National Human Rights Consultation: Submission

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Executive summary
We submit that the Commonwealth Parliament should enact a Human Rights Act (HRA). An Australian HRA is needed for three main reasons. First, the protection of human rights afforded by current Australian law is piecemeal, often weak and contains too many gaps. While modern Australia is not witness to the scale of human rights violations experienced by some other countries, that is not to say that Australia’s human rights record and current practices are perfect or even adequate. This submission sets out in detail the weaknesses in Australia’s approach to human rights, and how these can impact on the Australian community.

Secondly, Australia is obliged under international law to legislate domestically to protect human rights. Australia is unquestionably in breach of this obligation, and this leaves Australia isolated politically and legally.

Thirdly, and most importantly, there is a demonstrable need in the Australian community for enhanced legislative protection of human rights. The submission explains how a HRA would help to improve human rights protection in Australia.

The advent of a federal HRA would not be a panacea. Good human rights practice requires strong institutional support for human rights, the rule of law and a commitment by all arms of government to fairness and social justice. However, a HRA would be the most important element in achieving the goal of strong human rights protection.

Structure of submission and key recommendations
This submission is structured in three parts, each of which answers a question posed in the Terms of Reference for the National Human Rights Consultation. This submission also includes an Appendix, which provides a series of case studies indicating how a HRA can assist in the protection of human rights.

The remainder of this Executive Summary lists the principal recommendations made in this submission.

**Recommendation 1: Which human rights should be protected?**
The proposed federal Human Rights Act should incorporate into domestic law the human rights set out in the *International Covenant on Civil and Political Rights*, the *International Covenant on Economic Social and Cultural Rights* and the Universal Declaration of Human Rights. This would have two principal benefits: (i) it would bring Australia into compliance with its existing international law obligations, thereby significantly improving Australia’s international standing; (ii) it would provide Australia with access to a valuable source of international learning and jurisprudence relating to the protection, interpretation and balancing of human rights.

Economic, social and cultural rights should be included in the Human Rights Act, with appropriate safeguards to ensure that courts do not stray beyond their proper constitutional role.
In addition, in determining which human rights should be protected, the Consultation Committee should consider the demonstrated needs of the Australian community, and the values on which there is broad community consensus. The Consultation Committee should consult with the Australian community to help determine which rights are of greatest importance in Australia. That consultation should be by formal and informal means, and should include opinion polling and deliberative polling. Reference should also be made to the approaches taken in comparable jurisdictions.

**Recommendation 2: Rights, responsibilities and the need for a balanced approach**
The proposed Australian Human Rights Act should recognise that human rights are often limited by, or must be balanced against, other rights, and that human rights come with responsibilities. However, it would be inappropriate to codify a list of legally-enforceable individual responsibilities in this proposed Act.

**Recommendation 3: Current level of human rights protection in Australia**
Human rights are currently protected in Australia by a combination of the Australian Constitution, federal, state and territory legislation, the common law and Australia’s democratic institutions. However, significant gaps exist in this scheme, and a federal Human Rights Act is needed to remedy this problem.

**Recommendation 4: Impact of a Human Rights Act**
An Australian Human Rights Act would bolster Australia’s democratic institutions, in respecting human rights. As explained in this section, it would help to ensure Parliament and the Government give appropriate consideration to the impact of legislation and government policy on the human rights of people in Australia, encouraging an approach that is respectful of human rights. In particular, a Human Rights Act would be likely to have a significant, positive net benefit for marginalised and disadvantaged groups in the Australian community.

**Recommendation 5: Who should be able to claim protection of Human Rights Act?**
The purpose of an Australian Human Rights Act should be to protect individual dignity. As such, the proposed Act should directly protect the human rights of individuals or ‘natural persons’ only. The legitimate rights and interests of non-human entities, such as corporations, should continue to be protected in other areas of laws.

**Recommendation 6: Who should comply with a Human Rights Act?**
The proposed Human Rights Act should impose human rights obligations primarily on ‘public authorities’, which would include federal public servants, federal Government agencies and statutory authorities. The Act’s obligations should also extend to private parties to the extent that they perform ‘functions of a public nature’ on behalf of the federal Government.

These obligations should not apply to federal Members of Parliament, their personal staff or other Parliamentary staff, when exercising functions in connection with parliamentary proceedings.
Private parties should not be required to comply with a federal Human Rights Act in respect of functions of a purely private nature. However, the Act should allow private parties such as corporations to ‘opt in’ to the Human Rights Act regime, by undertaking to comply with the Act.

**Recommendation 7: Extraterritorial application and non-citizens**
The proposed Human Rights Act should apply to all individuals subject to Australia’s jurisdiction.

**Recommendation 8: The constitutional dialogue model**
The proposed Human Rights Act should strike an appropriate balance between the judiciary, executive and legislature; preserving the separation of powers and parliamentary supremacy, while also empowering the courts to enforce human rights standards. The Australian Human Rights Commission should be provided with adequate funding and resources to act as an independent, expert monitor of human rights in Australia.

The core elements of the Human Rights Act proposed by this submission are set out in Recommendation 10.

**Recommendation 9: Role of Parliament under a Human Rights Act**
The proposed Human Rights Act should require Parliament to consider the human rights impact of any draft law. The Minister responsible for introducing a new Bill should be required to state either that he or she believes the law to be compatible with the rights set out in the HRA, or the justification for any incompatibility.

**Recommendation 10: The Constitutionality of a Human Rights Act**
An Australian Human Rights Act, adopting the constitutional dialogue model, could be drafted so as not to infringe the Australian *Constitution*. There is no constitutional impediment to drafting an Act that involves the elements identified below.

For this reason, and for the other reasons set out in Part 3 of this submission, the basic structure of the Human Rights Act should be as follows:

(i) The Act should identify the human rights to be protected.
(ii) The Act should permit these rights to be limited in defined circumstances, taking into account factors such as the nature of the right and considerations of necessity and proportionality.
(iii) The Attorney-General, or the member introducing legislation, would be required to prepare and table in federal Parliament a human rights ‘statement of compatibility’. The statement of compatibility would, at a minimum, give reasoned consideration to whether the Bill was compatible with the human rights identified in the Act.
(iv) Federal public authorities would be required to act compatibly with the rights identified in the Act unless required by law to do otherwise. This obligation could extend to organisations acting on behalf of the Commonwealth in carrying out public functions.
(v) The Act should require all Commonwealth legislation to be interpreted consistently with the rights identified in the Act, so far as it is possible to do so consistently with the purpose of that legislation.
(vi) If a court finds that it cannot interpret a law of the Commonwealth consistently with the rights identified in the Act, the Act should provide a mechanism to bring this finding to the attention of federal Parliament and require a government response within a set period.

**Recommendation 11: Compensation for human rights violations?**
The proposed Human Rights Act should empower the courts to award monetary compensation against public authorities that are found to have violated an individual’s human rights. This power should be exercised only in appropriate cases.

**Recommendation 12: Harmonious human rights laws in Australia**
Human rights law should be harmonious across all Australian jurisdictions. To this end, the Australian Government should consult with state and territory governments in drafting a federal Human Rights Act, and the Act should provide a mechanism whereby the states and territories can opt in to the federal Human Rights Act regime.
Part 1: Which human rights and responsibilities should be protected and promoted?

Methodology for determining which rights to protect

It is generally accepted that individuals have inherent and inalienable rights simply by virtue of being human, and that these inherent rights should be protected by law. However, “the contention that human rights are those rights that a person possesses merely by virtue of being human does not indicate what particular rights flow from the status of being human.” An appropriate methodology must be employed in order to determine which rights should be protected and promoted in Australia.

The best means of determining which human rights should be protected in Australia involves consideration of three main sources: (i) Australia’s obligations under international human rights law; (ii) demonstrated community need and values; and (iii) the approach taken in similar jurisdictions in response to comparable problems.

International human rights law

Like all member states of the United Nations (“UN”), Australia is legally committed to respect, protect and promote fundamental human rights. In addition to this general undertaking, Australia has agreed specifically to be bound by the following treaties, all of which relate directly to human rights:

- the International Covenant on Civil and Political Rights (“ICCPR”); 4
- the International Covenant on Economic, Social and Cultural Rights (“ICESCR”); 5
- the Convention on the Elimination of All Forms of Discrimination Against Women; 6
- the International Convention on the Elimination of All Forms of Racial Discrimination; 7
- the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (“CAT”); 8
- the Convention on the Rights of the Child; 9 and
- the Convention on the Rights of Persons with Disabilities. 10

1 See, eg, Universal Declaration of Human Rights 1948 GA Res. 217A (III), 71, UN Doc A/810.
2 Andrew Byrnes, Hilary Charlesworth and Gabrielle McKinnon, Bills of Rights in Australia: history, politics and law (2009), 10.
8 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (10 December 1984) 1465 UNTS 85.
The Australian Government has also recently announced its support\textsuperscript{11} for the Declaration on the Rights of Indigenous Peoples.\textsuperscript{12}

The best means of Australia fulfilling its international law obligations is to pass a Human Rights Act ("HRA"). This Act should implement into domestic Australian law the human rights enshrined in the treaties listed above. This would benefit Australia on the international and domestic planes, as outlined below.

**Fulfilling Australia’s international obligations**

When Australia ratifies an international treaty, it becomes obliged under international law to abide by the terms of that treaty. However, treaties are not self-executing in Australia, and so the act of ratification does not itself implement the treaty into Australian domestic law.

For treaties to be incorporated into Australian law, they must be expressly implemented by legislation.\textsuperscript{13} Yet none of the human rights treaties listed above has been fully incorporated into Australian law. They have either been implemented only partially, leaving many gaps and inconsistencies, or not at all.\textsuperscript{14} We have no systematic legal framework protecting these fundamental rights and freedoms.\textsuperscript{15}

Australia’s failure to incorporate these treaty provisions into domestic law gives rise to a number of legal and political consequences. First, Australia is currently in violation of the international law requirement to take the necessary procedural measures to incorporate these human rights protections into our domestic legal system.\textsuperscript{16}

Secondly, Australia is in breach of the international law obligation to protect and promote these substantive rights. Unlike many other jurisdictions, in Australia, compliance with human rights is not currently a measure for determining the lawfulness or appropriateness of government action and policy. At present, Commonwealth legislators and government

\textsuperscript{10} Convention on the Rights of Persons with Disabilities (30 March 2007).

\textsuperscript{11} Commonwealth, Parliamentary Debates, House of Representatives, 3 April 2009 (the Hon Jenny Macklin MP).


\textsuperscript{13} Dietrich v The Queen (1992) 177 CLR 292 at 305.


\textsuperscript{15} See, eg, Miloon Kothari, Report of the Special Rapporteur on adequate housing as a component of the right to an adequate standard of living at [126], UN DOC A/HRC/4/18/Add.2 (2006); Martin Scheinen, Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism: Australia at [65], UN DOC A/HRC/4/26/Add.3 (2006).

\textsuperscript{16} See, eg, ICCPR art 2(2).
agencies are not required specifically to advert to and justify the potential impact of proposed laws and policies on the human rights of individuals. This weakness is exacerbated by the limited nature of judicial review available. In the absence of a federal HRA, the courts cannot adequately consider whether the Australian Government has infringed human rights.\footnote{Michael McHugh, \textit{The Need for Agitators—the Risk of Stagnation}, Speech delivered at the Sydney University Law Society Public Forum, 12 October 2005.}

This means that Australia can pass legislation that violates international human rights law, but when challenged, such legislation (and government action taken pursuant to it) will nevertheless be permitted by Australian courts. For example, s 189 of the \textit{Migration Act 1958 (Cth)} empowers the Australian Government to detain an “unlawful non-citizen” indefinitely.\footnote{See \textit{Al-Kateb v Godwin} (2004) 219 CLR 562.} While international law indicates such action to be a clear and disproportionate contravention of the right to liberty,\footnote{See, eg, \textit{Committee Against Torture, Concluding observations of the Committee Against Torture: Australia} at [11] UN Doc CAT/C/AUS/CO/3 (2008).} no successful means has been found in Australia of challenging it.

It is often observed that the enforcement mechanisms, available under international law where a state violates its international human rights obligations, are relatively weak, and inconsistently enforced. Indeed, the previous Howard Government indicated that it did not find the views of the United Nations Human Rights Committee influential.\footnote{Hilary Charlesworth, \textit{Human rights: Australia versus the UN} (2006) at 3-8; Alexander Downer (Minister for Foreign Affairs), Daryl Williams (Attorney-General) and Philip Ruddock (Minister for Immigration and Multicultural Affairs), “Improving the Effectiveness of United Nations Committees” (Press Release, 29 August 2000), as cited in Andrew Byrnes, Hilary Charlesworth and Gabrielle McKinnon, \textit{Bills of Rights in Australia: history, politics and law} (2009) at 21.} However, abiding by agreed norms of international law—particularly international human rights law—carries moral cachet and political significance. It demonstrates respect for multilateral institutions and the rule of law. It also militates against charges of hypocrisy being levelled at Australia when it calls on other states to improve their human rights records.

Implementing Australia’s human rights obligations into domestic law with a HRA would be an important and appropriate step in re-engaging with the international community. For example, it was recently reported that the perception that Australia does not adequately protect human rights might have jeopardised Australia’s bid for a non-permanent seat on the UN Security Council.\footnote{See, Daniel Ziffer, “Rights record under scrutiny in UN seat bid”, \textit{Sun-Herald} (22 March 2009).}

International human rights law provides a universal and enduring set of standards to which all governments should be accountable. The vast majority of countries have nominated as being of greatest importance the rights set out in the ICCPR, the ICESCR and the Universal Declaration of Human Rights, which are referred to collectively as the “International Bill of Rights”.

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**Ability to learn from the experience of other jurisdictions**

Reference is often made to the “global struggle for human rights”. The global nature of this struggle is reflected by the human rights focus of international law, and by the fact that every other comparable jurisdiction has some kind of national human rights statute. Australia is, of course, part of this global struggle, but the absence of a HRA cuts Australia off from a crucial part of this global struggle—that is, the application of human rights principles in domestic government decision making.

An Australian HRA, based on the International Bill of Rights, would allow Australia to draw on the extensive human rights jurisprudence that has developed in international, regional and domestic courts and tribunals around the world. This body of judicial consideration suggests practical compromises between conflicting rights, such as freedom of expression and the rights to privacy. It also provides guidance on the appropriate balance between the protection of rights and competing fundamental principles, as is necessary when responding to threats such as global terrorism.

Not only would a HRA, based on these widely-recognised human rights, end Australia’s jurisprudential isolationism, reopening access to legal developments and innovations in similar jurisdictions such as New Zealand, the UK, Canada and South Africa, it would also allow Australian law to draw on the work already done in comparable jurisdictions in interpreting and balancing of human rights.

The use of internationally-recognised formulations of rights in domestic legislation would help to establish the precise scope and operation of an Australian HRA, which necessarily articulates rights at the level of broad, general principle. To avoid any doubt, s 32(2) the Victorian Charter makes clear that “[t]he judgments of the domestic, foreign and international courts and tribunals relevant to a human right may be considered in interpreting a statutory provision”.

The benefits of this are twofold. First, legislating to protect universally-recognised rights would assist Australia in complying with the detail of its international obligations, as much of the content of international human rights norms has been developed and interpreted by other organs. For example, the UN Human Rights Committee’s interpretations and conclusions, although not binding on state parties, have great persuasive force and have been cited as authoritative by the International Court of Justice. Similarly, judgments of regional courts such as the European Court of Human Rights and respected domestic courts such as the United Kingdom’s House of Lords and Canada’s Supreme Court carry persuasive weight as a subsidiary source of international

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law. For Australia’s courts to have recourse to this case law would help Australia to keep in step with international human rights standards.

Secondly, employing a rights framework that encourages the use of international and comparative law allows Australian courts to benefit from the experience and developments of other jurisdictions facing similar problems and tensions between competing rights. The European Court of Human Rights is particularly useful in this regard, as “more cases have been decided and a greater proportion of them deal with issues of the type likely to arise” in well-developed liberal democracies such as New Zealand and Australia.

**Demonstrated community need and values**

A crucial touchstone in assessing how human rights should be protected is to consider the particular, demonstrable needs of the Australian community. As Part 2 of this submission explores, there are instances where our democratic institutions fail to protect minimum human rights standards, and where victims of human rights violations have been left without any enforceable remedy. Our current legislative framework for human rights protection leaves significant gaps, and so this process of reform should address those deficiencies.

Also relevant in any analysis of human rights protection is the need to promote the values around which the Australian community is built. It is true that the content of “community values” can be contentious. However, this does not make the task impossible or undesirable. We note, for instance, that in 2007, the Australian Government summarised core Australian values in its citizenship guide:

Values which are important in modern Australia include:
- respect for the equal worth, dignity and freedom of the individual
- freedom of speech
- freedom of religion and secular government
- freedom of association
- support for parliamentary democracy and the rule of law
- equality under the law
- equality of men and women
- equality of opportunity
- peacefulness
- tolerance, mutual respect and compassion for those in need.

Clearly, these values closely reflect the rights set out in the International Bill of Rights. In any event, while this submission does not propose a list of Australian values on which there is a consensus, the National Human Rights Consultation process represents a useful opportunity to gauge community views on this question.

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26 Statute of the International Court of Justice art 48(1)(d).
In addition to receiving submissions, and soliciting views in roundtable and “town hall”-style meetings, this could be achieved through opinion polling, and also deliberative polling. For example, in the United Kingdom and Northern Ireland, polls were conducted to gauge community support for the legislative protection of particular social and economic rights.  

Comparative law approach

Australia can benefit from adopting a comparative law approach, which stresses that useful lessons can be drawn from studying how other jurisdictions approach common problems. Here, the common problem boils down to the question: which human rights should be protected in law so as to safeguard the dignity of individuals in a well-developed liberal democracy? The usual point of distinction is between ‘first generation’ rights expressed in the ICCPR, ‘second generation’ rights expressed in the ICESCR and ‘third generation’ rights such as the right to enjoy and access a healthy environment.

In determining whether Australia should legislate to protect any or all of these rights, it is useful to examine how other jurisdictions have sought to resolve this issue. We recommend that particular regard be paid to the processes undertaken in comparable jurisdictions to Australia, such as the United Kingdom, New Zealand, South Africa and Canada, and of course, to jurisdictions within Australia itself, such as Victoria and the ACT.

Civil and political rights

“First generation” or civil and political rights arose from the political turmoil of the 17th-19th centuries. They include:

- The right to life, liberty and due process; the right to be free from torture and other inhuman or degrading treatment; freedom from slavery and forced labour; the right to a fair trial, freedoms of thought, conscience, religion, expression, association and movement; rights to privacy and respect for family life; the rights to vote and to participate in the political process; the rights of members of minorities to use their language and to take part in other communal activities; and rights to equality and non-discrimination.

Australia is obliged by its accession to the ICCPR to protect and promote civil and political rights, which includes the obligation to legislate to protect them. Further, these rights represent the universal core of charters and bills of rights around the world. Civil and political rights are protected in the human rights instruments in force in the UK, Canada, New Zealand, South Africa, all states party to the European Convention on

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32 This is consistent with the method suggested in Konrad Zweigert and Hein Kötz, *An Introduction to Comparative Law* (3rd ed, 1998) at 34–35.
34 ICCPR art 2(2).
Human Rights,\textsuperscript{35} and all states that have submitted to the jurisdiction of the Inter-American Court over the application of the American Convention on Human Rights.\textsuperscript{36}

Closer to home, the Victorian Charter and the ACT Human Rights Act both include civil and political rights.

**Economic, social and cultural rights**

“Second generation” or economic, social and cultural rights (“ESC rights”) were prompted by “the hardships and injustices of the industrial revolution”, and they include: the right to safe and decent conditions of labour, the right to organise, the right to education, the right to health, the right to an adequate standard of living (including access to adequate food, clothing and housing), the right to social support, and the right to participate in cultural activities.\textsuperscript{37}

ESC rights and civil and political rights are interdependent, and ESC rights underpin the full enjoyment of civil and political rights. For example, meaningful exercise of the civil and political right to participate in a democracy requires realisation of the right to education. The right to privacy and family life requires access to adequate and secure housing. At an even more fundamental level, as former Secretary-General of the United Nations Kofi Annan recognised, for many people “the right to vote is worth little if their children are hungry and do not have access to safe water.”\textsuperscript{38}

**Fulfilling international obligations**

Incorporating ESC rights into a HRA is necessary to fulfil Australia’s international law obligation to implement the ICESCR.\textsuperscript{39} Art 2(1) of the ICESCR provides:

> Each State Party to the present Covenant undertakes to take steps … to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures.

A developed country like Australia certainly has the “available resources” needed for the progressive achievement of minimum ESC rights for all members of our community, yet in 2000 the Committee on Economic, Social and Cultural Rights expressed its “deep concern” at Australia’s failure to provide these minimum standards to Indigenous peoples.\textsuperscript{40} The Committee noted that Australia’s failure to implement ESC rights at a federal and state level impedes “the full recognition and applicability of [ICESCR] provisions”. It recommended that Australia “incorporate the Covenant in its legislation, in

\textsuperscript{35} 213 UNTS 221.

\textsuperscript{36} (22 November 1969) 1144 UNTS 123.

\textsuperscript{37} Andrew Byrnes, Hilary Charlesworth and Gabrielle McKinnon, *Bills of Rights in Australia: history, politics and law* (2009) at 16.


\textsuperscript{39} Art 2(2).

\textsuperscript{40} Concluding Observations of the Committee on Economic, Social and Cultural Rights, *Consideration of the reports submitted by States Parties under Articles 16 and 17 of the Covenant* (2000) at [15], UN Doc E/C.12/1/Add.50.
order to ensure the applicability of the provisions of the Covenant in the domestic courts”. 41

**Australian perspectives**

Each of the independent committees advising the respective governments of Tasmania, Western Australia and the ACT on the protection of human rights recommended the inclusion of at least some ESC rights in a charter of rights. The Tasmanian Law Reform Institute stated that arguments for exclusion “[spoke] of timidity rather than rationality”. 42

The Victorian Charter does not currently include ESC rights, but it envisages that those rights might be included in the future. Under s 44, the Victorian Attorney-General is required to initiate a review of the Charter’s first four years of operation, and this review must consider, among other matters, whether additional rights, such as ESC rights, should be protected in the Charter.

There is also strong evidence to suggest that the orthodox hierarchy between civil and political rights and ESC rights is not shared by the general community. For example, in the United Kingdom and Northern Ireland, opinion polls were conducted to gauge community support for the inclusion of economic and social rights in a bill of rights. 88% believed that the right to public hospital treatment within a reasonable time should be protected. To give a point of reference, 89% thought that the right to a fair trial before a jury should be included. 43 This indicates strong support in developed states for the prioritisation of ESC rights protection.

It seems probable that Australians would have similar views about the interdependence of civil and political and ESC rights. Indeed, the success of the “Your Rights At Work” campaign in response to Work Choices indicates how seriously Australians take these kinds of social and economic rights. Further, a recent Nielsen survey commissioned by Amnesty International Australia found that 81% of respondents would support the introduction of a law to protect human rights in Australia, 44 without distinction as to which type of rights should be protected.

**Other jurisdictions**

Economic, social and cultural rights are recognised and legally protected in other jurisdictions. For example, in South Africa these rights are constitutionally entrenched. The Charter of Fundamental Rights of the European Union also includes ESC rights as an intrinsic part of the “indivisible, universal values of human dignity, freedom, equality and solidarity”. 45

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Given the shared legal history and institutional similarity of the United Kingdom and Australia, the developing position in the UK is instructive. The UK Parliament’s Joint Committee on Human Rights (JCHR) has investigated and reported on the potential inclusion of ESC rights in a mooted British Bill of Rights, which would supplement the existing *Human Rights Act 1998* (UK). The JCHR distinguished between *symbolically recognising* the importance of ESC rights, and *legally enforcing* them in a Bill of Rights.

**Are economic, social and cultural rights justiciable?**

Very few people would deny the importance of ESC rights. After all, it would be difficult to argue that healthcare, adequate food and education are unnecessary for a dignified life. Instead, as UK Prime Minister Gordon Brown has identified, the truly contentious issue is the extent to which these are matters on which the courts might be able to make a legitimate contribution:

The issue actually comes down to not being against social and economic rights being accorded importance in constitutions but whether they are justiciable.

From this concern, there arise two main arguments against including ESC rights in a Human Rights Act: (i) that ESC rights are vague and incapable of being given legal content; and (ii) that enshrining ESC rights in law will give excessive power to the courts to rule on what are, in essence, political questions.

**Are ESC rights capable of legal enforcement?**

It is true that the ICESCR and domestic human rights instruments, such as the South African Constitution, express ESC rights in aspirational terms. However:

There is now a considerable body of international and comparative jurisprudence that recognises that economic, social and cultural rights can be adjudicated and applied in a similar manner to civil and political rights.

For example, s 27 of the South African Constitution, which concerns health care, food, water and social security, reads as follows:

1. Everyone has the right to have access to:
   a. health care services, including reproductive health care;
   b. sufficient food and water; and
   c. social security, including, if they are unable to support themselves and their dependants, appropriate social assistance.
2. The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of each of these rights.
3. No one may be refused emergency medical treatment.

Even though s 27(2) does not provide an absolute guarantee of these rights in the same way as, for example, s 11 of the South African Constitution guarantees the right to life, it still creates a real and ascertainable obligation on government.

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The South African state is constitutionally obliged to “take reasonable legislative and other measures” to provide health care, food and water and social security to its people. Naturally, the measure of what is “reasonable” will be affected by “its available resources”. That is why the realisation of these rights is to be “progressive”, but it does not mean that “reasonable” has no ascertainable legal content.

The Treatment Action Campaign case\(^49\) provides an excellent example. This case concerned “Nevirapine”, an antiretroviral drug that prevents intrapartum mother-to-child transmission of HIV. It had been made available at only a small number of research facilities, and the claimants sought an order that the program be extended to all pregnant women. South Africa’s Constitutional Court found in favour of the claimants. It held that, given the overwhelming social concern of HIV/AIDS, the Government was required to devise and implement, subject to available resources, a comprehensive and coordinated program “to realise progressively the rights of pregnant women and their newborn children to have access to health services to combat mother-to-child transmission of HIV”. Its failure to do so breached s 27 of the Constitution, because the Government had failed “to act reasonably to provide access to the socio-economic rights”\(^50\).

**Would the inclusion of ESC rights in a Human Rights Act politicise the judiciary?**

The argument is often made that making human rights justiciable politicises the judiciary by requiring or encouraging the courts to consider what are, in essence, political questions.\(^51\) This problem is said to be particularly acute in relation to ESC rights, given that decisions on these questions could have resource implications. A hypothetical example is of a court ruling that a legal right to housing means that the government must provide housing of a particular standard to all people who are homeless. This would involve the court dictating a particular policy to the government, and it would be required to reallocate resources in a way that might have undesirable consequences.

At one level, it is clear that the protection of human rights costs money. As Professors Homles and Sunstein make clear, even civil and political rights, such as the right to a fair trial, require that tax dollars are spent on the court system (judges, jurors, registry staff, court buildings etc).\(^52\) That a court enforcing such rights makes a claim on the public purse is, of course, inevitable. Just as the enforcement of certain property and other rights have similar implications.

The real problem is of courts overstepping the mark, and acting as if they were members of the legislature or executive. However, for a number of reasons, a well-balanced HRA would avoid such problems. First, it should be remembered that courts can be vested with stronger or weaker powers to review government decisions that relate to ESC rights. This

\(^49\) Minister for Health v Treatment Action Campaign [2002] 5 SA 721.

\(^50\) Minister for Health v Treatment Action Campaign [2002] 5 SA 271 at [38].

\(^51\) See, eg, James Allan, ‘Siren Songs and Myths in the Bill of Rights Debate’, (Senate Occasional Lecture, Canberra, 4 April 2008) at 16.

would depend on the drafting of the proposed HRA as a whole, and of the particular ESC right in question.

Secondly, as discussed in Part 3 of this submission, the statutory HRA here proposed would not empower the courts to determine or dictate socio-economic policy, as federal courts would not be able to invalidate laws deemed incompatible with the rights set out in the HRA. Nor would it be unlawful for a public authority to rely on legislation that is incompatible with a particular right or rights.

Thirdly, the standard of review applicable to ESC rights could and should be calibrated to take into account the nature of the rights in question, the competing interests at stake, and the limits on judicial power. Thus, assuming that a federal HRA protected ESC rights in a manner similar to that in the ICESCR and the South African Constitution, the courts would impose a less stringent form of review in relation to ESC rights than for civil and political rights, forming judgments with reference to the limitations of “reasonableness”, the limited resources available to Government and the principle of “progressive development”. As the South African Constitutional Court explained in the Grootboom case, which concerned forced evictions into homelessness:

A court considering reasonableness will not enquire whether other or more desirable or favourable methods could have been adopted, or whether public money could have been better spent … It is necessary to recognise that a wide range of possible measures could be adopted by the state to meet its obligations. Many of these could meet the test of reasonableness.\(^53\)

This careful delineation of the judicial role recognises that a state can “reasonably” meet its human rights obligations in many different ways. The judicial deference in considering ESC rights—or, to put it another way, the “margin of appreciation” that the courts give to the legislature and executive in these circumstances—is a consistent feature of international human rights law jurisprudence.\(^54\) It is a limited judicial review that provides a safeguard for minimum human rights standards whilst respecting the principle of parliamentary supremacy and the limited constitutional role of the courts.

**Summary of rights that should be protected by a Human Rights Act**

Human rights law is designed to protect and promote the ability of individuals to live with dignity and participate in a democratic community. In order to achieve this objective, it is necessary to protect in law accepted civil and political rights, as well as core economic, social and cultural rights.

A blanket prioritisation of civil and political rights over economic, social and cultural rights is too arbitrary and does not adequately respond to the particular needs of the Australian community. These two categories of rights are often interdependent, and the focus should be on identifying those rights that are necessary to promote individual dignity and democratic participation, irrespective of how individual rights in this list might be classified.

\(^{53}\) Government of South Africa v Grootboom [2001] 1 SA 46 at [41].

\(^{54}\) See, eg, Lawless v Ireland (1961) 1 EHRR 15 at 82; Handyside v United Kingdom (1976) 1 EHRR 737 at 22; Ireland v United Kingdom (1980) 2 EHRR 25 at 86-87.
As Justice Albie Sachs of the South African Supreme Court told the UK Joint Committee, “a country which does not include social and economic rights in some form in its Bill of Rights is a country which has ‘‘given up on aspiration’’.”\(^{55}\) It would be possible to include ESC rights in a way that appropriately limits the judicial role, such that the courts do not trespass into areas of policy. As the UK Joint Committee has stated, “the formulation of ... a Bill [of Rights] is not a simply binary choice between a fully justiciable text on the one hand, or a purely symbolic text on the other. There is a continuum.”\(^{56}\)

**Recommendation 1**

The proposed federal Human Rights Act should incorporate into domestic law the human rights set out in the *International Covenant on Civil and Political Rights*, the *International Covenant on Economic Social and Cultural Rights* and the Universal Declaration of Human Rights. This would have two principal benefits: (i) it would bring Australia into compliance with its existing international law obligations, thereby significantly improving Australia’s international standing; (ii) it would provide Australia with access to a valuable source of international learning and jurisprudence relating to the protection, interpretation and balancing of human rights.

Economic, social and cultural rights should be included in the Human Rights Act, with appropriate safeguards to ensure that courts do not stray beyond their proper constitutional role.

In addition, in determining which human rights should be protected, the Consultation Committee should consider the demonstrated needs of the Australian community, and the values on which there is broad community consensus. The Consultation Committee should consult the Australian community to help determine which rights are of greatest importance in Australia. That consultation should be by formal and informal means, and should include opinion polling and deliberative polling. Reference should also be made to the approaches taken in comparable jurisdictions.

**How should ‘responsibilities’ be recognised in law?**

**Methodology for determining responsibilities**

It is far more difficult to achieve consensus on the specific content of ‘human responsibilities’, than it is in respect of human rights. Unlike human rights, which are designed to protect individual dignity and autonomy, there is no broadly-accepted theoretical underpinning to the articulation of human responsibilities. Instead, the responsibilities of people subject to Australian jurisdiction are set out in specific legislation wherever they apply. On this basis, a federal HRA seems an inappropriate instrument in which to legislate in respect of individual responsibilities.

There is very little in the way of international treaty or other law, nor is there comparative jurisprudence to guide the process of determining the most relevant responsibilities of

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those subject to Australian jurisdiction. This section of the submission discusses the extent to which the notion of ‘responsibilities’ ought to be made justiciable.

**International standards**

At present, international law does not clearly set out the fundamental responsibilities of individuals. The closest model is the Draft Universal Declaration of Human Responsibilities, drafted by an NGO, the InterAction Council, and launched on 1 September 1997.57

This Declaration lists responsibilities such as:

- Article 4: All people, endowed with reason and conscience, must accept a responsibility to each and all, to families and communities, to races, nations, and religions in a spirit of solidarity: What you do not wish to be done to yourself, do not do to others.
- Article 12: Every person has a responsibility to speak and act truthfully. No one, however high or mighty, should speak lies. The right to privacy and to personal and professional confidentiality is to be respected. No one is obliged to tell all the truth to everyone all the time.
- Article 17: In all its cultural and religious varieties, marriage requires love, loyalty and forgiveness and should aim at guaranteeing security and mutual support.

As is apparent from the text, these responsibilities are expressed in general terms. This Draft Declaration received a muted response from the international community58 and the concept appears “firmly buried in the UN human rights bureaucracy”.59

The lack of international interest is largely due to the role the established human rights instruments already fulfil in recognising the interrelationship between human rights and responsibilities.60 For example, art 29 of the UDHR reads:

1. Everyone has duties to the community in which alone the free and full development of his personality is possible.
2. In the exercise of his rights and freedoms, everyone shall be subject only to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society.
3. These rights and freedoms may in no case be exercised contrary to the purposes and principles of the United Nations.

**Comparative approaches**

Like the UDHR, the European Convention on Human Rights61 does not enumerate responsibilities. Instead, the Convention rights are limited by other rights and by correlative duties. An example of a specific limitation provision is found at art 10(2), which provides the following caveat to the art 10 protection of freedom of expression:

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The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

By contrast, the African Charter on Human and People’s Rights\(^6\) particularises in art 29 an extensive range of duties, including obligations “to preserve and strengthen social and national solidarity” and to promote African “moral well-being”. However, as Dr Ben Saul concluded, these duties “are so broad and ambiguous that practical enforcement would be almost impossible”.\(^6\)

The UK Government is currently considering the inclusion of human responsibilities in a Bill of Rights.\(^6\) In its recent Green Paper it suggested a list of responsibilities including: 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 for the sake of future generations…\(^6\)

However, the UK government does not endorse the use of a list of responsibilities, nor does it claim that the notion of social responsibilities can be given an agreed and unambiguous content. The UK is also considering expressing “responsibilities” in a general provision similar to Art 29 of the UDHR or the respective preambles to the ACT Human Rights Act and the Victorian Charter.\(^6\)

The South African Constitutional Bill of Rights likewise does not include responsibilities. However, in February 2008, South Africa produced a document entitled, “Bill of Responsibilities for the Youth of South Africa”. It was intended to be taught to children in schools. The twelve Responsibilities explain how rights such as the right to education require good behaviour in class, or how the right to freedom of expression places responsibilities on children to refrain from using speech to victimise or discriminate against others.\(^6\) Such a document, if drafted carefully, can have an important educative role. However, we do not consider the content of such a bill of responsibilities to be an appropriate addition to a legal instrument such as a HRA. Nor does South Africa: its Bill of Responsibilities has an educative role only. It has no legal force.

The two Australian jurisdictions with statutory human rights protections, the ACT and Victoria, have both chosen not to include any express responsibilities.

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\(^6\) (27 June 1981) 21 ILM 58.


\(^6\) United Kingdom Ministry of Justice, Rights and Responsibilities: developing our constitutional framework, CM 7577 (2009), Chapter 2.

\(^6\) United Kingdom Ministry of Justice, Rights and Responsibilities: developing our constitutional framework, CM 7577 (2009) at [2.26].

\(^6\) See United Kingdom Ministry of Justice, Rights and Responsibilities: developing our constitutional framework, CM 7577 (2009) at [2.42], [2.57]-[2.58].

In the ACT, Bill Stefaniak MLA introduced a Charter of Responsibilities Bill 2004,\(^68\) which was debated and rejected by the ACT Legislative Assembly by a vote of nine to five.\(^69\) Two key points emerged from that debate, which raised serious concerns about the justiciability of any kind of statutory list of responsibilities. First:

> A list of what is considered good behaviour, while it might be considered desirable in itself, is not an appropriate subject for legislation. It is necessarily selective, as it cannot cover every kind of situation, and seeks to intervene in personal relationships. It is vague and general, intended to cover all situations at all times. This makes its enforceability questionable.\(^70\)

The second concern was as follows:

> This bill is not based on any international treaties, and there is no international law on which to guide their interpretation. This bill states that the courts must interpret laws to be consistent with the charter, yet there is no body of law by which the court can do so.\(^71\)

Additionally, the avowed reason for a Bill of Responsibilities—the need to counter the supposed social imbalance that would be caused by the ACT’s HRA\(^72\)—has thus far proved groundless.

Despite the failure of a Bill of Responsibilities in the ACT, the idea of a Charter referring to responsibilities as well as rights resonated in Victoria. The Victorian statute is entitled “a Charter of Human Rights and Responsibilities”. It is worth noting, however, that while the word ‘responsibilities’ appears in the title of this law, the Charter does not impose any legal responsibilities on individuals. The inclusion of ‘responsibilities’ in the Preamble reflects s 7(2) of the Charter, which states that a “human right may be subject under law only to such reasonable limits as can be demonstrably justified in a free and democratic society based on human dignity, equality and freedom”. As Pound and Evans note, this recognises that rights are not absolute and may be limited in certain circumstances, including for the protection of the competing rights of others. The notion of responsibilities might also reflect the Charter requirements placed on government, including the preparation of statements of compatibility for new Bills and the human rights compliance obligations of public authorities. These requirements place a responsibility on government to protect human rights.\(^73\)

**How should responsibilities be recognised?**

We submit that a federal HRA should not enumerate a series of individual responsibilities and duties, the violation of which would impose legal consequences. This submission is based on three main grounds.

First, attempts to date to list individual “responsibilities” are ambiguous, disputed and any attempt to make them enforceable would be highly problematic. The overview of international, regional and domestic approaches suggests a rejection of any approach to list individual responsibilities in that way.

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\(^68\) ACT, Parliamentary Debates, Legislative Assembly, 23 June 2004 at 3875 (Bill Stefaniak).
\(^69\) ACT, Parliamentary Debates, Legislative Assembly, 18 August 2004 at 3886.
\(^70\) ACT, Parliamentary Debates, Legislative Assembly, 18 August 2004 at 3876 (Jos Stanhope).
\(^71\) ACT, Parliamentary Debates, Legislative Assembly, 18 August 2004 at 3878 (Roslyn Dundas).
\(^72\) See, ACT, Parliamentary Debates, Legislative Assembly, 23 June 2004 at 3886 (Bill Stefaniak).
Secondly, a federal HRA is not an appropriate vehicle for the legal recognition of responsibilities. Human rights are not conditional in the sense of being rewards for good behaviour, and so they cannot be suspended or abrogated by the commission of a crime or other anti-social behaviour. “Rights should not be contingent on performing responsibilities”, and the inclusion of such a list risks undermining the protections included in a HRA. In any event, limitations and duties are built into the architecture of a well-designed Act. For this reason, it is unnecessary to enumerate responsibilities in a HRA.

The most commonly recognised duties are correlative duties, referring to those duties that complement specific rights. Basically, a right is a legal advantage that entails a corresponding duty or disadvantage. For example, the right of free speech implies a duty to not interfere with the free speech of others, since the right has no meaning if the correlative duty is not observed.

Thirdly, a HRA should not “impose enforceable duties on individuals or responsibilities which they are already required by the general law to discharge”. Correlative responsibilities that could be given legal content, such as the duty not to abuse one’s right to freedom of speech by defaming others or inciting people to violence on discriminatory grounds, have already been given legal content by criminal and civil law. We strongly agree with the UK Government and Joint Committee on Human Rights in concluding that any HRA should not have “direct horizontal effect”:

- that is, it should not give freestanding causes of action to individuals against other private parties for breach of their fundamental rights... [T]his would be a recipe for uncertainty and confusion, cutting across the well-established categories of private law liability, and giving rise in practice to difficult questions of practice and procedure.

Subject to the points above, codes of responsibilities can play an important moral and civic role in, for example, educating children about their position in a liberal democracy. As noted, this is the approach taken in South Africa. Moreover, while an articulation of individual responsibilities may play an important role in understanding that human rights are generally not absolute, we endorse the view of the JCHR, which said:

- It may be in the form of a preamble referring to responsibilities; a limitation clause acknowledging that some rights can be justifiably limited to serve some other competing interest; positive obligations on the state to protect the rights of individuals against other private individuals; the indirect effect of the Bill of Rights on the law governing private relations because of the duty on courts to interpret the common law compatibly, including the common law governing private relations; or a prohibition on abuse of rights. All of these are manifestations of responsibilities being taken into account in Bills of Rights and none are controversial.

It would be appropriate for a federal HRA to recognise individual responsibilities by providing that rights may be limited in a democratic society to serve other interests, and

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74 Joint Committee on Human Rights, Twenty-Ninth Report (2008) at [274].
77 Joint Committee on Human Rights, Twenty-Ninth Report (2008) at [274].
by the inclusion of a clause about responsibilities in the preamble. We would support the inclusion of a preambulatory clause similar to that of the UDHR or the ACT’s HRA:

This Act encourages individuals to see themselves, and each other, as the holders of rights, and as responsible for upholding the rights of others.

Or in the preamble of the Victorian Charter:

Human rights come with responsibilities and must be exercised in a way that respects the human rights of others.

**Recommendation 2**

The proposed Australian Human Rights Act should recognise that human rights are often limited by, or must be balanced against, other rights, and that human rights come with responsibilities. However, it would be inappropriate to codify a list of legally-enforceable individual responsibilities in this proposed Act.
Part 2: Are these human rights currently sufficiently protected and promoted?

Introduction: Australia’s current level of human rights protection

Former Prime Minister John Howard said in 2000 that Australia’s human rights record is “quite magnificent” when “compared to the rest of the world”. The official 2007 position of the former Australian Government was that:

Australia’s strong democratic institutions, the Constitution, the common law and current legislation, including anti-discrimination legislation at the Commonwealth, State and Territory levels, protect and promote human rights in Australia. For these reasons, the Australian Government is not convinced of the need for a Bill of Rights in Australia.

Certainly, as a prosperous liberal society with effective democratic institutions, Australia does not face human rights abuses on the scale of Darfur or Afghanistan. But the fact that Australia’s human rights record could be far worse is not a justification for complacency or even satisfaction with the protection of human rights in Australia.

This section maps the existing constitutional, legislative and common law protections for human rights in Australia. It also considers how effectively individuals can enforce human rights at the international level. It is our conclusion that these legal protections are piecemeal, often weak and too limited to protect human rights adequately.

As explained below, human rights in Australia are legally protected on four levels. First, the Australian Constitution provides limited protection to a small number of human rights. Secondly, some ordinary legislation protects certain rights—either generally or sectorally. Thirdly, the common law provides limited human rights protection. Finally, if all domestic remedies are exhausted, an individual who believes Australia has violated international human rights law can, in certain circumstances, appeal to international adjudicative bodies, which can generally issue non-binding recommendations. This part of the submission provides a detailed map of current human rights protections in Australia, drawing attention to qualifications, limitations and weaknesses in this coverage, which can and have allowed people to slip through the gaps.

Despite Australia’s prosperity and “strong democratic institutions”, the gaps and weaknesses in our human rights laws have allowed human rights violations to occur, often unchecked. The absence of a statutory Human Rights Act (HRA) means that Australia has lost opportunities to promote human rights, and the piecemeal nature of human rights protection detracts from the emblematic status that fundamental freedoms should enjoy in our legal and political culture.

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The conclusion can only be that something must be added to our existing system if we wish to protect and promote human rights more effectively. In the next part, we show that a HRA is the best solution.

**Constitutional protection of human rights**

Unlike the United States or South African Constitutions, the Australian Constitution does not comprehensively protect human rights. The US constitutional Bill of Rights emerged from a combination of civil war and a fight for equality and rights. South Africa’s Constitution emerged out of a struggle against apartheid and was drafted with the express intention of promoting racial equality and the protection of human rights more generally.

On the other hand, the Australian Constitution was the result of a peaceful move away from Australia’s colonial status and was characterised by the desire to share powers and responsibilities between the existing Australian colonies and the soon-to-be-established Federal polity.\(^{82}\) The emphasis was on defining and limiting powers between State and Federal governments rather than protecting the individual from the powers of the government. Professor George Williams goes as far as to suggest that, to some extent, the framers were hostile to certain ideas of rights, particularly any notion of racial or sexual equality.\(^{83}\)

As a consequence, the Australian Constitution protects only a very narrow spectrum of rights. Moreover, judicial interpretation of many of these limited protections has further reduced their ambit.

**Trial by jury**

Section 80 of the Constitution provides that “the trial on indictment of any offence against any law of the Commonwealth shall be by jury”. This right contains an express limitation: it applies only to “trials on indictment”. The High Court has accepted that the federal Parliament can choose at its absolute discretion whether an offence should be tried on indictment or summarily.\(^{84}\) As a result, this provision, which might appear to enshrine the right to trial by jury, can be entirely circumvented by legislating to prosecute persons summarily instead. Moreover, this “guarantee” binds only the federal Government, not the States, even though most accused persons are prosecuted under State laws.\(^{85}\) Accordingly, as Barwick CJ observed, “What might have been thought to be a great constitutional guarantee has been discovered to be a mere procedural provision.”\(^{86}\)

Some, such as Geoffrey Sawer, have argued that the guarantee of trial by jury “has been in practice worthless.”\(^{87}\) Even if this concern is overstated, it is accurate to say that this constitutional guarantee has done less to protect the right than might be suggested by its terms.

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86 *Spratt v Hermes* (1965) 114 CLR 226 at 244.
Freedom of religion

Section 116 of the Constitution might appear to provide some protection of freedom of religion, but that protection has so far proven almost illusory. The provision states:

The Commonwealth shall not make any law for establishing any religion, or for imposing any religious observance, or for prohibiting the free exercise of any religion, and no religious test shall be required as a qualification for any office or public trust under the Commonwealth.

As with the guarantee of trial by jury, this inhibition on Commonwealth power does not apply to the states. Thus, s 116 does not prevent individual states from passing laws that infringe upon freedom of religion.

Further, although the High Court has interpreted the term ‘religion’ broadly, finding that it includes faiths beyond the well-established religions, the Court has nevertheless interpreted the protections offered by s 116 very narrowly. Only the first and third of these freedoms has been considered by the High Court, and the section “has never been successfully invoked to strike down a law”. For example, the imposition of mandatory military training on a conscientious objector was held not to infringe s 116, with Griffith CJ affirming “that a law requiring a man to do an act which his religion forbids ... does not come within the prohibition of s 116.”

Another example of the limitations of s 116 emerged in Kruger v Commonwealth (Stolen Generations Case). It was argued that the Aboriginals Ordinance 1918 (NT), which authorised the taking of Aboriginal children from their families and communities, was a violation of s 116. This was because the Ordinance had the consequence of prohibiting the free exercise of Aboriginal beliefs. However, the High Court held that s 116 does not protect any freestanding right of freedom of religion. Instead, it only prevents the Commonwealth from passing laws that have “the purpose of achieving an object which s 116 forbids.” In other words, provided that the purpose of the law is to achieve an object that is not forbidden by s 116, such as the supposedly protective removal of “half-caste” children, then even though the law might grossly and disproportionately inhibit freedom of religion for Indigenous peoples in practice, it will not infringe s 116.

The narrowness of this putative “freedom of religion” provision is an anachronism. Compare the modern expression of this right, as contained in Art 18 of the ICCPR:

1. Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have or to adopt a religion or belief of his choice, and freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching.
2. No one shall be subject to coercion which would impair his freedom to have or to adopt a religion or belief of his choice.

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88 Adelaide Company of Jehovah’s Witnesses v Commonwealth (1943) 76 CLR 116.
89 George Williams, Human Rights under the Australian Constitution (2002) at 111.
90 Krygger v Williams (1912) 15 CLR 366 at 369.
91 (1997) 190 CLR 1.
92 Kruger v Commonwealth (1997) 190 CLR 1 at 40 (Brennan CJ).
Freedom to manifest one’s religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others.

The States Parties to the present Covenant undertake to have respect for the liberty of parents and, when applicable, legal guardians to ensure the religious and moral education of their children in conformity with their own convictions.

Australia is obliged under international law to incorporate these terms into domestic law. Article 18(3) properly recognises that this right might sometimes be limited, but it requires such limitations to be necessary and proportionate to the good that is sought to be achieved, a safety net protection that simply does not exist in Australian law. The *Stolen Generations Case* highlights this yawning gap in our legal framework.

**Rights of out-of-state residents**

Section 117 provides a very narrow protection: a resident of one State must not be subjected in any other State to “any disability or discrimination which would not be equally applicable” if he or she were a resident of that other State.

Clearly, discrimination on the basis of a person’s State of residence should be prohibited. However, while the inclusion of s 117 was important to securing the agreement of the colonies to federate, it is of limited practical utility given that such discrimination is rarely (if ever) a problem. The protection offered by s 117 seems incongruous in light of the fact that the *Constitution* provides no recourse to those suffering discrimination on other more pernicious grounds, such as race, gender, religion, political or other opinion, nationality, sexual orientation or age.

**Economic rights**

The *Constitution* protects two economic rights. The first of these is s 92, which provides that interstate trade “shall be absolutely free”. This has been interpreted to strike down laws that are protectionist, in the sense of adversely discriminating against residents of a particular State or Territory in a way that is not reasonably considered necessary. The second is s 51(xxxi), which provides that the acquisition of property by the Commonwealth Government must be on “just terms”. Generally, “the High Court has chosen to be generous in its interpretation of economic guarantees.”

**Rights implied from the doctrine of representative government**

The *Constitution* is silent on the recognition and protection to be afforded other rights. Even so, the High Court has derived a small number of implied rights from the structure, system and doctrinal assumptions of the Constitution.

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The term ‘freedom of expression’ is not expressly referred to in the Constitution. However, an implied freedom of political communication has been recognised and upheld by the High Court. This implied freedom is derived from the constitutional doctrine of representative and responsible government, evidenced by ss 7, 24, 64 and 128 and more general structural and legal foundations of the Constitution. Its rationale is that constitutional protection must be provided to political communications to the extent necessary for the effective operation of the system of government provided for in the Constitution itself—namely, one that is based upon fair and open elections.

The test for constitutionality involves two limbs:

First, does the law effectively burden freedom of communication about government or political matters either in its terms, operation or effect? Second, if the law effectively burdens that freedom, is the law reasonably appropriate and adapted to serve a legitimate end the fulfilment of which is compatible with the maintenance of the constitutionally prescribed system of representative and responsible government and the procedure prescribed by s 128 for submitting a proposed amendment of the Constitution to the informed decision of the people.

The test should be applied such that “if the first [question] is answered “Yes”, and the second “No”, the law is invalid”.

Despite being constitutionally entrenched, this implied freedom of political communication is not as robust or as broad as would be a general right to freedom of expression. First, precisely because it is an implied freedom and one only recently articulated by the High Court, the scope and durability of the right are less clear, and its position more controversial, than that of a right specifically written into the Constitution or expressly set out by federal statute.

Secondly, this implied limitation on legislative and executive power only protects political communication; it does not protect freedom of expression more generally. And even this limited understanding of political communication has been read narrowly. As the Australian Law Reform Commission has stated, for a legislative provision to be unconstitutional:

It is necessary to show something more than that it merely burdens a broad notion of freedom of political communication. Rather, it would be necessary to demonstrate that the provision infringes the constitutional right to engage in public criticism of the government or government action.

Thirdly, this implied freedom does not confer a freestanding right. It has been interpreted negatively to be a prohibition on legislative or executive interference rather than a recognition and enlargement of a positive right.

**Implied right to vote**

On its face, s 41 of the *Constitution* might appear to confer a right to vote, but this has not been how it has been interpreted. On the other hand, more use has been made of s 24, which requires that government be “directly chosen by the people of the Commonwealth”. In *Roach v Electoral Commission*, \(^{101}\) the High Court held that a blanket law intended to disenfranchise all prisoners was unconstitutional. Gleeson CJ explained the rule as follows:

> Because the franchise is critical to representative government, and lies at the centre of our concept of participation in the life of the community, and of citizenship, disenfranchisement of any group of adult citizens on a basis that does not constitute a substantial reason for exclusion from such participation would not be consistent with choice by the people.\(^{102}\)

However, this means that provided the Government can show a *rationale* for exclusion, it may validly disenfranchise narrower classes of adult citizens—for example, current prisoners serving three or more years, rather than all current prisoners. This is so even if the disenfranchisement impinges further on human rights than is necessary to secure the Parliament’s lawful objective. That is, as Gleeson CJ emphasised, the Court will not impose a test of proportionality. Only jurisdictions with human rights laws require “both a rational connection between a constitutionally valid objective and the limitation in question, and also minimum impairment to the guaranteed right.”\(^{103}\)

The human rights instruments in Canada and the United Kingdom thus “confer a wider power of judicial review than that ordinarily applied under our Constitution.”\(^{104}\)

**Rights implied from the separation of powers**

The High Court derives some human rights protections from the constitutional separation of judicial power from legislative and executive power, which is implied from the system and structure of the Constitution. This ensures that the judiciary is politically independent, and so gives the public confidence in the administration of justice.

The doctrine also prevents the executive and the legislature from arrogating judicial functions, such as the punitive detention of persons who have not been judged and sentenced to imprisonment by a court. However, in practice this apparent guarantee of personal liberty is limited.

For example, the High Court has held that s 51(xix) of the *Constitution* permits the Commonwealth to hold non-citizens in involuntary detention, provided the detention is incidental to another, non-punitive purpose.\(^{105}\) In *Al-Kateb*,\(^{106}\) the High Court considered the constitutional validity of s 196 of the *Migration Act 1958* (Cth), which mandates the administrative detention of unlawful non-citizens for the purpose of deportation. The applicant was a stateless Palestinian. He had committed no crime, posed no security threat and had voluntarily agreed to depart Australia. However, no foreign state would

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accept him and there was no reasonable prospect of the situation changing. As a consequence, the Migration Act appeared to authorise the government to detain him indefinitely—for the rest of his life if need be.

A majority of the High Court affirmed that this was the case. If the detention is for the non-punitive purpose of deportation, the Australian Government may lawfully imprison non-citizens for the rest of their lives. The fact that this detention will likely feel exceedingly punitive to its victim is of no consequence to its constitutional validity.

Luckily for Mr Al-Kateb, he was eventually released by the relevant Minister, but only after significant media and public debate on his case had occurred. Unpopular minorities, politically unpalatable causes and less sensational human rights stories will struggle to achieve the same level of scrutiny, or a response more positive than indifference. The often arbitrary factors that bring a particular person’s case to the attention of the Australian public, and our elected representatives, provide an insufficient corrective force to prevent or remedy human rights abuses in Australia.

**Lack of remedy**

The Constitution is concerned “with the powers and functions of government and the restraints upon their exercise”, not with the rights of the individuals in Australia. These restraints have been framed as limitations on Commonwealth power; they do not give rise to freestanding rights. This means that individuals whose “constitutional rights” have been violated have no independent cause of action against the Commonwealth. Further:

If a government does or omits to do something the doing or omission of which attracts no liability under the general law, no liability in damages for doing or omitting to do that thing is imposed on the government by the Constitution.

Consequently, it would be a mistake to rely on the Constitution to ensure the protection of human rights in Australia.

**Statutory human rights protections**

The second level of human rights protection in Australia is that provided by ordinary legislation at the federal, state and territory levels. In one sense, this legislative protection of human rights is broader in scope and more robust in application, but it is still only piecemeal in its coverage. While some rights, such as the right not to be discriminated against on the grounds of race, sex, age and disability, are protected by legislation, other rights receive only limited and indirect protections that arise sectorally or in relation to specific situations.

**Federal laws**

The Commonwealth has enacted a suite of anti-discrimination laws. These include:

- the Racial Discrimination Act 1975 (Cth), which partially implements the

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110 *Kruger v Commonwealth (Stolen Generations Case)* (1997) 190 CLR 1 at 46 (Brennan CJ).
International Convention on the Elimination of All Forms of Racial Discrimination;\textsuperscript{111}
- the Sex Discrimination Act 1984 (Cth), which partially implements the Convention on the Elimination of All Forms of Discrimination Against Women;\textsuperscript{112}
- the Disability Discrimination Act 1992 (Cth), which partially implements the ICCPR and the Convention Concerning Discrimination in Respect of Employment and Occupation;\textsuperscript{113} and
- the Age Discrimination Act 2004 (Cth), which reflects the Political Declaration adopted in Madrid on 12 April 2002 by the Second World Assembly on Ageing.

These laws apply to all persons, not just officers of the Commonwealth, and they prohibit discrimination against individuals on the grounds of race, gender, disability and age in public life.

Also, the Human Rights and Equal Opportunity Commission Act 1986 (Cth) establishes a national human rights body to oversee the operation of the above Acts. Its purpose and functions include law reform, educating the community, intervention in court proceedings, investigating potential human rights infringements and conciliation of disputes. Schedules 1, 2, 3 and 4 of the Act annex various international treaties, including the ICCPR.\textsuperscript{114} However, this has not fully incorporated these treaties into Australian domestic law.\textsuperscript{115}

Additionally, civil and political and economic, social and cultural (ESC) rights receive some limited protection at a federal level. For example, privacy is protected by the Privacy Act 1988. The Freedom of Information Act 1982 and the Administrative Appeals Tribunal Act 1975 provide some protection in relation to data handling and to fair treatment in the determination of rights. The right to marriage is regulated by the Marriage Act 1961. Some ESC rights receive limited support in federal legislation, through means such as the Social Security Act 1991, the Workplace Relations Act 1996 and the Higher Education Support Act 2003, the last of which helps create equal access to tertiary education for students from all socio-economic backgrounds.

State and Territory laws
Human rights protections are at their most comprehensive in the ACT and Victoria. The Human Rights Act 2004 (ACT) gives statutory protection to an express list of fundamental rights and freedoms. The Charter of Human Rights and Responsibilities Act 2006 (Vic) operates in a similar fashion. Importantly, and unlike the scattered and

\textsuperscript{111} International Convention on the Elimination of All Forms of Racial Discrimination (21 December 1965) 660 UNTS 195.
\textsuperscript{112} Convention on the Elimination of All Forms of Discrimination against Women (18 December 1979) 1249 UNTS 13.
\textsuperscript{113} Convention Concerning Discrimination in Respect of Employment and Occupation (15 June 1960) 362 UNTS 31.
\textsuperscript{114} The Schedule also includes: Convention concerning Discrimination in respect of Employment and Occupation; Declaration of the Rights of the Child; Declaration on the Rights of Mentally Retarded Persons; Declaration on the Rights of Disabled Persons.
\textsuperscript{115} Dietrich v The Queen (1992) 177 CLR 292 at 305 (Mason CJ and McHugh J).
piecemeal protections available in other Commonwealth and State and Territory statutes, these HRAs focus on the rights of the individual in respect of State and Territory decision-making and does not do so in a sectoral or situation-specific way.

The other States and Territories have also enacted a number of laws providing for anti-discrimination and equal opportunity rights, racial and religious tolerance, and whistleblower protections. As with federal legislation, there is also some limited protection of other civil and political and ESC rights in State and Territory laws. For example, LEPRA codifies police powers and provides some pre-trial protections to accused persons. Some ESC rights are likewise protected in a haphazard way, for example in NSW by the Housing Act 1991, Industrial Relations (Child Employment) Act 2006 and the Education Act 1990.

**Weaknesses**

Although statutory protection of human rights is far more comprehensive than that of the Constitution, there are still significant flaws in the current system. First, the coverage of existing statutes is far from complete. For example, rights that are internationally recognised as fundamental to human liberty and dignity, such as freedoms of expression, association and assembly, are not protected.

Secondly, human rights issues arise only indirectly under much of this legislation, and the question whether government action disproportionately impinges on a human right is rarely if ever addressed. This hinders the domestic development of a principled human rights framework, and it also prevents Australia from engaging with the human rights jurisprudence that is fast developing in Canada, New Zealand, the United Kingdom, the European Union and elsewhere. Australia risks ever-increasing jurisprudential isolationism as a result, for Australian law will—and already is—developing on a different track to that of other, previously comparable jurisdictions. As Chief Justice James Spigelman noted extra-curially, “Australian common law is threatened with a degree of intellectual isolation that many would find disturbing.”

Particularly lacking is a principled and consistent understanding of a central tenet of human rights law: the concept of proportionality. “Proportionality” denotes the balancing

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of competing rights and interests, as well as the necessity of achieving legitimate public aims in a manner that impacts least upon rights fundamental to a democratic society. This tenet is common to judicial review in the jurisdictions mentioned above, but in Australia there is currently no clear statement of binding principle to which the Government must adhere when deciding when, how, and how much to interfere with human rights.

Thirdly, merely to scatter human rights protections across a host of different laws is to undermine the status of human rights in our legal system. A declaration of the human rights that are of fundamental importance in Australia has a moral role to play in our society in consolidating and promoting underlying community values. This role is diminished by Australia’s lack of a single, unifying document enshrining these fundamental rights and it is undermined by the lack of uniformity and universality in human rights standards and protections across Australia. We are failing to utilise a universal, non-sectarian statement of values that could unify our disparate beliefs under a charter of core values.

Common law protections
In addition to these scattered statutory protections, the common law provides a third level of protection to some of our fundamental rights and freedoms. As Spigelman CJ noted extra-curially, these common law rights include rebuttable presumptions that Parliament did not intend:

- To retrospectively change rights and obligations;
- To infringe personal liberty;
- To interfere with freedom of movement;
- To interfere with freedom of speech;
- To alter criminal law practices based on the principle of a fair trial;
- To restrict access to the courts;
- To permit an appeal from an acquittal;
- To interfere with the course of justice;
- To abrogate legal professional privilege;
- To exclude the right to claim self-incrimination;
- To extend the scope of a penal statute;
- To deny procedural fairness to persons affected by the exercise of public power;
- To give executive immunities a wide application;
- To interfere with vested property rights;
- To authorise the commission of a tort;
- To alienate property without compensation;
- To disregard common law protection of personal reputation; and
- To interfere with equality of religion.

This “common law bill of rights” is valuable but still too limited. First, although the “bill” overlaps to some extent with ICCPR and ICESCR rights, it fails to acknowledge and protect many rights recognised at international law and valued by the Australian

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122 See, eg, Murray Gleeson, “Rights and Values” (Speech delivered at the Melbourne Catholic Lawyers Association, 18 June 2004).

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community, such as freedom of association, the right to work and enjoy fair conditions of work, and the right to family life.

Secondly, the common law protects human rights by way of presumption, not a binding rule. As explained in *Coco v The Queen*:

The courts should not impute to the legislature an intention to interfere with fundamental rights. Such an intention must be clearly manifested by unmistakeable and unambiguous language. General words will rarely be sufficient for that purpose if they do not specifically deal with the question because, in the context in which they appear, they will often be ambiguous on the aspect of interference with fundamental rights.125

In other words, the courts will try to construe legislation in a way that is consistent with rights. If, however, they are faced with an Act that unambiguously infringes human rights, the common law presumption that the relevant right is protected will be overridden, and Parliament will not be under any obligation to justify its approach.

Thirdly, and related to this interplay between the courts and political processes, judgments that concern human rights issues but turn on complicated issues of interpretation and precedent will struggle to attract public attention and understanding. By contrast, judgments that squarely address human rights issues through a legal framework that expresses rights in plain language will be far more likely to gain the public exposure needed to impact the political process.126

A fourth problem with the common law “bill of rights” is demonstrated by the very closeness of the 4:3 decision in *Al-Kateb*. This reflects the uncertain nature and status of judge-made rights and the democratic concerns and constitutional confusions continuing to obscure the appropriate weight to give these rights in statutory interpretation.127

**International legal mechanisms**

The fourth level of protection is derived from Australia’s recognition of a small number of international legal avenues for rights protection. For example, in 1991, Australia acceded to the first Optional Protocol to the ICCPR, which allows individuals to take complaints about ICCPR violations to the Human Rights Committee (“HRC”), the UN monitoring body overseeing the ICCPR.128

Unfortunately, this final mechanism is of limited practical utility. First, the process by which one becomes eligible to apply to the HRC requires prior exhaustion of domestic legal remedies. This will almost inevitably involve costly and lengthy litigation through the Australian judicial system. Many individual applicants would be unable to sustain this litigation. Secondly, the HRC does not issue enforceable judgments but instead can only

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128 Australia has also ratified the two Optional Protocols to the CRC on the involvement of children in armed conflict, and on the sale of children, child prostitution and child pornography. Australia recognised the complaints process under the CAT and CERD in 1993.
make recommendations to the Australian Government to alter its laws or administrative application. The Australian Government cannot be compelled by a successful applicant to adhere to these recommendations.

Thirdly, despite the moral weight and authority of the HRC, its recommendations are unlikely to affect our domestic situation unless they receive media coverage and/or are incorporated into the policies of either or both of the major parties. For example, when the HRC concluded that the Tasmanian Criminal Code violated human rights by its criminalisation of homosexual acts, the Keating Labor Government passed overriding legislation with bipartisan support. By contrast, HRC recommendations carried far less weight with the previous Howard Government, which refused to implement a number of these recommendations concerning human rights issues in relation to the treatment of refugees, mandatory sentencing and race relations.

Consequently, this fourth level of protection is only worth so much as the attention and good will of the political process will grant it.

**Australia’s political culture and values**
A necessary and fundamental protection for human rights in Australia is precisely this political process. Opponents of a HRA often observe that some repressive dictatorships, such as Stalin’s Soviet Union, boasted particularly fine bills of rights. The fact that an operationally effective HRA requires an independent judiciary, accountable government, free press and an absence of secret police—in short, the rule of law—is so obvious that it should not need to be stated.

Australia’s democratic safeguards are without question a necessary part of our human rights protections, but it certainly does not follow that these institutions alone are sufficient. On the contrary, the following section addresses particular examples of victims of human rights infringements slipping through the legislative gaps and under the public radar. Good institutions alone are not enough; we need good laws also.

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**Recommendation 3**

Human rights are currently protected in Australia by a combination of the Australian Constitution, federal, state and territory legislation, the common law and Australia’s democratic institutions. However, significant gaps exist in this scheme, and a federal Human Rights Act is needed to remedy this problem.

**Gaps in existing human rights protections**

**Summary**

This section provides evidence of how Australia’s failure to provide adequate legal protection for human rights has resulted in human rights being breached and victims

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being left without legal remedy or prompt institutional response. While Australia provides some legal protection to human rights, and possesses “strong democratic institutions”, it is clear that these are insufficient,\(^{132}\) in view of the following factors:

- UN treaty-monitoring bodies have repeatedly found Australia to be in breach of its human rights obligations, and the Australian government has repeatedly failed to provide redress;\(^{133}\)
- Commonwealth, State and Territory Parliaments have passed laws, historically and more recently, that abrogate or detract from the protection of fundamental human rights and do so without proper scrutiny, consultation and/or public debate;\(^{134}\)
- government bodies develop and carry out policies without taking into account their disproportionately adverse impact on human rights;\(^{135}\)
- the judiciary lacks a clearly-defined structure of human rights principles against which it can hold the Government to account;\(^{136}\) and
- Parliament has repeatedly failed to take positive action comprehensively to protect human rights in Australia, despite the recommendations of Australian and international human rights and law reform bodies, and the example of comparative jurisdictions.\(^{137}\)

**Bolstering democratic institutions with a Human Rights Act**

As discussed above, Australia’s human rights protections fall short of our obligations under international human rights law. Australia has been repeatedly urged by UN treaty-monitoring bodies to implement a systematic legal framework to protect these fundamental rights and freedoms.\(^{138}\)

It is important to bolster even the most successful and reliable systems of democratic governments with a comprehensive legal framework for the protection of human rights. This is because there are three necessary assumptions underpinning the claim that

\(^{132}\) Contrary to the view of the former Howard Government: see Commonwealth of Australia, *Core Document: Australia* (2007) at [83].


\(^{134}\) See, eg, Northern Territory National Emergency Response Act 2007 (Cth).

\(^{135}\) See, eg, the findings of the Commonwealth and Immigration Ombudsman, *Report on referred immigration cases: Mr T* (2006) at 2.


Australia’s democratic institutions are sufficient to safeguard human rights, and each of these assumptions is false.

The first assumption is that the parliamentary process always allows specific and full consideration of the potential impact of particular laws on human rights. Yet given the volume of legislation that goes before Parliament and the speed with which some legislation is enacted, this view is rightly characterised by the Hon John von Doussa QC as “naïve”.\footnote{139}{John von Doussa, “Bill of rights is essential to serve human rights”, Sydney Morning Herald, 9 October 2008 with reference to the progress of the Northern Territory National Emergency Response Bill 2007 (Cth). See also in relation to anti-terrorism legislation: Report of the Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms while Countering Terrorism: Addendum: Australia: Study on Human Rights Compliance while Countering Terrorism, at [65] UN Doc A/HRC/4/26/Add.3 (2006).}

The second assumption is that a majoritarian democracy will hold the government to account electorally if it fails to protect and promote the human rights of all members of society. The first problem with this assumption is that, in reality, those most vulnerable to human rights infringements are the least able to defend their rights and interests, because they are often disadvantaged, marginalised and unpopular—in short, they are often persons to whom the majority are actively hostile or simply apathetic.\footnote{140}{Andrew Byrnes, Hilary Charlesworth & Gabrielle McKinnon, Bills of Rights in Australia: history, politics and law (2009) at 168.} For example, the recent ‘anti-bikie’ legislation in NSW was hurriedly enacted with apparent popular support.\footnote{141}{The NSW ‘anti-bikie’ that passed the NSW Legislative Assembly within an hour: “NSW Govt rushes anti-bikie laws”, Sydney Morning Herald (Sydney), 2 April 2009.} However, this legislation takes the problematic approach of imposing ‘status crimes’. As Simon Bronitt has explained, such legislation criminalises “a person’s status as a member of a group, rather than punishing them for what that person has done or intends to do”.\footnote{142}{Simon Bronitt, “Australia’s Legal Response To Terrorism: Neither Novel Nor Extraordinary?” in Human Rights 2004: The Year in Review (2005) at 48.} The next problem is that even if the majority does take issue with human rights infringements, it is unlikely that ‘fringe’ issues such as the treatment of bikies, refugees and prisoners would prove more decisive in an election than ‘mainstream’ issues such as the economy. Another problem is that Australia’s federal structure can sometimes make it unclear whether it is the Commonwealth or a State or Territory government that should be held to account for human rights abuses, such as the treatment of prisoners convicted under Commonwealth law but held in state prisons.\footnote{143}{See John von Doussa, Report of an inquiry into a complaint made on behalf of federal prisoners detained in New South Wales correctional centres that their human rights have been breached by the decision to ban distribution of the magazine ‘Framed’, HREOC Report No.32 (2006) at 3.2, accessed at <http://www.hreoc.gov.au/legal/HREOCA_reports/hrc_report_32.html> on 13 March 2009.}

The third underpinning assumption is that if rights are in fact infringed by laws or policies, this infringement will come to the notice of Parliament—or alternatively to the attention of the media and thence to Parliament—and the infringement will be either redressed or reaffirmed under public scrutiny. This is unrealistic. Many violations of
rights never receive public attention, yet have devastating consequences for the individuals concerned. For example, in Victoria, a pregnant single mother of two children living in community housing was given an eviction notice without reasons. Eviction would have meant homelessness for herself and her children, in violation of their civil and political right to private and family life, and of their ESC right to adequate housing. It is highly unlikely that her cause would have reached the attention of an MP or of the media. She was saved from homelessness only because Victoria has a Charter of Rights protecting the right to family life, and this was used to negotiate with her landlord to reach a compromise.\textsuperscript{144}

The falsity of these assumptions indicates that there are serious practical flaws with the argument that democratic institutions alone can sufficiently safeguard human rights. The remainder of this section offers case studies that consider how these institutions have in fact failed to protect and promote human rights in Australia.

**Findings of UN treaty monitoring bodies**

The UN Human Rights Committee (‘HRC’) is generally recognised as providing “authoritative interpretations” of the ICCPR.\textsuperscript{145} Its responses to individual complaints against Australia can be regarded as a persuasive assessment of whether Australia has violated the fundamental civil and political rights set out in the ICCPR.

In the past 10 years alone, the HRC has concluded that Australia has violated fundamental rights on a number of occasions. Professor Charlesworth has compiled a list of some of these human rights breaches:\textsuperscript{146}

- mistreatment of children—for example, in *Bakhtiyari v Australia*, the Human Rights Committee found that the detention of two children in immigration detention for two years and eight months violated the children’s rights;\textsuperscript{147}
- inhumane treatment of prisoners—for example, in *Cabal and Bertran v Australia*, the Human Rights Committee found that the detention of two prisoners in a triangular cage the size of a telephone booth was inhuman;\textsuperscript{148}
- denial of the right to family life—for example, in *Winata v Australia*, the Human Rights Committee found that deportation of the parents of a 13-year-old child who was born in and had grown up in Australia constituted an interference with the right to family life;\textsuperscript{149}
- undue trial delay—for example, in *Rogerson v Australia*, the Human Rights Committee held that a two-year delay by the Northern Territory Court of Appeals to deliver its decision on a criminal contempt charge constituted undue delay;\textsuperscript{150}
- in *Young v Australia*, a man applied for a war veteran’s dependent pension. This claim was rejected because his partner of 38 years was another man. The Human Rights Committee found that this was a breach of ICCPR article 26, the right to non-discrimination.\textsuperscript{151}


\textsuperscript{146} Hilary Charlesworth, *Human rights: Australia versus the UN* (2006) at 3.


•  *Brough v Australia* where a disabled young Aboriginal man was held in solitary confinement and deprived of clothing and blankets in a NSW adult prison; the Human Rights Committee found this constituted a violation of the right to humane treatment;\(^{152}\)

•  Most recently, *D & E v Australia* (UN Communication No. 1050/2002, views adopted 25 July 2006) where the Human Rights Committee found that the ‘immigration detention’ of an Iranian woman, together with her husband and two young children, for over three years was ‘arbitrary’ and in breach of Article 9 (1) of the ICCPR.

In order for such matters to reach the HRC, an applicant must first exhaust all domestic remedies. This means that the applicant must show that Australian courts cannot provide a remedy under existing laws. In the above examples, even though the Australian government would have been notified of these human rights claims by the domestic legal process, it failed to rectify these problems politically. Even after the HRC itself concluded that Australia had committed serious breaches of human rights, the former Howard Government frequently ignored these findings.\(^{153}\) These ongoing violations spanned 1998–2006, during which time the Howard Government won three federal elections. Clearly, the democratic process cannot be relied upon to ensure that governments are held accountable for human rights violations.

Part of the reason for the lack of impact of the UN human rights committees during this period was their sidelining as foreign bodies without real understanding of the domestic situation. For example, the Howard Government’s dismissal of HRC recommendations was expressed on the basis that “such matters should be resolved by Australians in Australia without having to ‘dance attendance on the views of committees that are a long way from Australia’”.\(^{154}\) Another major problem was that the Howard Government could choose strategically to ignore adverse findings of UN committees and let “silence [kill] the story” in the media.\(^{155}\) Neither strategy would be possible if Australian courts had the power to find legislation incompatible with an Australian HRA, with such a finding triggering duties on Parliament and the executive publicly to reconsider laws and policies and justify their response.

All such human rights violations flow from Australian laws, policies and decisions. The process by which such laws, policies and decisions are made does not do enough to inhibit such human rights infringements. This is the issue to which we turn now.

**Laws passed without proper scrutiny**

A significant weakness in the process by which laws are developed and implemented at the federal level in Australia is the institutional failure to scrutinise draft legislation with reference to human rights standards, and for the government publicly to justify any divergence from those standards.

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\(^{152}\) UN Doc CCPR/C/86/D/1184/2003 (27 April 2006)


Take the example of the Northern Territory Intervention of 2007. The *Northern Territory National Emergency Response Bill 2007* (Cth) (“NTER”) was enacted in a very short period, in response to an urgent call for action from the Board of Inquiry into the Protection of Aboriginal Children from Sexual Abuse in the Northern Territory.

Although there was broad agreement that urgent action was needed, the lack of proper scrutiny and review of the legislation at the time meant that many of its measures seriously and unnecessarily infringed human rights. Some of the problematic NTER measures include:\(^{156}\)

- suspending the *Racial Discrimination Act 1975* (Cth) to the extent that it pertains to the NTER;
- imposing income management schemes and welfare quarantining; and
- authorising the Commonwealth to acquire Indigenous-held land compulsorily under five-year leases.

The most problematic aspect of the NTER measures, to which the UN Human Rights Committee expressed its “particular concern”,\(^{157}\) was that they were implemented without consulting the Indigenous communities affected. According to the then Human Rights and Equal Opportunity Commission, this failure to consult “contemplates a paternalism that considers the views of a group as to their wellbeing irrelevant”.\(^{158}\) Moreover, in addition to discriminating against and disempowering Indigenous people in the Northern Territory, the failure to consult and work with the affected communities made it more likely that the NTER measures would misfire and have unintended negative consequences for Indigenous welfare.\(^{159}\)

As the 2008 Northern Territory Emergency Response Review Board found, many of these measures *did* in fact misfire,\(^{160}\) in particular the suspension of the *Racial Discrimination Act*. It was “made abundantly clear” to the Review Board that people in Aboriginal communities felt humiliated and shamed by the imposition of measures that marked them out as less worthy of the legislative protections afforded other Australians.\(^{161}\) Indeed, “one of the impacts of the NTER was to fracture an already tenuous relationship with government”.\(^{162}\) Although some aspects of the NTER were welcomed by Indigenous


the package would have been far more effective if there had been proper consultation with those communities—which in a jurisdiction like Victoria would have been part of the human rights scrutiny at the time of legislating.

Another example is provided by the NSW World Youth Day laws. Section 58 of the *World Youth Day Act 2006* (NSW) authorised the NSW Governor to make regulations to give effect to the Act. In 2008, the NSW Deputy Premier introduced the *World Youth Day Regulation 2008* (NSW), which purported to prohibit the distribution of certain goods in designated public places164 and imposed a maximum criminal liability of 50 penalty units ($5500) on persons who caused “annoyance or inconvenience” to World Youth Day participants.165

Shortly after its commencement, Father Brennan commented that:

The NSW regulation is a dreadful interference with civil liberties … there is no way that the Victorian parliament [which must declare and justify human rights infringements] would have passed a law authorising police to stop protesters simply from causing annoyance to pilgrims.166

The validity of this regulation was challenged in the Federal Court by the ‘NoToPope Coalition’, which proposed to distribute pamphlets, candles, coathangers, condoms and other paraphernalia of protest in public areas, in potential contravention of reg 4, and with a strong likelihood of “annoying” many pilgrims.167

The Federal Court ruled that the regulation was invalid to the extent that it prohibited “annoyance”. This was on the basis that a prohibition on “annoyance” is overbroad and a serious curtailment of free expression. Therefore, it was not authorised by s 58 of the *World Youth Day Act 2006* (NSW), which, in the absence of a clear intention to the contrary, was to be interpreted as only authorising regulations that were consistent with broadly-accepted human rights principles.168

This case demonstrates how, in Australian jurisdictions without a HRA, strong democratic institutions do not stop poorly-drafted subordinate legislation from being passed into law with minimal oversight and public debate. The NSW law in question purported to criminalise ‘annoying’ behaviour—a concept that is vague and susceptible to many differing interpretations. Accordingly, it provided the NSW police with very broad, coercive powers over public behaviour. The very breadth of this power would encourage self-censorship for fear of prosecution. As the Federal Court said, the regulation


See the list in reg 4, which arguably included the distribution of various protest materials.

See s 7(1)(b).


*Evans v NSW* (2008) 168 FCR 576 at 596-7. Note that the regulation would have been validly authorised if the NSW legislature had expressed that clear intention (although the implied freedom of political communication may have provided a limited degree of constitutional protection).

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can be expected to have a chilling effect upon the exercise of [the applicants’] freedom of speech because of the very uncertainty about the degree of its infringement upon that freedom.\textsuperscript{169}

Therefore, an overbroad regulation that is passed without proper scrutiny will interfere with fundamental freedoms simply by appearing to be in force. Moreover, in a jurisdiction without a HRA, individuals bear the burden of challenging such legislation. In this way, they risk either criminal sanction in a ‘test case’ prosecution, and in any event they incur the expense and trouble of litigation in cases such as Evans \textit{v} NSW.

**Government develops and implements policy without considering human rights**

Another major weakness in the current state of human rights protections in Australia is the lack of a clear human rights yardstick by which government bodies can develop and implement policy. By contrast, New Zealand’s statutory Bill of Rights has been described as being

not only for courts: it sets the standards for all governmental conduct and embodies values deemed essential in public life. Governments and its advisers must therefore have regard to the parameters set by the Bill of Rights when planning policies and actions.\textsuperscript{170}

Another comparable jurisdiction, the United Kingdom, has also found its Human Rights Act has encouraged a human rights-based approach to service provision. This “has led to a shift away from inflexible or blanket policies towards those which recognise the circumstances and characteristics of individuals.”\textsuperscript{171}

This is very significant, as disadvantaged and vulnerable people tend to be the most frequent users of public and social services, and so are most in need of human rights protection. However, at present Australian Government agencies are not required to respect human rights when forming policies, nor is there an institutional mechanism for taking into account the differing needs of individuals.

**Case study: the Department of Immigration and Multicultural Affairs**

In 2006 the Commonwealth Ombudsman released a report on an investigation into the circumstances that led to Mr T, an Australian citizen, being wrongfully detained under s 189 of the Migration Act 1958 (Cth).\textsuperscript{172} Mr T was detained on three separate occasions for a total of 253 days.\textsuperscript{173}

The investigation found that the wrongful detention occurred as a result of numerous systemic failures in the Department, including:

- a negative organisational culture …

\textsuperscript{169} Evans \textit{v} NSW (2008) 168 FCR 576 at 598.

\textsuperscript{170} Paul Rishworth, Grant Huscroft, Scott Optican and Richard Mahoney, \textit{The New Zealand Bill of Rights} (2003) at 3.


• a rigid application of policies and procedures that do not adequately accommodate the special needs of persons suffering from mental illness
• poor training of DIMA officers, including the management of mental health, language, cultural and ethnic issues…

The Ombudsman singled out as “disturbing” and “unacceptable” the practice of taking suspected unlawful non-citizens into custody on Fridays and failing to conduct formal interviews to ascertain their identity and citizenship status until the following week—apparently for budgetary reasons.

All of these failures revealed a deeper institutional problem: the lack of a human rights-based approach to the development and application of policy and departmental practice. In particular, the Department failed to consider the right to liberty of the individuals with whom it was dealing.

While a HRA would not be a panacea capable of protecting Mr T and “all meritorious human rights claims”, a HRA would oblige government agencies to consider human rights issues in policy development and practice guidelines. This would encourage government to act in a way that is more respectful of people’s human rights, and would help to prevent situations like that of Mr T.

Human rights issues not articulated and considered in legal argument

As noted above, Australia’s existing legal protections are very limited. A consequence of this is that there is no definitive legal framework within which human rights issues can be expressly articulated and considered in legal argument. This is significant because the principle of legality—a consequence of which is that if Parliament wishes to abrogate fundamental rights it must do so openly and endure any resultant political opprobrium—would operate more effectively if the courts were able to analyse directly whether fundamental rights have been infringed. As discussed later in this submission, where the law operates to diminish human rights protection, the courts should be able to draw this to the attention of Parliament and the public. In turn, Parliament should be required either to amend the law or to justify the need for the diminished rights protection.

Instead, at present “the Australian judicial system is unable to address human rights breaches in Commonwealth laws if legislation comes within a constitutional head of power.” For example, in a series of cases under the Migration Act the High Court ruled

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176 Mr T fits into a series of high-profile human rights failures by DIMA, such as the cases of Cornelia Rau and Vivian Alvarez Solon: see George Williams, A Charter of Rights for Australia (2007) at 19.
that the Australian Government may lawfully hold vulnerable children in mandatory detention,\(^\text{180}\) that it may detain “unlawful non-citizens” in circumstances where the detention is cruel, inhuman and degrading,\(^\text{181}\) and that such people may be detained indefinitely.\(^\text{182}\)

Australian courts are limited to determining technical questions about statutory authorisation and the purpose of detention. By contrast, in other jurisdictions such as the UK, “the structure of judicial reasoning” has been changed by the advent of a HRA.\(^\text{183}\) These courts can consider substantive human rights questions of proportionality and necessity when adjudicating such matters, for example, the lawfulness of indefinite administrative detention.\(^\text{184}\) By issuing declarations of incompatibility, Parliament faces appropriate political pressure to rectify or justify the situation.\(^\text{185}\)

**How would a Human Rights Act improve public service delivery?**

**Generally**

As noted above, the legislative protection of human rights in Australia is ad hoc, limited and selective, protecting some human rights but not others. It is also hard to navigate, being scattered through the common law and many instruments.\(^\text{186}\)

Australia has been frequently urged to use its wealth to promote the enjoyment of rights for disadvantaged people.\(^\text{187}\) For example, the Committee on the Elimination of Racial Discrimination has expressed “serious concern” at the “extent of the dramatic inequality still experienced” by Indigenous Australians, particularly given that they represent “only 2.1 per cent of the total population of a highly developed industrialized State”.\(^\text{188}\) The Australian Human Rights Commission has recently estimated the life expectancy of Indigenous Australians to be 17 years lower than that of the Australian population as a whole.\(^\text{189}\)

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\(^{181}\) *Behrooz v Secretary of the Department of Immigration and Multicultural and Indigenous* (2004) 219 CLR 486.


\(^{185}\) *A and others v Secretary of State for the Home Department* [2005] 2 AC 68 at [73] (Lord Bingham).


Australia is a highly-developed nation and does not have an overt culture of human rights violations. Nevertheless, Australia does not have a perfect record on human rights, nor are human rights adequately protected against future violation. Human rights problems in Australia particularly affect the more marginalised and disadvantaged groups, including children, people who are homeless, Indigenous people, ethnic and religious minorities, people with mental illness or disabilities, elderly people and asylum seekers. As noted earlier, since 1990, the UN Human Rights Committee has heard almost 50 complaints against Australia and, on 17 occasions, it found Australia had violated human rights under the ICCPR. Also, recently, the Committee’s review of Australia’s compliance with the ICCPR has raised a number of concerns, including with Australia’s immigration detention programs, protections against religious hatred and emphasised the need to “redress past and present circumstances of Australia’s Aboriginal peoples”.

In prosperous economic times, such inadequacies may be overlooked by the vast majority of people and human rights may be taken for granted. For example, personal wealth can act as a buffer from inadequate public services. However, all Australians are affected by government action, including through the distribution of public funds, the availability of public services and the requirement to comply with laws that restrict individual liberties. Also, many Australians at one time in their life or another, will face problems, the solution to which lies at least in part in the government. It is in this sense that a HRA can benefit everyone. Some problems may result in significant disadvantage, either directly (such as by becoming homeless as a result of relationship breakdown, domestic violence or severe financial hardship or becoming disabled as a result of an accident or the on-set of a mental illness) or indirectly as carers (such as of elderly parents, young people, disabled children or family members).

The recent Victorian Equal Opportunity & Human Rights Commission report on the operation of the Victorian Charter highlight the universal benefit of a HRA, finding “substantial, community-wide benefits from adopting human rights principles across government” and that “[t]he developments occurring in Victoria as a direct result of the Charter ... are proof that the Charter is much more than a ‘bureaucratic exercise’”.

**Marginalised and disadvantaged groups**
Comprehensive human rights protection, set out clearly and accessibly, is vitally important for marginalised and disadvantaged groups at any time, and for many others in

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190 See discussion in Parts 1 and 2 of this submission.
191 For examples, see the Appendix to this submission.
the community during times of economic or social crisis. This is especially so given that many people lack legal knowledge and have inadequate resources to enforce their rights. In addition, marginalised and disadvantaged persons are most likely to rely heavily on public services such as social security, public housing, education and health. Consequently, these groups are vulnerable to any human rights problems within these public sectors.

The table in the Appendix to this submission sets out some of the human rights problems faced by marginalised or disadvantaged people in Australia and examples of where such problems have been addressed by a HRA in comparable jurisdictions, especially the UK, New Zealand, Victoria and the ACT. These examples highlight that rather than pursuing human rights through the courts and tribunals, the greatest impact of a HRA is most likely beyond the court room in “challenging the rigid application of policies in ways that ignore the realities of human lives”.

**Case study: promoting the right to adequate housing**

Despite Australia’s relative prosperity, more than 100,000 people were reported homeless in the 2006 census report. The UN Special Rapporteur on adequate housing cautioned the Government against taking “retrogressive measures, such as cuts in expenditure on public housing or homelessness services,” which were permitted only in “exceptional circumstances” of economic crisis—“obviously not the case in Australia”. The Special Rapporteur went on to urge that:

> Australian governments should address homelessness and its causes as a priority. Moreover, laws that criminalize poverty and homelessness and those currently disproportionately impacting upon homeless people such as begging laws, public drinking laws and public space laws, should be revised and amended to ensure that fundamental human rights are protected.

In a similar vein, in 2000, the Committee on Economic, Social and Cultural Rights also expressed concern about Australia’s “lack of protection against eviction and unfair rent increases”, particularly in urban centres which were “experiencing very low rental property vacancy rates with intense competition”. As the Special Rapporteur on adequate housing stated:

> Forced evictions are considered to be a gross violation of a wide range of human rights under international law and are evidence of a systematic disregard for recognized human rights standards.

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Increasingly, in jurisdictions where the right to adequate housing is justiciable, domestic courts are finding the prohibition of forced evictions to be an integral element of this right.\textsuperscript{202} Evictions push people into homelessness, inadequate housing conditions and poverty, and affect almost exclusively the poorest, socially and economically most vulnerable and marginalized sectors of society.\textsuperscript{203}

The Australian Government’s remedy was to subsidise rent through the Commonwealth Rent Assistance programme (“CRA”). This went some way to ameliorating the problem, but it was not needs-based in its availability in the way that a policy that directly considered how individual rights would be affected would have been. Students over 25 receiving Austudy benefits and people on low wages below the eligibility level for the base Family Tax Benefit could not claim it. Nor did the CRA take into account the far higher rents in city areas.\textsuperscript{204}

The problem with the Government’s solution in this instance, and indeed with many other areas, is that insufficient consideration is given to how human rights would be affected by government policies, including policies of inaction. The Special Rapporteur concluded:

\begin{quote}
Australia has failed to implement its international legal obligation to progressively realize the human right to adequate housing to the maximum of its available resources, particularly in view of its possibilities as a rich and prosperous country.\textsuperscript{205}
\end{quote}

He diagnosed the problem:

\begin{quote}
There is no national policy framework against which the outcomes of government programmes and strategies can be evaluated to assess to what extent Australian governments are progressively realizing this right.\textsuperscript{206}
\end{quote}

The need to act positively to protect and promote fundamental human rights can only become more important in times of economic hardship. The current global financial crisis and recession make the need to take positive action to protect and promote economic and social rights “more urgent than ever”.\textsuperscript{207}

\textsuperscript{202} City of Johannesburg v. Rand Properties (Pty) Ltd. et al. (Unreported, High Court of South Africa Witwatersrand Local Division, 3 March 2006).

\textsuperscript{203} Miloon Kothari, Report of the Special Rapporteur on adequate housing as a component of the right to an adequate standard of living at [67], UN DOC A/HRC/4/18/Add.2 (2006).


\textsuperscript{205} Miloon Kothari, Report of the Special Rapporteur on adequate housing as a component of the right to an adequate standard of living, at [126], UN DOC A/HRC/4/18/Add.2 (2006).

\textsuperscript{206} Miloon Kothari, Report of the Special Rapporteur on adequate housing as a component of the right to an adequate standard of living at [126], UN DOC A/HRC/4/18/Add.2 (2006).

\textsuperscript{207} European Economic and Social Committee, Prioritising economic, social and cultural rights and social dialogue in EU external policies (2009) CES/09/3.
Recommendation 4
An Australian Human Rights Act would bolster Australia’s democratic institutions, in respecting human rights. As explained in this section, it would help to ensure Parliament and the Government give appropriate consideration to the impact of legislation and government policy on the human rights of people in Australia, encouraging an approach that is respectful of human rights. In particular, a Human Rights Act would be likely to have a significant, positive net benefit for marginalised and disadvantaged groups in the Australian community.

Who should be able to claim the benefits of human rights protection?

Humans
Human rights are designed to protect the dignity of every individual—including in their social, political and legal interactions. This is reflected in Art 1 of the UDHR:\(^{208}\)

All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood.

In most jurisdictions, non-human entities cannot claim the direct protection of human rights law. This reflects that human rights law are designed to protect individual dignity—something that, self-evidently, only humans possess. This, of course, does not deny the importance of protecting the legitimate rights and interests of those other entities.

Nevertheless, it should be noted that some jurisdictions extend the protection of human rights law to non-human entities. For example, under s 8(4) of South Africa’s constitutionally-entrenched Bill of Rights 1996, “other legal persons” can claim the direct benefit of the rights provided for, but only to the extent required, taking into account the nature of the right and the entity (human or otherwise) claiming protection.

The orthodox position, however, is that human rights law should apply to humans only. In Victoria, for example, it was decided that the rights of non-humans are better addressed in other areas of law.\(^{209}\) We submit that this position should be maintained in any Australian HRA.

Group rights
Some human rights may import a notion of group rights, Examples include the ethnic, religious or linguistic rights for minority groups in Art 27 of the ICCPR, the right to self-determination for indigenous people in Article 1 of the ICCPR and the collective rights of indigenous people set out in the United Nations Declaration on the Rights of Indigenous Peoples.\(^{210}\)

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\(^{209}\) Human Rights Consultation Committee, Rights, Responsibilities and Respect (2005) at 52, see submission of Professor Marcia Neave and Professor Spencer Zifcak.

\(^{210}\) We note that the United Nations Declaration on the Rights of Indigenous Peoples was recently formally supported by the Australian Government on 3 April 2009.
Under current Australian law, groups do not have legal standing except via mechanisms such as representative proceedings, and then the proceeding is on behalf of an identifiable group of persons. In light of Australian legal practice, we submit that only the rights of individuals should be protected under a Charter. However, as is the case under the UK Charter (which incorporates the European Convention), this should not prevent groups of individuals whose rights have been breached by an unlawful action or decision of a public authority, from pursuing an action against that public authority.

Commercial entities?

It should first be noted that it is generally (though not universally) accepted that corporations should not be able to claim the direct protection of human rights. The legitimate rights and interests of commercial entities are generally protected in other legislation. This is important because such rights are crucial to the social and economic wellbeing of any liberal democracy.

The Australian Law Reform Commission recently reinforced this position in the specific context of the right to privacy. It was of the view that ascribing human rights to corporations undermines fundamental principles of commercial law (including the extension to corporations and their members of separate legal personality), as well as the core principles of human rights law.

In contrast, as noted above, some overseas jurisdictions permit corporations to claim the direct benefit of at least certain human rights. For example, the Canadian Charter of Rights and Freedoms does not expressly limit rights protection to humans. On this basis, the Supreme Court of Canada found that the right to freedom of expression extends to commercial expression by corporations.

However, as the Victorian Human Rights Consultation Committee identified, there is a real risk that such approaches would introduce uncertainty in the application of a Charter and may interfere with the legitimate regulation of commercial activity by the government for matters such as improving public health, consumer protection and the environment.

Impact of a Human Rights Act on business

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212 See s 7(7) of the Human Rights Act 1998 (UK) and Article 34 of the European Convention.
While we do not support corporations and other such commercial entities being able to claim the direct benefit of a HRA, we nevertheless submit that such an Act would be good for business.\(^\text{216}\)

Under the preferred HRA model outlined in this submission, the primary responsibility for promoting and protecting human rights would remain with the Government. Generally speaking, such a HRA would not directly impact on business or the private sector. A business would be required to comply with such a HRA only when:

- *the business is classified as a ‘public authority’*. This could occur when the business performs a public function on behalf of the Government through an outsourcing arrangement. The business would then be required to comply with the HRA only in respect of those government functions it performs (but not when acting as an employer or in a purely commercial capacity); or

- *the business takes steps to bind itself to a HRA*. This could occur if a business contractually agrees to comply with the rights in the HRA, or if it opts to comply with the HRA, as part of its commitment to corporate social responsibility.

**Would a Human Rights Act have a positive or negative impact on business?**

The business sector is likely to have two main concerns about the enactment of a HRA as set out in this submission:

- *Cost of compliance*. Business is legitimately concerned that any new law not impose unreasonable costs of compliance. However, the imposition of a federal HRA would likely impose no compliance costs on the vast majority of businesses. Those few businesses bound by the Act—as well as those who choose to opt-in of their own volition—are likely to face only a minimal cost of compliance, and this is likely to be outweighed by the benefits of such an Act to these businesses.

- *Scope of the Charter*. A HRA would permit persons associated with a business (including its owners, directors, shareholders and other stakeholders) to exercise those rights set out in the Act themselves. There is debate, however, about whether a corporation should itself be able to claim the direct protection of these rights. As discussed in Part 2 of this submission, we submit that it is preferable for corporate rights not to be confused with human rights, which are different in character and foundation.

Any negative impact of a HRA would be substantially outweighed by the benefits of such an Act to Australia generally, and to business specifically. These benefits include:

- *Economic benefits*. As already noted, at one level, a commitment to human rights means a commitment by the government to establish and maintain a system that upholds rights.\(^\text{217}\) The right to vote means funding elections; the right to healthcare means funding public hospitals; and so on. Government must levy


taxes to pay for the legal and physical infrastructure that allows rights to be realised. To the extent that corporations are required to comply with human rights law, they must align their policies and practices accordingly. All of these things, directly or indirectly, can impose costs on business. However, research seems clearly to indicate that, overall, savings in the Australian economy associated with minimising human rights breaches, and maximising economic participation, are likely to flow to Australian businesses in their capacity as the providers of goods and services, as employers, and in their dealings with the federal Government.  

- **Corporate social responsibility.** ‘Opting in’ to a HRA regime would be a potent way for businesses to demonstrate their commitment to corporate social responsibility. A growing number of businesses in Australia and internationally are incorporating a human rights approach into their management practices. This makes economic sense, as research shows a direct correlation between a corporation’s commitment to respect human rights and its long-term sustainability and financial success. This is manifested in a number of ways, including increased employee productivity and better relations with customers and shareholders.

- **Improved regulatory framework.** A HRA would improve Government decision making, enhancing due process and the level of transparency, responsiveness and accountability of government action. This would benefit business, because setting out a human rights framework for the operation of the public sector would provide a more stable regulatory environment. It would give added protection to individuals associated with a business in their dealings with the Government. For example, stronger protection of freedom of expression would benefit both journalists and media proprietors.

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**Recommendation 5**
The purpose of an Australian Human Rights Act should be to protect individual dignity. As such, the proposed Act should directly protect the human rights of individuals or ‘natural persons’ only. The legitimate rights and interests of non-human entities such as corporations should continue to be protected in other areas of laws.

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Who should be required to comply with a Human Rights Act?
The International Bill of Human Rights\(^{220}\) envisions that the primary responsibility for promotion and protection of human rights should lie with the government, as distinct from the private sector. This is appropriate for two reasons. First, individuals have no choice but to deal with the government. Secondly, the government’s role is to infuse human rights protection into generally-applicable laws, something that would be assisted by a HRA’s interpretive principle.\(^{221}\)

Public authorities
In the UK, ACT and Victorian Human Rights Acts, ‘public authorities’ are required to comply with the rights set out in those respective Acts. The term ‘public authorities’ captures all executive government bodies, and all entities performing functions on behalf of the government. Applied at the Australian federal level, this would include, at least, federal public servants, federal Government agencies and statutory authorities and private sector entities performing the function of public authorities on behalf of government.

Private sector entities performing the function of public authorities\(^{222}\)
Individuals and other members of the private sector should not be required to comply with a HRA in respect of their private actions. There are many reasons for this. First, a human rights law of this nature—expressed in general terms, and directed especially towards decision making—applies most logically to government. This is reflected in the human rights laws of many comparable jurisdictions overseas.

Secondly, as was pointed out by Professor John Ruggie, Special Representative of the UN Secretary-General on Business and Human Rights (“UN Special Representative”), states bear the duty to protect against human rights abuses by third parties including business.\(^{223}\) Australian Parliaments have traditionally discharged this duty by passing laws, and instituting programs, that target particular human rights and specific sectors as the situation warrants. For example, Australian human rights law already applies to the private sector in relation to discrimination, privacy, occupational health and safety and equal opportunity.

However, where a private party performs ‘functions of a public nature’ on behalf of the federal Government, it should be required to comply with any federal HRA. As highlighted by the Victorian Government, this approach allows a human rights statute to respond to the “diverse organisational arrangements [modern governments utilise] to manage and deliver government services”.\(^{224}\) These arrangements include outsourcing,

\(^{220}\) The UDHR, ICCPR and its two Optional Protocols, and the ICESCR, form the so-called ‘International Bill of Human Rights’.

\(^{221}\) The interpretive principle is discussed in Part 3 of this submission.


\(^{223}\) Professor John Ruggie, UN Secretary-General’s Special Representative on Business and Human Rights, *Promotion and Protection of All Human Rights, Civil, Political, Economic, Social and Cultural Rights, including the Rights to Development* (2008) at 4.

privatisation and public private partnerships. In this way, the application of a HRA can extend into areas such as prisons, utilities, transport, housing and facilities for the aged, intellectually or physically impaired—whenever private companies are providing services on behalf of the government. This *functional* definition ensures that the government does not ‘contract out’ of its human rights obligations.\(^{225}\)

Therefore, the proposed HRA should set out clearly the factors that must be taken into account when deciding whether or not functions of a private party are of a public nature. Such guidance exists in the ACT and Victorian Acts.\(^{226}\) This would avoid the current situation in the UK where the House of Lords has interpreted this concept narrowly and, arguably, not in keeping with that Government’s original intention.\(^{227}\)

**Obligations of Parliament**

A HRA would require the federal Parliament to consider the human rights impact of any draft law, but it would not preclude Parliament from passing a Bill it knows to infringe on human rights.\(^{228}\) For this reason, the federal Parliament—that is, federal Members of Parliament, their personal staff and other Parliamentary staff—cannot be subjected to the same set of obligations that would apply to other public authorities under a HRA.

When exercising functions in connection with parliamentary proceedings, it would be inappropriate to vest the courts with a supervisory jurisdiction to review whether parliamentary officers have complied with human rights.\(^{229}\) Such an extension of a HRA would undermine the separation of judicial and legislative powers. It would discourage Parliament from engaging in open and vigorous debate that takes into account polycentric considerations.\(^{230}\)

**Private sector opting in to Human Rights Act**

A HRA should allow private entities to ‘opt in’ to the Act’s regime and similarly, to opt out at any time. Under this mechanism, the private entity would agree to be bound by the HRA in respect of its acts and decisions, including both ‘functions of a public nature’ and purely private functions.

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\(^{225}\) See discussion in Andrew Byrnes, Hilary Charlesworth and Gabrielle McKinnon, *Bills of Rights in Australia history, politics and law* (2009) 121 and 162.


\(^{228}\) See discussion in Part 3 of this submission.

\(^{229}\) A similar view was taken in *Human Rights Act 2004* (ACT) s 40(2)(a) and *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 4(1)(i).

Section 40D of the *Human Rights Act 2004* (ACT) provides such an opt-in mechanism. This provision commenced operation on 1 January 2009, although at the time of writing no entities have yet ‘opted-in’. The *Privacy Act 1988* (Cth) has a similar ‘opt-in’ mechanism for small business operators not otherwise covered by the Act and currently around 180 businesses are registered as having opted in.\(^{231}\)

There is a strong business case for ‘opting in’ to a Human Rights Act as a means of exhibiting corporate social responsibility for four main reasons:\(^{232}\)

- an increasing awareness by business both of human rights per se and the impact of businesses on the enjoyment of human rights around the world;
- a growing recognition of the importance of businesses acting in accordance with corporate social responsibility standards, including respect for human rights;
- a growing number of businesses in Australia and internationally voluntarily committing to respect human rights; and
- research shows a direct correlation between a human rights approach and the long-term sustainability and financial success of a business. This is manifested by, for example, increased employee productivity and better relations with customers and shareholders.

### Recommendation 6

The proposed Human Rights Act should impose human rights obligations primarily on ‘public authorities’, which would include federal public servants, federal Government agencies and statutory authorities. The Act’s obligations should also extend to private parties to the extent that they perform ‘functions of a public nature’ on behalf of the federal Government.

These obligations should not apply to federal Members of Parliament, their personal staff or other Parliamentary staff, when exercising functions in connection with parliamentary proceedings.

Private parties should not be required to comply with a federal Human Rights Act in respect of functions of a purely private nature. However, the Act should allow private parties, such as corporations, to ‘opt in’ to the Human Rights Act regime, by undertaking to comply with the Act.

### Extraterritorial application and non-citizens

A HRA should protect and promote the rights of all individuals who are subject to Australian jurisdiction, irrespective of the individual’s citizenship or other status, and irrespective of whether they are located outside Australia’s territory (but remain subject to its jurisdiction).

\(^{231}\) See *Privacy Act 1988* (Cth) s 6EA; Also see the webpage: Office of the Privacy Commissioner, *Register of businesses that have opted into the Privacy Act coverage*, available at <www.privacy.gov.au/business/register/index.html>, at 13 January 2009.


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This reflects the general principle of equality underpinning international human rights law.\textsuperscript{233} For example, pursuant to Article 2(1) of the ICCPR, each State party undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind...

**Non-citizens**

With respect to the rights of non-citizens, the Office of the United Nations High Commissioner for Human Rights has stated

International human rights law is founded on the premise that all persons, by virtue of their essential humanity, should enjoy all human rights without discrimination unless exceptional distinctions – for example between citizens and non-citizens – serve a legitimate State objective and are proportional to the achievement of that objective.\textsuperscript{234}

We concur that such exceptional distinctions are required for certain rights; for example, under the ICCPR: (i) only “citizens” enjoy the right fully to participate in public life (for example, voting in federal elections); and (ii) only those “lawfully within the territory of a State” fully enjoy the right to freedom of movement.\textsuperscript{235}

The vast majority of human rights statutes overseas do not differentiate between citizens and non-citizens, except where there is a demonstrable need. This position was endorsed by, for example, the Victorian Human Rights Consultation Committee, which stated:

[N]o person, whether citizen, resident or visitor, should be subjected to cruel and degrading treatment.

On the other hand, the Charter should not give tourists the right to vote.\textsuperscript{236}

**Extra-territorial application**

The better view is that an extra-territorial application of a HRA (but within Australia’s jurisdiction), would not offend the sovereignty of other countries, as is evident by the operation of similar human rights statutes in comparable overseas jurisdictions. For example, pursuant to Art 1 of the European Convention of Human Rights, signatory states are required to “secure to everyone within their jurisdiction the rights and freedoms” protected in the Convention. Jurisdiction has been held to be primarily within the state’s territory, but in exceptional cases also extends to acts of the state performed, or producing effects, outside its territory.\textsuperscript{237} For example, the death of an Iraqi citizen in a British military detention unit, operating in Iraq with the consent of the Iraqi sovereign


\textsuperscript{236} Human Rights Consultation Committee, *Rights, Responsibilities and Respect* (2005) at 51.

authorities, was found to be within the jurisdiction of the *Human Rights Act 1998* (UK).\(^{238}\)

By way of illustration, there are a number of situations in which the extraterritorial application of an Australian HRA would be essential, in particular given the recent concluding observations of the UN Human Rights Committee in its review of Australia’s compliance with the ICCPR:\(^{239}\)

- *Right to life*: cooperation by Australian authorities with countries where the death penalty may be imposed;\(^{240}\)
- *Equality before the law and rights of non-discrimination*: treatment of asylum seekers under the effective control of Australia (irrespective of whether they come under control of Australian authorities outside Australian territory).

We note in this regard, that Australia already has legislation with extraterritorial application including for certain criminal offences such as trafficking in persons, internet child pornography and sexual exploitation of children overseas. We submit that the protection of human rights is similarly important and hence requires the same legislative treatment.

**Recommendation 7**
The proposed Human Rights Act should apply to all individuals subject to Australia’s jurisdiction.

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Part 3: How could Australia better protect and promote human rights?

Role of the courts: the ‘constitutional dialogue model’

Introduction

As already noted, we recommend the enactment of a federal Human Rights Act (HRA). Given the benefits of a statutory HRA (as discussed above in Parts 1 and 2), this section of the submission asks: what is the most appropriate role of the courts under an Australian HRA?

Without considering constitutional reform, there are three main options in framing a statutory HRA:

(i) **A ‘strong’ HRA.** This would grant significant powers to the courts to disapply or invalidate legislation that a court finds to be inconsistent with the human rights set out in the HRA itself. Parliament would retain the power to overturn such decisions, setting the boundaries of human rights protections.

(ii) **A ‘moderate’ HRA.** This would grant more limited powers to the courts. It would allow the courts to interpret legislation consistently with HRA rights, except where the legislation is irreconcilably inconsistent with the rights in the HRA. In that situation, the court would not invalidate the legislation in question; rather it would determine the dispute between the parties in accordance with the legislation, and there would also be a means of notifying Parliament of the inconsistency between the legislation and HRA-protected rights.

(iii) **A ‘minimalist’ HRA.** Here, the courts would be empowered to interpret legislation consistently with the rights set out in the HRA except in the case of irreconcilable inconsistency. In that situation, the legislation would stand and the courts would have no further role.

All three types of HRA are examples of what is known as the ‘constitutional dialogue’ model of human rights legislation. The term ‘constitutional dialogue’ refers to a HRA that seeks to strike a balance between empowering the judiciary to enforce compliance with the HRA, and maintaining the principles of parliamentary supremacy and the separation of powers. Under this model, each of the arms of government—the executive, the legislature and the judiciary—has an important role in upholding human rights.

In one sense, the three arms of government are equal, with each having its own role to play. However, it is important to recognise that, under any of the variants of this model, parliament is the ‘first among equals’, in that it is given a special power authoritatively to resolve difficult questions of conflicting rights, or how to balance rights with other interests.

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241 Constitutional reform is not considered in this submission, given the stipulation in the Consultation’s Terms of Reference that “the options identified [by the Consultation Committee] should preserve the sovereignty of the Parliament and not include a constitutionally entrenched bill of rights”.

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‘Strong’ Human Rights Act

As with all of the differing iterations of a HRA based on the constitutional dialogue model, a strong form of HRA would have three main elements. The way in which the third of these elements is framed determines whether the HRA is ‘strong’, ‘moderate’ or ‘minimal’.

First, the HRA would set out a list of human rights that are protected by the Act itself. Secondly, the HRA would provide that all legislation should be interpreted consistently with the human rights set out in the HRA itself. This requirement would be subject to two qualifications. The first qualification is that a court could interpret a statutory provision consistently with human rights only as far as is possible. This reflects the ‘golden rule’ of statutory interpretation—namely, that a court should be guided by the natural and ordinary meaning of the legislative provision in question. This qualification would prevent a court from disregarding the actual words of the relevant provision, or invoking the interpretive principle to hide the fact that the court is effectively amending the relevant provision. The second qualification is that a court could not adopt a human rights consistent interpretation of a provision if that interpretation conflicts with the purpose of the impugned provision.

The third element of a ‘strong’ HRA is that it would provide that, where the relevant legislation is irreconcilably inconsistent with a right or rights set out in the HRA, the legislation would be inoperative to the extent of the inconsistency. This would also be subject to important exceptions. Crucially, Parliament would have the power to override the court’s decision to invalidate legislation. It could do this prospectively by providing that a particular Act or provision should not be considered under the HRA regime. In this situation, a court would not be able to consider (let alone invalidate) the relevant legislation in the first place. Alternatively, Parliament could pass a law that subsequently overrides the court’s decision to invalidate particular legislation.

Canada, a jurisdiction with a very similar legal system to Australia, provides an example of a ‘strong’ HRA. The Canadian Charter of Rights and Freedoms, like the now-repealed 1960 Canadian legislative Bill of Rights on which it was based, empowers the judiciary to uphold the rights set out in the Charter itself, invalidating any inconsistent legislation. However, if the relevant Canadian parliament wishes to curtail or abrogate a right set out in the Charter, it can do so by expressly declaring this intention in the relevant legislation.

See Part 1 of this submission for a discussion of which human rights should be included.

This second qualification appears in the Charter of Human Rights and Responsibilities Act 2006 (Vic); the Human Rights Act 2004 (ACT). It does not appear in some other HRAs: see, eg, the Human Rights Act 1998 (UK). As explained below, the second qualification is desirable to maintain an appropriate balance between the power of the courts and that of Parliament, and it is also a sensible protection against any Constitutional challenge.

See Canadian Charter of Rights and Freedoms, ss 24 and 32.

See Canadian Charter of Rights and Freedoms, s 33.
The Hon Michael McHugh AC QC recently proposed that Australia follow the approach of the 1960 Canadian statutory Bill of Rights. He argued that Australia should “give effect to the International Covenant on Civil and Political Rights and, if thought necessary, the International Covenant on Economic, Social and Cultural Rights” in a HRA of this form. He stated further:

> A human rights legislative model on these lines would have only a minimal effect on parliamentary sovereignty. Under my 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 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. Finally, such a model would be well within federal constitutional power and would not be open to the constitutional attacks that undoubtedly await the [‘moderate’ form of] dialogue model.

### ‘Moderate’ Human Rights Act

A ‘moderate’ form of HRA exists in Victoria, the ACT and the United Kingdom. As with all three types of HRA discussed in this section, a ‘moderate’ HRA would set out a list of protected human rights, and it would provide that all legislation should be interpreted consistently with these human rights—as far as such an interpretation is possible, and subject to the purpose of the legislation in question.

What distinguishes a moderate HRA is that it would provide that, where the relevant legislation is irreconcilably inconsistent with a right or rights set out in the HRA, the legislation would continue to operate regardless. That is, where a court is unable to achieve a human rights compatible construction, a moderate HRA does not empower the court to invalidate the provision under consideration. Instead, in this situation, the court (or some other entity) would publicly notify Parliament and the relevant Minister of this inconsistency. The Government then would be required to account publicly for the inconsistency. However, Parliament would decide—at its absolute discretion—whether or not to amend the provision in question.

### ‘Minimalist’ Human Rights Act

Like the other types of HRA discussed in this part, a ‘minimalist’ HRA would contain an interpretive principle, empowering the courts to interpret laws consistently with the rights set out in the HRA (subject to the qualifications discussed above). However, a minimalist HRA would differ from those other types of HRA in that, where a court finds a law to be irreconcilably inconsistent with a right or rights in the HRA, the court would not be permitted to invalidate the law in question, nor would there be a formal mechanism for notifying Parliament of the inconsistency. Nor would such a HRA impose obligations on Parliament or the Government publicly to respond where there is such an irreconcilable inconsistency.

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246 This was repealed when Canada passed its constitutionally-entrenched Charter of Rights and Freedoms. However, the Canadian Bill of Rights was materially very similar to its current Charter.


The New Zealand Bill of Rights Act 1990 (NZ) provides an example of a minimalist HRA. Its main ‘work’ is done by its interpretive provision, s 6, which states:

Wherever an enactment can be given a meaning that is consistent with the rights and freedoms contained in this Bill of Rights, that meaning shall be preferred to any other meaning.

Building institutional support for human rights

Improving human rights protection in Australia requires a multi-pronged approach. The centrepiece of that approach undoubtedly should be the enactment of a HRA. However, whichever model of HRA one favours, it will be crucial also to use other means to promote support for human rights within the institutions of the Australian Government.

The existence of an independent, expert authority from within the executive branch of government is vital to achieving this aim.249 The Australian Human Rights Commission is, of course, the most logical body to perform this role, given its developed expertise, proven party-political independence and strong multi-disciplinary approach. Fundamental to the successful operation of any Australian HRA will be a Commission that is able to provide frank, fearless and expert advice to Parliament and the Government of the day, to mediate in disputes relating to human rights and to conduct high-quality research to assist in human rights policy development. The Australian Government should provide the Australian Human Rights Commission with adequate funding and resources to carry out this role effectively.

Preferred form of Human Rights Act

We submit that Australia should enact a HRA that establishes a constitutional dialogue. Any of the three types of HRA described above—a ‘strong’, ‘moderate’ or ‘minimalist’ HRA—would be a real improvement on the status quo. However, we submit that the best reform for Australia, at least initially, would be to adopt what is here described as the ‘moderate’ type of HRA. The reasons why this model is favoured are set out in the other sections of this submission, but may be summarised as follows.

First, a ‘moderate’ HRA strikes the most appropriate balance between protecting fundamental human rights, and preserving key constitutional principles and conventions.250 It gives Parliament the role of deciding the parameters of human rights protection—by setting out which rights should be protected, how they are balanced etc—and it also allows Parliament to retain the power to make the ultimate decisions on when rights should cede to other interests. By the same token, it gives the judiciary an important role in enforcing human rights, and drawing to the attention of Parliament when the law does not protect rights. That, in turn, would encourage open, public debate about the appropriate limitations on rights.

249 See, eg, United Kingdom Ministry of Justice, Rights and Responsibilities: developing our constitutional framework, CM 7577 (2009) at [4.39].

Secondly, this model of human rights protection is already operating successfully in Victoria and the ACT, as well as the UK. As set out in the Appendix to this submission, there is overwhelming evidence of this model working effectively to improve human rights protection in a meaningful way. Moreover, this success has been achieved without realising fears about a growth in judicial activism and explosions in litigation in those jurisdictions.\textsuperscript{251}

\begin{mdframed}
\textbf{Recommendation 8}

The proposed Human Rights Act should strike an appropriate balance between the judiciary, executive and legislature; preserving the separation of powers and parliamentary supremacy, while also empowering the courts to enforce human rights standards. The Australian Human Rights Commission should be provided with adequate funding and resources to act as an independent, expert monitor of human rights in Australia.

The core elements of the Human Rights Act proposed by this submission are set out in Recommendation 10.
\end{mdframed}

\textbf{Role of Parliament under a Human Rights Act}

One of the most important positive impacts of a HRA is to encourage Parliament to consider the human rights impact of the laws it creates, and so to draft new legislation in a way that respects human rights.\textsuperscript{252} Under the ‘dialogue model’ of HRA in jurisdictions around the world, there is a requirement for the parliament to scrutinise any draft law, against the human rights set out in the HRA.\textsuperscript{253} This is designed to help foster debate within Parliament, and in the public arena, about the impact of new laws on human rights. It provides a mechanism for the parliament to ‘catch’ any unintended human rights breaches. Moreover, where a new law is intended to abrogate a right or rights set out in the HRA, it requires the parliament publicly and openly to justify this approach, thereby promoting debate and democratic engagement with human rights issues.

In Victoria, the legislature is obliged to table a Statement of Compatibility with each new Bill, which means it must advert to potential human rights infringements that may result from the Bill.\textsuperscript{254} The Scrutiny of Acts and Regulations Committee also examines new Bills and assesses their human rights compliance.\textsuperscript{255} Incorporating this standard of scrutiny into the legislative process is crucial to the role of democratic institutions in protecting human rights. This should be imposed as a legal duty upon the Australian Parliament.

\begin{flushright}
\textsuperscript{253} See, eg, \textit{Charter of Rights and Responsibilities Act 2006} (Vic), s 30.
\textsuperscript{254} \textit{Charter of Rights and Responsibilities Act 2006} (Vic) at s 28.
\textsuperscript{255} \textit{Charter of Rights and Responsibilities Act 2006} (Vic) at s 30.
\end{flushright}
Recommendation 9  
The proposed Human Rights Act should require Parliament to consider the human rights impact of any draft law. The Minister responsible for introducing a new Bill should be required to state either that he or she believes the law to be compatible with the rights set out in the HRA, or the justification for any incompatibility.

The Constitutionality of a Human Rights Act  
Constitutional power  
Paragraph 51(xxix) of the Australian Constitution grants the federal Parliament power to make laws with respect to “external affairs”. This would permit the enactment of a federal HRA that fulfils Australia’s obligations under international human rights law. Those obligations are expressed in treaties to which Australia is a party, *jus cogens* and other binding international law. The incorporation of international human rights law into Australian domestic law would end Australia’s ongoing violation of international law and bring Australia into compliance with the express and reiterated recommendations of UN human rights bodies.

Prima facie, therefore, the Commonwealth Parliament has the constitutional power to enact a HRA that implements into domestic law Australia’s international law obligations. It would be necessary to question the constitutionality of such a federal HRA only if, in passing the HRA, the Commonwealth violated some other constitutional principle.

Some commentators have questioned the constitutionality of aspects of this type of HRA—or, at least, particular iterations of the moderate HRA. For example, the former NSW Premier, Bob Carr, expressed concern that a HRA would undermine the doctrine of parliamentary supremacy, giving too much power to the judiciary at the expense of the democratically-elected parliament.

Interpretation  
The Hon Michael McHugh AC QC, commenting on the ‘New Matilda Draft Human Rights Bill’, identified two problems. First, Mr McHugh stated that the interpretive principle in a federal HRA would not pass constitutional muster if it permitted or required a court effectively “to amend federal Acts of Parliament”. We respectfully agree with this point. An Act that allowed, or indeed required, a court effectively to re-write a statutory provision that is inconsistent with human rights would offend the separation of powers. The problem with the New Matilda Bill, on which Mr McHugh was directing his comments, is that the interpretive principle is qualified only by what is “possible”. That is, it would require a court to adopt a human rights compatible

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257 See, eg, Committee on the Elimination of Racial Discrimination (“CERD”) at [7], CERD/C/304/ADD.101 (CERD, 2000); Human Rights Committee at [514]-[516] UN Doc A/55/40[VOL.1][SUPP].


construction “[s]o far as it is possible to do so”. This would arguably allow, or even compel, a court to disregard the legislative intent behind the provision in question.

However, there would be no constitutional impediment to a HRA containing an interpretive principle that required a court to interpret legislation consistently with human rights, if it is subject to an additional qualification. That is, a court could only adopt a human rights consistent interpretation where this does not conflict with the purpose of the impugned provision. Such is the case in the human rights statutes of Victoria and the ACT.260

Declarations of inconsistency
Mr McHugh was also concerned that a power given to the courts to issue declarations of incompatibility, in the manner set out in the New Matilda Bill, could cause either or both of the following problems:

[T]he question arises whether the provisions in sections 51 or 52 of the New Matilda Bill, creating a dialogue between the courts and Parliament, are invalid in that they invest a court exercising federal jurisdiction with non-judicial power. Closely allied to this question is whether the issues which would arise under sections 51 and 52 of the New Matilda Bill would involve “matters” within the meaning of sections 75, 76 and 77 of the Constitution.261

Again, Mr McHugh’s warning about the New Matilda Bill is well made. However, a simple solution could be adopted to deal with the problems arising from the declaration of incompatibility provision in the New Matilda Bill. Instead, where a court finds that a provision of an Act is incompatible with a right or rights in the HRA, the HRA could provide as follows:

• The court must dismiss the case.
• Where a case is dismissed for this reason, the court would not make a ‘declaration of incompatibility’ and so there would be no question of the court exercising non-judicial power. Instead, some executive entity (such as the registry of the court or the Australian Human Rights Commission) must transmit a notice to this effect to the Attorney-General.
• The Attorney-General must then table the notice in Parliament within a set period of time.
• The Attorney-General must prepare a response to the notice, and table it in Parliament within a set period of time.
• The applicant would not bear the costs in proceedings dismissed on this ground.

The principle of implied repeal
One particular aspect of a ‘strong’ HRA that might cause constitutional concern is the power it gives to the courts to invalidate laws passed after the HRA comes into force. This might cause friction with the principle of ‘implied repeal’, which states that where two pieces of primary legislation from the same jurisdiction are inconsistent, then the more recent of the two Acts will impliedly repeal the older Act to the extent of the

inconsistency.\textsuperscript{262} The problem is that under a ‘strong’ HRA, any Commonwealth Act passed after the HRA came into force would still be read subject to the Commonwealth HRA.

It seems clear, however, that this constitutional problem could be obviated simply by instructing legislative drafters to include, as a standard provision in new legislation, that the new Act is intended to be read subject to the HRA, or if Parliament intends to override certain or all rights in the HRA, that the new Act is intended to apply notwithstanding the HRA. In this way, there would be no question of implied repeal as Parliament would have made clear its intention one way or the other.

**Conclusion**

Mr McHugh’s warning on the issue of constitutionality must be understood in its proper context. It would be a grave misreading of Mr McHugh’s argument to conclude, as some have suggested,\textsuperscript{263} that the enactment of a federal HRA would be constitutionally impossible.

More recently, Mr McHugh has stated unequivocally that a carefully-drafted federal HRA, adopting the model of constitutional dialogue, would avoid these constitutional problems entirely.\textsuperscript{264} Mr McHugh was joined in this statement by a group of eminent Australian constitutional lawyers, judges and academics,\textsuperscript{265} who stated that “there is no constitutional impediment” to a HRA adopting the core elements of a moderate or minimalist form of HRA described above.

Specifically, in relation to interpretation and declarations of inconsistency, the statement said that a HRA adopting the following elements would be constitutionally sound:

[The HRA] would allow the rights identified in the [HRA] to be limited in defined circumstances, taking into account factors such as the nature of the right and considerations of necessity and proportionality...

\textsuperscript{262} Goodwin v Phillips (1908) 7 CLR 1.

\textsuperscript{263} See, eg, Bob Carr, Interview with Margaret Throsby (ABC Classic FM, ‘Mornings with Margaret Throsby’, 9 April 2009). In this interview, Mr Carr stated: “Michael McHugh gave a recent speech saying that that concept [a court declaring a law to be incompatible with a right in a federal Human Rights Act] ... is unconstitutional ... Mucking around with a Charter like the one in Victoria makes no difference whatsoever and there are grounds for saying that model is unconstitutional and would be struck down.”


\textsuperscript{265} The full list of signatories is: the Hon Sir Anthony Mason AC, KBE; the Hon Michael McHugh AC, QC; the Hon Catherine Branson QC, President, Australian Human Rights Commission; Pamela Tate SC, Solicitor-General of Victoria; Simeon Beckett, New South Wales Bar Association; Sarah Moulds, Law Council of Australia; Edward Santow, Gilbert + Tobin Centre of Public Law; Associate Professor James Stellios, Australian National University; Associate Professor Anne Twomey, University of Sydney; Bret Walker SC, New South Wales Bar Association; Associate Professor Kristen Walker, University of Melbourne; Professor George Williams, University of New South Wales; Professor Spencer Zifcak, Australian Catholic University.
The HRA would require courts to interpret all legislation of the Commonwealth in a way that is consistent with the rights identified in the [HRA], so far as it is possible to do so consistently with the purpose of that legislation...

If a court found that it could not interpret a law of the Commonwealth in a way that is consistent with the rights identified in the [HRA], a statutory process could apply to bring this finding to the attention of federal Parliament and require a government response. An example of a possible process is as follows:

The Australian Human Rights Commission would be empowered, at the request of a party to the proceeding or of its own motion, to notify the Attorney-General of a finding of inconsistency. The Attorney-General would be required to table this notification in federal Parliament. The Government would be required to respond to the notification within a defined period (for example, 6 months).266

More generally, it is important to approach other constitutional concerns cautiously. Some seem predicated upon the introduction of a constitutionally-entrenched Bill of Rights—a proposal that is expressly excluded from consideration in this consultative process. Others are based on the assumption that a particular HRA from another jurisdiction would be directly transposed to Australian federal law. This fails to acknowledge the important impact of the drafting of the machinery provisions of any eventual HRA in securing its constitutional validity. The unthinking transposition of any existing HRA, without due consideration to Australia’s constitutional structure, would of course be deeply unwise.

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**Recommendation 10**

An Australian Human Rights Act, adopting the constitutional dialogue model, could be drafted so as not to infringe the Australian *Constitution*. There is no constitutional impediment to drafting an Act that involves the elements identified below.

For this reason, and for the other reasons set out in Part 3 of this submission, the basic structure of the Human Rights Act should be as follows:

(i) The Act should identify the human rights to be protected.

(ii) The Act should permit these rights to be limited in defined circumstances, taking into account factors such as the nature of the right and considerations of necessity and proportionality.

(iii) The Attorney-General, or the member introducing legislation, would be required to prepare and table in federal Parliament a human rights ‘statement of compatibility’. The statement of compatibility would, at a minimum, give reasoned consideration to whether the Bill was compatible with the human rights identified in the Act.

(iv) Federal public authorities would be required to act compatibly with the rights identified in the Act unless required by law to do otherwise. This obligation could extend to organisations acting on behalf of the Commonwealth in carrying out public functions.

(v) The Act should require all Commonwealth legislation to be interpreted consistently with the rights identified in the Act, so far as it is possible to do so consistently with the purpose of that legislation.

(vi) If a court finds that it cannot interpret a law of the Commonwealth consistently with the rights identified in the Act, the Act should provide a mechanism to bring this finding to the attention of federal Parliament and require a government response within a set period.

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**Compensation for human rights violation?**

As explained in detail above, we submit that a federal HRA should require public authorities to comply with the human rights set out in the Act itself, subject to certain qualifications. A federal HRA should also require other legislation to be construed, in conformity with HRA-protected rights, where this is possible and subject to purpose of the legislation in question.

A key question, therefore, is whether the proposed HRA should allow a court to award damages or compensation where it finds that a public authority has breached an individual’s human rights. This question needs to be considered by reference to two fundamental principles in particular. The first of these is the underlying purpose of human rights law itself—that is, the protection of individual *dignity*. Secondly, as the term suggests, the legal remedy of ‘damages’ or ‘compensation’ is designed to help restore a person to the status quo before they were wronged. Such is the case in torts law, from which this principle derives.

However, the following problem arises. Often, but not always, where an individual’s human rights have been infringed, monetary compensation will be an inadequate remedy

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267 This proposition is discussed in Part 1 of this submission above.

in that it can do little, if anything, to restore the damage done to the individual’s dignity. For example, how would monetary compensation salve the dignity of an individual who is denied the right to vote? And even if one accepts that monetary compensation would assist in this situation, how much money would be an appropriate award? What factors would a court take into account?

On the other hand, while accepting that monetary compensation might sometimes be an inappropriate remedy, and that it might often be an imperfect remedy, in certain situations, it remains a viable remedy.

Take, by way of analogy, the law of defamation. This law is designed to strike a balance between freedom of expression and the right to protect one’s reputation against unjustified attack. Where a court accepts that a person has been defamed, it will often order that the defendant retracts the defamatory statement in question—that is, a non-monetary order. However, usually, it will also order the defendant to pay damages to the defamed person. In framing this order, the court is faced with a difficult question: how much money will relieve the harm to the plaintiff’s feelings and restore his or her reputation? It is generally accepted that a monetary award in the context of defamation is an imperfect remedy. It is also accepted that assessing damages in this context is a “rough-and-ready process” that “does not ... purport to be a scientific, or even a pseudo-scientific, process.” Nevertheless, the law reflects the view that damages can provide some help to the individual defamed, while also acting as a deterrent to other potential defamers.

Comparative law

It is instructive to consider how other jurisdictions have dealt with this question. The respective HRAs of Victoria and the ACT do not provide a freestanding right to compensation in respect of human rights violations by public authorities. The independent committee considering a Victorian HRA explained its approach as follows:

The Committee does not think that damages add significant extra value to the Charter model at this stage and most people seem more interested in making sure the rights are observed than in receiving compensation. Overseas experience shows that damages are rarely awarded and are not within the contemplation of many people who might seek justice for a rights violation.

Naturally, however, in these jurisdictions, where a public authority breaches a human right, this might also give rise to some other cause of action (such as under tort law), and thus the victim will not necessarily be without financial redress.

On the other hand, a number of other comparable jurisdictions—such as the UK, Canada and New Zealand—do allow for compensation to be awarded in appropriate cases. Moreover, under international law, the better view seems to be that courts should have at least the option of awarding compensation in appropriate cases. The UN Human Rights Committee has stated that parties to the ICCPR are required to make reparation to individuals whose [ICCPR] rights have been violated. Without reparation to individuals whose Covenant rights have been violated, the obligation to provide an effective remedy ...

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269 See, eg, Patrick George, Defamation Law in Australia (2006) at 370.
is not discharged. In addition to the explicit reparation required by [Articles 9(5) and 14(6)], the Committee considers that the [ICCPR] generally entails appropriate compensation. The Committee notes that, where appropriate, reparation can involve restitution, rehabilitation and measures of satisfaction, such as public apologies, public memorials, guarantees of non-repetition and changes in relevant laws and practices, as well as bringing to justice the perpetrators of human rights violations.\textsuperscript{271}

**Conclusion**

In the vast majority of cases of human rights violation, a desire for compensation is a relatively small part of the overall picture. In many cases, compensation is inappropriate and should not be awarded. Nevertheless, we submit that it is necessary to provide for the award of compensation, ultimately by a court, where appropriate.

In the jurisdictions where compensation is available for human rights violations, courts are reluctant to make such an order and, when they do, the monetary awards are usually modest. We believe that these are factors in favour of giving this tool to the courts, on the condition that it be used sparingly and only in appropriate cases. The primary benefit to the affected individual of making provision for compensation is that it can be of real, if indirect, assistance in recovering from a human rights violation. More generally, the prospect of damages being awarded is an important deterrent for public authorities, encouraging them to take human rights seriously.

<table>
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<th>Recommendation 11</th>
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<tbody>
<tr>
<td>The proposed Human Rights Act should empower the courts to award monetary compensation against public authorities that are found to have violated an individual’s human rights. This power should be exercised only in appropriate cases.</td>
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**Harmonious human rights laws in all Australian jurisdictions**

The essence of human rights is that they should be shared by all people in a particular community. The differences between the various jurisdictions in Australia are not so great that it would seem appropriate to have markedly different human rights protections for people living in one state or territory compared to another, or for a radically different approach to be taken at the Australian federal level, as compared with the state and territory levels.

A number of the states and territories—ACT, Victoria, Western Australian and Tasmania—have recently conducted independent inquiries that supported the adoption of HRAs in their respective jurisdictions.\textsuperscript{272} Also, the recent concluding observations of the UN Human Rights Committee in its review of Australia’s compliance with the ICCPR included a recommendation that Australia “enact comprehensive legislation giving de-


facto effect to all the [ICCPR] provisions uniformly across all jurisdictions in the Federation". 273

If one accepts that human rights law in Australia should be uniform, or at least harmonious, across Australia, the question then becomes: how should this be achieved?

One option would be for the Commonwealth to bind the states—in other words, for the federal Parliament to pass a HRA that applies to all federal, state and territory legislation and public authorities. This would have the benefit of complete uniformity, and there is little doubt that the Commonwealth would be constitutionally empowered to do this. 274 Indeed, this would have been the operation of the Human Rights Bill introduced in 1973 by then Commonwealth Attorney-General, Lionel Murphy. 275

The Canadian Charter of Rights and Freedoms, like the now-repealed statutory Bill of Rights on which it was based, applies both to the federal and provincial governments of Canada. 276 Each of those parliaments has the power to curtail or abrogate a right or rights set out in the Charter, provided it does so expressly in the relevant legislation. 277

While such an approach would possess the benefit of constitutional certainty, it would carry with it some disadvantages. These disadvantages are especially acute if a HRA is imposed on state and territory Governments without first obtaining their approval. The success of a HRA in achieving its aims is contingent on the institutional support of the government and parliament of the relevant jurisdiction. If viewed as an alien intrusion, to be complied with according to its letter but not necessarily its spirit, the positive force of a HRA is severely diminished. On the other hand, if supported by all arms of government, it is much more likely to have its intended impact.

For this reason, the federal Government should seek cooperation from the state and territory Governments to enact uniform, or at least harmonious, human rights legislation. Such has been the approach taken in a number of other areas of national importance, such as evidence and corporations law. One way of doing this would be for the Commonwealth to enact a HRA, following discussion with the states and territories. The HRA could include a provision that allows for state and territory parliaments to opt in to the Commonwealth legislative regime, by passing their own legislation to this effect.

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274 As discussed above, the Commonwealth Parliament has power to enact a HRA under s 51(xxix) of the Constitution. This legislation could be drafted so as to ‘cover the field’ and, by operation of s 109 of the Constitution, it could be made to apply to the states and territories as well, to the exclusion of any inconsistent legislation passed in those jurisdictions. See, eg, Botany Municipal Council v Federal Airports Corporation (1992) 175 CLR 453.

275 Human Rights Bill 1973 (Cth), cl 5(1). This Bill lapsed after the dismissal of the Whitlam Labor Government.

276 See Canadian Charter of Rights and Freedoms, ss 24 and 32.

277 See Canadian Charter of Rights and Freedoms, s 33.
Recommendation 12
Human rights law should be harmonious across all Australian jurisdictions. To this end, the Australian Government should consult with state and territory governments in drafting a federal Human Rights Act, and the Act should provide a mechanism whereby the states and territories can opt in to the federal Human Rights Act regime.
## Appendix: case studies of positive impact of a Human Rights Act

### Human rights protection within Australia

<table>
<thead>
<tr>
<th>Children and young people</th>
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<tr>
<td>Concern has been raised about the protection of children in Australia, including within the juvenile justice system (such as mandatory sentencing laws and holding children in adult facilities), immigration detention practices, protection of children in the workplace, exposure to domestic violence and access to education (in particular for Indigenous and disabled children and those from rural and low-income families).</td>
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Relevant human rights include: the right to protection of family life; the entitlement of children to special protection; equality before the law (and non-discrimination); privacy; freedom of thought, conscience and religion and minority rights.

### Examples of the positive impact of a Human Rights Act

**Eg 1.** In Victoria, a primary school used human rights principles to inform its policies and processes in re-designing and developing the school building including special consideration given to disabled and Indigenous children. The school’s principal noted that “the process had a positive effect on the students and broader school community through the development [of] strong relationships and positive, supportive community cultures”.

**Eg 2.** In the ACT, a single mother of two children was not entitled to remain in her mother’s public housing property when her mother died, as the lease had been in her mother’s name. The children had always lived in the house, had close links with the local community including school and friends and were at risk of being removed from their mother if she did not have a home for them. Advocates cited the right to protection of family life to the public housing authority, which granted a lease over the house to the mother.

**Eg 3.** Pursuant to its powers under the *Human Rights Act*, the ACT Human Rights Commission provided advice in relation to ensuring human rights

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Human rights protection within Australia | Examples of the positive impact of a Human Rights Act
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compliance of the new youth detention centre, Bimberi. The advice concerned matters including its design, physical structures, operating procedures and programs for residents, and identified areas for further development.\(^\text{282}\)

**Eg 4.** In the United Kingdom, a young girl with a learning disability was denied school transport ordinarily offered to children with special educational needs, even though she was unable to travel independently. This decision was made on the basis that she lived 2.8 miles, rather than the prescribed ‘more than 3 miles’, from school. The mother argued that this inflexible application of policy disproportionately interfered with her daughter’s right to respect for private life, and failed to consider her specific circumstances. The local authority reversed its decision.\(^\text{283}\)

**Elderly people**

Elderly people are particularly reliant on government decision making and public services. Whereas previously elderly relatives were often cared for within their family units, older people are now more likely to be placed in government care or to have to fund their own care in retirement facilities or nursing homes. This particularly affects those elderly persons who possess inadequate retirement funds, are on their own or suffer physical disabilities or mental illness. As a result of the

**Eg 1.** In a hospital in the United Kingdom, an elderly woman was strapped into a wheelchair by staff as they were fearful she might fall and hurt herself. The woman was in obvious distress. When the staff were advised this could be considered degrading treatment, they unstrapped her and obtained the advice of a physiotherapist, who encouraged them to support her to improve her mobility.\(^\text{285}\)

**Eg 2.** In a residential care home in the United Kingdom, a man was admitted following an illness but his wife of 65 years was not allowed to come with him. A public campaign was launched arguing that the local authority had

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## Human rights protection within Australia

Current global financial crisis, larger numbers of elderly people rely on government pensions and public services due to losses in their retirement savings.

Relevant human rights include: the right not to be treated in an inhuman or degrading way; privacy (including bodily privacy); and the right to life.\(^\text{284}\)

### Examples of the positive impact of a Human Rights Act

Breached the couple’s right to family life, resulting in the local authority reversing its decision.\(^\text{286}\)

**Eg 3.** In a United Kingdom residential care home, a large woman had not been bathed for many weeks, against her wishes, instead being ‘strip’ washed so staff did not have to lift her. An advocate for the woman notified the local authority that this was inhumane and degrading treatment, quickly resulting in the advice of an occupational therapist being sought, who recommended the use of a hoist.\(^\text{287}\)

## Persons with a physical or mental disability or with a mental illness

Concern has been raised about discrimination and disadvantage of disabled persons in Australia, including a lack of protection from vilification, inadequacy of services, an inability to challenge involuntary detention in a timely manner and access to public transport.\(^\text{288}\)

Relevant human rights include: equality before the law; privacy; protection of family; freedom from cruel, inhuman or degrading treatment; freedom

**Eg 1.** A 13 year old boy with Asperger Syndrome was deemed ineligible to receive disability support services because a Victorian Department did not consider Autism Spectrum Disorders to be a ‘disability’. The child’s mother sought merits review of this decision, in light of the rights contained in the Victorian Charter. Prior to the tribunal hearing, the Victorian Government changed its policy by acknowledging Autism Spectrum Disorders to be ‘disabilities’ under the Act, and provided additional funding.\(^\text{289}\)

**Eg 2.** A rehabilitation centre attached to a public hospital in Victoria sought to discharge several young persons with acquired brain injuries to aged care


Human rights protection within Australia

Examples of the positive impact of a Human Rights Act

from arbitrary detention; freedom of movement.\textsuperscript{289}

facilities, which were the only alternative care facilities available. However, these facilities did not provide the social environment or support services needed for the young people to continue their recovery. On an advocate raising the Victorian Charter, the rehabilitation centre agreed to consider its obligations under the charter before moving the young people.\textsuperscript{291}

\textbf{Eg 3.} In the United Kingdom, a man detained in a maximum security mental hospital was placed in seclusion where he repeatedly soiled himself. Staff refused to clean up the man’s bodily waste claiming he would make the same mess again so intervention was pointless. An advocate successfully challenged this practice based on the man’s right not to be treated in an inhuman and degrading way and to respect for private life.\textsuperscript{292}

\textbf{Indigenous people}

Concern has been expressed “regarding the protection and realisation of the rights contained in the ICCPR for Indigenous Australians”.\textsuperscript{293} This includes a failure to recognise the right to self-determination (including native title rights), the state of Indigenous health (including life expectancy), issues in the justice system (including

\textbf{Eg 1.} In Victoria, an Aboriginal community services organisation has identified, since the introduction of the Victorian Charter, a shift in thinking about cultural diversity and the inclusion of Aboriginal people in programs, and in its dealings with state and local government partners.\textsuperscript{296}

\textbf{Eg 2.} In Victoria, business vendors in a regional CBD were calling on a local council to introduce a ‘move on and stay away’ by-law that would apply to

\textsuperscript{293} See the Fact Sheet on Australia’s compliance with the ICCPR: Indigenous Australians, available at <www.hrlrc.org.au>.
Human rights protection within Australia

continued high number of deaths in custody, disproportionate impact of certain criminal laws such as mandatory sentencing) and suspension of the Racial Discrimination Act 1975 (Cth) in respect of the Northern Territory Intervention.294

Relevant human rights include: the right to self-determination; equality before the law (non-discrimination); the right to life; freedom from torture and other cruel treatment; freedom from slavery, servitude and forced labour; a fair trial.295

Examples of the positive impact of a Human Rights Act

those displaying antisocial behaviour. This was rejected by the local council on human rights grounds as it would disproportionately affect marginalised groups such as homeless and Indigenous persons.297

Prisoners

There is concern that conditions in Australian prisons are “unacceptable ... and may constitute cruel, inhumane or degrading treatment”, including as a result of overcrowding and lack of access to adequate health care.298 The treatment of women, Eg 1. Pursuant to its powers under the Human Rights Act, the ACT Human Rights Commission made 98 recommendations to the ACT Government for urgent attention and general improvement in the running of the ACT’s remand centres.300 According to Dr Watchirs, “many [of its] recommendations about humane treatment are being implemented and practical lessons being applied”

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<th>Human rights protection within Australia</th>
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| Indigenous and mentally ill prisoners has been highlighted as being of particular concern. | Relevant human rights include: the right to equality before the law (and non-discrimination); the right to humane treatment when deprived of liberty; freedom from torture, cruel, inhuman or degrading treatment; the right to protection of families and children; the entitlement of children to special protection.  
Eg 2. In Victoria, a prisoner initiated action against prison officers in relation to property that had been lost when he was transferred between prisons. The cost of attending the court hearing by escort from the prison was to be $1,380 and beyond the means of the prisoner. Advocates argued that the extraordinarily high cost was a significant impediment to the prisoner’s right to a fair trial pursuant to the Victorian Charter and successfully negotiated removal of the hearing to a closer court at significantly lower cost. |

**Asylum seekers**

Concern has been expressed that “Australia’s law, policy and practice with respect to immigration and asylum seekers raises serious concerns under the ICCPR”. This includes the practice of mandatory detention, the conditions within immigration detention facilities (such as prolonged and indeterminate periods of detention, overcrowding, separation of families, lack of access to legal advice since immigration laws are within the jurisdiction of the Commonwealth and not the states or territories, there are no current examples from either the ACT or Victorian HRAs in this respect.

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301 Helen Watchirs, ACT Human Rights and Discrimination Commissioner, ‘At last powers that be want to hear about your rights’, *The Canberra Times*, 31 March 2009.

Human rights protection within Australia

and adequate health care) and deportation of non-citizens who may be at risk of ill-treatment.  

Relevant human rights include: freedom from arbitrary detention; freedom of movement; procedural rights against expulsion; right to a fair trial; the right to recognition before the law (and non-discrimination); protection of family life.

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| NGOs have raised “concerns with respect to the right to freedom from discrimination on the basis of race”, in particular regarding the disproportionate and detrimental impact of Australia’s anti-terrorism measures on the Muslim and Arab population, the impact of sedition laws on the right to freedom of expression, the significant gaps and inconsistencies in Australia’s anti-vilification and discrimination legislation and issues facing particular groups of newly-arrived immigrants such as

**Eg 1.** In Victoria, a 23 year old Iraqi refugee with a severe intellectual disability and autism was placed in unsuitable supported accommodation, which had no Arabic-speaking workers and this significantly limited his ability to observe his religion (such as eating Halal food). On a visit home, it became apparent that he was frightened of his room mate and generally unhappy there. An advocate pointed to the need to protect his rights pursuant to the Victorian Charter, resulting in his being allowed to stay in his family home as he wished.

**Eg 2.** In New Zealand, a Muslim religious leader, dressed in traditional

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305 In this regard we note that the Australian Government has indicated it is intending to amend Australia’s sedition laws in response to the Australian Law Reform Commission’s report.
### Human rights protection within Australia

as those arriving from Africa.\(^{306}\)

Relevant human rights include: equality before the law and non-discrimination; freedom of thought, conscience and religion; freedom of opinion and expression and minority rights.\(^{307}\)

### Examples of the positive impact of a Human Rights Act

religious attire, was aboard a plane waiting to go overseas. He was a New Zealand resident but was not travelling on his New Zealand passport as he had dual citizenship. He went to the toilet in order to perform some ritual ablutions before takeoff as he intended reading some religious texts. He took about 10 minutes in the toilet and on leaving the toilet was escorted off the plane, had his passport checked and though valid, was not allowed to rejoin the plane because he had “upset the staff” and was considered a security threat by airport security, police and flight staff. Through the Human Rights Commission’s mediation process, the airline came to understand he was not a security threat given the context of his actions. An outcome of the process was his religious association giving a training session for airline staff on matters of religious and cultural practices to ensure this did not happen again.\(^{309}\)

### Persons who are homeless or on a low income

According to the Australian Bureau of Statistics, at least 105,000 people across Australia are homeless every night, for complex and varied reasons, including severe financial hardship, lack of affordable housing, domestic violence, lack of access to health care and drug and alcohol disorders.\(^{310}\) An NGO review has found that

**Eg 1.** In Victoria, a pregnant single mother of two children living in community housing was given an eviction notice without reason. The Victorian Charter was used to negotiate with the landlord to prevent an eviction into almost certain homelessness, and an alternative agreement was reached.\(^{313}\)

**Eg 2.** A homeless mother was temporarily living in NSW with one of her


\(^{310}\) See Human Rights Law Resource, *Fact Sheet on Australia’s compliance with the ICCPR: Homelessness in Australia*. 
Human rights protection within Australia

Discrimination against homeless persons is widespread in all Australian jurisdictions.\(^{311}\)

Relevant human rights include: the right to equality before the law (and non-discrimination); the right to protection of the family and children; privacy; freedom from inhuman and degrading treatment; the right to participate and vote.\(^{312}\)

Examples of the positive impact of a Human Rights Act

...children in a caravan without electricity, while her other child was living in the ACT with her grandmother in order to attend school. She was unable to apply for priority housing due to outstanding debts to the public housing authority from a previous tenancy. Advocates invoked the right to protection of family life pursuant to the Human Rights Act to advocate for flexibility in these allocation rules, resulting in the mother being housed as a priority candidate prior to her repayment of debts.\(^{314}\)

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