

ANU NATIONAL CENTRE FOR INDIGENOUS STUDIES
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Attorney-General's Department
National Human Rights Consultation Secretariat
Central Office, Robert Garran Offices
National Circuit
BARTON A.C.T. 2600

Dear Father Brennan, Ms. Kostakidis, Mr. Palmer and Ms Williams,

Re: NATIONAL HUMAN RIGHTS CONSULTATION SUBMISSION

I attach a submission on behalf of the ANU National Centre for Indigenous Studies. I would be pleased to elaborate on the contents of the submission or otherwise further assist you, if required.

Yours sincerely,



Professor Mick Dodson AM

Director, ANU National Centre for Indigenous Studies
Professor, ANU College of Law
Member (Pacific), United Nations Permanent Forum on Indigenous Issues

TERMS OF REFERENCE

Among the terms of reference are a stipulation that any “options identified should preserve the sovereignty¹ of the Parliament and not include a constitutionally entrenched bill of rights”. While this submission primarily discusses possibilities within these terms, it also canvasses possibilities that may be considered outside this specific term of reference (see **Recommendation 5** and **Recommendation 6**).

WHICH HUMAN RIGHTS (INCLUDING CORRESPONDING RESPONSIBILITIES) SHOULD BE PROTECTED & PROMOTED?

Recommendation 1: Natural Persons & Peoples

Consistent with fundamental principles of international human rights law, human rights protection in Australia should extend to natural persons (a larger group than for example citizens but a smaller group than legal persons or entities with legal personality such as corporations) and peoples (which, as defined by contemporary international human rights law, includes Indigenous peoples).

Recommendation 2: Rights to be Protected & Promoted

Although historically or because of definitional utility rights are often classified in groups, levels or generations within a hierarchy, these distinctions (such as between individual and collective rights, or between civil and political rights on the one hand and economic, social and cultural rights on the other) can be unhelpful in considering how to best protect human rights. Fundamental human rights are indivisible and interdependent.² Accordingly, decisions about which rights to protect must not be polarised into ‘either/or’ camps. At minimum:

A. Rights protected and promoted in Australia should extend to every covenant and convention that the State has ratified, thereby signalling its formal intention to observe those rights, to implement them domestically, and to be legally bound under international law in respect of those rights.

B. In addition, any *jus cogens* norms (including contemporary interpretation of them at international law) which Australia has not formally ratified, endorsed or otherwise acceded to must nonetheless be protected domestically, and must not be able to be abrogated, suspended or curtailed in any way, such as the suggestion in **Recommendation 4**.

¹ Although sometimes used interchangeably, there is considerable confusion about the terms ‘parliamentary sovereignty’ and ‘parliamentary supremacy’ and what those concepts entail. Many maintain that the Commonwealth Parliament is not sovereign in Albert Dicey’s sense because its legislative powers are limited by the Commonwealth Constitution and that the doctrine of parliamentary *supremacy* is more appropriate to the Australian context (see for example See Dawson J in *Kable v Director of Public Prosecutions for NSW* (1996) 189 CLR 51 at 71-6).

Opinion also diverges in relation to whether this doctrine is best construed as continuing or self-embracing, depending on the interpretation of the British *grundnorm* or rule of recognition. Dicean jurists generally maintain the sovereignty of parliament is one which continues in all respects so parliament may not detract from its own continuing legislative power and can always validly amend or repeal any enactment whatsoever (see for example *Kartinyeri v Commonwealth* (1998) 195 CLR per Brennan CJ and McHugh J at 355-7). This view does not readily admit the possibility of effective manner and form provisions binding future parliaments (See *Harris v Minister of the Interior* [1952] 2 SALR 428 which heralded increasing challenges to this view by determining that a sovereign legislature need not always be constituted in the same way. See also *Bribery Commissioner v Ranasinghe* (1965) AC 172 and *Attorney-General for NSW v Trethowan* [1932] AC 526 (PC) per Dixon J).

Scholars who prefer Herbert Hart tend to interpret the doctrine as being self-embracing, at least procedurally in regards to the requirements for future parliaments to exercise their legislative power. Parliaments are therefore bound by current law in relation to enacting legislation, which may include specified procedures for valid enactment (such as manner and form provisions). This latter view preserves the doctrine because the procedural requirements are not a substantive fetter so current and future parliaments retain their legislative power. Manner and form provisions merely provide a non-standard method for the exercise of legislative power, thereby offering some measure of protection against hasty or inadvertent amendment or repeal. They do not offer protection against clearly expressed, inconsistent, validly enacted legislation or provisions. Constitutional amendment would naturally provide the most protection against amendment or repeal.

² This was confirmed by the 1993 Vienna Declaration and Programme of Action, World Conference on Human Rights and endorsed more recently at the 2005 World Summit in New York (paragraph 121).

Recommendation 3: Developing Rights or Aspects of Rights

In order to allow for unforeseeable social, medical and legal developments, and to avoid any enumerated rights becoming an inflexible list preventing new rights being identified or current rights being reinterpreted in light of clearly established developments in international human rights law, not listing a right should in no way be held to abrogate or restrict the operation of that right.

Recommendation 4: Curtailing or Balancing Rights

Rights should only be subject to such limitations or restrictions as are prescribed by law and in accordance with international human rights obligations. These limitations or restrictions should be non-discriminatory³ and strictly the minimum curtailment necessary solely for the purpose of securing due recognition and respect for the rights and freedoms of others and for meeting the just and most compelling requirements of a democratic society. So for instance the minimum curtailment necessary may involve temporary suspension and subsequent revival of a right rather than its extinguishment.

ARE THESE HUMAN RIGHTS CURRENTLY SUFFICIENTLY PROTECTED & PROMOTED?

In general, notwithstanding the limited and patchwork legal protection of a very limited range of rights, rights are not sufficiently protected and promoted in Australia. There is a range of mechanisms for the legal protection of rights in Australia, including express and implied Commonwealth constitutional protection, State, Territory and Commonwealth legislation, common law protections, judicial review and administrative review tribunals. There is also a matrix of organisations and practices that promote and provide education about rights, including *inter alia* non-governmental organisations, the Australian Human Rights Commission and community legal centres. While these all form a complex network of rights protection, this network provides fragile protection of a scant list of rights. The system of protection is far from comprehensive in the rights it protects, and far from robust in the legal protection it affords even the meagre list of rights protected.

HOW COULD AUSTRALIA BETTER PROTECT & PROMOTE HUMAN RIGHTS?

Recommendation 5: Constitutional Protection

Although the terms of reference explicitly exclude “a constitutionally entrenched bill of rights”, this arguably still leaves room for options that identify possibilities for constitutionally protecting human rights either by:

A. constitutionally entrenching something less than a “bill of rights” (such as a single section constitutionally entrenching a right to be free from discrimination on the basis of race); or

³ This non-discriminatory element should be non-derogable in relation to racial discrimination, which should have an absolute prohibition on its breach or suspension.

B. constitutionally amending current sections (such as the ‘defence power’ s51(vi)) in order to clarify their operation in relation to specific human right/s or aspect/s thereof, with the purpose of better protecting the right/s.

Notwithstanding these options being considered outside the terms of reference they (along with a constitutionally entrenched “bill of rights”) are submitted here as the strongest and most comprehensive method of legally protecting and promoting human rights, as per the request by the National Human Rights Consultative Committee members at a consultation in Canberra that all options be submitted even if they may be clearly outside the terms of reference.

Recommendation 6: Legislative Entrenchment

Assuming **Recommendation 5** is adjudged outside the terms of reference or otherwise untenable, it is submitted that legislatively entrenching protection of human rights is a mechanism which would enable stronger legal protection than ordinary legislation while retaining the flexibility to amend, suspend, abolish or repeal without resorting to the onerous requirements for constitutional amendment. This could be achieved in various ways including *inter alia*:⁴

A. Doubly⁵ entrenched manner and form provisions in State legislation. There is well established authority for State legislatures enacting valid manner and form provisions by laws respecting the constitution, powers and procedures of the legislature.⁶

B. Doubly entrenched manner and form provisions in Commonwealth legislation.⁷

⁴ Theories about the principle of necessity and interpretations of the British *grundnorm* that also contemplate the possibility of limiting the legislative powers of future parliaments, and the substantial research on protecting civil liberties and human rights in Australia, Canada and the United Kingdom through interpretive provisions could also be relevant here. Ann Twomey has also suggested in her submission that legislative entrenchment may be achieved via the *Australia Acts* 1986 (Cth).

⁵ Unless manner and form provisions are doubly entrenched, they can be circumvented by legislatures amending or repealing the manner and form provision via the ordinary course of legislating, thereby avoiding complying with them.

⁶ *Attorney-General for NSW v Trethowan* [1932] AC 526 (PC); *Clayton v Heffron* (1960) 105 CLR 214, 258-9, 262 per Fullagar J, 275 per Menzies J. For a summary of the law in relation to State parliaments and manner and form, see Anne Twomey ‘Does anyone really understand manner and form?’ UNSW Constitutional Law Conference, UNSW, Sydney February 2005. Effective manner and form provisions change the manner or form in which legislation must be enacted, requiring future parliaments to comply with special restrictive procedures for enactments to be valid. This can make amendment and repeal more difficult while still enabling legislatures to retain the power to legislate since manner and form provisions cannot constitute a substantive fetter on the legislative power of parliaments. Statutorily entrenching rights in this way provides legislatures with the flexibility to protect against inadvertent or hasty amendment or repeal enacted in the ordinary course of legislating.

⁷ There is scant judicial authority on whether the Commonwealth Parliament can validly enact binding manner and form provisions in Commonwealth legislation beyond the constitutional manner provisions that it is already subject to (eg ss57, 128) because, to date, it has never done so (for an unsuccessful attempt see the *Flags Amendment Act* (Cth) 1998 and the *Human Rights Bill* (Cth) 1973 which lapsed with the 1974 double dissolution). However there is sufficient support – from judicial and academic commentary and relevant constitutional principles applied in the light of authorities in relevant analogous jurisdictions like Canada and the United Kingdom – to indicate that it might nonetheless be possible.

The Commonwealth Constitution makes provision respecting the manner of legislation but is silent on the subject of form. This could mean that the power of the Commonwealth Parliament to enact form provisions is wider than its ability to enact binding manner provisions. It could, for instance, effectively entrench a right to racial non-discrimination by inserting a doubly entrenched provision in the *Racial Discrimination Act 1975* (Cth) requiring subsequent inconsistent enactments to expressly declare that they operate notwithstanding that Act. The *Human Rights Bill 1973* (Cth) cl.5(2) and (3) sought to employ a similar form provision for entrenching rights which was modelled on s2 of the Canadian *Bill of Rights 1960* (for judicial recognition of the Canadian Parliament’s power to enact binding form provisions see *R v Drybones* [1970] SCR 282). As a common law jurisdiction with a federalist system whose parliamentary supremacy is subject to a written Constitution, the Canadian example lends significant weight to the application of this approach in Australia.

A manner provision establishing an additional or alternative legislature for enactments on certain areas within the legislative power of the Commonwealth (eg race: s51(xxvi)) is another way in which a right might be entrenched (see for example George Winterton ‘Can the Commonwealth Parliament Enact “Manner and Form” Legislation?’ (1980) 11 FLR 167). Winterton distinguishes a substituted legislature, which would be a manner provision that the Commonwealth Parliament could not validly enact (Commonwealth Constitution ss1, 128), from an additional or alternative legislature. The validity of the latter manner provision would depend on the interpretation of ss53 and 57 of the Commonwealth Constitution which Winterton considers would not prevent the establishment of an alternative legislature, provided it is approved by the Senate (s53) or implemented pursuant to s57, a permissive section suggesting one method of resolving disputes among the Houses (see the use of the word ‘may’ in the section). Other manner provisions such as specifying a special majority required to pass the legislation would be *ultra vires* (Commonwealth Constitution ss23, 40, 128). Proponents of this approach draw similarities between the legislative power of the Commonwealth Parliament and that of the United Kingdom Parliament (the latter of which is able to impose manner and form provisions on itself), due to the close historical and legal relationship between the two jurisdictions, a shared common law environment which influences the interpretation of their institutions of governance and the fact that the Commonwealth was established by an Act of the United Kingdom Parliament. Apart from the additional requirement that the Australian Parliament is subject to the Commonwealth Constitution, these provide a basis for submitting that Australia inherited similar legislative powers as the United Kingdom Parliament. The High Court has expressed a similar view in relation to the

Recommendation 7: Legislative Protection

Assuming the options mentioned in **Recommendations 5** and **6** are adjudged outside the terms of reference or otherwise untenable, the following possibilities are recommended:

A. Enacting new legislation implementing **Recommendations 1, 2, 3, 4** and **8**; and/or

B. Amending existing legislation to augment the protection of human rights. Examples may include directions in the *Acts Interpretation Act* (Cth) 1901 to interpret all legislation in light of specified rights, better resourcing the Australian Human Rights Commission and making the reporting function in the *Human Rights & Equal Opportunity Commission Act* (Cth) 1986 something that Parliament must respond to publicly with reasons for its decision, and strengthening the *Racial Discrimination Act* (Cth) 1975 or other legislation that have implications for human rights such as the *Sex Discrimination Act* (Cth) 1984, *Human Rights (Sexual Conduct) Act* (Cth) 1994 or the *Freedom of Information Act* (Cth) 1982.

Recommendation 8: Encouraging a Human Rights Culture via Education

Australia should signal the importance of human rights protection *inter alia*:

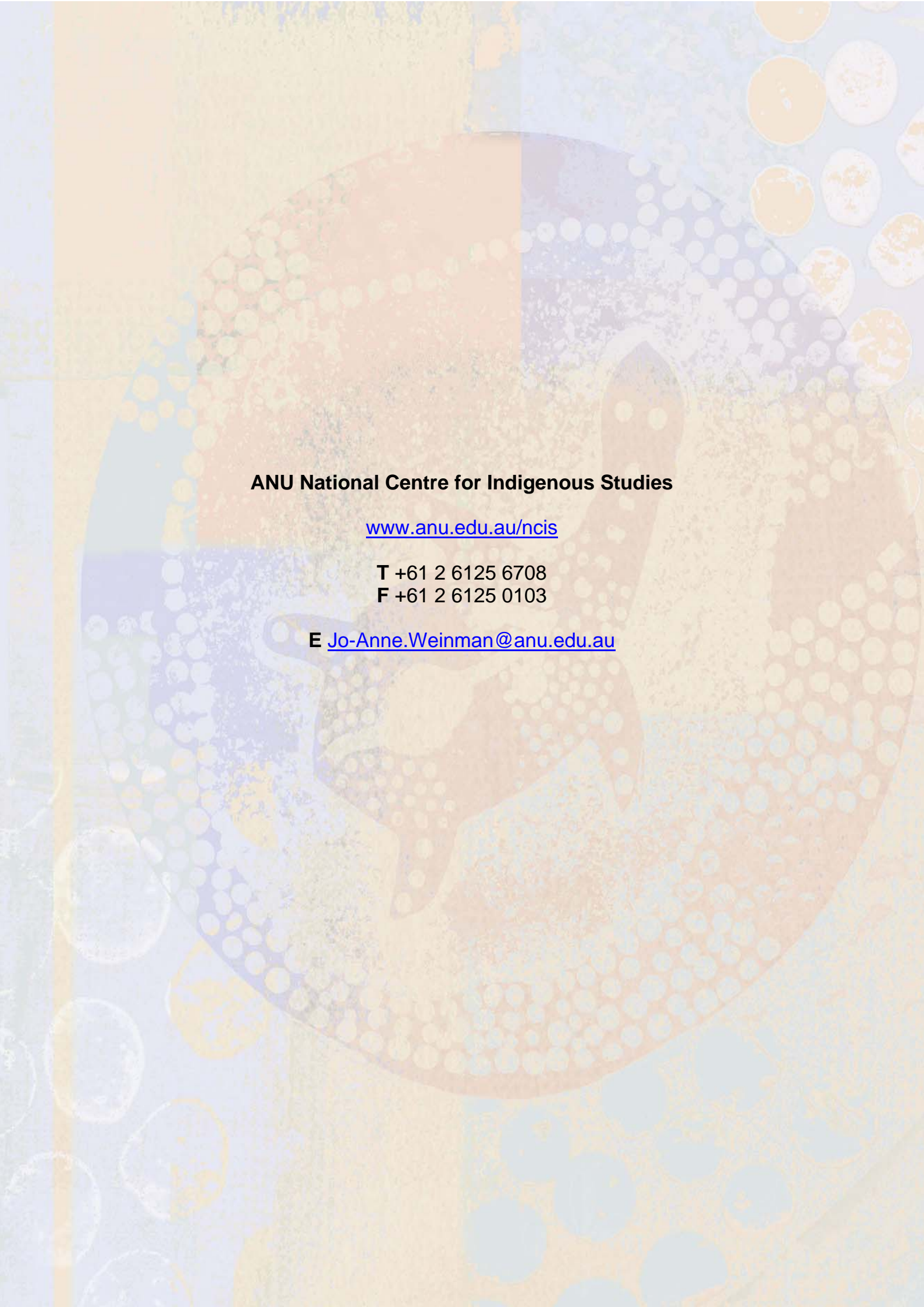
A. with better education about the current level of human rights protection both in Australia and internationally; and

B. by sponsoring and encouraging debate about human rights in a variety of arenas (such as government departments, agencies and organisations especially those service providers who have a lot of contact with the public [eg the police, Centrelink], educational institutions at all levels); and

C. by better resourcing bodies that protect and promote human rights (such as the Australian Human Rights Commission, non-governmental organisations and community legal centres).

D. by better informing people of Australia's international stance regarding declarations and treaties that are submitted for endorsement or signature.

principles of responsible government, prerogative powers and separation of powers (the Court examined it in relation to delegating legislative power in *Victorian Stevedoring and General Contracting Co Pty Ltd v Dignan* (1931) 46 CLR 73 per Evatt and Dixon JJ at 117-8 and 101-2; see also *Attorney-General for Australia v R (Boilermakers' Case)* [1957] AC 288, 321). In the absence of a constitutional provision to the contrary, the Commonwealth Parliament can therefore make binding manner and form enactments.



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