



# A WA HUMAN RIGHTS ACT



## HUMAN RIGHTS FOR WA DISCUSSION PAPER

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2007

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## FOREWORD

Human rights are about the fair treatment of individuals and ensuring that everyone in the community is treated with dignity and respect. Human rights are everyone's responsibility. Individuals, families, businesses, non-profit organisations, and the media all have a role to play in ensuring that human rights are respected and observed. Governments, in particular, have a significant role to play in the protection of human rights.

As Western Australia grows and develops, governments at all levels are called upon to deal with an increasing number of complex social, economic and environmental issues. As governments respond to demands that they fix a wide range of problems, many people feel that they are losing some of the freedoms they have enjoyed in the past. They want their rights as individual citizens to be respected. They want the public service to serve them and respect their rights.

Governments and their departments and agencies need to understand that there are limits on how far they interfere with the rights and liberties of those they govern and serve. The idea that we should aim for a culture of respect for human rights across government is attractive if it means that, as governments act, they are always conscious of the need to avoid infringing the basic rights of those affected.

The Western Australian Government has announced that it would like to introduce a WA Human Rights Act. It believes that this will help to create a culture of human rights in this State in which there is greater awareness of, respect for, and observance of, human rights at all levels of government and throughout the community.

Given the importance of a WA Human Rights Act, the Government has established an independent committee, known as the Consultation Committee for a proposed WA Human Rights Act, to consult with the community about the issue.

We, the members of the Committee are:

- Mr Fred Chaney AO (Chairman), Director of Reconciliation Australia Ltd, former Deputy President of the National Native Title Tribunal and former Chancellor of Murdoch University;
- Ms Lisa Baker, Executive Director of the Western Australian Council of Social Service;
- The Most Revd Dr Peter Carnley AO, former Anglican Archbishop of Perth and former Primate of the Anglican Church of Australia; and
- Associate Professor Colleen Hayward, Manager, Kulunga Research Network, Telethon Institute for Child Health Research.

Between us we have a diverse range of interests and experience. As part of the consultation process we hope to talk to a wide range of people, community groups and organisations, and government departments and

agencies. We intend to perform our role in an open, independent and inclusive manner. We welcome everyone to participate in the consultation.

The role specifically given to us by the Government is to:

- consider, and consult with Western Australians about the ways in which greater awareness of, respect for, and observance of, human rights can be achieved at all levels of the State government and throughout the Western Australian community;
- ask the community what it thinks about the Government's preferred model for a WA Human Rights Act;
- identify a human rights framework that will serve the needs of Western Australians in the future rather than to look at past and present policies and actions; and
- make recommendations to the Government about the matters which should be addressed in a WA Human Rights Act in order to create a human rights culture in this State.

We are making available this discussion paper as a first step in generating a dialogue with the people of Western Australia about human rights issues. After providing some information about our consultation and some background information, the paper is divided up into eight key questions that we would like you to answer. The discussion in this paper under each question is designed to help get you thinking and to provoke debate relevant to our consultation. Please feel free to read as much or as little of the paper as you find helpful and relevant to your interest. Different members of the community will have different perspectives of the law and human rights and this paper was prepared bearing that in mind. It is not intended to be a thorough analysis of all the issues, nor to limit debate, but rather to provide a starting point for discussion.

We also anticipate that there will be public discussion about human rights issues through the media, which will help to inform our dialogue with the community, and we will make available a range of other materials both in hardcopy and on our website to help get people thinking.

We will be encouraging as many people as possible to make submissions on these important issues. We invite you to make written submissions, including via our website, however, this is not the only way in which you can have a say. We will be travelling across Western Australia, holding a series of public meetings and forums, having face to face meetings with individuals and groups, and offering to take people's views back to the Government. We will also be looking for other culturally appropriate ways to involve people from around the State.

The proposed timeframe for our consultation, and the details of how you can make submissions, are set out in the first section of this paper. The Government has asked us to report back to it by **16 November 2007** and we have developed our consultation timeframe to try and ensure that we can speak to as many people as possible in the time available.

We consider that our consultation with the community will provide Western Australians with the chance to let the Government know their views and to influence what will happen in this State in terms of protecting human rights. We invite as many people as possible to take up this excellent opportunity. We will certainly value all of the contributions that we receive.

**Mr Fred Chaney AO (Chairman)**  
**Ms Lisa Baker**  
**The Most Revd Dr Peter Carnley AO**  
**Associate Professor Colleen Hayward**

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**Other documents related to this discussion paper include:**

- Statement of Intent by the Western Australian Government: A WA Human Rights Act
- The draft Western Australian *Human Rights Bill 2007*
- Pamphlet "We want your views on a WA Human Rights Act"

Copies of these documents can be downloaded from:  
**[www.humanrights.wa.gov.au](http://www.humanrights.wa.gov.au)**.

Alternatively, copies can be obtained from:

**Human Rights Secretariat**  
**Department of the Attorney General**  
**GPO Box F317**  
**PERTH WA 6841**

**Telephone: (08) 9264 1712**  
**Fax: (08) 9264 1836**  
**Email: [humanrights@justice.wa.gov.au](mailto:humanrights@justice.wa.gov.au)**



Written submissions can also be emailed to the Committee at the following address: **humanrights@justice.wa.gov.au**.

Alternatively, they can be submitted via the Committee's website at: **www.humanrights.wa.gov.au**.

We may publish on our website some of the written submissions that we receive so that people can see what others have had to say and to encourage wider discussion. Please tell us if you would like your submission to be kept confidential.

Instead of making a written submission, or in addition to making a written submission, you may wish to talk to the Committee about your views, either individually or on behalf of a group or organisation.

The Committee will be meeting with interested individuals, groups and organisations, and holding public forums and meetings, throughout the metropolitan area and regional Western Australia from May until mid-September 2007. The precise dates, times and locations will be published on the Committee's website, in *The West Australian* newspaper and in local media throughout regional Western Australia.

You may also contact the Committee's Secretariat to find out more information about the Committee's public consultations or to obtain copies of the Government's Statement of Intent, the Draft Bill or any of the other materials published on our website. The Secretariat's contact details are:

**Human Rights Secretariat  
Department of the Attorney General  
GPO Box F317  
PERTH WA 6841**

**Telephone: (08) 9264 1712  
Fax: (08) 9264 1836  
Email: humanrights@justice.wa.gov.au**

## **BACKGROUND**

### **What are human rights?**

Human rights are significant rights and freedoms that are recognised as belonging to everyone in the community. They are about the fair treatment of people and they enable people to live lives of dignity and value. Well-known human rights include the right to be free from discrimination, freedom of speech, freedom of religion, the right to vote and the right to a fair trial.

It is often said that rights and responsibilities go hand in hand. That is, whenever someone has a right, someone else has a responsibility to respect that right. Human rights are everyone's responsibility. Governments, in particular, have a significant role to play in the protection of human rights, however, individuals, families, businesses, non-profit organisations, and the media also play an important part in ensuring that human rights are respected and observed.

### **Why do human rights need to be protected?**

Protecting human rights is central to maintaining a free and democratic society. On a general level, the protection of human rights helps to encourage respect for others and thereby promote harmony amongst people of different genders, age groups, races, nationalities, cultures, religions, and social and political backgrounds.

The legal protection of human rights is also important because it limits what governments can do in their dealings with individuals, minority groups and the community and helps to ensure that governments do not abuse their power.

As Australia grows and develops, governments at all levels are called upon to deal with an increasing number of complex issues and to fix a wide range of problems. As governments respond to these issues and demands, many people feel that they are losing some of the freedoms that they have enjoyed in the past.

Government for the common good necessarily limits the behaviour of all of us where it would impact on the wellbeing of others, however, the actions of government can be so far reaching that they pose a threat to our liberty.

Governments need to have a clear understanding that there should be limits on their interference with the rights and liberties of those people they are elected to govern and serve.

The protection of human rights can also set examples for the conduct of non-government parties, including, businesses, non-profit organisations and the media.

## How are human rights legally protected in Western Australia at present?

While the law is only one way to protect human rights, it is an important way.

In Western Australia we enjoy, and expect that we will continue to enjoy, many rights, but we do not often stop to ask ourselves whether they are, in fact, protected by the law.

Australia's *Constitution* does not contain a Bill of Rights, and Australia is the only common law country without a national Bill of Rights. However, the *Constitution* does deal explicitly with some rights, and has been found to contain some implied rights. Implied rights are rights that exist even though they are not specifically mentioned in the written words of a law. There are also written laws passed by the Commonwealth and State governments which recognise and protect human rights in particular contexts. Some common law principles also deal with human rights.

### Australia's Constitution

The *Constitution* contains a number of explicit "guarantees" which protect certain rights (although these are not necessarily rights traditionally recognised as fundamental "human rights"). These guarantees include:

- a right to fair compensation if the Commonwealth acquires a person's property;
- a right to trial by jury for Commonwealth indictable offences;
- a prohibition on Commonwealth laws which establish or prohibit any religion; and
- a prohibition on the States placing restrictions on people who reside in other States that they do not place on their own residents.

Some of these guarantees are written in narrow terms. For example, the right to trial by jury only applies to a particular category of Commonwealth offences. Although other guarantees in the *Constitution* are not written in limited terms, they have been interpreted narrowly by the courts so that they provide only limited protection.

The High Court has also decided that there are some rights which are implied in the *Constitution*. For example, the Court has decided that implied in the *Constitution* is a freedom of communication on political and governmental matters. This freedom prevents the Commonwealth, States and Territories from introducing laws which restrict communication on political and governmental matters in a manner that is inconsistent with Australia's system of representative government.

Because implied freedoms are not specifically written into the *Constitution*, they are sometimes controversial and the extent of the protection that they offer to citizens is unclear.

## Commonwealth laws

A number of Commonwealth laws provide some protection for human rights. These include the:

- *Racial Discrimination Act 1975*;
- *Sex Discrimination Act 1994* ;
- *Disability Discrimination Act 1992*,
- *Age Discrimination Act 2004*;
- *Freedom of Information Act 1982*;
- *Human Rights and Equal Opportunity Commission Act 1986*;
- *Privacy Act 1992*; and
- *Criminal Code Act 1995*.

The Commonwealth's anti-discrimination laws prohibit direct and indirect discrimination in certain areas and create a complaint resolution system. Although these laws are committed to equality of treatment in Australia, they do not provide comprehensive guarantees of equality and it is sometimes said that their complaint resolution mechanisms and remedies are unsatisfactory.

The *Human Rights and Equal Opportunity Commission Act 1986* establishes the Human Rights and Equal Opportunity Commission, which has the power to examine Commonwealth laws to determine their consistency with certain international human rights treaties. Although this Act represents a more general means of protecting human rights, the Commonwealth Government is under no obligation to reform any law that the Commission considers to conflict with international human rights treaties.

## State laws

A number of Western Australia's written laws also provide protection for human rights in certain contexts. A good example is the *Equal Opportunity Act 1984*, the purposes of which include: the elimination, so far as is possible, of discrimination against persons on the ground of sex, marital status or pregnancy, family responsibility or family status, sexual orientation, race, religious or political conviction, impairment, age or, in certain cases, gender history. The Act aims to eliminate discrimination in the areas of work, accommodation, education, the provision of goods, facilities and services, and the activities of clubs. It also aims to promote recognition and acceptance within the community of the equality of men and women, equality of persons of all races, and of all persons regardless of their sexual orientation, religious or political convictions or their impairments or ages.

Other Western Australian laws that contain provisions dealing with specific human rights in specific contexts, include the:

- *Criminal Procedure Act 2004*;
- *Bail Act 1982*;
- *Criminal Investigation (Identifying People) Act 2002*;
- *Evidence Act 1906*; and
- *Freedom of Information Act 1992*.

Although various Western Australian laws deal with different aspects of human rights, there is no single Act which provides a comprehensive statement of human rights and how they are to be protected on a general level.

### The common law

The "common law" refers to the law that is made by judges in cases that come before them in court.

A number of human rights are recognised or protected, to varying degrees, by common law principles. For example, it has been recognised that the courts have the power to stop a criminal trial from going ahead if a person charged with a serious crime cannot afford a lawyer and cannot be provided with one free of charge, and if proceeding against them without a lawyer would result in an unfair trial.

Other common law principles which protect individual rights include the right not to incriminate one's self, the principles of natural justice, the prohibition on searches without a warrant, the principle that the prosecution bears the onus of proving a criminal offence, and the principle that the standard of proof in criminal matters is proof beyond reasonable doubt. On the other hand, the common law does not recognise a number of rights ordinarily considered fundamental human rights, such as the right to privacy.

The principles of statutory interpretation developed by the common law include a presumption that written laws are not intended to alter fundamental common law principles or rights. This presumption may, however, be overridden by the explicit wording of the written law or by implications drawn from the wording of the law. This means that the Parliament can always change or get rid of common law rights if it wants to.

### International law

Australia has signed a number of international treaties that aim to identify and protect fundamental human rights, including the:

- *Universal Declaration of Human Rights*;
- *International Covenant on Civil and Political Rights* ("the ICCPR");
- *First and Second Optional Protocols to the International Covenant on Civil and Political Rights*;
- *International Covenant on Economic, Social and Cultural Rights* ("the ICESCR");
- *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*;
- *Convention on the Rights of the Child*;
- *Convention on the Elimination of all forms of Racial Discrimination*; and
- *Convention on the Elimination of all forms of Discrimination against Women*.

The provisions of international treaties do not form part of Australian law unless they are specifically included in written laws by the Commonwealth

Parliament. So far, only some internationally recognised rights have been included in Australian law.

While the human rights set out in international treaties help to set international standards, they offer little practical protection for the rights of Western Australians.

### **Gaps in existing protections**

As the above discussion shows, the Australian *Constitution* and the common law do not comprehensively recognise or protect the fundamental human rights of Western Australians. Similarly, existing State and Commonwealth laws provide only fragmented protection of human rights.

Between 1944 and 2001 there were a number of unsuccessful attempts, both at the federal level and in some of the States, to develop some form of Bill or Charter of human rights. In more recent years, however, there has been progress in Victoria and the ACT. In recognition of the inadequacies in existing legal protections for human rights, the Victorian and ACT Parliaments introduced the *Charter of Human Rights and Responsibilities Act 2006* ("the Victorian Charter") and the *Human Rights Act 2004* ("the ACT Human Rights Act") respectively. These laws are similar to the *Human Rights Act 1998* in the UK ("the UK Human Rights Act") and the *Bill of Rights Act 1990* in New Zealand ("the NZ Bill of Rights Act"). Copies of these laws are available on the Committee's website.

Elsewhere in Australia, the NSW Attorney General has publicly declared his support for a community based discussion on a charter of human rights for NSW, and the Tasmanian Law Reform Institute is currently conducting an investigation into the question of whether human rights can be better enhanced and protected in that State. As part of its investigation, the Institute has invited contributions from the Tasmanian community. It is currently in the process of reading and collating all of the responses it has received and writing a report on its findings for the Tasmanian Government. On the federal level, the Australian Labor Party's 2007 National Platform, which was agreed at the party's recent National Conference, proposes to establish a process of public consultation on how best to recognise and protect human rights.

As announced in its recent Statement of Intent, the Western Australian Government considers that a WA Human Rights Act would help to fill the gaps in existing legal protections for human rights in Western Australia and help to establish a culture in which there is greater awareness of, respect for, and observance of, human rights at all levels of government and throughout the community.

## **EIGHT KEY QUESTIONS**

- 1. Should WA have a Human Rights Act?**
- 2. What rights should be protected in a WA Human Rights Act?**
- 3. What form should a WA Human Rights Act take?**
- 4. How should a WA Human Rights Act protect human rights?**
- 5. Who should be required to comply with the human rights recognised in a WA Human Rights Act?**
- 6. What should happen if a person's human rights are breached?**
- 7. If WA introduced a Human Rights Act what wider changes would be needed?**
- 8. What else can the Government and the community do to encourage a culture of respect for human rights in WA?**

## **1. SHOULD WA HAVE A HUMAN RIGHTS ACT?**

While the Government considers that an essential element in establishing a human rights culture in Western Australia is the enactment of a WA Human Rights Act, the Committee would like to know whether or not Western Australians agree.

Many of the arguments both for and against a Human Rights Act depend on the form and content of the Act being proposed, for example, what rights are included in the Act and whether they can be enforced. It is still possible, however, to summarise some of the major arguments for and against a Human Rights Act that have been put forward in the literature on human rights and during the community consultations relating to the Victorian Charter and the ACT Human Rights Act.

### **Arguments against a Human Rights Act**

- Existing legal protections of human rights are sufficient – "if it ain't broke don't fix it".
- The current approach of developing specific laws, as the need arises, to define the operation of specific rights is better than laying down a single, grand scheme of generally expressed and potentially unclear rights.
- A Human Rights Act would make little practical difference – unless rights are constitutionally entrenched, Parliament can still alter them.
- Human rights laws have not prevented human rights abuses in other States, Territories and countries that have adopted them.
- A law is not the best way to protect human rights – there needs to be changes in people's attitudes and conduct.
- A Human Rights Act should not be introduced because interpreting the rights within the Act is an inappropriate job to give to judges, who are not elected, and who are not accountable to the electorate, and because decisions on moral, social and economic issues are beyond the expertise of judges.
- Enacting a Human Rights Act might open the floodgates to increased litigation.
- A Human Rights Act might actually restrict rights – by defining rights we may limit them.
- A Human Rights Act would create a selfish society by focusing too much on rights and failing to advocate duties and responsibilities.
- A Commonwealth Human Rights Act, rather than a State Human Rights Act, is needed.

## **Arguments in favour of a Human Rights Act**

- Existing legal protections of human rights are inadequate – there are significant gaps in the protections given by current written laws and the common law.
- A Human Rights Act would deliver practical benefits by setting minimum standards for government.
- Enacting a Human Rights Act would help to educate people about their rights and responsibilities and create a human rights culture which involves greater awareness of, respect for and observance of, human rights at all levels of government and throughout the community.
- A Human Rights Act would modernise our democracy and help to give effect to Australia's international human rights obligations.
- There is already a lot of international legal experience on the interpretation of human rights laws which will help to guide judges, and the work of judges often requires them to apply legal principles in the context of social and economic disputes.
- The experience in other places such as the UK, New Zealand and the ACT, suggests that fear that a Human Rights Act might open the "litigation floodgates" is unfounded.
- A Human Rights Act would create a more tolerant and respectful society.
- In particular, additional protection is needed for disadvantaged and marginalised people who face unique barriers to exercising their human rights, for example, people with physical and intellectual disabilities.
- State human rights laws may be a modest step on the path to a federal human rights law or constitutional Bill of Rights.

### The Government's view

The Government is of the view that more can be done to protect the human rights of Western Australians as there is currently no single law that declares the human rights to which all Western Australians are entitled or that aims to protect those rights. Although a WA Human Rights Act would only be one piece of the puzzle in terms of protecting human rights, the Government believes that it would help to create a culture in which there is greater awareness of, respect for, and observance of human rights throughout government and the community.

In the Government's view, a WA Human Rights Act would have the benefit of putting in place minimum standards for government. It would also help to promote tolerance and respect amongst the community. Based on the experience in other places with human rights laws, the Government is not

worried that the introduction of a WA Human Rights Act would open the "litigation floodgates".

What do you think?

Does the law need to be changed? Should Western Australia have a Human Rights Act? Would a WA Human Rights Act increase awareness of, respect for, and observance of, human rights in our community? Would such an Act help to put in place minimum standards for government?

## 2. WHAT RIGHTS SHOULD BE PROTECTED IN A WA HUMAN RIGHTS ACT?

### The nature and source of the rights to be protected

Rights can be categorised in a number of different ways. A distinction is often drawn between civil and political rights on the one hand and economic, social and cultural rights on the other.

Civil and political rights are rights which are associated with human liberty and which enable people to participate in democratic processes. They include:

- Freedom from discrimination.
- The right to equality before the law.
- The right not to be subject to torture, cruel, inhuman or degrading treatment or punishment, or medical or scientific experimentation without consent.
- The right not to be held in slavery or servitude or be required to perform forced or compulsory labour.
- The right to liberty and security of the person.
- The right to a fair trial.
- Freedom of opinion and expression.
- Freedom of thought, conscience and religion.
- The right of peaceful assembly.
- Freedom of association.
- Freedom of movement.
- The right to vote.
- The right to privacy.
- The right of individuals belonging to ethnic, religious or linguistic minorities to enjoy their own culture, practise their own religion or use their own language.

Economic, social and cultural rights, on the other hand, include:

- The right to work.
- The right to social security.
- The right to an adequate standard of living, including adequate food, clothing, housing and to the continuous improvement of living conditions.
- The right to an education.
- The right to adequate health services.

Some people say that civil and political rights limit what governments can do, while economic, social and cultural rights require governments to take action and to spend money.

The Victorian Charter, the ACT Human Rights Act and the NZ Bill of Rights Act all focus on civil and political rights and, in particular, the civil and political rights set out in the ICCPR. The UK Human Rights Act also focuses on civil and political rights and draws its rights from the *European Convention on Human Rights*, which is very similar to the ICCPR. None of these Acts incorporate economic, social and cultural rights, such as those set out in the ICESCR.

Copies of the ICCPR and the ICESCR, together with the *Universal Declaration of Human Rights* can be found on the Committee's website.

Some people think that rights cannot be neatly divided up and that civil and political liberties can only be achieved when economic and social rights are also established and protected. For example, the right to life and the right to liberty and security can be affected by access to adequate food, health services and education.

Other people think that including economic, social and cultural rights in a human rights law may inappropriately restrict the Government's financial policies and resource allocation. Inclusion of these rights also raises difficult issues because responsibility for matters such as housing and health is shared between the Commonwealth and State governments.

### The Government's view

The Government's view, as set out in Part 2 of the Draft Bill, is that a WA Human Rights Act should, at least initially, focus on civil and political rights. By including economic, social and cultural rights in a WA Human Rights Act, Western Australia would become an exception among other States, Territories and countries with similar human rights laws. The commentary and case law relating to civil and political rights is far more developed than that on economic, social and cultural rights, and the likely practical impact of formally recognising economic, social and cultural rights is unclear. The Government also believes that the democratically elected Parliament of Western Australia, rather than the courts, should have responsibility for controlling social and financial policy in this State.

The Government believes, however, that a WA Human Rights Act should be reviewed in the future to look at whether it should be extended to include economic, social and cultural rights or other rights. Specific provisions for similar reviews exist in both the Victorian Charter and the ACT Human Rights Act.

The Government also believes that, while a WA Human Rights Act should focus on civil and political rights, it should not limit other rights that Western Australians already enjoy under other written laws and the common law.

The human rights set out in the ICCPR are widely recognised as a set of the most basic of all human rights. While they are not a complete statement of what might be considered universal and fundamental human rights, the Government is of the view that they represent a sensible starting point for the recognition and protection of human rights in Western Australia. Incorporating the rights set out in the ICCPR into a WA Human Rights Act would also be consistent with the achievement of Australia's international obligation to implement the ICCPR.

If a WA Human Rights Act were to include the rights in the ICCPR, the Government considers that some of these rights would need to be changed to reflect Western Australian needs and Western Australia's legal, political and

social situation. Consequently, the Draft Bill includes the rights set out in the ICCPR but changes them in some cases to reflect Western Australia's needs and its legal, political and social situation.

For example, Article 8(3)(a) of the ICCPR prohibits a person from being required to perform forced or compulsory labour. If this right is included in a WA Human Rights Act, the Government considers that the Act should make it clear that the right does not prevent a court from ordering a person convicted of a criminal offence to perform community service as part of their punishment.

Another example can be found in Article 10(2)(a) of the ICCPR, which deals with the right of accused persons to be separated from those who have actually been convicted (found guilty) of a criminal offence except in "exceptional circumstances". Occasionally, circumstances may arise, particularly in Western Australia's regional areas, where prison authorities are unable to separate accused persons from convicted persons because there are limited detention facilities and space problems. In order to recognise these practical difficulties, the Government's view is that the right in Article 10(2)(a) of the ICCPR should be changed in a WA Human Rights Act to require the separation of accused persons and convicted persons except where "*it is not reasonably practicable to do so*". "Reasonably practicable" is a slightly lower threshold than "exceptional circumstances" but still ensures that the basic principle of separation is protected.

A further example relates to Article 6(1) of the ICCPR, which deals with the right to life. This article is written in fairly general terms in the ICCPR but has been interpreted at the international level as not preventing abortion. The Government's preferred model for a WA Human Rights Act, set out in Part 2 of the Draft Bill, makes it clear that the right to life arises only *after* birth.

The Government also considers that there are some rights in the ICCPR which should be left out of a WA Human Rights Act altogether. Firstly, some of the rights in the ICCPR would be more appropriately included in a Commonwealth Human Rights Act than a State Human Rights Act, for example, the right of all peoples to self-determination in Article 1 of the ICCPR. Secondly, some of the rights in the ICCPR are covered by the Commonwealth Government's law-making power. This means that the Commonwealth Parliament has power to make laws about these rights and, if it chooses to do so, any provisions in a WA Human Rights Act dealing with the same rights could become invalid. In fact, some of the rights in the ICCPR are already dealt with by Commonwealth laws in such a way that there would be no point including them in a WA Human Rights Bill. One example is the right to marry.

### What do you think?

Which rights would you like to see included in a WA Human Rights Act? Should a WA Human Rights Act take an approach similar to the Victorian Charter and the ACT Human Rights Act and focus on civil and political rights, or should economic, social and cultural rights also be included?

If a WA Human Rights Act were to focus on civil and political rights, should it reflect the rights set out in an existing international convention such as the ICCPR?

If so, should any of the rights set out in the ICCPR be changed before being incorporated into a WA Human Rights Act? Should any of the rights set out in the ICCPR be left out of a WA Human Rights Act?

### **Specific rights for vulnerable groups?**

Another particular issue about which the Committee would like to hear your views is whether a WA Human Rights Act should deal specifically with the rights of vulnerable groups, such as children, those with physical or mental disabilities, cultural minorities or Aboriginal people.

Some people say that because these groups are particularly disadvantaged, they may not be able to enjoy general rights to the same extent as everyone else. Others, however, argue that it is better not to recognise special rights for certain people, but to recognise human rights generally because of their universal nature.

#### The Government's view

The Government's preferred model for a WA Human Rights Act, as set out in Part 2 of the Draft Bill, incorporates the rights in Articles 10, 14(4) and 24 of the ICCPR, which provide some specific rights for children.

Similarly, the Draft Bill incorporates Article 27 of the ICCPR, which provides protection for the rights of persons belonging to cultural, religious, racial or linguistic minorities.

The Government's preferred model for a WA Human Rights Act also includes specific protection for the distinct cultural rights of Aboriginal people and, in particular, their right to enjoy their identity and culture, their right to maintain and use their language and their right to maintain their kinship ties.

#### What do you think?

The Committee would like to know whether you think that a WA Human Rights Act should provide specific rights for vulnerable groups? If so, which vulnerable groups? What specific rights belonging to these groups should be protected?

### **Whose rights should be protected?**

In working out what rights a WA Human Rights Act should protect, another issue that arises is whether the Act should protect the rights of corporations as well as the rights of individual human beings.

Many people believe that *human* rights are essentially concerned with the dignity and value of the lives of *human* beings and so they should not extend to corporations. It is also argued that allowing corporations to rely on

protections for human rights can interfere with legitimate government attempts to regulate the activities of corporations for the benefit of the public.

The ICCPR and the ICESCR only apply to human beings. Similarly, the rights in the Victorian Charter and the ACT Human Rights Act only apply to human beings.

On the other hand, the rights in the NZ Bill of Rights Act and the *Charter of Rights and Freedoms* found in the *Canadian Constitution* ("the Canadian Charter") apply to corporations. This has meant, for example, that, under the Canadian Charter, a corporation has successfully challenged a law prohibiting large businesses from trading on a Sunday. The corporation argued that the law was inconsistent with the freedom of religion of people who observe the Sabbath on days other than Sunday. In another case, a tobacco company was able to successfully challenge a Canadian law which restricted it from advertising and selling tobacco products without health warnings on the basis that the law infringed the company's right to freedom of expression.

### The Government's view

The Western Australian Government's preferred model for a WA Human Rights Act, as set out in Part 2 of the Draft Bill, is that the human rights set out in the Act should only apply to human beings.

### What do you think?

Should the rights recognised in a WA Human Rights Act apply only to human beings or should corporations also enjoy the benefit of those rights?

### **3. WHAT FORM SHOULD A WA HUMAN RIGHTS ACT TAKE?**

#### **An ordinary Act or a constitutionally entrenched Bill of Rights?**

The two most commonly discussed options for human rights laws are: (1) an ordinary Act of Parliament; or (2) a constitutionally entrenched Bill of Rights.

Both models are used throughout the world. Examples of constitutionally entrenched bills of rights include the Canadian Charter, Chapter 2 of the *Constitution of the Republic of South Africa* and the *United States Bill of Rights*, which consists of a series of amendments to the *Constitution of the United States of America* ("the US Bill of Rights"). In the US, the Supreme Court can declare to be invalid laws that are inconsistent with the rights contained in its constitutionally entrenched Bill of Rights.

On the other hand, the Victorian Charter, the ACT Human Rights Act, the UK Human Rights Act and the NZ Bill of Rights Act are all ordinary Acts of Parliament.

A "constitutionally entrenched" Bill of Rights is more difficult to change than an ordinary Act of Parliament as special procedures have to be followed in order for the Bill of Rights to be changed which do not have to be followed in relation to ordinary Acts.

One argument in favour of a constitutionally entrenched Bill of Rights is that, by making a human rights law difficult to change Parliament sends a message about the fundamental importance of the rights in the Bill. Another argument is that it helps to prevent governments from introducing limitations on human rights whenever it suits them to do so. People who support this view think that the fact that an ordinary Act of Parliament can be more easily changed weakens the protection of human rights.

On the other hand, there is some legal uncertainty in Western Australia as to whether it is, in fact, possible to have an entrenched Bill of Rights in this State.

Some see the fact that an ordinary Act of Parliament can be more easily changed as an advantage because it maximises flexibility and preserves the sovereignty of Parliament. Attitudes to human rights can change over time. For example, slave-owning was, at one time, protected by the US Bill of Rights. In Australia, the White Australia Policy is often used as an example of how community views of rights and freedoms can change. The use of an ordinary Act of Parliament for a WA Human Rights Act would mean that Parliament could respond if and when changes occurred in society's attitudes towards the rights protected by the Act.

The use of an ordinary Act of Parliament would mean that Parliament would be free to expand the scope or operation of a WA Human Rights Act in the future if this were considered appropriate. For example, if a WA Human Rights Act were originally limited to those rights set out in the ICCPR, Parliament could later change the Act relatively easily to include those economic, social and cultural rights set out in the ICESCR as well.

Even if a WA Human Rights Act took the form of an ordinary Act of Parliament, it is possible that, over time, it could assume such fundamental importance that, politically speaking, the Act could not easily be changed.

### The Government's view

In order to balance the protection of human rights on one hand and the need to maximise flexibility on the other, the Government's preferred model is a Human Rights Act which takes the form of an ordinary Act of Parliament. In the Government's view, it is important to recognise that there will be circumstances in which the Parliament considers it necessary or appropriate, in the public interest, to make changes to the rights contained in a WA Human Rights Act. The model which preserves the sovereignty of Parliament to do so, is the most appropriate. There is also a legal question as to whether it is even possible to have an entrenched Bill of Rights in Western Australia.

### What do you think?

The Committee would like to know what form you think would be best for a WA Human Rights Act. Do you think that a WA Human Rights Act should be harder to change than an ordinary law? Is it important for a WA Human Rights Act to be flexible to adapt to changing attitudes and circumstances?

### **Should a WA Human Rights Act have a preamble?**

Another question related to the form of a WA Human Rights Act is whether such an Act should begin with a preamble. A preamble is a statement at the beginning of an Act which sets out the values or principles underlying the Act and/or its purpose or purposes.

Some people think that a preamble can serve as an important educative and interpretive tool, which can capture the spirit of an Act. Others see it as having limited legal effect and therefore as being unnecessary.

Both the Victorian Charter and the ACT Human Rights Acts contain preambles.

The Government's Draft Bill does not contain a preamble, however, the Committee would like to know what you think about this issue. Should a WA Human Rights Act begin by stating the fundamental values which underpin it and/or what the Act aims to achieve? If so, what should those values and aims be?

### **What should a WA Human Rights Act be called?**

If Western Australia introduces a Human Rights Act, what should the Act be called? Should it simply be called a "Human Rights Act" or would the term "Charter of Human Rights" or "Bill of Rights" be better? The Committee would like to know the name preferred by the community.

#### **4. HOW SHOULD A WA HUMAN RIGHTS ACT PROTECT HUMAN RIGHTS?**

There are various ways in which a WA Human Rights Act could require human rights to be complied with in order to achieve the objective of encouraging greater awareness of, respect for, and observance of, human rights within Western Australia.

##### The Government's view

The Government's preferred approach, as set out in Parts 4 and 5 of the Draft Bill, is that, at least initially, a WA Human Rights Act should focus on requiring the three "arms" of government in Western Australia – the executive government (Ministers, government departments and government agencies), the Parliament and the courts - to ensure that they respect the human rights of members of the community in their conduct and decision-making.

This should be achieved in three ways:

1. By requiring human rights to be considered whenever new written laws are introduced. The Government should be required to consider the impact on human rights of any new law it submits to the Parliament and explain and justify any proposed law that is incompatible with human rights. In turn, the Parliament should be required to consider the impact on human rights of any new law which it passes and, where possible, should ensure that written laws are not incompatible with human rights.
2. The courts should help to increase awareness of, respect for, and observance of, human rights by considering human rights whenever they interpret written laws and by interpreting laws consistently with human rights wherever possible.
3. The Supreme Court should also contribute by identifying written laws which are incompatible with human rights, and by alerting the Government and the Parliament to the existence of the incompatibility so that they may consider whether the laws should be amended.

This three-tiered approach is designed to encourage a "dialogue" between the different arms of government about human rights. A similar objective underlies the human rights laws in Victoria, the ACT, the UK and Canada.

##### What do you think?

The Committee would like to know what you think about the Government's preferred approach. Is this three-tiered approach appropriate for Western Australia? Is it the best way to encourage awareness of, respect for, and observance of, human rights within the State?

## **Ensuring that human rights are considered when new laws are made**

If human rights are to be respected and protected in Western Australia, it is essential that the Government and the Parliament consider how proposed new laws would impact on human rights.

There are a number of ways in which this could be done. For example, a Parliamentary Committee could be required to examine all Bills (draft laws) introduced into the Parliament and report on whether they are compatible with human rights.

Alternatively, the Minister or the member of the Opposition party responsible for introducing a Bill to Parliament could be required to provide a statement indicating whether or not the Bill is compatible with human rights when the Bill is introduced ("a statement of compatibility"). If a Bill is not compatible with human rights the statement of compatibility could indicate why it is appropriate that the Parliament should enact the Bill anyway.

The requirement to provide the Parliament with a statement of compatibility is a feature of the human rights laws in Victoria, the ACT and the UK, and is similar to the approach in the NZ Bill of Rights Act.

### The Government's view

The Western Australian Government's preferred approach, as set out in Part 4 of the Draft Bill, is to require a statement of compatibility to be presented to Parliament whenever a Bill is introduced. In the Government's view, this would be the most efficient and inexpensive way to ensure that the impact on human rights of all new laws is considered.

There may be occasions where it is not possible to provide a statement of compatibility in relation to a Bill, for example, situations of urgency. For this reason, the Government's view is that the absence of a statement should not affect the validity of any law. Both the Victorian Charter and the ACT Human Rights Act include provisions to that effect.

### What do you think?

Should Parliament be required to take human rights into account when making laws? Is the Government's preferred approach the best way to ensure that Parliament takes human rights into account, or should some other mechanism be used, such as the examination of Bills by a Parliamentary Committee?

## **Interpreting laws consistently with human rights**

An important way to increase the protection of human rights is to ensure that, where possible, all laws are interpreted consistently with those human rights. As the work of the courts involves interpreting the meaning of laws, the courts have an important role to play in determining how laws impact on human rights.

The New Zealand, UK, Victorian and ACT Human Rights laws each contain provisions requiring their courts to interpret laws compatibly with human rights. However, there has been debate as to what these provisions mean and how they should be applied, particularly in relation to laws which are unclear in their meaning.

### The Government's view

The Government's preferred approach, as set out in Part 5 of the Draft Bill, is that, where possible, the courts should be required to interpret laws compatibly with human rights. This requirement would ensure that the courts (and, effectively, everyone who has to work out the meaning of laws and do things required by laws) would place human rights at the forefront of their minds.

The Government's view is that the requirement to interpret laws compatibly with human rights should apply to all written laws, including primary legislation (Acts) and subsidiary legislation (for example, regulations). It should also apply to all laws, whether made before the commencement of a WA Human Rights Act or made after its commencement. In this way, the requirement would effectively help to create an ongoing review of all of Western Australia's written laws for their compatibility with human rights.

The Government's preferred approach is that, in order to avoid confusion, a WA Human Rights Act should spell out as clearly as possible the circumstances in which the courts must interpret laws consistently with human rights. For example, the courts should only be required to interpret a written law consistently with human rights where the meaning of the law is unclear or the ordinary and natural meaning of the law would lead to an absurd or unreasonable result *and* interpreting the law consistently with human rights would not undermine the purpose of the law. Considering the statement of compatibility for a law (if one exists) may assist in determining whether it is appropriate for the courts to interpret the law consistently with human rights.

The human rights set out in the ICCPR have been extensively considered by foreign and international courts and tribunals. The Government's view is that, if a WA Human Rights Act includes these rights, it should specifically allow the courts in Western Australia to consider the views of these foreign and international courts and tribunals when interpreting the WA Human Rights Act, provided that this is practical, having regard to the time, resources and cost involved in doing so.

The human rights laws in South Africa, the UK, Victoria and the ACT each contain provisions providing guidance on the sources of information to which the courts may refer when determining the meaning of the rights set out in those laws. The Government's preferred model for a WA Human Rights Act includes a similar provision which provides guidance as to when foreign and international material should be taken into account, and the weight which should be given to it.

## What do you think?

The Committee would like to hear your views on these issues. Should Western Australian courts be required to interpret laws consistently with human rights? If so, in what circumstances? What should happen where Parliament clearly intends for a law to restrict human rights? Should the courts be allowed (or even required) to take into account foreign and international materials in determining whether a law can be interpreted consistently with human rights?

### **Declaring that a law is incompatible with human rights**

When interpreting laws, the courts may occasionally decide that a law is not consistent with human rights. What should happen in those situations? There are a number of options:

- The courts could be given the power to declare the law to be invalid. The problem with this option is that it overrides the sovereignty of Parliament. The Parliament may have been aware that the law was inconsistent with human rights, but believed that it was justified anyway.
- The courts could do nothing. Effectively, this would maintain the present situation in Western Australia, because the courts are not currently required to do anything if they consider a law to be inconsistent with human rights.

The problem with this second option is that it means that laws which are inconsistent with human rights might not be publicly identified, so there is no opportunity for Parliament to consider and address the inconsistency. This would be a particular problem for laws made before the commencement of a WA Human Rights Act and, therefore, before any requirement that the Parliament consider the impact of laws on human rights at the time that the laws are introduced.

- A third option, which represents the middle ground, would be to allow the courts (or at least the Supreme Court) to declare that a law is incompatible with human rights ("a declaration of incompatibility") but not to declare the law invalid for that reason. Before making a declaration of incompatibility, the courts could be required to notify the Government that they were considering making a declaration. This would enable the Government to make submissions about whether, in its view, the declaration should be made. If, after hearing from the Government, a court made a declaration of incompatibility, it would be appropriate for that declaration to be drawn to the attention of Parliament, so that the Parliament could consider whether the law should be changed.

This third option reflects the position in the UK, Victoria and the ACT, and to some extent, New Zealand.

## The Government's view

It is often said that a declaration of incompatibility provides a means by which the courts can engage in human rights "dialogue" with the Parliament, without invalidating laws. In this way, Parliament can have the benefit of the courts' views on particular laws but the sovereignty of Parliament is protected. In the Government's view, this is important because it is appropriate that the Parliament be able to determine whether a law should be changed or should continue as it is, even though it may not be consistent with one or more human rights.

Despite the fundamental importance of human rights, there may be situations in which Parliament believes it is necessary or appropriate, in the public interest, to make laws which restrict the human rights recognised in a WA Human Rights Act. For example, it may be necessary to place restrictions on the right of an accused person to be present at his or her own trial in circumstances where his or her behaviour is endangering the safety of court staff or witnesses. It may also be necessary to place some restrictions on freedom of speech to ensure that the rights to privacy and freedom from discrimination are adequately protected. It is up to democratically elected politicians, rather than the courts, to make these decisions. Ultimately, the Government will be accountable to the public through the ballot box for any restrictions or changes it introduces. At the same time, one of the likely consequences of a declaration of incompatibility is that the Government and the Parliament would be under pressure to change, or at least to examine, the incompatible law.

This is why the Government's preferred model, as set out in Part 5 of the Draft Bill, is the third option outlined above. It is also why the Government's preferred model directs the courts that a written law is not to be taken to be incompatible with a human right if it imposes a limit that can be said to be reasonable and justifiable in a free and democratic society after all relevant factors are taken into account.

The Government's view is that the courts should be required to notify the Attorney General when they are considering making a declaration of incompatibility and before they actually do so. A WA Human Rights Act should also ensure that the Attorney General has an opportunity to have a say about whether the declaration should be made.

The Government's preferred model for a WA Human Rights Bill, as set out in Part 5 of the Draft Bill, is to require the courts to give the Attorney General a copy of any declaration of incompatibility that they make about a law. Under this model, the Attorney General is, in turn, required to notify the Minister responsible for the law that the declaration has been made. That Minister is then required to notify the Parliament of the declaration and of his/her response to it. This is designed to enable the Parliament to consider whether the law should be changed.

### What do you think?

The Committee would like your views in relation to these issues. Do you agree that the courts should be allowed to make declarations that laws are incompatible with human rights? Can you think of another option for what should happen if the courts decide that a law is not consistent with human rights? If the courts are allowed to make declarations of incompatibility, should they be required to be notified the Attorney General before they make them? How should the Parliament be notified when a declaration of incompatibility is made?

### **Which courts should be able to make declarations of incompatibility?**

One question that arises is whether all courts and tribunals should be allowed to make declarations of incompatibility. In Victoria, only the Supreme Court and the Court of Appeal may make such declarations, however all other courts and tribunals may refer questions regarding the compatibility of laws with human rights to the Supreme Court. In the ACT only the Supreme Court can make declarations of incompatibility and other courts and tribunals cannot refer questions regarding the compatibility of laws with human rights to the Supreme Court.

On one view, the importance of identifying laws which are incompatible with human rights, and of alerting the Government and Parliament to the existence of these laws, justifies giving all courts and tribunals the power to make declarations of incompatibility.

On the other hand, determining whether a law is incompatible with human rights may not be easy - in some cases it may involve lengthy and complex argument. Dealing with such arguments may take up considerable time and resources. If all courts and tribunals were permitted to make declarations of incompatibility, there could be undesirable consequences, such as adding to the time taken to determine cases, and creating delays in court lists. This would be a particular problem in those courts and tribunals which have a very large volume of cases to determine, and where it is desirable for cases to be determined as quickly as possible, for example, criminal cases where an accused person is in custody awaiting trial.

Determining questions of incompatibility with human rights may also add to the legal costs of a case. For that reason, it may also be undesirable for declarations of incompatibility to be made in cases where it is particularly desirable to keep legal costs low, for example, civil cases involving small amounts of money.

### The Government's view

The Government's preferred approach, as set out in Part 5 of the Draft Bill, is that only the Supreme Court and the Court of Appeal should be allowed to make declarations of incompatibility and that other courts and tribunals should not be able to refer questions regarding the compatibility of laws with human rights to the Supreme Court.

### What do you think?

If the declaration of incompatibility approach is used, should all courts and tribunals be able to make declarations of incompatibility or should that power be limited to the Supreme Court and Court of Appeal?

### **In what cases should the courts be able to make statements of incompatibility?**

Another question is whether a person should be able to bring new court proceedings for the specific purpose of asking for a declaration of incompatibility or whether declarations of incompatibility should only be available in existing proceedings.

If a declaration that a State law is incompatible with human rights could be made in separate proceedings where there were no issues about particular rights, it could be said that the court was determining a hypothetical question. That would be a problem because it is not appropriate for courts to answer hypothetical questions.

### The Government's view

The Government's view is that declarations of incompatibility should only be available in the course of existing proceedings and should not be granted in separate proceedings where the only purpose is to ask for a declaration of incompatibility. This is the situation in both Victoria and the ACT.

### What do you think?

The Committee would like to know what you think about this question. If the declaration of incompatibility approach is used, should declarations of incompatibility only be available in existing proceedings?

## **5. WHO SHOULD BE REQUIRED TO COMPLY WITH THE HUMAN RIGHTS RECOGNISED IN A WA HUMAN RIGHTS ACT?**

Should a WA Human Rights Act do more than what has already been discussed under question 4 above in order to encourage greater awareness of, respect for, and observance of, human rights? Should it impose legal obligations requiring compliance with the human rights recognised in the Act and, if so, on whom? There are a number of options:

- Everyone in the community, including the three arms of government and all citizens in their private relations, could be required to comply with human rights.

This is the approach adopted in the Bill of Rights in the South African Constitution. However, requiring everyone in the community to comply with human rights would be a very significant and controversial step, given the possible consequences for business and private relations between people.

- A WA Human Rights Act could say nothing about who has to comply with the human rights set out in the Act.

This is the approach taken in the ACT Human Rights Act. However, this approach has been criticised because of the uncertainty it has created about the effect of that Act. It has been assumed that at least government departments and agencies within the ACT must comply with the rights set out in the Act.

- A WA Human Rights Act could require government departments and agencies and some private bodies or institutions in our community, such as corporations, or persons or bodies who exercise public power, to comply with human rights.

Requiring corporations to comply with human rights may be justified on the ground that corporations are responsible for conducting the majority of business in our community and exercise a considerable amount of influence on many areas of life where human rights can be negatively affected, for example, employment conditions and the privacy of information obtained in the course of business. Corporations also frequently perform work for government, for example where the government "out-sources" the provision of services. Requiring all corporations to comply with the human rights set out in a WA Human Rights Act, however, may be controversial for a number of reasons, one of which is the possible cost of compliance.

- A Human Rights Act could focus only on State government departments and agencies and require them to comply with human rights in their conduct and decision-making.

## The Government's view

The Government's preferred model, as set out in Parts 3 and 6 of the Draft Bill, is that, at least initially, only State government departments and agencies should be required to comply with the human rights set out in a WA Human Rights Act. The term "government agency" is used in this context to refer to bodies within, or established by, the State government. It does not refer to private sector bodies and so it does not cover, for example, government contractors or community groups which provide services funded by the government.

The human rights that the Government would like to include in a WA Human Rights Act are of such a nature that, in many cases, whether or not those rights are respected and observed in the community depends completely, or largely, on the actions of government. At the same time, it is likely that considerable difficulties would be experienced if everyone in the community, including individuals in their private relations, businesses and non-profit organisations (whether corporations or not) were required to act compatibly with the rights set out in a WA Human Rights Act when the Act first commenced. Individuals, businesses and non-profit organisations could, however, continue to carry out any moral responsibilities they have to respect and protect human rights.

Once a WA Human Rights Act has been operating for a while and the community has become more familiar with the Act, the Government's view is that the question of whether individuals and bodies in the private sector should have to comply with human rights could be reconsidered.

The Government's preferred model for a WA Human Rights Act prohibits State government departments and agencies from acting in ways that are incompatible with human rights and requires them to consider human rights when making decisions. This is designed to ensure that human rights are taken into account in the development of government policy as well as in the daily conduct of government departments and agencies.

## What do you think?

The Committee would like to know your views on these issues. Who should be required to comply with the human rights set out in a WA Human Rights Act? Should the Act require individuals or bodies in the private sector to comply? If the Act applies to government departments and agencies, should some agencies be excluded from the obligation to comply with human rights and, if so, which agencies?

## **6. WHAT SHOULD HAPPEN IF A PERSON'S HUMAN RIGHTS ARE BREACHED?**

### **How should disputes about breaches of human rights be resolved?**

Most States, Territories and countries with human rights laws allow people to take action in the courts to enforce their rights.

It is sometimes said that if court action is the only remedy available to people there will be barriers for those who cannot afford to go to court. It is also argued that individual court cases are an ineffective way to change attitudes about human rights amongst government departments and agencies and that education and training within agencies is the key.

On the other hand, some people believe that it is important for people to "have their day in court" and that it is a powerful remedy for a court to declare that a government department or agency has breached a person's human rights and order the department or agency to change its practice. Fear of litigation is also said to motivate government to try to comply with human rights. For example, it has been reported that in the UK, court cases led to the Mental Health Review Tribunal speeding up its decision-making in circumstances where people were being detained for treatment.

An alternative option is to give a special independent body or officer, such as a Human Rights Commission or a Human Rights Ombudsman, the power to investigate and report on human rights breaches and/or to conciliate or mediate complaints of human rights breaches between the individuals and the government departments and agencies involved. Conciliation and mediation both involve the parties to a dispute sitting down with each other and an independent third party who helps them to try and reach an agreement and resolve their dispute through discussion.

Western Australia currently has an Equal Opportunity Commissioner who is responsible for investigating complaints of discrimination and sexual and racial harassment. The Commissioner has the power to attempt to resolve complaints by conciliation. Where a complaint cannot be resolved by conciliation, the Commissioner must refer it to the State Administrative Tribunal, which can hold an inquiry and either dismiss the complaint or find that it has been proven. The powers of the Commissioner and the Tribunal, however, are limited to issues of discrimination and harassment – they do not extend to human rights generally.

### The Government's view

The Government's preferred model, as set out in Part 6 of the Draft Bill, is for people to be able to seek remedies in the courts when their human rights have been breached by a government department or agency.

### What do you think?

The Committee would like to know your views about this issue. How should disputes about breaches of human rights be resolved? Should people be

restricted to taking action in the courts? Should a special body or officer be given the role of trying to resolve complaints through conciliation or mediation?

### **Compensation and/or review of government action**

In terms of allowing people to take action in the courts to enforce their rights, a central element of the human rights laws in most States, Territories and countries is provision for the courts to review government conduct. This essentially involves a court looking at what a government department or agency has done or failed to do in a particular case and determining whether the conduct or failure to act is compatible with human rights. If it is not compatible with human rights, the court then corrects the conduct or failure to act, for example, by declaring the government conduct to be invalid, overturning the government decision, ordering the government department or agency not to do something, or ordering it to do something again, but this time in a way that is compatible with human rights.

The human rights laws in some countries, such as Canada, the UK and South Africa, go further than this and allow people to seek compensation if their human rights are breached. While the NZ Bill of Rights Act does not specifically provide for compensation for human rights breaches, the courts have concluded that compensation can also be awarded under that Act.

Should a WA Human Rights Act allow the courts to award compensation for human rights breaches? One basis on which it could be said that allowing compensation for breaches of human rights by government departments and agencies is justified, is that the Western Australian *Equal Opportunity Act 1984* already permits compensation to be awarded for discrimination in breach of that Act.

On the other hand, the power to award compensation can create controversy. In New Zealand, there was public outcry after a relatively large amount of compensation was awarded to a number of maximum security prisoners when it was found that their treatment under two prisoner control mechanisms breached the NZ Bill of Rights Act.

The possibility of the courts declaring government conduct and decisions to be invalid because of a failure to comply with human rights seems more likely to encourage government departments and agencies to comply with the rights set out in a WA Human Rights Act than the possibility of them having to pay compensation.

In terms of the community's understanding of human rights and developing a culture of respect for human rights, it also appears to be undesirable to associate breaches of human rights with an award of money.

### **The Government's view**

The Government's preferred approach, as set out in Parts 3 and 6 of the Draft Bill, is that a WA Human Rights Act should not make compensation a remedy for breaches of human rights by government departments and agencies.

Given that the ultimate goal of the Government's preferred model for a WA Human Rights Act is to create a dialogue about human rights and to encourage greater awareness of, respect for, and observance of, human rights at all levels of government and throughout the community, the Government considers that remedies under such an Act should focus on the review of government conduct by the courts.

The Government therefore considers that it is not appropriate to allow a breach of a WA Human Rights Act to be the basis for a new or independent cause of action against a government department or agency. There are already a number of bases on which a person can seek a remedy against a government department or agency for acting unlawfully. In the Government's view it is desirable that a WA Human Rights Act allow a breach of a human right to be an additional basis for saying that a department or agency has acted unlawfully.

This approach would require government departments and agencies to consider relevant human rights when making decisions and to act in a way which is compatible with human rights. This, in turn, would be likely to have a positive effect on developing a culture of knowledge and respect for human rights within government.

The approach proposed by the Western Australian Government is similar to the approach adopted in the Victorian Charter. The ACT Human Rights Act, on the other hand, is silent in terms of remedies for breaches of human rights.

#### What do you think?

The Committee would like to know what remedies you think should be available if a person's human rights are breached. What remedies do you think would best promote a dialogue on human rights and a culture of human rights in Western Australia? Should the courts be able to award compensation? Should their role be limited to "correcting" government conduct and decisions that are incompatible with human rights? Should their powers extend to granting additional remedies, for example, public apologies by government departments and agencies? Should a breach of a human right be a basis for an independent cause of action against a government department or agency?

## **7. IF WA INTRODUCED A HUMAN RIGHTS ACT, WHAT WIDER CHANGES WOULD BE NEEDED?**

What additional measures are necessary to ensure that people are aware of their human rights and what a WA Human Rights Act does?

### **The creation of a WA Human Rights Commissioner?**

Some States, Territories and countries have created special bodies or officers to provide guidance and advice to government departments and agencies about human rights, to promote awareness of human rights and to undertake education and training programs both in the community and throughout government.

For example, the ACT Human Rights Act created the position of an ACT Human Rights Commissioner, which is filled by the existing Discrimination Commissioner. The functions of the Human Rights Commissioner include:

- reviewing the effect of ACT laws on human rights and report to the Attorney General on the results of that review;
- providing education about human rights; and
- advising the Attorney General on anything relevant to the operation of the Human Rights Act.

The ACT Supreme Court is also required to notify the Human Rights Commissioner when it is considering making a declaration that a law is incompatible with human rights in particular proceedings and the Commissioner may, in certain circumstances, become involved in those proceedings.

The Victorian Charter changed the name of the Equal Opportunity Commission of Victoria to the Victorian Equal Opportunity and Human Rights Commission and gave the Commission additional functions, including:

- the presentation of a yearly report to the Attorney General which examines the operation of the Charter;
- responding to requests by the Attorney General to review and report on the effect of written laws and the common law on human rights; and
- providing education about human rights and the Charter.

The Victorian Charter also requires the Victorian Equal Opportunity and Human Rights Commission to be notified of certain legal proceedings involving the Charter and allows the Commission to become involved in those proceedings.

In South Africa, the South African Human Rights Commission has been created to promote respect for human rights and a culture of human rights. It does this through advocacy, research, education and by hearing complaints about human rights breaches.

Similarly, in New Zealand, a Human Rights Commission has responsibility for creating education and publicity programmes and activities to promote respect for, and observance of, human rights.

The UK Human Rights Act does not currently establish any body with responsibility for educating the community about human rights or overseeing the extent to which human rights are observed by public authorities. However, the UK Parliament has recently passed a law which establishes a Commission for Equality and Human Rights. The Commission will come into existence in October 2007 and its role will focus on achieving strategic change by providing advice, campaigning for social change and raising public awareness and understanding of human rights.

### The Government's view

The preferred approach of the Western Australian Government, as set out in Part 8 of the Draft Bill, is to give the existing Western Australian Equal Opportunity Commissioner the additional function of promoting public knowledge of, and respect for, the human rights set out in a WA Human Rights Act.

The Government does not consider that the Equal Opportunity Commissioner should be given other functions, such as monitoring compliance with the Act amongst government departments and agencies, or becoming involved in legal proceedings before the courts.

Rather, the Government's preferred model for a WA Human Rights Act, as set out in Part 5 of the Draft Bill, is that the Attorney General be given the opportunity to become involved in legal proceedings relating to the Act. In such cases, it could be expected that the lawyer for the Attorney General would ensure that the court's attention is drawn to any relevant principles or cases to which the parties to the proceedings have not already referred. If the Equal Opportunity Commissioner also had the power to become involved in the proceedings, there would be likely to be a duplication of the work involved in making submissions to the court and the additional, unnecessary expense of the Commissioner having to hire a lawyer.

### What do you think?

The Committee would like to know whether you think that the creation of a Human Rights Commissioner for Western Australia is a necessary or appropriate measure? If so, should this role be "merged" with that of the current Equal Opportunity Commissioner or should it be created as an entirely separate office? What functions do you think should be given to a Western Australian Human Rights Commissioner? Should the Commissioner perform a monitoring role as well as an educative role?

**8. WHAT ELSE COULD THE GOVERNMENT AND THE COMMUNITY DO TO ENCOURAGE A CULTURE OF RESPECT FOR HUMAN RIGHTS IN WESTERN AUSTRALIA?**

The Committee is interested to know whether you think that there is anything else that could be done in addition to (or instead of) introducing a WA Human Rights Act, to promote a human rights culture in Western Australia.

Are there particular strategies that the community needs to implement to ensure that the reforms proposed by a WA Human Rights Act are successful?

Are there particular non-legal actions that need to be taken or does particular cultural change need to occur?

For example, it could be said that campaigning to put an end to racial taunts in sport through the introduction of rules and penalties is necessary to help change general attitudes and promote the right to freedom from discrimination.

It could also be said that ensuring that community facilities and services are accessible by people with physical and intellectual disabilities is necessary to enable such people to realise their legal right to be free from discrimination.

This final key question is designed to encourage you to think more generally and even "outside the box" about promoting a human rights culture within Western Australia. What are the best ways to encourage greater awareness of, respect for, and observance of, human rights in this State? What else do you think could be done to protect human rights?

## **SUMMARY OF WHAT THE GOVERNMENT'S DRAFT BILL DOES NOT DO**

One of the Committee's specific roles is to consult the community about the Draft Bill. Throughout this discussion paper we have outlined the Western Australian Government's preferred model for a WA Human Rights Act which is set out in the Draft Bill. We have tried to explain what the Draft Bill does and does not do. For your assistance, and to ensure that it is clear what the Government's preferred model for a WA Human Rights Act does not do, we have also prepared the following summary.

### **The Government's Draft Bill does NOT:**

- Incorporate all of the human rights set out in the ICCPR (it incorporates most of them but not all of them);
- Incorporate cultural, social or economic rights;
- Incorporate rights recognised in international human rights conventions which are directed to the rights of specific groups, for example, the *Convention on the Rights of the Child* or the *Convention on the Elimination of all forms of Discrimination against Women*;
- Protect the right to life in a way that prohibits abortion;
- Recognise human rights as belonging to anyone other than human beings, that is, the Bill does not give human rights to corporations;
- Attempt to prevent the Western Australian Parliament from changing the rights set out in a WA Human Rights Act in the future if necessary;
- Prevent the Western Australian Parliament from making laws that are inconsistent with the rights set out in a WA Human Rights Act;
- Allow the courts to declare that a law is invalid if it is inconsistent with the rights set out in a WA Human Rights Act;
- Allow all courts and tribunals to make a declaration that a law is incompatible with human rights (it allows the Supreme Court to make such a declaration but no other court or tribunal);
- Allow courts and tribunals to refer human rights questions to the Supreme Court for its consideration;
- Require individuals or private sector bodies to comply with the human rights set out in a WA Human Rights Act in their conduct or decision making (it only requires government departments and agencies to comply);
- Apply to government agencies apart from State government agencies (that is, it does not apply to federal government agencies or government agencies of other States or Territories);
- Allow an individual to commence separate legal proceedings which only seek a declaration that an Act is incompatible with one or more human rights (it allows a person to ask for such a declaration in the course of existing proceedings);

- Create a new cause of action specifically for a breach of human rights (instead it allows a breach of human rights to be included as an additional ground of unlawfulness in an action against a government department or agency for an unlawful act or decision); and
- Provide for an award of compensation in the event that a government agency does not comply with human rights in its conduct or decision-making in relation to a person (it provides for the courts to review and correct government action).



Department of the Attorney General  
Government of Western Australia

## MORE INFORMATION

Copies of the *Statement of Intent*, the Human Rights community discussion paper, the Human Rights in WA draft Bill and human rights reference material are now available.

***Electronic copies can be downloaded from:***

[www.humanrights.wa.gov.au](http://www.humanrights.wa.gov.au)

***Hard copies can be obtained by contacting:***

Human Rights Secretariat  
C/- Public Affairs Branch  
Department of the Attorney General  
GPO Box F317  
PERTH WA 6841  
Telephone: (08) 9264 1712  
Fax: (08) 9264 1836  
Email: [humanrights@justice.wa.gov.au](mailto:humanrights@justice.wa.gov.au)

***Mail submissions to:***

Chairman  
Consultation Committee for the Proposed Human Rights Act  
C/- Public Affairs Branch  
Department of the Attorney General  
GPO Box F317  
PERTH WA 6841

***Send electronic submissions to:***

Fax: (08) 9264 1836  
Email: [humanrights@justice.wa.gov.au](mailto:humanrights@justice.wa.gov.au)

**The closing date for written submissions is 31 August 2007, although the Committee will continue to consult with interested participants in the process until 14 September 2007.**