



Australian
Council of
Social Service

Submission to the National Human Rights Consultation

ACOSS, June 2009

Introduction

The Australian Council of Social Service (ACOSS) is the peak council of the community services and welfare sector and the national voice for the needs of people affected by poverty, disadvantage and inequality.

We thank the National Human Rights Consultation Committee ('the Committee') for the opportunity to participate in this important consultation on the adequacy of human rights protection in Australia and options to better protect and promote human rights.

The submission is structured into four sections, reflecting the consultation questions and including is a more general discussion of the relationship between human rights and other normative and policy frameworks, as follows:

- Section 1: The relationship between human rights, social justice and social inclusion
- Section 2: Which human rights should be protected and promoted?
- Section 3: Are these rights currently sufficiently promoted and protected?
- Section 4: How could Australia better protect and promote human rights?

In this submission, ACOSS responds to each of the consultation questions and makes a series of recommendations for policy and law reform. In doing so, our focus is on the rights and needs of low income and disadvantaged Australians and the role of the Australian community and welfare sector in rights protection.

ACOSS would like to take this opportunity to commend the Committee for its efforts to reach so many diverse members of the community from across the country. We acknowledge the efforts made to engage with people in outer-suburban areas and regional, rural and remote areas and a number of groups experiencing high levels of social exclusion and marginalisation.

In addition to the ACOSS submission, a number of state and territory Councils of Social Service (COSS) have also made submissions to the Committee. Although our recommendations are generally consistent, the other Councils offer some specific state and territory perspectives on human rights protection.

Executive Summary

ACOSS supports the enactment of a national human rights act to improve the level of human rights protection in Australia. A national act must include economic, social and cultural rights in addition to civil and political rights in recognition of the inter-dependence of rights and the vulnerability of low income Australians to human rights infringements.

There is widespread support for human rights principles within the community and welfare sector. Many organisations have embraced human rights principles in their organisational values, mission statements and service delivery models. Others continue to use the language of social justice, social inclusion, equality and fairness. ACOSS takes the view that human rights, social justice and social inclusion frameworks are complementary and mutually reinforcing and that these alternative frameworks are, and must be, human rights congruent and compliant. On this basis, we support the enactment of a human rights act which would bind community organisations performing public functions and give other organisations the ability to 'opt-in' to compliance.

ACOSS supports the protection of all economic, social, cultural, political and civil rights. This includes those rights which are contained in the International Bill of Rights and rights contained in other international agreements to which Australia is a party, many of which are rights specific to particular population groups.

An overview of existing human rights protections in Australia highlights the inadequacies and gaps in our system. In addition, an examination of the extent to which particular rights are being realised in Australia reveals that protections are weak, with many people experiencing infringements of their human rights. Low income and disadvantaged Australians are particularly at risk. This raises some serious questions about the adequacy of government efforts to protect and promote rights.

ACOSS submits that human rights could be better promoted and protected in Australia through:

- A. The enactment of a national human rights act which includes civil, political, economic, social and cultural rights;
- B. The provision of human rights training to employees of public authorities and other agencies bound by the act and a broader community education campaign; and
- C. The development of a comprehensive social inclusion strategy, which includes poverty reduction benchmarks and targets.

We propose a series of more detailed recommendations in the discussion below.

Section 1: Human rights, social justice and social inclusion

Community and welfare organisations utilise a number of different political, normative or ethical frameworks in their individual and systemic advocacy. While some organisations have adopted the language and principles of human rights, others use the principles and language of 'social justice', 'social inclusion', 'fairness' or 'equity'. These frameworks generally reflect a concern with social and economic equality and often have redistributive economic and social policies as the goal.

In this section, the similarities and differences between these frameworks are explored. They suggest that human rights, social justice and social inclusion offer complementary and mutually reinforcing frameworks. Social justice and social inclusion frameworks are human rights consistent, though the scope of these paradigms may be broader and the remedies different.

ACOSS takes the view that the diversity of the community and welfare sector should be preserved. Human rights offer an additional layer of legal protection for disadvantaged and marginalised members of the community. They also offer another set of principles and advocacy tools for advocates on their behalf.

Defining human rights

Human rights inhere in all humans, regardless of nationality, place of residence, sex, national or ethnic origin, colour, religion, language, or any other status.

They create individual (and in some cases group) entitlements and impose state obligations to act in certain ways or to refrain from certain acts, in order to promote and protect human rights and fundamental freedoms of individuals or groups.¹

They include civil and political rights, as well as social, economic and cultural rights.

Human rights are generally enshrined in law and offer a range of remedies, including legal remedies, for breach of rights.

Human rights and social justice

The complementary relationship between human rights and anti-poverty frameworks is described by the UN Office of the High Commissioner for Human Rights in the following terms:

'lack of political rights and freedoms is both a cause and a consequence of poverty. Socially and politically excluded people are more likely to become poor, and the poor are more vulnerable to social exclusion and political marginalisation'.²

¹ United Nations Office of the High Commissioner for Human Rights website at <http://www.ohchr.org/EN/Issues/Pages/WhatAreHumanRights.aspx>.

² UN Office of the High Commissioner for Human Rights, *Draft Guidelines: A Human Rights Approach to Poverty Reduction Strategies* (2002) at [200] accessed at <http://www.unhcr.ch/development/povertyfinal.html>.

A recent study of the use of human rights and social justice frameworks by Australian non-government organisations (NGOs) concluded that most NGOs see the two concepts as ‘interdependent’ and ‘largely interchangeable’ but with a different message and import depending on the circumstances.³

To the extent that ideas of social justice and human rights are seen as interdependent, the relationship between the two is consistently described as one where human rights is a step towards, or a way of, achieving social justice. This is, social justice is the larger goal, and human rights standards are a statement of a part - perhaps a large part – of what constitutes social justice.⁴

The broader conception of social justice includes a number of mechanisms which are critical to redistributive justice but largely outside the scope of human rights law. The tax and transfer system is perhaps the most significant mechanism through which redistributive social justice can be pursued. Although human rights principles include a right to social security, progressive taxation is largely outside the scope of human rights.⁵

Responses from NGOs also suggested that there was a perception among some organisations that human rights are concerned with individual claims while social justice addresses systemic issues.⁶ This is consistent with the fact that rights discussions in Australia have tended to focus on civil and political rights, with discrimination as the focus. Social and economic rights have been largely neglected in these discussions with redistributive policy issues discussed within social equity, justice or inclusion frameworks.

Perceptions of the comparative efficacy of social justice and human rights frameworks also seemed to be mixed, with some NGOs reporting that human rights language had greater effectiveness due to its perceived legal and moral authority. Similarly, other organisations saw human rights as a more empowering discourse, enabling individuals to assert rights against the state rather than seek assistance from the state thereby ‘[Shifting] rhetorical power from the state to the individual’.⁷ By contrast, other NGOs surveyed described the human rights framework as too abstract and difficult to enforce.

While a formal rights discourse has been slow to develop within Australian political culture, ACOSS takes the view that discourses of equity and social justice are generally rights congruent and that all of these discourses are mutually reinforcing.

Human rights and social inclusion

The Australian Government has committed to pursue a ‘social inclusion’ agenda to increase social and economic participation. There are clear consistencies, as well as some distinctly different emphases, between the social inclusion and the human rights framework. ACOSS takes the view that human rights and social inclusion represent distinct but complementary policy frameworks and emphasises the importance of both frameworks in facilitating social and economic equality and participation.

³ Simon Rice and Scott Calnan, *Sustainable Advocacy: Capabilities and attitudes of Australian human rights NGOs*, Australian Lawyers for Human Rights and Australian Human Rights Centre, 2007.

⁴ Rice and Calnan at 69.

⁵ Tom Campbell, ‘Can the law deliver social justice?’, [2001] *University of Western Sydney Law Review* 4.

⁶ Rice and Calnan at 44.

⁷ Graeme Innes AM, ‘Can rights resolve issues of poverty?’, Address to *NCOSS Conference: Perspectives on Poverty*, Wednesday 17 October 2007, accessed at www.humanrights.gov.au.

The community and welfare sector has generally supported the development and implementation of a comprehensive social inclusion strategy. ACOSS has argued for the development of a social inclusion agenda which includes a strong anti-poverty strategy in addition to broader measures to improve other aspects of social and economic participation.

‘Social inclusion’ has been defined in very different ways. As Hayes et al note:

For some it is synonymous with poverty. Others emphasise inadequate social participation, lack of social integration and lack of power. While related to poverty, social exclusion is a quite distinct concept that is also linked to the important notion of social capital. Social capital can be defined as the networks of social relations that are characterised by norms of trust and reciprocity that facilitate cooperative behaviour and build a cohesive society.⁸

The relationship between deprivation and social exclusion has been articulated by Saunders et al. (2007) as follows:

...while deprivation has been used to better define poverty, social exclusion has been seen as offering an alternative, broader approach that opens up issues associated with the role of institutional structures and process.⁹

Saunders alludes to the ‘broad’ nature of the social inclusion agenda, which is perhaps its most important advantage as a social policy framework. Social inclusion enables us to understand the links between different aspects of disadvantage and the effects of a range of different policies on individuals and communities.

Philip Lynch, from the Human Rights Law Resource Centre sees human rights as an ‘enabling condition’ of social inclusion. He argues that:

‘the realisation of human rights [ensures] the enabling conditions of social inclusion, participation and empowerment ... Together, these rights form a strong normative framework for establishing and maintaining the enabling conditions necessary for social inclusion’.¹⁰

Although the Australian Government has not produced a clear definition of ‘social inclusion’, it has identified a number of social inclusion principles.

1. Reducing disadvantage: Funding and service delivery should promote equitable access to universal benefits and services for Australians in all their diversity, and invest more intensively in those at risk of, or experiencing, social exclusion.¹¹
2. Increasing social, civil and economic participation;
3. A greater voice, combined with greater responsibility (to make the best use of the resources available);
4. Building on individual and community strengths;
5. Building partnerships with key stakeholders;

⁸ Alan Hayes, Matthew Gray and Ben Edwards, prepared for the Social Inclusion Unit, Department of the Prime Minister and Cabinet, *Social Inclusion: Origins, concepts and key themes*, Australian Institute of Family Studies, October 2008 at page 1, references omitted.

⁹ Saunders, P., Naidoo, Y. & Griffiths, M (2007) *Towards new indicators of disadvantage: Deprivation and social exclusion in Australia*. Sydney: Social Policy Research Centre, University of New South Wales.

¹⁰ Philip Lynch, ‘Homelessness, human rights and social inclusion’, *Alternative Law Journal* 30:30, June 2005 at 116.

¹¹ Australian Government, ‘Social Inclusion Principles for Australia’, accessed at <http://www.socialinclusion.gov.au/Principles/Documents/SIPrinciples.pdf>.

6. Developing tailored services;
7. Giving a high priority to early intervention and prevention;
8. Building joined-up services and whole of government solutions;
9. Using evidence and integrated data to inform policy;
10. Using locational approaches;
11. Planning for sustainability (long-term sustainable improvement).

While many of these principles are consistent with or complement human rights principles, there are also some clear differences between these frameworks. The first principle, 'reducing disadvantage' suggests state obligations to provide access to services in a non-discriminatory and equitable way as well as evoking a positive state obligation to assist those who are most disadvantaged. The principle of 'increasing social, civil and economic participation' also appears to be consistent with the right to participation under international human rights law. The right to participation is also reflected with the principle 'A greater voice', but the explicit reference to responsibilities is generally outside the scope of human rights instruments (though rights must be balanced against one another, which gives rise to some implied responsibilities, discussed below). The adoption of strengths-based approaches, though resonating with human rights concepts of human dignity and self-determination, reveals a specific conception of human capability and the relationship between service provider or government agency and individual, family or community.

Other principles are beyond the scope of human rights frameworks and go to the design of an effective service system. These include building partnerships, developing tailored services, prioritising early intervention and prevention, joined-up and whole-of-government service delivery, evidence-based policy, locational approaches and sustainability planning.

While these principles are not inconsistent with human rights, they reflect a focus on social and economic structures and the design and effects of service systems. These principles form part of human rights law and policy, but are not its core focus. Rather, the frameworks might be seen to overlap and reinforce each other.

Conclusions

Many community and welfare organisations have embraced human rights principles in their organisational values, mission statements and service delivery models. Others continue to use the language of social justice, social inclusion, equality and fairness. While some organisations perceive human rights language to be empowering and authoritative, others consider it to be too abstract, legal and individualistic. The community and welfare sector is characterised by a diversity of values, beliefs and organisational philosophies.

The above discussion highlights the complementarity between human rights, social inclusion and social justice frameworks.

It recognises some differences in emphasis and scope between the frameworks and suggests that organisational preferences for a particular normative framework should be respected (in so far as this does not breach human rights).

ACOSS supports the enactment of a national human rights act which binds community organisations providing public functions to act consistently with human rights. We also support community and welfare organisations being able to 'opt-in' to human rights

obligations. However, ACROSS understands that many organisations will wish to maintain their discretion to base their organisational values on alternative human rights-congruent frameworks, including social justice, social inclusion, capacity building, welfare and anti-poverty approaches, as well as, in some cases, religious values.

Section 2: Which human rights should be protected and promoted?

ACOSS supports the protection of all economic, social, cultural, political and civil rights.

This includes all rights contained in the International Bill of Rights, including the Universal Declaration of Human Rights (UDHR), the International Covenant on Economic, Social and Cultural Rights (ICESCR) and the International Covenant on Civil and Political Rights (ICCPR).

In addition, it includes a number of other international human rights agreements which Australia has signed or indicated support for, such as:

- Convention on the Rights of the Child (CROC);
- Convention on the Elimination of All Forms of Discrimination against Women (CEDAW);
- Convention on the Elimination of All Forms of Racial Discrimination (CERD);
- Convention on the Rights of Persons with Disabilities (CRPD);
- Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT);
- International Labour Organisation Discrimination (Employment and Occupation) Convention (ILO 111); and
- Convention relating to the status of refugees (Refugee Convention); and
- Declaration on the Rights of Indigenous Peoples.

Many of these agreements contain specific rights which apply to particular population groups, such as Indigenous rights, women's rights, children's rights and the rights of people with disability.

Human rights protection should be comprehensive, and the interdependence and indivisibility of all rights should be recognised as an underlying principle. This principle is expressed in the UN Vienna Declaration which states that 'all human rights are universal, indivisible and interdependent and interrelated'.

Indeed, ACOSS shares the concern expressed by VCOSS in its submission that the exclusion of social and economic rights in a national human rights act would not only result in a limited human rights regime, but create potential dangers. In particular, it would distort the balance between rights which must be struck, for example, when rights are in conflict.¹²

The Australian Government has committed to observe all of the rights contained within the above instruments. However, this does not mean that all rights contained in all international instruments to which Australia is a party must be included in a national human rights act. Rather, this might lead to an excessively long and complex piece of legislation. For this reason, we recommend that, *at a minimum*, a national human rights act contain those rights which are enshrined in the International Bill of Rights. However, consideration should also be given to the inclusion of specific rights for Indigenous peoples, women, children and people with disability. This would respond to the concerns of particular groups that the general rights contained in the International Bill of Rights provide inadequate protection, a

¹² See VCOSS Submission to the National Human Rights Consultation Committee.

concern raised by people with disability, for example. On this issue, it should be noted that the International Bill of Rights does not contain any specific rights for people with disabilities and 'disability' is not included a ground of non-discrimination in either ICESCR or the ICCPR.

Recommendation 1:

A national human rights act should be enacted which includes, at a minimum, all human rights enshrined in the International Bill of Rights (the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights). Consideration should also be given to the inclusion of specific rights for Indigenous peoples, women, children and people with disability.

Responsibilities

ACOSS does not support the explicit inclusion of individual responsibilities in national human rights legislation. ACOSS shares the concerns expressed by VCOSS in its submission to the Consultation Committee about the risk that the inclusion of 'responsibilities' could create an impression that rights are contingent on 'good citizenship'.¹³

In taking this position, we note that most human rights are not absolute and must be balanced against other rights. This balancing recognises the relationship between rights and responsibilities, as in Article 29 of the UDHR which states:

(1) Everyone has duties to the community in which alone the free and full development of his personality is possible. (2) In the exercise of his rights and freedoms, everyone shall be subject only to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society. (3) These rights and freedoms may in no case be exercised contrary to the purposes and principles of the United Nations.

We also note that there is no codified articulation of individual responsibilities in international law, comparative jurisdictions or Australian state and territory legislation upon which such a statement could be modeled. Although the Victorian Charter includes the term 'responsibilities' in its title, it does not in fact impose any legal responsibilities on individuals.

Recommendation 2: A national human rights act should not include individual responsibilities.

Human rights and low income and disadvantaged Australians

For the purposes of this submission and reflecting our mandate, we have focused on a number of rights which directly or exclusively affect low income and disadvantaged Australians. Many of these rights are social and economic in nature and relate to the adequacy of standard of living and access to services.

These rights which are the focus of this submission are the:

¹³ See VCOSS Submission to the National Human Rights Consultation Committee.

- right to equality and non-discrimination (including on the basis of social status);
- right to an adequate standard of living (including the right to housing);
- right to social security;
- right to health;
- right to work;
- right to education;
- right to self-determination; and
- right to non-discrimination (including on the basis of social status).

We do not discuss Indigenous cultural rights in any depth in this submission, however we strongly support the inclusion of these rights in a national human rights act.

Although we emphasise the importance of social and economic rights to low income Australians, ACOSS takes the view that all rights are interdependent and indivisible. As we argue in further detail below, in addition to social and economic rights, low income and disadvantaged Australians are often at greater risk of civil and political rights breaches than other citizens. In some cases, this is due to the dependence of these rights on social and economic rights. More generally, low income and disadvantaged Australians are most frequent users of public and community services, with many rights issues arising in service delivery (discrimination, lack of access to services or inadequacy of service provision).

In particular, low income and disadvantaged Australians are particularly vulnerable to their rights to equality and non-discrimination being breached on the basis of social status. In addition, the clear dependence of 'first generation' and 'second generation' rights is evident in relation to:

- the right to vote (requiring a fixed address. More generally, rights to democratic participation are made meaningful only with access to education);
- freedom of association and movement ('move on' laws disproportionately affect those who are homeless);
- the right to a fair trial (inability to afford legal representation can undermine this right);
- rights to privacy and respect for family life (these rights are often infringed for low income and disadvantaged Australians, particularly those in shared residential services and institutional settings and those who are homeless).

Further, the experience of the ACT and Victoria reveals that economic and social rights issues often arise in cases raising civil and political rights. Indeed, in the absence of social and economic rights protection, individuals may bring civil and political rights actions to achieve the same ends. For example, by bringing an action for breach of the right to family life to secure access to housing. As this will not always be possible (or desirable) it is essential that economic, social and cultural rights are explicitly and directly protected.

Section 3: Are these rights currently sufficiently promoted and protected?

The adequacy of current human rights protection can be measured both by the comprehensiveness of the existing system of rights protection, and by the extent to which rights are being realised.

In this section, gaps and weaknesses in the existing system of rights protection in Australia are identified. Then, a number of rights are individually considered to assess the degree to which these rights are being realised.

Existing rights protections in Australia

Existing rights protections in Australia are incomplete, ad hoc and provide only weak enforcement mechanisms.

Existing mechanisms for the protection of human rights include:

- International instruments to which Australia is a party;
- Constitutionally implied rights;
- Federal and state anti-discrimination laws;
- Common law rights;
- State and Territory human rights acts;
- Australia's democratic parliamentary system;
- The Australian Human Rights Commission; and
- The role of social policy and services.

These mechanisms are discussed below. Other mechanisms include criminal procedure laws, child protection legislation, privacy protections and court procedures.

International instruments to which Australia is a party

International instruments to which Australia is party create a number of rights enforcement and monitoring mechanisms, including reporting requirements, individual complaints to UN treaty bodies and Special Procedures. In addition, those rights which have been enacted in domestic law are enforceable within the Australian legal system. Finally, international instruments can also indirectly affect the development of Australian law by being taken into account in judicial decision-making.

Australia has obligations to periodically report to various UN treaty bodies on its progress in meeting rights obligations.

Australia may also have to answer complaints about breaches of civil and political rights made by individuals to the UN Human Rights Committee under a number of Optional Protocols which Australia has signed. These include the Optional Protocol to the ICCPR, CAT and CERD.

The Optional Protocol to ICESCR will be open for signing in September and will provide individuals with a right of individual complaint to the United Nations for infringements of

social, economic and cultural rights. ACOSS urges the Australian Government to sign the Optional Protocol.

Australia may also be subject to scrutiny by Special Procedures of the United Nations, for example, the UN Special Rapporteur on adequate housing.

While these international rights monitoring and enforcement processes are important, they lack legal force in domestic law. Although treaty bodies may make recommendations to the Australian Government, for example, requiring legal or policy changes, these bodies have no power to enforce their recommendations. The primary importance of these recommendations is therefore the political pressure they may apply to Governments to make changes, particularly when utilised by advocacy organisations.

International individual complaint mechanisms are difficult and expensive to access in practice due to the requirement that an individual exhaust all domestic legal remedies before bringing a complaint to the Human Rights Committee (HRC). Further, the recommendations of the HRC do not bind the Australian Government.

International treaties do not become part of Australian domestic law unless they are directly incorporated into domestic legislation. The *Sex Discrimination Act 1984* (Cth) and the *Racial Discrimination Act 1975* (Cth) are both examples of domestic incorporation of international human rights instruments (or part thereof) into domestic law. However, neither of the corresponding international instruments (CEDAW or CERD) has been enacted fully into Australian law.

Under the present system, international human rights law can also *indirectly* influence the development of Australian law in a number of ways including:

- informing the development of the common law;
- aiding legislative interpretation;
- developing and applying constitutional guarantees; and
- as a relevant consideration in reviewing administrative and executive decision making.¹⁴

The indirect nature of this influence means that the development of domestic rights principles is dependent on litigation outcomes and judicial approaches to international law.

This leaves gaps and inconsistencies in the protection of human rights, a lack of clarity around the level of rights protection and leaves Australia in breach of our international obligations to incorporate relevant rights protections into domestic law.

¹⁴ Philip Lynch and Jacqueline Cole, 'Homelessness and human rights: Regarding and responding to homelessness as a human rights violation' (2003) 4 *Melbourne Journal of International Law* 139.

Constitutionally implied rights

The Australian Constitution does not contain an explicit or comprehensive set of rights protections.

The rights which are explicitly protected by the Constitution are very narrow. These include trial by jury (section 80), freedom of religion (section 116) and compensation on just terms (section 51(xxxv)). These rights only bind the Commonwealth, and not the states.

The above rights have been supplemented by a number of rights which have been implied from the text or structure of the Constitution, including the right to freedom of political communication and the implied right to vote.¹⁵ However, these implied rights do not provide an independent cause of action.

The implication of constitutional rights is much contested, with allegations of 'judicial activism' and questions raised about the legitimacy and basis of the implications.

Constitutionally implied rights, developed as they are within case law, are fairly inaccessible for non-lawyers and particularly those who have low levels of literacy and education. This is a barrier to the assertion and enforcement of these rights for disadvantaged and marginalised members of the community.

A codified charter of rights, by contrast, would provide a clear, accessible and transparent statement of rights. It would clarify the rights of individuals and groups and identify the obligations of Government to protect those rights.

Federal and state anti-discrimination and other human rights laws

A number of anti-discrimination laws have been acted by the Commonwealth, including the:

- *Racial Discrimination Act 1975* (Cth)
- *Sex Discrimination Act 1984* (Cth)
- *Disability Discrimination Act 1992* (Cth)
- *Age Discrimination Act 2004* (Cth)

All states and territories also have anti-discrimination legislation.

Generally speaking, these laws only partially implement Australia's international obligations.

Unlike the proposed human rights act, these acts apply to *all persons*, not just officers of the Commonwealth. They will therefore have an important continuing role to play, even if a national human rights act is enacted.

Other Commonwealth human rights related legislation includes the *Human Rights and Equal Opportunity Commission Act 1986* (Cth), the *Privacy Act 1988* and the *Freedom of Information Act 1982*. There are also a limited range of specific rights contained in the *Social Security Act 1991* and the *Workplace Relations Act 1996*.

¹⁵ The right to vote is not unqualified, and, for example, excludes some prisoners. See *Roach v Electoral Commissioner* [2006] HCA 43.

Common law rights

Common law rights include 'rebuttable presumptions' that Parliament did not intend a number of effects, including:

- To retrospectively change rights and obligations;
- To infringe personal liberty;
- To interfere with freedom of movement;
- To interfere with freedom of speech;
- To alter criminal law practices based on the principle of a fair trial;
- To restrict access to the courts;
- To permit an appeal from an acquittal;
- To interfere with the course of justice;
- To abrogate legal professional privilege;
- To exclude the right to claim self-incrimination;
- To extend the scope of a penal statute;
- To deny procedural fairness to persons affected by the exercise of public power;
- To give executive immunities a wide application;
- To interfere with vested property rights;
- To authorise the commission of a tort;
- To alienate property without compensation;
- To disregard common law protection of personal reputation; and
- To interfere with equality of religion.¹⁶

As is clear from this list, the range of common law rights is limited, incomplete and vulnerable to statutory override. Like implied constitutional law rights, common law rights are also characterised by a lack of transparency and accessibility which makes them difficult to identify and define for non-lawyers.

State and territory human rights legislation

The Australian Capital Territory (ACT) and Victoria are the only jurisdictions to have enacted charters of rights in Australia. The human rights acts in these states incorporate most of the rights contained in the ICCPR but do not incorporate rights in the ICESCR, with the exception of references to cultural rights.

Neither of the state acts gives courts the power to invalidate legislation enacted by Parliament. Rather, both require courts to interpret laws in a way that is consistent with human rights where possible, and require administrative bodies to comply with human rights. Only natural persons are recognised as rights holders under the state acts, to the exclusion of private corporations and other legal entities.

Recent consultations in Tasmania and Western Australia have demonstrated widespread support for improved legal protection of human rights in those states, recommending the enactment of human rights legislation including both civil and political and some social and economic rights.

¹⁶ James Spigelman, *Statutory Interpretation and Human Rights* (2008) at 27-29, cited by Edward Santow, 'National Human Rights Consultation: Submission', Gilbert and Tobin Centre for Public Law at page 34.

The Tasmanian Law Reform Institute, which conducted the Tasmanian human rights consultations, identified specific rights which should be included in state legislation, including a number of social and economic rights (the right to work and just conditions of work, the right to adequate food, clothing and housing, the right to the highest attainable standard of physical and mental health and the right to education).¹⁷ The West Australian Consultation Committee for a Proposed WA Human Rights Act recommended that a 'WA Human Rights Act should recognise and protect the following economic, social and cultural rights, in addition to those economic, social and cultural rights already included in the draft Bill' including the rights to health, education, housing, participation in cultural life and not to be deprived of property other than in accordance with law and on 'just terms'.¹⁸

As noted above, all states and territories have a range of anti-discrimination and equal opportunity legislation and include specific user rights related to services, such as in state and territory housing assistance legislation.

However, the range of state and territory statutory rights protections is incomplete, and excludes many rights which are enshrined in international instruments to which Australia is a party.

Australia's democratic parliamentary system

Australia's system of parliamentary democracy with regular, free and fair elections and processes of inquiry and review in both houses is often held up as sufficient protection from the infringement of human rights. By contrast, human rights are often dismissed as tools for the assertion of minority claims against the majority (represented in Government).

There are a number of problems with this argument.

The first is that neither parliament nor public authorities are currently required to take human rights into consideration in the development of law or policy. Therefore, even if one supports the principle of parliamentary sovereignty in the resolution of human rights questions, the failure of governments to directly address human rights issues in the formulation of policy and in public discussion and debate means that these issues are often ignored. This has resulted in some serious human rights breaches (for example, the indefinite detention of asylum seekers) and more generally, in a lack of open public debate about critical rights issues.

The second problem is that marginalised and disadvantaged members of the community generally have significantly less collective voting and political power and their needs and interests are therefore often overlooked. These groups, including low income and disadvantaged Australians, the unemployed, the homeless, sole parents, Indigenous Australians, people with disabilities, people in prison, refugees and asylum seekers, are at particular risk of human rights infringements and are generally under-represented in Parliament.

¹⁷ Tasmanian Law Reform Institute, *A Charter of Rights for Tasmania*, Report No 10, October 2007 at 3.

¹⁸ Report of the Consultation Committee for a Proposed WA Human Rights Act, *A WA Human Rights Act*, November 2007 at iv.

Democratic institutions are essential to the protection and implementation of human rights. However, they are not enough. The enactment of legislation which sets out individual (and where relevant) group rights and government responsibilities is necessary to provide a framework for policy and decision-making. In turn, our democratic institutions must play an important role in implementing and upholding this framework.

Australian Human Rights Commission

The Australian Human Rights Commission is an independent statutory body funded by the Federal Government.

It administers a number of human rights-related acts and seeks to improve education and awareness about human rights. It has a number of functions including conducting rights inquiries, assisting courts in human rights cases, advising government and investigating complaints under discrimination legislation.

The AHRC cannot make recommendations or decisions which bind the Government. It is not able to provide affected individuals with effective or enforceable remedies where international human rights standards are not being met. Further, its capacity is also currently constrained by the inadequacy of government funding. These constraints are addressed below in the discussion of the potential role of the AHRC under a national human rights act.

In its most recent report, the UN Committee on Economic, Social and Cultural Rights noted with concern that the AHRC has limited competency, lacking adequate human and financial resources and recommended that the Australian Government strengthen the mandate of the Commission to cover all Covenant rights and ensure that it is adequately resourced.¹⁹

The role of social policies and services

The role of social services might also be considered as part of the existing system of human rights protection in Australia.

Although many community and welfare organisations do not think of themselves as human rights organisations, as discussed above, their provision of services to, and advocacy on behalf of, low income, disadvantaged and socially excluded members of the community plays a role in at least partly protecting some rights.

For example, the provision of crisis accommodation services to those who are experiencing or at risk of homelessness goes some way to protecting the right to housing. However, individuals currently have no *entitlement* in law to these services and funding and capacity constraints mean that many people are unable to receive assistance when they need it.

Further, there are no legal mechanisms to hold governments accountable for the inadequacy of funding for essential social services.

¹⁹ UN Committee on Economic, Social and Cultural Rights, *Consideration of reports submitted by states parties under articles 16 and 17 of the covenant: Concluding observations— Australia*, at page 3.

The extent to which human rights are being realised in Australia

International human rights monitoring bodies have repeatedly found Australia to be in breach of its human rights obligations.

The UN Human Rights Committee has concluded that Australia has breached its human rights obligations in relation to the:

- mistreatment of children—for example, in *Bakhtiyari v Australia*, the Human Rights Committee found that the detention of two children in immigration detention for two years and eight months violated the children's rights;
- inhumane treatment of prisoners—for example, in *Cabal and Bertran v Australia*, the Human Rights Committee found that the detention of two prisoners in a triangular cage the size of a telephone booth was inhuman;
- denial of the right to family life—for example, in *Winata v Australia*, the Human Rights Committee found that deportation of the parents of a 13-year-old child who was born in and had grown up in Australia constituted an interference with the right to family life;
- undue trial delay—for example, in *Rogerson v Australia*, the Human Rights Committee held that a two-year delay by the Northern Territory Court of Appeals to deliver its decision on a criminal contempt charge constituted undue delay;
- in *Young v Australia*, a man applied for a war veteran's dependent pension. This claim was rejected because his partner of 38 years was another man. The Human Rights Committee found that this was a breach of ICCPR article 26, the right to non-discrimination.
- *Brough v Australia* where a disabled young Aboriginal man was held in solitary confinement and deprived of clothing and blankets in a NSW adult prison; the Human Rights Committee found this constituted a violation of the right to humane treatment;
- Most recently, *D & E v Australia* (UN Communication No. 1050/2002, views adopted 25 July 2006) where the Human Rights Committee found that the 'immigration detention' of an Iranian woman, together with her husband and two young children, for over three years was 'arbitrary' and in breach of Article 9 (1) of the ICCPR.²⁰

Many of these findings have been ignored by successive federal governments.

It must be acknowledged that there have been some very positive human rights developments under the current government. These have included:

- the commitment to the current national human rights consultation;
- the national apology to the Stolen Generation;
- Government support for the Declaration on the Rights of Indigenous Peoples;
- the ratification of the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women, the Convention on the Rights of Persons with Disabilities, and the Optional Protocol to the Convention against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment;

²⁰ Hilary Charlesworth, *Human rights: Australia versus the UN*, Democratic Audit of Australia (2006) at 3, accessed at http://democratic.audit.anu.edu.au/papers/20060809_charlesworth_aust_un.pdf. References omitted.

- the commitment to a social inclusion agenda and establishment of a social inclusion unit in the Department of Prime Minister and Cabinet;
- the development of the homelessness white paper, *The Road Home*;
- social housing investment and the funding and implementation of the National Rental Affordability Scheme (NRAS) to improve the accessibility and affordability of housing;
- changes to some aspects of the Northern Territory Emergency Response (NTER) legislation;
- Changes to industrial relations law to strengthen workers' rights;
- Funding for a paid parental leave scheme to begin in 2010;
- The commitment to 'close the gap' to achieve equality of health status and life expectancy between Indigenous Australians and non-Indigenous Australians by 2030;
- increases to the age, disability and carer pensions; and
- Changes to social security and other laws to remove discrimination against same-sex couples.²¹

Despite these positive changes, many rights remain inadequately protected and rights infringements continue to occur. In this section, a number of rights which are not adequately protected in Australia are identified and discussed. The list of inadequately protected rights is not intended to be comprehensive, but provides some examples of the extent and effects of inadequate rights protection in Australia.

The right to housing is discussed as a case study at the end of Section 4 of this submission to explore the content and potential effects of social and economic rights protection in more detail. The case study explores the limits of current protection of the right to housing, the government's obligations under international law and the likely effects of the inclusion of a right to housing in a national human rights act.

General: Social, economic and cultural rights

Although the Australian Government is a signatory to ICESCR, the Covenant has not been enacted into domestic law and individuals have no access to UN complaint mechanisms.

The UN Committee on Economic, Social and Cultural Rights recommended in May this year that the Federal Government:

- a) enact comprehensive legislation giving effect to all economic, social and cultural rights uniformly across all jurisdictions in the Federation; b) consider the introduction of a Federal charter of rights that includes recognition and protection of economic, social and cultural rights, as recommended by the Australian Human Rights Commission; c) establish an effective mechanism to ensure the compatibility of domestic law with the Covenant and to guarantee effective judicial remedies for the protection of economic, social and cultural rights.²²

²¹ The changes amend 84 Commonwealth laws to eliminate discrimination against same-sex couples and their children in a wide range of areas, including social security, taxation, Medicare, veteran's affairs, workers' compensation, educational assistance, superannuation, family law and child support. Information obtained from the Commonwealth Attorney General's website at <http://www.ag.gov.au/samesexreform>.

²² UN Committee, *Concluding Observations* at page 3.

It should be noted that each of the independent committees inquiring into rights protection in the states and territories has recommended the inclusion of at least some economic, social and cultural rights in a charter. However, the Victorian and ACT acts currently exclude these rights. Their inclusion is to be considered in scheduled reviews of the acts in each jurisdiction.

Evidence would suggest that there is likely to be considerable public support in Australia for the protection of social, economic and cultural rights. UK research by the Joint Committee on Human Rights indicated high levels of public support for the inclusion of social and economic rights in a bill of rights. As the report stated:

...88% of people questioned thought that the right to hospital treatment ... within a reasonable time should be included in a Bill of Rights. This was only 1% less than the 89% who thought that the right to a fair trial before a jury should be included. 65% thought that the right of the homeless to be housed should also be included.²³

In Northern Ireland, support for social and economic rights was similarly high with more than 87% of the surveyed population supporting the inclusion of the right to health care and an adequate standard of living in a bill of rights.²⁴

This suggests that there may well also be high levels of support among the Australian public for economic, social and cultural rights. Indeed, many Australians may perceive that these rights are more relevant to their daily lives than some civil and political rights.

Equality and non-discrimination

Article 26 of the ICCPR states that:

All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

Article 2(2) of the ICESCR similarly requires that:

The States Parties to the present Covenant undertake to guarantee that the rights enunciated in the present Covenant will be exercised without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

Australian anti-discrimination laws do not include all prohibited grounds of discrimination that exist in human rights treaties to which Australia is a party. Excluded from these grounds in Australian law is the right to non-discrimination on the basis of 'social status', which includes a person's status as unemployed, a recipient of social security or homeless.

²³ Joseph Rowntree State of the Nation poll, October 2006, cited in Joint Committee on Human Rights, *A Bill of Rights for the UK*, Twenty-ninth Report of Session 2007-08, 2008 at [150].

²⁴ Northern Ireland Human Rights Commission, *A Bill of Rights for Northern Ireland, Summary of Opinion Poll Findings*, October 2001, cited in Joint Committee on Human Rights, *A Bill of Rights for the UK*, Twenty-ninth Report of Session 2007-08, 2008 at [151].

Discrimination on this basis principally affects low income and disadvantaged members of the community.

Discrimination on the basis of social status has a number of serious negative consequences for those affected, including material deprivation, for example, through the denial of goods or services as well as the negative psychological effects of differential treatment, in some cases amounting to a refusal to provide goods or services and associated public humiliation.

The UN Committee on Economic, Social and Cultural rights recommended in its recent Concluding Observations that Australia 'enact federal legislation to comprehensively protect the rights to equality and non-discrimination on all the prohibited grounds.'

The norm of non-discrimination is *immediately* (not progressively) realisable. This requires governments to prohibit discrimination on all prohibited grounds (including social status including status as homeless) and to ensure that all legislation is itself non-discriminatory.

Recommendation 3: National human rights legislation should protect the right to equality and non-discrimination on all prohibited grounds, including 'social status'.

To ensure that state, territory and national anti-discrimination laws are consistent, state and territory acts should be amended to be consistent with a national human rights act, including protection from discrimination on the basis of social status.

Recommendation 4: Existing federal, state and territory anti-discrimination laws should be amended to also include protection from discrimination on the basis of 'social status'.

Racial discrimination

Indigenous Australians continue to experience racial discrimination in many aspects of their lives. This discrimination causes extreme social exclusion, poverty and is associated with poor social and economic outcomes.

The most significant federal Government Indigenous policy initiative of recent years, the Northern Territory Emergency Response, directly affects the rights of many Indigenous men, women and children and raises serious questions about the adequacy of racial discrimination protections in this country.

Arguably, the NTER highlights the need for a national human rights act to improve the process and accountability of government decision making and provide a basis for Indigenous Australians to challenge decisions which affect them.

The most obvious human right affected by the NTER is the right to non-discrimination on the basis of race. The package of NTER legislation included a provision which suspended the *Racial Discrimination Act* from applying to NTER initiatives. This enabled the government to act in a way which treated Indigenous people differently, and arguably, *detrimentally* and denied Indigenous Australians a basis to challenge these decisions.

A number of other human rights have also been affected, if not infringed, by the NTER including:

- the right to self-determination: the NTER was developed without consulting affected Indigenous communities and the NTER legislation was passed in such a short period of time as to preclude meaningful public debate;
- the right to social security: the human rights implications of income management are complex and unclear, but the policy involves significant interference with the management and use of personal income;
- the right to freedom of movement: the Basics Card can only be reliably used in designated states and territories (at present the Northern Territory and Western Australia), which affects the freedom of movement of Basics Card users across state borders;
- Indigenous land rights: the compulsory acquisition of Indigenous-held land under five year leases was conducted without consultation and disregarding Indigenous land rights.

Equal rights of men and women

The equality provision contained in Article 2 of the ICCPR requires that governments respect and protect human rights without distinction on the basis of sex. Article 2 of ICESCR contains a similar equality guarantee.

Although Australia has national, state and territory sex-discrimination legislation, substantial inequalities continue to exist between Australian men and women.

As the recent NGO report on ICESCR stated:

Women remain significantly disadvantaged compared to men in relation to key indicators of well-being, including income, access to health, education, housing and political representation. Indigenous women, women from non-English speaking backgrounds and women with disability are particularly disadvantaged.

A number of other issues affecting Australian women can be usefully considered as human rights issues and highlight the inadequacy of existing rights protections. For example:

- the high rate of domestic violence and sexual assault against women, particularly affecting Indigenous women – statistics suggest that about one in three Australian women experience physical violence and almost one in five women experience sexual violence over their lifetime²⁵;
- the inadequacy of Parenting Payment Single for sole parents (mostly women) and the exclusion of this pension from recent payment increases;
- wage inequality and retirement income gaps; and
- sexual harassment and discrimination in the workplace.

There have been some recent policy developments which advance the rights of Australian women, including the national plan on domestic violence and the paid parental leave scheme. However, human rights protections for women are generally incomplete.

²⁵ Australian Bureau of Statistics, *Personal Safety Survey*, ABS Cat. No. 4906.0. Commonwealth of Australia, Canberra. 2005.

Right to an adequate standard of living

Article 25 of the *Universal Declaration of Human Rights* provides that:

(1) Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control.

(2) Motherhood and childhood are entitled to special care and assistance. All children, whether born in or out of wedlock, shall enjoy the same social protection.

Similarly, Article 11 of ICESCR requires that:

The States Parties to the present Covenant recognize the right of everyone to an adequate standard of living for himself and his family, including adequate **food, clothing and housing**, and to the continuous improvement of **living conditions**. The States Parties will take appropriate steps to ensure the realization of this right, recognizing to this effect the essential importance of international co-operation based on free consent. (Emphasis added)

Australian law does not expressly protect the right to an adequate standard of living.

Some national and state laws improve people's ability to access an adequate standard of living, for example the *Social Security Act*. However, these laws do not provide a general right, but set out eligibility criteria and administrative procedures and review processes.

Adequate standard of living can be assessed by reference to those items that the community perceives to be social necessities or essentials. More than 2 million Australians are living in poverty and are forced to go without many of the things that the community regards as essential, for example, meals and health care.²⁶ This research shows that poverty and deprivation is concentrated among particular population groups: the unemployed, sole parents, Indigenous Australians and people with disabilities.

A 2004 Senate report into poverty in Australia recommended that a comprehensive anti-poverty strategy be developed at the national level to coordinate action to reduce poverty across policy areas such as employment, health, education, income support, community services and housing. The report also recommended the establishment of poverty benchmarks and targets.²⁷

Despite these recommendations and the Government's stated commitment to a 'social inclusion agenda', Australia does not have a comprehensive anti-poverty strategy or clear commitments to poverty reduction benchmarks or targets.

As noted above, the right to adequate housing, as a component of the right to an adequate standard of living, is discussed in more detail at the end of Section 4 as a case study in the potential effects of a national human rights act.

²⁶ ACOSS, *Australia Fair: Update on those missing out*, 2007 at 3.

²⁷ Senate Standing Committee on Community Affairs, *A hand up not a hand out: Renewing the fight against poverty (Report on poverty and financial hardship)*, 11 March 2004.

Right to social security

Governments are required by international law to provide social security to the maximum level that can be reasonably expected, taking into consideration other demands on government funding. Income support payments should be available to all 'people who experience a loss of income beyond their control or who require income support to ensure the realisation of their human right to an adequate standard of living.'²⁸

Eligibility for social security payments and review and appeal processes are set out in national social security law and policy. Far from being a 'right', Australian courts have interpreted social security as 'no more than a gratuity, the payment of which a person can have no rights enforceable at law'.²⁹ Income support eligibility criteria exclude certain population groups from eligibility regardless of their financial or employment status. These groups include newly arrived migrants, asylum seekers, some New Zealand citizens, people unable to provide adequate proof of identity and those unable to satisfy 'mutual obligation' requirements.³⁰

The UN Committee on Economic, Social and Cultural Rights recently expressed concern that Australia's social security system does not provide universal coverage and that the inadequacy of certain benefits 'does not provide an effective income support system'. The Committee also highlighted concerns that existing conditionalities on certain payments 'have a negative impact on disadvantaged and marginalised individuals and groups'. The Committee recommended that:

...the State party take additional measures, legislative or otherwise, to ensure universal coverage of the social security system so as to include asylum seekers, newly arrived immigrants and indigenous peoples. The Committee also recommends that social security benefits, including unemployment benefits, old age pensions and youth allowance enable recipients to enjoy an adequate standard of living. The Committee strongly recommends that the State party review conditionalities such as "mutual obligations" in the welfare to work programme and the "quarantining" of welfare payments under the Northern Territory Intervention that may have a punitive effect on disadvantaged and marginalized families, women and children. The Committee further recommends that the State party consider ratifying ILO Convention No. 102 on minimum social security standards.³¹

It should be acknowledged that the Government has responded to the recommendation of the UN Committee on Economic, Social and Cultural Rights to introduce a paid maternity leave scheme.

The right to social security clearly interacts with other human rights, for example, the right to equal treatment and non-discrimination. This raises questions about the differential rates of income support payments for different population groups, where this is not justified on objective criteria, for example, the relative cost of living or rates of poverty. The lower rates of payment received by unemployed people and sole parents relative to other pensioners

²⁸ *Freedom Respect Equality Dignity: Action*, NGO Submission to the UN Committee on Economic, Social and Cultural Rights, Australia, April 2008 at [230]-[231].

³⁰ *Freedom Respect Equality Dignity: Action*, NGO Submission to the UN Committee on Economic, Social and Cultural Rights, Australia, April 2008 at page 10.

³¹ UN Committee's Concluding Observations at page 5.

potentially raises human rights questions, particularly when hardship and deprivation data highlights the relative disadvantage of the former groups.

In summary, a number of aspects of social security law and policy raise potential human rights issues:

- conditionality and loss of payments: including participation failures, no show no pay policies and 8 week penalty periods, which cause serious hardship; and
- income management and suspension trials: including the NTER comprehensive income management model, the school attendance and enrolment trials (involving potential income support suspensions for 12 weeks) and child protection income management trials (involving income management of 70% of income); and
- payment adequacy: particularly for the unemployed, sole parents and youth payment recipients.

Right to health

Article 12 of ICESCR sets out the human right to health as follows:

1. The States Parties to the present Covenant recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health.
2. The steps to be taken by the States Parties to the present Covenant to achieve the full realization of this right shall include those necessary for:
 - (a) The provision for the reduction of the stillbirth-rate and of infant mortality and for the healthy development of the child;
 - (b) The improvement of all aspects of environmental and industrial hygiene;
 - (c) The prevention, treatment and control of epidemic, endemic, occupational and other diseases;
 - (d) The creation of conditions which would assure to all medical service and medical attention in the event of sickness.

The right to health is clearly dependant upon the realisation of other rights including ‘the rights to food, housing, work, education, human dignity, life, non-discrimination, equality, the prohibition against torture, privacy, access to information, and the freedoms of association, assembly and movement. These and other rights and freedoms address integral components of the right to health.’³² The General Comment on the right to health makes clear that it is not to be understood as a right to be healthy, but ‘contains both freedoms and entitlements’:

The freedoms include the right to control one's health and body, including sexual and reproductive freedom, and the right to be free from interference, such as the right to be free from torture, non-consensual medical treatment and experimentation. By contrast, the entitlements include the right to a system of health protection which provides equality of opportunity for people to enjoy the highest attainable level of health.³³

As a social and economic right, the right to health imposes an obligation of progressive realisation on state parties. A country's resources must be taken into consideration in determining the extent of the state party's obligations; however, given the importance of the

³² UNCESCR, General Comment, *The right to the highest attainable standard of health*: 11/08/2000. E/C. 12/2000/4 (General Comments).

³³ General Comment at [8].

right to health, governments are expected to provide the area with the maximum amount of funding possible.

No general right to health is contained in Australian law. Further, although we have a publicly funded health system, its capacity is constrained by 'chronic under funding, rising medical costs, inadequate coverage, and inaccessibility — particularly for disadvantaged and marginalised people'.³⁴

Indigenous health is particularly poor, a reflection upon the unequal nature of access to health services between urban and remote areas and the social determinants of health affecting Indigenous Australians. Unequal access to services, inadequate funding for Indigenous health, including to community controlled health care services, the extent of the life expectancy gap and the lack of access to culturally appropriate health services all highlight the inadequacy of existing protections of the right to health.

In recognition of these shortcomings, the UN Committee on Economic, Social and Cultural Rights recently recommended that the Government implement a human rights health framework that ensures access to social determinants of health such as housing, safe drinking water, electricity and effective sanitation systems.

A number of inquiries into the mental health system have revealed the inadequacy of human rights protections for people with mental illness. The mental health system is under significant pressure and is often unable to assist people with a mental illness until they are in crisis. The most significant inquiry into the system, conducted by Brian Burdekin, concluded that:

- a) people affected by mental illness suffered from widespread systemic discrimination and were consistently denied the rights and services to which they were entitled; and
- b) health services and other services which would enable people with a mental illness to live effectively in the community were found to be seriously underfunded or in some areas just not available at all.³⁵

These findings are echoed in the SANE, *Dare to Care Report* in 2004, which concluded that:

Mental health services are in crisis to varying degrees all around Australia, barely able to cope with people experiencing acute episodes of illness, let alone provide ongoing treatment and support.³⁶

The findings of the Burdekin Report led to the development of a National Mental Health Strategy. More recently, there has been an increasing national, state and territory focus on improving mental health early intervention, prevention and promotion services. However, the under-resourcing of mental health systems continues.

National human rights legislation would support and improve patient and consumer protections enshrined in mental health legislation. The experience of other jurisdictions

³⁴ Human Rights Law Resource Centre, *A Human Rights Act for All Australians*, May 2009 at pg 62.

³⁵ Burdekin Report cited in NACLC, HRLRC and Rights Australia, *Sir Nigel Rodley – Visit to Australia – Briefing Paper on Key Human Rights Issues for Discussion with NGOs*, February 2007.

³⁶ SANE, *Dare to Care – SANE Mental Health Report 2004*.

highlights the important role that human rights legislation can play in giving effect to these protections, for example, those relating to compulsory treatment.

Access to some health services by low income Australians is particularly poor. Over recent years, ACOSS has raised serious concerns about dental care costs and waiting lists for low income patients. We have made a number of recommendations to Government to improve access to dental care.³⁷

A number of other population groups experience poor access to health care and possible infringements of the right to health. For example, a disproportionate number of prisoners have been diagnosed with mental illness and experience difficulty accessing appropriate and effective mental health treatment and support. Security and disciplinary practices can also have severe negative impacts on prisoner mental health, for example, solitary confinement. Prisoners also experience high rates of sexually transmitted infection and blood-borne viruses. Residents of regional, rural and remote areas also tend to have shorter lives and higher levels of illness and disease risk factors than those in major cities³⁸.

Right to work

Article 6 of ICESCR sets out the right to work as follows:

1. The States Parties to the present Covenant recognize the right to work, which includes the right of everyone to the opportunity to gain his living by work which he freely chooses or accepts, and will take appropriate steps to safeguard this right.
2. The steps to be taken by a State Party to the present Covenant to achieve the full realization of this right shall include technical and vocational guidance and training programmes, policies and techniques to achieve steady economic, social and cultural development and full and productive employment under conditions safeguarding fundamental political and economic freedoms to the individual.

Changes made under *Work Choices* legislation under the previous Government raised serious issues in relation to the right to work. In particular, the legislation discouraged collective bargaining and removed restrictions on the casualisation of the labour market. For many workers, the changes meant a loss of benefits and entitlements, decreased job security and increased the risk of unfair dismissal.

Workchoices had a number of significant effects on Australian workers, summarised in the NGO shadow report on ICESCR as follows:

In summary, *Work Choices*:

(a) further reduces the role of the Australian Industrial Relations Commission by removing much of its dispute resolution powers and abolishing the previous assurance of fair wages and conditions set by an independent tribunal;

(a) undermines the system of awards as a base of minimum conditions of employment by restricting award content and promoting Australian Workplace Agreements as the primary mechanism for establishing work standards. Australian Workplace Agreements are individual statutory agreements which allow employers to avoid the award safety net;

³⁷ ACOSS, *Fair Dental Care for Low Income Earners – National Report on the State of Dental Care*, ACOSS Info Paper 389, October 2006.

³⁸ Australian Institute of Health and Welfare, *Australia's Health 2008* at 62.

- (b) reduces workers' job security by excluding the majority of workers from unfair dismissal protection and by weakening the protections that remain. This is discussed in further detail under Article 7: Ensuring Job Security;
- (c) weakens the ability of workers to query or enforce wage rates and entitlements with their employer without fear of reprisal; and
- (d) fails to ensure reasonable hours of work, rest and leisure time.³⁹

The ability of a previous Government to make such significant changes to work rights, without being required to address associated human rights issues arose from the fact that Australia lacks a comprehensive human rights framework. The Government had no obligation to publicly address human rights issues, nor to justify the departure from human rights standards where that was the Government intention.

Although it would appear that this was a very significant issue in the last election, the delayed workings of parliamentary democracy meant that many individual and collective rights were infringed in the meantime, without remedy.

The current Government has made some significant changes to industrial relations legislation with the enactment of the *Fair Work Act 2009*. However, a number of work rights issues remain, for example significant restrictions will remain on unfair dismissal protections and the powers of the new industrial relations commission will be significantly limited.

Other issues arising in relation to the right to work include:

- The right to freedom of association and the right to strike, contained in Article 8, is not protected by Australian law;
- Workforce barriers for people with disabilities are not being adequately addressed;
- Reforms to CDEP and implications for the right to work, the right to equal access to services and the right to self-determination for Indigenous Australians;
- 'Work for the dole' and 'welfare to work' policies raise questions about choice of work and voluntariness; and
- The preclusion of some asylum seekers and migrants from participating in employment may breach equality and non-discrimination provisions.

Right to education

Article 13 of ICESCR sets out the right to education, under which State Parties agree that education 'shall strengthen the respect for human rights and fundamental freedoms' and 'enable all persons to participate effectively in a free society, promote understanding, tolerance and friendship among all nations and all racial, ethnic or religious groups'.

The article then sets out a number of more specific state obligations, including the provision of free compulsory primary education, (progressively) free and accessible secondary education and higher education which is equally accessible on the basis of capacity (with a view to progressive introduction of free education). The article also recognises parents' freedom to choose to send their children to privately run schools.

³⁹ NACLC, HRLRC and Kingsford Legal Centre, *Freedom Respect Equality Dignity: Action – NGO Submission to the UN Committee on Economic, Social and Cultural Rights, Australia*, April 2008 at [165].

The CESCR General Comment on the right to education emphasises its role in empowering young people and providing the enabling conditions to overcome disadvantage. It outlines the three types or levels of state obligations:

The right to education, like all human rights, imposes three types or levels of obligations on States parties: the obligations to respect, protect and fulfill. In turn, the obligation to fulfill incorporates both an obligation to facilitate and an obligation to provide.

The obligation to respect requires States parties to avoid measures that hinder or prevent the enjoyment of the right to education. The obligation to protect requires States parties to take measures that prevent third parties from interfering with the enjoyment of the right to education. The obligation to fulfil (facilitate) requires States to take positive measures that enable and assist individuals and communities to enjoy the right to education. Finally, States parties have an obligation to fulfil (provide) the right to education. As a general rule, States parties are obliged to fulfil (provide) a specific right in the Covenant when an individual or group is unable, for reasons beyond their control, to realize the right themselves by the means at their disposal. However, the extent of this obligation is always subject to the text of the Covenant.⁴⁰

Australia has a public education system which provides for compulsory primary school education and generally 4 years of secondary education, for nominal fees. We also have a large private schools sector, which receives significant levels of public funding. In addition, the Australian Government has committed to universal access to pre-school for all 4 year olds.

Despite the existence of a comprehensive public schools system, significant levels of educational disadvantage persist with social and economic inequalities translating into very different education outcomes. There are a number of issues associated with access to education and educational outcomes which raise potential human rights issues. Access to education in remote Indigenous communities and the balance of funding between public and private education systems both raise potential rights issues. Non-government schools receive high levels of government subsidy in addition to revenue from fees. This has resulted in a substantial resource gap between government and non-government schools. At the same time, public schools have suffered from under-funding, ageing infrastructure and over-crowded classrooms. This results in poorer educational outcomes, particularly for children from low-income families.

Right to self-determination

The right to self-determination is contained in Article 1 of ICESCR and the ICCPR, both of which state:

1. All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.
2. All peoples may, for their own ends, freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic co-operation, based upon the principle of mutual benefit, and international law. In no case may a people be deprived of its own means of subsistence.

⁴⁰ CESCR, General Comment, *The right to education (Art. 13)*: 08/12/99 E/C.12/1999/10. (General Comment) at [46]-[47].

Indigenous Australians are entitled to respect of their right to self-determination, both as individuals and as a collective community.

A number of potential breaches of the right to self-determination have already been raised in the above discussion, including the lack of consultation surrounding the development and implementation of the Northern Territory Emergency Response and the compulsory acquisition of land. Changes to the Community Development Employment Program may also raise issues of self-determination.

ACOSS welcomes the Government commitment to establish a new national Indigenous representative body. The body must be empowered to play a meaningful and robust role in policy development and debate.

Section 4: How could Australia better protect and promote human rights?

ACOSS submits that human rights could be better promoted and protected in Australia through:

- D. The enactment of a national human rights act which includes civil, political, economic, social and cultural rights;**
- E. The provision of human rights training to employees of public authorities and other agencies bound by the act and a broader community education campaign; and**
- F. The development of a comprehensive social inclusion strategy, which includes poverty reduction benchmarks and targets.**

We propose a series of more detailed recommendations in the discussion below.

In doing so, we emphasise that law reform is just the first step towards the protection of human rights. Institutional and cultural changes must then follow, complemented by community education, to produce real changes on the ground.

A. Enactment of a national human rights act which includes civil, political, economic, social and cultural rights.

As we have recommended above, ACOSS calls for the enactment of a national human rights act which includes, *at a minimum*, all human rights enshrined in the International Bill of Rights (the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights). Consideration should also be given to the inclusion of specific rights for Indigenous peoples, women, children and people with disability.

The justiciability of economic, social and cultural rights

Unlike civil and political rights, social, economic and cultural rights are expressed in aspirational, rather than absolute or immediately realisable terms. This, combined with the redistributive questions involved in the interpretation and determination of these rights, has led to arguments that economic, social and cultural rights are not justiciable or capable of legal enforcement.

However, this ignores the fact that a considerable body of jurisprudence has developed on the interpretation of these rights in comparable jurisdictions and international tribunals.

Economic, social and cultural rights place clear and enforceable obligations on Governments to take *reasonable* measures, defined according to *available resources*, to *progressively realise* relevant rights.

ICESCR requires State Parties to 'progressively realise' social, economic and cultural rights. Article 2(1) of ICESCR requires each State Party to:

Take steps ... to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognised in the present Covenant by all appropriate means, including particularly the adoption of legislative measures.

The meaning of these words has been clarified through UN General Comments, judicial decisions and academic commentary and can be explained as follows:

'To take steps': Put simply, this requires Governments to take action. Steps taken must be 'deliberate, concrete and targeted as clearly as possible towards meeting the obligations recognised in the Covenant'.⁴¹ In addition to a conduct obligation (to act), states must also discharge an obligation of result, requiring them 'to achieve specific targets to satisfy a detailed substantive standard'.⁴²

'To the maximum of its available resources': This requires governments to implement rights without retrogression. This does not necessarily mean that a reduction in public social spending in a relevant area (for example, housing or social security) will amount to a violation of a social and economic right. Indeed, the UN Committee on Social, Economic and Cultural rights has not found a state to be in violation of the Covenant due exclusively to reductions in public spending.⁴³ However, measures that are deemed to be 'retrogressive' or 'unjustified' are likely to be violations of the Covenant'.⁴⁴

'With a view to achieving progressively the full realization of the rights recognised in the present Covenant': This requires Governments 'to move as expeditiously and effectively as possible towards that goal' and to fully justify any 'deliberately retrogressive measures'.⁴⁵ As the Maastricht Guidelines make clear:

The fact that the full realisation of most economic, social and cultural rights can only be achieved progressively, which in fact also applies to most civil and political rights, does not alter the nature of the legal obligation of States which requires that certain steps be taken immediately and others as soon as possible.⁴⁶

'By all appropriate means': Options include legislation, judicial or administrative remedies or financial and social measures.⁴⁷ States have considerable discretion as to the policy model used to fulfill the right, for example the balance between public and private investment in social services and infrastructure.

Obligations to respect, protect and fulfill: Economic, social and cultural rights can also usefully be conceptualised as requiring governments to respect, protect and fulfill rights. 'Respecting' requires governments not to take actions which infringe rights, 'protecting' requires governments to prevent violations by third parties and 'fulfilling' requires positive government action, in some cases with resource implications. These principles have been developed in the *Maastricht Guidelines* which state:

⁴¹ Office of the High Commissioner for Human Rights, *The nature of States parties obligations (Art. 2, par 1)*: 14/12/90. CESCR General Comment 3.

⁴² *The Maastricht Guidelines on Violations of Economic, Social and Cultural Rights* at 4. Accessed at <http://www.uu.nl/uupublish/content/20-01.pdf>.

⁴³ Dan Nicholson, *The Human Rights to Housing*, Produced for the Housing is a Human Right Project, 2004 at 18.

⁴⁴ Dan Nicholson at 18.

⁴⁵ Dan Nicholson at 6.

⁴⁶ *Maastricht Guidelines* at 5.

⁴⁷ Dan Nicholson at 19.

The obligation to *respect* requires States to refrain from interfering with the enjoyment of economic, social and cultural rights. Thus, the right to housing is violated if the State engages in arbitrary forced evictions. The obligation to *protect* requires States to prevent violations of such rights by third parties. Thus, the failure to ensure that private employers comply with basic labour standards may amount to a violation of the right to work or the right to just and favourable conditions of work. The obligation to *fulfil* requires States to take appropriate legislative, administrative, budgetary, judicial and other measures towards the full realisation of such rights. Thus, the failure of States to provide essential primary health care to those in need may amount to a violation.⁴⁸

Thought of in this way, economic, social and cultural rights can be seen to be clearly justiciable, with some aspects of the right immediately realisable and others progressively realisable, all subject to a reasonableness criteria.

Violations: A violation of an economic, social or cultural right can occur by government 'commission' or 'omission'. Acts of commission include direct actions of the Government or entities which are insufficiently regulated by it. For example the adoption of any deliberately retrogressive measure which reduces the extent to which a right is guaranteed or active support by government for the actions of a third party which are inconsistent with human rights.⁴⁹ Acts of omission include failures of Government to take action required by its human rights obligations. This could include the failure to utilise the maximum of available resources towards the full realisation of a right.⁵⁰

Recommendation 5:
A national human rights act should require immediate realisation of civil and political rights and progressive realisation of social, economic and cultural rights. It should impose an obligation on the Federal to take steps to the maximum of its available resources, with a view to achieving progressively the full realization of all economic, social and cultural rights contained in the International Bill of Rights.

Who should a human rights act protect?

All individuals subject to Australia's jurisdiction

A national human rights act should apply to all individuals subject to Australia's jurisdiction, regardless of citizenship status and regardless of whether located outside Australian territory, provided they are subject to its jurisdiction. This would ensure consistency with Article 2(1) of the ICCPR, which provides that each State party undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognised in the present Covenant, without distinction of any kind.

While some rights logically apply only to citizens, for example, voting rights associated with the right to fully participate in public life, this can be expressed within the text of the particular right. For example, Article 25 of the ICCPR expressly relates to citizens:

⁴⁸ *Maastricht Guidelines* at 4.

⁴⁹ *Maastricht Guidelines* at 7.

⁵⁰ *Maastricht Guidelines* at 8.

Every citizen shall have the right and the opportunity, without any of the distinctions mentioned in article 2 and without unreasonable restrictions:

- (a) To take part in the conduct of public affairs, directly or through freely chosen representatives;
- (b) To vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors;
- (c) To have access, on general terms of equality, to public service in his country.

Recommendation 6: A national human rights act should apply to all individuals subject to Australia's jurisdiction, regardless of citizenship status and regardless of whether located outside Australian territory, provided they are subject to its jurisdiction.

Individual and group rights

A national human rights act should protect the rights of individuals and, in the case of rights held collectively, groups. While most human rights are held by individuals, some rights, like the right to self-determination, ethnic, religious and linguistic minority rights and Indigenous collective rights, are held by groups.

ACOSS submits that, in addition to 'group rights', groups of individuals should be able to bring actions under a national human rights act where all individuals in the group have been affected by an infringement of their right. This might mean, for example, that a group of people experiencing homelessness could bring an action together for breach of the right to housing or unemployed people, required to engage in unreasonable employment activities in order to receive social security, could together bring an action for breach of their right to social security or choice of work. The inclusion of such group actions in a national act will be critical to ensuring that low income and disadvantaged Australians are able to enforce their rights.

The role of representative bodies and unions in bringing human rights actions under a national act should also be considered.

Recommendation 7: A national human rights act should protect the rights of individuals and, in the case of rights held collectively, groups. In addition, groups of individuals should have standing to bring actions where all individuals in the group have been affected.

Other legal entities

As noted above, human rights inhere in individuals by virtue of their humanity. Other legal entities, like private corporations, should not be protected in a national human rights act and this should be made clear in a national act.

Under this model, community and welfare organisations would not be able to claim 'rights' under a national act. ACOSS believes this is appropriate, but suggests that particular activities conducted by the sector should be recognised and protected in some other way. For example, the legitimacy of the sector's role in systemic advocacy, threatened at times

by government funding conditions, should be expressly recognised in an appropriate mechanism, for example, a compact between the Government and the sector.

Recommendation 8: A national human rights act should not protect other legal entities, including private corporations.

Standing

Standing provisions under a national human rights act should be drafted such as to best ensure disadvantaged and marginalised members of the community are able to enforce their rights.

This could be achieved by enacting a provision similar to that contained in section 38 of the South African Charter of Rights:

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 interest of its members.

Recommendation 9: A national human rights act should include standing provisions which best facilitate access to justice for disadvantaged and marginalised members of the community. ACOSS suggests that standing provisions be modeled on section 38 of the South African Charter.

Who should a human rights act bind?

A national human rights act would have two key effects:

1. it would require public authorities to act and make decisions consistently with human rights; and
2. it would require the courts to interpret legislation consistently with human rights, where possible.

A human rights act would have a direct effect on public authorities and other agencies performing public functions and an indirect effect on other parties affected by the interpretation of other legislation consistently with a national human rights act.

A national human rights act should impose human rights obligations primarily on 'public authorities', which would include federal public servants, federal Government agencies and statutory authorities. The Act's obligations should also extend to private parties to the extent that they perform 'functions of a public nature' on behalf of the federal Government.

This is important given the Government practice of outsourcing service delivery to private companies and other organisations, and therefore protects against governments 'contracting out' its human rights obligations.

All State and territory Governments should enact consistent human rights legislation to bind state and territory governments and public authorities, including those performing public functions on their behalf.

Recommendations:

10. A national human rights act should directly impose duties and obligations on federal public authorities and other private parties to the extent that they perform ‘functions of a public nature’ on behalf of the Federal Government;

11. It should not directly bind State and Territory Governments, but these governments should enact consistent human rights legislation.

Public authorities

Public authorities should be required to act compatibly with human rights and to give proper consideration to human rights when making decisions and implementing legislation. An ‘act’ of a public authority should include both positive acts and failures to act.

It is clear that meeting these requirements will impose not insignificant resource demands on public authorities, particularly in terms of staff time. It will be important to ensure that all agencies and organisations bound by the act are adequately supported to meet these obligations, particularly where those organisations or agencies are already constrained by a lack of resources, for example, community and welfare organisations performing public functions.

Legislative clarity on the definition and scope of ‘functions of a public nature’ is essential so that the responsibilities of organisations engaged in social service delivery are clear. A national human rights act should set out factors to be taken into account in determining whether actions of a private party (be that a company or community organisation) are of a ‘public nature’.

ACOSS recommends that a national human rights act include a section based on section 4(2) of the Victorian Charter, which provides a non-exhaustive list of factors which courts may take into account in determining whether a function is of a public nature:

- (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 publicly 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 in which are held by or on behalf of the State.

The fact that one or more of these factors is present does not necessarily establish that a particular function is of a public nature. In particular, the fact that an entity receives public funding to perform a function does not necessarily mean that it is acting on behalf of the State or public authority.⁵¹

ACOSS also recommends that a national human rights act should also specify certain functions which ‘are taken to be of a public nature’, as in section 40A(3) of the ACT Human Rights Act, which provides that:

Without limiting subsection (1) or (2), the following functions are taken to be of a public nature:

- (a) the operation of detention places and correctional centres;
- (b) the provision of any of the following services:
 - (i) gas, electricity and water supply;
 - (ii) emergency services;
 - (iii) public health services;
 - (iv) public education;
 - (v) public transport;
 - (vi) public housing.

The leading case from the UK on the meaning of ‘public authorities’ is *YL v Birmingham City Council (YL)* which involved a private care home which received public funding for 80% of its clients.⁵² In a narrow construction of ‘public authority’ the majority of the court held that form rather than substance was critical – regardless of the source of funding, the activities of the care home were considered private in nature. The Victorian Parliament sought to embrace a wider view with the definition of a public authority to ‘extend to all persons or bodies that perform public functions on behalf of the state of Victoria, when they are performing those public functions’. ACOSS recommends that this broad approach be adopted in a national human rights act.

ACOSS is aware that there is widespread support for human rights principles and protection in the community and welfare sector. While some community and welfare organisations are likely to be bound by the act by virtue of their performing functions of public nature (for example, some community housing services, health services, aged care services), others may wish to voluntarily opt-in to compliance with the act. ACOSS recommends that the Act should allow organisations (apart from those directly bound by the act and including private companies and non-government organisations), to ‘opt in’ to compliance with the act as in section 40D of the ACT *Human Rights Act* which states that:

- 1) An entity that is not a public authority under [UUUUsection 40](#) may ask the Minister, in writing, to declare that the entity is subject to the obligations of a public authority under this part.
- 2) On request under subsection (1), the Minister must make the declaration.
- 3) The Minister may revoke the declaration only if the entity asks the Minister, in writing, to revoke it.
- 4) A declaration under this section is a notifiable instrument.

Community and welfare organisations who wish to opt-in to compliance should be provided with adequate resources to enable them to ensure that their organisational policies and procedures are human rights compliant. Indeed, one of the most significant reported impacts of the UK Human Rights Act is that it has influenced the development of more flexible service-delivery practices, which recognise the ‘circumstances and characteristics of individuals’. The participation of the community and welfare sector in the creation of a human rights compliant social service system is critical and must be supported.

⁵² *YL v Birmingham City Council* [2007] UKHL 27.

The community and welfare sector should also be supported to develop a set of human rights resources which explain the implications of a national human rights act for the sector. This should address issues including:

- How community organisations who provide a range of different services can determine their obligations under the national human rights act;
- How to manage obligations under national and state/ territory acts where community organisations receive funding from multiple funding sources;
- The risk of involvement in human rights litigation and the funding of legal representation;
- Available government resources and support for community and welfare organisations bound by the act or seeking to opt-in to achieve human rights compliance.

Further, it may be appropriate for the operation of the act to be phased in over a period, to allow time for education and training of staff in public authorities as well as the review of policies and procedures to ensure human rights compliance.

Recommendations:

12. A national human rights act should set out factors to be taken into account in determining whether actions of a private party (be that a company or community organisation) are of a 'public nature'.

13. A national human rights act should allow organisations (apart from those directly bound by the act), to 'opt in' to compliance with the act;

14. The Federal Government should support the community and welfare sector to develop a set of human rights resources which explain the implications of human rights legislation for the sector.

State and territory governments

The Federal Government is required under international human rights law to ensure that state and territory governments fully implement their human rights obligations.⁵³ It is unable to use Australia's federal arrangements as a justification for failing to implement its international obligations.⁵⁴ However, although the Federal Government has primary responsibility to ensure that rights are protected, even where they fall under the jurisdiction of state and territory governments, this does not absolve State and Territory Governments from obligations under the Convention.⁵⁵

The Victorian and ACT governments have enacted human rights acts in recent years. Some of the other states and territories have signalled their intention to do the same.

Australia's federal arrangements mean that the states and territories are responsible for the delivery of many of the services required by Australia's human rights obligations, particularly those required under economic and social rights.

Although there are some clear differences between the states and territories, there is no justification for inconsistent rights protections between jurisdictions.

⁵³ Dianne Otto and Philip Lynch, 'Housing, homelessness and human rights', [2004] *Australian Journal of Human Rights* 1.

⁵⁴ See Article 28 of ICESCR.

⁵⁵ Dan Nicholson at 19.

There are several options that could be pursued to achieve national human rights consistency. The Commonwealth could enact a federal human rights act which binds the state and territory governments (at least to some extent) or seek state and territory commitments to enact uniform or harmonious legislation. Alternatively, the national human rights act could include an opt-in provision (drafted in consultation with the states and territories) which covers the state and territory governments, under which the states could enact their own consistent legislation.

In view of the fact that a human rights act depends for its efficacy on institutional and political support, ACOSS recommends that national human rights protection may be best achieved through the enactment of harmonious state and territory acts, rather than the imposition of rights obligations by the federal Government on state and territory governments. The development of uniform legislation or inclusion of an 'opt-in' clause would both be effective ways to achieve this.

Where Commonwealth Government obligations or functions have been conferred on State and Territory Governments through domestic funding agreements, questions of responsibility and accountability are complex and must be clarified. The Act should make clear whether state and territory governments are in these cases exercising public functions on behalf of the federal Government, thereby being bound by any national act in the performance of these functions.

Private sector

Private corporations are subject to a number of human rights obligations under specific legislation, including anti-discrimination and occupational health and safety laws.

A national human rights act should bind entities, including private corporations, in the performance of public functions. In addition, opt-in provisions discussed above should enable private corporations to be bound.

In addition, a national human rights act could impose obligations on the federal Government to exercise due diligence in ensuring that non-State actors behave in a way which does not infringe human rights.⁵⁶

A national human rights act should not apply more generally to private corporations due to the challenges of implementation and enforcement.

Role of the courts

Legislative clarity in the definition of all rights included in a human rights act, and particularly social and economic rights, will be needed to overcome any judicial reluctance to adjudicate on matters of social and economic policy and to ensure that judicial decisions are informed by clear guidelines.

A national human rights act should include an interpretive clause requiring all common law and legislation to be interpreted as far as possible to be compatible with a human rights act.

⁵⁶ *Maastricht Guidelines* at 9.

It should be noted that the enactment of a national human rights act would enable Australian courts to draw on comparable jurisprudence from other jurisdictions, for example, the UK, Canada and South Africa. This will be an important aide to interpretation and would clarify the scope of relevant rights. ACOSS recommends that the national human rights act include a preamble similar to that contained in section 32(2) of the Victorian Charter, which states that:

‘[i]nternational law and the judgments of domestic, foreign and international courts and tribunals relevant to a human right may be considered in interpreting a statutory provision.’

Courts should be able to issue a declaration of incompatibility where it is not possible to interpret the law consistently with rights. Consideration should also be given to enabling courts to make declarations on incompatibility in situations where the Commonwealth is empowered to make a law protecting human rights but has failed to do so.⁵⁷

Opponents of human rights legislation frequently raise concerns about the involvement of the courts in determining questions of social policy which have clear resource implications. This issue requires some careful consideration. As advocates on behalf of low income and disadvantaged Australians, ACOSS is committed to the development of evidence-based, equitable and progressive social policy. The complexities of many of the social policy challenges arising in relation to disadvantaged Australians certainly suggests the need for some caution in the referral of these issues to the courts. However, in our view, an appropriately designed system, with clear limits on judicial power, would provide the necessary protection from judicial determinations which are at odds with contemporary policy evidence or best practice standards. Obviously, under a statutory model, the courts would not have power to invalidate laws deemed incompatible with rights, but would refer the issue back to parliament.

A number of other mechanisms have also been proposed to limit judicial power in cases of economic, social and cultural rights including giving courts weaker powers to review government decisions or setting a standard of review specific to these rights which ‘could and should be calibrated to take into account the nature of the rights in question, the competing interests at stake, and the limits on judicial power’.⁵⁸ This would be consistent with ICESCR and would enable courts to form judgments by reference to the ‘reasonableness’ of government action in light of resource limitations and the principle of ‘progressive realisation’. Legislation could specify that that there are a range of possible measures governments might take in response to a particular social issue, many of which might meet the test of reasonableness. In such cases, international jurisprudence suggests that courts should give Governments a ‘margin of appreciation’ or ‘degree of deference’ that they may not in other rights cases.

Recommendations:

15. A national human rights act should include an interpretive clause requiring all common law and legislation to be interpreted as far as possible to be compatible with the Act.

⁵⁷ See ACTCOSS ‘Submission to the National Human Rights Consultation’, Recommendation 9.

⁵⁸ Edward Santow at 18.

- 16. A national human rights act should include a preamble enabling courts to consider international law and the judgments of domestic, foreign and international courts and tribunals relevant to a human right in interpreting a statutory provision.**
- 17. A national human rights act should authorise the courts to issue a declaration of incompatibility where it is not possible to interpret the law consistently with the act.**

Role of parliament and the executive

A national human rights act should provide for improved parliamentary scrutiny of all legislation and policy for its human rights implications. This should be achieved by:

- a) requiring that each bill introduced into Parliament is accompanied by a human rights compatibility statement, with reasoning;
- b) establishing a Parliamentary Human Rights Committee to scrutinise each bill;
- c) requiring that all declarations of incompatibility be tabled in the federal Parliament; and
- d) requiring Parliament to publicly explain a decision to adopt a law that is inconsistent with the HRA.

This would not preclude Parliament from enacting a law which infringes human rights.

The requirement to provide 'reasoning' in human rights compatibility statements would require that statements did not merely assert human rights compatibility without explanation or justification.

The act should also enable existing legislation to be audited for its human rights compatibility and require that all legislation passed which is explicitly inconsistent with human rights be clearly justified and subject to a 'sunset clause'.

In addition, the act should require that all Cabinet decisions be accompanied by a Human Rights Impact Assessment to ensure that the human rights implications of government policies are considered.

Public decision-making and legislative processes will also be affected by the need to comply with the 'right to participation in public life', which should give rise to legal obligations to consult with affected population groups in the development of relevant law and policy.

Recommendations:

- 18. A national human rights act should require that each bill introduced into Parliament is accompanied by a human rights compatibility statement, with reasoning;**
- 19. It should establish a Parliamentary Human Rights Committee to scrutinise all new bills, and have power to consider existing legislation referred to it;**
- 20. It should require that all declarations of incompatibility be tabled in Federal Parliament and that Parliament explain a decision to adopt a law that is inconsistent with the Act;**

- 21. It should require that all legislation passed which is explicitly inconsistent with human rights be clearly justified and subject to a sunset clause;**
- 22. It should require that all Cabinet decisions be accompanied by a Human Rights Impact Assessment to ensure that the human rights implications of government policies are considered.**

Role of the Australian Human Rights Commission

ACOSS recommends that the Australian Human Rights Commission be resourced to play a key role in the implementation of the national human rights act, with powers to receive complaints and investigate human rights breaches.

Adequate additional resources should be provided to enable the Commission to carry out these additional responsibilities.

Consideration should also be given to scheduling ICESCR to the *HREOC Act 1986 (Cth)* to enable the Commission to investigate and monitor discrimination against people on the basis of social status particularly in relation to the implementation of economic, social and cultural rights such as housing and health.

Recommendation 23: A national human rights act should empower the Australian Human Rights Commission to receive complaints from individuals who allege a breach of their human rights and instigate investigations into breaches of those rights on behalf of persons aggrieved.

Remedies

The national human rights act should provide a broad range of remedies which includes judicial as well as administrative remedies (provided by independent statutory bodies or other forms of alternative dispute resolution) as well as policy-based remedies, for example, the development of implementation plans, the establishment of benchmarks or timeframes or the explicit articulation of human rights principles to guide program development.⁵⁹

ACOSS supports the recommendation of the Human Rights Law Resource Centre that:

A Human Rights Act should provide for a range of judicial and non-judicial remedies for breaches of the rights under the Act. Potential remedies for a person whose human rights have been infringed range from:

- (a) seeking redress in the courts; to
- (b) engaging in dispute resolution processes such as conciliation and mediation; to
- (c) lodging a complaint with a Human Rights Commissioner or the Ombudsman; to
- (d) seeking redress with the violating public authority (for example by requesting an internal review where appropriate).

ACOSS recommends that there should be a free-standing right to bring an action under a national human rights act, without the need to bring another cause of action.

⁵⁹ Di Otto, 'Homelessness and Human Rights', 27(6) *Alternative Law Journal* (December 2002) p 273, quoted in Dan Nicholson at 19.

Compensation should be available to individuals where rights have been breached by public authorities and there is no other appropriate remedy. The UK experience demonstrates that courts will award damages only in very limited cases, with judicial review and declaratory and injunctive relief more often provided. This should assuage concerns about the risks of large compensation pay outs arising in human rights litigation.

Appropriate remedies must be available for breaches of social, economic and cultural rights.

Recommendations:

24. A national human rights act should provide a broad range of remedies which includes judicial as well as administrative and policy-based remedies.

25. It should provide for a direct and free-standing right of action;

26. Compensation should be available to individuals where rights have been breached by public authorities and there is no other appropriate remedy.

Access to legal services

For human rights to be enforceable for low income members of the community, community legal centres and legal aid services will need to be specifically funded to bring human rights actions.

Failing this, rights may well seem illusory to many disadvantaged Australians.

You are alone, you have no money, you have heard of these things called human rights and social justice but unless you can access a service to help you implement them they are not worth the breath it takes to say them out loud.⁶⁰

Affordable legal services are already overwhelmed with demand and thousands of Australians are turned away without assistance every year.

A 2004 Senate Legal and Constitutional Affairs Committee inquiry into legal aid and access to justice found that many community legal centres and legal aid systems are facing a 'funding crisis'. The inadequate funding of legal aid commissions has led to a significant tightening of eligibility criteria, restricting the kind of matters for which legal advice is available and the number of eligible clients. As a result, minimal assistance is now available with respect to civil and administrative law matters, even where they relate to fundamental human rights.⁶¹

Consideration should also be given to the establishment of a national human rights resource centre which could engage in individual advocacy and offer support to community organisations.⁶²

Recommendation 27: Community legal services and legal aid services should be specifically funded to provide human rights legal advice and to bring legal actions on behalf of low income members of the community.

⁶⁰ Teresa Ellis, 'Human Rights and Social Justice: A frontline perspective from a Community Legal Centre', [1996] *MurUEJL* 34 at para [30].

⁶¹ These issues were raised by the Human Rights Law Resource Centre in their submission to the national consultation.

⁶² See ACTCOSS 'Submission to the National Human Rights Act'.

Other implications of a national human rights act for the community and welfare sector

As advocates

Many community and welfare sector organisations conduct advocacy on behalf of their individual clients or engage in systemic advocacy on behalf of population groups, for example, people with disabilities, low income Australians or those experiencing homelessness.

A national human rights act would give legal and political authority to a language and set of principles with which advocates could seek to challenge decisions or policies affecting those on whose behalf they advocate.

To maximize the effectiveness of human rights as an advocacy framework will require some strategic thinking and education about the relationship between human rights principles and wider equality and social concerns. In 2004, in recognition of the complexity of this relationship, the UK Government proposed the establishment of a Commission for Equality and Human Rights to work in partnership with the voluntary and welfare sector to 'fill the gap in understanding and application of human rights principles to wider equality and social concerns'.⁶³ For example, sector organisations need to understand both the potential use and the limitations of a human rights act in their advocacy. UK experience suggests there are widespread misperceptions in that NGO sector about the utility of the UK *Human Rights Act*.

The Federal Government should also ensure that any national compact which is developed between the Government and the community and welfare sector (or broader NGO sector) is consistent with and reflects human rights. The document should reflect the links between human rights and social inclusion and the sector's role in advancing both agendas.

As service providers

The international human rights framework requires that policies, programs and services be:

- 'Fair and non-discriminatory - the policy or service must be targeted at the alleviation of disadvantage and the elimination of discrimination;
- Participatory and empowering - the policy or service must be informed by the active participation of key stakeholders and expand their range of choice and freedoms;
- Holistic – the policy or service must have regard to the civil, political, economic, social and cultural determinants of wellbeing of affected persons;
- Transparent and accountable – the policy or service must identify the persons or entities responsible for implementation, set targets and indicators to measure progress, and establish mechanisms to ensure accountability.⁶⁴

⁶³ Frances Butler, *Human Rights: Who needs them? Using human rights in the voluntary sector*, Published by IPPR, 2004 at vi.

⁶⁴ These principles are all derived from the UN Office of the High Commissioner for Human Rights, *Draft Guidelines: A Human Rights Approach to Poverty Reduction Strategies* (2002).

These principles should be considered by courts in determining the service delivery standards required by a national human rights act.

As recommended above, the community and welfare sector should also be supported to develop a more detailed guide to human rights compliant service delivery, to assist organisations who perform public functions, seek to opt-in or seek to ensure they are human rights compliant even if this is not required by law.

What difference would a national human rights act make?: A case study on the right to housing.

The right to housing provides a useful case study in the content, interpretation, implications and effects of social and economic rights as it is one of the most developed social and economic rights, with a significant body of judicial interpretation and academic commentary, including two general comments adopted by CESCR.

The level of housing need in Australia

More than 100,000 people are homeless on any given night in Australia. Among these are approximately 50,000 who are under 25 and 10,000 who are children.⁶⁵ More than 50% of those who approach crisis accommodation services on any particular day are refused accommodation as services are at capacity.⁶⁶

The number of people experiencing homelessness is rapidly increasing and is likely to continue to do so, as a result of the economic downturn.

Many homeless people experience violations of their human rights to non-discrimination, social security, health, security of person, privacy and adequate housing.⁶⁷

Nearly one million low income Australians are experiencing housing stress, spending more than 30% of their income on rent or other housing costs. There is a serious shortage of affordable housing, with approximately 180,000 people on public housing waiting lists across the country⁶⁸ and an annual shortage in the construction of new housing of more than 30,000 dwellings.⁶⁹

As these statistics reveal, Australia faces some significant housing affordability challenges, with high levels of housing stress, a significant homeless population and long public housing waiting lists. While these statistics do not amount to human rights violations in themselves, they do place a strong onus on governments to show that appropriate steps are being taken to remedy the situation.⁷⁰

⁶⁶ SAAP IV Evaluation Report at 93.

⁶⁷ Dianne Otto and Philip Lynch, 'Housing, homelessness and human rights', [2004] *Australian Journal of Human Rights* 1.

⁶⁸ AIHW, *Public Rental Housing 2006-07: Commonwealth State Housing Agreement national data report*, at x and AIHW, *Australia's Welfare 2007* at 237.

⁶⁹ AIHW, *Housing Assistance in Australia*, 2008.

⁷⁰ Dan Nicholson at 7.

The content of the right and the nature of government obligations

The right to adequate housing is a component of the right to an adequate standard of living, contained in Article 11 of ICESCR.

In its General Comments, CESCR has identified a number of factors essential to the realisation of the right to adequate housing, including legal security of tenure; availability of services, materials, facilities and infrastructure; affordability; habitability, accessibility; location and cultural adequacy.⁷¹

Further, CESCR has specifically noted that security of tenure should guarantee protection against forced eviction and that evictions should not result in a person becoming homeless.⁷²

Government obligations under the right to housing have been interpreted to require a *significant level of public spending* on affordable housing to meet the requirement that the maximum of available resources must be directed to protection of the right. Although there are no clear benchmarks as to what constitutes adequate funding, Canada was criticised by the UN Committee on Social, Economic and Cultural Rights in 1993 for spending only 1.3% of its government expenditure on social housing.⁷³

In interpreting the requirement to pursue the progressive realisation of the right 'by all appropriate means' the Committee on Social, Economic and Cultural Rights has emphasised the importance of a *national housing strategy*.

The right has also been interpreted to require governments to provide *effective remedies* for those who are homeless or at risk of homelessness and to take steps to the maximum of its resources to progressively eliminate homelessness.⁷⁴

As a component of the right to an adequate standard of living, the links between housing and other rights must be understood. The conceptualisation of homelessness as a human rights issue highlights some of these links as it can be considered to bring into play the right to security of the person, the right to freedom from discrimination, the right to privacy, the right to freedom of expression, the right to freedom of association, the right to vote, the right to social security and the right to health, in addition to the right to housing.⁷⁵

A joint-government responsibility?

Responsibility for the implementation of the right to adequate housing is shared between the Commonwealth and the State and Territory Governments. This division of responsibilities is set out in the National Affordable Housing Agreement (NAHA) which has replaced the Commonwealth State Housing Agreement (CSHA) and the Supported Accommodation Assistance Program (SAAP) Agreement.

⁷¹ Philip Lynch and Jacqueline Cole, 'Homelessness and Human Rights: Regarding and responding to homelessness as a human rights violation', Volume 4 *Melbourne Journal of International Law* [2003].

⁷² Lynch and Cole citing CESCR *General Comment 7* at [1] and [16].

⁷³ Dan Nicholson at 18.

⁷⁴ Dianne Otto and Philip Lynch, 'Housing, homelessness and human rights', [2004] *Australian Journal of Human Rights* 1.

⁷⁵ Lynch and Cole.

Current protection of the right to housing

The right to housing is not explicitly protected in Australian legislation.

Further, individuals have no access to the UN individual complaints mechanism with respect to the right to housing, although the Optional Protocol to ICESCR will be open for signing in September.

Commonwealth-state housing agreements are supported by legislative frameworks set out in the *Housing Assistance Act 1996* (Cth) and the *Supported Accommodation and Assistance Act 1994* (Cth).

The preambles to each of these acts explicitly recognises that the goals of these programs are to be understood in light of international human rights standards, including the ICESCR, the ICCPR, CERD, CEDAW, CROC, the UDHR and the *Declaration on the Elimination of Violence against Women (1993)*.

However, although the legislative frameworks provide user rights, they do not provide rights of access to housing.⁷⁶

Gaps in the protection of the right to housing

There remains no clear legal protection of the right to housing in Australian law and a number of housing rights issues remain unaddressed.

A recent report by the UN Special Rapporteur on the Right to Housing found that Australia has 'failed to implement its legal obligation to progressively realise the human right to adequate housing ... particularly in view of its responsibilities as a rich and prosperous country'.⁷⁷ In particular, the Special Rapporteur highlighted the retrogressive nature of some of the former's Government's housing policy measures, for example, its cuts in expenditure to public housing and homelessness services. The Special Rapporteur highlighted the fact that such cuts are permitted only in exceptional circumstances of economic crisis. Their implementation during a period of strong economic growth and large budget surpluses could not, therefore, be justified.

Australia has also been criticised for the inadequacy of its protections against evictions and unfair rent increases. In 2000, the Committee on Economic, Social and Cultural Rights raised concerns about this issue, particularly in urban centres which were "experiencing very low rental property vacancy rates with intense competition".

The inadequacy of Commonwealth Rent Assistance, as one component of the housing assistance policy framework, has also been identified as an area in which Australia's obligation to direct 'maximum possible resources' to advance the right to housing may not be being met. Many low income households in receipt of CRA continue to experience housing stress due to the inadequacy of the payment, its failure to keep pace with market rents and the failure to take relative housing costs in different housing markets into account.

⁷⁶ Dan Nicholson at 7.

⁷⁷ Milaan Kothari, *Report of the Special Rapporteur on Adequate Housing as a component of the right to an adequate standard of living – Mission to Australia*, A/HRC/4/18/Add.2, 11 May 2007 at 2.

The current Government has substantially increased affordable housing expenditure and introduced some innovative affordable housing programs. The national homelessness white paper, *The Road Home*, signals a new direction in national housing policy with a much greater emphasis on early intervention and prevention, and is supported by additional funding to homelessness services of \$800 million over 4 years. Investment in social housing has also been substantially increased, with \$6.2 billion invested in social housing infrastructure as part of the Government's stimulus package. Investment of \$600 million in the National Rental Affordability Scheme (NRAS) to deliver an additional 50,000 affordable housing dwellings will also improve access to housing. Further, *Time for Action*, the report of the National Council to Reduce Violence against Women and their Children is an important step in improving the Government response to violence against women and children, and will inform the development of a National Plan to Reduce Violence Against Women.

These measures are all very welcome and go some way to meeting the Government's obligations under the right to housing. A national human rights act, including a right to housing as a component of the right to an adequate standard of living, would be an important further step in the protection of the right to housing.

What difference would a national human rights act make?

A national human rights act which included the right to housing could make a real difference to the lives of disadvantaged and marginalised Australians.

It would enable individuals to bring a direct action in the courts where the right to housing has been infringed by a public authority, for example, because of denial of access to housing on discriminatory grounds, because the condition of public housing is unsafe or in the case of an unfair eviction.

In such cases, a national human rights act would enable the court to find that a public authority had acted inconsistently with human rights and provide remedies, for example, ordering the relevant housing authority to take a particular action.

The court could also declare that a relevant law, for example requiring public authorities to act in a particular way, was incompatible with the national human rights act.

Parliament would then be required to respond to the declaration of incompatibility and substantively engage with the human rights questions arising.

Perhaps more importantly, a national human rights act would require Government to turn its mind to the impacts of any new legislation or policy on the right to housing and publicly articulate these impacts and its position. A 2008 report by the Victorian Equal Opportunity and Human Rights Commission on the operation of the Victorian Charter highlights some positive changes to public sector management and culture resulting from the Victorian charter of rights.

Reports from agencies and other sources suggest that the understanding of human rights in the Victorian public sector has been amplified and brought into sharper focus by the Charter. The Charter has encouraged employees to see human rights as relevant to their work, acted as a trigger for reform in some areas,

enhanced existing ethical frameworks and provided a new framework for independent statutory authorities to strengthen and reinforce the obligations of service providers.⁷⁸

Obviously, to maximise the indirect or cultural effects of a national human rights act, strong institutional support and resourcing will be required, including direct education regarding the impact of human rights on a broad range of social and community services, as discussed below.

⁷⁸ Victorian Equal Opportunity and Human Rights Commission, *Emerging Change: the 2008 report on the operation of the Charter of Human Rights and Responsibilities*, 2009 accessed at <http://www.humanrightscommission.vic.gov.au/pdf/2008charterreport.pdf> at page 5

B: Human rights training and education

In addition to the enactment of a national human rights act, the federal government should fund human rights education programs and campaigns. Human rights training should be provided to all employees in public authorities and to staff in agencies and organisations which perform public functions, as requested.

Recommendation 28: That the federal Government fund human rights training for employees of public authorities and organisations performing public functions, as requested.

In addition to staff training, a broader community education campaign should be funded involving education programs in schools and a broader awareness raising media campaign.

Recommendation 29: That the federal Government fund a community education campaign, including a schools program and broader media campaign.

Resources should also be provided for education and training for community and welfare sector organisations seeking to opt-in to the national legislation. Such training should equip community and welfare organisations to ensure that their policies and practices are human rights compliant.

ACOSS refers the Committee to the submission by the Human Rights Law Resource Centre containing a more detailed discussion of measures and initiatives to promote human rights, including human rights education.⁷⁹

C: Development of a comprehensive social inclusion strategy

ACOSS believes that social exclusion is a useful analytical tool and organising principle for social justice policies because:

- It includes, but extends beyond, people's immediate living standards.
- It is a dynamic concept that focuses on the processes leading to social disadvantage (including those amenable to policy action) as well as the end results.
- It is a good theme and organising principle for policies across a range of areas including employment, human services and social security and housing, thereby encouraging 'joined up government'.
- The effects of policy action in these areas can be measured using social exclusion concepts – for example exclusion from education and employment.
- Social exclusion provides a framework for the development of targets and benchmarks to give effect to policy commitments to end poverty and social disadvantage.

⁷⁹ Human Rights Law Resource Centre, *Engage, Educate, Empower: National Human Rights Consultation Submission on Measures and Initiatives to Promote and Protect Human Rights*, April 2009.

A human rights legal framework must be seen to complement and reinforce a broader range of socially inclusive laws and policies.

A human rights act can play an important role in protecting low income and disadvantaged Australians from breaches of their rights. However, the capacity of a human rights act to improve the standard of living and access to services for disadvantaged Australians is limited. Laws and policies that are not only consistent with human rights, but also socially inclusive, must play a central role in improving the lives of disadvantaged Australians.

Human rights compliance may not always be an adequate benchmark by which to measure the effectiveness and equity of policies and laws, although will be an important one.

The UN Committee on Economic, Social and Cultural Rights, in its recent Concluding Observations urged the Australian Government to ‘take all necessary measures to combat poverty and social exclusion, and to develop a comprehensive poverty reduction and social inclusion strategy which should integrate the economic, social and cultural rights...[and to] adopt evaluation measures to assess the impact of its poverty and social [exclusion] reduction strategies and identify its weaknesses...’⁸⁰

ACOSS believes that, in addition to a national human rights act, the federal Government should develop a comprehensive social inclusion strategy which includes poverty reduction benchmarks and targets.

Recommendation 30: That the federal Government develop and implement a comprehensive social inclusion and poverty reduction strategy, including poverty benchmarks and targets.

⁸⁰ UN Committee on Economic, Social and Cultural Rights, ‘Consideration of reports submitted by states parties under Articles 16 and 17 of the Covenant: Concluding Observations of the Committee on Economic, Social and Cultural Rights’, 22 May 2009.

Summary of recommendations:

ACOSS recommends that:

- 1: A national human rights act should be enacted which includes, *at a minimum*, all human rights enshrined in the International Bill of Rights (the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights). Consideration should also be given to the inclusion of specific rights for Indigenous peoples, women, children and people with disability.
- 2: A national human rights act should not include individual responsibilities.
- 3: A national human rights act should include a right to non-discrimination which includes 'social status' as a protected ground.
- 4: Existing federal, state and territory anti-discrimination laws should be amended to also include protection from discrimination on the basis of 'social status'.
- 5: A national human rights act should require immediate realisation of civil and political rights and progressive realisation of social, economic and cultural rights. It should impose an obligation on the Federal to take steps to the maximum of its available resources, with a view to achieving progressively the full realization of all economic, social and cultural rights contained in the International Bill of Rights.
- 6: A national human rights act should apply to all individuals subject to Australia's jurisdiction, regardless of citizenship status and regardless of whether located outside Australian territory, provided they are subject to its jurisdiction.
- 7: A national human rights act should protect the rights of individuals and, in the case of rights held collectively, groups. In addition, groups of individuals should have standing to bring actions where all individuals in the group have been affected.
- 8: A national human rights act should not protect other legal entities, including private corporations.
- 9: A national human rights act should include standing provisions which best facilitate access to justice for disadvantaged and marginalised members of the community. ACOSS suggests that standing provisions be modeled on section 38 of the South African Charter.
10. A national human rights act should directly impose duties and obligations on federal public authorities and to other private parties to the extent that they perform 'functions of a public nature' on behalf of the Federal Government.
11. A national human rights act should not bind State and Territory Governments, but these governments should enact consistent human rights legislation.

12. A national human rights act should set out factors to be taken into account in determining whether actions of a private party (be that a company or community organisation) are of a 'public nature'.
13. A national human rights act should allow organisations (apart from those directly bound by the act), to 'opt in' to compliance with the act.
14. The Federal Government should support the community and welfare sector to develop a set of human rights resources which explain the implications of human rights legislation for the sector.
15. A national human rights act should include an interpretive clause requiring all common law and legislation to be interpreted as far as possible to be compatible with the Act.
16. A national human rights act should include a preamble enabling courts to consider international law and the judgments of domestic, foreign and international courts and tribunals relevant to a human right in interpreting a statutory provision.
17. A national human rights act should authorise the courts to issue a declaration of incompatibility where it is not possible to interpret the law consistently with the act.
18. A national human rights act should require that each bill introduced into Parliament is accompanied by a human rights compatibility statement, with reasoning.
19. A national human rights act should establish a Parliamentary Human Rights Committee to scrutinise all new bills, and have power to consider existing legislation referred to it.
20. A national human rights act should require that all declarations of incompatibility be tabled in Federal Parliament and that Parliament explain a decision to adopt a law that is inconsistent with the Act.
21. A national human rights act should require that all legislation passed which is explicitly inconsistent with human rights be clearly justified and subject to a sunset clause.
22. A national human rights act should require that all Cabinet decisions be accompanied by a Human Rights Impact Assessment to ensure that the human rights implications of government policies are considered.
23. A national human rights act should empower the Australian Human Rights Commission to receive complaints from individuals who allege a breach of their human rights and instigate investigations into breaches of those rights on behalf of persons aggrieved.
24. A national human rights act should provide a broad range of remedies which includes judicial as well as administrative and policy-based remedies.
25. A national human rights act should provide for a direct and free-standing right of action.
26. Compensation should be available to individuals where rights have been breached by public authorities and there is no other appropriate remedy.

27: Community legal services and legal aid services should be specifically funded to provide human rights legal advice and to bring legal actions on behalf of low income members of the community.

28: The federal Government fund human rights training for employees of public authorities and organisations performing public functions, as requested.

29: The federal Government fund a community education campaign, including a schools program and broader media campaign.

30: The federal Government develop and implement a comprehensive social inclusion and poverty reduction strategy, including poverty benchmarks and targets.