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Submission to the Consultation Committee for a Proposed

Western Australian Human Rights Act

August 2007

FOSTERING A HUMAN RIGHTS CULTURE

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PART A – SUMMARY AND RECOMMENDATIONS

1.1 Introduction

The Human Rights Law Resource Centre Ltd (***HRLRC***) aims to promote and protect human rights in Australia through policy development, litigation and education.

This submission is made by the HRLRC in response to the questions raised by the Government of Western Australia 2007 discussion paper, *WA Human Rights Act: Human Rights for WA Discussion Paper* (***Discussion Paper***). The structure of this submission corresponds with the principal questions raised in the Discussion Paper.

1.2 Why a Human Rights Act?

The HRLRC strongly supports the introduction of a Western Australian Human Rights Act (the ***Human Rights Act***). Australia is the only Western democracy without a national human rights instrument. In the absence of a unified and dedicated Commonwealth human rights law, State and Territory governments have begun to introduce laws for the protection of human rights at State and Territory level. Further, the Federal Opposition has indicated that, if it wins office in the 2007 election, it intends to begin consultation on a Commonwealth human rights instrument.

Introducing the Human Rights Act will enhance Western Australia's democracy. It will provide a yardstick by which to measure the performance of all levels of government, the courts and the community. It will also assist disadvantaged people, who are more likely to deal directly with the public service.[1] New laws, policies and public programs will be measured against the Human Rights Act to ensure that human rights are safeguarded. Government departments and agencies will have to consider the impact that their day-to-day operations are likely to have on human rights. In this way, the 'ordinary citizen can have a check on the government when it comes to their rights'.[2]

The experience in comparative jurisdictions such as the United Kingdom, the Australian Capital Territory and, most recently, Victoria is that the introduction of legislative human rights instruments (***Charters***) have a significant impact on public sector culture, improving the community's experience of Government. Some of the benefits ascribed to Charters include:

- a 'significant, but beneficial, impact on the development of policy';
- enhanced scrutiny, transparency and accountability in government;
- better public service outcomes and increased levels of 'consumer' satisfaction as a result of more participatory and empowering policy development processes and more individualised, flexible and responsive public services;
- 'new thinking' as the core human rights principles of dignity, equality, respect, fairness and autonomy can help decision-makers 'see seemingly intractable problems in a new light';
- the language and ideas of rights can be used to secure positive changes not only to individual circumstances, but also to policies and procedures; and
- awareness-raising, education and capacity building around human rights can empower people and lead to improved public service delivery and outcomes.[3]

1. Former National Native Title Tribunal deputy president Fred Chaney, *The West Australian*, page 6 (Friday, 4 May 2007).
2. Attorney-General Jim McGinty, Comment, *Sunday Times Perth*, page 74 (Sunday, 13 May 2007).
3. See generally, Department for Constitutional Affairs (UK) (the ***DCA***), *Review of the Implementation of the Human Rights Act* (July 2006) (the ***DCA Review***); British Institute of Human Rights, *The Human Rights Act: Changing Lives* (2007); Audit Commission (UK), *Human Rights: Improving Public Service Delivery* (October 2003).

Charters have effectively dissuaded Governments from unreasonably curtailing human rights.[4] Charters operate to open Governments' eyes to human rights breaches that may otherwise be overlooked.

The Human Rights Act will constitute an historic leap forward for the protection of human rights in Western Australia. It will demonstrate Western Australia's commitment to improving social justice and fairness, particularly for the disadvantaged, and display a commitment to Australia's international human rights obligations.[5] The introduction and operation of the Human Rights Act will also confer on Western Australia a body of knowledge and experience that will place it in a position of influence in the development of any Commonwealth Charter.

Australia's ratification of the International Covenant on Civil and Political Rights (***ICCPR***) and the International Covenant on Economic, Social and Cultural Rights (***ICESCR***) has created international law obligations that require all arms of the federal system – including Western Australia's Government (legislature, executive and judiciary) – to act to respect, protect and fulfil human rights.

The Human Rights Act will foster a society that values and respects human rights and social justice – a society that will be inherited by future generations of Western Australians.

1.3 Which rights should be protected?

Human rights are interdependent. Their recognition and protection should not be artificially separated. For example, realisation of the right to education (a social right) is essential for the meaningful exercise of the right to participate in public affairs (a political right).

The HRLRC urges the inclusion of all fundamental human rights in the Human Rights Act – all civil and political rights as well as economic, social and cultural rights. The protection of the rights contained in the ICESCR (***ESC Rights***) can be incorporated into the Charter in a workable way and could operate comfortably alongside the protection of the civil and political rights contained in the ICCPR (***CP Rights***).

1.4 A workable model

This submission sets out a workable model for the Human Rights Act. The HRLRC's model retains the sovereignty of Parliament. Policy and budget decisions remain the domain of Western Australia's elected representatives. The HRLRC model does not empower courts to either strike down laws validly made by Parliament or make decisions as to the proper allocation of resources by public authorities.

Instead, the proposed model uses processes designed to ensure that human rights are given the fullest possible consideration in the development and implementation of legislation and policy. The Western Australian Parliament will have to consider the rights protected by the Human Rights Act (***Protected Rights***) in its day to day legislative work. The Human Rights Act will lay the foundations for a culture in which all the human rights of Western Australians are taken into account as a matter of course.

However, it is also important for the Human Rights Act to provide individuals with direct means of redress for overt breaches of CP Rights. The HRLRC considers that the respect, protection and fulfilment of ESC Rights can be pursued without exposing Government to liability for its allocation of scarce resources.

4. Attorney-General Jim McGinty, Comment, *Sunday Times Perth,* page 74 (Sunday, 13 May 2007).
5. Discussion Paper, 13.

The Human Rights Act will not create a torrent of human rights-based litigation. The Human Rights Act will instil a broad understanding of the effects of Government actions upon the rights of individuals through education rather than coercion. The early anti-litter campaigns of the 1970s and the present-day water conservation campaigns have contributed to the broad understanding across Australian society that it is in our own best interests to dispose of our litter thoughtfully and to use water carefully. Similar progress can be made in the field of human rights through concerted education and training efforts, underwritten by positive, enforceable obligations in the Human Rights Act.

A successful Human Rights Act relies upon adequate resources and commitment given to training, education and the dissemination of accurate human rights information. This can limit the negative impact that any misperceptions in the media and the general public might have on an otherwise successful implementation of the Human Rights Act.[6]

The introduction of the Human Rights Act is an opportunity to breathe local life into the realisation of Australia's international human rights obligations.

1.5 Protecting and promoting ESC Rights

Western Australia has the opportunity to introduce Australia's most comprehensive and progressive Charter - providing a model for others to adopt. Simply replicating the Charters passed elsewhere would be an opportunity lost. Western Australia has an opportunity to learn from and build upon the work done elsewhere and should seize the opportunity to lead the world in pioneering a practical way of incorporating ESC Rights into domestic Charters.

Victoria and the ACT have both expressed the intention to consider the inclusion of ESC Rights in their respective Charters, but one of the main concerns expressed has been the lack of 'mature domestic jurisprudence on [ESC Rights]' and 'no objective indicator of when they are achieved'.[7] The HRLRC model for introducing ESC Rights protection represents a middle ground that will create a body of knowledge on which to base future reviews of ESC Rights in domestic Charters.

1.6 Recommendations

Recommendation 1

The Western Australian Parliament should enact legislation for the protection of human rights in the form of a Human Rights Act.

Recommendation 2

The Human Rights Act should provide for the protection of all rights included in the ICCPR and ICESCR.

Recommendation 3

The Human Rights Act should protect the human rights of individuals, not corporations, save for the right to self-determination, which protects peoples.

6. The DCA Review includes examples of the sorts of myths and misperceptions which have surrounded the *Human Rights Act 1998* (UK) (U***K Act***). The DCA Review is available at www.dca.gov.uk/peoples-rights/human-rights/pdf/full_review.pdf.

7. ACT Department of Justice and Community Services (the ***DJCS***), *Human Rights Act 2004* (the ***ACT Act***) – *Twelve-Month Review – Report* (2006) (the ***ACT Review***), 40.

Recommendation 4

(a) The Human Rights Act should provide that certain rights are absolute and not subject to derogation, restriction or limitation. Absolute rights should include (without limitation):

- the right to life;
- the right to freedom from torture and other cruel, inhuman or degrading treatment or punishment;
- the right to freedom from slavery or forced labour;
- the right not to be imprisoned for a contractual debt;
- freedom from retrospective criminal punishment;
- the right to recognition as a person before the law;
- freedom of thought, conscience and religion;
- the right of persons deprived of liberty to be treated with humanity and with respect for the inherent dignity of the human person;
- the prohibition against taking of hostages, abductions or unacknowledged detention;
- the prohibition against incitement to discrimination, hostility or violence; and
- the obligation to provide access to effective remedies for breaches of human rights.

(b) The Human Rights Act should provide that any limitations on non-absolute human rights must be:

- compatible with the objects and purposes of the Human Rights Act;
- provided for by law;
- not arbitrary or unreasonable;
- compatible with the right to non-discrimination;
- necessary and demonstrably justifiable, which requires that it:
    - is based on one of the grounds which permit limitations (namely, public order, public health, public morals, national security, public safety or the rights and freedoms of others);
    - responds to a pressing need;
    - pursues a legitimate aim;
    - is proportionate and reasonably adapted to that aim; and
    - is the least restrictive means reasonably available to achieve the purpose that the limitation seeks to achieve.

Recommendation 5

The Human Rights Act should be in a legislative form.

Recommendation 6

The Human Rights Act should adopt the dialogical model.

Recommendation 7

In relation to Parliament, the Human Rights Act should provide:

(a) members introducing Bills into Parliament should provide reasoned statements as to the compatibility of the legislation with Protected Rights;

(b) an independent parliamentary committee, properly resourced, should be responsible for reviewing all Bills for compatibility with Protected Rights;

(c) the Minister responsible for legislation must respond to any Declarations of Incompatibility issued by the Supreme Court within 6 months;

(d) a writ of mandamus should be available against a Minister where Parliament has failed to respond to a Declaration of Incompatibility within 6 months; and

(e) Parliament should not be given the ability to expressly override Protected Rights in later legislation.

Recommendation 8

In relation to the role of the courts, the Human Rights Act should provide:

(a) all legislation should be interpreted and applied, including if necessary read up or down, in a manner compatible with Protected Rights;

(b) the Human Rights Act should provide for the Western Australian courts to refer to international and comparative jurisprudence when interpreting Protected Rights; and

(c) where a human rights compatible interpretation is not possible, the Western Australian Supreme Court should be empowered to make Declarations of Incompatibility.

Recommendation 9

(a) The entities bound by the Human Rights Act should be broadened to 'public authorities', encompassing all entities which exercise functions of a public nature (whether or not they are government agencies), insofar as they are exercising those functions.

(b) All public authorities should be required to:

- act in a manner that is compatible with Protected Rights; and
- give proper consideration to Protected Rights when making decisions.

(c) The Human Rights Act should require the development of executive policies and practises that promote protection of Protected Rights, including human right audits, reporting and action plans.

Recommendation 10

The Human Rights Act should provide the following remedies for breaches of CP Rights:

- a declaration or 'statement' that a law, policy or program is incompatible with human rights and requiring government to respond to this incompatibility;
- a declaration or order that a law, policy or program be implemented in accordance with human rights;
- an injunction, declaration or order that conduct or activity amounting to a breach of human rights be stopped;
- damages, compensation and reparations; and
- such other remedies as are just, appropriate and equitable.

Recommendation 11

A complaints procedure should be implemented to respond to allegations of breach of ESC Rights.

Recommendation 12

The Human Rights Act should confer standing on the following individuals and groups:

- any person or organisation aggrieved or directly affected by the matter;
- any person or organisation with a 'special interest' in the matter;
- any person or organisation intervening in the public interest; and
- any person or organisation acting for or on behalf of an individual or group that is unable to bring proceedings on their own behalf.

Recommendation 13

Western Australia should have a well-resourced Human Rights Commissioner with powers and functions including:

- human rights complaints handling and conciliation;
- the preparation of annual reports on compliance with the Human Rights Act for forwarding to the Attorney-General and then tabling in Parliament;
- reviewing the practices of public authorities for compliance with the Human Rights Act;
- making submissions to relevant legislative committees about the implications of proposed legislation on Protected Rights; and
- developing education programs to promote the acceptance of, and compliance with, the objectives of the Human Rights Act.

Recommendation 14

The Western Australian Government should ensure that adequate resources are provided to:

- a new Human Rights Commission, whether as part of the Equal Opportunity Commission or another similar body;
- the WA Legal Aid Commission;
- community legal centres; and
- other human rights and community organizations,

to enable them to provide targeted, accessible and adequate human rights education, information and legal services.

Recommendation 15

The Human Rights Act should be reviewed after four years and thereafter at 5 year intervals. The review should be conducted with the active and resourced participation of all stakeholders and should consider:

- the effectiveness of the Charter in respecting, protecting and fulfilling Protected Rights;
- whether further rights need to be included in the Act;
- whether judicial remedies should be available for breach of ESC Rights; and
- any special measures or strategies to promote and protect the human rights of vulnerable groups.

1.7 About the Human Rights Law Resource Centre Ltd

The HRLRC is the first national specialist human rights law centre in Australia. It aims to promote human rights in Australia – particularly the human rights of people who are disadvantaged or living in poverty – through the practice of law. The HRLRC's activities include human rights casework, litigation, policy analysis and advocacy, education, training and research.

The HRLRC has a significant and diverse body of stakeholders represented in its membership and the composition of both its Board and Advisory Committee. The HRLRC's stakeholders include community legal centres, legal aid, a number of major commercial law firms, legal professional associations, a number of university law schools, and a range of local, state, national and international non-government organisations.

This submission has been developed in consultation with many of these stakeholders but does not necessarily represent the views of any individual stakeholder.

PART B – RESPONSES TO QUESTIONS IN THE DISCUSSION PAPER

1. Question 1 Should Western Australia have a Human Rights Act?

1.1 Does the law need to be changed?

The HRLRC recognises that, currently, human rights are safeguarded to some extent in Western Australia through some statutory and common law protections. However, the legal protection of human rights in Western Australia (as it is throughout most of Australia) is not comprehensive. Many basic rights remain unprotected or are haphazardly covered by an assortment of laws.

Australia's ratification of the ICCPR and the ICESCR has created international law obligations that require all arms of the federal system – including Western Australia's Government (legislature, executive and judiciary) – to act to respect, protect and fulfil human rights.

Human rights are significant rights and freedoms that are recognised as belonging to everyone in the community. They include the right to be free from discrimination, freedom of speech, freedom of religion, the right to vote and the right to a fair trial. Human rights are about the fair treatment of all people and they enable people to live lives of dignity and value. As Australia grows and develops, governments at all levels are called upon to deal with an increasing number of complex issues and to address a wide range of problems. As governments respond to these issues and demands, many people feel that they are losing some of the freedoms they have enjoyed in the past.[8]

Many Western Australians enjoy, and expect to continue to enjoy, their rights and freedoms without considering the need for the express protection of those rights and freedoms under Western Australian law. However, more can, and should, be done to protect the human rights of Western Australians. The Australian Constitution and the common law do not comprehensively recognise or protect the fundamental human rights of Western Australians, and existing State and Commonwealth laws provide only fragmented human rights protection.[9]

The Human Rights Act will be a unified, clear and unambiguous statement of Western Australia's commitment to the protection of human rights. It will encourage a new 'rights aware' way of doing things, creating a:

> culture of human rights in this State in which there is greater awareness of, respect for, and observance of, human rights at all levels of government and throughout the community.[10]

8. Discussion Paper, 8.
9. Discussion Paper, 10.
10. Ibid, 1.

1.2 Should Western Australia have a Human Rights Act?

The HRLRC considers that, due to the fragmented protection of human rights, the Human Rights Act is essential to the continuation and enhancement of Western Australia's healthy democracy.

Human rights are fragile. While many Western Australians may believe that formal equality is afforded to each citizen, the reality for many disadvantaged and vulnerable groups and individuals is very different. The Human Rights Act will be a big step toward reconciling the reality and the ideal.

(a) Current protections

Western Australians currently enjoy the recognition and protection of some of their human rights through specific legislation such as the *Equal Opportunity Act 1984* (WA).[11] However, there is no comprehensive statement of rights in Western Australia which operates as a minimum standard for the protection of human rights, having general application and to which all public authorities must adhere.[12] Such a statement is necessary to prevent the breach of any Western Australian's rights from slipping through the gaps that exist in the current patchwork of laws and protections.

(b) Value and utility of legal protection of human rights

The benefits of introducing a Human Rights Act can be seen from the experience of the UK following the implementation of the *Human Rights Act 1998* (UK) (the ***UK Act***). In July 2006, the UK Department for Constitutional Affairs (the ***DCA***) released the *Review of the Implementation of the Human Rights Act* (the ***DCA Review***), which reviewed the first five years of the UK Act. According to the DCA Review, the UK Act has had a significant influence and conferred a range of benefits including the following:

(i) the process for ensuring compatibility with human rights has been formalised and clarified, improving transparency and parliamentary accountability, and establishing a dialogue between the judiciary and Parliament;

(ii) by requiring that policy makers consider the needs of all members of the population, the UK Act has led to better policy outcomes and enhanced the provision of public services;

(iii) breaches of human rights can now be more formally litigated, which in turn gives rise to changes in policy formulation and delivery; and

(iv) public authorities have undergone a change in culture and behaviour to take account of the impact of their actions on human rights, particularly in the shift away from inflexible or blanket policies.

It is also noteworthy that the DCA Review concluded that the UK Act has had 'no significant impact' on the UK Government's ability to fight crime, and that difficulties experienced in relation to anti-terrorism legislation stem from decisions not of the UK courts under the UK Act, but of the European Court of Human Rights.[13]

A recent report published by the British Institute of Human Rights, entitled *The Human Rights Act – Changing Lives*[14] analyses 15 case studies and highlights how, after only seven years of operation, the UK Act is making a significant and positive change to a wide cross-section of the community. The report provides a glimpse of how a culture of respect for human rights, supported by a Human Rights Act, assists and protects marginalised or vulnerable individuals and groups 'to challenge poor treatment and, through this, to improve their own and others' quality of life'.[15]

11. Other laws containing provisions dealing with specific human rights in specific contexts include: *Criminal Procedure Act 2004* (WA), *Bail Act 1982* (WA), *Criminal Investigation (Identifying People) Act 2002* (WA), *Evidence Act 1906* (WA) and *Freedom of Information Act 1992* (WA).
12. Discussion Paper, 8.
13. DCA Review, 10-11.
14. http://www.bihr.org/downloads/bihr_hra_changing_lives.pdf.
15. Ibid.

One of the conclusions of the report is to highlight how governments and governmental authorities can use the potential of a Charter to tackle inequality and disadvantage in society, and to protect those members of the public who are disadvantaged most by the lack of legislative protection of basic human rights.

This point was reinforced by the then Lord Chancellor and Secretary of State for Constitutional Affairs, Lord Falconer, who said in his recent lecture at the Manchester University School of Law:[16]

> in the Human Rights Act we have a mechanism by which our values are given greater protection and greater status than at any other point in our history. Incorporating convention rights into our domestic legislation is an unprecedented step in the UK in terms of identifying, codifying and protecting a set of common values. Values that we all grew up with – but values that until the Act came into operation – in many instances we would have had to go to a court to enforce.[17]

Lord Falconer also stated that, while the thought of basic human rights being enjoyed by all members of the community was a novel idea, the fact is that unless these values are given legislative protection they are simply empty words and do not provide substantive protection for individuals against the violation of their rights.[18] Lord Falconer's comments about the importance of protecting common values are of equal relevance in Western Australia.

The experience in the ACT also supports the introduction of the Human Rights Act in Western Australia. The ACT Department of Justice and Community Services (the ***DJCS***) recently undertook a review of the first twelve months of operation of the ACT Act, and in June 2006 published its *Human Rights Act 2004: Twelve-Month Review – Report* (the ***ACT Review***).[19] The ACT Review said that, although it was too early to comment definitively on its substantive effects, '[i]t is clear that the [ACT Act] is achieving results within the Executive and Legislature'.[20] Results have included a 'marked increase in the awareness of human rights principles' at the executive level,[21] and the broader scrutiny of Bills from a human rights perspective.[22]

The Human Rights Act will promote public debate about the meaning of human rights and their application to public authorities. Referring to human rights awareness amongst members of the broader community, the ACT Review notes 'a small, but growing impact beyond government'.[23] Additionally, the passage of the ACT Act has led to the introduction of a variety of measures aimed at establishing a human rights culture in the public sector and throughout the community, including education and training initiatives, the development and promotion of websites and publications and the organisation of public forums.[24]

16. Speech, Lord Falconer of Thoroton, Manchester University School of Law http://www.dca.gov.uk/speeches/2007/sp070209.htm.
17. Ibid, 2.
18. Ibid, 3.
19. www.jcs.act.gov.au/HumanRightsAct/Publications/twelve_month_review.pdf.
20. ACT Review, 2.
21. The ACT Human Rights Commissioner made comments to this effect in her submission to the ACT Review, ibid, 13.
22. Ibid, 15, 53-4.
23. Ibid, 16.
24. Ibid, 34-5.

The ACT Review also notes that there had been no 'flood of litigation' as a result of the introduction of the ACT Act.[25] Addressing another commonly held concern, the ACT Review also comments that 'fears over the potential for judicial activism by way of rewriting existing legislation have proven to be unfounded'.[26] Similarly the UK experience is that the UK Act has not led to a discernible increase in litigation, nor to any judicial usurpation of legislative functions.

The UK and ACT experiences have demonstrated that many benefits flow from the adoption of Charters. The provision of a defined set of rights will not only promote human rights awareness in the community, but will also enhance government decision-making by providing a defined set of rights as a point of reference.[27] In the absence of a dedicated human rights instrument, the public is less able to clearly understand their rights and how those rights should be applied, and public authorities are not provided with clear guidance as to how to deliver their services in compliance with international norms of human rights protection.[28]

The Human Rights Act will enshrine the core standards of fairness which Government should meet. The Human Rights Act model recommended by the HRLRC will not create private human rights obligations between individuals. It will protect the rights of individuals in their relationship with the State. More than anything else, the Human Rights Act will create a foundation on which Western Australia can build a human rights culture.

1.3 What should the Act be called?

The HRLRC does not have a strong view on what the instrument should be called, but considers that *Human Rights Act* is most appropriate for the following reasons:

- an Act is a statutory instrument that may be amended, repealed or otherwise affected by a subsequent Act, thereby preserving parliamentary sovereignty;
- a 'Bill of Rights' may create the impression that the instrument is constitutionally entrenched;
- people are broadly familiar with Acts of Parliament and how they operate, but may be less aware of the status of a Charter;[29] and
- an Act will promote uniformity with other jurisdictions such as the ACT and UK.[30]

1.4 Recommendation

Western Australia should enact legislation for the protection of human rights in the form of a Human Rights Act.

25. Ibid, 11.
26. Ibid, 32.
27. See, eg: Victorian Human Rights Consultation Committee (the Victorian Committee), 'Human Rights Consultation Committee: Rights, Responsibilities and Respect', Department of Justice, Melbourne, November 2005, 10.
28. See, eg: Frances Butler (Institute for Public Policy Research), Human Rights: Who Needs Them? Using Human Rights in the Voluntary Sector (2004).
29. The Oxford English Dictionary (online) defines charter as 'a written document delivered by the sovereign or legislature granting privileges to, or recognizing rights of, the people or of certain classes or individuals' (eg the Magna Carta or 'Great Charter' of Freedoms).
30. Eg UK Act and the ACT Act.

2. Question 2 What rights should be protected in a WA Human Rights Act?

2.1 What rights should be protected?

The HRLRC strongly considers that all of the rights enshrined in the ICCPR and the ICESCR should be enshrined in the Human Rights Act.

There are three important reasons why the Human Rights Act should incorporate not only CP Rights, but also ESC Rights.

First, the enjoyment of many human rights is dependent or contingent on, or contributes to, the enjoyment of other human rights.[31] For example:

- meaningful exercise of the right to participate in public affairs requires access to information and realisation of the right to education;
- the right to privacy is largely illusory for homeless people who are forced to live their private lives in public space contrary to the right to adequate housing; and
- access to adequate health care, consistent with the right to the highest attainable standard of health, is necessary if a person is to remain able to exercise their rights to freedom of movement and association.

Reflecting this mutuality, the international human rights law framework recognises the 'crucial interdependence' of human rights.[32] International law provides that civil, political, economic, social and cultural human rights are universal, interdependent, interrelated and indivisible.[33]

The second point is that the arguments most frequently advanced for excluding ESC Rights from human rights instruments – namely, that they are resource contingent and the business of Parliaments rather than courts – do not apply to dialogical models of human rights protection. The model adopted in Victoria under the *Charter of Human Rights and Responsibilities Act 2006* (Vic) (the ***Victorian Charter***), for example, is particularly suited to the inclusion of economic and social rights, notwithstanding that such rights have not been included at this stage. Under the Victorian Charter, courts do not have the power to strike down legislation or order remedies sounding in damages. Instead, the Victorian Charter provides for the courts to enter into a dialogue with Parliament, through the issuance of a 'Declaration of Inconsistent Interpretation', about the compatibility of a law, policy or practice with the Victorian Charter. Parliament retains ultimate power to respond to such a declaration, including by making policy and resource allocation decisions, as it sees fit. The Victorian Charter also requires that, so far as possible, courts interpret and apply legislation consistently with human rights. Again, this is suited to the inclusion of ESC Rights. It is more appropriate and preferable, for example, that the courts interpret and apply residential tenancies legislation, so far as possible, consistently with the right to adequate housing than in a manner that is inconsistent with this fundamental human right.

31. Office of the United Nations High Commissioner for Human Rights (the ***OHCHR***), *Draft Guidelines: A Human Rights Approach to Poverty Reduction Strategies* (2002) 2–3.
32. Ibid.
33. Vienna Declaration and Programme of Action: Report of the World Conference on Human Rights, [5], [8], UN Doc A/CONF.157/23 (1993).

The argument that the inclusion of ESC Rights in the Human Rights Act would infringe on parliamentary sovereignty and involve the courts in resource allocation decisions that are properly the province of government is simplistic and misconceived. According to the United Nations Committee on Economic, Social and Cultural Rights (the ***CESCR***):

> It is sometimes suggested that matters involving the allocation of resources should be left to the political authorities rather than the courts. While the respective competences of the various branches of government must be respected, it is appropriate to acknowledge that courts are generally already involved in a considerable range of matters which have important resource implications. The adoption of a rigid classification of economic, social and cultural rights which puts them, by definition, beyond the reach of the courts would thus be arbitrary and incompatible with the principle that the two sets of human rights are indivisible and interdependent. It would also drastically curtail the capacity of the courts to protect the rights of the most vulnerable and disadvantaged groups in society.[34]

Similarly, Kirby J has contended:

> Arguments of inconvenience and potential political embarrassment for the Court should fall on deaf judicial ears ... This Court, of its function, often finds itself required to make difficult decisions which have large economic, social and political consequences.[35]

The jurisprudence developed by the South African Constitutional Court regarding disputes arising in respect of ESC Rights enshrined under the *South African Bill of Rights 1996* provides helpful guidance and insight into the role that Western Australian courts could properly play with respect to ESC Rights contained in a Western Australian Human Rights Act. Appropriately, the South African Constitutional Court has been 'slow to interfere with rational decisions taken in good faith by the political organs … whose responsibility it is to deal with such matters'.[36] The South African Constitutional Court has, however, been prepared to inquire into the issue of 'reasonableness' in determining the extent to which governments have acted or should act in respect of ESC Rights. According to the South African Constitutional Court in the *Grootboom Case*, which concerned the right to adequate housing:

> A court considering reasonableness will not enquire whether other or more desirable or favourable measures could have been adopted, or whether public money could have been better spent … It is necessary to recognise that a wide range of possible measures could be adopted by the state to meet its obligations. Many of these could meet the test of reasonableness.[37]

In a further decision, the *Treatment Action Campaign Case,* which concerned access to anti-retroviral drugs in accordance with the right to health, the South African Constitutional Court held that:

> Determinations of reasonableness may in fact have budgetary implications, but are not in themselves directed at rearranging the budgets. … All that is possible, and all that can be expected of the state, is that it act reasonably to provide access to the socio-economic rights.[38]

34. CESCR, *General Comment 9: The Domestic Application of the Covenant*, UN Doc E/C.12.1998/24 (1998) [10].
35. *Kartinyeri v Commonwealth* (1998) 152 ALR 540, 595-6.
36. *Soobramoney v Minister of Health, Kwa-Zulu Natal* (1997) 12 BCLP 1696, [29].
37. *Government of South Africa v Grootboom* [2001] 1 SA 46, [41].
38. *Minister of Health v Treatment Action Campaign* [2002] 5 SA 271, [38], [35].

The third key point in favour of the inclusion of ESC Rights is that the legislative recognition of the interdependence of human rights has substantial benefits so far as decision-making and policy design processes are concerned. By seeking to identify the various civil, political, social, economic and cultural factors that contribute to policy 'problems', the framework promotes a more sophisticated analysis of social issues in a way that captures their multidimensional and interrelated elements. Further, by focusing on the conditions and capabilities that people need to meaningfully participate in society, the framework promotes an integrated and holistic response to the problems identified. Recognition of the interdependence of CP Rights and ESC Rights encourages 'joined up solutions to joined up problems'.[39]

The HRLRC does acknowledge that there are a range of concerns that may be raised in relation to the justiciability of ESC Rights. In this respect, the ACT Review provides an excellent analysis of the issues surrounding the inclusion of ESC Rights in a domestic Charter.

The ACT Government accepted that, in principle, ESC Rights should have the same status as CP Rights,[40] but it decided not to incorporate them at the time of the review. The principal concerns expressed in the ACT Review were the following:[41]

- Including ESC Rights might require a high level of government resource commitment and entail resource allocation judgments.[42] The DJCS expressed the view that it is unclear how courts would deal with resource implications of their decisions.[43]
- Although ESC Rights are 'easily compatible with general common law principles, there [is] no mature comparative domestic jurisprudence ... and no objective indicator of when they are achieved'.[44]
- ESC Rights are not so easily adapted as the CP Rights to protection through the court process and are better recognised and protected through inclusion in a foundation planning document.[45]

However, the ACT Review does not reject the inclusion of ESC Rights, noting that the ACT Chief Minister had expressed the view that the decision not to include ESC Rights in the ACT Act at the time of the Act's twelve-month review, 'does not mean that [the ACT Government does] not consider these rights to be just as important as [CP Rights] and that he was committed to their inclusion in Government policy and planning and would 'explore ways in which this can be achieved.'[46] The ACT Review later cites Professor Tom Campbell, who suggested that ESC Rights be partially incorporated, so as to engage "mechanisms that place obligations on the actions of the ACT government", and Professor Bayne, who suggested that ESC Rights be 'brought into focus through the scrutiny process'.[47] Further, the ACT Review says of the Indian model, which employs non-justiciable 'directive principles', that its 'focus has been on ensuring that due process is followed before [ESC Rights] can be denied.'[48]

39. OHCHR, *Draft Guidelines: A Human Rights Approach to Poverty Reduction Strategies* (2002) 2, 4–5. See also Geoff Mulgan and Andrea Lee, *Better Policy Delivery and Design: A Discussion Paper (2001) and Mark Moore, Creating Public Value: Strategic Management in Governance* (1995) 10; Andrew Jones and Paul Smyth, 'Social Exclusion: A New Framework for Social Policy Analysis?' (1999) 17 *Just Policy* 11, 16.
40. ACT Review, 40.
41. The ACT Review considered a number of other issues on which it did not appear to come to any definitive conclusion.
42. Ibid n 40.
43. Ibid, 46.
44. Ibid. The ACT Review (at 42) considered that South African jurisprudence is of limited application to the ACT situation because 'the South African Constitution is a self-consciously transformative document' motivated by 'historical content' and the desire to address 'deep social inequalities' in South Africa.
45. Ibid, 45; quoting the *Submission 4* received by the DJCS from Professor Peter Bayne of the Australian Catholic University.
46. ACT Review, above n 7, 41.
47. Both of which are referred to in Ibid, 47.
48. Ibid 43.

It seems apparent, therefore, that the DJCS might have considered introducing some form of ESC Rights protection had a submission been received which proposed a viable alternative. In the absence of applicable jurisprudence indicating the likely treatment of these rights by the courts,[49] the 'all or nothing' suggestions received by the DJCS left it with little alternative but to opt for 'nothing' – or at any rate, nothing until it completes its five-year review. However, the HRLRC considers that it is unlikely that any comparative jurisprudence will have been created for the DJCS to consider in its five-year review while the only options considered by governments are either fully enforceable ESC Rights, or no inclusion of ESC Rights at all.

The HRLRC submits that a plunge into the deep end of full enforceability is unnecessary – the Western Australian Government need only dip a toe in the water.

The HRLRC's proposed solution is for the Human Rights Act to protect both CP Rights and ESC Rights but to create a two-tiered remedial regime. Breaches of rights by public authorities can be treated differently depending on whether the right is a CP Right or an ESC Right.[50] The HRLRC proposal provides for a free standing cause of action allowing individuals to commence proceedings for breaches of CP Rights, with the full range of remedies available. However, breaches of ESC Rights may only be the subject of complaints and administrative rather than judicial remedies. The complaints process ensures that public authorities are made aware of policies or procedures which are not compatible with ESC Rights. While the HRLRC has suggested that complaints handling be the responsibility of a Human Rights Commissioner, the role of the Commissioner in respect of ESC Rights is similar to that of an Ombudsman.

This model provides for ESC Rights to form a part of the Western Australian human rights structure from the outset, while avoiding the risks identified in the ACT Review. It will promote accountability and transparency in public authorities without creating liabilities, thus encouraging a culture in which ESC Rights will be taken into account. Just as importantly, however, the complaints process for ESC Rights will make a significant contribution to supplying the information, which is currently lacking, to determine how and when to take additional steps for the positive enforcement of ESC Rights.

The HRLRC has prepared simplified draft examples of how some of the relevant provisions might appear. These simple examples are included in Annexure 1 of this submission.

2.2 Whose rights should be protected?

The HRLRC considers that the Human Rights Act should protect the rights of human beings and not corporations. The exclusion of corporations is a reflection of the fact that human rights jurisprudence is concerned with the dignity and value of the lives of human beings. The ICCPR, the ICESR, the ACT Act and the Victorian Charter are all limited in their application to the rights of human beings.

The Canadian experience has shown that where human rights legislation protects the rights of both human beings and corporations, there can be detrimental effects on public health and safety. For example, a tobacco company was able to successfully challenge Canadian legislation that restricted the sale and advertising of tobacco products without a health warning using human rights legislation.[51]

One exception to the application of rights to individuals is the right to the self-determination. The HRLRC submits that the Human Rights Act should include a right to self determination, which should apply to peoples, rather than individuals.

49. Leaving aside the South African experience on the grounds that the powers of the courts under a constitutional Bill of Rights are far greater than would be the case under a legislative Charter.

50. The Declaration of Incompatibility provision (such as under s 33 of the Victorian Charter, s 32 of the ACT Act or s 4 of the UK Act) and the Interpretative Principles (such as under s 32(1) of the Victorian Charter and s 3(1) of the UK Act) should apply equally to ESC Rights and CP Rights.

51. *McDonald Inc v Canada* [1995] 3 SCR 199.

2.3 Should the rights be subject to limitation?

At international law, it is well established that some human rights are absolute while other human rights may be limited in certain circumstances and subject to certain conditions.

Absolute rights

Article 4(2) of the ICCPR provides that the following human rights are absolute and must not be subject to limitation or derogation:

- the right to life (art 6);
- the right to freedom from torture and other cruel, inhuman or degrading treatment or punishment
  (art 7);
- the right to freedom from slavery or forced labour (art 8);
- the right not to be imprisoned for a contractual debt (art 11);
- freedom from retrospective criminal punishment (art 15);
- the right to recognition as a person before the law (art 16); and
- freedom of thought, conscience and religion (art 18).

In *General Comment 29*, the United Nations Human Rights Committee (the ***UNHRC***) posited that, in addition to those rights identified in art 4(2), the following further rights may not be lawfully derogated because to do so would be inherently inconsistent with the ICCPR or because they have attained the status of peremptory norms of customary international law:

- the right of persons deprived of liberty to be treated with humanity and with respect for the inherent dignity of the human person (art 10);
- the prohibition against taking of hostages, abductions or unacknowledged detention;
- the prohibition against incitement to discrimination, hostility or violence (art 20); and
- the obligation to provide 'effective remedies' for breaches of human rights (art 2(3)).[52]

Similarly to the ICCPR, art 37(5) of the South African Bill of Rights provides that components of particular human rights are non-derogable, including in relation to:

- the right to equality;
- the right to human dignity;
- the right to life;
- the right to freedom and security of the person;
- certain children's rights; and
- certain rights of arrested, detained and accused persons.

52. UNHRC, *General Comment 29: States of Emergency (Article 4)*, UN Doc CCPR/C/21/Rev.1/Add.11 (2001) [14]–[16].

Permissible limitations

International and comparative human rights law provides that, in respect of rights that are not absolute, limitations are only permissible in certain circumstances and subject to particular conditions. In *General Comment 31*, for example, the UNHRC stated that, where limitations or restrictions are made to rights under the ICCPR,

> States must demonstrate their necessity and only take such measures as are proportionate to the pursuance of legitimate aims in order to ensure continuous and effective protection of Covenant rights. In no case may the restrictions be applied or invoked in a manner that would impair the essence of a Covenant right.[53]

The general principles relating to the justification and extent of limitations have been further developed by the UN Economic and Social Council in the *Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights*. Those principles include that:

- no limitations or grounds for applying them may be inconsistent with the essence of the ICCPR or the particular right concerned;
- all limitation clauses should be interpreted strictly and in favour of the rights at issue;
- any limitation must be provided for by law and be compatible with the objects and purposes of the ICCPR;
- limitations must not be arbitrary or unreasonable;
- limitations must be subject to challenge and review;
- limitations must not discriminate on a prohibited ground;
- any limitation must be 'necessary', which requires that it:
    - is based on one of the grounds which permit limitations (namely, public order, public health, public morals, national security, public safety or the rights and freedoms of others);
    - responds to a pressing need;
    - pursues a legitimate aim; and
    - is proportionate to that aim.[54]

A number of domestic human rights instruments contain limitation provisions which are broadly consistent with these principles.[55] The HRLRC submits that the Victorian Charter has an appropriate limitation clause, providing at s 7 that:

> A human right may be subject under law only to such reasonable limits as can be demonstrably justified in a free and democratic society based on human dignity, equality and freedom and taking into account all relevant factors.

53. UNHRC, *General Comment 31: Nature of the General Legal Obligation Imposed on States Parties to the Covenant,* UN Doc CCPR/C/21/Rev.1/Add13 (2004) [6].
54. UN Economic and Social Council, Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights, UN Doc E/CN.4/1985/4, Annex (1985).
55. See, eg: *New Zealand Bill of Rights Act 1990* (NZ) s 5 and South African Bill of Rights contained in the *Constitution of the Republic of South Africa 1996* s 36.

Section 7 of the Victorian Charter sets out the following non-exhaustive list of relevant factors:

- the nature of the right;
- the importance of the purpose of the limitation;
- the nature and extent of the limitation;
- the relationship between the limitation and its purpose; and
- any less restrictive means reasonably available to achieve the purpose that the limitation seeks to achieve.

The section 'reflects Parliament's intention that human rights are, in general, not absolute rights, but must be balanced against each other and against other competing public interests'.[56] For example, laws which are necessary to protect security, public order or public safety may justifiably limit human rights in a free and democratic society. On the other hand, s 7 includes a safeguard against misuse of the Victorian Charter to destroy or limit human rights,[57] in that it should not be interpreted as giving a person, entity or public authority a right to limit or to destroy the human rights of any person.

The meaning of 'demonstrably justified in a free and democratic society' has been the subject of judicial scrutiny in Canada, where this limitation provision forms part of s 1 of the Canadian Charter of Rights and Freedoms (the ***Canadian Charter***).[58] In *Singh v Minister of Employment & Immigration*[59] it was stated that the courts conduct the inquiry as to what is justified 'in light of a commitment to uphold the rights and freedoms set out in the other sections of the [Canadian] Charter'.[60] The landmark judgment in respect of the interpretation of the phrase has been acknowledged[61] to be that of Dickson CJ of the Canadian Supreme Court, writing for the majority, in *R v Oakes*.[62] His Honour held that two key criteria must be satisfied to establish that a limitation meets the test:

1. The objective, which the measures responsible for a limitation on a Charter right are designed to serve, must be of sufficient importance to warrant overriding a constitutionally protected[63] right or freedom.[64]
2. If a sufficiently significant objective has been identified, it is for the party invoking the limitation provision to show that the means chosen are reasonably and demonstrably justified.[65]

56. Explanatory Memorandum, Charter of Human Rights and Responsibilities Bill 2006 (Vic) 8.
57. Ibid.
58. The statutory *Canadian Bill of Rights* (1960) was inserted into the Canadian Constitution by operation of the *Constitution Act* 1982.
59. [1985] 1 SCR 177.
60. Ibid, 218.
61. *Unger v Ontario (Ministry of Municipal Affairs)* [1997] 34 OMBR 439, [66].
62. [1986] 1 SCR 103.
63. The HRLRC supports the adoption of a legislative model for the Human Rights Act, but submits that Dickson CJ's first criterion is still applicable to any right or freedom that the Western Australian Government has sought to protect by the enactment of legislation.
64. [1986] 1 SCR 103, [73].
65. Ibid, [74].

Chief Justice Dickson concurred with the judgement in *R v Big M Drug Mart Ltd* [66] and supported the adoption of a form of proportionality test.[67] In applying this test, the courts are to balance the interests of society with those of individuals and groups.[68] Three important components to the test were recognised by Dickson CJ:[69]

1. The measures adopted must be carefully designed to achieve the objective in question. They must not be arbitrary, unfair or based on irrational considerations ('the legitimate aim test').
2. There must be proportionality between the effects of the measures which are responsible for limiting the Charter right or freedom and the objective which has been identified as of sufficient importance. The more severe the deleterious effects of a measure on individuals or groups, the more important the objective must be if the measure is to be reasonable and demonstrably justified (the 'proportionality test').
3. The means, even if rationally connected to the objective, should impair as little as possible the right or freedom in question (the 'minimal impairment test').[70]

66. [1985] 1 SCR 295, 352.
67. [1986] 1 SCR 103, [74].
68. Ibid.
69. Ibid. A similar test has been adopted in New Zealand as established in the leading decision of *Moonen v Film and Literature Board of Review* [2000] 2 NZLR 9, 16-17; see also *Drew v Attorney-General* [2000] 3 NZLR 750, 763.
70. Ibid, [75].

2.4 Recommendation

The Human Rights Act should provide for the protection of all rights included in the ICCPR and ICESCR.

The Human Rights Act should protect the human rights of individuals, not corporations, save for the right to self-determination, which protects peoples.

In relation to limitations on human rights:

(a) The Human Rights Act should provide that certain rights are absolute and not subject to derogation, restriction or limitation. Absolute rights should include (without limitation):

- the right to life;
- the right to freedom from torture and other cruel, inhuman or degrading treatment or punishment;
- the right to freedom from slavery or forced labour;
- the right not to be imprisoned for a contractual debt;
- freedom from retrospective criminal punishment;
- the right to recognition as a person before the law;
- freedom of thought, conscience and religion;
- the right of persons deprived of liberty to be treated with humanity and with respect for the inherent dignity of the human person;
- the prohibition against taking of hostages, abductions or unacknowledged detention;
- the prohibition against incitement to discrimination, hostility or violence; and
- the obligation to provide access to effective remedies for breaches of human rights.

(b) The Human Rights Act should provide that any limitations on non-absolute human rights must be:

- compatible with the objects and purposes of the Human Rights Act;
- provided for by law;
- not arbitrary or unreasonable;
- compatible with the right to non-discrimination;
- necessary and demonstrably justifiable, which requires that it:
- is based on one of the grounds which permit limitations (namely, public order, public health, public morals, national security, public safety or the rights and freedoms of others);
- responds to a pressing need;
- pursues a legitimate aim;
- is proportionate and reasonably adapted to that aim; and
- is the least restrictive means reasonably available to achieve the purpose that the limitation seeks to achieve.

3. Question 3 What form should a WA Human Rights Act take?

3.1 What form should the Human Rights Act take?

Human rights instruments have taken a number of forms around the world. These can be characterised as constitutional, legislative and 'hybrid' models. This section briefly summarises the advantages and disadvantages of each of these models.

(a) Constitutional model

The constitutional model for a Bill of Rights has been adopted in South Africa and the United States. Under this model, the Bill of Rights is 'entrenched' in the Constitution and can therefore only be amended in the manner provided for in the Constitution. This is generally by referendum or by special parliamentary (Congressional) majority.

The main advantages of the constitutional model are:

- the Bill of Rights can only be amended as provided for in the Constitution, making human rights protection less vulnerable to the prevailing political climate;[71]
- an independent judiciary is empowered to invalidate legislative and executive actions where those actions are held to be in violation of the rights entrenched in the Constitution;[72] and
- there is important symbolic value in demonstrating the depth of Government's commitment to upholding and enforcing human rights.[73]

The main disadvantages of the constitutional model are:

- the restriction on the power of Parliament or Congress to pass laws that contravene Protected Rights and the ability of the judiciary to invalidate laws held to contravene Protected Rights can be perceived as an erosion of parliamentary sovereignty, and the placement of excessive power in the hands of an 'unrepresentative judiciary';[74]
- a constitutionally entrenched Bill of Rights may be difficult to amend (depending on the nature of any entrenching provisions) and may become, over time, less well adapted to changed societal values and developments in the human rights dialogue (although this is counter-balanced by the principle that constitutions should be interpreted according to prevailing community standards); and
- empowering judges to strike down incompatible legislation may increase the politicisation of the judiciary and the judicial appointment process.[75]

71. For example, s128 of the Australian Constitution requires a referendum to be held.
72. Julie Debeljak, 'Submission on how best to protect and promote human rights in Victoria', 1 August 2005, www.law.monash.edu.au/castancentre/publications/submissions.html, 7.
73. Victorian Committee, above n 27, 20.
74. See, eg: Victorian Committee, above n 27, 15 and 20; John Howard, Australia Day address to the National Press Club, Great Hall, Parliament House, Canberra (25 January 2006): http://www.pm.gov.au/News/Speeches/speech1754.html.
75. ACT Bill of Rights Consultative Committee, Towards an ACT Human Rights Act May 2003, Canberra, Publishing Services, 43.

(b) Legislative model

Under the legislative model, adopted in various forms by the UK, New Zealand, the ACT and Victoria, a Charter is enacted into law as an ordinary piece of legislation.[76] Subsequent legislation that breaches the rights set out in the Charter is not invalidated, and the Charter itself can be amended by the passing of ordinary amending legislation.

The main advantages of the legislative model are:

- parliamentary sovereignty is preserved because:
  - Parliament retains the power to pass laws that contravene Protected Rights; and
  - even where a court declares a law to be inconsistent with the Protected Rights, such a declaration does not invalidate the law in question;[77]
- it is flexible, in that Parliament can amend the Charter by passing amending legislation, adapting it to changes in societal values and the development of the human rights dialogue;[78] and
- a finding by a court that legislation is inconsistent with the Charter presents a strong political *incentive* for Parliament to review the inconsistent legislation in question and make changes where the legislature and executive consider it appropriate.[79]

The main disadvantages of a legislative model are:

- later legislation overrides prior legislation to the extent of any inconsistency, so Protected Rights can be amended or repealed by simple parliamentary majority. The ease with which the Charter can be amended means that Protected Rights are less well protected than would be the case if they were constitutionally entrenched;[80] and
- as courts are unable to strike down inconsistent legislation, laws, once passed, are effectively subject only to declaratory relief in the courts. This model relies on the political will of the legislature to either ensure that laws are consistent with the Charter, or to otherwise justify any incompatibility.[81]

The effectiveness of a Charter is therefore dependent upon political factors, such as the willingness and capacity of the State opposition and media to place political pressure on a Government whose actions contravene Protected Rights. In a healthy democracy, this poses no problem, but it is when democratic institutions are eroded that the protection of human rights afforded by a Charter becomes of the utmost importance.

76. Julie Debeljak, above n 72, 9.
77. Kate Beattie, *How the UK brought rights home* (22 March 2006), www.humanrightsact.com.au/index2.php?option=com_content&task=view&id.
78. Victorian Committee, above n 27, 21.
79. According to the DCA Review, as at July 2006, 15 Declarations of Incompatibility had been made. Of those, five Declarations were overturned on appeal (and two remain subject to appeal).
80. Victorian Committee, above n 27, 22.
81. Julie Debeljak, 'The Human Rights Act 1998 (UK): the preservation of parliamentary supremacy in the context of rights protection' (2003) 9(1) *Australian Journal of Human Rights* 183, 226-227.

(c) Constitutional / legislative hybrid

Canada has instituted a model which is a combination of the constitutional and legislative models. The Canadian Charter empowers the judiciary to invalidate legislation that breaches the rights contained in the Canadian Charter on the basis that the legislation is unconstitutional.[82] The Canadian Charter can only be amended by the process of amendment provided for in the Canadian Constitution.[83] However, parliamentary sovereignty is ultimately preserved by an 'override provision', which allows Parliament to enact contravening laws where the legislation expressly declares that it will operate notwithstanding a provision of the Canadian Charter.[84]

The main advantage of the hybrid model is the ability of the judiciary to invalidate legislation on the basis that it breaches the rights set out in the Canadian Charter, while preserving parliamentary sovereignty. Parliament is required to act to preserve the validity of legislation by either amending it to make it consistent with the Canadian Charter, or by using the 'override' provision.[85]

The main disadvantages of the hybrid model are:

- override provisions enable Parliament to pass laws that contravene Protected Rights;[86]
- where a constitution does not contain restrictive procedures for its amendment, the Charter can be amended by an Act of Parliament, and is therefore subject to the prevailing political climate; and
- where a constitution does contain restrictive procedures, the Charter may be more difficult to amend, and become, over time, less well adapted to contemporary circumstances and values (although this is counterbalanced by the principle that constitutions should be interpreted according to prevailing community standards).

(d) Application to Western Australia – legislative model

The HRLRC submits that the most appropriate form for the Human Rights Act is a legislative model, similar to that adopted in the UK, the ACT and Victoria. This submission is based on a number of factors, including:

- the concern that parliamentary sovereignty be protected, which is a key feature of the Westminster system of government in Western Australia;[87]
- the limited additional protections which may be afforded under the Western Australian Constitution, due to the purely legislative character of the Western Australian Constitution and the complexity of amending it to entrench the Charter;[88]
- the 'legal uncertainty' as to whether it is, in fact, possible to have an entrenched Bill of Rights in Western Australia;[89]

82. Julie Debeljak, above n 72, 8.
83. The procedure for amending the Canadian Constitution is set out in s39 of the *Constitution Act 1982* (Can).
84. Section 33(1) of the Canadian Charter.
85. Julie Debeljak, above n 72, 11.
86. Cheryl Saunders, 'Protecting Rights in Common Law Constitutional Systems: A Framework for a Comparative Study' [2002] *VUWLRev* 21, [57]-[58] www.nzlii.org/nz/journals/VUWLRev/2002/21.html.
87. Jim McGinty MLA, *Statement of Intent by the Western Australian Government, A WA Human Rights Act* (May 2007), 23.
88. The *Constitution Act 1889* (WA) can be amended by legislation passed by the WA Parliament; see section 73. See also section 2 and 6 of the Australia Act 1986 (Cth); and, generally: P Hanks *Constitutional Law in Australia* (2nd ed: Butterworths) 1996, 133-138, *Attorney-General (NSW) v Trethowan* (1931) 44 CLR 394 and *Attorney-General (WA) v Marquet* (2003) 217 CLR 545, 568-576.
89. Discussion Paper, 20.

- the desirability of consistency across jurisdictions in which a Charter is in place, facilitating cross-jurisdictional flows of information and promoting the development of a broad, universal jurisprudence; and
- because enactment of the Human Rights Act will meet the Western Australian Government's stated aim of fostering a human rights culture, by improving human rights protections through education rather than coercion.

The legislative model affords practical protection of human rights, while preserving parliamentary sovereignty. However, as a Charter is susceptible to amendment by ordinary majority, it should be carefully drafted to ensure that Protected Rights are given the fullest protection afforded by that model.

(e) Dialogical model

As stated in paragraph (d) above, the HRLRC supports a legislative model for the Human Rights Act. The legislative model should be 'dialogical' in nature, meaning that it requires that human rights are explicitly taken into account when developing, interpreting and applying Western Australian law and policy, thereby protecting human rights without significantly altering the constitutional balance between the legislature, the executive and the judiciary.[90]

The 'dialogical' model proposed by the HRLRC is so called because it creates a dialogue between the three arms of government – the legislature, the executive, and the judiciary – and has the following key characteristics:

(i) each Bill tabled in Parliament must be accompanied by a reasoned Statement of Compatibility setting out whether the Bill contravenes any of the Protected Rights;

(ii) all legislation, including subordinate legislation, must be considered by a parliamentary committee for the purpose of reporting to Parliament on whether the legislation is compatible with the Protected Rights;

(iii) 'public authorities' must act compatibly with the Protected Rights and also give proper consideration to the Protected Rights in any decision-making process;

(iv) as far as possible, courts and tribunals must interpret and apply legislation consistently with the Protected Rights;

(v) courts may have regard to relevant international, regional and comparative domestic human rights law and jurisprudence in the interpretation and application of the Protected Rights;

(vi) the Supreme Court has the power to declare that a law cannot be interpreted and applied consistently with the Protected Rights and to issue a Declaration of Incompatibility;

(vii) the Government must respond to a Declaration of Incompatibility within six months; and

(viii) a government body (such as the WA Equal Opportunity Commission) is given responsibility for monitoring and reporting on the implementation and operation of the Human Rights Act and for community education on rights and responsibilities under the Human Rights Act.

90. In relation to the experience in the UK, see the DCA Review.

3.2 Should the Human Rights Act be harder to change than an ordinary law?

The HRLRC submits that the Human Rights Act should be no harder to change than an ordinary Act of Parliament. Parliament should be able to amend the Human Rights Act by the passage of ordinary amending legislation. This position supports the preservation of parliamentary sovereignty while also recognising the difficulty inherent in making the amendments to the Western Australian Constitution necessary to entrench the Human Rights Act.

3.3 Should the Act be flexible to adapt to changing attitudes and circumstances?

The HRLRC submits that the Human Rights Act should be flexible to adapt to changing attitudes and circumstances. Flexibility is best achieved by the adoption of the legislative model. The legislative model allows Parliament to respond to any such changes through the passage of ordinary amending legislation. Responsibility for responding to changes in community attitudes or circumstances rests with elected members of Parliament.

3.4 Recommendation

(a) The Human Rights Act should be in legislative form.

(b) The Human Rights Act should adopt the dialogical model.

4. Question 4 How should a WA Human Rights Act protect human rights?

4.1 Should Parliament be required to take human rights into account when making laws?

The requirement that Parliament take human rights into account when making laws is one of the key pillars of the Human Rights Act.[91] There are 3 essential tools Parliament will require to this end:

- Statements of Compatibility;
- Human Rights Legislation Scrutiny Committee; and
- Responses to Declarations of Incompatibility.

Statements of Compatibility

The HRLRC supports the inclusion of section 31 of the draft Western Australian Human Rights Bill 2007 (the ***Human Rights Bill***) in the Human Rights Act. Section 31 requires a statement of compatibility to be tabled before a House of Parliament before each new Bill receives its second reading.[92] This section is consistent with sections 28(1) and (2) of the Victorian Charter.

However, the HRLRC submits that Statements of Compatibility must be reasoned. The Human Rights Bill does not include this requirement. Where a Statement of Compatibility states that a Bill is incompatible with particular Protected Rights, the Statement must also include an explanation as to why the proposed legislation is a reasonable limitation on those rights.[93] Such a requirement is necessary as the integrity of the protection of human rights under a Charter depends upon parliamentary responsibility and accountability for any limitation of Act rights. The experience of the UK and the ACT has been that without a requirement for *reasoned* Statements of Compatibility, the likely or potential human rights repercussions of proposed legislation may receive inadequate consideration.[94] The HRLRC also considers that the maker of the Statement must be of the opinion that all parts of the Bill must be compatible with Protected Rights.

The HRLRC suggests that section 31(4) should read as follows:

(4) The statement of compatibility about a Bill must state –

(a) whether, in its maker's opinion, the Bill is compatible with human rights, and, if so, how it is compatible,[95] and

(b) if the opinion is that the Bill, or any part of the Bill, is not compatible[96] -

(i) the nature and extent of the incompatibility; and

(ii) why the Bill should nevertheless be considered by the House.[97]

91. The other two are the requirement that the courts interpret laws consistently with Protected Rights and the obligation on public authorities to act compatibly with Protected Rights.
92. s31(2) Human Rights Bill.
93. The requirement is now included in the UK's Human Rights Act Guidance for Departments, but is not part of the Victorian Charter.
94. See Dr Simon Evans, 'What difference will the Charter of Rights and Responsibilities make to the Victorian Public Service?', presented at Clayton Utz, Melbourne, 13 June 2006, http://cccs.law.unimelb.edu.au/go/research-andpublications/legislatures-and-human-rights-project/publications-and-working-papers/index.cfm.
95. Cf: s 31(4)(a) Human Rights Bill.
96. This wording is consistent with the Victorian Charter, see s28(3)(b) of the Victorian Charter.
97. Section 31(4)(b) Human Rights Bill.

The HRLRC supports the inclusion in the Human Rights Act of section 31(6) of the Human Rights Bill which states that a Statement of Compatibility will not bind any court or tribunal.[98] This makes it clear that the role of the Supreme Court in determining questions of law involving the interpretation and application of the Human Rights Act remains independent.[99]

Human Rights Legislation Scrutiny Committee

The HRLRC recommends that an independent parliamentary committee should be created with the role of scrutinising legislation for compatibility with Protected Rights. A Scrutiny Committee should have the power to review all new legislation – primary or subordinate – either of its own motion, in response to a report from the Human Rights Commissioner or following referral from either House of Parliament. The Scrutiny Committee should be able to receive submissions and report back to Parliament on its findings and recommendations. The UK experience shows that the combination of Statements of Compatibility and scrutiny by the Parliamentary Joint Committee on Human Rights has improved 'transparency and parliamentary accountability'.[100]

In Western Australia, legislation is currently scrutinised by three committees:

(a) *Legislation Committee* – a standing committee of the Legislative Council. The Legislation Committee scrutinises proposed primary legislation, but does not scrutinise all Bills introduced into the Legislative Council - only Bills referred to it by the Legislative Council. Legislative Council Standing Order 230B prohibits any standing committee from considering a Bill's policy, unless otherwise ordered to do so. The Committee's inquiries focus on a Bill's feasibility, clarity and technical competence.

(b) *Delegated Legislation Committee* – a joint standing committee. Delegated legislation which is 'published' (ie, the day the delegated legislation is Gazetted) is automatically referred to the Delegated Legislation Committee for consideration. However, the automatic referral of delegated legislation to the Delegated Legislation Committee does not guarantee that the delegated legislation is reviewed by the Committee. In considering an instrument of subordinate legislation, the Delegated Legislation Committee is to inquire whether the instrument:

(i) is authorised or contemplated by the empowering enactment;

(ii) has an adverse effect on existing rights, interests, or legitimate expectations beyond giving effect to a purpose authorized or contemplated by the empowering enactment;

(iii) ousts or modifies the rules of fairness;

(iv) deprives a person aggrieved by a decision of the ability to obtain review of the merits of that decision or seek judicial review;

(v) imposes terms and conditions regulating any review that would be likely to cause the review to be illusory or impracticable; or

(vi) contains provisions that, for any reason, would be more appropriately contained in an Act.[101]

(c) *Uniform Legislation and Statutes Review Committee (**Review Committee**)* – also a standing committee of the Legislative Council. The functions of the Review Committee include to:

- review the form and content of the statute book; and
- inquire into and report on any proposal to reform existing law that may be referred by the Legislative Council or a Minister.

98. This is consistent with the same section in the Victorian Charter: see s 28(4) of the Victorian Charter.

99. See Explanatory Memorandum, Charter of Human Rights and Responsibilities Bill 2006 (Vic), 21.

100. DCA Review – Executive Summary, 1.

101. Schedule 1 of Legislative Council Standing Orders, 3.6.

The HRLRC considers that all forms of legislation – proposed and existing primary and subordinate legislation – should be scrutinised for human rights compatibility. While scrutinising Bills has a clearly complementary role to the Statement of Compatibility requirement, the review of delegated and existing primary legislation will identify potential human rights issues *before* the issues eventuate.

There are two alternative approaches in the Western Australian context:

(A) Create a new, dedicated Human Rights Legislation Review Committee with the specific role of reviewing and scrutinising current and proposed primary and subordinate legislation for compliance with Protected Rights.

(B) Broaden the responsibility of each of the Legislation Committee, the Legislation Review Committee and the Delegated Legislation Committee to include scrutiny of legislation for compliance with Protected Rights.

The HRLRC considers that the preferable approach is to establish a single, dedicated human rights committee to consider issues distinct from those considered by the existing committees. Such a committee will need broader powers than those of the existing committees. For example, the Legislation Committee reviews only referred legislation, and although the Delegated Legislation Committee is required to consider factors closely related to human rights, the existing committees do not expressly consider policy.

Whichever model is adopted, it is essential that the committee or committees responsible for human rights scrutiny of legislation be a properly resourced and independent parliamentary committee. If an existing committee is given the additional role of human rights scrutiny, to enable it to meet its increased responsibilities under the Human Rights Act, it must be given additional financial and human resources, including (among other things) appointing people with human rights expertise to positions in the secretariat that supports the committee.

The HRLRC notes that in Victoria, the Departments have been responsible for reviewing all existing legislation for compatibility with human rights.

Responses to Declarations of Incompatibility

The HRLRC submits that where the Supreme Court makes a Declaration of Incompatibility (see also section 4.5 below), the Minister administering the statutory provision which has been declared inconsistent must be required, within 6 months of the declaration, to:

(a) prepare a written response to the declaration; and

(b) cause a copy of the declaration and of his or her response to it to be –

(i) laid before each House of Parliament; and

(ii) published in the Government Gazette.[102]

The HRLRC submits that requiring a response within a given time period enhances the likelihood that Parliament will take appropriate action in response to any Declarations of Incompatibility made by the Supreme Court.[103]

102. This approach is consistent with the approach in the Victorian Charter, see s37.

103. Explanatory Memorandum, Charter of Human Rights and Responsibilities Bill 2006 (Vic), 27.

The HRLRC considers that the integrity of the dialogical process would be afforded significant protection by the availability of a writ of mandamus against the Minister responsible for legislation the subject of a Declaration of Incompatibility, in the event that the Minister has not responded to the Declaration within 6 months of issue.

The UK experience offers insight into the effectiveness of this mechanism. As at July 2006, there had been fifteen Declarations of Incompatibility made by UK Courts and remitted to Parliament. Parliament's response has generally been to remedy the legislative breach of human rights by way of amending legislation.[104]

4.2 Should WA courts be required to interpret laws consistently with human rights? If so, in what circumstances?

The HRLRC submits that, Western Australian courts should interpret laws consistently with human rights. To achieve this, the role of the courts in the Human Rights Act should incorporate the following key attributes:

- the application of the 'interpretative principle';
- the use of international and comparative human rights jurisprudence; and
- Declarations of Incompatibility.

The Interpretative Principle

The HRLRC submits that the Human Rights Act should require that all legislation be interpreted and applied (and if necessary, read up or down) in a manner compatible with human rights (the ***Interpretive Principle***).

Section 34 of the Human Rights Bill sets out the proposed circumstances in which a law should be interpreted compatibly with human rights. It provides that where a law is ambiguous, obscure[105] or will lead to a result which is manifestly absurd or unreasonable,[106] it must be interpreted compatibly with human rights.[107] This appears to be a mere codification of the common law principle that where a statute or subordinate legislation is ambiguous, the courts should favour that construction which accords with Australia's obligations under a treaty or international convention to which Australia is a party.[108]

The HRLRC submits that, in the Human Rights Act, section 34 of the Human Rights Bill should be replaced with a provision similar to section 3 of the UK Act. That section requires that, as far as possible, primary and subordinate legislation must be read and given effect to compatibly with rights in the European Convention on Human Rights (the ***ECHR***). Section 32(1) of the Victorian Charter similarly requires that 'so far as it is possible to do so consistently with their purpose, all statutory provisions must be interpreted in a way that is compatible with human rights'.

104. Although a number of Declarations of Incompatibility were 'still under consideration with a view to remediation': DCA Review 17. See also HRLRC *Human Rights Law Resource Manual* (2006), 50.
105. s34(3)(a) Human Rights Bill.
106. s34(3)(b) Human Rights Bill.
107. s34(3)(c) Human Rights Bill.
108. See, eg, *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273, at 287 (Mason CJ and Deane J).

A provision adopting the Interpretive Principle requires that, as a matter of law, an interpretation consistent with human rights be adopted whenever it is possible to do so, regardless of whether there is any ambiguity in the meaning of a provision, and regardless of how the provision in question may have been previously interpreted and applied.[109] For example, the House of Lords, in *Ghaidan v Godin-Mendoza*,[110] applied the interpretive principle to give a construction to a provision that was contrary to an earlier decision which pre-dated the commencement of the UK Act.[111] According to Lord Nicholls of Birkenhead:

> [T]he intention of Parliament in enacting section 3 [the interpretive provision in the UK Act] was that, to an extent bounded only by what is 'possible', a court can modify the meaning, and hence the effect, of primary and secondary legislation.
>
> Parliament, however, cannot have intended that in the discharge of this extended interpretative function the courts should adopt a meaning inconsistent with a fundamental feature of legislation. That would be to cross the constitutional boundary section 3 seeks to demarcate and preserve. Parliament has retained the right to enact legislation in terms which are not Convention-compliant. … There may be several ways of making a provision Convention-compliant, and the choice may involve issues calling for legislative deliberation.[112]

An illustration of the limits of judicial interpretation for human rights consistency is *R (Anderson) v Secretary of State for the Home Department*.[113] In that case, the House of Lords held that an interpretation consistent with the UK Act was not possible with regard to an express legislative power essentially enabling the Home Secretary to alter the duration of a prisoner's sentence. Lord Bingham said that to read the relevant section as precluding participation by the Home Secretary, if it were possible to do so, would not be 'judicial interpretation but judicial vandalism', giving the section an effect quite different from that which Parliament intended and going beyond the Interpretive Principle in the UK Act.

The HRLRC acknowledges that the success of the Interpretative Principle is dependent upon the judiciary deploying it robustly, so that remedial action is encouraged. Human rights should be interpreted and applied in a manner which renders them 'practical and effective, not theoretical and illusory'.[114] Further, the Human Rights Act should be a 'living document' to be interpreted and applied in the context of contemporary and evolving values and standards.[115]

109. HRLRC, *Human Rights Law Resource Manual*, (2006) 45.
110. [2004] AC 557.
111. *Fitzpatrick v Sterling Housing Association Ltd* [2001] 1 AC 27.
112. *Ghaidan v Godin-Mendoza*, [2004] AC 557 [32] – [33]. [2003] 1 AC 837.
113. [2003] 1 AC 837.
114. *Goodwin v United Kingdom* (2002) 35 EHRR 447, [73]-[74]. See also Airey v Ireland (1979) 2 EHRR 305, 314.
115. *Tyrer v United Kingdom* (1978) 2 EHRR 1, 10; *Selmouni v France* (2000) 29 EHRR 403, [101].

Role of international and comparative human rights jurisprudence

The HRLRC supports the inclusion in the Human Rights Act of a section similar to section 33(1) of the Human Rights Bill, which provides for Western Australian courts to have recourse to international and comparative human rights jurisprudence when construing a statutory provision.

Common jurisprudence reduces the extent to which Western Australian courts will be required to 'reinvent the wheel'. Utilising international and comparative human rights jurisprudence is particularly important as it enables the courts to have regard to the instruments and bodies from which the rights in the Human Rights Act are derived.[116] Human rights are universal, so the development of human rights jurisprudence should be as consistent across all jurisdictions as is possible.

The HRLRC submits that section 33(1) of the Human Rights Bill should be amended in the Human Rights Act to read as follows:

(1) In this section –

"**International instruments and jurisprudence**" includes the following:

(a) international law, including:

(i) the *International Covenant on Civil and Political Rights*;

(ii) the sources of international law set out in s 38(1) of the Statute of the International Court of Justice;

(b) any treaty or other international agreement about the rights of peoples to which Australia is a party;

(c) any judgment of a foreign or international court or tribunal;

(d) general comments and views and jurisprudence of the United Nations bodies that monitor treaties about the rights of people;

(e) declarations and standards adopted by the United Nations General Assembly, the United Nations Human Rights Council and the United Nations Economic and Social Council that are relevant to the rights of people; and

(f) standards adopted and recommended by the Special Procedures of the United Nations Human Rights Council and other human rights experts and academics.

The HRLRC also considers that section 33(4) of the Human Rights Bill, by outlining factors which must be taken into account when considering international jurisprudence, restricts the discretion of Western Australian courts to manage their proceedings. The HRLRC submits that section 33(4) of the Human Rights Bill should not be included in the Human Rights Act.

116. For example the jurisprudence of the UNHRC, which issues General Comments that elucidate the meaning of particular rights under the ICCPR and hears individual complaints under the First Optional Protocol to the ICCPR.

4.3 What should happen where a law is clearly intended by Parliament to restrict human rights?

The Human Rights Act will not prevent Parliament from passing legislation restricting Protected Rights. Under the legislative model recommended by the HRLRC, parliamentary sovereignty is retained as any subsequent legislation that is inconsistent with the Human Rights Act will prevail. If Parliament considers legislation restricting Protected Rights to be necessary, and can demonstrate that the human rights restrictions are justified, the legislation can be passed under the limitation provisions.[117]

The HRLRC strongly opposes the inclusion of an override provision in the Human Rights Act, and is concerned that such a provision is currently included in section 30 of the Human Rights Bill. An override provision allows Parliament to expressly declare that an Act or a provision of an Act has effect despite being incompatible with Protected Rights.[118] The HRLRC submits that by requiring reasoned Statements of Compatibility to be tabled setting out any provisions in a Bill that are incompatible with Protected Rights (see section 4.1 above), and providing for permissible limitations on human rights that are 'reasonable' and 'demonstrably justifiable' (see section 2.3 above), an override clause is unnecessary. An override declaration will provide a means for bypassing the political accountability of the Statement of Compatibility process and will reduce the transparency the process introduces, in terms of understanding the human rights that a Bill may infringe. Most importantly, however, a declaration under an override provision may have the effect of suspending the requirement that legislation be interpreted consistently with human rights. This would unduly limit the application of the Human Rights Act, particularly the power of the courts to issue Declarations of Incompatibility.

4.4 Should courts be allowed to make declarations that laws are incompatible with human rights? If so, which courts?

Yes, see section 4.5 below.

4.5 What consequences should a declaration of incompatibility have?

The HRLRC submits that in the event that a court is unable to interpret and apply legislation consistently with human rights, the Western Australian Supreme Court should be empowered to issue a Declaration of Incompatibility. The HRLRC supports the inclusion of section 36 of the Human Rights Bill in the Human Rights Act, which provides that the Western Australian Supreme Court may make Declarations of Incompatibility. This is a remedy of last resort to be deployed only in circumstances where a human rights-compatible interpretation of legislation is not possible.[119] Declarations of Incompatibility should be available for breaches of both CP Rights and ESC Rights.

The HRLRC also supports the implementation of section 37 of the Human Rights Bill which, like section 36(5) of the Victorian Charter, provides, among other things, that a Declaration of Inconsistent Interpretation (ie, a Declaration of Incompatibility) does not affect the validity, operation or enforcement of the provision or create any legal right or give rise to any civil cause of action.

The HRLRC supports the inclusion of section 37(4) of the Human Rights Bill which provides that once a Declaration of Incompatibility is made, Parliament is required to formally respond within six months (see section 4.1 above).

117. See s34(4) of the Human Rights Bill.

118. See Victorian Charter, s31.

119. HRLRC, *Human Rights Law Resource Manual*, (2006), 48.

4.6 Recommendations

In relation to Parliament, the Human Rights Act should provide:

(a) members introducing Bills into Parliament should provide reasoned statements as to the compatibility of the legislation with Protected Rights;

(b) a parliamentary committee (ideally an independent, dedicated, joint committee), properly resourced, should be responsible for reviewing all Bills for compatibility with Protected Rights;

(c) the Minister responsible for legislation must respond to any Declarations of Incompatibility issued by the Supreme Court within 6 months;

(d) a writ of mandamus should be available against a Minister where the Minister has failed to respond to a Declaration of Incompatibility within 6 months; and

(e) Parliament should not be given the ability to expressly override Protected Rights in later legislation.

In relation to the role of the courts, the Human Rights Act should provide:

(a) all legislation should be interpreted and applied, including if necessary read up or down, in a manner compatible with Protected Rights;

(b) the Human Rights Act should provide for the Western Australian courts to refer to international and comparative jurisprudence when interpreting Protected Rights; and

(c) where a human rights compatible interpretation cannot be given to a legislative provision, the Western Australian Supreme Court should be empowered to make a Declaration of Incompatibility.

5. Question 5 Who should be required to comply with the human rights recognised in a WA Human Rights Act?

5.1 Should the Human Rights Act impose obligations on government departments and agencies to comply with the human rights recognised in the Act?

Governments have a particular role to play in the protection of human rights. The Western Australian Government, for example, has expressed the view that the protection of the rights under any proposed Human Rights Act will depend 'completely, or largely, on the actions of government'.[120]

The primary point of contact between Government and the public lies in the development and delivery of policy, services and programs by the executive arm of government. That primary point of contact is where the Human Rights Act will have its most fundamental impact. By encouraging a culture within the executive in which human rights are explicitly taken into account from the earliest stages of policy-making through to the day-to-day interactions between public authority staff and the public, effective obligations on the executive have both practical and symbolic human rights benefits:

- practically, because it is in the exercise of public functions that people are most likely to experience infringements of their rights; and
- symbolically, because Government itself will be seen to be committed to human rights protection, helping to foster a broader culture that recognises the importance of human rights.

The HRLRC submits that the Human Rights Act should make it unlawful for the executive to either:

- act in a manner that is incompatible with a Protected Right; or
- to fail to give proper consideration to a relevant Protected Right in making decisions.[121]

To promote a culture in which human rights are taken into account at all stages of executive activity, the Human Rights Act should *require* the development of policies and programs by public authorities which:[122]

- target the alleviation of disadvantage and the elimination of discrimination;
- are informed by active participation of key stakeholders and expand people's choices and freedoms;[124]
- have regard to civil, political, economic, social and cultural determinants of the wellbeing of affected persons;[125] and
- identify the persons or entities responsible for implementation, set targets and indicators to measure progress, and establish mechanisms to ensure accountability.[126]

120. Discussion Paper, 30.

121. See Victorian Charter, s38.

122. Philip Lynch (Public Interest Law Clearing House (Vic) Inc) *Homelessness and Human Rights in Victoria: Submission to the Human Rights Consultation Committee*, 2005, 60-61.

123. OHCHR Draft Guidelines, 2.

124. Ibid.

125. OHCHR Draft Guidelines, 2-3.

126. Ibid, 4-5.

The development of these policies and programs will promote continued improvements to the provision of public services. To encourage a cultural change in the provision of public services, the Human Rights Act should impose enforceable obligations on the executive in its conduct and in the exercise of its functions. In relation to CP Rights, the obligations on the executive should be made enforceable by including provisions similar to sections 6, 7 and 8 of the UK Act, which:

- make it unlawful for a public authority (as defined) to act incompatibly with human rights;
- provide for aggrieved persons to bring proceedings or rely on rights under the Act in proceedings; and
- give courts the power to grant remedies (including damages) for breaches of human rights.

In relation to ESC Rights, a complaints process should be introduced. Remedies are considered further in section 6 below and a suggested mechanism for the protection of ESC Rights is in Annexure 1.

Defining who will be bound by the Human Rights Act

The definition of the organisations and authorities bound by the Human Rights Act will be fundamental to its bringing any practical benefit to Western Australians.

The HRLRC notes the Government's view[127] that the Human Rights Act should initially only oblige State Government departments and agencies to comply with the human rights set out in the Human Rights Act. The Government's preferred model for the Human Rights Act will not apply to private sector bodies such as Government contractors or community groups providing Government-funded services.[128] The HRLRC considers that under this model some of the most vulnerable Western Australians will remain without recourse to the protections the Government is seeking to implement through the Act.

Non-Government bodies performing functions of a public nature should be required to comply with the Human Rights Act. To this end, the Human Rights Act should adopt a broader definition than the 'government agency' definition currently contained in section 39 of the Human Rights Bill. A definition encompassing private entities exercising public functions increases the protection of the rights of persons in the receipt of public services, without being inconsistent with the Government's intention to not (initially) oblige individuals in their private relations, businesses and non-profit organisations to comply with the Human Rights Act.[129]

The extensive and ongoing privatisation and outsourcing of traditional public functions (such as the delivery of utilities and public transport) means that public services in many areas are no longer being performed by government agencies. As currently drafted section 39 of the Human Rights Bill, if enacted, would effectively enable the Government to avoid statutory duties under the Human Rights Bill by contracting out certain functions. The HRLRC submits that this can be prevented without unduly expanding the remit of the Human Rights Act by adopting a similar definition of 'public authority' to that in the Victorian Charter. Section 4 of the Victorian Charter defines 'public authority' broadly to include 'core' and 'functional' public authorities (although the Victorian Charter does not use these terms expressly):

- 'core' public authorities,[130] are broadly similar to those defined as government agencies in section 39 of the Human Rights Bill; and
- 'functional' public authorities,[131] are entities whose functions are, or include, functions of a public nature, when they are exercising those functions on behalf of the state or a public authority (under contract or otherwise).

127. Discussion Paper, 30.
128. Ibid.
129. Ibid.
130. s4(1)(a), (b) and (d) - (k).
131. s4(1)(c) and 4(2).

The HRLRC notes that the meaning of 'public authority' in the UK Act has been the subject of two reports by the UK Joint Committee on Human Rights (the ***JCHR***). The 2004 report[132] (the ***First MPA Report***), found that the narrow interpretation given to 'functions of a public nature'[133] by UK courts was highly problematic,[134] and has left 'real gaps in human rights protection in the UK, including gaps that affect people who are particularly vulnerable to ill-treatment.'[135] The JCHR said that such gaps may breach the UK's international obligations to protect rights of all those in its jurisdiction and to provide mechanisms for redress where those rights are breached.[136] In the 2007 report by the JCHR[137] (the Second MPA Report), the JCHR adopted the assessment in the First MPA Report of the law and the implications of the gap in human rights protection,[138] adding that:

> [g]iven the increasing use of delegated powers and contracting-out, the restricted ambit of the [UK] Act is most likely to have an impact in social housing, healthcare provision to the elderly and to mental healthcare provision and children's services.[139]

The JCHR identified the aged, the incapacitated and those in detention as among the most vulnerable and the most likely to benefit from the protections of the UK Act. Services relating to aged care, mental health and detention and other compulsory powers are being procured under contract, but the JCHR considered that, under the law as it stands in the UK, the contractors would be unlikely to be bound by the UK Act, stating:

> In a series of cases our domestic courts have adopted a more restrictive interpretation of the meaning of public authority, potentially depriving numerous, often vulnerable people…from the human rights protection afforded by the Act. We consider that this is a problem of great importance, which is seriously at odds with the express intention that the Act would help to establish a widespread and deeply rooted culture of human rights in the UK.
>
> …
>
> In an environment where many services previously delivered by public authorities are being privatised or contracted out to private suppliers, the law is out of step with reality. The implications of the narrow interpretation…are particularly acute for a range of particularly vulnerable people in society, including elderly people in private care homes, people in housing association accommodation, and children outside the maintained education sector, or in receipt of children's services provided by private or voluntary sector bodies.[140]

It is clear from the UK experience that a restrictive definition of the bodies bound by the Human Rights Act will leave most exposed those who are most in need of the protections afforded by the Human Rights Act.

132. JCHR, *The Meaning of Public Authority under the Human Rights Act – Seventh Report of Session 2003-04*, 3 March 2004 www.publications.parliament.uk/pa/jt200304/jtselect/jtrights/39/39.pdf
133. UK Act, s6(3)(b).
134. First MPA Report, [41].
135. First MPA Report, [148].
136. Ibid. The JCHR was referring to the UK's obligations under Articles 1 and 13 of the ECHR, which equate to Australia's obligations under Article 2 of the ICCPR.
137. JCHR, *The meaning of public authority under the Human Rights Act – Ninth report of session 2006-07*, 28 March 2007 www.publications.parliament.uk/pa/jt200607/jtselect/jtrights/77/77.pdf
138. First MPA Report, [11].
139. Ibid, [71].
140. Ibid, [2] and [4].

'Core' public authorities

Core public authorities include the police, government departments and local councils. They are those parts of the Government that are fundamentally bound by the Human Rights Act. The HRLRC broadly supports the adoption of a definition of core public authorities based on section 39 of the Human Rights Bill, but submits that the Human Rights Act should also bind the following as 'core' public authorities:

- public officials, such as public sector employees, court employees and parliamentary officers;
- Government Ministers;
- Parliamentary Committees and their members, when acting in an administrative capacity;
- courts or tribunals, acting in either judicial or administrative capacities; and
- other entities declared under regulation to be public authorities.

The persons listed above make decisions that fundamentally affect human rights. The HRLRC submits that the Human Rights Act should require them to act consistently with Protected Rights and to take Protected Rights into account in decision making.

In relation to the courts, it has been suggested that

> the inclusion of the courts as a 'public authority' may create challenges in Australia's federal system which, according to the High Court, has one unified common law.[141]

This issue is said to arise from *Lipohar v The Queen*[142] and *Esso Australia v The Commissioner of Taxation*[143] supporting the proposition that there is 'one unified common law of Australia which is not susceptible to direct influence by legislation in any one State.'[144] However, the HRLRC submits that the view expressed by Justice John Perry is preferable. His Honour has said, extra-curially, that:

> The fact that there is one body of common law applicable throughout Australia does not mean that the individual States may not modify or displace the common law applicable in a particular State or Territory. To deny that obvious fact is to deny the sovereignty of State and Territory parliaments.[145]

'Functional' public authorities

Functional public authorities are increasingly important in the context of modern government practice as governments continue to privatise and outsource traditional governmental functions. The extension of coverage in the Victorian Charter to functional public authorities was recommended by the Victorian Committee on the basis of similar practice in New Zealand and the United Kingdom. Their inclusion reflects the reality that modern governments use numerous organisational structures and arrangements to deliver public services and ensures that the duty to respect Protected Rights is not avoided by the 'outsourcing' of government functions.

141. Victorian Committee, above n 27, quoted in Justice John Perry, 'International human rights and domestic law and advocacy', paper presented to HRLRC seminar, Melbourne, 7 August 2006, www.hrlrc.org.au/html/s09_search/default.asp?s=perry&dsa=232, 12.
142. (1999) 200 CLR 485.
143. (1999) 183 CLR 10.
144. Australian Human Rights Centre at the University of New South Wales, submission to the Victorian Committee, quoted in Perry, above n 141, 13.
145. Perry, above n 141, 13.

A broader definition of 'public authority', in line with the provisions in the Victorian Charter and with the expanded interpretation proposed by the JCHR,[146] would provide Western Australians with increased certainty as to the application of the Human Rights Act through the benefit of common jurisprudence. This provides clarity to authorities in Western Australia and means that Western Australian courts will not have to 'reinvent the wheel' on many Human Rights Act issues.

The HRLRC supports the adoption of a definition of functional public authorities similar to that in section 4(1)(c) of the Victorian Charter, which provides that for the purposes of that Charter a public authority is:

> any entity whose functions are or include functions of a public nature, when it is exercising those functions on behalf of the State or a public authority (whether under contract or otherwise).

Functional public authorities are only public authorities where they are exercising functions of a public nature. For example, a security firm which carries out work for a government prison and for a supermarket would be a public authority in respect of the first function and not in respect of the latter.[147]

In determining whether an entity exercises 'functions of a public nature', the following factors may be taken into account:[148]

(a) that the function is conferred on the entity by or under a statutory provision (eg, where legislation confers powers of arrest on authorised officers, such as public transport inspectors);

(b) that the function is connected to or generally identified with functions of government (eg, a private company may have the function of providing correctional services (such as managing a prison), which is a function generally identified as being a function of government);

(c) that the function is of a regulatory nature (eg, a professional association which has statutory disciplinary, ethical or qualification powers is likely to be exercising public functions);

(d) that the entity is publicly funded to perform the function; and

(e) that the entity that performs the function is a company (within the meaning of the *Corporations Act 2001* (Cth)) all of the shares in which are held by or on behalf of the State.

These factors were derived from jurisprudence and commentary relating to similar provisions in the UK Act and the New Zealand *Bill of Rights Act 1990* (the ***NZ Act***).[149] This approach is intended to avoid the hit-and-miss nature of scheduling to the Act a list of entities deemed to be public authorities,[150] and to provide greater certainty as to which entities will be considered to be a public authority, or in what circumstances (in the case of entities which combine public functions with those of a private nature).

146. See generally, Second MPA Report. See also Human Rights Act 1998 (Meaning of Public Authority) Bill 2007 (UK).

147. Victorian Committee, above n 27, 57.

148. See Victorian Charter, s4(2).

149. Explanatory Memorandum, Charter of Human Rights and Responsibilities Bill 2006 (Vic) 6, 4.

150. This approach was considered by the Victorian Committee (see Victorian Committee, above n 27, 55). See also Second MPA Report, 137, where the JCHR said that scheduling public authorities places emphasis on the character of the relevant body rather than the function which it performs, and could lead to inconsistency or confusion.

The HRLRC submits that, as the House of Lords found in Aston Cantlow,[151] 'public function' should be given a 'generously wide' interpretation so as to further the statutory aim of promoting human rights protection.[152] There should be 'no single test of universal application, given the diverse nature of governmental function[s] and the variety of means by which these functions are discharged today'.[153]

The HRLRC submits that, for the avoidance of doubt, and in light of the trend towards privatisation of public functions, the Human Rights Act should include a non-exhaustive list of those functions that are considered, prima facie, to be 'of a public nature'. The list would include (but should be expressed to not be limited to):

- operation of correctional/detention facilities;
- provision of essential services (gas, electricity, water);
- provision of emergency services;
- provision of all healthcare or medical services (public and private);
- provision of all educational services, including private schooling;
- provision of public transport; and
- provision of public housing.

Further, the Human Rights Act should state that where a government agency outsources its public functions it is not relieved of its obligations under the proposed Human Rights Act. That is, where a public authority delegates its functions to another entity, by contract or otherwise, the public authority will retain its obligations, regardless of whether the delegate is also conferred with those obligations.[154] This is not to say that the contractor should not also be required to comply with the Human Rights Act, merely that public authorities cannot contract out of their human rights obligations.

The HRLRC submits that any entity exercising a function that is, or has been, connected to or generally identified with functions of government should be presumed to be obliged to comply with the Human Rights Act. The HRLRC acknowledges that the perception of which functions of a public nature are 'generally identified with functions of government'[155] is likely to change over time with ongoing privatisation and outsourcing and the ebb and flow of trends to greater or lesser government provision of services. To accommodate this, the Human Rights Act should include a provision that an entity can be declared by regulation not to be a public authority for the purposes of the Act (in respect of the exercise of all of, or certain of, its functions).[156] Parliament can thereby respond to the changing nature of the provision of public services in Western Australia without diluting the benefits the Human Rights Act can bring to the State's most vulnerable citizens.

151. *Aston Cantlow Parish Church Council v Wallbank* (Appellate Committee of the House of Lords) [2004] 1 AC 546. Cf *YL v Birmingham City Council & Ors* [2007] UKHL 27 (20 June 2007).
152. Ibid, 11.
153. Ibid, 12.
154. The UK Court of Appeal held that this was the case under the UK Act in *R v Leonard Cheshire Foundation* [2002] EWCA Civ 366, [33].
155. Victorian Charter, s4(2)(b).
156. Cf: Victorian Charter, s4(1)(k).

The HRLRC submits that a broad definition of 'public authority' in the Human Rights Act will not result in market flight by private providers of public functions. The JCHR addressed such concerns in the Second MPA Report,[157] responding that:[158]

> there have been relatively few cases against "pure" public authorities in the context of the provision of services based on the [UK Act] since it came into force. … It is likely that many private providers responsible for the delivery of public services which engage Convention rights will already be subject to significant and close regulation and a significant risk of litigation or rebuke as a result of a failure to comply with relevant regulatory standards. …
>
> We are aware that threats to leave the market have followed a number of regulatory and consumer protection measures in other sectors. On the other hand, we heard from the Mayor of London that the implementation of their recent Group Sustainable Procurement Policy and the use of equality standards by Transport for London as contract conditions have not led to a significant flight of private providers from the market. It also appears that there has been no significant decline in those sectors where "functional" public authority status clearly applies to private providers, for example, independent hospital care (following the decision of [*R(A) v Partnerships in Care Ltd* [2002] 1 WLR 2610]).

For those entities which currently comply with their existing regulatory obligations, the application of the Human Rights Act to private providers will have little impact. This is not to say that explicit human rights protections are not necessary. The Western Australian Government has indicated that one aim of the Human Rights Act is to foster a culture of human rights 'in which there is greater awareness of, respect for, and observance of, human rights at all levels of government and throughout the community.'[159] The express consideration by all providers of public services of the impact their decisions and conduct have on the human rights of those with whom they deal is an essential element in the building of the broader human rights culture that the Human Rights Act is intended to achieve.

Human rights audits/reports

The Human Rights Act should require that all public authorities (as defined) undertake an annual audit of their human rights compliance and submit a detailed annual report to the authority responsible for oversight and enforcement of the Human Rights Act.

In the UK, in circumstances where public authorities have had inadequate (if any) auditing procedures in place, the implementation and incorporation of human rights into policy and service delivery has stalled.[160] Particularly significant was the finding by the Audit Commission that where human rights complaints were unsuccessful, the relevant public authority tended to conclude that they were complying with the UK Act.[161]

It is critical to the effective implementation of a Human Rights Act that any shortcomings in public authorities' compliance with and understanding of their obligations are quickly identified. Further training, education and assistance can then be provided where necessary.

157. Second MPA Report, [84] – [90].

158. Ibid, [87] – [88] (footnotes omitted).

159. Discussion Paper, 1.

160. Audit Commission, *Human Rights: Improving Public Service Delivery* (2003), 13.

161. Ibid.

Human rights audits and reports are central to the HRLRC's proposal for the effective inclusion of ESC Rights in the Human Rights Act. Under this proposal, public authorities are required to include in their annual audit reports:

- figures for all complaints referred to the authority by the Human Rights Commissioner (or equivalent body);
- any recommendations made by the Human Rights Commissioner;
- the authority's response to those complaints; and
- if the authority decides against taking action in response to any Human Rights Commission recommendation, the reasons for that decision.

The JCHR in the Second MPA Report said that it had received concerns that the administrative burden of the UK Act may be a disincentive for providers to remain in the market. The JCHR noted that none of the major service providers said that they would definitely be forced to leave the market if the UK Act applied directly to them, but that a small number of private providers may leave the market. The HRLRC submits that the administrative burden on smaller private providers of public services can be minimised by requiring core public authorities to report on human rights compliance by those smaller providers of public services for which the core public authority is responsible.

Human rights action plans

The OHCHR has stated:

> The most important source of added value in the human rights approach is the emphasis it places on the accountability of policy-makers and other actors whose actions have an impact on the rights of people. Rights imply duties, and duties demand accountability. It is therefore an intrinsic feature of the human rights approach that institutions and legal/administrative arrangements for ensuring accountability are built into any…strategy.[162]

The HRLRC supports the inclusion of a mandatory provision in the Human Rights Act requiring public authorities to develop a plan for the implementation, measurement, progress and accountability of human rights.[163] This approach has been effective in New Zealand, where the New Zealand Human Rights Commission has developed the New Zealand Action Plan for Human Rights. Its success can be attributed, in part, to the fact that it is well developed and resourced.[164] A lack of resources within a public authority could inhibit the authority's ability to develop an appropriate and effective action plan. The Western Australian Government should ensure that public authorities are adequately resourced for this purpose.

162. OHCHR Draft Guidelines, 5.

163. Lynch, above n 122, 74.

164. Human Rights Commission (NZ), *New Zealand Action Plan for Human Rights* (2005) http://www.hrc.co.nz/report/actionplan/0foreword.html.

The Office of the United Nations High Commissioner for Human Rights (the ***OHCHR***) has identified a number of conditions that are important to an effective human rights action plan.[165] The plan should:[166]

- clearly state what people's rights are;
- state the authority's human rights responsibilities;
- state the authority's commitment to the realisation of the human rights enumerated within the plan;
- include time frames for the realisation of human rights;
- include, at the very least, annual targets;
- include indicators of how targets are set and their success measured; and
- include strategies to promote and protect human rights, particularly amongst the target section of the public the authority deals with.

5.2 Should individuals or bodies in the private sector also be required to comply?

Except to the extent that private entities are carrying on public functions, as discussed above, the HRLRC agrees with the Government's view that, initially, the Human Rights Act should not apply to 'everyone in the community, including individuals in their private relations, businesses and non-profit organisations'.[167] The HRLRC also agrees that expansion of the coverage of the Human Rights Act to these groups should be the subject of further consideration once the Act has been 'operating for a while'.[168] However, the HRLRC submits that a timetable for reconsideration of the scope of the Act should be established in the course of the development and introduction of the Human Rights Act. The HRLRC submits that an initial review should be conducted four years after commencement, and that further reviews should be undertaken every five years thereafter.

5.3 Recommendations

(a) The definition of entities bound by the Human Rights Act should be a broad definition of 'public authorities', encompassing all entities who exercise functions of a public nature, insofar as they are exercising those functions.

(b) All public authorities should be required to:

- act in a manner that is compatible with a Protected Right; and
- give proper consideration to Protected Rights when making decisions.

(c) The Human Rights Act should require the development of executive policies and practises that promote protection of Protected Rights, including human right audits, reporting and action plans.

165. OHCHR Draft Guidelines, 15-17.

166. Ibid; Lynch above n 122, 74.

167. Discussion Paper, 30.

168. Ibid.

6. Question 6 What should happen if a person's human rights are breached?

6.1 How should disputes about breaches of human rights be resolved?

The HRLRC submits that a breach of a person's human rights should give rise to a freestanding cause of action. An aggrieved person should have two courses of action: (i) seek redress in the courts; or (ii) lodge a complaint with a Human Rights Commissioner. Remedies available in the courts should include compensation, declarations and injunctions.

The HRLRC notes that the Western Australian Government has indicated that provision for the court enforceability of Protected Rights or the creation of a Human Rights Commission are alternates (ie, the Human Rights Act will provide for one or the other).[169] The HRLRC considers that judicial remedies and non-judicial responses to alleged breaches should, in fact, be complementary. It is important that people have legal redress where their rights have been breached, but in many cases a non-judicial response (eg lodging a complaint with the Human Rights Commission) will be appropriate. (For example, an aggrieved person may be satisfied with a formal apology.) The availability of both judicial and non-judicial responses provides the legal redress identified as essential in the ICCPR, but also allows people to seek a resolution of their complaint without having to resort to litigation.

6.2 Obligation to ensure effective remedies in international law

Australia is obliged under international law to provide 'effective remedies' in relation to particular human rights.[170] According to the OHCHR:

> Rights and obligations demand accountability; unless supported by a system of accountability, they can become no more than window-dressing. Accordingly, the human rights approach … emphasises obligations and requires that all duty-holders, including States, be held to account for their conduct in relation to international human rights.[171]

Providing for effective mechanisms for seeking redress is critical to ensuring the community enjoys the benefits that the Human Rights Act will bring. The ICCPR requires States that are parties, to ensure that people whose rights are violated have an 'effective remedy'. While an effective remedy may be administrative in nature, the HRLRC submits that, in general, the availability of an effective remedy requires that 'individuals be able to seek enforcement of their rights before national courts and tribunals.'[172] Further, a remedy, if granted, should be enforceable.

169. Discussion Paper, 31.

170. See, eg: ICCPR, art 2(3); CERD, art 6; CAT, art 14; CROC, art 39.

171. OHCHR, *Human Rights and Poverty Reduction: A Conceptual Framework* (2004), 15-16.

172. See CESCR, *General Comment 9*, above n 34.

6.3 Free-standing cause of action for a breach of a CP Right

The Western Australian Government has indicated that, as the aim of the Human Rights Act is to create a human rights dialogue, remedies under the Human Rights Act should focus on the review of government conduct by the courts.[173] The HRLRC agrees that the Human Rights Act should promote a dialogue, but considers that the Human Rights Act cannot adequately protect substantive human rights without giving aggrieved individuals a freestanding cause of action for breach of their Protected Rights.[174] The HRLRC submits that a freestanding cause of action and the availability of compensation are not incompatible with focusing on the review of government action by the courts.

The UK experience suggests that concerns about the existence of a free-standing cause of action are, to a large extent, unfounded. The DCA Review considered the impact of the UK Act on the development of the substantive law, noting that:[175]

- decisions of the UK courts under the UK Act have had no significant impact on criminal law, or on the Government's ability to fight crime;
- the UK Act has had an impact upon the Government's counter-terrorism legislation, although the main difficulties in this area arise not from the UK Act, but from decisions of the European Court of Human Rights;
- in other areas the impact of the UK Act upon UK law has been beneficial, and has led to a positive dialogue between UK judges and those at the European Court of Human Rights;
- although the UK Act has been considered in up to a third of all cases in the House of Lords, it has not led to a discernible increase in litigation; and
- the UK Act has not significantly altered the constitutional balance between Parliament, the executive and the judiciary.[176]

The HRLRC acknowledges that there are concerns as to how ESC Rights might be interpreted by the courts, should the Human Rights Act provide for such rights to be directly enforceable.[177] The HRLRC therefore proposes that a model be adopted which provides different remedies for breaches of CP Rights and ESC Rights, limiting the availability of judicial remedies (including compensation) to actions involving breach of CP Rights.

173. Ibid, 33.

174. Julie Debeljak, 'Access to Civil Justice: Can a Bill of Rights Deliver?' (2001) 9 *Tort L Rev* 32, 50.

175. DCA Review, Part 2.

176. Ibid, 10.

177. See eg, ACT Review.

6.4 Effective remedies

The UNHRC has defined the right to an 'effective remedy' as requiring 'reparations' to be made to individuals whose rights have been violated. Such reparations may include:

> 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 perpetration of human rights violations.[178]

Accordingly, an effective remedy may require measures beyond a victim-specific remedy such as compensation.[179]

The CESCR has also stated that '[t]he right to an effective remedy need not be interpreted as always requiring a judicial remedy. Administrative remedies will, in many cases, be adequate'.[180] Nevertheless, some ICESCR obligations, such as those concerning non-discrimination, cannot be made fully effective without recourse to a judicial remedy.[181]

6.5 Remedies in the Human Rights Act

The HRLRC considers that, consistent with the international human rights framework, the Human Rights Act should ideally provide 'appropriate means of redress … to any aggrieved individual or group,'[182] whether the redress is for a breach of an ESC Right or a CP Right. In light of the concerns previously noted in relation to ESC Rights, the HRLRC proposes a two-tiered remedial system. The Human Rights Act should provide for the full range of judicial and non-judicial remedies for breaches of CP Rights, including compensation and injunctions, but purely non-judicial administrative responses to breaches of ESC Rights.

(a) Remedies for breaches of CP Rights

For breaches of CP Rights, the HRLRC submits that the Human Rights Act should adopt the following remedies available under domestic human rights frameworks in South Africa, Canada, New Zealand, the United States and the United Kingdom:

- a declaration or 'statement' that a law, policy or program is incompatible with Protected Rights and requiring the government to respond to this incompatibility;[183]
- a declaration or order that a law, policy or program be implemented in accordance with Protected Rights;[184]
- an injunction, declaration or order that conduct or activity amounting to a breach of Protected Rights be stopped;[185]
- compensation and reparations; and[186]
- such remedies as are 'just and appropriate'.[187]

178. UNHRC General Comment 31 above n 53, [16].
179. Ibid, 17.
180. CESCR, *General Comment 9*, above n 34, [9].
181. Ibid.
182. Ibid, [2].
183. See, eg: ACT Act, s32; UK Act, s 4.
184. See, eg: UK Act, s7.
185. UNHRC, *General Comment 31* above n 53 [17], [19], and remedy available under the Victorian Charter, if the action for breach of a Charter Right is brought in conjunction with another cause of action for that relief; s39.
186. See, eg: *Simpson v Attorney General (NZ)* [1994] 3 NZLR 667; UK Act, s8. The UNHRC has stated that 'States Parties [are required to] make reparation to individuals whose … rights have been violated. Without reparation to individuals whose … rights have been violated, the obligation to provide an effective remedy, which is central to efficacy of article 2, paragraph 3 is not discharged': UNHRC, *General Comment 31*. above n 53 [16].
187. See eg: UK Act, s7.

The Human Rights Act should provide for a range of remedies, both judicial and non-judicial. Judicial remedies should include damages or compensation (where there is no effective or appropriate alternative remedy), and non-judicial remedies should include the complaints, claims and conciliation processes through a Human Rights Commissioner (or an equivalent body).

Damages or compensation

Under the Victorian Charter there is no entitlement to compensatory damages for a breach of human rights.[188] It is likely that the Victorian Charter also prevents any payment of exemplary or punitive damages.[189] The UK Act, on the other hand, extends the power to award damages for a breach to any court that has the power to order payment of damages or compensation in a civil case.[190] As discussed at section 6.6 below, however, damages are rarely awarded under the UK Act, with judicial review and declaratory and injunctive relief more often providing effective remediation of breaches or proposed breaches of human rights. Nevertheless, the UK courts do retain the discretion to award damages where it is just and appropriate to do so.

The HRLRC submits that the Human Rights Act should adopt the UK approach. Where damages are awarded, they should be available to cover actual financial loss, for example loss of earnings, loss in the value of property, or loss of employment prospects. Damages should also be available for non-pecuniary loss such as anxiety or distress.

Non-judicial remedies

The HRLRC strongly supports the creation of an independent Human Rights Commission.[191] While it would be desirable for Western Australia to have an independent, dedicated Human Rights Commission, the role could be incorporated into an existing body, such as the Equal Opportunity Commission. In the ACT, the Human Rights Commissioner's role includes reviewing law for compliance with Protected Rights, and reporting to the Attorney-General on a regular basis.[192] The Western Australian commissioner should have a similar role.

The Victorian Charter provides for the pursuit of a breach through the Ombudsman, but not the Victorian Equal Opportunity and Human Rights Commission. The HRLRC submits that the Human Rights Act should create a Human Rights Commission with powers of complaints handling and conciliation. Once a decision is made (or a complaint is dismissed), this may be appealed to a judicial body such as the State Administrative Tribunal. Alternatively, such powers may be given to an existing body such as the Equal Opportunity Commission. This would reduce any risk that frivolous or unnecessary human rights litigation might be encouraged by a free-standing cause of action under the Human Rights Act (see section 6.3 above) as complainants would have ready access to an inexpensive alternative to litigation as a means of addressing the non-pecuniary aspects of their complaint.

188. s39(3).

189. Simon Evans, 'The Victorian Charter of Rights and Responsibilities and the ACT Human Rights Act: Four Key Differences and their Implications for Victoria' (Paper presented at the Australian Bills of Rights: The ACT and Beyond Conference, Australian National University, 21 June 2006).

190. UK Act, s8.

191. See ACT Act, Part 6.

192. Julie Debeljak, above n 72.

(b) Responses to breaches of ESC Rights

The HRLRC's preferred position would be for the Human Rights Act to provide for directly enforceable ESC Rights protections, in accordance with internationally accepted principles of the interdependence and indivisibility of human rights.

However, the HRLRC is aware that, in light of concerns expressed in relation to ESC Rights, the Western Australian Government is unlikely to go down the path of direct enforceability – at least not initially. The HRLRC submits that, as an alternative to providing from the outset for judicial remedies for breaches of ESC Rights, the Human Rights Act should provide for a Human Rights Commissioner (or existing body such as the Equal Opportunity Commission) to receive complaints from individuals who allege a breach of their ESC Rights.[193] The Commissioner should consider all complaints received (using policies, guidelines or regulations made for the purpose), to determine whether the complaint raises any issues which, in the Commissioner's opinion, should be addressed by the relevant public authority.

All complaints must be referred, within a specified period, to the public authority (or public authorities) which the Commissioner considers the most appropriate in the circumstances. The Commissioner must include with the referred complaint his or her conclusions as to the action that should be taken by the public authority. The HRLRC envisages that the Commissioner will have available three alternative recommendations (but this does not preclude the possibility that more options may become apparent with further consideration):

- the complaint does not disclose a shortcoming in the conduct, policies or procedures of the public authority or an officer thereof, and no remedial action by the public authority is recommended;
- the complaint does disclose a failure of conduct, policy or procedure by a public authority or officer thereof and the Commissioner recommends that action be taken to remedy the shortcoming(s), in which case the public authority must either:
    - take action to remedy the shortcoming; or
    - if, after giving the complaint and recommendation due consideration, it decides not to take action, publish its reasons for making that decision; or
- the complaint does not give rise to a need for corrective actions by the public authority, but the Commissioner is of the opinion that the person's complaint may be resolved by arbitration or conciliation (leading to potential results such as an apology).

All public authorities should be required to publish the details of all complaints received, the Commissioner's recommendations and any actions taken in response or the reasons for not taking remedial action, in their annual audit reports. The Commission, in its annual report, should also publish details of all complaints received, including referral and recommendation details, actions taken by the public authorities and any reasons given by the public authorities for actions not being taken. The information gained by this process will be extremely useful in allowing public authorities and Government to target policy areas that are in need of urgent attention, and will provide a basis for future reviews of the Human Rights Act to determine how and when to bolster the protection of ESC Rights.

A summary of suggested provisions for the incorporation of the ESC Rights procedure is attached to this Submission as Annexure 1.

193. An important related issue will be the implementation of a public education programme to ensure that people are made aware of the distinction between their CP Rights and ESC Rights: see s 9.

6.6 Remedies should be expressly articulated in the Human Rights Act

The HRLRC submits that the remedies for breach of the Human Rights Act should be clearly articulated.

The NZ Act does not include such an express remedy clause and the courts have had to *imply* a right to remedies,[194] namely, a judicial discretion to exclude evidence obtained in violation of rights; and a right to compensation.[195]

In relation to judicial remedies for breaches of CP Rights, the HRLRC submits that the Human Rights Act should adopt a provision similar to section 8 of the UK Act, which provides for a court to make such orders as are within its jurisdiction and are just and appropriate, including damages.[196] The UK experience is that this has not resulted in an explosion in the number of awards of damages. According to the DCA Review, damages under the UK Act have only been awarded in three reported cases.[197] Further, the DCA Review points out that an impression exists 'in the public mind that a wide range of claims are successful when in fact they are not – and have often been effectively laughed out of court.'[198] The most prominent example given is that of Dennis Nilsen, who was sentenced to life imprisonment in 1983 for multiple murders. Nilsen sought judicial review of a decision of the prison governor to deny him access to pornography, but his application was refused by the single judge at the permission stage. Not only was Nilsen's failure at the outset not widely reported, but as the DCA Review points out:

> the case is now often cited as the leading example of a bad decision made as a result of the [UK Act], with the Shadow Home Secretary himself asserting that Dennis Nilsen had been able to obtain hard-core pornography in prison by citing his "right to information and freedom of expression" under the Act.[199]

194. See *Simpson v Attorney-General* [1994] 3 NZLR 667, particularly the judgment of Cooke P.

195. ACT Bill of Rights Consultative Committee, ACT Legislative Assembly, *Towards an ACT Human Rights Act* (2003).

196. Section 8 relevantly provides:

    (1) In relation to any act (or proposed act) of a public authority which the court finds is (or would be) unlawful, it may grant such relief or remedy, or make such order, within its powers as it considers just and appropriate.

    (2) But damages may be awarded only by a court which has power to award damages, or to order the payment of compensation, in civil proceedings.

    (3) No award of damages is to be made unless, taking account of all the circumstances of the case, including:

    (a) any other relief or remedy granted, or order made, in relation to the act in question (by that or any other court); and

    (b) the consequences of any decision (of that or any other court) in respect of that act, the court is satisfied that the award is necessary to afford just satisfaction to the person in whose favour it is made.

197. *R (Bernard) v Enfield Borough Council* [2003] HRLR 111; *R(KB) v Mental Health Review Tribunal* [2004] QB 936; and *Van Colle v Chief Constable of Hertfordshire* [2006] EWHC 360; see DCA Review, 18.

198. DCA Review, 30.

199. Ibid; quoting 'Tories target human rights', *Daily Telegraph*, (London) 17 August 2004.

6.7 Standing

The HRLRC is strongly of the view that standing under the Human Rights Act should be broad and permissive to ensure that the interests of the most vulnerable Western Australians can be protected by enabling third parties to initiate or intervene in human rights proceedings. Where a person, or group, whose Protected Rights have been breached, or are at risk of being breached, are unable to bring a complaint on their own behalf, third parties should have standing to act on their behalf. Section 38 of the *South African Bill of Rights 1996* is a useful guide in this regard, providing as follows:

> Anyone listed in this section has the right to approach a competent court, alleging that a right in the Bill of Rights has been infringed or threatened, and the court may grant appropriate relief, including a declaration of rights. The persons who may approach a court are –
>
> (a) anyone acting in their own interest;
>
> (b) anyone acting on behalf of another person who cannot act in their own name;
>
> (c) anyone acting as a member of, or in the interest of, a group or class of persons;
>
> (d) anyone acting in the public interest; and
>
> (e) an association acting in the interest of its members.

6.8 Recommendations

(a) The Human Rights Act should provide the following remedies for breaches of CP Rights:

  (i) a declaration or 'statement' that a law, policy or program is incompatible with Protected Rights and requiring government to respond to this incompatibility;

  (ii) a declaration or order that a law, policy or program be implemented in accordance with Protected Rights;

  (iii) an injunction, declaration or order that the conduct or activity amounting to a breach of Protected Rights be stopped;

  (iv) damages, compensation and reparations; and

  (v) such other remedies as are just, appropriate and equitable.

(b) The office of Human Rights Commission should be created (or the role of Human Rights Commissioner given to an existing body such as the Equal Opportunity Commission) with the authority and function of complaints handling and conciliation in response to allegations of breaches of either CP Rights or ESC Rights.

(c) The Human Rights Act should confer standing on the following individuals and groups:

  (i) any person or organisation aggrieved or directly affected by the matter;

  (ii) any person or organisation with a 'special interest' in the matter;

  (iii) any person or organisation intervening in the public interest; and

  (iv) any person or organisation acting for or on behalf of an individual or group that is unable to bring proceedings on their own behalf.

7. Question 7 If WA introduced a Human Rights Act what wider changes would be needed?

7.1 Is the creation of a Human Rights Commissioner for WA a necessary or appropriate measure?

The HRLRC strongly supports the creation of an independent, dedicated Human Rights Commissioner.

The Western Australian Human Rights Commission could be incorporated into an existing body, such as the Equal Opportunity Commission, as occurred in Victoria.[200] The ACT Human Rights Commissioner's role may be as broad as reviewing the impact of laws on human rights, monitoring the operation of the ACT Act, encouraging government agencies and authorities to adopt policies and programs compatible with the Human Rights Act and generally performing a human rights educative function.[201]

The Human Rights Act should give the Human Rights Commissioner the powers to handle human rights complaints and to undertake conciliation. This would serve to mitigate any risk that frivolous or unnecessary human rights litigation might be encouraged by a free-standing cause of action under the Human Rights Act as complainants would have ready access to an inexpensive alternative to litigation as a means of addressing the non-pecuniary aspects of their complaint. This would be in contrast to the Victorian Charter, which provides for the pursuit of a breach through the Ombudsman, but not the Victorian Equal Opportunity and Human Rights Commission. Remedies for breaches of human rights are considered further in section 6 above.

The Human Rights Commissioner should have the authority to report on the actual or potential human rights effect of legislation. However, the role of examining legislative enactments for compliance with the Human Rights Act should be left to a parliamentary committee. Committee review of legislation is considered further in section 4 above.

The HRLRC submits that the Human Rights Commissioner's functions should include:

- human rights complaints handling and conciliation;
- the preparation of annual reports on compliance with the Human Rights Act for forwarding to the Attorney-General and then tabling in Parliament;
- reviewing the practices of public authorities for compliance with the Human Rights Act;
- making submissions to the relevant legislative committees about the implications of proposed legislation on protected human rights; and
- developing education programs to promote the acceptance of, and compliance with, the Human Rights Act's objectives.

Part 8 of the Human Rights Bill, which amends the *Equal Opportunity Act 1984* (WA) by inserting a new section 80A, would need to be amended to accommodate these powers.

200. For example, the Victorian Charter renamed the Equal Opportunity Commission of Victoria the Equal Opportunity and Human Rights Commission (Vic) and conferred additional functions on the Commission to promote understanding of, and compliance with, the Victorian Charter.

201. Refer s41(1) of the ACT Act. See also Julie Debeljak, above n 72.

7.2 Recommendation

Western Australia should have a well-resourced Human Rights Commissioner with powers and functions including:

- human rights complaints handling and conciliation;
- the preparation of annual reports on compliance with the Human Rights Act for forwarding to the Attorney-General and then tabling in Parliament;
- reviewing the practices of public authorities for compliance with the Human Rights Act;
- making submissions to the relevant legislative committees about the implications of proposed legislation on Protected Rights; and
- developing education programs to promote the acceptance of, and compliance with, the Human Rights Act's objectives.

8. Question 8
What else could the Government and the community do to encourage a culture of respect for human rights in Western Australia?

8.1 Is there anything else that could be done in addition to (or instead of) introducing a WA Human Rights Act, to promote a human rights culture in WA?

(a) Education and training

A critical factor to consider when initiating a Human Rights Act is how that Act will be integrated into the fabric of society. The underlying long-term goal of any Human Rights Act must be to foster a culture respectful of human rights.

Awareness of a Human Rights Act needs to permeate beyond the legal community and public institutions into the broader community. The establishment of a human rights culture is key to the enhancement of the protection of human rights, and education is key to the establishment of such a culture.

According to the DJCS, the first objective of a Charter must be to promote cultural change within the executive by ensuring that decision makers work within the internationally agreed framework of human rights standards.[202] The second objective must be to promote awareness of human rights and how they are used within the legal profession, community sector and the wider community.[203]

In the UK, the DCA has indicated that significant barriers to effective implementation of the UK Act have arisen from:

- myths, misperceptions and misrepresentations as to the role and effect of the UK Act;[204]
- deficiencies in training and guidance of public servants in relation to human rights;[205] and
- a general lack of human rights education among the public sector and the general public.[206]

The HRLRC submits that the success of the Human Rights Act will depend to a very great extent upon the priority and resources given to human rights education strategies by the Western Australian Government. The HRLRC considers that strategies should be developed, and education, training and resources provided, in relation to each of the following key groups:

- public authorities;
- the judiciary;
- the legal profession;
- non-government and community organisations; and
- the general community.[207]

202. Renee Leon, Chief Executive, DJCS, *Human Rights Act 2004 Twelve-Month Review – Discussion Paper* (March 2006).
203. Ibid. See also a review completed by the ACT Council of Social Service Inc (*ACTCOSS*), *Review of the Human Rights Act 2004: Submission to the Department of Justice and Community Safety's Discussion Paper* (May 2006).
204. DCA Review, Part 4.
205. Ibid, 41.
206. Ibid, 42
207. For an overview of the range of programs and resources that have been developed in relation to each of these groups in other jurisdictions, including the ACT, UK, New Zealand and South Africa, see HRLRC, *Human Rights Education Strategy Report* (2006), available at www.hrlrc.org.au.

The HRLRC considers, in particular, that valuable experience and insights are available from:

- the UK Department of Constitutional Affairs;[208]
- the British Institute of Human Rights;[209]
- the Victorian Department of Justice Human Rights Unit;[210]
- the Judicial College of Victoria;[211]
- the Victorian Equal Opportunity and Human Rights Commission;[212]
- the ACT Department of Justice and Community Safety;[213] and
- the ACT Human Rights Commission.[214]

If the HRLRC's proposed model for the Human Rights Act is adopted, it will be especially important for the general public to be made aware of which of their rights are CP Rights, and therefore directly enforceable, and which are ESC Rights for which redress is limited to the complaints process.

(b) Funding and resources

According to the ACTCOSS, the successful implementation and protection of human rights has been hindered by limited funds and resources in the ACT.[215] This is also a key learning from the UK.[216] Adequate funding and resources by the government must be made available and allocated as necessary to organisations working in the area of human rights protection and education. The availability of legal and advocacy services is critical, and adequate funding for relevant providers must be provided to ensure that the Human Rights Act is as effective as possible in protecting the rights of Western Australians most in need of its protection.

(c) Availability of legal and advocacy services

The rights to legal representation, equality before the law and a fair hearing are human rights in and of themselves, and are critical aspects of the promotion, protection, fulfilment and enforcement of other human rights. Recognising this, the availability of advice, assistance and advocacy about human rights must be an integral component of the strategy for the implementation of the Human Rights Act.

208. www.dca.gov.uk/peoples-rights/human-rights/index.htm.
209. www.bihr.org.uk.
210. www.justice.vic.gov.au.
211. www.judicialcollege.vic.edu.au.
212. www.humanrightscommission.vic.gov.au.
213. www.jcs.act.gov.au.
214. www.hrc.act.gov.au.
215. ACTCOSS, *Review of the Human Rights Act 2004: Submission to the Department of Justice and Community Safety's Discussion Paper* (May 2006).
216. DCA Review, 41-2.

It is particularly important that human rights advocacy and legal services be available to marginalised and disadvantaged individuals and groups, many of whose human rights are particularly vulnerable to violation and for whom legal services are often largely inaccessible. According to the OHCHR, the availability and accessibility of human rights legal services and the justiciability of human rights are among the 'most important tools' to prevent or seek redress for rights violations. The UN High Commissioner for Human Rights considers that the following measures should constitute key features of an effective human rights promotion and protection strategy:

- access to human rights legal services and clinics for poor and disadvantaged people;
- human rights information and education campaigns targeting marginalised and disadvantaged communities; and
- training programs for lawyers and judges about the content and use of human rights.

This is consistent with research conducted by the UK Institute for Public Policy Research regarding factors that have contributed to implementation successes and failures in respect of the UK Act.[217] In Victoria, this has led to the Department of Justice providing recurrent funding to the HRLRC to 'assist their advocacy work in relation to disadvantaged Victorians' as part of an overall package designed to support the implementation and operation of the Victorian Charter.

(d) Review of Human Rights Act provisions

It is important that the implementation of the Human Rights Act is well monitored and understood. In particular, where ESC Rights are protected, it will be important to understand the types of complaints that are made in relation to breach of ESC Rights, so as to build a base of knowledge in relation to future litigation that might arise if ESC Rights are made enforceable in courts. Review procedures have been included in the ACT Act and the Victorian Charter and, as discussed, the UK Act has recently been the subject of a significant review by the DCA.[218]

117. Frances Butler (IPPR), *Improving Public Services: Using a Human Rights Approach – Strategies for Implementation of the Human Rights Act within Public Authorities* (2005); and Frances Butler (IPPR), *Human Rights: Who Needs Them? Using Human Rights in the Voluntary Sector* (2005).

118. Reviews are to be conducted after one year and a subsequent review after four years in the ACT (ss43 and 44 ACT Act) and after 4 and 8 years of operation in Victoria (s44 and 45 Victorian Charter).

8.2 Recommendation

(a) The Western Australian Government should ensure that adequate resources are provided to:

- a new Human Rights Commission, whether as part of the Equal Opportunity Commission or another similar body;
- the WA Legal Aid Commission;
- community legal centres; and
- other human rights and community organisations,

to enable them to provide targeted, accessible and adequate human rights education, information and legal services.

(b) The Human Rights Act should be reviewed after four years and thereafter at five year intervals. The review should be conducted with the active and resourced participation of all stakeholders and should consider:

- the effectiveness of the Human Rights Act in respecting, protecting and fulfilling Act Rights;
- whether further rights need to be included in the Act;
- whether judicial remedies should be available for breach of ESC Rights; and
- any special measures or strategies to promote and protect the human rights of vulnerable groups.

ANNEXURE 1
EXAMPLES OF ESC RIGHTS PROVISIONS

This section provides guidance as to how the Human Rights Act might incorporate the protection of ESC Rights. This section is intended as a suggestion only, and does not represent a submission by the HRLRC as to the precise wording of the relevant sections of the Human Rights Act. If it would assist the Consultation Committee, the HRLRC would be pleased to elaborate further on the manner of implementing ESC Rights contained in this submission.

1.1 Preamble

The Western Australian Human Rights Act should include a Preamble like the Victorian Charter Preamble, but with the addition of the following bullet point:

- human rights, whether civil, political, economic, social or cultural in nature are universal, interdependent, interrelated and indivisible.

1.2 Purpose

The preliminary, purpose provision (the equivalent of section 1 of the Victorian Charter) should include words to the effect of either:

(a) The main purpose of this Act is to protect and promote human rights by:

(i) creating the role of Western Australian Human Rights Commissioner and conferring upon that Commissioner the jurisdiction to receive from individuals complaints related to human rights, and to refer those complaints to the relevant public authority with such recommendation as he or she considers appropriate;

or

(b) The main purpose of this Act is to protect and promote human rights by:

(i) renaming the Western Australian Equal Opportunity Commission the Western Australian Equal Opportunity and Human Rights Commission and conferring upon that Commissioner the jurisdiction to receive from individuals complaints related to human rights, and to refer those complaints to the relevant public authority with such recommendation as he or she considers appropriate.

1.3 Definitions and Schedules

The definitions should include:

Protected Right means a right set out in either Schedule 1 or Schedule 2 of this Act.

Schedule 1 Right means a right set out in Schedule 1 of this Act.

Schedule 2 Right means a right set out in Schedule 2 of this Act.

Subject to further consideration as to precisely which rights are to be included and how those rights are to be expressed, Schedule 1 should include the rights in the ICCPR, and Schedule 2 should include the rights in the ICESCR. (Alternatively, the ICCPR could be included as Schedule 1 and the ICESCR as Schedule 2.)

1.4 Remedies

The Human Rights Act should include provisions similar to sections 6, 7 and 8 of the UK Act, but should distinguish between breaches of CP Rights and ESC Rights:

[X] Acts of public authorities

(1) It is unlawful for a public authority to act in a way which is incompatible with a Protected Right or, in making a decision, to fail to give proper consideration to Protected Rights.

(2) Subsection (1) does not apply to an act if as the result of one or more provisions of primary legislation, the authority could not reasonably have acted differently or made a different decision.

(3) 'An act' includes a failure to act.

[XX] No criminal offence

Nothing in this Act creates a criminal offence.

[Y] Proceedings

A person who claims that a public authority has acted (or proposes to act) in a way which is made unlawful by section [X](1) may, if the Protected Right that has been breached by the act of the public authority (or is likely to be breached by the proposed act of the public authority) is a Schedule 1 Right:

(1) bring proceedings against the authority under this Act in the appropriate court or tribunal; and

(2) rely on the Protected Right or Protected Rights concerned in any legal proceedings.

[YY] Remedies

(1) In relation to any act (or proposed act) of a public authority which the court finds is (or would be) unlawful, and where the Protected Right that has been breached by the act of the public authority (or is likely to be breached by the proposed act of the public authority) is a Schedule 1 Right, the court may grant such relief or remedy, or make such order, within its powers as it considers just and appropriate.

(2) Damages may be awarded only by a court which has power to award damages, or to order the payment of compensation, in civil proceedings.

(3) No award of damages is to be made unless, taking account of all the circumstances of the case, including:

(a) any other relief or remedy granted, or order made, in relation to the act in question (by that or any other court); and

(b) the consequences of any decision (of that or any other court) in respect of that act,

the court is satisfied that the award is necessary to afford just satisfaction to the person in whose favour it is made.

[Z] Complaints

(1) A person who claims that a public authority has acted (or proposes to act) in a way which is made unlawful by section [X](1) may lodge a complaint in writing with the [Commissioner].

(2) A complaint lodged under sub-section (1) in relation to breach (or proposed breach) of a Schedule 1 Right does not preclude the commencement of proceedings under section [Y].

(3) The Commissioner must forward the complaint to the [chief executive] of any public authority that the Commissioner considers appropriate within [#] days of receipt of the complaint.

(4) At the time the Commissioner forwards the complaint to a public authority, the Commissioner must include with the complaint his or her conclusion, based upon the Commissioner's consideration of the complaint in accordance with any guidelines, policy or regulations made for that purpose, that:

(a) the complaint does not require action to be taken by the public authority; or

(b) the complaint discloses a deficiency in the public authority's policy or procedure and that the public authority must either:

(i) amend its policies or procedures to make them compatible with this Act; or

(ii) cause to be published in the Gazette a statement providing reasons why the public authority is unable to amend its policy or procedures to make them compatible with the relevant Protected Rights; or

(c) the complaint does not disclose a deficiency in the public authority's policy or procedure, but the Commissioner is of the opinion that the parties should seek to resolve the complaint by mediation or conciliation.

(5) All complaints received by a public authority under this section, the Commissioner's recommendations in relation to those complaints and the public authority's responses to those complaints and recommendations must be reported in the public authority's annual human rights audit report.

ANNEXURE 2
TABLE OF ABBREVIATIONS

ACT Act means the Human Rights Act 2004 (ACT).

ACTCOSS means the ACT Council of Social Service Inc.

ACTHRO means the ACT Human Rights Office.

ACT Review means Human Rights Act 2004 – Twelve-Month Review – Report, ACT Department of Justice and Community Safety (www.jcs.act.gov.au/HumanRightsAct/Publications/twelve_month_review.pdf), 2006.

Canadian Charter means the Canadian Charter of Rights and Freedoms contained within Schedule B, Part I of the Constitution Act 1982 (Can).

CESCR means the United Nations Committee on Economic, Social and Cultural Rights.

Charters means legislative human rights instruments.

CP Rights means the civil and political rights contained in the ICCPR.

DCA means the UK Department of Constitutional Affairs.

DCA Review means the UK Department of Constitutional Affairs Review of the Implementation of the Human Rights Act 2006 (www.dca.gov.uk/peoples-rights/pdf/full_review.pdf).

Discussion Paper means A WA Human Rights Act: Human Rights for WA Discussion Paper, Consultation Committee for the Proposed Human Rights Act (www.humanrights.wa.gov.au), 2007.

DJCS means the ACT Department of Justice and Community Safety.

ECHR means the European Convention on Human Rights.

ESC Rights means the economic, social and cultural rights contained in the ICESCR.

Executive means the executive arm of government including departments, agencies and private organisations fulfilling public roles.

First MPA Report means *The Meaning of Public Authority under the Human Rights Act – Seventh Report of Session 2003-04*, JCHR, (www.publications.parliament.uk/pa/jt200304/jtselect/jtrights/39/39.pdf), 3 March 2004.

HRLRC means the Human Rights Law Resource Centre Ltd.

Human Rights Act means the proposed Western Australian Human Rights Act.

Human Rights Bill means the draft Western Australian Human Rights Bill 2007.

ICCPR means the International Covenant on Civil and Political Rights.

ICESCR means the International Covenant on Economic, Social and Cultural Rights.

Interpretive Principle means that all legislation is to be interpreted and applied (and, if necessary, read down) in a manner compatible with human rights.

JCHR means the UK Joint Parliamentary Committee on Human Rights.

Liberty Victoria means the Victorian Council for Civil Liberties Inc.

NZ Act means the *Bill of Rights Act 1990* (NZ).

OHCHR means the Office of the United Nations High Commissioner for Human Rights.

PILCH means the Public Interest Law Clearing House (Vic) Inc.

Protected Rights means those rights protected by the Human Rights Act.

Review Committee means the Western Australian Uniform Legislation and Statutes Review Committee.

Second MPA Report means *The Meaning of Public Authority under the Human Rights Act – Ninth Report of Session 2006-07*, JCHR, (www.publications.parliament.uk/pa/jt200607/jtselect/jtrights/77/77.pdf), 28 March 2007.

UK Act means the *Human Rights Act 1998* (UK).

UNHRC United Nations Human Rights Committee.

Victorian Charter means the *Charter of Human Rights and Responsibilities Act 2006* (Vic).

Victorian Committee means the Victorian Human Rights Consultation Committee.