

# **PART FIVE**

## **The way forward**



## 15 The Committee's findings

The Committee is required to report on the concerns raised and the options identified during its Consultation with members of the Australian community, who were asked three questions:

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

Earlier chapters in this report describe numerous options, and the Committee makes a series of findings in relation to them. The Committee is required to describe the advantages and disadvantages of the various options and the level of community support they attracted. When an option attracted strong community support and the Committee is of the view that the advantages outweigh the disadvantages, the Committee usually makes a recommendation. Some recommendations appear in Chapters 6 to 9. This current chapter provides an overview of and a context for those recommendations and then sets out the Committee's recommendations in relation to a Human Rights Act in the light of matters considered in Chapters 10 to 14. When read with the report's summary, this chapter reveals the Committee's thinking behind the primary recommendations.

### 15.1 Which rights and responsibilities should be protected and promoted?

Most people who participated in the Consultation in some way are convinced that Australia is one of the world's great countries to live in. They see Australia as the land of 'the fair go'—this being at least an aspiration if not a reality—and they think Australia is at its best when it gives everyone a fair go, including Indigenous Australians and newcomers, mainstream individuals and people on the margins. The focus groups and the opinion survey confirmed the concern expressed by many roundtable participants—that they are worried for the dignity of their fellow Australians, especially people with mental illness, the elderly, people with disabilities, people living in rural and remote areas (particularly in remote Indigenous communities) and children in need. For example, 75 per cent of those surveyed thought that the human rights of people with a mental illness needed to

be better protected, and 72 per cent thought the same in connection with the elderly.<sup>1</sup>

Participants generally were in no doubt that as a nation we could do better in guaranteeing fairness for all within Australia's borders and in protecting the dignity of people who miss out. For some, the language of human rights was useful for providing criteria by which to judge the government's performance in delivering services and the entitlements of individuals. For others, 'human rights' was more an abstraction, reserved for countries with serious problems. They were doubtful about whether laws and lawyers could efficiently contribute to securing fairness and dignity for all. They urged that more resources be made available for meeting everyone's basic needs. And they argued for better distribution of scarce government resources, so that those in greatest need might have the opportunity to realise their potential in the land of the fair go.

At community roundtables participants were asked what prompted them to attend. Some civic-minded individuals simply wanted the opportunity to attend a genuine exercise in participative democracy; they wanted information just as much as they wanted to share their views. Many participants were people with grievances about government service delivery or particular government policies. Some had suffered at the hands of a government department themselves; most knew someone who had been adversely affected—a homeless person, an aged relative in care, a close family member with mental illness, or a neighbour with disabilities. Others were responding to invitations to involve themselves in campaigns that had developed as a result of the Consultation. Against the backdrop of these campaigns, the Committee heard from many people who claimed no legal or political expertise in relation to the desirability or otherwise of any particular law; they simply wanted to know that Australia would continue to play its role as a valued contributor to the international community while pragmatically dealing with problems at home.

Outside the capital cities and large urban centres the community roundtables tended to focus on local concerns, and there was limited use of 'human rights' language. People were more comfortable talking about the fair go, wanting to know what constitutes fair service delivery for small populations in far-flung places.

The Committee learnt that economic, social and cultural rights are important to the Australian community, and the way they are protected and promoted has a big impact on the lives of many. The most basic economic and social rights—the rights to the highest attainable standard of health, to housing and to education—matter most to Australians, and they matter most because they are the rights at greatest risk, especially for vulnerable groups in the community.

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<sup>1</sup> Colmar Brunton Social Research, *National Human Rights Consultation—community research report* (2009).

The community roundtables bore out the finding of Colmar Brunton Social Research's 15 focus groups that the community regards the following rights as unconditional and not to be limited:

- the right to basic amenities—water, food, clothing and shelter
- the right to essential health care
- the right of equitable access to justice
- the right to freedom of speech
- the right to freedom of religious expression
- the right to freedom from discrimination
- the right to personal safety
- the right to education.

Of the 8428 submissions that dealt with specific rights, the right most mentioned was the right to the highest attainable standard of health, which was discussed in 1183 submissions.

Most Australians think their civil and political rights are fairly well protected. People often take these rights for granted, but concern was expressed about the consistency of particular Australian laws (including the national security legislation) with these rights. There is much disquiet about what is seen as the unacceptable erosion of some civil rights, but the actual way civil and political rights are protected was not well understood. When these rights are violated people expect remedial action to be taken. Of the 8428 submissions that nominated particular rights and responsibilities for attention, the largest grouping (2641) specified civil and political rights.

There is also a lack of public confidence in public authorities' ability to exercise some powers of arrest and detention with integrity and in the public interest. Many people who participated in the Consultation felt that a range of legislative provisions—particularly those introduced in response to the events of 11 September 2001—have unacceptably eroded the human rights of Australians, rights that should be considered sacrosanct even in times of crisis. Many who understood the need for recent laws increasing powers of investigation and detention and supported their introduction were nevertheless concerned about the lack of transparency, due process, independent review and justification.

Although there was adverse comment about 'unelected judges' during the course of the Consultation, most participants agreed with the observation of retired Chief Justice Sir Anthony Mason:

There is a strong case for saying that issues relating to the rule of law and due process are best left in the hands of judges who are familiar with procedures which will ensure that persons are fairly dealt with when prosecuted for an offence or when subjected to restraints such as control orders.<sup>2</sup>

Some of the Committee's most powerful consultations were with Indigenous communities, and one of the most often repeated themes in all consultations concerned the plight of Indigenous Australians in remote communities. There is general agreement that Indigenous Australians should be consulted and included in genuine partnerships when policy is being designed and service delivery planned. The term 'self-determination' was not often used, but many participants in community roundtables thought special laws and policies for Indigenous Australians should not be imposed without government first having made every effort to consult and to work in partnership with Indigenous communities.

Even though only 245 submissions dealt specifically with environmental concerns, this subject was raised at most community roundtables. Newly emerging rights in international law—such as the right to a clean and sustainable environment—are constantly in the Australian public's gaze.

Many of the more detailed submissions presented to the Committee argued that all the rights detailed in the primary international instruments Australia has ratified without reservation should be protected and promoted. Most often mentioned were the International Covenant on Civil and Political Rights 1966 and the International Covenant on Economic, Social and Cultural Rights 1966, which, along with the Universal Declaration of Human Rights 1948, constitute the 'International Bill of Rights'.

Some submissions also included the International Convention on the Elimination of All Forms of Racial Discrimination 1965, the Convention on the Elimination of All Forms of Discrimination against Women 1979, the Convention against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment 1984, the Convention on the Rights of the Child 1989, and the Convention on the Rights of Persons with Disabilities 2006.

Having ratified these seven important human rights treaties, Australia has voluntarily undertaken to protect and promote the rights listed in them.

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<sup>2</sup> Sir Anthony Mason, 'The death of human rights? And related issues' (Speech delivered at the Australian National University, 24 August 2007).

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

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

Some Consultation participants also mentioned the Declaration on the Rights of Indigenous Peoples 2007. Being a declaration, however, it does not impose the same obligations as a ratified treaty.

Many Australians see respect for human rights as central to our international image and responsibility. Younger Australians, in particular, think of human rights in Australia in terms of our role in the region and at the wider international level, as well as within our borders.

There is general support for better recognition of the responsibilities of government and members of the community in relation to the protection and promotion of human rights. This does not mean, though, that enjoyment of human rights should be conditional on any such responsibilities. The Committee was troubled to learn the following:

41% of people surveyed agreed that if some members of a group abuse the wider community's rights then it was reasonable to restrict the entire group's rights, and only 26% disagreed (the rest were undecided). By comparison, 57% agreed that it was reasonable to reduce or take away an individual's rights if they did not respect the wider community's rights, and only 17% disagreed.<sup>3</sup>

There was a strong view that a populist government can sometimes play on the community's willingness to punish an identifiable minority group for the wrongdoings of just a few individuals.

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

Despite the general support for a fair go, at community roundtables disquiet was often expressed about the level of self-interest in the Australian community. The Committee considers that, in any reform of the current human rights agenda, respect for others and individual responsibilities should be stressed.

Although, in the Committee's view, there is no need for additional responsibilities to be codified into law, there is a need to emphasise and increase awareness of the importance of individual and community responsibility if individual rights are to be respected. There was general community agreement that people have a responsibility to respect the legal rights of others. If society is to function cohesively, a commitment to rights and a commitment to responsibilities are required in equal measure. Respect is a more positive moral obligation than the negative legal obligation not to breach the legal rights of others, and respect is essential if a deeper culture of rights is to take root in Australian society.

At present not all human rights are recognised and protected in Australian domestic law, but citizens, non-government organisations, corporations, public authorities and governments have a moral obligation not to breach the human rights of others, even when those rights have not been expressly recognised in Australian law. This responsibility can be discharged only if some individuals and groups in the community take responsibility for educating others about human rights. It will be discharged in organisations only if those in leadership roles provide the inspiration and the resources for education in and instilling of human rights. The economic and social rights most invoked during the Consultation—the rights to the highest attainable standard of health, to housing and to education—are not always enjoyed by people who 'fall through the cracks' in Australian society. In difficult economic times in particular, it is irresponsible if citizens leave the realisation of these rights for marginalised people to the government and the marginalised themselves. The Committee notes the submission of the Shop, Distributive and Allied Employees' Association:

The poor, dispossessed and those without a voice can and should be classified as a class within society. They should not be seen as individuals down on their luck. The poor, dispossessed and those without a voice should burden the conscience of society generally. They are the class whose dignity is being assaulted.<sup>4</sup>

People who enjoy their rights to the full in the land of the fair go have a responsibility for those who are marginalised. Better off members of society do have a responsibility to exercise their political power and social influence for the wellbeing of people who miss out.

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<sup>4</sup> Shop, Distributive and Allied Employees' Association, Submission.

## 15.2 **Are our human rights currently sufficiently protected and promoted?**

Colmar Brunton Social Research found ‘only 10% of people reported that they had ever had their rights infringed in any way, with another 10% who reported that someone close to them had had their rights infringed’.<sup>5</sup> The consultants reported that the bulk of participants in focus groups had very limited knowledge of human rights:

They had never felt their rights to be under threat, were generally unable to distinguish the concept of rights protection from service delivery or their daily experiences of receiving the benefits of human rights, and largely saw an absence of formalised protections as offering no real threat to their long-term welfare.<sup>6</sup>

Sixty-four per cent of survey respondents agreed that human rights in Australia are adequately protected; only 7 per cent disagreed; the remaining 29 per cent were uncommitted.<sup>7</sup> The Secretariat was able to assess 8671 submissions that expressed a view on the adequacy or inadequacy of the present system: of these, 2551 thought human rights were adequately protected, whereas 6120 (70 per cent) thought they were not.

There is enormous diversity in the community when it comes to understanding of and perspectives on rights protection.

Australia has a patchwork quilt of protection for human rights. We have made commitments to a range of obligations under international human rights law, but these obligations are enforceable in Australia only if implemented in domestic legislation. Although there are numerous mechanisms for holding Australia accountable at the international level, they are not legally binding and their recommendations can be, and have been, ignored by Australian governments. We also have strong democratic institutions, but they do not always ensure that human rights—and in particular minority rights—receive sufficient consideration.

The Australian Constitution was not designed to protect individual rights. It contains a few rights, but they are limited in scope and have been interpreted narrowly by the courts. Federal, state and territory legislation protects some human rights, but the legislation can always be amended or suspended to limit or remove that protection. Further, the legislative framework is inconsistent between jurisdictions and difficult to understand and apply.

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

<sup>6</sup> *ibid.*

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

Administrative law allows individuals to challenge government decisions and encourages standards of lawfulness, fairness, rationality and accountability. The remedies it offers are, however, limited, and there is no general onus on government to take human rights into account when making decisions.

The common law, which is developed by judges, protects some human rights, but it cannot stop parliament passing legislation that abrogates human rights with clear and unambiguous language. Chief Justice French has recently spoken of ‘the supremacy of Parliament which can, by using clear words for which it can be held politically accountable, qualify or extinguish [common law] rights and freedoms except to the extent that they may be protected by the Constitution’.<sup>8</sup> His predecessor, Mr Murray Gleeson, has said:

Judicial application of human rights standards sometimes provokes complaints that courts are going beyond their constitutional role. Historically, there is a paradox here, and it is worth exploring. Until the latter part of the 20th century, the principal argument advanced against statutory bills of rights was that the common law sufficiently protected our human rights and freedoms, and it would be unnecessary and mischievous to overlay them with legislation inspired by foreign sources. In Australia, that is still an argument with wide popular appeal. My present purpose is not to contradict it; that is a matter on which political opinions may differ. My purpose is to point out that the common law principles which are said to protect us in this way were made, and are continually applied and refined, by judges. If the common law provides adequate safeguards then that is the result of the activity of judges exercising the power to state and develop the common law, not the activity of elected parliamentarians. There is an inconsistency between an assertion that the common law makes legislative protection of human rights unnecessary and a complaint that legislative protection of human rights will empower judges who apply the legislation to make decisions about matters that are inappropriate for judicial decision making. People who believe our rights are sufficiently protected by the common law may or may not be correct, but they should keep in mind that the common law comes from the courts.<sup>9</sup>

As well as the courts, which interpret statutes and develop the common law, there are various oversight mechanisms such as the Australian Human Rights Commission that can review government action. Their powers are, however, limited and their recommendations are usually not enforceable.

The patchwork quilt of protections needs some mending.

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<sup>8</sup> Chief Justice Robert French, ‘The common law and the protection of human rights’ (Speech delivered to the Anglo Australasian Lawyers Society, Sydney, 4 September 2009).

<sup>9</sup> AM Gleeson, ‘Legal interpretation—the bounds of legitimacy’ (Speech delivered at Sydney University, 16 September 2009).

## 15.3 How could Australia better protect and promote human rights?

The Committee commissioned The Allen Consulting Group to conduct cost-benefit analyses of a selection of options proposed during the Consultation for the better protection and promotion of human rights in Australia. The consultants developed a set of criteria against which the potential effects of various options were assessed; the report on the outcome of this assessment is presented here as Appendix D. Each option was evaluated against three criteria—benefits to stakeholders, implementation costs and timeliness, and risks. The options evaluated were a Human Rights Act, human rights education, a parliamentary scrutiny committee for human rights, an augmented role for the Australian Human Rights Commission, review and consolidation of anti-discrimination laws, a new National Action Plan for human rights, and maintaining current arrangements (that is, ‘doing nothing’). Table 1 summarises the consultants’ assessment of the options. The model of Human Rights Act the Committee recommends resembles most closely Model 2.

Options	Assessment categories		
	Benefits to stakeholders	Implementation timeliness and costs	Risks
Human Rights Act			
Model 1	4	2	3
Model 2	4	2	3
Model 3	3	3	3
Model 4	2	4	4
Education in relation to human rights			
National curriculum	2	2	2
Public service education	2	2	3
Public awareness-raising measures	2	3	4
Parliamentary scrutiny committee	2	3	4
Increased role for Australian Human Rights Commission	2	3	3
Consolidated anti-discrimination legislation	3	1	3
New National Action Plan for human rights	2	2	4
Do nothing—maintain current arrangements	1	-	-

Notes: Benefits—4 = high, 3 = above average, 2 = moderate, 1 = low; implementation factors—4 = low, 3 = moderate, 2 = above average, 1 = high; risks—4 = low, 3 = moderate, 2 = above average, 1 = high.  
Source: The Allen Consulting Group.

The Allen Consulting Group noted:

While maintaining current arrangements will not incur additional costs, there are ongoing detrimental costs associated with maintaining current human rights arrangements. In summary these include a lack of redress for individuals with human rights complaints (of particular concern for disadvantaged sectors of the community), a lack of clarity concerning human rights obligations in Australia, a lack of community awareness of human rights, and unmet international obligations.<sup>10</sup>

## Education and culture

At many community roundtables participants said they didn't know what their rights were and didn't even know where to find them. When reference was made to the affirmation made by new citizens pledging loyalty to Australia and its people, 'whose rights and liberties I respect', many participants confessed they would be unable to tell the inquiring new citizen what those rights and liberties were and would not even be able to tell them where to look to find out. The Committee notes the observation of historian John Hirst 'that human rights are not enough, that if rights are to be protected there must be a community in which people care about each other's rights'.<sup>11</sup> It is necessary to educate the culturally diverse Australian community about the rights all Australians are entitled to enjoy. Eighty-one per cent of people surveyed by Colmar Brunton Social Research said they would support increased human rights education for children and adults as a way of better protecting human rights in Australia.<sup>12</sup>

At community roundtables there were consistent calls for better education. Of the 3914 submissions that considered specific reform options (other than or in addition to a Human Rights Act), 1197 dealt with the need for human rights education and the creation of a better human rights culture. This was the most frequent reform option raised in those submissions. While 45 per cent of respondents in the opinion survey agreed that 'people in Australia are sufficiently educated about their rights'<sup>13</sup>, Colmar Brunton concluded:

There is strong support for more education and the better promotion of human rights in Australia. It was apparent that few people have any specific understanding of what rights they do have, underlining a real need as well as a perceived need for further education.<sup>14</sup>

This confirms the Committee's experience of the community roundtables.

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<sup>10</sup> The Allen Consulting Group, *Analysis of Options Identified during the National Human Rights Consultation* (2009).

<sup>11</sup> John Hirst, 'From British rights to human rights' in J Leaser and R Haddrick (eds), *Don't Leave Us with the Bill: the case against an Australian bill of rights* (2009) 215, 222.

<sup>12</sup> Colmar Brunton Social Research, *National Human Rights Consultation—community research report* (2009).

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

<sup>14</sup> *ibid.*

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

As a result of the standard of living and lifestyle most Australians enjoy, there is in the community a level of complacency that is not conducive to the achievement of a positive national human rights culture. The Committee found there is a need for better understanding of and commitment to human rights, to ensure that people can engage in protection and promotion of those rights—both personally and in the way they relate to others. Responsibilities should also be highlighted in any education and awareness campaign.

If Australians are to improve current attitudes and values, in human rights terms, the need to acknowledge the dignity, culture and traditions of other people and the fundamental importance of respecting the rights of others must be better understood.

There is a specific need to improve the understanding of and commitment to human rights within government, in policy and legislative development, and in service delivery. This calls for a framework for public sector decision making that guarantees the adoption of processes attentive to human rights. The Allen Consulting Group noted, however, ‘The development of education and training initiatives for the public sector may incur significant costs’.<sup>15</sup>

There is strong public support for better education of public officials who exercise powers of investigation, arrest and detention and perform other duties that are likely to adversely affect the rights and freedoms of ordinary Australians. The Allen Consulting Group noted:

The costs associated with public awareness are not likely to be as high as those associated with developing a national curriculum or implementing public service education programs. Transition costs will be those incurred in initially developing the program or mechanism for the delivery of public awareness raising measures. This may include, for example, grants provided to non-government organisations or local government for the development of public awareness raising campaigns. Educational materials already developed by the AHRC [Australian Human Rights Commission] may be used which would minimise production costs of any new material required.<sup>16</sup>

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<sup>15</sup> The Allen Consulting Group, *Analysis of Options Identified during the National Human Rights Consultation* (2009).

<sup>16</sup> *ibid.*

The Committee recommends as follows:

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

The Committee’s recommendation that a readily comprehensible list of Australian rights and responsibilities be published and translated into various community languages follows from Colmar Brunton’s finding that there was ‘generally more support for a document outlining rights than for a formal piece of legislation per se’.<sup>17</sup> There was wide support for this idea in the focus groups, and 72 per cent of those surveyed thought it was important to have access to a document defining their rights.<sup>18</sup> Even more significantly, Colmar Brunton found:

In the devolved consultation phase with vulnerable and marginalised groups there was a very consistent desire to have rights explicitly defined so that they and others would be very clearly aware of what rights they were entitled to receive.<sup>19</sup>

Sixty-one per cent of people surveyed supported ‘a non-legally binding statement of human rights principles issued by the Federal Parliament and available to all people and organisations in Australia’.<sup>20</sup>

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<sup>17</sup> Colmar Brunton Social Research, *National Human Rights Consultation—community research report* (2009).

<sup>18</sup> *ibid.*

<sup>19</sup> *ibid.*

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

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

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

### **Better attention to human rights in policy and legislation**

The Committee finds that insufficient attention is paid to human rights when the Federal Government and parliament are formulating policy and legislation. Australia should in the long term comply with and implement all its international human rights obligations. Although governments and parliaments should never unduly trespass on civil and political rights, their obligations in relation to economic and social rights are best expressed in terms of progressive realisation. It is necessary to ensure that laws and policies are reasonably tailored, within the constraints of the available resources, to progressively achieving the full realisation of these rights.

In the Colmar Brunton survey the options attracting the greatest support for improving the protection of human rights in Australia were parliament being required to pay attention to human rights when making laws (90 per cent) and government being required to pay more attention to human rights when developing new laws and policies (85 per cent).<sup>21</sup>

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

At community roundtables the Committee heard constant calls for government and parliament to be more attentive to human rights when considering new laws and policies. The Committee finds there is a need to better integrate human rights considerations into the development of legislation and policy and in the parliamentary process. During the Consultation no serious objection emerged to the proposals, endorsed by the Federal Opposition, that there be an audit of Commonwealth laws for human rights compliance and that there be improved parliamentary scrutiny of proposed new laws.

The Committee recommends as follows:

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

Given that it will be necessary to assess legislative proposals, laws and administrative acts against human rights measures, it will be necessary to know *which* human rights are relevant. For consistency and completeness, it would be best to ensure compliance with all of Australia's international human rights obligations using a stand-alone, consolidated document that takes account of matters such as overlapping rights and the modification of rights for the Australian context. This would be more manageable than the seven main treaties (while accurately reflecting their content); it would also be more relevant to the Australian context and could be used as an educational tool.

The exercise of consolidating all Australia's international human rights obligations will be quite technical, however, and will take time. In the interim a list of those rights against which government action may be measured should be developed by the Attorney-General's Department. It should include the civil and political rights listed in the International Covenant on Civil and Political Rights and the primary economic and social rights listed in the International Covenant on Economic, Social and Cultural Rights that are of greatest concern to those who participated in all

aspects of the Consultation—the right to adequate housing, the right to the highest attainable standard of physical and mental health, and the right to education.

The Committee recommends that the Federal Government immediately compile an interim list of rights for protection and promotion, regardless of whether a Human Rights Act is introduced. The list should include rights from the International Covenant on Civil and Political Rights as well as the following rights from the International Covenant on Economic, Social and Cultural Rights that were most often raised during the Consultation: the right to an adequate standard of living (including food, clothing and housing); the right to the highest attainable standard of health; and the right to education.

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

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

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

The Allen Consulting Group noted:

In terms of costs associated with a scrutiny committee, these initially consist of costs accruing to the parliament associated with – recruitment of staff, new legislation clarifying the terms of reference, education about the revised committee to MPs and their advisers, education to government departments about the committee's new role, and, education to the committee members themselves and their research staff about how the reformed committee would work. The committee's ongoing role requires government funding for expert advice.<sup>22</sup>

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<sup>22</sup> The Allen Consulting Group, *Analysis of Options Identified during the National Human Rights Consultation* (2009).

If the establishment of a Joint Committee on Human Rights is not practical on the grounds of cost or because of the workload of parliamentarians serving on existing committees, it would be essential for the resources and mandate of the Senate Scrutiny of Bills and Regulations and Ordinances Committees to be augmented. While parliament awaits the definitive list of Australia's international human rights obligations, the proposed Joint Committee on Human Rights should be resourced to inquire into whether a proposed law unduly trespasses on civil and political rights or displays insufficient regard for the progressive realisation of the primary economic and social rights.

Were parliament minded to wait until the definitive list has been prepared and agreed on before establishing the new Joint Committee on Human Rights, consideration could be given to the suggestion put forward by former long-term Chair of the Scrutiny of Bills Committee, Father Michael Tate, that the Standing Orders of the Senate be amended to provide as follows:

At the commencement of each Parliament, a Standing Committee for the Scrutiny of Bills and Acts shall be appointed to declare, in respect of the clauses of Bills introduced into the Senate, and in respect of Acts of the Parliament, whether such Bills or Acts, by express words or otherwise:

- (i) trespass unduly on personal rights and liberties recognised or expressed under the Australian Constitution, in the Common Law, in statutes of the Parliament, or in treaties ratified by the Government of Australia and incorporated into law.<sup>23</sup>

## **Better attention to human rights in practice**

Instilling a human rights culture in the federal public sector is integral to better protection and promotion of human rights in Australia.

The Committee recommends as follows:

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

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<sup>23</sup> M Tate, Submission.

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

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

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

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

Although not recommending that the Australian Human Rights Commission have the power to review the policies and practices of public authorities on its own initiative, the Committee does recommend that the commission's functions and resources for hearing complaints be augmented, to ensure that it is able to effectively monitor human rights compliance at the federal level. It is the body most suitable for investigating complaints that the Commonwealth Government has failed to pay due heed to economic and social rights. In the light of the concerns that were raised about the justiciability of economic, social and cultural rights, and the limited experience to draw on from other jurisdictions, the Committee concludes that, where it is not possible to reach a settlement of these complaints by conciliation, recourse to the courts should not be available. The commission could, however, report to the Attorney-General on the matter.

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

- to expand the definition of 'human rights' in the Australian Human Rights Commission Act to include the following instruments:
  - the International Covenant on Civil and Political Rights

- the International Covenant on Economic, Social and Cultural Rights
  - the Convention on the Elimination of All Forms of Racial Discrimination
  - the Convention on the Elimination of All Forms of Discrimination against Women
  - the Convention against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment
  - the Convention on the Rights of the Child
  - the Convention on the Rights of Persons with Disabilities
  - the Declaration on the Rights of Indigenous Peoples.
- to examine any Bill at the request of the federal Attorney-General or the proposed Joint Committee on Human Rights for the purpose of ascertaining if any provision in the Bill is inconsistent with or contrary to any human right in the interim list and, later, the definitive list of Australia’s human rights obligations
  - to inquire into any act or practice of a federal public authority or other entity performing a public function under federal law that might be inconsistent with or contrary to any obligation in the interim list of human rights and, later, the definitive list of Australia’s human rights obligations
  - to provide the same remedies for complaints of human rights violations and International Labour Organization Convention 111 complaints as for unlawful discrimination, permitting determination by a court when settlement cannot be reached by conciliation—except in relation to complaints of violations of economic, social and cultural rights, in which case there should be no scope to bring court proceedings where conciliation has failed.

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

Access to justice is limited for many Australians, and the Federal Government should make greater efforts to remove the barriers and so ensure more effective protection of human rights. Of the 3914 submissions that canvassed reform options other than a Human Rights Act, 1083 raised improved access to justice—the most discussed reform option after human rights education. Given the costs involved in such reform, however, the Committee can do no more than the following.

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

## Human rights and Indigenous Australians

Of the 14 390 submissions that discussed particular topics other than a Human Rights Act or other reform options, 1309 raised racism, 581 Indigenous rights, 235 the Northern Territory Emergency Response (the 'Intervention') and 191 the *Racial Discrimination Act 1975* (Cth). At most community roundtables there was some discussion of Indigenous rights and entitlements.

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

The Committee recommends that, in partnership with Indigenous communities, the Federal Government develop and implement a framework for self-determination, outlining consultation protocols, roles and responsibilities (so that the communities have meaningful control over their affairs) and strategies for increasing Indigenous Australians' participation in the institutions of democratic government.

If the Federal Government and its agencies were to collect data from Indigenous peoples within an Indigenous framework, this would help to maintain the accuracy and integrity of the data. There is also a need for a comprehensive, nationally accredited interpreting service for Aboriginal and Torres Strait Islander peoples who are not proficient in English. Additionally, statutory or constitutional acknowledgment could be made of Indigenous Australians as the original inhabitants of this land, along with acknowledgment of their right to practise and observe their own customs and traditions.

### 15.4 **Should the Federal Parliament contemplate an Australian Human Rights Act?**

All the Committee's recommendations to date could be implemented regardless of whether the Federal Parliament passes a Human Rights Act. If the recommendations already made were adopted, protection and promotion of human rights in Australia would be much improved.

The clearest division of opinion at all stages of the Consultation was over the question of an Australian Human Rights Act. There is no community consensus on the matter, and there is strong disagreement in the parliament. At one end of the

spectrum are those who advocate a national law that guarantees all rights set down in any international instrument ratified by Australia and that would be binding on all levels of government, allowing the courts to strike down inconsistent legislation and to rule on inconsistent policy. At the other end are those who say 'If it ain't broke, don't fix it'. They see no need for a national law on human rights—not because they do not care about human rights but because they are confident that the existing arrangements, with a little tweaking, are adequate for protecting such rights.

The majority of those attending community roundtables favoured a Human Rights Act, and 87.4 per cent of those who presented submissions to the Committee and expressed a view on the question supported such an Act—29 153 out of 33 356. In the national telephone survey of 1200 people, 57 per cent expressed support for a Human Rights Act, 30 per cent were neutral, and only 14 per cent were opposed.<sup>24</sup> Survey respondents were asked for their opinions about five different ways of protecting human rights. Although 49 per cent strongly supported parliament paying attention to human rights when making laws<sup>25</sup>, only 23 per cent strongly supported a specific Human Rights Act that defined the human rights to which all people in Australia are entitled.<sup>26</sup> It was the question of a Human Rights Act that prompted GetUp!, Amnesty International Australia and the Australian Christian Lobby to conduct public campaigns during the Consultation: of the 29 153 submissions in favour of a Human Rights Act, 26 382 were campaign submissions. The question of an Act was what led to most media commentary and spawned the publication of several books. At the public hearings people spoke eloquently for and against an Act.

In addition to the thousands of submissions from individual citizens, the Committee was privileged to receive many well-researched submissions from non-government organisations, community groups, human rights commissions, governments, academic institutions, and distinguished academics and public advocates experienced in debating the utility and desirability of an Australian Human Rights Act.

All who contributed such submissions displayed a strong commitment to the protection and promotion of human rights. The disagreement was about how best to protect and promote those rights in contemporary Australia. For some, the calculus was simple: if Australia has ratified an international human rights treaty, it ought then at the national level legislate to ensure that the rights acknowledged in the treaty are enforceable—if need be, against all levels of government—in Australian courts. They saw all such rights as universal and indivisible and insisted that courts

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<sup>24</sup> Colmar Brunton Social Research, *National Human Rights Consultation—community research report* (2009).

<sup>25</sup> *ibid.*

<sup>26</sup> *ibid.*

should be able to enforce economic and social rights in the same way as they can civil and political rights.

Some people think the Federal Government should take unilateral action to protect some rights; others say the Federal Government should get its own house in order, leading by example and not imposing its will on state and territory governments. Even the Victorian Government, which is proud of its Charter of Human Rights and Responsibilities, recommended 'the enactment of a Federal Charter that applies to federal public authorities only and does not apply to the states'.<sup>27</sup> A potential disadvantage of a federal system is that laws and procedures governing the same conduct can vary, but an advantage of such a system is that different jurisdictions can experiment with different laws and policies. Over time, it might be possible to detect very different human rights outcomes between, say, Victoria, which has its charter, and New South Wales, which has none. It is early days. Those speaking of the costs and benefits of the Victorian and ACT human rights legislation can sometimes overstate their case.

Many who urged a greater role for the courts in protecting human rights conceded that parliament should still have the final word on contentious matters. Australians generally would not want to see judges having the last word on matters such as abortion and euthanasia. Retired Chief Justice Sir Anthony Mason, a supporter of some form of statutory bill of rights, has said:

Under a human rights regime, these issues are determined by reference to the very broad concept of the 'right to life'. That broad and abstract concept offers very little philosophical or practical guidance on how the two critical issues of euthanasia and abortion should be resolved. The result is that, under a human rights regime, it is left to the judges to reason to a conclusion on these issues from a vague abstract concept. Reasoning of this kind is unlikely to be convincing when the issue is one on which the community holds strong views. In these situations there is much to be said for accepting the majoritarian approach and leaving it to the political process. At least it can be said that the outcome has popular support.<sup>28</sup>

Similarly, same-sex marriage and exemptions from discrimination laws for single-gender clubs and religious organisations would be best left for the parliament to resolve.

The so-called dialogue model of a Human Rights Act would sit more comfortably with Australians than other models because, even when the courts have expressed a view about the limits on rights, most Australians would prefer parliament to express the final view, once it had received a further opinion from the executive in

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<sup>27</sup> Victorian Government, Submission.

<sup>28</sup> Sir Anthony Mason, 'The death of human rights? And related issues' (Speech delivered at the Australian National University, 24 August 2007).

response to an adverse court finding. The rights regime remains subject to parliament's will. As noted in Chapter 2, at the public hearings same-sex marriage advocate Rodney Croome asked, 'If a charter can't deal effectively with the hard issues what's the point?' Under a suitable Australian charter, the 'hard issues' could be considered by government, parliament and the courts, but the last word would remain with parliament.

It is appropriate that the Committee sets out the features of an Australian Human Rights Act that in its opinion most accurately reflect the concerns expressed by the community and are most compatible with existing constitutional arrangements. Of course, it is a decision for government whether to introduce a Human Rights Bill into parliament. Nevertheless, the Committee sets out here the desirable characteristics of such a Bill.

It would be counter-productive and unwise to have the Federal Parliament impose on the states and territories a catalogue of human rights and a process for determining the regular limitation of those rights. Given the history of attempts to legislate for human rights at the national level in Australia, the Committee thinks the Commonwealth should look to its own affairs and lead by example. The ACT Human Rights Act and the Victorian charter are novel Australian approaches to the protection of human rights. The ACT Act is at present being reviewed, and the Victorian charter will be reviewed in 2011. Over time, other states might decide to adopt similar laws, or they might not. In the Committee's view, it would be prudent for any federal government contemplating an Australian Human Rights Act to consider legislating in a manner broadly consistent with the best elements of the existing Victorian and ACT laws.

Any Human Rights Bill should be drafted so as to apply only to the Commonwealth and those public authorities exercising functions under Commonwealth law. The rights should be enjoyed only by human beings and not by corporations.

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

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

## Which rights?

### **Economic and social rights**

For most Australians the main concern is the realisation of primary economic and social rights such as the rights to education, housing and the highest attainable standard of health. The Committee acknowledges that it would be very difficult, if not impossible, to make such rights matters for determination in the courts.

In our robust democracy these are the very rights that feature most often in political debate, especially at election time. They are the rights that are scrutinised by specialist parliamentary committees on health and ageing, education and training, family, community, housing and youth. They are the rights that demand large resource allocations by government. No matter what the level of public deliberation in allocating scarce resources for securing these rights, there will always be some people who miss out. Being a signatory to the International Covenant on Economic, Social and Cultural Rights, Australia is committed to taking steps 'to the maximum of its available resources, with a view to achieving progressively the full realisation of the rights ... by all appropriate means, including particularly the adoption of legislative measures'.<sup>29</sup>

It is usually the state and territory governments that deliver services associated with the protection of these rights: the Federal Government generally does not run schools, hospitals, and community housing programs. Because Australia is so large, it is most often in remote areas where the Federal Government has no presence that people miss out on the enjoyment of these rights. The Commonwealth's usual role is the provision of funds and the attaching of conditions to government grants.

In South Africa at present the Constitutional Court is unique in being a court with a broad mandate under the Constitution to determine whether the State has taken 'reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of these rights'. The Committee considers that it is not prudent to impose this role on Australian federal courts. Many judges and retired judges have expressed strong reservations about the courts' capacity to determine the limits on economic and social rights, saying it is not appropriate for judges to opine on whether the government has dedicated enough resources to achieving particular economic and social rights.

At the Mintabie roundtable the Committee was struck by the dilemma confronting any government trying to deliver services to small, remote communities. There, the decision had been made to close the health clinic, whereas the primary school was to be maintained. If it came to a choice between the maintenance of the clinic or the primary school, there would be no suitable criteria a judge could apply to make

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<sup>29</sup> International Covenant on Economic, Social and Cultural Rights art. 2.1.

such a determination. If the residents had petitioned the court to maintain the clinic, the judge might not even be apprised of the fact that the school was being maintained.

The Committee endorses the observations of Professor Tom Campbell and Dr Nicholas Barry:

Courts have a bias towards negative rights, which protect the individual from interference by the state. Because ensuring the protection of socioeconomic rights requires positive action by the state, it involves decisions about the allocation of state resources which courts do not have the expertise or information to make.<sup>30</sup>

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

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

Statements of compatibility would need to deal with whether the proposed legislation is reasonably tailored to progressive realisation of these rights. That will also be a matter for consideration by the proposed Joint Committee on Human Rights.

### **Non-derogable civil and political rights**

Unlike the International Covenant on Economic, Social and Cultural Rights, the International Covenant on Civil and Political Rights makes no concession to the need for progressive realisation of rights. As a signatory to the latter, Australia is committed to ensuring for ‘all individuals within its territory and subject to its jurisdiction the rights recognized’ in the covenant. Six of those rights are expressed in absolute terms (‘No one shall be ...’) and are non-derogable, meaning that government cannot derogate from its obligation to protect these rights, even in times of national emergency. These are rights that are so fundamental they should never be breached or limited. A Human Rights Act could define these rights as follows.

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<sup>30</sup> T Campbell and N Barry, Submission.

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

- *The right to life.* Every person has the right to life. No one shall be arbitrarily deprived of life. The death penalty may not be imposed for any offence.
- *Protection from torture and cruel, inhuman or degrading treatment.* A person must not be
  - subjected to torture
  - or
  - treated or punished in a cruel, inhuman or degrading way
  - or
  - subjected to medical or scientific experimentation without his or her full, free and informed consent.
- *Freedom from slavery or servitude.* A person must not be held in slavery or servitude.
- *Retrospective criminal laws.*
  - A person must not be found guilty of a criminal offence as a result of conduct that was not a criminal offence when the conduct was engaged in.
  - A penalty imposed on a person for a criminal offence must not be greater than the penalty that applied to the offence when it was committed.
  - If a penalty for an offence is reduced after a person committed the offence but before the person is sentenced for that offence, the reduced penalty should be imposed.
  - Nothing in the foregoing affects the trial or punishment of any person for any act or omission that was a criminal offence under international law at the time the act or omission occurred.
- *Freedom from imprisonment for inability to fulfil a contractual obligation.* A person must not be imprisoned solely on the ground of inability to fulfil a contractual obligation.
- *Freedom from coercion or restraint in relation to religion and belief.* No person will be subject to coercion that would impair his or her freedom to have or to adopt a religion or belief of his or her choice.

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

While the right to life is not regarded as ‘absolute’ under international law, the Committee considers it could be regarded as such in Australia, where the death penalty has been abolished. The six rights just listed should not be subject to any general limitation provision included in a Human Rights Act.

The right to a fair trial should also not be limited in a fair and democratic society and, although it is not included in the foregoing list of non-derogable rights agreed 40 years ago in the International Covenant on Civil and Political Rights, there is a strong case for this right’s inclusion. A fair trial before an independent and impartial tribunal was raised at many community roundtables and was identified as an important right by 92 per cent of those surveyed by Colmar Brunton Social Research.<sup>31</sup>

Some will argue that there is no prospect of these rights being infringed in Australia, so why bother to legislate for them? The facts that any infringement of these rights would be indefensible and that most Australians hold such rights as sacrosanct create a strong case, in the opinion of the Committee, for these rights being guaranteed by Commonwealth law.

If in future a Federal Parliament were to legislate to interfere with these rights—as it could in theory, considering that not even these rights are included in the Constitution and put beyond the reach of parliament—the public would be aware that the rights were being infringed. There could be no argument that the limitation of these rights was reasonably justified in a democratic society.

### **Other civil and political rights**

The Committee received many submissions and heard many pleas at community roundtables calling for an Australian Human Rights Act that mirrors the main provisions of the Victorian and ACT human rights legislation. Some in the community see the need for an enhanced role by the courts in protecting civil and political rights. Rights other than the non-derogable ones are regularly limited in a free and democratic society—to accommodate other people’s rights or to promote the common good, the public interest, national security or public morality. The Committee accepts that there is a need to set limits on these rights and that those limits need to be justified.

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

- the right to freedom from forced work

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<sup>31</sup> Colmar Brunton Social Research, *National Human Rights Consultation—community research report* (2009).

- the right to freedom of movement
- the right to privacy and reputation
- the right to vote
- the right to freedom of thought, conscience and belief
- freedom to manifest one's religion or beliefs
- the right to freedom of expression
- the right to peaceful assembly
- the right to freedom of association
- the right to marry and found a family
- the right of children to be protected by family, society and the State
- the right to take part in public life
- the right to property
- the right to liberty and security of person
- the right to humane treatment when deprived of one's liberty
- the right to due process in criminal proceedings
- the right not to be tried or punished more than once
- the right to be compensated for wrongful conviction.

Although a right to property is not specifically mentioned in the International Covenant on Civil and Political Rights, it is often characterised as one of the few rights guaranteed in the Australian Constitution. Given that 91 per cent of the survey respondents thought it was important or very important 'to be able to own land or property that you can afford to purchase'<sup>32</sup>, the Committee would opt for the Victorian rather than the ACT approach by including a provision on property rights. The Committee does, however, question the usefulness of the Victorian provision—'A person must not be deprived of his or her property other than in accordance with the law'.<sup>33</sup> At the very least, the provision should provide for just compensation and due process for the compulsory acquisition by the Commonwealth of property required for public purposes.

The Victorian charter does not provide for compensation for wrongful conviction: the Victorian Consultation Committee advised against such a right on the ground it

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<sup>32</sup> *ibid.*

<sup>33</sup> *Charter of Human Rights and Responsibilities 2006 (Vic) s. 20.*

might entail a right to damages.<sup>34</sup> But such a right should be included in any Australian Human Rights Act, to ensure compliance with the International Covenant on Civil and Political Rights, which provides:

When a person has by a final decision been convicted of a criminal offence and when subsequently his conviction has been reversed or he has been pardoned on the ground that a new or newly discovered fact shows conclusively that there has been a miscarriage of justice, the person who has suffered punishment as a result of such conviction shall be compensated according to law, unless it is proved that the non-disclosure of the unknown fact in time is wholly or partly attributable to him.<sup>35</sup>

### **Other rights Australia has undertaken to respect**

There would be some rights not included in a Human Rights Act, but they should be included in the definitive list of Australia's human rights obligations. These additional rights would still be relevant when government is proposing legislation and when the recommended Joint Committee on Human Rights is scrutinising proposed legislation. There could also be a need for specific legislation to fill gaps in the protection of these rights.

### **The process of law making**

Amidst the controversy about the utility and cost of an Australian Human Rights Act, the Committee was required to consider only those options that preserve the sovereignty of parliament. At every major community roundtable there was at least a handful of citizens agitating for a constitutional bill of rights.<sup>36</sup> In the other corner of the room there was just as often a group claiming that Magna Carta was all that was needed to preserve our rights. It is beyond the Committee's terms of reference to consider a constitutionally entrenched bill of rights.

If parliament were minded to legislate for an Australian Human Rights Act, the Committee recommends a model that provides the means for each branch of government to play its specialist role. This is sometimes called the 'dialogue' model, although critics of the terminology rightly point out that it does not lead to conversation. Rather, each party contributes and responds to the contribution of other parties to the dialogue. The model works thus:

1. The executive proposes to parliament a Bill the executive has drawn up with an eye to compliance with the relevant listed human rights. The executive provides

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<sup>34</sup> Victorian Human Rights Consultation Committee, *Rights, Responsibilities and Respect: the report of the Human Rights Consultation Committee* (2005) 44. Such a right is included in the *Human Rights Act 2004* (ACT) s. 23; it replicates the International Covenant on Civil and Political Rights art. 14.6.

<sup>35</sup> International Covenant on Civil and Political Rights art. 14.6.

<sup>36</sup> Robert Oakeshott MP also provided a submission arguing for constitutional entrenchment of rights—R Oakeshott, Submission.

a statement of compatibility, attesting that any limits on the relevant rights are limits that can be demonstrably justified in a free and democratic society.

2. The parliament considers the Bill through its Parliamentary Committee on Human Rights, which decides whether it agrees with the executive's assessment of the Bill or decides to legislate nonetheless, even though the Bill entails excessive interference with a particular right.
3. When a person claiming an unwarranted infringement of their right applies for a remedy in court, the court interprets the law consistently with human rights and in a manner that is also consistent with the purpose of the law. The court might find that any limitation on the right in the particular instance is demonstrably justified in a free and democratic society, or it can issue a declaration of incompatibility, having given the executive the opportunity to be heard on the question of human rights compliance.
4. The effect of the declaration of incompatibility is that the law remains valid but the executive is required once again to provide to parliament a justification for or explanation of the law.
5. Parliament then has the opportunity to reconsider the legislation in the light of what has transpired during this process.

The Committee is of the view that this model is completely consistent with the sovereignty of parliament because parliament retains the last word on the content of the legislation. The procedure described gives parliament the opportunity to re-examine legislation that might provoke an unforeseen interference with human rights that comes to light only when a wronged person brings proceedings against government in the courts.

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

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

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

## The limits on human rights

The Committee notes that the Victorian and ACT laws contain similar provisions setting out the criteria for when a human right may be limited by law. The Victorian charter provides:

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

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

If included in a federal Human Rights Act, such a limitation provision would not apply to 'non-derogable' rights, as outlined. The Committee finds this a suitable test, although it does wonder whether the word 'demonstrably' adds anything to the test for justified limitations on rights. Some say it adds to the onus of proof.

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

This recommendation is made on the assumption that a court deciding that the limits on a right were 'justified in a free and democratic society' would be validly exercising judicial power.

## Interpretation of legislation

The Victorian and ACT laws now contain similar clauses relating to the interpretation of legislation: 'So far as it is possible to do so consistently with their purpose, all statutory provisions must be interpreted in a way that is compatible with human rights'.<sup>37</sup>

The Solicitor-General advised the Committee that 'such an interpretation provision would avoid the extremes of the United Kingdom approach and would be compatible with the exercise of judicial power as traditionally understood in

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<sup>37</sup> *Charter of Human Rights and Responsibilities 2006* (Vic) s. 32(1); compare *Human Rights Act 2004* (ACT) s. 30.

Australia'.<sup>38</sup> On the basis of this advice, the Committee considers that, for national consistency, it would be desirable for any Commonwealth law to have the same provision, thus making it clear that the courts would always interpret Commonwealth laws compatibly with human rights and (unlike the situation in the United Kingdom) consistently with parliament's intention.

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

### **Declarations of incompatibility**

During the Consultation there was considerable academic legal controversy about the constitutionality of a court making a declaration of incompatibility in relation to a Commonwealth law. The Committee always said it would consider only those options that were constitutionally watertight. The Solicitor-General advised the Committee that a declaration of incompatibility by a court is not to be characterised 'as incidental or ancillary to the exercise of judicial power'.<sup>39</sup> Rather, he considers it 'to be itself an exercise of judicial power and for that reason likely to be held constitutional'.<sup>40</sup> Importantly, this conclusion is based on the assumption that a declaration of incompatibility 'could be made only in proceedings for some other relief or remedy'<sup>41</sup> and 'only if a court were satisfied that a Commonwealth law is incompatible with a right or freedom' set out in a Human Rights Act.<sup>42</sup> In addition, the Solicitor-General stated that prospects of constitutional validity would be improved if there were a requirement that the declaration be binding as between the parties<sup>43</sup> and a requirement that the Attorney-General be joined as a party to such a proceeding.<sup>44</sup>

As noted, the Committee's terms of reference require all options identified to preserve the sovereignty of parliament. Some critics of the Victorian and ACT models, which are based on the UK Human Rights Act, thought it improper that courts be asked to do anything more than their customary task of interpreting legislation. They thought it improper to have courts issuing declarations of incompatibility that might become political weapons in parliamentary debate if the

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<sup>38</sup> S Gageler and H Burmester, SG No. 40 of 2009, 7.

<sup>39</sup> *ibid.* 12.

<sup>40</sup> *ibid.*

<sup>41</sup> *ibid.* 6.

<sup>42</sup> *ibid.*

<sup>43</sup> *ibid.* 9.

<sup>44</sup> *ibid.*

government were not inclined to propose or support amendments to its impugned legislation. This, they argued, would be an unwarranted interference by the judiciary in the affairs of parliament. And they thought it inaccurate to describe such a declaration as part of a dialogue since the executive would simply be handed a judicial ultimatum on the floor of the parliament.

The Committee does not agree with this interpretation of the effect of declarations of incompatibility. Rather, it commends the process as being consistent with the traditional roles of the three arms of government. Should this aspect of the model prove impractical or unacceptable to legislators, consideration could be given to allowing members of parliament, rather than the courts, to trigger the legislative review process.

Under the dialogue model it is usually only the jurisdiction's highest court that is able to issue a formal declaration of incompatibility or inconsistency. The Committee therefore considers it would be appropriate for parliament to require the executive to respond formally only to declarations of incompatibility by the High Court. Should a lower court make adverse observations about a Commonwealth law's consistency with the Human Rights Act, members of parliament would, of course, be free to seek an inquiry by the Joint Committee on Human Rights. That committee could then seek a response from the Minister concerned.

There could, however, be a problem with this approach. With the exception of matters that are within the original jurisdiction of the High Court, parties are heard in the High Court only on the grant of special leave to appeal. If a party is seeking a declaration of incompatibility in the High Court, it is most probable that the party will have lost its case in a lower court, having failed to convince the court that the action on the part of the defendant federal public authority is contrary to law. The losing party might have exhausted their cause of action and have no prospect of winning an appeal. The High Court might not be persuaded to grant special leave in a case where the law is clear, where the lawfulness of the public authority's action is established, and where the wronged party is now seeking no remedy other than a declaration of incompatibility.

The Solicitor-General advised the Committee that a declaration of incompatibility would be consistent with the exercise of judicial power, provided it is made in proceedings for some other relief or remedy and provided the court is satisfied that a Commonwealth law is incompatible with a right or freedom set out in the Human Rights Act.<sup>45</sup> The Committee is of the view that it would also be possible to allow the Federal Court or any state or territory Supreme Court to issue a declaration of incompatibility when such a court is exercising federal jurisdiction, interpreting

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<sup>45</sup> See foregoing discussion.

another Commonwealth law for compliance with the Human Rights Act. But that would create two more problems: the Federal Parliament might not be persuaded to engage in 'dialogue' with 10 different courts, and the Attorney-General might not relish the prospect of regular appearances in these different courts to argue compliance with the Human Rights Act in litigation that might still have some prospect of going on appeal.

In view of these problems, the Committee proposes that, if declarations of incompatibility cannot practically and fairly be restricted to the High Court, there be no provision for formal declarations of incompatibility by a court. Rather, the parties to the proceedings, and perhaps the Australian Human Rights Commission, could be given the power to notify the Joint Committee on Human Rights of the outcome of litigation and the court's reasoning indicating non-compliance of a Commonwealth law with the Human Rights Act. It would then be a matter for members of parliament themselves to trigger the processes of the Joint Committee, which could seek the Attorney-General's response.

The *Al-Kateb Case*<sup>46</sup> provides a good illustration. Were the High Court to uphold the validity of a law providing for indefinite detention of a stateless asylum seeker, the court could proceed to make a declaration that the law could not be interpreted consistently with the right to freedom of movement or the right not to be subjected to arbitrary detention. It would then be a matter for the executive to provide an explanation to parliament. The executive might well decide to retain the law, differing from the court in its assessment of what is a reasonable limit on these rights in a free and democratic society. Ultimately, it would be a matter for parliament to amend the law or to let it stand. Without a formal declaration from the High Court to trigger the parliamentary review, the Standing Orders could provide that a small quota of members of parliament could ask the Joint Committee on Human Rights to review the law in the light of a court decision that the law was valid despite its unwarranted interference with a right. The court declaration is not essential, but it is the most precise mechanism available for instigating further review of the law, with the executive reporting back to parliament.

Here it is necessary to distinguish two discrete functions. The parliamentary committee needs to receive notification that a court has found a Commonwealth law inconsistent with human rights. That notification could be provided by any party to the court proceedings or perhaps by the Australian Human Rights Commission. There is then a need for a trigger to instigate the review process—including notification of the Minister responsible for the impugned Act, a written response from that Minister to the parliamentary committee, the committee hearing and recommendation, and publication of the ministerial response in Hansard or the

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<sup>46</sup> *Al-Kateb v Godwin* (2004) 219 CLR 562.

*Government Notices Gazette*. The committee itself could trigger the review process on receipt of a request from a small number of members of either house of parliament. The notification and trigger provisions could be included in the Standing Orders or in an Act of parliament.

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

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

## Remedies

An Australian Human Rights Act could provide to the courts a statutory guide to interpreting Commonwealth laws consistent with human rights. It could also require Commonwealth public authorities to act compatibly with human rights (other than economic and social rights). Commonwealth public authorities could also be required to give due consideration to any relevant human rights when making decisions. Such obligations could include progressive realisation of the main economic and social rights. The Committee agrees with the observation of retired Federal Court judge Ron Merkel and Alistair Pound:

In the field of administrative law, a national Human Rights Act, which required public authorities to act compatibly with human rights, would make human rights a relevant consideration in all administrative decision making by public authorities and would make clear that such rights must be given real and genuine consideration.<sup>47</sup>

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

In Victoria, government agencies have welcomed their charter in part because it does not create an independent cause of action for breach of the charter. The Committee supports the Victorian Bar's proposal that 'a free-standing remedy against public authorities based solely on a breach of the protected rights should be provided'.<sup>48</sup> If a court were to be able to award damages for breach of a human right, it should be only in the circumstances set down in s. 8(3) of the UK Human Rights Act:

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<sup>47</sup> R Merkel and A Pound, Submission.

<sup>48</sup> Victorian Bar, Submission.

No award of damages is to be made unless, taking account of all the circumstances of the case, including—

(a) any other relief or remedy granted, or order made, in relation to the act in question (by that or any other court), and

(b) the consequences of any decision (of that or any other court) in respect of that act,

the court is satisfied that the award is necessary to afford just satisfaction to the person in whose favour it is made.

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

## 15.5 Conclusion

An Australian Human Rights Act that is broadly consistent with the Victorian and ACT legislation could provide a resilient thread in the federal quilt of human rights protection. Debate about and consideration of this question should not be allowed to delay action to improve the quality of economic and social rights of those Australians who are most disadvantaged. The Committee finds there has been a tendency for supporters and detractors of the Victorian and ACT models to overstate the models' achievements and their shortcomings.<sup>49</sup> A Human Rights Act on its own will not mend the largest holes in the quilt of Australian rights protection, but that is no reason to oppose such an Act.

An Australian Human Rights Act that recognises and fully protects the non-derogable civil and political rights and that offers a process for engagement by all three branches in government when parliament legislates to set limits on other civil and political rights could constitute a useful, cost-effective means of repairing some of the holes in Australia's patchwork of rights protection. It would trespass on the

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<sup>49</sup> For example, while supporters of the Victorian charter often point to benefits especially for the most vulnerable, the Royal Australian and New Zealand College of Psychiatrists informed the Committee: 'In its submission to the Victorian Legislative Council Standing Committee on Finance and Public Administration Inquiry into Public Hospital Performance Data in December 2008, the RANZCP Victorian Branch recommended an immediate increase in acute public hospital beds by a factor of at least 25% to address the lack of resources available for treating acute mentally ill patients'—Royal Australian and New Zealand College of Psychiatrists, Submission.

domain of state and territory public authorities only when they were performing public functions under Commonwealth law.

There was disagreement among members of the Committee—as there is in the community—about the need for and usefulness and desirability of a Human Rights Act. But, on the weight of all the views expressed, the Committee is persuaded of the need for such an Act drawn in the terms outlined in this chapter.

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

Whatever decision government makes about introducing into parliament a Bill for such an Act, it is essential that government take account of the other primary options raised in this report, especially in relation to economic and social rights. After all, a Human Rights Act will be no substitute for more resources and more effective distribution of those resources to secure the basic economic and social rights of those whose dignity is most at risk in contemporary Australia.

The Committee acknowledges the concern of Consultation participants seeking economic and social rights for all—especially for people who ‘fall through the cracks’. Noting the Solicitor-General’s advice that ‘an examination of the content of those rights as set out in the [International Covenant on Economic, Social and Cultural Rights] demonstrates a general absence of what would traditionally be regarded as judicially manageable standards’<sup>50</sup>, the Committee remains unconvinced that courts are well equipped to contribute to better scrutiny and protection of economic and social rights. Further, the states and territories remain the main providers of services that guarantee protection of the principal economic and social rights. The Commonwealth can do little but put its own house in order and lead by example.

Once the audit of all past Commonwealth legislation is complete, the Commonwealth Parliament will be able to respond to the shortfalls. Meanwhile, parliament could grant courts the power to interpret all Commonwealth laws consistently with human rights and the power to strike down subordinate legislation that is inconsistent with those rights—as listed in a Human Rights Act—and Commonwealth public authorities could be required to respect the rights of all people.

Even in the absence of a Human Rights Act, the modest steps for education, auditing, scrutiny and compliance should still be taken. Each is a small step on the path to dignity and a fair go for all. Australia has always been on this path. At times in the past our leaders—such as HV Evatt and Jessie Street—have taken great

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<sup>50</sup> S Gageler and H Burmester, SG No. 68 of 2009, 15.

strides on the path, showing the world a way forward. It is time for our elected leaders to decide which new steps to take on the path to protecting and promoting human rights.

