SUBMISSION TO THE CONSULTATION COMMITTEE FOR A PROPOSED WA HUMAN RIGHTS ACT

1. Introduction

1.1 Australian Lawyers for Human Rights (**ALHR**) is a national network of Australian lawyers active in practising and promoting awareness of human rights in Australia. ALHR's membership of over 1,200 people is national, with active national and State-based committees.

1.2 Through training, information, submissions and networking, ALHR promotes the practice of human rights law in Australia, and works with Australian and international human rights organisations to increase awareness of human rights in Australia. ALHR has extensive experience and expertise in the principles and practice of international law and human rights in Australia.

1.3 ALHR supports the Western Australian government's initiative of establishing the Consultation Committee to consider whether the protection of human rights in Western Australia (WA) can be improved. In short, ALHR's view is that it can and should be, and that the appropriate means of doing so is through the enactment of a Human Rights Act.

1.4 ALHR has similarly supported the enactment of a bill of rights in NSW, ACT, Victoria and Tasmania in submissions to the inquiries conducted in those jurisdictions. This submission has been compiled by the WA Committee of ALHR with the input and ultimate approval of the National Committee.

2. Submission highlights

2.1 The major highlights of the ALHR submission are

(a) That it supports the legislative protection of human rights in line with the ACT *Human Rights Act* 2004 and the Victorian *Charter of Human Rights and Responsibilities Act* 2006;

(b) That economic, social and cultural rights should be included in addition to civil and political rights and that great caution should be exercised in attempting to adapt well established rights to WA conditions;

(c) That if economic, social and cultural rights are to be non-justiciable then they may be used as a benchmark for the review of the acts of government;

(d) That if legislation is to state that it will operate incompatibly with human rights then this should only occur in exceptional circumstances;

(e) That the interpretative provision at proposed s.34(3) is not different to the common law position that ambiguous statutes should be interpreted compatibly with fundamental rights and it should be strengthened to be consistent with s.32 of the Victorian Charter and s. 30 of the ACT Human Rights Act;

(f) That the reasonable limits clause is inappropriately placed in s.34(4) and should be included in Part 2 of the Draft Bill;

(g) That the individual complaints of a breach of human rights should be able to be made to the State Administrative Tribunal which may order a remedy for breach including, in appropriate circumstances, the award of fair compensation; and

(h) That the Equal Opportunity Commission or similar body be given appropriate powers to promote the respect and protection of human rights, including public education and intervention in court proceedings.

3. Approach to submissions

3.1 In preparing these submissions, ALHR has had regard to:

(a) the document entitled "Human Rights in Western Australia: Community Discussion Paper" (Discussion Paper) released by the Consultation Committee;

(b) the draft *Human Rights Bill 2007* (WA) (Draft Bill) released by the WA government; and

(c) the document dated May 2007 and entitled "A WA Human Rights Act: Statement of Intent by the Western Australian Government" (Statement of Intent).

3.2 In the Discussion Paper, the Consultation Committee has raised eight key questions in relation to a Human Rights Act for WA. ALHR's submissions generally follow the order of those questions.

3.3 As a preliminary point, ALHR notes that while some of the submissions in this document propose amendments to the Draft Bill, or adopt a position that goes beyond that achieved in the Draft Bill, these should not be taken to detract from ALHR's general support for a Human Rights Act for WA that promotes and protects human rights in WA in some way, and if the Consultation Committee does not accept the suggestions of ALHR in these submissions, then ALHR would still prefer to see the Draft Bill enacted in its current form than for no legislation to be implemented.

4. Should WA have a Human Rights Act?

4.1 Does the law need to be changed?

4.2 There are some laws that operate to support the exercise and enjoyment of human rights in Western Australia, and such protection is part of the purpose of these laws.[1] The Discussion Paper has noted some of these laws. ALHR is aware of these laws and acknowledges their important role and, for the sake of completeness and to demonstrate ALHR's submission has been developed in complete awareness of these protections, we provide a brief summary of these laws.

(a) Commonwealth Constitution - specific rights

The Commonwealth Constitution contains limited specified rights, which include matters such as compensation for property acquisition (section 51xxxi), jury trials for Commonwealth indictable offences (section 80), freedom of religion (section 116), guarantees for independent federal judiciary (sections 1, 61 and 71), and the right to vote (section 41).

(b) Commonwealth Constitution - implied rights

There are further implied rights in the Constitution, including additional guarantees of an independent judiciary[2] and limited freedom of speech on political matters[3].

(c) Commonwealth statutory law

There are a range of Commonwealth laws addressing specific human rights and discrimination issues, including the *Racial Discrimination Act 1975*, *Sex Discrimination Act 1984*, *Disability Discrimination Act 1992* and the *Age Discrimination Act 2004*. There is also a range of other legislation which deals with particular issues such as the *Human Rights (Sexual Conduct) Act 1984*, *Privacy Act 1988*, *Crimes (Torture) Act 1988* and the *Freedom of Information Act 1982*. In addition to these, there is more general legislation which assists in the enjoyment of some human rights, such as the Commonwealth's various criminal and evidence laws. The Commonwealth's system and provision of various assistance in welfare and medical payments also goes toward the enjoyment of particular human rights in Western Australia.

(d) Western Australia – Constitution

The WA Constitution provides limited assistance to individuals' human rights. The most notable protection relates to assuring an independent judiciary.[4]

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[1] M Gleeson, *A Core Value*, October 2006, paper presented to Annual Colloquium Of Judicial Conference Of Australia.
[2] Eg. *Kable v. DPP (NSW)* [1996] HCA 24; *Wilson v Minister for Aboriginal & Torres Strait Islander Affairs* [1996] HCA 18; *Forge v Australian Securities and Investments Commission* [2006] HCA 44.
[3] *David Russell Lange v Australian Broadcasting Corp* [1997] HCA 25; *Theophanous v The Herald & Weekly Times Ltd* [1994] HCA 46; *Nationwide News Pty Ltd v Wills* [1992] HCA 46.
[4] Sections 54, 55 & 58.

(e) **Western Australia - Statutes**

Some of the areas addressed in Commonwealth statutes are also addressed by WA laws, which provide additional support to the enjoyment of various human rights. These laws include specific statutes like the *Equal Opportunity Act 1984* and *Freedom of Information Act 1992*, as well as more general laws like those statutes in relation to crime and evidence (both procedural as well as substantive law). Additionally, more general laws and regulation of matters such as education and, occupational health and safety assist in the enjoyment of various human rights by people in WA.

(f) **Common law**

The common law provides various protections including maintenance of an independent judiciary,[5] protection from impecunious defendants having to face serious charges unrepresented,[6] natural justice, freedom from self-incrimination, onus and standard of proof and freedom from torture (or at least a prohibition on torture-gained evidence).

4.3 **Should WA have a Human Rights Act?**

4.4 The human rights protections described above are piecemeal and limited in nature. Many of the rights set out in the various international human rights instruments to which Australia is a party (including in particular the *International Covenant on Civil and Political Rights* (**ICCPR**)) are not clearly protected. For example, the right to peaceful assembly (which is set out in ICCPR and the Draft Bill) currently has only piecemeal protection from a patchwork of laws, and the level of protection of this right changes, depending on the context.

4.5 This situation has been noted more generally in Australia, with the "Concluding Observations" of the UN Human Rights Committee on Australia's third and fourth reports under the ICCPR noting "concern...that in the absence of a constitutional Bill of Rights, or a constitutional provision giving effect to the [ICCPR], there remains lacunae in the protection of [ICCPR] rights in the Australian legal system". There are still significant areas in which the domestic legal system does not provide an effective remedy to persons whose rights under the [ICCPR] have been violated.

4.6 With the exception of the few human rights protected in the Commonwealth and Western Australian constitutions, all the protections described above can simply be changed by an act of Parliament. ALHR's view is that human rights should be immune, as far as possible, from such legislative intervention. This view is discussed in more detail below in sections 6.1 to **Error! Reference source not found.**.

[5] *Ebner v Official Trustee in Bankruptcy* [2000] HCA 63; *Fingleton v The Queen* [2005] HCA 34.
[6] *Dietrich v The Queen* [1992] HCA 57.

5. What rights should be protected in a WA Human Rights Act?

5.1 Introduction

5.2 The Consultation Committee has asked whether a WA Human Rights Act should:

- take a similar approach to the *Charter of Human Rights and Responsibilities Act 2006* (Vic) (**Victorian Charter**) and the *Human Rights Act 2004* (ACT) (**ACT Human Rights Act**), which focus on civil and political rights;[7] or
- include protections for economic, social and cultural rights as well.

5.3 Rights in the ICCPR

5.4 Consistently with the Victorian Charter and the ACT Human Rights Act, the Draft Bill currently recognises civil and political rights only. Those rights are largely drawn from the ICCPR, to which Australia is a party.

5.5 Rights such as the right to life, freedom from torture and servitude, and the rights to freedom of movement, expression, association and religion, thought and conscience are all found in the ICCPR, and their inclusion in the Draft Bill is to be commended. The ICCPR is recognised internationally as embodying the minimum human rights protections that governments should strive to observe. Its language is also mirrored in other major regional and national human rights instruments.[8] Further, there is extensive jurisprudence on the interpretation and application of the rights contained in the ICCPR which will be available to courts in WA to draw upon in the context of a WA Human Rights Act.[9]

(a) **Selecting the rights**

(b) However, ALHR submits that each right in the ICCPR needs to be carefully reviewed, and consideration must be given to whether it is appropriate for that particular right to be included in a WA Human Rights Bill (and, if so, in what form). It is not sufficient to simply "cut and paste" the rights in the ICCPR – the WA Human Rights Bill must reflect a conscious decision by the WA government to support, adopt and protect each right that is legislated for.

(c) In particular, ALHR supports the approach taken in the Victorian Charter and the ACT Human Rights Act of modernising the language of the ICCPR before including rights in a Human Rights Act. However, as the provisions of the ICCPR

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[7] Although note that rights such as the right to be free from forced labour or the right to participate in public and cultural life could arguably be characterised as economic, social or cultural rights. This supports ALHR's position (outlined below) that the two sets of rights are significantly linked.

[8] See, for example, the European Convention on Human Rights and Fundamental Freedoms, the African Convention on Human and Peoples' Rights, the Convention on the Rights of the Child, the Convention on the Elimination of All Forms of Discrimination Against Women and the *Human Rights Act 1998* (UK) (UK Human Rights Act).

[9] See, for example, the jurisprudence of the European Court of Human Rights, the Inter-American Court of Human Rights, the courts in the United Kingdom and the United Nations Human Rights Committee.

have now received considerable consideration by the UN Human Rights Committee and a number of superior courts care needs to be taken that the modernising of language does not inadvertently restrict the right concerned.

(d) **Adaptation to WA "legal, political and social" circumstances**

(e) ALHR understands some of the examples given on page 17 of the Discussion Paper regarding human rights and WA's "legal, political and social situation". However, ALHR does not support any proposal that the human rights in the ICCPR should be modified to suit the WA political climate, or policies of the government of the day. The rights in the ICCPR are fundamental and considerable justification indeed would be needed before they were limited. They are based on human equality and dignity, and a government should be cautious before proposing, or accepting, that there are unique WA conditions that justify different arrangements. The formulation of many of the rights found in the UK Human Rights Act 1998, the ACT Human Rights Act and the Victorian Charter are drawn from a long line of formulation of such universal rights back to the Universal Declaration of Human Rights. Where the formula proposed evinces a lesser standard then in a given case Australia could potentially be in breach of the specific provision of the ICCPR.

(f) There is also the risk that what might seem an appropriate adaptation to a human right at a particular point in time will, in hindsight, be recognised as an unjustified incursion on human rights. There are several examples we point to here. Firstly, there needs to be a more comprehensive analysis of the holding of remand and sentenced prisoners. The ICCPR specifically addresses this, stating "Accused persons shall, *save in exceptional circumstances*, be segregated from convicted persons".[10] This phrase has a clear understanding through various jurisprudence and in particular 'a shortage of staff and space are no justification for any infringement of' the requirement to hold accused and convicted persons separately save in exceptional circumstances.[11] The Draft Bill, however, has used a lower standard permitting accused and convicted persons to be jailed together when it is "*not reasonably practicable*" to do otherwise.[12] ALHR recommends the section be changed to use the direct wording of the ICCPR.

(g) Another example the Committee may wish to consider is in relation to WA's Aboriginal Heritage Legislation and its implementation. That legislation has an inbuilt discriminatory basis, enabling developers to appeal heritage decisions to the State Administrative Tribunal while preventing Indigenous interests from having that same right. This has been acknowledged in a recent Government-

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[10] Article 10(2)(a) – emphasis added.

[11] Human Rights Committee, *Concluding observations – FINLAND*, 2 December 2004, UN document CCPR/CO/82/FIN, para 11. The Committee noted that if the government encountered practical difficulties in separately holding sentenced and accused prisoners, then the government needed to 'take such administrative and budgetary steps as are appropriate to remedy the practical difficulties'.

[12] Draft Bill, s22(3) – emphasis added.

commissioned report.[13] Even in addition to the Heritage Act's racial discrimination provisions, there are various times when it has simply been ignored by executive or legislative direction (for example at Noonkanbah and then the Swan Brewery) in circumstances where subsequent court rulings have shown the government to have acted improperly.

(h) In section 5.17 below, we have set out a number of additional rights that in ALHR's view should be included in a WA Human Rights Act. However, in the following sections we have briefly commented on two significant ICCPR rights that ALHR considers have been wrongly excluded from the Draft Bill:

(i) the right to self-determination (article 1 of the ICCPR and article 1 of the ICESCR); and

(ii) freedom from the death penalty (articles 6(2), 6(4), 6(5) and 6(6) of the ICCPR).

(i) **Right to self-determination**

(j) The right to self-determination includes the right to freely determine political status and freely pursue economic, social and cultural development. The UN Human Rights Committee and the UN Committee on Economic, Social and Cultural Rights have identified self-determination as a right held by indigenous peoples, including in Australia.[14] The right may be conceptualised as a "sliding scale" of different types of entitlements to political emancipation, many of which may be satisfied by simply providing for meaningful participation in the political process.

(k) ALHR does not consider it is appropriate for the State government to abrogate its obligation to promote the right to self-determination by stating that it is the domain of the Commonwealth government to address. There are many important areas of government where the State and the Commonwealth share responsibilities (eg in relation to corporations, environment and discrimination).

(l) ALHR acknowledges that self-determination raises a number of difficult issues and concepts, however it is important to recognise that promoting the right of people (particularly indigenous people) to self-determination can take many different forms, and is ultimately part of a process designed to achieve human security and fulfilment, and to respect distinct cultural values and diversity.

(m) For example, accepting that indigenous languages could be used on public street signs could be one form of self-determination for indigenous people, and this is clearly an area that is within the domain of the State government. A similar way in which self-determination could be recognised is through an appropriate level of

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[13] Independent Review Committee, *Review of the Project Development Approvals System: Interim Report for comment*, Government of Western Australia (Perth, 2002), which noted 'Under the AH Act, an owner of land can appeal the Minister's decision regarding a Section 18 application, however, the legislation provides Aboriginal people with no such recourse', p36.

[14] For a list of concluding observations and jurisprudence, see the Aboriginal and Torres Strait Islander Social Justice Commissioner, *Social Justice Report 2002*, pages 13-14.

autonomy in matters relating to local and internal affairs, including financing for those autonomous functions.

(n) Further, to the extent that there is uncertainty about what is and what is not included in the right to self-determination in an Australian context, that may be avoided by adopting a relatively prescriptive approach to the content of the right (either through an exhaustive definition or by nominating examples of what is and is not included in the right).

(o) **Freedom from the death penalty**

In relation to a prohibition on the use of the death penalty, while it might be considered that such an express protection is outdated and unnecessary in today's society, comments from the highest political office in Australia suggest a departure from Australia's longstanding opposition to the death penalty.[15] Polling in 2006 revealed that 49.1% of respondents were in favour of the reintroduction of the death penalty in Australia, and only 46.8% were against it.[16] Accordingly ALHR considers that a clause making the prohibition against the death penalty explicit is important.

5.6 Economic, social and cultural rights

5.7 In addition to the ICCPR, the Consultation Committee will need to consider the rights in the *International Covenant on Economic, Social and Cultural Rights* (**ICESCR**).

(a) **Reasons for inclusion**

(b) Australia has an obligation under the ICESCR to guarantee economic, social and cultural rights. These include rights such as the right to food, health, housing and education.

(c) The Statement of Intent notes that the government's preferred approach is to focus on the rights in the ICCPR, but that the possible extension of the WA Human Rights Act to address the ICESCR rights could be considered at a later stage.[17]

(d) ALHR commends the government's recognition that economic, social and cultural rights need to be addressed, but does not agree that this should be deferred until a later time. In ALHR's view, the WA Human Rights Act should contain provisions for the rights in the ICESCR from the outset. The government has not provided any reason why those rights have not been included in the Draft Bill.

(e) ALHR recognises that there is a perception that economic, social and cultural rights are more difficult to realise than civil and political rights, because of limited available resources to meet all of the rights set out in the ICESCR. It is probably for this reason that rights of this nature have traditionally been seen as distinct from

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[15] ATV Channel 7, "Interview with John Howard (Part 2)", Sunday Sunrise, 16 February 2003; "PM happy over death penalty stance", AAP News, 15 September 2006.

[16] "Exclusive online poll: Death Penalty", The Bulletin, 7 March 2006.

[17] See page 4 of the Discussion Paper.

civil and political rights. The following comment at page 15 of the Discussion Paper highlights this distinction:

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

(f) However, as the ACT Bill of Rights Consultation Committee observed in its 2003 report:

> The distinction between [civil and political rights and economic, social and cultural rights is] in many ways an artificial one. If human rights are concerned with the conditions of a worthwhile human life, rights to health, housing and to education are as integral to human dignity as the right to vote. Many of the rights in the ICESCR and ICCPR are closely entwined. For example, the ICCPR protects the right to freedom of association, while the ICESCR protects the right to form trade unions.[18]

(g) Similarly, the right to life in the ICCPR is closely related to the ICESCR right to be free from hunger, and the rights in the ICCPR that protect against slavery and servitude are linked to the ICESCR right to work.

(h) Accordingly, ALHR considers that it is wrong to focus on ICCPR rights and to ignore ICESCR rights. Both sets of rights require government attention and government resources, so it is unhelpful to suggest that ICCPR rights are government limitations, and ICESCR rights are government requirements.

(i) In some ways, economic, social and cultural rights may be more relevant for many members of the WA population because they impact on the quality of day-to-day life, rather than only "kicking in" in relation to criminal offences and court proceedings as many of the rights in the Draft Bill currently do. The ICESCR has been ratified by 156 countries – only 4 fewer than the ICCPR. The parity of ICESCR rights with ICCPR is recognised not only in the international treaties but in Australian law.[19] This is indicative of an increasing recognition that economic, social and cultural rights are as fundamental and inherent to the dignity of all people as civil and political rights.

(j) Further, it is important to recognise that the ICESCR focuses on the "gradual realisation" of economic, social and political rights. Incorporating some or all of the ICESCR rights into a WA Human Rights Act would not mean that the WA government would have to devote all of its resources to attempting to meet those rights. Instead, it would need to take reasonable steps (in light of the resources at its disposal) towards eventually achieving full economic, social and cultural rights for all persons in WA.

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[18] ACT Bill of Rights Consultative Committee, *Towards an ACT Human Rights Act: Report of the ACT Bill of Rights Consultative Committee*, presented to the Chief Minister on 21 May 2003 at para 5.29.

[19] For example, section 10A of the *Human Rights and Equal Opportunity Commission Act 1986* (Cth) requires the Human Rights and Equal Opportunity Commission to ensure its functions under that Act are performed 'with regard for the indivisibility of human rights'

(k) The experience of implementing ICESCR rights in South Africa should provide some comfort in this regard. The *Constitution of the Republic of South African 1996* (**South African Constitution**) includes certain economic, social and cultural rights in relation to education, language, culture, health, housing and social security. This has not resulted in either a flood of litigation or the imposition of unreasonable demands on government resources. In particular, the South African Constitutional Court has emphasised the importance of restraint of the part of courts in adjudicating upon the reasonableness of measures taken to implement such rights. For example, in the context of the health budget, priorities have been held to lie with the political organisations and the medical authorities, and the courts will be slow to interfere.[20]

(l) Further, the UN Committee on Economic, Social and Cultural Rights has also produced helpful jurisprudence on the content and implementation of economic, social and cultural rights, which confirms that the ICESCR provides for progressive realisation of rights, and acknowledges the constraints placed on countries due to limited available resources.

(m) **Enforcement of economic, social and cultural rights**

(n) In ALHR's view, the issue of whether the rights in the ICESCR should be included in a WA Human Rights Act cannot be considered without also considering how the rights would be protected and implemented. ALHR submits that the WA Human Rights Act could adopt a flexible approach to enforcing economic, social and cultural rights. There is no reason why such rights must necessarily be treated identically to civil and political rights. In particular, if there are concerns about the feasibility of courts considering and ruling on ICESCR rights at this stage, there are still other ways for those rights to be included in a Human Rights Act.

(o) For example, rather than permitting individual complaints in relation to breaches of particular economic, social and cultural rights, government departments and other public authorities whose work impacts upon ICESCR rights could be the subject of appropriate benchmarking and public review against those benchmarks. There could also be provision for representative complaints to be made about the failure of a particular agency to meet its obligations to safeguard economic, social and cultural rights.

(p) Another option is that ICESCR rights could be included in some parts of the operation of a WA Human Rights Act. For example if, contrary to our position above, it were considered inappropriate for the courts to be able to declare laws incompatible with ICESCR rights, it could still be appropriate for ICESCR *as well as* ICCPR rights to be used in the assessment of executive action (under s40) and in Parliament's consideration of draft legislation (under s31).

(q) ALHR also notes that the fact that (outside of South Africa, and perhaps the UK) commentary and case law in relation to economic, social and cultural rights is not as developed as the jurisprudence in relation to civil and political rights is no reason

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[20] *Soobramoney v Minister of Health (Kwazulu-Natal)* (1997) 12 BCLR 1696 (CC) at para 29.

to shy away from including those rights in the WA Human Rights Act.[21] The WA judicial system is a sophisticated, mature legal system, and is well-equipped to address new or unclear areas of the law.

(r) **Mandatory review**

(s) If, contrary to ALHR's submissions, the WA Human Rights Act does not contain protections for the rights in the ICESCR at the outset, then ALHR considers that section 43(2) of the Draft Bill, which mandates periodic reviews of the Human Rights Act, should be amended to include an express obligation on the government to consider the inclusion of economic, social and cultural rights in each review of the Act.

(t) This is consistent with the approach taken in section 44 of the Victorian Charter, although ALHR notes that the Victorian Charter goes even further, by requiring the government to also consider the inclusion of the rights in other documents such as the Convention on the Rights of the Child.

5.8 **Specific rights for vulnerable groups?**

5.9 ALHR supports the specific protections for children and people in ethnic and cultural minorities contained in the Draft Bill.

5.10 However, in relation to indigenous people, ALHR considers that the proposed section 20(2) in the Draft Bill is unduly limited and recommends that a provision in the same form as s. 19(2) of the Victorian Charter is preferable. Section 19(2) provides that:

> Aboriginal persons hold distinct cultural rights and must not be denied the right, with other members of their community
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> (a) to enjoy their identity and culture; and
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> (b) to maintain and use their language; and
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> (c) to maintain their kinship ties; and
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> (d) to maintain their distinctive spiritual, material and economic relationship with the land and waters and other resources with which they have a connection under traditional laws and customs.

5.11 Given the protections for both native title holders and non-native title holders in the *Native Title Act 1993* (Cth) is appears anomalous that s. 19(2)(d) of the Victorian Charter, from whence it is drawn, has been omitted. A provision similar to s.19(2)(d) could not override the Native Title Act but would allow for the proper consideration of that right in State processes and the proper recognition of such rights of indigenous people. It is also important o point out that s.19(2) of the Victorian Charter is significantly weaker than

[21] See the comment in the Discussion Paper at page 16.

many of the provisions in the *Declaration of the Rights of Indigenous Peoples* recently adopted by the UN Human Rights Council.[22]

5.12 In addition, ALHR recommends that a WA Human Rights Act contain a right for involuntary patients in mental health facilities to be free from intrusive and irreversible treatments for mental illness (reflecting Principle 11, para 14 of the *United Nations Principles for the Protection of Persons with Mental Illness*).

5.13 Currently under the *Mental Health Act 1996* (WA) there are no restrictions on the use of Electro-Convulsive Therapy ('ECT') on patients, including children, pregnant women or the elderly. With ECT involving as much as 400 volts of electricity through the brain, harmful effects such as permanent brain damage and death are well documented.[23] With over 18,000 'treatments' given in 2005/06 in Australia, including to children under the age of 15,[24] it is vital that the right to refuse this highly controversial treatment be afforded protection by inclusion in the Human Rights Act.

5.14 On June 30, 2006, the Alaskan Supreme Court recognized the dangers of psychiatric drugs, stating: 'Psychotropic drugs affect the mind, behaviour, intellectual functions, perception, moods, and emotion and are known to cause a number of potentially devastating side effects.' Further, '[g]iven the nature and potentially devastating impact of psychotropic medications…we now similarly hold that the right to refuse to take psychotropic drugs is fundamental.'[25] In December 2004, the Australian Therapeutic Goods Administration published an Adverse Drug Reactions Bulletin indicating that there is evidence that commonly used antidepressants create an increased risk of suicidality, including suicidal ideation, suicide attempts and self-harm events.[26] Clearly drugs which can potentially cause irreversible damage or death to a patient should not be permitted to be administered to them against their will.

5.15 **Rights for corporations**

5.16 ALHR's view is that the rights in a WA Human Rights Act should not apply to corporations. Extending human rights protections to corporations risks diluting the focus of the government, courts and the community on the need to protect the rights of individual human beings.

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[22] UN Document A/HRC/1/L.3 available at http://www.humanrights.gov.au/social_justice/drip/DDRIPresolutionHRC.pdf

[23] Justice John P. Slattery, 'Consent and Disclosure', *Report of the Royal Commission into Deep Sleep Therapy*, Vol. 6.

[24] Medicare Australia, *Statistical Reporting* <http://www.medicareaustralia.gov.au> at 4 August 2007.

[25] *Faith Myers v Alaska Psychiatric Institute*, Supreme Court, 2-11021, Superior Court No. 3AN-03-00277, Opinion, No. 6021, 30 June 2006.

[26] 'Use of SSRI antidepressants in children and adolescents,' The Australian Goods Administration, Adverse Drug Reactions Bulletin, Vol. 23, No.6, Dec 2004, p22.

5.17 **Additional areas requiring protection**

5.18 ALHR considers that there are a number of fundamental rights which could be included in a WA Human Rights Act. In general these rights are already well-accepted principles which operate in the WA criminal and administrative law fields (see, for example, the right not to be subject to unreasonable search and seizure). Some have already been accepted in other jurisdictions such as in the New Zealand *Bill of Rights Act* 1991. Some of the rights are included in the ICCPR but have not made it into the draft WA Human Rights Act.

5.19 For ease of reference, we have listed each right below, and have referenced the source of that right in other bills of rights where relevant.

(a) **Medical treatment**

Every person has the right to refuse to undergo any medical treatment.[27]

(b) **Search, seizure, arrest and detention**

- Every person has the right to be secure against unreasonable search or seizure, whether of the person, property, correspondence or otherwise.[28]
- Every person has the right to:
  - be informed promptly of the right to remain silent; and
  - be informed promptly of the consequences of not remaining silent.[29]
- Every person has the right to refuse to consent to any form of forensic procedure, or to decline to participate in a line-up or identification parade.
- A person who has been arrested shall have the right to:
  - be charged promptly or to be released;[30] and
  - have his or her case for bail determined when he or she is brought before a court, and to be released on reasonable terms and conditions unless there is just cause for continued detention.[31]
- A person who has been the victim of unlawful arrest or detention shall have an enforceable right to compensation.[32]

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[27] *New Zealand Bill of Rights Act 1990* (**New Zealand Bill of Rights**), section 11.

[28] New Zealand Bill of Rights, section 21.

[29] South African Constitution, section 35(1)(a) and (b).

[30] New Zealand Bill of Rights, section 23(2).

[31] New Zealand Bill of Rights, section 23(1)(c).

(c) **The law and legal proceedings**

- Every person has the right to the observance of the principles of natural justice by any tribunal or other public authority which has the power to make a determination in respect of that person's rights, obligations, or interests protected or recognised by law.[33]

- Every person whose rights, obligations, or interests protected or recognised by law have been affected by a determination of any tribunal or other public authority has the right to apply, in accordance with law, for judicial review of that determination.[34]

- Every person has the right to bring civil proceedings against, and to defend civil proceedings brought by, the Crown, and to have those proceedings heard, according to law, in the same way as civil proceedings between individuals.[35]

(d) **Rights in the criminal process**

- No person who has been convicted of any offence and sentenced to a term of imprisonment shall be liable to punishment with hard labour.[36]

- Every person one who has been convicted of any offence and sentenced to a term of imprisonment has a right to opportunities aimed at their reformation and social rehabilitation.

- A person who is accused of an offence has the right to not have his or her trial proceed in circumstances where a Court becomes aware of a question of the person's fitness to be tried:

    - until the question of their fitness is determined; and

    - where he or she is found unfit to plead or is acquitted on grounds of mental illness, to have alternative procedures available to him or her.[37]

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[32] ICCPR, article 9(5)

[33] New Zealand Bill of Rights, section 27(1). The New Zealand formulation of this right goes beyond but overlaps with the proposed s.23(3) of the Draft Bill. The emphasis is on natural justice in all relevant procedures conducted by a public authority which affect rights, obligations and interests not just courts and tribunals.

[34] New Zealand Bill of Rights, section 27(2).

[35] New Zealand Bill of Rights, section 27(3).

[36] *Crimes Act 1900* (NSW), section 580G.

[37] *Crimes Act 1914* (Cth) – Part 1B Division 6

- Every person has the right to elect trial by jury or trial before a judge sitting alone when being tried on indictment.

- Every person has the right to have all the evidence known to the prosecution (including exculpatory and inculpatory evidence) made available to him or her.

- Every person has the right to not have admitted into evidence against him or her evidence obtained in a manner that infringed or denied a human right, if the admission of it in the proceedings would bring the administration of justice into disrepute.[38]

5.20 **Circumstances where rights can be limited**

5.21 In addition to considering whether the rights taken from the ICCPR or ICESCR should be modified in some way for the purpose of the WA Human Rights Act to take account of WA's political, legal or social circumstances (discussed above), a second issue arises in relation to whether, and how, rights in the Human Rights Act can be limited when Parliament is enacting legislation, or human rights are being interpreted or applied. We have addressed this issue in section 7 below.

6. What form should a WA Human Rights Act take?

6.1 Entrenchment or constitutional status

The Statement of Intent confirms that the government prefers that the WA Human Rights Act be an ordinary Act of Parliament, and not entrenched in any manner.[39] According to the statement, the Government will still "be accountable to the public through the ballot box for any restrictions or changes it introduces" to the Human Rights Act. Consistently with that, the Draft Bill does not contain any "entrenching" provisions. This "statutory bill of rights" approach is the same as has been taken with the UK Human Rights Act, New Zealand Bill of Rights, the ACT Human Rights Act and the Victorian Charter.

6.2 ALHR's position on this important issue is that human rights are fundamental rights that should be recognised as such and given appropriate protection. The word "fundamental" is crucial because human rights are distinct from other rights such as those recognised in statute. If human rights are to be properly recognised as fundamental then they need to be protected by appropriate safeguards. Inclusion of human rights in a statute such as the proposed Human Rights Act is certainly a welcome start to the process of the protection of human rights but will not, ultimately, provide sufficient protection for what are fundamental rights.

6.3 Constitutional entrenchment along the lines of that found in South Africa and Canada, of course, provides the strongest form of protection for human rights and is attractive to many of our members. Both represent a significant remodelling of constitutional entrenchment different to that found in the US Bill of Rights. In South Africa and Canada the

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[38] *Canadian Charter of Fundamental Rights and Freedoms* (Canadian Charter), s. 24(2)

[39] Statement of Intent at page 5.

Constitutional Court or Supreme Court, respectively, may strike down legislation on the basis that it is inconsistent with a constitutionally entrenched right. However, it should be noted that section 33 of the Canadian Charter maintains the supremacy of Parliament by allowing Parliament to specify that a law is valid notwithstanding that it offends a relevant provision of the Canadian Charter. This is a crucial difference with the USA Bill of Rights and remedies one of the substantial criticisms made of the USA position .

6.4 While there is significant support for constitutional entrenchment within ALHR's membership a distinction needs to be made between the position in Australia and the evolution of constitutional entrenchment in South Africa in Canada. The ravages and ultimate collapse of the apartheid regime in South Africa meant that there was an overwhelming need for the maximum protection of human rights to ensure the structural integrity and continuation of South Africa as a nation. In Canada human rights have been protected by statute since the 1960s beginning in a form substantially weaker than the ACT Human Rights Act or the Victorian Charter. Canadians were far more attuned to the concept and application of human rights by the time Prime Minister Trudeau proposed the incorporation of human rights into the Canadian Constitution in the late 1970s and its incorporation in 1982.

6.5 Neither of those situations applies in Australia or, for that matter, in WA. There is a distinct need for a graduated approach for the protection of human rights which will allow for an increase in understanding of the role of human rights in the life of the people of WA. ALHR recognises that many people do not properly understand the nature of human rights and how a democracy may properly operate within a human rights framework. That causes those people to, understandably, be cautious and in some circumstances to oppose even legislative protection of human rights. It is for this reason that ALHR recognises that at this stage human rights are best protected by a legislative instrument rather than constitutional entrenchment. However, that debate can only properly occur once the people of WA have had a proper opportunity to see how statutory protection of human rights operates. The Human Rights Act as proposed will achieve that, particularly if it is systematically implemented across the WA public service with sufficient public education.

6.6 The shortcomings of the statutory model of human rights protection are, in time, likely to be evident when specific legislation is enacted which either suspends or impliedly repeals provisions of the Human Rights Act. This is most likely to occur with respect to unpopular minorities such as those charged with criminal offences or prisoners. It is, of course, a truism that the WA government's protection of human rights in WA will be judged by the way it treats the human rights of its minorities. It is only at that time that a proper conversation can be had about constitutional entrenchment of human rights in WA.

6.7 In the absence of constitutional entrenchment ALHR's position is that strong protection should be provided in any legislative model. The dialogic model evident not just in Voctoria and the ACT but the UK and New Zealand achieves a high degree of protection and is therefore favoured. ALHR also supports protections not contained in the current Draft Bill such as a strengthened interpretation clause similar to the in Victoria and the UK and a complaints process allowing, where appropriate, for the payment of compensation for a breach of a human right by a government entity.

6.8 **Preamble**

6.9 ALHR considers that a WA Human Rights Act should contain a preamble that refers to both the fundamental rights underpinning the Act and the outcomes that it hopes to achieve. Clearly equality, dignity and democracy are crucial aspects of human rights and should be central to any such Preamble. Given the history of discrimination against Aboriginal people and their dispossession it is important that specific mention be made of them and their spiritual, social, cultural and economic relationship with their traditional lands and waters.

6.10 **What should the Human Rights Act be called?**

The simplicity and immediacy of "Human Rights Act" is attractive but ALHR is not opposed to the Victorian formulation of a "Charter of Human Rights and Responsibilities". The use of the term "bill of rights" is significantly outdated and may inadvertently lead to inappropriate comparison and confusion with the US Bill of Rights.

7. How should a WA Human Rights Act require human rights to be protected?

7.1 **Application to Parliament**

7.2 Section 31(2) of the Draft Bill provides that a written "statement of compatibility" must be laid before Parliament before the second reading of a bill. Section 31(3) envisages that the statement of compatibility will be made by the Attorney General (in the case of a bill introduced on behalf of the Government), or in any other case, by the member introducing the bill. The statement of compatibility must state:

- whether, in its maker's opinion, the bill is compatible with human rights; and
- if the opinion is that the bill is not compatible, the nature and extent of the incompatibility, and the reasons why the bill should nevertheless be considered by Parliament.

7.3 ALHR supports the requirement of a statement of compatibility for each new law to be introduced to Parliament. This will require both the government and Parliament to consider the impact that the proposed law would have on human rights, and will put the onus on the party introducing the bill to publicly justify any proposed limitation on human rights. ALHR considers that increased scrutiny and discussion of human rights will operate to better protect the human rights of all people in WA. The statement of compatibility is a crucial part of the dialogic process of protecting human rights between Parliament and the public.

7.4 The experience of ALHR members working on the new Victorian Charter for the Victorian Government is that the drafting of a statement of compatibility ensures early consideration of the impact of a legislative measure on human rights. That is, human rights issues are dealt internally within the particular government department while policy is being developed and before drafting instructions are provided to Parliamentary counsel. If human rights issues are properly integrated into policy and legislative development the desired policy outcomes may be achieved without impacting upon human rights or provide only a minimal and justifiable limit upon human rights.

7.5 The remarks made in the Discussion Paper (at p 23) about statements of compatibility in urgent cases are a cause for concern. Such statements needs to be fully integrated into the development of all legislation including urgent measures in the same way that legislation is required to be properly drafted and integrated with other legislation and the common law. If statements of compatibility are conceived as an "add on" or something that is merely done at the end of the process of legislative development then its impact will be greatly reduced and the protection of human rights will be reduced accordingly. The experience in NSW is that it is often urgent legislation which does particular damage to human rights without sufficient time for Parliamentary or public scrutiny. It is therefore vital that the assessment of the impact of legislation on human rights to be eventually reflected in a statement of compatibility be properly integrated into the legislative development process even in urgent cases. In Victoria this has been achieved by requiring all departments developing legislation to take responsibility for drafting the statement of compatibility rather than tasking the Human Rights Unit in the Department of Justice with drafting a statement of compatibility after the legislation has been drafted.[40] The centralisation of the drafting of such statements in the ACT in the Attorney-General's Department is a cause for concern.

7.6 ALHR notes that no specific role is given in the Draft Bill to the Standing Committee on Legislation and the Joint Standing Committee on Delegated Legislation to review legislation to ensure its compatibility with human rights. This is an important protection found in the ACT Human Rights Act and the Victorian Charter and provides for Parliamentary review as distinct from consideration by the Executive. The equivalent body in the UK, the Joint Committee on Human Rights, has been very active in considering legislation for its compatibility with the European Convention on Human Rights.

7.7 **What if Parliament intends a law to restrict human rights?**

7.8 Section 30(1) of the Draft Bill provides that a written law may state that it, or any part of it, operates despite being incompatible with one or more human rights. Provisions of this nature are often referred to as "override provisions", because they allow Parliament to override express or implied human rights.

7.9 ALHR recognises that, consistent with the doctrine of Parliamentary sovereignty on which Australia's legal system is based, Parliament will have the right to pass laws that are inconsistent with human rights. The unfettered nature of the provision in s.30 of the Draft Bill is of concern because the danger is that the Executive will all too readily resort to its use even where it is not necessary. The protection of human rights is better achieved by government considering ways in which policy aims may be achieved without infringing human rights. The experience in Victoria is that a few government officials have expressed a wish to avoid the perceived complexity of a human rights impact assessment and resort to the use of the override provision. However, the Victorian Charter requires that the override provision only be used in "exceptional circumstances". ALHR supports the inclusion of a similar protection in a WA Human Rights Act.

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[40] See Part 2 *Charter of Human Rights and Responsibilities: Guidelines for legislation and policy officers in Victoria* (Department of Justice, Victoria)

7.10 It is important to understand that international instruments such as the ICCPR and European Convention on Human Rights allow for rights to be derogated from in certain very limited circumstances. The proposed provision at s.30 is in this category. The ability to override or suspend the protections for human rights must only be exercisable in rare and exceptional circumstances if human rights are to be properly protected. One should not confuse the concept of derogation with the justifiable limits that may be placed on human rights in a free and democratic society found in s.34(4) of the Draft Bill.

7.11 In times of public emergency the operation of many human rights may, in international human rights law, be limited. An easy example is freedom of expression. However there are certain rights which are, understandably, non-derogable such as the right to life and freedom from torture (these are discussed in section 7.13 below). Those responsible for drafting the final version of a WA Human Rights Act could usefully consider the Siracusa Principles,[41] which offer guidance on when, and how, the normal human rights operation can be circumscribed. The Siracusa Principles are drawn from various international standards and jurisprudence, and show the circumstances and requirements for the reduction of various human rights.

7.12 In light of the above, ALHR submits that the circumstances in which the rights contained in a WA Human Rights Act can be modified or abrogated must be stated expressly in the Human Rights Act, and must be strictly limited. In this respect, ALHR commends the requirement in section 31(1) that a statement of compatibility must still be made for a bill which contains an express statement that it operates despite being incompatible with one or more human rights.

7.13 Nonetheless, ALHR considers that a number of other safeguards should be put in place to prevent governments from using the broad wording of section 30 to restrict human rights protections in WA, including the amendments in the following paragraphs.

(a) **Section 30(1) to operate only in exceptional circumstances**

(b) Article 4(1) of the ICCPR provides that in a time of "public emergency which threatens the life of the nation", states may "take measures derogating from their obligations under the present Covenant to the extent strictly required by the exigencies of the situation" provided that, among other things, the measures do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin.

(c) However, article 4(2) of the ICCPR states that no derogation from articles 6 (right to life), 7 (freedom from torture), 8 (paragraphs 1 and 2) (freedom from slavery and servitude), 11 (freedom from imprisonment on the grounds of breaching a contract), 15 (retrospective application of the law), 16 (right to be recognised as a legal person) and 18 (freedom of thought, conscience and religion) may be made under article 4(1).

(d) It is certainly understandable that a Human Rights Act would make provision for emergency situations, however history is replete with examples of such excuses

[41] <http://hei.unige.ch/~clapham/hrdoc/docs/siracusa.html>

being used simply to gain extra powers of governance where there is no emergency. Warning of the over-zealous use of such a provision is provided by a Canadian case where a local government declared a public emergency to enable them to use their emergency powers to regulate dog-control![42] This demonstrates that any "emergency" or "exceptional circumstances" power should be very carefully circumscribed.

(e) ALHR considers that section 30 should be amended in line with the ICCPR to provide that it will only operate in "exceptional circumstances". Possible examples of exceptional circumstances could include threats to national security, or a state of emergency which threatens the safety, security and welfare of the people of WA.

(f) If one accepts that parliamentary sovereignty is to be maintained then the Parliament cannot be restrained from amending a Human Rights Act. Section 30 cannot be construed as constraining the legislature but rather as a statement of intent by the legislature which passes it. Any such statement of intent should indicate that the power should only be exercised in 'exceptional circumstances' and that the definition of that term be informed by Article 4 of the ICCPR.

(g) **Sunset clause**

(h) Further, ALHR recommends that all laws which contain a statement made under section 30(1) must also contain a "sunset clause", which will provide that unless a majority of Parliament votes to re-enact the operation of the provision of the Act containing the section 30(1) statement, it will expire on a date 2 years after it comes into operation. This will require the government to publicly justify why the limits on human rights should continue. It will also prevent legislation that restricts human rights from slipping into disuse, and then being revived years later and applied to potentially different social circumstances to those to which it was intended to apply at the time it was enacted. ALHR notes that section 31(7) of the Victorian Charter contains a similar provision.

7.14 **Interpretation of human rights**

(a) **Obligation to interpret consistently with human rights**

(b) The Statement of Intent notes that the courts have a role to play in increasing awareness of, respect for and observance of, human rights in the WA community. The government considers that "one way to ensure that human rights are respected and protected is therefore to require the courts to interpret all laws, where possible, consistently with human rights".[43]

(c) ALHR supports the government's position that the courts should interpret all laws consistently with human rights. However, ALHR considers that, as currently drafted, the Draft Bill does not achieve that purpose. In fact, s.34(3) reflects a

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[42] *Kuypers v. Langley*, 1992 CanLII 693 http://www.canlii.org/en/bc/bcsc/doc/1992/1992canlii693/1992canlii693.html .

[43] See page 6 of the Statement of Intent.

considerable weakening of the provision found in s. 32(1) of the Victorian Charter and s.30(1) of the ACT Human Rights Act.

(d) Section 34(3) of the Draft Bill provides that if the meaning of a provision of a written law is ambiguous or obscure, or leads to a result that is manifestly absurd or unreasonable, "the provision must be interpreted in a way that is compatible with human rights so far as it possible [sic] to do so consistently with the purpose or object underlying the written law".

(e) If s.34(3) is enacted it will not solve the problem experienced in *Al-Kateb v Godwin* (2004) 219 CLR 562 where the High Court determined that the relevant provision of the Migration Act requiring mandatory detention of a prohibited non-citizen was not ambiguous and could not be interpreted so as to protect the appellant's right to liberty. That is, the interpretation provision found in s. 32(1) of the Victorian Charter and s.30(1) of the ACT Human Rights Act has considerable work to do in limiting broad and unambiguous powers which infringe a human right. It should further be noted that s.34(3) is no different from the position at common law that a fundamental right cannot be overridden by ambiguous or general words: *Al-Kateb v Godwin* per Gleeson CJ at [19]. As Gleeson CJ remarked in that case, that has been the position in Australia since at least 1908.[44]

(f) The interpretation provision is a fundamental aspect of the proposed Human Rights Act and ALHR urges the Committee to consider and reject the substantial narrowing of this formulation. The interpretation provision found in the Victorian Charter is to be preferred.

(g) ALHR agrees with the comment on page 24 of the Discussion Paper that the statement of compatibility for a statute may assist in interpreting the law consistently with human rights. However, ALHR considers that section 31(6) provides an important safeguard for human rights protections by making it clear that the courts are not bound by a statement of incompatibility so that, for example, even if the Attorney General's opinion is that a particular law is compatible with human rights, the Supreme Court could still make a declaration of incompatibility if the matter arose in later proceedings. This is effectively a "double-check" of whether the law is consistent with human rights obligations.

(h) **Reasonable limits clause**

(i) A statutory instrument for the protection of human rights may only operate properly if human rights, as proposed, can be reasonably limited in a free and democratic society. This is a fundamental aspect of human rights law and jurisprudence because otherwise inordinate deference would be given to individual rights. The origin of s.34(3) is s.7(2) of the Victorian Charter which was intended to state shortly and succinctly the manner in which human rights may be limited. While there is no equivalent in New Zealand and the UK the same principle is found in the

[44] At [19] referring to *Potter v Minahan* (1908) 7 CLR 277 at 304. See also *Plaintiff S157 v Commonwealth* (2003) 211 CLR 476 at 30

relevant jurisprudence and is often referred to as the principle of "proportionality". The aim of s.7(2) was to codify the principle for ease of application.

(j) Importantly both s.7(2) and s.28 of the ACT Human Rights Act apply to all the rights contained in their respective statutes in all relevant situations. That is, rights may be reasonably limited not only I the interpretation of a statute but in other important circumstances such as the acts of a government agency. Section 7(2) of the Victorian Charter applies across the Charter as a whole and is not limited to the interpretation of statutes. It is therefore anomalous that s.34(4) of the Draft Bill appears only with respect to the interpretation of a "written law". Indeed it seems to be an inadvertent error in the drafting to include it at s.34(4). More properly it should be included in Part 2 of the Draft Bill perhaps immediately before s.7. By inserting the provision at s.34(4) it has no impact upon the requirement for a government agency to act compatibly with human rights at s.40(3). That is a government agency may not act oin a way which limits a human right even where the limit is justifiable in a free and democratic society. This is an unworkable restraint on the executive and is not in keeping with the scheme of legislative protection of human rights found in the ACT and Victoria.

7.15 **Declarations of incompatibility**

7.16 Section 36(2) of the Draft Bill provides that if a human rights question arises in a case the Supreme Court may make a "declaration of incompatibility". However, the Supreme Court must not make a declaration of incompatibility unless the Attorney General has been notified under section 35(1), and has had a reasonable opportunity to make submissions on the issue.

7.17 "Declaration of incompatibility" is defined in section 32 to mean, in respect of a written law, a declaration that the law cannot be interpreted in a way that is compatible with human rights in so far as it is possible to do so consistently with the purpose or object underlying the written law.

7.18 ALHR strongly supports giving the courts the ability to make declarations of incompatibility in relation to written laws. This is consistent with the approach taken in the Victorian Charter, ACT Human Rights Act and the UK Human Rights Act. However, there are a number of issues in relation to the operation of such declarations that ALHR suggests require further consideration.

(a) **Which courts should be able to make declarations of incompatibility?**

(b) Section 35(2) of the Draft Bill provides that only the Supreme Court can make a declaration of incompatibility. At the same time, however, the Draft Bill does envisage that human rights questions will arise in cases before the lower courts or tribunals. For example, section 35(1)(a) provides that if "a human rights question arises in a case in a court or tribunal, the court or tribunal may require a party to the case to give the Attorney General a notice, in the prescribed form, of the question". That provision is not limited to the Supreme Court.

(c) It appears to have been the intention of the drafters that the lower court or tribunal would consider the interpretation of the relevant laws up to the point where it was unable to reconcile a particular law with human rights, but would then be required

to step back and leave it up to the Supreme Court (if the case got to that level on appeal) to declare whether a law is incompatible.

(d) A problem with this approach in practice is that a number of cases may terminate below the Supreme Court level, even where there are strong arguments that a law is incompatible with a human right. Given the lack of compensatory remedies for breach of human rights in the Draft Bill, where a party believes that a law is inconsistent with a human right, but otherwise does not feel it is appropriate to appeal a decision to the Supreme Court (due to costs or uncertainty about the strength of the other grounds of appeal), they are very unlikely to proceed with an appeal. This is because the best that the potential appellant could hope for is a declaration that the law is incompatible with the relevant human rights. There is, therefore, little incentive to proceed to the Supreme Court.

(e) The result of this arrangement could be an informal recognition by a lower court or tribunal that a law is incompatible with human rights, but no practical solution would be available, either for the individual complainant or to require the incompatibility to be remedied going forward.

(f) Accordingly, ALHR submits that the Draft Bill should be amended to expressly allow lower courts and tribunals to refer human rights questions to the Supreme Court on application of a party. This approach is taken in section 33 of the Victorian Charter, and will avoid absurd or unsatisfactory results of the sort discussed above. Unjustified delays by an applicant for referral may be avoided by requiring the leave of the lower court or tribunal for such referral.

(g) **Proceedings seeking only a declaration of incompatibility**

(h) If the purpose of s.36(1) is to stop hypothetical questions of compatibility coming before the Supreme Court then it is too widely drafted. As currently drafted the provision applies also to a specific situation where, for example, there is a clear and specific breach of a human right but the breach is permitted because of legislative authority. A person so affected could not legitimately seek a declaration of illegality because such an application to the Supreme Court would not have reasonable prospects of success. The person would be prevented from achieving a declaration highlighting that a particular power had been exercised which had negatively impacted upon his or her human right(s). There is already a disincentive to applying solely for a declaration of incompatibility because it achieves no remedy which has a practical outcome for the applicant. ALHR suggests that it be removed.

(i) **What should the consequences of incompatibility be?**

(j) Section 37(3) of the Draft Bill requires the Attorney General to give a copy of any declaration of incompatibility to the Minister administering the relevant law as soon as practicable after the time for appealing the proceedings in which the declaration was made expires, or any appeal is determined (the "final judgment date").

(k) Section 37(4) requires the Minister to prepare a written response to the declaration, lay it before both Houses of Parliament and publish it in the gazette. This must be done within 6 months of the final judgment date for the declaration.

(l) ALHR strongly supports these requirements, which are consistent with the Victorian Charter[45] and the ACT Human Rights Act.[46] Although under the Draft Bill the courts do not have the power to invalidate legislation that is incompatible with human rights, the requirement to publicly respond to a declaration of incompatibility will expose the government and Parliament to additional scrutiny by members of the public, given that a judicial officer has declared that one of Parliament's laws violates a fundamental right. This ensures that Parliamentary sovereignty remains intact, but a public dialogue in relation to the protection of human rights will nonetheless take place.

(m) Over time, ALHR hopes that this approach may contribute to the development of a "culture of human rights" in Western Australia, through public awareness, government consideration of human rights when drafting legislation and Ministerial reluctance to put forward legislation that is incompatible with human rights.

(n) ALHR considers that section 37 of the Draft Bill could go further towards protecting human rights than it currently by requiring the relevant Minister to investigate and report on ways in which the relevant law's objectives could be achieved without breaching human rights. This would be a more specific obligation than simply requiring the Minister to respond to the declaration of incompatibility.

8. Who should be required to comply with the human rights recognised in a WA Human Rights Act?

8.1 Application to all three branches of government

8.2 The Discussion Paper states that the Human Rights Act should ensure all three arms of government respect human rights in their conduct and decisions. Consistent with this, ALHR submits that all three branches of government, including any party exercising public functions, should comply with the human rights recognised in the WA Human Rights Act.

8.3 The New Zealand Bill of Rights applies to all three branches of government and to "any person or body in performance of any public function, power or duty conferring or imposed on that person or body by or pursuant to law". The UK Human Rights Act also applies to the acts of "public authorities". The term "public authority" is defined to include "a court or tribunal and any person certain of whose functions are function of a public nature". This does not include either House of Parliament.

8.4 ALHR submits that a Human Rights Act should impose obligations on any person or body performing any public function, power or duty. Given the widespread practice of contracting out government services it makes sense to extend the application of the Human Rights Act to private organisations when, and only when, they are performing a government function. The definition of public authority found at s. 4 of the Victorian Charter provides for such an extension. An important practical example of such an extension is a privately operated prison. The operation of prisons is a core government

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[45] See section 37 of the Victorian Charter.

[46] See section 33 of the ACT Human Rights Act (although we note that in the case of the ACT Human Rights Act it is the Attorney General who must respond to the declaration, not the relevant Minister).

function and it appears anomalous to exclude the application of the Human Rights Act merely because the prison is operated privately.

8.5 In the ACT, government agencies include a section in their annual reports on what measures they have taken during the year in relation to human rights.[47] This assists Parliament and others endeavouring to monitor the implementation of the ACT Human Rights Act to assess progress made by government agencies in this respect. ALHR suggests that a useful measure would be for the WA Human Rights Act to require similar reporting by WA government agencies.

9. What should happen if a person's human rights are breached?

9.1 The enforcement of the Human Rights Act, and the efficacy of its remedies, are critical. Conferring a right without conferring a means to enforce that right is of little value. ALHR submits that the Human Rights Act should extend beyond mere declaration of principle, and should contain appropriate enforcement mechanisms in order to sufficiently guarantee and protect the rights it proclaims.

9.2 There are three main approaches to the enforcement of human rights, namely:

- an interpretative approach;
- a "watchdog" approach;
- a complaints-based approach.

9.3 These approaches are not mutually exclusive, and some jurisdictions employ more than one approach to enforce their human rights guarantees. ALHR supports a combination of these methods of enforcement through the following approach:

(a) the inclusion of a clause that enables courts and tribunals to interpret legislation in a way that is compatible with the Human Rights Act so far as possible (see the comments on section 34(3) of the Draft Bill in section 7.14 above);

(b) the establishment of a Human Rights Commission in WA with the role of promoting compliance, undertaking research, educating the public, auditing legislation and policy, receiving representative complaints, reporting annually to parliament and intervening in human rights cases; and

(c) the granting of an ability to bring an individual cause of action against public authorities that breach the Human Rights Act. ALHR recommends that the jurisdiction of the State Administrative Tribunal be extended to deal with such human rights complaints.

9.4 An analysis of the three approaches, and ALHR's submissions in relation to each approach, are covered in more detail below.

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[47] See Department of Justice & Community Safety (ACT), *Human Rights Act 2004: Twelve month review – report* (June 2006) at page 58.

9.5 **Interpretative approach**

9.6 This issue is considered above with respect to the proposed s.34(3). In short. the interpretive approach must go beyond the common law interpretation principle with respect to ambiguity in statutes and fill the void created by broad discretions and powers.

9.7 ALHR believes that an interpretive approach alone is not sufficient to enforce a WA Human Rights Act and is needed in combination with a watchdog and complaints-based approaches.

9.8 **"Watchdog" approach**

9.9 This is an active approach, where a body has responsibility to administer and supervise the Human Rights Act. This could be a body akin to the Equal Opportunity Commission.

9.10 In the ACT, the Human Rights Commissioner has been given advisory, educational and review functions.[48] The Commissioner may intervene in proceedings before a Court that involves the application of the ACT Human Rights Act, subject to obtaining leave of the Court.[49]

9.11 In addition, the Human Rights Office assists individuals with human rights inquires, but does not have a complaint-handling role. The Human Rights Office has had an important role in the ACT in monitoring and championing the ACT Human Rights Act, and notes that the delay experienced in setting up an equivalent independent body in the UK[50] has been regarded as a weakness of the UK system.

9.12 A Human Rights Commission in Western Australia should have the following functions:

- to promote compliance with the WA Human Rights Act;
- to undertake research and educate the public about the WA Human Rights Act;
- to audit legislation and policy in order to identify any inconsistency with the Human Rights Act and to report to Parliament on results of the audit;
- to inquire into representative complaints (for the breach of economic, social and cultural rights) and make findings and recommendations to Parliament;
- to report annually to Parliament on matters relevant to the operation of the WA Human Rights Act; and
- to intervene in matters before the WA courts, tribunals and commissions of inquiry which relate to rights under the Human Rights Act.

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[48] Section 41 Human Rights Act 2004 (ACT).

[49] Section 36 Human Rights Act 2004 (ACT).

[50] Slated to commence operations in October 2007.

9.13 An expanded, renamed and reconstituted Equal Opportunity Commission could take on the role of a Human Rights Commission, particularly given that the right to equality enshrined in the *Equal Opportunity Act 1984* (WA) is one of a number of rights appropriate to be included in the WA Human Rights Act.

9.14 **Complaints-based approach**

9.15 ALHR supports a complaints-based approach where individuals or groups of individuals can initiate complaints. In relation to ICCPR rights, ALHR considers that individuals, or representatives of persons of a particular class, should be able to make complaints to a court or tribunal for adjudication. ALHR accepts that it may be appropriate for a different approach to be adopted in relation to ICESCR rights (see discussion in 5.7(m) above).

9.16 Pursuant to the UK Human Rights Act, a cause of action will lie where public authorities are found to be in breach of the Act, and a court may grant relief for remedy or make such orders as are within its powers if it is "necessary to afford just satisfaction to the person in whose favour it is made".[51]

9.17 Whilst no equivalent cause of action is expressly provided in the NZ Bill of Rights Act, the New Zealand Court of Appeal implied a remedy into the Bill of Rights, recognising a cause of action directly against the State for damages for breach of the Act.[52]

9.18 The ACT Human Rights Act 2004 does not contain an express remedies section, despite the ACT Bill of Rights Consultative Committee recommending one.[53] The Victorian Charter precludes damages. However, section 39(3) of the Victorian Charter allows access to any existing relief or remedy based on grounds that the act or decision was unlawful (section 39(1)).

9.19 ALHR supports the UK model and submits that an express provision be made for an individual cause of action against public authorities that breach the human rights set out in the Human Rights Act.

9.20 The forum for resolving human rights complaints should be accessible, inexpensive and include appropriate dispute resolution services. ALHR recommends that the Committee consider the appropriateness of extending the jurisdiction of the State Administrative Tribunal to deal with human rights complaints (with appeals to the Supreme Court on points of law). Available remedies should include powers equivalent to declaration, injunction, compensation and public apology.

9.21 **Powers of Courts to grant remedies**

9.22 A right should be defined by reference to its remedy and the means by which it is enforced. It is well recognised in international human rights law that a State must make reparation to

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[51] Section 8(3) Human Rights Act 1998 (UK).

[52] *Simpson v Attorney-General* [1994] 3 NZLR 667 (Baigent's case).

[53] Towards an ACT Human Rights Act: Report of the ACT Bill of Rights Consultative Committee – page 80.

individuals whose human rights are violated.[54] This is an essential element of providing an "effective remedy" for violations of human rights.[55] An effective remedy may include compensation but not necessarily.[56] It is ALHR's view that compensation should be available where a public authority is found to have acted in a manner which is incompatible with a human right. This is in accordance with the position under the UK Human Rights Act, which allows a court to award damages when other remedies are inappropriate.

9.23 An additional matter to consider in relation to the courts role in a Human Rights Act is the issue of costs in relation to any aspect of court proceedings involving a human rights question (as defined by the Draft Bill). ALHR considers that, due to the public function of such legislation, an appropriate provision would be for a presumption that the usual situation is no costs are awarded against a party. The Human Rights Act could use wording similar to that of the *Native Title Act 1993* (Cth):

> (1) Unless the Court orders otherwise, each party to a proceeding must bear their own costs.
>
> (2) Without limiting the Court's power to make orders under subsection (1), if the Court is satisfied that a party to a proceeding has, by any unreasonable act or omission, caused another party to incur costs in connection with the institution or conduct of the proceeding, the Court may order the first-mentioned party to pay some or all of those costs.

9.24 This section has received judicial consideration in various cases and has operated to ensure no costs order as the normal course, but has also seen the award of costs against applicants and respondents in cases where their position was unreasonably maintained.

9.25 **"Floodgates" issues**

9.26 Legislation provides a well articulated normative regime to which all Western Australians may refer. The fact that litigation may result from a breach is not the aim of the legislation but rather a necessary by-product.

9.27 In any event, jurisdictions which have enacted human rights legislation have not experienced excessive litigation as a result. The UK Department of Constitutional Affairs' *Review of the Implementation of the Human Rights Act* (July 2006) states that the impact of the Human Rights Act on litigation has been very small. Statistics compiled in 2005 revealed that the *Human Rights Act 1998* (UK) was raised in less than 0.5% of all criminal cases.[57] On the rare occasions where damages have been awarded, the amounts have been generally very modest and lower than in tort actions.

9.28 Similarly, the 12 month review of the ACT Human Rights Act, which was released by the Department of Justice and Community Safety in June 2006, states that "to date, the courts and tribunals have arguably been the least affected by the Human Rights Act…there has not been a flood of litigation as a result of the Act".

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[54] Article 2(3) of the ICCPR.

[55] Article 2(2) of the ICCPR.

[56] UN Human Rights Committee *General Comment No 31* at [16]

[57] *Human Rights Act 1998: Impact on Court Workloads*, Department of Constitutional Affairs, 14 November 2005

10. If WA introduced a Human Rights Act what wider changes would be needed?

10.1 Creation of a Human Rights Commission

10.2 ALHR endorses an approach where a body is created or charged with the task of taking responsibility for to promoting respect for and protection of human rights, including and supervision of the operation of the WA Human Rights Act.

10.3 As mentioned previously in these submissions, the ACT established a Human Rights Commissioner with functions of review, education and advice in relation to the ACT Human Rights Act.

10.4 In Victoria, the Equal Opportunity Commission's role was expanded to address the Human Rights Charter. The UK Human Rights Act did not create or empower a body to address the human rights protected by the Act, and this potentially restricted its beneficial effect.[58]

10.5 ALHR, as previously submitted, supports the establishment of a Human Rights Commission with functions as set out in section 9.12 above.

10.6 Intervention in Court proceedings

10.7 Section 35 of the Draft Bill allows the Attorney-General to intervene in court cases which raise human rights issues. The Discussion Paper stipulates that a lawyer for the Attorney-General will ensure that the court's attention is drawn to any relevant principles of the Human Rights Act.

10.8 Experience at the Commonwealth level indicates that in instances where the Attorney-General and HREOC have both intervened, they have in some cases, adopted different perspectives and sought opposite outcomes.[59] ALHR would propose that the Equal Opportunity Commission, or other agency operating as a human rights commission as discussed, be given the power to intervene in cases which raise human rights questions. This would provide the court with a plurality of views on the protection of the human right concerned.

11. What else can the Government and the community do to encourage a culture of respect for human rights in WA?

11.1 In many ways the major impact of a Human Rights Act should be felt within the WA public service and not through the court system. The application of s.40 to the WA public service is wide-ranging and care needs to be taken to ensure not only proper understanding of how human rights impact upon the work of the public service but also dissemination across all the branches of the executive. The effect of a Human Rights Act will be severely diminished if it is considered that only the Department of the Attorney-General is required to implement the Human Rights Act. The rights contained are wide and will impact across

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[58] Discussion Paper at pages 34-35.

[59] *Members of the Yorta Yorta Aboriginal Community v Victoria* [2002] HCA 58; *Western Australia v Ward* [2002] HCA 28. As further demonstration see *Ruddock v Vadarlis* [2001] FCA 1865, where the Attorney-General was a party to the action (HREOC an intervener) and the Commonwealth argued the litigation was "…an interference with an exercise of executive power analogous to a non-justiciable "act of State": at [30]-[31] per Black CJ & French J.

almost all government portfolios. In recognition of this there needs to be a whole of government approach to implementation. This has occurred in Victoria and is to be commended.

Simeon Beckett
President
31 August 2007