

2. General framework for the protection and promotion of human rights

C. Acceptance of international human rights norms

44. Australia has a long tradition of supporting human rights around the world, and was closely involved in the development of the international human rights system.

45. Australia has ratified the main international human rights conventions and protocols set out below, with reservations listed. The full text of these reservations is provided under Appendix B:

- **International Covenant on Economic, Social and Cultural Rights (ICESCR)**
- **International Covenant on Civil and Political Rights (ICCPR)**
Reservations: *Article 10 (2)(a) and (b) and 3; Article 14(6); Article 20*
- **First Optional Protocol to the International Covenant on Civil and Political Rights, concerning communications**
- **Second Optional Protocol to the International Covenant on Civil and Political Rights, concerning abolition of the death penalty**
- **International Convention on the Elimination of all Forms of Racial Discrimination (CERD)**
Reservation: *Article 4(a)*
- **Convention on the Elimination of All Forms of Discrimination against Women (CEDAW)**
Reservations: *Article 11(2); and concerning exclusion of women from combat duties*
- **Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT)**
- **Convention on the Rights of the Child (CROC)**
Reservation: *Article 37 (c)*
- **Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict**

C. Acceptance of international human rights norms

- **Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution, and child pornography**

46. At present, all of the above reservations are considered necessary, with the possible exception of the reservation concerning paid maternity leave under article 11(2) of CEDAW, which the Australian Government is actively considering the possibility of withdrawing.

47. A list of other relevant treaties to which Australia is party is available at Appendix C.

D. General legal framework within which human rights are protected at the national level

The human rights framework in Australia

48. In Australia, a variety of approaches and strategies are used to implement and protect human rights. These protections can be divided into two broad categories:

- existing institutionalised processes present in a liberal and democratic society—such as parliaments and an independent judicial system, and
- special legislative machinery to protect human rights, such as the Human Rights and Equal Opportunity Commission.

49. The high level of acceptance, protection and observance of human rights in Australia is founded on a system of representative and responsible government, certain limited constitutional guarantees, statute law including specialised human rights legislation, the common law and an independent judiciary.

Existing institutionalised processes

Australian parliaments

50. The liberal democratic system of government in each of the Australian jurisdictions enables interested individuals to bring to notice areas in which human rights and fundamental freedoms are in need of protection or in need of further

D. General legal framework within which human rights are protected at the national level

protection. Under the system of 'responsible government', Ministers are individually and collectively answerable to the Parliament and can retain office only while the Australian Government of which they form part retains the 'confidence' of the Lower House. Ministers must also answer questions in the Parliament concerning matters dealt with by their departments.

51. In addition, several Parliamentary Standing Committees scrutinise proposed legislation and report on various aspects of that legislation. The Senate Standing Committee for the Scrutiny of Bills was established in 1981 for the purpose of reviewing proposed legislative measures and alerting the Senate 'to the possibility of the infringement of personal rights and liberties or the erosion of legislative power of Parliament'. The Senate Standing Committee on Regulations and Ordinances examines delegated or subordinate legislation where it 'takes away, reduces, circumscribes or qualifies the fundamental rights and liberties traditionally enjoyed in a free and democratic society'.

Constitutional guarantees

52. The Australian Constitution does not contain provisions in the nature of a bill of rights. However, the Constitution contains a significant number of express or implied guarantees of rights and immunities. Some of the express guarantees are as follows:

- any property acquired by the Commonwealth Government must be acquired on just terms (s 51 (xxxii))
- trial on indictment of any offence against any law of the Commonwealth shall be by jury (s 80)
- the Commonwealth Government shall not make any law to establish any religion or to interfere with religious freedom (s 116), and
- citizens are not to be subjected to any discrimination in any State by reason of residence in another State (s 117).

53. Some provisions of the Constitution have also been found to include implied guarantees of individual rights. The High Court of Australia has recognised that there is an implied restriction on the legislative and executive power of the Commonwealth

D. General legal framework within which human rights are protected at the national level

and of the States and Territories protecting freedom of communication on governmental and political matters. This implication arises from the system of representative government created by the Constitution.

54. The High Court has also indicated that there are some rights inherent in the structure of the Constitution itself. The Court has held that the Constitution is predicated on a system of 'representative democracy' and that, since free communication and debate on political issues and institutions of government are essential to that system, legislation which infringes a freedom of communication on 'political matters' is invalid, unless necessary to protect some other public interest.

The common law

55. Australia has a common law legal system which means that the recognition and protection of many basic rights and freedoms relies on the enunciation of those rights over the centuries by judges in common law. For example, the right to a fair trial is protected by the common law.

The judiciary

56. The judiciary plays an important role in protecting certain recognised rights and freedoms which are regarded as fundamental and by developing rules of statutory construction which reduce the degree of inadvertent legislative encroachment into those rights and freedoms.

Administrative law remedies

57. Beginning in the 1970s, Australia has established a legislative system to allow people to challenge a wide range of decisions made under federal laws and to obtain reasons for particular decisions that have been made. The scheme involves the following pieces of legislation: the *Administrative Appeals Tribunal Act 1975*; the *Administrative Decisions (Judicial Review) Act 1977*; the *Ombudsman Act 1976*; and the *Freedom of Information Act 1982*.

58. The Administrative Appeals Tribunal is an independent body whose function is to review decisions made by Commonwealth Ministers, authorities and officials under

D. General legal framework within which human rights are protected at the national level

more than 200 Acts of the Commonwealth Parliament. The Tribunal is able to substitute its own decision in those areas in which it has jurisdiction, including social security, taxation, customs, and veterans' entitlements.

59. The *Administrative Decisions (Judicial Review) Act 1977* provides for judicial review by the Federal Court of Australia of administrative action taken under Commonwealth legislation. Where an order of review is sought by an aggrieved person, the Court is empowered to review the lawfulness of a decision, the conduct leading up to the making of a decision, or circumstances where there has been failure to make a decision.

60. The Office of the Commonwealth Ombudsman investigates complaints about the administrative actions of all Commonwealth Government departments and prescribed Commonwealth agencies. The Ombudsman can investigate matters on his or her own motion.

61. The *Freedom of Information Act 1982* creates a general right for members of the public to obtain access to documents, and sets out a range of obligations and restrictions on departments and the public for exercising these rights.

62. There is also a variety of specialist review tribunals which provide review on the merits of administrative decisions in specific areas such as industrial relations, veterans' affairs, social security and migration.

63. All Australian States and Territories have administrative law mechanisms which perform similar functions to those performed in the Commonwealth sphere.

64. Australian governments, from time to time, also establish Royal Commissions to inquire into and report on matters of public concern, including human rights issues.

Relationship between treaty obligations and domestic administrative law

65. In its Concluding Observations on Australia's Third and Fourth Periodic Reports under the ICCPR, the Human Rights Committee noted its concern with 'a

D. General legal framework within which human rights are protected at the national level

Government bill which would provide that ratification of human rights treaties does not create legitimate expectations that government officials will use their discretion in a manner that is consistent with those treaties’.

66. There is not a current bill before the Commonwealth Parliament which would have this effect. In a statement issued by the Minister for Foreign Affairs, and the then Attorney-General on 25 February 1997, the Australian Government noted that under Australia’s system of government, it is for the elected Australian parliament to change Australia’s domestic law where required to implement treaty obligations.¹ Consequently, the executive act of entering into treaties does not itself give rise to legitimate expectations in administrative law. This is a domestic issue concerning the relationship and roles of the different arms of government.

Specialised human rights machinery

Commonwealth human rights legislation

67. In Australia, treaties, including human rights instruments, are not self-executing and require legislative implementation to be effective in Australian law. Before Australia signs, ratifies or otherwise becomes bound by a treaty, the Australian Government satisfies itself that any legislation necessary to implement the treaty is in place.

68. An extensive human rights legislative framework exists in Australia at the federal level:

- The *Racial Discrimination Act 1975* (Cth) (RD Act) implements domestically obligations under CERD.
- The *Sex Discrimination Act 1984* (Cth) (SD Act) implements domestically obligations under CEDAW and certain aspects of the International Labour Organisation (ILO) Convention 156.
- The *Disability Discrimination Act 1992* (Cth) (DD Act) makes it unlawful to discriminate against people with a disability in areas of public life.

¹ This statement is available at:
<http://www.ag.gov.au/agd/www/Attorneygeneralhome.nsf/Page/RWP06E67B7AB7E85390CA256B50001D32EC?OpenDocument>.

D. General legal framework within which human rights are protected at the national level

- The *Age Discrimination Act 2004* (Cth) (AD Act) makes it unlawful to discriminate against people on the basis of age in areas of public life.
- The *Human Rights and Equal Opportunity Commission Act 1986* (Cth) (HREOC Act) establishes the Human Rights and Equal Opportunity Commission (HREOC) and gives it a wide range of functions, including educating and raising awareness in the community of human rights issues, complaint handling, the provision of advice on human rights compliance and assistance to the Australian Government on human rights policy and legislative development.
- The *Privacy Act 1988* (Cth) gives effect to the right of privacy recognised in Article 17 of the ICCPR, protecting personal information collected and held by Australian Government agencies and many private sector organisations.
- The *Workplace Relations Act 1996* (Cth) (WR Act) includes a range of provisions intended to help prevent and eliminate discrimination in the workplace on the basis of race, colour, sex, sexual preference, age, physical or mental disability, marital status, family responsibilities, pregnancy, religion, political opinion, national extraction or social origin.

The Human Rights and Equal Opportunity Commission

69. HREOC is Australia's national human rights institution. It is an independent statutory authority established by the Commonwealth Parliament, and meets the criteria for independent human rights institutions set out in the *Paris Principles*. The Commission plays an important national role in promoting awareness of, and a respect for, human rights in the community, and has functions under the HREOC Act, the RD Act, the SD Act, the DD Act and the AD Act.

70. The functions of the Commission include public education and human rights awareness functions and the power to investigate and conciliate individual complaints. It also has broader policy and promotional functions, including: advising the Australian Government on human rights questions, examining the potential domestic impact of draft treaties, reviewing existing and proposed legislation to ensure compliance with human rights principles, conducting research into human rights issues, and inquiring into, and if possible conciliating, complaints made under the

D. General legal framework within which human rights are protected at the national level

HREOC Act, the RD Act, the SD Act, the DD Act and the AD Act. The educational role of HREOC is detailed further under the heading '*E. General framework within which human rights are promoted at the national level*'.

71. If a complaint of unlawful discrimination under the RD Act, the SD Act, the DD Act or the AD Act cannot be conciliated, the President of the Commission will terminate the complaint. If a complaint on the grounds of race, sex, disability or age is terminated, the complainant may bring legal proceedings before the Federal Magistrates Court or the Federal Court of Australia seeking an enforceable remedy for unlawful discrimination. Remedies that may be awarded include an apology, monetary compensation, reinstatement or promotion, provision of goods or services required or a combination of these remedies.

72. The Commission can also inquire into complaints concerning alleged breaches of human rights by the Australian Government or an Australian Government authority, or discrimination in the area of employment on numerous grounds, including political opinion, age, sexual preference or trade union activity. Such complaints, if they cannot be resolved by conciliation, will be the subject of a report by the Commission to the Australian Attorney-General, who in turn must table the report in Parliament.

73. One of the most significant and innovative powers given to the Human Rights and Equal Opportunity Commission is the power to conduct public inquiries into human rights matters. Such public inquiries place major human rights issues in Australia on the political and public agenda.

The Aboriginal and Torres Strait Islander Social Justice Commissioner

74. The Aboriginal and Torres Strait Islander Social Justice Commissioner is a member of HREOC. The Commissioner prepares an annual 'Social Justice' report on the enjoyment and exercise of human rights and fundamental freedoms by Aboriginal and Torres Strait Islander peoples and on any action necessary to secure for Aboriginal and Torres Strait Islander peoples the full and equal enjoyment of their human rights and fundamental freedoms.

D. General legal framework within which human rights are protected at the national level

75. The Aboriginal and Torres Strait Islander Social Justice Commissioner also prepares an annual 'Native Title' report on the operation of the Commonwealth *Native Title Act 1993* and its effect on the exercise and enjoyment of human rights of Aboriginal and Torres Strait Islander peoples. While there is no statutory obligation to table this report, the Australian Government's practice has been to table the report at the same time as the Commissioner's Social Justice Report.

The Privacy Commissioner

76. The Office of the Federal Privacy Commissioner is an independent Office which investigates complaints from individuals about interferences with privacy against federal and ACT government agencies and private sector organisations.

State and Territory anti-discrimination legislation

77. A comprehensive anti-discrimination legislative framework also exists at State and Territory level, and each State and Territory has established a human rights, anti-discrimination or equal opportunity board or commission. Although the functions of each body vary, common functions include:

- the determination or conciliation of complaints of discrimination brought under legislation operating in the particular jurisdiction, and
- developing and conducting human rights education and awareness initiatives.

78. The Western Australian State Government endorsed the *WA Charter of Multiculturalism* in 2004. The purpose of the Charter is to explicitly state that the people of WA are of different linguistic, religious, racial and ethnic backgrounds, and to promote their participation in democratic governance within an inclusive society. The Charter recognises a democratic pluralism that understands difference as a hallmark of democracy, both at an institutional and individual level. The Charter signals the necessity to adopt different approaches to respond appropriately to these varying needs in order to ensure all people can participate fully in society.

79. The ACT *Human Rights Act 2004* establishes a 'dialogue model' which essentially seeks to ensure that human rights are taken into account when developing

D. General legal framework within which human rights are protected at the national level

and interpreting ACT law, without displacing the current constitutional arrangements. The model has been described as an ‘interpretive statutory model’ based on similar models that have been established in the United Kingdom and New Zealand.

80. The Victorian *Charter of Human Rights and Responsibilities Act 2006* (‘the Charter’) was passed by the Victorian Parliament in July 2006. The Charter becomes fully operational on 1 January 2008. Like the *ACT Human Rights Act 2004*, the Charter is an Act of Parliament which seeks to protect and promote civil and political rights, based on the International Covenant on Civil and Political Rights.

Non-government organisations and the media

81. NGOs play an active and important role in the promotion and protection of human rights in Australia. There are a large number of such groups in Australia and many operate as lobby groups, putting forward submissions to governments on matters of particular concern. Some of these agencies have received funding from both the Commonwealth and State or Territory governments to assist in their work.

82. The media in Australia also enjoys a high degree of freedom which allows the press, radio, television and the internet to play a significant role in exposing breaches of human rights and exerting pressure for remedial action. The media is free to report parliamentary and court decisions relating to human rights matters and parliamentary questions are often prompted by media coverage of a particular matter.

D. General legal framework within which human rights are protected at the national level

Means of ensuring protection of human rights in Australia

83. Australia's strong democratic institutions, the Constitution, the common law and current legislation, including anti-discrimination legislation at the Commonwealth, State and Territory levels, protect and promote human rights in Australia. For these reasons, the Australian Government is not convinced of the need for a Bill of Rights in Australia.

84. The Australian Government considers that the best ways to protect human rights are by ensuring that the existing mechanisms described above work effectively, and by educating the community about human rights and responsibilities.

D. General legal framework within which human rights are protected at the national level

E. General framework within which human rights are promoted at the national level

85. The Australian Government's five priorities for human rights, as set out in *Australia's National Framework for Human Rights—National Action Plan* (available at <<http://www.ag.gov.au/nap>>), are:

- promoting a strong, free democracy
- human rights education and awareness
- assisting disadvantaged groups to become more independent
- supporting the family, and
- promoting human rights internationally.

Human rights education

86. Australia believes that education and raising public awareness are the most lasting and effective ways to minimise discrimination and promote tolerance of all members of the community.

87. Australia has played a central role in promoting human rights education in the United Nations. This has included co-sponsoring a resolution at the 60th session of the UN Commission on Human Rights in April 2004 which recommended that the General Assembly proclaim a World Program for Human Rights Education, strongly supporting the resultant proclamation by the General Assembly contained in UNGA Resolution 59/113A of 10 December 2004 and introducing UNGA Resolution 59/113B of 14 July 2005 which adopted the Plan of Action for the first phase of the World Program (2005–2007).

The National Human Rights Institution

88. HREOC's statutory functions include promoting an awareness of, and respect for, human rights in the community, and almost all areas of HREOC's work have an educational or public awareness component. Recent initiatives include:

D. General legal framework within which human rights are protected at the national level

- the launch in 2006 of HREOC's new human rights webpage, *Information for Students*, an online education resource for secondary school students to help them gain an awareness and understanding of human rights and their origin and history, the development of international human rights norms and contemporary human rights issues in Australia (available at http://www.humanrights.gov.au/info_for_students/index.html)
- the project *Ismaξ—Listen: National consultations on eliminating prejudice against Arab and Muslim Australians*, undertaken by HREOC in 2003–2004, with the aim of exploring whether Arab and Muslim Australians were experiencing discrimination and vilification post September 11
- the annual publication of *Face the Facts: some questions and answers about immigration, refugees and Indigenous affairs* (http://www.humanrights.gov.au/racial_discrimination/face_facts/index.html), and
- the publication of *Same-Sex: Same Entitlements*, the report on its inquiry into discrimination against same sex couples regarding financial and work-related entitlements (<http://www.hreoc.gov.au/samesex/index.html>).

89. The HREOC website contains detailed information on human rights and includes information on and links to the international human rights treaties to which Australia is a party.

Role of non-government organisations

90. An important educative function is also played by NGOs. Australia has a strong and active NGO community which plays a double role in human rights education. They provide vital information to Government about human rights issues which affect people at the grassroots level, through specific Government forums with NGOs and on a more general level. At the same time, they serve to educate the public about the human rights programs and protections which are available to them.

The National Committee on Human Rights Education

91. The National Committee on Human Rights Education was established in 1998, with Australian Government support, to develop strategies for the effective and

D. General legal framework within which human rights are protected at the national level

coordinated delivery of human rights education throughout Australia in line with the objectives of the United Nations Decade on Human Rights Education (1995–2004).

Human rights education in schools

92. HREOC places an emphasis on human rights education programs in Australian schools, including the development, in consultation with education experts, of a range of human rights education modules specifically for use in upper primary and secondary schools. As discussed above, HREOC has also launched a human rights information webpage for students (see paragraph 88).

93. Australian Government initiatives in human rights education for schools have also included:

- the Civics and Citizenship program, which includes an annual national forum on civics and citizenship education for teachers, principals, pre-service educators, State and Territory officials, and parents, and
- the introduction of a National Framework for Values Education in Australian Schools which emphasises values such as respect, responsibility and understanding, tolerance and inclusion, which help students appreciate their local, national, regional and global responsibilities and help them to understand human rights.

94. States and Territories have also undertaken a range of initiatives to promote human rights education in schools, for example:

- NSW has incorporated cross-curriculum content on the areas of Difference and Diversity, Gender, Multiculturalism, Civics and Citizenship and Indigenous issues in all new syllabuses of the Years 7–10 curriculum; incorporated human rights issues in a compulsory test in Australian History, Geography, and Civics and Citizenship set for Year 10 School Certificate candidates; and included the study of human rights in the syllabuses for Legal Studies, Aboriginal Studies and Modern History
- Victoria has introduced the *Good Ideas for Human Rights Education* project, which documents and disseminates good practice in human rights education

D. General legal framework within which human rights are protected at the national level

across the school sectors in Victoria, and established a Languages & Multicultural Education Resource Centre which provides professional development programs on anti-racism education, the needs of refugees and other groups of at risk students, and culturally inclusive curriculum, and

- the ACT has implemented a trial scheme with Amnesty International to introduce Human Rights Education programs into high schools and primary schools, and introduced the *School Excellence Initiative*, which reviews ACT government schools on a three-yearly basis against criteria which include student involvement in active citizenship and a curriculum that promotes intercultural understanding and ethnic and gender diversity.

Promoting human rights internationally

95. Human rights are an inseparable part of Australia's overall foreign policy approach, because the treatment of individuals is of itself a matter of concern to Australians, and because promoting and protecting human rights underpins Australia's broader security and economic interests.

96. Australia's human rights policies are very strongly oriented towards achieving practical outcomes that improve the rights of individuals. The Australian Government considers that constructive engagement, combined with technical assistance, capacity building and development of institutions that protect human rights, is the most effective way of advancing human rights.

United Nations

97. The Australian Government plays a lead role in promoting efficiencies and reform of the United Nations human rights treaty body system, working with the UN to improve the functioning of the system.

Strengthening human rights in bilateral relationships

98. The Australian Government also continues its efforts to improve the human rights situations in other countries by engaging in bilateral dialogues. The Australian Government believes this approach is most likely to bring tangible long-term improvements. Australia continues to raise with other governments, on a case-by-

D. General legal framework within which human rights are protected at the national level

case basis, individual cases of concern and thematic concerns, such as the use of the death penalty, and also conducts formal human rights dialogues with a number of countries including China, Vietnam, Iran and Laos.

99. Australia's extradition law provides that extradition cannot be granted unless the requesting country provides an undertaking that the death penalty will not be imposed, or if imposed, will not be carried out. Australia has longstanding relationships with a number of countries which retain the death penalty. In situations where extradition is sought for offences which carry the death penalty, our experience has been that our extradition partners have provided such undertakings in order to secure extradition for offences which carry the death penalty. Our experience is that these undertakings are honoured.

100. Mutual assistance is the process countries use to obtain government to government assistance in criminal investigations and prosecutions and to recover the proceeds of crime. Where a foreign country requests assistance to investigate an offence which carries the death penalty, Australian legislation provides a discretion to refuse to provide the assistance. Where a foreign country requests assistance where a person has been charged with, or convicted of, an offence which carries the death penalty, Australian legislation provides the request must be denied unless there are special circumstances. Special circumstances include where the evidence would assist the defence, or where the foreign country undertakes not to impose or carry out the death penalty.

101. Mutual assistance is a separate form of cooperation from police-to-police assistance. Police-to-police assistance is cooperation that is provided by one country's police force to the police force of another country. The Australian Federal Police (AFP) has guidelines that govern the provision of police-to-police assistance in death penalty cases. These guidelines are Australian Government policy and provide that the AFP can assist foreign countries on a police-to-police basis where no charges have been laid, regardless of whether the foreign country may be investigating offences that attract the death penalty. Where charges have been laid in the foreign country, and the offences carry the death penalty, the AFP cannot provide assistance

D. General legal framework within which human rights are protected at the national level

unless the Australian Attorney-General or the Minister for Justice and Customs approves.

102. Police-to-police assistance does not include the use of coercive powers on behalf of a foreign country. Such assistance must be sought through a mutual assistance request. Under Australian legislation it is then a matter for the Attorney-General or the Minister for Justice and Customs to decide whether to authorise the use of coercive powers in Australia in response to a mutual assistance request from a foreign country.

Australia's overseas aid program

103. The Australian aid program contributes to the advancement of human rights through its focus on poverty reduction and sustainable development. Consistent with the need for States to take primary responsibility for their development, effective partnerships with developing countries are a central focus of Australia's aid. Country strategies are jointly developed with all major partner countries and form the basis for our assistance. Figures on Australia's development expenditure are available in the statistical annex.

104. Links to further information on human rights, and on Australia's promotion of human rights, are listed in Appendix D.