



**Realising rights:  
submission to the National Human Rights  
Consultation**

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# Part 1: Introduction

## 1.1 The Public Interest Advocacy Centre

The Public Interest Advocacy Centre (PIAC) is an independent, non-profit law and policy organisation that works for a fair, just and democratic society, empowering citizens, consumers and communities by taking strategic action on public interest issues.

PIAC identifies public interest issues and, where possible and appropriate, works co-operatively with other organisations to advocate for individuals and groups affected. PIAC seeks to:

- expose and redress unjust or unsafe practices, deficient laws or policies;
- promote accountable, transparent and responsive government;
- encourage, influence and inform public debate on issues affecting legal and democratic rights;
- promote the development of law that reflects the public interest;
- develop and assist community organisations with a public interest focus to pursue the interests of the communities they represent;
- develop models to respond to unmet legal need; and
- maintain an effective and sustainable organisation.

Established in July 1982 as an initiative of the Law Foundation of New South Wales, with support from the NSW Legal Aid Commission, PIAC was the first, and remains the only broadly based public interest legal centre in Australia. Financial support for PIAC comes primarily from the NSW Public Purpose Fund and the Commonwealth and State Community Legal Services Program. PIAC also receives funding from the NSW Government Department of Water and Energy for its work on utilities, and from Allens Arthur Robinson for its Indigenous Justice Program. PIAC also generates income from project and case grants, seminars, consultancy fees, donations and recovery of costs in legal actions.

## 1.2 PIAC's position on human rights

Acquired at birth, human rights belong to us all and provide standards for all people to be treated fairly with dignity and respect. The protection, promotion and fulfilment of human rights are vital to the effective removal of injustice in our society and achieving equity for people, particularly those who suffer disadvantage. They are fundamental to the maintenance of a fair, just and democratic society, and they require legal recognition to ensure that they are protected and accessible to all.

Human rights are recognised in Australia, though not for everyone, and not all the time. Indeed many of the human rights we take for granted have no protection under law.

Australia is a country that has a strong democratic tradition and a commitment to the Rule of Law. A comprehensive human rights law would assist in the preservation of Australia's democratic system by protecting the very rights and values that underpin it. A comprehensive human rights law would also empower citizens and the community, and help to keep governments accountable.

For these reasons, PIAC recommends the establishment of a comprehensive human rights law that gives legal protection to human rights. In the short term, this would be best achieved by the introduction of a single human rights statute (referred to in this submission as a Human Rights Act) by the Federal Government, with reciprocating state and territory legislation where necessary, that guarantees human rights in Australia and ensures that laws, policies and conduct are consistent with these rights.

### 1.3 PIAC's work on human rights

Much of PIAC's current and previous substantive work involves human rights. This includes work on privacy, discrimination, freedom of information, detention (including immigration detention), government and democracy, and access to justice. As such, PIAC has extensive experience in the impacts of laws, policies, programs and conduct on people's human rights and on their social and economic situation. A significant number of PIAC's casework clients have direct experience of what it means to have human rights infringed or not respected.

PIAC has also had a specific policy focus on human rights for a number of years. Since 2003, PIAC has had a project, *Protecting Human Rights in Australia*, as a core area of its work. This has been a three-stage project.

The first stage was the development, in consultation with a broad range of community organisations, of a human rights education kit. The purpose of that kit, *Protecting Human Rights in Australia: An Education Kit*<sup>1</sup>, was to provide members of the Australian community with basic information about human rights and about how those rights are protected, the extent of and gaps in the protection, and to illustrate the importance of human rights through case studies of instances of human rights being abused or not protected. All of the case studies are based on real situations in Australia. The production of the kit was funded by the Myer Foundation, and the production of translations into three community languages was funded by the Law and Justice Foundation of NSW.

The second stage of the project was the development and delivery nationally of a *Protecting Human Rights in Australia* 'train-the-trainer' program. This program involved firstly the development of a one-day workshop, based on the *Protecting Human Rights in Australia* kit, utilising a range of teaching and delivery methodologies to give participants the skills to deliver local workshops and training on human rights protection. Once the program was developed and material produced, PIAC conducted multiple training workshops in every state and territory of Australia. These workshops were targeted to community educators and other workers with the capacity to use the materials with their own communities or members. Through this program, PIAC delivered train-the-trainer workshops to over 800 people across Australia. The second stage of the project received funding support from Uniting Care NSW.ACT. PIAC's experience from that training was that most participants had a strong philosophical commitment to human rights, but little or no knowledge of human rights, how they have developed, what protection there is in Australia, how they can be applied to day-to-day situations and how they might be used to achieve greater social equity and opportunity.

The third stage of the project has been the promotion of community discussion and political engagement with human rights, with a focus on achieving comprehensive human rights protection in Australia. PIAC has provided responses to the various inquiries conducted across Australia in the last five years into human rights protection. PIAC has also taken on the role of secretariat and convenor of the NSW Charter Group, a coalition of individuals and organisations in NSW committed to achieving an independent community consultation on human rights in NSW. PIAC has continued to deliver training on human rights, based on the 'train-the-trainer' program and has developed a range of shorter presentations and workshops to enable greater take up. Over the last couple of years, PIAC has providing community education on human rights to a further 300-400 people.

Following the announcement on 10 December 2008 of the current consultation, PIAC turned its focus to the national consultation. Since that date, PIAC has conducted a range of community consultation processes and worked closely with its diverse networks to encourage those least likely to respond to the consultation to take

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<sup>1</sup> Public Interest Advocacy Centre, *Protecting Human Rights in Australia: An Education Kit* (2004) <<http://piac.asn.au/publications/hrkit.html>> at 11 June 2009.

part. This has included working with the following communities: homeless people, people with mental illness, Aboriginal people, prisoners and former prisoners, older Australians and people with disabilities. While most of this work has been done in NSW, PIAC also worked with organisations in Tasmania to deliver several workshops in April 2009 to encourage participation.

## 1.4 Terms of Reference

PIAC welcomes the Australian Government's statement in the National Human Rights Consultation's Terms of Reference that it recognises the fundamental equality of all persons and that it is committed to the promotion of human rights.

However, PIAC is disappointed that the Terms of Reference limit the scope in which the Australian public can respond to the questions posed by the Committee. In particular, the refusal to acknowledge proposals recommending the establishment of a constitutionally entrenched bill of rights is contrary to PIAC's strong belief that all models of human rights protection should have been open for consideration in the process, including a constitutionally entrenched model.

Furthermore, the requirement that the proposals presented by the Committee must 'preserve the sovereignty of the Parliament', advances the erroneous concept that promoting and protecting human rights comes at the expense of Parliament's powers and that Parliament in Australia is sovereign.

### (a) Constitutional Reform

The establishment of comprehensive human rights protection in Australian law is of paramount importance and PIAC supports a process that leads to the successful implementation of such protection.

With a view to contributing to the debate surrounding the protection and promotion of human rights in Australia, PIAC believes it is appropriate to discuss the advantages and disadvantages of a constitutionally entrenched mechanism for protection of human rights.

A fundamental aspect of human rights is that they be free from political or arbitrary interference so that established rights cannot be eroded over time by different governments, with different agendas. Human rights protection under a constitutional framework, rather than a statutory framework, would provide this protection from interference. Indeed, it is possibly the only way to guarantee it as all other laws are subject to repeal and amendment by subsequent parliaments.<sup>2</sup>

PIAC disagrees with the argument that a constitutionally entrenched human rights framework 'freezes' rights in time. This argument overlooks the fact that the Australian *Constitution*<sup>3</sup> (the *Constitution*) is a living document. Through judicial interpretation, the provisions of the *Constitution* are construed in a way that takes into account current societal trends. Courts are free to interpret the power and scope of constitutional rights, which over time shift in accordance with society's attitudes.

PIAC also disagrees that a constitutionally entrenched charter of human rights transfers too much power to judges. The federal judiciary is currently given the power under the *Constitution* to review Parliamentary legislation to determine its constitutionality. The judicial interpretation of human rights legislation, or constitutional provisions, is therefore a normal function and fundamental duty of courts as the third branch of federal government.

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<sup>2</sup> PIAC acknowledges that even constitutional protection is not an absolute guarantee; a point well illustrated by the recent suspension of the Fijian constitution.

<sup>3</sup> *Commonwealth of Australia Constitution Act 1900* (UK) (the *Constitution*).

Whilst PIAC recommends that constitutionally protected human rights be considered as a future development in the process of promoting and protecting human rights in Australia, it also believes that the Terms of Reference do not preclude it from recommending that existing constitutional provisions be amended to enhance human right protections in Australia. In particular, the removal or amendment of certain provisions of the *Constitution* would make it harder for human rights to be violated in Australia.

PIAC recommends the removal of section 51(xxvi) of the *Constitution*, which enables the Commonwealth Government to 'make laws for the people of any race for whom it is deemed necessary to make special laws'. This 'race power' specifically enables the Australian Government to make laws that discriminate people on the grounds of their race. This is in direct contravention of many of the human rights conventions that Australia has ratified, including most importantly, article 2 of the *International Convention on the Elimination of all Forms of Racial Discrimination*<sup>4</sup> (CERD), which states:

State Parties condemn racial discrimination and undertake to pursue by all appropriate means and without delay a policy of eliminating racial discrimination in all its forms and promoting understanding among all races, and, to this end:

- (a) Each State Party undertakes to engage in no act or practice of racial discrimination against persons, groups of persons or institutions and to ensure that all public authorities and public institutions, national and local, shall act in conformity with this obligation;
- (b) Each State Party undertakes not to sponsor, defend or support racial discrimination by any persons or organizations;
- (c) Each State Party shall take effective measures to review governmental, national and local policies, and to amend, rescind or nullify any laws and regulations which have the effect of creating or perpetuating racial discrimination wherever it exists;
- (d) Each State Party shall prohibit and bring to an end, by all appropriate means, including legislation as required by circumstances, racial discrimination by any persons, group or organization;
- (e) Each State Party undertakes to encourage, where appropriate, integrationist multiracial organizations and movements and other means of eliminating barriers between races, and to discourage anything which tends to strengthen racial division.

PIAC notes that the prohibition of discrimination on the basis of race as recognised in CERD has no exceptions to it, nor are there any provisions in CERD that permit derogation of the rights in times of national emergency. This is distinct from the rights set out in the *International Covenant on Economic, Social and Cultural Rights*<sup>5</sup> (ICESCR) and the *International Covenant on Civil and Political Rights*<sup>6</sup> (ICCPR).<sup>7</sup> PIAC notes also

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<sup>4</sup> *International Convention on the Elimination of All Forms of Racial Discrimination*, opened for signature 7 March 1966, 660 UNTS 195 (entered into force 4 January 1969) ratified by Australia on 30 September 1975 (entered into force for Australia on 30 October 1975, except article 14, which entered into force for Australia on 28 January 1993).

<sup>5</sup> *International Covenant on Economic, Social and Cultural Rights*, opened for signature 16 December 1966, 993 UNTS 3 (entered into force 3 January 1976) ratified by Australia on 10 December 1975 (entered into force for Australia on 10 March 1976).

<sup>6</sup> *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) ratified by Australia on 13 August 1980 (entered into force for Australia on 13 November 1980, except article 41, which entered into force for Australia on 28 January 1993).

<sup>7</sup> See the approach taken to progressive realisation of rights in the *International Covenant on Economic, Social and Cultural Rights*, above n5, art 2, the limitations permitted in the same Covenant that are 'compatible with the nature of these rights and solely for the purpose of promoting the general welfare in a democratic society', in art 4; and the approach of specifying rights that are non-derogable rights even in times of public emergency in the *International Covenant on Civil and Political Rights*, above n6, art 4.

that, even in times of officially proclaimed public emergency, the ICCPR specifies that limits on rights must 'not involve discrimination solely on the grounds of race ...'<sup>8</sup>

The Hindmarsh Island case<sup>9</sup> demonstrated that the race power allows the Commonwealth to make laws to the detriment of a particular racial group. In this case, the High Court considered whether the Federal Government's use of the race power to pass the *Hindmarsh Island Bridge Act 1997* (Cth) was constitutional. In his dissenting judgment, Justice Kirby said this Act was:

... detrimental to, and adversely discriminatory against, people of the Aboriginal race of Australia by reference to their race. As such it falls outside the class of laws which the race power in the Australian Constitution permits.<sup>10</sup>

However, in contrast to this finding, the majority of the High Court decided that even if the law that invoked the race power was racially discriminatory, it was not unconstitutional.

PIAC also recommends that an equality clause should be inserted into the *Constitution*. Such a clause would require that the legislation made by any parliament be non-discriminatory in effect, and that Federal legislation would apply equally to all across Australia. The equality clause could be inserted into section 51 of the *Constitution*, so that it would read:

The Parliament shall, subject to this Constitution, have power to make laws for the peace, order, **equality**, and good government of the Commonwealth with respect to ...

Lastly, PIAC recommends the inclusion of a preamble to the Australian *Constitution* that recognises the inherent human rights of all Australians and also recognises that the Australian Commonwealth is built on the heritage of Indigenous Australians, guardians/custodians of the land since time immemorial.

## **(b) Sovereignty**

PIAC objects to the implication in the Terms of Reference that parliamentary sovereignty would be undermined by human rights that are constitutionally protected.

PIAC contends that this erroneous implication has been made on the incorrect assertion that Parliament alone has sovereign power in the Australian Commonwealth, rather than on the more accurate position that sovereignty in the Australian Commonwealth resides in the *Constitution*.

In Australia, there is no greater authority of law or governance than the *Constitution*. As a constitutional monarchy, the powers and functions of Australia's Head of State, the monarch, are regulated by the *Constitution*. The *Constitution* also regulates the three branches of government: legislative, executive, and judicial. These government branches cannot exceed the powers granted to them by the *Constitution*.

As the Parliament derives its powers from the *Constitution*, the idea that the Parliament is sovereign and has unfettered legislative powers cannot be maintained. As Zifcak explains:

Parliamentary sovereignty in Australia's governmental system is heavily qualified. This is because what the parliament can or cannot do is subject ultimately to the provisions of Australia's Constitution. No law passed by the parliament can transgress the Constitution's provisions. If a law does infringe the

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<sup>8</sup> Ibid, art 4(1).

<sup>9</sup> *Kartinyeri v Commonwealth* [1998] HCA 22.

<sup>10</sup> Ibid, per Kirby J at 176.

Constitution, it may be challenged and struck down by the High Court of Australia. In this sense, the High Court of Australia has always been regarded as the ultimate guardian of the Constitution.<sup>11</sup>

The Parliament is responsible to the *Constitution*, which it cannot alter without the express consent of the Australian people, in accordance with section 128 of the *Constitution*.

PIAC asserts that the inclusion of constitutionally entrenched human rights protection would not impede the sovereignty of Parliament any more than the existing rights and limits expressed in the *Constitution*. Nor would the development of a Human Rights Act impede the sovereignty of Parliament more than any other Act, as it could be overridden or amended by Parliament at any time.

The development of a constitutional model of protection for human rights is most consistent with the fundamental nature of human rights. It is also more consistent with the history of the development of human rights at an international level. Human rights gained formal recognition by the international community following World War II. It was the fact of governments overriding rights and treating citizens and non-citizens as less than human that resulted in the international community acknowledging the need to identify those rights that we should all enjoy irrespective of the political situation where we live. Any human rights law that can be overridden by the legislature remains vulnerable. If human rights are fundamental, surely they are on equal footing to the fundamental structures of the Australian Commonwealth and the rights recognised in the *Constitution*.

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<sup>11</sup> S Zifcak and A King, *Wrongs, Rights and Remedies. An Australian Charter?* (2009) 51.

## Part 2: Which human rights?

Human rights cover the multitude of issues that affect people's lives in society. For political and other reasons, these have come to be divided into three categories: civil and political rights (known as 1<sup>st</sup> generation rights); social, economic and cultural rights (known as 2<sup>nd</sup> generation rights); as well as rights affecting the environment in which humans live (known as 3<sup>rd</sup> generation rights).

However, the distinction is academic as the interdependence of all human rights renders them indivisible. This indivisibility is recognised by the international community through the United Nations as a central principle of human rights. The reliance of one right on the existence of another can be demonstrated by the fact that the freedom of association can become meaningless if there is no right to security of person, or that the right to education is meaningless if there is no freedom of thought.

PIAC therefore recommends that all rights adopted in an Australian Human Rights Act receive equal protection and promotion.

Acknowledging the interdependent nature of human rights, PIAC recommends that the Australian Government give legislative force to all of the rights set out in various international agreements to which Australia is a party through ratification or accession, which include:

- the *Convention on the Prevention and Punishment of the Crime of Genocide*<sup>12</sup>;
- the *Convention relating to the Status of Refugees*<sup>13</sup>;
- the *International Convention on the Elimination of all Forms of Racial Discrimination*<sup>14</sup> (CERD);
- the *International Covenant on Economic, Social and Cultural Rights*<sup>15</sup> (ICESCR);
- the *International Covenant on Civil and Political Rights*<sup>16</sup> (ICCPR);
- the *Convention on the Elimination of all Forms of Discrimination Against Women*<sup>17</sup> (CEDAW);
- the *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*<sup>18</sup> (CAT);
- the *Convention on the Rights of the Child*<sup>19</sup> (CROC);

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<sup>12</sup> *Convention on the Prevention and Punishment of the Crime of Genocide*, opened for signature 9 December 1948, 78 UNTS 277 (entered into force 12 January 1951) ratified by Australia on 8 July 1949 (entered into force for Australia on 12 January 1951).

<sup>13</sup> *Convention relating to the Status of Refugees*, opened for signature 28 July 1951, 189 UNTS 150 (entered into force 22 April 1954) acceded to by Australia on 22 January 1954 (entered into force for Australia on 22 April 1954).

<sup>14</sup> *International Convention on the Elimination of All Forms of Racial Discrimination*, opened for signature 7 March 1966, 660 UNTS 195 (entered into force 4 January 1969) ratified by Australia on 30 September 1975 (entered into force for Australia on 30 October 1975, except article 14, which entered into force for Australia on 28 January 1993).

<sup>15</sup> *International Covenant on Economic, Social and Cultural Rights*, opened for signature 16 December 1966, 993 UNTS 3 (entered into force 3 January 1976) ratified by Australia on 10 December 1975 (entered into force for Australia on 10 March 1976).

<sup>16</sup> *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) ratified by Australia on 13 August 1980 (entered into force for Australia on 13 November 1980, except article 41, which entered into force for Australia on 28 January 1993).

<sup>17</sup> *Convention on the Elimination of All Forms of Discrimination Against Women*, opened for signature 18 December 1979, 1249 UNTS 13 (entered into force 3 September 1981) ratified by Australia 28 July 1983 (entered into force for Australia on 27 August 1983).

<sup>18</sup> *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, opened for signature 10 December 1984, 1465 UNTS 85 (entered into force 26 June 1987) ratified by Australia on 8 August 1989 (entered into force for Australia on 7 September 1989, except articles 21 and 22, which entered into force for Australia on 28 January 1993).

- the *Convention on the Rights of Persons with Disabilities*<sup>20</sup> (CRPD).

In providing domestic legislative protection of these rights, Australia would be doing no more than what is required of it under the terms of the international treaties that it has consented to abide by. In Part 4 below, PIAC addresses in further detail possible methods of providing this domestic protection.

PIAC also does not see the need for Australia to limit itself to these internationally recognised human rights. It should draw on rights recognised in other documents that have demonstrated their effectiveness in promoting and protecting human rights, such as the *Charter of Fundamental Rights of the European Union*.<sup>21</sup>

Moreover, Australia should recognise the growing emphasis placed on 3<sup>rd</sup> generation rights, that is, the rights concerning the environment in which humans live, and the effect the environment has on people's capacity to enjoy their human rights.

These 3<sup>rd</sup> generation rights introduce a stronger concept of human rights as community rights, as opposed to an individual's right, and are developing in response to the growing recognition of the effect humans have on the environment, and conversely, the effect the environment has on human rights.

Over sixty countries have recognised the human right to a healthy environment in their national constitutions<sup>22</sup>, and South Africa's Constitution provides a good articulation of 3<sup>rd</sup> generation rights by stating that:

Everyone has the right:

- to an environment that is not harmful to their health or well being; and
- to have the environment protected, for the benefit of present and future generations.<sup>23</sup>

PIAC recommends the adoption of these rights into an Australian Human Rights Act.

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<sup>19</sup> *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990) ratified by Australia 17 December 1990 (entered into force for Australia on 16 January 1991).

<sup>20</sup> *Convention on the Rights of Persons with Disabilities*, opened for signature 31 March 2007, Doc.A/61/611 (entered into force 3 May 2008), ratified by Australia on 17 July 2008 (entered into force for Australia on 16 August 2008). *Charter of Fundamental Rights of the European Union* (2000) 2000/C 364/01.

<sup>21</sup> Ayesha Dias, *Human rights, environment and development: with special emphasis on corporate accountability*, *Human Development Report 2000* (2000) <<http://origin-hdr.undp.org/en/reports/global/hdr2000/papers/ayesha%20dias%20.pdf>> at 15 June 2009.

<sup>23</sup> *Constitution of the Republic of South Africa 1996* (South Africa) s 24.

## Part 3: Current human rights protection and promotion

Gained from 27 years of experience in advocating for and defending human rights, it is PIAC's belief that human rights are currently insufficiently promoted and protected.

The existing frameworks that protect human rights in Australia have limited coverage and authority. PIAC offers the following analysis on the various frameworks:

### 3.1 Human Rights protection under the *Constitution*

Human rights are offered very limited protection under the *Constitution*. There are only a handful of rights that are expressly protected, including:

- the protection against arbitrary deprivation of property<sup>24</sup>: reflected in the section 51(xxxi) protections in respect of acquisition of property by the Commonwealth<sup>25</sup>;
- the right to a fair and public hearing by an independent and impartial tribunal<sup>26</sup>: reflected in the section 80 requirement for trial by jury in respect of serious offences;
- the freedom of movement and residence within the borders of the Nation State<sup>27</sup>: reflected in section 92 in respect of freedom of movement between the states;
- the right to vote<sup>28</sup>: reflected in section 41 in respect of voting entitlement for those with a right to vote in state elections, and in sections 7 and 24 in respect of the requirement that senators and members of the House of Representatives be 'directly chosen by the people';
- the freedom of thought, conscience and religion<sup>29</sup>: reflected in section 116 in respect of religious freedom.

Unfortunately, these rights have received narrow judicial interpretation:

Section 41 of the *Constitution* in respect of adult suffrage has been interpreted as a transitional provision relevant only at the point of federation<sup>30</sup> and has no continuing effect. According to the Chief Justice of Australia, Gleeson CJ in *Roach v Electoral Commissioner*<sup>31</sup>, universal suffrage came into being in Australia through legislative action.<sup>32</sup> In *Roach*, the majority of the High Court held that the Federal Parliament does not have the power to legislate to remove universal suffrage because of the operation of sections 7 and 24 of the *Constitution*. That said, the Court by majority held that the concept of universal suffrage does permit the Federal Parliament to limit voting in respect of prisoners to exclude prisoners serving terms of three years or more.

Implied rights have also been found in the Constitution by the High Court, in particular the freedom of political and governmental communication.<sup>33</sup> However, there are several significant limitations on this

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<sup>24</sup> *Universal Declaration of Human Rights* (1948) Art 17(2); see also, *International Covenant on Civil and Political Rights*, above n16, Art .

<sup>25</sup> PIAC notes that, as this protection operates in respect of the conduct of the Commonwealth, it provides no protection in respect of compulsory acquisition by a state government.

<sup>26</sup> *Ibid*, Art 10; see also, *International Covenant on Civil and Political Rights*, above n16, Art 14.

<sup>27</sup> *Ibid*, Art 13(1); see also, *International Covenant on Civil and Political Rights*, above n16, Art 12(1).

<sup>28</sup> *Ibid*, Art 21(3); see also, *International Covenant on Civil and Political Rights*, above n16, Art 25(b).

<sup>29</sup> *Ibid*, Art 18; see also, *International Covenant on Civil and Political Rights*, above n16, Art 18.

<sup>30</sup> *R v Pearson; Ex Parte Sipka* (1983) 152 CLR 254.

<sup>31</sup> *Roach v Electoral Commissioner* [2007] HCA 43.

<sup>32</sup> *Ibid*, per Gleeson CJ at [6].

<sup>33</sup> *Lange v Australian Broadcasting Corporation* [1997] HCA 25.

implied right. Firstly, as it is not expressly protected in the *Constitution*, there is a risk that it may be rejected by a High Court with a different interpretation of the Constitution. Or, it may be narrowly interpreted or applied in a way that is unclear and uncertain.<sup>34</sup> Furthermore, the implied right identified by the High Court is not as extensive as the right to freedom of speech or expression recognised in international law, but only protects the freedom of political communication.<sup>35</sup>

### 3.2 Human Rights protection through legislation and parliamentary processes

Federal and state jurisdictions have passed specific legislation that seeks to protect specified human rights. The clearest examples are anti-discrimination laws and privacy laws. However, in both cases, the relevant laws are not as extensive as the rights protected in the international human rights framework.

In the area of privacy law, legislation protects the privacy of personal information rather than extending to protect against 'arbitrary or unlawful interference with ... privacy, family, home or correspondence' as is required in article 17 of the ICCPR.

#### (a) Limits through the construction of anti-discrimination law

Anti-discrimination laws prohibit discriminatory behaviour of governments, business or individuals.<sup>36</sup> The statutory provisions protect people who have identified characteristics or are imputed to have those characteristics, such as race, gender, disability, but only in certain circumstances, such as when accessing services, and do not cover all forms of discrimination outlined in international treaties (as referred to in Part 2 above).

An example of the lack of coverage of anti-discrimination law to the areas protected under international human rights treaties is in the area of participation in public life. Under the ICCPR, there is a right to participate in public affairs and public service:

Article 25

Every citizen shall have the right and the opportunity, without any of the distinctions mentioned in article 2 and without unreasonable restrictions:

- (a) To take part in the conduct of public affairs, directly or through freely chosen representatives;
- (b) To vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors;
- (c) To have access, on general terms of equality, to public service in his country.

Under the *Disability Discrimination Act 1992* (Cth) and equivalent provisions in the *Anti-Discrimination Act 1977* (NSW), people with disabilities are protected against discrimination in a range of aspects of life, including employment, education, and access to goods services and facilities.

A key aspect of the way in which our justice system operates is the involvement of citizens in juries. These juries are selected randomly from the electoral rolls and, as such, any person enrolled to vote can be required to serve on a jury. Unfortunately, while such a requirement exists it is not characterised as a right despite jury

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<sup>34</sup> See, for example Diana Sedgwick 'The Implied Freedom of Political Communication: An Empty Promise?' (2003) 7 *University of Western Sydney Law Review* 35; Katherine Gelber, 'Pedestrian Malls and Local Government Powers: Political Speech at Risk' [2003] 5 *University of Technology Sydney Law Review* 48.

<sup>35</sup> See, for example, George Williams, *Human Rights under the Australian Constitution* (2002) 168. See also, *Brown v Classification Review Board* (1998) 154 ALR 67.

<sup>36</sup> See, for example, *Sex Discrimination Act 1984* (Cth), *Anti-Discrimination Act 1977* (NSW).

service being a form of (effectively) unpaid public service. A person with a disability can be excluded from serving on a jury by reason of their disability and have no recourse to anti-discrimination law unless they can persuade the tribunal that by serving on a jury they are in receipt of some type of service or there has been an unlawful barrier to accessing the premises.<sup>37</sup> This is clearly a distinction contemplated and prohibited in article 2 of the ICCPR and does not provide access 'on general terms of equality' to public service.

## **(b) Limits on legislative protection**

Furthermore, statutory protections do not prevent governments from overriding human rights protections when they choose. For example, the Federal Government bypassed human rights protections under the *Racial Discrimination Act 1974* (Cth) (RDA) when conducting its 'intervention' in the Northern Territory by passing the *Northern Territory National Emergency Response Act 2007* (Cth), which specifically excludes the Act from being subject to the provisions of the RDA or any Northern Territory anti-discrimination provisions.<sup>38</sup> PIAC notes that the mechanism established under section 10 of the RDA in respect of application to subsequent laws is more robust than other anti-discrimination laws and, despite this, the RDA was expressly overridden. (In respect of other federal anti-discrimination laws, any later law that is inconsistent with one of these statutes would simply operate despite the inconsistency.)

Whilst some jurisdictions in Australia have established dedicated human rights laws<sup>39</sup>, there is no consistent federal protection of human rights across Australia.

## **(c) Legislative review mechanisms as a protection of human rights**

One mechanism that has been promoted as an alternative or adjunct to human rights legislation is parliamentary committee review processes. Unfortunately, however, such processes are only as good as the parliament is in terms of its broader commitment to human rights. The evidence in NSW bodes poorly for such mechanisms being an effective part of human rights protection in Australia and PIAC refers the Committee to the submission of the NSW Charter Group for an example of the limited effect of the NSW Legislation Review Committee.<sup>40</sup>

A similar committee operates in the Federal Senate. Its role and purpose is set out in Senate Standing Order 24:

At the commencement of each Parliament, a Standing Committee for the Scrutiny of Bills shall be appointed to report, in respect of the clauses of Bills introduced into the Senate and in respect of Acts of Parliament, whether such Bills or Acts, by express words or otherwise:

- (i) trespass unduly on personal rights and liberties;
- (ii) make rights, liberties or obligations unduly dependent upon insufficiently defined administrative powers;
- (iii) make rights, liberties or obligations unduly dependent upon non-reviewable decisions;
- (iv) inappropriately delegate legislative powers; or
- (v) insufficiently subject the exercise of legislative power to parliamentary scrutiny.<sup>41</sup>

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<sup>37</sup> *Faye Druett and Ian Cooper v State of New South Wales* [2000] HREOC H99/6 and H98/70 (Unreported, Alexander Street SC, 17 April 2000) <[http://www.hreoc.gov.au/disability\\_rights/decisions/comdec/2000/DD000050.htm](http://www.hreoc.gov.au/disability_rights/decisions/comdec/2000/DD000050.htm)> at 15 June 2009.

<sup>38</sup> *Northern Territory National Emergency Response Act 2007* (Cth) ss 132 and 133.

<sup>39</sup> *Human Rights Act 2004* (ACT); *Charter of Human Rights and Responsibilities Act 2006* (Vic).

<sup>40</sup> NSW Charter Group, *Human rights protection for all: Submission to the National Human Rights Consultation* (2009).

<sup>41</sup> Parliament of Australia, *The Senate Standing Orders and Other Orders of the Senate* (2009) [Chapter 5 – Standing and select committees] <[http://www.aph.gov.au/Senate/pubs/standing\\_orders/b05.htm#24](http://www.aph.gov.au/Senate/pubs/standing_orders/b05.htm#24)> at 15 June 2009.

In speaking to a forum to note the tenth anniversary of the Senate Scrutiny of Bills Committee, The Hon Senator Barney Cooney stated:

... it is a fact that no matter how offensive the Committee might find a provision, the decision as to whether or not that provision passes into law is a matter for the Parliament.<sup>42</sup>

Unfortunately, far too often the members do not 'have the benefit of the committee's report' when they come to debate the Bill. In respect of the two anti-terrorism laws passed by the Federal Parliament in November 2005 for example, the Committee's *Alert* was only available to Senators after the first of the Bills was passed. The first of these two Bills, the Anti-Terrorism Bill 2005 was introduced in the House of Representative on 2 November 2005 and was passed by the Senate on 3 November 2005. The extent of scrutiny of this Bill by the Committee is set out in full in the *Alert Digest No. 13 of 2005*, published on 30 November 2005 and reproduced in full below:

#### **Anti-Terrorism Bill 2005**

Introduced into the House of Representatives on 2 November 2005 and passed by the Senate on 3 November 2005  
Portfolio: Attorney-General

#### **Background**

This bill amends the *Criminal Code Act 1995* to expand the scope of existing federal offences and powers relating to terrorist activity. The amendments specify that, in a prosecution for relevant offences, it is not necessary to identify a particular terrorist act.

*The Committee has no comment on this bill.*<sup>43</sup>

The second Bill, the Anti-Terrorism (No 2) Bill 2005 (Cth) was introduced to the Federal Parliament on 3 November 2005. The Committee gave this Bill rather more attention, although that attention is somewhat lacking in useful detail. The overview of the Bill identifies the range of measures being introduced, many of which have been the subject of intense criticism on the basis that they significantly impair human rights:

#### **Anti-Terrorism Bill (No. 2) 2005**

Introduced into the House of Representatives on 3 November 2005  
Portfolio: Attorney-General

#### **Background**

This bill amends a number of Acts to expand the federal regime of offences and powers relating to terrorist acts and terrorist organisations.

The bill extends the definition of a terrorist organisation to encompass organisations that advocate terrorism (Schedule 1); updates existing sedition offences to cover those who urge the use of force or violence, or assist an enemy at war (Schedule 7); extends offences for the financing of terrorist activity (Schedule 3) and amends financial transaction reporting requirements to implement certain recommendations relating to terrorist financing (Schedule 9).

The bill also introduces a number of new and expanded powers relating to terrorist activity, including:

- control orders and preventative detention orders (Schedule 4);

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<sup>42</sup> The Hon Senator Barney Cooney, 'The Operation of the Senate Standing Committee for the Scrutiny of Bills: 1981-1991' (Paper presented at Ten years of scrutiny, Canberra, 25 November 1991) 18.

<sup>43</sup> Senate Standing Committee for the Scrutiny of Bills, Parliament of Australia, *Alert Digest No. 13 of 2005* (2005) 7.

- a new regime of ‘stop, question, search and seize’ powers, exercisable at airports and other Commonwealth places (Schedule 5); and
- a ‘notice to produce’ regime to ensure the AFP can enforce compliance with requests for information in relation to relevant offences (Schedule 6).

The bill also establishes a statutory basis for video surveillance at airports and on aircraft (Schedule 8).

Finally, Schedule 10 of the bill extends ASIO’s powers in a number of relevant areas. These include:

- extending ASIO’s special powers warrant regime;
- providing greater access to aircraft and vessel information; and
- strengthening the offence for providing false or misleading information under an ASIO questioning warrant.

The bill also contains technical amendments.<sup>44</sup>

Having identified the scope of the legislation, the Committee then turned to specific impacts. It noted, for example, that the Bill trespassed on rights and liberties in that it had retrospective effect, and it made rights and liberties dependent on non-reviewable decisions in respect of prohibited contact orders.

The Committee found that while the Bill removed the protection against self-incrimination and undermined the protection of legal professional privilege, that these rights are not absolute. In respect of the changes that allowed self-incrimination, the Committee concluded that the Bill struck ‘a reasonable balance’, leaving the question of abrogation of legal professional privilege to the Senate.<sup>45</sup>

The Committee also noted that:

The power to issue ... a preventative detention order might appear to make rights or liberties dependent on non-reviewable decisions. However, proposed new section 105.51 allows the subject of such a detention order to apply to the Administrative Appeals Tribunal for a review of the decision, but only after the order has ceased to be in force.<sup>46</sup>

Somewhat incredibly, that is effectively the extent of the Committee’s comment on this provision and it provide no analysis of the impact on rights and any other comment on the rights impact of this aspect of the legislation.<sup>47</sup> In its analysis of clause 105.12 in respect of non-reviewable decisions to extend preventative detention orders, the Committee stated that ‘[it] is suggested that new section 105.51 takes new section 105.12 outside the terms of reference of the Committee, and that there is consequently no need to bring new section 105.12 to the attention of the Senate’.<sup>48</sup> The Committee provided no explanation of this statement.

The Committee made no substantive comment in respect of the exclusion of judicial review of certain decisions apparently on the basis that the explanatory memorandum sought to justify these provisions on the ground that it was ‘appropriate to exclude these decisions from such review due to their security nature’. The Committee formally stated that it was ‘prepared to accept this justification’.<sup>49</sup> The same type of analysis is applied to the exemption of prescribed security zone declarations from analysis as legislative instruments.<sup>50</sup> Perhaps even more alarmingly, the Committee makes no comment whatsoever on the provisions dealing

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<sup>44</sup> Ibid, 8, and following.

<sup>45</sup> Ibid, 15.

<sup>46</sup> Ibid, 11.

<sup>47</sup> Ibid.

<sup>48</sup> Ibid.

<sup>49</sup> Ibid, 13.

<sup>50</sup> Ibid, 14.

with sedition, provisions that were identified by many commentators as significantly interfering with freedom of expression and which were subsequently the subject of a critical review by the Australian Law Reform Commission, that recommended their repeal.<sup>51</sup>

This report compares poorly with those produced by the equivalent NSW Parliamentary Committee in that it makes no attempt to identify the rights or freedoms that are likely to be affected. Further, despite its role being to analyse legislation to identify potential impacts, it clearly wanders into the territory of determining for the Parliament that some potential rights infringements are 'justified'. As a tool for legislators to help them consider the impact of legislation on human rights it falls well short of being effective. Of note is the fact that when the Bill returned to the Senate for debate on 9 December 2005 (after the relevant *Alert* was published), there is no reference to the views set out in the *Alert* or even to the work of the Committee. There are, by comparison, many references to the report of the Senate Legal and Constitutional Affairs Committee Inquiry into the same legislation, a report that highlighted a number of key human rights concerns arising from the measures set out in the Bill.<sup>52</sup>

This example illustrates three key concerns about the current situation of human rights protection and promotion in Australia (and with the potential for such review committee as a keystone to any future protection mechanisms). Firstly, the legislature is not always well suited to the task of protecting and promoting human rights, particularly if an unpopular group is the target of rights infringing legislation as was the case here (alleged terrorists) and there is political mileage to be gained through talking tough on law and order. Second, parliamentary committees that are dominated by the majority parties are more likely to pay lip-service to their appointed task of scrutiny. The third concern is about the impact of this process on the debate within the legislature. Clearly, in this case—a case involving legislation that is widely accepted to seriously infringe human rights—the Committee's report was largely irrelevant to the Senate's deliberations, firstly because it failed to identify in any effective way the potential impacts on rights and liberties, and secondly because there was a much more effective report available from the Senate Legal and Constitutional Affairs Committee, a report that was developed through a process of public inquiry.

PIAC submits that reliance on such parliamentary review processes is inadequate and inappropriate, both in the current situation and in any future human rights framework.

### 3.3 Human Rights protected by the common law

The common law has long been a source of protection for fundamental human rights. This includes the protection against arbitrary detention<sup>53</sup>, which has been seen to be protected through the common law writ of *habeas corpus*, and the protection of the right to a fair trial.

In *Evans v NSW*<sup>54</sup>, the Federal Court pointed out that whilst the common law has its own set of constitutional rights, 'these are not formally entrenched against legislative repeal', and although the Court added that, '[f]undamental rights cannot be overridden by general or ambiguous words [of the Parliament]'<sup>55</sup>, they nevertheless can be overridden.

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<sup>51</sup> Australian Law Reform Commission, *Fighting Words: A Review of Seditious Laws in Australia* (2006) recommendations 2-1 and 3-2.

<sup>52</sup> Commonwealth, *Parliamentary Debates*, Senate, 9 December 2005, 1-21.

<sup>53</sup> *Universal Declaration of Human Rights*, Art 9; see also, *International Covenant on Civil and Political Rights*, above n16, Art 9(1).

<sup>54</sup> *Evans v State of New South Wales* [2008] FCAFC 130.

<sup>55</sup> *Ibid* at [72].

### **(a) Statutory impact on common law protection against arbitrary detention**

This power of the parliament to override common law rights is what occurred in the case of the indefinite detention of failed asylum seekers. Under international human rights law, the indefinite detention of failed asylum seekers constitutes arbitrary detention and is, as such, an interference with the freedom from arbitrary detention in article 9(1) of the ICCPR. It is also inconsistent with the common law protection against such detention. However, amendments made to the *Migration Act 1958* (Cth) provide for the detention of failed asylum seekers until they can be deported, such detention can (because of a range of factors) be indefinite in time. This situation was challenged by Mr Al-Kateb, a failed asylum seeker and stateless person. In *Al-Kateb v Godwin*<sup>56</sup>, the majority of the High Court confirmed that the Federal Parliament's amendments to the *Migration Act 1958* (Cth) were sufficiently clear to override the common law protection.

### **(b) Statutory impact on the common law right to a fair trial**

There are many elements that are said to comprise the right to a fair trial. These include, for example, the right of a criminal accused to be informed of the charges against them, the right to have the charged determined in a court by an independent judicial officer, and the right to trial by jury for serious offences.

Much has been written about the impact of national security laws on these and other rights and PIAC does not seek to repeat those arguments here. However, PIAC refers to these laws as another example of statutory override of rights that had long been held to be fundamental to the Australian judicial system and before it to the British judicial system. Statutory provisions allowing for preventive detention, for limiting access of the accused to evidence against them, and for the selection of specific judges to have authority in respect of warrants all undermine fair trial rights.

## **3.4 Human Rights protected by the Australia's 'Fair Go' ethos**

The Aussie 'fair go' attitude can go some way in promoting a culture of respecting and protecting human rights. Certainly when a 'fair go' attitude is widespread it will have a significantly beneficial effect on the protection and promotion of human rights as it will limit or even stop infringements of human rights occurring in the first place. However, this ethos does not always extend itself to the policies and actions of government and the bureaucracy, the conduct of industry and business, and often fails to play out in the day-to-day lives of many in the community.

By way of example, the NSW Department of Education has policies that unjustly discriminate against some children with disabilities and infringe on their human rights. Currently under NSW law all parents/guardians have a responsibility to send their school-age children to school. The relevant legislation provides for parents who fail in this obligation to be prosecuted and subject to a fine of \$1,100.<sup>57</sup> There has been a recent surge in such prosecutions, with a significant percentage of the prosecutions occurring in western NSW and south-western Sydney. This responsibility on the parents is not, however, balanced with any right to an education enforceable against the state. As such, a child can be denied an education by the state. Sadly, such denials do occur, particularly in respect of children with disabilities.

Policies may also be instigated that unintentionally or indirectly discriminate against certain people and the day-to-day conduct of people in the community can often inadvertently fail to respect the humanity of or discriminate against others. However, without legally protected human rights, discriminated people may have no access to recourse.

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<sup>56</sup> *Al-Kateb v Godwin* [2004] HCA 37.

<sup>57</sup> *Education Act 1990* (NSW) s 23.

While we often hear of the importance of ‘Australian values’, and attempts have even been made to articulate these in some detail<sup>58</sup>, it is PIAC’s view that often these values are espoused values rather than fully lived values. They are values to which we have a theoretical commitment, but do not always carry through into practice. In part, this may well reflect the fact that they are not clearly articulated; each of us if asked would probably express a slightly different set of values and each of us would interpret those values that we agree on differently. One of the benefits of a human rights framework is that it is a clearly articulated set of values that can be referred to, understood, and against which conduct and laws can be tested. In many ways they are the shared values that are agreed as necessary for just, fair and peaceful societies. They are values based on our shared humanity.

### 3.5 Legal literacy and its impact on human rights

The consolidation of human rights into one Human Rights Act has the clear benefit of promoting understanding and awareness of these rights by addressing the current issue that legally recognised human rights are spread thinly through the *Constitution*, the common law, and state or federal statutes. This current situation is problematic as it prevents Australians from understanding their rights and responsibilities in respect of human rights.

For example, the existing express rights in the *Constitution* are not found in the same chapter of the *Constitution* and implied rights can only be found through reading and understanding the decisions of the High Court. (PIAC also notes that this task is made more difficult by the fact that the decisions of the High Court are rarely a single unanimous judgment, with it being relatively common to have a number of separate decisions making up a majority judgment.<sup>59</sup>) Human rights in the *Constitution* are—whether express or implied—inaccessible to all but constitutional lawyers. Furthermore, little is currently done to educate or encourage Australians to see that the *Constitution* has a role in the defence of fundamental human rights.

The same is true of rights protected under common law. It is PIAC’s experience that very few members of the general public, other than lawyers, understand the concept of the common law. Many expect to be able to find it written down somewhere in a document akin to a statute. It is elitist of lawyers and politicians to assert that people’s human rights are adequately protected by the common law, etc, when part of effective protection of rights must surely be awareness and so few people have the skills and expertise to ‘find’ their rights. Only those who experience the privilege of awareness, the privilege of being members of the mainstream, and the privilege of having power in society could claim that their rights are effectively protected.

### 3.6 PIAC’s experience

In NSW, PIAC regularly encounters serious breaches of human rights. For example:

- The passage of the *Crimes (Criminal Organisations Control) Act 2009* (NSW), which makes it a criminal offence for members of declared criminal organisations to associate with one another and prohibits them from being employed in certain occupations, such as the security industry or tow truck businesses. This Act was criticised by the NSW Legislative Review Committee in its report who expressed concerns that this Act breached the right to freedom of association.<sup>60</sup> Almost as worrying as the Act itself was the lack of consultation preceding the introduction and passage of the Act and the fact that the NSW Legislation

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<sup>58</sup> Julie Macken, ‘This is Australia?’, *Australian Financial Review* (Sydney, 17 December 2005, 24).

<sup>59</sup> Enid Campbell, ‘Reasons for judgment: some consumer perspectives’ (2003) 77 ALJ 62.

<sup>60</sup> Legislation Review Committee, Parliament of New South Wales, *Digest 5 of 2009*, (2009) <<http://www.parliament.nsw.gov.au/Prod/parliament/committee.nsf/0/1278BAEC27EE847FCA2575AC0014637F>> at 15 June 2009.

Review Committee was not given sufficient opportunity to comment *before* the Act was passed (its report was tabled more than a month after the introduction of the Act).<sup>61</sup>

- In April 2008, the Department of Corrective Services introduced a policy of locking down inmates at Long Bay Hospital for an additional 5.5 hours per day. Within weeks it was apparent that this policy was exacerbating the mental illnesses suffered by many of the inmates in the Hospital and interfering with their ability to access adequate health care. In some cases, it was arguable that this new policy could amount to inhumane and degrading treatment in breach of human rights. However, there was little, if any, legal remedy for those prisoners.

Similarly, there is a lack of enforceable due process rights given to prisoners who are, for example, denied access to family through sudden relocations from correctional facilities close to family, to those at a significant distance, with for clear reason or given any opportunity to challenge this relocation. Prisoners also have limited access to education opportunities and to information, with no Internet access and many education programs available in the wider community being increasingly provided through internet facilities.

PIAC's experience in advocating for people whose human rights have been violated has shown that the laws and systems in place to protect human rights are insufficient. Seeking redress amongst NSW's existing rights legislation, or the common law, rarely results in a good outcome for victims, nor does it have any effect in changing society's behaviour and attitude towards human rights.

As part of its preparation for this submission, PIAC conducted consultations with community groups on human rights issues. Through these consultations PIAC encountered experiences of human rights breaches and collected submissions to the Committee's Consultation that have been separately provided. Examples of comments made in these submissions include the following:

- There is a lack of education in promoting human rights.<sup>62</sup>
- 'A work colleague wanted a private area for prayer three times a day, she was given the computer editing room, and the scheduled use for the room often clashed with her prayer time. Also the room had no lock and so she had no privacy during her prayer. A similar situation with other women wanting to breastfeed also occurs.'<sup>63</sup>
- 'People with mental health issues get the worse end of the stick. I was in hospital for mental health treatment for bi-polar and depression. When I came out I was given a certificate from the hospital saying that I was not to work for six months. When I tried to explain this to the job capacity assessor they told me that it did not matter; they could rip up that certificate and no one would even care.'<sup>64</sup>
- 'I am six months pregnant and my husband is drug dependant. He also abuses me (physical, sexual and emotional). I am on a bridging visa and have received no help from Centrelink. I have a caseworker but everything is very slow. I want more assistance for newly arrived women and migrant women. There should also be more shelters and refuges for abused women.'<sup>65</sup>

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<sup>61</sup> For details on this process, see the submission of the NSW Charter Group, above n40.

<sup>62</sup> Anonymous comment made by a student at the Glenmore Park High School Forum, April 2009.

<sup>63</sup> Anonymous story provided by a participant at the UTS Women and Human Rights Forum, 8 April 2009.

<sup>64</sup> Anonymous comment collected at the Homeless Persons' Legal Service Human Rights Consultation Event at Edward Eager Lodge, 4 May 2009.

<sup>65</sup> Meenu's story collected at the Homeless Persons' Legal Service Human Rights Consultation Event at Samaritan House, 6 May 2009.

Moreover, these consultations revealed that there is an absence of a culture in which human rights are respected and promoted.

From a national perspective, PIAC has encountered human rights breaches and problems with frameworks that protect rights. An example is in the area of access to transport for people with disabilities.

PIAC is currently acting for a wheelchair user who alleges that since 2006 the NSW Department of Transport has been licensing Wheelchair Accessible Taxis that do not comply with the *Disability Standards for Accessible Public Transport 2002* (Cth) (Public Transport Standards). This has resulted in a significant and growing number of Wheelchair Accessible Taxis in NSW that cannot accommodate people who use electric wheelchairs because there is inadequate space in the vehicles. However, as a result of the way the Public Transport Standards are drafted<sup>66</sup>, the NSW Department of Transport can only be named as an ancillary party to the disability discrimination complaint making it more difficult to successfully challenge their licensing practices that are at the crux of the issue.

PIAC also brings to the Committee's attention that at the Australia 2020 Summit, the Federal Government's chief community consultation program, three separate groups recommended the adoption of a national charter of human rights.<sup>67</sup>

Evidence suggests that the existence of a human rights charter in the ACT is changing the behaviour of government and the community in general. For example, in 2006, Gabrielle McKinnon said:

The second year of the Human Rights Act has shown the potential of the Act to have a real impact in generating a dialogue on human rights between each of the arms of government. It appears that the quality of this dialogue will continue to become richer and more developed as the courts, the legislature and the executive become more familiar with the Act, and its application across a range of government activities.<sup>68</sup>

Similarly, the Victorian Equal Opportunity and Human Rights Commission in 2008 reported that:

Victoria is making steady progress towards building a culture where human rights are recognised, respected and protected throughout our community.<sup>69</sup>

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<sup>66</sup> *Disability Standards for Accessible Public Transport 2002* (Cth) cl 1.4.

<sup>67</sup> Australia 2020 Summit groups included Strengthening Communities, Supporting Families and Social Inclusion; The Future of Australian Governance; Australia's Future Security and Prosperity in a Rapidly Changing Region and World.

<sup>68</sup> Gabrielle McKinnon, *The ACT Human Rights Act: The Second Year 2006, ANU - Australia's First Bill of Rights* (2006) <<http://acthra.anu.edu.au/articles/Gabrielle%20McKinnon%20ACTHRA%20second%20year.pdf>> at 15 June 2009.

<sup>69</sup> Victorian Equal Opportunity and Human Rights Commission, *The 2008 Report on the operation of the Charter of Human Rights and Responsibilities* (2008) 3.

## Part 4: Better human rights protection and promotion

Australia could make enormous inroads into better protecting and promoting human rights by introducing a federal Human Rights Act.

The Act would better protect and promote human rights by:

- clearly articulating the human rights that Australian law protects in a single, accessible document;
- providing an efficient system of redress for victims of human rights violations;
- providing a benchmark for legislation to ensure that human rights violations cannot be encouraged or sanctioned by government;
- changing the behaviour of governments, institutions, individuals, and businesses so to recognise and respect human rights.

PIAC submits that such a Human Rights Act should have an impact the role, function and powers of the Australian Human Rights Commission in respect of its general human rights jurisdiction, while leaving its role, functions and powers in respect of anti-discrimination law intact. This aspect is given specific consideration in section 4.5(d) below.

PIAC's view is that it is important to focus on what features should be included in any human rights framework to ensure it is effective in achieving the protection, promotion and fulfilment of human rights for all in Australia. In considering this, PIAC has examined the following aspects of human rights:

- What human rights should be protected: Which rights should be included and what guidance is needed on interpretation of those rights?
- What mechanisms should be used to protect rights: What can we learn from other jurisdictions and how can the effectiveness of mechanisms be optimised?
- Responsibilities: Who should be required to comply with human rights laws, and how should individual respect for human rights be dealt with?
- Rights bearers: Who should benefit from human rights protection?
- The involvement of government: What are the proper roles of the different branches of government in human rights law?
- Other mechanisms: What is the role of the broader community in improved human rights for all and what else needs to be done to achieve a human rights culture?

These questions are all addressed below.

### 4.1 What human rights should be protected

PIAC has recommended above that any human rights legislation in Australia should ensure that the rights set out in Australian-ratified international human rights treaties are protected.

In this section, PIAC considers how this might be achieved.

One key benefit of a Human Rights Act is to provide everyone in Australia with a clear statement of the human rights that we are all entitled to enjoy. This was a benefit that was repeatedly identified to PIAC in its numerous community consultation events. It is therefore necessary to consider how to achieve such a clear statement when Australia has obligations in respect of multiple human rights treaties.

In PIAC's view it is possible to achieve such a clear statement, while including within the framework a mechanism to ensure that all of the rights in the various treaties are effectively promoted and protected. To achieve this, PIAC recommends that a Human Rights Act consolidate the human rights that are common (at their core) to the various treaties, albeit with specific applications to identified groups. For example, the right to education is articulated in the ICESCR at article 13, in CERD at article 5(e)(v), in CEDAW at article 10, in CROC at article 28 and in the CRPD at article 24.

PIAC recommends that the Human Rights Act include:

- a statement of human rights as articulated in the ICESCR and the ICCPR, plus the 3<sup>rd</sup> generation rights as articulated in the South African Constitution, as the 'charter' of human rights for all Australians;
- appended as a Schedule, each of the other human rights treaties to which Australia is a party<sup>70</sup>;
- an interpretive provision that requires that the human rights in the 'charter' be interpreted consistent with the specialist treaties when the person or persons who are the subject of a specific human rights matter can be characterised as belonging to a relevant group, ie, women, children, people with disability, members of racial minorities, etc;
- an interpretive provision that requires that the human rights in the 'charter' be interpreted consistent with the decisions and deliberations of the relevant human rights treaty bodies;
- an interpretive provisions that requires that interpretation of the human rights in the 'charter' be assisted by the decisions and deliberations of relevant human rights courts and tribunals in other jurisdictions.

PIAC notes that many people who participated in PIAC's consultation events indicated that they felt Australia should give domestic effect to all of its human rights treaty obligations. Several participants proposed a very simple-form legislative framework that simply referred to all of the ratified treaties and provided the procedural mechanisms for asserting and protecting those rights. This approach is somewhat akin to the approach adopted in the United Kingdom with the relevant articles of European Convention of Human Rights being set out in Schedule 1 to the *Human Rights Act 1988*.<sup>71</sup>

## 4.2 What mechanisms should be used to protect rights

In order to have human rights, it is necessary to ensure that rights bearers have access to an effective remedy if and when rights are breached.

In this regard, Australia's international obligations are relevant. The obligations of states parties to the ICCPR have been clarified by the relevant treaty body, the Human Rights Committee, in its General Comment 31:

15. Article 2, paragraph 3 [of the ICCPR], requires that in addition to effective protection of Covenant rights States Parties must ensure that individuals also have accessible and effective remedies to vindicate those rights. Such remedies should be appropriately adapted so as to take account of the special vulnerability of certain categories of person, including in particular children. The Committee attaches importance to States Parties' establishing appropriate judicial and administrative mechanisms for addressing claims of rights violations under domestic law. The Committee notes that the enjoyment of the rights recognized under the Covenant can be effectively assured by the judiciary in many different ways, including direct applicability of the Covenant, application of comparable constitutional or other provisions of law, or the interpretive effect of the Covenant in the application of national law. Administrative mechanisms are

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<sup>70</sup> An alternative would be for the Act include a provision stating that all human rights treaties to which Australia is a party are to have effect through guiding the interpretation of rights set out in the 'charter'. This approach that would limit the need to make future amendments to the Schedule as new ratification documents are lodged by Australia but would have less educative impact. On balance, PIAC prefers the approach whereby the ratified treaties (including optional protocols) form a schedule or schedules to the Human Rights Act.

<sup>71</sup> *Human Rights Act 1988* (UK) c 42, s 1.

particularly required to give effect to the general obligation to investigate allegations of violations promptly, thoroughly and effectively through independent and impartial bodies. National human rights institutions, endowed with appropriate powers, can contribute to this end. A failure by a State Party to investigate allegations of violations could in and of itself give rise to a separate breach of the Covenant. Cessation of an ongoing violation is an essential element of the right to an effective remedy.

16. Article 2, paragraph 3, requires that States Parties make reparation to individuals whose Covenant rights have been violated. Without reparation to individuals whose Covenant rights have been violated, the obligation to provide an effective remedy, which is central to the efficacy of article 2, paragraph 3, is not discharged. In addition to the explicit reparation required by articles 9, paragraph 5, and 14, paragraph 6, the Committee considers that the Covenant 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.<sup>72</sup>

There are a number of elements identified in this extract of the General Comment that should, in PIAC's submission, become features of an Australian Human Rights Act. These are:

- Empowerment of the courts to use the legislation in its interpretation of existing laws.
- Empowerment of the courts to determine whether or not human rights breaches have occurred and to make orders to remedy the breaches including through compensation to those whose rights have been breached, restitution, rehabilitation, other 'measures of satisfaction, such as public apologies, public memorials', orders to prevent future breaches and to effect changes to the relevant laws and practices.
- A mechanism to stop an alleged breach from continuing (an injunctive power).
- Accessible mechanisms for individuals (or groups) who allege a human rights breach to complain of that breach and have it investigated and related mechanisms to ensure effective rights protection for those who are particularly vulnerable, such as children, people with disability, etc.
- Mechanisms to ensure that perpetrators—whether individuals or otherwise—of human rights violations can be prosecuted.

### **(a) Interpretation by courts and impact of incompatibility**

PIAC supports the inclusion in the Human Rights Act of a requirement that Courts interpret legislation in a way that is compatible with the rights set out in the 'charter'.

Where a court is unable to interpret legislation in a manner compatible with legislation, this will indicate that the legislation is incompatible with the 'charter' rights. PIAC does not support the approach taken in Victoria, the ACT or the UK whereby incompatible legislation continues to have effect despite the incompatibility. PIAC submits that a more appropriate approach is for any incompatibility to invalidate the legislation to the extent of that incompatibility unless the legislature has expressly overridden the Human Rights Act in respect of the particular incompatibility when passing the legislation. This approach both strengthens the value and operation of the Human Rights Act and ensures that the legislature genuinely considers whether or not proposed legislation impacts on human rights and goes through the process of properly considering whether the right balance has been struck.

Under the current legislative model that operates in Victoria and the ACT, as well as in the UK, legislatures can pay lip service only to the requirement that they consider the impact of any proposed legislation on human rights as no matter what impact it has, the legislation will stand.

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<sup>72</sup> Human Rights Committee, *General Comment No. 31 [80] Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, [15-16] UN Doc CCPR/C/21/Rev.1/Add.13 (General Comments) (2004).

The approach PIAC proposes reflects that found in section 10 of the *Racial Discrimination Act 1977* (Cth) (RDA), which states:

(1) If, by reason of, or of a provision of, a law of the Commonwealth or of a State or Territory, persons of a particular race, colour or national or ethnic origin do not enjoy a right that is enjoyed by persons of another race, colour or national or ethnic origin, or enjoy a right to a more limited extent than persons of another race, colour or national or ethnic origin, then, notwithstanding anything in that law, persons of the first-mentioned race, colour or national or ethnic origin shall, by force of this section, enjoy that right to the same extent as persons of that other race, colour or national or ethnic origin.

If the legislature wishes to avoid this invalidating effect, it must expressly suspend the operation of the RDA. While this can be done, and was done in the section 132 of the *Northern Territory National Emergency Response Act 2007* (Cth), it should not be done lightly and should only be done by a legislature in full knowledge of the impact on human rights. Further, PIAC submits that consideration should be given to a mechanism that places a time limit on the operation of any law that suspends the application of the Human Rights Act and/or requires a review of such legislation within a specified period, say two years.

Particular consideration should be given to whether or not a state or territory legislature should be able to suspend the operation of the Human Rights Act in this way. An alternative would be to establish a mechanism whereby the state or territory Attorney General could be expressly authorised by their legislature to ask the Commonwealth Parliament to prescribe the particular provisions that are incompatible to allow them to continue to operate for a specified period of time. An example of such a mechanism is found in the *Disability Discrimination Act 1992* (Cth), which states:

**47. Acts done under statutory authority**

...

- (2) This Part does not render unlawful anything done by a person in direct compliance with a prescribed law.
- (3) During the period beginning at the commencement of this section and ending 3 years after the day this section commences, this Part does not render unlawful anything done by a person in direct compliance with another law.

**132. Regulations**

- (1) The Governor-General may make regulations prescribing matters:
  - (a) required or permitted by this Act to be prescribed...

**(b) Court determinations and orders**

PIAC submits that, for human rights to be properly protected under Australian law, it is necessary to ensure that courts are able to make orders in respect of the full range of remedies usually available in other civil proceedings. These include but are not limited to orders for damages. In addition, experience in the area of anti-discrimination law suggests that courts need to be empowered to make orders that prevent the continued operation of incompatible policies, to require conduct to cease and not be repeated and to require non-financial remedies such as apologies and other forms of public acknowledgement.

While PIAC considers that court proceedings for human rights breaches will represent only a very small percentage of human rights disputes, such proceedings have an important educative effect. PIAC's work in the area of public interest law has repeatedly demonstrated that litigation can be an effective mechanism for bringing the public spotlight onto an issue, for highlighting problems facing particular groups within the community and for putting pressure on governments and others to improve their practices and procedures. Another benefit in the area of human rights of such litigation would be to ensure that the public can see that the Human Rights Act was making a difference.

### **(c) Injunctive powers**

Vital to effective rights protection is the capacity of courts to make orders to prevent conduct continuing before the substantive matters in dispute have been fully heard and determined. This is particularly important in the area of human rights as it will rarely be possible to fully compensate a person for the impact of having their rights breached. As such, any action to limit the impact should be taken at the earliest possible time.

PIAC recommends that the Human Rights Act include provisions empowering courts to grant injunctions to prevent continuing human rights breaches and/or maintain the status quo. The latter power is granted to the Federal Court under section 46PP of the *Human Rights and Equal Opportunity Commission Act 1986* (Cth). Under this provision, an application for an injunction can be made by either 'the Commission, a complainant, a respondent or an affected person'.<sup>73</sup> PIAC notes with approval that this provision also precludes the court from, 'as a condition of granting the interim injunction, requir[ing] a person to give an undertaking as to damages'.<sup>74</sup>

### **(d) Accessible mechanisms for complaint and effective rights protection for vulnerable groups**

PIAC recommends that the Australian Human Rights Commission have a role in respect of the investigation and possible early resolution of complaints of human rights breaches. This is considered in further detail in section 4.5(d).

PIAC also believes that it is necessary to ensure that there are mechanisms to ensure that individuals and groups are not precluded from having human rights breaches dealt with because of their limited capacity or financial resources, or through fear of risk of adverse consequences. To this end, PIAC recommends that the Human Rights Act include provisions that specifically deal with access to justice issues such as costs, representation, representative complaints and self-initiated complaints.

On the question of costs, PIAC has extensive experience of the impact of costs risks in the area of anti-discrimination law. Based on that experience, it is PIAC's view that a significant number of people who have been the subject of unlawful discrimination have either not taken any action in relation to that discrimination or have accepted an inadequate resolution in order to avoid the risk of an adverse costs order. PIAC therefore recommends that legal actions under the Human Rights Act should be subject to a special costs regime whereby successful complainants could obtain a costs order in their favour but unsuccessful complainants would only be subject to an adverse costs order if it could be shown that they had been vexatious or had acted in bad faith in bringing the action.

In respect of representation, PIAC submits that there should be a right of representation and that consideration will need to be given to the impact on free legal assistance services, such as community legal centres and legal aid commissions, of the establishment of a human rights jurisdiction. Many of those most likely to be victims of human rights breaches (based on their current experiences in respect of human rights) are those with the least capacity to pay for legal advice and representation.

The framework should also include a mechanism to enable representative actions both at the initial complaint stage and in any court proceedings. Representative actions are legal actions taken by a suitably qualified body on behalf of an individual or group affected by a human rights breach. Suitably qualified bodies could include non-profit civil society organisations with a particular focus on the rights of specific

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<sup>73</sup> *Human Rights and Equal Opportunity Commission Act 1986* (Cth) s 46PP(2).

<sup>74</sup> *Ibid*, s 46PP(5).

groups (such as people with disability, children, etc), with a focus on a particular area of human rights (such as trade unions in respect of rights in employment), or with a more general human rights focus (such as community legal centres or Amnesty International). As with individual complainants above, such groups should be protected from adverse costs orders unless it can be established to the satisfaction of the relevant court that the body was vexatious in bringing the action or had acted in bad faith in doing so.

PIAC submits that for-profit entities should not be permitted to bring complaints on behalf of aggrieved individuals as there is too much potential for such a situation to develop over time into a stand alone right for corporations.

The proposal for self-initiated complaints would permit the body with power to investigate human rights breaches, the Australian Human Rights Commission, to take action on a breach without requiring a specific complaint to do so. PIAC notes that the Commonwealth House of Representatives Standing Committee on Legal and Constitutional Affairs has recommended such a power be granted to the Australian Human Rights Commission in respect of breaches of the proposed Disability (Access to Premises – Buildings) Standards 2009.<sup>75</sup>

#### **(e) Prosecutorial mechanisms**

PIAC submits that there should be mechanisms to prosecute where an egregious breach of human rights is alleged and that this is best dealt with separately from the proposed Human Rights Act. PIAC notes the proposal recently announced by the Federal Government to ‘enact a Commonwealth offence against torture’.<sup>76</sup> This is an example of how a prosecutorial mechanism could be established.

In addition, PIAC submits that it would be useful for the Standing Committee of Attorneys General (or similar) to conduct a review of criminal offences to identify those that can be characterised as offences against human rights and consider mechanisms for ensuring that the fact that an offence has a human rights implication is a consideration in the decision by the public prosecutors on whether or not to proceed with a prosecution.

#### **(f) Why not simply adopt a ‘model’ from elsewhere?**

Australia’s system of governance is peculiar and unique, making the importation of foreign human rights models problematic. For example, the United Kingdom’s human rights framework would be inappropriate to adopt directly in Australia as it operates in an environment where:

- federalism does not exist;
- there is no written constitution and Parliament’s sovereignty is unquestioned, as opposed to Australian sovereignty being vested in the written *Australian Constitution*;
- the *European Convention on Human Rights* provides rights that the UK is bound under that Convention to protect within its jurisdiction, and another (‘backstop’) forum for redress (the European Court of Human Rights);
- the voting and parliamentary conduct of members are not as delineated along political party lines as they are in Australia;
- it has yet to operate under a government that was hostile to its implementation.

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<sup>75</sup> House of Representatives Standing Committee on Legal and Constitutional Affairs, Parliament of Australia, *Access all areas: Report of the Inquiry into the Draft Disability (Access to Premises – Building) Standards* (2009) Recommendation 17.

<sup>76</sup> The Hon Robert McClelland MP, Federal Attorney-General, and the Hon Stephen Smith MP, Minister for Foreign Affairs, ‘Australia takes action against torture’ (Media Release, 22 May 2009).

Therefore, while PIAC supports the creation of a statutory framework that provides human rights protection for everyone across Australia, it does not endorse a particular model for a Human Rights Act. Rather, PIAC, in this submission, identifies features of various models that are essential for a strong and effective human rights framework in Australia.

PIAC is also wary of a repeat of the experience of the 1999 republic referendum where, despite the majority of Australians wanting Australia to become a republic, disagreement over the adoption of a particular republican model ultimately led to a failure to establish an Australian republic.

PIAC does not want to see the goal of protecting and promoting human rights in Australia through a Human Rights Act denied as a result of disagreement over the particulars of the models that may be implemented. This situation could be avoided if the Australian Government determines that it will proceed with the development and implementation of a Human Rights Act and then, as is done with any other legislation, having identified the features of that Act leave it to Parliamentary counsel or the Federal Attorney-General's department to draft the legislation that best achieves those features. Once drafted, the framework would be put out for public consultation before being finalised and introduced into Parliament. This has been the approach taken in other fields, such as in the national energy market, freedom of information reforms, and privacy law.

### **4.3 Responsibilities**

#### **(a) Individuals and the rights and responsibilities debate**

Human rights come coupled with corresponding responsibilities in the sense that the ability to exercise one's human rights is balanced against everyone else's ability to exercise their rights. These responsibilities arise from the exercising of human rights and should not be legally enforceable in themselves. They also should not be considered as establishing behaviour necessary to unlock access to rights, for example the recognition of human rights should not be preconditioned on the performance of certain responsibilities. Any other approach to human rights would result in some people not being afforded rights because of their personal incapacity through, for example, severe intellectual disability. This is completely inconsistent with the underlying principle of human rights articulated so forcefully in the opening paragraph of the preamble to the *Universal Declaration of Human Rights* and reiterated in each of the human rights treaties including most recently the *Convention on the Rights of Persons with Disabilities*:

Whereas recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world,<sup>77</sup>

RECALLING the principles proclaimed in the *Charter of the United Nations* which recognize the inherent dignity and worth and the equal and inalienable rights of all members of the human family as the foundation of freedom, justice and peace in the world.<sup>78</sup>

There are clearly people in the community, including within the legislature, who believe that rights should be preconditioned particularly in relation to the rights of prisoners, alleged offenders and, for example, of asylum seekers and other non-citizens. However, it is PIAC's submission that the international human rights framework provides the appropriate limits on rights through, for example, recognition of the sovereignty of Nations States and the need for governments to be able to punish offenders, including by limiting their freedom.

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<sup>77</sup> *Universal Declaration of Human Rights* (1948) preamble.

<sup>78</sup> *Convention on the Rights of Persons with Disabilities*, above n20, preamble (a).

Rather than in the specific provisions of the Human Rights Act, PIAC believes that reference to the responsibilities that we all have to others in the community, particularly in regard to respecting the human rights of others, would be most appropriately made in a preamble or objects provision of the Act, where it can be articulated that the exercising of human rights requires respect for and taking care not to infringe other people's human rights.

### **(b) Who should be bound by human rights law**

PIAC submits that the Human Rights Act should be binding on all levels of government and all branches of government as well as on corporate entities. While the primary focus of human rights law has traditionally been on limiting the rights-infringing conduct of governments, this approach tended to reflect the fact that it was governments that had the greatest capacity to impair rights. Unfortunately, this situation is changing with the increasing power and capacity of private corporations to impact on human rights.

PIAC notes that it is not unusual for human rights laws to bind non-state actors, such as corporations. The key human rights legislation already in place in Australia—anti-discrimination law and privacy law—does precisely this. In enacting those pieces of human rights legislation that bind not only the Commonwealth government, but also state and territory governments and private corporations, the Federal legislature has recognised that many outside the federal government can and do infringe rights and those affected by such infringements ought to be able to prevent the infringement continuing and obtain an appropriate remedy for such infringements.

PIAC notes that the *Privacy Act 1988* (Cth) provides an interesting model for introducing human rights obligations progressively over time. When it was first introduced, the Act applied only to government. Then, in 2001, the Act was extended in its application to the private sector. However, that application was limited, exempting some small businesses with annual turnover of less than \$3 million. The recent review of privacy legislation in Australia conducted by the Australian Law Reform Commission recommended the removal of this exemption.<sup>79</sup>

Human rights principles could also be included in business principles, in the same way occupational health and safety, and equal employment opportunity principles are included, so that it becomes a condition of employment that employees consider Human Rights principles as part of their employment duties.

PIAC is also concerned to ensure that people across Australia should have equal protection of all human rights irrespective of the state or territory in which they live. Unless the Human Rights Act applies to the conduct of state and territory governments, only limited aspects of human rights will be effectively protected for people living anywhere other than Victoria and the ACT. (This is because many of the key services to the community are provided at the state or territory level of government.) PIAC notes that under its proposal, the rights protected would be more extensive than those protected under the Victorian and ACT legislation and, as such would extend the protection of rights in those jurisdictions also. PIAC recommends that the Human Rights Act be drafted to permit the continuing operation of the human rights laws in both Victoria and the ACT as well as the continued operation of the anti-discrimination laws of each of the states and territories and the commonwealth. The Human Rights Act should be permitted to operate to provide additional human rights protection and enhance already existing protections under these laws. This arrangement already exists in relation to the operation of federal anti-discrimination legislation alongside state and territory anti-discrimination legislation. An example of this is found in the *Disability Discrimination Act 1992* (Cth):

### **13. Operation of State and Territory laws**

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<sup>79</sup> Australian Law Reform Commission, *For your information: Australian Privacy Law and Practice - Report* (2008) recommendation 39-1, 53.

...

- (2) A reference in this section to a law of a State or Territory is a reference to a law of a State or Territory that deals with discrimination on the grounds of disability.
- (3) This Act is not intended to exclude or limit the operation of a law of a State or Territory that is capable of operating concurrently with this Act.

PIAC notes in conclusion that, as with federal anti-discrimination laws, the Federal legislature has power to legislate to this extent under the external affairs power in section 52(xxix) of the *Constitution*.

## 4.4 Rights bearers

### (a) The rights of individuals

A Human Rights Act should protect all natural persons who are subject to Australian law. This approach is consistent with Australia's obligations under international law. In its General Comment No 15, the Human Rights Committee stated that

2. ... the general rule is that each one of the rights of the Covenant must be guaranteed without discrimination between citizens and aliens. Aliens receive the benefit of the general requirement of non-discrimination in respect of the rights guaranteed in the Covenant, as provided for in article 2 thereof. This guarantee applies to aliens and citizens alike. Exceptionally, some of the rights recognized in the Covenant are expressly applicable only to citizens (art. 25), while article 13 applies only to aliens...

...

5. The Covenant does not recognize the right of aliens to enter or reside in the territory of a State party. It is in principle a matter for the State to decide who it will admit to its territory. However, in certain circumstances an alien may enjoy the protection of the Covenant even in relation to entry or residence, for example, when considerations of non-discrimination, prohibition of inhuman treatment and respect for family life arise.

6. Consent for entry may be given subject to conditions relating, for example, to movement, residence and employment. A State may also impose general conditions upon an alien who is in transit. However, once aliens are allowed to enter the territory of a State party they are entitled to the rights set out in the Covenant.

7. Aliens thus have an inherent right to life, protected by law, and may not be arbitrarily deprived of life. They must not be subjected to torture or to cruel, inhuman or degrading treatment or punishment; nor may they be held in slavery or servitude. Aliens have the full right to liberty and security of the person. If lawfully deprived of their liberty, they shall be treated with humanity and with respect for the inherent dignity of their person. Aliens may not be imprisoned for failure to fulfill a contractual obligation. They have the right to liberty of movement and free choice of residence; they shall be free to leave the country. Aliens shall be equal before the courts and tribunals, and shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law in the determination of any criminal charge or of rights and obligations in a suit at law. Aliens shall not be subjected to retrospective penal legislation, and are entitled to recognition before the law. They may not be subjected to arbitrary or unlawful interference with their privacy, family, home or correspondence. They have the right to freedom of thought, conscience and religion, and the right to hold opinions and to express them. Aliens receive the benefit of the right of peaceful assembly and of freedom of association. They may marry when at marriageable age. Their children are entitled to those measures of protection required by their status as minors. In those cases where aliens constitute a minority within the meaning of article 27, they shall not be denied the right, in community with other members of their group, to enjoy their own culture, to profess and practise their own religion and to use their own language. Aliens are entitled to equal protection by the law. There shall be no discrimination between aliens and citizens in the application of these rights. These rights of aliens may be qualified only by such limitations as may be lawfully imposed under the Covenant.

8. Once an alien is lawfully within a territory, his freedom of movement within the territory and his right to leave that territory may only be restricted in accordance with article 12, paragraph 3. Differences in treatment in this regard between aliens and nationals, or between different categories of aliens, need to be justified under article 12, paragraph 3. Since such restrictions must, inter alia, be consistent with the other rights recognized in the Covenant, a State party cannot, by restraining an alien or deporting him to a third country, arbitrarily prevent his return to his own country (art. 12, para. 4).<sup>80</sup>

PIAC notes that this extent of coverage was generally supported by people who participated in PIAC's consultation processes.

### **(b) The rights of non-human legal persons**

A Human Rights Act would seek to protect human dignity. For this reason, PIAC does not support measures that allow non-humans entities to claim human rights protection. Non-human entities, such as corporations, are generally able to pursue remedies through other legal avenues, for instance, by exercising their rights as a legally recognised (non-human) person.

However, this does not prevent non-human entities from being subject to human rights laws as discussed above in section 4.3(b).

## **4.5 The involvement of government**

With the aim of improving the quality and accountability of government, a Human Rights Act would place obligations on all three branches of government and all levels of government. This is consistent with the obligations Australia has as a party to international human rights law. In its General Comment 31 in respect of the ICCPR, the Human Rights Committee stated:

The obligations of the [ICCPR] in general and article 2 [obligations on State Parties and the equality right] in particular are binding on every State Party as a whole. All branches of government (executive, legislative and judicial), and other public or governmental authorities, at whatever level - national, regional or local - are in a position to engage the responsibility of the State Party.<sup>81</sup>

It is important that any developments in the area of human rights protection in Australia ensure that each branch and level of government has a proper role to play in the protection, promotion and fulfilment of human rights, consistent with its constitutional role.

### **(a) The role of the judiciary**

PIAC believes that the appropriate role of the courts under a Human Rights Act would be to interpret the provisions of the Act and adjudicate conduct or actions in respect of consistency with those provisions. Importantly the courts should also provide a forum for a complainant to seek redress from having their human rights violated.

By applying its interpretation of the Human Rights Act to the facts of a particular case, the court's role would be no different from the role of the courts under other laws or as interpreters of other legislation.

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<sup>80</sup> Human Rights Committee, *General Comment No. 15: The position of aliens under the Covenant*, [2-3, 5-8] 11/04/86 CCPR General Comment No 15 (General Comments) (1986).

<sup>81</sup> Human Rights Committee, *General Comment No. 13*, above n72.

## **(b) The role of the legislature**

PIAC submits that it is vital that the legislatures be required to consider the human rights impact of legislation as part of the public parliamentary debate. As noted above, PIAC believes this will only be genuinely and consistently achieved if the legislature is required to expressly deal with any incompatibility and, if it determines it is in the public interest to do so, to expressly permit that incompatibility to stand on the face of the legislation. Anything less than this will allow legislatures to simply pay lip service to the analysis of human rights impacts. PIAC refers to the section of this submission above on the operation of the Senate Standing Committee on the Scrutiny of Bills, to the NSW Charter Group's submission in respect of the operation of the NSW Joint Legislation Review Committee<sup>82</sup> and to the emerging evidence in Victoria that statements of compatibility are being given in respect of proposed legislation that external commentators and the relevant parliamentary committee view as incompatible.<sup>83</sup>

## **(c) The Role of the Executive**

Given the critical role that the Executive plays in the development of policy and programs and the delivery of programs and services, it is vital that it have a clear role and obligations under the Human Rights Act. This should include being responsible for ensuring that all policies, programs and services are developed and delivered consistent with human rights. To achieve this, all aspects of the Executive need to understand human rights and particular areas within the Executive will need to understand the specific application of human rights to their area of responsibility and particular groups they work with or provide services to.

In addition, PIAC recommends two additional functions:

- public consultations on impacts of current and proposed policies, programs and services on human rights; and
- public reporting on an annual basis of the impact of human rights on current and proposed policies, programs and services.

PIAC believes that both are important and necessary to avoid the current situation that appears to exist in both Victoria and the ACT, as well as in the UK, in relation to lack of community awareness of the positive impacts of human rights protection on the workings of government. In its dealings with community workers and members of the general public in both the ACT and Victoria, PIAC has repeatedly been told that the human rights laws have 'made no difference'. On further enquiry, this appears to reflect a lack of public awareness of the internal impacts of the legislation rather than reflecting an actual lack of impact. Many working specifically in human rights would deny this lack of impact, and because they are personally aware of the impacts may discount the importance of such a view being held. PIAC is concerned however to ensure that human rights law makes and is seen to make a tangible difference to everyone in the community and this can only be achieved if the general community is engaged with and informed of changes resulting from human rights law.

In PIAC's view, the role of the specialist human rights component of the Executive—the Australian Human Rights Commission— requires separate consideration. This is dealt with below.

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<sup>82</sup> NSW Charter Group, above n40.

<sup>83</sup> See, for example, the analysis of the Crimes Amendment (Identity Crime) Bill 2009 (Vic) provided by the Human Rights Law Resource Centre in its most recent bulletin, which indicates that the statement of compatibility is not consistent with the views of the Scrutiny of Acts and Regulations Committee: Charlotte Beeny, 'Victorian Charter of Rights Developments: Statements of Compatibility under the Victorian Charter' (2009) 38 *HRLRC Bulletin*.

#### **(d) The role of the Australian Human Rights Commission**

PIAC believes that the Australian Human Rights Commission (the Commission) as the national human rights institution for Australia should have a central role in respect of improved human rights protection. This will build on its already extensive expertise in human rights and its capacity to work with similar institutions in other overseas jurisdictions to identify best practice mechanisms for the protection, promotion and fulfilment of human rights.

To this end, PIAC recommends that the Human Rights Act specifically amend the *Human Rights and Equal Opportunity Commission Act 1986* (Cth) to:

- (a) replace the existing generalist human rights jurisdiction with a provision empowering the Commission to receive and investigate complaints of breaches of the human rights set out in the Human Rights Act, attempt to achieve resolution of those complaints and, where resolution is not possible, terminate the complaint to enable the complainant to commence court proceedings;
- (b) provide the Commission with the power to investigate human rights breaches at large and bring complaints where there is a systemic human rights issue identified without the need for an individual complaint; and
- (c) enable the Commission to be engaged by other parts of government (including other parts of the executive) to provide expert advice on human rights impacts and considerations.

#### **4.6 Other measures**

PIAC appreciates that the full protection and promotion of human rights in Australia is a long-term goal. In the short term, PIAC believes there are a number of amendments to existing legislation that can take place immediately in order to promote and protect human rights. These amendments would become crucial/vital in the event that the Australian Government does not enact a Human Rights Act.

PIAC recommends the following measures be implemented:

- Amendment to the *Marriage Act 1961* (Cth) to permit same-sex marriage.
- Federal anti-discrimination legislation be enacted to prohibit discrimination on the basis of sexuality.
- Federal anti-discrimination legislation be enacted to prohibit discrimination on the basis of religious belief (such as is prescribed under section 16 of the *Anti-Discrimination Act 1998* (Tas)).
- Amendment to the *Migration Act 1958* (Cth) so that it conforms with the recommendations made by the United Nations High Commission for Refugees.
- Repeal of section 132 of the *Northern Territory National Emergency Response Act 2007* (Cth) to allow the application of the *Racial Discrimination Act 1974* (Cth).
- A review of the laws relating to terrorism to remove those aspects of those laws that unjustifiably infringe human rights in Australia, particularly in relation to arbitrary detention, rights to privacy and rights to a fair trial.

#### **4.7 Concluding remarks**

PIAC reiterates its congratulations to the Federal Government for implementing the current consultation and to the Panel for its work nationally in conducting its inquiries.

PIAC urges the Consultation Panel and the Government to take the opportunity afforded by such broad engagement with the people of Australia to create a new way forward for human rights, not only for Australia but globally. The fact that Australia has been slow to adopt formal human rights protection can be turned into an advantage as it provides the opportunity to learn from the best and worst of experiences across the

world. It also provides Australia with the opportunity to be at the forefront of the next generation of human rights protection.

This is an extraordinary opportunity for Australia to be an international leader in realising rights for all.