DRAFT SPEECH FOR
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Panel topic:

"Human Rights Protections - What does Australia need?

It is a great pleasure to join this distinguished panel and engage in this important debate on how to strengthen the legal framework for human rights protection in Australia.

This is not a new issue, of course, and it has been actively debated for many years. The arguments for and against different legislative models have been thrashed out in great detail among parliamentarians, legal experts, and also – encouragingly – in the media and the broader community. This in itself is an extremely positive sign of the consciousness of human rights in Australian society, and an active debate on how they should be put into practice.

The National Human Rights Consultation conducted in 2009, and its comprehensive report, was a landmark in this process. By involving tens of thousands of people through community consultations, public hearings and submissions, it was model of transparency, consultation and participation which should always be the basis for human rights work. I will comment further on some of the recommendations this evening, but overall it offers a practical and well thought-out portfolio of reforms that would significantly advance human rights protection in Australia. I am pleased the Australian Government has committed itself to implementing at least some of these elements in its subsequent Human Rights Framework, but I hope that this too will provide a foundation for further and more ambitious reform.

My mandate as High Commissioner is to advance international human rights standards and see them given the fullest effect at the national level. Australia has a strong record of

commitment to the major international human rights treaties, of reporting on its compliance, and affording individuals the opportunity to bring petitions to the United Nations treaty bodies when they fail to gain redress. It has also issued a standing invitation to the special procedures mandate holders of the Human Rights Council. But in a legal system like Australia's, the strength of the international protections lies in their incorporation into national law. For many years now, the UN human rights treaty bodies – the expert committees which have considered Australia's periodic reports on implementation of the different treaties – have urged Australia to fully incorporate its international human rights obligations into domestic law and ensure they are enforceable by the courts.

In most countries where my Office is engaged, a strong foundation for human rights protection can be found in the Constitution. Often these constitutional guarantees have been forged out of the experience of conflict and upheaval or popular

revolutions and the fall of despotic regimes. In my own country, South Africa, the incorporation of one of the most forward-looking charters of human rights into the Constitution signalled a real and tangible change from the racist past.

Australia, of course, has been called a "lucky country". Like some of its Commonwealth partners, it has succeeded for more than a century on the basis of a stable and democratic constitutional order. Its Constitution may not have a fundamental rights chapter, but it has evolved its own human rights framework through a web of ratifications, legislation, national institutions, common law and policy. I am not surprised, therefore, that some should argue that "if it ain't broke, don't fix it?"

I think there is a time in the life of every State when it reaches a point of maturity and sophistication and a more comprehensive update is required. The circumstances for a fundamental change to the Constitution may not have arisen, and

the threshold for constitutional amendment may be high (although I do hope the renewed efforts to secure constitutional recognition for Australia's Aboriginal and Torres Strait Islander people will succeed). Australia also does not belong to any regional organisation that has developed its own human rights charter or regional protection system. But as your constitutional cousins in Canada, New Zealand and the United Kingdom have shown, the legislative path of a human rights act can provide a good alternative to creating a more complete, coherent and integrated framework for the fulfilment of international treaty obligations and the legal protection of human rights.

In some ways, it is analogous in this technological age to updating your computer system. You can download different programmes (in this case, treaties) on the rights of women, children and persons with disabilities. But unless you occasionally update the overall operating system (through domestic legislation), gaps and glitches and problems will inevitably occur. Judges want

certainty and clarity in the laws they implement, and this comes from the adoption of specific legislation. A human rights act would not only fully incorporate international standards into the domestic law, but ensure the entire system operates to its optimum effect in terms of protecting the rights of all.

The arguments for a federal human rights act in Australia are well framed in the National Consultation Report and are entirely persuasive. A human rights act would transcend the currently ad hoc and incomplete panoply of legislative measures with one comprehensive and coherent framework. It would improve the process for developing new laws and policies, government service delivery and judicial decisions. It would fill protection gaps, particularly for the most marginalized and disadvantaged in the community. It would increase awareness and public and parliamentary debate on the full range of human rights. It would speak for Australians' sense of themselves and secure Australia's standing among its peers in the international human rights system.

This is the kind of leadership we look for from Australia on human rights issues, both here in the Asia-Pacific region and internationally.

Equally, the fears that such an initiative generates – which were also reflected in the National Consultation Report – have not been borne out in the experience of other states. Human rights legislation in the United Kingdom and New Zealand – even in the Australian States which had adopted such laws – has not led to an avalanche of litigation or a new wave of judicial activism. I strongly believe – in a common law system like Australia – there is a well-established dynamic between the executive, parliament and judiciary which is more than capable of regulating itself and safeguarding against abuse. My own experience in South Africa suggests that the progressive rights enshrined in the Constitution have been the basis for a healthy dynamic between the executive, parliament and judiciary which has been an important force for the

protection and promotion of fundamental rights, civil, political, economic, social and cultural, for all in the country.

It is not my role to suggest one model or another for human rights legislation of this kind. Several different options have been analysed in the National Consultation Report. But I would like to posit a few important challenges for any future legislation and suggest a few areas where the model recommended by the National Consultation may prove a little conservative. First, it is critical that the human rights protected in the legislation should be extended to the full range of human rights for all embodied in the international treaties to which Australia is a party. Second, to be enforced meaningfully, the legislation should provide a mechanism by which individuals can directly seek judicial and non-judicial remedies. I believe these points should extend to coverage of economic, social and cultural rights which – as we have shown in South Africa – can be justiciable without the courts impinging on the government's policy and budget prerogatives.

Third, and finally, it is important that the legal protections of the legislation extend to the state and local levels in a federal system, particularly since state governments are responsible for most aspects of criminal law, as well as the delivery of important services such as health and education. In one of its general comments on the application of the International Covenant on Civil and Political Rights, the UN Human Rights Committee reminded States parties with a federal structure that the Covenant's provisions "shall extend to all parts of federal states without any limitations or exceptions". Obviously, this can add legal complexity to the task, but I commend Victoria and the Australian Capital Territory for leading the way for other states and territories with their own human rights legislation.

Obviously, as the National Consultation Report shows, this initiative will require a careful political balance to achieve success. I am also confident that, in the longer term, any system adopted

will grow and evolve as it is applied in practice. While I am disappointed that the Australian Government has not capitalized fully on the popular support and momentum developed during the National Consultation, I nonetheless welcome the new commitments made in the resulting Human Rights Framework which, in themselves, are valuable steps forward to increased human rights protection. In particular, I hope the proposed new parliamentary committee on human rights and the harmonized legislation for a new anti-discrimination law will be put in place shortly.

The promotion and protection of human rights is a journey, and I am pleased to see from the vibrant debate on this topic that Australia is making headway. I assure you of the continued support and partnership of my Office, and of the UN human rights system, in pursuing this road to its goal.

Thank you.