

# Summary

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

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

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

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

## Part One Introduction

### 1 The Consultation: an overview

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

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

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

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

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

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

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

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

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

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

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

## **3 Rights and responsibilities**

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

## **Part Three Reform options**

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

## **8 Human rights in practice**

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

## **Part Five      The way forward**

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

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