



A human rights act for australia

Submission to the federal human rights consultation

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Who we are

Background

The Australian Lawyers Alliance is the only national association of lawyers and other professionals dedicated to protecting and promoting justice, freedom and the rights of individuals. We estimate that our 1,500 members represent up to 200,000 people each year in Australia. We promote access to justice and equality before the law for all individuals regardless of their wealth, position, gender, age, race or religious belief. The Lawyers Alliance started in 1994 as the Australian Plaintiff Lawyers Association, when a small group of personal injury lawyers decided to pool their knowledge and resources to secure better outcomes for their clients – victims of negligence.

Corporate Structure

The Australian Lawyers Alliance is a company limited by guarantee with branches in every state and territory of Australia. We are governed by a board of directors made up of representatives from around the country. This board is known as the National Council. Our members elect one director per branch. Directors serve a two-year term, with half the branches holding an election each year. The Council meets four times each year to set the policy and strategic direction for the organisation. The members also elect a President-elect, who serves a one-year term in that role and then becomes National President in the following year. The members in each branch elect their own state/territory committees annually. The elected office-bearers are supported by twelve paid staff who are based in Sydney.

Funding

Our main source of funds is membership fees, with additional income generated by our events such as conferences and seminars, as well as through sponsorship, advertising, donations, investments, and conference and seminar paper sales. We receive no government funding.

Programs

We take an active role in contributing to the development of policy and legislation that will affect the rights of individuals, especially the injured and those disadvantaged through the negligence of others. The Lawyers Alliance is a leading national provider of Continuing Legal Education/Continuing Professional Development, with some 25 conferences and seminars planned for 2009. We host a variety of Special Interest Groups (SIGs) to promote the development of expertise in particular areas. SIGs also provide a focus for educational activities, exchanging information, developing materials, events and networking. They cover areas such as workers' compensation, public liability, motor vehicle accidents, professional negligence and women's justice. We also maintain a database of expert witnesses and services for the benefit of our members and their clients. Our bi-monthly magazine, *Precedent*, is essential reading for keeping lawyers and other professionals up to date with developments in personal injury, medical negligence, public interest and other, related areas of the law.

Introduction

The Australian Lawyers Alliance warmly welcomes the opportunity to contribute to such a fundamental consultation into human rights protections in Australia.

The Lawyers Alliance is a national association of lawyers and other professionals dedicated to protecting and promoting justice, freedom and the rights of the individual. It is estimated that our 1,500 members represent up to 200,000 people per year, many of whom are vulnerable, injured, suffer from mental or physical difficulties or are socially and economically disadvantaged. Advocating on behalf of such clients and - encountering first-hand how our legal and political framework can fail them - is a major reason (but by no means the only reason) why the Alliance has welcomed the opportunity to participate in this national consultation process.

While Australia is largely a safe and democratic country, it is failing to adequately protect human rights. Australia has seen the erosion of significant rights, particularly in the last decade, in the context of immigration policy, an aggressive counter-terrorism regime and controversial measures to manage dysfunction in certain Indigenous communities. However, it is not only these significant, high-profile examples of human rights violations that are problematic and concerning. There are numerous examples of 'ordinary' people suffering human rights violations every day, including people whose privacy has been invaded by government agencies, elderly people being abused and treated poorly in care, people with disabilities suffering from discrimination or people with mental illness being forgotten and neglected. When such stories come to public attention, Australians are often rightly outraged and indignant, but don't necessarily perceive such failings to be human rights violations. This lack of a human rights culture, consciousness and dialogue all too often creates the misleading impression that human rights abuses rarely occur in Australia, the 'lucky country'.

In the face of declining political debate and scrutiny, Australia can no longer afford such complacency, or to rely solely on political and legislative restraint to ensure that fundamental rights are protected. In this respect, Australia has grown increasingly isolated over recent years from the international community, which has moved largely towards formal political and legal recognition of the fundamental value and importance of rights.

The Australian Lawyers Alliance believes that a human rights act is the best way to protect human rights in Australia. The Alliance holds this view through the prism of understanding how legal mechanisms can effectively protect individual rights in both a preventative and corrective fashion. A human rights act would foster a human rights culture in which the rights and responsibilities of people in Australia are clearly set out as a benchmark to be observed by government, its agencies and the community more generally. It would strengthen our democratic institutions and lead to greater social and political engagement, which would serve to strengthen our understanding and respect for the rights of others.

Summary of recommendations

- **RECOMMENDATION 1:** The Lawyers Alliance recommends that the civil and political rights set out in the International Covenant on Civil and Political Rights (ICCPR) should be legislatively protected in Australia.
- **RECOMMENDATION 2:** The Lawyers Alliance recommends that the economic, social and cultural rights set out in the International Covenant on Economic Social and Cultural Rights (ICESCR) be legislatively protected in Australia. As a bare minimum, rights to adequate housing, education and healthcare should be formally protected.
- **RECOMMENDATION 3:** The Lawyers Alliance submits that a human rights act should be drafted in language that reflects the nature of responsibilities and implies reciprocity that applies to the enjoyment of human rights.
- **RECOMMENDATION 4:** The Lawyers Alliance submits that human rights should be enjoyed only by natural persons and not by legal entities, such as corporations.
- **RECOMMENDATION 5:** Any formal human rights protections should extend to all persons subject to the Australian jurisdiction (whether citizens or not), and whether that jurisdiction applies within Australia's territorial boundaries or overseas.
- **RECOMMENDATION 6:** Members of Parliament should be obliged to make statements of compatibility when introducing legislation in Australia. Where proposed legislation is incompatible, there should be a clear and unequivocal justification as to why the restriction on rights is necessary and proportionate to a legitimate aim.
- **RECOMMENDATION 7:** All legislation should be interpreted consistently with human rights as far as possible, but at the same time to remain consistent with the spirit and purpose of the legislation.
- **RECOMMENDATION 8:** Aggrieved individuals should have a primary cause of action in a human rights act if their human rights have been breached. Raising concerns under a human rights act should not be secondary or ancillary to an existing cause of action.
- **RECOMMENDATION 9:** Where there is a finding of inconsistency between proposed legislation and the human rights act, the courts should be empowered to issue a declaration of incompatibility directly to Parliament or, if constitutionally more appropriate, have a finding of inconsistency brought to the attention of the Australian Human Rights Commission.

- **RECOMMENDATION 10:** Courts should also be empowered, where appropriate, to give aggrieved parties the full range of judicial remedies under a human rights act, including monetary compensation.
- **RECOMMENDATION 11:** Where there is a finding of inconsistency or declaration of incompatibility, such a notification should be tabled in federal parliament, and a response should be required from Parliament within a six-month period.
- **RECOMMENDATION 12:** A human rights act should have an 'opt-in' clause for private entities, allowing private companies to be bound by the legislation if they wish.
- **RECOMMENDATION 13:** Human rights can be subject to limitation or suspension only when absolutely necessary, in circumstances recognised as appropriate and acceptable in international law.
- **RECOMMENDATION 14:** Any human rights act should reflect that certain human rights, as reflected in international law, are non-derogable and cannot be limited or suspended under any circumstances.
- **RECOMMENDATION 15:** The Lawyers Alliance submits that any federal human rights legislation should be confined in application to federal law and agencies and should not be imposed on states and territories by virtue of s109 of the Australian Constitution.
- **RECOMMENDATION 16:** The Lawyers Alliance supports a model where state and territory jurisdictions can 'opt-in' to the federal legislation or, alternatively, can enact 'mirror legislation' to ensure consistency among the jurisdictions.
- **RECOMMENDATION 17:** The Australian Lawyers Alliance supports a horizontal application of a human rights act, recognising that human rights law can be a valuable tool in resolving private disputes and assists with the balancing of legal rights and obligations.
- **RECOMMENDATION 18:** Any move to introduce human rights legislation should be coupled with significant education and training for all those responsible for implementing and applying the legislation and providing services on behalf of the government.
- **RECOMMENDATION 19:** The Lawyers Alliance submits that education on civics and human rights should form a greater part of the education syllabus for all children in Australia, so that parliamentary and democratic processes are clearly understood from a young age.
- **RECOMMENDATION 20:** Significant consultation with the Australian Human Rights Commission (AHRC) is necessary to ensure that the AHRC is well-funded and has the resources to fully carry out its mandate.

- **RECOMMENDATION 21:** A parliamentary committee should be formed consisting of ministers who are well-versed on human rights, supported by human rights expert policy advisers to assist Parliament in meeting its human rights obligations.

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

Australia and the International Human Rights Framework

Australia is a signatory to many formal international human rights instruments. These include:

- International Covenant on Civil and Political Rights (ICCPR);
- International Covenant on Economic, Social and Cultural Rights (ICESCR);
- The Convention on the Elimination of All Forms of Racial Discrimination (CERD);
- The Convention on the Elimination of all forms of Discrimination Against Women (CEDAW);
- The Convention on the Rights of the Child (CROC);
- The Convention Against Torture (CAT); and
- The Convention on the Rights of Persons with Disabilities.

Civil and political rights

Most formal human rights legislation in other jurisdictions enshrines fundamental civil and political rights. These are most commonly reflected in the International Covenant on Civil and Political Rights (ICCPR), to which Australia is a signatory.

Examples of civil and political rights include:

- the right to life;
- the right to live free from torture, cruel or inhuman treatment or punishment;
- the right to security and liberty of person;
- the right to live free from slavery;
- legal rights relating to equality before the law;
- the right to live free from arbitrary or unlawful interferences with privacy;
- rights to freedom of expression and association; and
- the right to live free from arbitrary interference with privacy or family life.

RECOMMENDATION 1: The Lawyers Alliance recommends that civil and political rights reflected in the ICCPR are legislatively protected in Australia.

Economic, social and cultural rights

These human rights relate to enjoying an adequate living standard, work rights and rights to health and housing. Examples of such rights can be found in the International Covenant on Economic Social and Cultural Rights (ICESCR), to which Australia is a signatory.

There has been a reluctance both internationally and also within Australian jurisdictions to fully recognise economic, social and cultural rights. There is perhaps a sense that such rights are secondary compared with civil and political rights. The

Lawyers Alliance submits that no such distinction should be made, and that given the multicultural composition of our nation there is added importance to recognising such rights. As the preamble to the ICESCR holds: 'the ideal of free human beings enjoying freedom from fear and want can only be achieved if conditions are created whereby everyone may enjoy his economic, social and cultural rights, as well as his civil and political rights.'

Examples of economic, social and cultural rights include:

- the right to work and to work in just and favourable working conditions;
- the right to form trade unions;
- the right to self-determination;
- the notion that special assistance and support should be granted to the family unit;
- the right to an adequate standard of living including to clothing, food and housing;
- the right to enjoy high standards of mental and physical healthcare;
- the right to education; and
- the right to participate in cultural life.

RECOMMENDATION 2: The Lawyers Alliance recommends that economic, social and cultural rights as reflected in the ICESCR be legislatively protected in Australia. As a bare minimum, rights to adequate housing, education and healthcare should be formally protected.

Other rights

Human rights do not have to be limited to the aforementioned rights. It may be appropriate to protect additional rights that are unique to Australia. Examples of other rights that can also be formally protected in human rights legislation include specific human rights relating to Indigenous people, such as land rights and the right to observe traditional practices where appropriate.¹ Other rights could include environmental rights relating to a clean environment and the right to live free from toxic materials and excessive pollution.

Human rights and responsibilities?

The Lawyers Alliance recognises that most human rights have correlating responsibilities. While it is important for everyone to fully enjoy their fundamental rights, there should also be recognition that such rights do not exist in isolation, and that we all have correlating duties both to fully realise our own rights and to respect the rights of others. The 2005 Victorian Human Rights consultation revealed a strong support for the recognition of correlating responsibilities to avoid creating a culture of entitlement and individualism.

The Lawyers Alliance supports a human rights act expressed in the language of reciprocity and mutual obligations. However, the Alliance submits that formalising

¹ For example, the Victorian *Charter of Human Rights and Responsibilities Act 2006* contains reference to cultural rights at article 19, including the right to enjoy identity and culture, maintain language and 'maintain spiritual, material and economic relationship with the land and waters'.

and enforcing specific 'responsibilities' is undesirable and complex. The Alliance submits that the notion of responsibilities should be implicit – for example, within the right to vote is an implicit responsibility to participate in the electoral process and cast a vote.

RECOMMENDATION 3: The Lawyers Alliance submits that a human rights act should be drafted with language that reflects the nature of responsibilities and reciprocity being implicit in the enjoyment of human rights.

Who should enjoy human rights?

Natural and legal persons

Human rights arise out of the notion that *a//* natural persons are entitled to be treated with dignity and respect, solely by virtue of their humanity. This has been recognised by human rights legislation in Victoria and the ACT, which specifically provides that human rights apply to individuals² or persons³, and therefore exclude artificial legal persons, such as corporations.⁴

RECOMMENDATION 4: The Lawyers Alliance submits that human rights should be enjoyed only by individuals or persons and not by legal entities, such as corporations.

Application to non-citizens

Most human rights instruments do not limit the application of human rights to citizens or permanent residents. Such an application is clearly undesirable, not only because such an exclusionary application directly contravenes the spirit underlying human rights legislation, but also because it denies groups such as temporary workers, refugees or visitors to Australia the same protection and enjoyment of human rights, despite those groups being subject to, and obligated to obey, Australian law.

RECOMMENDATION 5: Any formal human rights protections should extend to all persons subject to the Australian jurisdiction (whether citizens or not) whether that jurisdiction applies within Australia's territorial boundaries or overseas.

2. Are these rights currently sufficiently protected and promoted?

The Australian Lawyers Alliance would respectfully submit that fundamental human rights are not adequately protected in Australia. Having a clear understanding of

² *Human Rights Act 2004* (ACT), s6.

³ *Charter of Human Rights and Responsibilities Act 2006* (VIC), s6.

⁴ Corporations are explicitly excluded in s6 of the *Charter of Human Rights and Responsibilities Act 2006* (VIC)

how Australia currently tries to protect human rights will clearly illustrate the deficiencies in the current framework.

a.) Common law

The common law is essentially law created over time through judicial decision-making, and these common law principles are then applied by the courts. The common law can serve to protect certain basic rights – particularly in the criminal law context — such as fair trial rights and the right to silence.

There is also a rights-focused method of statutory interpretation derived from the common law, which requires that when interpreting legislation, judicial decision-makers apply the law on the assumption that the legislature did not intend to infringe or abrogate basic rights unless this is communicated expressly.⁵ This presumption is outlined by Lord Hoffman, as follows:

‘Fundamental rights cannot be overridden by general or ambiguous words. This is because there is too great a risk that the full implications of their unqualified meaning may have passed unnoticed in the democratic process. In the absence of express language or necessary implication to the contrary, the courts therefore presume that even the most general words were intended to be subject to the basic rights of the individual.’⁶

However, the common law is piecemeal and limited in nature and, more importantly, can be overridden by legislation. This means that the legislation can expressly, or unintentionally (as is sometimes the case) override common law principles that may protect human rights. Where legislative intent is clear and unambiguous, common law principles and presumptions do little to safeguard human rights. For example, in the High Court decision of *Al-Kateb v Godwin*⁷ (discussed later), in the majority McHugh J held:

‘It is not for the courts, exercising federal jurisdiction, to determine the course taken by Parliament is unjust or contrary to basic human rights. The function of the courts in this context is simply to determine whether the law of the Parliament is within the powers conferred on it by the Constitution.’⁸

Common law rights have not tended to be widely interpreted and used by judges. For example, Mason CJ expressed the limitation on discussion on a common law right to a speedy trial in the following terms:

‘Because there is no constitutional guarantee of a speedy trial, the remedies are discretionary and necessarily relate to the harm suffered or likely to be suffered if appropriate orders are not made.’⁹

As this statement demonstrates, the judiciary is able to protect rights only to the extent that it is empowered to, subject to the Constitution and the existing legislation, which is subject to the intention and goodwill of government.

⁵ *Coco v The Queen* (1993) 179 CLR 427 at 437.

⁶ *R v Secretary of State for the Home Department; ex parte Simms* [2000] 2 AC 115 at 131.

⁷ [2004] 219 CLR 562.

⁸ *Ibid* at 595.

⁹ *Jago v District Court* (1989) 168 CLR 23 at 33.

b.) The Constitution

Australia's Constitution sets out the relationship between the three arms of government: the executive, parliament and the judiciary. Unlike other constitutions, Australia's document is not primarily designed to regulate government actions against citizens, or to act as a document for the protection of fundamental human rights.

Express rights in the Australian Constitution

The Constitution does contain a limited number of express rights. These are:

- A limited right to a trial by jury for indictable Commonwealth offences;¹⁰
- The right of freedom of interstate trade;¹¹
- A prohibition on the federal government establishing a state religion or preventing the free exercise of religion;¹²
- The right to enjoy non-discrimination on the basis of state residence¹³; and
- The right to be compensated if the federal government compulsorily acquires land.¹⁴

The courts, recognising that these provisions and the Constitution itself are not designed to be a document to protect human rights, have not interpreted it as such. Therefore, these express rights (particularly sections 80 and 116) have not been interpreted broadly.

In addition to these express rights, the High Court has interpreted the Constitution to contain certain implied rights.

Implied rights in the Australian Constitution

By virtue of the provisions of the Constitution relating to representative and responsible government,¹⁵ the High Court has found an implied freedom of people to communicate on political matters pertaining to government in Australia.¹⁶

There is also an implicit recognition of the separation of powers doctrine in the Constitution that ensures that executive and parliamentary power can be fettered by and is independent from, the judiciary.

As O'Neill, Rice and Douglas held:

'The existing human rights provisions in the Australian Constitution, born out of political pragmatism and compromise and subject to interpretation by a court which quickly developed a tradition of strict legalism and judicial restraint, have not realised their potential. They carry with them the baggage of a century of usually narrow interpretation and they have spread widely throughout the Constitution rather than being collected in one chapter

¹⁰ Section 80.

¹¹ Section 92.

¹² Section 116.

¹³ Section 117.

¹⁴ Section 51 (xxxi).

¹⁵ Particularly sections 7, 24, 64 and 128.

¹⁶ *Lange v ABC* (1997) 189 CLR 520; *ACTV Pty Ltd v Commonwealth* (1992) 177 CLR 106; *Levy v Victoria* (1997) 187 CLR 579.

where they could be mutually supporting. These facts lead to the conclusion that the Australian Constitution contains few substantive human rights safeguards.¹⁷

The Constitution as a source of human rights protection?

If Constitutional rights are infringed, an aggrieved party can bring a constitutional challenge before the federal courts, with those courts being empowered to invalidate laws that are incompatible with the Constitution.

Launching a constitutional challenge is complex, risky and cost-prohibitive for most people, particularly for the disadvantaged or vulnerable. It is not a satisfactory mechanism for human rights protections, nor did the framers of the Constitution intend for it to be.

c.) Statute

The federal and state governments have enacted some legislation protecting certain human rights. In the federal context, this legislation includes:

- *Sex Discrimination Act 1984*
- *Racial Discrimination Act 1975*
- *Racial Hatred Act 1995*
- *Disability Discrimination Act 1992*
- *Human Rights (Sexual Conduct) Act 1994*
- *Crimes (Torture) Act 1988*
- *Human Rights and Equal Opportunity Commission Act 1986*

These statutes represent only some of the international human rights that Australia has agreed to be bound by. Many states have similar legislative instruments, particularly in relation to discrimination. Many other laws also act to indirectly protect human rights; for example, laws regulating or curtailing police powers, or relating to criminal procedure.

While the Australian Lawyers Alliance supports and recognises the value and importance of existing legislation, current statutory legislation is unsatisfactory in adequately and comprehensively protecting human rights for the following reasons:

- Not all fundamental human rights are protected; in fact, many basic rights contained in the ICCPR lack formal legislative protection in Australia. For example; the right to life, to vote, freedom of assembly and association and the right to be treated with humanity and dignity.
- The current human rights framework in Australia is not well-equipped to address multiple human rights infringements – for example, discrimination on the basis of race, disability and age – as each infringement needs to be made out separately, based on different pieces of legislation.
- The fragmented nature of statutory protections can be inaccessible and unnecessarily complicated for ordinary, aggrieved parties. Australia lacks a clear legislative statement that is in ordinary language and easily accessible to people in Australia, which would increase the accountability of government and public authorities.

¹⁷ Nick O'Neill, Simon Rice and Roger Douglas, *Retreat from Injustice: Human Rights Law in Australia* 2nd ed, (2004) The Federation Press at p93.

- Statutes can be easily suspended and excluded. The Northern Territory Emergency Response (also known as 'The Intervention') has significant human rights implications. The Howard government drafted the response to be exempt from *Racial Discrimination Act 1992*. This meant that the government was able to pass laws that had a discriminatory impact on Indigenous people.
- In the context of the states and territories, laws protecting human rights may not be consistent, leading to disparate protection for the same human rights infringement.

d.) International law

International treaties not self-executing for Australia

As outlined earlier, Australia is a signatory to numerous international human rights instruments that protect a wide range of human rights. However, under the Australian legal framework, treaties are not 'self-executing'. This means that despite the ratification of a treaty, the rights enshrined within such human rights treaties do not apply to Australia until the federal government passes legislation making the provisions of the treaty operational within domestic law.

The High Court has made this point clear on numerous occasions. In *Dietrich v R*,¹⁸ Mason CJ and McHugh J considered the relationship between the ICCPR and Australian domestic law, and held: '...ratification of the ICCPR as an executive act has no direct legal effect upon domestic law; the rights and obligations contained in the ICCPR are not incorporated into Australian law unless specific legislation is passed implementing the provision'.¹⁹ Similarly, in *Minogue v Human Rights and Equal Opportunity Commission*,²⁰ the Federal Court held that the ICCPR could not be used to challenge provisions of the *Human Rights and Equal Opportunity Commission Act 1986* on the basis of inconsistency, even though the legislation was in part designed to bring effect to Australia's obligations under it.

There is therefore no direct cause of action (other than individual communications, discussed below) based on international human rights law that enables a person to hold public authorities accountable, as international treaties do not 'give rights to or impose duties on members of the Australian community',²¹ and a person cannot rely upon international human rights '...as the direct and immediate source of the right which the applicant claims has been infringed'.²²

International human rights influencing Australian jurisprudence

There has been a somewhat slow and reluctant recognition by Australian jurists that in a widely globalised world, the wealth of international jurisprudence has become increasingly relevant in the guidance and development of Australian law.

¹⁸ (1992) 177 CLR 292.

¹⁹ *Ibid* at 305.

²⁰ [1999] FCA 85.

²¹ *Koowarta v Bjelke-Petersen* (1982) 153 CLR 168.

²² *Minogue v Williams* [1999] FCA 1585 at 35 per Weinberg J.

While international human rights law is not directly applicable domestically unless formally incorporated in legislation, there has been a recognition that international law may be used to resolve ambiguities within the law, and that efforts must be made to interpret legislation as consistently with Australia's international obligations as possible.²³ Sections 15AB(1) and (2) of the *Acts Interpretation Act 1901* provide that where a provision of legislation is 'ambiguous or obscure' or 'manifestly absurd..or unreasonable,' the courts may have recourse to 'any treaty or other international agreement that is referred to in the Act'. It is unclear as to what extent a treaty must be referred to, in order to allow recourse to its consideration.

While this ability to reflect upon international law as a secondary source of guidance is valuable, international human rights law does not exert any influence in cases where legislation is unambiguous and of clear intent or, where the issue relates to the novel development of the law, rather than resolution of an uncertainty.²⁴

This limited scope of influence manifests itself in undesirable results as in the decision of *Al-Kateb v Godwin*²⁵ where, by a 4-3 majority the High Court held that it was legally valid for the Commonwealth to detain a stateless refugee applicant indefinitely, pursuant to the provisions of the *Migration Act 1958*. In that case, McHugh J (forming part of the majority) held: 'The words of the three sections are too clear to read them as being subject to a purposive limitation or an intention not to affect fundamental rights.'²⁶ Therefore, international law was not sufficiently influential or applicable to affect the decision-making of the majority, despite the significant human rights implications the decision carried. The Hon Michael McHugh subsequently told Sydney law students that there was 'a powerful argument' that the decision would have been decided differently had Australia had formal human rights protections.²⁷

Individual communications

Australia does not have comprehensive human rights legislation: therefore, many people who suffer human rights abuses are not in a position to acquire adequate redress domestically, as Australia lacks a framework to support and remedy (let alone prevent) human rights violations.

However, once a party has exhausted the domestic legal processes, individual communications can be made internationally to relevant United Nations committees.²⁸ In order for a party to make a complaint to one of these bodies, Australia must not only be a signatory to the relevant human rights instrument, but

²³ *Teoh v Minister for Immigration, Local Government and Ethnic Affairs* (1994) 121 ALR 436 per Mason CJ and Deane J at 362.

²⁴ *Dietrich v R* (1992) 177 CLR 292.

²⁵ [2004] 219 CLR 562.

²⁶ *Ibid* at 33.

²⁷ Pelly, Michael, 'Our Human Rights Are Poor: Judge,' *The Sydney Morning Herald*, 13 October 2005.

²⁸ These committees include the Human Rights Committee, the Committee against Torture, the Committee on the Elimination of Racial Discrimination, the Committee on the Elimination of Discrimination against Women and the Committee on the Rights of Persons with Disability.

also to the Optional Protocol that provides the redress mechanism. Australia is a signatory to many Optional Protocols that allow for redress; however, this relief mechanism is unsatisfactory for the following reasons:

- It is financially prohibitive for most people, let alone for the vulnerable or disadvantaged. Exhausting all domestic remedies is extremely expensive, time consuming, and can also be emotionally and physically distressing for an aggrieved person.
- As Australia does not have an adequate human rights framework, it may be clear from the outset that an aggrieved party will not be able to obtain an effective remedy. Despite this, the person is required to undertake a significant financial burden to take steps that are doomed from the outset.
- Governments are not bound to make changes in line with international recommendations. For example, in the individual communication of *A v Australia*,²⁹ the Human Rights Committee found that the four-year mandatory detention of an asylum seeker was arbitrary, and A's inability to have their detention reviewed constituted a breach of Article 9 of the ICCPR. Despite this, the Australian government refused to change the legislation and was able to ignore these recommendations without significant criticism. This has happened in other communications, such as *Baban v Australia*³⁰ and *D & E v Australia*.³¹

Therefore, to seek redress under the international framework, an aggrieved person has to undertake a significant financial obligation, face significant delays and interruption in their lives and, even when they are vindicated internationally, any recommendation in favour of the applicant can be ignored.

The Lawyers Alliance submits that the international human rights law framework is inadequate in effectively protecting the rights of people in Australia. Comprehensive domestic legislation is necessary to ensure that fundamental rights are properly protected.

Lack of education

During the national human rights consultation, the Australian Lawyers Alliance conducted a national external education program. This involved members speaking to students, political party branches, Rotary and Probus clubs and community groups to inform the current discussion relating to formal human rights protections. These presentations addressed the arguments for and against formal legislative protection of human rights, explaining proposed models and demonstrating case studies where formal human rights legislation has been used positively to protect ordinary people.

What became clear from the various presentations is that most Australians have a very limited understanding of:

- What human rights are;

²⁹ UN Doc CCPR/C/59/D/560/1993.

³⁰ UN Doc CCPR/C/78/D/1014/2001.

³¹ UN Doc CCPR/C/87/D/1050/2002.

- What types of human rights exist (civil and political, economic, social and cultural, etc);
- How human rights are (or rather, aren't) protected in Australia;
- What is contained in the Australian Constitution; and
- What kinds of human rights protections exist in other jurisdictions, such as in the United Kingdom, Canada and New Zealand.

This limited understanding demonstrates a significant lack of human rights education in Australia and an absence of a human rights dialogue underpinning the way that Australians view public policy, democracy and their own political institutions.

A fundamental understanding of their rights and how they can enforce them leaves people in Australia vulnerable to unnecessary incursions into their human rights, and limits their ability to agitate against human rights infringements by government and its agencies.

Democracy and Parliament as the safeguards of human rights?

Opponents of legislative human rights protections frequently cite parliamentary sovereignty and the democratic process as the most appropriate framework within which to protect human rights. This argument is compelling on a theoretical level, but the realities of modern political life mean that legislation with a significant impact on human rights is often barely debated in Parliament, dissent within political parties can be stifled, and governments enjoying a majority in both the House of Representatives and the Senate can push through laws without having to make concessions to the opposition or minor parties that may seek to limit human rights infringements.

a.) Lack of parliamentary debate

Vigorous political debate is a fundamental tenet of democratic civil society and can potentially filter out unnecessarily draconian or reactive legislative provisions, and encourage a dialogue on the necessary balancing process between the needs of society and potential abuses of individuals' rights. Effective parliamentary debate also allows the media to better report on competing views and interests, therefore better informing the community of the issues at stake and engaging people with significant legislative reform.

Unfortunately, the reality is that vigorous debate and vetting processes frequently do not occur.

b.) Lack of time for adequate consideration

Complex legislation can have hundreds of provisions that require a significant amount of time and effort to adequately consider and scrutinise, and there is often insufficient time for this to occur. For example, the *Northern Territory National Emergency Response Act 2007* (a statute of significant length and detail with far reaching human rights implications, particularly in relation to racial discrimination, economic, social and cultural rights and civil and political rights) was introduced

into the House of Representatives on 7 August 2007.³² This legislation was passed the same day. Professor George Williams told the NSW Young Lawyers Conference³³ that he was called at 10.05am on the day for urgent advice on the constitutionality of the legislation and its human rights implications. This advice was required from Professor Williams, on no notice and by 10.45am, as the legislation was being rushed through at such a rapid pace.

c.) Lack of political capital in debating a particular issue

Legislation that has a disproportionately disadvantageous impact on minority groups, such as refugees, the injured, Indigenous people, the aged or those with disabilities, may not carry enough 'political capital' for governments to warrant time and effort in debate. Parliamentarians are voted in and sustain their power by the majority, and any measures that may decrease such wide base support is likely to be avoided or resisted, leaving the rights or interests of disadvantaged minorities more likely to be subjugated to the interests of the majority.

d.) Perceived threat or risk to security

Legislation can be passed in a climate of danger and when society is in a heightened sense of fear. In such a climate, legislation with significant human rights implications can be hurried through Parliament without adequate consideration of whether the legislation is necessary, proportionate to perceived risk and likely to achieve its legitimate aim.

In the context of national security, new law or legislative amendments are often made on the basis of confidential intelligence that is not shared with the public, who therefore have no way of assessing either the extent of the threat or the validity of the response. Those who question the necessity, validity or effectiveness of such measures are often labelled unpatriotic, irresponsible or willing to put Australian lives at risk.

Following incidents of international terrorism, the Australian legislature has responded by enacting counter-terrorism legislation that significantly threatens human rights. Many of these provisions depart significantly from accepted criminal procedure and were rushed through Parliament in a climate of fear. Following terrorist attacks in London, the Australian government announced major amendments to the existing counter-terrorism framework, which would extend considerably the powers of investigating authorities at the expense of individuals suspected of terrorism offences. The Bill was released on 31 October 2005 and tabled in Parliament along with legislation relating to student unionism and workplace relations reform. Only two hours of debate was allocated to the Bill.

e.) Concentration of Executive power and rigid adherence to party politics

Australia has experienced a change in the way that issues are vetted and debated in the political landscape. In recent times, the Executive enjoys a far greater

³² *House of Representatives, Hansard* No. 11, 2007, 7 August 2007 at p10.

³³ NSW State Library, Mitchell wing, 9 May 2009.

concentration of power and influence, greatly aided by a culture of rigid party discipline that has little tolerance for members who, perhaps guided by conscience, oppose actions and policies adopted by their party. While a level of consistency is necessary for stability within political parties, a culture where dissenters or even those with reservations regarding policy or legislation are stifled or ostracised can significantly impede the protection of rights.

3. How could Australia better protect and promote human rights?

There are many ways that human rights could be better protected in Australia. The Lawyers Alliance submits that improving human rights protections in Australia requires a multifaceted approach.

The Lawyers Alliance also wishes to note that any method of human rights protection in isolation will not act as a panacea to addressing all human rights infringements and should not be taken as such. Rights protection thrives in an environment where there are strong parliamentary processes, a robust media and a strong political will to embrace a human rights culture.

A Human Rights Act

The Lawyers Alliance recognises that there are different ways in which human rights could be better protected in Australia, but believes that the *best* way to protect human rights is through a federal legislative document outlining key human rights. However, many ancillary methods that are essential to the better protection of human rights should operate in conjunction with a federal human rights act.

The dialogue model

The 'dialogue' model, such as the current model in the United Kingdom, has frequently been cited as the preferred model by many human rights advocates, as it strikes the appropriate balance between the various arms of government while respecting the doctrine of parliamentary supremacy.

The dialogue model, in broad terms, operates the following way:

Passage of legislation

When passing or amending legislation, the government is required to consider its obligations under the human rights act, and issue a statement of compatibility outlining how the proposed legislation sits with the human rights act. If proposed legislation is not consistent with human rights, the relevant minister is required to outline directly why any infringement of human rights is necessary and appropriate.

Development of policies and procedures

Government and various departmental (or public authority) policies are also required to operate in a way that is consistent with the human rights legislation. This can often simply mean greater discretion and flexibility in bureaucratic decision-making to recognise individual circumstances, rather than the rigid application of policies

and procedures without the availability of appropriate exceptions. Inflexible policies are a frequent cause of human rights violations that are often unintended, and which can easily be remedied if human rights considerations are a forethought rather than an afterthought.

Obligations on public authorities

A human rights act operates to bind public authorities (or private enterprise conducting public functions) to consider fundamental human rights in the exercise of their duties and functions. While differently worded, both the ACT and Victorian human rights legislation define public authorities to cover not only government bodies but also private bodies 'exercising duties of a public nature' on behalf of the state.³⁴

This broader definition recognises the climate of out-sourcing public services to private enterprise, which has been steadily increasing over the past few years.

Declarations of incompatibility

Where a legal dispute comes before the courts and human rights implications are raised; the dialogue model empowers courts that are unable to find legislation or policies consistent with human rights legislation to issue a declaration of incompatibility. This serves to notify the legislature that a court has attempted to interpret the relevant legislation consistently with a human rights act, but has been unable to do so. Such a statement or declaration then places an obligation on Parliament to address the alleged inconsistency.

While such a declaration does not automatically invalidate the relevant legislation, it does provide a strong impetus for government to examine the consequences of relevant policies and legislation and consider how they could be remedied. Such a declaration can also stimulate public discussion and debate within the community and also within Parliament, enhancing the democratic process and, in most cases, leading to positive change that recognises human rights.

A direct model

Many supporters of human rights advocate for a more direct model of human rights enforcement. In his paper delivered at the Australian Human Rights Commission, the Hon Michael McHugh ACE QC³⁵ advocated for the legislative implementation of the ICCPR and, if necessary, the ICESCR, in a manner that would empower federal courts to invalidate inconsistent legislation and require all federal legislation to be read subject to the human rights legislation.

'The result would be that private citizens would have judicially enforceable human rights that were not affected by state, territory or federal legislation inconsistent with those rights and would have immediate judicial remedies for breaches of those rights.'³⁶

The Hon McHugh holds that this should be subject to Parliament having the power to insert 'notwithstanding' clauses in legislation that requires the courts to give effect to the particular statute, notwithstanding human rights legislation.

³⁴ *Human Rights Act 2004* (ACT) at s40 and *Charter of Human Rights and Responsibilities Act 2007* (Victoria) at s4.

³⁵ 'A human rights act, the courts and the Constitution,' delivered at the Australian Human Rights Commission, 5 March 2009.

³⁶ *Ibid.*

It is argued that this model avoids potential constitutional impediments and would provide judicially enforceable remedies for aggrieved individuals.

The preferred model of the Australian Lawyers Alliance

The Australian Lawyers Alliance recognises the value in the dialogue model in facilitating discussion and debate amongst the various arms of government but also recognises the importance of creating a system in which those whose legal rights are infringed have a legally enforceable remedy.

The Lawyers Alliance therefore endorses and recommends a statutory model with the following features:

RECOMMENDATION 6: Members of Parliament should be obliged to make statements of compatibility when introducing legislation in Australia. Where proposed legislation is incompatible, there should be a clear and unequivocal justification as to why the restriction on rights is necessary and proportionate to a legitimate aim.

RECOMMENDATION 7: All legislation should be interpreted consistently with human rights as far as possible, but at the same time to remain consistent with the spirit and purpose of the legislation.

RECOMMENDATION 8: An aggrieved individual should have a primary cause of action in a human rights act if their human rights have been breached. Raising concerns under a human rights act should not be secondary or ancillary to an existing cause of action.

RECOMMENDATION 9: Where there is a finding of inconsistency, the courts should be empowered to issue a declaration of incompatibility directly to Parliament or, if constitutionally more appropriate, bring a finding of inconsistency to the attention of the Australian Human Rights Commission.

RECOMMENDATION 10: Courts should also be empowered, where appropriate, to give aggrieved parties the full range of judicial remedies under a human rights act, including monetary compensation.

RECOMMENDATION 11: Where there is a finding of inconsistency or declaration of incompatibility, such a notification should be tabled in federal parliament, and a response should be required from Parliament within a six-month period.

Why a Human Rights Act?

The Lawyers Alliance respectfully submits that formal legislative protection of human rights is the most effective way to protect rights.

By requiring Parliament to consider human rights at the gestational stages of policy and legislative development, many often unintended human rights infringements

are avoided at an early stage, rather than being an afterthought. This leads to better policy development for the community. The Australian human rights legislation in Victoria and the ACT is sometimes criticised for being ineffective. While this may be a public perception, the fact that human rights act issues are not flooding the courts is indicative of a system that eliminates many human rights problems before they occur or before litigation is necessary. Advocates, carers, lawyers and members of the community are using human rights legislation as a tool with which to protect their own rights outside court.

Rather than hindering the operation of Parliament, a human rights act would serve to strengthen the parliamentary process by fostering discussion and debate while respecting the notion of separation of powers and parliamentary sovereignty.

The statements of compatibility and incompatibility provide an accessible basis for government to promote policies and legislation and for opposing parties, the media and the community to scrutinise and hold government accountable for failing to adequately consider or protect rights. This leads to better engagement of human rights issues and more robust debate and analysis of proposals that carry significant human rights implications.

Application of a Human Rights Act to private enterprise

In addition to the broadened definition of 'public authority', the ACT has created an 'opt-in' clause³⁷ which allows private companies, partnerships and associations to write to the attorney-general to request a declaration that they become bound by the provisions of the *Human Rights Act 2004* (ACT).

This unique provision arises out of a recognition that imposing human rights obligations on private entities from the outset may be perceived to be too onerous and lack support. However, binding private entities is 'consistent with the corporate social responsibility movement operating at global and multi-national levels'.³⁸ Though there has not been a rush from private bodies to opt-in, the Lawyers Alliance nonetheless submits that, with significant time, education and training, more private bodies may wish to demonstrate their commitment to human rights and the communities within which they operate.

RECOMMENDATION 12: A human rights act should have an 'opt-in' clause for private entities, allowing private companies to be bound by the legislation if they wish.

Should there be limitations on human rights?

It has been recognised that some limitations on human rights may be necessary or permissible in certain circumstances; for example, the detention and isolation of a person with a threatening, highly contagious communicable disease. Human rights legislation will generally contain a caveat that rights and freedoms within the

³⁷ *Human Rights Act 2004* (ACT), s40D

³⁸ ACT Human Rights Commission Fact Sheet 'Public authorities' available at <http://www.hrc.act.gov.au/assets/docs/public%20authorities%20factsheet.pdf> (accessed 18 May 2009).

statute are subject only to reasonable limitations prescribed by law that can be justified in a free and democratic society.³⁹

Determining whether human rights should be limited generally involves weighing up the nature of the right(s) affected against the extent to which the limitation will impede those rights and, whether there are less intrusive or restrictive means for achieving the same purpose.

RECOMMENDATION 13: Human rights can be subject to limitation or suspension only when absolutely necessary, in circumstances recognised as appropriate and acceptable in international law.

Non-derogable rights

Human rights law also recognises non-derogable rights, which cannot be limited or suspended under any circumstances. For, example under the ICCPR, rights to life, to live free from torture, cruel inhuman or degrading punishment, and freedom from slavery and servitude, are examples⁴⁰ of human rights that are so fundamental as to deserve special uncompromising protection and recognition.

RECOMMENDATION 14: Any human rights act should reflect that certain human rights, as reflected in international law, are non-derogable and cannot be limited or suspended under any circumstances.

Constitutional issues

Australia has a unique legal and political framework, and it is important to recognise that models or mechanisms that operate effectively in other jurisdictions may not be compatible or effective in the Australian context.

Are declarations of incompatibility constitutional?

There has been some doubt cast over whether the declaration mechanism – as described in the dialogue model – would be constitutional under the Australian federal legal and political framework.

The Australian Constitution requires courts created via Chapter III of the Constitution to exercise only judicial power, or power that is ancillary or incidental to the exercise of judicial power.⁴¹ To constitute judicial power, a court must consider legal standards, as opposed to policy criteria, and make binding and

³⁹ Also note Article 4(1) of the ICCPR which holds: 'In time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the States Parties to the present Covenant may take measures derogating from their obligations under the present Covenant to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their other obligations under international law and do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin.'

⁴⁰ Article 4(2) of the ICCPR provides that Articles 6, 7, 8 (paras 1 and 2), 11, 15, 16 and 18 constitute non-derogable rights.

⁴¹ Section 71 of the Australian Constitution.

authoritative and enforceable determinations. A court is not permitted to issue advisory opinions, which was held in *Mellifont*⁴² to have two elements:

'One is the notion of an abstract question of law not involving the right or duty of any body or person; the second is the making of a declaration of law divorced or disassociated from any attempts to administer it.'

It has been argued that declarations of incompatibility are unconstitutional, as they do not alter the law or affect a legal right or duty,⁴³ and therefore do not constitute an administration of the law in relation to a 'matter' for the purposes of ss75 and 76 of the Constitution, and are merely advisory opinions that do not constitute judicial power.

Constitutional experts⁴⁴ have indicated their belief that a declarations function, similar to that in the United Kingdom, would be compatible with the Australian Constitution on the basis that the courts in issuing a declaration of incompatibility would be exercising judicial power. Or, at the very least, functions ancillary to the exercise of judicial power.

Constitutional compatibility is argued on the following grounds:

- Parties raising incompatibility must do so in the context of an existing legal dispute (or a 'matter' for the purposes of the Constitution) where a court is undertaking the assessment of the legal rights and duties.
- Determination of incompatibility requires statutory interpretation and consideration of compatibility, inherently judicial functions.
- As a declaration of incompatibility is a function delegated by Parliament, it is intended to constitute a statement of law rather than of opinion.
- While federal courts are not permitted to issue advisory opinions, they are permitted to issue declarations where no other cause of action arises, and where such a declaration will impact upon future rights and obligations.⁴⁵

These experts recognise that a final determination of the matter lies with the High Court of Australia.

Interpretive clauses

Under a human rights act, courts are required to interpret legislation as far as possible to be consistent with the fundamental rights outlined in the relevant legislation. The interpretive clause⁴⁶ in the United Kingdom legislation has attracted criticism for giving judges too wide a scope to interpret legislation in a way that

⁴² *Mellifont v Attorney-General (Queensland)* (1991) 173 CLR 289 at 305 per Mason CJ, Deane, Dawson, Gaudron and McHugh JJ.

⁴³ For example, the High Court majority held in *In re Judiciary and Navigation Acts* (1921) 29 CLR 275 at 265-6: 'In our opinion there can be no matter within the meaning of the sections [75 and 76] unless there is some immediate right, duty or liability to be established by the determination of the Court.'

⁴⁴ Note particularly Pamela Tate SC, 'Protecting Human Rights in a Federation,' *Melbourne University Law Review*, Vol 33, No. 2 and Dominique Dalla-Pozza and George Williams, 'The Constitutional Validity of Declarations of Incompatibility in Australian Charters of Rights,' *Deakin Law Review*, Vol.12, No. 1.

⁴⁵ See for example, *Commonwealth v Sterling Nicholas Duty Free Pty Ltd* (1972) 126 CLR 294 and *Croome v Tasmania* (1997) 191 CLR 119.

⁴⁶ S3(1) of the *Human Rights Act 1998*.

was never intended by the legislature. Such a wide scope of interpretation, it is argued, infringes the doctrine of separation of powers implicit in the Australian Constitution.

Australian jurisdictions with human rights legislation have drafted their interpretive clause to reflect the notion of parliamentary supremacy by requiring legislation to be interpreted consistently with human rights, but also consistently with the spirit and purpose of the proposed legislation.⁴⁷ The Lawyers Alliance submits that this form of interpretation is appropriate and desired.

The agreed constitutionally accepted model

In response to some of the constitutional concerns,⁴⁸ the Australian Human Rights Commission convened a meeting of legal experts⁴⁹ to reach consensus on a model that participants believe would be constitutional under the Australian legal framework. It should be noted that this model does not necessarily represent an ideal model in the view of the participants, nor the only model that may be deemed constitutional, but represents a model that all participants could agree was compatible with the Constitution.

The model agreed upon is largely similar to the dialogue model described above, except rather than the courts issuing a declaration of incompatibility, the Australian Human Rights Commission would be empowered at request to notify the attorney-general of such a finding of inconsistency. The attorney-general would then be required to table this in Parliament, and the government would be required to respond within a fixed period.

Application to states and territories

The federal government has the legislative power to implement international human rights instruments into domestic legislation by virtue of its external affairs power under the Australian Constitution.⁵⁰ The federal government also has the power to make a federal charter applicable to states and territories, if those state and territory laws would be inconsistent with the federal human rights legislation.⁵¹

Alternatively, the federal government could provide that a federal human rights act should apply only to Commonwealth legislation, departments and authorities, thereby limiting the scope of the legislation to federal law.

While the Lawyers Alliance strongly supports all Australian jurisdictions having consistent and comprehensive human rights protections, we also recognise that a human rights culture will flourish only where there is political will and a commitment to implementation.

⁴⁷ S32(1) of the *Charter of Human Rights and Responsibilities Act (2007)* (Vic) and s30 of the *Human Rights Act 2004* (ACT).

⁴⁸ Notably raised by the Hon Michael McHugh AC QC in a speech entitled 'A human rights act, the courts and the Constitution' delivered at the Australian Human Rights Commission, 5 March 2009. It should be noted that this speech referred specifically to constitutional concerns from the New Matilda Bill 2006, and not necessarily human rights legislation generally.

⁴⁹ Including the Hon Michael McHugh AC QC – held at the Australian Human Rights Commission on 22 April 2009.

⁵⁰ S51(xxix) of the Constitution.

⁵¹ S109 of the Constitution.

RECOMMENDATION 15: The Lawyers Alliance submits that any federal human rights legislation should be confined in application to federal law and agencies and should not be imposed on states and territories by virtue of s109 of the Australian Constitution.

RECOMMENDATION 16: The Lawyers Alliance would support a model where state and territory jurisdictions can 'opt-in' to the federal legislation or alternatively, enact 'mirror legislation' to ensure consistency among the jurisdictions.

A horizontal application of a human rights act

Jurisdictions such as Canada and the United Kingdom have recognised that restricting the application of a human rights act only to the relationship between individuals and the state creates an artificial distinction that undermines the purpose of human rights legislation.

For this reason, while recognising that a human rights act does not provide a new legal cause of action, courts in both Canada and the United Kingdom have recognised that a human rights act can be relevant and apply indirectly to the resolution of disputes between private parties. This means courts consider the legal issues in the context of both parties' human rights and develop the common law with human rights principles in mind. This is known as the 'horizontal' application of rights as opposed to a strictly 'vertical' application.

RECOMMENDATION 17: The Australian Lawyers Alliance supports a horizontal application of a human rights act, recognising that human rights law can be a valuable tool in resolving private disputes and the balancing of legal rights and obligations.

Education

Extensive education of public servants, private entities delivering public services and the wider community is essential in order to better protect human rights. Unlike many other countries, Australia lacks a human rights culture or dialogue, and human rights are seen by many in the community as an abstract concept applying only to other parts of the world.

The external education campaign conducted by the Lawyers Alliance made it clear that many people do not understand Australia's parliamentary process, the division of federal and state power, the nature of the Australian constitution and how legislation is created. Many believe that Australia's Constitution already contains human rights protections, and almost everyone we spoke to were shocked to learn that basic rights, such as the right to vote, freedom of movement and association and the right to live free from torture, inhuman and degrading treatment, for example, were not legislatively or otherwise protected.

In order to better protect human rights, particularly if a human rights act is to be enacted, all service-providers bound by the legislation will need extensive training to ensure that they can act confidently and consistently with respect to their legislative and service delivery obligations.

RECOMMENDATION 18: Any move towards human rights legislation should be coupled with significant education and training for all those responsible for implementing and applying the human rights act and providing services on behalf of the government.

RECOMMENDATION 19: The Lawyers Alliance submits that education on civics and human rights should form a greater part of the education syllabus for all children in Australia, so that parliamentary and democratic processes are clearly understood from a young age.

The Australian Human Rights Commission (AHRC) also undertakes community human rights education, but has suffered cuts in funding over recent years. The AHRC is unable to effectively undertake the work within its jurisdiction if it is not adequately funded to carry out its mandate.

RECOMMENDATION 20: Significant consultation with the AHRC is necessary to ensure that the AHRC is well-funded and has the resources to fully carry out its mandate.

Human Rights Parliamentary Committee

The United Kingdom has a Joint Committee on Human Rights (JCOHR), consisting of 12 members who are well-versed in human rights law, appointed by both the House of Commons and the House of Lords. The members are assisted and supported by trained legal professionals. This committee assists with the compatibility of Bills and existing statutes, post-enaction scrutiny and with any relevant legislative reviews.

The JCOHR works closely with non-government organisations and community groups to assess the impact of legislation and policy. Murray Hunt, a legal adviser to JCOHR, said that since the enactment of human rights legislation the literacy of politicians in relation to human rights has greatly improved and continues to increase.⁵² Mr Hunt said that the implementation of a human rights act has created a mandate on politicians to spend more time and allocate greater resources to scrutinise bills, and the statements of compatibility/declarations of incompatibility have facilitated better parliamentary debate.

⁵² Speech delivered by Murray Hunt, 'The UK Human Rights Act as a 'parliamentary model' of rights protection: lessons for Australia', Australian Human Rights Commission, 17 February 2009.

RECOMMENDATION 21: A parliamentary committee should be formed consisting of ministers well-versed on human rights supported by human rights expert policy advisers, to assist parliamentarians in meeting their human rights obligations.

Addressing the challenging issues facing a human rights act

The Australian Lawyers Alliance notes that the federal consultation period has been somewhat marred by a campaign of misinformation and inaccurate statements from those who oppose legislative human rights protections. The Lawyers Alliance does not intend to address all the arguments against formal human rights protections, most of which have already been thoroughly addressed by other commentators or addressed indirectly through this submission.

However, the Lawyers Alliance recognises that implementing human rights legislation, as with many other types of legislation, is not without its challenges and difficulties.

Moral and hotly contested topics

Human rights law often intersects with hotly contested issues within our communities. Issues such as the right to life can raise questions around abortion, euthanasia and other moral and ethical minefields where community opinion can vary significantly. The fact that conflicting views are likely to occur, or the fact that human rights legislation may trigger such debate and discussion, is certainly no reason to avoid the passage of such legislation.

Intersection with hotly contested topics is not unique to human rights law. The recent furore and debate on whether Bill Henson's artwork fell within the legal definition of production of child pornography is but one example where the law has been applied in highly contested circumstances, leading to significant discussion and argument in the community about what constitutes art, what is pornography and how the law should deal with such issues. These are important discussions that the community needs to engage in.

In relation to the judiciary's involvement in such ethical discussions, judges already frequently grapple with issues of a contested or subjective nature. For example, courts often consider what is offensive, what is racist or discriminatory, what constitutes illegal or unethical behaviour in the context of existing legislation or factual scenarios facing the courts. The Lawyers Alliance submits that judges are in a unique position to take a reasoned and objective approach to such issues, as they are independent, enjoy security of tenure and are not subject to the immediate political pressures that can lead politicians to make ill-considered or reactive policy decisions.

Judges are also able to consider how other jurisdictions have dealt with similar issues, and draw on the collective knowledge of jurisprudence that can assist in resolving novel situations in Australia. There is no doubt that human rights law does not provide 'yes-and no' - type answers to these ethical and moral dilemmas, but it can provide guidance and ensure that in the process of discussion and debate –

something that should be encouraged – fundamental human rights are not sidelined or ignored.

Courts interpreting legislation in ways that does not reflect the intent of the legislature

Interpreting legislation is a fundamental judicial function and is not an easy task. Judges are often required to interpret legislation once a fact scenario presents itself, where applying the law directly leads to an absurd or fundamentally unjust outcome that parliamentarians clearly had not envisaged when passing such legislation. The nature of legal language is complex, and even the most basic words allow themselves various forms of interpretation.

The way that legislation has been interpreted by judges in the United Kingdom in the context of the *Human Rights Act 1998* has been the subject of much criticism. Section 3 of the *Human Rights Act 1998* only places an obligation on courts to interpret legislation in accordance with convention rights in the Act. Many argue that this wide mandate has led to uncertainty in the law, and cite the decision of *Ghaidan*⁵³, where the court held:

'Section 3 may require the court to depart from this legislative intention, that is, depart from the intention of the Parliament which enacted the legislation. The question of difficulty is how far, and in what circumstances, section 3 requires a court to depart from the intention of the enacting Parliament.'⁵⁴

The Lawyers Alliance submits that such a wide-reaching judicial ambit can be limited by drafting an interpretive provision that requires courts not only to interpret legislation consistently with human rights legislation but, in doing so, consider and recognise the intention and spirit behind the legislation. This would prevent courts effectively 're-writing' legislation, or ignoring the will of the legislature.

However, as always, if Parliament does not agree with an interpretation of the courts, it can ignore a finding of inconsistency, or alternatively, re-draft legislation to resolve any undesirable ambiguities that may affect the way in which a provision is applied by the courts.

Significant rules and processes governing statutory interpretation, and the scope for such interpretation can largely be limited at first instance by thorough and considered drafting and a clear indication of the purpose and desired application of the proposed legislation. Issues around interpretation become significant problems only where parliamentary intent is unclear and provisions are not well-considered and accurately drafted.

The gaps that would still remain in human rights protections

A human rights act is not a panacea to human rights problems in Australia, and this should be recognised. However, a human rights act would significantly improve the existing system for human rights protection, which is woefully inadequate, particularly in protecting the rights of vulnerable and marginalised people.

⁵³ *Ghaidan v Godin-Mendoza* [2004] UKHL 30.

⁵⁴ *Ibid* at 30.

In order to allow for the greatest protection of human rights, it is important that any move towards human rights legislation does not occur in isolation. Simply enacting a human rights act will do little without strong bipartisan political support, a commitment to increased funding, training of the public service and the judiciary, and significant, dedicated resources for promotion and education about human rights within the community.

Conclusion

As Louis Henken held:

'Human rights is an idea of our time. It asserts that every human being, in every society, is entitled to have basic autonomy and freedoms respected and basic needs satisfied.

Today, the human rights idea is universal, accepted by virtually all states and societies regardless of historical, cultural, ideological, economic or other differences. It is international, the subject of international diplomacy, law, and institutions. It is philosophically respectable, even to opposed philosophical persuasions.

The universality of human rights is a political fact.'⁵⁵

Australia has long been a supporter of human rights and pressed for better human rights recognition in the Asia-Pacific region and the wider international community. Implementing a human rights act is an opportunity for Australia to truly *demonstrate* confidence in our own political and legal institutions and our commitment. If human rights are truly valued and respected in Australia, as is so often stated by our political representatives, then parliamentarians should have little to fear – and much to gain – from their legislative protection.

⁵⁵ Louis Henkin *The International Bill of Rights*, (1981) Columbia University Press, at p1.