



THE LAW SOCIETY OF SOUTH AUSTRALIA

SUBMISSION TO NATIONAL HUMAN RIGHTS CONSULTATION COMMITTEE

1. Introduction

- 1.1. These submissions are presented by the Law Society of South Australia (“the Law Society”). The Law Society consents to these submissions being made public.
- 1.2. The Law Society has a proud record of promoting and advocating for the protection of human rights in Australia. For example, members of the Human Rights Committee organised lawyers on a pro bono basis to visit asylum seekers who were detained in the Woomera Detention Centre. This was a squalid camp which had been hastily constructed by the Federal Government in the remote north of South Australia and away from access to legal services. These lawyers represented the asylum seekers in Court and subsequently set up the Refugee Advocacy Service of South Australia, which was a pro bono service dedicated to advising and advocating on behalf of asylum seekers.
- 1.3. The Law Society has continued to fearlessly promote human rights issues, at times in the face of strident criticism from the State Government, eg recent comments by the SA Attorney-General concerning the Law Society’s critique of the “bikies” legislation.
- 1.4. The objectives of the Law Society include:
 - to preserve and uphold the integrity and independence of the legal profession and the rule of law,

- to represent the interests and views of members and of the legal profession in appropriate forums, before government and its agencies and in the media and the community,
- to undertake community education concerning the law and the legal profession and to undertake activities designed to improve access to justice,
- to promote reforms of the law and its administration.

- 1.5. The Law Society has approximately 3,000 members. It has certain statutory responsibilities pursuant to the *Legal Practitioner's Act, 1981 (SA)*. As part of its activities it also undertakes a substantial community service obligation through provision of pro bono or low cost services, through various forms of community education, and through comment on items of public interest.
- 1.6. The Law Society has a number of committees which report to the Council of the Law Society. These committees prepare papers, conduct research, arrange seminars, speak at forums and undertake other activities within their portfolio on behalf of the Law Society.
- 1.7. These submissions have been prepared by members of the Human Rights Committee of the Law Society.
- 1.8. The Law Society supports the policy of the Law Council of Australia ("the Law Council") and was involved in formulating that policy. Accordingly, these submissions are supplementary to that policy. As such, they are not intended to be a comprehensive commentary on the reasons for and the potential content of a statute of human rights. Rather, the submission highlights certain aspects of proposed legislation which the Human Rights Committee considers may be particularly relevant to the terms of reference of the National Consultation Committee.

2. Primary Position

- 2.1. The primary elements of the policy of the Law Council, which are supported by the Law Society, are set out below.
- 2.2. The Law Society supports the development of a statutory Bill or Charter of Human Rights (“Charter of Human Rights”) at the Federal Level.
- 2.3. Such a Charter of Human Rights should protect and promote the rights contained in the International Covenants to which Australia is a signatory, most notably the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights.
- 2.4. The Law Society considers that ideally such human rights should be entrenched in the Australian Constitution. However, it is recognised that achieving constitutional reform in the short term is highly unlikely and therefore the Law Society supports the protection of human rights as set out in a statute of the Commonwealth Parliament.
- 2.5. A Charter of Human Rights should enable a person to bring proceedings against a public authority for a violation of his or her human rights and to seek appropriate relief.
- 2.6. Such public authorities should include those entities and persons performing public functions.
- 2.7. It is noted that the Law Council acknowledges the political difficulties in extending the nature of the relief to damages at this time. However, the Law Society would support extending the range of remedies which may be awarded to include monetary damages at an appropriate time in the future.
- 2.8. The Law Society supports an individual right of redress based solely on the fact that the Human Rights Charter has been violated. There should not be an additional requirement that a plaintiff must also rely on some other legal action.

- 2.9. A Charter of Human Rights should require the Courts to interpret legislation in a way that is compatible with human rights set out in the Charter. It should also empower a Court to declare a law to be incompatible with the rights protected under the Charter which in turn would require a response from Parliament.
- 2.10. The Charter of Human Rights should also require Government Agencies and Departments to take human rights into account in development of policy and by reporting annually on compliance. Furthermore all Cabinet submissions should be accompanied by human rights impact statements.
- 2.11. The Law Society is of the view that a Charter of Human Rights should contain provisions similar to those in the Victorian and ACT human rights legislation requiring that a statement of compatibility be attached to each bill presented to Parliament.
- 2.12. In addition, the Law Society considers that all funding provided by the Federal Government to both the States and organisations should require the recipient to comply with the human rights set out in the Charter, in carrying out activities supported by that funding.

3. Overview - Why We Need a Statutory Charter of Human Rights

- 3.1. The Law Society does not consider that human rights are sufficiently protected and promoted within the current constitutional and legislative framework in Australia.
- 3.2. A Charter of Human Rights would assist to protect those in our society who are economically and socially disadvantaged or marginalised. In particular, it is such persons who are more likely to be reliant on public services and who may potentially be more likely to have their rights violated in such encounters. This includes refugees and people of different races and cultures, indigenous Australians, persons with a disability, women, children and young people, people who are homeless, people who are incarcerated, and gay and lesbian people.

3.3. It is submitted that a Charter of Human Rights would in fact improve the efficiency of the public service in carrying out its functions as well as making it more accountable.

3.4. Australia is signatory to a number of International Conventions which aim to protect human rights. However, there is no comprehensive legislative framework in Australia which is able to implement Conventions or which operates as a minimum standard for the protection of human rights.

3.5. This lack of a legislative framework has been remarked upon as follows:

3.5.1. For example the UN Human Rights Committee has noted that the *Covenant on Civil and Political Rights* has not been incorporated into domestic law and that Australia has not yet adopted a comprehensive legal framework for the protection of the Covenant rights at the Federal level, despite the recommendations adopted by the Human Rights Committee in 2000. Furthermore, the Committee regrets that judicial decisions make little reference to international human rights law, including the Covenant¹.

3.5.2. The Committee's recommendation was:

"The State party should: a) enact comprehensive legislation giving de-facto effect to all the Covenant provisions uniformly across all jurisdictions in the Federation; b) establish a mechanism to consistently ensure the compatibility of domestic law with the Covenant; c) provide effective judicial remedies for the protection of rights under the Covenant; and d) organise training programmes for the Judiciary on the Covenant and the jurisprudence of the Committee."

3.5.3. The Committee also expressed concern at Australia's unwillingness to give effect to its decisions on individual complaints submitted under the First Optional Protocol to the

¹ Concluding observations of the Human Rights Committee, Australia, (ICCPR/C/AUS/CO/5, 2 April 2009)

ICCPR. Specifically, the Committee pointed to Australia's restrictive interpretation of, and failure to fulfil its obligations under the First Optional Protocol and the Covenant, and at the fact that victims have not received reparation. The Committee further recalls that, by acceding to the First Optional Protocol the State party has recognised its competence to receive and examine complaints from individuals under the State party's jurisdiction, and that a failure to give effect to its Views would call into question the State party's commitment to the First Optional Protocol. (Article 2) The Committee then made the following recommendation:

"The State party should review its position in relation to Views adopted by the Committee under the First Optional Protocol and establish appropriate procedures to implement them, in order to comply with article 2, paragraph 3 of the covenant which guarantees a right to an effective remedy and reparation when there has been a violation of the Covenant."

- 3.5 A Charter of Human Rights would create respectfulness and attention to human rights in Australia.
- 3.6 A Human Rights Charter would enhance Australia's reputation and credibility as a leader and promoter of human rights in the world today. Australia currently is the only western democracy without a general human rights legislative framework. It is submitted that this deficiency undermines its authority when it seeks to speak out on human rights abuses in other countries.
- 3.7 At present because there is no effective remedy against a breach of many human rights in Australia, the victim must seek a remedy under specific legislation. This in turn requires the complaint to fit within specific categories which may be protected under the relevant legislation eg the *Sex Discrimination Act, 1984 (Cth)* or the *Disability Discrimination Act, 1992 (Cth)*.

- 3.8 The experience of members of the Law Society in representing asylum seekers incarcerated at Woomera Detention Centre and later at Baxter Detention Centre, and the struggles of these lawyers and their clients to obtain a fair hearing, and humane treatment of refugees, highlights the problems and gaps in our current legal system in seeking to support basic human rights.
- 3.9 The High Court decision of *Al-Kateb (Al-Kateb v Godwin)*, (2004) 219 CLR 567) for instance, which was argued by members of the South Australian profession, is a particularly damning indictment of the failure of our legal system. In that case, a stateless Palestinian asylum seeker, who had already been in an immigration detention for several years, sought to be removed from Australia but found that no country would accept him. He therefore sought a declaration that his continued detention was unlawful. However, the High Court held that the relevant provisions of the *Migration Act, 1958 (Cth)* meant that he could potentially remain incarcerated indefinitely and that the Act could not be interpreted as being subject to any basic human rights.
- 3.10 Another case which South Australian lawyers took on a pro bono basis in the Federal Court concerned an asylum seeker from Iran who was imprisoned at Baxter Detention Centre. This case is one example of the extraordinary lengths to which Federal public servants and outsourced functionaries may go without having any human rights framework to guide and limit their potential harmful actions.
- 3.11 The Statement of Claim filed on behalf of this person in the Federal Court asserted that in July 2003 guards entered the claimant's living area, beat him on his head, right knee and chest and ordered him to take off his clothes in front of his young daughter. When he refused to do so he was placed in solitary confinement, in a cell being approximately 3 metres square which contained a mattress and no other furniture. The cell was always lit. The asylum seeker had no view of anything outside his room and was confined to his cell for more than 23 hours in each day. He was not permitted television, radio

or any other diversion. The closed circuit TV camera observed and recorded his movements at all times.

3.12 The Statement of Claim noted that he suffered emotional shock and psychiatric injury. The lawyers for the asylum seeker sought interlocutory orders that he be taken out of solitary confinement and transferred to another detention centre pending final orders sought, which included damages.

3.13 The Federal Court at first instance decided that the asylum seeker should be released from solitary confinement and flown to Maribyrnong Detention Centre in Melbourne. The Federal Government then appealed that decision. The Full Federal Court dismissed the appeal and noted in doing so that there was no detailed regulatory regime in place for immigration detention centres. The Court considered that the failure to make such regulations necessarily resulted in uncertainty as to what powers and obligations applied in such centres. (*X v Secretary of DIMIA & Anor*, [2003] FCA 952 and *Secretary of DIMIA v X* [2004] FCAFC 93).

3.14 It would be expected that a Charter of Human Rights would set out a clear framework of conduct expected of both public servants and outsourced functionaries in such cases.

3.15 The reason why the Law Society supports a Charter of Human Rights is further elaborated in the following chapters.

4. A Human Rights Act should include Economic, Social and Cultural Rights as well as Civil and Political Rights

4.1 The concepts of a 'fair go' and social justice that have been viewed as quintessentially Australian contain within them a recognition of the importance of both freedom and the necessity of ensuring that all sections of Australian society are given access to the benefits of the Australian way of life. It is our view that Australia should have a framework document that represents the full range of values that the country has supported internationally and that it adheres to

domestically. There would be no inconsistency between an elaboration of a set of rights containing economic, social and cultural rights as well as civil and political rights and the fundamental values of the Australian democratic tradition.

- 4.2 Commentators on human rights sometimes forget that the commitment to the interdependence and indivisibility of rights set out in the Universal Declaration of Human rights was based on the concepts of freedom from fear and freedom from want as articulated by Franklin Roosevelt². These ideas were elaborated in greater detail in the 1946 Constitution of France and the 1948 Bogota Declaration of the Rights and Duties of Man³. Many of them were also firmly entrenched in the treaties and other documents of the International Labor Organisation⁴ (an organisation to which Australia has routinely made important contributions).
- 4.3 The Universal Declaration recognises the relationship between the individual and the society to which that individual belongs. It is founded on the idea of rights and responsibilities being corollaries of one another and envisages a democratic framework that assists the individual to develop to her or his full potential. The right to free speech is inextricably linked to the ability of workers to improve their standard of living and the conditions of their employment. Similarly the right to an education supports and enhances the right to equality and the ability to participate effectively in democratic elections.⁵
- 4.4 The legal heritage of Australia includes a commitment to the rule of law and to the furtherance of those rights intimately connected with a democratic state. However, the United Kingdom, which is the source

² Mary Ann Glendon, 'Propter Honoris Respectum: Knowing the Universal Declaration of Human Rights' (1998) 73 Notre Dame L Rev. 1153 at 1166

³ Id at 1167

⁴ Id.

⁵ The Committee on Economic, Social and Cultural Rights has observed: 'Education is both a human right in itself and an indispensable means of realizing other human rights. As an empowerment right, education is the primary vehicle by which economically and socially marginalized adults and children can lift themselves out of poverty and obtain the means to participate fully in their communities.' Committee on Economic, Social and Cultural Rights, General Comment No. 13, The right to education (article 13 of the Covenant), E/C.12/1999/10 at paragraph 1.

of that legal heritage, has put in place a Human Rights Act that includes civil and political rights as well as the right to education, the right to peaceful enjoyment of possessions, the right to free elections and a definitive statement to the effect that the UK has abolished the death penalty. The latter rights were incorporated into the United Kingdom Human Rights Act in accordance with obligations assumed by the United Kingdom pursuant to protocols to the European Convention on Human Rights.

- 4.5 In recognition of the strong connections between civil and political rights and economic, social and cultural rights, the drafters of the Universal Declaration of Human Rights included elements of both sets of rights in the text of the Declaration. Within the Council of Europe the recognition that both sets of rights required articulation and protection lead to the adoption of the European Convention on Human Rights⁶ as well as the European Social Charter⁷. The Convention has been expanded over time to include some aspects of economic, social and cultural rights, in particular the right to peaceful enjoyment of

⁶ The rights protected by the Convention are: the right to life, the right to liberty and security of the person, the right to a fair trial in civil and criminal matters, respect for private and family life, the equality of rights and responsibilities of spouses during marriage, the right of freedom of expression, freedom of peaceful assembly and association, the right to peaceful enjoyment of possession, the right to education, the right to free elections, liberty of movement and freedom to choose where to live. See The Council of Europe and the Protection of Human Rights, pages 4-5, http://www.coe.int/T/E/Human_rights/prothr_eng.pdf.

⁷ The rights and principles guaranteed by the Charter include the opportunity to earn a living, the right to just conditions of work, the right to safe and healthy working conditions, the right to fair remuneration, the right of workers and employers to freedom of association in organisations for the protection of their economic and social interests, the right to bargain collectively, the right of children and young persons to special protection against physical and moral hazards, the right of employed women in case of maternity to special protection, the right to appropriate facilities for vocational guidance, the right to benefit from measures enabling person to enjoy the highest possible standard of health, the right to social security, the right to social and medical assistance for those without adequate resources, the right of those with disabilities to independence, social integration and participation in the life of the community, the right of the family to appropriate social, legal and economic protection and the right of children to appropriate social, legal and economic protection, the right of nationals of all state parties to engage in a gainful occupation in the territory of another state party, protection for migrant workers, equal opportunity and treatment in employment without discrimination as to sex; the right of workers to be informed and consulted and to take part in the determination and improvement of their working conditions, the right of the elderly to social protection, the right of workers to protection in cases of termination of employment, in their claims in the event of the insolvency of their employers and to dignity at work, the ability of those with family responsibilities to engaged in employment without discrimination, the right to protection against poverty and social exclusion and the right to housing.. See European Social Charter (Revised), European Treaty Series – No 163, Strasbourg, 3.V.1996.

one's possessions and the right to education. The Social Charter has also been modified in terms of its content and its monitoring mechanisms.

4.6 Differing procedures exist for the oversighting of the two sets of rights. The European Court of Human Rights has the power to determine whether or not a state's law or practice violates the Convention's provisions. States are then obligated to remedy the violation and/or to pay compensation if the state's domestic law does not provide for a complete remedy for the 'consequences of the violation.'⁸ With respect to the Social Charter States must report annually on the steps they have taken to ensure that national law and practice are in 'conformity with the Charter'.⁹ The United Kingdom has supplied 28 reports with respect to its compliance with the Charter. Examples of changes that have been made to legislation and to policy in the United Kingdom include¹⁰: strengthening the *Disability Discrimination Act 1995*; protecting the confidentiality of trade union membership under the *Employment Relations Act 1999*; and improving the protection given to children in respect of sexual exploitation and trafficking for economic exploitation under the *Sexual Offences Act 2003*.

4.7 In its terms of reference to the Human Rights Consultation Committee the Commonwealth made clear that it does not intend to incorporate a statement of rights into the Australian Constitution. There are divergent views in the community as to whether or not individuals should be given access to the courts to seek redress for violations of their rights or should be limited to seeking declarations of incompatibility in keeping with the Victorian and ACT models of

⁸ The Council of Europe and the Protection of Human Rights, page 8, http://www.coe.int/T/E/Human_rights/prothr_eng.pdf.

⁹ The Council of Europe and the Protection of Human Rights, page 10, http://www.coe.int/T/E/Human_rights/prothr_eng.pdf.

¹⁰ Further information about the changes to UK law and practice as a result of the Social Charter is contained in United Kingdom, December 2008, available from the website of the Council of Europe: http://www.coe.int/t/dghl/monitoring/socialcharter/CountryFactsheets/UK_en.pdf. The Council also maintains a list of areas where member countries have not brought their law or practice into compliance with the Charter; this allows the Council and national organisations to maintain a dialogue with the country in question. For a list of areas of non-compliance in the UK see Id.

rights protection. Even if individuals were given direct access to the courts this could be limited to those rights the Consultative Committee believed to be capable of judicial determination. Other rights could be contained in a second part of an Act in an effort to offer guiding principles for law and practice in Australia.

- 4.8 The Covenant on Economic, Social and Cultural Rights sets out a more detailed framework for the protection of this category of rights than the Universal Declaration of Human Rights. The Consultation Committee may prefer a more general form of words similar to that in the Declaration. If so, we would urge the Consultation Committee to elaborate on some of the rights, for example, the Covenant right to the highest attainable standard of health. Although this right is subsumed within Article 25 of the Declaration, its importance in a modern, developed nation should result in a fuller articulation of its component parts as set out in Article 12 of the Covenant. We are not suggesting that the exact wording of the Covenant is required, however a clear statement of the nature of the right would assist the community as well as the government to fully appreciate the nature of the responsibilities that the government must undertake in fulfilment of its obligations.

4.8.1 The right to health is about both freedoms and entitlements. It encompasses an 'entitlement to a system of health protection which provides equality of opportunity for people to enjoy the highest attainable level of health.'¹¹

4.8.2 As noted by the Australian Human rights Commission in its submission to the Committee on Economic, Social and Cultural Rights¹², Australia's health policies have not sufficiently addressed the needs of Australia's indigenous populations. Although the "Close the Gap Statement of Intent" is viewed as a major step forward, concern remains that the statement has

¹¹ Committee on Economic, Social and Cultural Rights, General Comment No 14, E/C.12/2000/4 at paragraph 8.

¹² Australian Human Rights Commission, 'Review of Australia's Fourth Periodic Report on the Implementation of the International Covenant on Economic, Social and Cultural Rights, 17 April 2009.

not, as yet, had a significant influence on government policy, nor has the nature of the implementation process been sufficiently canvassed with indigenous communities. The latter issue demonstrates the inextricable link between health and equality.

4.9 As noted earlier, the Law Society has had an ongoing concern about the operation of Australia's mandatory immigration detention laws. Prolonged periods of what the Law Society considers to be arbitrary detention have had a deleterious effect on the physical and mental health of children and adults. It is the view of the Society that this issue has to be addressed both as a matter of civil and political rights as well as economic, social and cultural rights.

4.10 Australia has been a strong promoter of human rights at the international level. It played a key role in the drafting and adoption of the Universal Declaration of Human Rights, as well as the International Covenant on Civil and Political Rights and the International Covenant on Social, Economic and Cultural Rights. More recently Australia was an active participant in the efforts that led to the adoption of the Convention on the Rights of the Child. It would enhance Australia's position in the international arena if it were to adopt a comprehensive national statement of human rights protection. It is increasingly difficult for Australia to comment on the record of other countries when it lacks an authoritative document that speaks to its ongoing commitment to the enhancement of human dignity through the promotion and protection of human rights.

5. Remedies under a statutory Charter of Human Rights

5.1 The International Covenant on Civil and Political Rights provides that the State must provide an effective remedy against the breach of any of the rights it contains. The International Covenant on Economic, Social and Cultural Rights provide that the State must implement the rights contained in the respective Covenant.

- 5.2 The notion that rights must be accompanied by effective remedies has roots in longstanding jurisprudence. In 1803, Marshall CJ of the United States Supreme Court delivered his decision in *Marbury v Madison*,¹³ which marked the first time that court had declared the actions of another branch of its government unconstitutional, thereby creating the “check and balance” within that system of government. In this decision Marshall CJ stated:

The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury. One of the first duties of government is to afford that protection. In Great Britain the king himself is sued in the respectful form of a petition, and he never fails to comply with the judgment of his court.

In the third volume of his Commentaries, page 23, Blackstone states two cases in which a remedy is afforded by mere operation of law.

'In all other cases,' he says, 'it is a general and indisputable rule, that where there is a legal right, there is also a legal remedy by suit or action at law whenever that right is invaded.'

And afterwards, page 109 of the same volume, he says, 'I am next to consider such injuries as are cognizable by the courts of common law. And herein I shall for the present only remark, that all possible injuries whatsoever, that did not fall within the exclusive cognizance of either the ecclesiastical, military, or maritime tribunals, are, for that very reason, within the cognizance of the common law courts of justice; for it is a settled and invariable principle in the laws of England, that every right, when withheld, must have a remedy, and every injury its proper redress.'

The government of the United States has been emphatically termed a government of laws, and not of men. It will certainly cease to deserve this high appellation, if the laws furnish no remedy for the violation of a vested legal right.

- 5.3 At present there is no effective remedy against the breach of many human rights in Australia. A very limited number of direct and implied rights under the Constitution as well as some other rights currently protected by a patchwork of federal legislation and common law are overseen by independent commissions, tribunals and the courts.

¹³ 5 U.S. 137 (Cranch).

5.4 Australian parliaments are bound in the laws they make only by the Commonwealth Constitution and the constitutions of each of the States and Territories. They can make laws expressly breaching human rights not protected by the constitutions. If a statutory Charter of Human Rights were adopted, Australian parliaments would still be able to enact laws which breach human rights but at least would be made publicly accountable for any such breach.

5.5 Article 2(3) of the *International Covenant on Civil and Political Rights* states:

(3) Each State Party to the present Covenant undertakes:

- (a) To ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity;*
- (b) To ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy;*
- (c) To ensure that the competent authorities shall enforce such remedies when granted*

5.6 The Law Society has considered the various statutory charters of rights in place in other Australian jurisdictions and in other similar legal systems. We now make submissions as to the remedies which we consider should be available in respect of legislative action and the remedies which we consider should be available in respect of executive action.

5.7 In relation to legislative action, the Law Society submits the following:

5.7.1 The Charter of Human Rights should provide that any new legislation introduced to parliament must be accompanied by a declaration of in/compatibility. This will assist courts in determining the intention of the legislation.

- 5.7.2 The Charter of Human Rights should provide that any questions arising in relation to compatibility must be referred to specific or superior courts. Those courts must cause to be issued to all Attorney-General's of the States and Territories notice and an opportunity to be heard in relation to the referral, especially in light of the fact that many of the States and Territories have referred various law-making powers to the federal parliament. The courts must consider all materials before them as well as relevant international jurisprudence before determining in/compatibility and then make a declaration of in/compatibility.
- 5.7.3 A declaration of in/compatibility should not render the legislation to which it relates invalid. However, it should require a response from parliament.
- 5.7.4 Most human rights are not absolute. One human right might compete with another human right. Judges are accustomed to balancing competing considerations. For example, they already rule on the constitutional validity of legislation enacted by our parliamentarians and review the actions of our public servants. The legislature and executives can and should also balance the competing considerations themselves, but it is the independence of the judiciary in this task that provides the check and balance within government.
- 5.7.5 As those individuals whom legislation may affect may be without the means to pursue such a declaration from the courts, a broader base of persons and entities should have standing to pursue them on behalf of those individuals.¹⁴ For example, the Bill of Rights of South Africa may be a useful guide in providing:

¹⁴ Phillip Lynch and Phoebe Knowles, *The National Human Rights Consultation: Engaging in the Debate* Human Rights Law Resource Centre Ltd p 125.

Anyone listed in this section has the right to approach a competent court, alleging that a right in the Bill of Rights has been infringed or threatened, and the court may grant appropriate relief, including a declaration of rights. The persons who may approach a court are:

- (a) anyone acting in their own interest;*
- (b) anyone acting on behalf of another person who cannot act in their own name;*
- (c) anyone acting as a member of, or in the interest of, a group or class of persons;*
- (d) anyone acting in the public interest; and*
- (e) an association acting in the interests of its members.*

5.8 In relation to executive action, the Law Society submits the following:

5.8.1 The Charter of Human Rights should provide for an individual right of redress against public authorities based solely on the complaint that the rights it provides have been violated.¹⁵ An individual should not be required to rely on some other cause of action to seek such redress against public authorities. Such a requirement would serve to preclude many from obtaining a remedy at all.

5.8.2 An individual right of redress should not be available against public authorities when the legislature has expressly required them to act or make decisions in a manner that is incompatible with the Charter of Human Rights.

5.8.3 The Charter of Human Rights should operate prospectively but not contain any undue limitation period within which an action must be commenced.

5.8.4 The Charter of Human Rights should contain a broad definition of “public authority” and should apply to all government departments, agencies and public sector employees. It should extend to entities and persons performing public functions eg private contractors controlling prisons.. It should also provide

¹⁵ See e.g. *Human Rights Act, 2004* (ACT)

for entities or persons who would not be classed as “public authorities” under the definition to elect to be named in Regulations deeming them to be public authorities for the purposes of the Charter of Human Rights.¹⁶

5.8.5 Cabinet submissions and draft policies and programs of government departments and agencies should be assessed for their compatibility. This would help prevent a breach from occurring and requiring redress.

5.8.6 All appropriate non-monetary equitable and common law remedies should be available such as declarations, injunctions and judicial review through courts. At some point in the future, damages particularly for restitution and rehabilitation, should also be one of the remedies available in appropriate cases, at least where there is no other effective or appropriate remedy. Damages are not available under the ACT and Victorian statutory charter models, but they are available in limited circumstances under the UK statutory charter model.¹⁷

5.8.7 A remedy cannot be effected unless the community is aware of its existence and equipped to pursue it. It is therefore imperative that education and advocacy services be provided throughout the community. This point is pursued further in Section 7 below.

5.9 A Charter of Rights would create greater respect for and attention to human rights in Australia. It would serve an aspirational and educative function, thereby preventing violations of human rights in the first place. The prospect of having to make an incompatibility known to the public at the outset or having to respond to the opinion of the courts as to an incompatibility would hopefully dissuade parliament from enacting legislation in breach of human rights. The prospect of direct

¹⁶ Id

¹⁷ Lynch and Knowles, *supra*, p 126.

legal action would similarly encourage public servants to comply with human rights in carrying out their functions.

- 5.10 A statutory Charter of Rights would not curtail the power of parliament to enact legislation which is constitutional but which nevertheless explicitly breaches human rights. A Charter of Human Rights would bring human rights considerations to the fore, creating a transparent ongoing dialogue between the elected and unelected branches of government and keeping the public better informed about legislative and executive action that affects human rights, thereby enhancing Australian democracy.

6. Application to Public Authorities

- 6.1. The Law Council and the Law Society support a proposed Charter of Human Rights applying to Federal public authorities. In this respect the Law Society seeks a broad definition of “public authority”.
- 6.2. The Charter of Human Rights should apply to all Federal government departments, all Federal statutory authorities and all Federal public sector employees.
- 6.3. The definition should also extend, as with the Victorian Charter, to *“any entity whose functions are or include functions of a public nature, when it is exercising those functions on behalf of the [Commonwealth] or a public authority (whether under contract or otherwise)”*.
- 6.4. Similarly, the Law Society would support the inclusion of a list of factors that may be taken into account in determining a public authority, such as the criteria in the Victorian legislation
- “(a) that the function is conferred on the entity by or under a statutory provision;*
 - (b) that the function is connected to or generally identified with functions of government;*
 - (c) that the function is of a regulatory nature;*
 - (d) that the entity is public funded to perform the function; and*

(e) *that the entity that performs the function is a company (within the meaning of the Corporations Act) all of the shares of which are held by or on behalf of the [Commonwealth].*^{18,}

- 6.5. The Law Society would support a requirement in the Charter of Human Rights that all public authorities have a substantive obligation to comply with the Charter of Human Rights.
- 6.6. Furthermore, the Law Society would support requirements for all public authorities to undertake an annual audit of their compliance with the Charter of Human Rights and to provide a detailed annual report in this respect.
- 6.7. The role and power of Commonwealth Government funding is increasing substantially both in the relationship of the Federal Government with State Governments and in the relationship of the Federal Government with private individuals and organisations. The Law Society considers that a legislative Charter of Human Rights should ensure that the activities undertaken based on such funding, are not inconsistent with human rights as set out in the proposed Charter.
- 6.8. Funding applications to the Federal Government should require statements setting out how the proposed activities of that organisation or individual would accord with and promote human rights.
- 6.9. Public authorities should be required to assess applications for funding and the granting of such funding, with human rights criteria and specify how such grants may promote human rights.
- 6.10. A State Government, an organisation or an individual which is a recipient of funding for purposes which are in breach of human rights, should have that specific funding withdrawn.
- 6.11. The increasing trend towards public/private partnerships and projects should also necessitate compliance with the Charter of Human Rights. For instance, private organisations now receive substantial Federal

¹⁸ Refer generally to the discussion in the report by Lynch and Knowles, *supra* in particular Part C Section 5.

funding to carry out functions such as management of jails and detention centres, care of persons with physical and intellectual disabilities and functions such as employment seeking and rehabilitation, and aged care facilities.

- 6.12. It is recognised that such criteria would impact on the executive functions of State Government. We would consider this to be a positive move to ensure greater uniformity in the activities of State Governments, in particular where they may affect human rights.

7. The Importance of Human Rights Education

- 7.1. The Law Society is of the view that as part of its recommendations the Human Rights Consultation should refer to the March 2009 Concluding Observations made by Human Rights Committee to the Government of Australia:

The State party should consider adopting a comprehensive plan of action for human rights education including training programmes for public officials, teachers, judges, lawyers and police officers on the rights protected under the Covenant and the First Optional Protocol. Human rights education should also be incorporated at every level of general education.

- 7.2. Although these comments were made in the context of a report pursuant to the Covenant on Civil and Political rights we believe they apply to the full range of rights contained in the various Human Rights instruments to which Australia is a party. Few people in Australia are aware of either the reports prepared by Australia in fulfilment of its international obligations or of the dialogue that takes place between Australia and the various human rights monitoring bodies.
- 7.3. It should be part of our democratic tradition that the public's right to know includes their right to know and understand the extent to which Australia is carrying out its international obligations in the field of human rights, particularly its obligation to give meaning and effect to the rights contained in the treaties it has signed.

- 7.4. For example one could ask how many Australians would be aware of the link that exists between the right to equality and the right to life. Yet this link has been made by the Human Rights Committee in its general comment on the 'equal right of men and women to the enjoyment of all other rights on the basis of full equality. The Committee has observed that in giving full meaning to the concept of equality and the right to life countries are to provide information about the impact of poverty and deprivation on women that may pose a threat to their lives. This includes issues such as domestic violence due to the correlation between violence and poverty.
- 7.5. If we consider this issue in the context of Australia it becomes apparent immediately that this situation has particular resonance for indigenous women. We are all aware of the numerous reports on the situation that faces indigenous women and there can be little doubt that the violence they endure can affect their right to life.
- 7.6. When this issue was raised with Australia by the Human Rights Committee, it could not provide the Committee with the requested 'detailed statistics 'disaggregated by gender age, type of violence and relationship between the author of violence and the victim, concerning the number of complaints recorded, civil or criminal investigations conducted, penalties imposed, and compensation granted to the victims or their families.'¹⁹ The Commonwealth indicated that it could not do so 'as definitions and methods of data collection vary between jurisdictions, agencies and surveys.'²⁰
- 7.7. It is our view that in a modern developed country such as Australia, particularly a country that claims to respect the right to equality, the general population would consider such an answer to be unacceptable. The need for such statistics is obvious and encouraging public

¹⁹ Human Rights Committee, List of Issues to be Taken up in Connection with the Consideration of the Fifth Periodic Report of Australia, CCPR/C/AUS/Q/5, 24 November 2008 at para 10.

²⁰ Human Rights Committee, Replies to the List of Issues to be Taken up in Connection with the Consideration of the Fifth Periodic report of the Government of Australia, CCPR/C/AUS/Q/5/Add.1 at page 17.

authorities to consider this issue from a human rights perspective might result in more concrete steps being taken to create the systems necessary to collect appropriate data.

- 7.8. Of particular importance is the necessity of distributing this type of information to relevant sectors such as state government officials, lawyers, judges and the police so that those with the authority to make changes can consider areas of marked deficiency in laws and policies that so fundamentally affect the life, health and dignity interests of an all too large segment of our community – women subjected to domestic violence.
- 7.9. Other examples of issues that should be brought to the public's attention are those being considered in the discussions Australia is holding with the Economic Committee at present. For instance the Committee has asked Australia to provide²¹
- 7.9.1. information about the measures it intends to put in place to address the high rates of child abuse generally and within the indigenous communities specifically,
 - 7.9.2. data about the 'extent of homelessness and malnutrition among asylum-seekers; and
 - 7.9.3. information about the proportion of children with disabilities in secondary education.
- 7.10. It should be noted that these issues have been under consideration by various Committees of the Law Society of South Australia.
- 7.11. It is our view that public debate would be assisted if the government took more seriously its obligation to disseminate widely the materials it produces for international agencies.
- 7.12. In addition more effort should be made to educate the public and relevant officials about the human rights jurisprudence of the United Nations treaty bodies. This jurisprudence would assist the Australian

²¹ Committee on Economic, Social and Cultural rights, List of issues to be taken up in connection with the consideration of the fourth periodic report of Australia, E/C.12/AUS/Q/4.

community to gain a fuller appreciation of the scope of each of the human rights contained in the Covenants and the nature of the obligation Australia has assumed. Should Australia put in place its own Charter of rights this jurisprudence would be vital to those charged with overseeing the implementation of the Charter.

7.13. The above comment should not be interpreted as suggesting that Australia would not need to develop its own understanding of the nature of some of these rights. It is our hope that just as governments in other countries with Charters and Bills of Rights have and continue to improve their understanding of rights protection that all branches of government within Australia will construct a comprehensive rights framework in this country.

7.14. In accordance with measures adopted by the United Nations Human Rights Council, Australia should be undertaking an evaluation of its programme of action in the field of Human Rights Education.²² As part of that evaluation it is to report on progress made in its legal framework and policies well as the steps it has taken to improve access to materials on human rights within the school system. It is our hope that Australia can include in that evaluation a statement to the effect that it will be adopting a comprehensive legal framework for the protection and fulfilment of human rights and that materials will be developed for use in schools as well as the general community to foster awareness of its new Charter of Human Rights.

8. Issues Relevant to South Australia

8.1. The position of the Law Council is that the Charter of Human Rights should be implemented at the Federal level. At this time the intention is not to directly apply such a legislative charter to State Governments. However, the Law Society notes that controls and Federal Government

²² Resolution 10/3 World Programme for Human Rights Education, A/HRC/10/L.11 (Advance Unedited Version)

funding as discussed in part 6 above could impact on the functions of State Governments.

- 8.2. It would be helpful if the Consultation Committee recommended that all States adopt a Charter of Human Rights.
- 8.3. The Law Society has been particularly concerned at actions of the South Australian Government in recent times which would appear to contravene significant human rights principles. Indeed the South Australian Labor Government seems to have taken particular pride in emphasising that certain State legislation would breach human rights. In doing so it has also trumpeted its opposition to a Charter of Human Rights.
- 8.4. The South Australian Parliament has recently enacted the *Serious and Organised Crime (Control) Act 2008* ("the Control Act"). The law has the stated purpose of "disrupting and restricting the activities of criminal organisations, their members and associates". When its terms are considered, however, it becomes apparent that the Control Act is a law of general application which interferes in a radical and unprecedented fashion with well recognised human rights.
- 8.5. In general terms, the Control Act permits the Attorney General to prescribe organisations as "declared organisations" for the purposes of the Control Act. When an organisation is declared, a range of offences arise in connection with association with members of that organisation. In addition, the Control Act allows for the imposition of "control orders" on particular individuals curtailing their personal freedom, and the imposition of "public safety orders" on persons or classes of persons physically restricting where they may go.
- 8.6. The Control Act has the following features which are of significant concern from a human rights perspective:
 - 8.6.1. despite the potential for serious curtailment of basic rights involved, it does not contain any requirement that any

reasons be published for a decision to prescribe a particular organisation as a declared organisation;

8.6.2. it does not impose any requirement that there be objective proof of any criminal convictions, or objective proof of any activity which would constitute a criminal offence, before an organisation may be declared for the purposes of the Control Act. All that is required is that the Attorney-General be "satisfied" that an organisation (or its members) has a criminal purpose;

8.6.3. it creates an offence, punishable by up to 5 years imprisonment, for associating with certain persons without any requirement that any other criminal activity be proven, either on the part of an accused or the person they are alleged to have associated with;

8.6.4. it grants to the police the right to seek a Court-sanctioned control order against a person on the basis that they are a member of a declared organisation, but:

- does not permit the Court to consider the merits of the order in many cases; and
- does not permit the person who is to be the subject of the control order to know the alleged factual basis for the order;

8.6.5. it abrogates the right to silence in certain circumstances; and

8.6.6. it purports to oust meaningful judicial review of certain decisions, determinations, orders made, or proceedings brought under the Control Act..

8.7. The effect of the Control Act is thus:

8.7.1. to impose permanent and ongoing penalties on, and discriminate against, persons who have been convicted of

criminal offences despite the fact that they have completed any sentences associated with conviction;

8.7.2. to place into the hands of the Attorney-General (an inherently political position) and senior members of the police force the power to make decisions which fundamentally interfere with the human rights of citizens based upon secret and unreviewable information;

8.7.3. to place a person who is the subject of a proposed control order in a position where they must effectively disprove the basis for the order without themselves being privy to the information forming that basis, and thus to effectively reverse the onus of proof;

8.7.4. to require the Courts, in certain circumstances, to grant their authority to decisions of the executive which in certain circumstances fundamentally interfere with personal liberties without permitting the Courts to consider the merits of such decisions.

8.8. The Law Society has also been particularly concerned and made substantial submissions to the South Australian Government concerning the inhumane conditions in South Australian prisons.

8.9. The Universal Declaration of Human Rights maintains that no-one should be subjected to torture, or to cruel, inhumane or degrading treatment or punishment (Article 5). Article 10 of the international covenant on civil and political rights provides that “*All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person*”. The Law Society has been concerned that recent populist announcements by politicians, with the support of the media, have led to a race amongst State Governments trying to show who can be the “toughest” on convicted persons and who can impose the most lengthy prison sentences.

8.10. This has led to:

- over-crowding
- harsh conditions
- inadequate medical treatment
- inadequate rights for juveniles in prison
- inadequate consideration to special needs of indigenous prisoners
- inadequate facilities for women prisoners.

8.11. The call for longer prison sentences and pressure of politicians on the judiciary in this respect, together with legislation which reduces the discretion of the judiciary in sentencing according to the particular facts of a case, have had a significant effect on the rights of prisoners and length of prison terms.

8.12. The human rights of indigenous prisoners is a particular concern, with many of the recommendations of the Royal Commission into Aboriginal Deaths in Custody yet to be implemented. Aboriginal people continue to be a disproportionate percentage of the population incarcerated.

8.13. It would be hoped that a Charter of Human Rights would help to promote uniform benchmarks across all States for the treatment of prisoners which would accord with basic human rights.

9. Conclusion

9.1. The Law Society notes that critics of a Charter of Human Rights have argued that such a Charter would only provide a “feast for lawyers”, and promote substantial litigation. The Law Society considers that there is no basis for such an assertion. Indeed, the experience of Victoria, the ACT, Canada and the UK is that there has not been any significant increase in litigation relating to such laws.

- 9.2. Furthermore, most applicants in relation to human rights matters have very little funding to pay their lawyers. The very nature of such legislation is that it is designed to protect the weak and disadvantaged in our society. Often these people are subject to poverty or generally disenfranchised from the mainstream of society. Lawyers who take such cases often do so on a pro bono basis, as with the experience of lawyers acting for asylum seekers who were imprisoned in South Australia.
- 9.3. Another argument is that a Charter of Human Rights would give undue power to unelected judges, at the expense of the elected Parliament. Such an argument ignores the fact that the role of judges in our society is to interpret the law in the context of a particular factual situation. Democracy is dependent on the rule of law. An independent and impartial judiciary is one of the key components of the rule of law. In all other branches of the law we look to the courts to interpret legislation and to apply the common law. Citizens expect the courts to give them a fair hearing and to pronounce on their legal rights. There is no reason to suppose that our courts will not act with dignity and restraint in assessing the merits of complaints brought under a Human Rights Act. .
- 9.4. The model for a Charter of Human Rights, as recommended by the Law Society and the Law Council, still leaves Parliament with the final decision as to the content of any particular law. The courts would not have the power to strike down any legislation, but only to draw Parliament's attention to any incompatibility between a particular law and the Charter of Human Rights.
- 9.5. In conclusion, the Law Society repeats that it strongly supports the policy of the Law Council and urges the National Human Rights Consultation Committee to recommend legislation for a statutory Charter of Human Rights.