



MONASH University
Castan Centre for Human Rights Law

**National Human Rights Action Plan:
Draft Baseline Study**

**Submission to Australian Government Attorney-General's
Department Consultation**

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1. The Castan Centre thanks the Australian Government for the opportunity to comment on its draft Baseline Study for a new National Human Rights Action Plan. The Baseline Study, according to its introduction, is intended to survey the status of human rights in Australia and identify priority areas of action for inclusion in the Action Plan.¹ The introduction also states that specific recognition of gaps in protection and other challenges in relation to human rights in Australia are to be the principal focus of the Baseline Study and the Action Plan.

2. The Baseline Study draws on relevant research, UN recommendations and other data to present an overview of the current human rights situation in Australia. The Centre has previously provided submissions (notably to the National Human Rights Consultation²) which address many of the priority areas for reform, and we are aware of other planned submissions to the present process which will address the issues in Chapters 2 and 3 of the Baseline Study in detail. As such, we intend to focus in this submission on Chapter 1, which deals with Australia's engagement with the international human rights system and domestic legal protection for human rights.

3. In summary, the Centre's view is that the Baseline Study needs to strike a better balance between exposition of existing policies and laws and acknowledgement of gaps in protection. It should be seen as conceptually distinct from, for example, periodic reports to the United Nations treaty bodies, which by their nature tend to defend Australia's human rights record and explain Government policy to the external experts. The Baseline Study is a reference document for domestic actors who are generally familiar with the issues and policies, and to be useful it must confront the gaps in the protection and realisation of human rights in Australia in an open manner. The following section-by-section commentary contains suggestions in this vein for Chapter 1.

Introduction

4. The Introduction mentions that the Baseline Study draws on the National Human Rights Consultation, but to mention the 35,000 written submissions to this Consultation without acknowledging that the majority were in favour of a Bill of Rights is misleading. Acknowledgement of this fact, along with an explanation from the Government as to why the recommendation of the Consultation Committee in favour of a federal Human Rights Act³ was rejected, should be included here.

¹ Draft Baseline Study, 1.

² Available at: <<http://www.law.monash.edu.au/castancentre/publications/bill-of-rights.pdf>>.

³ See National Human Rights Consultation Report, Recommendation 18 (available at: <<http://www.humanrightsconsultation.gov.au>>).

5. The Centre welcomes the Baseline Study's assertion that recommendations to Australia from the Universal Periodic Review (UPR) process will provide the foundation for development of the Action Plan. The Introduction also notes that the Baseline Study "incorporates the relevant concluding observations and recommendations of the human rights treaty bodies...." The importance of these observations and recommendations should not be understated. The UPR process is undeniably important, but the treaty bodies comprise experts in human rights law who (generally) make targeted, detailed and well-informed recommendations which are just as (if not more) important to consider in the development of the Action Plan. As such, the Centre recommends that all relevant UN recommendations,⁴ and not just UPR recommendations, provide the foundation for 'developing actions' in the Action Plan.

Chapter 1: Protection and promotion of Human Rights in Australia

6. Chapter 1 makes some important points about the protection of human rights in Australia under our political and legal framework, but it also fails to address some critical issues.

7. First, in the spirit of identifying gaps, Chapter 1 should acknowledge that Australia has decided not to become party to two of the nine core UN human rights treaties – the International Convention on the Protection of the Rights of All Migrant Workers and Their Families⁵ and the International Convention for the Protection of All Persons from Enforced Disappearance.⁶ Reasons for this should be set out.

8. "At a domestic level," Chapter 1 continues, "human rights in Australia are protected by our constitutional system, strong democratic institutions and specific legal protections." At this point, a vigorous justification of Australia's decision not to give specific legal protection to the vast majority of human rights (economic, social and cultural rights in particular) would be appropriate. The Baseline Study is at pains to point out that the Views of UN human rights treaty bodies are not binding, but it does not acknowledge the same is true of its Human Rights Framework and the various Action Plans.

⁴ This would include not only recommendations from the treaty bodies and the Human Rights Council, but also recommendations from Special Procedures, the High Commissioner for Human Rights and the High Commissioner for Refugees.

⁵ 18 December 1990, 2220 UNTS 3, entry into force 1 July 2003.

⁶ 20 December 2006, UN Doc A/61/488; C.N.737.2008.TREATIES-12, entry into force 23 December 2010.

1.1 – Australia’s international human rights commitments

9. Australia’s early involvement with the human rights movement at the international level is significant and goes beyond the (important) achievements of Doc Evatt cited in the footnote to this paragraph. Some more relevant information could be included from *Australia and the Birth of the International Bill of Rights* by Annemarie Devereux.⁷

1.1.1 – Australia’s international human rights law obligations

10. This paragraph makes welcome reference to declarations and reservations entered by Australia on becoming party to several of the core human rights treaties. It also says the Government keeps these declarations and reservations under review. Given Australia’s stance on inappropriate or unnecessary reservations made by other countries,⁸ the Centre believes the Government could increase its efforts to review these declarations and reservations with a view to withdrawing them.

11. The following paragraph, on Optional Protocols, omits to mention the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights.⁹ The Baseline Study should acknowledge the existence of this Optional Protocol and explain why Australia has not ratified it. It should also acknowledge the final draft Optional Protocol to the Convention on the Rights of the Child establishing a communications procedure,¹⁰ which was adopted by the Human Rights Council on 17 June 2011.¹¹ In the context of this instrument, the Government should state clearly its position on the justiciability of economic, social and cultural rights. The Centre reminds the Government that, in its recent publication *Australia: Seeking Human Rights for All*,¹² Australia is said to be “a leading proponent of [the] consistent and comprehensive implementation” of the Universal Declaration of Human Rights, and to be “boosting its effort towards improved economic, social and cultural rights” recognising that “human rights are indivisible.”¹³

1.1.2 – Australia’s engagement with the UN human rights system

12. Australia’s engagement with the UN human rights system is positive in some ways (as noted in the draft Baseline Study), but wanting in others. One example is Australia’s responses to Concluding Observations of the treaty bodies. The Human Rights Committee last reviewed a periodic report from Australia in March 2009.¹⁴ In September

⁷ Federation Press, 2005.

⁸ See eg <<http://www.alhr.asn.au/articles/2011/07/31/pakistan-to-withdraw-human-rights-reservations-in-response-to-international-pressure.html>>.

⁹ 10 December 2008, UN Doc A/63/435; C.N.869.2009.TREATIES-34, not yet in force.

¹⁰ UN Doc A/HRC/17/L.8.

¹¹ This Optional Protocol has yet to be adopted by the General Assembly.

¹² <http://www.dfat.gov.au/hr/downloads/udhr_hr_for_all.pdf>.

¹³ Ibid, 2-3.

¹⁴ See: <<http://www2.ohchr.org/english/bodies/hrc/hrcs95.htm>>.

2010, the Special Rapporteur for Follow-up to Concluding Observations wrote to the Australian Government¹⁵ reiterating a request in the relevant Concluding Observations¹⁶ for further information on several issues. At the time of writing (another year later), no response appears to have been received by the Committee.¹⁷ The Committee against Torture's Concluding Observations of May 2008¹⁸ made a similar request, and once again no response has been published.¹⁹ There can be many reasons for delays in responding to certain matters – particularly if they involve security sensitivities, but ultimately the issue is one of inadequate prioritisation and resourcing. The Centre calls on the Government to address this issue in the National Action Plan, in the spirit of its commitment to engagement in the Human Rights Framework.

13. Engagement must also involve a significant level of compliance in good faith with our treaty obligations. However, Australia has provided an effective remedy to individuals in respect of whom the UN human rights treaty bodies have found breaches of our obligations in only a few cases.²⁰ Whilst the Views of the treaty bodies are non-binding, if the Government is serious about its respect and support for the human rights treaties to which Australia is a party²¹ it should make more of an effort to respect them and put in place a remedial scheme for those whose rights are found to have been violated. The Centre acknowledges the work of the AHRC in recommending compensation for certain violations,²² but a binding statutory scheme would be preferable.

14. This section also presents an opportunity for the Government to give more detail on the work of the Permanent Mission to the UN in Geneva, and outline a vision for its future (which would ideally involve a permanent position of human rights representative to provide much-needed continuity in Australia's engagement with the UN human rights system). The Geneva Mission's leadership of the JUSCANZ Group on Human Rights, its involvement with the treaty bodies (including its role as liaison for Canberra-based

¹⁵ See: <http://www2.ohchr.org/english/bodies/hrc/docs/Letter_Australia.pdf>.

¹⁶ UN Doc CCPR/C/AUS/CO/5 – see in particular paragraph 29.

¹⁷ The Australia's performance in this regard may be contrasted with that of Sweden, which complied with the Committee's request for further information in a timely fashion.

¹⁸ UN Doc CAT/C/AUS/CO/3 – see in particular paragraph 37.

¹⁹ See: <<http://www2.ohchr.org/english/bodies/cat/cats40.htm>>. The Centre concedes that other States which appeared at the Committee's 40th Session, including Sweden, also have yet to respond to the Concluding Observations. However, Norway and the Hong Kong SAR have responded to Concluding Observations issued in 2007 and 2008 and Australia should aim for best practice in this regard.

²⁰ See eg S Joseph, 'The Howard Government and the International Human Rights System,' 27 *Australian Yearbook of International Law* 45, 52. The current (ALP) Government seems to have a more positive attitude to human rights generally (see eg its response to the UPR Recommendations), but continues to ignore significant recommendations of the Human Rights Treaty Bodies in relation to eg legal remedies.

²¹ The ALP Platform (<http://www.alp.org.au/australian-labor/our-platform/>) suggests this is Government policy - see Chapter 7, paragraph 132, and the National Human Rights Framework also refers specifically to the Views of the Treaty Bodies under its "Respect" pillar.

²² See eg: <http://www.hreoc.gov.au/about/media/media_releases/2011/71_11.html>.

officials working on human rights matters²³) and relevant non-governmental organisations are all missing from this section. The Centre believes Australia's presence in Geneva is critical to its international engagement with the UN human rights system and should be promoted and reinforced as part of the National Action Plan.

15. The work of the New York Mission should be acknowledged too, even if its own description of its role does not mention Human Rights.²⁴ In July 2011 Ambassador Quinlan made a progressive statement in relation to the right to safe and clean drinking water and sanitation,²⁵ and earlier in the year the Mission sent representatives to the Permanent Forum on Indigenous Issues and the Commission on the Status of Women to discuss other important human rights topics.²⁶ Obviously the Baseline Study is only meant to present an overview of Australia's international engagement in the field of Human Rights, but even an overview should acknowledge the importance of diplomacy (backed up by policy) in this regard.

16. Finally, the section on international engagement ought to identify gaps in Australia's efforts, including regulation on Australian businesses' activities overseas. In 2008, Professor John Ruggie, the Special Representative of the UN Secretary-General on Transnational Corporations and other Business Enterprises,²⁷ published a report on human rights and good business practice which recommended that countries where transnational corporations are based, such as Australia, close legal loopholes and gaps that allow companies to conduct business without respect for Human Rights. In June 2011, Professor Ruggie issued new Guiding Principles on Business and Human Rights²⁸ to implement the UN's "Protect, Respect and Remedy" framework²⁹ which Australia should endorse and promote. In this context, the Centre also refers the Government to the Committee on the Elimination of Racial Discrimination's relevant recommendation in its most recent Concluding Observations on Australia.³⁰

1.2 – Australia's Constitutional system

17. The Baseline Study gives a succinct summary of Australia's Constitutional system in the introduction to this section, but in the human rights context the main point to note

²³ Including human rights sections of DFAT, AGD, DIAC and FaHCSIA.

²⁴ <<http://www.unny.mission.gov.au/unny/resources.html>>.

²⁵ <http://www.unny.mission.gov.au/unny/Water_27_07_11.html>.

²⁶ See: <http://www.unny.mission.gov.au/unny/110517_PFI.html>, <http://www.unny.mission.gov.au/unny/110518_PFI.html> and <http://www.unny.mission.gov.au/unny/110224_CSW.html>.

²⁷ <<http://www.ohchr.org/EN/Issues/TransnationalCorporations/Pages/SRSGTransCorplIndex.aspx>>.

²⁸ <<http://www.business-humanrights.org/media/documents/ruggie/ruggie-guiding-principles-21-mar-2011.pdf>>.

²⁹ <<http://www.business-humanrights.org/SpecialRepPortal/Home/Protect-Respect-Remedy-Framework>>.

³⁰ See: UN Doc CERD/C/AUS/CO/15-1 paragraph 13, <<http://www2.ohchr.org/english/bodies/cerd/cerds77.htm>>.

about Australia's Constitution is its almost complete lack of included rights. The strongest legal protection of human rights arises when they are entrenched in a constitution which prevails over ordinary legislation – as they are in so many countries around the world.³¹ There need not be an in-depth discussion of the Constitutional Conventions but there should be some kind of statement to the effect that the drafters considered the Westminster system of responsible Government, together with a strong separation of powers between the executive and the judiciary, to be sufficient to protect Australians' rights and freedoms.

1.2.1 – Constitutional rights and guarantees

18. The Australian Constitution contains very few individual rights, and some of the rights protected are not, strictly speaking, human rights. Section 92 (freedom of interstate trade and intercourse³²) could possibly be added to the examples of such individual rights given in this section. The Centre also notes that ss 51(xxxi), 80 and 116 bind only the Commonwealth, while ss 92 and 117 effectively bind only the States.³³ As noted in the draft Baseline Study, the High Court has also held that some rights in the nature of human rights are implicit in the Constitution. However, it should be noted that there may be some consequential rights which derive from the implied freedom of political communication³⁴ and that the right to vote conferred by the *Commonwealth Electoral Act 1918* is limited.³⁵ Some fair trial rights may also be derived from implications regarding the separation of judicial powers.³⁶ The Baseline Study, if it is to characterise these protections accurately, should also note that some of them have arguably been interpreted narrowly. For example, no law has ever been struck down for breach of freedom of religion in s 116.³⁷

19. Finally, the Study should note that each of the States has its own Constitution, but these contain even fewer specific rights protections than their Commonwealth counterpart.

³¹ These include Canada, Finland, the United States, France, the Philippines, Brazil, South Africa and the European Union. In addition, extensive rights have been implied into Israel's "Basic Laws" by its Supreme Court: see David Kretzmer, 'Basic Laws as a surrogate Bill of Rights: The case of Israel', in Philip Alston (ed), *Promoting Human Rights through Bills of Rights* (OUP, 1999) 75.

³² "Intercourse" includes movement between the States, thus providing some constitutional protection for freedom of movement.

³³ It is however theoretically possible for ss 92 and 117 to bind the Commonwealth. The Commonwealth is however far less likely than a State to pass legislation that inherently favours the people of a particular State.

³⁴ It is possible that further political rights might be derived from the core right to political speech, such as right of political assembly or association. The existence and scope of such derivative rights has not been confirmed by a High Court majority. See Sarah Joseph and Melissa Castan, *Federal Constitutional Law: A Contemporary View* (LBC, 2006, 2nded), 428-31.

³⁵ See *Roach v Electoral Commissioner* [2007] HCA 43 – some prisoners remain barred from exercising this right.

³⁶ Joseph and Castan, above n 34, ch 6.

³⁷ *Ibid* 378-84.

1.2.3 – Separation of powers

20. The separation of powers doctrine, involving as it does judicial independence, is clearly the most effective bastion of rights protection in Australia. However, an independent judiciary is still subject to Parliamentary supremacy. If the Parliament decides to pass a law which is incompatible with fundamental human rights (see further under *Legal Protections* below), the absence of a Constitutional Bill of Rights means judges are unable to “protect individual rights from government overreach.” A victim may hope for the law to be overturned or amended by a subsequent (differently-constituted) Parliament, but he/she otherwise has little chance of obtaining a remedy, despite Australia’s commitments under the International Covenant on Civil and Political Rights (ICCPR)³⁸ and other human rights instruments. From an international human rights perspective, this is a weakness in the Australian system of government.

1.3 – Australia’s democratic institutions

21. This section gives two examples of Parliamentary Committees which have conducted inquiries relevant to human rights, but it overlooks the relevant work of several other Committees (*ad hoc* and standing) including:

- The Senate Standing Committee on Legal and Constitutional Affairs
- the House Committee on Social Policy and Legal Affairs
- the Committees (Senate and Joint) on Foreign Affairs, Defence & Trade (which reviews acceptance of international human rights obligations)
- the House Committee on Aboriginal & Torres Strait Islander Affairs
- the Senate Committee on Community Affairs (which has conducted inquiries into eg children in institutional care), and
- the Joint Select Committee on Australia’s Immigration Detention Network.

22. Some high profile former select Committees, such as the Senate Select Committees on a Certain Maritime Incident³⁹ and on Mental Health⁴⁰ and the Joint Committee on Intelligence & Security⁴¹ also deserve to be mentioned. The inquiries conducted by these Committees are often the only real forum for substantial and considered debate on Australian Government policies and practices with human rights implications, not to mention the best opportunities for Australian civil society to provide input on these practices and policies, and their importance should therefore not be understated.

23. Given it was one of the major outcomes from the National Human Rights Consultation, it would be remiss of the Baseline Study not to mention the proposed Joint

³⁸ See in particular Article 2(3)(a).

³⁹ <http://www.aph.gov.au/Senate/committee/maritime_incident_ctte/index.htm>.

⁴⁰ <http://www.aph.gov.au/Senate/committee/mentalhealth_ctte/index.htm>.

⁴¹ <<http://www.aph.gov.au/house/committee/pjicis/index.htm>>.

Committee on Human Rights, which (once established) will be the foremost forum for scrutiny of Australian law for compliance with international human rights obligations.

24. Moving on from Parliament, the Baseline Study mentions National Human Rights Institutions (NHRIs). In the Centre's view, the AHRC is not the only organisation which deserves to be acknowledged in this section. The various State and Territory Human Rights and/or Equal Opportunity Commissions, along with the Ombuds Offices (at all levels) do important human rights work.⁴²

25. The Baseline Study goes on to state that Australia has free and independent media protected by the implied freedom of political communication. The Centre notes that this protection is incomplete – for example it has not prevented journalists being convicted of contempt of court for protecting their sources, even for stories of a political nature.⁴³ The Baseline Study should recognise the Government's significant efforts to bolster protection in this area, culminating in the *Evidence Amendment (Journalists' Privilege) Act 2011* (Cth).⁴⁴

26. The Centre welcomes the Government's recognition of the work of civil society in the Baseline Study, and also the commitment in the National Human Rights Framework to increase engagement and consultation. The independence and expertise which civil society can contribute should be recognised and supported by the Government in the development of any policy concerning or affecting human rights.

27. One final comment is applicable to all of the checks and balances mentioned in section 1.3 – none of them is binding on the Australian Government. 'Strong and robust' they may be, but even formal recommendations by the Parliamentary Committees or the Australian Human Rights Commission (AHRC) are at best persuasive, and can be ignored if the Government of the day declines to accept them. This should be acknowledged as a significant protection gap. The UN Committee against Torture⁴⁵ and Committee on Economic, Social and Cultural Rights⁴⁶ have both recommended that the AHRC mandate be strengthened, and the Centre would support such a move.

⁴² See eg the Commonwealth Ombudsman's reports on Police operations and immigration detention: <<http://www.ombudsman.gov.au/publications-and-media>>.

⁴³ See: <<http://www.theage.com.au/national/new-law-to-protect-identity-of-sources-20081102-5gb4.html>>. We note that it is not clear whether the implied freedom was relied on specifically in the relevant case.

⁴⁴ As well as its predecessor initiatives the Evidence Amendment (Journalists' Privilege) Bills of 2007, 2009, 2010 (x2).

⁴⁵ See UN Doc CAT/C/AUS/CO/3, 22 May 2008, Recommendation 14.

⁴⁶ See Un Doc E/C.12/AUS/CO/4, 12 June 2009, Recommendation 13.

1.4 – Legal Protections

Legislation

28. Australia is party to numerous international treaties, and is bound under international law to comply with those treaties. However, treaties do not become enforceable in Australian law unless they are incorporated into Australian law by legislation. Australia has largely incorporated CERD, parts of CEDAW, the CRC and the CAT into Australian law, as well as parts of the Genocide and Refugee Conventions.⁴⁷ Notably, it has not incorporated either of the two most comprehensive human rights treaties, the ICCPR and the ICESCR.

29. The Centre notes that the Australian Labor Party's Policy Platform contains the following statement:

Labor will adhere to Australia's international human rights obligations and will seek to have them incorporated into the domestic law of Australia, and have them taken into account in administrative decision-making and whenever new laws and policies are developed.⁴⁸

30. Section 1.4 should therefore begin with a robust justification of Australia's continuing omission to incorporate some of the most important of its international obligations into its domestic law at the federal level. Simply stating that some Australian law happens to be congruent with our international obligations fails to engage with the myriad recommendations from international actors to provide enforceable legal remedies for breaches of the human rights contained in the treaties to which Australia is party.⁴⁹

31. Of course Australians have the right to take their complaints to the UN human rights treaty bodies under some of these treaties. However, these international avenues cannot substitute for effective domestic protection of human rights (not least because they are not binding on States parties). In any case, it is surely preferable for Australia, with its robust legal and political system, to provide for its own protection of Human Rights, rather than to rely on the supervision of international bodies. In fact, the system of international human rights law is premised on the assumption that countries will use their domestic legal systems and administrative actions to achieve the realisation of Human Rights; the international avenues of scrutiny are intended to evaluate

⁴⁷ *Racial Discrimination Act 1975* (Cth); *Sex Discrimination Act 1984* (Cth); *Criminal Code Act 1995* (Cth); *Family Law Act 1975* (Cth); *Genocide Convention Act 1949* (Cth); *Migration Act 1958* (Cth).

⁴⁸ See *ALP Platform*, above n 21, Chapter 7 – *Securing an inclusive future for all Australians*, paragraph 133.

⁴⁹ See eg CAT/C/AUS/CO/3 (2008), Recommendation 9; E/C.12/AUS/CO/4 (2009), Recommendation 11(c); CERD/C/AUS/CO/15-1 (2010) Recommendation 9; CCPR/C/AUS/CO/5 (2009), Recommendation 8; Report by the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, James Anaya, A/HRC/15 (2010) Paragraph 75. These are just the most recent examples.

performance in that respect, as opposed to providing substantive human rights protection themselves.

32. Having said that, we should note there is other Australian legislation which protects rights, and which could be acknowledged in the Baseline Study – for example legislation to regulate police powers, aboriginal heritage and native title, privacy, administrative law, admissibility of evidence and elections. Certain economic and social entitlements are also provided under, for example, social security, health and education legislation. In addition, there are some State and Territory laws other than Anti-discrimination Acts and the ACT and Victorian Bills of Rights which are relevant – human rights-like protections are provided for under State legislation regarding, for example, police powers, criminal and civil procedure, legal aid, administrative law, social security and elections.

33. Nevertheless, existing protections are piecemeal and selective.⁵⁰ Examples of rights for which there is no specific protection in Australia include the right to compensation for miscarriages of justice (Article 14(6) ICCPR), the prohibitions on cruel, inhuman or degrading treatment or punishment,⁵¹ on the use of evidence obtained by torture⁵² and on *non-refoulement*.⁵³ Numerous aspects of economic, social and cultural rights also suffer from a lack of statutory protection.⁵⁴

Common Law

34. The Centre cannot let the statement that “[t]he common law’s development is itself influenced by international human rights law and Australia’s human rights commitments” pass without comment. It is often claimed that the common law provides significant protection for human rights.⁵⁵ Certainly, some common law rights overlap considerably with human rights.⁵⁶ For example, the tort of false imprisonment overlaps with the freedom from arbitrary detention. One’s right to reputation can be protected

⁵⁰ See eg Andrew Byrnes, Hilary Charlesworth and Gabrielle MacKinnon, *Bills of Rights in Australia* (UNSW Press, 2009) 36.

⁵¹ Division 274 of the *Criminal Code Act 1995* (Cth), which implements the Convention against Torture, makes no mention of cruel, inhuman or degrading treatment or punishment.

⁵² Australian courts have discretion to exclude evidence obtained improperly or illegally (see eg *Evidence Act 1995* (Cth) s 138), but this does not amount to a prohibition.

⁵³ The Centre acknowledges the Migration Amendment (Complementary Protection) Bill 2011 which is currently before Parliament, but fears that the current tenor of the debate about asylum seekers may delay or even prevent its passage.

⁵⁴ See generally, National Association of Community Legal Centres, *Freedom Respect Equality Dignity: Action: NGO Submission to the UN Committee on Economic, Social and Cultural Rights: Australia* (2008).

⁵⁵ Eg in the National Human Rights Consultation Report as cited in the Baseline Study, and Sir Gerard Brennan, ‘The Constitution, Good Governance and Human Rights’ (Paper presented at the Human Rights Law Resources Centre Seminar, 12 March 2008) 3, 21. It is submitted that such assertions exhibit an idealistic view of the common law as a protector of Human Rights.

⁵⁶ See generally, Nick O’Neill, Simon Rice, and Roger Douglas, *Retreat from Injustice: Human Rights Law in Australia* (Federation Press, 2004) Ch 5.

under the law of defamation, and trespass (to the person and to property) or private nuisance incidentally protect several human rights, such as the right to privacy.⁵⁷ Relatively recent developments include the uncovering of a common law right to fair trial (though the content of this right remains unclear) by the High Court in *Dietrich v R*,⁵⁸ the recognition in the common law of native title rights in *Mabo v Queensland (No 2)*,⁵⁹ and the inchoate development of a tort of breach of privacy.⁶⁰

35. However, it must be noted that the common law's role as a protector of human rights is patchy. Decisions such as *Victoria Park Racing and Recreation Grounds Club v Taylor*⁶¹ and *Malone v Metropolitan Police Commissioner*⁶² (indicating there is no common law right to privacy); *Dugan v Mirror Newspapers*⁶³ (no right of action in defamation to a person who had committed a capital crime); and *Duncan v Jones*⁶⁴ (no common law right to freedom of assembly) do not reflect well on the common law's capacity to protect human rights.⁶⁵ The common law has historically failed to protect the rights of women, for example, by excluding women from certain professions, from public office and the right to vote.⁶⁶ At common law, a woman's property rights became those of her husband upon marriage. Indeed, the Supreme Court of NSW in *Ex parte Ogden*⁶⁷ found that a married woman was simply not recognised as a person under the law. Until *R v L*,⁶⁸ the common law did not recognise the crime of rape perpetrated by a husband upon his wife. Most of these injustices were amended by statute, though some were belatedly cured by more enlightened courts, as in the case of *R v L*.

36. Furthermore, beyond property rights, where it historically provides for strong protection, the common provides little protection for economic, social and cultural rights – possibly because it has historically been difficult to access for the vulnerable and the poor.⁶⁹

37. More recently, there have been Australian cases in which the courts have refused to uphold fundamental rights in the face of legislation which abrogates them. In *Al-Kateb*

⁵⁷ See eg *Sedleigh-Denfield v O'Callaghan* [1940] 3 All ER 349.

⁵⁸ [1992] HCA 57.

⁵⁹ [1992] HCA 23.

⁶⁰ See *Grosse v Purvis* [2003] QDC 151 and *Doe v Australia Broadcasting Corporation* [2007] VCC 281.

⁶¹ [1937] HCA 45.

⁶² [1979] Ch 344.

⁶³ [1978] HCA 54.

⁶⁴ [1936] 1 KB 218.

⁶⁵ Note also the common law powers of magistrates to issue 'binding over' orders, which ensure that they keep the peace. Such orders were used extensively in the 1980s in the UK to target striking miners, and others protesting against certain policies of the Thatcher government.

⁶⁶ O'Neill et al, above n 56, 115-28.

⁶⁷ (1893) 14 NSWLR 86.

⁶⁸ [1991] HCA 48.

⁶⁹ See eg M Spencer, 'Common Law Legacy and Access to Justice: Contingency Fees and the Birth of Civil Legal Aid' 9 *Nottingham Law Journal* 32 (2000)

v Godwin,⁷⁰ the High Court effectively held that indefinite administrative detention of ‘unlawful non-citizens’ was permissible under the *Migration Act 1958* (Cth). McHugh J (with the majority) concluded:

It is not for courts, exercising federal jurisdiction, to determine whether the course taken by Parliament is unjust or contrary to basic human rights. The function of the courts in this context is simply to determine whether the law of the Parliament is within the powers conferred on it by the Constitution.⁷¹

38. Kirby J, in dissent, argued in favour of construing the Act not only in line with international human rights law, but also with the common law presumption in favour of personal liberty.⁷² This argument did not prevail. This was a very important test of the common law’s ability to protect fundamental rights in Australia, and it failed. Another example is *Nystrom v Minister for Immigration*,⁷³ in which the High Court overturned an order of the Full Federal Court to quash the Minister’s decision to cancel Mr Nystrom’s visa and deport him, despite the fact he had lived in Australia for all but 27 days of his life. Rights to family life and to enter one’s own country were ignored, as were freedoms from double jeopardy (the visa cancellation was based on criminal offences for which he has already served sentences) and arbitrary detention (Mr Nystrom was detained in a maximum-security prison for several months after his visa was cancelled).⁷⁴ In fact, neither common law liberties nor human rights were even mentioned in the judgments.

39. It emerges from these examples that the common law does not provide for significant human rights protection. In any case, there are two further problems. First, innovative common law protection is reliant upon the willingness of judges to innovate, which faces stern opposition in Australia. Indeed, the overturning of a particularly egregious and discriminatory doctrine, *terra nullius*, in the *Mabo 2* case (and the extension of native title rights in the subsequent *Wik* case) was criticised by some for its allegedly inappropriate level of judicial activism,⁷⁵ as were many of Justice Kirby’s judgments referring to human rights and Australia’s international obligations.⁷⁶ Second, the common law can be overridden by statute at any time, which is a significant limitation on its role as guarantor of rights. The Centre believes the Baseline Study should at least acknowledge these issues.

⁷⁰ [2004] HCA 37.

⁷¹ *Ibid* paragraph 74.

⁷² *Ibid* paragraph 150.

⁷³ [2005] HCA 50.

⁷⁴ For further details, see: <<http://www.hrlrc.org.au/files/PXB9OSNUM6/Individual%20Communication.pdf>>.

⁷⁵ Such criticisms are recorded in, for example, HP Lee, ‘Subverting Judicial Independence’ (1998) 1 *Constitutional Law and Policy Review* 55, 56; Sir Anthony Mason, ‘The State of the Judicature’ (1994) 68 *Australian Law Journal* 125, 133; Sir Anthony Mason, ‘No Place in a Modern Democratic Society for a Supine Judiciary’ (1997) 35 *Law Society Journal* 51.

⁷⁶ See eg M Kirby, ‘Judicial activism: power without responsibility? No, appropriate activism conforming to duty,’ (2006) 30(2) *Melbourne University Law Review* 576.

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40. *Al-Kateb and Nystrom*, along with a great many other migration-related cases, also demonstrate the fruitlessness of pursuing administrative law solutions in the absence of constitutional or legislative protection of Human Rights. With few notable exceptions,⁷⁷ Australian administrative law has not enabled the courts to review substantively Executive decisions affecting people's rights and liberties. Administrative law remedies have also been denied to many whose rights have been affected, particularly under the Migration Act, by privative clauses designed to prevent the courts from reviewing the relevant Executive actions.⁷⁸

41. In *Minister of State for Immigration and Ethnic Affairs v Ah Hin Teoh*,⁷⁹ the High Court developed a doctrine under which individuals have a legitimate expectation that government bodies will abide by Australia's international legal obligations when making decisions that affect them. *Teoh* confirmed the existence of procedural rights that government bodies would take treaty obligations into account in making decisions, rather than substantive rights that treaty obligations would actually be respected. *Teoh* has never been applied in any case since to invalidate a government action. Indeed, successive Australian governments have sought to neutralise this decision by Executive indications to the contrary,⁸⁰ as well as the introduction of proposed legislation to reverse the decision.⁸¹ Furthermore, recent obiter statements by four High Court judges have criticised the *Teoh* decision, signalling that it may not survive a direct challenge.⁸²

42. As a result, there is generally no requirement, outside the ACT and Victoria, for public officials to act in accordance with human rights in making decisions which affect the lives of individuals, substantively or procedurally. Individuals, particularly the vulnerable, such as the elderly, children, the homeless, prisoners or other detainees, or the mentally ill, are susceptible to being treated as problems to be dealt with rather than persons with human rights that deserve respect when decisions are made that affect

⁷⁷ Eg *Plaintiff S157/2002 v Cth* [2003] HCA 2.

⁷⁸ See eg *Migration Act 1958*, s 474.

⁷⁹ [1995] HCA 20.

⁸⁰ Senator Gareth Evans, Minister for Foreign Affairs and Trade, and Michael Lavarch, Attorney-General, 'International Treaties and the High Court Decision in *Teoh*' (Joint Statement, 10 May 1995). A second statement was later issued as a result of a change in government: Alexander Downer, Minister for Foreign Affairs and Trade, and Darryl Williams, Attorney General, 'The Effect of Treaties in Administrative Decision Making', (Joint Statement 25 February 1997). The legal effect of these executive statements is unclear. The Centre acknowledges the statement in the current ALP platform (above n 21, Chapter 7 – *Securing an inclusive future for all Australians*, paragraph 133) to the effect that the Labor Government intends to have international human rightstaken into account in administrative decision-making.

⁸¹ See, eg, *The Administrative Decisions (Effect of International Instruments) Bill 1996* (Cth) (lapsed). To date, only South Australia has enacted legislation which purportedly reverses *Teoh*: *Administrative Decisions (Effect of International Instruments) Act 1995* (SA).

⁸² See *Minister for Immigration and Multicultural Affairs; Ex parte Lam* [2003] HCA 6. The relevant four judges were McHugh, Gummow, Hayne and Callinan JJ.

their lives (eg their health, their houses, or their liberty). Even if such decisions are so objectively unreasonable as to enliven administrative law remedies, these remedies generally apply to regulate the procedural aspects, rather than the substantive aspects, of public decision-making: such remedies often cannot right the relevant wrongs.

43. In short, of the legal protections mentioned in section 1.4, only the anti-discrimination legislation and Bills of Rights in the ACT and Victoria deserve to be nominated. At the very least, this section would reflect reality better if it were divided into specific and general protections.

1.5.2 – Human rights education

44. Section 1.5.2 summarises the “Educate” pillar of the 2010 National Human Rights Framework’s framework, but it should at least echo the Framework’s explanation of why (much) more human rights education (HRE) is required in Australia. As the Framework notes, “Australians are supportive of ensuring that all citizens are given a fair go. However, it is not always fully appreciated how respect for human rights achieves that objective.”⁸³ The Baseline Study, in its efforts to identify gaps in human rights protection in Australia, should go further and acknowledge that awareness of, and knowledge about, human rights in Australia is sorely lacking. For one thing, human rights are not included in the new national school curriculum – either as part of broader civics and legal studies or as a separate item. Even if they were, HRE does not form part of the standard Diploma or Bachelor of Education or in-service teacher training. If teachers do not know about human rights and related pedagogy, they are not in a position to help students learn about human rights. A specific teacher training program is required if HRE is to become a part of the school experience of Australian children.

45. In this context, the Centre applauds the Government’s commitment to provide significant funding through the human rights education grants program and to support the AHRC’s educative role. The Centre acknowledges the AHRC’s excellent work on human rights education for the general public, as well as the modules it has developed to support HRE within primary and secondary schools.⁸⁴ The AHRC is also working towards better inclusion of human rights in the National School Curriculum.⁸⁵ However, we recommend the Government conduct (or commission) a comprehensive study of HRE at all levels to determine what is currently being taught, and which students it is reaching.⁸⁶

⁸³ At p 6.

⁸⁴ Mentioned in Australia’s Fourth Periodic Report under the CRC, available at: <http://www.ag.gov.au/www/agd/agd.nsf/Page/Humanrightsandanti-discrimination_ReportsundertheConventionontheRightsoftheChild> paragraph 24.

⁸⁵ <http://www.hreoc.gov.au/education/community_engagement.html>.

⁸⁶ Such a study was undertaken recently in the context of the teaching of values generally by Education Services Australia – see: *Giving Voice to the Impacts of Values Education: The Final Report of the Values in Action Schools Project*, October 2010, available at:

This would allow for the development of a more focussed plan to improve HRE throughout Australia.

46. In the 2008 *Melbourne Declaration on Educational Goals for Young Australians*, to which the Framework refers, civics and citizenship are mentioned as part of the humanities and social sciences learning area, but it appears they will teach students about existing rights and responsibilities of Australian citizens. Unless the students happen to live in the ACT or Victoria, the rights component of these lessons will have scant material from which to draw.

47. The Centre notes that Australia, as a party to the Convention on the Rights of the Child (CRC), has agreed under Article 29(1)(b) that “the education of the child shall be directed to,” amongst other things “[t]he development of respect for human rights and fundamental freedoms, and for the principles enshrined in the Charter of the United Nations.” Australia’s Fourth Periodic Report under the CRC of 2008⁸⁷ asserted that Australia promotes human rights education through the National Agenda for Early Childhood, support for the AHRC’s education initiatives and a website called The Source (which appears to have since become defunct⁸⁸). It also said the ‘Civics and Citizenship’ and ‘Values’ programs “promote the general themes of the World Program for Human Rights Education,”⁸⁹ which is debatable.⁹⁰

48. An in-depth study of HRE in Australia by the Centre’s Dr Paula Gerber, taking Victoria as an example and comparing it with human rights education in the US (which has not ratified the CRC), found Article 29(1)(b) had “no discernible impact on the nature and extent of human rights education] being provided in secondary schools.”⁹¹ As might be expected, the existence of a Bill of Rights in the US played a larger role.⁹² The study also found that both Australia and the US have traditionally been concerned to present themselves as champions of HRE internationally, and reminded us that Australia participated actively in the drafting of Article 29(1) of the CRC.⁹³ As such, the Australian Government should seize the opportunity of the new National Action Plan to fulfil its obligation under Article 29(1)(b) properly. This would also accord with the primary recommendation of the National Human Rights Consultation.

<http://www.curriculum.edu.au/verve/resources/VASP_FINAL_REPORT_2010.pdf>. This study only touches on human rights education (see eg p 56).

⁸⁷ See above n 84.

⁸⁸ Supplied URL <http://www.thesource.gov.au> was inactive as of August 2011.

⁸⁹ Fourth Periodic Report, above n 84, paragraphs 57-59.

⁹⁰ See eg *Activating Human Rights in Education: Exploration, Innovation and Transformation*, Australian College of Educators, 2008 at 30.

⁹¹ See P Gerber, *From Convention to Classroom: The Long Road to Human Rights Education*, VDM Verlag Dr Müller 2008, 323.

⁹² *Ibid*, 324.

⁹³ *Ibid*, 325.

49. The Centre acknowledges the division of responsibility for education between the Commonwealth and State/Territory Governments and the difficulties this presents for implementation, but urges the Commonwealth to find a way to overcome these difficulties as part of its commitments under the Framework – for example through a tied grant under section 96 of the Constitution.⁹⁴ The absence of a (strong) mandate from Government was one of the obstacles identified by teachers in the course of Dr Gerber’s study, along with a crowded curriculum and a lack of resources.⁹⁵ In our submission, these obstacles should be identified in the Baseline Study and the National Action Plan should set out ways to overcome them.

Summary

50. The positive steps set out in this chapter are all welcome inclusions, although “Australia has a constitutional system of government with strong and robust democratic institutions” seems incongruous in this list.

51. The Centre also welcomes the inclusions in the “Issues that a National Action Plan could address” section. However, in line with our comments above, the Centre recommends the following additions:

- Continue to close gaps in legal protection for human rights in Australia as they are identified.
- Provide for remedies for breaches of human rights identified by the UN treaty bodies and the AHRC.
- Ensure human rights are taken into account in administrative decision-making and whenever new laws and policies are developed.
- Strengthen the mandate of the AHRC in line with the recommendations of the UN human rights treaty bodies.
- Follow up on other treaty body and UPR recommendations in relation to Australia’s protection of Human Rights.
- Keep under review Australia’s decision not to become a party to various human rights treaties.
- Ensure that Australian-based transnational corporations are bound to respect human rights wherever they operate.
- In addition to the support for human rights education in the National Human Rights Framework, undertake a study of the current state of human rights education in Australian institutions and develop a policy to strengthen it based on this study.

⁹⁴ This has a (dubious) precedent in the *Schools Assistance (Learning Together Through Choice & Opportunity) Act 2004* (Cth), which required schools to do things such as fly the Australian flag and display the ‘national values framework’ for funding.

⁹⁵ See 91, Chapter 7.