

## 5 Are human rights adequately protected and promoted?

Chapter 4 describes the community's views on which rights and responsibilities need to be protected and promoted. This chapter deals with the question of whether these rights are already sufficiently protected and promoted in Australia. Generally, although the majority in the community seem to think their own rights are adequately protected, there is recognition that some are missing out and that the existing systems for protecting and promoting human rights could be improved.

### 5.1 The Australian tradition: 'a fair go' for all

In discussing the adequacy of the current system for protecting and promoting human rights, it is important to recognise the positive aspects of Australia's human rights record. As former Australian Labor Party President and Indigenous leader Warren Mundine noted at the public hearings, Australia's strengths lie in its democratic values and traditions, our sense of mateship and our belief in 'a fair go' for all.

In many ways Australia was a pioneer in the recognition of individual rights. As former Governor-General and Justice of the High Court Sir Ninian Stephen said:

A century or so ago Australia was very much a world leader in measures of constitutional and democratic reform. It had pioneered the secret ballot, was in the course of introducing adult franchise with the grant of votes to women, and the text of its new federal Constitution was not only being hammered out in public sessions by popularly elected delegates but was to depend for its adoption upon the vote of the people. These are but notable examples of what was an era of enterprising ventures in political reform.<sup>1</sup>

There appears to be general consensus that Australia measures well against many other countries in terms of its human rights protection.<sup>2</sup> There is a strong network of democratic institutions. Many Australians enjoy a standard of living that is at least equal to that in other First World countries and rarely would need to reflect on human rights or whether they are adequately protected.

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<sup>1</sup> Sir N Stephen, Foreword, in M Wilcox, *An Australian Charter of Rights?* (1993) v.

<sup>2</sup> For example, J Wood, Submission; K Budge, Submission; P Lucas, Submission, R and D Maude, Submission; Australian Chamber of Commerce and Industry, Submission.

But our record is not perfect. As Associate Professor Carolyn Evans noted:

It is important to acknowledge that, although Australia has had a comparatively good record of protection for human rights, it has a far from perfect record. From the beginning of nationhood in Australia there have been groups who have been discriminated against routinely and had their rights abused ... It is of little comfort to groups whose rights have been violated over long periods of time to know that their treatment is the exception rather than the rule.<sup>3</sup>

For example, while Australia was establishing itself as a progressive and advanced democracy, Indigenous peoples were often left behind. They were noticeably absent during the drafting of the Constitution, and ‘the only two original references to Indigenous people in the Australian Constitution of 1901 were both couched in the language of exclusion’.<sup>4</sup> The first express exclusion came by way of the power of Federal Parliament to make special laws for ‘the people of any race, other than the Aboriginal race’ pursuant to s. 51(xxvi) of the Constitution; and the second was in s. 127, which ‘excluded Aboriginal natives from being counted in the reckoning of the numbers of people of the Commonwealth or of a State’.<sup>5</sup>

Of the more than 35 000 people and organisations who presented submissions to the Committee, many expressed concern that the rights and benefits enjoyed by the majority are not shared by all. The research conducted by Colmar Brunton Social Research, however, revealed that most participants thought their human rights were adequately protected. In the telephone survey, 64 per cent of people agreed with the statement ‘Human rights in Australia are adequately protected’.<sup>6</sup> A similar attitude was reflected in a number of submissions and in the online forum.<sup>7</sup> While improving the protection of human rights was seen as desirable and possible, it generally was not considered urgent. Colmar Brunton noted, however, that focus group participants often confused their ‘experience’ of human rights with the rights’ ‘protection’, and participants assumed that, because they enjoy a particular right

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<sup>3</sup> C Evans, Submission.

<sup>4</sup> L O’Donoghue, *The Position of Indigenous People in National Constitutions: speeches from the conference, Canberra, 4-5 June 1993*, Council for Aboriginal Reconciliation and Constitutional Centenary Foundation (1993) 43.

<sup>5</sup> *ibid.* The 1967 referendum repealed s. 127 of the Constitution and removed the words ‘other than the Aboriginal race’ from s. 51(xxvi).

<sup>6</sup> Twenty-nine per cent were neutral and only 7 per cent disagreed with the statement—Colmar Brunton Social Research, *National Human Rights Consultation—community research report* (2009). As discussed in Chapter 1, Colmar Brunton conducted community research (which involved 15 focus groups and a national phone survey of 1200 people) and devolved consultations with groups who are especially vulnerable to having their rights threatened or violated. In addition, a recent telephone poll commissioned by Amnesty International Australia found that 84 per cent of participants believed that human rights are sufficiently protected in Australia (with 38 per cent believing their rights are completely protected and 54 per cent believing their rights are partially protected)—Amnesty International Australia, Submission.

<sup>7</sup> For example, C Schafer, Submission; A Prentice, Submission; D Colbourn, Submission; B Hambour, Submission; S Gear, Submission; E Mickelthwaite, Submission; P Orton, Submission; Y Small, Submission; G Wye, Submission; N Hunter, Submission; B H Kinkead, Submission; C Barlow, Submission; G Schmid, Submission; lisaballing27, Online Forum; P Newland, Online Forum; J Smuts, Online Forum.

daily, or have never felt it to be threatened, that right must be adequately protected under the law.<sup>8</sup>

Although most focus group participants reported that they had had no experience of their rights being violated, there was a recognition that some people and groups ‘fall through the cracks’ in the system. Among the groups identified as possibly needing greater protection (or at least assistance in exercising their rights) were children, people with a mental illness, the elderly, people with disabilities, carers, and Indigenous Australians (particularly those in remote areas).<sup>9</sup>

Colmar Brunton also conducted a devolved consultation with a number of groups, including homeless people, people with mental illness, people with physical disabilities, recently arrived refugees and immigrants, people in immigration detention, ex-prisoners, the aged, and people with drug or alcohol dependencies. It found that all these groups either explicitly reported that they do not get a fair go or described situations in which they were obviously not getting a fair go. Generally, there was a view that rights are protected so long as a person has the knowledge and means to assert them (or someone else to do so on their behalf). While there appears to be little understanding of human rights in the community, this is even more apparent—and has a more substantial impact—for people in these groups.<sup>10</sup>

Despite the Australian community believing in the idea of the fair go, the Public Interest Advocacy Centre commented that this attitude can go only part of the way in creating a culture in which human rights are respected and protected:

Certainly when a ‘fair go’ attitude is widespread it will have a significantly beneficial effect on the protection and promotion of human rights as it will limit or even stop infringements of human rights occurring in the first place. However, this ethos does not always extend itself to the policies and actions of government and the bureaucracy, the conduct of industry and business, and often fails to play out in the day-to-day lives of many in the community.<sup>11</sup>

Alice Edwards and Professor Robert McCorquodale noted:

It is insufficient to simply rely on ideologies and national concepts to protect human rights. As Australia proceeds to develop further its identity as a nation based on principles of equality and fairness, it must ensure that there is a firm legal foundation for these ideals.<sup>12</sup>

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<sup>8</sup> Colmar Brunton Social Research, *National Human Rights Consultation—community research report* (2009).

<sup>9</sup> *ibid.*

<sup>10</sup> Colmar Brunton Social Research, *National Human Rights Consultation—devolved consultation report* (2009).

<sup>11</sup> Public Interest Advocacy Centre, Submission.

<sup>12</sup> A Edwards and R McCorquodale, Submission.

The following sections assess whether there is such a ‘firm legal foundation’ by outlining the current mechanisms for the protection of human rights in Australia and noting their strengths and limitations.

## 5.2 International human rights law and Australia’s obligations

Australia’s obligations under international human rights law are found in treaties (that is, binding agreements entered into between States) and customary international law (that is, rules that are developed through the practice of States and recognised as binding on them). International human rights law requires a State to ‘respect, protect and fulfil’ the human rights of those within its jurisdiction.<sup>13</sup>

Australia adopts its treaty obligations in a two-step process—signature and ratification. By signing a treaty, Australia signals its ‘in-principle’ commitment but does not become bound by the treaty.<sup>14</sup> When it ratifies a treaty, it becomes a ‘State party’ and undertakes, as a matter of international law, to observe the rights and obligations expressed in the treaty. The treaty will not, however, automatically become part of Australian domestic law. For this to occur, the provisions of the treaty must be implemented domestically through legislation. In practice, not all of Australia’s international treaty obligations have been incorporated in domestic law.

As a matter of international law, the division of federal–state responsibilities cannot be used as an excuse for failure to comply with an international obligation. Extensive federal–state consultations are usually required to ensure that Australia can comply with its international legal obligations. This can involve enacting, amending or repealing federal or state or territory legislation to implement obligations or remove impediments to the enjoyment of particular rights and freedoms.

Australia is a party to the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights, which, together with the Universal Declaration of Human Rights, are known as the ‘International Bill of Rights’. These have been built on by a range of treaties that deal with the rights of individuals and groups with particular needs, such as women, children and people with disabilities. Australia is a party to a number of these treaties, among them the following:

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<sup>13</sup> For example, Mallesons Stephen Jaques Human Rights Law Group, Submission; Federation of Community Legal Centres (Vic), Submission; Human Rights Law Resource Centre (Human Rights Act for All Australians), Submission; Australian Council of Social Service, Submission.

<sup>14</sup> Specifically, by signing a treaty a State becomes obliged ‘to refrain from acts which would defeat the object and purpose of a treaty’: Vienna Convention on the Law of Treaties art. 18.

- the International Convention on the Elimination of All Forms of Racial Discrimination
- the Convention on the Elimination of All Forms of Discrimination against Women
- the Convention against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment
- the Convention on the Rights of the Child
- the Convention on the Rights of Persons with Disabilities.

Australia is also a party to the optional protocols to the International Covenant on Civil and Political Rights, the Convention on the Elimination of All Forms of Discrimination against Women and the Convention on the Rights of Persons with Disabilities (which provide an individual complaints mechanism, as discussed shortly); the optional protocols to the Convention on the Rights of the Child (on the involvement of children in armed conflict and on the sale of children, child prostitution and child pornography); and the second optional protocol to the International Covenant on Civil and Political Rights (aimed at abolition of the death penalty). It is working towards becoming a party to the optional protocol to the Convention against Torture (which enables the UN Committee against Torture to inspect places of detention). An optional protocol to the International Covenant on Economic, Social and Cultural Rights was adopted by the UN General Assembly in December 2008 and is to open for signature in September 2009.

In April 2009 the Federal Government made a formal statement in support of the UN Declaration on the Rights of Indigenous Peoples 2007.<sup>15</sup> While international declarations are not generally binding documents and do not create any enforceable obligations for States that adopt them, they do have moral and political significance.

As noted, Australia has not implemented all of its obligations under international law in domestic legislation. This means that these obligations cannot be enforced in Australian courts. There are, however, a number of mechanisms at the international level by which Australia can be held accountable for failing to fulfil its international human rights obligations.

## **Reporting to UN Committees**

For each of the human rights treaties just listed, there is a UN committee that monitors States' compliance. Australia is required to report to the committees every few years on its compliance with its treaty obligations. The reports are public

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<sup>15</sup> J Macklin MP, Minister for Families, Housing, Community Services and Indigenous Affairs, 'Statement on the United Nations Declaration on the Rights of Indigenous Peoples' (Speech delivered at Parliament House, Canberra, 3 April 2009).

documents and are tabled in parliament. Federal government representatives appear before the relevant committee to answer further questions. A committee may also take into account ‘shadow reports’ prepared by non-government organisations. After considering this information the committee issues ‘concluding observations’, making recommendations about ways of improving Australia’s compliance with its international obligations. The Federal Government then circulates these concluding observations to state and territory governments and considers whether and how they should be implemented. During 2009 concluding observations have been released on Australia’s compliance with both the ICCPR and the ICESCR.<sup>16</sup>

## **Individual complaints to UN Committees**

The optional protocols to some human rights treaties provide mechanisms by which individuals can lodge complaints against the State for human rights violations. If individuals feel their rights have been violated, and they have exhausted all avenues of redress in Australia, they can make a complaint to the relevant UN committee. Australia has agreed to such complaint mechanisms under the ICCPR, the International Convention on the Elimination of All Forms of Racial Discrimination, the Convention against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment, the Convention on the Elimination of All Forms of Discrimination against Women and the Convention on the Rights of Persons with Disabilities. The committees’ findings are not legally binding, but the publicity attached to them can place pressure on States to change their practices.

## **Human Rights Council mechanisms**

The Human Rights Council is an intergovernmental body established under the UN Charter. Comprising 47 member States, it monitors the human rights compliance of UN member States through a range of mechanisms, including ‘Universal Periodic Review’ (which reviews the human rights record of each member State every four years) and ‘Special Procedures’. Special Procedures involve the appointment of an individual (for example, a special rapporteur) or a working group to examine a specific country’s situation or a thematic matter of concern. They usually monitor the matter and report to the Human Rights Council on their findings and

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<sup>16</sup> 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).

recommendations.<sup>17</sup> In 2008 Australia issued a ‘standing invitation’ to UN special rapporteurs and other experts to visit the country.<sup>18</sup>

## The adequacy of international mechanisms

Throughout the Consultation concern was expressed about the ‘disconnect’ between the human rights obligations Australia has voluntarily adopted by ratifying international treaties and their implementation in domestic law. Many submissions made reference to the recent concluding observations of the committees that oversee compliance with the ICCPR and ICESCR.<sup>19</sup> While both committees acknowledged positive human rights developments in Australia, they also identified a range of areas in which Australia’s failure to implement its obligations under the treaties has had adverse human rights implications.<sup>20</sup>

As Elizabeth Evatt submitted, in the absence of domestic legislation that implements Australia’s international human rights obligations, Australians have no access to an effective remedy for some human rights violations.<sup>21</sup> This itself could constitute a breach of international law since a number of treaties (such as the ICCPR) oblige States parties to ensure that any person whose rights are violated has access to an effective remedy.<sup>22</sup>

As to the international mechanisms themselves, there is evidence of both their effectiveness and their limitations.

The *Toonen* matter is an example of the successful operation of the individual complaints mechanism. In 1991 Nicholas Toonen made a complaint to the Human Rights Committee (which oversees compliance with the ICCPR). At that time, consenting adult homosexual sex was an offence under the Tasmanian Criminal Code. The Human Rights Committee found that this violated article 17 of the ICCPR (the right to privacy).<sup>23</sup> In 1994 the Federal Parliament responded by passing the

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<sup>17</sup> *Manual of Operations of the Special Procedures of the Human Rights Council* (August 2008).

<sup>18</sup> Attorney-General and Minister for Foreign Affairs, ‘Invitation to United Nations human rights experts’ (Press release, 7 August 2008).

<sup>19</sup> For example, J Casben, Submission; National Native Title Council, Submission; Queensland Council of Social Service, Submission; Mallesons Stephen Jaques Human Rights Law Group, Submission; Human Rights Council of Australia, Submission; Australian Human Rights Commission, Submission.

<sup>20</sup> 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).

<sup>21</sup> E Evatt, Submission. Elizabeth Evatt is a former chair of the UN Committee on the Elimination of Discrimination Against Women and a former member of the UN Human Rights Committee.

<sup>22</sup> E Evatt, Submission, citing International Covenant on Civil and Political Rights art. 2(3).

<sup>23</sup> *Toonen v Australia*, Communication No. 488/1992 (1994). The Committee did not consider it necessary to determine whether there had been a breach of art. 26 of the ICCPR, which guarantees equality before the law.

*Human Rights (Sexual Conduct) Act 1994* (Cth), which overrode the Tasmanian provision, and the Tasmanian Parliament ultimately repealed the provision.<sup>24</sup>

There are a number of instances, however, where the Australian Government has either failed or refused to adopt the recommendations of these committees. For example, in *A v Australia*<sup>25</sup> the Human Rights Committee found that A's immigration detention was arbitrary (in violation of article 9(1) of the ICCPR) and that his inability to challenge the lawfulness of the detention breached article 9(4). The Committee recommended that Australia pay compensation to A, but the Federal Government rejected the recommendation.<sup>26</sup>

While the findings of treaty bodies can put political pressure on Australia to reconsider laws and policies that are found to be inconsistent with its international human rights obligations, the recommendations are not binding or enforceable.<sup>27</sup> As the Gilbert + Tobin Centre of Public Law noted:

the Australian Government cannot be compelled by a successful applicant to adhere to these recommendations ... [They] are unlikely to affect our domestic situation unless they receive media coverage and/or are incorporated into the policies of either or both of the major parties.<sup>28</sup>

### 5.3 The democratic system

Many submissions pointed to the strength of Australia's democratic institutions as a means of protecting and promoting human rights.

#### Australia's democratic institutions

- *The Australian Constitution*. The Constitution is in written form and can be amended only by referendum. This requires the approval of a majority of voters nationally, as well as a majority of voters in a majority of states.
- *Representative democracy*. Australia is a democratic nation that elects its governments by popular vote. For many this is a fundamental guarantee of human rights. As Steve Pasfield submitted, 'If the majority feel someone is not getting a fair go then they will speak at the ballot box'.<sup>29</sup>

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<sup>24</sup> N O'Neill, S Rice and R Douglas, *Retreat from Injustice: human rights law in Australia* (2004) 189.

<sup>25</sup> Communication No. 560/1993 (30 April 1997).

<sup>26</sup> N O'Neill, S Rice and R Douglas, *Retreat from Injustice: human rights law in Australia* (2004) 189.

<sup>27</sup> For example, Castan Centre for Human Rights Law, Submission; Australian Lawyers Alliance, Submission.

<sup>28</sup> Gilbert + Tobin Centre of Public Law (E Santow), Submission.

<sup>29</sup> S Pasfield, Submission. See also L Bagnall, Submission.

- *A federal system.* In Australia there is a national government and six state and two territory governments. The distribution of power between the different levels of government means that each can act as a check on the other.
- *Separation of powers.* Under the Constitution power is distributed between the executive, legislative and judicial arms of government. The separation of powers doctrine does not operate in a strict fashion in Australia (given that the members of the executive sit in parliament) except in relation to the independence of the judiciary. This means the judiciary can act as a check on the executive and the legislature and thereby protect individual rights.
- *Responsible government.* The doctrine of responsible government means that the executive is drawn from, and accountable to, parliament. Ministers are collectively responsible to parliament, and a government that loses the support of the House of Representatives must resign. Ministers are also individually responsible to parliament for the administration of their portfolios.<sup>30</sup>
- *Bicameral parliaments.* The Federal Parliament and all state parliaments except Queensland's are bicameral—meaning they have both an upper and a lower house.<sup>31</sup> Because of the different voting system for the upper house, that house can contain a majority of non-government members, as is usually the case with the Senate. This offers an additional check on the government's power.
- *Parliamentary committees.* Parliamentary committees—which are made up of members of one house of parliament or of both houses—can have a range of functions, including reviewing Bills and legislation for their impact on individual rights. For example, the Senate Scrutiny of Bills Committee is empowered to scrutinise Bills for their effect on fundamental rights and liberties.<sup>32</sup>
- *A free press.* The media is generally free to publish material that is critical of the government. This increases accountability and helps citizens make informed decisions at election time.

## The adequacy of democratic institutions

Throughout the Consultation some members of the community said Australia's network of democratic institutions is enough to protect human rights.<sup>33</sup> Many also recognised, however, that these institutions have limitations when it comes to the

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<sup>30</sup> M Groves and HP Lee (eds), *Australian Administrative Law: fundamentals, principles and doctrines* (2007) 4–5.

<sup>31</sup> The Northern Territory and the ACT have unicameral legislatures.

<sup>32</sup> See Senate Scrutiny of Bills Committee, Standing Order 24.

<sup>33</sup> For example, R Dennis, Submission; A Beveridge, Submission; A Teale-Sinclair, Submission; A Grills, Submission; J and T Van Duyn, Submission.

protection of human rights—in particular, the rights of minorities.<sup>34</sup> Ranil Ratnayeke submitted:

Democracy doesn't always work quickly enough to prevent human rights breaches, or to assist people whose rights have been breached. Australian history shows that in times of perceived emergency, governments have disregarded and failed to consider the human rights implications of new laws and policies.<sup>35</sup>

Although members of parliament are held accountable at the 'ballot box', at the federal level this is usually once every three years—by which time instances of human rights abuses might have faded from public memory and 'mainstream' concerns such as the economy are more decisive.<sup>36</sup> Further, elections usually express the will of the majority, whereas human rights abuses are usually felt by minorities who are often 'disadvantaged, marginalised and unpopular—in short, they are often persons to whom the majority are actively hostile or simply apathetic'.<sup>37</sup> Ballot box accountability also depends on the majority having been made aware of human rights abuses.

The existing parliamentary mechanisms do not always ensure that human rights are considered and debated before the passage of legislation.<sup>38</sup> Parliaments today deal with a huge volume of legislation, which makes it difficult for members to ensure they are aware of all the possible consequences of specific legislation before they are asked to vote on it.<sup>39</sup> In some cases parliament might be aware of human rights implications but nevertheless pass the legislation—for example, where a minority group is targeted as part of a 'law and order' campaign.<sup>40</sup> The Committee heard the following examples of legislation having been passed with insufficient consideration or observance of human rights.

### **National security legislation**

In submissions much concern was expressed in relation to the national security legislation that has been enacted in Australia since the terrorist attacks on 11 September 2001. Many submitted that the legislation does not strike a suitable

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<sup>34</sup> For example, International Commission of Jurists (Australia) Submission; C O'Connor, Submission; R Ratnayeke, Submission; D Klug, Submission; Gilbert + Tobin Centre of Public Law (E Santow), Submission; Public Interest Law Clearing House, Submission; Australian Council of Social Service, Submission; H Robert, Submission; Australian Lawyers Alliance, Submission.

<sup>35</sup> R Ratnayeke, Submission.

<sup>36</sup> For example, D Klug, Submission; Gilbert + Tobin Centre of Public Law (E Santow), Submission.

<sup>37</sup> Gilbert + Tobin Centre of Public Law (E Santow), Submission. See also Australian Council of Social Service, Submission; H Roberts, Submission; Public Interest Law Clearing House, Submission.

<sup>38</sup> For example, Australian Council of Social Service, Submission; A Freer, Submission; Australian Human Rights Commission, Submission; Australian Lawyers Alliance, Submission.

<sup>39</sup> Gilbert + Tobin Centre of Public Law (E Santow), Submission. See also Australian Lawyers Alliance, Submission.

<sup>40</sup> Public Interest Advocacy Centre, Submission.

balance between respect for human rights and national security.<sup>41</sup> The subject was also raised at many community roundtables<sup>42</sup>; one community roundtable participant noted:

We need to overcome the knee-jerk reaction that's immediate whenever we talk about terrorism and the fear that comes with that. We're essentially back in Tudor England ... People are able to be detained with no ability to contact family or lawyers for quite a period of time. These laws impinge on every single aspect of our society, our rights.<sup>43</sup>

The UN Human Rights Committee recently urged the Australian Government to amend national security laws to bring them into line with the ICCPR.<sup>44</sup> The Gilbert + Tobin Centre of Public Law noted a number of problems with the legislation, including the following<sup>45</sup>:

- It adopts an expansive interpretation of 'criminal liability', allowing individuals to be held criminally liable for their mere membership of a deemed 'terrorist organisation'.
- It allows individuals to be detained for several days without charge if that is seen as reasonably necessary to prevent a terrorist attack or to preserve evidence from a recent terrorist attack.<sup>46</sup>
- The definition of 'terrorist organisation' is too broad and has a 'chilling effect' on free speech.<sup>47</sup> Further, there is no obligation on the Attorney-General to publicise a decision to ban an organisation or to accord the organisation procedural fairness.
- It undermines the defendant's right to a fair trial. For example, in the absence of the defendant or his or her legal representatives, a court can decide whether to limit access to information on national security grounds.

Amnesty International Australia also noted that several offences reverse the onus of proof, undermining the right to be presumed innocent until proven guilty.<sup>48</sup>

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<sup>41</sup> For example, Victorian Bar, Submission; C Nicoll, Submission; N Broomhall, Submission; Law Council of Australia, Submission; R Watson, Submission; J Wilson, Submission; Australian Democrats, Submission; E Infield, Submission.

<sup>42</sup> For example, Queanbeyan, Community Roundtable; Alice Springs, Community Roundtable; Katherine, Community Roundtable; Busselton, Community Roundtable; Broken Hill, Community Roundtable; Mildura, Community Roundtable; Whyalla, Community Roundtable; Mt Gambier, Community Roundtable; Dubbo, Community Roundtable; Newcastle, Community Roundtable; Melbourne, Community Roundtable; Sydney, Community Roundtable; Cronulla, Community Roundtable.

<sup>43</sup> Tweed Heads, Community Roundtable.

<sup>44</sup> 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) [11].

<sup>45</sup> Gilbert + Tobin Centre of Public Law (B Golder, A Lynch, N McGarrity and C Michaelsen), Submission.

<sup>46</sup> See also Law Council of Australia, Submission.

<sup>47</sup> *ibid.*

<sup>48</sup> Amnesty International Australia, Submission.

The Gilbert + Tobin Centre of Public Law submitted that the legislation was passed in a climate of fear, which led to ‘an emphasis on the purported effectiveness of counter-terrorism measures as opposed to a reasoned deliberation on the human rights implications of any planned legislation’.<sup>49</sup> The Public Interest Advocacy Centre raised particular concerns with the passage of the Anti-Terrorism Bill 2005 (Cth) and the Anti-Terrorism Bill (No 2) 2005 (Cth). It submitted that the Senate Scrutiny of Bills Committee failed to make substantive comment on some of the most restrictive elements of the Bills (such as the sedition provisions) and noted that the committee’s report was only available after the first Bill had been passed by the parliament.<sup>50</sup>

Particular concerns were also expressed about the practical operation of the national security legislation—notably in relation to the case of Dr Mohamed Haneef.<sup>51</sup> In 2007 Dr Haneef was detained for 12 days before being charged with providing a resource to a terrorist organisation (providing a mobile phone SIM card to his second cousins). He remained in custody for another 13 days until the charge was withdrawn. The subsequent inquiry, conducted by the Hon. John Clarke QC, resulted in a number of criticisms of anti-terrorism laws.<sup>52</sup>

### **‘Bikie’ legislation**

A number of submissions expressed concern about the so-called bikie laws that have been passed in several jurisdictions in Australia.<sup>53</sup> They noted in particular the way in which the legislation was rushed through the New South Wales Parliament, with insufficient debate on the human rights implications.<sup>54</sup>

The *Crimes (Criminal Organisations Control) Act 2009* (NSW) makes it a criminal offence for members of declared criminal organisations to associate with one another and prohibits them from being employed in certain occupations, such as the security industry. It permits the Police Commissioner to apply to an ‘eligible judge’ (declared to be eligible by the state’s Attorney-General) for a declaration that a particular organisation is a ‘declared organisation’. The Police Commissioner may object to a member of the organisation being present at the hearing while ‘criminal intelligence’ is disclosed.

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<sup>49</sup> Gilbert + Tobin Centre of Public Law (B Golder, A Lynch, N McGarrity and C Michaelsen), Submission.

<sup>50</sup> Public Interest Advocacy Centre, Submission.

<sup>51</sup> For example, Public Interest Law Clearing House, Submission; NSW Bar Association, Submission; P Cram, Submission; N Cranswick, Submission; Law Council of Australia, Submission; Castan Centre for Human Rights Law, Submission.

<sup>52</sup> See MJ Clarke, *Report of the Inquiry into the Case of Dr Mohamed Haneef* (2008).

<sup>53</sup> J Tendys, Submission; S Hague, Submission; A Lindstad, Submission; D Klug, Submission; Staff of the Legal Aid Commission (ACT), Submission; B Saul, Submission; NSW Charter Group, Submission; Castan Centre for Human Rights Law, Submission.

<sup>54</sup> Gilbert + Tobin Centre of Public Law (E Santow), Submission; NSW Bar Association, Submission.

The Bill was passed by both houses of parliament less than 24 hours after its introduction. The Legislation Review Committee expressed a number of reservations about the Bill's impact on individual rights, but its report was not completed, published and tabled until more than a month after the Bill had been passed.<sup>55</sup>

### **The Northern Territory Intervention**

Many submissions and community roundtable participants were worried by the Northern Territory Emergency Response legislation, which introduced measures to deal with welfare problems, child sexual abuse and family violence in Indigenous communities in the Northern Territory. The legislation was cited as evidence that 'there is inadequate protection of rights of Indigenous peoples'.<sup>56</sup>

Although aspects of the Intervention appear to have a degree of community support (including among some of the Indigenous people affected by them), concern was raised about the discriminatory impact of the measures and the process by which they have been implemented.<sup>57</sup> The Australian Council of Social Service, for example, submitted that the Intervention has infringed a number of human rights, including the right to self-determination (since the response was developed in the absence of consultation with affected Indigenous communities), the right to social security (under the policy of income management), the right to freedom of movement (since the 'basics card' can be reliably used only in designated areas) and Indigenous land rights (as a result of the compulsory acquisition of Indigenous-held land under five-year leases).<sup>58</sup>

A particular concern has been expressed about suspension of the operation of the *Racial Discrimination Act 1975* (Cth) in relation to the Intervention legislation.<sup>59</sup> Since there is no guarantee of equality under the Constitution, the Federal Parliament can override the Act (and other anti-discrimination legislation) at any time and adopt laws that discriminate on the basis of race.<sup>60</sup>

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<sup>55</sup> See NSW Bar Association, Submission.

<sup>56</sup> NSW Reconciliation Council, Submission.

<sup>57</sup> For example, Mullumbimby Intervention Awareness Group, Submission; Victorian Aboriginal Child Care Agency, Submission; K Valentine, Submission; NSW Reconciliation Council, Submission; G Nanni, Submission; Victorian Bar, Submission; B Coyne, Submission; Australian Human Rights Commission, Submission; M Hagley, Submission; Australian Council of Social Service, Submission. For example, Tennant Creek, Community Roundtable; Alice Springs, Community Roundtable; Katherine, Community Roundtable; Yirrkala, Community Roundtable; Mt Gambier, Community Roundtable; Dubbo, Community Roundtable; Newcastle, Community Roundtable; Cronulla, Community Roundtable.

<sup>58</sup> Australian Council of Social Service, Submission.

<sup>59</sup> Foundation for Aboriginal and Islander Research Action, Submission; Aboriginal and Torres Strait Islander Legal Services, Submission; Close the Gap Campaign Steering Committee for Indigenous Health Equality, Submission; B Smith, Submission; Australian Council of Social Service, Submission; Public Interest Advocacy Centre, Submission; Northern Territory Council of Social Service, Submission; Centre for Human Rights Education (Curtin University), Submission.

<sup>60</sup> For example, Aboriginal and Torres Strait Islander Legal Services, Submission; Close the Gap Campaign Steering Committee for Indigenous Health Equality, Submission; Australian Human Rights Commission, Submission.

The Australian Human Rights Commission submitted, 'It is clear that Parliament did not hold an informed and rigorous debate about the serious potential human rights implications of the new legislation'.<sup>61</sup> The 600 pages of Intervention legislation were passed by the House of Representatives nine hours after they were introduced.<sup>62</sup> Debate on suspension of the Racial Discrimination Act lasted a mere 13 minutes.<sup>63</sup>

### The immigration regime

Many submissions pointed to aspects of Australia's immigration regime that undermine fundamental human rights. This subject was repeatedly raised at community roundtables.<sup>64</sup> Some cited the immigration legislation as another example of Australia's democratic institutions failing to adequately protect human rights.<sup>65</sup>

There was concern about the mandatory detention of 'unlawful' immigrants, which is said to violate a number of Australia's international human rights obligations, including the prohibition on arbitrary detention under article 9(1) of the ICCPR.<sup>66</sup> The concern remains, even after the Federal Government's recent changes to



The Committee and Mr Tim Overall, mayor of Queanbeyan, at the first community roundtable.

detention policy. The Refugee and Immigration Legal Service noted the damaging psychological effects of detention on asylum seekers, particularly children.<sup>67</sup>

Submissions also pointed to the problems with Australia's bridging visa system—in particularly Bridging Visa E, which denies its holders the right to work (even

<sup>61</sup> Australian Human Rights Commission, Submission.

<sup>62</sup> A Ramsey, 'No opposition, no debate, no contest', *The Sydney Morning Herald*, 11 August 2007, cited in Australian Human Rights Commission, Submission.

<sup>63</sup> G Williams, 'Wisdom of politicians is frail shield for our rights', *The Sydney Morning Herald*, 2 June 2009.

<sup>64</sup> For example, Queanbeyan, Community Roundtable; Whyalla, Community Roundtable; Dubbo, Community Roundtable; Sydney, Community Roundtable; Mt Gambier, Community Roundtable; Melbourne, Community Roundtable.

<sup>65</sup> For example, C O'Connor, Submission; Law Council of Australia, Submission.

<sup>66</sup> For example, Amnesty International Australia, Submission, Human Rights Council of Australia, Submission; Gilbert + Tobin Centre of Public Law (J McAdam and T Garcia), Submission; Refugee and Immigration Legal Service, Submission; ChilOut—Children Out of Detention, Submission; Asylum Seeker Resource Centre, Submission; C Byrne, Submission; P Wall, Submission; R Nairn, Submission.

<sup>67</sup> Refugee and Immigration Legal Service, Submission. See also Asylum Seeker Resource Centre, Submission; ChilOut—Children Out of Detention, Submission.

voluntarily).<sup>68</sup> Concern was also expressed about the offshore processing of asylum seekers, and it was said that the provision of essential services (such as interpreters, counsellors and legal advisors) is compromised by the facilities being so far away.<sup>69</sup>

## 5.4 The Australian Constitution

Enshrining human rights in the Constitution is said to be the strongest form of protection for those rights. This is because the Constitution can be altered only by referendum. Any federal legislation that is inconsistent with the Constitution is rendered invalid.

Throughout the Consultation some people expressed surprise to discover that the Constitution does not contain a bill of rights. In fact, the Constitution contains only a small number of rights, or mechanisms for protecting rights. Some of these rights are expressly included in the Constitution; others have been implied from its text and structure.

### Express rights

The Constitution expressly provides for a number of rights, among them the following:

- *The right to trial by jury (s. 80)*. This right applies only to federal offences and only to those who are to be tried by indictment.<sup>70</sup>
- *Freedom of religion (s. 116)*. This provides that ‘the Commonwealth shall not make any law for establishing any religion, or for imposing any religious observance, or for prohibiting the free exercise of any religion, and no religious test shall be required as a qualification for any office or public trust under the Commonwealth’. Some submissions argued that s. 116 is a sufficient guarantee of freedom of religion<sup>71</sup>, but the section has generally been interpreted narrowly, and no claim based on the provision has ever been upheld.<sup>72</sup>
- *A prohibition on discrimination based on residence (s. 117)*. This prohibits governments from imposing ‘any disability or discrimination’ based on an

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<sup>68</sup> For example, Refugee and Immigration Legal Service, Submission; ChilOut—Children Out of Detention, Submission; Gilbert + Tobin Centre of Public Law (J McAdam and T Garcia), Submission.

<sup>69</sup> Gilbert + Tobin Centre of Public Law (J McAdam and T Garcia), Submission; Refugee and Immigration Legal Service, Submission; Centre for Human Rights Education (Curtin University), Submission.

<sup>70</sup> For example, *R v Archdall and Roskrugge; Ex parte Carrigan and Brown* (1928) 41 CLR 128.

<sup>71</sup> For example, D Pennington, Submission; R Fisher, Submission; P Connelly, Submission; Catholic Women’s League Australia, Submission.

<sup>72</sup> G Williams, *A Charter of Rights for Australia* (2007) 36–37. For example, *Krygger v Williams* (1912) 15 CLR 366.

individual's place of residence.<sup>73</sup> For example, Victoria could not exclude the residents of any other state from its universities.<sup>74</sup>

- *The right to review of government actions (s. 75(v))*. This gives the High Court the power to issue writs of mandamus (which compel the performance of a public duty), prohibition and injunction (which forbid or prevent specified acts or omissions) against officers of the Commonwealth. Individuals are able to seek judicial review of federal government action.<sup>75</sup>
- *Acquisition of property on just terms (s. 51(xxxi))*. This provides that the Commonwealth can acquire 'property' only on 'just terms'. This is the provision that was made famous by the film *The Castle*. It means that that if the Federal Government compulsorily acquires a person's property it must provide fair value in return.<sup>76</sup>
- *Freedom of interstate trade (s. 92)*. This provides that 'trade, commerce and intercourse among the States ... shall be absolutely free'. This has been interpreted as prohibiting laws that are protectionist—in the sense of adversely discriminating against residents of a particular state or territory in a way that is not reasonably considered necessary.<sup>77</sup>

## Implied rights

- *The separation of powers*. The High Court has inferred from the structure of the Constitution that there is to be a 'separation of powers' between the judicial branch of government and the legislative and executive branches. This separation indirectly protects human rights because it ensures the independence of the judiciary and prevents the executive or legislature from exercising judicial power. For example, the legislature cannot impose punitive detention on people without them having been judged and sentenced to imprisonment by a court.<sup>78</sup>
- *Freedom of political communication*. The High Court has inferred a freedom of political communication from ss. 7 and 24 of the Constitution.<sup>79</sup> These provisions require that members of the Senate and the House of Representatives be 'directly chosen by the people'. The High Court found that for this to be an informed choice, there must be free access to relevant political

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<sup>73</sup> For example, *Street v Queensland Bar Association* (1989) 168 CLR 461.

<sup>74</sup> G Williams, *A Charter of Rights for Australia* (2007) 37.

<sup>75</sup> For example, *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476.

<sup>76</sup> G Williams, *A Charter of Rights for Australia* (2007) 38–9. For example, *Nelungaloo Pty Ltd v Commonwealth* (1947) 75 CLR 495; *Grace Bros Pty Ltd v Commonwealth* (1946) 72 CLR 269.

<sup>77</sup> For example, *Betfair Pty Limited v Western Australia* (2008) 234 CLR 418.

<sup>78</sup> *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1. For the application of this doctrine to the states see *Kable v DPP* (1996) 189 CLR 51.

<sup>79</sup> *Australian Capital Television Pty Limited v Commonwealth* (1992) 177 CLR 106.

information. The implied right to freedom of political communication is not as broad as a general right to freedom of expression.

- *The right to vote.*<sup>80</sup> In *Roach v Electoral Commissioner*<sup>81</sup> the High Court held that legislation that prohibited all people serving a prison sentence from voting in federal elections was unconstitutional. The court held that these provisions were inconsistent with the system of representative and responsible government mandated by the Constitution. It accepted, however, that the right to vote could be limited where there are substantial reasons for doing so—for example, on the basis of citizenship or the length of a prisoner’s sentence.

## The adequacy of Constitutional protections

Many submissions emphasised that the rights in the Constitution are limited in scope and generally have been interpreted narrowly by the courts.<sup>82</sup> Further, the remedies available for their breach are limited: ‘individuals whose “constitutional rights” have been violated have no independent cause of action against the Commonwealth’.<sup>83</sup> The remedy is often a simple declaration that particular legislation or executive action is unlawful.

Some noted that the limited human rights protection afforded by the Constitution is a product of the fact that the Constitution was not designed to protect individual rights but rather to limit the powers of the new federal government as against the states.<sup>84</sup> Dr Amelia Simpson and James Stellios submitted that the provisions often identified as constitutional rights are better understood as provisions forming part of the federal architecture of the Constitution and thus should not be a weighty consideration in determining whether our rights are adequately protected.<sup>85</sup>

The Australian Council of Social Service also noted that, because some constitutional rights are not written down but are developed by case law, they are

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<sup>80</sup> Section 41 of the Constitution grants the right to vote in federal elections to any ‘adult person who has or acquires a right to vote at elections for the more numerous House of the Parliament of a State’. Since the High Court has held that this applies only to a person who was entitled to vote in a state election before 1902, the right is meaningless—*R v Pearson; Ex parte Sipka* (1983) 152 CLR 254.

<sup>81</sup> (2007) 233 CLR 162.

<sup>82</sup> For example, Australian Association of Women Judges, Submission; Law Institute of Victoria, Submission; Mallesons Stephen Jaques Human Rights Law Group, Submission; Human Rights Council of Australia, Submission; Public Interest Advocacy Centre, Submission; Intellectual Disability Rights Service, Submission; J Debeljak, Submission; Gilbert + Tobin Centre of Public Law (E Santow), Submission; NSW Bar Association, Submission.

<sup>83</sup> Gilbert + Tobin Centre of Public Law (E Santow), Submission.

<sup>84</sup> For example, ACT Human Rights Commission, Submission; Australian Human Rights Commission, Submission; Gilbert + Tobin Centre of Public Law (E Santow), Submission; Amnesty Legal Group (Vic), Submission; Australian Lawyers Alliance, Submission.

<sup>85</sup> A Simpson and J Stellios, Submission.

inaccessible to non-lawyers and particularly people who have low levels of literacy and education.<sup>86</sup>

## 5.5 Legislative protections

As noted, Australia's obligations under international human rights law are enforceable in Australia only if they have been implemented in domestic legislation. Australia has implemented some but not all of its international human rights obligations.

### Federal legislation

One of Australia's obligations under international human rights law is to prohibit discrimination on a number of grounds. The Federal Parliament has gone part of the way to fulfilling this obligation by passing the following legislation:

- The *Racial Discrimination Act 1975* partially implements Australia's obligations under the International Convention on the Elimination of All Forms of Racial Discrimination. It prohibits discrimination against a person on the grounds of race, colour, descent or national or ethnic origin. It also prohibits offensive behaviour based on racial hatred (vilification) on all these grounds other than descent.
- The *Sex Discrimination Act 1984* partially implements Australia's obligations under the Convention on the Elimination of All Forms of Discrimination against Women. It prohibits discrimination on the grounds of sex, marital status, pregnancy and potential pregnancy in areas such as employment, accommodation, education, the provision of goods, facilities and services, the disposal of land, and the activities of clubs. It also prohibits sexual harassment.
- The *Age Discrimination Act 2004* implements parts of the ICCPR, the ICESCR, the Convention on the Rights of the Child and the ILO Convention Concerning Discrimination in Respect of Employment and Occupation. It prohibits discrimination on the basis of age in many areas of public life, including employment, access to goods, services and facilities, access to premises, administration of federal laws and programs, education, accommodation, the disposal of land, and requests for information.
- The *Disability Discrimination Act 1992* implements parts of the ICCPR, the ICESCR, the Convention on the Rights of the Child and the ILO Convention Concerning Discrimination in Respect of Employment and Occupation. It prohibits discrimination against people with disabilities in the areas of

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<sup>86</sup> Australian Council of Social Service, Submission.

employment, education, the provision of goods, services and facilities, accommodation, the disposal of land, the activities of clubs, sport, access to premises, the administration of federal laws and programs, and requests for information.

A number of other pieces of federal legislation protect human rights, among them the *Australian Human Rights Commission Act 1986* (which establishes the Australian Human Rights Commission, as discussed), laws regulating the use of police powers, laws protecting privacy, laws providing access to social security, health care and public education, and industrial relations laws. For example, acts constituting torture and other cruel, inhuman or degrading treatment or punishment are a criminal offence or a civil wrong, or both, in all Australian jurisdictions.<sup>87</sup>

## State and territory legislation

The states and territories have each enacted laws prohibiting discrimination.<sup>88</sup> As at the federal level, the states and territories also have a variety of other laws that protect individual rights in specific contexts—for example, laws limiting police powers and protecting privacy. In addition, as noted, the ACT and Victoria have both introduced statutory human rights legislation: the *Human Rights Act 2004* (ACT) and the *Charter of Human Rights and Responsibilities Act 2006* (Vic), which are discussed in Chapter 11.

## Adequacy of legislative protections

The Amnesty Legal Group (Vic) submitted that the problem with protecting rights through a range of different pieces of legislation is that it ‘limits the accessibility and understanding of rights by the Australian public’.<sup>89</sup> The other main problem with this method is that legislation is always vulnerable to amendment or suspension. For example, as outlined, the Federal Government suspended the Racial Discrimination Act in order to implement the Northern Territory Intervention. It was for this reason that many Consultation participants preferred to enshrine human rights in the Constitution<sup>90</sup>, which can be amended only by referendum.

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<sup>87</sup> *Australia’s Fourth Report under the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (2004) app. 1.

<sup>88</sup> *Anti-Discrimination Act 1992* (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) and *Racial and Religious Tolerance Act 2001* (Vic).

<sup>89</sup> Amnesty Legal Group (Vic), Submission. See also Australian Lawyers Alliance, Submission.

<sup>90</sup> For example, Aboriginal and Torres Strait Islander Legal Services, Submission; Victorian Aboriginal Child Care Agency, Submission; A Edwards and R McCorquodale, Submission, Human Rights Council of Australia, Submission; Federation of Ethnic Communities Councils of Australia, Submission; People for Constitutional Human Rights, Submission; S Ozdowski, Submission; V Bennett, Submission.

A large number of submissions focused on the inadequacies of the anti-discrimination legislation<sup>91</sup>, a subject that was also raised at community roundtables.<sup>92</sup> The following outlines the main criticisms made:

- The anti-discrimination framework is hard to understand and apply, there being inconsistencies between federal, state and territory laws.<sup>93</sup> For example, different federal laws adopt different tests for discrimination and exempt different groups from their application.<sup>94</sup>
- Anti-discrimination legislation prohibits discriminatory conduct, rather than requiring non-discriminatory conduct or promoting equality.<sup>95</sup>
- Federal laws prohibit discrimination on a more limited range of grounds than the state laws.<sup>96</sup> There was a particular concern that discrimination against lesbian, gay, bisexual, transgender and intersex people is not prohibited at the federal level.<sup>97</sup>
- The test for 'direct' discrimination is very difficult to make out.<sup>98</sup> Further, the applicant bears the onus of proof, which is hard to satisfy given that most of the relevant evidence is within the control of the discriminator.<sup>99</sup>
- Anti-discrimination legislation fails to deal with intersectional discrimination—that is, cases where individuals are discriminated against on more than one basis.<sup>100</sup>
- The Australian Human Rights Commission has insufficient power to investigate instances of discrimination—particularly systemic discrimination—and enforce its findings.<sup>101</sup>

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<sup>91</sup> For example, Australian Human Rights Commission, Submission; LGBTI Network, Submission; UNIFEM Australia, Submission; Seniors Rights Victoria, Submission.

<sup>92</sup> For example, Broken Hill, Community Roundtable; Dubbo, Community Roundtable; Sydney, Community Roundtable; Cronulla, Community Roundtable.

<sup>93</sup> Disability Discrimination Legal Service, Submission; UNIFEM Australia, Submission; Office of the Anti-Discrimination Commissioner (Tasmania), Submission; Australian Human Rights Commission, Submission.

<sup>94</sup> Australian Human Rights Commission, Submission.

<sup>95</sup> For example, B Smith, Submission; Australian Federation of Disability Organisations, Submission; NSW Council of Social Service, Submission; D Allen, Submission; Combined Community Legal Centres Group (NSW), Submission.

<sup>96</sup> For example, Australian Human Rights Commission, Submission; Law Council of Australia, Submission; Office of the Anti-Discrimination Commissioner (Tasmania), Submission; Human Rights Law Resource Centre (Educate, Engage, Empower), Submission.

<sup>97</sup> For example, J Goldbaum, Submission; Anti-Discrimination Commission Queensland, Submission; AIDS Council of NSW, Submission; Australian Coalition for Equality, Submission; LGBTI Network, Submission; t.omorley, Online Forum; AGMC Inc, Submission; Ministerial Advisory Committee on Gay, Lesbian, Bisexual, Transgender and Intersex Health and Wellbeing, Submission.

<sup>98</sup> Australian Human Rights Commission, Submission; Anti-Discrimination Commission Queensland, Submission.

<sup>99</sup> For example, Australian Human Rights Commission, Submission; J Empson, Submission.

<sup>100</sup> For example, WomenSpeak Alliance, Submission; Law Council of Australia, Submission; Mental Health Legal Centre, Submission; AGMC Inc, Submission.

<sup>101</sup> For example, D Allen, Submission; Law Council of Australia, Submission.

- Some thought the exemptions given to particular organisations under anti-discrimination legislation were too broad.<sup>102</sup> On the other hand, several submissions noted the importance of exemptions for religious organisations.<sup>103</sup>

## 5.6 Administrative law

Administrative law regulates the decisions of agencies of the executive government—for example, Ministers, departments and the individual officials working for them.<sup>104</sup> In addition to providing a framework for people to question or challenge the decisions of these agencies, the intention is to encourage standards of lawfulness, fairness, rationality and accountability in public administration.

Administrative law also provides mechanisms for obtaining reasons for an administrative decision, for gaining access to information held by government (for example, under the *Freedom of Information Act 1982* (Cth)) and for protecting personal information held by government (for example, under the *Privacy Act 1988* (Cth)).<sup>105</sup>

Government action is subject to both merits review and judicial review. Merits review is performed by non-judicial bodies such as tribunals (for example, the Administrative Appeals Tribunal). When performing this task, tribunals ‘stand in the shoes’ of the original decision maker and decide whether the decision made was the correct or preferable one. They might even substitute their own decision for that of the original decision maker. In contrast, judicial review is performed by courts, which review the legality, rather than the merits, of the decision. Importantly, there is no general power to review government action for its compliance with human rights. Courts can, however, have cause to consider human rights if, for example, the subject matter, scope and purpose of the legislation under which the particular action was taken make ‘human rights’ a relevant consideration the decision maker was bound to take into account.

Human rights have also become a greater feature in government decision making since the High Court’s decision in the *Teoh* Case.<sup>106</sup> The High Court held that when Australia has ratified an international treaty this creates a ‘legitimate expectation’, in the absence of statutory or executive indications to the contrary, that

<sup>102</sup> For example, J Goldbaum, Submission; V Ray, Submission; Australian Education Union, Submission; OUThere Rural Victorian Youth Council for Sexual Diversity, Submission.

<sup>103</sup> For example, D Little, Submission; L Smith, Submission; G Robertson, Submission.

<sup>104</sup> See M Groves & HP Lee (eds), *Australian Administrative Law: fundamentals, principles and doctrines* (2007) 1.

<sup>105</sup> R Creyke, ‘The performance of administrative law in protecting rights’ in T Campbell, J Goldsworthy and A Stone (eds), *Protecting Rights Without a Bill of Rights* (2006) 101, 102.

<sup>106</sup> *Minister of State for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273.

administrative decision makers will act in conformity with the treaty.<sup>107</sup> In practice, this principle does not prevent decision makers from departing from that expectation: it merely means that if they propose to depart from it they must give the person affected an opportunity to make submissions against the proposed course of action.

## The adequacy of administrative law

Administrative law is limited when it comes to the protection of human rights. For example, merits review by tribunals is available only when the legislation under which the particular decision was made provides for such review. There is no general right to have a decision reviewed by a tribunal.

As mentioned, judicial review is also limited by the absence of a general legal obligation on decision makers to consider the human rights implications of a decision.<sup>108</sup> Further, the remedies available under judicial review generally apply to the ‘procedural aspects, rather than the substantive aspects, of public decision-making: such remedies often cannot right the relevant wrongs’.<sup>109</sup> The remedy is usually a declaration that the decision was unlawful and the matter can be sent back to the original decision maker for determination. One participant in the devolved consultations expressed frustration at this process: ‘There is no other country in the world [that] has this process where a federal court can overturn a tribunal decision to have it return to the tribunal and the same decision made again’.<sup>110</sup>

The practical impact of the *Teoh* decision is now uncertain. Since that decision successive federal governments have tried to avoid its operation by making executive statements that no ‘legitimate expectations’ arise from Australia’s ratification of human rights treaties and by introducing into parliament legislation to similar effect, which later lapsed.<sup>111</sup> Although the *Teoh* decision still stands, subsequent case law suggests that the High Court might not follow it in the future.<sup>112</sup>

The Committee was informed of a number of cases in which administrative decision making or executive action has led to apparent breaches of human rights.

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<sup>107</sup> (1995) 183 CLR 273, 291–2 (Mason CJ and Deane J).

<sup>108</sup> For example, Australian Human Rights Commission, Submission; Law Council of Australia, Submission; Castan Centre for Human Rights Law, Submission.

<sup>109</sup> Castan Centre for Human Rights Law, Submission.

<sup>110</sup> Colmar Brunton Social Research, *National Human Rights Consultation—devolved consultation report* (2009).

<sup>111</sup> See, generally, N O’Neill, S Rice and R Douglas, *Retreat from Injustice: human rights law in Australia* (2004) 187. See also Malleons Stephen Jaques Human Rights Law Group, Submission.

<sup>112</sup> For example, *Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Lam* (2003) 214 CLR 1. See also H Charlesworth, M Chiam, D Hovell and G Williams, *No Country is an Island: Australia and international law* (2006) 30.

## The Bali Nine

In 2005 a group of young Australians now known as the ‘Bali Nine’ were arrested in Indonesia for their involvement in an attempt to smuggle heroin to Australia. Before their arrest, the Australian Federal Police provided to the Indonesian authorities information about their activities. Three of them are now awaiting execution in Indonesia.<sup>113</sup>

The father of one of the Bali Nine attended a community roundtable in Brisbane. He expressed dismay that the AFP had been told his son was travelling to Bali to transport drugs but had not sought to prevent his son from committing a crime it knew was punishable by the death penalty.

Representatives of four members of the Bali Nine brought an action against the AFP for exposing them to the death penalty. In *Rush v Commissioner of Police* the court found there was no cause of action. The judgment confirmed that the AFP can lawfully provide ‘police to police’ assistance in circumstances that could result in a person being charged with an offence punishable by death.<sup>114</sup> Justice Finn commented, however:

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.<sup>115</sup>

## Immigration detention

Submissions pointed to Australia’s system of immigration detention as an example of Australia’s federal government failing to adopt a human rights–based approach to the development and implementation of policy.<sup>116</sup>

The Gilbert + Tobin Centre of Public Law referred to the federal Ombudsman’s 2006 report on the wrongful detention of Mr T, an Australian citizen.<sup>117</sup> Mr T was detained on three separate occasions, for a total of 253 days. The Ombudsman’s report revealed a number of systemic problems within the immigration department, including a negative organisational culture, rigid application of policies and procedures that do not adequately accommodate the special needs of people suffering from mental illness, and poor training of departmental officers, including

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<sup>113</sup> Australian Human Rights Commission, Submission; Public Interest Law Clearing House, Submission.

<sup>114</sup> Australian Human Rights Commission, Submission.

<sup>115</sup> *Rush v Commissioner of Police* (2006) 150 FCR 165, 168.

<sup>116</sup> Gilbert + Tobin Centre of Public Law (E Santow), Submission; Gilbert + Tobin Centre of Public Law (J McAdam and T Garcia), Submission; Amnesty International Australia, Submission.

<sup>117</sup> Commonwealth and Immigration Ombudsman, *Report on Referred Immigration Cases: Mr T*, Report No. 04/2006 (2006).

in the management of mental health and in language, cultural and ethnic matters.<sup>118</sup>

Consultation participants gave personal accounts of their experiences at immigration detention centres. At the Whyalla community roundtable, Father Jim Monaghan described his experiences visiting Woomera Detention Centre between 1993 and 2003. He said solitary confinement was sometimes imposed for perceived breaches of procedure and that he was once told by an immigration official that he could return to Woomera only if he undertook not to speak to the media or anyone else about the conditions there.<sup>119</sup> At the public hearings Mustafa Najib, who was rescued by the *Tampa* and later held in immigration detention in Nauru, described his experience in detention as ‘psychological torture’ that highlighted his sense of powerlessness: no one could tell him what might eventually happen to him.

## 5.7 The common law

‘The common law’ refers to the system of law that has been developed by the courts over centuries, case by case. Over time, the common law has come to recognise particular human rights, including the right of an accused to a fair trial<sup>120</sup>, the right against self-incrimination<sup>121</sup>, immunity from search without warrant<sup>122</sup>, and the onus of proof in criminal proceedings (and the requirement for proof beyond reasonable doubt).<sup>123</sup>

The common law has also developed rules in relation to the interpretation of legislation that also function to protect human rights. The first is that when interpreting legislation the courts will presume that parliament did not intend to interfere with fundamental rights. As the High Court said in *Coco v The Queen*, ‘The courts should not impute to the legislature an intention to interfere with fundamental rights. Such an intention must be clearly manifested by unmistakable and unambiguous language’.<sup>124</sup>

In *Evans v State of New South Wales*<sup>125</sup> the Federal Court used this principle to strike down a clause in a regulation made under the *World Youth Day Act 2006* (NSW) that provided a power to direct a person to cease engaging in conduct that

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<sup>118</sup> *ibid.* 2.

<sup>119</sup> Whyalla, Community Roundtable.

<sup>120</sup> In *Dietrich v The Queen* (1992) 177 CLR 292 the High Court recognised the right to a fair trial and held that, where a person is charged with a serious criminal offence but cannot afford legal representation, the absence of any legal representation will be relevant to the fairness of the trial.

<sup>121</sup> See *Sorby v Commonwealth* (1983) 152 CLR 281.

<sup>122</sup> See *George v Rockett* (1990) 170 CLR 104.

<sup>123</sup> See *Woolmington v DPP* [1935] AC 462.

<sup>124</sup> (1994) 179 CLR 427, 437 (Mason CJ, Brennan, Gaudron and McHugh JJ).

<sup>125</sup> (2008) 168 FCR 576.

could cause ‘annoyance or inconvenience’ to pilgrims. The court interpreted the Act on the presumption that it was not parliament’s intention that a regulation would be made preventing or interfering with the exercise of freedom of speech.

Where international human rights law has not been incorporated through legislation, it can still influence domestic law in several ways.<sup>126</sup> It can be used in statutory interpretation. Usually, legislation must be interpreted and applied, so far as its language permits, so that it is consistent with, not in conflict with, established rules of international law.<sup>127</sup> There is, however, some debate about whether this rule is to be applied only when legislation is ambiguous<sup>128</sup> or where legislation is designed to implement Australia’s obligations under international law.<sup>129</sup> In practice, this means that courts can take international human rights law into account when interpreting legislation.



Melbourne community roundtable

International human rights law can also influence the development of the common law. For example, in *Mabo v Queensland (No 2)* Brennan J stated:

The common law does not necessarily conform with international law, but international law is a legitimate and important influence on the common law, especially when international law declares the existence of universal human rights. A common law doctrine founded on unjust discrimination in the enjoyment of civil and political rights demands reconsideration.<sup>130</sup>

Finally, international human rights law can be relevant in administrative decision making, as discussed.

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<sup>126</sup> This discussion is based on Sir G Brennan, ‘Human rights, international standards and the protection of minorities’, in P Cane (ed.), *Centenary Essays for the High Court of Australia* (2004).

<sup>127</sup> See *AMS v AIF* (1999) 199 CLR 160, 180 (Gleeson CJ, McHugh and Gummow JJ).

<sup>128</sup> For example, *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1, 38 (Brennan, Deane and Dawson JJ).

<sup>129</sup> For example, *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476, 492 (Gleeson CJ); *Coleman v Power* (2004) 220 CLR 1, 27–8 (Gleeson CJ).

<sup>130</sup> (1992) 175 CLR 1, 42. See also *Minister of State for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273, 288 (Mason CJ and Deane J).

## Adequacy of the common law

One major limitation of the common law is that it can be overridden at any time by legislation.<sup>131</sup> As was pointed out to the Committee, ‘Provided that the Parliament makes its intention clear, it can pass legislation violating almost any human right’ other than those protected by the Constitution.<sup>132</sup> Alison King submitted, ‘The common law is now the least significant and most insecure source of human rights protection as it may be readily overridden by an act of parliament’.<sup>133</sup>

This was made clear by the High Court in *Al-Kateb v Godwin*.<sup>134</sup> Mr Al-Kateb’s plight was raised in many submissions and at a number of community roundtables.<sup>135</sup> When he arrived in Australia without a valid visa he was placed in immigration detention. His application for refugee status was rejected. He sought release from detention but, because he was not a citizen of any country, no country was willing to accept him. The High Court was asked to decide whether the *Migration Act 1958* (Cth) authorised Mr Al-Kateb’s indefinite detention. Although the courts would usually seek to interpret the legislation consistently with the fundamental rights recognised under common law (here, the right to personal liberty), this could not be done where, as in this instance, the legislation abrogated the rights with clear and unambiguous language. Further, there was nothing in the Constitution preventing parliament from enacting such legislation.

Some submissions noted that the courts can develop the common law only to the extent that relevant cases are brought before it. Even when they are, a court is limited to declaring the rights of the parties before it: it cannot make general statements of rights.<sup>136</sup> Courts are also constrained by the doctrine of precedent, which means their decisions must be consistent with previous relevant decisions.<sup>137</sup>

Finally, some submissions pointed out that to rely on common law protections is to rely on judges to create and develop human rights protections.<sup>138</sup> Many have submitted that parliament, rather than ‘unelected judges’, should be responsible for determining human rights matters.

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<sup>131</sup> Australian Association of Women Judges, Submission; Amnesty Legal Group (Vic), Submission; Human Rights Law Resource Centre (Human Rights Act for All Australians), Submission; Public Interest Law Clearing House, Submission; Australian Human Rights Commission, Submission; Human Rights Council of Australia, Submission.

<sup>132</sup> Australian Democrats (ACT Division), Submission.

<sup>133</sup> A King, Submission.

<sup>134</sup> (2004) 219 CLR 562.

<sup>135</sup> For example, S Teale, Submission; J Dignam, Submission; A Coles, Submission; M D Osborne, Submission; Melbourne (3), Community Roundtable; Cronulla, Community Roundtable; Sydney (2), Community Roundtable.

<sup>136</sup> For example, Australian Association of Women Judges, Submission; Amnesty Legal Group (Vic), Submission; Human Rights Law Resource Centre (Human Rights Act for All Australians), Submission.

<sup>137</sup> Amnesty Legal Group (Vic), Submission; Public Interest Law Clearing House, Submission.

<sup>138</sup> Amnesty Legal Group (Vic), Submission; Human Rights Law Resource Centre (Human Rights Act for All Australians), Submission.

## 5.8 Oversight mechanisms

The human rights protections outlined in this chapter are buttressed by a number of independent oversight mechanisms. Not all of them have a specific ‘human rights’ jurisdiction, but they do contribute to maintaining the transparency and accountability of government.

### The Australian Human Rights Commission

The Australian Human Rights Commission (previously known as the Human Rights and Equal Opportunity Commission) is established under the *Australian Human Rights Commission Act 1986* (Cth). The commission has monitoring functions in relation to ‘human rights’<sup>139</sup> and also handles complaints of unlawful discrimination under the federal anti-discrimination legislation.

In relation to ‘human rights’ (as defined), the commission has the power to do the following<sup>140</sup>:

- examine federal laws—and, when requested by the Minister, Bills—to assess their consistency with human rights
- inquire into federal government acts and practices that might be inconsistent with or contrary to human rights. The commission may conciliate the matters that gave rise to the inquiry or, if conciliation is not possible or appropriate, report to the Minister
- promote an understanding and acceptance of human rights in Australia
- conduct research and educational programs for the purpose of promoting human rights
- on its own initiative or when requested by the Minister, report on laws that should be made in connection with human rights or action that should be taken to comply with human rights
- intervene, with the leave of the court, in proceedings involving human rights.

When a complaint is made under the federal anti-discrimination legislation, the commission may inquire into and attempt to conciliate the complaint. If the president of the commission terminates the complaint—for example, on being

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<sup>139</sup> Defined to include those rights under the ICCPR, the ILO Convention Concerning Discrimination in Respect of Employment and Occupation, the Declaration on the Rights of the Child, the Declaration on the Rights of Mentally Retarded Persons, the Declaration on the Rights of Disabled Persons, the Convention on the Rights of Persons with Disabilities, the Convention on the Rights of the Child, and the Declaration on the Elimination of All Forms of Intolerance and of Discrimination based on Religion or Belief—Australian Human Rights Commission, Submission.

<sup>140</sup> See *Australian Human Rights Commission Act 1986* (Cth) s. 11.

satisfied that there was no unlawful discrimination or the complaint was trivial or vexatious or when conciliation is unsuccessful—the complainant may make an application to the Federal Court or the Federal Magistrates Court alleging unlawful discrimination.<sup>141</sup>

During 2007–08 the Australian Human Rights Commission received 2077 complaints—a 17 per cent increase on the previous year.<sup>142</sup>

## **The Ombudsman and other mechanisms**

The federal Ombudsman can investigate the actions of government agencies, either on his or her own initiative or in response to a complaint.<sup>143</sup> The Ombudsman can investigate government action and report to the agency when he or she finds, for example, that the agency's action was contrary to law or unreasonable, unjust, oppressive or improperly discriminatory.<sup>144</sup> The Ombudsman also has an ongoing role in reporting to parliament about people held in long-term immigration detention.<sup>145</sup>

Among other oversight mechanisms are the Office of the Privacy Commissioner, which investigates complaints about breaches of the *Privacy Act 1988* (Cth) by federal and ACT government agencies and private sector organisations. The Auditor-General also plays a role in monitoring government action by providing auditing services to parliament and public sector agencies.<sup>146</sup> Additionally, the Productivity Commission can be asked by government to inquire into matters related to industry and productivity. For example, in 2003 the commission was asked to conduct a review of the *Disability Discrimination Act 1992* (Cth); it found, 'Overall, the DDA has been reasonably effective in reducing discrimination. But its report card is mixed and there is some way to go before its objectives are achieved'.<sup>147</sup>

## **The limitations of oversight mechanisms**

Many submissions highlighted the limits of the Australian Human Rights Commission's powers; the subject was also raised at community roundtables.<sup>148</sup> The following were the main criticisms:

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<sup>141</sup> See *Australian Human Rights Commission Act 1986* (Cth) Pt IIB.

<sup>142</sup> Human Rights and Equal Opportunity Commission, *Annual Report 2007–08* (2008), vii.

<sup>143</sup> *Ombudsman Act 1976* (Cth) s. 5.

<sup>144</sup> *ibid.* s. 15.

<sup>145</sup> See Commonwealth Ombudsman, *Immigration Reports Tabled in Parliament*, <[http://ombudsman.gov.au/commonwealth/publish.nsf/Content/publications\\_immigrationreports](http://ombudsman.gov.au/commonwealth/publish.nsf/Content/publications_immigrationreports)> at 7 September 2009.

<sup>146</sup> See *Auditor-General Act 1997* (Cth).

<sup>147</sup> Productivity Commission, *Review of the Disability Discrimination Act 1992* (2004) xxvi.

<sup>148</sup> For example, Darwin, Community Roundtable; Mildura, Community Roundtable; Dubbo, Community Roundtable; Melbourne, Community Roundtable.

- The commission’s functions are limited by the narrow definition of ‘human rights’ in the Australian Human Rights Commission Act, which does not include the rights in treaties such as the International Covenant on Economic, Social and Cultural Rights, the Convention against Torture, the Convention on the Elimination of All Forms of Discrimination against Women and the International Convention on the Elimination of All Forms of Racial Discrimination.<sup>149</sup>
- The commission’s enforcement powers are limited. It can report to the Attorney-General on human rights breaches by the Federal Government but its recommendations are not binding or enforceable in the courts.<sup>150</sup> Further, the commission has no power to monitor compliance with agreements entered into as a result of conciliation.<sup>151</sup>
- Although a complainant can initiate court proceedings if the commission terminates an investigation into an anti-discrimination complaint, complainants do not have the same ability in relation to human rights complaints.<sup>152</sup>
- The commission has no power to investigate human rights matters at the state level, which hinders its ability to report on widespread or systemic human rights abuses.<sup>153</sup>
- Although the commission can review federal or territory Bills for their consistency with human rights, it can do so only at the request of a Minister.<sup>154</sup> No such request has ever been made.<sup>155</sup>
- The government has no obligation to respond publicly to, or table, the commission’s reports.<sup>156</sup>
- The commission has the power to intervene in court cases involving human rights, but it can do so only with the leave of the court.<sup>157</sup>

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<sup>149</sup> Australian Human Rights Commission, Submission; Australian Council of Social Service, Submission; Human Rights Council of Australia, Submission; Castan Centre for Human Rights Law, Submission; PILCH Homeless Persons’ Legal Clinic, Submission.

<sup>150</sup> Australian Human Rights Commission, Submission.

<sup>151</sup> Human Rights Council of Australia, Submission; Human Rights Law Resource Centre (Educate, Engage, Empower), Submission.

<sup>152</sup> Australian Human Rights Commission, Submission; Public Interest Advocacy Centre, Submission.

<sup>153</sup> Australian Human Rights Commission, Submission; Human Rights Law Resource Centre (Educate, Engage, Empower), Submission.

<sup>154</sup> *Australian Human Rights Commission Act 1986* (Cth) s. 11(e).

<sup>155</sup> Australian Human Rights Commission, Submission.

<sup>156</sup> Law Council of Australia, Submission; Human Rights Law Resource Centre (Educate, Engage, Empower), Submission; Australian Human Rights Commission, Submission; Human Rights Council of Australia, Submission.

<sup>157</sup> Human Rights Council of Australia, Submission; Oxford Pro Bono Publico, Submission; D Allen, Submission; Seniors Rights Victoria, Submission; Anti-Discrimination Commission Queensland, Submission.

The Ombudsman's powers are also limited because his or her recommendations are not binding. He or she also has discretion to decide whether to investigate a complaint and whether to issue a copy of a report to the complainant.

## 5.9 Access to justice

The effectiveness of the protections outlined are limited if people do not possess the knowledge or the means to make use of them. This is why, in addition to discussing and evaluating the various legal and institutional means by which human rights may be protected in Australia, many submissions and community roundtable participants pointed to the overarching problem of access to justice.<sup>158</sup> As is discussed in Chapter 8, access to justice is not just about the ability to enforce rights in courts: it also refers to the ability to obtain legal advice and non-legal advocacy and support and to participate effectively in law reform processes.<sup>159</sup>

The Committee heard that access to justice is an important element of human rights protection and promotion.<sup>160</sup> Some submissions argued that access to justice is a human right in itself.<sup>161</sup> Such access is of particular importance to marginalised and disadvantaged individuals, who can face additional barriers in having their rights recognised and enforced. Associate Professor Simon Rice submitted:

The adequacy of human rights protection in Australia must be measured first against the needs of disempowered people: people who do not gain the benefits of full participation in our liberal-democratic-market society, who do not enjoy the protection that comes from having ready access to established institutions, complex systems and a dominant culture; from being able to exercise and influence power; from being able to participate in public debate and political life; and from engaging in and profiting from the market economy ...

Human rights protection matters to disempowered people, to people who are marginalised by the limited or inadequate operation of state systems and institutions. To deny that the institutions are inadequate or fail is to deny the existence of people who suffer by those inadequacies and failures ...<sup>162</sup>

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<sup>158</sup> For example, Human Rights Law Resource Centre (Educate, Engage, Empower), Submission; SCALES Community Legal Centre, Submission; NSW Disability Discrimination Legal Centre, Submission; Women's Legal Service Victoria, Submission; Australian Council of Social Service, Submission; Queanbeyan, Community Roundtable; Darwin, Community Roundtable; Mt Isa, Community Roundtable; Kalgoorlie, Community Roundtable.

<sup>159</sup> Law and Justice Foundation of New South Wales, *Access to Justice and Legal Needs: a project to identify legal needs, pathways and barriers for disadvantaged people in NSW* (2003), cited in Human Rights Law Resource Centre (Educate, Engage, Empower), Submission.

<sup>160</sup> Public Interest Law Clearing House, Submission; Human Rights Law Resource Centre (Educate, Engage, Empower), Submission.

<sup>161</sup> Human Rights Law Resource Centre (Educate, Engage, Empower), Submission; Law Council of Australia, Submission.

<sup>162</sup> S Rice, Submission.

Access to justice is dependent not only on available resources but also on the extent to which individuals understand their human rights and the means to enforce them. In relation to the participants in the focus groups, Colmar Brunton Social Research noted that ‘very few had any concrete understanding of their rights, or what is or is not protected in Australia’.<sup>163</sup> And in relation to participants in the devolved consultations it found that ‘a lack of awareness and understanding of human rights is a real problem for these groups’ and that ‘a perceived lack of easily accessible and understandable information about rights perpetuates this problem’.<sup>164</sup>

Consequently, when examining the adequacy of existing mechanisms for protecting and promoting human rights, it is important to take into account the extent to which those mechanisms are broadly accessible to the Australian community.

## 5.10 **The Committee’s findings**

The work of Colmar Brunton Social Research revealed that most people think their human rights are adequately protected. But it also revealed that most people have little knowledge of how those rights are protected; they tend to assume that, because they have never felt their rights to be threatened or violated, the rights must be protected under the law.

At the same time, there is general recognition that there are some people who ‘fall through the cracks’ and are in need of greater protection. After listening to the stories of those people and reading hundreds of submissions detailing the shortcomings of the current system, the Committee concluded that there is a patchwork of human rights protection in Australia. The patchwork is fragmented and incomplete, and its inadequacies are felt most keenly by the marginalised and the vulnerable.

Australia has agreed to ‘respect, protect and fulfil’ a range of human rights at the international level, but the current legal and institutional framework falls short of this commitment. The Committee notes the following limitations associated with the existing mechanisms for protecting human rights in Australia:

- *International human rights law.* Australia has committed itself to a variety of obligations under international human rights law, but these obligations are enforceable in Australia only if implemented by domestic legislation. Although

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<sup>163</sup> Colmar Brunton Social Research, *National Human Rights Consultation—community research report* (2009).

<sup>164</sup> Colmar Brunton Social Research, *National Human Rights Consultation—devolved consultation report* (2009).

various mechanisms exist to hold Australia accountable at the international level, they are not legally binding.

- *The democratic system.* Australia has strong democratic institutions, but they do not always ensure that human rights—in particular, minority rights—receive sufficient consideration.
- *The Australian Constitution.* Australia’s Constitution was not designed to protect individual rights. It contains a few rights, but they are limited in scope and have been interpreted narrowly by the courts.
- *Legislative protections.* Federal, state and territory legislation protects some human rights, but it can always be amended or suspended to limit or remove that protection. The legislative framework is inconsistent across jurisdictions and difficult to understand and apply.
- *Administrative law.* Administrative law enables individuals to challenge government decisions and encourages standards of lawfulness, fairness, rationality and accountability. The remedies it offers are, however, limited, and there is no general onus on government to take human rights into account when making decisions.
- *The common law.* The common law protects some human rights, but it cannot stop parliament passing legislation that abrogates human rights with clear and unambiguous language.
- *Independent oversight mechanisms.* There are a number of oversight mechanisms—for example, the Australian Human Rights Commission—that can review government action. The powers of these bodies are, however, limited when it comes to human rights, and their recommendations are usually not enforceable.
- *Access to justice.* Access to justice is an overarching problem in connection with the adequacy of existing protections. Individuals who lack the knowledge or means to make use of Australia’s framework of human rights protections will ultimately be unable to enforce their rights.