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Strengthening the Protection and Promotion of Human Rights:

A *Human Rights Act* for Australia

Submission to the National Human Rights Consultation Committee

12 June 2009

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A *Human Rights Act* for Australia

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List of Abbreviations

AAT	*Administrative Appeals Tribunal*
ACT HRA	*Human Rights Act 2004* (ACT)
ADA	*Aged Discrimination Act 2004* (Cth)
AFP	Australian Federal Police
AHRC	Australian Human Rights Commission
CEDAW	*Convention on the Elimination of All Forms of Discrimination against Women*
CEDAW Committee	Committee on the Elimination of Discrimination against Women
CERD Committee	Committee on the Elimination of Racial Discrimination
CESCR Committee	Committee on Economic, Social and Cultural Rights
CLC	Community Legal Centre
CP Rights	Civil and Political Rights
DDA	*Disability Discrimination Act 1992* (Cth)
ESC Rights	Economic, Social and Cultural Rights
HPLC	Homeless Persons' Legal Clinic
HRC	Human Rights Committee
HREOC	Human Rights and Equal Opportunity Commission
HREOC Act	*Human Rights and Equal Opportunity Commission Act 1986* (Cth)
HRLRC	Human Rights Law Resource Centre
ICCPR	*International Covenant on Civil and Political Rights*
ICESCR	*International Covenant on Economic, Social and Cultural Rights*
INP	Indonesian National Police
PCO	Protective costs orders
RDA	*Racial Discrimination Act 1975* (Cth)
SARC	Scrutiny of Acts and Regulations Committee
SDA	*Sex Discrimination Act 1984* (Cth)
UK HR Act	*Human Rights Act 1998* (UK)
VCAT	Victorian Civil and Administrative Tribunal
VEOHRC	Victorian Equal Opportunity and Human Rights Commission
Victorian Charter	*Charter of Human Rights and Responsibilities Act 2006* (Vic)

Part A – Executive summary and recommendations

1. Executive summary

1. The Public Interest Law Clearing House ('PILCH') welcomes the opportunity to contribute to the National Human Rights Consultation regarding the legal recognition, protection and promotion of human rights in Australia. We commend the Australian Government on its initiative to undertake the Consultation.

2. In this submission, PILCH examines the way in which human rights are currently protected and promoted in Australia. After providing this background, PILCH seeks to demonstrate how the current system has failed to adequately protect and promote human rights and fundamental freedoms. Taking into account gaps and weaknesses in the current system that this analysis exposes, the submission argues that there is a clear and pressing need to adopt measures that aim to ensure the better protection and promotion of human rights and fundamental freedoms in Australia. PILCH contends that the enactment of a national *Human Rights Act* is the most effective way to maximise the recognition, exercise and enjoyment of rights. Such an Act would: provide a much needed comprehensive and unambiguous statement of human rights; ensure protection of human rights and legal accountability for their violation; strengthen policy development and government decision making; provide an important educational tool for raising awareness about rights; and, go some way towards rectifying Australia's international human rights reputation.

3. The submission goes on to explore some of the key elements and rights that should be included in a *Human Rights Act.* PILCH argues that the Act should be a legislative model and thereby preserve parliamentary sovereignty. PILCH strongly believes that the Act should protect all of the human rights that are enshrined in international treaties to which Australia is a party, including economic, social and cultural rights as well as civil and political rights. PILCH contends that the Act should be binding on Parliament, the Judiciary and the Executive, and that rights should be borne by all natural persons within Australia's jurisdiction. PILCH submits that the Act should contain a detailed limitations provision which addresses the circumstances in which human rights may be limited, however the Act should recognise that some rights are absolute and that derogation from those rights is impermissible in all circumstances. Finally, PILCH submits that the Act should contain a range of judicial and non-judicial remedies for people who have suffered rights violations.

4. While PILCH maintains the view that enactment of a *Human Rights Act* is a necessary step in the protection of human rights in Australia, it believes that a *Human Rights Act* will not, of itself, address all of the inadequacies of the current system. Any such Act must be accompanied by a range of other measures. These include strengthening and expanding human rights education; improving access to justice; expanding the mandate of the Australian Human Rights Commission ('AHRC'); and, improving data collection on human rights violations.

5. A full list of PILCH's recommendations are set out in section 2 below. PILCH submits that these recommendations will advance the human rights and fundamental freedoms of all Australians, including the most marginalised and disadvantaged members of our community.

2. Recommendations

6. PILCH makes the following recommendations regarding the protection and promotion of human rights in Australia.

Recommendation 1

PILCH recommends that the current system for the protection and promotion of human rights in Australia should be substantially reformed in order to address its current inadequacies.

Recommendation 2

PILCH recommends that the Federal Government should enact a *Human Rights Act*.

Recommendation 3

PILCH recommends the adoption of a *Human Rights Act* that conforms to a legislative model.

Recommendation 4

PILCH recommends that a *Human Rights Act* should protect and promote economic, social and cultural rights as well as civil and political rights.

Recommendation 5

PILCH recommends that a *Human Rights Act* should enshrine the following rights, amongst others:

- the right to self-determination;
- the right to legal recourse when rights have been violated, even if the violator was acting in an official capacity;
- the right to equality of men and women in the enjoyment of their human rights;
- the right to life;
- the freedom from inhuman or degrading treatment or punishment;
- the freedom from arbitrary arrest or detention;
- the right to humane treatment in detention;
- the right not to be imprisoned for an inability to fulfil a contractual obligation;
- the right to non-discrimination;
- the freedom of movement;
- the right to a fair hearing;
- the prohibition against double jeopardy;
- the right to presumption of innocence until proven guilty;
- the right to appeal a conviction;
- the prohibition against retrospective punishment and penalty;
- the right to be recognised as a person before the law;
- the right to privacy and protection of that right by law;
- the freedom of thought, conscience, and religion;
- the freedom of opinion and expression;
- the freedom of assembly and association;
- the right to protection of the family;
- the right of children to special protection and assistance;
- the freedom from slavery and servitude;
- the right to liberty and security of the person;
- the right to vote;
- the right to equality of and before the law;
- the right of ethnic, religious or linguistic minorities to enjoy their own culture, religion and language;

- the right to take part in cultural life;
- the right to an adequate standard of living, including adequate housing;
- the right to work, including the right to gain one's living at work that is freely chosen and accepted;
- the right to just conditions of work and wages sufficient to support a minimum standard of living;
- the right to equal pay for equal work and equal opportunity for advancement;
- the right to form trade unions and the right to strike;
- the right to adequate food, water and sanitation;
- the right to the enjoyment of the highest attainable standard of physical and mental health;
- the right to social security; and,
- the right to education, including free primary education, and accessible education at all levels.

Recommendation 6

PILCH recommends that the Federal Government give careful consideration to how a *Human Rights Act* might afford protection to current and future generations whose rights are, and are likely to be, adversely impacted by the environmental consequences of climate change.

Recommendation 7

PILCH recommends that a *Human Rights Act* should impose obligations on courts to:
- interpret legislation compatibly with human rights;
- consider international and comparative domestic human rights jurisprudence when interpreting and applying the Act; and,
- make statements of incompatibility with respect to legislation that is unable to be interpreted compatibly with human rights.

Recommendation 8

PILCH recommends that a *Human Rights Act* impose obligations on parliament to:
- take human rights into consideration in the law-making process;
- table a statement of compatibility before parliament in relation to all bills;
- scrutinise all legislation that comes before parliament for human rights compatibility; and,
- respond to declarations of incompatibility issued by the courts.

Recommendation 9

PILCH recommends that a *Human Rights Act*:
- impose substantive and procedural obligations on public authorities;
- include a broad definition of public authorities that encompasses entities (whether public or private) that carry out the following services: prisons and detention centres; gas, electricity and water supply, emergency services; public health (including psychiatric facilities and aged care facilities); public education; public transport; and, public housing; and,
- specifically list, in the definition of public authority, the private entities that are considered to be public authorities and the functions that are to be considered 'functions of a public nature'.

Recommendation 10

PILCH recommends that a *Human Rights Act* include an opt-in provision for private entities.

Recommendation 11

PILCH recommends that a *Human Rights Act* should protect and promote the human rights and fundamental freedoms of:

- human beings, by which is meant that rights protections should not extend to non-human entities; and,
- Australian citizens and all persons under the jurisdiction of the Federal Government.

Recommendation 12

PILCH recommends that a *Human Rights Act*:
- specify those rights that are absolute and state that such rights cannot be limited at any time or in any way;
- state that derogation is permissible in exceptional, specified circumstances and identify those rights that are non-derogable; and,
- include a detailed limitations provision modelled on section 7 of the Victorian Charter.

Recommendation 13

PILCH recommends that a *Human Rights Act* should:
- include a freestanding cause of action to pursue alleged violations of that Act; and,
- provide for both judicial and non-judicial remedies for violations of human rights.

Recommendation 14

PILCH recommends that the Federal Government should:
- adopt a comprehensive communication and education campaign designed to provide relevant and targeted information about any new *Human Rights Act*; and,
- implement a long term human rights program designed to foster a human rights culture in Australia.

Recommendation 15

PILCH recommends that the Federal Government establish a scheme for funding disbursements in all jurisdictions in matters where the applicant is represented pro bono.

Recommendation 16

PILCH recommends that a disbursements funding scheme provide for the:
- guidelines for eligibility for assistance to extend to 'public interest cases';
- waiver of any application fee in cases of financial hardship and in 'public interest cases'; and,
- ability to grant funding retrospectively in situations where disbursements were incurred urgently or where there is some other compelling reason.

Recommendation 17

PILCH recommends that courts be specifically empowered to make protective costs orders, through an amendment to the courts' relevant empowering legislation.

Recommendation 18

PILCH recommends that the Federal Government should increase legal aid funding to ensure the effective operation of that system.

Recommendation 19

PILCH recommends that the Federal Government should remove restrictions on federal legal aid funding so that it is made available in state and territory legal aid matters.

Recommendation 20

PILCH recommends that the Federal Government should increase its funding of CLCs to ensure that they can continue to help individuals, who are otherwise unable to afford legal representation, to access justice and realise their human rights.

Recommendation 21

PILCH recommends that the Federal Government should take steps to promote and support the professionalism of pro bono legal services in the private sector through Government policy designed to increase socially responsible outcomes.

Recommendation 22

PILCH recommends that the Federal Government should:
- incorporate mandatory pro bono requirements into legal services contracts, in line with the Victorian model;
- leverage its significant purchasing power to encourage pro bono work in other sectors; and,
- strengthen provisions in procurement policies so that human rights and social considerations are taken into account.

Recommendation 23

PILCH recommends that the Federal Government should:
- strengthen and expand the mandate of the Australian Human Rights Commission to include new functions under *Human Rights Act*; and,
- increase the funding of the Australian Human Rights Commission commensurately with their increased functions.

Recommendation 24

PILCH recommends that the Federal Government expand the powers of, and increase the funding it makes available to, the Australian Human Rights Commission, to allow it to implement initiatives aimed at improving data collection on human rights violations in Australia.

Part B – About this submission

3. About PILCH

7. PILCH is a leading Victorian, not-for-profit organisation that is committed to furthering the public interest, improving access to justice and protecting human rights. It coordinates the delivery of pro bono legal services through six schemes: the Public Interest Law Scheme; the Victorian Bar Legal Assistance Scheme; the Law Institute of Victoria Legal Assistance Scheme; PilchConnect; the Homeless Persons' Legal Clinic ('HPLC'); and, the Seniors Rights Legal Clinic. PILCH's objectives are to:
    - improve access to justice and the legal system for those who are disadvantaged or marginalised;
    - identify matters of public interest requiring legal assistance;
    - seek redress in matters of public interest for those who are disadvantaged or marginalised;

- refer individuals, community groups, and not for profit organisations to lawyers in private practice, and to others in ancillary or related fields, who are willing to provide their services without charge;
- support community organisations to pursue the interests of the communities they seek to represent; and,
- encourage, foster and support the work and expertise of the legal profession in pro bono and/or public interest law.

PILCH seeks to meet these objectives by facilitating the provision of pro bono legal services, and by undertaking law reform, policy work and legal education.

8. In 2007-2008, PILCH facilitated pro bono assistance for over 2,000 individuals and organisations and provided hundreds of others with legal information and referrals. PILCH also encouraged and promoted pro bono work amongst Victorian lawyers, not just within private law firms but also those working in government and corporate legal departments. In the last year, PILCH also made numerous law reform submissions on questions of public interest. Much of this work assisted in securing human rights and access to justice for marginalised and disadvantaged members of the Australian community.

4. Scope and structure of this submission

9. This submission addresses the three questions enumerated in the Committee's Terms of Reference, namely:

- Which human rights (including corresponding responsibilities) should be protected and promoted?
- Are these human rights currently sufficiently protected and promoted?
- How could Australia better protect and promote human rights?

In drafting this submission, PILCH has drawn on its experience and expertise in addressing marginalisation and disadvantage in the community, and in attempting to effect structural change to address injustice and human rights violations. As a facilitator of pro bono legal assistance, which is generally an option of last resort for those seeking to access the justice system and assert their rights, PILCH is ideally placed to observe and comment upon the effectiveness of the current system for the protection and promotion of human rights in Australia.

10. The submission makes use of a wide range of case studies, many of which involve violations of the rights of PILCH clients. It should be noted, however, that it is not the intention of this submission to provide a comprehensive overview of every human rights issue in Australia. Nor does this submission seek to engage in a detailed examination of human rights jurisprudence in Australia or overseas.

11. This submission begins in Part C by responding to question 2 of the Committee's Terms of Reference, namely: Are these human rights currently sufficiently protected and promoted? More specifically, Part C briefly outlines how the current system aims to protect and promote human rights. It also identifies some of the major areas where, in PILCH's experience, the

current system has failed to adequately protect and promote human rights and fundamental freedoms. Part D of this submission addresses question 3 of the Committee's Terms of Reference, namely: How could Australia better protect and promote human rights? It also responds to question 1 of the Terms of Reference: Which human rights (including corresponding responsibilities) should be protected and promoted? In so doing, Part D examines the main arguments in favour of a *Human Rights Act* and the key elements and rights that might be included in such an Act. Last, Part D examines some of the measures that are needed to ensure the effective operation of a *Human Rights Act* and enhance human rights protections, more generally.

12. PILCH would like to thank Clayton Utz for its assistance with the preparation of parts of this submission.

Part C – Are human rights currently sufficiently protected and promoted?

> No system of law and government is perfect. Australia's is a whole lot better than most – above all, our institutions are largely uncorrupted. We must all endeavour to keep them so and we need always to be on the lookout for defects in our institutions and ways in which we can make them respond more effectively to contemporary challenges. That is what the charter of rights debate is all about. Not perfection. But improvement and enhanced transparency in our government institutions.[1]
>
> Justice Michael Kirby

13. Australia has a proud democratic history, wherein human rights and fundamental freedoms are generally valued and treated with respect. On 13 February 2008, for example, the Federal Government issued a formal apology to Australia's Indigenous Peoples – including, in particular, the Stolen Generations – for 'the laws and policies of successive parliaments and governments that have inflicted profound grief, suffering and loss on these our fellow Australians'[2]. In July 2008, the Australian Government ratified the *Convention on the Rights of Persons with Disabilities*[3] and, in December that same year, acceded to the *Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women*.[4]

[1] Michael Kirby, 'A Charter for Australia's Modern Needs,' *The Age* (Melbourne), 23 August 2008.

[2] Kevin Rudd, 'Apology to Australia's Indigenous Peoples' (Speech delivered to House of Representatives, Parliament House, Canberra), 13 February 2008.

[3] *Convention on the Rights of Persons with Disabilities*, opened for signature 30 March 2007, 993 UNTS 3 (entered into force 3 May 2008).

[4] *Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women*, GA Res 54/4, UN GAOR, 54th Sess, UN Doc. A/RES/54/4 (1999).

14. However, as the Attorney-General's Department has said, 'no nation is without its human rights challenges'[5] and Australia is no exception. In our nation's relatively short life, Australians have witnessed a significant number of grave and/or systematic human rights violations in their own backyard. The introduction and subsequent expansion of Australia's mandatory detention policy, for example, has seen countless asylum seekers, including children, indefinitely detained under cruel, inhuman and degrading conditions.[6] Following the terrorist attacks on September 11, 2001, draconian anti-terrorism laws were enacted in Australia, which severely compromise the exercise and enjoyment of a number of human rights, including the right to a fair trial.[7] Australia has systematically perpetrated grave human rights violations against its Indigenous people, including in relation to the Stolen Generations[8] and the Northern Territory intervention.[9] Moreover, names such as Vivian Alvarez Solon, David Hicks, Dr Mohammed Haneef, Ahmed Al-Kateb and Cornelia Rau have, all too commonly, been etched into the minds of ordinary Australians, and for all the wrong reasons.

15. That Australia faces a number of human rights challenges is not, of itself, unique or inherently problematic. However, how Australia has chosen, and continues, to respond to those challenges have a direct bearing on the lives of ordinary people, including their exercise and enjoyment of human rights and fundamental freedoms. Whilst no system of law or government is perfect, as Justice Kirby eloquently explains above, Australia must constantly strive to protect and promote human rights to the best of its ability.[10] Critical, in this regard, is the need to examine whether or not the current system for the protection and promotion of human rights in Australia is adequate. Would the aforementioned human rights violations have occurred, for example, had Australia taken *all* appropriate measures to strengthen its laws, policies, practices and institutions for the protection and promotion of human rights?

16. Part C of this submission addresses the second question posed by the National Human Rights Consultation Committee, namely: ***are human rights currently sufficiently protected and promoted****?* It provides a brief overview of the nature and operation of the current system for the protection and promotion of human rights in Australia. Drawing on the experiences of PILCH's clients, amongst others, this Part then analyses the reasons why this system has often

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[5] See http://www.ag.gov.au/www/agd/agd.nsf/Page/Humanrightsandanti-discrimination_Humanrights (March 31, 2009).

[6] See, eg, *Al-Kateb v Godwin* (2004) 219 CLR 562; Human Rights Committee ('HRC'), *Bakhtiyari v Australia*, UN Doc. CCPR/C/79/D/1069/2002 (29 October 2003); HRC, *D & E v Australia*, UN Doc. CCPR/C/87/D/1050/2002 (11 July 2006); HRC; *A v Australia*, UN Doc. CCPR/C/59/D/560/1993 (30 April 1997).

[7] See generally *Report of the Inquiry into the Case of Dr Mohamed Haneef*, Vol I (2008), vii, at http://www.haneefcaseinquiry.gov.au/www/inquiry/rwpattach.nsf/VAP/(3A6790B96C927794AF1031D9395C5C20)~Volume+1+FINAL.pdf/$file/Volume+1+FINAL.pdf.

[8] See, eg, Human Rights and Equal Opportunity Commission ('HREOC'), *Bringing Them Home: Report of the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from Their Families* (1997), 5, at http://www.hreoc.gov.au/pdf/social_justice/bringing_them_home_report.pdf.

[9] See, eg, Committee on the Elimination of Racial Discrimination, *Urgent Action Letter to Australia dated 13 March 2009*, at http://www.hrlrc.org.au/files/cerd-letter-to-australia130309.pdf.

proved inadequate, especially in respect of marginalised and disadvantaged Australians. It focuses, in particular, on how the current system has failed to effectively protect and promote human rights in respect of: Indigenous Australians; Australia's immigration regime; Australia's approach to the death penalty; Australia's anti-terrorism regime; homelessness; and, climate change. Part C provides practical examples of how the exercise and enjoyment of human rights and fundamental freedoms have been minimised through the failings of the current system. In so doing, they foreshadow the case for a national *Human Rights Act* and identify some of the areas where such an instrument could make a real difference in the lives of ordinary people in Australia.

5. The current system for protecting and promoting human rights

17. Australia is a constitutional monarchy with a parliamentary system of government. However, in stark contrast to other Western democracies, Australia has not enacted a unitary and comprehensive law that protects and promotes human rights and fundamental freedoms. Instead, in addition to a few constitutional protections, federal and state governments have introduced a range of ad hoc measures that afford limited human rights protections. Section 5 briefly canvasses these measures and, where appropriate, examines the ways in which they have been applied and interpreted by Australian courts.

5.1 Constitutional protection

(a) Express rights

18. The Constitution affords protection to a limited number of express human rights and fundamental freedoms, including the right to vote (s 41), the right to just compensation for compulsorily acquired property (s 51(xxxi)), the right to trial by jury (s 80) and the freedom of religion (s 116). In addition to being limited in number, a significant number of these rights and freedoms have been interpreted narrowly by Australian courts, including the freedom of religion.[11]

(b) Implied rights

19. A number of human rights guarantees have been implied into the Constitution. These include the freedom of political communication, which provides for the freedom to communicate about political and governmental issues,[12] and the presumption against retrospectivity, being the right not to have criminal laws

[10] Michael Kirby, 'A Charter for Australia's Modern Needs,' *The Age* (Melbourne), 23 August 2008.

[11] See, eg, *Krygger v Williams* (1912) 15 CLR 366; *Adelaide Company of Jehovah's Witnesses v The Commonwealth* (1943) 67 CLR 116; *Church of the New Faith v Commissioner for Payroll Tax (Vic.)* (1983) 154 CLR 120.

[12] See *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106.

applied retrospectively.[13] However, it is important to note that very few rights and freedoms have been implied into the Constitution through this piecemeal approach.[14]

5.2 Statutory protection

20. Some federal and state laws protect certain human rights and fundamental freedoms, either expressly or through their indirect operation.

(a) Federal legislation

21. The Federal Government has enacted a number of laws that prohibit discrimination on specified grounds such as age, disability, race and sex.[15] These laws prohibit discrimination in a number of areas, including employment, education and housing. However, the current legal protections against discrimination do not prohibit all forms of discrimination.

22. The current protections against discrimination are particularly limited in their ability to address systemic and compounded (ie, multiple) forms of discrimination, and prevent future acts of discrimination. The Senate Legal and Constitutional Affairs Committee, for example, has recognised that women who suffer compounded forms of discrimination frequently face difficulties in asserting their rights to non-discrimination and equality.[16] As one expert who gave evidence to the Senate Committee explained:

> The experience of discrimination for a woman from a non-English speaking background is a separate and unique experience to that of an English speaking woman. There is no capacity within the legislation to say, 'This is a whole unique experience.' You might be able to say, 'I have a complaint under the Race Discrimination Act, and I have a complaint under the Sex Discrimination Act,' but you cannot say, 'As they intersect it becomes a different experience.' There is no capacity for the courts to take that into account.[17]

Another expert noted that claims relating to compounded forms of sex discrimination are rarely litigated. 'It is very difficult, she explained, 'to work out

[13] See *Polyukhovich v The Commonwealth of Australia and Another* (1991) 172 CLR 501.

[14] Human Rights Law Resource Centre ('HRLRC'), *National Human Rights Consultation: Engaging in the Debate* (2008), 23.

[15] See *Age Discrimination Act 2004* (Cth) ('ADA'); *Disability Discrimination Act 1992* (Cth) ('DDA'); *Racial Discrimination Act 1975* (Cth) ('RDA'); and, *Sex Discrimination Act 1984* (Cth) ('SDA'). See also *Human Rights and Equal Opportunity Commission Act 1986* (Cth) ('HREOC Act').

[16] Standing Committee on Legal and Constitutional Affairs, *Effectiveness of the Sex Discrimination Act 1984 in Eliminating Discrimination and Promoting Gender Equality,* (2008), [3.61] [4.50] ['SDA Report'].

[17] Shirley Southgate quoted in ibid, at [4.51].

what these women would have to prove to establish their claims if the claim involves combined grounds of [sic] discrimination'[18].

23. Moreover, as the case studies below demonstrate, there is no federal prohibition against, or means to redress, discrimination on non-enumerated grounds, such as homelessness, social status, poverty, sexual orientation, or gender identity.

Case Study A – Discrimination on the ground of sexual orientation

'One of our lesbian friends lay ill and dying in her hospital bed. When it came time for her to die the hospital staff prevented her partner from entering her hospital room and sitting with her at the end of her life because she was not the 'spouse'. Our friend died, alone. Her partner sat outside in the corridor prevented from being with her. She continues to suffer great distress that her life-time partner died without her comfort and without knowing she was there with her'.

'My partner rode in the ambulance with me and stayed with me while I received treatment. However, when consent for further treatment was needed the hospital had to find my sister. Everything goes fine until the laws kick in and then the same sex partner is excluded'.

Source: Australian Human Rights Commission, *Stories of Discrimination Experienced by the Gay, Lesbian, Bisexual, Transgender and Intersex Community* (2007)

Case Study B – Recognition of sex in legal and government documents: discrimination on the ground of gender identity

'I simply wish to have the same rights as everyone else. I have a PhD and I teach at a university, I do volunteer work and participate at a number of local sports clubs. I'm a good teacher, a good son, a wonderful friend and a generally kind, loving and compassionate individual. In short, I'm an upstanding citizen. And I have, for the most part, a very normal life. Apart from my family, nobody in my social or professional networks knows that I was not born male. But like so many other people who are denied the right to have their legal documents reflect the gender that they live as, I feel quite strongly that I am still being denied the right to live a life of quiet dignity'. Blog participant

'Having documents that reflect one's sense of identity is important for employment, access to healthcare and medicines and also for self affirmation and acceptance by the government that – yes – this is who you really are'. Blog participant

Source: Australian Human Rights Commission, *Sex Files: The Legal Recognition of Sex in Documents and Government Records* (2009)

Whilst the enactment of the *Same-Sex Relationships (Equal Treatment in Commonwealth Laws – General Law Reform) Act 2008* (Cth) and the *Same-Sex Relationships (Equal Treatment in Commonwealth Laws – Superannuation) Act 2008* has gone some way to addressing discrimination on the ground of sexual orientation, these reforms were limited to the areas of financial and work-related

[18] Beth Gaze quoted in ibid, at [4.52].

entitlements and benefits. As a result, significant forms of sexual orientation discrimination persist in Australia.[19] The failure to enact a comprehensive prohibition against discrimination has meant that a number of marginalised and disadvantaged individuals and groups, including people experiencing homelessness, impoverished individuals, gays, lesbians, bisexuals, and trans and intersex people, have no legal recourse under federal law when they experience discrimination on non-enumerated grounds.

24. The Australian Government's failure to enact comprehensive protections against violations of the rights to non-discrimination and equality has attracted widespread criticism. For instance, the Committee on Economic, Social and Cultural Rights ('CESCR Committee'), the Human Rights Committee ('HRC') and the Committee on the Elimination of Discrimination against Women ('CEDAW Committee') have expressed their concern that the rights to non-discrimination and equality are not comprehensively protected under Australian federal law.[20] As well, the Committee on the Elimination of Racial Discrimination ('CERD Committee') has expressed its concern regarding 'the absence of any entrenched guarantee against racial discrimination that would override the law of the Commonwealth'[21].

25. The enactment of a national *Human Rights Act* that includes a general prohibition against discrimination and a general provision on equality of and before the law is critical for the equal exercise and enjoyment, in Australia, of all human rights and fundamental freedoms.[22] If Australia is to effectively address the unique forms of discrimination that different subgroups experience, and fully implement its international human rights obligations, it must take more seriously its obligations to eliminate and remedy *all* forms of discrimination.

26. It should also be borne in mind that legislative protection against discrimination is only one measure that is necessary to ensure the exercise and enjoyment of all human rights and fundamental freedoms. Such limited protection does not address circumstances in which human rights and fundamental freedoms are violated in a non-discriminatory manner (see Section 6), including where a person's freedom of expression, right to housing, right to education or right to the highest attainable standard of health is violated. In this respect, it is significant that the Federal Government has not explicitly and comprehensively legislated to

[19] See, eg, *Marriage Act 1961* (Cth), s 5.

[20] CESCR Committee, *Concluding Observations: Australia*, UN Doc. E/C.12/AUS/CO/4 (2009), at para. 14; HRC, *Concluding Observations: Australia*, UN Doc. CCPR/C/AUS/CO5/CPR1 (2009), at para. 12; CEDAW Committee, *Concluding Observations: Australia*, UN Doc. CEDAW/C/AUL/CO/5 (2006), at para. 12.

[21] CERD Committee, *Concluding Observations: Australia*, UN Doc. CERD/C/AUS/CO/14 (2005), at para. 9.

protect and promote other human rights and fundamental freedoms. It is also significant that the Federal Government has not fully implemented its obligations under international human rights law (see section 5.5). For example, despite ratifying the *Convention on the Elimination of All Forms of Discrimination against Women* ('CEDAW'), the Federal Government has only given domestic effect to some of its provisions, through the enactment of the *Sex Discrimination Act 1984* (Cth) ('SDA').[23]

(b) State legislation

27. Australian states and territories have enacted inconsistent, ad hoc and limited human rights protections.

28. In 2004, the Australian Capital Territory became the first Australian jurisdiction to enact human rights legislation, namely the *Human Rights Act 2004* (ACT) ('ACT HRA'). Two years later, Victoria followed suit, enacting its *Charter of Human Rights and Responsibilities Act 2006* (Vic) ('Victorian Charter'). The ACT HRA and the Victorian Charter require: government and public authorities to respect, protect and fulfil human rights; parliament to consider the human rights compatibility of proposed legislation; and, courts to interpret legislation in accordance with human rights. As both statutes are ordinary pieces of legislation, they can be amended or abrogated by the relevant parliaments. Moreover, whilst courts can declare a piece of legislation incompatible with these statutes, they are unable to strike down incompatible legislation. Parliamentary sovereignty is therefore preserved. No other state or territory has enacted comprehensive human rights laws.

29. In addition to the ACT HRA and the Victorian Charter, each state and territory has enacted anti-discrimination laws that prohibit discrimination on grounds such as sex, race, age, disability and religion.[24] Whilst the prohibited grounds of discrimination are generally more expansive than those under federal law, these legislative protections do not extend to circumstances where human rights are violated in a non-discriminatory way. Prohibitions against discrimination at the state and territory level are typically limited to certain areas of public life, including employment and housing.

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[22] PILCH also supports the enactment of a national *Equality Act*.

[23] SDA, s 3.

[24] *Anti-Discrimination Act 1996* (NT); *Anti-Discrimination Act 1998* (Tas); *Anti-Discrimination Act 1991* (Qld); *Anti-Discrimination Act 1977* (NSW); *Discrimination Act 1991* (ACT); *Equal Opportunity Act 1984* (SA); *Equal Opportunity Act 1995* (Vic); *Equal Opportunity Act 1984* (WA); *Racial Vilification Act 1996* (SA); *Racial and Religious Tolerance Act 2001* (Vic).

(c) Indirect protection through federal and state legislation

30. Some federal and state laws operate to protect human rights, although they were not necessarily enacted for that specific purpose. Such laws include the *Privacy Act 1988* (Cth) and the *Freedom of Information Act 1982* (Vic). The latter, for example, promotes transparency in decision-making and reduces the likelihood of abuse of public power through granting access to government documents. However, because such legislation has not been specifically enacted to maximise the exercise and enjoyment of human rights and fundamental freedoms, any protection of such rights and freedoms tends to be incidental to the overarching objects and purposes of these laws.

5.3 Common law protection

31. Courts have sometimes protected human rights through the common law. For example, in *Dietrich v The Queen*, the High Court of Australia held that, where a person is charged with a serious offence and is unable to obtain legal representation through no fault of his or her own, an application for adjournment or stay of proceedings should be granted and the trial delayed until representation is obtained.[25] Further, courts attempt to interpret legislation in a way that maximises rights and is consistent with treaties ratified by Australia.[26]

32. Notwithstanding, the common law has often proved to be a limited tool for protecting and promoting human rights in Australia. For example, one commentator has noted that

> [a] significant limitation on the ability of the common law to protect human rights is the reluctance of judges to develop the law to recognise basic freedoms. Many judges see this as a role for parliament and not the courts. And even where the common law does recognise rights it is always subject to change by parliament. Where a statute and the common law conflict … the common law is overridden.[27]

It has also been explained that '[w]here legislation is unambiguous, courts are unable to interpret it as being subject to fundamental rights and freedoms. This can lead to unacceptable outcomes from a human rights perspective'[28].

[25] *Dietrich v The Queen* (1992) 177 CLR 292.

[26] See *Minister for Immigration & Ethnic Affairs v Teoh* (195) 183 CLR 273, 287; *Kartinyeri v The Commonwealth* (1998) 195 CLR 337, 384; *Mabo v Queensland (No 2)* (1992) 175 CLR 1; *Royal Women's Hospital v Medical Practitioners Board of Victoria* (2006) 15 VR 22.

[27] George Williams, *A Charter of Rights for Australia* (2007), 47.

[28] HRLRC, above n 14, 26. See also *AL-Kateb v Godwin* (2004) 219 CLR 562, 595.

5.4 International human rights protections

33. In addition to the protections available at the domestic level, Australia is also party to a number of international human rights treaties. As a dualist country, such treaties do not operate as a direct source of enforceable rights, save to the extent that they have been specifically incorporated into domestic law.[29] For example, since the SDA only gives effect to certain provisions of the CEDAW, not all rights and freedoms protected in that treaty are directly enforceable in Australia. Nonetheless, in certain circumstances, unincorporated treaties might have an effect under Australian law. For example, an individual may be entitled to a 'legitimate expectation' that the Executive will act consistently with an international human rights treaty that it has ratified, and courts will seek to construe domestic legislation consistently with such treaties.[30]

5.5 Political system

34. Australia has a federal system of government based on the liberal democratic tradition. Key elements of this system include the principle of 'representative and responsible government' and the doctrine of 'separation of powers'. The principle of representative and responsible government refers to a system of government that is representative of, and accountable to, its constituency. The doctrine of separation of powers refers to a system of government in which power is divided between the Executive, the Legislature and the Judiciary, and each branch acts as a 'check and balance' against the others. Owing to the close relationship between the Executive and the Legislature, Australia does not enjoy a strict separation of powers.

35. Australia's political system has had a role to play in ensuring the exercise and enjoyment of human rights and fundamental freedoms.[31] For example, (if used effectively and not for political purposes) parliamentary question time provides an important opportunity for Members of Parliament to hold the Executive accountable for its actions, including those that threaten, or violate, human rights norms and standards. A number of parliamentary bodies – including the Senate Standing Committee for the Scrutiny of Bills, the Senate Standing Committee on Legal and Constitutional Affairs, the Joint Committee on Intelligence and Security, the Joint Standing Committee on Treaties, and the Senate Standing Committee on Regulations and Ordinances – also help to ensure that laws are compatible with human rights norms and standards.

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[29] See *Minister of State for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273, 287.

[30] See generally Simone Cusack and Cecilia Riebl, 'International Human Rights Law in Australian Courts: A Role for Amici Curiae and Interveners' (2006) 31(3) *Alternative Law Journal* 122.

[31] See Robert Menzies, *Central Power in the Australian Commonwealth* (1967), 54, quoted in Hillary Charlesworth, 'Who Wins under a Bill of Rights' (2006) 25 *University of Queensland Law Review* 39, at 43.

36. However, Australia's political system has a number of significant shortcomings, which have compromised, and continue to compromise, the exercise and enjoyment of human rights and fundamental freedoms.[32] For example, strong party discipline has meant that, in practice, Parliament plays only a limited role in holding the Executive accountable for its failure to respect, protect and fulfil human rights. Evidence of this can be seen in the 'children overboard scandal', which involved the Minister for Immigration announcing to the media that a number of asylum seekers had thrown children overboard from an 'illegal entry vessel' intercepted by the Australian Defence Force, an allegation that was later shown to be false.[33] In this case, Parliament was unable to hold the Executive accountable in time for the 2001 election and when it finally did, through the establishment of a Senate Select Committee, the Committee's report was divided along party lines.[34] This example demonstrates how the absence of a clear separation of powers has impeded the effectiveness of the system of checks and balances and, as a result, legal accountability for human rights violations.

37. In addition, as is clearly evident in section 6, below, the vast majority of human rights violations disproportionately affect minority groups, non-citizens and marginalised and disadvantaged individuals. Whilst Parliament is, in theory, representative of these interests groups, the entrenchment of major political parties has ensured that Parliament is dominated by certain interests and demographics (consider, for example, the number of ex-union officials or middle-aged, Anglo-Saxon males in Parliament). While allegations of branch-stacking, preselection rorts, and abuses of party political power continue,[35] since political parties control the legislature (and many politicians owe their tenure to such practices), there is an inherent reluctance to regulate political parties, in marked contrast to the much stronger standards of accountability and transparency rightly demanded of other sectors. This leads to further entrenchment of the mainstream interests represented by those parties, leaving the rights and interests of those most at risk of human rights violations severely underrepresented.

38. These, and other, shortcomings in Australia's political system have led to serious doubts regarding its effectiveness in protecting and promoting human rights. Moreover, these shortcomings have led to calls to strengthen the current system.[36]

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[32] George Williams, 'The Victorian Charter of Rights and Responsibilities: Origins and Scope' (2006) 30 *Melbourne University Law Review* 880, at 881.

[33] Senate Select Committee on a Certain Maritime Incident Secretariat, *Report of the Select Committee on a Certain Maritime Incident Secretariat* (2002), xxi.

[34] Ibid.

[35] See, eg, 'Buck Stops with You, ALP leaders: Start the Clean-Up', *The Age*, 12 June 2009.

[36] Williams, above n 32, at 881.

6. Failure of current system to adequately protect and promote human rights

39. Whilst Australia is rightly proud of its democracy and largely peaceful civil society, in PILCH's experience, Australia's ad hoc system of rights protection and its failure to enact comprehensive laws in relation to human rights, have resulted in a number of grave and systematic human rights violations. At times, these violations have occurred because of the failure to introduce laws, policies and practices that effectively protect and promote human rights and fundamental freedoms. At other times, rights have been violated by laws, policies and practices that are incompatible with human rights and in need of urgent reform. Section 6 examines some of the major failings of the current system, and how those failings have contributed directly to violations of the very rights the system holds itself out as protecting. PILCH submits that these, and other, rights violations demonstrate a clear and pressing need to enhance the protection and promotion of rights in Australia.

6.1 Indigenous Australians

40. There is a long history in this country of human rights abuses against Indigenous Australians, including in respect of the treatment of Indigenous Australians in the criminal justice system,[37] the limited nature of Indigenous property rights,[38] and the low standard of Indigenous health and life expectancy.[39] One of the areas in which PILCH has been particularly involved concerns the Federal and state governments' systematic policies of removing Indigenous children from their families, commonly referred to as the 'Stolen Generations'. As demonstrated in the case study below, many Indigenous children were removed against their parents' will and without justifiable reasons for doing so. This policy has had an immensely detrimental impact on the lives of the individuals affected, the maintenance of Indigenous culture and, for example, the cohesiveness of Indigenous communities.

Case Study C – Aboriginal child removed from family

Mr S, an Aboriginal man, was born in the early 1960s. When Mr S was 6 months old he was hospitalized for malnutrition. One month later, Mr S's mother, Ms T, was informed that an institution had offered to look after Mr S while he recovered. Ms T was unwell, employed fulltime and caring for her young daughter and, so, agreed to place Mr S in the institution's temporary care. Mr S was subsequently made a ward of the state, against Ms T's express wishes. He was placed in a series of foster homes, interspersed with time in state care. Despite Ms T's repeated efforts to contact Mr S, at no time was she informed of his

[37] See Office of the Aboriginal and Torres Strait Islander Social Justice Commissioner, *Indigenous Deaths in Custody: 1989 – 1996* (1996); HREOC, *Briefing Paper: Mandatory Sentencing in Australia* (2000).

[38] See, eg, Office of the Aboriginal and Torres Strait Islander Social Justice Commissioner, *Native Title Report 2007* (2007).

[39] See Aboriginal and Torres Strait Islander Social Justice Commissioner and the Steering Committee for Indigenous Health Equality, *Close the Gap: National Indigenous Health Equality Targets,* Outcomes from the National Indigenous Health Equality Summit (2008).

whereabouts. Mr S's foster parents were unaware that Ms A was seeking to contact Mr S, and Mr S's father was unaware that his child was not living with his mother until Mr S was 14 years old. Significantly, Mr S was never told about his Aboriginal lineage. When Mr S turned 18, he was discharged from state wardship. He sought out Ms T and reconciled with her and his siblings. Ms T died 6 years later. As a consequence of Mr S's removal and the subsequent failure of the government to allow his mother to contact him, Mr S was denied the opportunity to grow up with his family and to develop and enjoy his Aboriginal identity and culture. Mr S now suffers from ongoing mental health problems, including depression.

Source: PILCH

Regrettably, the removal of Mr S from his family was not an isolated violation of human rights; rather, his case is representative of a systematic social policy that was grounded in racial discrimination. In *Bringing Them Home: Report of the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from Their Families*, the AHRC (formerly HREOC) identified the numerous laws, practices and policies that led to the separation of Indigenous children and their families, by compulsion, duress or undue influence.[40] It also documented the invidious human rights violations suffered by Indigenous Australians as a result of their forcible removal from their families.[41]

41. On 13 February 2008, the Federal Government issued a formal apology to members of the Stolen Generations.[42] Notwithstanding this development, the Government's apology has not resulted in the realisation of justice for the Stolen Generations. Members have faced, and continue to face, significant barriers in accessing compensation for harms experienced as a result of the Government's policies of removal.[43] The Federal Government's failure to address these barriers bears adversely upon the human rights and fundamental freedoms of Indigenous Australians, including their rights to protection of the family, culture, non-discrimination, and the highest attainable standard of health.

42. The Government's failure to respect, protect and fulfil the rights of Australia's Indigenous population has attracted widespread criticism. For example, in 2009, the HRC noted its concern that Australia 'has not granted reparation, including compensation, to the victims of the Stolen Generations policies', and urged the Federal Government to 'adopt a comprehensive national mechanism to ensure that adequate

[40] HREOC, *Bringing Them Home: Report of the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from Their Families* (1997).

[41] Ibid at 5.

[42] See *Speech by Prime Minister Kevin Rudd to the Parliament*, 13 February 2009, at http://www.dfat.gov.au/indigenous_background/rudd_speech.html.

reparation, including compensation, is provided to the victims of the Stolen Generations policies'[44].

43. The Northern Territory Emergency Intervention provides another example of the Federal Government's failure to respect, protect and fulfil the rights of Indigenous Australians. The Intervention was a response to the 2007 *Little Children are Sacred* report that highlighted the prevalence of sexual violence against Indigenous women and children in the Northern Territory.[45] Whilst the problem of sexual violence is undoubtedly of grave concern, the Federal Government's response, which significantly includes suspension of the *Racial Discrimination Act 1975* (Cth) ('RDA'), is highly problematic and has, itself, resulted in serious and systemic violations of the rights of Indigenous Australians. For these reasons, the Government's Intervention has elicited widespread criticism. For example, the CESCR Committee has expressed its concern regarding the Intervention's inconsistency with ICESCR, including, in particular, the right to non-discrimination on the ground of race.[46]

44. A national *Human Rights Act* would provide recognition of fundamental human rights and freedoms that have not previously been protected in the case of so many Indigenous Australians. A *Human Rights Act* would ensure that the impact of laws and policies on marginalised groups, such as Indigenous Australians, would be scrutinised by law and policy makers and given genuine consideration by those implementing laws and policies. Further, it would enable courts to apply human rights principles in interpreting legislation and developing the common law when considering laws and policies that impact disproportionately on Indigenous Australians. It would also provide a strong advocacy tool for groups seeking: redress for human rights violations; increased support services for victims of past discriminatory policies such as members of the Stolen Generations; or, improved social services for Indigenous Australians living in remote communities.

45. Finally, by requiring an examination of the human rights impacts of legislation prior to enactment, a national *Human Rights Act* will help to ensure that racially discriminatory policies are not implemented in the future. While the introduction of a *Human Rights Act* would not necessarily have prevented the Government's intervention in the Northern Territory, which involved it suspending the RDA, it would have required

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[43] See *Cubillo v Commonwealth of Australia*, *Gunner v Commonwealth of Australia* (2000) 174 ALR 97 and *Kruger v Commonwealth* (1997) 190 CLR 1. The only successful claim by a member of the stolen generation seeking compensation has been in *Trevorrow v State of South Australia (No. 5)* [2007] SASC 285. However this case is now on appeal.

[44] HRC, *Concluding Observations: Australia*, UN Doc. CCPR/C/AUS/CO/5 (2009), at para 15.

[45] Report of the Northern Territory Board of Inquiry into the Protection of Aboriginal Children from Sexual Abuse, *Ampe Akelyernemane Meke Mekarle 'Little Children are Sacred'* (2007).

[46] CESCR Committee, *Concluding Observations Australia*, UN Doc. UN Doc E/C.12/AUS/CO/4 (2009), at para 15.

greater transparency and consultation to be incorporated into the law-making process. In particular, the Government would be required to explicitly consider whether its proposed response was proportionate and the least restrictive option available. Arguably, this process would have led to a more targeted policy that protected the rights of Indigenous women and children to be free from violence, without the need to suspend the RDA or to violate the rights of Indigenous Australians as a group (through polices such as wholesale income management). Importantly, a human rights approach would also have encouraged greater consultation with, and participation by, the Indigenous Australians affected, in policy development and implementation.

6.2 Immigration regime

46. Australia's immigration regime – including in respect of mandatory detention, the issuing of temporary protection visas, the cancellation of visas on 'character grounds' and the 'Pacific Solution' – is one area where the current system has not only failed to adequately protect and promote human rights, but has directly caused the violation of human rights and fundamental freedoms. The grave and systemic nature of violations resulting from the immigration regime has attracted substantial criticism, both domestically and internationally.[47] For example, in 2009, the CESCR Committee noted its concern regarding Australia's 'retention of the mandatory detention policy for asylum seekers for unauthorised arrivals'. It further noted its concern regarding 'the fact that some asylum seekers are detained for prolonged and indefinite periods of time, which results in a negative impact on their mental health'[48]. In addition, the HRC expressed its concern regarding Australia's failure to respect the principle of non-refoulement and urged it to take 'urgent and adequate measures, to ensure that nobody is returned to a country where there are substantial grounds to believe that they are at risk of being arbitrarily deprived of their life or being tortured or subjected to other cruel, inhuman or degrading treatment or punishment'[49].

47. PILCH recognises that, in recent years, some areas of the immigration regime have improved. For example, the circumstances under which children can be detained have been narrowed,[50] temporary protection visas have been abolished[51] and the Government has ended the policy of sending asylum seekers to Nauru. Despite these important improvements, many aspects of the immigration regime, including the ongoing practice of mandatory detention and offshore processing of asylum seekers,

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[47] See, eg, HRC, *A v Australia*, UN Doc CCPR/C/59/D/560/1993 (30 April 1997).

[48] CESCR Committee, *Concluding Observations: Australia*, UN Doc. E/C.12/AUS/CO/4/2009 (2009), at para 25.

[49] HRC, *Concluding Observations: Australia*, UN Doc. CCPR/C/AUS/CO/5 (2009), at para 20.

[50] *Migration Amendment (Detention Arrangements) Act 2005* (Cth), Sch 1, Pt 1.

[51] HREOC, *Media Release: End of Temporary Protection Visas for Refugees is a Step Forward for Human Rights* (2008).

continue to operate in violation of Australia's obligations under international human rights law.

48. An area of particular concern to PILCH is the cancellation of visas on 'character grounds' under s 501 of the *Migration Act 1958* (Cth). This provision has been used increasingly to cancel the visas of long-term permanent residents, which, as the following case study demonstrates, has given rise to a number of rights violations.

Case Study D – Permanent resident's visa cancelled

In 1975, Mr N arrived in Australia as a refugee from Vietnam. He became a heroin addict and was convicted of several serious offences. In 2007, a delegate of the Minister for Immigration and Citizenship cancelled Mr N's permanent visa, pursuant to s 501 of the *Migration Act 1958* (Cth).[52] The cancellation was justified on the ground of Mr N's criminal record, and was not subject to the rules of natural justice.[53] Mr N believed that, if returned to Vietnam, he would be persecuted and/or face further sentencing, including the death penalty. He also believed that the absence of family support would hamper his drug rehabilitation. Mr N appealed the decision to the Administrative Appeals Tribunal ('AAT').

At first instance, the AAT affirmed the decision to cancel Mr N's visa, despite noting his good conduct in prison, the effect deportation would have on his aged mother, and the difficulties in returning to a country he had not resided in for over 30 years. The Federal Court of Australia overturned this decision on appeal and remitted the matter back to the AAT. Before the matter could be heard, the Full Court of the Federal Court handed down its decision in *Sales v Minister for Immigration and Citizenship*,[54] in which it held that a transitional (permanent) visa was not 'granted' for the purposes of s 501, but rather is 'held' by virtue of transitional arrangements in effect in 1994. As the Minister was not empowered to cancel such visas, Mr N was released from immigration detention and his visa was reinstated. However, in response to *Sales*, the Federal Government amended the Act to address the issue that *Sales* raised, and empower the Minister to cancel a 501 visa. The amendment was applied retrospectively, and Mr N was informed that the Government intends to cancel his visa. The matter is ongoing.

Source: Victorian Bar Legal Assistance Scheme

If a *Human Rights Act* was in place in 1998 when section 501 was introduced into the *Migration Act 1958*, it is unlikely that the provision would have been enacted in its current form. This is because Parliament would have likely been required to analyse the provision's impact on human rights and be explicit if it intended to limit rights in any way. Even if section 501 was passed in its present form, the presence of a special interpretive obligation may have enabled the courts to interpret it in a manner compatible with Mr N's human rights. More generally, a *Human Rights Act* would provide an important opportunity to address inherent flaws and weaknesses in the

[52] *Migration Act 1958* (Cth), s 501(2) (providing: 'The Minister may cancel a visa that has been granted to a person if: (a) the Minister reasonably suspects that the person does not pass the character test; and (b) the person does not satisfy the Minister that the person passes the character test').

[53] AHRC, *Background Paper: Immigration detention and visa cancellation under section 501 of the Migration Act* (2009).

[54] *Sales v Minister for Immigration and Citizenship* [2008] FCAFC 132.

immigration regime, and provide stronger protections for some of the most vulnerable members of Australian society.

6.3 Death penalty

49. Notwithstanding abolishment of the death penalty in all Australian jurisdictions[55] and accession to the *Second Optional Protocol to the International Covenant on Civil and Political Rights, Aiming at the Abolition of the Death Penalty*, [56] the Federal Government, has exposed, and continues to expose, individuals to the real risk of the death penalty, in clear violation of its obligations under international human rights law.

50. Australia's ostensible opposition to the death penalty has been undermined by its inconsistent approach to death penalty cases. Whilst the Federal Government remains officially opposed to the death penalty,[57] statements made by senior members of the Executive have signalled a shift away from its principled opposition to the death penalty. For example, in the lead up to the five year anniversary of the Bali bombings, Kevin Rudd (then Opposition leader) stated publicly that 'no government that he led would ever make a diplomatic intervention to save the life of a terrorist facing capital punishment'[58]. More recently, Prime Minister Rudd stated that the Bali Bombers 'deserve the justice that will be delivered to them. They are murderers, they are mass murderers, and they are also cowards'[59]. These comments are in contrast to: Australia's official position of opposition to the death penalty; the *ALP National Platform and Constitution 2007*; and, Rudd's earlier assertion that 'Labor has a universal position of opposition to the death penalty both at home and abroad …. It is not possible, in our view, to be selective in the application of this policy'[60]. They are also in contrast to Rudd's statement that the Government is 'universally opposed to the death penalty. We make no exception to that'[61].

51. Thus, notwithstanding the Government's 'official' opposition to the death penalty, it has endorsed use of the death penalty in cases involving terrorists and has been indifferent

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[55] *Death Penalty Abolition Act 1973* (Cth); *Criminal Code Amendment Act 1922* (Qld); *Criminal Code Act 1968* (Tas); *Crimes (Capital Offences) Act 1975* (Vic); *Statutes Amendment (Capital Punishment Abolition) Act 1976* SA); *Acts Amendment (Abolition of Capital Punishment) Act 1984* (WA); *Crimes (Amendment) Act 1955* (NSW), *Crimes (Death Penalty Abolition) Amendment Act 1985* (NSW), *Miscellaneous Acts (Death Penalty Abolition) Amendment* Act 1985 (NSW).

[56] *Second Optional Protocol to the International Covenant on Civil and Political Rights, Aiming at the Abolition of the Death Penalty*, opened for signature 15 December 1989, 1642 UNTS 85 (entered into force 11 July 1991).

[57] See, eg, ibid; Australian Labor Party, 'Strengthening Australia's Place in the World', in *ALP National Platform and Constitution 2007*, 240, at para 97.

[58] Dan Harrison, 'PM Slams Rudd over Death Penalty', *The Age* (Oct. 9, 2007).

[59] Editorial, 'An Issue that Needs Diplomacy, not Jingoism', *The Age* (Oct. 4, 2008).

[60] Paul Maley, 'Kevin Rudd Dismisses Threat from Bali Bombers', *The Australian* (Oct. 3, 2008).

[61] Prime Minister Kevin Rudd, Interview with Neil Mitchell, Radio 3AW (Oct. 30, 2008), at http://www.pm.gov.au/media/interview/2008/interview_0575.cfm. See also Joe Kelly and Stephen Fitzpatrick, 'Hypocrisy Claim over Bali Bombers', *The Australian* (Oct. 31, 2008).

to its application in respect of drug traffickers (see below). Moreover, the Government's opposition to the death penalty appears limited to the execution of Australian citizens. PILCH considers that these inconsistencies send a damaging message about Australia's position on the death penalty, and suggest that Australia is not committed to fulfilling its international human rights law obligations. Importantly, these inconsistencies may also jeopardise Australia's ability to advocate on behalf of Australians facing the death penalty overseas.[62] As the Attorney-General recently stated, Australia 'can't expect others to lift their standards if we are not prepared to set an example' on human rights. If Australia is to 'be at the forefront of upholding human rights on the international stage,' it must ensure that its position on the death penalty is clear and unambiguous, and is consistent with Australia's human rights obligations.[63]

52. In addition to its inconsistent approach to the death penalty, the Federal Government's policy of cooperating with foreign law enforcement agencies in cases that could result in a death penalty charge, has, as the case study below demonstrates, resulted in clear violations of its international human rights obligations, including the right to life and the freedom from cruel, inhuman or degrading treatment.

Case Study E – Cooperation with Foreign Law Enforcement Agencies Led to Death Penalty Charge in the Case of the 'Bali Nine'

On 17 April 2005, nine Australians were arrested in Bali by the Indonesian National Police ('INP'), for their alleged involvement in the trafficking of heroin. The arrests occurred as a result of intelligence that the Australian Federal Police ('AFP') provided to the INP. Three members of the 'Bali Nine' are currently on death row owing to their respective convictions for drug trafficking offences.

The provision of intelligence by the AFP is governed by the *Practical Guide on International Police to Police Assistance in Death Penalty Charge Situations* ('Guidelines'). The Guidelines permit the sharing of intelligence with foreign law enforcement agencies on a police-to-police basis provided that the person who is the subject of the intelligence has not yet been charged with an offence that attracts the death penalty. In *Rush v Commissioner of Police*,[64] Finn J found that the provision of intelligence by the AFP was lawful pursuant to the Guidelines. However, His Honour stressed that: 'there is a need … to address the procedures and protocols followed by members of the Australian Federal Police … when providing information to the police forces of another country in circumstances which predictably could result in the charging of a person with an offence that would expose that person to the risk of the death penalty in that country'.

Although the Guidelines were amended in 2006 following Justice Finn's decision in *Rush*, they still permit the sharing of intelligence in cases that could result in the charging of an individual with an offence that attracts the death penalty. In 2008, the federal Attorney-General launched a review of the Guidelines to ensure that they reflect Government policy on the death penalty.[65] However, at the time

[62] Cynthia Banham, 'ALP Split on Death Penalty Stance', *The Sydney Morning Herald* (Oct. 21, 2008).

[63] The Hon. Robert McClelland, Speech to the NSW Young Lawyers Forum, NSW Law Society (Oct. 29, 2008), at para. 21.

[64] *Rush v. Commissioner of Police*, [2006] FCA 12, para. 1.

[65] See Daniel Flitton, 'Police Ties with Asia Reviewed', *The Age*, 3 October 2008.

of writing, PILCH was unaware of any decision to reform the Guidelines to ensure that they are compatible with human rights norms and standards.

Source: PILCH

53. PILCH recognises that, in the interests of regional peace and security, it is necessary and desirable for Australia to cooperate with foreign law enforcement agencies. However, such cooperation should not be permitted to jeopardise Australia's compliance with human rights and fundamental freedoms, including by exposing individuals to the real risk of the death penalty. Ensuring compliance with human rights does not mean that the AFP needs to cease all cooperation with foreign law enforcement agencies. However, it does require that the AFP not assist in the investigation, prosecution or punishment of an offence in respect of which the death penalty may be imposed, or which may result in a person being subject to cruel, inhuman or degrading treatment or punishment. This should be the case regardless of whether or not charges have been laid. Assistance should not be provided where it exposes individuals to a real risk that the death penalty might be applied to them. Where cooperation is deemed to be essential, such as in cases where there is an imminent threat to human life, safeguards should be put in place to ensure, to the maximum extent possible, that no individual is put at real risk of the death penalty.
54. PILCH believes that the Bali Nine case demonstrates an urgent need to clarify the nature and scope of the Guidelines to ensure their compliance with human rights law. Indeed, in its 2009 Concluding Observations on Australia, the HRC noted its concern regarding 'the residual power of the Attorney-General, in ill-defined circumstances, to allow the extradition of a person to a state where he or she may face the death penalty, as well as the lack of a comprehensive prohibition on the providing of international police assistance for the investigation of crimes that may lead to the imposition of the death penalty in another state, in violation of the State party's obligation under the Second Optional Protocol'[66]. The HRC urged Australia to 'take the necessary legislative and other steps to ensure that … it does not provide assistance in the investigation of crimes that may result in the imposition of the death penalty in another state …'[67].
55. A national *Human Rights Act* that guaranteed the right to life and the freedom from cruel, inhuman or degrading treatment, amongst other rights and freedoms, would play a crucial role in ensuring that Australia does not expose individuals to a real risk of the death penalty, in clear violation of their human rights and fundamental freedoms. For example, a review of the Guidelines conducted consistently with human rights codified

[66] HRC, *Concluding Observations: Australia*, UN Doc. CCPR/C/AUS/CO/5 (2009), at para 20.

[67] Ibid.

in a *Human Rights Act* would ensure that cooperation with foreign law enforcement agencies is only to be provided where a guarantee has been obtained from a competent foreign body that no person will be subject to the death penalty or such cooperation is exculpatory. PILCH considers that a *Human Rights Act* should have extraterritorial operation, consistent with international law, so that the rights protected therein extend to situations such as the Bali Nine.

6.4 Anti-terrorism regime

56. Following the September 11 attacks in 2001, the Federal Government introduced a range of laws on terrorism and related offences.[68] These laws have been widely criticised, including, in particular, because of their failure to respect, protect and fulfil human rights and fundamental freedoms. The HRC, for example, has recently expressed its concern that a number of the counter-terrorism measures adopted by Australia appear to be incompatible with the fundamental rights guaranteed in the *International Covenant on Civil and Political Rights*[69] ('ICCPR'), including those of a non-derogable nature.[70] Of particular concern to the HRC are the:
    - vague definition of 'terrorist act';
    - reversal of the burden of proof in violation of the right to be presumed innocent until proved guilty according to law;
    - failure to define what constitutes 'exceptional circumstances' for the purpose of rebutting the presumption of bail; and,
    - expansion of the Australian Security Intelligence Organisation's powers to include, *inter alia*, the ability to detain a person without access to a lawyer and in conditions of secrecy for up to seven-day renewable periods.[71]

57. A number of these concerns are borne out in the case study below.

Case Study F – Terrorism laws violate the human rights and fundamental freedoms of Dr Mohamed Haneef

On 2 July 2007, Indian national Dr Mohamed Haneef was detained by the AFP on suspicion of involvement in a terrorist act in the United Kingdom, namely providing a mobile phone SIM card to his second cousins who were suspected terrorists.[72] Under federal law, the AFP may detain a person for questioning for

[68] See *Australian Laws to Combat Terrorism* (2006), at: http://www.nationalsecurity.gov.au/agd/www/nationalsecurity.nsf/AllDocs/826190776D49EA90CA256FAB001BA5EA?OpenDocument (April 27, 2009).

[69] *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976 and for Australia 13 August 1980).

[70] HRC, *Concluding Observations: Australia*, UN Doc. CCPR/C/AUS/CO/5 (2009), at para 11.

[71] Ibid.

[72] *Report of the Inquiry into the Case of Dr Mohamed Haneef*, Vol 1(2008), vii, at http://www.haneefcaseinquiry.gov.au/www/inquiry/rwpattach.nsf/VAP/(3A6790B96C927794AF1031D9395C5C20)~Volume+1+FINAL.pdf/$file/Volume+1+FINAL.pdf (14 May 2009).

up to 4 hours, over total elapsed time of 20 hours where an extension of time is granted. Extensions of time are permitted under section 23DA of the *Crimes Act 1914* (Cth), which provides that 'dead time' (ie, delays in questioning a person in an ongoing investigation) should not be counted in determining the permitted period of detention. Between 3 and 14 July, Dr Haneef's detention was extended for more than 250 hours. Dr Haneef was not asked any questions after July 4. He was subsequently charged with intentionally providing resources to a terrorist organisation and was granted bail in respect of that charge.

Immediately following the grant of bail, the Minister for Immigration and Citizenship cancelled Dr Haneef's 457 Temporary Long Stay Visa on 'character grounds'. As a result, Dr Haneef chose not to post bail in respect of that charge and to remain in police custody, rather than be taken into immigration detention. The Attorney-General subsequently issued a Criminal Justice Stay Certificate, which required that Dr Haneef's deportation be stayed in the administration of criminal justice. Notwithstanding, Dr Haneef was not issued a Criminal Justice Stay Visa and, hence, had no valid visa to remain in Australia.

On 27 July 2007, the charge against Dr Haneef was dismissed and he was released from police custody. Following the cancellation of the Criminal Justice Stay Certificate, Dr Haneef was taken into immigration detention. On July 28, Dr Haneef left Australia. On August 21, Justice Spender set aside the decision of the Minister for Immigration and Citizenship to cancel Dr Haneef's visa.[73] In December, the Full Court of the Federal Court of Australia dismissed the Minister's appeal and restored Dr Haneef's Long Stay Visa.[74]

Source: Federation of Community Legal Centres, Anti-terrorism Laws Working Group; PILCH

PILCH respectfully submits that the Haneef case provides a clear demonstration of how the current anti-terrorism regime not only fails to guarantee human rights and fundamental freedoms, but also directly leads to violations of those rights and freedoms, including the right to the presumption of innocence and the right to a fair trial. In 2009, the HRC recommended that Australia ensure that its 'counter-terrorism legislation and practices are in full conformity' with the ICCPR, including by guaranteeing the right to be presumed innocent by avoiding reversing the burden of proof for terrorism offences'[75]. A *Human Rights Act* that guaranteed the presumption of innocence and the right to a fair trial, amongst other rights and freedoms, would ensure that Australia's response to terrorism is balanced against fundamental human rights considerations. In contrast, the absence of such an Act has meant that Australia's counter-terrorism laws have not been assessed against, or counterbalanced by, a legislative human rights framework.

[73] *Haneef v Minister for Immigration and Citizenship* [2007] FCA 1273.

[74] *Minister for Immigration & Citizenship v Haneef* [2007] FCAFC 203.

6.5 Homelessness

58. It is widely accepted that people experiencing, or at risk of, homelessness face grave and/or systemic violations of their rights everyday.[76] These violations – many of which are described in the submissions made by the HPLC,[77] which PILCH endorses – include the rights to an adequate standard of living, adequate housing, education, liberty and security of the person, privacy, and social security.

59. For example, in a 2009 survey conducted by the HPLC to ascertain whether or not people experiencing homelessness believe that the current system adequately protects and promotes their human rights, one participant observed: 'rooming houses are a blight on humanity. The hell that these places represent and the suffering and misery they engender and profit from is a disgrace'[78].

60. Homelessness is more than just a housing issue. A person who is homeless can, for example, also face violations of his or her right to the highest attainable standard of physical and mental health. Health problems might cause a person to become homeless, including in cases where mental health issues impede a person's ability to find and sustain employment. Health problems might arise from, or be exacerbated by, a person's experiences of being homeless.[79] Of the people surveyed by the HPLC, 73% indicated that they had an unmet health need, whilst 70% considered that their condition had worsened as a result of being homeless.[80] A common explanation for the compromised health of people experiencing homelessness is inadequate access to health services. This is often due to financial hardship, prioritisation of basic needs (eg, food and shelter) over health and, for example, inability to obtain a Medicare card.

61. The right to personal safety for people experiencing homelessness is also constantly under threat. With no home to go to, people experiencing homelessness are more vulnerable to crime and personal attacks. Tellingly, over 80% of people surveyed by the HPLC reported having been treated in a cruel and degrading way while

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[75] HRC, *Concluding Observations: Australia*, UN Doc. CCPR/C/AUS/CO/5 (2009), at para 11.

[76] See generally HPLC, *Protecting and Promoting the Human Rights of People Experiencing Homelessness in Australia*, Submission to the National Human Rights Consultation (2009); HPLC, *Righting the Wrongs of Homelessness,* Submission to the National Human Rights Consultation (2009); White Paper, The Commonwealth Department of Families, Housing, Community Services and Indigenous Affairs, *The Road Home: A National Approach to Reducing Homelessness* (2008).

[77] HPLC, *Protecting and Promoting the Human Rights of People Experiencing Homelessness in Australia*, ibid; HPLC, *Righting the Wrongs of Homelessness,* ibid.

[78] HPLC, *Protecting and Promoting the Human Rights of People Experiencing Homelessness in Australia*, ibid, at section 4.2.

[79] HREOC, '*Homelessness is a Human Rights Issue'* (2008), at 8.

[80] HPLC, *Protecting and Promoting the Human Rights of People Experiencing Homelessness in Australia*, above n 76, at section 1.2.

experiencing homelessness.[81] This is particularly concerning when viewed in light of statistics that show that almost half of all people experiencing homelessness are less than 24 years of age.[82]

62. Notwithstanding ad hoc protection of the rights of people experiencing, or at risk of, homelessness,[83] it is argued that the current system has proved largely inadequate in protecting and promoting the rights of these people. Indeed, in addition to a number of gaps and weaknesses, including in respect of the absence of a federal prohibition against discrimination on the grounds of housing status, homelessness or social status, as required under international human rights law,[84] federal laws often disproportionately effect people experiencing homelessness.[85]

63. People experiencing, or at risk of, homelessness should be able to exercise and enjoy the same human rights and fundamental freedoms as other members of society. Nevertheless, as the above discussion demonstrates, people experiencing, or at risk of, homelessness regularly suffer rights violations. PILCH submits that a national *Human Rights Act* that guarantees, amongst other things, the right to an adequate standard of living, the right to adequate housing, the right to non-discrimination and the right to privacy, will better protect and promote the rights of people experiencing, or at risk of, homelessness in this country. A *Human Rights Act* could, for example, prevent the enactment of legislation that disproportionately impinges on the rights of people experiencing homelessness, by requiring Parliament to consider the rights implications of proposed law. It is significant that over 99% of participants in HPLC's survey felt that Australia needed a *Human Rights Act* to protect and promote their human rights and fundamental freedoms.[86]

6.6 Climate change

64. In recent years there has been a growing public awareness about the issue of climate change, its detrimental environmental consequences, and the urgent need for a co-ordinated response. The human rights implications of climate change are perhaps less widely understood but are increasingly being identified. Climate change will impact the human rights of people in Australia in a variety of ways. In particular it will affect the economic and social rights of the marginalised and disadvantaged and will lead to the

[81] Ibid at section 4.2.

[82] Australian Bureau of Statistics, *Counting the Homeless 2001* (2003), 3-4; HREOC above n 79, at 8.

[83] See, eg, Australian Constitution, ss 41 (the right to vote), 117 (freedom from discrimination).

[84] See, eg, CESCR Committee, *General Comment No. 20: Non-Discrimination*, UN Doc. E/C.12/GC/20 (2009), at para 35.

[85] See, eg, *Social Security Act 1991* (Cth).

[86] HPLC, *Protecting and Promoting the Human Rights of People Experiencing Homelessness in Australia*, above n 76, at section 1.2.

increased prevalence of 'environmental refugees', with associated human rights implications. The issue of climate change also highlights the need to consider the human rights of future generations and whether or not it is time to recognise a human right to a healthy environment. This issue will be discussed in greater detail in Section 8.3(c) below. The current system for the protection and promotion of human rights in Australia does not address the human rights implications of climate change. In order to approach this issue pro-actively, rather than re-actively, it is time for this issue to be considered.

65. The extreme weather that is one consequence of climate change will have a detrimental effect on a range of economic, social and cultural rights such as the rights to health, housing, employment and an adequate standard of living. Importantly, this impact will be borne disproportionately by marginalised and disadvantaged individuals. For example, it is anticipated that, as Australia experiences extreme hot weather more frequently, there will be a rise in mortality rates, particularly amongst the elderly.[87] It has also been suggested that there will be an increase in fatal respiratory problems amongst people in Australia resulting from a reduction in air quality due to more frequent bush fires and air pollution.[88] Moreover, there is evidence to suggest that, as food production comes under stress from extreme weather events, such as longer and more severe droughts, people living in Australia will experience increased rates of malnutrition.[89] There are also obvious concerns about the effect that climate change will have on the ability of, for example, farmers to work and maintain an adequate standard of living.

66. Climate change will also lead to the emergence of 'environmental refugees'; that is, people who are no longer able to remain in their homes because of changes to the environment or natural disasters. It has been predicted that, in the next 50 years, 50 – 250 million people will be displaced by the effects of climate change, including rising sea levels and increased extreme weather events such as tsunamis and cyclones.[90] People living in the Asia Pacific are particularly vulnerable to the effects of climate change with small island states, such as Tuvalu, at risk of complete submersion.[91] It is

[87] 'Victoria's Heatwave "Claimed 374 Lives"',' *The Age* (6 April 2009.).

[88] See Victorian Government Department of Human Services, *Climate Change and Health: An Exploration of Challenges for Public Health in Victoria* (October 2007), 6, 10, 16, 20.

[89] See ibid at 5, 12, 15.

[90] Jane McAdam, *Climate Change 'Refugees' and International Law,* NSW Bar Association, 24 October 2007, 1, at: http://www.nswbar.asn.au/circulars/climatechange1.pdf [citations omitted].

[91] David Corlett, *Stormy Weather: The Challenge of Climate Change and Displacement*, University of New South Wales Press (2008), 15.

very likely that many environmental refugees in the Asia Pacific region will seek to immigrate to Australia, which gives rise to the question of how their human rights should be protected. Furthermore, within Australia, there is a significant risk of internal displacement in coastal and rural communities due to increased sea levels and extreme weather events such as bushfires and droughts. Whenever people are displaced, whether internally or externally, they are at increased risk of human rights violations and it is therefore important that consideration be given to how this risk can be addressed.

67. The current system of human rights protection fails to recognise the human rights implications of climate change. The introduction of a *Human Rights Act* provides an unparalleled opportunity to address this failure. By enshrining fundamental rights such as the right to health, housing and an adequate standard of living, such an Act would provide an invaluable framework for protecting human rights from the growing impacts of climate change. In particular, it would protect the rights of environmental refugees and internally displaced Australians, who will be rendered especially vulnerable. The desirability of including in a *Human Rights Act*, an explicit right to a health environment or preambular recognition of the challenges of climate change will be discussed in greater detail below. However, it should be noted that such recognition would encourage important dialogue on the human rights implications of climate change and provide a vital educative role for the Australian community, which is currently lacking.

* * *

68. In examining the current system for protecting and promoting human rights, Part C has sought to identify a number of its gaps and weaknesses that impair or nullify the exercise and enjoyment of rights in Australia. PILCH submits that, because there are significant gaps and weaknesses in the current system, there is an urgent need to reform that system to ensure the effective protection of human rights and fundamental freedoms in the future.

Recommendation 1

PILCH recommends that the current system for the protection and promotion of human rights in Australia should be substantially reformed in order to address its current inadequacies.

Part D – How could Australia better protect and promote human rights?

69. Taking into account the failure of the current system to adequately protect and promote human rights in Australia, there is a clear and pressing need to adopt measures that aim to ensure the better protection and promotion of those rights. PILCH submits that the enactment of a

national *Human Rights Act* is the most effective way to maximise the recognition, exercise and enjoyment of human rights and fundamental freedoms in Australia. PILCH further submits that there are a number of additional measures (eg, strengthened and expanded human rights education) that the Federal Government should take in order to ensure the effective operation of such an Act. PILCH submits that these measures should be pursued in conjunction with – and not in isolation from, or instead of – a *Human Rights Act*.

70. This section considers how the current system for the protection and promotion of human rights might be reformed to better protect and promote human rights in Australia. In so doing, it shall address the first and third questions posed by the Consultation Committee, namely:

- ***How could Australia better protect and promote human rights?***
- ***Which human rights (including corresponding responsibilities) should be protected and promoted?***

In addition, this Part examines some of the justifications for a national *Human Rights Act* and explains how the enactment of such an Act would benefit all members of the Australian community, especially those who are marginalised and disadvantaged. It also considers some of the key elements for inclusion in a *Human Rights Act*. Finally, this Part identifies some of the measures that are necessary to ensure the effective operation of such an Act, and the better protection and promotion of human rights, more generally.

7. The need for a *Human Rights Act*

71. PILCH submits that the effective protection and promotion of human rights in Australia would be best ensured through the enactment of a federal *Human Rights* Act. In PILCH's view, there are many and varied reasons why a *Human Rights Act*, as opposed to some other measure, would be the most effective means of addressing weaknesses and gaps in the current system for the protection and promotion of human rights. Significantly, and in stark contrast to what opponents of a *Human Rights Act* would have us believe, the overwhelming majority of arguments in favour of such an Act are not concerned with victims enforcing their human rights by way of litigation before domestic courts or facilitating a so-called 'lawyer's picnic'. Whilst the ability to enforce one's rights through the court system is undeniably important, as is the ability to enforce all other legal interests (eg, the ability to sue for defamation, recover debts or enforce a contract), the enactment of a *Human Rights Act* has much broader application, with widespread and tangible benefits for the entire Australian community.

72. For example, as shall be explained below, a key objective of human rights legislation is the prevention of human rights violations *before* they occur. What can be more effective for the protection and promotion of human rights in Australia than the adoption of a robust and comprehensive law designed to *prevent* human rights violation prior to the infliction of harm? Yet, owing to weaknesses and gaps in the current system, some of which have been

canvassed in Part C of this submission, that system is demonstrably incapable of preventing rights violations. A comprehensive *Human Rights Act* would seek to remedy this situation. It would also demonstrate that the Federal Government is committed to striving to improve rights protections in this country.

73. Section 7 shall examine what PILCH believes to be some of the main justifications for a *Human Rights Act*, namely, the need to:

- adopt a comprehensive and unambiguous statement of human rights;
- ensure protection of rights and legal accountability for their violation;
- strengthen policy development and decision-making;
- introduce an education tool to increase awareness of human rights; and,
- improve Australia's international reputation.

Whilst not exhaustive, PILCH submits that these justifications are illustrative of the depth and breadth of reasons why a *Human Rights Act* could enhance rights protections in Australia.

7.1 Adoption of a comprehensive and unambiguous statement of rights

74. As discussed in Part C, many fundamental human rights are either unprotected or afforded limited protection under the current system. Of the rights protections that do exist, many are inaccessible to ordinary people – and, in particular, the marginalised and disadvantaged – due, in part, to the fact that they are found in diverse legal sources and have often been applied in a restrictive and/or overly legalistic way. In an era where the law is becoming increasingly complex and difficult for non-lawyers to understand, a *Human Rights Act* would provide a comprehensive and unambiguous statement of the human rights and fundamental freedoms that underpin our society, in a format that is clear and accessible to everyone – especially non-lawyers. This statement would empower individuals by sending a clear message that the Federal Government values them and is committed to taking the necessary steps to respect, protect and fulfil their human rights and fundamental freedoms. It would also provide individuals with a comprehensive and accessible legal instrument to assert their rights. For example, at one roundtable,[92] a participant said that he found the Victorian Charter to be a useful tool when negotiating with public authorities and writing letters to newspapers, in support of human rights.

75. The enactment of a *Human Rights Act* would also provide a much needed opportunity to redress significant gaps and weaknesses in the current legal system. Should the Federal Government introduce a *Human Rights Act*, it might, amongst other things, ensure effective protection of economic, social and cultural rights, including the rights

to housing, education and the highest attainable standard of (physical and mental) health. For example, considering the significant number of people who are homeless on any one night, a *Human Rights Act* would be an important opportunity to strengthen the protection of rights for individuals experiencing, or at risk of, homelessness. In this connection, the Federal Government might guarantee such rights as the right to an adequate standard of living and the right to adequate food and water. In addition, the Federal Government might also expand existing protection against discrimination by introducing a general prohibition against discrimination. This would ensure improved protection against non-enumerated grounds of discrimination, as well as systemic and compounded forms of discrimination.

7.2 Ensuring protection of rights and legal accountability for their violation

76. A primary objective of human rights legislation is the prevention of human rights violations *before* they occur. Other key objectives include holding perpetrators legally accountable for violating human rights, providing legal remedies to people whose rights have been violated, and transforming laws, policies and practices to prevent human rights violations in the future. The introduction of a *Human Rights Act* in Australia would enhance the protection and promotion of human rights and fundamental freedoms, by striving to meet each of these objectives in a systematic and sustained way.

(a) Ensuring legislation is compatible with human rights

77. A *Human Rights Act* would seek to prevent human rights violations *before* they occur by requiring the Parliament of Australia to take human rights into account prior to enacting legislation. The requirement to produce statements of compatibility and, for example, to establish a parliamentary committee responsible for reviewing legislation for compatibility with human rights, would help to ensure that proposed legislation is drafted in a way that seeks to protect and promote human rights.[93]

78. The Victorian experience is illustrative of how human rights legislation with enhanced scrutiny and transparency requirements, can maximise the exercise and enjoyment of human rights.[94] Whilst the scrutiny process is still in its nascent stages, with only 18 bills being subject to parliamentary debate on their human rights implications, so far, analytical rigour has generally been applied in the consideration of the human rights

[92] National Human Rights Consultation, Community Roundtable, Melbourne, 14 April 2009, male participant.

[93] See Michael Kirby, 'A Charter for Australia's Modern Needs', *The Age* (23 August 2008).

[94] See *Charter of Rights and Responsibilities Act 2006* (Vic), ss 28, 30.

compatibility of proposed laws.[95] For example, when the *Evidence Bill 2008* (Vic) was introduced in 2008, it stipulated the circumstances in which a witness could be compelled to give evidence against a family member. During the Bill's passage through Parliament, an issue arose as to whether it imposed an unreasonable limitation on the right of Aboriginal families to maintain kinship ties. The Scrutiny of Acts and Regulations Committee ('SARC') found that the impugned provision might have been unreasonable and, as such, referred the question to Parliament for further debate. Whilst the Bill was ultimately passed without amendment,[96] the process ensured that rights considerations were publicly debated and taken into account, with a view to protecting the rights of Indigenous Australians. Significantly, this process has helped to cultivate human rights awareness amongst law makers and the general public.[97]

(b) Protection through advocacy

79. The introduction of a *Human Rights Act* would encourage protection of human rights by providing an accessible advocacy tool that individuals can use to assert their human rights in circumstances where those rights are threatened (eg, where a landlord threatens to evict a single mother without first taking into account her human rights), or have already been violated (eg, where a person is denied access to social security benefits because of a policy that is incompatible with human rights). Evidence suggests that one of the most significant impacts of human rights legislation is the way in which it assists individuals to secure the best possible standard of public service.[98] In the United Kingdom, for example, human rights legislation has resulted in a shift away from inflexible or blanket policies that often result in human rights violations, towards policies that take individual circumstances into account.[99]

80. A *Human Rights Act* would also provide an important advocacy tool that community organisations and advocates, such as PILCH, can rely on when advocating on behalf of marginalised and disadvantaged members of the community. For example, in a recent submission to the Community Consultation Panel's review of the *Mental Health Act 1986* (Vic), PILCH highlighted a number of weaknesses in the mental health system, including in relation to: external review of involuntary treatment orders and proceedings before the Mental Health Review Board; and, monitoring of, and

[95] Victorian Equal Opportunity & Human Rights Commission, *The 2008 Report on the Operation of the Charter of Human Rights and Responsibilities: Emerging Change* (2009), 1.

[96] See *Evidence Act 2008* (Vic).

[97] VEOHRC, *The 2008 Report on the Operation of the Charter of Human Rights and Responsibilities: Emerging Change*, 2009, 73 ('VEOHRC, 2008 Report').

[98] British Institute of Human Rights, *The Human Rights Act – Changing Lives* (2008), 3.

[99] Department for Constitutional Affairs, *Review of the Implementation of the Human Rights Act* (2006), 4.

complaints about, consumer care and treatment. In so doing, PILCH invoked the Victorian Charter to demonstrate how those weaknesses lead to violations of the human rights and fundamental freedoms of consumers of mental health services.[100] As the case study below demonstrates, the Victorian Charter has also been invoked by other community organisations and advocates when seeking to assist consumers of mental health services.

Case Study G – Young man with autism returned to family

Mr H, a 24-year-old Iraqi refugee with autism and an intellectual disability, was placed in supported accommodation that was ill equipped to meet his cultural and religious needs. Mr H spoke limited English and had difficulties communicating with staff and residents, none of whom spoke Arabic. The Halal food, left daily by his mother, was not always provided to him. Mr H's parents strongly believed that it was in their son's best interests for him to return home. However, a guardianship order was granted in favour of the Office of the Public Advocate and Mr H's parents were informed that their son would be moved to a new facility. They were not, however, consulted about the appropriateness of the new accommodation. At his new residence, Mr H was isolated, unhappy and afraid of his roommate, an older resident. As a result, Mr H's parents refused to return their son to the residence after a weekend at home.

The Office of the Public Advocate subsequently threatened to invoke its powers under the guardianship order to forcibly return Mr H to the residence. Mr H's youth disability advocate raised the Victorian Charter in an email to the Public Advocate in an attempt to prevent Mr H's being forcibly returned to the residence. In particular the advocate referred to the right to protection of the family, the right to culture and the right to freedom of religion. Whilst the matter was being resolved, Mr H was permitted to remain in the family home.

Mr H's parents then applied successfully to the Victorian Civil and Administrative Tribunal ('VCAT') to revoke the guardianship order, arguing that the order was inconsistent with Mr H's cultural and religious needs. As a result, Mr H was permitted to remain in the family home permanently, in accordance with his wishes and those of his parents.

Source: PILCH

The use of the Victorian Charter in this case not only lead to a positive outcome for the individuals involved, but it also highlighted the broader educative function (see below) of a *Human Rights Act* in improving public authorities' awareness of rights obligations.

(c) Legal accountability for human rights violations

81. The enactment of a *Human Rights Act* would provide a much-needed mechanism to ensure legal accountability and redress for violations of human rights at the federal level. Holding public authorities legally accountable for their human rights violations and providing relief to individuals whose rights have been violated is important not only in addressing individual violations, but also in preventing and deterring human rights violations in the future. Regrettably, as Part C demonstrates, the current protective

[100] PILCH, *Submission to the Review of the Mental Health Act 1996* (2009) at http://www.pilch.org.au/2009_submissions/#4.

mechanisms and frameworks have often proved insufficient in the coverage they offer and the remedies that they provide. As the case study below demonstrates, a *Human Rights Act* could seek to ensure legal accountability for human rights violations by enabling individual's to allege, and seek relief for, human rights violations.

Case Study H – Young man subject to damaging injections has treatment plan reviewed

P is a Somalian refugee who was subject, under the *Mental Health Act 1986* (Vic), to a community treatment order ('CTO') under which he involuntarily received weekly injections of a prescribed drug. As a direct side effect of the injections, P developed severe osteoporosis.

P appealed to the Mental Health Review Board for review of the extension of his CTO. He argued that the administration of the prescribed drug constituted cruel, inhuman and degrading treatment under s 10(b) of the Victorian Charter and that this limitation on his human rights, given the severe effect of the treatment, was not a reasonable limitation within the meaning of s 7 of the Charter. P argued that the references to 'treatment' or 'treatment plan' in the Act should be interpreted to mean 'treatment that was not cruel, inhuman or degrading'. Consequently, he argued that the injections of the prescribed drug could not be regarded as necessary treatment under s 8(1) of the Act and should be stopped. P also argued that the authorised psychiatrist had failed to explicitly take into account the effect of the prescribed drug on P's human rights when developing P's treatment plan and that the Board should order that the treatment plan be reviewed.

The Board agreed that the Act should now be interpreted compatibly with human rights so that references to 'treatment' or 'treatment plan' meant 'treatment that was not cruel, inhuman or degrading'. While the Board found that the side effects of the injections had not yet reached the level of severity necessary to be found cruel, inhuman or degrading, it held that if P's bone density deteriorated further the continued administration of the injections may become a violation of P's rights. The Board went on to say that the authorised psychiatrist had failed to explicitly consider the human rights implications of the treatment and to include in P's treatment plan adequate stipulations for monitoring and review. On this basis, the Board upheld the extension of the CTO but sent the treatment plan back to the authorised psychiatrist to be amended to explicitly consider P's human rights and stipulate the process for monitoring and review. The Board also found that the authorised psychiatrist and management of the mental health service had an obligation to provide regular training for staff on their human rights obligations.

Source: Victorian Bar Legal Assistance Scheme

This case study demonstrates the importance of individuals having access to mechanisms to enforce their human rights and fundamental freedoms. Although the Board did not overturn P's CTO, it provided valuable guidance to the mental health service designed to ensure that P's human rights are not violated by continued treatment.

82. Whilst the ability to enforce one's rights is an important aspect of a *Human Rights Act*, evidence from other jurisdictions suggests that the introduction of human rights legislation does *not* open the floodgates of litigation. Indeed, a very limited number of

cases involving human rights legislation ever reach court.[101] PILCH submits that this is because human rights legislation is used in a wide variety of ways, litigation being only one of those ways, and often only as an option of last resort.

7.3 Strengthening policy development and decision-making

83. That the enactment of a *Human Rights Act* will empower individuals to assert their rights and hold the Federal Government legally accountable for their violation, will undoubtedly enhance the protection and promotion of human rights in Australia. Yet, significantly, the advantages of such an Act are not limited to the provision of individual relief. The experiences of the ACT HRA and the Victorian Charter suggest that human rights legislation can also have positive and far-reaching impacts on the development and implementation of policy. Since the introduction of these Acts, a significant number of state and non-state actors have taken steps to ensure that their policies are compatible with, and give proper consideration to, human rights norms and standards. At times, these steps have been taken as a part of the proactive introduction or revision of policies, to formalise a process for ensuring compatibility with human rights. At other times, these steps have been taken, in part or entirely, in response to dispute resolution processes or litigation. Still, on other occasions, the development and implementation of policies that are human rights compatible have been driven by a legislative imperative.

84. Whatever the reasoning, it is clear that the enactment of the ACT HRA and the Victorian Charter has strengthened state and non-state policies and, subsequently, the exercise and enjoyment of human rights and fundamental freedoms by individuals in those jurisdictions. For example, as explained in the case study below, Youth Affairs Council of Victoria Inc. ('YACVic') and the City of Casey, Victoria, have sought to enhance the protection and promotion of the rights of young people, through the incorporation of human rights norms and standards into their policies and practices.

Case Study I – Victorian Charter used as a framework for a sector wide policy that supports best practice by youth workers

YACVic is the peak body and leading policy advocate on young people's issues in Victoria. Through its advocacy work, YACVic identified the need for a code of ethical practice that establishes a safe, professional and ethical practice standard for individuals working in the youth sector. In developing the *Code of Ethical Practice – A First Step for the Victorian Youth Sector*, YACVic adopted a human rights framework because it felt that it was important for individuals who work with youth to understand human rights, the ways in which they relate to youth and how they can work to protect and promote those rights. Significantly, YACVic relied on the Victorian Charter and other human rights instruments to inform the nature and content of the Code and, in so doing, enshrined such rights as the rights to equality, recognition of indigenous peoples, privacy, and protection of families and young people.

[101] See ACT Department of Justice & Community Safety, *Human Rights Act 2004: Twelve Month Review* Report (2006), 11.

Since being launched in 2007, the Code has been used in a variety of ways to protect and promote the rights of young people. For example, the City of Casey (which has one of Australia's largest populations of people aged 10-25 years) has used the Code to revise its policies and practices in an attempt to ensure that they enhance the human rights of young people. The City of Casey has also used the Code to develop a tool to audit its youth services. This tool has enabled the City of Casey to identify best practice indicators and allocate best practice responsibilities to its staff. As well, the City of Casey has published its own, simplified version of the Code, which distills the underpinning human rights values in an accessible format. Amongst other initiatives, the City of Casey has committed itself to auditing the Code every 2 years, with a view to ensuring that every effort is made to respect, protect and fulfil the rights of young people.

Source: YACVic; City of Casey; PilchConnect

The above case study is significant as it illustrates how the Victorian Charter has been used to inform and strengthen policy and professional standards in the youth sector and in the City of Casey, and to enhance the exercise and enjoyment, by youth, of their human rights. A *Human Rights Act* could provide a similar impetus at the federal level, encouraging state and non-state actors to ensure that they develop policies and reach decisions in ways that protect and promote human rights.

85. In the following case study, the Victorian Government reversed its policy of denying individuals with Autism Spectrum Disorders access to disability support services, whilst several cases challenging the Government's policy were pending before VCAT.

Case Study J – 14 year old boy granted access to disability support services

The Department of Human Services denied a 14 year old boy with Asperger's syndrome access to disability support services on the ground that Asperger's does not constitute a 'neurological impairment' and, thus, a disability for the purposes of the *Disability Act 2006* (Vic). The boy's father appealed the Department's decision to the Victorian Civil and Administrative Tribunal. The Tribunal stayed the proceedings pending the outcome of a similar case concerning a 13 year old boy.[102] In that case, the Human Rights Law Resource Centre ('HRLRC') advocated that the Department should adopt an inclusive and contextual interpretation of the term 'disability,' in accordance with its human rights obligations under the Victorian Charter.

In December 2008, and prior to the resolution of these cases, the Victorian Government announced that individuals with Autism Spectrum Disorders, including Asperger's, are now eligible to apply for disability support assistance under the *Disability Act 2006* (Vic). The Government also announced funding of $2.75 million to support those individuals affected by the change.

Shortly after these announcements were made, the Department registered the 14 year old boy for disability support services. As a result, the boy can now access those support services that had previously been denied to him. Commenting on the significance of this development, the boy's father said: 'As a family the changes to policy mean an incredible amount to us. We can now receive support whereas prior [to the changes] the first question we were asked by agencies that

[102] See Melanie Schleiger, 'Disability Advocates Achieve Assistance for Victorians with Autism,' (2009) 33 *Human Rights Law Resource Centre E-Bulletin* 1, 27.

support children was, "is your son registered with DHS?" When we said "no" they said, "sorry we can't help". We met with DHS today and they outlined the support that can be provided and what a difference this will make to our family. Its about 10 years too late for us as [my son] is a teenager and he would have really benefited from early intervention, however that's crying over spilt milk. Looking ahead I can only hope more families receive support and children are diagnosed early as they should be'[103].

Source: PILCH; HRLRC

The President of the Autistic Family Support Association has suggested that the reversal of the Department's policy of denying individuals with Autism Spectrum Disorders access to disability support services would not have occurred had these cases, which raised Charter-based arguments, not been litigated.[104]

7.4 Introducing an education tool to increase awareness of human rights

86. A *Human Rights Act* would provide an important educative tool to foster increased understanding of human rights. It would do this by: educating law-makers; empowering community organisations and the public to lobby for laws to be changed; and, teaching young people and the public more generally to understand their own human rights and respect the human rights of others. The British experience shows how the language and ideas of human rights can have a dynamic life beyond the courtroom, particularly in challenging inflexible policies.[105] One example given in the English context was of a London nursing home that had a practice of routinely placing residents in special 'tilt-back' wheelchairs, regardless of their mobility needs. As a consequence, residents who were able to walk unaided were stopped from doing so. A visiting consultant pointed out that the failure to consider the different mobility needs of individual residents was contrary to their right to respect for private life, which emphasises the importance of dignity and autonomy and their right not to be treated in a degrading way. As a consequence, the blanket practice was stopped. Residents who could walk were taken out of the chairs and encouraged to maintain their walking skills. [106]

87. The procedural obligations contained in human rights legislation require each branch of government to act compatibly with human rights. As a result, those involved in making and applying the law are required to educate themselves and each other about human rights. The introduction of the Victorian Charter has led to increased discussion of

[103] Email correspondence from client to Simone Cusack of PILCH, dated 20 January 2009 [on file with author].

[104] See 'Child with Autism Gains Entitlement to Disability Assistance, in 'Case Studies: How a Human Rights Act can Promote Dignity and Address Disadvantage', at para. 1.1, at http://www.hrlrc.org.au/html/s02_article/article_view.asp?id=438&nav_cat_id=188&nav_top_id=70.

[105] British Institute of Human Rights, above n 99, at 5.

[106] Ibid at 15.

human rights, including in Parliament and courts.[107] It also led to the introduction of training programs for the judiciary, government employees and those involved in the provision of public services.

88. The introduction of a *Human Rights Act* would also provide a valuable framework for the delivery of education to people, such as caseworkers and lawyers, who assist the marginalised and disadvantaged daily. PILCH has witnessed first-hand how human rights-based training can improve the realisation of rights for marginalised and disadvantaged members of the community. For example, the HPLC regularly uses the Victorian Charter when training lawyers on how they might assist people experiencing, or at risk of, homelessness. As the case study below demonstrates, this training lead to one HPLC lawyer invoking the Victorian Charter as a tool to prevent the eviction of a pregnant mother.

Case Study K – Eviction of pregnant single mother prevented

In 2008, a housing association served Ms B, a pregnant single mother of two children, with a notice to vacate her community housing and took her to court to get possession of the property. Reasons for the intended eviction were not provided. Ms B applied to VCAT seeking a declaration that the notice to vacate was invalid, and an injunction to prevent the association from terminating its rental contract without first complying with its legal obligations, including under the Victorian Charter. In her submission to VCAT, Ms B submitted, *inter alia*, that the notice to vacate violated her right to privacy, family and home (s 13), her right to protection of family and children (s 17) and her right to life (s 9), as guaranteed in the Victorian Charter, and that there was no reason to evict her. Before VCAT reached a decision in this matter, the parties settled and Ms B and her children were allowed to remain in their home.

As VCAT was not required to render a decision, the extent to which Ms B's Charter-based arguments influenced the outcome of proceedings in this case is unclear. Nevertheless, the Victorian Charter had a significant impact on Ms B insofar as it empowered her to assert her rights and the rights of her children. Ms B's submission also had an educative function: it improved the housing association's awareness of its human rights obligations and brought the relevant human rights considerations squarely to the attention of the Member and lawyers involved in the proceedings. Significantly, following the resolution of this case, the HPLC received a number of inquiries for legal assistance from similarly situated individuals who faced eviction, also from housing associations wishing to receive training and education in order to understand their human rights obligations.

Source: HPLC; PILCH

89. An important educative function of a *Human Rights Act* would be the role it could play in educating students and the public, more generally, about the importance of respecting, protecting and fulfilling human rights. Human rights education helps to

[107] VEOHRC, 2008 Report, above n 96, at 41, 56.

shape how people live in their community and also how they understand it.[108] A *Human Rights Act* could, for example, be an important tool for teaching students about the importance of not discriminating against others on the basis of their race.[109] Educating students in this way would not only promote racial tolerance and social cohesion,[110] but may also reduce the prevalence of racial discrimination in this country. Whilst the AHRC and the Victorian Equal Opportunity and Human Rights Commission ('VEOHRC') already play a substantial role in facilitating education about human rights, PILCH submits that their ability to do this is hampered by the lack of a national *Human Rights Act* because human rights issues involve services, laws, or policies provided or regulated by the Federal Government and to which state-based Charters do not apply.

7.5 Improving Australia's international reputation

90. Australia's reputation as a good international citizen and protector and promoter of human rights has languished significantly over the past decade or so. It has been noted that Australia's international standing has diminished on account of its repeated failure to address legitimate and expert criticisms regarding its failure to comply with international human rights norms and standards.[111] In this respect it is notable that all six of the UN human rights treaty bodies have issued critical reports of Australia's human rights record and expressed concern in relation to a perceived decline in Australia's commitment to international and national human rights protection in the last decade.

91. One of the most significant explanations for the decline in Australia's international human rights reputation is intricately connected to Australia's ongoing failure to enact a comprehensive and unambiguous statement of human rights; that is, a *Human Rights Act*. It has been widely noted, for instance, that Australia remains the only Western democracy not to have a national *Human Rights Act*.[112] This has implications not only for the level of human rights protection in Australia, but also for the quality of Australian jurisprudence.[113] The connection between the domestic protection of human rights and Australia's international reputation has been recognised by the HRC, which recently congratulated Australia for establishing the National Human Rights Consultation to examine the legal recognition and protection of human rights in Australia.[114]

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[108] See http://www.hreoc.gov.au/education/about_education.html.

[109] See generally http://www.humanrights.gov.au/education/index.html.

[110] See generally G McKinnon, 'Would a Bill of Rights Enhance Social Cohesion in Australia ' in J. Jupp, et al (eds.), *Social Cohesion in Australia* (2007), 17.

[111] See Spencer Zifcak and Alison King, *Wrongs, Rights & Remedies: An Australian Charter?* (2009), 44-47.

[112] See, eg, ibid at 8.

[113] Sir Anthony Mason, in G Lindell (ed), *The Mason Papers* (2007) Sydney, 90.

[114] HRC, *Concluding Observations: Australia*, UN Doc. CCPR/C/AUS/5 (2009), at para 5.

92. In this respect, it should be recognised that the present government carries a different attitude to human rights protection and to Australia's role in the international legal system more generally. Since coming to power in 2007, the Rudd Government has, *inter alia*, ratified the *Convention on the Rights of Persons with Disabilities*,[115] established a National Council to Reduce Violence against Women and their Children, and announced that it will seek election to the UN Security Council, with one of its four key pillars being 'human rights protection'[116]. Nevertheless, Australia has a long way to go to address the weaknesses and gaps in the current system that have led to the decline in its reputation as a protector and promoter of human rights.

93. The introduction of a national *Human Rights Act* would be consistent with the Government's expressed intention to play an active role in human rights protection regionally and will assist the Government in its bid to become a Security Council member. While a *Human Rights Act* will not be a panacea to all disadvantage and discrimination experienced in Australia, it will, at least, constitute a first step in the process of turning around our declining human rights reputation. It will also enable the Government to talk legitimately about human rights leadership.

* * *

94. Section 7 has elucidated some of the key benefits that, in PILCH's opinion, would flow from the introduction of a *Human Rights Act*. PILCH submits that a *Human Rights Act* would provide a much-needed unified statement of the human rights that are fundamental to Australian society. It would enable better protection of human rights and ensure legal accountability for violations when they do occur. A *Human Rights Act* would play an important role in strengthening the policy making process and enhancing the quality and transparency of government decision making. At the same time, it would have an important educative function and help to improve Australia's international reputation as protector and promoter of human rights.

Recommendation 2

PIILCH recommends that the Federal Government should enact a *Human Rights Act*.

8. Key elements of a *Human Rights Act*

95. Having explained PILCH's view that human rights are not adequately protected in Australia, and the principal way of improving human rights protection is by enacting a *Human Rights Act*, this section examines the possible content of such an Act. It considers: what model is

[115] *Convention on the Rights of Persons with Disabilities*, 13 December 2006 (entered into force 3 May 2008).

[116] 'Australia to seek membership of UN Security Council', *The Age* (30 March 2008); Philip Lynch, 'Australia can Regain 'AAA' Human Rights Rating', *The Age* (12 April 2009).

appropriate for Australia; whether or not we should implement a 'dialogue' model as is in place in Victoria; and, whether or not courts should be empowered to strike down incompatible legislation. This section then discusses what rights should be protected under a *Human Rights Act*, and emphasises the importance of including economic, social and cultural rights ('ESC rights') as well as the more traditional, civil and political rights ('CP rights'). It also considers: who should be bound by a *Human Rights Act*; what should be the nature and extent of obligations of such an Act; and, who should be rights bearers? Finally, this section looks at limitations on rights and whether and what remedies should be available for rights violations. In summary, PILCH recommends a *Human Rights Act* based largely on the Victorian Charter, with some suggested improvements based on PILCH's knowledge and experience of the operation of the Victorian Charter and its impact on marginalised and disadvantaged persons.

8.1 What model is appropriate?

96. An initial question that must be considered is the appropriate model for a *Human Rights Act*. The Federal Government has already indicated that it will not consider a constitutional model and, for that reason, this submission does not discuss that model. The other models for domestic human rights instruments are 'legislative' and 'hybrid' models. PILCH respectfully submits that a *Human Rights Act* should conform to a legislative model, by which is meant an ordinary piece of legislation that can be amended by parliament in the usual way. Under a legislative model, courts are not empowered to strike down legislation that is incompatible with human rights, but may declare to parliament that there is an incompatibility and require a formal response from parliament. Because of the interplay between the legislature and judiciary, this model is often also described as the 'dialogue' model. The legislative model has been implemented in the United Kingdom, New Zealand, the ACT and Victoria.

97. PILCH considers that the legislative model is preferable because it:

    - preserves parliamentary sovereignty (see section 8.2 below);
    - ensures, since it is not constitutionally entrenched, that human rights law can be amended by parliament to reflect changes in societal values; and,
    - promotes a dialogue between the 3 branches of government as well as cultural change, rather than simply imposing further regulation that encourages litigation to resolve rights violations.

    PILCH further considers that the dialogue model encourages the consideration of human rights by law-makers and decision-makers at the outset and enables parliament to consider rights in the context of a broad range of interests, rather than only where there is a clash between individuals' rights.

Recommendation 3

PILCH recommends the adoption of a *Human Rights Act* that conforms to a legislative model.

8.2 Parliamentary sovereignty

98. The issue of parliamentary sovereignty has featured strongly in debates about the desirability and need for a *Human Rights Act* in Australia. Many of the critics of a *Human Rights Act* are concerned about such legislation impinging upon the sovereignty of parliament and therefore undermining democracy (since they are the democratic representatives of the people). They contend that a *Human Rights Act* would transfer significant power to the Judiciary, who are not democratically elected by the people. It seems to be a distinctly Australian concern that the sovereignty of Parliament remains paramount and, conversely, that the courts not be given greater powers, that might, somehow, usurp Parliament's power. This concern appears to have informed the creation of the legislative or dialogue model. For instance, the features of the Victorian Charter that create this dialogue are: the courts' power to make declarations of incompatibility but not to invalidate legislation; the Parliament's ability to amend the *Human Rights Act*; and, the Parliament's ability to make laws that are incompatible with human rights. In addition, the key feature of the Victorian Charter, which is said to enshrine the paramountcy of Parliament, is the ability of Parliament to make an override declaration where it specifically acknowledges that certain legislation is not compatible with human rights and states that it is intended that the legislation have effect in any event.

99. In PILCH's view, the legislative model should allay concerns of critics that a *Human Rights Act* would impinge upon the sovereignty of Parliament, principally because the courts are not empowered to strike down laws that are incompatible with human rights. Under a national *Human Rights Act* based on the legislative model, Parliament would retain its sovereignty in respect of law-making, including the ability to: pass laws that are incompatible with human rights; amend the *Human Rights Act* where necessary to respond to changes in societal values; and, to respond to declarations of incompatibility from courts by repealing, amending or confirming the offending law.

8.3 What rights should we protect?

100. PILCH's view is that a *Human Rights Act* should incorporate the broad range of human rights, including, in particular, the CP rights contained in the ICCPR and the ESC rights

contained in the *International Covenant on Economic, Social and Cultural Rights*[117] ('ICESCR'). It is usual for CP rights to be included in domestic human rights instruments. However, the inclusion of ESC rights is considered more controversial. For example, most ESC rights are not included in the Victorian Charter or the ACT HRA.

101. CP rights refer to the rights and freedoms necessary to protect individuals from state power and abuse of that power and that enable individuals to fully participate in the civil and political affairs of the state. They include rights such as the right to: freedom of opinion and expression; freedom of thought and conscience; a fair trial; and, personal liberty. ESC rights refer to rights that protect the basic living conditions that are necessary in order for human beings to live a life of dignity and freedom. They include rights such as the right to: social security; work; join a trade union; education; health; and, an adequate standard of living for the whole family.

102. It is common to distinguish between CP and ESC rights on the basis that CP rights are 'negative', in that they are realised by permitting or obliging inaction or non-interference, and ESC rights are 'positive', in that they require states to take positive steps in order to ensure that they are realised. Of course, this is not an accurate distinction because CP rights also require positive state action and resources. For example, the right to a fair hearing requires state action to provide properly resourced courts, the right to vote requires state action to ensure that all citizens (including, for instance, prisoners and persons in medical facilities) are able to vote, and the freedom from cruel, inhuman and degrading treatment in detention requires positive state action to ensure prisoners have proper food, accommodation and healthcare. Nevertheless, ESC rights are often excluded from domestic human rights instruments because of a concern that they might impose positive obligations on states to provide individuals with certain goods and social services. In this way, ESC rights are said to have policy and economic or resource allocation implications that are appropriately the domain of the legislature and executive, rather than the courts. It is contended that courts lack legitimacy and competence to adequately adjudicate on cases that raise policy questions.

103. However, PILCH contends that the role of Australian courts is to interpret legislation, including legislation that may have policy implications. Courts are engaged in this interpretive process every day, and the legislative model proposed by PILCH for a *Human Rights Act* does not substantially alter this role. Courts already make decisions that have significant economic, social and political consequences for the state, as seen

[117] *International Covenant on Economic, Social and Cultural Rights*, opened for signature 16 December 1966, 993 UNTS 2 (entered into force generally 2 January 1976 and for Australia 10 March 1976).

in *Mabo v Queensland (No 2)*,[118] *Dietrich v The Queen*,[119] and anti-discrimination cases concerning access to government services. Further, there is a convention that Australian courts will defer to parliament and the executive when adjudicating cases that impact upon government policy. This convention also reflects the doctrine of the separation of powers and the prohibition in the Constitution against the courts exercising non-judicial power.[120]

104. The appropriateness of courts adjudicating on ESC rights, given the resource and policy implications attached to these rights, has been examined in comparative domestic jurisdictions. It was addressed in the Report of the UK Department of Constitutional Affairs which noted:

> the courts recognise that there is an area of judgment within which the judiciary will defer, on democratic grounds, to the considered opinion of the legislature or the executive. The term 'discretionary area of judgment' is now preferred to 'deference' (see, for example, *R (Pro-Life Alliance) v. British Broadcasting Authority* [2004] 1 AC 185, §§74-77) but the approach is the same – the courts seek to avoid substituting their own views on policy questions for those of the competent authorities.
>
> Whether and to what extent the courts will recognise a 'discretionary area of judgment' depends on the subject matter of the decision being challenged. Policy decisions made by Parliament on matters of national security (*Secretary of State for the Home Department v Rehman* [2003] 1 AC 153, 195) criminal justice (*R (Marper) v Chief Constable of South Yorkshire* [2004] 1 WLR 2196) and economic policy (*R (Hooper) v Pensions Secretary* [2005] 1 WLR 1681) are accorded particular respect.[121]

It is significant that, as in the United Kingdom, the Constitutional Court of South Africa has trodden carefully in adjudicating cases that involve matters that concern constitutionally entrenched ESC rights, which are considered to be in the realm of policy, and explicitly recognised the distinct roles of the legislature and the courts.[122] The Constitutional Court has stressed that its role is not to determine whether the South African Government adopted the correct measure or measures or misspent public money, but rather to determine whether the measures chosen by government are 'reasonable' in the circumstances.[123]

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[118] *Mabo v Queensland (No 2)* (1992) 175 CLR 1.

[119] *Dietrich v The Queen* (1992) 177 CLR 292.

[120] See *Australian Constitution*, Chapters I, II & III.

[121] UK Department for Constitutional Affairs, *Review of the Human Rights Act* (2006), 12, at www.dca.gov.uk/peoples-rights/human-rights/pdf/full_review.pdf.

[122] *Soobramoney v Minister of Health, Kwa-Zulu Natal* (1997) 12 BCLP 1696, [29].

[123] See *Government of South Africa v Grootboom* [2001] 1 SA 46, [41]; *Minister of Health v Treatment Action Campaign* [2002] 5 SA 271, [35], [38]

105. Evidence in other jurisdictions suggests that even where ESC rights have been enshrined in a constitutional or legislative bill of rights, courts do not abuse their power in making decisions that impact on policy and matters of resource allocation.[124] Therefore, PILCH contends that critics' concerns about the adjudication of ESC rights are not a justifiable reason for excluding ESC rights in a *Human Rights Act*.

(a) Progressive realisation

106. Importantly, in recognition of the potential for ESC rights to have public resource implications, international law does not require full and immediate realisation of ESC rights. Instead, article 2(1) of ICESCR requires 'progressive realisation' of ESC rights:

> 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 realisation of the rights recognised in the present Covenant by all appropriate means, including particularly the adoption of legislative measures.

The Limburg Principles[125] and Maastricht Guidelines[126] on the implementation of ICESCR provide the authoritative statement on states' obligations under this treaty and guidance as to the meaning of 'progressive realisation'. For instance, Principle 6 provides that there is no single road to full realisation of ESC rights and Principle 8 recognises that although 'the full realisation of rights is to be achieved progressively, the application of some rights can be made justiciable immediately while other rights can become justiciable over time'.

107. Given that ESC rights require only progressive and not immediate realisation, their inclusion in a *Human Rights Act* will not overburden the government, particularly in times of economic hardship, such as we are seeing as a consequence of the global financial crisis.

(b) Indivisibility of rights

108. PILCH's view is that CP and ESC rights are interdependent and indivisible. The protection of one category of rights, without the other, undermines the fulfilment of any rights. CP rights cannot have meaning or be realised unless ESC rights are also realised. For instance, a person who becomes seriously ill because of a lack of basic health care is unlikely to be in a position to exercise her CP rights, such as the right to participate in public life. As demonstrated in the case study below, the right to life is

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[124] See generally Ellie Palmer, *Judicial Review, Socio-Economic Rights and the Human Rights Act* (2007), 42.

[125] *Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights* (1987) 9 *Human Rights Quarterly* 122.

[126] *Maastricht Guidelines on Violations of Economic, Social and Cultural Rights*, (1998) 20 *Human Rights Quarterly* 691.

likely to be meaningless unless the state has realised a person's right to adequate health care.

Case Study L – Pregnant woman dies because of inadequate access to health services

In 2009, Ms C, a 38 year old rural woman with an ectopic pregnancy, died after reportedly waiting several hours for an ambulance. Commenting on the significance of Ms C's death, a reproductive health expert has noted: 'death from ectopic pregnancy … generally occurs only in third world countries with limited access to medical services'[127]. It is especially concerning therefore that Ms C's death occurred following the closure of 20 maternity services in Victoria, and in the context of concerns regarding an under-resourced healthcare system. Ms C's death is currently being investigated by the State Coroner.

Ms C's death highlights serious concerns about the accessibility of healthcare services in rural areas, including, in particular, reproductive health services. Under international human rights law,[128] states are obligated to ensure equal access to quality healthcare services. The CESCR Committee has explained, for instance, that '[p]ublic health infrastructures should provide for sexual and reproductive health services, including safe motherhood, particularly in rural areas'[129]. Whilst, internationally, Australia has agreed to respect, protect and fulfil the right to the highest attainable standard of health, it has failed to adopt all appropriate measures to guarantee this right at the domestic level. In this connection, one authoritative report notes: '[p]rovision of public health care in Australia is suffering from chronic underfunding, a decaying public hospital system, rising medical costs, inadequate coverage, and inaccessibility – particularly for disadvantaged and marginalised people'[130].

Source: PILCH

109. The practical ramifications of Australia's failure to guarantee the right to the highest attainable standard of health are evidenced clearly in cases such as Ms C's. The enactment of a national *Human Rights Act* that incorporates this fundamental human right is imperative if Australia is to meet its international human rights obligation to ensure that all Australians have equal access to quality healthcare services. While such an Act would not give courts the responsibility for making complex decisions about the appropriateness of various health policies, it would have required the Government to explicitly consider the human rights implications of its decision to close down the maternity units and may have given women in regional areas a powerful new advocacy tool to lobby the government against such closures, prior to the death occurring.
110. A similar example of the indivisibility of ESC and CP rights is illustrated in the context of homelessness, where the right to privacy cannot be realised for a person who is

[127] 'Anger over "Third World" Pregnancy Death', *The Age,* 7 January 2009.

[128] See, eg, CEDAW, art 12; CESCR, art 12.

[129] CESCR Committee, *General Comment No. 14: The Right to the Highest Attainable Standard of Health*, UN Doc. E/C.12/2000/4 (2000), at para 36.

forced to live on the streets due to the lack of affordable housing (ie, a violation of the right to adequate housing). As these examples demonstrate, ESC and CP rights cannot be separated without stripping the rights of real meaning.

111. PILCH therefore submits that a *Human Rights Act* should include ESC rights as well as CP rights. It should also include those rights spelt out in international human rights treaties to which Australia is a party, including those guaranteed in the *Convention on the Rights of the Child*, the *Convention on the Rights of Persons with Disabilities* and CEDAW.

Recommendation 4

PILCH recommends that a *Human Rights Act* should protect and promote ESC rights as well as CP rights.

Recommendation 5

PILCH recommends that a *Human Rights Act* should enshrine the following rights, amongst others:

- the right to self-determination;
- the right to legal recourse when rights have been violated, even if the violator was acting in an official capacity;
- the right to equality of men and women in the enjoyment of their human rights;
- the right to life;
- the freedom from inhuman or degrading treatment or punishment;
- the freedom from arbitrary arrest or detention;
- the right to humane treatment in detention;
- the right not to be imprisoned for an inability to fulfil a contractual obligation;
- the right to non-discrimination;
- the freedom of movement;
- the right to a fair hearing;
- the prohibition against double jeopardy;
- the right to presumption of innocence until proven guilty;
- the right to appeal a conviction;
- the prohibition against retrospective punishment and penalty;
- the right to be recognised as a person before the law;
- the right to privacy and protection of that right by law;
- the freedom of thought, conscience, and religion;

[130] National Association of Community Legal Centres, Human Rights Law Resource Centre and Kingston Legal Centre, *Freedom Respect Equality Dignity: Action;* NGO Submission to the UN Committee on Economic, Social and Cultural Rights (2008), at 115 ['*Freedom Respect Equality Dignity*'].

- the freedom of opinion and expression;
- the freedom of assembly and association;
- the right to protection of the family;
- the right of children to special protection and assistance;
- the freedom from slavery and servitude;
- the right to liberty and security of the person;
- the right to vote;
- the right to equality of and before the law;
- the right of ethnic, religious or linguistic minorities to enjoy their own culture, religion and language;
- the right to take part in cultural life;
- the right to an adequate standard of living, including adequate housing;
- the right to work, including the right to gain one's living at work that is freely chosen and accepted;
- the right to just conditions of work and wages sufficient to support a minimum standard of living;
- the right to equal pay for equal work and equal opportunity for advancement;
- the right to form trade unions and the right to strike;
- the right to adequate food, water and sanitation;
- the right to the enjoyment of the highest attainable standard of physical and mental health;
- the right to social security; and,
- the right to education, including free primary education, and accessible education at all levels.

(c) Human rights impact of climate change

112. Given the inadequacy of Australia's legal system to protect people from the adverse human rights impacts of climate change (such as health, housing and employment) identified at section 6.6 above, PILCH believes that the National Consultation is a timely and critical opportunity for the Federal Government to incorporate climate change considerations into the human rights framework for Australia. In particular, PILCH recommends that there be careful consideration of whether and how a *Human Rights Act* might achieve better protection for persons adversely impacted by climate change.

113. The adverse human rights impacts of climate change are not easily addressed within the current human rights framework. In part, this is because many of the consequences of climate change are likely to impact on future generations. For example, the ability of future generations of Indigenous Australians to enjoy their land

and cultural practices associated with the land, and to access a healthy food from the land, is jeopardised by climate change. Environmental degradation caused by climate change, risks denying future generations of Indigenous Australians the right '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,' a right currently protected under the Victorian Charter.

114. The right of future generations to an environment of a particular quality is encapsulated by the concept of 'intergenerational equity'. There is growing acceptance of this concept in legal jurisprudence.[131]

115. With these difficulties and this concept in mind, there are a number of ways in which this issue might be addressed in a *Human Rights Act*, including through:

- inclusion of a right to a healthy environment in a *Human Rights Act*;
- extension of human rights protection to future generations, either generally or only with respect to the right to a healthy environment; or,
- inclusion of preambular recognition in a *Human Rights Act* of the concept of 'intergenerational equity'.

(i) Right to a healthy environment?

116. Some commentators have suggested that a new right should be established that enshrines a right to a healthy environment. Others contend that the current catalogue of rights sufficiently protects persons adversely impacted by climate change. For instance: the right to life; the right to food and water; the right to housing; the rights of children; and non-discrimination rights.[132]

117. Specific recognition of the right to a healthy environment would elevate this issue commensurate with its importance and the gravity of the human rights consequences of climate change. This would ensure that law and policy makers specifically consider the impact of laws and polices on the health of the environment.

118. Examples of rights provisions relating to the environment in domestic constitutions include:

- Section 24 of the South African Bill of Rights:

[131] *Environment Protection and Biodiversity Conservation Act 1999* (Cth), s 3A(c); *Taralga Landscape Guardians Inc v Minister for Planning and RES Southern Cross Pty Ltd* [2007] NSWLEC 59; International Human Rights Clinic & Science & Environmental Health Network, *Models for Protecting the Environment for Future Generations* (2008), 7, 8 [citations omitted].

[132] See, eg, *Lopez-Ostra v Spain* (1995) 20 EHRR 277 (recognising that the right to life and the right to respect for the home, private and family life include environmental protections).

> Everyone has the right:
>
> (a) to an environment that is not harmful to their health or well-being; and
>
> (b) to have the environment protected, for the benefit of present and future generations, through reasonable legislative and other measures that:
>
> i. prevent pollution and ecological degradation;
>
> ii. promote conservation; and,
>
> iii. secure ecologically sustainable development and use of natural resources while promoting justifiable economic and social development.

- Article 45(1) of the Spanish Constitution provides for a right to 'an environment suitable for the development of the person'.
- Article 24 of the African Charter provides that: 'All peoples shall have the right to a general satisfactory environment favourable to their development'.

119. Recently, the UK Joint Committee on Human Rights[133] considered the inclusion in the UK Bill of Rights, of the right to a healthy environment. The Committee noted: 'We therefore believe that certain carefully defined environmental rights have now attained a sufficiently recognised status to be made a legally binding human right.'[134] The Committee concluded: 'there is a strong case to be made for including the right to a healthy and sustainable environment in a UK Bill of Rights', and suggested the following wording:

> Everyone has the right to an environment that is not harmful to their health.
>
> Everyone has the right to information enabling them to assess the risk to their health from their environment.
>
> Everyone has the right to a high level of environmental protection, for the benefit of present and future generations, through reasonable legislative and other measures that –
>
> (i) prevent pollution and ecological degradation;
>
> (ii) promote conservation; and,
>
> (iii) ensure that economic development and use of natural resources are sustainable.[135]

(ii) Future generations as rights bearers?

120. There is increasing debate in national and international fora regarding whether or not future generations should be rights bearers. This debate is particularly relevant in the context of climate change because of the potential for today's laws, policies and

[133] Joint Committee on Human Rights, UK Parliament, *Twenty-Ninth Report* (2008), at http://www.publications.parliament.uk/pa/jt200708/jtselect/jtrights/165/16502.htm.

[134] Ibid at para 209.

practices to negatively impact upon the health of the environment, which, in turn, affects the human rights and fundamental freedoms of future generations. Arguably, where no individual's rights are currently being violated (because the environmental impact is very likely to occur in the future), there is no legal ability to prevent current actions that are highly likely to violate the human rights of future generations, or to compel state action to ensure that such violations do not occur. If future generations were rights bearers, for example in the context of a right to a healthy environment or the right to health, there might be greater legal ability to prevent rights violations.

121. As set out above, the South African Bill of Rights extends to protection 'for the benefit of present and future generations'. Similarly, the UK Joint Committee on Human Rights recommends the inclusion in the proposed UK Bill of Rights of a 'right to a high level of environmental protection, for the benefit of present and future generations'.

122. This is a contentious notion, as it is a departure from the usual model of rights bearers being present human beings. Further, consideration needs to be given to who might enforce the rights of future generations and how the interests of future generations might be legitimately identified. The way that this problem has been addressed in South Africa is to frame the right as the right of the present generation to have the environment protected for the benefit of the future generation. This avoids the problem of future generations as rights bearers with respect to the right to a healthy environment.

(iii) Preambular recognition of intergenerational equity?

123. The preamble to a *Human Rights Act* might include recognition of the intersection between human rights and climate change by referring to the concept of intergenerational equity and identifying this concept as an important contextual principle in the implementation and adjudication of the human rights protected in the Act. The following are suggested examples of preambular language:

- The Federal Government is *committed* to protect the climate system and health of the environment for present and future generations.[136]
- The Federal Government *commits* to maintain the environment, including the ecological processes on which life depends, for the benefit of future generations.[137]

[135] Ibid at para 210.

[136] Adapted from the preamble of *The United Nations Framework Convention on Climate Change,* open for signature 14 June 1992 (entered into force 21 March 1994) (stating 'the parties to this convention….determined to protect the climate system for present and future generations').

[137] Adapted from *Taralga Landscape Guardians Inc v Minister for Planning and RES Southern Cross Pty Ltd* [2007] NSWLEC 59, 74.

Recommendation 6

PILCH recommends that the Federal Government give careful consideration to how a *Human Rights Act* might afford protection to current and future generations whose rights are, and are likely to be, adversely impacted by the environmental consequences of climate change.

8.4 Who should be bound by a *Human Rights Act?*

124. Legislative models for domestic human rights legislation usually impose human rights obligations on the state and entities carrying out state-like functions. Such bodies are commonly described as 'public authorities'. This is in-line with the genesis of the international human rights framework that was established following the World War II to guard individuals against future excesses and abuses by states. The position at international law provides that states are obligated to respect, protect and fulfil the human rights of their citizens and persons within their borders.

125. PILCH submits that a *Human Rights Act* should impose obligations on 'public authorities', which should include the three branches of government: the Judiciary; Parliament; and, the Executive. We explain below the nature and extent of the proposed obligations on each branch of government.

(a) Judiciary

126. PILCH proposes that a *Human Rights Act* should require federal courts to interpret legislation compatibly with human rights and make statements of incompatibility in respect of legislation that is unable to be interpreted compatibly with human rights. In our view, courts should not be empowered to invalidate legislation that is incompatible with human rights. It is also important that a *Human Rights Act* contain a provision enabling courts to consider international and comparative human rights jurisprudence, when interpreting and applying such an Act. This would enable federal courts to gain the benefit of the wealth of human rights jurisprudence that domestic, regional and international courts and treaty bodies have developed over the past fifty years. Whilst such jurisprudence should not be considered binding on federal courts, it should be utilised by them in interpreting a *Human Rights Act*. These obligations on courts are largely consistent with the obligations imposed under the Victorian Charter.

Recommendation 7

PILCH recommends that a *Human Rights Act* should impose obligations on courts to:
- interpret legislation compatibly with human rights;
- consider international and comparative domestic human rights jurisprudence when interpreting and applying the Act; and

- make statements of incompatibility with respect to legislation that is unable to be interpreted compatibly with human rights.

(b) Parliament

127. PILCH proposes that a *Human Rights Act* should impose on parliament three key obligations, namely, the obligations to:

- take human rights into account in the law-making process, and to table before parliament a statement that records whether or not a proposed bill is compatible with human rights and the nature and extent of any incompatibility. This obligation is important because it requires parliament to specifically consider human rights in the law-making process and to be explicit about its intention to make laws that are incompatible with human rights, thereby increasing transparency and accountability in the law-making process;
- properly scrutinise all legislation that comes before parliament (new Bills and amending Acts) to ensure compatibility with human rights; and,
- respond to declarations of incompatibility issued by courts (as discussed above).

As previously mentioned, these obligations do not impinge upon the sovereignty of parliament, since parliament retains the ability to make and amend laws, including laws that are incompatible with human rights.

Recommendation 8

PILCH recommends that a *Human Rights Act* impose obligations on parliament to:
- take human rights into consideration in the law-making process;
- table a statement of compatibility before parliament in relation to all bills;
- scrutinise all legislation that comes before parliament for human rights compatibility; and,
- respond to declarations of incompatibility issued by the courts.

(c) Executive

128. PILCH proposes that two key obligations be imposed on public authorities, namely a:

- procedural obligation to take human rights into account in decision-making and implementation; and,
- substantive obligation to act compatibly with human rights.

The objective of such provisions would be to foster a human rights culture within government, rather than burdening government with increased regulation and process requirements. Nevertheless, an effective remedy must be available where there government fails to act compatibly with human rights. A *Human Rights Act* should

stipulate that executive action that is incompatible with human rights is unlawful, and declaratory and injunctive relief should be available to the complainant. In addition, the procedural obligation should be stronger than the traditional administrative law notion of 'relevant and irrelevant considerations' that can lead to a 'tick the box' compliance exercise. The procedural obligation on public authorities under the Victorian Charter is to 'give proper consideration to'[138] human rights. PILCH considers that this formulation adopts the appropriate level of obligation as it requires the decision-maker to give real and genuine consideration (ie, greater than a 'tick the box' assessment) to human rights and to allocate the appropriate weight in the circumstances to such consideration. That is, this provision would enable a decision-maker to properly consider the individual circumstances of affected persons and to weigh each consideration according to the individual circumstances of the case. PILCH recommends a similar obligation be imposed on government in a *Human Rights Act*.

129. As the executive arm of government is large, complex and increasingly difficult to decipher where government ends and the private sector commences, it is critical to define which entities are and are not to be subject to these procedural and substantive obligations. Commentary divides the entities encompassed by this definition into two categories: core public authorities; and, functional public authorities.[139]

(i) Core public authorities

130. Core public authorities under the Victorian Charter are defined as follows:

- public officials, such as public sector employees, certain judicial employees and parliamentary officers;
- government departments and entities established by statutory provisions exercising functions of a public nature;
- Victoria Police;
- Ministers;
- Parliamentary Committees;
- Local Councils; and,
- other entities declared under the regulations to be 'core' public authorities.

In our view, a *Human Rights Act* should contain a similar definition of core public authorities that lists the entities enumerated above (other than local councils and with amendments for jurisdictional differences).

[138] Victorian Charter, s 38.

[139] These terms are not used in the legislation, but are referred to in commentary on the Victorian Charter.

(ii) Functional public authorities

131. PILCH submits that the term 'public authorities' should be defined broadly to include all entities (especially private entities) that conduct functions that are traditionally considered state functions. This is increasingly important given the trend to out-source key government responsibilities, including functions that impact on marginalised and disadvantaged people, such as: prisoners, persons suffering mental illness, medical patients, persons experiencing homelessness, persons in aged care facilities, children, persons with disabilities, and public transport users. Private entities that conduct such functions are 'functional public authorities'.

132. The Victorian Charter's definition of public authorities includes a helpful list of factors to be taken into account when determining whether or not a particular entity is a functional public authority. The UK HR Act, in contrast, does not include a similar list in its definition of public authority. This has lead to some uncertainty and inconsistencies in case law on what is and is not a public authority, and has given rise to calls to amend the Act to clarify and broaden the definition. The definition of public authority under the Victorian Charter has been less controversial, presumably because of the more prescriptive definition that sought to identify what might be 'functions of a public nature'.

133. In addition, the Victorian Charter and its Explanatory Memorandum[140] provide examples of functional public authorities and the type of functions that parliament considers are functions of a public nature. PILCH considers that these examples and the list of factors in the Charter have been helpful in determining what are functional public authorities and may have avoided unnecessary litigation on this topic.

134. The approach taken in the ACT HRA is to specify those functions that are to be considered 'functions of a public nature'. That Act lists the following functions: the operation of detention places and correctional centres; and, the provision of any of the following services: gas, electricity and water supply; emergency services; public health services; public education; public transport; or, public housing[141]

135. PILCH considers that this approach is preferable as it provides clarity around the notion of public authorities and would avoid some of the legal disputes in the UK.

[140] Explanatory Memorandum, Victorian Charter, 4.

[141] *Human Rights Amendment Act 2008* (ACT), s 7.

Recommendation 9

PILCH recommends that a *Human Rights Act*:

- impose substantive and procedural obligations on public authorities;
- include a broad definition of public authorities that encompasses entities (whether public or private) that carry out the following services: prisons and detention centres; gas, electricity and water supply, emergency services; public health (including psychiatric facilities and aged care facilities); public education; public transport; and, public housing; and,
- specifically list, in the definition of public authority, the private entities that are considered to be public authorities and the functions that are to be considered 'functions of a public nature'.

(d) Corporations – private sector

136. International human rights law does not impose any direct obligations on corporations or other non-state actors (eg, charities or religious institutions) to comply with human rights norms and standards. Similarly, most domestic instruments do not extend human rights obligations to these actors, except to the extent that they are exercising functions of a public nature (see above). This is because of the historical genesis of rights as intended to protect individuals from state abuse. However, many commentators see this approach as problematic, particularly with the prevalence of transnational corporations undertaking significant work that directly impacts individuals, and often in jurisdictions where local state protection of rights is non-existent or minimal.

137. As a reflection of the exponential growth of corporate power and changes in the political and economic context in which rights are operating, the Special Representative of the Secretary General on Business and Human Rights, Professor John Ruggie, is currently examining the relationship between human rights and non-state commercial actors. In a recent report,[142] Professor Ruggie recommended the development of a tripartite regulatory framework based on three core principles: the state duty to protect against human rights abuses by third parties, including business; the corporate responsibility to respect human rights; and, the need for more effective access to remedies.

138. Yet, the application of international human rights law to corporations remains very much in its nascent stages. For this reason, it would be premature to extend any obligations in a *Human Rights Act* to corporations. Even so, it should be emphasised that the Australian Government is obligated under international human rights law to take steps to protect individuals against rights violations by

[142] Report of the Special Representative of the Secretary General on the Issues of Human Rights and Transnational Corporations and other business enterprises, Professor John Ruggie, to the Human Rights Council, 'Protect, respect and

third parties. This includes rights violations perpetrated by corporations over whom Australia has jurisdiction.

139. The ACT has recently amended the ACT HRA to enable private entities to 'opt-in', by which is meant that they voluntarily agree to be bound by the obligations in that Act.[143] The ACT approach has the benefit of fostering cultural change and encouraging best practice amongst private entities. Yet it is accepted that an opt-in provision is unlikely to be taken up by large numbers of private entities, as evidenced by the fact that, at the time of writing, no private entity has 'opted-in' to the ACT HRA. Moreover, of the entities that do opt-in, many are likely to be organisations with an already well developed understanding of human rights and substantial internal human rights compliances processes. Therefore, whilst an opt-in provision may foster a human rights culture and encourage best practice in the private sector, its impact on improving the human rights compatibility of business practices is likely to minimal.

140. PILCH's view is that the promotion of human rights compatible practices in the private sector is likely to be achieved through measures such as: the many 'soft law' initiatives that have been developed in the private sector;[144] the promotion by Government of a broader culture of human rights (including via an opt-in provision); leveraging of Government purchasing power to protect and promote human rights; and, human rights education for the private sector and consumers who are able to make demands on business for better human rights compliance. The inclusion of an opt-in provision would further the second of these measures by sending a message to the private sector that human rights are applicable to them.

Recommendation 10

PILCH recommends that a *Human Rights Act* include an opt-in provision for private entities.

8.5 Who should be rights bearers?

141. Under international human rights law, human beings are rights bearers; rights protections do not extend to non-human entities, such as corporations or animals. The rationale for this is that human rights are derived from the inherent dignity and value of

remedy: A Framework for Business and Human Rights', A/HRC/8/8, 7 April 2008, see http://www.reports-and-materials.org/Ruggie-report-7-Apr-2008.pdf.

[143] ACT HRA, s 40D.

[144] See, eg, *UN Global Compact* at http://www.unglobalcompact.org; *The 'Equator Principles'; A Financial Industry Benchmark for Determining, Assessing and Managing Social & Environmental Risk in Project Financing* at http://www.equator-principles.com/documents/Equator_Principles.pdf; *United Nations Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights*, UN Doc. E/CN.4/Sub.2/2003/12/Rev.2.

the lives of individual human beings. Accordingly, most human rights instruments are limited to the protection of human beings. The noted exception is the Canadian Charter of Rights and Freedoms that protects the rights of both individuals and corporations.[145] PILCH submits that because human rights derive from a person's status as a human being and corporations are not humans and do not require the protections from state abuse that the human rights framework was established to achieve, a *Human Rights Act* should apply only to human beings.

142. PILCH considers that, to the extent permissible by law, a *Human Rights Act* should protect and promote the human rights of Australian citizens and all persons within Australian territory and over whom Australia has jurisdiction. This is consistent with the notion that human rights inhere in human beings by virtue of the fact that they are human. It is also particularly important given the recent treatment of non-citizens in Australia, as demonstrated in case study D above, which describes the deportation of a Vietnamese person who had lived in Australia for 30 years. It should not be permissible to violate the rights of a person who is subject to Australia's jurisdiction but who is not an Australian citizen, by virtue of their status as a non-citizen.

Recommendation 11

PILCH recommends that a *Human Rights Act* should protect and promote the human rights and fundamental freedoms of:

- human beings, by which is meant that rights protections should not extend to non-human entities; and,
- Australian citizens and all persons under the jurisdiction of the Federal Government.

8.6 Permissible limitations on human rights

143. In recognition of the fact that individual's human rights can and frequently do conflict with the rights of others and with broad community values or interests, most human rights are not absolute. This means that most human rights can be limited in some way. Before discussing how human rights may be limited, this section looks at those rights that can never be limited (absolute rights) and then at the special circumstances in which states are permitted to limit rights beyond the usual limitation principles (derogation).

(a) Absolute rights

144. Under International law, there are a number of human rights that are 'absolute', by which is meant that they cannot be limited in any way, at any time, including during a state of emergency. For instance, absolute rights contained in the ICCPR include: the

[145] The Charter of Human Rights is now entrenched in the Canadian Constitution pursuant to the *Constitution Act 1982.*

freedom free from torture and other cruel, inhuman or degrading treatment or punishment (art. 7); the freedom from slavery and servitude (arts. 8(1) and (2)); the prohibition on genocide (art. 6(3)); the prohibition on prolonged arbitrary detention (art. 9(1)); the prohibition on the retrospective operation of criminal laws (art. 15); and, the right of everyone to recognition everywhere as a person before the law (art. 16). No limitation or derogation is permitted in respect of these rights.

145. PILCH considers that a *Human Rights Act* should specifically list those rights that are absolute, in respect of which no limitations can apply.

(b) Derogation

146. Under international law, states are permitted to temporarily derogate from their treaty obligations (other than those identified above) in exceptional circumstances, such as in a 'time of public emergency which threatens the life of the nation', but only to the 'extent strictly required by the exigencies of the situation'[146]. For example, article 4 of the ICCPR states:

> In times of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the States Parties to the present Covenant may take measures derogating from their obligations under the present Covenant to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their other obligations under international law and do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin.

Nevertheless, there are a number of rights that are considered so fundamental that they are 'non-derogable', meaning that the operation of those rights cannot be suspended in times of emergency.[147] For instance, the following are non-derogable rights at international law: the right to life; the freedom from torture or cruel, inhuman and degrading treatment or punishment; the freedom of thought, conscience and religion; the freedom from medical or scientific experimentation without consent; and, the right of equal recognition before the law.

147. Obviously any provision that enables the executive to suspend the operation of human rights protections has the potential to be abused. It is therefore critical that stringent safeguards are in place to ensure that, if derogation is to be permitted, it cannot be abused. Such safeguards could include requirements that derogation be: proportional to the nature of the state of emergency; permitted for the minimum time period necessary for the purposes of the state of emergency and no longer than the duration

[146] ICCPR, art 4.

[147] The distinction between non-derogable and absolute rights is that absolute rights cannot be limited or suspended, whereas non-derogable rights can be limited (in accordance with the usual limitations principles as discussed below) but cannot be suspended. There is some overlap between absolute and non-derogable rights.

of the state of emergency; and, permitted only in times of dire public emergency specifically declared as such by the executive government. They could also include a requirement that any legislation enacted in respect of the state of emergency that derogates from human rights is required to be reviewed by parliament at regular intervals, or that derogation not be permitted in respect of absolute and non-derogable rights.

148. PILCH considers that derogation from rights should be allowed in specified, exceptional circumstances, but certain rights should be non-derogable and those rights should be identified in the Act. Further, any derogation permitted should be subject to stringent safeguards to protect against abuse.

(c) Limitations provision

149. For all other human rights (ie, non-absolute and derogable rights), limitations should be permissible in accordance with a detailed limitations provision. Many domestic human rights instruments include a general limitations provision that sets out the framework for how conflicting rights should be balanced and the justification and extent of limitations of rights. General limitations provisions are included in the ACT *Human Rights Act*,[148] the Victorian Charter[149] and the NZ Bill of Rights.[150]

150. Generally these limitations provisions are consistent with the principles described in the *Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights*.[151] Such principles include that:

- no limitation may be inconsistent with the essence of the ICCPR or the particular right concerned;
- all limitation clauses should be interpreted strictly and in favour of the rights at issue;
- limitations must not be applied arbitrarily and must be subject to challenge and review;
- where a limitation is required to be 'necessary', it must: be based on one of the grounds which permit limitations (namely, public order, public health, public morals, national security, public safety or the rights and freedoms of others); respond to pressing need; pursue a legitimate aim; and, be proportionate to that aim.

[148] ACT HRA, s 128.

[149] Victorian Charter, s 7.

[150] *Bill of Rights Act 1990* (NZ), s 5.

[151] UN Economic and Social Council, *Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights*, UN Doc E/CN.4/1985/4, Annex (1985).

151. PILCH submits that a general limitations provision should be consistent with these principles. As the limitations provision in section 7 of the Victorian Charter is consistent with these principles, PILCH submits that it is an appropriate model upon which to base a general limitations provision for a federal *Human Rights Act*. Importantly, section 7 of the Victorian Charter, requires courts, policy-makers and decision-makers to consider whether the proposed limitation is reasonable and can be 'demonstrably justified in a free and democratic society based on human dignity, equality and freedom'. Further, consideration must be given to the purpose, nature and extent of the limitation and any less restrictive means reasonably available to achieve the identified purpose. These requirements provide a framework to guide decision-makers through the limitations analysis and enable the full range of interests and conflicting rights to be examined and balanced in a systematic and considered way. This limitations analysis is a useful tool not only for courts, but also for the development of human rights compliant policies, procedures and work practices in government and the private sector.

Recommendation 12

PILCH recommends that a *Human Rights Act*:

- specify those rights that are absolute and state that such rights cannot be limited at any time or in any way;
- state that derogation is permissible in exceptional, specified circumstances and identify those rights that are non-derogable; and,
- include a detailed limitations provision modelled on section 7 of the Victorian Charter.

8.7 Remedies for human rights violations

152. If human rights and fundamental freedoms are to be meaningful and not just illusory, mechanisms must exist that enable victims to obtain redress, and perpetrators to be held legally accountable, for their violation.[152] The ICCPR requires States Parties to ensure that effective remedies are available to victims of rights violations, that a competent authority determines such liabilities and those remedies are enforced.[153] PILCH submits that a *Human Rights Act* should establish a freestanding cause of action in respect of violations and provide for judicial and non-judicial remedies.

(a) Freestanding cause of action

153. An important issue is whether or not a *Human Rights Act* should establish a freestanding cause of action in respect of human rights violations. One of the distinctive features of the Victorian Charter is that it explicitly denies litigants a

[152] See ICCPR, art 2(3); ICESCR, art 2(1).

[153] ICCPR, art 2(3).

freestanding cause of action in respect of alleged Charter violations: individuals may only allege violations of their Charter rights in cases where they have another, 'non-Charter' cause of action.[154] In practice, the Victorian Charter has had a very limited impact on litigation. During 2008, human rights considerations were integrated into a small number of proceedings over the course of the year and no matters were initiated solely on the basis of the Charter becoming fully operational'[155].

154. While some may argue that the lack of a freestanding cause of action has subdued the Victorian Charter's impact upon litigation, such sentiment is not borne out by the experience in other jurisdictions. For example, under the UK HR Act, which does establish a freestanding cause of action, there has not been a noticeable increase in the volume, length or costs of litigation.[156] Moreover, after 5 years of operation of the ACT HRA absent a freestanding cause of action, the legislature has now recognised that concerns regarding the impact of the Act on litigation were unfounded and have established a new, freestanding cause of action.[157]

155. PILCH submits that a *Human Rights Act* should include a freestanding cause of action for violations of that Act, so that individuals can seek redress for rights violations. In PILCH's view, the exclusion of a freestanding cause of action under the Victorian Charter undermines the Charter's effectiveness in upholding human rights. Further, in attempting to draft a provision that allows an action to be brought in respect of a violation of human rights only together with another cause of action, the provision has been rendered cumbersome and ambiguous. Moreover, as the experience in the UK and the ACT demonstrates, the exclusion of a freestanding cause of action will not lead to a perceptible increase in litigation.

(b) Judicial remedies

156. In PILCH's view, a *Human Rights Act* should provide for a broad range of judicial remedies for human rights violations. The provision of a broad of range of remedies would give courts flexibility in determining the appropriate and most effective remedy in a particular case. PILCH considers that judicial remedies should include:

- declarations that a law is incompatible with human rights and requiring the government to respond to this incompatibility;
- an order that a law, policy or program be implemented in accordance with human rights;

[154] Victorian Charter, s 39.

[155] VEOHRC, 2008 Report, above n 96, at 141.

[156] Administrative Court of England and Wales, *Report for the Period April 2001 to March 2002* (2003).

- an injunction, declaration or order that conduct or activity amounting to a breach of human rights cease;
- compensation and reparations (eg, restitution, rehabilitation and measures of satisfaction such as public apologies, public memorials, guarantees of non-repetition or changes in relevant laws); and,
- such remedies as are 'just and appropriate'.

(c) Non-judicial remedies

157. A *Human Rights Act* should also include a range of non-judicial remedies that allow for the resolution of rights violations without going to court and provide an opportunity for public authorities to learn from, and offer solutions to, rights violations. Such remedies might include: dispute resolution processes such as mediation or conciliation; complaints systems through an independent Human Rights Commission (such as the AHRC) or an Ombudsman; a requirement that public authorities establish internal human rights complaints mechanisms; the AHRC report to parliament annually on the implementation of the Act; and, compliance reporting requirements (eg, detailing human rights compatibility and complaints received) for public authorities. The inclusion of non-judicial remedies in a *Human Rights Act* is important, as it would promote a positive human rights culture, rather than one that is negative, reactive and court-bound.

Recommendation 13

PILCH recommends that a *Human Rights Act* should:
- include a freestanding cause of action to pursue alleged violations of that Act; and,
- provide for both judicial and non-judicial remedies for violations of human rights.

9. Other measures necessary to ensure an effective *Human Rights Act*

158. PILCH submits that the enactment of a *Human Rights Act* is not, of itself, sufficient to improve the recognition, exercise and enjoyment of human rights and fundamental freedoms in Australia. Indeed, the enactment of any legislation is unlikely to ever bring about the desired changes, unless accompanied by a suite of other measures designed to promote awareness of, and ensure the effective implementation of, that instrument, as well as the effective protection and promotion of rights, in general. For this reason, it is important that a *Human Rights Act* is introduced together with other measures designed to:

- strengthen and expand human rights education;

[157] ACT HR Act, s 40C(2).

- improve access to justice;
- expand the AHRC's mandate; and, for example,
- improve data collection on human rights violations.

It is important that these measures are pursued in conjunction with, and not in isolation from, the enactment of a *Human Rights Act*.

9.1 Strengthening and expanding human rights education

159. PILCH believes that, in order to ensure the better protection and promotion of human rights in Australia, it is necessary to strengthen and expand human rights education. The need for human rights education has already been addressed, in part, in section 7.4 of this submission. This section expands on that discussion and further outlines the form that such education might take.

160. PILCH submits that the introduction of a *Human Rights Act* should be accompanied by a robust educational program, both within and outside of government. The importance of such a program is highlighted by the UK experience, where in its initial years of operation, there was misunderstanding regarding the nature and scope of the UK HR Act. According to the Department for Constitutional Affairs, deficiencies in the training and guidance that accompanied the introduction of the UK HR Act led to the misapplication of the legislation and fuelled a number of damaging myths about human rights, which are only now being overcome.[158] The Federal Government should learn from this experience and adopt an educational campaign, similar to that undertaken upon introduction of the Victorian Charter.[159] This would include developing a 'whole-of-government strategy' that would ensure that information about the *Human Rights Act* is provided in an effective manner to government departments, the judiciary, lawyers, community sector workers, media and the public.

161. As well as education about the content of a *Human Rights Act* and the nature of the protections it affords, PILCH submits that the Federal Government should implement a long-term program of human rights education, aimed at fostering a human rights culture within Australia. As the Federal Attorney-General Rob McClelland has noted, 'the protection and promotion of human rights enhances our ability to work and live together in an inclusive society where we respect the capacity and value of each and every person'[160]. The way that people treat each other in every day life is based on the

[158] Department for Constitutional Affairs, *Review of the Implementation of the Human Rights Act*, (2006), 29.

[159] For information about the Victorian approach, see VEOHRC, *The 2007 Report on the Operation of the Charter of Human Rights and Responsibilities: First steps forwards* (2008).

[160] The Hon Robert McClelland MP, *Launch of It's Your Right* (speech delivered at the Settlement Council Conference, Multicultural Centre, Canberra, 28 May 2009).

assumptions made about the rights of others and our responsibilities towards them. Tackling issues such as racism and domestic violence requires not only strong laws but also a fundamental change in underlying attitudes. PILCH believes that broad human rights education, particularly in schools, is fundamental to achieving this change. For example, the Federal Government might consider adopting initiatives such as the incorporation of compulsory human rights modules into school curricula.[161]

Recommendation 14

PILCH recommends that the Federal Government should:

- adopt a comprehensive communication and education campaign designed to provide relevant and targeted information about any new *Human Rights Act*; and,
- implement a long term human rights program designed to foster a human rights culture in Australia.

9.2 Improving access to justice

162. PILCH believes that equitable access to justice is central to the effective protection and promotion of human rights in Australia. As the Attorney-General has explained, 'unless justice is accessible, respect for the rule of law is diminished and the integrity of our justice system is compromised'. Access to justice, he explained, 'helps guarantee sound democratic governance and promotes social stability … [it] is a basic human right and is central to the rule of law'. The Attorney-General also described the importance of 'ensuring that all our citizens can access the justice system, regardless of their particular circumstances'[162]. PILCH respectfully endorses this position, and submits that an individual's access to justice should not be prejudiced by reason of their inability to obtain adequate information about the law or legal system, or to afford the cost of legal advice.

163. Under international human rights law, the Federal Government is obligated to ensure access to justice.[163] Yet, in PILCH's experience and observation, equitable access to justice is not realised in practice in Australia. For example, the cost of delivering and achieving justice is becoming increasingly high, placing it beyond the reach of individuals, particularly the marginalised and disadvantaged. The HRC recently noted its concern regarding Australia's failure to ensure 'adequate access to justice for marginalised and disadvantaged groups'. In so doing, it urged the Federal Government to 'take effective measures to ensure equality in access to justice, by providing adequate services to assist marginalized and disadvantaged people, including indigenous people and aliens'. The HRC further urged the Government to

[161] See HRLRC, *Engage, Educate, Empower: Measures to Promote and Protect Human Rights* (2009), 21-26.

[162] The Hon Robert McClelland MP, 'Remarks at the Queensland Law Society Symposium' (speech delivered at the Convention Centre, Brisbane, 28 March 2009).

[163] See, eg, ICCPR, arts 14-16.

'provide adequate funding for Aboriginal and Torres Strait Islander legal aid, including interpreter services'[164].

164. As explained in section 9.2, pro bono legal services have a long history in improving access to justice and securing human rights in Australia. However, PILCH respectfully submits that the Federal Government needs to improve access to justice if it is to ensure the effective operation of a *Human Rights Act* and effective rights protections, in general.

(a) Right to a fair hearing

165. The cost of delivering and achieving justice is becoming increasingly high, placing it beyond the reach of many individuals, particularly the marginalised and disadvantaged. Litigation costs are so prohibitive[165] that they act as a barrier to: accessing the federal legal system; resolving disputes under that system; and, the ability to realise human rights. These costs include: the cost of legal representation; disbursements costs, including court fees; and, exposure to adverse costs orders.

166. The right to a fair hearing includes the right to equal access to, and equality before, the courts. It also includes procedural fairness. Where the costs of bringing a legal claim are so prohibitive that a significant number of potential litigants cannot afford to pursue legal redress or defend a claim, and are thereby excluded from the court process, the right to a fair hearing is violated.

167. PILCH considers that there are a number of areas of reform necessary to counter the prohibitive cost of delivering justice and, thus, ensure greater access to justice. These include: disbursement costs; costs in public interest litigation; and, limited pro bono services.

(i) Disbursement costs

168. Pro bono legal assistance plays an important role in ensuring that individuals can access justice. However, in order to pursue their legal rights, many litigants or potential litigants need assistance from other professionals. For instance, litigants may require medical opinions as part of their evidence. Litigants also face out-of-pocket expenses, such as interpreter and transcript fees. Even where a litigant is able to secure pro bono assistance, the costs of these disbursements can be a barrier to accessing justice.

169. Several initiatives have been introduced to alleviate the burden of disbursement. Court fee waiver schemes allow for the waiver of most court fees where a party can show financial hardship. Some jurisdictions have established limited disbursement funds to assist litigants in meeting disbursements costs in civil litigation. For example, in Victoria, 'Law Aid' assists individuals to meet disbursements in civil litigation (eg, claims against institutions involving discrimination or oppressive behaviour), where

[164] HRC, *Concluding Observations: Australia*, UN Doc. CCPR/C/AUS/CO/5 (2009), at para 25.

[165] See PILCH, *Submission to the Commonwealth Attorney-General on Protective Costs Orders* (2009); PILCH, *Submission to the Attorney-General of Victoria on Protective Costs Orders* (2008).

they are unable to afford them. Assistance is unavailable in criminal or family law matters.

170. Notwithstanding, PILCH regularly procures pro bono legal assistance in matters where the lack of funding for disbursements creates an obstacle to the matter's progression. PILCH also receives requests for assistance in appeal matters where transcripts are critical, but the client cannot afford the disbursements for them and Law Aid is unavailable. In such cases, PILCH is unable to procure assistance because it requires a copy of the transcript in order to the merits of the case. As the case studies below demonstrate, the limited availability of funding for disbursements can prevent a client from pursuing a meritorious claim, and discourage practitioners from providing pro bono advice. Conversely, where funding is available, this can aid the speedy resolution of disputes outside the courts.

Case Study M

PILCH has received a number of inquiries from persons subject to involuntary treatment orders in psychiatric hospitals who seek legal assistance to challenge their involuntary treatment order ('ITO'). In order to do so, it is usually highly desirable to obtain a second opinion from a qualified clinician as to the appropriateness of the ITO. Frequently, the person is unable to afford the cost of obtaining a second opinion and is advised that his or her legal claim lacks merit without a second opinion. Therefore, the person either decides not to pursue the claim, or is unable to secure pro bono legal assistance on the basis that the claim lacks legal merit.

Source: PILCH

171. PILCH submits that the right to a fair hearing requires increased funding for disbursements to be made available in all jurisdictions and in a broad range of cases. PILCH further submits that a disbursement funding scheme should be extended to apply to 'public interest', criminal and, for example, family matters. In addition, PILCH considers that a disbursement funding scheme should have provision for waiver of any application fee in cases where payment of that fee would cause significant financial hardship or where the matter raises an issue of public interest or human rights. Finally, a disbursements funding scheme should grant funding retrospectively in situations where disbursements were incurred urgently or there is another compelling reason for funding the disbursements.

Recommendation 15

PILCH recommends that the Federal Government establish a scheme for funding disbursements in all jurisdictions in matters where the applicant is represented pro bono.

Recommendation 16

PILCH recommends that a disbursements funding scheme provide for the:

- guidelines for eligibility for assistance to extend to 'public interest cases';
- waiver of any application fee in cases of financial hardship and in 'public interest cases'; and,
- ability to grant funding retrospectively in situations where disbursements were incurred urgently or where there is some other compelling reason.

(ii) Costs in public interest litigation

172. PILCH has observed that many meritorious public interest matters, including those that seek to protect and promote human rights, are not ultimately pursued because of the risk of an adverse costs order. Australia's costs regime acts as a disincentive to public interest litigation, particularly for marginalised and disadvantaged people. This is especially the case where the matter involves an unresolved area of law, in the nature of a test case, such that legal advisors are not able to advise with any degree of certainty the likely outcome of the litigation. Such uncertainty increases the risk of an adverse costs order and therefore reduces the likelihood that a marginalised or disadvantaged applicant will pursue important test cases, including in the area of human rights protection.

173. In its *Civil Justice Review: Report*, the Victorian Law Reform Commission identified the risk of adverse costs orders as a significant deterrent to public interest litigation. In so doing, it observed that there 'should be express provision for courts to make orders protecting public interest litigants from adverse costs in appropriate cases'. These orders, it said, 'could include orders made at the outset of the litigation'[166]. Similarly, the Australian Law Reform Commission has recommended that 'if private citizens are to be able to [initiate public interest litigation], any unnecessary barriers erected by the law of costs should be removed'[167].

174. The case studies below demonstrate how the risk of an adverse costs order can act as a disincentive to litigants pursuing meritorious public interest litigation.

Case Study N

PILCH referred the Tampa[168] matter and undertook much of the preparatory work for the proceedings. Since the appropriate applicants (the asylum seekers) could not be contacted, PILCH spent considerable time attempting to identify an alternative applicant to bring the claim on behalf of the asylum seekers. PILCH had real difficulties locating an applicant that would be prepared to bring the claim because they were concerned about the costs exposure. Ultimately Liberty Victoria was prepared to institute proceedings as the applicant despite this risk. In making a 'no costs' order in this matter, Black CJ and French J of the Federal Court said 'This is a most unusual case. It involved matters of high public importance and raised questions concerning the liberty of individuals who were unable to take action on their own behalf to determine their rights'.[169]

Source: PILCH

Case Study O

In *Roach v Electoral Commission* [2007] HCA 43, the plaintiff, Vickie Roach, brought a Special Case before the High Court of Australia challenging the validity of amendments made in 2006 to the *Commonwealth Electoral Act 1918* (Cth) that disqualified all

[166] Victorian Law Reform Commission, *Civil Justice Review Report* (2008), 676.

[167] Australian Law Reform Commission, *Costs Shifting: Who Pays for Litigation* (1995), 78.

[168] *Ruddock v Vardalis (No. 2)* (2001) 115 FCR 229.

[169] Ibid at [29].

prisoners from voting ('the blanket ban'). Ms Roach, an indigenous Australian, brought her case with the assistance of the HRLRC. The HRLRC experienced significant difficulty locating an applicant with sufficient standing who was prepared to bring the challenge because of the potential costs exposure.

In that case, the majority (Gleeson CJ and Gummow, Kirby and Crennan JJ) upheld Ms Roach's challenge to the blanket ban but held that the legislation in place prior to the 2006 amendments, which prohibited prisoners serving a sentence of three years or longer from voting, was valid and continued to apply. On the question of costs, the majority recognised that Ms Roach had brought the proceeding as a test case, raising important constitutional questions. Moreover, as her case had succeeded in part, the majority held that it would be just for her to receive half her costs of the Special Case. The minority judges (Heydon and Hayne JJ) upheld the validity of the 2006 amendments and, as a result, would have ordered Ms Roach to pay the costs of the case.

Source: PILCH

175. Although courts retain discretion as to costs, the general rule in civil proceedings is that costs follow the event. This means that the successful party can expect a costs award in his or her favour. Although Australia does not have any specific public interest costs regime, some courts have been prepared to make orders protecting public interest litigants against adverse costs orders. Moreover, in the United Kingdom, courts have developed specific rules for the granting of a 'protective costs order' ('PCO');[170] that is, orders that protect a party to a proceeding from an adverse costs outcome. Whilst the High Court of Australia has confirmed courts' jurisdiction to make orders in the nature of PCOs, such orders are rare, and there is little guidance on what constitute appropriate circumstances for making a PCO. There is thus a need for law reform to: confirm courts' jurisdiction to make PCOs and thereby overcome any reluctance to make such orders due to concerns about 'judicial law making'; and, clarify what factors are relevant to the discretion to make a PCO in public interest matters.

176. PILCH proposes that courts be explicitly empowered to make PCOs in relation to 'public interest matters', by amendment to the relevant empowering legislation. Such amendments would empower relevant courts to make a PCO in a proceeding at any time prior to judgment. PILCH strongly believes that empowering courts to make PCOs would significantly improve access to justice for the marginalised and disadvantaged, including their ability to assert their human rights in the court system. PILCH also believes that this measure is necessary to protect and promote the right to a fair hearing, which requires a party to be able to present his or her case and evidence to the court under conditions that do not place him or her at a substantial disadvantage when compared with the other party.

Recommendation 17

PILCH recommends that courts be specifically empowered to make protective costs orders, through an amendment to the courts' relevant empowering legislation.

[170] [2005] 1 WLR 2600.

(b) Improved access to legal representation

177. Equitable access to legal representation underpins a fair and efficient justice system, and is a central component of ensuring access to justice and the right to a fair hearing. Conversely, inability to access legal representation impedes the ability to achieve justice and realize their rights. This is particularly so for the marginalised and disadvantaged who tend to be over-represented in the justice system and who, because of the high cost of legal representation, frequently cannot afford legal services or to assert their rights. No person's access to the legal system should be prejudiced by reason of their incapacity to obtain adequate information about the law or the legal system, or their inability to afford the cost of legal assistance.

178. While legal aid and community legal centres ('CLCs') play a critical role in addressing the legal needs of many Australians who cannot afford to pay for legal services, there remains a critical gap in the availability of legal advice and representation, particularly in civil law areas, for those who cannot afford to pay for legal services. The difficulties in obtaining legal advice and assistance are compounded for disadvantaged groups, such as those with a mental illness or persons from culturally and linguistically diverse communities. PILCH respectfully submits that the Federal Government needs to adopt measures to address the significant unmet legal need in the community.

(i) *Legal aid*

179. Legal aid funding is provided by the Federal, and state and territory governments for the purpose of ensuring that the marginalised and disadvantaged can access justice and realise their rights. In recent years, however, government funding of legal aid has declined substantially, which has negatively impacted access to justice and the protection and promotion of rights. PILCH respectfully submits that, in order to ensure effective access to the justice system, the Federal Government must increase legal aid funding. PILCH further submits that the Federal Government should remove restrictions on federal legal aid funding so that it is made available in state and territory legal aid matters.

Recommendation 18

PILCH recommends that the Federal Government should increase legal aid funding to ensure the effective operation of that system.

Recommendation 19

PILCH recommends that the Federal Government should remove restrictions on federal legal aid funding so that it is made available in state and territory legal aid matters.

(ii) *Increase funding of community legal centres*

180. CLCs play a critical role in helping individuals to access justice and realise their rights. Notwithstanding Government funding has decreased significantly in recent years. This has brought further pressure to bear on CLCs, which already work under significant

resource and funding constraints.[171] Indeed, owing to overwhelming demand on their limited resources, CLCs have a high turn away rate. At the same time as funding has dried up, CLCs have experienced an influx in demand for their services,[172] demand which is only likely to increase. In order to enable CLCs to effectively meet unmet community need for legal assistance, including in respect of human rights, PILCH submits that the Federal Government should increase its funding of CLCs. PILCH considers CLCs should be allowed to operate on a needs-based model, with an abolition of the current policy of quarantining Commonwealth funding from state and territory matters. State and territory Legal Aid Commissions should not be required to separately account for Commonwealth contributions by applying these exclusively to Commonwealth matters.

Recommendation 20

PILCH recommends that the Federal Government should increase its funding of CLCs to ensure that they can continue to help individuals, who are otherwise unable to afford legal representation, to access justice and realise their human rights.

(iii) *Expanding government procurement policies to non-legal sectors*

181. Pro bono legal services, meaning those legal services that are provided free of charge, have long played an integral role in securing human rights and access to justice in Australia. This is especially true with respect to marginalised and disadvantaged individuals. Indeed, the majority of the Victorian Charter cases that have been determined to date have been conducted by lawyers acting pro bono on behalf of disadvantaged persons, such as those experiencing homelessness and mental illness.

182. By harnessing the pro bono power of the private legal sector, PILCH regularly assists individuals who fall through the cracks of our legal system because their rights are not adequately guaranteed under the current legal system. During 2007-2008, PILCH facilitated pro bono legal assistance for more than 2000 people and organisations. PILCH estimates that, in that same year, the amount of time contributed by lawyers who volunteer for the HPLC (just one of the legal schemes housed at PILCH) exceeded a commercial value of $6 million. More generally, a survey undertaken by the National Pro Bono Resource Centre in 2008 revealed that, during the previous year, Australia's top 25 law firms had cumulatively provided approximately 200,000 hours of pro bono legal assistance.[173]

183. Since 2001, the Victorian Government has required law firms that are members of its Legal Services Panel to provide pro bono services of at least 5-15% of the value of the

[171] See generally PILCH, *Submission to the Senate Legal and Constitutional Affairs Committee on the Inquiry into Access to Justice* (2009), 47-54.

[172] See Hugh de Krester, Federation of Community Legal Centres (Victoria), *Briefing Notes – Australian Access to Justice Funding* (2008).

[173] National Pro Bono Resource Centre, *Report on the Pro Bono Legal Work of 25 Large Australian Law Firms* (2008), 8.

legal fees paid under panel arrangements.[174] In 2007, an external review found that this policy has played a substantial role in enhancing access to justice for marginalised and disadvantaged Victorians[175] and, thereby, improved the protection and promotion of human rights in Victoria.

184. PILCH commends the Federal Government on its recent move to incorporate *voluntary* pro bono targets in its own legal services procurement policies.[176] However, PILCH submits that the Federal Government should consider incorporating *mandatory* pro bono requirements into its legal services contracts, in line with the Victorian model. This would have the likely effect of increasing the volume and quality of pro bono work undertaken by Australian law firms, which would, in turn, extend the above-listed benefits.

185. PILCH further submits that the Federal Government should apply this pro bono model to other, non-legal sectors. The Government plays an important role as an active participant in the market place, purchasing a large range of goods and services. PILCH believes that the Government's purchasing power can, and should, be harnessed to advance concepts of social justice – including, in particular, the protection and promotion of human rights – not just in the legal sector but also in a wide range of non-legal sectors. For example, the Federal Government could require accounting firms or building and construction companies that tender for Federal Government work to provide a certain amount of pro bono accounting or building and construction services to not-for-profit organisations.

186. In addition, PILCH believes that the Federal Government could better protect and promote human rights in Australia by using its procurement policies, and its status as a purchaser of a large quantity of goods and services more generally, to encourage corporate social responsibility. This has already occurred, to some extent, in the United Kingdom, where the Office of Government Commerce encourages public authorities to incorporate social considerations into their procurement policies, for example by requiring a certain percentage of the company's recruitment or training to be directed towards disadvantaged groups.[177] PILCH submits that, by adopting similar initiatives, the Federal Government could significantly aid the protection and promotion of human rights in Australia.

Recommendation 21

PILCH recommends that the Federal Government should take steps to promote and support the professionalism of pro bono legal services in the private sector through Government policy designed to increase socially responsible outcomes.

[174] Victorian Government Legal Services Panel Arrangements, *Promoting and Encouraging Pro Bono Legal Services*, National Pro Bono Resource Centre (2008).

[175] Beaton Consulting, *Report on the Legal Services to Government Panel Contract* (2007), 23.

[176] See *Commonwealth Deed of Standing Offer for the Provision of Legal Services*, s 4.1.3(b).

[177] See United Kingdom Office of Government and Commerce, *Make Equality* Count (2008); United Kingdom Office of Government and Commerce, *Buy and Make a Difference: How to address Social Issues in Public Procurement* (2008).

Recommendation 22

PILCH recommends that the Federal Government should:
- incorporate mandatory pro bono requirements into legal services contracts, in line with the Victorian model;
- leverage its significant purchasing power to encourage pro bono work in other sectors; and,
- strengthen provisions in procurement policies so that human rights and social considerations are taken into account.

9.3 Expanding the mandate of the Australian Human Rights Commission

187. PILCH submits that a federal *Human Rights Act* should strengthen and expand the powers and responsibilities of the AHRC. These would include powers and responsibilities similar to those conferred on the VEOHRC under the Victorian Charter.[178] PILCH believes that the AHRC should be given the responsibility to report annually to Government on the implementation of the *Human Rights Act*, the power to mediate and conciliate disputes about human rights in a non-judicial setting, the ability to receive complaints of human rights violations and to intervene in court proceedings that involve important issues of human rights. As discussed elsewhere in this submission, the AHRC could also play an important educative role in disseminating information about the *Human Rights Act* and human rights generally. It would also, as discussed below, be an appropriate body to oversee the collection of disaggregated data on the nature and prevalence of human rights violations. In addition, PILCH submits that the AHRC should be granted strengthened powers to investigate human rights violations and to consider the human rights impacts of legislation. PILCH submits that in order to perform these additional functions, the AHRC must be provided with commensurate additional funding.

Recommendation 23

PILCH recommends that the Federal Government should:
- strengthen and expand the mandate of the AHRC to include new functions under *Human Rights Act*; and,
- increase the funding of the AHRC commensurately with their increased functions.

9.4 Improving data collection on human rights violations

188. The effective protection and promotion of human rights is dependent, in part, on the collection of disaggregated data on the nature and extent of human rights violations. The collection of such data is critical to arming the Federal Government with the information it needs to introduce, tailor and reform its laws, policies, practices and institutions, so that they can effectively prevent and redress rights violations. The

collection of disaggregated data is particularly important for the identification of, and remedying, systematic human rights violations. Unless human rights violations are named, their nature and harms articulated, and their prevalence within the community documented, those violations and, perhaps most importantly, the people affected by them will be rendered invisible or, at best, marginalised. For example, prior to the 1997 release of the *Bringing Them Home Report*, grave and systematic rights violations perpetrated against members of the Stolen Generations went largely unrecognised in the broader community. However, following the release of this report, these violations were thrust into the public consciousness and pressure was brought to bear on the government to redress them. Widespread gaps in the availability of information on the nature and extent of violations of the rights of people experiencing, or at risk of, homelessness, amongst others, remains a significant impediment to the introduction of measures designed to ensure the effective protection and promotion of their rights.

189. A number of bodies in Australia, including the AHRC,[179] the HRLRC[180] and PILCH,[181] have played, and continue to play, an important role in collecting information on the nature and extend of human rights violations in Australia. However, the Federal Government needs to ensure that it takes a more proactive and systematic role in collecting disaggregated data on human rights violations. Indeed, a number of human rights treaty bodies have urged Australia to provide better disaggregated statistical data, so as to provide a full picture of Australia's implementation of its international human rights obligations.[182] The CERD Committee, for instance, has expressed its concern regarding 'reports of alleged discrimination in the grant of visas against persons from Asian countries and Muslims …'. In so doing, the CERD Committee urged Australia to provide 'more information on this issue, including statistical data'[183].

190. Improved data collection will also be essential to measuring the effectiveness of a *Human Rights Act*, its strengths, gaps and weaknesses. Disaggregated data, in particular, will aid the ongoing review of such an Act.

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[178] See *Charter of Human Rights and Responsibilities Act 2006* (Vic), ss 41 – 43.

[179] See, eg, AHRC, *Sexual Harassment: Serious Business; Results of the 2008 Sexual Harassment National Telephone Survey* (2008).

[180] See, eg, *Freedom, Respect, Equality, Dignity*, above n 131.

[181] See, eg, PILCH, *Submission to the Senate Legal and Constitutional Affairs Committee on the Inquiry into Access to Justice* (2009).

[182] See, eg, CEDAW Committee, *Concluding Observations: Australia*, UN Doc. CEDAW/C/AUL/CO/5 (2006), at paras 14-15; CERD Committee, *Concluding Observations: Australia*, UN Doc. CERD/C/AUS/CO/14 (2005), at paras 23-24.

[183] CERD Committee, *Concluding Observations: Australia*, UN Doc. CERD/C/AUS/CO/14 (2005), at para 22.

Recommendation 24

PILCH recommends that the Federal Government expand the powers of, and increase the funding it makes available to, the Australian Human Rights Commission, to allow it to implement initiatives aimed at improving data collection on human rights violations in Australia.