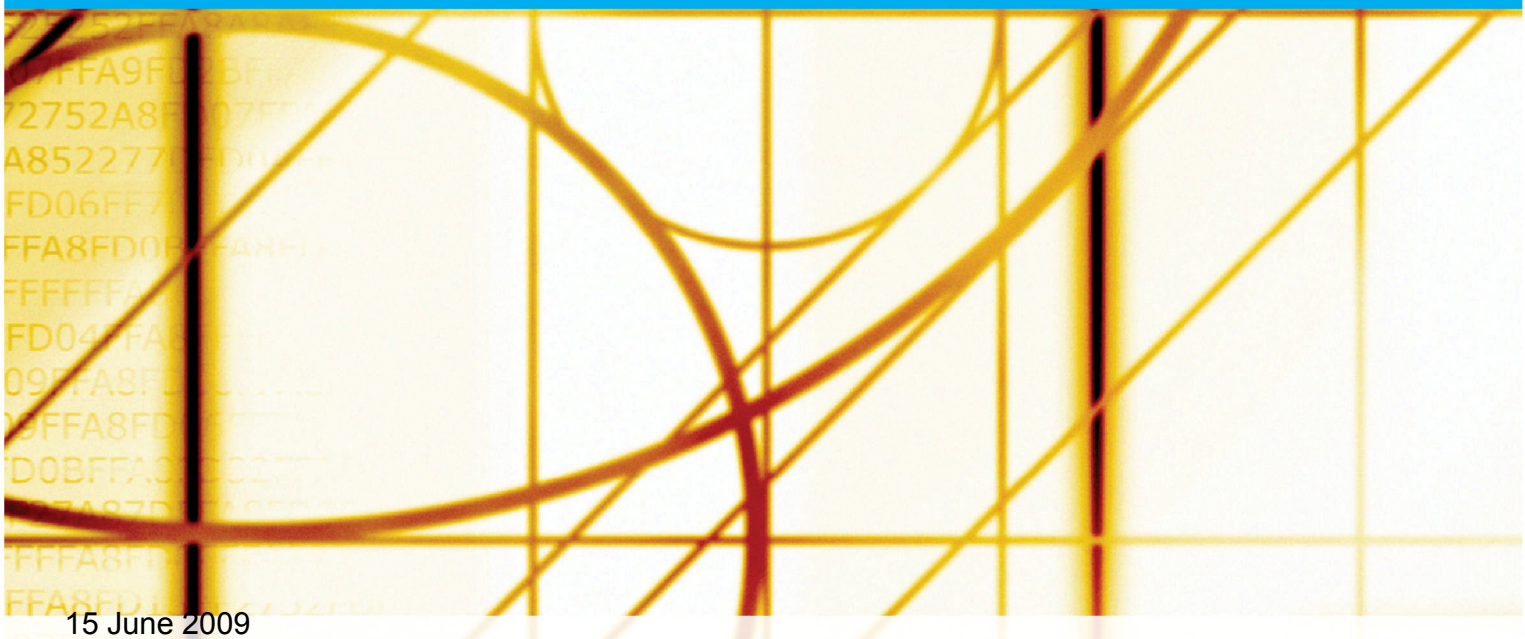
MALLESONS STEPHEN JAQUES

Submission to the National Human Rights Consultation

Mallesons Stephen Jaques - Human Rights Law Group



15 June 2009

The content of this submission represents the views and opinions of the Mallesons Stephen Jaques Human Rights Law Group, and does not represent the views of Mallesons Stephen Jaques or the views of the firm's clients.

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Executive Summary

In answer to the questions raised in the Committee's terms of reference, the Mallesons Stephen Jaques Human Rights Law Group makes the following recommendations:

- Australia should introduce a comprehensive statutory framework for human rights protection, in order to address the lack of express legislative protection for the human rights contained in the human rights treaties which Australia has ratified or to which it has acceded.

- In light of the limitation expressed in the Committee's terms of reference, express legislative protection of human rights would best take the form of an ordinary Act of Parliament setting out a framework for human rights protection: **a Human Rights Act**.

- Given that a legislative dialogue model has been successfully adopted in Victoria and the ACT, we submit that a similar approach should be followed at a Federal level. Such a Human Rights Act should set out the rights that are to be protected and the mechanisms used to aid human rights protection (for example, causes of action, remedies, statements of compatibility, declarations of incompatibility by the courts and periodic reviews of the legislation).

- In addition to implementing legislative rights protection, the Committee should consider enhancing the roles of educational institutions and the AHRC and strengthening or expanding other regulatory instruments.

- All of the civil and political rights recognised in the ICCPR should be protected under a Human Rights Act (save for those which are irrelevant or require modification in the domestic context).

- All of the economic, social and cultural rights recognised in the ICESCR should be protected under a Human Rights Act, subject to the principle of progressive realisation and save for those which are irrelevant or require modification in the domestic context.

- Other rights, such as indigenous rights protected under the DRIP, should also be considered for inclusion under a Human Rights Act (save for those which are irrelevant or require modification in the domestic context).

- The provision specific limitation mechanism provided for in the ICCPR should be adopted in a Human Rights Act.

- Should a global limitation clause be adopted, however, a Human Rights Act should include the following safeguards:

  (a) certain human rights should be expressed as being absolute and beyond the scope of limitation in any circumstances;

  (b) certain human rights should be subject to specific internal qualification; and

  (c) certain mandatory considerations should attach to a limitation mechanism that must be taken into account when determining the legality of a particular instance of limitation.

- The Human Rights Act should only permit derogations to the extent strictly required by the exigencies of the situation.

- The Human Rights Act should limit the measures which may be adopted in times of emergency to those which satisfy the international law standards of necessity, proportionality and non-discrimination.

- A Human Rights Act should protect the rights of all natural persons. Human rights attach to all human beings, so a Human Rights Act should protect all people in Australia irrespective of whether they are citizens and regardless of other attributes such as race or religion. However, rights should not be conferred on corporations or other legal persons.

- Government agencies, together with all corporations, individuals and other bodies acting in the exercise of public functions on behalf of the government, should be required to comply with the Human Rights Act. We submit that providing for human rights obligations to be imposed, even voluntarily, on corporations and individuals is not desirable at this time.

- A Human Rights Act should have extra-territorial application.

- A Human Rights Act should include the following specific mechanisms:

  (a) a requirement that the Attorney-General prepare a statement of compatibility to accompany new Government legislation, stating whether in his or her view the proposed bill is or is not compatible with the rights protected under the Human Rights Act;

  (b) the establishment of a separate human rights scrutiny committee (similar to the UK Joint Committee on Human Rights) to assess the compliance of new legislation with the Human Rights Act;

  (c) a requirement that all acts and decisions of public authorities should comply with the Human Rights Act;

  (d) a requirement that Courts interpret legislation in a way that is consistent with the Human Rights Act;

  (e) in doing so, Courts should be expressly permitted to have regard to international law and human rights jurisprudence; and

  (f) where a Court finds legislation to be incompatible with the Human Rights Act, and this is notified to the Attorney-General by the AHRC, the Attorney-General should be required to table the notification in Parliament and produce a report in response.

- The Commonwealth Attorney-General and the AHRC should have a right of intervention in litigation involving the application of a Human Rights Act.

- Where the State or a public authority has breached the Human Rights Act, a person adversely affected by such conduct should be entitled to:

  (a) a declaration that such conduct amounts to a breach;

  (b) an injunction to restrain any continuing breach;

(c) damages as compensation where loss can be proven; and

(d) remedy in the nature of certiorari, mandamus or prohibition.

- However, express limitations should be placed on this cause of action in respect of alleged breaches of economic, social and cultural rights.

Background

The Mallesons Stephen Jaques Human Rights Law Group ("**Mallesons HRLG**") was established in 2001. The aim of the group is to systematically broaden and deepen the firm's expertise in human rights law and corporate social responsibility issues, and to ensure that Mallesons has the expertise to advise upon and guide the activities of our clients when human rights law issues arise. Human rights issues have taken on increased legal significance since the introduction of the *Human Rights Act 2004* in the Australian Capital Territory and the *Charter of Human Rights and Responsibilities Act 2006* in Victoria.

The Mallesons HRLG made a submission to the Victorian Human Rights Consultation Committee in August 2005, and we welcome this opportunity to engage in the national dialogue on human rights by making a submission to the National Human Rights Consultation Committee.

This submission, which was jointly prepared by lawyers and law graduates in the firm's Melbourne and Sydney offices, focuses on the legal issues arising from the questions raised in the Committee's terms of reference.

The content of this submission represents the views and opinions of the Mallesons HRLG, and does not represent the views of Mallesons Stephen Jaques or the views of the firm's clients.

A Are human rights in Australia currently sufficiently protected?

1 Australia's international human rights obligations

Summary

Australia has ratified or acceded to:

(i) at least seven international human rights treaties; and

(ii) with one exception, each optional protocol to these treaties.

However, Australia's implementation of these human rights treaties into domestic law has been limited. Except for certain laws that:

(i) allow Australians access to unenforceable remedies through a domestic complaints mechanism; and/or

(ii) reflect, refer to or are based on certain aspects of treaties,

Australia has generally not introduced express legislative protection for the rights contained in the human rights treaties which it has ratified or to which it

has acceded.

Recommendation

Australia should introduce a comprehensive statutory framework for human rights protection, in order to address the lack of express legislative protection for the human rights contained in the human rights treaties which Australia has ratified or to which it has acceded.

1.1 Ratification or accession to international human rights treaties

Australia is an original signatory to the UDHR and has ratified or acceded to at least seven international human rights treaties, including the:

(i) *International Covenant on Civil and Political Rights* ("**ICCPR**");[1]

(ii) *International Covenant on Economic, Social and Cultural Rights* ("**ICCPR**");[2]

(iii) *Convention against Torture* ("**CAT**");[3]

(iv) *Convention on the Rights of the Child* ("**CROC**");[4]

(v) *Convention on the Elimination of All Forms of Discrimination Against Women* ("**CEDAW**");[5]

(vi) *International Convention on the Elimination of all Forms of Racial Discrimination* ("**CERD**");[6] and

(vii) *Convention on the Rights of Persons with Disabilities* ("**CRPD**").[7]

The Commonwealth's authority to ratify international treaties, and in doing so to accept the obligations contained therein, derives from the external affairs power in the Australian Constitution.[8]

Upon ratification or accession, Australia is obliged under the Vienna Convention to give effect to all provisions of the aforementioned international human rights treaties (other than the specific provisions in relation to which it lodged reservations).[9] Although the UN Human Rights Committee has a role to play in considering an individual's allegation that a state has not complied with the ICCPR or another human rights treaty, the primary responsibility for ensuring that a state complies with these treaties is at the domestic level.[10]

(a) ICCPR

1 Opened for signature 19 December 1966, 999 UNTS 171 (entered into force 23 March 1976).
2 Opened for signature 16 December 1966, 993 UNTS 3 (entered into force 3 January 1976).
3 Opened for signature 4 February 1985, 1465 UNTS 85 (entered into force 26 June 1987).
4 Opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990).
5 Opened for signature 18 December 1979, 1249 UNTS 13 (entered into force 3 September 1981).
6 Opened for signature 21 December 1965, 660 UNTS 195 (entered into force 4 January 1969).
7 Opened for signature 30 March 2007, 993 UNTS 3 (entered into force 3 May 2008).
8 Commonwealth of Australia Constitution Act 1900 (Imp) 63 & 64 Vict, cl 2, s 51(xxix).
9 Vienna Convention, art 26.
10 See, for example, the requirement that individuals must have exhausted all domestic remedies before they can bring a case before the UN Human Rights Committee: Optional Protocol to the ICCPR, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976), art 5(2)(b).

Australia:

(i) ratified the ICCPR in August 1980;[11]

(ii) acceded to the First Optional Protocol to the ICCPR [12] in September 1991; and

(iii) acceded to the Second Optional Protocol to the ICCPR [13] in October 1990.

Under Article 2(2) of the ICCPR, a State Party undertakes to:

> *adopt such legislative or other measures as may be necessary to give effect to the rights recognized in the present Covenant*.

Article 2(3) further provides that State Parties to the ICCPR must ensure that people whose rights are violated have an effective remedy. Complaints should be determined by "competent judicial, administrative or legislative authorities",[14] and a remedy, if granted, should be enforced.

(b) ICESCR

Australia ratified the ICESCR in March 1976.[15]

Under Article 2(1) of the ICESCR, a State Party 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.*[16]

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11 Australia ratified the ICCPR on 13 August 1980, but lodged a number of reservations. Reservations are statements where a State Party attempts to modify the legal effect of provisions of the treaty as they apply to the State, essentially putting the other parties to the treaty on notice as to how the state will interpret the particular provisions. Many of these have since been withdrawn, with those remaining being reservations in relation to art 10 (persons deprived of liberty), art 14 (right to a fair trial) and art 20 (propaganda for war).

12 First Optional Protocol to the ICCPR. Australia did not lodge any reservations or declarations.

13 Second Optional Protocol to the ICCPR, aiming at the abolition of the death penalty, opened for signature 15 December 1989, 1642 UNTS 414 (entered into force 11 July 1991). Australia did not lodge any reservations or declarations.

14 ICCPR, art 2(3).

15 Australia did not lodge any reservations or declarations when it ratified the ICESCR on 10 March 1976.

16 The UN CESCR has emphasised that 'although the full realization of the relevant rights may be achieved progressively', art 2(1) requires immediate targeted steps to be taken towards meeting the obligations under the ICESCR: The Nature of States Parties Obligations (art 2, para 1), Committee on Economic, Social and Cultural Rights, General Comment, UN Office of the High Commissioner for Human Rights, 5th sess [83-87], UN Doc E/1991/23 (1991).

(c) CAT

Australia ratified the CAT on 8 August 1989,[17] and has accepted all amendments to it.[18] However, Australia has not yet ratified the Optional Protocol to the Convention against Torture ("**OPCAT**"),[19] which aims to establish a system of regular visits to detention facilities in order to prevent torture and other cruel, inhuman or degrading treatment or punishment.[20] In March 2004, the JSCT recommended against ratification of the OPCAT.[21] Australia signed the OPCAT on 19 May 2009.[22]

Under Article 2(1) of the CAT, each State Party undertakes to:

> *take effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction.*

(d) CROC

Australia:

(i) ratified the CROC in December 1990;[23]

(ii) ratified the Optional Protocol to the CROC on the Involvement of Children in Armed Conflict[24] in September 2006; and

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17 Australia ratified the Convention against Torture on 8 August 1989 and, while not lodging any formal reservations, made a declaration that it recognised the competence of the Committee to receive and consider (a) communications to the effect that a State Party claims that another State Party is not fulfilling its obligations under the Convention against Torture and (b) communications from or on behalf of individuals subject to Australia's jurisdiction who claim to be victims of a violation by a State Party of the provisions of the Convention against Torture: United Nations Treaty Collection, *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (2009) <http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-9&chapter=4&lang=en?> at 11 June 2009.

18 The Government of Australia proposed amendments to arts 17(7) and 18(5) which were circulated by the Secretary-General on 28 February 1992. These were adopted by the Conference of State Parties on 8 September 1992 and accepted by Australia on 15 October 1993: United Nations Treaty Collection, *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (2009) <http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-9-a&chapter=4&lang=en> at 11 June 2009.

19 Optional Protocol to the Convention against Torture, opened for signature on 4 February 2003 (entered into force 22 June 2006): United Nations Treaty Collection, *Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (2009) <http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-9-b&chapter=4&lang=en> at 11 June 2009.

20 Optional Protocol to the Convention against Torture, art 1.

21 JSCT, *Report 58, Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (2004) <http://www.aph.gov.au/house/committee/jsct/OPCAT/report/front.pdf> at 11 June 2009.

22 Australian Labor Party, 'Australia takes action against torture' (Press Release, 25 May 2009) <http://www.alp.org.au/media/0509/msag250.php> at 11 June 2009.

23 Australia ratified the CROC on 17 December 1990 but lodged a reservation to art 37(c), noting that the obligation to separate children from adults in prison

> *is accepted only to the extent that such imprisonment is considered by the responsible authorities to be feasible and consistent with the obligation that children be able to maintain contact with their families, having regard to the geography and demography of Australia.*

United Nations Treaty Collection, *Convention on the Rights of the Child* (2009) http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-11&chapter=4&lang=en at 25 May 2009.

(iii) ratified the Optional Protocol to the CROC on the Sale of Children, Child Prostitution and Child Pornography[25] in January 2007.

Under Article 4 of the CROC, a State Party is required to:

> *undertake all appropriate legislative, administrative, and other measures for the implementation of the rights recognized in the present Convention. With regard to economic, social and cultural rights, States Parties shall undertake such measures to the maximum extent of their available resources and, where needed, within the framework of international co-operation.*

(e) CEDAW

Australia:

(i) ratified the CEDAW in July 1983;[26] and

(ii) acceded to the Optional Protocol to the CEDAW[27] in December 2008.[28]

Under Article 24 of the CEDAW, a State Party undertakes to:

> *adopt all necessary measures at the national level aimed at achieving the full realization of the rights recognized in the present Convention.*

(f) CERD

Australia ratified the CERD in September 1975.[29]

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[24] Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict, opened for signature 25 May 2000, A/RES/54/263 (entered into force 12 February 2002). Australia did not lodge any reservations or declarations.

[25] Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography, opened for signature 25 May 2000, A/RES/54/263 (entered into force 18 January 2002). Australia did not lodge any reservations or declarations.

[26] Australia ratified the CEDAW on 28 July 1983, and lodged reservations to art 11(2)(b) in relation to the provision of 'maternity leave with pay or comparable social benefits' and art 11 generally (on non-discrimination in employment) 'in so far as it would require alteration of Defence Force policy which excludes women for combat and combat-related duties' (noting that 'The Government of Australia is reviewing this policy so as to more closely define 'combat' and 'combat-related duties''), together with a statement that:

> *Australia has a federal constitutional system in which legislative, executive and judicial powers are shared or distributed between the Commonwealth and the constituent States. The implementation of the treaty throughout Australia will be effected by the Commonwealth, State and Territory authorities having regard to their respective constitutional powers and arrangements concerning their exercise.*

On 30 August 2000, Australia withdrew its reservation relating to the exclusion of women from combat and combat-related duties, and deposited a replacement reservation in identical terms save for the words 'and 'combat-related duties'' and removing any reference to policy review. United Nations Treaty Collection, *Convention against All Forms of Discrimination Against Women* (2009) <http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-8&chapter=4&lang=en> at 25 May 2009.

[27] Optional Protocol to the CEDAW, opened for signature 10 December 1999, 2131 UNTS 83 (entered into force 22 December 2000). Australia did not lodge any reservations or declarations.

[28] Robert McClelland and Tanya Plibersek, 'Australia Strengthens Women's Rights' (Press Release, 4 March 2009) <http://www.attorneygeneral.gov.au/www/ministers/robertmc.nsf/Page/MediaReleases_2009_FirstQuarter_4March-AustraliaStrengthensWomensRights> at 23 April 2009.

Under Article 6 of the CERD, a State Party undertakes to:

> *assure to everyone within their jurisdiction effective protection and remedies, through the competent national tribunals and other State institutions, against any acts of racial discrimination which violate his human rights and fundamental freedoms contrary to this Convention, as well as the right to seek from such tribunals just and adequate reparation or satisfaction for any damage suffered as a result of such discrimination.*

(g) CRPD

Australia ratified the CRPD in July 2008.[30] However, Australia has not yet ratified the Optional Protocol[31] to this convention, which would allow for individual communications and inquiries with the Committee on the Rights of Persons with Disabilities. In 2008, the Australian Government commenced a public consultation into the CRPD. Many respondents urged Australia to become a party to the Optional Protocol to the CRPD.[32] Despite the JSCT having recommended the ratification of the Optional Protocol, this has not been done to date.[33]

Under Article 4(a) of the CRPD, a State Party undertakes to:

> *adopt all appropriate legislative, administrative and other measures for the implementation of the rights recognized in the present Convention.*

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[29] Australia ratified the CEDAW on 30 September 1975, and lodged a reservation to art 4(a) which provides that laws relating to racial superiority or hatred, incitement to racial discrimination, or any act of violence or incitement relating to any race, shall be illegal. Australia lodged a further declaration on 28 January 1993 recognising the competence of the Committee on the Elimination of Racial Discrimination, which reads:

> *The Government of Australia hereby declares that it recognises, for and on behalf of Australia, the competence of the Committee to receive and consider communications from individuals or groups of individuals within its jurisdiction claiming to be victims of a violation by Australia of any of the rights set forth in the aforesaid Convention.*

United Nations Treaty Collection*, International Convention on the Elimination of All Forms of Racial Discrimination* (2009) <http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-2&chapter=4&lang=en> at 25 May 2009.

[30] Australia ratified the CRPD on 17 July 2008, and while not lodging any formal reservations, lodged a declaration whereby Australia, with respect to the rights contained in art 12 (Equal recognition before the law), art 17 (Protecting the integrity of the person) and art 18 (Liberty of movement and nationality), 'declares its understanding [of] the Convention' as allowing for 'fully supported or substituted decision-making arrangements' and 'compulsory assistance or treatment of persons' (both 'as a last resort and subject to safeguards') and as not creating 'a right for a person to enter or remain in a country of which he or she is not a national'. United Nations Treaty Collection, *CRPD* (2009) <http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-15&chapter=4&lang=en> at 25 May 2009.

[31] Optional Protocol to the CRPD, opened for signature 30 March 2007, UN Doc A/61/611 (entered into force 3 May 2008).

[32] Australian Treaty National Interest Analysis, *The Optional Protocol to the Convention on the Rights of Persons with Disabilities* [2008] ATNIA 31; [2008] ATNIA 21.

[33] Joint Standing committee on Treaties, *Optional Protocol to the Convention on the Rights of Persons with Disabilities,* Parliament of Australia (2008) <http://www.aph.gov.au/house/committee/jsct/3december2008/report/chapter2.pdf> at 27 April 2009.

1.2 Extent of legislative implementation of international treaties

Ratification alone does not give the provisions of a treaty the force of Australian domestic law; rather, a specific act of incorporation into domestic law is required.[34]

Therefore, in order for a person to be able to enforce a provision of an international treaty in Australia's domestic legal system, the terms of the treaty must have been implemented into domestic legislation at a Federal level, or in the relevant state or territory. Except for certain limited implementation through the legislation described below, this has generally not occurred in relation to the human rights treaties ratified by Australia.

(a) Legislative implementation of the ICCPR

The ICCPR has not yet been incorporated into Australian domestic law.

The ICCPR has been attached as a schedule to the HREOC Act. This allows access to a domestic complaints mechanism operated by the AHRC (formerly HREOC) in relation to those rights protected under the ICCPR. This operates in addition to the international complaints process under the First Optional Protocol.[35] However both these mechanisms provide, at best, an unenforceable remedy.[36] The Australian Government is not obligated to implement or even respond to any recommendations arising from these mechanisms. Further, the Full Federal Court has held that simply including the ICCPR as a schedule to the HREOC Act is not sufficient to satisfy the requirement to enact it into domestic law.[37]

A limited number of statutes give protection to, refer to, or are based on, certain aspects of the ICCPR,[38] particularly the right to non-

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[34] See *Dietrich v The Queen* (1992) 177 CLR 292; *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273.

[35] Australia acceded to the Optional Protocol to the ICCPR on 25 September 1991. By doing so, Australians who have exhausted domestic remedies may lodge a communication with the UN Human Rights Committee alleging a violation of their rights under the ICCPR. There is no scope for enforceable remedies to arise from a decision of the UN Human Rights Committee. For example in *A v Australia*, Communication No 560/1993 UN Doc CCPR/C/59/D/560/1993 (30 April 1997) the UN Human Rights Committee found that A, a Cambodian, had been held in immigration detention for longer than necessary, which therefore amounted to arbitrary detention, and recommended that the Australian Government pay him compensation. However the Australian Government rejected the view of the UN Human Rights Committee and recommendation, and took no further action on the matter.

[36] Nick O'Neill, Simon Rice and Roger Douglas, *Retreat from Injustice: Human Rights Law in Australia* (2nd ed, 2004) 178.

[37] *Minogue v Williams* [2000] FCA 125. Note however that the Full Court of the Family Court recognised in 2003 that the inclusion of the CROC as a schedule to the Human Rights and Equal Opportunity Commission Act may give it 'special significance': *B (Infants) & B (Intervener) v Minister for Immigration & Multicultural & Indigenous Affairs* [2003] FamCA 451. On appeal to the High Court this issue was not resolved: *Minister for Immigration and Multicultural and Indigenous Affairs v B* [2004] HCA 20.

[38] These include the following acts: Human Rights (Sexual Conduct) Act 1994 (Cwth), Disability Discrimination Act 1992 (Cwth), Privacy Act 1988 (Cwth), Racial Discrimination Act 1975 (Cwth), Sex Discrimination Act 1984 (Cwth), Disability Discrimination Act 1992 (Cwth), Age Discrimination Act 2004 (Cwth), Evidence Act 1995 (NSW), Evidence Act 1995 (Cwth), Law Reform Commission Act 1973 (Cwth), Human Rights and Equal Opportunity Commission Act 1986 (Cwth), Crimes (Torture) Act 1988 (Cwth) and Criminal Code Act 1995 (Cwth); Workplace Relations Act 1996 (Cth); Discrimination Act 1991 (ACT); Anti-Discrimination Act 1977 (NSW); Anti-Discrimination Act (NT); Anti-Discrimination Act 1991 (Qld); Equal Opportunity Act 1984 (SA); Evidence Act 2001 (Tas); Anti-Discrimination Act 1998 (Tas); Equal Opportunity Act 1995 (Vic); Equal Opportunity Act 1984 (WA).

discrimination.[39] However the only federal, state or territory legislation specifically incorporating and giving effect to the majority of substantive rights contained in the ICCPR are the ACT Human Rights Act and the Victorian Charter Many rights under the ICCPR remain unenforceable in Australian courts and tribunals.[40]

(b) Legislative implementation of the ICESCR

The ICESCR has not yet been incorporated into Australian domestic law.

Unlike the ICCPR, the ICESCR is not attached to the HREOC Act, and therefore, there is no opportunity to make a complaint to the AHRC in relation to the rights under the ICESCR. Furthermore, there is no international complaints mechanism for the ICESCR,[41] although the UN has established a Working Group to consider an optional protocol to the ICESCR.[42]

Therefore although the Australian Government provides services such as health and education in partial compliance with the ICESCR, there is no guarantee that a right to such services will be protected over time without a more formalised system of protection.

Accordingly, while certain human rights are protected by Australian statutes,[43] many rights under the ICESCR remain unenforceable in Australian courts and tribunals.[44]

(c) Legislative implementation of the CROC

The CROC has not yet been incorporated into Australian domestic law. While a number of Australian statutes reflect certain aspects of the CROC,[45] there has been very limited implementation of this treaty.[46]

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39 National Association of Community Legal Centres, Human Rights Law Resource Centre and Kingsford Legal Centre, *Freedom Respect Equality Dignity: Action — NGO Submission to the Human Rights Committee: Australia's Compliance with the ICCPR* (2008) <http://www2.ohchr.org/english/bodies/hrc/docs/ngos/NACLC_Australia_HRC95_en.pdf.> [12] at 27 April 2009.

40 National Association of Community Legal Centres, Human Rights Law Resource Centre and Kingsford Legal Centre, *Freedom Respect Equality Dignity: Action — NGO Submission to the Human Rights Committee: Australia's Compliance with the ICCPR* (2008) <http://www2.ohchr.org/english/bodies/hrc/docs/ngos/NACLC_Australia_HRC95_en.pdf.> [11] at 27 April 2009.

41 Nick O'Neill, Simon Rice and Roger Douglas, *Retreat from Injustice: Human Rights Law in Australia* (2nd ed, 2004) 178.

42 Office of the High Commissioner for Human Rights, Commission on Human Rights, *Question of the realization in all countries of the economic, social and cultural rights contained in the Universal Declaration of Human Rights and in the International Covenant on Economic, Social and Cultural Rights, and study of special problems which the developing countries face in their efforts to achieve these human rights*, Resolutions 2003/18 and 2004/29.

43 The ICESCR has been the constitutional basis for certain legislation, such as s 12(8)(b) of the Disability Discrimination Act 1992 (Cth) and s 10(7)(b) of the Age Discrimination Act 2004 (Cth): Nick O'Neill, Simon Rice and Roger Douglas, *Retreat from Injustice: Human Rights Law in Australia* (2nd ed, 2004) 180.

44 National Association of Community Legal Centres, Human Rights Law Resource Centre and Kingsford Legal Centre, *Freedom Respect Equality Dignity: Action — NGO Submission to the UN Committee on Economic, Social and Cultural Rights: Australia* (2008) <http://www2.ohchr.org/english/bodies/cescr/docs/info-ngos/HRLRC.pdf.> [11] at 27 April 2009.

45 See, for example, s 10(7)(b) of the Age Discrimination Act 2004 (Cth): Nick O'Neill, Simon Rice and Roger Douglas, *Retreat from Injustice: Human Rights Law in Australia* (2nd ed, 2004) 183. Art 12 of the CROC is reflected in the Children and Young Persons (Care and Protection) Act 1998 (NSW) s 10, Adoption Act 2000 (NSW) s 9, Children and Young Persons Act 1999 (ACT)

Like the ICCPR, the CROC has been attached as a schedule to the HREOC Act, allowing Australians access to the complaints process operated by the AHRC that gives them an unenforceable remedy.[47]

(d) Legislative implementation of the CEDAW

Australia became a party to CEDAW in 1983.[48] In recognition of this, the SDA was developed, which outlaws sex discrimination and provides for individuals to make a complaint to the AHRC in relation to sex discrimination or sexual harassment.

In December 2009, Australia acceded to the Optional Protocol to the CEDAW.[49] This protocol allows complaints to be filed with the UN Committee on the Elimination of Discrimination Against Women about alleged CEDAW violations, after exhausting domestic legal remedies.[50] However Australia is under no obligation to act on recommendations made by the UN Committee on the Elimination of Discrimination Against Women.

(e) Legislative implementation of the CERD

Australia became a signatory to the CERD in October 1966, and ratified the CERD on 30 September 1975.[51] The RDA was enacted in response to Australia's obligations under the CERD and a copy of the Convention is scheduled to the Act.[52] However, the CERD is only incorporated into Australian law to the extent that it is incorporated into the RDA.[53]

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ss 12(2)(a), 12(2)(b), Child Protection Act 1999 (Qld) s 5(h), Children's Protection Act 1993 (SA) s 4(3): 'How CROC Can Benefit Children' (2002) 1447 (2651) *Law and Policy Journal of the National Children's and Youth Law Centre* <http://www.ncylc.org.au/croc/crocbenefits.html#13> at 20 April 2009.

46 Nick O'Neill, Simon Rice and Roger Douglas, *Retreat from Injustice: Human Rights Law in Australia* (2nd ed, 2004) 188.

47 Nick O'Neill, Simon Rice and Roger Douglas, *Retreat from Injustice: Human Rights Law in Australia* (2nd ed, 2004) 188.

48 United Nations Treaty Collection, *Convention on the Elimination of All Forms of Discrimination Against Women* (2009) <http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-8&chapter=4&lang=en> at 27 April 2009.

49 Robert McClelland and Tanya Plibersek, 'Australia Comes in from the Cold on Women's Rights' (Press Release, 24 November 2008) <http://www.attorneygeneral.gov.au/www/ministers/RobertMc.nsf/Page/MediaReleases_2008_FourthQuarter_24October2008-AustraliaComesInFromTheColdOnWomensRights> at 21 April 2009.

50 Robert McClelland and Tanya Plibersek, 'Australia Comes in from the Cold on Women's Rights' (Press Release, 24 November 2008) <http://www.attorneygeneral.gov.au/www/ministers/RobertMc.nsf/Page/MediaReleases_2008_FourthQuarter_24October2008-AustraliaComesInFromTheColdOnWomensRights> at 21 April 2009.

51 United Nations Treaty Collection, *International Convention on the Elimination of All Forms of Racial Discrimination* (2009) <http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-2&chapter=4&lang=en> at 27 April 2009.

52 Neil Lofgren, 'Complaints Procedures under Article 14 of the International Convention on the Elimination of All Forms of Racial Discrimination' [1994] *Aboriginal Law Bulletin* 14 <http://www.austlii.org/au/journals/AboriginalLB/1994/14.html> at 21 April 2009.

53 Neil Lofgren, 'Complaints Procedures under Article 14 of the International Convention on the Elimination of All Forms of Racial Discrimination' [1994] *Aboriginal Law Bulletin* 14 <http://www.austlii.org/au/journals/AboriginalLB/1994/14.html> at 21 April 2009.

On 28 January 1993, Australia lodged a declaration with the UN accepting the optional complaint procedure of the CERD.[54] This recognised the right of an individual, within the jurisdiction of Australia, to apply to the Committee on the Elimination of Racial Discrimination to consider a potential breach of the CERD. This mechanism can only be used once domestic remedies have been exhausted.[55] Australia is under no obligation to act on the recommendations made by the Committee. Due to Australia's reservation to Article 4(a), complaints cannot be made under this section of the CERD.

(f) Legislative implementation of the CRPD

Australia became a signatory to the CRPD on 30 March 2007. It ratified the Convention on 17 July 2008.[56]

While not lodging any formal reservations, at the time of ratification Australia lodged a declaration with respect to the rights contained in Article 12 (Equal recognition before the law), Article 17 (Protecting the integrity of the person) and Article 18 (Liberty of movement and nationality), whereby it understands the Convention as allowing for "fully supported or substituted decision-making arrangements" and "compulsory assistance or treatment of persons" (both "as a last resort and subject to safeguards"), and as not creating "a right for a person to enter or remain in a country of which he or she is not a national".[57]

The JSCT has recommended the ratification of the optional protocol[58] which allows for individual communications and inquiries with the Committee on the Rights of Persons with Disabilities, but Australia has not yet done so.

Australia has previously enacted the DDA, which protects a number of the rights in the CRPD.

While the Convention on the Rights of Persons with Disabilities has not been attached as a schedule to the HREOC Act, the Declaration on the Rights of Disabled Persons has been attached as a schedule to the Act.[59]

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54 United Nations Treaty Collection, *International Convention on the Elimination of All Forms of Racial Discrimination* (2009) <http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-2&chapter=4&lang=en> at 27 April 2009.

55 CERD, art 14(7)(a).

56 United Nations Treaty Collection, *Convention on the Rights of Persons with Disabilities* (2009) <http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-15&chapter=4&lang=en> at 27 April 2009.

57 United Nations Treaty Collection, *Convention on the Rights of Persons with Disabilities* (2009) <http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-15&chapter=4&lang=en> at 27 April 2009.

58 Joint Standing committee on Treaties, *Optional Protocol to the Convention on the Rights of Persons with Disabilities,* Parliament of Australia (2008) <http://www.aph.gov.au/house/committee/jsct/3december2008/report/chapter2.pdf> at 27 April 2009.

59 The Declaration on the Rights of Disabled Persons is a declaration of the United Nations General Assembly made on 9 December 1975, and is seen as the precursor to the CRPD, although as a General Assembly resolution it is not binding on member nations.

2 Domestic human rights protection

Summary

Few rights are protected, either expressly or impliedly, by the Australian Constitution. The common law has therefore played an important role in adding some protection for certain essential human rights in Australia. However, reliance on the common law is subject to significant limitations.

The level of protection in Australia for essential human rights has been noted internationally, with bodies such as the UN Human Rights Committee and the UN CESCR having publicly expressed their concerns.

2.1 Constitutional protection of rights

(a) Express rights under the Constitution

Very few rights are explicitly protected in the Australian Constitution. The drafters of the Constitution expressly rejected a rights-based approach, believing that rights would best be protected by a democratically-elected parliament.[60] This intention has influenced the High Court's frequently narrow construction of those few rights included in the text of the Constitution.

Those rights that have a textual basis include the right to trial by jury[61] and freedom of religion.[62] In addition, the Constitution includes a number of other rights aimed at maintaining and protecting the Australian states and their residents.[63] Provision is also made for just terms compensation for property compulsorily acquired by the Commonwealth.[64]

It may appear that such rights are constitutionally protected and are therefore entrenched. However, in reality these rights have been narrowly interpreted in successive judgments that some commentators consider them to have been rendered non-existent.[65] This is especially true of certain civil and political rights, such as those in sections 80 and 116 of the Constitution. Thus, these express constitutional rights are better characterised not as individual rights or guarantees but rather as limitations on the legislative power of Parliament.

(b) Implied constitutional rights

A number of rights have been implied from the structure and text of the Constitution. The most notable of these is the implied freedom of political communication, which has been held to exist as a function of the system of representative and responsible government provided for in sections 7 and 24 of the Constitution.[66] This implied freedom only protects discourse relating to politics and elections, and is thus more

60 Paul Kildea, 'The Bill of Rights Debate in Australian Political Culture' (2003) 9 *Australian Journal of Human Rights* 7.
61 Australian Constitution s 80.
62 Australian Constitution s 116.
63 Australian Constitution ss 92, 117; see also ss 51(ii), 51(iii), 88, 90.
64 Australian Constitution s 51(xxxi).
65 See, for example, Adrienne Stone, 'Australia's Constitutional Rights and the Problem of Interpretative Disagreement' (2005) 27 *Sydney Law Review* 29.
66 *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520.

limited than the express guarantees of free speech found in the constitutions of other countries.[67]

There have been attempts to argue that the basis of the implied freedom of political communication may also underpin a related right of movement and association.[68] However, this implied right has been approached cautiously by the High Court and has yet to be affirmed.

The second source of implied constitutional rights is the strict separation of judicial power from legislative and executive power, reflected in the structure of the Constitution. The separation and preservation of judicial power in Chapter III of the Constitution has been held to mean that detention cannot be imposed as a punishment except by a court exercising judicial power under Chapter III,[69] nor can Parliament or the Executive make a determination of criminal guilt.[70] Even if certain rights can be derived from Chapter III and the associated jurisprudence, such rights exist only to the extent that they are incidental to the Chapter III limitations on legislative, executive and judicial power.

Statistics on constitutional cases heard by the High Court indicate that Chapter III and the separation of judicial power has been one of the most highly litigated areas of constitutional law in recent years.[71] It is likely that many of these matters raise rights issues also potentially falling within the scope of a Human Rights Act.

2.2 Judicial recognition of rights

Common law doctrines contribute to the protection of essential human rights in various ways. There has been no comprehensive review of the full scope of rights protected by the common law. However, some of the more well-known and specific rights ingrained in the common law include the privilege against self-incrimination[72] and the right to be free from arbitrary arrest and detention.[73]

The common law has developed complex doctrines to deal with specific situations where rights are at stake. Moreover, common law rights may contribute to the protection of one or more internationally recognised human rights. For example, it is the fundamental common law right of a person in possession of premises to exclude others from those premises.[74] This common law principle is relevant to a range of human rights including the rights to privacy, family life and freedom of expression.

Important common law presumptions of statutory interpretation are also relevant to the protection of human rights. First, when interpreting legislation, the Courts

67 See, for example, United States Constitution, amend I; Constitution of the Republic of Ireland, art 40(6)(i); Constitution of the Republic of South Africa, s 16.

68 *Kruger v Commonwealth of Australia* (1997) 190 CLR 1.

69 *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1.

70 Ibid.

71 See Andrew Lynch and George Williams, 'The High Court on Constitutional Law: The 2007 Statistics' (2008) 31 *UNSW Law Journal* 238; Andrew Lynch and George Williams, 'The High Court on Constitutional Law: The 2006 Statistics' (2007) 30 *UNSW Law Journal* 188; Andrew Lynch and George Williams, 'The High Court on Constitutional Law: The 2005 Statistics' (2006) 29 *UNSW Law Journal* 182.

72 *Sorby v Commonwealth* (1983) 152 CLR 281, 309 (per Mason, Wilson and Dawson JJ); *Sinclair v The King* (1946) 73 CLR 316, 337 (per Dixon J).

73 See *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1, 27 (per Brennan, Deane and Dawson JJ).

74 *Coco v R* (1994) 179 CLR 427.

will presume that Parliament does not intend to interfere with fundamental rights. This presumption can only be rebutted by clear, express statutory language or, in rare cases, by necessary implication.[75] Second, it is presumed that Parliament intends to legislate consistently with Australia's international legal obligations. Thus, where ambiguous legislation is capable of a construction that is consistent with Australia's international obligations, such a construction should be preferred.[76] This is relevant to treaties, including human rights treaties, entered into by Australia, even where they have not been incorporated into Australian domestic legislation. Third, it is presumed that Parliament intends that all statutes, except those which are declaratory or related to matters of procedure, will be prospective in operation. This provides a level of protection against the creation of retrospective offences and any punishment that might therefore ensue.[77]

Apart from influencing the construction of a statute or subordinate legislation, the High Court has also recognised that international human rights standards have a legitimate role to play in developing and interpreting the common law. In *Mabo v Queensland (No 2)*,[78] Brennan J stated that Australia's accession to the First Optional Protocol to the ICCPR

> *brings to bear on the common law the powerful influence of the Covenant and the international standards it imports. The common law does not necessarily conform with international law, but international law is a legitimate and important influence on the development of the common law, especially when international law declares the existence of universal human rights.*[79]

In *Minister for Immigration and Ethnic Affairs v Teoh*,[80] the High Court held that ratification of a treaty by Australia will give rise to a legitimate expectation that government decision-makers will take into account Australia's international treaty obligations when making decisions. It further held that this will be the case even if the treaty has not been incorporated into Australian law. The approach in *Teoh* has since been criticised by members of the High Court, suggesting that the legitimate expectations doctrine may be overturned in a future case.[81] Moreover, since 1995, successive governments have attempted to counter the effect of the decision in *Teoh*, first by executive statements[82] and subsequently by Bills which lapsed before they were voted on.[83] However, the current Labor Government has expressed an intent to depart from this approach, noting in its 2007 National Platform and Constitution:

> *Labor will adhere to Australia's international human rights obligations and will seek to have them incorporated into the domestic law of*

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75 Ibid.

76 *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1, 38 (Brennan, Deane and Dawson JJ); *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273, 287–8 (Mason CJ and Deane J).

77 See *Maxwell v Murphy* (1957) 96 CLR 261 (Dixon CJ); *Fisher v Hebburn Ltd* (1960) 105 CLR 188, 194 (Fullagar J); *Geraldton Building Co Pty Ltd v May* (1977) 136 CLR 379.

78 (1992) 175 CLR 1 ('***Mabo***').

79 *Mabo* (1992) 175 CLR 1, 42.

80 (1995) 183 CLR 273 ('***Teoh***').

81 *Re Minister for Immigration and Multicultural Affairs; Ex parte Lam* (2003) 214 CLR 1.

82 See, for example, Joint Statement by the Minister for Foreign Affairs and the Attorney-General, 'International Treaties and the High Court Decision in Teoh' (10 May 1995); Joint Statement by the Minister for Foreign Affairs and the Attorney-General and Minister for Justice, 'The Effect of Treaties in Administrative Decision-Making' (25 February 1997).

83 See Administrative Decisions (Effect of International Instruments) Bill 1995 (Cth); Administrative Decisions (Effect of International Instruments) Bill 1997 (Cth).

> *Australia and take them into account in administrative decision making*.[84]

For all of the benefits of these common law doctrines, information about these rights is only readily accessible to people who are familiar with the law and legal research. It cannot therefore be assumed that non-lawyers will be familiar with, or understand the scope of, such human rights as are protected at common law. Further, as with all common law doctrines, the nature of the rights protected therein is often imprecise, and they can of course be readily overridden by legislation.

2.3 Deficiencies in rights protection

The extent of domestic human rights protection outlined above is limited when considered in light of the extensive protections contained in the ICCPR and the ICESCR. Australia's lack of entrenched institutional protection for human rights, or constitutional provisions giving effect to the ICCPR and the ICESCR has been recognised at an international level on a number of occasions.

In its Concluding Observations on Australia's third and fourth periodic reports regarding implementation of the ICCPR, the UN Human Rights Committee stated that:

> *in the absence of a constitutional Bill of Rights, or a constitutional provision giving effect to the Covenant, there remain lacunae in the protection of Covenant rights in the Australian legal system. There are still areas in which the domestic legal system does not provide an effective remedy to persons whose rights under the Covenant have been violated.*[85]

This is significant because art 2(3) of the ICCPR requires States Parties to provide effective remedies in support of rights under the ICCPR.

While the UN Human Rights Committee has welcomed the National Human Rights Consultation, it recently recognised that Australia:

> *has not yet adopted a comprehensive legal framework for the protection of the Covenant rights at the Federal level, despite the recommendations adopted by the Committee in 2000.*[86]

The UN Human Rights Committee further stated that Australia should 'enact comprehensive legislation giving de-facto effect to all the Covenant provisions uniformly across all jurisdictions in the Federation.'[87]

Similarly, the UN CESCR stated in response to Australia's third periodic report on the implementation of the ICESCR that:

> *the Covenant continues to have no legal status at the federal and state level, thereby impeding the full recognition and applicability of its provisions.*[88]

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84 Australian Labor Party, *National Platform and Constitution* (2007) 207.

85 UN Human Rights Committee, *Concluding Observations of the Human Rights Committee: Australia*, [498]–[528], UN Doc A/55/40 (2000).

86 UN Human Rights Committee, *Concluding Observations of the Human Rights Committee: Australia*, [5]–[8], UN Doc CCPR/C/AUS/CO/5 (2009).

87 UN Human Rights Committee, *Concluding Observations of the Human Rights Committee: Australia*, [8], UN Doc CCPR/C/AUS/CO/5 (2009).

Concerns about Australia's lack of entrenched institutional protection for human rights have also been expressed by other UN bodies and special procedures, including the UN Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms,[89] and the UN Committee against Torture.[90] The Committee against Torture has recently encouraged Australia to continue consultations with regard to the adoption of a Bill of Rights to ensure a comprehensive constitutional protection of basic human rights at the federal level.[91]

B How could Australia better protect and promote human rights?

3 Australia's human rights obligations

3.1 Respect, protect and fulfil

International human rights jurisprudence employs a "*typology of State party obligations*" to facilitate the understanding and implementation of human rights.[92]

The Office of the High Commissioner for Human Rights recognises that "*human rights have little value if they are not implemented*".[93] The term "*respect, protect, fulfil*" is the international community's way of describing and distinguishing between varying human rights obligations imposed on states.[94]

In a practical sense, the words "*respect, protect, fulfill*" operate as a way of framing the way we think about human rights, and allow for their division into categories which can be enforced in particular ways

To this end, the words mean:

(i) the **obligation to respect** entails that governments shall refrain from actions which infringe on rights, including economic, social and cultural rights, or which prevent persons from satisfying these rights. This obligation is immediate and not subject to progressive realization;

(ii) the **obligation to protect** entails that governments must protect persons within their jurisdiction from violations of their human rights, including economic, social and cultural rights, by non-State actors, including businesses and international financial

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88 UN Committee on Economic, Social and Cultural Rights, *Concluding Observations of the Committee on Economic, Social and Cultural Rights: Australia*, [13], UN Doc E/C.12/1/Add.50 (2000).

89 Martin Scheinin, *Report of the Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms while Countering Terrorism- Australia: Study on Human Rights Compliance while Countering Terrorism*, [64]–[65], UN Doc A/HRC/4/26/Add.3 (2003).

90 UN Committee Against Torture, *Concluding Observations of the Committee Against Torture: Australia*, [9], UN Doc CAT/C/AUS/CO/3 (2008).

91 Ibid.

92 "The State Obligation to Respect, Protect and Fulfil Obligations" *International Commission of Jurists";* accessed at icj.org/IMG/pdf/7.pdf

93 UN Office of the High Commissioner for Human Rights, *The Commission on Human Rights: 2005*, available at http://www2.ohchr.org/english/bodies/chr/docs/61chr/leaflet61.pdf.

94 "The State Obligation to Respect, Protect and Fulfil Obligations" *International Commission of Jurists";* accessed at icj.org/IMG/pdf/7.pdf

institutions. This obligation is also immediate and not subject to progressive realization; and

(iii) the **obligation to fulfil** entails that governments must progressively realize the full enjoyment of all human rights, including economic, social and cultural rights, to persons within their jurisdiction. Some aspects of the obligation to fulfill are subject to progressive realization. Other aspects, however, are immediate, including the obligation to adopt appropriate legislative, administrative, budgetary, judicial, promotional and other measures toward the full realization of these rights.

3.2 Determining a state's obligations

Duties imposed on States are correlative (corresponding) to the realization of a right. For example, a right not to be tortured imposes on the state a correlative duty not to torture individuals. It may also impose on the State a positive duty to take action to prevent other people from torturing an individual - for example by providing police for protection.

A State's obligations to protect, respect and fulfil must be framed in a context which recalls that human rights are not static, but evolve and are evolving. Therefore, the obligations and duties on states may also be evolving. For example, the recognition of gender and race equality has changed the content of obligations that will be imposed on governments in the protection of human rights, such that the Australian Government now allocates resources to the protection of women from domestic violence, and implements programs promoting equal access to resources and equal opportunities for indigenous Australians which historically would not have been the subject of Government spending in the past.

Further, cultural relativism will influence the content and enforcement of rights. For example, a 2004 French law effectively banned from public schools the headscarf worn by the many Muslim girls, as well as designated clothing or symbols of other religions that indicated a student's religious affiliation.[95] By comparison, Australian society does not consciously strive to separate the State from religion. Human rights law and jurisprudence sets universal standards which must be adapted to a domestic context.

In addition, there may be circumstances where a State considers it is justified to derogate or override its human rights obligations - for example during times of emergency.

4 Models for better protecting and promoting human rights

Recommendations

In light of the limitation expressed in the Committee's terms of reference, express legislative protection of human rights would best take the form of an ordinary Act of Parliament setting out a framework for human rights

[95] Steiner, H, Alston, P, Goodman, R, *International Human Rights in Context Law, Politics, Morals,* 3rd Edition, Oxford: Oxford University Press, 2008 at 622

protection: a Human Rights Act.

Given that a legislative dialogue model has been successfully adopted in Victoria and the ACT, we submit that a similar approach should be followed at a Federal level. Such a Human Rights Act should set out the rights that are to be protected and the mechanisms used to aid human rights protection (for example, causes of action, remedies, statements of compatibility, declarations of incompatibility by the courts and periodic reviews of the legislation).96

In addition to implementing legislative rights protection, the Committee should consider enhancing the roles of educational institutions and the AHRC and strengthening or expanding other regulatory instruments.

Historically, human rights have been legislatively protected through constitutional entrenchment, from which no legislative derogation is possible without referendum, in an Act of Parliament, which emphasises the supremacy of the legislature to carry out the democratic will of the people, or in some combination of the two.[97]

A number of potential models could be adopted by Australia, regardless of which approach is followed. Potential limitations may arise in both legislative and constitutional models: sometimes the legislature must encroach on rights for the social good, which is best achieved with the flexibility of a legislative model; conversely, the legislature does not always effectively protect rights to the maximum extent practicable, which highlights a benefit of constitutionally entrenched protection.

4.1 Constitutional model

The Committee's terms of reference expressly state that any options identified by the Committee for the Government to consider should not include a constitutionally entrenched bill of rights. Notably, however, some countries have followed the approach of constitutional entrenchment of human rights protection, including the United States,[98] Germany,[99] South Africa,[100] India[101] and the Republic of Ireland.[102]

If human rights were to be protected by amending the Australian Constitution, Parliament would, subject to the principle of proportionality, be unable to make laws contrary to the fundamental human rights protected therein, except to the extent that a particular human right may be subject to permissible limitations and the law falls within that limitation. Further, such a method of protection would not be susceptible to being repealed by a subsequent Government or as a result of a chance in Government policy or priority.

Implementing a constitutionally entrenched model would require a successful referendum,[103] which could be difficult as, to date, less than one quarter of

96 Potential features of this framework are discussed in section 4.4 of this Submission.
97 *Marbury v Madison*, 5 US (1 Cranch) 137, 177 (1803) (Marshall CJ).
98 *Constitution of the United States of America.*
99 *Grundgesetz für die Bundesrepublik Deutschland* (Basic Law for the Federal Republic of Germany) ch 1 "Basic Rights" arts 1-19.
100 *South African Constitution*.
101 *Indian Constitution*.
102 *Ireland Constitution*.
103 *Australian Constitution* s 128.

proposed amendments to the Australian Constitution put to voters have been accepted.[104] It would also be difficult to later amend a constitutionally entrenched model, given the need for a further successful referendum. As there will likely be changes in how rights are valued and viewed over time, any constitutional amendments to incorporate comprehensive human rights protection would need to be drafted particularly carefully in light of the difficulty in making later amendments.[105]

Given the legal (and social) importance of the Australian Constitution, a constitutionally entrenched model might however have normative effects beyond judicial determination of its provisions. These include potentially enhancing the educative role of the charter,[106] and engaging with Australians' sense of national identity.[107]

4.2 Legislative model

The most common form of statutory human rights protection adopted in overseas jurisdictions is a legislative model, by which human rights protection is implemented through introducing a Human Rights Act as ordinary legislation.

Such a Human Rights Act could of course be amended by Parliament at any time by following the usual legislative process, thus requiring only a simple parliamentary majority. Accordingly, it is possible for a legislative model to respond to changes in human rights policy, and for any identified deficiencies or limitations in protection to be rectified. It is also possible that the Parliament could repeal the legislation at any time. [108]

Both Victoria and the ACT, as well as overseas jurisdictions such as the UK and New Zealand, have implemented rights protection in a form known as a 'legislative dialogue model'.[109] This model seeks to promote a rights-based dialogue between the three arms of Government, namely the Executive, the Legislature and the Judiciary, by requiring human rights to be taken into account when developing and introducing laws (by the Legislature), when interpreting laws (by the Judiciary) and when implementing laws (by the Executive).

This approach best protects parliamentary sovereignty, as long as Parliament retains the power to pass laws contravening human rights set out in a human Rights Act, and Courts are not given the power to invalidate laws which may not be compatible with a Human Rights Act.

The following mechanisms could be adopted in a legislative dialogue model:

(i) an obligation on Courts to interpret legislation consistently with a Human Rights Act to the extent such an interpretation is logically possible and not inconsistent with Parliament's clear

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104 See *Parliamentary Handbook of the Commonwealth of Australia* (31st ed, 2008) 385.

105 This is in contrast to changes in judicial interpretation of constitutional provisions.

106 Mr Justice David Malcolm AC, 'Does Australia Need a Bill of Rights?' (1988) 5(3) *Murdoch University Electronic Journal of Law* [22] <http://www.murdoch.edu.au/elaw/issues/v5n3/malcolm53_text.html> at 5 June 2009.

107 See Mark V Tushnet, 'Comparative Constitutional Law' in Vicki C Jackson and Mark V Tushnet, *Comparative Constitutional Law* (1999) 1225, 1253-55.

108 In light of Australia's international treaty obligations, it seems highly unlikely that Parliament would repeal a charter of rights implemented under a legislative model. Australia's treaty obligations are discussed in section 3 of this Submission.

109 Also referred to as a 'constitutional dialogue model'. Implemented in the *Human Rights Act* 2004 (ACT); *Charter of Human Rights and Responsibilities Act 2006* (Vic); *Human Rights Act* 1998 (UK); *Human Rights Act 1993* (NZ).

intention. There is also the possibility that a Court may notify Parliament of any inconsistency and require a response;

(ii) a requirement that new legislation be accompanied by a statement addressing its compatibility (or explaining its non-compatibility) with the rights protected by a Human Rights Act, and that it be separately scrutinised by a parliamentary committee to further consider its compliance; and

(iii) 'public authorities' must act and make decisions consistently with the rights set out in the Human Rights Act.

The 'strength' of a legislative Human Rights Act will depend upon how many of those mechanisms are adopted, and how forcefully they are to be applied. Further, Constitutional issues may arise in respect of these mechanisms in the context of a Human Rights Act - these are addressed in section 9 of this submission.

4.3 Hybrid model

Canada's Charter of Rights and Freedoms adopts a different approach to the constitutional or legislative models discussed above, and adopts features of each. Specifically, the Canadian Charter features partial constitutional entrenchment[110], in that amendments can only be made to the Canadian Charter by following the same process required for amendments to the Constitution, and it provides Courts with the right to invalidate legislation which is in breach of the Canadian Charter. However, the Canadian Charter also includes an "override" clause, which allows the Canadian Parliament or a provincial parliament to expressly declare when introducing new laws that they are intended to operate despite the inconsistency with the Charter.[111] The power to declare that a law has effect "notwithstanding" certain protected rights may be exercised instantly and without public consultation.

Hong Kong adopted a unique hybrid model whilst under British control, peculiarly adapted to the Hong Kong constitutional context and the terms of the *Sino-British Joint Declaration*, to ensure that human rights were entrenched after the handover to China to the maximum possible extent.[112]

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[110] *Canadian Charter of Rights and Freedoms.*

[111] *Constitution Act 1982* (Canada) Sch B Pt 1 "Canadian charter of rights and freedoms" s 33.

[112] See Andrew Byrnes 'Hong Kong's Bill of Rights Experience and its (Ir)Relevance to the ACT Debate over a Bill of Rights' in *Comparative Perspectives on Bills of Rights* (Australian National University, 2004) 35-36. The *Sino-British Joint Declaration* (entered into force 27 May 1985) articles 3(3) and (5) provided that laws will remain unchanged and rights will be ensured by law post-handover. A provision in the draft *Basic Law of the Hong Kong Special Administrative Region* (now art 39 of the *Basic Law* in force) provided that the ICCPR would remain in force as applied to Hong Kong. On 8 June 1991 para 7(5) was added to the *Hong Kong Letters Patent* (the basic law of Hong Kong pre-handover) providing that all subsequent law inconsistent with the ICCPR was inoperative, in the hope that art 39 of the *Basic Law* would render inconsistent provisions inoperative as was the case under the *Letters Patent*. Simultaneously, the *Hong Kong Bill of Rights Ordinance 1991* (HK) was enacted to require laws to be interpreted, retrospectively and prospectively, in a manner consistent with the ICCPR, in the hope that the *Sino-British Joint Declaration* would require Hong Kong to continue the requirement post-handover. As was intended, the *Ordinance* remains in force largely as originally enacted (A Byrnes 'And Some Have Bills of Rights Thrust Upon Them' in P Alston (ed) *Promoting Human Rights Through Bills of Rights: Comparative Perspectives* (1999) ch 9, 318-91) and art 39 of the *Basic Law* is now construed as allowing declarations of inconsistency rendering statutes

4.4 Recommended model

In light of the limitation expressed in the Committee's terms of reference, express legislative protection of human rights would best take the form of an ordinary Act of Parliament setting out a framework for human rights protection: a **Human Rights Act**.[113]

Given that a legislative dialogue model has been successfully adopted in Victoria and the ACT, we submit that a similar approach should be followed at a Federal level. Such a Human Rights Act should set out the rights that are to be protected and the mechanisms used to aid human rights protection (for example, causes of action, remedies, statements of compatibility, declarations of incompatibility by the courts and periodic reviews of the legislation).[114]

4.5 Constitutional power

The Commonwealth Parliament can only enact a Human Rights Act if it has the power to do so under the Australian Constitution.[115] While there is no specific Federal Constitutional power to legislate for human rights, the external affairs power enables Federal Parliament to enact legislation implementing international treaties.[116]

In relying on the external affairs power, Parliament must ensure that the legislation in question is 'reasonably capable of being considered appropriate and adapted' to implementing the relevant international treaty.[117] Accordingly, a Human Rights Act should:

(a) ensure that the rights protected reflect rights contained in international treaties to which Australia is a signatory;[118] and

(b) be able to be interpreted as appropriate and adapted to implementing the relevant treaties.[119]

The external affairs power may also extend to allowing Australia to incorporate obligations under customary international law.[120] However, relying on Australia's treaty obligations is a more certain constitutional basis for the legislation, and should provide sufficiently wide scope based on the subject matter of the relevant treaties.

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inoperative (*Hong Kong Special Administrative Region v Ng Kung Siu* (Court of Final Appeal of the Hong Kong SAR, Li CJ, Litton, Ching, Bokhary and Mason JJ, No 4 of 1999).

[113] While acknowledging that the name of the instrument is less significant than its content, we submit that "Human Rights Act" is the most appropriate name for such legislation, as opposed to Charter of Rights or Bill of Rights, as it best reflects the legislative nature of the instrument.

[114] Potential features of this framework are discussed in section 4.4 of this Submission.

[115] See *Australian Constitution* Chapter I Part V.

[116] The external affairs power is in section 51(xxix). See, eg, *Koowarta v Bjelke-Petersen* (1982) 153 CLR 168.

[117] *Victoria v Commonwealth* (1996) 187 CLR 416, 487 (Brennan CJ and Toohey, Gaudron, McHugh and Gummow JJ) ('*Industrial Relations Act Case*').

[118] This may require a Human Rights Act to include the reservations to ICCPR rights adopted by Australia upon ratifying the ICCPR: see section 1.1(a) of this Submission.

[119] Philip Lynch and Phoebe Knowles, *The National Human Rights Consultation: Engaging in the Debate* (2009) Human Rights Law Resource Centre 113 <http://www.hrlrc.org.au/files/hrlrc-the-national-human-rights-consultation-engaging-in-the-debate.pdf> at 5 June 2009.

[120] See, eg, *Koowarta v Bjelke-Petersen* (1982) 153 CLR 168, 220 (Stephen J).

4.6 Interaction of a Human Rights Act with State and Territory laws

Section 109 of the Australian Constitution provides that a State law is invalid to the extent it is inconsistent with a law of the Commonwealth.

Unless it provides otherwise, a Human Right Act would, pursuant to section 109 of the Commonwealth Constitution, render a State law invalid to the extent that State law is inconsistent with a provision of the Human Rights Act.[121] The State law would then be invalid to the extent of its direct inconsistency with the Human Rights Act provision - for example, if the legislation requires a person to do something to protect a right which the State law prohibits, or if the Human Rights Act confers an entitlement that the State law purports to take away or diminish. [122]

Pursuant to section 109 of the Australian Constitution, if a Human Rights Act is expressly intended to "cover the field" to the exclusion of State human rights legislation, and a provision of a State law relates to human rights, then the State legislative provisions will be rendered *entirely* inoperable.

The Commonwealth may not have the power to expressly cover the field if it enacts human rights legislation which is not appropriate or adapted to the purpose of fulfilling its international human rights obligations, particularly if it is less comprehensive than the State laws it seeks to invalidate.[123]

If it was considered desirable to avoid the risk of a Human Rights Act rendering State human rights legislation inoperable, the legislation could expressly indicate that it is not intended to cover the field or operate to the exclusion of a State law.[124]

However, the existence of co-existing Federal and State human rights regimes may reduce the effectiveness of governance and compliance with the legislation, and could create uncertainty to the extent there are any differences in the regimes.

The power of the Commonwealth to make laws with respect to the Territories is broad, wide-ranging and unfettered by the Commonwealth heads of power in section 51 of the Australian Constitution.[125] Inconsistencies between Commonwealth human rights legislation and Territory legislation are in effect inconsistencies with the Commonwealth legislation establishing the Territory legislatures.[126] A Human Rights Act should expressly provide that it prevails over the laws establishing Territory legislatures and any Territory laws, to the extent of any inconsistency, and that it is intended to bind Territory governments and government agencies.

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[121] Philip Lynch and Phoebe Knowles, *The National Human Rights Consultation: Engaging in the Debate* (2009) Human Rights Law Resource Centre 119 <http://www.hrlrc.org.au/files/hrlrc-the-national-human-rights-consultation-engaging-in-the-debate.pdf> at 5 June 2009.

[122] See Tony Blackshield and George Williams, *Australian Constitutional Law and Theory* (4th ed, 2006) 376.

[123] *Commonwealth v Tasmania* (1983) 158 CLR 1, 259 (Deane J) ('*Tasmanian Dams Case*'); *Industrial Relations Act Case* (1996) 187 CLR 416, 486-487 (Brennan CJ, Toohey, Gaudron, McHugh and Gummow JJ).

[124] Tony Blackshield and George Williams, *Australian Constitutional Law and Theory* (4th ed, 2006) 402; *R v Credit Tribunal; Ex parte General Motors Acceptance Corporation* (1977) 137 CLR 545 ('*GMAC Case*').

[125] *Teori Tau v Commonwealth* (1969) 119 CLR 564, 570; *Re Governor, Goulburn Correctional Centre; Ex parte Eastman* (1999) 200 CLR 322.

[126] For example, the *Australian Capital Territory (Self-Government) Act* 1988 (Cth) and the *Northern Territory (Self-Government) Act* 1978 (Cth).

4.7 The impact of human rights legislation in other jurisdictions

In jurisdictions with a legislative charter of rights, such as the ACT, Victoria and the UK, government agencies have noted that the legislation has had a significant and positive impact on law making and government policy. In particular, reported benefits include:

(i) the legislation's significant and beneficial impact on the development of government policy;[127]

(ii) improved government transparency and accountability;[128]

(iii) the legislation has not resulted in a flood of litigation, which is a concern expressed by many about the proposed enactment of legislative rights protection;[129] and

(iv) the legislation has not hampered the Government's ability to deal with crime, or had a detrimental impact on criminal law generally.[130]

4.8 Other methods of protecting and promoting human rights

In addition to implementing legislative rights protection, the Committee should consider enhancing the roles of educational institutions and the AHRC and strengthening or expanding other regulatory instruments.

(a) Educational institutions and the AHRC

Strengthening the powers and functions of existing institutions is a cost effective and efficient supplementary way of enhancing the protection and promotion of human rights in Australia.

Under international law, Australia has a duty to commit to providing human rights education.[131] Currently, human rights education is formally undertaken in Australia by schools and the AHRC.[132] Research on the topic of human rights education in Australian schools has identified that it is an ad hoc process, due to a lack of clear directives from government

[127] Department for Constitutional Affairs (UK), *Review of the Implementation of the Human Rights Act* (2006) 1; Victorian Equal Opportunity and Human Rights Commission, *The 2008 Report on the Operation of the Charter of Human Rights and Responsibilities - Emerging change* (2008) 5.

[128] Department for Constitutional Affairs (UK), *Review of the Implementation of the Human Rights Act* (2006) 1.

[129] ACT Department of Justice and Community Safety, *Human Rights Act 2004: Twelve-Month Review - Report* (2006) 11; Victorian Equal Opportunity and Human Rights Commission, *The 2008 Report on the Operation of the Charter of Human Rights and Responsibilities - Emerging change* (2008) 6.

[130] Department for Constitutional Affairs (UK), *Review of the Implementation of the Human Rights Act* (2006) 1.

[131] This duty is stipulated in several conventions to which Australia is a signatory, including the *International Covenant on Economic, Social and Cultural Rights*, opened for signature 16 December 1966, 993 UNTS 3, art 10 (entered into force 2 January 1976); the *Convention on the Rights of the Child*, open for signature 20 November 1989, 1577 UNTS 3, art 29 (entered into force 2 September 1990); the *International Convention on the Elimination of All Forms of Racial Discrimination*, opened for signature 21 December 1965, 660 UNTS 195, art 7 (entered into force 4 January 1969); *Convention on the Elimination of All Forms of Discrimination against Women*, opened for signature 18 December 1979, 1249 UNTS 13, art 10 (entered into force 3 September 1981). Also, article 26(2) of the Universal Declaration of Human Rights, GA Res 217A, art 26(2) (10 December 1948) specifies that the education provided to all persons shall be directed to strengthening a respect for human rights and fundamental freedoms.

[132] Non-government organisations and community legal centres also undertake human rights education and awareness raising on a more informal basis.

and school administrators, insufficient government-produced teaching materials relating to human rights education, and an overcrowded curriculum.[133]

The United Nations Human Rights Committee's (**"UN HRC**") most recent Concluding Observation on Australia released in April 2009[134] identified the lack of a framework and programme to promote knowledge of the ICCPR and its Optional Protocol amongst the Australian population. We endorse the UN HRC's recommendation that a comprehensive plan of action for human rights education including industry training programmes be adopted and that human rights education be incorporated at every level of general education. The best way to address this aspect of the UN HRC's recommendations would be through schools and the AHRC.

(b) A "human rights tort"

The nature of the rights already protected by the law of torts, and related enforcement mechanisms, raise the possibility of expanding the reach of tort law to incorporate the field of human rights. In the United States, the *Alien Tort Claims Act* ("**ATCA**") establishes a form of 'human rights tort", providing that 'district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States'[135] This provision permits non-US citizens to seek judicial redress in the United States for human rights violations, even if there is no nexus with the United States.[136]

Although enacted in 1789, the ATCA was rarely used until *Filartiga v Pena-Irala*[137] in 1980, in which it was held that a violation of international law triggers the operation of the ATCA, as long as the defendant is properly served with proceedings within the United States.[138] This confirmed that the ATCA can give rise to a discrete cause of action, beyond merely conferring jurisdiction on US courts.

It was also later confirmed in *Kadic v Karadzic*[139] that the ATCA can operate against individual parties acting under state authority, or if an

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[133] Faith Hill, "An Education Revolution for 'the Common Good' - The Role of Human Rights Education', and Paula Gerber, "From Convention to Classroom: The Long Road to Human Rights Education', both in Newell and Offord (eds), *Activating Human Rights in Education: Exploration, Innovation and Transformation* (2008) 27-38, as cited in Human Rights Law Resource Centre, 'Educate, Engage, Empower: Measures set to Promote and Protect Human Rights' (2009) 24 - 25.

[134] UN Human Rights Committee, Consideration of Reports Submitted by State Parties under article 40 of the Covenant: International Covenant on Civil and Political Rights: Concluding Observations of the Human Rights Committee: Australia, [27] CCPR/C/Aus/CO/5, available at http://www.unhrc.org/refworld/docid/491296130.html>. The UN Committee on Economic, Social and Cultural Rights also recommended in its most recent concluding observations on Australia that Australia "*provide human rights education on economic, social and cultural rights to students at all levels of education…*" in UN Committee on Economic, Social and Cultural Rights, Consideration of reports submitted by States parties under articles 16 and 17 of the Covenant on Economic, Social and Cultural Rights: concluding observations of the Committee on Economic, Social and Cultural Rights: Australia, [34], E/C.12/Aus/CO/4, available at <http://www.bayefsky.com/./pdf/australia_t4_cescr_42_adv.pdf>.

[135] 28 U.S.C. § 1350.

[136] See, eg, <http://cyber.law.harvard.edu/torts3y/readings/update-a-02.html> at 24 April 2009.

[137] 630 F.2d 876, 887 (2d Cir. 1980).

[138] <http://cyber.law.harvard.edu/torts3y/readings/update-a-02.html> at 24 April 2009. See also, Gary Hufbauer and Nicholas Mitrokostas, 'International Implications Of The Alien Tort Statute' (2004) 7 *Journal of International Economic Law* 245, 248.

[139] 70 F.3d 232 (2d Cir.1995).

individual breaches a norm of international law, the operation of which extends to the conduct of private parties.[140] Commentators have noted that these (and other similar) decisions have interpreted the "law of nations" broadly, which has given rise to a wide range of human rights-based claims by individuals.[141]

A similar cause of action for use by, and against, non-state entities for human rights violations could also be implemented in Australia by Federal legislation. This would likely draw upon the Commonwealth's external affairs power.[142]

The jurisdictional scope of such a provision would be a question of parliamentary discretion. Although a human rights tort such as that introduced by the ATCA permits judicial redress and enforcement, substantive rights would still need to be enunciated by legislation and / or developed by case law. Furthermore, other aims of statutory human rights protection, such as ensuring that courts interpret legislation consistently with substantive human rights principles, could not be achieved by this method. As a result, features of the torts model, such as availability of monetary compensation and application of protection to a wide range of actors, might be better incorporated into a Human Rights Act as a part of its enforcement mechanism.

(c) Strengthening or expanding regulatory instruments

Federal legislation presently protects only some rights contained in the human rights treaties which Australia has ratified or to which it has acceded. The extent of Australia's legislative implementation of international treaties is discussed in section 1.2 of this Submission.

The protection of human rights could be strengthened by amending existing legislation to address the lacunae in rights protection in Australia. In particular, amendments to existing legislation could increase the scope of protection and provide for the *binding* enforcement of protected rights.

Even if policy and legislative reform results in the strengthening and expanding of these enactments, difficulties arise from relying on human rights being sufficiently protected by a raft of different laws. In particular, this approach is likely to result in poorer governance due to the higher risk of piecemeal and erratic development of human rights law,[143] as well as decreased opportunities to access human rights enforcement and dispute resolution services.

The comparative advantages of a single and centralised human rights protection regime are compelling in this context. Accordingly, we recommend that any strengthening or expansion of existing legislation should be supplementary to the enactment of a Human Rights Act.

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[140] See also <http://cyber.law.harvard.edu/torts3y/readings/update-a-02.html> at 24 April 2009.
[141] Gary Hufbauer and Nicholas Mitrokostas, 'International Implications Of The Alien Tort Statute' (2004) 7 *Journal of International Economic Law* 245, 249.
[142] *Australian Constitution* s 51(xxix). See *Polyukovich v Commonwealth* (1991) 172 CLR 501.
[143] Phillip Lynch and Phoebe Knowles, *The National Human Rights Consultation: Engaging in the Debate*, Human Rights Law Resource Centre; p 24.

(d) Non-legislative options

Better protection of human rights could also be achieved through non-legislative means, such as a "community charter of people's rights and responsibilities".[144] Such a model could express the same substantive rights that we submit should be protected in a Human Rights Act, and would likely act as a source of guidance or inspiration for citizens and communities.

However, a "community charter" would not be enforceable against non-Government or Government actors. Its successful operation would depend upon voluntary compliance.

As a result, we recommend that a Human Rights Act be enacted in order to best ensure compliance with, consideration of, and discussion about, the human rights to which Australia has committed by becoming a signatory to the relevant treaties. The implementation of this legislation should, however, be accompanied by educational and awareness-building measures to ensure that citizens understand and appreciate the rights which are the subject of the legislation, and the manner in which they are protected.

5 What rights should be protected?

Recommendations

We submit that all of the civil and political rights recognised in the ICCPR should be protected under a Human Rights Act (save for those which are irrelevant or require modification in the domestic context).

We submit that all of the economic, social and cultural rights recognised in the ICESCR should be protected under a Human Rights Act, subject to the principle of progressive realisation and save for those which are irrelevant or require modification in the domestic context.

We submit that other rights, such as indigenous rights protected under the DRIP, should also be considered for inclusion under a Human Rights Act (save for those which are irrelevant or require modification in the domestic context).

5.1 What rights should be protected?

In light of the fundamental principle that all human rights are 'universal, indivisible and interdependent and interrelated',[145] we submit that a national Human Rights Act should incorporate economic, social and cultural rights, as well as civil and political rights.

These rights are enshrined in two multilateral human rights treaties, namely the ICCPR and the ICESCR.[146] Together with the UDHR, the ICCPR, the First and

[144] Commonwealth of Australia, National Human Rights Consultation, *National Human Rights Consultation Background Paper* (2008) 14.

[145] Vienna Declaration para 5. The Vienna Declaration was adopted by consensus, and involved 171 States reaffirming their commitment to the UDHR and to the protection of human rights in general.

[146] The ICCPR and ICESCR were adopted by the UN General Assembly in 1966 and entered into force in 1976 after receiving the requisite number of ratifications. Australia ratified the ICCPR

Second Optional Protocols to the ICCPR, and the ICESCR are regarded as the 'international bill of human rights'[147] and as such are particularly relevant to the development of any domestic Human Rights Act. While the UDHR does not expressly impose any international obligations on nations, Australia is obliged to give effect to all provisions of the ICCPR and the ICESCR (other than the specific provisions in relation to which it lodged reservations),[148] pursuant to the Vienna Convention.

In addition to ICCPR and ICESCR rights, we recommend that the Committee considers including indigenous rights, as contained in the DRIP, in a Human Rights Act. While there are many international human rights instruments other than the ICCPR and ICESCR, most clarify or give effect to ICCPR and ICESCR rights.[149] As such, there is no need for additional protection on the basis of those instruments. However, certain rights enshrined in the DRIP do not clearly overlap with the ICCPR and ICESCR, and so should also be considered by the Committee for inclusion in any Human Rights Act.

5.2 Protection of civil and political rights

The substantive civil and political rights protected by the ICCPR are set out in article 1 and Part III of the ICCPR.

Pursuant to art 2(2) of the ICCPR, States Parties undertake to 'adopt such laws or other measures as may be necessary to give effect to the rights recognized in the present Covenant'. Pursuant to article 2(3), States Parties must ensure that people whose rights are violated have an effective remedy. Complaints should be determined by 'competent judicial, administrative or legislative authorities',[150] and a remedy, if granted, should be enforced. The UN Human Rights Committee has stressed that this obligation 'calls for specific activities by the States parties to enable individuals to enjoy their rights'.[151]

Australia made the following declaration upon its ratification of the ICCPR:

> *Australia has a federal constitutional system in which legislative, executive and judicial powers are shared or distributed between the Commonwealth and the constituent States. The implementation of the treaty throughout Australia will be effected by the Commonwealth, State*

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in 1980 and acceded to the First Optional Protocol and the Second Optional Protocol in 1991 and 1990 respectively. Australia ratified the ICESCR in 1975.

147 UN Office of the High Commissioner for Human Rights, *Fact Sheet No. 2 (Rev. 1), The International Bill of Human Rights* (1996) <http://www.unhchr.ch/html/menu6/2/fs2.htm> at 8 May 2009.

148 Australia lodged a number of reservations when it ratified the ICCPR on 13 November 1980. Reservations are statements where a State Party attempts to modify the legal effect of provisions of the treaty as they apply to the State, essentially putting the other parties to the treaty on notice as to how the state will interpret the particular provisions. Many of these have since been withdrawn, with those remaining being reservations in relation to arts 10 (persons deprived of liberty), 14 (right to a fair trial) and 20 (propaganda for war). Australia did not lodge any reservations or declarations when it ratified the ICESCR on 10 December 1975.

149 See, eg, CROC; CRSR; CEDAW; *International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families,* opened for signature 18 December 1990, 2220 UNTS 93 (entered into force 1 July 2003); Convention against Torture; CERD.

150 ICCPR art 2(3).

151 UN Human Rights Committee, *General Comment No. 3: Article 2 Implementation at the National Level*, UN Doc HRI/GEN/Rev.1 (1981).

and Territory authorities having regard to their respective constitutional powers and arrangements concerning their exercise.[152]

Notably, not all ICCPR rights are protected in the legislative or constitutional human rights instruments adopted in other jurisdictions. For example:

(i) the NZ Bill of Rights Act omits the prohibition of slavery (article 8) and the right to marry (article 23);

(ii) the ACT Human Rights Act and the Victorian Charter both omit the right to self-determination (article 1);[153]

(iii) the Victorian Charter includes the additional right not to be deprived of one's property other than in accordance with the law;[154]

(iv) the South African Constitution entrenches certain additional rights such as the right of access to information;[155]

(v) the Canadian Charter excludes a number of ICCPR rights, including the prohibition of slavery (article 8), the right to humane treatment when deprived of liberty (article 10), the right not to be imprisoned merely for inability to fulfil a contractual obligation (article 11) and the right of freedom from interference with private and family life (article 17); and

(vi) the UK Human Rights Act gives domestic effect to the ECHR,[156] which contains certain additional rights such as the right not to be deprived of one's property and the right to education.

5.3 Protection of economic, social and cultural rights

The substantive economic, social and cultural rights protected by the ICESCR are set out in art 1 and Part III of the ICESCR.

Pursuant to art 2(1) of the ICESCR, a State Party 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 realisation of the rights recognised in the present Covenant by all appropriate means, including particularly the adoption of legislative measures.[157]

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[152] United Nations Treaty Collection, *Declarations and Reservations* (2002) UN Office of the High Commissioner for Human Rights <http://www.unhchr.ch/html/menu3/b/treaty5_asp.htm> at 8 May 2009.

[153] However, under s 44 of the Victorian Charter, the Victorian Attorney-General must conduct a review of the Charter after four years of operation, and must consider *inter alia* whether the right to self-determination should be included in the Victorian Charter. See s 44(2)(b).

[154] Victorian Charter s 20.

[155] South African Constitution s 32.

[156] See UK Human Rights Act s 1, sch 1.

[157] The UN CESCR has emphasised that 'although the full realisation of the relevant rights may be achieved progressively', art 2(1) requires targeted steps to be taken towards meeting the ICESCR

Therefore, under international law, Australia is obliged to take steps to achieve progressively the full realisation of all rights contained in the ICESCR.

The UN CESCR has considered the domestic application of the ICESCR.[158] The Committee 'strongly encourages' formal adoption or incorporation of the provisions in domestic law, whilst expressly recognising that the ICESCR does not oblige States to do so.[159] In particular, the UN CESCR considers that the adoption of a rigid classification of economic, social and cultural rights which puts these rights beyond the reach of courts would be arbitrary, and incompatible with the principle that the two sets of human rights (ICCPR and ICESCR) are indivisible and interdependent.[160]

Economic, social and cultural rights are arguably fundamentally linked to civil and political rights, in that the enjoyment of economic, social and cultural rights may be a necessary precondition for the enjoyment of civil and political rights. In its most recent Concluding Observations on Australia's compliance with the ICCPR, the UN Human Rights Committee concluded that '[Australia] should increase its efforts in order to ensure that social, economic and other conditions do not deprive homeless persons of the full enjoyment of the rights enshrined in the [ICCPR].'[161]

Further, the UN CESCR continues to encourage incorporation of the terms of the ICESCR in judicially enforceable human rights legislation. In 2000, the UN CESCR expressed its 'deep concern' with Australia's failure to provide minimum standards to indigenous peoples, particularly in the fields of employment, housing, health and education.[162] It noted that it is partly Australia's failure to implement economic, social and cultural rights at a federal and state level which impedes 'the full recognition and applicability of [ICESCR] provisions', and recommended that Australia 'incorporate the Covenant in its legislation, in order to ensure the applicability of the provisions of the Covenant in the domestic courts'.[163]

In its most recent consideration of Australia's compliance with its ICESCR obligations earlier this year, the UN CESCR expressed regret that the ICESCR had not been incorporated into domestic legislation despite its recommendations adopted in 2000. The UN CESCR further called on the Federal Government to 'consider the introduction of a Federal charter of rights that includes recognition and promotion of economic, social and cultural rights', and for the National

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obligations: UN CESCR, *General Comment No 3: The Nature of States Parties Obligations*, UN Doc E/1991/23, Annex III (1990).

[158] UN CESCR, *General Comment No 9: The Domestic Application of the Covenant,* UN Doc E/C.12/1998/24 (1998). The principle that civil and political rights and economic, social and cultural rights are indivisible and interdependent is enshrined in the Vienna Declaration para 5.

[159] UN CESCR, *General Comment No 9: The Domestic Application of the Covenant*, [8], UN Doc E/C.12/1998/24 (1998).

[160] UN CESCR, *General Comment No 9: The Domestic Application of the Covenant*, [10], UN Doc E/C.12/1998/24 (1998).

[161] UN Human Rights Committee, *Consideration of Reports Submitted by States Parties under Article 40 of the Covenant: Concluding Observations of the Human Rights Committee - Australia*, [18], UN Doc CCPR/C/AUS/CO/5 (2009).

[162] UN CESCR, *Consideration of the 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*, [15], UN Doc E/C.12/1/Add.50 (2000).

[163] UN CESCR, *Consideration of the 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*, [24], UN Doc E/C.12/1/Add.50 (2000).

Human Rights Consultation Committee to consider economic, social and cultural rights when it is preparing its recommendations to Government.[164]

(a) Progressive implementation and maximum resources

In its General Comment No 3, the UN CESCR considered the nature of the obligations imposed by art 2(1) of the ICESCR. It observed that states are bound to 'take steps' that are 'deliberate, concrete and targeted as clearly as possible to meeting the obligations recognized under the Covenant' and to use 'all appropriate means' to do so, including legislative, administrative, financial, educational and social measures and judicial remedies.[165] While noting that these rights may be achieved progressively, the UN CESCR observed that there is, nonetheless, 'an obligation to move as expeditiously and effectively as possible towards that goal'.[166] There is also a minimum obligation to meet 'minimum essential levels' of each of the rights protected by the ICESCR.[167]

Early in the development of international human rights treaties, it was decided to divide civil and political rights and economic, social and cultural rights into two separate Covenants. Differences were said to exist in the nature of the legal obligations and the systems of supervision that could be imposed, because:[168]

(i) ICCPR rights were typically negative and capable of implementation immediately by any state; whereas

(ii) ICESCR rights were mostly positive and susceptible only of progressive and differential compliance as each state's economy permitted.[169]

Article 2(1) of the ICESCR requires each State Party to take steps 'to the maximum of its available resources'. This requires a State to demonstrate that 'every effort has been made to use all resources that are at its disposition' and 'to strive to ensure the widest possible enjoyment of the relevant rights under the prevailing circumstances'.[170] The Limburg Principles require that in the use of available resources, States should be mindful of the need to ensure everyone 'satisfaction of subsistence requirements as well as the provision of essential services'.[171] Significantly, in its Concluding Observations dated 22 May 2009 the UN CESCR noted 'the absence of any significant factor or difficulties impeding the effective implementation of the Covenant' in Australia.[172]

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164 UN CESCR, *Consideration of the 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*, [11], UN Doc E/C.12/AUS/CO/4 (2009).

165 UN CESCR, *General Comment No 3: The Nature of States Parties Obligations*, [2]-[3], UN Doc E/1991/23, Annex III (1990).

166 UN CESCR, *General Comment No 3: The Nature of States Parties Obligations*, [9], UN Doc E/1991/23, Annex III (1990).

167 UN CESCR, *General Comment No 3: The Nature of States Parties Obligations*, para 10, UN Doc E/1991/23, Annex III (1990).

168 David Harris, *Cases and Materials on International Law* (2004) 741.

169 Ibid.

170 UN CESCR, *General Comment No 3: The Nature of States Parties Obligations*, [11], UN Doc E/1991/23, Annex III (1990).

171 *Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights*, UN ESCOR, 4th Comm, 43rd sess, Annex, [28], UN Doc E/CN.4/1987/17 (1987); UN CESCR, *General Comment No 3: The Nature of States Parties Obligations*, [9], UN Doc E/1991/23, Annex III (1990).

172 UN CESCR, *Consideration of the 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*, [9], UN Doc E/C.12/AUS/CO/4 (2009).

(b) Are all ICESCR rights protected in other jurisdictions?

Despite the above, very few jurisdictions have sought to protect economic, social and cultural rights through the inclusion of the ICESCR rights in legislative or constitutional human rights instrument.

In South Africa, one of the few exceptions, economic, social and cultural rights (as well as civil and political rights) are constitutionally entrenched. The South African government is obliged under its domestic law to 'take reasonable legislative and other measures' to provide health care, food and water and social security to its people.[173] For example, in the *Treatment Action Campaign* case,[174] an antiretroviral drug preventing intrapartum mother-to-child transmission of HIV had been made available only at a small number of research facilities. The claimants sought an order that the program be extended to all pregnant women. South Africa's Constitutional Court held that the government was required to devise and implement a comprehensive and coordinated program 'to realise progressively the rights of pregnant women and their newborn children to have access to health services to combat mother-to-child transmission of HIV'. Failure to do so was held to breach s 27 of the South African Constitution, as the government had failed 'to act reasonably to provide access to the socio-economic rights'.[175]

In Europe, whilst the ECHR does not enshrine economic, social and cultural rights, some limited economic, social and cultural rights are set out in the optional protocols to the Convention. However, the European Social Charter, which was first adopted by the Council of Europe in 1961,[176] does seek to protect social and economic human rights, and establishes a supervisory mechanism guaranteeing their respect by the States Parties.

The UK JCHR has investigated the potential for economic, social and cultural rights to be included in the UK Human Rights Act.[177] Although the UK JCHR recommended in 2008 that the UK Human Rights Act should cover economic, social and cultural rights,[178] the UK Government has not yet taken any steps to follow this recommendation.

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173 South African Constitution s 27.

174 *Minister of Health v Treatment Action Campaign (No 2)* (2002) 5 SA 721.

175 *Minister of Health v Treatment Action Campaign (No 2)* (2002) 5 SA 271, [38].

176 The 1996 revised European Social Charter, which came into force in 1999, is gradually replacing the initial 1961 treaty: Council of Europe, *European Social Charter (Revised)*, 3 May 1996, ETS 163, available at: http://www.unhcr.org/refworld/docid/3ae6b3678.html; Council of Europe, *European Social Charter*, 18 October 1961, ETS 35, available at: http://www.unhcr.org/refworld/docid/3ae6b3784.html.

177 UK JCHR, *Twenty-Ninth Report* (2008) ch 5.

178 UK JCHR, *Twenty-Ninth Report* (2008) [191]:

> "*In our view the main objections to the inclusion of social and economic rights in a Bill of Rights are not, in the end, objections of principle, but matters which are capable of being addressed by careful drafting. Having given the matter further attention, as recommended by our predecessor Committee, we are persuaded that the case for including economic and social rights in a UK Bill of Rights is made out. We agree with Justice Albie Sachs who told us during our visit to South Africa that a country which does not include social and economic rights in some form in its Bill of Rights is a country which has "given up on aspiration". We consider that rights to health, education and housing are part of this country's defining commitments, and including them in a UK Bill of Rights is therefore appropriate, if it can be achieved in a way which overcomes the traditional objections to such inclusion."*

In Australia, neither the ACT Human Rights Act nor the Victorian Charter protect economic, social and cultural rights (despite the ACT Consultative Committee recommending that ICESCR Rights should be included).[179]

(c) Difficulties relating to the inclusion of economic, social and cultural rights

The inclusion of economic, social and cultural rights in a Human Rights Act is more contentious than the inclusion of civil and political rights. In some respects, this can be attributed to perceived ambiguities associated with states' duties under article 2(1) of the ICESCR.

However, clarity regarding the content of economic, social and cultural rights has been improved through three avenues:

(i) the UN CESCR has elaborated on many of the rights through the production of 19 General Comments which, together with the UN CESCR's Concluding Observations on States Parties' reports, have helped to more comprehensively articulate the content of the ICESCR rights and the nature of States Parties' obligations;

(ii) academics and NGOs have contributed significantly to the normative development of economic, social and cultural rights;[180] and

(iii) jurisprudence on economic, social and cultural rights has expanded in recent years, following greater constitutional and domestic recognition of those rights.[181]

One issue raised in relation to the inclusion of such rights in a Human Rights Act is that to allow any judicial enforceability of those rights, the courts will likely be required to evaluate decisions involving complex social policy and substantial resource allocation issues, with little guidance. This concern could be limited by expressly deferring to the Government in evaluating the reasonableness of legislation. In the *Grootboom* case concerning forced evictions into homelessness, the South African Constitutional Court observed:

> *A court considering reasonableness will not enquire whether other or more desirable or favourable methods could have been adopted, or whether public money could have been better spent … It is necessary to recognise that a wide range of possible measures could be adopted by the state to meet its obligations. Many of these could meet the test of reasonableness.*[182]

Hence, courts could allow for a 'margin of appreciation', or sphere of deference when interpreting the content of any economic, social and cultural rights. This is

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179 See ACT Bill of Rights Consultative Committee, ACT Legislative Assembly, *Towards an ACT Human Rights Act: Report of the ACT* (2003) 6; Human Rights Consultation Committee, *Rights, Responsibilities and Respect* (2005) 46-7.

180 For example, the *Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights* (1986), and the *Maastricht Guidelines on Violations of Economic, Social and Cultural Rights* (1997) were produced by experts in international law. These documents analyse the particular content of various economic, social and cultural rights, and establish a comprehensive and methodological approach to those rights based on the obligations to respect, protect and fulfil rights.

181 See, eg, the decision of the South African Constitutional Court in *Government of the Republic of South Africa v Grootboom* 2000 (11) BCLR 1169.

182 *Government of South Africa v Grootboom* (2000) 11 BCLR 1169 [41].

a recurring feature in international human rights law jurisprudence.[183] It allows limited judicial review that safeguards minimum human rights standards whilst respecting the principle of parliamentary sovereignty.

Additionally, the UN CESCR considers that:

> *while the respective competences of the various branches of government must be respected, it is appropriate to acknowledge that courts are generally already involved in a considerable range of matters which have important resource implications.*[184]

In order to best address any difficulties said to arise from the inclusion of economic, social and cultural rights in a Human Rights Act, we submit that an independent cause of action should not be provided for potential breaches of these rights (discussed in detail at section 9.9 of this Submission).

5.4 Protecting 'third generation rights'

There is emerging human rights jurisprudence in the area of 'third generation rights.'[185] These rights differ from the civil and political and economic, social and cultural rights by locating the rights in social groups or peoples rather than individuals.

These rights include the right to development,[186] the right of current and future generations to a healthy environment,[187] the right to peace[188] and collective rights such as indigenous rights[189] and minority rights.[190] None of these rights exist in any instrument binding at international law, and are therefore often characterised as aspirational in nature. However, some of these rights have received protection in other jurisdictions, including South Africa, which has constitutionally enshrined the right 'to have the environment protected for the benefit of present and future generations.'[191]

While these rights are non-binding at international law, this should not preclude the Committee from considering their inclusion in a national Human Rights Act where those aspirations are sufficiently clear and appropriate to Australia's condition. One such example is the rights of indigenous peoples.

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183 See, eg, *Lawless v Ireland (No. 3)* (1961) 1 EHRR 15, 82; *Handyside v United Kingdom* (1976) 1 EHRR 737; *Ireland v United Kingdom* (1980) 2 EHRR 25, 86-87.

184 UN CESCR, *General Comment No 9: The Domestic Application of the Covenant*, [10], UN Doc E/C.12/1998/24 (1998).

185 The term 'third generation rights' has been attributed to Karel Vasak.

186 *Declaration on the Right to Development*, GA Res 41/128, 41st sess, 97th plen mtg, UN Doc A/Res/41/128 (1986).

187 See *Rio Declaration on Environment and Development* ("**Rio Declaration**"), Report of the United Nations Conference on Environment and Development, A/CONF.151/26 (Vol I) (1992). The Rio Declaration was adopted by a consensus of 172 States. See also *Declaration on the Human Environment* ("**Stockholm Declaration**"), Report of the United Nations Conference on the Human Environment, 21st plen mtg, A/CONF.48/14/Rev.1 (1972). The Stockholm Declaration was adopted by a consensus of 113 States.

188 *Declaration on the Right of Peoples to Peace*, GA Res 39/11, 39th sess, 57th plen mtg, UN Doc A/Res/39/11 (1984).

189 DRIP.

190 *Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities*, GA Res 47/135, 47th sess, 92nd plen mtg, UN Doc A/Res/47/135 (1992).

191 South African Constitution s 24.

(a) Protection of the rights of indigenous peoples

The DRIP was adopted in 2007 by an overwhelming majority of the UN General Assembly with 143 votes in favour, 4 negative votes (Australia, New Zealand, Canada and the United States) and 11 abstentions.

On 3 April 2009, Australia announced its official support for the DRIP.[192] While Declarations adopted by General Assembly Resolution are not binding at international law, they can contribute to the development of customary international law,[193] and therefore should be considered for implementation domestically in a Human Rights Act.

Some of the rights under the DRIP merely require the non-discriminatory application of civil and political and economic, social and cultural rights to indigenous persons.[194] The DRIP also gives effect to the indigenous peoples' right of self-determination in respect of internal and local affairs.[195] This does not permit any action which threatens the territorial integrity of a State Party.[196]

However, the DRIP goes further and grants specific collective rights which do not apply to the rest of the population. The Preamble states that 'indigenous peoples possess collective rights which are indispensable for their existence, well-being and integral development as peoples.' These rights are recognised because of their special importance to indigenous people, the special vulnerability and disadvantage that indigenous people have experienced and continue to experience, as well as the general benefit of cultural diversity.[197]

The rights relate to the maintenance and development of political, legal, economic, social and cultural institutions, spiritual and religious traditions, customs, history, traditional knowledge and traditional land. These rights are vested in the indigenous people as a collective and as individuals,[198] to be exercised by their chosen representatives[199] or by the state in their interests in consultation and cooperation with indigenous peoples.[200] Collectively, the special rights further enhance the right of self-determination that forms the cornerstone of the DRIP.

Certain additional factors which make it suitable as a starting point for the protection of third generation rights:

(i) the DRIP essentially applies the civil and political right of self-determination to the special circumstances of indigenous peoples. Therefore, the same considerations that weigh in favour of protecting civil and political rights should equally apply to the protection of rights of indigenous peoples;

(ii) unlike other rights such as the right to development, the DRIP is specific and clear and includes rules of practical application;

192 Jenny Macklin, 'Statement on the United Nations Declaration on the Rights of Indigenous Peoples' (Speech delivered at Parliament House, Canberra, 3 April 2009) <http://www.alp.org.au/media/0409/speia030.php> at 8 May 2009.
193 See *Legality of the Threat or Use of Nuclear Weapons (Advisory Opinion)* [1996] ICJ Rep 226, [70].
194 See, eg, DRIP arts 2, 9, 14, 16, 17(3), 21(1), 24(1).
195 DRIP arts 3, 4.
196 DRIP art 46(1).
197 DRIP Preamble.
198 DRIP art 1.
199 See, DRIP art 18.
200 DRIP art 38.

(iii) the DRIP is highly relevant to Australia with its unique cultural heritage and the important role it could have in 'closing the gap'[201] between the standard of living of indigenous and non-indigenous peoples; and

(iv) the current government has recently expressed a commitment to the rights of indigenous peoples with Prime Minister Rudd's national apology[202] and the Minister for Families, Community Services and Indigenous Affairs' speech expressing Australia's support for the DRIP.[203]

However, the inclusion of DRIP rights will require modification of some rights in their original form, to take into account Australia's specific circumstances, and the extent to which those rights may not be compatible with the ICCPR and ICESCR rights incorporated in a Human Rights Act (eg in relation to indigenous customary practices).

(b) Other 'third generation rights'

The emphasis on the rights of indigenous peoples should not preclude the Committee from considering the protection of other third generation rights in the future. It may be appropriate to include indigenous rights in a Human Rights Act and use them to gauge the efficacy of later protecting other third generation rights.

An important aspect of the protection of third generation rights is the recognition that human rights are not fixed in time and are constantly developing. Consequently, the Committee should consider a review process whereby such rights may be added to the national Human Rights Act as they develop into more clearly defined rights, and particularly when such rights become binding at international law.

5.5 Proposed wording of rights to be protected

We submit that the Committee should, as far as possible, adopt the wording of the international instruments upon which the protected rights are based (that is, the ICCPR, ICESCR and the DRIP). Using the same wording has a number of benefits. First, Courts will be able to readily draw upon the wealth of international jurisprudence in the area of human rights.[204] International jurisprudence will also assist the legislature when it is considering the compatibility of legislation, and, just as importantly, will assist the community in understanding the Human Rights Act. Second, Australia would be able to more

201 Jenny Macklin, 'Statement on the United Nations Declaration on the Rights of Indigenous Peoples' (Speech delivered at Parliament House, Canberra, 3 April 2009) <http://www.alp.org.au/media/0409/speia030.php> at 8 May 2009, quoting an Aboriginal woman: 'Closing the gap is not just about bricks and mortar, it is about self esteem, price, acceptance, and a recognition of the humanity of our peoples'.

202 Kevin Rudd, 'Apology to Australia's Indigenous Peoples' (Speech delivered at House of Representatives, Parliament House, Canberra, 13 February 2008) <http://www.pm.gov.au/media/speech/2008/speech_0073.cfm> at 9 June 2009.

203 Jenny Macklin, 'Statement on the United Nations Declaration on the Rights of Indigenous Peoples' (Speech delivered at Parliament House, Canberra, 3 April 2009) <http://www.alp.org.au/media/0409/speia030.php> at 8 May 2009.

204 The UN Human Rights Committee has built up a significant jurisprudence on the interpretations of the provisions of the Covenant. It has also developed General Comments on the meaning of the various provisions of the ICCPR, which give a detailed explanation of the content of the rights. Also of considerable assistance will be judicial decisions from overseas jurisdictions, such as Canada, New Zealand, South Africa and the UK, as well as regional human rights bodies such as the ECHR and the Inter-American Court of Human Rights.

effectively contribute to the development of international human rights jurisprudence. Third, this approach is consistent with the principle that all human rights are universal.

Where appropriate, it may be beneficial to depart from the ICCPR, ICESCR and DRIP wording in some instances to take into account the modernisation of language, and the specific circumstances of Australia and the Australian people, as has been done in other jurisdictions.[205] For example, the Committee may consider making it clear that the right to life only applies after birth.[206] Further, arts 6(2) to 6(6) of the ICCPR concern countries that have not abolished the death penalty (and such provisions are clearly irrelevant to Australia), and therefore do not need to be included.

However, it should be noted that making substantive changes to the wording contained in the ICCPR and ICESCR risks falling short of the standards required by those treaties. For example, the Victorian charter restricts the right to vote to 'eligible persons', which is a limitation not contained in the ICCPR.[207]

Both the Victorian Charter and the ACT Human Rights Act use gender neutral language. We submit that corresponding changes to ICCPR and ICESCR wording should also be made in a national Charter of Rights.

6 Limitations on rights

Recommendations

The provision specific limitation mechanism provided for in the ICCPR should be adopted in a Human Rights Act.

Should a global limitation clause be adopted, however, a Human Rights Act should include the following safeguards

(i) certain human rights should be expressed as being absolute and beyond the scope of limitation in any circumstances;

(ii) certain human rights should be subject to specific internal qualification; and

(iii) certain mandatory considerations should attach to a limitation mechanism that must be taken into account when determining the legality of a particular instance of limitation.

[205] See, eg, the ACT Human Rights Act. See also ACT Bill of Rights Consultative Committee, ACT Legislative Assembly, *Towards an ACT Human Rights Act: Report of the ACT* (2003) 90-3. The point that national human rights legislation should be worded so as to provide for the exigencies of the particular jurisdiction has also been made in the context of the proposal to implement a Bill of Rights for Northern Ireland. See Northern Ireland Human Rights Commission, *A Bill of Rights for Northern Ireland: Advice to the Secretary of State for Northern Ireland* (2008) 61-3, 72, 80, 86, 94.

[206] This approach has been taken in both the ACT and Victoria. ACT Human Rights Act s 9(2) provides 'This section [the right to life] applies to a person from the time of birth'. The Victorian Charter s 48 provides 'Nothing in this Charter affects any law applicable to abortion or child destruction'.

[207] Victorian Charter s 18.

The Human Rights Act should only permit derogations to the extent strictly required by the exigencies of the situation.

The Human Rights Act should limit the measures which may be adopted in times of emergency to those which satisfy the international law standards of necessity, proportionality and non-discrimination.

While the overriding objective of a human rights instrument is to promote respect, protection and fulfilment of human rights to the greatest extent possible, it is practically unworkable for all human rights to be absolute.

A human rights instrument must allow for appropriate limitation of rights in order to enable the balancing of competing rights. It may be necessary, for example, to limit one's right to freedom of expression in order to protect the rights and reputation of others. It is also necessary to limit rights where they may conflict with aspects of the public interest, such as public health, protecting the community from crime, and protection of national security. The need to appropriately limit rights is recognised in both the ICESCR and the ICCPR.[208]

In addition to limitations on human rights, international human rights law also permits States to derogate from, or suspend, human rights obligations in 'times of emergency'. Derogations differ to limitations insofar as they are applicable only in *exceptional circumstances* where there is a serious threat to the survival and security of the nation. Such derogations are temporary and terminate upon the cessation of the emergency.[209]

6.1 Limitation mechanism

Several jurisdictions have adopted a global limitation clause in their human rights instruments.[210] Such clauses generally provide that enumerated rights are subject to any reasonable limits set by law that can be demonstrably justified in a free and democratic society. The form of words used in each jurisdiction is similar.[211]

We submit that this rights-restricting mechanism is less than ideal for a number of reasons. In comparison with the alternative discussed below, a global limitation clause will necessarily be unstructured, providing little guidance on how the provision should be interpreted and applied. Such a clause is therefore open to a wide discretion in its application by both the courts, and those who apply it on a day-to-day basis. There is a risk that it could be interpreted so broadly as to render enumerated rights without substance. Conversely, there is a risk that the clause will be interpreted too narrowly, potentially stifling the government's ability to balance competing demands.

Another key concern regarding the inclusion of a global limitation clause arises if, as in some jurisdictions, the human rights instrument fails to identify certain rights as being absolute, so that it potentially applies to all enumerated human rights. In such a scenario, the clause could be used to justify limitations on rights that are considered to be absolute in international law.[212]

[208] See, eg, Article 4 of the ICESCR and Article 18 of the ICCPR.
[209] See Henry J Steiner, Philip Alston, Ryan Goodman, *International Human Rights in Context: Law, Politics, Morals* (3rd ed, 2007) ch 5.
[210] See human rights instruments of Victoria, ACT, New Zealand, South Africa, and Canada.
[211] See eg, ACT Human Rights Act, s28.
[212] See ICCPR, art 4, which list rights considered to be absolute.

There are some safeguards that could be implemented to partly counteract the deficiencies in this mechanism, which are discussed below.

The alternative to a global limitation clause is to allow for provision-specific limitations, whereby limitations attaching to particular rights are expressly provided on a clause-by-clause basis.[213] This method is adopted by the ICCPR[214] and the *European Convention for the protection of Human Rights and Fundamental Freedoms* ("**ECHR**").[215] Such clauses generally provide that rights are guaranteed subject to lawful restrictions that are necessary and justifiable by reference to particular objectives such as the protection of national security, public order or public health.[216] The potential to limit rights is further expressly confined for certain rights such as the right to freedom of expression.[217]

The advantage with this approach over the global limitation approach is that it provides more certainty as to circumstances in which limitations are allowable and the extent to which a right can be limited. It also means that allowable limitations are intended to be specifically tailored to the particular right in question. On the other hand, it may be too prescriptive an approach, and reduce the necessary flexibility to consider the appropriateness of rights being limited in a particular scenario.

We submit that the provision-specific limitation mechanism is preferable to the global limitation mechanism, as we consider it provides greater assurance that rights will not be limited beyond what is ordinarily accepted in international law. Accordingly, we submit that the framework and wording of the ICCPR limitation mechanism should be adopted in any human rights instrument implemented by the Commonwealth.

If however a global limitation clause was adopted, we submit that certain safeguards should be included:

(i) certain absolute rights should be expressed as being beyond the scope of limitation;

(ii) the rights considered absolute in the ICCPR should be adopted for this purpose.[218] We submit that it is inappropriate for these rights to be limited in any situation since there are no foreseeable circumstances in which it would be defensible to limit these rights in a democratic society;

(iii) certain rights should be subject to specific internal qualification. For example, the ICCPR expresses that the right to liberty and security of the person is qualified in specified circumstances, such as lawful detention after conviction by a court.[219] By including specific internal qualifications, the scope of what would constitute legitimate and necessary limitation is made more certain. The ICCPR should be used as a guide to

[213] See, eg, ICCPR and ECHR.
[214] ICCPR, arts 12, 18, 19, 21 and 22.
[215] ECHR, arts 8-11.
[216] See, eg, ICCPR, art 12.
[217] See ICCPR, art 19.
[218] See ICCPR, art 4.
[219] ICCPR, art 9.

determine which rights should be internally qualified, and how, in an Australian human rights instrument;[220] and

(iv) certain mandatory considerations should attach to a global limitation clause, which must be taken into account when determining the legality of a particular instance of limitation.

The Victorian Charter[221] provides the following mandatory considerations that must be taken into account:

(A) the nature of the right;

(B) the importance of the purpose of the limitation;

(C) the nature and extent of the limitation;

(D) the 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.

We submit that these mandatory considerations provide a sensible compromise that should be followed should a global limitation clause be adopted in an Australian human rights instrument. The inclusion of such safeguards limits the potential scope of limitation, providing greater certainty and accountability than a global limitation clause would otherwise provide.

6.2 Application of a limitation mechanism

In order to understand the potential scope of a limitation mechanism, regard can be had to international human rights jurisprudence. In Canada, a proportionality test is applied to the question of whether a particular instance of limitation is permissible. The Canadian test involves asking whether:

(i) the objective of the limitation is of "sufficient importance to warrant overriding" a protected right and whether such an objective relates to "concerns which are pressing and substantial"; and

(ii) the method chosen to achieve the objective is reasonable and demonstrably defensible. As to this question, a court will consider whether the means adopted is "designed to meet the objective in question", whether it impairs rights as little as is necessary and whether there is proportionality between the effects of the measures and the objective which the limiting method is seeking to achieve.[222]

Both the ACT and Victorian human rights instruments expressly provide that international human rights jurisprudence may be considered in interpreting the scope of a human right.[223] We submit that a similar express provision applying to the interpretation of a limitation mechanism is essential. This would enable

[220] See ICCPR, arts 8,9 and 14.
[221] Victorian Charter s7(2).
[222] See *R v Oakes* [1986] 1 SCR 103, 137-8, *R v Edwards Brookes and Art Ltd* (1986) 28 CRR 1; *Rights, Responsibilities and Respect - The Report of the Human Rights Consultation Committee,* State of Victoria, Department of Justice, 2005, p 47.
[223] See ACT Human Rights Act s 31 and Victorian Charter s 32(2).

Australian courts to draw on the wealth of knowledge and experience of other jurisdictions practised in this area, helping to ensure that the limitation mechanism is used appropriately in accordance with circumstances envisaged by international conventions.

Furthermore, it is strongly advisable, as a measure of accountability, that any human rights instrument should require a member of parliament to produce a statement of compatibility with the introduction of any new legislation, setting out "any limitation placed upon any human right, the importance and purpose of this limitation, the nature and extent of the limitation, the relation between the limitation and its purpose and whether there is any less restrictive means to achieve the purpose".[224] Such a requirement is partly taken up by the VHRA.[225] This is further discussed in section 9 below.

6.3 Derogation in Times of Emergency

In addition to limitation clauses, international human rights instruments contain provisions allowing derogation from human rights obligations in times of emergency.

The key components of a derogation clause requiring definition in a Human Rights Act are:

(i) what constitutes a 'state of emergency'?

(ii) what is the appropriate scope of derogations in a state of emergency? (ie which human rights are derogable and non-derogable)?

(iii) what measures may be adopted vis-à-vis the emergency?

Article 4 of the ICCPR is an authoritative starting point for analysis of derogation clauses. Article 4(1) defines a 'public emergency' as a situation which threatens the life and existence of the nation. Given the serious consequences of a declaration of a state of emergency, it should be limited to situations which threaten 'the life and existence of the nation' as per ICCPR art 4(1).[226]

It is submitted that ICCPR art 4 represents the international human rights standard regarding derogation clauses and is preferable to the 'exceptional circumstances' override in the Victorian Charter.[227] The use of a broad override provision as opposed to a specific derogation clause potentially breaches human rights law by permitting derogations from rights which are otherwise considered *jus cogens* or absolute.[228]

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[224] This was recommended by Victorian Human Rights Consultation Committee: *Rights, Responsibilities and Respect - The Report of the Human Rights Consultation Committee,* State of Victoria, Department of Justice, 2005, p 71.

[225] Victorian Charter s 28; see also ACT Human Rights Act s 37.

[226] ICCPR art 4; Human Rights Committee, *Concluding Observations by the Human Rights Committee: Colombia*, CCPR/C/79/Add.76 (Concluding Observations/Comments) [25].

[227] See Victorian Charter s 31(3) - (9). See also Julie Debeljak, '*Balancing Rights in a Democracy: the Problems with Limitations and Overrides of Rights Under the Victorian Charter of Human Rights and Responsibilities Act 2006*', (2008) 32 *Melbourne University Law Review,* 434.

[228] See Julie Debeljak, '*Balancing Rights in a Democracy: the Problems with Limitations and Overrides of Rights Under the Victorian Charter of Human Rights and Responsibilities Act 2006*', (2008) 32 *Melbourne University Law Review,* 428.

In addition, it is submitted that the *Greek Case*[229] criteria for defining a 'public emergency' constitutes an appropriate model for drafting the definition of 'a state of emergency' for a Human Rights Act:

(i) it must be actual or imminent;

(ii) its effects must involve the whole nation;

(iii) the continuance of the organised life of the community must be threatened; and

(iv) the crisis or danger must be exceptional, in that the normal measures or restrictions permitted by the Convention for the maintenance of public safety, health and order, are plainly inadequate.[230]

Under ICCPR art 4(1) derogations are limited to 'the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their other obligations under international law and do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin.'

Importantly, ICCPR art 4(2) prohibits derogations from certain 'core', or non-derogable, human rights such as the right to life, freedom of thought, conscience and religion and prohibitions on genocide, torture, slavery, and cruel, inhuman or degrading treatment.

General Comment 29 elaborates on ICCPR art 4 and is the 'most comprehensive discussion'[231] of derogations in times of emergency vis-à-vis the UN system. The Committee[232] made the following key comments:

(i) the restoration of the normal legal situation must be the predominant objective of a derogating state;

(ii) the decision to proclaim a state of emergency as well as the measures adopted must be lawful and carefully justified;

(iii) not every disturbance or catastrophe qualifies as a public emergency threatening the life of a nation;

(iv) the measures, duration, geographical coverage, and material scope of the state of emergency should be strictly limited (or 'proportional') to the exigencies of the situation;

(v) when reporting derogations States should advert to their other obligations protecting human rights in times of emergency including taking into account recent developments in those areas of international law;

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229 (1969) 12 YB 1, [159].

230 See also Inter-American Commission on Human Rights, Organisation of American States, *Second Report on the Situation of Human Rights in Peru* (2000) OEA/Ser.L/V/II.106 [70]; h Joseph, Jenny Schultz and Melissa Castan, *The International Covenant on Civil and Political Rights: Cases, Materials and Commentary* (2nd ed, 2004) 824–5.

231 Office of the High Commissioner for Human Rights, *Digest of Jurisprudence of the UN and Regional Organizations on the Protection of Human Rights while Countering Terrorism* (2003) < http://www.ohchr.org/Documents/Publications/DigestJurisprudenceen.pdf> at 20 April 2009.

232 See Human Rights Committee, General Comment 29 (on Article 4), UN Doc CCPR/C/21/Rev.1/Add.11, 24 July 2001.

(vi) art 4 cannot be used to justify any action taken under State authority in a time of emergency giving rise to individual criminal responsibility for crimes against humanity;

(vii) the non-derogable rights listed in art 4(2) should also include persons' right to respect and dignity who have been deprived of their liberty, prohibitions on hostage taking, abductions, or unacknowledged detention, rights of persons belonging to minorities, deportation or forcible transfer of population without grounds, no declarations by State's justifying war propaganda, advocacy of national, racial or religious hatred that would constitute incitement to discrimination, hostility or violence; and

(viii) a right to fair trial is non-derogable (given it is guaranteed in times of war) and includes the presumption of innocence and trial and punishment by a properly constituted court.

It is submitted that a Human Rights Act should adopt the Committee's comments identify important areas requiring consideration in drafting Human Rights Act provisions permitting derogation from human rights.

When a public emergency does in fact occur, it raises the issue of what measures may be adopted vis-à-vis the emergency. It is submitted that the scope of permissible measures are those which meet the international law standards of necessity, proportionality and non-discrimination.

Adapting art 15 of the ECHR, derogations will be necessary and proportionate if they are 'rationally connected to', and are 'no more than is necessary to', combat the particular threat.

7 Whose rights should be protected?

Recommendation

A Human Rights Act should protect the rights of all natural persons. Human rights attach to all human beings, so a Human Rights Act should protect all people in Australia irrespective of whether they are citizens and regardless of other attributes such as race or religion. However, rights should not be conferred on corporations or other legal persons.

7.1 Individuals

We submit that a Human Rights Act should protect the rights of individuals consistently with Australia's international obligations and prevailing international and domestic practice. The ICCPR and the ICESCR both recognise "the inherent dignity and… the equal and inalienable rights of all members of the human family"[233] by enshrining various individual rights. This approach is mirrored in existing instruments protecting human rights such as those in the ACT,[234] Victoria,[235] and South Africa.[236]

233 ICCPR, preamble; ICESCR, preamble.
234 ACT Human Rights Act.
235 Victorian Charter.
236 South African Constitution.

7.2 Non-citizens

We submit that non-citizens should, by virtue of their status as individuals, be entitled to human rights without discrimination unless exceptional distinctions between citizens and non-citizens serve a legitimate State objective[237] and are proportional to the achievement of that objective.[238] "Non-citizen" broadly includes permanent residents, foreign students, temporary visitors, asylum seekers, immigrants, non-immigrants, migrant workers, refugees, stateless persons, trafficked persons, and undocumented or illegal non-citizens.

Key instruments in international law protect the rights of all individuals without distinction of any kind, including by national origin,[239] birth or other status.[240] Specifically, the rights under the ICCPR "must be guaranteed without discrimination between citizens and aliens."[241] Various international instruments guarantee both the basic and specific rights of certain classes of non-citizens.[242]

International and domestic law suggests that a distinction between citizens and non-citizens may be drawn with regard to entitlements to certain political rights, freedom of movement and freedom from immigration control,[243] provided it is pursuant to a legitimate aim and proportional to the achievement of that aim.[244] Article 25 of the ICCPR explicitly guarantees citizens the right to participate in public affairs, to vote and hold office, and to have access to public service. Article 12(1) guarantees liberty of movement and choice of residence to persons "lawfully within the territory of the State", thereby permitting restrictions on undocumented migrants.[245]

In Australia, foreign citizens are disqualified from standing for or sitting in Parliament.[246] Voting rights in parliamentary elections are granted to non-citizens only insofar as they are British subjects resident in Australia who were on the electoral roll prior to 1984.247 The High Court of Australia and the Privy Council have suggested that every State has "the right to refuse to permit an alien to enter that State, to annex what conditions it pleases to the permission to enter it, and to expel or deport [an alien] from the State… especially if it considers his presence in the State opposed to its peace, order, and good government, or to its

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237 The definition of legitimate state objective will be a matter for domestic law.

238 D Weissbrodt, The rights of non-citizens, UN Doc HR/PUB/06/11 (2006) at 5.

239 CERD art 5.

240 UDHR, art 2; ICCPR, art 2(1); ICESCR, art 2(2).

241 Human Rights Committee, General Comment No. 15: The position of aliens under the Covenant, 27th sess, UN Doc HRI/GEN/1/Rev.6 at 140 (1986) at para 2.

242 Declaration on the Human Rights of Individuals who are not Nationals of the Country in which They Live, GA Res 144, UN GAOR, 40th sess, 116th plen mtg, UN Doc A/Res/40/144 (1985); The International Convention on the Protection of All Migrant Workers and Their Families, opened for signature on 18 December 1990, UN Doc A/RES/45/158 (entered into force 1 July 2003); The Protocol against the Smuggling of Migrants by Land, Sea, and Air, opened for signature 15 November 2000, UN Doc A/55/383 (entered into force 28 January 2004); CRSR, as amended by the Protocol relating to the Status of Refugees, opened for signature 31 January 1967, 606 UNTS 267 (entered into force 4 October 1967) (1967); Convention Relating to the Status of Stateless Persons, opened for signature 28 September 1954, 360 UNTS 117 (entered into force 6 June 1960).

243 For a discussion of the right of abode, see H Irving, "Still call Australia home: the Constitution and the citizen's right of abode" (2008) 30(1) Sydney Law Review 133.

244 Committee on the Elimination of Racial Discrimination, General Recommendation No. 30: Discrimination against non-citizens, 65th sess UN Doc A/59/18 (2004) at para 4.

245 D Weissbrodt, The rights of non-citizens, UN Doc HR/PUB/06/11 (2006) at 8.

246 *Australian Constitution* s 44(i).

247 *Commonwealth Electoral Act 1918* (Cth) s 93(1)(b)(ii).

social or material interests".248 Sections 51(xix) and (xxvii) of the Constitution enable Parliament to exercise these powers with respect to non-citizens.

7.3 Corporations

We submit that corporations should not be able to claim protection or seek to enforce rights under a Human Rights Act.

The dominant approach in domestic and international law is that corporations cannot claim the protection of human rights. This derives from the concept that human rights are concerned with the protection of human dignity, which can only exist in individuals or "peoples".[249]

The ALRC has suggested in the context of privacy law that corporations should be excluded from protection as there is insufficient judicial precedent in this area of law and corporations have alternative remedies available to them. The Commission argues that to ascribe human rights to corporations undermines not only the core principles of human rights law but also the fundamental principles of commercial law, including the protection of separate legal personality given to corporations and their members.[250]

In some jurisdictions human rights have been found to extend to corporations. In the United Kingdom, a corporation can commence proceedings as a "victim" of an alleged human rights violation.[251] In New Zealand and South Africa, corporations are recognised as "other legal persons" to whom human rights inhere as far as practicable taking into account the nature of the right, leaving recognition of specific corporate rights to the judiciary.[252]

Any protection of corporate rights under a Human Rights Act should not interfere with legitimate Government regulation of commercial activity, public health,[253] consumer protection and the environment.[254]

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248 *Re Minister for Immigration and Multicultural Affairs; Ex parte Te* (2002) 212 CLR 162 at 170, *Robtelmes v Brenan* (1906) 4 CLR 395 at 400; *Attorney-General for Canada v Cain and Gilhula* [1906] AC 542 at 546.

249 See Department of Justice (Victoria), *Rights, Responsibilities and Respect. The Report of the Human Rights Consultation Committee* (2005) 52-53; for a useful discussion see Francine Johnson and Edward Santow *Would an Australian Charter of Rights be good for business?* (2009) Gilbert + Tobin Centre of Public Law <http://www.gtcentre.unsw.edu.au/Resources/docs/cohr/Business_Charter_of_Rights.pdf> at 10 June 2009 at 14. For the rights of "peoples", see the African Charter and DRIP.

250 ALRC, *For Your Information: Australian Privacy Law and Practice*, Report No 109 (2007) [7.51]-[7.60].

251 Under section 7(1) of the UK Human Rights Act, any victim of an unlawful act by a public authority in the United Kingdom may instigate or defend legal proceedings. Under s 7(7), "victim" uses the same concept as applied in Article 34 of the European Convention on the Protection of Human Rights and Fundamental Freedoms, which includes a non-governmental organisation or a group. See James Strachan, 'The Human Rights Act 1998 and Commercial Law in the United Kingdom', in Stephen Bottomley and David Kinley (eds), *Commercial Law and Human Rights* (2002) 161, 176.

252 The South African LRC has stated that privacy law should protect both types of legal persons, including collective entities such as corporations. However, it acknowledged that it would be inappropriate to afford collective entities the same level of protection as natural persons. See South African LRC, *Privacy and Data Protection*, Discussion Paper 109 (2005), [3.4.8].

253 For example, in *McDonald v Canada* [1995] 3 SCR 199, the Supreme Court of Canada held that tobacco laws regulating advertising and health warnings were inconsistent with the right of freedom of expression in the Canadian Charter of Rights and Freedoms. Less restrictive tobacco advertising legislation was subsequently upheld under the Canadian Charter: *Canada v JTI-Macdonald Corp* [2007] 2 SCR 610.

254 Department of Justice (Victoria), *Rights, Responsibilities and Respect. The Report of the Human Rights Consultation Committee* (2005) 52.

8 Who should have to comply with rights protection, and how?

Recommendations

We submit that government agencies, together with all corporations, individuals and other bodies acting in the exercise of public functions on behalf of the government, should be required to comply with the Human Rights Act. We submit that providing for human rights obligations to be imposed, even voluntarily, on corporations and individuals is not desirable at this time.

A Human Rights Act should have extra-territorial application.

8.1 Government agencies

We submit that all branches of Government should have to comply with a Human Rights Act. This includes Government agencies, which owe their authority to the Government and therefore should comply with any legislation enacted. This would conform to the approaches in jurisdictions such as New Zealand,[255] the UK[256] and Victoria.[257]

A Human Rights Act should apply to Government agencies when they are making decisions that affect the rights of any person, including a refusal or failure to perform a duty or to exercise a power to make such a decision. This could be accomplished by providing for review of administrative decisions within the Human Rights Act itself. Alternatively non-compliance with the Human Rights Act could be made a ground for review under the ADJR Act s 5(1), failure to take a relevant provision of the Human Rights Act into account could be made an improper exercise of power under s5(2) of the ADJR Act, and/or legislation could provide that individuals affected by a decision have a legitimate expectation that the decision maker will act in accordance with the Human Rights Act. This would allow for judicial review of administrative decisions that fail to take into account the Human Rights Act within the framework of Australia's existing judicial review mechanisms. It may also be desirable to provide for merits review of administrative decisions that do not comply with the Human Rights Act.

8.2 Public authorities

We submit that all public authorities should have to comply with the provisions of a Human Rights Act. Public authorities are generally considered to be entities that perform public functions. It is important that a Human Rights Act clearly specify which entities are considered to fall within this obligation. This will require very careful definition.

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255 The NZ Bill of Rights Act s 3 provides that the Act applies to acts done by the legislative, executive or judicial branches of government, or by any person or body in the performance of any public function, power, or duty conferred or imposed on that person or body or pursuant to law.

256 UK Human Rights Act s 6.

257 The Victorian Charter s 6(2) states that the Charter applies to the Parliament, Courts and Tribunals, and public authorities, to the extent that they each have functions under specific and separate Parts of that Act.

The ACT Human Rights Act defines "public authority" to include an administrative unit, a territory authority or instrumentality, a Minister, a police officer exercising a function under a Territory law, a public employee and an entity whose functions are or include functions of a public nature (when exercising those functions for the Territory or a public authority).[258] The Legislative Assembly or a court will only constitute a public authority when acting in an administrative capacity.[259] The Victorian Charter defines public authorities in similar manner, but does not extend the definition to include public employees.[260]

Public authorities are generally defined by reference to the public nature of the functions they perform. The number and type of authorities required to comply with a Human Rights Act will largely depend on the definition applied when deciding whether a function of an entity is a "function of a public nature".[261] The ACT Human Rights Act contains a non-exhaustive list of factors that may be considered, including whether the function is conferred on the entity under a territory law, is connected to or generally identified with functions of government, or is of a regulatory nature, and whether the entity is publicly funded to perform the function or is a company with the majority of its shares held by or for the Territory.[262] These functions include the operation of detention places and correctional centres, and the provision of services such as gas, electricity and water supply, emergency services, public health services, public education, public transport and public housing.[263] The Victorian Charter contains a similar non-exhaustive list.[264]

The ACT Human Rights Act and Victorian Charter require all public authorities to act in a way that is compatible with human rights or, in making a decision, to give proper consideration to a relevant human right.[265] Failure to do so is accompanied by the risk of legal proceedings against the authority by the victim of the contravention.[266] Notably, the Victorian Charter provides an exception where the public authority could not have reasonably acted differently or made a different decision.[267] A further exemption is available where the act or decision was of a private nature, however the legislation provides no guidance on what that means.[268]

In contrast, section 40D of the ACT Human Rights Act expands the scope of the definition, allowing entities that are not public authorities to "opt-in" to the compliance obligations that apply to public authorities.

We submit that the public authority compliance obligations in a Human Rights Act should mirror those set out in the ACT Human Rights Act. The Human Rights Act should apply to all functions of a public nature performed by entities falling within the definition of public authority under the Human Rights Act, and provide a non-exhaustive list of factors to take into account when considering whether a function is of a public nature. We submit that the Human Rights Act

[258] ACT Human Rights Act pt VA s 40(1).
[259] ACT Human Rights Act pt VA s 40(2).
[260] Victorian Charter s 4.
[261] For example, the Victorian Charter s 4(3)(b) provides that a function will not be of a public nature merely because it is performed by a public authority. See also the UK Human Rights Act s 6(5).
[262] ACT Human Rights Act s 40A.
[263] ACT Human Rights Act s40A(3).
[264] Victorian Charter s4(2).
[265] ACT Human Rights Act s 40B and Victorian Charter s 38(1).
[266] ACT Human Rights Act s 40C.
[267] Victorian Charter s 38(2). The UK Human Rights Act s 6(2) provides for a similar exception.
[268] Victorian Charter s 38(3).

should definitively state that any such list does not limit the matters that may be considered in deciding whether a function is of a public nature.[269]

We submit that a Human Rights Act should include an exception where the public authority could not have reasonably acted differently or made a different decision, as provided in the Victorian Charter.

8.3 Extra-territorial application of the Act to Public Authorities

We submit that, consistent with principles in international law, a Human Rights Act should require Australian public authorities to comply with any Human Rights Act obligations whilst acting in their official capacity in territories outside of Australia. We submit that there is no barrier to the Act requiring acts of Australian public authorities committed in the territory of another State to be consistent with the Human Rights Act.[270] The nationality principle in international law permits a State to exercise jurisdiction to regulate and adjudicate on actions committed by its nationals in another State. However, without the consent or acquiescence of the other State or effective control over its territory, enforcement of the Human Rights Act must occur within Australia's borders.

(a) Current extra-territorial application of Australian laws

There is existing Commonwealth legislation with both internal and extraterritorial application. For example, the *Crimes (Child Sex Tourism) Amendment Act* 1994 (Cth) applies to acts committed by individuals outside Australia but connected to Australia on the basis of an offender's citizenship or residency.[271]

To some extent, corporate behaviour outside Australian territory is regulated under various domestic statutes. Section 5(1) of the *Trade Practices Act* extends provisions in the Act dealing with restrictive trade practices, unconscionable conduct and consumer protection to conduct committed outside Australia where the entity involved is incorporated in, carrying on business in, or is a citizen or ordinary resident of Australia.[272] It has been argued that certain provisions in the *Australian Securities and Investments Commission Act 2001* (Cth) and the Corporations Act proscribing misleading and deceptive conduct also have extraterritorial application.[273]

(b) Extraterritoriality under International law

As a general rule, pursuant to the principles of sovereign equality, non-intervention and comity in international law, a State cannot act to enforce its laws within the territory of another State without the consent of that foreign State or some other exceptional basis under international law.

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[269] ACT Human Rights Act s 40A(2).

[270] This argument is raised by Craig Forcese *Extraterritorial Application of the Charter to Canadian Forces* (2008) National Security Law: Canadian Practice in International Perspective <http://cforcese.typepad.com/ns/2008/03/extraterritoria.html> at 10 June 2009.

[271] *Crimes Act* 1914 (Cth) pt IIIA div 2 ss 50BA-50BD as inserted by the *Crimes (Child Sex Tourism) Amendment Act 1994* (Cth) ss 50BA-50BD. In the case of an offender being a legal entity, its place of incorporation or where its business was usually conducted creates the nexus to Australia (s 50AD). This legislation is discussed in Tim McIntosh "Exploring the boundaries: the impact of the child sex tourism legislation" (2000) 74 *Australian Law Journal* 613.

[272] See Deborah Senz and Hilary Charlesworth, "Building blocks: Australia's response to foreign extraterritorial legislation" (2001) 2(1) *Melbourne Journal of International Law* 69.

[273] Justin Gleeson SC, "Extraterritorial application of Australian statutes proscribing misleading conduct", (2005) 79 *Australian Law Journal* 296 at 311.

Two significant decisions of the European Court of Human Rights have considered the extraterritorial application of the ECHR. In *Bankovic*,[274] the Grand Chamber of the European Court of Human Rights stated that:

> *"... the jurisdictional competence of a State is primarily territorial. While international law does not exclude a State's exercise of jurisdiction extra-territorially, the suggested bases of such jurisdiction (including nationality, flag, diplomatic and consular relations, effect, protection, passive personality and universality) are, as a general rule, defined and limited by the sovereign territorial rights of the other relevant States."*[275]

The Court concluded that a State's exercise of extraterritorial jurisdiction should be recognised only in "exceptional" instances.[276] These instances include when a State, through the "effective control of the relevant territory and its inhabitants abroad" due to military occupation or through the consent, invitation or acquiescence of the Government of that territory, exercises public powers of government,[277] or circumstances involving the activities of a State's diplomatic or consular agents abroad.[278]

In *Issa*,[279] the European Court of Human Rights appeared to widen the concept of "jurisdiction", suggesting that extraterritorial jurisdiction may be found to exist not only where a State has effective control of the territory of another State, but also where an individual comes within the "authority and control" of another State. The Court found that:

> *"[A] State may also be held accountable for violation of the [ECHR] rights and freedoms of persons who are in the territory of another State but who are found to be under the former State's authority and control through its agents operating - whether lawfully or unlawfully - in the latter State…. Accountability in such situations stems from the fact that Article 1 of the Convention cannot be interpreted so as to allow a State party to perpetrate violations of the Convention on the territory of another State, which it could not perpetrate on its own territory."*[280]

The UN Human Rights Committee in its General Comment has attempted to clarify the issue of extraterritorial jurisdiction. The Committee stated that art 2(1) of the ICCPR, which requires each State Party to ensure the rights in the ICCPR apply to all individuals "within its territory and subject to its jurisdiction", refers to anyone within the power or effective control of that State Party or its forces, even if situated or acting outside the territory of the State Party.[281] In his authoritative ICCPR commentary, Nowak states that "[w]hen States parties… take actions on foreign territory that violate the rights of persons

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[274] *Bankovic and Others v Belgium and Others*, European Court of Human Rights Application no. 52207/99, Grand Chamber, 12 December 2001.
[275] *Bankovic* at [59].
[276] *Bankovic* at [71].
[277] *Bankovic* at [71]
[278] *Bankovic* at [73].
[279] *Issa and Others v Turkey*, European Court of Human Rights, Application no. 31821/96, 16 November 2004.
[280] *Issa* at [71].
[281] General Comment No. 31: Nature of the General Legal Obligation Imposed on States Parties to the Covenant, UN Doc CCPR/C/21/Rev/1/Add.13 (2004) at para 10.

subject to their sovereign authority, it would be contrary to the purpose of the Covenant if they could not be held responsible."[282]

(c) Domestic instruments in other jurisdictions

UK and Canadian courts have held that the scope of extraterritorial application of the UK Human Rights Act and Canadian Charter respectively is very limited.

Section 32 of the Canadian Charter does not expressly impose any territorial limits on the application of the Charter. In interpreting the jurisdictional reach of the Charter, Canadian courts have held that the Charter generally does not apply to the extraterritorial conduct of government actors, except with the consent of the territorial state to the application and enforcement of Canadian law, or some other basis under international law such as the nationality principle.[283]

The UK House of Lords has ruled that the UK Human Rights Act has extraterritorial application to all persons within the jurisdiction of the UK. In *Al Skeini*,[284] the House of Lords held that the UK Human Rights Act is capable of applying to the extraterritorial acts of a UK public authority only where the victim was within the jurisdiction of the UK for the purposes of art 1 of the ECHR. Applying the test in *Bankovic*, the House of Lords rejected the appeals by five claimants, whose relatives at the time they were killed were not under the control and authority of British troops in Iraq.[285] However, on a narrow basis by analogy with the extraterritorial exception made for embassies, it held that the UK Human Rights Act did apply to the sixth claimant, whose son "came within the control and authority of the UK from the time he was arrested" and who subsequently died at a British military detention base in Iraq from injuries allegedly caused by British soldiers.[286]

In *R (Smith)*,[287] the Court of Appeal held that a deceased British soldier was subject to UK jurisdiction so as to benefit from the rights guaranteed by the UK Human Rights Act while operating in Iraq. Referring to the emphasis in *Al Skeini* on obligations under the UK Human Rights Act flowing from the victim being "linked to the UK" and within UK jurisdiction at the time of death, the Court held that British soldiers who serve abroad plainly have a "sufficient link" to the UK and are thus entitled to the protection of the UK Human Rights Act.[288]

8.4 Corporations and non-government bodies

We submit that a Human Rights Act should not impose direct obligations on corporations and non-government bodies to uphold human rights, except insofar as they exercise a "public function" (and therefore fall within the definition of a

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[282] Manfred Nowak, *UN Covenant on Civil and Political Rights: ICCPR Commentary* (2nd ed, 2005) 43 -44.

[283] *R v Hape* [2007] 2 SCR 292 at [69], [106]; applied in *Amnesty International and British Columbia Civil Liberties Association v Chief of the Defence Staff for the Canadian Forces & Ors* [2008] 4 FC 546 at [331].

[284] *R (on the application of Mazin Jumaa Gatteh Al Skeini) v Secretary of State for Defence* [2008] 1 AC 153 (*"Al Skeini"*).

[285] *Al Skeini* at 209-210.

[286] *Al Skeini* at 208.

[287] *R (Smith) v* Oxfordshire *Assistant Deputy Coroner (Equality and Human Rights Commission intervening)* [2009] EWCA Civ 441; [2009] WLR (D) 158 ("*R (Smith)"*).

[288] *R (Smith)* at [28].

public authority, as discussed in section 8.2). This is consistent with approaches in other jurisdictions to human rights protection.[289]

Corporate accountability for human rights violations is an issue which has received attention at an international level. The UN Special Representative on Business and Human Rights recently asserted that States have a duty to ensure that non-State actors, including business entities, do not commit human rights abuses within their jurisdiction.[290] The UN Norms of Trans-National Corporations[291] outline human rights standards to be directly applied to corporations on an international level.

In Australia, criminal laws,[292] consumer and environmental protection laws, labour rights and health and safety laws as well as the law of civil remedies, already impose human rights obligations on corporations. Many companies and non-governmental entities already adhere to voluntary regimes such as the UN Global Compact which incorporates some human rights obligations.[293] However, voluntary regimes may fail to ensure that the principles that are advocated are upheld in practice, and existing law does not encompass all human rights that might be included in a Human Rights Act.

There is no substantive legal reason why private bodies cannot be directly bound by a Human Rights Act. However, we submit that the application of such obligations is likely to create legal uncertainty and place compliance burdens on corporations and other bodies. This burden and these uncertainties are likely to be disproportionate to the benefits likely to be realised, particularly when compared to existing regulatory approaches. We submit 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.

While a Human Rights Act could contain a voluntary "opt-in" provision for corporations, it is notable that the ACT Human Rights Act, which contains such an opt-in provision, has yet to attract any corporate signatories.[294] It is likely that businesses will perceive the social incentives or benefits as outweighed by the expanded risk of costs and liability associated with compliance with human rights obligations. Accordingly, we submit that an "opt-in" mechanism should not be included in a Human Rights Act.

8.5 Private citizens

We submit that it would be appropriate to include a statement in the preamble to a Human Rights Act that individuals must respect the human rights of others.

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289 For example: ACT Human Rights Act s 40; Victorian Charter s 4; NZ Bill of Rights Act s 3.

290 Special Representative of the Secretary General on Business and Human Rights *Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises* UN Doc A/HRC/4/035 (2007) para 18.

291 *Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights* UN Doc E/CN.4/Sub.2/2003/12/Rev.2 (2003) adopted 13 Aug. 2003 by UN Sub-Commission on the Promotion and Protection of Human Rights resolution 2003/16 UN Doc E/CN.4/Sub.2/2003/L.11 at 52 (2003).

292 eg *Criminal Code Act 1995* (Cth) Schedule (**"Criminal Code"**) div 268.

293 *The Ten Principles* UN Global Compact < http://www.unglobalcompact.org/AboutTheGC/TheTenPrinciples/index.html> at 12 June 2009; *Participants and Stakeholders* UN Global Compact < http://www.unglobalcompact.org/ParticipantsAndStakeholders/index.html> at 12 June 2009.

294 ACT Human Rights Act s 40D; for useful commentary see Paul Maley "Let business opt in to rights charter, urges HREOC chief" *The Australian* (Sydney) 20 January 2009.

However, individuals should not be liable for penalties arising from contraventions of a Human Rights Act since this would divert the focus of the legislation from education to punishment and depart from established international practice.

Under the human rights instruments of the ACT, Canada, New Zealand, South Africa and the United Kingdom, individuals do not have express obligations in their capacity as private citizens. Instead, as expressed in the preambles to the ICCPR, ICESCR and Victorian Charter, it is understood that an individual's entitlement to human rights necessarily implies that they must observe the rights of others, which may place limitations on their own rights.[295]

The Canadian Constitution gives effect to this understanding by allowing courts, in an action where an individual alleges an infringement of their human rights under the Constitution, to exclude any evidence obtained in a manner that infringes the rights of another.[296] The Victorian Charter also recognises the importance of responsibilities in its formal title – the *Charter of Human Rights and Responsibilities Act* – but leaves the imposition of substantial responsibilities to implication.[297]

In addition to creating obligatory norms of conduct, the Human Rights Act would be used in public education to foster a culture of human rights within the community.[298] In this context, preambular statements emphasising the importance of human rights may be more effective than sanctions in building a culture where human rights are valued and their respect is a matter of course. This is especially so in light of the many existing Australian laws, such as criminal and anti-discrimination laws, that already impose sanctions in situations where individuals infringe the human rights of others.[299] In the context of the existing obligations imposed on individuals in Australia, the Human Rights Act may have a greater and more appropriate impact as a foundational declaration of Australia's approach to human rights than as an instrument imposing personal liability.

8.6 Constitutionality

It is likely that a Human Rights Act can be drafted so as to bind State authorities, and corporations (whether or not they are exercising a public function), as well as private citizens and any other organisations.

The external affairs power in s 51(xxix) of the Australian Constitution is the most unequivocal constitutional basis for the power to enact legislation protecting

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295 A practical example is the Canadian Charter s 24(2), which states that in a court action where an individual alleges an infringement of their human rights under the Canadian Charter, any evidence obtained in a manner that infringes the rights of another will be excluded if its admission would bring the administration of justice into disrepute. *See* George Williams "The Victorian Charter of Human Rights and Responsibilities: Origins and Scope" (2006) 30(3) *Melbourne University Law Review* 880, 905*;* Department of Justice (Victoria), *Rights, Responsibilities and Respect*. *The Report of the Human Rights Consultation Committee* (2005) 30*;* Victorian Charter, preamble;

296 Canadian Charter s 24(2).

297 George Williams "The Victorian Charter of Human Rights and Responsibilities: Origins and Scope" (2006) 30(3) *Melbourne University Law Review* 892.

298 Department of Justice (Victoria), *Rights, Responsibilities and Respect*. *The Report of the Human Rights Consultation Committee* (2005) ii.

299 See, e.g. the remedies available if recourse is had to the Courts after under the *Human Rights and Equal Opportunity Commission Act 1986* (Cth) s 46PO(4) in respect of unlawful acts, omissions or practices under the *Racial Discrimination Act 1975* (Cth), *Age Discrimination Act 2004* (Cth), *Disability Discrimination Act 1992* (Cth), and *Sex Discrimination Act 1984* (Cth).

human rights.[300] It also supports provisions binding State authorities and corporations. Art 2 of the ICCPR and art 2 of the ICESR both make specific reference to the enactment of legislation to realise the enumerated rights. Art 2 of the ICCPR specifically provides for remedies. It is possible to argue that the extent of the external affairs power is unsettled, and in some respects limited. The potential limitations usually articulated are that the international treaty sought to be implemented should be "international in character",[301] and the implementation measures should be appropriate, adapted or proportional to it.[302] We submit that provisions binding State authorities and other parties acting as public authorities fall well within these limitations. To the extent that they do not, it is likely that any provisions binding corporations acting as public authorities would fall within the corporations power in s 51(xx) of the Australian Constitution, together with the reference of power to regulate corporations by the States.

9 What mechanisms should be employed to protect rights?

Recommendations

A Human Rights Act should include the following specific mechanisms:

(a) a requirement that the Attorney-General prepare a statement of compatibility to accompany new Government legislation, stating whether in his or her view the proposed bill is or is not compatible with the rights protected under the Human Rights Act;

(b) the establishment of a separate human rights scrutiny committee (similar to the UK Joint Committee on Human Rights) to assess the compliance of new legislation with the Human Rights Act;

(c) a requirement that all acts and decisions of public authorities should comply with the Human Rights Act;

(d) a requirement that Courts interpret legislation in a way that is consistent with the Human Rights Act;

(e) in doing so, Courts should be expressly permitted to have regard to international law and human rights jurisprudence; and

(f) where a Court finds legislation to be incompatible with the Human Rights Act, and this is notified to the Attorney-General by the AHRC, the Attorney-General should be required to table the notification in Parliament and produce a report in response.

The Commonwealth Attorney-General and the AHRC should have a right of intervention in litigation involving the application of a Human Rights Act.

300 See also paras 1.1 and 4.6 above.

301 *Koowarta v Bjelke-Petersen* (1982) 153 CLR 168, 212 and 214-215 per Stephen J, 229-230 per Mason J, 256-257 per Brennan J; *Richardson v Forestry Commission* (1988) 164 CLR 261, 322 per Dawson J.

302 *Airlines of NSW Pty Ltd v New South Wales (No 2) (Second Airlines Case)* (1965) 113 CLR 54, 86 per Barwick CJ; *Victoria v Commonwealth (Industrial Relations Act Case)* (1996) 187 CLR 416, 486-488 per Brennan CJ, Toohey, Gaudron, McHugh and Gummow JJ.

We submit that where the State or a public authority has breached the Human Rights Act, a person adversely affected by such conduct should be entitled to:

(a) a declaration that such conduct amounts to a breach;

(b) an injunction to restrain any continuing breach;

(c) damages as compensation where loss can be proven; and

(d) remedy in the nature of certiorari, mandamus or prohibition.

However, express limitations should be placed on this cause of action in respect of alleged breaches of economic, social and cultural rights.

We submit that a number of specific mechanisms should be included in a Human Rights Act in order to ensure the best protection and promotion of the rights which are to be covered.

9.1 Statements of compatibility

A number of jurisdictions, including New Zealand,[303] the UK,[304] Victoria[305] and the ACT,[306] have recognised the importance of, and implemented, a process for assessing whether proposed legislation is compatible with their respective human rights instruments. For example, in the ACT the Attorney-General must state whether a bill presented to the Legislative Assembly by a Minister is or is not consistent with human rights,[307] and a standing committee must report to Parliament about human rights issues raised by the bill.[308]

However, there are differences between the different regimes as to:

(i) who must prepare the statement: the Attorney-General (as in New Zealand and the ACT) or the Minister or member of Parliament introducing the Bill (as in the UK and Victoria);

(ii) whether the review process applies to all bills (as in New Zealand and Victoria) or only to bills proposed by a Minister (as in the ACT and the UK); and

(iii) whether there is an additional layer of review for compatibility with human rights by a parliamentary scrutiny committee (as in the ACT and Victoria).

We submit that the Commonwealth should adopt a dual bill review process for any new legislation introduced into Parliament, requiring:

303 In NZ, the Attorney-General must notify the House of Representatives of any provision in any Bill introduced that appears to be inconsistent with the rights in the NZ Bill of Rights Act: see NZ Bill of Rights Acts 7.

304 In the UK, a Minister in charge of a bill in either House of Parliament must, before the second reading of the bill, state whether in their view, the proposed bill is or is not compatible with the rights protected under the UK Human Rights Act: see s 19.

305 In Victoria, the member of Parliament who proposes to introduce a bill into either House of Parliament must cause a statement of compatibility to be made and must, before the second reading of the bill, present the statement of compatibility to the House: Victorian Charter s 28.

306 See ACT Human Rights Act Part 5.

307 ACT Human Rights Act s 37.

308 ACT Human Rights Act s 38.

(i) the Attorney-General to state whether in his or her view the proposed bill is or is not compatible with the rights protected under the Human Rights Act; and

(ii) additional scrutiny by the a separate human rights scrutiny committee (similar to the UK Joint Committee on Human Rights).

This recommendation is based on the experience in Victoria, where any Member of Parliament who proposes to introduce a bill must prepare a statement of compatibility which considers whether the proposed bill is compatible with the Victorian Charter. However, requiring a Member of Parliament or a Minister in charge of a bill to comment on its compatibility with the Victorian Charter may not always produce an objective or complete analysis of the rights on which the proposed bill may impact. The latter has sometimes been the case in Victoria, particularly in relation to private member's bills, where statements of compatibility can be very brief and add little to the human rights dialogue.[309]

We submit that a Human Rights Act should, as in the ACT and New Zealand, require the Attorney-General to analyse whether a bill is compatible with protected rights, in order to ensure that the proposed bill is scrutinised thoroughly by someone with appropriate expertise in legal analysis, and to seek a consistent approach to this step in the human rights dialogue.[310] To maximise the utility and benefit of statements of compatibility, the relevant provision in the Human Rights Act should seek to achieve a sufficient level of detail by requiring each statement to explain in detail:

(i) whether, in the Attorney-General's opinion, the bill is compatible with human rights and, if so, how it is compatible; and

(ii) if, in the Attorney-General's opinion, any part of the bill is incompatible with human rights, the nature and extent of the incompatibility.[311]

This procedure should be modified if the bill is a private member's bill, with the obligation imposed on the member introducing the bill.

9.2 Scrutiny of legislation by a Senate Committee

Since 1981 the *Senate Standing Committee for the Scrutiny of Bills* has examined the effect of Commonwealth legislative proposals on individual rights, liberties and obligations. The Standing Committee comprises both government and non-government members. Under its terms of reference the Standing Committee presently reports on whether, amongst other things, a bill:[312]

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309 See eg, the statements of compatibility for the *Summary Offences Amendment (Body Piercing) Bill 2007* (Vic), the *Medical Treatment (Physician Assisted Dying) Bill 2008* (Vic), and the *Crimes (Decriminalisation of Abortion) Bill* 2009 (Vic).

310 The reports by the NZ Attorney-General on the consistency of bills with the NZ Bill of Rights Act have tended to be more detailed and thorough than the statements of compatibility under the Victorian Charter: see e.g. the Attorney-General's reports on the *Sale of Liquor (Youth Alcohol Harm Reduction) Amendment Bill 2005* (NZ) and the *Policing Bill 2007* (NZ).

311 This mirrors the Victorian Charter s 28(3), which requires a greater level of detail to be included in compatibility statements than its equivalent provision in the ACT Human Rights Act. Section 37(3) of the ACT Human Rights Act does not require statements of compatibility to specify how the bill is compatible with human rights. Statements of compatibility in the ACT have tended to contain less analysis than those in Victoria, we recommend that the more specific and rigorous approach taken by the Victorian Charter is to be preferred.

312 For the Committee's complete terms of reference, see *Senate standing order 24* Australian Senate < http://www.aph.gov.au/senate/pubs/standing_orders/standingorders.pdf> at 12 June 2009.

(i) trespasses unduly on personal rights and liberties;

(ii) makes rights, liberties or obligations unduly dependent upon insufficiently defined administrative powers; or

(iii) makes rights, liberties or obligations unduly dependent upon non-reviewable decisions.

With the introduction of a Human Rights Act, the Standing Committee's terms of reference could be formally expanded to require the Standing Committee to also examine the compatibility with the human rights protected in a Human Rights Act of bills introduced into the Senate. The Standing Committee has already developed extensive expertise in scrutinising bills, and a similar approach was adopted in Victoria with the expansion of the responsibilities of the Scrutiny of Acts and Regulations Committee to incorporate monitoring compliance of new legislation with the Victorian Charter.[313] However, in order for the Standing Committee to be effective in this additional role under a federal Human Rights Act, the Government would need to ensure that the Standing Committee is adequately resourced, including with sufficient human rights expertise.

We submit that the preferable approach would be to introduce a separate human rights scrutiny committee, following the approach adopted in the United Kingdom. The UK Joint Committee on Human Rights is a select committee of the House of Commons and House of Lords, which undertakes inquiries on human rights issues, including reviewing new Government-introduced legislation to "*assess whether or not they comply with the UK's human rights obligations and to consider ways in which bills can enhance human rights in the UK*".[314] The UK Joint Committee's scrutiny activities include calling for public submissions, seeking further input from Ministers and publishing reports on the human rights compatibility of the proposed legislation.[315]

9.3 Statutory interpretation obligation and directive

We submit that a Human Rights Act should require all legislation to be interpreted consistently with the human rights contained in the Act. . The purpose of this requirement is to prevent to the greatest extent possible federal legislation from curtailing specified human rights, within the bounds of accepted understandings of the nature of the relationship between the courts and Parliament.

A "rights compliant interpretation" provision[316] imposing an obligation on courts to interpret legislation so that it is consistent with specified human rights, is used

313 As required by section 30 of the Victorian Charter.

314 Joint Committee on Human Rights, *Second Report: The Work of the Committee in 2007-08*, HL10/HC 92 (26 January 2009), available at http://www.publications.parliament.uk/pa/jt200809/jtselect/jtrights/10/1002.htm.

315 Joint Committee on Human Rights, *Second Report: The Work of the Committee in 2007-08*, HL10/HC 92 (26 January 2009) <http://www.publications.parliament.uk/pa/jt200809/jtselect/jtrights/10/1002.htm> at 15 June 2009.

316 This description is used by the Hon James Spigelman, Chief Justice of NSW, 'The application of quasi-constitutional laws' Second lecture in 2008 McPherson Lectures *Statutory interpretation and human rights* delivered 11 March 2008 <http://www.lawlink.nsw.gov.au/lawlink/supreme_court/ll_sc.nsf/vwFiles/spigelman110308.pdf/$file/spigelman110308.pdf> at 24 April 2009.

in a number of jurisdictions, including New Zealand,[317] the UK,[318] the ACT[319] and Victoria.[320]

(i) There are differences in the drafting of these provisions, such that the ACT and Victorian provisions require courts to interpret legislation so that it conforms with specified human rights but only so far as this is consistent with the purpose of the legislation; and the UK and NZ provisions do not expressly require a rights compliant interpretation to be consistent with the legislative purpose. The UK Human Rights Act provides that legislation must be interpreted so as to be consistent with specified rights 'so far as it is possible to do so'.[321]

We submit that a Human Rights Act should contain a provision adopting the wording of section 32 of the Victorian Charter, requiring 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*". This avoids any concern that a UK-style provision, would empower a Court to re-draft legislation so as to give it an interpretation *contrary to the intention of Parliament*, and in doing so offend the Constitutional prohibition against the conferral of legislative power on the judiciary.[322] Both the ACT Court of Appeal and VCAT have recently expressly rejected the argument that the ACT provision authorises a UK-style approach.[323] Further, the Explanatory Memorandum to the Victorian Charter explains that the purpose of the provision is to "*ensure that in… [interpreting legislation to give effect to human rights] courts do not strain the interpretation of legislation so as to displace Parliament's intended purpose or interpret legislation in a manner which avoids achieving the object of the legislation*".[324]

9.4 Considering international jurisprudence

We submit that, if courts are required to interpret provisions in a way that is compatible with human rights, they should be expressly permitted to have regard to international law and human rights jurisprudence developed in other countries and international courts and tribunals when doing so. Both the Victorian Charter

317 NZ Bill of Rights Act s 6.

318 UK Human Rights Act s 3.

319 ACT Human Rights Act s 30. The current provision commenced on 18 March 2008 and amended the original interpretation provision to mirror the Victorian Charter s 32.

320 Victorian Charter s 32.

321 UK Human Rights Act s 3. Similarly, the NZ Bill of Rights Act provides that "wherever an enactment can be given a meaning that is consistent with the rights and freedoms contained in this Bill of Rights, that meaning shall be preferred to any other meaning."

322 Michael McHugh AC 'A Human Rights Act, the courts and the Constitution', speech delivered at the AHRC, Sydney, 5 March 2009 <http://www.humanrights.gov.au/letstalkaboutrights/events/McHugh_2009.html> at 24 April 2009, 21-22; *Ghaidan v Godin-Mendoza* [2004] UKHL 30, [30]-[33]; *Sheldrake v Director of Public Prosecutions* [2005] 1 AC 264, 303-304 (Lord Bingham of Cornhill); *R v A (No 2)* [2002] 1 AC 45; *Secretary of State for the Home Department v MB* [2007] 3 WLR 681; *New South Wales v Commonwealth (Wheat Case)* (1915) 20 CLR 54, 90 (Isaacs J).

323 *Kracke v Mental Health Review Board & Ors (General) [2009] VCAT 646 (revised 21 May 2009)* at REF per Bell J; *Casey v Alcock* [2009] ACTCA 1 at [100]-[108] per Besanko J (Refshauge J agreeing). The ACT decision concerned the original rights compliant provision but Besanko J expressed the same view about the amended provision because both required an interpretation to be consistent with the purpose of the legislation, at [108]. Obiter comments of the Court of Appeal in the earlier decision of *Kingsley's Chicken Pty Ltd v Queensland Investment Corporation* [2006] ACTCA 9 had appeared to suggest the contrary view.

324 Explanatory Memorandum to the Victorian Charter, clause 23.

and the ACT Human Rights Act include similar provisions of this kind.[325] As Australian courts have yet to develop a substantial body of human rights jurisprudence, consideration of relevant foreign and international jurisprudence should increase the quality of human rights analysis by the courts.

We submit that the relevant provision should allow courts, in interpreting a statutory provision in light of a Human Rights Act, to consider international law and the judgments of domestic, foreign and international courts and tribunals relevant to a human right, along the same lines as the provision in the Victorian Charter.[326] This approach allows the courts greater flexibility in their use of international jurisprudence compared to the ACT Human Rights Act, which only permits use of these materials in interpreting the human right itself. The relevant provision should also set out specific factors that must be taken into account in considering the weight of the international jurisprudence. These factors should replicate the factors required by the *Acts Interpretation Act 1901* (Cth) to be taken into account in considering the weight of any extrinsic material, as any international jurisprudence will be considered to be extrinsic material for the purposes of that Act.[327]

9.5 Incompatible legislation

Parliament cannot confer power on the judiciary to strike down federal laws that are inconsistent with the rights protected by a Human Rights Act as this would infringe the constitutionally embedded doctrines of parliamentary supremacy and separation of judicial and executive powers.[328]

Jurisdictions that have stopped short of giving the courts the power to strike down legislation have instead granted the courts the ability to issue declarations of incompatibility (also called declarations of inconsistent interpretation). The human rights instruments in NZ,[329] the UK,[330] Victoria[331] and the ACT[332] have all included clauses enabling the courts to make declarations of incompatibility where the court cannot construe the relevant provisions of an act consistently with the relevant human rights instrument. Such declarations of incompatibility do not invalidate the incompatible legislation.

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325 ACT Human Rights Act s 31, and Victorian Charter s 32(2). The ACT provision is narrower than the Victorian provision because it limits the use of these materials in 'interpreting the human right' and also regulates the weight that may be given to the material.

326 Victorian Charter s 32(2).

327 *Acts Interpretation Act 1901* (Cth) s 15AB(3); ACT Human Rights Act s 31(2); see also the *Legislation Act 2001* (ACT) s 141. The factors include the desirability of persons being able to rely on the ordinary meaning conveyed by the text of the provision and the need to avoid prolonging legal or other proceedings without compensating advantage.

328 See eg, *New South Wales v Commonwealth (Wheat Case)* (1915) 20 CLR 54, [88] (Isaacs J); *R v Kirby; Ex parte Boilermakers' Society of Australia (Boilermakers' Case)* (1956) 94 CLR 254, [267]-[270 (Dixon CJ, McTiernan, Fullagar and Kitto JJ).

329 The power to issue a declaration of inconsistency is not expressly set out in the NZ Bill of Rights Act. However, the Court of Appeal has inferred Courts have the power, or even the duty, to indicate that legislation is inconsistent with the NZ Bill of Rights Act and is not demonstrably justified (*Moonen v Film and Literature Board of Review* [2000] 2 NZLR 9 at 17; *R v Poumako* [2000] 2 NZLR 695 at 715-716; *Belcher v The Chief Executive of the Department of Corrections* [2007] NZSC 54 at [6].) While no declarations of inconsistency have yet been made, it is unlikely that the Court will decide that it does not have the power to do so: R Harrison 'The new public law: A New Zealand perspective' (2003) 14 *Public Law Review* 41, 42-49), especially since the NZ Bill of Rights Act pt 1A now gives the Human Rights Review Tribunal the power to issue a declaration of inconsistency where it finds that an enactment is inconsistent with the right to freedom from discrimination in s 19.

330 UK Human Rights Act s 4.

331 Victorian Charter s 36(2).

332 ACT Human Rights Act s 31(2).

Constitutional issues with declarations of incompatibility

Making a declaration of incompatibility in the form of declaratory relief, which is not binding on the parties to the proceedings in which it is made, may be considered not to be an exercise of judicial power, and as such, in breach of Chapter III of the Constitution.

Whilst there is no exhaustive definition of judicial power,[333] there are some indicia of non-judicial power that will cast doubts on the constitutional validity of an enactment. In particular, it is unclear whether the High Court would consider that a declaration of incompatibility constitutes, or provides for, a binding and authoritative decision over the controversies between the parties in dispute - an important indicia of judicial power.[334] Justice McHugh has suggested that this may also indicate the non-existence of a "matter" within the meaning of Chapter III of the Constitution.[335] The strongest argument against a declaration of incompatibility being a proper exercise of judicial power is that the declaration is not binding on the parties to the dispute. There may be consequential binding obligations on, for example, the Attorney-General, but there is no authority to suggest that this satisfies the requirement of a binding and authoritative decision.

Alternative dialogue model

Given the constitutional issues with declarations of incompatibility, we recommend the adoption of an alternative "dialogue" model, as proposed by the constitutional experts round table instigated by the AHRC in April 2009.[336] This model would not include a requirement that the Court make a declaration of incompatibility where the Court cannot construe the relevant provisions of an act consistently with the interpretation clause of a Human Rights Act (in the sense of declaratory relief). Instead, the human rights "dialogue" would be facilitated by an executive body, such as the AHRC, taking on the role of notifying the Attorney-General where a Court has held that a legislative provision cannot be read consistently with the Human Rights Act.

In cases where questions of interpreting legislation consistently with the provisions of a Human Rights Act arise, the Court would be empowered, but not required, to make a finding that an act could not be read consistently with a Human Rights Act's interpretation clause. This would be a necessary corollary of the Court's judgment in the particular case before it, having regard to the interpretation clause in a Human Rights Act.

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333 See, *R v Trade Practices Tribunal; Ex parte Tasmanian Breweries Pty Ltd* (1970) 123 CLR 361, 394 (Windeyer J); *R v Quinn; Ex parte Consolidated Foods Corporation* (1977) 138 CLR 1, 15 (Aickin J); *Brandy v Human Rights and Equal Opportunities Commission* (1995) 183 CLR 245, 267 (Deane, Dawson, Gaudron and McHugh JJ); *Precision Data Holdings Ltd v Wills* (1991) 173 CLR 167, 188-189.

334 *Huddart, Parker & Co Pty Ltd v Moorehead* (1909) 8 CLR 330, 357 (Griffiths CJ); Re Ranger Uranium Mines (1987) 163 CLR 656 at 665-666 (Mason CJ, Wilson, Brennan, Deane, Dawson, Toohey and Gaudron JJ).

337 Hon Michael McHugh AC 'A Human Rights Act, the courts and the Constitution', speech delivered at the AHRC, Sydney, 5 March 2009, 11.

336 Hon Sir Anthony Mason et al, *Constitutional validity of an Australian Human Rights Act* (2009) Australian Human Rights Commission < http://www.humanrights.gov.au/letstalkaboutrights/roundtable.html> at 15 June 2009.

This recommendation does not undermine the need for, or the importance of, dialogue between the Court and the Legislature, because it serves the same purpose as a declaration of incompatibility in instigating this dialogue.[337]

In the event of such a finding of inconsistency by the Court, statutory reporting obligations would be imposed on the AHRC to notify the Attorney-General. The Act should require the Attorney-General to table the notification in Parliament, and prepare a report within a specified time frame on the Govenrment's proposed response.

Such a model should have similar results to the declarations of incompatibility used in the UK, where changes to bring incompatible legislation in line with human rights may be fast-tracked by a Minister of the Crown.[338] The UK parliament has been very willing to amend legislation in response to declarations of inconsistency.[339] It is also possible that constitutional conventions could develop whereby Parliament always amends legislation as a result of a report by the AHRC to Parliament.[340]

9.6 Override clauses

The inclusion of an override clause in the Human Rights Act would allow Parliament to expressly declare that an act shall operate notwithstanding an incompatibility with the Human Rights Act or particular rights contained therein. Section 31 of the Victorian Charter contains a provision of this kind.[341]

As a matter of law, an override clause is unnecessary[342] if the Human Rights Act takes the form of an ordinary act of Parliament. In that circumstance, Parliament already possesses the power to expressly declare that a particular act may operate notwithstanding the provisions of another act.

A declaration in an act that the provisions of a Human Rights Act do not have effect has the potential to:

(i) circumscribe a court's ability to undertake a rights-compatible interpretation when considering an enactment; and

(ii) stifle dialogue between the legislature and judiciary with respect to the human rights implications of an enactment (e.g. through the alternative dialogue model proposed above).

The Canadian Charter contains an override clause. However, the Canadian Charter is constitutionally entrenched and provides the courts with the power to strike down invalid legislation.[343] The inclusion of an override clause was

337 *Overview of the ACT Human Rights Act 2004* (2004) ACT Department of Justice and Community Safety <http://www.jcs.act.gov.au/humanrightsact/Publications/Overview%20HRA%20MASTER%20July%2004.pdf> at 4 May 2009, 4-5.

338 UK Human Rights Act s 10.

339 *Declarations of incompatibility made under section 4 of the Human Rights Act 1998* (2006) UK Department of Constitutional Affairs <http://www.dca.gov.uk/peoples-rights/human-rights/pdf/decl-incompat-tabl.pdf> at 15 June 2009.

340 Dr Rodney Harrison QC, 'The new public law: A New Zealand perspective' (2003) 14 *Public Law Review* 41 at 48.

341 Victorian Charter s 31

342 George Williams, 'The Victorian Charter of Human Rights and Responsibilities: Origins and Scope', (2006) 30 *Melbourne University Law Review* 880, 899.

343 Julie Debeljak, '*Balancing Rights in a Democracy: the Problems with Limitations and Overrides of Rights Under the Victorian Charter of Human Rights and Responsibilities Act 2006*', (2008) 32 *Melbourne University Law Review* 422, 454; Canadian Charter s 33.

therefore considered necessary to avoid the erosion of Parliament's sovereignty and prevent any judicial encroachments into law-making.[344] It is, we submit, unlikely that the same imperatives will exist in Australia.

In addition, an override clause carries with it the potential for legislative abuse. In determining whether to include the clause in the Human Rights Act, the Committee must consider whether the political cost of invoking the override clause in an enactment will be a sufficient counterweight to the convenience of its use.[345]

In light of this, if an override clause is included in a Human Rights Act, mechanisms should be put in place to avoid the potential for abuse. These include requirements that:

(iii) an override declaration can only be made in exceptional circumstances (the Explanatory Memorandum to the Victorian Charter suggests that threats to national security or a state of emergency which threatens the safety, security and welfare of the people of Victoria would constitute an 'exceptional circumstance');

(iv) an override declaration must specify which parts, and specifically which rights under the Human Rights Act, are being overridden;

(v) the member of Parliament introducing the Bill must make a statement in Parliament explaining the exceptional circumstances justifying the use of the override clause (failure to do so should, unlike in the Victorian Charter, result in the override declaration being invalidated in the enactment); and

(vi) an override declaration in an enactment only operate for a limited period and may only be renewed by undertaking the process set out in above.

9.7 A cause of action for individuals

We submit that the Human Rights Act should provide for a freestanding cause of action for breaches of rights contained in the Human Rights Act. The Victorian Charter does not provide a discrete cause of action, while the ACT Human Rights Act was amended such that from 1 January 2009 an aggrieved individual can now institute proceedings against the State or a public authority as a result of a failure to comply with its Charter-obligations.[346]

There are a number of compelling reasons for providing a freestanding cause of action for breaches of individual rights, including:

(i) (**empowerment**) the need to provide individuals with the legal tools to obtain relief directly against an offending public body or authority;

(ii) (**ensuring compliance**) the importance of imposing on public bodies and authorities the incentives necessary to achieve compliance with individual rights;

344 David Johansen and Philip Rosen, 'The Notwithstanding Clause of the Charter', *Parliamentary Information and Research Service* (Canada), February 1989 (Revised May 2005), 6.

345 George Williams, 'The Victorian Charter of Human Rights and Responsibilities: Origins and Scope', (2006) 30 *Melbourne University Law Review* 880, 899.

346 ACT Human Rights Act pt 5A, as inserted by the *Human Rights Amendment Act 2008* (ACT).

(iii) (**fidelity to international law**) the critical importance of ensuring that Australia is compliant with its obligations under international law;[347] and

(iv) (**efficient allocation of enforcement responsibilities**) the need to allocate the responsibility to enforce recognised individual rights to:

(A) public enforcement agencies and representatives, including the Attorney-General and the AHRC; and

(B) aggrieved persons,

so that public enforcement agencies and representatives do not under-enforce or selectively-enforce particular breaches of individual rights. The objections raised to providing a freestanding cause of action to remedy human rights breaches include the risk that the costs associated with litigating individual rights offences could be high, and could place unreasonable burdens on the existing resources available to Federal courts, and the risk that parties who are not truly aggrieved may file vexatious lawsuits against public bodies and authorities.

The objection that litigation costs will be 'excessive' is problematic for two reasons:

(i) first, from an economic perspective, there is no data available to indicate how much money it would cost the Commonwealth on a per annum basis to defend itself against such claims;[348] and

(ii) second, even if data demonstrated that the costs would exceed the Courts' presently available resources, it would be important for Government to recognise this and provide additional resourcing.

Further, mechanisms already exist for dealing with vexatious litigants,[349] and there is no reason why the same or similar procedures could not apply to misuse of these provisions in a Human Rights Act.

9.8 Standing

We submit that where the State or any public authority (including a non-public authority performing functions of a public authority nature) has breached the requirement that it take into account the human rights protected by the Human Rights Act, any person adversely affected by such a breach should have standing to bring proceedings against the relevant authority.

Although a number of models exist in relation to standing,[350] we submit that the availability of an independent cause of action to all aggrieved persons will best address the objectives of the Human Rights Act, for the following reasons:

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347 ICCPR art 2(3) guarantees effective remedies a human rights violations. Subsection (c) obliges the competent authorities to enforce such remedies when granted

348 There is some data suggesting that providing a freestanding cause of action might lead to a temporary increase in litigation in criminal law. E W Thomas, 'A Bill of Rights: The New Zealand Experience' in C Debonoand T Colwell (eds) *Comparative Perspectives on Bills of Rights* (2004) National Institute of Social Sciences & Law, Australian National University, http://law.anu.edu.au/nissl/bor.pdf at 15 June 2009, 28. However, given the vulnerability of individuals charged with criminal offences, it is important to provide a freestanding cause of action notwithstanding a potential temporary increase.

349 For example, *Federal Court Rules* (Cth) O 20 r 5 and O 21 r 1.

(i) it will increase the incentives for the Commonwealth and its agents to comply with the Human Rights Act;

(ii) it will reflect the principle of universality underlying the fundamental concept of human rights; and

(iii) it will reflect the standing requirements of other national charters of rights, such as the UK Human Rights Act[351] and the Canadian Charter.[352]

9.9 Should a cause of action be granted to all rights, or just to a subset of civil and political rights?

We submit that the independent cause of action should be granted to civil and political rights. Although there is no express requirement under international law for the State to provide an effective remedy for breaches of economic, social and cultural rights, we submit that consideration should be given to including these rights within the scope of a freestanding cause of action under the Human Rights Act, subject to express limitations on how such a cause of action could be exercised.

Legally, civil and political rights protected by the ICCPR may require more stringent protection than the economic, social and cultural rights protected under the ICESCR because:

(i) article 2(3) of the ICCPR requires signatories to provide effective remedies for human rights violations;

(ii) however, Article 2(1) of the ICESCR states that signatories must "**take steps**, individually and through international assistance and cooperation . . . 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."

A signatory which does not make available effective remedies for human rights violations is clearly in breach of its obligations under the ICCPR. However, under the ICESCR, a signatory is fulfilling its obligations if it is taking steps to "achieve progressively" the economic, social and cultural rights ensured in the ICESCR.

Nevertheless, it could be advantageous to provide a freestanding cause of action for breaches of both ICCPR rights and ICESCR rights, because:

(i) (**administrative efficiency**) these types of rights will often overlap in litigation, which means that providing a freestanding cause of action only for ICCPR rights would likely increase the number of pre-trial procedural disputes by making the definition and exclusion of ICESCR rights a live issue;

(ii) (**fair administration of justice**) providing a freestanding cause of action would allow Australian courts to develop a body of case law regarding

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350 For example, the freestanding cause of action might be made available to "aggrieved Australian citizens (perhaps including temporary and/or permanent residents)". See also paragraph 7.3 above.

351 UK Human Rights Act s 7(1).

352 Canadian Charter s 24(1).

how the economic, social and cultural rights should be applied in the Australian context;[353]

(iii) (**international leadership and participation**) if Australia is to become an international leader in the protection of human rights, it should take steps to protect the full range of human rights recognised in the various covenants and treaties to which it is a party. This is particularly important because treaty monitoring bodies established under both the ICCPR and ICESCR have criticised Australia's protection of human rights[354] and more generally have urged federal states to ensure that the rights protected by the ICCPR and the ICESCR are enforceable within their territories through legislation or policy measures and the establishment of independent and appropriate monitoring and adjudication mechanisms.[355]

To address the objection that a freestanding cause of action for economic, social and cultural rights could expose the Federal Government to excessive monetary awards[356] or unreasonable remedies,[357] a Human Rights Act could:

(iv) provide a full range of remedies for breaches of civil and political rights, but only allow administrative responses or non-compensatory remedies for breaches of economic, social and cultural rights;

(v) introduce rigorous standing requirements for claims that only or primarily involve breaches of economic, social and cultural rights;

(vi) require plaintiffs to attach all existing evidence to their statement of claim at the time of filing to reduce fraudulent and frivolous litigation; and/or

(vii) introduce specialised summary judgment procedures to expedite the disposition of fraudulent or frivolous claims.

9.10 Right to an effective remedy

Based on Australia's obligation under international law to facilitate the right to an effective remedy,[358] together with precedents for individual remedies set in

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353 Because the economic, social and cultural rights embodied in the ICESCR are largely aspirational, domestic legislation could be crafted to accommodate Australia's unique economic, political and cultural traditions.

354 *Concluding Observations of the Human Rights Committee: Australia* UN Doc A/55/40 (2000). *Concluding Observations of the Committee on Economic, Social and Cultural Rights: Australia* EC.12/1/Add.50 (2000).

355 See for example *Concluding Observations of the Committee on Economic, Social and Cultural Rights: Canada* UN Doc E/C.12/1/Add.31 (1998), para 52; *Concluding Observations of the Committee on Economic, Social and Cultural Rights: Australia* EC.12/1/Add.50 (2000).

356 For example, ICESCR art 16(1) protects the right to work. If monetary damages could be recovered from the State for an infringement of this right, it is easy to imagine opportunistic litigants seeking large monetary awards.

357 For example, ICESCR art 12(1) indicates that everyone has the right to enjoy "the highest attainable standard of physical and mental health". If the Charter did not include clearly thought out restrictions on the remedies available to enforce this right, it is not difficult to envisage a court imposing an unworkable and highly dubious remedy on a particular sector of private industry in Australia.

358 ICCPR art 2(3). The European Court of Human Rights has held that the analogous obligation under the ECHR art 13 means more than the *existence* of a judicial remedy, but also the provision of a remedy allowing the competent national authority "*both to deal with the substance of the relevant … complaint and to grant appropriate relief*": *Chahal v United Kingdom* (1996) 23 EHRR 413 at [145].

Canada,[359] South Africa[360] and New Zealand,[361] we submit that the Human Rights Act should recognise and give content to the right to an effective remedy, by making violations of human rights enforceable against all public authorities

A review of the experience in analogous jurisdictions indicates that the inclusion of individual remedies is unlikely to open the "floodgates" of litigation. In some instances, an initial increase in litigation has occurred in the area of criminal law, although this has not been sustained over time.[362] In any case, it is arguable that criminal law and procedure represents an area of law in which individuals are particularly vulnerable, and thus require the protection a Human Rights Act would offer. The New Zealand experience indicates that police procedures have improved in light of litigation permitted under the NZ Bill of Rights Act.[363]

It is essential that the Human Rights Act clearly defines the remedies that are available for conduct that is inconsistent with the Act. One criticism of the New Zealand regime has been that it is silent on the question of remedies.[364] The judiciary has been forced to "fill in the gaps" to provide solutions for the practical problems overlooked in the drafting of the NZ Bill of Rights Act. In order to prevent similar legal uncertainty, an exhaustive regime of effective remedies should be set out.

9.11 Declaration, injunction or damages

Where conduct by a public authority constitutes a breach of the Human Rights Act, a person who has been adversely affected by that conduct should have standing to seek, and the court should be empowered to grant:

(i) a declaration that such conduct amounts to a breach;

(ii) an injunction to restrain any continuing breach; and

(iii) damages as compensation where loss can be proven.

These remedies have been adopted to various extents in the other jurisdictions that have adopted a relevant Human Rights Act:

(i) under the Canadian Charter, an individual who believes that their rights or freedoms have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances. The court may declare the legislation invalid as far as it conflicts with the Canadian Charter or provide other appropriate remedies to the individual;[365]

(ii) under the South African Bill of Rights, certain persons may approach a competent court, alleging that a right in the Bills of Rights has been

[359] Canadian Charter s 24; Canadian Human Rights Act, R.S. C 1985, c. H-6 s 4.
[360] South African Constitution ch 2 s 38.
[361] Remedies arising from the NZ Bill of Rights Act have been judicially recognised: see e.g. *Simpson v Attorney-General (Baigent's case)* [1994] 3 NZLR 667.
[362] E W Thomas, 'A Bill of Rights: The New Zealand Experience' in C Debonoand T Colwell (eds) *Comparative Perspectives on Bills of Rights* (2004) National Institute of Social Sciences & Law, Australian National University, http://law.anu.edu.au/nissl/bor.pdf at 15 June 2009, 28. .
[363] Ibid. at 29.
[364] Ibid. at 28.
[365] Canadian Charter s 24; Department of Justice Canada, *Canada's System of Justice* (2008) 11 <http://www.justice.gc.ca/eng/dept-min/pub/just/img/courten.pdf> at 11 June 2009.

infringed or threatened and the court may grant appropriate relief, including a declaration of rights; [366]

(iii) under the UK Human Rights Act, a Court can grant such relief or remedy, within its powers as it considers just and appropriate in relation to any unlawful act of a public authority.[367] Although such relief may include damages, a Court may only grant such relief where it otherwise has a power to award damages in civil proceedings, and taking into account principles applied by the European Court of Human Rights;[368] and

(iv) the Victorian Charter does not provide any additional remedies such as injunctions or compensation, except where such remedies are otherwise available (eg through other legislation).[369]

Based on the NZ experience, loss for which compensation may be payable should include physical injury, damage to property, loss of liberty, economic loss and legal costs.[370]

9.12 ADJR remedies and constitutional writs

Administrative decisions that do not comply with the Human Rights Act should be subject to review under the ADJR Act (see section 8.1 above) and the remedies in section 16 of the ADJR Act should be available in respect of such decisions.

Legislation should also expressly require that all administrative decisions made in Australia must have regard to the Human Rights Act. The effect of this provision will be that any person affected by such a decision where the Human Rights Act has not been taken into account will have standing to bring proceedings for relief or remedy in the nature of certiorari, mandamus or prohibition, for a declaration of invalidity, or for an injunction in relation to the decision.

9.13 Intervention in Human Rights Act litigation

We submit that, in accordance with existing human rights legislation in the ACT and Victoria,[371] the Charter should expressly provide a right of intervention for the Commonwealth Attorney-General and the AHRC in litigation involving the application of a Human Rights Act. The Attorney-General's right to intervene in human rights related proceedings allows the Attorney-General, as a representative for the Commonwealth, to participate in proceedings that affect the prerogatives of the Crown.[372] In contrast, the role of intervention by a human

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366 South African Constitution s 38.

367 UK Human Rights Act s 8(1).

368 UK Human Rights Act s 8 (2)-(4).

369 Victorian Charter s 39.

370 *Simpson v Attorney-General* [1994] 3 NZLR 667, 676 ('*Baigent's Case*'); Phillip Joseph, 'The New Zealand Bill of Rights' (1996) 7 *Public Law Review* 162, 172.

371 ACT Human Rights Act ss 35, 36; Victorian Charter ss 34, 40.

372 *Adams v Adams* [1970] 3 All ER 572. This right of intervention is similar to the *Judiciary Act 1903* (Cth) s 78A, which provides for the intervention of the Commonwealth Attorney-General in constitutional matters. The Explanatory Statement to the ACT Human Rights Act expressly states that the Act's notice provision was modelled on the *Judiciary Act 1903* (Cth) s 78B (the equivalent notice section regarding constitutional matters): Explanatory Statement, Human Rights Bill 2004 (ACT) 6.

rights body is to ensure independent advocacy in relation to the interpretation and application of the relevant human rights legislation.[373]

This right should apply to all proceedings before the relevant court that involve the application of the Human Rights Act.[374] The requirement in the Victorian Charter that the relevant proceeding involve a "question of law"[375] is an unnecessary limitation on the right of intervention, because:

(i) the explanatory memoranda to the ACT Human Rights Act and the Victorian Charter emphasise that the right of intervention of the Attorney-General and the relevant human rights body are "unqualified" and/or a matter for their discretion;[376]

(ii) it is envisaged that the Attorney-General and the AHRC would exercise their discretion to intervene carefully and in accordance with specific guidelines (see below), meaning that it is unlikely either entity would intervene in cases where issues relating to the Human Rights Act are theoretical or illusory; and

(iii) although the Victorian Supreme Court has strictly interpreted the equivalent provision in the Victorian Charter to prevent the VEOHRC from intervening in a particular case,[377] the courts may nonetheless grant leave to intervene under the courts' inherent jurisdiction even where no "question of law" arises,[378] making the "question of law" limitation essentially ineffective.

We recommend that a Human Rights Act not provide for an express statutory right of intervention for bodies other than the Attorney-General and the AHRC. Such bodies may be granted leave to intervene in accordance with the normal principles of non-party intervention under the court's inherent jurisdiction.

The Human Rights Act should contain a requirement for the relevant court to give notice to the Attorney-General and the AHRC of any proceeding in which a question arises involving the application of the Human Rights Act and to which the Attorney-General or the AHRC is not a party.[379]

Once the Attorney-General and the AHRC have been notified, they may choose to intervene at their discretion.[380] We recommend that both the Commonwealth Attorney-General and the AHRC issue a set of guidelines regarding the exercise of their intervention powers, modelled on the guidelines published by VEOHRC,[381] the ACTHRC,[382] and the AHRC.[383] Such guidelines will provide

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373 Explanatory Statement, Human Rights Bill 2004 (ACT) 7.

374 This adopts the threshold for intervention set out in the ACT Human Rights Act ss 35, 36.

375 Victorian Charter ss 34, 40.

376 Explanatory Memorandum, Charter of Human Rights and Responsibilities Bill 2006 (Vic) 25, 29; Explanatory Statement, Human Rights Bill 2004 (ACT) 6, 7.

377 In *Kortel v Mirik & Mirik* [2008] VSC 103, the Court held that VEOHRC had no right of intervention in a situation where the particular issue relating to the Victorian Charter was 'purely theoretical' and had 'no practical implications for the conduct and determination of the proceedings'. The Court held that in such a situation, no 'question of law' properly arose.

378 *Kortel v Mirik & Mirik* [2008] VSC 103. The Court in this case also held that it is for the Court to determine when 'a question of law' arises: [16].

379 This follows the requirements to give notice set out in the ACT Human Rights Act s 34 and the Victorian Charter s 35.

380 This is consistent with the position under the Victorian Charter and the ACT Human Rights Act. See Explanatory Memorandum, Charter of Human Rights and Responsibilities Bill 2006 (Vic) 25, 29; Explanatory Statement, Human Rights Bill 2004 (ACT) 6, 7.

381 VEOHRC, *The VEOHRC Intervention Power under the Charter of Human Rights and Responsibilities: When Will the VEOHRC Intervene?* (2007)

certainty and transparency in relation to decisions regarding the power to intervene.

If the Attorney-General and/or the AHRC decide to intervene, they should be required to notify the other entity and the parties to the relevant proceeding of their intention to intervene and their intended submissions.[384]

The right of the Attorney-General and the AHRC to intervene should not result in the automatic joinder of either entity to the litigation[385] (given the consequences of being joined as a party to litigation, including potential responsibility for costs). Nor should it require the prior leave of the court,[386] as this would add further time and expense to proceedings involving the Human Rights Act and may not be in the interests of justice for the other parties involved.[387]

9.14 Alternative dispute resolution applied to human rights

Other remedies that may be considered include ADR, such as mediation and conciliation. Such processes provide a number of potential benefits that conventional judicial processes do not, including:

(i) providing a wider and more flexible range of possible remedies which enables parties to achieve outcomes reflective of their interests and which may not be available through Court-based legal forums, eg implementation of training programs and apologies;[388]

(ii) leading to greater party satisfaction;

(iii) allowing greater access to justice and less expense;

<http://www.equalopportunitycommission.vic.gov.au/pdf/intervention%20guidelines.pdf> at 11 June 2009.

382 CTHRC, *The Intervention Power under the Human Rights Act 2004: When Will the ACT Human Rights Commissioner Intervene?* (2004) <http://www.hrc.act.gov.au/assets/docs/A%20guide%20to%20the%20Human%20Rights%20Commissioner's%20Power%20to%20Intervene%20in%20Court%20Proceedings.doc> at 11 June 2009.

383 AHRC, *Guidelines for Intervention in Court Proceedings* (2008) <http://www.hreoc.gov.au/legal/submissions_court/intervention/interventions_in_court_proc.html> at 11 June 2009.

384 This is in accordance with the practice of VEOHRC under the Victorian Charter. See *Kortel v Mirik & Mirik* [2008] VSC 103, [7]; AHRC, *Guidelines for Intervention in Court Proceedings* (2008) <http://www.hreoc.gov.au/legal/submissions_court/intervention/interventions_in_court_proc.html> at 11 June 2009.

385 This is in accordance with the Victorian Charter ss 34, 40, which distinguishes between a right of intervention and the procedure of joinder.

386 See *Kortel v Mirik & Mirik* [2008] VSC 103, [16]; ACT Human Rights Act s 36(1).

387 Further, given the existence of clear guidelines for intervention, as in the case of the ACT Human Rights Commissioner and VEOHRC, it is unlikely that the Attorney-General and the AHRC would seek to intervene in matters in which the court would not ordinarily grant leave to intervene.

388 Ball, Jodie & Raymond, Tracey, *"Facilitator or Advisor?: A discussion of conciliator intervention in the resolution of disputes under Australian human rights and anti-discrimination law"* Australian Human Rights Commission < http://www.hreoc.gov.au/complaints_information/publications/facilitator_advisor.htm) at 29 April 2009.

(iv) providing the potential empowerment of disadvantaged sections of the community through involvement in the process and outcome of resolution;[389]

(v) the less formal and legal environment may allow the respondent to be more open to understand barriers and difficulties experienced by complainants;[390] and

(b) may be more beneficial where parties have an ongoing relationship.

We submit that any body set up to deal with complaints can also take a more active role in ensuring compliance with agreements reached through ADR. Under the Canadian system, the Canadian Commission (see below) may monitor the implementation of the settlement and if there is disagreement the matter can be brought to the Canadian Federal Court for enforcement.[391]

9.15 ADR in other jurisdictions

Alternative dispute resolution is not a remedy which is contemplated expressly in many of the Human Rights Acts that have been adopted by other jurisdictions,[392] although such mechanisms exist within the human rights frameworks adopted in Canada, South Africa and NZ.

(a) **Canada**

The Canadian Human Rights Act outlaws discrimination in employment and in the delivery of goods and services on eleven grounds.[393] The role of the Canadian Commission established by the Charter is,[394] amongst others, to try to resolve and investigate allegations of discrimination in employment and in the provision of services within federal jurisdiction.[395]

Once a complaint has been initiated (either by a party or at the Canadian Commission's initiative),[396] the Canadian Commission can direct the relevant parties to mediation or conciliation.[397] If this process is unsuccessful, the Commission will appoint an investigator who will eventually provide a report including a recommendation asking the Canadian Commission to take one of the following actions:

(i) dismiss the allegations if there is no evidence to support them;

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389 Jodie Ball and Tracey Raymond, *Facilitator or Advisor?: A Discussion of Conciliator Intervention in the Resolution of Disputes under Australian Human Rights and Anti-discrimination Law* (2004) Australian Human Rights Commission <http://www.hreoc.gov.au/complaints_information/publications/facilitator_advisor.htm> at 29 April 2009.

390 Tracey Raymond, *Alternative Dispute Resolution in the Human Rights and Anti-Discrimination Law Context: Reflections on the Theory Practice and Skills* (2006) Asia Pacific Mediation E Centre <http://www.ausdispute.unisa.edu.au/apmf/2006/papers/raymond.pdf> at 29 April 2009.

391 Canadian Commission, *Settlement Monitoring* (2008) Canadian Human Rights Commission <http://www.chrc-ccdp.ca/publications/br_monitoring_suivi-en.asp> at 29 April 2009.

392 See, eg, the UK, Victoria, and the ACT.

393 This model is reflected at the provincial and territorial level too.

394 The Canadian Commission also has jurisdiction under the *Employment Equity Act*, RS C 1995, c 44, ss 22, 25-27.

395 See Canadian Commission, *About the Commission* (2008) <http://www.chrc-ccdp.ca/faq/page1-en.asp> at 11 June 2009.

396 Canadian Human Rights Act s 40(3), although this power has seldom been exercised.

397 The Canadian Commission may determine that the complaints is filed too late or that they are trivial, vexatious or made in bad faith, or that there are other redress procedure available. See Canadian Human Rights Act s 41.

(ii) appoint a conciliator to help the parties try to reach a settlement; or

(iii) send the matter to the Canadian Human Rights Tribunal for hearing.[398]

(b) **New Zealand**

In addition to the NZ Bill of Rights Act, human rights in NZ are also protected by the Human Rights Act 1993 (as amended) which (among other things) outlines the functions of the NZHRC.[399] One of the many roles of the Commission is to facilitate alternative dispute mechanisms.[400] Complaints can also be made directly to the Director of the Office of Human Rights Proceedings who can promote settlement of the dispute or refer the matter to the Human Rights Review Tribunal on behalf of the Complainant.[401]

9.16 Lodging a complaint or seeking redress for a human rights violation

The AHRC is an independent statutory body which investigates complaints about discrimination[402] and human rights breaches.[403] Where a complaint is made, the AHRC can review the information provided and may investigate the matter. If the AHRC considers that there is not enough evidence to support the complaint, it may decide to terminate the complaint. The complainant may then make an application to the Federal Court or the Federal Magistrates Court.

If the complaint is not terminated at this stage, the AHRC may try to resolve the complaint through conciliation. If conciliation fails, the AHRC will terminate the complaint, and the complainant may make an application to the Federal Court or the Federal Magistrates Court.[404] In such proceedings, the President of the AHRC may provide a report to the court although it cannot disclose anything done in the course of the conciliation.[405]

A special-purpose Commissioner may assist the court as an *amicus curiae* in proceedings of special significance.[406] For complaints of breaches of human rights, if the President is satisfied that the breach has occurred, he or she will prepare a report about the complaint which is submitted to the Minister.[407]

The AHRC is similar to the Canadian Commission in that it may refer discriminatory practices to the court system and represent the public interest in proceedings of significance. However, the determination of fundamental breaches of human rights are dealt with directly by the court system in Canada. We submit that it is possible to extend the scope of the AHRC to refer breaches of human rights to the court system.

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398 See Canadian Human Rights Act ss 43, 44.

399 *Human Rights Act 1993* (NZ), No 82, s 5.

400 Tracey Raymond, *Alternative Dispute Resolution in the Human Rights and Anti-Discrimination Law Context: Reflections on Theory, Practice and Skills* (2006) Australian Human Rights Commission <www.hreoc.gov.au/complaints_information/publications/ADR_2006.html> at 11 June 2009.

401 *Human Rights Act 1993*, No 82, s 5.

402 Under the *Age Discrimination Act 2004* (Cth), DDA, HREOC Act, SDA and RDA.

403 Established by the HREOC Act s 7.

404 HREOC Act s 46PO. See also AHRC, *Information for Complainants Complaints lodged under the Disability Discrimination Act, Racial Discrimination Act, Sex Discrimination Act and Age Discrimination Act* <http://www.hreoc.gov.au/complaints_information/download/Info_for_complainants_DDA_etc.doc> at 28 April 2009.

405 HREOC Act s 46PS.

406 HREOC Act s 46PV.

407 HREOC Act s 29.

Given the established nature of the work already undertaken by the AHRC, it is well placed to act as a body for a complaint based mechanism for discriminatory breaches. Further extension of the jurisdiction of the AHRC to include bodies other than Commonwealth Agents may be considered. We submit that the AHRC is best placed to perform this role, over other existing bodies such as the Commonwealth Ombudsman.

Whilst under the South African model, the commission has the power to bring proceedings on behalf of parties,[408] we submit that such a role should not be adapted for the AHRC, to maintain the neutrality and independence of the AHRC. However, the role of the AHRC should be expanded to include greater investigative and enforcement powers and the power to develop enforceable codes of conduct and guidelines, in line with the powers of other national human rights commissions.[409]

Although it may be possible to set up specific human rights tribunal with judicial powers under Chapter III of the Australian Constitution, it may be more economical to refer cases to the Federal Court. We submit that it may be appropriate for the AHRC to act as a filtering system so that parties should exhaust remedies provided by the AHRC before turning to the courts.

One of the potential constitutional issues that might arise in the application of remedies concerns whether a relevant body established to hear or adjudicate on complaints would be exercising judicial power, a power which, under the constitution, is the exclusive domain of the courts.[410] Generally speaking, the exercise of a judicial power will happen if a body makes a determination regarding the existence of a right or obligation, such that the determination settles for the future the existence of that right or obligation.[411] To avoid such a situation arising, we recommend that any body or commission (apart from the establishment of an actual Tribunal) be restricted to investigatory powers, with a power of referral to the court system if a breach is suspected.

We submit that the AHRC should take on a broad and active role as the independent monitor of the Charter, and be invested with similar functions and powers as those conferred on the ACTHRC and VEOHRC. These bodies carry out a number of functions in addition to their intervention and investigation rights, including legislative review of the relevant human rights legislation, providing education about the relevant human rights legislation and reviewing and reporting on the effect of existing statutory and common law on human rights.[412]

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408 *Human Rights Commission Act* (South Africa), Act No 54 of 1994, s 7(e).

409 *Human Rights Commission Act* (South Africa), Act No 54 of 1994; Canadian Human Rights Act; *Equality Act 2006* (UK); *Human Rights Act 1993* (New Zealand).

410 *Huddart, Parker & Co Pty Ltd v Moorehead* (1909) 8 CLR 330, 355; *R v Kirby; Ex parte Boilermakers' Society of Australia* (1955) 94 CLR 254, 270.

411 See comments by Kitto J in *R v Trade Practices Tribunal; Ex parte Tasmanian Breweries Pty Ltd* (1970) 123 CLR 361, 374. See also the recent discussion in *Attorney General (Cth) v Alinta Ltd* (2008) 233 CLR 542.

412 Victorian Charter s 41; *Human Rights Commission Act 2005* (ACT) s 27(2).

10 Defined Terms

ABBREVIATION	DEFINITION
ACT	Australian Capital Territory
ACT Human Rights Act	*Human Rights Act 2004* (ACT)
ACTHRC	ACT Human Rights Commission
ADJR Act	*Administrative Decisions (Judicial Review) Act 1977* (Cth)
ADR	Alternative dispute resolution processes
African Charter	*African Charter on Human and Peoples' Rights*, opened for signature 27 June 1981, 1520 UNTS 217 (entered into force 21 October 1986)
AHRC	Australian Human Rights Commission (formerly the Human Rights and Equal Opportunity Commission)
ALRC	Australian Law Reform Commission
ATCA	*Alien Tort Claims Act* 28 USC 1350(1789)
Australian Constitution	*Commonwealth of Australia Constitution Act 1900*
Canadian Charter	The *Constitution Act 1982*, being Schedule B to the *Canada Act 1982* (UK) c 11, Part I "Canadian Charter of Rights and Freedoms"
Canadian Commission	Canadian Human Rights Commission
Canadian Constitution	The *Constitution Act 1982*, being Schedule B to the *Canada Act 1982* (UK) c 11
Canadian Human Rights Act	*Canadian Human Rights Act 1985* (Canada)
CEDAW	*Convention on the Elimination of All Forms of Discrimination against Women*, opened for signature 18 December 1979, 1249 UNTS 13 (entered into force 3 September 1981)
CERD	*Convention on the Elimination of All Forms of Racial Discrimination*, opened for signature 21 December 1965, 660 UNTS 195 (entered into force 4 January 1969).
CLERP	Corporate Law Economic Reform Program
Committee	National Human Rights Consultation Committee
Convention against Torture	*Convention against Torture and Other Forms of Cruel, Inhuman or Degrading Treatment or Punishment*, opened for signature 4 February 1985, 1465 UNTS 85 (entered into force 26 June 1987).
Corporations Act	*Corporations Act 2001* (Cth)

ABBREVIATION	DEFINITION
CROC	*Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990)
CRPD	*Convention on the Rights of Persons with Disabilities*, opened for signature 30 March 2007, 993 UNTS 3 (entered into force 3 May 2008)
CRSR	*Convention Relating to the Status of Refugees*, opened for signature 28 July 1951, 189 UNTS 150 (entered into force 22 April 1954)
DDA	*Disability Discrimination Act 1992* (Cth)
DRIP	*Declaration of the Rights of Indigenous Peoples*, GA Res 295, UN GAOR, 61st sess, 295th plen mtg, UN Doc A/Res/61/295
ECHR	*European Convention for the Protection of Human Rights and Fundamental Freedoms*, opened for signature 4 November 1950, 213 UNTS 222
Federal Attorney-General	Attorney-General of the Commonwealth of Australia
First Optional Protocol	*Optional Protocol to the International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 302 (entered into force 23 March 1976)
German Constitution	*Basic law for the Federal Republic of Germany 1949 (Grundgesetz für die Bundesrepublik Deutschland)*
HREOC Act	*Human Rights and Equal Opportunity Commission Act 1986* (Cth)
Human Rights Act	Federal legislation in relation to human rights
ICCPR	*International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976)
ICESCR	*International Covenant on Economic, Social and Cultural Rights*, opened for signature 16 December 1966, 993 UNTS 3 (entered into force 3 January 1976)
ICTY	International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991
Indian Constitution	*Constitution of India 1949*
Irish Constitution	*Constitution of the Republic of Ireland 1936* (*Bunreacht na hÉireann*)
JSCT	Australian Joint Standing Committee on Treaties
Mallesons	Mallesons Stephen Jaques

ABBREVIATION	DEFINITION
Mallesons HRLG	Mallesons Stephen Jaques Human Rights Law Group
NACLC	National Association of Community Legal Centres
NGO	nongovernmental organisation
NZ	New Zealand
NZ Bill of Rights Act	*Bill of Rights Act 1990* (NZ)
NZHRC	NZ Human Rights Commission
Parliament	Parliament of the Commonwealth of Australia
RDA	*Racial Discrimination Act 1975* (Cth)
SDA	*Sex Discrimination Act 1984* (Cth)
Second Optional Protocol	*Second Optional Protocol to the International Covenant on Civil and Political Rights, aiming at the abolition of the death penalty*, opened for signature 15 December 1989, 1642 UNTS 414 (entered into force 11 July 1991)
South African Constitution	*The Constitution of the Republic of South Africa 1996*
South African LRC	South African Law Reform Commission
Standing Committee	Senate Standing Committee for the Scrutiny of Bills
Trade Practices Act	*Trade Practices Act 1974* (Cth)
UDHR	*Universal Declaration of Human Rights* GA Res 217 (III), UN GAOR, 3d Sess, Supp No 13, UN Doc. A/810 (1948) 71
UK	United Kingdom
UK Human Rights Act	*Human Rights Act 1998* (UK) c 42
UK JCHR	UK Parliament's Joint Committee on Human Rights
UN	United Nations
UN CESCR	UN Committee on Economic, Social and Cultural Rights
UN HRC	UN Human Rights Committee
UNSW	University of New South Wales
UNTS	United Nations Treaty Series
US	United States of America
US Constitution	*Constitution of the United States of America 1787*
VEOHRC	Victorian Equal Opportunity and Human Rights Commission

ABBREVIATION	DEFINITION
VEOHRC	Victorian Equal Opportunity and Human Rights Commission
VIC	Victoria
Victorian Charter	*Charter of Human Rights and Responsibilities Act 2006* (VIC)
Vienna Convention	*Vienna Convention on the Law of Treaties*, opened for signature 23 May 1969, 1155 UNTS 331 (entered into force 27 January 1980)
Vienna Declaration	*Vienna Declaration and Programme of Action: Report of the World Conference on Human Rights* UN Doc A/CONF.157/23 (1993)