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Uniting Church in Australia
National Assembly

SUBMISSION TO THE

NATIONAL HUMAN RIGHTS CONSULTATION

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1 | INTRODUCTION

The Uniting Church in Australia is committed to involvement in the making of just public policy which prioritises the needs of the most vulnerable and disadvantaged in our society. In 1977, the Inaugural Assembly of the Uniting Church issued a *Statement to the Nation.*[1] In this statement, the Church declared that 'our response to the Christian gospel will continue to involve us in social and national affairs.' The Church also pledged

> to hope and work for a nation whose goals are not guided by self-interest alone, but by concern for the welfare of all persons everywhere — the family of the One God — the God made known in Jesus of Nazareth the One who gave His life for others.

The Uniting Church in Australia has, since its inception, been a church of social justice, committed to the achievement of human dignity for all. This commitment was enunciated in the Church's *Statement to the Nation* at its Inaugural Assembly in 1977, which reads

> We pledge ourselves to seek the correction of injustices wherever they occur. We will work for the eradication of poverty and racism within our society and beyond. We affirm the rights of all people to equal educational opportunities, adequate health care, freedom of speech, employment or dignity in unemployment if work is not available. We will oppose all forms of discrimination which infringe basic rights and freedoms.

The Uniting Church's support for human rights is based on how we understand the Christian faith.

Christians believe that human beings are created in the image of God who is three persons in open, joyful interaction. As bearers of God's image, human beings are inherently deserving of dignity and respect. The image of God that is reflected in human life, the form of life that corresponds to God, is the human community. Humans, made in God's image, are inherently relational, finding life and sustenance in relationship and community. Being called into community with the whole humankind as we are, when one person is diminished, we are all diminished.

As Christians we are called to live as faithful disciples of Jesus who came to fulfil the hope of the prophets: to bring good news to the poor, to proclaim release to the captives and recovery of sight to the blind and to let the oppressed go free. This is a mission to work for justice and resist injustice, and to stand in solidarity with the poor and the oppressed.

Christians and Christian churches have, all too often, been responsible for colluding with and perpetrating violence and oppression. Church history is scarred by greed and fear and so we have, too often, failed in our mission of love. However, there have always been Christians committed to ending violence and poverty and in the last hundred years or so the church has been engaged internationally to this end. The World Council of Churches, of which the Uniting Church in Australia is a member, has a strong and proud history of advocacy on human rights issues, and churches internationally were involved in the establishment of the United Nations and adoption of the Universal Declaration of Human Rights.

The Uniting Church believes that it has a responsibility to contribute to the building of societies in which all people are valued and respected. In the context of public policy and international affairs, this means participating the development of systems, processes and structures, such as the international human rights system and the protection of human rights domestically, that function to both protect and promote human dignity and peace, and hold all of us mutually accountable in this.

The Uniting Church's support for human rights and the upholding of the dignity of all people was fully articulated in its statement on human rights, *Dignity in Humanity: Recognising Christ in Every Person*, adopted by the National Assembly of the Church in 2006. As well as laying out the theological basis of our commitment to human rights, this statement expresses the Church's support for 'the human rights standards recognised by the United Nations', which express the birthright of all people to 'all that is necessary for a decent life and to the hope for a peaceful future.'

1 This statement is available at http://www.unitingjustice.org.au/images/pdfs/resources/churchstatementsandresolutions/1_statement1977.pdf

In *Dignity in Humanity*, the Uniting Church also urged

> the Australian Government to fulfil its responsibilities under the human rights covenants, conventions and treaties that Australia has ratified or signed

and pledged

> to assess current and future national public policy and practice against international human rights instruments, keeping in mind Christ's call and example to work for justice for the oppressed and vulnerable.

It is these promises which continue to drive the Church's involvement in the development of just and responsible government policy and practice in Australia. In this spirit, the National Assembly of the Uniting Church in Australia makes this submission to the National Human Rights Consultation.

We commend the National Human Rights Consultation committee for their work to gather the opinions of as many Australians as possible, and in particular for their work in the Community Roundtables. Any additions or changes to the way rights are protected in Australia must have the support and understanding of the community for them to truly have effect in our society and we believe the consultation process will help achieve that.

This submission was prepared by UnitingJustice Australia on behalf of the National Assembly of the Uniting Church in Australia.

2 | EXECUTIVE SUMMARY

The Uniting Church in Australia believes that the Australian Government, in its law-making, policy and practice, must protect and promote all of the human rights contained in the UN human rights instruments which Australia is party to, including civil and political rights and economic, social and cultural rights.

We do not believe that the current protection of human rights in Australia is sufficient. In recent years, the Uniting Church has on many occasions had cause to bring to the attention of church members, the general public, governments and the media, human rights violations occurring here in Australia, including the Northern Territory Emergency Response legislation, anti-terrorism legislation and the indefinite, mandatory detention of asylum seekers. Whilst it may be the case that Australia's record in the area of human rights is not as horrific as that of many other nations around the world, the existence and continuance of human rights violations in Australia is not something that should be tolerated.

We believe that a federal legislative Australian Human Rights Act, implementing the Australian Government's international human rights obligations and accompanied by comprehensive and well-funded education and training for the community and government bureaucracy, is the best way to protect and promote human rights in Australia. A Human Rights Act should be modelled in a way so as to allow for a greater role for the Parliament and the parliamentary processes in recognising and preventing potential human rights problems in proposed and existing legislation.

The Uniting Church believes that a Human Rights Act, operating within Australia's system of open and democratic government, will provide greater protection for fundamental rights and freedoms, promote dignity, address disadvantage and exclusion, and help to create a 'human rights culture' in Australia. Furthermore, it will serve to promote Australia's commitment to human rights in the Asia-Pacific and globally, and formalise the current government's commitment to the United Nations.

We support a Human Rights Act particularly because of the protections it would provide to the most vulnerable, marginalised and disadvantaged in our community, who currently have few avenues for remedy when their rights are violated. These groups of people include the homeless, people with a disability, women, Indigenous Australians, prisoners, people with a mental illness, newly-arrived migrants, asylum seekers and the unemployed. These groups in our community generally struggle to have their experiences heard, and are often marginalised from the political process. This means that abuses of their human rights often go unnoticed or unaddressed, and leave people with little option for redress or for the realisation of their rights.

We strongly believe that economic, social and cultural rights, as outlined in the International Covenant on Economic, Social and Cultural Rights, must be included in a Human Rights Act. Their inclusion is necessary, we believe, in order for an Act to have meaning in the community, to give effect to Australia's international obligations in this area, and to improve the lives of the most disadvantaged and vulnerable in our community.

3 | WHICH RIGHTS SHOULD BE PROTECTED AND PROMOTED?

Human rights are derived from our status as human beings in society. They describe the inherent and inalienable right of all people to live with dignity, free of persecution and violence, with access to all that is necessary for a decent life. Respect for human rights is needed to create a just and peaceful world founded on a common humanity. Human dignity can only be protected if human rights are protected and the responsibility of all nations and people to protect the rights and freedoms of all others is met. The UN's human rights treaties are a reflection and expression of these principles.

The Uniting Church in Australia believes that the Australian Government, in its law-making, policy and practice, must protect and promote all of the human rights contained in the UN human rights instruments which Australia is party to. These are the:

- International Covenant on Civil and Political Rights
- International Covenant on Economic, Social and Cultural Rights
- Convention against Torture and Other Cruel, Inhuman and Degrading Treatment and Punishment
- Convention in the Rights of the Child
- Convention on the Elimination of All Forms of Discrimination against Women
- Convention on the Elimination of All Forms of Racial Discrimination
- Convention on the Rights of Persons with a Disability
- Refugee Convention
- International Labor Organisation Discrimination (Employment) Convention ILO 111

We acknowledge that human rights can be protected in many different ways, in law, government policy and through government practice.

In the international arena, Australia has made a commitment to uphold and protect the rights and freedoms contained in these instruments. Any lack of such protection and subsequent human rights violations domestically place the Australian Government in breach of its obligations. Apart, of course, from the dangers this lack of protection poses for the Australian community, this also has a significantly negative effect on Australian's standing internationally, weakening our ability to advocate for human rights protections overseas, and particularly in our immediate region.

The protection of economic, social and cultural rights

The Uniting Church strongly supports the protection of economic, social and cultural rights. These rights are fundamental and essential for people to live a dignified life and for the building of an inclusive society.

Some of the most widespread human rights violations in Australia are those which infringe economic, social or cultural rights, including the continued socio-economic disadvantage experienced by Indigenous Australians and the prevalence of homelessness in our community. The legislative protection of rights contained in the International Covenant on Economic, Social and Cultural Rights would help to give effect to Australia's obligations under Article 2 (1) of the Covenant which states

> Each State Party to the present Covenant undertakes to take steps, individually and through international assistance and cooperation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures.

The exercise of civil and political rights is made very difficult without the enjoyment of social, economic and cultural rights. For example, it is often very difficult for people experiencing homelessness to exercise their right to vote. This relationship is recognised at the international level in, for instance, the Vienna Declaration which states that all human rights 'are universal, indivisible and interdependent and interrelated.'[2]

2 United Nations General Assembly (1993), *Vienna Declaration and programme of action*, World Conference on Human Rights, available: http://www.unhchr.ch/huridocda/huridoca.nsf/(Symbol)/A.CONF.157.23.En

Homelessness

People experiencing homelessness face violations of human dignity beyond a lack of access to safe and secure housing. They are also vulnerable, for example, to a denial of the right to a highest attainable standard of health, the right to social security, the right to an education, the right to liberty and security of person, the right to vote, the right to privacy and the right to freedom of movement and association.[3]

In 2008, Wesley Mission released a report *More than a bed: Sydney's homeless speak out* which detailed the findings of interviews with 206 homeless individuals from six homeless service centres in inner Sydney. It reported that

> social exclusion, lack of intimate/personal relationships, low sense of self (of having achieved something in life), sense of safety and security are among the life satisfaction indicators that are of pressing concern.[4]

Evidence from the UK suggests that a sound, procedural human rights approach by government to addressing social issues, including homelessness, leads to better quality services and long-term outcomes.[5] The *Changing Lives* report from the British Institute of Human Rights on the effect of the UK Human Rights Act notes, for example, an instance of homeless people being excluded form council consultation events because they did not have a stable address in the vicinity, impeding the right to take part in the conduct of public life (Article 25 of the ICCPR).

Limitations on rights

While some rights must never be derogated from, such as the right to life and to freedom from torture, there are many rights which are not absolute, and are instead required to be balanced so as to respect the rights of all people in our society.

For example, freedom of religion as provided for in Article 18 of the ICCPR should only be limited to measures which are 'necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others'.[6] Limitations of the rights contained in the ICCPR in time of public emergency should satisfy the criteria laid out for such restrictions in Article 4 of the Covenant.

We recommend that a Human Rights Act reflect the principles outlined in international human rights instruments in relation to limitations on specific rights.

3 Graeme Innes AM, Human Rights Commissioner, Human Rights and Equal Opportunity Commission (2007), *Can rights solve issues of poverty?*, speech to NCOSS Conference 'Perspectives on Poverty', 17 October, available: http://humanrights.gov.au/about/media/speeches/human_rights/2007/poverty20071017.html

4 Wesley Mission (2008), *More than a bed: Sydney's homeless speak out*, p.34, available: http://www.wesleymission.org.au/News/research/Homeless/report/Homelessness_wesleyreport_online.pdf

5 See the British Institute of Human Rights, *The Human Rights Act – Changing Lives* (2nd ed.), available: http://www.bihr.org.uk/sites/default/files/BIHR%20Changing%20Lives%20FINAL_0.pdf

6 ICCPR, Article 18 (3)

4 | ARE THESE HUMAN RIGHTS CURRENTLY SUFFICIENTLY PROTECTED AND PROMOTED?

The Uniting Church does not believe that the current protection of human rights in Australia, having been described at various times as "ad-hoc"[7] and "incomplete"[8], is sufficient. In Australia there is no federal law which sets out fundamental human rights and freedoms. Australia remains the only democratic nation in the world where this is the case.

Whilst it may be the case that Australia's record in the area of human rights is not as horrific as that of many other nations around the world, the existence and continuance of human rights violations in Australia is not something that should be tolerated.

The law and the Constitution

At the federal level human rights protections are severely lacking. There is a collection of legislation which protects some important elements of the human rights agreed to by nations at the international level, however this does not comprehensively or adequately provide the protection of rights and freedoms to which all members of the Australian community are entitled. These pieces of legislation include the *Racial Discrimination Act 1975 (Cth)* (which partially implements the International Convention on the Elimination of All Forms of Racial Discrimination) and the *Sex Discrimination Act 1984 (Cth)* (which partially implements the Convention on the Elimination of All Forms of Discrimination Against Women).

In the Australian Constitution, there are a few civil and political rights protected, including the right to vote, the right to trial by jury and an implied right to freedom of political communication (which has been interpreted by the High Court from the notions of representative and responsible government)[9].

Public policy

In public policy areas relevant to many rights, particularly to economic and social rights, numerous government programs are in place at both the state and federal level to indirectly address the human rights violations experienced by the most disadvantaged and at-risk communities in Australia. These cover areas such as employment, housing, education and housing assistance. In addition to the programs already in place, the election of the Labor Government in 2007 and the implementation of their additional commitments and policies such as the establishment of a Social Inclusion Unit within the Department of Prime Minster and Cabinet, the appointment of an expert committee to address homelessness and the development of a National Rental Affordability Scheme to address housing affordability and availability have created additional means for economic and social rights to be realised for more members of the Australian community. There still, however, remain significant gaps where the raft of Government programs are insufficient to adequately protect these rights.

The many gaps in the protection of rights contained in the ICESCR were identified in a submission prepared by the National Association of Community Legal Centres and the Human Rights Law Resource Centre to the United Nations Committee on Economic, Social and Cultural Rights on Australia's compliance with the ICESCR in 2008.[10] Some of the issues raised include:

- The significant disadvantage faced by women relative to men across many social indicators, including lower income levels and less participation in politics, public life and high level executive positions in business
- Many social security payments are pegged around or below the poverty line
- Between 2 and 3.5 million people live in poverty in Australia – and yet Australia does not have a comprehensive anti-poverty strategy
- A serious shortage in the availability of dental care and mental health services

The persistence of these violations of economic, social and cultural rights in a society otherwise as wealthy and prosperous as Australia is an indication that the resources of the Australian Government have not been allocated in a manner which prioritises the human rights of its most vulnerable and marginalised people.

7 Human Rights Law Resource Centre (2009), 'The National Human Rights Consultation – Engaging in the Debate', available: http://www.hrlrc.org.au/files/hrlrc-the-national-human-rights-consultation-engaging-in-the-debate.pdf, p.22

8 Australian Human Rights Commission (2009), 'Human rights – what do I need to know?', available: http://humanrights.gov.au/letstalkaboutrights/info/index.html

9 HRLRC (2009), op.cit., p.22-3

10 National Association of Community Legal Centres, Human Rights Law Resource Centre and Kingsford Legal Centre (2008), *Freedom Respect Equality Dignity: Action – NGO Submission to the UN Committee on Economic, Social and Cultural Rights,* available: http://hrlrc.org.au/files/MP9JMGYX55/Final.pdf

The power of the executive and legislative scrutiny

This lack of effective protection for many rights has left much in the safeguarding of human rights up to the goodwill of governments when enacting laws and policies. In recent years the Uniting Church has expressed concern about many instances where the increasing power of the executive to rush legislation through Parliament has lead to drastically inadequate timeframes for Parliamentary debate and for Parliamentary inquiries to conduct appropriate review.[11]

The problems with this system were evident, for example, in the enactment of the WorkChoices legislation which, owing to a Government majority in both houses of Parliament, was passed after a formal inquiry of just one week not allowing for sufficient scrutiny of legislation with such far-reaching effect on the minimum working conditions of millions of Australians.

Legislative scrutiny of proposed laws for human rights infringements does occur through Parliamentary committees. The Senate Standing Committee for the Scrutiny of Bills has the most direct role here, however the Senate and House of Representatives Standing Committees on Legal and Constitutional Affairs also conduct inquiries relevant to human rights, such as the recent House of Representatives committee inquiry into draft Disability (Access Premises – Buildings) Standards. However this process has been subject to increasingly limited timeframes, and has fundamental limitations. The parliamentary committee process occurs after the legislation has been drafted, policy objectives formulated, and often after politicians have publicly committed to the Bill's implementation.[12]

This has meant that the Australian Government can, and has, passed laws which contravene Australia's international human rights obligations and abuse the rights and freedoms of people in Australia with poor justification and inadeqaute processes for review. In recent years, the Uniting Church has on many occasions had cause to bring to the attention of church members, the general public, governments and the media, human rights violations occurring here in Australia, including

- the indefinite, mandatory detention of asylum seekers, including children, contravening the right to freedom from torture and other cruel treatment (Articles 7 and 10 of the ICCPR), the right to freedom from arbitrary detention (Article 9 of the ICCPR) and severely affecting the mental and physical health of already traumatised people (violating the right to the highest attainable standard of physical and mental health under Article 12 of the ICESCR)
- far-reaching anti-terrorism laws, which threatened freedom of association and speech, and raise serious concerns about the powers given to law enforcement authorities to detain people without charge and obtain control orders. We do not believe the threat posed by terrorism satisfies the criteria for a 'public emergency which threatens the life of the nation' permissible derogations from human rights protection in the time of public emergency under Article 4 of the ICCPR, and have instead called for a response which is proportionate to the terrorism threat

11 These concerns have been presented, for example, in submissions to the Senate Legal and Constitutional Affairs Committee's inquiries into the provisions of the *Anti-Terrorism (No. 2) Bill 2005* and into the *Classification (Publications, Films and Computer Games) Amendment (Terrorist Material) Bill 2007*, available: http://www.unitingjustice.org.au/images/pdfs/issues/human-rights/submissions/anti-terrorismsub_uca1105.pdf, and http://www.unitingjustice.org.au/images/pdfs/issues/human-rights/submissions/censorshiplegsub__uja0707.pdf respectively

12 The Hon John von Doussa QC, President, Human Rights and Equal Opportunities Commission, (2007), *Cross party briefing on a proposed Human Rights Act: Creating a culture of human rights compliance*, speech at Parliament House, Canberra, 28 February, available: http://www.humanrights.gov.au/about/media/speeches/speeches_president/2007/culture_of_hr_compliance.html

CASE STUDY: Northern Territory Emergency Response legislation

The Northern Territory Emergency Response (NT Intervention) legislation, which continues to have far-reaching consequences for the rights of Aboriginal and Torres Strait Islander peoples, was rushed through Parliament by the executive without needing to adhere to any processes for review and was enacted with scant regard for engagement with the people and communities affected.

The Uniting Church expressed its concerns about the swift passage of this tremendously important legislation in 2007:

> *This is some of the most significant legislation in the history of our nation, over riding aspects of the Race Discrimination and Native Title acts. It is with disbelief that we note that it merited only a one-day Senate hearing, which did not consult with some of the key stakeholders in the plan.*[13]

It was pointed out during the debate by Mr Daryl Melham MP, member for Banks in the then-ALP Opposition:

> *We are currently debating five bills. They come to 537 pages in total. There are also 196 pages of explanatory memoranda. With regard to the opposition's ability to scrutinize these bills, the public should appreciate that the shadow spokesperson was only given copies midmorning yesterday and they filtered through all the way into the evening. The ultraspeedy passage of these bills is clearly designed to avoid public scrutiny, not least from Aboriginal communities but also from other community bodies with legitimate concerns about the government's proposals.*[14]

The NT Intervention has illuminated the extent of the denial of human rights and access to basic support and services that Indigenous Australians have endured since colonisation. However, it is clear that numerous aspects of the Intervention continue this legacy of human rights violation.[15]

- the clear lack of evidence that many of these measures will address child abuse, combined with a substantial level of community opposition and lack of consent for the measures make it impossible to deem the policies 'special measures' under the ICERD and the Racial Discrimination Act 1975, thereby contravening the principle of non-discrimination under Article 2 of the ICCPR and ICESCR
- the compulsory acquisition of five year leases over Indigenous communities undermines the rights of traditional landowners and pays no respect to the importance of Aboriginal control over their lands
- the abolition of CDEP programs ignored the reality of employment opportunities in many remote Indigenous communities and affected the right of Indigenous people to employment
- the criteria for income management was based solely on race rather than on the basis of need, violating the principle that the right to social security be enjoyed without discrimination, including on the basis of race Article 9 of ICESCR, Article 5 of ICERD, Article 26 of CRoC and Articles 11(1)(e) and 14(2)(c) of CEDAW.

International human rights law requires that solutions be found to the problems of violence, abuse and poverty in Indigenous communities that protect all human rights. This is particularly pertinent given the Australian Government's commitments to the UN Declaration on the Rights of Indigenous Peoples. Effective and just policy should always stand up to human rights scrutiny. Policy cannot be sustainable in the long term if it does not safeguard the human rights of the population it is designed to benefit.

A more comprehensive human rights assessment of the Northern Territory Intervention, completed by UnitingJustice Australia, the justice and advocacy unit of the National Assembly of the Uniting Church, and which accompanied the submission of the Northern Synod of the Uniting Church to the Northern Territory Emergency Response Review, has been included as an appendix to this submission.

13 'Uniting Church condemns parliament processes on NT Indigenous Intervention', media release, 15 August 2007, available: http://www.unitingjustice.org.au/images/pdfs/issues/indigenous-justice/media/ntlegislationsenatereport_150807.pdf

14 House of Representatives Official Hansard, 7 August 2007, available: http://aph.gov.au/hansard/reps/dailys/dr070807.pdf, p.89

15 The submission of the Northern Synod of the Uniting Church in Australia to the Northern Territory Emergency Response Review articulates the Uniting Church's concerns in this area, and includes a human rights analysis of the measures, available: http://www.unitingjustice.org.au/images/pdfs/issues/indigenous-justice/submissions/nterreview_ns_0808.pdf

Avenues for redress

The current system of human rights protection has also left few options for those in the Australian community who feel their rights have been violated. The Australian Human Rights Commission (formerly HREOC), an independent body established to enhance the protection of human rights in Australia and report on Australia's human rights performance in relation to its international obligations, is able to offer recommendations to the Federal Government (as is the case for the United Nations' treaty-monitoring bodies). Australia's commitments at the United Nations, whilst conferring a certain degree of political and social pressure on the Government, are not legally binding in Australia unless they are incorporated into domestic law. It would be better if the Australian Parliament had direct mechanisms for ensuring its compliance with human rights obligations that Australia has embraced, as far as is possible.

Protection at the state level

At the state level, the protection of human rights differs in its comprehensiveness. Perhaps the most well-known protections for human rights at the state level are the Victorian *Charter of Human Rights and Responsibilities* and the *Human Rights Act* in place in the ACT. Whilst human rights acts or charters have been recommended in other states (by an independent Consultation Committee in Western Australia and the Tasmanian Law Reform Institute in Tasmania), the current protections in states and territories other than Victoria and the ACT are generally incomplete. Similarly to the situation at the Federal level, there are a number of statutory protections for various human rights in the states and territories, such as the *Anti-Discrimination Act 1998 (Tas), Equal Opportunity Act 1984 (SA)* and *Anti-Discrimination Act 1996 (NT)*, however these do not offer complete protection at the state level for all of the human rights Australia has committed to internationally.

Despite any advances at the state level in the protection of human rights, the importance of comprehensive human rights protection at the federal level cannot be overstated. State legislation does not apply to matters governed by federal law (for example, how employees of Centrelink or any other Federal Government service agency might interact with clients). Furthermore, protections at the federal level have the potential to lead the way to greater dialogue about human rights protection at the state level. Numerous commentaries on the implementation of human rights charters at the state level point to a current situation of "wait and see" about the result of the National Human Rights Consultation before furthering the states' human rights charter proceedings. Comprehensive human rights protection in Australia relies on complete protection at both the federal and state level.

5 | HOW COULD AUSTRALIA BETTER PROTECT AND PROMOTE HUMAN RIGHTS?

We believe that a federal legislative Australian Human Rights Act, implementing the Australian Government's international human rights obligations and accompanied by comprehensive and well-funded education and training for the community and government bureaucracy, is the best way to protect and promote human rights in Australia.[16]

As demonstrated in the previous section, Australia's current protections for human rights are inadequate. A Human Rights Act which clearly sets out, in one document, the rights and freedoms to which all people in Australia are entitled, would be an extremely useful tool in the prevention of human rights violations, in providing mechanisms for people to seek remedies when they feel their human rights have been abused, and in educating the public and all areas of government about human rights. We believe such an Act, and the government practices and public discussion which will occur around it, will help create a society in which the dignity of all people is upheld and protected and lead to increasing tolerance and respect in the Australian community for others, including those who are perceived to be "different" (because of their race, religion or culture).

The impact of a Human Rights Act would be heavily dependent on the democratic context within which it exists. In Australia, significant safeguards against abuses of power exist (we have an independent judiciary, and a democratically elected Parliament, for example), and in this context, a Human Rights Act would enhance these safeguards.

Whilst we believe that all of the human rights and freedoms contained in the UN treaties which Australia has signed should be reflected in Australian law, we also are aware that not all of these rights need to be protected and promoted domestically through the same mechanisms. As such, we believe that a Human Rights Act should protect the rights contained in the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, and the International Covenant on Economic, Social and Cultural Rights (referred to together as the International Bill of Rights).

The rights contained in other human rights instruments, such as the Convention in the Rights of the Child and the Convention on the Elimination of All Forms of Discrimination Against Women could be introduced at a later time after review of the effectiveness of a Human Rights Act that contains a more limited set of human rights. Elements of other human rights treaties should be protected in Australia through the various pieces of egislation which apply to them, such as through amending the *Racial Discrimination Act* to comprehensively and completely match Australia's obligations under the International Covenant on the Elimination of All Forms of Racial Discrimination, and amendment of the *Migration Act* to meet Australia's obligations under the Refugee Convention.

In submissions to the consultations on human rights protection in Victoria and Tasmania, the Justice and International Mission Unit in the Uniting Church Synod of Victoria and Tasmania expressed concern that a human rights charter may be used by state governments to retreat from existing human rights obligations. The Unit suggested that a charter list the human rights instruments that Australia is party to and state a commitment to upholding these instruments, otherwise the charter could be interpreted as a way of saying that the respective state government only recognises a more limited range of human rights. A Human Rights Act should not therefore be used to limit the application of international human rights obligations in particular areas.

One way to address this issue is for a federal Human Rights Act to include a similar clause to that contained in the Victoria *Charter of Human Rights and Responsibilities Act 2006.*

> Any right or freedom not included in this Charter must not be taken to be abrogated or limited only because the right or freedom is not included in this Charter or is only partly included.

Economic, social and cultural rights in a Human Rights Act

We strongly believe that economic, social and cultural rights, as outlined in the International Covenant on Economic, Social and Cultural Rights, must be included in Human Rights Act. Their inclusion is necessary, we believe, in order for an Act to have meaning in the community, to give effect to Australia's international obligations in this area, and to improve the lives of the most disadvantaged and vulnerable in our community.

16 The Assembly Standing Committee of the Uniting Church in Australia adopted a resolution in March 2008 supporting legislative human rights protection for Australia. This resolution is available at http://www.unitingjustice.org.au/images/pdfs/issues/human-rights/assembly-resolutions/11_asc_humanrightslegislation2008.pdf

It has been argued that the inclusion of such rights in a Human Rights Act will give courts the power to allocate resources, a fundamental policy-making decision which should be left to government. A Human Rights Act can be modelled, however, in a way which ensures courts do not have this power, and which gives courts a limited role in resource allocation, which is "appropriate and consistent with current practice".

Furthermore, the progressive realisation of economic, social and cultural rights is provided for in international law (as indicated in Article 2 (1) of the ICESCR outlined above). Were these rights to be included in a Human Rights Act, the Act could allow for their realisation over time. In 2006, the Human Rights Act for Australia campaign produced a model Human Rights Bill which sought to model Australia's obligations under a range of international human rights instruments, including the ICESCR. This Bill includes a clause which seeks to balance economic and social rights with the reality of limited government financial resources and the principle of progressive realisation:

> it is acknowledged that these human rights *[that is rights to education, work, an adequate standard of living, physical well-being and health and social security]* are subject to progressive realisation and that their realisation may be limited by the financial resources available to government. Accordingly, any proceeding under this Act that raises the application and operation of these human rights, a court must consider all the relevant circumstances of the particular case including –
>
> a) the nature of the benefit or detriment likely to accrue or be suffered by any person concerned; and
>
> b) the financial circumstances and estimated amount of expenditure required to be made by a public authority to act in a manner compatible with human rights

A Human Rights Act covering economic, social and cultural rights will provide disadvantaged and marginalised people in our community, and those who advocate on their behalf, with additional mechanisms to seek redress for violations of their rights. It also has the potential to make a real difference in the way public policy and practice is shaped by requiring the Government to consider social inclusion, deprivation and poverty issues from a holistic human rights approach, and allocate resources accordingly. We believe this will create public policy which puts the needs of the most excluded and disadvantaged first, and is geared towards dignity, equality and inclusion for those most in need.

Review and auditing mechanisms

A Human Rights Act must include a mechanism for review and change, which would enable any rights excluded from the Act to be considered again and any new issues which have emerged from the implementation of the Act to be addressed. A Human Rights Act should not be the end of changes to human rights protections in Australia, it should be the start of it.

A Human Rights Act should also include a requirement for government departments and agencies to take human rights into account when making their administrative decisions, and to regularly audit their operations against the Act.

Parliamentary scrutiny

A Human Rights Act should be modelled in a way so as to allow for a greater role for the Parliament and the parliamentary processes in recognising and preventing potential human rights problems in proposed and existing legislation. As discussed previously, the Uniting Church has on many occasions expressed its concern over the increasing power of the executive to rush legislation through the Parliament without adequate time for debate or review by parliamentary committees.

The Uniting Church is supportive of a requirement that all new legislation or changes to existing legislation to be accompanied by a Human Rights Impact Statement or similar. This statement should explain any effect of the legislation on human rights in Australia, and any negative effect must be explained and supported. This requirement would be similar to that contained in the Victorian *Charter of Human Rights and Responsibilities Act 2006* which requires that

> A member of Parliament who proposes to introduce a Bill into a House of Parliament must cause a statement of compatibility to be prepared in respect of that Bill[17]

This statement of compatibility is presented to the Parliament, and must state whether the Bill is compatible with human rights and, if so, how it is compatible and the nature and extent of an incompatibility.[18]

As discussed in Section 4, the current role of parliamentary committees and the parliamentary process in the recognition and remedy of human rights violation in legislation is limited. In a speech at the Australian Human Rights Commission on 17

17 Part 3, Division 1 Section 28 (1)

18 Part 3, Division 1 Sections 28 (2) and (3)

February 2009, Mr Murray Hunt, Legal Advisor to the UK Parliament's Joint Committee on Human Rights remarked that the UK Committee has the influence it does largely because its work is backed by the UK *Human Rights Act*. The Committee's criticisms and recommendations are responded to with considerable attention and in detail (albeit to varying degrees) because of the legal and moral authority that the *Human Rights Act* has afforded the Committee.[19]

In the UK, the Joint Committee on Human Rights scrutinises all Government Bills, selecting those with significant human rights implications for further examination, and undertakes broader thematic inquiries on human rights issues.[20] This Committee, which for example is currently conducting an inquiry into children's rights and examining a Health Bill, provides a viable example of how a parliamentary committee can operate to improve compliance with a human rights act.

We recommend that the current functioning and impact of the Senate Standing Committee for the Scrutiny of Bills in particular be reviewed. The role of this Committee could be altered to directly reference new Bills to the Human Rights Act, or a new Committee on Human Rights (similar in nature to that in the UK) could be established.

The rights of Indigenous Australians

While all rights apply generally to all people in the community, they have particular importance for Indigenous peoples, in light of the devastating levels of disadvantage faced by Indigenous peoples, in health, education, housing, employment opportunities and imprisonment rates.

The preambles of the ACT *Human Rights Act* and Victorian *Charter of Human Rights and Responsibilities* include specific reference to Indigenous peoples' rights. The Victorian Charter states that 'human rights have a special importance for the Aboriginal people of Victoria, as descendants of Australia's first people, with their diverse spiritual, social and cultural and economic relationship with their traditional lands and waters'. A similar clause should be included in the preamble of a national Human Rights Act, acknowledging the particular significance of the recognition of the rights of Australia's Aboriginal and Torres Strait Islander people.

Citizenship and human rights

A Human Rights Act would also be useful for Australian citizens, enabling them to understand the fundamental rights and freedoms protected in Australia, and their obligations to respect the rights of others in the Australian community.

In the Australian Citizenship Pledge, new citizens vow:

> …I pledge my loyalty to Australia and its people,
>
> Whose democratic beliefs I share,
>
> Whose rights and liberties I respect...[21]

It would be difficult for a prospective citizen to find out what these 'rights and liberties' are. The Australian Citizenship Test resource book *Becoming an Australian Citizen* does contain a list of 'Australian Values' which are 'important in modern Australia'. There is no indication in the booklet, however, of how these values relate to 'rights and liberties' and any legal protections of these rights. Furthermore the list is far from comprehensive, in relation to the rights already legally protected in Australia, or to the rights Australia is obliged to protect internationally.

We should be able to provide new citizens, and all migrants with a comprehensive list of all of the rights and freedoms protected in Australia. Doing so will help to promote and engrain human rights and a culture of respect for all people in the Australian community.

Rights of non-citizens

Human rights are not dependent on citizenship or nationality, and a person does not relinquish their rights when in a country of which they are not a citizen. As such, each nation has the responsibility to protect the rights of all people who reside within their jurisdiction. This obligation has been recognised by the United Nations Human Rights Council, which has stated that the rights in the ICCPR apply 'to everyone, irrespective of reciprocity, and irrespective of his or her nationality or statelessness'[22].

In 2003, the UN Special Rapporteur concluded in a report on the discrimination faced by non-citizens that

> In general, international human rights law requires the equal treatment of citizens and non-citizens. Exceptions to this principle may be made only if they are to serve a legitimate State objective and are proportional to achieve this objective. … There is, however, a disjuncture between the rights that international human

19 An audio recording of this speech is available at http://www.humanrights.gov.au/letstalkaboutrights/events/Hunt_2009.html

20 UK Joint Committee on Human Rights, http://www.parliament.uk/parliamentary_committees/joint_committee_on_human_rights.cfm

21 *Pledge of Commitment to Australia*, available: http://www.citizenship.gov.au/resources/ceremonies/citizenship/pledge/html

22 Office of the High Commissioner for Human Rights (27th session, 1986), *General Comment No. 15: The position of Aliens Under the Covenant*, available: http://www.unhchr.ch/tbs/doc.nsf/0/bc561aa81bc5d86ec12563ed004aaa1b?Opendocument

rights law guarantees to non-citizens and the realities non-citizens must face.[23]

Australia's policy of the mandatory detention of asylum seekers demonstrates that this 'disjuncture' is not confined to developing countries or those with poor human rights records.[24]

We believe that a Human Rights Act must apply to all people under Australia's jurisdiction.

Education, funding and resources

The enactment of more comprehensive legal protection for human rights will not be beneficial for the Australian community, however, if more funding and resources are not devoted to the promotion of human rights – in the community and in government departments and service agencies. Whilst we acknowledge the budgetary pressures caused by the global economic crisis, this should not deter governments from implementing measures which enhance the human rights protections of all Australians, and provide important social and economic benefits to all, but especially the already vulnerable and marginalised, in our community.

A 2006 report from the UK Department for Constitutional Affairs documented the problems created by myths and misunderstandings in relation to the UK *Human Rights Act*. These have been widely reported in the media and have influenced not only the view of the general public but also the way public servants have applied the Act where appropriate training has been absent.*25* This demonstrates the importance of accessible education and information for the general public about a human rights act, and appropriate training and guidance for public servants.

The Australian Human Rights Commission has extensive experience in the area of human rights education and monitoring, and as such we believe it appropriate for the Commission to be properly funded to undertake the task of educating the community about the Human Rights Act and monitoring compliance and assisting with complaints in relation to the Act.

However, the Commission should only be directed to perform this role if a substantive review of the existing role and demands on the Commission is undertaken.

In the Commission's 2007-08 Annual Report,[26] it was stated that the Commission had suffered a withdrawal of ongoing funding that had supported fourteen staff in the Complaints Handling Section, who had been engaged to handle the increase in complaints received after unfair dismissal laws were changed under the WorkChoices legislation. The wind back of the legislation by the current Government has not been accompanied by any corresponding reduction in complaints to the Commission and so it was decided by the then HREOC President that the funding cut would be shared across all operations of the Commission. This has resulted in a 14.5 percent funding cut in every Unit of the Commission, and has curtailed the work of each of these Units. The Human Rights Commission plays a pivotal role in the promotion and protection of human rights in Australia and because the Commission is uniquely placed to carry out the education programs needed for a Human Rights Act to make a real difference in the Australian community, it must be properly funded to carry out all of its roles in an effective and meaningful way.

In two submissions to the United Nations Committee on Economic, Social and Cultural Rights and the United Nations Human Rights Committee (both prepared in 2008 by the Human Rights Law Resource Centre, the National Association of Community Legal Centres and the Kingsford Legal Centre, and endorsed by a number of Australian NGOs), it was reported that Australia is yet to formulate any National Action Plan for human rights education, and that no formalised human rights education exists in any state or territory. Human rights education in schools tends to be implicit rather than explicit. Human rights education is, however, contained within civics and citizenship education nationally and various states and territories have subject material that teachers can use to provide human rights education. Further, the Curriculum Corporation, a partnership of all Australian Education Ministers, has produced high quality resources for human rights education in schools including recent material developed in collaboration with Amnesty International.

Within the Australian education system, however, human rights education itself is not a key learning area and there are few explicit key learning outcomes that have a link to human rights education. Thus, it is our view that human rights education in Australia falls short of Australia's obligations contained within Article 13(1) of the International Covenant on Economic, Social and Cultural Rights and Article 29(1) of the UN Convention on the Rights of the Child. Australian governments should include human rights education as a key learning area and ensure that human rights education is more explicitly integrated into school curriculum, while being sensitive to the problems of

23 UN Sub-Commission on the Promotion and Protection of Human Rights (2003), *Prevention Of Discrimination; The Rights Of Non-Citizens; Final Report Of The Special Rapporteur, Mr. David Weissbrodt* E/CN.4/Sub.2/2003/23, available at: http://www.unhcr.org/refworld/docid/3f46114c4.html

24 HRLRC (2009), op. cit., p.50

25 UK Department for Constitutional Affairs (2006), *Review of the Implementation of the Human Rights Act*, available: http://www.dca.gov.uk/peoples-rights/human-rights/pdf/full_review.pdf

26 Human Rights and Equal Opportunity Commission (2008), *Annual Report 2007-2008*, available: http://www.humanrights.gov.au/about/publications/annual_reports/2007_2008/index.html

the already crowded curriculum. The enhancement of human rights education in schools should also be investigated in the current development of the new national curriculum by the National Curriculum Board.

Government departments and service agencies also require greater assistance to understand their obligations in relation to human rights protections, and so adequate funding needs to be provided for education, implementation, monitoring and reporting of these responsibilities.

Freedom of religion

We believe it is important to note that we have observed some confusion about the relationship between the National Human Rights Consultation, anti-vilification laws and the *Australian Human Rights Commission's Freedom of Religion and Belief in the 21st Century* research project. In this context, we offer some comment on the Uniting Church's view on freedom of religion and belief, although we note this issue is explored in greater detail in our submission to the *Freedom of Religion and Belief in the 21st Century* research project.[27]

As part of our commitment to the upholding and protection of all human rights laid out in the United Nations' human rights instruments, the Uniting Church believes that freedom of religion and belief must be protected in a Human Rights Act, reflecting its protection at the international level. The right to freedom of thought, conscience and religion must always be bound together with the 'due recognition and respect for the rights and freedoms of others and of meeting the just requirements of human dignity and the general welfare of a democratic society.'[28]

Consistent with and in the context of the rights and freedoms described by the international human rights instruments, we believe that religious communities, groups and organisations should be accorded the freedoms necessary for the practice and maintenance of their faith.

The protection of freedom of religion and belief does not, however, end with the enactment of legal protections. We consider that a pro-active approach is needed to address what we believe has been increasing hostility towards Muslim Australians since the September 11 terrorist attacks in 2001. We believe that this antipathy has been fuelled in part by misinformation about Islam. In light of this, we welcome any community education initiatives aimed at promoting greater social cohesion and interfaith understanding, particularly as it relates to Muslims in Australia. Such programs could be run by the Federal Government, or an independent body such as the Australian Human Rights Commission.

Anti-vilification laws

The Uniting Church maintains that we can be strong and true to the Christian faith and, without compromise, engage in respectful and meaningful conversation with those of other faiths.

Anti-vilification laws are not, in our view, about stifling debate or difference but about addressing persecution and incitement to hatred and violence. Those who want to be free to voice their views, and claim the truth of their faith, have nothing to fear unless their intention is to incite persecution, hatred and violence. We also believe that religious communities, groups and organisations should be open to be challenged by society for any practices which may infringe upon the wellbeing of others and the general welfare of society.

In our view, the Victorian *Racial and Religious Tolerance Act* was introduced as a deterrent to those small number of people in our society who would seek to incite racial and religious hatred and as a remedy for those who have persecuted. The legislation allows for legitimate criticism and critique of religious beliefs or cultural practices in a way that does not incite hatred or violence, and is consistent with the international human rights principles in this area.

27 The Uniting Church's submission to the *Freedom of Religion and Belief in the 21st Century* research project is available at: http://www.unitingjustice.org.au/images/pdfs/issues/human-rights/submissions/uca_freedomofreligion_ahrc_submission0309.pdf

28 *Dignity in Humanity*, Uniting Church in Australia, paragraph 13(d) based on Article 29(b) *Universal Declaration of Human Rights,* op. cit.

6 | WHY DOES THE UNITING CHURCH SUPPORT A HUMAN RIGHTS ACT?

The Uniting Church believes that a Human Rights Act, operating within Australia's system of open and democratic government, will provide greater protection for fundamental rights and freedoms, promote dignity, address disadvantage and exclusion, and help to create a 'human rights culture' in Australia. Furthermore, it will serve to promote Australia's commitment to human rights in the Asia-Pacific and globally, and formalise the current Government's commitment to the United Nations.

We support a Human Rights Act particularly because of the protections it would provide to the most vulnerable, marginalised and disadvantaged in our community, who currently have few avenues for remedy when their rights are violated. These groups of people include the homeless, people with a disability, women, Indigenous Australians, prisoners, people with a mental illness, newly-arrived migrants, asylum seekers and the unemployed. These groups in our community are generally unable to have their experiences heard, and are often marginalised from the political process. This means that abuses of their human rights often go unnoticed or unaddressed, and leave these groups with little option for redress or for the realisation of their rights.

A Human Rights Act will improve the delivery of public services, ensuring greater accountability and transparency in the way public service agencies and departments interact with the public. The extent of this improvement will, however, depend very much on how public bodies are educated about their role in promoting human rights, are resourced and respond to their obligations and whether the public is educated about their rights and the Act.

Whilst the focus of much discussion around human rights acts or charters has been on the role of the courts in human rights protections, the Victorian, UK and ACT examples of human rights instruments show the effect a Human Rights Act could have before any cases reach the courts. A review of the Human Rights Act by the UK Department for Constitutional Affairs concluded that the UK Human Rights Act has

> had a positive and beneficial impact upon the relationship between the citizen and the State, by providing a framework for policy formulation which leads to better outcomes, and ensuring that the needs of all members of the UK's increasingly diverse population are appropriately considered both by those formulating policy and by those putting it into effect. The Act therefore directly contributes to greater personalisation and better public services.[29]

In Victoria, whilst the courts are a point for action once a breach of human rights has occurred, one of the main beneficial functions of the Victorian Charter of Rights is its preventative aspect, meaning that human rights principles are taken into account throughout government in the development of policy and practice and the drafting of laws so that violations of human rights do not occur in the first place.[30] In this way, the Charter has aimed to create a "dialogue on human rights between the community and government."[31] Similarly, the primary aim of the ACT *Human Rights Act 2004* is to establish a 'dialogue model' for the protection of human rights in the ACT which, although including a role for the courts, involves numerous preventative and review mechanisms before a case need be taken to the courts.[32]

These examples indicate that resort to the courts is not necessary for a federal Human Rights Act to have a substantial impact on the respect for and protection of human rights in Australia and that, in fact, a Human Rights Act if implemented properly should result in an eventual reduction in the number of cases needing to be taken to the courts.

We believe that the community in general currently has a limited understanding about what human rights are and how they are applicable in their lives. Together with appropriate education and resources, a Human Rights Act has the potential to build a culture of understanding and respect for human rights in the Australian community. Indeed, the long term aim of the ACT Human Rights Act is to build a 'human rights culture of tolerance and respect for human rights'. [33]

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29 UK Department for Constitutional Affairs (2006), op. cit., p. 35

30 Williams, G. (2006), 'The Victorian Charter of Human Rights and Responsibilities: Origins and Scope', *Melbourne University Law Review*, Vol. 30, p.903

31 Victorian Human Rights Consultation Committee (2005), *Rights, Responsibilities and Respect: The Report of the Human Rights Consultation Committee – Summary and Recommendations*, available: http://www.justice.vic.gov.au/wps/wcm/connect/DOJ+Internet/resources/file/eb98124a8a0e024/ReportSummary.htm

32 ACT Department of Justice and Community Safety (2006), Twelve-Month Review of the Human Rights Act 2004, available: http://www.jcs.act.gov.au/HumanRightsAct/Publications/twelve_month_review.pdf

33 ibid.

We believe it will also create a significant opportunity to build a culture of tolerance and understanding for those in our community who are perceived to be "different", because of differences in culture, religion, race, or many other elements of socio-economic identity.

The passing of legislation to protect the numerous human rights Australia has committed to uphold at the international level would also enact the recommendations of numerous United Nations treaty bodies. For example, in 2000 the Human Rights Committee expressed its concern that "there are still areas in which the domestic legal system does not provide an effective remedy to persons whose rights under the Covenant [the ICCPR] have been violated" and recommended that "the State party should take measures to give effect to all Covenant rights and freedoms and to ensure that all persons whose Covenant rights and freedoms have been violated have an effective remedy."[34]

Similarly, in September 2000, the Committee on Economic, Social and Cultural Rights observed "the Covenant [the ICESCR] continues to have no legal status at the federal and state level, thereby impeding the full recognition and applicability of its provisions."[35] Enacting legislation to give effect to these concerns and recommendations would send a clear signal to the international community about Australia's intentions to re-engage with the United Nations system in a more substantial way than it had done under the previous Federal Government.

34 UN Human Rights Committee (69th session, 2000), *Concluding observations of the Human Rights Committee: Australia*, A/55/40, paras.498-528

35 UN Committee on Economic, Social and Cultural Rights (23rd session, 2000), *Concluding observations of the Committee on Economic, Social and Cultural Rights: Australia*, E/C.12/1/Add.50

7 | ADDRESSING THE ARGUMENTS AGAINST A HUMAN RIGHTS ACT

In the lead up to the Federal Attorney-General's announcement of the National Human Rights Consultation, and in the time after it, several articles have appeared in the media espousing the dangers of a federal Human Rights Act. We would like to take this opportunity to refute several of these claims, and in doing so reiterate our support for a legislative Human Rights Act.

Will a Human Rights Act create a 'flood of litigation'?

We do not believe that a Human Rights Act would create a 'flood of litigation' as people rush to bring a claim under the act before the courts.

Studies of the UK Human Rights Act, Victorian Charter of Human Rights and Responsibilities and the ACT Human Rights Act have found no dramatic increase in the number of cases before the courts as a result of the introduction of legislative human rights protection.

In Victoria, the vast majority of issues are resolved without resort to the courts, as the *Charter of Human Rights and Responsibilities* is used to formulate policies which comply with human rights standards and for individuals and their advocates when raising issues with public authorities. For example, a young Iraqi refugee with a severe intellectual disability and autism was placed in unsuitable supported accommodation, where they were no Arabic-speaking workers and the man's ability to observe his religion and contact his family were significantly limited. This matter was raised by the young man's advocate with the relevant public authority and he was allowed to reside in his family home, where he wished to be.[36]

Will a Human Rights Act encourage 'judicial activism'?

The interpretation of a Human Rights Act would not involve a drastic departure from the role judges are already required to play. Judges are already required to make decisions on critical or contentious issues, within the confines of the law.

As is the case now with any existing laws, judges are required to apply an already-written document, not to write the law. In the case of a Human Rights Act, this law would be debated and passed by the democratically-elected Parliament.

Will a Human Rights Act undermine parliamentary sovereignty?

We believe that claims that a Human Rights Act would endanger parliamentary sovereignty (which in its strongest form renders that the actions of parliament cannot be challenged in any other forum and the power of the parliament to make laws is unconstrained[37]) are only applicable to constitutionally-entrenched human rights instruments, and have little standing in the debate about a legislative Human Rights Act.

Under a constitutional model, the courts can strike down laws that violate protected human rights. Australia has a strong attachment to the idea of parliamentary sovereignty, however this concept is tempered in Australia by some limits imposed by the Australian Constitution.[38] Nonetheless, this traditional has lead, in line with jurisdictions with a similar tradition (including the UK and New Zealand), to a rejection of the constitutional model of rights protection (as reflected in the terms of reference of this Consultation). This means that we must focus on the effect of a legislative form of human rights protection on parliamentary sovereignty.

If a federal Human Rights Act took a form similar to those in place in Victoria and the ACT, it would not give courts the power to invalidate or overturn laws. Rather, it will enable courts to interpret whether laws are consistent with the Act, and if an inconsistency is found bring it to the attention of the Parliament. The Parliament will have the final say on whether and how to act with this incompatibility.

A review conducted by the UK Department for Constitutional Affairs on the impact of the UK *Human Rights Act* found that 'arguments that the Human Rights Act has significantly altered the constitutional

36 case information taken from the Human Rights Law Resource Centre website: http://www.hrlrc.org.au/html/s02_article/article_view.asp?id=438&nav_cat_id=188&nav_top_id=70

37 Davis, M. and G. Williams (2002), 'A Statutory Bill of Rights for Australia? Lessons from the United Kingdom', *University of Queensland Law Journal*, Vol. 22, Iss. 1, p.6

38 HRLRC (2009), op. cit.

balance between Parliament, the Executive and the Judiciary have… been considerably exaggerated.'[39]

It has been argued in relation to this issue that a legislative Human Rights Act 'would not result in a dramatic realignment of judicial and legislative power… Any constraints would be primarily political rather than legal.'[40] A Human Rights Act would shed greater light through court proceedings on human rights violations occurring as a result of government policy and practice. As a result this will lead to greater conversation in the media, general public and the Parliament about the reasonability of such a violation. We do not believe that, in a democracy such as Australia, this is a negative thing.

A Human Rights Act could be drafted to include provisions for the Parliament to override the Act in specific circumstances. This clause could be similar to that contained in the Victorian *Charter of Human Rights and Responsibilities Act 2006*, which states

> Parliament may expressly declare in an Act that that Act or a provision of that Act or another Act or a provision of another Act has effect despite being incompatible with one or more of the human rights or despite anything else set out in this Charter.[41]

In the Victorian Charter, an override declaration must be accompanied by a statement from the member of Parliament who introduces the Bill which explains the exceptional circumstances that justify the inclusion of the override declaration.[42] Such a clause must be accompanied with a stringent set of checks and balances to ensure it is not used excessively to enact laws which have no regard for human rights.

Will a Human Rights Act quickly become outdated and irrelevant?

A Human Rights Act would be an act of the Federal Parliament, and would be subject to the normal parliamentary procedures for amending and adding to legislation. In this way, a legislative Human Rights Act is able to be more flexible and relevant than constitutionally-entrenched human rights protection which, given historical experiences with constitutional amendments, would likely be difficult to change.

Will a Human Rights Act lead to a focus on the rights of individuals at the expense of our responsibilities to others?

The Uniting Church believes that it is a misconception about human rights to claim that the concept elevates the status of the individual and diminishes the importance of community. In fact, the international human rights system developed in a context of international co-operation which sought to ensure the development of a global community. In this global community, nations would be accountable to each other for upholding the dignity of their citizens and relating to each other with respect for the purpose of building a peaceful world. In this way, human rights are essentially about how humans live with and relate to one another in a community.

In the international human rights system, most rights are not absolute and depend on the responsibility of everyone in society to respect one another's freedoms – to treat their neighbour as they themselves would wish to be treated. The freedom of expression, for example, is limited by privacy rights and obligations not to incite racial hatred or violence. More generally, Article 5 of the ICCPR limits the exercise of all rights contained in the Covenant by reference to the rights and freedoms of others.

The Uniting Church's support for a Human Rights Act is not based on any idea about the rights of individuals separate from our responsibilities, but rather how we, as individuals and as a society, develop systems and structures that support our responsibilities to care for the most marginalised in our society. In this endeavour, the legal protection and promotion of human rights is one important tool at our disposal.

39 UK Department for Constitutional Affairs (2006), op. cit., p.4

40 Davis, M. and G. Williams (2002), op. cit., p.16-17

41 Section 31 (1)

42 Section 31 (3)

APPENDIX 1 | THE NORTHERN TERRITORY EMERGENCY RESPONSE: A HUMAN RIGHTS ASSESSMENT

prepared by UnitingJustice Australia
National Assembly, Uniting Church in Australia

attachment to the submission from the Northern Synod of the Uniting Church in Australia to the Northern Territory Emergency Response Review, August 2008

This briefing paper discusses the Northern Territory Emergency Response in relation to Australia's international human rights commitments and the Commonwealth Racial Discrimination Act (RDA).

The phrase 'Northern Territory Emergency Response' refers in practice to several individual measures contained in three different pieces of Commonwealth legislation passed through federal parliament in August 2007:

- the *Northern Territory National Emergency Response Act 2007*
- the *Social Security and Other Legislation Amendment (Welfare Payment Reform Bill) 2007*
- the *Families, Community Services and Indigenous Affairs and Other Legislation Amendment (Northern Territory National Emergency Response and Other Measures) Bill 2007*

The Uniting Church and justice for Indigenous Australians

The Uniting Church hopes for a nation which acknowledges the rights of Indigenous Australians as the first people of this land, respects the land on which we live, and is committed to empowering Indigenous people to take control of their own lives and destinies. Justice for Indigenous people will depend on policies which ensure appropriate resourcing in the areas of health, housing, education, employment and welfare support and the Uniting Church is committed to public advocacy which press for these policies.

At its 7th National Assembly, the Uniting Church formally entered into a relationship of Covenant with its Indigenous members, recognising and repenting for the Church's complicity in the injustices perpetrated on Australia's Indigenous community, and pledging to move forward with a shared future:

> It is our desire to work in solidarity with the Uniting Aboriginal and Islander Christian Congress for the advancement of God's kingdom of justice and righteousness in this land, and we reaffirm the commitment made at the 1985 Assembly to do so. We want to bring discrimination to an end, so that your people are no longer gaoled in disproportionate numbers, and so that equal housing, health, education and employment opportunities are available for your people as for ours. To that end we commit ourselves to work with you towards national and state policy changes. We commit ourselves to build understanding between your people and ours in every locality, and to build relationships which respect the right of your people to self determination in the church and in the wider society.[1]

The Uniting Church and human rights

At its inception in 1977, the Uniting Church affirmed its commitment to human rights in its *Statement to the Nation*:

> We affirm our eagerness to uphold basic Christian values and principles, such as the importance of every human being, the need for integrity in public life, the proclamation of truth and justice, the rights for each citizen to participate in decision-making in the community, religious liberty and personal dignity, and a concern for the welfare of the whole human race…
>
> We pledge ourselves to seek the correction of injustices wherever they occur. We will work for the eradication of poverty and racism within our society and beyond. We affirm the rights of all people to equal educational opportunities, adequate health care, freedom of speech, employment or dignity in unemployment if work is not available. We will oppose all forms of discrimination which infringe basic rights and freedoms.

1 Uniting Church in Australia (1994), *Covenanting Statement*

The Church's commitment to human rights is born from the belief that every person is precious and entitled to live with dignity because they are God's children, and that each person's life and rights need to be protected or the human community (and its reflection of God) and all people are diminished.

In 2006, the National Assembly of the Uniting Church in Australia adopted its statement *Dignity in Humanity: Recognising Christ in Every Person*. This statement committed the Church to a continuance of its commitment to human rights and, in particular, to holding the Australian Government accountable to its international human rights obligations, stating:

> We pledge to assess current and future national public policy and practice against international human rights instruments, keeping in mind Christ's call and example to work for justice for the oppressed and vulnerable.

It is therefore crucial that the Church address the Northern Territory Emergency Response in relation to its impact on the rights of Indigenous Australians and advocate for improvements which better meet the Australian Government's international human rights commitments.

Racial equality and non-discrimination

Non-discrimination and equality before the law are among the most basic principles in the protection of human rights. These principles create an obligation on the Australian Government to ensure that every person is able to exercise their rights without discrimination. The Convention on the Rights of the Child (CRoC), for example, makes it clear that all human rights as they relate to children must be applied in a non-discriminatory fashion.[2]

One of the most important characteristics of the international human rights system is the acknowledgement that human rights are overlapping, inter-connected and indivisible. This means that all rights are of equal importance and there is no priority in the protection of rights. Governments cannot, therefore, act to protect one right whilst breaching another. In the context of the Northern Territory Emergency Response, it is not justifiable to violate the non-discriminatory principles of the international human rights system in order to further other rights (such as the rights of children and protection from violence). Human rights law requires that solutions be found to the problems of violence and poverty in Indigenous communities that protect all human rights.[3]

In Australia, there is no constitutional protection against discrimination, except on the narrow grounds of state residency. The most significant protections against racial discrimination are statutory, and contained within the Commonwealth Racial Discrimination Act of 1975. This Act prohibits 'any act involving a distinction, exclusion, restriction, or preference based on race, colour, descent or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of any human right or fundamental freedom'. The Act also makes it an offence to discriminate in many specific areas, such as employment, housing and the provision of goods and services.[4]

'Special measures': exemption from non-discrimination protections

In international law, the right to non-discrimination has attained a status of *jus cogens*, which means that under no circumstances can a government justify the introduction of discriminatory policy. Therefore, it is never permissible to claim to 'balance' a discriminatory measure to further the enjoyment of a specific human right.[5]

However, there does exist the concept of 'special measures', which allows for exemption from the prohibition of racial discrimination. 'Special measures' enables preferential treatment for a group, defined by race, in order to make possible the full enjoyment of their human rights. The International Convention on the Elimination of All Forms of Racial Discrimination (ICERD) states that these measures will not be deemed to be racial discrimination.

The criteria for a 'special measure' are set out in Article 1(4) of the ICERD. 'Special measures' will:

- provide a benefit to some or all members of a group based on race;
- have the sole purpose of securing the advancement of the group so they can enjoy human rights and fundamental freedoms equally with others;
- are necessary for the group to achieve that purpose; and
- stop once their purpose has been achieved and do not set up separate rights permanently for different racial groups.

2 HREOC Aboriginal and Torres Strait Islander Commissioner (2008a), *Social Justice Report 2007*, available: http://hreoc.gov.au/social_justice/sj_report/sjreport07/pdf/sjr_2007.pdf, p.239

3 ibid, p.238

4 HREOC (2008b), *An International Comparison of the Racial Discrimination Act 1975*, Background Paper No. 1, p.7

5 HREOC Aboriginal and Torres Strait Islander Commissioner (2008a), op. cit., p.239

In order for the Northern Territory Emergency Response to be deemed 'special measures', it needs to be demonstrated that these measures:

- will clearly benefit Indigenous people by materially tackling the problem of child abuse;
- have the sole purpose of advancing Indigenous people and tackling child abuse;
- are absolutely necessary to ensure the advancement of Indigenous people and protect Indigenous children
- will cease once their purpose has been achieved.[6]

Government position and justification of measures

The Government has consistently emphasised that the NT Emergency Response measures are consistent with Australia's human rights obligations and are overwhelmingly concerned with the safety of Indigenous children in the Northern Territory. The Explanatory Memorandum for the *Northern Territory National Emergency Response Bill 2007* claims that the Emergency Response measures will 'protect children and implement Australia's obligations under human rights treaties.' They have also maintained that urgent action was needed to address the problem of child abuse in Indigenous communities, characterising the situation as an 'emergency'. The term 'emergency' has been used to justify the breach of racial discrimination protections and as justification for the 'balance' that has allegedly been created between measures aimed at protecting children and ensuring they are non-discriminatory.

More specifically, the Government deemed the Emergency Response to constitute 'special measures', that is, they needed to be discriminatory in their intent and application in order to advance the rights of Indigenous people. The legislation was also exempted from the provisions of the RDA. Although this may seem a redundant measure (i.e. 'special measures' policies are permitted to be discriminatory and therefore RDA protections would be irrelevant), it was in fact needed as the RDA does not allow measures that involve the management of Aboriginal property by others without consent to qualify as 'special measures' under any circumstances. The Government justified this exemption from the RDA as ensuring certainty of process. [7]

6 ACOSS (2007), *Submission to the Senate Legal and Constitutional Affairs Committee on: Social Security and Other legislation (Welfare Payment Reform) Bill; Northern Territory National Emergency Response Bill 2007; and Family and Community Services and Indigenous Affairs and Other legislation (Northern Territory National Emergency Response and Other Measures) Bill 2007,* available: http://acoss.org.au/upload/publications/submissions/3015__Senate%20Legal%20Affairs%20Committee%202007.pdf

7 HREOC Aboriginal and Torres Strait Islander Commissioner (2008a), op. cit., p259

Evaluation

At the introduction of the Emergency Response, the Government stated that the measures were introduced to protect the rights of Indigenous children in the Northern Territory. Indeed, was the Government not to take action to address violence and abuse in Indigenous communities, they would be in breach of their human rights obligations under the Convention on the Rights of the Child (CRoC), the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) and ICERD.[8]

The publicity around the Emergency Response measures has illuminated the extent of the denial of human rights and access to basic support and services that Indigenous Australians have endured since colonisation. The renewed attention that has been cast on violence, abuse and poverty in Indigenous communities must be welcomed. However, it is clear that several of the measures included in the Emergency Response have a significant number of actual and potential negative impacts on the rights of Indigenous people, and many have minimal or no relationship to the protection of children from abuse and violence.[9]

'Special measures' and an 'emergency situation'

As previously discussed, it is clearly established in international law that protections against racial discrimination cannot be overridden by efforts to secure other rights. The CRoC also makes it clear that the protection of children's human rights most be ensured in a non-discriminatory manner. Whilst the situation in the Northern Territory certainly required urgent action, it does not meet the criteria laid out in the International Covenant on Civil and Political Rights for an emergency situation where limits on the protection of rights can be justified.[10] Claiming, therefore, that policies to address child abuse and violence in Northern Territory communities cannot be implemented in a non-discriminatory manner lacks credibility and cannot be justified.

The clear lack of evidence that many of these measures will address child abuse, combined with a substantial level of community opposition and lack of

8 ibid, p249

9 ibid., p.260

10 Article 4 of the ICCPR sets out these strict criteria for circumstances where a government may derogate from its human rights obligations – the situation involves a public emergency which threatens the life of the nation; the emergency is officially proclaimed; the restrictions on rights imposed are strictly required by the situation; the restrictions are not inconsistent with other provisions in international law; they may not involve discrimination solely on the basis of race; they must not breach certain provisions of the Covenant; and the intention to enact emergency measures must be communicated to all other member of the treaty.

consent for the measures make it impossible to deem the policies 'special measures'.

For measures that may negatively impact on human rights to be deemed 'special measures' they must be conducted in consultation with, and generally with the consent of, the group involved. If this is not the case, the measures cannot be reasonably said to be for the advancement of the target group. Doing so indicates a paternalism that considers the viewpoint of the target group on their wellbeing as irrelevant.

In addition, it is a very dangerous precedent to waive the Racial Discrimination Act, particularly with such feeble pretexts. It also potentially creates two sets of standards (one for Indigenous Australians and one for non-Indigenous Australians). This type of system will not assist whatsoever in furthering racial equality in Australia.

Land tenure and the permit system

The Emergency Response legislation abolished the permit system[11] and implemented compulsory five year government leases over Indigenous communities.

The compulsory acquisition of five year leases over Indigenous communities undermines the rights of traditional landowners and pays no respect to the importance of Aboriginal control over their lands. This approach would not have been required had policies been decided upon and implemented with the involvement of the Indigenous communities themselves. It disempowers communities and the existing governance arrangements and institutions which have been put in place with extensive community involvement and increases the difficulty in building trust and cooperative relationships between communities and government.

The Little Children are Sacred report made no reference to land tenure or permits. The Australian Government did not supply any justification for linking the permit system or current land tenure arrangements to child abuse and violence in Indigenous communities[12], instead stating that the new leasing provisions are required to secure access to townships and security over land and assets to allow the Government to build and repair buildings and infrastructure.[13] The permit system did not impede service delivery in communities, prevent media scrutiny or stop economic development from taking place. Rather, police in the Northern Territory have acknowledged that the permit system assisted them and the community to enforce alcohol bans and regulate visitors[14] and several submissions to the Inquiry into the provisions of Families, Housing, Community Services and Indigenous Affairs and Other Legislation Amendment (Emergency Response Consolidation) Bill 2008 noted the importance of the permit system in assisting Indigenous communities to manage their own affairs and maintain their culture.[15] The repeal of the changes to the permit system in the *Families, Housing, Community Services and Indigenous Affairs and Other Legislation Amendment (Emergency Response Consolidation) Bill 2008* (currently before the Senate) is therefore a welcome change to the Emergency Response measures.

The Community Development Employment Projects (CDEP) program

The reinstatement of Community Development Employment Projects (CDEP) program was an important step in reforming the grossly inappropriate Emergency Response measures. CDEP programs allow important community control over the types of activities that these programs perform, with many providing essential services extremely valuable to Indigenous communities. It is essential that the Government's current process of reform for the Indigenous Employment Program and the CDEP program is informed by the feedback it has received from those involved in the projects in the community.

The decision to abolish CDEP programs ignored the reality of employment opportunities in many remote Indigenous communities. In 2006, the Local Government Association of the Northern Territory found that there were only 2 955 'real' jobs across 52 remote communities in the Northern Territory, allocated across a population of 37 000, of which 2 722 were non-Indigenous. If those formerly employed on CDEP programs were unable to find other work, their incomes may have been significantly reduced and their ability to provide an adequate standard of living for themselves and their families threatened. It is also well known that unemployment

11 Legislation to reinstate the permit system is being passed through Parliament in the Families, Housing, Community Services and Indigenous Affairs and Other Legislation Amendment (Emergency Response Consolidation) Bill 2008. As at 1 August 2008 this Bill was still before the Senate.

12 ANTaR (2007), *Submission to the Senate Legal and Constitutional Affairs Committee Inquiry into the Appropriation (Northern Territory National Emergency Response) Bill (No.2) 2007-2008*, available: http://www.antar.org.au/images/stories/PDFs/sub60.pdf

13 HREOC Aboriginal and Torres Strait Islander Commissioner (2008a), op. cit., p.244

14 The Greens (2007), *The Australian Greens on the NT Intervention*, available: http://greens.org.au/content-data/473d47c43074c/NT%20Intervention%20Policy.pdf

15 Senate Community Affairs Committee (2008), *Report of the Inquiry into the provisions of Families, Housing, Community Services and Indigenous Affairs and Other Legislation Amendment (Emergency Response Consolidation) Bill 2008*, available: http://www.aph.gov.au/senate/committee/clac_ctte/NT_emerg_response_08/report/c01.pdf, p.5

places additional stress on families and it is possible that this may increase the risk of family violence in Indigenous communities.

There is no evidence of a link between the existence of CDEP and of child abuse and violence in Indigenous communities. What was clear is that the abolition of the CDEP would increase government control over the incomes of Indigenous people and will do little to improve the employment opportunities in Indigenous communities. CDEP participants, because they receive a wage, would not be subject to income management under the Emergency Response. Moving these workers off the CDEP and requiring them to register for Newstart allowances and partake in Work for the Dole in the instance that they are unable to find employment means their payments will be subject to income management.[16]

Income management

The *Social Security and other Legislation Amendment (Welfare Payment Reform) Act 2007* provided for the control of welfare payments of Indigenous peoples in the prescribed Northern Territory communities, initially for 12 months and with the possibility of an extension for up to five years. According to the Act, the purpose of this measure is to:

- Reduce the amount of incomes spent on substance abuse and gambling
- Ensure that welfare payments are spent on priority needs of adults and children
- Promote socially responsible behaviour, particularly in relation to the care and education of children.

The right to social security is set out in Article 9 of ICESCR, Article 5 of ICERD, Article 26 of CRoC and Articles 11(1)(e) and 14(2)(c) of CEDAW. One key feature of these articles is the principle that the right to social security is to be enjoyed without discrimination, including on the basis of race. Quarantining the income payments of all Indigenous people in the prescribed communities is a racially-based, and therefore discriminatory, measure. The blanket application of income management in the 73 prescribed communities in the Northern Territory means that individuals who are not responsible for the care of children, do not gamble and do not abuse alcohol or other substances will have their income managed. The criteria for income management are therefore based solely on race rather than on the basis of need.

The quarantining of income payments is a blunt, ineffective instrument for addressing the complex social problems in Indigenous communities. There is no evidence to suggest that making school attendance a condition of income support will improve attendance. In cases of truancy, parents want their children to attend schooling, but they are often powerless to achieve this without considerable support from schools, their family and other community services.[17]

Making improved school attendance an objective of income management presupposes that children in the Northern Territory could assess educational opportunities if they and their families wished to do so. The Combined Aboriginal Organisations of the Northern Territory reported[18], in response to the Emergency Response legislation, on a severe lack of educational services in the Northern Territory. 94 percent of Indigenous communities in the Northern Territory have no preschool, 56 percent have no secondary school and 27 percent have a local primary school that is more than 50km away. The Combined Aboriginal Organisations of the Northern Territory also details a lack of adequately trained, culturally-aware teachers and a high turnover of teachers in communities.

It has also been argued that quarantining welfare payments may increase the risk of violence against women and children, threatening their rights to live free of the threat of violence and abuse. In those communities where the mother is the person responsible for the children, the father may blame the mother for the quarantining of payments. In addition, many Indigenous families have care arrangements where other family members have responsibility for the children. Yet if those children fail to attend school, the payments of the mother and father will be quarantined. This may also expose a range of women to violence.

Income quarantining does not encourage financial responsibility, and may in fact lead to greater dependency on others to manage budgets.[19] More constructive and beneficial policy would involve programs to improve financial literacy and the capacity of Indigenous people to budget their welfare payments.

Alcohol bans

Alcohol restrictions with the full support and consent of communities may qualify as 'special measures' under the RDA. This type of policy should, however, be only the first step. A sustained policy response which properly establishes and funds programs to

16 HREOC Aboriginal and Torres Strait Islander Commissioner (2008a), op. cit., p.280

17 ACOSS (2007), op. cit.

18 Combined Aboriginal Organisations of the Northern Territory (2007), *Submission to the Inquiry into the Northern Territory National Emergency Response Bill 2007 and Related Bills*, available: http://www.aph.gov.au/senate/committee/legcon_ctte/completed_inquiries/2004-07/nt_emergency/submissions/sub125.pdf, p.18

19 ACOSS (2007), op. cit.

address the underlying factors that contribute to alcohol abuse is needed, including increased funding for treatment and rehabilitation services (such as counselling and health facilities).

Consultation with Indigenous people

Successful consultation with Indigenous Australians must be the cornerstone of any legitimate policy to address child abuse, violence and disadvantage in Indigenous communities. This did not occur to any degree prior to the Northern Territory Emergency Response.

Without consulting with communities, the Government cannot fully understand the needs and circumstances of Indigenous Australians and cannot expand successful programs that have been devised and run by Indigenous communities.

In addition, any measures that are taken with the neither the consultation nor consent of those affected cannot be legitimately labelled 'special measures'. This principle is particularly important in relation to the rights of Indigenous people. The UN Committee on the Elimination of Racial Discrimination has called on parties to ICERD to:

> ensure that members of indigenous peoples have equal rights in respect of effective participation in public life, and that no decisions directly relating to their rights and interests are taken without their informed consent

The approach taken by the Government distanced and disempowered Indigenous communities from the policy process.

Conclusion

Placing the fundamental problem of human rights violations at the heart of the Northern Territory Emergency Response will continue to hinder the building of trustful and productive partnerships between the Government and Indigenous communities. Failing to consult and engage with Indigenous communities has wasted a crucial opportunity on an issue where there is such potential for common ground and collaboration.

Effective and just policy should always stand up to human rights scrutiny. Policy cannot be sustainable in the long tern if it does not safeguard the human rights of the population it is designed to protect and benefit. Effective child abuse prevention and child protection occurs when local community agencies, police and child protection staff work in a collaborative environment.