

**NSW Council for Civil Liberties**

**Submission to:**

**National Consultation on Human Rights**

**June 2009**

## Table of Contents

Acronyms.....	2
Introduction.....	2
Executive Summary .....	4
<b>1. Which human rights (including corresponding responsibilities) should be protected and promoted? .....</b>	<b>4</b>
1.1 <i>General Comments</i> .....	4
1.2 <i>Amendments to the Civil &amp; Political Rights Division</i> .....	5
Right not to be tried or punished more than once .....	5
Right to marry .....	6
Protection of the family .....	6
Peaceful assembly and association .....	7
Freedom of expression .....	7
The rights of indigenous peoples .....	7
1.2 <i>Additions to the Civil &amp; Political Rights Division</i> .....	8
Civil right of access to information .....	9
Civil right of just administration.....	10
1.3 <i>Amendments to the Economic &amp; Social Rights Division</i> .....	11
Right to work.....	12
Right to clean drinking water .....	12
Interpretation of economic and social rights.....	12
1.4 <i>Additions to the Economic &amp; Social Rights Division</i> .....	12
Right to self-determination.....	12
Right to a clean environment.....	14
<b>2. Are these human rights currently sufficiently protected and promoted? .....</b>	<b>14</b>
<b>3. How could Australia better protect and promote human rights? .....</b>	<b>17</b>
3.1 <i>Methods of rights protection under the HRB</i> .....	17
Statement of compatibility .....	17
Joint Standing Committee .....	17
Interpretative mandate.....	18
Findings of Inconsistency vs Conditional Invalidation.....	19
Acts of public authorities .....	21
3.2 <i>Further comments on the HRB</i> .....	21
Preamble .....	21
Objects .....	22
3.3 <i>Jurisdiction</i> .....	22
Extraterritorial effect .....	22
The states .....	23
3.4 <i>Cause of action</i> .....	23
3.5 <i>Further initiatives beyond the HRB</i> .....	24
ASIO, ASIS and the AFP.....	24
Regional instruments .....	24
ASEAN.....	24
Pacific Islands Forum.....	25
The race power .....	25

## Acronyms

<b>ASEAN</b>	Association of South-east Asian Nations
<b>CCL</b>	New South Wales Council for Civil Liberties
<b>CESCR</b>	International Convention on Economic, Social & Cultural Rights
<b>DNA</b>	Deoxyribonucleic Acid
<b>HRB</b>	A Human Rights Act for Australia Campaign's submitted Human Rights Bill
<b>ICCPR</b>	International Covenant on Civil and Political Rights

## Introduction

1. The New South Wales Council of Civil Liberties ('CCL') welcomes the opportunity to contribute to the debate about how best to protect the human rights and fundamental freedoms of Australians in the 21<sup>st</sup> Century.
2. CCL commends the Federal Government for undertaking these consultations, which it has to be said are long overdue. CCL would also like to acknowledge the Human Rights Act for Australia Campaign, the University of New South Wales, and the countless volunteers who have given their time to make these consultations possible.
3. CCL must, however, express disappointment that the type of legal form Australia's human rights protection might take seems to have been prejudged by the Terms of Reference. In particular, CCL notes that the Terms of Reference specifically order the Committee not to identify options that "include a constitutionally entrenched bill of rights." CCL does not believe that this is the correct way of undertaking genuine consultations about human rights in this country. CCL believes that *bona fide* consultations with civil society ought to leave all options on the table in any matter.
4. The New South Wales Council for Civil Liberties ('CCL') is committed to protecting and promoting civil liberties and human rights in Australia. Our aim is to secure the equal rights of everyone in Australia and oppose any abuse or excessive power by the State against its people. CCL was established in 1963 and is one of Australia's leading human rights and civil liberties organisations.
5. To this end CCL attempts to influence public debate and government policy on a range of human rights issues. We try to secure amendments to laws, or changes in policy, where civil liberties and human rights are not fully respected. We also listen to individual complaints and, through volunteer efforts, attempt to help members of the public with civil liberties problems. We prepare submissions to government, conduct court cases, engage regularly in public debates, produce publications, and conduct awareness-raising activities.

6. CCL is an NGO in Special Consultative Status with the Economic and Social Council of the United Nations, by resolution 2006/221 (21 July 2006).

## Executive Summary

7. It is clear that there is insufficient protection in Australia generally for basic human rights as evidenced from time to time in the enactment of legislation that removes from classes of individuals rights such as the right to freedom of movement and association, the right to silence and the right to freedom from being detained without charge - amongst others. CCL believes that human rights protection in Australia should take the form of a constitutionally entrenched bill of rights.
8. However, as this option seems to have been precluded by the Terms of Reference, CCL believes that basic human rights contained in the ICCPR must be given protection so that they are inalienable rights within Australia and protected regardless of the nationality of the individual. CCL is open to other rights such as economic and social rights being included in a Bill but recognises the inherent difficulty in doing so as these rights are often subject to political decisions about the allocation of resources. CCL expresses its endorsement for the Human Rights Bill (the 'HRB') proposed by the Human Rights Act for Australia Campaign and for a charter of rights based in legislation. Rather than producing its own draft bill, CCL relies on the HRB (as attached) as a basis for any future Human Rights Act and provides a detailed analysis of the points of distinction with that draft. CCL believes that legislative protection of basic human rights will act to limit abuses of human rights by providing a reminder to parliament prior to law being enacted, which may ensure better legislation, and more significantly provide a basis for those adversely affected to obtain remedies.
9. CCL makes the following key recommendations:
10. (i). **That any Act to protect human rights in Australia should not contain responsibilities as they are already sufficiently contained within criminal law generally.**
11. (ii). **That all the human rights contained in the ICCPR should be respected, protected and fulfilled by the Federal Government in a Human Rights Act that preserves them as inalienable rights of every human within its jurisdiction, whether a citizen of Australia or not. In addition CCL, while recognising that economic and social rights are limited by the availability of resources, would not object to such rights being protected through adoption of a Human Rights Act such as the HRB.**
12. (iii). **That the ICCPR be implemented in a way that ensures that "Everyone of marriageable age has the right to marry and to found a family".**
13. (iv). **That any Act include a number of additional rights already recognised in other jurisdictions including the right that "No one may be forced by the State to join an association", that "Every citizen has the**

right to a passport” & That “Everyone has the right of access to any information held by the state”.

14. (v). CCL believes that the HRB provides a reasonable model for a future Human Rights Act but makes a number of points of distinction with that model as outlined in the submission in detail below.

## **1. Which human rights (including corresponding responsibilities) should be protected and promoted?**

### *1.1 General Comments*

15. CCL believes that the basic rights contained within the ICCPR should be protected and promoted with a few important distinctions. First that there should be a right to access information from government and secondly it believes that the right marriage should be clearly expressed so that it ensures the right of any person of marriageable age to marry any other person of marriageable age regardless of sex. In addition there should be protection from being forced by the state to join an association and a right of every citizen to a passport. CCL broadly supports the *Human Rights Bill 2009* (formerly the New Matilda Bill) proposed by the *Human Rights Act for Australia Campaign* and submitted to this consultation (with cover letter dated 19 May 2009) and endorses that bill as a model for any future legislative protection of human rights with the qualifications outlined in this submission.
16. Before continuing to the substance of the rights in HRB, CCL would like to record its concerns about the emphasis on ‘responsibilities’ found in the Terms of Reference and picked up in some quarters of the media and civil society. Focus on responsibilities in this consultation is misguided. The fact is that any person in Australia must already meet the long list of responsibilities contained in the Federal *Criminal Code* and a State or Territory *Crimes Act* or *Criminal Code*. This list of responsibilities is not only long but growing almost by the day. CCL therefore strongly urges this Committee to keep the focus on human rights and the appropriate limits to such rights as responsibilities are already mandated in the criminal law.

**Recommendation: That any Act to protect human rights in Australia should not contain responsibilities as they are already sufficiently contained within criminal law generally.**

**Recommendation: CCL believes that all the human rights contained in the ICCPR should be respected, protected and fulfilled by the Federal Government in a human rights act as inalienable rights of every human being whether a citizen or not. In addition CCL, while recognising that economic and social rights often are limited by the availability of resources, it would not object to such rights being protected through adoption of a Human Rights Act such as the HRB.**

17. However, CCL believes a number of changes to the HRB will better respect, protect and fulfill the rights of Australians. These changes can be divided between (a) civil and political rights and (b) economic and social rights. They can also be divided between (i) amendments and (ii) additions to the proposed HRB. Many of these changes are based either on the *Constitution of the Republic of South Africa* (1994) or the *Charter of Fundamental Rights of the European Union* (2000). Both of these documents are based to some degree on the *International Covenant on Civil & Political Rights*<sup>1</sup> and the *International Covenant on Economic, Social & Cultural Rights*.<sup>2</sup> However, as they are more modern documents, they better meet the challenges regarding human rights jurisprudence that have developed since the drafting of the UN covenants. CCL therefore recommends the Committee consider these documents in its report to the government.

## 1.2 Amendments to the Civil & Political Rights Division

### Right not to be tried or punished more than once

18. CCL notes that HRB cl 20 contains the right not to be tried or punished more than once for the same offence. The proposed section contains some notable exceptions regarding the right, being: where new evidence comes to light and where a previous acquittal is found to have been tainted. CCL understands the common perception of the importance of these exceptions, based on the interests of justice. Such exceptions provides a way for scientific advancements, such as DNA evidence, to play a role in the administration of justice. However, there are important reasons why such exceptions should not be included in these laws.

19. First, these sorts of retrials are inherently unfair.<sup>3</sup> There is simply no way that a person undergoing a retrial can receive a fair hearing. This fact alone ought to be enough to convince the Committee to rid HRB s 20 of the exceptions to the rule against double jeopardy.

20. Second, with regards to DNA evidence, the Committee ought to be aware and help make known to the public that such evidence simply cannot prove the *guilt* of any person, but is useful only for proving innocence.<sup>4</sup> DNA evidence can on occasion, in a particular factual circumstance, *disprove* that someone committed a crime. However, its ability to establish guilt is incredibly weak. It could be used to reopen a cold case in some (extremely rare) circumstances, but as the basis of a *retrial* it is simply untenable. The most it establishes is one piece of circumstantial evidence that will be analyzed by a jury in conjunction with all the other evidence available (that has already been used and has not persuaded a jury of the guilt of the accused). This evidence will

---

<sup>1</sup> Ratified by Australia on 13 August 1980

<sup>2</sup> Ratified by Australia on 10 December 1975

<sup>3</sup> For a more thorough explanation of this, please see *New South Wales Council for Civil Liberties and the University of New South Wales Council for Civil Liberties Submission to the Model Criminal Code Officers' Committee's Inquiry on Issue Estoppel, Double Jeopardy and Prosecution Appeals Against Acquittals*, 17 February 2004, available at <http://www.nswccl.org.au/publications/submissions.php> <last accessed 8 June 2009>, [7.3.7]

<sup>4</sup> *Ibid.*, [7.3.6]

then be subject to the analysis of various experts. And DNA ‘matches’ are not absolutes at the best of times. Therefore exception (a) is an unnecessary exception that greatly increases the power of the state.

21. Third, with regards to ‘tainted acquittals’ CCL might support such an exception but the drafting would need to be much more precise. In particular, the following gaps must be closed in the HRB:<sup>5</sup> (a) the ‘tainting’ must be established to have been committed with the knowledge of the accused in the original trial; (b) the ‘tainting’ must have *led to* the acquittal; (c) there must have been a “real possibility” of a guilty verdict established “beyond a reasonable doubt” for a retrial to be ordered. But even if all these concerns were incorporated into the HRB, CCL still views it as an unnecessary and potentially dangerous exemption to the rule against double jeopardy. A better approach would be to raise the sanctions for offences relating to the administration of justice.
22. Fourth, there is a concern that law enforcement officials may withhold evidence crucial to a case in order to have “two bites of the cherry” if the first attempt at prosecution fails. Even if officials do not actively do this, the exceptions may tend to encourage sloppy policing.

**Recommendation: Given that exceptions to the rule against double jeopardy may encourage poor or bad policing, that DNA evidence cannot prove the guilt of a person, and that there are better ways to protect against tainted acquittals, and given especially that a retrial of the same person for the same offence will never be a fair trial, the CCL strongly urges that the exceptions to the right not to be tried or punished more than once in HRB cl 20 be removed.**

### **Right to marry**

23. HRB cl 24 follows the text of the ICCPR in stating that “[a]ll men and women of marriageable age” can marry. CCL notes that the UN Human Rights Committee has interpreted the phrase “all men and women” to limit marriage to opposite-sex couples.<sup>6</sup> The Committee was of the mind that same-sex couples would have been included if the pronoun “everyone” had been used. Therefore, CCL urges the Committee to formulate the right to marry as “everyone of marriageable age has the right to marry and form a family.” This will ensure that Australian courts will not be unreasonably restricted to a narrow definition of marriage. This will also accord with the jurisprudence of leading human rights jurisdictions which have recognised same sex marriage on the grounds that an exclusively heterosexual definition of marriage is discriminatory and unjustifiable in a free and democratic society.<sup>7</sup>

**Recommendation: CCL recommends that HRB cl 24(1) be redrafted to read “Everyone of marriageable age has the right to marry and to found a family”.**

---

<sup>5</sup> *Ibid.*, [7.4]

<sup>6</sup> *Joslin v New Zealand* (2002) UN Doc CCPR/C/75/D/902/1992, [8.2].

<sup>7</sup> *Minister of Home Affairs v Fourie & Bonthuys* (2005) *find correct citation* (CCT 60/04) [2005] ZACC 19; 2006 (3) BCLR 355 (CC) (1 December 2005); *Reference re: same-sex marriage* [2004] 3 SCR 698 (Supreme Court of Canada)

## Protection of the family

24. CCL welcomes the HRB's proposed protection of the family which includes "special protection" for "mothers during a reasonable period before and after child birth." CCL would like to draw the Committee's attention to the recent Concluding Observations in which the UN recommends that compulsory paid maternity leave be granted to the women of Australia.<sup>8</sup> CCL strongly urges the government to take this opportunity to make this important right available to women through the HRB.

**Recommendation: CCL suggests that, in line with the recommendations of the UN Committee on Economic, Social & Cultural Rights, the HRB's right to protection of the family include a provision for compulsory paid maternity leave.**

## Peaceful assembly and association

25. CCL notes that the HRB cl 28 contains the right to peaceful assembly and association, which is also found in the Universal Declaration of Human Rights ('UDHR'). However, CCL also notes that the right in the UDHR provides that "no one may be compelled to belong to an association."<sup>9</sup> The ICCPR does not include such a guarantee, though some members of the UN Human Rights Committee have implied a guarantee that 'no one may be forced *by the State* to join an association.' However, for the sake of certainty CCL urges the Committee to include the right *not* to join an association in terms similar to the UDHR.

**Recommendation: CCL recommends that HRB cl 28 be modified to include subsection "(3) No one may be forced by the State to join an association".**

## Freedom of expression

26. CCL notes that the right to free expression includes a requirement that advocacy of national, racial or religious hatred intended *or* reasonably likely to incite violence must be prohibited by law. CCL welcomes such a provision. CCL notes, however, that the proposed wording might cast too wide a net in seeking to punish incitement to violence. While these laws are crucial in any democratic society, their overuse tends to enflame the very passions they seek to smother. CCL therefore recommends that the HRB be modified to be closer to the US requirement of both intending to incite violence *and* being reasonably likely to incite such violence.<sup>10</sup>

**Recommendation: CCL recommends that HRB cl 29(5) be changed to "Any advocacy of national, racial or religious hatred that is intended to, and is reasonably likely to, incite violence shall be prohibited by law."**

## Freedom of movement

---

<sup>8</sup> Committee on Social, Economic & Cultural Rights, *Concluding Observations for Australia*, E/C.12/Aus/CO/4, 22 May 2009.

<sup>9</sup> UDHR Art 20(2).

<sup>10</sup> *Brandenburg v Ohio* 395 U.S. 444 (1969)

27. CCL notes that HRB cl 30 grants freedom of movement within, into and out of Australia. However, CCL endorses the comments of the UN Human Rights Committee that: "since international travel usually requires appropriate documents, in particular a passport, the right to leave a country must include the right to obtain the necessary travel documents."<sup>11</sup> The issuing of passports is normally incumbent on the State of nationality of the individual. CCL notes that constitutional courts in the United States,<sup>12</sup> Ireland<sup>13</sup> and India<sup>14</sup> have implied the right to a passport deriving from the right to liberty. CCL also notes that the European Court of Human Rights<sup>15</sup> and Nigerian Supreme Court<sup>16</sup> have derived the right to a passport from the right to freedom of movement. However, CCL commends the innovation in the South African Bill of Rights of expressly guaranteeing that "[e]very citizen has the right to a passport."<sup>17</sup> It should be noted that such an express right is derogable (s 44) and would still be subject to the Limitations Clause (s 10).

**Recommendation: CCL recommends that HRB cl 30 be amended to include subclause "(4) Every citizen has the right to a passport".**

### **The rights of indigenous peoples**

28. CCL welcomes the inclusion of the rights of indigenous peoples. CCL believes that this presents the possibility to undertake some practical steps to build on the apology issued to the First Australians in February 2007. CCL notes that the Rudd Government has recently expressed its support for the *UN Declaration of the Rights of Indigenous Peoples (2007)*.<sup>18</sup> CCL therefore urges the government to put some of the rights that are contained in that Declaration into the HRB. Obviously, the Declaration is quite extensive, but CCL believes that in addition to the rights already in the HRB, at least some of the rights contained in the Declaration deserve special protection in the HRB. These rights ought to include: the right to be free from any kind of discrimination;<sup>19</sup> the right to self-determination<sup>20</sup> and the right to distinct political, legal, economic, social and cultural traditions;<sup>21</sup> the right not to be subject to forced assimilation or destruction of their culture, including the right not to have children forcibly removed;<sup>22</sup> the right not to be forcibly removed from land;<sup>23</sup> the right to establish and control their own educational systems and institutions providing education in their own languages;<sup>24</sup> the right to ownership and spiritual relationship with their lands, territories, waters and

---

<sup>11</sup> UN Human Rights Committee, *General Comment 27* (1999) UN Doc CCPR/C/21/Rev.1/Add.9, [9].

<sup>12</sup> *Kent v Dulles* (1958) 357 US 116.

<sup>13</sup> *The State (KM & RD) v AG* [1979] IT 73.

<sup>14</sup> *Satwant Singh Sawhney v D Ramarathnam, Asst Passport Officer* (1967) 2 SCR 525.

<sup>15</sup> *Napijalo v Croatia* [2003] ECHR 66485/01 (23 October 2003).

<sup>16</sup> *Director of State Security Service v Agbakoba* [1999] ICHRL 30 (5 March 1999).

<sup>17</sup> Section 21(4).

<sup>18</sup> Endorsed by Minister for Indigenous Affairs, Hon Jenny Macklin MP on 3 April 2009 see [http://www.jennymacklin.fahcsia.gov.au/internet/jennymacklin.nsf/content/un\\_declaration\\_03apr09.htm](http://www.jennymacklin.fahcsia.gov.au/internet/jennymacklin.nsf/content/un_declaration_03apr09.htm) <last accessed 10 June 2009>

<sup>19</sup> UN Declaration on the Rights of Indigenous Persons, UN Doc A/61/L.67, 7 September 2007, Article 2.

<sup>20</sup> *ibid.*, Art 3

<sup>21</sup> Art 5

<sup>22</sup> Articles 7 and 8.

<sup>23</sup> Art 10

<sup>24</sup> Art 14

coastal seas and other resources;<sup>25</sup> the right to determine their own identity and membership.<sup>26</sup>

29. CCL notes that the Declaration stipulates that these rights ought to extend equally to female and male indigenous individuals<sup>27</sup> and that nothing in these rights threatens the territorial integrity of Australia.<sup>28</sup> CCL also endorses HRB cl 36 (4) whereby none of the rights may be exercised in a manner inconsistent with any other rights in the HRB.
30. CCL strongly urges the Committee to recommend to the government to include an extensive list of indigenous rights for statutory protection. CCL believes that such protection is long overdue and will improve the opportunities for First Australians to partake in the national life. Even if some of the rights overlap to some degree with the other rights in the HRB, CCL believes that such protection will (a) send a powerful message of support to First Australians; and (b) perform an educative function for Australians as a whole. This will be crucial if the nation is to redress indigenous disadvantage in the country and may also help to show First Australians that the law is not simply an instrument of state repression but can positively work for good in their lives.

**Recommendation: CCL commends the Federal Government for endorsing the *UN Declaration on the Rights of Indigenous Peoples*. CCL believes that the HRB presents a real opportunity for the government to follow up its words with concrete actions. CCL therefore strongly supports HRB cl 36. However, CCL feels that there are a number of rights from the *UN Declaration* that need mention within the HRB. These rights include: the right to be free from any kind of discrimination; the right to self-determination and the right to distinct political, legal, economic, social and cultural traditions; the right not to be subject to forced assimilation or destruction of their culture, including the right not to have children forcibly removed; the right not to be forcibly removed from their land; the right to establish and control their own educational systems and institutions providing education in their own languages; the right to ownership and spiritual relationship with their lands, territories, waters and coastal seas and other resources; the right to determine their own identity and membership. CCL notes that the UN Declaration stipulates that such rights should extend equally to male and female indigenous individuals and that under no circumstances will such rights threaten Australia's territorial integrity.**

### *1.2 Additions to the Civil & Political Rights Division*

31. There are two more rights which CCL believes are missing from the "Civil & Political Rights" Division of the HRB. The rights are currently protected in Australian law. However, CCL believes it is crucial to incorporate them into the HRB for at least two reasons. First, the HRB performs an important educative function, which shows a person a way to partake in the public life of

---

<sup>25</sup> Articles 25 and 26.

<sup>26</sup> Art 33

<sup>27</sup> Art 44

<sup>28</sup> Art 46

the community. A right that appears in the HRB will be more accessible to a person who may not be at all aware of the intricacies of administrative law. Second, incorporating these rights will subject organs of state to the more probing form of proportionality review, rather than the simple rationality test under administrative law. This level of review is the type of review that every other developed country (and a good deal of developing countries) applies to government departments. By placing these rights in the HRB, they will have greater force for people against the state.

### **Civil right of access to information**

32. The Charter of Fundamental Rights of the European Union ('European Charter') was proclaimed in December 2000. It recognises a right of access to government documents:

#### **Article 42**

Any citizen of the Union, and any natural or legal person residing or having its registered office in a Member State, has a right of access to European Parliament, Council and Commission documents.

The South African Bill of Rights, which came into force in 1997, also recognises this right, but in addition recognises a right to access information in the possession of anyone where that information is 'required for the exercise or protection of any rights'. The right is also balanced by a recognition of public resource constraints:

#### **Article 32**

1. Everyone has the right of access to-

(a) any information held by the state; and

(b) any information that is held by another person and that is required for the exercise or protection of any rights.

2. National legislation must be enacted to give effect to this right, and may provide for reasonable measures to alleviate the administrative and financial burden on the state.

33. CCL submits that this right is already recognised in all Australian jurisdictions in the form of the various Freedom of Information Acts and other similar legislation. This important civil right ensures that electors can engage in informed public debate, which is an essential prerequisite for the healthy functioning of a representative democracy. It also ensures that people have a right to view and correct personal information held by others.

**Recommendation: CCL suggests that the civil right of access to information be added to the HRB in terms similar to s 32 of the Constitution of the Republic of South Africa.**

### **Civil right of just administration**

34. Article 41 of the European Charter recognises a right to just administration. It is expressed in terms of the rights Australians expect from administrative law.

The South African Bill of Rights recognises this right to just administration in these terms:

**Article 33**

1. Everyone has the right to administrative action that is lawful, reasonable and procedurally fair.
2. Everyone whose rights have been adversely affected by administrative action has the right to be given written reasons.

35. CCL submits that this right is already recognised in the body of Australian administrative law. This important civil right protects everyone from the excesses of government. Its significance should be acknowledged by including it in any contemporary Bill of Rights.

**Recommendation: CCL suggests that the civil right of just administration be added to the HRB in terms similar to s 33 of the Constitution of the Republic of South Africa.**

*1.3 Amendments to the Economic & Social Rights Division*

**Right to work**

36. CCL notes that the right to work has been included in the HRB. This clause has been included in terms similar to the ICESCR. CCL cannot profess any expertise in the intricacies of Australian employment law. However, there is one obligation contained in the ICESCR that is clearly missing from the HRB. This is the right to equal pay for work of equal value. CCL understands that this right is covered under other laws in Australia. But it is important to include it here. First, because the type of review that the courts can then submit government entities such as the Fair Pay Commission will be more probing than standard administrative review. Second, this may also provide greater protections for people in the private sector.

**Recommendation 12: CCL urges the government to amend HRB cl 39 to include “(5) Everyone has the right to receive equal pay for work of equal value.”**

**Right to clean drinking water**

37. CCL notes that the HRB cl 40 covers the right to an adequate standard of living. CCL notes however that there is no right to water incorporated under this provision. It is probably true to say that the right to water is included in the right to adequate housing, however, the Committee on Economic, Social & Cultural Rights has recommended a stand alone provision for Australia.<sup>29</sup> We concur.

**Recommendation: Given the importance of the right, CCL recommends that HRB cl 40 be amended to include: “(3) Everyone has the right to clean drinking water.”**

---

<sup>29</sup> Committee on Economic, Social & Cultural Rights, *op cit.*, [27]

## Interpretation of economic and social rights

38. It is generally accepted that there are at least three obligations generated by rights: the obligations to respect, protect and fulfill. The obligation to respect is known as a vertical negative obligation whereby government is prohibited from actively interfering with a person's enjoyment of a right. The obligation to protect a right is known as a horizontal negative obligation whereby the government is committed to preventing a third party from interfering with a person's right. The obligation to fulfill a right is a vertical positive obligation whereby a government is required to facilitate a person's achievement of a right.
39. The common perception is that economic and social rights are concerned with the third type of obligation, the vertical positive obligation to fulfill a right. In fact, the stipulation of these rights also covers the first two types of obligations, which can be equally important. Think for example, of a child who is being prevented from going to school by her father. The HRB will speak to this and other scenarios. In such a situation it is not appropriate for a court to undertake an assessment of the benefit of the right or the estimated amount of public expenditure by the state. It might be better to insert a subclause stating that this section only applies to cases concerning the state's positive obligation to fulfill the right in question.
40. However, it should also be noted that civil and political rights can also sometimes generate vertical positive obligations. So for example, the European Court of Human Rights has found that the right to freedom of association can incur an obligation on the state to provide sufficient protection for a meeting.<sup>30</sup> Freedom of speech can also generate claims over private property (at state expense) or police protection. Therefore, CCL wonders whether it is even necessary for the HRB to contain cl 43. The failure to fulfill a right can equally be found as a justifiable limitation under the Limitations Clause. The Limitations Clause requires a means-ends analysis of the government action. One of the factors to be taken into account in such an analysis is the legitimate claims of the community as a whole. So, for example, in a case about airport noise, the European Court of Human Rights found that there was certainly an interference with the privacy of an individual where there was a change of flight paths, but that the interference was justified in light of the interests of "the community as a whole."<sup>31</sup> Therefore the Limitations Clause already does the work of the proposed cl 43.

**Recommendation: Since the Limitations Clause already allows the courts to take into account the expense required in a claim to fulfil a positive right, and since cl 43 should not apply when making a determination about respecting or protecting an economic and social right, CCL recommends that cl 43 of the HRB be removed. Alternatively, the clause could be amended to include "(2) Such a consideration need not be undertaken if the case concerns a claim only to respect or protect the right in question."**

---

<sup>30</sup> *Plattform "Arzte fur des Leben" v Austria*, (10126/82) ECtHR (21 June 1988).

<sup>31</sup> *Powell & Rayner v UK* (9310/81) ECtHR (21 February 1990), § 41.

## 1.4 Additions to the Economic & Social Rights Division

### Right to self-determination

41. The right to self-determination has a long history in law on both the international and domestic levels. It is a right that is often misunderstood as being synonymous with secession and is instinctively feared by governments for that reason. It does not entail the right to secede, except under the strictest circumstances, being roughly: (1) when a group is under foreign occupation; or (2) when a group is excluded from the political process.<sup>32</sup> However, beyond this, the right to self-determination is an important group right that can enable peoples to organize themselves politically and exercise forms of self-government within a state of which they are a part. Such a right also has economic implications, particularly as regards the disposal of natural resources. Thus it can help to ensure that the common heritage of the Australian people is used for the benefit of all Australians. The right to self-determination was considered so important to the framers of the UN Charter that it was included as the first article.<sup>33</sup> Further, it was then enshrined in the first article of the CESC. Under these circumstances, it ought to be included as one of the rights that is protected in Australia's human rights regime.

**Recommendation: Given that the right to determination does not threaten the territorial integrity of a state and that it is a fundamental right long recognized in law, CCL urges the Committee to include the right to self-determination in terms similar to the CESC.**

### Right to a clean environment

42. The right to a clean environment has emerged as an important, indeed urgent, fundamental right. Such a right will provide Australians with much needed protections for their environment, especially regarding the actions of the state or large corporations. The right is now provided for on the international level and has been protected in the South African Constitution.<sup>34</sup>

**Recommendation: CCL strongly urges the Committee to include in the HRB a right to a clean environment in terms similar to s 24 of the South African Constitution.**

## **2. Are these human rights currently sufficiently protected and promoted?**

43. No. CCL believes that the current human rights protection in Australia is woefully inadequate. Australia is the only liberal democracy without constitutional or statutory protection of fundamental rights. The inadequacy of our rights protection has been amply demonstrated over the past decade.

---

<sup>32</sup> For the most thorough discuss of the right to self-determination see *Reference Re: Secession of Quebec*, Supreme Court of Canada, 20 August 1998.

<sup>33</sup> UN Charter, Art 1 – 'principle of self-determination' (as it was then known).

<sup>34</sup> Constitution of the Republic of South Africa Act 1997, s 24.

Liberty and privacy rights have been stripped away throughout this time with no recourse to the courts and no requirement for the government to properly justify its actions.

44. It is wrong to say that the common law is a sufficient protection for human rights in Australia as legislation is regularly passed by parliaments in Australia, which overrides and removes common law rights. As a recent example of the lack of protection of human rights in Australia the so-called new “Bikie laws” are contained in the *Crimes (Criminal Organisations Control) Act 2009*. This act makes no reference to bike clubs per se but can apply to any organisation involved in certain criminal activity.
45. The laws, like those in SA, are no doubt inspired by the recent federal laws on terrorist organisations. This is part of the serious “function creep” that we are seeing with whole raft of so-called anti-terrorist laws being applied to the general criminal law with the loss of basic liberties in the process. The covert search warrant laws are another recent example of the extension of special laws that were to only apply to terrorism offences.
46. The new law allows selected judges to declare organizations illegal on secret evidence and makes association a crime with up to 5 years in prison. Section 26 (6) provides that “in proceedings for an offence against this section, it is not necessary for the prosecution to prove that the defendant associated with another person for any particular purpose or that the association would have led to the commission of any offence.”
47. The main flaw in this law is that it criminalizes association rather than criminal activity. It takes the old consorting laws and the idea of guilt by association to new levels never seen in Australian law before. A very slight tweaking of these laws would make them suitable for use by future governments against direct action type groups like some environmental groups who may commit minor offences as part of their political protest.
48. It is noted that the NSW Legislation Review Committee was unable to consider the impact of these laws on human rights prior to them being passed into law by that Parliament. It notes that the committee was critical of the laws and the lack of opportunity to consider the legislation before it was passed.
49. In another example new Federal anti-terrorism laws were introduced in the late 2005<sup>35</sup>. The new laws made some fundamental changes about dealing with alleged criminal activity and was over 140 pages long incorporating changes into existing legislation such as the Federal *Criminal Code*<sup>36</sup>. These changes were in addition to earlier major anti-terrorism legislation and amendments enacted since 2001, especially Part 5.3 of the *Criminal Code* relating to terrorism and ASIO’s questioning and detention powers<sup>37</sup>.

---

<sup>35</sup> *Anti-Terrorism Act No 2 (2005)* (Cth)

<sup>36</sup> Being the Schedule to the *Criminal Code Act 1995* (Cth) as amended.

<sup>37</sup> Part III of the *Australian Security Intelligence Organisation Act 1979* (Cth)

50. The most fundamental changes were control orders which see restrictions placed on Australian citizens who may never be charged with any criminal offence, Notices to Produce issued by police officers (essentially search warrants without judicial oversight) and secret detention orders. There are also important changes to the definition of terrorism organizations, the financing of terrorism and a new definition of sedition.
51. Common features running through many of the provisions of these laws was the use of recklessness as an adequate intention for very serious offences, the incorporation of the defences where the onus is on the defendant, being an effective reversal of onus of proof, and the consent of the Attorney-General being required for many actions. An area that attracted a great deal of public comment in relation to this legislation was the upgrading and providing a new definition of the sedition offence.
52. As a result of a political compromise with its own backbench members, the Government agreed to a review of the sedition laws by the Australian Law Reform Commission but nevertheless insisted that the proposed amendments be enacted (albeit with some minor changes) even before the Commission has reported. Therefore, a new offence of sedition, with increased penalties, was enacted in the *Criminal Code*. It is important to note with regard to this offence, that it is urging which is a criminal action and the actual activities that might be considered antisocial and deserving of criminal sanction are already dealt with by an expanded definition of treason. Sedition seeks to overlay that by criminalising expressions that can be said to be urging to treasonous activity. Also like so much of the anti-terrorism legislation, it also contains provisions that provide that recklessness applies to certain elements of the offences and for defences on which the defendant bears an onus. The defences contained in s 80.3 also require the person to be acting in good faith to be able to take the benefit of these defences. This expression of “good faith” normally is associated with such areas as administrative law and it is unclear how that will operate in criminal law relating to a matter of sedition or urging. There are several defences but there is no general defence of artistic, academic and journalistic purposes that usually apply, for instance, in most anti-vilification offences. Given the definition of Treason in s.80.1 of the Code, as it already deals with giving direct assistance to the enemies of Commonwealth forces, and other criminal offences dealing with incitement to violence, it is hard to see the necessity for a specific offence of sedition. Many overseas jurisdictions have completely done away with this crime and replaced it with more defined offences relating to the inciting of specific violence or activities. The sedition laws were reviewed by the Australian Law Reform Commission<sup>38</sup> which recommended repeal of the sedition offence and replacement by a modern offence aimed at intentional incitement of violence. These fundamental changes were rushed through Parliament with virtually no opposition from the ALP and very little scrutiny. The promised review of the sedition laws was simply ignored.

---

<sup>38</sup> ALRC Report 104 *Fighting Words: A Review of Sedition Laws in Australia*

53. In this way basic rights (which were to some degree recognised by the common law) such as the right to liberty and due process before the law, the right to silence and the right to freedom of speech have been overridden by legislation.

### **3. How could Australia better protect and promote human rights?**

#### *3.1 Methods of rights protection (under the HRB)*

54. CCL has long argued for a constitutionally-entrenched bill of rights. It is disappointing that in conducting this exercise the government has refused to keep all options on the table, as one would expect in *bona fide* consultations. CCL strongly believes that a constitutionally-entrenched bill of rights is the surest way to protect Australian's individual and collective rights in the 21<sup>st</sup> Century.

55. However, as this option is off the table, CCL here expresses its support for a statutory bill of rights as proposed by the *Human Rights Act for Australia Campaign* in its submitted HRB. CCL sees this as a step towards a constitutionally-entrenched bill of rights.

56. CCL notes that there are five ways in which human rights are protected under the HRB: (1) a requirement that the Attorney-General make a compatibility statement with regards to government bills; (2) the establishment of a Parliamentary Joint Standing Committee on Human Rights; (3) an interpretative mandate for courts to better protect rights; (4) the power of a court to make a finding of inconsistency; and (5) judicial review of administrative acts in light of the HRB. CCL here addresses each in turn before making (6) some general comments.

#### **Statement of compatibility**

57. CCL welcomes (1) the HRB's requirement that the federal Attorney-General issue a 'statement of compatibility' with human rights for each piece of proposed legislation.<sup>39</sup> This will help to foster a human rights culture at critical stages of policy formulation and legislative drafting. CCL believes that such a step *must* be undertaken before a bill is passed and that clause 47 – providing that legislation will be effective even without such a step - should not be enacted, at least in its current form (see [36] – [37] below).

#### **Joint Standing Committee**

58. CCL welcomes (2) the HRB's creation of a Joint Standing Committee on Human Rights ('Joint Committee').<sup>40</sup> The Joint Committee's role of reviewing compatibility statements and Bills will help to reduce litigation, because non-

---

<sup>39</sup> HRB cl 45

<sup>40</sup> HRB cl 46

complying legislation will be identified before it is enacted. It will also help to foster a human rights culture among parliamentarians, policy makers and the bureaucracy. The process of committee scrutiny is important because it is more transparent, consultative and democratic than the process of compatibility statements.

59. However, CCL is concerned that clause 47 undermines the utility of compatibility statements and the review of Bills by the Joint Committee. Except in extreme situations, every Bill should require a report from the Joint Committee *before* it can be passed by Parliament. The Joint Committee should be required to consult with the community, at the very least by inviting written submissions. These simple rules are very important, if the HRB is to avoid the disastrous experience of New South Wales. In 2001, after torpedoing a Bill of Rights for New South Wales, the Carr government declared that rights would be best protected by Parliament, overseen only by a parliamentary legislative review committee. In New South Wales the Legislation Review Committee scrutinizes every Bill brought before Parliament and reports on whether the legislation ‘trespasses unduly on personal rights and liberties’.<sup>41</sup> The experiment has been an abysmal failure. Not only is the community completely excluded from the process, because there is no provision for public submissions to the committee, but Parliament simply ignores adverse decisions of the committee – often without comment. The process is farcical when one considers that legislation can receive Royal Assent even before the committee has published its report on a Bill.<sup>42</sup>

60. CCL recognises that there will be emergency situations in which there will be no time for the formalities of compatibility statements and committee scrutiny. However, the default process should be that a law will not be valid until it has undergone these important processes. This will help to reinforce the importance of respect for human rights. Therefore, CCL believes that clause 47 must be amended to operate only when a Bill is declared urgent by a majority vote of both Houses of Parliament.

**Recommendation: CCL suggests that HRB cl 47 be strengthened to operate only when a Bill is declared urgent by a majority vote of both Houses of Parliament.**

### **Interpretative mandate**

61. CCL welcomes (3) the interpretative mandate given to courts in the HRB. This follows the United Kingdom (UK) model which was adopted in 1998. Experience from NZ suggests that this model will be used conservatively, perhaps even too conservatively, in the absence of a regional human rights body for people in Australia to access.<sup>43</sup> Therefore, to give judges more incentive to protect human rights, CCL recommends that the terms “compatibly with its purpose.” This will enable judges to make more rights-

---

<sup>41</sup> *Legislative Review Act*, s 8A

<sup>42</sup> *Ibid.*, s 8A(2)

<sup>43</sup> Petra Butler, *Australian Bills of Rights – the ACT and Beyond: Lessons from New Zealand*, Address to the Australian National University, 29 June 2006, available at <http://acthra.anu.edu.au/articles/Butler%20P-%20lessons%20from%20NZ.pdf> <accessed on 9 June 2009>

protective judgments regarding primary and secondary legislation. Further, this will make the interpretative mandate similar to the UK and NZ provisions, which do not require that interpretation should be made “compatibly with the purpose” of the legislation. Such an addition to the provision, might go so far as to render the interpretative mandate meaningless.

**Recommendation: CCL recommends that the phrase “compatibly with its purpose” be removed from HRB cl 50 to make it comparable to the UK and NZ interpretative provisions.**

62. In addition, CCL does not believe subclauses 50(2)(b) and (c) do not belong in the HRB. The current drafting seems to presuppose that an interpretation of legislation could invalidate primary or secondary legislation. But interpretation of legislation does not and cannot invalidate legislation. CCL believes these clauses may be more relevant to cl 52 but that given the current drafting of that clause, and the changes that CCL recommends, such subclauses are unnecessary and potentially misleading.

**Recommendation: CCL recommends that subclauses 50(2)(b) and (c) be removed on the grounds that they are unnecessary and potentially misleading.**

### **Findings of Inconsistency vs Conditional Invalidation**

63. CCL notes (4) that the HRB gives the power to the courts to make “Findings of Inconsistency”. This HRB proposes to follow the UK Model, which means that if a court makes a finding of inconsistency, it is up to the Parliament to respond as it sees fit. This ‘dialogue’ between the judicial and legislative arms of government is a feature of Bills of Rights of Westminster-style democracies.

64. However, there is an older, more robust and tried-and-true dialogue model than the UK version: the pre-Charter statutory model of the Canadian Bill of Rights (1960). This model served Canada well for over two decades in the statutory Canadian Bill of Rights. It was introduced in 1960 and entrenched in the 1982 Constitution as the Charter of Rights and Freedoms. The Canadian dialogue model offers the advantage of championing individual rights whenever Parliament chooses to do nothing about a law that violates rights. In the weaker UK model, if Parliament chooses to do nothing about an inconsistent law, then the law remains in force. So, for example, in New Zealand, parliament has taken anywhere from six months to eight years to remedy violations of the NZ Bill of Rights.<sup>44</sup> The Canadian dialogue model permits the courts to invalidate legislation, but provides Parliament with the ultimate ‘trump card’ of a ‘notwithstanding clause’.<sup>45</sup> see *R v Drybones*.<sup>46</sup> By inserting a notwithstanding clause in a piece of legislation, Parliament has the power to override the courts and the legislation shall remain in force.

65. The Canadian model forces Parliament to respond to a violation of human rights. When a court finds that legislation violates individual rights, then

---

<sup>44</sup> Petra Butler, *op cit*, [3].

<sup>45</sup> *Canadian Bill of Rights* 1960, s 2

<sup>46</sup> [1970] SCR 282

Parliament can choose to do nothing, in which case the legislation ceases to be law. Alternatively, Parliament can choose to assert its sovereignty by inserting into the legislation a clause stating that the law is valid despite the fact that it violates fundamental rights. This 'notwithstanding clause' overrides the court's view, preserving the supremacy of parliament. The advantages of the Canadian statutory model has been stated as follows:<sup>47</sup>

*In terms of the benefit of legislative inertia, the [Canadian] Charter favours the individual whose rights have been violated over the Parliament, whereas the [UK Human Rights Act] favours the Parliament over the individual. There are many reasons why, in the face of a judicial invalidation or declaration of incompatibility, the Parliament does not respond. There may be no clear mandate [...]; the legislative timetable may not allow; the Parliament may not want to create an election issue out of human rights; and more disturbingly, inertia may be motivated by a mean-spirited refusal to acknowledge the violation of the rights of the unpopular or a minority. Whatever the reason for inertia, a society committed to minimum human rights standards should prefer the individual to benefit from inertia, rather than the Parliament. The power imbalance between the individual and the Parliament alone dictates this. Moreover, preferring the individual does not threaten the underlying themes of the [UK Human Rights Act]. Preferring the individual shows a commitment to the respect of human rights without undermining parliamentary sovereignty, as [the notwithstanding clause] of the Charter ensures. In addition, preferring the individual does not compromise the dialogue model of rights protection, as is illustrated by the differently constituted dialogue model of the Charter.*

66. Therefore, CCL recommends that the power of Findings of Inconsistency be removed from the HRB and instead "Orders of conditional invalidity" be inserted. The order of conditional invalidity should be in terms of the following recommendation.

**Recommendation: CCL recommends that a 'notwithstanding clause' mechanism be inserted into the HRB to make it similar to the statutory Canadian Bill of Rights (1960). The Canadian dialogue model can take the place of the power of the courts to make "Findings of Inconsistency," currently in the HRB. CCL suggests that the new cl 52 could take the following form:**

**52(1) Where a court determines that a provision of primary or subordinate legislation is incapable of interpretation in a manner consistent with this Act, it may invalidate that provision to the extent of the inconsistency.**

**(2) Where a provision has been invalidated under this section, a party to the proceedings may notify the Australian Human Rights Commission.**

---

<sup>47</sup> Julie Debeljak, 'The Human Rights Act 1998 (UK): the preservation of parliamentary supremacy in the context of rights protection,' (2003) 9(1) *Australian Journal of Human Rights* 183, 226-7.

**Upon receipt of such a notification, the Commission must notify the Attorney-General of the fact that a provision has been invalidated.**

Recommendation: **CCL suggests that it may also be advisable to include a power of the parliament and government to enact laws that are inconsistent with the HRB as long as an express provision states that the laws shall operate notwithstanding the inconsistency. This will be necessary to ensure parliamentary supremacy if the changes to cl 47 and cl 52 are made.**

67. If such a power is given to the courts, the supremacy of parliament will still be retained by the authority to pass laws notwithstanding the HRB under cl 45. Thus the ability to 'override' a decision of the court will take the form of an amendment to legislation that has had a provision invalidated. The proposed amendment must then also contain a provision to state that the reenacted provision it is to have effect 'notwithstanding' the inconsistency with the relevant human right.

Recommendation: **HRB cl 53 be amended to reflect the abolition of the 'Finding of Inconsistency' but the power of the Attorney-General to act, in similar terms to the current proposed clause, be retained so that, in the event a provision is invalidated, the supremacy of parliament is assured.**

68. As a matter of historical interest, prior to the constitutional entrenchment of the Charter in 1982, the Canadian notwithstanding clause was only used once. The *Public Order (Temporary Measures) Act 1970 (Canada)* was introduced in response to a violent uprising in Quebec in October 1970.<sup>48</sup> The Act only remained in force for five months.

### **Acts of public authorities**

69. CCL welcomes (5) the HRB's proposed judicial review of administrative actions. Given the explosion of administrative control over the lives of Australians, this is perhaps the most important aspect of the proposed HRB. CCL hopes that the AHRC will be able to assist the disadvantaged in making the most of this clause.

### *3.2 Further comments on the HRB*

#### **Preamble**

70. CCL notes that the Committee has been using the term 'protects and promotes' with regards to human rights. This is the language that is also used in the Preamble of the HRB. As discussed above, in human rights law, it is generally recognized that there are three types of obligations regarding any right: to "respect," to "protect" and to "fulfill" the right. These categories would seem at first glance to be the same as those in the Preamble. However, it is submitted that the word "promotes" is capable of shades of meaning quite distinct from the more categorical "fulfills." Therefore, the stronger and clearer word ought to be used.

---

<sup>48</sup> See <<http://www2.marianopolis.edu/quebechistory/docs/october/regsnov.htm>>.

Recommendation: **As the word ‘fulfils’ is a stronger and clearer word than ‘promotes,’ CCL urges the Committee to amend the Preamble to the HRB to read: “This is an Act to respect, protect and fulfil human rights in Australia.”**

## **Objects**

71. CCL notes that the proposed HRB contains a list of the international instruments that the Act will domesticate. Listing the international human rights treaties to which Australia is a party in subsection 3(b) is not necessarily a good idea. It might be interpreted to limit the effect of the HRB. For example, the list fails to include the Second Optional Protocol to the International Covenant on Civil and Political Rights aiming at the abolition of the death penalty. That Protocol reflects the substantive right in section 11(2) of the HRB. It also reflects Australia’s international obligations under article 1 of the Second Optional Protocol.

Recommendation: **CCL suggests that the list of international human rights treaties in the objects clause of the HRB be replaced with a more flexible phrase such as “Australia’s international human rights obligations”. Alternatively, the Second Optional Protocol to the ICCPR should be added to the list of international treaties in the objects clause.**

### *3.3 Jurisdiction*

#### **Extraterritorial effect**

72. CCL notes that the HRB does not necessarily bind Commonwealth officials operating in foreign jurisdictions. This means that Australian officials stationed overseas could, for example, torture people with immunity from this law. CCL has been concerned for some time that Australian Federal Police operate in South East Asia without advertng to Australia’s international human rights obligations with respect to the abolition of capital punishment. This was the case with the Bali Nine and is also the case with Huu Trinh in Vietnam.<sup>49</sup>

73. Given the universal nature of human rights, CCL strongly believes that Australia’s international human rights obligations do not stop at Australia’s borders. CCL recommends that the HRB should have extraterritorial effect, binding Australian officials in foreign jurisdictions.

Recommendation: **CCL strongly recommends that the HRB should have extraterritorial effect.**

74. Following the express approach taken in the Death Penalty Abolition Act and several other federal Acts, this extraterritorial jurisdiction can be achieved by simply inserting a section along these lines:<sup>50</sup>

This Act applies within and outside Australia and extends to all the Territories.

---

<sup>49</sup> Tom Hyland , ‘AFP under fire over Vietnam drug arrest’, *Sun Herald* (Sydney) 19 February 2006, <<http://www.smh.com.au/news/national/afp-under-fire-over-vietnam-drug-arrest/2006/02/18/1140151850921.html>>

<sup>50</sup> *Death Penalty Abolition Act 1973* (Cth) s.3. See also: *Australian Radiation Protection and Nuclear Safety Act 1998* (Cth) s.6; *Maternity Leave (Commonwealth Employees) Act 1973* (Cth) s.1; and, *Superannuation Benefits (Supervisory Mechanisms) Act 1990* (Cth) s.1

## The states

75. CCL also notes that the HRB is expressed only to bind the Commonwealth. Given that the stated objects of this Bill are to ensure that “the law of Australia better conforms with Australia’s obligations”, it is disappointing that it does not bind the States. The Murphy Bill of 1973 clearly stated that “this Act binds Australia and each State”.<sup>51</sup> Such legislation is constitutional under the head of the external affairs power. Such an approach would also be consistent with the recent recommendations to the government from the Economic & Social Council.<sup>52</sup>

**Recommendation: CCL suggests that the Committee make the HRB bind the States as well as the Commonwealth.**

### 3.4 Cause of action

76. CCL notes that the HRB only provides an individual with a cause of action against public authorities. This seems unnecessarily restrictive, given that the rights of individuals can also be violated by private organisations and individuals. Furthermore, research in this field suggests that the distinction between public and private actor eventually becomes untenable to sustain in human rights law.<sup>53</sup> The problem is that “private actors” inevitably involve the state in their actions in innumerable ways – a good example is a racially discriminatory contract between two parties. Will the courts enforce such a contract in light of the HRB? It is better to examine the US and Canadian experiences and adopt the South African approach, whereby all actors are covered by the law.

77. The parliament also has the power to do this. In 1973 the Attorney-General Lionel Murphy introduced into federal parliament the Human Rights Bill 1973 (‘the Murphy Bill’). The Murphy Bill provided a much broader cause of action, including both public and private violations:

#### **Section 40 (Civil Proceedings)**

(2) A person aggrieved by an act that he considers to be a contravention of [the rights in this Act] may institute a proceeding against the person who did the act by way of a civil action in the Australian Industrial Court for a declaration that the act is a contravention of [a right in this Act] and for any one or more of the remedies specified in sub-section (3).

78. With the obvious modifications, such as substituting ‘the appropriate court’ for ‘the Australian Industrial Court’, the Murphy Bill provides a much better cause of action than the submitted HRB.

**Recommendation: Given that experience has shown that maintaining a distinction between ‘public authorities’ and ‘private individuals’ is ultimately unsustainable in human rights law, CCL suggests that HRB cls 53 – 56 are amended to ensure that civil proceedings against private as well as public violators of human rights are possible.**

---

<sup>51</sup> Human Rights Bill 1973 (Cth) s.5(1).

<sup>52</sup> Committee on Economic, Social & Cultural Rights, op cit, [11].

<sup>53</sup> For a good explanation of this phenomenon see Mark Tushnet, ‘Weak Courts, Strong Rights’, Princeton University Press, Princeton, 2008, p 199.

### 3.5 Further initiatives beyond the HRB

#### ASIO, ASIS and the AFP

79. CCL has expressed concern over the serious erosion of civil liberties over the past number of years, and especially since the commencement of the 'war on terror.' This extension of the police powers has been unprecedented in a time of peace. CCL has submitted various recommendations with regards to these powers.<sup>54</sup> These powers have also been massively expanded at the state level, so that citizens face multiple levels of agents of the government invading on their personal lives. CCL would obviously like to see these laws repealed as quickly as possible. Nevertheless, CCL is alive to the real threat that terrorism presents to Australia and concerns in the community about safety. Therefore CCL would like to ask the government to consider launching an independent commission of inquiry into the effectiveness of the measures taken in the fight against criminal terrorists since 2001.

**Recommendation: CCL recommends that in order to gauge the effectiveness of the state and federal response to criminal terrorists an independent commission of inquiry be launched by the government.**

#### Regional instruments

80. CCL notes that regional human rights instruments have been effective in protecting human rights in a number of regions around the world. One of the reasons for their effectiveness is that the courts of the domestic level seem to be more responsive to such claims if they know that there is the possibility of an appeal to a higher body.<sup>55</sup> The regional bodies tend to make decisions that are not strictly enforceable by any particular body. Nevertheless, adherence to the judgments is high. CCL notes that Australia is not a party to such a regional instrument. CCL strongly urges the Australian government to take the lead in creating such a regional human rights framework. This would not just help to create a more rights-protective milieu at home. It would also have the significant added advantage of increasing adherence to human rights and the rule of law in our region, thus increasing the chances of peace in our time. CCL notes that there are two possible organizations to promote such a charter being: (1) ASEAN; and (2) the Pacific Islands Forum.

#### ASEAN

81. CCL would prefer to see a regional human rights instrument initiated by Australia with ASEAN. The obvious and potentially insurmountable obstacle is that Australia is not a member of ASEAN. CCL does not pretend to offer any advice with regards to a political question that is clearly the government's prerogative. However, CCL would like the government to consider how it

---

<sup>54</sup> For a good overview see *Submission to ICJ Eminent Jurist Panel on Australia's Counter Terrorism Legislation*, other examples include the *Telecommunications (Interception and Access) Bill* and the *Classification (Publications, Films & Computer Games) Amendment (Terrorist Material) Bill* see <http://www.nswccl.org.au/publications/submissions.php> <last accessed 10 June 2009>

<sup>55</sup> Petra Butler, *op cit*, [17].

might approach ASEAN to have a joint regional human rights instrument in the name of justice and peace.

### **Pacific Islands Forum**

82. Alternatively, Australia should initiate a regional human rights instrument with the Pacific Islands Forum. Such an instrument would not only show the government's commitment to human rights at home, and improve the domestic human rights situation, but it might go a long way to promoting stability and peace to what has been a troubled region of late.

**Recommendation 29: As they are well documented as encouraging stronger human rights protection and promotion at the domestic level, CCL strongly urges the government to implement a regional human rights instrument. Such an instrument would preferably be made with ASEAN but could equally be signed with the Pacific Islands Forum. This type of initiative would demonstrate the government's commitment to human rights and may contribute to peace and stability in the region.**

### **The race power**

83. The race power CCL is concerned that, in the 21st century, the federal Constitution still grants parliament the power to pass laws based on race. Section 51(xxvi) states that:

*The Parliament shall, subject to this Constitution, have power to make laws for the peace, order, and good government of the Commonwealth with respect to... the people of any race for whom it is deemed necessary to make special laws.*

84. This power has been used to pass laws to the detriment of a particular race in the country. This is not an acceptable power for a government in the 21<sup>st</sup> Century. Therefore CCL strongly urges its removal from the Constitution.

**Recommendation: The government should seek the removal of the races power from the Constitution.**