



An Australian Human Rights Act
Position Paper of the Law Society of Western Australia
Submission to the Law Council of Australia

September 2008

Executive Summary

- [1.1] This Paper was prepared for the Law Society of Western Australia as a considered discussion on whether legislation or other measures are necessary to strengthen the legislative branch, judicial branch, executive branch or civil society with a view to protecting the enjoyment of human rights in Australia.
- [1.2] **Legislative reform is preferable to constitutional reform.** In light of the arguments and challenges associated with constitutional reform, this discussion is limited to consideration of whether statutory reform is desirable to improve the protection of human rights in Australia. (See [1.20]).
- [1.3] **What is a Human Rights Act?** The purpose of each of the UK *Human Rights Act 1998*, ACT *Human Rights Act 2004* and Victorian *Charter of Human Rights and Responsibilities Act 2006* include enhancing the protection of human rights in those respective jurisdictions. These instruments will be referred to in this report as the human rights act (HRA) of each jurisdiction. The common features of each HRA are set out below.

A HRA is an ordinary statute of parliament. A HRA may be repealed or amended. The effect of a HRA on existing laws and upon laws enacted after the HRA is governed by established rules of statutory interpretation. An existing law will be impliedly repealed to the extent that it is inconsistent with the HRA. A later inconsistent statute may expressly or impliedly repeal *pro tanto* the HRA itself.

Human rights are listed. The human rights to which a HRA applies are listed in the Act (“the listed human rights”). The listed human rights are based upon the civil and political rights of an international human rights instrument such as the *International Covenant on Civil and Political Rights* (ICCPR).

Parliament: a new Human Rights Committee. A Human Rights Parliamentary Committee is created with functions that include examining every Bill presented to Parliament and to report upon whether the Bill is consistent with the listed human rights.

Executive: (1) prepare a statement of human rights compatibility for each Bill; (2) conduct that infringes a listed human right is unlawful; (3) a new Human Rights Commission. A Minister must make a statement to parliament on the compatibility of each Government Bill with the listed human rights. It is unlawful for a public authority to engage in conduct that is incompatible with a listed human right. A Human Rights Commission advises the Attorney-General on the listed human rights and has the power to intervene, with leave, in court proceedings concerning the listed human rights.

Courts: (1) subject to a new rule of statutory interpretation; (2) jurisdiction to make non-binding declaration of incompatibility. In working out the meaning of a written law, an interpretation that is consistent with the listed human rights is to be preferred. A superior court may make a declaration of incompatibility on finding that a written law is incompatible with a listed human right. The declaration does not affect the validity of the written law and is not binding on the parties to the proceedings. (See [1.22])

- [1.4] **A Human Rights Act for Australia?** This paper considers whether, compared to the status quo, a HRA would result in the improved protection of human rights in Australia. Arguments *for* a Human Rights Act¹ include:
- the current protection of human rights is inadequate;
 - additional protection is needed for disadvantaged and marginalized peoples;
 - a Human Rights Act would modernize our democracy and give effect to Australia's human rights obligations; and
 - a Human Rights Act would educate people about their rights and responsibilities.

Arguments *against* a Human Rights Act² include:

- our human rights are adequately protected – 'If it ain't broke don't fix it.';
- a Human Rights Act would make no practical difference;
- a Human Rights Act would give too much power to judges;
- human rights are not a matter for Parliament;
- a Human Rights Act might actually restrict rights;
- a Human Rights Act would create a selfish society;
- a law is not the best way to protect human rights; a Federal Human Rights Act rather than a State Human Rights Act is needed. (See [3.1])

- [1.5] **Conclusion in favour of a Human Rights Act.** The arguments for and against a HRA cannot be evaluated in isolation from: the characteristics of human rights; the particular human rights to be listed in a HRA; and the precise impact of a HRA on parliament, the executive and the courts. If a judicial determination of invalidity is made, the democratic structure remains in that the Parliament is supreme. It is left to the executive and the legislature to assess the consequences for democracy which follow from the way in which it responds to a declaration of invalidity. Those arms of government are vested with the responsibility of judging what the people desire or will tolerate by way of compliance with human rights standards in the form of democracy which exists in this State. Alternatively, if a tension develops between the Judiciary and other arms of the government in relation to declarations of invalidity or inconsistency, that in itself may be a healthy manifestation of the checks and balances which ought to exist in a democratic system. The conclusion of this paper is that, compared to the status quo, a HRA would result in the improved protection of human rights in Australia. (See [3.2])

- [1.6] **What rights should be included in an Australian Human Rights Act? A HRA should:**

- Include listed human rights that are based on the text of the *International Covenant on Civil and Political Rights* (ICCPR). This list includes Article 27 of the ICCPR on the right of minorities not to be denied the right to enjoy their culture. Consequently, the cultural rights of Indigenous peoples would enjoy a measure of protection, if that Article was among those incorporated into the Act. However, there would be no inconsistency with the general proposition of the ICCPR being the principle guiding text for the legislation if a provision was included which is similar to that set out in the Victorian HRA recognizing the cultural rights of Indigenous peoples in Australia.
- Include the right of a person not to be deprived of his or her property other than in accordance with law, with just compensation and after according a reasonable right to be heard and include the right of a person not to be

deprived of his or her right at common law to be compensated for personal injury caused by civil wrong.

- Provide that the HRA is to have no effect on the operation of existing State laws relating to the performance of abortions¹. The HRA should otherwise *not* exclude the operation of the HRA from applying to existing laws and practices.
- Apply to corporations in those circumstances where international law provides for the application of human rights norms to corporations;
- Include a provision that anticipates reasonable limits may be placed on the enjoyment of human rights provided those limits are demonstrably justified taking into account relevant factors.
- Should *not* include a clause to the effect that ‘parliament may expressly declare in an Act that the Act or another Act has effect despite being incompatible with the human rights in the HRA’ (as in s 31 Victorian HRA). Such a clause is unnecessary given parliament may expressly repeal or amend any provision of a HRA.

[1.7] **An Australian Human Rights Act and Parliament.** The work of the Legal & Constitutional Committee of the Parliament of Victoria on the potential role of a parliamentary committee, as detailed in a *Report on the Desirability or Otherwise of Legislation Defining and Protecting Human Rights* (1987), is commended and adopted. The recommendations of that Committee followed findings on the operation of the Victorian Parliament that are applicable to the Parliament of the Commonwealth of Australia. For example, reference was made to the ‘volume of legislation that passes through Parliament’ and the fact that the ‘concerns and interests of those whose duty it will be to administer those Bills’ will not always favour a close regard to human rights. A HRA should make provision for:

- Parliament to receive a statement on whether, in the opinion of the Attorney-General, each government Bill is compatible with the listed human rights.
- A parliamentary committee to consider any Bill introduced into Parliament and report on whether the Bill is incompatible with the listed human rights.
- A declaration of incompatibility between any law of a State, Territory or the Commonwealth by a Federal, State or Territory Court or a finding of incompatibility following an inquiry by the Human Rights and Equal Opportunity Commission to be reported to Parliament by the Human Rights and Equal Opportunity Commission. (See [4.1])

[1.8] **An Australian Human Rights Act and the Executive.** A HRA should provide:

- It is unlawful for a public authority to act incompatibly with the listed human rights. The definition of ‘public authority’ should include: a government department; a statutory authority; the police; local government; an entity whose functions include functions of a public nature when it is performing those functions on behalf of the Commonwealth, the States or the Territories of the Commonwealth (whether under contract or otherwise).
- A person aggrieved by the unlawful conduct of a public authority may obtain a remedy in the form of any orders that a court considers ‘just and appropriate’ including damages.

¹ e.g. Health Act 1911 (WA), s 334.

- For the vesting in the Human Rights and Equal Opportunity Commission (“HREOC”) of the power of conducting inquiries and making findings of incompatibility between any laws of the Commonwealth, States or Territories and the HRA (See [5.1])
- [1.9] **An Australian Human Rights Act, the Courts and HREOC.** A HRA should provide:
- For a rule of statutory interpretation to the effect that courts must interpret written laws ‘in a way that is compatible with human rights’ and ‘so far as it is possible to do so consistently with the purpose’ of the HRA.
 - That HREOC have the power to make a finding, following an inquiry, that a Commonwealth, State or Territory law is incompatible with human rights and to report the same to the Commonwealth Parliament through the Attorney-General. (See [6.1])
- [1.10] **A Human Rights Act and Civil Society.** Consideration should be given to mechanisms for the involvement of non-state entities in identifying and preventing infringement of human rights. For example, the work of the Parliamentary Human Rights Committee should facilitate the involvement of professional organisations, business and employer organisations and trade unions. Consideration should also be given to allowing such groups to contribute to the development of the law by appearing (with leave) as *amicus* in any case concerning the listed human rights. (See [7.1])
- [1.11] **A community consultation process is required before introducing human rights legislation into Parliament.** Having regard to the experience in the ACT and Victoria, the Government should embark upon a process of extensive community education and consultation before introducing a Human Rights Bill into Parliament. (See [8.1])

EXECUTIVE SUMMARY	ii
1. INTRODUCTION	1
Purpose of Report.....	1
Background.....	1
What is a Human Rights Act?	3
Documents included in the Appendix	6
2. WHAT ARE “HUMAN RIGHTS” AND HOW ARE THEY CURRENTLY PROTECTED?.....	7
What are “Human Rights”?	7
Current Mechanisms for the Protection of Human Rights	7
Characteristics of Human Rights	10
3. ARGUMENTS ‘FOR’ AND ‘AGAINST’ A HUMAN RIGHTS ACT	12
The Experience in the UK, ACT and Victoria.....	12
Civil and Political Rights	13
Economic, social and cultural rights.	14
Conclusions	14
4. PARLIAMENT	16
Statement of Human Rights Compatibility of Each Bill	16
Parliamentary Committee on Human Rights	16
Finding of Incompatibility Presented to Parliament.....	17
5. EXECUTIVE	19
Unlawful For Public Authorities To Act In A Way That Is Incompatible With Human Rights ..	19
Remedies Unlawful Conduct of a Public Authority	21
Human Rights and Equal Opportunity Commission	23
Conclusions on a Human Rights Act and the Executive.....	24
6. COURTS.....	25
Interpreting Statutes Consistently With Human Rights ‘So Far As Possible’.....	25
Court Power to Make a Non-Binding Declaration That a Law is Incompatible With Human Rights.....	26
Conclusions on a Human Rights Act and the Courts.....	30
7. CIVIL SOCIETY.....	31
The role of non-state entities in the protection of Human Rights.....	31
Conclusions on a Human Rights Act and Civil Society.....	31
8. COMMUNITY CONSULTATION ON A HUMAN RIGHTS ACT.....	32
The Process in the UK, ACT and Victoria.....	32
Conclusion on a Human Rights Act and Consultations	32
APPENDICES.....	33
Appendix 1: Objects of the Law Society of Western Australia.....	33
The objects of the Law Society of Western Australia are to:	33
Appendix 2: Sample list of human rights: extracts from the Victorian Bill for the <i>Charter of Human Rights and Responsibilities Act 2006</i>	33
Appendix 3: Cases Under the UK Human Rights Act 1998.....	37
Appendix 4: Is change needed in Victoria to better protect human rights?	42
ENDNOTES	51

1. INTRODUCTION

Purpose of Report

- [1.12] The Law Society of Western Australia is a voluntary association of lawyers which has among its aims assisting the community by advocating for justice and providing education about the law.
- [1.13] This report was prepared for the Law Society of Western Australia in order to contribute to the public debate as to whether human rights legislation is in the public interest.
- [1.14] This paper, before evaluating proposals for reform, refers to the existing protections at the Commonwealth level including the *Constitution (Cth)*, Commonwealth legislation and the role and functions of the Human Rights and Equal Opportunity Commission (HREOC) (see [2.3]).

Background

- [1.15] The United States. The starting point for any discussion of law reform of human rights protection in Australia has tended to be a comparison with the experience of the United States. The US Constitution includes the amendments collected in the Bill of Rights. The first 14 amendments include a guarantee of freedom of speech (1st amendment), a right to due process of law (5th), and a right to ‘equal protection of the laws’ (14th). The Supreme Court of the United States, exercising the power of judicial review, may declare invalid any law or executive conduct found to be inconsistent with the Bill of Rights.
- [1.16] Arguments against a constitutionally entrenched bill of rights. For good reason, even Australian lawyers with a track record as human rights advocates have paused before recommending a system that has seen a handful of unelected judges have the final say on issues such as abortion and affirmative action.³ Hard cases on the scope of human rights are inevitable and judges may not be better qualified than many others to determine the right answer to whether a guarantee of freedom of speech protects pornography, flag-burning, topless-dancing, begging, racial abuse etc. Professor Jeremy Waldron has argued that constitutionally entrenching any human right has the ironical consequence of infringing the human right of each of us to participate in the institutions of democracy (eg. parliament) that determine the procedures by which hard cases on human rights are to be resolved.⁴ Waldron favours rights. He has a democratic objection to constitutionally entrenching the method by which their scope is worked out in hard cases.
- [1.17] Arguments in favour of a constitutionally entrenched bill of rights. Professor Ronald Dworkin is also concerned with democracy. However, Dworkin observes that ours is a communal democracy rather a statistical democracy. In a communal democracy, the concerns of each of us must be equally respected even when a statistical majority would prefer to ignore those concerns. Securing ‘equal concern and respect’ requires the constant vigilance of the judicial branch exercising the power of judicial review over a handful of fundamental liberties. The indeterminacy of hard cases (not admitted by Dworkin) is a small price to pay for securing “true” democracy.

- [1.18] The Canadian Charter of Rights and Freedoms (1982). The Canadian Charter of Rights and Freedoms is similar to the US Bill of Rights in so far as constitutionally entrenched rights are subject to judicial review. However, the Canadian Charter contains two clauses not found in the US Bill of Rights:
- **The “reasonable limits clause”** provides that the rights in the Charter are subject to ‘such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society’ (s 1). In practice, the test applied by the Supreme Court of Canada in response to the interpretation clause has been to cast the onus on Government to demonstrate that an infringement of a Charter right is reasonably proportionate to achieving an important objective.⁵ A reasonable limits clause *may* be interpreted by a court to allow the parliamentary branch a wide “margin of appreciation” when resolving hard cases.
 - **The “notwithstanding clause”** provides that parliament may expressly declare in a statute that the statute (or a provision) shall operate notwithstanding a right listed in the Charter (s 33). The declaration has an automatic 5 year sunset clause (which may be re-enacted). The clause has rarely been invoked.⁶ A notwithstanding clause means that the sovereignty of parliament is not altered to the extent that the clause allows parliament to prospectively “opt out” of judicial review.

Each of these clauses goes some way to addressing the concerns of Australian opponents of a constitutionally entrenched bill of rights. Of course, these measures will not allay the concerns of those who are of the view that *any* re-casting of the existing roles of the Australian parliaments and the Australian courts runs a risk of unintended and undesirable consequences for each institution.

- [1.19] **Failed attempts at entrenching human rights in the *Australian Constitution*.** Those who favour an amendment of the Australian Constitution to include human rights guarantees face the daunting hurdle of the section 128 requirements for amendment: a majority of voters in a majority of States. The 1944 referendum (to guarantee: freedom of speech and expression, religious freedom, freedom from want, and freedom from fear) was carried in only two States and received an overall “yes” vote of 45.39%. The “yes” vote was lower again (30.33%) in the 1988 referendum (to prevent States from infringing the: guarantee of trial by jury, right to acquisition of property without compensation and religious freedom).
- [1.20] **Entrenching human rights in the Constitution.** The only State of Australia which has so far enacted a HRA, Victoria, has chosen the path of enacting an ordinary statute, and not attempted to entrench human rights in its constitution. The Australia Act 1986 (Cth) confirms that a State parliament may entrench a law ‘respecting the constitution, powers or procedure of the Parliament of the State’.⁷ It is not obvious that human rights fall within the quoted clause. Arguments may be made for alternative sources of power by which a State parliament may entrench particular laws.⁸ However, there is serious doubt about the prospects of success of those arguments.⁹ It might be argued that a US style Bill of Rights recognizes the important role which the Courts have in applying the considered judgment of the judiciary to the preservation of human rights in circumstances where the parliamentary and executive branches do not have the capacity to adequately focus upon the human rights of individuals and minority groups. In light of the arguments and challenges associated with constitutional reform, this paper has limited itself

to consideration of whether statutory reform is desirable to improve the protection of human rights.

- [1.21] **The UK Human Rights Act 1998.** The arguments and challenges associated with constitutional reform in Australia mean that recent experiences of constitutional reform in Canada and South Africa are not necessarily a useful point of comparison. It may be more useful to review the recent experiences of New Zealand and the UK where statutory reform has been embarked upon with the goal of improving the protection of human rights.

What is a Human Rights Act?

- [1.22] The UK *Human Rights Act 1998* has had considerable impact on debate about the protection of human rights in Australia, not least because many (but not all) of the features of the UK statute have been incorporated into the ACT *Human Rights Act 2004* and the Victorian *Charter of Human Rights and Responsibilities Act 2006*. These instruments will be referred to in this paper as the human rights act (HRA) of each jurisdiction. A significant feature of each HRA is the novel power conferred upon superior courts to make a non-binding declaration of incompatibility where a written law is inconsistent with human rights. However, an equally significant feature of each HRA is the fresh attention directed to the institutional reform of parliament and the executive with a view to the better protection of human rights.

Unless stated otherwise, the HRA of each jurisdiction contains each of the ten features summarized below.

1. A Human Rights Act is an Ordinary Statute

Each HRA is an ordinary statute of parliament. It follows that parliament may subsequently amend or repeal the HRA. It also follows that the impact of the HRA on legislation that is already on the statute books and upon laws enacted after the HRA depends upon the terms of the HRA and upon the application of established rules of statutory interpretation including the rule that a statute is impliedly repealed to the extent that it is inconsistent with a subsequent statute.

2. Human Rights Are Listed

The “human rights” to which the HRA applies are listed. The list is based upon the civil and political rights of a particular international human rights instrument. In the case of the UK HRA, it is the list in the European Convention for the Protection of Human Rights and Fundamental Freedoms. In the case of the ACT and Victorian statutes, the International Covenant on Civil and Political Rights (to which Australia is a party) forms the basis for each list. The section headings of the list in the Victorian HRA are as follows:

8. Recognition and equality before the law;
- 9 Right to life;
- 10 Protection from torture and cruel, inhuman or degrading treatment;
- 11 Freedom from forced work;
- 12 Freedom of movement;
- 13 Privacy and reputation;
- 14 Freedom of thought, conscience, religion and belief;
15. Freedom of expression;
16. Peaceful assembly and freedom of association;
- 17 Protection of families and children;

18. Taking part in public life;
- 19 Cultural rights;
- 20 Property rights;
- 21 Right to liberty and security of person;
- 22 Humane treatment when deprived of liberty;
- 23 Children in the criminal process;
- 24 Fair hearing;
- 25 Rights in criminal proceedings;
- 26 Right not to be tried or punished more than once;
- 27 Retrospective criminal laws.

3. Notwithstanding Clause: Parliament May “Opt Out”

A clause, based on the notwithstanding clause in the Canadian Charter appears in the Victorian HRA, but not the HRAs of the UK or the ACT. The clause provides: ‘Parliament may expressly declare in an Act that the Act or another Act has effect despite being incompatible with one or more of the human rights or despite anything else set out in this [HRA]’.

4. Parliamentary Human Rights Committee

A Human Rights Parliamentary Committee is created with functions that include examining every Bill presented to Parliament and to report upon whether the Bill is consistent with the human rights listed in the HRA. In the UK and Victoria (but not the ACT), the parliamentary committee also has a role to play following the making of a non-binding declaration of incompatibility by a court (see 8. below).

5. Ministerial Statement of Compatibility

The Minister of the Crown in charge of each Bill must, before the Second Reading of the Bill, make a statement of compatibility on the conformity of the Bill with the human rights listed in the HRA.

6. Public Authorities

In the UK and Victoria (but not in the ACT), it is unlawful for a public authority to exercise discretion in a way that is incompatible with human rights. In the UK (but not in Victoria or the ACT), unlawful conduct by the public authority gives rise to a cause of action with the remedy being any order considered just and appropriate including damages. In Victoria, the only remedy available is judicial review of the lawfulness of a decision of a public authority. In the UK HRA (but not in the HRAs of Victoria or the ACT) the definition of public authority is extended to include the lower courts with provision for appeals and damages to be awarded against the Crown.

7. Courts Approach to the Interpretation of Legislation

In working out the meaning of a written law, an interpretation that is consistent with the human rights listed in the HRA is to be preferred. One consequence is that subsidiary legislation that is inconsistent with a human right will be invalid unless the primary power authorizing subsidiary legislation is incapable of being read to be consistent with human rights

8. Courts Jurisdiction to Make a Non-binding Declaration of Incompatibility

If a superior court is satisfied that a written law is incompatible with a listed human right, the court may make a declaration of incompatibility. The declaration does not affect the validity of the written law and is not binding on the parties to the proceedings. In the UK (but not in Victoria or the ACT), the Minister has the power, by order, to amend written laws to remove the incompatibility and the parliamentary human rights committee reviews such orders. In the ACT and Victoria, the declaration and a report must be presented to the Parliament by the Attorney-General.

9. Defined functions of a Human Rights Commissioner

In the HRAs of the ACT and Victoria (but not the UK) a Human Rights Commissioner is created with statutory functions including advising the Attorney-General on human rights and intervening, with leave, in court proceedings concerning human rights.

10. Third party power to intervene

In the Victorian HRA (but not in the HRAs of UK or the ACT) there is provision for intervention, with leave, by interested parties in any court proceeding concerning human rights.

[1.23] Human Rights Acts focus on the parliament, executive *and* the judiciary.

One of the significant features of the three HRAs described above is the novel role played by the judiciary in making non-binding declarations. However, an equally significant feature of the HRAs is the fresh attention paid to institutional reform of parliament and the executive with a view to better protection of human rights. In a study of the first year of operation of the UK HRA, the following findings were made:

- The UK HRA was considered in 149 cases. Of those 149 cases, the statute affected the outcome or reasoning in 85 cases and was the basis for a successful claim in 24 cases.
- Of the 24 cases where the UK HRA was the basis for a successful claim: 16 claims followed a finding of unlawful conduct by a public authority, 6 claims relied upon an interpretation of legislation that was consistent with the HRA and 2 claims resulted in non-binding declarations of incompatibility.¹⁰

[1.24] **A Commonwealth Human Rights Bill?** The Commonwealth Attorney General has allocated funding for a national consultation process concerning a HRA. This paper is intended to contribute to that process.

Methodology

[1.25] This paper has been prepared on the basis of:

- The views and experiences of the members of the Human Rights Committee of the Law Society of Western Australia on infringements of human rights norms that exist in Australia;
- Expert publications on systemic infringements of human rights norms that exist in WA. For example, *Finding a Place: Report of the inquiry into the existence of discriminatory practices in relation to the provision of Public Housing and related services to Aboriginal People in Western Australia* (2004) (www.eoc.wa.gov.au);

- Expert publications on options for institutional reform at the State level for the purpose of improving protection of human rights. For example, Legal & Constitutional Committee (Parliament of Victoria) *Report on the Desirability or Otherwise of Legislation Defining and Protecting Human Rights* (1987);
- A review of the literature on the operation of the UK, ACT and Victorian HRAs. Of particular relevance are two web sites: (1) <http://acthra.anu.edu.au/index.html> is the web site of the *ACT Human Rights Act Research Project*. It is a joint project of the ANU and the ACT Government with the objective of evaluating the impact of the first 5 years of the ACT HRA; (2) <http://www.justice.vic.gov.au/humanrights> is the web site of resources relevant to the Victorian HRA.

Documents included in the Appendix

[1.26] The following documents are included in the Appendix of this paper.

- Appendix 1 Objects of the Law Society of WA.
- Appendix 2 Sample list of human rights: extracts from the Victorian Bill for the *Charter of Human Rights and Responsibilities Act 2006*
- Appendix 3 Cases under the UK Human Rights Act 1998 from an appendix to the opinion of Lord Steyn in *Ghaidan v Godin-Mendoza* [2004] UKHL 30
- Appendix 4 Is Change Needed in Victoria to Better Protect Human Rights? From *Rights, Respect and Responsibilities: the Report of the Human Rights Committee* (2005),

2. WHAT ARE “HUMAN RIGHTS” AND HOW ARE THEY CURRENTLY PROTECTED?

What are “Human Rights”?

- [2.1] **A very short history.** Philosophers have long discussed (and disputed) the source and content of the rights that we each enjoy by virtue of being human. John Locke’s (1632-1704) arguments for the existence of “natural rights” (identified by him as life, liberty and estate) was influential on the drafting of significant legal texts of the 17th and 18th century including the English *Bill of Rights of 1689*, Jefferson’s *Declaration of Independence (1776)*, the French *Declaration of the Rights of Man (1789)* and United States *Bill of Rights (1791)*. The next generation of influential English philosophers – notably Bentham (1748-1832), Mill (1806-1873) and Austin (1790-1859) – were more interested in articulating the rights associated with a liberal political philosophy and the attraction of utilitarianism than in the mechanisms by which the individual might secure the enjoyment of rights in a liberal state. More importantly in the present context, they were also positivists and critical of the concept of “natural” rights. This criticism and A.V. Dicey’s elegant characterization (in 1885) of parliamentary sovereignty and the rule of law as the twin pillars of the unwritten British Constitution left little enthusiasm throughout the Commonwealth for articulating human rights in legal texts – at least until the revelation of the holocaust in the wake of World War II.¹¹
- [2.2] ***Universal Declaration of Human Rights (UDHR), International Covenant on Civil and Political Rights (ICCPR) and International Covenant on Economic, Social and Cultural Rights (ICESCR).*** The holocaust has been the impetus for the dramatic growth of international law on human rights over the last 50 years. Notwithstanding the volume of international human rights law that now exists, there does not exist an indisputable list of human rights nor an agreed textual formulation of particular human rights. Nevertheless, there is significant agreement among international law scholars that the 1948 *Universal Declaration of Human Rights (UDHR)* has achieved the status of customary international law. In other words, there is evidence of consistent and general practice respecting the rights listed in the declaration by states that consider those rights are legally binding. The preamble of the UDHR locates the source of human rights as the ‘inherent dignity’ of ‘all members of the human family’ that is the ‘foundation of freedom, justice and peace in the world.’ Two of the thirty articles of the UDHR are only relevant at the Federal level, namely, the right to seek and enjoy asylum and the right to nationality. Of the remaining articles, those relating to “civil and political rights” have been elaborated upon in the ICCPR and those relating to “economic, social and cultural rights” and have been elaborated upon in the ICESCR. Australia is a party to each of these treaties.

Current Mechanisms for the Protection of Human Rights

- [2.3] **Representative democracy, constitutionalism and the rule of law in a Federal system.** The preamble to the UDHR links freedom from tyranny and oppression and the enjoyment of human rights to the rule of law. The UDHR itself provides for the right to: equality before the law (Art 7); access to an effective remedy for violation of the law (Art 8); an independent judiciary (Art

10); and participate in government through freely chosen representatives (Art 21). Many of these rights are already secured at the Commonwealth and State level. For example:

- **Participation in government.** The *Australian Constitution* guarantees that members of the Federal Parliament will be ‘directly chosen by the people’ (ss7, 24, 41). In Western Australia the *Electoral Act 1907 (WA)* regulates the election of members of the WA Parliament. A right to freedom of political communication has been implied from the system of representative government evident from the ‘text and structure’ of the Constitution: *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520.
- **Independence of the judiciary.** Chapter III of the *Australian Constitution* provides for security of tenure etc. for the High Court and other courts created by the Federal Parliament (s 72). WA statutes providing for similar, though not identical conditions, for judicial officers in WA courts (*Supreme Court Act 1935 (WA)* etc.). The common law rules of procedural fairness include a rule that a judge is disqualified from participating in a case if a fair-minded lay observer might reasonably apprehend that the judge might not bring an impartial mind to the resolution of the question the judge is required to decide: *Ebner v The Official Trustee in Bankruptcy* [2000] HCA 63).
- **Separation of powers.** A separation of powers principle has been implied from the structure of Constitution and the text of Chapter III with the result that the judicial power of the Commonwealth may only be exercised by courts established under Chapter III: *R v Kirby; Ex parte Boilermakers’ Society of Australia* (1956) 94 CLR 254. The principle has been extended so that State courts invested with federal jurisdiction may not exercise powers that ‘might undermine public confidence in the impartial administration of the judicial functions of State courts’: *Kable v DPP (NSW)* (1996) 189 CLR 51.
- **Legality.** The availability of judicial review of the constitutionality of laws is assumed in our system of government. The *Australian Constitution (Cth)* contains a guarantee of judicial review of Commonwealth executive action: s 75(v). Subject to statutory exceptions, the WA Supreme Court has jurisdiction over the issue of common law prerogative writs and, to that extent, reviews the WA executive.
- **Federalism.** Under the Australian federation, the division of power between the Commonwealth and the States necessarily involves a limitation of power and, to this extent, a limitation upon the chances of the infringement of human rights that are a characteristic of the concentration of unbridled political power. Under s 109 of the *Constitution (Cth)* where a law of a State is inconsistent with a law of the Commonwealth the latter shall prevail, and the former shall, to the extent of the inconsistency, be invalid. In the area of human rights in a number of cases inconsistencies between State laws and the *Racial Discrimination Act 1975 (Cth)* have been found to result in invalidity of the State law by operation of s 109 of the *Constitution (Cth)*: *Mabo v Queensland (No 1)* (1988) 166 CLR 186; *Western Australia v Commonwealth (Native Title Act Case)* (1995) 183 CLR 373.

On the other hand, where there is a multiplicity of governments within a federation, with each law of government comes a fresh opportunity for regulation that may infringe human rights.

- [2.4] **Civil and Political Rights in the Australian Constitution.** Mention has been made of the implied freedom of political communication and the separation of powers doctrine, see [2.3]. The *Australian Constitution* contains very few other guarantees of human rights. Commonwealth laws providing for acquisition of property must also make provision for just terms: s 51(xxxi) (Cf Art 17(2) UDHR). The Commonwealth may not make any law for establishing any religion or prohibiting the free exercise of any religion: s116 (Cf Art 18 UDHR).
- [2.5] **Civil and political rights in legislation.** Commonwealth and WA legislation provide a guarantee of non-discrimination on the grounds of race, sex, disability and analogous grounds.¹² The treatment of other human rights is best described as “piecemeal” with statutes regulating (or preventing) the enjoyment of the subject matter of the right. Examples may be found in:
- Commonwealth statutes: *Administrative Decisions (Judicial Review) Act 1977*; *Australian Security Intelligence Organisation Act 1979*; *Crimes Act 1914*; *Criminal Code 1995*; *Evidence Act 1995*; *Family Law Act 1975*; *Migration Act 1958*; *Native Title Act 1993*; *Privacy Act 1988*; *Social Security Act 1991*; *Workplace Relations Act 1996*.
 - WA statutes: *Aboriginal Communities Act 1979*; *Aboriginal Heritage Act 1972*; *Criminal Code*; *Education Act 1928*; *Police Act 1892*; *Workplace Agreements Act 1993*; *Young Offenders Act 1994*.
- [2.6] **Human Rights and Equal Opportunity Commission (HREOC).** The *Human Rights and Equal Opportunity Commission Act 1986 (Cth)* creates HREOC. The functions of HREOC include conducting inquiries and reporting to Federal Parliament – in response to complaints or of its own initiative - in relation to laws, policies and practices of the Commonwealth that infringe human rights including those rights listed in the ICCPR. Details of the work of HREOC pursuant to this function appear at http://www.hreoc.gov.au/human_rights/index.html.
- [2.7] **Common law.** Relevant common law rules include:
- **Statutory interpretation and fundamental rights or freedoms.** A court will not impute to the legislature an intention to abrogate or curtail fundamental rights or freedoms in the absence of clear unambiguous language: *Coco v The Queen* [1994] HCA 15; (1994) 179 CLR 427 (a statute authorising the grant of a warrant to use a listening device by a member of the police force in the execution of his/her duty was held not to authorise the grant of a warrant that permitted entry to private property).
 - **Teoh’s case.** The ratification of a treaty – including a human rights treaty - may give rise to a legitimate expectation (subject to a legislative or executive indication to the contrary) that the executive will consider relevant treaty obligations when making administrative decisions. If a decision-maker proposes to ignore a relevant treaty, the person affected must be informed otherwise the person has been denied procedural fairness: *Minister for Immigration and Ethnic Affairs v Ah Hin Teoh* (1995) 183 CLR 273. In *Re Minister for Immigration and Multicultural Affairs; Ex parte Lam* [2003] HCA 6, the rule was disapproved by Gummow and McHugh JJ and Callinan J; and doubted by Hayne J. These observations were *obiter* in that case.
 - **Common law rules of evidence and rules guaranteeing a fair trial.** These rules are increasingly being overtaken by statute.

- **Right to bodily inviolability.** The High Court has affirmed the right not to undergo invasive medical treatment without consent: *Re Marion* (1991) 175 CLR 218 (1991).
- **Native title.** The common law recognition of the right of Indigenous people to their traditional lands (subject to the extinguishment of the right) is consistent with human rights guarantee of the non-discriminatory enjoyment of property rights and the right of Indigenous minorities not to be denied the enjoyment of their culture: *Mabo v Queensland (No 1)* (1988) 166 CLR 186; *Mabo v Queensland (No 2)* (1995) 183 CLR 373; *Western Australia v Commonwealth (Native Title Act Case)* (1995) 183 CLR 373; *Western Australia v Ward* (2002) 213 CLR 1.

Characteristics of Human Rights

[2.8] **Human rights are often expressed in general terms; their protection depends upon the interpretation of the scope of the right.** It is expedient to prohibit ‘torture, cruel, inhuman or degrading treatment or punishment’ rather than attempt to anticipate and define all forms of prohibited conduct. The protection afforded by a guarantee of a particular human right will depend upon the interpretation of the scope of the right. Some guarantees – particularly associated with a fair criminal trial – are relatively detailed and the areas of dispute are relatively narrow. Other guarantees involve intractable controversy. The guarantee of the “right to life” clearly prohibits a police officer from shooting a suspect (absent self-defence). However, whether the guarantee prohibits abortion or active voluntary euthanasia is controversial. (See [3.3] below on one response to the controversy: the exclusion of abortion from the right to life protection of the ACT and Victorian HRAs.)

[2.9] **Human rights are not absolute; the measure of protection depends upon the interpretation of the circumstances when limitations are necessary.** The interdependency of human rights means that the limitation of one right may be necessary to secure the enjoyment of another right. It may be necessary to limit or regulate the enjoyment of the freedom of peaceful assembly on a public road so that others may enjoy the right to freedom of movement. It is also well accepted that there may be some limitations on the enjoyment of *some* human rights on the grounds of national security, public order or public health. Again, the protection afforded by a guarantee of a particular human right will depend upon the interpretation of the extent to which government ought to be permitted to limit the enjoyment of the right. The approach of the High Court to a law that burdens the implied freedom of political communication is to ask whether the law is reasonably appropriate and adapted to achieving an end, the fulfilment of which is compatible with the system of representative and responsible government prescribed by the Constitution.¹³ The Victorian HRA includes a clause that offers guidance on the proper approach to limitations on the enjoyment of a human right.

7. Human rights—what they are and when they may be limited (1) This Part sets out the human rights that Parliament specifically seeks to protect and promote. (2) A human right may be subject under law only to such reasonable limits as can be demonstrably justified in a free and democratic society based on human dignity, equality and freedom, and taking into account all relevant factors including— (a) the nature of the right; and (b) the importance of the purpose of the limitation; and (c) the nature and extent of the limitation; and (d) the relationship between the limitation and its purpose;

and (e) any less restrictive means reasonably available to achieve the purpose that the limitation seeks to achieve. (3) Nothing in this Charter gives a person, entity or public authority a right to limit (to a greater extent than is provided for in this Charter) or destroy the human rights of any person.

Clause 7 reflects the approach of other jurisdictions to the interpretation of domestic human rights instruments including Section 36 of the South African *Bill of Rights* and the approach of the Supreme Court of Canada to the *Canadian Charter of Rights and Freedoms* (1982).

- [2.10] **The effective protection of human rights requires government to assume positive and negative obligations.** An instrument that guarantees the human rights of individuals will require the state to refrain from passing laws that infringe those rights and to refrain from engaging in executive conduct. The *negative* obligation of the state not to infringe human rights is the one most commonly associated with a guarantee of civil and political rights. However, a moment's reflection reveals that the *effective* protection of civil and political rights will also require the State to assume some *positive* obligations. This point is well illustrated by *Dietrich v The Queen* (1992) 177 CLR 292. The enjoyment of the right not to be tried unfairly requires a State to allocate sufficient resources to the legal aid system so that each defendant to a serious criminal charge has access to counsel. The discharge of a positive obligation may require the resolution of complex policy questions. What proportion of the finite resources of the State should be devoted to the protection of the human right? There may be a variety of positive steps that could be taken to protect the human right. The State must make a judgment as to which of those may be most effective, bearing in mind a range of factors including the cost which the public may be prepared to bear.

3. ARGUMENTS ‘FOR’ AND ‘AGAINST’ A HUMAN RIGHTS ACT

The Experience in the UK, ACT and Victoria.

[3.1] Compared to the status quo, will a HRA result in the improved protection of human rights in Australia. The Human Rights Consultation Committee established to advise the Victorian Government (the Victorian Committee) identified the arguments for and against a HRA in *Rights, Respect and Responsibilities: the Report of the Human Rights Committee* (2005). We have included the relevant extract as an appendix to this report. Those arguments were as follows.

Arguments “for” a Human Rights Act¹⁴

- The current protection of human rights is inadequate.
- Additional protection is needed for disadvantaged and marginalized peoples.
- A Human Rights Act would modernize our democracy and give effect to Australia’s human rights obligations.
- A Human Rights Act would educate people about their rights and responsibilities.

Arguments “against” a Human Rights Act¹⁵

- Our human rights are adequately protected – ‘If it ain’t broke don’t fix it.’
- A Human Rights Act would make no practical difference.
- A Human Rights Act would give too much power to judges.
- Human rights are not a matter for Parliament.
- A Human Rights Act might actually restrict rights.
- A Human Rights Act would create a selfish society.
- A law is not the best way to protect human rights.
- A Federal Human Rights Act rather than a State Human Rights Act is needed.

[3.2] The above arguments cannot be evaluated in isolation from: the characteristics of human rights - discussed at [2.8]; the human rights that are proposed to be included in the HRA - discussed at [3.3]); and the impact of *each* provision of a HRA compared to the status quo - discussed in the chapters following on parliament, the executive and the courts. For example, at [6.7] we observe that if a judicial determination of invalidity is made, the democratic structure remains in that the Parliament is supreme. It is left to the executive and the legislature to assess the consequences for democracy which follow from the way in which it responds to a declaration of invalidity. Those arms of government are vested with the responsibility of judging what the people desire or will tolerate by way of compliance with human rights standards in the form of democracy which exists in Australia. Alternatively, if a tension develops between the Judiciary and other arms of the government in relation to declarations of inconsistency, that in itself may be a healthy manifestation of the checks and balances which ought to exist in a democratic system. After considering the arguments ‘for’ and ‘against’ a HRA and other matters noted in this paragraph, compared to the status quo, a HRA would result in the improved protection of human rights in Australia.

Civil and Political Rights

- [3.3] **Human rights listed in Human Rights Acts.** The ICCPR is the basis for the rights that appear in the ACT and Victorian HRAs (see Appendix 2). This fact will enable useful comparison to be made with the substantial international jurisprudence on each ICCPR article.
- [3.4] Taking the Victorian HRA as an example, there are a small number instances where the HRA departs from the text of the ICCPR:
- To declare that an existing law does not infringe a right. For example, community service orders are exempted from the prohibition on forced labour and the right to the assistance of counsel at a criminal trial is deemed to be satisfied by the legal aid regime. Similarly, by Clause 48, the HRA is taken not to affect ‘any law applicable to abortion’.
 - To add clause 19(2) (quoted below) on Aboriginal culture which, although it does not appear in the ICCPR, does not add anything to the protection of minority cultural rights guaranteed by Article 27 of the ICCPR and included as clause 19(1) (also quoted):
“**19. Cultural rights** (1) All persons with a particular cultural, religious, racial or linguistic background must not be denied the right, in community with other persons of that background, to enjoy his or her culture, to declare and practise his or her religion and to use his or her language. (2) Aboriginal persons hold distinct cultural rights and must not be denied the right, with other members of their community— (a) to enjoy their identity and culture; and (b) to maintain and use their language; and (c) to maintain their kinship ties; and (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.”
- [3.5] **Corporations and Human Rights.** The ACT and Victorian HRA each contain a provision to the effect that human beings and not corporations enjoy human rights, see Clause 6 of the Victorian HRA in Appendix 2. These provisions are a response to the Canadian experience of large corporations (including tobacco companies) relying upon the guarantee of freedom of expression to avoid government restrictions on advertising.¹⁶ There are two disadvantages of the clause. First, individuals who conduct business or hold personal assets through small family companies may not been able to pursue property rights protected by the Bill. For example, a case has arisen in the ACT where a house was owned by a family company and leased to the family. The company could not invoke the right to privacy in planning litigation: *Vosame Pty Limited v ACT Planning & Land Authority* [2006] ACTAAT 12. Secondly, the clause undermines attempts to encourage corporations to respect human rights.
- [3.6] **Property Rights.** The ICCPR prohibits discrimination on the grounds of property ownership but does not otherwise protect property rights. The Universal Declaration of Human Rights prohibits the arbitrary deprivation of property. A HRA ought to protect a key tenet of liberalism in our market economy by providing that the acquisition of property by the state under must be on ‘just terms’. This protection is found in s 51(xxxi) of the Commonwealth Constitution so far as Commonwealth acquisition of property is concerned. On the other hand, ‘debate over the meaning of property, of the kinds of power that should be allocated to individuals and the limits on that power

(environmental regulation, minimum wage law etc.) should be part of the ongoing debate of legislative assemblies.¹⁷ The Victorian HRA reflects the Universal Declaration in providing that ‘a person must not be deprived of his or her property other than in accordance with law’. In order for a deprivation of property not to be arbitrary, the person whose property is at risk must be given a right to be heard before an deprivation takes place and just compensation must be accorded: see *Minister of State for the Army v Dalziel* (1944) 68 CLR 261 per Rich J at 284-6; *Mabo v Queensland (No 1)* (1988) 166 CLR 186 and *Commonwealth v Tasmania* (1983) 158 CLR 1 (Tasmanian Dam Case) per Deane J at 290. The common law right to compensation for personal injury is a form of property in the nature of a chose in action. It is a right which has been the subject of significant statutory incursion. The UDHR prohibition against arbitrary deprivation ought to also apply to that right.

Economic, social and cultural rights.

- [3.7] **Argument of the ACT Bill of Rights Consultative Committee on Economic, social and cultural rights.** The ICESCR rights include the: right to work (just conditions, safe conditions), right to social security, recognition of family (special protection for children), right to adequate standard of living, adequate food, clothing and housing; right to highest attainable standard of physical and mental health; right of everyone to education; right of everyone to take part in cultural life. Apart from the inclusion of the right to education in the United Kingdom HRA, no other ICESCR rights appear in the list of human rights of any HRA. The ACT Bill of Rights Consultative Committee and the Consultation Committee for the Proposed WA Human Rights Act recommended that a selection of ICESCR rights be included in the ACT HRA and any WA HRA. It was contended by the ACT Committee that the ‘deep connections’ between civil and political rights on the one hand and economic, social and cultural rights on the other hand required both to be included to ensure the balanced protection of each set of rights. The WA Committee concluded that there was no practical reason why such rights should not be included, particularly if a dialogue model of HRA is adopted.
- [3.8] **ACT and Victoria consider and reject case for including economic, social and cultural rights.** The ACT Government considered and rejected the above arguments on the basis that it was better to ‘wait and see’ whether the HRA was successful.¹⁸ The Victorian Human Rights Consultation Committee recommended against the inclusion of any ICESCR rights for similar reasons.¹⁹

Conclusions

- [3.9] A HRA would result in the improved protection of human rights in Australia. A HRA should:
- Include listed human rights that are based on the text of the ICCPR. This list includes Article 27 of the ICCPR on the right of minorities not to be denied the right to enjoy their culture. (Consequently, the cultural rights of Indigenous peoples would enjoy a measure of protection.)
 - Include the right of a person not to be deprived of his or her property other than in accordance with law.
 - Provide that the HRA is to have no effect on the operation of state laws authorizing the performance of abortions (e.g., *Health Act 1911* (WA), s

334) but should otherwise *not* exclude the operation of the HRA to existing laws and practices.

- Apply to corporations in those circumstances where international law provides for the application of the ICCPR to corporations;
- Include a provision that anticipates reasonable limits may be placed on the enjoyment of human rights provided those limits are demonstrably justified taking into account relevant factors.
- Should not include a clause” to the effect that ‘parliament may expressly declare in an Act that the Act or another Act has effect despite being incompatible with the human rights in the HRA’ (as in s 31 Victorian HRA).

4. PARLIAMENT

Statement of Human Rights Compatibility of Each Bill

- [4.1] The UK, ACT and Victorian HRAs each require the Government to present to the parliament a statement on whether, in the opinion of a Minister, a Government Bill is compatible with human rights. Section 28 of the Victorian HRA is an example:

Section 28 Statements of compatibility (1) A Member of Parliament who proposes to introduce a Bill into a House of Parliament must cause a statement of compatibility to be prepared in respect of that Bill. ... (3) A statement of compatibility must state— (a) whether, in the member's opinion, the Bill is compatible with human rights and, if so, how it is compatible; and (b) if, in the member's opinion, any part of the Bill is incompatible with human rights, the nature and extent of the incompatibility. (4) A statement of compatibility made under this section is not binding on any court or tribunal.

- [4.2] The role of the executive branch of Government when drafting legislation is critical to the protection of human rights. The Chief Executive of the ACT Department of Justice and Community Safety has said that the section 37 requirement has resulted in 'robust dialogue, particularly where agencies are committed to the implementation of a particular policy in a particular way.'²⁰

Parliamentary Committee on Human Rights

- [4.3] The ACT and Victorian HRAs each create a parliamentary committee to examine Bills and report on 'human rights issues'. Section 30 of the Victorian HRA is an example:

Section 30 Scrutiny of Acts and Regulations Committee. The Scrutiny of Acts and Regulations Committee must consider any Bill introduced into Parliament and must report to the Parliament as to whether the Bill is incompatible with human rights.

In the UK, the Joint Committee on Human Rights examines every Bill and 'publishes regular progress reports on its scrutiny of Bills, setting out any initial concerns it has about Bills it has examined and, subsequently, the Government's responses to these concerns and any further observations it may have on these responses.'

- [4.4] The work of a parliamentary committee is a valuable opportunity for community and expert concern on human rights issues to be directly incorporated in the parliamentary process. On the other hand, a significant increase in committee resources may be required if the committee is to engage in meaningful public consultation and to produce timely reports on a number of Bills.
- [4.5] The *Legal & Constitutional Committee* of the Parliament of Victoria recommended the creation of Human Rights Committee in a *Report on the Desirability or Otherwise of Legislation Defining and Protecting Human Rights*

(1987). The recommendation followed a finding on the operation of the Victorian Parliament that is equally true of the Commonwealth Parliament:

“One of the greatest limitations upon the effectiveness of Parliament as a means of protecting human rights is the sheer logistical and organizational difficulties which it presently faces in seeking to discharge its task. Of these difficulties, probably the most obvious is the enormous volume of legislation that passes through Parliament. ... Another charge often leveled against Parliament in the context of its ability to protect human rights is that it is dominated by the executive. ... [I]t is clear that certain features of the modern relationship between the executive and the Parliament do tend to inhibit the effective functioning of the latter as the protector of human rights. ... It should be noted that, to some extent, the parliamentary executive faces its own difficulties in maintaining an adequate control over public administration. ... In the specific context of legislation, the content of most of the Bills introduced into Parliament will owe much to the concerns and interests of those whose duty it will be to administer those Bills should they become law. ... In drafting or seeking to influence the drafting of Bills, the attention of bureaucrats will only rarely be turned to questions of human rights.”²¹

Finding of Incompatibility Presented to Parliament

- [4.6] The ACT and Victorian HRAs each provide that, on the making of a declaration of incompatibility, a Government Minister is required to present a written response to the Parliament within a further nominated period. Section 37 of the Victorian HRA is an example:

Section 37 Action on declaration of inconsistent interpretation Within 6 months after receiving a declaration of inconsistent interpretation, the Minister administering the statutory provision in respect of which the declaration was made must—(a) prepare a written response to the declaration; and (b) cause a copy of the declaration and of his or her response to it to be— (i) laid before each House of Parliament; and (ii) published in the Government Gazette.

The UK statute goes further and includes a “Henry VIIIth clause”, conferring on the Attorney the power to amend laws by order following a declaration. The UK provision enables a rapid response by government to a declaration of incompatibility. This procedure does have the advantage of speed – in Australia remedial legislation would require the usual three readings in each House, and assent by the Governor-General -in-Council. While there is often skepticism about granting a Minister such a “Henry VIII” power to change Parliamentary legislation by executive order or regulation, it is now quite common to grant a Minister (or even a public officer) the power to reconcile conflicts or inconsistencies between legislation (eg where complex legislation has been amended) by regulation or order. However, it also results in the concentration of power of uncertain scope.

- [4.7] The impact throughout the Commonwealth of a provision in similar terms to section 37 (quoted above) is difficult to predict. The objective is clear enough: to create a dialogue between the courts, the executive and the parliament. The experience in the UK is encouraging insofar as declarations made by the court have inevitably resulted in a change to the law or practice: see paragraph [6.6] below.

Conclusions on a Human Rights Act and the Parliament

- [4.8] A HRA should make provision for:
- Parliament to receive a statement on whether, in the opinion of the Attorney-General, each government Bill is compatible with the listed human rights (as in the UK, ACT and Victoria).
 - A parliamentary committee to consider any Bill introduced into Parliament and report on whether the Bill is incompatible with the listed human rights.
 - The HREOC to have the power to inquire into and report to the Parliament through the Attorney-General when a law is found to be incompatible with human rights under the HRA: see paragraphs [6.7] to [6.8] below.

5. EXECUTIVE

Unlawful For Public Authorities To Act In A Way That Is Incompatible With Human Rights

- [5.1] The UK and Victorian HRAs provide that, subject to exceptions, it is unlawful for a public authority to act in a way that is incompatible with a human right. The ACT HRA does not contain an equivalent provision. Section 38 of the Victorian HRA is an example:

38. Conduct of public authorities (1) Subject to sub-section (2), it is unlawful for a public authority to act in a way that is incompatible with a human right or, in making a decision, to fail to give proper consideration to a relevant human right. (2) Sub-section (1) does not apply if, as a result of a statutory provision or a provision made by or under an Act of the Commonwealth or otherwise under law, the public authority could not reasonably have acted differently or made a different decision. [Example: Where the public authority is acting to give effect to a statutory provision that is incompatible with a human right.] (3) This section does not apply to an act or decision of a private nature.

- [5.2] **Public authority?** The UK and Victorian HRAs also contain a definition of “public authority” that includes government departments, ministers, public servants, local government, police and other entities performing public functions.²² The core elements of the Executive would obviously be subject to the HRA. One of the most important issues in relation to the application of a HRA would appear to be to what entities or decision-making the HRA should apply, beyond the core of the Executive (ie beyond Ministers, government departments and other agents of the Crown) and beyond the most obvious form of exercising executive power, namely taking decisions in terms of statutory powers and functions.
- [5.3] In the current era of privatisation and outsourcing of the delivery of government services an argument could be made for a wide application of a HRA. This question of the extended application of public law obligations and remedies relating to human rights is often referred to as the issue of ‘horizontalty’. While the relationship between the core Executive and the citizen which would be subject to the HRA may be seen as lying in a vertical line (top to bottom), the top part of the relationship (and the obligations under the HRA) may be extended ‘horizontally’ to embrace entities outside the core of the Executive when those entities exercise what may be termed public powers or public functions. Of course, there will often be a debate whether a particular exercise of power by an entity outside the core of government is sufficiently ‘public’ to attract obligations under a HRA. (This debate is a live one in the context of common law judicial review, in relation to the question which decisions or actions should be amenable to the prerogative writs or judicial review by way of declaratory or injunctive relief.)
- [5.4] When the various legislative models are considered, there would appear to be (at least) three ways in which horizontalty or a measure of horizontalty can be achieved in relation to the application of human rights:

- (a) The model used by the Victorian HRA. The HRA applies to functions of a 'public' (as contrasted with a 'private') nature taken by 'public authorities'. 'Public authorities' is given an extended definition in s 4(1) of the HRA. The most open-ended category of public authority is referred to in s 4(1)(c). The Victorian HRA would thus appear to apply where the delivery of governmental services has been contracted out to a private company.
- (b) By having a general horizontality provision, like section 8(2) of the South African Constitution 1996.
- (c) By making the Courts subject to the material provisions of the HRA in deciding cases, so that they have to apply the rights and obligations of the HRA to the parties before them and to their rights and obligations to be determined in the case. This is reflected in s 8(3)(a) of the South African Constitution 1996 and in s 6 of the UK Human Rights Act 1998. In terms of this approach, a court should apply the right to privacy (art 8 of the Convention) in litigation between two private parties.

As a matter of general approach, the Victorian option appears to be the most feasible. Even if the Courts themselves are not regarded as 'public authorities' they will inevitably have to apply human rights not only in interpreting legislation but also in respect of the exercise of judicial discretion, when matters such as the rights of children in the criminal process (s 23 of the Victorian HRA) and rights to a fair hearing (s 24 of the HRA) are in issue.

[5.5] **A UK example.** The operation of the provision in the UK is well illustrated by the decision of the Court of Appeal *In R(P and Q) v the Home Secretary* [2001] 1 WLR 2002. A prison service policy allowed a mother to care for her baby in prison – but only until the baby turned 18 months of age. At issue was the fact that the policy did not allow for any extension beyond 18 months and whether, in an individual case, this resulted in an inconsistency with the right to respect for family life. The judgment of the Court included the following:

We ... accept that the Prison Service is entitled to have a policy. ... It is entitled to decide what children it will and will not accommodate. It is not obliged to make any provision at all. ... The only question we have to decide is whether the Prison Service is entitled to operate its policy in a rigid fashion, insisting that all children leave by the age of 18 months at the latest, however catastrophic the separation may be in the case of a particular mother and child, however unsatisfactory the alternative placement available for the child, and however attractive the alternative solution of combining day care outside prison with remaining in prison with the mother. In our view the policy must admit of greater flexibility than that. .. [T]he interference with the child's family life which the Prison Service has allowed and encouraged to develop must be justified In considering whether the interference is proportionate to its legitimate aims, the service will have to strike a fair balance between those aims. These fall into three basic categories. First, there are the necessary limitations on the mother's rights and freedoms brought about by her imprisonment. ... The second is the extent to which any relaxation in the policy would cause problems within the prison or the Prison Service generally.... The third is the welfare of the individual child. In the great majority of cases, almost all of these considerations would point to separating mother and child at or before the age of 18 months. After that age the harm to the mother's family life could not normally outweigh the harm to the welfare of the child or to the good order of the prison. But there may be very rare exceptions where the interests of mother and child coincide."

- [5.6] The impact throughout the Commonwealth of a provision on similar terms to section 38 (quoted above) would depend upon a number of factors, including:
- the definition of “public authority”;
 - the extent to which each public authority was aware of the obligation created by the provision and consequently adjusted individual decision making criteria and systems for creating policy;
 - the remedies available to a person aggrieved by the unlawful conduct of a public authority see below.

Remedies Unlawful Conduct of a Public Authority

- [5.7] **Any order considered just and appropriate: UK.** The effect of the UK HRA is that a person aggrieved by the unlawful conduct of a public authority may obtain a remedy in the form of any orders that a court considers ‘just and appropriate’ including damages (s 8 UK HRA). In practice, few awards of damages are being made in the UK. In *Anufrijeva v London Borough of Southwark* [2003] EWCA Civ 1406, the Court of Appeal has explained why damages are not often awarded under the UK HRA:

Where an infringement of an individual's human rights has occurred, the concern will usually be to bring the infringement to an end and any question of compensation will be of secondary, if any, importance. This is reflected in the fact that, when it is necessary to resort to the courts to uphold and protect human rights, the remedies that are most frequently sought are the orders which are the descendants of the historic prerogative orders or declaratory judgments. The orders enable the court to order a public body to refrain from or to take action, or to quash an offending administrative decision of a public body. Declaratory judgments usually resolve disputes as to what is the correct answer in law to a dispute. This means that it is often procedurally convenient for actions concerning human rights to be heard on an application for judicial review in the Administrative Court.

- [5.8] **Damages?** One reason to favour the availability of damages for unlawful conduct of a public authority is that there will be a few cases where no remedy other than damages can compensate the aggrieved party. Consider the example of a person who has been detained as a result of unlawful conduct. On the other hand a focus on damages may promote a litigation culture rather than a culture of respect for human rights. The New Zealand *Bill of Rights Act* (1990) says nothing about remedies. Nevertheless, in *Simpson v Attorney-General (Baigent's case)* [1994] 3 NZLR 667 the majority of the Court of Appeal found that the Crown was liable for damages for when a police officer infringed the rights found in the statute. The New Zealand parliament has recently moved to limit claims by prisoners following a public outcry after a number of successful claims by prisoners, see *Taunoa v Attorney-General* [2004] BCL 968.
- [5.9] **Limited remedies excluding damages: Victoria.** The most common remedies made in the UK following proof of unlawful conduct by a public authority are injunctions, declarations and other remedies made following a successful application for judicial review of an administrative decision. The effect is that the original decision is vacated and the decision made again – in accordance with the law as propounded by the Court. The Victorian HRA attempts to limit remedies to those available on judicial review of an

administrative decision. Section 39(2) of the Victorian HRA makes clear that damages are not available and section 39(1) suggests that a remedy in the form of judicial review may be available.

39. Legal proceedings (1) If, otherwise than because of this Charter, a person may seek any relief or remedy in respect of an act, or decision, of a public authority on the ground that the act or decision was unlawful, that person may seek that relief or remedy on a ground of unlawfulness arising because of this Charter. (2) This section does not affect any right that a person has, otherwise than because of this Charter, to seek any relief or remedy in respect of an act, or decision, of a public authority, including a right— (a) to seek judicial review under the Administrative Law Act 1978 or under Order 56 of Chapter I of the Rules of the Supreme Court; and (b) to seek a declaration of unlawfulness and associated relief including an injunction, a stay of proceedings or exclusion of evidence. (3) A person is not entitled to be awarded any damages because of a breach of this Charter. (4) Nothing in this section affects any right a person may have to damages apart from the operation of this section.

[5.10] Section 39(1) of the Victorian HRA is obscure insofar as it limits the availability of a remedy for unlawfulness to the circumstance when a person may seek relief ‘otherwise than because of’ the statute. These words would seem to save the remedy for a situation where unlawfulness *of itself* is significant. For example:

- If *unlawfully* obtained evidence may be excluded from proceedings, evidence obtained in a manner which is incompatible with a human right will have been *unlawfully* obtained and may be excluded.
- If an aggrieved person is able to satisfy the “formal” requirements for an application for judicial review (justiciability and standing), the UK jurisprudence suggests that inconsistency with a human right is a distinct ground of judicial review.

The Victorian HRA stigmatises as ‘unlawful’ acts and decisions of a public authority (not being acts or decisions of a private nature) which are incompatible with a human right. It also provides that it is ‘unlawful’ to fail to give proper consideration to a relevant human right in making a decision. The meaning and consequences of ‘unlawfulness’ in this context are however somewhat obscure. The Victorian HRA does not grant any right of redress or remedy based directly on the infringement of human rights. Moreover, the HRA Act does not say whether administrative action or decisions rendered ‘unlawful’ because they infringe the HRA, are invalid for the purpose of seeking judicial review of such action or decisions.

Lord Steyn has held that ‘there is a material difference between the *Wednesbury* grounds of review (no reasonable decision maker could have made the decision) and the approach of proportionality applicable in respect of review where’ a HRA is being applied. The quoted words are from *Secretary of State For The Home Department, Ex Parte Daly* [2001] UKHL 26; [2001] 3 All ER 433 where Lord Steyn continued:

The starting point is that there is an overlap between the traditional grounds of review and the approach of proportionality. Most cases would be decided in the same way whichever approach is adopted. But the intensity of review is somewhat greater under the proportionality approach. Making due allowance

for important structural differences between various convention rights, which I do not propose to discuss, a few generalisations are perhaps permissible. I would mention three concrete differences without suggesting that my statement is exhaustive. First, the doctrine of proportionality may require the reviewing court to assess the balance which the decision maker has struck, not merely whether it is within the range of rational or reasonable decisions. Secondly, the proportionality test may go further than the traditional grounds of review inasmuch as it may require attention to be directed to the relative weight accorded to interests and considerations. ... The differences in approach between the traditional grounds of review and the proportionality approach may therefore sometimes yield different results. ... This does not mean that there has been a shift to merits review. On the contrary, as Professor Jowell ... has pointed out the respective roles of judges and administrators are fundamentally distinct and will remain so. And Laws LJ rightly emphasised in *Mahmood* "that the intensity of review in a public law case will depend on the subject matter in hand". That is so even in cases involving Convention rights. In law context is everything.

It remains to be seen whether the above distinction will be applied in the case of the Victorian HRA.

- [5.11] Any HRA should provide for remedies and should explicate that 'unlawful' in terms of the HRA entails invalidity in a judicial review context – as is the case under the UK HRA. The term 'unlawful' could then be said to entail an extended application of the *ultra vires* doctrine and to give rise to a ground of review akin to the residual ground of review under the Commonwealth AD(JR) Act which applies to decisions and conduct, namely "otherwise contrary to law". 'Unlawfulness' would then also be akin to the doctrine of repugnancy at common law.
- [5.12] Whether damages should be awarded for administrative action contrary to the HRA is an important issue. Damages should be a remedy, as is the case under the UK HRA. Awards of damages under that Act tend to be quite modest. There should be no limitations on the damages which may be awarded under a HRA. Alternatively, it is now quite common to circumscribe or cap awards of damages in legislation, e.g., in a criminal compensation or anti-discrimination context. Conduct infringing a HRA may cause a victim to incur legal costs or other expenses which should in all fairness be compensated. Where other corrective action cannot be taken, an award of damages (even a modest one) can also often have a salving effect for a victim.

Human Rights and Equal Opportunity Commission

- [5.13] The ACT and Victorian HRAs provide that a Human Rights Commission will monitor and assist in the implementing of the HRA. Section 40 and 41 of the Victorian HRA is an example:

Section 40 Intervention by Commission (1) The Commission may intervene in, and may be joined as a party to, any proceeding before any court or tribunal in which a question of law arises that relates to the application of this Charter or a question arises with respect to the interpretation of a statutory provision in accordance with this Charter.

Section 41 Functions of the Commission The Commission has the following functions in relation to this Charter— (a) to present to the Attorney-

General an annual report ...; (b) when requested by the Attorney-General, to review the effect of statutory provisions and the common law on human rights and report in writing to the Attorney-General on the results of the review; and (c) when requested by a public authority, to review that authority's programs and practices to determine their compatibility with human rights; and (d) to provide education about human rights and this Charter; and (e) to assist the Attorney-General in the review of this Charter ...

HREOC already performs similar functions to those at the Federal level. It is recommended that HREOC also have the role of investigating and making the declarations of incompatibility which in the UK, NZ, Victorian and ACT HRA's have been vested solely in the Courts.

Conclusions on a Human Rights Act and the Executive

[5.14] A HRA should provide that:

- It is unlawful for a public authority to act incompatibly with the listed human rights.
- The definition of “public authority” should include a government department; a statutory authority; the police; local government; an entity whose functions include functions of a public nature, when it is performing those functions on behalf of the State whether under contract or otherwise.
- A person aggrieved by the unlawful conduct of a public authority may obtain a remedy in the form of any orders that a court considers ‘just and appropriate’ *including* damages.
- The Human Rights and Equal Opportunity Commission should have all the same powers and functions including intervention in relevant cases and advising the Attorney-General on listed human rights which have been provided to the Human Rights Commission under the Victorian HRA.

6. COURTS

Interpreting Statutes Consistently With Human Rights ‘So Far As Possible’.

- [6.1] The UK, ACT and Victorian HRAs provide that, ‘so far as possible’ written laws must be interpreted in a way that is compatible with human rights. Section 32 of the Victorian HRA is an example:

Section 32 Interpretation (1) So far as it is possible to do so consistently with their purpose, all statutory provisions must be interpreted in a way that is compatible with human rights. (2) International law and the judgments of domestic, foreign and international courts and tribunals relevant to a human right may be considered in interpreting a statutory provision. (3) This section does not affect the validity of— (a) an Act or provision of an Act that is incompatible with a human right; or (b) a subordinate instrument or provision of a subordinate instrument that is incompatible with a human right and is empowered to be so by the Act under which it is made.

- [6.2] **UK experience: a broad view of the interpretive power.** The impact of the UK provision (section 3 of the UK HRA) has been significant insofar as UK courts have relied upon the provision to go further than resolve an obvious ambiguity in a statute. For example, in *R v A (No. 2)* [2002] 1 AC 45 the House of Lords created an exception to a legislative direction excluding any evidence of prior sexual history of a sexual assault complainant. The effect of section of the UK HRA was found to be that, acknowledging ‘the importance of seeking to protect the complainant from indignity and from humiliating questions, the test of admissibility is whether the evidence (and questioning in relation to it) is nevertheless so relevant to the issue of consent that to exclude it would endanger the fairness of the trial under article 6 of the Convention.’
- [6.3] The capacity of a court to read words into a statute was addressed by Lord Nicholls of Birkenhead in *Ghaidan v. Godin-Mendoza* [2004] UKHL 30 - a case in which ‘a person who was living with the original tenant as his or her wife or husband’ was construed by the majority to include a same-sex partner.²³

It is now generally accepted that the application of section 3 does not depend upon the presence of ambiguity in the legislation being interpreted. Even if, construed according to the ordinary principles of interpretation, the meaning of the legislation admits of no doubt, section 3 may nonetheless require the legislation to be given a different meaning. ... From this it follows that the interpretative obligation decreed by section 3 is of an unusual and far-reaching character. ... In the ordinary course the interpretation of legislation involves seeking the intention reasonably to be attributed to Parliament in using the language in question. Section 3 may require the court to depart from this legislative intention, that is, depart from the intention of the Parliament which enacted the legislation. The question of difficulty is how far, and in what circumstances, section 3 requires a court to depart from the intention of the enacting Parliament. The answer to this question depends upon the intention reasonably to be attributed to Parliament in enacting section 3. ...[T]he intention of Parliament in enacting section 3 was that, to an extent bounded only by what is ‘possible’, a court can modify the meaning, and hence the effect, of primary and secondary legislation. ...Parliament,

however, cannot have intended that in the discharge of this extended interpretative function the courts should adopt a meaning inconsistent with a fundamental feature of legislation. That would be to cross the constitutional boundary section 3 seeks to demarcate and preserve. Parliament has retained the right to enact legislation in terms which are not Convention-compliant. The meaning imported by application of section 3 must be compatible with the underlying thrust of the legislation being construed. Words implied must, in the phrase of my noble and learned friend Lord Rodger of Earlsferry, 'go with the grain of the legislation'. Nor can Parliament have intended that section 3 should require courts to make decisions for which they are not equipped. There may be several ways of making a provision Convention-compliant, and the choice may involve issues calling for legislative deliberation.

- [6.4] **NZ experience: a narrow view of the interpretive power.** The UK approach may not be followed in the ACT and Victoria as a result of additional wording in those HRAs that direct a court to prefer an interpretation that best achieves the purpose of a law. A number of commentators (including NSW Chief Justice Spigelman writing extra-judicially) have suggested that, on this issue, ACT courts are more likely to follow New Zealand courts than UK courts.²⁴ Section 6 of the New Zealand *Bill of Rights Act* (1990) is in similar terms to section 3 of the UK HRA. The experience in New Zealand was recently summarized by an academic, Dr Petra Butler, as follows:²⁵

New Zealand courts usually start with a “s 6 BORA orientation” - that is a preference for beginning the analysis of a statutory interpretation problem having construed BORA first and only then turning to the other enactment. This orientation means that in many cases the court will have in the forefront of its mind the standards that an enactment must meet in order to ensure BORA consistency. That being the case, the court can approach the enactment largely free of preconceptions as to its literal meaning, focusing instead on the goal of achieving a BORA-consistent interpretation. Adopting this orientation ensures that judges see more possibilities for BORA consistent meanings than they would have, had the literal meaning of the other enactment been determined earlier. At the same time, the Court of Appeal has consistently emphasized that the consistency direction in s 6 only authorizes consistent meanings to be given to enactments where such a meaning can be “reasonably” or “properly” given; conversely, s 6 does not authorize a “strained” interpretation. The BORA-consistent interpretation must be “fairly open”⁶³ and “tenable”. Section 6 does not authorize the rewriting of the law.

Court Power to Make a Non-Binding Declaration That a Law is Incompatible With Human Rights

- [6.5] The UK, ACT and Victorian HRAs provide that a superior court has the power to make a declaration that a statutory provision is incompatible with a human right. A declaration does not affect the validity of the law or confer any rights upon any person. However, once a declaration is made:
- The declaration must be given to the Minister responsible for administering the impugned statute;
 - The Attorney-General must report to parliament on the making of the declaration in accordance with the procedure described above in paragraph [4.6].

Section 36 of the Victorian HRA is an example of a provision conferring power to make a declaration:

36. Declaration of inconsistent interpretation (1) This section applies if — (a) in a Supreme Court proceeding a question of law arises that relates to the application of this Charter or a question arises with respect to the interpretation of a statutory provision in accordance with this Charter; or (b) the Supreme Court has had a question referred to it under section 33; or (c) an appeal before the Court of Appeal relates to a question of a kind referred to in paragraph (a). (2) Subject to any relevant override declaration, if in a proceeding the Supreme Court is of the opinion that a statutory provision cannot be interpreted consistently with a human right, the Court may make a declaration to that effect in accordance with this section. (3) If the Supreme Court is considering making a declaration of inconsistent interpretation, it must ensure that notice in the prescribed form of that fact is given to the Attorney-General and the Commission. (5) A declaration of inconsistent interpretation does not— (a) affect in any way the validity, operation or enforcement of the statutory provision in respect of which the declaration was made; or (b) create in any person any legal right or give rise to any civil cause of action. ... (7) The Attorney-General must, as soon as reasonably practicable, give a copy of a declaration of inconsistent interpretation received under subsection (6) to the Minister administering the statutory provision in respect of which the declaration was made, unless the relevant Minister is the Attorney-General.

[6.6] **Declarations in the UK.** In the UK, 10 declarations have been made and changes to the law or practice have been made or announced in relation to 8 of the declarations, see the cases in Appendix 3. For example, mental health legislation was amended following a declaration that the right to liberty had been violated by mental health laws that cast the onus on the involuntary patients to prove he/she was not suffering from a disorder. In the ACT, a declaration has only been sought in one case (*SI bhnf CC v KS bhnf IS* [2005] ACTSC 125). The case concerned a provision of restraining order legislation that appeared to prevent a challenge to an interim order. The declaration was not made after the court construed the statute to allow a challenge to the interim order.

[6.7] In assessing the potential impact in the Commonwealth of Australia of a provision in similar terms to section 36 quoted above it is relevant to consider the following matters:

- The experience in the UK and the ACT. This experience suggests that the impact of a HRA will be measured and appropriately targeted;
- The likely source and number of applications being made having regard to the resources required to make an application .It could be anticipated that many applications will be commenced in the HREOC, which does not require resources beyond the reach of ordinary citizens and ought to result in numbers of applications not being outside the usual level of activity of the HREOC;
- What effect such a provision might have in relation to the High Court of Australia, other Federal Courts or other Courts exercising ‘judicial power’ pursuant to Chapter III of the *Constitution (Cth)*. “Judicial power”, as that term is used in s 71 of the *Constitution (Cth)* is classically understood to be the power “to decide controversies” and the “exercise of the power does not begin until some tribunal which has power to give a binding an

authoritative decision... is called upon to take action': Griffith CJ in *Huddart Parker and Co Pty Ltd v Moorehead* (1909) 8 CLR 330, at 357. Enforceability of decisions is often cited as the key ingredient of a judicial determination: *Brandy v Human Rights and Equal Opportunity Commission* (1995) 183 CLR 245, at 268.

- The issue of whether a complaint of the breach of human rights arising from a HRA will be within the jurisdiction of a court vested with 'judicial power' if, in a particular case, the only 'remedy' which the HRA empowers a court to 'administer' is a 'non-binding declaration of incompatibility'. The Parliament, under s 76 of the *Constitution (Cth)* has power to make laws conferring jurisdiction on the High Court in any "matter" and under s 77 may define the jurisdiction of other federal courts and invest State courts with jurisdiction in relation to those "matters" set out in s 76.
- That a "matter", as that term is used in s 76, comprises the subject of a controversy which is amenable to judicial determination in a proceeding: *Croome v Tasmania* [1997] HCA 5; (1997) 191 CLR 119; (1997) 142 ALR 397; (1997) 71 ALJR 430 (26 February 1997) Brennan CJ, Dawson and Toohey JJ². In *In re Judiciary and Navigation Acts*³, the majority of the Court said:

"In our opinion there can be no matter within the meaning of [s 76] unless there is some immediate right, duty or liability to be established by the determination of the Court. ... But [the Legislature] cannot authorize this Court to make a declaration of the law divorced from any attempt to administer that law."

- That speaking of this passage, the majority in *Mellifont v Attorney-General (Q)*⁴ said it contained "two critical concepts":
"One is the notion of an abstract question of law not involving the right or duty of any body or person; the second is the making of a declaration of law divorced or dissociated from any attempt to administer it."

² *In re Judiciary and Navigation Acts* [1921] HCA 20; (1921) 29 CLR 257 at 265-266; *Fencott v Muller* [1983] HCA 12; (1983) 152 CLR 570 at 591, 603; *Crouch v Commissioner for Railways (Q)* [1985] HCA 69; (1985) 159 CLR 22 at 37.

³ [1921] HCA 20; (1921) 29 CLR 257 at 265-266. See also *Fencott v Muller* [1983] HCA 12; (1983) 152 CLR 570 at 591, 603; *Mellifont v Attorney-General (Q)* [1991] HCA 53; (1991) 173 CLR 289 at 303, 316, 321-322; *Ainsworth v Criminal Justice Commission* [1992] HCA 10; (1992) 175 CLR 564 at 582.

⁴ [1991] HCA 53; (1991) 173 CLR 289 at 303.

- That in *Abebe v The Commonwealth* [1999] HCA 14 at [31] Gleeson CJ and McHugh J said:

A "matter" cannot exist in the abstract. If there is no legal remedy for a "wrong", there can be no "matter". A legally enforceable remedy is as essential to the existence of a "matter" as the right, duty or liability which gives rise to the remedy. Without the right to bring a curial proceeding, there can be no "matter". If a person breaches a legal duty which is unenforceable in a court of justice, there can be no "matter". Such duties are not unknown to the law. For example, in *Australian Broadcasting Corporation v Redmore Pty Ltd*⁵, this Court had to consider the effect on a contract of a statutory provision which prohibited the making of the contract without the approval of a Minister. The prohibition arose in a context where s 8(1) of the relevant Act imposed a duty on the Board of the appellant to ensure that it did not contravene any provision of the Act but s 8(3) provided that "[n]othing in this section shall be taken to impose on the Board a duty that is enforceable by proceedings in a court." Although the point did not arise for decision, it is plain that breach of the prohibition was incapable of giving rise to a "matter".

- In the case of a party aggrieved by a breach of human rights seeking a 'non-binding declaration of incompatibility' it is not a case of an abstract question of law being raised. There will be a right and a duty which can be identified by reference to the HRA. However, it is unlikely that a court would regard a 'non-binding declaration of incompatibility' as providing a remedy. As Gaudron J said in *Truth About Motorways Pty Ltd v Macquarie Infrastructure Investment Management Ltd*:

"Absent the availability of relief related to the wrong which the plaintiff alleges, no immediate right, duty or liability is established by the Court's determination. Similarly, if there is no available remedy, there is no administration of the relevant law."⁶

- The circumstances in which a Court exercising judicial power under the *Constitution (Cth)* may need to contemplate whether to make a 'non-binding declaration of incompatibility' in isolation from any other remedy may be rare. Where the challenge is to a State law because of an inconsistency with a Commonwealth HRA, then the Court will have ample jurisdiction and power to deal with the matter by applying s 109 of the *Constitution (Cth)* and declaring whether the State law is inconsistent with the Commonwealth law and, thus invalid. If the laws in issue are the HRA and an earlier Commonwealth law, then the Court would apply the usual rule of construction in which the implication is that the later law was intended to repeal the earlier law to the extent of any inconsistency. It will only be were a law enacted after a HRA cannot be given an interpretation which is consistent with the HRA that an 'incompatibility' would need to be addressed. If the HRA works effectively in the way contemplated by the UK and Victorian HRA's and the Government Minister who has introduced the legislation into the Parliament has done what is contemplated by the

⁵ [1989] HCA 15; (1989) 166 CLR 454.

⁶ (2000) 200 CLR 591 at 612; referred to by Gaudron and Gummow JJ in *Re McBain; Ex pater Australian Catholic Bishops Conference* 92002) 209 CLR 372 at 406-7.

usual provisions of a HRA, then that incompatibility will have been identified to the Parliament when enacting the law and the Parliament will have indicated its intention to pass the law despite any ‘incompatibility’.

- Given the prospect that a HRA provision authorising a ‘non-binding declaration of incompatibility’ is at serious risk of being found to be an attempt to vest a power in courts which is not a judicial power within the terms of the *Constitution (Cth)*, and that the need for it may be limited, for the reasons referred to above, the better approach may be to not pursue the course in a Commonwealth HRA. Rather it may be preferable to empower the HREOC to conduct inquiries at its own initiative or upon complaint into possible instances of incompatibility of laws with rights under a HRA and to report the same to the Attorney. That is a function which is well within the administrative role of a Commission of inquiry such as the HREOC, i.e., conducting inquiries for the purpose of providing advice to the Executive. That approach has the further consequence, of diminishing the criticism which is made of HRAs which vest that power of making ‘declarations of incompatibility’ in an ‘unelected judiciary’.

Conclusions on a Human Rights Act and the Courts

[6.8] A HRA should provide:

- For a rule of statutory interpretation to the effect that courts must interpret written law ‘in a way that is compatible with human rights’ and ‘so far as it is possible to do so consistently with the purpose’ of the statute being interpreted, but not for a power in the Courts to make a non-binding declaration of incompatibility of a law with a provision of the HRA.
- That the HREOC have the power to inquire into and report to the Parliament through the Attorney-General when a law is found to be incompatible with human rights under the HRA.

7. CIVIL SOCIETY

The role of non-state entities in the protection of Human Rights

- [7.1] The capacity of the state to protect human rights depends upon the co-operation and assistance of a large number of non-state entities.

For a long time, social scientists believed that we lived in a two-sector world. There was the market or the economy on the one hand, and the state or government on the other. Our great theories speak to them, and virtually all our energy was dedicated to exploring the two institutional complexes of market and state. Nothing else seemed to matter much. .Not surprisingly, 'society' was pushed to the sidelines and ultimately became a very abstract notion, relegated to the confines of sociological theorising and social philosophy, not fitting the two-sector world view that has dominated the social sciences for the last fifty years. ...Of course, there were and are many private institutions that serve public purposes-voluntary associations, charities, nonprofits, foundations and non-governmental organisations-that do not fit the state-market dichotomy. Yet, until quite recently, such third-sector institutions were neglected if not ignored outright by all social sciences.²⁶

- [7.2] In WA the 'third-sector' institutions include charities, community organisations, churches, professional organisations, business and employer organisations and trade unions. These organisations have the capacity to influence the enjoyment of human rights in at least two ways.

- First, the state may enlist an organisation to perform a function on behalf of the state. The definition of "public authority" (mentioned above at paragraph [5.1]) may have the result that such organisations are subject to obligations in a HRA.
- Secondly, the expertise of these organisations may be helpful in assessing whether there has been an infringement of human rights and in devising an appropriate response. Experience in Canada and the United States suggests that third parties, given leave to intervene in appellate courts and often on terms that are limited to written submission, have the capacity to make a significant contribution to the development of human rights jurisprudence.

Conclusions on a Human Rights Act and Civil Society

- [7.3] Consideration should be given to mechanisms for the involvement of non-state entities in identifying and preventing infringement of human rights. For example, the work of the Parliamentary Human Rights Committee should facilitate the involvement of professional organisations, business and employer organisations and trade unions. Consideration should also be given allowing such groups to contribute to the development of the law by appearing (with leave as *amicus curiae*) in any case concerning the listed human rights.

8. COMMUNITY CONSULTATION ON A HUMAN RIGHTS ACT

The Process in the UK, ACT and Victoria

- [8.1] **United Kingdom** The process leading to the UK HRA in 1998 included a pre-election Labour Party consultation document (*Bringing Rights Home* (1996)) and a Government White Paper (*Rights Brought Home: The Human Rights Bill* (1997)).
- [8.2] **ACT.** The process leading to the ACT HRA in 2003 included a Labor party pre-election policy announcement in October 2001 and the appointment of the *ACT Bill of Rights Consultative Committee* in April 2002. This Committee, comprised of legal experts and community representatives, was required to consult with the community and report on ‘whether it is appropriate and desirable to enact legislation establishing a bill of rights in the ACT’. The work of the Committee included: the preparation of an issues paper, convening of seminars and meetings, the conduct of a deliberative poll, receiving of 145 written submissions and the preparation of a final report. The ACT HRA was passed in March 2003 and commenced operation on 1 July 2004.
- [8.3] **Victoria.** The process leading to the Bill for *Charter of Human Rights and Responsibilities* has been described by the Victorian Government as follows²⁷:

In April 2005, the Victorian Government initiated a process to consult with the Victorian community about whether change was needed in Victoria to better protect human rights. The Government released a Statement of Intent and set up an independent Committee to talk with all Victorians about whether change is needed, and if so, what that change might be. The Statement of Intent discusses the main issues the Government is taking into account. The community consultation commenced on 1 June 2005 when the Human Rights Consultation Committee (Professor George Williams, Rhonda Galbally AO, The Hon Professor Haddon Storey QC, Andrew Gaze) released its Community Discussion Paper and called for submissions. The Committee employed various innovative strategies to ensure information about the consultation process was distributed as widely as possible, particularly to marginalized and disadvantaged communities. A total of 2524 people and organizations made submissions to inform the Committee of their thoughts on whether human rights could be better protected in Victoria. The Committee also participated in 55 community consultation meetings, information sessions and public forums and 75 consultations with government and other bodies. On 2 May 2006 the Attorney-General announced that the Government had introduced the Charter of Human Rights and Responsibilities Bill into Parliament.

Conclusion on a Human Rights Act and Consultations

- [8.4] Having regard to the experience in the ACT and Victoria, the Government should embark upon a process of extensive community education and consultation before introducing a Human Rights Act into Parliament.

Appendix 1: Objects of the Law Society of Western Australia
The objects of the Law Society of Western Australia are to:
assist members of the *legal profession in the practice of law*
assist the community by advocating for justice

- provide education about the law, and
- assist in the facilitation of access to legal services

Appendix 2: Sample list of human rights: extracts from the Victorian Bill for the *Charter of Human Rights and Responsibilities Act 2006*

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6. Application

(1) Only persons have human rights. All persons have the human rights set out in Part 2.

Note: Corporations do not have human rights.

....

7. Human rights—what they are and when they may be limited

(1) This Part sets out the human rights that Parliament specifically seeks to protect and promote.

(2) A human right may be subject under law only to such reasonable limits as can be demonstrably justified in a free and democratic society based on human dignity, equality and freedom, and taking into account all relevant factors including—

- (a) the nature of the right; and
- (b) the importance of the purpose of the limitation; and
- (c) the nature and extent of the limitation; and
- (d) the relationship between the limitation and its purpose; and
- (e) any less restrictive means reasonably available to achieve the purpose that the limitation seeks to achieve.

(3) Nothing in this Charter gives a person, entity or public authority a right to limit (to a greater extent than is provided for in this Charter) or destroy the human rights of any person.

8. **Recognition and equality before the law** (1) Every person has the right to recognition as a person before the law. (2) Every person has the right to enjoy his or her human rights without discrimination. (3) Every person is equal before the law and is entitled to the equal protection of the law without discrimination and has the right to equal and effective protection against discrimination. (4) Measures taken for the purpose of assisting or advancing persons or groups of persons disadvantaged because of discrimination do not constitute discrimination.

9. **Right to life** Every person has the right to life and has the right not to be arbitrarily deprived of life. [Note. Section 48 provides “Nothing in this Charter affects any law applicable to abortion or child destruction.”]

10. **Protection from torture and cruel, inhuman or degrading treatment** A person must not be— (a) subjected to torture; or (b) treated or punished in a cruel, inhuman

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or degrading way; or (c) subjected to medical or scientific experimentation or treatment without his or her full, free and informed consent.

- 11. Freedom from forced work** (1) A person must not be held in slavery or servitude. (2) A person must not be made to perform forced or compulsory labour. (3) For the purposes of sub-section (2) "forced or compulsory labour" does not include— (a) work or service normally required of a person who is under detention because of a lawful court order or who, under a lawful court order, has been conditionally released from detention or ordered to perform work in the community; or (b) work or service required because of an emergency threatening the Victorian community or a part of the Victorian community; or (c) work or service that forms part of normal civil obligations. (4) In this section "court order" includes an order made by a court of another jurisdiction.
- 12. Freedom of movement** Every person lawfully within Victoria has the right to move freely within Victoria and to enter and leave it and has the freedom to choose where to live.
- 13. Privacy and reputation** A person has the right— (a) not to have his or her privacy, family, home or correspondence unlawfully or arbitrarily interfered with; and (b) not to have his or her reputation unlawfully attacked.
- 14. Freedom of thought, conscience, religion and belief** (1) Every person has the right to freedom of thought, conscience, religion and belief, including— (a) the freedom to have or to adopt a religion or belief of his or her choice; and (b) the freedom to demonstrate his or her religion or belief in worship, observance, practice and teaching, either individually or as part of a community, in public or in private. (2) A person must not be coerced or restrained in a way that limits his or her freedom to have or adopt a religion or belief in worship, observance, practice or teaching.
- 15. Freedom of expression** (1) Every person has the right to hold an opinion without interference. (2) Every person has the right to freedom of expression which includes the freedom to seek, receive and impart information and ideas of all kinds, whether within or outside Victoria and whether— (a) orally; or (b) in writing; or (c) in print; or (d) by way of art; or (e) in another medium chosen by him or her. (3) Special duties and responsibilities are attached to the right of freedom of expression and the right may be subject to lawful restrictions reasonably necessary— (a) to respect the rights and reputation of other persons; or (b) for the protection of national security, public order, public health or public morality.
- 16. Peaceful assembly and freedom of association** (1) Every person has the right of peaceful assembly. (2) Every person has the right to freedom of association with others, including the right to form and join trade unions.
- 17. Protection of families and children** (1) Families are the fundamental group unit of society and are entitled to be protected by society and the State. (2) Every child has the right, without discrimination, to such protection as is in his or her best interests and is needed by him or her by reason of being a child.
- 18. Taking part in public life** (1) Every person in Victoria has the right, and is to have the opportunity, without discrimination, to participate in the conduct of public affairs, directly or through freely chosen representatives. (2) Every eligible person has the right, and is to have the opportunity, without discrimination— (a) to vote and be elected at periodic State and municipal elections that guarantee the free expression of the will of the electors; and (b) to have access, on general terms of equality, to the Victorian public service and public office.

Appendix 1: Objects of the Law Society of Western Australia
The objects of the Law Society of Western Australia are to:
assist members of the *legal profession in the practice of law*
assist the community by advocating for justice

- provide education about the law, and
- assist in the facilitation of access to legal services

Appendix 2: Sample list of human rights: extracts from the Victorian Bill for the *Charter of Human Rights and Responsibilities Act 2006*

- 19. Cultural rights** (1) All persons with a particular cultural, religious, racial or linguistic background must not be denied the right, in community with other persons of that background, to enjoy his or her culture, to declare and practise his or her religion and to use his or her language. (2) Aboriginal persons hold distinct cultural rights and must not be denied the right, with other members of their community— (a) to enjoy their identity and culture; and (b) to maintain and use their language; and (c) to maintain their kinship ties; and (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.
- 20. Property rights** A person must not be deprived of his or her property other than in accordance with law.
- 21. Right to liberty and security of person** (1) Every person has the right to liberty and security. (2) A person must not be subjected to arbitrary arrest or detention. (3) A person must not be deprived of his or her liberty except on grounds, and in accordance with procedures, established by law. (4) A person who is arrested or detained must be informed at the time of arrest or detention of the reason for the arrest or detention and must be promptly informed about any proceedings to be brought against him or her. (5) A person who is arrested or detained on a criminal charge— (a) must be promptly brought before a court; and (b) has the right to be brought to trial without unreasonable delay; and (c) must be released if paragraph (a) or (b) is not complied with. (6) A person awaiting trial must not be automatically detained in custody, but his or her release may be subject to guarantees to appear— (a) for trial; and (b) at any other stage of the judicial proceeding; and (c) if appropriate, for execution of judgment. (7) Any person deprived of liberty by arrest or detention is entitled to apply to a court for a declaration or order regarding the lawfulness of his or her detention, and the court must— (a) make a decision without delay; and (b) order the release of the person if it finds that the detention is unlawful. (8) A person must not be imprisoned only because of his or her inability to perform a contractual obligation.
- 22. Humane treatment when deprived of liberty** (1) All persons deprived of liberty must be treated with humanity and with respect for the inherent dignity of the human person. (2) An accused person who is detained or a person detained without charge must be segregated from persons who have been convicted of offences, except where reasonably necessary. (3) An accused person who is detained or a person detained without charge must be treated in a way that is appropriate for a person who has not been convicted.
- 23. Children in the criminal process** (1) An accused child who is detained or a child detained without charge must be segregated from all detained adults. (2) An accused child must be brought to trial as quickly as possible. (3) A child who has been convicted of an offence must be treated in a way that is appropriate for his or her age.
- 24. Fair hearing** (1) A person charged with a criminal offence or a party to a civil proceeding has the right to have the charge or proceeding decided by a competent, independent and impartial court or tribunal after a fair and public hearing. (2) Despite sub-section (1), a court or tribunal may exclude members of media organizations or other persons or the general public from all or part of a hearing if permitted to do so by a law other than this Charter. Note: For example, section 19 of the Supreme Court Act 1986 sets out the circumstances in which the Supreme Court may close all or part of a proceeding to the public. See also section 80AA of the County Court Act 1958 and section 126 of the Magistrates' Court Act 1989. (3) All judgments or decisions made by a court or tribunal in a criminal or civil proceeding must be made public

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unless the best interests of a child otherwise requires or a law other than this Charter otherwise permits.

- 25. Rights in criminal proceedings** (1) A person charged with a criminal offence has the right to be presumed innocent until proved guilty according to law. (2) A person charged with a criminal offence is entitled without discrimination to the following minimum guarantees— (a) to be informed promptly and in detail of the nature and reason for the charge in a language or, if necessary, a type of communication that he or she speaks or understands; and (b) to have adequate time and facilities to prepare his or her defence and to communicate with a lawyer or advisor chosen by him or her; and (c) to be tried without unreasonable delay; and (d) to be tried in person, and to defend himself or herself personally or through legal assistance chosen by him or her or, if eligible, through legal aid provided by Victoria Legal Aid under the Legal Aid Act 1978; and (e) to be told, if he or she does not have legal assistance, about the right, if eligible, to legal aid under the Legal Aid Act 1978; and (f) to have legal aid provided if the interests of justice require it, without any costs payable by him or her if he or she meets the eligibility criteria set out in the Legal Aid Act 1978; and (g) to examine, or have examined, witnesses against him or her, unless otherwise provided for by law; and (h) to obtain the attendance and examination of witnesses on his or her behalf under the same conditions as witnesses for the prosecution; and (i) to have the free assistance of an interpreter if he or she cannot understand or speak English; and (j) to have the free assistance of assistants and specialized communication tools and technology if he or she has communication or speech difficulties that require such assistance; and (k) not to be compelled to testify against himself or herself or to confess guilt. (3) A child charged with a criminal offence has the right to a procedure that takes account of his or her age and the desirability of promoting the child's rehabilitation. (4) Any person convicted of a criminal offence has the right to have the conviction and any sentence imposed in respect of it reviewed by a higher court in accordance with law.
- 26. Right not to be tried or punished more than once** A person must not be tried or punished more than once for an offence in respect of which he or she has already been finally convicted or acquitted in accordance with law.
- 27. Retrospective criminal laws** (1) A person must not be found guilty of a criminal offence because of conduct that was not a criminal offence when it was engaged in. (2) A penalty must not be imposed on any person for a criminal offence that is greater than the penalty that applied to the offence when it was committed. (3) If a penalty for an offence is reduced after a person committed the offence but before the person is sentenced for that offence, that person is eligible for the reduced penalty. (4) Nothing in this section affects the trial or punishment of any person for any act or omission which was a criminal offence under international law at the time it was done or omitted to be done.

Appendix 3: Cases Under the UK Human Rights Act 1998[Appendix to the opinion of Lord Steyn in *Ghaidan v. Godin-Mendoza* [2004] UKHL 30]**A. Declarations of Incompatibility Made Under Section 4 of the Human Rights Act 1998**

	Case	Relevant ECHR provision	Provision declared incompatible
1	R (H) v London North and East Region Mental Health Review Tribunal (Secretary of State for Health intervening) http://www.bailii.org/ew/cases/EWCA/Civ/2001/415.html [2002] QB 1	Articles 5(1) and 5(4)	Mental Health Act 1983 s. 73
2	International Transport Roth GmbH v Secretary of State for the Home Department http://www.bailii.org/ew/cases/EWCA/Civ/2002/158.html [2003] QB 728	Article 6 and Protocol 1 article 1	Penalty Scheme contained in Part II of the Immigration and Asylum Act 1999
3	R v McR (2002) NIQB 58 unreported except on the Northern Ireland Court Service website.	Article 8	Offences Against the Person Act 1861 s. 62
4	R (Wilkinson) v Commissioners of Inland Revenue http://www.bailii.org/ew/cases/EWHC/Admin/2002/182.html [2002] STC 347, upheld by the Court of Appeal http://www.bailii.org/ew/cases/EWCA/Civ/2003/814.html [2003] 1 WLR 2683	Article 14 when read in conjunction with Protocol 1 article 1	Income and Corporation Taxes Act 1988 s. 262
5	R (Anderson) v Secretary of State for the Home Department http://www.bailii.org/uk/cases/UKHL/2002/46.html [2003] 1 AC 837	Article 6(1)	Crime (Sentences) Act 1997 s.29
6	R (D) v Secretary of State for the Home Department [2003] 1 WLR 1315	Article 5(4)	Mental Health Act 1983 s. 74
7	Blood and Tarbuck v Secretary of State for Health Declaration by consent	Article 8 and/or article 8 when read with article 14	Human Fertilization and Embryology Act 1990 s. 28(6)(b)
8	Bellinger v Bellinger http://www.bailii.org/uk/cases/UKHL/2003/21.html [2003] 2 AC 467	Article 8 and article 12	Matrimonial Causes Act 1973 s. 11(c)
9	R (on the application of FM) v Secretary of State for Health [2003] ACD 389	Article 8	Mental Health Act 1983 ss. 26(1) and 29
10	R (Uttley) v Secretary of State for the Home Department [2003] 1 WLR 2590	Article 7	Criminal Justice Act 1991 ss. 33(2), 37(4)(a) and s. 39

B. Declarations of Incompatibility Overturned on Appeal

	Case	ECHR provision	Provision declared incompatible	Overturned: Court, Date and Reason
1	R (Alconbury Developments Ltd) v Secretary of State for the Environment, Transport and the Regions http://www.bailii.org/uk/cases/UKHL/2001/23.html [2003] 2 AC 295	Article 6(1)	Ss. 77, 78, 79 and paragraphs 3 and 4 of Schedule 6 of the Town and Country Planning Act 1990; ss. 1, 3 and 23(4) of the Transport and Works Act 1992; ss. 14(3)(a), 16(5)(a), 18(3)(a), 125 and paragraphs 1, 7 and 8 of Part 1 of Schedule 1 to the Highways Act 1980; s. 2 (3) and paragraph 4 of Schedule 1 to the Acquisition of Land Act 1981.	House of Lords 9 May 2001 No incompatibility with Article 6(1)
2	Wilson v First County Trust (No 2) http://www.bailii.org/uk/cases/UKHL/2003/40.html [2004] 1 AC 816	Article 6(1) and article 1 Protocol 1	Consumer Credit Act 1974 s. 127(3)	House of Lords 10 July 2003 S.3(1) and s. 4 did not apply to causes of action accruing before the HRA 1998 came into force.
3	Matthews v Ministry of Defence http://www.bailii.org/uk/cases/UKHL/2003/4.html [2003] 1 AC 1163	Article 6(1)	Crown Proceedings Act 1947 s. 10	Court of Appeal 29 May 2002 ([2002] 1 WLR 2621) and upheld on appeal by the House of Lords 13 February 2003. The claimant had no civil right to which article 6 might apply.
4	R (Hooper) v Secretary of State for Work and Pensions [2003] 1WLR 2623	Article 14 read together with article 8	Social Security Contributions and Benefit Act 1992 ss. 36 and 37	The Court of Appeal 18 June 2003 Leave to appeal to the House of Lords granted
5	A v Secretary of State for the Home Department http://www.bailii.org/ew/cases/EWCA/Civ/2002/1502.html [2004] QB 335	Article 5(1)	Anti-Terrorism, Crime and Security Act 2001 s. 23	The Court of Appeal 25 October 2002 No incompatibility with the Convention.

C. Interpretations Under S. 3(1)

	Case	ECHR provision	Provision in issue	Interpretation adopted
1	R v Offen [2001] 1 WLR 253, CA	Articles 3, 5, 7	Crime (Sentences) Act 1997 (c43), s. 2	The imposition of an automatic life sentence as required by s. 2 could be disproportionate if the defendant poses no risk to the public, thereby breaching articles 3 and 5. The phrase "exceptional circumstances" was to be given a less restrictive interpretation.
2	R v A (No 2) http://www.bailii.org/uk/cases/UKHL/2001/25.html [2002] 1 AC 45	Article 6	Youth Justice and Criminal Evidence Act 1999 s. 41	Prior sexual contact between the complainant and the defendant could be relevant to the issue of consent. The blanket exclusion of this evidence in s. 41 was disproportionate. By applying s. 3, the test of admissibility was whether the evidential material was so relevant to the issue of consent that to exclude it would endanger the fairness of the trial under article 6.
3	Cachia v Faluyi http://www.bailii.org/ew/cases/EWCA/Civ/2001/998.html [2001] 1 WLR 1966, CA	Article 6(1)	Fatal Accidents Act 1976 s. 2(3)	The restriction that "not more than one action shall lie for and in respect of the same subject matter of complaint" served no legitimate purpose and was a procedural quirk. "Action" was therefore interpreted as "served process" to enable claimants, whose writs had been issued but not served, to issue a new claim.
4	R v Lambert [2002] QB 1112	Article 6	Misuse of Drugs Act 1971 s. 28	The legal burden of proof placed on the defendant pursuant to the ordinary meaning of the phrase "if he proves" in the s. 28 defences was incompatible with article 6. Accordingly it is to be read as though it says "to give sufficient evidence".
5	Goode v Martin http://www.bailii.org/ew/cases/EWCA/Civ/2001/1899.html [2002] 1 WLR 1828, CA	Article 6	Civil Procedure Rule 17.4(2)	To comply with article 6(1), the rule should be read as though it contains the words in italics: "The court may allow an amendment whose effect will be to add ... a new claim, but only if the new claim arises out of the same facts or substantially the same facts as are already in issue on a claim in respect of which the party applying for permission has already claimed a remedy in the proceedings."
6	R v Carass [2002] 1 WLR	Article 6(2)	Insolvency Act 1986 s. 206	There is no justification for imposing a legal rather than evidential burden of proof on a defendant accused of concealing

Appendix 3 Cases under the UK Human Rights Act 1998

	Case	ECHR provision	Provision in issue	Interpretation adopted
	1714, CA			debts in anticipation of winding up a company, who raises a defence under s. 206(4). Accordingly "prove" is to be read as "adduce sufficient evidence".
7	R (Van Hoogstraten) v Governor of Belmarsh Prison [2003] 1 WLR 263	Article 6	Prison Rules 1999 s. 2(1)	Reading the rule compatibly with s. 3 HRA, a prisoner's legal adviser, defined in s. 2(1) as "his counsel or solicitor, and includes a clerk acting on behalf of his solicitor ..." must embrace any lawyer who (a) is chosen by the prisoner, and (b) is entitled to represent the prisoner in criminal proceedings to which the prisoner is a defendant and therefore includes an Italian "avvocato" who falls within the definition of "EEC lawyer" in the European Communities (Services of Lawyers) Order 1978 (SI 1978/1910).
8	Sheldrake v Director of Public Prosecutions [2003] 2 WLR 1629, DC	Article 6(2)	Road Traffic Act 1988, ss. 5(1)(b) and 5(2)	The s. 5(2) defence to the offence of driving while under the influence of alcohol over the prescribed limit, which requires the defendant to meet the legal burden of proving that there was no likelihood of his driving the vehicle while over the limit, is to be read down as imposing only an evidential burden on the defendant.
9	R (Sim) v Parole Board http://www.bailii.org/ew/cases/EWHC/Admin/2003/152.html [2003] 2 WLR 1374	Article 5	Criminal Justice Act 1991 s. 44A(4)	In order to be compatible with Article 5, s. 44A(4) should be read as requiring the Parole Board to direct a recalled prisoner's release unless it is positively satisfied that the interests of the public require that his confinement should continue.
10	R (Middleton) v Her Majesty's Coroner for the Western District of Somerset http://www.bailii.org/uk/cases/UKHL/2	Article 2	Coroners Act 1988 s. 11(5)(b)(ii); Coroners Rules 1944, r. 36(1)(b)	"How" in the phrase "how, when and where the deceased came by his death" is to be read in a broad sense, to mean "by what means and in what circumstances" rather than simply "by what means".

Appendix 3 Cases under the UK Human Rights Act 1998

	Case	ECHR provision	Provision in issue	Interpretation adopted
	004/10.ht ml[2004] 2 WLR 800			

Appendix 4: Is change needed in Victoria to better protect human rights?

(Rights, Respect and Responsibilities: the Report of the Human Rights Committee (2005) pp 4-19)

1.2.3 Arguments for a Charter

The vast majority of submissions to the Committee said that change is needed to better protect and promote human rights in Victoria. The main reasons given were:

- The current protection of human rights is inadequate.
- Additional protection is needed for disadvantaged and marginalized people.
- A Charter would deliver practical benefits by setting minimum standards for government.
- A Charter would modernize our democracy and give effect to Australia's human rights obligations.
- A Charter would educate people about their rights and responsibilities.

We discuss these arguments below.

The current protection of human rights is inadequate

A large number of submissions stated that rights are not adequately protected in Victoria. Some people pointed to gaps in the existing legal protection of human rights.¹ Benjamin Skepper, for example, said: 'A Charter is highly overdue. We have extremely limited Constitutional protection of rights in Australia.'² Jonathan Wilkinson gave a few specific rights as examples: 'I believe the protection of every citizen's rights to privacy, marry and form a family, to due process of law and to humane treatment in detention or prison are currently not given enough protection.'³ The Law Institute of Victoria said that the current laws are not always being applied or respected.⁴

The Australian Lawyers Alliance expressed the views of many when they said:

The fabric of human rights in Australia resembles more of a patchwork quilt, frayed at the edges, than a secure and comprehensive regime of rights and freedoms.
(Submission 1017)

Human rights are currently protected in Australia by the Australian and Victorian Constitutions, legislation, the common law and international law. For example, the Australian Constitution protects some rights, although generally only against Federal and not State laws. An example of this is section 116 of the Constitution, which contains the right of freedom of religion. The High Court has also implied certain rights from the Constitution.⁵

Federal legislation also protects some human rights, for example anti-discrimination legislation and laws protecting privacy.⁶ In addition, the federal Human Rights and Equal Opportunity Commission oversees the protection of the rights in these Acts and has investigatory and reporting powers.

In Victoria, the *Equal Opportunity Act* 1995 prohibits discrimination and sexual harassment. Human rights provisions are also contained in other Victorian legislation, including the *Electoral Act* 2002, the *Racial and Religious Tolerance Act* 2001, the

Information Privacy Act 2000, the Freedom of Information Act 1982, the Evidence Act 1958 and the Crimes Act 1958.

Human rights are also protected through the common law, which is made by judges in the cases that come before them in court. Examples include the *Mabo* case (which recognized Aboriginal native title) and the *Dietrich* case (which recognized that a trial may be stopped or 'stayed' if a person accused of a serious crime cannot afford a lawyer and the government has refused legal representation). There is also limited protection of rights through international channels.⁷

The Committee agrees that there are gaps in the current protection of rights. Professor Marcia Neave and Professor Spencer Zifcak gave the following examples:

Many other human rights recognized by international law are not protected by Victorian law. There is, for example, no provision which prevents legislation being enacted to create criminal offences retrospectively, no legislative prohibition on the use of torture or cruel, inhuman or degrading treatment and no legislation protecting freedom of speech. Indeed freedom of speech is what is left over after the censorship laws, defamation, contempt of court, contempt of Parliament, sedition, criminal blasphemy, radio and television programme standards and other minor limitations have been taken into account. (Submission 840)

Professors Neave and Zifcak also identified gaps in Victorian privacy and equal opportunity legislation. For example, they stated that privacy law relates mainly to 'information privacy in the public sector and with health information and [does] not protect people from other types of privacy invasion'.⁸ Submissions that focused on deficiencies in the Equal Opportunity Act pointed to exceptions to the Act and to its failure to prohibit discrimination against people because they are homeless or poor.⁹ The Committee also notes the recent report of the Victorian Scrutiny of Acts and Regulations Committee (SARC) entitled 'Discrimination in the Law',¹⁰ which highlighted provisions in Victorian laws that discriminate or may lead to discrimination. Some submissions made the additional point that, because human rights protection in Victoria is not comprehensive, deficiencies in the protection of rights are identified and addressed in a 'reactive and arbitrary' manner,¹¹ and obtaining a remedy is unnecessarily complex and difficult. The Committee considers that human rights protection in Victoria is far from comprehensive and that those rights that are protected are scattered and often hard to find. We agree with the large number of people making submissions who pointed out that a Charter would benefit all Victorians by writing down in one place the basic rights we all hold and expect government to observe.

Additional protection is needed for disadvantaged and marginalized people

The Committee heard powerful stories about the impact that a lack of respect for human rights has in the lives of many Victorians, particularly those who are disadvantaged. These problems often related to civil and political rights, indicating that disadvantaged people have much to gain from a Charter that protects these rights. For example, people with physical disabilities reported difficulties with access and participation, including barriers to exercising their right to vote.¹² At a forum we attended on this issue, several peak disability bodies including ACROD (The National Industry Association for Disability Services), the Disability Advisory Council of Victoria, The Australian Federation of Disability Organizations, the Victorian Women with Disabilities Network and Villamanta

Legal Service said that the impediments to voting for people with disabilities include physical access to polling booths, difficulties becoming registered to vote and staying registered, the inaccessibility of the voting ballot and privacy issues.¹³

People with intellectual disabilities reported that they are not always treated fairly and with dignity and respect when they have contact with the criminal justice system.¹⁵ A person with an intellectual disability taking part in a consultation told the story of a person with cerebral palsy being detained by the police while walking along the street because the police believed that he was intoxicated. One participant stated: 'We get sick and tired of our rights not being met. We've been fighting for our rights for decades.'¹⁶ Older people and people with disabilities in the residential care system were identified as being cut off from the civil and political rights that most of us take for granted, such as freedom of movement.¹⁷ Young people also talked a lot about their desire to be heard and to participate in decisions affecting them.¹⁸

Systemic discrimination was reported in submissions and consultation meetings with members of culturally and linguistically diverse communities. For example, Muslim communities reported racial discrimination and vilification.¹⁹ Participants in an Eritrean community forum expressed fears that the anti-terror laws would unduly impact on the community.²⁰ People were frustrated that current anti-discrimination law deals with individual complaints and has not effectively tackled ingrained and institutional racism. Indigenous Australians reported deep-seated racism, discrimination in the provision of essential services, as well as a lack of respect for land rights and cultural identity. Racism was reported in each of the eight Indigenous consultations held throughout the State.

Members of gay, lesbian, bisexual, transgender and intersex communities also reported discrimination and vilification. We received a significant number of submissions from members of these communities, all in favour of comprehensive rights protection through a Charter.

Homeless people stated that their human rights were being violated in a number of ways. In focus groups conducted by the Public Interest Law Clearing House Homeless Persons' Legal Clinic, 80 per cent of participants thought that the current protection of human rights in Victoria is inadequate. In addition, 94 per cent thought that the law needed to be changed to better protect human rights.²¹

A number of people also made the point that, without an instrument to safeguard human rights, the rights of minorities might be neglected in an electoral process that focuses on the majority.²² As Bianca Jayawardena argued: *There are certain individuals who are in need of greater protection in certain situations. Minorities, in particular will benefit from such legislation. As a democracy, their rights often go unheard and unprotected, but as a liberal society the government should not ignore their need for protection.* (Submission 363) The Committee accepts the evidence from many marginalized people that their rights are not always respected. It also supports the view put by many Victorians, from all walks of life, that a Charter could provide valuable additional protection for the most disadvantaged in the community.

A Charter would deliver practical benefits by setting minimum standards for government

Many members of the community told the Committee that the Charter would be a powerful tool in assessing whether human rights protection in Victoria reaches minimum standards.²³ Some submissions made the point that without such a law there is no guarantee that the rights that we currently enjoy will not be taken away in the future,²⁴ such as hard-won equality rights for women and people with disabilities. Many people stressed that a new law would enhance government decision-making and would build public confidence in government. For example, Chris White said that a Charter ‘would ensure that all legislation passed by Victorian Parliament must accord with basic standards of human rights, including the right to freedom from discrimination’.²⁵ A participant at a Jewish community consultation said that a new human rights law would be like a virus checker, so that when the government infringes rights the window pops up and then the society and the government have to consider whether the infringement can be justified.²⁶ The Victorian Bar made these comments: *Experience in comparable jurisdictions shows that a Charter of Human Rights which adopts an integrated approach to the processes of policy-making, legislation and court enforcement can significantly enhance the quality of decision-making within the executive government and by the legislature.* (Submission 139) The Committee agrees that a human rights Charter could be extremely valuable in promoting better government. It would provide a democratic insurance policy for every Victorian by requiring that government laws, policies, decisions and actions take into account fundamental human rights. It would also ensure that, where the government wants to restrict human rights, there is proper debate about whether any proposed measures strike the right balance between the rights of Victorians and the objective that the government is seeking to achieve. The Committee was mindful of the following comments by the Equal Opportunity Commission Victoria, which describe some of the pitfalls of policy development in the current absence of a human rights framework: *In the absence of a clearly defined human rights benchmark, identifying, analyzing and making decisions on the human rights implications of public policy development and implementation occurs on an ad hoc basis in which:• human rights requirements are neither clear nor fully understood; and• there is an absence of comprehensive assistance for public servants and politicians to consider and comply with their human rights obligations. This not only detracts from the efficiency of the public policy process itself, but also gives rise to a risk of developing policies that have unforeseen human rights implications which then need to be rectified after implementation when they have become a problem rather than addressed in the planning and development phase.* (Submission 816)

Responding to Terrorism

One example of where a human rights Charter might contribute to better decision-making by government is in the area of terrorism. The enactment of expansive new counter-terrorism laws has generated community and media debate about the balance between counter-terrorism measures and fundamental freedoms. In submissions, a number of people expressed concern that our current rights were being eroded as a consequence of the ‘war on terror.’³¹ As the Australian Arabic Council noted: ‘The threat of being detained without trial is a throwback to the legal systems many communities left and moved to Australia to avoid.’ (Submission 1108) The Committee considers that a new law on human rights could improve the debate about new terrorism laws in the following ways:• It could institutionalize the checks and balances that Parliament should

apply in its consideration of any further anti-terrorism laws. Giving these safeguards explicit recognition in a human rights instrument would demonstrate to the community that security measures are not about security for security's sake, but are about the achievement of higher community goals.

- It could introduce a sense of proportionality to the debate and provide States with clear parameters within which to co-operate with the Commonwealth on security issues.
- It might also provide comfort to particular communities that they are not being singled out on racial or religious grounds. For communities to feel confident about isolating extremists and speaking out against terrorism, they must feel a part of the broader community and feel safe within that community. A human rights instrument that provides an explicit statement of freedoms and responsibilities could be an important element of this confidence building process.

A Charter Would Modernize Our Democracy and Give Effect to Our International Human Rights Obligations

A number of submissions mentioned that a new law would give domestic effect to Australia's international obligations and could serve to connect Victoria with developments in international human rights law that now affect so many other nations.³² Without it, many fear that Victoria, and Australia more generally, may become increasingly isolated from human rights discussions in the international community. As The Charter Group noted: *Our system of democracy, and our country as a whole, may begin to lose credibility, both domestically and internationally, if we continue to bypass the consideration of human rights which is becoming an increasingly significant factor in the democratic system of other nations.* (Submission 842) Dr Elissa Sutherland argued that the introduction of a human rights law might also boost Melbourne's international standing more generally: *[T]he Charter would offer Melbourne an opportunity to boost its international and national profile. Melbourne through an adoption of our own Charter of rights will come to be seen as a place of progressive ideals and will attract a wide variety of people to live, work, and do business with those in this city.* (Submission 10)

A Charter Would Educate People About Their Rights and Responsibilities

The Committee received many submissions about how a Charter could encourage a human rights culture in Victoria and fulfill an important educative role, both in the community and across government. As Dr Aron Paul Igai said: *Such a Charter will provide a focus of pride for Victorians and a useful tool in educating young people about human rights and fostering a human rights culture in Australia based around equality and human dignity ... It provides a conceptual framework within which cultural differences can be negotiated without recourse to notions of cultural superiority or inferiority. It recognizes the reality of a pluralist society in which groups and individuals must respect each other.* (Submission 344) Overseas experience indicates the transformative potential of a Charter when it is backed up by education and community participation. For example in Canada, the Centre for Research and Information released a survey that showed 88 per cent community support for that country's Charter (saying that the Charter is a 'good thing for Canada'). The Centre said its polling revealed that 'the charter has become a living symbol of national identity because it defines the very ideal of Canada: a pluralist, inclusive and tolerant country.'³³ This shows how a Charter

has the potential to be a powerful symbolic and educative tool for future generations, as well as for people such as new migrants to Victoria.

1.2.4 Arguments against a Charter

13 per cent of formal submissions to the Committee said that change is not needed to better protect and promote human rights in Victoria. (A further 3 per cent expressed no clear opinion on this question.) People opposed to a Charter raised the following arguments:• Our human rights are adequately protected – ‘If it ain’t broke don’t fix it’• A Charter would make no practical difference.• A Charter would give too much power to judges.• Human rights are not a matter for Parliament.• A Charter might actually restrict rights.

• A Charter would create a selfish society.• A law is not the best way to protect and promote rights.• A Federal Charter rather than a State Charter is needed. The following paragraphs discuss these arguments.

Our Human Rights Are Adequately Protected – ‘If It Ain’t Broke Don’t Fix It’

Of those who argued against change, one of the most common reasons given was that human rights are already well protected through our democratic system of government in Victoria and that no change is needed. This is the other side of the argument raised by those who support change on the basis that the current protection of human rights is not adequate. As Andrew Munden argued: *Firstly, I ask why is there a desire to have a Charter of Human Rights? I believe that the customs, constitution and laws of the government already cover all of the major human rights issues ... I believe that the Australian system of democracy and government already exhibits very strong capabilities to protect the human rights of all citizens. In other words, if it isn’t broken, why bother to try and fix it?* (Submission 295)

The Committee agrees that we live in a robust democracy with a relatively sound record on human rights. However, as pointed out earlier, the Committee has received many submissions attesting to shortcomings in the current protection of human rights and revealing that human rights are not enjoyed by all Victorians. The Committee acknowledges that these breaches are not always in the public consciousness because they are often experienced by members of disadvantaged groups who are unable to stand up for their rights. As one participant in a consultation conducted by the Victorian Council of Social Service stated: ‘People like us aren’t going to complain about it.’³⁴ It is precisely for this reason that the most vulnerable and most disadvantaged Victorians need appropriate protection.

A Charter Would Make No Practical Difference

Some people making submissions said that a Charter would make little difference. As Bill Muehlenberg of the Australian Family Association argued: *A Bill of Rights has not prevented human rights abuses in nations that have adopted them. Some of the most oppressive societies on earth, including the former Soviet Union, have had elaborate and exquisite BoRs ... a BoR is no panacea, and can certainly offer no guarantees of a genuine promotion of rights.* (Submission 506)Others such as the Australian Lawyers’ Alliance disagreed and said a Charter would provide important checks and balances to government action.

Historically, those who oppose have argued that a Bill of Rights would achieve no useful purpose in a free society... [This] ignores the fact that a primary purpose of a Bill of Rights is to provide a safety net whereby those who wield power within a democratic society are subjected to a code of conduct in accordance with the rule of law which operates to prevent them exercising power in such a way as would infringe the basic rights of that society's citizens. Thus, a Bill of Rights is a powerful tool not only in keeping a society tolerant and democratic, but as an essential adjunct to the institutions of Parliamentary democracy and the common law. (Submission 1017).

The Committee recognizes that for the Charter to make a difference it needs to add something to our existing system. It must be focused on the basic standards that government can and should meet and provide a means by which ordinary Victorians can hold the government accountable. We are persuaded by the experience in other countries, and the weight of submissions arguing that a Charter can contribute to better government. For this potential to be realized, the Charter needs to set out how human rights standards are built into government processes for developing policy and legislation. More detail about this is provided in Chapter 4.

A Charter Would Give Too Much Power To Judges

Some people making submissions to the Committee considered that enacting a Charter would take away power from the Parliament and give unelected judges too much power.³⁵ As Michael McCrohan argued: *I believe our rights are best protected through existing common law and the democratic process of Parliament. I am not in favour of turning our courts into undemocratic interpreters of human rights taking the issues out of the debate and control of the Australian people through the ballot box and duly elected representatives. (Submission 419)*

Douglas and Dulcie Anderson also said: *Our main concern is that a bill of rights would take from the Parliament the decisions concerning major policies and legislative issues and give them to the unelected judges in the courts. We do not agree that unaccountable judges should have this power which is vested in the members of parliament who are elected by the constituents. (Submission 374.)*

Rather than handing over power to judges, as does the United States Bill of Rights, modern human rights laws like that now operating in the United Kingdom do not give judges the power to strike down laws made by Parliament. Instead, judges can be directed to open up debate about how law and policy is made, casting a powerful lens over the day-to-day work of Government. As we set out in later Chapters, the Committee is recommending a model that gives the final say to the Parliament and not the courts. This is very different to places like the United States.

Human Rights Are Not a Matter For Parliament

A number of submissions said that human rights are given by God and should not be re-invented and limited by man. The Australian Christian Lobby expressed this view: *The ACL is of the view that inalienable and immutable human rights are ordained by God; they are not given by the decree of collective humanity or a parliament, but are to be found in natural law and the scriptures, heritage and tradition of the Judaeo-Christian faith and the Bible ...Human Rights as proposed by parliamentary decree will not be*

inalienable and immutable, but may be given to some individuals and groups and taken away from other individuals and groups by the Parliament. When the community agrees to Government establishing a Charter of Human Rights it agrees that it is the Government which gives rights, not God, and that Governments can therefore take them away. This is the first, greatest and gravest overriding error ... A 'Charter of Human Rights' as proposed may in fact only be a reflection of the prevailing culture, and not a true indication of real human rights (as bestowed by God). (Submission 1153)

The Committee acknowledges that people may have different views about the ultimate source of our human rights. Nevertheless, the law-making capacity of the Parliament is an important part of our democracy and Parliaments around the world have made laws about human rights.

A Charter Might Actually Restrict Rights

Another argument put in submissions was that a new law may actually restrict rights. Some said that by defining rights we limit them³⁹ and that it is preferable to start from the proposition that people have all human rights except those expressly limited or withdrawn by the government through law.⁴⁰ The Committee wants to emphasize that the Charter is not intended to restrict or limit any rights already provided for in the law. We have proposed a section for inclusion in the draft Bill attached to this report that prevents the limitation of any existing rights.

A Charter Would Create a Selfish Society

Others, such as the Australian Family Association, were concerned that a new law would create a selfish 'rights' culture: *The enactment of a BoR will further add to the 'rights culture' that is so characteristic of modern Western societies, along with a further erosion of responsibility. Everyone is demanding rights these days, but few are advocating duties and responsibilities, without which rights talk becomes empty blather.* (Submission 506) The Committee does not accept this argument. There is no evidence from similar jurisdictions that requiring governments to observe human rights automatically makes people selfish. The Charter we are recommending specifically mentions the importance of responsibilities and is aimed at promoting respect for others.

A Law Is Not the Best Way to Protect and Promote Rights

Some people were concerned that the Charter might have the opposite effect to that intended: *I believe that Human Rights are central to a society. However, the law is not accessible to a great number of people. By putting Human Rights into the legal system, it can have the reverse effect to what is intended ... Obviously, simply creating a Charter of Human Rights will not protect human rights. It is deeper than this. My fear is that human rights may lose its force by becoming a legal document. I believe in human rights but want it to be more fluid and something which will be the beginning of a process towards justice, rather than within the justice system itself and thus up for interpretation and legalistic debate.* Submission 126: Name withheld by request

Others expressed the need for reforms not involving a Charter of Human Rights, such as changes to policy and broader government and community initiatives to promote rights.⁴¹ For example, some submissions expressed a preference for amending existing anti-discrimination laws, rather than creating a new rights regime.⁴² The Committee

considered that a Charter is only one piece of the human rights puzzle and political commitment to observing rights in law-making, policy formulation and practice is vital for the legislation to have real effect. These issues are discussed in more depth in later Chapters of this report.

A Federal Charter Rather than a State Charter is Needed

Some submissions considered that change is needed at the Federal and not at the State level. As Tim Armytage stated: *To attempt to frame a Charter of Human Rights for an individual State within the Commonwealth will lead to confusion and is a waste of time, money and effort, when the Federal Government could facilitate a uniform Charter for the whole nation.* (Submission 451) Other people thought a State Charter would be an important step in rights protection and might eventually lead to a Commonwealth Bill of Rights. In Canada, for example, legislation at the provincial level was a initial step towards the Canadian Charter of Rights and Freedoms 1982. Victoria Legal Aid explained: *As there is no current move towards a federal charter, we support the introduction of a state charter as a first step. There are some good reasons to enact a state charter first. It will provide protection in areas that have practical impact on many people (e.g. education, hospitals and police), and give the community an opportunity to test the impact and operation of a charter.* (Submission 470)

The Committee was not asked to consider the question of a Commonwealth Bill of Rights. However, we see no inconsistency. State and Federal laws on many matters, such as on anti-discrimination, already co-exist (as they do in other federal systems of government). A State human rights law would also be needed even if there were a federal law on the topic because, under the Australian Constitution, the federal law could not apply to many aspects of State government.

Endnotes

- ¹ Rights, Respect and Responsibilities: the Report of the Human Rights Committee (2005), p 4
- ² Rights, Respect and Responsibilities: the Report of the Human Rights Committee (2005), p 13
- ³ Frank Brennan, "An Australian Convert from a Constitutional Bill of Rights" (1996) 7 Public Law Review 132; Frank Brennan, "Thirty Years On, Do We Need a Bill of Rights?" (1998) 18 Adelaide Law Review 123.
- ⁴ Jeremy Waldron, "A Right-Based Critique of Constitutional Rights" (1993) 13 *Oxford Journal of Legal Studies* 18.
- ⁵ R. v. Oakes 1986 CanLII 46 (S.C.C.), [1986] 1 S.C.R. 103
- ⁶ It has never been invoked at the Federal level and, apart from its routine use by Quebec in the period 1982-1985, it has only been used once by each of Saskatchewan and Quebec .
- ⁷ See s 6 and *Attorney-General (WA) v Marquet* [2003] HCA 67
- ⁸ For example, arguments are based on comments in *Bribery Commissioner v Pedric Ranasinghe* [1965] AC 172 and s 106 *Australian Constitution* .
- ⁹ See *McGinty v Western Australia* (1996) 186 CLR 140 at 297.
- ¹⁰ Francesca Klug and Keir Starmer, 'Incorporation through the "Front Door": The First Year of the Human Rights Act' [2001] Public Law 654
- ¹¹ There were exceptions. The first Geneva Convention to protect the wounded during war dates from 1864. The Australian Constitution (1901) includes a limited protection of property rights (s1(xxxi)) and a limited guarantee of freedom of religion (s116). The Minorities Treaties that followed World War I guaranteed to racial minorities the rights necessary to preserve the survival of their culture (non-discrimination, use of language etc.).
- ¹² Racial Discrimination Act 1975 (Cth), Sex Discrimination Act 1984 (Cth), Disability Discrimination Act 1992 (Cth), Equal Opportunity Act 1984 (WA).
- ¹³ *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 at 561-562. Applied in *Coleman v Power* [2004] HCA 39. See also Stone, "The Limits of Constitutional Text and Structure: Standards of Review and the Freedom of Political Communication", (1999) 23 *Melbourne University Law Review* 668.
- ¹⁴ Rights, Respect and Responsibilities: the Report of the Human Rights Committee (2005), p 4
- ¹⁵ Rights, Respect and Responsibilities: the Report of the Human Rights Committee (2005), p 13
- ¹⁶ *McDonald v Canada* [1995] 3 SCR 199
- ¹⁷ Jennifer Nedelsky quoted in S Evans "Should Australian Bills of Rights Protect Property Rights" 2006 Alt Law J 19 at 22.
- ¹⁸ The recommendation appears at 5.13 of *Towards an ACT Human Rights Act*, Report of the ACT Bill of Rights Consultative Committee (2003).
- ¹⁹ 2.2.2 of *Rights, Responsibilities and Respect*, The Report of the Human Rights Consultation Committee (2005).
- ²⁰ Kelly, E, 'Government in the ACT: A Human Rights Dialogue' (Paper presented at the Conference Assessing the First Year of the ACT Human Rights Act, ANU, 29 June 2005)
- ²¹ Legal & Constitutional Committee of the Parliament of Victoria *Report on the Desirability or Otherwise of Legislation Defining and Protecting Human Rights* (1987), pp 36-40.
- ²² Section 4 of the Victorian HRA provides:" 4. (1)... [A] public authority is— (a) a public official within the meaning of the Public Administration Act 2004; or (b) an entity established by a statutory provision that has functions of a public nature; or (c) an entity whose functions are or include functions of a public nature, when it is exercising those functions on behalf of the State or a public authority (whether under contract or otherwise); or (d) Victoria Police; or (e) a [Local Government] Council ... (f) a Minister; ... — but does not include— (i) Parliament...; or (j) a court or tribunal except when it is acting in an administrative capacity; ... (2) In determining if a function is of a public nature the factors that may be taken into account include— (a) that the function is conferred on the entity by or under a statutory provision; (b) that the function is connected to or generally identified with functions of government; (c) that the function is of a regulatory nature; (d) that the entity is publicly funded to perform the function; (e) that the entity that performs the function is a company (within the meaning of the Corporations Act) all of the shares in which are held by or on behalf of the State. ..."
- ²³ See also *In Re S* [2002] 2 AC 291 (section 3 is not authority to add words to a statute); *A (Anderson) v Secretary of State for the Home Department* [2003] 1 AC 837 (section 3 not authority to remove a power expressly conferred)
- ²⁴ Keynote address, 9th International Criminal Law Congress, Canberra, 28 October 2004 citing *Mooney v Film & Literature Board of Review* [2000] 2 NZLR 9 at [16]-[20]; *R v Poumako* [2000] 2 NZLR 695 at [29], [37], [57], [80]-[84]; *R v Pora* [2001] 2 NZLR 37 at [53]-[56], [116].
- ²⁵ Butler, P: Australian Bills of Rights: Lessons from New Zealand (ANU 21 June 2006, see <http://acthra.anu.edu.au/articles/Butler%20P-%20lessons%20from%20NZ.pdf>)
- ²⁶ LSE Centre for Civil Society "What is civil society?" http://www.lse.ac.uk/collections/CCS/what_is_civil_society.htm
- ²⁷ Department of Justice, Human Rights Consultation Web Site: <http://www.justice.vic.gov.au> .