

**Submission of**

**Emilia Della Torre**

**to the**

**National Human Rights Consultation Committee**

**ON THE QUESTION OF THE PROTECTION AND  
PROMOTION OF HUMAN RIGHTS BY THE  
AUSTRALIAN GOVERNMENT**

*“The test of a system of human rights is not only how it treats the weakest but also how it treats the worst amongst us.”*

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## Executive Summary

This submission puts forward the view that we need an Australian Charter of Rights and Responsibilities (Australian Charter) to better protect and promote the human rights (and corresponding responsibilities) of all individuals and groups of individuals who are subject to the jurisdiction of Australia. Concurrently, we need to establish a Joint Parliamentary Standing Committee on Human Rights and Responsibilities to monitor whether or not proposed federal laws, policies and programs conform to the Australian Charter. I submit that training programs should also be rolled out to assist all those people and institutions substantially engaged in public functions to learn how to incorporate the minimum human rights standards contained in the Australian Charter into their public professional operations.

By the term 'human rights' I mean the system of internationally recognized human rights - particularly civil and political rights and environmental, economic, social and cultural rights - publicly adopted by the Government of Australia and which the Government of Australia has the constitutional power to protect and promote. Human rights and responsibilities are unique legal interests based on the inherent dignity of the human person. They are universal, inalienable and indivisible. But they are not unlimited. It is an established legal principle that the protection and promotion of human rights (and corresponding responsibilities) will sometimes need to be restricted *inter alia* in the national interest.

In my view, an Australian Charter should take the form of an ordinary act of Federal Parliament which incorporates the International Bill of Rights into the law of Australia. The purpose of such a Charter would be to regulate the relations between government and citizens. An Australian Charter must list the rights, responsibilities and remedies recognized under Australian law for this purpose. This suggested approach would preserve the supremacy of the Parliament of Australia within whose power it remains to enact, repeal or amend such legislation. The overall effect of an Australian Charter would be threefold: to act as a hallmark of national identity; to set minimum national standards of conduct to inform the activities of public actors; and to provide appropriate and effective sanctions on those occasions when these minimum standards are breached.

I put forward three principal arguments to support the view that we need an Australian Charter of Human Rights and Responsibilities. (i) Human rights are not adequately protected in Australia today. (ii) Therefore, we need to develop a systemic culture in which human rights and responsibilities are better protected and promoted. (iii) Each of the three arms of government can and should make a distinctive and complementary contribution to this end. I conclude that improving the protection and promotion of human rights (and corresponding responsibilities) is a way to enhance the democratic governance of Australia.

## **Summary of Recommendations**

### Recommendation 1

That the International Bill of Rights be incorporated into the domestic law of Australia by means of federal legislation, called the Australian Charter of Human Rights and Responsibilities Act.

### Recommendation 2

That the Australian Charter of Human Rights and Responsibilities Act contain a limitations clause which guarantees the rights and freedoms set down in it are subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

### Recommendation 3

That the purpose of the Australian Charter of Human Rights and Responsibilities Act is the regulation of the relations between government and citizens, where “government” includes all individuals and organizations substantially involved in public functions.

### Recommendation 4

That the Preamble to the Australian Charter of Human Rights and Responsibilities Act articulate detailed and specific national responsibilities which government, individuals and groups of individuals hold towards each other and towards this nation.

### Recommendation 5

That the Australian Charter of Human Rights and Responsibilities Act articulate minimum national human rights standards.

### Recommendation 6

That a Joint Standing Committee on Human Rights and Responsibilities be established under the Act in order to develop guidelines on the implementation of an Australian Charter; to scrutinize all proposed legislation and delegated legislation for compliance with the human rights and responsibilities under an Australian Charter; and to produce a Human Rights and Responsibilities Impact Statement to accompany all proposed legislation and delegated legislation which is tabled in Parliament.

### Recommendation 7

That the introduction of the Australian Charter of Human Rights and Responsibilities Act be accompanied by an extensive training program throughout all public institutions (and private institutions substantially carrying out governmental functions) in order to effect and reinforce a shift in public sector culture towards greater human rights and responsibilities compliance.

### Recommendation 8

That the Australian Charter of Human Rights and Responsibilities Act contain:

(i) A provision allowing federal Parliament to expressly declare that a legal instrument or a provision thereof shall operate notwithstanding anything to the contrary in the Charter. Such a notwithstanding clause shall only apply in relation to derogable human rights.

(ii) A statutory presumption that all federal legislation and delegated legislation is intended to comply with the Charter in its entirety unless a standard form “notwithstanding clause” is expressly placed in the instrument in question. This is the codification of the principle of legality.

(iii) An interpretative clause which provides that courts vested with federal jurisdiction must read federal legislation subject to the Charter which gives effect to the International Bill of Rights in its entirety.

(iv) A provision which empowers courts vested with federal jurisdiction to hold that federal legislation and delegated legislation that is inconsistent with the Charter is invalid - absent a “notwithstanding clause” in the relevant legal instrument.

(v) A provision which empowers courts vested with federal jurisdiction to hold that State and Territory legislation that is inconsistent with the Charter is invalid.

### Recommendation 9

That the Australian Charter of Human Rights and Responsibilities Act include:

(i) A provision that individuals and groups of individuals who allege their Charter rights have been violated can bring court proceedings against a person or institution substantially engaged in a governmental function.

(ii) A non-exhaustive list of judicially enforceable remedies available under the Charter to individuals or groups of individuals whose Charter rights have been violated; including an apology, stay of proceedings, damages, injunction, declaration or judicial direction.

(iii) A savings provision to the effect that a right or freedom not included in the Charter that arises or is recognized under any other law of Australia is not abrogated or limited only because the right or freedom is not included or is only partly included in this Charter.

1. **Which human rights (including corresponding responsibilities) should be protected and promoted? International human rights (and corresponding responsibilities).**

Human rights

International human rights law is the *corpus iuris* which has been adopted by the international community to represent the common values of all civilized nations which seek to protect and promote human rights.<sup>1</sup> Australia is part of this international community and has already publicly adopted these rights.<sup>2</sup> Although it is not a perfect system, the principles, rights and responsibilities of international human rights law comprise the best available list of human rights adopted by civilized nations. Therefore, in my view the human rights recognized by international human rights law should become the body of human rights (and corresponding responsibilities) protected and promoted in Australia. There is already a well established mechanism to ensure that we can adopt and adapt these international human rights (and corresponding responsibilities) in a manner which is entirely appropriate in Australia.<sup>3</sup> Human rights (and corresponding responsibilities) are not absolute. It is an established legal principle that the protection and promotion of human rights (and corresponding responsibilities) will sometimes need to be restricted *inter alia* in the national interest.<sup>4</sup>

There is no agreed definition of 'human rights'. Nevertheless ... [o]n 10 December 1948 the international community, almost miraculously, agreed on a statement of rights to which no country objected. This was the Universal Declaration of Human Rights. The UDHR, with its 30 Articles, has become

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<sup>1</sup> It is important to recognize that human rights are not absolute. The international articulation of human rights (and corresponding responsibilities) is found in a well-established and complex body of law, which in turn is found in international treaties, customary international law, judgments of international courts and tribunals and, to a lesser extent, in the writings of legal experts: Article 38(1) of the *Statute of the International Court of Justice*.

<sup>2</sup> See Appendix One List of International Human Rights Instruments Publicly Adopted by Australia. At the Tenth Session of the United Nations Human Rights Council (3 March 2009) Mr Bob McMullan MP Parliamentary Secretary for International Development Assistance stated: "Australia's democracy has the protection of human rights as its cornerstone. We are deeply committed to promoting and protecting human rights both at home and abroad."

<sup>3</sup> The doctrine of the margin of appreciation: 'By reason of their direct and continuous contact with the vital forces of their countries, State authorities are in principle in a better position than the [...] judge to give an opinion on the exact content of these requirements [of the protection of human rights] as well as the 'necessity' of a 'restriction' or 'penalty' intended to meet them.': *Handyside v United Kingdom*, Judgment of 7 December 1976, Ser. A No. 24 (1979-80) at 22. The doctrine gives a State party to the European Convention on Human Rights and Fundamental Freedoms 'a certain measure of discretion in assessing the extent strictly required by the exigencies of the situation' in order to comply with a [human rights] obligation: Appl. 176/56 *Greece v United Kingdom*, Yearbook II (1958-59) 174 at 176. The doctrine is, in effect, the expression of judicial self-restraint.

<sup>4</sup> For example, section 5 of the New Zealand *Bill of Rights Act (1990)* states: "... the rights and freedoms contained in this Bill of Rights may be subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society." See also the reservations and declarations listed in Appendix One (below).

the accepted and authoritative statement of human rights for the whole world. It was agreed to by the UN General Assembly, with 48 supporting votes and no dissents (but eight abstentions). Nearly 20 years later, in 1966, and after much debate, the international community in effect translated the effect of the UDHR into binding treaties, or Covenants, as they were called. The two covenants – the ICESCR, and the ICCPR and its two Optional Protocols – have been ratified by Australia. Together, these instruments constitute what is known as the International Bill of Rights, the currently definitive statement of the scope of human rights.<sup>5</sup>

Australia should incorporate the International Bill of Rights into its domestic law in the form of an Australian Charter of Human Rights and Responsibilities to protect and promote the human rights (and corresponding responsibilities) of all individuals and groups of individuals who are subject to the jurisdiction of Australia. The purpose of the Australian Charter would be to regulate the relations between government and citizens. By the term ‘government’ I mean to include all those people and institutions substantially engaged in public functions. The Australian Government has the constitutional power to incorporate the rights contained in the International Bill of Rights into national law: *The Commonwealth v Tasmania* (1983) 158 CLR 1; *Victoria v Commonwealth* (1996) 138 ALR 129.<sup>6</sup> Such a proposal is not without critics. For example, some in the community are concerned that the progressive realization of economic, social and cultural rights takes time and resources and is ultimately not justiciable. It is not the purpose of this submission to answer critics.<sup>7</sup> *In nuce*, while I respect their right to hold and

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<sup>5</sup> Bailey, P *The Human Rights Enterprise in Australia and Internationally* LexisNexis Butterworths 2009 at pages 8-9.

<sup>6</sup> The only limitations the High Court has placed on treaty implementation is that the implementing legislation must not violate other provisions of the Constitution (for example, those protecting free trade between the States): *Koowarta v Bjelke-Peterson* (1982) 153 CLR 168 (Koowarta) at 191-2 (per Gibbs CJ), 213 (per Stephen J), 225-6 (per Mason J), 240 (per Murphy J), 243 (per Aickin J), 250 (per Wilson J); and that treaties must be entered into in good faith, without simply the intention to extend the powers of the Commonwealth: *Koowarta* at 196 (per Gibbs CJ), 216-7 (per Stephen J), 231 (per Mason J), 260 (per Brennan J). Provided that this is not its sole purpose in entering into a treaty, the Commonwealth has the potential to legislate in all areas of State activity.

<sup>7</sup> In fact, the European experience demonstrates that economic, social and cultural rights are justiciable. The European Committee of Social Rights is a treaty body which monitors the progressive realisation of specific economic and social rights within the Council of Europe; viz. the rights to housing; health; education; employment; legal and social protections; movement of persons and non-discrimination. The Committee operates under the *European Social Charter* (ESC) – as well as the 1988 Additional Protocol to the ESC, the 1996 Revised ESC and the 1998 Collective Complaints Protocol – to determine whether or not national law and practice of the States parties are in conformity with the ESC. The Committee is comprised of fifteen independent, impartial members who are elected by the Council of Europe Committee of Ministers for a period of six years, renewable once. The ESC allows States to ratify its provisions selectively, subject to a minimum number of acceptances over a range of obligations - an ‘à la carte’ method of acceptance. The European Committee of Social Rights monitors compliance of these accepted ESC obligations through the examination of periodic reports and in respect of a collective complaints procedure. See *European Social Charter Portal: Human Rights Reporting*

express their opinions, I neither share their concerns nor the values which underpin them. There is no doubt that effective incorporation of the International Bill of Rights into Australian law raises complex questions of co-operative federalism.<sup>8</sup> Incorporation will only succeed if there is genuine political will and co-operation on the part of State, Territory and Federal governments.<sup>9</sup> There are a number of advantages to the incorporation of the International Bill of Rights into the laws of Australia. In my view, an Australian Charter would act as a hallmark of Australian identity and symbolically mark Australia as a free and fair democratic society. It would identify Australia as an active member of the group of the world's civilized nations which includes the United Kingdom, New Zealand, Canada, Hong Kong, South Africa and the United States of America. However, in my view it is important to ensure that the enactment of an Australian Charter is more than a grand symbolic gesture.

### Recommendation 1

**That the International Bill of Rights be incorporated into the domestic law of Australia by means of federal legislation, called the Australian Charter of Human Rights and Responsibilities Act.**

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[http://www.coe.int/T/E/Human\\_Rights/Esc/3\\_Reporting\\_procedure/](http://www.coe.int/T/E/Human_Rights/Esc/3_Reporting_procedure/) Similarly, the Constitutional Court of South African at <http://www.saflii.org/za/cases/ZACC/> : see, for example, *Government of the RSA v Grootboom* (2000) - right to housing ; *Minister of Health v Treatment Action Campaign* (2002) - right to health care and access to HIV/Aids treatment ; and *Njongi v Member of the Executive Council, Department of Welfare, Eastern Cape* (CCT 37/07) [2008] ZACC 4; (28 March 2008) - right of access to social security.

<sup>8</sup> See Chapter 4, House Standing Committee on Legal and Constitutional Affairs *Report into the Inquiry on Constitutional Reform* (23 June 2008) at

<http://www.aph.gov.au/house/committee/laca/constitutionalreform/report/chapter4.pdf>

<sup>9</sup> In Australia, the protection of human rights has been a political issue since federation. While a belief in the supremacy of Parliament and the rule of law strongly influenced the decision not to adopt a Bill of Rights in the Australian Constitution, there was also a less high minded reason. A constitutionally entrenched Bill of Rights would have caused major problems for newly created Federal and State governments of the time in their treatment of minorities. A Bill of Rights at the turn of the twentieth century would have caused major problems for the validity of the White Australia Policy in immigration and in the prevailing treatment of aboriginal persons at the time. One of the framers of the Constitution, Andrew Inglis Clark, proposed a clause taken from the United States Bill of Rights which would prevent discrimination on the basis of race. This anti-discrimination clause was rejected at the 1898 Constitutional Convention in favour of the current section 117 which merely prevents discrimination between states based upon residency. It states:

“A subject of the Queen, resident in any State, shall not be subject in any other State to any disability or discrimination which would not be equally applicable to him if he were a subject of the Queens resident in such other State.”

In the debate of the Inglis clause Sir John Forest, one of the State Premiers, successfully argued:

“It is no use for us to shut our eyes to the fact that there is a great feeling all over Australia against the introduction of coloured persons. It goes without saying that we do not like to talk about it. But it is still so. I do not want this clause to pass in a shape which would undo what is about to be done in most of the colonies, and what has already been done in Western Australian [legislation preventing Asians and Africans from gaining miners' rights on gold fields], in regard to that class of persons: *Official Record of the Debates of the Australian Federal Convention* (1986).”

## **Recommendation 2**

**That the Australian Charter of Human Rights and Responsibilities Act contain a limitations clause which guarantees the rights and freedoms set down in it are subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.**

## **Recommendation 3**

**That the purpose of the Australian Charter of Human Rights and Responsibilities Act is the regulation of the relations between government and citizens, where “government” includes all individuals and organizations substantially involved in public functions.**

### Corresponding responsibilities

Unlike the articulation of human rights, the international community only provides limited guidance as to how corresponding responsibilities might be articulated in an Australian Charter. Possibly this is because while the articulation of international human rights pertaining to individuals and groups of individuals is universal, the articulation of their corresponding responsibilities has a more contextually specific character. For example, *The African Charter of Human and Peoples’ Rights* states:

#### **Article 27**

1. Every individual shall have duties towards his family and society, the State and other legally recognized communities and the international community. 2. The rights and freedoms of each individual shall be exercised with due regard to the rights of others, collective security, morality and common interest.

#### **Article 28**

Every individual shall have the duty to respect and consider his fellow beings without discrimination, and to maintain relations aimed at promoting, safeguarding and reinforcing mutual respect and tolerance.

#### **Article 29**

The individual shall also have the duty: 1. to preserve the harmonious development of the family and to work for the cohesion and respect of the family; to respect his parents at all times, to maintain them in case of need; 2. To serve his national community by placing his physical and intellectual abilities at its service; 3. Not to compromise the security of the State whose national or resident he is; 4. To preserve and strengthen social and national solidarity, particularly when the latter is threatened; 5. To preserve and strengthen the national independence and the territorial integrity of his country and to contribute to its defence in accordance with the law; 6. To work to the best of his abilities and competence, and to pay taxes imposed by law in the interest of the society; 7. to preserve and strengthen

positive African cultural values in his relations with other members of the society, in the spirit of tolerance, dialogue and consultation and, in general, to contribute to the promotion of the moral well being of society; 8. To contribute to the best of his abilities, at all times and at all levels, to the promotion and achievement of African unity.

Clearly, while the right to family life (and the protection of the institution of the family) is universal, not all the corresponding responsibilities articulated in the African Charter could be transposed into an Australian context.

An Australian Charter could contain specific responsibilities for individuals (for example towards our indigenous populations; towards each other at times of national disaster; towards newcomers to this country) which have not been highlighted in the African context but which are appropriate to promote here in Australia. Recognition of human rights also implies responsibilities for Australian governments. Chief among these is the responsibility is to create the economic, political, social and environmental conditions in which all people may develop their physical, mental and moral capacities.<sup>10</sup> Given the reticence of the Australian common law to impose positive obligations on an individual, the legal effects of any list of obligations would need to be carefully circumscribed. It is not the purpose of this submission to specifically identify each human right and its corresponding responsibility. However, any work done to articulate an Australian list of corresponding responsibilities will represent an opportunity to highlight the values which Australia considers most important in the areas of human rights law and policy. The fact that such a list does not exist in Australia is significant and constitutes a gap in our national social conscience which it might be time to fill. The issue whether there is a need to formulate responsibilities has recently been given attention in the United Kingdom.<sup>11</sup>

#### Recommendation 4

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<sup>10</sup> Preamble paragraph 7 *New Matilda Human Rights Bill 2006* at <http://www.humanrightsact.com.au/2008/>

<sup>11</sup> See Chapter 8 of the House of Lords House of Commons Joint Committee on Human Rights *A Bill of Rights for the UK? Twenty-ninth Report of Session 2007–08 Report*, (10 August 2008) paras 292-295 (inclusive) at <http://www.publications.parliament.uk/pa/jt200708/jtselect/jtrights/165/165i.pdf> Subsequently, a UK Green Paper has been circulated for public consideration: see Chapter 2 *Responsibilities Rights and Responsibilities: developing our constitutional framework* Presented to Parliament by the Lord Chancellor and Secretary of State for Justice by Command of Her Majesty (March 2009) at <http://www.justice.gov.uk/docs/rights-responsibilities.pdf> where it states:

“Although not necessarily suitable for expression as a series of new legally enforceable duties, it may be desirable to express succinctly, in one place, the key responsibilities we all owe as members of UK society, ensuring a clearer understanding of them in a new, accessible constitutional document and reinforcing the imperative to observe them. Such responsibilities could include treating National Health Service and other public sector staff with respect; safeguarding and promoting the wellbeing of children in our care; living within our environmental limits; participating in civic society through voting and jury service; assisting the police in reporting crimes and co-operating with the prosecution agencies; as well as general duties such as paying taxes and obeying the law.”

**That the Preamble to the Australian Charter of Human Rights and Responsibilities Act articulate detailed and specific national responsibilities which government, individuals and groups of individuals hold towards each other and towards this nation.**

**2. Are these human rights currently sufficiently protected and promoted? No.**

The human rights of people within Australia's jurisdiction currently receive some protection and promotion because Australia is a representative democracy with a written Constitution, anti-discrimination and other legislation in each of our States and Territories and a system of common law developed through our courts. Notwithstanding, there remain significant gaps in the existing protection and promotion of human rights in Australia. In my view, neither the Australian Parliament, the executive arm of government, nor the Australian courts taken alone or together currently protects and promotes the human rights of individuals and groups of individuals sufficiently in our nation. The critical insufficiency in my view is that our current arrangements of public governance are too atomistic and too reactive.

Each arm of government has a distinctive and important role to play in this arena. We need to create a culture of human rights and responsibilities based on rational and proportionate minimum standards which moderate and counterbalance proposed legislation and delegated legislation which might offend fundamental human rights and freedoms in Australia. A human rights and responsibilities culture could then, in turn, inform the manner in which legislative instruments are interpreted and administered by the executive during their implementation of government policy and programs. Although minimum human rights standards do not necessarily resolve any disagreement between the three arms of government, they do provide a common framework of debate and dialogue.

There is a clear role for an Australian Charter, for example, to inform the conduct of all public officials by setting minimum standards of their behaviour on the basis of civilizing values. I have observed that in Australia we sometimes hold the belief that we are born with an inbuilt moral "fair go" compass. This is a double-edged sword.<sup>12</sup> I have directly observed many situations in which this moral "fair

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<sup>12</sup> The values which underpin an Australian Charter of Rights reflect our innate sense of fairness, compassion and common humanity. For example, in a speech responding to criticisms of the UK Human Rights Act, Lord Falconer of Thoroton (then Lord Chancellor) rejected the argument that the UK law 'favours criminals over victims'. He stated:

"In reality, the [UK] Human Rights Act is about common sense - it does pretty much what our instincts judge to be fair and proper. Yes, citizens should have their life protected by law and have a right to liberty and security. And there should be no punishment without law. And, equally, in return citizens should behave with respect for others. Not all behaviour is permissible in all

go” compass has blinded otherwise competent and well-meaning public officials to their systemic (and therefore unintentional) violations of an individual’s fundamental human rights and freedoms. An Australian Charter is arguably one of the most efficient and effective mechanism to educate public federal officials about human rights (and corresponding responsibilities) and to force them to actively and expressly consider their actions and inactions within the light of objectively verifiable minimum human rights standards at the time they exercise their authority. Setting national minimum standards based on shared values is particularly critical in a poly-ethnic country like Australia.

### Locational Inequality

The protection of human rights in Australia sometimes differs simply because Australians live in different parts of the country. For example, although most Australian citizens have the right (and the corresponding responsibility) to vote in federal elections,<sup>13</sup> not all votes of all citizens have equal value: *McGinty v Western Australia* (1996) 186 CLR 140. If you live in the middle of a capital city in Australia chances are your vote may be worth up to three times less than the vote of a person in remote rural Australia. Again, although all Australian children are guaranteed a minimum level of education throughout the country, differences in compulsory school starting and school leaving ages exist across Australia.<sup>14</sup> For example, in Tasmania a child must start school at age 5 years and must not leave until the age of 16 years. In New South Wales a child must start school by 6 years of age and cannot leave until they are 15 years. As a consequence, some (possibly the most disadvantaged) Australian children will receive more

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circumstances. Sometimes the behaviour of a minority is so intolerable that it has to be proscribed for the good of the majority. The [UK] Human Rights Act recognises this.”

Lord Falconer of Thoroton, 'Using Human Rights in the Voluntary Sector' (Speech delivered at Institute of Public Policy and Research, London, 10 December 2004), available at:

[www.dca.gov.uk/speeches/2004/lc101204.htm](http://www.dca.gov.uk/speeches/2004/lc101204.htm).

<sup>13</sup> But not, for example, certain prisoners: see *Roach v Electoral Commissioner* [2007] HCA 43 (26 September 2007) where the plaintiff was imprisoned in the State of Victoria for committing an offence against Victorian law and by reason of ss 93(8AA) and 208(2)(c) of the *Commonwealth Electoral Act* 1918 (Cth) was not permitted to vote at a federal parliamentary election.

<sup>14</sup> The structure of school education varies across states and territories. These differences can influence the interpretation of data presented under common classifications. Formal schooling consists of six to eight years of primary school education followed by five to six years of secondary school education, depending on the state or territory. All states and territories divide school education into compulsory and non-compulsory components based primarily on age. In 2007, the compulsory starting age for school education in states and territories was:

- 5 years of age (Tasmania)
- 6 years of age (NSW, Victoria, Queensland, SA, ACT and NT)
- from the beginning of the year in which the child reaches 6 years and 6 months (WA).

Although some students may undertake other/alternative approved courses/programs/activities (including approved employment) in some states, in general students were required to stay at school until:

- reaching 15 years of age (NSW, Victoria, ACT and NT)
- reaching 16 years of age (SA and Tasmania)
- reaching 16 years of age or completing year 10 (Queensland)
- the end of the year in which students turn 16 years of age (WA).

*Report on Government Services 2009* Australian Productivity Commission Chapter 4 School Education - [http://www.pc.gov.au/data/assets/pdf\\_file/0008/85373/13-chapter4-only.pdf](http://www.pc.gov.au/data/assets/pdf_file/0008/85373/13-chapter4-only.pdf)

education than others simply because of where they live.<sup>15</sup> The issue was raised by the Committee on Economic, Social and Cultural Rights in 1993 when it stated: “The Committee notes that differences exist in legislation concerning education within the federal system of Australia. The Committee also notes that the State party has identified several groups as being disadvantaged with regard to the participation in education. In particular, the Committee notes that socio-economic factors and the isolation of certain Aboriginal and Torres Strait Islander communities constitute major difficulties in the implementation of the Covenant.” These are just some examples.<sup>16</sup>

The principles of equality and non-discrimination are cornerstone human rights principles. In my view, every law or policy or program in Australia needs to fulfill a positive obligation to accord with these principles. In my view, every law or policy or program would ideally also comply with a negative obligation not to limit these principles unlawfully or arbitrarily.<sup>17</sup> In order to try to ensure that everyone is equal before the law and equally protected by the law without discrimination, it would be helpful to create substantive minimum standards of human rights (and corresponding responsibilities) that apply to everyone under Australia’s jurisdiction regardless of their location. Despite s117 of the Australian Constitution which guarantees equal rights to out-of-State residents,<sup>18</sup> this is not the case. Based on my experience of over fifteen years of university lecturing in this country, I know that many Australians are shocked when they learn that their fundamental rights and freedoms can vary depending on where they live. Most people in Australia simply assume we are all equally protected by the law

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<sup>15</sup> See UN Doc. E/C.12/1993/9 *Concluding Observations of the Committee on Economic, Social and Cultural Rights : Australia. 03/06/93.*

<sup>16</sup> There are many other examples which illustrate this gap in human rights’ protection. However, it is not the purpose of this submission to comprehensively identify these locational inequalities, merely to highlight their existence. Some further examples follow. The national *Inquiry into Older People and the Law* drew attention in 2007 to the critical need for national approaches to decision making mechanisms in the areas of powers of attorney, advance health care planning, and guardianship and administration procedures: see <http://www.aph.gov.au/house/committee/laca/olderpeople/report.htm> Problems of federalism are felt acutely by indigenous communities. There is no doubt that since the 1967 referendum granting the Commonwealth legislative power in Indigenous affairs the unintended consequence has been that the split between federal and state governments of responsibility for indigenous affairs has created one of the biggest structural barriers to our ability to effectively deal with some of the pressing needs of the indigenous issues in health, employment and education. Again, the minimum term of a federal prisoner’s sentence can differ solely because of the Australian State in which their crime occurred: *Leeth v Commonwealth*(1992) 174 CLR 455. The ability of a minor to consent to medical treatment and the corresponding right of a parent to be involved in the medical treatment of their children varies according to where in Australia they live. Finally, Australia is failing in its international obligation to progressively provide all people within its jurisdiction with an adequate standard of living: UN Doc. A/HRC/4/18/Add.2 (11 May 2007) Implementation of General Assembly Resolution 60/251 of 15 March 2006 Entitled “Human Rights Council” Report of the Special Rapporteur on adequate housing as a component of the right to an adequate standard of living, Miloon Kothari Addendum Mission to Australia” (31 July to 15 August 2006).

<sup>17</sup> *General Comment No. 31* [90] UN Doc.CCPR/C/21/Rev.1/Add.13 (26 May 2004) at paragraph 6.

<sup>18</sup> Section 117 of the Australian Constitution states: ‘A subject of the Queen, resident in any State, shall not be subject in any other State to any disability or discrimination which would not be equally applicable to him if he were a subject of the Queen resident in such other State.’

because we are 'all Australian'. This is not the case. An Australian Charter could harmonize the protection of human rights and the promotion of corresponding responsibilities throughout Australia. I acknowledge that such a view raises complex political sensitivities within our federation. However, in the case of gun laws, corporations' law and in the case of terrorism laws (for example) such sensitivities have been and continue to be successfully negotiated. They are not insuperable obstacles. In my view, States' rights should not automatically trump human rights. It is a question of values.

### **Recommendation 5**

**That the Australian Charter of Human Rights and Responsibilities Act articulate minimum national human rights standards.**

#### The Parliament

The traditional checks and balances of the Westminster system cannot always be relied upon to protect and promote human rights in Australia despite our system of responsible government and representative democracy. Particularly when the Senate is controlled by the government of the day, there is a real risk that legislation which offends human rights and freedoms will become law in Australia. This has already happened in the past. For example, our freedom of speech has been excessively curtailed by the introduction of section 82 of the *Criminal Code Act 1995* (Cth); freedom from arbitrary detention and the common law right to a fair trial in Australia have been unnecessarily circumscribed under the *Australian Security Intelligence Organisation Legislation Amendment (Terrorism) Act 2003* (Cth).<sup>19</sup> It seems that our Parliament has the legal capacity

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<sup>19</sup> Committee Against Torture *Consideration of Reports Submitted by States Parties under Article 19 of the Convention Concluding observations of the Committee against Torture Australia* CAT/C/AUS/CO/3 (22 May 2008) states at page 3:

“10. The Committee, while noting that there are a number of legislative and procedural safeguards ensuring that individuals are treated in accordance with their rights, is nonetheless concerned about the following issues related to the State party's anti-terrorism laws and practice:

- (a) The increased powers provided to the Australian Security Intelligence Organization (ASIO), including the possibility of detaining a person for renewable periods of seven days for questioning, which pose some difficulties especially due to the lack of a right to a lawyer of choice to be present during the questioning and of the right to seek a judicial review of the validity of the detention;
- (b) The lack of judicial review and the character of secrecy surrounding imposition of preventative detention and control orders, introduced by the Anti-Terrorism Act (No. 2) 2005;
- (c) Reports concerning the harsh conditions of detention of unconvicted remand prisoners charged with terrorism-related offences, also taking into account their status of accused (and not convicted) persons.

The State party should:

- (a) Ensure that the increased powers of detention of ASIO are in compliance with the right to a fair trial and the right to take proceedings before a court to determine the lawfulness of the detention;

to make specific race laws for the detriment of members of our indigenous populations: *Kartinyeri v The Commonwealth* [1998] HCA 22 ('the Hindmarsh Island Case').<sup>20</sup> Parliament has disenfranchised some adult Australian citizens of their right to vote: *Roach v Electoral Commissioner* [2007] HCA 43 (26 September 2007). Under valid Australian laws a person can currently be indefinitely locked up in immigration detention even though they have committed no crime: *Al-Kateb v Godwin* [2004] HCA 37; 219 CLR 562; 208 ALR 124; 78 ALJR 1099 (6 August 2004).

There is room for our federal Parliamentary system to become more rights and responsibilities compliant. In Australia we do not have clear and uniform minimum standards of rights and responsibilities with which federal legislation and delegated legislation must comply. We do not have systems in place to assist our elected representatives in this regard. Within our federal parliamentary system, there is currently no specific mechanism (such as a parliamentary rights and responsibilities committee)<sup>21</sup> nor overarching mechanism (such as a human rights impact statement)<sup>22</sup> to systematically address human rights (and corresponding responsibilities) issues. There is no set of transparent and accessible guidelines for parliamentarians to consider as they engage in the complex task of balancing competing interests in society.<sup>23</sup> In Australia, we currently have little or no guarantee when or how our Parliament will choose to protect our human rights - particularly when more politically pressing circumstances arise. We need minimum Australian standards. The adoption of

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(b) Guarantee that both preventative detention and control orders are imposed in a manner that is consistent with the State party's human rights obligations, including the right to a fair trial including procedural guarantees;

(c) Ensure that accused remand prisoners are separated from convicted persons and are subject to separate treatment appropriate to their status as unconvicted persons."

<sup>20</sup> "It is difficult to draw many firm conclusions from the Hindmarsh Island Bridge case. While the majority upholding the legislation was numerically strong, the reasons given were diverse. On the issue of the nature of the races power there was essentially a 2:2:2 split, with two judges not commenting (and in fact urging their judicial colleagues not to pass comment), two judges deciding the race power could not be said to support only laws for the benefit of indigenous races, and two judges deciding that, at this point in Australia's history, the race power could probably not be used for the detriment of Aboriginal people." See: Parliament of Australia Parliamentary Library Research Note 41 1997-98 Kirsty Magarey, Law and Bills Digest Group (6 April 1998).

<sup>21</sup> See, for example, the UK Parliament Joint Committee on Human Rights

[http://www.parliament.uk/parliamentary\\_committees/joint\\_committee\\_on\\_human\\_rights.cfm](http://www.parliament.uk/parliamentary_committees/joint_committee_on_human_rights.cfm)

<sup>22</sup> A human rights impact statement embedded in the policy formulation process would accompany all cabinet documents. For examples see *Report: Legal protection at risk - the cumulative impact of anti-terror legislation in the Netherlands* Humanist Committee on Human Rights The Netherlands November 2005 at

[http://www.humanrightsimpact.org/resource-database/reports/resources/view/26/user\\_hria\\_reports/](http://www.humanrightsimpact.org/resource-database/reports/resources/view/26/user_hria_reports/) and

also Hunt, P & MacNaughton, G *Impact Assessments, Poverty and Human Rights: A Case Study Using The Right to the Highest Attainable Standard of Health* Submitted to UNESCO 31 May 2006 at

[http://www2.essex.ac.uk/human\\_rights\\_centre/rth/docs/Impact%20Assessments%209Dec06%5B1%5D.doc](http://www2.essex.ac.uk/human_rights_centre/rth/docs/Impact%20Assessments%209Dec06%5B1%5D.doc)

<sup>23</sup> See, for example, New Zealand Ministry of Justice *The Guidelines on the New Zealand Bill of Rights Act 1990: A Guide to the Rights and Freedoms in the Bill of Rights Act for the Public*

<http://www.justice.govt.nz/pubs/reports/2004/bill-of-rights-guidelines/index.html>

minimum rights and responsibilities standards would help to promote our system of responsible government.<sup>24</sup> In countries which already have a charter of rights, the rights and freedoms of an individual or group of individuals are restricted when it is in the public interest to restrict them: on grounds of national security, to preserve public order, to protect public health, to maintain moral standards, to secure due recognition and respect for the rights and freedoms of others or to meet the just requirements of the general welfare of a democratic society. The reality that human rights are not absolute, and are subject to reasonable restrictions, does not however mean that they should be arbitrarily curtailed according to legislative or bureaucratic discretion. The manner in which restrictions are to be determined and imposed and the criteria which apply to the formulation of restrictions are crucial.

The case of Albert Langer highlights our current vulnerability. In 1996 an Australian citizen, Albert Langer, was jailed when he peacefully told (and continued to tell) other Australian citizens how to cast a valid vote at an upcoming federal election.<sup>25</sup> The offending section of the Commonwealth

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<sup>24</sup> “Rigid party discipline; the rise of the unaccountable cohort of ministerial advisers; ... ministerial evasion in question time; a general decline in parliamentary standards; and the privatisation and corporatisation of government such that ministers may claim no longer to be responsible for conduct of important public functions: have all contributed to what is now a profound constitutional weakness.” Zifcak, S and King, A “Wrongs, Rights & Remedies An Australian Charter?” 2009 at page 41.

<sup>25</sup> In 1996, Albert Langer was jailed for telling people how to vote. Langer was a member of the Neither! campaign, which argued that voters shouldn't have to direct their preferences to parties they didn't agree with. They said that voters could legally vote 1 for a party of their choice, and then put a 2 in each of the other boxes, thereby stopping their preferences from flowing on to the major parties when they didn't want them to. This was particularly aimed at supporters of minor parties, who might not want to see their votes ultimately go to Labor or the Coalition, as it usually does for all votes in the House of Representatives. The Australian Electoral Commission argued that while Langer had the right to vote this way, he should not be encouraging others to do so. The Victorian Supreme Court ultimately agreed and then ordered that Langer be jailed for contempt of court when he continued his campaign after being ordered to stop. When Langer was sent to prison Amnesty International declared him Australia's first prisoner of conscience for more than twenty years, and called for his release. In the end, Albert Langer only served three weeks of a ten week term because the Federal Court ruled the Victorian Supreme Court's sentence had been too severe. See, Australian Electoral Commission *Electoral backgrounder No. 18 2007* “Informal Voting” Published October 2007 at [http://www.aec.gov.au/pdf/backgrounders/18/EB\\_18\\_Informal\\_Voting.pdf](http://www.aec.gov.au/pdf/backgrounders/18/EB_18_Informal_Voting.pdf) See also Australian Electoral Commission “The Langer cases” at [http://www.aec.gov.au/Elections/federal\\_elections/1996/report/litigation.htm](http://www.aec.gov.au/Elections/federal_elections/1996/report/litigation.htm) where it states:  
Injunction order: *Australian Electoral Commission v Langer* (4287 of 1996), 8 February 1996, Beach J, Supreme Court of Victoria, unreported  
Contempt order: *Australian Electoral Commission v Langer* (4287 of 1996), 14 February 1996, Beach J, Supreme Court of Victoria, unreported  
Injunction appeal: *Langer v Australian Electoral Commission* (VG 96 of 1996), 1 March 1996, Black CJ, Lockhart and Beaumont JJ, Federal Court, unreported  
Contempt appeal: *Langer v Australian Electoral Commission* (VG 96 of 1996), 7 March 1996, Black CJ, Lockhart and Beaumont JJ, Federal Court, unreported  
On 8 February 1996 the AEC obtained an injunction from the Victorian Supreme Court to restrain Mr Albert Langer from breaching section 329A of the CEA. On 14 February Mr Langer was jailed by this Court until 30 April for contempt of the orders of the Court. Mr Langer's appeal against the injunction was dismissed by the Federal Court on 1 March, and on 7 March, on appeal from the contempt order, Mr Langer was given early release from jail.

Electoral Act was eventually amended two years after Mr Langer's arrest and imprisonment.<sup>26</sup> Yet the question remains: How could such a provision - one that made it unlawful in a democratic country like Australia for one person simply to tell another person how to cast a valid vote in a federal election - have been passed in the first place? In my view, it is not sufficient to wait until these sorts of legislative anomalies or oversights are discovered and then take remedial action. I would prefer to live in a country that would take every reasonable step never to allow people to be arbitrarily jailed for expressing a peaceful political opinion; where indefinite detention without review is not lawful; where genocide is not only unthinkable but also impossible; and where the cruel and degrading treatment of an individual by or on behalf of the Australian Government is never sanctioned. Today in Australia all this (and more) is possible. In my view, our human rights (and corresponding responsibilities) are not sufficiently protected and promoted by the Australian Parliament.

### **Recommendation 6**

**That a Joint Standing Committee on Human Rights and Responsibilities be established under the Act in order to develop guidelines on the implementation of an Australian Charter; to scrutinize all proposed legislation and delegated legislation for compliance with the human rights and responsibilities under an Australian Charter; and to produce a Human Rights and Responsibilities Impact Statement to accompany all proposed legislation and delegated legislation which is tabled in Parliament.**

### The Executive

The administration of government laws, policies and programs in Australia is an adaptive and evolutionary process.<sup>27</sup> It often requires the nuanced interpretation, balancing and implementation of complex and competing responsibilities. In my view, there is a strong evidence-based argument that the federal executive could continue to improve its human rights (and corresponding responsibilities) compliance record in the implementation of government policy and programs. There is a fundamental need for the executive to start to act in a manner that is less atomistic and reactive.

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*Langer v Commonwealth (1996) 70 ALJR 176*

In a related matter arising from the 1993 federal election, when Mr Langer failed to obtain an injunction against the AEC, the High Court ordered on 7 February 1996 that section 329A of the CEA is a valid enactment of the parliament, because it prohibits conduct that might undermine full preferential voting as required by the CEA, and therefore does not infringe the implied freedom of political communication in the Constitution.

<sup>26</sup> See the original section 239 of the *Electoral Act 1918* (Cth).

<sup>27</sup> The modern Australian approach to public federal administration was largely shaped by the recommendations of the Kerr and Bland Committees of the 1970s. The Kerr Committee proposals resulted in the enactment of the *Administrative Appeals Tribunal Act 1975* (Cth) and the *Administrative Decisions (Judicial Review) Act 1977* (Cth), the establishment of the Administrative Review Council and the office of Ombudsman. The Fraser government later also introduced the *Freedom of Information Act 1982* (Cth) but not as a result of the Kerr Committee proposals.

Today the federal executive is made up of a number of “micro-cultures”. There is no obligation on any member of the federal executive to (and indeed they do not) take routine steps to try to ensure human rights violations do not occur as a result of the actions of public officials, let alone that human rights are protected and promoted by them. This lacuna can lead to egregious violations of human rights. How else could one explain the case of Cornelia Rau, a vulnerable and innocent woman who was unnecessarily placed in a women’s prison for six months as part of her ten month unlawful immigration detention and at the same time continually subject to inadequate treatment for her serious mental health illness in a way that was fundamentally flawed?<sup>28</sup> How else could one explain that three years later a young, innocent and well respected medical professional was arrested, held without charge for twelve days for suspected terrorist activities, released and then subsequently deported from this country?<sup>29</sup> Without a culture of human rights to inform the Australian Federal Police, it appears that an individual AFP officer who is well respected in his organization might take it upon himself to protect Australia from a terrorist suspect at all costs<sup>30</sup> – regardless of the evidence and regardless of that individual’s legal rights and human dignity. Commenting on the Haneef case, John Lawler, Chief Executive Officer of the Australian Crime Commission, has stated: “I think the people who need to know do know that in actual fact the AFP and its executive are performing very well. ... From my perspective the AFP had a job to do, did it to the best of their ability, no suggestion of any corruption, no suggestion of any malpractice. These were people who were operating in the best interests of the community.”<sup>31</sup> Mr Lawler made this public statement some months after the release of the findings of the official *Inquiry into the Case of Dr Mohammed Haneef Volume One* by the Hon. John Clarke.<sup>32</sup> These two views are not easy to reconcile. Who should decide what is in “the best interests of the community” and how should they decide? On what basis is that decision to be made? To whom should the AFP be accountable?

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<sup>28</sup> See in particular Main Findings 6, 10 and 17 of the Palmer Report, *Inquiry into the Circumstances of the Immigration Detention of Cornelia Rau Report* (July 2005)

[www.immi.gov.au/media/publications/pdf/palmer-report.pdf](http://www.immi.gov.au/media/publications/pdf/palmer-report.pdf)

<sup>29</sup> Mohamed Haneef was charged on 14 July 2007 with the offence of intentionally providing support or resources to an organization that would help the organization in preparing, planning, assisting in or fostering the doing of a terrorist act, reckless as to whether the organization was a terrorist organization, contrary to section 102.7(2) of the *Criminal Code Act 1995* (Cth). The charges were later dropped. Dr Haneef was falsely suspected of providing his cousin in the UK with a telephone sim card used by his cousin to detonate a terrorist bomb in the UK. Dr Haneef’s matter was the subject of a government inquiry (see fn 30 below) and he later received an undisclosed monetary sum from the Australian Government by way of compensation.

<sup>30</sup> *The Report of the Inquiry into the Case of Dr Mohammed Haneef Volume One* by the Hon. John Clarke QC [Commonwealth of Australia, November 2008] at page 278 identified, for example, that the Australian Federal Police may have failed to properly analyse material and correct information when it was found to be inaccurate even though this information formed the basis of the on-going detention of a terrorist suspect who would otherwise have had a right to be released.

<sup>31</sup> *The Canberra Times* Saturday March 21, 2009 at Forum 7 (emphasis added)

<sup>32</sup> See footnote 30 above.

Historically in Australia, to protect individuals from the excessive or unlawful exercise of power by a public authority, an individual was given the opportunity to agitate that certain of their statutory rights had been violated by a public official and on that basis to have their allegations independently reviewed.<sup>33</sup> More than thirty years later, this historical approach continues to inform our federal system of public governance. It is a system of governance based on transparency and accountability and centered on merits review and judicial review.<sup>34</sup> Today, however, we have the chance to move beyond this historical ‘review’ model of federal public governance. We have the opportunity to develop a contemporary model of governance: one which is systemic rather than atomistic; proactive rather than reactive. Such a contemporary model of public governance would be informed by a human rights culture. It would build on the efforts and past achievements of existing public institutions such as the office of Ombudsman. In my view, this contemporary model of public governance is more desirable and more economically responsible than our current ‘review’ model. It would identify and take steps to prevent a possible rights (and corresponding responsibility) violation before it occurred rather than waiting to review and make reparation when something goes wrong.

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<sup>33</sup> This excerpt from a 2007 speech by Sir Anthony Mason is insightful: “The most convincing account of the need for reform was that given by Mr Ernst Willheim, Secretary of the Bland Committee and later Special Counsel in the Justice Division of the Attorney-General’s Department. His account of his experience, before the reforms, working as a legal adviser in the “one man” sub-office of the Immigration Department, [“Recollections of an Attorney-General’s Department Lawyer”, (2001) 8 *Australian Journal of Administrative Law* 151 at 152] is illuminating. On his first day, he was required to initial a bundle of deportation orders, his signature being taken to indicate that the orders were legally correct. On investigation, he found that almost all the orders were defective for various reasons. After he provided reasons for his view, the head of the deportation unit bluntly informed him “... you don’t seem to understand that it’s your job to initial these”, pointing out that, unless they were initialed, the Minister would not sign them, adding “we want these people out”. In his account, Mr Willheim points out that officers of the Department lacked any real familiarity with the legislation, with the statutory requirements and criteria. There was a culture of disdain for notions of validity and legality. Implementing government policy was all that mattered. Curiously enough, despite the advances made in the intervening years, the recent Reports by Mr Mick Palmer and Mr Neil Comrie into the cases of Cornelia Rau and Vivian Alvarez (Solon), and the Report last month by the Ombudsman into the 247 cases referred to him, revealed a systemic tendency in the Department to subordinate human rights considerations to the perceived superior demands of policy. It is not going too far to say that, at both times, there was a culture of disrespect for the rule of law, even more pronounced in the early 1970s than in recent years. The Secretary of the Department has, however, recently committed the Department to wide-ranging reform, including reforms recommended by the Ombudsman.” (emphasis added) “The Kerr Report of 1971: Its Continuing Significance” Inaugural Whitmore Lecture Delivered by The Hon. Sir Anthony Mason AC KBE, Council of Australasian Tribunals NSW Chapter - Annual General Meeting (19 September 2007) at <http://www.coat.gov.au/docs/NSWChapter/InauguralWhitmoreLecture.pdf>

<sup>34</sup> More recently there has been an extensive use of privative clauses made by the federal Howard Parliaments. This development has had the effect of endowing s. 75(v) of the Australian Constitution with greater importance than it would otherwise have had. We now have a dual system of federal judicial review consisting of review under the ADJR Act and review under s. 39B of the Judiciary Act 1903 (Cth) and s. 75(v). In addition, we have renewed emphasis on jurisdictional complexities because privative clauses cannot protect an administrative decision from review on the ground of jurisdictional error: *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476.

Australia would be a safer and fairer country to live in if we took steps to create a system of public governance informed by a culture of human rights. The adoption of an Australian Charter would be a tangible and proven step towards moving forward in this direction. The experience of other countries is helpful to consider in this regard. In the United Kingdom, for example, the *Human Rights Act* has made concrete changes in the executive culture and consequently in people's lives in Britain. This change has resulted in protecting the fundamental rights of women, children, older people, disabled people, people with mental health needs, people with learning disabilities and asylum seekers as well as promoting good practices in public services.<sup>35</sup> In Victoria, where the *Victorian Charter of Human Rights and Responsibilities Act 2006* also promotes a human rights dialogue at all levels of Government, there has been a change in culture so that when laws are developed, decisions made or services delivered, they are done with the human rights and responsibilities of every Victorian in mind. As a result, the lives of ordinary Victorians, particularly some of the most vulnerable members of the Victorian community, have been improved.<sup>36</sup>

### **Recommendation 7**

**That the introduction of the Australian Charter of Human Rights and Responsibilities Act be accompanied by an extensive training program throughout all public institutions (and private institutions substantially carrying out governmental functions) in order to effect and reinforce a shift in public sector culture towards greater human rights and responsibilities compliance.**

### The Courts

Although today the judiciary has some capacity to ensure Australia's international human rights obligations are reflected in the development of the common law, this is very restricted.<sup>37</sup> It is open to the federal Parliament to enact an Australian Charter and to confer Australian courts with the federal jurisdiction to consider

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<sup>35</sup> The *Human Rights Act 1998* (UK) is based on a dialogue model which aims to create such a culture of human rights. A ten year review of the operation of the UK Human Rights Act by the British Institute of Human Rights (*The Human Rights Act - Changing Lives* 2008 Second Edition) concludes that this approach has made a tangible and quantifiable difference to the lives of vulnerable individuals in Britain as well as "promoting good practices in public services". See

<http://www.bih.org.uk/sites/default/files/BIHR%20Changing%20Lives%20FINAL.pdf>

<sup>36</sup> Media Release, Premier and Attorney-General, Monday 16 February, 2009 "Brumby Government Takes the Lead on Human Rights" at <http://www.premier.vic.gov.au/attorney-general/brumby-government-takes-the-lead-on-human-rights.html>. See also Rachel Ball 'Outside Classrooms and Courtrooms: The Good News on Human Rights' presented at the Victorian Equal Opportunity and Human Rights Commission's Human Rights Conference (2009) and

[http://www.hrlrc.org.au/html/s02\\_article/article\\_view.asp?id=438&nav\\_cat\\_id=188&nav\\_top\\_id=70](http://www.hrlrc.org.au/html/s02_article/article_view.asp?id=438&nav_cat_id=188&nav_top_id=70)

<sup>37</sup> For example, the well-established interpretative presumption that governments intend to legislate consistently with their international legal obligations, unless expressly indicated otherwise: *Jumbunna Coal Mines NL v Victorian Coal Miners' Association* (1908) 6 CLR 309, 363; *Polites v Commonwealth* (1945) 70 CLR 60.

any matter<sup>38</sup> arising under an Australian Charter. The terms used by federal Parliament to enact an Australian Charter would, of course, be critical. Parliament would determine when and how a court exercising federal jurisdiction is able to interpret an Australian Charter. Parliament would determine whether or not a court would be able to find that a violation of an individual's human rights (and corresponding responsibilities) has or has not occurred. The terms of an Australian Charter made by Parliament may also determine whether a remedy will or will not be made available to an individual whose Australian Charter rights have been violated.<sup>39</sup> This is a direct consequence of our system of governance based on the rule of law, the independence of the judiciary and the doctrine of the separation of powers - all central to Australia's democracy. The role of any Australian court exercising federal Australian Charter jurisdiction is, therefore, in some sense derivative. Our courts will only be able to entertain those matters to the extent - and in the manner - that Parliament validly authorizes them to do so. In this sense, an Australian Charter will operate like any other valid federal law. For example, if the Parliament validly proscribes that: "A court is not to order the release from immigration detention of a designated person."<sup>40</sup> that is the clear expression of the will of Parliament and that is end of the story. It is the duty of the courts to apply these terms whatever the personal view of the judges of the court. In *Western Australia v The Commonwealth (the Native Title Act Case)* (1995) 183 CLR 373 the High Court said:

..., section 12 attempts to confer legislative power upon the judicial branch of government. That attempt must fail either because the Parliament cannot exercise the powers of the Courts or because the Courts cannot exercise the powers of the Parliament.<sup>41</sup> .... "[u]nder the Constitution, the Parliament cannot delegate to the Courts the power to make laws involving, as that power does, a discretion or, at least, a choice as to what that law should be."<sup>42</sup>

With the enactment of an Australian Charter, Australian courts exercising federal jurisdiction would have the opportunity to develop a coherent, predictable and rational jurisprudence of Australian human rights and responsibilities at the behest of the Parliament. This would bring our courts in line with every other democratic country in the developed world. Without an Australian Charter, courts exercising federal jurisdiction currently have a very limited and piecemeal role in

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<sup>38</sup> The Hon Michael McHugh AC, QC at a presentation given at the Australian Human Rights Commission on 5 March 2009 'A Human Rights Act, the Courts and the Constitution' has persuasively argued that a 'dialogue model' of human rights which directs a federal court to make a declaration of incompatibility would offend ss 75, 76 and 77 of the Australian Constitution and is most unlikely to be considered a 'matter' at constitutional law.

<sup>39</sup> See *Plaintiff S157/2002 v Commonwealth* [2003] HCA 2; 211 CLR 476; 195 ALR 24; 77 ALJR 454 (4 February 2003) where a privative clause in the *Migration Act 1958* (Cth) was interpreted by the High Court in the light of Australian Constitution s75(v).

<sup>40</sup> Section 183 *Migration Act 1958* (Cth)

<sup>41</sup> *per* Mason CJ, Brennan, Deane, Toohey, Gaudron and McHugh JJ at 485

<sup>42</sup> *ibid* at 486

assisting the Parliament and the Executive to protect and promote human rights (and corresponding responsibilities) in Australia.<sup>43</sup> There are a multitude of competing models of democracy. However, in Australia all institutions of government share responsibility for defining democracy, its institutions of governance, their powers and limits, the processes they should follow and the outcomes they should pursue.

### **Recommendation 8**

**That the Australian Charter of Human Rights and Responsibilities Act contain:**

**(i) A provision for federal Parliament to expressly declare that a legal instrument or a provision thereof shall operate notwithstanding anything to the contrary in the Charter. Such a notwithstanding clause shall only apply in relation to derogable human rights.**

**(ii) A statutory presumption that all federal legislation and delegated legislation is intended to comply with the Charter in its entirety unless a standard form “notwithstanding clause” is expressly placed in the instrument in question. This is the codification of the principle of legality.**

**(iii) An interpretative clause which provides that courts vested with federal jurisdiction must read federal legislation subject to the Charter which gives effect to the International Bill of Rights in its entirety.**

**(iv) A provision which empowers courts vested with federal jurisdiction to hold that federal legislation and delegated legislation that is inconsistent with the Charter is invalid - absent a “notwithstanding clause” in the relevant legal instrument.**

**(v) A provision which empowers courts vested with federal jurisdiction to hold that State and Territory legislation that is inconsistent with the Charter is invalid.**

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<sup>43</sup> Currently, courts exercising federal jurisdiction have been called upon to interpret anti-discrimination legislation and administrative laws. They have found that in Australia there is an implied right to freedom of political speech - *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106 at 135 - but not a general right to free speech. The High Court has found that in Australia we enjoy a few specific procedural (*Coco v R* (1994) 197 CLR 427; *MIEA v Teoh* (1995) 183 CLR 273) and substantive (*Mabo (No 2) v Commonwealth* (1992) 175 CLR 1; *Dietrich v R* (1996) 177 CLR 292) rights. It has narrowly interpreted a small number of rights granted to individuals under the Australian Constitution : section 41 democratic rights (*McGinty v Western Australia* (1996) 186 CLR 140); section 80 right to trial by jury for an indictable offence (*Cheatle v R* (1993) 177 CLR 541); section 51 (xxxii) acquisition of property on just terms (*Wurridjal & Ors v Commonwealth of Australia & Anor* [2009] HCA 2 (2 February 2009)); section 92 freedom of interstate trade & commerce (*Cole v Whitfield* (1988) 165 CLR 360); section 116 freedom of religion (*Church of New Faith v Commissioner for Pay-Roll Tax (Vict.)* (1983) 154 CLR 120); section 117 equal rights of out of State residents (*Street v Queensland Bar Association* (1989) 168 CLR 461; and section 75(v) right to review government action (*Plaintiff S157/2002 v Commonwealth* above fn 37).

### 3. How could Australia better protect and promote human rights? Making a difference.

#### Values

In order to function well, all three arms of government need to be adequately resourced. However, the fact that human rights (and corresponding responsibilities) are not currently and sufficiently protected and promoted in Australia is not a simple question of resources. It is a question of values. This is best illustrated by example. In 2008, the current government undertook a review of long term immigration detainees in association with the office of the federal Ombudsman.<sup>44</sup> As a result of the review, the deployment of additional resources by government has led to faster immigration processing times and a quicker turnover of asylum applications from those in immigration detention.<sup>45</sup> However, the allocation of additional resources alone can never transform an arbitrary immigration policy<sup>46</sup> into a policy which is human rights compliant; ie one based on criteria which rationally justify immigration detention in each particular case. Human rights compliance can only come about with a deliberate change in immigration detention policy. Indeed, a change in mandatory immigration detention policy which represented a shift in values was announced by the Minister on 29 July 2008.<sup>47</sup> The current policy now states: ‘Detention that is indefinite or otherwise arbitrary is not acceptable and the length and conditions of detention, including the appropriateness of both the accommodation and the services provided, [will] be subject to regular review.’ (emphasis added).<sup>48</sup> This

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<sup>44</sup> Joint Standing Committee on Migration *Inquiry into immigration detention in Australia Report - Criteria for release from detention (1 December 2008)* at <http://www.aph.gov.au/house/committee/mig/detention/report.htm>.

<sup>45</sup> Media Release *Progress made in long-term immigration detention cases* (Wednesday 24 September 2008) by Senator Chris Evans, Minister For Immigration:

“We have been working hard to resolve these cases, rather than leave them in the too-hard basket – too often the default position of the former government,” Senator Evans said. Of the 72 long-term immigration detention cases reviewed earlier this year:

- 29 have already been granted permanent or temporary visas, while eight are progressing with their Public Interest Criteria checks for a visa
- 12 of the 24 people on a removal pathway have been removed from Australia
- seven people are subject to ongoing legal proceedings which is impeding resolution of their cases, while four have been released after a recent Federal Court decision.

Senator Evans said the 12 removals included some of the most difficult cases of recent years, including three people who had been in immigration detention for more than six years. Senator Evans said he was looking forward to further improvements in the prompt resolution of detention cases as the Government’s *New Directions in Detention* policy is implemented over coming months.”

<http://www.minister.immi.gov.au/media/media-releases/2008/ce08092.htm>

<sup>46</sup> The then policy of mandatory immigration detention (not only the manner of its administration) was arbitrary and offended rational and proportionate human rights standards: *A v Australia* UN Doc. CCPR/C/59/D/560/1993, 1997 at paragraph 9.4.

<sup>47</sup> Senator Chris Evans, Minister For Immigration “New Directions in Detention - Restoring Integrity to Australia’s Immigration System” Australian National University, Canberra, Tuesday 29 July 2008 at <http://www.minister.immi.gov.au/media/media-releases/2008/ce08043.htm>

<sup>48</sup> However, one cannot now jump to the conclusion that the mandatory nature of Australia’s current immigration detention policy based on Divisions 6 and 7A of the *Migration Act 1958* (Cth) is human rights

specific change in policy came with very high human costs as well as high economic costs. Hundreds of asylum seekers were detained for between two to six years at the cost of many hundreds of dollars a day. Significant resources of several public agencies were used to review this situation for close to twelve months. The government payouts awarded to some asylum seekers by way of compensation for their wrongful detention and inhumane treatment while in immigration detention is just part of the story. Innocent human lives have been destroyed because of a past policy that undervalued the worth and dignity of these individuals. Australia needs to actively embrace a system of shared human rights (and corresponding responsibilities) values and embed these values into our public laws, policies and programs.

### Scrutiny

Australia has publicly adopted the civilizing values contained in the International Bill of Rights and has opened itself up to international compliance scrutiny by voluntarily becoming a party to most of the major international human rights treaties of civilized nations.<sup>49</sup> Yet we remain in violation of certain of our international human rights obligations: for example, in our treatment of indigenous peoples and asylum seekers.<sup>50</sup> Even though Australia is doing well in the protection and promotion of human rights, we could do better. An Australian Charter should detail the rights, responsibilities and remedies necessary to better promote human rights (and corresponding responsibilities) in Australia. In this way, Australia would be better able to withstand robust international scrutiny of our human rights record. Our international reputation as a member of the international community would be enhanced.

### Remedies

There are no rights without remedies. The creation of legally enforceable remedies for the violations of an individual's rights under an Australian Charter would make a tangible difference to the lives of the citizens of this country. An Australian Charter could include a non-exhaustive list of judicially enforceable remedies which would be available to individuals or groups of individuals whose rights under an Australian Charter have been violated. These remedies would need to be appropriate and effective.

When human rights are not respected human dignity is injured. An appropriate remedy redresses the injury done to the dignity and worth of an individual or group of individuals whose human rights have not been respected and observed. Overseas experience suggests that granting "appropriate relief" in such human rights actions may require our courts to remain flexible and responsive to the

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compliant. That is a separate question. See, for example, *A and Ors v United Kingdom* [2009] ECHR 3455/05 [Grand Chamber] (19 February 2009).

<sup>49</sup> See Appendix One.

<sup>50</sup> *Consideration of Reports Submitted by States Parties under Article 40 of the Covenant Concluding observations of the Human Rights Committee Australia* UN Doc. CCPR/C/AUS/CO/5 (2 April 2009) <http://www2.ohchr.org/english/bodies/hrc/docs/co/CCPR-C-AUS-CO5-CRPI.doc>.

needs of a given case and sometimes make orders for relief that have “novel and creative features”.<sup>51</sup> Consider the following hypothetical example. An Australian Federal Police Officer unlawfully shoots and kills a psychotic individual outside a mosque in Bankstown, New South Wales, in violation of their right to life under the Australian Charter. There are a number of actions other than an Australian Charter action that could be brought in these circumstances. A criminal action would vindicate the interest of the State in our peace and good governance. Certain civil and statutory actions would vindicate the right of the deceased to bodily integrity and grant their estate monetary compensation. There exist specific statutory sanctions to discipline the offending police officer. What, if any, additional relief might vindicate the dignity and value of the human life that had been lost? In my view, this is a pivotal question.<sup>52</sup> An official apology by the Commonwealth could be appropriate.<sup>53</sup> Should our courts follow the example of Canada in our hypothetical example and combine individual and systemic relief in the form of a “judicial direction” to the AFP to review the relevant police policy?<sup>54</sup> Such a judicial direction falls somewhere between a general declaration and a mandatory order such as an injunction or mandamus. Unlike a declaration, a judicial direction would allow the courts to exercise on-going supervision of the case without the need for continuing interlocutory orders. The answer to these questions will lie at the intersection of human rights law and our federal constitution. In New Zealand, the courts have developed a variety of remedies which include issuing a stay of proceedings for undue delay under s 25(b) of the Bill of Rights Act: *Martin v Tauranga District Court* [1995] 1 NZLR 491; and the award of monetary compensation when the existing cause of action and remedy is inadequate: *Dunlea v Attorney-General* [2000] 3 NZLR 136.<sup>55</sup>

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<sup>51</sup> *Doucet-Boudreau v Nova Scotia* (2003) SCC 62 at 59,67.

<sup>52</sup> Consider response of the Inter-American Court of Human Rights to a claim by the next of kin of five street children who were tortured and murdered by the State of Guatemala. The following sanctions were specifically ordered by the court to make good the injury to the human worth and dignity of the five children who had been murdered. Each of the next of kin was awarded an amount for pecuniary damages calculated by the loss of income of each child plus court expenses; and an amount for non-pecuniary damages which represents the suffering each death caused them. In addition, the State was ordered to amend its relevant domestic legislation; to assist one family transfer and bury the remains of one of the children in accordance with the wishes of his next of kin; to designate an educational centre with a name allusive to the five victims and place a plaque of remembrance there; and to investigate and punish those responsible for the crimes: *The ‘Street Children’ Case (Villagran Morales et al v Guatemala) Reparations* Inter-Am. Ct HR Judgment of 26 May 2001 para. 123. In the 2003 Annual Report of the Inter-American Court it is noted that there had already been partial compliance by the State with these orders: see [http://www.corteidh.or.cr/public\\_ing/reports.html](http://www.corteidh.or.cr/public_ing/reports.html).

<sup>53</sup> In the area of discrimination law, a number of courts have acknowledged that an apology may be an appropriate form of relief in cases where a person has suffered hurt, humiliation or distress as a result of discriminatory conduct. It has been stated, for example, that an apology may be “worth more to an applicant than money”: *Cooke v Plauen Holdings* [2005] FMCA 91, [43]; and that an apology may help an applicant achieve “final closure”: *Forbes v Commonwealth of Australia* [2003] FMCA 140, [34]; Hunyor, J. “Human rights remedies for unlawful discrimination” *Law Society Journal* August 2005 at page 40.

<sup>54</sup> Reference re: *Manitoba’s Public Schools Act* (1993) 100 DLR (4<sup>th</sup>) 723 at 737-8 (S.C.C.).

<sup>55</sup> See “Part IV Remedies under the Bill of Rights” in [The Guidelines on the New Zealand Bill of Rights Act 1990: A Guide to the Rights and Freedoms in the Bill of Rights Act for the Public Sector](http://www.justice.govt.nz/pubs/reports/2004/bill-of-rights-guidelines/part4.html#980) New Zealand Ministry of Justice at <http://www.justice.govt.nz/pubs/reports/2004/bill-of-rights-guidelines/part4.html#980>

An effective remedy under an Australian Charter would be one that invites compliance. It is generally taken to be a remedy that is accessible, affordable, timely and effective.<sup>56</sup> These are particularly important considerations when dealing with a public authority defendant. More specifically, an effective remedy under the Charter would possess three particular features. Firstly, an effective remedy would prevent the continuation of the unlawful act of the public authority. Secondly, an effective remedy would prevent the repetition of similar acts in the future. Thirdly, an effective remedy would overcome or compensate and individual or group of individuals for the wrongs that have been suffered. Our courts tend to shy away from polycentric decisions and often invoke the doctrine of separation of powers as their reason.<sup>57</sup> However, the Charter would place a positive legal duty on a public authority to fulfill human rights obligations. A Charter remedy to an unlawful act by a public authority may therefore need to be polycentric.<sup>58</sup> In such circumstances, to be effective the relief ordered by a court will need to strike a careful balance. It will need to both vindicate the human rights of the individual and allow the public authority some choice of means to do so: in effect, creating an Australian doctrine of margin of appreciation.<sup>59</sup> For this reason, for example, in a case concerning minority language rights, the Canadian Supreme Court issued an injunction to the public authority to report on the progress of the government response in order to reduce the risk that “minority rights would be smothered in additional procedural delay.”<sup>60</sup>

Democracy and human rights are inter-related, inter-dependent and mutually reinforcing concepts. In a functioning democracy, each arm of government has a distinctive and complementary role in the protection and promotion of human rights. Under an Australian Charter judges would have the ability to strike down laws or read down an act (ie interpret it to comply with Charter rights). In my view, the fact judges are unelected is their strength rather than a weakness. Whether or not our judges are given this responsibility under an Australian Charter is a matter for Parliament. In the words of the Hon. Michael McHugh”:

“A human rights legislative model on these lines would have only a minimal effect on parliamentary sovereignty. Under [this] preferred model, it would be open to the Parliament of the Commonwealth to insert in any federal legislation a “notwithstanding” clause which required the courts to give effect to that particular legislation

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<sup>56</sup> Committee on Economic, Social and Cultural Rights *General Comment No. 9 The domestic application of the Covenant* (03/12/98) UN Doc. E/C.12/1998/24 at paragraph 9.

<sup>57</sup> See *Kable v Director of Public Prosecutions (NSW)* [1996] HCA 24; (1996) 189 CLR 51 (12 September 1996) generally.

<sup>58</sup> See Squires, J, Langford, M & Thiel, B *The Road to a Remedy Current Issues in the Litigation of Economic, Social and Cultural Rights* UNSW Press (2005) for an overview of contemporary judicial approaches.

<sup>59</sup> The doctrine of margin of appreciation was developed in the European Court of Human Rights. See footnote 3 above.

<sup>60</sup> *Doucet-Boudreau v Nova Scotia* (2003) SCC 62 at para. 69.

notwithstanding the enactment of the human rights legislation. And, of course, it would be open to the Parliament after any decision with which it disagreed to insert a “notwithstanding” clause in the legislation which the court had said should be ignored in determining rights and obligations.”<sup>61</sup>

### **Recommendation 9**

**That the Australian Charter of Human Rights and Responsibilities Act include:**

**(i) A provision that individuals and groups of individuals who allege their Charter rights have been violated can bring court proceedings against a person or institution substantially engaged in a governmental function.**

**(ii) A non-exhaustive list of judicially enforceable remedies available under the Charter to individuals or groups of individuals whose Charter rights have been violated; including an apology, stay of proceedings, damages, injunction, declaration or judicial direction.**

**(iii) A savings provision to the effect that a right or freedom not included in the Charter that arises or is recognized under any other law of Australia is not abrogated or limited only because the right or freedom is not included or is only partly included in this Charter.**

## **4. Conclusion**

The purpose of this submission is to draw the Committee’s attention firstly, to the need to take steps to improve the way in which we protect and promote human rights in this country and secondly, to draw the Committee’s attention to the means to do so. I have outlined three mechanisms which would start to achieve this end by creating a contemporary culture of human rights and responsibilities throughout the three arms of government. They are the adoption of an Australian Charter of Human Rights and Responsibilities; the creation of a Joint Parliamentary Standing Committee on Human Rights and Responsibilities; and the targeted training of public policy actors in the minimum human rights standards contained in an Australian Charter. Taken together, these mechanisms could contribute to the emergence of a systemic, proactive and contemporary approach to public governance in Australia based on the principles of democracy, equality and non-discrimination. I have shown that overseas experience suggests that such an approach could significantly improve our democratic governance, and could also impact positively on the lives of individuals and groups of individuals in Australia. To preserve democracy, we need to preserve and protect the values fundamental to our society which

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<sup>61</sup> See footnote 38 above.

includes securing and enhancing the control each person has over decisions that affect them, ensuring that everyone can participate in such decision-making processes as equals, and legitimating only those decisions that treat everyone with equal concern and respect. Ultimately, these should be amongst the values of all civilized nations – including Australia.

## Appendix One

### List of Major International Human Rights Instruments Adopted by Australia

1. [Convention on the Prevention and Punishment of the Crime of Genocide](#) (New York, 9 December 1948). Signature 11 Dec 1948; Ratification 8 Jul 1949.

2. [International Convention on the Elimination of All Forms of Racial Discrimination](#) (New York, 7 March 1966). Signature 13 Oct 1966; Ratification 30 Sep 1975.

Reservation: 30 September 1975

"The Government of Australia ... declares that Australia is not at present in a position specifically to treat as offences all the matters covered by article 4 (a) of the Convention. Acts of the kind there mentioned are punishable only to the extent provided by the existing criminal law dealing with such matters as the maintenance of public order, public mischief, assault, riot, criminal libel, conspiracy and attempts. It is the intention of the Australian Government, at the first suitable moment, to seek from Parliament legislation specifically implementing the terms of article 4 (a)."

Declaration recognizing the competence of the Committee on the Elimination of Racial Discrimination: 28 January 1993

"The Government of Australia hereby declares that it recognises, for and on behalf of Australia, the competence of the Committee to receive and consider communications from individuals or groups of individuals within its jurisdiction claiming to be victims of a violation by Australia of any of the rights set forth in the aforesaid Convention."

2a. [Amendment to article 8 of the International Convention on the Elimination of All Forms of Racial Discrimination](#) (New York, 15 January 1992.) Acceptance 15 Oct 1993.

**Note** : The amendment proposed by the Government of Australia and circulated by the Secretary-General under cover of depositary notification C.N.285.1991.TREATIES-4 of 20 December 1991, was adopted by the States Parties to the Convention at their Fourteenth Meeting and submitted to the General Assembly in accordance with article 23 of the Convention. The General Assembly endorsed the said amendment at its Forty-seventh session by resolution 47/111 of 16 December 1992.

3 [International Covenant on Economic, Social and Cultural Rights](#) (New York, 16 December 1966.) Signature 19 Feb 1968; Ratification 8 Aug 1986.

### 3a. Optional Protocol to the International Covenant on Economic, Social and Cultural Rights

(New York, 10 December 2008. Not yet in force.) No treaty action by Australia.

### 4. International Covenant on Civil and Political Rights

(New York, 16 December 1966.) Signature 18 Dec 1972; Ratification 13 Aug 1980.

By a communication received on 6 November 1984, the Government of Australia notified the Secretary-General of its decision to withdraw the reservations and declarations made upon ratification with regard to articles 2 and 50, 17, 19, 25 and to partially withdraw its reservations to articles 10 and 14.

Reservations: 13 August 1980

#### Article 10

"In relation to paragraph 2 (a) the principle of segregation is accepted as an objective to be achieved progressively. In relation to paragraph 2 (b) and 3 (second sentence) the obligation to segregate is accepted only to the extent that such segregation is considered by the responsible authorities to be beneficial to the juveniles or adults concerned".

#### Article 14

"Australia makes the reservation that the provision of compensation for miscarriage of justice in the circumstances contemplated in paragraph 6 of article 14 may be by administrative procedures rather than pursuant to specific legal provision."

#### Article 20

"Australia interprets the rights provided for by articles 19, 21 and 22 as consistent with article 20; accordingly, the Commonwealth and the constituent States, having legislated with respect to the subject matter of the article in matters of practical concern in the interest of public order ( ordre public ), the right is reserved not to introduce any further legislative provision on these matters."

Declaration: 13 August 1980

"Australia has a federal constitutional system in which legislative, executive and judicial powers are shared or distributed between the Commonwealth and the constituent States. The implementation of the treaty throughout

Australia will be effected by the Commonwealth, State and Territory authorities having regard to their respective constitutional powers and arrangements concerning their exercise."

[5. Optional Protocol to the International Covenant on Civil and Political Rights](#)  
(New York, 16 December 1966.) Accession 25 Sep 1991.

[6. Convention on the Elimination of All Forms of Discrimination against Women](#)

(New York, 18 December 1979.) Signature 17 Jul 1980; Ratification 28 Jul 1983.

Reservations: 28 July 1983

"The Government of Australia states that maternity leave with pay is provided in respect of most women employed by the Commonwealth Government and the Governments of New South Wales and Victoria. Unpaid maternity leave is provided in respect of all other women employed in the State of New South Wales and elsewhere to women employed under Federal and some State industrial awards. Social Security benefits subject to income tests are available to women who are sole parents.

"The Government of Australia advises that it is not at present in a position to take the measures required by article 11 (2) to introduce maternity leave with pay or with comparable social benefits throughout Australia.

The Government of Australia advises that it does not accept the application of the Convention is so far as it would require alteration of Defence Force policy which excludes women for combat and combat-related duties. The Government of Australia is reviewing this policy do as to more closely define 'combat' and ' combat-related duties.'"

On 30 August 2000, the Government of Australia notified the Secretary-General of the following:

"The Government of Australia having considered the reservations [made upon ratification], hereby withdraws that part of the reservations which states:

The Government of Australia advises that it does not accept the application of the Convention in so far as it would require alteration of Defence Force policy which excludes women from combat and combat-related duties. The Government of Australia is reviewing this policy so as to more closely define 'combat' and 'combat-related duties'."

[6.a. Amendment to article 20, paragraph 1 of the Convention on the Elimination of All Forms of Discrimination against Women](#)

(New York, 22 December 1995.) Acceptance 4 Jun 1998.

[6.b. Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women](#)

New York, 6 October 1999.) Accession 4 Dec 2008.

[7. Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment](#)

(New York, 10 December 1984.) Signature 10 Dec 1985; Ratification 8 Aug 1989.

Declaration made under articles 21 and 22: 28 January 1993

"The Government of Australia hereby declares that it recognises, for and on behalf of Australia, the competence of the Committee to receive and consider communications to the effect that a State Party claims that another State Party is not fulfilling its obligations under the aforesaid Convention; and The Government of Australia hereby declares that it recognises, for and on behalf of Australia, the competence of the Committee to receive and consider communications from or on behalf of individuals subject to Australia's jurisdiction who claim to be victims of a violation by a State Party of the provisions of the aforesaid Convention."

[7.a. Amendments to articles 17 \(7\) and 18 \(5\) of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment](#)

(New York, 8 September 1992.) Acceptance 15 Oct 1993 (Not yet in force).

[7.b. Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment](#)

(New York, 18 December 2002.) No treaty action by Australia.

[8. Convention on the Rights of the Child](#)

(New York, 20 November 1989.) Signature 22 Aug 1990; Ratification 17 Dec 1990.

Reservation: 17 December 1990

"Australia accepts the general principles of article 37. In relation to the second sentence of paragraph (c), the obligation to separate children from adults in prison is accepted only to the extent that such imprisonment is considered by the responsible authorities to be feasible and consistent with the obligation that children be able to maintain contact with their families, having regard to the geography and demography of Australia. Australia, therefore, ratifies the Convention to the extent that it is unable to comply with the obligation imposed by article 37 (c)."

[8.a. Amendment to article 43 \(2\) of the Convention on the Rights of the Child](#)  
(New York, 12 December 1995.) No treaty action by Australia.

[8.b. Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict](#)  
(New York, 25 May 2000.) Signature 21 Oct 2002; Ratification 26 Sep 2006.

Declaration:

"The Australian Defence Force (ADF) shall continue to observe a minimum voluntary recruitment age of 17 years. Pursuant to Article 3 (5) of the Optional Protocol, age limitations do not apply to military schools. A list of authorised establishments, both military and civilian (including those used to train apprentices), to which this age exemption applies is held by the Service Director-General Career Management. Age limitations also do not apply to cadet schemes, members of which are not recruited into, and are therefore not members of, the ADF. Persons wishing to join the ADF must present an original certified copy of their birth certificate to their recruiting officer. Before their enlistment or appointment, all ADF applicants who are less than 18 years of age must present the written informed consent of their parents or guardians. All applicants wishing to join the ADF must be fully informed of the nature of their future duties and responsibilities. Recruiting officers must be satisfied that an application for membership by a person less than 18 years of age is made on a genuinely voluntary basis."

[8.c. Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography](#)  
(New York, 25 May 2000.) Signature 18 Dec 2001; Ratification 8 Jan 2007.

[9. Second Optional Protocol to the International Covenant on Civil and Political Rights, aiming at the abolition of the death penalty](#)  
(New York, 15 December 1989.) Accession 2 Oct 1990.

[10. Convention on the Rights of Persons with Disabilities](#)  
(New York, 13 December 2006) Signature 30 Mar 2007; Ratification 17 Jul 2008.

Declaration: 17 July 2008

"Australia recognizes that persons with disability enjoy legal capacity on an equal basis with others in all aspects of life. Australia declares its understanding that the Convention allows for fully supported or substituted decision-making arrangements, which provide for decisions to be made on behalf of a person, only where such arrangements are necessary, as a last resort and subject to safeguards;

Australia recognizes that every person with disability has a right to respect for his or her physical and mental integrity on an equal basis with others.

Australia further declares its understanding that the Convention allows for compulsory assistance or treatment of persons, including measures taken for the treatment of mental disability, where such treatment is necessary, as a last resort and subject to safeguards;

Australia recognizes the rights of persons with disability to liberty of movement, to freedom to choose their residence and to a nationality, on an equal basis with others. Australia further declares its understanding that the Convention does not create a right for a person to enter or remain in a country of which he or she is not a national, nor impact on Australia's health requirements for non-nationals seeking to enter or remain in Australia, where these requirements are based on legitimate, objective and reasonable criteria."