

8 Human rights in practice

During the Consultation a number of options for improving the protection and promotion of human rights in practice were identified. The main ones were measures aimed at ensuring that the Federal Government adopts a more coordinated and strategic approach to human rights and measures designed to ensure that the Federal Government better integrates human rights into public sector policy development, decision making and service delivery. These two options are discussed in this chapter, as are options for strengthening independent oversight mechanisms and for improving access to justice in relation to human rights.

8.1 A more coordinated and strategic framework

There is strong support in the community for the Federal Government taking a more coordinated approach to the protection and promotion of human rights. One way of doing this is to adopt a strategic framework within which human rights legislation, policy and practice will be developed and implemented.

In 1993 the World Conference on Human Rights recommended that nation States consider the desirability of preparing national action plans identifying the steps they would take to improve the promotion and protection of human rights.¹ National action plans are designed to outline human rights priorities and set out clear strategies and steps for achieving the desired outcomes. They aim to integrate human rights as a central public policy objective, so that governments and communities can endorse them as practical goals, devise programs to ensure the achievement of these goals, engage all relevant sectors of government and society, and allocate sufficient resources. This encourages a proactive, rather than reactive, approach to human rights.²



Philip Flood AO and Mary Kostakidis at Mt Gambier.

¹ See Vienna Declaration and Programme of Action, adopted by the UN World Conference on Human Rights, Vienna, 14–25 June 1993, [71].

² See, generally, Office of the UN High Commissioner for Human Rights, *Handbook on National Human Rights Plans of Action* (2002).

Australia's current National Action Plan was last updated in December 2004. It outlines the Federal Government's five priorities for human rights in Australia—promoting a strong, free democracy; human rights education and awareness; addressing disadvantage and assisting independence; supporting the family; and promoting human rights internationally.³

The National Action Plan has been criticised on a number of grounds, including the following:

- It highlights human rights concerns and lists government initiatives to respond to them, rather than identifying targets, performance indicators and time lines for the future.⁴
- It does not commit any resources to action or take account of the specific needs of vulnerable groups in the community.⁵
- It adopts a narrow approach to human rights by failing to respond to concerns that have been the subject of much public debate in Australia.⁶
- It does not reflect a commitment by the Federal Government to uphold and promote Australia's international human rights obligations, legislate to give effect to those obligations, and ensure that Australia's laws and policies are compatible with human rights standards.⁷

Fifty-eight submissions to the Committee proposed that the Federal Government adopt a whole-of-government approach or a new National Action Plan for human rights. In addition, the Committee considers that the range of opinions and options put forward during the Consultation were clearly based on a view that a more coordinated, whole-of-government approach is required. One community roundtable participant suggested that this could be achieved by establishing a human rights unit in the Department of the Prime Minister and Cabinet.⁸

The Allen Consulting Group provided advice on the option of developing a new National Action Plan. It outlined the main potential benefit of a new plan (or, presumably, any new strategic framework):

There is certainly potential for a new NAP to deliver benefits to stakeholders through an improved framework, whereby government's human rights strategy is better coordinated, focused on priorities and cost-effective. The key ways in which this

³ *Australia's National Framework for Human Rights: National Action Plan* (2005).

⁴ For example, Public Interest Advocacy Centre, Submission to the Draft National Action Plan on Human Rights (2004) 3; see also Women with Disabilities Australia, Submission.

⁵ For example, Federation of Ethnic Communities' Councils of Australia, Submission to the Draft National Action Plan on Human Rights (2004).

⁶ Law Council of Australia, Submission.

⁷ *ibid.*

⁸ Tweed Heads, Community Roundtable.

approach may be beneficial are through better facilitation of reforms to protect human rights, and increased human rights awareness.⁹

The effectiveness of a new National Action Plan would, however, be dependent on the allocation of sufficient resources to develop the plan and implement the reforms that flow from it. In the view of The Allen Consulting Group:

Initial costs of a new NAP would primarily be development costs to government, including conducting research to establish a baseline measure of current protections (to be able to properly measure the impact of future reforms). There are also the costs of stakeholder consultation on the new NAP, although the current Consultation could be substituted here.

The most effective implementation strategy for a NAP requires periodic monitoring of progress and evaluation, which incurs related costs for government on an ongoing basis.¹⁰

The Committee's findings

Whether or not a federal Human Rights Act is adopted, the Federal Government should adopt a whole-of-government approach to human rights, coordinated by the Department of the Prime Minister and Cabinet. Additionally, a new strategic approach is required to improve the framework for protecting and promoting human rights in Australia. The government could achieve this by developing a new National Action Plan or another strategic framework that focuses on better integration of Australia's international human rights obligations in legislation, policy and practice. Development and implementation of such a framework would entail the participation of all sectors of the Australian community involved in human rights, including the non-government sector.

Although the preparation of a new National Action Plan could be pursued in the absence of a federal Human Rights Act, the Committee notes the Law Council of Australia's view that such a process would also be necessary if a Human Rights Act was introduced, in order to provide a framework for guiding the development of human rights policy.¹¹

⁹ The Allen Consulting Group, *Analysis of Options Identified during the National Human Rights Consultation* (2009).

¹⁰ *ibid.*

¹¹ Law Council of Australia, Submission. The Law Institute of Victoria also suggested that an Action Plan be pursued alongside a Human Rights Act—Law Institute of Victoria, Submission.

Recommendation

Recommendation 8

The Committee recommends as follows:

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

8.2 Human rights and the public sector

As discussed in Chapter 6, the Committee became aware that there was strong support for the development of a human rights culture in the public sector; it was felt this would lead to better integration of human rights in the development of legislation and policy, in administrative decision making, and in service delivery. In all, 116 submissions expressed support for measures that would promote human rights in the public sector.

Generally, those who supported the introduction of a federal Human Rights Act recognised that additional measures would be necessary in order to ensure that the public sector is in a position to comply with its new obligations. For example, the Australian Human Rights Commission argued for better education of the public sector on human rights and its legislative obligations; requiring federal government departments and agencies to develop human rights action plans, to conduct annual human rights audits, and to prepare annual reports on compliance with the Act; and integrating respect for human rights into public sector values and codes of conduct.¹²

In the Committee’s view, regardless of whether a federal Human Rights Act is introduced, measures will be required to better incorporate human rights considerations in the public sector’s practices and procedures. In the absence of a Human Rights Act, human rights compliance would need to be measured against all of Australia’s human rights obligations or against a consolidated list of those obligations.

¹² Australian Human Rights Commission, Submission.

The measures outlined in the remainder of this section were raised primarily by people working in the legal and human rights fields, rather than the broader community. The Committee notes, however, that this is to be expected given the measures' more technical nature and the fact that they would in any case assist in achieving the goal of creating a human rights culture, a notion that enjoyed broad support among participants in the Consultation.

Public sector codes of conduct

Support was expressed for integrating respect for human rights into public sector values and codes of conduct.¹³

At present all federal public servants must uphold the Australian Public Service Values and comply with the Code of Conduct; any breach of the code can result in sanctions—termination of employment being one of them. The Public Service Commissioner evaluates the extent to which agencies incorporate and adhere to the values and the adequacy of systems and procedures for ensuring that employees comply with the code.¹⁴



Professor Andrew Podger speaks of human rights values formation in the Australian Public Service.

The Australian Human Rights Commission submitted that the APS Values and Code of Conduct should describe public servants' responsibility to respect and promote human rights in the performance of their duties. It suggested adopting provisions similar to those operating in Victoria.¹⁵

The *Public Administration Act 2004* (Vic) makes provision for a public sector value in relation to human rights, stating that public officials should respect and promote the human rights expressed in the Victorian Charter of Human Rights by '(i) making decisions and providing advice consistent with human rights; and (ii) actively implementing, promoting and supporting human rights'. The Act also requires agency heads to adhere to employment processes that ensure that the human rights set out in the charter are upheld.¹⁶ The Victorian Government referred to

¹³ For example, Australian Human Rights Commission, Submission; Australian Chamber of Commerce and Industry, Submission.

¹⁴ Australian Public Service Commission, *APS Values and Code of Conduct in Practice* <<http://www.apsc.gov.au/values/conductguidelines3.htm>> at 21 September 2009.

¹⁵ Australian Human Rights Commission, Submission.

¹⁶ *ibid.*

these provisions as a measure that reinforces public authorities' legislative obligation to act compatibly with the human rights expressed in the charter.¹⁷

The Committee considers this would be an effective way of integrating human rights into the culture of the federal public sector and notes that—in the absence of a federal Human Rights Act—the APS Values and Code of Conduct should instead refer to all of Australia's human rights obligations or to a consolidated list of those obligations.

Administrative review

There was a high level of support for public servants being required to take human rights into account when they make decisions.¹⁸ Many Consultation participants thought such an obligation should be included in a federal Human Rights Act (see the discussion in Chapter 14). It was also suggested, however, that this goal could be achieved by amending existing legislation.¹⁹ Seventy-two submissions expressed specific support for incorporating human rights considerations in administrative decision making.

At the federal level it is possible to seek judicial review of government decisions under a variety of laws.²⁰ The *Administrative Decisions (Judicial Review) Act 1977* allows courts to review certain government decisions on various grounds, one of them being that the decision maker failed to take into account a 'relevant consideration'. In some cases legislation outlines the relevant considerations; in other cases they will be implied from the subject matter, context and purpose of the legislation.

Ron Merkel QC and Alistair Pound suggested that a federal Human Rights Act:

... which required public authorities to act compatibly with human rights, would make human rights a relevant consideration in all administrative decision-making by public authorities and would make clear that such rights must be given real and genuine consideration'.²¹

Chapter 14 deals with this option in detail.

¹⁷ Victorian Government, Submission.

¹⁸ For example, Law Council of Australia, Submission; Australian Human Rights Commission, Submission; Northern Territory Anti-Discrimination Commission, Submission; Welfare Rights and Legal Centre, Submission. This subject was also often raised at community roundtables.

¹⁹ For example, K Eastman, Submission.

²⁰ This includes s. 75(v) of the Constitution, which gives the High Court original jurisdiction to hear matters in which certain remedies are sought against an 'officer of the Commonwealth'—R Merkel and A Pound, Submission.

²¹ R Merkel and A Pound, Submission, citing S Evans and C Evans, 'Legal redress under the Victorian Charter of Human Rights and Responsibilities' (2006) 17(4) *Public Law Review* 264, 278.

It was also suggested to the Committee that the Administrative Decisions (Judicial Review) Act should be amended to provide a ground for judicial review if decisions made under federal legislation are not made consistently with specific human rights obligations.²² This proposal could be adopted with or without a Human Rights Act. If a Human Rights Act were introduced, the ADJR Act could be amended to confirm that failure to act consistently with or to take into account the rights in the Human Rights Act is a ground for judicial review. In the absence of a Human Rights Act, the ADJR Act could refer to Australia's international human rights obligations or a consolidated list of those obligations. This would be an effective way of ensuring that human rights considerations are integrated into public sector decision making, especially if the Federal Government decides against implementing a federal Human Rights Act.

Human rights action plans and reports

Other possible options involve requiring federal government departments and agencies to develop human rights action plans, conduct or comply with annual human rights audits, and prepare annual reports on human rights compliance.²³ A further suggestion involved identifying specific senior Ministers as being responsible for monitoring the implementation and progress of a Human Rights Act.²⁴

As noted, some Consultation participants were in favour of using these measures as part of a framework supporting a federal Human Rights Act.²⁵ The Committee notes, however, that such measures would be necessary whether or not a Human Rights Act is implemented at the federal level.

The Law Institute of Victoria suggested that a federal Human Rights Act should require the Federal Government to produce and publish human rights action plans 'designed to create an understanding and culture of human rights compliance at all stages of public decision-making and application of law and policy'. The government should also be required to report on compliance with the plans and human rights generally, and the composition of and compliance with the plans should be subject to independent review.²⁶

Professor Tom Campbell and Dr Nicholas Barry submitted that audits of government agencies would draw attention to human rights violations that might otherwise go unnoticed and would lead to greater scrutiny by parliament, government, the media

²² K Eastman, Submission; M Byrnes, Submission.

²³ See Australian Human Rights Commission, Submission.

²⁴ Human Rights Law Resource Centre (Human Rights Act for All Australians), Submission.

²⁵ For example, Law Institute of Victoria, Submission; Zonta International, Submission.

²⁶ Law Institute of Victoria, Submission.

and the public.²⁷ The ACT Human Rights Commission cited its audit of Quamby Juvenile Detention Centre as demonstrating the benefits of this option.²⁸

Victoria Police submitted that it had conducted internal audits throughout the organisation to assess human rights compliance immediately after the Victorian charter came into force. The legal audit reviewed all the Victorian legislation under which the police operate in order to identify provisions that were not human rights compliant and report to government with recommended resolutions. An audit of internal policies and procedures was also conducted, and where potentially incompatible matters were identified steps were taken to redress them.²⁹

There was support for these audits being conducted by the Australian Human Rights Commission³⁰ or by agencies themselves.³¹ Alternatively, the Auditor-General could be given this role.

Dr Julie Debeljak suggested that government departments and other public authorities should be required to report their compliance with and implementation of human rights in their annual reports. In her view, this will ensure that human rights become part of the public decision-making matrix:

Human rights will no longer automatically be trumped by other factors, such as cost or efficiency. Moreover, to require annual reporting should also ensure that human rights become a tool to enhance public administration. Human rights, rather than being a separate add-on or an additional regulatory burden, will become the (or at least part of an) operational framework for public administration, enhancing its quality, and giving expression to values that were once intuitive, but are now clearly defined.³²

The Committee supports measures that involve greater human rights planning and compliance reporting by the federal public sector and considers that periodic human rights audits of specific agencies and their practices would provide a useful measure for ensuring greater transparency and public accountability. Options in relation to audits of public sector agencies are discussed in more detail in Section 8.3.

²⁷ T Campbell and N Barry, Submission.

²⁸ ACT Human Rights Commission, Submission. See also T Campbell and N Barry, Submission.

²⁹ Victoria Police, Submission.

³⁰ For example, ACT Human Rights Commission, Submission; T Campbell and N Barry, Submission; Human Rights Council of Australia, Submission.

³¹ For example, Australian Human Rights Commission, Submission; PILCH Homeless Persons' Legal Clinic, Submission.

³² J Debeljak, Submission.

Interpretation of legislation

There was some support for requiring those who interpret federal legislation to interpret it consistently with Australia's international human rights obligations. This could apply to the courts as well as decision makers within government. Most people who supported this option suggested that it should be included in a federal Human Rights Act (as discussed in Chapter 14)³³, but some participants raised it as a stand-alone option.³⁴ As discussed in Chapter 5, common law principles of statutory interpretation already require that legislation be interpreted on the presumption that parliament did not intend to abrogate fundamental rights.³⁵ The 'fundamental rights' recognised at common law do not, however, include all the human rights contained in treaties to which Australia is a party.

There is also a common law rule of statutory interpretation that legislation be interpreted and applied, so far as its language permits, so that it is consistent with established rules of international law.³⁶ There is some debate, however, as to whether this rule is to be applied only where legislation is ambiguous³⁷ or where legislation is designed to implement Australia's obligations under international law.³⁸

Some submissions supported amending the *Acts Interpretation Act 1901* (Cth) to strengthen or clarify these common law rules of interpretation. Professor Ivan Shearer proposed the amendments should provide, in the words of Chief Justice Mason and Justice Deane, that, 'If the language of the legislation is susceptible of a construction which is consistent with the terms of an international instrument and the obligations which it imposes on Australia, then that construction should prevail'.³⁹ Professor Helen Irving made a similar suggestion but limited its scope to 'particular rights and freedoms'.⁴⁰ Michael Byrnes submitted that the Acts Interpretation Act should be amended 'so that judges will have to interpret Federal laws consistently with both their purpose and the rights set out in the International Covenant on Civil and Political Rights and International Covenant on Economic, Social and Cultural Rights'.⁴¹

The Committee's view is that, in the absence of a Human Rights Act, there would be value in amending the Acts Interpretation Act to require that, as far as it is possible

³³ For example, Australian Human Rights Commission, Submission; J Gilbert, Submission.

³⁴ National Children's and Youth Law Centre, Submission; H Irving, Submission; I Shearer, Submission.

³⁵ *Coco v The Queen* (1994) 179 CLR 427.

³⁶ *AIMS v AIF* (1999) 199 CLR 160, 180 (Gleeson CJ, McHugh and Gummow JJ).

³⁷ See, eg, *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1, 38 (Brennan, Deane and Dawson JJ).

³⁸ See, eg, *Plaintiff 157/2002 v Commonwealth* (2003) 211 CLR 476, 492 (Gleeson CJ); *Coleman v Power* (2004) 220 CLR 1, 28-28 (Gleeson CJ).

³⁹ I Shearer, Submission, citing *Minister of State for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273, 287-288. See also K Eastman, Submission.

⁴⁰ H Irving, Submission.

⁴¹ Michael Byrnes, Submission.

to do so consistently with its purpose, federal legislation is to be interpreted consistently with human rights. In the absence of a Human Rights Act that sets out those rights, the interpretative task would have to be carried out by reference to Australia's international human rights obligations or a consolidated list of those obligations.

The Committee's findings

Instilling a human rights culture in the federal public sector is integral to better protection and promotion of human rights in Australia. It would offer a number of advantages, among them better identification and resolution of human rights considerations in the development and implementation of policy and legislation; incorporation of human rights considerations in administrative decision making; and an approach to service delivery that better accommodates and responds to human rights concerns among the community.

The Committee recognises that these measures entail costs. These would include the cost of training public sector officers in human rights and their obligations under any federal Human Rights Act or other legislative amendments (for example, in making human rights a relevant consideration under the Administrative Decisions (Judicial Review) Act or amending the Acts Interpretation Act) and adequately resourcing government departments and agencies so that they can prepare and implement human rights action plans and prepare annual reports on compliance. There might also be cost implications for the court system if the measures result in a high number of applications for judicial review on human rights grounds. It is, however, expected that these costs would be transitional only: decision makers would soon become more aware of human rights as a relevant consideration in their decision making.

Nevertheless, as with some other options, the Committee considers that the costs of not taking action are likely to be higher in the long term. Among these costs are the damage to Australia's international reputation that would result from failure to implement comprehensive human rights protection domestically and the social costs for a community that does not have the level of human rights protection that might be expected in a developed country such as Australia.

If the Federal Government elects to implement a federal Human Rights Act, these measures would support that framework. If it chooses not to implement such legislation, there is even more reason to pursue these measures in order to ensure greater incorporation of human rights considerations in government policies and practice.

Recommendations

Recommendation 9

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

Recommendation 10

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

Recommendation 11

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

Recommendation 12

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

8.3 Improving independent oversight

The UN Human Rights Committee has emphasised the role of independent oversight mechanisms in fulfilling States parties' obligations under the International Covenant on Civil and Political Rights. In particular, it has stated that article 2(3) of the ICCPR⁴² requires States parties to investigate violations of human rights through independent and impartial bodies. It noted that administrative mechanisms such as national human rights institutions are particularly required to give effect to this obligation and that the failure to properly investigate allegations of human rights violations could, of itself, constitute a breach of the ICCPR.⁴³

The Committee became aware there was considerable support for strengthening Australia's independent oversight mechanisms in the human rights context. For example, 318 submissions supported strengthening the Australian Human Rights Commission's role in dealing with human rights, while 97 submissions supported strengthening other independent oversight bodies more generally.⁴⁴ Professor Tom Campbell and Dr Nicholas Barry noted that such institutions are important because they 'can raise human rights awareness within and beyond government without involving the courts'.⁴⁵ The Human Rights Law Resource Centre submitted that the role, powers and mandate of human rights institutions should be as broad as possible.⁴⁶

The Ombudsman

As discussed in Chapter 5, the Commonwealth Ombudsman can investigate the actions of federal government agencies either on his or her own initiative or in response to a complaint.⁴⁷ He or she can investigate government action and report to the agency if it is found, for example, that the agency's action was contrary to law or unreasonable, unjust, oppressive or improperly discriminatory.⁴⁸ The

⁴² Article 2(3) provides that States Parties must ensure that any person whose rights are violated has an effective remedy and that this must be determined by a competent judicial, administrative or legislative authority. The article is discussed in Human Rights Law Resource Centre (Educate, Engage, Empower), Submission.

⁴³ Human Rights Committee, *General Comment No. 31: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, (26 May 2004) [15].

⁴⁴ See, for example—in relation to the Australian Human Rights Commission—Human Rights Council of Australia, Submission; Law Council of Australia, Submission; Jesuit Social Services, Submission; T Campbell and N Barry, Submission; J Debeljak, Submission. In relation to the Ombudsman, see B Saul, Submission; T Campbell and N Barry, Submission.

⁴⁵ T Campbell and N Barry, Submission.

⁴⁶ Human Rights Law Resource Centre (Educate, Engage, Empower), Submission, citing *Principles Relating to the Status of National Institutions (The Paris Principles)*, (20 December 1993), principle 2.

⁴⁷ *Ombudsman Act 1976* (Cth) s. 5.

⁴⁸ *ibid.*, s. 15.

Ombudsman also has an ongoing role in reporting to parliament about people held in long-term immigration detention.⁴⁹

There was some support for giving the Ombudsman expanded powers to investigate human rights violations⁵⁰, and similar proposals were often raised at community roundtables.⁵¹ Dr Ben Saul submitted that the Ombudsman should be given the power to make a report if he or she finds that an act is 'inconsistent with the enjoyment of a human right'. In Dr Saul's view this could constitute a speedy, informal and cheap alternative to bringing matters before the courts; he proposed that a special human rights unit be established within the Ombudsman's office to deal with human rights complaints.⁵²

In Victoria the *Charter of Human Rights and Responsibilities Act 2006* has extended the Victorian Ombudsman's functions to include a power to inquire into or investigate whether any administrative action is incompatible with human rights. This applies to investigations the Ombudsman may conduct on his or her own initiative, as well as inquiries or investigations initiated as a result of a complaint. The Victorian Government noted:

The Ombudsman already promotes fairness, integrity, respect for human rights and administrative excellence in Victoria. Conferring the human rights complaint handling function on the Ombudsman took advantage of the significant experience of the Ombudsman's office in considering complaints about human rights prior to the enactment of the Charter ...

The Ombudsman therefore plays an important role in building a human rights culture in Victoria and ensuring the successful implementation of obligations under the Victorian Charter.⁵³

The ACT Human Rights Commission did not support adopting the Victorian model at the federal level. It submitted:

As a public authority itself, and also having its jurisdiction limited to government departments and statutory bodies the Ombudsman should already monitor its own and others' decision-making processes and actions to ensure they are human rights compliant. A complaints jurisdiction is more appropriately placed in human rights agencies, which are already experienced with discrimination cases.⁵⁴

⁴⁹ See Commonwealth Ombudsman, *Immigration Reports tabled in Parliament*, <http://ombudsman.gov.au/commonwealth/publish.nsf/Content/publications_immigrationreports> at 21 September 2009.

⁵⁰ For example, T Campbell and N Barry, Submission.

⁵¹ For example, Tweed Heads, Community Roundtable; Queanbeyan, Community Roundtable; Whyalla, Community Roundtable; Newcastle, Community Roundtable; Cronulla, Community Roundtable; Cairns, Community Roundtable.

⁵² B Saul, Submission.

⁵³ Victorian Government, Submission.

⁵⁴ ACT Human Rights Commission, Submission.

At the Committee's public hearings the Commonwealth Ombudsman, Professor John McMillan, offered a different perspective, saying the Ombudsman's office already deals with what are essentially human rights matters—such as immigration, the use of interpreters by government agencies, police control of intoxicated people, and disputes with Centrelink—and that the present scope of his powers is sufficient.

The Australian Human Rights Commission

The Committee heard considerable support for strengthening the role of the Australian Human Rights Commission, so that it is better able to engage in and monitor the promotion and protection of human rights.⁵⁵

As noted, the Committee received 318 submissions expressing support for this option. In community roundtables, there were many calls for the commission to be given 'teeth' and to be adequately resourced so that it can better deal with human rights matters.⁵⁶ Submissions also emphasised the need for adequate resources for the commission to carry out its functions.⁵⁷

As discussed in Chapter 5, the Australian Human Rights Commission already has a range of human rights-related functions, among them examining Bills and laws for their consistency with human rights; inquiring into acts and practices that might be inconsistent with or contrary to human rights; and intervening, with the leave of the court, in proceedings that involve human rights concerns. The commission can report to the federal Attorney-General on the laws that should be made, or action that should be taken, in connection with matters relating to human rights and on action Australia should take in order to comply with particular human rights instruments. It also has public education functions in relation to human rights.⁵⁸

Submissions proposed the following measures to strengthen the commission's powers and functions in relation to human rights. The commission's potential role under a federal Human Rights Act is discussed in Chapter 14.

⁵⁵ For example, Human Rights Council of Australia, Submission; Law Council of Australia, Submission; D Allen, Submission; Jesuit Social Services, Submission; T Campbell and N Barry, Submission; J Debeljak, Submission; PILCH Homeless Persons' Legal Clinic, Submission; Australian Human Rights Commission, Submission; Seventh Day Adventist Church, Submission; Women with Disabilities Australia, Submission; AIDS Council of NSW, Submission.

⁵⁶ For example, Darwin, Community Roundtable; Mildura, Community Roundtable; Burnie, Community Roundtable; Dubbo, Community Roundtable; Melbourne, Community Roundtable; Sydney, Community Roundtable.

⁵⁷ For example, T Campbell and N Barry, Submission; Law Council of Australia, Submission; ACT Human Rights Commission, Submission; Australian Council of Social Service, Submission; PILCH Homeless Persons' Legal Clinic, Submission; Australian Human Rights Commission, Submission.

⁵⁸ *Australian Human Rights Commission Act 1986* (Cth), s. 11.

Jurisdiction in relation to human rights

At present the Australian Human Rights Commission's functions are limited by the definition of 'human rights' in the *Australian Human Rights Commission Act 1986* (Cth). The definition includes the rights set out in the International Covenant on Civil and Political Rights⁵⁹ but not the rights in the International Covenant on Economic, Social and Cultural Rights, the Convention against Torture and several other instruments. As a result, the commission cannot inquire into alleged breaches of the rights set out in those instruments or review legislation to assess its consistency with those rights.⁶⁰

Several submissions supported expanding the commission's jurisdiction, including to cover all of Australia's international human rights obligations or the rights in the International Covenant on Economic, Social and Cultural Rights⁶¹, the Convention against Torture⁶², the Convention on the Rights of the Child⁶³, the Declaration on the Rights of Indigenous Peoples⁶⁴, the Convention on the Elimination of Discrimination against Women⁶⁵, the Convention on the Elimination of Racial Discrimination⁶⁶, and the Convention on the Rights of Persons with Disabilities.⁶⁷ It should be noted that some of these international instruments fall within the commission's existing functions. For example, the Convention on the Rights of the Child and the Convention on the Rights of Persons with Disabilities fall within the commission's functions relating to 'human rights'.⁶⁸ In addition, the commission can consider complaints relating to many of the rights under the Convention on the Elimination of Discrimination against Women and the Convention on the Elimination of Racial Discrimination through its functions conferred by the *Racial Discrimination Act 1975* (Cth) and the *Sex Discrimination Act 1984* (Cth)

In the commission's own view, expanding its functions relating to 'human rights' to include the International Covenant on Economic, Social and Cultural Rights, the Convention against Torture and the Declaration on the Rights of Indigenous Peoples

⁵⁹ It also includes the rights the ILO Convention Concerning Discrimination in Respect of Employment and Occupation 1958 (ILO Convention 111), the Declaration on the Rights of the Child 1959, the Declaration on the Rights of Mentally Retarded Persons 1971, the Declaration on the Rights of Disabled Persons 1975, the Convention on the Rights of Persons with Disabilities 2006, the Convention on the Rights of the Child 1989, and the Declaration on the Elimination of all Forms of Intolerance and of Discrimination based on Religion or Belief 1981—Australian Human Rights Commission, Submission.

⁶⁰ Australian Human Rights Commission, Submission.

⁶¹ For example, Australian Council of Social Service, Submission; Human Rights Council of Australia, Submission; Castan Centre for Human Rights Law, Submission; PILCH Homeless Persons' Legal Clinic, Submission.

⁶² Australian Human Rights Commission, Submission; PILCH Homeless Persons' Legal Clinic, Submission.

⁶³ *ibid.*

⁶⁴ Australian Human Rights Commission, Submission.

⁶⁵ PILCH Homeless Persons' Legal Clinic, Submission.

⁶⁶ *ibid.*

⁶⁷ *ibid.*

⁶⁸ For an explanation of the Commission's functions relating to 'human rights', see Chapter 5.

‘would mean that the Commission could properly promote public awareness and understanding of the rights contained in these instruments’.⁶⁹

Examining bills and laws

At present the Australian Human Rights Commission has the power to review federal Acts for their consistency with human rights on its own initiative and the power to review federal Bills if asked to do so by the Minister⁷⁰, although the commission advised the Committee that no such request has ever been made.⁷¹ The Committee heard suggestions that the commission should have the power to review, on its own initiative, the human rights implications of existing or proposed federal, state and territory legislation.⁷²

Investigation powers

The commission can inquire into complaints of International Labour Organization Convention 111 discrimination and complaints about federal government acts and practices that could be inconsistent with or contrary to human rights. It can try to settle the matter by conciliation or, if that is inappropriate or unsuccessful, it can report to the Attorney-General.⁷³

Several submissions recommended that the commission be given the power to conduct inquiries on any matter affecting human rights in Australia—regardless of whether the responsible entity is the Federal Government or a state or territory government. This would allow it to inquire into systemic and widespread human rights problems permeating all levels of government.⁷⁴ There was also support for the commission being able to initiate all investigations on its own motion (that is, in the absence of a complaint)⁷⁵ and for requiring the Federal Government to respond publicly to the commission’s reports.⁷⁶

Additionally, the Committee heard that the commission should be given an audit power similar to that operating under s. 41 of the *Human Rights Act 2004* (ACT)⁷⁷, which gives the ACT Human Rights Commission the function of reviewing the effect

⁶⁹ Australian Human Rights Commission, Submission.

⁷⁰ *Australian Human Rights Commission Act 1986* (Cth) s. 11(e).

⁷¹ Australian Human Rights Commission, Submission.

⁷² For example, Human Rights Law Resource Centre (Educate, Engage, Empower), Submission; Human Rights Council of Australia, Submission; Jesuit Social Services, Submission; Castan Centre for Human Rights Law, Submission.

⁷³ *Australian Human Rights Commission Act 1986*, ss 11(1)(f), 3(1).

⁷⁴ For example, Australian Human Rights Commission, Submission; Human Rights Law Resource Centre (Educate, Engage, Empower), Submission; Law Council of Australia, Submission.

⁷⁵ For example, Human Rights Law Resource Centre (Educate, Engage, Empower), Submission; Law Council of Australia, Submission; Public Interest Advocacy Centre, Submission; Jesuit Social Services, Submission; Human Rights Council of Australia, Submission.

⁷⁶ For example, Australian Human Rights Commission, Submission; Human Rights Law Resource Centre (Educate, Engage, Empower), Submission; Law Council of Australia, Submission; Womenspeak Alliance, Submission.

⁷⁷ For example, P Mathew, Submission; ACT Human Rights Commission, Submission.

of ACT laws, including the common law, on human rights and reporting to the ACT Attorney-General on the results of that review. The Attorney-General must present a copy of the report to the Legislative Assembly within six sitting days. The ACT Human Rights Commission submitted, 'These audits enable identification of systemic human rights issues and have been a vital tool in identifying [and] subsequently rectifying human rights breaches in the ACT'.⁷⁸

Human rights complaints

The Australian Human Rights Commission currently has two main complaints-based roles—involving complaints of unlawful discrimination and complaints of particular human rights violations and discrimination contrary to ILO Convention 111. If the commission receives either type of complaint it can try to reach a settlement by conciliation.⁷⁹ If this is not possible, a person who has complained of unlawful discrimination can initiate court proceedings with a view to obtaining a determination.⁸⁰ Matters can also be referred to Fair Work Australia, the Remuneration Tribunal or the Defence Force Remuneration Tribunal where appropriate.⁸¹ In contrast, a person who has complained of a human rights violation or discrimination contrary to ILO Convention 111 has no other option or remedy available.⁸² The commission can, however, make a report to the federal Attorney-General⁸³, to which the government is under no obligation to respond.⁸⁴

The commission submitted that the same enforcement remedies should be available for human rights complaints, ILO Convention 111 complaints and unlawful discrimination complaints. It said this would greatly improve the protection of human rights in Australia.⁸⁵ The Public Interest Advocacy Centre submitted that people complaining of human rights violations should be able to initiate court proceedings after attempting conciliation.⁸⁶ The ACT Human Rights Commission suggested that a federal Human Rights Act should include a conciliation-based complaints-handling system modelled on the existing complaints-handling framework.⁸⁷ This is discussed in more detail in Chapter 14.

⁷⁸ ACT Human Rights Commission, Submission.

⁷⁹ *Australian Human Rights Commission Act 1986* ss 11(1)(aa).

⁸⁰ *ibid.* s. 46PH(1)(h) and Part IIB Division 2—Proceedings in the Federal Court and the Federal Magistrates Court.

⁸¹ *ibid.* Part IIC—Referral of discriminatory awards and determinations to other bodies.

⁸² *ibid.* ss 11(1)(f), Part II Division 2—Functions relating to human rights; Australian Human Rights Commission, Submission.

⁸³ *Australian Human Rights Commission Act 1986* ss 11(1)(f) and (j).

⁸⁴ Australian Human Rights Commission, Submission; Law Council of Australia, Submission.

⁸⁵ Australian Human Rights Commission, Submission.

⁸⁶ Public Interest Advocacy Centre, Submission.

⁸⁷ ACT Human Rights Commission, Submission.

The Human Rights Law Resource Centre⁸⁸ noted that the International Covenant on Civil and Political Rights and the Paris Principles⁸⁹ require that bodies such as the Australian Human Rights Commission have the power to investigate and monitor compliance with the orders issued as a result of their investigations. The Commission should therefore have the power, on its own initiative, to initiate court proceedings to seek enforcement of the conciliation agreements that result from its complaints-handling framework. The centre also suggested that the commission be given the power to issue binding codes of conduct or guidelines relating to the process for the resolution of all complaints under federal anti-discrimination law and concerning human rights, as is the case in Canada. In the centre's view this would provide greater clarity for employers and the community in relation to their rights and responsibilities.⁹⁰

Intervention in court proceedings

At present the Australian Human Rights Commission may intervene in court proceedings involving 'human rights' (as defined) only with the leave of the court.⁹¹ The commission can also intervene and its commissioners can act as *amicus curiae* (a friend of the court) in cases involving discrimination.⁹² The Committee heard that the commission should have the power to intervene, as of right, in all cases that raise significant human rights concerns.⁹³ This would allow it to bring its human rights expertise to the range of human rights concerns that may be considered in such proceedings.⁹⁴

Requiring government responses

The Federal Government is not at present required to respond to any commission reports. The commission submitted that, for reports prepared by the commission under one of its statutory functions and subsequently tabled in Federal Parliament⁹⁵, the Attorney-General should be required to table a response within a fixed period, indicating how the government intends to respond to the commission's

⁸⁸ Human Rights Law Resource Centre (Educate, Engage, Empower), Submission.

⁸⁹ *Principles Relating to the Status of National Institutions (The Paris Principles)* (20 December 1993).

⁹⁰ Human Rights Law Resource Centre, (Educate, Engage, Empower) Submission. See also Human Rights Council of Australia, Submission.

⁹¹ *Australian Human Rights Commission Act 1986* (Cth) ss 11(1)(o), 3(1).

⁹² *ibid.*

⁹³ For example, Australian Human Rights Commission, Submission; Human Rights Council of Australia, Submission; Oxford Pro Bono Publico, Submission; D Allen, Submission; Seniors Rights Victoria, Submission.

⁹⁴ For example, Australian Human Rights Commission, Submission; Oxford Pro Bono Publico, Submission.

⁹⁵ This would include reports on individual complaints, inquiries into systemic human rights problems, and the annual *Social Justice Report* and *Native Title Report*.

recommendations.⁹⁶ Other submissions also supported a mandatory government response to these reports.⁹⁷

Improving data collection on human rights violations

The Public Interest Law Clearing House submitted that effective promotion and protection of human rights depends, at least in part, on the collection of data on the nature and extent of human rights violations.⁹⁸ It noted that several Australian bodies collect some information but argued that the Federal Government should adopt a more practical and systematic role. Accordingly, it proposed that the Australian Human Rights Commission be given the power and resources to implement initiatives to improve data collection on human rights violations.⁹⁹

The Committee's findings

During the Consultation the Committee became aware of broad support for the Australian Human Rights Commission and the way it performs as an independent oversight body. Concerns were, however, expressed, at a range of community roundtables and in many submissions, about the limited powers the commission has in monitoring human rights and its limited resources to carry out its functions.

The Committee considers that the framework of independent oversight of human rights compliance is limited and needs to be strengthened. As discussed in Chapter 4, there is strong support in the community for Australia to implement in domestic legislation all the human rights obligations it has voluntarily assumed under international law. In Chapter 7 the Committee recommends that an audit of all federal legislation, policies and practices be conducted in order to ensure that they comply with these international obligations. This will, however, be a substantial task that is unlikely to be completed in the short term.

In view of this, the Committee recommends that the functions and powers of the Australian Human Rights Commission relating to 'human rights' be expanded to include all the human rights contained in the international human rights treaties Australia has ratified. Importantly, this would allow the commission to promote understanding, acceptance and public discussion of the rights contained in these instruments in Australia.

The Committee also heard concerns about the limited enforcement framework applying to complaints about human rights violations. At present, as noted, the Australian Human Rights Commission may receive complaints of certain human

⁹⁶ Australian Human Rights Commission, Submission.

⁹⁷ Law Council of Australia, Submission; Human Rights Law Resource Centre (Educate, Engage, Empower), Submission.

⁹⁸ Public Interest Law Clearing House, Submission.

⁹⁹ *ibid.*

rights violations by federal agencies as well as complaints of discrimination contrary to ILO Convention 111. But if it is not possible to reach a settlement by conciliation a person who has made a complaint of this nature cannot initiate court proceedings to obtain a determination. With the exception described in the following paragraph, there is in principle no reason why these complaints should be subject to enforcement remedies different from those available for unlawful discrimination complaints. Accordingly, the Committee considers that, with one exception, the federal enforcement framework currently applying to complaints of unlawful discrimination should also apply to complaints of human rights violations and ILO Convention 111 complaints.

As discussed in Chapter 4, the Committee found that economic, social and cultural rights are important to the Australian community, and the way in which they are protected and promoted can have a big impact on the day-to-day lives of many Australians. The Committee considers that the Australian Human Rights Commission should have the power to deal with complaints of violations of these rights. In view of the concerns that have been expressed about the justiciability of economic, social and cultural rights, however, and given the limited experience to draw on from other jurisdictions, the Committee considers that where it is not possible to reach a settlement of these complaints by conciliation there should be no recourse to the courts. The commission could instead report to the Attorney-General on the matter. This limitation should be reviewed over time in the light of experience in Australian and other jurisdictions.

The Committee recognises that there will be economic costs associated with these proposals. Generally, these would involve the costs of developing legislative amendments to confer the additional functions on the Australian Human Rights Commission, the need for additional resources for the Commission to carry out its expanded functions, and additional costs for administering the courts in relation to complaints of human rights violations.

Nevertheless, because the Australian Human Rights Commission already exists, the transition and ongoing costs could be expected to be lower than would be the case if a new organisation were created. In addition, the Committee notes that these costs should be measured against the economic and social benefits of a stronger framework for the protection and promotion of human rights and the longer term benefits that can be expected to result from instilling a human rights culture in the Australian community. The Committee expects that, as it becomes clear that possible violations of human rights can result in independent investigation, reporting and a formal response, human rights will become more respected and fewer violations will occur.

Recommendation

Recommendation 13

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

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

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

8.4 Improved access to justice

Another option for improving the protection and promotion of human rights is to provide improved access to justice so that people can know, understand and enforce their rights. This option was raised at many community roundtables¹⁰⁰, and 1083 submissions to the Committee expressed support for measures for improving access to justice.¹⁰¹

‘Access to justice’ is not simply about the ability to enforce rights in courts: it also refers to the ability to obtain legal advice and non-legal advocacy and support and to participate effectively in law reform processes.¹⁰² The Committee heard that access to justice is important in the promotion, protection and fulfilment of human rights¹⁰³; some suggest it is a human right in itself considering that the International Covenant on Civil and Political Rights requires States parties to protect and respect the right to a fair hearing (article 14), certain rights in criminal cases (articles 14 and 15) and the right to recognition as a person before the law (article 16).¹⁰⁴

In 2009 the UN Human Rights Committee noted, in relation to Australia, the ‘lack of adequate access to justice for marginalized and disadvantaged groups, including Indigenous people and aliens’ and recommended that Australia:

... take effective measures to ensure equality in access to justice, by providing adequate services to assist marginalized and disadvantaged people, including Indigenous people and aliens. The State party should provide adequate funding for Aboriginal and Torres Strait Islander legal aid, including interpreter services.¹⁰⁵

Improving access to legal representation

Many submissions raised the need to improve access to legal representation, particularly by increasing funding to legal aid and community legal centres.¹⁰⁶ In

¹⁰⁰ For example, Geelong, Round Table; Mt Isa, Round Table; Broken Hill, Round Table; Mt Gambier, Round Table; Wodonga, Round Table; Melbourne, Round Table; Canberra, Round Table.

¹⁰¹ On 23 September the Attorney-General launched the governments’ *Access to Justice Report* and a Strategic Framework for Access to Justice to guide future policy and reforms in our civil justice system. The Committee had insufficient time to consider these documents before publishing its report.

¹⁰² L Schetzer, J Mullins and R Buonamano, *Access to Justice and Legal Needs: a project to identify legal needs, pathways and barriers for disadvantaged people in NSW*, Law and Justice Foundation of NSW (2003), cited in Human Rights Law Resource Centre (Educate, Engage, Empower), Submission.

¹⁰³ Public Interest Law Clearing House, Submission; Human Rights Law Resource Centre (Educate, Engage, Empower), Submission.

¹⁰⁴ Human Rights Law Resource Centre (Educate, Engage, Empower), Submission; Law Council of Australia, Submission.

¹⁰⁵ Human Rights Committee, *Concluding Observations—Australia*, (7 May 2009) [25].

¹⁰⁶ For example, ACT Human Rights Commission, Submission; Australian Council of Social Service, Submission; Australian Lawyers for Human Rights, Submission; GetUp (E Coper), Submission; Public Interest Law Clearing House, Submission; Human Rights Law Resource Centre (Educate, Engage, Empower), Submission; Federation of Community Legal Centres, Submission; ACT Disability, Aged and Carer Advocacy Service, Submission; Seniors Rights Victoria, Submission.

addition, community roundtable participants often expressed the need for more funding in these areas.¹⁰⁷

The UN Human Rights Committee has noted that the availability of legal assistance can determine whether people are able to gain access to and participate in the justice system in a meaningful way and has encouraged States that are party to the International Covenant on Civil and Political Rights to provide free legal aid to people who do not have the means to pay.¹⁰⁸

In 2003–04 the Senate Legal and Constitutional References Committee conducted an inquiry into legal aid and access to justice. Among other things, the committee recommended the reform of legal aid funding arrangements; the collection of data on the demand for legal services and unmet legal need; increased funding for family law matters; the introduction of specialty legal advice services for Indigenous Australians, people living in rural and remote areas, refugees and migrants; the expansion of duty solicitor services; and increased funding for community legal centres.¹⁰⁹

Increased funding for legal aid

Legal aid is funded by the federal and state and territory governments to provide free legal representation to people who cannot pay for it.

Several submissions noted that funding for legal aid has declined substantially in recent years, producing adverse effects on access to justice in human rights matters. Particular concern was expressed that Indigenous legal aid funding has been static for more than a decade, representing a fall of 40 per cent in real terms.¹¹⁰ Submissions supported increased funding for legal aid¹¹¹ and the removal of restrictions on federal legal aid funding so that it can be used for state and territory matters.¹¹² In addition, the Human Rights Law Resource Centre submitted that the Federal Government should implement the recommendations of the 2007 national legal aid report *A New National Policy for Legal Aid in Australia*.¹¹³

¹⁰⁷ For example, Darwin, Community Roundtable; Ballarat, Community Roundtable; Bendigo, Community Roundtable; Burnie, Community Roundtable; Geelong, Community Roundtable.

¹⁰⁸ Human Rights Committee, *General Comment No. 32: right to equality before courts and tribunals and to a fair trial*, (23 August 2007) [10].

¹⁰⁹ Senate Legal and Constitutional References Committee, *Legal Aid and Access to Justice* (2004), as summarised in Human Rights Law Resource Centre (Educate, Engage, Empower), Submission.

¹¹⁰ Aboriginal and Torres Strait Islander Legal Services, Submission.

¹¹¹ Staff of the Legal Aid Commission (ACT), Submission; Public Interest Law Clearing House, Submission.

¹¹² Public Interest Law Clearing House, Submission.

¹¹³ National Legal Aid, *A New National Policy for Legal Aid in Australia* (2007), cited in Human Rights Law Resource Centre, Submission.

Increased funding for community legal centres

Community legal centres are independent community organisations that provide free legal services to the public. They are partially funded by the federal and state or territory governments or philanthropic organisations, but some receive no funding at all and are staffed entirely by volunteers.¹¹⁴

The Committee heard that community legal centres play a crucial role in helping people gain access to justice and realise their rights—particularly in the case of people who cannot pay for a lawyer or do not qualify for legal aid. Again, the Committee heard that substantial cuts in government funding in recent years have placed significant pressure on these centres, despite increased demand for their services.¹¹⁵ There was support for increased government funding of community legal centres.¹¹⁶

Encouraging pro bono services

Pro bono programs run by private law firms could make an important contribution to access to justice. The Committee was informed that the Victorian Government requires the law firms on its Legal Services Panel to provide pro bono services of at least 5 to 15 per cent of the value of the legal fees derived under panel arrangements.¹¹⁷ A 2007 review concluded that this had played a substantial role in improving access to justice for marginalised and disadvantaged Victorians.¹¹⁸ Several submissions recommended that the Federal Government adopt a similar mandatory policy.¹¹⁹

Other proposals

The Committee heard that the Federal Government should consider introducing tax and other financial incentives to encourage lawyers to train or practice in rural and remote areas.¹²⁰ It was also suggested that there be greater access to legal aid for civil matters.¹²¹

¹¹⁴ Human Rights Law Resource Centre (Educate, Engage, Empower), Submission.

¹¹⁵ Public Interest Law Clearing House, Submission.

¹¹⁶ For example, Human Rights Law Resource Centre (Educate, Engage, Empower), Submission; Australian Lawyers for Human Rights, Submission; ACT Disability, Aged and Carer Advocacy Service, Submission; Federation of Community Legal Centres, Submission; Seniors Rights Victoria, Submission.

¹¹⁷ Public Interest Law Clearing House, Submission; Human Rights Law Resource Centre (Educate, Engage, Empower), Submission; Australian Lawyers for Human Rights, Submission.

¹¹⁸ Department of Justice, *Report on the Review of Legal Services to Government Panel Contract (2007)*, cited in Human Rights Law Resource Centre, Submission.

¹¹⁹ For example, Public Interest Law Clearing House, Submission; Human Rights Law Resource Centre (Educate, Engage, Empower), Submission; Australian Lawyers for Human Rights, Submission.

¹²⁰ Australian Lawyers for Human Rights, Submission.

¹²¹ *ibid.*; Legal Aid Queensland, Submission; Human Rights Law Resource Centre (Educate, Engage, Empower), Submission; Public Interest Law Clearing House, Submission.

Reducing the cost of access to justice

A number of submissions noted that the cost of delivering and achieving justice is becoming increasingly high, placing justice beyond the reach of many. In particular, the costs of court action are so prohibitive that many potential litigants do not pursue their claims.¹²² Submissions suggested a variety of measures to help reduce the costs of litigation.

Alternative dispute resolution

Several submissions argued that an alternative dispute resolution regime should be a central part of the framework supporting a Human Rights Act¹²³, although use of such a regime could also be promoted in the absence of an Act. As the Mallesons Stephen Jacques Human Rights Law Group noted, alternative dispute resolution can provide a number of benefits—among them a wider and more flexible range of possible remedies, greater party satisfaction, a sense of empowerment for disadvantaged sections of the community, and a less formal and legalistic environment.¹²⁴ As noted, the Australian Human Rights Commission or the Commonwealth Ombudsman could play an important role in managing human rights complaints, which would help individuals limit the costs of litigation.

Protective costs orders

The Committee was told that Australia's costs regime acts as a disincentive to public interest litigation. The general rule in civil proceedings is 'costs follow the event', meaning that the unsuccessful party will have to pay the other side's legal costs as well as their own. A number of submissions noted that cases involving human rights or the public interest often are not pursued because of the risk of an adverse costs order.¹²⁵ The Public Interest Law Clearing House submitted:

This is especially the case where the matter involves an unresolved area of law, in the nature of a test case, such that legal advisors are not able to advise with any degree of certainty the likely outcome of the litigation. Such uncertainty increases the risk of an adverse costs order and therefore reduces the likelihood that a marginalised or disadvantaged applicant will pursue important test cases, including in the area of human rights protection.¹²⁶

It noted that the Victorian Law Reform Commission has previously identified the risk of adverse costs orders as a significant deterrent to public interest litigation¹²⁷ and

¹²² Public Interest Law Clearing House, Submission.

¹²³ Jesuit Social Services, Submission; Mallesons Stephen Jacques Human Rights Law Group, Submission; W Martin, Submission; Australian Human Rights Commission, Submission; Victorian Equal Opportunity & Human Rights Commission, Submission; Australian Council of Social Service, Submission.

¹²⁴ Mallesons Stephen Jacques Human Rights Law Group, Submission.

¹²⁵ R Merkel and A Pound, Submission; Public Interest Law Clearing House, Submission.

¹²⁶ Public Interest Law Clearing House, Submission.

¹²⁷ Victorian Law Reform Commission, *Civil Justice Review*, Report No. 14 (2008) 676, cited in Public Interest Law Clearing House, Submission.

that the Australian Law Reform Commission has recommended that ‘if private citizens are to be able to [initiate public interest litigation], any unnecessary barriers erected by the law of costs should be removed’.¹²⁸

The Committee heard support for encouraging courts to use protective costs orders—that is, orders that protect a party from having to pay the other side’s legal costs if they are not successful.¹²⁹ A protective costs order regime has been adopted in the United Kingdom. Although Australian courts already have discretion to make such orders, the Committee was informed there is little guidance on when this discretion should be exercised. Accordingly, it was suggested, courts should be given an express power to make these orders, the orders should be available at the beginning of litigation, and the rules of court should specify when it is appropriate to make the orders.¹³⁰

Some submissions also proposed that human rights cases should be a ‘no costs jurisdiction’; that is, parties would be expected to pay their own costs regardless of whether or not they succeed.¹³¹ Alternatively, the Human Rights Council of Australia suggested that the Federal Government establish a test case litigation fund, as has operated in Canada since 1985, to provide resources to those running important human rights cases.¹³²

Disbursement costs

The Public Interest Law Clearing House noted that, even if a party is able to obtain free legal advice, there are other costs associated with litigation. Many people might also need assistance in meeting the costs of other professional services (known as ‘disbursements’)—such as obtaining medical opinions (to be used in evidence), interpreter services, and copies of the transcript of proceedings. The Clearing House suggested that the Federal Government do the following:

- establish a scheme for funding disbursements in all jurisdictions in matters where an applicant is represented pro bono and make such a scheme available for public interest cases
- allow for the waiver of application fees in cases of financial hardship and in public interest cases

¹²⁸ Australian Law Reform Commission, *Costs Shifting: who pays for litigation*, Report No. 75 (1995) 78, cited in Public Interest Law Clearing House, Submission.

¹²⁹ Public Interest Law Clearing House, Submission. Support was also expressed in the context of a federal Human Rights Act, as opposed to more generally—R Merkel and A Pound, Submission.

¹³⁰ Public Interest Law Clearing House, Submission.

¹³¹ For example, ACT Human Rights Commission, Submission; ACT Disability, Aged and Carer Advocacy Service, Submission; A Galbreath, Submission.

¹³² Human Rights Council of Australia, Submission.

- allow funding to be granted retrospectively if disbursements were incurred urgently or if there is another compelling reason.¹³³

The Committee's findings

Access to justice is limited for many Australians, and more effort on the part of the Federal Government is needed to remove the barriers and so ensure more effective protection of human rights in Australia. The Committee was surprised by the extent of concern about access to justice throughout Australia: it was apparent at many community roundtables, and a large number of submissions raised the subject.

It is obvious that more needs to be done in this area, and the Committee heard a range of suggestions for remedying the situation. But much work has already been done to identify concerns and possible reforms in this area, so the Committee decided against making any specific proposals. Instead, it considers the Federal Government should develop and implement a framework for improving access to justice, in consultation with the legal profession and the non-government sector.

Some of the options for improving access to justice could be costly (for example, increasing funding for legal aid matters); others might be less so (for example, requiring government panel firms to engage in pro bono work). Nevertheless, as with a range of other reforms discussed in this report, the cost to the community of not taking any action is likely to be greater if the people who experience human rights violations are unable to seek justice or redress.

Recommendation

Recommendation 14

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

¹³³ Public Interest Law Clearing House, Submission.

