Law Council
OF AUSTRALIA

# A Charter: Protecting the rights of all Australians

## Law Council of Australia's Submission to the National Consultation on Human Rights

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GPO Box 1989, Canberra
ACT 2601, DX 5719 Canberra
19 Torrens St Braddon ACT 2612

Telephone **+61 2 6246 3788**
Facsimile +61 2 6248 0639

Law Council of Australia Limited
ABN 85 005 260 622
www.lawcouncil.asn.au

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## Acknowledgement


The Law Council acknowledges the kind assistance of the New South Wales Bar Association's Human Rights Committee in the preparation of the constitutional issues section of this submission.

## Executive Summary

In this submission, the Law Council argues that current protection of human rights in Australia is plainly inadequate.

Australia is a signatory to the major international human rights treaties but, unlike all other Western democracies, has not implemented these treaties in a comprehensive piece of legislation or in the Constitution.

The Law Council wants to see a comprehensive legislative Charter of Rights which includes traditional civil and political rights, such as the right to a fair trial, as well as economic, social and cultural rights, such as the right to adequate food, housing and clothing.

A Charter of Rights would increase rights protection for all Australians but particularly the disadvantaged and vulnerable. In this submission, the Law Council describes the way that a Charter could be used to protect ordinary Australians in vulnerable situations, such as being a young person held in custody with older, more serious offenders.

The Law Council wants a Charter so that the Government would always have to take human rights into account by:

- requiring a Human Rights Impact Statement for each Cabinet decision; and
- requiring government departments and other public authorities to publish Human Rights Action Plans and report their progress each year.

The Law Council wants a Charter that would require Parliament to always take human rights into account by looking at a Human Rights Compatibility Statement for all legislation introduced into Parliament.

The Law Council wants a Charter that would allow anyone affected by a breach of human rights to ask a court to decide if the action of a Government department or agency violated their human rights. The court could also decide that the law under which the action was taken is inconsistent with human rights. If the court finds an inconsistency, the Charter would require Parliament to respond by changing the law to protect human rights or explain to the public why it will not change the law to protect human rights.

The features of the type of Charter that the Law Council wants are described in this submission. The Law Council believes that such features would comply with the requirements of the Australian Constitution and has made a joint statement with other constitutional lawyers to this effect.

The Law Council recognises that there are other models for Charters, including constitutionally entrenched Charters and Charters which allow courts to declare laws to be invalid.

The Law Council believes that the best option for improved human rights protection is the adoption of a legislative Charter of Rights containing the features described in this submission.

The Law Council recognises that a model which allows courts to invalidate laws would also provide improved human rights protection and accordingly supports the Committee examining this option as well, even though it is not the option preferred by the Law Council.

The Law Council also recognises that there are a range of other means that Australia could adopt to improve the protection and promotion of human rights, such as those outlined in the Background Paper issued by the Consultation Committee. These means include:

- improving Parliamentary processes by creating a Parliamentary Secretary for Human Rights;
- strengthening anti-discrimination laws and the role of the Australian Human Rights Commission; and
- improving human rights education and awareness in the community.

While these mechanisms would all contribute to the development of a culture of respect for human rights, without being accompanied by a Charter of Rights they will be unable to provide the type of comprehensive protection for fundamental rights that is urgently needed in this country.

The Law Council has welcomed this timely national debate about what Australia can do to make sure we protect and promote human rights in this country. Like many other individuals and organisations, the Law Council knows that the time has come for something to be done to rectify the current situation, where the rights of the most disadvantaged Australians remain inadequately protected and vulnerable to abuse. The Law Council argues that the adoption of a Charter of Rights is the best way to ensure all Australians' human rights get the protection they deserve.

## Introduction

1. The Law Council of Australia is pleased to provide its submission to the National Consultation on Human Rights and welcomes the Federal Government's commitment to engage in broad community consultation on how rights and responsibilities should be protected and promoted.

2. The Law Council is strongly in favour of the adoption of a federal Charter or Bill of Human Rights ('Charter of Rights')[1] and believes that this form of specific legislative protection for human rights is urgently needed in Australia.

3. The Law Council represents over 50,000 lawyers, through its constituent bodies. For many of these lawyers, human rights are issues of central public importance and part of their day to day work.

4. Every day Australian lawyers are involved in the business of representing the members of our community who are most vulnerable to having their human rights abused. Many of these lawyers give their services pro bono. Through this important work, lawyers ensure that everyone, no matter how unpopular or what crime they may be accused of, has the right to legal representation and to have their case heard by an independent court. In addition, all Australian lawyers uphold the rule of law of which human rights protection is an important component.

5. It is through these experiences that lawyers come into contact with the aspects of our legal system that are not operating to protect the rights of the Australian community.

6. In the course of this submission, the Law Council will identify what rights it believes require specific legal protection and describe what it considers to constitute 'sufficient protection' for these rights.

7. The Law Council will also identify the many gaps in the protection currently offered at the federal level for human rights and offer its views on the best mechanism to fill these gaps.

8. The Law Council believes that a Charter of Rights is the best mechanism to fill the gaps in human rights protection.

9. Following extensive consultation with the legal profession the Law Council has adopted a Policy Statement on a Federal Charter or Bill of Rights ('Policy Statement', which is **Attachment B** to this submission). The Law Council's Policy outlines the nature of the human rights that should be protected, the type of protection that should be afforded to those rights and the respective roles of the courts, the Executive and the Parliament. The Policy is aimed at ensuring that Parliament and Government decision-makers take human rights into account when making and administering the law.

10. The Law Council believes that a Charter which reflects this Policy would provide enhanced protection for human rights at the federal level – without disturbing the existing balance of power between the Parliament, the Executive and the courts.

[1] For the remainder of this submission the term 'Charter of Rights' will be used as a shortened form of 'Charter or Bill of Human Rights'. The Law Council notes that its Policy Statement refers to a 'Charter or Bill of Human Rights'. The use of the shortened term does not intend to imply a preference for a 'Charter' over a 'Bill' – it is used for convenience only.

11. A Charter of Rights would also deliver the type of comprehensive legal protection for human rights that is currently lacking within the federal system and that is unlikely to be achieved by the adoption of alternative measures designed to provide improved protection for human rights.

12. As the peak national body representing the legal profession the Law Council has a unique perspective to offer to the public debate on human rights protection in Australia, and hopes that the following submission will assist the Consultation Committee in its task of identifying options for the Federal Government to consider.

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

13. Human rights are the basic freedoms and protections that all of us are entitled to because we are human beings. Human rights apply to everyone equally, regardless of age, nationality, race, colour, religion, gender, or sexual preference or other status.

14. Human rights are catalogued in a range of international instruments, and centre on those rights enshrined in the *Universal Declaration of Human Rights*. These rights reflect the shared values of the international community and the fundamental freedoms necessary to ensure respect for the inherent dignity and equality of all human beings.

15. As a party to the main international human rights treaties, Australia is bound to implement a broad range of internationally recognised rights. These rights are set out first and foremost in the *International Covenant on Civil and Political Rights* (ICCPR) and the *International Covenant on Economic, Social and Cultural Rights* (ICESCR), with other treaties and conventions articulating in greater detail how these rights ought to be applied and realised with respect to particular groups or in particular circumstances. Both the ICCPR and ICESCR oblige Australia, as a State party, to give effect to the rights contained therein at the domestic level.

16. The Law Council believes that Australia has an obligation to protect and promote all rights contained in the international treaties to which it is a party.[2] In particular, the Law Council believes that those rights contained in the ICCPR and the ICESCR require specific legislative protection. These rights include, but are not limited to the:

- right to equal protection of the law and freedom from discrimination, for example, the right not to be discriminated against on the basis of race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status;
- right to liberty and security of person, for example the right for a person who is arrested and detained by police to be charged, brought before a court and tried within a reasonable time;
- right to self-determination, for example, the right for Indigenous Australians to freely pursue their economic, social and cultural development;[3]
- right to life and the right not to be arbitrarily deprived of life, for example, the obligation on the State to protect its citizens from genocide and to punish deprivation of life by criminal acts;
- right to freedom from torture and cruel, inhuman or degrading treatment or punishment, for example the right not to be held in incommunicado detention, or to be subjected to lengthy periods of solitary confinement;

[2] In addition to the ICCPR and the ICESCR, Australia is also a State Party to other international human rights treaties including the Genocide Convention, the Convention on the Elimination of all Forms of Racial Discrimination, the Convention Against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment, the Convention on the Elimination of All Forms of Discrimination Against Women, the Convention on the Rights of the Child, and the Convention Relating to the Status of Refugees.

[3] This right has been interpreted as requiring that the constituent peoples of a properly formed sovereign nation express their aspirations through the national political system, not through the creation of new States. For further discussion see Daes, E., Explanatory note concerning the Draft Declaration on the Rights of Indigenous Peoples, UN Doc: E/CN.4/Sub.2/1993/26/Add.1, (1993), [21]

- right to freedom from forced work, including freedom from slavery or servitude, for example the right not to be forced to perform work for another person under threat or coercion;
- right to humane treatment when deprived of liberty, for example the right for child prisoners to be separated from adult prisoners and the right for accused persons to be separated from convicted persons;
- right to freedom of movement, for example the right for people to move freely around Australia and choose where they live;
- right to a fair trial, for example the right for a person arrested by police to be informed of the nature of the charges against them and to be presumed innocent until proven guilty before a competent and independent tribunal;
- right to freedom from retrospective criminal liability, for example the right not be convicted for conduct that was not a criminal offence at the time it was undertaken;
- right to privacy and freedom from arbitrary interference with home and family life, for example the right for a person to have his or her privacy taken into account when government decisions are made about the person's home;
- right to freedom of thought, conscience and religion, for example the right to adopt a religion or belief of your choice and to practice that religion in a peaceful way without fear of arrest or persecution;
- right to freedom of expression and opinion, for example the right to get involved in political debates and express an opinion that is contrary to that expressed by the Government;
- right of peaceful assembly and freedom of association, for example the right to form a trade union or a political party without being arrested;
- right to protection of the family and children, for example the right to marry and start a family and equality of rights and responsibilities of spouses during marriage and its dissolution;
- right to vote and take part in public life, for example the right to receive material produced by political parties;
- right to work and to just and favourable conditions of work, for example the right to fair wages and equal pay for equal work;
- right to an adequate standard of living for every person and their family, for example the right to adequate food, clothing and housing;
- right to the enjoyment of the highest attainable standard of physical and mental health, for example the right to access medical treatment for mental illness;
- right to education, for example the right to free, compulsory primary education;
- right to take part in cultural life, for example the right to access information in other languages and the right to peacefully celebrate days of cultural significance.

17. The rights protected under the Victorian *Charter of Human Rights and Responsibilities 2006* ('the Victorian Charter') and the Australian Capital Territory's *Human Rights Act 2004* ('the ACT Act') are largely drawn from the civil and political rights contained in the ICCPR, but contain differences in emphasis. For example, no specific reference is made to the right to self-determination (article 1 ICCPR); the obligations of States Parties in respect of expulsion of aliens (article 13 ICCPR), the right to freedom from imprisonment for breach of contractual obligations (article 11 ICCPR) and the prohibition on war propaganda (article 20 ICCPR).

18. The ACT Act places an emphasis on fair trial rights, setting out five separate rights that broadly reflect different components of the article 14 right to a fair trial. The ACT Act also contains a right concerning 'children in criminal proceedings' which expands upon the rights in articles 14 and 24 of the ICCPR.

19. The Victorian Charter makes specific reference to the cultural rights of Indigenous Australians to enjoy their identity and culture; maintain and use their language; maintain their kinship ties; and to maintain their distinctive spiritual, material and economic relationship with the land and waters and other resources with which they have a connection under traditional laws and customs. The Victorian Charter also includes a specific property right, namely that a 'person must not be deprived of his or her property other than in accordance with law.'

20. Both the ACT Act and Victorian Charter contain a right to 'recognition and equality before the law' - broadly based on articles 2, 16, and 26 of the ICCPR. The ACT Act formulation closely reflects the text of those articles. The Victorian Act also reflects the text of those articles but includes a paragraph on 'affirmative action' not being discrimination.

21. The Law Council would like to see all of the ICCPR and ICESCR rights included in a federal Charter of Rights.

## 1.1 Civil and Political Rights v Economic, Social and Cultural Rights

22. Although the Australian legal system is more familiar with articulating, protecting and adjudicating civil and political rights, this does not mean that only this category of rights deserves protection.

23. Some of the most disturbing incidences of rights violations in Australia, such as the comparatively low life expectancy of Indigenous Australians and the growing homelessness epidemic, concern the denial of economic, social or cultural rights. As noted by the Law Institute of Victoria:

> *[E]conomic, social and cultural rights, including rights to just and favourable conditions of work, adequate food and clothing, access to adequate housing and high available standards of physical and mental health are central to the concerns of the community, particularly those most likely to experience hardship and disadvantage.*[4]

24. It is a widely accepted principle of international human rights law that human rights are *indivisible*, *interdependent* and *interrelated*. Whether they are expressed as civil and political rights or economic, cultural and social rights, the fundamental notion underpinning human rights is that they are derived from the inherent dignity of every human person.

[4] Law Institute of Victoria, *Submission to Victorian Human Rights Consultation Committee*, 2006.

The fulfilment of one right often depends, wholly or in part, upon the fulfilment of others. Consequently, all human rights have equal status, and cannot be positioned in a hierarchical order. This principle is reflected in the *Universal Declaration of Human Rights* which recognises civil, cultural, economic, political and social rights as equally fundamental.[5]

25. At the same time, it is also widely recognised that the implementation by States Parties of social, economic and cultural rights may be constrained by the limits of their available resources and thus the nature of the obligation imposed on States Parties at international law is to take steps towards 'progressive implementation'.[6]

26. The Law Council recognises the different practical and resource implications of creating legal obligations on States Parties to promote, protect and fulfil different categories of human rights. However, these challenges are apparent across the entire spectrum of internationally recognised human rights and are not just limited to economic, social and cultural rights. For example, providing sufficient protection for the right to adequate health care is likely to be multifaceted, and impose positive obligations on the State Party to expend resources building medical facilities and hospitals. Similar demands also arise in the context of civil and political rights, which also require the expenditure of significant resources, such as the establishment of a fair and just court system and the provision of adequate legal aid. While different rights might require different forms of protection, this should not lead to the creation of a hierarchy of rights.

**For these reasons, the Law Council is of the view that Australia has an obligation to protect and promote all rights contained in the ICCPR and the ICESCR and in principle no differentiation should be made between those categories of rights when setting out the nature, content and scope of Australia's obligations.** [7]

## 1.2 Rights and Responsibilities

27. The Law Council recognises that all human rights come with corresponding responsibilities. This recognition is a direct consequence of the inalienable and inherent nature of human rights: every human is afforded fundamental rights due to their status as a human being, and every human is thus invested with the responsibility of respecting the fundamental rights of others.

28. In this context, when the Law Council refers to rights that need protection, it is implied that this protection also extends to the promotion of the corresponding responsibility to respect that right. Thus, the absence of repeated reference to responsibilities throughout this submission does not indicate ambivalence towards the notion. Rather it stems from the principle that human rights automatically generate the responsibility to respect the rights of others.

**The Law Council believes that both the rights and corresponding responsibilities of all Australians should be protected.**

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[5] Although the Universal Declaration of Human Rights is not a legally binding document per se, the principles contained therein are now considered to be legally binding on States Parties either as customary international law, general principles of law, or as fundamental principles of humanity.

[6] See ICESCR Article 2(2), see UN Committee on Economic, Social and Cultural Rights General Comment 3, *The Nature of State Parties Obligations* 14/12/90, available at http://www.unhchr.ch/tbs/doc.nsf/(symbol)/CESCR+General+comment+3.En?OpenDocument.

[7] Law Council Policy on a Federal Charter or Bill of Human Rights para [4].

## 1.3 Emerging Human Rights Principles

29. The Background Paper refers to the development of new human rights principles, which move beyond the traditional categories of civil, political, economic, social and cultural rights into areas such as environmental rights, including a specific right to a healthy environment and the right to water. Most of these rights have yet to be formally codified in human rights conventions or protocols but some have been referred to in international and regional human rights courts, such as the European Court of Human Rights.

30. In terms of the human rights the Law Council believes require specific legislative protection, the Law Council's Policy focuses on those rights currently contained in the ICCPR and the ICESCR, as described above. For the Law Council, protection of these rights is urgently needed to secure the dignity, freedom and equality of all Australians.

31. However, the Law Council also recognises that human rights have both an inalienable and dynamic character. On the one hand, certain fundamental rights remain constant throughout changing social circumstances, such as the right to life or the right to equality. On the other hand, certain human rights, such as the right to health or the right to education, may take on a different complexion in light of social, economic, technological or environmental change. The realisation and protection of the right to health, for example, may demand that States Parties undertake positive action to protect the environment. This obligation may in turn prove to be so critical that it of itself gains the status of a free standing right, such as the right to a healthy environment.

32. To provide a further example, the Law Council recognises that the enjoyment of the right to a fair trial and the right to equality before the law depends upon a person having ready and equal access to quality legal services, regardless of wealth or other status. Equality before the law is meaningless if there are barriers that prevent people from enforcing their rights, just as the right to a fair trial is severely undermined if the person cannot access legal representation. This precondition may prove to be so fundamental to the enjoyment of these human rights that it itself becomes recognised as a human right, such as the right to access to justice. The Law Council is strongly of the view that the current legal system fails to provide access to justice for marginalised and disadvantaged members of the Australian community, and regularly observes this having a negative impact on the ability of those members of the community to articulate and enforce their fundamental rights.[8]

33. The Law Council believes that Australia should actively engage with the process of developing new human rights principles through its interaction with international human rights bodies and by enhancing and capitalising on existing human rights dialogues, particularly in the Asia-Pacific region.

34. The Law Council also encourages robust public debate about new human rights principles at the domestic level, and notes that such debate would benefit from strengthened human rights education across all levels of the Australian community.

35. As will be discussed later in this submission, the Charter of Rights supported by the Law Council allows Parliament the flexibility to add new human rights to the catalogue of rights protected in the Charter by legislative enactment. The Law Council would also

[8] For further discussion see Law Council of Australia, *Legal Aid and Access to Justice Policy Principles*, November 2008 available at http://www.lawcouncil.asn.au/library/policies-&-guidelines/general/legal_aid.cfm.

anticipate that the content of any Charter would be subject to regular formal and informal review by Parliament, Government and the general public, which could provide important opportunities to reconsider the content and range of human rights protected therein.

## 2. Are these human rights currently sufficiently protected and promoted?

36. The Law Council believes that specific legislative protection of human rights in the form of a federal Charter of Rights is needed to ensure human rights are sufficiently protected and promoted.

37. However, before answering this question, it is important to consider what is meant by the term 'protection', and what features would indicate 'sufficient protection' of human rights.

### 2.1 What does 'protection' of human rights mean?

38. Within the context of international human rights law, 'protection' of human rights generally implies an obligation to protect, promote and fulfil universally recognised human rights, and to ensure adequate remedies are available where a violation of those rights occurs.

39. Article 2 of the ICCPR describes a State Party's obligations under that Covenant as an obligation to respect and to ensure to all persons within its territory the rights contained in the Covenant. Further, article 2 (2) provides that:

> *2. Where not already provided for by existing legislative or other measures, each State Party to the present Covenant undertakes to take the necessary steps, in accordance with its constitutional processes and with the provisions of the present Covenant, to adopt such legislative or other measures as may be necessary to give effect to the rights recognized in the present Covenant.*
>
> *3. Each State Party to the present Covenant undertakes:*
>
> *(a) To ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity;*
>
> *(b) To ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy;*
>
> *(c) To ensure that the competent authorities shall enforce such remedies when granted."*

40. Article 2 of the ICESCR describes a State Party's obligations as follows:

> *1. Each State Party to the present Covenant undertakes to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures.*
>
> *2. The States Parties to the present Covenant undertake to guarantee that the rights enunciated in the present Covenant will be exercised without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.*

41. It is clear that at international law, 'protection' requires provision for and enforcement of appropriate remedies for breach of rights and the provision of resources for the realisation of those rights. To that end, Australia's human rights obligations go beyond

merely articulating human rights ideals in an aspirational way and instead require the implementation of mechanisms which compel Australia to give effect to those rights.

42. The UN Human Rights Committee has noted that it is generally up to States Parties to determine the method of implementation of their obligations under the ICCPR in their own territories, within the framework set out in Article 2.[9]

43. However, most States Parties to the international covenants have adopted a specific statement of human rights, either as a constitutionally entrenched document, or by incorporation of international and/or regional human rights instruments into domestic law.

44. In fact, Australia is the only western democracy without some form of specific legislative protection for a catalogue of human rights.

## 2.2 Does 'protection' require that rights may not be subject to restriction and limitation?

45. At international law it is recognised that in order for every person's human rights to be protected and promoted, the enjoyment of certain human rights must be subject to some limitation or restriction. International law also recognises that certain rights are of such a fundamental character that no restriction or limitation should be lawfully permitted.

46. Article 4(2) of the ICCPR lists the civil and political rights in respect of which no derogation is permitted. These rights include: the right to life, freedom from torture, freedom of religion and freedom from slavery. Increasingly, the right to a fair trial has also begun to be considered as a non-derogable right.[10]

47. Many of the other rights contained in the ICCPR, such as freedom of association, freedom of expression, and right to liberty and security are not absolute rights and may be subject to restriction or limitation. This qualification recognises that human rights may be subject to valid restriction if necessary to protect the rights of others. This principle is also recognised in the *Universal Declaration of Human Rights*:

> *In the exercise of his rights and freedoms, everyone shall be subject only to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society.*

48. The international jurisprudence in this area provides some guidance as to the grounds on which restrictions or limitations of human rights are permitted. For example, the

[9] UN Human Rights Committee, *General Comment No 3: Implementation at the national level* (Art 2): 29/07/81

[10] This right is not listed in Article 4(2) the ICCPR as a non-derogable right, however, as a principle of customary international law and as a recognised precursor to the enjoyment of other ICCPR rights, it has become increasingly difficult to justify restrictions or limitations on the right to a free trial – at least at the international level. Through its comments on the periodic reports of States Parties on implementation of the ICCPR and its conclusions on individual cases, the UN Human Rights Committee has expressed the view that some of the core fair trial rights in Article 14(1) and the right to habeas corpus should be considered non-derogable. For example, in 1994 the Human Rights Committee stated that: "a State may not reserve the right ... to arbitrarily arrest and detain persons, ... to presume a person guilty unless he proves his innocence, ... And while reservations to particular clauses of Article 14 may be acceptable, a general reservation to the right to a fair trial would not be." [UN Doc. CCPR/C/21/Rev.1/Add.6 (1994)] For further discussion see Evelyne Schmid, 'The Right to a Fair Trial in Times of Terrorism: A Method to Identify the Non-Derogable Aspects of Article 14 of the International Covenant on Civil and Political Right' (2009) 1(1) *Goettingen Journal of International Law* at pp. 29-44.

ICCPR requires any restriction of a protected right to be (a) prescribed by law (b) necessary for a legitimate purpose (such as the protection of public safety) and (c) proportionate to (that is the least restrictive means of achieving) that legitimate end.

49. In modern statements of rights, the need to provide for lawful restrictions of certain rights has been addressed either by placing limits on specific rights on a clause-by-clause basis or by including a general, reasonable limits clause that applies to all rights. The latter approach has generally been more popular.

50. For example, section 7 of the Victorian Charter provides 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 including-

    (a) the nature of the right; and

    (b) the importance of the purpose of the limitation; and

    (c) the nature and extent of the limitation; and

    (d) the relationship between the limitation and its purpose; and

    (e) any less restrictive means reasonably available to achieve the purpose that the limitation seeks to achieve.

51. Article 1 of the Canadian Charter of rights contains a specific 'limitation' clause that provides that rights contained in the Charter may only be subject to such reasonable limits as "can be demonstrably justified in a free and democratic society". A similar approach is taken under section 5 of the New Zealand *Bill of Rights Act 1990*.

**The Law Council has formed the view that certain rights, namely the right to life, freedom from torture, freedom of religion and freedom from slavery are non-derogable. All other rights may be subject to restrictions provided that such restrictions are: (a) prescribed by law (b) necessary to achieve a purpose recognised as legitimate and justifiable in a free and democratic society and (c) proportionate to (that is the least restrictive means of achieving) that legitimate end.**[11]

## 2.3 Who should be bound to observe human rights?

52. Although human rights are derived from the inherent dignity of each person, rather than created or granted by the nation state, the system of international human rights law relies on nation states as the vehicle through which rights are implemented and protected. Only *states* are parties to international human rights treaties and only *states* can be the respondent to a complaint under a human rights treaty that provides a complaint mechanism. This thinking has dominated domestic mechanisms for protecting human rights – many of which are limited to imposing obligations on the institutions of government[12] or public entities/institutions, such as government departments,

[11] Law Council Policy Statement para [5].

[12] This can be interpreted to include the executive arm of government and its relevant departments, agencies and bodies, public officials and even those bodies or agencies who perform a public function or deliver a public service.

government agencies or statutory authorities, and those entities performing public functions.[13]

53. However, it can be argued that extending the obligation to respect human rights beyond the State is both practically necessary to ensure human rights protection and a logical corollary of the inherent nature of human rights.

54. On the conceptual level, it can be argued that if rights are conceived as 'indivisible' in nature they should not be conceived as 'divisible' in application. In other words, whether a right is able to be enforced or its breach remedied should not depend on the identity of the body or person that is alleged to have violated the right.

55. On the practical level, it is clear that private organisations, corporations and private individuals have a significant impact on the full enjoyment of human rights, fulfilling many of the functions previously the domain of the State, for example as employers or service providers. As the NSW Law Society Human Rights Committee has observed:

> *Non-government bodies now exercise power and control over individuals and affect their lives in important ways. Individuals are now more vulnerable to intrusive and wide-ranging powers which may affect their rights, and these powers are wholly unconnected with the State.*
>
> …
>
> *A rights protection strategy that focuses only on state power leaves the individual increasingly vulnerable to the exercise of other forms of power which are just as invasive as the powers that were once exercised by the state."*[14]

56. This concern has been recognised by international human rights bodies, who, despite their limited mandate to deal with non-State actors, clearly envisage a role for non-State actors in the realisation of human rights. For example, the UN Committee on Economic, Social and Cultural Rights has observed that:

> *While only States are parties to the Covenant and thus ultimately accountable for compliance with it, all members of society — individuals, including health professionals, families, local communities, intergovernmental and non-governmental organizations, civil society organizations, as well as the private business sector — have responsibilities regarding the realization of the right to health.*[15]

57. Imposing human rights obligations on non-State or private actors has not been an approach adopted by the majority of States Parties with specific legislation for constitutional protection of human rights, except where the non-State actor has been carrying out public functions. The notion of private actors being legally obliged to observe human rights has been seen as a

[13] For example, the Victorian Charter is limited in application to 'public authorities'; the UK Human Rights Act applies only to 'public authorities'; the New Zealand Bill of Rights applies to acts done by the institutions of New Zealand government and by persons performing public functions. In contrast the South African Bill of Rights applies to all laws, all state organisations and to private relations. The Human Rights Amendment Act 2008 (ACT) inserted a new Part 5A into the Human Rights Act 2004 (ACT), which contains a definition of 'public authority', makes it clear that public authorities are bound to observe human rights and provides for a limited direct right of action by an individual against a public authority for a breach of human rights. These provisions came into force on 1 January 2009.

[14] The Law Society of NSW Human Rights Committee, *Submission to the Inquiry into a Bill of Rights for NSW* (Legislative Council Standing Committee on Law and Justice) (1999) p. 17

[15] CRC/C/121, 31st Session, 20 September 2002.

controversial step, particularly in the context of legal orders where specific human rights protection has been limited.[16]

58. The ACT and Victorian legislation provide that only private entities which perform public functions on behalf of the State are bound. For example, section 4(1)(c) of the Victorian Charter provides that a public authority includes an 'entity whose functions are or include functions of a public nature, when exercising those functions on behalf of the State or a public authority, whether under contract or otherwise.' This category would, for example, include a private security firm when providing security at a prison.[17]

59. The Law Council notes that, even if the legal obligation to observe human rights is not extended beyond the State, the nature of the State's obligations may include a duty to protect people's rights from interference by non-State actors. For example, the State is obliged not only to ensure that its own agents do not violate the right to life by committing extra-judicial executions, it also has an obligation to act with due diligence to protect its citizen from breaches of the right to life by private individuals. In many cases this translates into an obligation to prevent, investigate and punish (and thereby deter) acts which interfere with rights that that the State is bound to protect.

**The Law Council takes the view that only public authorities, including government departments, government agencies and statutory authorities, (and entities and persons performing public functions) should be bound to observe human rights.[18]**

## 2.4 Does sufficient protection require the constitutional entrenchment of rights?

60. From an international law perspective, constitutional protection is often seen as the most appropriate form of domestic protection for non-derogable rights, such as the right to life and the right to freedom from torture. The notion that Parliament could make laws in contravention of these rights runs counter to their non-derogable status. For other rights, such as freedom of association, freedom of movement and freedom of expression, in respect of which restrictions or limitations may be permitted in certain circumstances, the need for constitutional protection may not be as clear.

61. Constitutional protection of rights operates to circumscribe the law making powers of Parliament, and ensures that Parliament does not have the authority to make a law or to authorise an action which will lead to a breach of a fundamental rights, except to the extent that a particular right is subject to limitation and the law falls within that

[16] Australian Governments considering whether to enact specific legislative protection for human rights have generally been reluctant to explore the possibility of binding private entities. For example, the terms of reference for the Victorian Consultation on whether there should be a Charter of Human Rights in Victoria were limited to considerations of the obligations between individuals and the State and did not extend to consideration of whether private entities should also be bound to observe human rights. See Human Rights Consultation Committee Report (Department of Justice Victoria) December 2005, available at http://www.justice.vic.gov.au/wps/wcm/connect/DOJ+Internet/Home/Your+Rights/Research+and+Statistics/JUSTICE+-+Human+Rights+Consultation+Committee+Report+Rights+Responsibilities+and+Respect+(PDF). A similar approach was taken in the WA Consultation, see Report of the Consultation Committee for a proposed WA Human Rights Act, (WA Department of Justice) Chapter 7, November 2007, available at http://www.department.dotag.wa.gov.au/_manifest/human_rights_report_chapter7.jmf. For a contrasting view, see Justice Nolan, 'With Power Comes Responsibility: Human Rights And Corporate Accountability' (2005) *University of NSW Law Journal* 38.

[17] For further discussion of the meaning of 'public authority' under the Victorian Charter see Dr Julie Debeljak, "Human Rights Responsibilities of Public Authorities Under the Charter of Rights' Presented at The Law Institute of Victoria Charter of Rights Conference, Melbourne, 18 May 2007 available at http://www.hrlrc.org.au/files/XRA1F9XVTJ/Debeljak%20-%20Obligations%20of%20Public%20Authorities.pdf.

[18] Law Council Policy Statement para [8].

limitation.[19] Constitutional entrenchment ensures that the content of protected rights will not be subject to the vagaries of the politics of the day and creates a nexus between lawfulness and compliance with the State's human rights obligations.

62. Where rights are protected by ordinary statute, subsequent parliaments retain a largely unfettered ability to enact contrary laws that directly interfere with or undermine previously protected rights. In short, the protection offered by a Charter in an ordinary Act of Parliament depends on a high level of voluntary respect and reverence for its content by the legislative arm of government. The consequences flowing from a clear decision to override, suspend or interfere with a statutorily protected, rather than constitutionally protected, right are political, rather than legal.

63. However, it can also be argued that statutory protection of rights is preferable to constitutional entrenchment on the grounds that rights are best protected when the community itself, via its elected representatives, remains free to determine the scope, content and application of those rights based on the circumstances in which it finds itself at any particular time.

64. Constitutional entrenchment of individual rights creates a largely static statement of rights, difficult to add to or change. Unless couched in broad terms, constitutionally protected rights may not be able to easily respond to changing domestic or international circumstances. Their scope and precise content is likely to be articulated by the courts in the context of adjudicating upon the lawfulness of a particular piece of legislation or a particular Executive action, rather than democratically debated and decided by the Parliament.

65. Conversely, statutory protection of rights allows for a degree of dynamism. It provides a flexible model of rights protection that can be shaped and developed to meet unforeseen challenges to human rights.

66. Statutory protection of human rights has also been used as a precursor to constitutional protection, as the community has become comfortable with the operation of specific human rights protection and the content of that protection.[20]

**Ideally, the Law Council would support constitutional protection for fundamental human rights. However, given that the terms of reference for the National Consultation do not allow the Committee to examine this option, the Law Council believes that the next best option for improved human rights protection is specific statutory protection for human rights.**[21]

[19] In many western democracies civil and political rights have been constitutionally enshrined. For example, Germany, Canada, United States, South Africa.

[20] This process was the experience in Canada. In 1960, the federal government passed the Canadian Bill of Rights. This law statute was not part of the Constitution but contained a catalogue of fundamental freedoms, legal rights and equality before the law. The Bill only applied to federal, not provincial laws. In 1980, the Canadian government set up a special all-party committee to consult the Canadian community on the notion of a constitutionally entrenched Charter. Following substantial consultations and negotiations with provincial governments, the Bill of Rights inspired the development of a Charter of Human Rights, which became part of the Canadian Constitution incorporated in the Canada Act 1982. The equality rights section of the Charter was delayed until April 1985.

[21] Law Council Policy Statement para [7].

## 2.5 Does our current legal order provide sufficient protection?

67. No. The Law Council is firmly of the view that the existing legal framework at the federal level fails to guarantee adequate protection for fundamental human rights. Insufficient prominence is afforded to human rights within the existing framework, either as a set of principles to which the arms of government must have regard or as a set of principles by which the arms of government are bound. The Law Council believes that specific legislative protection for human rights, in the form of Charter of Rights, is needed to fill this gap in protection.[22]

68. The need for specific legislative protection of human rights is starkly apparent when one considers that the current federal legal system fails to provide adequate protection for many fundamental human rights, including the:

(a) right to liberty and security of person, for example, in certain circumstances federal law authorises the detention of persons without charge for potentially indefinite periods;[23]

(b) right to privacy and the freedom from arbitrary interference with family life, for example there is no free standing right to privacy under federal law;

(c) right to humane conditions of detention, for example there is no federal statutory requirement that juveniles offenders be separated from adult offenders when incarcerated;[24]

(d) right to freedom of expression and opinion, for example there is no specific right to free speech in Australia and federal laws criminalise certain forms of speech in certain circumstances;[25]

(e) right to freedom of association, for example federal laws make it an offence to associate with certain persons or to become a member of certain groups;[26]

(f) right to freedom from torture, for example there is no specific federal offence criminalising the use of torture or other forms of cruel or unusual punishment or treatment;

(g) right to a fair trial, for example numerous federal laws remove key components of the right to a fair trial including the right to be presumed innocent, the right to access legal representation and the privilege against self incrimination;[27] and

(h) right to equality before the law, for example there is no law making it illegal to discriminate against someone on the grounds of sexual preference.

[22] Law Council Policy Statement para [1].
[23] See *Crimes Act 1914* (Cth) Part 1C.
[24] See for example *Brough v Australia* (2006) UN Doc CCPR/C/86/D/1184/2003 (27 April 2006) where the UN Human Rights Committee found that Australia was in violation of violations of: article 10(1) of the ICCPR, which requires that prisoners be treated humanely; article 10(3), which provides that juveniles be separated from adults in prison; and article 24(1) which requires that children be protected by society and the State without discrimination.
[25] For example see the sedition offences in *Criminal Code 1995* (Cth) Division 80.
[26] See for example the unlawful associations provisions in *Crimes Act 1915* (Cth) s30A; see also terrorist organisation offences in *Criminal Code 1995* (Cth) Division 102.
[27] For further discussion see para [84] of this submission.

69. In adopting this position, the Law Council recognises that the Australian legal system currently offers some protection for certain individual rights and a limited range of remedies for rights violations. As an example:

(a) A limited number of fundamental rights are protected by the Australian Constitution, including the right to vote (section 41); the right to a trial by jury in the jurisdiction where the alleged federal offence took place (section 80); the prohibition on laws limiting the free exercise of religion (section 116); the requirement that property only be expropriated on just terms (section 51xxxi) and the prohibition against discrimination on the basis of State and residency (section 117). There are also a number of implied constitutional rights, such as the implied freedom of political communication.

(b) Specific Commonwealth legislation[28] prohibits discrimination on the grounds of race, national or ethnic origin, sex, marital status, pregnancy, family responsibilities; disability and age.[29] If unlawful discrimination is established, a range of remedies are available including compensation.

(c) Commonwealth administrative law also provides limited protection for certain rights. For example, in some cases a person affected by a decision made by a government agency may have the merits of that decision reviewed; the *Privacy Act 1988* (Cth) provides some protection against the disclosure of personal information by certain government agencies and certain organisations; and the *Freedom of Information Act 1982* (Cth) allows individuals to apply for access to government documents relevant to an administrative decision against that individual.

(d) In each jurisdiction in Australia it is unlawful to apprehend or detain a person unless authorised by statute or common law.[30] The remedy for unlawful arrest is the civil action of false imprisonment.[31] An action for false imprisonment is actionable *per se* and compensation may be awarded.[32]

(e) There are a number of common law doctrines which underlie our legal system and which can only be displaced by a clear parliamentary intent to do so. These include the right against self incrimination,[33] immunity from search without warrant,[34] onus of proof in criminal proceedings,[35] and the burden of proof beyond reasonable doubt in criminal proceedings.[36]

70. Despite the existence of limited constitutional, statutory and common law protections, the Law Council's extensive advocacy work in the area of human rights strongly

[28] *Racial Discrimination Act 1975* (Cth), *Disability Discrimination Act 1992* (Cth), *Sex Discrimination Act 1984* (Cth), and *Age Discrimination Act 2004* (Cth).
[29] Also falling within the definition of 'unlawful discrimination' is offensive behaviour based on racial hatred; sexual harassment; and harassment of people with disabilities.
[30] An arrest is unlawful if it is not for the purpose of bringing a person before a court to be dealt with according to law. See for example *Crimes Act 1900* (NSW) s 352; *Crimes Act 1958* (Vic) ss 457-459.
[31] *Christie v Leachinsky* [1947] AC 573 at 587; per Viscount Simon.
[32] *Watson v Marshall* (1971) 124 CLR 621 (affirmed *Marshall v Watson* (1972) 124 CLR 640). *Attorney-General (St Christopher, Nevis and Anguilla) v Reynolds* [1980] AC 637; *Myer Stores Ltd v Soo* [1991] 2 VR 597.
[33] See *Sorby v the Commonwealth* (1983) 152 CLR at 288 per Gibbs CJ.
[34] See *George v Rockett* (1990) 170 CLR 104 at 110-111.
[35] See *Woolmington v DPP* [1935] AC 462 at 481-482.
[36] See *Woolmington v DPP* [1935] AC 462 at 481-482; *Brown v The King* (1913) 17 CLR 570 at 594.

suggests that there are identifiable weaknesses in the human rights protection offered by Australia's legal system.

71. This weakness can be observed from both the:

- structural, functional and legal limitations which inhibit the ability of existing mechanisms to adequately protect and promote human rights in Australia; and
- gaps present in the existing system, leading to circumstances where Australians' human rights are not fully protected.

### *Structural, functional and legal limitations*

72. In Australia, international treaties are not self-executing: incorporation into domestic legislation is required.

73. As a result, although Australia is party to the main human rights treaties,[37] at a federal level it has only specifically legislated to give effect to a limited range of its human rights obligations, for example those relating to the elimination of discrimination on the basis of race, disability, age or sex.[38]

74. Outside of these laws, there is no requirement that law makers or administrative decision makers act in a manner that is compatible with international human rights law.[39] This limitation means, for example, that the Government can pass laws that discriminate against people on the grounds of race, gender or disability without having to tell the Parliament or the public that these laws breach human rights principles.

75. The Law Council recognises that certain human rights that are not incorporated into domestic legislation may still have some influence on the interpretation and application of Australian law. For example, it is an established rule of statutory interpretation that a statute is to be interpreted and applied, so far as its language admits, in a manner which is consistent with the basic rights of the individual.[40]

76. However, beyond this important rule of statutory interpretation, the scope of influence of Australia's international human rights obligations on the development of Australian domestic law remains limited in important respects. For example, the landmark High

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[37] For an up-to-date list of human rights treaties ratified by Australia see the *Australian Treaties Library* at www.austlii.edu.au/au/other/dfat.

[38] See *Racial Discrimination Act 1975* (Cth), *Disability Discrimination Act 1992* (Cth); *Age Discrimination Act 2004* (Cth) and *Sex Discrimination Act 1984* (Cth).

[39] There currently exists a Commonwealth Senate Standing Commission for the Scrutiny of Bills which assesses legislative proposals against a set of accountability standards, including whether bills trespass unduly on personal rights and liberties. However, there is no requirement to consider bills for compliance with international human rights standards, such as those rights contained in the ICCPR or the ICESCR.

[40] This principle was recently explained by Gleeson CJ in *Al-Kateb v Godwin* (2004) 219 CLR 562 at [19];. See also *Jumbunna Coal Mine NL v Victorian Coal Miners' Association* (1908) 6 CLR 309 at 363; *Lim* at 38 per Brennan, Deane and Dawson JJ. *Dietrich v The Queen* (1992) 177 CLR 292 at 306 per Mason CJ and McHugh J; *John Fairfax Publications v Doe* (1995) 37 NSWLR 81 at 90 per Gleeson CJ. See also *Maxwell on the Interpretation of Statutes* (7th Ed, 1929) at 127; Pearce & Geddes, *Statutory Interpretation In Australia* (5th ed 2001) at [5.14]. The approach is not limited in its application to ambiguous statutory provisions: *Brown v Classification Review Board* (1998) 154 ALR 67 at 78 per French J; *Secretary of State, Ex Parte Simms* [2000] 2 AC 115 at 130 per Lord Steyn, 131 per Lord Hoffman. Rather, wherever the language of a statute is susceptible of a construction which is consistent with the terms of the relevant international instrument and the obligations which it imposes on Australia, that construction must prevail: *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273 at 287 per Mason CJ and Deane J. See also *Kartinyeri v Commonwealth* (1998) 195 CLR 337 at 384 per Gummow and Hayne JJ. See also Spigelman, 'Access to Justice and Human Rights Treaties' (2000) 22 *Sydney Law Review* 141 at 149; Statutory Interpretation And Human Rights, address to the Pacific Judicial Conference by the Hon JJ Spigelman AC, Vanuatu, 26 July 2005; also J J Spigelman, "Principle of Legality and the Clear Statement of Principle" (2005) 79 ALJ 769.

Court case of *Teoh*, which established that the ratification of an international treaty could give rise to a legitimate expectation that administrative decision makers would act in conformity with the treaty, has been subsequently questioned by the High Court.[41]

77. The Government's attempts to remove the notion of 'legitimate expectation' through various unsuccessful Bills to amend relevant legislation[42] highlights that Australia considers that a legislative response is usually necessary before international human rights obligations will have a binding effect at the domestic level.

78. In this context, it is not surprising that in recent years increased and largely unsupervised discretionary powers have been given to the executive arm of government, without any requirement that such powers be exercised in a manner that is consistent with human rights principles. For example, the Attorney-General has the power to decide that any organisation, falling within a very broad definition, should be proscribed as a terrorist organisation, automatically making it an offence to associate with that group.[43] Such Executive discretion is not limited by human rights considerations and need not be exercised with reference to these principles.

79. Other powers invested in the executive arm of Government which threaten to undermine or violate human rights principles include:

    (i) new investigative powers for the Australian Federal Police, authorising the detention of persons who are suspected of, but have not been charged with, a criminal offence, for an effectively, extended, undefined period;

    (ii) a system of control orders and preventative detention orders, authorising the detention or restriction of liberty of persons not charged with a criminal offence, for the purpose of preventing a potential terrorist related offence; and

    (iii) new powers for Australia's domestic intelligence agency, ASIO, to question and detain persons not charged with or suspected of a criminal offence but thought to have information relevant to the collection of intelligence in relation to a terrorist offence.

80. In addition Australian courts have limited scope to assess the exercise of statutory power or the validity of legislation in light of human rights standards. As the Hon Michael McHugh AC QC has observed:

    *judges are unable to consider the effect of legislation on fundamental human rights as a primary reference point when considering the validity of that legislation. If legislation falls within a head of power in the*

[41] In the landmark High Court case of *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273 ("*Teoh*") the majority of the Court held that although the provisions of the *Convention on the Rights of the Child* (CRC) had not been enacted into Australian domestic law, the ratification of the CRC gave rise to a legitimate expectation that administrative decision-makers would act in conformity with the Convention and treat the best interests of the child as a primary consideration. The *Teoh* decision has subsequently been questioned by the High Court and its future application remains uncertain (See for example *Re Minister for Immigration and Multicultural Affairs; Ex parte Lam* (2003) 214 CLR 1).

[42] Between 1995 and 1999 the former Keating and Howard Governments introduced a number of Bills into Parliament seeking to eliminate any expectation that government decision makers were legally obliged to act in accordance with an international treaty obligation. (*Administrative Decisions (Effect of International Instruments) Bill 1999* (Cth); *Administrative Decisions (Effect of International Instruments) Bill 1997* (Cth); *Administrative Decisions (Effect of International Instruments) Bill 1995* (Cth). None of these Bills were enacted into legislation.

[43] See *Criminal Code 1995* (Cth) Division 102.

*Constitution, the substantive content of the legislation is irrelevant; Parliament can therefore legislate as unjustly as it sees fit.*[44]

81. For example, in *Al-Kateb,* a case challenging the validity of Australia's immigration detention policy, the majority of the court agreed that the question to be determined was not whether the Australian detention regime conformed to international human rights standards. Rather, the question was limited to whether the legislation under which the applicant was detained was within the legislative power of the Commonwealth. As McHugh J observed in that case:

*It is not for the courts, exercising federal jurisdiction, to determine whether the course taken by Parliament is unjust or contrary to basic human rights. The function of the courts in this context is simply to determine whether the law of the Parliament is within the powers conferred on it by the Constitution.*[45]

82. These structural and functional limitations result in a gap in the human rights protection available at the federal level.

### *Gaps present in the existing legal system*

83. In addition to the structural and functional constraints described above, there are many areas in which the federal legal framework currently does not provide sufficient protection for certain human rights. As noted above, there is no specific law at the federal level protecting freedom of expression, freedom of movement, freedom from torture, the right to liberty and security of person, or the right to humane conditions of detention.

84. The consequences of this gap in protection can be seen by the passage of the many counter terrorism measures introduced since September 2001 which threaten and undermine the right to liberty and security of person and the right to a fair trial. These laws were passed by Parliament without significant debate about human rights obligations. Among other concerning features,[46] these laws:

(i) criminalise certain forms of speech by the introduction of broadly-worded sedition offences;[47]

(ii) authorise the detention of a person, or the significant restriction of their liberty, *before* the person has been charged or convicted of a criminal offence or been given an opportunity to understand or challenge the order made against them;[48]

(iii) require a person to provide information and subject them to a criminal penalty if they seek to exercise their right to silence or privilege against self-incrimination;[49]

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[44] The Hon Mr McHugh AC QC speaking at Sydney University, 'Does Australia need a bill of rights' (October 2005).
[45] *Al-Kateb v Godwin* [2004] HCA 37 at [75] per McHugh J.
[46] For further discussion of the Law Council's concerns regarding Australia's anti-terrorism laws see Law Council of Australia, *Anti-Terrorism Reform Project,* November 2008, available at http://www.lawcouncil.asn.au/initiatives/anti-terrorism_reform.cfm.
[47] See *Criminal Code 1995* (Cth) Division 80.
[48] See *Criminal Code 1995* (Cth) Divisions 104 and 105.
[49] See *Australian Security and Intelligence Organisation Act 1979* (Cth) Part 3, Division 3.

(iv) remove the presumption that a person charged with a criminal offence is entitled to be released prior to trial, and thus undermine the presumption of innocence;[50]

(v) limit access to independent legal representation by effectively requiring lawyers to be issued with a security clearance before participating in cases involving classified or security sensitive information;[51] and

(vi) provide the Minister with the power to definitively determine that the disclosure of certain evidence may be prejudicial to national security, in a manner that has the potential to impact on the right to a public trial. [52]

85. Further examples of consequences of the gap in human rights protection at the federal level include:

(a) Australia's policy of mandatory immigration detention for all unlawful arrivals, without sufficient access to judicial review, which is enshrined in the provisions of the *Migration Act 1958* (Cth). Although there has been a shift in policy announced in July 2008 by the Rudd Government which includes a commitment to using detention only as a last resort,[53] the relevant provisions in the *Migration Act* remain unchanged.

(b) The provisions of the *Crimes Act 1914* (Cth) which preclude Australian courts from considering an offender's cultural background or customary laws when making bail or sentencing decisions.[54]

(c) The existence of imprecisely framed legislative provisions which allow the Commonwealth Attorney General a broad discretion to authorise the provision of formal assistance to foreign governments in the investigation and prosecution of offences that attract the death penalty.

86. Even where specific legislation has been enacted to provide protection for certain rights, this legislation provides an incomplete patchwork of protection which can be easily amended, repealed, suspended, restricted or excluded from operation by another Act of Parliament. For example:

(a) Federal Parliament suspended the operation of the federal *Racial Discrimination Act 1975* (Cth) and Northern Territory (NT) Anti-Discrimination laws from all actions carried out under the NT Emergency Response Legislation, which led to:

(i) the compulsory acquisition of Aboriginal townships in the NT;

(ii) weakening of the land permit system; and

(iii) quarantining of welfare payments.

(b) Federal anti-discrimination laws offer limited protection for persons who have been discriminated against in employment because of their criminal record, trade

[50] See *Crimes Act 1915* (Cth) s15AA.
[51] See *National Security Information (Civil and Criminal Proceedings) Act 2004* (Cth) Part 3.
[52] See *National Security Information (Civil and Criminal Proceedings) Act 2004* (Cth) Part 3.
[53] See Press Release, Minister for Immigration and Citizenship, 'Labor unveils new risk-based detention policy' 29 July 2008 available at http://www.minister.immi.gov.au/media/media-releases/2008/.
[54] The Law Council notes that these provisions of the *Crimes Act 1914* (Cth) are currently being reviewed.

union membership, or sexuality. While these persons may be able to make a complaint to the Australian Human Rights Commission,[55] no enforceable consequences can be imposed on the employer. There are also no laws requiring paid maternity or parental leave for all employees.

(c) In recent years there have been a number of attempts to limit the type of administrative decisions that can be subject to judicial review in terms of human rights standards. For example, a number of decisions have been added to Schedule 1 of the *Administrative Decisions (Judicial Review) Act 1977* such as decisions of the Attorney-General under the control order and preventative detention regime, decisions of the Minister under the *Australian Security and Intelligence Organisation Act 1979* and decisions of the Minster under the *Telecommunications (Interception and Access) Act 1979*. The scheduling of these decisions has the effect of removing them from the ambit of judicial review. In addition, a privative clause has been added to section 474(2) of *Migration Act,* making certain decisions by the Minister, such as a decision to cancel a person's visa on character grounds, final and not subject to judicial review.

(d) Certain Commonwealth laws, such as the *Privacy Act 1988* and the *Freedom of Information Act 1982* fail to adequately or comprehensively protect and promote rights such as the right to privacy, freedom of expression or the right to fair trial. For example, there is no free standing right to privacy under the *Privacy Act* and a wide range of exemptions exist which exclude a range of government agencies and private organisations from compliance with the protections contained in the Act. Following a recent inquiry into Australia's privacy laws, the Australian Law Reform Commission recommended that a limited statutory right to privacy be enacted and the number of agencies and organisations excluded from the Act be limited, to improve protection of privacy rights in Australia.[56]

87. These limitations and gaps in incorporation of international human rights in Australia lead the Law Council to conclude that the current federal legal framework fails to provide adequate or sufficient protection for human rights.

### *Gap in protection recognised by the international community*

88. The inadequate level of rights protection offered by the Australian legal system has been noted at the international level. For example, the UN Human Rights Committee has raised the concern that:

> *in the absence of a constitutional Bill or [sic] Rights, or a constitutional provision giving effect to the Covenant, there remain lacunae in the protection of Covenant rights in the Australian legal system. There are still areas in which the domestic legal system does not provide an effective remedy to persons whose rights under the Covenant have been violated.*

[55] Complaints can be made under the *Human Rights and Equal Opportunity Act 1986* (Cth), however the enforceability of any recommendations made following a complaint are limited, see Division 3 of the Act.

[56] See Australian Law Reform Commission following its Inquiry into the Privacy Act, see ALRC Report No 108, *Inquiry into the Privacy Act* (August 2008) available at http://www.austlii.edu.au/au/other/alrc/publications/reports/108/. For recent Law Council advocacy in this area see Law Council of Australia, *Submission to Australian Law Reform Commission's Inquiry into Privacy Law*, 20 December 2007; Law Council of Australia, *Submission to Senate Finance and Public Administration Committee's Inquiry into the Freedom of Information (Removal of Conclusive Certificates and Other Measures) Bill 2008*, 29 January 2009; Law Council of Australia , *Submission to Australian Law Reform Commission's Review of Secrecy Laws*, 27 February 2009 all available at http://www.lawcouncil.asn.au/library/submissions.cfm?.

*[Australia] should take measures to give effect to all Covenant rights and freedoms and to ensure that all persons whose Covenant rights and freedoms have been violated have an effective remedy."*[57]

89. More recently, when the UN Human Rights Committee made its concluding observations on Australia's fifth periodic report under the ICCPR, Australia was praised for initiating the present consultation on human rights.[58] However, the Committee continued to raise concerns about the fact that the ICCPR has not yet been incorporated into domestic law. It also expressed regret that judicial decisions in Australia make little reference to international human rights law.[59] The Committee recommended that Australia: [60]

    *(a) enact comprehensive legislation giving de-facto effect to all the [ICCPR] provisions uniformly across all jurisdictions in the Federation;*

    *(b) establish a mechanism to consistently ensure the compatibility of domestic law with the [ICCPR];*

    *(c) provide effective judicial remedies for the protection of rights under the Covenant; and*

    *(d) organize training programmes for the Judiciary on the [ICCPR] and the jurisprudence of the Committee.*

90. Over the last decade Australia has been repeatedly criticised by international bodies charged with monitoring human rights compliance and has often ignored these criticisms. For example:

    (a) Australia has effectively continued its policy of mandatory detention of asylum seekers despite five adverse findings by the UN Committee against Australia's detention regime in less than ten years.[61] The UN High Commissioner for Refugees has also held three times that Australia's policy of mandatory detention of asylum seekers is in breach of international human rights law. Recent policy changes to limit the use of detention have not been enacted as legislation yet.

    (b) In 1998 the UN Committee on the Elimination of Racial Discrimination (CERD Committee) found that the Government's amendments to the *Native Title Act 1993* (Cth) breached the *Convention on the Elimination of All Forms of Racial Discrimination* (CERD).[62] The Government subsequently refused to repeal the 1998 amendments and as a result was subject to 'early warning' monitoring by the UN for acts of racial discrimination.[63]

    (c) The Australian Government failed to object to the ongoing detention of Australian citizen David Hicks in Guantanamo Bay and his trial by ad hoc military commission, despite a statement by five independent Special Rapporteurs appointed by the UN Human Rights Commissioner[64] calling on the United States

[57] UN Human Rights Committee's Concluding Observations, Australia, 24/07/2001, A/55/40, 506.
[58] UN Human Rights Committee, Concluding Observations, Australia, 3/04/2009, CCPR/C/AUS/CO/5 at [5].
[59] Ibid at [8].
[60] Ibid at [8].
[61] The decision in *D & E v Australia* is the fifth time since 1997 that the UN Committee has found against Australia regarding mandatory detention. See also HREOC Media Release, 'Migration laws must live up to Australia's human rights commitments' (6 August 2006).
[62] Committee on the Elimination of Racial Discrimination (CERD), 53rd Session (1998).
[63] CERD, 54th Session (1999).
[64] The five investigators were: the Chairman Rapporteur of the Working Group on Arbitrary Detention, the Special Rapporteur on the independence of judges and lawyers, the Special Rapporteur on torture and other cruel, inhuman or

to immediately close the detention centre in Guantánamo Bay and bring all detainees before an independent and competent tribunal or release them.

(d) The Australian Government sought to avoid its international obligations under the *Convention Relating to the Status of Refugees,* the ICCPR and the *Convention on the Rights of the Child* (CRC) by establishing a system of offshore processing of asylum seekers. This system involved excising Australian territories, such as Christmas Island, from the Australian migration zone. This move attracted condemnation from a range of UN bodies, in particular from the UN High Commissioner for Refugees, who found the offshore processing of refugees to result in a deterioration of detention conditions and a denial of access to legal forums for asylum seekers to challenge their detention or assert their human rights.[65] The Law Council notes that policy announcements made in July 2008 seek to provide access to legal assistance for asylum seekers held off-shore,[66] however such changes have not yet been given legislative effect.

91. Australia's previously dismissive attitude to the opinions of UN treaty bodies has not gone unnoticed by the international community and has damaged Australia's reputation as a nation that values and respects human rights. As Committee member Elizabeth Evatt observed:

> *In taking this attitude, and in promoting the idea that the international monitoring system is flawed, the government is discounting the role of the independent treaty bodies in interpreting the provisions of human rights treaties, and undermining the whole concept of an international system of human rights, under which states are accountable for their actions. …*
>
> *Australia's reputation as a good international citizen has been badly dented by these events.*[67]

While the Law Council has welcomed efforts by the Rudd Government to improve Australia's relationship with the UN treaty bodies, [68] there remains some way to go – particularly in the absence of any specific legislative protection for fundamental rights at the federal level and in light of the gaps in human rights protection identified above.

**The Law Council believes that the existing legal framework at the federal level fails to guarantee adequate protection for fundamental human rights. Insufficient prominence is afforded to human rights within the existing framework, either as a set of principles to which the arms of government must have regard or as a set of principles by which the arms of government are bound. Specific legislative protection for human rights in the form of a Charter of Rights is needed. [69]**

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degrading treatment or punishment, the Special Rapporteur on freedom of religion or belief, and the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health.

[65] See statement by Erica Feller, Assistance High Commissioner for Refugees (12 May 2006). NB the Rudd Government has taken steps to end the off-shore processing of asylum seekers. Processing facilities on Manus Island and Nauru are no longer in operation. Processing continues to take place on Christmas Island.

[66] See Press Release, Minister for Immigration and Citizenship, 'Labor unveils new risk-based detention policy' 29 July 2008 available at http://www.minister.immi.gov.au/media/media-releases/2008/.

[67] Elizabeth Evatt, 'Relaxed & dumbing down' (Media Statement, 2001) available at http://evatt.labor.net.au/publications/papers/22.html

[68] This was noted recently by the UN Human Rights Committee, Concluding Observations, Australia, 3/04/2009, CCPR/C/AUS/CO/5 at [2] –[5].

[69] Law Council Policy Statement para [3].

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

### 3.1 A Federal Charter or Bill of Human Rights

#### *Why a Charter of Rights?*

92. The Law Council strongly supports the adoption of a federal Charter of Rights. A Charter of Rights is the best mechanism to fill the gaps in human rights protection identified above. [70]

93. Unlike alternative options available, a Charter of Rights would:

    (a) provide comprehensive human rights protection;

    (b) complement the existing features of Australia's legal and political structures that operate to protect rights;

    (c) provide a clear list of rights that the Australian community considers worthy of protection;

    (d) impose legal obligations on Parliament and public authorities to comply with human rights;

    (e) promote a culture of respect for human rights within Government and the broader community;

    (f) aim to ensure law makers and decision makers take human rights principles into account;

    (g) assist people to identify and assert their human rights, and provide an avenue to bring to public attention any violation of those rights;

    (h) provide a framework for the courts to use to help determine whether a violation of human rights has occurred; and

    (i) become an important and proud part of Australia's national and international identity.

#### *Features of a Federal Charter of Rights*

94. The Law Council Policy Statement identifies the key features of a federal Charter of Rights.

95. The Policy is not intended to prescribe the precise form of any statute, but rather to outline the nature of the human rights that should be protected, the type of protection that should be afforded to those rights and the respective roles of the courts, the Executive and the Parliament.

96. Should the Commonwealth Government decide to adopt a Charter of Rights, the Law Council would be well placed to assist in the drafting process by providing policy input and technical legal advice on any proposed model.

[70] Law Council Policy Statement at para [1].

97. The key features of the Charter of Rights supported by the Law Council are outlined in detail below, but can be summarised as follows:

- statutory rather than constitutional in nature;
- recognises that rights have corresponding responsibilities;
- contains a catalogue of rights based on those rights contained in the ICCPR and the ICESCR, including the right to liberty, the right to equality, the right to a fair trial, the right to education, the right to an adequate standard of living, and the right to freedom of expression and opinion.
- provides that certain rights cannot be restricted or limited, such as the right to life, freedom from torture, freedom of religion and freedom from slavery, but permits the limitation of other rights in certain circumstances;
- binds public authorities, including government departments and statutory authorities, and entities and persons performing public functions;
- invests individuals with the right to challenge the lawfulness of a decision of a public authority on the basis of a violation of his or her human rights and requires the executive arm of government to take human rights into account in the policy process;
- requires that all draft legislation introduced to Parliament must be accompanied by a Human Rights Compatibility Statement;
- requires the courts to interpret legislation in a way that is compatible with human rights, so far as it is possible to do so consistently with the statute's purpose; and
- empowers the courts to make a declaration or a finding that a law cannot be interpreted in a manner consistent with the rights protected under the Charter. Such a declaration or finding would not operate to invalidate the law, but would require a response from Parliament.

98. In the next part of this submission, the Law Council will outline what a Charter of Rights would mean for each of the three arms of government and make some preliminary comments on the constitutionality of these features of a Charter of Rights.

### *The Constitutionality of the Features of a Charter of Rights*

99. Some commentators have argued that some of these features of a Charter of Rights may be unconstitutional.[71]

100. On 22 April 2009, the Law Council attended a Roundtable with a number of other constitutional lawyers at the Australian Human Rights Commission to discuss these arguments ('the Constitutional Roundtable').[72]

[71] For example, see the Hon Michael McHugh AC, QC 'A Human Rights, the courts and the Constitution' Presentation given at the Australian Human Rights Commission on 5 March 2009.
[72] Participants at the Roundtable included Sir Anthony Mason; the Hon Michael McHugh AC QC; The Hon Catherine Branson QC; Ms Pamela Tate SC; Associate Professor James Stellios; Associate Professor Anne Twomey; Associate Professor Kristen Walker; Professor George Williams; Professor Spencer Zifcak and Mr Brett Walker SC.

101. The participants and organisations represented at the Constitutional Roundtable have subsequently made a joint statement to the Consultation Committee which agrees that the following features of a Charter would be constitutionally valid:

- protection of a defined set of human rights based on those contained in the ICCPR;
- limitation of rights in defined circumstances;
- a Human Rights Compatibility Statement for draft legislation;
- binding of public authorities and organisations carrying out public functions;
- requirements for courts to interpret legislation consistently with human rights so far as it is possible to do so consistently with the purpose of the legislation; and
- a requirement for the Government to respond publicly if a court finds that a law is inconsistent with human rights.

102. The constitutionality of some of the features of a Charter will be discussed in greater detail below.

103. The Law Council notes that the joint statement provides that if a court found that it could not interpret a law of the Commonwealth in a way that is consistent with the rights identified in the Act, a statutory process could apply to bring this finding to the attention of federal Parliament and require a government response.

104. This 'finding of inconsistency' mechanism is consistent with the mechanism described in the Law Council's Policy as empowering a court to *declare that a law is incompatible with human rights,* which also triggers a response from parliament.[73] As a party to the joint statement, the Law Council now prefers the language of 'finding of inconsistency' to describe this mechanism.

105. The Law Council is of the view that any analysis of the constitutionality of declarations of incompatibility can also support the constitutionality of findings of inconsistency. This submission therefore deals with the constitutionality of both findings of inconsistency and declarations of incompatibility. However, when discussing the views of other commentators, who have previously dealt only with the constitutionality of declarations of incompatibility, this submission refers only to declarations of incompatibility.

### *The Role of the Executive Arm of Government under a Charter of Rights*

106. As discussed earlier in this submission, most charters or bills of rights oblige public authorities (and private entities which carry out public functions) to observe the human rights contained therein.

107. Under the Charter of Rights supported by the Law Council, the Executive arm of government would be required to:

[73] It should be noted that the Law Council's Policy does *not* prescribe a statutory process for how Parliament or Government may respond to a court's declaration of incompatibility, such as that contained in the New Matilda Bill, the Victorian Charter or the ACT Act. As such it is consistent with the mechanism described in paragraph 6 of the joint statement.

(a) comply with the human rights contained in the Charter when making decisions or exercising statutory powers. This means that public authorities, including government departments, government agencies and statutory authorities, must take human rights into account when making administrative decisions; and

(b) adopt measures designed to set benchmarks against which executive action can be tested. For example, this means that :

(i) all public authorities would be required to take human rights into account in the policy process, for example, by publishing internal Human Rights Action Plans, and by reporting annually on compliance; and

(ii) all Cabinet submissions would be required to be accompanied by a Human Rights Impact Statement.[74]

108. These requirements would mean, for example, that if a person lived in a Sydney suburb that is directly under the flight path for the Sydney airport, the relevant Minister would be required to take that person's right to privacy and freedom from arbitrary interference with family life into account when determining whether or not to shorten the no-flight curfew to between 12 midnight and 4am.[75]

109. These measures would provide a preventative form of protection for human rights, by ensuring that public policy is developed and delivered in a way that is compatible with human rights principles. These measures would also ensure that the community can easily evaluate whether government bodies and agencies are complying with their human rights obligations. Providing a framework for decision making that is consistent with human rights principles improves accountability and transparency in Government, with benefits for the individual, the community and the Government itself.

110. As will be discussed in the context of the role of the courts, the incentive for public authorities to comply with these measures takes on an extra dimension in light of the right of action provided to individuals to bring to the courts' attention an alleged violation of human rights by a public authority.

**Any federal human rights instrument must require the executive arm of government to comply with the human rights contained therein with a view to promoting a culture of respect for human rights within Government. It must also require the adoption of measures designed to set benchmarks against which executive action can be tested. This should include, but should not necessarily be limited to, requiring that:**

- **all public authorities take human rights into account in the policy process, for example, by requiring government departments to publish internal Human Rights Action Plans, and report annually on compliance; and**

- **all Cabinet submissions are accompanied by a Human Rights Impact Statement.[76]**

[74] Law Council Policy Statement at para [9].
[75] This example is analogous to a case heard in the European Court of Human Rights, *Hatton v United Kingdom* [2003] ECHR 338, wherein the European Court upheld a claim that certain airport noise from Heathrow airport constituted a violation of Article 8 of the *European Convention on Human Rights*, which protects the right to respect for a person's private and family life, his home and his correspondence. This right is also protected under section 13 of the Victorian Charter.
[76] Law Council Policy Statement at para [9].

### *The Role of the Parliament under a Charter of Rights*

111. A key rationale behind the adoption of a Charter of Rights is to engender a culture of rights protection within Parliament and Government.

112. The Charter of Rights supported by the Law Council would help achieve this by requiring that all draft legislation introduced to Parliament be accompanied by a Human Rights Compatibility Statement. This requirement would provide an opportunity for the Parliament and the public to scrutinise the proposed law for its compliance with the human rights protected in the Charter.

113. This form of scrutiny is currently lacking within the federal Parliamentary system, which contains no formal mechanism to require Government to explain whether the proposed law complies with human rights, and if not why. Not only would this improve the accountability and transparency of the law making process, it would also act as a preventative measure by providing strong scrutiny of any new laws that purport to infringe or have the potential to infringe human rights.

**Any Charter of Rights should require that all draft legislation introduced to Parliament must be accompanied by a Human Rights Compatibility Statement.**[77]

114. It is often contended that a Charter of Rights would somehow detract from the central role Parliament plays in Australia's legal system, by shifting power away from the Parliament toward another arm of government, such as the courts.

115. However, under the Charter of Rights supported by the Law Council, Parliamentary sovereignty would be preserved.

116. The Charter of Rights would be an ordinary piece of legislation, rather than a constitutionally entrenched document, which means that Parliament can amend or even repeal the Charter through the usual legislative process. It could, for example, add or remove particular rights if the community supported such a change. Such a process would allow for the straightforward addition of emerging human rights principles.

117. Also, under the Law Council Policy, Parliament would retain the 'last say' about laws that are found by the courts to be inconsistent or incompatible with human rights.

118. While the courts would be empowered to make a finding that a law cannot be interpreted in a manner consistent or compatible with the Charter of Rights, that finding would not operate to invalidate the law. Such a finding would send a powerful message to the public and the Parliament that the law is operating in a manner that may result in a violation of human rights, but the response to that message will remain in the hands of Parliament. It could choose to amend the law, or it could choose to do nothing, in which case the law would continue to operate regardless of the court's finding.

### *The Role of the Courts under a Charter of Rights*

119. The Law Council notes that, contrary to what has been suggested by Charter opponents, the introduction of Charters in the ACT and Victoria has not led to a flood of litigation that the Government has had to spend money defending. Rather, the use of such legislation in court proceedings has been limited, with many persons complaining of

[77] Law Council Policy Statement at para [12].

human rights violations being able to utilise the principles contained in the Victorian Charter or ACT Act to effect change in government policy or decisions without recourse to litigation.[78]

120. However, the Law Council acknowledges that even with the best mechanisms in place to protect and promote human rights within Government, there are still likely to be instances where individuals' rights or freedoms are violated. For this reason, the Charter of Rights supported by the Law Council would include provision for a specific role for the courts.[79]

121. A Charter of Rights would assist individuals to identify and assert their human rights and would provide courts with a framework to evaluate whether the particular law, action or decision did in fact violate human rights.

*Interpretation*

122. Under the Charter of Rights supported by the Law Council, the courts would be required to interpret legislation in a way that is compatible with human rights, so far as it is possible to do so consistently with the purpose of the legislation.

123. Such an interpretive provision would provide protection against violations of human rights by providing a strong incentive to public authorities to interpret their own statutory powers or obligations in a manner that complies with the human rights protected under the Charter.

124. Such an interpretive provision would also strengthen the existing rule of statutory interpretation which provides that a statute is to be interpreted and applied, so far as its language admits, in a manner which is consistent with the basic rights of the individual.[80]

125. An interpretative power has been upheld as an important enforcement mechanism and is a key feature of the Canadian Charter of Rights. However, it has also been criticised on the basis that it undermines parliamentary sovereignty and certainty of law by permitting the courts to ascribe a new or different meaning to a statue other than that intended by the legislature.

126. It is important to note that the interpretive power the Law Council supports is limited to the requirement that that courts interpret legislation in a way which is compatible with human rights contained in the Charter '*so far as is possible to do so consistently with its legislative purpose'*. This limitation preserves the sovereignty of Parliament by ensuring that the legislative will of Parliament will be given effect even if that legislative intention cannot be interpreted in a manner consistent with human rights.

127. This limitation is similar to the approach adopted in Victoria and the ACT, where all statutory provisions must be interpreted in a way that is compatible with human rights, so far as it is possible to do so consistently with their purpose.[81]

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[78] The impact of the Charter on the community and the bureaucracy will be discussed in further detail later in this submission. For relevant case study examples of the Victorian experience see the Human Rights Legal Resource Centre database of 'good news stories' on the Victorian Charter of Human Rights: HRLRC Bulletin (December 2008) at www.hrlrc.org.au/html/s02_article/default.asp?nav_top_id=59&nav_cat_id=138.

[79] In this section of the submission the term 'courts' refers to federal courts, or courts exercising federal jurisdiction.

[80] For further discussion of this principle see paras [74]-[75].

[81] See for example *Charter of Human Rights and Responsibilities 2006* (Vic) s32(1). See also Decision of the Mental Health Review Board, *09-003* [2008] VMHRB 1 (3 June 2008) available at http://www.austlii.edu.au/cgi-

128. The approach supported by the Law Council can be contrasted to that adopted in the UK where primary legislation and subordinate legislation must be read and given effect in a way which is compatible with the rights protected under the *European Convention on Human Rights*.[82] Some commentators have expressed concern that that UK approach has led to courts having the power to modify legislation to give effect to human rights, even where the meaning of the legislation is unambiguous and even though the modification is contrary to the intention of Parliament.[83]

**Courts should be required to interpret legislation in a way that is compatible with human rights, so far as it is possible to do so consistently with the statute's purpose.[84]**

*Direct Right of Action*

129. The Law Council believes that a right of action for individuals for a breach of a human right provides a strong legal incentive for compliance amongst those bound to observe human rights.

130. The Charter of Rights supported by the Law Council would allow an individual to bring an action in a court alleging a violation of his or her rights by a public authority. This right would be limited: it would not extend to the right to seek damages for a breach of a right and would not arise where a law expressly requires that the act be done or decision be made in a manner that is incompatible with a human right.

131. Under the Law Council Policy, if a person considers that the actions of a public authority resulted in a decision adverse to them they could challenge that decision on the basis that their human rights were violated. If the court finds that a violation has occurred and that the public authority could have acted or exercised its powers in a manner consistent with human rights but failed to do so, it may grant appropriate relief, such as those remedies available under administrative law but not damages,. If the court is unable to interpret the particular law in manner consistent with the rights protected in the Charter, it can make a finding of inconsistency or incompatibility. This would not operate to invalidate the law, but would require a response from Parliament.

**A person should have the right to bring proceedings against a public authority for a violation of his or her human rights. Such a right does not arise where a law expressly requires that the act be done or decision be made in a manner that is incompatible with a human right.[85]**

*Findings of Inconsistency or Incompatibility*

132. Under the Charter of Rights supported by the Law Council, if a person alleges a violation of his or her human rights by a public authority, and the law or provision authorising that act was not able to be interpreted in a manner consistent with human rights, the courts would be able to make a finding of inconsistency or incompatibility.[86]

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bin/sinodisp/au/cases/vic/VMHRB/2008/1.html?query=cohrara2006433%20s32. See also ACT Act s30; Andrew Casey v Richard Luke Alcock [2009] ACTCA 1 (23 January 2009).

[82] *Human Rights Act 1998* (UK) s3(1).

[83] See for example The Hon Michael McHugh AC, QC 'A Human Rights Act, the courts and the Constitution' Presentation given at the Australian Human Rights Commission on 5 March 2009 at pp. 20-33.

[84] Law Council Policy Statement at para [10].

[85] Law Council Policy Statement at para [7].

[86] As noted above, the 'declaration of incompatibility' mechanism contemplated in the Law Council Policy is consistent with the mechanism described as a 'finding of inconsistency' in the joint statement issued by the Constitutional Roundtable..

133. Such a finding would send a powerful message to the legislature that the particular law or provision is inconsistent with human rights, and may be operating so as to result in a violation of human rights.

134. A finding of inconsistency mechanism would not operate so as to invalidate the law, but it would require a response from Parliament. This response could take the form of an amendment to the particular law or provision, its repeal or a decision that no action be taken by Parliament. For example, under a finding of inconsistency mechanism, the Attorney-General could be required to respond to a court's finding by preparing a report and tabling this in Parliament. Parliament could choose to ignore the report and the court's declaration: it would be up to Parliament to respond as it sees fit. Alternatively, a finding of inconsistency mechanism could empower the Australian Human Rights Commission, at the request of a party to the proceeding, to notify the Attorney-General of the finding. The Attorney-General could then be required to respond to this finding in Parliament.

135. This approach has been described as preserving the doctrine of the separation of powers and respecting parliamentary sovereignty as it requires Parliament to make the final decision on the validity of a law that is inconsistent or incompatible with the statement of protected rights.[87]

136. Findings of inconsistency or declarations of incompatibility that do not operate to invalidate the law have been shown to be an effective means of ensuring Parliament considers laws that are incompatible with the protected statement of rights. For example, in the UK:[88]

    (a) the *Mental Health Act 1983* was amended following a declaration that certain sections were incompatible with the *European Convention on Human Rights* as they did not require the discharge of a patient where it could not be shown that he or she was suffering from a mental disorder that warranted detention;

    (b) the *Nationality, Immigration and Asylum Act 2002* was amended following a declaration that provisions of the Act were incompatible with the *European Convention on Human Rights* because the fixed nature of the penalties under the penalty scheme offended the right to have a penalty determined by an independent tribunal.

    (c) the *Welfare Reform and Pensions Act 1999* was amended just prior to a declaration that provisions of the Act were incompatible with the *European Convention on Human Rights* in that benefits were provided to widows but not widowers.

137. Although there may be times when Parliament will choose not to amend legislation to make it compatible with the statement of protected human rights, such a decision would operate as a powerful incentive to ensure that all laws can be interpreted and applied in a way that is compatible with human rights.[89]

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[87] For example see UK Government's White Paper on a *Human Rights Act* in the UK 1997 at para 2.13.

[88] The UK *Human Rights Act 1998* contains a 'declaration of incompatibility' mechanism in s4. For further information see a table prepared by lawyers in the UK Department of Constitutional Affairs entitled *'Declarations of incompatibility made under section 4 of the Human Rights Act 1998*, last updated August 2006. Available at http://www.dca.gov.uk/peoples-rights/human-rights/pdf/decl-incompat-tabl.pdf.

[89] Speech by Elizabeth Kelly, A/g CEO Dept of Justice and Community Safety, Australian Institute of Administrative Law Forum, *'Human Rights Act 2004: A New Dawn for Human Rights Protection?* ' ACT Legislative Assembly Reception Hall, Wednesday 31 March 2004

**Any Charter of Rights should enable a court to make a finding that a law cannot be interpreted in a manner consistent with the rights protected under the charter. Such a finding should not operate to invalidate the law, but it should require a response from Parliament.**

## 3.2 What difference would a Charter of Rights Make to the Australian Community?

138. As discussed above, the Law Council believes that a federal Charter of Rights is the best mechanism to improve human rights.

139. The following examples illustrate how a Charter of Rights would lead to real life outcomes for the Australian community by filling the gaps in human rights protection at the federal level:

(a) Imagine a man, A, who has a car pool arrangement with a colleague from work, B. While A and B share lifts each day they have not become close friends, but A knows that his colleague is actively involved in the Islamic community and often helps refugees from the Middle East settle into life in Australia. One day the media reports that there has been a failed terrorist attack on the MCG.

On the way home from work with B, A's car is stopped by the police. Both A and B are arrested. A is held in the police lock up overnight without being told of the charges against him. A later learns that B is suspected of being a member of a terrorist organisation. A is held in the police lock up for a further 5 days and is questioned by police for long periods. Meanwhile A's home is searched and his lap top seized by police. A's picture is on the front page of the Australian newspapers and A's wife and children have been harassed by the media. Finally A is released without being charged with any offence.[90]

This type of treatment is in breach of A's human rights to liberty, to know the charges against him and to humane treatment while in detention, to name a few. Under a Charter of Rights, A may be able to challenge this treatment in court as a breach of his human rights.[91] Further, under a Charter, the Government would not be able to pass laws authorising this type of treatment without first making it clear to the public and the Parliament that the law is in breach of human rights.

(b) Imagine a retired Aussie Rules football player, C, who has been honoured for his contributions to sport in Australia. C has two adult children who now live interstate. C has suffered a permanent spinal injury and as a result relies on a disability pension to get by. Because C lives in the Northern Territory and because he is Aboriginal, half of his pension has been quarantined by Centrelink for food and other necessities. C has effectively lost control over how his money is spent.[92]

[90] This example is broadly analogous to the case of Dr Mohamed Haneef. Detention without charge is currently lawful under Part 1C of the *Crimes Act 1914* (Cth). Under Division 102 of the *Commonwealth Criminal Code* it is an offence to associate with a member of a terrorist organisation.

[91] For example, human rights considerations relating to conditions of detention were raised during the applications for bail in the Benbrika terrorism trials, wherein 12 accused were charged with a number of terrorist organisation offences. See for example. *R v Benbrika & Ors (Ruling No 20)* [2008] VSC 80 (20 March 2008).

[92] This example is analogous to the NT Emergency Response Legislation, which introduced a system of quarantining welfare payments for Indigenous Australians and suspended the operation of the *Racial Discrimination Act 1975* (Cth).

Under a Charter of Rights, Parliament would have had to make it clear to the public that this law was in breach of the right to be free from discrimination.

(c) Imagine a woman D living in a Sydney suburb that is directly under the flight path for the Sydney airport. D has a young child who has only recently begun sleeping through the night. Currently the curfew for flights is between 10pm and 6am however, the Minister[93] has just decided to shorten the curfew to between 12 midnight and 4am.[94]

Under a Charter of Rights, D could seek a declaration or finding from the court that this shorter curfew breaches her right not to have her privacy, family or home arbitrarily interfered with. Under a Charter, the Minister would be required to take these considerations into account when determining whether or not to shorten the curfew.

(d) Imagine a young woman, E, with a baby. E has recently left a physically and mentally abusive relationship with the father of her child and is now living with her parents. During the past year, E has often spent time at various relatives' and friends' houses to escape the violence of her partner.

The father of E's child has gone to the Family Court to seek full-time residence of the child. He claims that E lives an 'erratic lifestyle' and would not be able to provide the child with a stable home. E can't afford to pay for a lawyer, so applies for legal aid. E's application is denied. E represents herself at the trial, and although E tries to tell the court about the domestic violence, E is unable to arrange for any witnesses or experts to give evidence. Full-time residence is awarded to the father.[95]

Under a Charter of Rights, E could have applied for a review of the decision to refuse legal aid on the basis that her right to legal representation[96] and her right to be treated equally before the law had been breached.[97] Under a Charter, the Commonwealth program under which legal aid funding is provided would have to consider the human rights implications of the guidelines for funding such cases.

(e) Imagine a 17 year old boy, F, who goes with a group of friends to the Australia Day celebrations held on the lawns of Parliament House in Canberra. The event is marketed as an all-ages, alcohol free event and the Australian Federal Police have promised to take a tough approach to any underage people caught drinking

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[93] Under the *Sydney Airport Curfew Act 1995* (Cth) ss6, 23 the Minister has the power to set and change the Sydney Airport curfew.

[94] This example is analogous to a case heard in the European Court of Human Rights, *Hatton v United Kingdom* [2003] ECHR 338, wherein the European Court upheld a claim that certain airport noise from Heathrow airport constituted a violation of Article 8 of the *European Convention on Human Rights*, which protects the right to respect for a person's private and family life, his home and his correspondence. This right is also protected under section 13 of the *Charter of Human Rights and Responsibilities Act 2006*(Vic).

[95] This example is analogous to the case of *T v S* [2001] Fam CA 1147 heard by the Full Court of the Family Court in 2001. In *T v S*, the Mother was denied legal aid and was self represented at the trial. The Judge did not accept her evidence of domestic violence. The Mother later obtained legal representation and appealed the order. The appeal was upheld. During the course of his judgment, Nicholson CJ referred to international human rights principles regarding freedom from discrimination and the right to legal representation.

[96] The right of a person to legal representation is protected under the *Charter of Human Rights and Responsibilities Act 2006*(Vic) s25(2)(f), however it is limited to the right to legal aid in respect to criminal proceedings, if the interests of justice require it, provided the person meets the eligibility criteria set out in the *Legal Aid Act 1978* (Vic).

[97] The right to equal treatment before the law is protected under Articles 14(1) and 26 of the *International Covenant on Civil and Political Rights,* as well as under section 8 of the *Charter of Human Rights and Responsibilities Act 2006*(Vic).

alcohol or consuming illicit drugs. F is caught holding a small container of coloured pills for someone else outside the toilets. The pills are later confirmed to be amphetamines. F is arrested by the AFP but because the local police cells are full he is transported to the adult remand centre where he is imprisoned over night. In the same remand centre are a number of adult offenders charged with serious violent offences. F is highly traumatised after being harassed by other inmates while in custody.

Under a Charter the AFP would have to consider the human rights implications of its detention policy following arrests of juveniles in Commonwealth places and the implications this might have on decisions relating to bail.

140. These examples demonstrate that a federal Charter of Rights would have a real and positive impact on the lives of Australians by facilitating greater awareness of human rights principles and by providing a mechanism to ensure that Government decision makers and Parliamentary law makers take those rights into account.

## 3.3 What impact will a Charter of Rights have on the legal profession?

141. The Law Council has welcomed the public debate on the question of whether Australia should adopt a Charter of Rights at the federal level.

142. Within this debate, a number of commentators have expressed concerns about lawyers supporting a Charter of Rights because it will give more power to judges and lawyers.

143. In response, the Law Council has emphasised that its support for a Charter is not about creating more work for lawyers.

144. Every day Australian lawyers are involved in the business of representing the members of our community who are most vulnerable to having their human rights abused. Many of these lawyers give their services pro bono or under the legal aid system. Through this important work, lawyers ensure that everyone, no matter how unpopular or what crime they may be accused of, has the right to legal representation and to have their case heard by an independent court.

145. It is through these experiences that lawyers come into contact with the aspects of our legal system that are not operating to protect the rights of the Australian community. It is this gap in protection that the Law Council believes a Charter of Rights could help fill.

146. As discussed above, the Charter supported by the Law Council would not invest the courts with power to declare laws invalid but would preserve Parliamentary sovereignty and foster a human rights culture in Government. Such a Charter should mean less work for lawyers not more.

147. The Law Council acknowledges that even with the best mechanisms in place to protect and promote human rights within Government, there are still likely to be instances where individuals' rights or freedoms are violated. In such instances lawyers will continue to play an important role in representing the interests of individuals and the interests of the community.

148. A Charter of Rights would assist individuals to identify and assert their human rights and would provide the court with a framework to evaluate whether the particular law, action or decision did in fact violate human rights. If a violation of a human right was

found, the Charter supported by the Law Council would not empower the court to invalidate the law or award damages, but it would require Parliament to respond to the court's finding of inconsistency.

149. This type of decision making by the judiciary that requires balancing the interests of the community against those of the individual is not something new or radical. It is the type of decision making that the courts engage in every day. Similarly, the notion of lawyers working to help protect people's individual rights is part of the daily work of many members of the profession and it is something to be valued and admired, not feared or denigrated.

150. As the peak national body representing the legal profession in Australia, the Law Council has an important, but not the only, perspective to offer the Committee on the question of how human rights could be better protected in Australia. This perspective arises from the legal profession's particularly relevant experience and expertise, rather than any pecuniary interest in cases pursued under a Charter. The fact that much of the human rights work that lawyers currently engage is undertaken on a pro bono basis or through the legal aid system suggests that if there is an expansion of this type of work under a Charter of Rights, the financial rewards to the legal profession are likely to be very meagre indeed.

## 3.4 What impact will a Charter of Rights have on the bureaucracy?

151. Some opponents of a Charter of Rights have expressed concern that such an instrument will be costly to implement and add another layer of bureaucracy to the Australian public service.

152. The Law Council recognises that Australia is facing an unprecedented set of economic challenges arising from the global financial crisis. However, this economic strain should not deter the Government from implementing measures that are necessary to protect the human rights of Australians, particularly when such measures can also provide important social, economic and cultural benefits.

153. One of the benefits of a legislative Charter of Rights is to *improve public service delivery* by making sure providers take human rights into account when making decisions.

154. Evidence of the service delivery benefits, particularly for the most marginalized or disadvantaged members of the community, has begun to emerge in Victoria, following the enactment of the Victorian Charter. For example, a 13 year old boy with Asperger Syndrome was ineligible to receive disability support services because a Victorian Government Department did not consider Asperger Syndrome and other Autism Spectrum Disorders to be a 'disability'.[98] The child's mother applied to the Victorian Civil and Administrative Tribunal for a review of the Department's decision and advocated for an inclusive and contextual interpretation of 'disability' in light of the rights contained in the Charter, including the right to privacy and equality before the law. Before the application proceeded to hearing, the Victorian Government issued a media statement advising that it had decided to acknowledge Autism Spectrum Disorders (including Asperger Syndrome) as a disability under the Act, and thereby entitled Victorians with autism to disability assistance.

[98] This example has been published by the Human Rights Legal Resource Centre as part of their database of 'good news stories' on the Victorian Charter of Human Rights. See HRLRC Bulletin (December 2008) at www.hrlrc.org.au/html/s02_article/default.asp?nav_top_id=59&nav_cat_id=138.

155. The ACT Act has been used by the Department of Correctional Services to assist in the planning and construction of a new corrections facility. As a result, the new Alexander Maconochie Centre is the first prison in the country to be designed and built in line with human rights principles.

156. These experiences, and those of overseas jurisdictions such as the UK,[99] suggest that if government agencies have sound, fair decision making procedures in place, the services they deliver will be better quality and lead to better long-term outcomes. These outcomes should result in less complaints and expensive public inquiries into substandard practices. For example, the cost to the Australian community flowing from the handling of the Haneef case could have been avoided or substantially reduced if a Charter of Rights had been place.

157. While the Law Council accepts that introducing a Charter of Rights is unlikely to be cost free, it does not have to be an expensive exercise.

158. Human rights compliance is no more expensive than other forms of compliance, such as preparing Environmental Impact Statements or ensuring equal opportunity programs are in place. For example, the bodies charged with administering the Human Rights Charters in the ACT and Victoria are of modest size, with staff of around 20 in the ACT and 50 in Victoria (and both of these bodies have other functions as well, such as handling discrimination and health complaints).

159. Further, contrary to what has been suggested by Charter opponents, the introduction of Charters in the ACT and Victoria has not led to a flood of litigation that the Government has had to spend money defending.

160. Although it is likely that public servants will require training to understand their human rights obligations under a Charter, these costs will be outweighed by the value a Charter will add in terms of better quality services.[100]

161. For the Law Council, the benefits of a Government and public service that respects human rights – both in terms of promoting and protecting human dignity and in improving service delivery across the board – greatly outweighs any initial costs that may be associated with introducing a Charter of Rights.

## 3.5 How does a Charter of Rights fit with the Australian Constitution?

162. The Law Council believes that the features of a Charter of Rights contained in the Law Council's Policy would be constitutionally valid.

163. However, the Law Council notes that within the public debate on the issue of a federal Charter of Rights for Australia, it has been contended that investing the courts, in particular the High Court, with the power to make a finding of inconsistency or incompatibility, would be contrary to the *Australian Constitution*.[101] This criticism has

[99] See British Institute of Human Rights' publication, *The Human Rights Act – Changing Lives* (2007) available at www.hirh.org.uk.

[100] The Lord Chancellor, the UK Audit Commission and the British Institute of Human Rights have each separately published reports concluding that human rights legislation - particularly the requirement that public authorities act compatibly with and give proper consideration to human rights - leads to better public services and outcomes.

[101] For example, former High Court Chief Justice Sir Gerard Brennan has been quoted as saying that the power of the courts to issue a declaration of incompatibility could face constitutional problems in the High Court, see Michael Pelly, 'Brennan foresees constitutional glitch with rights charter', *The Australian* , 14 March 2008.

been largely directed at the particular type of 'declaration of incompatibility' mechanisms found in the ACT Act, the UK Act and the New Matilda Bill.[102]

164. As noted above, the Law Council supports a Charter that allows a court to make a finding that a law is inconsistent or incompatible with the rights protected under the Charter, and prefers the term 'finding of inconsistency' rather than 'declaration of incompatibility' to describe this feature. However, in the next section of this submission, the Law Council discusses the views of commentators who have dealt only with the 'declaration of incompatibility' mechanism and therefore uses this term only when dealing directly with this commentary.

165. Two common arguments advanced in support of the contention that declarations of incompatibility may not be constitutional are that:

    (a) investing federal courts with the power to make declarations of incompatibility would be investing such courts with non-judicial power; and

    (b) the making of a declaration of incompatibility by a court does not involve a determination of a 'matter', and is therefore outside of the jurisdiction of the High Court, and may not be a valid exercise of judicial power as prescribed by Chapter III of the *Constitution.*

166. Both of these contentions have been countered by arguments demonstrating that a declaration of incompatibility mechanism could withstand any constitutional challenge, particularly if care is taken with the manner in which a federal Act is drafted.[103]

### *The Law Council Policy Statement and the New Matilda Bill*

167. In 2005 a group of advocates launched a *Human Rights Act for Australia Campaign* with the support of the on-line magazine, New Matilda. The campaign produced a model federal *Human Rights Bill* ('the New Matilda Bill')[104] which has been the subject of some debate during the current National Consultation on Human Rights.[105]

168. It is important to note that unlike the *Human Rights Act for Australia Campaign*, the Law Council has not developed a draft Bill for consideration by the Committee. Rather, the Law Council has adopted a Policy Statement containing the key features of a federal Charter of Rights.

169. It should also be noted that there are important differences between the New Matilda Bill and the Law Council Policy Statement. Importantly for the present discussion:

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[102] See UK Act s4, ACT Act s32, s51 New Matilda Bill. The Victorian Charter contains a 'declaration of inconsistent interpretation' mechanism, see s36.

[103] For example, see Dominique Dalla-Pozza and George Williams, 'The Constitutional Validity of Declarations of Incompatibility in Australian Charters of Rights' (2007) 12(1) *Deakin Law Review* 1; Pamela Tate SC, 'Protecting Human Rights in a Federation' (2007) 33(2) *Monash University Law Review* 217 at 234-236.

[104] The *Human Rights Act for Australia Campaign* is chaired by Susan Ryan. The campaign was officially launched in the Sydney Town Hall on 5 October 2005 under the sponsorship of the on-line magazine, New Matilda (www.newmatilda.com) as the New Matilda Human Rights Act for Australia campaign. In January 2008 it was decided to separate the campaign from New Matilda, so as not to compromise the independence of the New Matilda magazine. The campaign has been relaunched as the Human Rights Act for Australia campaign. The campaign produced a model federal Human Rights Bill. Professor Spencer Zifcak led the drafting, with assistance of Professor George Williams, Professor Hilary Charlesworth, Dr Helen Watchirs, Julian Burnside QC, Brian Walters SC and Jo Swarc. For more information and full text of the Bill see http://www.humanrightsact.com.au/2008/about-the-campaign/#bill.

[105] For example, the New Matilda Bill was considered by the Hon Michael McHugh AC QC in his recent address to the Australian Human Rights Commission on the topic of a federal Charter or Bill of Rights for Australia.

(a) Unlike the New Matilda Bill, which provides that '[s]o far as it is possible to do so, primary and subordinate legislation must be read and given effect in a way which is compatible with human rights',[106] the Law Council Policy Statement provides that the courts should be required to interpret legislation in a way that is compatible with human rights *so far as it is possible to do so consistently with the statute's purpose*.

(b) Section 51 of the New Matilda Bill authorises the courts to make a declaration of incompatibility, if a Court is satisfied that a provision of primary legislation is incompatible with a protected right or freedom. Section 51 provides a particular process for how Government is to respond to such a declaration and makes it clear that a declaration of incompatibility does not affect the validity, continuing operation or enforcement of the provision in respect of which it is given. As noted above, the Law Council's Policy provides that where a court cannot interpret a law in a manner consistent with human rights, it may make a finding of inconsistency or incompatibility. However, the Law Council Policy does not prescribe a particular process for how Parliament or Government may respond to this finding, other than to provide that such a finding would not operate to invalidate the law but would require a response from Parliament

(c) Section 51 of the New Matilda Bill also explicitly provides that a declaration of incompatibility is not binding on the parties to the proceedings in which it is made. Unlike the New Matilda Bill, the Law Council policy does not specifically provide that finding of inconsistency or incompatibility is not binding on the parties to the proceedings in which it is made.

170. By adopting a Policy Statement rather than proposing a draft Bill, the Law Council recognises that the drafting of any legislation designed to provide comprehensive protection for human rights in Australia is likely to be a complex process that should be undertaken by parliamentary counsel, following consultation with the legal profession and other relevant stakeholders with appropriate expertise.

### *Are declarations of incompatibility an exercise of judicial power?*

171. The Law Council is of the view that findings of inconsistency or incompatibility constitute a valid exercise of judicial power. However, it has been contended by some commentators that investing the courts with the power to make declarations of incompatibility could be unconstitutional on the grounds that such power is non-judicial.[107]

172. In order to examine this argument it is necessary to consider what constitutes judicial power. The constitutional notion of 'judicial power' is derived from the constitutionally entrenched doctrine of the separation of powers.[108] This doctrine provides that 'the Parliament is restrained from both reposing any power essentially judicial in any other organ or body [other than a court or tribunal], and from reposing any other than that

[106] New Matilda Bill s49(1).
[107] For example see the Hon Michael McHugh AC, QC 'A Human Rights Act, the courts and the Constitution' Presentation given at the Australian Human Rights Commission on 5 March 2009.
[108] Section 1 of the Constitution vests the legislative power of the Commonwealth in the Federal Parliament. Section 61 vests the executive power of the Commonwealth in the Queen via the Governor General, although in constitutional practice it is exercisable by the government of the day. Section 71 vests the judicial power of the Commonwealth in the High Court and other such federal courts as the Parliament creates and in such other courts as it invests with federal jurisdiction.

judicial power in such tribunals'.[109] Chapter III of the *Constitution* provides that only courts created through section 71 of the *Constitution* may exercise judicial power and that these courts cannot exercise anything other than judicial power, unless that other power is ancillary or incidental to the exercise of judicial power.[110]

173. Central to the definition of judicial power is the distinction between the settlement of a dispute between parties about existing rights, and the creation or pronouncement of new rights.[111] The first power involves the ascertainment of existing rights by judicial determination of issues of fact and law and falls squarely within judicial power. This power can be distinguished from the creation of new rights and obligations, which falls within the realm of non-judicial power.[112]

174. The meaning of 'judicial power' has yet to be exhaustively defined,[113] however, over time the High Court has identified a number of characteristics or indicia of judicial power.[114]

175. These indicia include:

- the determination of controversies between private parties or between the Government and its citizens;[115]
- the making of a decision by the application of a pre-existing legal standard rather than by the formulation of policy or the exercise of an administrative discretion;[116]
- a binding and authoritative decision determining the existence of a right or obligation;[117] and
- the ability to enforce a decision once it has been made.[118]

The determination of judicial power is made by weighing the indicia present against those which are absent.

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[109] See *Victorian Stevedoring and General Contracting Co Pty Ltd and Meakes v Dignan* (1931) 46 CLR 73, 98. See also *R v Kirby; Ex parte Boilermakers' Society of Australia* ('*Boilermakers'Case'*) (1956) 94 CLR 254 at 281.
[110] For further discussion see *Boilermakers' Case* (1956) 94 CLR 254 at 274, 281-282 and 296.
[111] See Halsburys Laws of Australia, para [90-5125]; see also *R v Davison* (1954) 90 CLR 353 at 369; *Rola Co (Aust) Pty Ltd v Commonwealth* (1944) 69 CLR 185 at 203; *Brandy v Human Rights and Equal Opportunity Commission* (1995) CLR 245 at 258-9.
[112] *Rola Co (Aust) Pty Ltd v Commonwealth* (1944) 69 CLR 185 at 203; *Wilson v Minister for Aboriginal and Torres Strait Islander Affairs* (1996) 189 CLR 1 at 11; *Oguzhan v Minister for Immigration and Multicultural Affairs* (2000) 99 FCR 285.
[113] The difficulty in formulating a definition has often been acknowledged. See *R v Trade Practices Tribunal; Ex parte Tasmanian Breweries Pty Ltd* (1970) 123 CLR 361, 394 per Windeyer J ('*Tasmanian Breweries*'); *R v Quinn; Ex parte Consolidated Food Corporation* (1977) 138 CLR 1, 15 per Aikin J; *Brandy v Human Rights and Equal Opportunity Commission* (1995) 183 CLR 245, 267 per Deane, Dawson, Gaudron and McHugh JJ ('*Brandy*').
[114] See for example *Albarran v Companies Auditors and Liquidators Disciplinary* Board (2007) 231 CLR 350 at [16]-[36] (Gleeson CJ, Gummow, Hayne, Callinan, Heydon and Crennan JJ); *Visnic v ASIC* (2007) 231 CLR 381 at [12]-[18] (Gleeson CJ, Gummow, Hayne, Callinan, Heydon and Crennan JJ); *White v Director of Military Prosecutions* (2007) 231 CLR 570 at [44]-[59] (Gummow, Hayne and Crennan JJ) Thomas *v Mowbray* (2007) 233 CLR 307 at [64]-[110] (Gummow and Crennan JJ); *Attorney General (Cth) v Alinta* (2008) 233 CLR 542 at [93]-[100] (Hayne J) (with whom Gummow J agreed at [9]-[14]), [151-[175] (Crennan and Kiefel JJ). For further discussion see Zines, *The High Court and the Constitution*, (Federation Press, 5th Ed, 2008), pp 208-218 (separation of judicial power) and Chapter 10 (pp 219-299) (the judicial power of the Commonwealth); and Campbell and Lee, *The Australian Judiciary* (Cambridge UP, 2001), pp 39-44.
[115] See *Huddart, Parker & Co Pty Ltd v Moorehead* (1909) 8 CLR 330,357 per Griffiths CJ.
[116] See *Brandy*(1995) 183 CLR 245 at 268 per Deane, Dawson, Gaudron and McHugh JJ.
[117] See *Tasmanian Breweries* (1970) 123 CLR 361 at 374 per Kitto J.
[118] See *Brandy* (1995) 183 CLR 245 at 268 per Deane, Dawson, Gaudron and McHugh JJ.

### *Do declarations of incompatibility meet these indicia?*

176. It has been argued on a number of grounds that a declaration of incompatibility mechanism can meet the necessary indicia of judicial power.

177. First, even though a declaration of incompatibility may not affect the rights of the parties to the dispute of itself, the enforceable character of such declarations could be made clear by drafting a Charter so as to ensure that binding obligations flow once courts have declared that an incompatibility or inconsistency exists.[119] For example, under the ACT Act and the Victorian Charter, the relevant Minister is compelled to respond in writing to the declaration and ensure that this response is tabled before each House of Parliament.[120]

178. Secondly, a Charter of Rights can be drafted so as to ensure that a declaration of incompatibility can only be made in the context of a pre-existing controversy between parties who are seeking to have their rights and liabilities determined by law.[121] For example, the Victorian Charter makes it clear that before a declaration of inconsistent interpretation can be made in a proceeding, there must be some other self-sufficient basis for commencing proceedings between the parties.[122] As Solicitor-General for Victoria, Pamela Tate SC explains, the ability of a court to make a declaration of inconsistent interpretation is only enlivened if a court is faced with a problem of interpretation arising in a controversy between the parties where rights and duties will be affected by the favoured interpretation, and the court is unable to interpret the particular law in question in a manner consistent with the protected human rights.[123] The Victorian experience suggests that findings of inconsistent interpretation will only arise when parties to a controversy are seeking some other form of remedy or relief, such as through judicial review of administrative action.

179. Thirdly, the making of a declaration of incompatibility is a power that requires the use of legal standards, as opposed to policy criteria, in determining a dispute .[124] A Charter of Rights can be drafted to set out defined legal standards which the courts are to use to determine whether to issue a declaration of incompatibility.

180. Fourthly, a declaration of incompatibility may fall within the definition of an exercise of judicial power 'provided it is *conclusive of* the controversy regarding inconsistency'.[125] The controversy is 'concluded' either by the court determining that there is no inconsistency and refusing to issue a declaration of incompatibility, or by the court issuing a declaration that an inconsistency or incompatibility exists. As Tate observes 'it is the construction that is ultimately arrived at by the Court which is final, binding and determinative of the controversy between the parties'. [126]

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[119] Dalla-Pozza and Williams, above n 103, at 14.
[120] See Victorian Charter ss36(6) and 36(7).
[121] Tate, above n103 at 234.
[122] See Victorian Charter s36. This additional requirement does not apply in the ACT: *Human Rights Act 2004*, s 40C.
[123] See Pamela Tate SC, 'Victoria's Charter of Human Rights and Responsibilities: A Contribution to the National Charter Debate', Speech delivered at the meeting of the Commonwealth Lawyers Association 6-7 April 2009, Hong Kong, p. 16.
[124] Dalla-Pozza and Williams, above n 103, at 11.
[125] Wendy Lacey and David Wright, 'Highlighting Inconsistency: The Declaration as a Remedy in Administrative Law and International Human Rights Standards' in Chris Finn (ed) *Shaping Administrative Law for the Next Generation: Fresh Perspectives* (2005) 32 at 55.
[126] Tate, above n 103 at 235. See also Dalla-Pozza and Williams, above n 103 at 19. See also Pamela Tate SC, 'Victoria's Charter of Human Rights and Responsibilities: A Contribution to the National Charter Debate', Speech delivered at the meeting of the Commonwealth Lawyers Association 6-7 April 2009, Hong Kong, p. 9.

181. However, not all commentators have been persuaded by the above arguments. Recently, at an address to the Australian Human Rights Commission, the Hon Michael McHugh AC QC raised doubts about whether declarations of incompatibility constituted a valid exercise of judicial power. [127]

182. Although Mr McHugh agreed that a number of the arguments expressed above have some merit,[128] he preferred the view that 'the making of the declaration has a temporal character, not a determinative character that defines the rights of the parties'.[129] Mr McHugh reasoned that because a declaration of incompatibility does not resolve the dispute that gives rise to the federal court's jurisdiction over the parties, the High Court may find that such declarations are not a valid exercise of judicial power. [130]

183. Commenting on the content of the draft federal Human Rights Bill proposed by the New Matilda advocacy group,[131] Mr McHugh pointed to the provisions that explicitly provide that a declaration of incompatibility does not bind the parties to the dispute to support this conclusion. A similar provision exists in the ACT Act.[132] Mr McHugh observed:

> *If the declaration was binding on the parties, it would declare as between them that, on its proper interpretation, the relevant legislation was incompatible with the human right in question. The court's obligation to transmit a copy of the declaration to the Attorney General might then be seen as an incidental, ancillary or necessary act in the exercise of federal judicial power. But given the presence of s 51 (4) (b) [which is similar to s32(3) of the ACT Act], the making of the declaration does not make any determination of the parties' rights. On that view, the making of a declaration does not cause any change in or recognition of the rights of the parties. It does not involve determining a right or duty. Nor, of itself, is it an attempt to administer the law. Hence, on the basis that it is not binding on the parties, it does not involve an exercise of federal judicial power, as between them.* [133]

184. However, Mr McHugh also conceded that it may be possible to resolve this issue by pursuing an argument advanced by Stephanie Wilkins in the context of the ACT Act.[134] Wilkins contends that, although no substantive rights are involved in or arise from a declaration of incompatibility, a party who obtains a declaration is 'entitled to a process: a response from the Attorney General (albeit one directed to the Legislative Assembly), and the possibility of a reconsideration (albeit of a law rather than of an administrative decision).' [135]

185. Citing Minister for *Immigration and Ethnic Affairs v Teoh*[136], *Abebe v Commonwealth*[137] and *Croome v Tasmania*[138] as examples, Wilkins argues that federal judicial power may be exercised even though the only practical entitlement of the applicant is the fulfilment of a formality by the Executive Government and the possibility of a reconsideration of an original decision. [139] For example, in *Teoh*, the applicant was not entitled to the fulfilment

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127 McHugh, above n 107.
128 Ibid at p. 45.
129 Ibid at p. 46.
130 Ibid at p. 48.
131 For the full text of this draft Bill see http://www.humanrightsact.com.au/2008/about-the-campaign/#bill.
132 See ACT Acts 32(3)
133 McHugh, above n 107 at p. 51
134 Stephanie Wilkins, 'Constitutional Limits On Bills Of Rights Introduced By A State Or Territory' (2007) 35 *Federal Law Review* 431 at 439.
135 Ibid 439.
136 (1995) 183 CLR 273.
137 (1999) 197 CLR 510.
138 (1997) 191 CLR 119.
139 Wilkins, above n 133, at 439.

of his legitimate expectation that Australia's international obligations would be fulfilled, only a right to have the original decision reconsidered by taking into account those obligations. Similarly, in *Croome*, the Court held that although the applicant was not at risk of the law being enforced against him, he had the right to have the validity of the State law considered because his conduct fell within its purview.[140]

186. Mr McHugh concluded that this argument, although not without difficulty, could find favour in the High Court and support the contention that a declaration of incompatibility is a valid exercise of judicial power.

187. The Law Council also notes that Mr McHugh was subsequently a member of the Constitutional Roundtable which recently issued a joint statement attesting to the constitutionality of a Charter of Rights that includes a feature that empowers a court to make a finding of inconsistency where it is unable to interpret legislation consistently with the rights protected under the Charter.

188. The Law Council believes that empowering a court to make finding of inconsistency or incompatibility would constitute a valid exercise of judicial power, particularly if care is taken in the drafting of the relevant provisions.

### *Do declarations of incompatibility involve the determination of a 'matter' for the purpose of Chapter III of the Constitution?*

189. Related to the question of whether a declaration of incompatibility is a valid exercise of judicial power is the question of whether the making of a declaration of incompatibility involves the determination of a 'matter'. If no 'matter' is involved, the validity of the High Court making such declarations or considering them on appeal may be called into question. [141]

190. In the context of Chapter III of the *Constitution*, the High Court's jurisdiction is limited to 'matters' in proceedings where some immediate right, duty or liability is required to be established.[142] As the High Court observed in *Re Judiciary Act*:

> *[A] matter under the Judicature provisions of the Constitution must involve some right or privilege or protection given by law, or the prevention, redress or punishment of some act inhibited by law. The adjudication of the court may be sought in proceedings inter partes or ex parte, or if Courts had the requisite jurisdiction, even in those administrative proceedings with reference to the custody, residence and management of the affairs of infants or lunatics. But we can find nothing in Ch III. of the Constitution to lend colour to the view that Parliament can confer power or jurisdiction upon the High Court to determine abstract questions of law without the right or duty of any body or person being involved.*[143]

191. The question of whether a declaration of incompatibility involves a 'matter' is also relevant to the question of whether making a declaration of incompatibility is a valid exercise of judicial power. As observed in *Mellifont*, Parliament cannot invest courts with the power to provide an 'advisory opinion' that involves 'an abstract question, and

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[140] McHugh, above n 107, at p. 45.
[141] For example, McHugh has noted that the absence of a power to give a binding decision affecting the parties is a clear indicator of a power or procedure being non-judicial and is also a strong indicator of the non-existence of a 'matter' within the meaning of Chapter III of the *Constitution.* McHugh, above n 107 at p. 16.
[142] See sections 75-77 of the *Constitution.*
[143] *Re the Judiciary Act 1903-1920 and in the Matter of the Navigation Act 1912-1920* (1921) 29 CLR 257 at [6] per Knox CJ, Gavan Duffy, Powers, Rich, Starke JJ.

[is] hypothetical in the sense that it was unrelated to any actual controversy between parties'.[144]

192. Thus, it has been contended that in order to ensure constitutional validity, declarations of incompatibility must be shown to involve the determination of a 'matter' and be differentiated from advisory opinions. [145]

193. The Victorian Solicitor-General along with academic commentators Williams and Dalla-Pozza argue that is likely that declarations of incompatibility do involve a 'matter".[146] They point out that the High Court has been prepared to determine questions in which declaratory relief has been sought where there has only been a tenuous link to an immediate right or duty.[147] For example, in *O'Toole v Charles David Pty Ltd*[148], the majority of the High Court held that the answer to questions of law, which did not of themselves determine the rights of parties, did not constitute an advisory opinion because they were given as an integral part of the process of determining the rights and obligations of the parties. In *Mellifont v Attorney-General (Queensland)*[149], the High Court held that no advisory opinion was involved in a procedure which empowered the Attorney-General to refer a point of law to a Court of Criminal Appeal in cases where an accused person had been acquitted of a charge.

194. There are a number of other features of declarations of incompatibility that distinguish them from advisory opinions and suggest that they satisfy the 'matter' requirement in Chapter III of the *Constitution.*

195. First, declarations of incompatibility can only be made as part of a judicial proceeding initiated by a party, wherein the parties' rights and duties are in dispute. Such proceedings are likely to arise in the context of ordinary civil or criminal litigation which includes the grant or refusal of ordinary forms of relief. This requirement is incorporated in the Victorian Charter which clearly provides that declarations of inconsistent interpretation can only be issued in the context of a pre-existing dispute.[150] This requirement means that declarations of incompatibly cannot be made in response to abstract or hypothetical questions of law and can thus be distinguished from a mere advisory opinion. [151]

196. Secondly, applying for a declaration of incompatibility can be seen to constitute a 'matter' and distinct from an advisory opinion because the making of a declaration is not divorced from the administration of the law. [152] In this way, a declaration that a law is incompatible with protected human rights is analogous to a declaration that a State law is inconsistent with a federal law that grants a rights or privilege.[153] In the case of the declaration of incompatibility, the law that is being administered is the federal law

144 *Mellifont v Attorney-General (Qld)* (1991) 173 CLR 289 at 305 per Mason CJ, Deane, Dawson, Gaudron and McHugh JJ.
145 Hon Sir Gerard Brennan AC KBE 'Introduction to Human Rights Law' Seminar Part II (2007) 81 *Australian Law Journal* 248 at 250.
146 Tate, above n 103 at 238; Dalla-Pozza and Williams, above n 103, at 22.
147 For example see *Croome v Tasmania* (1997) 191 CLR 119, 125-6 per Brennan CJ, Dawson and Toohey JJ.
148 (1991) 171 CLR 232, 244 per Mason CJ; 283-285 per Deane, Gaudron and McHugh JJ; 302 per Dawson J; 309 per Toohey J.
149 (1991) 173 CLR 289, 305.
150 See Victorian Charter s36(1).
151 Dalla-Pozza and Williams, above n 103, at 22.
152 Tate, above n 103, at 235. See also McHugh, above n 107.
153 See *Croome v Tasmania* (1997) 191 CLR 119, 126 per Brennan CJ, Dawson J and Toohey J. For further discussion see McHugh, above n 107.

that is alleged to be incompatible with the human right protected under the Charter of Rights. [154]

197. Thirdly, it can be argued that even if the process of making a declaration of incompatibility is thought not to involve an exercise of strictly judicial powers, the making of such a declaration is consistent with Chapter III principles because it is incidental or ancillary to judicial power validly conferred on a court.[155] The making of a declaration of incompatibility is incidental to the exercise of judicial power because it is a *consequence* of an authoritative decision by a court in which rights and obligations of parties are determined.[156] This argument can be supported by the fact that, although the making of a declaration may not affect the rights of the parties between themselves, it leads to enforceable obligations against the Attorney-General. [157]

198. Mr McHugh suggests that if this view is adopted, the High Court may be persuaded to find that the making of a declaration is incidental or ancillary to the exercise of judicial power and a 'matter' for the purpose of Chapter III of the Constitution. [158] As cases involving the responsibilities of trustees, liquidators and others show, there may be an exercise of judicial power although there is 'no lis inter partes or adjudication of rights'.[159]

199. The Law Council believes that the reasoning supporting the claim that a declaration of incompatibility mechanism can meet the requirements in Chapter III of the *Constitution* also support the constitutionality of a finding of inconsistency mechanism, particularly if the relevant legislative provisions are drafted carefully to ensure that they can only be made in the context of a dispute between parties.

### *Drafting Requirements*

200. As noted above, the Law Council is of the view that there are a range of strong arguments in support of the constitutional validity of a finding of inconsistency mechanism.

201. The Law Council further notes that the Constitutional Roundtable has recently issued a joint statement indicating that a legislative Charter of Rights that includes a particular finding of inconsistency mechanism would be constitutionally sound.[160]

202. These arguments can be reinforced by careful drafting of a Charter.

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[154] Ibid.

[155] Section 71 of the *Constitution* provides that courts cannot exercise anything other than judicial power, unless that other power is ancillary or incidental to the exercise of judicial power. See also *Cominos v Cominos* (1972) 127 CLR 588; *The Queen v Joske; ex parte Shop Distributive and Allied Employees' Association* (1979) 135 CLR 194. For further discussion see Tate, above n 103, at 234

[156] McHugh, above n 107, at 45.

[157] For example, a court could issue an order in the nature of *mandamus* to the Attorney General for breach of the obligations that flow from the making of the declaration of incompatibility. See *Cominos v Cominos* (1972) 127 CLR 588; *The Queen v Joske; ex parte Shop Distributive and Allied Employees' Association* (1979) 135 CLR 194. For further discussion see Tate, above n 103, at 234; McHugh, above n 107, at 59.

[158] McHugh, above n 107, at 60.

[159] *The Queen v Davison* (1954) 90 CLR 353 at 368.

[160] See Statement issued following the Roundtable on a Federal Human Rights Act and the Constitution, hosted by the Australian Law Reform Commission on 22 April 2009, available from the Australian Human Rights Commission website http://www.hreoc.gov.au/index.htm. Roundtable participants included the Hon Catherine Branson QC, Sir Anthony Mason AC KBE, Associate Professor James Stellios, Ms Pamela Tate SC, Associate Professor Anne Twomey, Associate Professor Kristen Walker, Professor George Williams, Professor Spencer Zifcak, the Hon Michael McHugh AC QC and Mr Brett Walker SC.

203. For example, it could be made clear, as it is under the Victorian Charter,[161] that a finding of inconsistency can only be sought in conjunction with a separate proceeding or an application for other remedies or relief. This requirement would ensure that the courts' consideration of a whether a law is inconsistent or incompatible with protected human rights involves a pre-existing dispute between parties and involves a 'matter' for determination by the court. It would also make it very likely that any appeal of such a dispute would also involve an appeal against a decision to grant some other form of relief, and thus fall within the jurisdiction of the High Court under section 73 of the *Constitution.*

204. The Charter of Rights could also be drafted so as to require that the Attorney-General be joined as a party to the proceedings before the court or be invited to intervene in proceedings as is currently the case under the Victorian Charter.[162] This requirement would reinforce the view supported by Mr McHugh[163] that where a declaration of incompatibility is made, the court would be able to issue a writ of mandamus directly to the Attorney to require him or her to respond in accordance with the procedure set out in the Charter of Rights. This requirement would help reinforce the enforceable character of a finding of inconsistency by clearly imposing binding obligations on the Attorney-General.

205. Alternatively, the Charter of Rights could be drafted so as to enable a party to the proceedings to bring a finding of inconsistency to the attention of the Australian Human Rights Commission. The Commission could then notify the Attorney General who would be required to respond to the finding of inconsistency and table this response in Parliament within a specified time.[164]

206. The drafting of any legislation designed to provide comprehensive protection for human rights in Australia is likely to be a complex process, wherein the constitutionally entrenched doctrine of separation of powers requires careful consideration.

207. The Law Council notes that the New Matilda Bill, which has been challenged as to its constitutionality, was not drafted by parliamentary counsel. The Law Council suggests that expertise of parliamentary counsel and the legal profession would be required to draft a Charter which takes into account the current state of the law in relation to matters such as the Commonwealth Constitutional separation of powers.

### *The McHugh Alternative*

208. The Hon Michael McHugh AC QC also recently suggested an alternative legislative model which would protect human rights without including a finding of inconsistency mechanism. The McHugh model is based on the 1960 Canadian legislative *Bill of Rights*. It would give legal effect to the ICCPR and possibly the ICESCR by empowering courts invested with federal jurisdiction to hold that State and Territory legislation that is inconsistent with the human rights legislation is invalid and that federal legislation is to

[161] See Victorian Charter s36(1).
[162] See Victorian Charter s36(3).
[163] See McHugh above n 107 at p. 17.
[164] This is the approach contained in the Statement issued following the Roundtable on a Federal Human Rights Act and the Constitution, hosted by the Australian Law Reform Commission on 22 April 2009, available from the Australian Human Rights Commission website.

be read subject to the *Bill of Rights Act* that gives effect to those international covenants.[165]

209. Under this model, individuals would have judicially enforceable human rights that were not generally affected by State, Territory or federal legislation inconsistent with those rights and would have immediate judicial remedies for breaches of those rights.

210. However, critics argue that this model undermines the notion of parliamentary sovereignty by empowering the courts, rather than Parliament, to have the final say on the protection of human rights.[166]

211. Mr McHugh responds to this criticism by arguing that this model would have only a minimal effect on parliamentary sovereignty because it would be open to the Parliament of the Commonwealth to insert in any federal legislation a 'notwithstanding' clause which required the courts to give effect to that particular legislation notwithstanding the enactment of the human rights legislation. [167] It would also be open to the Parliament after any decision with which it disagreed to insert a 'notwithstanding' clause in the legislation which the court had said should be ignored in determining rights and obligations. [168]

212. As discussed above, the Charter of Rights supported by the Law Council also seeks to preserve Parliamentary sovereignty but by different mechanisms to that proposed in the McHugh model.

213. Although the Law Council has adopted a Policy Statement supporting particular features of a Charter of Rights, the Council acknowledges the present consultation process should involve the Committee giving active consideration to other forms of specific legislative protection for human rights at the federal level. To this end, the Law Council encourages the Committee to also consider the model proposed by Mr McHugh as a mechanism to improve human rights protection in Australia. Although this model differs from that supported by the Law Council, it offers a form of legal protection for human rights that would help fill the gaps in the protection currently available at the federal level and deserves thoughtful consideration by the Committee.

## 3.6 What Impact would a Charter of Rights have on the States and Territories?

214. If a legislative Charter or Bill of Human Rights was adopted at the federal level it would undoubtedly have an impact on the Australian States and Territories.

215. Under the *Australian Constitution,* the Commonwealth Parliament does not have a specific, exclusive legislative power to make laws with respect to human rights, although it does enjoy a number of heads of power that would enable it to do so.[169] The States and Territories enjoy the power to legislate with respect to a wide range of subject

[165] McHugh, above n 107, at p. 19.
[166] Concerns have also been raised that the McHugh alternative could cause an uneasy relationship between the federal Parliament and the States as it would result in any State law which was inconsistent with the federal Act being declared invalid by virtue of s109 of the Constitution. It has also been contended that the McHugh alternative could face constitutional difficulties if the notwithstanding clause requirement was considered to constitute a 'manner and form' direction to federal Parliament. For further discussion see Pamela Tate SC, 'Victoria's Charter of Human Rights and Responsibilities: A Contribution to the National Charter Debate', Speech delivered at the meeting of the Commonwealth Lawyers Association 6-7 April 2009, Hong Kong, pp. 18-19.
[167] Ibid at 37.
[168] Ibid at 37.
[169] For example, section 51(xxix) of the *Constitution* supports the Commonwealth government to pass laws that implement treaty obligations, see *Commonwealth v Tasmania* (1983) 158 CLR 1.

matters, many of which impact on the enjoyment of human rights, such as criminal law, education, health care and housing.

216. This Constitutional arrangement means that the States and Territories are not precluded from enacting legislation dealing with human rights. In fact, legislation protecting and promoting human rights at the State and Territory level - in addition to specific legislative protection at the federal level - is thought to be necessary to give full effect to Australia's international human rights obligations, including those under the ICCPR and ICESCR.[170] Because a federal Charter of Rights would apply only to federal laws and bind only federal public authorities,[171] it could easily co-exist with the specific human rights legislation currently existing in the ACT and Victoria and that being considered by other jurisdictions, such as Western Australia and Tasmania.

217. A consistent and harmonised approach to the protection and promotion of human rights across Australian jurisdictions could be achieved by the adoption of model laws by each of the jurisdictions, developed in consultation with the Commonwealth and the States and Territories, such as the approach taken to classification of publications, films, computer games and advertisement[172] and the national regulation of gene technology.[173]

218. Alternatively, a federal Charter of Rights could exist concurrently with a range of human rights Acts or Charters in the various States and Territories, such as the approach taken to anti-discrimination law in Australia.[174]

219. Under this regime, each jurisdiction has specific legislation covering various areas of discrimination, commonly supported by an anti-discrimination or equal opportunity commission which assists in the implementation of the regime and to perform a complaints handling and conciliation function.

220. A similar regime could be established in the context of human rights, with a federal Charter of Rights supported by the Australian Human Rights Commission, which would work separately from, but in cooperation with, the relevant human rights commissions in Victoria and the ACT and other States and Territories, which pass relevant legislation. Care would need to be taken to ensure key messages about human rights are kept

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170 See Article 50 of the ICCPR, Article 28 of the ICESCR.

171 The Law Council notes that it has been suggested that a federal Charter or Bill of Human Rights could be drafted so as to apply to certain state public authorities in much the same way as the Commonwealth Sex Discrimination Act applies to state bodies, see for example the Human Rights Legal Resource Centre submission to the National Consultation (April 2009).

172 A cooperative statutory scheme has been enacted to provide for a uniform censorship and classification system throughout all Australian jurisdictions, Classification (Publications, Films and Computer Games) Act 1995 (Cth). The Commonwealth Act covers the classification of material according to legislated standards of public morality, prescribed by the National Classification Code. The Act covers the structure and functions of the Office of Film and Literature Classification. State and Territory legislation generally deals with the enforcement of classification decisions, see *Classification (Publications, Films and Computer Games) (Enforcement) Act 1995* (ACT); *Classification of Publications, Films and Computer Games Act 1985* (NT); *Classification (Publications, Films and Computer Games) Enforcement Act 1995* (NSW); *Classification of Publications Act 1991* (Qld); *Classification of Films Act 1991* (Qld) *Classification of Computer Games and Images Act 1995* (Qld); *Classification (Publications, Films and Computer Games) Act 1995* (SA); *Classification (Publications, Films and Computer Games) Enforcement Act 1995* (Tas); *Classification (Publications, Films and Computer Games) (Enforcement) Act 1995* (Vic); Censorship Act 1996 (WA).

173 The *Gene Technology Act 2000* (Cth), *Gene Technology Regulations 2001* (Cth) in conjunction with complementary State and Territory legislation, underpin the national regulatory scheme for live and viable genetically modified organisms in Australia. The implementation of the scheme is overseen by the Gene Technology Ministerial Council, which comprises representation from all Australian jurisdictions. For further information see the Office of the Gene Technology Regulator Website at http://www.ogtr.gov.au/.

174 See *Racial Discrimination Act 1975* (Cth); *Sex Discrimination Act 1984* (Cth), *Disability Discrimination Act 1992* (Cth) *Age Discrimination Act 2004* (Cth) *Anti-Discrimination Act 1977* (NSW), *Equal Opportunity Act 1995* (Vic), *Anti-Discrimination Act 1991* (Qld), *Equal Opportunity Act 1984* (SA), *Equal Opportunity Act 1984* (WA), *Anti-Discrimination Act 1998* (Tas); *Discrimination Act 1991* (ACT); *Anti-Discrimination Act* (NT).

consistent across Australia, but the legal requirements in each jurisdiction need not be identical to be effective.

221. While the interpretative clauses and power to make findings of inconsistency under a federal Charter of Rights would not apply to State or Territory laws, a federal Charter of Rights could nonetheless have an impact on the validity of State or Territory laws.

222. This impact arises from section 109 of the *Constitution* which provides that 'when a law of a State is inconsistent with a law of the Commonwealth, the latter shall prevail, and the former shall, to the extent of the inconsistency, be invalid'. In other words, to the extent that any law of a state[175] is inconsistent with the federal Charter of Rights, the state law would be inoperative.[176]

223. A section 109 inconsistency can arise where there is a direct conflict between the State and Commonwealth law[177] or a textual collision between the laws.[178.] For example, it may be impossible for a person to obey one law without disobeying the other,[179] or the application of one law may remove a right, privilege or immunity conferred by the other law.[180] This situation arose in the case of *Clyde Engineering Co Ltd v Cowburn* where a State law which required employers to pay full award wages for a 44 hour week was found to be inconsistent with a Commonwealth law authorising an industrial award that required workers to work a 48 hour week.[181]

224. A direct inconsistency of this type would appear unlikely to occur in the context of the federal Charter of Rights and the relevant Victorian or ACT human rights law as the Victorian and ACT human rights Acts are specifically limited to those jurisdictions. For example, the ACT Act only applies to Territory laws and only binds public authorities established under Territory law, or those authorities performing a function of a public authority established under Territory law.[182] There may be limited instances, however, where both the federal Charter of Rights and the State or Territory human rights law could apply.[183]

225. A section 109 inconsistency can also arise if the Commonwealth Parliament demonstrates an intention to make a law which will completely, exhaustively or exclusively govern the particular conduct or matter to which it is directed, and a State Parliament attempts to govern the same conduct or matter.[184] This type of inconsistency is sometimes described as arising from the Commonwealth's intention to 'cover the field'.[185]

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[175] In general, a section 109 inconsistency will only arise in the context of State or Territory legislation, and not to principles of common law *Amalgamated Society of Engineers v Adelaide Steamship Co Ltd (Engineers' Case)* (1920) 28 CLR 129 at 155; 26 ALR 337 per Knox CJ, Isaacs, Rich and Starke JJ.
[176] *Butler v Attorney-General (Victoria)* (1961) 106 CLR 268.
[177] *University of Wollongong v Metwally* (1984) 158 CLR 447 at 455-6 per Gibbs CJ, at 483-4 per Dawson J.
[178] *Miller v Miller* (1978) 141 CLR 269 at 275 per Barwick CJ.
[179] *R v Licensing Court of Brisbane; Ex parte Daniell (*1920) 28 CLR 23.
[180] *Blackley v Devondale Cream (Vic) Pty Ltd* (1968) 117 CLR 253.
[181] (1926) 37 CLR 466.
[182] See ss29, 40 of the ACT Act.
[183] For example, in *DPP (Cth) v Barbaro* [2009] VSCA 26 (3 March 2009) at [35]-[36] per Maxwell P, Vincent and Kellam JJA it was observed in obiter that sections 21 and 25 of Victorian Charter were applicable to an application for bail in respect of Commonwealth offences. In that case, bail was being considered under the *Bail Act 1977* (Vic), however the defendant was charged with Commonwealth drug trafficking offences.
[184] *Ex parte McLean* (1930) 43 CLR 472 at 483 per Dixon J.
[185] *Clyde Engineering Co Ltd v Cowburn* (1926) 37 CLR 466 at 489 per Isaacs J.

226. It would appear that if a federal Charter of Rights was adopted, it is possible that the ACT Act or the Victorian Charter would be considered inconsistent with the federal Charter of Rights on the basis that the federal law demonstrates an intention by Commonwealth Parliament to cover the field.

227. If the Commonwealth Government was keen to limit the potential for state laws to be found to be inoperative by virtue of this form of inconsistency, it could expressly state that the federal Charter of Rights is not intended to 'cover the field'.

228. This approach was taken by the Commonwealth in the context of the *Racial Discrimination Act 1975* (Cth) following the decision in *Viskauskas v Niland,*[186] where the High Court considered the relationship between the Commonwealth Act and the *Anti-Discrimination Act 1977* (NSW). In *Viskauskas*, the High Court found that there was no direct inconsistency between the two laws, in the sense that it was possible for a person to obey both laws at the same time. However, the Court went on to say that there was an inconsistency apparent from the fact that both legislatures have enacted laws upon the same subject matter in a manner that displays an intention to 'cover the field'. In an attempt to avoid or at least limit the extent of inconsistency disclosed by *Viskauskas*, the Commonwealth Government inserted section 6A into the *Racial Discrimination Act 1975* (Cth) to make its' legislative intentions clear. Section 6A provides:

*This Act is not intended, and shall be deemed never to have been intended, to exclude or limit the operation of a law of a State or territory that furthers the objects of the Convention and is capable of operating concurrently with this Act.*

229. An express statement of this kind by Parliament has been found by the High Court to be a strong indication of whether or not the Commonwealth does in fact intend to cover the field,[187] and may assist in ensuring State and Territory laws enacted to protect and promote human rights can co-exist with a federal Charter of Human Rights.

## 3.7 Alternative Mechanisms to Protect and Promote Human Rights

230. The Law Council supports the adoption of a federal Charter of Rights as the most effective form of human rights protection at the federal level.

231. The Law Council is aware of a range of other mechanisms, such as those identified in the Background Paper, that could be employed in conjunction with a Charter of Rights that also offer some protection for human rights in Australia. However, the Law Council warns against the adoption of such alternatives as a substitute for a Charter of Rights.

232. While the alternatives discussed in the Background Paper may all contribute to an improved culture of human rights protection in Australia, if implemented without being accompanied by a Charter of Rights, these measures will fail to deliver the type of comprehensive protection and promotion of human rights that is currently absent at the federal level.

233. For the Law Council, adequate human rights protection in Australia demands more than the introduction of a range of ad hoc or discrete processes or provisions. What is

[186] (1983) 153 CLR 280.

[187] See for example *University of Woollongong v Metwally* (1984) 158 CLR 447, 446 per Gibbs CJ; 460-1 per Mason J; 469 per Murphy J; 472 per Wilson J; 474 per Brennan J; 483 per Dawson J. Cf Greg McCarry, 'Landmines Among the Landmarks: Constitutional Aspects of Anti-Discrimination Laws' (1989) 63 *Australian Law Journal 327.*

needed is a strong statement by the Australian community of what rights we think ought to be protected, which clearly outline the various roles and obligations of each arm of government.

234. In the next section of this submission, the Law Council will examine a number of the alternative mechanisms identified in the Background Paper as options for providing improved protection for human rights in Australia.

### *Increase the parliamentary scrutiny process*

235. The Background Paper discusses a number of options to increase the parliamentary scrutiny process:

(a) the creation of a Parliamentary Committee to provide guidance to government departments, legislative drafters and policy advisers on human rights issues;

(b) a process of tabling human rights Compatibility Statements;

(c) a process of assessing proposed laws against human rights set out in legislation; and

(d) the creation of a Parliamentary Secretary for Human Rights.

236. The Law Council strongly supports a process whereby new laws are examined and assessed for their compliance with human rights.[188]

237. While this could be achieved by the creation of a new Parliamentary Committee or the adoption of the other mechanisms listed above, the Law Council believes that such scrutiny of new laws is best achieved through the framework of a federal Charter of Rights. A Charter of Rights would improve parliamentary scrutiny by:

(a) providing a clear legislative framework against which all new laws could be assessed.

(b) clearly listing the human rights the Australian community thought worthy of protection

(c) requiring government departments to consider human rights compliance at the policy development stage, before the new law is introduced;

(d) requiring that all new laws be accompanied by a Human Rights Compatibility Statement, which would tell the Parliament and the public whether or not the new law complies with human rights;

(e) promoting consistency across all areas of law and policy by applying the same criteria to all new policy proposals and draft laws; and

(f) providing a strong incentive for government departments and other public authorities to take human rights into account in all aspects of their work, from policy formation to the exercise of statutory powers, by making public authorities

[188] The Law Council notes that there currently exists a Commonwealth Senate Standing Commission for the Scrutiny of Bills which assesses legislative proposals against a set of accountability standards, including whether bills trespass unduly on personal rights and liberties. However, there is no requirement to consider bills for compliance with international human rights standards, such as those rights contained in the ICCPR or the ICESCR.

bound to observe human rights and attaching legal consequences to non-compliance.

238. This type of Charter of Rights can be contrasted with the suggested Parliamentary Committee approach, which lacks any features to enforce human rights compliance. The Committee could make recommendations that a proposed law be amended or repealed, for example, but Parliament is not bound to consider these recommendations, and would be free to disregard them in the enactment and implementation of the new law, as can be frequently observed in the context of recommendations made by existing Parliamentary Committees.

239. For these reasons the Law Council submits that while a new Parliamentary Committee could be established to support and complement a Charter of Rights, it should not be considered a viable alternative to this form of human rights protection.

240. The Background Paper also raises the question of whether policy development by Government departments could be improved if there was a formal process to assess the human rights implications of new policy proposals.

241. The Law Council is of the view that policy development would be improved if thought was given as to whether the particular proposed policy complies with human rights. The most effective means of ensuring that Government policy was developed in this way is to adopt a Federal Charter of Rights. For example, the Charter of Rights supported by the Law Council would require government departments to consider human rights compliance at the policy development stage and would also require government departments to complete a Human Rights Impact Statement for all Cabinet submissions, outlining how the proposed policy or law would impact on human rights.

### *Strengthen Commonwealth Anti-Discrimination Laws*

242. The Background Paper also identifies strengthening Commonwealth anti-discrimination laws as a possible option for improving the protection and promotion of human rights in Australia.

243. The Law Council has a long standing interest in ensuring Australian laws adequately protect people from discrimination and has advocated for a strengthening of Australia's anti-discrimination laws in many forums. The Law Council has advocated for a range of changes to anti-discrimination laws, including that they be reviewed or amended to:

(a) provide greater scope for the grounds of discrimination;

(b) improve access to and efficiency of the complaints system; and

(c) ensure that instances of systemic discrimination can be investigated and remedied.

244. Most recently, the Law Council has made submissions calling for reform of certain provisions of the *Sex Discrimination Act* and the *Disability Discrimination Act*, with the objective of strengthening the protection offered by these statutes.[189]

[189] Law Council of Australia and NSW Bar Association Submission to Senate Committee on Legal and Constitutional Affairs, *Inquiry into the Effectiveness of the Commonwealth Sex Discrimination Act 1984 in Eliminating Discrimination and Promoting Gender Equality* (15 August 2008); Law Council of Australia Submission to Senate Committee on Legal and Constitutional Affairs *Disability Discrimination and Other Human Rights Legislation Amendment Bill 2008* (14 January 2009).

245. The Law Council acknowledges that anti-discrimination law has undoubtedly had a positive impact on the protection of fundamental rights in Australia.

246. However, the ability of anti-discrimination law to provide sufficient protection for human rights is limited, even in the field of discrimination. For example, current Commonwealth anti-discrimination laws do not provide adequate protection against discrimination on the grounds of sexual preference, criminal record or religion, nor do they provide sufficient protection against multiple or intersectional grounds of discrimination.

247. The Law Council supports efforts to review and harmonise Australia's anti-discrimination laws, with a view to improving the processes for making complaints and re-evaluating the basis on which complaints can be made. Value may also be gained by providing a more active role for the various Human Rights and Anti-Discrimination Commissioners and authorities, to enable the investigation of instances of systemic discrimination, for example. The Law Council intends to actively participate in any reviews or policy proposals undertaken in this area. However, even if anti-discrimination laws were strengthened, or streamlined into a single *Equality Act by* referral of powers to the Commonwealth, anti-discrimination law would still provide only a limited form of protection for human rights because anti-discrimination laws are:

(a) limited to the protection of certain types of rights and could not be sensibly expanded to provide comprehensive protection for all human rights worthy of protection, such as the right to liberty and security of person, the right to free speech and the right to privacy;

(b) unlikely to contain a catalogue of all of the human rights the Australian community believes should receive specific protection;

(c) based on a complaints system that is largely designed to address incidences of discrimination and is limited in its ability to prevent violations of rights from occurring

(d) unlikely to invest courts with interpretative powers, or the power to make declarations that other laws are incompatible with anti-discrimination laws; and

(e) generally limited in their ability to influence policy making across all fields.

248. This is why other Western nations with similar political and legal systems as Australia have opted to adopt a specific legislative or constitutional protection for a broad range of fundamental rights, in addition to functioning anti-discrimination laws.

### *Strengthen the role of the Australian Human Rights Commission*

249. The Background Paper also refers to the possibility of strengthening the role of the Australian Human Rights Commission (AHRC) as an option for improving human rights protection in Australia.

250. The Background Paper asks:

(a) whether the jurisdiction of the Commission should be expanded to enable it to inquire into and conciliate a broader range of human rights complaints;

(b) whether the Commission should have a greater role in scrutinising legislation for human rights compatibility; and

(c) how the Government should respond to the Commission's recommendations.

251. The Law Council supports the idea of strengthening the role of the AHRC.

252. Currently, the AHRC has two main roles. First, it has specific conciliation and complaints handling powers in respect of unlawful discrimination. If a complaint of unlawful discrimination is not successfully resolved by the Commission, it can be referred to the Federal Court or the Federal Magistrates Court for determination and/or enforcement. Secondly, it can receive complaints from individuals of violations of the human rights listed in the Schedule to the *Human Rights and Equal Opportunities Act 1986* (Cth) by Commonwealth agencies. In respect of these complaints, the AHRC has a conciliation role, but its recommendations are not enforceable, and the complaint cannot proceed to a federal court.[190] As part of this second role, the AHRC can write a report to the Attorney-General which is tabled in Parliament; however there is no obligation upon Parliament to respond to the report or its recommendations.

253. One the key weaknesses in the current functions of the AHRC is that outside of its anti-discrimination complaints handling process, its recommendations and findings in respect of violations of human rights are unenforceable, and do not require a response from Parliament. The Law Council would support a strengthening of the AHRC's role and powers in this regard, for example by requiring that the Attorney-General make a formal response to a report of the AHRC within a reasonable time.

254. The Law Council also supports the notion of increasing the powers of the AHRC to inquire into and conciliate a broader range of human rights complaints, including instances of systemic rights violations. For example, in the Law Council's recent submission to the Senate Legal and Constitutional Affair's *Inquiry into the Effectiveness of the Commonwealth Sex Discrimination Act 1984 in Eliminating Discrimination and Promoting Gender Equality*, the Law Council submitted that changes should be made to the *Sex Discrimination Act* that would:

(a) empower the Sex Discrimination Commissioner to investigate systemic and/or pervasive discriminatory practices at her own initiative and without needing to rely upon a form of individual complaint and without requiring the consent of HREOC [now the AHRC];

(b) enable the Sex Discrimination Commissioner to report to the Attorney-General on any organisation that fails to implement the recommendations of the Sex Discrimination Commissioner made pursuant to an investigation of that organisation.

255. Provided it is accompanied by the provision of additional and adequate resources, the Law Council agrees that a strengthened role for the AHRC would improve human rights protection in key areas such as discrimination and would add to the already considerable educative role the AHRC undertakes to promote human rights awareness in Australia.

[190] See *Human Rights and Equal Opportunities Act 1986* (Cth) Division 3.

256. However, the Law Council does not suggest that an increased role of the AHRC of itself would provide adequate or sufficient human rights protection at the federal level. Such a role for the AHRC would complement the introduction of a Charter of Rights, but should not be considered as an alternative approach to human rights protection.

### *Improve Human Rights awareness*

257. The Background Paper considers how human rights awareness within the community might be improved, and whether this would provide an option for improved protection and promotion of human rights in Australia.

258. The Background Paper discusses the development of a new National Action Plan with a focus on integrating human rights protection and promotion as a central public policy objective, with appropriate review mechanisms to assess implementation of the Action Plan against its objectives.

259. The Law Council strongly supports efforts to improve human right awareness in the community and is of the view that the adoption of a Charter of Rights would be an effective means of promoting such awareness.

260. Significant educational and awareness-raising work is already undertaken by the AHRC and other human rights-focused organisations. This work could be consolidated and enhanced by the adoption of a Charter of Rights.

261. This enhancement can be observed in the case of Victoria and the ACT, where the introduction of specific statutory human rights protection has led to improved public awareness of human rights and very active human rights commissions.

262. For example, the ACT Human Rights Commission runs regular workshops for all government departments, businesses and individuals on the purpose and operation of the *Human Rights Act* and the substance and effect of the rights contained therein. It also runs regular school programs on human rights, including the Annual Human Rights Senior Primary School Students Award. The Commission also hosts forums on specific human rights issues, such as anti-terrorism laws, mental health and victims' rights. The ACT Human Rights Commissioner, Dr Helen Watchirs, has cited the primary impact of the ACT Act as 'developing a human rights culture' and contributing to policy development.[191]

263. The Victorian Human Rights Commission runs similar workshops and forums targeted specifically at businesses, community organisations, schools and individuals. Workshops include: From principle to practice: Implementing the human rights based approach in community organisations; Human Rights for local government; and The Advocates' Charter: a tool for individual and systemic change.[192] The Victorian Human Rights Commissioner also appoints inspiring young people as 'human rights ambassadors' who are tasked with raising awareness of the Victorian Charter of Human Rights in the community.

264. The Background Paper makes reference to the National Action Plan for Human Rights as another possible option for improving human rights awareness and protection.

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[191] Dr Helen Watchirs, ACT Human Rights Commissioner, *Protecting rights in the ACT* , 9 January 2009, available on www.humanrightsact.com.au

[192] For more information see www.humanrightscommission.vic.gov.au

265. The current National Action Plan outlines the Australian Government's five priorities for human rights promotion in Australia.[193] These are:

- promoting a strong, free democracy;
- human rights education and awareness;
- assisting disadvantaged groups to become more independent;
- supporting the family; and
- promoting human rights internationally.

266. While the Law Council supports the identification of human rights priorities, it is of the view that the current National Action Plan generally reflects a narrow approach to the promotion and protection of human rights in Australia. The National Action Plan fails to tackle human rights issues the subject of significant public debate and, moreover, fails to reflect a commitment by the Federal Government to:

- uphold and promote Australia's obligations under international human rights agreements;
- legislate, where necessary, to give effect to internationally recognised human rights; and
- ensure that all of Australia's laws and policies are compatible with human rights standards.

267. In the absence of these elements, the general framework in which human rights are protected at the national level lacks the robustness and comprehensive coverage necessary to provide the type of protection the Law Council believes is needed.

268. If a Charter of Rights were to be adopted, it would be likely to demand the development of a new National Action Plan for Human Rights. Such an Action Plan would provide an important framework for guiding the development of Government policy in the area of human rights, and for outlining priority areas of focus.

269. The Background Paper also considers the adoption of a Community Charter, as an alternative to a statutory charter, as a means of improving human rights awareness and improving human rights protection and promotion in Australia.

270. The Community Charter referred to in the Background Paper would not be a legal instrument and would not give rise to legally binding obligations on the Government or individuals. However it could be used by Government, individuals or businesses as a guide to help protect and promote human rights as part o f the Australian culture.

271. The Law Council supports the adoption of a statement of human rights which the community believes deserve protection. The Law Council shares the view that such a statement would provide an important guide to Government, individuals and businesses to protect and promote human rights.

[193] In June 1993, the World Conference on Human Rights recommended that State Parties consider drawing up a National Action Plan, identifying ways in which States Parties could improve the promotion and protection of human rights. Australia first released its National Action Plan on Human Rights in 1994. The National Action Plan was later updated in 2004. Attorney-General's Department, Australia's National Action Plan on Human Rights, (December 2004).

272. However, the Law Council is of the view that such a statement of human rights is best contained in a statutory Charter of Rights, which also sets out the obligations and responsibilities of Parliament, Government and individuals and provides some mechanism for preventing human rights violations and enforcing human rights protections. Without such a legislative framework there is a risk that a Community Charter will be ignored or overlooked by key Government decision makers. Because the protection of human rights is a fundamental obligation of a functioning, democratic State, the Law Council believes that human rights must be protected by law, rather than relying purely on community and political support, regardless of how robust that might be.

273. For these reasons, the Law Council supports the adoption of a statutory Charter of Rights, as opposed to the adoption of a Community Charter.

# Conclusion

274. Respect for human rights should and can be a defining characteristic of Australian society, but currently, Australia stands alone among liberal democracies by the absence of specific and comprehensive protection for human rights at the federal level.

275. The current federal legal framework is not suited to robust human rights protection, with our government departments, courts and Parliaments having few tools or opportunities to enable them to consider human rights when making, interpreting or administering the law. Moreover, the current legal framework has a number of significant gaps in protection for fundamental individual rights, including the right to liberty, security of person, privacy and free expression.

276. While there are a number of things the Commonwealth Government could do to improve human rights protection, such as improving human rights education or increasing parliamentary scrutiny of new laws, a comprehensive, legislative framework in the form of a Charter of Rights is the best way to ensure all Australian's rights are protected and promoted.

277. The Charter of Rights supported by the Law Council would provide enhanced protection for human rights at the federal level and would ensure that Parliament and Government decision-makers take human rights into account when making and administering the law – without disturbing the existing balance of power between the Parliament, the Executive and the courts.

278. For the reasons outlined in this submission, the Law Council urges to the Committee to recommend that Australia adopt a federal Charter of Rights.

## Attachment A: Profile of the Law Council of Australia

The Law Council of Australia is the peak national representative body of the Australian legal profession. The Law Council was established in 1933. It is the federal organisation representing approximately 50,000 Australian lawyers, through their representative bar associations and law societies (the "constituent bodies" of the Law Council).

The constituent bodies of the Law Council are, in alphabetical order:

- Australian Capital Territory Bar Association
- Bar Association of Queensland Inc
- Law Institute of Victoria
- Law Society of New South Wales
- Law Society of South Australia
- Law Society of Tasmania
- Law Society of the Australian Capital Territory
- Law Society of the Northern Territory
- Law Society of Western Australia
- New South Wales Bar Association
- Northern Territory Bar Association
- Queensland Law Society
- South Australian Bar Association
- Tasmanian Bar Association
- The Victorian Bar Inc
- Western Australian Bar Association
- LLFG Limited (a corporation with large law firm members)

The Law Council speaks for the Australian legal profession on the legal aspects of national and international issues, on federal law and on the operation of federal courts and tribunals. It works for the improvement of the law and of the administration of justice.

The Law Council is the most inclusive, on both geographical and professional bases, of all Australian legal professional organisations.

# A Charter

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# Policy Statement

# Law Council Policy on a Federal Charter or Bill of Human Rights

**The Law Council of Australia supports the development of a charter or bill of rights at the federal level.**

**Such an instrument should reflect both the rights and the corresponding responsibilities of all Australians.**

## Why do we need a specific federal human rights instrument?

The existing legal framework at the federal level fails to guarantee adequate protection for fundamental human rights. Insufficient prominence is afforded to human rights within the existing framework, either as a set of principles to which the arms of government must have regard or as a set of principles by which the arms of government are bound. Some further dedicated form of or vehicle for human rights protection is needed.

## What human rights should be protected?

Australia has an obligation to protect and promote all rights contained in the International Covenant on Civil and Political Rights and International Covenant on Economic, Social and Cultural Rights. In principle, no differentiation should be made between those categories of rights when setting out the nature, content and scope of Australia's obligations.

## Should human rights be subject to limitation or restriction?

Certain rights, namely the right to life, freedom from torture, freedom of religion and freedom from slavery are non-derogable. All other rights may be subject to restrictions provided that such restrictions are:

- prescribed by law;
- necessary to achieve a purpose recognised as legitimate and justifiable in a free and democratic society; and
- proportionate to (that is the least restrictive means of achieving) that legitimate end.

## What does 'protection' entail?

Ideally, either all rights recognised as warranting protection by law or at least a subset of those rights should be constitutionally entrenched and thus protected from interference or abrogation by any future parliament. However, recognising that achieving constitutional reform of this kind in the short term is highly unlikely, in the interim the articulation and protection of rights under ordinary statute is regarded as providing an improved form of rights protection.

A person should have the right to bring proceedings against a public authority for a violation of his or her human rights and to seek appropriate relief, excluding damages. Such a right does not arise where a law expressly requires that the act be done or decision be made in a manner that is incompatible with a human right.

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## Who is bound to observe human rights?

Ideally, all individuals, public and private entities should be bound to observe human rights. However, recognising that such a proposition may cause unnecessary alarm in the context of a legal order where formal rights protection has to date been limited, it is accepted that, for the time being, only public authorities (and entities and persons performing public functions) should be bound to observe human rights.

## What does this mean for the executive arm of government?

Any federal human rights instrument must require the executive arm of government to comply with the human rights contained therein with a view to promoting a culture of respect for human rights within government. It must also require the adoption of measures designed to set benchmarks against which executive action can be tested. This should include, but should not necessarily be limited to, requiring that:

- all government agencies and departments take human rights into account in the policy process, for example, by publishing internal Human Rights Action Plans, and by reporting annually on compliance; and
- all Cabinet submissions be accompanied by a Human Rights Impact Statement.

## What does this mean for the Courts?

Courts should be required to interpret legislation in a way that is compatible with human rights, so far as it is consistent with the statute's purpose.

Any charter or bill of rights should empower a court to declare a law to be incompatible with the rights protected under the charter. Such declaration should not operate to invalidate the law, but it should require a response from parliament.

## What does this mean for Commonwealth Parliament?

Any charter or bill of rights should require that all draft legislation introduced to parliament must be accompanied by a Human Rights Compatibility Statement.

## How should public consultation proceed?

The Law Council supports comprehensive public consultation on the need for a specific federal human rights instrument. The form of consultation adopted in the development of the *Victorian Charter of Human Rights and Responsibilities* is a useful model to follow.

**Authorised by LCA Directors**
*Law Council of Australia*
*29 November 2008*

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Law Council
OF AUSTRALIA

19 Torrens Street
Braddon ACT 2601

P. +61 2 6246 3788
F. +61 2 6248 0639

www.lawcouncil.asn.au