

12 The case for a Human Rights Act

Chapters 6 to 9 describe a range of options available for the Australian Government to consider in order to better protect human rights. During the course of the Committee's consultations the most contested option was that of introducing comprehensive legislative protection in the form of a 'bill of rights', 'charter of rights' or 'human rights Act'. It should be noted that there is no settled definition of these terms, which are often used interchangeably.

This chapter outlines the main arguments for a Human Rights Act; Chapter 13 outlines the main arguments against such an Act. Various models of comprehensive human rights protection were advocated in submissions; they are discussed in Chapter 14.

This present chapter uses the term 'Human Rights Act' to refer to the most commonly advocated model of human rights protection, which is loosely based on human rights Acts adopted in the United Kingdom, the Australian Capital Territory and Victoria. A Human Rights Act of this kind would require that law makers and parliament consider how proposed legislation might affect rights, require government and public authorities to comply with human rights, and require courts to interpret legislation in accordance with human rights or issue a declaration of incompatibility if such an interpretation was not possible.

12.1 The level of community support

A considerable degree of community support for a federal Human Rights Act was expressed during the Committee's consultations. This support was expressed in community roundtables and submissions and through independent research the Committee commissioned.

There was strong support for a Human Rights Act at community roundtables, and many participants emphasised the symbolic and practical benefits of such an instrument.¹ Concern was, however, raised lest the introduction of a Human Rights Act serve to restrict existing rights.² Some roundtable participants doubted whether

¹ For example, Queanbeyan (2), Community Roundtable; Paraburdoo, Community Roundtable; Whyalla, Community Roundtable; Mt Gambier, Community Roundtable; Dubbo, Community Roundtable.

² For example, Darwin (2), Community Roundtable; Bendigo, Community Roundtable; Wodonga, Community Roundtable.

such an Act would bring about meaningful change³; others were concerned that it would hand too much power to judges.⁴

Of the 35 014 submissions the Committee received, 33 356 (95 per cent) discussed the option of enacting a charter of rights or a Human Rights Act. Of these, 29 153 (87.4 per cent) were in favour of this option, leaving 4203 (12.6 per cent) opposed to it.

The Committee commissioned a report from Colmar Brunton Social Research in order to gauge the views of the broader community, including people who might not have participated directly in the consultation process. The consultants conducted a telephone survey of 1200 people. Respondents were asked whether they would oppose or support a specific law that defined the human rights to which all people in Australia were entitled. Fifty-seven per cent of respondents said they would support such a law; 30 per cent were neutral; the remaining 14 per cent said they would oppose such a law.⁵

The consultants also conducted a number of focus groups in order to obtain qualitative data. They found that participants in favour of a Human Rights Act tended to be better informed about the limited nature of existing rights protection. Many participants considered a Human Rights Act unnecessary: they thought the current systems did not show sufficient evidence of failure.

In March 2009 Amnesty International Australia commissioned Nielsen to conduct a survey of 1000 people in order to gauge the level of support for the introduction of a law to protect human rights in Australia. Eighty-one per cent of respondents said they would support such a law; 11 per cent were neutral; the remaining 8 per cent said they would oppose such a law.⁶

In reviewing these statistics, it is worth noting that Colmar Brunton Social Research found that, although focus group participants knew much of the language used to describe rights, few had any concrete understanding of their rights or what is or is not protected in Australia. For example, many focus group participants assumed that rights are sufficiently protected simply because they enjoy them every day.

The discrepancy between the results of the Colmar Brunton Social Research and Amnesty International Australia surveys can be attributed to the fact that the questions asked were different. The Amnesty International Australia survey referred

³ For example, Nhulunbuy, Community Roundtable; Alice Springs, Community Roundtable; Broken Hill, Community Roundtable.

⁴ For example, Perth (2), Community Roundtable; Melbourne (2), Community Roundtable; Cairns, Community Roundtable; Alice Springs, Community Roundtable; Kalgoorlie, Community Roundtable.

⁵ Colmar Brunton Social Research, *National Human Rights Consultation—community research report* (2009). (Appendix B presents a summary of this report.)

⁶ Material provided by Amnesty International Australia.

to a law that would ‘protect human rights in Australia’, whereas the Colmar Brunton Social Research question referred to a law that ‘defined the human rights to which all people in Australia were entitled’.

The Committee also commissioned Colmar Brunton Social Research to conduct a qualitative study in order to better understand the experiences and opinions of members of groups that are marginalised in society or are particularly vulnerable to having their rights violated.⁷ Many who participated in this research thought a written document outlining the rights of all groups in society was necessary for the protection of human rights. The notion of an ‘overarching Act’ was also supported by non-government organisations that took part in this additional study; they suggested that if vulnerable groups had a written document this would provide a framework within which breaches of their rights could be resolved.

12.2 Arguments in favour of a Human Rights Act

Redressing the inadequacy of existing human rights protections

One of the main arguments in favour of a Human Rights Act is that it would answer concerns about the ad hoc nature of human rights protection in Australia. The argument is that the current human rights framework is incomplete, and there are inadequate checks on executive power. A Human Rights Act would provide a comprehensive statement of the fundamental rights and freedoms of all Australians and a framework for ensuring compliance with those rights and freedoms.

Gaps in the existing framework

As discussed in Chapter 5, the Australian legal system has been criticised for providing only a patchwork of human rights protection. There is a view that the dominance of the executive has increased in recent years but that there has been inadequate concurrent development of checks and balances.⁸ Many submissions contended



The Hon. Susan Ryan AO puts the case for an Australian Human Rights Act.

⁷ Colmar Brunton Social Research, *National Human Rights Consultation—devolved consultation report* (2009). (Appendix C presents a summary of this report.)

⁸ S Zifcak and A King, Submission.

that the legal protections for human rights in Australia remain ad hoc and incomplete.⁹

The Gilbert + Tobin Centre of Public Law submitted as follows:

The legislative protection of human rights in Australia is ad hoc, limited and selective, protecting some human rights but not others. It is also hard to navigate, being scattered through the common law and many instruments.¹⁰

The International Commission of Jurists commented:

Current democratic institutions do not work to protect basic human rights in Australia. It is a systemic problem not necessarily attributable [to] any individual or group that may be in power from time to time. That under the current Australian system human rights protection depends on the goodwill of governments who may be in power from time to time demonstrates the problem with the system.¹¹

In addition, the Committee was made aware of examples of apparent systemic human rights problems. For example, Philip Lee commented:

The experience in Australia in recent years including the detention of children in detention centres, the mandatory detention of asylum seekers, the indefinite detention of stateless asylum seekers, the deportation of Australian citizens on migration grounds and the draconian anti terrorism laws provide an undeniable case for a National Charter of Human Rights. It has become increasingly clear that our rights are not adequately protected by the courts, the executive and the parliament.¹²

Stephen King pointed to a number of recent high-profile cases:

The experiences of Cornelia Rau, Vivian Alvarez Solon, Ahmed Al-Kateb, David Hicks and Mohammed Haneef are all vivid reminders that the *ad hoc* protections of rights in Australia [are] inadequate and serve [to] undermine the argument that Australians currently enjoy world's best rights protections.¹³

Similar concerns were expressed at community roundtables. It was argued that recent anti-terrorism legislation has not struck a suitable balance between

⁹ For example, Western NSW Community Legal Centre, Submission; Murray Mallee Community Legal Service, Submission; Australian Council of Social Service, Submission; NSW Charter Group, Submission; Amnesty International, Submission; Australian Human Rights Commission, Submission; N Gotzmann, Submission; ACT Ministerial Advisory Council on Women, Submission; Victorian Government, Submission; Youthlaw, Submission; A Edwards and R McCorquodale, Submission.

¹⁰ Gilbert + Tobin Centre of Public Law (E Santow), Submission.

¹¹ International Commission of Jurists, Submission.

¹² P Lee, Submission.

¹³ S King, Submission.

individual rights and the need to protect national security.¹⁴ There were also comments about the discrimination experienced by Indigenous Australians, with particular reference to the suspension of the *Racial Discrimination Act 1975* (Cth) for the Northern Territory Emergency Response (also known as the 'Intervention').¹⁵

Another common theme was the treatment of asylum seekers¹⁶, including the degree of accountability of private contractors operating detention centres. The High Court's decision in *Al-Kateb v Godwin*¹⁷—that there was no constitutional bar to legislation allowing for the indefinite detention of an asylum seeker pending removal from Australia—was referred to as evidence of the inadequacy of human rights protection in Australia.¹⁸

The Australian Human Rights Commission submitted:

Any one of us could move from a situation where our rights are currently well protected to one where they are vulnerable. For example, any person could suffer a car accident and end up in a wheelchair; we are all going to get older; we may have a family member who suffers from a mental illness; and with the global financial crisis, we are all more vulnerable to unemployment and associated concerns about housing, education, transport and food.¹⁹

A range of concerns in relation to service delivery by government agencies were also expressed—among them the lack of mental health services in rural and remote areas²⁰; the long waiting lists for emergency and ordinary public housing in some areas²¹; the practice of placing people with disabilities (in particular, young people) in nursing homes²²; and the treatment of the elderly in nursing homes.²³

Finally, the Committee heard many personal accounts of circumstances in which people feel that their rights or expectations are not being adequately

¹⁴ For example, Tweed Heads, Community Roundtable; Alice Springs, Community Roundtable; Busselton, Community Roundtable; Broken Hill, Community Roundtable; Mildura, Community Roundtable; Mt Gambier, Community Roundtable; Sydney, Community Roundtable; Cronulla (2) Community Roundtable.

¹⁵ For example, Tennant Creek, Community Roundtable; Alice Springs, Community Roundtable; Katherine, Community Roundtable; Wadeye, Community Roundtable; Yirrkala, Community Roundtable; Mt Gambier, Community Roundtable; Dubbo, Community Roundtable; Newcastle, Community Roundtable; Cairns, Community Roundtable; Wollongong, Community Roundtable.

¹⁶ For example, Ballarat, Community Roundtable; Perth (1), Community Roundtable; Burnie, Community Roundtable; Whyalla, Community Roundtable; Mt Gambier, Community Roundtable; Melbourne (3), Community Roundtable; Geelong, Community Roundtable; Brisbane (2), Community Roundtable.

¹⁷ (2004) 219 CLR 562.

¹⁸ For example, Melbourne (3), Community Roundtable; Cronulla (1), Community Roundtable; Sydney (2), Community Roundtable;

¹⁹ Australian Human Rights Commission, Submission.

²⁰ For example, Tennant Creek, Community Roundtable; Alice Springs, Community Roundtable; Katherine, Community Roundtable; Mount Isa, Community Roundtable; Bendigo, Community Roundtable.

²¹ For example, Burnie, Community Roundtable; Whyalla, Community Roundtable; Coober Pedy, Community Roundtable.

²² For example, Wodonga, Community Roundtable; Wollongong, Community Roundtable; G Crafti, Submission.

²³ For example, Queanbeyan (2), Community Roundtable; Katherine, Community Roundtable; Bendigo, Community Roundtable; Burnie, Community Roundtable.

accommodated—for example, the lack of recognition in Australia of same-sex marriage²⁴ and the prohibition on euthanasia.²⁵

The impact of a Human Rights Act

Supporters of the implementation of a Human Rights Act suggest that it could comprehensively eliminate the ‘gaps’ in the existing scheme of human rights protection and constitute an effective enforcement mechanism. They also argue that it would improve the processes for developing laws and policies and increase public awareness and discussion of aspects of human rights.

In the view of Jesuit Social Services a Human Rights Act ‘would fill in the gaps and omissions in our present system of human rights protection, including harmonising our domestic laws with our international human rights obligations’.²⁶ Similarly, the Law Institute of Victoria summarised the potential impact of a Human Rights Act:

A National Human Rights Act could improve Australia’s human rights performance through a single comprehensive law clearly stating which human rights are protected and promoted and how those human rights are to be protected and promoted in a manner consistent with Australia’s international commitments. The rights and obligations would be clearly described for the public authorities required to abide by them, helping to create a culture of human rights protection that can prevent human rights violations and deal with any abuses quickly and openly if they happen.²⁷

A number of commentators have discussed the impact a Human Rights Act might have had in relation to the *Al-Kateb* Case. They say such an Act would have allowed the issue that arose in that case to be identified and resolved at an earlier stage—perhaps during the drafting of amendments to the legislation or in the preparation of a human rights compatibility statement. Alternatively, if the issue had been identified only at a later stage, it could have been resolved by the courts interpreting the legislation in a manner consistent with human rights or making a declaration of incompatibility (which could form the basis for political pressure for change).²⁸

Julian Burnside QC submitted:

Al-Kateb would likely have been decided differently if the Commonwealth had had a Charter of Rights equivalent to the Victorian Charter ... Importantly, a Charter would

²⁴ For example, Canberra, Community Roundtable; Australian Marriage Equality, Submission; D Broughton, Submission; L Stanford, Submission; H Wang, Submission; C Murray, Submission; K Young, Submission; J Lennox, Submission; C Deane, Submission; K Dilkarra, Submission; S Rajander, Submission; S Mitchell, Submission; Tasmanian Gay and Lesbian Rights Group, Submission; B Patch, Submission.

²⁵ For example, Broome, Community Roundtable; Katherine, Community Roundtable; Broken Hill, Community Roundtable; Dubbo, Community Roundtable; Canberra, Community Roundtable; Voluntary Euthanasia Society of NSW, Submission; L Falzon, Submission.

²⁶ Jesuit Social Services, Submission.

²⁷ Law Institute of Victoria, Submission.

²⁸ A Byrnes, H Charlesworth and G McKinnon, *Bills of Rights in Australia: history, politics, law* (2009) 167–68.

have made it possible to argue the case by reference to human rights standards. As it was, the argument in the case did not refer to human rights, because human rights are legally irrelevant in a jurisdiction without formal human rights protection embedded in the law.²⁹

Reflecting basic Australian values

Another argument in favour of a Human Rights Act is that such an Act would serve as an important symbolic statement of Australian values.³⁰ The Australian Federation of Disability Organisations submitted that at present ‘there is no one piece of legislation or constitutional law which articulates what is arguably a fundamental part of the Australian identity, and it is left to High Court judges to interpret the implicit and explicit rights laid out in the Constitution’.³¹ A Human Rights Act would provide an opportunity to ‘define the freedoms that have an important place in the Australian story’³² and would be the legislative expression of the nation’s or community’s core values.³³

Ed Coper from GetUp! emphasised that a Human Rights Act would ‘give Australians the chance to set down our values and our vision for our society, and make sure that the values that we hold dear—freedom, dignity, respect, equality and fairness—apply to every person in Australia’.³⁴ Waleed Aly observed in the public hearings that a Human Rights Act could provide the basis for a strong national sense of self.

Timothy Ginnane SC stressed the importance of Australia fashioning its own Human Rights Act and noted that the Act should incorporate Australia’s approach to the ‘fair go’.³⁵ Professor Stuart Rees, Director of the Sydney Peace Foundation, commented:

A new identity for Australians would contribute to renewed pride in our participation in international affairs, witness the ripple effects of Sorry Day February 13th 2008 and the subsequent signing of the Kyoto Treaty on climate change. A language to influence relationships between men and women, between different ethnic groups, between the powerful and the not so powerful will have arrived. The idea that rights are somehow only the property of lawyers and politicians will have been defused if not debunked ... [W]ith the passing of a Bill of Rights, a culture’s aspirations and the ways in which they can be realized will have been set in train.³⁶

Participants in community roundtables emphasised the need for a central document against which all legislation could be assessed and government

²⁹ J Burnside, Submission.

³⁰ A Byrnes, H Charlesworth and G McKinnon, *Bills of Rights in Australia: history, politics and law* (2009) 169.

³¹ Australian Federation of Disability Organisations, Submission.

³² G Robertson, *The Statute of Liberty* (2009) 92.

³³ Australian Human Rights Commission, Submission; Gilbert + Tobin (E Santow), Submission.

³⁴ GetUp! (E Coper), Submission.

³⁵ T Ginnane, Submission.

³⁶ S Rees, Submission.

decisions measured.³⁷ They also spoke of the value of such a document in helping the community understand their rights.³⁸

Protecting the marginalised and disadvantaged

It is commonly argued that human rights problems particularly affect marginalised and disadvantaged members of the community—among them children, Indigenous Australians, the homeless, ethnic and religious minorities, prisoners, people with mental illness, people with disabilities, the elderly, and asylum seekers.³⁹ All these groups were identified during the Committee’s consultations as frequently suffering discrimination.

People who are disadvantaged or marginalised are more likely to come into contact with government services (such as social security, public housing and health services)⁴⁰, but they are less likely to be aware of their rights, to be able to obtain information about their rights, or to be in a position to enforce their rights.⁴¹

Many submissions also noted that there is scope for minority rights to be ignored or inadequately recognised in a democracy. It was said this is particularly the case for ‘minority groups and persons who by dint of their position or actions are deeply unpopular’.⁴² For example, the Prisoners’ Legal Service submission noted:

Prisoners as a group are a socially unpopular category and their rights can be subject to violation with little objection ever likely to be raised by the public, media or politicians. Moreover, their incarceration forces incarcerated persons to be completely reliant on the State for day to day matters, increasing the potential for ongoing abuses.⁴³

Sisters Inside submitted that ‘the current system, which relies on the good faith of government to meet [its] human rights obligations, is clearly not resulting in adequate protection and promotion of women prisoners’ human rights’.⁴⁴

The rights of religious minorities were also raised during community roundtables. For example, a representative of a Muslim women’s association noted the difficulty

³⁷ Cronulla (1), Community Roundtable; Whyalla, Community Roundtable; Queanbeyan (1), Community Roundtable.

³⁸ Mt Gambier, Community Roundtable.

³⁹ Gilbert + Tobin Centre of Public Law (E Santow), Submission.

⁴⁰ Human Rights Law Resource Centre (Human Rights Act for All Australians), Submission; Gilbert + Tobin Centre of Public Law (E Santow), Submission.

⁴¹ *ibid.*

⁴² M Crock and T Freeman, Submission; see also Public Interest Advocacy Centre, Submission; Castan Centre for Human Rights Law, Submission; Gilbert + Tobin Centre of Public Law (E Santow), Submission; J Debeljak, Submission.

⁴³ Prisoners’ Legal Service, Submission.

⁴⁴ Sisters Inside, Submission.

minority groups can have in gaining access to justice, especially in a climate of fear.⁴⁵

Particular concern was evident in relation to the experience of Indigenous Australians. Sean Brennan pointed out that, notwithstanding decades of policy action:

[b]y any number of socio-economic indicators—life expectancy, educational attainment, incidence of chronic and acute disease, income levels, quality of housing, employment, skills, incarceration, substance abuse—Aboriginal Australians fare very poorly when compared with non-Indigenous Australians.⁴⁶

Aboriginal and Torres Strait Islander Legal Services noted that existing human rights protections ‘do not go far enough in adequately protecting and providing recourse to Aboriginal and Torres Strait Islander people who have suffered human rights violations’.⁴⁷ It submitted that, although the *Racial Discrimination Act 1975* (Cth) has provided possibly the best available level of protection for Indigenous peoples in Australia, it ‘has proved to be a fragile shield’.⁴⁸ Indeed, Sean Brennan observed that a statutory Human Rights Act could be ‘swept aside in a climate of “national emergency”, in exactly the same way as the [Racial Discrimination Act] was in 2007 by the Intervention’.⁴⁹

A Human Rights Act would ensure greater protection of the rights of minorities and other marginalised people, it is contended. As well as providing a set of human rights against which proposed laws and policies could be assessed, such an Act would assist in educating disadvantaged and marginalised people and groups about their rights and empowering them to advocate better promotion and protection of those rights.⁵⁰ Experience in other jurisdictions shows that a Human Rights Act would bring about a move towards policies aimed at ensuring that the needs of disadvantaged or marginalised individuals are taken into account.⁵¹

In their submission Professor Mary Crock and Tobias Freeman noted that ‘the passage of human rights legislation ... would go at least some way towards reducing the vulnerabilities of [unpopular] persons in the face of the vocal majority who have the ear of government’.⁵² The Gilbert + Tobin Centre of Public Law suggested, ‘Comprehensive human rights protection, set out clearly and accessibly, is vitally

⁴⁵ Sydney (1), Community Roundtable.

⁴⁶ Gilbert + Tobin Centre of Public Law (S Brennan), Submission.

⁴⁷ Aboriginal and Torres Strait Islander Legal Services, Submission.

⁴⁸ *ibid.*

⁴⁹ Gilbert + Tobin Centre of Public Law (S Brennan), Submission.

⁵⁰ Human Rights Law Resource Centre (Human Rights Act for All Australians), Submission.

⁵¹ *ibid.*; Department for Constitutional Affairs (UK), *Review of the Implementation of the Human Rights Act* (2006), 4.

⁵² M Crock and T Freeman, Submission.

important for marginalised and disadvantaged groups'.⁵³ Russell Thirgood submitted that a Human Rights Act 'would not be a panacea against all evil but would be of further assistance in protecting unpopular or vulnerable minorities'.⁵⁴

Improving the quality and accountability of government

It is argued that the 'dialogue' model of a Human Rights Act would give rise to institutional interaction or conversations between the judiciary, the executive and the legislature in relation to human rights and would encourage public debate on the subject.⁵⁵ This, it is said, would improve legislative and policy outcomes, as well as government service delivery and judicial decisions.⁵⁶

Improved government policy

A Human Rights Act could require Ministers and their departments to consider human rights at an early stage of policy development. For example, if a 'human rights impact statement' was required with every Cabinet submission this would ensure that the Minister and the relevant department had evaluated the human rights implications of the proposal and either amended the proposal to ensure compliance or justified the decision to proceed in spite of non-compliance. In some cases Cabinet might require the Minister to amend the proposal to make it compliant.



The Hon. Catherine Branson QC argues for an Australian Human Rights Act.

The Victorian Government submitted that experience in that state supports this view:

The early assessment of human rights impacts will ... build public confidence that government processes will prevent human rights breaches before they arise. This is certainly the experience in Victoria where human rights considerations often result in changes being made in the policy and legislative development process, before introduction of legislation into Parliament and before there is any effect on the public.⁵⁷

Improved legislation

A Human Rights Act could require a member of parliament to table a human rights compatibility statement with any Bill and could establish a parliamentary committee with responsibility for scrutinising new laws to determine whether they comply with

⁵³ Gilbert + Tobin Centre of Public Law (E Santow), Submission.

⁵⁴ R Thirgood, Submission.

⁵⁵ A Byrnes, H Charlesworth and G McKinnon, *Bills of Rights in Australia: history, politics, law* (2009) 51–4.

⁵⁶ Liberty Victoria, Submission.

⁵⁷ Victorian Government, Submission.

the Act. This would encourage internal government deliberation on the human rights implications of legislation before and during its drafting.⁵⁸ It would also ensure a level of parliamentary scrutiny of—and public debate about—legislative proposals.⁵⁹

In Victoria the *Charter of Human Rights and Responsibilities Act 2006* has encouraged public and parliamentary debate on human rights-related subjects as varied as practices in detention centres for young people, prisoners' voting rights, wearing headscarves in schools, strip-searching powers, procedures at inquests after bushfires, the treatment of public housing tenants, and penalties for tree removal.⁶⁰ This can be contrasted with the level of parliamentary debate in relation to the 480-page package of legislation to support the Northern Territory Intervention: the package was introduced into the House of Representatives on 7 August 2007 and was passed later that day 'with the key debate on suspension of the Racial Discrimination Act running for only 13 minutes'.⁶¹

Many submissions emphasised the benefits of 'getting legislation right in the first place'.⁶² Ed Coper from GetUp! noted that parliamentary scrutiny for rights compliance would ensure that parliament takes human rights into account when passing laws about 'police powers, voting, sedition, workplace relations, privacy, freedom of speech, the rights of Indigenous people, counter-terrorism or internet censorship'.⁶³ A Human Rights Act could also prompt systematic review and amendment of particular areas of the law, to ensure that they are consistent with human rights.⁶⁴ Participants in community roundtables expressed their support for legislative scrutiny of laws to determine the laws' human rights compliance.⁶⁵

Improved government service delivery

Another argument has it that a Human Rights Act could ensure minimum standards for government policies and practices, provide a mechanism whereby the executive arm of government is held accountable for its actions, and encourage cultural change in public sector agencies over time, so that they adopt policies that take into account the particular characteristics and circumstances of the individuals with whom they interact.

⁵⁸ S Zifcak and A King, Submission; Human Rights Law Resource Centre (Human Rights Act for All Australians), Submission; Victorian Government, Submission; Australian Human Rights Commission, Submission; H Charlesworth, A Byrne and R Thilagaratnam, Submission.

⁵⁹ S Zifcak and A King, Submission.

⁶⁰ G Robertson, *The Statute of Liberty* (2009) 96.

⁶¹ G Williams, 'Wisdom of politicians is frail shield for our rights', *Sydney Morning Herald*, 2 June 2009.

⁶² P Mathew, Submission.

⁶³ GetUp! (E Coper), Submission.

⁶⁴ A Byrnes, H Charlesworth and G McKinnon, *Bills of Rights in Australia: history, politics and law* (2009) 67.

⁶⁵ Cairns, Community Roundtable; Darwin (2), Community Roundtable; Perth (1), Community Roundtable.

Many submissions referred to case studies from the United Kingdom⁶⁶, where a formal review of the Human Rights Act found that it had ‘led to a shift away from inflexible or blanket policies towards those which are capable of adjustment to recognise the circumstances and characteristics of individuals’.⁶⁷ Susan Harris Rimmer submitted, ‘Where countries have enacted human rights legislation, such as the UK, it is ordinary folk engaged in everyday activities involving government services that have often reaped the benefits’.⁶⁸ In this way, ‘human rights principles are not merely the domain of lawyers, and are used to guide government and community services’.⁶⁹

The Law Council of Australia noted, ‘Evidence of the service delivery benefits, particularly for the most marginalized or disadvantaged members of the community, has begun to emerge in Victoria’.⁷⁰ The Victorian Equal Opportunity & Human Rights Commission identified a number of areas in which a Human Rights Act can have a positive impact on policy development and service delivery, including in correctional services, policing and health care.⁷¹ Participants in community roundtables expressed their support for the idea of authorities being held to greater standards of integrity in order to prevent abuses of power.⁷²

The submission from Seniors Rights Victoria provided an example of how a Human Rights Act might bring about better service delivery for older Australians:

Of most importance to older people is the framework a Human Rights Act would provide for public service providers (and their contractors) to improve older people’s experience of public services, particularly health care services. The active process of identifying and balancing human rights (against other rights and the needs of the community generally) will turn the minds of public service providers to the human rights issues involved in caring for older people.⁷³

It should be noted that if a Human Rights Act applied solely at the federal level it would have a direct influence only on Commonwealth public authorities. This would take in a number of areas of government service delivery (such as social security), but it would exclude a large number of services for which the states and territories are primarily responsible (such as health and education).

⁶⁶ For example, Human Rights Law Resource Centre (Human Rights Act for All Australians), Submission; R Merkel and A Pound, Submission; Victorian Equal Opportunity & Human Rights Commission, Submission; Australian Human Rights Commission, Submission; Gilbert + Tobin Centre of Public Law (E Santow), Submission.

⁶⁷ Department for Constitutional Affairs (UK), *Review of the Implementation of the Human Rights Act (2006)*, 4.

⁶⁸ S Harris Rimmer, Submission.

⁶⁹ Human Rights Law Resource Centre (Human Rights Act for All Australians), Submission.

⁷⁰ Law Council of Australia, Submission.

⁷¹ Victorian Equal Opportunity & Human Rights Commission, Submission.

⁷² Newcastle, Community Roundtable; Cronulla (1) Community Roundtable.

⁷³ Seniors Rights Victoria, Submission.

Improved judicial decisions

A Human Rights Act would allow judges to decide cases on first principles, rather than old precedents and would make judicial decisions more comprehensible, logical and reasonable.⁷⁴ The Victorian Government emphasised that a direction to courts to interpret the law in a manner consistent with human rights would 'signal the importance of Australia's international human rights obligations in Australia and ensure that Australian law develops consistently with international human rights jurisprudence'.⁷⁵

Contributing to a culture of respect for human rights

It is argued that human rights have meaning only if they exist in the context of a 'supportive legal, political and cultural environment'.⁷⁶ People who support a Human Rights Act contend that Australia does not have a culture in which human rights are respected, protected and promoted. At the same time, the fragmented and ad hoc nature of the human rights protection that does apply in Australia means that many Australians do not have a good understanding of which human rights are currently protected under Australian law and tend to take their rights for granted.

A Human Rights Act would constitute a clear statement of the human rights and responsibilities of all members of the Australian community and of the government's commitment to promoting and protecting those rights. Over time, implementation of a Human Rights Act by politicians, public sector agencies and the courts would lead to

greater awareness of human rights in the community and greater consideration of, and adherence to, human rights principles by all sectors of the community. Associate Professor Simon Rice submitted:

Law, alone, is not an effective means of achieving deep understanding and lasting attitudinal change in the community. Lasting social change requires a wide range of complementary strategies. Community-wide attitudinal change is driven by many



Human Rights Commissioners—Linda Matthews (South Australia), Dr Helen Watchirs (ACT) and Dr Helen Szoke (Victoria).

⁷⁴ G Robertson, *The Statute of Liberty* (2009) 104; see also Liberty Victoria, Submission.

⁷⁵ Victorian Government, Submission.

⁷⁶ G Williams, *A Charter of Rights for Australia* (2007) 87.

factors, two of which are the legislative setting of standards, and enforcement of those standards.⁷⁷

A Human Rights Act could play an important educative role in the general community, and a formal government commitment to protecting human rights would help to develop a broader culture that understands and respects human rights for all members of society. Public education campaigns are likely to make the community more aware of the rights contained in the Act and mechanisms for their enforcement.

The Committee became aware that there is strong support for greater community education about human rights and the notion of creating a culture of human rights promotion and protection in the Australian community.⁷⁸ At the public hearings, Dr Paula Gerber noted that a Human Rights Act would give school teachers a sense of the importance of human rights.⁷⁹ Women's Health Victoria submitted, 'A federal charter could act as a foundation for a human rights culture by encouraging a society in which individuals are aware of and assert their rights and responsibilities'.⁸⁰

In community roundtables the Committee heard that what is needed is not simply a piece of paper but a culture⁸¹; that you can't legislate for goodwill; that there needs to be a cultural shift towards greater tolerance and thoughtfulness⁸²; that human rights should be so ingrained in how we all think and act (right down to the official at Centrelink) that it is just as much a consideration as speaking politely to a person in front of you⁸³; and that bottom-up measures are needed to create a culture of human rights entrenched in education at every level and incorporated in government policy.⁸⁴ The Committee also heard the view that education is crucial if Australia is to effect such a cultural shift.⁸⁵

Improving Australia's international standing in relation to human rights

It is argued that a Human Rights Act could improve Australia's international standing in three important ways.

⁷⁷ S Rice, Submission.

⁷⁸ For example, Human Rights Law Resource Centre (Human Rights Act for All Australians), Submission; J Tobin, Submission; ACT Disability, Aged & Carer Advocacy Service, Submission.

⁷⁹ Dr Paula Gerber, Public Hearings.

⁸⁰ Women's Health Victoria, Submission.

⁸¹ Wodonga, Community Roundtable.

⁸² Mildura, Community Roundtable.

⁸³ Brisbane (2), Community Roundtable.

⁸⁴ Newcastle, Community Roundtable.

⁸⁵ Sydney (3), Community Roundtable.

First, ensuring full domestic implementation of the human rights obligations that Australia has already accepted at the international level could improve Australia's reputation and limit criticism for non-compliance.⁸⁶ By ratifying international human rights instruments, Australia has agreed to comply with the obligations described in them, but to date we have implemented these instruments domestically on only a limited basis. Alice Edwards and Professor Robert McCorquodale pointed to an 'enlargening gap between our international obligations and our domestic legal framework and performance record on human rights protection'.⁸⁷ It was suggested that, by failing to implement these instruments more comprehensively in domestic law, Australia is in breach of international law.⁸⁸

Indeed, the UN Human Rights Committee (which oversees compliance with the International Covenant on Civil and Political Rights) and the Committee on Economic, Social and Cultural Rights (which oversees compliance with the International Covenant on Economic, Social and Cultural Rights) have criticised Australia for failing to enact accessible and uniform coverage of its international human rights obligations. Both committees recently recommended that Australia consider the introduction of comprehensive human rights legislation.⁸⁹ In its submission, the ACT Government remarked, 'It is important that Australia's actions in ratifying these treaties do not become hollow and meaningless gestures which do little in practical terms to protect the rights and freedoms of all Australians'.⁹⁰

Second, implementing Australia's international human rights obligations domestically would 'bring rights home' and reduce the number of complaints made to international treaty bodies. In some cases Australia has signed optional protocols to international human rights instruments that allow individuals in Australia to make a complaint to an international treaty body (for example, the Human Rights Committee in the case of the International Covenant on Civil and Political Rights).⁹¹ As Elizabeth Evatt pointed out in her submission, 'A body of human rights jurisprudence is being developed by the treaty bodies, in the context of Australian cases, without any opportunity arising for Australian courts to consider and to pronounce upon the relevant issues'.⁹² Implementing Australia's international human rights obligations domestically would provide a 'home-grown' system of

⁸⁶ Liberty Victoria, Submission.

⁸⁷ A Edwards and R McCorquodale, Submission.

⁸⁸ M Crock and T Freeman, Submission; Australian Human Rights Group, Submission.

⁸⁹ Human Rights Committee, *Consideration of Reports Submitted by States Parties under Article 40 of the Covenant: concluding observations of the Human Rights Committee—Australia* (7 May 2009); Committee on Economic, Social and Cultural Rights, *Consideration of Reports Submitted by States Parties under Articles 16 and 17 of the Covenant: concluding observations of the Committee on Economic, Social and Cultural Rights—Australia* (22 May 2009)..

⁹⁰ ACT Government, Submission.

⁹¹ See also Chapter 5.

⁹² E Evatt, Submission.

human rights protection.⁹³ In addition, the Human Rights Law Resource Centre noted:

It is very undesirable that members of the public be put to the expense and the considerable delay of seeking redress in New York or Geneva for a human rights complaint which could, had such human rights been part of domestic law, have been granted more inexpensively and much more quickly at home.⁹⁴

Finally, domestic implementation of Australia's human rights obligations would give Australia greater credibility when commenting on human rights abuses in other jurisdictions. In its submission the Victorian Government commented, 'Australia is a human rights leader in the Asia-Pacific region, and having a Federal Charter would help to set the benchmark in the context of conversations between Australia and its neighbours'.⁹⁵

Similarly, Elizabeth Evatt noted:

Australia's ability to influence the protection of human rights in other countries and in international forums should be enhanced when it demonstrates its willingness to ensure the effective implementation and enforcement of rights in Australia, and when it accepts the enforcement of human rights principles, whatever the effect this may have on the policy goals sought by a government.⁹⁶

Bringing Australia into line with other democracies

Several commentators have remarked that 'Australia finds itself increasingly isolated from the international community'⁹⁷ as the only Western democracy that does not have some form of national charter or bill of rights.⁹⁸ Some express concern at this fact alone; others worry that it could leave the Australian legal system isolated from developments in other similar systems⁹⁹ and that it might undermine Australia's authority to take part in discussions about human rights in the international arena.¹⁰⁰

Over time the Australian common law has developed with the assistance of a large body of cases considered by courts in other common law systems, among them the United Kingdom, Canada and New Zealand. Each of those countries has now developed some form of charter of human rights, and there is concern that they will

⁹³ A Edwards and R McCorquodale, Submission.

⁹⁴ Human Rights Law Resource Centre (Human Rights Act for All Australians), Submission.

⁹⁵ Victorian Government, Submission.

⁹⁶ E Evatt, Submission.

⁹⁷ G Lindell, Submission.

⁹⁸ Human Rights Law Resource Centre (Human Rights Act for All Australians), Submission; Human Rights Council of Australia, Submission.

⁹⁹ Human Rights Council of Australia, Submission; G Lindell, Submission.

¹⁰⁰ Human Rights Law Resource Centre (Human Rights Act for All Australians), Submission; GetUp! (E Coper), Submission; Women's Legal Service Victoria, Submission.

no longer be sources of influence and inspiration for our courts because their common law will increasingly be influenced by their human rights instruments. As a result, the Australian common law could experience a degree of 'intellectual isolation'.¹⁰¹

A related concern is that if Australia does not adopt some form of Human Rights Act its judiciary will be unable to play a part in the important debates and developments associated with human rights that are taking place in other jurisdictions and internationally.¹⁰² Elizabeth Evatt pointed out, 'Legislating for human rights would give the High Court a better opportunity to draw on and to contribute to the development of human rights jurisprudence'.¹⁰³

Generating economic benefits

Some commentators say a Human Rights Act could reduce the economic costs associated with policies that do not protect the lives and safety of Australians.

In its submission the Human Rights Law Resource Centre mentioned economic research into the costs of human rights violations. In 2004 Access Economics conducted a study of the costs of domestic violence to the Australian economy, finding that in 2002–03 the total cost of domestic violence was an estimated \$8.1 billion.¹⁰⁴ A 2004 Productivity Commission review of the *Disability Discrimination Act 1992* (Cth) found a correlation between equitable social policy and economic growth and noted that the Act was 'very likely to have produced a net community benefit in the period since its introduction'.¹⁰⁵ A 2008 Access Economics and Reconciliation Australia joint report stated that there is clear economic justification for reducing Indigenous disadvantage.¹⁰⁶

The Victorian Equal Opportunity & Human Rights Commission also identified an emerging business case for a human rights-based approach to government. Its submission mentioned a number of evidence-based indicators for this view, among them satisfaction on the part of service users, improved outcomes for service users, job satisfaction for staff, and the ease and quality of staff decision making.¹⁰⁷

¹⁰¹ J Spigelman, 'Access to justice and human rights treaties', Speech delivered at the National Conference of the Australian Plaintiff Lawyers Association, 22 October 1999; see also A Mason, 'The death of human rights? and related issues', Speech delivered at the Australian National University, 24 August 2007.

¹⁰² Human Rights Law Resource Centre (Human Rights Act for All Australians), Submission. See also G Robertson, *The Statute of Liberty* (2009) 103.

¹⁰³ E Evatt, Submission.

¹⁰⁴ Access Economics, *The Cost of Domestic Violence to the Australian Economy* (2004) 63, cited in Human Rights Law Resource Centre (Human Rights Act for All Australians), Submission.

¹⁰⁵ Productivity Commission, *Review of the Disability Discrimination Act 1992* (2004) 152, cited in Human Rights Law Resource Centre (Human Rights Act for All Australians), Submission.

¹⁰⁶ Access Economics and Reconciliation Australia, *An Overview of the Economic Impact of Indigenous Disadvantage* (2008) 47, cited in Human Rights Law Resource Centre (Human Rights Act for All Australians), Submission.

¹⁰⁷ Victorian Equal Opportunity & Human Rights Commission, Submission.

12.3 Countering the arguments

Chapter 13 presents the case against a Human Rights Act. A number of the arguments for such an Act, as just outlined, are, however, countered here in the following paragraphs.

First, in relation to the claim that the dialogue model of a Human Rights Act would generate a useful conversation about rights, experience in other jurisdictions suggests that a Human Rights Act is unlikely to give rise to institutional dialogue. If parliament simply accepts declarations of incompatibility by courts, genuine dialogue will not take place. Equally, if courts are reluctant to issue declarations of incompatibility, no dialogue about rights is initiated, and the courts might be seen to be providing legitimacy for questionable legislation.¹⁰⁸

Second, in relation to the claim that a Human Rights Act would bring Australia in line with other democracies, it has been argued that such a claim is superficial and says nothing about the substantive human rights protections in operation in Australia.¹⁰⁹ As to the potential ‘isolation’ of Australia’s judiciary, Julian Leeser points out that even before the enactment of the UK *Human Rights Act 1998* Australia was not following precedents set by the United Kingdom and other countries in the development of the Australian common law. He concludes, ‘It is surely no bad thing for Australian judges to continue to be as self-reliant as they currently are’.¹¹⁰ Professor Patrick Parkinson took this argument a step further, asserting that a Human Rights Act could mean that ‘Australian law will lose some of its autonomy and be carried along by the public policy fashions of North America and Europe, as interpreted by judges’.¹¹¹

Finally, in relation to the claim that a Human Rights Act would bring about a stronger culture of human rights, it has been argued that Australia already enjoys a culture in which rights are respected and protected. Further, such an Act could give rise to negative cultural change; for example, Brigadier Jim Wallace expressed concern about the development of a ‘rights based culture where someone must always be to blame’.¹¹²

¹⁰⁸ T Campbell and N Barry, Submission.

¹⁰⁹ Australian Christian Lobby, Submission.

¹¹⁰ J Leeser, ‘Responding to some arguments in favour of the bill of rights’ in J Leeser and R Haddrick (eds), *Don’t Leave Us with the Bill: the case against an Australian bill of rights* (2009), Submission, 54.

¹¹¹ P Parkinson, Submission.

¹¹² J Wallace, ‘Why should Christians be concerned about a bill of rights?’ in J Leeser and R Haddrick (eds), *Don’t Leave Us with the Bill: the case against an Australian bill of rights* (2009), Submission, 261; see also M Court, Submission.