect and uphold rights. As discussed, some rights in the ICCPR have been recognised as 'absolute', meaning they cannot be limited in any way. Many rights are, however, defined in terms that permit regular limitation for good reason. For example, the ICCPR provides for a right of peaceful assembly. The right of the protester must accommodate the right of others to go about their lawful business. So legal limits can be imposed on the right to protest provided those limits 'are necessary in a democratic society in the interests of national security or public safety, public order ... the protection of public health or morals or the protection of the rights and freedoms of others'.<sup>38</sup>

When it comes to economic, social and cultural rights such as the rights to health, housing, employment and education, the international community has acknowledged that respect for and protection and promotion of such rights is often more complex.<sup>39</sup> Governments always work with finite resources; parliaments weigh conflicting claims by a diverse range of constituents when deciding how resources should be allocated to the provision of services in areas such as health, education and housing. It is all very well to espouse a right to work, but in times of economic downturn there are limits to how far governments, even democratic ones, can go in providing assistance to unemployed people in search of work. The International Covenant on Economic, Social and Cultural Rights recognises that full implementation of economic and social rights may not be immediately possible but requires States to take steps to the maximum of their available resources to progressively achieve the rights. Article 2.1 of the covenant provides:

Each State Party to the present Covenant undertakes to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures.

In Australia some of the most spirited political debate is about the allocation of resources in order to accommodate these rights—especially for disadvantaged groups and people living in remote and regional areas. Even when there is agreement about the need for a greater allocation of resources to achieve recognition of these rights for all, there can be furious disagreement about the political philosophy to apply and the level of government to take responsibility.

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<sup>37</sup> See International Covenant on Civil and Political Rights arts 4, 6, 7, 8.1, 8.2, 11, 15, 16 and 18.

<sup>38</sup> *ibid.* art. 21.

<sup>39</sup> It should be noted that civil and political rights can also be resource-intensive—for example, the right to a fair trial.

Some might favour legislative guarantees of these rights; others think there are more appropriate means than economic and social rights being enforceable by the courts.

The drafters of the International Covenant on Economic, Social and Cultural Rights obviously envisaged a continuing variety of political perspectives on individual entitlements to State assistance with the enjoyment of these rights. Unlike the ICCPR, which does not include a general limitations clause, the ICESCR provides that ‘the State may subject such rights only to such limitations as are determined by law only in so far as this may be compatible with the nature of these rights and solely for the purpose of promoting the general welfare in a democratic society’.<sup>40</sup> It is possible for elected politicians to argue in good faith that they are respectful of the ICESCR while restricting the availability of taxpayer funds for employment programs or for health services to remote communities; they would argue that such funds are better spent for the general welfare of the community by providing an economic stimulus for all or by providing specialist health services in population hubs.

If Australians want to ensure faithful compliance with these international instruments as a means of increasing everyone’s enjoyment of human rights, we face some fundamental questions:

- Which level of government is best equipped to take primary responsibility for the protection of these rights?
- Is legislation the most suitable means of protection?
- Which organ of government is best suited to ensuring protection of these rights and delimitation of the rights when that is justified under the international instruments?

In our federal system there is always a need for cooperation between the different levels of government. There is also a need for appropriate allocation of tasks between the executive, the parliament, and the judiciary.

Whenever a parliament enacts a law that recognises a catalogue of human rights it might be necessary to include words of limitation. The Victorian *Charter of Human Rights and Responsibilities Act 2006*, for example, recognises that human rights might have to be limited in some circumstances. Under the charter, rights may be limited but only when justified in a free and democratic society, taking into account a number of listed factors. The following factors should be considered:

- Which right is to be limited? Is the right an absolute or a non-derogable right?

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<sup>40</sup> International Covenant on Economic, Social and Cultural Rights art. 4.

- Is the reason for wanting to limit the right pressing and important to society?
- What sort of limitation is being proposed? How might it infringe human rights?
- Is the limitation likely to achieve its purpose? Is it excessive or out of proportion to its purpose?
- Are there any less restrictive means reasonably available to achieve the purpose the limitation seeks to achieve?

For example, the right to freedom of expression might be restricted in order to respect the rights and reputation of other people or for the protection of national security, public order, public health or public morality. A balance must be struck between people's rights and the need for government departments and other public authorities to protect the broader public interest.

## 3.2 Responsibilities

### Philosophical perspectives

In the first of her 2002 Reith Lectures, entitled 'A question of trust', Baroness O'Neill said:

We fantasise, in my view irresponsibly, that we can promulgate rights without thinking carefully about the counterpart obligations, and without checking whether the rights we favour are consistent, with one another let alone set feasible demands on those who have to secure them for others.<sup>41</sup>

In her second lecture she elaborated:

The underlying difficulty of any Declaration of Rights is that it assumes a passive view of human life and citizenship. Rights answer the questions 'What are my entitlements?' or 'What should I get?'. They don't answer the active citizen's question 'What should I do?'.<sup>42</sup>

Yet no claim to rights has the faintest chance of making a real difference without clear answers to the question 'What should I do?'.<sup>42</sup>

Legal rights are usually enforceable in the courts, and this means people have a duty to respect and uphold those rights. Human rights in the various declarations of rights are not always enacted as legal rights in a domestic legal system. If they are asserted meaningfully in the public domain—even when they are not recognised as legal rights—there must be some responsibilities or duties imposed on or voluntarily

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<sup>41</sup> Available at <<http://www.bbc.co.uk/radio4/reith2002/lecture1.shtml>>.

<sup>42</sup> Available at <<http://www.bbc.co.uk/radio4/reith2002/lecture2.shtml>>.

assumed by individuals or the State. If a moral claim to a human right is made, that claim can have no meaning unless a moral claim of responsibility to recognise, respect and protect that right can be asserted against another. Professor Jack Mahoney says moral rights give rise to moral duties: 'In the moral sphere the very point of recognising rights is to create the possibility of making claims on others, who when identified have corresponding moral duties to respect those claims'.<sup>43</sup> Some communitarian philosophers, such as Professor Mary Anne Glendon, have warned that, without sufficient attention to responsibilities, 'the new rhetoric of rights is less about human dignity and freedom than about insistent, unending desires'.<sup>44</sup> She speaks of the need:

... for refining our deliberations concerning such matters as whether a particular issue is best conceptualised as involving a right; the relation a given right should have to other rights and interests; the responsibilities, if any, that should be correlative with a given right; the social cost of rights; and what effects a given right can be expected to have on the setting of conditions for the durable protection of freedom and human dignity.<sup>45</sup>

If it makes sense to speak of human rights as being more than the legal rights enforceable in domestic law, we must be able to assert the need for individuals and the State to fulfil their duties and honour their responsibilities so that these human rights might be enjoyed with or without domestic legal protection.

## International law perspectives

All the important international human rights instruments make some mention of duties and responsibilities. Article 1 of the Universal Declaration of Human Rights proclaims that human beings 'should act towards one another in a spirit of brotherhood'. This is not the sort of aspiration that could ever be legislated or legally enforced. It is a responsibility that can be assumed only voluntarily, with support and encouragement from others who instil a culture of care and respect for all.

Article 29 of the declaration provides, 'Everyone has duties to the community in which alone the free and full development of his personality is possible'. So here in the heart of the modern world's most celebrated declaration of human rights is an acknowledgment that we all have not just rights but also duties—duties to the community, which, perhaps counter-intuitively, enable us to develop our personalities. The preambles of both the ICCPR and the ICESCR are drafted in such a way as to confirm that individuals have not only human rights but also responsibilities: 'The individual, having duties to other individuals and to the

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<sup>43</sup> J Mahoney, *The Challenge of Human Rights: origin, development and significance* (2007) 90.

<sup>44</sup> M Glendon, *Rights Talk: the impoverishment of political discourse* (1991) 171.

<sup>45</sup> *ibid.* 177.

community to which he belongs, is under a responsibility to strive for the promotion and observance of the rights recognized in the present Covenant’.

In 2003 Miguel Alfonso Martinez, who was appointed Special Rapporteur by the Economic and Social Council at the request of the UN Commission on Human Rights and its Sub-Commission on the Promotion and Protection of Human Rights, delivered his report entitled *Promotion and Protection of Human Rights*. He noted:

The Special Rapporteur starts out from the premise that the idea that there can be rights without ethical duties or responsibilities, or rights not based on equity and human solidarity, constitutes a patent breach of logic, as well as a social impossibility. The proof is the thousands of millions of human beings in the world who today suffer from all sorts of deprivations, and the generalized crisis in the economy, the environment and governance that visibly marks today’s world should serve as a clear warning to all. Freedoms recognized only generically and in the abstract are simply useless. On the other hand, to argue that social duties can exist without individual rights is not only unimaginable, but absolutely unacceptable under the principles of ethics and equity.

For these reasons he considers that all persons have, at the same time, *rights*, *obligations* and *duties* in all aspects of life touching on the promotion, effective realization and protection of *all* human rights. Neither from a legal point of view, nor on the ethical plane, is it possible to conceive of rights without such a logical correlation. Every right, in one way or another, is linked to some obligation or some responsibility, and every time that a duty is fulfilled, it is very likely that the violation of some right is prevented.

The recognition of individual or collective human rights requires, at the same time, the acknowledgement—with equal zeal—of the matching importance of the duties or responsibilities that are incumbent upon every individual. Only in this way will it be possible to establish an ethical basis upon which to begin to make possible that world ‘in larger freedom’ whose advent we have been awaiting since the Charter of the United Nations was signed.<sup>46</sup>

So human rights entail responsibilities. This is not to say that if you are not responsible you do not have human rights: everyone has human rights by virtue of being human. Human rights law is traditionally concerned with relations between the State and its subjects; responsibilities, however, need not be limited to relations between the State and the individual. Individuals can have responsibilities to each other, even if not legally enforceable. Discharging social obligations with mutual respect between public officials and the public, employers and employees and, more generally, between all people makes for a better society.

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<sup>46</sup> *Promotion and Protection of Human Rights*, Report to the United Nations Economic and Social Council (17 March 2003) paras 42–4.

The notion of corporate responsibility is an emerging concern in the international discourse on human rights. The ACT Human Rights Act has an ‘opt-in’ clause for corporations.

The Committee received from Professor John Ruggie, UN Special Representative of the Secretary-General, a submission on the subject of human rights and transnational corporations and other business enterprises. The submission outlined a three-pronged approach to augmenting the responsibilities assumed by transnational corporations—‘the State duty to protect against human rights abuses by third parties, including business; the corporate responsibility to respect human rights; and the need for more effective access to remedies’. Professor Ruggie says that these ‘three principles form a complementary whole in that each supports the others in achieving sustainable progress’.<sup>47</sup> The Human Rights Law Group of Mallesons Stephen Jaques submitted that ‘at this stage, specific legislation or industry codes rather than a Human Rights Act remain more appropriate mechanisms for directly enforcing human rights obligations with respect to the actions of private bodies’.<sup>48</sup>

## Community perspectives

The question of whether, and if so to what extent, responsibilities should be included in any bill of rights has been the subject of recent consideration in the United Kingdom. In 2008 the Joint Committee on Human Rights concluded:

Responsibilities ... often have some role to play in modern Bills of Rights, albeit falling far short of directly enforceable duties. It may be in the form of a preamble referring to responsibilities; a limitation clause acknowledging that some rights can be justifiably limited to serve some other competing interest; positive obligations on the state to protect the rights of individuals against other private individuals; the indirect effect of the Bill of Rights on the law governing private relations because of the duty on courts to interpret the common law compatibly, including the common law governing private relations; or a prohibition on abuse of rights. All of these are manifestations of responsibilities being taken into account in Bills of Rights and none are controversial.<sup>49</sup>

More recently, the UK Ministry of Justice has released a consultation paper on rights and responsibilities. It suggests that among the primary responsibilities for all members of its society could be:

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<sup>47</sup> His report to the UN General Assembly’s Human Rights Council, *Protect, Respect and Remedy: a framework for business and human rights*, was attached to the submission. See A/HRC/8/5 (7 April 2008) 1.

<sup>48</sup> Mallesons Stephen Jaques Human Rights Law Group, Submission.

<sup>49</sup> Joint Committee on Human Rights, *A Bill of Rights for the UK?* Twenty-ninth Report of Session 2007–08 (2008) 74.



... treating National Health Service and other public sector staff with respect; safeguarding and promoting the wellbeing of children in our care; living within our environmental limits; participating in civic society through voting and jury service; assisting the police in reporting crimes and co-operating with the prosecution agencies; as well as general duties such as paying taxes and obeying the law.<sup>50</sup>

Although the question of responsibilities was raised during a number of community roundtables, few submissions discussed the matter in any detail. A range of submissions highlighted the interrelated nature of rights and responsibilities; for example, citizens have not only the right to vote in Australia but also a responsibility to cast a ballot as part of a system of compulsory voting.<sup>51</sup> In addition, governments have responsibilities in connection with human rights:

Governments bear the ultimate responsibility for the realisation of human rights. However, in order for human rights to be achieved, individuals and other non-government actors are also required to respect and not breach the human rights of others. Therefore, governments have a further obligation to ensure that individuals and non-government actors are aware of human rights and can discharge their responsibilities in accordance with their obligations.<sup>52</sup>

There was strong concern that an emphasis on rights without a corresponding emphasis on responsibilities could engender an individualistic and even selfish approach to community living, with people demanding that their insistent desires be met by someone else or by the State without any consideration of the costs involved. Some participants went so far as to insist that rights should be denied to those who fail to fulfil their responsibilities. Participants were often able to provide a comprehensive listing of rights, but they tended to be more vague when detailing the responsibilities that should be imposed on individuals. The booklet *Australian Citizenship: our common bond* lists only four specific responsibilities of citizenship—to obey the law, to vote, to serve on a jury, and to defend Australia should the need arise.

## The listing of responsibilities

When enacting its human rights legislation, Victoria embraced the concept of responsibilities in the title of the Act—the *Charter of Human Rights and Responsibilities Act 2006*—and in the preamble, but no responsibilities are enumerated in the Act. The ACT’s *Human Rights Act 2004* declares, ‘This Act encourages individuals to see themselves, and each other, as the holders of rights, and as responsible for upholding the human rights of others’.<sup>53</sup> A private member’s Bill suggesting that the ACT adopt a ‘Bill of Responsibilities’, which was intended to

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<sup>50</sup> UK Ministry of Justice, *Rights and Responsibilities: developing our constitutional framework* (2009) 9.

<sup>51</sup> G Williams, Submission.

<sup>52</sup> Australian Council for International Development, Submission.

<sup>53</sup> ACT *Human Rights Act 2004* (ACT), preamble (5).

have paramountcy over the bill of rights, was proposed but not supported following the adoption of the Human Rights Act.<sup>54</sup> The Canadian Charter of Rights and Freedoms does not mention responsibilities; nor do the UK Human Rights Act and the US Bill of Rights.

To date, parliaments enacting human rights legislation have not seen fit to legislate an accompanying set of duties and responsibilities. Even if there are no additional, legally enforceable duties imposed on everyone in the jurisdiction so that all might enjoy their human rights more fully, there will always be greater protection of human rights when citizens as well as public officials take more responsibility for their neighbours, especially those most at risk.

If we are to create a culture of human rights, regardless of the legal enforcement mechanisms that might be instituted, education about responsibilities is just as important as education about rights. It is imperative that we provide better opportunities for citizens to answer the question ‘What should I do and what can I do to create a society in which the just entitlements of all people are acknowledged, respected and fulfilled?’ Even if a list of responsibilities is not included in any human rights statute, such a list would be a helpful tool for a citizen who is concerned with more than their own individual entitlements.

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<sup>54</sup> B Stefaniak, ‘A reflection on the ACT Human Rights Act’ in J Leeson and R Haddrick (eds), *Don’t Leave Us with the Bill: the case against an Australian bill of rights* (2009) Submission, 313.

## **PART TWO**

# **Rights and responsibilities in Australia**

The Committee sought the community's views in a variety of ways. This part of the report discusses the community's responses to questions about which rights and responsibilities should be protected and promoted and whether the existing protections are adequate.

Chapter 4 outlines which human rights and responsibilities the community would like to see protected and promoted in Australia and Chapter 5 reviews the adequacy of existing protections for these rights in Australia.



## 4 Which rights and responsibilities?

Chapter 3 looks at the question of what human rights and responsibilities are. This chapter considers the question of which rights and responsibilities should be protected and promoted, which is part of the Committee's terms of reference and was central to its Consultation with the Australian community.

The community perspective on human rights that emerged during the Consultation is discussed in Chapter 3. The degree to which these rights are understood by the community is particularly relevant to the question of which rights and responsibilities should be protected and promoted. It became apparent to the Committee that in the community there is no settled understanding of the term 'human rights'. Dr John Tobin commented that, owing to the lack of effective human rights education in Australian schools, 'there is a very poor understanding as to [the] nature, scope and content of human rights in Australia'.<sup>1</sup> Any lack of understanding of human rights will inevitably have an impact on the identification of 'which rights' are important. Dr Carol Steiner submitted:

As a transplanted American who grew up learning about my rights from primary school onwards and being inspired by the grandeur of the founding fathers' vision and their love for and faith in the people, I am always amazed how little Australians know or care about the origins and fragility of their political and civil rights. They cynically leave it to their parliamentarians and then grizzle in the pub about what a crap job politicians do!<sup>2</sup>

This view was reinforced by the work of Colmar Brunton Social Research, which found that many focus group participants had difficulty conceiving of rights in an abstract sense—that is, in the absence of some concrete experience. Many participants equated rights with service delivery.<sup>3</sup> Similarly, many participants in community roundtables spoke in terms of their expectations of government in relation to regulation and service delivery, rather than in the language of specific rights.<sup>4</sup> Colmar Brunton emphasised that most focus group participants assumed

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<sup>1</sup> J Tobin, Submission.

<sup>2</sup> C Steiner, Submission.

<sup>3</sup> Colmar Brunton Social Research, *National Human Rights Consultation—community research report* (2009).

<sup>4</sup> For example, Tennant Creek, Community Roundtable; Alice Springs, Community Roundtable; Katherine, Community Roundtable; Mt Isa, Community Roundtable; Charleville, Community Roundtable.

that, because they experience a right daily, ‘it must therefore be sufficiently protected’.<sup>5</sup>

In dealing with this question, a number of submissions noted that any list of human rights to be protected and promoted should be non-exhaustive and sufficiently flexible to allow future amendment.<sup>6</sup> The Law Council of Australia took this a step further, submitting, ‘Australia should actively engage with the process of developing new human rights principles through its interaction with international human rights bodies’.<sup>7</sup>

It is worth noting that Consultation participants who identified rights and responsibilities requiring protection and promotion did not all agree on *how* this should be achieved. The majority advocated a Human Rights Act; others called for greater parliamentary scrutiny; others still suggested that existing protections of human rights are adequate. Chapters 6 to 14 outline the different options for better protection and promotion of the rights identified in this chapter, which summarises the main rights and responsibilities discussed during the Consultation.

Of the 35 014 submissions the Committee received, 24 per cent (8428) discussed which rights and responsibilities should be protected and promoted in Australia. Of these, 593 expressed support for the protection and promotion of all the rights contained in the international treaties to which Australia is a party; 2641 expressed support for the protection and promotion of civil and political rights; 1252 expressed support for the protection and promotion of economic, social and cultural rights; 520 expressed support for the protection and promotion of Indigenous rights; 245 expressed support for rights that are new or emerging, such as environmental rights; and 159 expressed support for the protection and promotion of responsibilities.

In relation to economic, social and cultural rights, 978 submissions expressed support for the protection and promotion of the right to an adequate standard of living; 689 expressed support for the right to education; 1183 expressed support for the right to the highest attainable standard of health; and 169 expressed support for the right to work.

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<sup>5</sup> Colmar Brunton Social Research, *National Human Rights Consultation—community research report* (2009).

<sup>6</sup> Federation of Community Legal Centres Victoria, Submission; Australian Human Rights Commission, Submission.

<sup>7</sup> Law Council of Australia, Submission.

## 4.1 Rights

### **All Australia's obligations under international human rights law**

In submissions and community roundtables a common response to the question of which rights and responsibilities should be protected and promoted was that Australia should protect and promote all the human rights reflected in its obligations under international human rights law.<sup>8</sup> This would include Australia's obligations under the International Covenant on Civil and Political Rights 1966 and the International Covenant on Economic, Social and Cultural Rights 1966, which, together with the Universal Declaration of Human Rights 1948, are known as the 'International Bill of Rights'.

It would also include the International Convention on the Elimination of All Forms of Racial Discrimination 1965, the Convention on the Elimination of All Forms of Discrimination against Women 1979, the Convention against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment 1984, the Convention on the Rights of the Child 1989 and the Convention on the Rights of Persons with Disabilities 2006.

First, those in favour of this approach argued that Australia is already obliged under international law to implement these obligations domestically.<sup>9</sup> The Public Interest Advocacy Centre submitted, 'In providing domestic legislative protection of these rights, Australia would be doing no more than what is required of it under the terms of the international treaties that it has consented to abide by'.<sup>10</sup> Implementation of Australia's international human rights obligations would help Australia comply with those obligations; for example, reporting to international treaty bodies could be simplified if domestic human rights protections were harmonised with our international obligations.

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<sup>8</sup> For example, Law Institute of Victoria, Submission; Public Interest Advocacy Centre, Submission; NSW Charter Group, Submission; Public Interest Law Clearing House, Submission; Intellectual Disability Rights Service, Submission; Women's Health Victoria, Submission; Federation of Ethnic Communities' Councils of Australia, Submission; Law Council of Australia, Submission; Amnesty International Australia, Submission; Australian Council for International Development, Submission; Australian Human Rights Commission, Submission; Australian Lawyers for Human Rights, Submission; Federation of Community Legal Centres Victoria, Submission; Human Rights Law Resource Centre (Human Rights Act for All Australians), Submission; Uniting Church WA Synod Social Justice Board, Submission; Cabramatta Community Centre, Submission; Queensland Council for Civil Liberties, Submission; E Evatt, Submission; Centre for Human Rights Education, Submission; Queanbeyan (1), Community Roundtable; Yirrkala, Community Roundtable; Perth (1), Community Roundtable; Broken Hill, Community Roundtable; Newcastle, Community Roundtable; Melbourne (3), Community Roundtable; Sydney (2), Community Roundtable; Canberra, Community Roundtable; Wollongong, Community Roundtable.

<sup>9</sup> For example, Law Institute of Victoria, Submission; Gilbert + Tobin Centre of Public Law (E Santow), Submission; Public Interest Advocacy Centre, Submission, NSW Charter Group, Submission, ACT Human Rights Commission, Submission; Human Rights Law Resource Centre (Human Rights Act for All Australians), Submission; Law Council of Australia, Submission.

<sup>10</sup> Public Interest Advocacy Centre, Submission.

Second, the argument that Australia should protect and promote all of its obligations under international human rights law is supported by the view that rights are universal, indivisible, interdependent and interrelated.<sup>11</sup> On this view, there is no reason why we should privilege some of our international human rights obligations over others: all are equally important. The NSW Charter Group submitted, ‘Due to the interdependent relationship of the rights set out in these documents, no particular set of rights, such as political rights or cultural rights, should be favoured over another’.<sup>12</sup>

The Colmar Brunton Social Research report reinforced the notion that the traditional hierarchy of rights adopted in international human rights law is not shared by the general community. Instead, most people surveyed identified ‘survival’ rights—among them the right to basic amenities (food, clothing, water and shelter), the right to essential health care, freedom of speech and access to justice—as most important.<sup>13</sup>

Finally, it was argued that this approach would ensure that Australia’s international obligations have effect and meaning in the domestic context.<sup>14</sup> Implementing Australia’s international obligations would allow Australian courts—and ultimately the community—to benefit from the experience of other jurisdictions facing similar problems. The Gilbert + Tobin Centre of Public Law submitted that implementing Australia’s human rights obligations ‘would allow Australia to draw on the extensive human rights jurisprudence that has developed in international, regional and domestic courts and tribunals around the world’.<sup>15</sup> A participant in the Mt Gambier community roundtable said, ‘A lot of the hard work has already been done [with the development of international human rights instruments]; we just need to work out how to make them work in practice’.<sup>16</sup>

Some submitted that, at a minimum, Australia should ensure protection and promotion of the rights in the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights and the

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<sup>11</sup> Amnesty International Australia, Submission; Women’s Legal Services NSW, Submission; Edmund Rice Centre for Justice & Community Education, Submission; Victorian Council of Social Service, Submission; Family Planning NSW, Submission; Human Rights Law Resource Centre (Human Rights Act for All Australians), Submission; Australian Council of Social Service, Submission; Law Council of Australia, Submission; Gold Coast Advocacy, Submission; J Rostant, Submission; E Tadros, Submission; J Tobin, Submission; A Edwards and R McCorquodale, Submission. See also Vienna Declaration and Programme of Action; and Chapter 3.

<sup>12</sup> NSW Charter Group, Submission.

<sup>13</sup> Colmar Brunton Social Research, *National Human Rights Consultation—community research report* (2009).

<sup>14</sup> For example, Human Rights Law Resource Centre (Human Rights Act for All Australians), Submission; Federation of Community Legal Centres, Submission; ACT Human Rights Commission, Submission.

<sup>15</sup> Gilbert + Tobin Centre of Public Law (E Santow), Submission.

<sup>16</sup> Mt Gambier, Community Roundtable.



Universal Declaration of Human Rights—the International Bill of Rights.<sup>17</sup> Others submitted that only the rights included in the International Bill of Rights should be protected and promoted<sup>18</sup>; the Australian Christian Lobby commented, ‘Any attempt to deviate beyond the scope of these covenants to recognise an ever increasing array of “rights” will weaken the fundamental nature of these covenant rights’.<sup>19</sup>

Those advocating that Australia protect and promote its obligations under international human rights law acknowledged that, since many of these rights were formulated some time ago, some might require modification so that they reflect contemporary values and the community’s aspirations. For example, the Victorian Bar submitted, ‘Consideration should be given to ... a non discriminatory formulation of the right to marry’.<sup>20</sup>

It was recognised that some of Australia’s international human rights obligations might not be suitable for domestic implementation. For example, the Victorian Consultation Committee expressed concern that, in the absence of settled precedent about the content of the right to self-determination, there might be unintended consequences if that right were included in the *Charter of Rights And Responsibilities Act 2006* (Vic).<sup>21</sup> The committee suggested that inclusion of the right could be considered in a future review of the Victorian charter. In addition, some rights might be excluded for practical reasons; for example, Australia might choose not to implement its obligation domestically under the second optional protocol to the International Covenant on Civil and Political Rights to abolish the death penalty on the basis it has already done so.

## Civil and political rights

Many Consultation participants supported the promotion and protection of civil and political rights in Australia.<sup>22</sup> Civil and political rights are those rights and freedoms ‘necessary to protect individuals from state power and abuse of that power and that enable individuals to fully participate in the civil and political affairs of the state’.<sup>23</sup>

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<sup>17</sup> For example, Australian Council of Social Service, Submission; Australian Human Rights Commission, Submission; Human Rights Council of Australia, Submission; M Crock and T Freeman, Submission; Gilbert + Tobin Centre of Public Law (E Santow), Submission; Castan Centre for Human Rights Law, Submission; A Edwards and R McCorquodale, Submission; A Howard, Submission.

<sup>18</sup> Anglican Church of Australia General Synod, Submission; Australian Christian Lobby, Submission.

<sup>19</sup> Australian Christian Lobby, Submission.

<sup>20</sup> Victorian Bar, Submission. It should be noted that a non-discriminatory construction of the right to marry may be open on the terms in which it is framed in the ICCPR.

<sup>21</sup> This example is cited in Human Rights Law Resource Centre (Human Rights Act for All Australians), Submission.

<sup>22</sup> For example, Human Rights Law Resource Centre (Human Rights Act for All Australians), Submission; Gilbert + Tobin Centre of Public Law (E Santow), Submission; Victorian Council of Social Service, Submission; Australian Human Rights Commission, Submission; T Ginnane, Submission; R Merkel and A Pound, Submission; Victorian Government, Submission; Anglican Church of Australia General Synod, Submission; Australian Press Council, Submission; S Ozdowski, Submission; Sydney (3), Community Roundtable; Darwin (1), Community Roundtable; Melbourne (3), Community Roundtable.

<sup>23</sup> Public Interest Law Clearing House, Submission.

They include the right to life, the right not to be subjected to torture or ill-treatment, the right not to be held in slavery, the right to liberty and security of the person, the right to freedom of movement, equality before the law, the right to a fair trial, the right to freedom of thought, conscience and religion, the right to peaceful assembly, the right to freedom of association, the right to marry and to found a family, the right to take part in public affairs, and the right for minorities to enjoy their own culture, religion and language.

The International Covenant on Civil and Political Rights provides a useful summary of civil and political rights and was often used as a reference point by people advocating the protection and promotion of civil and political rights. It also includes the right to an 'effective remedy' for a violation of civil or political rights.<sup>24</sup>

Some in favour of this approach argued that only civil and political rights should be protected.<sup>25</sup> For example, Timothy Ginnane SC submitted, 'Since 1948 much of the world has accepted the importance of providing public protection of civil and political rights', so it is appropriate that Australia should protect and promote the rights contained in the International Covenant on Civil and Political Rights.<sup>26</sup> Ron Merkel QC and Alistair Pound acknowledged the arguments in favour of economic, social and cultural rights but concluded, 'The most desirable, and practically achievable, approach at this time is to limit [a Human Rights] Act to the protection of civil and political rights'.<sup>27</sup> Similarly, the Victorian Government recommended that the same civil and political rights provided for in the Victorian charter should be protected at the federal level initially, with scope for review at a later stage.<sup>28</sup>

Some submissions favoured an even narrower conception of civil and political rights. For example, Professor Helen Irving suggested that the only rights that should be protected from legislative erosion and enforced by the courts are those 'rights involved in the legal process and the enforcement of law: rights arising in the course of the arrest, detention, and trial of individuals'.<sup>29</sup>

Others in favour of protecting civil and political rights argued that these rights do require protection but not to the exclusion of other rights.<sup>30</sup> The Gilbert + Tobin Centre of Public Law submitted, 'Blanket prioritisation of civil and political rights over economic, social and cultural rights is too arbitrary and does not adequately respond to the particular needs of the Australian community'.<sup>31</sup> Women's Health

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<sup>24</sup> International Covenant on Civil and Political Rights, art. 2(3).

<sup>25</sup> For example, T Ginnane, Submission; R Merkel and A Pound, Submission; Victorian Government, Submission; H Irving, Submission; Australian Press Council, Submission; S Ozdowski, Submission. T Ginnane, Submission.

<sup>26</sup> R Merkel and A Pound, Submission.

<sup>27</sup> Victorian Government, Submission.

<sup>28</sup> H Irving, Submission.

<sup>29</sup> For example, Gilbert + Tobin Centre of Public Law (E Santow), Submission; Victorian Council of Social Service, Submission; Women's Health West, Submission.

<sup>30</sup> Gilbert + Tobin Centre of Public Law (E Santow), Submission.

West submitted, 'A federal charter must reflect the indivisibility and interdependence of civil and political rights and economic, social and cultural rights by including both sets of rights'.<sup>32</sup> The Victorian Council of Social Service submitted that a model protecting only civil and political rights is not only 'limited' but 'potentially dangerous' in that the act of balancing rights 'becomes skewed'.<sup>33</sup>

Civil and political rights were considered to be of particular importance to some groups in the community. For example, the right to non-discrimination, the right to freedom from torture and ill-treatment and the right to liberty and security of the person might be of special relevance for people with mental illness<sup>34</sup>; the right to non-discrimination, the right to freedom from torture and the right to a fair trial were considered especially relevant for prisoners<sup>35</sup>; the right to freedom of association has special relevance for workers<sup>36</sup>; and the right to non-discrimination and the right to marry were viewed as particularly important for same-sex couples.<sup>37</sup>

A civil and political right that received considerable attention in submissions and community roundtables was the right to freedom of thought, conscience and religion.<sup>38</sup> The Anglican Church of Australia emphasised the importance of protecting 'the right to freedom of religion, including the right to change one's religion, and freedom, either alone or in community with others and in public or private, to manifest one's religion in teaching, practice, worship and observance ...'.<sup>39</sup> The Seventh-day Adventist Church submitted:

One human right, amongst the many, that should be protected and promoted is that of freedom of religion and belief. When defining, clarifying and protecting freedom of religion and belief, as it is with so many human rights, there is necessity to be sure that no essential aspect is missed or complication overlooked.<sup>40</sup>

The Church of Jesus Christ of Latter-Day Saints described fundamental religious rights as including:

... the right to believe or disbelieve; the right to worship, either alone or with others; the right to assemble for religious purposes; the right to own or occupy property for

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<sup>32</sup> Women's Health West, Submission.

<sup>33</sup> Victorian Council of Social Service, Submission.

<sup>34</sup> Mental Health Legal Centre, Submission.

<sup>35</sup> Prisoners' Legal Service, Submission; Sisters Inside, Submission.

<sup>36</sup> Australian Council of Trade Unions, Submission; Shop, Distributive and Allied Employees' Association, Submission.

<sup>37</sup> Australian Marriage Equality, Submission; Tasmanian Gay and Lesbian Rights Group, Submission.

<sup>38</sup> For example, Seventh-day Adventist Church, Submission; Anglican Church of Australia General Synod, Submission; Church of Jesus Christ of Latter-Day Saints, Submission; Church and Nation Committee Presbyterian Church of Victoria, Submission; Australian Christian Lobby, Submission; Baptistcare, Submission; R Fisher, Submission; B Chigwidden, Submission; C Le Page, Submission; C Wilks, Submission; J Myers, Submission; G Doust, Submission; P Flynn, Submission; A van der Linden, Submission; M Hood, Submission.

<sup>39</sup> Anglican Church of Australia General Synod, Submission.

<sup>40</sup> Seventh-day Adventist Church, Submission.

the purpose of worship; the right to perform religious ceremonies; the right to possess and distribute religious media; and the right to establish rules for fellowship in a religious society.<sup>41</sup>

Gwenneth Compton commented, ‘Any new law ... needs to allow people to critique other ideologies, world views and religions’.<sup>42</sup> It is of note that organisations and individuals supporting the protection and promotion of freedom of religion adopted diverse positions on the adequacy of existing protections for that right and on proposals for further protection of that right.

The Committee also received a number of submissions focusing on the right to privacy<sup>43</sup>, which was also raised as a particular concern at a number of community roundtables.<sup>44</sup> There is anxiety about whether existing protections for privacy are adequate.

## **Economic, social and cultural rights**

A large number of respondents to the question of which rights and responsibilities should be protected and promoted argued the case for economic, social and cultural rights.<sup>45</sup> These rights ‘protect the basic living conditions that are necessary in order for human beings to live a life of dignity and freedom’.<sup>46</sup> Among them are the right to work, the right to form and join trade unions, the right to social security, the right to an adequate standard of living, the right to the highest attainable standard of health, the right to education, and the right to take part in cultural life. The International Covenant on Economic, Social and Cultural Rights provides a useful summary of economic, social and cultural rights and was often used as a reference point by advocates of the protection and promotion of these rights. The covenant includes a cross-cutting right to be able to exercise economic, social and cultural rights without discrimination on one of the grounds specified.<sup>47</sup>

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<sup>41</sup> Church of Jesus Christ of Latter-Day Saints, Submission.

<sup>42</sup> G Compton, Submission.

<sup>43</sup> For example, Office of the Victorian Privacy Commissioner, Submission; Australian Privacy Foundation, Submission.

<sup>44</sup> For example, Darwin (1), Community Roundtable; Broken Hill, Community Roundtable; Mt Gambier, Community Roundtable; Cronulla (1), Community Roundtable.

<sup>45</sup> For example, Human Rights Law Resource Centre (Human Rights Act for All Australians), Submission; Australian Human Rights Commission, Submission; Australian Council of Social Service, Submission; Victorian Bar, Submission; Australian Lawyers for Human Rights, Submission; Public Interest Law Clearing House, Submission; P Mathew, Submission; Jesuit Social Services, Submission; G Williams, Submission; Human Rights Council of Australia, Submission; Queensland Council of Social Service, Submission; Sydney Food Fairness Alliance, Submission; B Schokman, Submission; Women’s Health Loddon Mallee, Submission; A Cody, Submission; V Tee, Submission; S Walker, Submission; B Henderson, Submission; R Brydon, Submission; L Baker, Submission; Darwin (1), Community Roundtable; Perth (2), Community Roundtable; Melbourne (3), Community Roundtable; Burnie, Community Roundtable; Newcastle, Community Roundtable; Geelong, Community Roundtable.

<sup>46</sup> Public Interest Law Clearing House, Submission.

<sup>47</sup> International Covenant on Economic, Social and Cultural Rights art. 2(2).

First, participants taking this approach argued that the indivisibility and interdependence of human rights require that economic, social and cultural rights be protected and promoted.<sup>48</sup> The Human Rights Law Resource Centre submitted, ‘The arbitrary division of rights makes no sense to the rights holder and does not respond to



Mintabie clinic

the aspirations or needs of people, particularly people experiencing marginalisation or disadvantage’.<sup>49</sup> Some submissions noted the inherent connection between civil and political rights and economic, social and cultural rights. For example, protecting the right to life of a woman who is subjected to domestic violence (which involves a civil and political right) might also require that government ensure the right to adequate housing (an economic, social and cultural right).<sup>50</sup> Similarly, the right to privacy has little meaning in the absence of the right to an adequate standard of living.<sup>51</sup>

Second, proponents of the inclusion of economic, social and cultural rights argued that these rights are of great importance to the Australian community—especially to people living in poverty.<sup>52</sup> The Law Council of Australia submitted, ‘Some of the most disturbing incidences of rights violations in Australia, such as the comparatively low life expectancy of Indigenous Australians and the growing homelessness epidemic, concern the denial of economic, social or cultural rights’.<sup>53</sup> Similarly, Professor Hilary Charlesworth, Professor Andrew Byrne and Renuka Thilagaratnam submitted that economic, social and cultural rights ‘are the human rights that often have the greatest relevance and meaning for the community, particularly for those most disadvantaged’.<sup>54</sup> Katharine Young noted, ‘It is clear that the concerns met by

<sup>48</sup> For example, Law Council of Australia, Submission; A Sathanapallay, Submission; Human Rights Law Resource Centre (Human Rights Act for All Australians), Submission; Australian Human Rights Commission, Submission; Australian Council of Social Service, Submission; Women’s Health Victoria, Submission.

<sup>49</sup> Human Rights Law Resource Centre (Human Rights Act for All Australians), Submission.

<sup>50</sup> Federation of Community Legal Services Victoria, Submission.

<sup>51</sup> Tenants’ Union of Tasmania, Submission.

<sup>52</sup> For example, Law Council of Australia, Submission; Human Rights Law Resource Centre (Human Rights Act for All Australians), Submission.

<sup>53</sup> Law Council of Australia, Submission.

<sup>54</sup> RegNET (H Charlesworth, A Byrne and R Thilagaratnam), Submission.

access to the resources of housing, education, social security, water and food are all manifestly appropriate for Australians'.<sup>55</sup>

In support of this view, the Colmar Brunton report highlighted the tendency for Australians to give priority to 'survival' rights—such as the right to food, water and clothing and the right to health and medical care.<sup>56</sup> For example, 96 per cent of surveyed respondents considered the right to sufficient food, water and clothing an important or very important right; similarly, 95 per cent thought the right to essential health care was an important or very important right. These rights accord closely with economic, social and cultural rights such as the right to an adequate standard of living (including adequate food, clothing and housing)<sup>57</sup> and the right to enjoy the highest attainable standard of physical and mental health.<sup>58</sup>

Finally, those in favour of this approach argued that economic, social and cultural rights are justiciable; that is, they are rights that can be determined by a court.<sup>59</sup> In recognition of the potential for economic, social and cultural rights to have public resource implications, international law requires only 'progressive realisation' of those rights.<sup>60</sup> The Public Interest Law Clearing House submitted, 'Given that [economic, social and cultural] rights require only progressive and not immediate realisation, their inclusion in a Human Rights Act will not overburden the government'.<sup>61</sup> Katharine Young submitted:

Comparative practice reveals that judicial intervention in questions of economic and social rights has not overpowered courts at the expense of the legislative and executive branches, but in fact has often prompted greater democratic participation.<sup>62</sup>

The South African approach was identified as an option for justiciable economic and social rights.<sup>63</sup> That nation's Constitution provides that the government must 'take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation' of the rights of access to health care services, sufficient

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<sup>55</sup> K Young, Submission.

<sup>56</sup> Colmar Brunton Social Research, *National Human Rights consultation—community research report* (2009).

<sup>57</sup> ICESCR art. 11.

<sup>58</sup> ICESCR art. 12.

<sup>59</sup> For example, Human Rights Law Resource Centre (Human Rights Act for All Australians), Submission; Gilbert + Tobin Centre of Public Law (E Santow), Submission; R Young, Submission; Mallesons, Submission; J Debeljak, Submission; B Saul, Submission; Women's Health Victoria, Submission; ACT Human Rights Commission, Submission; Australian Council of Social Service, Submission; Castan Centre for Human Rights Law, Submission; Queensland Council of Social Service, Submission.

<sup>60</sup> See, for example, Human Rights Council of Australia, Submission.

<sup>61</sup> Public Interest Law Clearing House, Submission.

<sup>62</sup> K Young, Submission.

<sup>63</sup> For example, Australian Human Rights Commission, Submission; Australian Lawyers for Human Rights, Submission; Australian Human Rights Centre, Submission; Gilbert + Tobin Centre of Public Law (E Santow), Submission; Law Institute of Victoria, Submission. See also Arthur Chaskalson, 'How about a bill of rights?' (Tony Fitzgerald Lecture, The Griffith University, 28 July 2009).

food and water, social security and adequate housing.<sup>64</sup> The Committee heard that the South African courts have developed a form of ‘reasonableness’ review of government action when interpreting and applying these rights.<sup>65</sup>

Some submissions noted the argument that these rights can be protected indirectly through the interpretation of civil and political rights.<sup>66</sup> For example, it was noted that in Canada the civil and political rights to life, liberty and the security of the person have been used to protect the right to the highest attainable standard of physical and mental health and the right to adequate housing.<sup>67</sup> There was, however, a concern that this would result in ad hoc and limited protection for some of these rights.<sup>68</sup>

An alternative approach, put forward by the Australian Human Rights Commission, would be to ensure protection and promotion of a core minimum set of economic, social and cultural rights. This might include, for example, the right to work, the right to adequate housing, the right to the highest attainable standard of health and the right to education on the basis that these rights ‘touch the substance of people’s everyday lives’.<sup>69</sup> Core minimum rights could be stated initially and expanded on at a later date.<sup>70</sup> Liberty Victoria submitted that ‘at least’ basic economic, social and cultural rights ‘such as the rights to health, education, social security, housing and an adequate standard of living’ should be protected and promoted.<sup>71</sup>

Chapter 14 discusses further the possible inclusion of economic, social and cultural rights in a federal Human Rights Act and the various options for enforcing these rights under such legislation.

Economic, social and cultural rights are of particular importance to some groups in the Australian community. The right to adequate housing, the right to an adequate standard of living, the right to the highest attainable standard of health, and the right to education are of particular importance to Indigenous Australians<sup>72</sup>; the right to education, the right to adequate housing and the right to the highest attainable standard of health are especially important for people living in rural and remote

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<sup>64</sup> Constitution of the Republic of South Africa.

<sup>65</sup> See Australian Human Rights Commission, Submission; Australian Centre for Human Rights, Submission.

<sup>66</sup> R Young, Submission; Australian Human Rights Commission, Submission; Human Rights Law Resource Centre (Human Rights Act for All Australians), Submission.

<sup>67</sup> Australian Human Rights Commission, Submission.

<sup>68</sup> Consultation Committee for a Proposed WA Human Rights Act, *A WA Human Rights Act: report of the Consultation Committee for a Proposed WA Human Rights Act* (2007), cited in Australian Human Rights Commission, Submission.

<sup>69</sup> Joint Committee on Human Rights, *A Bill of Rights for the UK?* (2008), cited in Australian Human Rights Commission, Submission.

<sup>70</sup> It should be noted that the commission’s preferred approach was that a Human Rights Act should ‘explicitly recognise and protect the civil, political, economic, social and cultural rights in the ICCPR and ICESCR’—Australian Human Rights Commission, Submission.

<sup>71</sup> Liberty Victoria, Submission.

<sup>72</sup> Close the Gap Campaign Steering Committee for Indigenous Health Equality, Submission; Wirringa Baiya Aboriginal Women’s Legal Centre, Submission.



Australia.<sup>73</sup> A considerable number of submissions focused in particular on the right to adequate housing, which is of special relevance for those who are homeless.<sup>74</sup>

In contrast, a considerable number of submissions argued that economic, social and cultural rights should *not* be given legal protection in Australia.<sup>75</sup> In most instances this was a specific objection to any proposal that would allow judges to make determinations relating to economic, social and cultural rights.<sup>76</sup> Generally, the reasons given for this view were that parliament—not the courts—should make decisions about social and fiscal policy<sup>77</sup> and that economic, social and cultural rights are vague and not amenable to judicial adjudication.<sup>78</sup>

Associate Professor Anne Twomey submitted, ‘The inclusion of economic and social rights in an Australian charter of rights is inappropriate and, depending on how they apply, potentially constitutionally invalid’.<sup>79</sup> The Church and Nation Committee Presbyterian Church of Victoria submitted, ‘Many of the rights commonly characterised as economic and cultural rights represent equally worthy and laudable aspirations. However, we consider that to characterise these goals as rights is absurd’.<sup>80</sup>

## **The rights of special and vulnerable groups**

Some people argued that the rights of special and vulnerable groups in the Australian community deserve particular attention.

### **Indigenous Australians**

A large number of submissions called for protection and promotion of the rights of Indigenous Australians.<sup>81</sup> Community roundtables also emphasised the need to

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<sup>73</sup> Western NSW Community Legal Centre, Submission; Murray Mallee Community Legal Service, Submission.

<sup>74</sup> Housing is a Human Right Project, Submission; Youth Accommodation Interagency Nepean, Submission; Public Interest Law Clearing House Homeless Persons’ Legal Clinic, Submission; S Levett, Submission; Homelessness NSW, Submission; Homeless Persons’ Legal Service (NSW), Submission; Council to Homeless Persons, Submission; ACT Shelter, Submission.

<sup>75</sup> For example, Church and Nation Committee Presbyterian Church of Victoria, Submission; H Irving, Submission.

<sup>76</sup> For example, A Twomey, Submission; H Irving, Submission.

<sup>77</sup> For example, H Irving, Submission.

<sup>78</sup> For example, P de Jersey, ‘A Reflection on a bill of rights’ in J Leeson and R Haddrick (eds), *Don’t Leave Us with the Bill: the case against an Australian bill of rights* (2009), Submission, 14.

<sup>79</sup> A Twomey, Submission.

<sup>80</sup> Church and Nation Committee Presbyterian Church of Victoria, Submission.

<sup>81</sup> For example, Close the Gap Steering Committee for Indigenous Health, Submission; Aboriginal Resource and Development Services, Submission; Aboriginal and Torres Strait Islander Legal Services, Submission; Foundation for Aboriginal and Torres Strait Islander Research, Submission; Australians for Native Title and Reconciliation Victoria, Submission; Australians for Native Title and Reconciliation NSW, Submission; Victorian Indigenous Youth Advisory Council, Submission; National Native Title Council, Submission; NSW Reconciliation Council, Submission; Liberty Victoria, Submission; University of Western Australia Boatshed Roundtable, Submission; T Blake, Submission; A Odeleye, Submission; K Knight, Submission; S McMillan, Submission.



protect Indigenous rights.<sup>82</sup> These rights were said to include the right of Indigenous peoples to self-determination<sup>83</sup>, the right to practise and revitalise their cultures<sup>84</sup>, and the right to be consulted before the approval of projects affecting their lands, territories or other resources.<sup>85</sup> Numerous submissions referred to the UN



The Chair's smoking ceremony at Santa Teresa

Declaration on the Rights of Indigenous Peoples as providing a useful summary of indigenous rights. A number of civil, political, social, economic and cultural rights were also said to be of particular significance to Indigenous Australians<sup>86</sup>, among them the right to the highest attainable standard of health, the right to adequate housing, the right to non-discrimination, and access to justice.<sup>87</sup> Submissions also cited the Victorian charter, which refers specifically to Indigenous rights in the preamble: 'Human rights have a special importance for the Aboriginal people of Victoria, as descendants of Australia's first people, with their diverse spiritual, social, cultural and economic relationship with their traditional lands and waters'.<sup>88</sup>

The Victorian charter also provides that Indigenous people have distinct cultural rights and must not be denied the right to enjoy their identity and culture, maintain and use their language, maintain kinship ties, and 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.<sup>89</sup> Neither the Victorian charter nor the *ACT Human Rights Act 2004* protects the right to self-determination.

The Wirringa Baiya Aboriginal Women's Legal Centre submitted, 'A national Human Rights Act should ... recognise Indigenous people in its preamble. It should also

<sup>82</sup> For example, Coober Pedy, Community Roundtable; Kalgoorlie, Community Roundtable; Bendigo, Community Roundtable; Broken Hill, Community Roundtable, Bourke, Community Roundtable; Dubbo, Community Roundtable; Wodonga, Community Roundtable.

<sup>83</sup> For example, Victorian Aboriginal Child Care Agency Co-op, Submission; Foundation for Aboriginal and Torres Strait Islander Research, Submission; NSW reconciliation Council, Submission. See also Declaration on the Rights of Indigenous Peoples art. 3.

<sup>84</sup> For example, Liberty Victoria, Submission; NSW Reconciliation Council, Submission. See also Declaration on the Rights of Indigenous Peoples art. 11.

<sup>85</sup> For example, National Native Title Council, Submission; Australians for Native Title and Reconciliation NSW, Submission; Declaration on the Rights of Indigenous Peoples art. 32.

<sup>86</sup> A Edwards and R McCorquodale, Submission.

<sup>87</sup> Close the Gap Steering Committee for Indigenous Health, Submission.

<sup>88</sup> *Charter of Rights and Responsibilities Act 2006* (Vic), preamble.

<sup>89</sup> *ibid.* s. 19.

have a separate category dealing with Indigenous rights to land, language, culture and self-determination'.<sup>90</sup> The NSW Reconciliation Council argued for specific protections for Indigenous rights, including the right to a distinct status and culture, the right to enjoyment of culture and use and preservation of languages, recognition and protection of traditional lands, and the right to self-determination.<sup>91</sup> The Aboriginal Family Violence Prevention and Legal Service Victoria submitted, 'It is critical that the rights of Aboriginal and Torres Strait Islanders as the First Australians are protected and promoted in a framework determined by Aboriginal and Torres Strait Islanders'.<sup>92</sup>

## Children and young people

A significant number of submissions advocated the protection and promotion of rights that apply to children and young people<sup>93</sup>, as did participants at community roundtables.<sup>94</sup> Among the rights referred to were the right of a child who is capable of forming his or her own views to participate in decisions affecting him or her<sup>95</sup> and the principle that the best interests of the child should be a primary consideration in all actions concerning children.<sup>96</sup> The Convention on the Rights of the Child provides a useful summary of rights specific to children and young people and was often used as a reference point by supporters of the protection and promotion of these rights.

Youthlaw submitted that, recognising the limitations of the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights, 'rights specific to children and young people should be protected so as to reflect and address the special needs and experiences of children and young people'.<sup>97</sup> Similarly, the Youth Justice Coalition submitted, 'The Australian government should ensure that the interests and vulnerabilities of children and young people are protected and promoted'.<sup>98</sup> Several submissions noted that these

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<sup>90</sup> Wirringa Baiya Aboriginal Women's Legal Centre, Submission.

<sup>91</sup> NSW Reconciliation Council, Submission.

<sup>92</sup> Aboriginal Family Violence Prevention and Legal Service Victoria, Submission.

<sup>93</sup> For example, Youthlaw, Submission; Youth Affairs Council of Victoria, Submission; UN Youth Association of Australia, Submission; Children's Commissioners and Guardians of ACT, NSW, SA, Tas and WA, Submission; Child Rights Coalition, Submission; RMIT School of Global Studies, Social Science and Planning, Submission; Youth Justice Coalition (NSW), Submission; ChilOut—Children Out of Detention, Submission; Youth Advocacy Centre, Submission; Office of the Child Safety Commissioner Victoria, Submission; Australian Youth Forum, Submission; National Youth Coalition for Housing, Submission; N Cranswick, Submission; Logan Youth Legal Service, Submission; Left Right Think-Tank, Submission; E Shaw, Submission.

<sup>94</sup> For example, Tweed Heads, Community Roundtable; Queanbeyan (1), Community Roundtable; Darwin (1), Community Roundtable; Katherine, Community Roundtable; Perth (2), Community Roundtable.

<sup>95</sup> For example, Youthlaw, Submission; Children's Commissioners and Guardians of ACT, NSW, SA, Tas and WA, Submission; Child Rights Coalition, Submission. See also Convention on the Rights of the Child art. 12.

<sup>96</sup> Logan Youth Legal Service, Submission; Child Rights Coalition, Submission; Youthlaw, Submission. See also Convention on the Rights of the Child art. 3.

<sup>97</sup> Youthlaw, Submission.

<sup>98</sup> Youth Justice Coalition (NSW), Submission.

rights are of particular relevance to children and young people in the care of the state<sup>99</sup>, and it was argued that they are also important for children and young people who come into contact with police and the juvenile justice system.<sup>100</sup>

## Women

Many submissions highlighted the need for protection and promotion of the rights of women<sup>101</sup>, a subject also raised at community roundtables.<sup>102</sup> The rights of women were said to include the right to gender equality<sup>103</sup>, the right to be free from violence against women<sup>104</sup> and the right to the highest attainable standard of health (including reproductive health).<sup>105</sup>

WomenSpeak Alliance stressed that ‘the government has the capacity now to address specific rights issues affecting women that have already been identified’.<sup>106</sup> It urged government to consider how central elements of ‘women’s policy machinery’ (integrating a gender perspective in all government operations) might be reinstated.<sup>107</sup> The Women’s Legal Service in Victoria recommended the inclusion of a right to gender equality based on the Canadian Charter of Rights and Freedoms, to ‘ensure that laws and policies are guaranteed a gendered perspective when being developed and implemented’.<sup>108</sup> The rights of women in prison were also emphasised.<sup>109</sup>

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<sup>99</sup> National Youth Coalition for Housing, Submission; National Children’s and Youth Law Centre—Child Rights Coalition, Submission; Youthlaw, Submission.

<sup>100</sup> UN Youth Association of Australia, Submission; Youth Justice Coalition (NSW), Submission; Left Right Think-Tank, Submission; NSW Charter Group, Submission; Children’s Commissioners and Guardians of ACT, NSW, SA, Tas and WA, Submission.

<sup>101</sup> WomenSpeak Alliance, Submission; Women’s Legal Service Victoria, Submission; UNIFEM, Submission; The Democracy Project, Submission; ACT Ministerial Advisory Council on Women, Submission; Women’s Legal Services (NSW), Submission; Women’s Electoral Lobby, Submission; Zonta International District 24, Submission; Women’s Health Loddon Mallee, Submission; Women’s Health Victoria, Submission; Australian Education Union, Submission; R Russell, Submission; F Grace, Submission.

<sup>102</sup> For example, Darwin (1), Community Roundtable; Katherine, Community Roundtable; Wadeye, Community Roundtable; Mount Isa, Community Roundtable; Perth (1), Community Roundtable.

<sup>103</sup> For example, UNIFEM, Submission; Women’s Legal Services Australia, Submission; WomenSpeak Alliance, Submission.

<sup>104</sup> For example, Women’s Legal Service Victoria, Submission; WomenSpeak Alliance, Submission; Women’s Legal Services NSW, Submission; Women’s Health West, Submission.

<sup>105</sup> Women’s Health West, Submission; Women’s Health Loddon Mallee, Submission; Women’s Health Victoria, Submission. See also Convention on the Elimination of All Forms of Discrimination against Women art. 12.

<sup>106</sup> WomenSpeak Alliance, Submission.

<sup>107</sup> *ibid.*

<sup>108</sup> Women’s Legal Service (Vic), Submission.

<sup>109</sup> Top End Women’s Legal Service, Submission; Sisters Inside, Submission.

## People with disabilities

The Committee received many submissions advocating protection and promotion of the rights of people with disabilities.<sup>110</sup> The subject was also raised regularly at community roundtables.<sup>111</sup> These rights were said to include the right to have access to the physical environment, transport and information<sup>112</sup>; freedom from exploitation, violence and abuse<sup>113</sup>; and the right to live independently and be included in the community.<sup>114</sup>

The Australian Federation of Disability Organisations noted the particular problems people with disabilities face in relation to their civil, political, economic, social and cultural rights, commenting that people with disabilities ‘often experience significant disadvantage in achieving social participation and even personal safety and self determination’.<sup>115</sup> The Disability Discrimination Legal Service submitted:

People with disabilities for a variety of reasons have different and specific needs that are actually imposed not so much by their disabilities but by the fact that contemporary society is designed for people without disabilities. This means that providing ‘special protection’ to people with disabilities is in a true sense only providing what is their right as equal members of a social and political community.<sup>116</sup>

One participant at a community roundtable noted the particular difficulties of people with disabilities living in rural and remote Australia, who often have to travel great distances just to get a disability assessment.<sup>117</sup> Another participant wanted to see ‘people with disability enjoy the same rights as those without disability ... The most basic civil right, the right to vote, is not available to many people with disability’.<sup>118</sup>

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<sup>110</sup> For example, Australian Federation of Disability Organisations, Submission; Disability Discrimination Legal Service, Submission; NSW Council for Intellectual Disability, Submission; Physical Disability Council of NSW, Submission; National Ethnic Disability Alliance, Submission; Australian Association for Families of Children with a Disability, Submission; Women working alongside Women with Intellectual and Learning Disabilities, Submission; National Council on Intellectual Disability, Submission; Queenslanders with Disability Network, Submission; NSW Disability Discrimination Legal Centre, Submission; Victorian Women with Disabilities Network, Submission; Women with Disabilities Australia, Submission; Deaf Australia, Submission; Blind Citizens Australia, Submission.

<sup>111</sup> For example, Geelong, Community Roundtable; Darwin (1), Community Roundtable; Tennant Creek, Community Roundtable; Alice Springs, Community Roundtable; Katherine, Community Roundtable; Ballarat, Community Roundtable; Charleville, Community Roundtable; Busselton, Community Roundtable; Burnie, Community Roundtable; Whyalla, Community Roundtable; Mt Gambier, Community Roundtable; Melbourne (1), Community Roundtable.

<sup>112</sup> For example, NSW Disability Discrimination Legal Centre, Submission; Disability Discrimination Legal Service, Submission. See also Convention on the Rights of Persons with Disabilities art. 9.

<sup>113</sup> For example, Victorian Women with Disabilities Network, Submission. See also Convention on the Rights of Persons with Disabilities art. 16.

<sup>114</sup> For example, National Council on Intellectual Disability, Submission. See also Convention on the Rights of Persons with Disabilities art. 19.

<sup>115</sup> Australian Federation of Disability Organisations, Submission.

<sup>116</sup> Disability Discrimination Legal Service, Submission.

<sup>117</sup> Whyalla, Community Roundtable.

<sup>118</sup> Sydney (2), Community Roundtable.

For example, people who are blind or vision impaired, as well as those with disabilities that affect their mobility, can have difficulty exercising their right to vote.

### **People with mental illness**

A significant number of submissions discussed the rights of people with mental illness<sup>119</sup>, and the subject was also raised at numerous community roundtables.<sup>120</sup> These rights were said to include the right to non-discrimination<sup>121</sup>, freedom from torture and ill-treatment<sup>122</sup>, the right to liberty and security of the person (including freedom from arbitrary detention)<sup>123</sup> and the right to the highest attainable standard of mental health.<sup>124</sup> The Mental Health Legal Centre submitted:

The experiences of some persons subject to an involuntary treatment order ... may conflict with the right to be free from cruel, inhuman or degrading treatment. ... The forcible administration of medication with severe side effects may also be tantamount to cruel, inhuman or degrading treatment.<sup>125</sup>

Access to mental health treatment and services was raised as a problem at many community roundtables.<sup>126</sup>

### **Asylum seekers and refugees**

Many submissions highlighted the rights of asylum seekers and refugees<sup>127</sup>, and the subject was also raised at many community roundtables.<sup>128</sup> The rights of asylum seekers and refugees were seen to include the right to liberty and security of the person (including freedom from arbitrary detention)<sup>129</sup>, the right to legal

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<sup>119</sup> For example, Reach Out Mental Health, Submission; Mental Health Legal Centre, Submission; NSW Consumer Advisory Group—Mental Health, Submission; Victorian Institute of Forensic Mental Health, Submission; Homeless Outreach Psychiatric Service, Submission; Royal Australian and New Zealand College of Psychiatrists, Submission.

<sup>120</sup> For example, Tweed Heads, Community Roundtable; Queanbeyan (1), Community Roundtable; Alice Springs, Community Roundtable; Mt Isa, Community Roundtable; Paraburdoo, Community Roundtable.

<sup>121</sup> For example, NSW Consumer Advisory Group—Mental Health, Submission; Mental Health Legal Centre, Submission.

<sup>122</sup> For example, Mental Health Legal Centre, Submission; ReachOut Mental Health, Submission.

<sup>123</sup> For example, Mental Health Legal Centre, Submission.

<sup>124</sup> For example, Mental Health Coordinating Council, Submission.

<sup>125</sup> Mental Health Legal Centre, Submission.

<sup>126</sup> For example, Katherine, Community Roundtable; Mt Isa, Community Roundtable; Paraburdoo, Community Roundtable; Bendigo, Community Roundtable.

<sup>127</sup> For example, Hotham Mission Asylum Seeker Project, Submission; Asylum Seeker Resource Centre, Submission; Asylum Seekers Centre of NSW, Submission; Refugee Council of Australia, Submission; Refugee Advice + Casework Service, Submission; St Ignatius' Parish, Norwood Refugee Support Group, Submission; Network of Immigrant and Refugee Women of Australia, Submission; Gilbert + Tobin Centre of Public Law (J McAdam and T Garcia), Submission; Refugee Youth Workers Network, Submission; Queensland Public Interest Law Clearing House—Refugee Civil Law Clinic, Submission; J Burnside, Submission.

<sup>128</sup> For example, Alice Springs, Community Roundtable; Ballarat, Community Roundtable; Perth (1), Community Roundtable; Burnie, Community Roundtable; Whyalla, Community Roundtable; Mt Gambier, Community Roundtable; Melbourne (3), Community Roundtable; Geelong, Community Roundtable; Broome, Community Roundtable.

<sup>129</sup> Refugee Council of Australia, Submission.

representation and a translator<sup>130</sup>, and basic economic, social and cultural rights such as the right to work, the right to the highest attainable standard of health, and the right to social security.<sup>131</sup>

The Hotham Mission Asylum Seeker Project submitted:

The provisions of minimum entitlements to work, health care and welfare support for asylum seekers are embedded in Australia's international obligations. The International Covenant on Economic, Social and Cultural Rights contains rights relating to appropriate and suitable healthcare, housing, and income support.<sup>132</sup>

At the public hearings Mustafa Najib described his experiences as an asylum seeker from Afghanistan. He was rescued by the *Tampa* and then detained on Nauru, and he said he had no access to legal representation during his detention.<sup>133</sup>

### **Ethnic, religious and linguistic minorities**

A number of submissions focused on the rights of ethnic minorities.<sup>134</sup> For example, the Federation of Ethnic Communities' Councils of Australia noted rights of particular importance to those from diverse cultural, linguistic and faith backgrounds living in Australia—for example, the right to cultural and linguistic freedom and the right to non-discrimination.<sup>135</sup>

A number of submissions focused on the rights of religious minorities.<sup>136</sup> The rights of non-religious people were also discussed in submissions and at community roundtables.<sup>137</sup> For example, the Australian Baha'i Community submitted:



Ms Maha Krayem Abdo OAM speaks of the experiences of Australian Muslim women

<sup>130</sup> St Ignatius' Parish, Norwood Refugee Support Group, Submission.

<sup>131</sup> Hotham Mission Asylum Seeker Project, Submission; Asylum Seekers Centre of NSW, Submission.

<sup>132</sup> Hotham Mission Asylum Seeker Project, Submission (emphasis in original removed).

<sup>133</sup> Mustafa Najib, Public Hearing.

<sup>134</sup> For example, Federation of Ethnic Communities' Councils of Australia, Submission; Ethnic Communities Council of Queensland, Submission.

<sup>135</sup> Federation of Ethnic Communities' Councils of Australia, Submission.

<sup>136</sup> Australia/Israel & Jewish Affairs Council, Submission; Muslim Women's Support Centre of WA, Submission; Australian Baha'i Community, Submission; Falun Dafa Association of Victoria, Submission; Odinist Rite of Australia, Submission; ACT Muslim Advisory Council, Submission.

<sup>137</sup> For example, Z Bailey, Submission; D Wilson, Submission; Newcastle, Community Roundtable; Sydney (3), Community Roundtable; Cronulla (1), Community Roundtable.

While members of our own community report only occasional and isolated incidents of religious discrimination in Australia, we recognise that for some other communities, such discrimination has become more frequent and widespread in the past ten years.<sup>138</sup>

A number of submissions focused on the rights of linguistic minorities.<sup>139</sup> For example, Aboriginal Resource and Development Services submitted, 'The right to the free assistance of a [National Accreditation Authority for Translators and Interpreters]-accredited professional-level interpreter for Indigenous people who do not speak English as a first language should be protected and promoted as a human right'.<sup>140</sup>

### **The elderly**

A number of submissions and community roundtables discussed the rights of the elderly.<sup>141</sup> These rights were said to include the right not to be subjected to ill-treatment<sup>142</sup> and the right to respect for private life and family.<sup>143</sup> For example, Seniors Rights Victoria submitted:

The right to be free from degrading treatment is especially relevant for older people living in Commonwealth Aged Care facilities and nursing homes. This is because their treatment is entirely dependent on facility staff and their carers. Older people have limited ability to protect themselves and assert their rights in an environment where efficiency is often the main priority of caregivers.<sup>144</sup>

The dignity of the elderly was also raised during the Colmar Brunton devolved consultation. For example, one participant commented, 'In nursing homes the use of infantile talk reserved for small children and pets, diminishes dignity'.<sup>145</sup> Another participant commented, 'Ageism is the inability/refusal to recognise the rights and dignity of older people'.<sup>146</sup>

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<sup>138</sup> Australian Baha'i Community, Submission.

<sup>139</sup> Human Rights Council of Australia, Submission.

<sup>140</sup> Aboriginal Resource and Development Services, Submission.

<sup>141</sup> For example, Seniors Legal Support Service (Brisbane), Submission; Seniors Rights Victoria, Submission; Council on the Ageing NSW, Submission; Senior Roundtable, Submission; C Steiner, Submission; Queanbeyan (1), Community Roundtable; Alice Springs, Community Roundtable; Ballarat, Community Roundtable; Bendigo, Community Roundtable; Mildura, Community Roundtable; Geelong, Community Roundtable.

<sup>142</sup> Seniors Rights Victoria, Submission.

<sup>143</sup> *ibid.*

<sup>144</sup> *ibid.*

<sup>145</sup> Colmar Brunton Social Research, *National Human Rights Consultation—devolved consultation report* (2009).

<sup>146</sup> *ibid.*

## Gay, lesbian, bisexual, transgender and intersex

A significant number of submissions and community roundtables raised the subject of the rights of gay, lesbian, bisexual, transgender and intersex people.<sup>147</sup> These rights were said to include the right not to be discriminated against on the basis of sex, gender identity or sexual orientation<sup>148</sup>, the right to the highest attainable standard of health<sup>149</sup>, the right to privacy and family<sup>150</sup> and the right to freedom of expression.<sup>151</sup> Many groups asserted that there are only limited protections against discrimination on the basis of sexual orientation, gender identity or intersex status in Australia.<sup>152</sup> For example, the Tasmanian Coming Out Proud Program submitted:

Universal enactment of equity is very important for GLBTI [gay, lesbian, bisexual, transgender and intersex] people in Australia because our community still experiences strong discrimination and intimidation ... We are all entitled to the enjoyment of human rights without discrimination of any kind, including discrimination on the basis of sexuality, sex identity or gender identity.<sup>153</sup>

## Workers

A number of submissions and community roundtables discussed workers' rights.<sup>154</sup> 'Fundamental' workers' rights were said to include 'freedom of association and the rights to organise and to bargain collectively ... freedom from discrimination in employment (including equal remuneration for work of equal value) ... and freedom from harmful child labour'.<sup>155</sup> The ACTU submitted:

Australia has a range of obligations to respect workers' human rights ... These rights encompass civil and political and economic, social and cultural rights. Any consideration of the extent to which Australian law currently protects human rights

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<sup>147</sup> For example, Ministerial Advisory Committee on Gay, Lesbian, Bisexual, Transgender and Intersex Health and Wellbeing, Submission; OUTthere Rural Victorian Youth Council for Sexual Diversity, Submission; The Tasmanian Coming Out Proud Program State Steering Committee, Submission; National LGBT Health Alliance, Submission; Queer Muslims in Australia, Submission; AGMC, Submission; Parents and Friends of Lesbians and Gays, Submission; Lesbian and Gay Solidarity Melbourne, Submission; Gay & Lesbian Health Victoria, Submission; S Hawthorne, Submission; Coalition of Activist Lesbians, Submission; J-P Ameur, Submission; Tweed Heads, Community Roundtable; Perth (2), Community Roundtable; Mt Gambier, Community Roundtable; Geelong, Community Roundtable; Sydney (2), Community Roundtable; Canberra, Community Roundtable; Melbourne (3) Community Roundtable.

<sup>148</sup> For example, Gay and Lesbian Rights Lobby, Submission; Ministerial Advisory Committee on Gay, Lesbian, Bisexual, Transgender and Intersex Health and Wellbeing, Submission.

<sup>149</sup> For example, National LGBT Health Alliance, Submission.

<sup>150</sup> For example, Tasmanian Gay and Lesbian Rights Group.

<sup>151</sup> For example, Ministerial Advisory Committee on Gay, Lesbian, Bisexual, Transgender and Intersex Health and Wellbeing, Submission.

<sup>152</sup> For example, Australian Coalition for equality, Submission; AIDS Council of NSW, Submission; National LGBT Health Alliance, Submission.

<sup>153</sup> The Tasmanian Coming Out Proud Program State Steering Committee, Submission.

<sup>154</sup> For example, Australian Council of Trade Unions, Submission; Shop, Distributive and Allied Employees Association, Submission; Australian Education Union, Submission; JobWatch Employment Rights Legal Centre, Submission; Broken Hill, Community Roundtable; Cronulla (1), Community Roundtable.

<sup>155</sup> Australian Council of Trade Unions, Submission.



and of the extent to which such rights could be better protected must take into account these obligations.<sup>156</sup>

## New and emerging rights

Some submissions proposed that new and emerging rights should be protected and promoted in Australia. In international law the distinction is sometimes made between ‘first-generation’ rights (civil and political rights), ‘second-generation’ rights (economic, social and cultural rights) and ‘third-generation rights’ (group or collective rights, such as the right to social and economic development and the right to a healthy environment).

The new and emerging right that received most attention in submissions and at community roundtables was the third-generation right to an environment that is not harmful to health or wellbeing, together with the related right to have the environment protected.<sup>157</sup> The Australian Network of Environmental Defenders Offices supported ‘the inclusion of a “third generation” right, namely, the right to a clean and healthy environment’, favouring ‘a stand-alone right/responsibility, on the basis of growing support at international law, and in numerous domestic jurisdictions, for such a model’.<sup>158</sup> In addition, a number of submissions supported a reference to ‘the responsibility to intergenerational equity’,<sup>159</sup> which the Australian Network of Environmental Defenders Offices described thus:

The concept of intergenerational equity says that humans ‘hold the natural and cultural environment of the Earth in common both with other members of the present generation and with other generations, past and future’. It contends that the earth is inherited from previous generations and an obligation exists to pass it on in reasonable condition to future generations. Intergenerational equity is central to the idea of sustainable development.<sup>160</sup>

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<sup>156</sup> *ibid.*

<sup>157</sup> For example, Australian Network of Environmental Defenders Offices, Submission; S Sellwood, Submission; Law Institute of Victoria, Submission; Public Interest Advocacy Centre, Submission; NSW Charter Group, Submission; Youth Affairs Council of Victoria, Submission; C Riebl, Submission; A Cianchi, Submission; Queanbeyan (1), Community Roundtable; Alice Springs, Community Roundtable; Yirrkala, Community Roundtable; Perth (2), Community Roundtable; Mildura, Community Roundtable; Whyalla, Community Roundtable; Mt Gambier, Community Roundtable; Newcastle, Community Roundtable; Melbourne (2), Community Roundtable; Sydney (3), Community Roundtable; Cronulla (1), Community Roundtable; Cairns, Community Roundtable.

<sup>158</sup> Australian Network of Environmental Defenders Offices, Submission.

<sup>159</sup> *ibid.*; Federation of Community Legal Centres, Submission; L Ealing, Submission.

<sup>160</sup> UN World Commission on Environment and Development, *Our Common Future* (1987), cited in Australian Network of Environmental Defenders Offices, Submission.

The Public Interest Advocacy Centre submitted that third-generation rights:

... introduce a stronger concept of human rights as community rights ... and are developing in response to the growing recognition of the effect humans have on the environment, and conversely, the effect the environment has on human rights.<sup>161</sup>

Colmar Brunton Social Research found that 95 per cent of survey respondents considered the right to a clean and healthy natural environment important or very important.

## Other rights

Other discrete rights that do not fall into a category discussed thus far were raised in submissions and at community roundtables. For example, the Scarlet Alliance proposed a ‘right to equal treatment under the law, regardless of HIV status’.<sup>162</sup> A number of submissions specifically opposed protection of the right to property<sup>163</sup>; others supported protection of this right.<sup>164</sup>

Dr Carol Steiner outlined a range of rights not commonly mentioned—among them ‘the right to freedom from a painful death’, ‘the right to demand family friendly working hours’ and ‘the right to free speech for public servants and bureaucrats’.<sup>165</sup>

The Committee received a number of submissions dealing with the rights of victims of crime.<sup>166</sup> For example, Michael O’Connell, the South Australian Commissioner for Victims’ Rights, submitted:

Victims of crime in Australia will not achieve equity in the criminal justice system unless they have legislated rights to be treated with fairness, dignity and respect; rights to access to justice and to participate in our justice systems; rights to services, including available and accessible victim assistance; and rights to reparations, including restitution from offenders and compensation from the state [if] the offender is unable to pay restitution.<sup>167</sup>

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<sup>161</sup> Public Interest Advocacy Centre, Submission.

<sup>162</sup> Scarlet Alliance, Submission.

<sup>163</sup> J Debeljak, Submission; Castan Centre for Human Rights Law, Submission;

<sup>164</sup> For example, Human Rights Council of Australia, Submission.

<sup>165</sup> C Steiner, Submission.

<sup>166</sup> For example, Commissioner for Victims’ Rights South Australia, Submission; Victim Support Australasia, Submission.

<sup>167</sup> Commissioner for Victims’ Rights South Australia, Submission.

## 4.2 Responsibilities

During the Consultation the discussion of responsibilities covered both what are traditionally called ‘obligations’ in international law (that is, enforceable obligations owed by States to individuals) and the responsibilities individuals have alongside their rights. A number of potential bearers of ‘responsibility’ were identified, among them the following:

- individuals, corporations, non-government organisations and other social groups—being responsible for respecting and refraining from breaching the rights of others, protecting the rights of others, and promoting human rights
- the State, including public authorities and organisations performing a public function—being responsible for respecting and refraining from breaching the rights of people in the State (not just citizens), respecting and refraining from breaching the rights of people beyond the State’s borders, protecting the rights of people, promoting human rights, and providing access to remedies for individual human rights violations.

Many submissions and community roundtables recognised that each one of us should take responsibility for the rights of others.<sup>168</sup> For example, the Law Institute of Victoria submitted, ‘All persons—whether individuals or public or private entities—have a responsibility to observe human rights’. The Australian Human Rights Commission submitted, ‘It is important to recognise that, just as all people are entitled to enjoy all human rights, all people also have responsibilities to respect the rights of others’.<sup>169</sup> Some submissions also noted that the ability to exercise one’s human rights must be balanced against the ability of others to exercise their rights.<sup>170</sup> In the focus groups conducted by Colmar Brunton Social Research it was generally agreed that human rights need to go hand in hand with associated responsibilities.<sup>171</sup>

The Committee learnt that many participants do not want an individualistic society where people are self-centredly focused on their ‘rights’, without thinking of the greater good and our ‘responsibilities’. Timothy Ginnane SC submitted:

In determining what restrictions on the exercise of human rights should be acceptable, the fact that the individual lives in, and owes duties to society, should be kept constantly in mind. That is not to deny that in many instances the exercise of human rights should be looked at mainly from the perspective of the individual

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<sup>168</sup> Law Council of Australia, Submission; Australian Democrats, Submission; B Saul, Submission; Law Institute of Victoria, Submission; Darwin (2), Community Roundtable.

<sup>169</sup> Australian Human Rights Commission, Submission.

<sup>170</sup> Public Interest Advocacy Centre, Submission.

<sup>171</sup> Colmar Brunton Social Research, *National Human Rights Consultation—community research report* (2009).

and indeed it will often be in the interest of society to do just that. Nevertheless in very few circumstances should the protection of and exercise of human rights be regarded as pertaining to autonomous individuals, but rather to individuals who live in and in relation to society and its members.<sup>172</sup>

The idea that individuals should be encouraged to act responsibly towards each other was an important aspect of what many Consultation participants raised with the Committee. Most participants thought it just as important to encourage an ethos in which we all take responsibility for protecting and promoting the human rights of others as it is to have our human rights protected. As Bill Stefaniak, Appeals President of the ACT Civil and Administrative Tribunal, has remarked, 'The rule of law and human rights depend on the readiness of everyone in our society to act justly'.<sup>173</sup>

A small number of submissions proposed that responsibilities be treated in a manner equal to, or more important than, rights.<sup>174</sup> For example, Adrien Adair submitted, 'It is a self indulgent and distorted exercise to be focussing on individual rights, without at the same time addressing with equal passion, individual responsibilities'.<sup>175</sup> Brian Schroeder submitted:

We need to teach people about responsibilities, not rights. For example, parents' responsibilities to their children, rather than their rights to children; business' responsibilities to their employees, customers, society; employees' responsibilities to their employers; government's responsibilities to their nation & people; and so on.<sup>176</sup>

On the other hand, a significant number of submissions opposed the recognition, protection or promotion of responsibilities on the basis that the responsibilities are not legally enforceable<sup>177</sup>, are not reflected in international law<sup>178</sup>, and raise the dangerous prospect of rights contingent on responsibilities.<sup>179</sup> For example, Michael Pearce SC submitted that he was 'doubtful of the need to consider the protection and promotion of responsibilities along with rights' since the 'common law and statute books are replete with legal responsibilities'.<sup>180</sup> Dr Ben Saul noted:

The concept and practice of 'human responsibilities' has proven open to abuse and manipulation, and is frequently deployed to unjustifiably repress legitimate rights

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<sup>172</sup> T Ginnane, Submission.

<sup>173</sup> Bill Stefaniak, 'A reflection on the ACT Human Rights Act' in *Don't Leave Us with the Bill: the case against an Australian bill of rights* (2009) 312.

<sup>174</sup> For example, Queanbeyan (1), Community Roundtable.

<sup>175</sup> A Adair, Submission.

<sup>176</sup> B Schroeder, Submission.

<sup>177</sup> Gilbert + Tobin Centre of Public Law, Submission.

<sup>178</sup> For example, A Edwards and R McCorquodale, Submission.

<sup>179</sup> For example, M Pearce, Submission; Law Institute of Victoria, Submission; Australian Council of Social Service, Submission; A Edwards and R McCorquodale, Submission.

<sup>180</sup> For example, M Pearce, Submission.

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.<sup>181</sup>

Finally, a number of submissions proposed that responsibilities be recognised but not protected or promoted in the same way as rights. For example, submissions generally did not support the introduction of legally binding responsibilities.<sup>182</sup> In particular, the Committee heard concerns that the inclusion of ‘responsibilities’ could create an impression that rights are contingent on ‘good citizenship’.<sup>183</sup> There was, however, some support for references to responsibilities being included in the title, preamble or objects provision of a Human Rights Act.<sup>184</sup> Responsibilities could also form part of an education or community awareness campaign about rights and responsibilities.<sup>185</sup> According to Professor George Williams, this would send:

... an important signal that the law is not simply about vindicating individual rights but also about recognising important communitarian concerns (for example, not only that there is a right to vote but also that citizens have a responsibility to cast a ballot as part of a system of compulsory voting). Responsibilities might be reflected in the title to the instrument and also the preamble. The use of responsibilities also sends an important signal to parliamentarians that the law is not simply about judicial interpretation but has a core focus on parliamentary debate and indeed that Parliament has the primary role of balancing competing rights and determining human rights outcomes.<sup>186</sup>

### 4.3 The Committee’s findings

The Committee heard a range of views about which rights and responsibilities should be protected and promoted. Some people suggested that all of Australia’s obligations under international law should be reflected in domestic human rights protections; others focused on civil and political rights. The question of how economic, social and cultural rights should be protected was somewhat controversial. The rights of special and vulnerable groups in the Australian

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<sup>181</sup> B Saul, Submission.

<sup>182</sup> For example, Australian Human Rights Commission, Submission; Public Interest Advocacy Centre, Submission; Human Rights Council of Australia, Submission; Australian Council of Social Service, Submission; Victorian Bar, Submission. The Law Institute of Victoria noted that it would not support the inclusion in a federal Human Rights Act of binding responsibilities on individuals but would welcome further consideration of the matter at a later stage in the Act’s life.

<sup>183</sup> Australian Council of Social Service, Submission.

<sup>184</sup> For example, Australian Human Rights Commission, Submission; G Williams, Submission; Public Interest Advocacy Centre, Submission; Human Rights Council of Australia, Submission; NSW Charter Group, Submission.

<sup>185</sup> For example, Broome, Community Roundtable.

<sup>186</sup> G Williams, Submission.

community received particular attention. Finally, a number of new and emerging rights, such as the right to a clean environment, were referred to.

The Committee finds as follows:

- There is strong support for the notion that Australia should protect and promote all the rights contained in the international human rights treaties to which it is a party.
- Protection and promotion of civil and political rights in Australia is important to the Australian community.
- Protection and promotion of economic, social and cultural rights is important to the community, and the way they are protected and promoted has a major impact on the lives of many Australians. The right to adequate housing, the right to the highest attainable standard of physical and mental health, and the right to education are particular priorities for the community.
- Although there is support for better recognition of the responsibilities of government and individuals in relation to protection and promotion of human rights, most people feel that responsibilities need not be codified into law.

## 5 Are human rights adequately protected and promoted?

Chapter 4 describes the community's views on which rights and responsibilities need to be protected and promoted. This chapter deals with the question of whether these rights are already sufficiently protected and promoted in Australia. Generally, although the majority in the community seem to think their own rights are adequately protected, there is recognition that some are missing out and that the existing systems for protecting and promoting human rights could be improved.

### 5.1 The Australian tradition: 'a fair go' for all

In discussing the adequacy of the current system for protecting and promoting human rights, it is important to recognise the positive aspects of Australia's human rights record. As former Australian Labor Party President and Indigenous leader Warren Mundine noted at the public hearings, Australia's strengths lie in its democratic values and traditions, our sense of mateship and our belief in 'a fair go' for all.

In many ways Australia was a pioneer in the recognition of individual rights. As former Governor-General and Justice of the High Court Sir Ninian Stephen said:

A century or so ago Australia was very much a world leader in measures of constitutional and democratic reform. It had pioneered the secret ballot, was in the course of introducing adult franchise with the grant of votes to women, and the text of its new federal Constitution was not only being hammered out in public sessions by popularly elected delegates but was to depend for its adoption upon the vote of the people. These are but notable examples of what was an era of enterprising ventures in political reform.<sup>1</sup>

There appears to be general consensus that Australia measures well against many other countries in terms of its human rights protection.<sup>2</sup> There is a strong network of democratic institutions. Many Australians enjoy a standard of living that is at least equal to that in other First World countries and rarely would need to reflect on human rights or whether they are adequately protected.

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<sup>1</sup> Sir N Stephen, Foreword, in M Wilcox, *An Australian Charter of Rights?* (1993) v.

<sup>2</sup> For example, J Wood, Submission; K Budge, Submission; P Lucas, Submission, R and D Maude, Submission; Australian Chamber of Commerce and Industry, Submission.

But our record is not perfect. As Associate Professor Carolyn Evans noted:

It is important to acknowledge that, although Australia has had a comparatively good record of protection for human rights, it has a far from perfect record. From the beginning of nationhood in Australia there have been groups who have been discriminated against routinely and had their rights abused ... It is of little comfort to groups whose rights have been violated over long periods of time to know that their treatment is the exception rather than the rule.<sup>3</sup>

For example, while Australia was establishing itself as a progressive and advanced democracy, Indigenous peoples were often left behind. They were noticeably absent during the drafting of the Constitution, and ‘the only two original references to Indigenous people in the Australian Constitution of 1901 were both couched in the language of exclusion’.<sup>4</sup> The first express exclusion came by way of the power of Federal Parliament to make special laws for ‘the people of any race, other than the Aboriginal race’ pursuant to s. 51(xxvi) of the Constitution; and the second was in s. 127, which ‘excluded Aboriginal natives from being counted in the reckoning of the numbers of people of the Commonwealth or of a State’.<sup>5</sup>

Of the more than 35 000 people and organisations who presented submissions to the Committee, many expressed concern that the rights and benefits enjoyed by the majority are not shared by all. The research conducted by Colmar Brunton Social Research, however, revealed that most participants thought their human rights were adequately protected. In the telephone survey, 64 per cent of people agreed with the statement ‘Human rights in Australia are adequately protected’.<sup>6</sup> A similar attitude was reflected in a number of submissions and in the online forum.<sup>7</sup> While improving the protection of human rights was seen as desirable and possible, it generally was not considered urgent. Colmar Brunton noted, however, that focus group participants often confused their ‘experience’ of human rights with the rights’ ‘protection’, and participants assumed that, because they enjoy a particular right

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<sup>3</sup> C Evans, Submission.

<sup>4</sup> L O’Donoghue, *The Position of Indigenous People in National Constitutions: speeches from the conference, Canberra, 4-5 June 1993*, Council for Aboriginal Reconciliation and Constitutional Centenary Foundation (1993) 43.

<sup>5</sup> *ibid.* The 1967 referendum repealed s. 127 of the Constitution and removed the words ‘other than the Aboriginal race’ from s. 51(xxvi).

<sup>6</sup> Twenty-nine per cent were neutral and only 7 per cent disagreed with the statement—Colmar Brunton Social Research, *National Human Rights Consultation—community research report* (2009). As discussed in Chapter 1, Colmar Brunton conducted community research (which involved 15 focus groups and a national phone survey of 1200 people) and devolved consultations with groups who are especially vulnerable to having their rights threatened or violated. In addition, a recent telephone poll commissioned by Amnesty International Australia found that 84 per cent of participants believed that human rights are sufficiently protected in Australia (with 38 per cent believing their rights are completely protected and 54 per cent believing their rights are partially protected)—Amnesty International Australia, Submission.

<sup>7</sup> For example, C Schafer, Submission; A Prentice, Submission; D Colbourn, Submission; B Hambour, Submission; S Gear, Submission; E Micklethwaite, Submission; P Orton, Submission; Y Small, Submission; G Wye, Submission; N Hunter, Submission; B H Kinkead, Submission; C Barlow, Submission; G Schmid, Submission; lisaballinger27, Online Forum; P Newland, Online Forum; J Smuts, Online Forum.



daily, or have never felt it to be threatened, that right must be adequately protected under the law.<sup>8</sup>

Although most focus group participants reported that they had had no experience of their rights being violated, there was a recognition that some people and groups ‘fall through the cracks’ in the system. Among the groups identified as possibly needing greater protection (or at least assistance in exercising their rights) were children, people with a mental illness, the elderly, people with disabilities, carers, and Indigenous Australians (particularly those in remote areas).<sup>9</sup>

Colmar Brunton also conducted a devolved consultation with a number of groups, including homeless people, people with mental illness, people with physical disabilities, recently arrived refugees and immigrants, people in immigration detention, ex-prisoners, the aged, and people with drug or alcohol dependencies. It found that all these groups either explicitly reported that they do not get a fair go or described situations in which they were obviously not getting a fair go. Generally, there was a view that rights are protected so long as a person has the knowledge and means to assert them (or someone else to do so on their behalf). While there appears to be little understanding of human rights in the community, this is even more apparent—and has a more substantial impact—for people in these groups.<sup>10</sup>

Despite the Australian community believing in the idea of the fair go, the Public Interest Advocacy Centre commented that this attitude can go only part of the way in creating a culture in which human rights are respected and protected:

Certainly when a ‘fair go’ attitude is widespread it will have a significantly beneficial effect on the protection and promotion of human rights as it will limit or even stop infringements of human rights occurring in the first place. However, this ethos does not always extend itself to the policies and actions of government and the bureaucracy, the conduct of industry and business, and often fails to play out in the day-to-day lives of many in the community.<sup>11</sup>

Alice Edwards and Professor Robert McCorquodale noted:

It is insufficient to simply rely on ideologies and national concepts to protect human rights. As Australia proceeds to develop further its identity as a nation based on principles of equality and fairness, it must ensure that there is a firm legal foundation for these ideals.<sup>12</sup>

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<sup>8</sup> Colmar Brunton Social Research, *National Human Rights Consultation—community research report* (2009).

<sup>9</sup> *ibid.*

<sup>10</sup> Colmar Brunton Social Research, *National Human Rights Consultation—devolved consultation report* (2009).

<sup>11</sup> Public Interest Advocacy Centre, Submission.

<sup>12</sup> A Edwards and R McCorquodale, Submission.

The following sections assess whether there is such a ‘firm legal foundation’ by outlining the current mechanisms for the protection of human rights in Australia and noting their strengths and limitations.

## 5.2 International human rights law and Australia’s obligations

Australia’s obligations under international human rights law are found in treaties (that is, binding agreements entered into between States) and customary international law (that is, rules that are developed through the practice of States and recognised as binding on them). International human rights law requires a State to ‘respect, protect and fulfil’ the human rights of those within its jurisdiction.<sup>13</sup>

Australia adopts its treaty obligations in a two-step process—signature and ratification. By signing a treaty, Australia signals its ‘in-principle’ commitment but does not become bound by the treaty.<sup>14</sup> When it ratifies a treaty, it becomes a ‘State party’ and undertakes, as a matter of international law, to observe the rights and obligations expressed in the treaty. The treaty will not, however, automatically become part of Australian domestic law. For this to occur, the provisions of the treaty must be implemented domestically through legislation. In practice, not all of Australia’s international treaty obligations have been incorporated in domestic law.

As a matter of international law, the division of federal–state responsibilities cannot be used as an excuse for failure to comply with an international obligation. Extensive federal–state consultations are usually required to ensure that Australia can comply with its international legal obligations. This can involve enacting, amending or repealing federal or state or territory legislation to implement obligations or remove impediments to the enjoyment of particular rights and freedoms.

Australia is a party to the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights, which, together with the Universal Declaration of Human Rights, are known as the ‘International Bill of Rights’. These have been built on by a range of treaties that deal with the rights of individuals and groups with particular needs, such as women, children and people with disabilities. Australia is a party to a number of these treaties, among them the following:

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<sup>13</sup> For example, Mallesons Stephen Jaques Human Rights Law Group, Submission; Federation of Community Legal Centres (Vic), Submission; Human Rights Law Resource Centre (Human Rights Act for All Australians), Submission; Australian Council of Social Service, Submission.

<sup>14</sup> Specifically, by signing a treaty a State becomes obliged ‘to refrain from acts which would defeat the object and purpose of a treaty’: Vienna Convention on the Law of Treaties art. 18.

- the International Convention on the Elimination of All Forms of Racial Discrimination
- the Convention on the Elimination of All Forms of Discrimination against Women
- the Convention against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment
- the Convention on the Rights of the Child
- the Convention on the Rights of Persons with Disabilities.

Australia is also a party to the optional protocols to the International Covenant on Civil and Political Rights, the Convention on the Elimination of All Forms of Discrimination against Women and the Convention on the Rights of Persons with Disabilities (which provide an individual complaints mechanism, as discussed shortly); the optional protocols to the Convention on the Rights of the Child (on the involvement of children in armed conflict and on the sale of children, child prostitution and child pornography); and the second optional protocol to the International Covenant on Civil and Political Rights (aimed at abolition of the death penalty). It is working towards becoming a party to the optional protocol to the Convention against Torture (which enables the UN Committee against Torture to inspect places of detention). An optional protocol to the International Covenant on Economic, Social and Cultural Rights was adopted by the UN General Assembly in December 2008 and is to open for signature in September 2009.

In April 2009 the Federal Government made a formal statement in support of the UN Declaration on the Rights of Indigenous Peoples 2007.<sup>15</sup> While international declarations are not generally binding documents and do not create any enforceable obligations for States that adopt them, they do have moral and political significance.

As noted, Australia has not implemented all of its obligations under international law in domestic legislation. This means that these obligations cannot be enforced in Australian courts. There are, however, a number of mechanisms at the international level by which Australia can be held accountable for failing to fulfil its international human rights obligations.

## Reporting to UN Committees

For each of the human rights treaties just listed, there is a UN committee that monitors States' compliance. Australia is required to report to the committees every few years on its compliance with its treaty obligations. The reports are public

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<sup>15</sup> J Macklin MP, Minister for Families, Housing, Community Services and Indigenous Affairs, 'Statement on the United Nations Declaration on the Rights of Indigenous Peoples' (Speech delivered at Parliament House, Canberra, 3 April 2009).

documents and are tabled in parliament. Federal government representatives appear before the relevant committee to answer further questions. A committee may also take into account ‘shadow reports’ prepared by non-government organisations. After considering this information the committee issues ‘concluding observations’, making recommendations about ways of improving Australia’s compliance with its international obligations. The Federal Government then circulates these concluding observations to state and territory governments and considers whether and how they should be implemented. During 2009 concluding observations have been released on Australia’s compliance with both the ICCPR and the ICESCR.<sup>16</sup>

## **Individual complaints to UN Committees**

The optional protocols to some human rights treaties provide mechanisms by which individuals can lodge complaints against the State for human rights violations. If individuals feel their rights have been violated, and they have exhausted all avenues of redress in Australia, they can make a complaint to the relevant UN committee. Australia has agreed to such complaint mechanisms under the ICCPR, the International Convention on the Elimination of All Forms of Racial Discrimination, the Convention against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment, the Convention on the Elimination of All Forms of Discrimination against Women and the Convention on the Rights of Persons with Disabilities. The committees’ findings are not legally binding, but the publicity attached to them can place pressure on States to change their practices.

## **Human Rights Council mechanisms**

The Human Rights Council is an intergovernmental body established under the UN Charter. Comprising 47 member States, it monitors the human rights compliance of UN member States through a range of mechanisms, including ‘Universal Periodic Review’ (which reviews the human rights record of each member State every four years) and ‘Special Procedures’. Special Procedures involve the appointment of an individual (for example, a special rapporteur) or a working group to examine a specific country’s situation or a thematic matter of concern. They usually monitor the matter and report to the Human Rights Council on their findings and

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<sup>16</sup> Human Rights Committee, *Consideration of Reports Submitted by States Parties under Article 40 of the Covenant: concluding observations of the Human Rights Committee—Australia* (7 May 2009); Committee on Economic, Social and Cultural Rights, *Consideration of Reports Submitted by States Parties under Articles 16 and 17 of the Covenant: concluding observations of the Committee on Economic, Social and Cultural Rights—Australia* (22 May 2009).

recommendations.<sup>17</sup> In 2008 Australia issued a ‘standing invitation’ to UN special rapporteurs and other experts to visit the country.<sup>18</sup>

## The adequacy of international mechanisms

Throughout the Consultation concern was expressed about the ‘disconnect’ between the human rights obligations Australia has voluntarily adopted by ratifying international treaties and their implementation in domestic law. Many submissions made reference to the recent concluding observations of the committees that oversee compliance with the ICCPR and ICESCR.<sup>19</sup> While both committees acknowledged positive human rights developments in Australia, they also identified a range of areas in which Australia’s failure to implement its obligations under the treaties has had adverse human rights implications.<sup>20</sup>

As Elizabeth Evatt submitted, in the absence of domestic legislation that implements Australia’s international human rights obligations, Australians have no access to an effective remedy for some human rights violations.<sup>21</sup> This itself could constitute a breach of international law since a number of treaties (such as the ICCPR) oblige States parties to ensure that any person whose rights are violated has access to an effective remedy.<sup>22</sup>

As to the international mechanisms themselves, there is evidence of both their effectiveness and their limitations.

The *Toonen* matter is an example of the successful operation of the individual complaints mechanism. In 1991 Nicholas Toonen made a complaint to the Human Rights Committee (which oversees compliance with the ICCPR). At that time, consenting adult homosexual sex was an offence under the Tasmanian Criminal Code. The Human Rights Committee found that this violated article 17 of the ICCPR (the right to privacy).<sup>23</sup> In 1994 the Federal Parliament responded by passing the

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<sup>17</sup> *Manual of Operations of the Special Procedures of the Human Rights Council* (August 2008).

<sup>18</sup> Attorney-General and Minister for Foreign Affairs, ‘Invitation to United Nations human rights experts’ (Press release, 7 August 2008).

<sup>19</sup> For example, J Casben, Submission; National Native Title Council, Submission; Queensland Council of Social Service, Submission; Mallesons Stephen Jaques Human Rights Law Group, Submission; Human Rights Council of Australia, Submission; Australian Human Rights Commission, Submission.

<sup>20</sup> Human Rights Committee, *Consideration of Reports Submitted by States Parties under Article 40 of the Covenant: concluding observations of the Human Rights Committee—Australia* (7 May 2009); Committee on Economic, Social and Cultural Rights, *Consideration of Reports Submitted by States Parties under Articles 16 and 17 of the Covenant: concluding observations of the Committee on Economic, Social and Cultural Rights—Australia* (22 May 2009).

<sup>21</sup> E Evatt, Submission. Elizabeth Evatt is a former chair of the UN Committee on the Elimination of Discrimination Against Women and a former member of the UN Human Rights Committee.

<sup>22</sup> E Evatt, Submission, citing International Covenant on Civil and Political Rights art. 2(3).

<sup>23</sup> *Toonen v Australia*, Communication No. 488/1992 (1994). The Committee did not consider it necessary to determine whether there had been a breach of art. 26 of the ICCPR, which guarantees equality before the law.

*Human Rights (Sexual Conduct) Act 1994* (Cth), which overrode the Tasmanian provision, and the Tasmanian Parliament ultimately repealed the provision.<sup>24</sup>

There are a number of instances, however, where the Australian Government has either failed or refused to adopt the recommendations of these committees. For example, in *A v Australia*<sup>25</sup> the Human Rights Committee found that A's immigration detention was arbitrary (in violation of article 9(1) of the ICCPR) and that his inability to challenge the lawfulness of the detention breached article 9(4). The Committee recommended that Australia pay compensation to A, but the Federal Government rejected the recommendation.<sup>26</sup>

While the findings of treaty bodies can put political pressure on Australia to reconsider laws and policies that are found to be inconsistent with its international human rights obligations, the recommendations are not binding or enforceable.<sup>27</sup> As the Gilbert + Tobin Centre of Public Law noted:

the Australian Government cannot be compelled by a successful applicant to adhere to these recommendations ... [They] are unlikely to affect our domestic situation unless they receive media coverage and/or are incorporated into the policies of either or both of the major parties.<sup>28</sup>

### 5.3 The democratic system

Many submissions pointed to the strength of Australia's democratic institutions as a means of protecting and promoting human rights.

#### Australia's democratic institutions

- *The Australian Constitution.* The Constitution is in written form and can be amended only by referendum. This requires the approval of a majority of voters nationally, as well as a majority of voters in a majority of states.
- *Representative democracy.* Australia is a democratic nation that elects its governments by popular vote. For many this is a fundamental guarantee of human rights. As Steve Pasfield submitted, 'If the majority feel someone is not getting a fair go then they will speak at the ballot box'.<sup>29</sup>

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<sup>24</sup> N O'Neill, S Rice and R Douglas, *Retreat from Injustice: human rights law in Australia* (2004) 189.

<sup>25</sup> Communication No. 560/1993 (30 April 1997).

<sup>26</sup> N O'Neill, S Rice and R Douglas, *Retreat from Injustice: human rights law in Australia* (2004) 189.

<sup>27</sup> For example, Castan Centre for Human Rights Law, Submission; Australian Lawyers Alliance, Submission.

<sup>28</sup> Gilbert + Tobin Centre of Public Law (E Santow), Submission.

<sup>29</sup> S Pasfield, Submission. See also L Bagnall, Submission.

- *A federal system.* In Australia there is a national government and six state and two territory governments. The distribution of power between the different levels of government means that each can act as a check on the other.
- *Separation of powers.* Under the Constitution power is distributed between the executive, legislative and judicial arms of government. The separation of powers doctrine does not operate in a strict fashion in Australia (given that the members of the executive sit in parliament) except in relation to the independence of the judiciary. This means the judiciary can act as a check on the executive and the legislature and thereby protect individual rights.
- *Responsible government.* The doctrine of responsible government means that the executive is drawn from, and accountable to, parliament. Ministers are collectively responsible to parliament, and a government that loses the support of the House of Representatives must resign. Ministers are also individually responsible to parliament for the administration of their portfolios.<sup>30</sup>
- *Bicameral parliaments.* The Federal Parliament and all state parliaments except Queensland's are bicameral—meaning they have both an upper and a lower house.<sup>31</sup> Because of the different voting system for the upper house, that house can contain a majority of non-government members, as is usually the case with the Senate. This offers an additional check on the government's power.
- *Parliamentary committees.* Parliamentary committees—which are made up of members of one house of parliament or of both houses—can have a range of functions, including reviewing Bills and legislation for their impact on individual rights. For example, the Senate Scrutiny of Bills Committee is empowered to scrutinise Bills for their effect on fundamental rights and liberties.<sup>32</sup>
- *A free press.* The media is generally free to publish material that is critical of the government. This increases accountability and helps citizens make informed decisions at election time.

## The adequacy of democratic institutions

Throughout the Consultation some members of the community said Australia's network of democratic institutions is enough to protect human rights.<sup>33</sup> Many also recognised, however, that these institutions have limitations when it comes to the

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<sup>30</sup> M Groves and HP Lee (eds), *Australian Administrative Law: fundamentals, principles and doctrines* (2007) 4–5.

<sup>31</sup> The Northern Territory and the ACT have unicameral legislatures.

<sup>32</sup> See Senate Scrutiny of Bills Committee, Standing Order 24.

<sup>33</sup> For example, R Dennis, Submission; A Beveridge, Submission; A Teale-Sinclair, Submission; A Grills, Submission; J and T Van Duyn, Submission.

protection of human rights—in particular, the rights of minorities.<sup>34</sup> Ranil Ratnayeke submitted:

Democracy doesn't always work quickly enough to prevent human rights breaches, or to assist people whose rights have been breached. Australian history shows that in times of perceived emergency, governments have disregarded and failed to consider the human rights implications of new laws and policies.<sup>35</sup>

Although members of parliament are held accountable at the 'ballot box', at the federal level this is usually once every three years—by which time instances of human rights abuses might have faded from public memory and 'mainstream' concerns such as the economy are more decisive.<sup>36</sup> Further, elections usually express the will of the majority, whereas human rights abuses are usually felt by minorities who are often 'disadvantaged, marginalised and unpopular—in short, they are often persons to whom the majority are actively hostile or simply apathetic'.<sup>37</sup> Ballot box accountability also depends on the majority having been made aware of human rights abuses.

The existing parliamentary mechanisms do not always ensure that human rights are considered and debated before the passage of legislation.<sup>38</sup> Parliaments today deal with a huge volume of legislation, which makes it difficult for members to ensure they are aware of all the possible consequences of specific legislation before they are asked to vote on it.<sup>39</sup> In some cases parliament might be aware of human rights implications but nevertheless pass the legislation—for example, where a minority group is targeted as part of a 'law and order' campaign.<sup>40</sup> The Committee heard the following examples of legislation having been passed with insufficient consideration or observance of human rights.

### **National security legislation**

In submissions much concern was expressed in relation to the national security legislation that has been enacted in Australia since the terrorist attacks on 11 September 2001. Many submitted that the legislation does not strike a suitable

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<sup>34</sup> For example, International Commission of Jurists (Australia) Submission; C O'Connor, Submission; R Ratnayeke, Submission; D Klug, Submission; Gilbert + Tobin Centre of Public Law (E Santow), Submission; Public Interest Law Clearing House, Submission; Australian Council of Social Service, Submission; H Robert, Submission; Australian Lawyers Alliance, Submission.

<sup>35</sup> R Ratnayeke, Submission.

<sup>36</sup> For example, D Klug, Submission; Gilbert + Tobin Centre of Public Law (E Santow), Submission.

<sup>37</sup> Gilbert + Tobin Centre of Public Law (E Santow), Submission. See also Australian Council of Social Service, Submission; H Roberts, Submission; Public Interest Law Clearing House, Submission.

<sup>38</sup> For example, Australian Council of Social Service, Submission; A Freer, Submission; Australian Human Rights Commission, Submission; Australian Lawyers Alliance, Submission.

<sup>39</sup> Gilbert + Tobin Centre of Public Law (E Santow), Submission. See also Australian Lawyers Alliance, Submission.

<sup>40</sup> Public Interest Advocacy Centre, Submission.



balance between respect for human rights and national security.<sup>41</sup> The subject was also raised at many community roundtables<sup>42</sup>; one community roundtable participant noted:

We need to overcome the knee-jerk reaction that's immediate whenever we talk about terrorism and the fear that comes with that. We're essentially back in Tudor England ... People are able to be detained with no ability to contact family or lawyers for quite a period of time. These laws impinge on every single aspect of our society, our rights.<sup>43</sup>

The UN Human Rights Committee recently urged the Australian Government to amend national security laws to bring them into line with the ICCPR.<sup>44</sup> The Gilbert + Tobin Centre of Public Law noted a number of problems with the legislation, including the following<sup>45</sup>:

- It adopts an expansive interpretation of 'criminal liability', allowing individuals to be held criminally liable for their mere membership of a deemed 'terrorist organisation'.
- It allows individuals to be detained for several days without charge if that is seen as reasonably necessary to prevent a terrorist attack or to preserve evidence from a recent terrorist attack.<sup>46</sup>
- The definition of 'terrorist organisation' is too broad and has a 'chilling effect' on free speech.<sup>47</sup> Further, there is no obligation on the Attorney-General to publicise a decision to ban an organisation or to accord the organisation procedural fairness.
- It undermines the defendant's right to a fair trial. For example, in the absence of the defendant or his or her legal representatives, a court can decide whether to limit access to information on national security grounds.

Amnesty International Australia also noted that several offences reverse the onus of proof, undermining the right to be presumed innocent until proven guilty.<sup>48</sup>

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<sup>41</sup> For example, Victorian Bar, Submission; C Nicoll, Submission; N Broomhall, Submission; Law Council of Australia, Submission; R Watson, Submission; J Wilson, Submission; Australian Democrats, Submission; E Infield, Submission.

<sup>42</sup> For example, Queanbeyan, Community Roundtable; Alice Springs, Community Roundtable; Katherine, Community Roundtable; Busselton, Community Roundtable; Broken Hill, Community Roundtable; Mildura, Community Roundtable; Whyalla, Community Roundtable; Mt Gambier, Community Roundtable; Dubbo, Community Roundtable; Newcastle, Community Roundtable; Melbourne, Community Roundtable; Sydney, Community Roundtable; Cronulla, Community Roundtable. Tweed Heads, Community Roundtable.

<sup>43</sup> Human Rights Committee, *Consideration of Reports Submitted by States Parties under Article 40 of the Covenant: concluding observations of the Human Rights Committee—Australia* (7 May 2009) [11].

<sup>44</sup> Gilbert + Tobin Centre of Public Law (B Golder, A Lynch, N McGarrity and C Michaelsen), Submission.

<sup>45</sup> See also Law Council of Australia, Submission.

<sup>46</sup> *ibid.*

<sup>47</sup> Amnesty International Australia, Submission.

The Gilbert + Tobin Centre of Public Law submitted that the legislation was passed in a climate of fear, which led to ‘an emphasis on the purported effectiveness of counter-terrorism measures as opposed to a reasoned deliberation on the human rights implications of any planned legislation’.<sup>49</sup> The Public Interest Advocacy Centre raised particular concerns with the passage of the Anti-Terrorism Bill 2005 (Cth) and the Anti-Terrorism Bill (No 2) 2005 (Cth). It submitted that the Senate Scrutiny of Bills Committee failed to make substantive comment on some of the most restrictive elements of the Bills (such as the sedition provisions) and noted that the committee’s report was only available after the first Bill had been passed by the parliament.<sup>50</sup>

Particular concerns were also expressed about the practical operation of the national security legislation—notably in relation to the case of Dr Mohamed Haneef.<sup>51</sup> In 2007 Dr Haneef was detained for 12 days before being charged with providing a resource to a terrorist organisation (providing a mobile phone SIM card to his second cousins). He remained in custody for another 13 days until the charge was withdrawn. The subsequent inquiry, conducted by the Hon. John Clarke QC, resulted in a number of criticisms of anti-terrorism laws.<sup>52</sup>

### **‘Bikie’ legislation**

A number of submissions expressed concern about the so-called bikie laws that have been passed in several jurisdictions in Australia.<sup>53</sup> They noted in particular the way in which the legislation was rushed through the New South Wales Parliament, with insufficient debate on the human rights implications.<sup>54</sup>

The *Crimes (Criminal Organisations Control) Act 2009* (NSW) makes it a criminal offence for members of declared criminal organisations to associate with one another and prohibits them from being employed in certain occupations, such as the security industry. It permits the Police Commissioner to apply to an ‘eligible judge’ (declared to be eligible by the state’s Attorney-General) for a declaration that a particular organisation is a ‘declared organisation’. The Police Commissioner may object to a member of the organisation being present at the hearing while ‘criminal intelligence’ is disclosed.

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<sup>49</sup> Gilbert + Tobin Centre of Public Law (B Golder, A Lynch, N McGarrity and C Michaelsen), Submission.

<sup>50</sup> Public Interest Advocacy Centre, Submission.

<sup>51</sup> For example, Public Interest Law Clearing House, Submission; NSW Bar Association, Submission; P Cram, Submission; N Cranswick, Submission; Law Council of Australia, Submission; Castan Centre for Human Rights Law, Submission.

<sup>52</sup> See MJ Clarke, *Report of the Inquiry into the Case of Dr Mohamed Haneef* (2008).

<sup>53</sup> J Tendys, Submission; S Hague, Submission; A Lindstad, Submission; D Klug, Submission; Staff of the Legal Aid Commission (ACT), Submission; B Saul, Submission; NSW Charter Group, Submission; Castan Centre for Human Rights Law, Submission.

<sup>54</sup> Gilbert + Tobin Centre of Public Law (E Santow), Submission; NSW Bar Association, Submission.

The Bill was passed by both houses of parliament less than 24 hours after its introduction. The Legislation Review Committee expressed a number of reservations about the Bill's impact on individual rights, but its report was not completed, published and tabled until more than a month after the Bill had been passed.<sup>55</sup>

### **The Northern Territory Intervention**

Many submissions and community roundtable participants were worried by the Northern Territory Emergency Response legislation, which introduced measures to deal with welfare problems, child sexual abuse and family violence in Indigenous communities in the Northern Territory. The legislation was cited as evidence that 'there is inadequate protection of rights of Indigenous peoples'.<sup>56</sup>

Although aspects of the Intervention appear to have a degree of community support (including among some of the Indigenous people affected by them), concern was raised about the discriminatory impact of the measures and the process by which they have been implemented.<sup>57</sup> The Australian Council of Social Service, for example, submitted that the Intervention has infringed a number of human rights, including the right to self-determination (since the response was developed in the absence of consultation with affected Indigenous communities), the right to social security (under the policy of income management), the right to freedom of movement (since the 'basics card' can be reliably used only in designated areas) and Indigenous land rights (as a result of the compulsory acquisition of Indigenous-held land under five-year leases).<sup>58</sup>

A particular concern has been expressed about suspension of the operation of the *Racial Discrimination Act 1975* (Cth) in relation to the Intervention legislation.<sup>59</sup> Since there is no guarantee of equality under the Constitution, the Federal Parliament can override the Act (and other anti-discrimination legislation) at any time and adopt laws that discriminate on the basis of race.<sup>60</sup>

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<sup>55</sup> See NSW Bar Association, Submission.

<sup>56</sup> NSW Reconciliation Council, Submission.

<sup>57</sup> For example, Mullumbimby Intervention Awareness Group, Submission; Victorian Aboriginal Child Care Agency, Submission; K Valentine, Submission; NSW Reconciliation Council, Submission; G Nanni, Submission; Victorian Bar, Submission; B Coyne, Submission; Australian Human Rights Commission, Submission; M Hagley, Submission; Australian Council of Social Service, Submission. For example, Tennant Creek, Community Roundtable; Alice Springs, Community Roundtable; Katherine, Community Roundtable; Yirrkala, Community Roundtable; Mt Gambier, Community Roundtable; Dubbo, Community Roundtable; Newcastle, Community Roundtable; Cronulla, Community Roundtable.

<sup>58</sup> Australian Council of Social Service, Submission.

<sup>59</sup> Foundation for Aboriginal and Islander Research Action, Submission; Aboriginal and Torres Strait Islander Legal Services, Submission; Close the Gap Campaign Steering Committee for Indigenous Health Equality, Submission; B Smith, Submission; Australian Council of Social Service, Submission; Public Interest Advocacy Centre, Submission; Northern Territory Council of Social Service, Submission; Centre for Human Rights Education (Curtin University), Submission.

<sup>60</sup> For example, Aboriginal and Torres Strait Islander Legal Services, Submission; Close the Gap Campaign Steering Committee for Indigenous Health Equality, Submission; Australian Human Rights Commission, Submission.

The Australian Human Rights Commission submitted, 'It is clear that Parliament did not hold an informed and rigorous debate about the serious potential human rights implications of the new legislation'.<sup>61</sup> The 600 pages of Intervention legislation were passed by the House of Representatives nine hours after they were introduced.<sup>62</sup> Debate on suspension of the Racial Discrimination Act lasted a mere 13 minutes.<sup>63</sup>

### The immigration regime

Many submissions pointed to aspects of Australia's immigration regime that undermine fundamental human rights. This subject was repeatedly raised at community roundtables.<sup>64</sup> Some cited the immigration legislation as another example of Australia's democratic institutions failing to adequately protect human rights.<sup>65</sup>

There was concern about the mandatory detention of 'unlawful' immigrants, which is said to violate a number of Australia's international human rights obligations, including the prohibition on arbitrary detention under article 9(1) of the ICCPR.<sup>66</sup> The concern remains, even after the Federal Government's recent changes to



The Committee and Mr Tim Overall, mayor of Queanbeyan, at the first community roundtable.

detention policy. The Refugee and Immigration Legal Service noted the damaging psychological effects of detention on asylum seekers, particularly children.<sup>67</sup>

Submissions also pointed to the problems with Australia's bridging visa system—in particularly Bridging Visa E, which denies its holders the right to work (even

<sup>61</sup> Australian Human Rights Commission, Submission.

<sup>62</sup> A Ramsey, 'No opposition, no debate, no contest', *The Sydney Morning Herald*, 11 August 2007, cited in Australian Human Rights Commission, Submission.

<sup>63</sup> G Williams, 'Wisdom of politicians is frail shield for our rights', *The Sydney Morning Herald*, 2 June 2009.

<sup>64</sup> For example, Queanbeyan, Community Roundtable; Whyalla, Community Roundtable; Dubbo, Community Roundtable; Sydney, Community Roundtable; Mt Gambier, Community Roundtable; Melbourne, Community Roundtable.

<sup>65</sup> For example, C O'Connor, Submission; Law Council of Australia, Submission.

<sup>66</sup> For example, Amnesty International Australia, Submission; Human Rights Council of Australia, Submission; Gilbert + Tobin Centre of Public Law (J McAdam and T Garcia), Submission; Refugee and Immigration Legal Service, Submission; ChilOut—Children Out of Detention, Submission; Asylum Seeker Resource Centre, Submission; C Byrne, Submission; P Wall, Submission; R Nairn, Submission.

<sup>67</sup> Refugee and Immigration Legal Service, Submission. See also Asylum Seeker Resource Centre, Submission; ChilOut—Children Out of Detention, Submission.

voluntarily).<sup>68</sup> Concern was also expressed about the offshore processing of asylum seekers, and it was said that the provision of essential services (such as interpreters, counsellors and legal advisors) is compromised by the facilities being so far away.<sup>69</sup>

## 5.4 The Australian Constitution

Enshrining human rights in the Constitution is said to be the strongest form of protection for those rights. This is because the Constitution can be altered only by referendum. Any federal legislation that is inconsistent with the Constitution is rendered invalid.

Throughout the Consultation some people expressed surprise to discover that the Constitution does not contain a bill of rights. In fact, the Constitution contains only a small number of rights, or mechanisms for protecting rights. Some of these rights are expressly included in the Constitution; others have been implied from its text and structure.

### Express rights

The Constitution expressly provides for a number of rights, among them the following:

- *The right to trial by jury (s. 80)*. This right applies only to federal offences and only to those who are to be tried by indictment.<sup>70</sup>
- *Freedom of religion (s. 116)*. This provides that ‘the Commonwealth shall not make any law for establishing any religion, or for imposing any religious observance, or for prohibiting the free exercise of any religion, and no religious test shall be required as a qualification for any office or public trust under the Commonwealth’. Some submissions argued that s. 116 is a sufficient guarantee of freedom of religion<sup>71</sup>, but the section has generally been interpreted narrowly, and no claim based on the provision has ever been upheld.<sup>72</sup>
- *A prohibition on discrimination based on residence (s. 117)*. This prohibits governments from imposing ‘any disability or discrimination’ based on an

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<sup>68</sup> For example, Refugee and Immigration Legal Service, Submission; ChilOut—Children Out of Detention, Submission; Gilbert + Tobin Centre of Public Law (J McAdam and T Garcia), Submission.

<sup>69</sup> Gilbert + Tobin Centre of Public Law (J McAdam and T Garcia), Submission; Refugee and Immigration Legal Service, Submission; Centre for Human Rights Education (Curtin University), Submission.

<sup>70</sup> For example, *R v Archdall and Roskrugge; Ex parte Carrigan and Brown* (1928) 41 CLR 128.

<sup>71</sup> For example, D Pennington, Submission; R Fisher, Submission; P Connelly, Submission; Catholic Women’s League Australia, Submission.

<sup>72</sup> G Williams, *A Charter of Rights for Australia* (2007) 36–37. For example, *Krygger v Williams* (1912) 15 CLR 366.

individual's place of residence.<sup>73</sup> For example, Victoria could not exclude the residents of any other state from its universities.<sup>74</sup>

- *The right to review of government actions* (s. 75(v)). This gives the High Court the power to issue writs of mandamus (which compel the performance of a public duty), prohibition and injunction (which forbid or prevent specified acts or omissions) against officers of the Commonwealth. Individuals are able to seek judicial review of federal government action.<sup>75</sup>
- *Acquisition of property on just terms* (s. 51(xxxi)). This provides that the Commonwealth can acquire 'property' only on 'just terms'. This is the provision that was made famous by the film *The Castle*. It means that if the Federal Government compulsorily acquires a person's property it must provide fair value in return.<sup>76</sup>
- *Freedom of interstate trade* (s. 92). This provides that 'trade, commerce and intercourse among the States ... shall be absolutely free'. This has been interpreted as prohibiting laws that are protectionist—in the sense of adversely discriminating against residents of a particular state or territory in a way that is not reasonably considered necessary.<sup>77</sup>

## Implied rights

- *The separation of powers*. The High Court has inferred from the structure of the Constitution that there is to be a 'separation of powers' between the judicial branch of government and the legislative and executive branches. This separation indirectly protects human rights because it ensures the independence of the judiciary and prevents the executive or legislature from exercising judicial power. For example, the legislature cannot impose punitive detention on people without them having been judged and sentenced to imprisonment by a court.<sup>78</sup>
- *Freedom of political communication*. The High Court has inferred a freedom of political communication from ss. 7 and 24 of the Constitution.<sup>79</sup> These provisions require that members of the Senate and the House of Representatives be 'directly chosen by the people'. The High Court found that for this to be an informed choice, there must be free access to relevant political

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<sup>73</sup> For example, *Street v Queensland Bar Association* (1989) 168 CLR 461.

<sup>74</sup> G Williams, *A Charter of Rights for Australia* (2007) 37.

<sup>75</sup> For example, *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476.

<sup>76</sup> G Williams, *A Charter of Rights for Australia* (2007) 38–9. For example, *Nelungaloo Pty Ltd v Commonwealth* (1947) 75 CLR 495; *Grace Bros Pty Ltd v Commonwealth* (1946) 72 CLR 269.

<sup>77</sup> For example, *Betfair Pty Limited v Western Australia* (2008) 234 CLR 418.

<sup>78</sup> *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1. For the application of this doctrine to the states see *Kable v DPP* (1996) 189 CLR 51.

<sup>79</sup> *Australian Capital Television Pty Limited v Commonwealth* (1992) 177 CLR 106.

information. The implied right to freedom of political communication is not as broad as a general right to freedom of expression.

- *The right to vote.*<sup>80</sup> In *Roach v Electoral Commissioner*<sup>81</sup> the High Court held that legislation that prohibited all people serving a prison sentence from voting in federal elections was unconstitutional. The court held that these provisions were inconsistent with the system of representative and responsible government mandated by the Constitution. It accepted, however, that the right to vote could be limited where there are substantial reasons for doing so—for example, on the basis of citizenship or the length of a prisoner’s sentence.

## **The adequacy of Constitutional protections**

Many submissions emphasised that the rights in the Constitution are limited in scope and generally have been interpreted narrowly by the courts.<sup>82</sup> Further, the remedies available for their breach are limited: ‘individuals whose “constitutional rights” have been violated have no independent cause of action against the Commonwealth’.<sup>83</sup> The remedy is often a simple declaration that particular legislation or executive action is unlawful.

Some noted that the limited human rights protection afforded by the Constitution is a product of the fact that the Constitution was not designed to protect individual rights but rather to limit the powers of the new federal government as against the states.<sup>84</sup> Dr Amelia Simpson and James Stellios submitted that the provisions often identified as constitutional rights are better understood as provisions forming part of the federal architecture of the Constitution and thus should not be a weighty consideration in determining whether our rights are adequately protected.<sup>85</sup>

The Australian Council of Social Service also noted that, because some constitutional rights are not written down but are developed by case law, they are

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<sup>80</sup> Section 41 of the Constitution grants the right to vote in federal elections to any ‘adult person who has or acquires a right to vote at elections for the more numerous House of the Parliament of a State’. Since the High Court has held that this applies only to a person who was entitled to vote in a state election before 1902, the right is meaningless—*R v Pearson; Ex parte Sipka* (1983) 152 CLR 254.

<sup>81</sup> (2007) 233 CLR 162.

<sup>82</sup> For example, Australian Association of Women Judges, Submission; Law Institute of Victoria, Submission; Mallesons Stephen Jaques Human Rights Law Group, Submission; Human Rights Council of Australia, Submission; Public Interest Advocacy Centre, Submission; Intellectual Disability Rights Service, Submission; J Debeljak, Submission; Gilbert + Tobin Centre of Public Law (E Santow), Submission; NSW Bar Association, Submission.

<sup>83</sup> Gilbert + Tobin Centre of Public Law (E Santow), Submission.

<sup>84</sup> For example, ACT Human Rights Commission, Submission; Australian Human Rights Commission, Submission; Gilbert + Tobin Centre of Public Law (E Santow), Submission; Amnesty Legal Group (Vic), Submission; Australian Lawyers Alliance, Submission.

<sup>85</sup> A Simpson and J Stellios, Submission.

inaccessible to non-lawyers and particularly people who have low levels of literacy and education.<sup>86</sup>

## 5.5 Legislative protections

As noted, Australia's obligations under international human rights law are enforceable in Australia only if they have been implemented in domestic legislation. Australia has implemented some but not all of its international human rights obligations.

### Federal legislation

One of Australia's obligations under international human rights law is to prohibit discrimination on a number of grounds. The Federal Parliament has gone part of the way to fulfilling this obligation by passing the following legislation:

- The *Racial Discrimination Act 1975* partially implements Australia's obligations under the International Convention on the Elimination of All Forms of Racial Discrimination. It prohibits discrimination against a person on the grounds of race, colour, descent or national or ethnic origin. It also prohibits offensive behaviour based on racial hatred (vilification) on all these grounds other than descent.
- The *Sex Discrimination Act 1984* partially implements Australia's obligations under the Convention on the Elimination of All Forms of Discrimination against Women. It prohibits discrimination on the grounds of sex, marital status, pregnancy and potential pregnancy in areas such as employment, accommodation, education, the provision of goods, facilities and services, the disposal of land, and the activities of clubs. It also prohibits sexual harassment.
- The *Age Discrimination Act 2004* implements parts of the ICCPR, the ICESCR, the Convention on the Rights of the Child and the ILO Convention Concerning Discrimination in Respect of Employment and Occupation. It prohibits discrimination on the basis of age in many areas of public life, including employment, access to goods, services and facilities, access to premises, administration of federal laws and programs, education, accommodation, the disposal of land, and requests for information.
- The *Disability Discrimination Act 1992* implements parts of the ICCPR, the ICESCR, the Convention on the Rights of the Child and the ILO Convention Concerning Discrimination in Respect of Employment and Occupation. It prohibits discrimination against people with disabilities in the areas of

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<sup>86</sup> Australian Council of Social Service, Submission.



employment, education, the provision of goods, services and facilities, accommodation, the disposal of land, the activities of clubs, sport, access to premises, the administration of federal laws and programs, and requests for information.

A number of other pieces of federal legislation protect human rights, among them the *Australian Human Rights Commission Act 1986* (which establishes the Australian Human Rights Commission, as discussed), laws regulating the use of police powers, laws protecting privacy, laws providing access to social security, health care and public education, and industrial relations laws. For example, acts constituting torture and other cruel, inhuman or degrading treatment or punishment are a criminal offence or a civil wrong, or both, in all Australian jurisdictions.<sup>87</sup>

## State and territory legislation

The states and territories have each enacted laws prohibiting discrimination.<sup>88</sup> As at the federal level, the states and territories also have a variety of other laws that protect individual rights in specific contexts—for example, laws limiting police powers and protecting privacy. In addition, as noted, the ACT and Victoria have both introduced statutory human rights legislation: the *Human Rights Act 2004* (ACT) and the *Charter of Human Rights and Responsibilities Act 2006* (Vic), which are discussed in Chapter 11.

## Adequacy of legislative protections

The Amnesty Legal Group (Vic) submitted that the problem with protecting rights through a range of different pieces of legislation is that it ‘limits the accessibility and understanding of rights by the Australian public’.<sup>89</sup> The other main problem with this method is that legislation is always vulnerable to amendment or suspension. For example, as outlined, the Federal Government suspended the Racial Discrimination Act in order to implement the Northern Territory Intervention. It was for this reason that many Consultation participants preferred to enshrine human rights in the Constitution<sup>90</sup>, which can be amended only by referendum.

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<sup>87</sup> *Australia's Fourth Report under the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (2004) app. 1.

<sup>88</sup> *Anti-Discrimination Act 1992* (NT), *Anti-Discrimination Act 1998* (Tas), *Anti-Discrimination Act 1991* (Qld), *Anti-Discrimination Act 1977* (NSW), *Discrimination Act 1991* (ACT), *Equal Opportunity Act 1984* (SA), *Equal Opportunity Act 1995* (Vic), *Equal Opportunity Act 1984* (WA), *Racial Vilification Act 1996* (SA) and *Racial and Religious Tolerance Act 2001* (Vic).

<sup>89</sup> Amnesty Legal Group (Vic), Submission. See also Australian Lawyers Alliance, Submission.

<sup>90</sup> For example, Aboriginal and Torres Strait Islander Legal Services, Submission; Victorian Aboriginal Child Care Agency, Submission; A Edwards and R McCorquodale, Submission, Human Rights Council of Australia, Submission; Federation of Ethnic Communities Councils of Australia, Submission; People for Constitutional Human Rights, Submission; S Ozdowski, Submission; V Bennett, Submission.

A large number of submissions focused on the inadequacies of the anti-discrimination legislation<sup>91</sup>, a subject that was also raised at community roundtables.<sup>92</sup> The following outlines the main criticisms made:

- The anti-discrimination framework is hard to understand and apply, there being inconsistencies between federal, state and territory laws.<sup>93</sup> For example, different federal laws adopt different tests for discrimination and exempt different groups from their application.<sup>94</sup>
- Anti-discrimination legislation prohibits discriminatory conduct, rather than requiring non-discriminatory conduct or promoting equality.<sup>95</sup>
- Federal laws prohibit discrimination on a more limited range of grounds than the state laws.<sup>96</sup> There was a particular concern that discrimination against lesbian, gay, bisexual, transgender and intersex people is not prohibited at the federal level.<sup>97</sup>
- The test for ‘direct’ discrimination is very difficult to make out.<sup>98</sup> Further, the applicant bears the onus of proof, which is hard to satisfy given that most of the relevant evidence is within the control of the discriminator.<sup>99</sup>
- Anti-discrimination legislation fails to deal with intersectional discrimination—that is, cases where individuals are discriminated against on more than one basis.<sup>100</sup>
- The Australian Human Rights Commission has insufficient power to investigate instances of discrimination—particularly systemic discrimination—and enforce its findings.<sup>101</sup>

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<sup>91</sup> For example, Australian Human Rights Commission, Submission; LGBTI Network, Submission; UNIFEM Australia, Submission; Seniors Rights Victoria, Submission.

<sup>92</sup> For example, Broken Hill, Community Roundtable; Dubbo, Community Roundtable; Sydney, Community Roundtable; Cronulla, Community Roundtable.

<sup>93</sup> Disability Discrimination Legal Service, Submission; UNIFEM Australia, Submission; Office of the Anti-Discrimination Commissioner (Tasmania), Submission; Australian Human Rights Commission, Submission.

<sup>94</sup> Australian Human Rights Commission, Submission.

<sup>95</sup> For example, B Smith, Submission; Australian Federation of Disability Organisations, Submission; NSW Council of Social Service, Submission; D Allen, Submission; Combined Community Legal Centres Group (NSW), Submission.

<sup>96</sup> For example, Australian Human Rights Commission, Submission; Law Council of Australia, Submission; Office of the Anti-Discrimination Commissioner (Tasmania), Submission; Human Rights Law Resource Centre (Educate, Engage, Empower), Submission.

<sup>97</sup> For example, J Goldbaum, Submission; Anti-Discrimination Commission Queensland, Submission; AIDS Council of NSW, Submission; Australian Coalition for Equality, Submission; LGBTI Network, Submission; t.omorley, Online Forum; AGMC Inc, Submission; Ministerial Advisory Committee on Gay, Lesbian, Bisexual, Transgender and Intersex Health and Wellbeing, Submission.

<sup>98</sup> Australian Human Rights Commission, Submission; Anti-Discrimination Commission Queensland, Submission.

<sup>99</sup> For example, Australian Human Rights Commission, Submission; J Empson, Submission.

<sup>100</sup> For example, WomenSpeak Alliance, Submission; Law Council of Australia, Submission; Mental Health Legal Centre, Submission; AGMC Inc, Submission.

<sup>101</sup> For example, D Allen, Submission; Law Council of Australia, Submission.

- Some thought the exemptions given to particular organisations under anti-discrimination legislation were too broad.<sup>102</sup> On the other hand, several submissions noted the importance of exemptions for religious organisations.<sup>103</sup>

## 5.6 Administrative law

Administrative law regulates the decisions of agencies of the executive government—for example, Ministers, departments and the individual officials working for them.<sup>104</sup> In addition to providing a framework for people to question or challenge the decisions of these agencies, the intention is to encourage standards of lawfulness, fairness, rationality and accountability in public administration.

Administrative law also provides mechanisms for obtaining reasons for an administrative decision, for gaining access to information held by government (for example, under the *Freedom of Information Act 1982* (Cth)) and for protecting personal information held by government (for example, under the *Privacy Act 1988* (Cth)).<sup>105</sup>

Government action is subject to both merits review and judicial review. Merits review is performed by non-judicial bodies such as tribunals (for example, the Administrative Appeals Tribunal). When performing this task, tribunals ‘stand in the shoes’ of the original decision maker and decide whether the decision made was the correct or preferable one. They might even substitute their own decision for that of the original decision maker. In contrast, judicial review is performed by courts, which review the legality, rather than the merits, of the decision. Importantly, there is no general power to review government action for its compliance with human rights. Courts can, however, have cause to consider human rights if, for example, the subject matter, scope and purpose of the legislation under which the particular action was taken make ‘human rights’ a relevant consideration the decision maker was bound to take into account.

Human rights have also become a greater feature in government decision making since the High Court’s decision in the *Teoh* Case.<sup>106</sup> The High Court held that when Australia has ratified an international treaty this creates a ‘legitimate expectation’, in the absence of statutory or executive indications to the contrary, that

<sup>102</sup> For example, J Goldbaum, Submission; V Ray, Submission; Australian Education Union, Submission; OUTthere Rural Victorian Youth Council for Sexual Diversity, Submission.

<sup>103</sup> For example, D Little, Submission; L Smith, Submission; G Robertson, Submission.

<sup>104</sup> See M Groves & HP Lee (eds), *Australian Administrative Law: fundamentals, principles and doctrines* (2007) 1.

<sup>105</sup> R Creyke, ‘The performance of administrative law in protecting rights’ in T Campbell, J Goldsworthy and A Stone (eds), *Protecting Rights Without a Bill of Rights* (2006) 101, 102.

<sup>106</sup> *Minister of State for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273.

administrative decision makers will act in conformity with the treaty.<sup>107</sup> In practice, this principle does not prevent decision makers from departing from that expectation: it merely means that if they propose to depart from it they must give the person affected an opportunity to make submissions against the proposed course of action.

## **The adequacy of administrative law**

Administrative law is limited when it comes to the protection of human rights. For example, merits review by tribunals is available only when the legislation under which the particular decision was made provides for such review. There is no general right to have a decision reviewed by a tribunal.

As mentioned, judicial review is also limited by the absence of a general legal obligation on decision makers to consider the human rights implications of a decision.<sup>108</sup> Further, the remedies available under judicial review generally apply to the ‘procedural aspects, rather than the substantive aspects, of public decision-making: such remedies often cannot right the relevant wrongs’.<sup>109</sup> The remedy is usually a declaration that the decision was unlawful and the matter can be sent back to the original decision maker for determination. One participant in the devolved consultations expressed frustration at this process: ‘There is no other country in the world [that] has this process where a federal court can overturn a tribunal decision to have it return to the tribunal and the same decision made again’.<sup>110</sup>

The practical impact of the *Teoh* decision is now uncertain. Since that decision successive federal governments have tried to avoid its operation by making executive statements that no ‘legitimate expectations’ arise from Australia’s ratification of human rights treaties and by introducing into parliament legislation to similar effect, which later lapsed.<sup>111</sup> Although the *Teoh* decision still stands, subsequent case law suggests that the High Court might not follow it in the future.<sup>112</sup>

The Committee was informed of a number of cases in which administrative decision making or executive action has led to apparent breaches of human rights.

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<sup>107</sup> (1995) 183 CLR 273, 291–2 (Mason CJ and Deane J).

<sup>108</sup> For example, Australian Human Rights Commission, Submission; Law Council of Australia, Submission; Castan Centre for Human Rights Law, Submission.

<sup>109</sup> Castan Centre for Human Rights Law, Submission.

<sup>110</sup> Colmar Brunton Social Research, *National Human Rights Consultation—devolved consultation report* (2009).

<sup>111</sup> See, generally, N O’Neill, S Rice and R Douglas, *Retreat from Injustice: human rights law in Australia* (2004) 187. See also Mallesons Stephen Jaques Human Rights Law Group, Submission.

<sup>112</sup> For example, *Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Lam* (2003) 214 CLR 1. See also H Charlesworth, M Chiam, D Hovell and G Williams, *No Country is an Island: Australia and international law* (2006) 30.

## The Bali Nine

In 2005 a group of young Australians now known as the ‘Bali Nine’ were arrested in Indonesia for their involvement in an attempt to smuggle heroin to Australia. Before their arrest, the Australian Federal Police provided to the Indonesian authorities information about their activities. Three of them are now awaiting execution in Indonesia.<sup>113</sup>

The father of one of the Bali Nine attended a community roundtable in Brisbane. He expressed dismay that the AFP had been told his son was travelling to Bali to transport drugs but had not sought to prevent his son from committing a crime it knew was punishable by the death penalty.

Representatives of four members of the Bali Nine brought an action against the AFP for exposing them to the death penalty. In *Rush v Commissioner of Police* the court found there was no cause of action. The judgment confirmed that the AFP can lawfully provide ‘police to police’ assistance in circumstances that could result in a person being charged with an offence punishable by death.<sup>114</sup> Justice Finn commented, however:

There is a need ... to address the procedures and protocols followed by members of the Australian Federal Police ... when providing information to the police forces of another country in circumstances which predictably could result in the charging of a person with an offence that would expose that person to the risk of the death penalty in that country.<sup>115</sup>

## Immigration detention

Submissions pointed to Australia’s system of immigration detention as an example of Australia’s federal government failing to adopt a human rights–based approach to the development and implementation of policy.<sup>116</sup>

The Gilbert + Tobin Centre of Public Law referred to the federal Ombudsman’s 2006 report on the wrongful detention of Mr T, an Australian citizen.<sup>117</sup> Mr T was detained on three separate occasions, for a total of 253 days. The Ombudsman’s report revealed a number of systemic problems within the immigration department, including a negative organisational culture, rigid application of policies and procedures that do not adequately accommodate the special needs of people suffering from mental illness, and poor training of departmental officers, including

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<sup>113</sup> Australian Human Rights Commission, Submission; Public Interest Law Clearing House, Submission.

<sup>114</sup> Australian Human Rights Commission, Submission.

<sup>115</sup> *Rush v Commissioner of Police* (2006) 150 FCR 165, 168.

<sup>116</sup> Gilbert + Tobin Centre of Public Law (E Santow), Submission; Gilbert + Tobin Centre of Public Law (J McAdam and T Garcia), Submission; Amnesty International Australia, Submission.

<sup>117</sup> Commonwealth and Immigration Ombudsman, *Report on Referred Immigration Cases: Mr T*, Report No. 04/2006 (2006).

in the management of mental health and in language, cultural and ethnic matters.<sup>118</sup>

Consultation participants gave personal accounts of their experiences at immigration detention centres. At the Whyalla community roundtable, Father Jim Monaghan described his experiences visiting Woomera Detention Centre between 1993 and 2003. He said solitary confinement was sometimes imposed for perceived breaches of procedure and that he was once told by an immigration official that he could return to Woomera only if he undertook not to speak to the media or anyone else about the conditions there.<sup>119</sup> At the public hearings Mustafa Najib, who was rescued by the *Tampa* and later held in immigration detention in Nauru, described his experience in detention as ‘psychological torture’ that highlighted his sense of powerlessness: no one could tell him what might eventually happen to him.

## 5.7 The common law

‘The common law’ refers to the system of law that has been developed by the courts over centuries, case by case. Over time, the common law has come to recognise particular human rights, including the right of an accused to a fair trial<sup>120</sup>, the right against self-incrimination<sup>121</sup>, immunity from search without warrant<sup>122</sup>, and the onus of proof in criminal proceedings (and the requirement for proof beyond reasonable doubt).<sup>123</sup>

The common law has also developed rules in relation to the interpretation of legislation that also function to protect human rights. The first is that when interpreting legislation the courts will presume that parliament did not intend to interfere with fundamental rights. As the High Court said in *Coco v The Queen*, ‘The courts should not impute to the legislature an intention to interfere with fundamental rights. Such an intention must be clearly manifested by unmistakable and unambiguous language’.<sup>124</sup>

In *Evans v State of New South Wales*<sup>125</sup> the Federal Court used this principle to strike down a clause in a regulation made under the *World Youth Day Act 2006* (NSW) that provided a power to direct a person to cease engaging in conduct that

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<sup>118</sup> *ibid.* 2.

<sup>119</sup> Whyalla, Community Roundtable.

<sup>120</sup> In *Dietrich v The Queen* (1992) 177 CLR 292 the High Court recognised the right to a fair trial and held that, where a person is charged with a serious criminal offence but cannot afford legal representation, the absence of any legal representation will be relevant to the fairness of the trial.

<sup>121</sup> See *Sorby v Commonwealth* (1983) 152 CLR 281.

<sup>122</sup> See *George v Rockett* (1990) 170 CLR 104.

<sup>123</sup> See *Woolmington v DPP* [1935] AC 462.

<sup>124</sup> (1994) 179 CLR 427, 437 (Mason CJ, Brennan, Gaudron and McHugh JJ).

<sup>125</sup> (2008) 168 FCR 576.

could cause ‘annoyance or inconvenience’ to pilgrims. The court interpreted the Act on the presumption that it was not parliament’s intention that a regulation would be made preventing or interfering with the exercise of freedom of speech.

Where international human rights law has not been incorporated through legislation, it can still influence domestic law in several ways.<sup>126</sup> It can be used in statutory interpretation. Usually, legislation must be interpreted and applied, so far as its language permits, so that it is consistent with, not in conflict with, established rules of international law.<sup>127</sup> There is, however, some debate about whether this rule is to be applied only when legislation is ambiguous<sup>128</sup> or where legislation is designed to implement Australia’s obligations under international law.<sup>129</sup> In practice, this means that courts can take international human rights law into account when interpreting legislation.



Melbourne community roundtable

International human rights law can also influence the development of the common law. For example, in *Mabo v Queensland (No 2)* Brennan J stated:

The common law does not necessarily conform with international law, but international law is a legitimate and important influence on the common law, especially when international law declares the existence of universal human rights. A common law doctrine founded on unjust discrimination in the enjoyment of civil and political rights demands reconsideration.<sup>130</sup>

Finally, international human rights law can be relevant in administrative decision making, as discussed.

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<sup>126</sup> This discussion is based on Sir G Brennan, ‘Human rights, international standards and the protection of minorities’, in P Cane (ed.), *Centenary Essays for the High Court of Australia* (2004).

<sup>127</sup> See *AMS v AIF* (1999) 199 CLR 160, 180 (Gleeson CJ, McHugh and Gummow JJ).

<sup>128</sup> For example, *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1, 38 (Brennan, Deane and Dawson JJ).

<sup>129</sup> For example, *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476, 492 (Gleeson CJ); *Coleman v Power* (2004) 220 CLR 1, 27–8 (Gleeson CJ).

<sup>130</sup> (1992) 175 CLR 1, 42. See also *Minister of State for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273, 288 (Mason CJ and Deane J).

## Adequacy of the common law

One major limitation of the common law is that it can be overridden at any time by legislation.<sup>131</sup> As was pointed out to the Committee, ‘Provided that the Parliament makes its intention clear, it can pass legislation violating almost any human right’ other than those protected by the Constitution.<sup>132</sup> Alison King submitted, ‘The common law is now the least significant and most insecure source of human rights protection as it may be readily overridden by an act of parliament’.<sup>133</sup>

This was made clear by the High Court in *Al-Kateb v Godwin*.<sup>134</sup> Mr Al-Kateb’s plight was raised in many submissions and at a number of community roundtables.<sup>135</sup> When he arrived in Australia without a valid visa he was placed in immigration detention. His application for refugee status was rejected. He sought release from detention but, because he was not a citizen of any country, no country was willing to accept him. The High Court was asked to decide whether the *Migration Act 1958* (Cth) authorised Mr Al-Kateb’s indefinite detention. Although the courts would usually seek to interpret the legislation consistently with the fundamental rights recognised under common law (here, the right to personal liberty), this could not be done where, as in this instance, the legislation abrogated the rights with clear and unambiguous language. Further, there was nothing in the Constitution preventing parliament from enacting such legislation.

Some submissions noted that the courts can develop the common law only to the extent that relevant cases are brought before it. Even when they are, a court is limited to declaring the rights of the parties before it: it cannot make general statements of rights.<sup>136</sup> Courts are also constrained by the doctrine of precedent, which means their decisions must be consistent with previous relevant decisions.<sup>137</sup>

Finally, some submissions pointed out that to rely on common law protections is to rely on judges to create and develop human rights protections.<sup>138</sup> Many have submitted that parliament, rather than ‘unelected judges’, should be responsible for determining human rights matters.

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<sup>131</sup> Australian Association of Women Judges, Submission; Amnesty Legal Group (Vic), Submission; Human Rights Law Resource Centre (Human Rights Act for All Australians), Submission; Public Interest Law Clearing House, Submission; Australian Human Rights Commission, Submission; Human Rights Council of Australia, Submission.

<sup>132</sup> Australian Democrats (ACT Division), Submission.

<sup>133</sup> A King, Submission.

<sup>134</sup> (2004) 219 CLR 562.

<sup>135</sup> For example, S Teale, Submission; J Dignam, Submission; A Coles, Submission; M D Osborne, Submission; Melbourne (3), Community Roundtable; Cronulla, Community Roundtable; Sydney (2), Community Roundtable.

<sup>136</sup> For example, Australian Association of Women Judges, Submission; Amnesty Legal Group (Vic), Submission; Human Rights Law Resource Centre (Human Rights Act for All Australians), Submission.

<sup>137</sup> Amnesty Legal Group (Vic), Submission; Public Interest Law Clearing House, Submission.

<sup>138</sup> Amnesty Legal Group (Vic), Submission; Human Rights Law Resource Centre (Human Rights Act for All Australians), Submission.



## 5.8 Oversight mechanisms

The human rights protections outlined in this chapter are buttressed by a number of independent oversight mechanisms. Not all of them have a specific ‘human rights’ jurisdiction, but they do contribute to maintaining the transparency and accountability of government.

### The Australian Human Rights Commission

The Australian Human Rights Commission (previously known as the Human Rights and Equal Opportunity Commission) is established under the *Australian Human Rights Commission Act 1986* (Cth). The commission has monitoring functions in relation to ‘human rights’<sup>139</sup> and also handles complaints of unlawful discrimination under the federal anti-discrimination legislation.

In relation to ‘human rights’ (as defined), the commission has the power to do the following<sup>140</sup>:

- examine federal laws—and, when requested by the Minister, Bills—to assess their consistency with human rights
- inquire into federal government acts and practices that might be inconsistent with or contrary to human rights. The commission may conciliate the matters that gave rise to the inquiry or, if conciliation is not possible or appropriate, report to the Minister
- promote an understanding and acceptance of human rights in Australia
- conduct research and educational programs for the purpose of promoting human rights
- on its own initiative or when requested by the Minister, report on laws that should be made in connection with human rights or action that should be taken to comply with human rights
- intervene, with the leave of the court, in proceedings involving human rights.

When a complaint is made under the federal anti-discrimination legislation, the commission may inquire into and attempt to conciliate the complaint. If the president of the commission terminates the complaint—for example, on being

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<sup>139</sup> Defined to include those rights under the ICCPR, the ILO Convention Concerning Discrimination in Respect of Employment and Occupation, the Declaration on the Rights of the Child, the Declaration on the Rights of Mentally Retarded Persons, the Declaration on the Rights of Disabled Persons, the Convention on the Rights of Persons with Disabilities, the Convention on the Rights of the Child, and the Declaration on the Elimination of All Forms of Intolerance and of Discrimination based on Religion or Belief—Australian Human Rights Commission, Submission.

<sup>140</sup> See *Australian Human Rights Commission Act 1986* (Cth) s. 11.

satisfied that there was no unlawful discrimination or the complaint was trivial or vexatious or when conciliation is unsuccessful—the complainant may make an application to the Federal Court or the Federal Magistrates Court alleging unlawful discrimination.<sup>141</sup>

During 2007–08 the Australian Human Rights Commission received 2077 complaints—a 17 per cent increase on the previous year.<sup>142</sup>

## **The Ombudsman and other mechanisms**

The federal Ombudsman can investigate the actions of government agencies, either on his or her own initiative or in response to a complaint.<sup>143</sup> The Ombudsman can investigate government action and report to the agency when he or she finds, for example, that the agency's action was contrary to law or unreasonable, unjust, oppressive or improperly discriminatory.<sup>144</sup> The Ombudsman also has an ongoing role in reporting to parliament about people held in long-term immigration detention.<sup>145</sup>

Among other oversight mechanisms are the Office of the Privacy Commissioner, which investigates complaints about breaches of the *Privacy Act 1988* (Cth) by federal and ACT government agencies and private sector organisations. The Auditor-General also plays a role in monitoring government action by providing auditing services to parliament and public sector agencies.<sup>146</sup> Additionally, the Productivity Commission can be asked by government to inquire into matters related to industry and productivity. For example, in 2003 the commission was asked to conduct a review of the *Disability Discrimination Act 1992* (Cth); it found, 'Overall, the DDA has been reasonably effective in reducing discrimination. But its report card is mixed and there is some way to go before its objectives are achieved'.<sup>147</sup>

## **The limitations of oversight mechanisms**

Many submissions highlighted the limits of the Australian Human Rights Commission's powers; the subject was also raised at community roundtables.<sup>148</sup> The following were the main criticisms:

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<sup>141</sup> See *Australian Human Rights Commission Act 1986* (Cth) Pt IIB.

<sup>142</sup> Human Rights and Equal Opportunity Commission, *Annual Report 2007–08* (2008), vii.

<sup>143</sup> *Ombudsman Act 1976* (Cth) s. 5.

<sup>144</sup> *ibid.* s. 15.

<sup>145</sup> See Commonwealth Ombudsman, *Immigration Reports Tabled in Parliament*, <[http://ombudsman.gov.au/commonwealth/publish.nsf/Content/publications\\_immigrationreports](http://ombudsman.gov.au/commonwealth/publish.nsf/Content/publications_immigrationreports)> at 7 September 2009.

<sup>146</sup> See *Auditor-General Act 1997* (Cth).

<sup>147</sup> Productivity Commission, *Review of the Disability Discrimination Act 1992* (2004) xxvi.

<sup>148</sup> For example, Darwin, Community Roundtable; Mildura, Community Roundtable; Dubbo, Community Roundtable; Melbourne, Community Roundtable.

- The commission's functions are limited by the narrow definition of 'human rights' in the Australian Human Rights Commission Act, which does not include the rights in treaties such as the International Covenant on Economic, Social and Cultural Rights, the Convention against Torture, the Convention on the Elimination of All Forms of Discrimination against Women and the International Convention on the Elimination of All Forms of Racial Discrimination.<sup>149</sup>
- The commission's enforcement powers are limited. It can report to the Attorney-General on human rights breaches by the Federal Government but its recommendations are not binding or enforceable in the courts.<sup>150</sup> Further, the commission has no power to monitor compliance with agreements entered into as a result of conciliation.<sup>151</sup>
- Although a complainant can initiate court proceedings if the commission terminates an investigation into an anti-discrimination complaint, complainants do not have the same ability in relation to human rights complaints.<sup>152</sup>
- The commission has no power to investigate human rights matters at the state level, which hinders its ability to report on widespread or systemic human rights abuses.<sup>153</sup>
- Although the commission can review federal or territory Bills for their consistency with human rights, it can do so only at the request of a Minister.<sup>154</sup> No such request has ever been made.<sup>155</sup>
- The government has no obligation to respond publicly to, or table, the commission's reports.<sup>156</sup>
- The commission has the power to intervene in court cases involving human rights, but it can do so only with the leave of the court.<sup>157</sup>

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<sup>149</sup> Australian Human Rights Commission, Submission; Australian Council of Social Service, Submission; Human Rights Council of Australia, Submission; Castan Centre for Human Rights Law, Submission; PILCH Homeless Persons' Legal Clinic, Submission.

<sup>150</sup> Australian Human Rights Commission, Submission.

<sup>151</sup> Human Rights Council of Australia, Submission; Human Rights Law Resource Centre (Educate, Engage, Empower), Submission.

<sup>152</sup> Australian Human Rights Commission, Submission; Public Interest Advocacy Centre, Submission.

<sup>153</sup> Australian Human Rights Commission, Submission; Human Rights Law Resource Centre (Educate, Engage, Empower), Submission.

<sup>154</sup> *Australian Human Rights Commission Act 1986* (Cth) s. 11(e).

<sup>155</sup> Australian Human Rights Commission, Submission.

<sup>156</sup> Law Council of Australia, Submission; Human Rights Law Resource Centre (Educate, Engage, Empower), Submission; Australian Human Rights Commission, Submission; Human Rights Council of Australia, Submission.

<sup>157</sup> Human Rights Council of Australia, Submission; Oxford Pro Bono Publico, Submission; D Allen, Submission; Seniors Rights Victoria, Submission; Anti-Discrimination Commission Queensland, Submission.

The Ombudsman's powers are also limited because his or her recommendations are not binding. He or she also has discretion to decide whether to investigate a complaint and whether to issue a copy of a report to the complainant.

## 5.9 Access to justice

The effectiveness of the protections outlined are limited if people do not possess the knowledge or the means to make use of them. This is why, in addition to discussing and evaluating the various legal and institutional means by which human rights may be protected in Australia, many submissions and community roundtable participants pointed to the overarching problem of access to justice.<sup>158</sup> As is discussed in Chapter 8, access to justice is not just about the ability to enforce rights in courts: it also refers to the ability to obtain legal advice and non-legal advocacy and support and to participate effectively in law reform processes.<sup>159</sup>

The Committee heard that access to justice is an important element of human rights protection and promotion.<sup>160</sup> Some submissions argued that access to justice is a human right in itself.<sup>161</sup> Such access is of particular importance to marginalised and disadvantaged individuals, who can face additional barriers in having their rights recognised and enforced. Associate Professor Simon Rice submitted:

The adequacy of human rights protection in Australia must be measured first against the needs of disempowered people: people who do not gain the benefits of full participation in our liberal-democratic-market society, who do not enjoy the protection that comes from having ready access to established institutions, complex systems and a dominant culture; from being able to exercise and influence power; from being able to participate in public debate and political life; and from engaging in and profiting from the market economy ...

Human rights protection matters to disempowered people, to people who are marginalised by the limited or inadequate operation of state systems and institutions. To deny that the institutions are inadequate or fail is to deny the existence of people who suffer by those inadequacies and failures ...<sup>162</sup>

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<sup>158</sup> For example, Human Rights Law Resource Centre (Educate, Engage, Empower), Submission; SCALES Community Legal Centre, Submission; NSW Disability Discrimination Legal Centre, Submission; Women's Legal Service Victoria, Submission; Australian Council of Social Service, Submission; Queanbeyan, Community Roundtable; Darwin, Community Roundtable; Mt Isa, Community Roundtable; Kalgoorlie, Community Roundtable.

<sup>159</sup> Law and Justice Foundation of New South Wales, *Access to Justice and Legal Needs: a project to identify legal needs, pathways and barriers for disadvantaged people in NSW* (2003), cited in Human Rights Law Resource Centre (Educate, Engage, Empower), Submission.

<sup>160</sup> Public Interest Law Clearing House, Submission; Human Rights Law Resource Centre (Educate, Engage, Empower), Submission.

<sup>161</sup> Human Rights Law Resource Centre (Educate, Engage, Empower), Submission; Law Council of Australia, Submission.

<sup>162</sup> S Rice, Submission.

Access to justice is dependent not only on available resources but also on the extent to which individuals understand their human rights and the means to enforce them. In relation to the participants in the focus groups, Colmar Brunton Social Research noted that ‘very few had any concrete understanding of their rights, or what is or is not protected in Australia’.<sup>163</sup> And in relation to participants in the devolved consultations it found that ‘a lack of awareness and understanding of human rights is a real problem for these groups’ and that ‘a perceived lack of easily accessible and understandable information about rights perpetuates this problem’.<sup>164</sup>

Consequently, when examining the adequacy of existing mechanisms for protecting and promoting human rights, it is important to take into account the extent to which those mechanisms are broadly accessible to the Australian community.

## 5.10 The Committee’s findings

The work of Colmar Brunton Social Research revealed that most people think their human rights are adequately protected. But it also revealed that most people have little knowledge of how those rights are protected; they tend to assume that, because they have never felt their rights to be threatened or violated, the rights must be protected under the law.

At the same time, there is general recognition that there are some people who ‘fall through the cracks’ and are in need of greater protection. After listening to the stories of those people and reading hundreds of submissions detailing the shortcomings of the current system, the Committee concluded that there is a patchwork of human rights protection in Australia. The patchwork is fragmented and incomplete, and its inadequacies are felt most keenly by the marginalised and the vulnerable.

Australia has agreed to ‘respect, protect and fulfil’ a range of human rights at the international level, but the current legal and institutional framework falls short of this commitment. The Committee notes the following limitations associated with the existing mechanisms for protecting human rights in Australia:

- *International human rights law.* Australia has committed itself to a variety of obligations under international human rights law, but these obligations are enforceable in Australia only if implemented by domestic legislation. Although

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<sup>163</sup> Colmar Brunton Social Research, *National Human Rights Consultation—community research report* (2009).

<sup>164</sup> Colmar Brunton Social Research, *National Human Rights Consultation—devolved consultation report* (2009).

various mechanisms exist to hold Australia accountable at the international level, they are not legally binding.

- *The democratic system.* Australia has strong democratic institutions, but they do not always ensure that human rights—in particular, minority rights—receive sufficient consideration.
- *The Australian Constitution.* Australia's Constitution was not designed to protect individual rights. It contains a few rights, but they are limited in scope and have been interpreted narrowly by the courts.
- *Legislative protections.* Federal, state and territory legislation protects some human rights, but it can always be amended or suspended to limit or remove that protection. The legislative framework is inconsistent across jurisdictions and difficult to understand and apply.
- *Administrative law.* Administrative law enables individuals to challenge government decisions and encourages standards of lawfulness, fairness, rationality and accountability. The remedies it offers are, however, limited, and there is no general onus on government to take human rights into account when making decisions.
- *The common law.* The common law protects some human rights, but it cannot stop parliament passing legislation that abrogates human rights with clear and unambiguous language.
- *Independent oversight mechanisms.* There are a number of oversight mechanisms—for example, the Australian Human Rights Commission—that can review government action. The powers of these bodies are, however, limited when it comes to human rights, and their recommendations are usually not enforceable.
- *Access to justice.* Access to justice is an overarching problem in connection with the adequacy of existing protections. Individuals who lack the knowledge or means to make use of Australia's framework of human rights protections will ultimately be unable to enforce their rights.

## 6 Creating a human rights culture

This chapter discusses the importance of creating a human rights culture in the Australian community and ways of doing that. In the Committee's view, human rights can be protected and promoted effectively only if an understanding of, and commitment to, those rights are a part of everyday life for all members of the community and for government, the private sector and non-government organisations.

### 6.1 The importance of a human rights culture

The need to create in Australia a culture in which human rights are better understood and are respected, protected and promoted was a central theme emerging from the Consultation. A considerable number of the submissions the Committee received referred to the need for greater human rights education and for the development of a human rights culture in the community.

Many who participated in the Consultation saw the introduction of a federal Human Rights Act as a fundamental component of creating a human rights culture. They noted that over time implementation of a Human Rights Act by politicians, public sector agencies and the courts would probably lead to a greater awareness of human rights among members of the community and greater consideration of and adherence to human rights principles by all sectors of society. Whether or not participants supported the introduction of a federal Human Rights Act, there was strong support for the notion that it is necessary to create a human rights culture in our community.

Improving people's understanding of what human rights are, how they are protected and what they mean in terms of individual and collective responsibilities appears to be vital to developing a human rights culture. Participants echoed this sentiment throughout the country, saying, 'People need to know what their rights are and how to access them'.<sup>1</sup> The Committee accepts the view that if a community has a greater understanding of human rights its members will start to see themselves as 'rights-holding entities' and, in turn, will be better able to assert their rights and be more likely to respect the rights of others. In the words of a young person cited in one

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<sup>1</sup> Darwin, Community Roundtable.

submission, ‘If people are more aware of their own rights, they are less likely to violate others’ [rights]’.<sup>2</sup>

The Committee also notes the words of the former UN High Commissioner for Human Rights, the late Sergio Vieira de Mello:

The culture of human rights derives its greatest strength from the informed expectations of each individual. Responsibility for the protection of human rights lies with states. But the understanding, respect and expectation of human rights by each individual person is what gives human rights its daily texture, its day-to-day resilience.<sup>3</sup>

Many people who participated in the Consultation considered that improved education was fundamental to an improved community understanding of and commitment to human rights. For example, the UN Youth Association of Australia noted:

While there is general support for the notion of human rights in Australia, a thriving culture of human rights is lacking. There is limited understanding and awareness of human rights amongst both young people and the broader community, existing human rights protection mechanisms are rarely accessed and human rights do not form a large part of the Australian political discourse except in particular issue areas ...<sup>4</sup>

The Australian Centre for Human Rights Education submitted that one of the ways of better protecting and promoting human rights in Australia is by ‘making sure that those who are most marginalised and most vulnerable are seen, their voices heard, and that they participate in decisions about their own future’.<sup>5</sup> This accords with what the Committee heard from members of the community who find themselves in vulnerable positions. Claims such as ‘The system is designed for functional people’<sup>6</sup> and ‘The whole system falls down if you can’t communicate what you need’<sup>7</sup> were regularly heard from marginalised people. The Australian Centre for Human Rights Education noted further:

The development of a human rights culture in wider society will contribute substantially over time to addressing the recalcitrant features of social inequality

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<sup>2</sup> UN Youth Association of Australia, Submission.

<sup>3</sup> S Vieira de Mello, *Statement to the Opening of the 59th Session of the Commission on Human Rights*, Geneva, 17 March 2003.

<sup>4</sup> United Nations Youth Association of Australia, Submission.

<sup>5</sup> Australian Centre for Human Rights Education, Submission.

<sup>6</sup> Colmar Brunton Social Research, *National Human Rights Consultation—devolved consultation report* (2009).

<sup>7</sup> *ibid.*



and injustice by bringing into light ‘invisible victims’ whose life quality does not presently amount to ‘a fair go’.<sup>8</sup>

The Committee endorses this assessment.

## 6.2 The need for human rights education

A range of international human rights instruments contain provisions relating to education associated with human rights.<sup>9</sup> Such education has also been recognised as an aspect of the right to education under the Convention on the Rights of the Child.<sup>10</sup>

The World Programme for Human Rights Education ‘seeks to promote a common understanding of the basic principles and methodologies of human rights education, to provide a concrete framework for action and to strengthen partnerships and cooperation from the international level down to the grass roots’. The Federal Government has expressed support for this program.<sup>11</sup> The first phase of the World Programme (2005 to 2009) focuses on primary and secondary school systems. The Plan of Action notes:

Human rights education can be defined as education, training and information aiming at building a universal culture of human rights through the sharing of knowledge, imparting of skills and moulding of attitudes directed to:

- (a) The strengthening of respect for human rights and fundamental freedoms;
- (b) The full development of the human personality and the sense of its dignity;
- (c) The promotion of understanding, tolerance, gender equality and friendship among all nations, Indigenous peoples and racial, national, ethnic, religious and linguistic groups;
- (d) The enabling of all persons to participate effectively in a free and democratic society governed by the rule of law;
- (e) The building and maintenance of peace;

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<sup>8</sup> Australian Centre for Human Rights Education, Submission.

<sup>9</sup> For example, the Universal Declaration of Human Rights art. 26(2); the International Covenant on Economic, Social and Cultural Rights art. 13(1); the Convention on the Rights of the Child art.29(1)(b); the Convention on the Elimination of All Forms of Discrimination against Women art. 10; and the International Convention on the Elimination of All Forms of Racial Discrimination art. 7. In relation to Australia’s international human rights obligations, see, for example, Australian Human Rights Commission, Submission; Human Rights Law Resource Centre (Educate, Engage, Empower), Submission; National Association of Community Legal Centres, Submission.

<sup>10</sup> UN Committee on the Rights of the Child, *General Comment No 1: the aims of education* (2001).

<sup>11</sup> Australian Human Rights Commission, Submission.

- (f) The promotion of people-centred sustainable development and social justice.

...

Human rights education encompasses:

- (a) Knowledge and skills — learning about human rights and mechanisms for their protection, as well as acquiring skills to apply them in daily life;
- (b) Values, attitudes and behaviour — developing values and reinforcing attitudes and behaviour which uphold human rights;
- (c) Action — taking action to defend and promote human rights.<sup>12</sup>

The Committee heard strong criticism of the extent of human rights education available in the Australian community. 'We don't know what our rights are' and 'We don't know where to find out about human rights' were common refrains when the Committee visited locations around Australia. One roundtable participant said, 'I've spent 12 years, like most people, in schools, then university, etc, and not once did I see the promotion of human rights during my education, as is required by the UN declaration'.<sup>13</sup>

As discussed in Chapter 1, the Committee commissioned Colmar Brunton Social Research to undertake research so that the Committee might gain an appreciation of the level of interest in and knowledge and attitudes about human rights and their protection among a random sample of Australians who had not attended the community roundtables or presented a submission. Colmar Brunton Social Research was also commissioned to conduct a focus group study in order to learn more of the experiences and opinions of marginalised and vulnerable groups.

The Colmar Brunton Social Research report noted that focus group participants considered human rights important but that 'better understanding and awareness of human rights would be desirable and that more education on the topic would be useful'.<sup>14</sup> The consultants obtained similar results in their telephone survey involving 1200 participants: only 45 per cent of respondents agreed that 'people in Australia are sufficiently educated about their rights'.<sup>15</sup> Promotion of and education about rights were thought to be an important strategy for improving the protection of human rights. In addition, the consultants noted:

It was apparent that few people have any specific understanding of what rights they do have, underlining a real need as well as a perceived need for further education.

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<sup>12</sup> UNESCO and UN Office of the UN High Commissioner for Human Rights, *Plan of Action: World Programme for Human Rights Education: first phase* (2006).

<sup>13</sup> Tweed Heads, Community Roundtable.

<sup>14</sup> Colmar Brunton Social Research, *National Human Rights Consultation—community research phase* (2009).

<sup>15</sup> *ibid.*

Many participants in the research may have felt that education would demonstrate to them that their assumptions that rights were well protected was correct, and provide missing details. It is possible that if the real level of protection does not match expectations, then with greater education there would actually be a decrease in satisfaction with the current protections and views on necessary or desirable steps to improve protection could change.<sup>16</sup>

Colmar Brunton found a similar lack of awareness and understanding of human rights in its devolved consultation and noted that most participants thought this resulted from a lack of basic human rights education.<sup>17</sup>

Almost without exception, community roundtables expressed support for increased education about human rights. Increasing the level of human rights education in Australia was often what motivated people to attend a community roundtable. The Committee heard, 'We need to change the culture with human rights education starting from age five'<sup>18</sup> and that 'Human rights education should start in schools'<sup>19</sup> and 'continue into high school'<sup>20</sup> and should involve a 'public awareness campaign'.<sup>21</sup>

Submissions also revealed strong support for human rights education. The Child Rights Coalition submitted:

As a nation, we already possess a strong ethical and social commitment to equality and fairness. These values are consistent with a human rights culture. A broad-based community education strategy can influence, articulate and develop community understanding of concepts such as human rights. Australians have developed an understanding of the relatively complex concept of anti-discrimination law and rights over the last twenty years. Now is an appropriate time for the Australian Government to commit to a human rights education strategy.<sup>22</sup>

Many participants thought a human rights education program a necessary component of a federal Human Rights Act, in order to instil a human rights culture in the community.<sup>23</sup> Several submissions suggested adopting campaigns similar to those used in Victoria and the ACT before the introduction of their human rights Acts.<sup>24</sup>

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<sup>16</sup> *ibid.*

<sup>17</sup> Colmar Brunton Social Research, *National Human Rights Consultation: devolved consultation report* (2009).

<sup>18</sup> Dandenong, Community Roundtable.

<sup>19</sup> Darwin, Community Roundtable.

<sup>20</sup> Broome, Community Roundtable.

<sup>21</sup> Cairns, Community Roundtable.

<sup>22</sup> Child Rights Coalition, Submission.

<sup>23</sup> For example, Australian Council of Social Service, Submission; Amnesty International Australia, Submission; Redfern Legal Centre, Submission; Victorian Government, Submission.

<sup>24</sup> For example, Public Interest Law Clearing House, Submission; Law Council of Australia, Submission; ACT Human Rights Commission, Submission.

Some participants saw a Human Rights Act as a fundamental tool for better community education about human rights. The Australian Human Rights Commission noted that, if a clear statement of Australian rights and values and the means by which they are to be protected were set out, 'it could provide a clear focus for a human rights education and community awareness program across Australia'.<sup>25</sup> In particular, it 'could help people in Australia to identify their rights and their responsibilities to respect the rights of others. It could also explain what to do if these rights are not respected by public authorities'.<sup>26</sup> Professor George Williams submitted:

One major advantage of a charter of rights is it would provide the instrument necessary to begin a process of effective education in schools and elsewhere about human rights protection. The absence of such an instrument is a major hurdle to providing such education, whether it be for Australians or new citizens. I have seen first hand the difficulties of educating Australians about their human rights and the human rights of others in the absence of a clear Australian statement of those rights.<sup>27</sup>

It was noted, however, that, although human rights education would be integral to the implementation of a Human Rights Act, it could not be a suitable substitute for the legislation.<sup>28</sup> Associate Professor Simon Rice commented on the need for both education and legislation:

Reliance is commonly placed on education and awareness activity as a means of achieving community-wide attitudinal change particularly, in recent years in Australia, in relation to human rights. But in the absence of laws and their enforcement, no amount of education and awareness activity will achieve lasting change. Education and awareness activity alone do not prevent false and misleading commercial conduct, which is why we have fair trading laws, or prevent race discrimination, which is why we have anti-discrimination laws, or prevent erroneous decisions by bureaucrats, which is why we have laws that permit review.<sup>29</sup>

Nevertheless, there was support for a comprehensive human rights education plan, regardless of whether a federal Human Rights Act is enacted.

## **Human rights in the education system**

The Committee heard strong support for better human rights education in schools and other educational institutions. This, it was said, would have direct benefit for young people by helping them understand and assert their rights and would be an

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<sup>25</sup> Australian Human Rights Commission, Submission.

<sup>26</sup> *ibid.*

<sup>27</sup> G Williams, Submission.

<sup>28</sup> ACT Human Rights Commission, Submission.

<sup>29</sup> S Rice, Submission.

essential building block for developing a broader human rights culture in the wider community.<sup>30</sup>

In 2008 all Australian Ministers responsible for education issued the Melbourne Declaration on Educational Goals for Young Australians. The declaration speaks of ‘a commitment to supporting all young Australians to become active and informed citizens, and it sets the direction for Australian schooling over the next ten years’.<sup>31</sup> Concern has, however, been expressed that human rights are not sufficiently integrated into this framework<sup>32</sup> and that a coherent approach to ‘human rights’ in other curricula is lacking.<sup>33</sup>

The Human Rights Law Resource Centre noted that recent research on ‘human rights education in Australian schools has found it to be ad hoc and “well short of what is mandated by Article 29 of CROC [the Convention on the Rights of the Child]”<sup>34</sup> and ‘that more than 80% of surveyed students did not receive any human rights education during their formal years of schooling’.<sup>35</sup> The centre submitted that the available evidence ‘indicates that Australia has not achieved a systematic and integrated approach to human rights education’.<sup>36</sup>

The Committee was informed that reasons ‘for Australia’s poor human rights education in schools include a crowded educational curriculum; the lack of a government mandate and corresponding resources; and a lack of training’.<sup>37</sup> The Law Institute of Victoria suggested, ‘Any mandate for human rights education would need to address impediments to its implementation’.<sup>38</sup>

A number of submissions emphasised the importance of making human rights education part of the curriculum for all primary and secondary school students and of ensuring that all pre-service and in-service teachers receive human rights

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<sup>30</sup> For example, Youthlaw, Submission; UN Youth Association of Australia, Submission.

<sup>31</sup> Australian Human Rights Commission, Submission.

<sup>32</sup> For example, UN Youth Association of Australia, Submission; Amnesty International Australia, Submission.

<sup>33</sup> Australian Human Rights Commission, Submission.

<sup>34</sup> Human Rights Law Resource Centre (Educate, Engage, Empower), Submission, citing P Gerber, ‘From convention to classroom: the long road to human rights education’ in C Newell and B Offord (eds), *Activating Human Rights in Education: exploration, innovation and transformation* (2008).

<sup>35</sup> *ibid.* citing F Hill, ‘An education revolution for ‘the common good’—the role of human rights education’, in C Newell and B Offord (eds), *Activating Human Rights in Education: exploration, innovation and transformation* (2008).

<sup>36</sup> Human Rights Law Resource Centre (Educate, Engage, Empower), Submission.

<sup>37</sup> Law Institute of Victoria, Submission, citing P Gerber, ‘From convention to classroom: the long road to human rights education’ in C Newell and B Offord (eds), *Activating Human Rights in Education: exploration, innovation and transformation* (2008).

<sup>38</sup> Law Institute of Victoria, Submission.

education and training.<sup>39</sup> Some suggested that the former is necessary if the Federal Government is to comply with its obligations under international law.<sup>40</sup>

Dr Nina Burrridge submitted, 'Schools are ideally situated to teach about the history of human rights; to explore what constitutes human rights for the ordinary citizens and to discuss human rights violations both in a historical context and in the current context, nationally and internationally'.<sup>41</sup> Dr John Tobin, however, stressed the need:

... to avoid the missionary zeal that all too often accompanies human rights education. Instead a critical and reflective approach to human rights education should be developed in which the difficulties in resolving tensions between competing rights should be explored and discussed. Attention would need to be focused on both the entitlements and burdens that attach to all individuals under a model of human rights that was grounded in the international standards.<sup>42</sup>

The Victorian Equal Opportunity & Human Rights Commission suggested that a national human rights instrument could:

... act as a catalyst for reflecting upon how we educate children around the notion of citizenship in a community that aspires to a culture of human rights, and further, it provides an objective benchmark or framework of values on which to plan and centre future education strategies directed toward this goal.<sup>43</sup>

## Community human rights education

The Committee heard that efforts to raise awareness of human rights should be made not only through formal education but must also be part of a broader community awareness campaign if the level of the Australian community's understanding of human rights is to be effectively and meaningfully improved.

Among the functions of the Australian Human Rights Commission are promoting understanding, acceptance and public discussion of human rights; conducting research and educational programs on behalf of the Federal Government in order to promote human rights; and publishing guidelines on avoiding acts or practices by the federal government that could breach human rights.<sup>44</sup> The commission has, however, raised concern about its ability to perform its human rights education role given the resources it currently has.<sup>45</sup> A variety of other bodies, including non-government organisations, also engage in some form of human rights-related

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<sup>39</sup> For example, Human Rights Law Resource Centre, (Educate, Engage, Empower) Submission; Jesuit Social Services, Submission; Youthlaw, Submission.

<sup>40</sup> For example, Human Rights Law Resource Centre, (Educate, Engage, Empower) Submission; Child Rights Coalition, Submission.

<sup>41</sup> N Burrridge, Submission.

<sup>42</sup> J Tobin, Submission.

<sup>43</sup> Victorian Equal Opportunity & Human Rights Commission, Submission.

<sup>44</sup> *Australian Human Rights Commission Act 1986* (Cth) s. 11.

<sup>45</sup> Australian Human Rights Commission, Submission.

community education, but their efforts appear to be ad hoc and constrained by limited resources.<sup>46</sup>

Although these initiatives are valuable, the limited nature of the Australian community's understanding of matters to do with human rights suggests that more needs to be done. Participants in a number of community roundtables acknowledged that they had an inadequate understanding of how our democracy works; indeed, one said, 'I couldn't even tell you what's in the Constitution'.<sup>47</sup> The Wirringa Baiya Aboriginal Women's Legal Centre submitted:

What are human rights, and the value of having them, should then be sold to the Australian public via a national public education campaign. Such an education program should be a permanent fixture and not a one off campaign. Ongoing multi media messages should aim to fix human rights issues into the public consciousness.<sup>48</sup>

Submissions supported broader community education about human rights and argued that this would help foster among all Australians a better understanding of their rights and ways of enforcing them, as well as creating more respect for the human rights of others. For example, the Australian Human Rights Commission submitted:

Broad education about human rights, and the relevance of human rights to people's lives, should lead to a culture of increased tolerance and respect. Education should focus on ensuring that all people in Australia understand their own rights and their responsibility to respect the rights of others.<sup>49</sup>

Submissions noted the need to ensure that human rights education is delivered in a way that is easily understood by all members of the community and is easily accessible. Some who participated in the Colmar Brunton Social Research project said 'a written document outlining the rights of all groups in society' was 'a necessary step before any rights [can] be consistently protected'.<sup>50</sup> The need for specific human rights education for specific groups in the community was also recognised. For example, a variety of submissions highlighted the importance of human rights education for young people and sectors that often interact with young people—for example, Centrelink and housing and transport authorities.<sup>51</sup> Others pointed to a particular need for human rights education in rural and remote

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<sup>46</sup> For example, UN Youth Association of Australia, Submission.

<sup>47</sup> Mount Isa, Community Roundtable.

<sup>48</sup> Wirringa Baiya Aboriginal Women's Legal Centre, Submission.

<sup>49</sup> Australian Human Rights Commission, Submission.

<sup>50</sup> Colmar Brunton Social Research, *National Human Rights Consultation—community research phase* (2009).

<sup>51</sup> Youth Justice Coalition, Submission; Child Rights Coalition, Submission; UN Youth Association of Australia, Submission.

communities<sup>52</sup> and among older people.<sup>53</sup> One recently arrived immigrant said, 'I just want something that tells me what rights I have when I get to Australia'.<sup>54</sup>

A view often expressed was that a greater willingness to engage in human rights dialogue at the community level will help with creating a culture in which human rights offer a legitimate way for people to speak out about disadvantage, discrimination and marginalisation and will clarify the community's thinking in this regard.

## Resources for human rights education

The Committee heard that non-government organisations play an important role in human rights education. There is, however, little collaboration in the development of these materials, and there is no single 'clearing house' for resources for human rights education.<sup>55</sup> The UN Youth Association of Australia expressed support for a government-initiated comprehensive audit of and central repository for human rights resources.<sup>56</sup>

### 6.3 A national human rights education plan

During 2009 the UN Human Rights Committee recommended that Australia 'consider adopting a comprehensive plan of action for human rights education', which should be incorporated at every level of general education and include training programs for public officials, teachers, judges, lawyers and police officers on the rights protected under the International Covenant on Civil and Political Rights (and its first optional protocol).<sup>57</sup> The UN Committee on Economic, Social and Cultural Rights made a similar recommendation in relation to the rights expressed in the International Covenant on Economic, Social and Cultural Rights.<sup>58</sup>

The Committee learnt that there is strong support for the development of a comprehensive human rights education plan.<sup>59</sup> Those in favour of such a measure

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<sup>52</sup> Australian Human Rights Commission, Submission.

<sup>53</sup> Seniors Rights Victoria, Submission.

<sup>54</sup> Colmar Brunton Social Research, *National Human Rights Consultation—devolved consultation report* (2009).

<sup>55</sup> See, for example, Australian Human Rights Commission, Submission.

<sup>56</sup> UN Youth Association of Australia, Submission.

<sup>57</sup> See Human Rights Committee, *Consideration of Reports Submitted by States Parties under Article 40 of the Covenant: concluding observations of the Human Rights Committee—Australia* (7 May 2009).

<sup>58</sup> Committee on Economic, Social and Cultural Rights, *Consideration of Reports Submitted by States Parties under Articles 16 and 17 of the Covenant: concluding observations of the Committee on Economic, Social and Cultural Rights—Australia* (22 May 2009).

<sup>59</sup> For example, Australian Human Rights Commission, Submission; UN Youth Association of Australia, Submission; Australian Lawyers for Human Rights, Submission; Child Rights Coalition, Submission; ACT Disability, Aged and Carer Advocacy Service, Submission; Youth Justice Coalition, Submission; Queensland Working Women's Service Inc., Submission; Youthlaw, Submission; Regional Office for the Pacific, UN Office of the High Commissioner for Human Rights, Submission.



say it would be an integral part of any human rights culture and would help Australia meet the requirements of the UN World Programme for Human Rights Education. The Australian Human Rights Commission proposed that there be an audit of all human rights education initiatives in Australian education systems before a national plan is developed.<sup>60</sup>

The ACT Disability, Aged and Carer Advocacy Service summarised the potential scope of a comprehensive education program. It submitted that the program should operate on a number of levels:

- To raise general community awareness of the protected rights, how they are balanced and the available enforcement mechanisms
- To raise the awareness of government, business and community service decision-makers about compliance responsibilities
- To educate children and young people about rights so that the next generations automatically think about issues from a rights perspective
- To educate specific population groups about how the human rights framework can operate to assist them to assert their interests and have their needs met.<sup>61</sup>

Apparently effective human rights education plans were cited. For example, the Victorian Equal Opportunity & Human Rights Commission has developed a human rights education plan in relation to the state's *Charter of Human Rights and Responsibilities Act 2006*.<sup>62</sup> It noted:

Human rights education targeting non-government sectors, the general community and increasingly, local government and other public authorities has been the focus of our educative work under the Charter for the past 2½ years. The Commission has successfully delivered an integrated, creative and responsive human rights education strategy that has engaged a range of communities and other educators. The success of our approach has been built upon simple messages, numerous applied resources, and proactive and targeted community engagement strategies that have increased understanding about the implications of a potentially powerful but complex legislative tool.<sup>63</sup>

The Committee heard a range of suggestions for the content of a national human rights education plan. These included incorporating human rights education in the curriculum for primary and secondary schools and human rights training in all tertiary institutions and professional and technical training programs<sup>64</sup>; improved

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<sup>60</sup> Australian Human Rights Commission, Submission.

<sup>61</sup> ACT Disability, Aged and Carer Advocacy Service, Submission.

<sup>62</sup> For example, Australian Lawyers for Human Rights, Submission.

<sup>63</sup> Victorian Equal Opportunity & Human Rights Commission, Submission.

<sup>64</sup> For example, Child Rights Coalition, Submission.

teacher training in human rights education; human rights awareness programs in the community; a ‘rights-based’ approach to schooling<sup>65</sup>; ‘increased production, distribution and promotion of human rights education curriculum materials’<sup>66</sup>; sponsoring and encouraging debate about human rights in a variety of arenas; and ‘better resourcing bodies that protect and promote human rights (such as the Australian Human Rights Commission, non-governmental organisations and community legal centres)’.<sup>67</sup>

In addition, at community roundtables many Indigenous Australians voiced grave concern at non-Indigenous Australians’ lack of knowledge of Indigenous customary laws and practices and their intent, value and importance. Similar concern was expressed in submissions. Accordingly, the Committee considers that a national human rights education plan should include education about Australia’s occupation and pre-occupation history: this would help improve the levels of acceptance and engagement between Indigenous and non-Indigenous Australians and would reinforce a human rights culture.

The Australian Federation of Disability Organisations emphasised the importance of ensuring that any human rights education program is accessible to people with disabilities and portrays people with disabilities in a respectful way.<sup>68</sup>

There was also support for making the Australian Human Rights Commission or another independent institution primarily responsible for human rights education and awareness at the federal level.<sup>69</sup>

## 6.4 Social inclusion

The Committee was informed that a Human Rights Act would have only limited capacity to improve the standard of living and access to services for disadvantaged Australians. The Australian Council of Social Services submitted, ‘Human rights compliance may not always be an adequate benchmark by which to measure the effectiveness and equity of policies and laws, although [it] will be an important one’.<sup>70</sup> In its view, ‘Laws and policies that are not only consistent with human rights, but also socially inclusive, must play a central role in improving the lives of disadvantaged Australians’.<sup>71</sup> It argued that, in addition to a federal Human Rights Act, the Federal Government should develop a comprehensive social inclusion

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<sup>65</sup> UN Youth Association of Australia, Submission.

<sup>66</sup> Australian Human Rights Commission, Submission; Human Rights Law Resource Centre (Educate, Engage, Empower), Submission.

<sup>67</sup> ANU National Centre for Indigenous Studies, Submission.

<sup>68</sup> Australian Federation of Disability Organisations, Submission.

<sup>69</sup> For example, Australian Lawyers for Human Rights, Submission; J Tobin, Submission.

<sup>70</sup> Australian Council of Social Service, Submission.

<sup>71</sup> *ibid.*

strategy. In this case, a human rights legal framework would complement and reinforce ‘a broader range of socially inclusive laws and policies’.<sup>72</sup>

The Committee notes that the Federal Government has appointed a Social Inclusion Board, the board’s brief being to give all Australians the opportunity to:

- secure a job
- gain access to services
- connect with family, friends, work and their local community
- deal with crises
- have their voices heard.

The Committee considers that this strategy of social inclusion could, and should, be developed and implemented with an emphasis on human rights and responsibilities, regardless of whether or not a decision is made to enact a Human Rights Act.

## **6.5 Creating a culture of human rights in the public sector**

During the Committee’s consultations it became clear that many of the human rights difficulties that do arise occur when ordinary members of the public have contact with public sector decision makers and service providers. Be it the Centrelink office, a police station, an aged care facility, a hospital outpatients department or an immigration centre, the public sector has an important role to play in safeguarding human rights, and this is not always acknowledged.

The Colmar Brunton Social Research report noted that participants in the research project placed considerable emphasis on the role of government in protecting and promoting human rights.<sup>73</sup> This was often reiterated during the community roundtables, and the sentiment that public officials should have to ‘think about human rights’ and treat people fairly and respectfully when exercising discretion or making decisions was strong. There was also strong support for accountable and transparent decision making, and participants often pointed to the need for public sector employees to take human rights into account when engaging in their work.

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<sup>72</sup> *ibid.*

<sup>73</sup> Colmar Brunton Social Research, *National Human Rights Consultation—community research report* (2009).

One roundtable participant argued that public sector accountability ‘is the linchpin for human rights legislation’.<sup>74</sup>

Many submissions stressed the importance of human rights education in the public sector<sup>75</sup>, including to support the effective implementation of a federal Human Rights Act. For example, the Law Institute of Victoria noted the importance ‘of human rights action plans designed to create an understanding and culture of human rights compliance at all stages of public decision-making, and in the application of law and policy’ and ‘the instruction of decision-makers and public authorities in their obligations’ under any such legislation (see Chapter 8 for details about these obligations).<sup>76</sup> It cited the Victorian Department of Justice’s guide for legislation and policy officers as an example of such instruction.<sup>77</sup>

There was, however, also a view that such education and training are important regardless of whether a federal Human Rights Act is enacted.

## Indigenous Australians

A lack of engagement and meaningful understanding was a particular focus of concern in relation to Indigenous Australians, both in Torres Strait and in remote mainland communities. In community roundtables health and social workers in Northern Territory communities subject to the Northern Territory Emergency Response (the ‘Intervention’), as well as Thursday Island residents, spoke forcefully about the harmful and counterproductive consequences that too frequently resulted from poor engagement and the execution of well-intentioned programs. A clinical psychologist attending a community roundtable in Katherine recounted:



Kalgoorlie Magistrate Elizabeth Langdon describes the human rights deficit in the bush

Indigenous people’s perception is that this is a new oppressive policy like the Stolen Generations. Human rights and ethics get lost when politicians abandon the rule of law, even temporarily, in the name of ‘closing the gap’—but you can’t just suspend it for a discrete part of the population. It goes against everything we’ve known.<sup>78</sup>

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<sup>74</sup> Cronulla, Community Roundtable.

<sup>75</sup> For example, Australian Human Rights Commission, Submission; Australian Council of Social Service, Submission; Amnesty International Australia, Submission; ACT Human Rights Commission, Submission; Victorian Equal Opportunity & Human Rights Commission, Submission.

<sup>76</sup> Law Institute of Victoria, Submission.

<sup>77</sup> *ibid.*

<sup>78</sup> Katherine, Community Roundtable.

Policy and decision makers were often seen to concentrate on the symptoms rather than the cause when the cause was glaringly obvious to the people affected by these policies. A participant in the Katherine community roundtable noted, ‘Most of the government business managers that were sent up to the communities—they don’t work well in the communities, they don’t consult with the community or deliver what the community needs’.<sup>79</sup> Another participant, at Yirrkala, advised that before the Intervention ‘They should have sat down with each community and asked what are the problems that we face here and work on them together’.<sup>80</sup>

## National security and policing

The Committee was also made aware of particular concerns about implementation of the national security legislation enacted in response to the 11 September 2001 terrorist attacks. Since then we have seen the enactment of new legislative powers and authorities that in different circumstances would have been widely recognised as excessive, unacceptably intrusive on human rights, and paying insufficient regard to due process. Many who participated in the Consultation felt this legislation has eroded individual rights that should remain sacrosanct and reflects an overreaction on the part of the legislators to the problems and dangers being faced.

Even Consultation participants who agreed that there was a need for more powerful investigation- and detention-related legislation frequently expressed concern about the lack of transparency and independent scrutiny of process. A common view was that even in times of crisis human rights should be suspended only in extreme and specific circumstances and only after the people most likely to be affected by the new provisions are consulted.<sup>81</sup> In Tweed Heads one participant described how he felt about the current national security laws:

We need to overcome the knee-jerk reaction that’s immediate whenever we talk about terrorism and the fear that comes with that. We’re essentially back in Tudor England ... people are able to be detained with no ability to contact family or lawyers for quite a period of time. These laws impinge on every single aspect of our society, our rights ... There needs to be greater transparency as to what these powers really mean to us. Any one of us can be scape-goated and targeted.<sup>82</sup>

During community roundtable discussions anxiety was expressed about public officials being able to exercise powers of arrest and detention and perform other duties potentially impinging on the rights and freedoms of ordinary Australians.<sup>83</sup> Greater human rights education for public officials is therefore desirable. In cases

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<sup>79</sup> *ibid.*

<sup>80</sup> Yirrkala, Community Roundtable.

<sup>81</sup> For example, Queanbeyan (1), Community Roundtable; Nhulunbuy, Community Roundtable; Adelaide, Community Roundtable; Katherine, Community Roundtable.

<sup>82</sup> Tweed Heads, Community Roundtable.

<sup>83</sup> For example, Katherine, Community Roundtable; Palm Island, Community Roundtable.

where powers of arrest and detention are involved, there was a strong view that the processes applied should be transparent, subject to independent review and demonstrably justifiable.<sup>84</sup> There is obviously a lack of public confidence in the willingness or ability of public authorities to consistently exercise these powers with integrity and in accordance with the law.

Public confidence in the operation of mandatory, coercive or similarly intrusive powers of investigation and detention has been shaken by the events of recent years. In the Committee's view, the situation would be much improved if there were clear evidence of appropriate education and training, quality assurance and oversight of the officers who exercise those powers.

Victoria Police appears to provide a good example of the public sector incorporating human rights in its day-to-day activities. It submitted that it 'is confident that human rights protection is synonymous with good policing in liberal democratic societies'.<sup>85</sup> The submission outlined the human rights education programs Victoria offered in partnership with specialist human rights services and the university sector when the Victorian Charter of Human Rights and Responsibilities was introduced and added that one of the most significant outcomes of its education programs and audits has been the introduction of a human rights framework that includes decision making. In Victoria Police's view, 'The education undertaken by employees has provided a better understanding of human rights by those responsible for the delivery of policing services directly to the community'.<sup>86</sup>



Victoria Police Commissioner Simon Overland speaks in favour of the Victorian Charter.

## 6.6 **Creating a culture of human rights in other sectors**

Traditionally, international law has imposed human rights obligations on non-State actors only in exceptional circumstances—such as the prohibition of slavery and genocide. States do, however, have an international obligation 'to protect against

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<sup>84</sup> For example, Tweed Heads, Community Roundtable; Mt Gambier, Community Roundtable.

<sup>85</sup> Victoria Police, Submission.

<sup>86</sup> *ibid.*

the commission of human rights violations by non-State actors', which includes private sector organisations.<sup>87</sup>

## The private sector

A number of community roundtables and submissions discussed the need for greater recognition of the responsibilities of corporations. For example, the Queensland Public Interest Law Clearing House noted, 'As the influence of corporations has increased and the potential of corporations as human rights violators has grown it is now important to consider mechanisms for engaging business in the human rights dialogue'.<sup>88</sup>

Professor John Ruggie, Special Representative of the UN Secretary-General on Business and Human Rights, submitted that government should adopt the 'Protect, Respect and Remedy' framework that he proposed in 2008 and that was unanimously welcomed by the UN Human Rights Council. The framework provides that under international law States have a duty to protect against human rights abuses by non-State actors (including business), that business should act with due diligence to avoid infringing human rights, and that States are under a duty to provide access to remedies for breaches by non-State actors.<sup>89</sup>

Professor Ruggie argued that one of the most effective ways of promoting rights compliance is to develop corporate cultures in which respecting rights is seen as an integral part of doing business.<sup>90</sup>

Other submissions supported the adoption of his framework and suggested a range of measures that could be implemented to develop a corporate culture of human rights compliance. There was support for requiring businesses to report on their observance of human rights and for establishing industry-specific complaints mechanisms.<sup>91</sup> Among the more specific proposals were the following:

- incorporating human rights provisions in government contracts<sup>92</sup>
- requiring 'businesses to produce a compliant human rights policy, implementation plan and/or compliance reports as a condition of doing business with government'<sup>93</sup>
- including requirements for human rights impact assessments for large projects involving public-private partnerships<sup>94</sup>

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<sup>87</sup> Human Rights Law Resource Centre (Educate, Engage, Empower), Submission.

<sup>88</sup> Queensland Public Interest Law Clearing House, Submission.

<sup>89</sup> J Ruggie, Submission.

<sup>90</sup> *ibid.*

<sup>91</sup> Australian Council for International Development, Submission.

<sup>92</sup> For example, *ibid.*; Human Rights Law Resource Centre (Educate, Engage, Empower), Submission.

<sup>93</sup> Queensland Public Interest Law Clearing House, Submission.

- encouraging professional bodies and large corporations ‘to set aspirational human rights targets to meet or be measured against’<sup>95</sup>
- providing resources and support for the use of ‘socially responsible share market indices and certification programs’ and taking them into account in procurement practices<sup>96</sup>
- funding the Australian Human Rights Commission to establish a unit dedicated to promoting human rights in business<sup>97</sup>
- increasing awareness of the OECD National Contact Point ‘complaints’ system as a mechanism for responding to complaints against corporations<sup>98</sup>
- including an ‘opt in’ clause in a federal Human Rights Act (see Chapter 14 for details).

## Non-government organisations

There was also support for more meaningful engagement between government and organisations involved in protecting and promoting human rights in the community.<sup>99</sup> The Human Rights Law Resource Centre suggested the following measures for achieving this goal:

- establishing and funding an annual summit for human rights NGOs
- holding an ‘annual conversation’ between the Federal Government and human rights NGOs, which could be coordinated by the Department of the Prime Minister and Cabinet on a ‘whole-of-government’ basis
- establishing a Human Rights Leadership Group—including government decision makers, local government, human rights NGO representatives, human rights experts, and representatives of human rights advocacy organisations—to provide leadership and support for the promotion of human rights
- improving funding for NGOs—for example, by amending taxation legislation to include ‘the promotion and protection of human rights’ as a charitable purpose and reviewing and revising funding to human rights organisations and specific human rights grants for these organisations.<sup>100</sup>

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<sup>94</sup> Human Rights Law Resource Centre (Educate, Engage, Empower), Submission.

<sup>95</sup> Queensland Public Interest Law Clearing House, Submission.

<sup>96</sup> Human Rights Law Resource Centre (Educate, Engage, Empower), Submission.

<sup>97</sup> *ibid.*

<sup>98</sup> *ibid.*

<sup>99</sup> For example, World Vision Australia, Submission.

<sup>100</sup> Human Rights Law Resource Centre (Educate, Engage, Empower), Submission.



## 6.7 The Committee's findings

Human rights are not well understood by the Australian community, and there is a need for better education about human rights generally and the way in which they are protected and promoted.

In recent years the global climate of uncertainty and insecurity has given rise to a fear of change and 'difference' that has frequently been evident in the majority community attitude to minority groups such as asylum seekers, ethnic minorities, different religious groups and Indigenous Australians. The Committee notes the remarks of Julian Burnside QC:

I think Australians are generally in favour of the idea of human rights in the abstract, but as a nation our thinking on the subject is not very developed. This might be in part because we have never had to fight to secure our human rights. Many Australians appear to be concerned about their own rights, but less concerned about the rights of those they fear or hate ... it is plain to see that many were untroubled about the plight of David Hicks, or the stolen generations (or the plight of aborigines generally) or asylum seekers in detention centres. To tolerate these things with unconcern (or to be actively in favour of them while believing in the importance of human rights), is cognitive dissonance of a high order. It rests on an unconscious division of people into human beings like us (whose rights matter) and others (whose rights do not matter).<sup>101</sup>

To the extent it exists, this level of antipathy, lack of interest or complacency is in direct conflict with the normal Australian commitment to 'a fair go' for all. In the Committee's view, any meaningful change to human rights protection and a fair go for everyone depends on improving the level of understanding and reducing the levels of fear and ignorance that surround many aspects of life. Amidst this apathy are strong calls for change, respect, and progress towards realising a better human rights culture in Australia.

If Australians are to challenge and reconsider current attitudes, recognition of other people's dignity, culture and traditions and the fundamental importance of respecting the rights of those who are different must become better understood. This recognition and respect can then shape our values and our very selves. Additionally, if better human rights education is provided and a human rights culture is nurtured, members of our community will be better able to engage in their own human rights protection.

The Committee finds there is a need for a better understanding of and a commitment to human rights within government—in policy and legislative

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<sup>101</sup> J Burnside, Submission.

development and in service delivery—and within the community, to ensure that people can engage in their own protection and promotion and relate with respect and generosity to others in the community. Responsibilities should also be highlighted in any education and awareness campaign. The Committee notes the concerns of Australians warning against the development of a more selfish culture if the importance of responsibilities is not acknowledged. It is clear that, in order to successfully develop a stronger culture of human rights, responsibilities must form a central part of any education initiative. This is vital if we are to develop the true spirit of any human rights culture—one that will foster communitarian values. It is the capacity of those whose own rights are not at risk to consider and defend the rights of others that will result in greater protection of the rights of the individual or classes of individuals.

Accordingly, resources developed for educational purposes should not only take account of the rights agreed in international and domestic law but also place such rights in a context of purpose and means. A society that is to function cohesively requires in equal measure the commitment to rights and responsibilities.

A document needs to be developed that clearly lists the rights we are entitled to because we are human. It should also include responsibilities we have towards others and towards our community. Such responsibilities could include the following commitments:

- to respect the rights of others
- to support parliamentary democracy and the rule of law
- to uphold and obey the laws of Australia
- to serve on a jury when required
- to vote and to ensure to the best of our ability that our vote is informed
- to show respect for diversity and the equal worth, dignity and freedom of others
- to promote peaceful means for the resolution of conflict and just outcomes
- to promote and protect the rights of the vulnerable
- to acknowledge and respect the special place of our Indigenous people and acknowledge the need to redress their disadvantage
- to play an active role in monitoring the extent to which governments are protecting the rights of the most vulnerable
- to ensure that we are attentive to the needs of our fellow human beings and contribute according to our means.

There will be costs associated with the development of a comprehensive national human rights education plan—among them the cost of engaging broadly with the

community in order to develop the framework and the programs to support it and the costs involved in funding the Australian Human Rights Commission, the education system and other bodies so that they can implement the plan. The Committee is, however, convinced that the cost of not taking action will be far greater in terms of the potential damage to Australia's international reputation and the continuing human costs—including the creation of further domestic divisions, disadvantage and hostility—that will continue to be borne by the community as a whole and by individual members of it.

The main benefits of greater human rights education and the creation of a human rights culture will be greater understanding and better integration of human rights awareness in the community as a whole. Once a human rights culture has taken hold, fewer human rights violations will occur, and people will come to see human rights as synonymous with 'a fair go' and as incorporating the values of decency and respect, which individually and collectively all people should enjoy.

People will begin to see themselves, and others, as 'rights-holding entities'. In this way they will be more likely to assert their own rights and to refrain from violating the rights of others. In time, human rights will be integrated within the public sector to the extent that they become an everyday consideration when policy and legislation are being developed, decisions are being made and services are being delivered.

In addition, once a human rights culture has developed, there will be more robust responses when breaches of those rights do occur. In the absence of this, there is every chance that human rights violations will continue to be perpetrated in ways that might not attract media attention or any response at all. The community sent the Committee a forceful message that more needs to be done in this regard.

## Recommendations

### Recommendation 1

The Committee recommends that education be the highest priority for improving and promoting human rights in Australia.

### Recommendation 2

The Committee recommends as follows:

- that the Federal Government develop a national plan to implement a comprehensive framework, supported by specific programs, of education in human rights and responsibilities in schools, universities, the public sector and the community generally
- that human rights education be based on Australia's international human rights obligations, as well as those that have been implemented domestically (whether in a Human Rights Act or otherwise), and the mechanisms for enforcement of those rights
- that the Federal Government publish a readily comprehensible list of Australian rights and responsibilities that can be translated into various community languages
- that any education and awareness campaign incorporate the experiences of Indigenous Australians—with a particular focus on recent and historical examples of human rights concerns
- that the Federal Government collaborate with non-government organisations and the private sector in developing and implementing its national plan for human rights education.

### Recommendation 3

The Committee recommends that its proposed readily comprehensible list of Australian rights and responsibilities include commitments such as the responsibility:

- to respect the rights of others
- to support parliamentary democracy and the rule of law
- to uphold and obey the laws of Australia
- to serve on a jury when required
- to vote and to ensure to the best of our ability that our vote is informed
- to show respect for diversity and the equal worth, dignity and freedom of others
- to promote peaceful means for the resolution of conflict and just outcomes
- to acknowledge and respect the special place of our Indigenous people and acknowledge the need to redress their disadvantage
- to promote and protect the rights of the vulnerable

- to play an active role in monitoring the extent to which governments are protecting the rights of the most vulnerable
- to ensure that we are attentive to the needs of our fellow human beings and contribute according to our means.



## 7 Human rights in policy and legislation

During the Consultation a number of options for improving the protection and promotion of human rights in the development of policy and legislation were identified. Among them were the following:

- conducting an audit of all existing federal legislation, policies and practices in order to determine their degree of compliance with human rights
- developing mechanisms for ensuring that human rights-related matters can be more readily accommodated when legislation and policy are being formulated.

These two options are discussed in this chapter.

### 7.1 An audit of existing federal legislation, policies and practices

The purpose of conducting an audit of all federal legislation and federal government policy and practices would be to identify any shortcomings and inconsistencies in Australia's implementation of its international human rights obligations. Once these were identified, the government should seek to amend the laws, policies and practices in question to bring them into compliance.<sup>1</sup> The Committee received 133 submissions expressing support for such an audit.

The Victorian Government reviewed its legislation for compatibility with the *Charter of Human Rights and Responsibilities Act 2006* before the Act came into force. The review was coordinated by the Department of Justice.<sup>2</sup> If there were to be an audit of federal legislation, policies and practices it could be done by the Federal Government—for example, under the auspices of the Attorney-General's Department or the Department of the Prime Minister and Cabinet—or it could be referred to the Australian Human Rights Commission or a parliamentary committee. An audit could be conducted as a precursor to a federal Human Rights Act or regardless of whether such legislation is enacted.

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<sup>1</sup> For example, Law Institute of Victoria, Submission; J Debeljak, Submission; NSW Council of Social Service, Submission; Vixen Victoria, Submission; G Brandis, Submission. The LGBTI Network submitted that the Federal Government should make a commitment to review and amend laws that discriminate against lesbian, gay, bisexual, transgender and intersex (LGBTI) people.

<sup>2</sup> Victorian Government, Submission.

Senator George Brandis SC, on behalf of the Federal Opposition, signalled that the Opposition would support such an option:

In the view of the Opposition, the protection of human rights would be better secured by express statutory words, containing their own specific protections, in a particular statute governing the issue. We favour more thoroughgoing Parliamentary scrutiny of legislation, including a comprehensive audit of existing legislation, to identify and repair gaps in human rights protection under the existing law.<sup>3</sup>

Dr Julie Debeljak supported the conduct of an audit before any federal Human Rights Act was to come into force. She noted that in the United Kingdom all government departments conducted audits for human rights compliance before the *Human Rights Act 1998* (UK) came into force. These audits identified priority areas for redress, and the results have since influenced the work of specialist human rights legal teams.<sup>4</sup> She noted, however:

Unfortunately, the audit process focussed heavily on the expectation of judicial challenges to legislation, policies and practices. Rather than using the [Human Rights Act] as ‘the springboard for further steps to be taken as part of a proactive human rights policy,’ the government adopted ‘a containment strategy’ aimed at ‘avoiding or reducing successful challenges’ to policy and legislative initiatives. A more proactive approach would have increased the influence of the executive in the process of delimiting the open-textured Convention rights.<sup>5</sup>

Accordingly, she submitted, any audit conducted by the Federal Government should ‘[use] the opportunity to mainstream human rights rather than contain human rights’.<sup>6</sup>

The idea of an audit was raised mainly by lawyers, academics and people working in the human rights field. In contrast, only a small number of participants in the Colmar Brunton Social Research focus groups suggested this option; some even saw it as a possible ‘waste of time’ considering that the laws could be repealed at any time.<sup>7</sup> Nevertheless, the Committee notes that an audit would probably allay the concerns of many of those who made submissions and community roundtable participants in relation to gaps in the implementation of Australia’s international human rights obligations.

The Committee recognises that such an audit would constitute a substantial task and is unlikely to be conducted in the short term. The audit would, however, present an opportunity to identify and remedy cases of inadvertent non-compliance, either

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<sup>3</sup> G Brandis, Submission.

<sup>4</sup> J Debeljak, Submission.

<sup>5</sup> *ibid.*

<sup>6</sup> *ibid.*

<sup>7</sup> Colmar Brunton Social Research, *National Human Rights Consultation—community research report* (2009).



at the time the legislation or policy was implemented or through subsequent amendment. It would also allow for reconsideration of legislation, policies and practices that have been implemented despite their obvious non-compliance.

This option would probably entail major costs for the government—in reviewing legislation, policies and practices for compliance with international human rights obligations and in developing and implementing legislation and policy in order to secure compliance. The Committee notes, however, that the review and development of legislation are already important government tasks. An audit is also consistent with the requirement that Australia implement its international human rights obligations domestically.

In view of the scale of the task, the Committee suggests that two areas be identified for priority review—the anti-discrimination framework and national security legislation.

### **The anti-discrimination framework**

The anti-discrimination framework is one of the main mechanisms for protecting human rights in Australia. As discussed in Chapter 5, the framework has been criticised on several grounds, including its incomplete and inconsistent coverage.

During 2009 both the UN Human Rights Committee and the UN Committee on Economic, Social and Cultural Rights recommended that Australia adopt federal legislation ‘covering all grounds and areas of discrimination to provide comprehensive protection to the rights to equality and non-discrimination’.<sup>8</sup>

The Committee received 71 submissions that expressed support for strengthening or reforming anti-discrimination legislation. But, although there appears to be a degree of community support for reconsidering the framework, there are differing views about how this should be done.

### **Harmonisation of anti-discrimination laws**

A number of submissions noted that the anti-discrimination framework is difficult to navigate, with differing protections at the federal and state and territory levels.<sup>9</sup> Some suggested that the laws be harmonised.<sup>10</sup> The Standing Committee of

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<sup>8</sup> Human Rights Committee, *Consideration of Reports Submitted by States Parties under Article 40 of the Covenant: concluding observations of the Human Rights Committee—Australia* (7 May 2009); Committee on Economic, Social and Cultural Rights, *Consideration of Reports Submitted by States Parties under Articles 16 and 17 of the Covenant: concluding observations of the Committee on Economic, Social and Cultural Rights—Australia* (22 May 2009).

<sup>9</sup> For example, Disability Discrimination Legal Service, Submission; UNIFEM Australia, Submission; Office of the Tasmanian Anti-Discrimination Commissioner, Submission; Australian Human Rights Commission, Submission.

<sup>10</sup> For example, Law Institute of Victoria, Submission; Office of the Tasmanian Anti-Discrimination Commissioner, Submission.

Attorneys-General has initiated a reform process directed at greater harmonisation of federal and state and territory anti-discrimination legislation.<sup>11</sup> Dr Belinda Smith submitted that this ‘is a good first step, but more substantive changes are required’.<sup>12</sup>

## **An equality Act**

A range of submissions expressed support for the adoption of a single ‘equality Act’ to replace existing anti-discrimination statutes or at least for a public inquiry into this option.<sup>13</sup> Views differed on whether an equality Act should apply across all (federal, state and territory) jurisdictions or at the federal level only, in which case it could provide a basis for future harmonisation with the states and territories.

The Committee heard that some of the advantages of an equality Act are that it would simplify anti-discrimination law, clarify that all forms of discrimination have equal status, and help individuals who have been subject to discrimination on several grounds to make their complaint more easily.<sup>14</sup>

A single Act model already operates in each state and territory, as well as in Canada and New Zealand, and is being developed in the United Kingdom.<sup>15</sup> In 2008 the Senate Committee on Legal and Constitutional Affairs recommended a public inquiry into the merits of such an Act<sup>16</sup>, and this Committee understands that the Federal Government has been considering the proposal.

It should be noted that it is likely that a federal equality Act could be more limited in its scope than existing state and territory anti-discrimination legislation. To enact an equality Act, the Federal Government would need to rely on limited constitutional heads of power (such as the external affairs power), whereas the states and territories effectively have plenary power to enact anti-discrimination legislation.

## **Specific improvements to anti-discrimination laws**

A number of submissions suggested specific improvements to the anti-discrimination laws. These were often raised in the context of an equality Act, although they could also be implemented in the absence of such an Act. Among the suggestions were the following:

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<sup>11</sup> Standing Committee of Attorneys-General, *Communique*, 25 July 2008.

<sup>12</sup> B Smith, Submission.

<sup>13</sup> For example, Australian Human Rights Commission, Submission; Human Rights Law Resource Centre (Educate, Engage, Empower), Submission; LGBTI Network, Submission; WomenSpeak Alliance, Submission.

<sup>14</sup> For example, Australian Human Rights Commission, Submission; Human Rights Law Resource Centre (Educate, Engage, Empower), Submission.

<sup>15</sup> Australian Human Rights Commission, Submission.

<sup>16</sup> Senate Legal and Constitutional Affairs Committee, Parliament of Australia, *Report on the Effectiveness of the Sex Discrimination Act 1984 in Eliminating Discrimination and Promoting Gender Equality* (2008), rec. 43.

- ensuring substantive rather than formal equality<sup>17</sup>, which acknowledges that sometimes groups need special assistance in order to reach a ‘level playing field’<sup>18</sup>
- focusing on positive obligations—such as an obligation to promote equality rather than merely to avoid discrimination.<sup>19</sup> For example, legislation could require employers to take action to remedy the under-representation of certain groups<sup>20</sup>
- prohibiting discrimination on a broader range of grounds, as is the case with state and territory legislation.<sup>21</sup> The need to prohibit discrimination against lesbian, gay, bisexual, transgender and intersex people was often raised<sup>22</sup>, and enactment of a national sexual orientation and gender identity anti-discrimination statute was proposed<sup>23</sup>
- revising the test for discrimination and the burden of proof to remove apparent barriers to establishing discrimination<sup>24</sup>
- redressing compounded or intersectional discrimination and providing a mechanism whereby a person complaining of different forms of discrimination can have those complaints heard together<sup>25</sup>
- giving the Australian Human Rights Commission stronger enforcement powers—such as the power to investigate instances of discrimination (including systemic discrimination) on its own initiative and to help individuals with their complaints, including funding litigation<sup>26</sup>

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<sup>17</sup> For example, D Allen, Submission; WomenSpeak Alliance, Submission; Human Rights Law Resource Centre (Educate, Engage, Empower), Submission; B Smith, Submission; S Martin, Submission.

<sup>18</sup> National Ethnic Disability Alliance, Submission.

<sup>19</sup> For example, Australian Federation of Disability Organisations, Submission; NSW Council of Social Service, Submission; D Allen, Submission; Australian Human Rights Commission, Submission; B Smith, Submission.

<sup>20</sup> D Allen, Submission.

<sup>21</sup> For example, Office of the Tasmanian Anti-Discrimination Commissioner, Submission; Law Council of Australia, Submission; Human Rights Law Resource Centre (Educate, Engage, Empower), Submission; Australian Human Rights Commission, Submission.

<sup>22</sup> For example, Anti-Discrimination Commission Queensland, Submission; AIDS Council of NSW, Submission; Australian Coalition for Equality, Submission; LGBTI Network, Submission; Victorian Equal Opportunity & Human Rights Commission, Submission; Victorian Bar, Submission; Tasmanian Gay and Lesbian Rights Group, Submission.

<sup>23</sup> Tasmanian Gay and Lesbian Rights Group, Submission; LGBTI Network, Submission.

<sup>24</sup> Australian Human Rights Commission, Submission.

<sup>25</sup> For example, Human Rights Law Resource Centre (Educate, Engage, Empower), Submission; WomenSpeak Alliance, Submission; Law Council of Australia, Submission; Mental Health Legal Centre, Submission.

<sup>26</sup> For example, D Allen, Submission; Law Council of Australia, Submission.

- removing or amending some of the exemptions in anti-discrimination law.<sup>27</sup> For example, some submissions noted that migration decisions are exempt from the *Disability Discrimination Act 1992* (Cth)<sup>28</sup>
- adopting the Senate Committee on Legal and Constitutional Affairs' recommendations in relation to the *Sex Discrimination Act 1984* (Cth).<sup>29</sup>

### **A constitutional guarantee of equality**

A number of submissions proposed that a guarantee of equality be inserted in the Constitution.<sup>30</sup> The Human Rights Law Resource Centre said this would have much symbolic power and would ensure that governments could not easily amend or overturn through legislation the right to equality.<sup>31</sup>

The centre noted that constitutional entrenchment and protection of equality are particularly necessary in Australia because under s. 51(xxvi) of the Constitution parliament has the power to pass laws that are detrimental to or discriminatory against the people of any race by reference to their race.<sup>32</sup>

Given the difficulty of amending the Constitution and the need to consider carefully how an equality provision might work, the Human Rights Law Resource Centre recommended that a referendum on a constitutional equality guarantee be considered after an equality Act has been implemented.<sup>33</sup> The Australian Human Rights Commission proposed a national inquiry into the matter.<sup>34</sup>

### **National security legislation**

As discussed in Chapter 5, a number of submissions argued that Australia's national security legislation does not strike a suitable balance between national security and respect for human rights.<sup>35</sup> Similar concern about this was evident at a

<sup>27</sup> For example, J Goldbaum, Submission; V Ray, Submission; Australian Education Union, Submission; OUTthere Rural Victorian Youth Council for Sexual Diversity, Submission.

<sup>28</sup> For example, Novita Children's Network, Submission; Australian Federation of Disability Organisations, Submission; National Ethnic Disability Alliance, Submission.

<sup>29</sup> For example, Women's Legal Services NSW, Submission; WomenSpeak Alliance, Submission; UNIFEM Australia, Submission, citing Senate Legal and Constitutional Affairs Committee, Parliament of Australia, *Report on the Effectiveness of the Sex Discrimination Act 1984 in Eliminating Discrimination and Promoting Gender Equality* (2008).

<sup>30</sup> For example, Australian Human Rights Commission, Submission; Human Rights Law Resource Centre (Educate, Engage, Empower), Submission; A Tseng, Submission; Women's Legal Services NSW, Submission. The Australian National University National Centre for Indigenous Studies suggested inserting in the Constitution a 'right to be free from discrimination on the basis of race': ANU National Centre for Indigenous Studies, Submission.

<sup>31</sup> Human Rights Law Resource Centre (Educate, Engage, Empower), Submission.

<sup>32</sup> *ibid.*, citing *Kartinyeri v Commonwealth* (1998) 152 ALR 140, 571–3.

<sup>33</sup> Human Rights Law Resource Centre (Educate, Engage, Empower), Submission.

<sup>34</sup> Australian Human Rights Commission, Submission.

<sup>35</sup> For example, Victorian Bar, Submission; Gilbert + Tobin Centre of Public Law (B Golder, A Lynch, N McGarrity, C Michaelsen), Submission; Law Council of Australia, Submission; Public Interest Law Clearing House, Submission; J Wilson, Submission; Amnesty International Australia, Submission.

number of community roundtables.<sup>36</sup> A total of 344 submissions to the Committee expressed support for dedicated legislation to respond to specific aspects of human rights—for example, in relation to national security legislation.

Overall, the Committee was made aware of considerable community disquiet about the existing national security legislation—in particular, that it does not strike a suitable balance between the need to protect Australians from harm and the need to protect individual rights and the community’s sense of ‘fair play’. A high level of support for amending national security legislation to better reflect this balance was evident.

In 2009 the UN Human Rights Committee urged the Australian Government to amend its counter-terrorism laws and practices so that they would comply with the International Covenant on Civil and Political Rights.<sup>37</sup> On 12 August the federal Attorney-General released a discussion paper dealing with a number of proposals for amendments to national security legislation. The proposals ‘seek to achieve an appropriate balance between the Government’s responsibility to protect Australia, its people and its interests and instilling confidence that our national security and counter-terrorism laws will be exercised in a just and accountable way’.<sup>38</sup> The government has also introduced into the Federal Parliament legislation to establish a National Security Legislation Monitor to conduct annual reviews of the operation of national security and counter-terrorism legislation and to extend the mandate of the Inspector-General of Intelligence and Security to cover agencies such as the Australian Federal Police.<sup>39</sup> The discussion paper deals with some, but not all, of the concerns raised during the Consultation.

In the Committee’s view the existing national security legislation gives rise to serious human rights concerns, and action should be taken to redress this. A review of national security legislation, policies and practices should form part of the Federal Government’s human rights audit.

## **The Committee’s findings**

As discussed in Chapter 5, the Committee was informed of a range of federal legislation, policies and practices that do not adequately reflect human rights

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<sup>36</sup> For example, Queanbeyan, Community Roundtable; Katherine, Community Roundtable; Busselton Community Roundtable; Alice Springs, Community Roundtable; Broken Hill, Community Roundtable; Mildura, Community Roundtable; Whyalla, Community Roundtable; Mt Gambier, Community Roundtable; Dubbo Community Roundtable, Newcastle Community Roundtable, Melbourne, Community Roundtable; Cronulla, Community Roundtable.

<sup>37</sup> Human Rights Committee, *Consideration of Reports Submitted by States Parties under Article 40 of the Covenant: concluding observations of the Human Rights Committee—Australia* (7 May 2009).

<sup>38</sup> Attorney-General, the Hon. Robert McClelland MP, *Media Release: national security legislation and discussion paper*, 12 August 2009.

<sup>39</sup> *ibid.*

considerations or do not fully implement Australia's international human rights obligations.

Among the examples that were mentioned over and over in submissions and community roundtables were the following:

- a federal anti-discrimination framework that does not protect a right of equality or take account of all possible areas of discrimination that receive protection in international law
- racial discrimination legislation that has been overridden by the Federal Parliament on a number of occasions in relation to Indigenous peoples
- national security legislation that is considered to reflect an improper balance between the need to protect the community from harm and the need to safeguard individual liberties
- an immigration framework that permits the indefinite detention of people who have committed no offence and appears to have resulted in serious mental harm for some of those subject to it.

The Committee also became aware of a degree of community concern about particular practices on the part of the Federal Government and its agencies that appear to fall short of Australia's human rights obligations. This included practices that led to some members of the 'Bali Nine' facing execution in Indonesia and a view that the government could have done more to assist an Australian citizen, David Hicks, while he was detained by the US Government in Guantanamo Bay.

The Committee notes that these are the 'high-profile' examples of a broader concern among many in the community. There is disquiet about an apparent 'disconnect' between the human rights obligations Australia has voluntarily assumed at the international level and its performance in implementing those obligations in domestic legislation, policy and practice. Indeed, as noted, 344 submissions to the Committee expressed support for dedicated legislation to respond to specific aspects of human rights—including national security legislation.

In the Committee's view the Federal Government should conduct an audit of all federal legislation, policy and practices to determine whether they comply with Australia's international human rights obligations and, if not, amend them so that they do comply. The Committee notes again that this would be a substantial task that is unlikely to be carried out in the short term. It is, however, a fundamental and necessary step towards ensuring that the human rights that are important to the Australian community are adequately protected and promoted.

If a federal Human Rights Act is enacted, the audit could be conducted before the legislation comes into force. Should the government decide against the introduction

of a Human Rights Act, there would be an even greater need to review the existing framework to ensure that it complies fully with Australia's international obligations.

## **Recommendation**

### **Recommendation 4**

The Committee recommends as follows:

- that the Federal Government conduct an audit of all federal legislation, policies and practices to determine their compliance with Australia's international human rights obligations, regardless of whether a federal Human Rights Act is introduced. The government should then amend legislation, policies and practices as required, so that they become compliant
- that, in the conduct of the audit, the Federal Government give priority to the following areas:
  - anti-discrimination legislation, policies and practices
  - national security legislation, policies and practices
  - immigration legislation, policies and practices
  - policies and practices of Australian agencies that could result in Australians being denied their human rights when outside Australia's jurisdiction.

## **7.2 Human rights in the development of legislation and policy**

It is not enough simply to deal with the existing gaps in current legislation, policies and practices: mechanisms are also needed to ensure that human rights are taken into account when policies and legislation are being formulated.

There appears to be a high level of community support for such mechanisms. In the Colmar Brunton Social Research telephone survey of 1200 people, participants were offered a range of options for human rights protection and asked whether they supported them. The options attracting most support were for 'parliament to pay attention to human rights when making laws' (supported by 90 per cent of respondents) and for 'governments to pay more attention to human rights when

they are developing new laws and policies’ (supported by 85 per cent of respondents).<sup>40</sup>

The following sections outline a variety of ways of encouraging parliament and government to ‘pay attention’ to human rights in the formulation of new laws and policies. The Committee notes that such mechanisms could be included as part of the framework for a Human Rights Act (as discussed in Chapter 14) or could be introduced as stand-alone measures. The discussion that follows here focuses on how they could operate in the absence of such legislation.

## Human rights impact statements

One option is a requirement that all Cabinet submissions (including proposals for new or amended laws or policies) contain a ‘human rights impact statement’. The statement could provide an assessment of whether a proposed law or policy is consistent with human rights and the reasons for any inconsistency. It could also note any limitation placed on a human right, as well as the limitation’s purpose and justification and whether there is any less restrictive means of achieving the purpose.<sup>41</sup> These statements could be prepared by the Minister responsible for the proposal or by a specialist unit in the Attorney-General’s Department. Proposals could be assessed for compliance with all of Australia’s international human rights obligations or a consolidated list of those obligations.

The ACT’s Cabinet Paper Drafting Guide requires that all Cabinet submissions state whether the proposal in question is compatible with the *Human Rights Act 2004* (ACT). The Victorian Government has issued guidelines requiring that any policy or law proposals submitted to Cabinet identify any associated human rights impacts. New Zealand’s *Cabinet Manual* requires that any draft legislation presented to Cabinet be certified as human rights compliant.<sup>42</sup>

Sixty-one submissions to the Committee expressed support for the use of human rights impact statements.<sup>43</sup> Associate Professor Simon Evans submitted that the requirement for human rights impact statements should apply to all policy proposals ‘brought forward for approval’ at departmental, ministerial or Cabinet level and that an agency should be responsible for auditing the quality of such statements.<sup>44</sup> The New South Wales Bar Association argued that the process could be extended beyond Cabinet decision making to decisions taken by individual Ministers.<sup>45</sup> The

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<sup>40</sup> Colmar Brunton Social Research, *National Human Rights Consultation—community research phase* (2009).

<sup>41</sup> NSW Bar Association, Submission.

<sup>42</sup> Department of Prime Minister and Cabinet (NZ), *Cabinet Manual 2008* (2008) 95.

<sup>43</sup> For example, Australian Human Rights Commission, Submission; S Evans, Submission; Law Council of Australia, Submission; Oxford Pro Bono Publico, Submission; NSW Bar Association, Submission; Australian Council of Social Service, Submission.

<sup>44</sup> S Evans, Submission.

<sup>45</sup> NSW Bar Association, Submission.



Australian Human Rights Commission suggested that the Commonwealth *Legislation Handbook* should require that Ministers and their departments take account of human rights when developing new laws.<sup>46</sup>

The advantage of human rights impact statements is that they can facilitate early identification of human rights shortcomings. The ACT Human Rights Commission submitted,

In practice, [the requirement for Cabinet submissions to deal with human rights compatibility] has resulted in human rights issues raised early on in [the] policy and law development process, which provides greater opportunity for detailed consideration of the impact of proposals on human rights.<sup>47</sup>

The Victorian Government submitted that the requirement ‘has resulted in numerous amendments to reduce adverse human rights impacts even before a policy or Bill is considered by Cabinet’.<sup>48</sup>

Once identified, these potential adverse impacts could be resolved by departmental officers or the relevant Minister before a proposal is submitted for Cabinet approval. At the very least, Cabinet would be informed of any potential human rights implications of a proposal, in which case it could reject a proposal on the ground of non-compliance, require a Minister to amend the proposal, or approve the proposal despite its non-compliance after having made an informed decision to do so.

The Committee acknowledges that if this course of action were adopted considerable demands would be made of government and there would be significant associated costs. Included in these costs would be the costs of providing human rights training to departmental staff involved in policy and legislative development and the additional time involved in preparing statements for inclusion in Cabinet submissions. Although such training would in any case be required if many of the other reforms proposed during the Consultation were to be implemented, the Committee considers that this particular suggestion is best left to government for further consideration.

## **Statements of compatibility**

Another option is a requirement that all Bills introduced into parliament be accompanied by a ‘statement of compatibility’, which would include an assessment of whether the Bill was compatible with human rights and a justification for any limitations imposed on human rights. The same requirement could apply to

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<sup>46</sup> Australian Human Rights Commission, Submission.

<sup>47</sup> ACT Human Rights Commission, Submission.

<sup>48</sup> Victorian Government, Submission.

amendments proposed during parliamentary debate and to all proposed regulations being forwarded to the Executive Council or when they are tabled in Parliament.

There was broad support for the use of statements of compatibility as part of a federal Human Rights Act (see Chapter 14).<sup>49</sup> Like human rights impact statements, statements of compatibility could be required in the absence of a Human Rights Act: the statement could simply assess the proposed law's compatibility with all of Australia's international human rights obligations or with a consolidated list of these obligations.

Under the ACT's *Human Rights Act 2004* the ACT Attorney-General must prepare a compatibility statement for each Bill a Minister introduces into the Legislative Assembly. The Attorney-General must state whether he or she considers the Bill consistent with human rights and, if not, how it is inconsistent. Under Victoria's *Charter of Human Rights and Responsibilities Act 2006* any member of parliament who introduces a Bill (or another member acting on his or her behalf) must table a statement of compatibility when introducing the Bill. The statement must say whether the member considers the Bill compatible with human rights (and, if so, how) and, if not, the nature and extent of the incompatibility.

The United Kingdom's *Human Rights Act 1998* requires the Minister with responsibility for a Bill introduced into parliament to state whether the Bill is compatible with human rights. The New Zealand *Bill of Rights Act 1990* does not require such a statement for every Bill introduced into parliament: instead, where a Bill appears to be inconsistent with the human rights legislation, the Attorney-General must bring the inconsistent provisions to the attention of parliament.

The Victorian Government submitted that the requirement for a statement of compatibility 'has ensured that any limitations on rights are identified and explained to Parliament, and can inform any debate about the Bill'. It contended that such statements, along with the obligations on public authorities, 'have been the main drivers of cultural change across government'.<sup>50</sup> The ACT Government submitted that the process of preparing the statements has led to a 'dramatic increase in the dialogue within the public service about human rights related issues', which has in

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<sup>49</sup> For example, Australian Human Rights Commission, Submission; Australian Lawyers for Human Rights, Submission; Australian Council of Social Service, Submission; Castan Centre for Human Rights Law, Submission; Human Rights Law Resource Centre (Human Rights Act for All Australians), Submission; Law Council of Australia, Submission; R Merkel and A Pound, Submission; NSW Bar Association, Submission; Human Rights Council of Australia, Submission; Oxford Pro Bono Publico, Submission; Public Interest Law Clearing House, Submission; Law Institute of Victoria, Submission; ACT Disability, Aged and Carer Advocacy Service, Submission; Victorian Government, Submission; Baptistcare, Submission; Mental Health Legal Centre, Submission; ACT Disability, Aged and Carer Advocacy Service, Submission; N Gotzmann, Submission; Australian Human Rights Centre, Submission; Queensland Council of Social Service, Submission; ACT Human Rights Commission, Submission; Anti-Discrimination Commission of Queensland, Submission; Mallesons Stephen Jaques Human Rights Law Group, Submission.

<sup>50</sup> Victorian Government, Submission.

turn resulted in ‘better policy processes and legislative outcomes’.<sup>51</sup> Oxford Pro Bono Publico submitted that in the United Kingdom these statements have had a ‘significant and beneficial effect at the early stages of legislative drafting, with attention now being systematically paid to human rights implications’.<sup>52</sup>

Overall, submissions noted that statements of compatibility would contribute to the creation of a rights culture within the executive government<sup>53</sup>, facilitate debate inside and outside parliament about the potential impact of new laws on human rights<sup>54</sup>, increase transparency and accountability in law making<sup>55</sup>, reduce the likelihood of rights being inadvertently infringed<sup>56</sup>, and require the parliament to clearly justify any limitation of a human right.<sup>57</sup> The Law Council of Australia submitted:

This form of scrutiny is currently lacking within the federal Parliamentary system, which contains no formal mechanism to require Government to explain whether the proposed law complies with human rights, and if not why. Not only would this improve the accountability and transparency of the law making process, it would also act as a preventative measure by providing strong scrutiny of any new laws that purport to infringe or have the potential to infringe human rights.<sup>58</sup>

When discussing a model for a federal Human Rights Act a number of submissions suggested that statements of compatibility should be required for all Bills (rather than government Bills only)<sup>59</sup> and should include reasons for the conclusion about compatibility.<sup>60</sup> Independent consultative committees in Tasmania and Western Australia have also recommended that any human rights Act in those jurisdictions require the government to give reasons as part of their statements of compatibility.<sup>61</sup>

The Human Rights Law Resource Centre noted that this would obviate the delays that have occurred in the United Kingdom when the Joint Committee on Human Rights has written to Ministers asking for proper reasons for their assertions of

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<sup>51</sup> ACT Government, Submission.

<sup>52</sup> Oxford Pro Bono Publico, Submission.

<sup>53</sup> T Campbell and N Barry, Submission.

<sup>54</sup> Gilbert + Tobin Centre of Public Law (E Santow), Submission.

<sup>55</sup> Law Council of Australia, Submission.

<sup>56</sup> Human Rights Law Resource Centre (Human Rights Act for All Australians), Submission.

<sup>57</sup> Gilbert + Tobin Centre of Public Law (E Santow), Submission.

<sup>58</sup> Law Council of Australia, Submission.

<sup>59</sup> Australian Lawyers for Human Rights, Submission; Oxford Pro Bono Publico, Submission; Castan Centre for Human Rights Law, Submission.

<sup>60</sup> For example, Australian Human Rights Commission, Submission; Human Rights Law Resource Centre (Human Rights Act for All Australians), Submission; Australian Lawyers for Human Rights, Submission; Oxford Pro Bono Publico, Submission; Castan Centre for Human Rights Law, Submission; Australian Council of Social Service, Submission; ACT Human Rights Commission, Submission.

<sup>61</sup> A Byrnes, H Charlesworth and G MacKinnon, *Bills of Rights in Australia: history, politics and law* (2009) 158.

rights compliance.<sup>62</sup> The Victorian Government submitted that the requirement for reasons has been important in ‘ensuring the credibility and transparency of the process’.<sup>63</sup> In contrast, Associate Professor Jeremy Gans has suggested that in some cases these statements can become too complex and detailed:

Many statements of compatibility extend for several, sometimes dozens, of tightly spaced Hansard pages, incorporating all manner of rights assessments, minor and major, and including both detailed case analysis and some of the most laboured and bewildering rights talk imaginable. It is doubtful that anyone other than a handful of public servants and legal advisers ever reads a word of them.<sup>64</sup>

Another question raised concerned whether, in the case of government Bills, the statements should be prepared by the Attorney-General or by the Minister responsible for the Bill. The ACT Human Rights Commission submitted that the former approach is ‘more rigorous and consistent’<sup>65</sup>; the Victorian Government submitted that the latter approach ‘has ensured that there is ownership and responsibility for the Victorian Charter across the different portfolios of government’.<sup>66</sup>

In the Committee’s view, statements of compatibility accompanied by sufficiently detailed reasons would be valuable in ensuring that human rights receive the attention they deserve in the formulation of legislation and regulations. If necessary, the legislation could be amended to avoid non-compliance. If not, the parliament would be alerted to the non-compliance and any justification for it, which would facilitate parliamentary and public debate about the potential impact and appropriateness of the measure.

Statements of compatibility should be required for all Bills introduced into the Federal Parliament, as well as all amendments debated in parliament and proposed subordinate legislation. The Committee prefers the ACT approach of having the Attorney-General prepare the statements for government Bills, considering that this would encourage a more rigorous and consistent process. Failing that, it would be preferable that statements of compatibility prepared by other departments are vetted by the Attorney-General’s Department.

## **A parliamentary scrutiny committee**

Two hundred and two submissions to the Committee expressed support for greater parliamentary scrutiny in relation to human rights. A number of them proposed that

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<sup>62</sup> Human Rights Law Resource Centre (Human Rights Act for All Australians), Submission.

<sup>63</sup> Victorian Government, Submission.

<sup>64</sup> J Gans, ‘Scrutiny of Bills under bills of rights: is Victoria’s model the way forward?’ (Paper presented at Australia – New Zealand Scrutiny of Legislation Conference, Canberra, 8 July 2009) 17. Associate Professor Gans is legal advisor to the Victorian Parliament’s Scrutiny of Acts and Regulations Committee.

<sup>65</sup> ACT Human Rights Commission, Submission.

<sup>66</sup> Victorian Government, Submission.

a parliamentary committee—that is, a committee consisting of members of parliament—be empowered to review Bills for their compatibility with human rights. Again, the majority of those who raised this option suggested that it be part of a human rights Act framework<sup>67</sup>, although others pointed out that it could also be implemented in the absence of one.<sup>68</sup>

### Existing models

The Federal Parliament already has parliamentary committees that scrutinise proposed and existing legislation and matters relating to public administration and policy.

The Senate Standing Committee on the Scrutiny of Bills is required to report on whether Bills introduced into the Senate, as well as existing Acts of parliament, ‘trespass unduly on personal rights and liberties’.<sup>69</sup> Similarly, the Senate Standing Committee on Regulations and Ordinances is required to scrutinise regulations, ordinances and other legislative instruments that are tabled in the Senate to ensure that they do ‘not trespass unduly on personal rights and liberties’.<sup>70</sup>

In the case of the Scrutiny of Bills Committee, at the end of each sitting week a legal adviser assesses Bills introduced into either house of parliament. The committee examines the adviser’s report within days and tables an *Alert Digest* to alert senators and members of parliament to any concerns. The Minister responsible for the Bill is encouraged to respond quickly, so that the house can debate and vote on the Bill with the benefit of the committee’s view and the Minister’s response.<sup>71</sup>

Throughout the Consultation the Committee heard doubt expressed about the capacity of these existing committees to engage in comprehensive human rights scrutiny. It was said there is a lack of formal guidance about which rights and liberties the committees should consider, how the committees should determine whether those rights and liberties have been justifiably limited<sup>72</sup>, and how or whether to assess compliance with international human rights standards.<sup>73</sup> Concern was also expressed about the Scrutiny of Bills Committee’s lack of ‘teeth’, the limited time frame available to it for scrutinising Bills, and the fact that the committee’s response is not always available before the parliamentary debate.

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<sup>67</sup> For example, ACT Human Rights Commission, Submission; Australian Lawyers for Human Rights, Submission; L Herron, Submission; Mental Health Legal Centre, Submission.

<sup>68</sup> For example, G Brandis, Submission; Australian Christian Lobby, Submission. In contrast, the Law Council expressed a strong view that such a parliamentary committee should not be considered a viable alternative to a federal human rights Act—Law Council of Australia, Submission.

<sup>69</sup> Standing Order of the Senate 24 (Scrutiny of Bills).

<sup>70</sup> Standing Order of the Senate 23 (Regulations and Ordinances).

<sup>71</sup> M Tate, Submission.

<sup>72</sup> Human Rights Law Resource Centre (Human Rights Act for All Australians), Submission.

<sup>73</sup> Law Council of Australia, Submission; S Evans, Submission. See also Oxford Pro Bono Publico, Submission.

On the other hand, Harry Evans, the Clerk of the Senate, suggested during the public hearings that the two committees:

... have a considerable impact on the content of legislation. Their scrutiny discourages executive departments from attempting any major infringement of rights and liberties in the preparation of legislation. They also bring about the amendment of legislation after its introduction.<sup>74</sup>

In the United Kingdom the Joint Committee on Human Rights consists of members from each house of parliament and has very broad terms of reference; among other things, it is required to consider ‘matters relating to human rights in the United Kingdom (but excluding consideration of individual cases)’. The committee scrutinises government Bills for human rights compliance, carries out inquiries into human rights matters, and reviews the United Kingdom’s response to adverse human rights judgments.<sup>75</sup> Some of those who made submissions suggested that Australia should follow this model.<sup>76</sup>

The ACT’s Scrutiny of Bills and Subordinate Legislation Committee reports to the Legislative Assembly on human rights considerations raised in all new Bills. In Victoria the *Charter of Human Rights and Responsibilities Act 2006* requires the Scrutiny of Acts and Regulations Committee to examine any Bill—or statutory rule, as provided for in the *Subordinate Legislation Act 1994*—and report to parliament on its compatibility with human rights. A 2007 review noted the number of cases in which the committee’s evaluation of a Bill differed from the government’s compatibility statement. In some cases the committee had raised human rights questions that had not been identified in the compatibility statements.<sup>77</sup>

Associate Professor Jeremy Gans has noted that a particular problem for the Scrutiny of Acts and Regulations Committee is the need to assess what limits on rights are reasonable. The committee might have to make inquiries about ‘demonstrable justification’ and whether there are ‘less restrictive reasonably available’ alternatives. Professor Gans says:

Reaching firm views on such matters risks turning SARC into a government policy scrutiny committee. In practice, what prevents this is SARC’s lack of capacity to

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<sup>74</sup> H Evans, Clerk of the Senate, Public Hearings.

<sup>75</sup> Joint Committee on Human Rights <[www.parliament.uk/parliamentary\\_committees/joint\\_committee\\_on\\_human\\_rights.cfm](http://www.parliament.uk/parliamentary_committees/joint_committee_on_human_rights.cfm)> at 28 August 2009.

<sup>76</sup> For example, T Campbell and N Barry, Submission; Australian Lawyers for Human Rights, Submission; Human Rights Law Resource Centre (Educate, Engage, Empower), Submission; Australian Human Rights Centre, Submission; Australian Human Rights Commission, Submission.

<sup>77</sup> A Byrnes, H Charlesworth and G MacKinnon, *Bills of Rights in Australia: history, politics and law* (2009), 133.

assess policy; rather, SARC's response to these sorts of issues is either to ask for further information from Ministers or refer contentious issues to Parliament.<sup>78</sup>

### Possible options

During the Consultation the Committee became aware of the substantial support for greater parliamentary scrutiny of human rights and, in particular, a parliamentary committee that would scrutinise proposed Bills and provide to the parliament advice on their compatibility with a Human Rights Act.<sup>79</sup> There are two main options for remedying the situation: refining the existing system or establishing a committee specifically to deal with human rights.

#### *Refine the existing parliamentary committee system*

Refining the existing parliamentary committee system would involve amending the terms of reference of the Senate Standing Committee on the Scrutiny of Bills and the Senate Standing Committee on Regulations and Ordinances in order to define the personal rights and liberties against which the committees must scrutinise federal laws. Professor Michael Tate suggested that this could include the rights contained in the Constitution, the common law and other legislation and Australia's international human rights obligations implemented in domestic law.<sup>80</sup> In his view, this formulation:



Reverend Father the Hon. Michael Tate AO argues for greater parliamentary scrutiny.

... has the merit of being politically uncontroversial in that it refers to the sources of law with which we are familiar. And is ambulatory: able to encompass any changes made by the electorate in referenda, by the judiciary expounding Constitutional and Common Law, by the Parliament passing legislation, or by the Government ratifying treaties incorporated into law.<sup>81</sup>

The two committees could also be given stronger powers—for example, to 'declare' rather than report incompatibility—which might give their conclusions more weight in parliamentary and community debates on proposed legislation.<sup>82</sup> In Professor Tate's

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<sup>78</sup> J Gans, 'Scrutiny of Bills under bills of rights: is Victoria's model the way forward?' (Paper presented at Australia – New Zealand Scrutiny of Legislation Conference, Canberra, 8 July 2009) 12.

<sup>79</sup> For example, Australian Human Rights Commission, Submission. Human Rights Law Resource Centre (Educate, Engage, Empower), Submission; Australian Lawyers for Human Rights, Submission; Oxford Pro Bono Publico, Submission; Castan Centre for Human Rights Law, Submission; S Evans, Submission; Human Rights Council of Australia, Submission.

<sup>80</sup> For example, Australian Christian Lobby, Submission; M Tate, Submission.

<sup>81</sup> M Tate, Submission.

<sup>82</sup> For example, Australian Christian Lobby, Submission; M Tate, Submission.

view, the advantage of this option is that it could be implemented quickly, with sufficient resourcing of the committee’s secretariat and legal advice capacity.<sup>83</sup>

*Establish a parliamentary committee specifically to deal with human rights*

A number of submissions proposed the establishment of a new parliamentary committee that would focus solely on human rights.<sup>84</sup> It was suggested that such a committee could have a range of functions. In relation to the scrutiny of Bills and legislation, Australian Lawyers for Human Rights proposed that the committee be able to conduct public hearings and seek advice from government departments and other sources of specialised knowledge.<sup>85</sup> Alice Edwards and Professor Robert McCorquodale submitted that the committee should be given draft legislation before the second reading because it is at this stage that the UK Joint Committee on Human Rights has been able to usefully suggest amendments.<sup>86</sup> The Australian Human Rights Commission recognised that there might be cases where a Bill must be expedited through parliament, leaving insufficient time for full pre-legislative scrutiny: in this circumstance parliamentary review of the legislation should be required after a fixed period.<sup>87</sup> It was also suggested that the committee should have the power to review proposed and existing legislation (and subordinate legislation) on its own initiative—for example, in response to a report from an independent body such as the Australian Human Rights Commission—or following referral from either house of parliament.<sup>88</sup>

As for other potential roles, the Human Rights Law Resource Centre proposed that the committee be able to conduct inquiries into any questions referred to it by parliament, conduct thematic inquiries into human rights matters, assist in government responses to declarations of incompatibility (under a Human Rights Act), and assist in government responses to the decisions and concluding observations of UN treaty-oversight bodies such as the Human Rights Committee.<sup>89</sup>

Senator George Brandis SC, on behalf of the Federal Opposition, signalled the Opposition’s support for a new parliamentary committee—either a joint standing committee or a senate standing committee. It supported such a committee scrutinising Bills in the light of Australia’s international human rights obligations, noting that this would place greater emphasis on human rights ‘at the heart of the political system itself, while it is free of the potentially undemocratic consequences

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<sup>83</sup> M Tate, Submission.

<sup>84</sup> For example, Australian Lawyers for Human Rights, Submission; T Campbell and N Barry, Submission; B Horrigan, Submission; Oxford Pro Bono Publico, Submission; A Edwards and R McCorquodale, Submission.

<sup>85</sup> For example, Australian Lawyers for Human Rights, Submission.

<sup>86</sup> A Edwards and R McCorquodale, Submission.

<sup>87</sup> Australian Human Rights Commission, Submission.

<sup>88</sup> Human Rights Law Resource Centre (Human Rights Act for All Australians), Submission.

<sup>89</sup> Human Rights Law Resource Centre (Educate, Engage, Empower), Submission.



of placing unprecedented power to resolve essentially political questions in the hands of the judiciary'.<sup>90</sup>

A number of submissions argued that the new parliamentary committee should be a joint committee<sup>91</sup>, which would allow both houses of parliament to contribute to the scrutiny process. Such a committee could be established by statute or by a resolution of both houses. On the other hand, in the public hearings Harry Evans, the Clerk of the Senate, was cautious about a joint committee:

The ability of the committees to bring about amendments of legislation largely depends on the lack of government control over the Senate; when the last government controlled both Houses (in July 2005 to December 2007), government legislation generally passed unamended. Joint committees are invariably controlled by the government. The Senate could be inhibited in amending legislation on civil liberties grounds when the legislation would have already been approved by a joint committee.<sup>92</sup>

The Allen Consulting Group commented on the potential costs of a new parliamentary scrutiny committee:

In terms of costs associated with a scrutiny committee, these initially consist of costs accruing to the parliament associated with—recruitment of staff, new legislation clarifying the terms of reference, education about the revised committee to MPs and their advisers, education to government departments about the committee's new role, and, education to the committee members themselves and their research staff ... The committee's ongoing role requires government funding for expert advice.<sup>93</sup>

The consultants considered this a low-cost option, noting that transition and ongoing costs would be 'moderate' and that it would be reasonably quick to implement.<sup>94</sup>

The Committee notes that there would be costs associated with establishing a new parliamentary committee. On the other hand, though, if a new committee were created this would avoid overburdening existing committees, allow for the appointment of members and staff with demonstrated expertise in the area of human rights, and foster the development of expertise in human rights scrutiny. The Committee also sees value in both houses of parliament being involved in the

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<sup>90</sup> G Brandis, Submission.

<sup>91</sup> For example, A Coles, Submission; A Edwards and R McCorquodale, Submission; ACT Human Rights Commission, Submission; Human Rights Council of Australia, Submission; E Della Torre, Submission.

<sup>92</sup> H Evans, Clerk of the Senate, Public Hearings.

<sup>93</sup> The Allen Consulting Group, *Analysis of Options Identified during the National Human Rights Consultation* (2009).

<sup>94</sup> *ibid.*

scrutiny process and therefore feels that a joint committee would be the most suitable solution.

### **The Committee's findings**

Greater consideration of human rights is needed in the development of legislation and policy and in the parliamentary process in general. The primary aim of such consideration is to ensure that human rights concerns are identified early, so that policy and legislation can be developed in ways that do not impinge on human rights or, in circumstances where limitations on rights are necessary, those limitations can be justified to parliament and the community.

Statements of compatibility should be required for all Bills introduced into Federal Parliament, as well as all amendments debated in parliament and proposed legislative instruments. The statements should contain reasons for the asserted compatibility or incompatibility and, in the case of government Bills, should be prepared by the Attorney-General. A Joint Committee on Human Rights should also be established to review all Bills and regulations for human rights compliance.

If a federal Human Rights Act is enacted, each of these mechanisms—the statements of compatibility and the joint committee—could be used to assess compliance with the human rights expressed in the Act. If the government decides against enacting a Human Rights Act, the mechanisms should be used to assess the compliance of proposed legislation with all of Australia's international human rights obligations or against a consolidated list of those obligations.

### **Recommendations**

#### **Recommendation 5**

The Committee recommends that the Federal Government immediately compile an interim list of rights for protection and promotion, regardless of whether a Human Rights Act is introduced. The list should include rights from the International Covenant on Civil and Political Rights as well as the following rights from the International Covenant on Economic, Social and Cultural Rights that were most often raised during the Consultation: the right to an adequate standard of living (including food, clothing and housing); the right to the highest attainable standard of health; and the right to education.

The government should replace the interim list of rights with a definitive list of Australia's international human rights obligations within two years of the publication of the interim list.

### Recommendation 6

The Committee recommends that a statement of compatibility be required for all Bills introduced into the Federal Parliament, all Bills before the third reading (so as to allow scrutiny of amendments) and legislative instruments as defined by the *Legislative Instruments Act 2003* (Cth). The statement should assess the law's compatibility with the proposed interim list of rights and, later, the definitive list of Australia's human rights obligations.

### Recommendation 7

The Committee recommends that a Joint Committee on Human Rights be established to review all Bills and relevant legislative instruments for compliance with the interim list of rights and, later, the definitive list of Australia's human rights obligations.



## 8 Human rights in practice

During the Consultation a number of options for improving the protection and promotion of human rights in practice were identified. The main ones were measures aimed at ensuring that the Federal Government adopts a more coordinated and strategic approach to human rights and measures designed to ensure that the Federal Government better integrates human rights into public sector policy development, decision making and service delivery. These two options are discussed in this chapter, as are options for strengthening independent oversight mechanisms and for improving access to justice in relation to human rights.

### 8.1 A more coordinated and strategic framework

There is strong support in the community for the Federal Government taking a more coordinated approach to the protection and promotion of human rights. One way of doing this is to adopt a strategic framework within which human rights legislation, policy and practice will be developed and implemented.

In 1993 the World Conference on Human Rights recommended that nation States consider the desirability of preparing national action plans identifying the steps they would take to improve the promotion and protection of human rights.<sup>1</sup> National action plans are designed to outline human rights priorities and set out clear strategies and steps for achieving the desired outcomes. They aim to integrate human rights as a central public policy objective, so that governments and communities can endorse them as practical goals, devise programs to ensure the achievement of these goals, engage all relevant sectors of government and society, and allocate sufficient resources. This encourages a proactive, rather than reactive, approach to human rights.<sup>2</sup>



Philip Flood AO and Mary Kostakidis at Mt Gambier.

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<sup>1</sup> See Vienna Declaration and Programme of Action, adopted by the UN World Conference on Human Rights, Vienna, 14–25 June 1993, [71].

<sup>2</sup> See, generally, Office of the UN High Commissioner for Human Rights, *Handbook on National Human Rights Plans of Action* (2002).

Australia's current National Action Plan was last updated in December 2004. It outlines the Federal Government's five priorities for human rights in Australia—promoting a strong, free democracy; human rights education and awareness; addressing disadvantage and assisting independence; supporting the family; and promoting human rights internationally.<sup>3</sup>

The National Action Plan has been criticised on a number of grounds, including the following:

- It highlights human rights concerns and lists government initiatives to respond to them, rather than identifying targets, performance indicators and time lines for the future.<sup>4</sup>
- It does not commit any resources to action or take account of the specific needs of vulnerable groups in the community.<sup>5</sup>
- It adopts a narrow approach to human rights by failing to respond to concerns that have been the subject of much public debate in Australia.<sup>6</sup>
- It does not reflect a commitment by the Federal Government to uphold and promote Australia's international human rights obligations, legislate to give effect to those obligations, and ensure that Australia's laws and policies are compatible with human rights standards.<sup>7</sup>

Fifty-eight submissions to the Committee proposed that the Federal Government adopt a whole-of-government approach or a new National Action Plan for human rights. In addition, the Committee considers that the range of opinions and options put forward during the Consultation were clearly based on a view that a more coordinated, whole-of-government approach is required. One community roundtable participant suggested that this could be achieved by establishing a human rights unit in the Department of the Prime Minister and Cabinet.<sup>8</sup>

The Allen Consulting Group provided advice on the option of developing a new National Action Plan. It outlined the main potential benefit of a new plan (or, presumably, any new strategic framework):

There is certainly potential for a new NAP to deliver benefits to stakeholders through an improved framework, whereby government's human rights strategy is better coordinated, focused on priorities and cost-effective. The key ways in which this

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<sup>3</sup> *Australia's National Framework for Human Rights: National Action Plan* (2005).

<sup>4</sup> For example, Public Interest Advocacy Centre, Submission to the Draft National Action Plan on Human Rights (2004) 3; see also Women with Disabilities Australia, Submission.

<sup>5</sup> For example, Federation of Ethnic Communities' Councils of Australia, Submission to the Draft National Action Plan on Human Rights (2004).

<sup>6</sup> Law Council of Australia, Submission.

<sup>7</sup> *ibid.*

<sup>8</sup> Tweed Heads, Community Roundtable.

approach may be beneficial are through better facilitation of reforms to protect human rights, and increased human rights awareness.<sup>9</sup>

The effectiveness of a new National Action Plan would, however, be dependent on the allocation of sufficient resources to develop the plan and implement the reforms that flow from it. In the view of The Allen Consulting Group:

Initial costs of a new NAP would primarily be development costs to government, including conducting research to establish a baseline measure of current protections (to be able to properly measure the impact of future reforms). There are also the costs of stakeholder consultation on the new NAP, although the current Consultation could be substituted here.

The most effective implementation strategy for a NAP requires periodic monitoring of progress and evaluation, which incurs related costs for government on an ongoing basis.<sup>10</sup>

### **The Committee's findings**

Whether or not a federal Human Rights Act is adopted, the Federal Government should adopt a whole-of-government approach to human rights, coordinated by the Department of the Prime Minister and Cabinet. Additionally, a new strategic approach is required to improve the framework for protecting and promoting human rights in Australia. The government could achieve this by developing a new National Action Plan or another strategic framework that focuses on better integration of Australia's international human rights obligations in legislation, policy and practice. Development and implementation of such a framework would entail the participation of all sectors of the Australian community involved in human rights, including the non-government sector.

Although the preparation of a new National Action Plan could be pursued in the absence of a federal Human Rights Act, the Committee notes the Law Council of Australia's view that such a process would also be necessary if a Human Rights Act was introduced, in order to provide a framework for guiding the development of human rights policy.<sup>11</sup>

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<sup>9</sup> The Allen Consulting Group, *Analysis of Options Identified during the National Human Rights Consultation* (2009).

<sup>10</sup> *ibid.*

<sup>11</sup> Law Council of Australia, Submission. The Law Institute of Victoria also suggested that an Action Plan be pursued alongside a Human Rights Act—Law Institute of Victoria, Submission.

## Recommendation

### Recommendation 8

The Committee recommends as follows:

- that the Federal Government develop a whole-of-government framework for ensuring that human rights—based either on Australia’s international obligations or on a federal Human Rights Act, or both—are better integrated into public sector policy and legislative development, decision making, service delivery, and practice more generally
- that the Federal Government nominate a Minister responsible for implementation and oversight of the framework and for annual reporting to parliament on the operation of the framework.

## 8.2 Human rights and the public sector

As discussed in Chapter 6, the Committee became aware that there was strong support for the development of a human rights culture in the public sector; it was felt this would lead to better integration of human rights in the development of legislation and policy, in administrative decision making, and in service delivery. In all, 116 submissions expressed support for measures that would promote human rights in the public sector.

Generally, those who supported the introduction of a federal Human Rights Act recognised that additional measures would be necessary in order to ensure that the public sector is in a position to comply with its new obligations. For example, the Australian Human Rights Commission argued for better education of the public sector on human rights and its legislative obligations; requiring federal government departments and agencies to develop human rights action plans, to conduct annual human rights audits, and to prepare annual reports on compliance with the Act; and integrating respect for human rights into public sector values and codes of conduct.<sup>12</sup>

In the Committee’s view, regardless of whether a federal Human Rights Act is introduced, measures will be required to better incorporate human rights considerations in the public sector’s practices and procedures. In the absence of a Human Rights Act, human rights compliance would need to be measured against all of Australia’s human rights obligations or against a consolidated list of those obligations.

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<sup>12</sup> Australian Human Rights Commission, Submission.



The measures outlined in the remainder of this section were raised primarily by people working in the legal and human rights fields, rather than the broader community. The Committee notes, however, that this is to be expected given the measures' more technical nature and the fact that they would in any case assist in achieving the goal of creating a human rights culture, a notion that enjoyed broad support among participants in the Consultation.

## Public sector codes of conduct

Support was expressed for integrating respect for human rights into public sector values and codes of conduct.<sup>13</sup>

At present all federal public servants must uphold the Australian Public Service Values and comply with the Code of Conduct; any breach of the code can result in sanctions—termination of employment being one of them. The Public Service Commissioner evaluates the extent to which agencies incorporate and adhere to the values and the adequacy of systems and procedures for ensuring that employees comply with the code.<sup>14</sup>



Professor Andrew Podger speaks of human rights values formation in the Australian Public Service.

The Australian Human Rights Commission submitted that the APS Values and Code of Conduct should describe public servants' responsibility to respect and promote human rights in the performance of their duties. It suggested adopting provisions similar to those operating in Victoria.<sup>15</sup>

The *Public Administration Act 2004* (Vic) makes provision for a public sector value in relation to human rights, stating that public officials should respect and promote the human rights expressed in the Victorian Charter of Human Rights by '(i) making decisions and providing advice consistent with human rights; and (ii) actively implementing, promoting and supporting human rights'. The Act also requires agency heads to adhere to employment processes that ensure that the human rights set out in the charter are upheld.<sup>16</sup> The Victorian Government referred to

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<sup>13</sup> For example, Australian Human Rights Commission, Submission; Australian Chamber of Commerce and Industry, Submission.

<sup>14</sup> Australian Public Service Commission, *APS Values and Code of Conduct in Practice* <<http://www.apsc.gov.au/values/conductguidelines3.htm>> at 21 September 2009.

<sup>15</sup> Australian Human Rights Commission, Submission.

<sup>16</sup> *ibid.*

these provisions as a measure that reinforces public authorities' legislative obligation to act compatibly with the human rights expressed in the charter.<sup>17</sup>

The Committee considers this would be an effective way of integrating human rights into the culture of the federal public sector and notes that—in the absence of a federal Human Rights Act—the APS Values and Code of Conduct should instead refer to all of Australia's human rights obligations or to a consolidated list of those obligations.

## Administrative review

There was a high level of support for public servants being required to take human rights into account when they make decisions.<sup>18</sup> Many Consultation participants thought such an obligation should be included in a federal Human Rights Act (see the discussion in Chapter 14). It was also suggested, however, that this goal could be achieved by amending existing legislation.<sup>19</sup> Seventy-two submissions expressed specific support for incorporating human rights considerations in administrative decision making.

At the federal level it is possible to seek judicial review of government decisions under a variety of laws.<sup>20</sup> The *Administrative Decisions (Judicial Review) Act 1977* allows courts to review certain government decisions on various grounds, one of them being that the decision maker failed to take into account a 'relevant consideration'. In some cases legislation outlines the relevant considerations; in other cases they will be implied from the subject matter, context and purpose of the legislation.

Ron Merkel QC and Alistair Pound suggested that a federal Human Rights Act:

... which required public authorities to act compatibly with human rights, would make human rights a relevant consideration in all administrative decision-making by public authorities and would make clear that such rights must be given real and genuine consideration'.<sup>21</sup>

Chapter 14 deals with this option in detail.

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<sup>17</sup> Victorian Government, Submission.

<sup>18</sup> For example, Law Council of Australia, Submission; Australian Human Rights Commission, Submission; Northern Territory Anti-Discrimination Commission, Submission; Welfare Rights and Legal Centre, Submission. This subject was also often raised at community roundtables.

<sup>19</sup> For example, K Eastman, Submission.

<sup>20</sup> This includes s. 75(v) of the Constitution, which gives the High Court original jurisdiction to hear matters in which certain remedies are sought against an 'officer of the Commonwealth'—R Merkel and A Pound, Submission.

<sup>21</sup> R Merkel and A Pound, Submission, citing S Evans and C Evans, 'Legal redress under the Victorian Charter of Human Rights and Responsibilities' (2006) 17(4) *Public Law Review* 264, 278.

It was also suggested to the Committee that the Administrative Decisions (Judicial Review) Act should be amended to provide a ground for judicial review if decisions made under federal legislation are not made consistently with specific human rights obligations.<sup>22</sup> This proposal could be adopted with or without a Human Rights Act. If a Human Rights Act were introduced, the ADJR Act could be amended to confirm that failure to act consistently with or to take into account the rights in the Human Rights Act is a ground for judicial review. In the absence of a Human Rights Act, the ADJR Act could refer to Australia's international human rights obligations or a consolidated list of those obligations. This would be an effective way of ensuring that human rights considerations are integrated into public sector decision making, especially if the Federal Government decides against implementing a federal Human Rights Act.

### **Human rights action plans and reports**

Other possible options involve requiring federal government departments and agencies to develop human rights action plans, conduct or comply with annual human rights audits, and prepare annual reports on human rights compliance.<sup>23</sup> A further suggestion involved identifying specific senior Ministers as being responsible for monitoring the implementation and progress of a Human Rights Act.<sup>24</sup>

As noted, some Consultation participants were in favour of using these measures as part of a framework supporting a federal Human Rights Act.<sup>25</sup> The Committee notes, however, that such measures would be necessary whether or not a Human Rights Act is implemented at the federal level.

The Law Institute of Victoria suggested that a federal Human Rights Act should require the Federal Government to produce and publish human rights action plans 'designed to create an understanding and culture of human rights compliance at all stages of public decision-making and application of law and policy'. The government should also be required to report on compliance with the plans and human rights generally, and the composition of and compliance with the plans should be subject to independent review.<sup>26</sup>

Professor Tom Campbell and Dr Nicholas Barry submitted that audits of government agencies would draw attention to human rights violations that might otherwise go unnoticed and would lead to greater scrutiny by parliament, government, the media

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<sup>22</sup> K Eastman, Submission; M Byrnes, Submission.

<sup>23</sup> See Australian Human Rights Commission, Submission.

<sup>24</sup> Human Rights Law Resource Centre (Human Rights Act for All Australians), Submission.

<sup>25</sup> For example, Law Institute of Victoria, Submission; Zonta International, Submission.

<sup>26</sup> Law Institute of Victoria, Submission.

and the public.<sup>27</sup> The ACT Human Rights Commission cited its audit of Quamby Juvenile Detention Centre as demonstrating the benefits of this option.<sup>28</sup>

Victoria Police submitted that it had conducted internal audits throughout the organisation to assess human rights compliance immediately after the Victorian charter came into force. The legal audit reviewed all the Victorian legislation under which the police operate in order to identify provisions that were not human rights compliant and report to government with recommended resolutions. An audit of internal policies and procedures was also conducted, and where potentially incompatible matters were identified steps were taken to redress them.<sup>29</sup>

There was support for these audits being conducted by the Australian Human Rights Commission<sup>30</sup> or by agencies themselves.<sup>31</sup> Alternatively, the Auditor-General could be given this role.

Dr Julie Debeljak suggested that government departments and other public authorities should be required to report their compliance with and implementation of human rights in their annual reports. In her view, this will ensure that human rights become part of the public decision-making matrix:

Human rights will no longer automatically be trumped by other factors, such as cost or efficiency. Moreover, to require annual reporting should also ensure that human rights become a tool to enhance public administration. Human rights, rather than being a separate add-on or an additional regulatory burden, will become the (or at least part of an) operational framework for public administration, enhancing its quality, and giving expression to values that were once intuitive, but are now clearly defined.<sup>32</sup>

The Committee supports measures that involve greater human rights planning and compliance reporting by the federal public sector and considers that periodic human rights audits of specific agencies and their practices would provide a useful measure for ensuring greater transparency and public accountability. Options in relation to audits of public sector agencies are discussed in more detail in Section 8.3.

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<sup>27</sup> T Campbell and N Barry, Submission.

<sup>28</sup> ACT Human Rights Commission, Submission. See also T Campbell and N Barry, Submission.

<sup>29</sup> Victoria Police, Submission.

<sup>30</sup> For example, ACT Human Rights Commission, Submission; T Campbell and N Barry, Submission; Human Rights Council of Australia, Submission.

<sup>31</sup> For example, Australian Human Rights Commission, Submission; PILCH Homeless Persons' Legal Clinic, Submission.

<sup>32</sup> J Debeljak, Submission.

## Interpretation of legislation

There was some support for requiring those who interpret federal legislation to interpret it consistently with Australia's international human rights obligations. This could apply to the courts as well as decision makers within government. Most people who supported this option suggested that it should be included in a federal Human Rights Act (as discussed in Chapter 14)<sup>33</sup>, but some participants raised it as a stand-alone option.<sup>34</sup> As discussed in Chapter 5, common law principles of statutory interpretation already require that legislation be interpreted on the presumption that parliament did not intend to abrogate fundamental rights.<sup>35</sup> The 'fundamental rights' recognised at common law do not, however, include all the human rights contained in treaties to which Australia is a party.

There is also a common law rule of statutory interpretation that legislation be interpreted and applied, so far as its language permits, so that it is consistent with established rules of international law.<sup>36</sup> There is some debate, however, as to whether this rule is to be applied only where legislation is ambiguous<sup>37</sup> or where legislation is designed to implement Australia's obligations under international law.<sup>38</sup>

Some submissions supported amending the *Acts Interpretation Act 1901* (Cth) to strengthen or clarify these common law rules of interpretation. Professor Ivan Shearer proposed the amendments should provide, in the words of Chief Justice Mason and Justice Deane, that, 'If the language of the legislation is susceptible of a construction which is consistent with the terms of an international instrument and the obligations which it imposes on Australia, then that construction should prevail'.<sup>39</sup> Professor Helen Irving made a similar suggestion but limited its scope to 'particular rights and freedoms'.<sup>40</sup> Michael Byrnes submitted that the Acts Interpretation Act should be amended 'so that judges will have to interpret Federal laws consistently with both their purpose and the rights set out in the International Covenant on Civil and Political Rights and International Covenant on Economic, Social and Cultural Rights'.<sup>41</sup>

The Committee's view is that, in the absence of a Human Rights Act, there would be value in amending the Acts Interpretation Act to require that, as far as it is possible

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<sup>33</sup> For example, Australian Human Rights Commission, Submission; J Gilbert, Submission.

<sup>34</sup> National Children's and Youth Law Centre, Submission; H Irving, Submission; I Shearer, Submission.

<sup>35</sup> *Coco v The Queen* (1994) 179 CLR 427.

<sup>36</sup> *AIMS v AIF* (1999) 199 CLR 160, 180 (Gleeson CJ, McHugh and Gummow JJ).

<sup>37</sup> See, eg, *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1, 38 (Brennan, Deane and Dawson JJ).

<sup>38</sup> See, eg, *Plaintiff 157/2002 v Commonwealth* (2003) 211 CLR 476, 492 (Gleeson CJ); *Coleman v Power* (2004) 220 CLR 1, 28-28 (Gleeson CJ).

<sup>39</sup> I Shearer, Submission, citing *Minister of State for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273, 287-288. See also K Eastman, Submission.

<sup>40</sup> H Irving, Submission.

<sup>41</sup> Michael Byrnes, Submission.

to do so consistently with its purpose, federal legislation is to be interpreted consistently with human rights. In the absence of a Human Rights Act that sets out those rights, the interpretative task would have to be carried out by reference to Australia's international human rights obligations or a consolidated list of those obligations.

## **The Committee's findings**

Instilling a human rights culture in the federal public sector is integral to better protection and promotion of human rights in Australia. It would offer a number of advantages, among them better identification and resolution of human rights considerations in the development and implementation of policy and legislation; incorporation of human rights considerations in administrative decision making; and an approach to service delivery that better accommodates and responds to human rights concerns among the community.

The Committee recognises that these measures entail costs. These would include the cost of training public sector officers in human rights and their obligations under any federal Human Rights Act or other legislative amendments (for example, in making human rights a relevant consideration under the Administrative Decisions (Judicial Review) Act or amending the Acts Interpretation Act) and adequately resourcing government departments and agencies so that they can prepare and implement human rights action plans and prepare annual reports on compliance. There might also be cost implications for the court system if the measures result in a high number of applications for judicial review on human rights grounds. It is, however, expected that these costs would be transitional only: decision makers would soon become more aware of human rights as a relevant consideration in their decision making.

Nevertheless, as with some other options, the Committee considers that the costs of not taking action are likely to be higher in the long term. Among these costs are the damage to Australia's international reputation that would result from failure to implement comprehensive human rights protection domestically and the social costs for a community that does not have the level of human rights protection that might be expected in a developed country such as Australia.

If the Federal Government elects to implement a federal Human Rights Act, these measures would support that framework. If it chooses not to implement such legislation, there is even more reason to pursue these measures in order to ensure greater incorporation of human rights considerations in government policies and practice.

## Recommendations

### Recommendation 9

The Committee recommends that the Federal Government incorporate human rights compliance in the Australian Public Service Values and Code of Conduct.

### Recommendation 10

The Committee recommends that the Federal Government require federal departments and agencies to develop human rights action plans and report on human rights compliance in their annual reports.

### Recommendation 11

The Committee recommends that the *Administrative Decisions Judicial Review Act 1975* (Cth) be amended in such a way as to make the definitive list of Australia's international human rights obligations a relevant consideration in government decision making.

### Recommendation 12

The Committee recommends that, in the absence of a federal Human Rights Act, the *Acts Interpretation Act 1901* (Cth) be amended to require that, as far as it is possible to do so consistently with the legislation's purpose, all federal legislation is to be interpreted consistently with the interim list of rights and, later, the definitive list of Australia's human rights obligations.

### 8.3 Improving independent oversight

The UN Human Rights Committee has emphasised the role of independent oversight mechanisms in fulfilling States parties' obligations under the International Covenant on Civil and Political Rights. In particular, it has stated that article 2(3) of the ICCPR<sup>42</sup> requires States parties to investigate violations of human rights through independent and impartial bodies. It noted that administrative mechanisms such as national human rights institutions are particularly required to give effect to this obligation and that the failure to properly investigate allegations of human rights violations could, of itself, constitute a breach of the ICCPR.<sup>43</sup>

The Committee became aware there was considerable support for strengthening Australia's independent oversight mechanisms in the human rights context. For example, 318 submissions supported strengthening the Australian Human Rights Commission's role in dealing with human rights, while 97 submissions supported strengthening other independent oversight bodies more generally.<sup>44</sup> Professor Tom Campbell and Dr Nicholas Barry noted that such institutions are important because they 'can raise human rights awareness within and beyond government without involving the courts'.<sup>45</sup> The Human Rights Law Resource Centre submitted that the role, powers and mandate of human rights institutions should be as broad as possible.<sup>46</sup>

#### The Ombudsman

As discussed in Chapter 5, the Commonwealth Ombudsman can investigate the actions of federal government agencies either on his or her own initiative or in response to a complaint.<sup>47</sup> He or she can investigate government action and report to the agency if it is found, for example, that the agency's action was contrary to law or unreasonable, unjust, oppressive or improperly discriminatory.<sup>48</sup> The

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<sup>42</sup> Article 2(3) provides that States Parties must ensure that any person whose rights are violated has an effective remedy and that this must be determined by a competent judicial, administrative or legislative authority. The article is discussed in Human Rights Law Resource Centre (Educate, Engage, Empower), Submission.

<sup>43</sup> Human Rights Committee, *General Comment No. 31: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, (26 May 2004) [15].

<sup>44</sup> See, for example—in relation to the Australian Human Rights Commission—Human Rights Council of Australia, Submission; Law Council of Australia, Submission; Jesuit Social Services, Submission; T Campbell and N Barry, Submission; J Debeljak, Submission. In relation to the Ombudsman, see B Saul, Submission; T Campbell and N Barry, Submission.

<sup>45</sup> T Campbell and N Barry, Submission.

<sup>46</sup> Human Rights Law Resource Centre (Educate, Engage, Empower), Submission, citing *Principles Relating to the Status of National Institutions (The Paris Principles)*, (20 December 1993), principle 2.

<sup>47</sup> *Ombudsman Act 1976* (Cth) s. 5.

<sup>48</sup> *ibid.*, s. 15.



Ombudsman also has an ongoing role in reporting to parliament about people held in long-term immigration detention.<sup>49</sup>

There was some support for giving the Ombudsman expanded powers to investigate human rights violations<sup>50</sup>, and similar proposals were often raised at community roundtables.<sup>51</sup> Dr Ben Saul submitted that the Ombudsman should be given the power to make a report if he or she finds that an act is 'inconsistent with the enjoyment of a human right'. In Dr Saul's view this could constitute a speedy, informal and cheap alternative to bringing matters before the courts; he proposed that a special human rights unit be established within the Ombudsman's office to deal with human rights complaints.<sup>52</sup>

In Victoria the *Charter of Human Rights and Responsibilities Act 2006* has extended the Victorian Ombudsman's functions to include a power to inquire into or investigate whether any administrative action is incompatible with human rights. This applies to investigations the Ombudsman may conduct on his or her own initiative, as well as inquiries or investigations initiated as a result of a complaint. The Victorian Government noted:

The Ombudsman already promotes fairness, integrity, respect for human rights and administrative excellence in Victoria. Conferring the human rights complaint handling function on the Ombudsman took advantage of the significant experience of the Ombudsman's office in considering complaints about human rights prior to the enactment of the Charter ...

The Ombudsman therefore plays an important role in building a human rights culture in Victoria and ensuring the successful implementation of obligations under the Victorian Charter.<sup>53</sup>

The ACT Human Rights Commission did not support adopting the Victorian model at the federal level. It submitted:

As a public authority itself, and also having its jurisdiction limited to government departments and statutory bodies the Ombudsman should already monitor its own and others' decision-making processes and actions to ensure they are human rights compliant. A complaints jurisdiction is more appropriately placed in human rights agencies, which are already experienced with discrimination cases.<sup>54</sup>

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<sup>49</sup> See Commonwealth Ombudsman, *Immigration Reports tabled in Parliament*, <[http://ombudsman.gov.au/commonwealth/publish.nsf/Content/publications\\_immigrationreports](http://ombudsman.gov.au/commonwealth/publish.nsf/Content/publications_immigrationreports)> at 21 September 2009.

<sup>50</sup> For example, T Campbell and N Barry, Submission.

<sup>51</sup> For example, Tweed Heads, Community Roundtable; Queanbeyan, Community Roundtable; Whyalla, Community Roundtable; Newcastle, Community Roundtable; Cronulla, Community Roundtable; Cairns, Community Roundtable.

<sup>52</sup> B Saul, Submission.

<sup>53</sup> Victorian Government, Submission.

<sup>54</sup> ACT Human Rights Commission, Submission.

At the Committee's public hearings the Commonwealth Ombudsman, Professor John McMillan, offered a different perspective, saying the Ombudsman's office already deals with what are essentially human rights matters—such as immigration, the use of interpreters by government agencies, police control of intoxicated people, and disputes with Centrelink—and that the present scope of his powers is sufficient.

## **The Australian Human Rights Commission**

The Committee heard considerable support for strengthening the role of the Australian Human Rights Commission, so that it is better able to engage in and monitor the promotion and protection of human rights.<sup>55</sup>

As noted, the Committee received 318 submissions expressing support for this option. In community roundtables, there were many calls for the commission to be given 'teeth' and to be adequately resourced so that it can better deal with human rights matters.<sup>56</sup> Submissions also emphasised the need for adequate resources for the commission to carry out its functions.<sup>57</sup>

As discussed in Chapter 5, the Australian Human Rights Commission already has a range of human rights-related functions, among them examining Bills and laws for their consistency with human rights; inquiring into acts and practices that might be inconsistent with or contrary to human rights; and intervening, with the leave of the court, in proceedings that involve human rights concerns. The commission can report to the federal Attorney-General on the laws that should be made, or action that should be taken, in connection with matters relating to human rights and on action Australia should take in order to comply with particular human rights instruments. It also has public education functions in relation to human rights.<sup>58</sup>

Submissions proposed the following measures to strengthen the commission's powers and functions in relation to human rights. The commission's potential role under a federal Human Rights Act is discussed in Chapter 14.

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<sup>55</sup> For example, Human Rights Council of Australia, Submission; Law Council of Australia, Submission; D Allen, Submission; Jesuit Social Services, Submission; T Campbell and N Barry, Submission; J Debeljak, Submission; PILCH Homeless Persons' Legal Clinic, Submission; Australian Human Rights Commission, Submission; Seventh Day Adventist Church, Submission; Women with Disabilities Australia, Submission; AIDS Council of NSW, Submission.

<sup>56</sup> For example, Darwin, Community Roundtable; Mildura, Community Roundtable; Burnie, Community Roundtable; Dubbo, Community Roundtable; Melbourne, Community Roundtable; Sydney, Community Roundtable.

<sup>57</sup> For example, T Campbell and N Barry, Submission; Law Council of Australia, Submission; ACT Human Rights Commission, Submission; Australian Council of Social Service, Submission; PILCH Homeless Persons' Legal Clinic, Submission; Australian Human Rights Commission, Submission.

<sup>58</sup> *Australian Human Rights Commission Act 1986* (Cth), s. 11.

## Jurisdiction in relation to human rights

At present the Australian Human Rights Commission's functions are limited by the definition of 'human rights' in the *Australian Human Rights Commission Act 1986* (Cth). The definition includes the rights set out in the International Covenant on Civil and Political Rights<sup>59</sup> but not the rights in the International Covenant on Economic, Social and Cultural Rights, the Convention against Torture and several other instruments. As a result, the commission cannot inquire into alleged breaches of the rights set out in those instruments or review legislation to assess its consistency with those rights.<sup>60</sup>

Several submissions supported expanding the commission's jurisdiction, including to cover all of Australia's international human rights obligations or the rights in the International Covenant on Economic, Social and Cultural Rights<sup>61</sup>, the Convention against Torture<sup>62</sup>, the Convention on the Rights of the Child<sup>63</sup>, the Declaration on the Rights of Indigenous Peoples<sup>64</sup>, the Convention on the Elimination of Discrimination against Women<sup>65</sup>, the Convention on the Elimination of Racial Discrimination<sup>66</sup>, and the Convention on the Rights of Persons with Disabilities.<sup>67</sup> It should be noted that some of these international instruments fall within the commission's existing functions. For example, the Convention on the Rights of the Child and the Convention on the Rights of Persons with Disabilities fall within the commission's functions relating to 'human rights'.<sup>68</sup> In addition, the commission can consider complaints relating to many of the rights under the Convention on the Elimination of Discrimination against Women and the Convention on the Elimination of Racial Discrimination through its functions conferred by the *Racial Discrimination Act 1975* (Cth) and the *Sex Discrimination Act 1984* (Cth)

In the commission's own view, expanding its functions relating to 'human rights' to include the International Covenant on Economic, Social and Cultural Rights, the Convention against Torture and the Declaration on the Rights of Indigenous Peoples

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<sup>59</sup> It also includes the rights the ILO Convention Concerning Discrimination in Respect of Employment and Occupation 1958 (ILO Convention 111), the Declaration on the Rights of the Child 1959, the Declaration on the Rights of Mentally Retarded Persons 1971, the Declaration on the Rights of Disabled Persons 1975, the Convention on the Rights of Persons with Disabilities 2006, the Convention on the Rights of the Child 1989, and the Declaration on the Elimination of all Forms of Intolerance and of Discrimination based on Religion or Belief 1981—Australian Human Rights Commission, Submission.

<sup>60</sup> Australian Human Rights Commission, Submission.

<sup>61</sup> For example, Australian Council of Social Service, Submission; Human Rights Council of Australia, Submission; Castan Centre for Human Rights Law, Submission; PILCH Homeless Persons' Legal Clinic, Submission.

<sup>62</sup> Australian Human Rights Commission, Submission; PILCH Homeless Persons' Legal Clinic, Submission.

<sup>63</sup> *ibid.*

<sup>64</sup> Australian Human Rights Commission, Submission.

<sup>65</sup> PILCH Homeless Persons' Legal Clinic, Submission.

<sup>66</sup> *ibid.*

<sup>67</sup> *ibid.*

<sup>68</sup> For an explanation of the Commission's functions relating to 'human rights', see Chapter 5.

‘would mean that the Commission could properly promote public awareness and understanding of the rights contained in these instruments’.<sup>69</sup>

### Examining bills and laws

At present the Australian Human Rights Commission has the power to review federal Acts for their consistency with human rights on its own initiative and the power to review federal Bills if asked to do so by the Minister<sup>70</sup>, although the commission advised the Committee that no such request has ever been made.<sup>71</sup> The Committee heard suggestions that the commission should have the power to review, on its own initiative, the human rights implications of existing or proposed federal, state and territory legislation.<sup>72</sup>

### Investigation powers

The commission can inquire into complaints of International Labour Organization Convention 111 discrimination and complaints about federal government acts and practices that could be inconsistent with or contrary to human rights. It can try to settle the matter by conciliation or, if that is inappropriate or unsuccessful, it can report to the Attorney-General.<sup>73</sup>

Several submissions recommended that the commission be given the power to conduct inquiries on any matter affecting human rights in Australia—regardless of whether the responsible entity is the Federal Government or a state or territory government. This would allow it to inquire into systemic and widespread human rights problems permeating all levels of government.<sup>74</sup> There was also support for the commission being able to initiate all investigations on its own motion (that is, in the absence of a complaint)<sup>75</sup> and for requiring the Federal Government to respond publicly to the commission’s reports.<sup>76</sup>

Additionally, the Committee heard that the commission should be given an audit power similar to that operating under s. 41 of the *Human Rights Act 2004* (ACT)<sup>77</sup>, which gives the ACT Human Rights Commission the function of reviewing the effect

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<sup>69</sup> Australian Human Rights Commission, Submission.

<sup>70</sup> *Australian Human Rights Commission Act 1986* (Cth) s. 11(e).

<sup>71</sup> Australian Human Rights Commission, Submission.

<sup>72</sup> For example, Human Rights Law Resource Centre (Educate, Engage, Empower), Submission; Human Rights Council of Australia, Submission; Jesuit Social Services, Submission; Castan Centre for Human Rights Law, Submission.

<sup>73</sup> *Australian Human Rights Commission Act 1986*, ss 11(1)(f), 3(1).

<sup>74</sup> For example, Australian Human Rights Commission, Submission; Human Rights Law Resource Centre (Educate, Engage, Empower), Submission; Law Council of Australia, Submission.

<sup>75</sup> For example, Human Rights Law Resource Centre (Educate, Engage, Empower), Submission; Law Council of Australia, Submission; Public Interest Advocacy Centre, Submission; Jesuit Social Services, Submission; Human Rights Council of Australia, Submission.

<sup>76</sup> For example, Australian Human Rights Commission, Submission; Human Rights Law Resource Centre (Educate, Engage, Empower), Submission; Law Council of Australia, Submission; Womenspeak Alliance, Submission.

<sup>77</sup> For example, P Mathew, Submission; ACT Human Rights Commission, Submission.

of ACT laws, including the common law, on human rights and reporting to the ACT Attorney-General on the results of that review. The Attorney-General must present a copy of the report to the Legislative Assembly within six sitting days. The ACT Human Rights Commission submitted, ‘These audits enable identification of systemic human rights issues and have been a vital tool in identifying [and] subsequently rectifying human rights breaches in the ACT’.<sup>78</sup>

### Human rights complaints

The Australian Human Rights Commission currently has two main complaints-based roles—involving complaints of unlawful discrimination and complaints of particular human rights violations and discrimination contrary to ILO Convention 111. If the commission receives either type of complaint it can try to reach a settlement by conciliation.<sup>79</sup> If this is not possible, a person who has complained of unlawful discrimination can initiate court proceedings with a view to obtaining a determination.<sup>80</sup> Matters can also be referred to Fair Work Australia, the Remuneration Tribunal or the Defence Force Remuneration Tribunal where appropriate.<sup>81</sup> In contrast, a person who has complained of a human rights violation or discrimination contrary to ILO Convention 111 has no other option or remedy available.<sup>82</sup> The commission can, however, make a report to the federal Attorney-General<sup>83</sup>, to which the government is under no obligation to respond.<sup>84</sup>

The commission submitted that the same enforcement remedies should be available for human rights complaints, ILO Convention 111 complaints and unlawful discrimination complaints. It said this would greatly improve the protection of human rights in Australia.<sup>85</sup> The Public Interest Advocacy Centre submitted that people complaining of human rights violations should be able to initiate court proceedings after attempting conciliation.<sup>86</sup> The ACT Human Rights Commission suggested that a federal Human Rights Act should include a conciliation-based complaints-handling system modelled on the existing complaints-handling framework.<sup>87</sup> This is discussed in more detail in Chapter 14.

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<sup>78</sup> ACT Human Rights Commission, Submission.

<sup>79</sup> *Australian Human Rights Commission Act 1986* ss 11(1)(aa).

<sup>80</sup> *ibid.* s. 46PH(1)(h) and Part IIB Division 2—Proceedings in the Federal Court and the Federal Magistrates Court.

<sup>81</sup> *ibid.* Part IIC—Referral of discriminatory awards and determinations to other bodies.

<sup>82</sup> *ibid.* ss 11(1)(f), Part II Division 2—Functions relating to human rights; Australian Human Rights Commission, Submission.

<sup>83</sup> *Australian Human Rights Commission Act 1986* ss 11(1)(f) and (j).

<sup>84</sup> Australian Human Rights Commission, Submission; Law Council of Australia, Submission.

<sup>85</sup> Australian Human Rights Commission, Submission.

<sup>86</sup> Public Interest Advocacy Centre, Submission.

<sup>87</sup> ACT Human Rights Commission, Submission.

The Human Rights Law Resource Centre<sup>88</sup> noted that the International Covenant on Civil and Political Rights and the Paris Principles<sup>89</sup> require that bodies such as the Australian Human Rights Commission have the power to investigate and monitor compliance with the orders issued as a result of their investigations. The Commission should therefore have the power, on its own initiative, to initiate court proceedings to seek enforcement of the conciliation agreements that result from its complaints-handling framework. The centre also suggested that the commission be given the power to issue binding codes of conduct or guidelines relating to the process for the resolution of all complaints under federal anti-discrimination law and concerning human rights, as is the case in Canada. In the centre's view this would provide greater clarity for employers and the community in relation to their rights and responsibilities.<sup>90</sup>

### **Intervention in court proceedings**

At present the Australian Human Rights Commission may intervene in court proceedings involving 'human rights' (as defined) only with the leave of the court.<sup>91</sup> The commission can also intervene and its commissioners can act as *amicus curiae* (a friend of the court) in cases involving discrimination.<sup>92</sup> The Committee heard that the commission should have the power to intervene, as of right, in all cases that raise significant human rights concerns.<sup>93</sup> This would allow it to bring its human rights expertise to the range of human rights concerns that may be considered in such proceedings.<sup>94</sup>

### **Requiring government responses**

The Federal Government is not at present required to respond to any commission reports. The commission submitted that, for reports prepared by the commission under one of its statutory functions and subsequently tabled in Federal Parliament<sup>95</sup>, the Attorney-General should be required to table a response within a fixed period, indicating how the government intends to respond to the commission's

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<sup>88</sup> Human Rights Law Resource Centre (Educate, Engage, Empower), Submission.

<sup>89</sup> *Principles Relating to the Status of National Institutions (The Paris Principles)* (20 December 1993).

<sup>90</sup> Human Rights Law Resource Centre, (Educate, Engage, Empower) Submission. See also Human Rights Council of Australia, Submission.

<sup>91</sup> *Australian Human Rights Commission Act 1986* (Cth) ss 11(1)(o), 3(1).

<sup>92</sup> *ibid.*

<sup>93</sup> For example, Australian Human Rights Commission, Submission; Human Rights Council of Australia, Submission; Oxford Pro Bono Publico, Submission; D Allen, Submission; Seniors Rights Victoria, Submission.

<sup>94</sup> For example, Australian Human Rights Commission, Submission; Oxford Pro Bono Publico, Submission.

<sup>95</sup> This would include reports on individual complaints, inquiries into systemic human rights problems, and the annual *Social Justice Report* and *Native Title Report*.

recommendations.<sup>96</sup> Other submissions also supported a mandatory government response to these reports.<sup>97</sup>

### **Improving data collection on human rights violations**

The Public Interest Law Clearing House submitted that effective promotion and protection of human rights depends, at least in part, on the collection of data on the nature and extent of human rights violations.<sup>98</sup> It noted that several Australian bodies collect some information but argued that the Federal Government should adopt a more practical and systematic role. Accordingly, it proposed that the Australian Human Rights Commission be given the power and resources to implement initiatives to improve data collection on human rights violations.<sup>99</sup>

### **The Committee's findings**

During the Consultation the Committee became aware of broad support for the Australian Human Rights Commission and the way it performs as an independent oversight body. Concerns were, however, expressed, at a range of community roundtables and in many submissions, about the limited powers the commission has in monitoring human rights and its limited resources to carry out its functions.

The Committee considers that the framework of independent oversight of human rights compliance is limited and needs to be strengthened. As discussed in Chapter 4, there is strong support in the community for Australia to implement in domestic legislation all the human rights obligations it has voluntarily assumed under international law. In Chapter 7 the Committee recommends that an audit of all federal legislation, policies and practices be conducted in order to ensure that they comply with these international obligations. This will, however, be a substantial task that is unlikely to be completed in the short term.

In view of this, the Committee recommends that the functions and powers of the Australian Human Rights Commission relating to 'human rights' be expanded to include all the human rights contained in the international human rights treaties Australia has ratified. Importantly, this would allow the commission to promote understanding, acceptance and public discussion of the rights contained in these instruments in Australia.

The Committee also heard concerns about the limited enforcement framework applying to complaints about human rights violations. At present, as noted, the Australian Human Rights Commission may receive complaints of certain human

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<sup>96</sup> Australian Human Rights Commission, Submission.

<sup>97</sup> Law Council of Australia, Submission; Human Rights Law Resource Centre (Educate, Engage, Empower), Submission.

<sup>98</sup> Public Interest Law Clearing House, Submission.

<sup>99</sup> *ibid.*

rights violations by federal agencies as well as complaints of discrimination contrary to ILO Convention 111. But if it is not possible to reach a settlement by conciliation a person who has made a complaint of this nature cannot initiate court proceedings to obtain a determination. With the exception described in the following paragraph, there is in principle no reason why these complaints should be subject to enforcement remedies different from those available for unlawful discrimination complaints. Accordingly, the Committee considers that, with one exception, the federal enforcement framework currently applying to complaints of unlawful discrimination should also apply to complaints of human rights violations and ILO Convention 111 complaints.

As discussed in Chapter 4, the Committee found that economic, social and cultural rights are important to the Australian community, and the way in which they are protected and promoted can have a big impact on the day-to-day lives of many Australians. The Committee considers that the Australian Human Rights Commission should have the power to deal with complaints of violations of these rights. In view of the concerns that have been expressed about the justiciability of economic, social and cultural rights, however, and given the limited experience to draw on from other jurisdictions, the Committee considers that where it is not possible to reach a settlement of these complaints by conciliation there should be no recourse to the courts. The commission could instead report to the Attorney-General on the matter. This limitation should be reviewed over time in the light of experience in Australian and other jurisdictions.

The Committee recognises that there will be economic costs associated with these proposals. Generally, these would involve the costs of developing legislative amendments to confer the additional functions on the Australian Human Rights Commission, the need for additional resources for the Commission to carry out its expanded functions, and additional costs for administering the courts in relation to complaints of human rights violations.

Nevertheless, because the Australian Human Rights Commission already exists, the transition and ongoing costs could be expected to be lower than would be the case if a new organisation were created. In addition, the Committee notes that these costs should be measured against the economic and social benefits of a stronger framework for the protection and promotion of human rights and the longer term benefits that can be expected to result from instilling a human rights culture in the Australian community. The Committee expects that, as it becomes clear that possible violations of human rights can result in independent investigation, reporting and a formal response, human rights will become more respected and fewer violations will occur.



## Recommendation

### Recommendation 13

The Committee recommends that the functions of the Australian Human Rights Commission be augmented to include the following:

- to expand the definition of ‘human rights’ in the Australian Human Rights Commission Act to include the following instruments:
  - the International Covenant on Civil and Political Rights
  - the International Covenant on Economic, Social and Cultural Rights
  - the Convention on the Elimination of All Forms of Racial Discrimination
  - the Convention on the Elimination of All Forms of Discrimination against Women
  - the Convention against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment
  - the Convention on the Rights of the Child
  - the Convention on the Rights of Persons with Disabilities
  - the Declaration on the Rights of Indigenous Peoples.
- to examine any Bill at the request of the federal Attorney-General or the proposed Joint Committee on Human Rights for the purpose of ascertaining if any provision in the Bill is inconsistent with or contrary to any human right in the interim list and, later, the definitive list of Australia’s human rights obligations
- to inquire into any act or practice of a federal public authority or other entity performing a public function under federal law that might be inconsistent with or contrary to any obligation in the interim list of human rights and, later, the definitive list of Australia’s human rights obligations
- to provide the same remedies for complaints of human rights violations and International Labour Organization Convention 111 complaints as for unlawful discrimination, permitting determination by a court when settlement cannot be reached by conciliation—except in relation to complaints of violations of economic, social and cultural rights, in which case there should be no scope to bring court proceedings where conciliation has failed.

The Federal Government should be required to table a response to any Australian Human Rights Commission report on complaints within six months of receiving that report.

## 8.4 Improved access to justice

Another option for improving the protection and promotion of human rights is to provide improved access to justice so that people can know, understand and enforce their rights. This option was raised at many community roundtables<sup>100</sup>, and 1083 submissions to the Committee expressed support for measures for improving access to justice.<sup>101</sup>

‘Access to justice’ is not simply about the ability to enforce rights in courts: it also refers to the ability to obtain legal advice and non-legal advocacy and support and to participate effectively in law reform processes.<sup>102</sup> The Committee heard that access to justice is important in the promotion, protection and fulfilment of human rights<sup>103</sup>; some suggest it is a human right in itself considering that the International Covenant on Civil and Political Rights requires States parties to protect and respect the right to a fair hearing (article 14), certain rights in criminal cases (articles 14 and 15) and the right to recognition as a person before the law (article 16).<sup>104</sup>

In 2009 the UN Human Rights Committee noted, in relation to Australia, the ‘lack of adequate access to justice for marginalized and disadvantaged groups, including Indigenous people and aliens’ and recommended that Australia:

... take effective measures to ensure equality in access to justice, by providing adequate services to assist marginalized and disadvantaged people, including Indigenous people and aliens. The State party should provide adequate funding for Aboriginal and Torres Strait Islander legal aid, including interpreter services.<sup>105</sup>

### Improving access to legal representation

Many submissions raised the need to improve access to legal representation, particularly by increasing funding to legal aid and community legal centres.<sup>106</sup> In

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<sup>100</sup> For example, Geelong, Round Table; Mt Isa, Round Table; Broken Hill, Round Table; Mt Gambier, Round Table; Wodonga, Round Table; Melbourne, Round Table; Canberra, Round Table.

<sup>101</sup> On 23 September the Attorney-General launched the governments’ *Access to Justice Report* and a Strategic Framework for Access to Justice to guide future policy and reforms in our civil justice system. The Committee had insufficient time to consider these documents before publishing its report.

<sup>102</sup> L Schetzer, J Mullins and R Buonamano, *Access to Justice and Legal Needs: a project to identify legal needs, pathways and barriers for disadvantaged people in NSW*, Law and Justice Foundation of NSW (2003), cited in Human Rights Law Resource Centre (Educate, Engage, Empower), Submission.

<sup>103</sup> Public Interest Law Clearing House, Submission; Human Rights Law Resource Centre (Educate, Engage, Empower), Submission.

<sup>104</sup> Human Rights Law Resource Centre (Educate, Engage, Empower), Submission; Law Council of Australia, Submission.

<sup>105</sup> Human Rights Committee, *Concluding Observations—Australia*, (7 May 2009) [25].

<sup>106</sup> For example, ACT Human Rights Commission, Submission; Australian Council of Social Service, Submission; Australian Lawyers for Human Rights, Submission; GetUp (E Coper), Submission; Public Interest Law Clearing House, Submission; Human Rights Law Resource Centre (Educate, Engage, Empower), Submission; Federation of Community Legal Centres, Submission; ACT Disability, Aged and Carer Advocacy Service, Submission; Seniors Rights Victoria, Submission.

addition, community roundtable participants often expressed the need for more funding in these areas.<sup>107</sup>

The UN Human Rights Committee has noted that the availability of legal assistance can determine whether people are able to gain access to and participate in the justice system in a meaningful way and has encouraged States that are party to the International Covenant on Civil and Political Rights to provide free legal aid to people who do not have the means to pay.<sup>108</sup>

In 2003–04 the Senate Legal and Constitutional References Committee conducted an inquiry into legal aid and access to justice. Among other things, the committee recommended the reform of legal aid funding arrangements; the collection of data on the demand for legal services and unmet legal need; increased funding for family law matters; the introduction of specialty legal advice services for Indigenous Australians, people living in rural and remote areas, refugees and migrants; the expansion of duty solicitor services; and increased funding for community legal centres.<sup>109</sup>

### **Increased funding for legal aid**

Legal aid is funded by the federal and state and territory governments to provide free legal representation to people who cannot pay for it.

Several submissions noted that funding for legal aid has declined substantially in recent years, producing adverse effects on access to justice in human rights matters. Particular concern was expressed that Indigenous legal aid funding has been static for more than a decade, representing a fall of 40 per cent in real terms.<sup>110</sup> Submissions supported increased funding for legal aid<sup>111</sup> and the removal of restrictions on federal legal aid funding so that it can be used for state and territory matters.<sup>112</sup> In addition, the Human Rights Law Resource Centre submitted that the Federal Government should implement the recommendations of the 2007 national legal aid report *A New National Policy for Legal Aid in Australia*.<sup>113</sup>

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<sup>107</sup> For example, Darwin, Community Roundtable; Ballarat, Community Roundtable; Bendigo, Community Roundtable; Burnie, Community Roundtable; Geelong, Community Roundtable.

<sup>108</sup> Human Rights Committee, *General Comment No. 32: right to equality before courts and tribunals and to a fair trial*, (23 August 2007) [10].

<sup>109</sup> Senate Legal and Constitutional References Committee, *Legal Aid and Access to Justice* (2004), as summarised in Human Rights Law Resource Centre (Educate, Engage, Empower), Submission.

<sup>110</sup> Aboriginal and Torres Strait Islander Legal Services, Submission.

<sup>111</sup> Staff of the Legal Aid Commission (ACT), Submission; Public Interest Law Clearing House, Submission.

<sup>112</sup> Public Interest Law Clearing House, Submission.

<sup>113</sup> National Legal Aid, *A New National Policy for Legal Aid in Australia* (2007), cited in Human Rights Law Resource Centre, Submission.

### Increased funding for community legal centres

Community legal centres are independent community organisations that provide free legal services to the public. They are partially funded by the federal and state or territory governments or philanthropic organisations, but some receive no funding at all and are staffed entirely by volunteers.<sup>114</sup>

The Committee heard that community legal centres play a crucial role in helping people gain access to justice and realise their rights—particularly in the case of people who cannot pay for a lawyer or do not qualify for legal aid. Again, the Committee heard that substantial cuts in government funding in recent years have placed significant pressure on these centres, despite increased demand for their services.<sup>115</sup> There was support for increased government funding of community legal centres.<sup>116</sup>

### Encouraging pro bono services

Pro bono programs run by private law firms could make an important contribution to access to justice. The Committee was informed that the Victorian Government requires the law firms on its Legal Services Panel to provide pro bono services of at least 5 to 15 per cent of the value of the legal fees derived under panel arrangements.<sup>117</sup> A 2007 review concluded that this had played a substantial role in improving access to justice for marginalised and disadvantaged Victorians.<sup>118</sup> Several submissions recommended that the Federal Government adopt a similar mandatory policy.<sup>119</sup>

### Other proposals

The Committee heard that the Federal Government should consider introducing tax and other financial incentives to encourage lawyers to train or practice in rural and remote areas.<sup>120</sup> It was also suggested that there be greater access to legal aid for civil matters.<sup>121</sup>

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<sup>114</sup> Human Rights Law Resource Centre (Educate, Engage, Empower), Submission.

<sup>115</sup> Public Interest Law Clearing House, Submission.

<sup>116</sup> For example, Human Rights Law Resource Centre (Educate, Engage, Empower), Submission; Australian Lawyers for Human Rights, Submission; ACT Disability, Aged and Carer Advocacy Service, Submission; Federation of Community Legal Centres, Submission; Seniors Rights Victoria, Submission.

<sup>117</sup> Public Interest Law Clearing House, Submission; Human Rights Law Resource Centre (Educate, Engage, Empower), Submission; Australian Lawyers for Human Rights, Submission.

<sup>118</sup> Department of Justice, *Report on the Review of Legal Services to Government Panel Contract* (2007), cited in Human Rights Law Resource Centre, Submission.

<sup>119</sup> For example, Public Interest Law Clearing House, Submission; Human Rights Law Resource Centre (Educate, Engage, Empower), Submission; Australian Lawyers for Human Rights, Submission.

<sup>120</sup> Australian Lawyers for Human Rights, Submission.

<sup>121</sup> *ibid.*; Legal Aid Queensland, Submission; Human Rights Law Resource Centre (Educate, Engage, Empower), Submission; Public Interest Law Clearing House, Submission.

## Reducing the cost of access to justice

A number of submissions noted that the cost of delivering and achieving justice is becoming increasingly high, placing justice beyond the reach of many. In particular, the costs of court action are so prohibitive that many potential litigants do not pursue their claims.<sup>122</sup> Submissions suggested a variety of measures to help reduce the costs of litigation.

### Alternative dispute resolution

Several submissions argued that an alternative dispute resolution regime should be a central part of the framework supporting a Human Rights Act<sup>123</sup>, although use of such a regime could also be promoted in the absence of an Act. As the Mallesons Stephen Jacques Human Rights Law Group noted, alternative dispute resolution can provide a number of benefits—among them a wider and more flexible range of possible remedies, greater party satisfaction, a sense of empowerment for disadvantaged sections of the community, and a less formal and legalistic environment.<sup>124</sup> As noted, the Australian Human Rights Commission or the Commonwealth Ombudsman could play an important role in managing human rights complaints, which would help individuals limit the costs of litigation.

### Protective costs orders

The Committee was told that Australia's costs regime acts as a disincentive to public interest litigation. The general rule in civil proceedings is 'costs follow the event', meaning that the unsuccessful party will have to pay the other side's legal costs as well as their own. A number of submissions noted that cases involving human rights or the public interest often are not pursued because of the risk of an adverse costs order.<sup>125</sup> The Public Interest Law Clearing House submitted:

This is especially the case where the matter involves an unresolved area of law, in the nature of a test case, such that legal advisors are not able to advise with any degree of certainty the likely outcome of the litigation. Such uncertainty increases the risk of an adverse costs order and therefore reduces the likelihood that a marginalised or disadvantaged applicant will pursue important test cases, including in the area of human rights protection.<sup>126</sup>

It noted that the Victorian Law Reform Commission has previously identified the risk of adverse costs orders as a significant deterrent to public interest litigation<sup>127</sup> and

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<sup>122</sup> Public Interest Law Clearing House, Submission.

<sup>123</sup> Jesuit Social Services, Submission; Mallesons Stephen Jacques Human Rights Law Group, Submission; W Martin, Submission; Australian Human Rights Commission, Submission; Victorian Equal Opportunity & Human Rights Commission, Submission; Australian Council of Social Service, Submission.

<sup>124</sup> Mallesons Stephen Jacques Human Rights Law Group, Submission.

<sup>125</sup> R Merkel and A Pound, Submission; Public Interest Law Clearing House, Submission.

<sup>126</sup> Public Interest Law Clearing House, Submission.

<sup>127</sup> Victorian Law Reform Commission, *Civil Justice Review*, Report No. 14 (2008) 676, cited in Public Interest Law Clearing House, Submission.

that the Australian Law Reform Commission has recommended that ‘if private citizens are to be able to [initiate public interest litigation], any unnecessary barriers erected by the law of costs should be removed’.<sup>128</sup>

The Committee heard support for encouraging courts to use protective costs orders—that is, orders that protect a party from having to pay the other side’s legal costs if they are not successful.<sup>129</sup> A protective costs order regime has been adopted in the United Kingdom. Although Australian courts already have discretion to make such orders, the Committee was informed there is little guidance on when this discretion should be exercised. Accordingly, it was suggested, courts should be given an express power to make these orders, the orders should be available at the beginning of litigation, and the rules of court should specify when it is appropriate to make the orders.<sup>130</sup>

Some submissions also proposed that human rights cases should be a ‘no costs jurisdiction’; that is, parties would be expected to pay their own costs regardless of whether or not they succeed.<sup>131</sup> Alternatively, the Human Rights Council of Australia suggested that the Federal Government establish a test case litigation fund, as has operated in Canada since 1985, to provide resources to those running important human rights cases.<sup>132</sup>

### **Disbursement costs**

The Public Interest Law Clearing House noted that, even if a party is able to obtain free legal advice, there are other costs associated with litigation. Many people might also need assistance in meeting the costs of other professional services (known as ‘disbursements’)—such as obtaining medical opinions (to be used in evidence), interpreter services, and copies of the transcript of proceedings. The Clearing House suggested that the Federal Government do the following:

- establish a scheme for funding disbursements in all jurisdictions in matters where an applicant is represented pro bono and make such a scheme available for public interest cases
- allow for the waiver of application fees in cases of financial hardship and in public interest cases

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<sup>128</sup> Australian Law Reform Commission, *Costs Shifting: who pays for litigation*, Report No. 75 (1995) 78, cited in Public Interest Law Clearing House, Submission.

<sup>129</sup> Public Interest Law Clearing House, Submission. Support was also expressed in the context of a federal Human Rights Act, as opposed to more generally—R Merkel and A Pound, Submission.

<sup>130</sup> Public Interest Law Clearing House, Submission.

<sup>131</sup> For example, ACT Human Rights Commission, Submission; ACT Disability, Aged and Carer Advocacy Service, Submission; A Galbreath, Submission.

<sup>132</sup> Human Rights Council of Australia, Submission.

- allow funding to be granted retrospectively if disbursements were incurred urgently or if there is another compelling reason.<sup>133</sup>

## **The Committee's findings**

Access to justice is limited for many Australians, and more effort on the part of the Federal Government is needed to remove the barriers and so ensure more effective protection of human rights in Australia. The Committee was surprised by the extent of concern about access to justice throughout Australia: it was apparent at many community roundtables, and a large number of submissions raised the subject.

It is obvious that more needs to be done in this area, and the Committee heard a range of suggestions for remedying the situation. But much work has already been done to identify concerns and possible reforms in this area, so the Committee decided against making any specific proposals. Instead, it considers the Federal Government should develop and implement a framework for improving access to justice, in consultation with the legal profession and the non-government sector.

Some of the options for improving access to justice could be costly (for example, increasing funding for legal aid matters); others might be less so (for example, requiring government panel firms to engage in pro bono work). Nevertheless, as with a range of other reforms discussed in this report, the cost to the community of not taking any action is likely to be greater if the people who experience human rights violations are unable to seek justice or redress.

## **Recommendation**

### **Recommendation 14**

The Committee recommends that the Federal Government develop and implement a framework for improving access to justice, in consultation with the legal profession and the non-government sector.

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<sup>133</sup> Public Interest Law Clearing House, Submission.





## 9 Human rights and Indigenous Australians

One of the most contentious and frequently discussed topics throughout the Consultation was the rights of Australian's Indigenous peoples. There was widespread acknowledgment that the experiences of Aboriginal and Torres Strait Islander peoples are 'generally less favourable' than those of other Australians.<sup>1</sup> There was less agreement, however, about the types of strategies that are needed to respond to disadvantage and whether the situation justifies the invoking of specific 'Indigenous-only' rights. This chapter discusses the merits of the main options for reform, as put forward in the submissions, the community roundtables, the phone survey and the focus groups.

### 9.1 What are 'Indigenous rights'?

There is in the international community continuing philosophical debate about the nature and source of human rights.<sup>2</sup> Human rights are the 'rights of humans'. If human rights are universal—that is, rights we all have in common because we are all part of humanity—can some human rights be exclusively enjoyed only by a subset of humanity?

The tensions and complexities in balancing the universal rights of humankind against the legitimate concerns of minorities are highlighted in the case of many of the world's indigenous peoples. On 13 September 2007 the UN General Assembly tried to resolve some of these difficulties when it adopted the UN Declaration on the Rights of Indigenous Peoples (2007). While not legally binding on States parties, the instrument affirms that indigenous peoples are equal to all other peoples, while at the same time recognising the distinct rights of indigenous peoples. The declaration seeks to protect individual and collective rights; cultural rights and identity; and rights to education, health, employment and language. It prohibits discrimination and promotes the full and effective participation of indigenous peoples in all matters that concern them. Additionally, it ensures the right of indigenous peoples

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<sup>1</sup> Colmar Brunton Social Research, *National Human Rights Consultation—community research report* (2009).

<sup>2</sup> See Chapter 3.

to remain distinct and to pursue their own priorities in economic, social and cultural development.<sup>3</sup>

At the time of adoption of the declaration a number of countries expressed concern that a balance between the competing interests had not been achieved. Four States—Australia, Canada, New Zealand and the United States, all of whom have sizeable indigenous populations—voted against the declaration. Eleven states abstained and 34 states were absent from the vote.<sup>4</sup>

After the change of government in late 2007 Australia formally announced its support for the declaration in April 2009. The National Human Rights Consultation revealed, however, that the debate about distinctive Indigenous rights is far from settled in the Australian community.

In the context of Indigenous Australians, the rights discussed by many Consultation participants related to the enjoyment of general ‘citizenship’ rights (or general rights that are afforded to all) by Aboriginal and Torres Strait Islander people. ‘Amelia’ posted the following blog on the Australian Youth Forum website: ‘Many [A]boriginal people are living in very poor conditions, and are robbed of basic human rights because ... [the] family they have been brought into has lost their culture, morals and pride’.<sup>5</sup> In another blog, ‘Nathan’ maintained that Indigenous Australians should be treated the same way as all other Australians:

Aboriginal people are in no way inferior to anyone else and should be able to function in today’s society. Of course you should offer them assistance finding jobs, getting education, but they should be made equal to any other citizen, regardless of race.<sup>6</sup>

In contrast, other consultation participants spoke of the collective rights Indigenous Australians should have because they are the traditional owners of the land and waters: ‘Of course, they are the original inhabitants of Australia, they have a special status’.<sup>7</sup> The Close the Gap Steering Committee referred to earlier comments made by former Social Justice Commissioner and Australian of the Year Professor Mick Dodson:

It is because Indigenous rights encompass both categories [citizenship rights and distinct Indigenous rights] that a comprehensive recognition of Indigenous rights

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<sup>3</sup> UN High Commissioner for Human Rights, ‘High Commissioner for Human Rights hails adoption of Declaration on Indigenous Rights’ (Press release, 13 September 2007).

<sup>4</sup> In all, 143 States voted in favour of the Resolution.

<sup>5</sup> Australian Youth Forum, Submission.

<sup>6</sup> *ibid.*

<sup>7</sup> Hobart participant cited in Colmar Brunton Social Research, *National Human Rights Consultation—community research report* (2009).

requires a balancing act; holding in one hand the principle of equality or equity, and in the other the principle of difference.<sup>8</sup>

## Universal human rights and Indigenous Australians

Many of the rights numerous participants in the Consultation's community roundtables felt the rights that are not fully enjoyed by Aboriginal and Torres Strait Islander peoples fall into the category of economic, social and cultural rights—for example, the substandard housing<sup>9</sup>; the poor educational outcomes of students attending schools in Indigenous communities<sup>10</sup>; the inferior quality, supply and price of groceries<sup>11</sup>; the high mortality rates<sup>12</sup>; and the limited physical access to health care facilities and treatment. David Cooper has made the point that 'it is also important to understand that amongst these issues are some of the significant contributors to the discrimination and injustice faced by Indigenous people today. So getting this right is also a fundamental issue of justice'.<sup>13</sup> As long as the poor social indicators outlined in the Close the Gap Steering Committee's submission—such as poor life expectancy, unemployment, homelessness, family violence and imprisonment—exist, the chasm of disadvantage will remain.

These views are consistent with the general sentiments of many Consultation participants who said economic, social and cultural rights should be protected just as much as the civil and political rights of all Australians (as discussed in Chapter 4). The interrelatedness and indivisibility of these rights is particularly relevant to Aboriginal and Torres Strait Islander people:

Whether they are expressed as civil and political rights or economic, cultural and social rights, the fundamental notion underpinning human rights is that they are derived from the inherent dignity of every human person. The fulfilment of one right often depends, wholly or in part, upon the fulfilment of others.<sup>14</sup>

The Centre for Human Rights Education submitted, 'Introducing human rights legislation which focuses on civil and political rights and excludes economic, social and cultural rights is unlikely to contribute to significant improvements in the day-to-day lives of Indigenous Australians'.<sup>15</sup> The Committee sees merit in this argument, but it also acknowledges that there is among jurists and legal scholars debate about whether economic, social and cultural rights are justiciable. The Committee

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<sup>8</sup> M Dodson, 'The unique nature of the Australian Indigenous experience' (1996) 9 *Without Prejudice* 3, cited in Close the Gap Campaign Steering Committee for Indigenous Health Equality, Submission.

<sup>9</sup> Alice Springs, Community Roundtable; Yirrkala, Community Roundtable.

<sup>10</sup> Palm Island, Community Roundtable.

<sup>11</sup> *ibid.*

<sup>12</sup> Bourke, Community Roundtable.

<sup>13</sup> D Cooper, "'Close the Gap" to the Rudd Government's "Closing the Gap on Indigenous disadvantage"', cited in Australians for Native Title and Reconciliation NSW, Submission.

<sup>14</sup> Law Council of Australia, Submission.

<sup>15</sup> Centre for Human Rights Education, Submission.

also notes that the complexities of implementing legislative protections for these rights precluded the Victorian Parliament and the ACT Legislative Assembly from including them in their human rights legislation.

Nonetheless, a number of submissions argued that fundamental civil and political rights, such as the right to a fair trial, are not fully protected and enjoyed by Indigenous people in Australia and that a contributing factor to the over-representation of Indigenous people in the criminal justice system is the lack of ‘accredited professional-level interpreter[s] for Indigenous people who do not speak English as a first language’.<sup>16</sup> Sir Harry Gibbs, former Chief Justice of the High Court of Australia, once said, ‘Justice can be done only if the evidence and arguments are fully and clearly understood by all concerned’.<sup>17</sup> Aboriginal Resource and Development Services submitted that, even outside the court room, the lack of interpreter assistance can exacerbate disadvantage by inhibiting access to essential government services and programs such as Centrelink and Medicare. Aboriginal and Torres Strait Islander Legal Services reported that in remote areas ‘one in five [Indigenous people] experience difficulty in understanding or being understood by service providers’.<sup>18</sup>

## Indigenous-specific rights

The Declaration on the Rights of Indigenous Peoples recognises a number of rights that are exclusively enjoyed by the world’s indigenous peoples. Arguably these distinctive rights should be enjoyed by indigenous peoples because of their unique status as the traditional owners of land, their relationship with the land and waterways, and their vulnerability to losing their traditional customs, knowledge and language.<sup>19</sup> At the community roundtables Indigenous participants spoke about the importance these rights have for the maintenance of their culture and their physical and spiritual survival: ‘[Living on the homelands] it’s where we belong ... that is why we are strong, it gives us strength’.<sup>20</sup> They also saw that protection of their intellectual property rights was integral to their cultural rights and fundamental to the government’s focus on Indigenous economic development activities:



Yarrabah sign

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<sup>16</sup> Aboriginal Resource and Development Services, Submission.

<sup>17</sup> Sir Harry Gibbs, Sydney Law Society, ‘Legal interpreting: a fair go for migrants’ (1988) *Law Society Journal* 56.

<sup>18</sup> Aboriginal and Torres Strait Islander Legal Services, Submission.

<sup>19</sup> Mallesons Stephen Jacques Human Rights Law Group, Submission.

<sup>20</sup> Yirrkala, Community Roundtable.

Scientists have re-discovered a species they thought was extinct ... only because of the traditional people who showed them ... And the scientist goes back and writes it all up and gets credit from it, but he would never have known all that but for the traditional owner showing him. The traditional owners lose their rights, they don't even get a mention ... Aboriginal people and knowledge aren't recognised and valued in any way. There isn't any payment, no recognised award that pays traditional owners for their knowledge and time.<sup>21</sup>

The New Matilda Bill, a model human rights Act submitted by the Human Rights Act for Australia Campaign, recognises not only collective and individual rights of Aboriginal and Torres Strait Islander people in relation to their culture and traditions but also the right to 'live in freedom, peace and security and to full guarantees against genocide or any other act of violence'.<sup>22</sup> Although protection from violence is not a right that should exclusively apply to Indigenous Australians, a number of submissions highlighted the particularly high incidence of family violence and sexual assault in which Indigenous women and children are victims. The Wirringa Baiya Aboriginal Women's Legal Centre described the severity of many of its cases as being so great that this 'domestic violence ... is best described as torture'.<sup>23</sup>

Colmar Brunton Social Research's work reveals that Consultation participants are concerned about different rights being granted to different minority groups in Australia at the risk of 'the majority' being marginalised.<sup>24</sup> For example, 'If you are white and born in Australia you are discriminated [against]' and 'The majority groups are missing out'.<sup>25</sup> This supports the notion that human rights are universal and applicable to all simply because we are all human<sup>26</sup>; any specific rights for minority groups can be viewed as either a superior class of rights or evidence that a hierarchy of rights exists. Many participants felt they suffered a form of reverse discrimination and resented the additional benefits Indigenous Australians were said to have received.<sup>27</sup> Similar views were expressed by some young Australians who contributed their opinions through the Australian Youth Forum website:

Tragically Australia maintains separate law for Aboriginal groups, including land rights and exemption from many laws ... The segregation of Australian society needs to end. Self-governance needs to be discontinued and land rights, at the very least, limited.<sup>28</sup>

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<sup>21</sup> Coober Pedy, Community Roundtable.

<sup>22</sup> Human Rights Act for Australian Campaign (New Matilda), Submission.

<sup>23</sup> Wirringa Baiya Aboriginal Women's Legal Centre, Submission.

<sup>24</sup> Colmar Brunton Social Research, *National Human Rights Consultation—community research report* (2009).

<sup>25</sup> *ibid.*

<sup>26</sup> *ibid.*

<sup>27</sup> *ibid.*

<sup>28</sup> Australian Youth Forum, Submission.

Some focus group and survey participants felt that Aboriginal and Torres Strait Islander people had too many rights, giving them ‘more than a fair go’.<sup>29</sup> While there ‘was some recognition that Indigenous Australians are a special case’<sup>30</sup>, it was a common view that the same set of rights should apply to everyone and the difference ‘should be in the expression of rights, rather than different rights’.<sup>31</sup> To achieve this there might be a need to tailor general ‘citizenship’ rights (which are applicable to all), applying them in a way that attempts to improve the protection of human rights for Aboriginal and Torres Strait Islander peoples. In *Kruger v Commonwealth*<sup>32</sup> the High Court considered the constitutional validity of removing Indigenous children from their families under the Northern Territory’s *Aboriginals Ordinance 1918*. The plaintiffs, who were members of the Stolen Generations, unsuccessfully argued that this was in breach of their constitutional rights. This case highlights the weaknesses in the protection of certain rights within the existing Australian human rights framework.<sup>33</sup>

## 9.2 Options for achieving social equality

Consultation participants, especially participants in the survey and the focus groups, were divided on the protection of particular human rights for Indigenous Australians. The Colmar Brunton report suggests that it was recognised as a difficult area, unlikely to be resolved without considerable effort on both sides.<sup>34</sup> In spite of the legal complexities surrounding the protection of specific rights, the rights and responsibilities of Indigenous Australians must not be overlooked. Human rights do not exist in a legal vacuum; rather, as Simon Evans suggested in his submission, they should be protected by a suite of mechanisms.<sup>35</sup> Earlier chapters in this report outline the political, economic and cultural structures within our national human rights framework. In Chapter 6 the Committee stresses the need to introduce comprehensive cultural change in each of these structures in order to protect and promote human rights and responsibilities for Australians.

Any attempt to achieve social equality by ‘closing the gap’ of Indigenous disadvantage and protecting the basic human rights of Aboriginal and Torres Strait Islander peoples must include a range of well-directed initiatives across the

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<sup>29</sup> Colmar Brunton Social Research, *National Human Rights Consultation—community research report* (2009).

<sup>30</sup> *ibid.*

<sup>31</sup> *ibid.*

<sup>32</sup> (1997) 190 CLR 1.

<sup>33</sup> L Behrendt, *The 1967 Referendum: 40 years on ...* (2007) <[http://www.gtcentre.unsw.edu.au/publications/papers/docs/2007/153\\_LarissaBehrendt.pdf](http://www.gtcentre.unsw.edu.au/publications/papers/docs/2007/153_LarissaBehrendt.pdf)> at 23 September 2009.

<sup>34</sup> Colmar Brunton Social Research, *National Human Rights Consultation—community research report* (2009).

<sup>35</sup> S Evans, Submission.

structures of our national human rights framework. The Queensland Public Interest Legal Clearing House submitted that there is a need for:

... ‘a national human rights campaign’, comprising of legislation, education and other measures, [which] should acknowledge the atrocities of the past, provide better legislative protection of the human rights of Indigenous Australians and ... provide another mechanism to redirect the Australian government’s relationship with the Indigenous people of Australia.<sup>36</sup>

For this to be workable, a balance must be struck between achieving a degree of rights reform that responds to the legitimate concerns of Indigenous Australians in an environment that is often hostile to perceptions of so-called preferential treatment and separatism.

### **Recognition of Indigenous-specific rights in legal instruments**

Throughout the Consultation—especially at those community roundtables with a large number of Indigenous participants—there was a clear expression of the specific Indigenous rights that needed further protection. People were, however, less forthcoming about the detail of how these rights should be protected. The Committee received a number of submissions, from both Indigenous and non-Indigenous people, recommending the recognition of Indigenous-specific rights in various legal instruments. Some recommended that ‘a treaty and/or treaties between Aboriginal and Torres Strait Islander peoples and non-Indigenous Australians’<sup>37</sup> be entered into; others preferred a Human Rights Act with Aboriginal and Torres Strait Islander peoples recognised in a preamble and a separate part providing for the protection of specific Indigenous rights relating to land, language, culture and self-determination.<sup>38</sup>

The New South Wales Reconciliation Council submitted that the rights recognised in the Declaration on the Rights of Indigenous Peoples should be protected and promoted in a federal Human Rights Act. Although acknowledging the legally non-binding status of the declaration, the Mallesons Stephen Jacques Human Rights Law Group submitted that the declaration nevertheless plays an important role in the development of customary international law. For these reasons, it was argued, such declarations ‘should be considered for implementation domestically in a Human Rights Act’.<sup>39</sup>

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<sup>36</sup> Queensland Public Interest Law Clearing House, Submission.

<sup>37</sup> Australians for Native Title and Reconciliation NSW, Submission.

<sup>38</sup> Wirringa Baiya Aboriginal Women’s Legal Centre, Submission.

<sup>39</sup> Mallesons Stephen Jacques Human Rights Law Group, Submission.

Another preferred option for reform was enshrining Indigenous-specific rights—including the ‘recognition as first peoples of the land and water’<sup>40</sup>—in the Constitution or a treaty. A participant at the Yirrkala community roundtable said, ‘There is nothing in the Constitution; the basic human rights of Aboriginal people have never been recognised’.<sup>41</sup> There was concern that ‘What the government gives you today by statutory right, they will quite quickly take away tomorrow. Very rarely [are the Acts] amended upwards’.<sup>42</sup> In Broome Patrick Dodson remarked to Committee members:

It is hard to be enthusiastic about the outcome of this Inquiry ... Do we keep amending and repealing Acts or do we need an overhaul of the entire Constitutional framework? Why do we constantly abrogate to Parliament and judges for our rights? Until there is an overhaul of the Constitution, it will be an injustice for Indigenous Australians ... [because] we are at the mercy of Parliament.<sup>43</sup>

### **The Committee’s findings**

The Committee accepts that, as traditional owners, Aboriginal and Torres Strait Islander peoples collectively have a unique relationship with the land and waters and are vulnerable to losing their traditional customs, knowledge and language. A strengthening of the existing Australian human rights framework so that it adequately protects certain rights could contribute to improved social and economic outcomes for Indigenous peoples. In a 2008 report Access Economics and Reconciliation Australia found there were ‘sizable economy wide benefits to be achieved from improving the quality of life of Indigenous Australians’.<sup>44</sup> The Allen Consulting Group, while not specifically doing a cost–benefit analysis of this option, found that, of the options it reviewed, statutory human rights protection would have the greatest potential for protecting human rights (see Appendix D).

The Consultation terms of reference require the Committee to consider, among other things, the level of community support for each option. Despite over 35 000 written submissions being received and the thousands of people who participated in the community roundtables, Indigenous Australians did not put forward a significant number of recommendations about which specific Indigenous rights should be recognised and within what type of legal instrument. Colmar Brunton reported that participants in the survey and focus groups were cautious, if not resentful, about

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<sup>40</sup> Australians for Native Title and Reconciliation NSW, Submission.

<sup>41</sup> Yirrkala, Community Roundtable.

<sup>42</sup> Coober Pedy, Community Roundtable.

<sup>43</sup> Meeting held in Broome, Western Australia, June 2009.

<sup>44</sup> Access Economics & Reconciliation Australia, *An Overview of the Economic Impact of Indigenous Disadvantage* (2008), cited in Human Rights Law Resource Centre (Human Rights Act for All Australians), Submission.



Indigenous-specific rights, offering only minimal support for their recognition in a legal instrument such as a Human Rights Act.<sup>45</sup>

In view of the lack of support from the broader Australian community for different rights for different people, and the limited response from the Indigenous community on this point, the Committee is unable to recommend that specific Indigenous rights be recognised in a Human Rights Act, treaty or other legal instrument.<sup>46</sup> This proposal could, however, be used as a basis for further consultation with the Indigenous community.

### **Limiting parliament's ability to pass legislation to the detriment of Indigenous people**

During the community roundtables the Northern Territory Emergency Response (the 'Intervention') was the most cited instance of the impact of government policy and legislative decisions on the day-to-day lives of Indigenous Australians. The Northern Territory Emergency Response Review Board reported that it had been 'made abundantly clear' to it 'that people in Aboriginal communities felt humiliated and shamed by the imposition of measures that marked them out as less worthy of the legislative protections afforded other Australians'.<sup>47</sup> This was consistent with anecdotes provided to the Committee: 'It is demeaning to elders when they use the basics card. Shop assistants have been known to make fun of Yolngu people, giggling when they use the basics card'.<sup>48</sup> It was also said that the signs erected on the borders of Indigenous communities declaring they are a 'prescribed area' and subject to the Intervention 'label every member of that community a "paedophile" or "pornographer" or "alcoholic"'.<sup>49</sup>



Santa Teresa community roundtable participants

Ninety per cent of the participants in the Colmar Brunton survey and focus groups supported the view that parliament needs to pay attention to human rights when making laws.<sup>50</sup> Despite participants' varying views in relation to Indigenous people,

<sup>45</sup> Colmar Brunton Social Research, *National Human Rights Consultation—community research report* (2009).

<sup>46</sup> It should be noted that, in any event, constitutional protection of Indigenous rights would be precluded by the Committee's terms of reference.

<sup>47</sup> NTER Review Board, *Report of the NTER Review Board* (2008), cited in Gilbert + Tobin Centre of Public Law (S Brennan), Submission.

<sup>48</sup> Yirrkala, Community Roundtable.

<sup>49</sup> Tennant Creek, Community Roundtable.

<sup>50</sup> Colmar Brunton Social Research, *National Human Rights Consultation—community research report* (2009).

they nonetheless felt this cohort of the Australian population had generally been subject to inadequate service delivery. These views correlated with those expressed by Aboriginal and Torres Strait Islander people—particularly those who lived in remote locations, where many felt they were passive bystanders and excluded from the decision-making process: ‘Everyone talks about our dysfunction but no one is telling me how to function’<sup>51</sup> and ‘If it is not done by the government, nothing happens. People are taught to depend on government, so they do ... You need to change policies and you need to let Indigenous people take responsibility’.<sup>52</sup>

On the online forum ‘lucyv’, a social worker in the Northern Territory, submitted that the income management system had not been properly explained to the members of her community. She was in favour of ‘proper consultation with Indigenous people about laws affecting their own lives’. The Gilbert + Tobin Centre of Public Law submission on Indigenous legal matters stated that the Intervention reforms would have been far more effective if there had been proper consultation with Indigenous communities.<sup>53</sup>

The limitations of the *Racial Discrimination Act 1975* (Cth) and the need to guarantee racial equality were matters of concern for many Consultation participants. For example, it was recommended that the Act be unconditionally reinstated and strengthened with dire urgency<sup>54</sup>, and Aboriginal and Torres Strait Islander Legal Services submitted that the Act should be entrenched in the Constitution:

The RDA [Racial Discrimination Act] does not constitute a genuine guarantee of equal treatment for Australian citizens, on the basis of race. It is submitted that the only effective remedy is that the RDA be entrenched such that its essential principles cannot be interfered with by subsequent legislation of the Australian Parliament ... The RDA should be entrenched as a constitutional amendment to prevent it being subjected to implied or express repeal by the Australian Parliament whenever the Parliament sees fit.<sup>55</sup>

Australians for Native Title and Reconciliation NSW recommended the removal of ‘the racially-discriminatory section 25 of the *Constitution*’<sup>56</sup>, while others sought to replace it ‘with a racial equality clause’.<sup>57</sup> It was proposed by a number of participants at community roundtables and in written submissions that s. 51(xxvi) of

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<sup>51</sup> Palm Island, Community Roundtable.

<sup>52</sup> *ibid.*

<sup>53</sup> Gilbert + Tobin Centre of Public Law (S Brennan), Submission.

<sup>54</sup> University of Western Australia Boatshed Roundtable, Submission.

<sup>55</sup> Aboriginal and Torres Strait Islander Legal Services, Submission.

<sup>56</sup> Australians for Native Title and Reconciliation NSW, Submission. Section 25 of the Constitution provides that ‘if by the law of any State all persons of any race are disqualified from voting at elections for the more numerous House of the Parliament of the State, then, in reckoning the number of the people of the State or of the Commonwealth, persons of that race resident in that State shall not be counted’.

<sup>57</sup> University of Western Australia Boatshed Roundtable, Submission.

the Constitution be amended so that parliament's power to pass legislation with respect to people of any race for whom it is deemed necessary to make special laws cannot be used to the detriment of Aboriginal and Torres Strait Islander peoples.<sup>58</sup> It should be noted that the subject of constitutional protection of Indigenous rights is not part of the Committee's terms of reference.

Proponents of the protection of racial equality—whether it be through a Human Rights Act, an amendment to s. 51(xxvi) of the Constitution or constitutional entrenchment of the principle of non-discrimination—argue that this would help redress the disparity of Indigenous disadvantage. There is, however, a legitimate view that the extent of disadvantage suffered by many Indigenous Australians is such that future reform might not occur in the absence of invoking the 'race power' under the Constitution. This is not to suggest that racial discrimination should not be prohibited. The Gilbert + Tobin Centre of Public Law made the point that 'this is not a simple issue. The truth is that Australia needs ... either the races power or a power to make laws regarding Indigenous peoples for the federal government to make progress in many areas of reform'.<sup>59</sup>

In the High Court decision in *Gerhardy v Brown*<sup>60</sup> Justice Brennan set down a test for stipulating when a law applying only to people of a particular race (as authorised by s. 51(xxvi) of the Constitution) could be classed as a special measure. He stressed that the primary purpose of the special measure must be the advancement of the beneficiaries:

The purpose of securing advancement for a racial group is not established by showing that the branch of government or the person who takes the measure does so for the purpose of conferring what it or he regards as a benefit for the group if the group does not seek or wish to have the benefit. The wishes of the beneficiaries for the measure are of great importance (perhaps essential) in determining whether a measure is taken for the purpose of securing their advancement.<sup>61</sup>

This test is problematic in that it raises practical difficulties in connection with degrees of consent. In the case of the Intervention, the Committee heard compelling but conflicting opinions from Indigenous people who are directly affected by the legislation. Professor Helen Irving noted that the Intervention 'may have adverse effects for some and beneficial effects for others. It may be adverse in the immediate term and beneficial in the long term (or vice versa)'.<sup>62</sup>

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<sup>58</sup> For example, Australians for Native Title and Reconciliation NSW, Submission. Section 51(xxvi) of the Constitution provides that the Commonwealth Parliament has power to make laws with respect to 'the people of any race for whom it is deemed necessary to make special laws'.

<sup>59</sup> Gilbert + Tobin Centre of Public Law (S Brennan); Submission.

<sup>60</sup> (1985) 159 CLR 70.

<sup>61</sup> (1985) 159 CLR 70.

<sup>62</sup> H Irving, Submission.

How do we determine when consent is deemed to have been given if the beneficiaries have valid and opposing views? It would be an unfair expectation if a people, such as Indigenous Australians, were expected to reach consensus every time a controversial policy decision or controversial legislation was being contemplated. And to do so could cause unreasonable delay at a time when government action is most required. This challenge illustrates the tension that exists, in many areas of human rights protection, when seeking to achieve an equitable balance between rights and responsibilities.

### **The Committee's findings**

The Committee sees merit in parliament enacting a law or at least a Standing Order providing that, if a Bill or a provision contained in a Bill relates to Aboriginal and Torres Strait Islander peoples and is inconsistent with the *Racial Discrimination Act 1975* or can be classed as a special measure, there must be tabled in parliament a statement of impact stipulating the reasons for the suspension of the Act or the institution of the special measure. The statement of impact would need to discuss the following:

- the purpose or object of the measure
- the reasonableness and proportionality of the purpose or object to the proposed act or omission
- the amount of time until the purpose or object is achieved
- whether there has been consent or at least adequate consultation with interested parties and potential beneficiaries in relation to the proposed measure.

Such a provision or Standing Order could ensure a 'proper, sophisticated human rights analysis ... of competing rights and considerations'.<sup>63</sup> Although the procedure would not affect the validity of a law and would not prevent future discriminatory laws being passed, it would arguably 'deter scandalously abbreviated parliamentary processes, or inadequate policy development, or shoddy implementation that lacks basic respect for human dignity'.<sup>64</sup> The cost of implementing this option would be low when one considers the benefits it could have for the rights of Aboriginal and Torres Strait Islander peoples. In addition, the Committee notes the significant support expressed during the Consultation for the general proposition 'Parliament needs to pay attention to human rights when making laws'.<sup>65</sup>

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<sup>63</sup> Gilbert + Tobin Centre of Public Law (S Brennan), Submission.

<sup>64</sup> *ibid.*

<sup>65</sup> Colmar Brunton Social Research, *National Human Rights Consultation—community research report* (2009).

## Recognition of the right to self-determination

Although the concept of self-determination was often discussed in submissions and raised during community roundtables, there was no consistent definition for the term. Participants' opinions varied in relation to the content of such a right and how it could be realised. Some equated the right with Indigenous sovereignty<sup>66</sup> and thought of it as an inherent birthright<sup>67</sup>; some identified it as a crucial ingredient in redressing disadvantage<sup>68</sup>; yet others viewed it in terms of strategies for increasing Indigenous peoples' participation in the mainstream political process.<sup>69</sup>

The Declaration on the Rights of Indigenous Peoples provides as follows:

### *Article 3*

Indigenous 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.

### *Article 4*

Indigenous peoples, in exercising their right to self-determination, have the right to autonomy or self-government in matters relating to their internal and local affairs, as well as ways and means for financing their autonomous functions.

Some argue that the right to self-determination includes the rights to autonomy or self-government; distinct political, legal, economic, social and cultural institutions; and control of education, languages and media.<sup>70</sup>

The Indigenous Law Centre offered a different perspective on the scope and limitation of the right. It argued, 'There is misinformation about what the right to self-determination means and how it is implemented'.<sup>71</sup> It pointed out that the right of Aboriginal and Torres Strait Islander peoples to self-determination means their right to democratically determine their political destiny.<sup>72</sup> It was also suggested that the right could be realised and protected by the creation of a representative body that liaises between Indigenous communities and the Federal Government.<sup>73</sup>

The UN General Assembly has stated that the right to self-determination does not permit action that threatens the territorial integrity of the State.<sup>74</sup> This position is confirmed in the Declaration on the Rights of Indigenous Peoples, which states that

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<sup>66</sup> Australians for Native Title and Reconciliation VIC, Submission.

<sup>67</sup> Thursday Island, Community Roundtable.

<sup>68</sup> Victorian Aboriginal Child Care Agency, Submission.

<sup>69</sup> Palm Island, Community Roundtable.

<sup>70</sup> Foundation of Aboriginal and Islander Research Action, Submission.

<sup>71</sup> Indigenous Law Centre, Submission.

<sup>72</sup> *ibid.*

<sup>73</sup> For example, *ibid.*

<sup>74</sup> For example, UN General Assembly, Declaration on the Granting of Independence to Colonial Countries and Peoples, (1960).

the right ‘does not permit any action which threatens the territorial integrity of a State Party’<sup>75</sup> and is ‘subject to such limitations as are determined by law and in accordance with international human rights obligations’<sup>76</sup>:

Thus in contemporary international human rights law the right to self-determination is about procedure and process. Fundamentally for Aboriginal and Torres Strait Islander communities it is about consultation and being consulted on the decisions that affect their lives as individuals and communities.<sup>77</sup>

### **The Committee’s findings**

The Committee notes the results of the Colmar Brunton survey and focus group sessions. Some participants, demonstrating a limited understanding of the concept of self-determination, were opposed to the idea—particularly if it resulted in parallel communities.<sup>78</sup> This correlates with the differing perspectives Indigenous people themselves have in relation to the scope of this right. The most appropriate interpretation of the right is that Aboriginal and Torres Strait Islander peoples ought to be free to determine their internal and local affairs but in such a way as not to ‘dismember or impair, totally or in part, the territorial integrity’ of Australia and subject to those limits necessary for ‘securing due recognition and respect for the rights and freedoms of others and for meeting the just and most compelling requirements of a democratic society’.<sup>79</sup> This interpretation is consistent with the position of the Federal Government, which ‘does not support an interpretation of self determination that has the potential to undermine Australia’s territorial integrity or political sovereignty’.<sup>80</sup> The Committee finds it is possible for the right of Aboriginal and Torres Strait Islander peoples to self-determination to be meaningfully expressed subject to workable limitations. A number of low-cost but moderate-impact initiatives could enable the government to adhere to the right to self-determination. Two examples are:

- requiring a statement of impact on Aboriginal and Torres Strait Islander persons to be prepared when intending to legislate exclusively for them, having ensured that there has been consent or at least full consultation with interested parties and potential beneficiaries (as discussed)
- developing and implementing, in partnership with local Indigenous communities, a framework for self-determination outlining consultation protocols, roles and

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<sup>75</sup> Mallesons Stephen Jacques Human Rights Law Group, Submission, referring to the UN Declaration on the Rights of Indigenous Peoples (2007), art. 46(1).

<sup>76</sup> Indigenous Law Centre, Submission, referring to the UN Declaration on the Rights of Indigenous Peoples (2007), art. 46(2).

<sup>77</sup> Indigenous Law Centre, Submission.

<sup>78</sup> Colmar Brunton Social Research, *National Human Rights Consultation—community research report* (2009).

<sup>79</sup> UN Declaration on the Rights of Indigenous Peoples (2007), art. 46.1, 46.2.

<sup>80</sup> *Australia—core document forming part of the reports of States Parties* (2007), 45.

responsibilities, so that Indigenous people have meaningful control over their affairs, and strategies for increasing Indigenous people's participation in the institutions of democratic government.

### **Statutory acknowledgment of Indigenous Australians' cultural rights and historical status**

Among Indigenous people there was considerable support for legislative recognition of Aboriginal and Torres Strait Islander peoples as Australia's original inhabitants. The National Native Title Council submitted that this acknowledgment was essential. Additionally, it could be practical if the acknowledgment included a statutory definition of 'Aboriginal and Torres Strait Islander peoples'. For example, the *Corporations (Aboriginal and Torres Strait Islander) Act 2006* (Cth) primarily provides for the incorporation and regulation of Aboriginal and Torres Strait Islander corporations or organisations, yet 'there is little statutory guidance provided in the ... Act on the requirements a person must satisfy in order to be considered an Aboriginal [or] Torres Strait Islander person'.<sup>81</sup>

#### **The Committee's findings**

The Committee notes the importance of maintaining a balance between achieving some of the desired outcomes expressed during the Consultation and at the same time adhering to the sentiments of the majority of survey and focus group participants—that differences should be in the mode of enjoyment of the same rights, rather than the enjoyment of differing rights.<sup>82</sup> A cost–benefit analysis of this particular reform option was not done by The Allen Consulting Group, but it did find that statutory mechanisms offer significant potential for human rights protection (see Appendix D). The period of implementation would need to allow sufficient time for consultation with representatives of Aboriginal and Torres Strait Islander communities, the Attorney-General's Department and the Office of the Parliamentary Counsel in relation to the proposed wording of the provisions. In the Committee's view, this proposal could be used as a basis for further consultation with the Indigenous community.

#### *Statutory definition of Aboriginal and Torres Strait Islander people*

The Committee finds there would be practical benefits in having a statutory definition of Aboriginal and Torres Strait Islander peoples. A definition the Federal Government might consider is the test outlined by Justice Deane in the High Court decision in *Commonwealth v Tasmania*<sup>83</sup>:

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<sup>81</sup> Office of the Registrar of Aboriginal and Torres Strait Islander Corporations, *Policy Statement 11: the indigeneity requirement* (2008).

<sup>82</sup> Colmar Brunton Social Research, *National Human Rights Consultation—community research report* (2009).

<sup>83</sup> (1983) 158 CLR 1.

- ‘Aboriginal and Torres Strait Islander’ means a person who—
  - is of Aboriginal and/or Torres Strait Islander descent
  - identifies himself or herself as being Aboriginal and/or Torres Strait Islander descent
- and
- the community recognises the person as an Aboriginal and/or Torres Strait Islander person.

The test has since been adopted by the government and is commonly endorsed by the Indigenous community.

An important feature of this definition is that it should allay concerns on the part of members of the Torres Strait Islander community that their status as Indigenous Australians is often overlooked and therefore not duly recognised.

#### *Recognition of cultural matters*

There would be both symbolic value and practical benefit in the Federal Parliament affording statutory acknowledgment of Aboriginal and Torres Strait Islander peoples as the ‘original inhabitants of Australia prior to European settlement’, as well as the customs and traditions some Aboriginal and Torres Strait Islander people might still observe. The Federal Parliament could acknowledge the following cultural principles:

- Although distinct and culturally diverse, Aboriginal and Torres Strait Islander peoples are recognised as the Indigenous peoples of Australia.
- Aboriginal and Torres Strait Islander peoples, in accordance with their customs and traditions, may—
  - possess specialised knowledge, skills, expertise and language
  - hold a unique and special relationship with their traditional lands and waters and other moveable objects—including human skeletal remains and tissue material—of religious and cultural significance.
- In accordance with customs and traditions, Aboriginal and Torres Strait Islander family and kinship structures may include individuals who would not otherwise be defined as an immediate family member—whether or not the individuals are biologically related.

In recent years state, territory and federal parliaments in Australia have evinced a willingness to recognise certain aspects of Aboriginal and Torres Strait Islander traditions, practices and customs. For example, the New South Wales Parliament has passed the *Succession Amendment (Intestacy) Act 2009*, which recognises that



in the absence of a will an Indigenous person might be ‘entitled to share in an intestate estate under the laws, customs, traditions and practices of the Indigenous community or group to which an Indigenous intestate belonged’.<sup>84</sup> Proposed cultural principles might not constitute ‘rights’ conferred automatically on Indigenous Australians but could provide assistance to courts, tribunals and the executive in the following three important areas.

- *Assistance in the statutory interpretation of Commonwealth legislation.* Courts’ use of cultural principles as a statutory interpretation tool is consistent with the view of 69 per cent of the participants in the Colmar Brunton survey and focus groups, who agreed that ‘courts should interpret parliamentary laws in a way that they feel most respects human rights’ and not ‘exactly as they are worded’.<sup>85</sup> For example, the *Sex Discrimination Act 1984* (Cth) makes it unlawful to discriminate on the grounds of family responsibility. Another section, however, restricts the definition of ‘family responsibilities’ to either a dependent child or any other immediate family member who is in need of care or support. The term ‘immediate family member’ is further restricted by another subsection to mean a spouse or an adult child, parent, grandparent, grandchild or sibling. This notion of ‘family’ has an exclusionary effect for some Aboriginal and Torres Strait Islander people because it is too narrow to allow contemplation of the broader kinship system and extended family relationships.

Additionally, to preserve the sovereignty of the Federal Parliament, these principles should be applied to interpretation of a statute only so far as it is possible to do so consistently with the statute’s purpose or underlying object and the interpretation does not lead to a manifestly absurd or unreasonable result. The Committee notes that there could be occasions when the Federal Parliament seeks to exclude the consideration of cultural principles (or particular cultural matters) from the interpretation of a statutory provision. For example, parliament might consider it inappropriate for courts to consider aspects of Indigenous cultural practices when interpreting the *Marriage Act 1961* (Cth) or the *Crimes Act 1914* (Cth), which expressly exclude customary law from being taken into account when sentencing Indigenous offenders.<sup>86</sup>

- *Additional factors to be considered in the merit review of reviewable decisions of a Commonwealth agency or body.*

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<sup>84</sup> *Succession Amendment (Intestacy) Act 2009* (NSW) s. 133(1).

<sup>85</sup> Colmar Brunton Social Research, *National Human Rights Consultation—community research report* (2009).

<sup>86</sup> The *Crimes Act 1914* (Cth) s. 16A provides that the court must not take into account customary law or cultural practice as a reason for: ‘(a) Excusing, justifying, authorizing, requiring or lessening the seriousness of the criminal behavior to which the offence relates; or (b) Aggravating the seriousness of the criminal behavior to which the offence relates’.

- *Assistance to the executive when developing and implementing policy to consider the impact that policy could have on certain aspects of Aboriginal and Torres Strait Islander culture.*

The public service has an important role in the protection of human rights: it is through public servants' delivery of government programs and services that many Australians enjoy particular civil, political, economic, social and cultural rights. In the focus group sessions facilitated by Colmar Brunton 'Indigenous Australians' were commonly cited as an example of a group for whom service delivery was perceived to be inadequate.<sup>87</sup> Merit review by an administrative decisions tribunal is therefore a central component of Australia's existing human rights framework. The cultural principles could provide guidance for tribunals considering relevant information when reviewing a decision involving an Aboriginal or Torres Strait Islander person. This approach is consistent with the established principle that tribunals 'are not fettered by the need to apply the rules of evidence and procedure'<sup>88</sup> and have some flexibility when considering what matters are relevant in decision making.

### **Inclusion of Indigenous people in the development and delivery of a national human rights education and awareness campaign**

In Chapter 6 the Committee recommends the implementation of a national human rights education plan. In connection with Indigenous Australians, it is recommended that Aboriginal and Torres Strait Islander people be involved in the development and delivery of this plan. Both Indigenous and non-Indigenous participants in the Consultation stressed the importance of incorporating the experiences of Aboriginal and Torres Strait Islander peoples in the content of such a plan—with a particular focus on recent history. A participant in the Busselton community roundtable highlighted the importance of this history being shared:

I grew up in an imaginary Australia and I was fed a myth ... You didn't see Aboriginal people at my school. I only saw them at my church and saw them playing sport at the mission. I didn't realise that the babies were separated from their siblings. It's hard to know how to connect to them ... It's not an intentional misleading of a myth just an absence of contact, friendly contact—we didn't get to listen to each other's stories.<sup>89</sup>

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<sup>87</sup> Colmar Brunton Social Research, *National Human Rights Consultation—community research report* (2009).

<sup>88</sup> Council of Australasian Tribunals, *Practice Manual for Tribunals* (2009). See 5.6.1, 'Inapplicability of the rules of evidence and procedure'.

<sup>89</sup> Busselton, Community Roundtable.

## **The Committee's findings**

It is important that an education and awareness campaign incorporates the experiences of Aboriginal and Torres Strait Islander peoples—with a particular focus on contemporary historical examples of human rights successes and failures. The time frame for implementing the national education and awareness campaign would need to allow for the development of this content. In addition to the costs and risks identified in Chapter 6, there would be research and consultancy costs associated with the inclusion of Indigenous people in the development and delivery of the plan. This proposal could be used as a basis for further consultation with the Indigenous community.

## **Improving the methods used for collecting data from Indigenous peoples**

The census is a problem for us. It doesn't count people properly. The consequence of the census not being reflective is that the community gets a small percentage of funding.<sup>90</sup>

Consultation participants told the Committee about the human rights consequences inaccurate data can have for 'planning, policy development, service delivery and allocation of funding'<sup>91</sup> to deal with Indigenous disadvantage. Examples of how the data collection can be inaccurate are the assumption that the Indigenous respondent is a proficient speaker or reader of the English language<sup>92</sup>, population statistics not recognising the natural migration or movement patterns of local residents within a greater regional area<sup>93</sup>, and the reluctance of older Indigenous people to have their details recorded by the government as a result of past government practices—for example, memories of living 'under the Act' on government-controlled mission reserves and settlements. A collective submission from about 40 prominent researchers recommended that the involvement of Indigenous people in all stages of the design and data-collection processes would be an important strategy for mitigating the risk of inaccuracies.<sup>94</sup>

## **The Committee's finding**

The Committee notes the value of the Federal Government's collection of data from Indigenous peoples within an Indigenous framework. The Allen Consulting Group did not do a cost-benefit analysis of a model for improving the collection of data from Indigenous people, but it can be said that significant resources would be required in order to develop and apply an agreed research framework across government. This

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<sup>90</sup> Coober Pedy, Community Roundtable.

<sup>91</sup> University of Western Australia Boatshed Roundtable, Submission.

<sup>92</sup> Coober Pedy, Community Roundtable.

<sup>93</sup> Tennant Creek, Community Roundtable.

<sup>94</sup> University of Western Australia Boatshed Roundtable, Submission.

proposal could be used as a basis for further consultation with the Indigenous community.

## **Improving Indigenous peoples' access to accredited interpreters**

At common law there is no automatic right to an interpreter.<sup>95</sup> Section 30 of the *Evidence Act 1995* (Cth) appears to confer the right to an interpreter, but this right can be challenged on the basis that 'the witness can understand and speak the English language sufficiently'. It is then generally in the hands of the judge, who might not be adept at assessing language skills, to determine whether a person before the court meets the criteria for excluding the right to an interpreter. Even if a court grants a witness the right to an interpreter, this right can be exercised only if there is available an accredited interpreter who is fluent in the person's language. To be qualified as an interpreter that person must be accredited by the National Accreditation Authority for Translators and Interpreters. The submission from Aboriginal Resource and Development Services referred the Committee to the findings of other important reports—including those of the Royal Commission into Aboriginal Deaths in Custody, which found a need for the government to 'take more positive steps to recruit and train Aboriginal people as court staff and interpreters in locations where significant numbers of Aboriginal people appear before the courts'.<sup>96</sup>

### **The Committee's findings**

The Committee notes the concern of Consultation participants who raised the question of improving Aboriginal and Torres Strait Islander people's access to accredited interpreters.<sup>97</sup> Although The Allen Consulting Group did not do a cost-benefit analysis of appropriate interpreting models, the Committee is aware of the considerable resources that would be required in order to develop a comprehensive nationally accredited interpreting service for Aboriginal and Torres Strait Islander people who are not proficient in English. The time frame for implementation would need to allow sufficient time for:

- developing a process for identifying Indigenous languages currently spoken and their speakers
- reviewing the recruitment and accreditation framework for speakers of Indigenous languages for which there are insufficient accredited interpreters available

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<sup>95</sup> *Dairy Farmers Co-Operative Co. Ltd. v Aquilina* (1963) 109 CLR 458.

<sup>96</sup> *Royal Commission into Aboriginal Deaths in Custody: final report* (1991), recommendation 100.

<sup>97</sup> Aboriginal Resource and Development Services, Submission; Aboriginal and Torres Strait Islander Legal Services, Submission.

- auditing the existing strategies and resources available for assisting Indigenous clients of essential government services who have difficulty communicating with representatives of the Federal Government because they do not speak or understand English well.

The Committee also notes that the question of Indigenous Australians' access to accredited interpreting services was not often raised by Consultation participants. Nevertheless, the foregoing proposal could be used as a basis for further consultation with the Indigenous community.

## Recommendations

### Recommendation 15

The Committee recommends that a 'statement of impact on Aboriginal and Torres Strait Islander peoples' be provided to the Federal Parliament when the intent is to legislate exclusively for those peoples, to suspend the *Racial Discrimination Act 1975* (Cth) or to institute a special measure. The statement should explain the object, purpose and proportionality of the legislation and detail the processes of consultation and the attempts made to obtain informed consent from those concerned.

### Recommendation 16

The Committee recommends that, in partnership with Indigenous communities, the Federal Government develop and implement a framework for self-determination, outlining consultation protocols, roles and responsibilities (so that the communities have meaningful control over their affairs) and strategies for increasing Indigenous Australians' participation in the institutions of democratic government.



## **PART FOUR**

### **A Human Rights Act?**

Although members of the community proposed to the Committee a range of options for improving the promotion and protection of human rights, many focused on the desirability of a Human Rights Act and the form it should take. This part of the report discusses the views put forward and describes the historical and comparative context of the debate.

Chapter 10 provides an overview of previous attempts to introduce a bill of rights (or specific human rights protections) in either constitutional or statutory form in Australia, Chapter 11 outlines the statutory models of human rights protection that have been introduced overseas and in some Australian jurisdictions, Chapters 12 and 13 examine the arguments for and against a Human Rights Act, and Chapter 14 discusses some of the technical aspects of drafting such an Act.





## 10 Bill of rights debates: a historical overview

The questions of whether and how human rights should be protected in Australia have been the subject of debate since before Federation. The drafters of the Australian Constitution considered whether they should include a list of rights and ultimately settled on including a small number of limited rights. Since then, at the federal level there have been a number of proposals either to alter the Constitution or to pass new legislation in order to formally protect human rights. This chapter examines these proposals and outlines the findings and outcomes of recent inquiries into the desirability of human rights Acts at the state and territory level.

1890s—The Australian Constitution is drafted. It includes a limited range of rights.

1944—A referendum on freedom of speech and freedom of religion fails.

1973—Federal Attorney-General Lionel Murphy introduces a human rights Bill into parliament. It is never passed.

1981—The Commonwealth *Human Rights Commission Act 1981* is passed.

1984—Senator Gareth Evans drafts a human rights Bill, but it is never introduced into parliament.

1985—Senator Lionel Bowen's human rights Bill passes the House of Representatives but stalls in the Senate.

1988—A referendum on extending constitutional rights to the states fails.

### 10.1 The drafting of the Australian Constitution

The Australian Constitution was drafted at a series of conventions held in the 1890s. One of the questions debated by the delegates was whether rights should be provided for in the Constitution, as they had been in the US Constitution. Tasmanian Attorney-General Andrew Inglis Clark proposed that the Constitution include the right to trial by jury for all crimes, the right to the privileges and immunities of state citizenship, the right to equal protection under the law, the right

to freedom of religion, and a prohibition on the establishing of any religion by the Commonwealth.<sup>1</sup>

As outlined in Chapter 5, some of these protections were ultimately included in the Constitution, albeit in a limited form.<sup>2</sup> A more comprehensive list of rights was not included: it was generally felt that parliamentary democracy was a sufficient guarantee of citizens' rights. It has also been suggested the delegates feared that such protections might inhibit the states' abilities to enact racially discriminatory legislation.<sup>3</sup>

## 10.2 Constitutional attempts to protect rights

### The 1944 referendum

In 1944 the Curtin Government proposed that the Constitution be amended to transfer a range of state powers to the federal government to assist in postwar reconstruction. The powers covered 14 different areas, among them health, Indigenous peoples, employment, companies, the production and distribution of goods, and the control of overseas exchange and investment. The federal Attorney-General, Dr HV Evatt, proposed that the package of reforms include protections for certain rights, apparently to allay concerns that the government was trying to implement a socialist agenda.<sup>4</sup>

The proposed provisions would have prevented both state and federal governments from curtailing freedom of speech and expression and would have extended to the states the freedom of religion contained in s. 116 of the Constitution. Some of the 14 areas in which power was to be transferred proved very controversial<sup>5</sup>, and the referendum required voters to vote on the entire package of reforms. The proposals were ultimately defeated.<sup>6</sup>

### The 1988 referendum

In 1985 the Hawke Government established a Constitutional Commission to investigate the need for constitutional change and, in particular, whether new rights and freedoms should be inserted in the Constitution. Because of an apparent

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<sup>1</sup> A Byrnes, H Charlesworth and G McKinnon, *Bills of Rights in Australia: history, politics and law* (2009) 24.

<sup>2</sup> See the discussion of constitutional protections in Chapter 5.

<sup>3</sup> JA La Nauze, *The Making of the Australian Constitution* (1972) 231–2; G Williams, *Human Rights under the Australian Constitution* (1999) 41–2.

<sup>4</sup> H Charlesworth, 'The Australian reluctance about rights' in P Alston (ed.) *Towards an Australian Bill of Rights* (1994) 25.

<sup>5</sup> S Bennett, *The Politics of Constitutional Amendment*, Parliamentary Research Service, Commonwealth Parliament, Research Paper No. 11 (2003) 17.

<sup>6</sup> H Charlesworth, 'The Australian reluctance about rights' in P Alston (ed.) *Towards an Australian Bill of Rights* (1994) 25.

eagerness to hold the referendum in 1988—the bicentenary of European settlement in Australia—the government asked the commission to prepare an interim report, which was released in 1987. The report recommended the inclusion of a range of rights drawn from the International Covenant on Civil and Political Rights. Before the commission had issued its final recommendations, however, the government announced its plan for constitutional change.<sup>7</sup>

The September 1988 referendum proposed to guarantee the right to trial by jury for all people in Australia charged with offences carrying a maximum penalty of at least two years' imprisonment and to extend to the states the existing provisions relating to freedom of religion and the requirement that the acquisition of property be on just terms.<sup>8</sup> The referendum also proposed reforms associated with the electoral system and local government. Voters were able to vote on each reform separately, but all the proposals were defeated. In the view of one commentator, the defeat can be attributed to 'the rushed nature of the referendum, the effective spoiling campaign mounted by the opponents ... the lack of community understanding of the proposals' and the absence of bipartisan support.<sup>9</sup> Other commentators point to the fact that the Constitutional Commission had no state support and was seen to lack independence from the Labor Government.<sup>10</sup>

## 10.3 Federal legislative proposals to protect rights

### The Murphy Bill

In 1973, following the Whitlam Government's signing of the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights, federal Attorney-General Senator Lionel Murphy introduced the Human Rights Bill 1973 into Parliament. When doing so, he noted that, although rights were basic to a democratic society, they received 'remarkably little legal protection in Australia'.<sup>11</sup> The Bill provided for civil and political rights virtually identical to those in the International Covenant on Civil and Political Rights,

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<sup>7</sup> See G Williams, *A Charter of Rights for Australia* (1997) 61; A Byrnes, H Charlesworth and G McKinnon, *Bills of Rights in Australia: history, politics and law* (2009) 33. The commission's final report, issued in June 1988, recommended more ambitious changes than its interim report. It proposed that a new chapter—Chapter VIA, 'Rights and freedoms'—be inserted in the Constitution, based heavily on the Canadian Charter of Rights and Freedoms. Unlike the Canadian Charter, though, government would not be given the power to 'opt out' of those rights and freedoms if it wished to pass legislation that was inconsistent with them.

<sup>8</sup> Constitution Alteration (Rights and Freedoms) Bill 1988 (Cth).

<sup>9</sup> G Williams, *A Charter of Rights for Australia* (1997) 62.

<sup>10</sup> B Galligan, R Knopff and J Uhr, 'Australian federalism and the debate over a bill of rights' (1990) 20(4) *Publius* 53, 61–2.

<sup>11</sup> Commonwealth, *Parliamentary Debates*, Senate, 21 November 1973, 1972 (Senator Murphy, Attorney-General).

including the right to non-discrimination; equal protection under the law; freedom of thought, expression and movement; the right to vote; and the right to privacy.

The Murphy Bill had the following features:

- *Scope of application.* The Bill applied at the federal level and throughout the states and territories.
- *Enforcement of obligations.* The Australian Human Rights Commissioner could, on his or her own initiative, investigate human rights breaches by any person (including federal, state and territory authorities and private individuals) and then conciliate the matter or bring an action against the offender in the Australian Industrial Court. Individuals could also initiate court proceedings. The court could make a declaration that the offender's actions violated human rights and order a range of remedies, among them injunctions and damages.
- *Effect on inconsistent legislation.* Any federal or territory law that was inconsistent with the Bill, whether passed before or after the Bill, would be rendered inoperative to the extent of the inconsistency unless the law was expressed to operate regardless of any inconsistency. Any state law that was inconsistent with the Bill would be rendered inoperative by virtue of s. 109 of the Constitution.<sup>12</sup>

The Bill was criticised as 'unnecessary' and 'likely to politicise the judiciary'<sup>13</sup> and intrude on state power.<sup>14</sup> Its legitimacy was also called into question because it was based on the International Covenant on Civil and Political Rights, which had not yet entered into force. The Bill lapsed when both houses of parliament were dissolved in 1974, and it was not re-introduced.<sup>15</sup>

## The Human Rights Commission Act

In 1981 the Fraser Government took a different approach to the legislative protection of human rights. It had ratified the International Covenant on Economic, Social and Cultural Rights in 1976 and the International Covenant on Civil and Political Rights in 1980 but argued that a human rights Act was inappropriate in the Australian context because it 'would have serious implications for our federal system of government' and 'would be contrary to our long established constitutional

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<sup>12</sup> Section 109 of the Australian Constitution provides that, where a law of a state is inconsistent with a federal law, the state law is invalid to the extent of the inconsistency. Generally, a state law may be found to be inconsistent where the state and federal laws cannot be obeyed simultaneously; the state law would alter, impair or detract from the operation of the federal law or the exercise of a power under the federal law; or a law of a state enters a field that the federal law was intended to cover exclusively or exhaustively.

<sup>13</sup> A Byrnes, H Charlesworth and G McKinnon, *Bills of Rights in Australia: history, politics and law* (2009) 29.

<sup>14</sup> One state spokesperson asserted that the real purpose behind the Bill was to 'assert a Commonwealth domination over the States'—see B Galligan, R Knopff and J Uhr, 'Australian federalism and the debate over a bill of rights' (1990) 20(4) *Publius* 53, 57–8.

<sup>15</sup> A Byrnes, H Charlesworth and G McKinnon, *Bills of Rights in Australia: history, politics and law* (2009) 29.

traditions, according to which authority for our basic human rights is primarily derived from the parliamentary and elective processes'.<sup>16</sup>

To redress some of the defects in the system, however, the *Human Rights Commission Act 1981* (Cth) was enacted. It established the Human Rights Commission, which was able to inquire into acts or practices of the federal government that were inconsistent with human rights.<sup>17</sup> The commission could try to settle the matter and if this was not possible or appropriate, it could report to the Minister on its findings. Its functions also included examining federal legislation to determine its compatibility with human rights, reporting on laws that should be made or actions that should be taken in matters relating to human rights, promoting an understanding and acceptance of human rights, and engaging in research and educational programs to promote human rights. The Act applied only at the federal level since the states had apparently signalled their unwillingness to cooperate if the commission's powers extended to state affairs.<sup>18</sup>

Five years later the Act was replaced by the *Human Rights and Equal Opportunity Commission Act 1986* (Cth), which established the Human Rights and Equal Opportunity Commission (now called the Australian Human Rights Commission). While its predecessor the Human Rights Commission had operated essentially as a part-time body, the Human Rights and Equal Opportunity Commission employed three full-time commissioners. It also had an expanded complaint-handling function and a greater emphasis on research and education.<sup>19</sup>

## The Evans Bill

In July 1983 Senator Gareth Evans, Attorney-General in the Hawke Government, announced that the government would introduce the Australian Bill of Rights Bill 1984 as a precursor to constitutional reform. As with the Murphy Bill, the rights were drawn from the International Covenant on Civil and Political Rights. Senator Evans sought, however, to distinguish his Bill from the failed Murphy Bill: this one would be used 'not so much as an aggressive weapon in its own right, but rather as an aid to the interpretation of existing rules'.<sup>20</sup>

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<sup>16</sup> Commonwealth, *Parliamentary Debates*, Senate, 25 September 1979, 918 (Senator Durack).

<sup>17</sup> 'Human rights' took in the rights contained in the International Covenant on Civil and Political Rights, the Declaration on the Rights of the Child 1959, the Declaration on the Rights of Mentally Retarded Persons 1971 and the Declaration on the Rights of Disabled Persons 1975.

<sup>18</sup> P Bailey, *Human Rights: Australia in an international context* (1990) 106–7.

<sup>19</sup> See Australian Human Rights Commission, *History of the Commission*, <<http://www.hreoc.gov.au/about/history/index.html>> at 21 August 2009.

<sup>20</sup> J Faine and M Pearce, 'An interview with Gareth Evans: blueprints for reform' (1983) 8 *Legislative Services Bulletin* 117, 118, cited in H Charlesworth, 'The Australian reluctance about rights' in P Alston (ed) *Towards an Australian Bill of Rights* (1994) 31.

The Evans Bill had the following features:

- *Scope of application.* The Bill applied at the federal level and throughout the states and territories.
- *Enforcement of obligations.* In contrast with the Murphy Bill, neither individuals nor the Human Rights Commission could bring court actions for human rights breaches. The commission was empowered to investigate complaints about federal, state or territory government authorities and to resolve them through conciliation.
- *Effect on inconsistent legislation.* Where federal, state or territory legislation was ambiguous, the Bill required that legislation be interpreted in a manner that was consistent with the Bill or that furthered the Bill's objects. Any federal legislation that had been passed before the Bill and was inconsistent with it would be impliedly repealed. Any federal legislation that was passed after the Bill and was inconsistent with it would be rendered inoperative unless it was expressed to operate regardless of the inconsistency. If individuals felt that their rights had been or would be infringed by federal, state or territory legislation they could apply to a court for a declaration to that effect.<sup>21</sup> Inconsistent state legislation would be rendered inoperative by virtue of s. 109 of the Constitution.

Senator Evans circulated the draft Bill among a few people but decided not to make it public until after the 1984 federal election.<sup>22</sup> Queensland Premier Sir Joh Bjelke-Petersen exposed the Bill during the election, however, calling it 'an audacious attempt to restructure Australian political and social life to meet the demands of a power-hungry Commonwealth Government bent on the destruction of the States and the establishment of a socialist republic'.<sup>23</sup> Western Australian Premier Brian Burke attacked the Bill for its impact on the states.<sup>24</sup> The Bill was never introduced into Parliament.<sup>25</sup>

## The Bowen Bill

In April 1985 the Senate Standing Committee on Constitutional and Legal Affairs conducted an inquiry into the desirability of a human rights Act. In November of that year the committee produced an exposure report that recommended the adoption of such an Act<sup>26</sup>, but the report was overshadowed by the introduction into

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<sup>21</sup> Unless the individual was a party to proceedings arising under the impugned legislation.

<sup>22</sup> B Galligan, R Knopff and J Uhr, 'Australian federalism and the debate over a bill of rights' (1990) 20(4) *Publius* 53, 60.

<sup>23</sup> *The Canberra Times*, 24 October 1984, cited in B Galligan, R Knopff and J Uhr, 'Australian federalism and the debate over a bill of rights' (1990) 20(4) *Publius* 53, 60.

<sup>24</sup> A Byrnes, H Charlesworth and G McKinnon, *Bills of Rights in Australia: history, politics and law* (2009) 31.

<sup>25</sup> H Charlesworth, 'The Australian reluctance about rights' in P Alston (ed.) *Towards an Australian Bill of Rights* (1994) 32.

<sup>26</sup> Senate Standing Committee on Constitutional and Legal Affairs, Parliament of Australia, *A Bill of Rights for Australia? An exposure report for the consideration of senators* (1985).

parliament of a revised Australian Bill of Rights Bill 1985 by the new federal Attorney-General, Lionel Bowen. The Bill focused on civil and political rights but was less ambitious than the Murphy and Evans Bills.

The Bowen Bill had the following features:

- *Scope of application.* The Bill applied at the federal level and to the territories. It applied to the states only with respect to the powers and functions of the new Human Rights and Equal Opportunity Commission.
- *Enforcement of obligations.* As with the Evans Bill, neither individuals nor the commission could bring court actions against government authorities. The commission retained its power to investigate and report on breaches by federal and territory authorities but could do so in relation to state authorities only with the consent of the federal attorney-general.
- *Effect on inconsistent legislation.* In contrast with the Evans Bill, only federal and territory legislation was to be interpreted consistently with human rights. Any existing federal legislation that was inconsistent with the Bill was deemed repealed, and any inconsistent federal legislation passed after the Bill would be rendered inoperative unless it was expressed to operate regardless of the inconsistency. The Bill omitted the Evans Bill provision that enabled individuals to seek a court declaration that a particular piece of legislation infringed their human rights.

Despite considerable opposition, the Bill was passed by the House of Representatives, but it stalled in the Senate, where it was attacked by both sides of the debate: the Australian Democrats said the Bill did not go far enough<sup>27</sup>; others said it was unnecessary<sup>28</sup>, liable to be abused by ‘crooks’<sup>29</sup> and forced judges to decide political matters.<sup>30</sup> The Bill was withdrawn in November 1986.

## Other attempts

There have been several other attempts to introduce human rights Bills into the federal parliament<sup>31</sup>:

- *Senator Janine Haines, Australian Democrats—Human Rights Bill 1982 (introduced as a private senator’s Bill).* The Haines Bill was modelled on the Murphy Bill but contained several revisions: it protected the family as the

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<sup>27</sup> See, for example, B Galligan, R Knopff and J Uhr, ‘Australian federalism and the debate over a bill of rights’ (1990) 20(4) *Publius* 53, 60.

<sup>28</sup> Commonwealth, *Parliamentary Debates*, Senate, 18 February 1986, 543 (Senator Collard).

<sup>29</sup> *ibid.*, 554–5 (Senator Archer).

<sup>30</sup> *ibid.*, 552 (Senator Hill).

<sup>31</sup> See Parliament of Australia, Parliamentary Library, *Bills of Rights*, <<http://www.aph.gov.au/library/intguide/law/billofrights.htm>> at 21 August 2009.

‘natural and fundamental unit of society’, limited the permissible extent of government interference in religious freedom, and protected the freedom to manifest one’s sexual preference.<sup>32</sup> The Bill did not progress beyond its second reading.

- *Senator Meg Lees, Australian Democrats—Parliamentary Charter of Rights and Freedoms Bill 2001.* The Lees Bill was modelled on the Bowen Bill but also applied to state laws and actions, as well as the common law and delegated legislation. The Bill did not progress beyond its second reading but was re-introduced by Senator Natasha Stott Despoja in 2005 and 2008.
- *Dr Andrew Theophanous MP, Independent—Australian Bill of Rights Bill 2001.* The Theophanous Bill required federal, state and territory legislation to be interpreted consistently with human rights and gave the Human Rights and Equal Opportunity Commission the power to investigate the conduct of federal, state and territory authorities. The Bill did not proceed to a second reading.

## 10.4 Why did previous attempts fail?

Although there are many reasons why these previous attempts failed, what is common to all the attempts is the impact they had on state power. The 1944 and 1988 constitutional amendments sought to constrain state power by reference to particular rights. The legislative attempts either imposed obligations on state authorities or affected the operation of state legislation, albeit to varying degrees. Although commentators acknowledge that many factors were at play during the debates over these Bills, they point to federal–state dynamics as an important element of the controversy.<sup>33</sup>

One commentator has attributed the progressive weakening of the Bills in large part to ‘federal pressures’: ‘Some of the States predicted a dismantling of the federation because of the erosion of their rights’.<sup>34</sup> She noted that one concern in relation to Evans’s proposal was the Human Rights Commission’s ability to investigate state action and that the sole successful attempt at legislative protection—the *Human Rights Commission Act 1981* (Cth)—was passed only because it did not affect state legislation.<sup>35</sup>

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<sup>32</sup> Commonwealth, *Parliamentary Debates*, Senate, 9 November 1982, 2058 (Senator Haines).

<sup>33</sup> See, for example, B Galligan, R Knopff and J Uhr, ‘Australian federalism and the debate over a bill of rights’ (1990) 20(4) *Publius* 53, 57.

<sup>34</sup> H Charlesworth, ‘The Australian reluctance about rights’ in P Alston (ed.) *Towards an Australian Bill of Rights* (1994) 33. See also B Galligan, R Knopff and J Uhr, ‘Australian federalism and the debate over a bill of rights’ (1990) 20(4) *Publius* 53.

<sup>35</sup> H Charlesworth, ‘The Australian reluctance about rights’ in P Alston (ed.) *Towards an Australian Bill of Rights* (1994) 33.



The second main reason for the failure of the various attempts is that they were seen to transfer power from a democratically elected parliament to an ‘unelected’ judiciary. Under the Murphy Bill both individuals and the Human Rights Commission were able to bring court actions, and there was a wide range of potential remedies available. Under all the Bills courts could declare legislation inconsistent with the Bill, with the consequence that it would be rendered inoperative.

## 10.5 Recent state and territory inquiries

In recent years six Australian jurisdictions have held inquiries into how human rights can be better protected.

In Victoria, Tasmania, Western Australia and the Australian Capital Territory the inquiries were conducted by independent committees—that is, the committees did not consist of members of parliament. All recommended the adoption of a human rights Act for their state or territory. Victoria and the ACT have now acted on that recommendation by passing the *Charter of Human Rights and Responsibilities Act 2006* (Vic) and the *Human Rights Act 2004* (ACT). Tasmania and Western Australia have deferred action until this National Human Rights Consultation is finalised.

In Queensland and New South Wales inquiries were conducted by parliamentary committees; both committees rejected the notion of a human rights Act and instead recommended the adoption of other measures to protect and promote human rights.

Following is a summary of the recommendations of the various inquiries and the extent to which those recommendations have been implemented.

### Queensland

In 1998 the Legal, Constitutional and Administrative Review Committee considered whether Queensland should adopt a human rights Act. The committee released an issues paper and sought submissions from the public. It received 67 submissions.

The committee rejected all human rights Act models, finding that a human rights Act would involve an inappropriate transfer of power from parliament to an ‘unelected judiciary’, which could find itself making decisions of a policy nature. The committee was concerned that a human rights Act would have an unpredictable impact on the amount and cost of litigation and that increased legal costs would make such an Act of use only to the wealthy. It noted that a human rights Act that regulated the acts of public authorities would be limited in its coverage in view of the increasingly powerful private sector. Another factor found to weigh against a human rights Act

was that there were no readily identifiable solutions to questions such as which rights should be protected.<sup>36</sup>

The committee's recommendations focused instead on education, and it prepared a handbook—*Queenslanders' Basic Rights*—for this purpose. It recommended that the handbook form an integral part of rights and civics education, that it be regularly updated by the committee, and that the Minister for Education report to parliament on current and planned strategies for ensuring that school children receive effective civics education. The committee also recommended improved public sector education.

In response, the government has taken steps to include civics education in school curricula and has sent resource kits to secondary schools, TAFEs, universities, state members of parliament, local governments and community groups.<sup>37</sup> *Queenslanders' Basic Rights* does not appear to have been updated since 1998.

## New South Wales

In 1999 the Legislative Council Standing Committee on Law and Justice was asked to report on whether New South Wales should adopt a human rights Act and, if so, what rights and enforcement mechanisms should be included in the Act. The committee held 12 public hearings and received 82 submissions and 59 letters.

The committee acknowledged the failures of the current system but decided it was not in the public interest to enact a human rights Act because such an Act would undermine parliamentary supremacy and the independence of the judiciary.<sup>38</sup> It instead recommended the establishment of a new parliamentary committee to review Bills for their compliance with human rights. It also recommended amending the *Interpretation Act 1987* (NSW) to allow judges to consider international treaties to which Australia is a party when interpreting ambiguous legislation.

The Legislation Review Committee was established in 2003. It is required to report to parliament on whether a proposed law 'trespasses unduly on personal rights and liberties'.<sup>39</sup> The Interpretation Act was not amended in accordance with the committee's recommendations.

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<sup>36</sup> See Legal, Constitutional and Administrative Review Committee, Parliament of Queensland, *The Preservation and Enhancement of Individuals' Rights and Freedoms in Queensland: should Queensland adopt a bill of rights?* Report No. 12 (1998) 52–3.

<sup>37</sup> Department of Premier and Cabinet, *Regional Communities Newsletter*, Issue 7, September 2002, 3.

<sup>38</sup> See Legislative Council Standing Committee on Law and Justice, Parliament of NSW, *A NSW Bill of Rights*, Report No. 17 (2001) 110.

<sup>39</sup> *Legislation Review Act 1987* (NSW), s. 8A(1)(b)(i).

## The Australian Capital Territory

In 2002 the ACT Government appointed a Bill of Rights Consultative Committee to inquire into the possibility of a human rights Act for the ACT. The committee received 145 submissions, hosted six public consultations and held a further 49 meetings with various community groups and individuals. A deliberative poll was conducted at which 200 representative ACT residents were given the opportunity to discuss human rights before being surveyed.

The committee recommended the adoption of a human rights Act and for that to be accompanied by broad and continuing education programs.<sup>40</sup> The Act was to be based on the ‘dialogue’ model (see Chapter 11) and was to include civil, political, economic, social and cultural rights.

The ACT Government accepted most of the committee’s recommendations—although it rejected, for example, the inclusion of economic, social and cultural rights—and the *Human Rights Act 2004* was passed.

## Victoria

In 2005 the Victorian Government appointed a Human Rights Consultation Committee to consult the community about whether Victorian law should be changed in order to better protect human rights. Before the committee’s appointment the government released a statement of intent, setting out its preferred model for a human rights Act.<sup>41</sup> In all, 2524 submissions were received; 55 community consultations, information sessions and public forums were held; and there were 75 consultations with government and parties with an interest in the subject, among them the judiciary, the police, businesspeople, human rights bodies, victims of crime and legal academics.

The committee recommended the enactment of a human rights Act based on the dialogue model, focusing on civil and political rights but with the possibility of inserting economic, social and cultural rights at a later stage.<sup>42</sup>

The Victorian Government accepted most of the committee’s recommendations and the *Charter of Human Rights and Responsibilities Act 2006* (Vic) was passed.

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<sup>40</sup> ACT Bill of Rights Consultative Committee, *Towards an ACT Human Rights Act: report of the ACT Bill of Rights Consultative Committee* (2003).

<sup>41</sup> See Victorian Human Rights Consultation Committee, *Rights, Responsibilities and Respect: the report of the Human Rights Consultation Committee* (2005), Appendix B.

<sup>42</sup> Victorian Human Rights Consultation Committee, *Rights, Responsibilities and Respect: the report of the Human Rights Consultation Committee* (2005).

## Tasmania

In 2006 the Tasmanian Government asked the Tasmanian Law Reform Institute to consider how human rights could best be promoted and protected in the state. The institute established a Human Rights Community Consultation Committee, which received 407 submissions and held 66 community consultation meetings, briefing sessions and presentations with a range of community groups.

The committee recommended the enactment of a human rights Act based on the dialogue model and including civil, political, economic, social and cultural rights.<sup>43</sup>

The Tasmanian Government decided to delay action on the matter until this National Human Rights Consultation is finalised.<sup>44</sup>

## Western Australia

In 2007 the Western Australian Government appointed a Consultation Committee for a Proposed WA Human Rights Act and asked it to consider the ways in which greater awareness of, respect for and observance of human rights could be achieved. The government prepared a draft Human Rights Bill 2007 to facilitate consultation, the Bill being based on the dialogue model and designed to protect civil and political rights. The committee received 377 submissions, held 39 public forums and 50 meetings with interested parties, conducted a random survey of 400 people, and consulted 405 people from marginalised groups.

The committee recommended the adoption of the Human Rights Bill with some modifications, among them the inclusion of economic, social and cultural rights.<sup>45</sup>

When the report was published the Western Australian Government announced it would await the outcome of this National Consultation before giving further consideration to a human rights Act.<sup>46</sup> Since then, however, the Attorney-General has revealed he is opposed to a human rights Act.<sup>47</sup>

## Conclusion

Victoria and the ACT are not alone in having passed human rights Acts: in fact, they both drew heavily from other human rights legislation around the world. Chapter 11 compares the Victorian and ACT human rights Acts with Acts that have been adopted in New Zealand, the United Kingdom and Canada.

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<sup>43</sup> Tasmania Law Reform Institute, *A Charter of Rights for Tasmania*, Report No. 10 (2007).

<sup>44</sup> 'Plans for a Tasmanian bill on hold', *The Mercury* (Hobart) 11 December 2008.

<sup>45</sup> Consultation Committee for a proposed WA Human Rights Act, *A WA Human Rights Act: report of the Consultation Committee for a Proposed WA Human Rights Act* (2007).

<sup>46</sup> Attorney-General, 'Human rights report completed' (Press release, 20 December 2007).

<sup>47</sup> See, for example, C Porter, 'Pluralism, parliamentary democracy and bills of rights' in J Leeson and R Haddrick (eds) *Don't Leave Us with the Bill: the case against an Australian bill of rights* (2009) 127–44.

## 11 Statutory models of human rights protection: a comparison

This chapter compares human rights Acts that have been introduced overseas and in Victoria and the Australian Capital Territory. The Consultation Committee's terms of reference specify that any options the Committee identifies should not include a constitutional bill of rights, so this chapter focuses on jurisdictions that have adopted statutory bills of rights. Further, since the majority of submissions favouring a human rights Act proposed that Australia adopt a 'dialogue' model of human rights protection, the discussion here is limited to that model. Alternative models are discussed in Chapter 14.

### 11.1 The dialogue model

What is common to the human rights Acts adopted in New Zealand, the United Kingdom, Victoria and the ACT is that they aim to facilitate a 'dialogue' between the three arms of government—the executive, the parliament and the judiciary. The Acts set out a range of rights to be protected and then give distinct roles to each arm of government in relation to those rights:

- The executive (the government and its agencies) is required to act in a manner consistent with human rights in its decision making and can face court action if it fails to do so. When introducing new legislation into parliament, the government is (or members of parliament are) generally required to include a statement about whether the legislation is 'human rights compliant'. When a court makes a declaration that specific legislation is inconsistent with human rights, some models require the government to report to parliament on the inconsistency.
- The parliament is given the final say on laws. It can decide to pass legislation that overrides human rights. If a court makes a declaration that specific legislation is inconsistent with human rights, parliament can choose whether to amend the legislation. Parliamentary committees are involved in scrutinising Bills for human rights compliance before they are passed.
- The judiciary is required to interpret legislation in a manner consistent with human rights. It may be empowered to provide remedies if the executive breaches human rights and to make declarations of incompatibility if legislation is found to be inconsistent with human rights. Importantly, such a declaration

does not affect the operation or validity of the legislation: it is merely a signal to the government that it should consider amending the legislation.

In this way the three arms of government prompt responses from each other when a proposed law or policy is inconsistent with human rights. This is often referred to as the 'dialogue' model.

## 11.2 New Zealand

In 1990 New Zealand passed the *Bill of Rights Act 1990* after a failed attempt at introducing an entrenched bill of rights, which would have empowered the courts to declare legislation invalid.

### Who must comply?

The Bill of Rights Act applies to 'acts' done by the legislative, executive or judicial branches of government and to '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'. Those acts must be performed in a manner consistent with human rights.<sup>1</sup> This obligation can also extend to private bodies when they engage in public functions.

Unlike the human rights Acts in the ACT and Victoria, the New Zealand Bill of Rights Act does not specify which factors are relevant to determining whether a function is of a public nature, although the courts have generally taken into account whether the body is acting in the public interest, conferring a public benefit, acting to implement government policy, subject to special obligations that other private bodies do not have, receiving public funding, or exercising powers under a statute or regulation.<sup>2</sup>

### Who is protected?

The Bill of Rights Act protects both natural persons (that is, individuals) and legal persons (such as corporations), which means, for example, that both individuals and corporations are able to bring claims for breaches of human rights. This protection is not limited to citizens of New Zealand.

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<sup>1</sup> Unlike the ACT and Victorian human rights Acts, the New Zealand Act does not spell out public authorities' specific obligations in relation to human rights. It applies to all 'acts' done by public authorities: New Zealand Ministry of Justice, *The Handbook of the New Zealand Bill of Rights Act 1990: an introduction to the rights and freedoms in the Bill of Rights Act for the public sector* (2004) 10.

<sup>2</sup> New Zealand Ministry of Justice, *The Handbook of the New Zealand Bill of Rights Act 1990: an introduction to the rights and freedoms in the Bill of Rights Act for the public sector* (2004) 13–14.

## Which rights and responsibilities are included?

The Bill of Rights Act provides for civil and political rights such as the right not to be subjected to torture; the right to vote; freedom of thought, conscience and religion; freedom of association; freedom from discrimination; the rights of individuals during search, arrest and detention; and the rights of minorities to enjoy their culture, practise their religion and use their own language. The Act does not make mention of responsibilities. It does, however, provide that any existing rights or freedoms are not abrogated merely because they are not mentioned in the Act.

## Can the rights be limited?

Some human rights Acts contain a general limitation clause allowing all rights to be limited in particular circumstances. Others allow limitations only in relation to specific rights. The New Zealand Act takes the former approach, providing that rights ‘may be subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society’.

## The dialogue framework

### Statements of compatibility

Unlike human rights Acts in other jurisdictions, the New Zealand Act does not require that every Bill introduced into parliament be accompanied by a ‘statement of compatibility’ that sets out whether the Bill is compatible with the rights provided for in the Act. Rather, if legislation introduced into parliament appears to be inconsistent with the Act, the Attorney-General is required to bring the inconsistent provisions to parliament’s attention. Nevertheless, failure to comply with this requirement has no effect on the validity of the legislation. New Zealand’s *Cabinet Manual* also requires Ministers presenting Bills to Cabinet to confirm that each Bill complies with the Bill of Rights Act, the *Human Rights Act 1993* (NZ) and various other legal principles and obligations.<sup>3</sup>

### Scrutiny of Bills

Some jurisdictions require that every Bill introduced into parliament be scrutinised for human rights compliance by a parliamentary committee. The New Zealand Bill of Rights Act does not require this, but the parliamentary Justice and Electoral Committee is empowered under different legislation to review Bills on a range of matters, including human rights.

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<sup>3</sup> Cabinet Office, Department of Prime Minister and Cabinet, *Cabinet Manual 2008*, (2008) 95.

## **An override provision**

In some jurisdictions parliament can expressly provide that a piece of legislation is to have effect despite being incompatible with human rights—an ‘override provision’. This means that the human rights Act will not apply to that legislation. The New Zealand Bill of Rights Act contains no such provision.

## **An interpretative provision**

All the human rights Acts discussed in this chapter require that legislation be interpreted in a manner consistent with human rights, although they all adopt slightly different formulations of that obligation. Section 6 of the New Zealand Bill of Rights Act provides that ‘wherever an enactment can be given a meaning that is consistent with the rights and freedoms contained in [the Bill of Rights Act], that meaning shall be preferred to any other meaning’. The obligation is not limited to the courts and applies to anyone interpreting legislation, including public servants. This formulation is broader than formulations applying in other jurisdictions since those interpreting legislation are not required to assess whether their interpretation is consistent with the intention of parliament; if the legislation can be interpreted consistently with human rights, that interpretation must be preferred.<sup>4</sup>

## **Declarations of incompatibility**

Some jurisdictions empower courts to make a ‘declaration of incompatibility’ if they find that a piece of legislation cannot be interpreted in a manner consistent with human rights. The declaration has no effect on the validity of the legislation. The New Zealand Bill of Rights Act contains no such provision.<sup>5</sup>

The New Zealand Supreme Court has, however, generally noted where legislation disproportionately or unreasonably interferes with human rights, ‘seeing this as the initiation of a “dialogue” with the legislative branch which might cause it to amend the law’.<sup>6</sup> A number of judges have gone further and issued formal ‘declarations of incompatibility’.<sup>7</sup> Some argue that this is in fact permissible under the Bill of Rights Act. Although the Act provides that a court cannot hold legislation to be impliedly repealed or revoked solely on the grounds of inconsistency with the Bill of Rights

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<sup>4</sup> See, for example, *R v Poumako* [2000] 2 NZLR 695 [37].

<sup>5</sup> Although under the *Human Rights Act 1993* (NZ) the Human Rights Review Tribunal and, on appeal, the High Court may issue declarations of incompatibility in relation to legislation that is found to be inconsistent with s. 19 of the Bill of Rights Act (the provision concerning discrimination).

<sup>6</sup> A Twomey, Submission. Associate Professor Twomey offers the examples of *Hansen v R* [2007] 3 NZLR 1 [253]–[254] (McGrath J) and [267]–[268] (Anderson J), as well as *Moonen v Film and Literature Board of Review* [2000] 2 NZLR 9 [20].

<sup>7</sup> See, for example, *R v Poumako* [2000] 2 NZLR 695 [86]–[107] (Thomas J); *Moonen v Film and Literature Board of Review* [2000] 2 NZLR 9 [20].



Act, this does not necessarily exclude the making of declarations that have no effect on the validity of the legislation.<sup>8</sup>

## Subordinate legislation

Some human rights Acts empower the courts to strike down subordinate legislation (including regulations, statutory rules and bylaws) that is inconsistent with human rights. Although the New Zealand Bill of Rights Act does not specifically empower the courts to do this, the courts have stated they will strike down inconsistent subordinate legislation if the statute pursuant to which it was enacted does not expressly authorise the inconsistency.<sup>9</sup>

## Causes of action

The Bill of Rights Act does not provide for individuals a free-standing right to bring court actions against public authorities for human rights breaches. Instead, a party must raise a human rights complaint in the context of other court proceedings—for example, a claim in tort or an application for judicial review.

## Remedies

The New Zealand Bill of Rights Act does not expressly provide for any remedies for human rights breaches, although the courts have found that a variety of remedies are nonetheless available. For example, evidence obtained in breach of the Act may be excluded in criminal proceedings.<sup>10</sup> In the landmark *Baigent's Case* the Court of Appeal also held that damages may be awarded against those who commit human rights breaches.<sup>11</sup> In that instance compensation was awarded to a woman whose house had been raided by the police, despite her daughter pointing out that the police had the wrong address. The courts have, however, tended to award damages only as a last resort and in modest amounts.<sup>12</sup>

## The role of the Human Rights Commission

The Human Rights Commission of New Zealand is not given any powers under the Bill of Rights Act. Instead, its powers come from the *Human Rights Act 1993*, and its primary functions are to advocate and promote respect for human rights and to encourage the maintenance and development of harmonious relations between individuals and the diverse groups in the New Zealand community. The commission has the power to resolve disputes relating to unlawful discrimination but not

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<sup>8</sup> AS Butler, 'Strengthening the Bill of Rights' (2000) 31 *Victoria University of Wellington Law Review* 129.

<sup>9</sup> *Drew v Attorney-General* [2002] 1 NZLR 58.

<sup>10</sup> *R v Shaheed* [2002] 2 NZLR 377.

<sup>11</sup> *Simpson v Attorney-General* [1994] 3 NZLR 667 (*Baigent's Case*).

<sup>12</sup> J Philpott, 'Damages under the United Kingdom's *Human Rights Act 1998* and the New Zealand *Bill of Rights Act 1990*' (2007) 5 *New Zealand Journal of Public and International Law* 211.

disputes under the Bill of Rights Act. The Human Rights Review Tribunal also has jurisdiction to hear complaints under the *Privacy Act 1993*, the *Health and Disability Commissioner Act 1994* and the Human Rights Act.

## Conclusion

Overall, the New Zealand Bill of Rights Act is said to have ‘infused public debate, influenced public attitudes, shaped legislation, and improved the conduct of state actors’.<sup>13</sup> Its effect has been seen in the formulation of policy and legislation and in the decisions of courts.

By August 2009 the Attorney-General had reported 49 times under s. 7 of the Act on Bills (both government and non-government) that appear to be inconsistent with human rights.<sup>14</sup> Although the Attorney-General is not required to give a statement of reasons, since 2003 advice from the Ministry of Justice and the Crown Law Office in relation to identified inconsistencies has been published online. Parliament’s response to these reports has been mixed: some Bills have been amended and some have remained unchanged.<sup>15</sup> One commentator has noted that Parliament often fails to engage with the substance of s. 7 reports or to explain why certain breaches of human rights are justified.<sup>16</sup> Another commentator has, however, pointed to the benefits s. 7 reports produce before Bills even get to parliament:

Because all proposed legislative measures must pass muster under the [Bill of Rights Act], or else receive the unwanted attention of an Attorney-General’s section 7 report, section 7 has ensured that the [Act] is a significant factor in the policy formulation and the law drafting processes.<sup>17</sup>

As noted, s. 7 is buttressed by the *Cabinet Manual*, which requires that all draft legislation submitted to Cabinet be certified as ‘human rights compliant’. In addition, a handbook published by the Ministry of Justice in 2004 gives to policy advisers advice on how to take human rights into account in the development of policy. It is said that measures such as these have ensured that the Bill of Rights Act ‘has been woven into the fabric of New Zealand law and society’.<sup>18</sup>

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<sup>13</sup> EW Thomas, ‘A bill of rights: The New Zealand experience’ (Paper presented at ANU Comparative Perspectives on Bills of Rights conference, Canberra, 18 December 2002) 30.

<sup>14</sup> See Ministry of Justice, *New Zealand Bill of Rights Act 1990* <<http://www.justice.govt.nz/bill-of-rights/>> at 20 August 2009.

<sup>15</sup> One commentator notes that, in relation to the 17 reports tabled by the Attorney-General between 2003 and 2008, seven of the Bills were not enacted, eight were enacted with the impugned provisions unchanged, one was enacted with the extent of the breach lessened, and one was enacted with the breach removed entirely: T Bromwich, ‘Parliamentary rights-vetting under the NZBORA’ (June 2009) *New Zealand Law Journal* 189.

<sup>16</sup> T Bromwich, ‘Parliamentary rights-vetting under the NZBORA’ (June 2009) *New Zealand Law Journal* 189, 190–1.

<sup>17</sup> AS Butler, ‘Strengthening the Bill of Rights’ (2000) 31 *Victoria University of Wellington Law Review* 129.

<sup>18</sup> EW Thomas, ‘A bill of rights: The New Zealand experience’ (Paper presented at ANU Comparative Perspectives on Bills of Rights Conference, Canberra, 18 December 2002) 30.

As in many jurisdictions, there was initially a fear that passage of the Bill of Rights Act would result in a flood of litigation. Despite this, during the Consultation Committee Chair's visit to New Zealand—which included meetings with judges, government officials and legal academics—it became clear that this fear has not been realised. The Act has, however, been severely criticised for the way it has encouraged a spate of 'judicial activism': courts are said to have 'invented' the power to award damages and issue declarations of incompatibility.<sup>19</sup> The judges acted because parliament failed to clarify the question of remedies, it is said.<sup>20</sup> Although parliament has always been able to limit or remove these powers by passing further legislation, it has not done so.

### 11.3 The United Kingdom

The United Kingdom's *Human Rights Act 1998* gives UK courts power to enforce the rights provided for under the Convention for the Protection of Fundamental Rights and Freedoms (known as the European Convention on Human Rights) and some of its protocols. Before the Act's passage in 1998 individuals could go only to the European Court of Human Rights in Strasbourg to enforce their rights under the convention.

#### Who must comply?

Under the UK Human Rights Act it is unlawful for public authorities to act in a way that is incompatible with rights provided for under the European Convention on Human Rights. 'Public authorities' includes courts and tribunals and any person whose functions are of a public nature. The definition does not include either house of parliament or a person exercising functions in connection with a parliamentary proceeding. Unlike the human rights Acts in the ACT and Victoria, the UK Act does not contain a list of factors to be taken into account when determining whether a function is of a public nature.

#### Who is protected?

The UK Human Rights Act does not specify whether natural or legal persons are protected, but a person may bring proceedings only if he or she is or would be a victim of a human rights breach. This protection is not limited to citizens of the United Kingdom.

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<sup>19</sup> See, for example, J Allan, 'What's wrong about a statutory bill of rights?' in J Leeson and R Haddrick (eds) *Don't Leave Us with the Bill: the case against an Australian bill of rights* (2009) 83–95, Submission.

<sup>20</sup> EW Thomas, 'A bill of rights: The New Zealand experience' (Paper presented at ANU Comparative Perspectives on Bills of Rights CONFERENCE, Canberra, 18 December 2002) 28.

## **Which rights and responsibilities are included?**

The Act does not set out its own list of rights; rather, it protects certain rights under the European Convention on Human Rights and its protocols. These are mostly civil and political rights—among them the right to life; freedom from torture and slavery; the right to due process; respect for private and family life; freedom of thought, conscience and religion; the right to peaceful assembly; and the right to marry. The Act also protects the right to peaceful enjoyment of possessions, the right to free elections and, significantly, the right to education. With one exception, it makes no mention of responsibilities; the exception is the right to freedom of expression, in relation to which the Act specifies that the right ‘carries with it duties and responsibilities’.

## **Can those rights be limited?**

In contrast with the situation in New Zealand, the ACT and Victoria, the UK Human Rights Act does not contain a general limitation clause. Instead, it allows some limitations in relation to specific rights. For example, the right to peaceful assembly can be subject to such limitations as are prescribed by law and are necessary in a democratic society in the interests of national security or public safety. The UK Act also provides that rights can be suspended in times of national emergency (see ‘An override provision’ in the next section).

## **The dialogue framework**

### **Statements of compatibility**

The Minister with responsibility for a Bill introduced into parliament must make a statement that the Bill is compatible with convention rights or that, despite its incompatibility, the government wishes to proceed with its enactment. Failure to do this does not affect the validity of the legislation.

### **Scrutiny of Bills**

Although the Human Rights Act does not provide for scrutiny of Bills by a parliamentary committee, the Joint Committee on Human Rights routinely scrutinises Bills for their compatibility with human rights. The committee also examines government action taken in response to judgments of the UK courts or the European Court of Human Rights and conducts thematic inquiries into matters associated with human rights.

### **An override provision**

The Act makes provision for recognising derogations made by the United Kingdom from its obligations under the European Convention on Human Rights and its protocols. A ‘designated derogation order’ made by the Secretary of State will make

a derogation effective in domestic law. The scope for parliamentary and judicial scrutiny of such orders is uncertain.<sup>21</sup>

### **An interpretative provision**

The Act provides that, so far as it is possible to do so, primary and subordinate legislation must be read and given effect in a way that is compatible with convention rights. Like the New Zealand Bill of Rights Act, the UK Human Rights Act does not expressly provide that the interpretation adopted must be in accordance with the object and purpose of the legislation. The seemingly wide scope of the Human Rights Act's interpretative clause has resulted in some controversial decisions when judges have 'read' certain provisions into legislation.<sup>22</sup> In subsequent cases, however, the House of Lords has made it clear that amendment of primary legislation is the role of parliament and that an interpretation that departs substantially from the fundamental features of a statute is not acceptable.<sup>23</sup>

### **Declarations of incompatibility**

If a court is unable to interpret legislation in a manner consistent with human rights, it may issue a declaration of incompatibility. Such a declaration does not affect the validity or operation of the legislation and is not binding on the parties to the proceedings in which the declaration is made. The Human Rights Act does not require the Minister to respond to the declaration but does allow the Minister to amend the legislation if that is thought necessary.

If a court is considering making a declaration of incompatibility, the government must be notified of the proceedings, and a Minister is entitled to be joined as a party to those proceedings.

### **Subordinate legislation**

Subordinate legislation must also be interpreted in a manner consistent with human rights. Unless the primary legislation prevents the removal of the inconsistent provision, a court may refuse to give effect to inconsistent subordinate legislation.

### **Causes of action**

Like the ACT Human Rights Act, the UK Human Rights Act creates a free-standing cause of action that allows individuals to bring claims against public authorities that

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<sup>21</sup> Joint Committee on Human Rights, *Counter-terrorism Policy and Human Rights*, Thirtieth Report of Session 2007–08 (8 October 2008) (para. 95).

<sup>22</sup> See, for example, *R v A (No 2)* [2002] 1 AC 45.

<sup>23</sup> See, for example, *Re S (Minors) (Care Order: Implementation of Care Plan)* [2002] 2 AC 291.

act incompatibly with human rights. They can also rely on the Act to establish an ‘unlawful act’ in other legal proceedings, such as applications for judicial review.

## Remedies

The courts may grant ‘just and appropriate’ remedies where public authorities act incompatibly with human rights. The UK Act provides that monetary compensation is to be awarded only when no other remedy is appropriate. The courts have used this power sparingly: in the first eight years of the Act’s operation, damages were awarded in only three reported cases.<sup>24</sup>

## The role of the Equality and Human Rights Commission

The Equality and Human Rights Commission is established not under the Human Rights Act but under the *Equality Act 2006* (UK). Among its functions in relation to the Human Rights Act are promoting an understanding of that Act, holding inquiries, and initiating judicial review proceedings.

## Conclusion

A 2006 review conducted by the UK Department for Constitutional Affairs concluded that the Human Rights Act has had a significant and beneficial impact on the development of law and policy by providing a framework for ensuring that the needs of the UK population are properly considered.<sup>25</sup> This view was echoed by Murray Hunt, legal advisor to the UK Joint Committee on Human Rights, at the public hearings the Consultation Committee held. The Act also seems to have had an impact on the day-to-day lives of ordinary people. A recent study by the British Institute of Human Rights outlined a range of instances in which the Act had been used outside the courts to call for improvements to, for example, conditions in nursing homes.<sup>26</sup>

The 2006 review also concluded that the Act had ‘not significantly altered the constitutional balance between Parliament, the Executive and the Judiciary’.<sup>27</sup> It found that there had been only 11 occasions on which superior courts had upheld declarations of incompatibility and that in each case parliament had passed further legislation to resolve the inconsistency.<sup>28</sup> Additionally, courts had used the interpretative provision on only 12 occasions since 2000.<sup>29</sup> On the other hand, Felicity McMahon argued at the Consultation Committee’s public hearings that the Act had undermined parliamentary sovereignty; she has elsewhere said the

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<sup>24</sup> Department for Constitutional Affairs, *Review of the Implementation of the Human Rights Act* (2006) 18.

<sup>25</sup> *ibid.* 19.

<sup>26</sup> British Institute of Human Rights, *The Human Rights Act—changing lives* (2006); see also 2nd edn (2008).

<sup>27</sup> Department for Constitutional Affairs, *Review of the Implementation of the Human Rights Act* (2006) 1.

<sup>28</sup> *ibid.* 4.

<sup>29</sup> *ibid.* 4, 20.

‘interpretative obligations contained in the HRA have unleashed judicial activism on a scale that Parliament did not intend’.<sup>30</sup> Such criticisms must, however, be read in the context of the United Kingdom having adopted a comparatively broad interpretative provision.

The introduction of the UK Act was met with fears that it would result in increased litigation and be abused by criminals but, as Murray Hunt noted at the public hearings, the flood of litigation has not come. The 2006 review provided evidence that the Act had been substantively raised in only 2 per cent of cases determined by appellate courts.<sup>31</sup> The review also found that the Act had had no significant impact on the criminal law or the government’s ability to fight crime.<sup>32</sup>

Although the UK Government has said it remains committed to the Human Rights Act, it is now considering possibilities for reforming the human rights framework. In March 2009 the Ministry of Justice released a Green Paper that raised the possibility of passing a UK ‘bill of rights and responsibilities’, which would include certain rights and responsibilities not included in the European Convention on Human Rights.<sup>33</sup>

## 11.4 The Australian Capital Territory

In 2002 the ACT Government appointed the ACT Bill of Rights Consultative Committee to inquire into whether the ACT should adopt a human rights Act. In 2003 the committee recommended that a bill of rights be adopted in the ACT, finding that:

While highly visible abuses of human rights are not commonplace in the ACT, rights are currently protected in a partial and piecemeal manner under Commonwealth and ACT laws. A bill of rights would improve the protection of rights and also provide an accessible statement of the rights that are fundamental to a life of dignity and value.<sup>34</sup>

The committee’s report contained a draft Human Rights Bill. The ACT Legislative Assembly subsequently enacted the *Human Rights Act 2004*, which was based on most, but not all, of the committee’s recommendations.

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<sup>30</sup> F McMahon, ‘The *Human Rights Act 1998* (UK): an impossible compromise’ in J Leeson and R Haddrick (eds) *Don’t Leave Us with the Bill: the case against an Australian bill of rights* (2009) 272, Submission.  
<sup>31</sup> Department for Constitutional Affairs, *Review of the Implementation of the Human Rights Act* (2006) 10.  
<sup>32</sup> *ibid.* 10.  
<sup>33</sup> Ministry of Justice, *Rights and Responsibilities: developing our constitutional framework* (2009).  
<sup>34</sup> ACT Bill of Rights Consultative Committee, *Towards an ACT Human Rights Act: report of the ACT Bill of Rights Consultative Committee* (2003) 2.

## Who must comply?

As a result of recent amendments to the ACT Human Rights Act, public authorities have a duty to act in a manner consistent with human rights. It is unlawful for a public authority to act in a way that is incompatible with a human right or to fail to give proper consideration to a relevant human right when making a decision. A 'public authority' is defined as follows:

an administrative unit; a territory authority; a territory instrumentality; a Minister; a police officer, when exercising a function under a Territory law; a public employee; and an entity whose functions are or include functions of a public nature, when it is exercising those functions for the Territory or a public authority (whether under contract or otherwise).

A 'public authority' does not, however, include the Legislative Assembly or a court (unless either is acting in an administrative capacity).

The Act outlines the functions that are taken to be of a public nature—among them operating correctional centres and providing a range of listed services—and sets out a range of factors that may be considered in determining whether a function is of a public nature, including whether the function is conferred under ACT law or publicly funded.

The recent amendments have also enabled the private sector to 'opt in' to the Act and thereby be subject to the same obligations as public authorities.

## Who is protected?

The ACT Human Rights Act provides that 'only individuals have human rights'. This protection is not limited to citizens of Australia or residents of the ACT.

## Which rights and responsibilities are included?

The Act protects most of the civil and political rights expressed in the International Covenant on Civil and Political Rights. Among the rights protected are the right to equality before the law, the right to life (specified to apply from the time of birth), protection of the family and children, freedom of movement, freedom of expression, the right to take part in public life, rights of children in the criminal process, and the right to a fair trial. The Act also protects the right of anyone who belongs to an ethnic, religious or linguistic minority to declare and practise their religion and to use their own language. Unlike the Victorian human rights Act, it also makes provision for compensation in the event of wrongful conviction.

The Act does not cover specific Indigenous rights or any responsibilities, although both are mentioned in the preamble. The Act itself stipulates that it is not exhaustive of the rights a person might have under domestic or international law.



## Can those rights be limited?

The ACT Human Rights Act contains a general limitation clause that provides that rights may be subject only to reasonable limits set by ACT laws that can be demonstrably justified in a free and democratic society. In contrast with the New Zealand Bill of Rights Act, the ACT Human Rights Act outlines some of the factors that must be considered when making this determination—for example, the nature of the right affected, the nature and extent of the limitation and the importance of its purpose, the relationship between the limitation and its purpose, and any less restrictive means reasonably available to achieve that purpose.

## The dialogue framework

### Statements of compatibility

The ACT Human Rights Act requires that the Attorney-General—rather than the Minister with responsibility for a Bill—state whether a Bill introduced into the Legislative Assembly is consistent with human rights. In contrast with the Victorian human rights Act, there is no obligation to provide reasons why a Bill is found to be human rights compliant.<sup>35</sup> If the Bill is found to be inconsistent with human rights, however, the Attorney-General must outline ‘how it is not consistent’. Failure to comply with this provision has no effect on the validity, operation or enforcement of the proposed legislation. The ACT’s Cabinet Paper Drafting Guide also requires that all Cabinet submissions include an assessment of the proposal’s compatibility with human rights.

### Scrutiny of Bills

Under the Act the ‘relevant standing committee’ must report to the Legislative Assembly on human rights questions raised by Bills. In practice, the Scrutiny of Bills and Subordinate Legislation Committee performs this function. Again, failure to comply with this provision does not affect the validity of the proposed legislation.

### An override provision

Unlike the Victorian human rights Act, the ACT Human Rights Act contains no override provision.

### Interpretive provisions

Courts and decision makers must interpret an ACT law (including statutory instruments) in a way that is compatible with human rights ‘so far as it is possible to do so consistently with its purpose’. The ACT Human Rights Act also provides that

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<sup>35</sup> Under a 2008 agreement between the Greens and the Labor Party, however, the government has committed to including a detailed statement of reasons with each statement of compatibility—H Charlesworth, A Byrnes and R Thilagaratnam, Submission.

international law and judgments of foreign and international courts may be considered when interpreting a human right.

### **Declarations of incompatibility**

The Supreme Court of the ACT may make a declaration of incompatibility if it is satisfied that legislation is not consistent with a human right. The registrar of the court must give a copy of the declaration to the Attorney-General, who is then required to present the copy to the Legislative Assembly within six sitting days and a response within six months. The declaration has no effect on the validity of the legislation.

When in Supreme Court proceedings a question arises concerning the application of the ACT Human Rights Act or the court is considering making a declaration of incompatibility, the court must ensure that notice of the proceedings has been given to the Attorney-General and the ACT Human Rights Commission and each has had a reasonable time to decide whether to intervene. The Attorney-General may intervene in proceedings as of right; the Human Rights Commissioner may do so only with the leave of the court.

### **Subordinate legislation**

ACT laws are defined to include statutory instruments, meaning that the interpretative clause and the power to make declarations of incompatibility also apply to subordinate legislation.

### **Causes of action**

Initially, the ACT Human Rights Act did not provide any independent cause of action against public authorities for human rights breaches. This meant that such claims could be raised only in the context of other proceedings. Recent amendments mean, however, that a person who claims a public authority has breached its obligations under the Human Rights Act, and who is or would be a victim of the breach, may now bring a claim in the Supreme Court against the public authority or rely on his or her rights under the Act in other proceedings. This is similar to the UK position but broader than that in New Zealand and Victoria.

### **Remedies**

If an action against a public authority is successful the Supreme Court may 'grant the relief it considers appropriate'. Unlike in the United Kingdom, this does not include damages. In practice, however, a human rights argument could be used to strengthen a pre-existing claim for damages in other proceedings.

## The role of the Human Rights Commission

The ACT Human Rights Commission was established by the *Human Rights Commission Act 2005* (ACT), under which the commission has a range of functions, among them resolving complaints made under the Act, promoting community discussion and providing community education about the Act, and inquiring into matters complained about under the Act. The Act gives the Commission two additional functions: as noted, the Human Rights Commissioner may intervene in proceedings relating to the application of the ACT Human Rights Act with the leave of the court, and the commission is to review the effect of ACT laws (including the common law) on human rights and report to the Attorney-General on the results of the review.

## Review of the legislation

The ACT Human Rights Act provides that the Attorney-General must review the operation of the Act and table the resultant report in the Legislative Assembly by 1 July 2009. On 18 August 2009 the Attorney-General tabled the report of a five-year review of the Act, conducted by the ACT Human Rights Act Research Project, and announced that further public consultations would take place before the government implemented any recommendations for reform.

## Conclusion

The ACT Government submitted to the Consultation Committee that it considers the operation of the Human Rights Act to have been ‘an overwhelming success’, leading to ‘better policy processes and legislative outcomes’.<sup>36</sup>

The Human Rights Act Research Project’s report found that one of the Act’s clearest effects has been ‘to improve the quality of law-making in the Territory, to ensure that human rights concerns are given due consideration in the framing of new legislation and policy’.<sup>37</sup> The report noted that the ‘development of new laws by the executive has been shaped by the requirement to issue a statement of compatibility ... and the approach of government has been influenced by a robust dialogue with the legislature, the Scrutiny Committee and the Human Rights Commissioner’.<sup>38</sup>

It noted, however, that, although the Act has had a beneficial effect on the ‘culture’ of government, ‘the effect has neither been consistent, nor widespread’.<sup>39</sup> Some agencies were said to demonstrate a very high level of engagement with the Act—

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<sup>36</sup> ACT Government, Submission.

<sup>37</sup> ACT Human Rights Act Research Project, *The Human Rights Act 2004 (ACT): the first five years of operation: a report to the ACT Department of Justice and Community Safety* (2009) 6. The findings of this review are also summarised in H Charlesworth, A Byrnes and R Thilagaratnam, Submission.

<sup>38</sup> ACT Human Rights Act Research Project, *The Human Rights Act 2004 (ACT): the first five years of operation: a report to the ACT Department of Justice and Community Safety* (2009) 6.

<sup>39</sup> *ibid.* 42.

especially those not involved in legislative development—but others were found to have little familiarity with the Act or its relevance to their work.<sup>40</sup> The report noted that the new provisions imposing on public authorities obligations to act in a manner consistent with human rights should make the Act more relevant and accessible to staff. It also recommended more intensive and continuing human rights training at all levels of government.<sup>41</sup>

The ACT Government noted that initially there were criticisms that the Act would transfer power to unelected judges ‘who would quash the laws of democratically elected legislature’, cause massive backlogs in the court system, be a ‘lawyers’ picnic’ as a result of protracted litigation, and ‘see a rush of criminals let loose on the community’. Almost five years on, it submitted that all these concerns have proved unfounded.<sup>42</sup> The ACT Human Rights Commission agreed.<sup>43</sup>

By mid-August 2009 the ACT Supreme Court was yet to issue a declaration of incompatibility. Although this might suggest the court has been adopting ‘creative’ interpretations in order to avoid making declarations, the ACT Government submitted that it was not aware of any instance in which the court had adopted a ‘strained’ or ‘far-fetched’ interpretation that is inconsistent with the intention of the Legislative Assembly.<sup>44</sup> The evidence is that the courts have not been flooded with human rights cases. The Human Rights Act Research Project reported that the Human Rights Act has been referred to in 91 cases in ACT courts and tribunals.<sup>45</sup> The Human Rights Commission submitted that there is no evidence of ‘criminals escaping justice through human rights loopholes’ and noted that the Director of Public Prosecutions had described the Act’s overall effect as positive.<sup>46</sup>

Others have criticised the ACT Human Rights Act for not having the transformative effect it was supposed to have. Bill Stefaniak, Appeals President of the ACT Civil and Administrative Tribunal, has noted that the Act has ‘done little if anything to assist ordinary, law-abiding people in Canberra’ and has instead undermined the justice system ‘by unequally favouring the rights of accused criminals over victims’ and ‘led to significant increases in bureaucracy and the creation of a number of costly senior public service positions’.<sup>47</sup>

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<sup>40</sup> ibid. 64.

<sup>41</sup> ibid. 43.

<sup>42</sup> ACT Government, Submission.

<sup>43</sup> ACT Human Rights Commission, Submission.

<sup>44</sup> ACT Government, Submission.

<sup>45</sup> As at the end of May 2009: ACT Human Rights Act Research Project, *The Human Rights Act 2004 (ACT): the first five years of operation: a report to the ACT Department of Justice and Community Safety* (2009) 47.

<sup>46</sup> ACT Human Rights Commission, Submission.

<sup>47</sup> B Stefaniak, ‘A reflection on the ACT Human Rights Act 2004’ in J Leeson and R Haddrick (eds) *Don’t Leave Us with the Bill: the case against an Australian bill of rights* (2009) 309–10, Submission.

## 11.5 **Victoria**

In April 2005 the Victorian Government appointed a Human Rights Consultation Committee to lead a public discussion on the future of human rights protection in Victoria. The committee delivered its report in November 2005, providing with it a draft Charter of Human Rights and Responsibilities.<sup>48</sup> The Victorian Parliament subsequently enacted the *Charter of Human Rights and Responsibilities Act 2006*, which is based on the committee's draft charter.

### **Who has to comply?**

It is unlawful for a public authority to act in a way that is incompatible with a human right or to fail to give proper consideration to a relevant human right when making a decision. Unlike the ACT Human Rights Act, the Victorian charter stipulates that this provision does not require a public authority to act in a way that prevents a religious body from acting in conformity with religious doctrine, beliefs or principles.

A 'public authority' is defined as a public official (as defined); an entity established by legislation and that has functions of a public nature; 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; Victoria Police; a local council; a government Minister; members of a parliamentary committee when that committee is acting in an administrative capacity; and an entity prescribed in the regulations. It does not include parliament; a court or tribunal (unless it is acting in an administrative capacity); or an entity declared by the regulations not to be a public entity.

Like the ACT Human Rights Act, the Victorian charter provides a non-exhaustive list of factors for a court to take into account when determining if a function is of a public nature. This functional definition allows the reach of the charter to cover those private entities to which the government has 'contracted out' certain functions.

### **Who is protected?**

The Victorian charter applies only to persons, not corporations. Protection is not limited to Victorian residents or Australian citizens.

### **Which rights and responsibilities are included?**

The Victorian charter protects rights similar to those protected by the ACT Human Rights Act. The charter's cultural rights provision is, however, broader in that it

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<sup>48</sup> Victorian Human Rights Consultation Committee, *Rights, Responsibilities and Respect: the report of the Human Rights Consultation Committee* (2005).

protects the rights of ‘all persons with a particular cultural, religious, racial or linguistic background’, rather than just minority groups, and gives specific protection to Indigenous peoples. Unlike the ACT Act, the charter also includes a protection from being deprived of property other than in accordance with the law. Apart from in the title of the charter, responsibilities are mentioned in the preamble and in the provision relating to freedom of expression (which provides that special duties and responsibilities are attached to such freedom).

The charter also provides that other rights or freedoms must be not taken to be abrogated or limited simply because the right or freedom is not included in the charter.

### **Are those rights limited?**

Like the ACT Human Rights Act, the Victorian charter includes a general limitation clause providing that a human right may be subject under law only to ‘such reasonable limits as can be demonstrably justified in a free and democratic society based on human dignity, equality and freedom’. It also sets out which factors are relevant to determining whether a limitation meets this threshold. In addition, it includes some specific limitations for certain rights. Freedom of expression, for example, ‘may be subject to lawful restrictions reasonably necessary to respect the rights and reputation of other persons or for the protection of national security, public order, public health or public morality’.

## **The dialogue framework**

### **Statements of compatibility**

The Victorian charter requires that all members of parliament who introduce a Bill into parliament table a statement of compatibility. Unlike the ACT Human Rights Act, which merely requires that the Attorney-General state ‘whether’ the Bill is consistent with human rights, the Victorian charter requires the member to say ‘how’ the Bill is compatible. If a Bill is incompatible with human rights, the statement must describe the nature and extent of the incompatibility. Any such statement is not binding on a court or tribunal, and failure to prepare one does not affect the validity, operation or enforcement of the legislation. The Victorian Cabinet has also approved a set of guidelines that require all legal and policy officers to identify the human rights impacts of all proposed policies and Bills before those policies and Bills are submitted to Cabinet.<sup>49</sup>

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<sup>49</sup> Victorian Government, Submission.

## **Scrutiny of Bills**

The Victorian charter requires the Scrutiny of Acts and Regulations Committee to consider any Bill introduced into parliament (as well as any subordinate legislation laid before the parliament) and to inform parliament whether the legislation is incompatible with human rights.

## **An override provision**

Unlike the ACT Human Rights Act, the Victorian charter allows parliament to expressly declare that an Act or legislative provision applies, despite incompatibility with the charter. The charter states that such declarations should be made only in exceptional circumstances, which would include ‘threats to national security or a state of emergency which threatens the safety, security and welfare of the people of Victoria’.<sup>50</sup> The override declarations expire after five years but can be reinstated. Where such a declaration is made, the charter will have no application: the interpretive provision does not apply, and the Supreme Court cannot make a declaration of inconsistent interpretation.

## **An interpretive provision**

Courts and decision makers must interpret all statutory provisions in a way that is compatible with human rights ‘so far as it is possible to do so consistently with [the provisions]’ purpose’. Like the ACT Act, the charter provides that international law and the judgments of domestic, foreign and international courts relevant to a human right may be considered when interpreting legislation.

If in a court or tribunal a question of law arises as to the interpretation of legislation in accordance with the charter—or the application of the charter in general—the Attorney-General and the Victorian Equal Opportunity & Human Rights Commission have a right to intervene in such proceedings.

## **Declarations of incompatibility**

The Supreme Court may issue a ‘declaration of inconsistent interpretation’ if it considers that a statutory provision cannot be interpreted consistently with a human right. This power is, however, not available where parliament has made an override declaration. A declaration of inconsistent interpretation will not affect the validity of the legislation or create any legal right or give rise to any civil cause of action.

If the Supreme Court is considering making a declaration it must ensure that notice has been given to the Attorney-General and the Equal Opportunity & Human Rights Commission and that they have had a reasonable opportunity to intervene in the proceedings or make submissions.

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<sup>50</sup> Explanatory Memorandum, Charter of Human Rights and Responsibilities Bill 2006, 21.

The Supreme Court must provide a copy of the declaration to the Attorney-General, who must provide a copy to the Minister responsible for the legislation. The Minister must then table a copy of the declaration and his or her response in parliament within six months and publish a copy of both in the government Gazette.

### **Subordinate legislation**

The responsible Minister is required to prepare a human rights certificate in respect of all proposed subordinate legislation; the certificate must certify whether, in the Minister's opinion, the proposed statutory rule limits any human rights set out in the charter and, if it does, explain why the limitation is considered justifiable. The override provision, interpretative provision and power to make declarations of inconsistent interpretation also apply to subordinate legislation.

### **Cause of action**

Unlike the ACT Human Rights Act and the UK Human Rights Act, the Victorian charter does not establish an independent cause of action against public authorities for human rights breaches. Such claims can be raised only in the context of other proceedings.

### **Remedies**

Unlike the ACT and UK Human Rights Acts, the Victorian charter does not provide any discrete remedies for human rights breaches. If a claim under the charter is raised in the context of another proceeding, it might provide an additional reason for granting the remedy sought in those proceedings, but a person is not entitled to a remedy solely by reason of a breach of the charter.

### **The role of the Equal Opportunity & Human Rights Commission**

The Equal Opportunity & Human Rights Commission has a number of functions under the Victorian charter, among them the following:

- providing to the Attorney-General an annual report on the operation of the charter, all declarations of inconsistent interpretation, and all override declarations made during the year in question
- when requested by the Attorney-General, reviewing the effect of statutory provisions and the common law on human rights and reporting on the results
- when requested by a public authority, reviewing the authority's programs and practices to determine their compatibility with human rights
- providing education about human rights and the charter
- assisting the Attorney-General in statutory reviews of the charter



- advising the Attorney-General on anything relevant to the charter.

The commission's reports to the Attorney-General must be tabled in parliament.

## Review

The Victorian charter is to be reviewed in 2011 and 2015. The first review must consider matters such as whether additional human rights should be included (including economic, social and cultural rights, children's and women's rights, and the right to self-determination), whether auditing of public authorities to assess compliance with the charter should be mandatory, and whether further provision should be made in relation to proceedings that may be brought or remedies that may be awarded in relation to unlawful acts.

## Conclusion

The Victorian Government submitted that the charter has resulted in 'more transparent and accountable government actions and improved scrutiny of government decision-making'.<sup>51</sup> Dr John Tobin submitted that 'human rights are becoming an increasingly important factor in the delivery of services and the development of public policy'.<sup>52</sup> The Victorian Equal Opportunity & Human Rights Commission highlighted the charter's impact on public service culture:

These impacts range from reinvigorating existing practices through to substantial changes in the way organisations operate, make decisions, deliver services and deal with people. The Charter is also encouraging new ways of thinking about human rights, including exploring innovative approaches to giving people a say in decisions that affect them.<sup>53</sup>

The Victorian Government also submitted that the charter does not 'stop the government from taking strong action to protect the community'.<sup>54</sup>

The government further argued that courts have been performing their functions in a 'measured and careful way'. By mid-August 2009 no declarations of inconsistent interpretation had been made. The government submitted that the charter has 'not significantly changed the way courts are already approaching issues under the common law'. Ben Jellis has, however, argued that the charter has introduced an element of uncertainty because it means that previous decisions relating to parliament's intention in enacting a piece of legislation no longer stand.<sup>55</sup>

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<sup>51</sup> Victorian Government, Submission.

<sup>52</sup> J Tobin, Submission.

<sup>53</sup> Victorian Equal Opportunity & Human Rights Commission, Submission.

<sup>54</sup> Victorian Government, Submission.

<sup>55</sup> B Jellis, 'Look but don't leap: lessons from the Victorian statutory bill of rights' in J Leeson and R Haddrick (eds) *Don't Leave Us with the Bill: the case against an Australian bill of rights* (2009) 323–5, Submission.

The Victorian Bar pointed out several problems with the charter. It submitted that any federal Human Rights Act should depart from the Victorian model by including a free-standing remedy against public authorities based solely on a breach of human rights. It also proposed limiting the Attorney-General's right of intervention in charter matters: the Attorney-General's involvement has generally extended the time taken in court and the resources required to bring a charter action.<sup>56</sup> Associate Professor Carolyn Evans supported limiting the Attorney-General's right of intervention to those cases in which a declaration of incompatibility is being sought.<sup>57</sup>

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<sup>56</sup> Victorian Bar, Submission.

<sup>57</sup> C Evans, Submission.

## 12 The case for a Human Rights Act

Chapters 6 to 9 describe a range of options available for the Australian Government to consider in order to better protect human rights. During the course of the Committee's consultations the most contested option was that of introducing comprehensive legislative protection in the form of a 'bill of rights', 'charter of rights' or 'human rights Act'. It should be noted that there is no settled definition of these terms, which are often used interchangeably.

This chapter outlines the main arguments for a Human Rights Act; Chapter 13 outlines the main arguments against such an Act. Various models of comprehensive human rights protection were advocated in submissions; they are discussed in Chapter 14.

This present chapter uses the term 'Human Rights Act' to refer to the most commonly advocated model of human rights protection, which is loosely based on human rights Acts adopted in the United Kingdom, the Australian Capital Territory and Victoria. A Human Rights Act of this kind would require that law makers and parliament consider how proposed legislation might affect rights, require government and public authorities to comply with human rights, and require courts to interpret legislation in accordance with human rights or issue a declaration of incompatibility if such an interpretation was not possible.

### 12.1 The level of community support

A considerable degree of community support for a federal Human Rights Act was expressed during the Committee's consultations. This support was expressed in community roundtables and submissions and through independent research the Committee commissioned.

There was strong support for a Human Rights Act at community roundtables, and many participants emphasised the symbolic and practical benefits of such an instrument.<sup>1</sup> Concern was, however, raised lest the introduction of a Human Rights Act serve to restrict existing rights.<sup>2</sup> Some roundtable participants doubted whether

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<sup>1</sup> For example, Queanbeyan (2), Community Roundtable; Paraburdoo, Community Roundtable; Whyalla, Community Roundtable; Mt Gambier, Community Roundtable; Dubbo, Community Roundtable.

<sup>2</sup> For example, Darwin (2), Community Roundtable; Bendigo, Community Roundtable; Wodonga, Community Roundtable.

such an Act would bring about meaningful change<sup>3</sup>; others were concerned that it would hand too much power to judges.<sup>4</sup>

Of the 35 014 submissions the Committee received, 33 356 (95 per cent) discussed the option of enacting a charter of rights or a Human Rights Act. Of these, 29 153 (87.4 per cent) were in favour of this option, leaving 4203 (12.6 per cent) opposed to it.

The Committee commissioned a report from Colmar Brunton Social Research in order to gauge the views of the broader community, including people who might not have participated directly in the consultation process. The consultants conducted a telephone survey of 1200 people. Respondents were asked whether they would oppose or support a specific law that defined the human rights to which all people in Australia were entitled. Fifty-seven per cent of respondents said they would support such a law; 30 per cent were neutral; the remaining 14 per cent said they would oppose such a law.<sup>5</sup>

The consultants also conducted a number of focus groups in order to obtain qualitative data. They found that participants in favour of a Human Rights Act tended to be better informed about the limited nature of existing rights protection. Many participants considered a Human Rights Act unnecessary: they thought the current systems did not show sufficient evidence of failure.

In March 2009 Amnesty International Australia commissioned Nielsen to conduct a survey of 1000 people in order to gauge the level of support for the introduction of a law to protect human rights in Australia. Eighty-one per cent of respondents said they would support such a law; 11 per cent were neutral; the remaining 8 per cent said they would oppose such a law.<sup>6</sup>

In reviewing these statistics, it is worth noting that Colmar Brunton Social Research found that, although focus group participants knew much of the language used to describe rights, few had any concrete understanding of their rights or what is or is not protected in Australia. For example, many focus group participants assumed that rights are sufficiently protected simply because they enjoy them every day.

The discrepancy between the results of the Colmar Brunton Social Research and Amnesty International Australia surveys can be attributed to the fact that the questions asked were different. The Amnesty International Australia survey referred

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<sup>3</sup> For example, Nhulunbuy, Community Roundtable; Alice Springs, Community Roundtable; Broken Hill, Community Roundtable.

<sup>4</sup> For example, Perth (2), Community Roundtable; Melbourne (2), Community Roundtable; Cairns, Community Roundtable; Alice Springs, Community Roundtable; Kalgoorlie, Community Roundtable.

<sup>5</sup> Colmar Brunton Social Research, *National Human Rights Consultation—community research report* (2009). (Appendix B presents a summary of this report.)

<sup>6</sup> Material provided by Amnesty International Australia.

to a law that would ‘protect human rights in Australia’, whereas the Colmar Brunton Social Research question referred to a law that ‘defined the human rights to which all people in Australia were entitled’.

The Committee also commissioned Colmar Brunton Social Research to conduct a qualitative study in order to better understand the experiences and opinions of members of groups that are marginalised in society or are particularly vulnerable to having their rights violated.<sup>7</sup> Many who participated in this research thought a written document outlining the rights of all groups in society was necessary for the protection of human rights. The notion of an ‘overarching Act’ was also supported by non-government organisations that took part in this additional study; they suggested that if vulnerable groups had a written document this would provide a framework within which breaches of their rights could be resolved.

## 12.2 Arguments in favour of a Human Rights Act

### Redressing the inadequacy of existing human rights protections

One of the main arguments in favour of a Human Rights Act is that it would answer concerns about the ad hoc nature of human rights protection in Australia. The argument is that the current human rights framework is incomplete, and there are inadequate checks on executive power. A

Human Rights Act would provide a comprehensive statement of the fundamental rights and freedoms of all Australians and a framework for ensuring compliance with those rights and freedoms.

#### Gaps in the existing framework

As discussed in Chapter 5, the Australian legal system has been criticised for providing only a patchwork of human rights protection. There is a view that the dominance of the executive has increased in recent years but that there has been inadequate concurrent development of checks and balances.<sup>8</sup> Many submissions contended



The Hon. Susan Ryan AO puts the case for an Australian Human Rights Act.

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<sup>7</sup> Colmar Brunton Social Research, *National Human Rights Consultation—devolved consultation report* (2009). (Appendix C presents a summary of this report.)

<sup>8</sup> S Zifcak and A King, Submission.

that the legal protections for human rights in Australia remain ad hoc and incomplete.<sup>9</sup>

The Gilbert + Tobin Centre of Public Law submitted as follows:

The legislative protection of human rights in Australia is ad hoc, limited and selective, protecting some human rights but not others. It is also hard to navigate, being scattered through the common law and many instruments.<sup>10</sup>

The International Commission of Jurists commented:

Current democratic institutions do not work to protect basic human rights in Australia. It is a systemic problem not necessarily attributable [to] any individual or group that may be in power from time to time. That under the current Australian system human rights protection depends on the goodwill of governments who may be in power from time to time demonstrates the problem with the system.<sup>11</sup>

In addition, the Committee was made aware of examples of apparent systemic human rights problems. For example, Philip Lee commented:

The experience in Australia in recent years including the detention of children in detention centres, the mandatory detention of asylum seekers, the indefinite detention of stateless asylum seekers, the deportation of Australian citizens on migration grounds and the draconian anti terrorism laws provide an undeniable case for a National Charter of Human Rights. It has become increasingly clear that our rights are not adequately protected by the courts, the executive and the parliament.<sup>12</sup>

Stephen King pointed to a number of recent high-profile cases:

The experiences of Cornelia Rau, Vivian Alvarez Solon, Ahmed Al-Kateb, David Hicks and Mohammed Haneef are all vivid reminders that the *ad hoc* protections of rights in Australia [are] inadequate and serve [to] undermine the argument that Australians currently enjoy world's best rights protections.<sup>13</sup>

Similar concerns were expressed at community roundtables. It was argued that recent anti-terrorism legislation has not struck a suitable balance between

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<sup>9</sup> For example, Western NSW Community Legal Centre, Submission; Murray Mallee Community Legal Service, Submission; Australian Council of Social Service, Submission; NSW Charter Group, Submission; Amnesty International, Submission; Australian Human Rights Commission, Submission; N Gotzmann, Submission; ACT Ministerial Advisory Council on Women, Submission; Victorian Government, Submission; Youthlaw, Submission; A Edwards and R McCorquodale, Submission.

<sup>10</sup> Gilbert + Tobin Centre of Public Law (E Santow), Submission.

<sup>11</sup> International Commission of Jurists, Submission.

<sup>12</sup> P Lee, Submission.

<sup>13</sup> S King, Submission.

individual rights and the need to protect national security.<sup>14</sup> There were also comments about the discrimination experienced by Indigenous Australians, with particular reference to the suspension of the *Racial Discrimination Act 1975* (Cth) for the Northern Territory Emergency Response (also known as the ‘Intervention’).<sup>15</sup>

Another common theme was the treatment of asylum seekers<sup>16</sup>, including the degree of accountability of private contractors operating detention centres. The High Court’s decision in *Al-Kateb v Godwin*<sup>17</sup>—that there was no constitutional bar to legislation allowing for the indefinite detention of an asylum seeker pending removal from Australia—was referred to as evidence of the inadequacy of human rights protection in Australia.<sup>18</sup>

The Australian Human Rights Commission submitted:

Any one of us could move from a situation where our rights are currently well protected to one where they are vulnerable. For example, any person could suffer a car accident and end up in a wheelchair; we are all going to get older; we may have a family member who suffers from a mental illness; and with the global financial crisis, we are all more vulnerable to unemployment and associated concerns about housing, education, transport and food.<sup>19</sup>

A range of concerns in relation to service delivery by government agencies were also expressed—among them the lack of mental health services in rural and remote areas<sup>20</sup>; the long waiting lists for emergency and ordinary public housing in some areas<sup>21</sup>; the practice of placing people with disabilities (in particular, young people) in nursing homes<sup>22</sup>; and the treatment of the elderly in nursing homes.<sup>23</sup>

Finally, the Committee heard many personal accounts of circumstances in which people feel that their rights or expectations are not being adequately

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<sup>14</sup> For example, Tweed Heads, Community Roundtable; Alice Springs, Community Roundtable; Busselton, Community Roundtable; Broken Hill, Community Roundtable; Mildura, Community Roundtable; Mt Gambier, Community Roundtable; Sydney, Community Roundtable; Cronulla (2) Community Roundtable.

<sup>15</sup> For example, Tennant Creek, Community Roundtable; Alice Springs, Community Roundtable; Katherine, Community Roundtable; Wadeye, Community Roundtable; Yirrkala, Community Roundtable; Mt Gambier, Community Roundtable; Dubbo, Community Roundtable; Newcastle, Community Roundtable; Cairns, Community Roundtable; Wollongong, Community Roundtable.

<sup>16</sup> For example, Ballarat, Community Roundtable; Perth (1), Community Roundtable; Burnie, Community Roundtable; Whyalla, Community Roundtable; Mt Gambier, Community Roundtable; Melbourne (3), Community Roundtable; Geelong, Community Roundtable; Brisbane (2), Community Roundtable.

<sup>17</sup> (2004) 219 CLR 562.

<sup>18</sup> For example, Melbourne (3), Community Roundtable; Cronulla (1), Community Roundtable; Sydney (2), Community Roundtable;

<sup>19</sup> Australian Human Rights Commission, Submission.

<sup>20</sup> For example, Tennant Creek, Community Roundtable; Alice Springs, Community Roundtable; Katherine, Community Roundtable; Mount Isa, Community Roundtable; Bendigo, Community Roundtable.

<sup>21</sup> For example, Burnie, Community Roundtable; Whyalla, Community Roundtable; Coober Pedy, Community Roundtable.

<sup>22</sup> For example, Wodonga, Community Roundtable; Wollongong, Community Roundtable; G Crafti, Submission.

<sup>23</sup> For example, Queanbeyan (2), Community Roundtable; Katherine, Community Roundtable; Bendigo, Community Roundtable; Burnie, Community Roundtable.

accommodated—for example, the lack of recognition in Australia of same-sex marriage<sup>24</sup> and the prohibition on euthanasia.<sup>25</sup>

### **The impact of a Human Rights Act**

Supporters of the implementation of a Human Rights Act suggest that it could comprehensively eliminate the ‘gaps’ in the existing scheme of human rights protection and constitute an effective enforcement mechanism. They also argue that it would improve the processes for developing laws and policies and increase public awareness and discussion of aspects of human rights.

In the view of Jesuit Social Services a Human Rights Act ‘would fill in the gaps and omissions in our present system of human rights protection, including harmonising our domestic laws with our international human rights obligations’.<sup>26</sup> Similarly, the Law Institute of Victoria summarised the potential impact of a Human Rights Act:

A National Human Rights Act could improve Australia’s human rights performance through a single comprehensive law clearly stating which human rights are protected and promoted and how those human rights are to be protected and promoted in a manner consistent with Australia’s international commitments. The rights and obligations would be clearly described for the public authorities required to abide by them, helping to create a culture of human rights protection that can prevent human rights violations and deal with any abuses quickly and openly if they happen.<sup>27</sup>

A number of commentators have discussed the impact a Human Rights Act might have had in relation to the *Al-Kateb* Case. They say such an Act would have allowed the issue that arose in that case to be identified and resolved at an earlier stage—perhaps during the drafting of amendments to the legislation or in the preparation of a human rights compatibility statement. Alternatively, if the issue had been identified only at a later stage, it could have been resolved by the courts interpreting the legislation in a manner consistent with human rights or making a declaration of incompatibility (which could form the basis for political pressure for change).<sup>28</sup> Julian Burnside QC submitted:

*Al-Kateb* would likely have been decided differently if the Commonwealth had had a Charter of Rights equivalent to the Victorian Charter ... Importantly, a Charter would

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<sup>24</sup> For example, Canberra, Community Roundtable; Australian Marriage Equality, Submission; D Broughton, Submission; L Stanford, Submission; H Wang, Submission; C Murray, Submission; K Young, Submission; J Lennox, Submission; C Deane, Submission; K Dilkarra, Submission; S Rajander, Submission; S Mitchell, Submission; Tasmanian Gay and Lesbian Rights Group, Submission; B Patch, Submission.

<sup>25</sup> For example, Broome, Community Roundtable; Katherine, Community Roundtable; Broken Hill, Community Roundtable; Dubbo, Community Roundtable; Canberra, Community Roundtable; Voluntary Euthanasia Society of NSW, Submission; L Falzon, Submission.

<sup>26</sup> Jesuit Social Services, Submission.

<sup>27</sup> Law Institute of Victoria, Submission.

<sup>28</sup> A Byrnes, H Charlesworth and G McKinnon, *Bills of Rights in Australia: history, politics, law* (2009) 167–68.



have made it possible to argue the case by reference to human rights standards. As it was, the argument in the case did not refer to human rights, because human rights are legally irrelevant in a jurisdiction without formal human rights protection embedded in the law.<sup>29</sup>

## Reflecting basic Australian values

Another argument in favour of a Human Rights Act is that such an Act would serve as an important symbolic statement of Australian values.<sup>30</sup> The Australian Federation of Disability Organisations submitted that at present ‘there is no one piece of legislation or constitutional law which articulates what is arguably a fundamental part of the Australian identity, and it is left to High Court judges to interpret the implicit and explicit rights laid out in the Constitution’.<sup>31</sup> A Human Rights Act would provide an opportunity to ‘define the freedoms that have an important place in the Australian story’<sup>32</sup> and would be the legislative expression of the nation’s or community’s core values.<sup>33</sup>

Ed Coper from GetUp! emphasised that a Human Rights Act would ‘give Australians the chance to set down our values and our vision for our society, and make sure that the values that we hold dear—freedom, dignity, respect, equality and fairness—apply to every person in Australia’.<sup>34</sup> Waleed Aly observed in the public hearings that a Human Rights Act could provide the basis for a strong national sense of self.

Timothy Ginnane SC stressed the importance of Australia fashioning its own Human Rights Act and noted that the Act should incorporate Australia’s approach to the ‘fair go’.<sup>35</sup> Professor Stuart Rees, Director of the Sydney Peace Foundation, commented:

A new identity for Australians would contribute to renewed pride in our participation in international affairs, witness the ripple effects of Sorry Day February 13th 2008 and the subsequent signing of the Kyoto Treaty on climate change. A language to influence relationships between men and women, between different ethnic groups, between the powerful and the not so powerful will have arrived. The idea that rights are somehow only the property of lawyers and politicians will have been defused if not debunked ... [W]ith the passing of a Bill of Rights, a culture’s aspirations and the ways in which they can be realized will have been set in train.<sup>36</sup>

Participants in community roundtables emphasised the need for a central document against which all legislation could be assessed and government

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<sup>29</sup> J Burnside, Submission.

<sup>30</sup> A Byrnes, H Charlesworth and G McKinnon, *Bills of Rights in Australia: history, politics and law* (2009) 169.

<sup>31</sup> Australian Federation of Disability Organisations, Submission.

<sup>32</sup> G Robertson, *The Statute of Liberty* (2009) 92.

<sup>33</sup> Australian Human Rights Commission, Submission; Gilbert + Tobin (E Santow), Submission.

<sup>34</sup> GetUp! (E Coper), Submission.

<sup>35</sup> T Ginnane, Submission.

<sup>36</sup> S Rees, Submission.

decisions measured.<sup>37</sup> They also spoke of the value of such a document in helping the community understand their rights.<sup>38</sup>

## **Protecting the marginalised and disadvantaged**

It is commonly argued that human rights problems particularly affect marginalised and disadvantaged members of the community—among them children, Indigenous Australians, the homeless, ethnic and religious minorities, prisoners, people with mental illness, people with disabilities, the elderly, and asylum seekers.<sup>39</sup> All these groups were identified during the Committee's consultations as frequently suffering discrimination.

People who are disadvantaged or marginalised are more likely to come into contact with government services (such as social security, public housing and health services)<sup>40</sup>, but they are less likely to be aware of their rights, to be able to obtain information about their rights, or to be in a position to enforce their rights.<sup>41</sup>

Many submissions also noted that there is scope for minority rights to be ignored or inadequately recognised in a democracy. It was said this is particularly the case for 'minority groups and persons who by dint of their position or actions are deeply unpopular'.<sup>42</sup> For example, the Prisoners' Legal Service submission noted:

Prisoners as a group are a socially unpopular category and their rights can be subject to violation with little objection ever likely to be raised by the public, media or politicians. Moreover, their incarceration forces incarcerated persons to be completely reliant on the State for day to day matters, increasing the potential for ongoing abuses.<sup>43</sup>

Sisters Inside submitted that 'the current system, which relies on the good faith of government to meet [its] human rights obligations, is clearly not resulting in adequate protection and promotion of women prisoners' human rights'.<sup>44</sup>

The rights of religious minorities were also raised during community roundtables. For example, a representative of a Muslim women's association noted the difficulty

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<sup>37</sup> Cronulla (1), Community Roundtable; Whyalla, Community Roundtable; Queanbeyan (1), Community Roundtable.

<sup>38</sup> Mt Gambier, Community Roundtable.

<sup>39</sup> Gilbert + Tobin Centre of Public Law (E Santow), Submission.

<sup>40</sup> Human Rights Law Resource Centre (Human Rights Act for All Australians), Submission; Gilbert + Tobin Centre of Public Law (E Santow), Submission.

<sup>41</sup> *ibid.*

<sup>42</sup> M Crock and T Freeman, Submission; see also Public Interest Advocacy Centre, Submission; Castan Centre for Human Rights Law, Submission; Gilbert + Tobin Centre of Public Law (E Santow), Submission; J Debeljak, Submission.

<sup>43</sup> Prisoners' Legal Service, Submission.

<sup>44</sup> Sisters Inside, Submission.

minority groups can have in gaining access to justice, especially in a climate of fear.<sup>45</sup>

Particular concern was evident in relation to the experience of Indigenous Australians. Sean Brennan pointed out that, notwithstanding decades of policy action:

[b]y any number of socio-economic indicators—life expectancy, educational attainment, incidence of chronic and acute disease, income levels, quality of housing, employment, skills, incarceration, substance abuse—Aboriginal Australians fare very poorly when compared with non-Indigenous Australians.<sup>46</sup>

Aboriginal and Torres Strait Islander Legal Services noted that existing human rights protections ‘do not go far enough in adequately protecting and providing recourse to Aboriginal and Torres Strait Islander people who have suffered human rights violations’.<sup>47</sup> It submitted that, although the *Racial Discrimination Act 1975* (Cth) has provided possibly the best available level of protection for Indigenous peoples in Australia, it ‘has proved to be a fragile shield’.<sup>48</sup> Indeed, Sean Brennan observed that a statutory Human Rights Act could be ‘swept aside in a climate of “national emergency”, in exactly the same way as the [Racial Discrimination Act] was in 2007 by the Intervention’.<sup>49</sup>

A Human Rights Act would ensure greater protection of the rights of minorities and other marginalised people, it is contended. As well as providing a set of human rights against which proposed laws and policies could be assessed, such an Act would assist in educating disadvantaged and marginalised people and groups about their rights and empowering them to advocate better promotion and protection of those rights.<sup>50</sup> Experience in other jurisdictions shows that a Human Rights Act would bring about a move towards policies aimed at ensuring that the needs of disadvantaged or marginalised individuals are taken into account.<sup>51</sup>

In their submission Professor Mary Crock and Tobias Freeman noted that ‘the passage of human rights legislation ... would go at least some way towards reducing the vulnerabilities of [unpopular] persons in the face of the vocal majority who have the ear of government’.<sup>52</sup> The Gilbert + Tobin Centre of Public Law suggested, ‘Comprehensive human rights protection, set out clearly and accessibly, is vitally

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<sup>45</sup> Sydney (1), Community Roundtable.

<sup>46</sup> Gilbert + Tobin Centre of Public Law (S Brennan), Submission.

<sup>47</sup> Aboriginal and Torres Strait Islander Legal Services, Submission.

<sup>48</sup> *ibid.*

<sup>49</sup> Gilbert + Tobin Centre of Public Law (S Brennan), Submission.

<sup>50</sup> Human Rights Law Resource Centre (Human Rights Act for All Australians), Submission.

<sup>51</sup> *ibid.*; Department for Constitutional Affairs (UK), *Review of the Implementation of the Human Rights Act* (2006), 4.

<sup>52</sup> M Crock and T Freeman, Submission.

important for marginalised and disadvantaged groups'.<sup>53</sup> Russell Thirgood submitted that a Human Rights Act 'would not be a panacea against all evil but would be of further assistance in protecting unpopular or vulnerable minorities'.<sup>54</sup>

## Improving the quality and accountability of government

It is argued that the 'dialogue' model of a Human Rights Act would give rise to institutional interaction or conversations between the judiciary, the executive and the legislature in relation to human rights and would encourage public debate on the subject.<sup>55</sup> This, it is said, would improve legislative and policy outcomes, as well as government service delivery and judicial decisions.<sup>56</sup>

### Improved government policy

A Human Rights Act could require Ministers and their departments to consider human rights at an early stage of policy development. For example, if a 'human rights impact statement' was required with every Cabinet submission this would ensure that the Minister and the relevant department had evaluated the human rights implications of the proposal and either amended the proposal to ensure compliance or justified the decision to proceed in spite of non-compliance. In some cases Cabinet might require the Minister to amend the proposal to make it compliant.



The Hon. Catherine Branson QC argues for an Australian Human Rights Act.

The Victorian Government submitted that experience in that state supports this view:

The early assessment of human rights impacts will ... build public confidence that government processes will prevent human rights breaches before they arise. This is certainly the experience in Victoria where human rights considerations often result in changes being made in the policy and legislative development process, before introduction of legislation into Parliament and before there is any effect on the public.<sup>57</sup>

### Improved legislation

A Human Rights Act could require a member of parliament to table a human rights compatibility statement with any Bill and could establish a parliamentary committee with responsibility for scrutinising new laws to determine whether they comply with

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<sup>53</sup> Gilbert + Tobin Centre of Public Law (E Santow), Submission.

<sup>54</sup> R Thirgood, Submission.

<sup>55</sup> A Byrnes, H Charlesworth and G McKinnon, *Bills of Rights in Australia: history, politics, law* (2009) 51–4.

<sup>56</sup> Liberty Victoria, Submission.

<sup>57</sup> Victorian Government, Submission.

the Act. This would encourage internal government deliberation on the human rights implications of legislation before and during its drafting.<sup>58</sup> It would also ensure a level of parliamentary scrutiny of—and public debate about—legislative proposals.<sup>59</sup>

In Victoria the *Charter of Human Rights and Responsibilities Act 2006* has encouraged public and parliamentary debate on human rights-related subjects as varied as practices in detention centres for young people, prisoners' voting rights, wearing headscarves in schools, strip-searching powers, procedures at inquests after bushfires, the treatment of public housing tenants, and penalties for tree removal.<sup>60</sup> This can be contrasted with the level of parliamentary debate in relation to the 480-page package of legislation to support the Northern Territory Intervention: the package was introduced into the House of Representatives on 7 August 2007 and was passed later that day 'with the key debate on suspension of the Racial Discrimination Act running for only 13 minutes'.<sup>61</sup>

Many submissions emphasised the benefits of 'getting legislation right in the first place'.<sup>62</sup> Ed Coper from GetUp! noted that parliamentary scrutiny for rights compliance would ensure that parliament takes human rights into account when passing laws about 'police powers, voting, sedition, workplace relations, privacy, freedom of speech, the rights of Indigenous people, counter-terrorism or internet censorship'.<sup>63</sup> A Human Rights Act could also prompt systematic review and amendment of particular areas of the law, to ensure that they are consistent with human rights.<sup>64</sup> Participants in community roundtables expressed their support for legislative scrutiny of laws to determine the laws' human rights compliance.<sup>65</sup>

### **Improved government service delivery**

Another argument has it that a Human Rights Act could ensure minimum standards for government policies and practices, provide a mechanism whereby the executive arm of government is held accountable for its actions, and encourage cultural change in public sector agencies over time, so that they adopt policies that take into account the particular characteristics and circumstances of the individuals with whom they interact.

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<sup>58</sup> S Zifcak and A King, Submission; Human Rights Law Resource Centre (Human Rights Act for All Australians), Submission; Victorian Government, Submission; Australian Human Rights Commission, Submission; H Charlesworth, A Byrne and R Thilagaratnam, Submission.

<sup>59</sup> S Zifcak and A King, Submission.

<sup>60</sup> G Robertson, *The Statute of Liberty* (2009) 96.

<sup>61</sup> G Williams, 'Wisdom of politicians is frail shield for our rights', *Sydney Morning Herald*, 2 June 2009.

<sup>62</sup> P Mathew, Submission.

<sup>63</sup> GetUp! (E Coper), Submission.

<sup>64</sup> A Byrnes, H Charlesworth and G McKinnon, *Bills of Rights in Australia: history, politics and law* (2009) 67.

<sup>65</sup> Cairns, Community Roundtable; Darwin (2), Community Roundtable; Perth (1), Community Roundtable.

Many submissions referred to case studies from the United Kingdom<sup>66</sup>, where a formal review of the Human Rights Act found that it had ‘led to a shift away from inflexible or blanket policies towards those which are capable of adjustment to recognise the circumstances and characteristics of individuals’.<sup>67</sup> Susan Harris Rimmer submitted, ‘Where countries have enacted human rights legislation, such as the UK, it is ordinary folk engaged in everyday activities involving government services that have often reaped the benefits’.<sup>68</sup> In this way, ‘human rights principles are not merely the domain of lawyers, and are used to guide government and community services’.<sup>69</sup>

The Law Council of Australia noted, ‘Evidence of the service delivery benefits, particularly for the most marginalized or disadvantaged members of the community, has begun to emerge in Victoria’.<sup>70</sup> The Victorian Equal Opportunity & Human Rights Commission identified a number of areas in which a Human Rights Act can have a positive impact on policy development and service delivery, including in correctional services, policing and health care.<sup>71</sup> Participants in community roundtables expressed their support for the idea of authorities being held to greater standards of integrity in order to prevent abuses of power.<sup>72</sup>

The submission from Seniors Rights Victoria provided an example of how a Human Rights Act might bring about better service delivery for older Australians:

Of most importance to older people is the framework a Human Rights Act would provide for public service providers (and their contractors) to improve older people’s experience of public services, particularly health care services. The active process of identifying and balancing human rights (against other rights and the needs of the community generally) will turn the minds of public service providers to the human rights issues involved in caring for older people.<sup>73</sup>

It should be noted that if a Human Rights Act applied solely at the federal level it would have a direct influence only on Commonwealth public authorities. This would take in a number of areas of government service delivery (such as social security), but it would exclude a large number of services for which the states and territories are primarily responsible (such as health and education).

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<sup>66</sup> For example, Human Rights Law Resource Centre (Human Rights Act for All Australians), Submission; R Merkel and A Pound, Submission; Victorian Equal Opportunity & Human Rights Commission, Submission; Australian Human Rights Commission, Submission; Gilbert + Tobin Centre of Public Law (E Santow), Submission.

<sup>67</sup> Department for Constitutional Affairs (UK), *Review of the Implementation of the Human Rights Act* (2006), 4.

<sup>68</sup> S Harris Rimmer, Submission.

<sup>69</sup> Human Rights Law Resource Centre (Human Rights Act for All Australians), Submission.

<sup>70</sup> Law Council of Australia, Submission.

<sup>71</sup> Victorian Equal Opportunity & Human Rights Commission, Submission.

<sup>72</sup> Newcastle, Community Roundtable; Cronulla (1) Community Roundtable.

<sup>73</sup> Seniors Rights Victoria, Submission.

### Improved judicial decisions

A Human Rights Act would allow judges to decide cases on first principles, rather than old precedents and would make judicial decisions more comprehensible, logical and reasonable.<sup>74</sup> The Victorian Government emphasised that a direction to courts to interpret the law in a manner consistent with human rights would ‘signal the importance of Australia’s international human rights obligations in Australia and ensure that Australian law develops consistently with international human rights jurisprudence’.<sup>75</sup>

### Contributing to a culture of respect for human rights

It is argued that human rights have meaning only if they exist in the context of a ‘supportive legal, political and cultural environment’.<sup>76</sup> People who support a Human Rights Act contend that Australia does not have a culture in which human rights are respected, protected and promoted. At the same time, the fragmented and ad hoc nature of the human rights protection that does apply in Australia means that many Australians do not have a good understanding of which human rights are currently protected under Australian law and tend to take their rights for granted.

A Human Rights Act would constitute a clear statement of the human rights and responsibilities of all members of the Australian community and of the government’s commitment to promoting and protecting those rights. Over time, implementation of a Human Rights Act by politicians, public sector agencies and the courts would lead to

greater awareness of human rights in the community and greater consideration of, and adherence to, human rights principles by all sectors of the community. Associate Professor Simon Rice submitted:

Law, alone, is not an effective means of achieving deep understanding and lasting attitudinal change in the community. Lasting social change requires a wide range of complementary strategies. Community-wide attitudinal change is driven by many



Human Rights Commissioners—Linda Matthews (South Australia), Dr Helen Watchirs (ACT) and Dr Helen Szoke (Victoria).

<sup>74</sup> G Robertson, *The Statute of Liberty* (2009) 104; see also Liberty Victoria, Submission.

<sup>75</sup> Victorian Government, Submission.

<sup>76</sup> G Williams, *A Charter of Rights for Australia* (2007) 87.

factors, two of which are the legislative setting of standards, and enforcement of those standards.<sup>77</sup>

A Human Rights Act could play an important educative role in the general community, and a formal government commitment to protecting human rights would help to develop a broader culture that understands and respects human rights for all members of society. Public education campaigns are likely to make the community more aware of the rights contained in the Act and mechanisms for their enforcement.

The Committee became aware that there is strong support for greater community education about human rights and the notion of creating a culture of human rights promotion and protection in the Australian community.<sup>78</sup> At the public hearings, Dr Paula Gerber noted that a Human Rights Act would give school teachers a sense of the importance of human rights.<sup>79</sup> Women's Health Victoria submitted, 'A federal charter could act as a foundation for a human rights culture by encouraging a society in which individuals are aware of and assert their rights and responsibilities'.<sup>80</sup>

In community roundtables the Committee heard that what is needed is not simply a piece of paper but a culture<sup>81</sup>; that you can't legislate for goodwill; that there needs to be a cultural shift towards greater tolerance and thoughtfulness<sup>82</sup>; that human rights should be so ingrained in how we all think and act (right down to the official at Centrelink) that it is just as much a consideration as speaking politely to a person in front of you<sup>83</sup>; and that bottom-up measures are needed to create a culture of human rights entrenched in education at every level and incorporated in government policy.<sup>84</sup> The Committee also heard the view that education is crucial if Australia is to effect such a cultural shift.<sup>85</sup>

## **Improving Australia's international standing in relation to human rights**

It is argued that a Human Rights Act could improve Australia's international standing in three important ways.

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<sup>77</sup> S Rice, Submission.

<sup>78</sup> For example, Human Rights Law Resource Centre (Human Rights Act for All Australians), Submission; J Tobin, Submission; ACT Disability, Aged & Carer Advocacy Service, Submission.

<sup>79</sup> Dr Paula Gerber, Public Hearings.

<sup>80</sup> Women's Health Victoria, Submission.

<sup>81</sup> Wodonga, Community Roundtable.

<sup>82</sup> Mildura, Community Roundtable.

<sup>83</sup> Brisbane (2), Community Roundtable.

<sup>84</sup> Newcastle, Community Roundtable.

<sup>85</sup> Sydney (3), Community Roundtable.



First, ensuring full domestic implementation of the human rights obligations that Australia has already accepted at the international level could improve Australia's reputation and limit criticism for non-compliance.<sup>86</sup> By ratifying international human rights instruments, Australia has agreed to comply with the obligations described in them, but to date we have implemented these instruments domestically on only a limited basis. Alice Edwards and Professor Robert McCorquodale pointed to an 'enlargening gap between our international obligations and our domestic legal framework and performance record on human rights protection'.<sup>87</sup> It was suggested that, by failing to implement these instruments more comprehensively in domestic law, Australia is in breach of international law.<sup>88</sup>

Indeed, the UN Human Rights Committee (which oversees compliance with the International Covenant on Civil and Political Rights) and the Committee on Economic, Social and Cultural Rights (which oversees compliance with the International Covenant on Economic, Social and Cultural Rights) have criticised Australia for failing to enact accessible and uniform coverage of its international human rights obligations. Both committees recently recommended that Australia consider the introduction of comprehensive human rights legislation.<sup>89</sup> In its submission, the ACT Government remarked, 'It is important that Australia's actions in ratifying these treaties do not become hollow and meaningless gestures which do little in practical terms to protect the rights and freedoms of all Australians'.<sup>90</sup>

Second, implementing Australia's international human rights obligations domestically would 'bring rights home' and reduce the number of complaints made to international treaty bodies. In some cases Australia has signed optional protocols to international human rights instruments that allow individuals in Australia to make a complaint to an international treaty body (for example, the Human Rights Committee in the case of the International Covenant on Civil and Political Rights).<sup>91</sup> As Elizabeth Evatt pointed out in her submission, 'A body of human rights jurisprudence is being developed by the treaty bodies, in the context of Australian cases, without any opportunity arising for Australian courts to consider and to pronounce upon the relevant issues'.<sup>92</sup> Implementing Australia's international human rights obligations domestically would provide a 'home-grown' system of

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<sup>86</sup> Liberty Victoria, Submission.

<sup>87</sup> A Edwards and R McCorquodale, Submission.

<sup>88</sup> M Crock and T Freeman, Submission; Australian Human Rights Group, Submission.

<sup>89</sup> Human Rights Committee, *Consideration of Reports Submitted by States Parties under Article 40 of the Covenant: concluding observations of the Human Rights Committee—Australia* (7 May 2009); Committee on Economic, Social and Cultural Rights, *Consideration of Reports Submitted by States Parties under Articles 16 and 17 of the Covenant: concluding observations of the Committee on Economic, Social and Cultural Rights—Australia* (22 May 2009)..

<sup>90</sup> ACT Government, Submission.

<sup>91</sup> See also Chapter 5.

<sup>92</sup> E Evatt, Submission.

human rights protection.<sup>93</sup> In addition, the Human Rights Law Resource Centre noted:

It is very undesirable that members of the public be put to the expense and the considerable delay of seeking redress in New York or Geneva for a human rights complaint which could, had such human rights been part of domestic law, have been granted more inexpensively and much more quickly at home.<sup>94</sup>

Finally, domestic implementation of Australia's human rights obligations would give Australia greater credibility when commenting on human rights abuses in other jurisdictions. In its submission the Victorian Government commented, 'Australia is a human rights leader in the Asia-Pacific region, and having a Federal Charter would help to set the benchmark in the context of conversations between Australia and its neighbours'.<sup>95</sup>

Similarly, Elizabeth Evatt noted:

Australia's ability to influence the protection of human rights in other countries and in international forums should be enhanced when it demonstrates its willingness to ensure the effective implementation and enforcement of rights in Australia, and when it accepts the enforcement of human rights principles, whatever the effect this may have on the policy goals sought by a government.<sup>96</sup>

## **Bringing Australia into line with other democracies**

Several commentators have remarked that 'Australia finds itself increasingly isolated from the international community'<sup>97</sup> as the only Western democracy that does not have some form of national charter or bill of rights.<sup>98</sup> Some express concern at this fact alone; others worry that it could leave the Australian legal system isolated from developments in other similar systems<sup>99</sup> and that it might undermine Australia's authority to take part in discussions about human rights in the international arena.<sup>100</sup>

Over time the Australian common law has developed with the assistance of a large body of cases considered by courts in other common law systems, among them the United Kingdom, Canada and New Zealand. Each of those countries has now developed some form of charter of human rights, and there is concern that they will

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<sup>93</sup> A Edwards and R McCorquodale, Submission.

<sup>94</sup> Human Rights Law Resource Centre (Human Rights Act for All Australians), Submission.

<sup>95</sup> Victorian Government, Submission.

<sup>96</sup> E Evatt, Submission.

<sup>97</sup> G Lindell, Submission.

<sup>98</sup> Human Rights Law Resource Centre (Human Rights Act for All Australians), Submission; Human Rights Council of Australia, Submission.

<sup>99</sup> Human Rights Council of Australia, Submission; G Lindell, Submission.

<sup>100</sup> Human Rights Law Resource Centre (Human Rights Act for All Australians), Submission; GetUp! (E Coper), Submission; Women's Legal Service Victoria, Submission.

no longer be sources of influence and inspiration for our courts because their common law will increasingly be influenced by their human rights instruments. As a result, the Australian common law could experience a degree of 'intellectual isolation'.<sup>101</sup>

A related concern is that if Australia does not adopt some form of Human Rights Act its judiciary will be unable to play a part in the important debates and developments associated with human rights that are taking place in other jurisdictions and internationally.<sup>102</sup> Elizabeth Evatt pointed out, 'Legislating for human rights would give the High Court a better opportunity to draw on and to contribute to the development of human rights jurisprudence'.<sup>103</sup>

### Generating economic benefits

Some commentators say a Human Rights Act could reduce the economic costs associated with policies that do not protect the lives and safety of Australians.

In its submission the Human Rights Law Resource Centre mentioned economic research into the costs of human rights violations. In 2004 Access Economics conducted a study of the costs of domestic violence to the Australian economy, finding that in 2002–03 the total cost of domestic violence was an estimated \$8.1 billion.<sup>104</sup> A 2004 Productivity Commission review of the *Disability Discrimination Act 1992* (Cth) found a correlation between equitable social policy and economic growth and noted that the Act was 'very likely to have produced a net community benefit in the period since its introduction'.<sup>105</sup> A 2008 Access Economics and Reconciliation Australia joint report stated that there is clear economic justification for reducing Indigenous disadvantage.<sup>106</sup>

The Victorian Equal Opportunity & Human Rights Commission also identified an emerging business case for a human rights-based approach to government. Its submission mentioned a number of evidence-based indicators for this view, among them satisfaction on the part of service users, improved outcomes for service users, job satisfaction for staff, and the ease and quality of staff decision making.<sup>107</sup>

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<sup>101</sup> J Spigelman, 'Access to justice and human rights treaties', Speech delivered at the National Conference of the Australian Plaintiff Lawyers Association, 22 October 1999; see also A Mason, 'The death of human rights? and related issues', Speech delivered at the Australian National University, 24 August 2007.

<sup>102</sup> Human Rights Law Resource Centre (Human Rights Act for All Australians), Submission. See also G Robertson, *The Statute of Liberty* (2009) 103.

<sup>103</sup> E Evatt, Submission.

<sup>104</sup> Access Economics, *The Cost of Domestic Violence to the Australian Economy* (2004) 63, cited in Human Rights Law Resource Centre (Human Rights Act for All Australians), Submission.

<sup>105</sup> Productivity Commission, *Review of the Disability Discrimination Act 1992* (2004) 152, cited in Human Rights Law Resource Centre (Human Rights Act for All Australians), Submission.

<sup>106</sup> Access Economics and Reconciliation Australia, *An Overview of the Economic Impact of Indigenous Disadvantage* (2008) 47, cited in Human Rights Law Resource Centre (Human Rights Act for All Australians), Submission.

<sup>107</sup> Victorian Equal Opportunity & Human Rights Commission, Submission.

## 12.3 Countering the arguments

Chapter 13 presents the case against a Human Rights Act. A number of the arguments for such an Act, as just outlined, are, however, countered here in the following paragraphs.

First, in relation to the claim that the dialogue model of a Human Rights Act would generate a useful conversation about rights, experience in other jurisdictions suggests that a Human Rights Act is unlikely to give rise to institutional dialogue. If parliament simply accepts declarations of incompatibility by courts, genuine dialogue will not take place. Equally, if courts are reluctant to issue declarations of incompatibility, no dialogue about rights is initiated, and the courts might be seen to be providing legitimacy for questionable legislation.<sup>108</sup>

Second, in relation to the claim that a Human Rights Act would bring Australia in line with other democracies, it has been argued that such a claim is superficial and says nothing about the substantive human rights protections in operation in Australia.<sup>109</sup> As to the potential ‘isolation’ of Australia’s judiciary, Julian Leaser points out that even before the enactment of the UK *Human Rights Act 1998* Australia was not following precedents set by the United Kingdom and other countries in the development of the Australian common law. He concludes, ‘It is surely no bad thing for Australian judges to continue to be as self-reliant as they currently are’.<sup>110</sup> Professor Patrick Parkinson took this argument a step further, asserting that a Human Rights Act could mean that ‘Australian law will lose some of its autonomy and be carried along by the public policy fashions of North America and Europe, as interpreted by judges’.<sup>111</sup>

Finally, in relation to the claim that a Human Rights Act would bring about a stronger culture of human rights, it has been argued that Australia already enjoys a culture in which rights are respected and protected. Further, such an Act could give rise to negative cultural change; for example, Brigadier Jim Wallace expressed concern about the development of a ‘rights based culture where someone must always be to blame’.<sup>112</sup>

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<sup>108</sup> T Campbell and N Barry, Submission.

<sup>109</sup> Australian Christian Lobby, Submission.

<sup>110</sup> J Leaser, ‘Responding to some arguments in favour of the bill of rights’ in J Leaser and R Haddrick (eds), *Don’t Leave Us with the Bill: the case against an Australian bill of rights* (2009), Submission, 54.

<sup>111</sup> P Parkinson, Submission.

<sup>112</sup> J Wallace, ‘Why should Christians be concerned about a bill of rights?’ in J Leaser and R Haddrick (eds), *Don’t Leave Us with the Bill: the case against an Australian bill of rights* (2009), Submission, 261; see also M Court, Submission.

## 13 The case against a Human Rights Act

Chapter 12 outlines the main arguments in favour of a Human Rights Act; this chapter outlines the main arguments against such an Act.

Again, the term ‘Human Rights Act’ is used to refer to the most commonly advocated model, which is loosely based on the human rights Acts adopted in the United Kingdom, the Australian Capital Territory and Victoria. A Human Rights Act of this kind would require that law makers and parliament consider how proposed legislation might affect rights, require government and public authorities to comply with human rights, and require courts to interpret legislation in accordance with human rights or issue a declaration of incompatibility if such an interpretation was not possible.

### 13.1 The level of community support

Considerable opposition to a federal Human Rights Act was apparent during the Committee’s Consultation. It was expressed in community roundtables and submissions and is evident in the results of independent research the Committee commissioned. As noted in Chapter 12, of the 35 014 submissions the Committee received, 33 356 (95 per cent) discussed the option of enacting a charter of rights or a Human Rights Act. Of these, 29 153 (87.4 per cent) were in favour of this option, leaving 4203 (12.6 per cent) opposed to it.



The Hon. Bob Carr puts the case against an Australian Human Rights Act.

### 13.2 Arguments against a Human Rights Act

#### **The adequacy of current human rights protections in Australia**

One of the main arguments put forward against a Human Rights Act is that it is not necessary because Australia already offers adequate protection of human rights through democratic institutions, constitutional protections, specific legislation and the common law.

Consultation participants who were opposed to a Human Rights Act often emphasised their support for human rights protections in general.<sup>1</sup> For example, one participant in a community roundtable noted that it is quite possible to support human rights but be against the introduction of a Human Rights Act.<sup>2</sup> Senator George Brandis SC, the Shadow Attorney-General, made the same point at the public hearings.

Those who support this argument note that Australia has a historical tradition that differs from that in most countries that have introduced charters or bills of rights. For example, our nation was created without civil conflict.<sup>3</sup> Peter Heerey QC submitted, ‘A striking feature of the Australian civic achievement is that, compared with most other countries, in our domestic polity very little blood has stained the wattle’.<sup>4</sup> This distinguishes Australia from countries in which democracy came about through wars of independence or dramatic constitutional upheaval: for them, a bill or charter of rights was an important reflection of new values and a new constitutional order. The main human rights-related victories in Australia have been achieved primarily through legislative and administrative decision making.<sup>5</sup> The Hon. Greg Donnelly MLC submitted:

The human rights that are currently enjoyed by Australians have developed over time taking into account the country’s unique history and a number of important influences including the common law, a comprehensive electoral system, local state and federal levels of government, an independent judiciary, operation of the separation of powers principle and a free press, just to name a few.<sup>6</sup>

This argument has it that the Australian legal framework contains adequate mechanisms for protecting human rights.<sup>7</sup> Australia’s system of government—entailing representative democracy, federalism, the separation of powers and responsible government—functions to protect rights. Democratic institutions such as the Australian Human Rights Commission, the Commonwealth Ombudsman, the Privacy Commissioner, the Auditor-General and various tribunals, are charged with safeguarding human rights.<sup>8</sup> Australia’s system of administrative law is well

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<sup>1</sup> Al Tonking, Submission.

<sup>2</sup> Melbourne (2), Community Roundtable.

<sup>3</sup> G Brandis, ‘The debate we didn’t have to have: the proposal for an Australian bill of rights’ in J Leeson and R Haddrick (eds), *Don’t Leave Us with the Bill: the case against an Australian bill of rights* (2009), Submission, 17.

<sup>4</sup> P Heerey, Submission.

<sup>5</sup> B Galligan and T Moreton, ‘Australian exceptionalism: rights protection without a bill of rights’ in T Campbell, J Goldsworthy and A Stone (eds), *Protecting Rights Without a Bill of Rights* (2006) 19.

<sup>6</sup> G Donnelly, Submission.

<sup>7</sup> For example, J Hatzistergos, Submission; Australian Christian Lobby, Submission; Australian Chamber of Commerce and Industry, Submission; H Irving, Submission; F Costa, Submission; A Ewers, Submission; D Gates, Submission; D Hernandez, Submission; C Rodgers, Submission; P Cluff, Submission; see also Chapter 5.

<sup>8</sup> See J Leeson, ‘Responding to some arguments in favour of a bill of rights’ in J Leeson and R Haddrick (eds), *Don’t Leave Us with the Bill: the case against an Australian bill of rights* (2009), Submission, 55; H Irving, Submission.

equipped to protect rights<sup>9</sup>, and a broad range of legislation (including anti-discrimination legislation operating at the federal and state and territory levels) promotes and protects human rights.<sup>10</sup> These rights are also protected by the Constitution and by the various common law presumptions that apply when interpreting legislation that might impinge on rights.<sup>11</sup>

The Australian Christian Lobby submitted, 'Australia's excellent human rights record shows that its approach to protecting human rights works well without a bill or charter of rights'.<sup>12</sup> Timothy Watson submitted, 'Human rights are very well safeguarded in Australia through our democratic system of government, independent judicial system, independent media and Human Rights Commission'.<sup>13</sup> The Shop, Distributive and Allied Employees' Association submitted, 'Australia, without a Charter of rights, enjoys the highest standard of freedom throughout the world'<sup>14</sup>; on this basis, the submission argued, 'Why should we risk a system that works effectively and where human rights are not breached?'<sup>15</sup>

At the public hearings the Commonwealth Ombudsman, Professor John McMillan, emphasised that Australia has a more comprehensive system of executive oversight than applies in most Western nations. He noted that in his experience the problems in government that result in human rights concerns are generally a consequence of wrongful administration of laws and policy—as opposed to bad laws and policy in the first place.

Submissions emphasised that there is little evidence of significant human rights abuses in Australia<sup>16</sup> and that 'ordinary Australians already enjoy rights and privileges equal to, or better than, countries with a Bill of Rights'.<sup>17</sup> It was argued that, in the few cases where there have been allegations of serious human rights violations, ordinary legal and parliamentary processes have produced a good result while ensuring flexibility for policy makers.<sup>18</sup>

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<sup>9</sup> See J Leaser, 'Responding to some arguments in favour of a bill of rights' in *Don't Leave Us with the Bill*, Submission, 55–6; see also R Creyke, 'The performance of administrative law in protecting rights' in T Campbell, J Goldsworthy and A Stone (eds), *Protecting Rights Without a Bill of Rights* (2006) 101.

<sup>10</sup> H Irving, 'A legal perspective on bills of rights' in *Don't Leave Us with the Bill*, Submission, 171–2.

<sup>11</sup> See, generally, P de Jersey, 'A reflection on a bill of rights' in *Don't Leave Us with the Bill*, Submission, 10–13; H Irving, Submission.

<sup>12</sup> Australian Christian Lobby, Submission.

<sup>13</sup> T Watson, Submission.

<sup>14</sup> Shop, Distributive and Allied Employees' Association, Submission.

<sup>15</sup> *ibid.*

<sup>16</sup> For example, C Schafer, Submission; R Mackie, Submission.

<sup>17</sup> L Cook, Submission. See also K Budge, Submission; D King, Submission; A McGregor, Submission; R Moore, Submission; J Calvert, Submission; P Lucas, Submission.

<sup>18</sup> J Leaser, 'Responding to some arguments in favour of a bill of rights' in *Don't Leave Us with the Bill*, Submission, 38; E Micklethwaite, Submission.

For example, Mohamed Al-Kateb was ultimately granted a visa, notwithstanding the High Court's decision.<sup>19</sup> Full, transparent and independent inquiries were held into the cases of Cornelia Rau, Vivian Solon and Dr Mohamed Haneef, and compensation was provided as appropriate.<sup>20</sup> Moreover, it is argued, there is no guarantee that a Human Rights Act would have prevented such incidents or offered a better outcome for those concerned.<sup>21</sup> Ian Tonking SC submitted, 'Many perceived wrongs occur because of ignorance or incompetence or neglect rather than as a result of any structural impediments to the exercise of "rights"'.<sup>22</sup> In his submission on behalf of the Federal Opposition, Senator George Brandis SC referred to these incidents, commenting:

Although alleged threats to human rights have been the subject of political controversy in recent years (for instance, in debate over the anti-terrorism laws, the 'children in detention' issue and the Haneef case), arguments about the desirability of a bill of rights were not a significant feature of those political controversies.<sup>23</sup>

Similar views were expressed in community roundtables. One participant noted, 'I am tired of hearing Australians do nothing right. We do a lot right. We could learn and do more but we need recognition for what we do'.<sup>24</sup> Another roundtable participant said, 'We are one of the very few countries without [a Human Rights Act] and, compared to those that have one, we're doing very well. There are other countries that still have slavery, even though they have a bill of rights'.<sup>25</sup> Finally, it was observed in several community roundtables and many submissions that our rights are already sufficiently protected: 'If it ain't broke, don't fix it'.<sup>26</sup>

## Undermining our tradition of parliamentary sovereignty

One prominent concern expressed was that a Human Rights Act would result in an unacceptable change in the relationship between the legislature and the judiciary, transferring power from the parliament (which is answerable to the community through the electoral process) to the judiciary (which is not).

The Hon. Greg Donnelly MLC submitted that a Human Rights Act would 'fundamentally alter the democratic dynamic that, while not perfect, has served this

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<sup>19</sup> J Leeser, 'Responding to some arguments in favour of a bill of rights' in *Don't Leave Us with the Bill*, Submission, 37–8.

<sup>20</sup> *ibid.* 39.

<sup>21</sup> P Heerey, Submission; G Brandis, 'The debate we didn't have to have: the proposal for an Australian bill of rights' in *Don't Leave Us With the Bill*, Submission, 21.

<sup>22</sup> Al Tonking, Submission.

<sup>23</sup> G Brandis, Submission.

<sup>24</sup> Brisbane (2), Community Roundtable.

<sup>25</sup> Cronulla (1), Community Roundtable.

<sup>26</sup> For example, Katherine, Community Roundtable; Bendigo, Community Roundtable; Melbourne (1), Community Roundtable; A Prentice, Submission; B Chant, Submission; S Jenkinson, Submission; A Hodge, Submission; J Goss, Submission; T Edwards, Submission; D Hernandez, Submission; A Laughton, Submission.



country well'.<sup>27</sup> Professor Tom Campbell and Dr Nicholas Barry emphasised the unrepresentative nature of judges, who are 'drawn from a narrow section of society and ... do not represent the diverse range of reasonable views about human rights that exist in Australia'.<sup>28</sup> Colin Grant submitted:

Our democratic political system seeks to ensure that the engine room of this country's values, freedoms and rights is the lounge room of the Australian home as citizens exercise their responsibility to think and decide, as a majority, on the shape and freedoms of this country. To adopt a Bill of Rights would radically shift the engine room from the lounge room to the courtroom, from the majority of Australians to the minority of a single judge.<sup>29</sup>

### **Requiring judges to make policy decisions**

It is argued that the human rights set out in human rights Acts tend to be expressed in general terms, allowing greater scope for interpretation. 'Human rights' encapsulates a set of broad moral values, and, the argument goes, a Human Rights Act would require courts to make decisions about vague, open-ended and abstract propositions.<sup>30</sup> Many human rights, such as reproductive rights, sexual orientation rights and the right to life, rest on highly contentious values. A Human Rights Act would engage courts in the difficult exercise of balancing different rights.<sup>31</sup>

The contention is that the problem with a Human Rights Act lies in the very nature of what it asks judges to do.<sup>32</sup> The Hon. Malcolm McLelland QC described rights in a Human Rights Act as 'broad statements of abstract social values treated as rules of law' that tend to be couched in vague and general language.<sup>33</sup> Senator George Brandis SC, on behalf of the Federal Opposition, commented:

Central to the Opposition's concern about bills of rights is that they inevitably import ideological and cultural agenda. [They] define a particular hierarchy of political values, which both purports to resolve contestable philosophical issues by favouring certain values over others (eg liberty over egalitarianism; communitarianism over private ownership), and universalizes the values of one particular time.<sup>34</sup>

The submission from Professor Tom Campbell and Dr Nicholas Barry also outlined some of the problems that arise from the abstract nature of rights: 'When judges apply these rights to complex cases, difficult and contestable decisions will have to

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<sup>27</sup> G Donnelly, Submission.

<sup>28</sup> T Campbell and N Barry, Submission.

<sup>29</sup> C Grant, Submission.

<sup>30</sup> For example, P Parkinson, Submission; M McLelland, Submission; G Brandis, Submission; T Campbell and N Barry, Submission; Seventh Day Adventist Church, Submission; AI Tonking, Submission.

<sup>31</sup> P Heerey, Submission; Police Federation of Australia, Submission.

<sup>32</sup> H Irving, 'A legal perspective on bills of rights' in *Don't Leave Us with the Bill*, Submission, 171.

<sup>33</sup> M McLelland, Submission.

<sup>34</sup> G Brandis, Submission.

be made about what specific rights should mean in practice, and how they are to be weighed against each other and other competing moral principles'.<sup>35</sup>

A particular concern arises in the case of courts being asked to make decisions about economic and social rights. Associate Professor Anne Twomey argued that this requires a court to make judgments about the value and effectiveness of government policy and the allocation of resources. She concluded that it is 'not [the court's] place to make a budget decision about whether to give priority to that particular cost above and beyond any number of other government priorities'.<sup>36</sup>

### **Transferring legislative power to unelected judges**

Concern has been expressed that an obligation for courts to interpret legislation consistently with human rights will fundamentally change the way courts interpret legislation. Professor Tom Campbell and Dr Nicholas Barry argued that courts 'will assume that all Acts of Parliament are intended to be consistent with the bill of rights, and as a result, they will depart from their literal meaning, adopting creative interpretations to ensure that they cohere with the court's understanding of the bill of rights ...'<sup>37</sup> At the extreme, this could result in courts 'rewriting' legislation and usurping a role that should be left to parliament.<sup>38</sup> Ultimately, 'courts will steadily undermine the separation of powers by adopting the radical interpretive practices that arise from reading down provisions'.<sup>39</sup>

There was also concern that courts' declarations of incompatibility would convey the impression that governments are rights violators and courts are rights protectors, when the government might simply have a different interpretation of what rights mean in a particular context. Although a Human Rights Act might not technically undermine parliamentary sovereignty, parliament could be reluctant to exercise its authority when a declaration of incompatibility is issued.<sup>40</sup> New South Wales Attorney General the Hon. John Hatzistergos MLC submitted:

Parliaments would face unacceptable political pressure from the judiciary. By declaring incompatibility with human rights, even when such a 'violation' is entirely practical, reasonable and necessary, or by invoking the interpretation division, democratically elected representatives are branded human rights abusers and held accountable to unelected appointees.<sup>41</sup>

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<sup>35</sup> T Campbell and N Barry, Submission.

<sup>36</sup> A Twomey, Submission.

<sup>37</sup> T Campbell and N Barry, Submission.

<sup>38</sup> J Allan, 'What's wrong about a statutory bill of rights' in *Don't Leave Us with the Bill*, Submission, 87. See also J Hatzistergos, Submission.

<sup>39</sup> T Campbell and N Barry, Submission.

<sup>40</sup> T Campbell and N Barry, Submission.

<sup>41</sup> J Hatzistergos, Submission.

A number of people who participated in community roundtables were anxious about the possible transfer of power to unelected judges.<sup>42</sup> One participant noted that—unlike politicians—‘the judiciary is accountable to no one’.<sup>43</sup>

### **Politicising the judiciary**

A further concern is that the open-ended and abstract nature of rights set out in a Human Rights Act would mean that judges were called on to make broad-ranging decisions in areas of social and economic policy. This would lead to politicisation of the judiciary, undermining public confidence in the independence of the courts.<sup>44</sup> In the words of Ryan Haddrick:

The damage done to the judicial function of government, and the reputation of judges, by asking the courts to give meaning to the prevalent moral and political theories does nothing to protect human rights in the long run. The rule of law necessitates the protection of the separation of powers and, in particular, the judicial function.<sup>45</sup>

There was also concern that judges are unqualified to determine matters of economic and social policy and have no reliable way of gauging ‘the will of the people’.<sup>46</sup> The Hon. Malcolm McLelland QC commented:

Any increasing tendency for judicial decisions to be, or to be perceived to be, determined by judges’ views on social policy, would result in a corresponding increase in pressure to select as judges those whose views on policy questions reflect the views of the selectors.<sup>47</sup>

### **No better human rights protections**

It is argued that a Human Rights Act is an ineffective way to protect a community against government tyranny. Many submissions pointed to particular countries that have had a charter or bill of rights—including Zimbabwe and the former Soviet Union—and noted that these instruments failed to protect the population against human rights violations.<sup>48</sup>

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<sup>42</sup> For example, Perth (2), Community Roundtable; Kalgoorlie, Community Roundtable; Melbourne (1), Community Roundtable.

<sup>43</sup> Kalgoorlie, Community Roundtable.

<sup>44</sup> J Howard, ‘Don’t risk what we have’ in *Don’t Leave Us with the Bill*, Submission, 67. See also M Tate, Submission; A Tonkin, Submission; H Irving, Submission; C Southwell, Submission; A Stone, Submission; R Mews, Submission; Australian Christian Lobby, Submission; D Pix, Submission; K Bartel, Submission.

<sup>45</sup> R Haddrick, ‘The judicature, bills of rights, and Chapter III’ *Don’t Leave Us with the Bill*, Submission, 168.

<sup>46</sup> P de Jersey, ‘A reflection on a bill of rights’ in *Don’t Leave Us with the Bill*, Submission, 8.

<sup>47</sup> M McLelland, Submission.

<sup>48</sup> For example, G Brandis, Submission; Australian Christian Lobby, Submission; Australian Chamber of Commerce and Industry, Submission; E Micklethwaite, Submission; A Ewers, Submission; J Ridd, Submission; M Court, Submission; S Smith, Submission; A Green, Submission; T Overheu, Submission.

In addition, there is concern that a Human Rights Act would not result in better laws. Rather than being motivated by good outcomes, parliament would become preoccupied with pre-empting negative judicial consequences or ‘charter-proofing’ legislation. Professor Tom Campbell and Dr Nicholas Barry submitted:

The political review mechanisms will also become less effective, as governments focus on heading off criticism from the courts when formulating legislation. Instead of developing and defending their own approach to human rights, which may clash with judicial interpretations, the government will rely on advice from lawyers to anticipate how the courts are likely to interpret the bill of rights, and ensure that their legislation is in keeping with this.<sup>49</sup>

Alternatively, a Human Rights Act could allow parliament to abdicate its duty in relation to difficult policy questions, leaving these for the courts to decide.<sup>50</sup> This could lead to less legislative scrutiny and a weakening of the parliamentary role in protecting rights. Professor Patrick Parkinson submitted:

Politicians often avoid controversial issues where the community is deeply split. If a position has been taken by some neutral decision-maker, that makes it easier to deflect the controversy. I mean no disrespect to politicians when I say that the political exigencies of the day may well lead politicians to avoid taking a position, or deferring to the neutral decision-maker, on the hard issues—especially in an election year.<sup>51</sup>

It is also argued that a Human Rights Act would not result in better government services and policies. Sir James Gobbo noted that the most obvious place to direct complaints about service delivery is to the provider of the service. Relevant case studies from the United Kingdom at best show that when unjust or unfair situations are brought to the attention of those in authority the response is generally positive.<sup>52</sup> There is a risk that a Human Rights Act would impose further costs on government agencies, which would be obliged to ensure that policies, programs and



Senator the Hon. George Brandis SC puts the Opposition's case against an Australian Human Rights Act.

<sup>49</sup> T Campbell and N Barry, Submission.

<sup>50</sup> J Howard, ‘Don’t risk what we have’ in *Don’t Leave Us with the Bill*, Submission, 71; I Callinan, ‘In whom we should trust’ in *Don’t Leave Us with the Bill*, Submission, 74.

<sup>51</sup> P Parkinson, Submission.

<sup>52</sup> J Gobbo, Submission; British Institute of Human Rights, *The Human Rights Act—changing lives*, 2nd edn, (2008).

actions were consistent with human rights<sup>53</sup> and to deal with costly claims about alleged violations of rights.<sup>54</sup>

It is argued that ordinary Australians would not benefit greatly from a Human Rights Act.<sup>55</sup> The South Australian Commissioner of Police submitted:

It is inevitably the case that these instruments are devised to the advantage of perpetrators of crime, not the victims, and rarely does one see anything remotely like a right for people not to be the victim of crime or the right to be free from the criminal acts of others.<sup>56</sup>

Many submissions contended that a Human Rights Act would place an unwarranted focus on the rights of minority groups.<sup>57</sup> For example, Helen Loudon submitted that a Human Rights Act is ‘primarily a way for fringe groups to obtain power to promote their ideology’.<sup>58</sup> On the other hand, ‘The only people to gain from a Charter of Rights will be lawyers’<sup>59</sup>, who would profit from the fees it generates.

Finally, a Human Rights Act could create a false expectation on the part of the community that their individual grievances could be simply redressed through access to the courts and that their claims of denial or breach of rights would invariably be vindicated.<sup>60</sup>

## Potentially negative outcomes for human rights

There is an argument that a Human Rights Act might actually limit human rights or lead to other negative outcomes for human rights protection.

First, it is said, the process of defining rights and including them in a Human Rights Act might limit rights. Exclusion of particular rights from the Act might leave those rights outside the reach of the Australian community or imply that they are not worthy of protection.<sup>61</sup> Senator George Brandis SC, on behalf of the Federal Opposition, submitted that, by identifying specific rights, a Human Rights Act ‘declares that those identified rights have a certain status or privilege, which other putative rights, which are not recognized by the bill of rights, do not enjoy’.<sup>62</sup> A

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<sup>53</sup> J Hatzistergos, Submission.

<sup>54</sup> H Irving, Submission.

<sup>55</sup> Human Rights Consultation Committee, *Rights, Responsibilities and Respect: the report of the Human Rights Consultation Committee (Victoria)*, (2005) 14–15.

<sup>56</sup> Police Commissioner, South Australia, Submission.

<sup>57</sup> For example, R Patterson, Submission; K Smith, Submission; H Newby, Submission; L Bagnall, Submission; R Mead, Submission; D Bernard, Submission; D Bell, Submission; E Nnadigwe, Submission; Z Wigmore, Submission.

<sup>58</sup> H Loudon, Submission.

<sup>59</sup> P Uren, Submission.

<sup>60</sup> H Irving, Submission.

<sup>61</sup> P de Jersey, ‘A reflection on a bill of rights’ in *Don’t Leave Us with the Bill*, Submission, 14; G Brandis, ‘The debate we didn’t have to have: the proposal for an Australian bill of rights’ in *Don’t Leave Us With the Bill*, Submission, 23.

<sup>62</sup> G Brandis, Submission.

participant in a community roundtable expressed concern that some rights might be compromised by the express recognition of others.<sup>63</sup> In addition to this, it is argued that the very attempt to define human rights in a Human Rights Act could in fact limit the rights.<sup>64</sup>

A related consideration is that the human rights that are considered important today might not be important to future generations.<sup>65</sup> Ian Tonking SC

submitted that a charter or bill of rights adopted at Federation would probably have included the White Australia Policy and excluded Indigenous Australians from participation in politics.<sup>66</sup> It has further been suggested that a static Human Rights Act could fail to embrace new, but equally fundamental, rights such as those relating to biotechnology and the human genome project.<sup>67</sup>

Second, there is concern that unintended or adverse consequences could flow from the protection of particular rights. For example, the Hon. Bob Carr, former Premier of New South Wales, has suggested that a right to property, combined with a conservative court, could prevent a government from stopping the clearing of native vegetation on farms or pockets of rainforest on private land.<sup>68</sup> The Shop, Distributive and Allied Employees' Association's submission expressed concern about the potential impact of a Human Rights Act on the activities of trade unions, stating it 'may very well promote a new set of standards where trade union activity is pitted against the right to privacy, or the right to free movement or the right to assembly'.<sup>69</sup>

A number of submissions identified apparently perverse court decisions resulting from the interpretation of human rights Acts in other jurisdictions. For example, it



The Hon. John Hatzistergos MLC argues against an Australian Human Rights Act.

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<sup>63</sup> Newcastle, Community Roundtable.

<sup>64</sup> G Brandis, 'The debate we didn't have to have: the proposal for an Australian bill of rights' in *Don't Leave Us With the Bill*, Submission, 22.

<sup>65</sup> P de Jersey, 'A reflection on a bill of rights' in *Don't Leave Us with the Bill*, Submission, 8-9; see also J Hatzistergos, Submission.

<sup>66</sup> Al Tonking, Submission.

<sup>67</sup> P de Jersey, 'A reflection on a bill of rights' in *Don't Leave Us with the Bill*, Submission, 8.

<sup>68</sup> B Carr, 'Bill of rights is the wrong call', *The Australian*, 9 May 2009.

<sup>69</sup> Shop, Distributive and Allied Employees' Association, Submission.

was noted that the Supreme Court of Canada has interpreted the right of freedom of expression as permitting tobacco advertising.<sup>70</sup>

One submission stated that a Human Rights Act has the potential to be exploited by religious groups wishing to introduce practices that discriminate against minorities or women.<sup>71</sup> For example, the Canadian Charter of Rights and Freedoms was recently relied on by a defendant to a charge of polygamy.<sup>72</sup>

Dr Gary Johns has suggested that a Human Rights Act could have negative implications for Indigenous Australians. In his view, such an Act, aided by international instruments, 'will undo the policy gains made in recent years in the Aboriginal policy area because the charter focuses the debate on processes not outcomes and on rights not on responsibilities'.<sup>73</sup>

Finally, it was suggested that, if courts are reluctant to issue declarations of incompatibility, a Human Rights Act could actually facilitate the violation of human rights. For example, if courts are 'too weak to stand up to governments on important issues such as national security ... [that] may in fact undermine human rights by adding legitimacy to morally dubious policies'.<sup>74</sup>

## **Excessive and costly litigation**

Opponents of a Human Rights Act say such an Act would result in a 'lawyers' picnic', in which the legal profession becomes the main beneficiary as a result of increased litigation, and would have an adverse impact on the court system.

First, introduction of the Act could lead to excessive litigation as a consequence of individuals and public interest groups seeking to challenge various forms of legislation and government policy as well as individual government decisions.<sup>75</sup> Alternatively, additional litigation could be generated by a desire to clarify the meaning and content of the general rights outlined in the Act or by people seeking to pursue what are essentially political agendas.<sup>76</sup> The additional litigation could lead to extra costs for government in responding to the various challenges and in administering the courts and could lead to delays in completing cases. The Hon.

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<sup>70</sup> For example, H Irving, Submission; K Fong, Submission; P Campion, Submission; H Keech, Submission; D Jessen, Submission; S Potter, Submission. A subsequent amendment to the legislation, again restricting tobacco advertising, was upheld by the Supreme Court as constituting a reasonable limitation on the right to freedom of expression—NSW Bar Association, Submission.

<sup>71</sup> Confidential, Submission.

<sup>72</sup> B Hutchinson, 'Polygamy and the legal wrangling that surrounds it', *National Post*, 9 January 2009.

<sup>73</sup> G Johns, 'A charter of rights will harm Aboriginal prospects' in *Don't Leave Us with the Bill*, Submission, 191.

<sup>74</sup> T Campbell and N Barry, Submission.

<sup>75</sup> For example, A Anderson, 'Solomon's heirs? Dissecting the campaign for judicial rule in Australia' in *Don't Leave Us with the Bill*, Submission, 108; M McLelland, Submission; W Hall, Submission; T Minchin, Submission; P Horton, Submission; T Edwards, Submission.

<sup>76</sup> M McLelland, Submission.

John Hatzistergos MLC noted that, although the Victorian and ACT human rights Acts have not resulted in a flood of litigation, ‘It is more difficult to quantify the court time dedicated to human rights arguments, which are very often used as auxiliary arguments, causing court cases to be prolonged’.<sup>77</sup>

A participant in one of the community roundtables asked, ‘What type of society do we want to be? Do we want to be as litigious as the US? Or do we want to consider alternative systems of dispute resolution?’<sup>78</sup> Several participants were worried about the creation of a ‘human rights industry’<sup>79</sup>; another was worried that a Human Rights Act would ‘become a lawyers’ picnic at great cost to the community’.<sup>80</sup> In the online forum John Smuts commented, ‘The only group of people who will ultimately benefit if this bill were to be introduced would be lawyers’.<sup>81</sup>

Second, opponents foresee that a Human Rights Act could create uncertainty in the law, which would increase the difficulty and expense of obtaining legal advice, reduce the reliability of such advice, and increase the likelihood, volume, complexity and length of litigation. The Hon. Malcolm McLelland QC submitted, ‘Legislation against which a bill of rights challenge might conceivably be mounted could never be treated as certain law unless and until such a challenge was actually made’.<sup>82</sup> In relation to workplace rights, the Shop, Distributive and Allied Employees’ Association submitted that a Human Rights Act ‘would most likely introduce a new layer of laws that would compromise and confuse existing laws and entitlements’.<sup>83</sup>

Third, if a Human Rights Act increases the time and cost of litigation, this could affect access to justice. Professor Helen Irving submitted that under a Human Rights Act ‘the cost of litigation is commonly borne by the very individuals who are already disadvantaged, and whose expectation of success is (statistically at least) unlikely to be matched by reality’.<sup>84</sup> One participant in a community roundtable noted, ‘It wouldn’t help to have a right to go to court: we couldn’t afford legal representation’.<sup>85</sup>

Finally, there was concern that a Human Rights Act could lead to an individualistic, litigation-focused culture. Donald McLellan submitted:

The problem with such an emphasis on individual rights ... is that the cultural balance shifts from the good of society as a whole, which may require the individual

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<sup>77</sup> J Hatzistergos, Submission.

<sup>78</sup> Sydney (1), Community Roundtable.

<sup>79</sup> For example, Brisbane (2), Community Roundtable; Melbourne (3), Community Roundtable.

<sup>80</sup> Melbourne (3), Community Roundtable.

<sup>81</sup> J Smuts, Online forum.

<sup>82</sup> M McLelland, Submission.

<sup>83</sup> Shop, Distributive and Allied Employees’ Association, Submission.

<sup>84</sup> H Irving, Submission.

<sup>85</sup> Mintabie, Community Roundtable.



to accept a certain level of discomfort, to the good of the individual, which may be to the detriment of society generally.<sup>86</sup>

## **Democratic processes and institutions offer better protection of rights**

It is argued that if any measures are needed to improve human rights protection in Australia they can and should be introduced through democratic processes and institutions and without the creation of a Human Rights Act.

The argument maintains that rights are best protected through a healthy democracy, a strong civil society and strong democratic institutions<sup>87</sup>, and it is the customs, attitudes and culture of a people, as expressed through their institutions, that determine the strength of commitment to democratic values.<sup>88</sup> Parliaments are institutions designed for consultation and discussion about difficult policy matters, so any ‘dialogue’ about rights should ultimately be between elected representatives and their constituents.

Samantha Bryan submitted, ‘Our elected politicians are the people to make decisions regarding the protection of human rights. We are able to change those politicians if we are not happy with their decisions’.<sup>89</sup> The Police Federation of Australia submitted, ‘Striking the delicate balance between competing rights and responsibilities is something that should be the responsibility of democratically elected members of our Parliaments, not judges’.<sup>90</sup>

Any additional protection of rights should strengthen rather than undermine Australia’s democratic institutions, it is said. There are many ways of doing this that do not involve the creation of a Human Rights Act. For example, Australia’s existing human rights legislation could be evaluated in order to identify any gaps<sup>91</sup>; better targeted legislation dealing with human rights could be developed<sup>92</sup>; additional scrutiny of proposed legislation could be implemented<sup>93</sup>; better coordinated approaches to human rights protection could be achieved through the Standing Committee of Attorneys-General<sup>94</sup>; and the *Acts Interpretation Act 1901* (Cth) could be amended to require courts to interpret legislation in the light of specified rights.<sup>95</sup>

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<sup>86</sup> D McLellan, Submission.

<sup>87</sup> T Campbell and N Barry, Submission.

<sup>88</sup> J Howard, ‘Don’t risk what we have’ in *Don’t Leave Us with the Bill*, Submission, 70.

<sup>89</sup> S Bryan, Submission.

<sup>90</sup> Police Federation of Australia, Submission.

<sup>91</sup> J Leaser, ‘Responding to some arguments in favour of a bill of rights’ in *Don’t Leave Us with the Bill*, Submission, 56–63.

<sup>92</sup> J Hatzistergos, Submission; D Bayliss, Submission.

<sup>93</sup> T Campbell and N Barry, Submission.

<sup>94</sup> Law Institute of Victoria, Submission.

<sup>95</sup> H Irving, Submission.

Finally, it was suggested that many claims of human rights abuse in Australia are to do with failures in bureaucratic processes, which can be redressed without a Human Rights Act. For example, in submissions and community roundtables concern was often expressed about the efficiency and effectiveness of government service delivery. Those opposed to a Human Rights Act contend that improvements in government services are best achieved through political leadership and attitudinal change on the part of those responsible for service delivery.<sup>96</sup> Ultimately, concerns about a government's performance in delivering services can be expressed at the ballot box. As Dr David van Gend submitted, 'It is up to the public to be energetic in holding MPs to account when they fail to do [justice] in their legislation (and so, through Australian history, unjust laws have been found wanting and duly rejected)'.<sup>97</sup>

## **A major economic cost**

It is asserted that the economic costs of introducing a Human Rights Act would outweigh any particular benefits the Act might have to offer. The Hon. John Hatzistergos MLC submitted, 'The cost of this project to tax-payers is unacceptably high' and went on to cite some of the 'obvious costs':

... research and formulation of the legislation and consequential amendments;  
administration costs (including funding and resources for organisations);  
compliance costs (training and monitoring public bodies subject to the Act); training  
for lawyers and judges; education for the public to avoid the misperceptions that  
plague the UK Act; and legal costs.<sup>98</sup>

The Victorian Government's submission provided some information about the costs of that state's human rights Act. In 2006–07, the government allocated \$6.5 million for human rights initiatives over four years, to cover agencies such as Victoria Police, Corrections Victoria, the Department of Human Services, the Department of Justice and the Equal Opportunity & Human Rights Commission.<sup>99</sup> The government noted that under its devolved model the costs of meeting the charter obligations are spread across government.

As discussed in Chapter 1, the Committee commissioned The Allen Consulting Group to prepare a draft that would assist in evaluating the various options in terms of, among other things, their potential costs and benefits. The report noted that

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<sup>96</sup> J Leeser, 'Responding to some arguments in favour of a bill of rights' in *Don't Leave Us with the Bill*, Submission, 33.

<sup>97</sup> D van Gend, Submission.

<sup>98</sup> J Hatzistergos, Submission

<sup>99</sup> Victorian Government, Submission.

implementation of a Human Rights Act would generate specific transition costs as well as ongoing costs associated with new obligations.<sup>100</sup>

## **Unnecessarily legalised human rights**

A number of commentators have expressed concern that a Human Rights Act would ‘take social and political questions and transform them into legal ones’.<sup>101</sup>

At the public hearings Professor Adrienne Stone pointed out that human rights are moral concepts about which we disagree and that, although a Human Rights Act would draw attention to the protection of rights, it would detract from healthy dialogue about rights. In particular, it would turn moral debates about rights into technical debates about statutory interpretation, undermining the potential for cultural change. A Human Rights Act would privilege a legal discourse about human rights.

The Commonwealth Ombudsman, Professor John McMillan, expressed similar concern. He noted that with a Human Rights Act the interpretation of rights becomes a task for lawyers and that, although lawyers can bring useful skills to human rights considerations, in his experience most human rights complaints can be resolved without the assistance of lawyers.

Associate Professor Simon Evans submitted that the greatest risk associated with a Human Rights Act:

... is that the legal protections of human rights come to dominate the political, economic and cultural mechanisms for the protection of human rights—the public culture of human rights becomes subsumed within the legal culture, policy development is cowed by the courts’ interpretation of human rights, legislatures automatically defer to legal interpretations of human rights. This would be a tragedy because the legal concept of human rights is just one concept and the legal mechanisms just one set of mechanisms for protecting human rights.<sup>102</sup>

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<sup>100</sup> The Allen Consulting Group, *Analysis of Options Identified during the National Human Rights Consultation* (2009).

<sup>101</sup> G Donnelly, Submission.

<sup>102</sup> S Evans, Submission.

### 13.3 Countering the arguments

Chapter 12 presents the case in favour of a Human Rights Act. A number of the arguments against such an Act, as just outlined, are, however, countered here in the following paragraphs.

First, in relation to the claim that a Human Rights Act would undermine parliamentary sovereignty by transferring power from the legislature to the judiciary, it is argued that this claim is particularly weak in the case of a legislative (as opposed to constitutional) charter of rights. In addition, the separation of powers under the Australian Constitution is designed specifically to allow the sharing of sovereignty, recognising the limits of majoritarian democracy and the benefits of an independent judiciary.<sup>103</sup> It is further contended that a Human Rights Act is not only consistent with democracy but ‘should in fact strengthen democracy through the different and complementary roles played by the different arms of Government’.<sup>104</sup>

Additionally, under a Human Rights Act parliament can ignore or override decisions by courts and retains the power to amend the Act itself.<sup>105</sup> It is argued that executive governments and parliaments are unlikely merely to accept judicial decisions they consider to be untenable. Moreover, there is no evidence to suggest that the introduction of human rights Acts in the United Kingdom, the ACT and Victoria has resulted in politicisation of the judiciary.

Second, in relation to the claim that a Human Rights Act is ineffective against tyranny, it is argued that the strength of the rule of law and existing democratic institutions in Australia distinguish this nation from nations such as Zimbabwe and the former Soviet Union. No Human Rights Act—or constitution, for that matter—can protect rights if democratic institutions and the rule of law are not strong.<sup>106</sup> It is the breakdown of democratic institutions and the rule of law, rather than the failure of human rights instruments themselves, that results in violations of human rights. Proponents of a human rights Act acknowledge that such an Act alone will not solve all human rights problems, but they contend that it could build on existing protections—in particular, an apolitical, impartial and independent judiciary—and lead to improved government accountability.<sup>107</sup>

Third, in relation to the claim that a Human Rights Act would give privilege to some rights over others and would not be susceptible to change over time, it is argued that a Human Rights Act would be sufficiently flexible to adapt to emerging

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<sup>103</sup> B Saul, Submission; C Brennan, Submission.

<sup>104</sup> Australian Association of Women Judges, Submission.

<sup>105</sup> Castan Centre for Human Rights Law, Submission.

<sup>106</sup> J Burnside, Submission.

<sup>107</sup> Australian Human Rights Commission, Submission; Victorian Equal Opportunity & Human Rights Commission, Submission.

needs.<sup>108</sup> A Human Rights Act would constitute an ordinary piece of legislation, so parliament could amend it at any time to incorporate new rights or remove existing rights. The Act could expressly state that the list of rights included in the Act is not exhaustive.<sup>109</sup>

Finally, in relation to the claim that a Human Rights Act would lead to excessive litigation, experience in the United Kingdom, the ACT and Victoria shows that the impact of such an Act on litigation is likely to be minimal.<sup>110</sup> The United States might not provide a useful comparison in this respect: it is an ‘excessively litigious’ society, that litigiousness being promoted by factors other than its constitutional Bill of Rights—such as large damages awards.<sup>111</sup> Over time, it is argued, a legislative Human Rights Act should in fact limit litigation because it helps to ensure that laws and policies comply with human rights in the first place.<sup>112</sup>

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<sup>108</sup> Law Council of Australia, Submission; Australian Human Rights Commission, Submission; Human Rights Legal Resource Centre, Submission; Oxford Pro Bono Publico, Submission.

<sup>109</sup> Australian Human Rights Commission, Submission.

<sup>110</sup> H Charlesworth, A Byrne and R Thilagaratnam, Submission; Castan Centre for Human Rights Law, Submission; Human Rights Legal Resource Centre (Human Rights Act for All Australians), Submission; Oxford Pro Bono Publico, Submission; Liberty Victoria, Submission.

<sup>111</sup> Castan Centre for Human Rights Law, Submission.

<sup>112</sup> Human Rights Law Resource Centre (Human Rights Act for All Australians), Submission.



## 14 Practical considerations for a Human Rights Act

Chapter 11 outlines the various models of statutory human rights protection operating in Australia and overseas; Chapters 12 and 13 outline the arguments for and against a Human Rights Act. This chapter discusses the possible form a Human Rights Act could take, given the various legal and practical considerations associated with its application.

A number of submissions expressed support for a constitutional bill of rights.<sup>1</sup> The Committee's terms of reference exclude this option, however, so it is not discussed in any detail. Instead, this chapter focuses on the various ways in which a Human Rights Act could be designed.

### 14.1 Potential models for a Human Rights Act

A number of different models for a Human Rights Act were raised during the Consultation, among them the 'dialogue' model, the Canadian legislative model, a 'democratic' model<sup>2</sup> and an 'entrenched' model.<sup>3</sup>

#### The dialogue model

Most of the submissions that supported a Human Rights Act expressed support for a dialogue model, the main features of which are discussed in Chapter 11. A dialogue model could take various forms, as is demonstrated by the differences between existing models (for example, in New Zealand, the United Kingdom, the ACT and Victoria) and other models proposed by, for example, the Human Rights Act for Australia campaign<sup>4</sup> and Geoffrey Robertson QC.<sup>5</sup>

Under this model, where courts are not able to interpret legislation consistently with the rights set out in the Human Rights Act (in a manner that is also consistent with the purpose of the legislation), the legislation would continue to operate. There

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<sup>1</sup> For example, A Edwards and R McCorquodale, Submission; A Pollard, Submission; D Sartoris, Submission; NSW Council of Social Service, Submission; Queenslanders with Disability Network, Submission; Spirit of Eureka Adelaide, Submission; SCALES Community Legal Centre, Submission; Murray Mallee Community Legal Service, Submission; G Lanyi, Submission; Australian Lawyers for Human Rights, Submission.

<sup>2</sup> See T Campbell and N Barry, Submission.

<sup>3</sup> See A Twomey, Submission.

<sup>4</sup> See Human Rights Act for Australia Campaign (New Matilda), Submission.

<sup>5</sup> See G Robertson, *The Statute of Liberty* (2009), Submission.

would, however, be a mechanism for notifying parliament of the inconsistency between the legislation and the Act, and there could be some requirement for the parliament to respond to this notification.

The dialogue model has been the subject of much debate. Supporters say it strikes a suitable balance between the judicial protection of human rights and parliamentary sovereignty because parliament retains the power to amend the Human Rights Act, to pass laws that are inconsistent with it, and to respond in any way it considers appropriate to a court's finding of inconsistency. The model has already been tested in several jurisdictions, and any federal model could draw on the lessons learnt from that experience. The Human Rights Law Resource Centre suggested that the dialogue model has been proven to create 'important systemic and cultural change within governments towards the protection and promotion of human rights'.<sup>6</sup>

On the other hand, the dialogue model has been criticised on several grounds. The facts that parliament can amend the Human Rights Act at any time and that any legislative response to a court's finding of inconsistency depends on political will are regarded as weaknesses in the model.<sup>7</sup> Some commentators have also suggested that some technical aspects of the model might encounter practical or constitutional difficulties. Others—including the Commonwealth Solicitor-General<sup>8</sup>—are more confident that a carefully drafted Human Rights Act could avoid some of these problems.

### **The Canadian legislative model**

The Canadian legislative model provides that where it is not possible to interpret legislation consistently with the rights contained in a Human Rights Act, the legislation is inoperative to the extent of the inconsistency. This model is based on the Canadian Bill of Rights 1960, which applies only to federal legislation and has largely been superseded by the constitutional Canadian Charter of Rights and Freedoms.

Former High Court justice the Hon. Michael McHugh has suggested a similar model, in which all federal legislation would be read subject to the human rights set out in a federal Human Rights Act. Any federal legislation that is inconsistent with the Act would be inoperative, and parliament would be able to provide that legislation is to

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<sup>6</sup> Human Rights Law Resource Centre (Human Rights Act for All Australians), Submission.

<sup>7</sup> *ibid.*

<sup>8</sup> S Gageler and H Burmester, SG No. 40 of 2009; S Gageler and H Burmester, SG No. 68 of 2009.



operate ‘notwithstanding’ the Act. In addition, state laws would be inoperative to the extent of the inconsistency as a result of s. 109 of the Constitution.<sup>9</sup>

The main benefit of this model is that it has a stronger enforcement framework than the dialogue model. The process puts the onus on the government and parliament to respond to a judicial decision if they wish the law to continue in operation.<sup>10</sup> In addition, individuals would have judicially enforceable rights and remedies where rights are breached.<sup>11</sup>

The doctrine of ‘implied repeal’ might, however, cause some practical difficulties with this model. Under the doctrine, where two pieces of legislation from the same jurisdiction are inconsistent, the later one will impliedly repeal the earlier one to the extent of the inconsistency.<sup>12</sup> Accordingly, federal laws enacted before a Human Rights Act could be repealed to the extent of inconsistency, while those enacted after such an Act could repeal the provisions of the Act to the extent of the inconsistency.<sup>13</sup>

Submissions suggested that this difficulty could be overcome in several ways, including providing for other mechanisms (for example, declarations of incompatibility) for inconsistent legislation passed after the Human Rights Act<sup>14</sup> or by inserting a standard provision in all new legislation, saying that the Act is intended to be read subject to the Human Rights Act (or that the new Act is intended to apply despite the Human Rights Act).<sup>15</sup>

Alternatively, several submissions commented on the possibility of including a ‘manner and form’ provision in a Human Rights Act. Such a provision could provide that the Act prevails over later laws unless they are enacted in a particular manner

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<sup>9</sup> M McHugh, ‘A human rights act, the courts and the Constitution’ (Paper presented at the Australian Human Rights Commission, Sydney, 5 March 2009). Section 109 of the Constitution provides that where a law of a state is inconsistent with a Commonwealth law, the state law is invalid to the extent of the inconsistency. Generally, a state law may be found to be inconsistent where the state and Commonwealth laws cannot be obeyed simultaneously; the state law would alter, impair or detract from the operation of the Commonwealth law or the exercise of a power under the Commonwealth law; or a law of a state enters a field that the Commonwealth law was intended to cover exclusively or exhaustively; or where one law takes away a right, power or authority conferred by the other law.

<sup>10</sup> Oxford Pro Bono Publico, Submission.

<sup>11</sup> M McHugh, ‘A human rights act, the courts and the Constitution’ (Paper presented at the Australian Human Rights Commission, Sydney, 5 March 2009).

<sup>12</sup> See Gilbert + Tobin Centre of Public Law (E Santow), Submission. The doctrine is based on the notion of parliamentary sovereignty; that is, one parliament should not bind a future parliament—A Twomey, Submission.

<sup>13</sup> For example, A Twomey, Submission.

<sup>14</sup> Australian Human Rights Commission, Submission.

<sup>15</sup> Gilbert + Tobin Centre of Public Law (E Santow), Submission.

or form.<sup>16</sup> There is, however, some debate about whether the Federal Parliament can be validly bound by manner and form provisions.<sup>17</sup>

## The democratic model

Professor Tom Campbell and Dr Nicholas Barry proposed the democratic model on the basis of their view that human rights are ‘best protected and promoted through a healthy democracy, a robust civil society, and strong oversight mechanisms, rather than rights-based judicial review’.<sup>18</sup> The model involves a statutory Human Rights Act, the use of human rights compatibility statements<sup>19</sup>, stronger human rights oversight mechanisms (in particular, through the Commonwealth Ombudsman and the Australian Human Rights Commission) and improved parliamentary scrutiny. Although courts would be involved in enforcing legislation that is developed through these processes, they would not have any role in interpreting or applying the Human Rights Act.<sup>20</sup>

## The entrenched model

Associate Professor Anne Twomey noted the existence of another potential model, which involves having the federal and state parliaments amend the *Australia Act 1986* to insert a new chapter setting out an agreed set of rights and applying those rights equally at the federal and state levels. She pointed out that this model offers the benefit of entrenchment—without constitutional entrenchment—and would allow for changes to be made through the cooperative enactment of federal and state legislation. In the interests of parliamentary sovereignty, the federal and state parliaments could be granted the power to enact provisions that expressly



The Coober Pedy community roundtable, with Mr George Cooley, Chair of Umoona Aboriginal City Council.

<sup>16</sup> For instance, it could require that future inconsistent legislation be enacted in a specified manner (for example, by a special majority of parliament or a referendum) or in a particular form (for example, the inclusion in legislation of an express declaration that legislation apply despite the Human Rights Act).

<sup>17</sup> For example, A Twomey, Submission; Castan Centre for Human Rights Law, Submission; ANU National Centre for Indigenous Studies, Submission; Oxford Pro Bono Publico, Submission; Gilbert + Tobin Centre of Public Law (E Santow), Submission; Australian Human Rights Commission, Submission; Human Rights Law Resource Centre (Human Rights Act for All Australians), Submission; B Saul, Submission. Several submissions cited G Winterton ‘Can the Commonwealth Parliament enact “manner and form” legislation?’ (1980) 11 *Federal Law Review* 167.

<sup>18</sup> T Campbell and N Barry, Submission.

<sup>19</sup> The submission refers to ‘human rights impact statements’ but, since these have another meaning in this chapter, the term ‘human rights compatibility statements’ has been used.

<sup>20</sup> T Campbell and N Barry, Submission.

exempt particular laws from the application of the rights set out in the Australia Act.<sup>21</sup>

### **The Committee's preferred model**

Most of the submissions that discussed this subject expressed support for the dialogue model. The Committee agrees that, were Australia to adopt a Human Rights Act, the dialogue model is the preferred model: it strikes the best balance between parliamentary sovereignty and judicial protection of human rights. There are some constitutional and practical difficulties associated with its application, but the Committee is of the view that these could be resolved by careful drafting. The following sections outline the main difficulties and the approaches that could be taken to resolve them. The Committee's findings and recommendations in relation to a Human Rights Act and its potential features are detailed in Chapter 15.

## **14.2 Jurisdictional scope of a Human Rights Act**

### **Source of power**

The Federal Parliament's powers to make laws are limited to those specified in the Constitution. Although there is no specific power to make laws in relation to human rights, the external affairs power in s. 51(xxix) of the Constitution would provide the basis for legislation that implements Australia's obligations under international law.

If a Human Rights Act included provisions that extend beyond Australia's obligations under international law, the provisions would need to be based on a different source of power under the Constitution or on a referral of powers from the states.

The Solicitor-General advised the Committee that the external affairs power would support the enactment of a Human Rights Act that included rights from the International Covenant on Civil and Political Rights only. This is the case even if the Act were to include some but not all of the rights from the ICCPR, 'so long as that partial implementation is itself consistent with the convention and the [provisions in the Act remain] reasonably capable of being considered appropriate and adapted to its implementation'.<sup>22</sup> The Solicitor-General noted, however, that including rights from the International Covenant on Economic, Social and Cultural Rights would be 'more problematic', since they could lack "sufficient specificity" to support the making of a law under the external affairs power'.<sup>23</sup> The Solicitor-General also noted that in any event, laws enacted in reliance on the external affairs power must be compatible with Chapter III of the Constitution.

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<sup>21</sup> A Twomey, Submission.

<sup>22</sup> S Gageler and H Burmester, SG No. 68 of 2009, [7]–[8].

<sup>23</sup> *ibid.* [9], citing *Victoria v Commonwealth* (1996) 187 CLR 416, 486.

## Application to the states and territories

The Committee heard considerable support for a model that applies uniformly across Australia. This would involve a federal Human Rights Act that applies to federal, state and territory laws and the relevant public authorities.<sup>24</sup>

The main reason for this approach is that, by including the states and territories, the Act would cover many of the human rights concerns that affect the day-to-day lives of most Australians. For example, the states and territories are responsible for most areas of criminal law, as well as service delivery in the areas of education, transport, health, policing and housing.<sup>25</sup>

Among other reasons are the fact that the Federal Government is responsible under international law for ensuring that human rights are implemented throughout the country (and not just at the federal level) and the difficulties people face in understanding their rights and ways of enforcing them when they are dealt with differently across Australia.<sup>26</sup>

A number of constitutional, political and practical difficulties have, however, been raised in connection with this option. The Gilbert + Tobin Centre of Public Law submitted that a Human Rights Act that seeks to bind the states ‘would operate unevenly across different spheres of government, inhibit the development of existing and future human rights laws at State level, and risk placing ongoing strain on relations between the Commonwealth and the States’.<sup>27</sup>

If a dialogue model were adopted, the implications of incompatibility would differ for federal and state laws. If the courts determined that a state law was incompatible with a right protected in a federal Human Rights Act, the law would be invalid to the extent of the inconsistency under s. 109 of the Constitution.<sup>28</sup> In contrast, an incompatible federal law would continue to operate pending parliament’s response to the finding of incompatibility. Accordingly, such an Act ‘may produce uniformity with respect to the actual rights protected but not as to the legal and political consequences for their breach’.<sup>29</sup>

There could also be difficulties in applying other aspects of the dialogue model to the states. For example, under the doctrine of implied intergovernmental

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<sup>24</sup> For example, SCALES Community Legal Centre, Submission; J Casben, Submission.

<sup>25</sup> For example, Australian Lawyers for Human Rights, Submission; Oxford Pro Bono Publico, Submission.

<sup>26</sup> Australian Human Rights Commission, Submission.

<sup>27</sup> Gilbert + Tobin Centre of Public Law (P Kildea and A Lynch), Submission. See also G Williams, Submission.

<sup>28</sup> The Hon. Malcolm McLelland QC submitted that the effect of s. 109 is that any federal Human Rights Act that extended to the states would have ‘the same effect in relation to State parliaments and agencies as if it were constitutionally entrenched’. He said such an option would fall outside the Committee’s terms of reference, which require it to consider only those options that preserve the sovereignty of parliament—M McLelland, Submission.

<sup>29</sup> Gilbert + Tobin Centre of Public Law (P Kildea and A Lynch), Submission. See also A Twomey, Submission; G Lindell, Submission.

immunities there are limits on the power of the federal parliament to legislate with respect to the states where to do so ‘restricts or burdens one or more of the States in the exercise of their constitutional powers’.<sup>30</sup> This would include a law that operates to curtail the continued existence of the states or their capacity to operate as governments.<sup>31</sup>

Constitutional limitations might mean that significant elements of a federal Human Rights Act would not apply at the state level. For example:

- State courts could not be required to interpret state laws consistently with the protected rights.
- State Ministers could not be required to provide statements of compatibility to state parliaments.
- It is doubtful whether the states could be required to establish a parliamentary committee for the scrutiny of Bills in relation to protected rights.<sup>32</sup>

Even if a Human Rights Act were limited to the federal jurisdiction, there were concerns about its effect on state legislation because of the operation of s. 109 of the Constitution. For example, Associate Professor Anne Twomey noted that if the Act were to provide that ‘everyone has the right to ...’ such provisions might be regarded as provisions with which state laws must not be inconsistent, even if the provisions were expressed as exercisable only against federal public authorities or as relevant to the interpretative obligation. Submissions noted that if a federal Human Rights Act were to state clearly that it is not intended to ‘cover the field’ this could limit the potential for state laws to be found inoperative.<sup>33</sup> The Victorian Bar submitted that a Human Rights Act could follow the approach adopted in federal anti-discrimination legislation by including ‘a clear statement that the Act was not intended to exclude or limit the operation of a law of a state (or territory) that furthers the objects of the International Covenant on Civil and Political Rights and/or other relevant rights conventions and is capable of operating concurrently with the Human Rights Act’.<sup>34</sup>

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<sup>30</sup> Gilbert + Tobin Centre of Public Law (P Kildea and A Lynch), Submission, citing *Austin v Commonwealth* (2003) 215 CLR 185, 258.

<sup>31</sup> Human Rights Law Resource Centre (Human Rights Act for All Australians), Submission, citing *Melbourne Corporation v Commonwealth* (1947) 74 CLR 31, 82; *Austin v Commonwealth* (2003) 215 CLR 185, 249–56.

<sup>32</sup> Gilbert + Tobin Centre of Public Law (P Kildea and A Lynch), Submission. See also the discussion in Oxford Pro Bono Publico, Submission; Castan Centre for Human Rights Law, Submission; G Williams, Submission. For example, Law Council of Australia, Submission; Law Institute of Victoria, Submission.

<sup>34</sup> Victorian Bar, Submission. For example, the *Racial Discrimination Act 1975* (Cth) provides that the ‘Act is not intended ... to exclude or limit the operation of a law of a State or Territory that furthers the objects of the [Convention on the Elimination of All Forms of Racial Discrimination] and is capable of operating concurrently with this Act’. Before the Act contained such a provision the High Court found that the *Anti-Discrimination Act 1977* (NSW) was inoperative by virtue of its inconsistency with the *Racial Discrimination Act*—*Viskauskas v Niland* (1983) 153 CLR 280.

The Commonwealth Solicitor-General advised the Committee, ‘The expression of a right in terms that “every person has the right to X” could easily be subjected to an express qualification so as to make clear that the right has only the limited operation for which the [Act] is designed’.<sup>35</sup> He also noted:

Express qualification of the rights protected by the [Act] could easily be combined with a provision making clear that the [Act] does not cover the field and is intended to operate concurrently with State law. The result would be effectively to limit situations of inconsistency under s 109 of the Constitution to cases of direct inconsistency: where the State law in its legal or practical operation would otherwise operate to alter, detract from or impair the limited operation given to the right by the [Act] ... In a case of direct inconsistency, the State law would be invalid to the extent, but only to the extent, of the direct inconsistency.<sup>36</sup>

The Committee also heard that a Human Rights Act that was limited to the federal jurisdiction could create inconsistency for previously uniform schemes or undermine and limit the use of federal–state cooperative schemes.<sup>37</sup> For example, where the federal and state governments have adopted mirror legislation, its utility could be undermined if federal and state laws are interpreted differently.<sup>38</sup> Finally, the Committee notes that a Human Rights Act that applies at the federal level might also affect state authorities that exercise public functions on behalf of the Federal Government, depending on the definition of ‘public authorities’ adopted.

The Committee was made aware of a number of potential options for resolving these difficulties, among them the following:

- a Human Rights Act that binds the states to the extent constitutionally possible. The Federal Government could encourage the states to enact their own legislation for the outstanding elements—such as provisions dealing with parliamentary processes<sup>39</sup>
- a Human Rights Act that binds the states to the extent constitutionally possible but exempts those states with their own human rights legislation<sup>40</sup>
- a Human Rights Act that is binding at the federal level only, in which case the Federal Government could use fiscal or other means to encourage the states to adopt equivalent legislation<sup>41</sup>

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<sup>35</sup> S Gageler and H Burmester, SG No. 68 of 2009, [14].

<sup>36</sup> *ibid.* [15].

<sup>37</sup> A Twomey, Submission.

<sup>38</sup> *ibid.*

<sup>39</sup> For example, Australian Human Rights Commission, Submission; Law Institute of Victoria, Submission.

<sup>40</sup> Oxford Pro Bono Publico, Submission.

<sup>41</sup> *ibid.* See also Australian Council of Social Service, Submission; Australian Human Rights Commission, Submission.

- a Human Rights Act that is binding at the federal level only but allows state parliaments to ‘opt in’ to the federal legislative regime.<sup>42</sup>

If a Human Rights Act were to apply at the federal level only, there are two main options for maintaining uniform and cooperative schemes. First, the states could agree to adopt in their mirror laws a requirement that the law be consistent with the Human Rights Act. Alternatively, consideration could be given to allowing for exemptions from a federal Human Rights Act, on a case-by-case basis, for laws requiring uniform interpretation.<sup>43</sup>

## Extraterritorial application

There was some support for a Human Rights Act applying to the conduct of Australian public authorities operating overseas—for example, the Australian Federal Police and AusAID.<sup>44</sup> The Australian Council for International Development noted that under international law a government is obliged to ‘promote and protect human rights for all people subject to its jurisdiction or within its territory or control’ and that:

Government obligations arising out of ‘jurisdiction’ based on ‘effective control’ are particularly important when considering the increasing role that Australia plays in peacekeeping, humanitarian response and post-conflict reconstruction. Increase of natural disasters due to climate change and the trend for intra-state conflict will only further increase the role of the Australian government and other actors acting in development contexts.<sup>45</sup>

On the other hand, some concerns were raised about a Human Rights Act applying to the conduct of certain authorities overseas, such as the Australian Defence Force. Major General AJ Molan has noted that applying a Human Rights Act to the ADF could ‘replace an operational command culture that is now based on trust between subordinates and superiors ... with a ‘safety first’ culture that is based on boards of legal review’.<sup>46</sup> He noted that the *Human Rights Act 1998* (UK) has been

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<sup>42</sup> For example, Gilbert + Tobin Centre of Public Law (E Santow), Submission. See also G Williams, Submission; Australian Lawyers for Human Rights, Submission; Australian Council of Social Service, Submission.

<sup>43</sup> A Twomey, Submission.

<sup>44</sup> Human Rights Law Resource Centre (Human Rights Act for All Australians), Submission. See also Australian Human Rights Commission, Submission; Castan Centre for Human Rights Law, Submission; Mallesons Stephen Jaques Human Rights Law Group, Submission; Federation of Community Legal Centres (Vic), Submission; V Holmes, Submission; WomenSpeak Alliance, Submission; Australina Lawyers for Human Rights, Submission.

<sup>45</sup> Australian Council for International Development, Submission. See also Human Rights Committee, *General Comment No. 31: nature of the general legal obligation imposed on States parties to the covenant*, (26 May 2004) [10].

<sup>46</sup> AJ Molan, ‘Trust me—it will not be as bad as you think’ in J Leeson and R Haddrick (eds) *Don’t Leave Us with the Bill: the case against an Australian bill of rights* (2009), Submission, 202.

found to apply to UK defence forces extraterritorially and that this should be avoided in an Australian Human Rights Act.<sup>47</sup>

## 14.3 Who should comply?

### Public authorities

The UK, ACT and Victorian legislation requires ‘public authorities’ to comply with the rights outlined in it. The term ‘public authorities’ is defined to include people or entities exercising functions of a public nature (a ‘functional’ definition), which means that some private bodies will also be required to comply (for example, private bodies acting under outsourcing arrangements, as a result of privatisation and in public–private partnerships). A range of submissions supported adopting such a definition in a federal Human Rights Act.<sup>48</sup> It was suggested that extending the obligations to private bodies exercising public functions would ensure that government does not ‘contract out’ of its human rights obligations.<sup>49</sup>

The Australian Human Rights Commission suggested that the definition of ‘public authority’ should be sufficiently clear to provide certainty about who is bound by a Human Rights Act and flexible enough to accommodate changes to governance arrangements.<sup>50</sup> Some submitted that a Human Rights Act should specify that certain functions ‘are taken to be of a public nature’ (as in the ACT legislation) or provide a non-exhaustive list of factors for a court to take into account in determining whether a function is of a public nature (as in the ACT and Victorian legislation).<sup>51</sup> It was submitted that this would avoid the situation in the United Kingdom, where the concept of functions of a ‘public nature’ has been interpreted narrowly.<sup>52</sup>

Some concerns were expressed about the potential ambit of a functional definition. Associate Professor Anne Twomey noted that such a definition could encompass state and territory public authorities—for example, when state and territory police

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<sup>47</sup> *ibid.* 203.

<sup>48</sup> For example, Australian Human Rights Commission, Submission; Gilbert + Tobin Centre of Public Law (E Santow), Submission; Human Rights Law Resource Centre (Human Rights Act for All Australians), Submission; Human Rights Council of Australia, Submission; Australian Council of Social Service, Submission; Australian Lawyers Alliance, Submission; SCALES Community Legal Centre, Submission; Women’s Legal Services Australia, Submission; Youthlaw Young People’s Legal Rights Centre, Submission.

<sup>49</sup> For example, Gilbert + Tobin Centre of Public Law (E Santow), Submission. See also Australian Council of Social Service, Submission; Australian Lawyers Alliance, Submission.

<sup>50</sup> Australian Human Rights Commission, Submission.

<sup>51</sup> For example, Human Rights Law Resource Centre (Human Rights Act for All Australians), Submission; Gilbert + Tobin Centre of Public Law (E Santow), Submission; A Edwards and R McCorquodale, Submission; Mallesons Stephen Jaques Human Rights Law Group, Submission; Law Institute of Victoria, Submission; Amnesty Legal Group (Vic), Submission.

<sup>52</sup> Gilbert + Tobin Centre of Public Law (E Santow), Submission.



are exercising federal jurisdiction.<sup>53</sup> The Australian Human Rights Commission noted that ‘public authorities’ should include courts, tribunals and parliament only if they are acting in an administrative capacity. This is the position adopted in Victoria and the ACT: it is designed to preserve parliamentary supremacy and judicial independence.<sup>54</sup> Others suggested that Australia should follow the UK definition, which includes courts and tribunals regardless of whether they are acting in an administrative, judicial or quasi-judicial capacity.<sup>55</sup>

## The private sector

Given that international human rights instruments focus primarily on the relationship between the state and the community, other jurisdictions generally have not required the private sector to comply with their human rights legislation if they are not performing functions of a public nature.

There were mixed views about whether a Human Rights Act should impose obligations on the private sector, including corporations. Some opposed this approach<sup>56</sup>; others supported it.<sup>57</sup> The Committee also heard support for imposing obligations on natural persons under a Human Rights Act.<sup>58</sup> Those who supported placing obligations on corporations noted that this would be consistent with existing human rights legislation, such as anti-discrimination and privacy legislation.<sup>59</sup> The Australian Council of Social Service submitted that a Human Rights Act should impose obligations on the Federal Government to ‘exercise due diligence in ensuring that non-State actors behave in a way which does not infringe human rights’.<sup>60</sup>

There was also support for an alternative option based on the ACT legislation, which allows private sector entities to ‘opt in’ to the Act’s regime.<sup>61</sup> It was suggested that such entities might do so as a way of demonstrating their corporate social responsibility. The ACT Human Rights Commission submitted:

Encouraging broader, voluntary compliance with human rights standards provides an important opportunity for the non-government sector, as a vital part of Australia’s

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<sup>53</sup> A Twomey, Submission.

<sup>54</sup> For example, Australian Human Rights Commission, Submission.

<sup>55</sup> For example, Law Institute of Victoria, Submission; A Edwards and R McCorquodale, Submission.

<sup>56</sup> For example, Gilbert + Tobin Centre of Public Law (E Santow), Submission, Human Rights Law Resource Centre (Human Rights Act for All Australians), Submission.

<sup>57</sup> For example, Amnesty Legal Group (Vic), Submission; Public Interest Advocacy Centre, Submission; NSW Charter Group, Submission; B Saul, Submission; Mental Health Legal Centre, Submission. See also the discussion in NSW Bar Association, Submission.

<sup>58</sup> Amnesty Legal Group (Vic), Submission; AGMC Inc, Submission.

<sup>59</sup> For example, Public Interest Advocacy Centre, Submission; Australian Council of Social Service, Submission.

<sup>60</sup> Australian Council of Social Service, Submission.

<sup>61</sup> For example, Gilbert + Tobin Centre of Public Law (E Santow), Submission; Australian Council of Social Service, Submission; Australian Lawyers Alliance, Submission; SCALES Community Legal Centre, Submission; Youthlaw Young People’s Legal Rights Centre, Submission.

social fabric, to respect, protect and promote human rights. These provisions have only been in force in the ACT for less than six months, and although no organisations have opted in as yet, the Commission is aware of strong interest from a number of organisations who are currently in the process of consulting within their organisation with a view to opting in.<sup>62</sup>

## 14.4 Who should be protected?

### Natural persons only?

In most jurisdictions Human Rights Acts apply only for the benefit of humans. The Committee heard, however, that both Canada and South Africa extend the benefits of their human rights law to some extent to non-human entities such as corporations.<sup>63</sup> The New Zealand legislation also protects the rights of legal persons such as corporations, while the UK, Victorian and the ACT legislation limits protection to natural persons only.

There appears to be general support for a Human Rights Act not applying to corporations.<sup>64</sup> Among the reasons given for this view are the fact that human rights ‘derive from the inherent dignity of the human person’<sup>65</sup>, the need to avoid any unintended consequences of a Human Rights Act or interference with the legitimate regulation of commercial activity<sup>66</sup>, and the probability that the exclusion of corporations would reduce human rights litigation.<sup>67</sup>

### Individuals only?

Some internationally recognised human rights are enjoyed by groups rather than individuals. These include the right to self-determination and ethnic, religious or linguistic rights for minority groups. This raises the question of whether a Human Rights Act should include rights that may be enjoyed and enforced on a group, rather than individual, basis.<sup>68</sup>

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<sup>62</sup> ACT Human Rights Commission, Submission.

<sup>63</sup> Gilbert + Tobin Centre of Public Law (E Santow), Submission.

<sup>64</sup> For example, *ibid.*; Australian Human Rights Commission, Submission; Castan Centre for Human Rights Law, Submission; Human Rights Law Resource Centre (Human Rights Act for All Australians), Submission; Mallesons Stephen Jaques Human Rights Law Group, Submission; Law Institute of Victoria, Submission; Public Interest Law Clearing House, Submission; Australian Council of Social Service, Submission; Amnesty Legal Group (Vic), Submission; K Bonney, Submission; A Edwards and R McCorquodale, Submission; Federation of Community Legal Centres (Vic), Submission; N Jacka, Submission; D Peetz, Submission.

<sup>65</sup> For example, Law Institute of Victoria, Submission; Castan Centre for Human Rights Law, Submission; Mallesons Stephen Jaques Human Rights Law Group, Submission; Public Interest Law Clearing House, Submission; Public Interest Advocacy Centre, Submission.

<sup>66</sup> Human Rights Consultation Committee, *Rights, Responsibilities and Respect: the report of the Human Rights Consultation Committee* (2005), 52–3.

<sup>67</sup> Castan Centre for Human Rights Law, Submission.

<sup>68</sup> Gilbert + Tobin Centre of Public Law (E Santow), Submission.

Views on this appear to differ. For example, the Gilbert + Tobin Centre of Public Law commented that it is only through representative actions, which are brought on behalf of an identifiable group, that groups have legal standing to bring proceedings under existing Australian law. It therefore concluded that only the rights of individuals should be protected under a Human Rights Act.<sup>69</sup> In contrast, several submissions suggested that a Human Rights Act should protect individuals and groups, depending on the nature of the rights included.<sup>70</sup>

## Citizens only?

There is a further question about whether a Human Rights Act should apply to citizens only. This would exclude a range of non-citizens—such as asylum seekers, residents, foreign students, tourists and other temporary visitors to Australia.<sup>71</sup>

The UK, Victorian and ACT legislation does not limit its application to citizens. The New Zealand legislation is also not limited to citizens, although there are several exceptions, such as electoral rights and the right to enter the country.

There appears to be much support for the application of a Human Rights Act to all people, not just citizens.<sup>72</sup> Among the reasons given were the fact that international human rights law emphasises the universality of human rights and recent practices by Australian governments in the immigration context—including the forcible removal of asylum seekers to Manus Island and Nauru and detaining asylum seekers indefinitely.<sup>73</sup> Some, however, noted that particular rights, such as the right to vote and the right to freely enter and leave the country, are appropriately limited to citizens.<sup>74</sup>

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<sup>69</sup> *ibid.*

<sup>70</sup> See eg, Australian Human Rights Commission, Submission; Human Rights Law Resource Centre (Human Rights Act for All Australians), Submission; NSW Bar Association, Submission; Amnesty Legal Group (Vic), Submission; Australian Council of Social Service, Submission.

<sup>71</sup> For example, Mallesons Stephen Jaques Human Rights Law Group, Submission.

<sup>72</sup> For example, Australian Human Rights Commission, Submission; Castan Centre for Human Rights Law, Submission; Gilbert + Tobin Centre of Public Law (E Santow), Submission; Law Institute of Victoria, Submission; Public Interest Law Clearing House, Submission; Public Interest Advocacy Centre, Submission; Gilbert + Tobin Centre of Public Law (J McAdam and T Garcia), Submission; Australian Council of Social Service, Submission; Human Rights Law Resource Centre (Human Rights Act for All Australians), Submission; Australian Lawyers for Human Rights, Submission; Amnesty Legal Group (Vic), Submission; NSW Bar Association, Submission; NSW Charter Group, Submission; ACT Human Rights Commission, Submission; Springvale Monash Legal Service (Vic), Submission; Women's Health Victoria, Submission; Youthlaw Young People's Legal Rights Centre, Submission.

<sup>73</sup> For example, Human Rights Law Resource Centre (Human Rights Act for All Australians), Submission; Castan Centre for Human Rights Law, Submission; Public Interest Law Clearing House, Submission. See also Gilbert + Tobin Centre of Public Law (J McAdam and T Garcia), Submission.

<sup>74</sup> For example, Gilbert + Tobin Centre of Public Law (E Santow), Submission; A Twomey, Submission; Human Rights Law Resource Centre (Human Rights Act for All Australians), Submission; Mallesons Stephen Jaques Human Rights Law Group, Submission.

## Extraterritorial application?

There is some support for the protections given under a Human Rights Act being extended to all people who are subject to Australian jurisdiction, whether or not they are located in or outside Australia's territory.<sup>75</sup> It was suggested that this could apply to cases of cooperation by Australian authorities with countries where the death penalty may be imposed, in relation to the treatment of asylum seekers under the effective control of Australia<sup>76</sup>, and to people outside Australia who are detained by our armed forces.<sup>77</sup>

### 14.5 Which rights and responsibilities should be included?

Chapter 4 deals with the broader question of which rights and responsibilities should be protected. Many of the arguments outlined in that chapter are also relevant when considering which rights and responsibilities should be included in a Human Rights Act. The Committee heard a number of views on this, including that a Human Rights Act should protect:

- all the rights contained in the international human rights treaties to which Australia is a party
- a subset of these rights, such as those contained in the International Bill of Rights—that is, the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights
- the rights contained in the International Covenant on Civil and Political Rights only
- other rights that are considered of importance to the Australian community but that might not yet be reflected in international human rights treaties.

New Zealand, Victoria and the ACT have included civil and political rights only, whereas the United Kingdom has also included a right to education. In contrast, the South African constitutional Bill of Rights contains civil and political, economic, social and cultural rights.

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<sup>75</sup> For example, Australian Human Rights Commission, Submission; Gilbert + Tobin Centre of Public Law (E Santow), Submission; Australian Lawyers for Human Rights, Submission; Law Institute of Victoria, Submission; Public Interest Law Clearing House, Submission; Gilbert + Tobin Centre of Public Law (J McAdam and T Garcia), Submission; Australian Council of Social Service, Submission; Amnesty Legal Group (Vic), Submission; NSW Bar Association, Submission; Australian Democrats (ACT Division), Submission; Australian Lawyers Alliance, Submission.

<sup>76</sup> For example, Gilbert + Tobin Centre of Public Law (J McAdam and T Garcia), Submission.

<sup>77</sup> Castan Centre for Human Rights Law, Submission.

The Victorian and ACT laws have not incorporated all the civil and political rights covered in the ICCPR. Submissions noted, however, that some rights were excluded because they were thought to be inapplicable to local circumstances (for example, the prohibition on the death penalty) or because they fell within areas of federal responsibility (for example, the rights of trade unions).<sup>78</sup>

Independent committees in the ACT, Tasmania and Western Australia and the UK Joint Parliamentary Committee on Human Rights have each recommended the inclusion of at least some economic, social and cultural rights in human rights legislation.<sup>79</sup>

## **All Australia's obligations under international human rights law**

There was some support for including in a Human Rights Act all the human rights to which Australia has made a commitment at the international level.<sup>80</sup> Many submissions noted that, having ratified international human rights treaties, Australia is required to secure the realisation and enjoyment of all the human rights contained in them and to provide effective remedies for their violation.

On the other hand, the Australian Council of Social Service noted that including all the human rights Australia has undertaken to observe could lead to an excessively long and complex piece of legislation.<sup>81</sup> It was suggested by some that these human rights be consolidated in order to identify areas of overlap.<sup>82</sup>

Some submissions supported including a more limited set of rights in a Human Rights Act, such as:

- all the rights contained in the International Bill of Rights—that is, the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights<sup>83</sup>
- the rights set out in the ICCPR and the ICESCR only<sup>84</sup>

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<sup>78</sup> For example, Victorian Bar, Submission; ACT Human Rights Commission, Submission.

<sup>79</sup> See, generally, Australian Human Rights Commission, Submission.

<sup>80</sup> For example, Human Rights Law Resource Centre (Human Rights Act for All Australians), Submission; J Rostant, Submission; Australian Human Rights Commission, Submission; ACT Human Rights Commission, Submission; Intellectual Disability Rights Service, Submission; Law Institute of Victoria, Submission; NSW Charter Group, Submission; A Edwards and R McCorquodale, Submission; Australian Council of Social Service, Submission; Women's Legal Services Australia, Submission; Queenslanders with Disability Network, Submission.

<sup>81</sup> Australian Council of Social Service, Submission.

<sup>82</sup> For example, NSW Charter Group, Submission; Public Interest Advocacy Centre, Submission.

<sup>83</sup> For example, E Della Torre, Submission; Australian Council of Social Service, Submission; Human Rights Council of Australia, Submission.

<sup>84</sup> For example, Anglican Church of Australia General Synod, Submission; J Glyn, Submission; Baptistcare, Submission; Eastern Community Legal Centre, Submission.

- the rights in the ICCPR and the ICESCR and the third-generation rights included in the South African Constitution.<sup>85</sup>

A number of other international instruments build on these rights in relation to different groups—such as Indigenous peoples, women, children and people with disabilities—and it was suggested to the Committee that specific rights for these groups should be included in a Human Rights Act.<sup>86</sup> Alternatively, some suggested that a Human Rights Act could expressly allow courts and decision makers to consider international law, including human rights materials that elaborate on the rights of specific groups, when interpreting the human rights set out in the Act.<sup>87</sup>

Several submissions also suggested that it be made clear in a Human Rights Act that the rights included are not exhaustive.<sup>88</sup> For example, both the Victorian and ACT laws provide that a right or freedom should not be taken to be limited simply because it is not included in the legislation.

## Civil and political rights only

Some submissions supported the inclusion of civil and political rights only<sup>89</sup> or at least initially.<sup>90</sup> Ron Merkel QC and Alistair Pound suggested that the possibility of including economic, social and cultural rights at some later stage could be expressly referred to in a Human Rights Act, as is the case with the Victorian legislation.<sup>91</sup>

## Economic, social and cultural rights

Inclusion of economic, social and cultural rights in a federal Human Rights Act has been a matter of some debate. A range of submissions supported the inclusion of these rights.<sup>92</sup> Many noted that, at a minimum, rights such as the right to work, education, adequate housing and the highest attainable standard of health should be protected.<sup>93</sup> Generally, the reasons given for including economic, social and

<sup>85</sup> Public Interest Advocacy Centre, Submission.

<sup>86</sup> For example, Australian Council of Social Service, Submission; ACT Human Rights Commission, Submission (children's rights); Youthlaw Young People's Legal Rights Centre, Submission (children's rights); Youth Affairs Council of Victoria, Submission (children's rights); WomenSpeak Alliance (gender equality); Women's Legal Services Australia, Submission (gender equality); National Council on Intellectual Disability, Submission (rights of persons with disability); Queenslanders with Disability Network, Submission (rights of persons with disability).

<sup>87</sup> Australian Human Rights Commission, Submission.

<sup>88</sup> For example, *ibid.*

<sup>89</sup> For example, T Ginnane, Submission; S Ozdowski, Submission.

<sup>90</sup> For example, R Merkel and A Pound, Submission; Victorian Government, Submission.

<sup>91</sup> R Merkel and A Pound, Submission.

<sup>92</sup> For example, Human Rights Law Resource Centre (Human Rights Act for All Australians), Submission; B Schokman, Submission; Australian Human Rights Commission, Submission; A Cody, Submission; Australian Council of Social Service, Submission; V Tee, Submission; Victorian Bar, Submission; S Walker, Submission; Australian Centre for Human Rights, Submission; B Henderson, Submission; PILCH Homeless Persons' Legal Clinic, Submission; P Mathew, Submission; C Roberts, Submission; Jesuit Social Services, Submission; G Williams, Submission; T Foley, Submission; Human Rights Council of Australia, Submission.

<sup>93</sup> See Australian Human Rights Commission, Submission. Others included the right to social security and an adequate standard of living—see, for example, Liberty Victoria, Submission.

cultural rights were the interdependent, indivisible and mutually reinforcing nature of human rights<sup>94</sup>, a concern that ‘piecemeal’ recognition of human rights would threaten their effective implementation<sup>95</sup>, a view that recognising civil and political rights only would ‘distort the balance’ between rights (for example, when rights are in conflict)<sup>96</sup>, and a view that recognition of economic and social rights would have more impact on the everyday life experience of most members of the Australian community than recognition of civil and political rights.<sup>97</sup>

Although there was some support for giving economic, social and cultural rights the same status as civil and political rights<sup>98</sup>, others noted that the former group of rights could be protected in different ways, such as through the principle of ‘progressive realisation’.<sup>99</sup> As noted in Chapter 4, the South African Constitution provides that the government must ‘take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation’ of the rights of access to health care services, sufficient food and water, social security and adequate housing. Submissions noted that this obligation avoids overburdening government by taking into account the availability of resources.<sup>100</sup> South African courts have developed a form of ‘reasonableness’ review of government action when interpreting and applying these rights.<sup>101</sup> For example, a court considering reasonableness:

... will not enquire whether other more desirable or favourable measures could have been adopted, or whether public money could have been better spent. The question would be whether the measures that have been adopted are reasonable. It is necessary to recognise that a wide range of possible measures could be adopted by the State to meet its obligations. Many of these would meet the requirement of reasonableness. Once it is shown that the measures do so, this requirement is met.<sup>102</sup>

The Amnesty Legal Group (Vic) referred to the UK Joint Committee on Human Rights’ proposal for a UK Bill of Rights and Freedoms, which would involve imposing an

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<sup>94</sup> For example, S Walker, Submission; Human Rights Law Resource Centre (Human Rights Act for All Australians), Submission; T Foley, Submission; Australian Human Rights Commission, Submission; Australian Council of Social Service, Submission; Women’s Health West, Submission.

<sup>95</sup> Human Rights Law Resource Centre (Human Rights Act for All Australians), Submission.

<sup>96</sup> For example, Australian Council of Social Service, Submission; Castan Centre for Human Rights Law, Submission.

<sup>97</sup> Victorian Bar, Submission; RegNET (H Charlesworth, A Byrne and R Thilagaratnam), Submission; K Young, Submission.

<sup>98</sup> For example, Human Rights Law Resource Centre (Human Rights Act for All Australians), Submission.

<sup>99</sup> For example, Victorian Bar, Submission; Anti-Discrimination Commission Queensland, Submission; R Young, Submission; SCALES Community Legal Centre, Submission; Close the Gap Campaign Steering Committee for Indigenous Health Equality, Submission; Mallesons Stephen Jaques Human Rights Law Group, Submission.

<sup>100</sup> For example, Public Interest Law Clearing House, Submission; K Young, Submission.

<sup>101</sup> For example, Australian Human Rights Commission, Submission; Australian Centre for Human Rights, Submission; R Young, Submission.

<sup>102</sup> *South Africa v Grootboom* [2001] 1 SA 46 [41], cited in Australian Human Rights Commission, Submission.

obligation on the UK Government to achieve the ‘progressive realisation’ of certain economic, social and cultural rights. Under the scheme, these rights would not be enforceable by individuals, but the courts could assess the ‘reasonableness’ of measures taken by the UK Government to achieve their progressive realisation and could consider the rights where relevant to the interpretation of other legislation. The government would also be required to report to parliament on its progress in achieving their progressive realisation.<sup>103</sup>

The Committee also heard strong opposition to the inclusion of any economic, social or cultural rights in a Human Rights Act. Some suggested that such rights are not justiciable since there are no criteria by which courts can assess the ‘reasonableness’ of a government’s approach to progressive realisation.<sup>104</sup> Others noted that the inclusion of such rights would require courts to make ‘policy judgments about the value and effectiveness of government policy and the allocation of resources’.<sup>105</sup> Judges would have to consider ‘financial statements, budget papers, and justifications for fiscal policy’<sup>106</sup> or ‘the relative priorities of education, transport, health, defence and other government services’.<sup>107</sup> Submissions noted that parliaments are better placed to consider such aspects of social and fiscal policy.<sup>108</sup>

A number of submissions sought to counter these arguments.<sup>109</sup> Dr Ben Saul noted that concerns about judges determining policy matters have less weight under a dialogue model, which would not empower courts to strike down legislation or compel governments to allocate resources to remedy rights violations. He also noted that courts already decide questions of resource allocation (for example, when they award compensatory damages against the government) and that judicial determination of civil and political rights might equally have consequences for resource allocation. In response to the concern that such rights are too vague and indeterminate, Dr Saul noted that this criticism could also apply to other legal concepts judges regularly consider—such as the tests of reasonableness, equity, fairness and justice.<sup>110</sup> Dr Julie Debeljak also noted that the content of economic, social and cultural rights has been clarified by South African jurisprudence as well as the comments of the UN Committee on Economic, Social and Cultural Rights.<sup>111</sup>

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<sup>103</sup> Amnesty Legal Group (Vic), Submission; see UK Parliament Joint Committee on Human Rights, *Twenty-Ninth Report* (2008).

<sup>104</sup> For example, H Irving, Submission.

<sup>105</sup> A Twomey, Submission. See also M Pearce, Submission.

<sup>106</sup> H Irving, Submission.

<sup>107</sup> P Heerey, Submission.

<sup>108</sup> See generally the discussion in J Leeson and R Haddrick (eds), *Don’t Leave Us with the Bill: the case against an Australian bill of rights* (2009), Submission.

<sup>109</sup> For example, J Debeljak, Submission; K Young, Submission; B Saul, Submission; Castan Centre for Human Rights Law, Submission.

<sup>110</sup> B Saul, Submission.

<sup>111</sup> J Debeljak, Submission



The Commonwealth Solicitor-General was asked to advise the Committee on whether it would be a valid exercise of judicial power for a court to interpret a provision of Commonwealth legislation consistently with rights, make a declaration of incompatibility or determine that a public authority had acted incompatibly with four named economic and social rights. The four named rights were the rights under articles 7 (the right to the enjoyment of just and favourable conditions of work), 11 (the right to an adequate standard of living), 12 (the right to the enjoyment of the highest attainable standard of physical and mental health) and 13 (the right to education) of the International Covenant on Economic, Social and Cultural Rights. The Solicitor-General considered there to be:

... considerable difficulty concerning the ability of a court in the exercise of judicial power to interpret and enforce the rights set out in Arts 7, 11, 12 and 13 of the ICESCR. The problem stems from the requirement for the exercise of judicial power under Ch III of the Constitution always to involve the application of criteria or standards that are sufficiently definite.<sup>112</sup>

He noted, however, that articles 7 and 13 include ‘some more specific rights that may represent judicially manageable standards: eg the obligation in Art 7(a)(i) for equal pay for equal work; in Art 7(d) for remuneration for public holidays; and in Art 13(2)(a) for free and compulsory primary education’.<sup>113</sup>

Concerns about the justiciability of economic, social and cultural rights could be allayed if implementation of the rights were monitored through administrative complaints mechanisms. Under one proposal, the Australian Human Rights Commission could refer complaints to the relevant public authority along with its conclusions about an appropriate response. Public authorities would then be required to include in their annual reports details of all complaints, the commission’s recommendations, and any actions taken in response or the reasons for not taking such action.<sup>114</sup> Under the commission’s own proposal, it could report to the Attorney-General on specific complaints and the recommended actions, as well as in relation to a series of complaints indicating the need to further consider particular policy areas. The Attorney-General could then be required to respond to such reports in parliament.<sup>115</sup>

The Australian Human Rights Commission noted that even if a Human Rights Act did not provide an independent cause of action for breaches of economic, social and cultural rights, these rights could still be considered in pre-legislative scrutiny processes, courts could be required to interpret legislation consistently with them, and public authorities could be required to give proper consideration to them in

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<sup>112</sup> S Gageler and H Burmester, SG No. 68 of 2009, [17].

<sup>113</sup> *ibid.* [19].

<sup>114</sup> Human Rights Law Resource Centre (Human Rights Act for All Australians), Submission.

<sup>115</sup> Australian Human Rights Commission, Submission.

their decision making. Further, individuals should still be able to gain access to existing administrative review processes if a public authority breaches this obligation. The commission also noted that the principle of ‘progressive realisation’ could be made a relevant factor when considering the reasonableness of limitations on economic, social and cultural rights.<sup>116</sup>

## **The rights of Indigenous peoples**

Some submissions proposed that the rights of Indigenous peoples receive greater recognition in a federal Human Rights Act than they currently receive in the ACT and Victorian legislation.

The only mention of Indigenous peoples in the ACT legislation is in the preamble, which states that human rights have a ‘special significance for Indigenous people—the first owners of this land, members of its most enduring cultures, and individuals for whom the issue of rights protection has great and continuing importance’. The Victorian legislation’s provision on cultural rights recognises that ‘Aboriginal persons hold distinct cultural rights’ and must not be denied the right to ‘enjoy their identity and culture’, ‘maintain and use their language’, ‘maintain their kinship ties’, and ‘maintain their distinctive spiritual, material and economic relationship with the land and waters’.

Aboriginal and Torres Strait Islander Legal Services submitted that a Human Rights Act should contain a ‘preamble or some other special acknowledgment of Aboriginal and Torres Strait Islander peoples as the First Nations peoples of Australia’.<sup>117</sup> Australians for Native Title and Reconciliation Victoria submitted that such an Act should include a right to self-determination for Indigenous communities.<sup>118</sup> The NSW Reconciliation Council noted that the provisions should be in line with the UN Declaration on the Rights of Indigenous Peoples and should include the right to a distinct status and culture, the right to enjoyment of culture and use and preservation of languages, and the right to recognition and protection of traditional lands, territories and resources.<sup>119</sup> The Victorian Bar submitted that a provision adopting the text of article 31 of the UN Declaration on the Rights of Indigenous Peoples should be included, protecting the rights of Indigenous peoples ‘to maintain, control, protect and develop their cultural heritage, traditional knowledge and traditional cultural expression’.<sup>120</sup> The question of whether the rights of Indigenous peoples should be given legislative recognition is discussed in Chapter 9.

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<sup>116</sup> *ibid.*

<sup>117</sup> Aboriginal and Torres Strait Islander Legal Services, Submission.

<sup>118</sup> Australians for Native Title and Reconciliation Victoria, Submission. See also Wirringa Baiya Aboriginal Women’s Legal Centre, Submission; NSW Reconciliation Council, Submission; Castan Centre for Human Rights Law, Submission.

<sup>119</sup> NSW Reconciliation Council, Submission.

<sup>120</sup> Victorian Bar, Submission.

## New and evolving rights

There was some support for the inclusion in a Human Rights Act of new or evolving rights that have not yet been incorporated in international human rights treaties.<sup>121</sup> The environment and the impact of climate change were raised as a areas of particular concern.<sup>122</sup> Submissions argued that the right to a clean, safe and healthy environment should be included in a Human Rights Act.<sup>123</sup>

If a Human Rights Act were to include rights that are not contained in an international treaty to which Australia is a party, those provisions might not be supported by the external affairs power in the Constitution. The government might have to rely on an alternative source of power to include such provisions.

## Should responsibilities be included?

As discussed in Chapter 3, there has been some recognition of the notion of responsibilities at the international level—for example, in the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights. Chapter 11 discusses the approach of other jurisdictions in relation to the incorporation of responsibilities in human rights legislation. The preamble to the ACT legislation ‘encourages individuals to see themselves, and each other, as the holders of rights, and as responsible for upholding the human rights of others’; the preamble to the Victorian legislation declares that ‘human rights come with responsibilities and must be exercised in a way that respects the human rights of others’. The UK Ministry of Justice has recently released a consultation paper that considers the possibility of including certain responsibilities in a new UK Bill of Rights and Responsibilities.<sup>124</sup>

As noted in Chapter 4, a number of submissions and community roundtable participants supported greater recognition of responsibilities in the Australian community. Most, however, did not support the inclusion of binding responsibilities in a federal Human Rights Act.<sup>125</sup> In particular, there were concerns that the

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<sup>121</sup> For example, Public Interest Law Clearing House, Submission; Amnesty Legal Group (Vic), Submission.

<sup>122</sup> For example, Public Interest Law Clearing House, Submission; NSW Charter Group, Submission.

<sup>123</sup> For example, Amnesty Legal Group (Vic), Submission; UN Youth Association of Australia, Submission; NSW Charter Group, Submission; Law Institute of Victoria, Submission; Human Rights Council of Australia, Submission; Public Interest Advocacy Centre, Submission; Australian Network of Environmental Defenders Offices, Submission; J Geary, Submission.

<sup>124</sup> UK Ministry of Justice, *Rights and Responsibilities: developing our constitutional framework* (2009).

<sup>125</sup> For example, Australian Human Rights Commission, Submission; G Williams, Submission; Public Interest Advocacy Centre, Submission; A Edwards and R McCorquodale, Submission; M Pearce, Submission; Human Rights Council of Australia, Submission; Australian Council of Social Service, Submission; Victorian Bar, Submission; NSW Charter Group, Submission. The Law Institute of Victoria noted that it would not support the inclusion in a federal Human Rights Act of binding responsibilities on individuals but would welcome further consideration of the matter at a later stage in the Act’s life—Law Institute of Victoria, Submission.

inclusion of ‘responsibilities’ could create an impression that rights are contingent on ‘good citizenship’.<sup>126</sup>

The Australian Council of Social Service suggested that most human rights are not absolute and must be balanced against other rights and that this balancing already ‘recognises the relationship between rights and responsibilities’.<sup>127</sup> Alice Edwards and Professor Robert McCorquodale made a similar point, noting that ‘implicit in rights are correlative duties’ and that those duties are ‘more appropriately dealt with via expressly stated limitations and derogations’.<sup>128</sup>

There was, however, some support for references to responsibilities being included in the title, preamble or objects provision of a Human Rights Act.<sup>129</sup>

## 14.6 What limitations should apply?

As noted in Chapter 3, under international law certain human rights are considered so fundamental they are ‘absolute’, meaning they cannot be limited under any circumstances. Examples of such rights are the right to freedom from torture and other cruel, inhuman or degrading treatment or punishment; freedom from slavery and servitude; and the prohibition on retrospective operation of criminal laws.<sup>130</sup>

Most rights are, however, not absolute. Some rights might need to be limited in order to take other interests into account—for example, to secure the enjoyment of other people’s rights or to maintain public health and safety. In times of emergency governments might consider it necessary to suspend specific rights temporarily. In contrast, most absolute rights are also non-derogable, meaning they cannot be suspended, even in times of public emergency.<sup>131</sup>

Some international human rights instruments recognise that rights may be limited in certain circumstances. For example, article 29(2) of the Universal Declaration of Human Rights provides as follows:

In the exercise of his rights and freedoms, everyone shall be subject only to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the

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<sup>126</sup> For example, Australian Council of Social Service, Submission; Public Interest Advocacy Centre, Submission; A Edwards and R McCorquodale, Submission.

<sup>127</sup> Australian Council of Social Service, Submission.

<sup>128</sup> A Edwards and R McCorquodale, Submission.

<sup>129</sup> For example, Australian Human Rights Commission, Submission; G Williams, Submission; Public Interest Advocacy Centre, Submission; Human Rights Council of Australia, Submission; NSW Charter Group, Submission; T Ginnane, Submission.

<sup>130</sup> See Human Rights Law Resource Centre (Human Rights Act for All Australians), Submission.

<sup>131</sup> See *ibid.*; Australian Human Rights Commission, Submission.

just requirements of morality, public order and the general welfare in a democratic society.

The Victorian, ACT and New Zealand human rights laws each include a general limitation clause allowing rights to be subject to such reasonable limits as can be ‘demonstrably justified in a free and democratic society’. The UK legislation does not include a general limitation clause but instead includes limitations within certain rights provisions—for example, the right to peaceful assembly, which can be limited in the interests of national security and public safety. The Victorian and ACT legislation also requires all relevant factors to be taken into account in making this determination, including the nature of the right, the importance of the purpose of the limitation, the nature and extent of the limitation, the relationship between the limitation and its purpose, and any less restrictive means reasonably available to achieve the purpose of the limitation.

Submissions generally supported the inclusion of a general limitation clause<sup>132</sup> and, in particular, one modelled on the Victorian and ACT legislation.<sup>133</sup> On the other hand, the Victorian Bar preferred a model based on the Canadian Charter of Rights and Freedoms, which does not set out relevant criteria for determining whether a limitation is reasonable. It submitted that the Victorian limitation clause is overly prescriptive and could limit judicial development of the concept of ‘demonstrable justification’ and encourage a ‘tick the box’ mentality within government.<sup>134</sup> The Mallesons Stephen Jaques Human Rights Law Group submitted that a general limitation clause should be avoided altogether, instead preferring to incorporate limitations in certain rights provisions to minimise the risk of a general clause being interpreted too broadly or too narrowly.<sup>135</sup>

A number of submissions also proposed that the Human Rights Act specify which rights are absolute and prohibit any limitation of these rights.<sup>136</sup> The Human Rights Law Resource Centre noted that if the Act were to permit limitations on these rights it would not be consistent with Australia’s international human rights obligations.<sup>137</sup>

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<sup>132</sup> For example, E Della Torre, Submission; Australian Lawyers Alliance, Submission; WomenSpeak Alliance, Submission.

<sup>133</sup> For example, Human Rights Law Resource Centre (Human Rights Act for All Australians), Submission; Australian Human Rights Commission, Submission; R Merkel and A Pound, Submission; Amnesty Legal Group (Vic), Submission; Human Rights Council of Australia, Submission; Law Institute of Victoria, Submission; B Saul, Submission; Illawarra Legal Centre, Submission; ACT Human Rights Commission, Submission.

<sup>134</sup> Victorian Bar, Submission.

<sup>135</sup> Mallesons Stephen Jaques Human Rights Law Group, Submission.

<sup>136</sup> For example, Human Rights Law Resource Centre (Human Rights Act for All Australians), Submission; SCALES Community Legal Centre, Submission; Amnesty Legal Group (Vic), Submission; NSW Bar Association, Submission; Law Institute of Victoria, Submission; B Saul, Submission; ACT Human Rights Commission, Submission; A Edwards and R McCorquodale, Submission; Mallesons Stephen Jaques Human Rights Law Group, Submission.

<sup>137</sup> Human Rights Law Resource Centre (Human Rights Act for All Australians), Submission.

## 14.7 Human rights in legislation and policy development

Submissions suggested a range of mechanisms that could be included in a Human Rights Act to ensure that greater attention is paid to human rights during the development and making of law and policy.

### Human rights impact statements

One option is to require that all Cabinet submissions (including proposals for new or amended laws or policies) be accompanied by a human rights impact statement. This statement could provide an assessment of whether a proposed law or policy is consistent with the human rights set out in the Human Rights Act and the reasons for any inconsistency.<sup>138</sup> This would allow Cabinet to consider the potential human rights implications of proposals put before it and ask that a Minister amend a proposal to ensure consistency with the Human Rights Act. The requirement would not necessarily be included in a Human Rights Act: it could be part of the framework supporting the Act.

This option is discussed in detail in Chapter 7, where it is noted that such a requirement has been adopted in the ACT, Victoria and New Zealand. The proposal was supported in a number of submissions<sup>139</sup>, among them submissions from the ACT Human Rights Commission and the Victorian Government, which said the requirement had resulted in human rights issues being identified much earlier in the policy and law development process.<sup>140</sup>

### Statements of compatibility

One of the main features of the dialogue model—although it could apply in any model adopted—is a requirement that a member of parliament responsible for a Bill table a statement of compatibility when introducing the Bill into parliament. The statement would say whether the Bill was compatible with the human rights in the Human Rights Act. The same requirement could also apply to any amendments moved during debate and to all proposed regulations being forwarded to the Executive Council for consideration (and/or when they are tabled in parliament).

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<sup>138</sup> The NSW Bar Association suggested that they should include a statement of the purpose of the Bill, policy or proposal; its effect on any of the human rights in the Human Rights Act; any limitation placed on any human right in the Human Rights Act; the limitation's nature and extent, importance and purpose; the relationship between the limitation and its purpose; and whether there is any less restrictive means of achieving the purpose—NSW Bar Association, Submission.

<sup>139</sup> For example, Australian Human Rights Commission, Submission; S Evans, Submission; Law Council of Australia, Submission; Oxford Pro Bono Publico, Submission; NSW Bar Association, Submission; Australian Council of Social Service, Submission; Australian Lawyers for Human Rights, Submission.

<sup>140</sup> ACT Human Rights Commission, Submission; Victorian Government, Submission.

This option is discussed in Chapter 7, where it is noted that the UK, ACT and Victorian human rights laws require statements of compatibility for Bills introduced into parliament. A number of submissions supported including a similar requirement in a federal Human Rights Act.<sup>141</sup> They argued that such statements would facilitate debate inside and outside parliament about the potential impact of new laws on human rights<sup>142</sup>, increase transparency and accountability in law making<sup>143</sup>, reduce the likelihood of rights being inadvertently infringed<sup>144</sup>, and require the parliament to clearly justify any limitation of a human right.<sup>145</sup>

## **A parliamentary human rights committee**

A parliamentary committee with the ability to review all Bills for their compliance with human rights is an important aspect of the dialogue model. Both the ACT and the Victorian laws provide for scrutiny of Bills by a parliamentary committee, but such a committee could also be a part of other models. For example, under the democratic model proposed by Professor Tom Campbell and Dr Nicholas Barry a parliamentary committee based on the UK's Joint Committee on Human Rights would be the primary tool for enforcing a Human Rights Act. In their view, governments are more likely to take rights-based objections to a Bill seriously if they threaten the passage of the Bill through parliament, and this is more likely to occur in Australia, where the Senate usually is not controlled by the government.<sup>146</sup>

The various options for establishing a parliamentary human rights committee are discussed in Chapter 7, where it is noted that there are already a number of parliamentary committees at the federal level that scrutinise proposed and existing legislation but that concerns have been raised about their capacity to engage in comprehensive human rights scrutiny. One option is to expand the powers of the existing parliamentary committees to review Bills for compliance with the rights under the Human Rights Act.<sup>147</sup> Alternatively, a new parliamentary committee—

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<sup>141</sup> For example, Australian Human Rights Commission, Submission; A King, Submission; Human Rights Law Resource Centre (Human Rights Act for All Australians), Submission; Baptistcare, Submission; L Schetzer, Submission; Australian Lawyers for Human Rights, Submission; Law Council of Australia, Submission; Castan Centre for Human Rights Law, Submission; R Merkel and A Pound, Submission; NSW Bar Association, Submission; Australian Council of Social Service, Submission; Gilbert + Tobin Centre of Public Law (E Santow), Submission; Human Rights Council of Australia, Submission; Oxford Pro Bono Publico, Submission; Public Interest Law Clearing House, Submission; Law Institute of Victoria, Submission; ACT Disability, Aged & Carer Advocacy Service, Submission.

<sup>142</sup> Gilbert + Tobin Centre of Public Law (E Santow), Submission.

<sup>143</sup> Law Council of Australia, Submission.

<sup>144</sup> Human Rights Law Resource Centre (Human Rights Act for All Australians), Submission.

<sup>145</sup> Gilbert + Tobin Centre of Public Law (E Santow), Submission.

<sup>146</sup> T Campbell and N Barry, Submission.

<sup>147</sup> For example, Australian Christian Lobby, Submission; M Tate, Submission.

made up of members of one or both houses of parliament—could be established to focus solely on human rights.<sup>148</sup>

## **Override provisions**

In addition to a limitation clause, a Human Rights Act could give parliament an ‘override power’, which would allow it to state that legislation will have effect despite being incompatible with the Act. Where such a provision is used, the Human Rights Act would not apply to the particular law and it would not be possible to obtain a declaration of incompatibility in relation to the law.

The Victorian legislation contains an ‘override provision’ that states that the Victorian Parliament can override any right or anything else in the charter. This is based on the Canadian Charter of Rights and Freedoms, which provides that the Federal Parliament may pass a law notwithstanding a provision of the charter.

The ACT Human Rights Commission noted that such a clause is unnecessary in a framework where parliament can pass inconsistent legislation, courts cannot strike down legislation for inconsistency, and the Human Rights Act contains a general limitation provision.<sup>149</sup> The Human Rights Law Resource Centre submitted that, if such a provision were to be included, it should permit derogations only for non-absolute and derogable rights, in exceptional circumstances, for limited periods, and subject to proper accountability mechanisms.<sup>150</sup>

## **14.8 Interpreting and applying the Human Rights Act**

### **Interpreting legislation**

A Human Rights Act could require courts and public authorities to interpret primary and subordinate legislation consistently with the rights protected in the Act. Generally, this would mean that when interpreting and applying any other federal legislation it would be necessary to do so in a way that is consistent with the human rights outlined in the Human Rights Act. This could apply to the courts as well as to public authorities—including those involved in policy development and government service delivery.

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<sup>148</sup> For example, Tenants’ Union of Tasmania, Submission; Australian Lawyers for Human Rights, Submission; T Campbell and N Barry, Submission; B Horrigan, Submission; Oxford Pro Bono Publico, Submission; G Brandis, Submission; A Edward and R McCorquodale, Submission; Australian Human Rights Commission, Submission; A Coles, Submission; Human Rights Law Resource Centre (Human Rights Act for All Australians), Submission.

<sup>149</sup> ACT Human Rights Commission, Submission. See also Human Rights Law Resource Centre (Human Rights Act for All Australians), Submission; Mallesons Stephen Jaques Human Rights Law Group, Submission.

<sup>150</sup> Human Rights Law Resource Centre (Human Rights Act for All Australians), Submission. See also Mallesons Stephen Jaques Human Rights Law Group, Submission.



There has been some debate about the nature of an appropriate interpretive provision. Some have expressed concern with the United Kingdom's provision, which requires that, so far as it is possible to do so, legislation must be read and given effect in a way that is compatible with human rights. The concern is that this would disturb the separation of powers<sup>151</sup>, effectively allowing the courts to redraft legislation so that it is



Differing judicial views—retired Federal Court judges the Hon. Peter Heerey QC and the Hon. Ron Merkel QC

compatible with human rights but potentially contrary to the intention of parliament when making the legislation.<sup>152</sup> In contrast to the UK legislation, the Victorian and ACT human rights laws both require legislation to be interpreted in a way that is compatible with human rights *and* consistent with its purpose.

There appears to be general support for an interpretive provision based on the Victorian and ACT legislation.<sup>153</sup> The Law Council of Australia noted that this would strengthen the existing common law rule of statutory interpretation, which provides that a statute is to be interpreted and applied—so far as its language permits—in a manner that is consistent with the basic rights of the individual.<sup>154</sup>

The Australian Human Rights Commission suggested that this approach 'would ensure that courts do not cross the line between legitimate judicial interpretation and improper judicial law-making. It would preserve the separation of powers and ensure that courts do not tread onto the territory of legislators'. It noted that a roundtable of leading constitutional and human rights lawyers has confirmed that there is no constitutional impediment to introducing this kind of provision in a federal Human Rights Act.<sup>155</sup>

<sup>151</sup> For example, J Spigelman, Submission.

<sup>152</sup> For example, J Allan, 'What's wrong about a statutory bill of rights' in J Leeson and R Haddrick (eds) *Don't Leave Us with the Bill: the case against an Australian bill of rights* (2009), Submission. See also M McHugh, 'A human rights act, the courts and the Constitution' (Paper presented at the Australian Human Rights Commission, Sydney, 5 March 2009).

<sup>153</sup> For example, T Watson, Submission; Gilbert + Tobin Centre of Public Law (E Santow), Submission; A King, Submission; Human Rights Law Resource Centre (Human Rights Act for All Australians), Submission; Australian Human Rights Commission, Submission; Law Council of Australia, Submission; Castan Centre for Human Rights Law, Submission; Australian Council of Social Service, Submission; Human Rights Council of Australia, Submission; NSW Bar Association, Submission.

<sup>154</sup> Law Council of Australia, Submission.

<sup>155</sup> Australian Human Rights Commission, Submission, citing 'Constitutional validity of an Australian human rights Act' (22 April 2009).

The Commonwealth Solicitor-General advised the Committee that an interpretive provision based on the Victorian legislation ‘would avoid the extremes of the United Kingdom approach and would be compatible with the exercise of judicial power as traditionally understood in Australia’.<sup>156</sup>

On the other hand, the Hon. Chief Justice James Spigelman submitted that, were a Human Rights Act to be adopted, the interpretative provision should merely reflect the existing common law rule of statutory interpretation and could be formulated as follows: ‘In the interpretation of an Act, the rights set out in (here refer to the schedule or section listing rights to be recognised) are taken not to be abrogated or curtailed, unless the intention to do so is clearly manifest’.<sup>157</sup>

### **The use of human rights jurisprudence**

There was some support for expressly providing in a Human Rights Act that courts may consider international and comparative human rights jurisprudence when interpreting and applying the Act and any other laws that have an impact on human rights.<sup>158</sup> The ACT and Victorian laws contain provisions to this effect.

In the view of the Human Rights Law Resource Centre, such a provision would reduce the extent to which courts will be required to ‘reinvent the wheel’ and better equip decision makers and courts to determine the rights and other matters that arise under the Human Rights Act. It also enables the courts to consider the instruments and bodies from which the rights in the Act derive and is in keeping with the universal nature of human rights by allowing the consistent development of human rights jurisprudence.<sup>159</sup>

### **Dealing with incompatibility**

There is some debate about the most suitable remedy in circumstances where it is not possible for courts to interpret legislation consistently with human rights.

Under the Canadian legislative model, if a court were to find that legislation is inconsistent with the rights outlined in a Human Rights Act, the legislation would be held inoperative to the extent of the inconsistency. Under the dialogue model, as applied in the United Kingdom, the ACT and Victoria, courts can make a declaration that the legislation is inconsistent with human rights, but that declaration has no effect on the operation or validity of the legislation. Under the New Zealand model courts are not expressly empowered to make a declaration of incompatibility. As

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<sup>156</sup> S Gageler and H Burmester, SG No. 40 of 2009, [13].

<sup>157</sup> J Spigelman, Submission.

<sup>158</sup> For example, Baptistcare, Submission; International Commission of Jurists, Submission; Public Interest Law Clearing House, Submission; Australian Council of Social Service, Submission; V Holmes, Submission; J Casben, Submission.

<sup>159</sup> Human Rights Law Resource Centre (Human Rights Act for All Australians), Submission.

noted in Chapter 11, however, in some cases they have chosen to make such a declaration or at least make a clear finding that the legislation is inconsistent with human rights.

### **Declarations of incompatibility**

In the United Kingdom, Victoria and the ACT courts can issue a ‘declaration of incompatibility’ (or ‘inconsistency’) if they are unable to interpret legislation in a way that is compatible with human rights. The declaration does not affect the validity of the legislation, but it is brought to the attention of parliament, which may then choose to respond as it considers appropriate. In Victoria and the ACT the court is required to forward a copy of the declaration to the Attorney-General. In Victoria the Minister responsible, and in the ACT the Attorney-General, is required to respond to a declaration within six months and to table the response in parliament.

To date, no declarations of incompatibility have been made in Victoria or the ACT. A 2006 review of the UK legislation found that there had been 11 occasions on which superior courts had upheld declarations of incompatibility and that in each case parliament had passed further legislation to remedy the inconsistency.<sup>160</sup>

Generally, there appears to be strong support for the declaration of incompatibility mechanism.<sup>161</sup> The Human Rights Law Resource Centre noted:

Parliamentary sovereignty is clearly enhanced by a Declaration of Incompatibility, when compared with empowering the courts to strike down inconsistent laws. This is because the process of tabling and responding to Declarations ensures a high degree of scrutiny, transparency and accountability but Parliament retains the power to determine whether legislation should be amended in accordance with ... the Declaration.<sup>162</sup>

Differing views have, however, been expressed about whether the declaration of incompatibility mechanisms included in the Victorian and ACT legislation would be constitutional in the federal context. Submissions raised several doubts about their compatibility with Chapter III of Constitution, which deals with the judiciary. The first concern is that if courts were merely to declare that legislation is inconsistent with the rights in the Human Rights Act there would be no ‘matter’ before the court and declarations would be merely advisory opinions that the court has no jurisdiction to provide. Another concern is that such declarations would not constitute an exercise

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<sup>160</sup> Department for Constitutional Affairs, *Review of the Implementation of the Human Rights Act* (2006), 4, 17.

<sup>161</sup> For example, International Commission of Jurists, Submission; Anglican Diocese of Melbourne Social Responsibilities Committee, Submission; Law Council of Australia, Submission; Australian Press Council, Submission; Australian Council of Social Service, Submission; Tenants’ Union of Tasmania, Submission; Human Rights Law Resource Centre (Human Rights Act for All Australians), Submission; Australian Human Rights Commission, Submission.

<sup>162</sup> Human Rights Law Resource Centre, Submission.

of judicial power if the legal consequences of the declarations are not made binding on the parties.<sup>163</sup>

Others were more optimistic about the constitutional validity of such declarations. Associate Professor Carolyn Evans noted that the term ‘declaration’ might be misleading:

Declarations of incompatibility are usually granted by courts only after it has proved impossible to interpret legislation compatibility with human rights. Effectively they are part of the reasons of the court—a formal way of saying ‘we understand we are usually required ... to interpret legislation compatibly with human rights but we have not done so in this case because it was impossible to do so.’ This form of reasoning is formalised by being called a Declaration. The Attorney-General then plays a role in ensuring that this element of the reasoning is drawn to the Parliament’s attention and the Parliament can then decide what it wishes to do with it. Thus understood, there is no constitutional problem with a declaration.<sup>164</sup>

A number of submissions noted that any perceived problems could be avoided with careful drafting.<sup>165</sup> Various options were suggested:

- The Australian Human Rights Commission submitted that courts could be taken out of the notification process. It cited a suggestion by a roundtable of leading constitutional and human rights lawyers that, if a court were unable to interpret legislation consistently with human rights, the Commission could notify the Attorney-General of this finding. This would obviate the need for a formal declaration of incompatibility.<sup>166</sup>
- Mark Moshinsky SC submitted that, contrary to the UK legislation, a federal Human Rights Act should provide that a declaration is binding on the parties to the proceeding in relation to which it is made.<sup>167</sup>
- The International Commission of Jurists submitted that the declaration should impose some obligation on the executive—for example, requiring the Attorney-General to table a response within a specified time frame.<sup>168</sup> The Tenants’ Union of Tasmania proposed that the Attorney-General be made a party to the proceedings.<sup>169</sup>

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<sup>163</sup> For example, J Stellios, Submission; G McIntyre, Submission; H Irving, Submission. See also M McHugh, ‘A human rights act, the courts and the Constitution’ (Paper presented at the Australian Human Rights Commission, Sydney, 5 March 2009).

<sup>164</sup> C Evans, Submission.

<sup>165</sup> For example, Tenants’ Union of Tasmania, Submission; M Moshinsky, Submission; International Commission of Jurists, Submission; C Evans, Submission.

<sup>166</sup> Australian Human Rights Commission, Submission, citing ‘Constitutional validity of an Australian Human Rights Act’ (22 April 2009). See also A Twomey, Submission; Victorian Bar, Submission.

<sup>167</sup> M Moshinsky, Submission.

<sup>168</sup> International Commission of Jurists, Submission.

<sup>169</sup> Tenants’ Union of Tasmania, Submission.

- Others submitted that the Human Rights Act should provide that a declaration can be sought only in conjunction with a separate cause of action for other remedies or relief.<sup>170</sup>

The Commonwealth Solicitor-General advised the Committee on the constitutionality of this mechanism. His advice was premised on two assumptions, which, in his view, were ‘critical’: first, that a declaration ‘could be made only in proceedings for some other relief or remedy: there would need to be an existing cause or matter’ and, second, that a declaration ‘could be made only if a court were satisfied that a Commonwealth law is incompatible with a right or freedom set out in the [Human Rights Act]’.<sup>171</sup> He noted that, in interpreting the law, the court:

... would have formed an opinion as to the compatibility of the legislation with the human right as an integral step in making a decision that determines a dispute as to the rights, duties or liabilities of the parties before the court. It is just that, [if the Commonwealth law were not able to be interpreted as consistent with the relevant human right], the court would be empowered to go on expressly to translate the opinion it had formed in reaching that decision into a formal declaration.<sup>172</sup>

The Solicitor-General advised, however, that in a Human Rights Act several provisions would be desirable to support the validity of these declarations:

- The interpretive provision should require that any interpretation adopted be consistent with the purpose of a statute (as discussed).
- The declaration should bind the parties to a proceeding in which it is made.
- The Attorney-General should be joined as a party before the declaration is made.

### **Parliament’s response to incompatibility**

As noted, under the UK, ACT and Victorian legislation a court’s declaration of incompatibility has no effect on the operation or validity of the legislation. Once the declaration has been drawn to its attention, parliament can choose to amend the legislation to remedy the inconsistency or to leave it as it is despite the inconsistency. As noted, in Victoria the Minister responsible for the legislation, and in the ACT the Attorney-General, is required to table a written response to the declaration within six months. Failure to comply with this timetable does not, however, affect the validity of the legislation.

Several submissions suggested that a Human Rights Act should take the same approach, requiring the responsible Minister to prepare a written response to the

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<sup>170</sup> For example, an application for prerogative writs against a public authority on the grounds that their conduct was unlawful for breach of human rights—Human Rights Law Resource Centre (Human Rights Act for All Australians), Submission. See also Tenants’ Union of Tasmania, Submission.

<sup>171</sup> S Gageler and H Burmester, SG No. 40 of 2009, [12]–[13].

<sup>172</sup> *ibid* [15].

declaration of incompatibility within six months and to table the declaration and the response in parliament.<sup>173</sup>

The Human Rights Law Resource Centre also suggested that the integrity of the dialogue model would be improved by the availability of a writ of mandamus against the Minister responsible for the legislation if he or she does not provide such a response within the specified period.<sup>174</sup> The Commonwealth Solicitor-General advised that the ability of a party to the proceedings to enforce such an obligation would be strengthened if the Human Rights Act specified that the declaration was to be binding between the parties and that otherwise the obligation might be seen as essentially a matter ‘for parliamentary, rather than judicial, enforcement’.<sup>175</sup> He also advised that making the relevant Minister a party to the proceedings would ‘give [the Minister] an opportunity to put argument on the issue and would avoid a situation whereby a duty is imposed on a non-party’.<sup>176</sup> He noted that, ‘unless the Commonwealth Parliament conferred standing on a broader range of persons, only parties to the court case [in which the declaration is made] would be likely to have standing’.<sup>177</sup>

### **Subordinate legislation**

Although most submissions focused on the consequences of incompatibility for primary legislation, the Committee also heard some views about the consequences of incompatibility for subordinate legislation, including regulations, which can be made where authorised in legislation.

At present, if a provision in a regulation goes beyond the scope of the legislation under which it is made or is not reasonably proportionate to the purpose sought to be achieved by the legislation, it will be invalid. Ron Merkel QC and Alistair Pound suggested that this should also apply to subordinate legislation that cannot be interpreted compatibly with the human rights in a Human Rights Act.<sup>178</sup> In cases of incompatibility, subordinate legislation would not be the subject of a declaration of incompatibility but would be held invalid. They noted that this would ensure that the sovereignty of parliament (as expressed in a Human Rights Act) cannot be undermined by the executive government through subordinate legislation.<sup>179</sup>

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<sup>173</sup> For example, Human Rights Law Resource Centre (Human Rights Act for All Australians), Submission; L Schetzer, Submission; Human Rights Council of Australia, Submission; Children’s Commissioners and Guardians (K Boland, G Calvert, P Mason, A Roy, M Scott and P Simmons), Submission; ACT Human Rights Commission, Submission; Australian Human Rights Commission, Submission; Law Society of NSW, Submission.

<sup>174</sup> Human Rights Law Resource Centre (Human Rights Act for All Australians), Submission.

<sup>175</sup> S Gageler and H Burmester, SG No. 40 of 2009, [20].

<sup>176</sup> *ibid.* [21].

<sup>177</sup> *ibid.* [23].

<sup>178</sup> R Merkel and A Pound, Submission. See also J Glyn, Submission; Human Rights Council of Australia, Submission.

<sup>179</sup> R Merkel and A Pound, Submission.

## 14.9 The role of public authorities

The Committee received from the community a strong message about the importance of recognising the rights and dignity of individuals in the process of government service delivery. Options for creating a human rights culture in the public service are discussed in Chapters 6 and 8, but a Human Rights Act could also have a role to play.

The Australian Human Rights Commission noted that ‘public authorities such as Centrelink and Medicare make many of the day-to-day government decisions which impact on the lives of people in Australia. A Human Rights Act could help ensure that public authorities respect human rights when making those decisions’. It further submitted:

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

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

In this way, a Human Rights Act would positively impact on the lives of people in Australia in their regular, day-to-day contact with government departments and public services. It would strengthen Australia’s human rights culture both in government and the general community.<sup>180</sup>

The Law Council of Australia submitted that experience in the United Kingdom, the ACT and Victoria suggests:

If government agencies have sound, fair decision making procedures in place, the services they deliver will be better quality and lead to better long-term outcomes. These outcomes should result in less complaints and expensive public inquiries into substandard practices. For example, the cost to the Australian community flowing from the handling of the Haneef case could have been avoided or substantially reduced if a Charter of Rights had been [in] place.<sup>181</sup>

### Duties of public authorities

A Human Rights Act could require public authorities to act compatibly with human rights (a ‘substantive obligation’). For example, the Act could make it unlawful for a

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<sup>180</sup> Australian Human Rights Commission, Submission.

<sup>181</sup> Law Council of Australia, Submission.

public authority to act in a way that is incompatible with human rights (where an ‘act’ includes a failure, refusal or proposal to act). Administrative law traditionally focuses on decisions and the procedures by which decisions are made, but this obligation focuses on the actions of public authorities.<sup>182</sup>

A Human Rights Act also could require all public authorities to give proper consideration to human rights when making decisions and implementing legislation and policy (a ‘procedural obligation’).<sup>183</sup>

The Victorian and ACT laws impose both a substantive and a procedural obligation on public authorities. Several submissions suggested, however, that there should be limitations on such obligations. For example, an Australian Human Rights Act could adopt the Victorian approach of providing that an action is not unlawful if, as a result of other legislation, ‘the public authority could not reasonably have acted differently or made a different decision’.<sup>184</sup>

A Human Rights Act could also provide that an action is not ‘incompatible’ with a human right if it could be demonstrably justified as a reasonable limitation in the circumstances.<sup>185</sup> Neither the ACT nor the Victorian legislation specifies how the general limitation provision interacts with the obligations of public authorities. The Victorian Bar submitted this is a weakness in the Victorian Charter that should be rectified.<sup>186</sup>

## **Embedding human rights in the public sector**

If these obligations were imposed on public authorities it would be necessary to take steps to ensure that respect for human rights is embedded in public sector practice and procedure. Chapter 6 discusses the need for better human rights education in the public sector. Chapter 8 discusses a number of practical measures to encourage public sector compliance with human rights, including incorporating respect for human rights in public sector values and codes of conduct, as well as requiring government departments to formulate human rights action plans, conduct or comply with annual human rights audits, and prepare annual reports on human rights compliance.

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<sup>182</sup> For example, Human Rights Law Resource Centre (Human Rights Act for All Australians), Submission; Human Rights Council of Australia, Submission; Oxford Pro Bono Publico, Submission; Public Interest Law Clearing House, Submission.

<sup>183</sup> For example, Australian Human Rights Commission, Submission; Human Rights Law Resource Centre (Human Rights Act for All Australians), Submission; Human Rights Council of Australia, Submission; Oxford Pro Bono Publico, Submission; Public Interest Law Clearing House, Submission.

<sup>184</sup> For example, Human Rights Law Resource Centre (Human Rights Act for All Australians), Submission; ACT Human Rights Commission, Submission; Australian Human Rights Commission, Submission; NSW Bar Association, Submission; Oxford Pro Bono Publico, Submission (which states that public authorities should be bound to act in accordance with the human rights in a Human Rights Act ‘unless specifically authorised not to do so by parliament’).

<sup>185</sup> For example, Human Rights Law Resource Centre (Human Rights Act for All Australians), Submission.

<sup>186</sup> Victorian Bar, Submission.



Although it might not be appropriate for all these mechanisms to be included in a Human Rights Act, the Act could provide a benchmark for public sector compliance with human rights. For example, departments' annual reports could detail the measures taken to comply with the Human Rights Act.

It was suggested to the Committee that a Human Rights Act should make provision for external bodies—for example, the Australian Human Rights Commission—to audit of public sector agencies for human rights compliance.<sup>187</sup> Under the Victorian legislation the Victorian Equal Opportunity & Human Rights Commission may, when requested by a public authority, review the authority's programs and practices to determine their compatibility with human rights. The legislation also provides that the 2011 review of the charter should consider whether regular auditing of public authorities to assess human rights compliance should be mandatory.

#### 14.10 Causes of action

Integration of human rights considerations in the decision-making processes of public authorities could make public servants more aware of the impacts of their decisions and so help prevent human rights breaches. There may, however, be cases in which human rights breaches will occur despite these measures.<sup>188</sup>

In the United Kingdom and the ACT a person may initiate court proceedings to seek a remedy solely on the ground that there has been a breach of his or her human rights, as contained in the human rights Act—'an independent cause of action'. In Victoria, however, a person may initiate proceedings only if he or she already has a cause of action other than under the human rights legislation.

There is a fear that an independent cause of action could 'open the floodgates' of litigation and be costly for government and public authorities as a result of award of compensation against them.<sup>189</sup> This has not occurred in the United Kingdom; nor has it occurred in New Zealand, where courts have implied a right of action and entitlement to a remedy for a breach of human rights.<sup>190</sup>

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<sup>187</sup> For example, ACT Human Rights Commission, Submission; T Campbell and N Barry, Submission; Human Rights Council of Australia, Submission.

<sup>188</sup> See Australian Human Rights Commission, Submission.

<sup>189</sup> See the discussion in Human Rights Law Resource Centre (Human Rights Act for All Australians), Submission; Australian Human Rights Commission, Submission; Oxford Pro Bono Publico, Submission.

<sup>190</sup> For example, Human Rights Law Resource Centre (Human Rights Act for All Australians), Submission; Amnesty Legal Group (Vic), Submission.

There was support for providing an independent cause of action for breaches of the rights protected by a Human Rights Act.<sup>191</sup> The Human Rights Law Resource Centre submitted that if there were no independent cause of action it would increase the difficulty of bringing court proceedings and would be likely to prevent some individuals from bringing proceedings. It noted that this could ‘create the impression that human rights will not be treated with the seriousness and importance that they deserve’.<sup>192</sup>

Concern was expressed about the lack of clarity in relation to this in the Victorian legislation<sup>193</sup>, which provides:

If, otherwise than because of this Charter, a person may seek any relief or remedy in respect of an act or decision of a public authority on the ground that the act or decision was unlawful, that person may seek that relief or remedy on a ground of unlawfulness arising because of this Charter.

The effect of this provision is that a claim for breach of the charter can be raised only in the context of other proceedings—for example, an application for judicial review. Christine Ernst submitted:

[The] Victorian model leaves no recourse to individuals whose rights have been violated but who would not have had a remedy under the pre-Charter law. It does nothing to change the excessively procedural focus that leaves administrative law poorly attuned to protecting substantive rights.<sup>194</sup>

The Victorian Bar also submitted that the absence of a free-standing cause of action is a weakness in the charter, since ‘judicial protection of human rights will not always sit comfortably with judicial review proceedings or any other kind of proceeding’.<sup>195</sup>

It might be that, if public authorities are obliged to act compatibly with or give proper consideration to the human rights under a Human Rights Act, a person will always have an independent cause of action under administrative law. Ron Merkel QC and

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<sup>191</sup> For example, Murray Mallee Community Legal Service, Submission; B Schokman, Submission; Australian Human Rights Commission, Submission; C Ernst, Submission; Law Council of Australia, Submission; NSW Bar Association, Submission; R Minty, Submission; Youthlaw Young People's Legal Rights Centre, Submission; Oxford Pro Bono Publico, Submission; R Merkel and A Pound, Submission; ACT Human Rights Commission, Submission; K Clark, Submission; Human Rights Council of Australia, Submission; A Edwards and R McCorquodale, Submission; Human Rights Law Resource Centre (Human Rights Act for All Australians), Submission; Law Institute of Victoria, Submission; M Kovari, Submission; Amnesty Legal Group (Vic), Submission; ACT Disability, Aged & Carer Advocacy Service, Submission; R Vickery, Submission; Australian Council of Social Service, Submission; Public Interest Law Clearing House, Submission; Federation of Community Legal Centres (Vic), Submission.

<sup>192</sup> Human Rights Law Resource Centre (Human Rights Act for All Australians), Submission, citing C Evans, ‘Responsibility for rights: the ACT Human Rights Act’ (2004) *Federal Law Review* 291, 300, 302.

<sup>193</sup> For example, Law Institute of Victoria, Submission; Victorian Bar, Submission; R Merkel and A Pound, Submission.

<sup>194</sup> C Ernst, Submission.

<sup>195</sup> Victorian Bar, Submission.

Alistair Pound submitted that such obligations would ‘make human rights a relevant consideration in all administrative decision-making by public authorities and would make it clear that such rights must be given real and genuine consideration’.<sup>196</sup> As noted in Chapter 5, however, administrative law offers a limited range of remedies for human rights violations.

The Committee notes the Commonwealth Solicitor-General’s advice that a declaration of incompatibility should be made only in proceedings for some other relief or remedy; that is, there would need to be an existing cause or matter.<sup>197</sup> Accordingly, if a Human Rights Act were to include an independent cause of action for breach of the human rights included in it, this might not be available where the only relief sought is a declaration of incompatibility.

## 14.11 Remedies

A number of submissions proposed that any federal Human Rights Act should include remedies for breach of the human rights contained in the Act.<sup>198</sup> Under the UK legislation a court ‘may grant such relief or remedy, or make such order, within its powers as it considers just and appropriate’. The ACT legislation empowers the Supreme Court to ‘grant the relief it considers appropriate except damages’. The Victorian legislation does not allow courts to award remedies solely for human rights breaches. Associate Professor Carolyn Evans submitted that the Victorian approach ‘makes [the charter] difficult to use and understand for those who are self-represented and even for lawyers who are not familiar with the complicated way in which remedies are granted under the Charter’.<sup>199</sup> Dr John Tobin noted:

The granting of rights invariably creates an expectation within the public that this will be accompanied by a remedy. The failure to provide this remedy creates an expectation deficit which in turn creates a level of hostility towards the Charter and a crisis for its legitimacy.<sup>200</sup>

The Australian Human Rights Commission submitted that providing for enforceable remedies would convey to the community a message that the Federal Government takes its human rights obligations seriously, would empower individuals to assert their rights, and would be a signal to public authorities that there will be consequences for breaches of human rights.<sup>201</sup> Submissions noted Australia’s

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<sup>196</sup> R Merkel and A Pound, Submission.

<sup>197</sup> S Gageler and H Burmester, SG No. 40 of 2009, [12].

<sup>198</sup> For example, M Kovari, Submission; P Lynch, Submission; T Watson, Submission; J Davis, Submission; G Lanyi, Submission; Refugee and Immigration Legal Service, Submission; R Vickery, Submission.

<sup>199</sup> C Evans, Submission.

<sup>200</sup> J Tobin, Submission.

<sup>201</sup> Australian Human Rights Commission, Submission

international legal obligation to provide an effective remedy where rights have been violated.<sup>202</sup> A range of judicial and non-judicial remedies were suggested.

## Judicial remedies

There is support for providing in a Human Rights Act for the following judicial remedies: declarations of incompatibility (as discussed); an order that a law, policy or program be implemented in accordance with human rights<sup>203</sup>; an injunction, declaration or order that conduct or activity amounting to a breach of human rights be stopped<sup>204</sup>; and any other remedy that is just and equitable in the circumstances.<sup>205</sup>

In suggesting a provision that would allow courts to provide a ‘just and effective remedy in the circumstances’, Oxford Pro Bono Publico noted:

Anticipating in advance the full range of circumstances in which rights might be breached, and therefore attempting to predict the remedial powers that may be necessary, is an impossible task ... Human rights violations may call for innovative remedies, which may include apologies, rehabilitation, satisfaction, and guarantees of non-repetition.<sup>206</sup>

There were differing views on whether a Human Rights Act should provide for compensation or damages when a human right has been violated. Damages are not available under the Victorian or ACT Acts. In contrast, the UK legislation provides that damages may be awarded if ‘the court is satisfied that the award is necessary to afford just satisfaction to the person in whose favour it is made’.

Some submitted that a Human Rights Act should not extend to the right to seek damages.<sup>207</sup> In contrast, others supported allowing the courts to order damages in specific circumstances—for example, where there is no other effective or appropriate remedy.<sup>208</sup> The Human Rights Law Resource Centre noted that

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<sup>202</sup> For example, Australian Human Rights Commission, Submission; Anti-Discrimination Commission Queensland, Submission.

<sup>203</sup> For example, Human Rights Law Resource Centre (Human Rights Act for All Australians), Submission; Australian Human Rights Commission, Submission; Public Interest Law Clearing House, Submission.

<sup>204</sup> For example, Human Rights Law Resource Centre (Human Rights Act for All Australians), Submission; Australian Human Rights Commission, Submission; Public Interest Law Clearing House, Submission; Public Interest Advocacy Centre, Submission.

<sup>205</sup> For example, Oxford Pro Bono Publico, Submission; Human Rights Law Resource Centre (Human Rights Act for All Australians), Submission; Australian Human Rights Commission, Submission; Public Interest Law Clearing House, Submission; Federation of Community Legal Centres (Vic), Submission.

<sup>206</sup> Oxford Pro Bono Publico, Submission.

<sup>207</sup> For example, Law Council of Australia, Submission.

<sup>208</sup> For example, Anglican Diocese of Melbourne Social Responsibilities Committee, Submission Human Rights Law Resource Centre (Human Rights Act for All Australians), Submission; R Minty, Submission; Australian Human Rights Commission, Submission; Baptistcare, Submission; Law Society of NSW, Submission; Human Rights Council of Australia, Submission; C Evans, Submission; Amnesty Legal Group (Vic), Submission; Law Society of Western Australia, Submission; Australian Council of Social Service, Submission; NSW Bar Association, Submission; ACT Human Rights Commission, Submission.

damages are rarely awarded under the UK legislation since declaratory and injunctive relief often provide effective remedies for breaches or proposed breaches of human rights.<sup>209</sup>

The Australian Human Rights Commission noted that at present damages are available under federal anti-discrimination laws. It submitted, 'The right to claim monetary damages for a breach of human rights would send an important message to public authorities, people in Australia and the international community: Australia takes breaches of human rights by or on behalf of its government seriously'.<sup>210</sup>

## Non-judicial remedies

Considering that court proceedings are not always cost-effective or efficient as a means of obtaining a remedy, there was also support for including non-judicial, conciliation-based remedies in a Human Rights Act.<sup>211</sup> The NSW Bar Association suggested that the Act should provide 'an informal process that is quick, inexpensive and will secure an effective resolution for all parties'.<sup>212</sup>

As discussed in Chapter 5, the Australian Human Rights Commission already has the power to deal with complaints of alleged violations of some human rights by federal authorities. The ACT Human Rights Commission submitted that a federal Human Rights Act should empower the Australian Human Rights Commission to receive and conciliate complaints under the Act, there being the option of taking the complaint to court if conciliation is unsuccessful.<sup>213</sup>

Among other possible non-judicial remedies that could be included in a Human Rights Act are requiring public authorities to establish internal human rights complaints mechanisms<sup>214</sup> or conferring jurisdiction on the Commonwealth Ombudsman to receive complaints under the Act.<sup>215</sup> In Victoria the *Ombudsman Act 1973* (Vic) was amended to give the Ombudsman power to investigate whether administrative action is incompatible with the Victorian charter. The Victorian Government submitted that the Ombudsman has played an important role in monitoring compliance with the Charter.<sup>216</sup>

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<sup>209</sup> Human Rights Law Resource Centre (Human Rights Act for All Australians), Submission. See also Law Society of Western Australia, Submission.

<sup>210</sup> Australian Human Rights Commission, Submission.

<sup>211</sup> For example, ACT Human Rights Commission, Submission; R Minty, Submission; R Creasy, Submission; WomenSpeak Alliance, Submission; NSW Bar Association, Submission.

<sup>212</sup> NSW Bar Association, Submission.

<sup>213</sup> ACT Human Rights Commission, Submission. See also M Byrnes, Submission; Australian Human Rights Commission, Submission; NSW Bar Association, Submission; Anti-Discrimination Commission Queensland, Submission.

<sup>214</sup> For example, Public Interest Law Clearing House, Submission; Anti-Discrimination Commission Queensland, Submission;

<sup>215</sup> For example, L Schetzer, Submission; B Saul, Submission; Anti-Discrimination Commission Queensland, Submission.

<sup>216</sup> Victorian Government, Submission.

## 14.12 Who can bring human rights claims?

There was some support for a Human Rights Act including a broad standing provision allowing those other than the victim of a human rights breach to bring a claim on the victim's behalf.<sup>217</sup> Some submissions supported the approach taken in the South African Constitution, which allows anyone to bring a claim if they are acting in their own interest, acting on behalf of another person who cannot act in their own name, acting as a member of or in the interest of a group or class of persons, acting in the public interest or, in the case of an association, acting in the interest of its members.<sup>218</sup>

Submissions also proposed measures for minimising the costs of bringing claims under the Human Rights Act. For example, the ACT Human Rights Commission suggested the inclusion of a costs provision based on the presumption that parties bear their own costs.<sup>219</sup>

Finally, submissions addressed the potential role of the federal Attorney-General and the Australian Human Rights Commission in proceedings involving the Human Rights Act. Under the ACT legislation the ACT Attorney-General may intervene in human rights cases as of right, but the ACT Human Rights Commissioner requires the leave of the court. Under the Victorian legislation both the Victorian Attorney-General and the Victorian Equal Opportunity & Human Rights Commission have the right to intervene. The commission submitted that 'it was essential' for the Australian Human Rights Commission to have a 'similarly broad and unfettered power to intervene in relevant proceedings'.<sup>220</sup>

The Victorian Bar noted that the Attorney-General's intervention in proceedings has often extended the time and resources necessary to bring an action under the charter and that counsel and clients sometimes avoid charter arguments for this reason. It suggested that consideration be given to whether the Attorney-General must seek leave to appear.<sup>221</sup> Associate Professor Carolyn Evans supported limiting the Attorney-General's right of intervention to cases in which declarations of incompatibility are sought, submitting that the requirement to give notice to the

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<sup>217</sup> Springvale Monash Legal Service, Submission; Women's Legal Services Victoria, Submission; Human Rights Council of Australia, Submission; Human Rights Law Resource Centre (Human Rights Act for All Australians), Submission; Australian Council of Social Service, Submission.

<sup>218</sup> See Human Rights Law Resource Centre (Human Rights Act for All Australians), Submission; Australian Council of Social Service, Submission.

<sup>219</sup> ACT Human Rights Commission, Submission. See also ACT Disability, Aged and Carer Advocacy Service, Submission.

<sup>220</sup> Victorian Equal Opportunity & Human Rights Commission, Submission. See also Australian Human Rights Commission, Submission; Oxford Pro Bono Publico, Submission; D Allen, Submission.

<sup>221</sup> Victorian Bar, Submission.

Attorney-General in relation to all charter cases creates ‘disincentives to raising rights issues and make[s] them appear exceptional rather than usual’.<sup>222</sup>

### 14.13 **The role of the Australian Human Rights Commission**

Both Victoria and the ACT accord to the Victorian Equal Opportunity & Human Rights Commission and the ACT Human Rights Commission respectively specific functions under their human rights legislation. The Victorian charter, for example, requires the commission to present to the Attorney-General an annual report that examines the operation of the charter; when requested by the Attorney-General, to review the effect of statutory provisions and the common law on human rights and report in writing; when requested by a public authority, to review that authority’s programs and practices to determine their compatibility with human rights; to provide education about human rights and the charter; and to assist the Attorney-General in the 2011 and 2015 reviews of the charter.

Submissions proposed that the Australian Human Rights Commission have a range of different functions under a Human Rights Act, among them the following:

- the ability to receive and conciliate complaints under the Act.<sup>223</sup> As noted, the Australian Human Rights Commission submitted that this could be an alternative to court enforcement of economic, social and cultural rights<sup>224</sup>
- the ability to intervene in court cases involving the Act<sup>225</sup>
- the power to review the effect of laws (including the common law) on human rights and report in writing to parliament. Such a provision is included in the ACT legislation, and the ACT Human Rights Commission strongly supported a similar provision being included in a federal Human Rights Act<sup>226</sup>
- the power to audit public sector agencies for their compliance with the Act<sup>227</sup>

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<sup>222</sup> C Evans, Submission.

<sup>223</sup> ACT Human Rights Commission, Submission; M Byrnes, Submission; Australian Human Rights Commission, Submission; NSW Bar Association, Submission; Anti-Discrimination Commission Queensland, Submission; Law Institute of Victoria, Submission; Human Rights Law Resource Centre (Human Rights Act for All Australians), Submission; Public Interest Law Clearing House, Submission.

<sup>224</sup> Australian Human Rights Commission, Submission.

<sup>225</sup> Victorian Equal Opportunity & Human Rights Commission, Submission; Australian Human Rights Commission, Submission; Oxford Pro Bono Publico, Submission; D Allen, Submission; Public Interest Law Clearing House, Submission.

<sup>226</sup> ACT Human Rights Commission, Submission. See also D Allen, Submission.

<sup>227</sup> T Campbell and N Barry, Submission; Human Rights Council of Australia, Submission; SCALES Community Legal Centre, Submission; Public Interest Law Clearing House, Submission.

- assisting the government in reviewing the operation of the Act<sup>228</sup>
- engaging in educational activities and research relating to the Act.<sup>229</sup>

#### 14.14 **A review provision**

Both the Victorian and ACT Acts specify that the government must arrange for a review of the operation of the legislation to be conducted and tabled in parliament within a certain time frame. A number of submissions supported incorporating such a provision in a federal Human Rights Act.<sup>230</sup>

The provision could specify the matters that must be considered as part of the review. The Victorian charter, for example, specifies that the 2011 review should consider the insertion of additional rights (including rights in the International Covenant on Economic, Social and Cultural Rights, the Convention on the Rights of the Child and the Convention on the Elimination of all forms of Discrimination against Women), the insertion of a right to self-determination, whether the regular auditing of public authorities for human rights compliance should be mandatory, and whether further provision should be made in relation to proceedings that may be brought or remedies that may be awarded.

Another option is to extend to an independent body—such as the Australian Human Rights Commission—the ability to conduct regular reviews of the Human Rights Act.<sup>231</sup> For example, the Victorian charter empowers the Victorian Equal Opportunity & Human Rights Commission to report annually to the Attorney-General on the operation of the charter.

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<sup>228</sup> For example, G Williams, Submission; ACT Human Rights Commission, Submission; Law Institute of Victoria, Submission.

<sup>229</sup> Human Rights Council of Australia, Submission; T Campbell and N Barry, Submission; Law Institute of Victoria, Submission; Public Interest Law Clearing House, Submission.

<sup>230</sup> For example, G Williams, Submission; Mental Health Legal Centre, Submission; ACT Human Rights Commission, Submission. The Queenslanders with Disability Network submitted that such a review should consider whether the Human Rights Act should be constitutionally entrenched—Queenslanders with Disability Network, Submission.

<sup>231</sup> G Williams, Submission; ACT Human Rights Commission, Submission.



## **PART FIVE**

### **The way forward**



## 15 The Committee's findings

The Committee is required to report on the concerns raised and the options identified during its Consultation with members of the Australian community, who were asked three questions:

- Which human rights (including corresponding responsibilities) should be protected and promoted?
- Are these human rights currently sufficiently protected and promoted?
- How could Australia better protect and promote human rights?

Earlier chapters in this report describe numerous options, and the Committee makes a series of findings in relation to them. The Committee is required to describe the advantages and disadvantages of the various options and the level of community support they attracted. When an option attracted strong community support and the Committee is of the view that the advantages outweigh the disadvantages, the Committee usually makes a recommendation. Some recommendations appear in Chapters 6 to 9. This current chapter provides an overview of and a context for those recommendations and then sets out the Committee's recommendations in relation to a Human Rights Act in the light of matters considered in Chapters 10 to 14. When read with the report's summary, this chapter reveals the Committee's thinking behind the primary recommendations.

### 15.1 Which rights and responsibilities should be protected and promoted?

Most people who participated in the Consultation in some way are convinced that Australia is one of the world's great countries to live in. They see Australia as the land of 'the fair go'—this being at least an aspiration if not a reality—and they think Australia is at its best when it gives everyone a fair go, including Indigenous Australians and newcomers, mainstream individuals and people on the margins. The focus groups and the opinion survey confirmed the concern expressed by many roundtable participants—that they are worried for the dignity of their fellow Australians, especially people with mental illness, the elderly, people with disabilities, people living in rural and remote areas (particularly in remote Indigenous communities) and children in need. For example, 75 per cent of those surveyed thought that the human rights of people with a mental illness needed to

be better protected, and 72 per cent thought the same in connection with the elderly.<sup>1</sup>

Participants generally were in no doubt that as a nation we could do better in guaranteeing fairness for all within Australia's borders and in protecting the dignity of people who miss out. For some, the language of human rights was useful for providing criteria by which to judge the government's performance in delivering services and the entitlements of individuals. For others, 'human rights' was more an abstraction, reserved for countries with serious problems. They were doubtful about whether laws and lawyers could efficiently contribute to securing fairness and dignity for all. They urged that more resources be made available for meeting everyone's basic needs. And they argued for better distribution of scarce government resources, so that those in greatest need might have the opportunity to realise their potential in the land of the fair go.

At community roundtables participants were asked what prompted them to attend. Some civic-minded individuals simply wanted the opportunity to attend a genuine exercise in participative democracy; they wanted information just as much as they wanted to share their views. Many participants were people with grievances about government service delivery or particular government policies. Some had suffered at the hands of a government department themselves; most knew someone who had been adversely affected—a homeless person, an aged relative in care, a close family member with mental illness, or a neighbour with disabilities. Others were responding to invitations to involve themselves in campaigns that had developed as a result of the Consultation. Against the backdrop of these campaigns, the Committee heard from many people who claimed no legal or political expertise in relation to the desirability or otherwise of any particular law; they simply wanted to know that Australia would continue to play its role as a valued contributor to the international community while pragmatically dealing with problems at home.

Outside the capital cities and large urban centres the community roundtables tended to focus on local concerns, and there was limited use of 'human rights' language. People were more comfortable talking about the fair go, wanting to know what constitutes fair service delivery for small populations in far-flung places.

The Committee learnt that economic, social and cultural rights are important to the Australian community, and the way they are protected and promoted has a big impact on the lives of many. The most basic economic and social rights—the rights to the highest attainable standard of health, to housing and to education—matter most to Australians, and they matter most because they are the rights at greatest risk, especially for vulnerable groups in the community.

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<sup>1</sup> Colmar Brunton Social Research, *National Human Rights Consultation—community research report* (2009).

The community roundtables bore out the finding of Colmar Brunton Social Research's 15 focus groups that the community regards the following rights as unconditional and not to be limited:

- the right to basic amenities—water, food, clothing and shelter
- the right to essential health care
- the right of equitable access to justice
- the right to freedom of speech
- the right to freedom of religious expression
- the right to freedom from discrimination
- the right to personal safety
- the right to education.

Of the 8428 submissions that dealt with specific rights, the right most mentioned was the right to the highest attainable standard of health, which was discussed in 1183 submissions.

Most Australians think their civil and political rights are fairly well protected. People often take these rights for granted, but concern was expressed about the consistency of particular Australian laws (including the national security legislation) with these rights. There is much disquiet about what is seen as the unacceptable erosion of some civil rights, but the actual way civil and political rights are protected was not well understood. When these rights are violated people expect remedial action to be taken. Of the 8428 submissions that nominated particular rights and responsibilities for attention, the largest grouping (2641) specified civil and political rights.

There is also a lack of public confidence in public authorities' ability to exercise some powers of arrest and detention with integrity and in the public interest. Many people who participated in the Consultation felt that a range of legislative provisions—particularly those introduced in response to the events of 11 September 2001—have unacceptably eroded the human rights of Australians, rights that should be considered sacrosanct even in times of crisis. Many who understood the need for recent laws increasing powers of investigation and detention and supported their introduction were nevertheless concerned about the lack of transparency, due process, independent review and justification.

Although there was adverse comment about 'unelected judges' during the course of the Consultation, most participants agreed with the observation of retired Chief Justice Sir Anthony Mason:

There is a strong case for saying that issues relating to the rule of law and due process are best left in the hands of judges who are familiar with procedures which will ensure that persons are fairly dealt with when prosecuted for an offence or when subjected to restraints such as control orders.<sup>2</sup>

Some of the Committee's most powerful consultations were with Indigenous communities, and one of the most often repeated themes in all consultations concerned the plight of Indigenous Australians in remote communities. There is general agreement that Indigenous Australians should be consulted and included in genuine partnerships when policy is being designed and service delivery planned. The term 'self-determination' was not often used, but many participants in community roundtables thought special laws and policies for Indigenous Australians should not be imposed without government first having made every effort to consult and to work in partnership with Indigenous communities.

Even though only 245 submissions dealt specifically with environmental concerns, this subject was raised at most community roundtables. Newly emerging rights in international law—such as the right to a clean and sustainable environment—are constantly in the Australian public's gaze.

Many of the more detailed submissions presented to the Committee argued that all the rights detailed in the primary international instruments Australia has ratified without reservation should be protected and promoted. Most often mentioned were the International Covenant on Civil and Political Rights 1966 and the International Covenant on Economic, Social and Cultural Rights 1966, which, along with the Universal Declaration of Human Rights 1948, constitute the 'International Bill of Rights'.

Some submissions also included the International Convention on the Elimination of All Forms of Racial Discrimination 1965, the Convention on the Elimination of All Forms of Discrimination against Women 1979, the Convention against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment 1984, the Convention on the Rights of the Child 1989, and the Convention on the Rights of Persons with Disabilities 2006.

Having ratified these seven important human rights treaties, Australia has voluntarily undertaken to protect and promote the rights listed in them.

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<sup>2</sup> Sir Anthony Mason, 'The death of human rights? And related issues' (Speech delivered at the Australian National University, 24 August 2007).

The Committee recommends that the Federal Government operate on the assumption that, unless it has entered a formal reservation in relation to a particular right, any right listed in the following seven international human rights treaties should be protected and promoted:

- the International Covenant on Civil and Political Rights
- the International Covenant on Economic, Social and Cultural Rights
- the Convention on the Elimination of All Forms of Racial Discrimination
- the Convention on the Elimination of All Forms of Discrimination Against Women
- the Convention against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment
- the Convention on the Rights of the Child
- the Convention on the Rights of Persons with Disabilities.

Some Consultation participants also mentioned the Declaration on the Rights of Indigenous Peoples 2007. Being a declaration, however, it does not impose the same obligations as a ratified treaty.

Many Australians see respect for human rights as central to our international image and responsibility. Younger Australians, in particular, think of human rights in Australia in terms of our role in the region and at the wider international level, as well as within our borders.

There is general support for better recognition of the responsibilities of government and members of the community in relation to the protection and promotion of human rights. This does not mean, though, that enjoyment of human rights should be conditional on any such responsibilities. The Committee was troubled to learn the following:

41% of people surveyed agreed that if some members of a group abuse the wider community's rights then it was reasonable to restrict the entire group's rights, and only 26% disagreed (the rest were undecided). By comparison, 57% agreed that it was reasonable to reduce or take away an individual's rights if they did not respect the wider community's rights, and only 17% disagreed.<sup>3</sup>

There was a strong view that a populist government can sometimes play on the community's willingness to punish an identifiable minority group for the wrongdoings of just a few individuals.

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<sup>3</sup> Colmar Brunton Social Research, *National Human Rights Consultation—community research report* (2009).

Despite the general support for a fair go, at community roundtables disquiet was often expressed about the level of self-interest in the Australian community. The Committee considers that, in any reform of the current human rights agenda, respect for others and individual responsibilities should be stressed.

Although, in the Committee's view, there is no need for additional responsibilities to be codified into law, there is a need to emphasise and increase awareness of the importance of individual and community responsibility if individual rights are to be respected. There was general community agreement that people have a responsibility to respect the legal rights of others. If society is to function cohesively, a commitment to rights and a commitment to responsibilities are required in equal measure. Respect is a more positive moral obligation than the negative legal obligation not to breach the legal rights of others, and respect is essential if a deeper culture of rights is to take root in Australian society.

At present not all human rights are recognised and protected in Australian domestic law, but citizens, non-government organisations, corporations, public authorities and governments have a moral obligation not to breach the human rights of others, even when those rights have not been expressly recognised in Australian law. This responsibility can be discharged only if some individuals and groups in the community take responsibility for educating others about human rights. It will be discharged in organisations only if those in leadership roles provide the inspiration and the resources for education in and instilling of human rights. The economic and social rights most invoked during the Consultation—the rights to the highest attainable standard of health, to housing and to education—are not always enjoyed by people who 'fall through the cracks' in Australian society. In difficult economic times in particular, it is irresponsible if citizens leave the realisation of these rights for marginalised people to the government and the marginalised themselves. The Committee notes the submission of the Shop, Distributive and Allied Employees' Association:

The poor, dispossessed and those without a voice can and should be classified as a class within society. They should not be seen as individuals down on their luck. The poor, dispossessed and those without a voice should burden the conscience of society generally. They are the class whose dignity is being assaulted.<sup>4</sup>

People who enjoy their rights to the full in the land of the fair go have a responsibility for those who are marginalised. Better off members of society do have a responsibility to exercise their political power and social influence for the wellbeing of people who miss out.

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<sup>4</sup> Shop, Distributive and Allied Employees' Association, Submission.



## 15.2 **Are our human rights currently sufficiently protected and promoted?**

Colmar Brunton Social Research found ‘only 10% of people reported that they had ever had their rights infringed in any way, with another 10% who reported that someone close to them had had their rights infringed’.<sup>5</sup> The consultants reported that the bulk of participants in focus groups had very limited knowledge of human rights:

They had never felt their rights to be under threat, were generally unable to distinguish the concept of rights protection from service delivery or their daily experiences of receiving the benefits of human rights, and largely saw an absence of formalised protections as offering no real threat to their long-term welfare.<sup>6</sup>

Sixty-four per cent of survey respondents agreed that human rights in Australia are adequately protected; only 7 per cent disagreed; the remaining 29 per cent were uncommitted.<sup>7</sup> The Secretariat was able to assess 8671 submissions that expressed a view on the adequacy or inadequacy of the present system: of these, 2551 thought human rights were adequately protected, whereas 6120 (70 per cent) thought they were not.

There is enormous diversity in the community when it comes to understanding of and perspectives on rights protection.

Australia has a patchwork quilt of protection for human rights. We have made commitments to a range of obligations under international human rights law, but these obligations are enforceable in Australia only if implemented in domestic legislation. Although there are numerous mechanisms for holding Australia accountable at the international level, they are not legally binding and their recommendations can be, and have been, ignored by Australian governments. We also have strong democratic institutions, but they do not always ensure that human rights—and in particular minority rights—receive sufficient consideration.

The Australian Constitution was not designed to protect individual rights. It contains a few rights, but they are limited in scope and have been interpreted narrowly by the courts. Federal, state and territory legislation protects some human rights, but the legislation can always be amended or suspended to limit or remove that protection. Further, the legislative framework is inconsistent between jurisdictions and difficult to understand and apply.

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<sup>5</sup> Colmar Brunton Social Research, *National Human Rights Consultation—community research report* (2009).

<sup>6</sup> *ibid.*

<sup>7</sup> *ibid.*

Administrative law allows individuals to challenge government decisions and encourages standards of lawfulness, fairness, rationality and accountability. The remedies it offers are, however, limited, and there is no general onus on government to take human rights into account when making decisions.

The common law, which is developed by judges, protects some human rights, but it cannot stop parliament passing legislation that abrogates human rights with clear and unambiguous language. Chief Justice French has recently spoken of ‘the supremacy of Parliament which can, by using clear words for which it can be held politically accountable, qualify or extinguish [common law] rights and freedoms except to the extent that they may be protected by the Constitution’.<sup>8</sup> His predecessor, Mr Murray Gleeson, has said:

Judicial application of human rights standards sometimes provokes complaints that courts are going beyond their constitutional role. Historically, there is a paradox here, and it is worth exploring. Until the latter part of the 20th century, the principal argument advanced against statutory bills of rights was that the common law sufficiently protected our human rights and freedoms, and it would be unnecessary and mischievous to overlay them with legislation inspired by foreign sources. In Australia, that is still an argument with wide popular appeal. My present purpose is not to contradict it; that is a matter on which political opinions may differ. My purpose is to point out that the common law principles which are said to protect us in this way were made, and are continually applied and refined, by judges. If the common law provides adequate safeguards then that is the result of the activity of judges exercising the power to state and develop the common law, not the activity of elected parliamentarians. There is an inconsistency between an assertion that the common law makes legislative protection of human rights unnecessary and a complaint that legislative protection of human rights will empower judges who apply the legislation to make decisions about matters that are inappropriate for judicial decision making. People who believe our rights are sufficiently protected by the common law may or may not be correct, but they should keep in mind that the common law comes from the courts.<sup>9</sup>

As well as the courts, which interpret statutes and develop the common law, there are various oversight mechanisms such as the Australian Human Rights Commission that can review government action. Their powers are, however, limited and their recommendations are usually not enforceable.

The patchwork quilt of protections needs some mending.

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<sup>8</sup> Chief Justice Robert French, ‘The common law and the protection of human rights’ (Speech delivered to the Anglo Australasian Lawyers Society, Sydney, 4 September 2009).

<sup>9</sup> AM Gleeson, ‘Legal interpretation—the bounds of legitimacy’ (Speech delivered at Sydney University, 16 September 2009).

### 15.3 How could Australia better protect and promote human rights?

The Committee commissioned The Allen Consulting Group to conduct cost–benefit analyses of a selection of options proposed during the Consultation for the better protection and promotion of human rights in Australia. The consultants developed a set of criteria against which the potential effects of various options were assessed; the report on the outcome of this assessment is presented here as Appendix D. Each option was evaluated against three criteria—benefits to stakeholders, implementation costs and timeliness, and risks. The options evaluated were a Human Rights Act, human rights education, a parliamentary scrutiny committee for human rights, an augmented role for the Australian Human Rights Commission, review and consolidation of anti-discrimination laws, a new National Action Plan for human rights, and maintaining current arrangements (that is, ‘doing nothing’). Table 1 summarises the consultants’ assessment of the options. The model of Human Rights Act the Committee recommends resembles most closely Model 2.

Table 1 Summary of assessment options: average ranking against categories			
Options	Assessment categories		
	Benefits to stakeholders	Implementation timeliness and costs	Risks
Human Rights Act			
Model 1	4	2	3
Model 2	4	2	3
Model 3	3	3	3
Model 4	2	4	4
Education in relation to human rights			
National curriculum	2	2	2
Public service education	2	2	3
Public awareness–raising measures	2	3	4
Parliamentary scrutiny committee	2	3	4
Increased role for Australian Human Rights Commission	2	3	3
Consolidated anti-discrimination legislation	3	1	3
New National Action Plan for human rights	2	2	4
Do nothing–maintain current arrangements	1	-	-

Notes: Benefits—4 = high, 3 = above average, 2 = moderate, 1 = low; implementation factors—4 = low, 3 = moderate, 2 = above average, 1 = high; risks—4 = low, 3 = moderate, 2 = above average, 1 = high.  
Source: The Allen Consulting Group.

The Allen Consulting Group noted:

While maintaining current arrangements will not incur additional costs, there are ongoing detrimental costs associated with maintaining current human rights arrangements. In summary these include a lack of redress for individuals with human rights complaints (of particular concern for disadvantaged sectors of the community), a lack of clarity concerning human rights obligations in Australia, a lack of community awareness of human rights, and unmet international obligations.<sup>10</sup>

## Education and culture

At many community roundtables participants said they didn't know what their rights were and didn't even know where to find them. When reference was made to the affirmation made by new citizens pledging loyalty to Australia and its people, 'whose rights and liberties I respect', many participants confessed they would be unable to tell the inquiring new citizen what those rights and liberties were and would not even be able to tell them where to look to find out. The Committee notes the observation of historian John Hirst 'that human rights are not enough, that if rights are to be protected there must be a community in which people care about each other's rights'.<sup>11</sup> It is necessary to educate the culturally diverse Australian community about the rights all Australians are entitled to enjoy. Eighty-one per cent of people surveyed by Colmar Brunton Social Research said they would support increased human rights education for children and adults as a way of better protecting human rights in Australia.<sup>12</sup>

At community roundtables there were consistent calls for better education. Of the 3914 submissions that considered specific reform options (other than or in addition to a Human Rights Act), 1197 dealt with the need for human rights education and the creation of a better human rights culture. This was the most frequent reform option raised in those submissions. While 45 per cent of respondents in the opinion survey agreed that 'people in Australia are sufficiently educated about their rights'<sup>13</sup>, Colmar Brunton concluded:

There is strong support for more education and the better promotion of human rights in Australia. It was apparent that few people have any specific understanding of what rights they do have, underlining a real need as well as a perceived need for further education.<sup>14</sup>

This confirms the Committee's experience of the community roundtables.

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<sup>10</sup> The Allen Consulting Group, *Analysis of Options Identified during the National Human Rights Consultation* (2009).

<sup>11</sup> John Hirst, 'From British rights to human rights' in J Leaser and R Haddrick (eds), *Don't Leave Us with the Bill: the case against an Australian bill of rights* (2009) 215, 222.

<sup>12</sup> Colmar Brunton Social Research, *National Human Rights Consultation—community research report* (2009).

<sup>13</sup> *ibid.*

<sup>14</sup> *ibid.*

The Committee recommends that education be the highest priority for improving and promoting human rights in Australia.

As a result of the standard of living and lifestyle most Australians enjoy, there is in the community a level of complacency that is not conducive to the achievement of a positive national human rights culture. The Committee found there is a need for better understanding of and commitment to human rights, to ensure that people can engage in protection and promotion of those rights—both personally and in the way they relate to others. Responsibilities should also be highlighted in any education and awareness campaign.

If Australians are to improve current attitudes and values, in human rights terms, the need to acknowledge the dignity, culture and traditions of other people and the fundamental importance of respecting the rights of others must be better understood.

There is a specific need to improve the understanding of and commitment to human rights within government, in policy and legislative development, and in service delivery. This calls for a framework for public sector decision making that guarantees the adoption of processes attentive to human rights. The Allen Consulting Group noted, however, 'The development of education and training initiatives for the public sector may incur significant costs'.<sup>15</sup>

There is strong public support for better education of public officials who exercise powers of investigation, arrest and detention and perform other duties that are likely to adversely affect the rights and freedoms of ordinary Australians. The Allen Consulting Group noted:

The costs associated with public awareness are not likely to be as high as those associated with developing a national curriculum or implementing public service education programs. Transition costs will be those incurred in initially developing the program or mechanism for the delivery of public awareness raising measures. This may include, for example, grants provided to non-government organisations or local government for the development of public awareness raising campaigns. Educational materials already developed by the AHRC [Australian Human Rights Commission] may be used which would minimise production costs of any new material required.<sup>16</sup>

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<sup>15</sup> The Allen Consulting Group, *Analysis of Options Identified during the National Human Rights Consultation* (2009).

<sup>16</sup> *ibid.*

The Committee recommends as follows:

- that the Federal Government develop a national plan to implement a comprehensive framework, supported by specific programs, of education in human rights and responsibilities in schools, universities, the public sector and the community generally
- that human rights education be based on Australia's international human rights obligations, as well as those that have been implemented domestically (whether in a Human Rights Act or otherwise), and the mechanisms for enforcement of those rights
- that the Federal Government publish a readily comprehensible list of Australian rights and responsibilities that can be translated into various community languages
- that any education and awareness campaign incorporate the experiences of Indigenous Australians—with a particular focus on recent and historical examples of human rights concerns
- that the Federal Government collaborate with non-government organisations and the private sector in developing and implementing its national plan for human rights education.

The Committee's recommendation that a readily comprehensible list of Australian rights and responsibilities be published and translated into various community languages follows from Colmar Brunton's finding that there was 'generally more support for a document outlining rights than for a formal piece of legislation per se'.<sup>17</sup> There was wide support for this idea in the focus groups, and 72 per cent of those surveyed thought it was important to have access to a document defining their rights.<sup>18</sup> Even more significantly, Colmar Brunton found:

In the devolved consultation phase with vulnerable and marginalised groups there was a very consistent desire to have rights explicitly defined so that they and others would be very clearly aware of what rights they were entitled to receive.<sup>19</sup>

Sixty-one per cent of people surveyed supported 'a non-legally binding statement of human rights principles issued by the Federal Parliament and available to all people and organisations in Australia'.<sup>20</sup>

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<sup>17</sup> Colmar Brunton Social Research, *National Human Rights Consultation—community research report* (2009).

<sup>18</sup> *ibid.*

<sup>19</sup> *ibid.*

<sup>20</sup> *ibid.*

The Committee recommends that its proposed readily comprehensible list of Australian rights and responsibilities include commitments such as the responsibility:

- to respect the rights of others
- to support parliamentary democracy and the rule of law
- to uphold and obey the laws of Australia
- to serve on a jury when required
- to vote and to ensure to the best of our ability that our vote is informed
- to show respect for diversity and the equal worth, dignity and freedom of others
- to promote peaceful means for the resolution of conflict and just outcomes
- to acknowledge and respect the special place of our Indigenous people and acknowledge the need to redress their disadvantage
- to promote and protect the rights of the vulnerable
- to play an active role in monitoring the extent to which governments are protecting the rights of the most vulnerable
- to ensure that we are attentive to the needs of our fellow human beings and contribute according to our means.

### **Better attention to human rights in policy and legislation**

The Committee finds that insufficient attention is paid to human rights when the Federal Government and parliament are formulating policy and legislation. Australia should in the long term comply with and implement all its international human rights obligations. Although governments and parliaments should never unduly trespass on civil and political rights, their obligations in relation to economic and social rights are best expressed in terms of progressive realisation. It is necessary to ensure that laws and policies are reasonably tailored, within the constraints of the available resources, to progressively achieving the full realisation of these rights.

In the Colmar Brunton survey the options attracting the greatest support for improving the protection of human rights in Australia were parliament being required to pay attention to human rights when making laws (90 per cent) and government being required to pay more attention to human rights when developing new laws and policies (85 per cent).<sup>21</sup>

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<sup>21</sup> *ibid.*

At community roundtables the Committee heard constant calls for government and parliament to be more attentive to human rights when considering new laws and policies. The Committee finds there is a need to better integrate human rights considerations into the development of legislation and policy and in the parliamentary process. During the Consultation no serious objection emerged to the proposals, endorsed by the Federal Opposition, that there be an audit of Commonwealth laws for human rights compliance and that there be improved parliamentary scrutiny of proposed new laws.

The Committee recommends as follows:

- that the Federal Government conduct an audit of all federal legislation, policies and practices to determine their compliance with Australia's international human rights obligations, regardless of whether a federal Human Rights Act is introduced. The government should then amend legislation, policies and practices as required, so that they become compliant
- that, in the conduct of the audit, the Federal Government give priority to the following areas:
  - anti-discrimination legislation, policies and practices
  - national security legislation, policies and practices
  - immigration legislation, policies and practices
  - policies and practices of Australian agencies that could result in Australians being denied their human rights when outside Australia's jurisdiction.

Given that it will be necessary to assess legislative proposals, laws and administrative acts against human rights measures, it will be necessary to know *which* human rights are relevant. For consistency and completeness, it would be best to ensure compliance with all of Australia's international human rights obligations using a stand-alone, consolidated document that takes account of matters such as overlapping rights and the modification of rights for the Australian context. This would be more manageable than the seven main treaties (while accurately reflecting their content); it would also be more relevant to the Australian context and could be used as an educational tool.

The exercise of consolidating all Australia's international human rights obligations will be quite technical, however, and will take time. In the interim a list of those rights against which government action may be measured should be developed by the Attorney-General's Department. It should include the civil and political rights listed in the International Covenant on Civil and Political Rights and the primary economic and social rights listed in the International Covenant on Economic, Social and Cultural Rights that are of greatest concern to those who participated in all



aspects of the Consultation—the right to adequate housing, the right to the highest attainable standard of physical and mental health, and the right to education.

The Committee recommends that the Federal Government immediately compile an interim list of rights for protection and promotion, regardless of whether a Human Rights Act is introduced. The list should include rights from the International Covenant on Civil and Political Rights as well as the following rights from the International Covenant on Economic, Social and Cultural Rights that were most often raised during the Consultation: the right to an adequate standard of living (including food, clothing and housing); the right to the highest attainable standard of health; and the right to education.

The government should replace the interim list of rights with a definitive list of Australia's international human rights obligations within two years of the publication of the interim list.

The Committee recommends that a statement of compatibility be required for all Bills introduced into the Federal Parliament, all Bills before the third reading (so as to allow scrutiny of amendments) and legislative instruments as defined by the *Legislative Instruments Act 2003* (Cth). The statement should assess the law's compatibility with the proposed interim list of rights and, later, the definitive list of Australia's human rights obligations.

The Committee recommends that a Joint Committee on Human Rights be established to review all Bills and relevant legislative instruments for compliance with the interim list of rights and, later, the definitive list of Australia's human rights obligations.

The Allen Consulting Group noted:

In terms of costs associated with a scrutiny committee, these initially consist of costs accruing to the parliament associated with — recruitment of staff, new legislation clarifying the terms of reference, education about the revised committee to MPs and their advisers, education to government departments about the committee's new role, and, education to the committee members themselves and their research staff about how the reformed committee would work. The committee's ongoing role requires government funding for expert advice.<sup>22</sup>

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<sup>22</sup> The Allen Consulting Group, *Analysis of Options Identified during the National Human Rights Consultation* (2009).

If the establishment of a Joint Committee on Human Rights is not practical on the grounds of cost or because of the workload of parliamentarians serving on existing committees, it would be essential for the resources and mandate of the Senate Scrutiny of Bills and Regulations and Ordinances Committees to be augmented. While parliament awaits the definitive list of Australia's international human rights obligations, the proposed Joint Committee on Human Rights should be resourced to inquire into whether a proposed law unduly trespasses on civil and political rights or displays insufficient regard for the progressive realisation of the primary economic and social rights.

Were parliament minded to wait until the definitive list has been prepared and agreed on before establishing the new Joint Committee on Human Rights, consideration could be given to the suggestion put forward by former long-term Chair of the Scrutiny of Bills Committee, Father Michael Tate, that the Standing Orders of the Senate be amended to provide as follows:

At the commencement of each Parliament, a Standing Committee for the Scrutiny of Bills and Acts shall be appointed to declare, in respect of the clauses of Bills introduced into the Senate, and in respect of Acts of the Parliament, whether such Bills or Acts, by express words or otherwise:

- (i) trespass unduly on personal rights and liberties recognised or expressed under the Australian Constitution, in the Common Law, in statutes of the Parliament, or in treaties ratified by the Government of Australia and incorporated into law.<sup>23</sup>

## **Better attention to human rights in practice**

Instilling a human rights culture in the federal public sector is integral to better protection and promotion of human rights in Australia.

The Committee recommends as follows:

- that the Federal Government develop a whole-of-government framework for ensuring that human rights—based either on Australia's international obligations or on a federal Human Rights Act, or both—are better integrated into public sector policy and legislative development, decision making, service delivery, and practice more generally
- that the Federal Government nominate a Minister responsible for implementation and oversight of the framework and for annual reporting to parliament on the operation of the framework.

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<sup>23</sup> M Tate, Submission.

The Committee recommends that the Federal Government incorporate human rights compliance in the Australian Public Service Values and Code of Conduct.

The Committee recommends that the Federal Government require federal departments and agencies to develop human rights action plans and report on human rights compliance in their annual reports.

The Committee recommends that the *Administrative Decisions Judicial Review Act 1975* (Cth) be amended in such a way as to make the definitive list of Australia's international human rights obligations a relevant consideration in government decision making.

The Committee recommends that, in the absence of a federal Human Rights Act, the *Acts Interpretation Act 1901* (Cth) be amended to require that, as far as it is possible to do so consistently with the legislation's purpose, all federal legislation is to be interpreted consistently with the interim list of rights and, later, the definitive list of Australia's human rights obligations.

Although not recommending that the Australian Human Rights Commission have the power to review the policies and practices of public authorities on its own initiative, the Committee does recommend that the commission's functions and resources for hearing complaints be augmented, to ensure that it is able to effectively monitor human rights compliance at the federal level. It is the body most suitable for investigating complaints that the Commonwealth Government has failed to pay due heed to economic and social rights. In the light of the concerns that were raised about the justiciability of economic, social and cultural rights, and the limited experience to draw on from other jurisdictions, the Committee concludes that, where it is not possible to reach a settlement of these complaints by conciliation, recourse to the courts should not be available. The commission could, however, report to the Attorney-General on the matter.

The Committee recommends that the functions of the Australian Human Rights Commission be augmented to include the following:

- to expand the definition of 'human rights' in the Australian Human Rights Commission Act to include the following instruments:
  - the International Covenant on Civil and Political Rights

- the International Covenant on Economic, Social and Cultural Rights
  - the Convention on the Elimination of All Forms of Racial Discrimination
  - the Convention on the Elimination of All Forms of Discrimination against Women
  - the Convention against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment
  - the Convention on the Rights of the Child
  - the Convention on the Rights of Persons with Disabilities
  - the Declaration on the Rights of Indigenous Peoples.
- to examine any Bill at the request of the federal Attorney-General or the proposed Joint Committee on Human Rights for the purpose of ascertaining if any provision in the Bill is inconsistent with or contrary to any human right in the interim list and, later, the definitive list of Australia's human rights obligations
  - to inquire into any act or practice of a federal public authority or other entity performing a public function under federal law that might be inconsistent with or contrary to any obligation in the interim list of human rights and, later, the definitive list of Australia's human rights obligations
  - to provide the same remedies for complaints of human rights violations and International Labour Organization Convention 111 complaints as for unlawful discrimination, permitting determination by a court when settlement cannot be reached by conciliation—except in relation to complaints of violations of economic, social and cultural rights, in which case there should be no scope to bring court proceedings where conciliation has failed.

The Federal Government should be required to table a response to any Australian Human Rights Commission report on complaints within six months of receiving that report.

Access to justice is limited for many Australians, and the Federal Government should make greater efforts to remove the barriers and so ensure more effective protection of human rights. Of the 3914 submissions that canvassed reform options other than a Human Rights Act, 1083 raised improved access to justice—the most discussed reform option after human rights education. Given the costs involved in such reform, however, the Committee can do no more than the following.

The Committee recommends that the Federal Government develop and implement a framework for improving access to justice, in consultation with the legal profession and the non-government sector.

## Human rights and Indigenous Australians

Of the 14 390 submissions that discussed particular topics other than a Human Rights Act or other reform options, 1309 raised racism, 581 Indigenous rights, 235 the Northern Territory Emergency Response (the 'Intervention') and 191 the *Racial Discrimination Act 1975* (Cth). At most community roundtables there was some discussion of Indigenous rights and entitlements.

The Committee recommends that a 'statement of impact on Aboriginal and Torres Strait Islander peoples' be provided to the Federal Parliament when the intent is to legislate exclusively for those peoples, to suspend the *Racial Discrimination Act 1975* (Cth) or to institute a special measure. The statement should explain the object, purpose and proportionality of the legislation and detail the processes of consultation and the attempts made to obtain informed consent from those concerned.

The Committee recommends that, in partnership with Indigenous communities, the Federal Government develop and implement a framework for self-determination, outlining consultation protocols, roles and responsibilities (so that the communities have meaningful control over their affairs) and strategies for increasing Indigenous Australians' participation in the institutions of democratic government.

If the Federal Government and its agencies were to collect data from Indigenous peoples within an Indigenous framework, this would help to maintain the accuracy and integrity of the data. There is also a need for a comprehensive, nationally accredited interpreting service for Aboriginal and Torres Strait Islander peoples who are not proficient in English. Additionally, statutory or constitutional acknowledgment could be made of Indigenous Australians as the original inhabitants of this land, along with acknowledgment of their right to practise and observe their own customs and traditions.

### 15.4 **Should the Federal Parliament contemplate an Australian Human Rights Act?**

All the Committee's recommendations to date could be implemented regardless of whether the Federal Parliament passes a Human Rights Act. If the recommendations already made were adopted, protection and promotion of human rights in Australia would be much improved.

The clearest division of opinion at all stages of the Consultation was over the question of an Australian Human Rights Act. There is no community consensus on the matter, and there is strong disagreement in the parliament. At one end of the

spectrum are those who advocate a national law that guarantees all rights set down in any international instrument ratified by Australia and that would be binding on all levels of government, allowing the courts to strike down inconsistent legislation and to rule on inconsistent policy. At the other end are those who say 'If it ain't broke, don't fix it'. They see no need for a national law on human rights—not because they do not care about human rights but because they are confident that the existing arrangements, with a little tweaking, are adequate for protecting such rights.

The majority of those attending community roundtables favoured a Human Rights Act, and 87.4 per cent of those who presented submissions to the Committee and expressed a view on the question supported such an Act—29 153 out of 33 356. In the national telephone survey of 1200 people, 57 per cent expressed support for a Human Rights Act, 30 per cent were neutral, and only 14 per cent were opposed.<sup>24</sup> Survey respondents were asked for their opinions about five different ways of protecting human rights. Although 49 per cent strongly supported parliament paying attention to human rights when making laws<sup>25</sup>, only 23 per cent strongly supported a specific Human Rights Act that defined the human rights to which all people in Australia are entitled.<sup>26</sup> It was the question of a Human Rights Act that prompted GetUp!, Amnesty International Australia and the Australian Christian Lobby to conduct public campaigns during the Consultation: of the 29 153 submissions in favour of a Human Rights Act, 26 382 were campaign submissions. The question of an Act was what led to most media commentary and spawned the publication of several books. At the public hearings people spoke eloquently for and against an Act.

In addition to the thousands of submissions from individual citizens, the Committee was privileged to receive many well-researched submissions from non-government organisations, community groups, human rights commissions, governments, academic institutions, and distinguished academics and public advocates experienced in debating the utility and desirability of an Australian Human Rights Act.

All who contributed such submissions displayed a strong commitment to the protection and promotion of human rights. The disagreement was about how best to protect and promote those rights in contemporary Australia. For some, the calculus was simple: if Australia has ratified an international human rights treaty, it ought then at the national level legislate to ensure that the rights acknowledged in the treaty are enforceable—if need be, against all levels of government—in Australian courts. They saw all such rights as universal and indivisible and insisted that courts

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<sup>24</sup> Colmar Brunton Social Research, *National Human Rights Consultation—community research report* (2009).

<sup>25</sup> *ibid.*

<sup>26</sup> *ibid.*

should be able to enforce economic and social rights in the same way as they can civil and political rights.

Some people think the Federal Government should take unilateral action to protect some rights; others say the Federal Government should get its own house in order, leading by example and not imposing its will on state and territory governments. Even the Victorian Government, which is proud of its Charter of Human Rights and Responsibilities, recommended 'the enactment of a Federal Charter that applies to federal public authorities only and does not apply to the states'.<sup>27</sup> A potential disadvantage of a federal system is that laws and procedures governing the same conduct can vary, but an advantage of such a system is that different jurisdictions can experiment with different laws and policies. Over time, it might be possible to detect very different human rights outcomes between, say, Victoria, which has its charter, and New South Wales, which has none. It is early days. Those speaking of the costs and benefits of the Victorian and ACT human rights legislation can sometimes overstate their case.

Many who urged a greater role for the courts in protecting human rights conceded that parliament should still have the final word on contentious matters. Australians generally would not want to see judges having the last word on matters such as abortion and euthanasia. Retired Chief Justice Sir Anthony Mason, a supporter of some form of statutory bill of rights, has said:

Under a human rights regime, these issues are determined by reference to the very broad concept of the 'right to life'. That broad and abstract concept offers very little philosophical or practical guidance on how the two critical issues of euthanasia and abortion should be resolved. The result is that, under a human rights regime, it is left to the judges to reason to a conclusion on these issues from a vague abstract concept. Reasoning of this kind is unlikely to be convincing when the issue is one on which the community holds strong views. In these situations there is much to be said for accepting the majoritarian approach and leaving it to the political process. At least it can be said that the outcome has popular support.<sup>28</sup>

Similarly, same-sex marriage and exemptions from discrimination laws for single-gender clubs and religious organisations would be best left for the parliament to resolve.

The so-called dialogue model of a Human Rights Act would sit more comfortably with Australians than other models because, even when the courts have expressed a view about the limits on rights, most Australians would prefer parliament to express the final view, once it had received a further opinion from the executive in

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<sup>27</sup> Victorian Government, Submission.

<sup>28</sup> Sir Anthony Mason, 'The death of human rights? And related issues' (Speech delivered at the Australian National University, 24 August 2007).

response to an adverse court finding. The rights regime remains subject to parliament's will. As noted in Chapter 2, at the public hearings same-sex marriage advocate Rodney Croome asked, 'If a charter can't deal effectively with the hard issues what's the point?' Under a suitable Australian charter, the 'hard issues' could be considered by government, parliament and the courts, but the last word would remain with parliament.

It is appropriate that the Committee sets out the features of an Australian Human Rights Act that in its opinion most accurately reflect the concerns expressed by the community and are most compatible with existing constitutional arrangements. Of course, it is a decision for government whether to introduce a Human Rights Bill into parliament. Nevertheless, the Committee sets out here the desirable characteristics of such a Bill.

It would be counter-productive and unwise to have the Federal Parliament impose on the states and territories a catalogue of human rights and a process for determining the regular limitation of those rights. Given the history of attempts to legislate for human rights at the national level in Australia, the Committee thinks the Commonwealth should look to its own affairs and lead by example. The ACT Human Rights Act and the Victorian charter are novel Australian approaches to the protection of human rights. The ACT Act is at present being reviewed, and the Victorian charter will be reviewed in 2011. Over time, other states might decide to adopt similar laws, or they might not. In the Committee's view, it would be prudent for any federal government contemplating an Australian Human Rights Act to consider legislating in a manner broadly consistent with the best elements of the existing Victorian and ACT laws.

Any Human Rights Bill should be drafted so as to apply only to the Commonwealth and those public authorities exercising functions under Commonwealth law. The rights should be enjoyed only by human beings and not by corporations.

The Committee recommends that any federal Human Rights Act protect the rights of human beings only and that the obligation to act in accordance with those rights be imposed only on federal public authorities—including federal Ministers, federal officials, entities established by federal law and performing public functions, and other entities performing public functions under federal law or on behalf of another federal public authority.

The Committee recommends that any federal Human Rights Act protect the rights of all people in Australia and all people who are overseas but subject to Australian jurisdiction.



## Which rights?

### **Economic and social rights**

For most Australians the main concern is the realisation of primary economic and social rights such as the rights to education, housing and the highest attainable standard of health. The Committee acknowledges that it would be very difficult, if not impossible, to make such rights matters for determination in the courts.

In our robust democracy these are the very rights that feature most often in political debate, especially at election time. They are the rights that are scrutinised by specialist parliamentary committees on health and ageing, education and training, family, community, housing and youth. They are the rights that demand large resource allocations by government. No matter what the level of public deliberation in allocating scarce resources for securing these rights, there will always be some people who miss out. Being a signatory to the International Covenant on Economic, Social and Cultural Rights, Australia is committed to taking steps 'to the maximum of its available resources, with a view to achieving progressively the full realisation of the rights ... by all appropriate means, including particularly the adoption of legislative measures'.<sup>29</sup>

It is usually the state and territory governments that deliver services associated with the protection of these rights: the Federal Government generally does not run schools, hospitals, and community housing programs. Because Australia is so large, it is most often in remote areas where the Federal Government has no presence that people miss out on the enjoyment of these rights. The Commonwealth's usual role is the provision of funds and the attaching of conditions to government grants.

In South Africa at present the Constitutional Court is unique in being a court with a broad mandate under the Constitution to determine whether the State has taken 'reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of these rights'. The Committee considers that it is not prudent to impose this role on Australian federal courts. Many judges and retired judges have expressed strong reservations about the courts' capacity to determine the limits on economic and social rights, saying it is not appropriate for judges to opine on whether the government has dedicated enough resources to achieving particular economic and social rights.

At the Mintabie roundtable the Committee was struck by the dilemma confronting any government trying to deliver services to small, remote communities. There, the decision had been made to close the health clinic, whereas the primary school was to be maintained. If it came to a choice between the maintenance of the clinic or the primary school, there would be no suitable criteria a judge could apply to make

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<sup>29</sup> International Covenant on Economic, Social and Cultural Rights art. 2.1.

such a determination. If the residents had petitioned the court to maintain the clinic, the judge might not even be apprised of the fact that the school was being maintained.

The Committee endorses the observations of Professor Tom Campbell and Dr Nicholas Barry:

Courts have a bias towards negative rights, which protect the individual from interference by the state. Because ensuring the protection of socioeconomic rights requires positive action by the state, it involves decisions about the allocation of state resources which courts do not have the expertise or information to make.<sup>30</sup>

The Committee recommends that, if economic and social rights are listed in a federal Human Rights Act, those rights not be justiciable and that complaints be heard by the Australian Human Rights Commission. Priority should be given to the following:

- the right to an adequate standard of living—including adequate food, clothing and housing
- the right to the enjoyment of the highest attainable standard of physical and mental health
- the right to education.

Statements of compatibility would need to deal with whether the proposed legislation is reasonably tailored to progressive realisation of these rights. That will also be a matter for consideration by the proposed Joint Committee on Human Rights.

### **Non-derogable civil and political rights**

Unlike the International Covenant on Economic, Social and Cultural Rights, the International Covenant on Civil and Political Rights makes no concession to the need for progressive realisation of rights. As a signatory to the latter, Australia is committed to ensuring for ‘all individuals within its territory and subject to its jurisdiction the rights recognized’ in the covenant. Six of those rights are expressed in absolute terms (‘No one shall be ...’) and are non-derogable, meaning that government cannot derogate from its obligation to protect these rights, even in times of national emergency. These are rights that are so fundamental they should never be breached or limited. A Human Rights Act could define these rights as follows.

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<sup>30</sup> T Campbell and N Barry, Submission.

The Committee recommends that the following non-derogable civil and political rights be included in any federal Human Rights Act, without limitation:

- *The right to life.* Every person has the right to life. No one shall be arbitrarily deprived of life. The death penalty may not be imposed for any offence.
- *Protection from torture and cruel, inhuman or degrading treatment.* A person must not be
  - subjected to torture
  - or
  - treated or punished in a cruel, inhuman or degrading way
  - or
  - subjected to medical or scientific experimentation without his or her full, free and informed consent.
- *Freedom from slavery or servitude.* A person must not be held in slavery or servitude.
- *Retrospective criminal laws.*
  - A person must not be found guilty of a criminal offence as a result of conduct that was not a criminal offence when the conduct was engaged in.
  - A penalty imposed on a person for a criminal offence must not be greater than the penalty that applied to the offence when it was committed.
  - If a penalty for an offence is reduced after a person committed the offence but before the person is sentenced for that offence, the reduced penalty should be imposed.
  - Nothing in the foregoing affects the trial or punishment of any person for any act or omission that was a criminal offence under international law at the time the act or omission occurred.
- *Freedom from imprisonment for inability to fulfil a contractual obligation.* A person must not be imprisoned solely on the ground of inability to fulfil a contractual obligation.
- *Freedom from coercion or restraint in relation to religion and belief.* No person will be subject to coercion that would impair his or her freedom to have or to adopt a religion or belief of his or her choice.

The right to a fair trial should also not be limited.

While the right to life is not regarded as ‘absolute’ under international law, the Committee considers it could be regarded as such in Australia, where the death penalty has been abolished. The six rights just listed should not be subject to any general limitation provision included in a Human Rights Act.

The right to a fair trial should also not be limited in a fair and democratic society and, although it is not included in the foregoing list of non-derogable rights agreed 40 years ago in the International Covenant on Civil and Political Rights, there is a strong case for this right’s inclusion. A fair trial before an independent and impartial tribunal was raised at many community roundtables and was identified as an important right by 92 per cent of those surveyed by Colmar Brunton Social Research.<sup>31</sup>

Some will argue that there is no prospect of these rights being infringed in Australia, so why bother to legislate for them? The facts that any infringement of these rights would be indefensible and that most Australians hold such rights as sacrosanct create a strong case, in the opinion of the Committee, for these rights being guaranteed by Commonwealth law.

If in future a Federal Parliament were to legislate to interfere with these rights—as it could in theory, considering that not even these rights are included in the Constitution and put beyond the reach of parliament—the public would be aware that the rights were being infringed. There could be no argument that the limitation of these rights was reasonably justified in a democratic society.

### **Other civil and political rights**

The Committee received many submissions and heard many pleas at community roundtables calling for an Australian Human Rights Act that mirrors the main provisions of the Victorian and ACT human rights legislation. Some in the community see the need for an enhanced role by the courts in protecting civil and political rights. Rights other than the non-derogable ones are regularly limited in a free and democratic society—to accommodate other people’s rights or to promote the common good, the public interest, national security or public morality. The Committee accepts that there is a need to set limits on these rights and that those limits need to be justified.

The Committee recommends that the following additional civil and political rights be included in any federal Human Rights Act:

- the right to freedom from forced work

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<sup>31</sup> Colmar Brunton Social Research, *National Human Rights Consultation—community research report* (2009).

- the right to freedom of movement
- the right to privacy and reputation
- the right to vote
- the right to freedom of thought, conscience and belief
- freedom to manifest one's religion or beliefs
- the right to freedom of expression
- the right to peaceful assembly
- the right to freedom of association
- the right to marry and found a family
- the right of children to be protected by family, society and the State
- the right to take part in public life
- the right to property
- the right to liberty and security of person
- the right to humane treatment when deprived of one's liberty
- the right to due process in criminal proceedings
- the right not to be tried or punished more than once
- the right to be compensated for wrongful conviction.

Although a right to property is not specifically mentioned in the International Covenant on Civil and Political Rights, it is often characterised as one of the few rights guaranteed in the Australian Constitution. Given that 91 per cent of the survey respondents thought it was important or very important 'to be able to own land or property that you can afford to purchase'<sup>32</sup>, the Committee would opt for the Victorian rather than the ACT approach by including a provision on property rights. The Committee does, however, question the usefulness of the Victorian provision—'A person must not be deprived of his or her property other than in accordance with the law'.<sup>33</sup> At the very least, the provision should provide for just compensation and due process for the compulsory acquisition by the Commonwealth of property required for public purposes.

The Victorian charter does not provide for compensation for wrongful conviction: the Victorian Consultation Committee advised against such a right on the ground it

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<sup>32</sup> *ibid.*

<sup>33</sup> *Charter of Human Rights and Responsibilities 2006 (Vic) s. 20.*

might entail a right to damages.<sup>34</sup> But such a right should be included in any Australian Human Rights Act, to ensure compliance with the International Covenant on Civil and Political Rights, which provides:

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.<sup>35</sup>

### **Other rights Australia has undertaken to respect**

There would be some rights not included in a Human Rights Act, but they should be included in the definitive list of Australia's human rights obligations. These additional rights would still be relevant when government is proposing legislation and when the recommended Joint Committee on Human Rights is scrutinising proposed legislation. There could also be a need for specific legislation to fill gaps in the protection of these rights.

### **The process of law making**

Amidst the controversy about the utility and cost of an Australian Human Rights Act, the Committee was required to consider only those options that preserve the sovereignty of parliament. At every major community roundtable there was at least a handful of citizens agitating for a constitutional bill of rights.<sup>36</sup> In the other corner of the room there was just as often a group claiming that Magna Carta was all that was needed to preserve our rights. It is beyond the Committee's terms of reference to consider a constitutionally entrenched bill of rights.

If parliament were minded to legislate for an Australian Human Rights Act, the Committee recommends a model that provides the means for each branch of government to play its specialist role. This is sometimes called the 'dialogue' model, although critics of the terminology rightly point out that it does not lead to conversation. Rather, each party contributes and responds to the contribution of other parties to the dialogue. The model works thus:

1. The executive proposes to parliament a Bill the executive has drawn up with an eye to compliance with the relevant listed human rights. The executive provides

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<sup>34</sup> Victorian Human Rights Consultation Committee, *Rights, Responsibilities and Respect: the report of the Human Rights Consultation Committee* (2005) 44. Such a right is included in the *Human Rights Act 2004* (ACT) s. 23; it replicates the International Covenant on Civil and Political Rights art. 14.6.

<sup>35</sup> International Covenant on Civil and Political Rights art. 14.6.

<sup>36</sup> Robert Oakeshott MP also provided a submission arguing for constitutional entrenchment of rights—R Oakeshott, Submission.

a statement of compatibility, attesting that any limits on the relevant rights are limits that can be demonstrably justified in a free and democratic society.

2. The parliament considers the Bill through its Parliamentary Committee on Human Rights, which decides whether it agrees with the executive's assessment of the Bill or decides to legislate nonetheless, even though the Bill entails excessive interference with a particular right.
3. When a person claiming an unwarranted infringement of their right applies for a remedy in court, the court interprets the law consistently with human rights and in a manner that is also consistent with the purpose of the law. The court might find that any limitation on the right in the particular instance is demonstrably justified in a free and democratic society, or it can issue a declaration of incompatibility, having given the executive the opportunity to be heard on the question of human rights compliance.
4. The effect of the declaration of incompatibility is that the law remains valid but the executive is required once again to provide to parliament a justification for or explanation of the law.
5. Parliament then has the opportunity to reconsider the legislation in the light of what has transpired during this process.

The Committee is of the view that this model is completely consistent with the sovereignty of parliament because parliament retains the last word on the content of the legislation. The procedure described gives parliament the opportunity to re-examine legislation that might provoke an unforeseen interference with human rights that comes to light only when a wronged person brings proceedings against government in the courts.

The Committee recommends that any federal Human Rights Act be based on the 'dialogue' model.

The Committee recommends that any federal Human Rights Act require statements of compatibility to be tabled for all Bills introduced into the Federal Parliament, all Bills before the third reading (so as to allow scrutiny of amendments) and legislative instruments as defined by the *Legislative Instruments Act 2003*.

The Committee recommends that any federal Human Rights Act empower the proposed Joint Committee on Human Rights to review all Bills and the relevant legislative instruments for compliance with the human rights expressed in the Act.

## The limits on human rights

The Committee notes that the Victorian and ACT laws contain similar provisions setting out the criteria for when a human right may be limited by law. The Victorian charter provides:

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

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

If included in a federal Human Rights Act, such a limitation provision would not apply to ‘non-derogable’ rights, as outlined. The Committee finds this a suitable test, although it does wonder whether the word ‘demonstrably’ adds anything to the test for justified limitations on rights. Some say it adds to the onus of proof.

The Committee recommends that a limitation clause for derogable civil and political rights, similar to that contained in the Australian Capital Territory and Victorian human rights legislation, be included in any federal Human Rights Act.

This recommendation is made on the assumption that a court deciding that the limits on a right were ‘justified in a free and democratic society’ would be validly exercising judicial power.

## Interpretation of legislation

The Victorian and ACT laws now contain similar clauses relating to the interpretation of legislation: ‘So far as it is possible to do so consistently with their purpose, all statutory provisions must be interpreted in a way that is compatible with human rights’.<sup>37</sup>

The Solicitor-General advised the Committee that ‘such an interpretation provision would avoid the extremes of the United Kingdom approach and would be compatible with the exercise of judicial power as traditionally understood in

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<sup>37</sup> *Charter of Human Rights and Responsibilities 2006* (Vic) s. 32(1); compare *Human Rights Act 2004* (ACT) s. 30.



Australia'.<sup>38</sup> On the basis of this advice, the Committee considers that, for national consistency, it would be desirable for any Commonwealth law to have the same provision, thus making it clear that the courts would always interpret Commonwealth laws compatibly with human rights and (unlike the situation in the United Kingdom) consistently with parliament's intention.

The Committee recommends that any federal Human Rights Act contain an interpretative provision that is more restrictive than the UK provision and that requires federal legislation to be interpreted in a way that is compatible with the human rights expressed in the Act and consistent with parliament's purpose in enacting the legislation. The interpretative provision should not apply in relation to economic, social and cultural rights.

### **Declarations of incompatibility**

During the Consultation there was considerable academic legal controversy about the constitutionality of a court making a declaration of incompatibility in relation to a Commonwealth law. The Committee always said it would consider only those options that were constitutionally watertight. The Solicitor-General advised the Committee that a declaration of incompatibility by a court is not to be characterised 'as incidental or ancillary to the exercise of judicial power'.<sup>39</sup> Rather, he considers it 'to be itself an exercise of judicial power and for that reason likely to be held constitutional'.<sup>40</sup> Importantly, this conclusion is based on the assumption that a declaration of incompatibility 'could be made only in proceedings for some other relief or remedy'<sup>41</sup> and 'only if a court were satisfied that a Commonwealth law is incompatible with a right or freedom' set out in a Human Rights Act.<sup>42</sup> In addition, the Solicitor-General stated that prospects of constitutional validity would be improved if there were a requirement that the declaration be binding as between the parties<sup>43</sup> and a requirement that the Attorney-General be joined as a party to such a proceeding.<sup>44</sup>

As noted, the Committee's terms of reference require all options identified to preserve the sovereignty of parliament. Some critics of the Victorian and ACT models, which are based on the UK Human Rights Act, thought it improper that courts be asked to do anything more than their customary task of interpreting legislation. They thought it improper to have courts issuing declarations of incompatibility that might become political weapons in parliamentary debate if the

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<sup>38</sup> S Gageler and H Burmester, SG No. 40 of 2009, 7.

<sup>39</sup> *ibid.* 12.

<sup>40</sup> *ibid.*

<sup>41</sup> *ibid.* 6.

<sup>42</sup> *ibid.*

<sup>43</sup> *ibid.* 9.

<sup>44</sup> *ibid.*

government were not inclined to propose or support amendments to its impugned legislation. This, they argued, would be an unwarranted interference by the judiciary in the affairs of parliament. And they thought it inaccurate to describe such a declaration as part of a dialogue since the executive would simply be handed a judicial ultimatum on the floor of the parliament.

The Committee does not agree with this interpretation of the effect of declarations of incompatibility. Rather, it commends the process as being consistent with the traditional roles of the three arms of government. Should this aspect of the model prove impractical or unacceptable to legislators, consideration could be given to allowing members of parliament, rather than the courts, to trigger the legislative review process.

Under the dialogue model it is usually only the jurisdiction's highest court that is able to issue a formal declaration of incompatibility or inconsistency. The Committee therefore considers it would be appropriate for parliament to require the executive to respond formally only to declarations of incompatibility by the High Court. Should a lower court make adverse observations about a Commonwealth law's consistency with the Human Rights Act, members of parliament would, of course, be free to seek an inquiry by the Joint Committee on Human Rights. That committee could then seek a response from the Minister concerned.

There could, however, be a problem with this approach. With the exception of matters that are within the original jurisdiction of the High Court, parties are heard in the High Court only on the grant of special leave to appeal. If a party is seeking a declaration of incompatibility in the High Court, it is most probable that the party will have lost its case in a lower court, having failed to convince the court that the action on the part of the defendant federal public authority is contrary to law. The losing party might have exhausted their cause of action and have no prospect of winning an appeal. The High Court might not be persuaded to grant special leave in a case where the law is clear, where the lawfulness of the public authority's action is established, and where the wronged party is now seeking no remedy other than a declaration of incompatibility.

The Solicitor-General advised the Committee that a declaration of incompatibility would be consistent with the exercise of judicial power, provided it is made in proceedings for some other relief or remedy and provided the court is satisfied that a Commonwealth law is incompatible with a right or freedom set out in the Human Rights Act.<sup>45</sup> The Committee is of the view that it would also be possible to allow the Federal Court or any state or territory Supreme Court to issue a declaration of incompatibility when such a court is exercising federal jurisdiction, interpreting

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<sup>45</sup> See foregoing discussion.

another Commonwealth law for compliance with the Human Rights Act. But that would create two more problems: the Federal Parliament might not be persuaded to engage in ‘dialogue’ with 10 different courts, and the Attorney-General might not relish the prospect of regular appearances in these different courts to argue compliance with the Human Rights Act in litigation that might still have some prospect of going on appeal.

In view of these problems, the Committee proposes that, if declarations of incompatibility cannot practically and fairly be restricted to the High Court, there be no provision for formal declarations of incompatibility by a court. Rather, the parties to the proceedings, and perhaps the Australian Human Rights Commission, could be given the power to notify the Joint Committee on Human Rights of the outcome of litigation and the court’s reasoning indicating non-compliance of a Commonwealth law with the Human Rights Act. It would then be a matter for members of parliament themselves to trigger the processes of the Joint Committee, which could seek the Attorney-General’s response.

The *Al-Kateb Case*<sup>46</sup> provides a good illustration. Were the High Court to uphold the validity of a law providing for indefinite detention of a stateless asylum seeker, the court could proceed to make a declaration that the law could not be interpreted consistently with the right to freedom of movement or the right not to be subjected to arbitrary detention. It would then be a matter for the executive to provide an explanation to parliament. The executive might well decide to retain the law, differing from the court in its assessment of what is a reasonable limit on these rights in a free and democratic society. Ultimately, it would be a matter for parliament to amend the law or to let it stand. Without a formal declaration from the High Court to trigger the parliamentary review, the Standing Orders could provide that a small quota of members of parliament could ask the Joint Committee on Human Rights to review the law in the light of a court decision that the law was valid despite its unwarranted interference with a right. The court declaration is not essential, but it is the most precise mechanism available for instigating further review of the law, with the executive reporting back to parliament.

Here it is necessary to distinguish two discrete functions. The parliamentary committee needs to receive notification that a court has found a Commonwealth law inconsistent with human rights. That notification could be provided by any party to the court proceedings or perhaps by the Australian Human Rights Commission. There is then a need for a trigger to instigate the review process—including notification of the Minister responsible for the impugned Act, a written response from that Minister to the parliamentary committee, the committee hearing and recommendation, and publication of the ministerial response in Hansard or the

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<sup>46</sup> *Al-Kateb v Godwin* (2004) 219 CLR 562.

*Government Notices Gazette*. The committee itself could trigger the review process on receipt of a request from a small number of members of either house of parliament. The notification and trigger provisions could be included in the Standing Orders or in an Act of parliament.

The Committee recommends that any federal Human Rights Act extend only to the High Court the power to make a declaration of incompatibility.

(Should this recommendation prove impractical, the Committee recommends alternatively that any federal Human Rights Act not extend to courts the formal power to make a declaration of incompatibility.)

## Remedies

An Australian Human Rights Act could provide to the courts a statutory guide to interpreting Commonwealth laws consistent with human rights. It could also require Commonwealth public authorities to act compatibly with human rights (other than economic and social rights). Commonwealth public authorities could also be required to give due consideration to any relevant human rights when making decisions. Such obligations could include progressive realisation of the main economic and social rights. The Committee agrees with the observation of retired Federal Court judge Ron Merkel and Alistair Pound:

In the field of administrative law, a national Human Rights Act, which required public authorities to act compatibly with human rights, would make human rights a relevant consideration in all administrative decision making by public authorities and would make clear that such rights must be given real and genuine consideration.<sup>47</sup>

The Committee recommends that any federal Human Rights Act require Commonwealth public authorities to act in a manner compatible with human rights (other than economic and social rights) and to give proper consideration to relevant human rights (including economic and social rights) when making decisions.

In Victoria, government agencies have welcomed their charter in part because it does not create an independent cause of action for breach of the charter. The Committee supports the Victorian Bar's proposal that 'a free-standing remedy against public authorities based solely on a breach of the protected rights should be provided'.<sup>48</sup> If a court were to be able to award damages for breach of a human right, it should be only in the circumstances set down in s. 8(3) of the UK Human Rights Act:

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<sup>47</sup> R Merkel and A Pound, Submission.

<sup>48</sup> Victorian Bar, Submission.

No award of damages is to be made unless, taking account of all the circumstances of the case, including—

(a) any other relief or remedy granted, or order made, in relation to the act in question (by that or any other court), and

(b) the consequences of any decision (of that or any other court) in respect of that act,

the court is satisfied that the award is necessary to afford just satisfaction to the person in whose favour it is made.

The Committee recommends that under any federal Human Rights Act an individual be able to institute an independent cause of action against a federal public authority for breach of human rights and that a court be able to provide the usual suite of remedies—including damages, as is the case under the UK Human Rights Act. The independent cause of action should not be available in relation to economic, social and cultural rights.

## 15.5 Conclusion

An Australian Human Rights Act that is broadly consistent with the Victorian and ACT legislation could provide a resilient thread in the federal quilt of human rights protection. Debate about and consideration of this question should not be allowed to delay action to improve the quality of economic and social rights of those Australians who are most disadvantaged. The Committee finds there has been a tendency for supporters and detractors of the Victorian and ACT models to overstate the models' achievements and their shortcomings.<sup>49</sup> A Human Rights Act on its own will not mend the largest holes in the quilt of Australian rights protection, but that is no reason to oppose such an Act.

An Australian Human Rights Act that recognises and fully protects the non-derogable civil and political rights and that offers a process for engagement by all three branches in government when parliament legislates to set limits on other civil and political rights could constitute a useful, cost-effective means of repairing some of the holes in Australia's patchwork of rights protection. It would trespass on the

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<sup>49</sup> For example, while supporters of the Victorian charter often point to benefits especially for the most vulnerable, the Royal Australian and New Zealand College of Psychiatrists informed the Committee: 'In its submission to the Victorian Legislative Council Standing Committee on Finance and Public Administration Inquiry into Public Hospital Performance Data in December 2008, the RANZCP Victorian Branch recommended an immediate increase in acute public hospital beds by a factor of at least 25% to address the lack of resources available for treating acute mentally ill patients'—Royal Australian and New Zealand College of Psychiatrists, Submission.

domain of state and territory public authorities only when they were performing public functions under Commonwealth law.

There was disagreement among members of the Committee—as there is in the community—about the need for and usefulness and desirability of a Human Rights Act. But, on the weight of all the views expressed, the Committee is persuaded of the need for such an Act drawn in the terms outlined in this chapter.

The Committee recommends that Australia adopt a federal Human Rights Act.

Whatever decision government makes about introducing into parliament a Bill for such an Act, it is essential that government take account of the other primary options raised in this report, especially in relation to economic and social rights. After all, a Human Rights Act will be no substitute for more resources and more effective distribution of those resources to secure the basic economic and social rights of those whose dignity is most at risk in contemporary Australia.

The Committee acknowledges the concern of Consultation participants seeking economic and social rights for all—especially for people who ‘fall through the cracks’. Noting the Solicitor-General’s advice that ‘an examination of the content of those rights as set out in the [International Covenant on Economic, Social and Cultural Rights] demonstrates a general absence of what would traditionally be regarded as judicially manageable standards’<sup>50</sup>, the Committee remains unconvinced that courts are well equipped to contribute to better scrutiny and protection of economic and social rights. Further, the states and territories remain the main providers of services that guarantee protection of the principal economic and social rights. The Commonwealth can do little but put its own house in order and lead by example.

Once the audit of all past Commonwealth legislation is complete, the Commonwealth Parliament will be able to respond to the shortfalls. Meanwhile, parliament could grant courts the power to interpret all Commonwealth laws consistently with human rights and the power to strike down subordinate legislation that is inconsistent with those rights—as listed in a Human Rights Act—and Commonwealth public authorities could be required to respect the rights of all people.

Even in the absence of a Human Rights Act, the modest steps for education, auditing, scrutiny and compliance should still be taken. Each is a small step on the path to dignity and a fair go for all. Australia has always been on this path. At times in the past our leaders—such as HV Evatt and Jessie Street—have taken great

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<sup>50</sup> S Gageler and H Burmester, SG No. 68 of 2009, 15.

strides on the path, showing the world a way forward. It is time for our elected leaders to decide which new steps to take on the path to protecting and promoting human rights.





## Appendix A Terms of reference

The Australian Government is committed to the protection and promotion of human rights—a commitment that is based on the belief in the fundamental equality of all persons.

The Government believes that the protection and promotion of human rights is a question of national importance for all Australians. The National Human Rights Consultation Committee will undertake an Australia-wide community consultation for protecting and promoting human rights and corresponding responsibilities in Australia.

The Government has given the Consultation Committee the following terms of reference:

1. The Committee will ask the Australian community:
  - Which human rights (including corresponding responsibilities) should be protected and promoted?
  - Are these human rights currently sufficiently protected and promoted?
  - How could Australia better protect and promote human rights?
2. In conducting the consultation the Committee will:
  - consult broadly with the community, particularly those who live in rural and regional areas
  - undertake a range of awareness raising activities to enhance participation in the consultation by a wide cross section of Australia's diverse community
  - seek out the diverse range of views held by the community about the protection and promotion of human rights
  - identify key issues raised by the community in relation to the protection and promotion of human rights, and
3. The Committee will report to the Australian Government by [30 September 2009] on the issues raised and the options identified for the Government to consider to enhance the protection and promotion of human rights. The Committee is to set out the advantages and disadvantages (including social and economic costs and benefits) and an assessment of the level of community support for each option it identifies.

The options identified should preserve the sovereignty of the Parliament and not include a constitutionally entrenched bill of rights.

Original

## **Final Report**

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## **National Human Rights Consultation - Community Research Phase**

prepared for

### **Attorney General's Department**

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September 2009

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## EXECUTIVE SUMMARY

### Background and Methodology

The National Human Rights Consultation was launched on 10 December 2008. The Australian Government identified three key questions for the Consultation:

1. Which human rights (including corresponding responsibilities) should be protected and promoted?
2. Are these human rights currently sufficiently protected and promoted?
3. How could Australia better protect and promote human rights?

The Australian Government appointed an independent Consultation Committee to conduct the National Human Rights Consultation (NHRC, or "*the Consultation*"). The role of the Committee is to bring together the full range of views as to how Australian society should protect and promote human rights. The Committee undertook a series of roundtable sessions across the country, as well as running a written submission process and an on-line forum.

In order to establish a reliable and representative benchmark of community attitudes, and partly to assist in contextualising the inputs from the self selection consultation components, a robust qualitative and quantitative research project was commissioned. Colmar Brunton Social Research completed this research in May and June 2009.

It consisted of 15 focus groups (one metropolitan, one regional group in each state and territory – except the ACT where no regional group was conducted) followed by a national telephone survey to quantify attitudes and preferences. The telephone survey had a total sample size of N=1200, and was stratified as n=150 in each state / territory in order to allow jurisdictional analysis. To maximise the representativeness of the survey sample, true random digit dialling was used; and age, gender and metropolitan / regional quotas were used to structure the raw sample, with statistical weighting used to correct any final discrepancies to the actual population.

Human Rights is a particularly difficult concept to research, for several reasons. It is a very broad and complex area, and knowledge and understanding are likely to be limited to a greater or lesser degree for most people. It is also an area in which both emotion and logic have a role to play, which inevitably results in complex and sometimes conflicting views - even within an individual. As a result, it is easy for research to fall back into „motherhood“ type statements, failing to delve more deeply into attitudes. Generic probes such as “are human rights important” are not sufficient to fully explore this complexity, as they will simply generate unthinking and apparently universal agreement – but only measure attitudes at a superficial level. While these can be illustrative, they are not sufficient to really understand what the community thinks and feels.

This project deliberately tried to go beyond this by using the qualitative stage to identify more meaningful questions that could better explore the complexities of the issue in the survey stage. The questionnaire used was designed only after the qualitative stage was completed, allowing a more careful and effective use of question formats and word selections, and also better selection of issues to be covered.

## Key results

**Note:** the results reported here draw on both the qualitative and quantitative stages of the research.

### Understanding and Awareness of Human Rights

Human rights are important to participants. Their experience of rights has been generally very positive, while awareness and understanding of rights in any detail is very limited – at least partly due to their positive experiences meaning there is no clear need for most people to invest time and effort in knowing more.

In the qualitative stage participants consistently indicated the importance of human rights to them. In the survey, 75% of respondents considered human rights to be important or very important.

Human rights were most often defined in terms of what they protect – primarily quality of life, and a basic standard of living. They were seen as a combination of moral and cultural values expressed in a legal framework. It was believed that as a society becomes more prosperous and sophisticated it moves away from having to focus on basic rights associated with survival and moves on to focus on rights that allow individual and community expression and development. The association of commensurate responsibilities with rights was almost universal, and a failure to meet these was a ground to have one's rights restricted.

Most focus group participants reported that they had had no experience of having their rights violated, or had even felt that they were under any particular threat. However, it was common for participants to feel that there were some people and groups who did „fall through the cracks“ and have less positive experiences. In the survey, only 10% of people reported that they had ever had their rights infringed in any way, with another 10% who reported that someone close to them had had their rights infringed.

Most focus group participants had only very limited ability to distinguish between the concrete experience of their daily experiences of human rights, and the more abstract concept of formal protection. Many assumed that rights are sufficiently protected simply because they experience them every day. The only people in the groups who *could* make this distinction tended to have relevant professional or educational experiences that assisted them to do so. However, in the survey only 42% of respondents reported *not* having at least some such experience of human rights, and there was little distinction in the views of those who had and had not – suggesting that this type of experience is necessary but not sufficient to be able to make the distinction.

In the focus groups, participants often expressed a view that better understanding and awareness of human rights would be desirable, and that more education on the topic would be useful. This came out strongly in the survey as well, with just 45% of respondents agreeing that „people in Australia are sufficiently educated about their rights“. By comparison, 64% agreed that „human rights in Australia are adequately protected“ - so it is perhaps unsurprising that when methods of improving the protection of human rights in Australia were considered there was a stronger support for an education-related approach than a more legislative one.

While focus group participants were consistent in their general views that human rights are important and that most people in Australia have positive experiences of rights, there were a range of more specific issues that emerged from the discussions on which views varied substantially. Overall, attitudes expressed in the focus groups suggested that what was similar was probably more important than what varied, but it was clear that attitudes on specific issues *can* vary substantially, and it cannot therefore be assumed that views on how to specifically achieve higher-level outcomes would be universal. For example, one of the more contentious issues in the groups was how to balance the good of the wider community with the rights of individuals, and both were clearly important to participants.

The survey reinforced what was seen in the group discussions, showing a surprisingly high level of homogeneity for such a complex and potentially emotive subject, but also some areas of strongly divergent views across the community. It is possible that this pattern reflects (at least partly) a low

level of understanding of the broader subject - resulting in relatively non-distinctive views overall – but with specific issues of particular importance to some individuals.

Explorations of the patterns of responses in the survey suggested that the range of issues that were important to people could be reduced to a smaller number of „factors“. Five such factors seemed to account for about half of all the variation in opinions seen across the respondents. The five main issues or factors that were seen in respondent attitudes were:

**Table E1. Importance and name of attitudinal factors**

Factor	Characteristic belief that ...	% total variance accounted for*
1.	The Human Rights situation in Australia is fine	23%
2.	Good of society takes precedence over individual rights	9%
3.	Rights and knowledge are not balanced	8%
4.	Individuals rights need stricter protection and consideration	6%
5.	Only protection in law is meaningful	5%

\* Percent variance accounted for is a statistical indicator of the relative importance of each factor – the greater the variance accounted for the more strongly that one factor would reflect an individual's overall attitude.

There were also groups of people who tended to respond in broadly similar ways (known as „segments“). If there are profound differences between segments, understanding them can be more important than using the „average“ of them as shown by the community level results. However, this is not the case on this occasion, with the segments providing some additional insight into the nuances likely to be encountered across the community – but their differences generally being secondary to the community level results.

42% of the community were largely positive about human rights in Australia, 32% moderate, and 26% concerned. Within these three broad categories, there were eight segments identified based on their typical responses to a range of issues, including the factors above. Labels for the segments are based on the characteristics that distinguish them from the other groups.

**Table E2. Segment Demographic & Attitudinal Profiles**

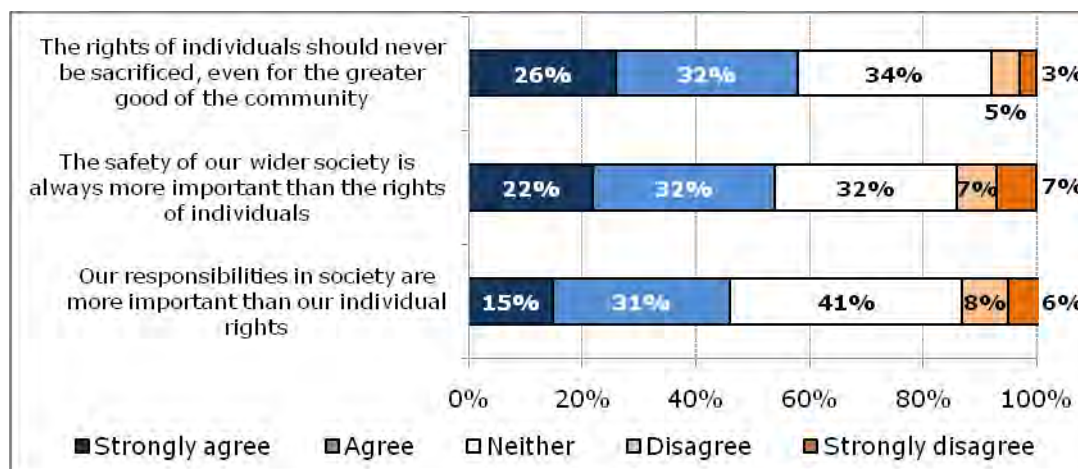
#	Size	Label	Overall view of human rights in Australia	
1	6%	HAPPY COMMUNITY ORIENTED	Positive	42%
4	27%	HAPPY PROTECTIONISTS		
8	9%	HAPPY INDIVIDUALISTS		
3	20%	COMPLACENT	Moderate	32%
5	12%	HARNESS COMMUNITY VALUES		
2	9%	EDUCATE AND PROTECT	Concerned	26%
6	6%	WANT MORE PROTECTION		
7	11%	RESPECT ME MORE		

Compared to males, females were more likely to be moderate (39% vs 25%) and less likely to be positive (37% vs 48%).

The focus groups suggested that probably the most difficult issue in the human rights area for most people is the balance of the rights of individuals and the good of the community. Both were clearly important to participants, with some people clearly uncomfortable to trade one off for the other. The

survey reinforced just how difficult this is, with respondents indicating that *both* are important to them, and many not really indicating one or the other was more important than the other.

**Figure E3: Preferences for balancing community good and individual rights**



Q3. Using a scale of 0-10, where 0 means 'totally disagree' and 10 means 'totally agree', how much do you disagree or agree with the following statements?

Base = total sample (Weighted to national distribution by gender and jurisdiction – N=1204-1206)

### Relative Importance of Specific Human Rights

Focus group participants appeared to use two criteria in considering particular rights – importance and conditionality. „Conditionality“ refers to whether a right can ever be limited or removed, and those which can never be limited or removed are seen as conceptually different. Only „importance“ was addressed in the survey, and the results from this stage (see following chart) were broadly consistent with those views expressed in the qualitative stage. Basic human survival rights typically emerged from both stages as most important, but as the chart shows, all of these rights are considered important or very important by more than 60% of respondents.

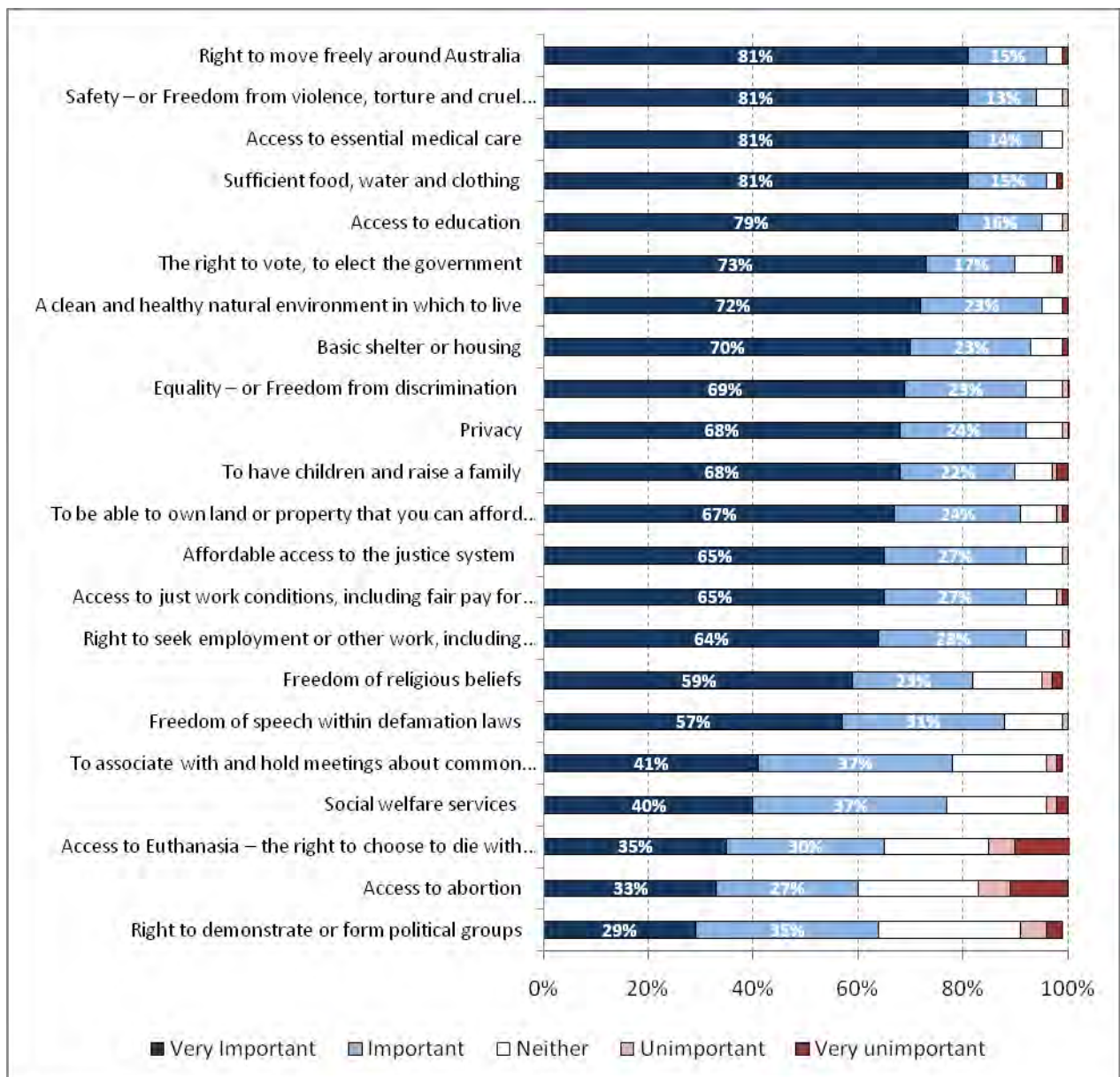
Using the two concepts of importance and conditionality that focus group participants talked about, it is possible to identify a hierarchy of three categories or levels of rights. These are characterised as below. Note that the labels used here are *not* ones used in the community. They are applied here to convey the concept of the category – but these distinctions are not explicitly made in the community without significant probing, and hence there is no natural language for them. These are drawn only from the qualitative component of the research:

1. Absolute Rights – Those which are especially important to survival and / or are unconditional rights that can never be limited.
  - i. Basic amenities (water, food, clothing, shelter)
  - ii. Essential health care
  - iii. Access to equitable justice
  - iv. Freedom of speech, religious expression and from discrimination
  - v. Personal safety
  - vi. Education
2. Qualified Rights – Those which are not directly related to survival, and can be conditional under some circumstances.
  - i. Be considered for employment
  - ii. Vote
  - iii. Association and public assembly



- iv. Parent children as desired
  - v. Freedom of movement
  - vi. Dignity in death (euthanasia)
3. Desirable Rights – These are not universally seen as rights per se – they are more complex and conditional, but clearly desirable if achievable.
- i. Privacy
  - ii. Clean environment
  - iii. Social welfare
  - iv. Choice
  - v. Abortion

**Figure E4. Importance of individual human rights (from the survey)**



Q2. Thinking now about specific human rights in Australia, I'm going to read you a list that people who live in Australia have suggested are our rights. For each of them, can you please tell me how important each of them is to YOU PERSONALLY...?

Base = Total Sample (Weighted to national distribution by gender and jurisdiction; Sample size N=1182-1225)

Participants thought some rights (Qualified and Desirable) could be limited or removed under some circumstances, though this was usually only temporary. There were generally only two situations in which such a limitation or removal would be considered appropriate – i) where individuals do not meet their responsibilities; and ii) for the short term broader good of the community.

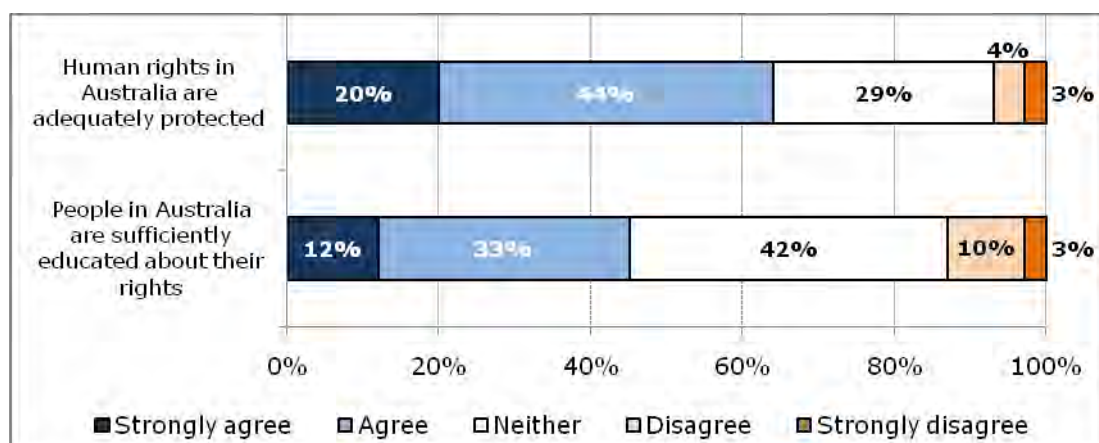
There was a view widely expressed in the groups that „punishments“ should be directed at individuals and not groups. This was an example of where individual rights and community good clashed, and even though there was some willingness to consider a group penalty „if the ends justified the means“, there was generally some discomfort about this. The survey did however show that 41% of people agreed that if some members of a group abuse the wider community’s rights then it was reasonable to restrict the entire group’s rights, and only 26% disagreed (the rest were undecided).

## Protection of Human Rights

It is important to note that most group participants appeared unable to distinguish between the *experience* of a right and its *protection*. Many participants appeared to make the assumption that because they experience a right on a daily basis, and have for a long time, that it must therefore be sufficiently protected. This observation underlies all attitudes then expressed about protection, including how urgent improvements to protection are, and how to go about making improvements.

The survey confirmed the overall sense from the groups that rights are felt to be well protected by most people – as can be seen below, respondents feel that education is more lacking than protection.

**Figure E5. Perceptions of adequate protection and sufficient education**

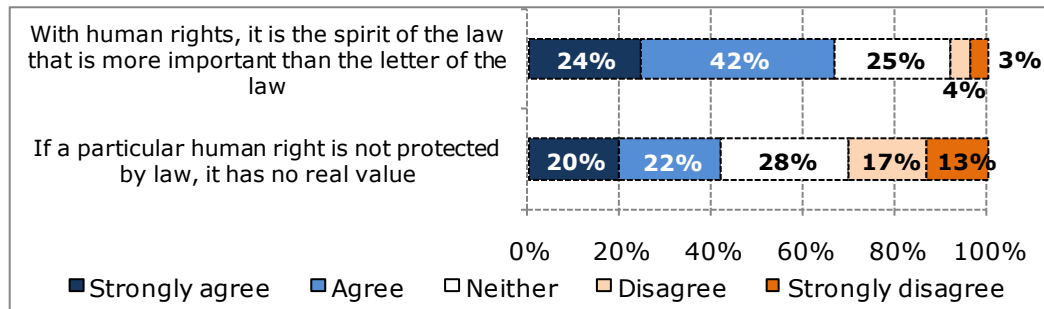


Q3. Using a scale of 0-10, where 0 means 'totally disagree' and 10 means 'totally agree', how much do you disagree or agree with the following statements?

Base = Total Sample (Weighted to national distribution by gender and jurisdiction ; N=1188-1212)

The importance of legal protection for rights was also contentious. Some focus group participants explicitly felt that without legal protection, then a right literally was not a right. Others felt that so long as it was agreed and respected that a right was a right, then legal protection was not necessary.

The survey showed views on this were equally split, but that there was strong agreement that the *spirit* of the law was more important than the *letter* of the law where human rights were concerned. The focus groups would suggest that this is underlain by a desire to maximise the protection derived from any law, and to interpret it in a way that maximises the degree of protection and the range of people protected. One of the concerns expressed about more formal legislation by some group participants was that it creates a clearer definition of who is *not* protected, and for some this was not desirable. These views may be behind the preference expressed later for the courts to be able to interpret laws in a way that they felt was most consistent with human rights rather than exactly as they are worded.

**Figure E6: Importance of specific legal protection for rights**

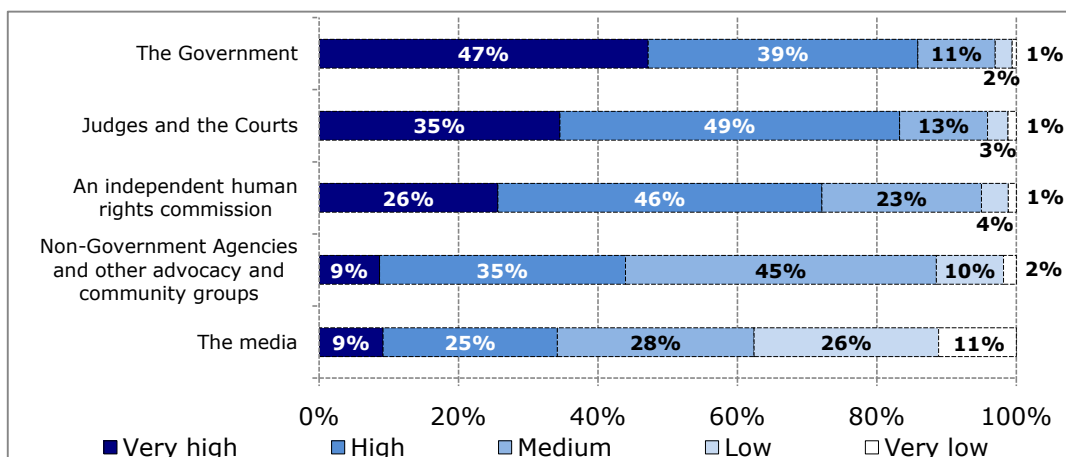
Q3. Using a scale of 0-10, where 0 means 'totally disagree' and 10 means 'totally agree', how much do you disagree or agree with the following statements?

Base = total sample (Weighted to national distribution by gender and jurisdiction – N=1158-1193)

Human rights in Australia are thought to be protected by a number of mechanisms:

- The legislative system is widely assumed to provide protection;
- Government departments and the Social Welfare system provide access to some rights (and access to the welfare system is actually seen as right in itself by some);
- Individuals and the community taking action (though it was thought that Australians were disinclined to be involved in community action);
- Access to the media – while it was felt that the media's interest was a self-interest and that they may distort the „story“ to suit their needs, the fact that people can get their story into the media at all gives them a sense of protection; and
- Advocacy groups are seen as very important avenues of protection (especially important as Government itself is thought to be one of the potential infringers of rights).

Many survey respondents thought the Government and the courts had the main responsibility to protect human rights in Australia – with the Government (in its broadest definition and encompassing both the Government of the day and Parliament) being seen to be the main protector. 86% thought that the Government had a high or very high responsibility, with 47% choosing the very high category. 84% thought the courts had a high or very high responsibility, with 35% choosing the very high category. 84% thought the courts had a high or very high responsibility, with 35% choosing the very high category.

**Figure E7. Perceived Levels of Responsibility for Rights Protection**

Q7. Which groups and institutions SHOULD have responsibility for protecting human rights in Australia? Using the scale very high, high, medium, low and very low, how much responsibility should each of the following have for protecting human rights in Australia?

Base = Total Sample (Weighted to national distribution by gender and jurisdiction, N=1188-1219)

Avenues that could be used to get help with human rights issues were more hypothetical than real, as most people had not needed to use these. It was thought that the avenue to pursue would depend on the specific circumstance, with options such as Government Departments, police, an advocacy group / ombudsman and human rights commission commonly suggested. Older people also indicated they would consider their local MP, while younger people expected to „Google“ a solution. There was strong support for the concept of a single point of contact to which all complaints or queries could be (at least initially) directed.

Problems that focus group participants could see in protecting their rights included:

- Lack of awareness of human rights, even within relevant Government departments;
- Lack of awareness of channels to seek redress;
- Financial, physical and organisation resources that might be required;
- Constant changes to legislation; and
- Fear of repercussions (primarily from the organisation or person they complain against).

### **Differing Experiences of Different Groups**

There was a clear preference from the focus groups that everyone in Australia experiences fundamentally the same set of rights. However, it was recognised that not all groups currently have an equal experience and some may require deliberate efforts to approach an equitable experience.

People who cannot speak or act for themselves (eg: children, or those with a mental illness) were seen as requiring more assistance and protection. The elderly and carers were other groups who were seen as being at risk and potentially requiring more systemic protection and assistance.

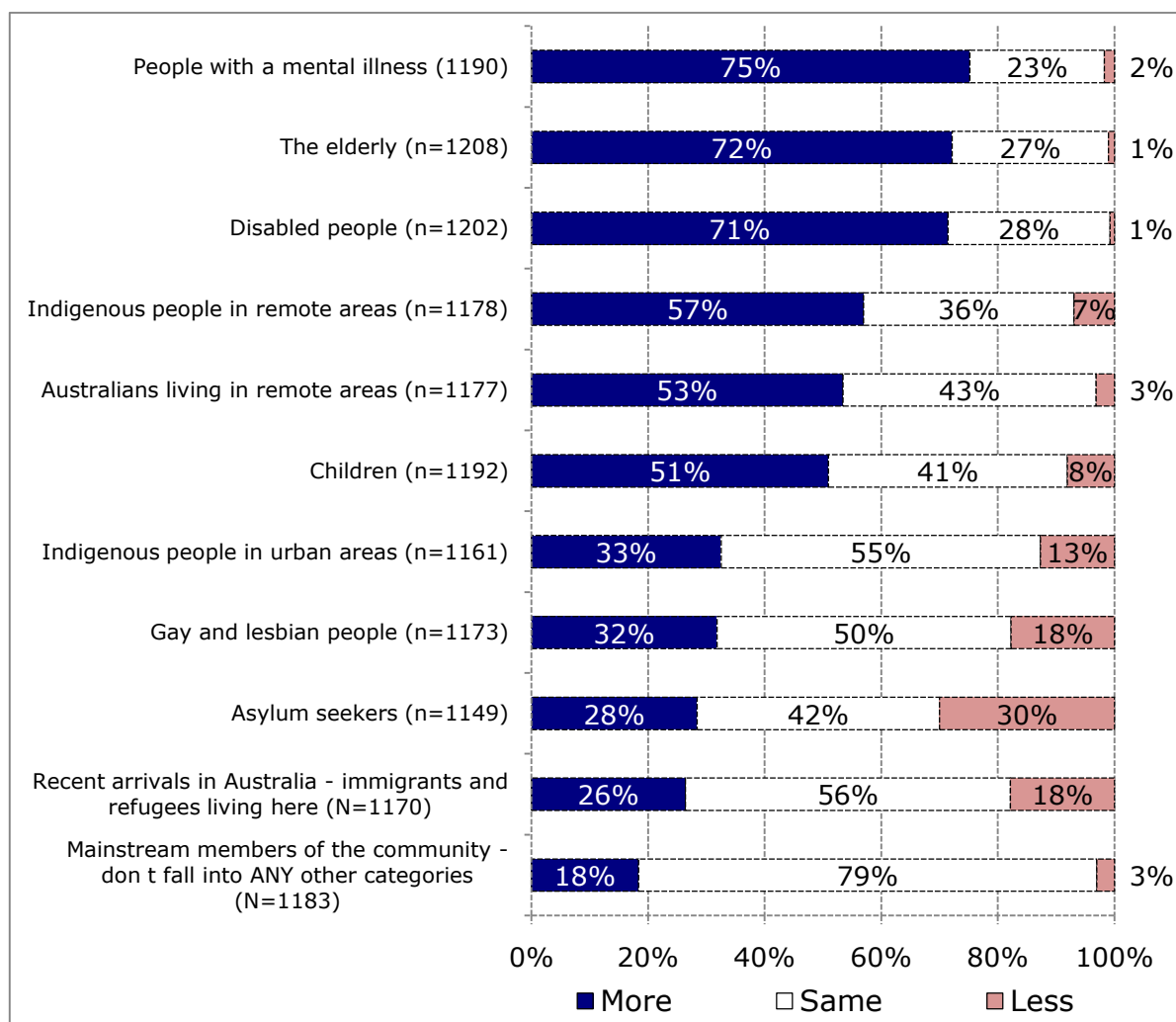
The experiences of indigenous Australians were a source of widely disparate views. Many recognised that their daily experience of rights was poorer than non-indigenous Australians. However, it was not uncommon for non-indigenous focus group participants to express a view that they experienced a form of reverse discrimination, with indigenous Australians getting benefits that they themselves were not able to access. While this seemed to generate some resentment in itself, it was the perceived lack of appreciation or respect shown in return that was particularly singled out for negative comment. The concept of indigenous self-determination was not understood – it was widely interpreted to refer to some sort of parallel set of laws, and this was not desired.

A number of focus group participants indicated that minority groups tended to have a better understanding of their rights and more actively pursued them, resulting in a gradual weakening of the rights of the mainstream community in favour of these various groups. In the survey, 57% of respondents agreed or strongly agreed that there are so many rights given to minorities that the government is forgetting to protect the values of mainstream Australian society.

Respondents to the survey most strongly felt that people with a mental illness (75%), the elderly (72%) and the disabled (71%) required more protection than they currently get. More respondents felt that Indigenous (57%) and non-indigenous (53%) people in remote areas required more protection than did Indigenous people in urban areas (33%).

51% felt that children needed more protection. In the groups children tended to be in the highest category for more protection, and the step down which was seen in the survey perhaps reflects a more general consideration of children in this context whereas the group participants were more specifically thinking of children of less-functional parents.

Asylum seekers were the only group which as many respondents felt should get less protection (30%) than they currently do as felt they should get more (28%).

**Figure E8. Amount of Protection Required By Groups**

Q6. I'm going to read out some particular groups now. For each, do you feel their human rights need to be given more, less or the same amount of protection than they are currently getting in Australia?

Base = Total Sample (Weighted to national distribution by gender and jurisdiction; Sample size N=1149-1208)

### Improving the Protection of Human Rights

The focus group discussions of human rights in Australia showed that most participants were positive about the human rights situation in this country. The survey confirmed this, with a majority at least moderately positive, and nearly two thirds who feel that rights are sufficiently protected. However, while protection is seen to be reasonable, group participants also indicated a clear opportunity for further improvements to be made – albeit that it is not generally seen as an urgent need.

Strategies for improving protection of human rights that were identified and discussed in the groups or addressed in the survey included:

- Documenting our rights more explicitly was widely supported in the focus groups (though not universally), and 72% of survey respondents agreed that it was important to have human rights explicitly defined rather than relying on a set of general principles. Those opposed to the concept generally expressed concern that to do so would create loopholes and exclusions that were worse than no documentation at all given that the status quo seemed to largely work well. It was notable in the devolved consultation phase with vulnerable and marginalised

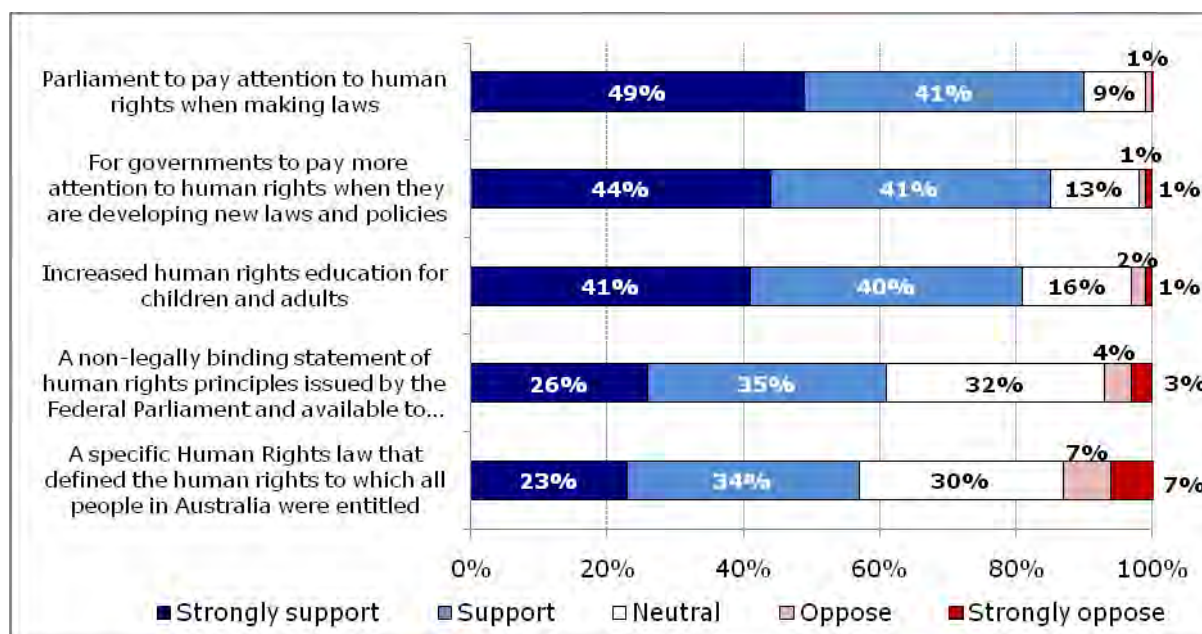


groups there was a very consistent desire to have rights explicitly defined so that they and others would be very clearly aware of what rights they were entitled to receive.

- Specific human rights legislation, including a bill of rights, was brought up and discussed in most focus groups, but was not widely seen as necessary. Those who were best able to distinguish the concept of protection from their daily experiences tended to be most in favour of some sort of formal legislation, but those opposed tended to feel it became a very difficult tool to change or update. A specific human rights law was the least supported of five options for increasing protection of human rights in the survey.
- The role of the courts was seen as important. 61% of survey respondents supported a system where the courts can tell Parliament if new legislation seems to impact on human rights of any groups in Australia – but with Parliament always having the final say on the law. Only 11% were opposed to this role for the courts. 69% preferred that the courts interpret parliamentary laws „in a way that they feel most respects human rights” rather than „exactly as they are worded”.
- Improved service delivery was seen as a way of improving protection, and in particular a desirable way of addressing problem cases in such a way that blanket changes to rights which affect non-problem cases as well are not needed.
- Raising awareness of rights, and education generally, was seen as an important strategy. Various specific strategies were discussed from simple reference material to multi-media attitude changing campaigns. However, what all of these have in common is increasing awareness and understanding of the current situation. If rights are not currently as well protected as many people assume, then this strategy could be potentially problematic.
- Streamlining the administrative process through the establishment and / or promotion of a single point of contact that people could use for all queries and problems relating to human rights was felt to be a practical way of improving protection.

Support for five specific ways that protection of human rights in Australia could be improved was canvassed in the survey. Support for all of these was high – ranging from 57% to 90%. It is clear from the chart below though that the three most preferred approaches were those which provided the least *additional* definition of rights.

**Figure E9. Support Levels for Various Protection Options**



Q10. There are a number of ways the protection of human rights in Australia could be changed. Using a scale where 0 means 'totally oppose' and 10 means 'totally support', how much would you oppose or support the following approaches?

Base = Total Sample (Weighted to national distribution by gender and jurisdiction; Sample size N = 1173-1222)

When forced to choose just one, *most* preferred change, the highest level of support was for Parliament to pay attention to human rights when making laws (29%), ahead of more human rights education (23%).

Only 8% of respondents felt that doing none of these was the most preferred approach.

**Table E10. Most preferred protection option**

Option	Most preferred
Parliament to pay attention to human rights when making laws	29%
More human rights education	23%
More Government attention to human rights when developing laws and policies	18%
A statement of principles available to everyone	11%
Legislation by Federal Parliament	10%
<i>None of these</i>	8%

Q10a. Which of these would be your *MOST* preferred option?

Base = Total Sample (Weighted to national distribution by gender and jurisdiction; Sample size N = 1226)

## Conclusions

Human rights are important to Australians. Three quarters of those surveyed thought that the issue of human rights in Australia is important or very important to them.

While human rights are important, this does not mean that the majority are concerned about their rights, have experienced any violation of their rights, or feel that they are threatened. In fact, the opposite is true, with the majority of people in the research personally reporting generally positive experiences with human rights. They are mostly aware that some groups are “falling through the cracks” – but in the general community people who are seriously concerned about their own personal rights are uncommon.

Perhaps at least partly due to the generally positive experiences of living their human rights on a day-to-day basis, most people involved in the research have little specific knowledge about their rights or how they are protected. Most people appear unable to distinguish easily between their daily experience of life with the benefit of the rights they value and the formal protection of these rights.

In the absence of this conceptual distinction, most were satisfied with the current level of protection and had little awareness that many of the rights they identified and experience have little or no protection in law. They think their rights are protected because they are not personally affected and they have limited detailed knowledge to the contrary. Only a relatively small proportion of people appeared to be able to make the distinction between experience and protection, and this often appeared to be correlated with relevant educational or professional experiences (though in itself this did not seem automatically sufficient to make this distinction).

This very concrete, experience-based understanding of human rights may account for the lack of clarity about other more abstract concepts, such as the distinction between a right that is not recognised or protected and a right that is recognised and protected but not presently enjoyed.

Participants implicitly perceived a hierarchy of rights, but also appeared unsure as to whether these rights themselves changed over time as a society evolved, or whether the rights that a society could seek and expect to actually experience changed.

The most fundamental level of rights was a combination of those seen as important for physical survival and those which could not be limited or removed under any circumstances. These Absolute, often survivalist, rights included chiefly social and economic rights as well as some political and civil rights. Beyond these was a further category of Qualified human rights which were able to be limited or removed under some circumstances – usually upon failure to meet associated responsibilities (eg: criminal activity or infringing others rights) or for the benefit of the wider community (eg: public safety or health). A third category were Desirable rights - those seen as benefits rather than human rights *per se* and tending to be more sophisticated and complex issues which were clearly desirable, but not always seen as feasible or even a realistic expectation as a right of an individual.

It was generally felt desirable that any limitations on rights should be as short lived as possible, and in most cases there was a preference for this to be on a case-by-case individual basis rather than done at a general or group level. The balance of individual rights and the greater community good was clearly the most difficult issue in the whole human rights area, with both of these being seen to be very important. Any compromise of either to benefit the other met with some discomfort from most people. As the two require some degree of trade-off, some degree of dissatisfaction with any balance is therefore inevitable.

Given that the human rights situation was seen by the majority of participants to be at least moderately positive and rights generally well protected, there was a common sense that improvements were possible but not urgent. A majority favoured some form of documentation of our rights rather than relying on general principles – but there was also a strong sense that the spirit of human rights needed to be retained as much as a cold, hard definition of rights that could potentially exclude some people under some circumstances.

In addition to formally documenting our rights and human rights legislation, improving service delivery and raising awareness of rights were seen as potentially important ways of improving human rights protection. A clear, simple and streamlined process for getting information about rights and resolving issues was seen as important, and commonly linked with a single point of contact for all human rights related issues. Overall, there was a preference for less formal measures to improve human rights in Australia. While more than half the community supported a specific human rights law or a non-legally binding statement of principles from the Federal Parliament, support for these was less than for increased education and for Parliament and Governments to pay more attention to human rights when developing and making laws.

Overall, attitudes to human rights were surprisingly homogenous across the community. Knowledge of rights and perceptions of their protection varied considerably, and there were groups of people in the community who demonstrated consistent differences in their attitudes and preferences from other groups. However, what was common was generally more important than what was different across these groups. Similarly, there were few consistent or substantial differences in the views of respondents by age, gender or location across the country. In this sense, the overall community-level results do tend to be the best indication of the attitudes expressed by respondents.

## Which human rights should be protected and promoted?

The most important rights to protect and promote in Australia are those seen as absolute rights – those that are essential for physical survival and / or those which cannot be limited or removed at any time. These include the right to:

- Basic amenities (water, food, clothing, shelter)
- Essential health care
- Access to equitable justice
- Freedom of speech, religious expression and from discrimination
- Personal safety
- Education



A second tier of qualified rights are more related to expression and development of individuals and the society, and can conceivably be restricted under certain circumstances. These include the right to:

- Be considered for employment
- Vote
- Association and public assembly
- Parent children as desired
- Freedom of movement
- Dignity in death

### **Are these sufficiently protected and promoted?**

Most people who participated in the research enjoy the benefits of these rights on a daily basis, and are unable to distinguish between these daily experiences and the more abstract concept of formal protection. Thus, in the absence of personal experience or knowledge to the contrary, they tend to think that human rights are sufficiently protected - even though many of the rights listed above have little or no formal, legal protection.

Improving protection of human rights is seen as desirable and possible, but because of perceptions of an existing sufficiency of protection, generally not urgent. It was noted that some groups „fell through the cracks“ and had more common human rights issues. Groups which were specifically identified as potentially needing greater protection (or at least assistance to receive the benefits of their rights) included children (especially those with parents unable or unwilling to care for them), those with a mental illness, the elderly and indigenous Australians (particularly those in remote areas). Carers were also often identified as a group whose daily life was not as rich as other groups, and who could benefit from greater assistance.

There is strong support for the better promotion and education of human rights in Australia. It was apparent that few people have any specific understanding of what rights they do have, underlining a real need as well as a perceived need for further education.

Many participants in the research may have felt that education would demonstrate to them that their assumptions that rights were well protected was correct, and provide missing details. It is possible that if the real level of protection does not match expectations, then with greater education there would actually be a decrease in satisfaction with the current protections and views on necessary or desirable steps to improve protection could change.

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

A number of ways in which human rights in Australia could be better protected were discussed throughout the research.

There was strong support for better documentation of rights, though this was not universal. Those who supported this approach felt that it provided at least a common starting point, even if there was cynicism about how much it would really be worth if and when tested. A concern that was raised was that the more specific any such documentation was, the more it could create loopholes and exclusions which could be more problematic than the current situation. Those who had the greatest concern about the current level of protection were more likely to support better documentation of rights.

Government was seen to have a clear responsibility for protecting human rights, including the need to ensure that there are sufficient advocacy organisations to assist people - especially when they have an issue with Government itself. The courts' responsibility was seen to be only marginally lower. There was a strong preference for courts to be able to interpret laws in a way that most respects human rights, rather than reading them exactly as they are worded.

It was often felt that failures to deliver human rights to individuals were due to poor service delivery, and that this was an important avenue to make improvements. In particular, failure to be able to deal effectively with small numbers of problem cases (eg: abusive parents, criminal activity amongst bikie gangs) was seen as being sometimes a catalyst to change the rules for everyone, often to the detriment of „innocent“ individuals and without the desired effect on the negative cases anyway.

Promotion and education about rights was also thought to be an important strategy for improving protection. However, this was predicated on a belief that rights do exist and are protected, and that education would communicate the detail of this which is currently missing. If this belief is not well-founded, and rights cannot easily be explicitly explained or protections defined, then education alone cannot be a viable solution.

While most participants in the groups felt that they could resolve a human rights issue if one arose for them, they do not have a clear idea of what avenues they could or should pursue. While this was not felt to be a major barrier, having a single point of contact for all human rights related issues (both queries and complaints) was generally considered desirable.

Of the five specific ways that human rights could be improved that were included in the survey, support for all of them was over 50%, and in some cases as high as 90%. However, support (and preference) was highest for those options which did *not* involve any *additional* definition of rights or protection. Parliament and Government paying attention to human rights when developing or making laws were the most supported; ahead of increased education; then a non-binding statement of human rights issued by the Federal Parliament; and then a specific human rights law, which was the least preferred of these options.

# 1 BACKGROUND, OBJECTIVES AND METHODOLOGY

## 1.1 Background

The National Human Rights Consultation was launched on 10 December 2008. The Australian Government identified three key questions for the Consultation:

1. Which human rights (including corresponding responsibilities) should be protected and promoted?
2. Are these human rights currently sufficiently protected and promoted?
3. How could Australia better protect and promote human rights?

The Australian Government appointed an independent Consultation Committee to conduct the National Human Rights Consultation (NHRC, or “*the Consultation*”). The role of the Committee is to bring together the full range of views as to how Australian society should protect and promote human rights. The Committee has conducted over 66 roundtables and has received over 35,000 written submissions from the public and interested organisations.

The Committee commissioned this research to better understand how well what they heard from consultation participants represents the views of the wider Australian community. There is a well established understanding that interested parties can often be over-represented in self-selection community consultation processes, and that the „silent majority“ may be un-represented by these expressed views.

This research establishes the prevalence of particular views, attitudes and expectations within the general community, allowing the inputs from other channels of the Consultation to be interpreted more confidently, and with an understanding of how they may be expected to reflect wider views.

Additionally, some of the groups within the Australian community who are potentially most at risk of having their rights threatened or violated are also those least likely to be participants in either the self selection process or the community level research. Some groups may have less confidence than others to choose to participate, or not be able to even find out that such community consultations are happening. These groups are also unlikely to be included in community level research, due to factors such as communications barriers, being unable to be randomly contacted, and simply being relatively infrequent within the community and therefore difficult to detect from a statistical perspective. A third phase, the Devolved Consultation, has therefore also been completed. This is reported in a separate volume, but cross references between the two have been included where relevant.

## 1.2 Aims and objectives

The key aims of this consultancy were to address the three overarching key questions for the Consultation amongst a diverse cross-section of Australian society:

1. Which human rights should be protected and promoted?
2. Are these human rights currently sufficiently protected and promoted?
3. How could Australia better protect and promote human rights?

From these, Colmar Brunton Research derived a number of specific research objectives to assess general views about the protection and promotion of human rights.

These specific research objectives include establishing

- The language surrounding the key issues, including understanding of key terms and an exploration of the „vernacular“ language currently used.

- How are human rights understood by mainstream Australians?
  - How important an issue is human rights protection?
  - How important are various potential human rights?
  - What are the positives/negatives about Human Rights protection?
- What awareness is there of human rights and how they are protected?
  - What influences our understanding of human rights?
- Awareness of current types of protection.
- How well protected each right is perceived to be.
- Barriers to protection.
- Perceptions regarding for whom rights are over or under-protected; which groups should have rights that are enhanced or reduced; and which need special assistance to have rights respected?
- Whether Indigenous Australians should have rights that are different?
- Perceived responsibilities of Government and citizens in terms of protection and promotion.
- Desired avenues of redress.
- Perceived improvements to protection and promotion required.
- Differences in response across demographic and socio-graphic groups and by attitudinal „segments“.

### 1.3 Methodology in Brief

A two stage research methodology was used for this research.

The first stage was exploratory qualitative research, and used a focus group methodology. 15 groups were conducted – one in each of the eight state and territory capital cities; and one in a major regional centre in each state and territory other than the ACT. Each group included approximately equal numbers of males and females, and had participants from the 18-29, 30-49 and 50+ age groups. Groups lasted for 2 hours, and the discussion guide used can be seen in Appendix A.

The second stage was a national telephone survey. Respondents were drawn using a Random Digit Dialling sampling approach to maximise the representativeness of the sample through random selection. The questionnaire was designed based on the results of the focus groups, and its purpose is to quantify the prevalence of attitudes and preferences expressed in the focus groups. N=150 interviews were done in each state and territory, with age and gender quotas used to keep the raw sample very close to correct population profiles within each state. This approach allowed us to identify any major differences across states and territories, with the maximum sample error for the state / territory samples being  $\pm 8\%$ . To calculate the national results reported, the individual state samples were weighted to their correct proportions. Slight gender variations in the raw sample were also corrected in the weighting. The overall national sample of N=1200 has a maximum sample error of  $\pm 2.8\%$ .

To avoid the survey being too generic and high level, resulting in „motherhood“ type issues which are not sufficient for delving below superficial attitudes to more complex issues, the questionnaire was only developed once the qualitative stage was completed and more insightful issues identified.

For a more detailed description of the research methodology, including the discussion guide and telephone survey used, as well as the weighting schedule for the survey data, please refer to Appendix A.

## 2 DETAILED RESULTS

**Note** The results section draws on information from both the qualitative and quantitative stages, with these two sources intertwined to provide the clearest indication of community attitudes and preferences. Typically, the survey results are used to represent the prevailing community views, while the qualitative results are used to provide explanation and additional detail. In some cases, where data is only available from one or the other stage, then only results from one source will be reported.

In almost all cases, results in charts and tables are from the survey, and the specific question and sample size(s) are shown below. Where results are drawn from the qualitative stage, they will generally be prefaced with a specific reference to focus group *'participants'*. Results sourced from the survey will refer to survey *'respondents'*.

### 2.1 Understanding and Awareness of Human Rights

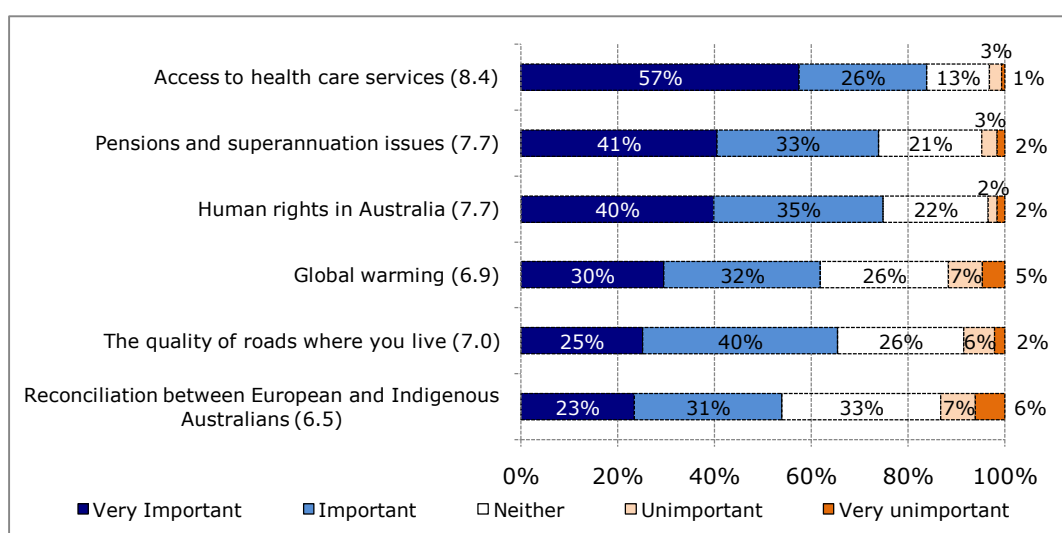
#### 2.1.1 Importance of human rights

The focus groups suggested that human rights was an issue that, while often not given a great deal of thought by members of the Australian community, is nonetheless of high importance to them.

The survey stage confirmed the importance of human rights to respondents. When compared to several other general issues in the community, human rights in general and the two other specific issues canvassed which were most closely related to human rights came out as being more important than other issues such as global warming, roads and reconciliation. As Figure 1. shows, 75% of the community see human rights as important or very important.

There were no significant differences in ratings by jurisdiction. Females were significantly more likely to give higher importance ratings to human rights (and four of the other five issues) than were males (mean ratings 8.1 vs 7.1).

**Figure 1. Relative Importance of Social Issues**



Q1. Thinking about the situation in Australia, on a scale of 0-10 where 0 means 'extremely unimportant' and 10 means 'extremely important', how important are the following issues to you right now?  
Weighted to national distribution by age, gender and jurisdiction (n=1205 – 1224)  
Figures in brackets are mean importance ratings out of 10.

## 2.1.2 How do Australians conceptualise human rights?

Group participants generally considered human rights to be entitlements or protections which should be available to them and other people. Some saw them as protecting „the basic necessities of life“ – providing access to things required for survival. Others saw them as a „sort of framework in which we operate“, allowing us to „walk, talk, dream (and) love“ and assisting humans to reach their potential.

**They are most often defined in terms of the outcomes they protect – namely, quality of life; a certain basic standard of living;** a sense of security and comfort; enabling freedom of choice and the ability to access certain opportunities; and/or providing humans with a sense of dignity and self-respect.

*‘The basic standard of which every human being is entitled to live under’*

*Canberra participant*

The concept of ensuring equality was seen as central in terms of an outcome of human rights.

*‘(They) ensure that we all have access to a relatively high standard of living’*

*Canberra participant*

Numerous individual rights were discussed, and it appears that while some people did not differentiate between their relative importance, most people did in fact use some combination of two considerations to categorise them. These two considerations were how essential the right is to basic living (how important) and whether it was something that could potentially be reduced or limited (how conditional).

Some rights were clearly seen as universal – important and unconditional, applicable to every human and necessary for their survival (eg; food, shelter, essential healthcare). Others are more seen as necessary or contributing to a society’s further development. Importance was often correlated with how conditional a right was, but the two were not precisely matched. In reality – all rights were seen as important, and so the categorisation perhaps had more to do with whether a right was felt to be able to be universally applied or offered as much as anything. The most important rights include social, economic and political rights, and include health care.

The classification of rights into conceptual tiers is discussed in much more detail in section 2.3, but examples of „survival“ rights include food, water, accommodation and health care; while more „developmental“ rights include the right to association and freedom of movement.

It was widely held that as a society becomes more prosperous and sophisticated, the emphasis moves away from delivering the foundation tier of „survival“ level rights, and to ensuring access to more advanced rights. In this sense, participants agreed that human rights available in Australia go beyond those available in developing countries.

In thinking about human rights, many group participants found it difficult to understand rights in an abstract sense – that is, in the absence of some concrete experience or service to deliver that right. Hence some people feel that in developing countries, many of the more advanced rights are non-existent rather than being „unrealised“ rights.

Many group participants consistently equated rights with service delivery, equating better access to a service or benefit to a „better“ right. As a result, some believed that the wealthier and more powerful have more rights than others in society. Only a few recognised that this group experiences a better quality of life rather than having different or enhanced rights *per se*. Others defined human rights as the right to access an opportunity, and this tended to resolve the difference of opinion.

The concept of having to earn rights by meeting responsibilities was often raised by groups.

*‘If you get some (right), you should give back, however you (are able to) do that’*

*Perth participant*

It was generally agreed that to work in society, human rights need to go hand-in-hand with associated responsibilities and that in the case of more general rights such as freedom of choice, it is valid for the legal system to put limits on these in order to protect the wider good of the community.

### 2.1.3 Where do human rights come from?

There was some debate over where human rights actually come from. More pragmatic comments centred on the Universal Declaration of Human Rights, but at a more philosophical level there was a question of whether they have a moral or a legal basis, or both. There were some people who felt that the moral base was clearly the primary source of rights. Others, and in particular the relatively small group who best understood the concept of „protection“ for human rights (see section 2.4), felt that there was a critical legal basis, and without this, a right was not a right at all.

*‘I don’t think it’s a right unless there’s a law with it, it’s an ideal, if it’s not supported then it’s not really anything.’*

Canberra participant

Ultimately, most people agreed that conceptually human rights are a combination of moral or cultural values expressed in a legal framework. Exactly how and when moral or cultural values influenced rights also generated some debate.

There was general agreement that many rights originate in the cultural values and customs by which a society lives. As a result, there was recognition that different cultures value certain human rights differently and that over time, as society changes, so do some of the rights to which they subscribe.

*‘It’s an ingrained thing from the way you’re brought up’*

Perth participant

*‘If we transplanted ourselves into another culture it would be different’*

Canberra participant

*‘It’s important to have human rights. Humans can be self destructive - you have to have rights to stop humans from doing (bad) things to others.’*

Darwin participant

This implied acceptance of change over time is an interesting issue, as it suggests that people’s underlying sense is that rights are neither 100% fixed nor universal – which is, on the surface at least, inconsistent with the intended „inalienable“ nature of these rights. This is consistent though with a view commonly expressed in the groups that human rights appear to be different in different countries and cultures. Few people in the groups identified that the *right* in these cases stays constant, but that the desired *expression* or typical level of *experience* of the right changes across time or cultures. This is also consistent with the common **inability to easily distinguish between the experience of a right and its protection**, and together these observations suggest that most people in Australia respond to human rights at a very concrete, experience-based level rather than in a more abstract or conceptual way.

Some group participants saw human rights as principles that „ordinary people“ had valued and fought for over time.

*‘People can band together for a right they want to fight for’*

Melbourne participant

*‘Through struggle, people get fed up with being put upon’*

Hobart participant

Some believed that that if there were no rights, the powerful who make laws would act only in their own interests. **Thus human rights were seen as ensuring that the more powerful in society have to consider the less powerful.**

Many understood that elected governments confirm such rights as a part of the democratic process. In that sense they are seen as part of the political framework. International bodies such as the United Nations were regarded as another source of rights. Many participants were of the view that the government allows human rights to be respected - by enacting relevant legislation or through other less formal approaches - and that the people of Australia can force them to respect rights through the democratic process. There appears to be an underlying **assumption and confidence in the durability of the effective democratic process that operates in Australia.**

*‘If they don’t do the right thing, then we vote them out’.*

Port Augusta participant



There was also some feeling that what we are exposed to in the media helps create our sense of human rights. Television advertising of global injustices in the name of charities such as World Vision was also seen as influential. This was reinforced in the devolved consultation stage, with immigrants and refugees now living in Australia concerned that some negativity they experienced in Australia was due to persistently negative reporting of events in their home countries which in turn created negative associations in the minds of community members.

## 2.2 Attitudes towards Human Rights

### 2.2.1 Variations observed amongst Qualitative Participants

It became clear from the focus groups that most people fell into one of three broad groups in regard to their understanding of human rights.

The **bulk of participants had very limited knowledge of the area** - they had **never felt their rights to be under threat**, were generally unable to distinguish the concept of rights protection from service delivery or their daily experiences of receiving the benefits of human rights, and largely saw an absence of formalised protections as offering **no real threat to their long-term welfare**.

A smaller group of participants *were* able to distinguish the concept of protection from their daily experiences. These tended to be people who could draw knowledge from relevant professional or educational experiences, in areas such as law, senior public service positions, or healthcare settings or social work.

An even smaller group, and one which included immigrants from developing nations or countries where they had experienced conflict, had personal experience of rights infringements both in other environments and sometimes in Australia. They appeared to have a greater appreciation of the importance of rights protection, though their ability to distinguish the abstract concepts of protection and experience varied from individual to individual.

From the focus groups a large number of attitudes were identified which appeared to influence how individuals felt about aspects of human rights. It was hypothesised from these that two factors were especially important to understanding a person's likely views on human rights. The first of these was their educational, professional or personal experiences of human rights issues, with those who have more such experiences holding different views on protection in particular. The **second factor was where a person fell on a continuum describing their preferred balance of individual rights versus the good of society**.

*'We have become very selfish and believe our personal rights have become too important.'*

*Adelaide participant*

These attitudes were carried forward into the quantitative (survey) stage in order to determine their relative prevalence in the community, as well as to assist in segmenting the population. This more formal segmentation would show whether the two factors described above were observed in a statistical sense within the population or whether other factors were more effective in separating groups within the broader community, and whether the segments that were suggested in the group setting was sustained in the more rigorous survey data.



## 2.2.2 Segments within the population

At an overall level, there was a strong homogeneity in attitudes towards human rights across the community. Attitudes and preferences varied surprisingly little across demographic and geographic groups, and the total community level results tended to be a good indicator of the views of any more specific group of interest.

However, while this is true, it was also possible to find groups of people in the general community whose views did tend to differ in specific ways on particular issues (“segments”) – though often this was more about shades of grey rather than diametrically opposed views (ie: all segments often share similar dominant views but to a greater or lesser extent).

Eight segments were identified in the survey results, and the process by which these were found and their typical characteristics are described below. The segments are defined not by their demographic characteristics, but rather by their attitudes. Thus, while some segments may have dominant demographic characteristics, it is the opinions of an individual that classifies them into a segment.

These segments are interesting for a number of reasons. First, in their essential nature they give an indication of the ways in which parts of the community vary from each other, what sorts of things tend to be important to different people, and the relative sizes of these segments. Second, they are used throughout the rest of this report to break down many other results to a finer level than can be gained from the overall community level results alone. It is not intended that the segment results should be given precedence over the community level results, but rather that they can help in better understanding the nuances that underlie the higher level results.

### *Identifying the segments*

Nineteen attitudinal statements covering a wide range of issues from the qualitative stage were used to explore whether a smaller number of more general „factors“ could be identified which explained most variance in these specific attitudes. Five such factors were identified that accounted for about half (51%) of the total variation in attitudes<sup>1</sup>.

By recognising particular themes which most strongly identified each factor, we were able to label them as follows:

**Table 2. Importance and name of attitudinal factors**

<b>Factor</b>	<b>Characteristic belief that ...</b>	<b>% total variance accounted for*</b>
1	The Human Rights situation in Australia is fine	23%
2	Good of society takes precedence over individual rights	9%
3	Rights and knowledge are not balanced	8%
4	Individuals rights need stricter protection and consideration	6%
5	Only protection in law is meaningful	5%

\* Percent variance accounted for is a statistical indicator of the relative importance of each factor – the greater the variance accounted for the more strongly that one factor would reflect an individual's overall attitude.

<sup>1</sup> Factor Analysis was used for this process. See Appendix B for more details, and factor weightings for the individual attitudinal statements.

A second analysis<sup>2</sup> was then conducted to identify groups of people in the community who show broadly similar characteristics. This found an eight segment „best-fit“ solution. The individual segments ranged from 27% of the sample to just 6% in size. The table below shows the relative profiles of each of the segments against the five main factors identified, and it can be seen that the profile of each segment is different any other on at least one factor.

**Table 3. Relationship between attitudinal factors and segments**

		Segment							
		1	2	3	4	5	6	7	8
	Size	6%	9%	20%	27%	12%	6%	11%	9%
The Human Rights situation in Australia is fine	<b>Fact 1</b>	↑	↓				↓		↑
Good of society takes precedence over individual rights	<b>Fact 2</b>				↑	↑		↓	↓
Rights and knowledge are not balanced	<b>Fact 3</b>						↓	↑	↓
Individuals rights need stricter protection and consideration	<b>Fact 4</b>	↓	↓					↑	↑
Only protection in law is meaningful	<b>Fact 5</b>		↑		↑	↓	↑	↓	

Arrows indicate the defining characteristics of each segment, showing higher or lower than average associations with that factor.

These segments also vary substantially on many of the 19 individual attitudinal items, and the average scores for each of these are shown in a table in Appendix B.

Based on the attitudinal profiles of each segment, we were able to give them descriptive labels highlighting the theme(s) which most differentiated them from other segments. These are illustrated in Table 5 which summarises the typical demographic and attitudinal profiles of each of these eight segments. The labels tend to reflect the primary characteristics of the segment, but it should always be remembered that segments are more complex than that, with secondary and tertiary characteristics that can also be important to particular issues.

It shows that three of the eight segments (totalling 42% of respondents) are generally positive about the human rights situation in Australia. Another two segments (32%) are more moderate, and a final three segments (26%) tend to be more concerned about the current human rights situation.

This is consistent with what was seen in the focus group stage, where the majority of participants felt that human rights in Australia were generally good, and only a relatively small proportion of participants were concerned. The survey results suggest that overall, it is about 1-in-4 people who are concerned about human rights in this country. It is probably this broader three-level distinction that was evident in the focus groups, and the finer eight-segment distinction is only really evident in the statistical analysis of the survey data.

<sup>2</sup> An unconstrained „best fit“ cluster analysis against the factor loadings.

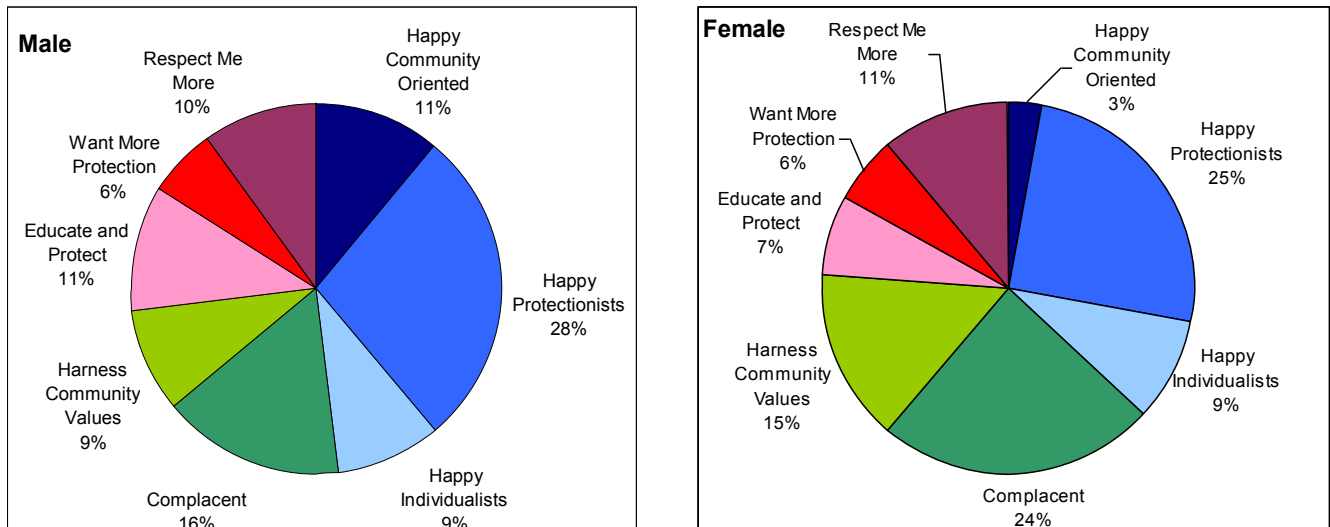
Table 4. Segment Demographic &amp; Attitudinal Profiles

#	Size	Label	More likely to be	Typical 'mind-set'
1	6%	HAPPY COMMUNITY ORIENTED	University-educated Working full-time or retired High income brackets 60+ years Male Have education or work experience in HR	<b>Human rights situation positive</b> Good of community outweighs individual rights Legal protection not as necessary See HR as of lowest importance of any segment
4	27%	HAPPY PROTECTIONISTS	Less educated Retired, 60+ years Lower income Less experience of HR violations	<b>Human rights situation positive</b> Legal protection is very important Good of community and individual rights both very important
8	9%	HAPPY INDIVIDUALISTS	16-29 years	<b>Human rights situation positive</b> See HR as very important issue Individual rights more important than the good of the community
3	20%	COMPLACENT	Less than 60 years old Female Less experience of HR violations	<b>Human rights situation moderate</b> No strong views regarding HR or any specific issue
5	12%	HARNESS COMMUNITY VALUES	University-educated Working full-time High income brackets 30-44 years Female Less experience of HR violations	<b>Human rights situation moderate</b> Good of community outweighs individual rights Legal protection not necessary
2	9%	EDUCATE AND PROTECT	Working full-time, Lower income Younger (16-29 years) Male Experience of HR violation	<b>Concerned about Human rights situation</b> See HR as of less importance Australians are ill-educated about HR Legal protection is necessary
6	6%	WANT MORE PROTECTION	Low income Working part time / casual Experienced HR violation Have education or prof experience in HR	<b>Concerned about Human rights situation</b> See HR as very important Protect individuals ahead of society Australians are ill-educated about HR Legal protection is necessary
7	11%	RESPECT ME MORE	Less educated Low income Retired Experienced HR violation	<b>Concerned about Human rights situation</b> Protect individuals ahead of society Minorities are given too many rights while I / we miss out Some groups take advantage

The mean ratings for specific demographic items for each segment from which this table is derived are shown in Appendix B.

The chart below shows the gender differences across these segments within the Australian community. These distributions show that 48% of males fall into the three segments that feel the human rights situation in Australia is largely positive, and just 25% in the moderate segments and 27% in the more negative segments. For females, only 37% are in the positive segments and 39% are in the moderate segments, with still 24% in the more negative segments.

**Figure 5 Prevalence of Attitudinal Segments by Gender**



As well as gender differences, there were also differences in the prevalence of the segments across different states and territories. NSW and Tas were the only states where there was not at least one segment that was 5%+ more or less common compared to the national average. ACT (5 of the 8 segments) and Qld (4 of the 8) were the most different from the national average).

**Table 6: Prevalence of Attitudinal Segments by State / Territory**

Segment	Aust	NSW	Vic	Qld	WA	SA	Tas	ACT	NT
Happy Community Oriented	<b>6%</b>	6%	<b>11%</b>	3%	4%	4%	7%	10%	<b>12%</b>
Happy Protectionists	<b>27%</b>	25%	24%	<b>33%</b>	30%	25%	24%	<b>14%</b>	23%
Happy Individualists	<b>9%</b>	8%	9%	11%	11%	9%	10%	<b>15%</b>	7%
Complacent	<b>20%</b>	24%	16%	<b>14%</b>	20%	<b>28%</b>	16%	<b>27%</b>	19%
Harness Community Values	<b>12%</b>	12%	<b>18%</b>	<b>7%</b>	13%	9%	12%	<b>7%</b>	11%
Educate and Protect	<b>9%</b>	8%	8%	9%	10%	8%	12%	9%	12%
Want More Protection	<b>6%</b>	5%	6%	5%	6%	10%	8%	<b>11%</b>	10%
Respect Me More	<b>11%</b>	11%	8%	<b>17%</b>	<b>6%</b>	7%	11%	7%	<b>6%</b>

**Red bold** figures are >5% higher than the national proportion

**Green bold italicised** figures are >5% lower than the national proportion

State results based on within state weighted data (sample size for each state n=150-159)

### 2.2.3 How are they learned?

Qualitative group participants generally agreed that human rights are learned implicitly from one's cultural upbringing and life experiences – from parents, extended family, peer and social networks. In Alice Springs for instance, one group member recognised that „remote (indigenous) communities have their own cultures, (so) their understanding of rights vary“ from that of non-indigenous Australians

Many agreed that in recent years, children are receiving significant education in the primary and secondary school environment regarding their rights and often are better informed than their parents regarding their own entitlements under law. Some group participants were teachers and they confirmed this perception.

*‘we would talk about respect, ownership, expectations, consequences. In an ideal world parents would back this up, but they don’t.’*

*Darwin school teacher*

*‘(in) schools you reach a lot more people than you think ... kids ... talk to parents about what they’ve learned’.*

*Perth participant*

Many group participants, and particularly those involved in Australia's education system, pointed out that for most children, values need to be not simply „taught“ in schools but „lived“ and to be reinforced in a child's family and social networks if they are to be retained.

*‘it’s about acting these rights out, living them.’*

*Darwin participant*

*‘Most families would not actually know the rights, and articulate it to their kids. I think you’ll find schools do a lot of it.’*

*Darwin participant*

Church and other community groups were also seen as playing important roles in instilling awareness of human rights.

It was also recognised that the media play a major role in educating Australians about human rights. Participants were constantly impacted by how the media portrays human rights issues, abuses and perpetrators within Australia and internationally.

**The US system of human rights – through its constitutional bill of rights - also maintains a high profile in the news and entertainment media and serves as a surprisingly strong reference point for Australians.**

### 2.2.4 How should human rights be applied?

Group participants consistently re-iterated the belief that different rights should not be granted to different communities within Australia. There was a firm conviction amongst most groups that all cultural groups in Australia should have access to the same rights and responsibilities. Otherwise, there was the concern that „different rights would mean different societies.“

While there was some recognition that indigenous Australians are a special case, the general preference was for the same set of rights to apply. If there was to be any differences, they should be in the *expression* of rights, rather than different rights.

There were strong feelings amongst the majority of group participants that some basic human rights should be available at all times to all people, regardless of their status in society and including criminals, illegal immigrants and temporary visitors. These were those rights described as being „survival“ issues. However, beyond this most basic category of rights, it was considered that there were occasions when rights may be limited or removed based on situational needs and how well individuals met their obligations in terms of responsibility towards others. This is discussed in more

detail in section 2.3.3 of this report – but the key point to note with respect to the application of human rights is that survival-type rights are not negotiable to any person in the country.

Group participants commonly believed that government should ensure that the wider community is made aware of how to access information required to protect their rights.

When asked what responsibilities government has in this area, **many agreed that the government should have a key role in human rights promotion via passing necessary legislation and respecting human rights themselves.** This was seen as righting identified wrongs and ensuring compensation (not necessarily monetary) where justified.

There was general agreement that Government should:

- Listen to the community and respond to its needs;
- Maintain the legal system to ensure legislation can be enforced and breaches punished; and
- Ensure non-government organisations receive adequate funding to act as an independent voice in human rights protection.

This last role was seen as crucial. Some recognised that **the government has been or can be one of the main perpetrators of human rights infringements**, so it was seen as totally inappropriate that they be relied on alone to police human rights protection.

A key question emerging from group discussions was the relative importance of protecting individual rights compared to those of the wider Australian community. Many participants believed that where rights conflicted, the interests of the wider community should take precedence. However others felt they would put individual rights before the safety of the wider community. This is clearly demonstrated in the segments that were seen in the survey results.

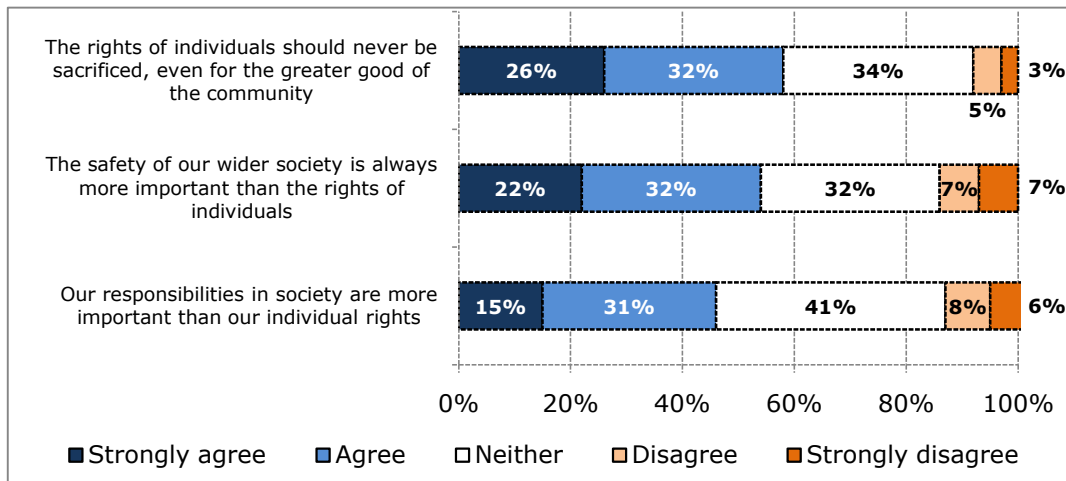
Indeed, **this balance of individual rights and community good consistently emerges as one of the most difficult challenges for human rights in Australia.** Many participants were uncomfortable with choosing one over the other, recognising the importance of both.

The qualitative stage indicated that in the minds of many it ultimately became a question of “the ends justifying the means” – which was in itself problematic because the outcome (or the ends) could only be assessed retrospectively. In most cases, this seemed to relate to examples where a reduction of individual rights was proposed for the benefit of the community (for example: laws relating to bikie gangs; but also rights to parental discipline, privacy and others). Many group participants gave the impression that there were some restrictions to individual rights that they were willing to put up with if it achieved the desired community benefit, but this evidently made even some of these people uncomfortable. Where there was scepticism that the intended outcome would actually be achieved, then there was less support for the means to be implemented.

The charts below summarise community attitudes regarding how human rights should be applied, and demonstrates the complexity of the issue.

In terms of the balance between community good and individual rights, **more than half of the respondents felt that the safety of the wider society is always more important than the rights of individuals – but nearly 60% felt that the rights of individuals should never be sacrificed, even for the greater good of the community.**

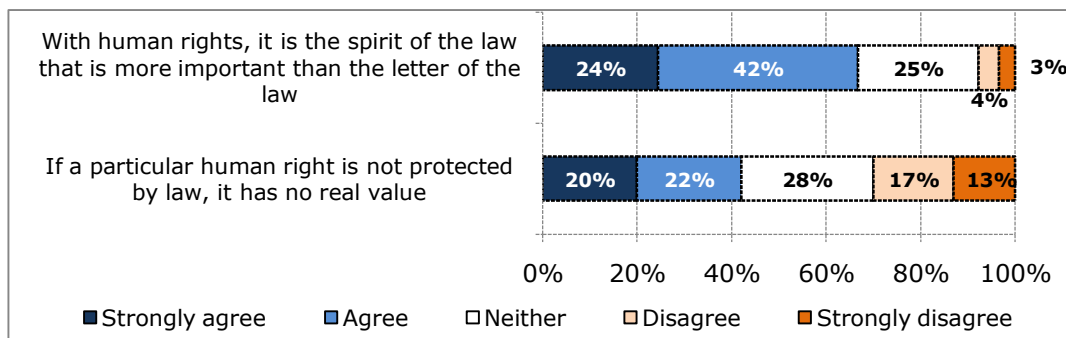
More detailed examination of responses showed that 1-in-3 respondents actually agreed with *both* of these, seemingly mutually exclusive, views. The focus groups suggests that this does not reflect people failing to understand the question – but rather they do genuinely strongly agree with both propositions. If forced to choose between them, it is likely that they will be at least somewhat uncomfortable regardless with which direction they chose to support.

**Figure 7: Preferences for balancing community good and individual rights**

Q3. Using a scale of 0-10, where 0 means 'totally disagree' and 10 means 'totally agree', how much do you disagree or agree with the following statements?

Base = total sample (Weighted to national distribution by gender and jurisdiction – N=1204-1206)

Survey participants also made it clear that the application of human rights should go well beyond simple legal protections. 58% of people did not agree that if a right is not protected in law then it has no real value, including 30% who actively disagreed with this proposition. Two thirds of respondents (66%) agreed that with human rights the spirit of the law is more important than the letter of the law. This was consistent with a view expressed by a number of people in the focus groups that with human rights it was important to interpret laws in an inclusive rather than literal manner to maximise the protection imbued to the maximum number of people.

**Figure 8: Importance of specific legal protection for rights**

Q3. Using a scale of 0-10, where 0 means 'totally disagree' and 10 means 'totally agree', how much do you disagree or agree with the following statements?

Base = total sample (Weighted to national distribution by gender and jurisdiction – N=1158-1193)

ACT respondents were significantly more likely than those from other jurisdictions to believe that human rights could have real value despite an absence of legal protection. NT respondents were significantly more likely to believe that the rights of individuals should be sacrificed for the greater good of the community (mean rating 4.9 vs 5.5).

Older respondents were also significantly more likely to believe rights needed protection in law to have value (mean rating 6.6 vs 5.5) and that our responsibilities in society are more important than individual rights (mean rating 6.8 vs 6.1).



As would be expected based on the fundamental characteristics of the segments identified in the community, there were considerable differences between them across these two issues.

The differences in preference for prioritising the good of the community or individual rights are consistent with many of the segments descriptive labels because this is one of the primary factors in the segment definitions.

The comparison of the necessity of legal protection questions shows that the only segments who place more emphasis on legal protection than on the „spirit“ of the law are two of the three groups who are currently less satisfied with the human rights situation in Australia (the Educate and Protect and Want More Protection segments). This may be an important characteristic of those who feel that the situation is less ideal – that only legal protection is effective.

**Table 9 : Segment differences in the preferred application of human rights**

Segment	Good of society ahead of individual rights	Individual rights ahead of good of society	Must be protected in law	Spirit of law more important than letter of law	Sample size
Happy Community Oriented	<b>6.8</b>	4.4	3.5	<b>7.2</b>	79
Happy Protectionists	7.8	7.8	8.0	7.7	325
Happy Individualists	5.2	<b>7.4</b>	4.3	<b>7.9</b>	116
Complacent	5.7	<b>6.3</b>	5.2	<b>6.4</b>	238
Harness Community Values	<b>6.9</b>	6.1	2.8	<b>7.1</b>	145
Educate and Protect	<b>5.4</b>	4.9	<b>6.4</b>	4.9	108
Want More Protection	5.1	<b>6.4</b>	<b>6.7</b>	5.8	72
Respect Me More	6.2	<b>8.6</b>	4.0	<b>7.7</b>	125
<b>Total</b>	<b>6.4</b>	<b>6.8</b>	<b>5.5</b>	<b>7.0</b>	1206

**Bold** figures are statistically higher than their direct comparison within the segment

## 2.2.5 How aware are Australians of their own human rights?

Whilst group participants knew much of the language which is used (particularly by the media) to describe human rights (eg: the word „enshrine“), very few had any concrete understanding of their rights, or what is or is not protected in Australia.

*‘I guess we don’t have documented any rights on a website where you can look it up, it’s all sort of airy fairy’*

*Canberra participant*

Judgements of what are human rights comes more from a sense of what is fair and acceptable rather than any specific knowledge of legislation, and many rights cited were assumed to be such simply because Australians can access an associated service or commodity. It appeared that many participants assumed that certain things must be human rights simply because they experience them on a daily basis – almost reversing the relationship.

*‘I have no idea what’s in legislation. I would say that the majority of government employees wouldn’t know what’s in legislation.’*

*Darwin participant*

In the devolved consultation phase, one of the refugee participants tried to do some research before the group on human rights in Australia, and was quite surprised to find that there was nothing definitive for them to refer to.



Most awareness of human rights was acknowledged to stem from the media – often it was issues such as the rights of celebrities to privacy that group members were most aware of, or street protests, particularly those that „careered out of control“ (eg, the Cronulla riots) and individual high profile cases. Some pointed out that the facts portrayed by the media were not always accurate – but nonetheless, they too reflected that much of their knowledge and impressions do come from the media.

Many admitted that human rights are not an issue to which they give much thought in their day-to-day lives. Very few had personal experience of their rights being breached and hence most admitted that they take most of the human rights they had identified for granted. More often the media was observed to report on human rights abuses overseas - in regions such as the Middle East, Afghanistan and Iraq. In contrast, human rights abuses were recognised as seldom reported in Australia.

*‘we don’t really care about them because they’re not under threat’*

*‘when you take it away, then you notice.’*

*Hobart participants*

This seemed especially to be the case in regional areas. Many participants could think of just a few human rights unprompted, and again this was more pronounced in the regional locations visited.

When prompted on the set of human rights which appear in international conventions, group members sometimes remarked „(its) second nature, we know basically what they are“.

Some groups in society were acknowledged to have better awareness of human rights, often due to their responsibilities for mandatory reporting of suspected child abuse. These groups included teachers, doctors and childcare workers. Some people suspected that new migrants were probably also more aware of their rights than mainstream Australians.

Many groups reported that young Australians are more aware of the specific rights and benefits available to them, particularly in relation to social welfare benefits, discipline and appropriate contact by an adult, based on greater coverage of this topic in secondary school curricula in recent years. This was often discussed in the context of a perceived difference between the level of knowledge of rights, and the balance of rights themselves, between parents and children. In particular, this was felt by some to have resulted in less disciplined children and a subsequent negative effect on the wider community.

## 2.3 Relative Importance of Specific Human Rights

As noted in the previous discussion of how rights are conceptualised, there was a hierarchy of rights that were commonly identified, and along with a sense of how conditional a right could be, importance was clearly one of the main pillars of this hierarchy.

To a large extent, this hierarchy reflects an analogue to the widely referenced Hierarchy of Needs proposed by A.H. Maslow in 1962. Maslow’s hierarchy begins with physiological needs and proceeds through increasingly abstract levels towards the concept of „self actualisation“, which can loosely be thought of as „achieving one’s full potential“. While this hierarchy of needs is rarely used in any practical way, its bottom up conceptualisation is an intuitive one, and a potentially useful image for understanding the way human rights appear to be conceptualised by Australians.

The most fundamental level of rights identified was a group referred to as „survival“ needs, and is very consistent with Maslow’s base physiological tier of needs. The remaining rights identified would fit more into the mid-level tiers of Maslow’s hierarchy – while those that were more related to the pinnacle of Maslow’s hierarchy (at the self-actualisation end of the scale) were possibly those seen more as „expectations“ or „luxuries“ than as rights.

As with Maslow’s model, the higher level rights were perceived to only become relevant once the lower tier were taken care of. This was the crux of a key difference seen between rights in Australia

and those in developing countries. In Australia, it was understood that for most people these „survival“ rights could be assumed, and so the next level of rights was more relevant to our society. In less prosperous or stable countries, where these survival rights could not be assumed, then the higher levels were seen as far less relevant.

Participants in the groups understood that this changed over time with the (hopefully upwards) evolution of a society. However, participants were not particularly clear as to whether this meant that the set of human rights that exist in a country changes over time, or whether these higher level rights still exist as aspirational albeit currently unrealisable rights. When pushed, the latter was probably the case – but as many people found it hard to distinguish the concept of unrealised rights from non-existent rights, they found this hard to express.

While this priority, „survival“ tier of rights was seen as the most critical, there was also a secondary characteristic of them – they were also more likely to be seen as universal and unconditional. These rights were considered to be essential for all people, at all times. Those rights outside of this tier were partly there because they were relatively less important to some extent, but also because they were rights that could potentially be (preferably temporarily) reduced, limited or taken away under some circumstances.

In the survey, respondents were asked to rate the importance to them personally of 22 separate rights. Their ratings closely reflected the pattern seen in focus groups (see following page). **Basic ‘survival’ type rights emerged as those which were typically seen as most important**, though all of the rights identified in the groups were seen as moderately to highly important.

Particularly interesting was the high level of importance given in the survey to the right to a clean and healthy environment (72% very important), which was in fact rated slightly higher than the right to basic shelter (70%), freedom from discrimination (69%) and justice (65%). This is possibly connected with the high level of exposure of environmental concerns in the mainstream media in recent years.

As was found in the focus group component, rights to social welfare, abortion and euthanasia were significantly less commonly rated as very important compared to other rights.

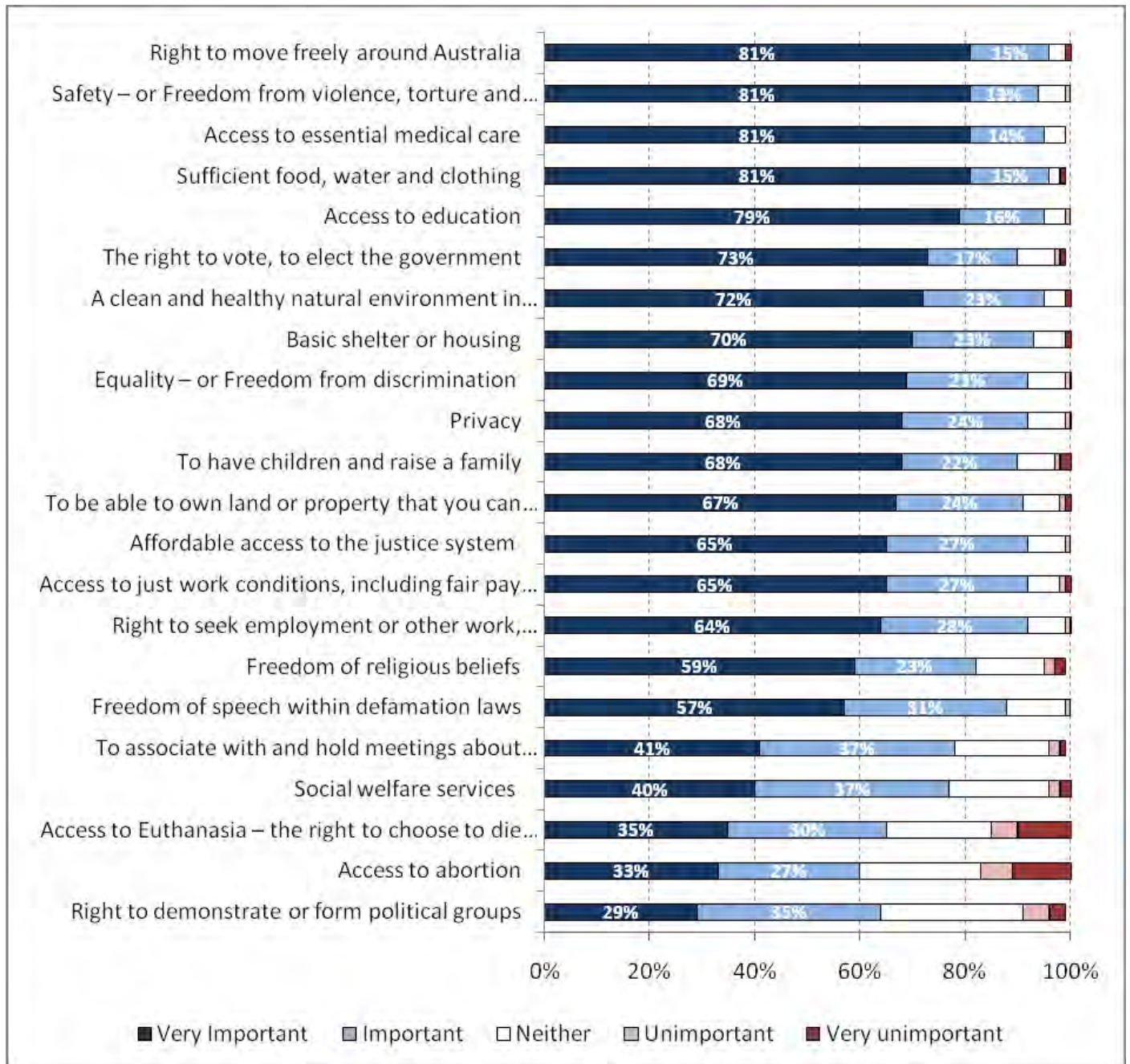
Also noteworthy was the comparatively lower importance (64% important or very important) given to the right to demonstrate or form political parties. However, given Australia’s high level of political stability and the fact that these questions were focused on importance to Australian respondents rather than to the wider world, this lower rating is perhaps not as surprising.

There were few significant differences in importance ratings at the jurisdictional level. Queenslanders were significantly more likely to personally rate privacy and Tasmanians to rate euthanasia as highly important compared to other jurisdictions – but overall there was a very consistent view of the importance of the different human rights considered.

Those in the survey who believed rights are poorly protected in Australia attributed significantly higher levels of importance to many rights, including freedom of speech, freedom of association, the right to education, basic amenities, a healthy environment, to democracy, freedom of religion and safety.

Older respondents (45+ years) gave significantly higher importance ratings to the right to associate regarding common interests. Those aged over 60 years rate the right to vote and religious freedom as significantly more important than younger respondents.

Females were also significantly more likely to give higher importance ratings to most rights tested (16 of 22) compared to males.

**Figure 10 Importance of individual human rights (from the survey)**

Q2. Thinking now about specific human rights in Australia, I'm going to read you a list that people who live in Australia have suggested are our rights. For each of them, can you please tell me how important each of them is to YOU PERSONALLY...?

Base = Total Sample (Weighted to national distribution by gender and jurisdiction; Sample size N=1182-1225)

### 2.3.1 Categories of rights

Using the two concepts of importance and conditionality that focus group participants talked about, it is possible to identify a hierarchy of three categories or levels of rights. These are characterised as below. Note that the labels used here are *not* ones used in the community. They are applied here to convey the concept of the category – but these distinctions are not explicitly made in the community without significant probing, and hence there is no natural language for them. These are drawn only from the qualitative component of the research:

1. Absolute Rights – Those which are especially important to survival and / or are unconditional rights that can never be limited.
2. Qualified Rights – Those which are not directly related to survival, and can be conditional under some circumstances.
3. Desirable Rights – These are not universally seen as rights per se – they are more complex and conditional, but clearly desirable if achievable.

It will be noted below that some rights considered as essential within the focus groups received lower importance ratings in the telephone survey than other rights determined by focus group participants as conditional. This is unsurprising, and reflects the different natures of the two research processes. **Consideration of human rights is a complex and sometimes contentious area and it was only after considerable discussion that group participants were able to reach some consensus** on which rights they categorised as universal, conditional and beneficial. Hence the quantitative survey results can at times be interpreted as „gut reactions“ to the issues raised, while the **qualitative findings represent more considered opinions**.

However, that the survey results, the „gut reactions“, are so similar to the focus groups overall suggests that these gut reactions are indeed a good indication of more considered views.

#### Absolute Rights

These were the sort of rights which group participants saw as applicable across all people in all places at all times:

*‘There should be a set of very basic things that should apply to everyone in the world’*  
*Darwin participant.*

These „absolute“ human rights were defined by group participants as those necessary to survival, democracy and basic human dignity. These were those seen as being the basic necessities – applicable in all countries and societies, and fortunately able to be largely taken for granted in Australia (though respondents recognised that there were some people who „fell through the cracks“). These could not be taken away, under any circumstances.

**Table 11. Absolute human rights**

<b>The right to basic amenities</b>	<p>Sufficient food, clean water, clothing and shelter were actually seldom raised by groups unprompted, as they are so much taken for granted in Australian society that they are sub-conscious for many people.</p> <p>However they were agreed to be the most important universal rights. Some felt that these were more an expectation than a right, based on the fact that (most) people pay for even basic amenities.</p> <p>When reminded that not all those on Australian soil can afford to pay for food and shelter, group members agreed that all should be provided with these commodities, and that access to them was a basic right.</p>
<b>The right to essential healthcare</b>	<p>This was usually seen as the second most important right, given its role in ensuring a basic quality of life. It was defined as ensuring that all people in Australia were able to access essential healthcare services – and for those unable to pay for such services themselves, these be provided free.</p>

<b>Equitable access to justice</b>	Access to justice (ie, to a fair trial) was identified in this core group also. While some spoke of access to legal aid as being a right; it was generally viewed as a mechanism to ensure all Australians are able to obtain a fair trial.
<b>Freedom of speech, freedom from discrimination and religious freedom</b>	While these are in fact different rights, they tended to be grouped together by people in the way they thought of them. Freedom of speech had perhaps the highest level of unprompted awareness amongst group participants. These three rights were seen as core rights of vital importance in Australian society, so long as they are practised within the limits of Australian law and while respecting the rights of others.
<b>The right to live without fear/ feel secure</b>	<p>This was one of the most commonly mentioned core rights and related to the right to personal safety. The ability to protect this right generated significant debate however. Some felt that „it was a lovely idea“ but given the impossibility of guaranteeing it, could not therefore be seen as a right (again, confusing the difference between experience and concept). Some suggested it might instead be interpreted as the right to expect police support if one’s safety was violated.</p> <p><i>‘You should have the right to feel secure on public transport’</i> Melbourne participant</p> <p><i>‘it’s a human right to live without fear no matter where you are’</i> Perth participant</p> <p>The related right, more commonly expressed in international conventions, to freedom from torture and cruel, inhuman or degrading treatment or punishment was never raised unprompted in these groups.</p>
<b>Right to education</b>	<p>This right had quite high levels of unprompted awareness. It was seen as essential to human development</p> <p><i>‘a good education should open up someone’s mind to new ideas’</i> Bunbury participant</p>

## Qualified Rights

Beyond the absolute rights necessary to human survival and dignity are further rights that allow people and communities to develop and express themselves. These rights are still seen as important (as the survey results clearly show), but unlike the more universal rights described above, having these rights is seen as somewhat more conditional on meeting responsibilities as well.

Most group participants felt that many human rights are only possible based on individuals taking on responsibilities in society (eg, respecting the rights of others, but also more generally though things such as paying taxes, and adhering to laws). The rights in this category are the ones that people who „do the right thing“ by society can expect to have – but because they are not tied to „survival“, then those who do not meet their responsibilities could have them limited. For example, there was agreement that it is appropriate to deny groups such as incarcerated criminals and refugees arriving outside the legal system (see section 2.3.3) many of these rights, given they have not fulfilled their responsibilities to Australian society.

**Table 12. Qualified human rights**

<b>The right to work</b>	<p>Often this was not mentioned unprompted at all, given it is taken for granted by so many. Most agreed it should be limited to those Australians who have citizenship or those who have legal work visas (ie: not just anyone who is in the country).</p> <p>Many disagreed though that employment per se is a right, given employers have the right not to employ you / continue to employ you under our system. The right to seek and be considered for work was viewed more universally as a legitimate human right – but because of this conceptual complexity the right to work was not typically placed in the top tier of universal rights.</p>
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<b>Right to vote</b>	<p>Was widely felt that this should be limited to those with Australian citizenship.</p> <p>Interestingly, although the concept of democracy was at the heart of why many people felt that the human rights situation in Australia was very good – the right to vote per se did not tend to feature prominently in the list of most unconditional rights.</p>
<b>Right to association &amp; public assembly</b>	<p>This was taken for granted by focus group participants. Its removal was discussed in relation to criminal groups and often (though not universally) seen as justified – thus placing it in this conditional category. The question of „guilt by association“ was the primary qualm expressed in this context.</p>
<b>Right of parents to decide how they will raise children</b>	<p>This was raised in several groups as a right, particularly in the context of its perceived reduction in the face of increased rights given to children. Again, it was conditional on how parents behaved towards their children.</p>
<b>Right to freedom of movement</b>	<p>This was most often conceptualised as the freedom to cross state borders and to live where one chose. While taken for granted by most, it was seen as appropriate to be suspended amongst convicted criminals and illegal arrivals (for a defined period), and was quite a proto-typical example of this category of important but conditional rights.</p>
<b>Right to dignity in death (euthanasia)</b>	<p>While there were high levels of support for treating euthanasia as a basic human right amongst all focus groups, it was seen as needing to be carefully defined so it was not abused. The majority felt it was a right requiring protection.</p> <p><i>‘I have the right to say enough is enough’</i> Canberra participant</p> <p><i>‘I believe everybody has that right’</i> Melbourne participant</p> <p>Older group participants pointed out that it became a particularly important right „when you need it yourself“. A minority consigned this right to the „too hard“ basket, preferring to ignore it, while only little opposition was seen.</p>

The right to abortion was recognised as a contentious issue with group participants acknowledging the existence of strong views on both sides (and this was considerably more the case for abortion than for euthanasia, which had generally strong conceptual support in the groups). Considerable numbers of group participants argued for it as a basic human right, while many others felt it should be omitted or banned, and this right is therefore placed in the last category instead.

## Desirable Rights

Some individual freedoms were regarded by focus group participants as so dependent on context, related responsibilities and protecting the rights of others and the wider community that they were sometimes viewed more as „benefits“ or „luxuries“ that *maybe* available rather than human rights *per se*. It was clear that these were largely desirable, but not necessarily things that could be expected.

**Table 13. Desirable human rights**

<b>Right to privacy regarding home and family life</b>	<p>In some occupations (eg nursing/ healthcare and government services) respondents reported that this is particularly emphasised as a right.</p> <p>However more generally, it was recognised to be subject to many provisos, most of which group members accepted as appropriate. It was generally recognised that this is a „grey area“, with the government increasingly infringing on privacy (eg the right to tap the phones of those suspected of terrorist activity).</p> <p>Many felt that recent terrorism laws at the federal level have eroded Australians right to privacy. However there was also a general acceptance that some levels of privacy should be treated more as a benefit rather than an unalienable right in</p>
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	<p>order to protect the community. Again, this is an example of where the balance between individual rights and the benefit to society is complex, and to some extent will only be judged retrospectively on what gains have been actually achieved in exchange for the „costs“ in terms of individual rights given up.</p>
<b>Clean environment</b>	<p>A clean environment was clearly something that many people aspired to – but it did not tend to come into their thinking as a human right in the same way that many others did.</p> <p>While some participants raised the right to a clean environment as an important issue in today's society, this was framed more in the context of the next generation's right to clean waterways, air and an absence of noise pollution.</p> <p>There was a general recognition that society has damaged the environment in the pursuit of „modern facilities ... good roads and cars.“ However some commented that a cleaner environment has been recognised to be a basic necessity for mankind's future. „Without it we can't live“.</p> <p>In Tasmania, this was an important human rights issue which was seen as highly relevant (and closely related to the right to protest).</p> <p><i>'We often protest here about pulp mills and things that are going to contaminate the environment and affect our health.'</i> Hobart participant</p> <p>In other parts of Australia, this tended not to be mentioned unprompted by group participants. It was identified instead as an emerging right, encompassing the right to clean waterways and clean air.</p> <p>Access to appropriate sewerage and garbage removal services, while recognised as a right not universally applicable across the world, was raised by some as a basic right they expected in return for paying their taxes.</p>
<b>Access to social welfare</b>	<p>While interpreted by many to be a right in itself, the welfare system was recognised by others as being a privilege or benefit of living in Australia, and a mechanism to assist individuals experience a number of universal „survival“ rights (eg: food, water, clothing and accommodation).</p> <p><i>'If it's not in place, then our country becomes not a good place'</i> Darwin participant</p> <p>The inability to distinguish between this as a right or as a mechanism for protecting rights was symptomatic of the general inability to distinguish between experiencing a right and protecting it.</p> <p>There was a fairly consistent belief that welfare benefits should be assessed based on need and not automatically given to certain groups.</p>
<b>Freedom of choice</b>	<p>This „right“ had particularly high unprompted awareness amongst group participants. It was recognised as an enormous area, encompassing choices as disparate as how many hours a week one chooses to work, whether one bears children and if so, how many, the right to own a business, the right to abortion and euthanasia.</p> <p>It was recognised that an individual's choices can impact adversely on others. Hence groups tended to agree that individual choices need to be made within the confines of the law and respect for one's fellow man.</p> <p>Conceptually, freedom of choice was often described as a benefit obtained from having many more specific freedoms – and hence may really be an outcome more than a right.</p>

**Abortion**

In regard to the right to abortion, opinions were divided, and views were complicated by discussion of the rights of the unborn foetus versus the mother.

In general however, group participants tended to favour the right of all women to choose to have a termination early in their pregnancy.

*'it's so much governed by religion and society, its not a basic right I think (it's) too affected by morality.'*

Sydney participant

There was some discussion of whether additional concepts such as internet communications, transport and infrastructure were rights that should be included. However, most people agreed while these were services which we might legitimately see as expectations of modern Australian society, they were not necessarily human rights as such.

### 2.3.2 Rights not available in Australia

**The only identified right which was widely desired in the groups but not available in Australia at all was euthanasia** – or the right to die with dignity. It was known that this is not available in Australia due to legislation which explicitly outlaws it.

Interestingly, the **right to bear arms** was commonly mentioned as **a right not available in Australia**, based on its high profile and inclusion in the US constitution. It was generally not a right seen as important or desirable to group participants, who were more interested in a more general right to safety and security, but rather an example of a right that we do not have. Most interestingly, it **showed just how strong a reference point the US is for this discussion of rights**. Some however, particularly women on their own, felt the right to carry a gun might indeed make them feel safer.

### 2.3.3 When rights can be limited or removed

There were high levels of agreement in the focus groups that while some rights can never be restricted, some potentially can be (though usually only temporarily).

There were generally only two general situations in which such a limitation or removal would be considered appropriate – where individuals do not meet their responsibilities; and for the short term broader good of the community.

## Criminals

Participants uniformly agreed that those convicted of a crime should have their freedom of movement, choice, privacy, the right to vote and speech curtailed, based on the criminals' flouting of their responsibilities. Some believed this group should also have restricted legal rights – particularly in relation to the ability to access the appeals system at taxpayers expense.

*'Not everybody has the right to freedom. If you break the law you don't have a right to it.'*  
Canberra participant

A minority believed that criminals should forfeit the right to further education while in custody.

Many believed that after sentences had been served, the rights of most criminals should be restored – though the devolved consultation phase showed that former prisoners definitely do not believe that this



actually happens. Often group participants made exceptions in regard to paedophiles, and this was one of the few cases where permanent restrictions of individual rights were justified, with this group seen as having forfeited the right to privacy on an ongoing basis in the interests of protecting the wider community.

There was disagreement regarding the rights of groups such as motorcycle gangs.

Within the South Australian groups, where prohibitions on gang association are strongest, there were mixed feelings. Some believed this group had „brought it on themselves“, and so it was hard to sympathise with them. However there was also a sense of uneasiness that restriction of rights of association had gone too far in affecting the rights of individuals who were not guilty of any crime. There was also an expectation that these restrictions would not produce the desired results, and in the absence of this outcome then the ends would probably not justify the means.

Some believed that it had been proven that motorcycle gang members were violent types who „pushed drugs“ and hence their rights should be removed.

*‘the government needs to show us they are protecting the majority of the population.’*  
Brisbane participant

Others stated that changing the law to prevent a type of person meeting was an inappropriate removal of rights. This group believed that law and order should be protected via alternative measures.

In two groups, those served apprehended violence orders were identified as having some of their rights of association appropriately curbed.

There was also some support for the concept of preventative detainment. 61% of respondents in the survey agreed that it was acceptable to detain suspected terrorists without charge to ensure the safety of the wider society.

See also discussion below on restricting the rights of a group based on the actions of some individual group members.

## Asylum seekers

All group participants agreed this group should be given access to the universal rights to food, shelter, clean water, essential healthcare, access to the legal system and to practice their religion (within the Australian legal framework) – but there was a general view that some temporary restriction of more general rights was appropriate. However some admitted this was not the view of all those people they knew.

*‘My husband would send them out to sea and blow the boat up’*  
Traralgon participant

Many agreed they should also be given the right to access education, particularly for children in detention.

However, it was common to see this group as a type of criminal, and as such, agreed that while their applications were being processed, they should have no freedom of movement.

*‘They come here because they know it’s a soft target’*  
Traralgon participant

Some argued that detention and screening was essential „in case they have a disease“.

*‘With illegal immigrants, you don’t know their past.’*  
Melbourne participant

For some, there was an underlying level of fear that is if asylum seekers were given too many rights „you open the floodgates“, potentially undermining the current standard of living of Australians. Commonly group participants voiced a fear that giving asylum seekers too many rights threatened the

benefits Australians have come to expect. For example, in relation to giving this group the right to work a common fear is expressed below:

*'What about jobs of our children? It will get to a saturation point where our children can't get a job'*

*Toowoomba participant*

Many also believed their right to privacy, to vote and to free speech should be curtailed in this processing period, though this view was by no means unanimous.

However, most agreed that the removal of asylum seekers rights and detention for indefinite periods was inappropriate and unfair. Some felt this should be limited to three months. Others thought 12 months should be the maximum detention period.

Some group members commented that Australians „have some responsibility to help those less fortunate than ourselves,” and a minority were particularly uncomfortable with curtailing asylum seekers rights of movement and right to work.

*'I can't see any reason why they don't get a temporary work visa'*

*Toowoomba participant*

Others vehemently disagreed though:

*'It's a big cost and a big ask'*

*Traralgon participant*

### **The Mentally Ill**

Some mentally ill people were seen as requiring confinement to appropriate facilities, denying their right to free movement, where they were incapable of looking after themselves. This was seen as in the interests of both the community and the individuals.

It was also recognised that this group requires advocates to champion their rights as they are unable to do so themselves.

### **Those on work or tourist visas**

Group participants agreed that it was appropriate that this group not be given the right to vote or to access Australian welfare benefits.

### **Those overstaying visas**

Those overstaying tourist or work visas were considered to have broken the law. Many felt this group should receive no more than rights to basic human amenities such as food, water. Many believed this population should have to pay for any healthcare, housing and education

### **Protection of Wider Community**

Some suggested that times of war and health crises such as swine flu might necessitate the removal of certain rights we currently take for granted in the interests of protecting the wider community. A key issue here was the establishment of a mechanism for restoring rights temporarily removed and to do so as quickly as possible.

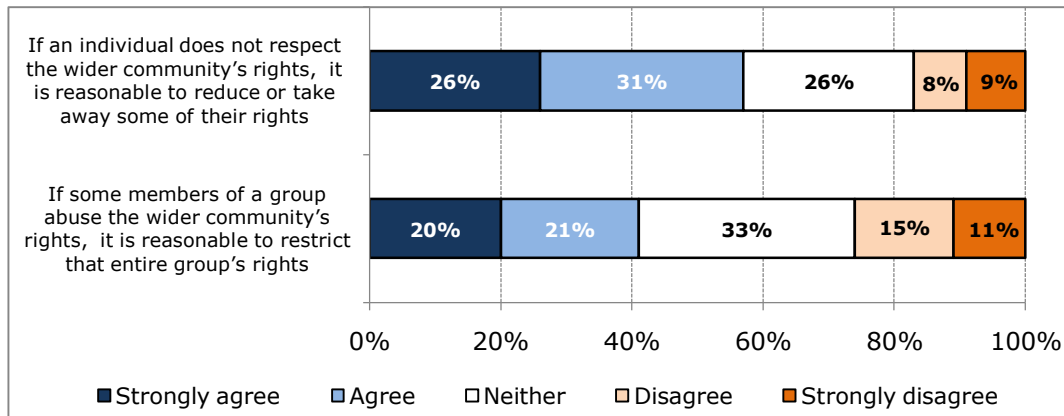
In relation to the South Australian governments recent removal of the right of certain motorcycle groups to meet, there was a popular view that the government was acting appropriately, trying to „stop the violence” and protect the wider community.

### 2.3.4 Restricting the rights of groups based on individual behaviour

There were a number of issues covered in the research where there was no clear consensus across the community – and in some cases individuals were unable to come to a definitive position of their own. Ultimately, most of these cases were directly or indirectly related back to the issue of balancing the rights of individuals with the good of the community.

The issue of restricting the rights of groups based on individuals' actions was a case in point. The focus group discussions were inconclusive, and the survey reinforced this.

**Figure 14: Restricting a group's rights because of individuals' behaviour**



Q3. Using a scale of 0-10, where 0 means 'totally disagree' and 10 means 'totally agree', how much do you disagree or agree with the following statements?

Base = Total Sample (Weighted to national distribution by gender and jurisdiction ; N=1204-1206)

The quantitative sample demonstrated a clear lack of consensus over the propriety of restricting the rights of a group because of the actions of some group members (see Figure 4.12).

Over a quarter (26%) disagreed with this approach, while 41% agreed. By comparison, 57% agreed that it was reasonable to reduce or take away an individual's rights if they did not respect the wider community's rights, and only 17% disagreed.

Those aged 60+ years and those with the lowest education levels were significantly more likely than the average to support restrictions on groups because of the actions of individuals.

When considering the rights of groups, there appeared to be (ie: inferred rather than explicitly stated) a general view that it was preferable to resolve the individual cases directly if at all possible rather than impact on the rights of a wider group in order to solve the problem. This principle was inferred from conversations on topics such as bikie laws, parental rights and responsibilities, and others.

## 2.4 Protection of Human Rights

It is important to note that **most group participants appeared unable to distinguish between the experience of a right and its protection**. This was a very consistent finding, and one that must be continuously considered when interpreting the responses of the community members in both the qualitative and quantitative stages of the research. Many participants appeared to make the **assumption that because they experience a right on a daily basis, and have for a long time, that it must therefore be sufficiently protected**.

Similarly with the distinction between an unrealised right and a non-existent right in developing countries, the conceptual distinction between experience and protection was not one that most members of the community appeared able or willing to make. As a result, given that most mainstream members of the Australian community obtain the benefits of most rights discussed every day (and many reported that they had **never even felt that their human rights were threatened**), **there was a widespread perception that many human rights in Australia are well protected**.

There was a small segment of participants in the focus groups who *could* make the distinction between experience and protection. These tended to be people who had educational or professional experiences that encompassed relevant areas (eg: law, public service, social work). In the focus groups, this small segment of people almost universally felt that while some individual rights were well protected, most in fact were not protected by anything more substantial than good will and custom.

### 2.4.1 Benefits and negatives of human rights protection

#### Benefits

Participants felt that in the Australian context, human rights are very important because they provide us with benefits such as:

- The freedom to be creative, through freedom of speech and choice, which in turn was seen as encouraging diversity;
- A greater level of equality in society;
- Protection from poverty, reducing levels of inequality, protecting the vulnerable and our standard of living;
- A sense of security in our day-to-day lives, including protection of an income;
- A sense of harmony in our lives; and
- A stable economy.

Some participants also felt that the application of freedom from discrimination laws and other workplace legislation protecting the rights to fair wages had improved Australian workplaces. Commonly group members agreed that the presence of human rights provides greater levels of equality and order, provides the ability to challenge prejudice and prevents society from descending into chaos and anarchy.

In a few groups, participants saw human rights protection as vital in allowing asylum seekers arriving by boat some refuge in Australia. Others saw human rights as protecting those with disabilities.

*'gives us the ability to get ... help from the government when we need it.'*

*Melbourne participant*

## Negatives

There were some perceived downsides of human rights protection, such as the danger of forcing the ideals of one society or social system on all groups and the fact that different cultures put very different values on various human rights.

It was also recognised that protecting individual rights can be at the expense of the wider community or *vice versa* – a recurring theme throughout the research. For example some saw the current Global Financial Crisis as a consequence of freedom of choice being taken too far for the individual, resulting in a significant financial burden, particularly in the United States.

Freedom of speech was another right which some felt could have negative consequences. Some felt threatened by visitors and recent arrivals using free speech to disparage Australian values.

*'You can't have people criticising our way of life in Australia ... it incites violence.'*

*Perth participant*

Some felt that visitors to Australia should have less rights to free speech than Australian citizens.

In many groups it was believed that the protection in law of some vulnerable groups had tipped the balance too far. While a number of examples were given, the common theme appeared to be that dealing with a small number of problematic cases by changing the balance of the rights of groups was not preferred – rather it was felt that having better capabilities to resolve those problem cases was a preferable solution.

For instance the perceived growth in rights of children was commonly highlighted as potentially damaging. The rights of children not to be tried under the adult legal system, not to be physically punished (through smacking) and to access welfare benefits immediately if they run away from home were perceived as sometimes exploited by teenagers.

Some group participants reported for example frustration or concern at parents no longer being able to physically discipline their children. The issue was particularly raised by older female women. There was debate over whether parents should be allowed to physically discipline their child by smacking, and the likelihood of some parents exploiting this right. Some felt that the removal of this form of parental discipline undermined parental authority and caused some children to take advantage of their greater power to „act out“ without fear of retribution. This was sometimes seen as a factor causing greater discipline problems and higher levels of delinquent youth.

There was a perception that to prevent the minority of cases where parental discipline went too far, the law and society had built in too many protections. In doing so, it had watered down the rights of all parents. Strengthening of legislation around child protection was seen as only minimally effective in preventing „bad parents“ and left responsible parents with limited capacity to discipline children.

*'kids rights have been overprotected to the point that they have an exaggerated view of ... their level of protection in society.'*

*Perth participant*

Commonly group participants felt that the government has gone too far in attempting to protect children's rights, at the expense of family unity and the need of teachers to sometimes physically engage with children. The principle of punishing the group (parents) for the failings of the few was not a generally supported principle.

*'kids are taught how to walk away from their parents'*

*Adelaide participant*

*'children these days think they shouldn't even be smacked'*

*Melbourne participant*

*'they can push the boundaries and they know exactly what they can get away with'*

*Brisbane participant*

*'You have children coming home thinking they can do whatever they want'*

*Melbourne participant*

*'(they) smash a window of the car and police can't touch them because they are under age'*

*Brisbane participant*

*'Children ... get mixed messages from ...American TV that gives them an inflated sense of their rights'*

*Perth participant*

*There are times when the rights can get out of control – where the kids have taken advantage of a right where it's not within their best interest'*

*Brisbane participant*

*'I want to raise my kids with smacking, but I can't do that ...' In some areas the rights of children have gone to far – it's the rights of parents have been diminished, the language of kids is terrible, but what can parents do?*

*Darwin participant*

*'Parents should have the right to discipline their children, physically. These days they don't get disciplined?'*

*Darwin participant*

Often group participants agreed that given these problems, enshrining the rights of children in law was not necessarily the best way of protecting those rights. A proposed solution was instead to address the problem cases more effectively with better resourced and skilled service delivery agencies.

## 2.4.2 How rights are protected in Australia

Focus group participants had limited knowledge about how rights are protected in Australia, and how well protected they are.

There was limited awareness that many rights which Australians take for granted are not specifically protected in law. Only a few group participants raised this issue, and they tended to be those who had professional or personal experience that gave them insight into human rights and an understanding of what protection actually requires.

Participants did identify a number of formal and informal mechanisms currently in place which protect our rights. However, it was often **cultural norms and expectations that were viewed as a particularly protective aspect of the Australian community**.

## The legislative system

Initial reactions from group members demonstrated an **assumption** that human rights are protected by the laws that govern our society.

Many saw the Australian government as „custodians“ of our rights, though some pointed out **that laws frequently change and this led to some concern about the future protection of rights which mainstream Australians have taken for granted** - especially as examples of changes given tended to be ones where rights were reduced rather than enhanced. Some pointed out that Australian governments have made advances in protecting the human rights of minority groups such as same-sex couples, through legislation changes, but more examples were given where rights such as privacy and to protest had been reduced rather than increased.

Some believed that if there was not legislation to protect their right, there was „probably not much that can be done“ apart from lobbying for change to the law.

Others were concerned that it's very difficult to set rights in concrete without creating loopholes or excluding people, as there are so many variables.

The Australian government was identified by a minority of participants to have signed United Nations declarations, agreeing to support a society free from discrimination, hence giving Australians that entitlement.

## Government departments and the social welfare system

The **role of the welfare system as a mechanism to ensure that (most) people were able to get access to at least the most basic survival needs was implicitly recognised – to the point where it was not clear whether this was seen as a mechanism or a right in itself.** The associated right was presumably the right to access welfare, while as a mechanism it then allowed people to access these universal rights.

Government departments such as family and community services, law enforcement and consumer affairs agencies were also seen as having a protective role – through identification of rights abuse and prosecution and by developing appropriate social policies. Police personnel, social workers and teachers were recognised as playing important roles here.

Some participants specified that keeping Australia's social welfare system in place is an important strategy to ensure human rights are protected. For example, **in some states it was felt that departments tasked with protecting the welfare of children were under-resourced and this was a risk to their ongoing protection.**

## Individuals and wider community action

There was a common belief that a caring society is inherently protective of human rights. Hence there was also a strong view that we as individuals, parents and as a community have a most important role in ensuring our rights are protected through action such as reporting abuses, lobbying for justice or changes to the law. Rights are seen to be protected through social norms and community pressure.

*'we have to fight for them, vote for them, make noise about it.'*

*Darwin participant*

*'we are responsible to speak up... and to report things that are wrong'*

*Port Augusta participant*

As a result, group participants suggested they might talk about such issues in their social groups, for instance to mates in the pub.

*'Society looks at things and its either acceptable or not acceptable ... (with injustices) there's some social pressure to have a good look ... we can assert pressure.'*

*Canberra participant*

*'don't just turn your back'*

*Melbourne participant*

It was noted that many Australians are however disinclined to take part in a protest and have been far less vocal than minority groups (which was sometimes felt to have been to their detriment). Instead mainstream Australians were thought more comfortable using talkback radio and letters to the editor pages.

*'I haven't grown up with protests, I would never go to one.'*

*Perth participant*

*'We are apathetic...you have to sacrifice a lot to protest... they can dock a day's pay'*

*Perth participant*

While it was acknowledged that most do not bother to protest, those in the Hobart group could also think of local examples where residents were very active in fighting for rights on particular issues. This preparedness to protest was seen as stronger than in mainland Australia, and one of the ways that the community could protect its own rights.

## Media exposure

It was also widely recognised that access to the media can be a powerful tool for individuals to draw the attention of government and the wider community to hear of (perceived) breaches. There was a perception that the media play a protective role in Australia by remaining accessible to the community – even if their motivation is often only in chasing a good story.

Some suggested talk-back radio or commercial television shows such as A Current Affair as useful avenues to have human rights issues aired.

*‘The media ... gets a whole heap of people fighting for your cause’*

*Perth participant*

While group participants accepted that media channels will often twist a story to suit their own need for entertainment value, commonly groups suggested that those with a human rights complaint and/or who were lobbying for improvements could take their story to a TV channel, or the letters page of the newspaper.

## Advocacy groups

Commonly, group members identified church groups, charities, unions and other non-government organisations (such as gay rights groups, St Vincent de Paul, Amnesty, Red Cross, the Salvation Army, the United Nations, the Human Rights Commission, the Law Reform commission and industry ombudsmen) as important advocacy groups whose role was seen as important in promoting human rights awareness, assisting with advocacy and hence the protection of human rights.

Environmental advocacy groups were also identified. Some participants were able to identify community legal centres and similar organisations which had such an advocacy role.

Some group members reported that they tended to be made aware of a rights breach when caught up in community support (often via signing petitions) for a particular issue.

### 2.4.3 Who should have responsibility for protecting human rights

The Government and the courts are most widely felt to have a responsibility to protect human rights in Australia – with the Government felt only slightly more widely of the two to be responsible.

86% of people felt that the Government<sup>3</sup> had a high or very high responsibility, with 47% choosing the very high category. The equivalent figures for the courts were 84% and 35% respectively.

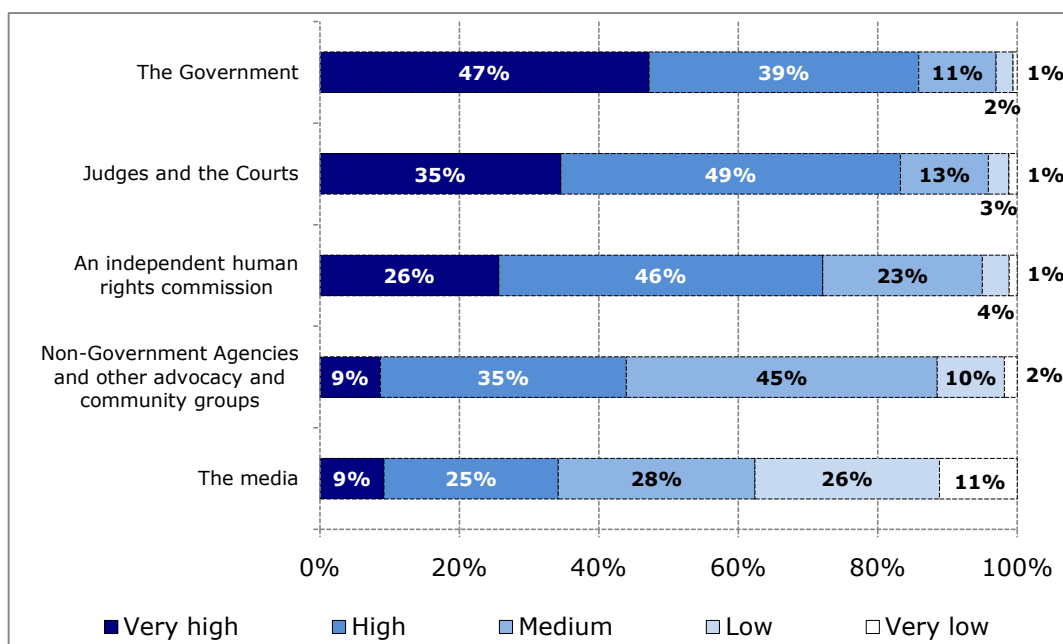
There were no major differences in perceived levels of responsibility by state or territory. Those respondents from small towns and rural Australia were significantly less likely than the average to rate highly the role of an independent human rights commission in rights protection (63% vs 72%).

<sup>3</sup> The focus groups suggest that by „Government“, most people are taking a very broad definition of the term and inclusive of both the Government of the day and Parliament.



While NGOs and other advocacy and community groups were generally seen as having only a moderate role to play in human rights protection, females attributed higher levels of responsibility to these than did males.

**Figure 15: Perceived Levels of Responsibility for Rights Protection**



Q7. Which groups and institutions *SHOULD* have responsibility for protecting human rights in Australia? Using the scale very high, high, medium, low and very low, how much responsibility should each of the following have for protecting human rights in Australia?

Base = Total Sample (Weighted to national distribution by gender and jurisdiction, N=1188-1219)

In terms of the segments, there were some variations across the three groups or institutions felt to have the most responsibility overall:

- The Want More Protection segment felt that the Government should have very high responsibility (60%), but only 41% of the Protect Me More segment did.
- The courts should have very high responsibility to the Harness Community Values (42%), Happy Individualists (40%) and Complacent (39%) segments; but fewer of the Happy Community Oriented segment agreed (24%).
- An Independent Human Rights Commission was of particular importance to the Protect Me More segment (45% very high, and 87% at least high responsibility), while the Happy Community Oriented felt there was less responsibility for a Commission (16% and 46% respectively).

Despite these variations though, all segments felt that Government should have the highest responsibility, and only the Want More Protection segment put an Independent Human Rights Commission ahead of the courts as having the second highest responsibility.

## 2.4.4 Perception of how well human rights are protected in Australia

In general, **most people in Australia have not experienced what they would consider violations of their human rights, and do not feel that there is any real threat to their rights.** Focus group participants strongly indicated that they benefit from most rights on a daily basis, and the survey reinforced this, with 70% agreeing that they benefit from the set of rights they consider important and only 4% who did not. **While there was an acknowledgment that some improvement was possible, it was not widely considered urgent to achieve this.**

*'I think it's at a pretty good standard ... compared to some third world countries.'*

*Canberra participant*

Those participants in both the main research and the devolved consultation phases who came to Australia from less developed countries tended to have a greater awareness and appreciation of the rights they had in Australia

*'We are blessed...coming to Australia is like a breath of fresh air.'*

*Toowoomba participant*

While people do think that human rights are important, this positive environment has resulted in a **generally passive attitude to rights** and an acknowledged **lack of real understanding or awareness of issues about them.** In particular, being able to conceptualise **subtle distinctions such as between general experience and formal protection is not common.**

Reflecting this context, **even though they are unable to precisely articulate what their rights are nor the nature of the protection they have, most people in Australia are quite satisfied with the level of protection that their rights have.** Both the focus groups and the survey demonstrated this, though in the focus groups some participants did note that where they had seen rights tested or changed, they had turned out not to be as protected as they had previously assumed.

However, a smaller group of people in the focus groups were concerned that formal protection for human rights in Australia was quite insubstantial.

*'It's difficult for us to put them into words, but the fact we don't have a bill of rights means they aren't secure.'*

*'Who can you turn to and say I have the right to (something)? Somebody could just say No you don't'*

*Hobart participants*

Some focus group participants did feel that specific rights had been taken away by the Australian government in recent years in trying to protect the wider community. Some pointed out that there was no guarantee that future governments would not repeal other laws currently protecting human rights.

*'Freedom of speech may disappear unless we concrete it'*

*Toowoomba participant*

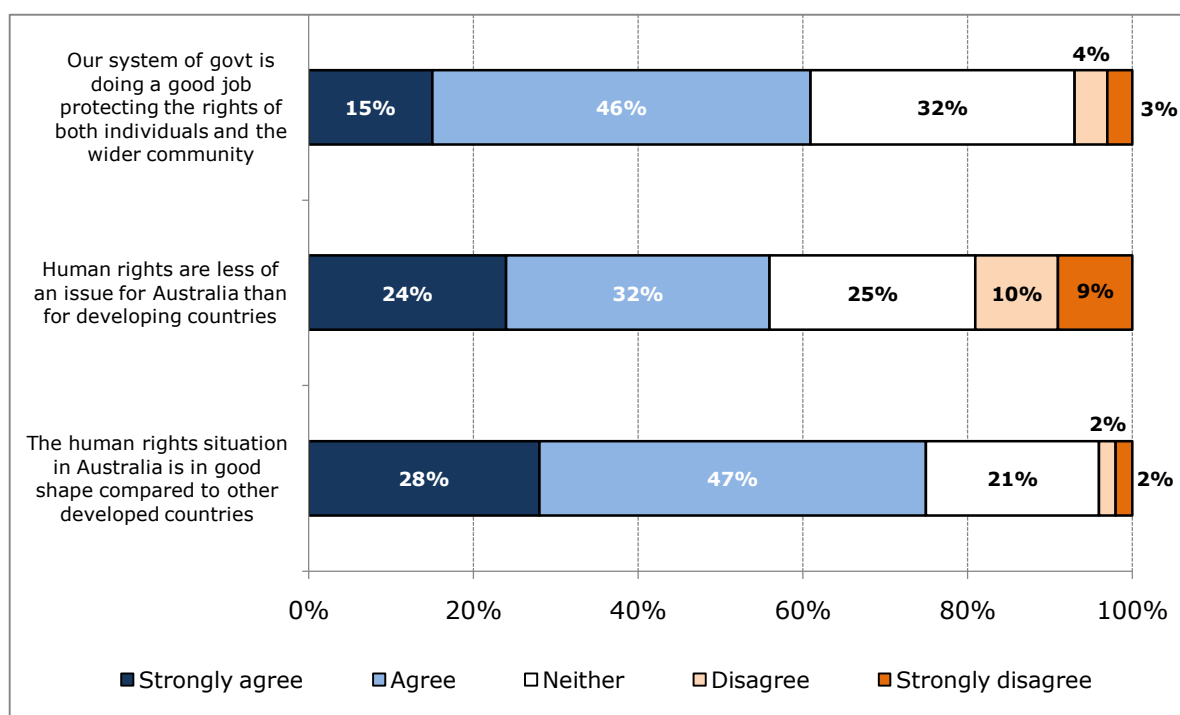
## Overall protection

The focus groups indicated that there was a general sense **that rights are adequately protected**, with only small numbers of dissenting views. There were distinctions made in perceived protection between some individual rights, and the discussion will shortly look at these. However, the survey confirmed the overall sense from the groups **that rights are felt to be well protected by most people.**

75% of people feel that the human rights situation in Australia is in good shape compared to other developed countries, and 61% that our system of Government is doing a good job to protect the rights of individuals and the wider community. 56% felt that human rights are less of an issue in Australia than they are for developing countries.

People who had experienced some form of breach of their rights, not surprisingly, were a little less likely to agree with these statements, but otherwise they were very consistent across states and territories, age and gender groups.

**Figure 16: Attitudes to Rights Protection A**



Q3. Using a scale of 0-10, where 0 means 'totally disagree' and 10 means 'totally agree', how much do you disagree or agree with the following statements?

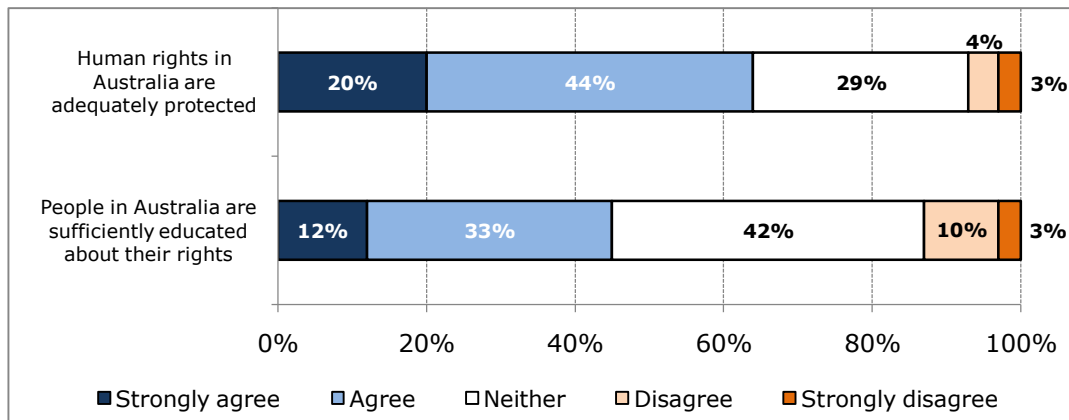
Base = Total Sample (Weighted to national distribution by gender and jurisdiction ; N=1188-1209)

However, reflecting their attitudinal basis, there were some differences amongst the segments.

- The three segments who were most positive about the human rights situation in Australia were, predictably, all more likely than average to agree with these statements (except for the Happy Individualists with respect to Human Rights being less of an issue for Australia than for developing countries).
- The two moderate segments largely reflected the overall community averages.
- The three segments who were least positive about the human rights situation were, also predictably, less likely to agree with these propositions. The Want More Protection segment in particular were least likely to agree with all three, and a majority of this segment actively disagreed that human rights are less of an issue for Australia than they are for developing countries.

More explicitly, 64% of people agreed that human rights are adequately protected in Australia, and just 7% disagreed with this. Interestingly, **although the focus groups continuously showed that people knew very little detail about human rights in Australia (and acknowledged this), 45% of agreed that people in Australia were sufficiently educated about their rights, and only 13% disagreed.**

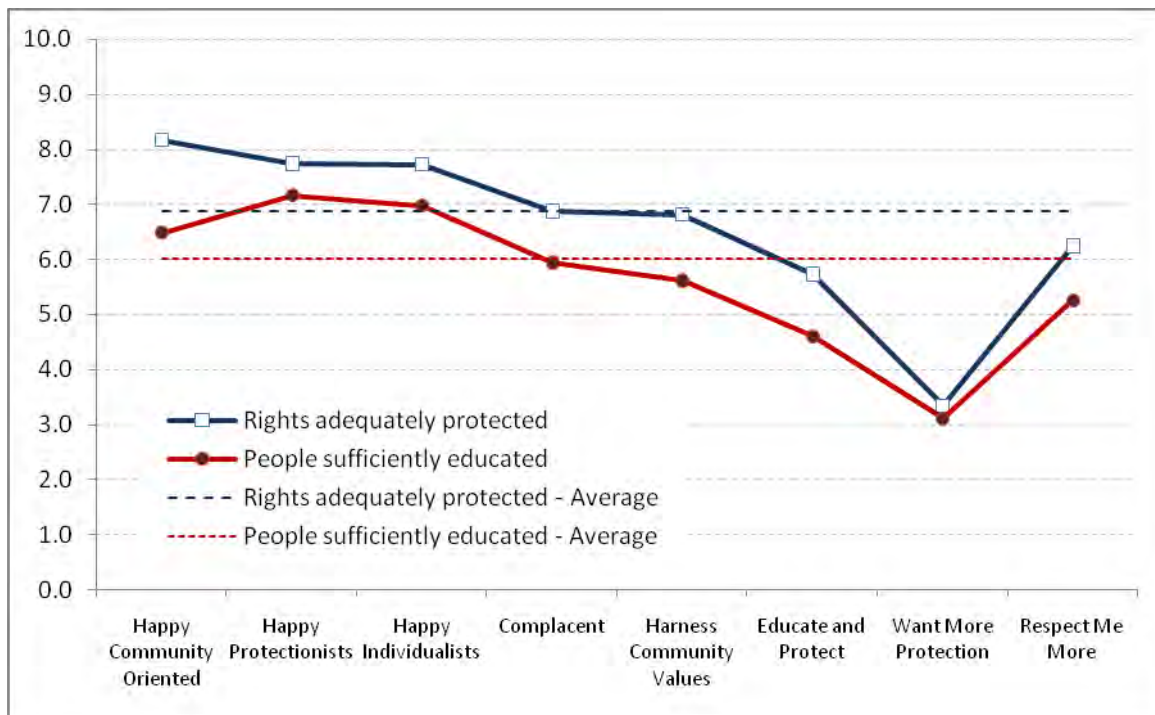
Again, these views were consistent across states and territories, age and gender, but varied significantly between the segments.

**Figure 17: Attitudes to Rights Protection B**

Q3. Using a scale of 0-10, where 0 means 'totally disagree' and 10 means 'totally agree', how much do you disagree or agree with the following statements?

Base = Total Sample (Weighted to national distribution by gender and jurisdiction ; N=1188-1212)

As the chart below shows, perceptions of protection and education levels both mirror each other and follow the three „categories“ of segments – but are dramatically lowest amongst the Want More Protection segment.

**Figure 18: Attitudes to Rights Protection B by segment**

## Protection of individual rights

Table 20 summarises, across the 15 focus groups, the general consensus on how well individual rights were seen to be protected. This was not able to be covered in such detail in the survey, and even in the more deliberative environment of the focus group, for many this was a difficult question to address. Most group participants had little knowledge of any specific mechanisms of protection apart from a general assumption that laws are likely to be in place. Hence, **perceptions of the level of protection are closely aligned with how well people believe that the given right is actually experienced**, and only in isolated cases did a detailed separation of experience and protection emerge.

The level of protection tended to be considered lower ranked where group members could recall specific Australian instances from media reports where that right had (apparently) been infringed or otherwise limited.

Rights to abortion were seen to vary given laws varied in this regard from state to state around Australia. While seen as insufficiently protected, Australia's environment was seen as having been largely sullied by our own lifestyle choices which the country, through its government, is now taking steps to address.

**Table 19: How well is each Right Protected (Summary of focus group views)**

Right	Perceived Level of Protection		
	Sufficient	Insufficient	Not at all
To sufficient food, clothing, housing, public amenities	✓	<b>(Housing)</b>	
To vote, choose government	✓		
To access essential medical treatment	✓		
To religious beliefs	✓		
To work and to just and favourable work conditions	✓		
To free primary and intermediate secondary education	✓		
To equitable access to justice	✓		
To freedom of speech	✓		
To freedom of movement	✓		
To own property	✓		
To safety/ be protected freedom from torture & violence		✓	
To freedom of assembly and association		✓	
To freedom from discrimination		✓	
To privacy regarding home and family life		✓	
To a clean environment		✓	
To freedom of choice within law		✓	
To euthanasia			✓
To abortion	←	varies	→

Source: Summary of focus groups

## Well protected rights

Those rights seen as most highly protected in Australia are the right to vote (protected in law as both a right and a responsibility); religious freedom; the right to education, essential healthcare; equitable access to justice and basic amenities (food, clothing and water).

Each of these latter rights in particular was seen as well protected not so much because there are laws protecting them, but because there are workable systems in place ensuring their delivery to all people in Australia.

*'they can't cut your water off if you can't pay a bill...its an unwritten right.'*

*'when you move into a house the water is [the one thing that is] never switched off.'*

*Canberra participants*

Participants generally agreed that the right to access essential healthcare promptly for life-threatening conditions is present, and this was particularly expressed as people not being turned away from hospitals or medical providers if they had no capacity to pay for the service. However some were not so sure that essential healthcare is uniformly protected given some groups, such as indigenous and elderly populations, can have difficulty accessing healthcare.

There were some mixed views about the level of protection of another basic amenity – housing. Group members often cited the number of homeless persons as evidence that this right is inadequately protected. However others pointed out that homelessness rates in Australia are lower than in other countries, that many of the homeless are offered accommodation but choose not to take advantage of it, and that other homeless persons choose not to even seek accommodation. In general it was felt that this right was well protected, if not perfectly so. The view of actual homeless people in the devolved consultation was not so positive towards the protection of this right or the adequacy of services to them.

*'there are refuges ... for people who are homeless but ... there is a huge unmet demand and not everybody gets a bed.'*

*Canberra participant*

There were a **minority of group participants who were aware that while systems are in place to deliver essential amenities to Australians, these are not legally protected** as a right.

Rights to just and favourable work conditions were also seen as being fairly well protected by minimum wage awards for various industries and a union system.

### Less well protected rights

For some rights, it was felt that there was some protection, but that it required further development to be sufficient. Rights to freedom from discrimination, freedom of speech and freedom of movement were judged as somewhat less well protected.

Discriminatory practices in Australia were seen to affect the rights of groups such as the Muslim community to set up schools or build mosques

*'I think it is stopping them from practicing their religion...the government should be obligated to ensure religious freedom is protected... As a Christian in Australia you get to observe (Christian) holidays. Jews don't and Muslims don't'.*

*Hobart participant*

To some extent discrimination is a particularly good example of the complexity of the distinction between experiences and protection. While laws were understood to be in place to protect freedom from discrimination, many agreed that discrimination is still common in Australia (especially in less formal settings where there are less controls in place), and therefore that this protection is insufficient. While the logic of the argument makes sense, in the absence of the marker of experience, protection is less easily judged.

In regard to freedom of movement, group participants often cited asylum seekers as a group who had had this right removed. However most agreed that such lack of protection was justifiable.

*'The system at the moment is horrible, but there needs to be a system'.*

*Brisbane participant*

Restrictions of this right to contain the spread of transmissible disease was also seen as reasonable. However the government's recent laws allowing people to be detained without charge made some

concerned that protection of individual rights might in the future be inadequate, and contributed to the sense that this right was insufficiently protected.

*'I .... don't think it's that far from the possibility of it being out of control. I worry about it personally. ...We've seen people ... who were held for no good reason.'*

*Hobart participant*

Other examples where this right has been limited pertains to non-Indigenous Australians visiting WA & the Northern Territory indigenous lands only with a valid permit. Some viewed this restriction as unreasonable, or at least inconsistent with freedom of movement as a concept.

Rights considered as most poorly protected – again based largely on experiences - are the right to a clean environment, the right to safety, to privacy, freedom of assembly and freedom of choice. In each of these cases, participants in most groups could cite evidence of recent abuses, or at least threats.

While protection of the environment was seen as poor, many believed that the government is taking steps to redress this.

In regard to freedom of assembly, many recognised that increasingly Australian governments are implementing laws to restrict this right. In Tasmania for instance, group participants talked of a government „crack-down“ during a summit meeting to make it difficult to stage protests.

*'(The government) brought out riot police and created different laws that affected our ability to protest'*

*Hobart participant*

Participant opinions regarding the appropriateness of restrictions recently placed on motorcycle clubs in South Australia were divided, including in that state. Some felt the changes to the laws making it illegal for motorcycle clubs to meet was „ridiculous“, introducing guilt by association.

*'Government is making laws against one group ... They shouldn't ... take away the rights.... you can't make laws for certain people. There should be criminal laws to deal with the drugs.'*

However another typical view within each group held that restricting individual rights is justified if society is better protected.

*'society does have to take a stand against groups, if there's a group that works to the detriment of society'*

*Canberra participant*

Many observed that the right to privacy had been increasingly eroded over recent years, though many thought this justified in the interests of protecting the wider community.

In regard to the right to freedom of choice for the individual, it was recognised that this right is very wide, and that the protection of the wider community needs to take precedence. As a result, it is open to countless provisos and inappropriate to protect in law.

The right to safety and freedom from violence was often seen, on reflection, as an ideal more than a right, given it was unrealistic to imagine all violence could be prevented.

*'I don't think we can expect to live without violence... I don't think we can stop it.'*

*Canberra participant*

## Unprotected rights

The only right that was identified as not only unprotected, but in fact actually illegal, was that of euthanasia, or the right to die with dignity.

The degree of perceived protection for the right to abortion (a more controversial right to begin with) was also varied across individuals and groups.

### 2.4.5 How to get help

It was recognised that where one sought assistance would depend on the human rights issue. Most agreed that it is up to individuals to seek out and use channels available to them to gain assistance and advice.

Younger group participants indicated they would search for potential contact information regarding human rights issues on-line, often by „Googling“ the topic in question. Accessing bodies such as the police, an industry ombudsman, a consumer affairs department, government department or Human Rights Commission were seen as potentially useful.

Older group members noted they might contact their local Member of Parliament or councillor. There was an expectation that they would, at a minimum, be able to point the enquirer in the right direction to have the matter addressed

Overall, it was clear that most people did not know exactly where they would seek assistance from – though many assumed it would not be difficult to find out if and when they needed to. However, there was a strong support for the concept of a single point of contact to which all complaints or queries could be (at least initially) directed.

### 2.4.6 Problems in protecting human rights

While very few in the focus group component could recall having their rights infringed, many could envisage potential problems in trying to protect these. Commonly mentioned possible barriers are described here.

#### Lack of awareness of human rights

- Without awareness, individuals could or would not commence action as they were not sure if a specific right existed and therefore could be infringed.
- Some were concerned that given a lack of human rights documentation there was the potential of simply being told there is no such right.
- There was seen to be a lack of awareness, even within government departments, of what is and is not protected under Australia's complex legislative system.

*‘I work with a government department who doesn't even know what is in their Act.’*

*Darwin participant*

#### Lack of awareness of channels of redress

- Many participants agreed that Australians would not know where to go should they have a human rights concern. Some for example believed that „the only place you can go is to court“ (which has potential cost issues, seems more suited to serious issues and requires significantly higher commitment to pursue).
- Others identified a fear that they would be given „the run around“ by government departments, imagining they would be passed from agency to agency.

*‘You just give up when you get the run around’*

*Canberra participant*



### **Finding the physical, organisational and financial resources to fight an issue**

- Formal processes, especially ones requiring legal representation, can be expensive to pursue.
- It was occasionally recognised that some people would need assistance in writing/ filling out forms and dealing with government red tape.
- Potential problems in proving one's case. This barrier was more to do with the unfamiliarity of the terrain than any specific issue.
- It was felt that some Australians are too proud, or too shy to take a stand against a perceived injustice or abused right.

### **Legislation is rapidly changing**

- Occasionally participants remarked that governments can rapidly alter legislation to curb human rights, threatening the right to justice or „due process“, citing cases covered in the media to illustrate their point.

### **Dissipation of existing rights through political inclusivity**

- There was a not uncommon view that the rights of „mainstream“ Australians have been weakened by government attempts not to offend newer cultural groups in Australia. Examples included rulings within some schools and other organisations that Christmas could not be celebrated in the traditional way.

*‘They’re stopping us from doing what we’ve been doing for 100 years.’*

*Perth participant*

There was commonly a view that often new arrivals expect to live as they want, choosing not to respect the rights of Australians, but wanting theirs to be respected instead. There was a strong feeling that new immigrants needed to understand what rights and traditions Australia accepts and commit to these.

### **Fear of repercussions**

- Some recognised that standing up for one's rights risked the individual being branded as a troublemaker, an „activist“, a „ratbag“, a „whistleblower“ or a „do-gooder“ all of which had negative connotations.
- Some felt that communities might shun a family member who stands up for individual rights in the face of community traditions.
- Others recognised that where an organisation was the target of a complaint, the complainant might be ostracised from that organisation.

## 2.5 Groups within the Wider Community

### 2.5.1 Groups whose experience of human rights may be different

There was a clear preference from the focus groups that everyone in Australia experiences fundamentally the same set of rights. However, it was recognised that not all groups currently have an equal experience and some may require deliberate strategies to approach an equitable experience.

The devolved consultation phase specifically addresses the experiences of a number of marginalised or potentially vulnerable groups within the community, providing more detailed illustrations of how their situations impacts on their daily experiences of living in Australia. **This report**, by comparison, **reflects the perceptions of the mainstream community**.

*'This is probably the best country in the world as far as human rights goes, but there's still a lot of injustice for minority groups that don't have the ability or knowledge to protect their rights'*

Canberra participant

#### People who cannot speak or act for themselves

Children and people with mental illnesses were identified as groups (potentially) requiring other people to speak or act on their behalf to ensure that they receive the same benefits as others. Young children in dysfunctional families were seen as especially at risk, but children of working parents were also seen as being at risk by some.

*'Their lifestyle doesn't allow them to look after their children.'*

Canberra participant

Alongside this though was a not uncommon view that children have, in general, been given too many rights and that this was contributing to a reduction in discipline and desirable behaviour amongst children and youths. 54% of survey respondents agreed that children have been given more rights in our society than is reasonable.

It was recognised that the most effective advocates for the mentally and physically incapacitated and children are their own families.

#### The elderly

The elderly were identified as a group requiring advocacy because they tended to have such stoic mindsets. They were sometimes seen as „a generation that don't speak out – suffer in silence“, but putting them at risk.

As well, the elderly were seen as open to exploitation by the unethical (in the aged care and commercial settings).

Elderly Australians living in aged care facilities were also recognised as at risk by those group participants who had parents in such facilities or worked in that environment. The rights of the elderly to dignity and privacy was often infringed, simply due to a lack of aged care nursing staff in such facilities. This was seen to stem from undervaluing aged care workers, child care workers and carers generally, resulting in poor rates of pay and hence difficulties in attracting staff.

#### Carers

Carers were identified in a number of the focus groups as a group in the community whose rights can be impacted by the additional role they play. It was often unclear exactly how the rights of carers were potentially reduced, and it is possible that this more reflected a desire to recognise the contribution of carers – but nonetheless this group was often mentioned.

Some specific issues that did arise around carers were with respect to childcare support services that were limited to parents rather than carers, excluding some from being able to access them.

## Indigenous Australians

Indigenous Australian's experience of human rights was perhaps one of the more contentious issues discussed in the focus groups. It was widely recognised that Indigenous Australian's experiences are generally less favourable – but there was less consensus on the appropriateness of strategies to redress this, and indeed some animosity to a perceived „reverse discrimination“ was expressed in many groups.

There was a strong belief amongst participants that the rights of indigenous Australians should be on a par with the non-indigenous population rather than greater. **The concept of 'Indigenous self determination' was little understood**, but often responses to this idea were opposed on the basis of avoiding parallel communities (for example, with potentially different and incompatible laws). This terminology is not likely to be widely accepted in the community without significant supporting education as to its intent and application (see also the discussion at the end of this section).

However there was some recognition that remote dwelling indigenous Australians (in particular) who have retained their culture do have „vast cultural differences“ which required human rights and associated service delivery to be carefully considered.

*'Of course, they're the original inhabitants of Australia, they have a special status.'*

*Hobart participant*

Some city-dwelling participants tended to recognise that indigenous Australians are more vulnerable to „the ills“ of Western society and hence require greater levels of education to protect their rights to a healthy productive life. Such participants considered the rights of indigenous Australians poorly protected given their poorer levels of education and access to basic services.

*'our food is giving them diabetes...they are not told how to live in (western) accommodation.'*

*Melbourne participant*

This type of participant tended to believe that indigenous Australians, particularly those in remote areas, miss out on opportunities and hence their rights are inadequately protected – though the survey suggests that people more associate remoteness than Indigenous status with disadvantage (see next section). Those with this mindset believed that equal access to rights required greater benefits being awarded to this indigenous population to promote access. One pointed out „we may have to go outside what we would accept as right to help that particular segment.“

More often however, group participants referred to indigenous rights as „reverse discrimination“, in that this population had too many rights, giving them „more than a fair go“. In many regional locations in particular (but by no means limited to those locations), group participants observed that while the Australian government invested large amounts in infrastructure and services to ensure indigenous populations can access education for example, ensuring the population accesses their right is simply not possible.

*'the kids won't come. They have supplies and resources and sometimes they get paid to go (to school), but they won't go'*

*Toowoomba participant*

Group participants reported exasperation and resentment at the additional benefits available to indigenous Australians, especially to indigenous youth (eg payments to attend school, generous subsidies for sports trips) and benefits for all indigenous people such as low interest loans, cheaper housing, vehicles and food vouchers. These were often viewed by non-indigenous Australians as additional rights, rather than a strategy to achieve equality. This was exacerbated by, and possibly caused by, resentment regarding Indigenous Australians apparent lack of respect for the benefits provided to them (for instance housing).

*'they built houses for them and they would knock out floorboards and build campfires'*

*Melbourne participant*

Some saw it as unfair that indigenous school students are awarded additional marks to assist their university admissions.

*'How come indigenous people get some stuff free and I don't? How come their kids get paid to go to school and mine don't?... They can go to uni for free.'*

*Darwin participant*

*'Aboriginal society gets too much of a free go sometimes... taxi fares to school for children, home loans'.*

*Adelaide participant*

There was a general view that current policies of providing additional benefits (often viewed as rights) to indigenous communities were not working, given they were not resulting in positive outcomes. Such experiences discouraged the belief that awarding this group additional rights was a sensible policy.

*'Indigenous (communities) need more assistance with protecting rights in more innovative ways, rather than just throwing money (at them)'*

*Canberra participant*

*'This has been going for 30 years. There needs to be a plan for when it ends. It can't go on forever... Indigenous people shouldn't have additional rights as a blanket rule. We all need to be treated equally'*

*Darwin participant*

*'I don't mind them getting it in desperate circumstances – maybe it should be means tested'*

*Toowoomba participant*

While the following section shows that in the survey respondents did not tend to suggest that Indigenous Australians receive less protection than they do now – in fact, just the opposite – the groups make it clear that there is a broad sense of dissatisfaction with policies which are evidently seen as neither effective nor appreciated by the beneficiaries.

**In Queensland groups, participants observed that the rights of indigenous Australians differ in the Northern Territory compared to Queensland, owing to different state legislation.** This was observed to **conflict with participant's beliefs** that rights should be universal.

Indigenous land rights were another area of contention amongst group participants. Some felt that awarding indigenous populations large sums per month in relation for mining rights was inappropriate and had not led to a positive outcome anyway.

*'(The) Kakadu royalty right is appalling. Four to five thousand a month but.... They drink it.'*

*Brisbane participant*

*'It's ridiculous to say that they own the minerals'*

*Port Augusta participant*

*'You have to watch it. In WA ... (indigenous communities) will see over two billion dollars over two years because they found gas.'*

*Melbourne participant*

Some in the Canberra group felt that land rights could be a basic human right for indigenous communities. This concept produced heated debate, as evidenced in the following exchange.

*'Isn't it then [giving indigenous land rights] discrimination against us?'*

*'Is it discrimination that we put a fence around the land that they were on first?'*

*'We can't have two separate laws'*

*'If we do that we're segregating.'*

In general, there was no clear consensus reached about Indigenous Australians and human rights. It was recognised as an issue, and a difficult one – and not one that was likely to be quickly resolved without considerable effort on both sides.

### Self-Determination

When asked about whether remote Indigenous communities should have the right to self-determination, for example the right to manage their own lands and communities, participants in WA, the NT and Queensland tended to disagree.

*‘to have them tucked away from everyone else, with permits ... it’s racial discrimination’*  
Darwin participant

*‘You can’t just have a separate justice system for all the different groups in society’*  
Canberra participant

Some believed that white Australia has controlled indigenous development for too long for a self-determination model to work.

Opposition to the concept was based on the perception that recently trialled models of self-determination, providing indigenous communities with livestock, vehicles and machinery for example, allowing them to manage their own stations, were felt to have failed, with evidence of corruption and a failure of recipients to value and look after the commodities received. Some participants voiced frustration at this failure.

In regards to indigenous communities rights to make their own laws, again there was a common feeling that this had not „worked“ and many felt that parallel sets of „laws“ was simply not viable – though positive examples of the use of tribal justice systems within the wider community framework were given by some participants. Some in Tasmania believed that giving indigenous communities the right to follow tribal laws alongside our laws had not been given sufficient opportunities.

*‘It’s a problem, they’ll choose which law they want.’*  
Darwin participant

In Canberra, attitudes were more moderate regarding self-determination. Here some believed indigenous Australians „should have greater input into the current legal system that would take their culture into account.“

*‘If they were given education, they become managers of things and then they can look after their own settlements.’*

*‘Let them decide what they need’*  
Canberra participants

Some believed that if indigenous land owners are to be given large amounts of money every month for mining rights, they need also to be given education on how to manage such sums of money.

Most participants believed that there should be flexibility for Indigenous Australians to express their rights in different ways, but that overall rights should be consistent with those of non-indigenous Australians.

### **Mainstream society**

For some, the perceived high level of protection of the rights of under-privileged groups had produced some resentment and encouraged racism. It was reported by some that minority groups and recent arrivals were, or were becoming, more vocal and active in pressing their cases, and that this was resulting in changes being made within society.

In several groups (Darwin, Perth, Port Augusta, Adelaide) participants felt that Australia has been awarding **so much protection of rights to minority groups**, via mechanisms such as jobs specifically for minority groups, **that the white Australian-born male is beginning to have their rights infringed**.

Some blamed „too many bleeding hearts coming into Australia....I think we are too soft – that is what gets taken advantage of.”

*‘If you are white and born in Australia you are discriminated (against)’*

*Adelaide participant*

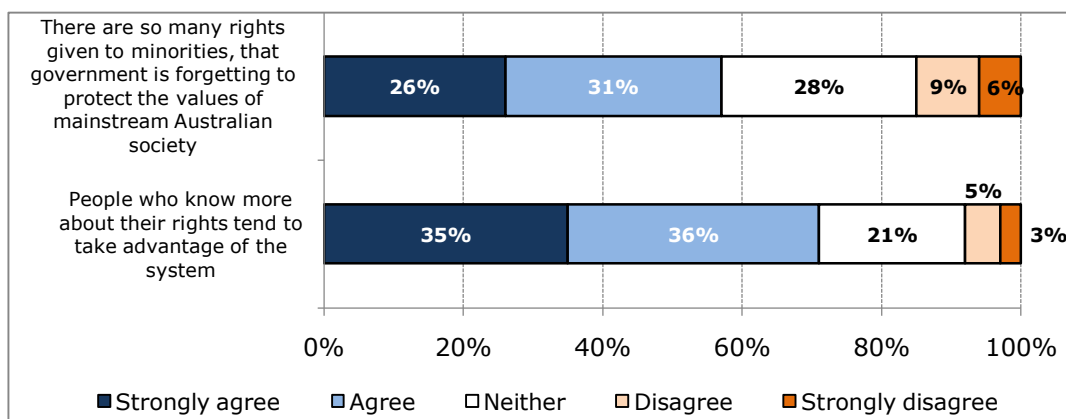
*‘The majority groups are missing out’*

*Adelaide participant*

Some male participants complained about **a government too cowed to stand up for ‘traditional’ Australian values**. Some also reflected that many mainstream Australian males of European background are relatively speaking, apathetic regarding voicing their concerns. As a result, louder minority voices have tended to generate more government action.

The survey results supported these views – **with 57% of the respondents agreeing that minorities have been given so many rights that the government is forgetting to protect the values of mainstream Australian society; and 71% that people who know more about their rights tend to take advantage of the system**.

**Figure 20: Rights of minorities and the mainstream community**



Q3. Using a scale of 0-10, where 0 means 'totally disagree' and 10 means 'totally agree', how much do you disagree or agree with the following statements?

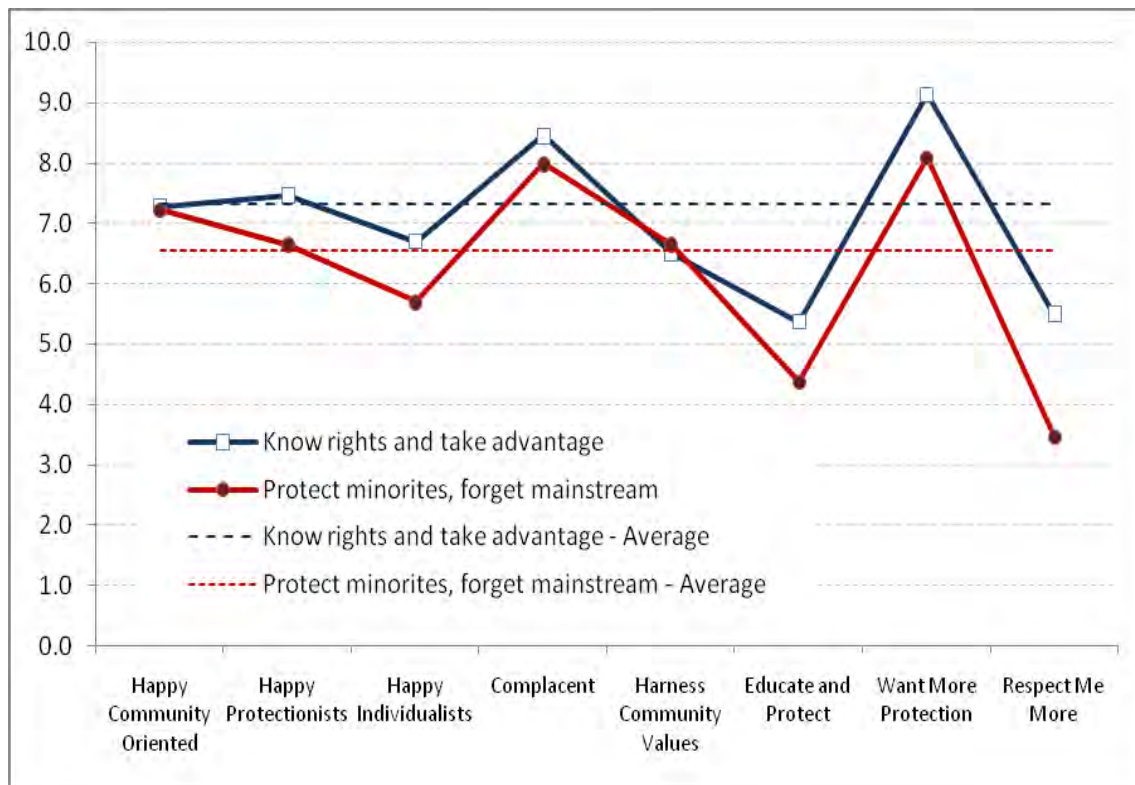
Base = Total Sample (Weighted to national distribution by gender and jurisdiction ; N=1186-1209)

There were some demographic differences seen across these views.

- Older respondents (60+ years) were significantly more likely than the average to believe government is protecting minorities at the expense of mainstream Australian society (mean ratings 7.1 vs 6.5).
- Those with the lowest levels of education were significantly more likely to believe that those who know more about their rights tend to take advantage of the system (mean rating 8.0 vs 7.2); and that the government is protecting minorities at the expense of mainstream Australian society (7.6 vs 6.5).

The Complacent and Want More Protection segments were the most likely to agree with both these statements.

**Figure 21: Rights of minorities and the mainstream community by segment**



## 2.5.2 Changing the level of protection for different groups

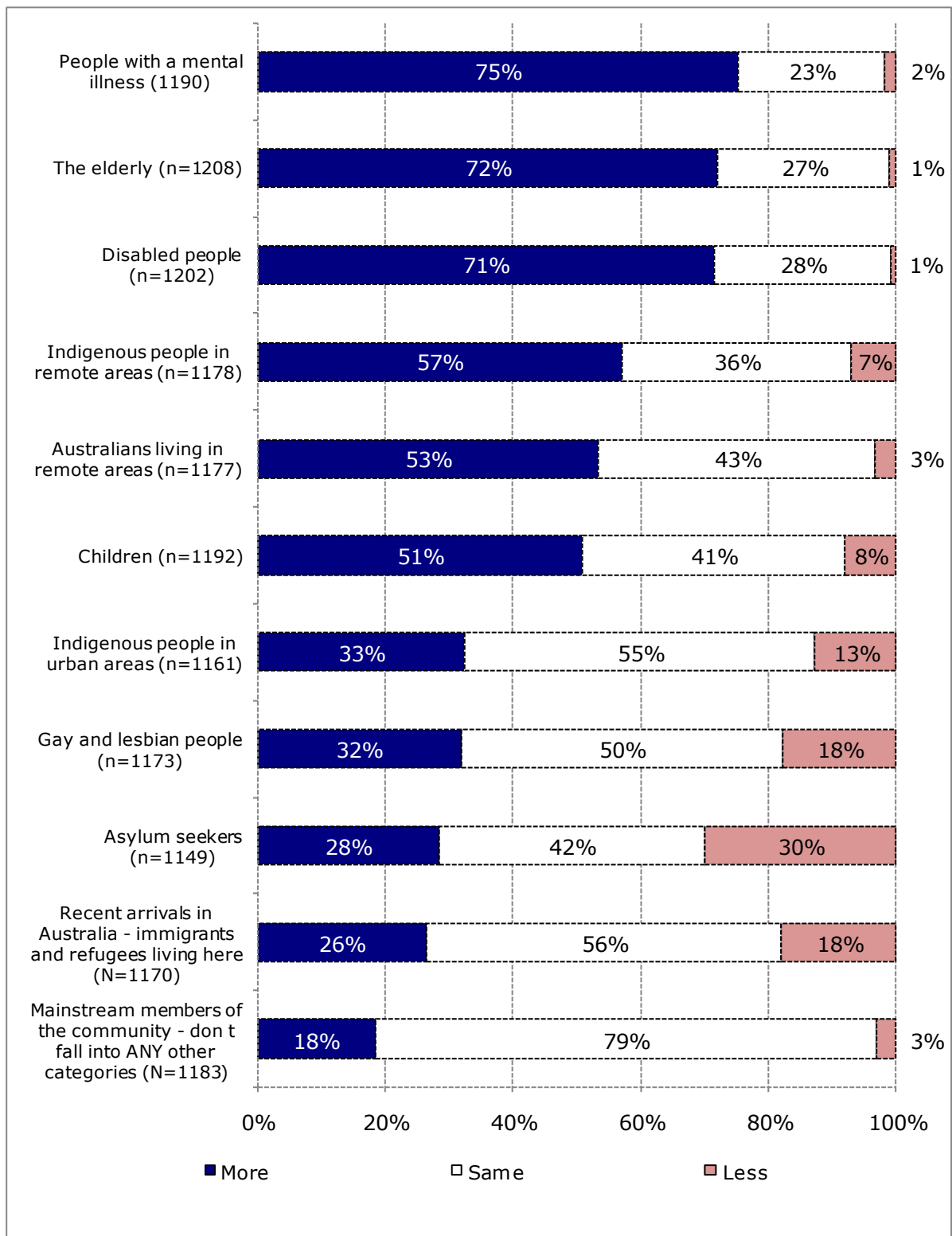
Figure 23 illustrates that greater protection is most strongly seen as necessary for three groups: the mentally ill (75%); the elderly (72%) and the disabled (71%).

Remote indigenous (57%) and remote non-indigenous communities (53%), as well as children (51%) are also seen by at least half the community as requiring greater protection of their rights.

Opinions regarding rights protection were more polarised for urban indigenous communities, gay and lesbian Australians, and recent immigrant/refugee arrivals. For each of these groups 26%-33% felt that they needed more protection, but 13%-18% felt they needed less protection. Same-sex couples were seen as now, appropriately, having almost equal rights to other Australians in terms of access to financial and legal benefits, except for the right to marry.

Opinions are most divided over asylum seekers, with 28% who felt they needed more protection – but a similar proportion (30%) wanting to reduce their level of rights protection.

There was also a reasonable proportion of respondents (18%) who believed that the rights of mainstream Australians require greater protection than is now the case. Qualitative group feedback suggested that this result is due to a sense that the rights of minorities are being given too much precedence over rights of the „mainstream“ community.

**Figure 22: Amount of Protection Required By Group**

Q6. I'm going to read out some particular groups now. For each, do you feel their human rights need to be give more, less or the same amount of protection than they are currently getting in Australia?

Base = Total Sample (Weighted to national distribution by gender and jurisdiction; Sample size N=1149-1208)



Differences between the views of groups include:

- In the ACT a significantly greater proportion of respondents than in other jurisdictions believed gay and lesbian people (48%) and asylum seekers (45%) should receive more protection than they do currently.
- Younger respondents (16-29 year olds) were significantly more likely than the average to believe gay and lesbian people, asylum seekers and recent arrivals need more protection of their rights than they currently receive.
- Those respondents with university degrees were also significantly more likely than the average to believe asylum seekers and recent arrivals need more protection.

## 2.6 Improving the Protection of Human Rights

The discussion of human rights in Australia has shown that most Australians are positive about the human rights situation in this country – but while protection is seen to be reasonable, there is also clear opportunity for further improvements to be made.

Amongst group participants, **the majority felt Australians ‘have it good’ when it comes to human rights protection.** Nonetheless, there was a general feeling that it was an **important issue which Australians took for granted and would benefit from increased awareness if nothing else.**

*‘I don’t feel we are in any danger...feel pretty safe at the moment.’*

*Adelaide participant*

The **minority of people in the groups who best appeared to understand the difference between ‘experience’ and ‘protection’ almost exclusively felt that there was not enough protection, and that something more formal is required.**

**Many believed that the main channel of protection is through changing the laws,** necessitating lobbying of politicians.

*‘If it wasn’t enshrined in legislation or law, then you wouldn’t have a way to seek redress’*

*Darwin participant*

### 2.6.1 Approaches to and considerations for making improvements

#### Documenting our rights

In the focus groups, after some consideration there was generally **at least some interest in each group in having the human rights that exist in Australian formally documented.** Reasons given related to enhancing the perception of safety „we can feel more protected“, and providing at the very least a point of reference or common language for human rights. A number of participants felt that if a right is not written down somewhere, then it does not really exist. Having these rights formally documented also helps overcome misunderstandings.

*‘Of course it should be written down, it stops the misinterpretation’*

*Darwin participant*

*‘When it comes to basic (human rights) everything has to be in writing’*

*Toowoomba participant*

Some believed that those human rights applicable to Australians should be easily available on the **internet**, so that we all understand what human rights are officially recognised and that government is committed to protecting.

However, **others did not see any pressing need for documenting rights**, pointing out that Australia was already *'a great country ... without having anything enshrined.'* **Many were of the view that Australia had adequately protected human rights to date without anything more formal, and that it was therefore unnecessary.** Some believed there were more important things the government should be spending money on than a documentation process.

Some believed that Australia's absence of any formalisation of its citizen's human rights perhaps had some positives in that

*'We don't fear for them, we just assume they are there.'*

*'Do we need a document that says these are the ... rights we need to address when we already know that there are people in society that aren't getting them?'*

*Canberra participants*

While some simply felt that there was no need to document rights, others were more actively concerned that there were problems associated with writing down our rights, **including a lack of any flexibility of interpretation, and difficulty in making changes, potentially creating more problems.**

*'Once it's written down, people are loath to change it.'*

*'There are always going to be loopholes and problems, if you write it down.'*

*Hobart participants*

There was also some awareness that **a written document did not necessarily provide protection.**

*'Something written on a piece of paper doesn't mean very much – like a guarantee - only as good as the people at the top.'*

*Adelaide participant*

*'Even if we do get our rights mapped out, there are so many loopholes around it. ... You set down your laws, and as soon as you're righting them you're rewriting them. (Instead) I think we have to be vigilant.'*

*Hobart participant*

There were many who were **wary of cementing human rights in our constitution**, worried that this would make it **very difficult to make changes**. Even in regard to a written list, there were concerns about the potential time and cost involved if it were decided that changes were necessary.

Some sort of documentation of human rights available in Australia was seen as useful for new arrivals. However some believed that *'immigrants [already] know more than we do.'* **The devolved consultation process suggested that immigrants and refugees would indeed find some reference documentation useful.**

On balance, while there was not universal accord in the groups, it appeared that **there was moderately strong support for some form of documentation of rights. This was supported in the survey, where 72% of respondents agreed that it was essential to have human rights explicitly defined rather than relying on a general set of principles.** Females were more likely than males to agree with this.

## Human rights in legislation

A few participants in each focus group believed that enshrining rights in law would provide a higher level of protection. Some were very surprised that human rights are not automatically considered

during the legislative process for new laws, and in the survey **86% of respondents agreed that the Government should be required to always consider human rights before finalising new laws.**

A minority suggested that the government should review all its laws in light of human rights considerations. However, others saw this as a huge task likely to be „a waste of time“ given the government could then repeal laws at whim.

There was **very little unprompted support for the development of a Bill of Rights in Australia**, though the concept was mentioned in many of the groups. Those in favour tended to be better informed of the limited nature of current rights protection. For them, a Bill of Rights was seen as anything from a good point of reference to an essential legal addition.

Those who did support such a bill believed it would make them more secure in the knowledge that their rights were associated with protective mechanisms. However, it was recognised that **if rights were to be protected in such a way, then the responsibilities of citizens should be similarly declared.**

*‘I’ve always been against the Bill of Rights ... but ... now because of the growth of government (control)... there’s now a need for ... some legislative instrument about what governments can and can’t do. .. Rights are usually compromised, by governments ... I’m sad to say.’*

*Canberra participant*

*‘It’s unlikely the government would abuse the power of not having a Bill of Rights, but it would give lots of comfort if we did have one.’*

*Hobart participant*

Some participants were concerned at the potential cost of developing such a bill „from scratch“ and instead suggested taking material from an equivalent international document and fine-tuning it to reflect Australian values.

*‘It’s a waste of money to have another government sub-committee to develop another one.’*

*Darwin participant*

Amongst those more actively opposed, a Bill of Rights was seen as difficult to put in place without „loopholes“ which could be circumvented and a very difficult document in terms of trying to include all relevant issues.

Most commonly, **participants were of the view that a Bill of Rights was unnecessary as they felt the current systems in place did not show sufficient evidence of failure.**

*‘If it’s worked up to now, what would be the point of having one now?’*

*Toowoomba participant*

## The role of the courts

In the focus groups, the role of the courts was rarely spontaneously mentioned – with the conversations far more focussed on Government and citizens instead. However, previously reported results from the survey showed that the courts were only slightly behind the Government in terms of institutions that it was felt should be responsible for the protection of rights.

The survey also explored the possible role of the courts in more detail. **Nearly two thirds of respondents (61%) supported a system where the courts can tell Parliament if new legislation seems to impact on human rights** of any groups in Australia – but while Parliament always has the final say on the law. Only 11% were opposed to this role for the courts. Remarkably, support for this role did not vary significantly based on any demographic variable – but also remained constant across all eight segments.

The survey also asked respondents to choose between two alternative for how **courts should interpret parliamentary laws: 'in a way that they feel most respects human rights'** and „exactly as they are worded“. Over two-thirds of the Australian sample (69%) laws preferred the former approach, allowing the courts some flexibility in interpretation.

- Females (72%) were slightly more likely than males (67%) to prefer this more flexible interpretation;
- Support for the more flexible interpretation decreased with increasing age from 79% of those aged 16-29 down to 61% of those aged 60+.
- Support for the flexible approach was between 66% and 75% for six of the eight segments – with only the Happy Individualists (81%) and the Happy Community Oriented (52%) outside this range.

## Improving Service Delivery

It was often considered that the rights of vulnerable groups are threatened not by the absence of documented rights but by **inadequate service delivery**. Indigenous Australians, those in nursing homes and children vulnerable to abuse were common examples mentioned where service delivery was perceived to be inadequate.

Often this issue was seen to extend to systemic issues of underpaid childcare and aged care workers, resulting in the inability to attract quality staff to caring roles integral to supporting the rights of the vulnerable.

A minority of focus group participants recognised that where the government had been unable to effectively „solve“ problems for some vulnerable Australians, system-wide approaches had been (sometimes inappropriately) implemented - impinging on the rights of the wider community. Instead some suggested that rather than legislating for a whole group to provide additional protection to a small proportion of that group, the problems of those at-risk individuals should be specifically addressed.

## Raising Awareness of what Rights we have

It was acknowledged that many Australian adults have little top-of-mind awareness and understanding of human rights and associated issues. Some felt that the majority of Australians „never need to know this stuff“ so education campaigns were unnecessary. Those with this mindset preferred to simply know there was a written document somewhere which could be consulted if necessary.

However many agreed **that rather than increased protection, simply reminding Australians of their rights is important, as well as reminding them of their associated responsibilities. This was seen as best achieved through education and information campaigns**, through the primary and secondary school system and by encouraging Australians to talk to each other about human rights.

*‘There’s a certain amount of marketing that needs to happen.’*

*Sydney participant*

*‘We all need to be educated more on human rights ... I’ve ... finished college, and never talked about human rights .... or where you could go (for advice). you would think that education of human rights should be ...just as equal as maths and science, but it’s not.’*

*Hobart participant*

In some groups, raising awareness of avenues of redress was also identified as an important initiative to empower Australians to be able to protect their own rights.

Most agreed that human rights values are to some extent being instilled in children via the education system already.

*'The little ones take it in and take it seriously'*

*Adelaide participant*

In several groups participants pointed out that human rights are covered in courses such as Civics and Religious Studies. However these are optional in secondary school and some felt these should perhaps be made compulsory. There was some recognition that school age children can and do transfer knowledge about human rights to their parents.

However not all agreed even with promoting human rights awareness. To some, raising awareness of human rights „suggests ... there is something not right“ with the current system.

*'I prefer to be totally ignorant'*

*Hobart participant*

There was also a fear amongst a small proportion of group participants that if awareness of individual rights was promoted too much, Australians would end up like...

*'the Americans ... self centred, and less community focused.'*

*Hobart participant*

A common theme expressed was the importance of raising awareness of the responsibilities that we have in society. Some believed that it was these which should be promoted ahead of rights, as reciprocal responsibilities also communicated implicit rights. This approach might avoid an approach which has the effect of only emphasising „what's in it for the individual“.

The concept of mailed materials on human rights, raised by some participants, received mixed responses. Some saw information booklets, available from post offices, as useful, particularly for older Australians. However for some, there were limits to the utility of written materials,

*'If the family is dysfunctional, then the brochure ... won't affect them. They won't read it.'*

*'People hate government mail outs. It's a waste of money.'*

*Darwin participants*

Others believed that for new Australians, providing them with a written brochure might be particularly useful. Group members commonly suggested that media campaigns were a more effective tool in awareness raising for mainstream Australia rather than written brochures.

Some even suggested campaigns which dispersed human rights messages through shopping centres via interactive media and via advertising on everyday items like milk bottles, cigarette packets, cereal boxes and takeaway containers.

## Streamlining the administrative process

Commonly group participants wanted the ability to make direct contact with someone well enough informed to correctly respond to, or at least direct, their enquiry. Some suggested a specific institution could be tasked with this role.

Follow-up feedback acknowledging that the issue had been logged and was being dealt with was considered important. Participants expected to be given a timeframe and/or the name of the person to whom the issue had been passed.

Group members agreed that a single point of contact who could deal with their issue without having to repeatedly explain it would be ideal. Younger group members wanted to see a „one-stop-shop“

website they could access to direct them to the appropriate area. There was some expectation that fair arbitration be made available and the right to protest if an issue remained unaddressed.

A well-known central point of access such as a 1800 number, from where callers could be directed to an appropriate person, were seen as very important to offer. Telephone advice was identified as important so one could ask questions of the adviser.

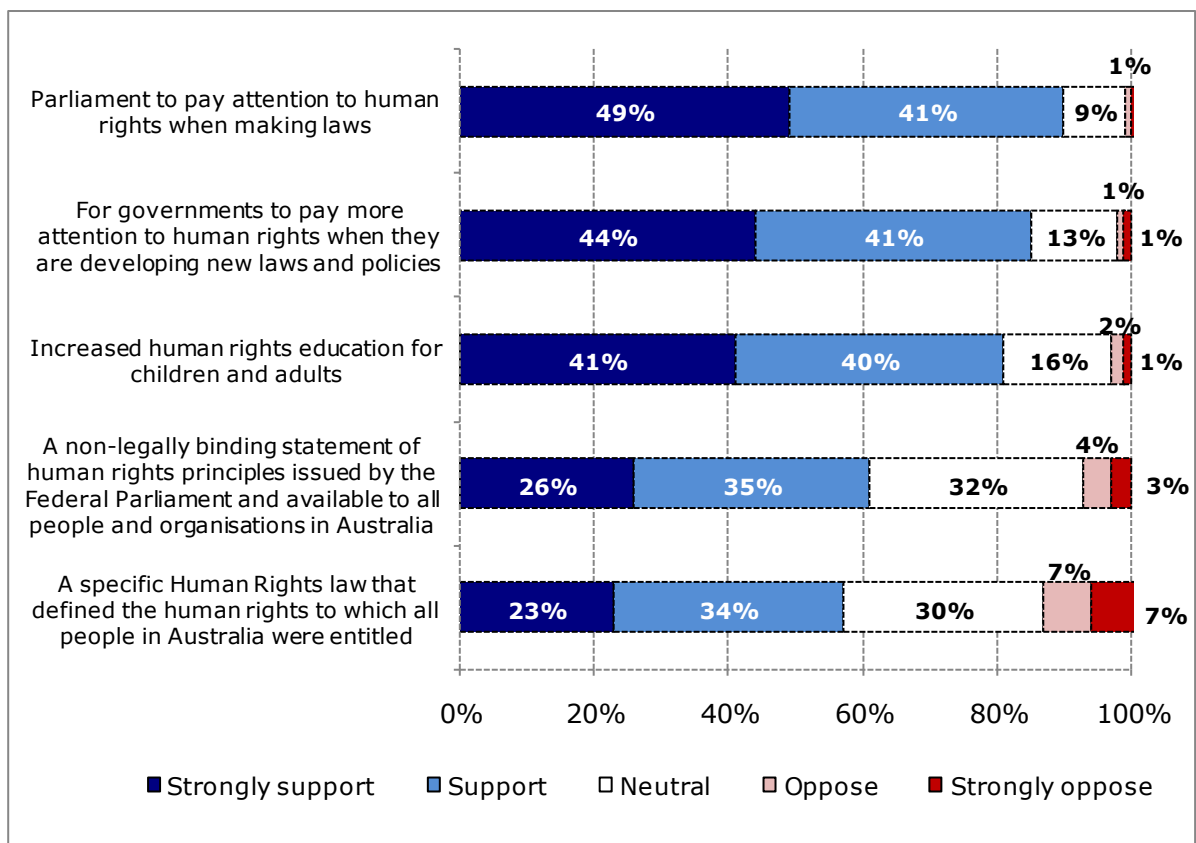
Group members suggested that general practitioners and schools be well-informed about such central contact points, so they could refer people. The ideal process was seen to include having an issue fully investigated without the complainant being victimised.

## 2.6.2 Preferred approach to improvements in Human Rights

Support for five approaches for the way that protection of human rights in Australia could be changed was canvassed in the survey. Support for each of these was high – ranging from 57% to 90%.

It is clear from the chart below though that support for the three most preferred approaches were higher than the other two, and that these three were those which provided the least additional definition of rights. Support was highest for Parliament to pay attention to human rights when making laws (90%) and for Governments to pay more attention to human rights when developing laws and policies (85%). Increase education (81%) was the other top three supported approaches. A non-legally binding statement of rights (61%) and a specific human rights law (55%) were less supported.

**Figure 23: Support Levels for Various Protection Options**



Q10. There are a number of ways the protection of human rights in Australia could be changed. Using a scale where 0 means 'totally oppose' and 10 means 'totally support', how much would you oppose or support the following approaches?

Base = Total Sample (Weighted to national distribution by gender and jurisdiction; Sample size N = 1173-1222)

Females were slightly more supportive of each of the three most supported approaches, but not to a particularly meaningful extent. Support did not vary with age, nor by state.

There were statistically significant differences between the segments, but the overall pattern was maintained within each segment, and the differences were more in terms of the average level of support across all approaches.

## Most preferred change

When forced to choose just one, *most* preferred change, the highest level of support was for Parliament to pay attention to human rights when making laws (29%), ahead of more human rights education (23%).

Only 8% of respondents felt that doing none of these was the most preferred approach.

**Table 24: Most preferred protection option**

Option	Most preferred
Parliament to pay attention to human rights when making laws	29%
More human rights education	23%
More Government attention to human rights when developing laws and policies	18%
A statement of principles available to everyone	11%
Legislation by Federal Parliament	10%
<i>None of these</i>	8%

Q10a. Which of these would be your MOST preferred option?

Base = Total Sample (Weighted to national distribution by gender and jurisdiction; Sample size N = 1226)

The most preferred options did not vary significantly by age, gender or state.

There was some difference amongst the segments:

- The Happy Community Oriented segment were spread most evenly across all options, but the other two segments who were most happy with the current human rights situation were strongly focussed on the two most preferred options overall.
- The two moderately happy segments were also broadly similar to the overall pattern.
- Of the three segments who were less positive about human rights in Australia, two (Educate And Protect, and Want More Protection) were more likely to prefer the human rights law option (24% and 19%) and least likely to prefer the non-legally binding statement option (7% and 1%). The Protect Me More segment was more focussed on the most preferred option of Parliament paying attention when making laws (36%).

### 3 CONCLUSIONS

Human rights are important to Australians. Three quarters of those surveyed thought that the issue of human rights in Australia is important or very important to them.

While human rights are important, this does not mean that the majority are concerned about their rights, have experienced any violation of their rights, or feel that they are threatened. In fact, the opposite is true, with the majority of people in the research personally reporting generally positive experiences with human rights. They are mostly aware that some groups are “falling through the cracks” – but in the general community people who are seriously concerned about their own personal rights are uncommon.

Perhaps at least partly due to the generally positive experiences of living their human rights on a day-to-day basis, most people involved in the research have little specific knowledge about their rights or how they are protected. Most people appear unable to distinguish easily between their daily experience of life with the benefit of the rights they value and the formal protection of these rights.

In the absence of this conceptual distinction, most were satisfied with the current level of protection and had little awareness that many of the rights they identified and experience have little or no protection in law. They think their rights are protected because they are not personally affected and they have limited detailed knowledge to the contrary. Only a relatively small proportion of people appeared to be able to make the distinction between experience and protection, and this often appeared to be correlated with relevant educational or professional experiences (though in itself this did not seem automatically sufficient to make this distinction).

This very concrete, experience-based understanding of human rights may account for the lack of clarity about other more abstract concepts, such as the distinction between a right that is not recognised or protected and a right that is recognised and protected but not presently enjoyed.

Participants implicitly perceived a hierarchy of rights, but also appeared unsure as to whether these rights themselves changed over time as a society evolved, or whether the rights that a society could seek and expect to actually experience changed.

The most fundamental level of rights was a combination of those seen as important for physical survival and those which could not be limited or removed under any circumstances. These Absolute, often survivalist, rights included chiefly social and economic rights as well as some political and civil rights. Beyond these was a further category of Qualified human rights which were able to be limited or removed under some circumstances – usually upon failure to meet associated responsibilities (eg: criminal activity or infringing others rights) or for the benefit of the wider community (eg: public safety or health). A third category were Desirable rights - those seen as benefits rather than human rights *per se* and tending to be more sophisticated and complex issues which were clearly desirable, but not always seen as feasible or even a realistic expectation as a right of an individual.

It was generally felt desirable that any limitations on rights should be as short lived as possible, and in most cases there was a preference for this to be on a case-by-case individual basis rather than done at a general or group level. The balance of individual rights and the greater community good was clearly the most difficult issue in the whole human rights area, with both of these being seen to be very important. Any compromise of either to benefit the other met with some discomfort from most people. As the two require some degree of trade-off, some degree of dissatisfaction with any balance is therefore inevitable.

Given that the human rights situation was seen by the majority of participants to be at least moderately positive and rights generally well protected, there was a common sense that improvements were possible but not urgent. A majority favoured some form of documentation of our rights rather than relying on general principles – but there was also a strong sense that the spirit of human rights needed to be retained as much as a cold, hard definition of rights that could potentially exclude some people under some circumstances.

In addition to formally documenting our rights and human rights legislation, improving service delivery and raising awareness of rights were seen as potentially important ways of improving human rights



protection. A clear, simple and streamlined process for getting information about rights and resolving issues was seen as important, and commonly linked with a single point of contact for all human rights related issues. Overall, there was a preference for less formal measures to improve human rights in Australia. While more than half the community supported a specific human rights law or a non-legally binding statement of principles from the Federal Parliament, support for these was less than for increased education and for Parliament and Governments to pay more attention to human rights when developing and making laws.

Overall, attitudes to human rights were surprisingly homogenous across the community. Knowledge of rights and perceptions of their protection varied considerably, and there were groups of people in the community who demonstrated consistent differences in their attitudes and preferences from other groups. However, what was common was generally more important than what was different across these groups. Similarly, there were few consistent or substantial differences in the views of respondents by age, gender or location across the country. In this sense, the overall community-level results do tend to be the best indication of the attitudes expressed by respondents.

### 3.1 Which human rights should be protected and promoted?

The most important rights to protect and promote in Australia are those seen as absolute rights – those that are essential for physical survival and / or those which cannot be limited or removed at any time. These include the right to:

- Basic amenities (water, food, clothing, shelter)
- Essential health care
- Access to equitable justice
- Freedom of speech, religious expression and from discrimination
- Personal safety
- Education

A second tier of qualified rights are more related to expression and development of individuals and the society, and can conceivably be restricted under certain circumstances. These include the right to:

- Be considered for employment
- Vote
- Association and public assembly
- Parent children as desired
- Freedom of movement
- Dignity in death

### 3.2 Are these sufficiently protected and promoted?

Most people who participated in the research enjoy the benefits of these rights on a daily basis, and are unable to distinguish between these daily experiences and the more abstract concept of formal protection. Thus, in the absence of personal experience or knowledge to the contrary, they tend to think that human rights are sufficiently protected - even though many of the rights listed above have little or no formal, legal protection.

Improving protection of human rights is seen as desirable and possible, but because of perceptions of an existing sufficiency of protection, generally not urgent. It was noted that some groups „fell through the cracks“ and had more common human rights issues. Groups which were specifically identified as

potentially needing greater protection (or at least assistance to receive the benefits of their rights) included children (especially those with parents unable or unwilling to care for them), those with a mental illness, the elderly and indigenous Australians (particularly those in remote areas). Carers were also often identified as a group whose daily life was not as rich as other groups, and who could benefit from greater assistance.

There is strong support for the better promotion and education of human rights in Australia. It was apparent that few people have any specific understanding of what rights they do have, underlining a real need as well as a perceived need for further education.

It is possible that with greater education about the level of formal protection of human rights in Australia there would actually be a decrease in satisfaction with the current protections.

### 3.3 How could Australia better protect and promote human rights?

A number of ways in which human rights in Australia could be better protected were discussed throughout the research.

There was strong support for better documentation of rights, though this was not universal. Those who supported this approach felt that it provided at least a common starting point, even if there was cynicism about how much it would really be worth if and when tested. A concern that was raised was that the more specific any such documentation was, the more it could create loopholes and exclusions which could be more problematic than the current situation. Those who had the greatest concern about the current level of protection were more likely to support better documentation of rights.

Government was seen to have a clear responsibility for protecting human rights, including the need to ensure that there are sufficient advocacy organisations to assist people - especially when they have an issue with Government itself. The courts' responsibility was seen to be only marginally lower. There was a strong preference for courts to be able to interpret laws in a way that most respects human rights, rather than reading them exactly as they are worded.

It was often felt that failures to deliver human rights to individuals were due to poor service delivery, and that this was an important avenue to make improvements. In particular, failure to be able to deal effectively with small numbers of problem cases (eg: abusive parents, criminal activity amongst bikie gangs) was seen as being sometimes a catalyst to change the rules for everyone, often to the detriment of „innocent“ individuals and without the desired effect on the negative cases anyway.

Promotion and education about rights was also thought to be an important strategy for improving protection. However, this was predicated on a belief that rights do exist and are protected, and that education would communicate the detail of this which is currently missing. If this belief is not well-founded, and rights cannot easily be explicitly explained or protections defined, then education alone cannot be a viable solution.

While most participants in the groups felt that they could resolve a human rights issue if one arose for them, they do not have a clear idea of what avenues they could or should pursue. While this was not felt to be a major barrier, having a single point of contact for all human rights related issues (both queries and complaints) was generally considered desirable.

Of the five specific ways that human rights could be improved that were included in the survey, support for all of them was over 50%, and in some cases as high as 90%. However, support (and preference) was highest for those options which did *not* involve any *additional* definition of rights or protection. Parliament and Government paying attention to human rights when developing or making laws were the most supported; ahead of increased education; then a non-binding statement of human rights issued by the Federal Parliament; and then a specific human rights law, which was the least preferred of these options.

## APPENDIX A: METHODOLOGY IN DETAIL

### Qualitative Methods

The first of the two primary research phases was qualitative research involving focus groups in each state and territory in Australia. One metropolitan and one regional group were conducted in each state except the ACT (metropolitan only), providing 15 groups in total.

This ensured that any issues important to specific geographic areas were identified, as well as communicating to the community in all parts of the country that they are an important consideration.

Groups consisted of approximately equal numbers of males and females, and for each group recruits were spread across three age groups (16-29, 30-49 and 50+), ensuring that all parts of the community were given a voice. Groups ran for 2.5 hours to allow us to explore the full range of relevant issues in sufficient depth. Participants were paid \$100 to thank them for their time and input – standard practice in qualitative market and social research in Australia.

Minority groups, such as Indigenous Australian and those with a CALD background were only picked up at incidence level. Hence it was not possible to clearly identify their views, however we understand that another parallel project will cover these groups. The results reported from this research deliberately pertain to the mainstream Australian community.

**Table A1. Focus Group Locations and Attendance Levels**

Group No.	Location	City	State	Participants
1	Metro	Canberra	ACT	8
2	Metro	Sydney	NSW	9
3	Regional	Woy Woy	NSW	8
4	Metro	Brisbane	QLD	9
5	Regional	Toowoomba	QLD	9
6	Metro	Darwin	NT	9
7	Regional	Alice Springs	NT	8
8	Metro	Perth	WA	9
9	Regional	Bunbury	WA	8
10	Metro	Hobart	Tas	8
11	Regional	Devonport	Tas	8
12	Metro	Adelaide	SA	8
13	Regional	Pt Augusta	SA	6
14	Metro	Melbourne	Vic	10
15	Regional	Traralgon	Vic	8
				<b>125</b>

As shown within Table A2, efforts were made to recruit a broad socio-demographic cross-section of Australians to the qualitative group process, with a roughly even split of males and females, age groups and household income groups.

**Table A2. Qualitative Sample Characteristics**

<b>Age Group</b>	<i>N=125</i>
16-29 years	28%
30-50 years	30%
51+ years	29%
Not stated	13%
<b>Gender</b>	
Male	43%
Female	50%
Not stated	7%
<b>Education</b>	
Some secondary	18%
Completed secondary	25%
Trade certificate	6%
TAFE	13%
Degree / Diploma	31%
Not stated	6%
<b>Household income</b>	
<\$21K	10%
\$21-\$40K	21%
\$41-\$60K	15%
\$61-\$80K	16%
\$81-\$100K	10%
>\$100K	21%
Not stated	8%

## Quantitative Methods

### Sampling

A technically rigorous sampling design was utilised to ensure robustness of results at a national and state/territory level. Random Digit Dialling (RDD) was employed rather than a research panel, maximising the representativeness of the sample. Panels are widely used in both commercial and social research to improve the efficiency and therefore cost effectiveness of research, and a well recruited and managed panel will generally be a sufficiently reliable indicator of the wider community in most research settings. However, for this project, where there was a need to ensure that the best possible representation of the community was achieved, the more technically pure RDD approach to sampling was used.

Sampleworx was utilised as a source of numbers, given this provided a clean and maximally efficient sampling frame. Sampleworx uses probability sampling to supply sample that is representative of

Australian households with land lines and VoIP numbers. This ensured that each household within the sampling frame has a calculable probability of being included. New generation technology was applied to validate each number before inclusion in the database. Sampleworx complies with: the Telecommunications Consumer Protections Code; the Privacy Code 1988; Telecommunications Act 1997; The Spam Code 2003 and the Internet Industry Code of Practice – Content Code.

### Sample Sizes

A total sample size of N=1226 was achieved, providing a maximum sample error of  $\pm 2.8\%$ . Within this sample, quotas were set to ensure a minimum of 150 interviews were completed in each state and territory. This provided jurisdictional maximum sampling errors of  $\pm 8\%$ . Within each state / territory, further quotas were set to ensure a 66% metropolitan / 34% regional distribution of respondents.

Interlocking age and gender quotas were also applied to match the Australian population distribution.

### Data Collection

An 18 minute stand-alone telephone survey provided a balance between being able to explore the issues sufficiently, while not overly impacting on participation rates. An 18 per cent success rate was achieved from numbers where a live contact was obtained, which is a reasonably typical participation rate for a telephone survey of this length.

The data collection was completed by Your Source, Colmar Brunton's ISO 20252 accredited field company, using their phone rooms in Sydney and Melbourne. Standard best practice protocols for sampling, call backs and interviewing were followed.

### Sample Profile

In keeping with the planned quotas for sampling, the sample achieved was equally split between males and females. The tables below summarise other aspects of the sample profile.

**Table A3. Sample Characteristics**

Age Group <span>N=1226</span>		Employment Status <span>N=1226</span>	
16-29 years	23%	Working full-time in paid employment	43%
30-44 years	28%	Working part-time or casually in paid employment	18%
45-59 years	27%	Doing volunteer work	2%
60+ years	23%	Home duties	8%
Location		Studying	8%
Capital city	68%	Retired, or on a pension	20%
Major regional town or city	10%	Refused	1%
Smaller country town	13%	Household Income	
Rural or remote area	10%	Zero or negative	1%
Education		\$1 - \$49,000	31%
Year 10 or less	21%	\$50,000 - \$79,000	24%
Year 11 or 12	32%	\$80,000 - \$119,000	17%
University degree (including post-graduate)	28%	Over \$120,000	13%
TAFE certificate or diploma	18%	Refused	14%
Refused	1%		

Residency Status		Born overseas	
Australian citizen	97%	Yes	20%
Australian permanent resident	2%	Yes – one or more parents	37%
Here on a visa	0%	No	60%

Table A4. Human Rights Exposure

Had rights infringed	N=1226
Me	10%
Someone close to me	10%
No	79%
Don't know	2%
Had experience of	
Specific training or education about Human Rights	21%
Had to consider human rights as part of work	46%
Providing assistance to people whose rights had, or may have been, breached	33%
None of these	42%

## Weighting

Statistical weighting is an important part of the analysis process. Samples are intended to represent the views of larger populations, and within an understood margin of error are very good at doing this. However, if the sample is not correctly profiled to match the wider population, then systematic differences between sub-groups that are over or under represented in the sample by comparison to the population can distort the results, making them less representative.

Sample designs and the use of quotas can minimise the amount of weighting required, which is desirable as high degrees of weighting do have detrimental impact on the effective sample size and the associated sample error. However, some weighting is almost always required to correct any final or unintended distortions seen within the sample.

The dataset for this project was weighted in two ways, and most results reported in the study are based on data weighted in one of these two ways. The first of these was to allow for the use of a stratified sample approach; the second to correct a slight demographic imbalance detected within the sub-samples at levels below where quotas were set.

Firstly, the sample design was stratified by state to ensure that there was a sufficient sample for analysis at the level of the individual states and territories. However, if this aggregated raw sample was also used to represent the national population, it would over-represent the views of respondents from less populous states and under-represent those from the more populous states. To ensure that the national level results correctly reflect any differences between residents of particular states or territories, the sample is weighted to reflect the actual population proportions.

The table below shows the sample and population proportions from each state, and the necessary weights to correct this.

**Table A5. Weighting to convert stratified sample to population proportions**

Population									
State	NSW	Vic	Qld	WA	SA	Tas	ACT	NT	Total
<b>Metro</b>	20.67%	18.37%	9.19%	7.81%	5.51%	0.99%	1.61%	0.57%	<b>65%</b>
<b>Regional</b>	11.48%	6.43%	11.02%	2.30%	2.30%	1.31%	0.00%	0.44%	<b>35%</b>
<b>Total</b>	32.15%	24.80%	20.21%	10.11%	7.81%	2.30%	1.61%	1.01%	<b>100%</b>
Sample									
State	NSW	Vic	Qld	WA	SA	Tas	ACT	NT	Total
<b>Metro</b>	8.24%	7.91%	8.08%	7.99%	7.99%	8.24%	7.91%	8.08%	<b>64%</b>
<b>Regional</b>	4.24%	4.49%	4.40%	4.81%	4.73%	4.24%	4.49%	4.40%	<b>36%</b>
<b>Total</b>	12.48%	12.40%	12.48%	12.81%	12.72%	12.48%	12.40%	12.48%	<b>100%</b>
Weights									
State	NSW	Vic	Qld	WA	SA	Tas	ACT	NT	Total*
<b>Metro</b>	2.509	2.322	1.138	0.977	0.690	0.120	0.203	0.071	<i>1.004*</i>
<b>Regional</b>	2.708	1.433	2.503	0.477	0.485	0.309	0.000	0.100	<i>0.985*</i>
<b>Total</b>	2.577	2.001	1.620	0.789	0.614	0.184	0.130	0.081	<i>0.998*</i>

\* Total weights are not required, and are shown here as indications only

The second weighting was required to provide fine correction of some demographic skews that were not fully avoided by the use of quotas. The use of interlocking age and gender quotas at the state and overall level ensured that the overall sample profile is correctly balanced, but more detailed checking of the final sample showed some skew of the age and gender profile between the metropolitan and regional samples *within* each state. An initial inspection of the data showed few age variations on key questions, but notable variations between males and females. Therefore, the within state data was statistically weighted to balance the gender contributions within each state. This gender correction was also incorporated into the national sample weighting.

The table below shows the weights applied to each cell within the sample structure.

**Table A6. Final weights applied for National and State / Territory calculations**

National Weights									
State	NSW	Vic	Qld	WA	SA	Tas	ACT	NT	Total*
<b>Metro male</b>	2.223	2.086	0.955	0.840	0.593	0.141	0.130	0.062	<i>0.864*</i>
<b>Metro female</b>	2.880	2.619	1.408	1.168	0.824	0.126	0.131	0.090	<i>1.069*</i>
<b>Reg'nal male</b>	3.352	1.792	3.754	0.640	0.741	0.243		0.135	<i>1.395*</i>
<b>Reg'nal female</b>	2.271	1.195	1.877	0.381	0.361	0.277		0.075	<i>0.897*</i>
State / Territory Weights									
State	NSW	Vic	Qld	WA	SA	Tas	ACT	NT	Total*
<b>Metro male</b>	0.863	1.043	0.589	1.064	0.966	0.765	0.993	0.760	<i>0.864*</i>
<b>Metro female</b>	1.118	1.309	0.869	1.479	1.343	0.685	1.007	1.091	<i>1.069*</i>
<b>Reg'nal male</b>	1.301	0.896	2.318	0.811	1.207	1.321		1.647	<i>1.395*</i>
<b>Reg'nal female</b>	0.881	0.597	1.159	0.482	0.588	1.504		0.915	<i>0.897*</i>

\* Total weights are not required, and are shown here as indications only

## Qualitative Discussion Guide

- CONTEXT FOR DISCUSSION IS THE RIGHTS OF ALL PEOPLE IN AUSTRALIA (IE: NOT JUST CITIZENS / RESIDENTS) AND INCLUDES THE WIDEST DEFINITION OF AUSTRALIA (IE: INCLUDES OFFSHORE ISLANDS, REEFS, ETC).
- AUSTRALIA'S ROLE IN HUMAN RIGHTS ON AN INTERNATIONAL SCALE IS OF SECONDARY INTEREST, BUT NOT TO BE EXPLICITLY EXPLORED.
- IT IS NOT ABOUT THE RIGHTS OF AUSTRALIANS WHEN TRAVELLING OVERSEAS
- ENCOURAGE PARTICIPANTS TO GO BEYOND THEIR OWN PERSONAL EXPERIENCES (WHICH ARE RELEVANT) BUT TO ALSO THINK ABOUT AUSTRALIA AS A SOCIETY

### **PART 1: INTRODUCTORY DISCUSSION [MAX 20 MINS]**

What are all the human rights we have in Australia? [MODERATOR NOTE THESE FOR PART 2]

What ARE Human Rights?

Where do they come from? What makes something a Human Right?

What are the good things about Human Rights in Australia?

What are the bad things about Human Rights in Australia?

What would happen if we did not have Human Rights in Australia?

What difference would it make?

Where do we get information about human rights from?

### **PART 2: SPECIFIC RIGHTS (WHICH ARE MOST IMPORTANT, AND WHICH ARE SUFFICIENTLY PROTECTED) [MAX 45 MINS]**

Let's now come up with some specific examples of human rights that we have in Australia.

Probes: What basic human rights do people in Australia have?

What other human rights do they have?

Complete the sentence „It is a human right of people in Australia to....

What other Human Rights are there that we do NOT have in Australia at all?

MODERATOR WRITE UP THOSE ALREADY MENTIONED IN PART 1 – TWO LEVEL BULLET POINT LIST (SPECIFIC UNDER TYPE)

MODERATOR TO CREATE LIST, IN A MATRIX FORM OF PROTECTED / NOT PROTECTED WELL / NOT PROTECTED AT ALL / NOT HERE AT ALL] IN THIS SECTION HAVE ONLY BRIEF DISCUSSIONS OF HOW RIGHTS ARE PROTECTED – THIS WILL BE COVERED IN MORE DETAIL LATER.



MODERATOR TO CHECK THAT THE FOLLOWING RIGHTS HAVE BEEN MENTIONED. IF NOT, THEY SHOULD BE INTRODUCED AS: What about \_\_\_\_\_?

- Freedom of expression
  - Eg: media, whistleblowers, racial / religious vilification laws
- Freedom of assembly and association
  - Right to protest; send aid to overseas groups, bikie laws
- Education
  - Access; HR education in national curriculum; better education about how government works
- Employment
  - Safety, access to jobs, non-discrimination
- Housing
  - Public housing; homelessness
- Health
  - Access in rural and remote areas; mental health; dignity in service for aged
- Justice
  - Affordability of courts; alternative to courts; legal aid; equality of parties;
- Children / young people
  - Domestic violence situations; right to vote; police harassment in public spaces
- Indigenous
  - Enhanced protection; specific and additional protection;
- Disabled people
  - Access to services such as housing and education
  
- Asylum seekers
  - Mandatory detention
- Same sex rights
  - Marriage
- Euthanasia
  - Right to die with dignity
- Environmental rights
  - Clean air food and water

Looking at this list....

Which are the most important? Which are the least important?

CREATE RANKING 1= HIGHEST → x = LOWEST

How come?

WHERE NOT ALREADY DISCUSSED:

How well is \_\_\_\_\_ protected in Australia at the moment?

How is it protected?

How come it is sufficiently / insufficiently protected?

### **PART 3: VARIATIONS IN RIGHTS [max 45 mins]**

In Australia at the moment, are there any groups of people who are missing out when it comes to their human rights – not getting a fair go?

Who?

In what way?

How come?

Are there any groups who are getting things too much their way – getting more than their fair go / share?

Who?

In what way?

How come?

Are there any groups in Australia who should have human rights that are different in some way?

Are there any groups who should have enhanced or special rights in some way?

Are there any groups who should have reduced rights in some way?

When, if ever, should a person or a group have their rights reduced or taken away?

IF IT DOES NOT COME UP IN CONVERSATION: Should Indigenous Australians have rights that are different to non-Indigenous people in Australia?

How come?

In what way different?

What about Indigenous self-determination?

Are there any groups that need special assistance to actually have their human rights respected?

Who?

In what way?

How come?

Are there any groups who need their rights protected more than other?

Who?

In what way?

How come?

We've talked a lot tonight about rights so far – but what about responsibilities?

Who is responsible for PROTECTING human rights?

Who is responsible for PROMOTING human rights?

What are the responsibilities of Government when it comes to Human Rights in Australia?

What are the responsibilities of us citizens when it comes to Human Rights in Australia?

#### PART 4: PROTECTION AND REDRESS [max 30 mins]

How do we know when someone's human rights have been breached / disregarded?

What examples are there of this?

What problems might we face in trying to protect our own rights?

How are human rights currently protected in Australia?

Where would we go if we felt that our rights had been breached?

What do you think you SHOULD be able to do if you feel that your rights have been breached?

Does the protection of human rights in Australia need to be improved? THIS MAY HAVE ALREADY BEEN ANSWERED

How could the protection of human rights in Australia be improved? SPECIFIC EXAMPLES AND GENERAL PRINCIPLES

How could human rights be better PROMOTED in Australia?

#### PART 5: CLOSE [5 MINS]

HAVE OUR VIEWS ON HUMAN RIGHTS CHANGED AT ALL AFTER TONIGHTS DISCUSSION?

WHAT OTHER INFORMATION WOULD WE WANT TO HAVE?

### SECTION C: CONCLUSION (MANDATORY QMS REQUIREMENTS)

Guide	Stimulus	Outcome
<b>TOPIC X: CLOSING AND THANKING</b> <span style="float: right;"><b>XX mins</b></span>		
<ul style="list-style-type: none"> <li>Inform respondents that it is the end of the discussion and thank them for their time and opinions.</li> <li>State that as this is market research, it is carried out in compliance with the Privacy Act / information provided will only be used for research purposes.</li> <li><b>Reveal Client Identity if not revealed during intro [unless there is a valid reason not to do so. Should not be done without the client's permission].</b></li> <li>Remind them that you are from Colmar Brunton. Advise if any queries, call the Market Research Society's free Survey Line on 1300 364 830 or CBR on (Melb:1800 555 145/Syd:1800 888 683).</li> <li>Ask for any final comments?</li> <li>Issue incentives - ensure respondent signs "Qual Validation Report &amp; Acknowledgement of Reimbursement".</li> <li>Complete comments section of "Qual Validation Report &amp; Acknowledgement of Reimbursement".</li> </ul>	EG	○

## CATI Questionnaire

## QMS CATI QUESTIONNAIRE

Project No.: 40338

Project Name: Human Rights Survey

## INTRODUCTION

Good morning/afternoon my name is [INTERVIEWER] from Colmar Brunton Social Research, an independent market and social research company.

We're currently doing a project for the Australian Government on what it's like living in Australia. After already talking to people in every state and territory of Australia, we are now doing a survey across the country to give us a clear idea of what people think and feel. The survey takes about 15 minutes to do

## S1. INTEREST

S1. Would you be interested in participating?

1. Yes
2. No

**IF 2 IN S1, THANK AND CLOSE.**

## S2. COMMENCE NOW

S2. Is now a good time?

1. Yes
2. No

**IF 2 IN S2, ARRANGE ANOTHER TIME TO CALL BACK.**

## PART 1 – HOW IMPORTANT IS HR

## Q1. IMPORTANCE OF SITUATION

Q1. Thinking about the situation in Australia, on a scale of 0-10 where 0 means "extremely unimportant" and 10 means "extremely important", how important are the following issues to you right now? **(READ OUT, RANDOMISE)**

1. Human rights in Australia	0	1	2	3	4	5	6	7	8	9	10
2. The quality of roads where you live	0	1	2	3	4	5	6	7	8	9	10
3. Global warming	0	1	2	3	4	5	6	7	8	9	10
4. Access to health care services	0	1	2	3	4	5	6	7	8	9	10
5. Pensions and superannuation issues	0	1	2	3	4	5	6	7	8	9	10
6. Reconciliation between European and Indigenous Australians	0	1	2	3	4	5	6	7	8	9	10

## PART 2 – IMPORTANCE OF RIGHTS

### Q2. IMPORTANCE OF SPECIFIC RIGHTS

Q2. Thinking now about specific human rights in Australia, I'm going to read you a list that people who live in Australia have suggested are our rights. For each of them, can you please tell me how important each of them is to YOU PERSONALLY, using a scale from 0 to 10 where 0 means „extremely Unimportant“ and 10 means „extremely important“? **(READ OUT, RANDOMISE)**

INTERVIEWER NOTE: IF RESPONDENT SAYS THAT THIS IS NOT A RIGHT AT ALL, RATE IT AS “0”.

1. Freedom of speech within defamation laws	0	1	2	3	4	5	6	7	8	9	10
2. Right to demonstrate or form political groups	0	1	2	3	4	5	6	7	8	9	10
3. To associate with and hold meetings about common interests with other people of your choice	0	1	2	3	4	5	6	7	8	9	10
4. Access to education	0	1	2	3	4	5	6	7	8	9	10
5. Access to just work conditions, including fair pay for work done	0	1	2	3	4	5	6	7	8	9	10
6. Right to seek employment or other work, including voluntary work and home duties as desired	0	1	2	3	4	5	6	7	8	9	10
7. Sufficient food, water and clothing	0	1	2	3	4	5	6	7	8	9	10
8. Basic shelter or housing	0	1	2	3	4	5	6	7	8	9	10
9. A clean and healthy natural environment in which to live	0	1	2	3	4	5	6	7	8	9	10
10. Social welfare services (eg the dole and other income support)	0	1	2	3	4	5	6	7	8	9	10
11. Access to essential medical care	0	1	2	3	4	5	6	7	8	9	10
12. Affordable access to the justice system (EG: a fair trial if you were on legal charges)	0	1	2	3	4	5	6	7	8	9	10
13. Equality – or Freedom from discrimination (based on race, gender, sexual preference, religion, political beliefs etc)	0	1	2	3	4	5	6	7	8	9	10
14. The right to vote, to elect the government	0	1	2	3	4	5	6	7	8	9	10
15. Freedom of religious beliefs	0	1	2	3	4	5	6	7	8	9	10
16. Right to move freely around Australia	0	1	2	3	4	5	6	7	8	9	10
17. Safety – or Freedom from violence, torture and cruel treatment or punishment	0	1	2	3	4	5	6	7	8	9	10
18. Access to Euthanasia – the right to choose to die with dignity	0	1	2	3	4	5	6	7	8	9	10
19. Access to abortion	0	1	2	3	4	5	6	7	8	9	10
20. Privacy	0	1	2	3	4	5	6	7	8	9	10
21. To have children and raise a family	0	1	2	3	4	5	6	7	8	9	10
22. To be able to own land or property that you can afford to purchase	0	1	2	3	4	5	6	7	8	9	10

### Q2a. ADDITIONAL RIGHTS

Q2a. Are there any other rights that you think are important that were not mentioned in this list? **(RECORD OPEN ENDER)**

**PART 3 – ATTITUDES TOWARDS RIGHTS IN AUSTRALIA****Q3. ATTITUDES TOWARDS RIGHTS**

Q3. Using a scale of 0-10, where 0 means „totally disagree“ and 10 means „totally agree“, how much do you disagree or agree with the following statements? **(READ OUT, RANDOMISE ORDER – BUT 18 ALWAYS TO BE ASKED IMMEDIATELY AFTER 17)**

1	The human rights situation in Australia is in good shape compared to other developed countries	0	1	2	3	4	5	6	7	8	9	10
2	Human rights are less of an issue for Australia than for developing countries	0	1	2	3	4	5	6	7	8	9	10
3	The set of basic human rights we need to protect stays the same regardless of how society grows or changes	0	1	2	3	4	5	6	7	8	9	10
4	Human rights in Australia are adequately protected	0	1	2	3	4	5	6	7	8	9	10
5	People in Australia are sufficiently well educated about their human rights	0	1	2	3	4	5	6	7	8	9	10
6	People who know more about their rights tend to take advantage of the system	0	1	2	3	4	5	6	7	8	9	10
7	The safety of our wider society is <u>always</u> more important than the rights of individuals	0	1	2	3	4	5	6	7	8	9	10
8	The rights of individuals should never be sacrificed, even for the greater good of the community	0	1	2	3	4	5	6	7	8	9	10
9	If a particular human right is not protected by law, it has no real value	0	1	2	3	4	5	6	7	8	9	10
10	Children have been given more rights in our society than is reasonable	0	1	2	3	4	5	6	7	8	9	10
11	<i>Proposed item deleted at least q'aire edit stage</i>											
12	<i>Proposed item deleted at least q'aire edit stage</i>											
13	Detaining suspected terrorists without charge is acceptable to ensure the safety of the wider community	0	1	2	3	4	5	6	7	8	9	10
14	Our government should be required to always consider human rights before finalising new laws	0	1	2	3	4	5	6	7	8	9	10
15	It is essential to have human rights explicitly defined rather than relying on a general set of principles	0	1	2	3	4	5	6	7	8	9	10
16	With human rights, it is the <u>spirit</u> of the law that is more important than the <u>letter</u> of the law – that is, the intended meaning rather than the exact way it is written down	0	1	2	3	4	5	6	7	8	9	10
17	If an individual does not respect the wider community's rights, it is reasonable to reduce or take away some of their rights	0	1	2	3	4	5	6	7	8	9	10
18	If some members of a group abuse the wider community's rights, it is reasonable to restrict that entire group's rights	0	1	2	3	4	5	6	7	8	9	10
19	Our responsibilities in society are more important than our individual rights	0	1	2	3	4	5	6	7	8	9	10
20	There are so many rights given to minorities, that government is forgetting to protect the values of mainstream Australian society	0	1	2	3	4	5	6	7	8	9	10
21	Our system of government is doing a good job of protecting the human rights of both individuals and the wider community.	0	1	2	3	4	5	6	7	8	9	10

## PART 4: ISSUES RELATING TO PROTECTION, INCLUDING OUTCOMES AND CONSEQUENCES

There is a difference between us experiencing or benefiting from a right on a day-to-day basis, and it being formally protected in some way.

### Q4. PERSONAL BENEFIT FROM RIGHTS

Q4. Thinking about all the rights that you feel are important, on a scale of 0 to 10, where 0 means „very badly“ and 10 means „very well“, how well do you personally benefit from these rights?  
RECORD SCORE:

Very Badly  
Well

Very

0	1	2	3	4	5	6	7	8	9	10
---	---	---	---	---	---	---	---	---	---	----

### Q5. FEEL RIGHTS ARE PROTECTED

Q5. Still thinking about all the rights that you feel are important, this time on a scale of 0 to 10, where 0 means „totally unprotected“ and 10 means „totally protected“, how well do you feel that these rights are protected for people in Australia?

Totally Unprotected  
Protected

Totally

0	1	2	3	4	5	6	7	8	9	10
---	---	---	---	---	---	---	---	---	---	----

### Q6. AMOUNT OF PROTECTION

Q6. I'm going to read out some particular groups now. For each, do you feel their human rights need to be give more, less or the same amount of protection than they are currently getting in Australia? (**READ OUT, RANDOMISE – EXCEPT FOR 11 WHICH SHOULD ALWAYS BE LAST**)

	More	Same	Less	Don't Know
1. Children	1	2	3	9
2. Australians living in remote areas	1	2	3	9
3. Indigenous people in remote areas	1	2	3	9
4. Indigenous people in urban areas	1	2	3	9
5. Disabled people	1	2	3	9
6. People with a mental illness	1	2	3	9
7. The elderly	1	2	3	9
8. Gay and lesbian people	1	2	3	9
9. Asylum seekers	1	2	3	9
10. Recent arrivals in Australia – immigrants and refugees living here	1	2	3	9
11. Mainstream members of the community – those who don't fall into ANY of these other categories	1	2	3	9

## Q7. RESPONSIBILITY OF GROUPS

Q7. Which groups and institutions SHOULD have responsibility for protecting human rights in Australia? Using the scale very high, high, medium, low and very low, how much responsibility should each of the following have for protecting human rights in Australia? **(READ OUT, RANDOMISE)**

	Very high	High	Medium	Low	Very low	Don't Know
1. Judges and the Courts	1	2	3	4	5	9
2. The Government	1	2	3	4	5	9
3. An independent human rights commission	1	2	3	4	5	9
4. The media	1	2	3	4	5	9
5. Non-Government Agencies and other advocacy and community groups	1	2	3	4	5	9

## Q8. SUPPORT HR LEGISLATION

Q8. Thinking about ways human rights might be protected, other than through a constitutional amendment, on a scale of 0 to 10, where 0 means „totally opposed“ and 10 means „totally support“, how much do you oppose or support a system where the Courts can tell parliament if new legislation seems to impact on the human rights of any groups of people in Australia - but where parliament always has the final say on whether the law remains?

Totally Opposed  
Support

Totally

0	1	2	3	4	5	6	7	8	9	10
---	---	---	---	---	---	---	---	---	---	----

## Q9. PREFERRED OPTION

Q9. Which of the following two options would you MOST PREFER to see in Australia? **(READ OUT, ROTATE ORDER)**

1. A system where the courts are able to interpret laws in a way that they feel most respects human rights.
2. A system where the Courts are required to interpret laws passed by Parliament exactly as they are worded.

## Q10. SUPPORT FOR APPROACHES

Q10. There are a number of ways the protection of human rights in Australia could be changed. Using a scale where 0 means "totally oppose" and 10 means "totally support", how much would you oppose or support the following approaches? **(READ OUT, RANDOMISE – #5 always to be asked immediately after #4)**

1	A specific Human Rights law that defined the human rights to which all people in Australia were entitled – passed by the Federal Parliament and able to be amended by future Parliaments without requiring a referendum.	0	1	2	3	4	5	6	7	8	9	10
2	A non-legally binding statement of human rights principles issued by the Federal Parliament and available to all people and organisations in Australia	0	1	2	3	4	5	6	7	8	9	10
3	Increased human rights education for children and adults	0	1	2	3	4	5	6	7	8	9	10
4	For governments to pay more attention to human rights when they are <u>developing</u> new laws and policies	0	1	2	3	4	5	6	7	8	9	10
5	Parliament to pay attention to human rights when <u>making</u> laws	0	1	2	3	4	5	6	7	8	9	10



Q10a. PREFERRED APPROACH

Q10a. Which of these would be your MOST preferred option? Or do you think none of these things needs to be done? To remind you of the options, they were...  
**(READ OUT, 1-5 in same order as Q10 – 6 always last)**

1. Legislation by Federal Parliament
2. A statement of principles available to everyone
3. More human rights education
4. More Government attention to human rights when **developing** laws and policies
5. Parliament to pay attention to human rights when **making** laws
6. ...None of these

## **PART 5 – PERSONAL EXPERIENCE**

Q11. HAD HUMAN RIGHTS INFRINGED

Q11. Have you or someone close to you ever had their human rights infringed?

1. Yes – me
2. Yes – someone close to me
3. No
98. Don't know / can't say

Q12. DONE ONE OF THE FOLLOWING

Q12. Have you ever...? **(READ OUT 1-3, MULTIPLE RESPONSE ALLOWED)**

1. Received any specific training or education about Human Rights
2. Had to consider human rights as part of your work
3. Provided assistance to people whose rights had, or may have been, breached
4. None of these
98. Can't remember / don't know

## **DEMOGRAPHICS**

Finally, we just need to ask you a few questions about yourself. This is really important, as it allows us to make sure that we've spoken to a good cross section of the community, and also to see if different groups of people have different views on any of the things we've talked about today / tonight.

Q13. RESIDENCY STATUS

Q13. Which best describes your official status in Australia. Are you an...?

1. Australian citizen
2. Australian permanent resident
3. Here on a working visa
4. Here on another type of visa

Q14a. BORN OVERSEAS

Q14a. Were you or your parents born in a country other than Australia?

1. Yes – me
2. Yes – my parents
3. No

**ASK IF Q14A = 1 OR 2, ELSE SKIP TO Q15**

Q14b. IMMIGRATION

Q14b. Did you or your family come to Australia as immigrants or as refugees?

1. Immigrants
2. Refugees
9. Can't say / Don't know / Refused

**Q15. AGE GROUP**

Q15. Which of the following age groups do you fall into? **(READ OUT, SINGLE RESPONSE)**

1. 16-29 years
2. 30-44 years
3. 45-59 years
4. 60+ years
9. Refused

**Q16. LOCATION**

Q16. Would you describe where you live as being a...? **(READ OUT, SINGLE RESPONSE)**

1. Capital city
2. Major regional town or city
3. Smaller country town
4. Rural or remote area

**Q17. EDUCATION**

Q17. What is the highest level of education you have finished?

1. Left school after or before year 10
2. Year 11 or 12
3. University degree (including post-graduate)
4. TAFE certificate or diploma
9. Refused

**Q18. EMPLOYMENT STATUS**

Q18. Which of the following best describes you? **(READ OUT)**

1. Working full-time in paid employment
2. Working part-time or casually in paid employment
3. Doing volunteer work
4. Home duties
5. Studying
6. Retired, or on a pension
9. Refused

**Q19. HOUSEHOLD INCOME**

Q19. Which of the following best describes your household's yearly income?

1. Zero or negative
2. Between \$1 and \$49,000
3. Between \$50,000 and \$79,000
4. Between \$80,000 and \$119,000
5. Over \$120,000
9. Refused

**Q20. GENDER**

Q20. Gender **(RECORD)**

1. Male
2. Female

**Q21. STATE**

Q21. State **(RECORD)**

1. NSW
2. Vic
3. Qld
4. WA
5. SA
6. Tas
7. ACT
8. NT

*That's the end of the survey. Thank you very much for your time. As part of our quality control process a supervisor may need to check some of my work. 10% of all our work is checked in this way. Could I please just have your first name and permission to call back in case my supervisor needs to re-contact you to check my work?*

	RECORD NAME	01
	REFUSED TO BE VALIDATED	02

## FINAL CLOSE/TERMINATION (ALL CONTACTS)

Thank you for your cooperation in answering these questions. Just to remind you, I'm calling from Colmar Brunton Social Research, and as a market research company, we comply with the requirements of the Privacy Act. Would you like me to give you any more details about how we comply?

### **[IF THE RESPONDENT WISHES TO KNOW MORE ABOUT PRIVACY COMPLIANCE]**

The information you provided will be used only for research purposes. Your answers will be combined with those of other participants to help our client in their decision making.

Once the information processing and validation period has finished, your name and contact details will be removed from your responses to this survey. After that time we will no longer be able to identify the responses provided by you. However, for the period that your name and contact details remain with your survey responses, which will be approximately 3 months, you can contact us to gain access to your information or have it deleted.

If you have any queries regarding this survey, you can call the Market & Social Research Society's Survey Line on 1300 364 830 or contact Your Source on [\[\(Melb\) 1800 555 145 / \(Syd\) 1800 888 683\]](#).

INTERVIEWER'S DECLARATION	
I certify that this is a true, accurate and complete interview, conducted in accordance with industry standards and the AMSRS Code of Professional Behaviour (ICC/ESOMAR). I will not disclose to any other person the content of this questionnaire or any other information relating to this project	
Interviewer Name:	
Date:	

## APPENDIX B - MULTIVARIATE ANALYSIS - TECHNICAL NOTES

Segmentation is a complex statistical technique which seeks to identify groups of people who respond in largely consistent ways across a number of individual issues. Identifying such segments (and their underlying characters) can be an important step in understanding the nature of the community level response. While sometimes the segments within a population can be quite similar (variations on a common theme), it is not uncommon for segments to exist with quite different and even diametrically opposed views, with the population „average“ representing the aggregation of the segments. In extreme cases, such as where half the population hold one view and half hold the opposing view, the average can be misleading as an indicator of what is typical - as there may in fact be *very few people* holding that middle view.

Segmentations are conducted in a number of iterative steps.

- From the qualitative research, possibly important issues observed are collated and statements are created that capture the essence of each issue. These are constructed in terms that people should be able to comfortably agree or disagree with, and seek to be strongly worded but not value-laden (ie: there should be as little as possible „social“ pressure to agree or disagree with a statement, allowing respondents to be comfortable expressing their honest views).
- A final set of statements is included in the survey stage. This statement set ideally should encompass all important issues, so that nothing critical to the topic is omitted from the range of statements.
- The survey data is subject to a two stage analytical process: factor analysis followed by cluster analysis.
  - Factor analysis looks at the set of statements and identifies common underlying factors that link individual statements. Typically, it can reduce the number of variables from the total number of statements to a smaller number of factors. If these factors account for a large proportion of the overall variance in individual statements responses, and the linked statements exhibit a common theme, then the factor solution can replace the statements as a simplified variable set for further analysis. Each factor can be named to represent the underlying issues.
  - Cluster analysis looks at people rather than statements. Instead of linking variables which seem to relate to the same underlying issue, it finds groups of people who respond in common ways across the different issues. Cluster analysis is done on the identified factors if they are accepted - otherwise on the individual statements. This process is able to identify groups within the sample exhibiting different patterns of response, allocating each person to a particular group (or segment). The size of each segment can then be determined, as well as the demographic and attitudinal profile. Segments can be named based on defining attitudinal characteristics, and then used as a variable for further analysis in the same way as any other defining characteristic.

Table B1. Level of correlation of Attitude Statements with Five Factor Solution

#	Statement	Mean	Factor Loading				
			F1	F2	F3	F4	F5
			23%	9%	8%	6%	5%
4	Human rights in Australia are adequately protected	6.9	0.8				
21	Our system of government is doing a good job of protecting the human rights of both individuals and the wider community.	6.7	0.68				
1	The human rights situation in Australia is in good shape compared to other developed countries	7.4	0.67				
5	People in Australia are sufficiently well educated about their human rights	6	0.66				
2	Human rights are less of an issue for Australia than for developing countries	6.3	0.48				
16	With human rights, it is the <u>spirit</u> of the law that is more important than the <u>letter</u> of the law – that is, the intended meaning rather than the exact way it is written down	7	0.34			0.31	
18	If some members of a group abuse the wider community's rights, it is reasonable to restrict that entire group's rights	5.6		0.71			
17	If an individual does not respect the wider community's rights, it is reasonable to reduce or take away some of their rights	6.5		0.7			
19	Our responsibilities in society are more important than our individual rights	6		0.64			
7	The safety of our wider society is <u>always</u> more important than the rights of individuals	6.4		0.58			
13	Detaining suspected terrorists without charge is acceptable to ensure the safety of the wider community	6.9		0.51	0.33		-0.42
20	There are so many rights given to minorities, that government is forgetting to protect the values of mainstream Australian society	6.6		0.41	0.64		
6	People who know more about their rights tend to take advantage of the system	7.3			0.74		
10	Children have been given more rights in our society than is reasonable	6.3			0.72		
14	Our government should be required to always consider human rights before finalising new laws	8.3				0.79	
15	It is essential to have human rights explicitly defined rather than relying on a general set of principles	7.5				0.66	
8	The rights of individuals should never be sacrificed, even for the greater good of the community	6.8				0.61	
3	The set of basic human rights we need to protect stays the same regardless of how society grows or changes	6.8				0.32	0.42
9	If a particular human right is not protected by law, it has no real value	5.5					0.74

Table B2. Attitude Statement Mean Scores By Segment

		Size:	6%	9%	20%	27%	12%	6%	11%	9%
		Total	1	2	3	4	5	6	7	8
Factor 1	1 The human rights situation in Australia is in good shape compared to other developed countries	7.4	8.1	5.9	7.3	8.3	7.4	5.1	6.9	8.0
	4 Human rights in Australia are adequately protected	6.9	8.2	5.7	6.9	7.7	6.8	3.3	6.2	7.7
	21 Our system of government is doing a good job of protecting the human rights of both individuals and the wider community.	6.7	7.4	5.4	6.6	7.8	6.5	5.0	4.8	7.6
	5 People in Australia are sufficiently well educated about their human rights	6	6.5	4.6	5.9	7.2	5.6	3.1	5.2	7.0
	2 Human rights are less of an issue for Australia than for developing countries	6.3	7.5	4.7	6.1	7.6	6.6	3.1	5.9	5.7
Factor 2	16 With human rights, it is the <u>spirit</u> of the law that is more important than the <u>letter</u> of the law – that is, the intended meaning rather than the exact way it is written down	7	7.2	4.9	6.4	7.7	7.1	5.8	7.7	7.9
	18 If some members of a group abuse the wider community's rights, it is reasonable to restrict that entire group's rights	5.6	5.4	5.8	4.8	7.9	6.1	3.9	3.5	3.6
	17 If an individual does not respect the wider community's rights, it is reasonable to reduce or take away some of their rights	6.5	5.9	6.3	5.8	8.4	7.5	5.2	4.8	4.6
	19 Our responsibilities in society are more important than our individual rights	6	5.6	5.7	5.7	7.8	6.0	5.5	4.1	5.0
	7 The safety of our wider society is <u>always</u> more important than the rights of individuals	6.4	6.8	5.4	5.7	7.8	6.9	5.1	6.2	5.2
F3	13 Detaining suspected terrorists without charge is acceptable to ensure the safety of the wider community	6.9	7.8	5.1	6.2	8.4	8.3	3.0	7.8	5.0
	20 There are so many rights given to minorities, that government is forgetting to protect the values of mainstream Australian society	6.6	7.2	6.6	5.7	8.0	6.6	4.4	8.1	3.5
	6 People who know more about their rights tend to take advantage of the system	7.3	7.3	7.5	6.7	8.4	6.5	5.4	9.1	5.5
F4	10 Children have been given more rights in our society than is reasonable	6.3	6.8	6.5	5.8	7.7	5.0	4.5	8.3	3.8
	14 Our government should be required to always consider human rights before finalising new laws	8.3	4.9	5.9	8.0	8.9	9.0	9.4	9.0	9.3
	15 It is essential to have human rights explicitly defined rather than relying on a general set of principles	7.5	5.2	5.6	7.1	8.5	7.3	8.3	8.4	7.9
F5	8 The rights of individuals should never be sacrificed, even for the greater good of the community	6.8	4.4	4.9	6.3	7.8	6.1	6.4	8.6	7.4
	3 The set of basic human rights we need to protect stays the same regardless of how society grows or changes	6.8	5.4	5.9	6.3	8.2	5.2	6.5	6.9	7.5
	9 If a particular human right is not protected by law, it has no real value	5.5	3.5	6.4	5.2	8.0	2.8	6.7	4.0	4.3
Average Rating: Importance of Human Rights		7.7	6.1	6.7	7.5	8.0	7.9	8.5	7.9	8.4

## Demographic Data By Segment

Table B3. Mean Demographic item ratings by Segment

Segment	Happy community oriented	Happy protectionists	Happy individualists	Comp-lacent	Harness community values	Educate and protect	Want more protection	Respect me more	Total
<b>Gender</b>									
Male	80%	52%	50%	41%	38%	61%	53%	48%	50%
Female	20%	48%	50%	59%	63%	39%	47%	52%	50%
<b>Age</b>									
16-29 years	23%	14%	46%	27%	25%	32%	19%	12%	23%
30-44 years	21%	23%	24%	32%	38%	24%	29%	33%	28%
45-59 years	28%	28%	18%	25%	25%	30%	31%	32%	27%
60+ years	28%	35%	12%	15%	13%	14%	21%	22%	22%
<b>Professional or educational experience of human rights</b>									
Yes	72%	47%	58%	53%	51%	61%	64%	58%	55%
no	28%	53%	42%	47%	49%	39%	36%	42%	45%
<b>Born overseas</b>									
Yes	84%	69%	86%	84%	68%	81%	75%	85%	78%
no	16%	31%	14%	16%	32%	19%	25%	15%	23%
<b>Education</b>									
Left school after or before year 10	24%	33%	16%	17%	9%	10%	17%	38%	22%
Year 11 or 12	20%	32%	44%	32%	25%	33%	26%	35%	32%
University degree (including post-graduate)	43%	18%	27%	32%	40%	35%	29%	13%	27%
TAFE certificate or diploma	14%	17%	9%	19%	25%	21%	22%	15%	18%
Refused	0%	0%	3%	0%	0%	1%	6%	0%	1%
<b>Employment</b>									
Working full-time in paid employment	56%	37%	35%	38%	49%	52%	33%	45%	42%
Working part-time or casually in paid employment	10%	16%	26%	19%	16%	14%	25%	13%	17%
Doing volunteer work	1%	3%	1%	0%	1%	5%	1%	2%	2%
Home duties	0%	9%	9%	11%	11%	6%	11%	13%	9%
Studying	3%	4%	20%	17%	7%	7%	10%	5%	9%
Retired, or on a pension	29%	30%	8%	14%	15%	14%	17%	23%	20%
Refused	1%	1%	2%	0%	1%	2%	3%	0%	1%

*This document takes into account the particular instructions and requirements of our Client. It is not intended for and should not be relied upon by any third party and no responsibility is undertaken to any third party.*

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## **National Human Rights Consultation: Devolved Consultation Report**

prepared for

### **Attorney General's Department**

Our ref: 40401

Your ref: National Human Rights Devolved Consultation

August 2009

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## EXECUTIVE SUMMARY

### Background and method

As part of the National Human Rights Consultation, two research projects have been undertaken in the Australian community. One of these is focussed at the community level, consisting of focus groups in each state and territory followed by a national telephone survey to identify and measure prevailing attitudes and opinions within the general community. The other, known as the Devolved Consultation component, was a qualitative study to better understand the experiences and opinions of groups who are marginalised in society or thought to be specifically vulnerable to their rights being threatened or violated.

The Devolved Consultation reported here involved small group discussions with people from a number of groups. These sessions were organised by service providers and peak bodies who work in the area, and interviews were also conducted with the contacts at these organisations. The discussions and interviews focussed on understanding the practical, day-to-day experiences of these groups to provide better understanding of the real world impacts of the concepts discussed more theoretically in other parts of the Consultation.

Nine group sessions and nine interviews were conducted in Sydney and Wagga Wagga in June and July 2009. The groups involved were: homeless people; people with a mental illness and with a physical disability; recently arrived refugees, immigrants and those recently released from immigration detention; ex-prisoners; the aged; and people with drug or alcohol dependencies.

### Key findings

#### Who does not get a fair go

All of the groups involved either explicitly reported that they do not get a fair go, or described situations in which clearly they were not. A number of factors that impacted on getting a fair go were seen:

- People who have limited functionality or who are outside of the „norm“ tend to get less of a fair go. This is particularly the case for those who cannot communicate or „defend“ themselves.
- Individuals who fall into more than one vulnerable group, or at the intersection of vulnerable groups, were particularly worse off.
- Financial problems are often a consequence or correlate of the experiences of these marginalised groups, exacerbating the problems they experience.
- Indigenous Australians and Carers were two groups who were commonly identified, even by people themselves in these marginalised groups, as having their rights compromised.

#### What rights are at risk

In the general Australian community, the benefits of the most fundamental rights relating to survival can mostly be taken for granted, and attention then turns to higher level rights associated with expression and development. However, for those in the most vulnerable or marginalised groups, it is precisely these survival-type rights that are most threatened. Food, shelter, personal safety and access to medical care are all at risk for many of these groups.

The right to dignity, a concept which underlies much of human rights, is also threatened or absent for many groups.

Many people in these marginalised groups report difficulties with being able to „move on“ from their situation. Having to disclose past behaviours or experiences, even though they may refer to a past phase of their lives, continues to impact on their current experiences, and mostly in a negative way. One of the more widespread problems for these groups appears to be obtaining employment, with their past often making them unattractive to employers or uncompetitive against other applicants.

### **Problems faced in getting a fair go**

A lack of awareness and understanding of human rights is a real problem for these groups, not just the inconvenience or curiosity it is to the general community. From both people and agencies, they feel that a lack of clearly understood rights prevents them getting the same opportunities that others do. Their own lack of knowledge means that often they are not even sure whether they have a legitimate complaint or not. A perceived lack of easily accessible and understandable information about rights perpetuates this problem.

Other problems these groups face disproportionately to the general community include not being as able to keep up with technology, negative stereotyping, and not being able to access documentation they are required to have to utilise services or for other processes.

### **How protection can be improved**

A written document outlining the rights of all groups in society was seen by many of the marginalised and vulnerable groups to be a necessary step before any rights could be consistently protected. This would be expected to provide guidance for what was perceived as a general goodwill to do the right thing in the Australian community. It would also serve an important role for educating the community, organisations and themselves about what rights they had.

Service delivery was seen as a major area where improvements were possible – largely because this is where the actual day to day experience often derives from. Processes designed more for functioning people in „normal“ situations were a cause of frustration; complex bureaucratic processes were higher barriers to many of these groups than the general community; and a lack of caring case management further marginalised some groups.

Generally, in relation to human rights, enhancing service delivery was felt to come down to four factors:

1. Ensuring all staff within service providers know, understand and uphold the rights of those receiving services.
2. Ensuring that service providers, government departments and health workers show respect and empathy when dealing with vulnerable groups.
3. Ensuring that vulnerable groups are treated the same as other members of society.
4. Designing services and service delivery more around the needs, barriers, and limitations of those using the service.

It was also felt that a „statute of limitations“ on having to disclose historical information would assist many people in these groups to move back into the general community more easily by limiting the impact of their past on their present and future.

### Issues for individual groups

A number of issues were raised by the individual groups. Some of these crossed over groups, while others were specific to particular groups. The table below summarises these issues.

Issue	Homeless	Aged	Mental illness	Physical disability	Ex-Prisoners	Drug and alcohol users	Immigrants / refugees	Immigration detention
Carers		X		X				
Medical treatment		X	X		X	X		
Discrimination / stereotyping		X				X	X	
Dignity		X	X		X			
Communication barriers		X					X	
Education and opportunity			X		X			
Safety	X	X		X				
Movement and access				X				
Able to defend own rights					X			
To „move on“ / get employment					X	X	X	
Accommodation / live on the street	X							
Documentation	X						X	
Mental health impacts					X		X	X
Case workers / service providers					X			X

# 1 BACKGROUND, OBJECTIVES AND METHODOLOGY

## 1.1 Background

The National Human Rights Consultation was launched on 10 December 2008. The Australian Government identified three key questions for the Consultation:

1. Which human rights (including corresponding responsibilities) should be protected and promoted?
2. Are these human rights currently sufficiently protected and promoted?
3. How could Australia better protect and promote human rights?

The Australian Government appointed an independent Consultation Committee to conduct the National Human Rights Consultation (NHRC, or “*the Consultation*”). The role of the Committee is to bring together the full range of views as to how Australian society should protect and promote human rights. The Committee has conducted over 66 roundtables and has received over 35,000 written submissions from the public and interested organisations.

The Committee commissioned research to better understand how well what they heard from consultation participants represents the views of the wider Australian community. There is a well established understanding that interested parties can often be over-represented in self-selection community consultation processes, and that the „silent majority“ may be un-represented by these expressed views. The general community research established the prevalence of particular views, attitudes and expectations within the general community, allowing the inputs from other channels of the Consultation to be interpreted more confidently, and with an understanding of how they may be expected to reflect wider views.

However, some of the groups within the Australian community who are potentially most at risk of having their rights threatened or violated are also those least likely to be participants in either the self selection process or the community level research. Some groups may have less confidence than others to choose to participate, or not be able to even find out that such community consultations are happening. These groups can also be unlikely to be included in community level research, due to factors such as communications barriers, being unable to be randomly contacted, and simply being relatively infrequent within the community and therefore difficult to detect from a statistical perspective.

A third, Devolved Consultation, phase has therefore also been completed and is reported here - with cross references to the separate community level research where relevant.

## 1.2 Aims and objectives

The key aims of this consultancy were to address the Consultation’s three overarching key questions amongst specific, marginalised groups in Australian society.

From these, Colmar Brunton Social Research has derived a number of specific research objectives to assess specific views about the protection and promotion of human rights.

These specific research objectives with these groups include exploring perceptions of:

- Groups who are missing out on getting a fair go
- What rights are at risk or being violated
- Problems faced in trying to get a fair go
- How protection of human rights could be improved for these groups

In addition, the research seeks to identify specific issues experienced by individual groups, and any commonalities across some or all groups.

In particular, the devolved consultation process looking at the experiences of vulnerable and marginalised groups specifically sought to understand how such experiences translate into daily living

for these groups. It specifically sought to obtain detailed stories and examples from people to illustrate the reality of these experiences alongside the often more philosophical debates that have taken place in other channels of the Consultation.

### 1.3 Methodology

A qualitative methodology was used, with two key components:

1. Small group sessions with vulnerable groups, and
2. One-on-one phone interviews with Non Government Organisation (NGO) service providers to vulnerable groups.

The groups and interviews were conducted mainly in Sydney, with a full schedule outlined below.

Participants were recruited through contacts at service providers and peak bodies provided by the Attorney General's Department. These contacts were asked to recruit a small number of participants from their clients and contacts for the groups, and most of the contacts were also asked to be participants for the depth interviews. Groups were facilitated by the Managing Director and CEO of Colmar Brunton Research, both experienced researchers and facilitators.

Nine discussion groups were completed with members of the targeted groups. Each session ran for 90-120 minutes, with 3-8 respondents in each group. These were conducted at facilities provided by the NGO service providers. Colmar Brunton would like to gratefully acknowledge the important contribution of the service providers and peak bodies who contributed to the success of this project by assisting in the organisation of the group discussions.

Nine depth interviews (15-60 minutes each) were conducted with NGO service providers or Peak Body representatives who are directly in contact with vulnerable groups. Most interviews were conducted over the phone, but some face to face around the group sessions.

Group	Discussion Groups		NGO Interviews
	<i>Number of Respondents</i>	<i>Location</i>	<i>Number</i>
Homeless	4	Sydney CBD	1
Recently released prisoners (12m-)	4	Sydney CBD	1 (extended duration)
People with a criminal record (12m+ released)			
Refugees	5	Wagga	1
People in immigrant detention	2 (interviews)	Sydney	2
Recently arrived immigrants	3	Wagga	1
People with a mental illness	4	Sydney Eastwood	1
People with disabilities	7	Sydney CBD	1
The aged	8	Sydney CBD	1
People with drug and alcohol dependencies	3	Sydney CBD	0*

\* NGO contacts participated in group session rather than in separate interviews

## 2 DETAILED RESULTS

### 2.1 Which groups are not getting a fair go?

#### 2.1.1 Any individual who has limited functionality or is outside the norm

All groups included in the study either consciously felt that their rights were compromised in one way or another, or gave examples that showed they were. A summary of specific vulnerable groups' concerns is presented in Section 2.5. However, there was a general consensus among participants that all societal groups who are in any way dysfunctional, who cannot communicate clearly or defend themselves, tend to get less of a "fair go". Rights are generally seen to be protected, so long as an individual has the knowledge and means to stand up for themselves (or have an appropriate person stand up on their behalf). Where these are lacking, rights were often seen to be abused.

*"The system is designed for functional people"*

Drug user group

*"The whole system falls down if you can't communicate what you need"*

Mentally ill group

This was also seen in the general community research, with groups such as children, the elderly and those with a mental illness identified as groups who are at risk unless others can assist them to resolve or avoid problem situations.

There are two broad ways in which "the system" is seen to fail to preserve the rights of vulnerable or marginalised groups. The first is in instances where an individual's situation makes it difficult to satisfy basic requirements to get help – in other words, where service providers expect "normal things from abnormal people".

*"The issue of being able to identify yourself, especially when you're living on the street. If you don't have sufficient identification you can't access a lot of these services that are meant to look after your human rights. And the issue of ID with street people has always been a very very big issue in terms of accessing services... How many homeless people do you reckon would be carrying passports around?"*

Homeless group

*"I can't get a job 'cause I've got no qualifications, I can't get any ID and I can't even get a Centrelink payment 'cause I can't get a bank account."*

Ex prisoner group

On this point, the NGOs reiterated the concern that there is no "identification" of unique needs of each vulnerable group. There is a sense that the standard requirements are "unrealistic" for these individuals. These groups need additional consideration in order to navigate "the system" and access services to get a "fair go."

*"The system doesn't identify those who need extra support"*

NGO, Homeless

*"Not many homeless people know that they do have any rights, so they come up against a government department who is being frustrating or denying rights then they just storm off and then not access things that are really vital for them- so many do not access Centrelink at all because it is too frustrating"*

NGO, Homeless

*"a [homeless] mother was issued with truancy fines even though the school were aware both mother and children were living on the streets as a result of domestic violence situation"*

NGO, Homeless



*"If you come as a refugee it is much harder to access services [healthcare, housing, employment]. That is until you make yourself understood [in English] it is hard to navigate the bureaucracy of the immigration system"*

Immigrant Detention, NGO

The second way in which the system is seen to let vulnerable groups down is in the attitudes of service providers, agencies and the public in regards to people who are seen to be dysfunctional. Individuals in vulnerable groups claim to be stigmatised and actively discriminated against.

*"We actually fit in when we don't disclose [our mental illness] but as soon as we disclose we seem to be treated different if that makes sense"*

Mentally ill group

*"We went to the police station, wanted to make a report about the incident [physical abuse], and the policeman said "where do you normally live?" And my mate said to him I live on the street, and the officer said well there you go, bye. Couldn't be bothered filling the paperwork out."*

Homeless group

The NGOs also support the notion that there is active discrimination and prejudice toward vulnerable groups from the general public and service providers. This is not considered to be "a fair go."

*"I had a recent example where the [mentally ill] person was purchasing an excursion ticket on a bus, the driver questioned the legitimacy of the disability pension card- they look normal"*

Mentally ill, NGO

*"The stigma about mental illness is strongest amongst doctors"*

Mentally ill, NGO

*"There is underlying racism in the community"*

Immigrant Detention, NGO

*"Despite being well dressed, and heading to a business address, this individual [with polio related physical impairment] was subjected to an interrogation from a taxi driver as to whether they would be able to pay the taxi fare"*

Disability , NGO

*"On release from prison parole officers can vary in their duty. Many are there to „catch them out“ rather than help them re-integrate in society"*

Criminal, NGO

## 2.1.2 Indigenous Australians

It is important to note that one of the first, and most often, cited groups within society that participants felt had their rights compromised were Indigenous Australians.

*"Aborigines are the most discriminated against and over-represented groups within prisons"*

Ex-prisoner group

*"The aboriginal population would be the obvious first example [of a group not getting a fair go]"*

Drug user group

*“Indigenous Australians...that would be nearly number one”*

Mentally ill group

*“They [indigenous people] have a poorer education quality and find it more difficult to survive in our society they don’t have the support services”*

Ex-prisoner NGO

However, apart from initial mentions by participants, the issue of aboriginal rights was not explored in depth within this phase of the research, given that it was explored elsewhere.

### 2.1.3 Carers

Many participants across different groups noted that the rights of carers were not appropriately protected, and this group was also similarly identified in the general community research. Participants believed that many did not become carers willingly and were forced to take on a carer’s role as there was no one else in the family capable of taking on the role. Participants felt that the absence of choice in becoming a carer for many was a reason to have special protection or consideration for this group.

*“There is a lot of discrimination of carers and carers aren’t just older people, carers are across the board, even from children, teenagers, young teenagers, not going to school or trying to juggle school and caring for somebody at home, whether it’s their mother or assisting with a sibling or whatever.”*

Aged group

*“They [doctors] withdrew her medication without any consultation with the carer”*

Mentally ill group

Carers were also believed to „inherit“ the stigma of the people for whom they are caring, thereby often suffering the same discrimination or perceived abuse of rights.

*“The taxi driver was so pleasant to her [mental health worker], until he found out what she did for a living and then all of a sudden the attitude just totally changed...so she had the same stigma put on her as the people she cared for”*

Mentally ill group

There were also some who believed that carers should be allowed to represent the rights of people they cared for if those people are incapable of understanding or expressing their own rights.

*“There’s a fine line between allowing people with Alzheimer’s to make their own decisions about their lives, and their carers knowing that they’re making wonkey decisions”*

Aged group

### 2.1.4 Individuals who fall into more than one vulnerable group

A common belief among group participants was that individuals who exist at “the intersection” of vulnerable groups (e.g. homeless people who are also drug users, or elderly individuals or refugees who also have mental illness, etc) were particularly worse off than others when it came to human rights. Such people were seen to suffer multiple stigmas, and were more likely to be discriminated against.

*“If you are a woman and you have a physical disability and you are from a vulnerable religious background then you are pretty much at the bottom of the society ladder”*

Physical disability group

*"I think ..where the stuff intersects... where drug using intersects with being poor, with being Aboriginal ...that is where it really belts home"*

Drug user group

*"Multi-cultural groups with mental illness as well... they actually have like stigma in two areas, plus with mental illness a lot of their culture would actually interfere as well"*

Mental illness group

Furthermore, many of the groups felt individuals in disadvantaged situations often develop additional problems due to their circumstances. Drug use and psychological disorders (particularly depression) were seen as serious risk factors for many individuals who participated in the research.

*"People on the streets go to escape being on the streets with drugs and alcohol or anything that they can find. Yeah, so, it's just creating more problems, more mental problems, physical problems, and yeah, it's just a massive cycle."*

Homeless group

*"I think if you can't see and can't hear and can't really get around, then you're going to be depressed"*

Physical disability group

*"If you've been inside for a while, you really do have some issues to deal with...jails cause mental health problems"*

Ex-prisoner group

A consistent finding in the NGO interviews was also that individuals "intersecting" more than one of the vulnerable groups had an even tougher time in relation to human rights. The most common intersections were drug use and mental illness, though the stresses of being a refugee were also linked to mental health issues. For some, drug use was discussed in terms of a "coping strategy" for other conditions present (i.e. homelessness, mental illness).

*"Around 60% of the homeless population also suffer from drug/alcohol dependencies and mental illness "*

Homeless NGO

*"Addiction is often a coping strategy; medications make them feel drowsy so they want an upper"*

Mentally ill NGO

*"You are stressed – without your family, you don't know anyone"*

*"Physically they are happy, but mentally they are worried"*

Refugee group

Amongst NGOs there was a strong sense that individuals intersecting multiple vulnerable groups were not getting a fair go. In relation to risk factors; NGOs indicated that services tend to provide band-aid solutions rather than target the root of the problem (ie family breakdown, domestic abuse). As a result of these problems not being adequately addressed, they snowball into larger problems (criminal behaviour, homelessness, mental illness etc). These individuals were seen to become even worse off in relation to their human rights and much more vulnerable.

*"There is a ,Lock away and taught a lesson" mentality, but we should be targeting the underlying causes which are mainly family breakdowns."*

Ex Criminal, NGO

*"Homelessness is a big problem for the ex-prisoner community...when prisoners are released and have no place to go.... Eventually [they] get kicked out of hostels"*

Ex-prisoner NGO

*"The refugees coming out of detention are suffering severe mental health problems....clinical depression is well documented amongst refugee groups"*

Immigrant Detention NGO

*"Mentally ill prisoners are in gaols where their mental health conditions are not being addressed"*

Ex-prisoner NGO

## **Impact of financial dependence**

A common theme that was identified across a number of groups was that a financial dependence can be an outcome of the factor that results in them being in a marginalised group. For example, refugees and immigrants, as well as ex-prisoners and drug users all talked of the difficulties of obtaining employment. Homeless people talked of having to use almost all of their Centrelink payments on accommodation, leaving nothing for food. For these people, there can simply be not enough money to allow them to pay for all the elements of a „normal" lifestyle.

In these cases, the person's financial situation brings with it additional complexities which contribute to and exacerbate their situation – and increase their chances of falling into more than one at risk group. For example, financial problems are also associated with mental health issues; or the costs of accommodation and food being mutually prohibitive.

## 2.2 What are the main rights perceived to be at risk?

The main rights identified by marginalised and vulnerable groups as being at risk are amongst those identified in the mainstream community research as being the most important and unconditional rights – those related to survival. The community level research indicated that most people in society can assume that these will be met, and that the more expressive and developmental rights are more salient at this level. However, participants did identify that some people and groups „fall through the cracks“ in terms of these universal rights, and the experiences described here show that this is clearly the case.

### 2.2.1 Food and shelter

Generally food, water and shelter were seen as the most basic human rights. Most groups felt that the right to having clean water and food was well protected and delivered within Australian society. However, some members of the homeless group felt that food and water were more difficult for them to receive than other groups.

*“You’re forced to virtually hand over 80 percent of fortnightly payments in accommodation which leaves very little money for anything else... I was stuck in a boarding house paying \$180.00 a week on DSP and not eating and just having a roof over my head, just for the sake of not going back out on the street again”*

Homeless group

*“We have to source food from service providers like charities”*

Homeless group

Along with food, shelter was seen as a basic necessity and right. However, in contrast to food and water, many participants across the groups felt that their right to clean and safe shelter was often unfulfilled. Although it was acknowledged that there were systems in place for the purpose of housing people, these systems were often seen to fail those for whom they were designed. Waiting lists were seen to be too long, and when shelter was received, it was often considered unclean and unsafe.

*“There is a waiting list like a hundred thousand waiting for housing commission... But that’s across the board, even in our area you look through the paper, and rents for two bedroom houses, \$250, \$300. Now an older person or a single person has no hope in hell of paying for even a granny flat”*

Aged group

*“Departments have to understand the urgency of it all. The guy is looking now, he’s not looking for it [shelter] now and hoping for it in 12 months time. He’s looking for it ‘cause he needs it now”*

Homeless group

*“It [the boarding house] was disgusting - raking cockroaches out of me mouth at 12 o’clock at night, pulling them out of me nose and hoping they don’t crawl down my ears...using a kitchen that people just might as well use as a toilet. They’re totally overpriced, totally unsafe ...they’re inhumane.”*

Homeless group

*“Something that’s really basic to me is a home. Like you know that’s your safety that’s your shelter. And you’ve been in gaol so you’ve got no recent references for real estate”*

Ex-prisoner group

*“They’re sleeping on the floor in someone’s apartment, if they’re lucky.”*

Immigrant Detention NGO

The sentiments of the homeless group were played back by the NGO (homeless) who indicated that some individuals can be on department of housing waiting lists in some cases for 5 or 10 years. In more recent times, there has been increased incidence of families on the street as a result of; (1) domestic violence and (2) the global financial crisis.

The ability to access shelter was seen as more difficult for vulnerable groups. Discrimination was mentioned in relation to the Department of Housing selecting successful applicants – which is consistent with the view that people who are at the intersection of two or more vulnerabilities are more likely to miss out on getting a fair go.

*“Department of housing employees told me that when they receive an application for housing from someone with an anxiety disorder that automatically place it on the reject pile”*

Mentally ill NGO

There was also concern raised over the „peaceful inhabitation“ of shelter in the community. The NGO (homeless) reported that police and security guards do not always follow the legislation of „peaceful inhabitation“ so that homeless persons are “moved on” by Police or security when there is “an event” (ie APEC) or complaints from residents or businesses despite the legislation.

## 2.2.2 Safety from harm

A basic right to personal safety was seen as both critical, and often neglected amongst group participants. Although a number of participants recounted experiences in which they, or someone near to them, suffered physical abuse, the most prevalent abuse of safety was amongst the homeless.

*“I can’t count the amount of times I’ve been bashed and moved on, mistreated, urinated on, excreted on.”*

Homeless group

*“We couldn’t sleep where we normally slept, so we moved up the road...about two o’clock in the morning we woke up and a few guys were using size 12 alarm clocks on us, kicking the shit out of us, about six of them. That’s what happened to me after they urinated all over me first”*

Homeless group

Furthermore, the right to personal safety was seen to be unfulfilled twice for many people – once when they are abused, and again when they try to report the crime.

*“I reported it [being physically abused] twice and was told to piss off. That was with a fractured skull, couple of missing teeth, face was out here like a pumpkin”*

Homeless group

*“If a crime happens to you as a known drug user, it is very hard for you to go to the police and expect equal treatment”*

Drug user group

There were also concerns amongst elderly and disabled groups about abuse by carers or within institutions.

*“Over 50% of people with physical disability have been sexually abused...because of that, I will only let my son [who is physically disabled] be looked after by family members...I need to think about the mechanisms that are in place to insure his safety”*

Physical disability group

*“She spent one year in the acute [psychiatric] ward and being subjected to males who were dual diagnosis and very aggressive in the ward, kicking walls in and swearing,*

*threatening sexual contact. She could not go to sleep at night... she felt very very threatened."*

Mental illness group

The immigrant detention group indicated that they felt there was no protection for them, and they were not safe from harm in the community, because "the system" (i.e. police, legal system) did not consider them. Immigrants both in the community and in detention did not feel safe from harm, and did not feel they had an avenue of protection.

*" [The migration agent] was saying the new comers are getting cocky, and disobey the rules, and it is time to teach them a lesson" ... " my son was attacked by a person in a balaclava with a knife"*

Immigrant detention group

*"My son was put in stage 1 in a mix up, this centre is reserved for criminals... there are gangs and knives and murderers in that place"*

Immigrant detention group

The NGOs reported similar cases where individuals in vulnerable groups were not protected from harm in care facilities.

Examples of harm ranged from intellectually disabled individuals suffering abusive episodes from other residents (living in government accommodation), through to extremely violent acts of seclusion and restraint in mental care facilities.

*"We contacted the facility, and the property manager looked into it, but the violence continued and it had to be escalated to the ombudsman"*

Disability NGO

*"When I was reviewing the services in a particular hospital, I heard reports that the doctors would request nurses "box and bag" the patients when they needed restraint. This act involved male nurses sitting on patients in order to get them into a straight jacket, then patients were put in isolation"*

Mental illness NGO

The notion of „safe from harm“ is a complex issue in mental health services. There are two major concerns from the NGO perspective:

(1) Firstly, The mental health act currently has a provision for mechanical restraint as a last option, however the NGO indicated that restraint processes were common and not only used as last resort. Health care workers (nurses) were "afraid" to stand up to the doctors in these instances.

*"The nurse admitted she was too afraid to the doctor yet was horrified with what was going on"*

Mental illness NGO

(2) Secondly, the existing process of "scheduling" in the community is discussed as an example where there is an "inappropriate" amount of force and criminalisation.

*"The process of scheduling needs reform, in some cases 6 police officers will enforce a schedule and throw a person in the paddy wagon"... "treatment as a criminal has long lasting effects"*

Mental illness NGO

There is a strong sense that "force" is routine in the seclusion and restraint processes in mental health facilities.

### 2.2.3 Health and medical care

Almost all groups interviewed claimed that their right to medical and health care were either failed or not adequate. Inability to get appropriate medical care was often a result of being seen as a second or lower class citizen.

This discrimination took a slightly different form for each of the groups. Drug users found it particularly difficult to get appropriate treatment because they are stereotyped as a “junkies” and there is distrust associated with prescribing them with drugs.

*“Drug users are too scared to approach health services because doctors classify them as junkies”*

Drug user group

*“Doctors don’t trust you, they will under-prescribe”*

Drug user group

For the homeless, getting sick is not an option,

*“A bloke asked me “what happens when you get sick on the street?” I said you just don’t get sick mate”*

Homeless group

For mentally ill patients, they felt they were not given a fair go in the health service sector both from their doctors and other mental health workers. Patients believe they are a low priority for their doctors. Doctors reportedly treat similar patients in the same fashion, with same medications, treatment plan etc.

Both the group and service provider indicated that the best treatment outcomes for mental illness occur when there is a partnership between doctors and patients rather than „one size fits all” approach to treatment. Older doctors were reported to be unaware of (or to not practice) newer techniques such as psychotherapy.

*“The stigma that’s in the community is very much evident within health professions...there are health professionals that treat people with mental illness as lower class”*

Mental illness group

*“Older doctors don’t understand or know all options like psychotherapy” ... “they just provide the standard medications”.*

Mental illness NGO

Another reason for inadequate or inappropriate medical care is the perception that the individual is beyond treatment or too much of a risk for medical intervention. This was particularly the case for elderly participants, many of whom have been rejected for treatment due to their age. Elderly participants also felt that proactive or preventative medicine (e.g. tests and screens) was less likely to be offered to them.

*“Hasn’t that person of 88 got the same human rights and right to medical treatment that maybe someone else has?”*

Aged group

*“The attitude is well we shouldn’t really be putting as much care into them [elderly] as into someone in their 40’s. And I think that’s a human rights issue. They’ve got every right to get the same sort of treatment and medical care as someone that could be forty or fifty.”*

Aged group



*"I was wondering about having a prostatectomy. And the doctor said at your age, no surgeon would do it. In other words you live with the cancer rather than removing it. And it's this question of if I was ten years younger, no problem. They'd take out the prostate....But don't you have the same right as someone ten years younger?"*

Aged group

*"I'm as good a patient as the bloke across the road who's had his appendix out, never touched drugs, waiting to go back to work, I don't 'cause any trouble to the nurses or to any other staff that maybe around. I'm just as polite, but because I'm taking methadone, I'm registered at a certain clinic, I'm an ex-junkie, no I'm just in there to sort pills and all the rest of it. And the treatment is absolute third world"*

Homeless group

Prisoners also found it difficult to obtain adequate medical care, both in and out of gaol. In gaol, the queue for medical care was often considered too long and the treatments too superficial.

*"This guy had a really really bad tooth ache, like unbelievable pain. And he said look I've got an appointment to see the dentist in two months time, but I have to see him now I'm in all sorts of pain. And they said no, you're going to have to stay in the queue, wait your two months and he was given just Panadol by the local nurse there [in gaol]. And he was told we don't care how much pain you're in. Tough mate, tough."*

Ex-prisoner group

The ex-prisoner NGO detailed a pattern of healthcare in gaols where inmates enter gaol in poor physical health (due to substance abuse, homelessness etc) and actually leave gaol in much worse condition.

*"A large number of people in gaol don't have access to dental treatment so they lose their teeth and are in constant pain"*

Ex-prisoner NGO

*"They get Medicare taken away when entering, so can't get medication or specialist treatment"*

Ex-prisoner NGO

For immigrants, Medicare was not always accessible (depending on their visa) and doctors were wary to treat them.

*"Sometimes [immigrants] turn up to the hospital and they have to sign a paper saying they're going to pay the bill. But when they're on bridging Visa E, they don't have money to pay for anything. They only get \$90 a week from Centrelink."*

Immigrant detention NGO

*"I had been poisoned [in Russia] and arrived as a refugee with no hair, very sick"... "doctors always asked me what visa I had, they were negligent toward me and did not want to spend anytime with me" ... "I could not get any real medical assistance until I was a permanent resident"*

Immigrant detention group

Experiences as a migrant in the immigrant detention system highlight patterns of mental health issues and long term clinical depression. There was strong agreement that these cases were not being identified and adequately treated by "the system."

*"When my brother arrived in detention, a man just hanged himself"*

Immigrant detention group

*“Clinical depression is well documented in immigrant detainee groups”*

Immigrant detention NGO

*“Healthcare needs to be improved in detention facilities, a private prison company is in charge of the detention centre and try to make a profit, doing everything on the cheap”*

Immigrant detention NGO

Despite suffering some discrimination (i.e. not considered a priority), the NGO (aged) was positive about the standard of health services provided to the aged group. Although single pensioners were identified as a group that may not be able to access the medication they need, overall the health system compared well to America.

*“Single pensioners have an inadequate pension. Those suffering illness may have medication that cost more than the pension - in some cases some disregard the medication in order to have a decent meal”*

Aged NGO

*“Old people are not too badly off with the health system”.... “Thank god we’re not in America” ...“we pay only \$5.30 for a \$30 prescription”*

Aged NGO

## 2.2.4 The right to “move on”

Although not explicitly expressed as a right, most groups talked about the difficulty of “moving on” from one’s past or present situation. There was a feeling that once someone had fallen into a vulnerable group such as the mentally ill, prisoners, or drug users, it was difficult to escape the stigma, even after recovery.

This was particularly relevant to getting work, something that most group participants felt was both a fundamental right and a difficult goal to achieve, but had wider long-term implications and impacts.

*“If you go and fill out a job application it says where do you live, no fixed address. You know, do you have a criminal record, yes. What do you think’s going to happen to that job application? It’s going to go straight through the shredder, you know...it’s 15 years ago I committed an offence, longer now, but it’s always going to harm me”*

Homeless group

*“And my doctor has said to me like you probably won’t get an internship anywhere because you see I’m a self harmer and I’ve self harmed on my arms...It’s not fair. And self harm marks they can last, the scars can last for the rest of your life”*

Mentally ill group

*“Employers are not educated toward mental illness, there is no empathy”...“[employers] assume [we] are unwell all the time “*

Mentally ill NGO

*“When you come out of gaol and apply for a job now, even private, they ask about do you have a criminal record. And of course, if you’re honest and you tick that box, then there is no way you’re going to get that position.”*

Ex-prisoner group

*“[Patients] need help preparing for employment.. a co- operative owned job would help [patients] and employers”*

Mentally ill NGO

### 2.2.5 The right to work

On the whole, employment was seen to be a positive self esteem promoting activity that assisted individuals with a sense of belonging, self worth and was a positive activity in changing their situation. For those who suffer discrimination or are unable to work, this leads to feeling of social isolation and helplessness (e.g. immigrant and mentally ill).

The right to work was discussed in some detail in the general public research, and amongst this group it was more often seen that there was a right to be *considered* for work, rather than to have a job per se. The issues described above show clearly that some of the marginalised groups do not experience this right to be considered – ex-prisoners, the homeless and drug users for example.

However, there are a number of barriers to employment beyond the „moving on“ from past problems. Most employment situations are competitive, and many individuals from all these groups are likely to be relatively uncompetitive compared to other candidates. Refugees and immigrants particularly spoke of problems related to language barriers, and to a lack of any or recognised work experience. While in this sense they are at least being treated to the right to be considered, to be perpetually uncompetitive means that being considered will not necessarily lead to the desired outcome.

### 2.2.6 The right to dignity

In discussions in the groups, most of the discussion explicitly centred around more basic rights in the hierarchy of human needs, such as food, shelter, and safety (in the general community research, these were identified as being more universal rights).

However, many group participants also described situations in which they felt their dignity was taken from them – and implicitly made reference to the fact that this was an important right that was being violated. Indeed, these were the stories that often evoked the most emotion, both from those telling the stories and from the rest of the group.

*“You get used to the indignation from the average Joe on the street....they spit on you with their eyes...feeling of being on the streets and of people spitting at us with their eyes, you feel like the absolute lowest forms of life there is. You feel like a worm crawling across the ground. And you’re just waiting for people to step all over you.”*

Homeless group

*“With these seven women, they [gaol guards] had them undress, stand there naked, video them from behind fully naked which is illegal, asked them to spread their legs, where then two officers then went down beneath under their legs and looked up. Made them stand there for a length of time naked right so breached so many different rules in the policy that’s required when you strip search a woman. Nothing was found on any woman. Sorry what’s the video tape for, what are you videotaping my naked person for? Oh this is for training for officers at the academy. So both men and women officers are going to see my naked body. Yes they will. So is this allowed?”*

Ex-prisoner group

*“Like when psychiatrists or other professionals start sort of babying you and belittling you...you know that’s sort of really dehumanising and demoralising.”*

Mentally ill group

Elderly participants also talked about the importance of the right to a dignified old age and death (in reference to euthanasia). A number of elderly participants were worried about growing old and losing their dignity, particularly within institutions.

*“It’s a human right to live in dignity till you die and there are a lot of people out there that haven’t got that”*

Aged group

The concept of dignity was also a common theme for both the disability and aged NGOs (as well amongst the general community groups) who described instances where individuals were unable, or scared to communicate their wishes / preferences to carers. The result was care provision that was not respectful of their dignity.

*"While in care, an individual spent several years being cared for by male nurses, which was extremely distressing for this individual, this only came to light following her recovering the ability to communicate."*

Disability NGO

*"In nursing homes the use of infantile talk reserved for small children and pets, diminishes dignity and is a form of discrimination"... many fear to challenge this talk in fear of victimisation after doing this as they require care from the staff."*

Aged NGO

## 2.3 What are the problems faced in trying to get a fair go?

### 2.3.1 Lack of public awareness of human rights

One of the main problems that participants faced in trying to defend their rights is the perceived lack of awareness of rights amongst the general public.

*"Australians are not very well versed in the notions of human rights"*

Drug user group

This lack of awareness and understanding was also identified in the mainstream community research. However, for most people – where their rights are not under threat – this is not much of a problem. For these marginalised and vulnerable groups though, who *are* experiencing a threat to their rights, this does become a real problem, with others not knowing exactly what they can and cannot expect.

For a few, this was seen to be a direct result of Australia's not having a Bill of Rights, though for most, it was more due to a lack of basic education on human rights. A number of people mentioned the need to have a special syllabus in schools covering human rights.

*"I think that we should start right from the beginning to educate our young"*

Aged group

*"A lot of it is brought down to a lack of education and awareness among consumers"*

Mentally ill group

*"Maybe the school should have a special kind of program that starts educating our young from a very young age"*

Aged group

*"[immigrants] think democracy equals human rights"*

Immigrant Detention NGO

### 2.3.2 Lack of awareness amongst vulnerable groups

An additional problem relating to awareness was the perception that the vulnerable groups themselves were lacking awareness of their own basic rights and how to obtain information on them. Again, this was recognised amongst the wider population, but was less of a problem.

*"A lot of people living on the street don't understand their rights. And they're not prepared to stand up and fight for their rights because they don't know what their rights are. So how do you fight for something you don't know?"*

Homeless group

*"Not many homeless people know that they do have any rights, so they come up against a government department who is being frustrating or denying rights then they just storm off and then not access things that are really vital for them - so many do not access Centrelink at all because it is too frustrating"*

Homeless NGO

*"We went to Amnesty International to find out about our rights, but they did not help"*

Immigrant Detention group

Many of the NGOs reported that there is no form of rights communication to vulnerable groups they work with. For some, they have tried to facilitate an awareness process (distributing information), but the material was not distributed by government agencies (i.e. prisons), while others were the port of call for any breaches.

*"We sent them [gaols] info packs on human rights for prisoners, but prisoners never saw the material"*

Ex-prisoner NGO

*"There is no access to human right info, [immigrants] think democracy equals human rights"*

Immigrant Detention NGO

*"They go to NGOs for information"*

Aged NGO

*"Support structures for those with disability are often not well known or accessible so that the ombudsman is contacted to review the breaches"*

Disabled NGO

### 2.3.3 Lack of awareness amongst service providers

Lack of awareness amongst service providers was also mentioned as a considerable barrier in getting a "fair go". Individuals working in government departments were seen as having not enough understanding / education about the people they serve or of basic human rights. Low education / awareness was reported to lead to:

- Incorrect / incomplete servicing of individual (i.e. refugees)
- Discrimination (via stereotype or standardised policies that do not consider unique needs)
- Allocation to the "too hard basket" (immigration)
- Breaching from services (Centrelink, Department of Housing)

*"The government employ people who have no idea about the people using their services"*

Physical disability group

*"There is very low education level in the immigration system"*

Immigrant Detention group

*"Department of housing employees told me that when they receive an application for housing from someone with an anxiety disorder they automatically place it on the reject pile"*

Mentally ill NGO

*"Many carers don't even realise their actions [of ageism] are discriminatory"*

Aged, NGO

*"The lack of "identification" amongst service providers is also an issue, where no provision is made for the conditions of the individual."*

Homeless NGO

*"Homeless are made to "go through rigmarole of making job applications" to receive Centrelink payment"*

Homeless NGO

### 2.3.4 Accessible information

For those wishing to receive information on human rights, there was a feeling that information was not easily accessible – though this may reflect more that such information simply does not exist in a comprehensive form. Group participants generally did not know where to go to get information about human rights and often mentioned their relevant non-government organisation as a first port of call.

*“Well the consumers who come here to this facility on a regular basis, they learn a lot. They learn heaps because [name] and [name] are such good advocates that they make sure that they’re fed that information...But there are too many, just like there are hidden carers, they are hidden consumers out there who are still isolated and don’t come to these places where all the information is”*

Mentally ill group

*“I don’t have any information. I wanted to know more about them [human rights, to prepare for the discussion], and I searched for the information...couldn’t find it.”*

Refugee group

It was also mentioned that even when information was accessible, it was often in a format that was inappropriate for those who needed it. Participants with severe visual impairment claimed that it was difficult to come by the information in Braille, while homeless participants pointed out that information available on the internet was inaccessible to them. For immigrants, language was a huge factor in accessing support and services in the community.

### 2.3.5 Inability to keep up with technology

A number of participants felt that their lack of understanding of the latest technologies was an impediment to getting a “fair go” and having their rights upheld. There was a feeling that much of the information that was available on rights was on the internet, a medium that was either unfamiliar (particularly amongst the elderly) or physically inaccessible (for example, among the homeless).

*“It’s assumed today that everyone is computer literate and can work mobile phones and can have access to MSM and whatever technology is the buzz at the moment.... you miss out”*

Aged group

*“A lot of elderly people don’t have access to the internet and aren’t interested”*

Aged group

For refugees and immigrants from developing countries, technology could also be a substantial barrier. In these countries technology is far less pervasive than it is in Australia, and many people will have grown up without any experience of the sorts of technologies that are fundamental to daily living in Australia. This lack of familiarity can be both an immediate barrier, but also a longer term one.

### 2.3.6 Stereotyping

Many of the groups involved in this stage of the research explicitly or implicitly reported that the wider community treats them as stereotypes of the category rather than as individuals – and that in most cases these stereotypes are negative, and have negative impacts on how they are treated. Examples included drug users who reported that it was just assumed they were robbing the system to obtain drugs; refugees that people saw them as people from countries that they knew only bad things about; and mentally ill people who are „normal“ until they disclose their illness.

This stereotyping appears to result in negative encounters and outcomes, in some cases generating ill-will and if anything perpetuating the stereotype. Being able to be treated as an individual rather than a member of a group may help those who are trying to “move on” to do so.

### 2.3.7 Documentation

A number of groups also reported problems associated with documentation. Being able to prove your identity to access certain services and benefits often requires formal documents, which some people do not have. For example, homeless people may not have passports and driver's licences, nor credit cards and other secondary identifications that most members of the community do have.

Refugees also described a problem with being able to access documents. In the countries that they come from, record keeping is often not as formal as it is in Australia, and some reported that only one original hard copy of documents is likely to ever have existed. If these are destroyed or unable to be accessed – not uncommon in countries where refugees have come from – then there is simply no way to obtain a copy of them. However, they report that Australian agencies and companies are often very rigid in their requirements for documents, and cannot deal with situations where they cannot be provided.



## 2.4 How protection of human rights could be improved

### 2.4.1 Make it “black and white”

A fundamental, written document outlining the rights of all groups in society was seen by many of the marginalised and vulnerable groups to be a necessary step before any rights could be consistently protected. Although most generally agreed that Australian culture and society usually sought to uphold human rights, most felt that it was necessary to commit to the protection of human rights in writing so that this good intent had some specific guidance.

*“You will never stop discrimination, whether it be racial discrimination, whether it be class discrimination, whatever. You will never stop that, but if it’s in black and white saying that you cannot purposely go out and victimise that person because they’re homeless, then at least the person that is homeless has some form of rights by that charter, by that legislation”*

Homeless group

*“I think if there was a human rights bill legislated to me that would mean that not only all government departments but all NGO’s would have to follow that legislation”*

Drug user group

*“We as individuals don’t have to educate the doctor, the legislation does it for us....Makes it a level playing field. Then they’ve got no defence”*

Aged group

*“I just want something that tells me what rights I have when I get to Australia”*

Immigrant detention group

This view was also widely expressed in the qualitative stages of the general community research – though interestingly it did not come through so strongly in the survey responses.

Several participants suggested that human rights could be summarised in a document that could be easily hung on a wall. This document could then be distributed amongst government departments and agencies, thus serving as a constant reminder to staff and an easy reference to those receiving government services. This may help to overcome the problems of both individuals now knowing their rights, but also agencies or service providers who work with them not knowing their rights.

This notion of an “overarching act” was reiterated by the NGOs who believed having a written document would help vulnerable groups have a framework to approach breaches in their rights. Often, the existing structures for addressing human rights breaches (ombudsman, equal opportunities, conciliation) are difficult and end in no formal findings.

*“A human rights act would be ideal - so that department agencies have a framework in which they can manage homeless person’s situation.”*

Homeless NGO

*“The lack of formal documentation [of rights] means that the ombudsman is often the only way to address the breaches”*

Disability NGO

*“Signing of the optional protocol, once ratified will be great. It will make the country responsible for the conditions of the prisoners, UN inspectors come and inspect to shame countries”*

Ex Prisoner NGO

## 2.4.2 Enhance service delivery

In describing many of the problems that participants had in attaining their basic human rights, the vast majority of participants referred not to human rights *per se*, but to service providers. As in the general public research, there was a feeling that rights were essentially protected by the Australian legal system and also by Australian culture, but that when rights were not upheld it was often due to systemic problems with service delivery.

*"Australian society is generally about getting a fair go...it's the systems in society where we generally come unstuck"*

Physical disability group

As described earlier (see Section 2.1), service providers are often seen to have been designed to deal only with people who can function at a „normal“ level – ie: those with fixed addresses, telephone numbers, those who can communicate clearly, travel easily etc. This was often seen to be at odds with real people in need of service provision. A homeless group participant described such a situation:

*"In 2008 I had received a letter from the Department of Housing to say that I had two working days from date of issue to contact them, otherwise it would be assumed by the Department of Housing that I was already housed and no longer required their services. That's what they said, two working days. When I was living on the street I only used to access my mail once a week, once or twice a week from a service provider and I was five or six days late anyway. So I looked at it and I thought well, there's my train and it's already gone"*

Homeless group

This particular scenario was described as quite common by the NGO for homeless people, interviewed in the research. The NGO claimed knowledge of "at least 100" such situations, where there was clear mismatch in service delivery protocol and the needs of those who rely on the service.

*"Most of them just tear up the letter and don't bother following it up any further than that".*

NGO, homeless

Refugees also reported similar issues with respect to, for example, Centrelink payments being stopped if a response was not received within 2 working days to a letter – but through language barriers or failure to have updated contact details, these letters not being received or understood.

Given the opt-in nature of these type of arrangements, these cases may in fact look like successes to the agencies involved – but are clearly failures from the perspective of the (non) recipient.

Migrant and immigration detention service provision is another area NGOs would like to see focus in order to improve basic human rights provision for this vulnerable group. For NGOs it was about a „fair go“ for immigrants / refugees who need support services and do not have the luxury of contacting their own embassy in Australia as they are fleeing from that administration.

There are 3 areas for improvement to better protect human rights; (1) Support services, (2) Immigration Legislation/process reform and (3) Case management.

(1) Increased support services (induction and education). Access to migrant services and support was reported to have declined considerably so that migrants were left isolated and unsupported in the community. The migration system is in need of induction and support when entering the country or exiting detention to ensure these individuals are not simply lost.

*"We need to know what to do, where to go, who to talk to"*

Immigrant detention group

*"This organisation was lovely but they did not know anything, they were only able to give us some furniture. They could not tell us about legal advice, housing or education schemes, we did not know how to find information"*

Immigrant detention group

In one example, refugees (from Africa) arrived in Australia and were collected by migrant services and delivered to housing, but not given any instructions on how to do basic activities such as how to use a kettle, or use a phone.

*"Migrant Services arrived to the house on Monday, and the family had not eaten anything all weekend, they didn't know how to open a tin"*

Immigrant Detention, NGO

*"An African family arrived on Friday with an ill child, by Monday the child was dead because the father could not use a telephone or speak English"*

Immigrant Detention, NGO

*"If you've fled Afghanistan, or Nigeria or anywhere, unless you're really sure the people you are talking to are trustworthy, then you've got a real problem. They don't know who to talk to."*

Immigrant Detention, NGO

*"Some people tell them to go to a migration agent. Sometimes they go to legal aid, if they know about legal aid, but often they can't find out about these things."*

Immigrant Detention, NGO

*"The NGOs take responsibility for caring for refugees in detention and when they are released because the government does not provide any support"*

Immigrant Detention, NGO

(2) The Immigration process and legislation. The NGOs indicated that not only is the system so difficult to navigate but there are legislations which "need" reform.

*"Whichever way we turn there is another regulation"*

Immigrant Detention, NGO

*"Migration Act should change- as it stand there is a clause that people may be locked up indefinitely – which is outrageous"*

Immigrant Detention, NGO

*"There is no other country in the world has this process where a federal court can overturn a tribunal decision to have it return to the tribunal and the same decision made again"*

Immigrant Detention, group

Refugees and the refugee NGO noted that processes which they need to access – for example, trying to bring family members to Australia - are often very complex, and made especially difficult for people with limited English language skills. Refugees also reported that they were often not given any information about what criteria their applications needed to meet – either before being made, and in some cases even after being rejected.

### (3) Case management across a range of issues

There is no provision in the immigration system for case management when individual cases are complex. For many immigrants they feel at the mercy of the system and powerless to change their situation because they cannot work or obtain an education.

*"Some of them [immigrants] just give up [mentally] and are not interested any more"*

Immigrant Detention, group

In these instances, NGOs may take a case management role, and in most cases they incur great personal expense to do this.

*"God sent us these people [NGO name] and [NGO name]"*

Immigrant Detention, group

*"I just wanted to come to Australia and get an education, but I had no right to work and no right to study, if I did, I would be sent to detention"*

Immigrant Detention group

The parole system is another service provision area described as being in need of reform. Currently being run by corrective services, the parole system is considered to focus on "catching people out" rather than helping readjust and rehabilitate in the community. Some parole restrictions placed on parolees are considered "unrealistic" and counter-productive in the readjustment process.

*"One parole officer did not allow parolee to see any person including his mother and brother, whom he had a close relationship with. Isn't this essential? Shouldn't we be encouraging this?"*

Ex prisoner NGO

*"Because parole officers are not easy to deal with, some prisoners will not take parole and serve entire 7 years" [instead of 5 years plus 2 years parole]*

Ex prisoner NGO

The inability to access support structures in order to "move on" was a common theme amongst NGO interviews. The prisoner community were considered to be in need of re-adjustment mentoring and education post gaol time in order to significantly reduce re-offense rates.

*"Prisoners are not given appropriate training to prepare for release... how to operate computers, skills, proper training course"*

Ex-prisoner NGO

*"Mentor needs to be able to introduce the „mentee" to proper housing programs, education programs, computer programs"*

Ex-prisoner NGO

For those with mental illness, there was also a strong call for increased coaching and mentoring services to help a readjustment and recovery process in the community. The mental illness patients are in need of mentoring and support to re-adjust to life and employment after periods of "relapse."

*"NGOs play the role to fill the gap when care co-ordinators do not have the time to sit on a bus or go to the movies"*

*"[patients] need assistance to prepare a wellness plan to prevent relapse"*

Mentally ill NGO

Generally, in relation to human rights, enhancing service delivery was felt to come down to four factors:

1. Ensuring all staff within service providers know, understand and uphold the rights of those receiving services.
2. Ensuring that service providers, government departments and health workers show respect and empathy when dealing with vulnerable groups.
3. Ensuring that vulnerable groups are treated the same as other members of society.
4. Designing services and service delivery more around the needs, barriers, and limitations of those using the service.

### 2.4.3 Raising awareness through easily accessible media

Most felt that raising awareness of human rights is an important step to protecting the rights of vulnerable groups.

A number of participants mentioned that the 60<sup>th</sup> Anniversary Special Edition booklets produced by the United Nations are a good example of an accessible and transferable medium through which to promote individual rights.

*"I think handing out booklets like this that are easy to carry is a great idea. Relatively easy to read, I mean for those that can read."*

Homeless group

### 2.4.4 Enforce a "statute of limitations" on background information

The issue of people who were previously in a marginalised or vulnerable group moving on was clearly identified as a problem. The ability of people to move out of these groups and into mainstream society is clearly beneficial for all parties, but forcing people to have to continue to acknowledge past events which may no longer be directly relevant for an extended period of time can prevent them from doing so – with this information from their past continuing to shape their present.

*"Anyone that's done ten years after gaol that hasn't re-offended ...if there is a box to tick, they shouldn't have to tick it [when applying for a job]"*

Ex-prisoner group

*"The ,tickbox" should be removed unless its relevant, for example we shouldn't need it if applying for a job as a postman or labourer"*

Ex-prisoner NGO

## 2.5 Specific issues raised by vulnerable groups

### 2.5.1 The aged

Elderly participants generally felt that rights are well protected within Australia, but had concerns about a number of specific issues:

#### *Grandparents raising children*

Participants were concerned that, although the number of grandparents raising children was growing in Australia, this group did not have access to the same welfare rights as carers (largely because they are considered family by service providers, rather than carers).

#### *The right to the best available medical treatment*

Elderly participants were not only concerned about their right to access appropriate and affordable medicine, but also their right to choose the treatments they received. Several participants noted that medical practitioners often failed to recommend the best course of action for elderly patients because they felt the patient was too much at risk or simply because the patient was considered to have little time to live regardless (see Section 2.2.3).

Some participants also felt that preventative healthcare should be as much a right of the elderly as of younger demographics.

*“Mammograms for women over 70 you’re actively encouraged between 60 and 70 to have a mammogram. And after 70 they go quiet, „cause you’re too old, they don’t care.”*

Aged group

*“For those suffering illness [on a single pension] the medication costs more than the pension - in some cases people will disregard medication in order to get a decent meal”*

Aged NGO

#### *The concept of ageism*

The concept of ageism was used as a term that covered discrimination against the aged population. Electronic and print media were cited to reinforce the negative stereotypes of the aged.

*“Ageism is the inability / refusal to recognise the rights and dignity of older people. Community sees older people lacking competence, having problems with computers. Ageist views are in the work place where it is believed that we can’t learn new skills, absenteeism is greater and I don’t respect my manager”*

Aged NGO

#### *The right to dignity in old age and in death*

Aged care institutions were often seen as removing older people’s rights to dignity, based on the experiences of some people that group participants knew.

Several participants commented on the importance (and perceived absence) of the right to a “dignified death”, or euthanasia. This was also commonly mentioned in the general community research.

For others, it was a concern of appropriate communication to the elderly in care;

*“In nursing homes the use of infantile talk reserved for small children and pets, diminishes dignity and is a form of discrimination... many fear to challenge this talk in fear of victimisation after doing this as they require care from the staff.”*

Aged NGO

*The rights and role of carers of the elderly*

There was much discussion around carers and the fact that this group needed to be recognised more within the welfare system. Participants also felt that there were situations where carers should be made “custodians” of the rights of those they cared for. This was particularly important in situations where a recipient of care is not sound of mind and is incapable of making good decisions, for example in the case of progressive senility or age-related mental illness.

*Using appropriate technology to communicate rights*

Elderly participants were amongst the most vocal in criticising the exclusive use of internet and, to a lesser extent, mobile phones, for communicating rights to people. They felt that they, as a generation, were naturally less likely to use such technologies, and thus, unlikely to benefit.

*Equal Opportunities for the Aged*

An area emphasised by the NGO was surrounding equal opportunities for persons over 50 years, and in particular employment opportunities. It was reported that there are “myths” about the aged that prevent them from getting employment. The inability to secure employment is reported to cause feelings of low self esteem.

*“The thing that really gets up men’s noses is the devalued feelings... it’s an issue of self esteem. Low self esteem means sicker more often”*

Aged NGO

*“Equal opportunities should have an educating function”*

Aged NGO

*“Some companies offer training (like Westpac bank) and have an all ages policy - good stuff”*

Aged NGO

## 2.5.2 The mentally ill

Participants with mental illness tended to focus on many of the same themes that arose in the Aged group, namely:

*The right to dignity*

Participants with mental illness felt strongly that there was a stigma attached to mental disorders and that they suffered discrimination as a result, even at the hands of health care professionals.

*“We’re not schizophrenia, bipolar, ADHD...we’re people and that’s what human right is all about”*

Mentally ill group

*“The stigma about mental illness is strongest amongst doctors”*

Mentally ill, NGO

*“The process of scheduling needs reform, in some cases 6 police officers will enforce a schedule and throw person in the paddy wagon”... “treatment as a criminal has long lasting effects”*

Mentally ill, NGO

They also felt that the stigma associated with mental illness often prevented them from attaining other rights, such as the right to work and drive.

*"There is this assumption that people with mental illness are ill all the time"*

Mentally ill NGO

#### *The right to choose treatments*

A specific issue raised within this group was the right to choose medicines and treatments. There was a feeling that the medical system often imposed treatments without considering the preferences of the individual, or the potential side effects for that individual.

*"All the education I've got is my own body, my own body tells me what [medicine] works and what doesn't work"*

Mentally ill group

*"I help educate consumers to plan appointments to tell doctors certain information so they are not given blanket medications.".... "We need to respect the rights to be part of the decision making process."*

Mentally ill, NGO

#### *The rights to holistic mental health care and support*

The mental health system is described as a system operating in silos that do not have a holistic approach to care provision. The mental illness NGO suggested that people with mental illnesses will not be given a fair go in the Australian community until there is an holistic approach.

An holistic approach is suggested to enable those in the system to have a number of services co-ordinated on their behalf. The system is described to focus on crisis care and dealing with the symptoms of the mental illness but not the underlying causes (eg childhood trauma or abuse). The system is depicted to be overloaded so that there is not an imbalance between crisis care and care co-ordination.

In addition mentoring programs to assist readjustment and recovery was back in the community will ensure individual can access all the rights/services they require.

#### *The right to Education & Opportunity*

It is reported that there is widespread misunderstanding of mental illness amongst the broader Australian community. It is suggested that increasing *accurate* knowledge and awareness of mental illness in the community will help with increased empathy and opportunities from employers and organisations. One solution for employment opportunity was suggested to be "commune jobs".

*"Assistance to re-join society in the form of employment, responsibilities"*

Mentally ill, NGO

## **2.5.3 The physically disabled**

Physically disabled participants also voiced similar concerns to aged and mentally ill participants, including:



### *The right to safety from harm*

One of the key concerns of physically disabled individuals, their carers and relevant NGOs was the levels of abuse they suffered – both physical and sexual. Severely physically disabled individuals were seen to be at considerable risk, particularly if they were incapable of communicating clearly.

### *The rights of parents of disabled children*

Several participants felt that parents of children with disabilities needed their rights protected, particularly in regards to welfare, medical and psychological/psychiatric treatment. Participants felt that parents' needs and rights were often overlooked, despite the physical and mental burden of caring for a disabled person.

*"Often you get pretty severe health deterioration among parents [of disabled children]  
...who is speaking out on their behalf?"*

Physically disabled group (parent)

### *The right to freedom of movement and access*

Although group participants acknowledged that much progress had been made in ensuring that disabled people were able to move freely in public, many felt that there were still too many instances in which facilities were not designed with the rights of disabled people in mind.

*"It shouldn't be that we have to argue after a building is built [for disabled access]"*

Physically disabled group

*"Person with dexterous difficulties may be unable to purchase transport tickets from  
ticketing machines"*

Physically disabled NGO

## **2.5.4 Ex-prisoners**

Although group participants were all ex-prisoners now living freely within society, many of their concerns were focussed on the rights of people inside prison.

*"There's a general statement inside prison about how people feel about their rights. And  
that is that you've got no rights"*

Ex-prisoner group

There was a general belief that all rights within prisons were either taken away or to some extent degraded. However, there were some specific rights that participants felt were particularly important.

### *The right to dignity*

Basic rights (or needs) such as food, water and shelter were generally seen to be provided, but participants felt that prisoners often lost their identity and humanity. A number of stories arose in which prisoners were degraded (e.g. by being asked to strip, then video-taped).

### *Right to defend one's rights*

Ex-prisoners felt that the prison system punished those who spoke out and tried to defend their rights whilst in gaol, by taking away basic privileges.

*"You know it's wrong, you know it's illegal, but if you were to make a complaint, you will  
lose because of it."*

Ex-prisoner group

*"If you start standing up there's ramifications ... You're a trouble maker and you lose things as a result."*

Ex-prisoner group

*"Why don't people speak up about all these things that happen [in prison]? Most times, because they've been knocked down so many times when they do speak up in there and they lose so much more as a result of speaking up, so they don't after a while"*

Ex-prisoner group

#### *Right to an education*

There was feeling that prisoners were seen as "lost to society", with little investment made in rehabilitation, including provision for education whilst in prison. The right to an education was seen as a fundamental right that should be protected for all members of society, including prisoners.

*"The teacher's federation are up in arms about this, they've got all the wonderful facilities, but no one will pay for the teachers to come out and teach them"*

Ex-prisoner group

#### *Right to "move on"*

One of the biggest issues for ex-prisoners after leaving gaol was the difficulty of re-integrating into society (see also Section 2.2.4). In order to do so effectively, participants believed that there was a necessity to "move on" from the past. However, this was difficult to achieve given the constant need to provide information about their prison time – employment forms, applications for private housing, and applications for bank accounts and finance all require them to identify their past records – and this is felt to further negatively influence the outcomes of their current application.

### **2.5.5 Drug users**

Most of the concerns of drug users were also reflected in other groups (particularly the ex-prisoner and homeless groups).

#### *The right to healthcare*

The biggest concern for drug users was in the difficulty of obtaining what they perceived to be good healthcare. Generally, there was a belief that users are "judged" very quickly within the medical system, then treated as a secondary priority. This was particularly the case if they suffered medical conditions that were prevalent amongst users, such Hepatitis C.

*"Drug users are too scared to approach health services...Doctors classify them as junkies"*

Drug user group

*"They don't identify themselves as a user or Hep C user, because they feel judged"*

Drug user group

#### *The right to "move on"*

More so than many other groups, drug users felt that their condition rendered it very difficult to get on with their lives once they decided to take action to stop using drugs.

*"It is very difficult to get back on track"*

Drug user group

Many drug cessation treatments were seen to be harsh, and unsympathetic to users. It was noted that for other addictions and mental health problems (e.g. gambling), treatments tended to wean people off their addictions, whereas most drug cessation treatment expected users to suddenly stop using substances, whilst at the same time trying to fit back into "normal" society.

### 2.5.6 Homeless

Not surprisingly, basic rights such as food and shelter were the main concerns of homeless people. Shelter, in particular, was seen as a basic right that was not adequately protected. Participants understood that systems were in place to provide housing, but often complained that the systems are designed as if to deal with normal people, rather than people in their circumstances. The following is a story that summarises such a situation:

*"Early in 2008 I had received a letter from the Department of Housing to say that I had two working days from date of issue to either contact them, otherwise it would be assumed by the Department of Housing that I was already housed and no longer required their services. That's what they said, two working days. I have a copy of the letter in my bag if you would like one. When I was living on the street I only used to access my mail once a week, once or twice a week from a service provider and I was five or six days late anyway. So I looked at it and I thought well, there's my train and it's already gone...why should I bother ringing up, getting rejected once again by the Department of Housing saying sorry AJ but you were meant to contact us within two working days from date of issue."*

Homeless group

#### *The right to safety from harm*

After food and shelter, physical safety is a key issue for homeless people. Sleeping on the streets exposes "Streeties" to frequent attacks and violence (see Section 2.2.2 for more detail and examples).

#### *The right to live on the streets*

Although apparently counter intuitive, one of the rights that this group felt needed protecting was the right to live on the streets. Having found themselves with no option but to sleep on the streets, homeless people felt that they should be protected and left in peace, without the constant pressure to be "moved on" by police.

*"These people have to have written rights where they are able to stay on the streets in a safe place without move on orders and disruption so they can get themselves into housing or at some stage when they can find housing. You know they are protected in their Cocoon, not torn out and accused and thrown about and spat on and all the rest of it"*

Homeless group

### 2.5.7 Recently arrived Immigrants and Refugees

Refugees and immigrants faced many of the same issues, though there were some additional factors that were especially relevant to refugees. Those people who participated in the research (both immigrants and refugees) generally indicated that they found the human rights situation in Australia far better than what they had previously experienced, and overall were very positive about Australia and the way they were treated. They were aware that some individual people treated them badly, but felt that mostly their treatment by Australians was good. The refugees in particular were at pains to make

it clear that they would have preferred to have been able to stay in their home country, but once they had had to leave, Australia offered them a very good alternative. The service provider interviewed felt that where racial tension was seen it was because groups instinctively realised that they were competing with each other for limited resources and funding –and that this seemed particularly to be the case between the indigenous population, and some (but not all) immigrant or refugee communities.

*"Australia is doing very well. Where I came from before, we had no rights."*

Refugee group

*"Australian person very nice. I feel very comfortable. Love the freedom. Hope to stay in \_\_\_\_\_, find job."*

Immigrant group

*"I see Australia as a combination of all the refugees that come together - a free country, a free mind, [for] a broken heart. You describe the refugee, like a group of people that they are all broken, they have broken hearts. A hopeless life...they are hopeless because they saw their life destroyed...they don't have any hope that they can make their life again or not. They think "I'll be alive, or not". In Australia we can't say that all these people they are hopeless and they have a broken heart. All broken hearts together to start a new life...because every refugee comes together [and] they make a new life"*

Refugee group

*"Not all the branches are wet, and not all the branches are dry. In every country there are good people and bad people."*

Refugee group

*"It's just been a huge change in my life, and I thank God for that."*

Refugee group

They did note however that Australian's perceptions of them were often quite stereotyped, and often these stereotypes were based on attitudes derived from a continually negative depiction of their home countries in the media. It wasn't that the media was felt to portray them or their countries unfairly, but rather in an unbalanced way such that only negative images were ever propagated. The result of this was that some people tended to judge them based on visual characteristics such as skin colour etc, rather than treat them as individuals, and that the automatic associations were of poverty, crime and violence.

*"You only ever hear of these places when there is a problem."*

Refugee group

*"All that people know here about \_\_\_\_\_ is bad."*

Refugee group

### *Communications and language*

The most obvious issue which influences the experience of someone who comes to Australia from another country is their language skills. People who come from English speaking countries (even non-Anglo English speaking countries) have a significant advantage over those who do not. People who cannot communicate in English are forced to utilise friends or other community members to act as translators, with this dependence giving them less freedom to move around the community and interact with people.

*"People who cannot speak English have a much harder time than refugees who can speak English."*

Refugee group

The service provider interviewed reported that relatively few immigrants who they work with appear to use the various translation services available, due to factors like cost, awareness and unfamiliarity with how to actually use them. They also noted that even when underlying language skills are reasonable, that an accent causes some people to assume that they cannot or will not understand the person, and so they don't even try to listen to what they are saying.

Communications problems cause a number of issues, and can result in relatively trivial issues becoming more serious.

*"For instance, I remember I was with a driver who was stopped by a policeman simply because he had more than enough people in the car. Instead of charging or fining him they sent this man straight to jail. From there he spent two days in jail before they sent him to court. The judge sent him to work two weeks in prison - he spent another fortnight. It's the complication; you have no one to look after you."*

Refugee group

It was noted however that there were English language classes readily available, and that children learned more easily in schools and became a valuable resource for parents and the older generation. The service provider interviewed felt that sometimes teachers in schools were not really aware of the culturally different roles that children played in immigrant or refugee families, and how these may impact on the time that they could devote to schoolwork.

*"My 15 year old daughter learns English at the high school, she has much better English than me or my Husband."*

Immigrant group

A consequence of poor language skills is that written communications are not understood, and often not read at all. This is particularly important when communications from Government agencies, especially Centrelink, are not responded to. Participants reported cases where they knew of people who had received letters from Centrelink that they could not read – but which had required a response within two days in order to avoid payments being stopped. Because they had not been able to do so, this had resulted in significant economic hardship in the interim.

Complex bureaucratic forms and processes are also not well understood by those with poor English. Given that many immigrants and refugees are trying to work with systems to bring out other family members, which is a particularly complex process, this often causes problems and additional stress. Refugees reported not being able to find out about the criteria that they had to meet, or those that they had not met when they were declined.

A final note on immigrant and refugee communication skills relates to the difference between spoken and written language. Because education levels in many countries are poor, some people cannot read or write their own language to start with; and some English speakers can speak but not read or write in English. In this way, immigrants and refugees can more easily find themselves having similar issues that any illiterate person in the community might, even when their spoken skills are adequate.

### *Employment*

A key impact of the communication barrier is on the ability of immigrants and refugees to obtain a job. The failure to have a job means that their financial situation can be difficult, and then there are further issues that flow from this state.

*"To find a job is difficult, because of the language."*

Immigrant group

Both immigrants and, in particular, refugees identified the requirement to have work experience as a major barrier to their ability to obtain work. When competing for work, having no experience (and presumably no referees) makes them relatively less competitive, and therefore less able to obtain a job.

Ability to get a job can also be impacted by limited experience with pervasive technologies, putting immigrants and refugees at a competitive disadvantage.

*"What about people who don't understand computers?"*

Refugee group

In order to actually get a job, immigrants and refugees often have to repeatedly move around the country trying to find opportunities. This is somewhat problematic in terms of settling into a community and establishing networks. It also means that often the contact details that Government agencies have for them are out of date, and important communications such as Centrelink notices or driver's licence papers go astray.

### *Documents*

People who come to Australia from other countries often do not have, or have access to, documents that most Australians would be able to obtain. This is especially the case for refugees, for whom any such documents often only ever exist in their original form – and the events that lead to them becoming refugees often also result in the destruction of these documents or else make them impossible to get.

Australian systems are often very inflexible in respect to these documents, and participants reported having excessive delays or being unable to proceed when not able to produce documents such as marriage certificates or the like.

*"I could not get my marriage certificate. I thought the photos we had from our wedding would be enough, but they said no. It was only because I had not deleted e-mails that I could prove that I had been in communication with him [my Husband] for the whole time, but what if I had not kept them?"*

Refugee group

### *Mental Health*

This research has shown that people with mental health issues also have associated human rights issues; and that people who experience more than one marginalising factor can be particularly vulnerable to human rights issues. The very experience of being an immigrant is stressful, and for refugees this is amplified by the events that lead to their situation, and quite often separation from and uncertainty about family members. It seems very likely that immigrants and especially refugees could experience mental health problems.

*"Physically they are happy, but mentally they are worried."*

Refugee group

*"I can see it in their eyes that they [people in the street] are scared of me."*

Refugee group

Immigrants and refugees who have language barriers experience additional stress, including being concerned that with their limited skills they will inadvertently cause offence. Because they cannot express themselves, they often will say that things are „good“ even if they are not, simply to avoid problems.

*"I am...always...worried."*

Refugee group (very limited English skills)

### *Lack of Information*

One participant in the refugee group attempted to do some research into Human Rights in Australia, and was surprised to find that he could not find any single document that described the rights that people had. He felt that this would be very useful information to have.

## 2.5.8 People in immigration detention

The experiences of detainees were similar to experiences of refugees and recently arrived immigrant groups in relation to communication and navigating the bureaucracy of immigration with the plethora of forms and documents required. The people who participated in the research indicated the overall experience in Australia had been frustrating because “the system” did not provide any support for them, they needed to know “what to do, where to go, who to talk to” and this was not provided. The types of support the group indicated was needed were legal advice, housing advice and education scheme advice.

*“I had no right to work, no right to study and if I do, I go to detention”*

Immigrant detention group

The immigrant detention group generally had positive feelings toward the Australian community, and felt indebted to the NGO for support provided to them. Apart from this support, these immigrants felt they had no support and “no voice,” they indicated that they had “nothing to do with the government” in relation to rights. In particular, the immigration department was described as discriminatory, unfair, inconsistent (in its actions) with a high degree of regulation which left immigrants feeling helpless and powerless to continue in their situation.

*“[NGO name] was interested in our case and helped us, she was the only one”*

Immigrant detention group

*“Until you make yourself understood [in English] it is hard to navigate the bureaucracy of the immigration system”*

Immigrant Detention, NGO

*“You have no voice unless you have a lawyer with you”*

Immigrant detention group

*“They do not have a voice, they come from countries where they are not allowed to have a voice or stand up for themselves”*

Immigrant detention NGO

### *The Detention Experience*

Both the immigrant group and service provider described the detention experience as one with no rights, no access to support and no provision of a human rights framework. Overall, the detention experience is described to be isolated, with poor general conditions and medical care. In several examples, individuals in detention would sell all property and assets in their home countries to arrange legal support while in detention, often to no avail, being still in detention and subsequently penniless.

*“Unless you get a visitor you are never brought out into the main area, I was involved with one lady who had no contact for 6 years while she was in detention”*

Immigrant detention NGO

*“Healthcare needs to be improved in detention facilities, a private prison company is in charge of the detention centre and try to make a profit, doing everything on the cheap”*

Immigrant detention NGO

### *Mental Health*

Mental health is a particular concern with high incidence in detention. There were cited cases of suicide whilst in detention; long term depression and drug use associated and resulting from the detention experience (see section 2.2.3).

### *Employment & Education after detention*

The immigrant detention group and service provider spoke about the Visa situation (Class E) and requirements to report to immigration (in some cases this was daily). This scenario meant immigrants were not allowed to work or study. Daily reporting to CBD immigration offices was a huge struggle for immigrants from a cost and language perspective. The immigrants felt it was an unfair expectation, as they were not allowed to work to earn money or study to learn English - yet they were required to have both money and English skills to travel to immigration.

### *Migration Agents*

Both the immigrant detention group and service provider described concerning accounts of experiences between immigrants and migration agents. Immigrants described being advised to contact migration agents as a first port of call for legal advice / support. There was a sense that migration agents were taking advantage of the illegal immigrant situation (ie the vulnerability of having no English language skills and no visa).

There was strong concern of insufficient policing of migration agents so they were doing whatever they wanted to do. The group cited examples of alleged personal threats, violence, theft of documents, over charging, and blackmail. In one example, a group member alleged that the migration agent "lied" on the paperwork that resulted in the individual being sent to detention.

### *Lack of Information*

The immigrant detention group indicated that they were not provided with any information from the government about services and support available. In many cases they were writing their own high court, immigration and tribunal as they did not know who else to contact or where else to go.



### 3 APPENDIX A: THE DISCUSSION GUIDE

**NOTE: START RECORDING AT OUTSET OF SESSION SO THAT AKNOWELDGMNT OF RECORDING IS ON FILE**

**INTRO:** Thanks for coming along to talk to us today. This session, and a number of others like it, is part of a wider National Human Rights Consultation. We have been talking to people around the country about what human rights are, what is important about them, and how well they are protected in Australia. What we'd like to talk to you about today is mainly your own personal experiences of living in Australia, but also what you have seen of the experiences of other people and groups.

Before we start though, can you just tell us what you have been told about today, and what you are expecting it to be?

*DON'T NEED TO CAPTURE – PRIMARILY FOR MODERATOR TO GET A SENSE OF GROUP EXPECTATIONS.*

We'd like to make sure that everyone gets a chance to tell us some of their experiences today, but when you do, we'd like to hear about them in quite some detail.

I'd like to make it absolutely clear that what you tell us today is totally confidential. Our client doesn't know who is at the session today, and they never will – that is one of the reasons for using our company to do this work. We hope that you can tell us openly and honestly what you think during the session today.

We will be recording what we talk about today – these recordings are generally only used by us to make sure we can get exactly what people say. Our client will very occasionally want to listen to a recording, but they only do so without any information about who is in the session, and if they somehow recognise a participant they are required to stop listening immediately. No other organisation or people will be allowed to listen to the recordings without us getting your permission first.

We have a series of questions that we'd like to work through today. We'd like for you to answer as many of them as possible, but if there are things you don't want to share with us, please feel free not to, or to come and talk to us privately after the session.

To start off the discussion....

1. In Australia at the moment, are there any groups of people who are missing out when it comes to getting a fair go?

Who?

In what way?

How come?

1a. IF NECESSARY: Are we missing out on getting a fair go? PROBE IN DETAIL

Who?

In what way?

How come?

2. Are there any groups that need special assistance to actually get a fair go?

Who?

In what way?

How come?

3. What problems might we face in trying to get a fair go for ourselves?

4. Where do we go now if we feel that we are not getting a fair go?

5. What SHOULD we be able to do if we feel that we are not getting a fair go?

6. What is being done now to improve our lives?

What are we doing

What is the government doing

What are other people doing

What are other organisations or groups doing

Who IS helping us

How

7. Protecting Human Rights is one of the ways that everyone in Australia can get a fair go. Where do we get information about human rights from?

8. How could the protection of our own human rights in Australia be improved?

9. What are the good things about Human Rights in Australia?

10. What are the bad things about Human Rights in Australia?

11. What other information would we want to have about human rights in Australia?

CLOSE

*This document takes into account the particular instructions and requirements of our Client. It is not intended for and should not be relied upon by any third party and no responsibility is undertaken to any third party.*

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The Allen Consulting Group

# **Analysis of options identified during the National Human Rights Consultation**

Final summary report

**September 2009**

Report to Attorney-General's Department

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## Summary of assessment

### 1.1 Context for this analysis

The Allen Consulting Group (ACG) has been commissioned by the Australian Government Attorney-General's Department (Commonwealth) to: develop a set of criteria against which the potential effects of various policy options proposed in the National Human Rights Consultation (Consultation) can be assessed; to undertake an assessment of the policy options against this evaluation framework; and to report on the outcome of this assessment.

This framework allows for the evaluation of the options in terms of their effectiveness, potential costs and benefits, and potential risks or unintended consequences. The purpose of this evaluation is not to provide a recommended approach, but rather to provide the Consultation Committee with a consistent method for the assessment of a set of diverse policy responses.

### 1.2 Policy options being assessed

The options have been derived from the Consultation undertaken by the independent National Human Rights Consultation Committee, and are shown in Table 1.1. They represent the Consultation Committee's views on the key options raised by stakeholders in consultations and submissions during the Consultation process, which are within the scope of the Consultation Committee's Terms of Reference.

The Consultation Secretariat also provided Allen Consulting Group with a representative sample of publicly available submissions, in order to conduct this assessment.

Table 1.1

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**SUMMARY OF POLICY OPTIONS**

Options and sub-options
Option 1 – Human Rights Act <i>Sub-options – four models with varying scope</i>
Option 2 – Education in relation to human rights <i>Sub-options – national curriculum; public service; public awareness raising measures</i>
Option 3 – Parliamentary scrutiny committee for human rights
Option 4 – Increased role for AHRC
Option 5 – Consolidated anti-discrimination laws
Option 6 – New NAP for human rights
Option 7 – Do nothing, maintain current arrangements

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Abbreviations: AHRC – Australian Human Rights Commission; NAP – National Action Plan

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### **Option 1 – Human Rights Act**

A Human Rights Act can take a number of different forms and also take into account different human rights.<sup>1</sup> For this reason, four models of a Human Rights Act are considered under option 1. The variations are designed to reflect the concerns and desires expressed in submissions to the Consultation. In summary the four models have the following features (see Appendix A for more detail on the variations):

*Model 1* – includes the widest scope of human rights (civil, political, economic, social, cultural, and some third generation rights), provides a direct cause of action (access to court and monetary damages), allows for the judiciary to strike down legislation (primary and delegated) where it is in breach of the Act, requires a statement of compatibility upon introduction of legislation and requires all public authorities and private entities conducting public functions to comply with the Act. This is the strongest form of the Act and is unlikely to gain wide support due to the view held by many that the court's capacity to strike down legislation is an unacceptable encroachment upon parliamentary sovereignty. The *Canadian Charter of Rights and Freedoms* is an example of a strong Human Rights Act.<sup>2</sup>

*Model 2* – includes civil, political and a smaller range of economic and social rights (such as the right to health and education), provides a direct cause of action excluding monetary damages, and allows for the judiciary to interpret legislation consistently with human rights. Where an inconsistency arises, this model requires parliament to be informed and respond publicly. All public authorities and private entities with public functions must comply with the Act.

*Model 3* – includes protection only for civil and political rights, does not provide a direct cause of action, and allows the judiciary to interpret legislation consistently with human rights subject to the purpose of the legislation. Where *delegated* legislation is found to be inconsistent with the Act, it becomes inoperative only to the extent of the inconsistency. Members of Parliament must make a statement of compatibility or explain an inconsistency, when introducing new legislation into parliament.

*Model 4* – includes protection only for civil and political rights, no direct cause of action, and a principle that legislation is to be interpreted consistently with human rights set out in the Act. Under this model, there is no capacity for a court to invalidate inconsistent legislation or to formally notify parliament of any inconsistency. Members of Parliament must make a statement of compatibility or explain an inconsistency on introduction of legislation into parliament. A final feature of this model is that no obligation is placed upon public or private entities to comply with the rights set out in the Act.

---

<sup>1</sup> The Terms of Reference do not allow for consideration of a constitutionally entrenched Bill of rights and require that any options identified must preserve the sovereignty of parliament.

<sup>2</sup> The Canadian Charter is a constitutional charter, and is based upon and replaced the 1960s Canadian legislative *Bill of Rights*.



## ***Option 2 – Education in relation to human rights***

Many participants at public meetings held as part of the Consultation said we ‘don’t know what our rights are’, ‘where to find them’ or ‘what to do if our rights are breached’. They also called for measures to increase awareness of human rights amongst the community — in particular, incorporating human rights education into a national curriculum, introducing human rights education for administrative decision-makers and a broader campaign of public awareness raising measures. These concerns are reflected in the three alternative variations within the education option.

### ***National Curriculum***

Human rights education could be incorporated into various aspects of the new national curriculum.<sup>3</sup> It may be incorporated in modules, or as an ongoing component of education at all levels of schooling. Consultation participants called for education that provides students with information about what human rights are, where they come from, what to do if they are violated, as well as information about the history of Australia, our system of democracy, responsibilities we have as people living in Australia, and a broader understanding of global politics.

### ***Public Service education***

Service provision agencies, such as Centrelink, make decisions that affect people’s material wellbeing and may affect their human rights. It was frequently alleged that many breaches of human rights are made during administrative decision making processes.

The Victorian Department of Justice and Department of Human Services note that the introduction of the (Victorian) Charter of Human Rights and Responsibilities has encouraged decision makers — often people on the front counter — to be more transparent in their decision making processes and to take their clients’ human rights into consideration. To achieve this, Victoria implemented human rights training for all public servants. The Consultation heard frequent calls for explicit human rights training for government service provision agencies, such as Centrelink and the Department of Immigration and Citizenship.

### ***Public awareness raising measures***

Consultation participants called for a broader public awareness raising campaign, informing people of what their human rights and responsibilities are, and what to do if they feel they have been violated. Suggested measures include TV commercials, human rights education vans, posters and festivals.

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<sup>3</sup>

Development of a national curriculum is currently underway and is said to be ‘futures-oriented and will outline the essential skills, knowledge and capabilities that all young Australians are entitled to learn, regardless of their social or economic background or the school they attend.’ The Australian Curriculum, Assessment and Reporting Authority will take on the responsibility for the national curriculum.

### **Option 3 – Parliamentary scrutiny committee for human rights**

Many submissions to the Consultation proposed a new parliamentary scrutiny committee for human rights. The purpose of having laws scrutinised is to ensure they are consistent with human rights principles, and in the event that they are not, that this is a deliberate, rationalised and publicly transparent decision made by parliament. Pre-enactment scrutiny helps to ‘catch’ laws that would otherwise pass and be enforced, contrary to the rights of individuals. In addition, scrutiny committees can often consider laws that have already been passed.

Scrutiny of proposed Bills could operate as part of a human rights system that does or does not include a Human Rights Act.

Currently in Australia there exists a Senate Scrutiny of Bills Committee and a Senate Scrutiny of Regulations and Ordinances Committee. The latter scrutinises delegated legislation ‘for compliance with non-partisan principles of personal rights and parliamentary propriety’ and the former scrutinises Acts of Parliament as to whether they ‘trespass unduly on personal rights and liberties.’

The current system attracted the following criticisms:

- there is no clearly defined list of ‘rights and liberties’ that should not be ‘unduly trespassed’ upon;
- the Committee’s reporting function is limited and cannot take any stronger measures, such as declaring that a Bill is incompatible with human rights;
- the Committee’s timeframe does not allow adequate consideration or review of proposed laws, nor consideration of existing law; and
- the Committee’s work is not adequately publicised, nor is there a body of jurisprudence developed.

### **Option 4 – increased role for AHRC**

Established in 1986, AHRC is an independent statutory organisation and reports to the Commonwealth Parliament through the Attorney-General. The AHRC is created by, and its powers are derived from, the *Australian Human Rights Commission Act 1986*.

Currently, the AHRC develops human rights education programs, advises the Commonwealth on human rights issues, conducts research into human rights issues, and inquires into and conciliates complaints of unlawful discrimination.

#### ***Extension of the Commission’s role<sup>4</sup>***

The Commission’s role could be extended to include:

- the power to conduct inquiries on any matter affecting human rights in Australia, as well as powers necessary to conduct such inquiries appropriately;
- the power to consider (on its own motion) and report on the human rights implications of any existing or proposed Commonwealth, state or territory legislation;

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<sup>4</sup> Largely drawn from HRLRC 2009, *Engage, Educate Empower: National Human Rights Consultation Submission on Measures and Initiatives to Promote and Protect Human Rights*, April 2009.

- the power to initiate investigations on its own motion where it becomes aware of potential infringements of anti-discrimination legislation and other human rights instruments (including economic, social and cultural rights, and emerging human rights principles such as the right to a clean, sustainable environment), and conduct those investigations appropriately;<sup>5</sup>
- the power to, on its own motion, seek enforcement of conciliation agreements that are entered into as a result of AHRC procedures;
- the power to make binding codes of conduct or guidelines setting out the process for the resolution of complaints by the AHRC under Commonwealth anti-discrimination law and other human rights instruments; and
- raise the prominence of the AHRC through increased human rights research activity, educational activities and provision of information.

### ***Option 5 – Consolidated anti-discrimination legislation***

Many Consultation participants indicated that they wanted to see improvements in anti-discrimination legislation in Australia. Anti-discrimination law in Australia has a multi-tiered structure. Currently, states and territories each have a Human Rights Commission or equivalent body, as well as individual anti-discrimination laws. The Commonwealth also has the AHRC and various discrimination acts. This means that there are different laws and processes across nine jurisdictions.

Individuals and businesses alike reported it confusing to make or respond to a complaint. Differences in available grounds, processes for making a complaint, and remedies, contribute to this complexity. For example, discrimination on the basis of marital status is unlawful in all states and territories except for Queensland and the ACT, whilst discrimination on the basis of religious belief or activity is unlawful in each state and territory except for South Australia and New South Wales.

A further discrepancy exists between anti-discrimination laws in the states and territories and those at the Commonwealth level: for example, discrimination on the basis of sexual orientation is unlawful in all states and territories, but the Commonwealth has yet to legislate in this area.

There are also inconsistencies between the Commonwealth laws dealing with discrimination on the basis of age, race, sex and disability.

### ***Creation of national legislation for anti-discrimination***

This involves the creation of a national piece of legislation that can consolidate and build on current Commonwealth anti-discrimination laws. Such legislation may increase the grounds available for complaints about discrimination — in accordance with many improvements already agreed to by states and territories. Its other purpose may be to create one piece of anti-discrimination legislation that consolidates the current range of acts.

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<sup>5</sup> Note that such an investigative function could also be vested in an Ombudsman.

### **Option 6 – New NAP for human rights**

In the *Vienna Declaration and Programme of Action*, adopted in June 1993, the World Conference on Human Rights recommended nations consider drawing up a National Action Plan (NAP). A NAP enables government to develop a clear strategy, as well as identify concrete steps to be taken, to assist in the protection and promotion of human rights. A NAP is not limited to legal commitments to human rights, but may also include commitments to improve policy and service delivery.

NAPs often include commitments to reform or implement stronger legal frameworks, strengthen regard for international human rights standards in domestic law. They result in better protection of individuals' human rights and a stronger human rights culture generally.

Australia currently has a NAP, which was last updated by the Howard Government in 2004. Key criticisms of the current NAP include:

- it only reports current actions rather than sets a future strategy for government;
- a lack of commitment for resources;
- a lack of assessment of the Australian human rights situation (for instance, in terms of using key indicators or measures of the extent of awareness and protection of human rights); and
- the inability to address specific needs of vulnerable groups in Australian society.

In seeking to address these criticisms, this option involves the development of a new NAP with a stronger strategic focus and which includes future commitments — including consideration of resource needs to improve human rights protections in Australia.

It was not possible within the scope of this review to ascertain the preferred detail of such a NAP (that is, what specific commitments would be included in the NAP). The assessment of this option, therefore, is focused on the process and framework that a NAP would provide, rather than specific commitments.

### **Option 7 – Do nothing, maintain current arrangements**

Whilst many see the need for human rights to be better protected and promoted, others see that the current system is adequate and does not require any alterations. Material gathered from community roundtable discussions suggests that a minority favour this option. Specific criticisms of the current arrangements have been rehearsed in the descriptions of the other options.

## **1.3 Methodological approach**

Each option was assessed individually, rather than in combination with other options (although there is potential for some options to be implemented concurrently). This was so as to focus on the key aspects of each of the options, as well as to not complicate the assessment with the multiplicity of combinations and permutations possible.

A multi-criteria analysis was used to assess the options: this is an analytical framework that allows a set of qualitatively different options to be compared using common criteria. Three categories of assessment criteria were used (see Table 1.2); these were agreed to reflect the important considerations for government in reviewing the options.

Table 1.2

**ANALYTICAL FRAMEWORK – ASSESSMENT CATEGORIES AND THEIR CRITERIA**

Assessment category with description	Assessment criteria
<b>Benefits to stakeholders</b>  Assesses the effectiveness of an option in terms of how well the option is likely to work, and how stakeholders will benefit	<ul style="list-style-type: none"> <li>• Clarification of rights for individuals</li> <li>• Better human rights protections</li> <li>• Certainty of obligations</li> <li>• Improved capacity to seek redress where rights have been breached</li> </ul>
<b>Implementation timeliness and costs</b>  Assesses the cost effectiveness and proportionality of an option	<ul style="list-style-type: none"> <li>• Transition costs</li> <li>• On-going costs</li> <li>• Timeliness of potential changes</li> </ul>
<b>Risks</b>  Assesses the potential negative impacts or unintended consequences that may arise from the implementation of an option	<ul style="list-style-type: none"> <li>• Increased litigation</li> <li>• Parliamentary sovereignty</li> <li>• Insufficient resourcing</li> <li>• Lack of community support/agreement</li> </ul>

Source: Allen Consulting Group

The assessment criteria were used to evaluate each option against a four point scale, resulting in a quantitative rating. The scale differs for each assessment category, as is shown in Table 1.3. Although such assessment inevitably involves some judgement, these judgements are transparent.

Table 1.3

**FOUR POINT SCALE FOR ASSESSING THE OPTIONS**

Category	Rating on scale	
	1 ...	...4
Benefits to stakeholders	The option does not provide any benefits	The option provides a number of benefits
Implementation timeliness and costs	The option involves high costs / a long time frame for implementation	The option involves low costs / a short timeframe for implementation
Risks	The option presents a high degree of risk	The option presents a low degree of risk

Source: Allen Consulting Group

## 1.4 Key assessments

The performance of each option against the evaluation framework is discussed in this section and structured according to the three assessment categories: Benefits to stakeholders; Implementation timeliness and costs; and Risks. A summary assessment table, comparing the average performance of the options against the assessment categories, is provided below (Table 1.4). The following sections discuss these assessments further, and details of the quantitative ratings for each of the assessment criteria are provided in Appendix B (see Tables B.1-B.3).

Table 1.4

### SUMMARY OF ASSESSMENT – OPTIONS AVERAGE RANKING AGAINST ASSESSMENT CATEGORIES

Options	Assessment categories		
	Benefits to stakeholders	Implementation timeliness and costs	Risks
1 Human Rights Act*			
model 1	4	2	3
model 2	4	2	3
model 3	3	3	3
model 4	2	4	4
2 Education in relation to human rights			
national curriculum	2	2	2
public service education	2	2	3
public awareness raising measures	2	3	4
3 Parliamentary scrutiny committee for human rights	2	3	4
4 Increased role for AHRC	2	3	3
5 Consolidated anti-discrimination legislation	3	1	3
6 New NAP for human rights	2	2	4
7 Do nothing, maintain current arrangements	1	—	—

**KEY:**

Benefits: 4 = high, 3 = above average, 2 = moderate, 1 = low

Implementation factors: 4 = low, 3 = moderate, 2 = above average, 1 = high

Risks: 4 = low risk, 3 = moderate risk, 2 = above average risk, 1 = high risk

### Category 1. Benefits to stakeholders

#### Option 1 – Human Rights Act

A Human Rights Act is an important and significant option arising from the Consultation. A proposal for a Human Rights Act reflects support expressed in a significant number of submissions made to the Consultation, both at community roundtables and in writing.

Proponents of a Human Rights Act, such as the Law Council of Australia, the AHRC, and the Gilbert + Tobin Centre of Public Law, among others, believe that current protection of human rights in Australia is inadequate, especially in regard to the disadvantaged and vulnerable. They also point to the fact that Australia is the only Western democracy that has not implemented the major international human rights treaties in a national Charter of rights or in the Constitution.

Submissions to the Consultation made an important distinction when calling for a Human Rights Act. Namely that an Act on its own is not sufficient to fully address all human rights related problems in Australia. Rather, an Act is seen as a ‘catalyst for change’<sup>6</sup> and one that requires support in the form of accompanying education and training, in order to best improve human rights protection and promotion.

Option 1 represents a strong response to the issues raised above and ultimately benefits stakeholders through better protection of human rights, the enunciation of rights and responsibilities, and by raising the community’s awareness of human rights. Implementing a Human Rights Act would also deliver a strong signal that Australia intends to address these concerns and its international reputation in relation to human rights.

All four models being proposed protect and promote human rights by providing a consolidated list of human rights to be protected under the Act. Models 1 and 2 provide clear and direct causes of action should rights be breached, and both offer remedies for individuals. Models 1, 2 and 3 have a stronger focus on protection through judicial interpretation and associated parliamentary response, public parliamentary statements on the human rights compatibility of new legislation, and the requirement for compliance from public authorities. Model 4 is the weakest form of an Act, since it does not stipulate compliance, nor does it offer any formal protection.

The models vary according to their respective responses to protect human rights in the circumstances of an inconsistency arising between legislation and the Human Rights Act. Model 4 is the least effective as it lacks a formal process to notify and respond to inconsistent legislation and there is no obligation for public and private entities to comply with the Act.

Models 1 and 2 include direct causes of legal action and formal remedies should human rights be breached, and thus provide the greatest improvement in the capacity for individuals to seek redress. Model 3 does not have a direct cause of action, but may allow for human rights issues to be discussed in court in an indirect manner. Model 4 will not improve redress, as there is no obligation upon entities operating under the Act to comply with human rights.

However, many submissions highlighted that the greatest impact upon redress, should human rights be breached, is not linked to the ability to pursue human rights violations through courts and tribunals. Rather it is where an Act is used to ‘challenge the rigid application of policies in ways that ignore the realities of human lives.’<sup>7,8</sup>

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<sup>6</sup> Williams G 2009 *Personal Submission to National Human Rights Consultation*, Foundation Director at the Gilbert + Tobin Centre of Public Law, Faculty of Law, UNSW.

<sup>7</sup> Quoted from Byrnes, Charlesworth and McKinnon 2009, *Bills of Rights in Australian history, politics and law*, p165, by Santow 2009, *National Human Rights Consultation Submission*, Gilbert + Tobin Centre of Public Law.



Evidence of social benefits derived from an Act was found in other jurisdictions and primarily relates to better, ‘human rights focused’ service delivery. In the UK, a shift has occurred away from inflexible, ‘one size fits all’ policies, to ones that recognise the circumstances and differing needs of individuals.<sup>9</sup> There is similar evidence from Victoria where its Charter has worked to improve the delivery of services and the rights of disadvantaged people:

For example, in Victoria, a pregnant single mother of two children living in community housing was given an eviction notice without reasons. Eviction would have meant homelessness for herself and her children, in violation of their civil and political right to private and family life, and of their ESC right to adequate housing... She was saved from homelessness only because Victoria has a Charter of Rights protecting the right to family life, and this was used to negotiate with her landlord to reach a compromise.<sup>10</sup>

This is a highly beneficial shift since it is disadvantaged and vulnerable people who are most likely to require public and social services, and are in greatest need for better human rights protections. To this end, Models 1, 2 and 3 offer better ‘grass roots’ protection of human rights, and potential to deliver social benefits — due to the requirement for compliance from public servants, government agencies, statutory authorities and private entities with public functions.

### *Option 2 – Education in relation to human rights*

Many participants at each public meeting held as part of the Consultation said we ‘don’t know what our rights are’, ‘where to find them’ or ‘what to do if our rights are breached’. They also called for measures to increase awareness of human rights within the community — as is reflected in the three education initiatives: incorporating human rights education into a national curriculum; introducing human rights education for the public sector; and a broader campaign of public awareness raising measures.

Improving human rights education will serve primarily to improve awareness of human rights. All three variations meet this objective, although public service education does so to a slightly lesser extent — being targeted towards a smaller section of the community (public servants and their clients), when compared to the other education initiatives.

Education will help meet Australia’s international human rights obligations. Australia has a duty under the Universal Declaration on Human Rights, and other conventions to which it is a signatory, to commit to providing human rights education.<sup>11</sup>

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<sup>8</sup> Examples where disadvantaged people have benefited the use of an Act to address human rights issues in comparable jurisdictions (including the ACT, Victoria, the UK and New Zealand), are provided in an appendix to Santow 2009, *National Human Rights Consultation Submission*, Gilbert + Tobin Centre of Public Law.

<sup>9</sup> Santow 2009, *National Human Rights Consultation Submission*, Gilbert + Tobin Centre of Public Law p43.

<sup>10</sup> Example quoted in Santow 2009, *National Human Rights Consultation Submission*, Gilbert + Tobin Centre of Public Law p39, and referenced to Human Rights Law Resource Centre, *Case Studies: How a Human Rights Act can Promote Dignity and Address Disadvantage*, section 1.4.

<sup>11</sup> According to HRLRC 2009, *Engage, Educate Empower: National Human Rights Consultation Submission on Measures and Initiatives to Promote and Protect Human Rights*, April 2009, these conventions include the *International Covenant on Economic, Social and Cultural Rights*, the *Convention on the Rights of the Child*, the *International Convention on the Elimination of All Forms of Racial Discrimination*, the *Convention on the Elimination of Discrimination in Education* and the *Convention on the Elimination of All Forms of Discrimination against Women*.



However, without the establishment of human rights in law, human rights education does not offer ‘protection’ in any formal sense. Nor will education help in terms of redress, even though individuals might be better able to identify a breach of their human rights.

Public authorities such as Centrelink and Medicare make decisions that impact the daily lives of people in Australia. Increased awareness of human rights throughout the decision making process is an important way to ensure the human rights of community members are respected.

The training and education initiatives for public servants arising out of the introduction of the Victorian Charter have had an important impact on the way the government delivers services:

...by articulating a clear framework for protecting individual rights and creating an obligation on public authorities to act compatibly with human rights.<sup>12</sup>

In summary, this option has the capacity to reduce the frequency of human rights breaches when the community has an increased awareness of human rights and service providers better understand their related obligations and responsibilities. It also brings Australia into line with international human rights education obligations. It does not provide any formal protection of rights or means of individual redress.

### *Option 3 – Parliamentary scrutiny committee for human rights*

Pre-enactment scrutiny will better protect human rights by helping to catch laws that would otherwise pass and be enforced, contrary to the rights of individuals. In their submission, the AHRC commented on current scrutiny arrangements, indicating there is much scope for better protecting human rights through a reformed committee:

The Standing Committee on Regulations and Ordinances and the Scrutiny of Bills Committee are governed by the Senate Standing Orders, which require the Committees to consider whether regulations, ordinances or Bills may ‘trespass unduly on personal rights and liberties.’<sup>13</sup> However, these Committees are given no guidance on which rights and liberties they should consider, or how they should determine when those rights can be justifiably limited.<sup>14</sup>

Publication of the committee’s findings will contribute to improving awareness of human rights. Additionally, the committee’s findings will develop a body of knowledge on what constitutes human rights and responsibilities, and how these are to be interpreted — helping to more clearly enunciate human rights. Accordingly, service providers operating in an environment where rights and responsibilities are clarified, will be more able to improve their service delivery.

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<sup>12</sup> State Government of Victoria 2009, *National Human Rights Consultation — Victorian Government Submission*, 9 June 2009 p13.

<sup>13</sup> Senate Table Office, *Standing Orders and other Orders of the Senate* 2006, Standing Orders 23 and 24, p-20-21.

<sup>14</sup> AHRC 2009, *National Human Rights Consultation: Australian Human Rights Commission Submission*, Section 12.4, paragraph 148.

The scrutiny committee is not intended to improve means of redress for individuals beyond the extent afforded by the scrutiny of new and existing legislation. Scrutiny of new or existing legislation will not prevent human rights breaches from occurring in the implementation and application of legislation. Thus, in order to better protect human rights it will be necessary to also have adequate capacity for individuals to seek redress.

The UK's experience provides further evidence of benefits linked to increased scrutiny. Here, the reports of the British Joint Committee on Human Rights (JCHR) have resulted in changes to legislation in only three per cent of cases. However, it is argued that the government anticipates the reactions of the JCHR when it is forming policy and drafting legislation, and therefore, legislation that opposes human rights principles is seldom presented to parliament.<sup>15</sup>

#### *Option 4 – Increased role for AHRC*

The current system of human rights protection largely relies upon individuals to lodge complaints to the AHRC when they believe their human rights have been breached. The key benefit to stakeholders arising from a stronger AHRC is better human rights protection.

A stronger AHRC could initiate investigations on its own motion, where it becomes aware of potential infringements of anti-discrimination legislation and other human rights instruments, improving human rights protection. Further, the ability to seek enforcement of conciliation agreements that are entered into as a result of AHRC procedures, and to make binding codes of conduct or guidelines setting out the process for the resolution of complaints, would further protect human rights.

Expansion of the AHRC's 'watchdog' role – expanded inquiry, reporting and investigation, and enforcement activities, would also help clarify individuals' rights. This is primarily achieved through more clear and consistent monitoring of human rights issues and violations in Australia.

Additional benefits to stakeholders include clarification of rights and greater certainty of obligations.

This option only improves the capacity for individuals to seek redress if the basis for complaints to be made to the AHRC is increased, or if the AHRC's conciliation functions are expanded.

#### *Option 5 – Consolidated anti-discrimination laws*

The enactment of consolidated anti-discrimination legislation may serve to simplify anti-discrimination law by consolidating disparate anti-discrimination laws into a single piece of legislation, with consistent drafting of definitions and key concepts.

Consolidated anti-discrimination legislation may serve to increase awareness of human rights in the community if accompanied by an information and education campaign. This is usual practice when introducing significant new Commonwealth legislation. However, without accompanying and broad based public awareness campaigns (such as in option 2), such awareness may be limited.

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<sup>15</sup> Campbell 2009, *National Human Rights Consultation Submission* Centre for Applied Philosophy and Public Ethics, Australian National University.

To some extent, consolidated anti-discrimination legislation will improve certainty of obligations, although this may depend on consistency with the provisions of existing state and territory legislation.

It may provide a more easily accessible avenue by which individuals can seek redress for breaches of their rights. Additionally, it may broaden the range of grounds for which individuals may seek redress.

Australia is party to a number of international human rights instruments<sup>16</sup> that oblige it to ensure ‘full and effective legislative protection of the right to equality and freedom from discrimination.’<sup>17</sup> The United Nations Human Rights Committee (UNHRC) noted its concern that ‘the rights to equality and non-discrimination are not comprehensively protected in Australia in federal law’ and recommends that:

The State party should adopt federal legislation, covering all grounds and areas of discrimination to<sup>18</sup> provide comprehensive protection to the rights to equality and non-discrimination.

The United Nations Committee on Economic, Social and Cultural Rights made a similar recommendation. Consolidated anti-discrimination legislation may thus assist Australia in meeting its international obligation to ensure the full and effective legislative protection of human rights required by the United Nations.

The AHRC<sup>19</sup> noted that such consolidated anti-discrimination legislation is necessary even if a Human Rights Act is enacted, as anti-discrimination laws provide a different and complementary role to an Act.

Employers are subject to multiple and potentially overlapping anti-discrimination laws at the state, territory and Commonwealth level, and must manage a complex web of obligations with respect to these laws.<sup>20</sup> Consequently, consolidated anti-discrimination legislation at the Commonwealth level may produce benefits to employers through improving the certainty of their anti-discrimination obligations.

### **Option 6 – New NAP for human rights**

The broad intention of a NAP is to ‘enhance the way in which Human Rights issues are approached and progressed by Australia both domestically and internationally.’<sup>21</sup> This option concerns the merits of improving the current NAP, as it is widely accepted that the current NAP is ineffective.

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<sup>16</sup> Including the International Convention on the Elimination of All Forms of Racial Discrimination, the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, the Convention on the Elimination of All Forms of Discrimination against Women, and the Convention on the Rights of Persons with Disabilities.

<sup>17</sup> HRLRC 2009, *Engage, Educate Empower: National Human Rights Consultation Submission on Measures and Initiatives to Promote and Protect Human Rights*, April 2009 p54.

<sup>18</sup> UNHRC [United Nations Human Rights Committee] 2009, *Concluding Observations of the Human Rights Committee – Australia*, paragraph 12.

<sup>19</sup> AHRC 2009, *National Human Rights Consultation: Australian Human Rights Commission Submission*, June 2009.

<sup>20</sup> Australian Chamber of Commerce and Industry (ACCI) 2008, *Submission to the Senate Standing Committee on Legal and Constitutional Affairs – Sex Discrimination Act Inquiry 2008*.

<sup>21</sup> Law Council of Australia 2009, *A Charter: Protecting the rights of all Australians Law Council of Australia’s Submission to the National Consultation on Human Rights*, May 2009, p2.

Specific details on commitments within a new NAP are not known at this stage. It may, for example, include a commitment to a Human Rights Act or to strengthening parliamentary scrutiny of legislation on human rights grounds. Assessing the potential benefits, costs and risks of developing a new NAP is therefore primarily based on the value of the *mechanism* itself, as a facilitator of other reforms, rather than its content.

There is certainly potential for a new NAP to deliver benefits to stakeholders through an improved framework, whereby government's human rights strategy is better coordinated, focused on priorities and cost-effective. The key ways in which this approach may be beneficial are through better facilitation of reforms to protect human rights, and increased human rights awareness.

### ***Option 7 – Do nothing, maintain current arrangements***

While public roundtable sessions suggested that a minority favour this option overall, many submissions indicated that current human rights protections are adequate. Human rights are protected through a range of mechanisms. The Australian Constitution provides limited protection to a small number of human rights. Some existing legislation protects certain rights, for example the Victorian Charter (2006). The common law provides limited human rights protection. Finally, an individual who believes Australia has violated international human rights law can, in certain circumstances, appeal to international adjudicative bodies, which can generally issue non-binding recommendations.

This option meets some stakeholder requirements, however, the way human rights and responsibilities are currently enunciated is not clear. As the Victorian Government describes in its submission to the consultation:

Currently, the federal protection of human rights is a piecemeal collection of provisions in various Acts and the common law. (This was also the case in Victoria prior to the enactment of the Victorian Charter.)<sup>22</sup>

## ***Criterion 2. Implementation timeliness and costs***

### ***Option 1 – Human Rights Act***

At one level, implementing a Human Rights Act is a timely response to better protect and promote human rights. This is the case if 'implementation' is limited to drafting legislation (which can be completed in a period of weeks) and the legislation has clear passage through parliament.

The stronger forms of a Human Rights Act, models 1, 2 and 3, all require compliance among public sector entities and private sector entities with public functions. Public service training in relation to human rights obligations could take a period of months to complete. In the Victorian example, a period of 12 months was needed prior to the introduction of the Charter to accommodate such training.

Following implementation of Models 1, 2 & 3, evidence of an associated improvement in service delivery may take many months to achieve. Evidence of a shift towards a 'human rights culture' in the broader community may take several years to develop.

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<sup>22</sup> Victorian Government 2009, *National Human Rights Consultation, submission of the Victorian Government*, paragraph 9.7 p23.

Model 4 does not require compliance by the public sector, or offer remedies, or require public statements when legislation is found to be in breach of the Act. Model 4 does not have any inherent training requirements, nor are there more contentious issues to debate (such as surrounding parliamentary sovereignty or the inclusion of third generation rights). Without such potentially time consuming variables, this model could be implemented without inherent delay.

Any commitment to a Human Rights Act is accompanied by the commitment to establish and maintain the systems and facilities that uphold those rights. As government is primarily responsible for the protection and promotion of rights, public funding will be required to pay for the legal, service delivery and other infrastructure required to meet the protections covered in an Act.

Further research is required to establish the economic and social, costs and benefits associated with the implementation of a Human Rights Act, particularly for models 1, 2 and 3. The Victorian government publically quotes a cost of \$6.5 million over 4 years ‘to fund human rights initiatives’ relating to the Charter.<sup>23</sup> The detailed allocation of this funding is presented in Box 1.1. Other jurisdictions were unable to provide data to this study.

Box 1.1

#### **COSTS ASSOCIATED WITH IMPLEMENTING THE VICTORIAN CHARTER**

In 2006-07 the Victorian Government allocated total funding of \$6.5m for human rights initiatives over 4 years. The breakdown of funding was as follows:

- Victoria Police \$1,806,000 over 2 years – nil ongoing;
- Corrections Victoria \$119,000 in the first year only – nil ongoing;
- Department of Human Services \$624,000 over 2 years – nil ongoing;
- Human Rights Unit (Department of Justice) \$1,386,000 over first 4 years – \$266,000 per annum ongoing;
- Victorian Equal Opportunity and Human Rights Commission Charter education \$1,337,000 over 3 years – nil ongoing; and
- Victorian Equal Opportunity and Human Rights Commission reporting function \$996,000 over 3 years - \$402,000 per annum ongoing.

Additional funding includes:

- In 2009, the Department of Justice provided \$485,000 (i.e. in addition to the existing ongoing) to the Commission to perform its functions under the Charter;
- The Department of Justice supplements the Human Rights Unit budget, which amounts to \$300-400,000 annually; and
- Some departments also provided additional resources to prepare for the commencement of the Charter.

Source: Victorian Department of Justice (14 September 2009)<sup>24</sup>

Regardless of the model chosen, it will be vital to secure institutional support for an Act from the many Commonwealth public agencies and authorities, whose operation and delivery of services will be effected by the introduction of an Act. This is in addition to the costs of enactment of a Human Rights Act.

<sup>23</sup> Victorian Government 2009, *National Human Rights Consultation, submission of the Victorian Government*, paragraph 6.1 p21.

<sup>24</sup> Figures requested from and provided by the Victorian Department of Justice, 14 September 2009.

For example, all proposed models include scrutiny of new legislation for human rights compliance. This will require additional funding on an initial and ongoing basis to support the government efficiently and effectively develop and implement policy. Such support could include expert advice from an authority, for example a parliamentary scrutiny committee for human rights, or from other experts or relevant stakeholders. Recommendation 32 of the AHRC's submission to the Consultation requests that sufficient funding be supplied, should its role be expanded under an Act.<sup>25</sup>

The submission from the Law Council of Australia notes that the costs of public servant training to understand their human rights obligations under an Act will be outweighed by the value added through better quality services and associated savings gained through avoidance of breaches to human rights.<sup>26</sup> There is clearly the potential for costs savings in both economic and social terms as a result of a strengthened human rights system.

The Law Council of Australia states that compliance costs are not expected to be excessive:

Human rights compliance is no more expensive than other forms of compliance, such as preparing Environmental Impact Statements... For example, the bodies charged with administering the Human Rights Charters in the ACT and Victoria are of modest size, with staff of around 20 in the ACT and 50 in Victoria (both these bodies have other functions as well, such as handling discrimination and health complaints).<sup>27</sup>

### *Option 2 – Education in relation to human rights*

The formation of a national curriculum requires a long timeframe, at least 1-2 years, for development and implementation, particularly as it would require approval from nine state and territory governments prior to its delivery. The United Nations World Programme for Human Rights Education suggests four stages for a national human rights education strategy and suggests the time commitment (from initial analysis through to evaluation of the program) may involve several years.<sup>28</sup>

The introduction of human rights education to the public sector is relatively straightforward, compared to the introduction of a national curriculum. However, it may take some time (at least 6-12 months) to develop training materials and tailor these to different government agencies.

Public awareness raising measures could be developed in a much shorter timeframe, in the order of 3-6 months. The AHRC has already developed educational materials that may be used.<sup>29</sup>

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<sup>25</sup> AHRC 2009, *National Human Rights Consultation: Australian Human Rights Commission Submission*, June 2009 p78.

<sup>26</sup> Law Council of Australia 2009, *A Charter: Protecting the rights of all Australians*, Law Council of Australia's Submission to the National Consultation on Human Rights May 2009.

<sup>27</sup> *Ibid* p40.

<sup>28</sup> United Nations 2006, *Plan of Action: World Programme for Human Rights Education, First Phase*.

<sup>29</sup> AHRC 2009, *Education*.



The UN World Programme for Human Rights Education indicates that the costs to government of human rights education may include the training of teachers, the development of teaching materials, in addition to the engagement of external stakeholders such as teacher training institutions, teachers' associations, non-governmental organisations, parents' and students' associations, and community leaders.<sup>30</sup>

However, the United Nations notes that:

...funding for human rights education could be found among the resources allocated to the national education system in general, and in particular by optimising funds already committed to quality education.<sup>31</sup>

The Department of Education, Employment and Workplace Relations (DEEWR) is currently developing a national curriculum for English, Mathematics, the Sciences and History. There is scope for a future human rights curriculum to be incorporated into this process, thereby reducing the overall transition costs.

The development of education and training initiatives for the public sector may incur significant costs. For example, upon introduction of the Victorian Charter of Human Rights and Responsibilities, the Victorian government implemented a number of education initiatives including internal communication strategies, training courses and workshops, online training modules, Human Rights Ambassador programs, and human rights promotional material such as calendars and displays<sup>32</sup> (see also Box 1.1).

The costs associated with public awareness are not likely to be as high as those associated with developing a national curriculum or implementing public service education programs. Transition costs will be those incurred in initially developing the program or mechanism for the delivery of public awareness raising measures. This may include, for example, grants provided to non-government organisations or local government for the development of public awareness raising campaigns. Educational materials already developed by the AHRC may be used to minimise production costs of any new material required.

### **Option 3 – Parliamentary scrutiny committee for human rights**

A parliamentary scrutiny committee for human rights is an option that could be introduced quickly (some 3-6 months) and relatively easily. As stated in one submission:

The greatest merit of the proposal is that it could, with sufficient resourcing of the Committee's secretariat and legal advice capacity, be implemented tomorrow.<sup>33</sup>

In terms of costs associated with a scrutiny committee, these initially consist of costs accruing to the parliament associated with — recruitment of staff, new legislation clarifying the terms of reference, education about the revised committee to MPs and their advisers, education to government departments about the committee's new role, and, education to the committee members themselves and their research staff about how the reformed committee would work. The committee's ongoing role requires government funding for expert advice.

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<sup>30</sup> United Nations 2006, *Plan of Action: World Programme for Human Rights Education, First Phase*.

<sup>31</sup> *Ibid* p6.

<sup>32</sup> VEOHRC [Victorian Equal Opportunity and Human Rights Commission] 2009a, *Emerging change: the 2008 report on the operation of the Charter of Human Rights and Responsibilities*.

<sup>33</sup> Tate 2009 *Submission to Human Rights Consultation Panel*, personal submission p4.

A scrutiny committee is not expected to increase costs to business (except in circumstances where clarification around human rights and responsibilities required businesses to change their practices to ensure compliance). It may add costs to government departments, through the need to provide additional supporting information when preparing new legislation.

#### *Option 4 – Increased role for AHRC*

Given the AHRC is an established and recognised national institution, this option involves strengthening the organisation and expanding its role. Thus implementation — expansion of its role, activities and influence — is a comparatively straightforward and reasonably quick (3-6 months) process.

Execution of the AHRC's increased role is dependent upon additional government funding. Transition costs to government include — recruitment of staff, drafting new legislation clarifying the AHRC's expanded role, educating staff and key stakeholders on the strengthened role, and changing the AHRC's structure and strategic vision.

A strengthened AHRC would increase the cost of compliance to the extent that its new powers (associated with education or the ability to conduct inquiries or initiate investigations), would require, for example, compliance from businesses or organisations that previously were not complying with relevant legislation. These businesses may need to update or change, for example, recruitment procedures, and equal opportunity action plans.

#### *Option 5 – Consolidated anti-discrimination laws*

This option requires a lengthy consultation process, in light of the necessity to reach agreement among the states, territories, and key stakeholders, on a process of review and consolidation. The drafting of consolidated anti-discrimination legislation is also likely to take a significant amount of time, similarly its passage through parliament. It is estimated that the consolidation of anti-discrimination legislation may take 1-2 years to complete.

The Commonwealth government may incur significant costs in developing and enacting consolidated anti-discrimination legislation, in particular through the management of the aforementioned consultation process, prior to drafting. Places of employment and other organisations may face transition costs when becoming compliant with consolidated legislation.

The drafting of consolidated anti-discrimination legislation may require significant resources in terms of staff involvement. However, to the extent that additional resources may be required beyond the normal drafting activities that occur in government, these costs are likely to be relatively low. Additional staff resources will be required for the consultation process.

Consolidated anti-discrimination laws may impose costs on businesses, for example in training and educating staff, responding to and investigating complaints, and engaging legal and specialist assistance where necessary. However in some instances, where employers have maintained compliance with existing state, territory and Commonwealth legislation prior to the introduction of consolidated legislation, such costs may be minimised.



On a positive note the ACCI points to:

...cost benefits to employers in achieving recognition as an employer with a 'discrimination-free culture' — such as in staff well being, the quality of job applicants, productivity, lower absenteeism, fewer conflict issues requiring resolution, and higher rates of retention.<sup>34</sup>

#### *Option 6 – New NAP for human rights*

A key advantage of this option is that it could be implemented immediately, by building on existing structures, while concomitantly including a strategy for longer term goals.

Initial costs of a new NAP would primarily be development costs to government, including conducting research to establish a baseline measure of current protections (to be able to properly measure the impact of future reforms). There are also the costs of stakeholder consultation on the new NAP, although the current Consultation could be substituted here.

The most effective implementation strategy for a NAP requires periodic monitoring of progress and evaluation, which incurs related costs for government on an ongoing basis.

#### *Option 7 – Do nothing, maintain current arrangements*

While maintaining current arrangements will not incur additional costs, there are ongoing detrimental costs associated with maintaining current human rights arrangements. In summary these include a lack of redress for individuals with human rights complaints (of particular concern for disadvantaged sectors of the community), a lack of clarity concerning human rights obligations in Australia, a lack of community awareness of human rights, and unmet international obligations.

### **Criterion 3. Risks**

#### *Option 1 – Human Rights Act*

Despite having the greatest potential for improving human rights protections, this option may also pose the greatest implementation risks, depending upon the model concerned. Risks primarily relate to models 1 and 2, and concern the infringement upon parliamentary sovereignty (models 1 and 2), increased litigation (models 1 and 2), and resourcing requirements relating to third generation rights (model 1). Under model 3 the interpretive principle only applies to delegated legislation. This means that models 3 and 4 do not affect parliamentary sovereignty.

Many submissions point out that there is no risk of infringing parliamentary sovereignty if a Human Rights Act requires judges to interpret legislation consistently with its purpose, and if parliament is free to choose how to respond to declarations of incompatibility made by courts. Parliament will not be prevented from passing legislation that is inconsistent with the Human Rights Act, or from amending the Human Rights Act itself.

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<sup>34</sup> ACCI 2008, *Submission to the Senate Standing Committee on Legal and Constitutional Affairs — Sex Discrimination Act Inquiry 2008*, p3; also noted in Diversity Council of Australia 2008, *DCA's submission to the Federal Government's Senate Committee Review into the effectiveness of the Commonwealth Sex Discrimination Act (1984)*.

In terms of an increase in litigation, evidence presented in many submissions states that this risk is often overstated.<sup>35</sup> Evidence from the Law Council of Australia suggests that governments need not fear a flood of litigation that requires government funding, since this has not been the case under the Victorian Charter or the ACT Act.<sup>36</sup> In any event, only models 1 and 2 provide for a direct cause of action.

Resourcing also presents a potential risk to the full benefits of an Act being delivered. The inclusion of economic, social and cultural rights may have high resource implications. The extent of resources necessary to implement an Act is determined, in part, by the nature of rights it contains.

### *Option 2 – Education in relation to human rights*

The three initiatives for improving human rights education carry low risk in terms of increasing litigation, affecting parliamentary sovereignty, and lacking community support. Sufficient resourcing is a significant risk, particularly in regard to the resourcing requirements associated with a national curriculum and public service training.

### *Option 3 – Parliamentary scrutiny committee for human rights*

Option 3 is a low risk and medium impact policy. It does not present a risk for parliamentary sovereignty, as parliament would not be bound to follow the advice of a scrutiny committee. A scrutiny committee does not result in increased litigation because it does not provide any form of redress for individuals.

This option relies on additional resources. It is a significant risk that if funding were reduced, the scope and power of the committee will subsequently diminish.

### *Option 4 – Increased role for AHRC*

The key risk associated with this option relates to future resourcing. An increased role for the AHRC is unlikely to open significantly greater opportunities for litigation for individuals.

The power to consider (on its own motion) and report on the human rights implications of any existing or proposed Commonwealth legislation has the potential to reveal human rights violations in the legislation approved by parliament. To the extent that this could call into question the parliamentary process, this option may have implications for parliamentary sovereignty. However, this is not regarded as a substantial risk to parliamentary sovereignty.

### *Option 5 – Consolidated anti-discrimination laws*

The introduction of consolidated anti-discrimination legislation may pose a risk in terms of future resourcing and the potential for an increase in litigation. However, new legislation does not pose a risk to parliamentary sovereignty and is likely to be strongly supported by the community.

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<sup>35</sup> See for example Santow 2009, *National Human Rights Consultation Submission* Gilbert + Tobin Centre of Public Law.

<sup>36</sup> Law Council of Australia 2009, *A Charter: Protecting the rights of all Australians*, Law Council of Australia's Submission to the National Consultation on Human Rights May 2009.

*Option 6 – New NAP for human rights*

This is a low risk option. A new NAP is unlikely to pose any risk through increased litigation or threaten parliamentary sovereignty (though specific elements in a NAP may have these risks, having a NAP in and of itself does not increase these risks).

There are some risks to the effectiveness of this option through future resourcing needs — the new NAP will only lead to benefits where it is properly monitored and reviewed on a regular basis, and where stakeholders are encouraged to participate in this process. This requires government to ensure that there are sufficient resources to maintain the new NAP.

*Option 7 – Do nothing, maintain current arrangements*

The only risk criterion that is applicable to this option concerns community support for maintaining the status quo. In light of the resounding response to the Consultation, doing nothing represents a significant risk.

## Appendix A

# Details of the variations to a Human Rights Act

## A.1 Variables used to distinguish models of a Human Rights Act

A Human Rights Act can take a number of different forms and also take into account different human rights. For this reason, four models of a Human Rights Act were included under option 1.

These models differ on the basis of eight key variables, as set out in Box A.1.

Box A.1

### KEY VARIABLES FOR MODELS OF A HUMAN RIGHTS ACT

There are eight key variables which have been considered in developing the four models of a Human Rights Act (as sub-options under option 1):

1. *Which human rights?* — what type of human rights are included under the Act? These can include civil and political rights; economic, social and cultural rights; and new and emerging rights such as the right to a clean environment.
2. *A cause of action* — a direct cause of action provides for individuals to directly take a complaint to court on the basis of a Human Rights Act. An alternative model is for individuals to be able to raise human rights arguments based on a Human Rights Act only where there is a case that arises, for example, under other legislation.
3. *Remedies available* — remedies are orders made by the court to rectify a breach of an individual's human rights. Remedies can include payments or compensation that individuals may receive as a result of a breach of their human rights.
4. *Interpretive principle* — the interpretive principle determines the extent to which courts would interpret legislation consistently with a Human Rights Act. It may be that all legislation is interpreted consistently with human rights *as far as is possible* (a strong interpretive principle), or that the intention of the legislation is considered in this assessment (a weaker model), or that only delegated legislation is interpreted consistently with a Human Rights Act.
5. *Judiciary's role in striking down incompatible legislation and parliament's response* — some models of a Human Rights Act may allow the judiciary to strike down legislation (either primary or delegated) that is incompatible with the rights set out in a Human Rights Act others may allow the judiciary to declare or report the incompatibility to parliament but not to strike down legislation.
6. *Statement of compatibility for introduction of legislation* — a component of a Human Rights Act, can be a requirement that all legislation introduced into the parliament include a statement by the member introducing, of compatibility with the Human Rights Act (or the reason for any inconsistency)
7. *Parliamentary scrutiny* — this variable determines the extent to which a parliamentary committee scrutinises legislation against human rights standards prior to its introduction into Parliament.
8. *Who must comply?* — this variable determines which parties are required to comply with a Human Rights Act (for instance, only public sector agencies, private sector agencies performing a public function, wholly private entities or individuals).

## A.2 Details of four models of a Human Rights Act

Differences among the four models of a Human Rights Act across the eight variables are shown in Table A.1.

Table A.1

**DIFFERENCES AMONG FOUR MODELS OF A HUMAN RIGHTS ACT**

Model 1	Model 2	Model 3	Model 4
<b>1. Which human rights?</b> Contains a list of the civil and political rights; economic, social and cultural rights (such as health, education, social security) as well as limited third generation rights (such as the right to water and a clean environment) protected under the Act	Contains a list of the civil and political rights and the limited economic and social rights (such as the right to health and the right to education) protected under the Act	Contains a list of the civil and political rights protected under the Act	Contains a list of civil and political rights
<b>2. A cause of action</b> A direct cause of action	A direct cause of action	No direct cause of action	No direct cause of action
<b>3. Remedies available</b> Remedies available for breaches of human rights including monetary damages	Remedies available for breaches of human rights <i>not</i> including monetary damages	No remedies	No remedies
<b>4. Interpretive principle</b> An interpretive principle, providing that all legislation should be interpreted consistently with the human rights set out in the Act	An interpretive principle, providing that all legislation should be interpreted consistently with the human rights set out in the Act, as far as such an interpretation is possible, and subject to the purpose of the legislation in question	An interpretive principle, providing that all delegated legislation should be interpreted consistently with the human rights set out in the Act	An interpretive principle, providing that all legislation should be interpreted consistently with the human rights set out in the Act
<b>5. Judiciary's role in striking down incompatible legislation and parliament's response</b> A clause providing that, where legislation is irreconcilably inconsistent with a Right or Rights in the Act, the legislation is inoperative to the extent of the inconsistency	A clause providing that, where legislation is irreconcilably inconsistent with a Right or Rights in the Act, the legislation continues to operate regardless but parliament is informed of the inconsistency & is required to respond publicly (although parliament decides, at its absolute discretion, whether or not to amend the provision)	A clause providing that, where delegated legislation is irreconcilably inconsistent with a Right or Rights in the Act, the legislation is inoperative to the extent of the inconsistency	A clause providing that, where legislation is irreconcilably inconsistent with a Right or Rights in the Act, the court would not be permitted to invalidate the law in question (there would be no formal mechanism to notify parliament of the inconsistency, and no obligation on parliament or the government to publicly respond)
<b>6. Statement of compatibility for introduction of legislation</b> A clause requiring that a Member of Parliament introducing legislation into parliament must make a statement of compatibility (or justification for any incompatibility)	A clause requiring that a Member of Parliament introducing legislation into parliament must make a statement of compatibility (or justification for any incompatibility)	A clause requiring that a Member of Parliament introducing legislation into parliament must make a statement of compatibility (or justification for any incompatibility)	A clause requiring that a Member of Parliament introducing legislation into parliament must make a statement of compatibility (or justification for any incompatibility)
<b>7. Parliamentary scrutiny</b> Parliamentary scrutiny of such statements (for example, by specialist parliamentary committee)	Parliamentary scrutiny of such statements (for example, by specialist parliamentary committee)	Parliamentary scrutiny of such statements (for example, by specialist parliamentary committee)	Parliamentary scrutiny of such statements (for example, by specialist parliamentary committee)
<b>8. Who must comply?</b> A clause requiring all public authorities, and private entities carrying out public functions, to comply with the rights set out in the Act as well as corporations	A clause requiring all public authorities, and private entities carrying out public functions, to comply with the rights set out in the Act	A clause requiring all public authorities, and private entities carrying out public functions, to comply with the rights set out in the Act	No obligation on public authorities, private entities or any other entity to comply with the rights set out in the Act

*Appendix B***Assessment of options using the analytical framework****B.1 Assessment of options against benefits criteria**

Table B.1

**ASSESSMENT OF OPTIONS AGAINST BENEFITS ASSESSMENT CRITERIA**

Option	Benefits assessment criteria			
	Clarification of rights for individuals	Better human rights protections	Certainty of obligations	Improved capacity to seek redress
1 Human Rights Act*				
model 1	4	4	3	4
model 2	4	4	3	4
model 3	4	3	3	2
model 4	4	1	2	1
2 Education in relation to human rights				
national curriculum	4	1	1	1
public service education	3	1	1	1
public awareness raising measures	4	1	1	1
3 Parliamentary scrutiny committee for human rights	2	2	2	1
4 Increased role for AHRC	2	3	2	1
5 Consolidated anti-discrimination legislation	3	3	3	3
6 New NAP for human rights	2	2	1	1
7 Do nothing, maintain current arrangements	2	na	1	na

Key: 4 = high, 3 = above average, 2 = moderate, 1 = low

## B.2 Assessment of options against implementation timeliness and costs criteria

Table B.2

### ASSESSMENT OF OPTIONS AGAINST IMPLEMENTATION ASSESSMENT CRITERIA

Option	Implementation assessment criteria		
	Transition costs	On-going costs	Timeliness of potential changes
1 Human Rights Act*			
model 1	3	2	3
model 2	3	2	3
model 3	3	3	3
model 4	4	4	4
2 Education in relation to human rights			
national curriculum	2	3	2
public service education	2	2	2
public awareness raising measures	3	3	3
3 Parliamentary scrutiny committee for human rights	3	3	4
4 Increased role for AHRC	2	3	4
5 Consolidated anti-discrimination legislation	1	2	1
6 New NAP for human rights	2	1	4
7 Do nothing, maintain current arrangements	na	na	na

Key: 4 = low, 3 = moderate, 2 = above average, 1 = high

\* Option 1 includes drafting of legislation, clear passage through the senate and does not take into account education (i.e. option 2)

### B.3 Assessment of options against risks assessment criteria

Table B.3

#### ASSESSMENT OF OPTIONS AGAINST RISKS ASSESSMENT CRITERIA

Option	Risk assessment criteria			
	Increased litigation	Parliamentary sovereignty	Insufficient resourcing	Lack of community support or agreement
1 Human Rights Act*				
model 1	3	2	3	3
model 2	3	3	3	3
model 3	4	4	3	3
model 4	4	4	4	2
2 Education in relation to human rights				
national curriculum	4	4	2	4
public service education	4	4	2	4
public awareness raising measures	4	4	3	4
3 Parliamentary scrutiny committee for human rights	4	4	3	4
4 Increased role for AHRC	3	3	3	2
5 Consolidated anti-discrimination legislation	3	4	2	3
6 New NAP for human rights	4	4	3	4
7 Do nothing, maintain current arrangements	na	na	na	1

Key: 4 = low risk, 3 = moderate risk, 2 = above average risk, 1 = high risk

\* Option 1 includes drafting of legislation, clear passage through the senate and does not include education (i.e. option 2)





SG No. 40 of 2009

## IN THE MATTER OF CONSTITUTIONAL ISSUES CONCERNING A

### CHARTER OF RIGHTS

### OPINION

#### INTRODUCTION

1. We are asked to advise whether Ch III of the Australian Constitution would prevent the Commonwealth Parliament from enacting a statutory charter of rights along the lines of the “dialogue” model contained in the Victorian *Charter of Rights and Responsibilities Act 2006* (**Charter**) and the Australian Capital Territory *Human Rights Act 2004* (**HRA**).
2. A key feature of the Charter and the HRA is that they provide the Victorian and Australian Capital Territory Supreme Courts with the power to make a “declaration of inconsistent interpretation” (s 36 of the Charter) or a “declaration of incompatibility” (s 32 of the HRA). The policy intent is to create a “dialogue” between the three arms of

government by providing a mechanism for the court to alert the executive and the legislature that it has identified an incompatibility between a human right protected by the Charter or the HRA and another statute. The declaration imposes obligations on the Attorney-General in each jurisdiction to prepare a response and to ensure that the declaration and the response are presented to the Parliament. The declaration does not bind the parties to the proceeding, give rise to any legal right or cause of action, or affect the validity, operation or enforcement of the law in question.

3. There are differing opinions among academic and other commentators as to the constitutional validity of this mechanism, principally in relation to the issue of its compatibility with the exercise of federal jurisdiction under Chapter III of the Constitution. There is a question as to whether the making of a declaration would constitute an exercise of judicial power. If the making of a declaration would not constitute an exercise of judicial power, there are further questions as to whether the declaration-making powers contained in the Charter and the HRA would apply to proceedings in the exercise of federal jurisdiction and as to whether it would be possible to appeal to the High Court from a declaration made in the exercise of State or Territory jurisdiction.
4. While the Australian Government has not produced a draft national human rights charter for the purposes of the consultation, the group “New Matilda” has drafted a Bill that provides an example of the kind of “declaration of incompatibility” provision that might be included in any national human rights charter. This New Matilda Bill provides that a court exercising jurisdiction in any “cause or matter” may make a declaration of incompatibility if satisfied that a Commonwealth law is incompatible with a right or freedom set out in the Bill (cl 51). It provides that the court would be required to provide a copy of the declaration to the Attorney-General, and that the Attorney-General would be required to present a copy of the declaration to the House of

Representatives and provide a written response to the House within 6 months (cl 52). As with the Charter and the HRA, the declaration would not bind the parties to the cause or matter, or affect the validity, operation or enforcement of the law in question.

5. Because the power of the Commonwealth Parliament to confer functions on a court is limited by Ch III of the Constitution to the conferral of “judicial power” with respect to “matters” and to the conferral of functions incidental to the exercise of judicial power, the central issue that inevitably arises is whether or not the making of a declaration of incompatibility would be, or would be incidental to, an exercise of judicial power.
6. Thus, questions have been raised as to whether cl 51 of the New Matilda Bill conforms with the generally accepted indications of an exercise of judicial power, including that “legal standards” (rather than policy criteria) are used to make the declaration of incompatibility, that binding and enforceable obligations flow from it, and that it is made in the context of a “matter” involving an actual controversy as to some immediate right, duty or liability to be established by the determination of the court (rather than an abstract question not involving a right or duty or liability or one that is hypothetical in the sense of being unrelated to any actual controversy between the parties).
7. The arguments advanced to support the proposition that the making of a declaration does not amount to an exercise of judicial power include that the declaration mechanism set out in the New Matilda Bill would not, of itself, determine any right, duty or liability and that no binding and enforceable obligation would flow from it. There is also an argument that even if the declaration were considered to be a remedy, it could not be seen as determinative of, or as providing relief in relation to, a right, duty or liability alleged by a party.

8. The contrary view has also been expressed. It has been suggested that the making of a declaration involves the exercise of judicial power for various reasons. These include that the requisite “legal standards” by which compatibility with human rights can be judged are sufficiently set out in the Bill, that this assessment is made in the context of an existing controversy between parties, and that binding obligations are created by the requirement for the court to provide a copy of the declaration to the Attorney-General who is in turn required to present the court’s declaration to the House of Representatives and to provide a written response to the House.

## QUESTIONS

9. We are asked:
  - (1) Would provision for the making of a declaration of incompatibility under any national charter of human rights along the lines of cl 51 of the New Matilda Bill be valid?
  - (2) In particular, would provision for the making of a declaration of incompatibility under any national charter of human rights along the lines of cl 51 of the New Matilda Bill be regarded as ancillary or incidental to the exercise of a judicial power?
  - (3) What further provisions would be necessary or desirable in relation to the making of declarations in order to support validity?
  - (4) Are there any other related constitutional concerns that arise, and that we consider should be addressed?

**SHORT ANSWERS**

10. Our short answers are as follows:

- (1) Yes.
- (2) The making of a declaration of incompatibility would itself be an exercise of judicial power.
- (3) The following provisions would be desirable to support validity:
  - (a) the requirement that Commonwealth laws be interpreted so far as possible to be compatible with human rights should be qualified to require consistency with statutory purpose (see para 13 below);
  - (b) a declaration of incompatibility should bind the parties to the proceeding in which it is made and the Attorney-General should be joined as a party before it is made (see paras 20 and 21 below)
- (4) There would be related constitutional issues if any of the rights on which a court might be required to adjudicate were not capable of being judicially determined. These issues are likely to arise if the charter were to include economic and social rights in addition to more traditional civil and political rights.

## CONSIDERATION

### Context of declaration

11. Before turning to the constitutional validity of enacting the particular mechanism at issue, it is useful to consider the context in which a court would come to consider the making of a declaration of incompatibility under the terms of the New Matilda Bill. Two elements of the context are, in our view, critical.
12. The first is that a declaration of incompatibility could be made only in proceedings for some other relief or remedy: there would need to be an existing cause or matter. It is not envisaged that a party would be able to seek a declaration of incompatibility divorced from a specific situation involving an application of some other law to the determination of a dispute as to the rights, duties or liabilities of the parties before it. In our view, this will ensure that there is always a “matter” before the court in any proceedings where a declaration may be sought.
13. The second is that a declaration of incompatibility could be made only if a court were satisfied that a Commonwealth law is incompatible with a right or freedom set out in the Bill. This requirement is very closely linked to way in which Commonwealth laws applicable to the matter before the court are to be required to be interpreted. The New Matilda Bill provides in cl 49 that “[s]o far as it is possible to do so” all such laws “must be read and given effect in a way which is compatible with human rights”. It has been suggested that a provision like this may raise constitutional problems in that it invites courts to rewrite legislation in a way that is not compatible with the exercise of judicial power. Constitutional issues might well arise if courts in Australia were expected to redraft legislation in the way that courts in the United Kingdom have been willing to do in light of similar language in the *Human Rights Act 1998* (Cth): see generally *Ghaidan v*

*Hodin-Mendoza* [2004] 2 AC 557 and *Sheldrake v Director of Public Prosecutions, Attorney-General's Reference (No 4 of 2002)* [2005] 1 AC 264 discussed in Spigelman, *Statutory Interpretation and Human Rights* (2008) at pp 62-86. However, concerns in this regard could, in our view, be addressed by using language like that in the Victorian Charter which requires a court to read a statute consistently with human rights only in so far as that is consistent with the statute's purpose (s 32). We consider that such an interpretation provision would avoid the extremes of the United Kingdom approach and would be compatible with the exercise of judicial power as traditionally understood in Australia.

14. The consequence is that it would only be where a court could not interpret a Commonwealth law applicable to the matter before it in a way that is consistent with the relevant human right that the making of a declaration of incompatibility arises. In order to get to the stage of considering making such a declaration, a court would therefore need to have:
  - (a) identified the Commonwealth law as bearing upon the determination of the matter before it;
  - (b) ascertained what the relevant human right requires; and
  - (c) formed an opinion as to whether, and, if so, to what extent, the Commonwealth law is compatible with that requirement.
15. If the Commonwealth law were able to be interpreted compatibly with the relevant human right, the court would apply the law as so interpreted to determine the matter compatibly with the relevant human right. If the Commonwealth law were not able to be interpreted as consistent with the relevant human right, the court would still be

required to apply the law as so interpreted to determine the matter incompatibly with the relevant human right. In either event, the court would have formed an opinion as to the compatibility of the legislation with the human right as an integral step in making a decision that determines a dispute as to the rights, duties or liabilities of the parties before the court. It is just that, in the latter event, the court would be empowered to go on expressly to translate the opinion it had formed in reaching that decision into a formal declaration. The declaration would in this way flow out of an integral part of the court's determination of the matter.

16. In the Charter, the court is empowered to make a "declaration of inconsistent interpretation" rather than to make a declaration of incompatibility. We do not consider the different nomenclature to be constitutionally significant. The circumstance in which the declaration can be made is essentially the same. That circumstance in our opinion involves nothing antithetical to the exercise of judicial power. The declaration flows directly out of the resolution of a specific controversy.

### **Consequences of Declaration**

17. The more critical issue from a constitutional perspective is whether the limited consequences of making a declaration of incompatibility would mean that what is otherwise apparently judicial cannot be properly regarded as such.
18. Among the commentators, it is the lack of any consequences directly for the parties as a result of the making of a declaration that is a principal concern in terms of possible constitutional risk.
19. A feature of the New Matilda Bill, as well as the Charter and the HRA, is that the declaration of incompatibility does not bind the parties to the dispute. The only



consequences of such a declaration is the imposition of obligations on the Attorney-General.

20. We consider that the prospects of constitutional validity would be enhanced if the declaration were binding as between the parties. If this were the case, it would give the losing party a clearer basis to appeal against the declaration. It would also strengthen an argument that a party could enforce the obligations imposed on the Attorney-General by the making of a declaration, obligations that might otherwise be seen as essentially matters for parliamentary, rather than judicial, enforcement. Making a declaration binding on the parties could still be accompanied by a provision that makes clear that a declaration does not give rise to any civil remedy other than against the Attorney-General to compel compliance with the express obligations imposed on him or her. We understand that the concern to avoid any such remedy is the principal reason for inclusion of the non-binding provision.
21. We also think that the prospects of validity would be enhanced if there were a requirement for the Attorney-General to be joined as a party to a proceeding in order for a declaration to be made. This would give the Attorney-General an opportunity to put argument on the issue and would avoid a situation whereby a duty is imposed on a non-party.
22. Even so, we recognize that the underlying issue remains that any declaration does not change the rights or remedies of a party *vis à vis* the other party to the dispute. No reputation is protected and no positive result would necessarily ensue other than a “dialogue” between the court, the Attorney-General and Parliament.
23. We recognize that, absent any express provision for the making of a declaration with these consequences, a court would be unlikely to make one.

24. However, that is a long way from saying that the making of such a declaration would be constitutionally impossible. In *Ainsworth v Criminal Justice Commission* (1992) 175 CLR 564 at 582, the High Court noted that the discretionary power to grant a declaration was “confined by the considerations which mark out the boundaries of judicial power”. One of those considerations was identified by reference to *Gardner v Dairy Industry Authority* (NSW) (1977) 52 ALJR 180 at 188 as being that a declaration would not be made if the Court’s declaration “will produce no foreseeable consequences for the parties”. Yet such a statement cannot be taken too far. The actual decision in *Gardner* concerned proceedings for a bare declaration relating to past events in respect of which the plaintiffs claimed no existing rights. All that was suggested in support of the making of the declaration was “that the Executive might in some undefined way initiate administrative or legislative action which would improve the lot” of the plaintiffs. There are cases which illustrate that a foreseeable practical consequence may be sufficient and that a declaration need not produce some immediate legal consequence for the parties: eg *Aussie Airlines Pty Ltd v Australian Airlines Ltd* (1996) 68 FCR 406.
25. Here, as we have already explained, a declaration of incompatibility would in any event have an immediate legal consequence in that it would impose an obligation on the Attorney-General. We have already suggested that the obligation should expressly be enforceable at the instance of a party.
26. More fundamentally, a declaration of incompatibility would not give an answer to a hypothetical or abstract question but would arise out of a particular dispute between parties about existing rights, duties or liabilities and would give formal expression to a finding that was integral to the judicial determination of that dispute. The reasoning in each of *O’Toole v Charles David Pty Ltd* (1991) 171 CLR 232 (characterising as an exercise of judicial power the giving of answers to questions reserved by a trial judge), in *Mellifont v Attorney-General (Qld)* (1991) 173 CLR 289 (upholding as an exercise of judicial power

the determination of a question of law referred to a Court of Criminal Appeal by an Attorney-General following the acquittal of an accused at trial) and in *Attorney-General v Alinta Ltd* (2008) 233 CLR 542 (allowing an appeal from a decision notwithstanding that the decision on appeal had no effect on any immediate right, duty or liability of any of the parties) strongly supports the view that those characteristics are sufficient to allow the making of a declaration of incompatibility to be characterised as an exercise of judicial power and that the fact that the rights of neither party would be directly altered or affected by the declaration is of no consequence.

27. The decision in *Mellifont* is of particular significance. The reasoning of the majority involved a rejection of a specific argument (recorded at 293) that the determination of a question of law referred to the Court of Criminal Appeal by the Attorney-General was “not in substance a judicial decision because it does not have a binding effect on the parties” (the premise of the argument being that an exercise of judicial power “must be directed to the determination as between specific parties of rights or obligations which must be affected by the determination”). It also involved a rejection of an alternative argument that the determination (even if it involved an exercise of judicial power) was invalid because it was “not in a matter” given that the “matter had terminated”. What was said by the plurality in *Mellifont* at 305 to be sufficient for the determination of a question of law referred by the Attorney-General to constitute an exercise of judicial power was that the determination “was made with respect to a ‘matter’ which was the subject-matter of the legal proceedings” (even though the matter had already terminated in acquittal) and that the determination “was not divorced from the ordinary administration of the law”.
28. Likewise, a declaration of incompatibility would be made with respect to a matter and would be closely allied to the “ordinary administration of the law” involved in the determination of that matter. It would flow directly out of the court’s determination of

the matter and would be a formal statement of a finding reached by the court in making that determination.

29. In this regard, we do not think the proper way to approach the issue is to characterize the making of a declaration as incidental or ancillary to the exercise of judicial power. Rather, for the reasons given, we consider it to be itself an exercise of judicial power and for that reason likely to be held constitutional.

### **Other issues**

30. The one other consideration that may have a bearing on the validity of what is proposed is whether particular human rights that a court could be called to adjudicate upon are susceptible to the application of “legal standards”. This issue is likely to arise if the charter were to include economic or social rights (such as a right to adequate housing) in addition to more traditional civil rights. In the absence of knowing what rights may be included, we do no more than mention the issue. It may mean that the declaration of incompatibility could only be available in relation to certain of the rights included in a charter. It may be, however, that the need for an existing dispute, and hence a matter, provides sufficient protection for the courts from being required to adjudicate in relation to rights not traditionally regarded as judicially manageable. We can advise further on this issue if necessary once it is clearer what rights might be included in any charter.
31. We mention, finally, that we have not in this Opinion canvassed constitutional issues relating to the enactment by the Commonwealth Parliament of a statutory charter of rights other than those pertaining specifically to Ch III of the Constitution. In particular, we have not addressed the interrelated issues of the source of power to enact the statutory charter and the scope of its coverage. Nor have we addressed issues of inconsistency with State and Territory laws.

Dated: 15 June, 2009

**STEPHEN GAGELER SC**

**HENRY BURMESTER QC**

IN THE MATTER OF  
CONSTITUTIONAL ISSUES  
CONCERNING A CHARTER OF  
RIGHTS

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OPINION

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Attorney-General's Department  
Social Inclusion Division  
Human Rights Branch

Attn: Mr John Boersig  
Assistant Secretary

SG No. 40 of 2009



SG No. 68 of 2009

**IN THE MATTER OF CONSTITUTIONAL ISSUES CONCERNING A**

**CHARTER OF RIGHTS**

**SUPPLEMENTARY OPINION**

**INTRODUCTION**

32. Following from our Opinion of 15 June 2009 (SG No. 40 of 2009) (**Opinion**), we are asked to provide further advice concerning the constitutional capacity of the Commonwealth Parliament to enact a statutory charter of rights specifically along the lines of the *Charter of Human Rights and Responsibilities Act 2006* (Vic) (**Victorian Charter**) so as to implement part of the International Covenant on Civil and Political Rights (**ICCPR**) and possibly also to implement part of the International Covenant on Economic, Social and Cultural Rights (**ICESCR**).

33. For this purpose, we are asked to assume that a statutory charter of rights enacted by the Commonwealth Parliament would:

- (5) define “human rights” along the lines of the rights set out in Pt 2 of the Victorian Charter, which are in turn based on those set out in Pt II of the ICCPR;
- (6) require a Member of the House of Representatives who proposes to introduce a Bill into the House of Representatives, or a Senator who proposes to introduce a Bill into the Senate, to cause a statement of compatibility to be prepared in respect of the Bill, stating whether the Bill is compatible with human rights, along the lines of s 28 of the Victorian Charter;
- (7) require a Committee of the House of Representatives or of the Senate or a Joint Committee to consider any Bill introduced into the Commonwealth Parliament and report on whether the Bill is incompatible with human rights, along the lines of s 30 of the Victorian Charter;
- (8) provide that “it is unlawful for a public authority to act in a way that is incompatible with a human right or, in making a decision, to fail to give proper consideration to a relevant human right”, along the lines of s 38(1) of the Victorian Charter;
- (9) define “public authority” for this purpose to encompass Commonwealth officers and entities whose functions are or include functions of a public nature when they are exercising those functions on behalf of the Commonwealth, along the lines of s 4 of the Victorian Charter;



- (10) provide that “so far as it is possible to do so consistently with their purpose, all statutory provisions must be interpreted in a way that is compatible with human rights”, along the lines of s 32(1) of the Victorian Charter;
  - (11) define “statutory provisions” for this purpose to encompass provisions of Commonwealth laws and subordinate legislation;
  - (12) provide that a court may make a declaration that a statutory provision cannot be interpreted consistently with a human right, along the lines of s 36(2) of the Victorian Charter; and
  - (13) require the Minister responsible for the statutory provision the subject of the declaration to prepare a written response to the declaration and cause it to be laid before each House of Parliament, along the lines of s 37 of the Victorian Charter.
34. We are also asked to make the additional assumption that, either in the statutory charter of rights or in another enactment, the Commonwealth Parliament would enact the following six absolute and non-derogable rights with the intention that any State legislation inconsistent with those rights would be rendered inoperative by virtue of s 109 of the Constitution and that it would be unlawful for anyone, including Commonwealth, State and Territory governments and agencies, to infringe those rights:
- (1) a right to life (along the lines of s 9 of the Victorian Charter and Art 6 of the ICCPR, but going further in respect of the death penalty in reliance on the Second Optional Protocol to the ICCPR) framed as follows:
    - “1. Every person has the right to life and has the right not to be arbitrarily deprived of life.

- i. The death penalty may not be imposed for any offence.”
- (2) a right to protection from torture and cruel, inhuman or degrading treatment (along the lines of s 10 of the Victorian Charter and Art 7 of the ICCPR) framed as follows:

“A person must not be:

- a) subjected to torture; or
  - b) treated or punished in a cruel, inhuman or degrading way; or
  - c) subjected to medical or scientific experimentation or treatment without his or her full, free and informed consent.”
- (3) a right to freedom from forced work (along the lines of s 11 of the Victorian Charter and Art 8 of the ICCPR) framed as follows:

“A person must not be held in slavery or servitude.”

- (4) a right to freedom from retrospective criminal laws (along the lines of s 27 of the Victorian Charter and Art 15 of the ICCPR) framed as follows:

- “1. A person must not be found guilty of a criminal offence because of conduct that was not a criminal offence when it was engaged in.
- 2. A penalty must not be imposed on any person for a criminal offence that is greater than the penalty that applied to the offence when it was committed.
- 3. If a penalty for an offence is reduced after a person committed the offence but before the person is sentenced for that offence, that person is eligible for the reduced penalty.
- 4. Nothing in this section affects the trial or punishment of any person for any act or omission which was a criminal offence under international law at the time it was done or omitted to be done.”

- (5) a right to freedom from imprisonment for inability to fulfil a contractual obligation (along the lines of Art 11 of the ICCPR) framed as follows:

“A person must not be imprisoned on the ground of inability to fulfil a contractual obligation.”

- (6) a right to freedom from coercion or restraint in relation to religion and belief (along the lines of s 14 Victorian Charter and Art 18 of the ICCPR) framed as follows:

“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.”

## QUESTIONS

35. We are asked:

- a. Would the enactment of the statutory charter of rights be supported by the external affairs power?
- b. Would it make a difference if the statutory charter of rights implemented only some of the obligations in the ICCPR or the ICESCR?
- c. If the “human rights” set out in the statutory Victorian Charter of rights were expressed in the form “*every person* has the right to X”, could that inadvertently give rise to a claim against State public authorities or affect the interpretation of State legislation?
- d. What would be the effect of s 109 of the Constitution on State legislation inconsistent with the rights set out in the statutory Victorian Charter of rights? What would be the effect of a provision stating that the statutory charter of

rights did not intend to “cover the field” of human rights and was intended to operate concurrently with State legislation?

- e. What sort of State agencies could the definition of “public authorities”, as set out in assumption (5), encompass? For example, could it encompass State police engaged in joint operations with the AFP, or State prisons housing prisoners convicted of Commonwealth offences?
- f. Could the statutory charter of rights validly bind the Crown in right of the States with respect to the six absolute and non-derogable rights?
- g. If “human rights” were defined to include both those rights in Pt 2 of the Victorian Charter and certain rights from the ICESCR – in particular the right to the enjoyment of just and favourable conditions of work (Art 7), the right to adequate housing (Art 11), the right to health (Art 12), the right to education (Art 13) – would it constitute a valid exercise of judicial power for a court to:
  - d) interpret a provision of Commonwealth legislation consistently with those rights or make a declaration of incompatibility?
  - e) determine that a public authority had acted incompatibly with those rights?
- h. For the purposes of Question (7), does it matter whether (a) or (b) is done in the course of proceedings for some other relief or remedy (ie there is some other existing cause or matter)?

- i. Could the statutory charter of rights validly impose on Members or Senators an obligation to prepare a “statement of compatibility” for each Bill introduced into Parliament as set out in assumption (2)?
- j. Could the statutory charter of rights validly require a Parliamentary Committee to scrutinise a Bill for compatibility with human rights as set out in assumption (3)?
- k. What would be the effect of non-compliance with the requirements set out in assumptions (2) or (3)? Specifically, if the statutory charter of rights did not provide that non-compliance had no effect on the validity of a Commonwealth law along the lines of s 29 of the Victorian Charter, would there be any effect on the validity of the legislation?
- l. Could the statutory charter of rights require a Minister to respond to a declaration of incompatibility issued by a court as set out in assumption (9)? Could such an obligation be imposed if no formal “declaration of incompatibility” was issued by the court, but the court merely held, in the course of its reasoning, that it could not interpret the legislation consistently with human rights and some other mechanism was used to draw the holding to the Minister’s attention?
- m. If the obligations set out in assumption (2) or assumption (9) were imposed on the Attorney-General or relevant Minister, would an action lie under s 75(v) of the Constitution to compel performance of that obligation? Who would have standing to bring such an action?

## SHORT ANSWERS

36. Our short answers are as follows:

- a. Yes, in so far as the statutory charter of rights would - in accordance with assumption (1) - enact rights set out in the ICCPR. Reliance on the external affairs power to enact rights set out in the ICESCR would be more problematic.
- b. No.
- c. The statutory charter of rights could be drafted to avoid this consequence. An express provision indicating what the statutory charter of rights does not do, as well as a provision clearly stating what it does do, may be desirable for this purpose.
- d. Section 109 of the Constitution would make State laws inoperative to the extent of any inconsistency. A provision stating that the statutory charter of rights was not intended to cover the field would reduce the circumstances in which inconsistency would arise: only State laws directly inconsistent would be inoperative.
- e. The extent, if at all, to which State agencies would fall within the definition of “public authorities” is essentially a drafting issue. There is no constitutional reason why the statutory charter of rights could not be made to apply both to State police engaged in joint operations with the AFP and to State prisons housing prisoners convicted of Commonwealth offences. It is a policy question whether the Commonwealth Parliament wishes to impose its law on State prisons in relation to only some prisoners, thus introducing a form of discrimination, when State prisons remain for all intents under State control.

- f. Yes.
- g. Probably no, in relation to the general rights in Arts 7, 11, 12 and 13 of the ICESCR. Yes, in relation to the rights in Pt 2 of the Victorian Charter.
- h. For the reasons set out in our Opinion, it would matter for the making of a declaration of incompatibility in relation to the rights in Pt 2 of the Victorian Charter that it be done in the course of proceedings for some other relief or remedy.
- i. Yes, although this may be something that is best left to the standing orders of each House, or a direction to Ministers from Cabinet.
- j. Yes.
- k. In the absence of an express provision like s 29 of the Victorian Charter, the effect of non compliance with statutorily prescribed parliamentary procedures would probably not be an issue that a court would inquire into, given it relates to the internal workings of the Parliament. However, there is room for argument, and a provision like s 29 of the Victorian Charter would be desirable.
- l. Yes, in both situations.
- m. In respect of the obligation set out in assumption (2), no action would lie. In respect of the obligation set out in assumption (9) an action would lie. As indicated in our Opinion, it would be desirable for judicial power reasons expressly to confer a right on the parties to a proceeding in which a declaration

of incompatibility was made to seek enforcement. Any other person would be likely to have standing if the statutory charter of rights expressly so provided.

## CONSIDERATION

### Sources of power: Questions (1) and (2)

37. We consider that the external affairs power in s 51(xxix) of the Constitution would support the enactment by the Commonwealth Parliament of a statutory charter of rights implementing rights set out in the ICCPR along the lines of the Victorian Charter. The statutory charter of rights could be drafted in a way that would enable a court to conclude that it was “reasonably capable of being considered appropriate and adapted to [implementing the ICCPR]”: *Victoria v Commonwealth (Industrial Relations Act Case)* (1996) 187 CLR 416 at 487.

38. We do not think it matters for this purpose whether or not the statutory charter of rights might:

- (1) enact only some of the rights in the ICCPR (assumption (1));
- (2) have application only in respect of Commonwealth public authorities (assumptions (3) and (4)) and Commonwealth legislation (assumptions (5) and (6)); or
- (3) have wider and general application only in respect of the six absolute and non-derogable rights (additional assumption (1) to (6)).



39. The *Industrial Relations Case* makes clear at 489 that it is not essential to validity under the external affairs power that a law implement all the obligations under an international convention. Partial implementation of an international convention is permissible so long as that partial implementation is itself consistent with the convention and the law by which that partial implementation is achieved remains reasonably capable of being considered appropriate and adapted to its implementation. Although questions of degree would be involved, we consider that the statutory charter of rights would remain consistent with the ICCPR and could be drafted in a way that would be able to remain reasonably capable of being considered appropriate and adapted to the implementation of the ICCPR notwithstanding that its implementation of the ICCPR might only be incomplete in any one or more of the three ways we have mentioned. We note, in particular concerning the wider and general application in respect of the six absolute and non-derogable rights, that Art 50 of the ICCPR extends its provisions “to all parts of federal States without any limitations or exceptions” and that the particular rights identified in additional assumptions (1) to (6) all fall within those from which Art 4 of the ICCPR says there is to be “no derogation” even in a time of national emergency.
40. The position with the ICESCR is more problematic. Many of the rights set out in that convention are expressed in very general terms: in particular, the right to the enjoyment of just and favourable conditions of work (Art 7), the right to adequate housing (Art 11), the right to health (Art 12) and the right to education (Art 13). We think that the prescription in the ICESCR of rights of that nature – which might be sought to be achieved through any one or more of a range of measures – would be likely to be regarded by the High Court as lacking “sufficient specificity” to support the making of a law under the external affairs power: *Industrial Relations Case* at 486. In any event, any law enacted in reliance on the external affairs power must be compatible with Ch III of the Constitution. For reasons we give in relation to Questions (7) and (8), we consider

that any general provision for enforcement of rights of that nature would not be compatible with Ch III of the Constitution.

41. We mention that we do not think it necessary to rely on the external affairs power to the extent that the statutory charter of rights would do no more than bind Commonwealth public authorities and affect the interpretation of Commonwealth legislation. The express incidental power in s 51(xxxix) of the Constitution and the incidental power that accompanies each of the substantive grants of power in ss 51 and 52 of the Constitution undoubtedly would extend to the prescription of rules governing whether, and if so to what extent, Commonwealth legislation is to be interpreted consistently with human rights. The same powers also undoubtedly extend to “the regulation and supervision of the [Commonwealth’s] own activities” including by compelling observance of human rights: *State Chamber of Commerce and Industry v Commonwealth* (1987) 163 CLR 329 at 357; *Carter v Egg and Egg Pulp Marketing Board (Vic)* (1942) 66 CLR 557 at 571. Quite independently of the external affairs power, the combination of those other legislative powers would therefore be sufficient to support the application of the statutory charter of rights to Commonwealth legislation and executive action.

#### **Effect on the States: Questions (3) to (6)**

42. Subject to the implied constitutional limitation protecting the capacity of States to function as governments, a law made by the Commonwealth Parliament in reliance on the external affairs power is capable of being made so as to bind the executive governments of the States and their agencies and, by force of s 109 of the Constitution, will prevail over any State law to the extent of any inconsistency.
43. We have already indicated that we consider it possible under the external affairs power to give general application to the six absolute and non-derogable rights identified in

additional assumptions (1) to (6). We consider that binding the executive governments of the States and their agencies in relation to those rights would be valid under the external affairs power and would involve no infringement of the implied constitutional limitation protecting the capacity of States to function as governments. There would be no “singling out” of the States for some “differential treatment” or “special burden” (cf *Clarke v Commissioner of Taxation* [2009] HCA 33 at [34], [65]-[66]) and such burden as would be imposed on the exercise of State executive power or powers conferred by State legislation would be wholly incidental to the nature of the rights protected (cf *Western Australia v Commonwealth* (1995) 183 CLR 373 at 476-82).

44. The extent, if at all, to which a statutory charter of rights designed to apply in respect of Commonwealth public authorities (assumptions (3) and (4)) and Commonwealth legislation (assumptions (5) and (6)) might incidentally be made binding on State agencies is essentially a matter for the Commonwealth Parliament. In particular, the extent, if at all, to which State agencies might fall within the definition of “public authorities” is essentially a drafting issue. There is no constitutional reason why the statutory charter of rights could not be made to apply, for example, to State police when exercising powers under Commonwealth laws and to State prison authorities in relation to Commonwealth prisoners.
45. Similarly, the extent to which a statutory charter of rights designed to apply in respect of Commonwealth public authorities and Commonwealth legislation might impact on State legislation through the operation of s 109 of the Constitution is essentially a matter for the Commonwealth Parliament in that it would turn in large measure on the terms in which the Commonwealth Parliament chooses to express the rights it enacts. The expression of a right in terms that “every person has the right to X” could easily be subjected to an express qualification so as make clear that the right has only the limited operation for which the statutory charter of rights is designed. As we have suggested in

our short answer to Question (3), an express provision indicating what the statutory charter of rights does not do, as well as a provision clearly stating what it does do, may be desirable for this purpose.

46. Express qualification of the rights protected by the statutory charter of rights could easily be combined with a provision making clear that the statutory charter of rights does not cover the field and is intended to operate concurrently with State law. The result would be effectively to limit situations of inconsistency under s 109 of the Constitution to cases of direct inconsistency: where the State law in its legal or practical operation would otherwise operate to alter, detract from or impair the limited operation given to the right by the statutory charter of rights: cf *APLA Ltd v Legal Services Commissioner* (NSW) (2005) 224 CLR 322 at [205]-[208]. In a case of direct inconsistency, the State law would be invalid to the extent, but only to the extent, of the direct inconsistency.

#### **Justiciability of rights: Questions (7) and (8)**

47. We do not consider there to be any doubt about the ability of a court in the exercise of judicial power to interpret and enforce the rights set out in Pt 2 of the Victorian Charter. For the reasons, and subject to the qualifications, set out in our Opinion, we consider that a court would validly exercise judicial power in making declarations of incompatibility in respect of those rights.
48. In contrast, we do consider there to be considerable difficulty concerning the ability of a court in the exercise of judicial power to interpret and enforce the rights set out in Arts 7, 11, 12 and 13 of the ICESCR. The problem stems from the requirement for the exercise of judicial power under Ch III of the Constitution always to involve the application of criteria or standards that are sufficiently definite.

49. An examination of the content of those rights as set out in the ICESCR demonstrates a general absence of what would traditionally be regarded as judicially manageable standards. Given the issues of resource allocation that are necessarily involved, how is a court to assess, for instance, whether or not a person is being denied “just and favorable conditions of work” (Art 7), “an adequate standard of living” (Art 11) or “the enjoyment of the highest attainable standard of physical and mental health” (Art 12)?
50. We note, however, that the elaboration in Arts 7 and 13 of the “right[s] of everyone” to “the enjoyment of just and favourable conditions of work” and “education” includes some more specific rights that may represent judicially manageable standards: eg the obligation in Art 7(a)(i) for equal pay for equal work; in Art 7(d) for remuneration for public holidays; and in Art 13(2)(a) for free and compulsory primary education.
51. Allowing for the possibility of these limited exceptions we therefore consider that any general provision for enforcement of the rights set out in Arts 7, 11, 12 and 13 of the ICESCR would be unlikely to be held to involve the exercise of judicial power within the meaning of Ch III of the Constitution. The position would be the same whether or not an issue concerning those rights arose in the course of proceedings for some other relief or remedy.

#### **Parliamentary processes: Questions (9) to (13)**

52. In our opinion, the power of the Commonwealth Parliament to enact legislation having the characteristics in assumptions (2), (3) and (9) is to be found in that aspect of the express incidental power in s 51(xxxix) of the Constitution which allows the Parliament to make laws with respect to “matters incidental to the execution of any power vested by this Constitution in the Parliament”. Alternatively, the power could be found in s 51(xxxvi) of the Constitution insofar as it allows for making of laws with respect to that

part of the subject matter of s 49 of the Constitution that encompasses “powers ... of the Senate and of the House of Representatives, and of the members and the committees of Each House”. Although s 50 of the Constitution allows each House of the Parliament to make rules and orders with respect to the mode in which its powers are to be exercised and as to the order and conduct of its business, the High Court in *The Queen v Richards; Ex parte Fitzpatrick and Browne* (1955) 92 CLR 157 at 169 unanimously rejected an argument that s 50 thereby subtracts part of the subject matter of s 49 and deals with it separately: rather s 50 was described as conferring a “mere power” and as being “ancillary” to s 49.

53. Even in the absence of an express provision along the lines of s 29 of the Victorian Charter, a court would not interpret the statutory charter of rights as making compliance with the procedures set out in assumptions (2) and (3) a precondition to the validity of a Commonwealth law. A statutory requirement imposed on the parliamentary process of legislating would not in the absence of very strong language be regarded as a matter for judicial enforcement but rather as “a matter ... outside the ordinary scope of inquiry by the courts”: *Clayton v Heffron* (1960) 105 CLR 214 at 246-7. However, a provision along the lines of s 29 of the Victorian Charter would be desirable to put the matter beyond all question.
54. We indicated in our Opinion that it would be possible to impose an obligation on a Minister to respond to a declaration of incompatibility and to make that enforceable by a party to the legal action. In addition, we see no reason why a similar obligation could not be imposed on a Minister where a court merely held, in the course of its reasoning, that it could not interpret the legislation consistently with human rights and where some other mechanism was used to draw that holding to the Minister’s attention. In either case, an action would lie under s 75(v) of the Constitution to enforce the obligation.

Unless the Commonwealth Parliament conferred standing on a broader range of persons, only parties to the court case would be likely to have standing.

Dated: 7 September, 2009

**STEPHEN GAGELER SC**

**HENRY BURMESTER QC**

IN THE MATTER OF  
CONSTITUTIONAL ISSUES  
CONCERNING A CHARTER OF  
RIGHTS

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SUPPLEMENTARY OPINION

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Attorney-General's Department  
Social Inclusion Division  
Human Rights Branch

Attn: Mr John Boersig  
Assistant Secretary

SG No. 68 of 2009



## Appendix F The public hearings

The Committee held three days of public hearings, from 1 to 3 July 2009, in the Great Hall of Parliament House in Canberra. The following people spoke:

Abdo OAM, Maha Krayem  
Aly, Waleed  
Anderson, Alan  
Baker MLA, Lisa  
Banks, Robin  
Bingham of Cornhill KG, PC, FBA, Lord Thomas  
Brandis SC, Senator the Hon. George  
Branson QC, the Hon. Catherine  
Burgess, Mark  
Carr, the Hon. Robert  
Charlesworth AM, Professor Hilary  
Clerahan, Liza  
Cowdery AM, QC, Nicholas  
Craven, Professor Greg  
Croome AM, Rodney  
Debus MP, the Hon. Robert  
Evans, Harry  
Falzon, Dr John  
Forsyth, Right Reverend Robert  
Francis, Neil  
Galligan, Professor Brian  
Gerber, Paula  
Gordon AM, Dr Sue  
Hatzistergos MLC, the Hon. John  
Havnen, Olga  
Heerey QC, the Hon. Peter  
Hodges, Auwa Benny  
Horrigan, Professor Bryan  
Hunt, Murray  
Innes AM, Graeme  
Irlam, Corey  
Irving, Professor Helen  
Joseph, Rita  
Kayess, Rosemary

Langdon, Elizabeth  
Leeser, Julian  
Lynch, Phil  
Mallinson, Claire  
Matthews, Linda  
McMahon, Felicity  
McMillan, Professor John  
Merkel QC, the Hon. Ronald  
Mitchell, Bill  
Najib, Mustafa  
Naylor, Ines  
O'Connell APM, Michael  
Overall, Tiffany  
Overland, Simon  
Owen, Emma  
Patterson, Michelle  
Phillips, Jacqueline  
Podger, Professor Andrew  
Rees AM, Emeritus Professor Stuart  
Richardson-Dunai, Stella  
Riebl, Cecilia  
Roach, Vickie  
Robertson QC, Professor Geoffrey  
Ryan AO, the Hon. Susan  
Santow, Edward  
Sheikh, Simon  
Stellato, Chiara Ariza  
Stone, Professor Adrienne  
Straw MP, the Rt Hon. Jack  
Szoke, Dr Helen  
Tate AO, Reverend Father the Hon. Michael  
Tee MP, Brian  
Varghese, James  
Wallace AM, Brigadier (Retd) Jim  
Watchirs, Dr Helen  
Webster AO, Emeritus Professor Ian  
Williams, Professor George  
Wood, Janet

## Appendix G Community roundtables

The Committee conducted 66 community roundtables in 52 locations around Australia between February and June 2009. In capital cities and other larger centres, two or three sessions were scheduled. Following are the locations of the roundtables:

### Australian Capital Territory

Canberra

### New South Wales

Bourke

Broken Hill

Cronulla

Dubbo

Newcastle

Penrith

Queanbeyan

Sydney

Taree

Tweed Heads

Wagga Wagga

Wollongong

### Victoria

Ballarat

Bendigo

Dandenong

Geelong

Melbourne

Mildura

Wodonga

### Queensland

Brisbane

Cairns

Charleville

Ipswich

Mount Isa

Palm Island

Rockhampton

Thursday Island

Townsville

Weipa

Yarrabah

### South Australia

Adelaide

Coober Pedy

Mintabie

Mount Gambier

Whyalla

### Tasmania

Burnie

Hobart

Launceston

### Western Australia

Broome

Busselton

Geraldton

Kalgoorlie

Paraburdoo

Perth

### Northern Territory

Alice Springs

Darwin

Katherine

Nhulunbuy (Gove)

Tennant Creek

Wadeye

Yirrkala

The Chair also met with groups in Lismore, Mornington Peninsula, Christmas Island and Santa Teresa.



## Appendix H Statistics

Description	Total
Submissions	
Total submissions	35 014
Submitted electronically	26 650
Submitted via post	8 364
Campaign submissions	27 112
GetUp!	14 604
Amnesty International Australia	10 488
Other campaigns	2 020
Individuals and other organisations	7 902
Human Rights Act	
For	27 888
Against	4 203
Reform options (support for)	
Increased parliamentary scrutiny	202
Increased human rights education/culture	1 197
Strengthening of Australian Human Rights Commission	318
Strengthening other oversight bodies/mechanisms	97
Whole of government approach/plan for compliance	58
Human rights audit of legislation, policies and practices	133
Promoting human rights in the public sector	116
Human rights in administrative decision making	72
Human rights compliance in the private sector	36
Enhanced role of NGOs	15
Access to justice	1 083
Strengthening or reforming anti-discrimination legislation	71
Targeted human rights legislation	344
Human rights impact statements	61
Indigenous measures	111
Consultations	
Community roundtables	66
Locations of community roundtables	52
Individuals registered to attend community roundtables	5 554
Public hearings	
Individuals registered to attend	756
Speakers	60

Description	Total
Research	
Phone survey	
Participants	1 200
Focus group research	
Participants	125
Devolved consultation	
Participants	40
NGOs	9
Online participation	
National Human Rights Consultation online forum	
Posts	8 932
Visits	12 622
Australian Youth Forum	
Posts	45
Votes	600
National Human Rights Consultation website	
Hits	394 522
Average hits per day	2 174
Visits	60 549
Average visits per day	334
Hotline	
Calls received	2 198