National Human Rights Consultation

Australian Human Rights Commission Submission

June 2009

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1 Introduction

1. The Australian Human Rights Commission (the Commission) welcomes the opportunity to make this submission to the National Human Rights Consultation (the Consultation).

2. The Commission is Australia's national human rights institution, with 23 years of experience promoting and protecting human rights in Australia.

3. The Consultation provides the first ever Australia-wide consultation about protecting and promoting human rights. This broad-based consultation process is a good example of participative democracy – people throughout Australia have been given an opportunity to tell the Australian Government how they want their human rights protected.

4. The Commission acknowledges that there is a significant divergence of views about the appropriate mechanisms for protecting human rights in Australia. The Consultation Committee has been asked to 'consult broadly', to 'seek out the wide range of views held by the community about the protection and promotion of human rights' and to 'provide an assessment of the level of community support for each option it identifies'.

5. Genuine and broad-based support for the better protection of human rights in Australia is the first step towards creating a vibrant human rights culture across the country. Consequently, the Commission sees this consultation process as critical in moving towards enhanced human rights protections for all people in Australia.

6. The Commission's long experience working on human rights issues places it in a unique position to offer recommendations about the most appropriate mechanisms for better protecting human rights in Australia.

7. The Commission has consulted directly with Australians about their human rights concerns for over two decades. This includes, for example, people from vulnerable communities including Aboriginal and Torres Strait Islander peoples, people with a disability and people who are homeless. It also includes 'ordinary' Australians from a broad cross-section of the community, including women from all walks of life and people who live in rural and remote Australia.

8. Overwhelmingly, the Commission hears that Australians care about their fundamental human rights and think that there should be better protection of these rights.

9. In light of all the Commission's experience and after careful consideration, the Commission has come to the view that a better developed culture of respect for human rights is essential to improved human rights protection in Australia. The Commission believes that a number of measures must be taken to achieve this cultural change – and that the centre-piece of these measures should be a Human Rights Act which requires each of the three branches of government to integrate consideration of human rights into its everyday work.

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

2 Summary

11. Australia's strong traditions of liberal democracy, an independent judiciary and a robust media have been sufficient to protect the rights and freedoms of most people in Australia, most of the time. However, not all people in Australia can be confident of enjoying this protection in respect of all aspects of their lives all of the time.

12. Australia needs a system of government that makes sure that *all* people, no matter who they are, what they do, or where they live, have a safety net to protect their fundamental human rights.

13. All people in Australia should be able to name the human rights that the Australian Government has pledged to protect; and they should understand their responsibility to respect the rights of others.

14. A stronger human rights culture will build respect for the human dignity, freedom and equality of all people in Australia.

15. This submission addresses the following key questions.

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

16. The Commission believes that Australia should protect and promote all human rights in the international human rights treaties to which Australia is a party and the international human rights declarations Australia supports.

17. Many of the human rights in international instruments the Australian Government has agreed to uphold have not yet been implemented in Australia. This should change. Australia should live up to its international commitments by ensuring that human rights standards are brought into domestic law.

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

18. In the Commission's view, human rights are not sufficiently protected and promoted in Australia at present. Most of the international human rights instruments that Australia has promised to uphold are not recognised in Australian law. There is no single place in Australian law where people can find a clear statement of the rights which are recognised by that law. Furthermore:

    - the Australian Constitution does not fully protect human rights
    - Parliament can make laws that breach human rights without providing explicit justification
    - human rights can be overlooked in law and policy development processes
    - the common law does not adequately protect human rights

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

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

19. A good system of human rights protection involves consideration of human rights at all levels, and by all branches of government, with the aim of preventing human rights violations. It also involves providing enforceable remedies for people whose human rights are breached.

20. The building blocks of such a system include:

    - a Parliament that considers the human rights implications of all new laws
    - Australian Government decision-makers who respect human rights when implementing laws, developing policy and delivering public services
    - Australian courts that consider human rights when making decisions
    - the right to challenge government decisions which breach the human rights of individuals
    - all people in Australia being aware of their human rights and their responsibility to respect the rights of others.

21. The Commission believes that the following key measures would help to create a better system of human rights protection in Australia:

    - a national Human Rights Act
    - strengthened and streamlined federal anti-discrimination laws which extend the grounds of prohibited discrimination and promote equality
    - constitutional reform to
        - recognise Indigenous peoples in the preamble to the Australian Constitution
        - remove racially discriminatory provisions from the Australian Constitution
        - replace discriminatory provisions with a guarantee of equality and non-discrimination
    - a significantly enhanced national program of human rights education
    - enhancing the role of the Australian Human Rights Commission to support the better promotion and protection of human rights, and ensuring adequate funding for the Commission to fulfil that role.

22. In making the key recommendation that a national Human Rights Act should be adopted, the Commission respectfully acknowledges the range of views about the best way to protect and promote human rights in Australia. Alternative arguments include, but are not limited to:

    - the argument for a constitutionally entrenched bill of rights
    - the argument for a stronger form of statutory human rights protection
    - the argument that our current system of government provides adequate protection for human rights and that no specific human rights law is necessary or desirable.

23. The Commission has carefully considered these alternatives and has engaged in many discussions about the pros and cons of the various models. Ultimately, the Commission has come to the view that the best way to protect and promote human rights is through a national Human Rights Act, similar to the model used in the United Kingdom, New Zealand, Victoria and the Australian Capital Territory.

24. The Commission believes that such a Human Rights Act would ensure that relevant human rights are considered every time a government law, policy or other decision is made. In this way, a Human Rights Act would help promote the development of a culture of respect for human rights, thus helping to prevent human rights breaches before they occur, and introduce greater transparency and accountability into our system of government.

A Human Rights Act would be an exercise of parliamentary supremacy

25. A national Human Rights Act should make sure that Australian Government decision-making respects human rights, while ensuring that parliamentary supremacy is preserved.

26. Enacting a Human Rights Act would, in itself, be fundamentally democratic. It would be Parliament deciding how it believes human rights should be protected, promoted and respected in Australia. It would be Parliament deciding how its own processes and those of the executive and the courts should be altered to achieve that human rights protection.

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

27. A Human Rights Act should require the federal Parliament to consider human rights when it makes new laws:

    - each bill introduced into Parliament should be accompanied by a human rights compatibility statement
    - a parliamentary Human Rights Committee should be established to review the compatibility of each bill with the human rights set out in the Human Rights Act
    - Parliament should be required to publicly explain a decision to adopt a law that is inconsistent with the Human Rights Act.

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

28. A Human Rights Act should require the Australian Government to respect human rights when developing policy, making decisions and delivering services:

    - all Cabinet submissions should be accompanied by a Human Rights Impact Assessment
    - all federal public authorities should respect the human rights set out in the Human Rights Act by
        - considering and respecting human rights when they make decisions and set policies
        - preparing internal Human Rights Action Plans
        - reporting annually on compliance with the Human Rights Act
        - ensuring that public servants receive adequate human rights training.

29. It should be unlawful for a public authority to:

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

A Human Rights Act should bring human rights into the courts

30. Federal courts and tribunals should be required to interpret legislation, as far as it is possible to do so consistent with the statutory purpose, in a manner that is consistent with the human rights in the Human Rights Act.

31. There should be a mechanism to alert Parliament when a court finds that a law cannot be interpreted consistently with human rights. It would then be up to Parliament to consider the future of that law. The courts would not have the power to invalidate legislation.

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

32. A Human Rights Act should provide ways for individuals whose human rights have been breached to seek remedies. These remedies should include:

    - internal complaint handling mechanisms within federal public authorities
    - conciliation of complaints by the Australian Human Rights Commission
    - a cause of action in the courts
    - the right to seek reparations, including compensation where necessary and appropriate.

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

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

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

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

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

35. Although this submission focuses on a Human Rights Act, such legislation alone will not be enough to fully protect and promote human rights in Australia.

36. The Australian Constitution continues to discriminate on the basis of race. This is unacceptable. The Australian Government should initiate a process of constitutional reform to ensure the constitutional protection of equality and non-discrimination, as soon as possible.

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

37. For Australia to develop a robust human rights culture, all people in Australia need to better understand their human rights and their responsibility to respect the rights of others. This includes parliamentarians, court officials, public servants, private sector workers, students in both schools and universities and members of the general public.

38. Currently, human rights education efforts are ad hoc and inadequate. There is an urgent need for a properly resourced national human rights education program.

The role of the Australian Human Rights Commission should be enhanced

39. The Australian Human Rights Commission has over two decades of expertise in the protection and promotion of human rights in Australia. If Australia adopts a Human Rights Act, the Commission is the appropriate body to assist with the Act's implementation and to monitor its effectiveness. In particular, the Commission should be charged with investigating and conciliating a broader range of human rights complaints.

40. However, regardless of whether Australia adopts a Human Rights Act, there is a range of ways in which, if properly resourced, the Commission's functions could be strengthened to ensure better protection and promotion of human rights. Strengthening the Commission would also lead to an enhanced ability to address systemic discrimination and build substantive equality.

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

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

42. None of these measures will work in isolation. For there to be a real and lasting improvement to human rights protection in Australia, all of these reforms should be implemented.

43. The cumulative impact of these reforms will be the development of a stronger human rights culture in Australia. This will lead to a fairer Australia, where the human dignity, freedom and equality of all people are better respected.

3 Recommendations

44. The Australian Human Rights Commission makes the following key recommendations to the Consultation:

    1. The Australian Parliament should enact a national Human Rights Act.

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

    3. The Australian Government should begin a process of constitutional reform to protect the principle of equality for all people in Australia.

    4. The Australian Government should resource a significantly enhanced nation-wide human rights education program.

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

45. Further recommendations are made throughout this submission. A full list of recommendations is provided in Appendix 1.

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

4 Introduction

46. The Consultation Committee has focused on three key questions. The first asks which human rights (including corresponding responsibilities) should be protected and promoted in Australia.

47. The Commission's answer to that question is that Australia should protect and promote all human rights in the international human rights treaties to which Australia is a party and the international human rights declarations Australia supports.

48. Many of the human rights in international instruments the Australian Government has agreed to uphold have not yet been incorporated into Australian law. This should change. Australia should live up to its commitments by ensuring that the human rights standards to which it has agreed internationally are implemented domestically.

49. This section provides a fuller answer to the Consultation Committee's first question by providing brief background on: what human rights and responsibilities are; where human rights come from; and Australia's international human rights obligations.

5 What are human rights?

5.1 Human rights are core human values

50. Human rights are the basic standards of treatment that all people are entitled to, simply because they are human. They are based on the fundamental belief that all human beings have inherent dignity and worth.

51. Human rights are based on core values like freedom, equality, dignity and respect. They are about living a life free from fear, harassment and discrimination. They protect people's freedom to make choices about their own lives, and they promote equal opportunities for all people to develop to their full potential.

52. Equality is one of the most fundamental values underpinning human rights. Equality is a fundamental right in itself – all people have a right to be equal before the law and to be protected from discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.[1] In addition, all people are entitled to enjoy all of their other human rights without discrimination.[2]

5.2 Human rights are universal and inalienable

53. Human rights are universal – they apply to everyone, everywhere, every day. All people are entitled to enjoy the same basic rights regardless of who they are, what they look like, where they come from or what they believe in.

54. The international community has long recognised that the enjoyment of human rights and fundamental freedoms is an essential element of a peaceful society. As acknowledged by the *Universal Declaration of Human Rights* (the Universal Declaration), the 'recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world'.[3]

5.3 Human rights are indivisible and interdependent

55. Human rights are often divided into two broad categories – civil and political rights, and economic, social and cultural rights. However, in practice this is an artificial distinction.

56. In reality, human rights are indivisible and interdependent. The realisation of all human rights is necessary for an individual to live with dignity and to enjoy equality. Many civil and political rights cannot be realised unless economic, social and cultural rights are also secured.

57. For example, if a person does not enjoy their economic right to adequate food, their civil right to life will be undermined. Or, if a person does not enjoy their economic right to adequate housing, they might have difficulty enjoying various civil and political rights including the right to privacy and the right to vote.

58. In the Commission's experience, many of the most pressing human rights concerns facing people in Australia relate to economic, social and cultural rights. These include access to adequate health care, education and housing. And the restriction of these rights is often linked to civil and political rights like the right to non-discrimination.

59. The need for better protection to ensure the progressive realisation of economic, social and cultural rights in particular is discussed in more detail in section 20.5 of this submission.

5.4 Human rights come with responsibilities

60. It is important to recognise that, just as all people are entitled to enjoy all human rights, all people also have responsibilities to respect the rights of others.

61. This is recognised in the Universal Declaration, which calls on every individual in society to promote respect for human rights and freedoms.[4] It is also recognised in key human rights treaties, which note that individuals have duties to other individuals and to their community, and have a responsibility to strive for the promotion and observance of human rights.[5]

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

6 Where do Australia's human rights obligations come from?

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

6.1 Seven major human rights treaties

64. Australia is a party to seven of the major international human rights treaties, as follows:[6]

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

65. The two core treaties, adopted by the United Nations (UN) General Assembly in 1966, are the ICCPR and the ICESCR.

66. The ICCPR protects a broad range of civil and political rights. Many of these aim to ensure that all people are able to participate in public and political affairs – for example, the right to vote and to run for election, and freedom of speech, association and assembly. Other rights aim to protect people's physical liberty and safety – for example, the right to life and to be free from torture, freedom of movement, freedom from arbitrary detention, and the right to a fair trial.

67. The ICESCR creates obligations on government to progressively realise a diverse range of economic, social and cultural rights. Many of these relate to the basic necessities people need in order to lead a healthy and dignified life – for example, the right to adequate shelter, food and clothing and the right to adequate health care. Others aim to ensure that all people can develop to their full potential and have access to economic opportunities – for example, the rights to a basic education, to work, and to fair and safe conditions at work.

6.2 Other human rights treaties

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

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

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

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

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

6.3 International human rights declarations

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

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

(a) The Universal Declaration of Human Rights

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

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

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

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

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

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

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

(c) Other human rights declarations

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

- *Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief* [36]
- *Declaration on the Rights of Mentally Retarded Persons*[37]

- *Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities.*[38]

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

79. The human rights set out in an international treaty do not automatically become part of Australian law because the Australian Government becomes a party to that treaty. However, by becoming a party, the Australian Government makes a commitment to the international community – and is thereafter bound by international law – to protect the treaty rights in Australian law and practice.

80. The major international human rights treaties require the Australian Government to take a range of steps to respect, protect, fulfil and promote human rights.[39] An overview of the key steps is set out below.

7.1 Adopt laws that protect and promote human rights

81. All of the human rights treaties require Australia to take concrete measures, including changing or adopting laws, to implement the terms of the treaty domestically.[40]

82. For example, in the case of the ICCPR, Australia is obliged to 'adopt such laws or other measures as may be necessary to give effect to the rights' recognised in the Covenant.[41]

83. The UN Human Rights Committee has said this means that:

> …unless Covenant rights are already protected by their domestic laws or practices, States Parties are required on ratification to make such changes to domestic laws and practices as are necessary to ensure their conformity with the Covenant. Where there are inconsistencies between domestic law and the Covenant, article 2 requires that the domestic law or practice be changed to meet the standards imposed by the Covenant's substantive guarantees.[42]

84. This obligation to implement domestic protection under the ICCPR is unqualified and took effect as soon as Australia became a party. The UN Human Rights Committee has said that '[a] failure to comply with this obligation cannot be justified by reference to political, social, cultural or economic considerations within the State'.[43]

85. The obligation to ensure that human rights are respected and protected domestically is primarily the responsibility of the federal government. It is well established that in federal nations like Australia, this obligation includes ensuring protections also apply at the state and territory level. For example, Article 50 of the ICCPR states that '[t]he provisions of the present Covenant shall extend to all parts of federal States without any limitations or exceptions'.[44]

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

86. In addition to adopting laws that protect and promote human rights, the Australian Government is obliged to implement all other appropriate measures required to give full effect to the rights recognised in the human rights treaties.[45]

87. For example, in the case of the ICESCR, Australia is obliged to implement the Covenant rights using 'all appropriate means' including legislative, administrative, financial, educational and social measures.[46]

88. The ICESCR is slightly different to the other human rights treaties, in that the obligation to implement the rights is expressed in terms of 'progressive realisation'.[47] This allows for the full realisation of the rights over a period of time and allows for resource constraints to be taken into account. However, it still requires the taking of 'deliberate, concrete and targeted' steps towards realising the Covenant rights using all appropriate means.[48] The UN Committee on Economic, Social and Cultural Rights has also made clear that the ICESCR does impose minimum 'core obligations' in relation to the rights recognised in the Covenant. In relation to the right to health, for example, this requires access to health facilities, goods and services on a non-discriminatory basis; access to minimum essential food which is nutritionally adequate and safe; and access to basic shelter, housing and sanitation and an adequate supply of safe and potable water.[49]

7.3 Implement human rights without discrimination

89. Australia must ensure that it implements all of the rights contained in the human rights treaties without discrimination.[50]

90. For example, the Australian Government must ensure that all children within Australia's jurisdiction can enjoy the rights in the CRC:

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

7.4 Provide effective remedies for breaches of human rights

91. The human rights treaties either explicitly or implicitly require Australia to ensure that a person has access to effective remedies, including judicial remedies, if their rights are breached.[52]

92. According to the UN Human Rights Committee, an 'effective remedy' requires reparation to the person whose rights have been violated. Reparations can 'involve restitution, rehabilitation and measures of satisfaction, such as public apologies, public memorials, guarantees of non-repetition and changes in relevant laws and practices'.[53]

93. In the case of the ICESCR, the UN Committee on Economic, Social and Cultural Rights has noted that although administrative remedies can sometimes

be enough, 'whenever a Covenant right cannot be made fully effective without some role for the judiciary, judicial remedies are necessary'.[54]

7.5 Report to international treaty committees on Australia's progress

94. Every two to five years (depending on the treaty), Australia must report to the UN committee charged with monitoring each major human rights treaty.[55]

95. In those reports, the Australian Government should explain what it has done to implement the relevant treaty and what progress has been made in the enjoyment of the rights under the treaty.[56] The reports should include an update on any recent developments in Australian law or practice.[57] Reports should also respond to issues raised by the relevant UN committee in its concluding observations on Australia's previous report.[58]

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

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

8 Introduction

96. The second key question asked by the Consultation Committee is whether human rights are currently sufficiently protected and promoted in Australia.

97. The Commission's experience has persuaded it that the answer to this question is no. While Australia's laws and democratic institutions provide an important level of respect for fundamental rights and freedoms, the protection of human rights in Australia is piecemeal, with systemic weaknesses and significant gaps.

98. Many Australians are lucky enough to enjoy most of their human rights without interference, most of the time. However, there are appreciable numbers of people in Australia whose rights are infringed on a daily basis. And there is always potential for people to move from 'lucky' to 'unlucky'.

99. For more than twenty years the Commission has heard from people all around Australia about situations where their human rights have not been properly protected, and the impacts these experiences have had on their lives and livelihoods.

100. This section of the submission provides a brief overview of some of those human rights problems. It then goes on to discuss the underlying causes of those problems – the gaps and systemic weaknesses in Australia's promotion and protection of human rights.

101. The gaps and weaknesses in human rights protection in Australia include the following:

- international human rights treaties have not been adequately incorporated into Australian law
- Australia's Constitution does not fully protect human rights
- human rights can be overlooked in law and policy development processes
- the common law does not properly protect human rights
- administrative decisions may breach human rights
- Australia does not always provide effective remedies for human rights breaches
- the Australian Human Rights Commission's human rights protection functions are limited and its funding base is inadequate
- anti-discrimination laws do not protect all human rights or prohibit all types of discrimination
- resources for human rights education are seriously inadequate.

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

102. For almost 23 years, the Commission has worked towards ensuring that the human rights of people in Australia are promoted and protected. This work has covered a vast array of issues, and has often been carried out in conjunction with stakeholders including government, NGOs, educational institutions, community groups, business and the Australian public. The Commission has examined numerous laws and policies for their compliance with Australia's human rights obligations, conducted nation-wide inquiries into issues of critical concern, listened to the stories of countless Australians, and investigated thousands of individual complaints about human rights breaches.

103. On a daily basis, the Commission hears from people in Australia who feel that their human rights have been breached. In many cases the Commission is not able to offer an effective solution, because its statutory powers are limited.

104. It is often the most vulnerable members of society who are most at risk of falling through the gaps in Australia's human rights protection. The following is a very brief snapshot of just some of the ways in which human rights are insufficiently promoted and protected in Australia.

- **Aboriginal and Torres Strait Islander peoples:** Aboriginal and Torres Strait Islander peoples (Indigenous peoples)[59] continue to face enormous challenges to enjoying their human rights. Compared to non-Indigenous Australians, they experience poorer educational outcomes, higher rates of unemployment, lower income levels and lower rates of home ownership; while at the same time experiencing higher levels of family violence and child abuse, and overrepresentation in prisons.[60]

- **Homelessness:** Every night more than 100 000 people in Australia are homeless. One in every two people requesting accommodation from a homeless service is turned away.[61] More than 40% of people who are homeless in Australia are younger than 25.[62] Indigenous peoples are particularly vulnerable to homelessness because of their high levels of economic, social and cultural disadvantage.[63]

- **Domestic violence:** As many as one in three Australian women are affected by domestic and family violence.[64] Nearly one in five Australian women has experienced sexual violence since the age of 15.[65] Domestic violence has been identified as the leading contributor to preventable death, disability and illness in women aged 15 to 44 in Victoria.[66] Further, domestic violence is the most common reason cited by individuals seeking assistance with Australian housing services.[67] A high proportion of women with a disability experience domestic violence.[68]

- **Gender inequality:** Women experience lower levels of workforce participation, take on greater shares of caring responsibilities, and are generally paid less for the same work than men.[69] In the World Economic Forum's Global Gender Gap Index, Australia is ranked number one (with other countries) for educational attainment, but number 41 for labour force

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

- **Children and young people:** Young people are often 'moved-on' from public places where they gather, under laws which give police broad powers to 'move-on' or detain people in public spaces.[74] These powers disproportionately impact on young people, especially Indigenous and homeless youth. Many children in Australia are subjected to child abuse and neglect or are exposed to domestic violence.[75] Others are not able to access adequate educational opportunities, particularly in rural and remote areas.[76]

- **People with disability**: People with disability continue to face higher barriers to participation and employment than many other groups in Australian society.[77] People with disability represent a significant proportion of Australia's working age population (16.6%), yet they participate in the workforce at lower rates, they are less likely to be employed when they do attempt to participate, and they will earn less if they do get a job.[78] Some people with disability face challenges to enjoying their right to vote, given the lack of electronic voting for people who are blind or visually impaired.[79]

- **People in prison or detention:** Some prisoners in Australia face difficult conditions due to overcrowding, as well as inadequate health and mental health care.[80] UN treaty bodies have raised concerns that children are sometimes detained in adult correctional facilities.[81] Australia's mandatory immigration detention law remains in place, and some immigration detainees face prolonged and uncertain periods in detention in violation of the right to be free from arbitrary detention. In addition, some children are still held in Australia's immigration detention facilities.[82]

- **People in rural and remote communities**: People living in some remote and rural areas in Australia face significant challenges to enjoying their human rights, particularly the rights to education and health care, due to lack of access to adequate services and facilities. Some communities have little access to essential support services such as mental health care, accommodation assistance for people who are homeless, and alcohol and drug rehabilitation facilities. Access to public buildings for people with a disability is also a significant challenge in some rural areas.[83]

- **People who are gay, lesbian, bisexual, transgender or intersex (GLBTI):** There is no federal law specifically prohibiting discrimination on the grounds of sexuality, sex identity or gender identity. Many GLBTI people in Australia still experience significant levels of violence, harassment, bullying and discrimination in the workplace and the broader community. Same-sex couples do not enjoy equality of rights regarding relationship recognition, including civil marriage rights. Some people who are sex and gender diverse face difficulties obtaining official documents that accurately reflect their sex or gender.[84]

- **People with mental illness:** One in five Australians will be affected by a mental illness during their lifetime. Many people in Australia with mental illness are not able to access prompt and adequate psychological or psychiatric care; some have difficulty getting necessary medication; and others face challenges accessing adequate accommodation support and welfare benefits. They and their families or carers often report being treated with a lack of respect and dignity when they seek assistance.[85]

- **People from culturally and linguistically diverse backgrounds:** Many people in Australia face experiences of discrimination, vilification or violence because of their ethnic, racial, cultural or linguistic background.[86] Over the past few years this has been an increasing issue for Arab and Muslim Australians in particular, some of whom have been subjected to discrimination, harassment or violence.[87] Discrimination against Jewish people also remains a problem in Australia.[88]

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

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

106. While some human rights enjoy legal protection in Australia, many aspects of the major human rights treaties have not been incorporated into Australia's legal system. The major human rights treaties that Australia has agreed to uphold (as discussed in Part A) are not adequately protected in Australian law.

107. Some aspects of the right to equality and non-discrimination (as set out in the ICCPR, CERD, CEDAW, ILO No.111 and the Disability Convention) are implemented through the four federal anti-discrimination laws – the *Racial Discrimination Act 1975* (Cth) (Race Discrimination Act), the *Sex Discrimination Act 1984* (Cth) (Sex Discrimination Act), the *Disability Discrimination Act 1992* (Cth) (Disability Discrimination Act) and the *Age Discrimination Act 2004* (Cth) (Age Discrimination Act).[89] However, as discussed in section 21 of this submission, those laws do not fully protect the right to equality.[90]

108. The rights contained in a range of treaties and declarations are recognised under the *Human Rights and Equal Opportunity Commission Act 1986* (Cth) (the HREOC Act), either as schedules to it[91] or as 'relevant international instruments' declared under section 47 of the HREOC Act.[92] However, this does not make those treaties part of Australian law.[93] It does mean that the Commission has jurisdiction to exercise its human rights functions with regard to those treaty rights, but the Commission cannot make binding recommendations and cannot enforce remedies for breaches of the rights. Two major treaties – the ICESCR and the CAT – are not scheduled to the HREOC Act or declared to be 'relevant international instruments'. Nor are they otherwise fully incorporated into Australian law.[94]

109. The UN treaty bodies charged with monitoring implementation of the ICCPR, ICESCR, CRC and CAT have each concluded that those treaties have not been adequately incorporated into Australia's legal system.[95] In many cases this means that a person in Australia who feels that the government has breached their rights under one of those treaties is left without an enforceable remedy.

110. In 2000, the UN Committee on Economic, Social and Cultural Rights expressed regret that 'because the Covenant has not been entrenched as law in the domestic legal order, its provisions cannot be invoked before a court of law', and strongly recommended that Australia 'incorporate the Covenant in its legislation, in order to ensure the applicability of the provisions of the Covenant in the domestic courts'.[96]

111. In 2009, the same Committee expressed regret that their 2000 recommendation had not been implemented, and called for 'comprehensive legislation giving effect to all economic, social and cultural rights uniformly across all jurisdictions'.[97]

112. In 2000, the UN Human Rights Committee raised concerns that, in the absence of a constitutional bill of rights or a constitutional provision giving effect to the ICCPR, there are gaps in Australia's protection of the ICCPR rights and areas where people are not able to access an effective remedy for a rights violation.[98]

113. In 2009, the same Committee reiterated its concerns and recommended:

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

11 Australia's Constitution does not fully protect human rights

114. Contrary to the belief of many Australians,[100] the Australian Constitution does not include a bill of rights, and it offers only limited protection for a small number of discrete human rights. None of the international human rights treaties agreed to by the Australian Government have been incorporated into the Constitution.

115. When the Australian Constitution was written, the drafters were more concerned with the rights of the states than with the rights of individuals in Australia. One of the key arguments against the inclusion of individual rights in the Constitution at federation was that they would 'usurp the power of the States'.[101] Further, the drafters were also 'concerned to maintain the power of colonies, once they became the Australian states, to discriminate between people on the ground of their race'.[102]

116. At the Constitutional Conventions in the 1890s, there were no Indigenous people, women or working men as delegates. Those who drafted the Constitution were confident that 'the protections to individual rights provided by the traditions of acting as honourable men were quite sufficient for a civilised society'.[103]

117. As a result, the Australian Constitution provides only limited safeguards for individual rights and freedoms. These include:

- the right to compensation on just terms in the event of a compulsory acquisition of property by the Commonwealth[104]
- the right to trial by jury for a federal indictable offence[105]
- the right to challenge the lawfulness of decisions of the Australian Government in the High Court[106]
- a prohibition on making federal laws that establish a religion, impose a religious observance or prohibit the free exercise of any religion[107]
- a prohibition on making federal laws that discriminate against a person because of the state in which they live.[108]

118. The High Court has found that some rights are implied in the text of the Constitution. This includes freedom of expression in relation to public and political affairs, commonly referred to as 'freedom of political communication'.[109] This right is directed at ensuring that people are free to discover and debate matters which enable them to exercise a free and informed choice as voters.[110]

119. The High Court has rejected suggestions that other basic rights, like the right to equality, are implied by the text of the Constitution.[111] Even for those rights that are protected by the Constitution, either expressly or by implication, the Australian judiciary has generally interpreted them narrowly.[112] The High Court has not supported the proposition that, in cases of ambiguity, the Constitution should be interpreted consistently with human rights.[113]

120. Thus, there are many fundamental human rights that the Australian Constitution does not protect – the right to life, the right to equality and non-discrimination, the right to be free from arbitrary detention, freedom of assembly, and the right to be free from torture and cruel or inhuman treatment – to name just a few.[114]

121. In combination, these factors mean that the Australian Constitution offers very limited protection for human rights, and very limited constraints on the ability of the federal Parliament to pass laws that breach human rights.

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

122. The UN Committee on the Elimination of Racial Discrimination has expressed concern that there is no entrenched guarantee against racial discrimination in Australia.[115]

123. While the Race Discrimination Act provides some protection against racial discrimination, the Australian Constitution does not include protection for the right to racial equality. This means the federal Parliament can override the legislative protection offered by the Race Discrimination Act and adopt laws that discriminate on the basis of race.

124. The federal Parliament did this in 2007, when it suspended the operation of the Race Discrimination Act in order to pass the Northern Territory Emergency Response (NTER) legislation. The NTER legislation introduced measures to address child sexual abuse and family violence in 73 prescribed Indigenous communities in the Northern Territory.

125. The Commission does not dispute that the Australian Government has an obligation to promote and protect the right of Indigenous peoples to be free from family violence and child abuse.[116] The Commission has consistently supported those aspects of the NTER.[117] However, the Commission does not accept that to take the urgent action necessary to protect the rights of children and families, it is necessary to discriminate on the basis of race.

126. The NTER legislation measures that discriminate or allow discrimination on the basis of race include:

- suspending the application of the Race Discrimination Act and allowing officials to act in a racially discriminatory way
- controlling how a person spends their money through income management measures, a significant interference with the right to privacy
- applying parts of the social security legislation retrospectively
- excluding some aspects of social security administrative decisions from review
- acquiring property on a different basis to other property holders in the Northern Territory.

127. The UN Human Rights Committee criticised the Northern Territory Emergency Response as being inconsistent with Australia's obligations under the ICCPR, and expressed particular concern about the suspension of the Race Discrimination Act and the lack of consultation with Indigenous peoples in designing the NTER measures.[118]

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

128. In the 2004 case of *Al-Kateb v Godwin*, the High Court of Australia was asked to decide whether the *Migration Act 1958* (Cth) (Migration Act) authorises the indefinite detention of an unlawful non-citizen when there is no real prospect of his removal from Australia.[119] The Court found that a law that resulted in a person being held in immigration detention indefinitely was constitutionally valid.

129. Mr Al-Kateb was twenty four when he arrived in Australia by fishing boat, without a valid visa. He was taken to Curtin Immigration Detention Centre in the Western Australian desert. Mr Al-Kateb's application for a protection visa to stay in Australia was rejected. The Department of Immigration tried to remove Mr Al-Kateb without success. Mr Al-Kateb was held in immigration detention for years, with no idea when he would be freed.

130. In the High Court, Mr Al-Kateb argued that the Migration Act should be interpreted consistently with Australia's obligations under the ICCPR, which protects the right to liberty and prohibits arbitrary detention.[120]

131. The majority of the High Court found that the words of the Migration Act clearly required Mr Al-Kateb to be detained until he could be removed from Australia, regardless of the fact that there was no reasonable prospect of this happening in the foreseeable future. Because the majority decided the words were unambiguous, they did not consider Mr Al-Kateb's human rights. Justice McHugh recognised that the situation was 'tragic' but said:

> It is not for courts … to determine whether the course taken by Parliament is unjust or contrary to basic human rights. The function of the courts in this context is simply to determine whether the law of the Parliament is within the powers conferred on it by the Constitution.[121]

132. According to Justice McHugh, the case illustrated that a judge 'may be called upon to reach legal conclusions that are applied with "tragic" consequences'.[122] This observation could also be made about other cases – in the same year as the Al-Kateb case, the High Court also upheld the legality of the long-term detention of children and confirmed that immigration detention remains lawful even if the conditions are harsh or inhuman.[123]

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

133. As mentioned above, the best system of human rights protection is one that prevents breaches of human rights occurring in the first place. One of the key weaknesses in Australia's current system is that there are no formal mechanisms to ensure that federal ministers, parliamentarians and government departments assess the potential human rights implications of laws and policies before they are adopted.

134. Parliament can pass laws that breach Australia's international human rights obligations without even considering those obligations during the drafting process, and without public debate or explanation.

135. The Australian Government can also adopt and implement policy measures without considering whether those measures promote and protect the human rights Australia has agreed to uphold.

136. In recent years, these systemic weaknesses have allowed the adoption of laws and policies that breach numerous human rights. For example, Australia has adopted laws and measures that discriminate against Indigenous peoples in the Northern Territory; laws allowing the indefinite detention of people seeking asylum; laws discriminating against same-sex couples; and a raft of counter-terrorism laws that infringe on fundamental freedoms.

137. There are various stages of the law- and policy-making process where human rights may currently be overlooked, as discussed below.

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

138. The *Commonwealth Legislation Handbook* (the Legislation Handbook) describes the procedures for making federal laws.[124] It provides a 'guide for departmental officers and focuses on matters which require action by departmental officers'.[125]

139. The Legislation Handbook does not require ministers or their respective departments to consider human rights in the law- and policy-making process. This means that a new policy can be formulated and approved by a minister, and legislation can be drafted without consideration as to whether it complies with Australia's human rights obligations.

140. The Legislation Handbook does state that the Attorney-General's Department should be 'consulted on proposed provisions that may be inconsistent with, or contrary to, an international instrument relating to human rights'.[126] However, since ministers and departments are not required to consider human rights in the first place, it is unclear how human rights issues will be identified and it is likely that they will be overlooked in other than clear cases. Further, the Legislation Handbook does not explain what should happen in the event that the Attorney-General's Department does confirm an inconsistency with human rights.

12.2 Human rights may be overlooked by Cabinet

141. The Legislation Handbook requires Cabinet approval for certain significant policy proposals involving legislation.[127] However, the Handbook 'does not single out policy proposals with a rights impact for Cabinet consideration'.[128] Nor does it require Cabinet submissions to consider how proposals for new legislation might impact on human rights.

142. The federal *Cabinet Handbook* provides further guidance for departmental officers involved with Cabinet submissions.[129] However, like the Legislation Handbook, this document does not contain any guidance on how human rights should be considered in the preparation of Cabinet submissions.

12.3 Human rights may be overlooked when making subordinate legislation

143. The Legislation Handbook recommends that 'rules which have a significant impact on individual rights and liberties' and 'provisions conferring enforceable rights on citizens or organisations' should be implemented through primary legislation rather than delegated (or subordinate) legislation.[130]

144. The *Federal Executive Council Handbook*, which sets out procedures for making subordinate legislation, contains no specific guidance on how human rights should be considered in the drafting and approval of subordinate legislation.[131]

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

12.4 Human rights may be overlooked by parliamentary committees

146. Parliamentary committees scrutinise government activity including new bills, existing laws, and issues of public administration and policy.

147. There are a number of parliamentary committees with special areas of expertise. However, there is no specialist committee focused on examining the human rights implications of proposed laws. Further, there is no general requirement for other specialist committees to consider human rights during their inquiries, unless their specific terms of reference require them to do so. In practice, terms of reference rarely include human rights considerations.

148. The Standing Committee on Regulations and Ordinances and the Scrutiny of Bills Committee are governed by the Senate Standing Orders, which require the Committees to consider whether regulations, ordinances or bills may 'trespass unduly on personal rights and liberties'.[133] However, these Committees are given no guidance on which rights and liberties they should consider, or how they should determine when those rights can be justifiably limited.

12.5 Human rights may be overlooked in parliamentary debate

149. Some opponents of stronger legal protections for human rights suggest that robust parliamentary debate currently provides sufficient protection.[134] However, as Professor Hilary Charlesworth has observed, this claim:

> has little empirical basis in Australian history: indeed the current operation of the Commonwealth Parliament indicates the sharp diminution of the role of the legislature in policy development generally.[135]

150. Bills are often debated and adopted by Parliament with little reference to the potential impacts on people's human rights. In some cases, parliamentarians and the general public may be unaware of the human rights obligations that could be undermined by the proposed legislation. In some cases, parliamentarians may be aware, but are not required to explain or justify publicly the limitations on rights. In other cases, bills are simply rushed through without adequate time to consider or address the potential human rights consequences.

151. Returning to the NTER legislation as an example, it is clear that Parliament did not hold an informed and rigorous debate about the serious potential human rights implications of the new legislation.

152. Alan Ramsey described the passage of the NTER legislation – which has since had significant impacts on human rights – as follows:

> In the House, which met at 12.30pm, Malcolm Thomas Brough, 45, cabinet minister, introduced a package of five bills totalling some 700 pages, including explanatory memoranda. He began speaking at 12.30. He sat down at 1.51pm after reading five speeches end on end, like sausages. It had taken him 10 minutes short of two hours just to introduce his five bills. At 9.34 that night it was all over.
>
> That is, the people's house passed Brough's five bills of 600 pages of legislative detail just nine hours after the Prime Minister's delegate introduced them. Debate had lasted four hours and 16 minutes. Fourteen politicians had spoken, including Brough a second time. Thus in a legislature of 150 MPs, only 13 were allowed only twice as long, collectively, to debate the bills as it had taken the minister to read his five speeches introducing them.[136]

153. Similarly, over the past decade, numerous counter-terrorism laws were rushed through Parliament without adequate consideration of, or debate about, their potential impacts on fundamental rights and freedoms.[137]

154. Both the UN Human Rights Committee and the UN Committee against Torture have since raised concerns about aspects of Australia's counter-terrorism laws.[138] The impacts of these laws are discussed further in the case study in section 13.3 below.

13 The common law does not properly protect human rights

155. Some human rights are protected by established common law principles. Other human rights have limited protection through certain principles of statutory interpretation, as discussed below.

156. However, many of the human rights the Australian Government has agreed to uphold are not protected at all by the common law. And the protection that does exist is fragile. Parliament can adopt legislation that overrides the common law at any time, without giving due consideration to the human rights implications and without having to offer public justification.

13.1 The common law offers some human rights protections

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

13.3 Example: Australia's counter-terrorism laws

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

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

- **Detention without charge:** The Australian Federal Police (AFP) has the power to detain a suspect without charge for 24 hours.[151] After 24 hours the AFP can seek an order from a court to detain the suspect for a further 24 hours. These 24 hour caps do not include 'dead time', which can include time when the suspect is contacting a lawyer, taking meal breaks and sleeping.[152] This means that, in practice, a person can be detained without charge for much longer periods. In 2007, Dr Mohammed Haneef was detained for 12 days under this power.

- **Restrictions on movement**: The *Anti-Terrorism Act (No. 2) 2005* (Cth) gave federal courts the power to issue control orders in response to a request from the AFP.[153] Control orders can force a person to stay in a certain place at certain times, prevent them from going to certain places or talking to certain people, or require them to wear a tracking device. Depending on the severity of the restrictions imposed, a control order could effectively amount to home detention.

- **Special powers of detention:** The *Australian Security Intelligence Organisation Legislation Amendment (Terrorism) Act 2003* (Cth) gave ASIO special powers to question, or question and detain, a person suspected of having information related to an anti-terrorism investigation, even if that person is not suspected of a terrorist offence.[154] Under these powers, a person who is not suspected of a terrorism offence can be detained for up to seven days.[155] The grounds for detention can be kept secret.[156]

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

orders and control orders.[158] Both committees have criticised the increased powers given to ASIO.[159]

14 Administrative decisions may breach human rights

170. Australian laws regularly authorise federal officials and ministers to make administrative decisions that can have significant impacts on people's human rights. It would be reasonable to assume that, when making administrative decisions, Australian officials will act in accordance with Australia's international human rights obligations.

171. However, while the High Court has held that the ratification of an international treaty creates a legitimate expectation that administrative decision-makers will act in conformity with the treaty, this expectation falls short of a legal right for the person who is the subject of the decision, and the decision-maker is not bound to comply with the treaty.[160]

172. Courts and tribunals can review administrative decisions to ensure the decision-maker is acting fairly, within their powers and in accordance with the law.[161] However, there is no general legal obligation upon a decision-maker to give proper consideration to human rights when making a decision.

173. At the federal level, the *Administrative Decisions (Judicial Review) Act 1977* (Cth) (ADJR Act) sets out the grounds for judicial review of administrative decisions. Failing to give proper consideration to a relevant human right is not a ground of review under the ADJR Act.[162]

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

174. In 2005, nine young Australians were arrested in Indonesia for their involvement in a plan to smuggle heroin from Indonesia to Australia. Before their arrest, the AFP provided information to the Indonesian authorities about the young men and women who are now known as the 'Bali Nine'. The information was provided in accordance with guidelines which permit the AFP to assist police in other countries, even in cases which may attract the death penalty.

175. Representatives of four members of the Bali Nine brought an action against the AFP. In *Rush v Commissioner of Police*, Justice Finn found there was no cause of action against the AFP for exposing the members of the Bali Nine to the death penalty.[163] The judgment confirmed that the AFP can lawfully provide 'police to police' assistance in circumstances which could result in a person being charged with an offence punishable by death. This is despite the fact that Australia has abolished the death penalty domestically; is a party to the ICCPR, which protects the right to life; and is a party to the Second Optional Protocol to the ICCPR, which aims at the abolition of the death penalty worldwide.[164]

176. Three members of the Bali Nine are currently awaiting execution in Indonesia.

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

177. As discussed in section 10 above, many aspects of the international human rights treaties that Australia has agreed to uphold have not been adequately incorporated into Australia's legal system. In many cases this means that a person in Australia who feels that the government has breached their rights under one of those treaties is left without an effective remedy.

178. The Commission provides investigation and conciliation processes to resolve complaints about certain human rights issues. However, the UN Human Rights Committee has confirmed that these processes cannot be characterised as 'effective remedies' under the ICCPR because the Commission's recommendations are not binding.[165]

179. In the last decade, an increasing number of people have resorted to making human rights complaints to UN treaty bodies because they could not get an effective remedy within Australia. In a significant number of cases, treaty bodies have found that Australia has breached the human rights of people within its jurisdiction.[166] These include the following:

- In *Brough v Australia*, the UN Human Rights Committee found that the conditions of detention of an Aboriginal boy with a mild intellectual disability violated the right of persons deprived of their liberty to be treated with humanity and respect for their dignity, the right of juvenile offenders to be segregated from adults, and the right of all children to special protection without discrimination. The boy was held in solitary confinement in an adult prison, his clothes and blankets were removed from him, and he was exposed to prolonged periods of artificial light. While being detained in these conditions, he attempted suicide.[167]
- In *Young v Australia*, the UN Human Rights Committee found that an Australian law discriminated against same-sex couples, in breach of the right to equality before the law. Mr Young had been in a relationship with Mr C for 38 years. Mr C was a war veteran. When he passed away, Mr Young applied for a veteran's pension under the *Veterans' Entitlements Act 1986* (Cth). The Department of Veterans' Affairs denied his application on the basis that he did not fall within the definition of persons who could be a veteran's 'dependant', which covered members of de facto couples but not same-sex couples.[168]
- In *A v Australia*, the UN Human Rights Committee found that the immigration detention of a Cambodian man at the Port Hedland detention centre for more than four years violated his right to be free from arbitrary detention. The Committee also found that Mr A's right to have the lawfulness of his detention reviewed by a court had been breached – although an Australian court had found his detention was lawful under the Migration Act, the court did not consider his rights under the ICCPR, including his right to be free from arbitrary detention.[169]
- In *Coleman v Australia*, the UN Human Rights Committee found that Australia had violated the right to freedom of expression. Mr Coleman was

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

180. In each of these cases, the person whose rights were breached could not access an effective remedy within Australia – if they had been able to do so, their complaint would not have been admissible to the UN treaty body.

181. However, even the views of the UN treaty bodies are not enforceable, and the Australian Government has often rejected their conclusions and recommendations.[171] This means that a person's efforts to seek a remedy for a human rights breach may be extremely time-consuming, expensive and ultimately fruitless.

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

182. The Australian Human Rights Commission is Australia's national independent human rights institution. The Commission's 'human rights' functions are defined in section 11 and Division 3 of Part II of the HREOC Act.

183. Under section 11 of the HREOC Act, the Commission is given the following functions:

- examine laws and proposed laws to assess whether they are consistent with human rights, and report the results of the examination to the Attorney-General
- inquire into acts and practices that may be inconsistent with or contrary to human rights
- promote an understanding and acceptance, and the public discussion, of human rights
- undertake research and educational programs to promote human rights, and co-ordinate other such programs undertaken on behalf of the Commonwealth
- report to the Attorney-General as to the laws that should be made by the Parliament, or action that should be taken by the Commonwealth, on matters relating to human rights
- report to the Attorney-General as to the action that needs to be taken by Australia in order to comply with the provisions of certain human rights instruments
- publish guidelines for the avoidance of acts or practices done by or on behalf of the Commonwealth that would breach human rights
- intervene, with the leave of the court, in proceedings that involve human rights issues
- do anything incidental or conducive to the performance of any other functions.

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

16.1 The Commission has limited powers of pre-legislative scrutiny

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

16.2 The Commission's functions are limited by a narrow definition of human rights

186. The Commission's human rights functions are limited by the definition of 'human rights' in the HREOC Act (which includes those rights set out in the instruments scheduled to the Act and other designated 'relevant international instruments').[173]

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

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

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

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

16.3 The Commission has limited jurisdiction to investigate human rights complaints

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

16.4 The Commission lacks adequate resources to fulfil its functions

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

16.5 The Commission cannot enforce its recommendations about human rights complaints

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

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

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

16.6 Commission reports and recommendations can be ignored by government

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

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

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

197. Some of the obstacles faced by the Commission in holding the Australian Government accountable in respect of its international human rights obligations are illustrated by the Commission's repeated efforts to address human rights violations caused by Australia's mandatory immigration detention system.

198. The Commission has investigated numerous complaints of human rights breaches in immigration detention over the past 13 years.[180] In cases where the Commission has found there was a breach, a report has been tabled in federal Parliament setting out recommendations for redress. While the Australian Government is required to table these reports, it is not required to respond. In many cases, the Commission's recommendations have been ignored.

199. More than a decade ago, the Commission conducted an inquiry into the mandatory detention system, which resulted in the 1998 report, *Those who've come across the seas: Detention of unauthorised arrivals*.[181] The Commission found that Australia's mandatory detention policy violated international human rights standards, including the right not to be subjected to arbitrary detention. The Commission made 94 recommendations about the use of, and conditions in, detention and put forward an alternative detention model and a range of community release options.

200. The Australian Government asserted that the mandatory detention policy did not breach Australia's human rights obligations, and did not consider implementing the community release options. The government rejected the Commission's recommendations that the lawfulness of immigration detention, as interpreted under international law, be subject to judicial review.

201. In 2004, the Commission released the report of its national inquiry into children in immigration detention, *A last resort?*.[182] The inquiry found that Australia's mandatory detention laws and practices resulted in numerous and repeated breaches of the CRC. In 2005, the Migration Act was amended to affirm the principle that children should only be detained as a measure of last resort, and children were gradually released from immigration detention centres (IDCs). However, while children are no longer held in IDCs, some children are still held in other closed immigration detention facilities, both on the mainland and on Christmas Island.

202. While there have been some key improvements to Australia's immigration detention system over the past few years, many of the Commission's major concerns remain, despite more than a decade of efforts to reform the system. Throughout this decade many men, women and children have been detained for prolonged periods of time. Australia's mandatory detention law remains in place; the lawfulness of immigration detention is not subject to judicial review; there are no legislated standards for conditions in detention; and offshore processing of asylum seekers continues on Christmas Island.[183] The UN treaty bodies have made numerous criticisms about Australia's mandatory detention system and have urged its repeal.[184]

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

203. Australia has four federal anti-discrimination laws, which provide some important protections against discrimination on the basis of race, sex, disability and age.[185]

204. However, as discussed in further detail in section 21 of this submission, there are a number of significant limitations and deficiencies with these laws. They fail to offer comprehensive protection against discrimination on the grounds of race, sex, disability and age; they do not cover discrimination on a broad range of other grounds; and they contain various inconsistencies.

205. In practice, this means that people are often left without an effective remedy for a breach of their right to equality and non-discrimination.

17.1 Example: Discrimination on the grounds of criminal record

206. Unlike equivalent legislation in the states and territories, federal anti-discrimination laws do not provide protection against discrimination on the ground of a person's criminal record.[186] While the Commission can accept a complaint on this ground under the HREOC Act, it cannot provide an enforceable remedy.

207. The Commission has received numerous complaints over the years from people who have been refused employment on the basis of a prior criminal record, which is not directly relevant to the job the person is applying for.

208. For example, in 1991, a man was convicted for receiving stolen goods. He completed 200 hours of community service at a police academy in South Australia (SA), after which he was employed by the SA Police as a grounds person at the academy.

209. Ten years after his conviction, his position was made redundant and he was moved to a security guard position with the Police Security Services Branch, where he worked for three months. However, prior to being formally employed in the role, the SA Police undertook a criminal record check, as part of its standard employment procedures. This check revealed his 1991 conviction and he was advised that he would not be offered the security guard position because of that criminal record.

210. The man lodged a complaint with the Commission. The Commission found that he had been discriminated against on the basis of his criminal record. There was enough evidence available to the SA Police to demonstrate that the man possessed the integrity and character required for the job, notwithstanding his criminal record. In particular, he had provided ten years of service to the SA Police, during which his employment and integrity had been highly praised.

211. The Commission made recommendations for remedies including compensation, but these recommendations were not enforceable under Australian law. To

date, the SA Police has not informed the Commission that it has complied with any of the recommendations.[187]

18 Resources for human rights education are seriously inadequate

212. One of the major gaps in the current protection of human rights in Australia is that many people are not aware of what their human rights are, and what courses of action are available to them if their rights are breached.[188] There is a need for significantly enhanced human rights education in the community, in the public sector, and in schools and universities.

213. The need for enhanced human rights education was highlighted by young people in various parts of Australia during Commission workshops aimed at encouraging broad public participation in the National Human Rights Consultation process. (These workshops and the views expressed by young people are discussed further in Appendix 5 and Appendix 6.)

214. The Commission has statutory functions relating to human rights education in Australia. These include promoting understanding and public discussion of human rights, and undertaking research and educational programs for the purpose of promoting human rights.[189] Over the years the Commission has developed a wide range of education resources and programs.

215. However, the Commission cannot continue to produce an adequate range of materials or adequately distribute them under its current budget. This issue is discussed further in section 24.8 of this submission.

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

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

216. There are a number of ways that human rights could be better promoted and protected in Australia. Over the past 23 years, the Commission has recommended numerous measures for improving human rights protections for specific, vulnerable groups. Some of the major ongoing human rights issues are set out in Appendix 2 to this submission.

217. It is clear from the Commission's years of experience that, to prevent human rights problems from arising, Australia needs to develop a culture of greater respect for human rights.

218. A stronger human rights culture in Australia is unlikely to be achieved through ad hoc, piecemeal reform. For all people in Australia to live in a community that is truly inclusive and respectful of their rights, no matter who they are or what their circumstances, there needs to be overarching, systemic changes to the way government, at all levels, considers the human rights of all people. There also needs to be greater awareness in the general community of the human rights to which we are all entitled and the responsibilities that come with them.

219. The Commission believes that a combination of the following five major reforms would help to build a stronger culture of respect for human rights in Australia:

- a national Human Rights Act
- stronger statutory protection of equality and non-discrimination
- a referendum to amend the Australian Constitution so that it recognises Aboriginal and Torres Strait Islander peoples; removes the existing racially discriminatory provisions; and protects equality for all people
- a significantly enhanced national program of human rights education
- expanded functions and better resourcing for the Commission, as Australia's national human rights institution.

220. Any one of these reforms would, in some measure, improve the protection and promotion of human rights in Australia. However, the Commission believes that each of these reforms would complement and strengthen each other. Together they would work to help Australia better live up to its international promises to protect human rights.

221. This part of the Commission's submission explains each one of these five major reforms in further detail, with specific emphasis on the Commission's recommendation for a Human Rights Act for Australia.

20 A Human Rights Act for Australia

222. The Commission appreciates that the question of how Australia can best protect human rights, and whether Australia should have a Human Rights Act is the subject of much debate.

223. Some believe that only a constitutionally entrenched bill of rights can properly protect human rights in Australia. Others believe that our current democratic system already properly protects human rights and any interference with that system could undermine our democracy.

224. At the end of this section (in section 20.16) the Commission specifically responds to each of the primary arguments against a Human Rights Act.

225. In the main body of this section, the Commission explains why it believes that a Human Rights Act could make a real difference to human rights protection in Australia, and how it could be the catalyst for creating a stronger human rights culture in the Australian Government and in the Australian community.

226. In particular, the Commission explains how a Human Rights Act could improve the enjoyment, protection and promotion of human rights by simultaneously strengthening Australia's human rights culture and Australia's democratic system of government.

20.1 Australia should have a Human Rights Act

227. The Commission believes that a Human Rights Act would help to build a culture that respects the human rights of all people in Australia, no matter who they are.

228. When Australia signed up to the major international human rights treaties, it made a commitment to ensure that Australia's government would always keep in mind the basic rights of every person – whether they were part of the majority or a minority in the community.

229. If the federal Parliament passed a Human Rights Act, it would be a major step towards fulfilling Australia's commitment to protecting human rights.

230. A Human Rights Act would be Parliament's clear statement of the fundamental rights and values to which Australia is committed. The Australian Government has already made that statement to the international community; it is now time to make it to the Australian community.

231. A Human Rights Act would set out the human rights that all people in Australia are entitled to have protected, and explain that we are all responsible for respecting the rights of others.

232. In this way, a Human Rights Act would be an extremely powerful tool for furthering the type of human rights dialogue and education that occurred during this Consultation process.

233. A Human Rights Act would also be Parliament's commitment to a democratic system that provides transparency and accountability in all decision-making which might impact on human rights.

234. Thus, a Human Rights Act could help to create a stronger human rights culture throughout government and the community by:

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

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

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

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

(a) Why statutory human rights protection?

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

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

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

238. The Commission also notes that the Hon Michael McHugh recently suggested a model of statutory protection based on the Canadian Bill of Rights.[190] This model would require federal laws to be read subject to the Human Rights Act and allow courts to hold that state and territory laws are invalid if they are inconsistent with it.[191] The model would, however, allow federal Parliament to expressly declare that a law could operate notwithstanding the Human Rights Act. Parliament could do this at the time the law was first introduced or in response to a court decision with which it disagreed.

239. However, the Commission recognises that there is some community concern about the potential role of the courts under a Human Rights Act or a constitutionally entrenched bill of rights. It may be that this concern will abate as Australia develops an improved human rights culture. Should it do so, the question of comprehensive constitutional protection of human rights could appropriately be revisited.

240. The Commission also recognises that many of the reforms to public decision-making processes that it proposes could be implemented independently of a Human Rights Act.

241. However, piecemeal reform risks replicating the current gaps in Australia's human rights protections. Further, a Human Rights Act would have the overarching benefit of being both a clear statement of human rights all people in Australia are entitled to, as well as a guide to the steps that should be taken to ensure the protection and promotion of these rights.

242. Therefore, the Commission believes that Australia should have a Human Rights Act based on the model described below, because:

- This model embeds human rights considerations into all stages – including very early stages – of public decision-making. This should help prevent human rights problems from occurring.
- This model creates the type of accountability and transparency in decision-making which would strengthen Australia's democratic system of government and build upon our system of checks and balances.
- This model preserves parliamentary supremacy. It would be a positive action taken by Parliament to express its view on how human rights should be protected, and to create the system it believes would achieve that purpose.
- This model provides a clear statement to all people in Australia, and around the world, that Australia intends to live up to its international human rights commitments.
- There is precedent for this model in New Zealand, the UK, Victoria and the ACT, and the Consultation Committees in WA and Tasmania have both supported this model.

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

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

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

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

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

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

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

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

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

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

249. Overwhelmingly, a Human Rights Act will benefit ordinary people, in their everyday interaction with government, by creating a more transparent and accountable decision-making system. While some individuals and groups may make more use of the legislation than others, this would be because those individuals and groups are in greater need of human rights protection than others – take, for example, Indigenous peoples who suffer more disadvantage than many other groups in Australia.

250. A Human Rights Act should protect individuals and groups, depending on the nature of the rights included.[193]

251. A Human Rights Act should also protect the rights of citizens and non-citizens. However it would need to recognise that some rights, such as the right to vote, apply only to citizens.[194]

252. A Human Rights Act should not confer human rights on corporations.

(b) Ideally, Australia should have uniform protection of human rights

253. Under international human rights law, the federal government has ultimate responsibility for ensuring that human rights protections extend throughout the country.[195]

254. Ideally, human rights should be consistently protected by all federal, state and territory governments in Australia.

255. As illustrated by the different discrimination laws in Australia (see section 21), it is very difficult for people to understand what their rights are and how they are protected if they are protected in different ways by the federal, state and territory governments. Further, many of the human rights issues that touch people's everyday lives are affected by state and territory laws and policy.

256. However, there are practical and political difficulties to achieving uniform human rights protection across Australia.

257. It is constitutionally possible for a national Human Rights Act to bind the states to some extent.

258. Pursuant to the external affairs power,[196] federal Parliament could introduce a national system of human rights protection that binds federal, state and territory governments. It is also constitutionally possible that a national Human Rights Act may render inconsistent state laws inoperative.[197]

259. However, it might not be possible to extend all elements of a national Human Rights Act to the states, as the Australian Government does not have the power to make laws that would undermine the capacity of the states to function.[198]

260. Recognising this limitation, the federal government could introduce a Human Rights Act that binds the states to the extent constitutionally possible. The Australian Government could then encourage the states to enact their own legislation in relation to the outstanding elements (for example, those provisions about parliamentary processes).

261. An alternative approach would be to limit the operation of a national Human Rights Act to federal laws and public authorities and encourage the states and territories to enter into co-operative arrangements to implement Human Rights Acts throughout Australia.

262. There is some prospect of success with this approach. The ACT and Victoria have already introduced specific laws to protect human rights. Western Australia and Tasmania have conducted inquiries into human rights protections which recommended that these states introduce human rights acts.[199]

263. In the meantime, if a national Human Rights Act does in fact apply only to federal laws and public authorities, it should clearly express an intention to operate alongside state and territory human rights legislation. A similar approach is taken in federal discrimination laws to preserve the operation of state and territory anti-discrimination laws.[200]

264. As the Commission's expertise lies in the federal jurisdiction, this submission focuses on the potential beneficial impact of a national Human Rights Act upon federal laws and policies, and the actions of federal public authorities. However, the Commission recommends that the Consultation Committee explore all options for uniform human rights protection across Australia.

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

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

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

265. While it may have limited legal significance, the preamble to a Human Rights Act could send a strong symbolic message to the Australian community about the importance of human rights.

266. A preamble to a Human Rights Act could articulate, in plain and simple language, the importance of human rights for an inclusive, cohesive and democratic society. It could set out the fundamental principles and values that underpin the Act. And it could affirm that all people in Australia are entitled to enjoy human rights, without discrimination.

267. A preamble should also specifically recognise the unique status of Indigenous peoples as first peoples and acknowledge their human rights.[201]

268. By recognising Indigenous peoples in the preamble to a Human Rights Act, the Australian Government would demonstrate a clear commitment to protecting their human rights. This is appropriate given the significant and sustained breaches of human rights that Indigenous peoples face.

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

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

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

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

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

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

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

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

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

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

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

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

277. There are several reasons for this view.

278. First, human rights are universal, interdependent and indivisible. This means that the full enjoyment of civil and political rights may be hampered if economic, social and cultural rights are not also protected (see section 5.3).

279. Secondly, some of the most pressing human rights concerns facing people in Australia involve economic, social and cultural rights. If economic, social and cultural rights were included in a Human Rights Act, those concerns could be better addressed.

280. Thirdly, the omission of economic, social and cultural rights from a Human Rights Act would reinforce a commonly-held misconception that these rights are somehow less important than civil and political rights. Including those rights in a Human Rights Act would help guide and educate decision-makers on the significance of these rights to the lives of people in Australia.

281. Finally, the independent human rights consultation committees in the ACT, Tasmania and Western Australia all recommended that at least some economic, social and cultural rights be included in state level human rights acts.[203] The UK Human Rights Act includes the right to education, and the UK Joint Committee on Human Rights has suggested that further economic, social and cultural rights should also be protected.[204]

(i) Economic, social and cultural rights should be explicitly set out in a Human Rights Act

282. Some people argue that it is possible to protect economic, social and cultural rights without explicitly listing them in a Human Rights Act. This is because they can be protected indirectly through the interpretation of civil and political rights.

283. For example, civil and political rights such as the right to equality and the right to life, liberty and security of the person have been used in Canada to protect key economic, social and cultural rights. This includes the right to the highest attainable standard of physical and mental health,[205] and the right to adequate housing.[206]

284. However, the Commission believes that economic, social and cultural rights should be explicitly set out in a national Human Rights Act. The Commission shares the concern of the Western Australian Human Rights Act Consultation Committee that an indirect approach to protecting economic, social and cultural rights 'would, at best, result in ad hoc and limited protection for some of these rights'.[207]

285. The WA Committee further stated that it is 'undesirable that the protection of ESC rights should depend upon the occurrence of a breach of a civil and political right in a context which also involves the enjoyment of an ESC right'.[208]

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

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

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

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

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

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

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

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

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

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

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

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

294. For example, the UK Joint Committee on Human Rights recommended that a UK Bill of Rights should contain rights to health, education, housing and an adequate standard of living. Inclusion of these core rights was recommended because they 'touch the substance of people's everyday lives'.[211] The Joint Committee further considered that this list should be reviewed after a period to determine if further economic, social and cultural rights should be added.

295. In terms of which rights to include in a Human Rights Act, the Commission is confident that people in Australia will tell the Consultation Committee about the rights that 'touch the substance' of their everyday lives. In the Commission's experience, this includes fundamental economic, social and cultural rights such as the right to an adequate standard of living, education, housing and health. At the very least, such core economic, social and cultural rights should be included in a Human Rights Act.

296. If only a limited number of economic, social and cultural rights are protected initially, a Human Rights Act should be reviewed periodically to assess of whether further rights should be included (see section 20.14).

(b) A Human Rights Act should include mechanisms to incorporate the rights of specific groups in Australia

297. As a statement of rights that all people in Australia are entitled to enjoy, a Human Rights Act might initially include human rights sourced in the ICCPR and ICESCR. These rights are typically expressed in general language, applying to everyone.[212]

298. Australia has also committed to international treaties and declarations which protect the rights of women, children, people with disability, people of different races and Indigenous peoples.[213]

299. These specific instruments often articulate the way in which general human rights apply to people whose human rights are most at risk. They build upon the general rights set out in the ICCPR and the ICESCR. For example, the CEDAW builds upon the right to equality and non-discrimination as it applies to women and the circumstances they face.

300. The Commission understands the concern that specific issues affecting certain groups could be overlooked if a Human Rights Act does not include rights as expressed in these instruments.

301. One way of addressing this is to expressly permit courts and decision-makers to consider international law, including human rights materials that elaborate the rights of specific groups of people, when interpreting the general civil, political, economic, social and cultural rights set out in the Human Rights Act.[214]

302. A Human Rights Act need not attempt to exhaustively list which materials the courts and decision-makers can consider. It could, however, draw attention to

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

303. This should include:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

20.6 A Human Rights Act should allow justifiable limitations on rights

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

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

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

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

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

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

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

> A human right may be subject under law only to such reasonable limits as can be demonstrably justified in a free and democratic society based on human dignity, equality and freedom, and taking into account all relevant factors including –
>
> (a) the nature of the right; and
>
> (b) the importance of the purpose of the limitation;
>
> (c) the nature and extent of the limitation; and
>
> (d) the relationship between the limitation and its purpose; and
>
> (e) any less restrictive means reasonably available to achieve the purpose that the limitation seeks to achieve.

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

318. According to the recent Victorian decision in *Kracke*, the requirement that any limitation upon a human right be both 'reasonable' and 'demonstrably justified' imposes a 'stringent standard of justification' on the government.[220]

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

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

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

> carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:
>
> (a) For respect of the rights or reputations of others;
>
> (b) For the protection of national security or of public order (*ordre public*), or of public health or morals.[221]

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

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

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

322. Some of those 'non-derogable' rights have internal limitations.[223] For example, article 18(3) of the ICCPR provides:

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

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

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

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

(c) Applying a reasonable limits clause

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

327. Further, Australian courts already apply a proportionality analysis in relation to the constitutionally implied 'freedom of political communication' and the guarantee that inter-state trade and commerce shall be absolutely free.[228]

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

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

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

329. The Commission believes that many human rights problems could be avoided if human rights were actively considered in the earliest stages of law- and policy-making. In other words, human rights breaches may not occur if policy and law makers were required to consider the potential human rights impact of policies and laws before they finalised them.

330. The Commission therefore recommends that a Human Rights Act should require that any policy submission put to federal Cabinet (including proposals for new laws, amendments and policies) should be accompanied by a human rights impact statement.

331. A human rights impact statement should include an assessment of whether a proposed law or policy is consistent with the human rights set out in the Human Rights Act. It should also draw Cabinet's attention to any proposed limitations on rights and justify those limitations in accordance with any reasonable limits provision in the Human Rights Act.

332. Through these human rights impact statements, Cabinet would be alerted to the potential human rights impact of proposed laws and policies and would be in a better position to consider human rights in its deliberations.

333. The Australian Government should also set out these procedures in the Cabinet Handbook to provide clear direction to ministers and departments.

334. Further, the Commonwealth Legislation Handbook should explicitly require ministers and their departments to consider the human rights set out in the Human Rights Act when developing new laws.[229]

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

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

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

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

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

337. A Human Rights Act could help prevent human rights breaches by ensuring that the human rights implications of new laws are openly and transparently assessed and debated, in an informed manner, before the laws are enacted.

338. Pre-legislative human rights scrutiny should require Members of Parliament to consider how legislation may affect human rights before the proposed legislation is put to a vote. The human rights implications of any proposed measure should be clearly identified. They could then be debated openly in Parliament. And in the event that the executive or Parliament was intending to limit the enjoyment of any human rights, this should be explicitly identified and publicly justified and debated.

339. Pre-legislative scrutiny would also ensure that courts are better informed of legislative intent.

340. Thus, pre-legislative scrutiny processes could increase accountability and transparency – the public would be put on notice when their elected representatives were considering measures that would limit human rights.

341. Pre-legislative scrutiny would also mean that all Members of Parliament, including ministers, would have to become familiar with the potential impact of new laws and policies on human rights. It would help create an awareness of, and a culture of respect for, human rights within Parliament and across government departments.

342. In the Commission's view, a Human Rights Act should include the following pre-legislative processes:

- every bill introduced into Parliament should be accompanied by a statement of human rights compatibility
- every bill should be scrutinised by a specialist parliamentary Human Rights Committee
- in the event that a bill bypasses those processes, the law should be automatically reviewed after a fixed period of time.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

350. The Committee should be permanent and dedicated to conducting human rights scrutiny. This would produce a better result than simply expanding the role of existing legislative scrutiny committees, because it would enable the Committee to build special expertise in analysing human rights issues.

351. The pre-legislative scrutiny conducted by the Committee should be a public process, further increasing the transparency of public decision-making. The Committee's scrutiny process could also involve engagement with the public and civil society, improving the ability of people in Australia to become involved in democratic processes.

352. Experience in the UK and Victoria has shown that human rights committees have had an important impact on parliamentary debate. In the UK, it has been suggested that parliamentary debate on human rights issues is more informed and sophisticated as a result of the work of the Joint Committee on Human Rights.[231] In Victoria, the pre-legislative scrutiny process has resulted in meaningful exchanges been ministers and the Scrutiny of Acts and Regulations Committee.[232]

(i) A parliamentary Human Rights Committee should have broad functions

353. The parliamentary Human Rights Committee should consider each bill introduced into Parliament and inquire into whether the bill is consistent with the Human Rights Act.

354. A Human Rights Act would guide the parliamentary committee on the rights that it should consider when conducting these functions. It would also provide guidance on how to assess whether a limitation upon a right could be justified.

355. The Committee should report its findings to Parliament before Parliament is due to vote on the bill in question.

356. The parliamentary Human Rights Committee could also inquire into any questions referred to it by Parliament.

357. A parliamentary Human Rights Committee could adopt broad terms of reference similar to those used in the UK, which enable the UK Committee to consider 'matters relating to human rights in the United Kingdom (but excluding consideration of individual cases)'.[233] The UK Committee undertakes a wide range of other functions including:

- examining existing laws on an ad hoc basis
- examining pre-legislative documents (for example, Green Papers)
- monitoring implementation of the human rights legislation
- monitoring the work of human rights commissions
- monitoring the government's human rights policy.[234]

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

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

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

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

360. However, the Commission believes that parliamentary committees alone cannot ensure comprehensive human rights protection.[236]

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

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

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

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

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

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

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

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

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

365. In the Commission's view, it is important that public authorities consider how their actions and decisions might impact on a person's human rights. It is also appropriate that courts interpret laws consistently with human rights, provided the purpose of Parliament in enacting legislation is respected.

(a) Public authorities and courts should interpret laws consistently with human rights

366. A Human Rights Act could require courts and public authorities to interpret federal legislation consistently with the rights protected by the Human Rights Act.[237]

367. The purpose of a provision of this kind would be to make sure that human rights are considered in decision-making at all levels of government so that human rights breaches are avoided to the maximum extent possible.

368. A Human Rights Act which included such an interpretive provision would 'bring human rights immediately to the mind of everybody involved in statutory interpretation, whether they be a judicial officer, government official or legal practitioner'.[238]

369. A human rights interpretive provision would clarify and strengthen the established common law presumption that Parliament does not intend to abrogate fundamental rights and freedoms in the absence of a clear intention to the contrary.[239]

370. This principle of interpretation means that Parliament:

> must squarely confront what it is doing and accept the political cost. Fundamental rights cannot be overridden by general or ambiguous words. This is because there is too great a risk that the full implications of their unqualified meaning may have passed unnoticed in the democratic process. In the absence of express language or necessary implication to the contrary, the courts therefore presume that even the most general words were intended to be subject to the basic rights of the individual.[240]

371. A Human Rights Act would strengthen the presumption by supplementing common law fundamental freedoms with a specific list of rights that reflects Australia's international human rights obligations.[241]

372. Possible models for a human rights interpretive provision can be found in the ACT Human Rights Act, Victorian Charter, NZ Bill of Rights Act and the UK Human Rights Act.[242] There is growing body of jurisprudence about how these principles should be applied.[243]

373. As is the case in other jurisdictions, the interpretive provision should apply to both legislation and regulations,[244] regardless of whether they were introduced before or after the introduction of the Human Rights Act.[245]

(b) The purpose of Parliament must be respected

374. A human rights interpretive provision would build upon what Australian courts already do – interpret and apply laws enacted by Parliament. As Chief Justice Spigelman has observed, significant areas of the law are now governed entirely by statute. As such, 'the law of statutory interpretation has become the most important single aspect of legal practice'.[246]

375. However, the Commission acknowledges the concern that a Human Rights Act may give judges a licence to rewrite legislation and therefore trespass on parliamentary supremacy.[247]

376. To address this concern, a Human Rights Act should provide that legislation may only be interpreted consistently with human rights, if that meaning is also consistent with the purpose of the legislation.[248] The pre-legislative scrutiny processes proposed by the Commission would result in courts being better informed about the actual legislative intent.

377. An interpretive provision would ensure that courts do not cross the line between legitimate judicial interpretation and improper judicial law-making.[249] It would preserve the separation of powers and ensure that courts do not tread onto the territory of legislators.

378. Eminent constitutional and human rights lawyers have confirmed that there is no constitutional impediment to introducing such a provision in a national Human Rights Act.[250]

379. This type of provision would not limit Parliament's power to make laws, including laws that breach human rights. However, it would require Parliament to be explicit about its intention to pass a law that is inconsistent with human rights.

380. Similarly, if Parliament objected to the way legislation had been interpreted by a court, Parliament could introduce amendments clarifying the operation of the law.

381. In either case, the introduction of a new law or amendments which deliberately limit the enjoyment of human rights would engage the pre-legislative scrutiny process described in section 20.8. Parliament would be required to justify a decision to enact legislative amendments which were inconsistent with human rights. However, parliamentary supremacy would be preserved.

382. Combined with the pre-legislative scrutiny process, the requirement that Parliament clearly identify its legislative purpose would ensure that the public is better informed about the actions of its elected representatives.

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

> The interpretive provision in a Human Rights Act may have made a difference to Mr Al-Kateb's case (see section 11.2). A Human Rights Act would have required the High Court to explore if there was a possibility that the Migration Act could be interpreted consistently with the purpose of the mandatory detention provisions and

the human rights of Mr Al-Kateb. The decision of the minority in *Al-Kateb* indicates that it was possible to do so.[251]

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

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

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

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

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

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

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

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

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

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

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

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

392. A declaration of incompatibility does not affect the 'validity, operation or enforcement' of the provision that is the subject of the declaration.[253] However, in Victoria the minister responsible, and in the ACT the Attorney-General, is required to respond to a declaration of incompatibility within six months.[254] A failure to comply with this timetable does not affect the validity of the legislation.

393. So far, no declarations of incompatibility have been made in Victoria or the ACT.

394. Seventeen declarations of incompatibility have been made in the UK.[255] In all 17 cases, Parliament has taken legislative action to ensure the laws in question comply with human rights.[256]

(b) A Human Rights Act could use an alternative notification process

395. Some people have raised doubts about the constitutional validity of a 'declaration of incompatibility' in the federal context. In particular, former High Court Justice the Hon Michael McHugh has raised the following questions:

- Does the question of whether a law is consistent with the Human Rights Act raise a 'matter' within the meaning of Ch III of the Constitution?
- Is issuing a declaration of incompatibility an exercise of federal judicial power? [257]

396. These questions warrant careful consideration in the design of a Human Rights Act. However, such constitutional concerns could be addressed if courts were taken out of the notification process.

397. A roundtable of Australia's leading constitutional and human rights lawyers, including the Hon Michael McHugh and the former Chief Justice of the High Court, Sir Anthony Mason, suggested that one option could be to give an independent body such as the Australian Human Rights Commission a role in the notification process.

398. For example, if a court is unable to interpret legislation consistently with the rights set out in a Human Rights Act, the Commission could notify the Attorney-General of this finding.

399. If the Commission were to be given this role, it would not be empowered to reopen or re-examine the case. Nor would it be empowered to affect the validity or ongoing operation of the legislation in question in any way. The Commission could simply draw the Attorney-General's attention to the fact that a court had not been able to interpret legislation consistently with human rights.

400. The Commission could be empowered to do this of its own motion or at the request of a party to the proceeding.

401. The Attorney-General could be required to table the notification in federal Parliament and the government could be required to respond to the notification within a defined period (for example, six months).

(c) Subordinate legislation could be invalidated by courts

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

418. For example, a Human Rights Act could make it unlawful for the Department of Immigration and Citizenship to treat a person in immigration detention in a way that breaches the right to be free from cruel, inhuman and degrading treatment.

419. When making decisions, a public authority would need to interpret and apply laws and regulations in a way that is compatible with human rights. However, this obligation would be subject to Parliament's clear intention to the contrary. In other words, a public authority's actions or decisions would not be unlawful if the legislation expressly required the authority to act in a way that was inconsistent with human rights.[265]

420. The Commission acknowledges that these obligations may require some changes to the policies and procedures of public authorities. To address this operational concern, the obligations on public authorities under a Human Rights Act could commence after a 'lead-in' period of one to two years.

(c) Human rights should be incorporated into public sector practice and procedures

421. If a Human Rights Act imposes obligations on public authorities, the public sector could need to take steps to ensure that respect for human rights is embedded into public sector practice and procedure.

422. Those steps could include:

- better education of the public sector about human rights and the obligations under a Human Rights Act
- requiring federal government departments and agencies to develop human rights action plans
- requiring federal government departments and agencies to conduct annual human rights audits and prepare annual reports on compliance with the Human Rights Act
- integrating respect for human rights into public sector values and codes of conduct

423. These initiatives are described more fully below.

424. It may not be appropriate for all of these mechanisms to be explicitly set out in a Human Rights Act. Rather, these features could be integrated into the practice and procedure of the public sector.

425. The Commission understands that some people are concerned that this could lead to undue bureaucracy and expense for public authorities. However, most of these measures should complement, or be incorporated into, the current practice and procedure of the public service.

426. For example, the Australian Public Service has had the 'Charter of Public Service in a Culturally Diverse Society' since 1998.[266] This Charter recognises that service delivery should be tailored to the different needs of different groups

of people and that this is 'the foundation upon which to improve effectiveness and efficiency'.[267]

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

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

> A Human Rights Act would lead to improvements in the practice and procedures of public authorities.
>
> Example one: In Victoria, a local service provider for people with disability implemented a new system in which its routine assessment of client needs included explicit consideration of their human rights through the use of a mandatory Human Rights Checklist. Any issues identified by staff were then referred to an internal Human Rights Committee for review, with the Committee making recommendations to the person's case manager. Through the implementation of these new processes, the service provider became aware of a number of people with intellectual disabilities whose ability to exercise their right to vote had been restricted. The service took immediate steps to support them to make individual decisions about how they would vote.[268]
>
> Example two: A nursing home in the UK had a practice of routinely placing residents in special 'tilt-back' wheelchairs, regardless of whether they could walk or not. As a consequence, residents who were able to walk unaided were stopped from doing so. This had a severe impact on their ability to make choices about everyday activities, as well as their capacity to feed themselves and use the bathroom. A consultant pointed out to staff that their failure to consider the different circumstances of individual residents was contrary to human rights principles. She drew particular attention to the right to respect for private life, which emphasises the importance of dignity and autonomy, and the right not to be treated in a degrading way. This 'one-size-fits-all' practice was stopped. Residents who could walk were taken out of the chairs and encouraged to maintain their walking skills.[269]

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

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

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

- Legal and Legislative Policy Officer Training delivered to over 500 participants
- the Human Rights Implementation Program, a train-the-trainer course delivered to over 300 service delivery staff across government.[270]

431. These whole-of-government initiatives were complemented by initiatives at the departmental level, including:

- training courses for staff
- changes to the induction and performance management programs
- online learning modules and other internal communication strategies such as newsletters, displays and a Human Rights Week.[271]

432. These complementary initiatives continued into 2008. As the different departments became more familiar with the Victorian Charter, they generally provided a greater level of support to private bodies acting as public authorities.[272]

(ii) Human rights action plans for federal departments and agencies

433. Federal government departments and agencies should be required to prepare internal human rights action plans specifying how they intend to fulfil their obligations under the Human Rights Act. These action plans would assist departments and agencies to embed the consideration of human rights into their policies, procedure and practice.

434. The human rights action plans should become the assessment and reporting framework for audits and annual reports on compliance with human rights.

(iii) A Human Rights Act could require annual reports and human rights audits

435. A Human Rights Act could require federal government departments and agencies to conduct an annual human rights audit and to report on their compliance with the Act.

436. The annual reports could include:

- details about the measures undertaken to comply with the Human Rights Act, including an assessment of the department or agency's performance against its human rights action plan
- human rights education or training that the department or agency has undertaken and the impact of that training on staff
- details about complaints under the Human Rights Act involving the department or agency, including information on the status of those complaints or how those complaints were resolved.

437. Government departments and agencies could also be subject to an external audit to determine the extent to which their practices and procedures are compatible with human rights.

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

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

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

> human rights—public officials should respect and promote the human rights set out in the Charter of Human Rights and Responsibilities by—
>
> (i) making decisions and providing advice consistent with human rights; and
> (ii) actively implementing, promoting and supporting human rights.[273]

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

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

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

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

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

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

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

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

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

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

442. As discussed above, the integration of human rights considerations into the decision-making processes of public authorities should make public servants more aware of the impacts of their decisions, and therefore help to prevent human rights breaches.

443. However, sometimes better processes and education will not be enough, and breaches of human rights may occur.

444. In those circumstances a Human Rights Act should provide a cause of action and the possibility of enforceable remedies. This should, in itself, help to build a stronger human rights culture both in the community and in government.

445. This would convey to the community that the Australian Government takes its human rights obligations seriously. It would empower individuals to assert their rights. It would also be a signal to public authorities that there will be consequences for breaches of human rights.

(a) A Human Rights Act should provide an independent cause of action

446. A Human Rights Act should provide an independent cause of action for victims of a breach of human rights committed by a public authority.

447. The Commission understands the concern that a Human Rights Act may lead to increased litigation.

448. However, an accessible alternative dispute resolution (ADR) process would reduce the impact of a Human Rights Act on the judicial system.

449. Litigation need not be the only – or indeed, the first – port of call for people who want to make a complaint alleging a breach of human rights.

450. The current anti-discrimination jurisdiction recognises the potential of ADR to resolve disputes between complainants and public authorities in a quick, cost-efficient and effective manner.[276]

451. Following this model, a Human Rights Act could require a person to attempt to resolve a human rights complaint through the investigation and conciliation processes provided by the Commission.

452. Any ADR process under a Human Rights Act should be properly funded, accessible and affordable.

453. Where a complaint cannot be resolved through conciliation, complainants should be entitled to pursue their claim in the Federal Court of Australia or the Federal Magistrates Court.

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

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

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

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

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

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

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

459. For example, a Human Rights Act could:

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

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

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

462. The Attorney-General could be required to respond to such reports in Parliament.

(ii) Even if there was no cause of action for economic, social and cultural rights, other aspects of the Human Rights Act should still apply

463. Even if a Human Rights Act did not create an independent cause of action for breaches of economic, social and cultural rights, those rights should still be considered in pre-legislative scrutiny processes.

464. Further, courts should still interpret legislation consistently with the economic, social and cultural rights protected by the Human Rights Act.

465. Finally, a public authority should still be required to give proper consideration to economic, social and cultural rights in decision-making, and individuals should still be able to access existing administrative review processes if a public authority breaches this obligation (see section 20.12 below).

466. While these options would not provide full protection of economic, social and cultural rights, they would still promote greater scrutiny of the impact of public authorities on the enjoyment of those rights than is currently in place.

(c) A Human Rights Act should provide a range of enforceable remedies against public authorities

467. A public authority should be held accountable if it breaches the human rights of an individual.

468. A Human Rights Act could provide that accountability by giving a person access to enforceable remedies when a public authority breaches his or her human rights under the Act.

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

(i) Orders requiring action

470. A Human Rights Act should give courts the power to make an order requiring a respondent to act to redress any loss or damage suffered by a person whose human rights have been breached.

471. Courts should also have the power to direct a respondent not continue or repeat conduct that has been found to breach human rights.

472. Such powers would be consistent with the powers of courts hearing federal discrimination claims. Section 46PO(4) of the HREOC Act sets out a non-exhaustive list of remedies that are available for a successful claim under the Race Discrimination Act, the Sex Discrimination Act, the Disability Discrimination Act or the Age Discrimination Act. These include orders 'directing the respondent not to repeat or continue… unlawful discrimination' and

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

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

(ii) Injunctions

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

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

(iii) Damages

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

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

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

479. Damages are currently available for breaches of rights protected by federal discrimination laws.[280]

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

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

482. Damages are not available under the ACT Human Rights Act or the Victorian Charter.[283]

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

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

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

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

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

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

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

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

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

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

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

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

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

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

proceedings, particularly where the claim involves a systemic problem that affects a wide class of persons.[286]

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

> A Human Rights Act could raise awareness of human rights and be used as an advocacy tool to ensure that public authorities respect human rights.
>
> Example one: In Victoria, a pregnant single mother of two children living in community housing was given an eviction notice. The notice didn't provide any reasons for the eviction or allow her to address the landlord's concerns. The Victorian Charter was used to negotiate with the landlord to prevent an eviction into homelessness. An alternative agreement was reached.[288]
>
> Example two: Following the death of her mother, a woman found that she and her children were not entitled to remain in her mother's public housing property, because the lease had been in her mother's name. The children had always lived in that house and had close contacts with the local community, especially their school and nearby friends. There was a risk the woman would lose custody of her children if they were required to leave the property and she could not provide a home for them. A community legal centre helped the woman by raising the right to protection of family life in submissions to the public housing authority. The woman was given a lease over the property.[289]

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

20.14 A Human Rights Act should be periodically reviewed

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

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

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

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

505. Reviews could also consider whether the causes of action and remedies under a Human Rights Act provide effective redress for breaches of human rights.

506. Reviews might also consider whether further human rights education initiatives are required to better implement the Human Rights Act.

507. These periodic reviews should involve widespread public consultation. In particular, the consultation process should ensure that Indigenous peoples can participate effectively.

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

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

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

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

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

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

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

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

511. Greater pre-legislative scrutiny is a critical tool for preventing breaches of human rights. The Commission's expertise means that it can play a valuable role in scrutinising bills and laws for human rights compatibility.

512. However, as discussed in section 16.1, the Commission currently has limited powers in relation to scrutiny of proposed laws. It also has limited powers to progress recommendations about existing laws that are incompatible with human rights.

513. Under a Human Rights Act, the Commission could be given an independent power to examine whether laws and bills are compatible with the human rights protected by the Act.

514. Such a power should be discretionary, not mandatory. It should be a self-initiated power of the Commission (in other words it should not require the invitation of the Attorney-General or any other party).

515. When the Commission undertook such an examination and provided a report to the Attorney-General, the Attorney should be required to table the report in Parliament within a fixed time period.

516. Importantly, the Attorney-General should also be required to table a response setting out how the government intended to respond to the Commission's recommendations. This response should be tabled within a fixed period, for example within six months of the initial report being tabled.

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

517. The Consultation Committee's Background Paper invites people to consider whether the Commission's jurisdiction should be expanded to enable it to inquire into and conciliate a broader range of human rights complaints.[291]

518. The Commission currently handles complaints of human rights breaches, as well as complaints of workplace discrimination and unlawful discrimination contrary the four federal anti-discrimination laws.[292] The Commission's complaints procedure provides an accessible, cost-effective and efficient system of alternative dispute resolution. During the 2007-2008 financial year, the Commission's Complaint Information Service handled 18 765 enquiries, and finalised 1883 complaints in an average time of six months.[293]

519. If a Human Rights Act permitted complaints of alleged human rights breaches to be made against public authorities, the Commission could be given jurisdiction to investigate and conciliate those complaints.

520. The process for resolving complaints of alleged human rights violations under a Human Rights Act could mirror the Commission's current complaints procedure in the unlawful discrimination jurisdiction.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

544. For example, in the most recent inquiry, an independent opinion poll found that 89% of Western Australians thought that their state should have a law that aims to protect human rights.[298]

545. Further, in February 2009, an independent Neilson poll commissioned by Amnesty International Australia found that 81% of people surveyed would support the introduction of a law to protect human rights in Australia.[299]

(b) There are already sufficient human rights protections in Australia – 'if it ain't broke, don't fix it'

546. Many people in Australia enjoy a relatively high standard of living. Australia is a great country to live in, for most of us, most of the time.

547. However, as detailed in section 9 and Appendix 2, the Commission's experience over the past 23 years confirms that human rights are not always adequately protected and promoted in Australia. This applies to many groups in the community, including Indigenous peoples, people seeking asylum, refugees, women, people with disability, and people who are homeless, to name a few.

548. In addition, any one of us could move from a situation where our rights are currently well protected to one where they are vulnerable. For example, any person could suffer a car accident and end up in a wheelchair; we are all going to get older; we may have a family member who suffers from a mental illness; and with the global financial crisis, we are all more vulnerable to unemployment and associated concerns about housing, education, transport and food.

549. For many people in Australia, the system is 'broke'. It is time to fix it.

(c) Human rights can be best protected by relying on our democratic institutions

550. Australia is a robust democracy. However, as discussed in Part B, there are numerous examples of laws and policies that have, despite this democratic system, shown insufficient regard or respect for fundamental human rights.

551. These examples, and the human rights concerns discussed in Appendix 2, suggest that politicians cannot always be counted on to pay sufficient regard to the protection of the human rights of all people in Australia.

552. While the capacity to vote politicians out of power is a fundamental aspect of Australia's democracy, the majority view is not always aware of, or sympathetic to international human rights standards.

553. Opponents of a Human Rights Act point to the achievements of Parliament in addressing some human rights problems as evidence that Australia's democratic system currently protects human rights. There are certainly examples of wrongs that Parliament has set right. Yet, change is often too slow.

554. For example, public pressure eventually led to the removal of many asylum-seeking children from immigration detention centres – but only after hundreds of children were held in detention centres for long periods of time, during which the

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

555. Similarly, last year the Australian Government amended more than 80 laws which discriminated against people in same-sex relationships – but only after thousands of people had suffered ongoing financial hardship just because of the sex of the person they loved.

556. On the other hand, parliamentary processes can sometimes work swiftly and without proper consideration of human rights. This was the case, for example, with the Northern Territory Emergency Response legislation and the counter-terrorism laws discussed in sections 11.1 and 13.3.

557. A Human Rights Act would lead to the routine and careful consideration of human rights in the early stages of the law- and policy-making process. This would help prevent human rights problems. It would also result in courts being better informed about the legislative intent behind particular laws.

558. Further, in considering whether a law could be interpreted consistently with human rights, courts could help reveal human rights impacts that were not at first apparent or that only emerged in the application of the law to an individual. This would give Parliament the opportunity to reconsider laws in a fresh light. A Human Rights Act could therefore enhance the ability of Australia's democratic institutions to respond to human rights problems when they do occur.

(d) A Human Rights Act would be undemocratic

559. A common argument against a Human Rights Act is that it will shift power from Parliament to unelected judges.

560. However, the Human Rights Act model suggested by the Commission would maintain the supremacy of Parliament. It would be an ordinary Act passed by Australia's elected representatives, meaning that it would be a fundamentally democratic document. Any power given to a court, or any other body, would be voluntarily given by the Parliament itself. And Parliament would be able to repeal, amend or override a Human Rights Act using its ordinary legislative mechanisms.

561. A Human Rights Act would not upset the separation of powers, or politicise the judiciary by permitting courts to 'make' policy.

562. Under a Human Rights Act, Australian courts would be doing the kind of work they always do – interpreting laws, balancing competing issues and social concerns, and making difficult decisions in complex matters.

563. The Human Rights Act model preferred by the Commission would not permit courts to interpret legislation in a way that is inconsistent with the purpose of Parliament (see section 20.9). And it would not permit courts to invalidate laws made by Parliament.

564. If a court was unable to interpret legislation consistently with the rights set out in the Human Rights Act, Parliament could be notified of this inconsistency and be required to respond publicly.

565. The final decision on how to deal with that law would remain with the elected Parliament. If Parliament chose to amend the law, this would not be the result of 'undemocratic' interference or pressure from courts. This would be democracy in action. For if Parliament decided not to amend a law that was found to be inconsistent with human rights, it would have to justify that decision to the public. The Australian people would have the ultimate say – at the ballot box.

566. A Human Rights Act may also allow Parliament to limit rights in certain situations. However, if that happened, Parliament would have to publicly justify those limitations according to criteria that it decided upon in enacting the Human Rights Act.

567. Rather than being undemocratic, a Human Rights Act would mean that the public would be better informed about parliamentary decisions that affect their human rights. This would promote greater accountability among politicians, and strengthen Australia's democratic system of government.

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

568. It has been suggested that a Human Rights Acts would consist of vague guarantees or values.

569. The Commission believes that a Human Rights Act should contain fundamental, universal rights sourced in treaties to which Australia is already a party. Those human rights have decades of history behind them, and the Australian Government has voluntarily agreed to uphold those standards.

570. Because they are universal, these rights are frequently cast in general terms. However, this does not mean that courts will be 'taking leaps into the dark … they will be walking along judicially well-worn paths'.[300] Courts will be able to draw upon the considerable body of international and comparative jurisprudence that has given content to human rights.

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

571. Another common argument against a Human Rights Act is that it would limit rights to those included in the Act, and that it would become outdated and inflexible.

572. However, a Human Rights Act could be amended by federal Parliament if necessary. For instance, if Australia committed to the protection of new rights, these could readily be incorporated into a Human Rights Act.

573. Further, a Human Rights Act could state that the rights in the Act are not exhaustive. Rights recognised elsewhere in Australian or international law would not be limited just because they are not included, or are not fully

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

594. However, a Human Rights Act would not prevent Parliament from passing laws. Nor would it allow courts to strike down laws. It would require Parliament to consider human rights when making decisions and to publicly justify decisions to limit rights. The Commission believes that this would be a good thing, even if it came at the expense of speed.

595. It is sometimes argued that a Human Rights Act could place undue bureaucratic burdens upon public authorities.

596. It is true that, initially, a Human Rights Act may create additional work for public authorities. However, a Human Rights Act should work alongside existing processes and structures so as to reduce administrative burdens. There could also be a 'lead-in' period to allow time for public authorities to adjust to a Human Rights Act.

597. Some public authorities may need to review and change their practices to comply with the Human Rights Act. Yet, as Byrnes, Charlesworth and McKinnon have observed, where the operations of public authorities do not conform to human rights standards 'there may be good reasons for insisting on the change'.[306]

598. By requiring public authorities to consider human rights in decision-making, a Human Rights Act could actually lead to greater efficiency, more targeted service delivery, and less time spent responding to complaints.

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

599. It has been argued that a Human Rights Act would stifle debate about important, and often contentious, matters. The Commission believes a Human Rights Act would have the opposite effect.

600. In the Commission's view, a Human Rights Act would encourage further debate about contentious issues by requiring Parliament to openly consider the human rights impacts of legislation. Under a Human Rights Act, Parliament would still have the same power to make or change laws that it has now.

(l) A Bill of Rights didn't work in the USSR, Pakistan or Zimbabwe, why would a Human Rights Act work here?

601. Opponents of a Human Rights Act have emphasised the failure of domestic rights guarantees to prevent human rights abuses in certain countries, such as the USSR, Nazi Germany, Pakistan or Zimbabwe.

602. No law operates independently of its social context. The failure to protect rights in certain countries cannot be attributed to a human rights law or a bill of rights – but rather to complex social and political factors, including civil unrest and a lack of respect for the rule of law.

603. It has also been claimed that the US Bill of Rights did not stop Guantanamo Bay. However, it is arguable that the US Government chose this detention site

precisely because it was attempting to avoid the reach of its constitutional safeguards.[307]

604. A Human Rights Act alone is not the solution to all human rights problems. Where democratic institutions break down, human rights protections may be of limited value. A Human Rights Act works best when it is embedded within governance systems that respect the rule of law.

605. Australia has a healthy respect for the rule of law, but Australia's system of checks and balances has not always protected the human rights of all people in Australia.

606. A Human Rights Act could build upon Australia's existing protections. It could enhance our democratic system of government by requiring greater transparency in, and accountability for, decision-making by elected representatives and public authorities.

21 An Equality Act for Australia

21.1 Introduction

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

608. The Consultation Committee's Background Paper asks:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(b) The protections provided by federal laws are inadequate

619. There are many gaps in the protections provided by federal anti-discrimination laws.[323]

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

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

622. Aside from gaps in protection, a number of practical obstacles further limit the effectiveness of current federal anti-discrimination laws. For example, the various tests for direct discrimination incorporate a requirement that an applicant establish less favourable treatment compared with a hypothetical 'comparator'. The practical application of the comparator, however, has proved problematic due to difficulties in constructing the same or similar circumstances for carrying out the comparison.[329] In particular, to what extent should circumstances or characteristics related to the protected attribute be included or excluded from the comparison, and to what extent can a comparison be sensibly made where the relevant experience is unique to one group only?[330]

623. Practical difficulties also arise in relation to proving indirect discrimination. Under the Disability Discrimination Act, for example, applicants must establish that they have been required to comply with an unreasonable requirement or condition with which they cannot comply, but with which a substantially higher proportion of persons without their disability can comply. This has raised difficulties and uncertainties where, for example, an applicant can technically comply with the relevant requirement, but with additional hardships not experienced by other persons without their disability.[331]

624. In addition, despite widely recognised difficulties in proving discrimination,[332] current federal laws generally require the applicant to carry the onus of proof in relation to all elements of discrimination.[333] This is despite the reality that information relating to causation (such as the respondent's basis for treating the applicant in a particular way) is typically within the control of the respondent, not the applicant.

625. Further, each of the laws establishes a proscriptive, negative-based standard. Discriminatory conduct is *prohibited*, rather than non-discriminatory or other positive conduct being *required.*[334] Unlike recent developments in the United Kingdom (discussed below), federal anti-discrimination laws lack positive obligations to promote equality.

626. These gaps and limitations undermine Australia's compliance with its international obligations.

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

627. In addition to gaps within the laws themselves, there are various idiosyncratic differences and inconsistencies between the four federal anti-discrimination laws.

628. These inconsistencies make it hard for people to understand what their rights are. They also complicate the process for legal advisers, judges, advocates and those on whom the laws impose obligations.[335]

629. For example, each anti-discrimination Act adopts a different definition of discrimination and includes different exceptions and defences. The areas of public life sought to be regulated vary between the Acts, as does:

- the onus of proof in indirect discrimination

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

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

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

21.3 The United Kingdom's improvements to its equality laws

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

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

(a) The United Kingdom's review of equality legislation

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

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

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

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

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

- British discrimination law should comply with the requirements of European law.[340]

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

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

(b) Lessons from the United Kingdom's experience

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

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

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

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

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

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

21.4 Australia should have a national inquiry into equality protection

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

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

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

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

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

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

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

649. First, the inquiry would inevitably need to examine the powers, functions and institutional arrangements of the Commission itself.

650. Secondly, as the federal body responsible for receiving, investigating and conciliating discrimination complaints, the Commission is an integral component of the anti-discrimination regulatory system.

651. An independent body such as the Australian Law Reform Commission (ALRC) would be a more appropriate choice as it would not be as vulnerable to criticisms of having a vested interest in the outcome of the inquiry.

652. However, the Commission could assist such an inquiry by acting in an advisory capacity. For example, the Commission could participate in an advisory board to the ALRC, as it has done in other ALRC inquiries.

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

653. The Commission notes that the Standing Committee of Attorneys-General has already commenced a process for harmonising the federal and state anti-discrimination jurisdictions generally. The Commission has previously commented that there are obvious advantages to such harmonisation, provided that it complies with certain guiding principles and does not erode existing protections by adopting a 'lowest common denominator' approach.[349]

654. A national review of Australia's federal anti-discrimination laws would provide an appropriate first step towards national harmonisation, by formulating a 'best practice' model at the federal level to lead the harmonisation process.

21.5 Australia should have a single Equality Act

655. A key question for a national inquiry would inevitably be whether to unify discrimination laws into a single Equality Act.

656. In its submission to the Senate Standing Committee's review of the Sex Discrimination Act, the Commission observed that there were potential concerns with pursuing a single Equality Act. Those concerns include the consequences of losing dedicated laws that have 'represented important national statements of the right to non-discrimination for particular groups within society'.[350]

657. The Senate Standing Committee similarly noted that certain submissions had expressed concerns about a single Equality Act due to the 'iconic status' of anti-discrimination laws for particular groups in the community.[351]

658. A national inquiry would provide an appropriate forum for these concerns to be debated.[352]

659. However, having had an opportunity to consider the issues further, the Commission is increasingly of the view that a single Equality Act is the most appropriate way to promote equality.[353]

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

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

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

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

(b) Special purpose Commissioners should be retained

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

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

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

22.1 Introduction

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

665. Australia's Constitution:

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

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

667. In particular:

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

22.2 Recognise Indigenous peoples in the preamble

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

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

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

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

672. A proposal for a new preamble to the Constitution was put to a referendum in November 1999. The proposal included limited recognition of Indigenous peoples. No state or territory recorded a majority vote in favour of the proposal, with only 39.34% of the total Australian population voting in favour.

673. Part of the reason for the failure of this proposal was poor drafting and a poor consultation process. Many Australians who support recognition of Indigenous peoples in the preamble voted against the proposal because of dissatisfaction with the language used.

674. A lesson from this failed attempt at constitutional change is that there must be extensive, genuine engagement with Indigenous peoples and the broader Australian community to determine the wording of any proposed preamble. A failure to do so could undermine community support for constitutional change.

22.3 Remove section 25 from the Constitution

675. Section 25 of the Constitution reflects a time when there were racist restrictions on the right to vote. It provides that, for the purposes of determining the composition of the House of Representatives:

> … if by the law of any State all persons of any race are disqualified from voting at elections for the more numerous House of the Parliament of the State, then, in reckoning the number of the people of the State or of the Commonwealth, persons of that race resident in that State shall not be counted.

676. The section clearly recognises that states may exclude voters on racial lines. As the Council for Aboriginal Reconciliation has stated, '[s]uch a provision is inappropriate for any democratic nation, particularly one whose people come from many different backgrounds'.[357] Similarly, the 1988 Constitutional Commission described section 25 as 'odious' and recommended that it be repealed.[358]

677. A constitutional provision that contemplates denial of the right to vote on the basis of race has no place in an inclusive, multicultural Australia.

678. The Commission therefore believes that section 25 should be removed from the Australian Constitution.

22.4 Protect racial equality in the Constitution

679. The removal of section 25 should be accompanied by the insertion of a clause to guarantee racial equality and to prohibit racial discrimination.

680. Neither a statutory Human Rights Act, nor an Equality Act (discussed in sections 20 and 21 above) would prevent Parliament from introducing laws that discriminate on the basis of race.

681. For example, the federal Parliament exercised its power to override the operation of the Racial Discrimination Act when it passed the Northern Territory Emergency Response legislation (see the case study in section 11.1 above).

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

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

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

(a) Section 51(xxvi) could be amended

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

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

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

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

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

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

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

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

recommended that Australia 'work towards the inclusion of an entrenched guarantee against racial discrimination in its domestic law'.[363]

22.5 Initiate dialogue about general equality protection in the Constitution

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

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

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

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

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

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

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

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

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

23 Enhance human rights education in Australia

23.1 Introduction

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

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

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

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

23.2 Australia has an international obligation to provide human rights education

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

700. Australia's duty to provide human rights education is set out in several international human rights agreements.[365]

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

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

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

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

> Consider adopting a comprehensive plan of action for human rights education including training programmes for public officials, teachers, judges, lawyers and

> police officers on rights protected under the Covenant and the First Optional Protocol. Human rights education should be incorporated at every level of general education.[367]

(b) The World Program of Human Rights Education

704. Australia has also made commitments under the World Program for Human Rights Education (WPHRE).

705. The WPHRE was initiated in January 2005 as a follow up to the United Nations Decade for Human Rights Education (1995-2005). The Australian Government has expressed broad support for this program.

706. The first phase of the WPHRE was extended to 2009 so that UN Member States could have a four year period to report on progress in developing national programs for human rights education. Reports for this period are due in September 2009. A second phase of the World Programme begins on 1 January 2010.

23.3 Human rights education in the community

707. As outlined in section 20.13, if Australia adopts a Human Rights Act, there should be broad and accessible community education about human rights and the operation of the Act.

708. However, community education about human rights is important regardless of whether Australia adopts a Human Rights Act.

709. Broad education about human rights, and the relevance of human rights to people's lives, should lead to a culture of increased tolerance and respect. Education should focus on ensuring that all people in Australia understand their own rights and their responsibility to respect the rights of others.

710. It is also important to develop specific human rights education initiatives to address the needs of communities facing particular human rights issues. For example, the Commission was funded in June 2007 by the Attorney-General's Department to develop and deliver training aimed at preventing family violence in Indigenous communities. This initiative was to achieve one of the aims of the Intergovernmental Summit on Violence and Child Abuse in Indigenous Communities and the COAG Communiqué of July 2006:

> COAG has… agreed to invest in community legal education to ensure Indigenous Australians are informed about their legal rights, know how to access assistance and are encouraged to report incidents of violence and abuse.[368]

711. In March, August and December 2008 the Commission delivered training to Community Legal Educators across Australia. To date, approximately half of the existing Family Violence Prevention Legal Services of Australia have had access to this training.

712. The training program provides 40 hours of face to face training and resource materials relevant to family violence and tailored to the legislation and guidelines of each state and territory. The course examines the legislation

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

713. The training program has been mapped against the Certificate III, Certificate IV and the Diploma courses in National Indigenous Legal Advocacy. The Commission is the copyright holder of these nationally accredited courses. Upon successful completion of all training assessment tasks, participants are issued with a certificate of completion which supports applications for recognition of prior learning.

714. The two evaluations of the training program contain evidence of a high degree of satisfaction with the quality of the training, the relevance of the materials and the delivery of the course content.

715. Unfortunately the government funding was for a limited period and there are no additional funds for the future. This means that the remaining Family Violence Prevention Legal Services of Australia will not have access to the training. In addition, there is evidence of a high degree of interest in the training outside of this sector. The Commission has had requests for the training from Indigenous Justice Groups, state government violence prevention workers, paralegal employees, non-government organisations, training institutions and government departments.

716. If the Commission received funding aimed at human rights education in future, the Commission could deliver programs similar to that described above.

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

717. Education and training about human rights is also important for federal public servants and administrative decision-makers regardless of whether or not Australia adopts a Human Rights Act.

718. As outlined in section 20.11, experience in other jurisdictions demonstrates that understanding about human rights leads to better public service delivery. Importantly, this contributes to preventing breaches of human rights before they occur.

23.5 Human rights education in Australian schools

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

720. In schools, human rights is embedded in the 'Civics and Citizenship' National Statements for Learning, which all states have either added on to or used to underpin their Society and Environment curriculum area. However, future funding for 'Civics and Citizenship' from the Department of Education, Employment and Workplace Relations is unclear after 2009.

721. On 5 December 2008, the Melbourne Declaration of Educational Goals for Young Australians was issued by all Australian Ministers for Education.[369] It includes a commitment to supporting all young Australians to become active and informed citizens, and it sets the direction for Australian schooling over the next ten years.

722. The current transition towards a national curriculum includes key learning areas of English, Maths, Science and History. Human rights content overlaps with each of these areas, particularly History. Developed by the interim National Curriculum Board, a framing paper on national curriculum in History notes the links between History and Civics and Citizenship education, including the role played by human rights principles and institutions.

723. Human rights also has a strong presence in all subjects within the key learning areas of Society and Environment (for example, Geography and Legal Studies), as well as in Career Education and Personal Development, Health and Physical Education.

724. However, currently there is no coherent approach to the topic of 'human rights' throughout other curriculum in the states and territories. Educators of all curriculum areas require professional support to adequately teach the human rights content.

725. There are several human rights education centres at the university level. However, none of these has a formally recognised national role other than the National Centre for Human Rights Education (NCHRE). The NCHRE was established at RMIT University in Melbourne and launched in December 2007.

726. There is currently no recognised 'clearing house' for human rights education material in Australia. While there are numerous published resources, there are no official distribution channels, and no support for the professional development of educators.

(a) The Commission's education materials for Australian schools

727. The Commission has specific functions relating to human rights education:

- to promote an understanding and acceptance, and the public discussion, of human rights in Australia
- to undertake research and educational programs for the purpose of promoting human rights.

728. The Commission has a strong track record of working with Australia's state and territory education departments, schools and community organisations to promote an understanding of, and commitment to, human rights education.

729. The Commission has developed practical human rights education resources and programs through its Human Rights Education Program. The program is guided by a clear set of education principles and learning outcomes, and the approach supports the goals and direction of the WPHRE.

730. The Human Rights Education Program includes a range of interactive, resource-rich, web-based learning modules for use in the classroom with students ranging in age from years 10 to 17. The Commission has linked these core human rights education modules with curriculum frameworks from Education Departments across each Australian state and territory. Links have been established in a range of key learning areas: Studies of Society and Environment (especially Aboriginal Studies and Australian Studies), English, Civics and Citizenship/Discovering Democracy, Geography, History, and Drama.

731. The Commission's human rights education resources are available online at: www.humanrights.gov.au/education.

732. Unfortunately, the Commission's current budget insufficient to allow production of a full range of human rights education materials, or adequate distribution and promotion of these materials.

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

733. In order to fulfil the requirements of the WPHRE, the Commission recommends that there be an audit (situational analysis) of all of the human rights education initiatives (and curriculum links) that currently exist in Australian education systems.

734. This situational analysis should be the precursor to developing a national plan for human rights education.

735. Some of the areas that could be covered in a national plan for human rights education include:

- consideration on how best to incorporate human rights education across the curriculum
- mechanisms to achieve pre-service and in-service human rights training and professional support for all teachers in Australian schools
- increased production, distribution and promotion of human rights education curriculum materials.

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

24 Enhance the role of the Australian Human Rights Commission

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

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

  The Commission's answer: Yes.

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

  The Commission's answer: Yes.

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

  The Commission's answer: Formally and promptly.

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

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

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

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

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

740. Section 16 of this submission outlines the limitations of the Commission's current roles in scrutinising bills and laws for human rights compatibility.

741. Currently the Commission can examine existing laws for their compatibility with human rights (as defined in the HREOC Act).[371] However, the Australian Government is not required to respond to a Commission report which shows that a law is incompatible with human rights. Further, the Commission can only examine bills at the Minister's request. It has never been requested to do so.

742. As suggested in section 20.15, if Australia adopts a Human Rights Act, the Commission should be given the power to examine whether bills and laws are compatible with the human rights set out in the Human Rights Act.

743. The examination of laws before they are passed is a powerful tool for preventing human rights breaches from occurring. The Commission should therefore be given the power to examine bills for their compatibility with human rights regardless of whether Australia has a Human Rights Act. This power should be discretionary and self-initiated.

744. When the Commission examines a bill or a law and reports to Parliament, the Attorney-General should be required to table both the Commission's report, as well as a government response, within a specified time period.

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

745. Section 20.15 of this submission outlines the Commission's current intervention and *amicus* roles, and suggests that the Commission should have the power to intervene in court or tribunal proceedings involving the interpretation or application of a Human Rights Act.

746. Regardless of whether Australia adopts a Human Rights Act, the Commission should have the power to intervene, as of right, in all cases that raise significant human rights issues.

747. This power would allow the Commission to bring its human rights expertise to cases involving significant human rights issues. It would provide the Commission with an important opportunity to inform and assist lawyers, judges and complainants about the relevance of human rights to legal issues.

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

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

749. If Australia adopts a Human Rights Act, the Commission should have the power to conduct its functions with respect to all of the rights set out in that Act.

750. However, regardless of whether Australia adopts a Human Rights Act, the Commission believes that its jurisdiction should be expanded to cover the human rights in the:

    - ICESCR[372]
    - CAT
    - Declaration on the Rights of Indigenous Peoples.

751. Australia is already a party to these treaties, and has expressed its support for this declaration.

752. Section 47 of the HREOC Act enables the Attorney-General to declare an instrument which has been ratified by Australia (or a declaration that has been adopted by Australia) to be an international instrument relating to human rights for the purposes of the HREOC Act.

753. The legal effect of declaring an instrument under section 47 is that the rights contained within that instrument will then fall within the definition of 'human rights' in sections 3 and 46A of the HREOC Act, and the Commission's statutory 'human rights' functions can then be exercised in relation to the rights contained in the declared instruments.

754. Declaring these additional instruments under the HREOC Act would mean that the Commission could properly promote public awareness and understanding of the rights contained in these instruments as well as inquire into, and help resolve, a broader range of human rights complaints.

755. The Commission could play a significant role promoting economic, social and cultural rights. This would be particularly important if these human rights were excluded from court action under a Human Rights Act.

756. The Commission currently has the power to investigate and conciliate some complaints of economic, social and cultural rights. The Commission can receive complaints about breaches of the rights set out in the CRC, if the complaint is against the Commonwealth or one of its agencies. The CRC includes a wide range of economic, social and cultural rights.

757. Further, the Commission has extensive expertise in analysing and reporting to Parliament about the protection and promotion of economic, social and cultural rights. For example:

    - The Aboriginal and Torres Strait Islander Social Justice Commissioner has powers to consider economic, social and cultural rights in the annual Social Justice Reports. These reports provide comprehensive analyses of the protection and promotion of the human rights of Indigenous peoples.

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

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

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

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

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

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

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

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

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

24.5 Provide enforceable remedies for complaints made under the HREOC Act

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

766. This means that a person who makes a complaint of unlawful discrimination (for example discrimination on the basis of disability) against a federal government agency can commence court proceedings and has access to an enforceable remedy. However, a person who makes a complaint against the same government agency, of a breach of a human right not covered by the anti-discrimination laws (for example, the right to be free from cruel, inhuman and degrading treatment or punishment), does not have access to an enforceable remedy.

767. The protection of human rights would be significantly enhanced if there were enforceable remedies for complaints made under the HREOC Act.

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

24.6 Require the government to respond to Commission recommendations

769. Currently, there is no obligation on the government to respond to Commission reports that are tabled in Parliament, including those regarding:

- individual complaints
- inquiries into systemic human rights issues (for example *A last resort?*, the report of the National Inquiry into Children in Immigration Detention)
- the annual Social Justice Report and Native Title Report.

770. Commission reports about individual complaints can include recommendations for preventing repetition of an act or continuation of a practice, as well as the payment of compensation or other remedies.[379] However, as described above the Commission cannot enforce its recommendations, and the Australian Government is not required to respond to them.

771. Similarly, the Australian Government is not required to respond to the Commission's other human rights recommendations.

772. The Commission believes that, at a minimum, the Australian Government should be required to provide a response to the Commission's individual complaint reports indicating how the government intends to address the Commission's recommendations. This could be achieved by amending the HREOC Act to require that the Attorney-General table a response to the Commission's reports in Parliament within a set period, for example six months after the report is tabled.

773. In the case of other reports prepared by the Commission under one of its statutory functions and subsequently tabled in federal Parliament, the Attorney-General should be required to table a response in Parliament within a set period of time, again possibly six months after the report is tabled.[380] For example, this would include:

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

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

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

24.7 Better resource the Commission's education work

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

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

24.8 Financially support the Commission to properly carry out its functions

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

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

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

780. The Commission faced another significant budget cut in the 2008-2009 financial year. The Commission's budget appropriation for the year was $13.55 million, representing a 12.5% cut compared to the previous year.[382] To accommodate

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

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

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

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

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

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

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

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

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

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

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

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

[54] UN Committee on Economic, Social and Cultural Rights, *General Comment No 9: The domestic application of the Covenant*, UN Doc E/C.12/1998/24,CESCR (1998), para 9. At http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/4ceb75c5492497d9802566d500516036?Opendocument (viewed 29 May 2009). See also UN Committee on Economic, Social and Cultural Rights, *General Comment 3*, note 46, para 5.
[55] State party reports are required once every five years under the ICCPR, ICESCR and the CRC; once every four years under CAT, CEDAW and the Disability Convention; and once every two years under CERD.
[56] See ICCPR, note 1, art 40; ICESCR, note 2, art 16; CERD, note 7, art 9; CEDAW, note 10, art 18; CAT, note 11, art 19; CRC, note 12, art 44; Disability Convention, note 13, art 35.
[57] Inter-Committee Technical Working Group, *Harmonized guidelines on reporting under the international human rights treaties, including guidelines on a common core document and treaty-specific documents*, UN Doc HRI/MC/2006/3 (2006), para 29. At http://www.dfat.gov.au/hr/reports/icescr-iccpr/harmonised_guidelines.pdf (viewed 29 May 2009).
[58] Inter-Committee Technical Working Group, above.
[59] The Commission recognises the diversity of the cultures, languages, kinship structures and ways of life of Aboriginal and Torres Strait Islander peoples. Aboriginal and Torres Strait Islander peoples are primarily referred to as 'Indigenous peoples' in this document. This is because the term carries a meaning in international law. In particular, the use of 'peoples' with an 's' (and *not* people singular) reflects the human rights instruments that refer to the collective right of self-determination as one enjoyed by 'peoples'. For a more detailed explanation on the use of terms see: Aboriginal and Torres Strait Islander Social Justice Commissioner, *Social Justice Report 2008* (2009). At http://www.humanrights.gov.au/social_justice/sj_report/sjreport08/index.html (viewed 3 June 2009).
[60] See Aboriginal and Torres Strait Islander Social Justice Commissioner, *Social Justice Reports* (1993-2008) at http://www.humanrights.gov.au/social_justice/sj_report/index.html (viewed 28 May 2009); Australian Bureau of Statistics and Australian Institute of Health and Welfare, *The Health and Welfare of Australia's Aboriginal and Torres Strait Islander Peoples* (2005) at www.aihw.gov.au/publications/ihw/hwaatsip05/hwaatsip05.pdf (viewed 28 May 2009); Australian Institute of Health and Welfare, *Australia's Health No.11* (2008) at http://www.aihw.gov.au/publications/aus/ah08/ah08-c03.pdf (viewed 28 May 2009).
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[62] Australian Bureau of Statistics, *Counting the Homeless 2006* (2008), p ix. At http://www.ausstats.abs.gov.au/ausstats/subscriber.nsf/0/57393A13387C425DCA2574B900162DF0/$File/20500-2008Reissue.pdf (viewed 29 May 2009). See also Human Rights and Equal Opportunity Commission, *Our Homeless Children: Report of the National Inquiry into Homeless Children* (1989).
[63] For further discussion about homelessness as a human rights issue, see Human Rights and Equal Opportunity Commission, *Submission to the Green Paper on Homelessness - Which Way Home?* (4 July 2008) at http://humanrights.gov.au/legal/submissions/2008/20080704_homelessness.html (viewed 28 May 2009); Human Rights and Equal Opportunity Commission, *Homelessness is a Human Rights Issue* (2008) at http://humanrights.gov.au/human_rights/housing/homelessness_2008.html (viewed 28 May 2009).
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[65] Australian Bureau of Statistics, *Personal Safety Survey (Reissue)* (2005), p 11. At http://www.ausstats.abs.gov.au/ausstats/subscriber.nsf/0/056A404DAA576AE6CA2571D00080E985/$File/49060_2005%20(reissue).pdf (viewed 29 May 2009).
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[67] Australian Institute of Health and Welfare, *Homeless people in SAAP: SAAP National Data Collection annual report 2006-07 Australia* (2008), p 32. At http://www.aihw.gov.au/publications/index.cfm/title/10523 (viewed 6 April 2009).
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[71] Australian Bureau of Statistics, *Average Weekly Earnings, Australia*, *February 2008* (2008). At http://www.abs.gov.au/AUSSTATS/abs@.nsf/DetailsPage/6302.0Feb%202008?OpenDocument (viewed 1 June 2009).
[72] Australian Bureau of Statistics, above.
[73] See S Kelly, *Entering Retirement: the Financial Aspects* (Paper for the Communicating the Gendered Impact of Economic Policies: The Case of Women's Retirement Incomes Conference, Perth, 12 - 13 December 2006).
[74] See, for example, *Crime Prevention Powers Act 1998* (ACT); *Summary Offences Act 1953* (SA); *Summary Offences Act 2005* (Qld); *Police Powers and Responsibilities Act 2000* (Qld).
[75] See, for example UN Committee on the Rights of the Child, *Consideration of Reports Submitted by States Parties Under Article 44 of the Convention, Concluding Observations: Australia*, UN Doc CRC/C/15/Add.268 (2005), pp 8 - 9. At http://www.unhchr.ch/tbs/doc.nsf/898586b1dc7b4043c1256a450044f331/6f6879be758d0e8ec12570d9003340ba/$FILE/G0544374.pdf (viewed 1 June 2009).
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[83] See, for example, Human Rights and Equal Opportunity Commission, *Bush Talks* (1999). At http://www.humanrights.gov.au/pdf/human_rights/bush_talks.pdf (viewed 29 May 2009).
[84] For further discussion of these issues, see Human Rights and Equal Opportunity Commission, *Stories of discrimination experienced by the gay, lesbian, bisexual, transgender and intersex community* (2007), at http://humanrights.gov.au/human_rights/gay_lesbian/stories.html (viewed 1 June 2009); Australian Human Rights Commission, *Sex Files: the legal recognition of sex in documents and government records*, Concluding Paper of the sex and gender diversity project (2009), at http://humanrights.gov.au/genderdiversity/sex_files2009.html (viewed 1 June 2009).

[85] See, for example, Human Rights and Equal Opportunity Commission, *Not for service: Experiences of injustice and despair in mental health care in Australia* (2005). At http://www.humanrights.gov.au/disability_rights/notforservice/report/index.html (viewed 29 May 2009).
[86] See, for example, Human Rights and Equal Opportunity Commission, *Voices of Australia: 30 years of the Racial Discrimination Act: 1975-2005* (2005). At http://www.humanrights.gov.au/racial_discrimination/voices/index.html (viewed 29 May 2009).
[87] See Human Rights and Equal Opportunity Commission, *Ismaξ – Listen: National consultations on eliminating prejudice against Arab and Muslim Australians* (2004), at http://www.humanrights.gov.au/racial_discrimination/isma/index.html (viewed 29 May 2009); Human Rights and Equal Opportunity Commission, *Living Spirit: A dialogue on human rights and responsibilities*, Report on Muslim Women's Project 2006 (2008) at http://www.humanrights.gov.au/racial_discrimination/livingspirit/1.html#5_3 (viewed 1 June 2009).
[88] J Jones, *2008 Report on antisemitism in Australia* (2008). At http://www.antisemitism.org.il/eng/2008%20Report%20on%20antisemitism%20in%20Australia%20-%20By%20Jeremy%20Jones (viewed 9 June 2009).
[89] *Racial Discrimination Act 1975* (Cth); *Sex Discrimination Act 1984* (Cth); *Disability Discrimination Act 1992* (Cth); *Age Discrimination Act 2004* (Cth).
[90] See also UN Human Rights Committee, *Consideration of Reports Submitted by States Parties under Article 40 of the Covenant: Concluding Observations of the Human Rights Committee – Australia* (Advanced Unedited Version), UN Doc CCPR/C/AUS/CO/5 (2 April 2009), para 12, at http://www2.ohchr.org/english/bodies/hrc/docs/co/CCPR-C-AUS-CO5-CRP1.doc (viewed 9 June 2009); UN Committee on Economic, Social and Cultural Rights, *Concluding Observations: Australia* (2009), note 80, para 14.
[91] The schedules to the HREOC Act are ILO No. 111, the ICCPR, the Declaration of the Rights of the Child, the Declaration on the Rights of Mentally Retarded Persons and the Declaration on the Rights of Disabled Persons.
[92] Declarations have been made in relation to the Disability Convention, the Convention on the Rights of the Child and the Declaration on the Elimination of all Forms of Intolerance and of Discrimination based on Religion or Belief.
[93] See *Sales v Minister for Immigration and Citizenship* (2007) 99 ALD 523, 528 (Flick J) and the authorities cited therein.
[94] However, the Aboriginal and Torres Strait Islander Social Justice Commissioner must 'have regard to' other human rights instruments including the ICESCR: *Human Rights and Equal Opportunity Act 1986* (Cth), s 46C(4)(a). With regard to the CAT, the Australian Government has recently announced that it will consider introducing a new federal offence of torture. This will strengthen the limited protection provided by the *Crimes (Torture) Act 1988* (Cth).
[95] UN Human Rights Committee, *Concluding Observations: Australia* (2009), note 90, para 8; UN Committee on Economic, Social and Cultural Rights, *Concluding Observations: Australia* (2009), note 80, para 11; UN Committee on Economic, Social and Cultural Rights, *Concluding observations of the Committee on Economic, Social and Cultural Rights: Australia*, UN Doc E/C.12/1/Add.50 (2000), paras 14, 24, at http://www.unhchr.ch/tbs/doc.nsf/0/693c56f3d2694130c12569580039a1a2?Opendocument (viewed 23 April 2009); UN Committee on the Rights of the Child, *Concluding Observations: Australia* (2005), note 75, paras 9 - 10; UN Committee against Torture, *Concluding Observations: Australia* (2008), note 80, para 9.
[96] UN Committee on Economic, Social and Cultural Rights, *Concluding Observations: Australia* (2000), above, paras 14, 24.
[97] UN Committee on Economic, Social and Cultural Rights, *Concluding Observations: Australia* (2009), note 80, para 11.
[98] UN Human Rights Committee, *Concluding observations of the Human Rights Committee: Australia*, UN Doc A/55/40 (2000), paras 498 - 528. At http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/A.55.40,paras.498-528.En?OpenDocument (viewed 2 June 2009).
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[100] See Roy Morgan Research, *Anti-Terrorism Legislation Community Survey prepared for Amnesty International Australia* (2006), p 12. At http://acthra.anu.edu.au/articles/Anti-terror%20community%20survey%20report.pdf (viewed 2 June 2009).

[101] RCL Moffat, 'Philosophical Foundations of the Australian Constitutional Tradition' (1965) 5 *Sydney Law Review* 85, p 86.
[102] G Williams, *Human Rights under the Australian Constitution* (2002), p 41.
[103] H Charlesworth, 'The Australian Reluctance about Rights' (1993) 31 *Osgoode Hall Law Journal* 195, p 210.
[104] Australian Constitution, s 51(xxxi).
[105] Australian Constitution, s 80.
[106] Australian Constitution, s 75(v).
[107] Australian Constitution, s 116.
[108] Australian Constitution, s 117.
[109] *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106; *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520; *Levy v Victoria* (1997) 189 CLR 579.
[110] *Australian Capital Television Pty Ltd*, above, 187.
[111] A substantive doctrine of equality under the Constitution was proposed by Deane and Toohey JJ in their dissenting judgment in *Leeth v Commonwealth* (1992) 174 CLR 455, 486 - 492 (Deane and Toohey JJ), but was rejected in the joint judgment of Mason CJ, Dawson and McHugh JJ. It was also rejected by a majority of the Court in *Kruger v Commonwealth* (1997) 190 CLR 1. The more limited procedural doctrine of equality proposed by Gaudron J in *Leeth* may still be open for argument.
[112] Charlesworth, 'The Australian Reluctance about Rights', note 103, p 198; J Doyle and B Wells, 'How Far Can the Common Law go Towards Protecting Human Rights?' in P Alston (ed), *Promoting Human Rights Through Bills of Rights: Comparative Perspectives* (1999) 17, p 61.
[113] See, for example, *Roach v Electoral Commissioner* (2007) 233 CLR 162, 224 - 225 (Heydon J) and the authorities cited therein. A contrary view has been expressed by Kirby J: see, for example, *Newcrest Mining (WA) Ltd v Commonwealth* (1997) 190 CLR 513, 657 - 658 (Kirby J).
[114] See sections 21 and 22 of this submission for further discussion of the weaknesses of the Australian Constitution in protecting racial equality and the right to equality more generally.
[115] UN Committee on the Elimination of Racial Discrimination, *Concluding Observations of the Committee on the Elimination of Racial Discrimination: Australia,* UN Doc CERD/C/AUS/CO/14 (2005), para 9. At http://www.unhchr.ch/tbs/doc.nsf/898586b1dc7b4043c1256a450044f331/fff3368f665eaf93c125701400444342/$FILE/G0541073.pdf (viewed 23 April 2009).
[116] Aboriginal and Torres Strait Islander Social Justice Commissioner, *Social Justice Report 2007* (2008), ch 3. At http://humanrights.gov.au/social_justice/sj_report/sjreport07/ (viewed 2 June 2009).
[117] Human Rights and Equal Opportunity Commission, *Submission to Senate Legal and Constitutional Committee on the Northern Territory National Emergency Response Legislation* (10 August 2007). At http://www.humanrights.gov.au/legal/submissions/2007/NTNER_Measures20070810.html (viewed 9 June 2009).
[118] UN Human Rights Committee, *Concluding Observations: Australia* (2009), note 90, para 14.
[119] *Al-Kateb v Godwin* (2004) 219 CLR 562.
[120] ICCPR, note 1, art 9.
[121] *Al-Kateb v Godwin* (2004) 219 CLR 562, 595 (McHugh J).
[122] The Hon M McHugh AC, *The need for agitators: the risk of stagnation* (Paper presented to the Sydney University Public Law Forum, Sydney, 12 October 2005), p 7. At http://www.hcourt.gov.au/speeches/mchughj/mchughj_12oct05.pdf (viewed 29 May 2009).
[123] *Re Woolley; Ex parte Applicants M276/2003* (2004) 225 CLR 1; *Behrooz v Secretary, Department of Immigration and Multicultural and Indigenous Affairs* (2004) 219 CLR 486.
[124] Department of the Prime Minister and Cabinet, *Commonwealth Legislation Handbook* (1999, updated as of May 2000). At http://www.dpmc.gov.au/guidelines/docs/legislation_handbook.pdf (viewed 26 May 2009).
[125] Department of the Prime Minister and Cabinet, *Commonwealth Legislation Handbook*, above, para 1.1.
[126] Department of the Prime Minister and Cabinet, *Commonwealth Legislation Handbook*, above, para 6.34.
[127] Department of the Prime Minister and Cabinet, *Commonwealth Legislation Handbook*, above, para 4.5.
[128] S Evans, 'Improving Human Rights Analysis in the Legislative and Policy Processes' (2005) 29 *Melbourne University Law Review* 665, p 674.

[129] Department of the Prime Minister and Cabinet, *Cabinet Handbook*, (5th ed, 1983, amended as of March 2004). At http://www.dpmc.gov.au/guidelines/docs/cabinet_handbook.rtf (viewed 26 May 2009).
[130] Department of the Prime Minister and Cabinet, *Commonwealth Legislation Handbook*, note 124, para 1.12.
[131] Department of the Prime Minister and Cabinet, *Federal Executive Council Handbook* (2005). At http://www.dpmc.gov.au/guidelines/docs/executive_handbook.doc (viewed 26 May 2009).
[132] *Legislative Instruments Act 2003* (Cth), s 26.
[133] Senate Table Office, *Standing Orders and other Orders of the Senate* (2006), Standing Orders 23 and 24, pp 20 - 21. At http://www.aph.gov.au/senate/pubs/standing_orders/standingorders.pdf (viewed 2 June 2009).
[134] For further discussion, see section 20.16 of this submission.
[135] H Charlesworth, 'Who wins under a Bill of Rights?' (2006) 25 *The University of Queensland Law Journal* 1, p 44.
[136] A Ramsey, 'No opposition, no debate, no contest', *The Sydney Morning Herald,* 11 August 2007. At http://www.smh.com.au/news/opinion/no-opposition-no-debate-no-contest/2007/08/10/1186530620958.html (viewed 2 June 2009).
[137] See further Australian Human Rights Commission, *A Human Rights Guide to Australia's Counter-Terrorism Laws* (2008). At http://humanrights.gov.au/legal/publications/counter_terrorism_laws.html (viewed 10 June 2009).
[138] UN Human Rights Committee, *Concluding Observations: Australia* (2009), note 90, pp 3 - 4; UN Committee against Torture, *Concluding Observations: Australia* (2008), note 80, p 3.
[139] *Mabo v Queensland (No 2)* (1991) 175 CLR 1, 42 (Brennan J) (*Mabo (No 2)*).
[140] *Mabo (No 2)*, above, 29 (Brennan J).
[141] The Hon M McHugh AC QC, *Does Australia Need a Bill of Rights?* (Speech delivered at Law Week Oration, University of Melbourne, 15 May 2007). At http://acthra.anu.edu.au/resources/DoesAustraliaNeedABillofrights.pdf (viewed 2 June 2009).
[142] (1994) 179 CLR 427.
[143] *Coco v The Queen* (1994) 179 CLR 427, 437 (Mason CJ, Brennan, Gaudron and McHugh JJ).
[144] See generally *K-Generation Pty Limited v Liquor Licensing Court* [2009] HCA 4, para 47 (French J), and the authorities cited therein.
[145] *Jumbunna Coal Mine NL v Victorian Coal Miners' Association* (1908) 6 CLR 309, 363 (O'Connor J); *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273, 287 (Mason CJ and Deane J); *Kartinyeri v Commonwealth* (1998) 195 CLR 337, 384 (Gummow and Hayne JJ).
[146] *Chu Kheng Lim v Minster for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1, 38 (Brennan, Deane and Dawson JJ).
[147] See D Pearce and R Geddes, *Statutory Interpretation in Australia* (6th ed, 2006), pp 38 - 39.
[148] See further Doyle and Wells, note 112, p 74.
[149] See Australian Human Rights Commission, *A Human Rights Guide to Australia's Counter-Terrorism Laws*, note 137.
[150] *Trobridge v Hardy* (1955) 94 CLR 147, 152 (Fullagher J).
[151] *Crimes Act 1914* (Cth), pt 1C, div 2.
[152] *Crimes Act 1914* (Cth), pt 1C, div 2. The provision for 'dead time' is found in ss 23CA(8)(m) and 23CB.
[153] *Criminal Code Act 1995* (Cth), schedule, div 104.
[154] *Australian Security Intelligence Organisation Act 1979* (Cth), pt III, div 3.
[155] *Australian Security Intelligence Organisation Act 1979* (Cth), s 34G(4).
[156] *Australian Security Intelligence Organisation Act 1979* (Cth), s 34ZS.
[157] UN Human Rights Committee, *Concluding Observations: Australia* (2009), note 90, pp 3 - 4. See also Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms while Countering Terrorism, *Australia: Study on Human Rights Compliance while Countering Terrorism*, UN Doc A/HRC/4/26/Add.3 (2006). At http://daccessdds.un.org/doc/UNDOC/GEN/G06/155/49/PDF/G0615549.pdf?OpenElement (viewed 2 June 2009).
[158] UN Committee against Torture, *Concluding Observations: Australia* (2008), note 80, p 3.
[159] UN Human Rights Committee, *Concluding Observations: Australia* (2009), note 90, pp 3 - 4; UN Committee against Torture, *Concluding Observations: Australia* (2008), note 80, p 3.

[160] *Minister for Immigration & Ethnic Affairs v Teoh* (1995) 183 CLR 273. The concept of 'legitimate expectation' has been questioned in subsequent cases, but has not been reversed. See, for example, *Re Minister for Immigration and Multicultural Affairs; Ex parte Lam* (2003) 214 CLR 1.
[161] Section 75(v) of the Australian Constitution guarantees the High Court's jurisdiction to judicially review the actions of a Commonwealth officer (including the actions of a Minister). Section 39B of the *Judiciary Act 1903* (Cth) gives the Federal Court jurisdiction to review the lawfulness of federal executive action.
[162] *Administrative Decisions (Judicial Review) Act 1977* (Cth), s 5.
[163] *Rush v Commissioner of Police* [2006] FCA 12.
[164] Second Optional Protocol to the ICCPR, note 22.
[165] UN Human Rights Committee, *C v Australia,* Communication No. 900/1999, UN Doc CCPR/C/76/D/900/1999 (2002), para 7.3. At http://www.unhchr.ch/tbs/doc.nsf/0/f8755fbb0a55e15ac1256c7f002f17bd?Opendocument (viewed 2 June 2009).
[166] The UN Human Rights Committee has found that Australia has breached the human rights of those within its jurisdiction 17 times. The UN Committee on Elimination of Racial Discrimination and the Committee against Torture have each made one finding against Australia.
[167] UN Human Rights Committee, *Brough v Australia*, Communication No. 1184/2003, UN Doc CCPR/C/86/D/1184/2003 (2006). At http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/8aeb1fcbc458419ac125716200520f4b?Opendocument (viewed 1 June 2009).
[168] UN Human Rights Committee, *Young v Australia*, Communication No. 941/2000, UN Doc CCPR/C/78/D/941/2000 (2003). At http://www.unhchr.ch/tbs/doc.nsf/0/3c839cb2ae3bef6fc1256dac002b3034?Opendocument (viewed 1 June 2009).
[169] UN Human Rights Committee, *A v Australia*, Communication No. 560/1993, UN Doc CCPR/C/59/D/560/1993 (1997). At http://www.unhchr.ch/tbs/doc.nsf/0/30c417539ddd944380256713005e80d3?Opendocument (viewed 1 June 2009).
[170] UN Human Rights Committee, *Coleman v Australia*, Communication No. 1157/2003, UN Doc CCPR/C/87/D/1157/2003 (2006). At http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/bb31fe728f09bc5dc12571cd0048757c?Opendocument (viewed 1 June 2009).
[171] For example, in the case of *A v Australia*, the Australian Government rejected the Committee's findings that Mr A's detention was in contravention of the ICCPR and that the review of the lawfulness of the detention by Australian courts was inadequate. The Government also rejected the Committee's view that compensation should be paid to Mr A. See H Charlesworth, *Human rights: Australia versus the UN*, Democratic Audit of Australia, Discussion Paper 22/06 (2006). At http://democratic.audit.anu.edu.au/papers/20060809_charlesworth_aust_un.pdf (viewed 1 June 2009).
[172] *Human Rights and Equal Opportunity Commission Act 1986* (Cth), s 11(1)(e).
[173] *Human Rights and Equal Opportunity Commission Act 1986* (Cth), s 3.
[174] The definition of 'human rights' in s 3 of the *Human Rights and Equal Opportunity Commission Act 1986* (Cth) makes reference to rights 'recognised or declared by any relevant international instrument'. While this appears to give the definition a broad scope, the term 'relevant international instrument' is defined later in s 3 to be 'an international instrument in respect of which a declaration under s 47 is in force'. To date only the *Declaration on the Elimination of all Forms of Intolerance and of Discrimination based on Religion or Belief*, the CRC, and the Disability Convention have been the subject of a declaration under s 47.
[175] There is one exception to this. The Aboriginal and Torres Strait Islander Social Justice Commission 'must, as appropriate, have regard to' the ICESCR and 'such other instruments relating to human rights as the Commissioner considers relevant': *Human Rights and Equal Opportunity Commission Act 1986* (Cth), ss 46C(4)(a), 46C(4)(b).
[176] The Commission has certain limited powers in relation to the examination of legislation or proposed legislation that may be contrary to CEDAW by virtue of s 48 of the Sex Discrimination Act.
[177] However, the Commission may conduct inquiries into discrimination in employment, including systemic discrimination. This function is not limited to employment by the Commonwealth. It also applies to private workplaces and employment by States and Territories. *Human Rights and Equal Opportunity Commission Act 1986* (Cth), s 31(b).

[178] *Human Rights and Equal Opportunity Commission Act 1986* (Cth), s 11(1)(f). 'Human rights' are defined in s 3 of the *Human Rights and Equal Opportunity Commission Act 1986* (Cth).
[179] *Human Rights and Equal Opportunity Commission Act 1986* (Cth), ss 29(2)(b), 29(2)(c).
[180] Reports of complaints are available at http://www.humanrights.gov.au/legal/HREOCA_reports/index.html.
[181] Human Rights and Equal Opportunity Commission, *Those who've come across the seas – Detention of unauthorised arrivals* (1998). At http://www.humanrights.gov.au/pdf/human_rights/asylum_seekers/h5_2_2.pdf (viewed 2 June 2009).
[182] Human Rights and Equal Opportunity Commission, *A last resort? National Inquiry into Children in Immigration Detention* (2004). At http://www.humanrights.gov.au/human_rights/children_detention_report/report/PDF/alr_complete.pdf (viewed 2 June 2009).
[183] See further Australian Human Rights Commission, *2008 Immigration detention report*, note 82; Human Rights and Equal Opportunity Commission, *Submission to the Joint Standing Committee on Migration Inquiry into Immigration Detention in Australia*, note 82.
[184] See, for example, UN Human Rights Committee, *Concluding Observations: Australia* (2009), note 90, pp 7-8; Committee against Torture, *Concluding Observations: Australia* (2008), note 80, pp 4, 8; Committee on the Rights of the Child, *Concluding Observations: Australia* (2005), note 75, p 13.
[185] *Racial Discrimination Act 1975* (Cth); *Sex Discrimination Act 1984* (Cth); *Disability Discrimination Act 1992* (Cth); *Age Discrimination Act 2004* (Cth).
[186] See *Discrimination Act 1991* (ACT), s 7(1)(o); *Anti-Discrimination Act 1998* (Tas), s 16(r); *Anti-Discrimination Act* (NT), s 19(1)(q).
[187] Human Rights and Equal Opportunity Commission, *Report of an inquiry into a complaint by Mr Frank Ottaviano of discrimination in employment on the basis of criminal record against South Australia Police*, Report No. 38 (2007). At http://www.humanrights.gov.au/legal/HREOCA_reports/hrc_report_38.html (viewed 2 June 2009).
[188] For example, Amnesty International Australia commissioned a nationwide poll of 1001 voters in 2006. Sixty one per cent of respondents said they thought Australia had a bill or charter of rights. Thirteen percent said that Australia did not have a bill or charter of rights. Twenty six percent could not say. See Roy Morgan Research, note 100.
[189] *Human Rights and Equal Opportunity Commission Act 1986* (Cth), ss 11(1)(g), 11(1)(h).
[190] The Hon M McHugh AC QC, *A Human Rights Act, the courts and the Constitution* (Paper presented at the Australian Human Rights Commission, Sydney, 5 March 2009). At http://humanrights.gov.au/letstalkaboutrights/events/McHugh2009_%20paper.doc (viewed 4 June 2009). The *Canadian Bill of Rights 1960* (Can), s 2 states:

> Every law of Canada shall, unless it is expressly declared by an Act of the Parliament of Canada that it shall operate notwithstanding the *Canadian Bill of Rights*, be so construed and applied as not to abrogate, abridge or infringe or to authorize the abrogation, abridgment or infringement of any of the rights or freedoms herein recognized and declared …

[191] For example, in *R v Drybones* [1970] SCR 282, the Supreme Court of Canada held that a law that could not be sensibly construed so as not to abrogate the rights and freedoms recognised in the *Canadian Bill of Rights* was inoperative to the extent of the inconsistency, unless there was an express declaration that the law operated notwithstanding the *Canadian Bill of Rights*. Pamela Tate SC has raised concerns about the constitutional implications of introducing a 'notwithstanding' clause of this type in the Australian federal context. See P Tate, *Victoria's Charter of Human Rights and Responsibilities: A contribution to the Debate on a National Charter* (Paper presented the 2009 Commonwealth Law Conference, Hong Kong, 6 April 2009).
[192] See ICCPR, note 1, art 2(1).
[193] In particular, the right to self-determination is a collective right, held by 'peoples': ICCPR, note 1, art 1; ICESCR, note 2, art 1.
[194] ICCPR, note 1, art 25(b). See also UN Human Rights Committee, *General comment No 15: The position of aliens under the Covenant* (1986), reprinted in UN Doc HRI/GEN/1/Rev.9 (Vol I) (2008), p 189. At http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/bc561aa81bc5d86ec12563ed004aaa1b?Opendocument (viewed 7 June 2009).
[195] ICCPR, note 1, art 50; ICESCR, note 2, art 28.
[196] The Commonwealth can introduce laws that protect human rights pursuant to s 51(xxix) of the Australian Constitution (the external affairs power), which gives Parliament the power to introduce

laws that implement the terms of those international agreements to which Australia is a party: *Commonwealth v Tasmania* (1983) 158 CLR 1.
[197] Australian Constitution, s 109.
[198] Although the precise formulation of this rule is not entirely clear, it is doubtful that the Commonwealth would be able to control the procedures by which a state Parliament makes laws. See *Austin v Commonwealth* (2003) 215 CLR 185, pp 257 - 258 (Gaudron, Gummow and Hayne JJ); *Re Australian Education Union: ex parte Victoria* (1995) 184 CLR 188, 231 (Mason CJ, Brennan, Deane, Toohey, Gaudron and McHugh JJ); A Simpson, 'State Immunity from Commonwealth Laws: *Austin v Commonwealth* and Dilemmas of Doctrinal Design' (2004) 32 *University of Western Australia Law Review* 45, p 50.
[199] Consultation Committee for a Proposed WA Human Rights Act, *A WA Human Rights Act: Report of the Consultation Committee for a Proposed WA Human Rights Act* (2007), at http://www.department.dotag.wa.gov.au/H/human_rights_report_2007.aspx?uid=0053-1186-4534-3685 (viewed 7 June 2009); Tasmania Law Reform Institute, *A Charter of Rights for Tasmania*, Report No 10 (2007), at http://www.law.utas.edu.au/reform/docs/Human_Rights_A4_Final_10_Oct_2007_revised.pdf (viewed 7 June 2009).
[200] See *Racial Discrimination Act 1975* (Cth), s 6A(1); *Sex Discrimination Act 1984* (Cth), ss 10(3),11(3); *Disability Discrimination Act 1992* (Cth), s 13(3); *Age Discrimination Act 2004* (Cth), s 12(3).
[201] See *Charter of Human Rights and Responsibilities Act 2006* (Vic), preamble; *Human Rights Act 2004* (ACT), preamble.
[202] See *Charter of Human Rights and Responsibilities Act 2006* (Vic), preamble; *Human Rights Act 2004* (ACT), preamble.
[203] Consultation Committee for a Proposed WA Human Rights Act, note 199, pp 76 - 77; Tasmania Law Reform Institute, note 199, pp 169 - 170; ACT Bill of Rights Consultative Committee, *Towards an ACT Human Rights Act: Report of the ACT Bill of Rights Consultative Committee* (2003), p 100, at http://www.jcs.act.gov.au/prd/rights/reports.html (viewed 7 June 2009).
[204] *Human Rights Act 1998* (UK), sch 1, pt II; Joint Committee on Human Rights, *A Bill of Rights for the UK? Twenty–ninth Report of Session 2007–08* (2008), p 56, at http://www.publications.parliament.uk/pa/jt200708/jtselect/jtrights/165/16502.htm (viewed 7 June 2009).
[205] In *Eldridge v British Columbia (Attorney General)* [1997] 3 SCR 624, the Supreme Court of Canada held that the State's failure to provide interpreters to people with a hearing impairment when they accessed health services violated the right to equality contained in s 15(1) of the *Charter of Rights and Freedoms*.
[206] In *Victoria (City) v Adams*, 2008 BCSC 1363, the Supreme Court of British Columbia found that a bylaw that prohibited the erection of temporary shelter on public property deprived people who are homeless of the right to life, liberty and security of the person guaranteed by s 7 of the *Charter of Rights and Freedoms*.
[207] Consultation Committee for a Proposed WA Human Rights Act, note 199, p 86. See further, P Macklem, *Indigenous Difference and the Constitution of Canada* (2002), p 243: Canadian 'courts have generally been reluctant to invest civil and political rights with much social [or] economic …content'. See also A Byrnes, H Charlesworth and G McKinnon, quoted in ACT Department of Justice and Community Safety, *Human Rights Act 2004: Twelve-Month Review – Report* (2006), p 48: 'Even in … Canada where a Charter of Rights had long been established, the record of the courts in protecting social, economic and cultural rights through other rights … has been mixed at best'.
[208] Consultation Committee for a Proposed WA Human Rights Act, note 199, p 87.
[209] *Constitution of the Republic of South Africa*, *1996*, ss 26 - 27.
[210] *South Africa v Grootboom* [2001] 1 SA 46, para 41.
[211] Joint Committee on Human Rights, *A Bill of Rights for the UK?*, note 204, p 56.
[212] Although certain rights are tailored, for example, to the circumstances of lawful aliens, children, citizens, ethnic, religious or linguistic minorities and mothers: ICCPR, note 1, arts 13, 24, 25, 27; ICESCR, note 2, art 10.
[213] CEDAW, note 10; CRC, note 12; Disability Convention, note 13; CERD, note 7; Declaration on the Rights of Indigenous Peoples, note 33.

[214] Australian courts already have recourse to international human rights jurisprudence in interpreting laws which give effect to Australia's international obligations. They may also have reference to it in the context of applying the common law principle of statutory interpretation that, in the case of ambiguity, courts should prefer an interpretation that is consistent with Australia's international obligations: *Koowarta v Bjelke-Petersen* (1982) 153 CLR 168, 264 - 265 (Brennan J); *Gerhardy v Brown (*1985) 159 CLR 70, 124 (Brennan J); *Qantas Airways Limited v Christie* (1998) 193 CLR 280, 303 (McHugh J), 332 - 333 (Kirby J). It has been held that approach is not confined in its application to ambiguous statutory provisions: *X v Commonwealth* (1999) 200 CLR 177, 222 - 223 (Kirby J); *Qantas Airways Limited v Christie* (1998) 193 CLR 280, 332 - 333 and footnotes 168 - 169 (Kirby J).
[215] See, for example, *Charter of Human Rights and Responsibilities Act 2006* (Vic), s 32(2); *Human Rights Act 2004* (ACT), s 31(1). See further *Human Rights Act 2004* (ACT), dictionary; Explanatory Statement to the Human Rights Bill 2003 (ACT), pp 5 - 6; Explanatory Memorandum to the Charter of Human Rights and Responsibilities Bill 2006 (Vic), pp 23 - 24. See also other sources of international law as outlined in the *Statute of the International Court of Justice*, art 38.
[216] For further on a Human Rights Act and the rights of Aboriginal and Torres Strait Islander peoples, see Aboriginal and Torres Strait Islander Commissioner, *Social Justice Report 2008*, note 59, ch 2.
[217] *Charter of Human Rights and Responsibilities Act 2006* (Vic), s 5.
[218] *Human Rights Act 2004* (ACT), s 28.
[219] For an analysis of internal limitations in the ACT Human Rights Act and Victorian Charter, see C Evans and S Evans, *Australian Bills of Rights: The Law of the Victorian Charter and ACT Human Rights Act* (2008), paras 5.20 – 5.22.
[220] *Kracke v Mental Health Review Board* [2009] VCAT 646, para 108, citing *R v Oakes* [1986] 1 SCR 103, para 67.
[221] ICCPR, note 1, art 19(3).
[222] ICCPR, above, art 4(2). The UN Human Rights Committee considers that there are elements of other rights that may not lawfully be subject to derogation: UN Human Rights Committee, *General Comment No 29: States of Emergency (Article 4)*, UN Doc CCPR/C/21/Rev.1/Add. 11 (2001), para 13. At http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/71eba4be3974b4f7c1256ae200517361?Opendocument (viewed 2 June 2009).
[223] UN Human Rights Committee, above, para 7.
[224] J Debeljak, 'Balancing Rights in a Democracy: the Problems with Limitations and Overrides of Rights under the *Victorian Charter of Human Rights and Responsibilities Act 2006*' (2008) 32 *Melbourne University Law Review* 422, p 434.
[225] See further, Debeljak, above, p 435.
[226] *Bropho v Western Australia* [2008] FCAFC 100, para 83.
[227] See *Charter of Human Rights and Responsibilities Act 2006* (Vic), s 7(2); *Human Rights Act 2004* (ACT), s 28; *New Zealand Bill of Rights Act 1990* (NZ), s 5; *Constitution of the Republic of South Africa*, *1996*, s 36. See also *R v Oakes* [1986] 1 SCR 103.
[228] P Tate, 'Protecting Human Rights in a Federation' (2008) 33 *Monash University Law Review* 212, p 232. See also Evans and Evans, note 219, para 5.49.
[229] Department of Prime Minister and Cabinet, *Commonwealth Legislation Handbook*, note 124.
[230] Victorian Equal Opportunity and Human Rights Commission, *Emerging Change: The 2008 report on the operation of the Charter of Human Rights and Responsibilities* (2009), p 30. At http://www.humanrightscommission.vic.gov.au/publications/annual%20reports/2008charterreport.asp (viewed 7 June 2009).
[231] M Hunt, *The UK Human Rights Act as a 'parliamentary model' of rights protection: lessons for Australia* (Speech delivered at the Australian Human Rights Commission, Sydney, 17 February 2009). At http://www.humanrights.gov.au/letstalkaboutrights/events/Hunt_2009.html (viewed 7 June 2009).
[232] Victorian Equal Opportunities and Human Rights Commission, *Emerging Change*, note 230, p 71.
[233] See, for example, Joint Committee on Human Rights. At http://www.parliament.uk/parliamentary_committees/joint_committee_on_human_rights/jchrabout.cfm (viewed 2 June 2009).
[234] UK Department for Constitutional Affairs, *Review of the Implementation of the Human Rights Act* (2006), p 21; Hunt, note 231.
[235] See J Uhr, 'Leap into lead on rights path', *The Canberra Times*, 13 May 2009. At http://www.canberratimes.com.au/news/opinion/editorial/general/leap-into-lead-on-rights-path/1511515.aspx (viewed 7 June 2009).

[236] In the UK, Parliament has passed laws that are incompatible with human rights against the advice of the Joint Parliamentary Committee. The ability of courts under the UK Human Rights Act to issue a declaration of incompatibility has provided further opportunity for Parliament to publicly consider the human rights impacts of laws. See Hunt, note 231.
[237] See *Kracke v Mental Health Review Board* [2009] VCAT 646, para 206 where Justice Bell said '[t]he subject of s 32(1) is everybody. It applies to the courts, tribunals, government officials and public authorities'.
[238] The Hon Kevin Bell, *Enhancing Australian Democracy with a Bill of Rights* (Paper presented to the Australian Institute of Administrative Law (Victorian Chapter), 20 November 2008), p 3.
[239] For discussion of this presumption, see section 13.1 of this submission.
[240] *R v Secretary of State for the Home Department Ex Parte Simms* [2000] 2 AC 115, 131 (Lord Hoffman) (*Ex Parte Simms*). This presumption 'has been described in the United Kingdom as an aspect of a "principle of legality" governing the relationship between parliament, the executive and the courts': *K-Generation Pty Limited v Liquor Licensing Court* [2009] HCA 4, para 47 (French CJ).
[241] See *Ex Parte Simms*, above, 131 (Lord Hoffman). Common law rights have never been comprehensively defined. However, they are narrower than those protected by the ICCPR and ICESCR. For further discussion of how the interpretive provision extends beyond the existing common law statutory interpretation principles, see Evans and Evans, note 219, paras 3.16 - 3.17.
[242] *Human Rights Act 2004* (ACT), s 30; *Charter of Human Rights and Responsibilities Act 2006* (Vic), s 32(1); *New Zealand Bill of Rights Act 1990* (NZ), s 6; *Human Rights Act 1998* (UK), s 3.
[243] For a discussion of the application of the interpretive provision in the Victorian context, see *Kracke v Mental Health Review Board* [2009] VCAT 646; in the United Kingdom, see *Ghaidan v Godin-Mendoza* [2004] 2 AC 557; and in New Zealand, see *R v Hansen* [2007] 3 NZLR 1.
[244] The interpretation of federal legislative instruments is dealt with by common law principles and the *Legislative Instruments Act 2003* (Cth), s 13. This Act could be amended to make it clear that all legislative instruments should be interpreted consistent with the interpretive provision in a Human Rights Act.
[245] However, the interpretive provision should not impose obligations on public authorities to interpret legislation consistently with human rights where the act of interpreting the legislation occurs before the Human Rights Act comes into force. For a discussion of the retrospective application of the Victorian Charter, see *Kracke v Mental Health Review Board* [2009] VCAT 646, paras 334 - 365.
[246] The Hon Chief Justice J Spigelman AC, *The Application of Quasi-Constitutional Laws* (Speech delivered at the 2008 McPherson Lecture Series, Brisbane, 11 March 2008), p 9. At http://www.lawlink.nsw.gov.au/lawlink/supreme_court/ll_sc.nsf/vwFiles/spigelman110308.pdf/$file/spigelman110308.pdf (viewed 4 June 2009).
[247] For an example of such criticisms in relation to the UK interpretive provision, see McHugh, *A Human Rights Act, the courts and the Constitution*, note 190, pp 20 - 23, 26 - 27.
[248] Such a provision is contained in *Charter of Human Rights and Responsibilities Act 2006* (Vic), s 32(1); *Human Rights Act 2004* (ACT), s 30. The Commission envisages that this interpretive provision would operate consistently with s 15AA of the *Acts Interpretation Act 1901* (Cth), which states: '[i]n the interpretation of a provision of an Act, a construction that would promote the purpose or object underlying the Act (whether that purpose or object is expressly stated in the Act or not) shall be preferred to a construction that would not promote that purpose or object'.
[249] Chief Justice Spigelman argues that the words 'consistently with their purpose' in the Victorian Charter and the ACT Human Rights Act are words of limitation which do not permit the courts in Victoria and the ACT to apply the interpretive obligation as expansively as had occurred in the UK. See Spigelman, note 246, p 32; McHugh, *A Human Rights Act, the courts and the Constitution*, note 190, p 26.
[250] Statement of Constitutional Validity of an Australian Human Rights Act (22 April 2009) (Reproduced as Appendix 3 of this submission). At http://www.humanrights.gov.au/letstalkaboutrights/roundtable.html (viewed 4 June 2009). In *K-Generation* [2009] HCA 4, para 46, French CJ observed that statutory interpretation is 'to be informed by the principle that the parliament, whether of the State or the Commonwealth, did not intend the statute to exceed constitutional limits. It should be interpreted, so far as its words allow, to keep it within constitutional limits'. Any interpretive provision included in a national Human Rights Act would therefore be interpreted, as far as its words allowed, to keep it within constitutional limits and not to infringe the separation of powers.

[251] *Al-Kateb v Godwin* (2004) 219 CLR 562, 577 - 578 (Gleeson CJ), 607 - 609 (Gummow J), 615 - 616 (Kirby J).
[252] *Human Rights Act 1998* (UK), ss 4, 36; *Human Rights Act 2004* (ACT), s 32. In Victoria, this is known as a 'declaration of inconsistent interpretation': *Charter of Human Rights and Responsibilities Act 2006* (Vic), s 36.
[253] *Charter of Human Rights and Responsibilities Act 2006* (Vic), s 36(5); *Human Rights Act 2004* (ACT), s 32(3).
[254] *Charter of Human Rights and Responsibilities Act 2006* (Vic), s 37; *Human Rights Act 2004* (ACT), s 33(3).
[255] Twenty-six declarations of incompatibility have been issued in the UK, but nine were overturned on appeal. Statistic cited by Hunt, note 231.
[256] Statistic cited by Hunt, above.
[257] McHugh, *A Human Rights Act, the courts and the Constitution*, note 190.
[258] J Debeljak, 'The *Human Rights Act 2004* (ACT): A Significant, Yet Incomplete, Step Toward the Domestic Protection and Promotion of Human Rights' (2004) 15 *Public Law Review* 169, p 175. See also D Meagher, 'Taking Parliamentary Sovereignty Seriously within a Bill of Rights Framework' (2005) 10 *Deakin Law Review* 686.
[259] The British Institute of Human Rights, *The Human Rights Act: Changing Lives* (2008), p 5. At http://www.bihr.org.uk/sites/default/files/The%20Human%20Rights%20Act%20-%20Changing%20Lives.pdf (viewed 7 June 2009).
[260] Victorian Equal Opportunity and Human Rights Commission, *The 2007 Report on the Operation of the Charter of Human Rights and Responsibilities: First steps forward* (2008), p 6. At http://www.humanrightscommission.vic.gov.au/publications/annual%20reports/2008charterreport.asp (viewed 4 June 2009).
[261] For definitions of 'public authority' in other jurisdictions, see *Human Rights Act 2004* (ACT), s 40; *Charter of Human Rights and Responsibilities Act 2006* (Vic), s 4; *Human Rights Act 1998* (UK), s 6.
[262] These services include those in the areas of welfare services, health care, and management of prisons and other detention facilities.
[263] Regarding the ICCPR, the UN Human Rights Committee has stated 'it would be unconscionable to so interpret the responsibility under article 2 of the Covenant as to permit a State party to perpetrate violations of the Covenant on the territory of another State, which violations it could not perpetrate on its own territory': UN Human Rights Committee, *Delia Saldias de Lopez v Uruguay*, Communication No. 52/1979, UN Doc CCPR/C/OP/1 (1984), 88 at para 12.3. At http://www1.umn.edu/humanrts/undocs/html/52_1979.htm (viewed 4 June 2009).
[264] A similar provision is included in *Charter of Human Rights and Responsibilities Act 2006* (Vic), s 3(1).
[265] A similar provision is included in *Human Rights Act 2004* (ACT), s 40B(2); *Charter of Human Rights and Responsibilities Act 2006* (Vic), s 38(2).
[266] Department of Immigration and Multicultural Affairs, *Charter of Public Service in a Culturally Diverse Society* (1998). At http://www.immi.gov.au/media/publications/multicultural/nmac/append_g.htm (viewed 9 June 2009).
[267] M Kalantis and B Cope, 'The charter of public service in a culturally diverse society, Australian Government', *New Learning*. At http://newlearningonline.com/new-learning/chapter-4-learning-civics/the-charter-of-public-service-in-a-culturally-diverse-society-australian-government/ (viewed 7 June 2009).
[268] Human Rights Law Resource Centre, *Case Studies: How a Human Rights Act can Promote Dignity and Address Disadvantage*, section 1.12. At http://www.hrlrc.org.au/content/topics/national-human-rights-consultation/case-studies/ (viewed 26 May 2009).
[269] The British Institute of Human Rights, *The Human Rights Act: Changing Lives* (2nd ed, 2008), p 15. At http://www.bihr.org.uk/sites/default/files/BIHR%20Changing%20Lives%20FINAL_0.pdf (viewed 7 June 2009).
[270] Victorian Equal Opportunity and Human Rights Commission, *First steps forward*, note 260, p 12.
[271] Victorian Equal Opportunity and Human Rights Commission, above, p 12.
[272] Victorian Equal Opportunity and Human Rights Commission, *Emerging change,* note 230, p 21.
[273] *Public Administration Act 2004* (Vic), s 7(1)(g).
[274] *Public Administration Act 2004* (Vic), s 8(ca).
[275] *Public Service Act 1999* (Cth), ss 10, 13.

[276] For information on the complaints process, see Australian Human Rights Commission, *Federal Discrimination Law Online*, ch 6. At http://www.humanrights.gov.au/legal/FDL/index.html (viewed 4 June 2009).
[277] UN Committee on Economic, Social and Cultural Rights, *General comment No 9*, note 54, para 10.
[278] International Commission of Jurists, *Courts and the Legal Enforcement of Economic, Social and Cultural Rights: Comparative experiences of justiciability* (2008), p 99. At http://www.humanrights.ch/home/upload/pdf/080819_justiziabilitt_esc.pdf (viewed 4 June 2009).
[279] For a review of how courts around the world have adjudicated matters relating to economic, social and cultural rights, see International Commission of Jurists, above, ch 3.
[280] *Human Rights and Equal Opportunity Commission Act 1986* (Cth), s 46P0(4)(d). See also Australian Human Rights Commission, *Federal Discrimination Law Online*, note 276, ch 7.
[281] *Human Rights Act 1998* (UK), s 8(3).
[282] *Simpson v Attorney-General* (*Baigent's case*) [1994] 3 NZLR 667.
[283] *Charter of Human Rights and Responsibilities Act 2006* (Vic), s 39(3); *Human Rights Act 2004* (ACT), s 40C(4).
[284] See *Administrative Decisions (Judicial Review) Act 1977* (Cth), ss 5, 6. It would be possible, but not necessary, to include a specific ground of review relating to a failure to take into account the human rights specified in a national Human Rights Act.
[285] *Administrative Decisions (Judicial Review) Act 1977* (Cth), ss 15, 15A, 16. *Park Oh Ho v Minister for Immigration and Ethnic Affairs* (1988) 20 FCR 104, 114 (Sweeney J), 126 (Morling J), 134 (Foster J).
[286] See Australian Law Reform Commission, *Beyond The Door-Keeper: Standing to sue for public remedies*, ALRC 87 (1996), at http://www.austlii.edu.au/au/other/alrc/publications/reports/78/ALRC78.html (viewed 5 June 2009); Australian Law Reform Commission, *Standing in Public Interest Litigation*, ALRC 27 (1985), at http://www.austlii.edu.au/au/other/alrc/publications/reports/27/ (viewed 5 June 2009).
[287] *Human Rights and Equal Opportunity Commission Act 1986* (Cth), ss 46P(2), 46PO(1). See also *Access for All Alliance (Hervey Bay) Inc v Hervey Bay City Council* (2007) 162 FCR 313.
[288] Human Rights Law Resource Centre, *Case Studies*, note 268, section 1.4.
[289] Human Rights Law Resource Centre, above, section 2.2.
[290] *Human Rights and Equal Opportunity Commission Act 1986* (Cth), s 11(1)(g).
[291] *National Human Rights Consultation Background Paper* (2008), p 13. At http://www.humanrightsconsultation.gov.au/www/nhrcc/nhrcc.nsf/Page/About_Human_Rights_in_Australia (viewed 9 June 2009).
[292] See section 11(1)(f) and Part II, Divisions 3 and 4 of the HREOC Act regarding the Commission's human rights and discrimination in employment complaint functions. See Part IIB of the HREOC Act regarding the Commission's unlawful discrimination complaint functions.
[293] Human Rights and Equal Opportunity Commission, *Annual Report 2007-2008*, ch 4. At http://www.humanrights.gov.au/about/publications/annual_reports/2007_2008/chap4.html#4_1 (viewed 9 June 2009).
[294] *Human Rights and Equal Opportunity Commission Act 1986* (Cth), s 11(1)(o), s 3(1).
[295] *Racial Discrimination Act 1975* (Cth), s 20(1)(e); *Sex Discrimination Act 1984* (Cth), s 48(1)(gb); *Disability Discrimination Act 1992* (Cth), s 67(1)(l); *Age Discrimination Act 2004* (Cth), s 53(1)(g). Special purpose commissioners also have the specific function of assisting the Federal Court and Federal Magistrates Court as *amicus curiae* with leave of the court: *Human Rights and Equal Opportunity Commission Act 1986* (Cth), s 46PV.
[296] *Charter of Human Rights and Responsibilities Act 2006* (Vic), s 40(1).
[297] Williams, note 102, p 25.
[298] Consultation Committee for a Proposed WA Human Rights Act, note 199, Appendix E.
[299] Amnesty International Australia, 'Majority support the introduction of a law to protect human rights in Australia', (Media Release, 12 March 2009). At http://www.amnesty.org.au/news/comments/20460/ (viewed 6 May 2009).
[300] S Zifcak & A King, *Wrongs, Rights & Remedies: An Australian Charter?* (2009), p 54. At http://www.australiancollaboration.com.au/booksreports/Wrongs_Rights_Remedies.pdf (viewed 7 June 2009).
[301] S Harris Rimmer, 'Some lawyers take cheap shots, some even work pro bono', *The Canberra Times*, 27 January 2009. At http://www.canberratimes.com.au/news/opinion/editorial/general/some-

lawyers-take-cheap-shots-some-even-work-pro-bono/1416770.aspx?storypage=0 (viewed 12 May 2009).

[302] See, for example, British Institute of Human Rights, *Changing Lives*, note 259; British Institute of Human Rights, *Changing Lives* (2nd ed), note 269; Human Rights Law Resource Centre, *Case Studies*, note 268.

[303] UK Department for Constitutional Affairs, note 234, p 4.

[304] Jack Straw (UK Lord Chancellor and Secretary of State for Justice) has acknowledged that the *Human Rights Act 1998* (UK) is 'unfortunately perceived by sections of the public and the media as a "villains charter"'. However, he remains 'firmly supportive' of the Human Rights Act: Letter from the Rt Hon Jack Straw MP, Secretary of State for Justice to the Chairman, Joint Committee on Human Rights, 11 January 2009, reproduced in Joint Committee on Human Rights, *A Bill of Rights for the UK? Government Response to the Committee's Twenty-ninth Report of Session 2007-08* (2009), p 32.

[305] UK Department for Constitutional Affairs, note 234, p 4.

[306] A Byrnes, H Charlesworth & G McKinnon, *Bills of Rights in Australia: History, Politics and Law* (2009), p 65.

[307] J Burnside, *Who's afraid of Human Rights?* (28th Sir Richard Kirby Lecture, Wollongong University, 25 September 2008). At http://www.humanrightsact.com.au/2008/2008/11/27/whos-afraid-of-human-rights/ (viewed 13 May 2009).

[308] National Human Rights Consultation, *Background Paper* (2008), p 12. At http://www.humanrightsconsultation.gov.au/www/nhrcc/nhrcc.nsf/Page/About_Human_Rights_in_Australia (viewed 9 June 2009).

[309] *Racial Discrimination Act 1975* (Cth); *Sex Discrimination Act 1984* (Cth); *Disability Discrimination Act 1992*; *Age Discrimination Act 2004*. The Race Discrimination Act and Sex Discrimination Act were intended to give effect to Australia's obligations under the CERD and CEDAW, respectively.

[310] The particular grounds of unlawful discrimination under federal anti-discrimination law can be summarised as follows: race, colour, descent or national or ethnic origin; sex; marital status; pregnancy or potential pregnancy; family responsibilities; disability; people with disabilities in possession of palliative or therapeutic devices or auxiliary aids; people with disabilities accompanied by an interpreter, reader, assistant or carer; a person with a disability accompanied by a guide dog or an 'assistance animal'; and age. Also falling within the definition of 'unlawful discrimination' is: offensive behaviour based on racial hatred; sexual harassment; harassment of people with disabilities; and victimisation and several criminal offences relating to discrimination.

[311] *Equal Opportunity Act 1995* (Vic), s 6(j) (religious belief or activity); *Discrimination Act 1991* (ACT), s 7(1)(i) (religious conviction); *Anti-Discrimination Act 1991* (Qld), s 7(1)(i) (religious belief or religious activity); *Anti-Discrimination Act 1998* (Tas), ss 16(o) (religious belief or affiliation), 16(p) (religious activity); *Anti-Discrimination Act 1992* (NT), s 19(1)(m) (religious belief or activity); *Equal Opportunity Act 1984* (WA), s 53 (religious conviction); *Anti-Discrimination Act 1977* (NSW), s 7 (race, including ethno-religious origin); *Canadian Human Rights Act 1985* (Can), s 3(1) (religion); *Equality Act 2006* (UK), pt 2 (religion and belief); *Human Rights Act 1993* (NZ), s 21(1)(c) (religious belief).

[312] *Equal Opportunity Act 1995* (Vic), s 6(g) (political belief or activity); *Discrimination Act 1991* (ACT), s 7(1)(i) (political conviction); *Anti-Discrimination Act 1991* (Qld), s 7(1)(j) (political belief or activity); *Anti-Discrimination Act 1998* (Tas), ss 16(m) (political belief or affiliation), 16(n) (political activity); *Anti-Discrimination Act 1992* (NT), s 19(1)(n) (political opinion, affiliation or activity); *Equal Opportunity Act 1984* (WA), s 53 (political conviction); *Equality Act 2006* (UK), pt 2 (belief); *Human Rights Act 1993* (NZ), s 21(1)(j) (political opinion).

[313] *Equal Opportunity Act 1995* (Vic), ss 6(d) (lawful sexual activity), 6(l) (sexual orientation); *Anti-Discrimination Act 1977* (NSW), s 49ZG (homosexuality); *Equal Opportunity Act 1995* (Vic), ss 6(d) (lawful sexual activity), 6(l) (sexual orientation); *Anti-Discrimination Act 1991* (Qld), ss 7(1)(l) (lawful sexual activity), 7(1)(n) (sexuality); *Anti-Discrimination Act 1998* (Tas), ss 16(c) (sexual orientation, including heterosexuality, homosexuality & bisexuality), 16(d) (lawful sexual activity); *Equal Opportunity Act 1984* (WA), s 35O (sexual orientation); *Equal Opportunity Act 1984* (SA), s 29(1)(b) (sexuality, including heterosexuality, homosexuality & bisexuality); *Anti-Discrimination Act 1992* (NT), s 19(1)(c) (sexuality, including heterosexuality, homosexuality & bisexuality); *Canadian Human Rights Act 1985* (Can), s 3(1) (sexual orientation); *Equality Act 2006* (UK), Pt 3 (sexual orientation); *Human Rights Act 1993* (NZ), s 21(1)(m) (sexual orientation, including a heterosexual, homosexual, lesbian or bisexual orientation).

[314] *Anti-Discrimination Act 1977* (NSW), s 38B (transgender); *Equal Opportunity Act 1995* (Vic), s 6(ac) (gender identity); *Discrimination Act 1991* (ACT), ss 7(1)(b) (sexuality), 7(1)(c) (transsexuality); *Equal*

Opportunity Act 1984 (SA), s 29(1)(b) (sexuality, including transsexuality); *Anti-Discrimination Act 1998* (Tas), s 16(c) (sexual orientation, including transsexuality); *Anti-Discrimination Act 1992* (NT), s 19(1)(c) (sexuality, including transsexuality).

[315] *Equal Opportunity Act 1995* (Vic), s 6(c) (industrial activity); *Discrimination Act 1991* (ACT), s 7(k) (membership or non-membership of an association or organisation of employers or employees); *Anti-Discrimination Act 1991* (Qld), s 7(1)(k) (trade union activity); *Anti-Discrimination Act 1998* (Tas), s 16(l) (industrial activity); *Anti-Discrimination Act 1992* (NT), s 19(1)(k) (trade union or employer association activity).

[316] *Anti-Discrimination Act 1977* (NSW), s 7 (race, including nationality); *Anti-Discrimination Act 1998* (Tas), s 16(a) (race, including nationality); *Equal Opportunity Act 1995* (Vic), s 6(i) (race, including nationality); *Discrimination Act 1991* (ACT), s 7(1)(h) (race, including nationality); *Anti-Discrimination Act 1991* (Qld), s 7(1)(g) (race, including nationality); *Equal Opportunity Act 1984* (WA), s 51 (race, including nationality); *Anti-Discrimination Act 1992* (NT), s 19(1)(a); *Equal Opportunity Act 1984* (WA), s 36 (race, including nationality); *Human Rights Act 1993* (NZ), s 21(1)(g) (ethnic or national origins including nationality and citizenship). Whilst the Race Discrimination Act prohibits discrimination on the basis of 'national origin', this is separate from 'nationality' and 'citizenship' which are not protected under the Race Discrimination Act. See, for example, *Australian Medical Council v Wilson* (1996) 68 FCR 46, 75 (Sackville J); *Macabenta v Minister for Immigration and Multicultural Affairs* (1998) 90 FCR 202, 210 - 212 (Carr, Sundberg and North JJ).

[317] *Discrimination Act 1991* (ACT), s 7(1)(m) (profession, trade, occupation or calling).

[318] *Anti-Discrimination Act 1998* (Tas), s 16(r) (irrelevant medical record); *Anti-Discrimination Act 1992* (NT), s 19(1)(p) (irrelevant medical record).

[319] *Discrimination Act 1991* (ACT), s 7(1)(o) (spent conviction within the meaning of the *Spent Convictions Act 2000* (ACT)); *Anti-Discrimination Act 1998* (Tas), s 16(q) (irrelevant criminal record); *Anti-Discrimination Act 1992* (NT), s 19(1)(q) (irrelevant criminal record).

[320] ICCPR, note 1, art 26.

[321] UN Human Rights Committee, *Concluding Observations: Australia* (2009), note 90, para 12.

[322] UN Committee on Economic, Social and Cultural Rights, *Concluding Observations: Australia* (2009), note 80, para 14.

[323] See, generally, Human Rights and Equal Opportunity Commission, *Submission to the Senate Standing Committee on Legal and Constitutional Affairs on the Inquiry into the Effectiveness of the Sex Discrimination Act 1984 (Cth) in Eliminating Discrimination and Promoting Gender Equality* (1 September 2008), pts 11 and 12. At http://www.humanrights.gov.au/legal/submissions/2008/20080901_SDA.html (viewed 7 June 2009).

[324] The Senate Standing Committee on Legal and Constitutional Affairs concluded that it was 'concerned by evidence it received of specific gaps in coverage under the Act': Senate Standing Committee on Legal and Constitutional Affairs, Parliament of Australia, *Effectiveness of the* Sex Discrimination Act 1984 *(Cth) in eliminating discrimination and promoting gender equality* (2008), para 11.20. At http://www.aph.gov.au/Senate/committee/legcon_ctte/sex_discrim/report/index.htm (viewed 7 June 2009). Likewise, the Australian Law Reform Commission has observed that the SDA 'remains only a partial response to women's legal inequality': *Equality Before the Law: Women's Equality,* Report No 69, pt II (1994), para 4.5. At http://www.austlii.edu.au/au/other/alrc/publications/reports/69part2/ (viewed 7 June 2009).

[325] Human Rights and Equal Opportunity Commission, *Submission to the Inquiry into the Effectiveness of the* Sex Discrimination Act, note 323, paras 312 - 317.

[326] Human Rights and Equal Opportunity Commission, above, pt 10. See also Human Rights and Equal Opportunity Commission, *It's About Time: Women, men, work and family* (2007). At http://www.humanrights.gov.au/sex_discrimination/its_about_time/ (viewed 7 June 2009).

[327] Human Rights and Equal Opportunity Commission, *Submission to the Inquiry into the Effectiveness of the* Sex Discrimination Act, note 323, paras 388 - 393.

[328] Human Rights and Equal Opportunity Commission, above, paras 318 - 327.

[329] See, for example, K Lindsay, N Rees and S Rice, *Australian Anti-Discrimination Law: Text, Cases and Materials* (2008), p 83.

[330] See, for example, M Thornton, *The Liberal Promise: Anti-Discrimination Legislation in Australia* (1990) pp 2 – 3.

[331] See, for example, *Hinchcliffe v University of Sydney* (2004) 186 FLR 376, 476 at paras 115 - 116. The Commission acknowledges, however, that the current definition of indirect discrimination under

the Disability Discrimination Act may soon be amended under the *Disability Discrimination and Other Human Rights Legislation Amendment Bill 2008*.
[332] See, for example, *IW v City of Perth* (1997) 191 CLR 1, 63 (Kirby J); *Australian Iron & Steel Pty Ltd v Banovic* (1989) 169 CLR 165, 176 (Deane and Gaudron JJ); *Glasgow City Council v Zafar* [1998] 2 All ER 953, 958, cited with approval in *Sharma v Legal Aid (Qld)* [2002] FCAFC 196, para 40 (Heerey, Mansfield and Hely JJ); *Shamoon v Chief Constable of the RUC* [2003] 2 All ER 26, 71 (Ld Rodger).
[333] The notable exception is the Sex Discrimination Act, where the onus of proving reasonableness in respect of indirect discrimination rests with the respondent (s 7C). However, the onus in respect of the remaining elements of direct and indirect discrimination remains with the applicant under the Sex Discrimination Act.
[334] See further Human Rights and Equal Opportunity Commission, *Submission to the Inquiry into the Effectiveness of the* Sex Discrimination Act, note 323, paras 190 – 199.
[335] The Senate Standing Committee on Legal and Constitutional Affairs noted that 'the existing patchwork approach to coverage under the [Sex Discrimination Act] appears both unnecessarily complex and undesirable': Senate Standing Committee on Legal and Constitutional Affairs, *Effectiveness of the* Sex Discrimination Act, note 324, para 11.22.
[336] The Labour Party, *Manifesto 2005: Britain forward not back* (2005), p 112. At http://news.bbc.co.uk/1/shared/bsp/hi/pdfs/13_04_05_labour_manifesto.pdf (viewed 7 June 2005).
[337] United Kingdom, Department for Communities and Local Government, *Discrimination Law Review, A Framework for Fairness: Proposals for a Single Equality Bill for Great Britain – A consultation paper,* (June 2007), p 11. At http://www.communities.gov.uk/publications/communities/frameworkforfairnessconsultation (viewed 7 June 2005).
[338] UK Department for Communities and Local Government, above, p 11.
[339] UK Department for Communities and Local Government, above, p 12.
[340] UK Department for Communities and Local Government, above, p 13.
[341] *Equality Act 2006* (UK), pts 1 - 4. Protection now applies to discrimination on the basis of religion or belief and sexual orientation. For more detail on the nature of the positive duties aimed at combating systemic discrimination, see the UK Commission for Equality and Human Rights, *Public Sector Duties*. At http://www.equalityhumanrights.com/en/forbusinessesandorganisation/psd/Pages/variationSiteDefault.aspx (viewed 28 May 2009).
[342] United Kingdom, Government Equalities Office, 'Harman: Equality Bill confirmed in Legislative Programme' (Press Release, 3 December 2008). At http://www.equalities.gov.uk/media/press_releases/equality_bill_confirmed.aspx (viewed 28 May 2009).
[343] See, generally, United Kingdom, *The Equality Bill – Government response to the Consultation* (2008). At http://www.official-documents.gov.uk/document/cm74/7454/7454.asp (viewed 7 June 2009).
[344] See, generally, The Equalities Review, *Fairness and Freedom: The Final Report of the Equalities Review* (2007). At http://archive.cabinetoffice.gov.uk/equalitiesreview/publications.html (viewed 7 June 2009).
[345] See, for example, UK Department for Communities and Local Government, note 337, p 13.
[346] Senate Standing Committee on Legal and Constitutional Affairs, *Effectiveness of the* Sex Discrimination Act 1984, note 324; Senate Standing Committee on Legal and Constitutional Affairs, Parliament of Australia, *Inquiry into the Disability Discrimination and Human Rights Legislation Amendment Bill 2008* (2009), at http://www.aph.gov.au/Senate/committee/legcon_ctte/disability_discrimination/report/index.htm (7 June 2009).
[347] Productivity Commission, *Review of the* Disability Discrimination Act 1992, Report no. 30 (2004). At http://www.pc.gov.au/projects/inquiry/dda/docs/finalreport (7 June 2009).
[348] Senate Standing Committee on Legal and Constitutional Affairs, *Effectiveness of the* Sex Discrimination Act, note 324, Recommendation 43.
[349] It is imperative to ensure that any such harmonisation process: (1) ensures that laws comply with international human rights standards; (2) promotes 'best practice' models rather than the 'lowest common denominator' from each jurisdiction; (3) provides greater clarity about the practical application of equality rights and responsibilities in specific contexts; (4) reduces the transactional costs for both applicants and respondents; and (5) promotes access to justice, with particular focus on improving access for people who are mostly intensely affected by inequality and other violations of human rights

in Australia. See Human Rights and Equal Opportunity Commission, *Submission to the Inquiry into the Effectiveness of the* Sex Discrimination Act, note 323, para 776.
[350] Human Rights and Equal Opportunity Commission, *Submission to the Inquiry into the Effectiveness of the* Sex Discrimination Act, note 323, para 781.
[351] Senate Standing Committee on Legal and Constitutional Affairs, *Effectiveness of the* Sex Discrimination Act, note 324, para 11.107.
[352] Human Rights and Equal Opportunity Commission, *Submission to the Inquiry into the Effectiveness of the* Sex Discrimination Act 1984, note 323, paras 781 - 783.
[353] A similar view was expressed in several other submissions to the Senate review of the SDA: Senate Standing Committee on Legal and Constitutional Affairs, *Effectiveness of the* Sex Discrimination Act, note 324, paras 4.57 - 4.65.
[354] United Kingdom, *The Equality Bill,* note 343, para 1.11.
[355] See *Canadian Human Rights Act 1985* (Can); *Human Rights Act 1993* (NZ); *Equal Opportunity Act 1995* (Vic); *Equal Opportunity Act 1984* (WA); *Anti-Discrimination Act 1991* (Qld); *Anti-Discrimination Act 1977* (NSW); *Equal Opportunity Act 1984* (SA); *Anti-Discrimination Act 1998* (Tas); *Equal Opportunity Act 1984* (SA); *Anti-Discrimination Act 1991* (Qld); *Anti-Discrimination Act 1992* (NT); *Discrimination Act 1991* (ACT).
[356] The Sex Discrimination Commissioner also has responsibility for matters relating to discrimination on the basis of age.
[357] Council for Aboriginal Reconciliation, *Recognising Aboriginal and Torres Strait Islander Rights: Ways to implement the National Strategy to Recognise Aboriginal and Torres Strait Islander Rights, one of four National Strategies in the* Roadmap for Reconciliation (2000). At http://www.austlii.edu.au/au/other/IndigLRes/car/2000/9/pg7.htm (viewed 1 May 2009).
[358] Constitutional Commission, *Final Report of the Constitutional Commission* (1988), p 16. See also House of Representatives Standing Committee on Legal and Constitutional Affairs, Parliament of Australia, *Reforming our Constitution: A roundtable discussion* (2008), p 49. At http://www.aph.gov.au/house/committee/laca/constitutionalreform/report/fullreport.pdf (viewed 1 May 2009).
[359] Council for Aboriginal Reconciliation, *Reconciliation: Australia's Challenge: final report of the Council for Aboriginal Reconciliation to the Prime Minister and the Commonwealth Parliament* (2000), p 105. At http://www.austlii.edu.au/au/other/IndigLRes/car/2000/16/text10.htm (viewed 28 May 2009). Constitutional reform was also identified as an essential component of the proposed 'Social Justice Package' to be developed in response to the *Mabo* decision: see Aboriginal and Torres Strait Islander Social Justice Commissioner, *Social Justice Report 1995* (1995), ch 4. At http://www.humanrights.gov.au/social_justice/sj_report/sjreport95.html (viewed 28 May 2009). See also Aboriginal and Torres Strait Islander Commission, *Recognition, Rights and Reform: a Report to Government on Native Title Social Justice Measures* (1995).
[360] In *Kartinyeri v Commonwealth*, Gaudron, Gummow and Hayne JJ left open the possibility that a 'manifest abuse' of the federal legislature's use of s 51(xxvi) may generate a justiciable constitutional question for the High Court: (1998) 195 CLR 337, 369, 380.
[361] R S French, *Dolores Umbridge and the Concept of Policy as Legal Magic* (Speech delivered at the Australian Law Teachers' Association National Conference, Perth, 24 September 2007), para 19.
[362] See further Aboriginal and Torres Strait Islander Social Justice Commissioner, *Social Justice Report 2008*, note 59, pp 71 - 74.
[363] UN Committee on the Elimination of Racial Discrimination, *Concluding observations of the Committee on the Elimination of Racial Discrimination: Australia*, UN Doc CERD/C/AUS/CO/14 (2005), para 9.
[364] Australian Law Reform Commission, *Equality before the Law: Women's Equality*, note 324, para 4.16.
[365] ICESCR, note 2, art 13; CRC, note 12, art 28; CERD, note 7, arts 5, 7; CEDAW, note 10, art 10.
[366] Universal Declaration, note 3, art 26(2).
[367] UN Human Rights Committee, *Concluding Observations: Australia* (2009), note 90, pp 8 - 9.
[368] Council of Australian Governments (COAG), *Communiqué: Indigenous Issues* (COAG Meeting, Canberra, 14 July 2006). At http://www.austlii.edu.au/au/journals/AILR/2006/58.html (viewed 28 May 2009).
[369] Ministerial Council on Education, Employment, Training and Youth Affairs, *Melbourne Declaration on Educational Goals for Young Australians* (5 December 2008). At http://www.curriculum.edu.au/mceetya/melbourne_declaration,25979.html (viewed 5 June 2009).

[370] National Human Rights Consultation, note 308, p 13.
[371] *Human Rights and Equal Opportunity Commission Act 1986* (Cth), s 11(1)(e).
[372] In May 2009, the UN Committee on Economic, Social and Cultural Rights noted with concern that the Commission has limited competency with regard to the ICESCR. The Committee recommended that Australia strengthen the mandate of the Commission in order to cover all rights in the ICESCR. See UN Committee on Economic, Social and Cultural Rights, *Concluding Observations: Australia* (2009), note 80, para 13.
[373] Human Rights and Equal Opportunity Commission, *A last resort?*, note 182.
[374] Human Rights and Equal Opportunity Commission, *National Inquiry into Rural and Remote Education*, note 76.
[375] *Human Rights and Equal Opportunity Commission Act 1986* (Cth), s 11(1)(f).
[376] *Human Rights and Equal Opportunity Commission Act 1986* (Cth), ss 11(1)(f), 3(1).
[377] *Human Rights and Equal Opportunity Commission Act 1986* (Cth), ss 30(1), 31(b).
[378] *Human Rights and Equal Opportunity Commission Act 1986* (Cth), ss 21 - 23.
[379] *Human Rights and Equal Opportunity Commission Act 1986* (Cth), ss 29(2)(b), 29(2)(c).
[380] Note that, under section 45 of the *Human Rights and Equal Opportunity Commission Act 1986* (Cth), the Commission is required to prepare an annual report on its operations during the prior year. It is not suggested that the Australian Government be required to table a formal response to the Commission's annual report.
[381] Senate Standing Committee on Legal and Constitutional Affairs, *Reconciliation: Off track* (2003), para 6.35, recommendation 9. At http://www.aph.gov.au/senate/committee/legcon_ctte/completed_inquiries/2002-04/reconciliation/index.htm (viewed 5 June 2009).
[382] Human Rights and Equal Opportunity Commission, S*ubmission to the Joint Committee of Public Accounts and Audit Inquiry on the Effects of the Ongoing Efficiency Dividend on Smaller Public Sector Agencies* (29 July 2008), para 6. At http://www.humanrights.gov.au/legal/submissions/2008/20080729_efficiency_dividend.html (viewed 7 June 2009). Budget appropriation for 2007-08 was $15.5m. This was reduced to $14.9m at additional estimates with the withdrawal of funding for workplace relations reform and the application of the additional 2% efficiency dividend.
[383] For further background to this funding reduction, see Human Rights and Equal Opportunity Commission, *Submission to the Joint Committee of Public Accounts and Audit Inquiry*, above.