



The New South Wales Bar Association

**THE NEW SOUTH WALES BAR ASSOCIATION**

**SUBMISSION TO**

**THE NATIONAL HUMAN RIGHTS CONSULTATION**

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## EXECUTIVE SUMMARY

The New South Wales Bar Association welcomes the opportunity to participate in this important debate about an Australian charter of rights.

The New South Wales Bar Association considers that the most appropriate option for protecting human rights in Australia at the present time is through the adoption of a national statutory charter or bill of rights that incorporates the human rights recognised in the *International Covenant on Civil and Political Rights (ICCPR)* and the *International Covenant on Economic, Social and Cultural Rights (ICESCR)*. Further, the New South Wales Bar Association considers that an Australian charter of rights should make specific provision for the rights of indigenous peoples.

An Australian charter of rights should be both consistent with Australia's international human rights obligations, as well as appropriate to Australia's constitutional and legal framework.

The New South Wales Bar Association supports an Australian charter of rights that protects human rights as against the Commonwealth and State and Territory Governments, and their agencies, statutory authorities and entities or persons performing identifiable public functions. It should also be subject to appropriate limitations, precedents for which are discussed in detail in this submission.

The New South Wales Bar Association supports an Australian charter of rights that has as its primary focus the role of the courts, the executive, Ministers and the Parliament. However, individuals should also have an avenue of redress. In general terms, the Bar Association supports a model that provides for quick, effective and inexpensive resolution of disputes. Individuals should be encouraged where possible to conciliate or mediate disputes in preference to litigation. However, in appropriate cases individuals should also be entitled to seek damages. Damages are available under both the New Zealand *Bill of Rights Act 1990* and the *United Kingdom Human Rights Act 1988*, and experience in both those jurisdictions has been salutary.

Recent human rights enactments in the United Kingdom, Victoria and the Australian Capital Territory embody a so-called "*dialogue model*" of human rights protection. A common feature of the dialogue model is the power given to courts to make "*declarations of*

*incompatibility*” where they find that they cannot interpret a law in a way that is consistent with human rights. The effect of such a declaration or finding is not to invalidate the impugned legislation in whole or in part, nor to otherwise affect its operation or enforcement.

During the course of the National Human Rights Consultation, some concern was raised as to whether a declaration of incompatibility mechanism contained in a federal charter of rights would fall foul of the Constitution. On 22 April 2009, the President of the Australian Human Rights Commission the Hon Catherine Branson QC convened a roundtable of constitutional and human rights law experts to discuss the constitutional implications of an Australian Human Rights Act. A statement was subsequently adopted recording the consensus reached by those at the meeting.<sup>1</sup> The Bar Association is confident that the statement issued by the roundtable removes any residual doubt concerning the constitutionality of the making of what the roundtable refers to as a “*finding of inconsistency*” by a court exercising federal jurisdiction.

In its submission to the National Human Rights Consultation, the Law Council of Australia supports the legislative model referred to as the dialogue model, which incorporates a “*finding of inconsistency*” mechanism as described above. The Law Council’s submission is based on the Policy Statement on a Federal Charter or Bill of Rights adopted by the Law Council on 29 November 2008 (see paragraph 213 of the Law Council’s submission to the National Human Rights Consultation, dated 6 May 2009). The New South Wales Bar Association has previously expressed support for this position.

However, speaking since the Law Council adopted its Policy Statement in late 2008, the Honourable Justice Michael McHugh AC QC has expressed support for a so-called “*direct incorporation model*” of human rights protection.<sup>2</sup> Such a model would involve Parliament giving effect to the ICCPR and the ICESCR by interpretive legislation empowering courts invested with federal jurisdiction to hold that legislation that is inconsistent with the human rights legislation is invalid in the case of State and Territory legislation and that, in the absence of a sufficiently clear statement to the contrary, all federal legislation is to be read subject to the human rights legislation of the Parliament.

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<sup>1</sup> “Constitution poses no obstacle to national Human Rights Act”, 6 May 2009, [http://www.hreoc.gov.au/about/media/media\\_releases/2009/32\\_09.html](http://www.hreoc.gov.au/about/media/media_releases/2009/32_09.html).

<sup>2</sup> M McHugh AC QC “A Human Rights Act – the Courts and the Constitution”, 5 March 2009, Address to the Australian Human Rights Commission.

As Mr McHugh has commented, a legislative model along these lines, directly incorporating the ICCPR and ICESCR, would have only a minimal effect on parliamentary sovereignty since it would be open to the Parliament of the Commonwealth to insert in any federal legislation a clause requiring the courts to give effect to that particular legislation, notwithstanding the enactment of the human rights legislation. It would also be open to the Parliament after any decision with which it disagreed to insert a clause in the legislation which the court had said should be ignored in determining rights and obligations.

The Bar Association has given careful consideration to the arguments in favour of direct incorporation. It is now the view of the Bar Association that such a model provides a superior form of statutory protection to the dialogue model. The advantages of the “*dialogue model*” in improving the human rights components and analysis in policymaking and the legislative process would remain in a direct incorporation model. These include reasoned statements of compatibility, a specific parliamentary scrutiny function, and other features intended to promote a culture of human rights more broadly.

Proposals for a charter or bill of rights in Australia have attracted criticism. The Bar Association considers that much of this criticism is misconceived and has been the product of misrepresentation and misunderstanding. Nonetheless, some of the points raised are serious and require a response. This submission refers to the important recent contribution to the debate by Lord Bingham in responding to such criticism.

A critical question is whether an Australian charter of rights will make a difference for Australians. The New South Wales Bar Association considers that an Australian charter of rights would supplement the existing legal protections and fill the gaps. An Australian charter of rights would provide an important safety net for all Australians. Importantly, it would result in a greater focus on human rights analysis during the policymaking and legislative process. The New South Wales Bar Association’s submission highlights the inconsistent and incomplete protection of human rights in Australia and, relevantly, the State of New South Wales.

## **INTRODUCTION AND OVERVIEW**

### **The National Human Rights Consultation Committee's terms of reference**

1. The Consultation Committee's terms of reference pose three questions:
  - Which human rights (including corresponding responsibilities) should be protected and promoted?
  - Are these human rights currently sufficiently protected and promoted?
  - How could Australia better protect and promote human rights?
2. The Bar Association's submission addresses each of these questions.

### ***The New South Wales Bar Association***

3. The New South Wales Bar Association is a voluntary association of practising barristers. Our aims, as expressed in our Constitution include:
  - to promote the administration of justice;
  - to promote, maintain and improve the interests and standards of local practising barristers;
  - to make recommendations with respect to legislation, law reform, rules of court and the business and procedure of courts;
  - to seek to ensure that the benefits of the administration of justice are reasonably and equally available to all members of the community;
  - to arrange and promote continuing professional development;
  - to promote fair and honourable practice amongst barristers; to suppress, discourage and prevent malpractice and professional misconduct;
  - to inquire into questions as to professional conduct and etiquette of barristers;
  - to confer and co-operate with bodies in Australia or elsewhere representing the profession of the law;

- to encourage professional, educational, cultural and social relations amongst the members of the Bar Association; and
  - to make donations to charities and such other objects in the public interest as determined from time to time by the Bar Council.
4. The Bar Association has previously considered the options for a charter of rights for New South Wales. On 4 May 2006, the Bar Association resolved to support the Attorney General's call for a community consultation with respect to a charter of human rights for New South Wales. On 19 April 2007, the Bar Council resolved to support the adoption of a statutory charter of human rights for NSW.<sup>3</sup> In November 2008, the Bar Council resolved to support the Law Council of Australia's policy statement in favour of the adoption of a charter or bill of human rights at the federal level.

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<sup>3</sup> A copy is also available at [www.nswbar.asn.au/docs/resources/publications/human\\_rights.pdf](http://www.nswbar.asn.au/docs/resources/publications/human_rights.pdf).



**QUESTION ONE: WHICH HUMAN RIGHTS (INCLUDING CORRESPONDING RESPONSIBILITIES) SHOULD BE PROTECTED AND PROMOTED?**

5. Human rights are concerned with the inherent dignity of all human beings. Domestic legal systems play a critical role in providing a framework of the protection and promotion of those rights. Since 1945, the international community has adopted many human rights instruments. Australia is a party to each of the principal human rights treaties. While there might be legitimate debate about which rights should be protected in a national charter of rights, the Bar Association submits that the rights recognised in the so called International Bill of Rights should be given domestic recognition and protection.
6. In particular, the Bar Association supports an Australian charter of rights that incorporates human rights recognised in the following international instruments:
  - *International Covenant on Civil and Political Rights*; and
  - *International Covenant on Economic, Social and Cultural Rights*, which entered into force for Australia on 13 November 1980, and 10 March 1976 respectively.<sup>4</sup>
7. The ICCPR contains rights such as the right not to be subjected to torture or to cruel, inhuman or degrading treatment or punishment, the right to liberty, the right to a fair trial, freedom of expression, freedom of movement, freedom from discrimination, and equality before the law.
8. The ICESCR contains rights such as the rights to work, health, education and housing.
9. Both the ICCPR and ICESCR ensure that the rights recognised in each covenant are recognised without distinction as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. Both covenants contain provisions regarding special assistance to and protection of the family and of children. The covenants also provide for the right of all persons to participate in public and cultural life. Each State party undertakes to adopt such legislative or other measures as will give effect to the rights recognised in each of the two covenants.

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<sup>4</sup> The covenants were adopted by the United Nations General Assembly in 1966, and entered into force in June in 1976.

10. In addition to the ICCPR and the ICESCR, the United Nations General Assembly has adopted human rights protections specific to particular groups, and expanding on the foundation rights in the covenants. Australia has ratified each of the following multilateral treaties:

- *International Convention on the Elimination of All Forms of Racial Discrimination* 1965 (**CERD**);
- *Convention on the Elimination of All Forms of Discrimination Against Women* 1979 (**CEDAW**);
- *Convention on the Rights of the Child* 1989 (**CRC**);
- *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* 1984 (**CAT**); and
- *Convention on the Rights of Persons with Disabilities* 2006 (**CRPD**).

11. These instruments are also relevant to understanding the scope and content of the rights that may be included in an Australian charter of rights.

### **Rights which should be included in an Australian charter of rights**

12. The Bar Association supports the Law Council of Australia's submission with respect to the human rights that should be included in an Australian charter of rights.<sup>5</sup> Further, the Bar Association considers that an Australian charter of rights should make specific provision for the rights of indigenous peoples.

13. The Bar Association supports the inclusion in an Australian charter of all of the rights contained in the ICCPR and ICESCR. In particular, the following list of rights is recommended for incorporation into an Australian charter of rights:

- the right to self determination;
- equality before the law and freedom from discrimination;
- the right to life and the right not to be arbitrarily deprived of life;

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<sup>5</sup> "A Charter: Protecting the Rights of all Australian"; Law Council of Australia, 6 May 2009 ; para 13-21.

- the right to liberty and security of the person;
- protection from torture and cruel, inhuman or degrading punishment and treatment;
- the right to humane treatment in all forms of detention, including recognition of the special needs of juvenile detainees;
- the right to privacy in all its forms and protection from unlawful attacks upon a person's reputation;
- freedom from slavery, servitude and forced or compulsory labour;
- freedom of expression;
- freedom of association;
- freedom of peaceful assembly;
- freedom of movement;
- freedom of thought, conscience, religion and belief;
- the right of Australian citizens to vote and be elected to public office;
- fair trial rights applicable to civil and criminal proceedings;
- the right not to be tried or punished more than once;
- protection from retrospective criminal laws;
- protection of the family and children;
- the right to marry;
- the rights of indigenous peoples;
- the right of persons belong to ethnic, religious or linguistic minority groups to enjoy their own culture, to profess and practise their own religion, and to use their own language in community with the other members of their group;

- the right to asylum;
  - the right to work and to just and favourable conditions of work;
  - the right to an adequate standard of living;
  - the right to the enjoyment of the highest attainable standard of health;
  - the right to education; and
  - the right to participate in the cultural life of Australia.
14. In those jurisdictions where bills of rights operate, while the executive and legislature play a central role in interpreting human rights in broad policy terms, courts and tribunals also play an important role in their interpretation and in determining their application to a given set of facts. Some human rights, such as the right to a fair trial or the right not to be tried more than once, focus on procedural protections, and may be informed by local procedural laws. The jurisprudence of international courts and committees and national courts suggests that understanding of the precise content of human rights will develop over time. The Bar Association supports an approach that encourages Australian courts and tribunals that may be called on to interpret and apply human rights to have recourse to international and comparative jurisprudence.
15. The application of human rights charters often involves reconciling conflicting rights or seeking to strike a balance between the rights of the individual and the interests of the community generally. For this reason, an Australian charter of rights must provide a means of resolving a clash of rights or an apparent conflict between individual rights and broader public interests with appropriately drafted limitation clauses (discussed below).

### **Application of the human rights in an Australian charter of rights**

#### ***Beneficiaries of human rights***

16. The Bar Association submits that an Australian charter of rights should apply to all individuals and groups of individuals within the territory of Australia, as well as to individuals subject to the jurisdiction of Australia. An Australian charter of rights may apply to individuals who are not present in Australia, but engage with Australian

government departments or agencies. For example, an applicant seeking to migrate to Australia should expect that the Australian government agencies the person deals with outside Australia will afford him or her rights in relation to privacy and protection of the family and children.

17. There should be no distinction between citizens and non-citizens, save with respect to the right to vote and certain rights in relation to standing for public office. In this respect, it is important that those rights be read consistently with the Constitution.<sup>6</sup>
18. The Bar Association notes that the term “*person*” is defined in s 22 of the *Acts Interpretation Act 1901* (Cth) to include, unless the contrary appears, a body politic or corporate as well as an individual. If it is not proposed to extend an Australian charter of rights to afford human rights protections to corporations, care will be required to ensure that an Australian charter of rights applies only to natural persons; cf the *Human Rights Act 1998* (UK), the *New Zealand Bill of Rights Act 1990* and the Canadian Charter of Rights and Freedoms the protection of which is extended to juristic entities other than natural persons.

***Persons responsible for protecting and respecting human rights***

19. The Consultation Committee’s terms of reference raise *inter alia* the question of which human rights (**including corresponding responsibilities**) should be protected and promoted (emphasis added).
20. As to those who are required to observe and protect human rights, the Bar Association notes that there is considerable force in the argument that responsibility for compliance with a charter of rights should apply across the community and not be limited to government or its agencies. Plainly, as a matter of international law, Australia has responsibility in relation to human rights violations committed by non-government actors also.
21. With respect to a model that would impose obligations on non-government actors, such as corporations or individuals, it is interesting to note the way in which the Commonwealth’s approach to privacy has developed over time. Initially, the *Privacy*

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<sup>6</sup> Section 34 and see also *Koroitamana v Commonwealth* (2006) 80 ALJR 1146, *Bennett v Commonwealth* (2007) 81 ALJR 950.

*Act 1988* (Cth) applied only to the Commonwealth and its agencies. However, over the twenty years since first enacted, the *Privacy Act* has extended to regulate privacy in health, credit reporting and some aspects of the private sector.

22. The Bar Association notes the Law Council of Australia's submission that only "*public authorities*" being Commonwealth government departments, agencies, statutory authorities and entities or persons performing identifiable public functions should be bound to observe the human rights which have been identified for inclusion in an Australian charter of rights.
  
23. The Bar Association submits that an Australian charter of rights should not be limited to the Commonwealth. Consistently with Australia's international obligations, the human rights recognised in the charter should also be protected at the State and Territory levels. For example, Article 50 of the ICCPR provides that the provisions of that covenant shall extend to all parts of federal states without any limitations or exceptions. Article 28 of the ICESCR is in relevantly identical terms. The Bar Association notes that there have been a number of findings by international human rights treaty bodies that Australia is in breach of its obligations under the ICCPR with respect to State legislation or conduct of State governments.<sup>7</sup> Given the rights identified for inclusion in an Australian charter, it is important that the States and Territories (as well as local governments) be held accountable for the protection of relevant rights. In particular, States bear the primary responsibility for delivery of services which touch upon and affect the enjoyment of economic, social and cultural rights. State courts also deal with the majority of criminal trials, and States are responsible for the administration of detention facilities.<sup>8</sup>
  
24. The Bar Association submits that Australia's international obligations require there to be a consistent approach to the protection of human rights throughout Australia. In particular, the residents of New South Wales should not be subject to lesser protection of their human rights because New South Wales has no State charter of rights.

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<sup>7</sup> See *Toonen v Australia* Communication No. 488/199; CCPR/C/50/D/488/1992, *Rogerson v. Australia* Communication No. 802/1998; CCPR/C/74/802/1998, *Cabal and Pasini v. Australia* Communication No. 1020/2001; CCPR/C/78/D/1020/2001, *Brough v Australia* Communication No. 1184/2003; CCPR/C/86/D/1184/2003, *Coleman v Australia* Communication No. 1157/2003; Australia. 10/08/2006. CCPR/C/87/D/1157/2003 and *Dudko v Australia* Communication No. 1347/2005 CCPR/C/90/D/1347/2005/.

<sup>8</sup> Section 120 of the Constitution.

***Economic, social and cultural rights***

25. With the Law Council of Australia, the Bar Association supports the inclusion of the rights contained in the ICESCR in an Australian charter of human rights. Such an approach conforms with the universality and indivisibility of all human rights and fundamental freedoms, a principle consistently recognised by the international community (and referred to in s 10A(1)(a)(i) of the *Human Rights and Equal Opportunity Commission Act 1984* (Cth)).<sup>9</sup>
26. The Bar Association also considers that the inclusion of economic, social and cultural rights in a federal charter of rights is an appropriate and necessary step to give effect to the obligation imposed by article 2(1) on Australia as a State party to the ICESCR. Article 2(1) provides:

*“Each State Party to the present Covenant undertakes to take steps ... to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognised in the present Covenant by all appropriate means, including particularly the adoption of legislative measures.”*

27. It is sometimes suggested that the inclusion of economic, social and cultural rights in a charter of rights will draw the judiciary into making policy decisions and determining how resources should be allocated. It is also sometimes argued that it is not possible to ascribe any meaningful normative content to economic, social and cultural rights. Both these arguments have been addressed recently in the United Kingdom in the context of discussion of the desirability and feasibility of including economic, social and cultural rights in human rights legislation. The UK *Human Rights Act 1988* itself includes the right to education and the right to property (right to peaceful enjoyment of one’s possessions), both of which are guaranteed under Protocol I to the *European Convention on Human Rights (ECHR)*. In two major reports published in 2004<sup>10</sup> and 2008<sup>11</sup>, the United Kingdom Parliamentary Joint

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<sup>9</sup> It is noteworthy that a reference in s 10(1) of the *Racial Discrimination Act 1975* (Cth) (which guarantees equality before the law) to a right includes a reference to a right of a kind referred to in article 5 of the *Convention on the Elimination of All Forms of Racial Discrimination*. Article 5 refers to both civil and political, as well as economic, social and cultural rights.

<sup>10</sup> Joint Committee on Human Rights, *The International Covenant on Economic, Social and Cultural Rights, Twenty-first Report of Session 2003-04*, November 2004.

<sup>11</sup> Joint Committee on Human Rights, *A Bill of Rights for the UK? Twenty-ninth Report of Session 2007-08*, August 2008, Chapter 5, [147]-[198].

Committee on Human Rights considered the arguments in favour and against legislative recognition of economic, social and cultural rights.

28. In its 2004 Report, the Joint Committee noted that “[n]o clear line of demarcation can be drawn between the substance of rights classified as civil and political, and those classified as economic, social and cultural” and that “[s]ome measure of protection for economic and social rights is afforded by the primarily civil and political rights guaranteed under the Human Rights Act.”<sup>12</sup> It also stated that the right to property and the right to education under the *Human Rights Act* “are without difficulty guaranteed and applied by the UK courts, if in relatively circumscribed and qualified form, alongside the civil and political guarantees”.<sup>13</sup>
29. More generally, the Joint Committee rejected the notion that, as a group, economic and social rights are excessively vague, do not impose immediate obligations but are subject only to progressive realization, and are not appropriate subjects for judicial oversight or enforcement. The Joint Committee agreed with the UN Committee on Economic, Social and Cultural Rights that many elements of ICESCR rights “which do not require allocation for resources for their protection are recognised as imposing immediate obligations, in the same way as civil and political rights”,<sup>14</sup> and also that the obligation of progressive realization imposed an obligation “to take steps with immediate and continued effect” towards achievement of the rights; these steps are to be “deliberate, concrete and targeted”.<sup>15</sup> At the same time, the Joint Committee shared the concern of the UK Government that it was inappropriate for courts to become engaged “in large-scale redistribution of resources”,<sup>16</sup> and that the development of economic and social policy and the setting of priorities for resource distribution was preeminently a task for the executive and the legislature.
30. In its 2008 Report, the Joint Committee addressed directly the ways in which economic and social rights might be included in a statutory bill of rights. Building on the analysis in its 2004 Report, the Joint Committee rejected the three arguments put forward by the government to the effect that economic and social rights are “aspirational policy goals,

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<sup>12</sup> 2004 Report, [21].

<sup>13</sup> 2004 Report, [22].

<sup>14</sup> 2004 Report, [46].

<sup>15</sup> 2004 Report, [48].

<sup>16</sup> 2004 Report, [71]. However, the Committee also noted that some courts decisions on civil and political rights may have “substantial resource implications”): [72].



*not enforceable legal rights*”, namely that they were formulated in “*such imprecise and general terms as not to be suitable for consideration in the courts*”, that “*incorporating the rights would allow the courts to usurp the proper functions of the democratically elected Government and Parliament*”, and that this “*would lead to judicial involvement in resource allocation which would be constitutionally inappropriate*”.<sup>17</sup>

31. The Joint Committee sketched three possibilities for inclusion of economic and social rights in a statutory bill of rights:<sup>18</sup>

- fully justiciable and legally enforceable economic and social rights;
- the inclusion of economic and social rights as “*directive principles of State policy*” (the models being the Constitutions of India and Ireland); and
- a hybrid model involving a duty of progressive realisation with a closely circumscribed judicial role (based on the South African constitutional experience).

32. The Joint Committee did not support the first option, since it considered that this “*carries too great a risk that the courts will interfere with legislative judgments about priority setting*” and that “*the democratic branches (Government and Parliament) must retain the responsibility for economic and social policy, in which the courts lack expertise and have limited institutional competence or authority*”<sup>19</sup> Nor did the Committee support the second model, because, although it “*avoids the pitfalls of the first model because it keeps the courts out altogether . . . it risks the constitutional commitments being meaningless in practice. When some possibility of judicial enforcement exists, it is more likely that the relevant rights will in practice receive respect.*”<sup>20</sup>

33. The Joint Committee found the hybrid model the most attractive:<sup>21</sup>

*“Such a hybrid model combines the advantages of the other two models whilst avoiding their main disadvantages. On this third model, implementation of the*

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<sup>17</sup> 2008 Report, [155], [183]-[191].

<sup>18</sup> It also rejected the possibility of a “*purely declaratory model*” of “*holly symbolic rather than legal effect*”: 2008 Report, [165].

<sup>19</sup> 2008 Report, [167].

<sup>20</sup> 2008 Report, [169].

<sup>21</sup> 2008 Report, [172].

*basic commitments spelled out in the Bill of Rights is still primarily through democratic processes rather than the courts, but with the possibility of a degree of judicial involvement in extreme cases (eg. of unjustifiable omission of provision for a particular vulnerable group). Individuals do not have legally enforceable rights against the State to full protection of the rights recognised by the Bill of Rights. But resort to the courts might be possible if one particular vulnerable group was being neglected altogether, because then the State is failing to take reasonable legislative and other measures, within available resources, to achieve progressive realisation of the rights. So there is scope for some judicial role in enforcing the constitutional provision, but the caveats surrounding the definition of the rights mean that there is very little scope indeed for judicial interference with the setting of priorities.”*

34. Accordingly, the Joint Committee put forward for consideration a proposal drawing on the South African model but containing “*additional wording designed to ensure that the role of the courts in relation to social and economic rights is appropriately limited*”:<sup>22</sup>

*“The broad scheme of these provisions is to impose a duty on the Government to achieve the progressive realisation of the relevant rights, by legislative or other measures, within available resources, and to report to Parliament on the progress made; and to provide that the rights are not enforceable by individuals, but rather that the courts have a very closely circumscribed role in reviewing the measures taken by the Government.”*

35. The Bar Association submits that while the option preferred by the Joint Committee may be too limited in the rights which it proposes for inclusion and the extent of judicial oversight permitted, it nevertheless demonstrates that in a comparable jurisdiction to Australia, a leading Parliamentary body with a decade-long engagement with a statutory charter of rights considers that there are strong arguments for the inclusion of economic, social and cultural rights in a statutory bill of rights, and that there is a role for judicial oversight. It is also important to recall the point made by the Joint Committee in its 2004 report that, as with the inclusion of civil and political rights in a statutory charter, the most important effect of the inclusion of economic and social rights is likely to be its effect on the policymaking process and the legislative process, by promoting a culture of rights and ensuring that a human rights framework is used throughout all arms of government.<sup>23</sup>

36. Similarly, both the South African Constitutional Court and the United Nations Committee on Economic, Social and Cultural Rights, the body responsible for

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<sup>22</sup> 2008 Report, [192].

<sup>23</sup> 2004 Report, [75]-[88]

supervising implementation of the ICESCR by States parties, have identified an important role for the courts in ascribing normative content to economic, social and cultural rights, and a legitimate, albeit limited, role for the courts in the adjudication of complaints concerning contraventions of economic, social and cultural rights.

37. The South African Constitutional Court has developed an extensive jurisprudence in relation to the normative content and implementation of economic, social and cultural rights contained in the South African Constitution in cases such as *Further Certification of the Constitution of The Republic of South Africa, 1996*<sup>24</sup>; *Soobramoney v Minister of Health (Kwazulu-Natal)*<sup>25</sup>; *Government of the Republic of South Africa v Grootboom*<sup>26</sup>; *Minister of Health v Treatment Action Campaign*.<sup>27</sup> Significantly, the Court has confirmed the importance of restraint on the part of courts in adjudicating upon the reasonableness of measures taken to implement economic, social and cultural rights. For example, it has recognised that responsibility for making the difficult decisions in relation to the health budget and priorities lies with the political organs and the medical authorities. In *Soobramoney*, the Court commented: “A court will be slow to interfere with rational decisions taken in good faith by the political organs and medical authorities whose responsibility it is to deal with such matters.”<sup>28</sup>
38. In *Grootboom*, which concerned s 26 of the South African Constitution (which provides for the right to have access to adequate housing), the Court confirmed that the State is not obliged to go beyond available resources or to provide for immediate realisation of rights of access to housing, health care, sufficient food and water, and social security.<sup>29</sup> The question was whether the legislative and other measures taken by the State were reasonable. The Court observed that in considering reasonableness, a court should not ask whether other more desirable or favourable measures could have been adopted, or whether public money could have been better spent. A wide

<sup>24</sup> CCT23/96; (1996) 10 BCLR 1253, paras 77-78.

<sup>25</sup> (1997) 12 BCLR 1696 (CC). See discussion in H Steiner, “Social Rights and Economic Development; Converging Discourses” (1998) 4 *Buffalo Human Rights Law Review* 25 at 30-34.

<sup>26</sup> (2001) (1) SA 46 (CC).

<sup>27</sup> (2002) 10 BCLR 1033 (CC).

<sup>28</sup> (1997) 12 BCLR 1696 (CC) at [29].

<sup>29</sup> [2001] 1 SA 46 (CC) at [94].

range of possible measures could be adopted, many of which would meet the requirement of reasonableness.<sup>30</sup>

39. The *Treatment Action Campaign case*<sup>31</sup> concerned the government's failure to make available antiretroviral drugs to assist in the prevention of mother-child transmission of HIV. The Constitutional Court confirmed that it will not always be possible to give everyone access to even a "core" service immediately. According to the Court, all that is possible is that the State act reasonably to provide access to socio-economic rights. Again, it emphasised that courts are not "*institutionally equipped to make the wide-ranging factual and political enquiries necessary for determining what the minimum-core standards called for ... should be, nor for deciding how public revenues should most effectively be spent*"<sup>32</sup>. The Court recognised that courts are ill-suited to adjudicate upon issues where court orders could have multiple social and economic consequences for the community, and observed that "*the Constitution contemplates rather a restrained and focused role for the courts, namely, to require the state to take measures to meet its constitutional obligations and to subject the reasonableness of these measures to evaluation. Such determinations of reasonableness may in fact have budgetary implications, but are not in themselves directed at rearranging budgets.*"<sup>33</sup>
40. The UN Committee on Economic, Social and Cultural Rights has observed that "*the adoption of a rigid classification of economic, social and cultural rights which puts them beyond the reach of the courts would be arbitrary and incompatible with the principle that the two sets of human rights are indivisible and interdependent*": General Comment No 9 "*The domestic application of the Covenant*" at paragraph 10. The Committee has also produced helpful jurisprudence in relation to the implementation and normative content of economic, social and cultural rights. It has confirmed that the ICESCR provides in general for progressive realisation and acknowledges the constraints that flow from the limits of available resources. In its General Comment No 3 "*The nature of States parties obligations*", the Committee stated at paragraph 9:

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<sup>30</sup> [2001] 1 SA 46 (CC) at [41].

<sup>31</sup> [2002] 5 SA 721 (CC).

<sup>32</sup> [2002] 5 SA 721 at [37].

<sup>33</sup> Para 38.

*“The principal obligation of result reflected in article 2 (1) is to take steps “with a view to achieving progressively the full realization of the rights recognised” in the Covenant. The term “progressive realization” is often used to describe the intent of this phrase. The concept of progressive realization constitutes a recognition of the fact that full realization of all economic, social and cultural rights will generally not be able to be achieved in a short period of time. In this sense the obligation differs significantly from that contained in article 2 of the International Covenant on Civil and Political Rights which embodies an immediate obligation to respect and ensure all of the relevant rights. Nevertheless, the fact that realization over time, or in other words progressively, is foreseen under the Covenant should not be misinterpreted as depriving the obligation of all meaningful content. It is on the one hand a necessary flexibility device, reflecting the realities of the real world and the difficulties involved for any country in ensuring full realization of economic, social and cultural rights. On the other hand, the phrase must be read in the light of the overall objective, indeed the raison d’être, of the Covenant which is to establish clear obligations for States parties in respect of the full realization of the rights in question. It thus imposes an obligation to move as expeditiously and effectively as possible towards that goal. Moreover, any deliberately retrogressive measures in that regard would require the most careful consideration and would need to be fully justified by reference to the totality of the rights provided for in the Covenant and in the context of the full use of the maximum available resources.”*

41. At the same time, the Committee has also recognised that some aspects of economic, social and cultural rights may be capable of being protected immediately, and may also be capable of judicial enforcement. Discrimination in the enjoyment of economic, social and cultural rights is one example. This is already recognised in Australia by extensive legislative protection and judicial enforcement of the right not to be subjected to discrimination in the fields of work, education and access to services, among others. Similarly, Australian courts and tribunals play a role in the implementation of aspects of the right to adequate housing, for example, through judicial enforcement of tenancy laws. This is one of many examples where the Australian legal system already confers upon the judiciary a role in the implementation of economic, social and cultural rights.
42. The Committee on Economic, Social and Cultural Rights has produced a series of general comments in relation to the rights recognised in the ICESCR with a view to assisting States parties' implementation of the covenant and the fulfillment of their reporting obligations. The Bar Association commends these general comments to the National Human Rights Consultation as a valuable source of jurisprudence in relation to the normative content of the rights in the ICESCR.

43. Significantly, on 10 December 2008, the General Assembly unanimously adopted an Optional Protocol to the ICESCR which enables the Committee on Economic, Social and Cultural Rights to receive and consider communications from individuals or groups of individuals under the jurisdiction of a State Party, claiming to be victims of a violation of any of the economic, social and cultural rights in the ICESCR. Consistent with the jurisprudence of the South African Constitutional Court referred to above, article 9(4) of the Optional Protocol provides as follows:

*“When examining communications under the present Protocol, the Committee shall consider the reasonableness of the steps taken by the State Party in accordance with part II of the Covenant. In doing so, the Committee shall bear in mind that the State Party may adopt a range of possible policy measures for the implementation of the rights set forth in the Covenant.”*

44. It is also significant to recall that the report of the ACT Bill of Rights Consultative Committee, *“Towards an ACT Human Rights Act: Report of the ACT Bill of Rights Consultative Committee”*, presented to the Chief Minister on 21 May 2003, recommended *inter alia* *“that the rights set out in the two major human rights treaties to which Australia is a party, the International Covenant on Economic, Social and Cultural Rights and the International Covenant on Civil and Political Rights, should be protected by the Human Rights Act in so far as they are within the jurisdiction of the ACT”* (Recommendation 10). The *Human Rights Bill 2003* (ACT) proposed by the Committee gave protection to both economic, social and cultural rights, as well as civil and political rights.<sup>34</sup>
45. The *Human Rights Bill 2003* (ACT) offered two alternative approaches to implementation in clause 14, entitled *“Limitations and restrictions on human rights”*.<sup>35</sup> The first approach recognised the different obligations of implementation attaching to the rights in the ICESCR compared to those in the ICCPR. It recognised that ICESCR rights are subject to *“progressive realisation”*, with courts or tribunals required to balance the nature of the benefit from observing such human rights with the fiscal cost involved: *“In other words, the obligation on the ACT government to protect economic, social and cultural rights is one to take reasonable measures within*

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<sup>34</sup> *Towards an ACT Human Rights Act: Report of the ACT Bill of Rights Consultative Committee*, May 2003, para 5.27.

<sup>35</sup> *Ibid.*, para 5.46.

*its available resources to realise the rights progressively.*<sup>36</sup> The alternative approach did not explicitly distinguish between economic, social and cultural rights, and civil and political rights. It provided that “*limitations may be placed on rights if the limitations are reasonable and justifiable taking into account all relevant factors including the nature of the right, the importance of the purpose of the limitations, the nature and extent of the limitation, the relation between the limitation and its purpose and less restrictive means to achieve the limitation's purpose.*”<sup>37</sup> The ACT Consultative Committee’s strong preference was for the second alternative which it considered to be more consistent with the idea of the indivisibility of human rights.<sup>38</sup> The Bar Association agrees with that approach.

### ***Indigenous rights***

46. The Bar Association supports specific recognition of the rights of indigenous peoples in an Australian charter of rights.
47. It is true that the general human rights framework, especially the right to self-determination and the economic, social and cultural rights contained in it, would offer particular protection to indigenous people.<sup>39</sup> However, in light of specific normative developments internationally concerning the rights of indigenous peoples, reflected in particular in the adoption by the General Assembly of the United Nations Declaration on the Rights of Indigenous Peoples on 13 September 2007, the Bar Association considers that there should be specific recognition in a charter of rights of the rights of indigenous peoples.
48. On 13 September 2007, Australia was one of only four States to vote against the Declaration. On 3 April 2009, Australia gave its support to the Declaration. On that occasion, the Minister for Families, Housing, Community Services and Indigenous Affairs, Jenny Macklin MP said the following:

*“Today, Australia takes another important step in re-setting the relationship between Indigenous and non-Indigenous Australians and moving forward towards a new future.*”

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<sup>36</sup> This approach is reflected in Alternative 1 (clauses 14.1-14.3), pages 22-23.

<sup>37</sup> This approach is reflected in Alternative 2 (clauses 14.1-14.2), pages 23.

<sup>38</sup> Para 5.46.

<sup>39</sup> *Towards an ACT Human Rights Act: Report of the ACT Bill of Rights Consultative Committee*, May 2003, recommendation 11.

*Today, Australia joins the international community to affirm the aspirations of all Indigenous peoples.*

*We show our respect for Indigenous peoples.*

*We show our faith in a new era of relations between states and Indigenous peoples grounded in good faith, goodwill and mutual respect.*

*The work of drafting the United Nations Declaration on the Rights of Indigenous Peoples began in 1985.*

*The Declaration was more than twenty years in the making.*

*For the first time governments worked directly with Indigenous peoples to develop a significant human rights statement.*

*The decades of work culminated in a landmark document. A document that reflects and pays homage to the unique place of Indigenous peoples and their entitlement to all human rights as recognised in international law.”*

49. The Declaration on the Rights of Indigenous Peoples was drafted in recognition of the inadequacies of the existing body of human rights instruments in addressing the human rights of indigenous peoples. Accordingly, it is appropriate that in an Australian charter of rights, as well, there be acknowledgment of the particular rights of indigenous peoples which derive from their distinct historical experiences, identities and aspirations.<sup>40</sup>
50. In this regard, the Bar Association does not consider that article 27 of the ICCPR concerning the rights of persons belonging to ethnic, linguistic, and religious minorities is appropriate or adequate to guarantee the rights of Aboriginal and Torres Strait Islander peoples. Further, the Bar Association urges the National Human Rights Consultation to consider an approach which goes beyond that adopted in s 19 of the *Charter of Human Rights and Responsibilities Act 2006* (Vic) (**Victorian Charter**) and which is based on article 27 of the ICCPR. Section 19(2) of the Victorian Charter provides as follows:

*“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*

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<sup>40</sup> Cf in Victoria, *Report of the Human Rights Consultation Committee*, p 40.



- (c) *to maintain their kinship ties; and*
- (d) *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.”*

51. In his recent *Social Justice Report 2008*, the Aboriginal and Torres Strait Islander Social Justice Commissioner Tom Calma provides a detailed analysis and critique of the approaches recommended by each of the various State and Territory consultation processes in relation to human rights acts.
52. The Bar Association does not advocate a particular approach to the recognition of the rights of indigenous peoples in a federal charter of rights. However, it urges the National Consultation to consider carefully the significance of the United Nations Declaration on the Rights of Indigenous Peoples, and the important submissions made to it by Aboriginal and Torres Strait Islander organisations, including the Aboriginal and Torres Strait Islander Social Justice Commissioner, in relation to the specific recognition of indigenous peoples’ rights in an Australian charter.

### ***Limitation of human rights***

53. Recognising that rights carry responsibilities and at times a balance must be struck between competing rights, the Bar Association considers an Australian charter of rights should include provisions that permit human rights to be limited where appropriate.
54. The bills and charters of rights in Canada, South Africa, England, New Zealand, the ACT and Victoria all contain some form of express limitation provision. That is, whether constitutional or statutory, some form of limitation provision plays a key role in each of them (by contrast with the rigid rights formula of the United States Constitution). The National Human Rights Consultation may be assisted by consideration of the operation of limitation clauses in these charters and some relevant jurisprudence.

### ***Canada***

55. Section 1 of the Canadian Charter of Rights and Freedoms (which is entrenched in the Constitution of Canada) (**Canadian Charter**) provides “*The [Charter] guarantees*

*the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society*". In the leading decision of the Supreme Court of Canada, *R v Oakes*,<sup>41</sup> Chief Justice Dickson, for the Court, said that a "*reasonable limit*" must meet two criteria in order to satisfy s 1. First, the objective must be of sufficient importance to warrant overriding a constitutionally protected right or freedom. Second, the means chosen must be "*reasonable and demonstrably justified*", something that Dickson CJ described as a form of "*proportionality test*."<sup>42</sup>

56. Perhaps one of the clearest examples of the use of s 1 in Canada is in cases where the right that has been limited is the right to freedom of expression (s 2(b)):

- In *R v Keegstra*<sup>43</sup>, the Supreme Court held that communications that wilfully promote hatred against an identifiable group are protected by s 2(b) of the Canadian Charter and on that basis, *prima facie*, a criminal provision seeking to proscribe such communication would violate the Charter. However, the Court held that the impugned hate speech provision was a reasonable limit upon freedom of expression and therefore valid.
- In *R v Butler*<sup>44</sup>, the law in question proscribed certain forms of obscene publication (pornography). The Supreme Court held that activities could not be excluded from the scope of the guaranteed freedom on the basis of the content or meaning being conveyed. On that basis, s 163 of the *Criminal Code*, which prohibited certain types of "*expressive activity*" was held to infringe s 2(b) of the Canadian Charter. However, after an extensive analysis based on the harm caused by certain forms of pornography, the Court upheld the validity of the provision as justifiable under s 1 of the Charter.
- In *Harper v Canada (Attorney General)*,<sup>45</sup> a statutory limit on advertising spending in the context of election campaigns was also upheld by the Supreme Court of Canada. After finding a *prima facie* violation of the right to freedom of expression, the Court held "*On balance, the contextual factors favour a*

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<sup>41</sup> *R v Oakes* [1986] 1 SCR 103.

<sup>42</sup> [1986] 1 SCR 103 at [69]-[70].

<sup>43</sup> [1990] 3 SCR 697.

<sup>44</sup> [1992] 1 SCR 452.

<sup>45</sup> [2004] 1 SCR 827.

*deferential approach to Parliament in determining whether the third party advertising expense limits are demonstrably justified in a free and democratic society. Given the difficulties in measuring this harm, a reasoned apprehension that the absence of third party election advertising limits will lead to electoral unfairness is sufficient”.*<sup>46</sup>

- On 28 June 2007, in *Canada (Attorney General) v JTI-Macdonald Corp (JTI)*<sup>47</sup>, the Supreme Court ruled on the Canadian Government’s most recent efforts to regulate the advertising of tobacco products. The case was the latest part of a decade long constitutional debate over tobacco advertising. In 1995, the Court had held that certain forms of bans on tobacco advertising were unconstitutional.<sup>48</sup> In that case, the Court held that the tobacco companies’ right to freedom of expression was protected by s 2(b) of the Charter and, by majority, that the advertising provisions of the *Tobacco Act* were overly restrictive, and not justified under s 1. In response to the decision, the Canadian Government amended the legislation. Again tobacco companies challenged the *Tobacco Act* (as amended) and associated regulations. In the second case, the Supreme Court unanimously upheld each of the impugned provisions as a reasonable limitation of the right to freedom of expression under s 1 of the Charter.

### ***South Africa***

57. The South African Bill of Rights (Chapter 2 of the Constitution of the Republic of South Africa) also provides for an evaluation of a law that *prima facie* violates one of the enumerated rights by reference to “*reasonable limits*”.
58. However, unlike the Canadian Charter, s 36 of the South African Constitution sets out a list of factors to take into account in determining whether a law constitutes a reasonable limit, as follows:

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<sup>46</sup> [2004] 1 SCR 827 at [88].

<sup>47</sup> [2007] 2 S.C.R. 610.

<sup>48</sup> [1995] 3 S.C.R. 199.

*“The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including-*

- a. the nature of the right;*
- b. the importance of the purpose of the limitation;*
- c. the nature and extent of the limitation;*
- d. the relation between the limitation and its purpose; and*
- e. less restrictive means to achieve the purpose.*

*Except as provided in subsection (1) or in any other provision of the Constitution, no law may limit any right entrenched in the Bill of Rights.”*<sup>49</sup>

59. In one of its earliest decisions, the Constitutional Court of South Africa considered the application of this provision when striking down the death penalty.<sup>50</sup> In that case, the Court held that the applicant’s right not to be subject to cruel, inhuman and degrading punishment outweighed the state’s interest in the death penalty, which could not be justified under the equivalent of s 36 in the Interim Constitution. More recently, in *DPP Transvaal v Minister for Justice and Constitutional Development and others*,<sup>51</sup> Ngcobo J (for the Court) said:

*“The question of whether a right in the Bill of Rights has been violated generally involves a two-pronged enquiry. The first enquiry is whether the invalidated provision limits a right in the Bill of Rights. If the provision limits a right in the Bill of Rights, this right must be clearly identified. The second enquiry is whether the limitation is reasonable and justifiable under section 36(1) of the Constitution. Courts considering the constitutionality of a statutory provision should therefore adhere to this approach to constitutional adjudication.”*

### ***Limitation provisions in statutory bills of rights: UK, New Zealand, ACT and Victoria***

60. Perhaps more relevant to the current debate in Australia are the limitation provisions in the statutory bills of rights. The UK *Human Rights Act*, which incorporates the

<sup>49</sup> With some minor editorial changes, this list of factors to consider is now mirrored in s 28(2) of the *Human Rights Act 2004* (ACT).

<sup>50</sup> *S v Makwanyane* 1995 (2) SACR 1. For a detailed discussion of s 36, and an argument that the decision in *Makwanyane* signaled a divergence from the approach of the Supreme Court of Canada in *R v Oakes*, see Stu Woolman & Henk Botha, “Shared Constitutional Interpretation, An Appropriate Normative Framework & Hard Choices”, chapter 10 in Stu Woolman and Michael Bishop (eds), *Constitutional Conversations*, 2008, Pretoria University Law Press, available at [http://www.pulp.up.ac.za/pdf/2008\\_07/2008\\_07.pdf](http://www.pulp.up.ac.za/pdf/2008_07/2008_07.pdf).

<sup>51</sup> Case CCT 36/08; [2009] ZACC 8 at [114].

provisions of the ECHR, contains a number of limitation provisions within the articles themselves that establish particular rights, rather than by way of one overall provision such as in Canada and South Africa. A clear example is provided by article 8 of the ECHR:

“(1) *Everyone has the right to respect for his private and family life, his home and his correspondence.*

(2) *There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.”*

61. In *Kay v Lambeth London Borough Council*<sup>52</sup>, a challenge to a possession order based on article 8 was dismissed by the House of Lords, which held that the right of a public authority landlord to enforce a claim for possession under domestic law would, in most cases, automatically supply the justification required by article 8(2) for an interference with the occupier's right to respect for his home. The House of Lords noted that article 8 did not impose an obligation on each applicant for a possession order to plead or prove justification; rather, courts were to assume that domestic law struck the proper balance of the competing interests and was compatible with article 8.
62. *R v A (No 2)*<sup>53</sup> involved a challenge to a “rape shield” law, that is, a statutory provision limiting the types of questions that can be put to victims of sexual assault in cross-examination.<sup>54</sup> A defendant challenged the provision on the ground that it deprived him of a fair trial under article 6 of the ECHR. The House of Lords held that the challenged evidence was “*so relevant to the issue of consent that to exclude it would endanger the fairness of the trial under Article 6 of the Convention*”.<sup>55</sup>

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<sup>52</sup> [2006] 2 AC 465.

<sup>53</sup> [2002] 1 AC 45.

<sup>54</sup> For a NSW equivalent, see *Criminal Procedure Act 1986 (NSW)*, Part 5.

<sup>55</sup> [2002] 1 AC 45 (at [46] per Lord Steyn. In a discussion of the House of Lords’ decision in *R v A*, Conor Gearty raises questions about the “dialogue” between courts and legislatures: “*The common law courts have long regarded with suspicion attempts by the legislative branch to fix in advance the deployment of evidence in a criminal trial, and the issue has frequently been controversial in the field of sexual offences. But it is not impossible to view the statutory provision under scrutiny in R v A as reflecting a deliberate choice by the legislature that in a situation which is bound to be unfair to one side, the burden of unfairness should be placed upon the defendant. Now, under the guise of the Human Rights Act, s 3(1) ..., the House of Lords has placed*

63. A rape shield law had also been successfully challenged in an early Canadian Charter case, *R v Seaboyer; R v Gayme*<sup>56</sup> (*Seaboyer*), where an attempt to defend the law by reference to s 1 against a claim that it deprived the accused of his right to a fair trial was unsuccessful. The Court held that the impugned rape shield provision violated s 7 (“Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice”) and s 11(d) (right to a fair trial), and could not be justified under s 1. The Court stressed that in striking down the statutory limits on the use of sexual history evidence, it was not returning to the old common law. Rather, the Court noted that “evidence of sexual conduct and reputation in itself cannot be regarded as logically probative of either the complainant’s credibility or consent.” It followed that “the old rules which permitted evidence of sexual conduct and condoned invalid inferences from it solely for these purposes have no place in our law.”<sup>57</sup> The Court then outlined a set of guidelines (which it distinguished from “judicial legislation cast in stone”)<sup>58</sup> that placed limits on the use of prior sexual history evidence, both in terms of content, and in relation to the manner in which any such evidence that was admissible was to be used (eg the use of a voir dire and appropriate warnings to the jury).
64. Following the decision in *Seaboyer*, the Canadian Parliament enacted new legislation to replace the provisions that had been found to breach the Charter. In doing so, the Parliament followed the *guidelines* that Justice McLachlin (as she then was) had articulated for the Court in *Seaboyer*. In *R v Darrach*<sup>59</sup>, the Supreme Court of Canada held that the revised legislative scheme and the limits it placed on cross examination of alleged victims of sexual assault, was constitutional and did not offend against s 7 or s 11, and therefore did not require a s 1 justification.

### ***New Zealand***

65. Section 5 of the *New Zealand Bill of Rights Act 1990* provides:

“5. *Justified limitations-*

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that disadvantage squarely back on the complainant.” Conor Gearty, *Principles of Human Rights Adjudication*, OUP, 2004, at 159.

<sup>56</sup> [1991] 2 SCR 577.

<sup>57</sup> [1991] 2 SCR 577 at [95] – [96].

<sup>58</sup> [1991] 2 SCR 577 at [103] and see [106] for the guidelines.

<sup>59</sup> [2000] 2 SCR 443.

*Subject to section 4 of this Bill of Rights, the rights and freedoms contained in this Bill of Rights may be subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.”*

66. Section 4 in turn provides:

*“4. Other enactments not affected-*

*No court shall, in relation to any enactment (whether passed or made before or after the commencement of this Bill of Rights),-*

*(a) Hold any provision of the enactment to be impliedly repealed or revoked, or to be in any way invalid or ineffective; or*

*(b) Decline to apply any provision of the enactment-*

*by reason only that the provision is inconsistent with any provision of this Bill of Rights.”*

67. In New Zealand, there has been little judicial consideration of s 5.<sup>60</sup>

#### ***Human Rights Act 2004 (ACT)***

68. The ACT *Human Rights Act* provides in s 28 that *“Human Rights may be subject only to such reasonable limits set by Territory laws that can be demonstrably justified in a free and democratic society.”*

69. Section 28 was amended in 2008 to introduce a list of factors almost identical to those in s 36 of the South African Constitution to aid in the balancing exercise called for by s 28. There is little if any judicial consideration of s 28, though it was discussed obiter by the Court of Appeal in a case earlier in 2009.<sup>61</sup>

#### ***Victoria***

70. The Victorian Charter has the same form of limitation provision to that in the ACT Act. Section 7 provides as follows

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

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<sup>60</sup> The New Zealand courts have followed the approach of the Canadian Supreme Court in *R v Oakes* [1986] 1 SCR 103 - see *Moonen v Film and Literature Board of Review* [2002] 2 NZLR 9, *R v Hansen* [2007] 3 NZLR 1. See also the Hon Chief Justice Sian Elias, *Limiting Rights under a Human Rights Act: A New Zealand Perspective*” Address to the Australian Bill of Rights Conference, University of Melbourne Law School 3 October 2008.

<sup>61</sup> *R v Fearnside* [2009] ACTCA 3 esp at [93] et seq.

(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.”*

71. There has been little relevant judicial consideration of s 7 of the Victorian Charter.<sup>62</sup>

***Proposed limitation clause in an Australian charter of rights***

72. The Bar Association notes that human rights may be limited on “*rights by rights*” basis or by a general limitation clause applicable to all rights. The ICCPR takes a rights by rights approach. For example:

- article 9 guarantees a right not to be subjected to *arbitrary* arrest or detention;
- articles 12 and 13 guarantees certain rights for persons who are *lawfully* within the territory;
- article 17 guarantees the right not to be subject to *arbitrary* or *unlawful* interference with one’s privacy, family, or correspondence; and
- article 21 guarantees the right to *peaceful* assembly.

73. Other ICCPR rights – such as articles 18, 19, 22 – provide a limitation clause that requires the right to be limited for a particular purpose and by law. The limitation must be necessary to achieve its particular purpose. For example, article 2(2) of the ICCPR provides:

*“No restrictions may be placed on the exercise of this right other than those which are prescribed by law and which are necessary in a democratic society*

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<sup>62</sup> Section 7 was discussed by Hollingworth J in *Sabet v Medical Practitioners Board of Victoria* [2008] VSC 346, though the Court had already determined that there had been no limit placed on the applicant’s right to the presumption of innocence: see [185] et seq; and see also *R v Williams* [2007] VSC 2.



*in the interests of national security or public safety, public order (order public), the protection of public health or morals or the protection of the rights and freedoms of others.”*

74. For ICESCR rights, article 4 of the ICESCR provides a general limitation clause:

*“The States Parties to the present Covenant recognize that, in the enjoyment of those rights provided by the State in conformity with the present Covenant, the State may subject such rights only to such limitations as are determined by law only in so far as this may be compatible with the nature of these rights and solely for the purpose of promoting the general welfare in a democratic society.”*

75. Article 4 must also be read with article 2(1) of the ICESCR which recognizes that the rights in the covenant are subject to “*progressive realisation*” to the maximum of the available resources of the State.
76. As noted above, many national bills/charters of rights use a general limitation clause of the kind set out in article 2(2) of the ICCPR. This approach is appropriate for a charter of rights that includes economic, social and cultural rights. The Bar Association supports an Australian charter of rights that contains a general limitation clause applicable to all human rights, save for the right to be free from torture, the right not to be subjected to slavery, and freedom of thought. Those rights should not be subject to any form of limitation, and should be treated as absolute guarantees.
77. The Bar Association agrees with the Law Council’s submission that a limitation clause must be included in an Australian charter of rights.<sup>63</sup> The Bar Association notes that non-derogation of rights during an emergency and limitation of human rights generally are different concepts. The concept of non-derogation in article 4 of the ICCPR is concerned with the suspension of ICCPR rights generally in times of public emergency which threaten the life of the nation, and to the extent strictly required by the exigencies of the situation. Article 4 acknowledges that a State may suspend some human rights where it follows specified procedures and can justify the reasons by which such suspension was activated. A number of rights – those in articles 6, 7, 8, 11, 15, 16 and 18 – however, are expressed to be non-derogable.
78. Thus, article 4(2) of the ICCPR carves out specific rights and provides that even in times of emergency a State cannot derogate from the right to life, freedom from

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<sup>63</sup> See Part 2.2 of the Law Council’s submission.

torture, freedom from slavery, the right not be imprisoned merely on the ground of inability to fulfil a contractual obligation, retrospective criminal laws, recognition before the law and freedom of religion. These rights are often described as non-derogable. However, this does not mean that the rights themselves can never be limited. For example, freedom of religion is subject to limitations as provided by article 18(3) of the ICCPR, namely freedom to manifest one's religion or beliefs is subject to such limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others.

**QUESTION TWO: ARE THESE HUMAN RIGHTS CURRENTLY SUFFICIENTLY PROTECTED AND PROMOTED?**

79. The Bar Association considers that human rights are not currently sufficiently protected and promoted in Australia. The Bar Association supports the Law Council of Australia's submissions at Part 2.5 which provides a comprehensive overview of deficiencies of the Australian legal system in the protection of human rights.
80. In recent years, Australia has become increasingly isolated in the common law world due to the absence of a specific statutory or constitutionally based mechanism for the protection of human rights. Two factors particularly have caused human rights protection to be prominent in recent public discussions of rights. First, the United Kingdom, Victoria and the ACT have all enacted human rights charters. Second, all common law countries (including Australia at Commonwealth, State and Territory levels) have enacted increasingly draconian antiterrorism legislation in the wake of September 11, 2001.
81. After 2001, the Australian Parliament enacted amendments to the *Australian Security and Intelligence Organisation Act 1979* (Cth) and to the *Criminal Code 1995* (Cth), including wide new powers for the police and intelligence services. A number of legal bodies, including the Law Council of Australia and the Bar Association, have raised concerns about the human rights ramifications of the new measures. The *Anti-Terrorism Act (No 2) 2005* (Cth) sparked much debate about preventative detention (without trial), control orders and sedition. Further provisions provide powers to detain non-suspects for questioning and wide telecommunications interception powers.
82. The application of anti-terrorism and migration laws with respect to Dr Mohamed Haneef has drawn particular criticism from the Australian Bar Association and the Law Council of Australia, with concern expressed in relation to the lack of respect for the rule of law and Dr Haneef's human rights.
82. Lawyers have also been concerned about the new Federal laws which allow for executive certificates of evidence to be used in court by prosecutors, restrict the ability of counsel for defendants to obtain evidence proffered against an accused, and which require security clearance for defence counsel. The New South Wales

Parliament has enacted reciprocal and related legislation in its *Terrorism (Police Powers) Act 2002* (NSW), which provides *inter alia* additional search warrant powers in terrorism cases, preventative detention measures and increased powers for police to take DNA samples.

83. On 11 March 2009, without prior notice, the NSW Government introduced the *Law Enforcement (Powers and Responsibilities) Amendment (Search Powers) Bill 2009*, that extended the “*covert search warrants*” powers of the *Terrorism (Police Powers) Act* to a wide range of non-terrorism-related criminal offences carrying a maximum penalty of seven years imprisonment or more. The Bill authorises police to obtain a warrant from an “*eligible judge*” (the eligibility of particular judges to be determined by the executive; see further discussion below) to covertly enter and search premises, gaining access if necessary by covertly entering neighbouring premises, and not to inform the occupiers that the search had occurred for up to three years. The Government declined to publicly release an Ombudsman's review of the operation of the earlier terrorism legislation, thus disabling an informed community debate as to how these powers had impacted on basic human rights. The Act was passed on 31 March 2009.
84. On 3 April 2009, the NSW Parliament passed the *Crimes (Criminal Organisations Control) Act 2009* after less than 1 day of debate. That legislation has extraordinary effects upon freedom of speech and association as well as upon the ordinary machinery for the administration of justice. It is discussed further below.

### ***Current protection of human rights in Australia***

85. While Sir Anthony Mason AC QC has recognised that international law has always been a source of Australian domestic law,<sup>64</sup> international human rights laws are not automatically part of Australian law. They have no direct legal effect upon the rights

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<sup>64</sup> Mason A “International Law as a Source of Domestic Law” in Opeksin B and Rothwell D *International Law and Australian Federalism* Melbourne University Press, 1997 at 210.

and duties of individuals.<sup>65</sup> Nor can federal legislation, which is otherwise valid, be held invalid solely on the ground that it is inconsistent with international law.<sup>66</sup>

86. At present, the only way in which a person may directly seek redress for an alleged violation of the human rights treaties to which Australia is party is to submit a complaint to one of the United Nations committees, the competence of which to receive such complaints has been accepted by Australia. These are the so-called treaty bodies established under the ICCPR, CAT, CERD and CEDAW.
87. The First Optional Protocol to the ICCPR, to which Australia is a party, permits individuals to make complaints or “*communications*” to the Human Rights Committee, a body of independent experts established under the ICCPR. Complaints may only be made once all available remedies in the Australian domestic system have been exhausted. The Human Rights Committee receives communications in writing and, in response, submissions from the relevant country, and makes a decision on the papers.
88. Similar procedures have been accepted by Australia under CAT, CERD and most recently CEDAW.<sup>67</sup> While the decisions of such committees are structured like judicial decisions, they are not formally binding as a matter of international law. Nor is there any mechanism for their enforcement. Accordingly, the Australian Government (among others) has felt free to decline to comply with adverse decisions of human rights treaty bodies, and, in some cases to reject them outright.<sup>68</sup>
89. One argument advanced in the UK context – and equally applicable to Australia – is that the existence of a domestic bill or charter of rights allows complaints of human rights violations to be raised directly before domestic courts, and reduces the likelihood of a successful challenge being brought at the international level. That is, Australian courts would have the opportunity to remedy any alleged breach of rights,

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<sup>65</sup> *Kioa v West* (1985) 159 CLR 550 at 570, *S & M Motor Repairs Pty Ltd v Caltex (Oil) Pty Ltd* (1988) 12 NSWLR 358 at 580 - 2.

<sup>66</sup> *Chu Kheng Lim v Minister for Immigration* (1992) 176 CLR 1 at 37-8, 52 and 74, *Horta v Commonwealth* (1994) 181 CLR 183.

<sup>67</sup> It is expected that Australia will shortly accede to the Optional Protocol to the Convention on the Rights of Persons with Disabilities, which contains both an individual complaints procedure and an inquiry procedure.

<sup>68</sup> This is an important difference with the UK since, as a matter of international law, judgments of the European Court of Human Rights are binding. A failure to follow a decision would bring it into disrepute with the other members of the ECHR’s governing body, the Council of Europe. The Council’s members include all the members of the European Union.

rather than leaving aggrieved persons no recourse other than to approach a UN committee in Geneva.<sup>69</sup>

90. The current Australian federal model for the protection of human rights comprises the following elements:
- protections in international law, including monitoring by international committees or “*treaty bodies*”;
  - very limited federal Constitutional protection;
  - statutory schemes for the protection of specific rights;
  - common law protections and presumptions; and
  - institutions of Parliamentary democracy.
91. The Bar Association submits that the current protection of human rights in Australia is *ad hoc* and limited. It is ripe for rationalisation and for the development of a comprehensive approach similar to that in other common law countries that share Australia’s legal foundations.

***Constitutional protection and freedoms of speech, movement and assembly***

92. The Australian Constitution was not intended to be a source of human rights. Nor was it intended to protect the human rights of Australian citizens or those within the jurisdiction of Australia.<sup>70</sup>
93. The Constitution provides some limited express human rights protections: with respect to the acquisition of property on just terms (s 51(xxxi)), trial by jury for an indictable offence (s 80), freedom of religion (s 116), and non-discrimination between residents of States (s 117).

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<sup>69</sup> It should be noted that the European Court of Human Rights has held on a number of occasions that the declaration of incompatibility provided for under the UK *Human Rights Act* does not necessarily provide an effective remedy, and that therefore resort to litigation under the Act may not be necessary before a case can be taken to Strasbourg: for a recent review, see *Burden v United Kingdom*, European Court of Human Rights, Grand Chamber, judgment of 29 April 2008, paras 36-45. The same argument would apply in relation to the exhaustion requirement under the UN human rights treaty procedures.

<sup>70</sup> Williams G, *Human Rights under the Australian Constitution*, OUP Melbourne 1999.

94. Some of the implied rights found in the Constitution operate as a restraint on the Commonwealth's power to legislate in a manner which impairs freedom of political communication and freedom of movement.
95. Recent Australian constitutional jurisprudence has established that the implied freedom of political communication is not as extensive as freedom of speech or freedom of movement or assembly, as enshrined in the ICCPR. The test that has been adopted by the High Court for determining whether a particular law infringes the implied constitutional freedom of communication on political matters is twofold. The first question is whether the law effectively burdens freedom of communication about government or political matters either in its terms, operation or effect.<sup>71</sup> Such burdening is permissible if the second question is answered in the affirmative: whether the law is reasonably appropriate and adapted to serve a legitimate end in a manner which is compatible with the maintenance of the constitutionally prescribed system of representative and responsible Government.<sup>72</sup>

***Case study on the implied freedom of political communication – the APEC laws***

96. Section 24 of the *APEC Meeting (Police Powers) Act 2007* (NSW) permitted the removal of persons named as “*excludable persons*” on a list compiled by the Commissioner of Police under s 26 from areas of the Sydney CBD that were gazetted as “*APEC security areas*”. One of those persons, Padraic Gibson, wished to participate in a demonstration in the Sydney CBD. Gibson sought a declaration that ss 24(1)(g) and 26 of the legislation were beyond the power of the Parliament of NSW because they infringed the implied freedom of political communication.
97. The New South Wales Court of Appeal held that:

*“[T]he provisions under challenge here are appropriate to achieve the end of public safety and the safety of leaders of other countries and their accompanying parties who are present in Australia for the APEC meeting. It is relevant and significant that the legislation does not prohibit public protests by any person including persons on an “excluded persons list”. Rather, it provides for the potential exclusion of persons on the “excluded persons list” for a limited period in designated areas.*”

<sup>71</sup> *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 at 567.

<sup>72</sup> *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 at 567; *Coleman v Power* (2004) 220 CLR 1 at 77-78, 82.

*The ability to engage in protests and any other form of political communication both before, during and after the APEC period in any other part of the city or indeed, any other part of the State of New South Wales, is unaffected.*

*We consider, therefore, that there is no disproportionate effect on any burden of communication as recognised in Lange and the recognition of achieving the legitimate ends of the APEC Act are compatible with the maintenance of the system of representative and responsible government”.*<sup>73</sup>

98. The Court of Appeal’s decision suggests that the implied freedom of political communication in protecting freedom of speech and assembly is of at best limited utility.

### ***Further discussion of Constitutional protection***

99. Statutory *ultra vires* grounds often accompany a claim that a law infringes the implied freedom. The opportunities for the development of jurisprudence in respect of the implied freedom of communication on government and political matters have been impeded by judicial approaches that involve determination of the statutory *ultra vires* claim first, thus potentially removing the necessity of examining the law in light of the Constitution.<sup>74</sup> The result is that the implied constitutional freedom receives judicial attention in some, but not all, cases in which the exercise of human rights of expression, assembly and movement are in issue.
100. Recent jurisprudence concerning Chapter III of the Constitution may be a further source of human rights protections in the context of fair trial and procedural rights.<sup>75</sup> However, any such source of the right to a fair trial has no, or only limited, application to the States.
101. To the extent that State laws may impair human rights protected by Commonwealth law, s 109 of the Constitution operates to invalidate such State laws.<sup>76</sup>
102. The New South Wales Constitution does not expressly or impliedly deal with the human rights of individuals or groups vis-à-vis the State,<sup>77</sup> except as to the democratic

<sup>73</sup> *Padraic Gibson v Commissioner of Police* [2007] NSWCA 251 at [10]-[12] per Beazley, Giles and Ipp JA.

<sup>74</sup> For example, *Evans v New South Wales* (2008) 168 FCR 576.

<sup>75</sup> Hon Justice MH McHugh AC *Does Chapter III of the Constitution protect substantive as well as procedural rights?*, Sir Maurice Byers Lecture delivered on 17 October 2001.

<sup>76</sup> *Koowarta v Bjelke-Petersen* (1982) 153 CLR 168, and *Australian Postal Commission v Dao* (1987)70 ALR 449.



structures of NSW, for example in relation to elections, Parliament, the Governor and the judiciary. Such rights, whilst of vital importance to our democracy, do not exhaust the rights that the Bar Association considers should be protected in a charter of rights.

103. In summary, the protections available under the Commonwealth Constitution are limited. The Constitution in its present form is not an instrument which comprehensively articulates human rights, or is capable of securing their protection.

*Protection by specific statute*

104. Amongst federal laws there is no single enactment that comprehensively protects the human rights found in the international human rights instruments to which Australia is party. A multitude of statutes affect specific rights in different ways, the enumeration of which is beyond the scope of this discussion. The most significant should, however, be mentioned.
105. The *Human Rights and Equal Opportunity Commission Act 1986* (Cth) (**HREOC Act**) establishes a Commission, previously known as HREOC, now the Australian Human Rights Commission. The functions of the Commission are stipulated in s 11 to include dealing with complaints, inquiring into acts or practices that may be inconsistent with human rights, and reporting to the Attorney-General on laws that should be made by the Parliament or action that should be taken by the Commonwealth on matters relating to human rights. “*Human rights*” are defined to include the rights and freedoms recognised in the ICCPR. The ICCPR is Schedule 2 to the Act.
106. Complaints about a breach of human rights by a federal authority may be made to the Commission, which may investigate the complaint, make findings and report to the Attorney-General including making any recommendation. The report is to be laid before the House of Representatives, but any recommendation made by the Commission is not binding. Evidence suggests that due primarily to the lack of a

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<sup>77</sup> *Kable v DPP* (1995) 36 NSWLR 374 per Mahoney J at 388 and Clarke JA at 395).

binding decision, and the delays that occur, the procedure is seldom used.<sup>78</sup> Reports laid before Parliament attract little public attention.

107. The Commission is also responsible for investigating complaints of discrimination for alleged contraventions of federal anti-discrimination laws which incorporate, in part, some of the international instruments to which Australia is a party.
108. The federal statutes are the *Racial Discrimination Act 1975* (relying on CERD), the *Sex Discrimination Act 1984* (relying on CEDAW), *Disability Discrimination Act 1992* (relying on the ICCPR, the ICESCR and International Labour Organisation (ILO) Convention No 111, *Discrimination (Employment and Occupation) Convention 1958* ILO 111<sup>79</sup>), and the *Age Discrimination Act 2004* (relying on the ICCPR and ILO 111). If the Commission is unable to conciliate these complaints, proceedings may be commenced in the Federal Court or Federal Magistrates Court to have the complaint of discrimination determined.<sup>80</sup>
109. The suite of discrimination statutes mentioned above is the best example of a regime presently available which provides for enforcement of some human rights in federal law. Other Commonwealth enactments that provide for specific rights include the *Crimes (Torture) Act 1988*, the *Privacy Act 1988* and the *Human Rights (Sexual Conduct) Act 1994*. Further specific rights are provided in individual pieces of legislation. However, none of these provide a comprehensive charter for the protection of human rights. For example, s 138(3)(f) of the *Evidence Act 1995* (Cth) provides that evidence which may have been obtained in contravention of a person's rights under the ICCPR is a factor that a court may take into account when deciding whether to exercise its discretion to admit evidence obtained by an impropriety or contravention of Australian law.

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<sup>78</sup> In 2005-2006 less than 3% of 1400 complaints received related to ICCPR rights with the vast majority concerning federal discrimination statutes: *HREOC Annual Report 2005-2006* pp 70, 87. These statistics are consistent with previous years. Less than 9% of all complaints under the HREOC Act (excluding discrimination complaints but not limited to the ICCPR) were referred for inquiry and possible report: p 89. A total of 4 reports with respect to violations of the ICCPR were laid before Federal Parliament in 2005-2006: pp 92-94.

<sup>79</sup> The *Discrimination (Employment and Occupation) Convention 1958* is Schedule 1 to the HREOC Act.

<sup>80</sup> Section 46PO of the HREOC Act.

### *Statutory interpretation*

110. General principles of statutory interpretation may also provide some incidental protection for human rights by permitting courts to interpret statutory provisions in accordance with human rights standards.
111. It is a long-established principle that a statute is to be interpreted and applied, so far as its language permits, in a manner which is consistent with established rules of international law and which accords with Australia's treaty obligations.<sup>81</sup> The approach is not limited in its application to ambiguous statutory provisions.<sup>82</sup> Rather, wherever the language of a statute is susceptible of a construction which is consistent with the terms of the relevant international instrument and the obligations which it imposes on Australia, that construction must prevail.<sup>83</sup>
112. The Courts have recognised the following principles of interpretation as applicable where proceedings involve the interpretation and application of principles of international human rights law:
- (i) where the provisions of an international treaty are transposed into a statute in whole or in part, the language of the statute should bear the same meaning as the treaty;<sup>84</sup>
  - (ii) when ascertaining the meaning of an international treaty, primacy should be given to the text of the international treaty with consideration of the context, objects and purposes of the treaty;<sup>85</sup>
  - (iii) the approach to interpreting an international treaty is more liberal than that adopted by a court construing an entirely domestic statute. It is undertaken in a

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<sup>81</sup> *Jumbunna Coal Mine NL v Victorian Coal Miners' Association* (1908) 6 CLR 309 at 363; *Lim* at 38 per Brennan, Deane and Dawson JJ; *Dietrich v The Queen* (1992) 177 CLR 292 at 306 per Mason CJ and McHugh J; *John Fairfax Publications v Doe* (1995) 37 NSWLR 81 at 90 per Gleeson CJ. See also *Maxwell on the Interpretation of Statutes* (7th Ed, 1929) at 127; Pearce & Geddes, *Statutory Interpretation in Australia* (5th ed 2001) at [5.14].

<sup>82</sup> *Brown v Classification Review Board* (1998) 154 ALR 67 at 78 per French J; *Secretary of State, Ex Parte Simms* [2000] 2 AC 115 at 130 per Lord Steyn, 131 per Lord Hoffman.

<sup>83</sup> *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273 at 287 per Mason CJ and Deane J. See also *Kartinyeri v Commonwealth* (1998) 195 CLR 337 at 384 per Gummow and Hayne JJ; Spigelman, 'Access to Justice and Human Rights Treaties' (2000) 22 *Sydney Law Review* 141 at 149.

<sup>84</sup> *Applicant A v Minister for Immigration and Ethnic Affairs* (1997) 190 CLR 225, 230-31 (Brennan CJ).

<sup>85</sup> *Pilkington (Australia) Ltd v Minister of State for Justice & Customs* (2002) 127 FCR 92, [26] (Mansfield, Conti and Allsop JJ).

manner unconstrained by technical local rules or precedent, but on broad principles of “*general acceptance*”;<sup>86</sup>

- (iv) where it is necessary to discern the meaning of a provision of an international treaty, a court may apply the international rules applicable to treaty interpretation, namely articles 31 and 32 of the 1969 *Vienna Convention on the Law of Treaties*.<sup>87</sup> A court may also be assisted by reference to the jurisprudence of specialist international courts and tribunals that have construed treaty provisions;<sup>88</sup>
- (v) there is a presumption that Parliament intended to legislate in accordance with its international obligations;<sup>89</sup>
- (vi) where legislation has been enacted pursuant to, or in contemplation of, the assumption of international obligations under a treaty or international convention, to the extent the language permits a court should favour a construction which accords with Australia's obligations;<sup>90</sup>
- (vii) where the statutory provisions are designed to give effect to international human rights treaties, the statutory provisions should be beneficially construed;<sup>91</sup>
- (viii) a court should not impute to the legislature an intention to abrogate or curtail fundamental rights or freedoms unless such an intention is clearly manifested by unmistakable and unambiguous language. General words will rarely be sufficient for that purpose. There must be a clear indication that the legislature has directed its attention to the rights or freedoms in question, and has

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<sup>86</sup> *Pilkington (Australia) Ltd* (2002) 127 FCR 92 [26] and authorities cited therein.

<sup>87</sup> Entry into force for Australia and generally on 27 January 1980. See *Minister for Foreign Affairs and Trade v Magno* (1992) 37 FCR 298, 303 – 305 (Gummow J).

<sup>88</sup> *AB v Registrar of Births, Deaths and Marriages* [2007] FCAFC 140, [14], [16] (Black CJ), [66]ff (Kenny J with Black CJ and Gyles J agreeing).

<sup>89</sup> *Minister for Foreign Affairs and Trade v Magno* (1992) 37 FCR 298, 305 (Gummow J).

<sup>90</sup> See footnote 79 above; also *R & R Fazzolari Pty Limited v Parramatta City Council*; *Mac's Pty Limited v Parramatta City Council* [2009] HCA 12 at [43], [44] French CJ; *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476, 492 [28] (Gleeson CJ).

<sup>91</sup> *IW v City of Perth* (1997) 191 CLR 1, 14 (Brennan CJ and McHugh J), 22-23 (Gaudron J), 27 (Toohey J), 39 and 41-42 (Gummow J), 58 (Kirby J). See also *Acts Interpretation Act 1901* (Cth) s 15AA.

consciously decided upon abrogation or curtailment;<sup>92</sup>

- (ix) exemptions and other provisions which restrict rights should be strictly construed;<sup>93</sup> and
  - (x) in the case of any conflict, the domestic law prevails over the requirements of the international treaty.<sup>94</sup>
113. Both the former Chief Justice of Australia, the Honourable Murray Gleeson AC QC in his 2000 Boyer Lectures, *The Rule of Law and the Constitution*, and more recently the Chief Justice of New South Wales, the Honourable James Spigelman AC, have commented that the greater salience being given to human rights considerations is reflected in the emergence of what has come to be called “*the principle of legality*”.<sup>95</sup>
114. The principle of legality identifies the higher purpose of a number of principles of the law of statutory interpretation. The principle of legality was introduced into contemporary discourse by Lord Steyn, being a phrase he found in the 4th edition of *Halsburys Laws of England*, where it was employed as equivalent to the traditional phrase “*the rule of law*”.<sup>96</sup> It was subsequently adopted in Australia, first by former Chief Justice Gleeson writing extra-judicially and subsequently in a number of judgments: see *Al-Kateb v Godwin*<sup>97</sup> and *Electrolux Home Products Pty Ltd v Australian Workers’ Union*.<sup>98</sup> It has also been adopted by Chief Justice Elias in New Zealand.<sup>99</sup>

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<sup>92</sup> *K-Generation Pty Limited v Liquor Licensing Court* [2009] HCA 4 at [47] (French J), *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476, 492 [29] (Gleeson CJ) citing *Coco v The Queen* (1994) 179 CLR 427 at 437 per Mason CJ, Brennan, Gaudron and McHugh JJ, *R v Home Secretary; Ex parte Simms* [2000] 2 AC 115 at 131 and *Annetts v McCann* (1990) 170 CLR 596 at 598 per Mason CJ, Deane and McHugh JJ.

<sup>93</sup> *X v Commonwealth* (1999) 200 CLR 177, 223 (Kirby J).

<sup>94</sup> *Minister for Immigration and Multicultural and Indigenous Affairs v QAAH of 2004* (2006) 81 ALJR 304, [66] (Kirby J).

<sup>95</sup> Murray Gleeson, *The Rule of Law and the Constitution: Boyer Lectures* (2000) ABC Books pp 2, 5. For example, “*Statutory Interpretation And Human Rights*”, address to the Pacific Judicial Conference by the Hon JJ Spigelman AC, Vanuatu, 26 July 2005; also JJ Spigelman, “Principle of Legality and the Clear Statement of Principle” (2005) 79 ALJ 769.

<sup>96</sup> See *R v Secretary of State for the Home Office; Ex parte Pierson* [1998] AC 539 at 587. *Halsbury’s Laws of England* (4th ed) Reissue vol 8(2) (1996) para 6.

<sup>97</sup> (2004) 219 CLR 562 at [19].

<sup>98</sup> (2004) 209 ALR 116 at [21], [23].

<sup>99</sup> *R v Pora* [2001] 2 NZLR 37 at 53.

115. In the case which established the principle of legality as a unifying principle in English law, *R v Secretary of State for the Home Department; Ex parte Simms*,<sup>100</sup> Lord Hoffman said:

*“[T]he principle of legality means that Parliament must squarely confront what it is doing and accept the political costs. Fundamental rights cannot be overridden by general or ambiguous words. This is because there is too great a risk that the full implications of their unqualified meaning may have passed unnoticed in the democratic process. In the absence of express language or necessary implication to the contrary, the courts therefore presume that even the most general words were intended to be subject to the basic rights of the individual. In this way the courts of the United Kingdom, though acknowledging the sovereignty of Parliament, apply principles of constitutionality little different from those which exist in countries where the power of the legislature is expressly limited by a constitutional document.”*<sup>101</sup>

116. This passage has been quoted with approval by, *inter alia*, Gleeson CJ, Kirby J, Spigelman CJ, Elias CJ and Tipping J.<sup>102</sup>
117. In a speech published in the *Australian Law Journal*, Spigelman CJ gave as manifestations of the principle of legality the presumptions that Parliament did not intend to invade fundamental rights, freedoms and immunities; to restrict access to the courts; to abrogate the protection of legal professional privilege; to exclude the right to claims of self-incrimination; to permit a court to extend the scope of a penal statute; to deny procedural fairness to persons affected by the exercise of public power; to give immunities for governmental agencies a wide application; to interfere with vested property rights; to alienate property without compensation; and to interfere with equality of religion.<sup>103</sup> The Bar Association submits that the limits of such principles of statutory interpretation in protecting fundamental rights were clearly exhibited in the decision of the High Court in *Al-Kateb v Godwin*.<sup>104</sup> There, the majority held that the language of the relevant statutory provisions could not yield to a construction consistent with international human rights norms and jurisprudence. Hence, Mr Al-Kateb was required to be detained indefinitely in immigration detention. The decision is discussed further below in this submission.

<sup>100</sup> [2000] 2 AC 115.

<sup>101</sup> At 131.

<sup>102</sup> In *Plaintiff S157/2002 v The Commonwealth* (2003) 211 CLR 476 at 30; *Al-Kateb* supra at [19] at fn 11, by Kirby J in *Daniels Corporation v ACCC* (2002) 213 CLR 543 at 582, by Spigelman CJ in *Lodhi v Regina* [2006] NSWCCA 121 at [32]ff, and by Elias CJ and Tipping J in *R v Pora* [2001] 2 NZLR 37 at 53.

<sup>103</sup> "Principle of Legality and the Clear Statement of Principle" (2005) 79 ALJ 769.

<sup>104</sup> (2004) 219 CLR 562, per McHugh J at [35]; Hayne J at [239]; Callinan at [298].

118. Likewise, in *Re Woolley*<sup>105</sup> the High Court considered that Parliament had made clear its intention to permit the detention of infant unlawful non-citizens, notwithstanding Australia's obligations under the ICCPR and the CRC, and a body of international jurisprudence favouring the argument that the mandatory detention of infant asylum seekers is arbitrary.

***Common law protections and presumptions***

119. The common law has an important albeit limited role to play in the protection of human rights. It is settled, for example, that a common law right may not be overridden by statute unless by clear words or necessary intendment.<sup>106</sup> The right to liberty and the right to own property are examples of such well recognised common law rights. The former is protected by the ancient writ of habeas corpus preserved in NSW by the *Supreme Court Act 1970*.<sup>107</sup> Others are in foundation statutes such as *Magna Carta 1297*, *Habeas Corpus Acts* of 1640, 1679 and 1816, the *Act of Settlement* and the *Bill of Rights Act 1688*.<sup>108</sup> Further common law rights have received recognition more recently, such as the existence of native title rights in *Mabo v The State of Queensland*<sup>109</sup>, and the right to a fair trial in *Dietrich v R*.<sup>110</sup> Other attempts to have rights such as privacy and freedom of speech confirmed as common law rights have failed.
120. The Bar Association submits that whilst the importance of the common law in protecting certain rights should not be underestimated, at the same time it must be recognised that the scope of such protection is limited, and the rights vulnerable to a legislature intent on their abolition or limitation.
121. Further, whilst in theory the common law may adapt to changing circumstances, in practice there are very few examples where courts have used human rights principles to develop the common law, notwithstanding Brennan J's observation in *Mabo (No 2)*

<sup>105</sup> (2004) 210 ALR 369, [2004] HCA 49 per McHugh J at [107] ff, Kirby J at [195] ff.

<sup>106</sup> See, for example, *Coco v Queen* (1993) 179 CLR 427 at 437.

<sup>107</sup> Section 71.

<sup>108</sup> See s 6 of the *Imperial Acts Application Act 1969* and Schedule 2 therein.

<sup>109</sup> (1992) 175 CLR 1.

<sup>110</sup> (1992) 177 CLR 292.

that “[a] *common law doctrine founded on unjust discrimination in the enjoyment of civil and political rights demands reconsideration.*”<sup>111</sup>

### ***Administrative law and human rights***

122. In 1995, the High Court held in *Minister for Immigration and Ethnic Affairs v Teoh*<sup>112</sup> that the ratification of an international instrument may create a legitimate expectation that an administrative decision-maker will have regard to relevant provisions of the instrument. However, the decision in *Teoh* has been controversial. There have been a number of attempts to legislate against the presumption of such a legitimate expectation. A number of members of the present High Court indicated in *Minister for Immigration; ex parte Lam* that further attention was required to the basis upon which *Teoh* rests.<sup>113</sup>

### ***Case study examples***

123. The following case studies highlight deficiencies in existing Australian laws in relation to the protection of human rights.

### ***Freedom from arbitrary detention – anti-terrorism laws and the detention of Dr Haneef***

124. The Inquiry conducted by the Honourable John Clarke QC into the case of Dr Mohamed Haneef was charged *inter alia* to examine and report on “*any deficiencies in the relevant laws or administrative and operational procedures and arrangements of the Commonwealth and its agencies*” under which Dr Haneef was arrested, detained and charged in 2007.<sup>114</sup>
125. One of the key issues reported on by the Clarke Inquiry was the effect of provisions introduced into the *Crimes Act* 1914 (Cth) on 1 July 2004 to govern investigation periods and the extension of these: see ss 23CA(8)(m) and s 23DA. While under s 23CA(4) the investigation period is normally 4 hours, as the Clarke Inquiry found, a person detained for the purpose of investigating whether he or she had committed a

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<sup>111</sup> (1992) 175 CLR 1 at 42.

<sup>112</sup> (1995) 183 CLR 273, per Mason CJ and Deane J.

<sup>113</sup> (2003) 214 CLR 1. See, for example, McHugh and Gummow JJ at [97] to [102].

<sup>114</sup> Report of the Inquiry into the Case of Dr Mohamed Haneef (Vol 1), p 1.



terrorism offence can potentially be detained indefinitely, without charge, by reference to ss 23CA(8)(m) and 23DA.

126. Dr Haneef was detained for a total of 264 hours, or 11 days. During this period, a magistrate granted the maximum extension of the investigation period of 20 hours under s 23DA, and three successful applications were made under s 23CA, resulting in a further 192 hours.
127. The Hon Mr Clarke QC commented that “*the most obvious deficiency in Part 1C of the Crimes Act is the absence of a cap on, or limit to, the amount of dead time that may be specified*”.<sup>115</sup> He further observed that “*the concept of uncapped detention time is unacceptable to the majority of the community and involves far too great an intrusion on the liberty of citizens and non-citizens alike*.”<sup>116</sup> Whilst some thought that “*judicial oversight was a sufficient substitute for a cap*” Mr Clarke did not share that view.<sup>117</sup>
128. The Bar Association shares Mr Clarke’s concerns. It considers that the provisions of the *anti-terrorism* laws concerning periods of detention clearly infringe the right to liberty and to freedom from arbitrary detention.

***Freedom from arbitrary detention: migration laws***

129. The case of *Al-Kateb v Godwin*<sup>118</sup> has been referred to above. In that case, a majority of the High Court held that the plain words of the *Migration Act 1958* (Cth) required the indefinite detention of an unlawful non-citizen when there was no real prospect of his removal from Australia. The majority held that it was not open to construe the relevant provisions of the *Migration Act* consistently with Australia's obligations under the ICCPR, and in particular the right to liberty and prohibition on arbitrary detention.
130. As discussed further below, a member of the majority McHugh J, writing since his retirement from the High Court, has described the result in the decision as one he deplored and regards as tragic.

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<sup>115</sup> Report of the Inquiry into the Case of Dr Mohamed Haneef (Vol 1), p 248.

<sup>116</sup> Report of the Inquiry into the Case of Dr Mohamed Haneef (Vol 1), p 248.

<sup>117</sup> Report of the Inquiry into the Case of Dr Mohamed Haneef (Vol 1), p 249.

<sup>118</sup> (2004) 219 CLR 562.

***The right to silence – the ABCC***

131. Section 52 of the *Building and Construction Industry Improvement Act 2005* (Cth) confers upon the Australian Building and Construction Commissioner extraordinary powers to obtain information. For persons served with a notice to provide information, documents, or attend for an examination, it is an offence to fail to provide that information, or documents, or to fail to take the oath or affirmation, or to refuse to answer questions: s 52(6). The privilege against self incrimination is explicitly abrogated: s 53(1)(b).
132. As Professor George Williams has noted:

*“This power could be used to require a person to: reveal all their phone and email records, whether of a business or personal nature; report not only on their own activities, but those of their fellow workers; reveal their membership of an organisation, such as a union; report on discussions in private union meeting or other meetings of workers. The provisions can be applied not only to a person suspected of breaching the law, but to: workers in the building industry not in any way suspected of wrongdoing; innocent bystanders; the families, including children of any age, of workers in the industry; journalists and academics (or even, to take what might seem a farfetched example, a priest regarding what someone has told them in the confession box).”*<sup>119</sup>

133. The extraordinary powers conferred upon the Commissioner run counter to the long established right to silence, and threaten freedoms of speech, assembly and association.

***Protection of human rights in New South Wales***

134. The patchwork of human rights protections available in the federal sphere is mirrored in New South Wales. There is no comprehensive instrument protecting human rights. Instead, there are *ad hoc* and limited protections, which vary according to the nature of the right and the status of the person. In New South Wales, unlike the ACT and Victoria, there is no State charter or bill of rights.
135. In addition to federal anti-discrimination protections, there is in New South Wales the *Anti-Discrimination Act 1977* (NSW) (**the ADA**) which prohibits discrimination on

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<sup>119</sup> G Williams “*The Building and Construction Commission: An appropriate use of public power?*” Speech to the Forum on Industrial Laws applying in the Australian Construction Industry, convened at the National Press Club in Canberra on 25 August 2008 [HTTP://EVATT.LABOR.NET.AU/PUBLICATIONS/PAPERS/203.HTML](http://EVATT.LABOR.NET.AU/PUBLICATIONS/PAPERS/203.HTML)

certain grounds, some of which are not covered in the federal statutes.<sup>120</sup> The ADA establishes an Anti-Discrimination Board, which does not have a general human rights remit, and is limited to the conciliation of discrimination complaints and certain inquiries. The Anti-Discrimination Board does not have powers akin to those of the Australian Human Rights Commission (formerly HREOC) to investigate and report on contraventions of the ICCPR.

136. The New South Wales Court of Appeal<sup>121</sup> has not accepted a fundamental rights doctrine described by Sir Robin Cooke in *Fraser v State Services Commission*<sup>122</sup> as those “common law rights [which] may go so deep that even Parliament cannot be accepted by the Courts to have destroyed them.” In the *BLF Case*, the Court of Appeal rejected the availability of a doctrine of fundamental rights to strike down legislation (used in that case to deregister the Builders Labourers Federation).
137. The *parens patriae* jurisdiction of the NSW Supreme Court allows for the protection of certain persons who are particularly vulnerable.<sup>123</sup> The jurisdiction is limited to narrow classes of persons (for example, minors and the mentally ill), and may be characterised as welfare-oriented rather than rights-oriented. The jurisdiction interacts with various related powers such as those under the *Protected Estates Act 1983* (whether a person is capable of managing their own affairs), the *Guardianship Act 1987*, Part XVI Div 2 of the *Conveyancing Act 1919* (powers of attorney), and the *Mental Health Act 2007* (discharge of patients).
138. The writ of *habeas corpus* generally maintains its strength in New South Wales<sup>124</sup>, however its expansion to permit judicial review of the conditions of prisoners in detention was rejected by the New South Wales Court of Appeal in a case concerning the provision of condoms to prisoners to prevent contraction of HIV/AIDS.<sup>125</sup>
139. The *Privacy and Personal Information Protection Act 1998* (NSW) creates rights in relation to the protection of personal information held by New South Wales agencies, but its protection of privacy rights is limited.

<sup>120</sup> Such as homosexuality, transgender and HIV/AIDS.

<sup>121</sup> *BLF v Minister Industrial Relations* (1986) 7 NSWLR 372 at 387 per Street CJ, 405 per Kirby P.

<sup>122</sup> [1984] 1 NZLR 116 at 121.

<sup>123</sup> For a recent elaboration, see *Director-General, Department of Community Services; Re Thomas* [2009] NSWSC 217 at [22]-[38].

<sup>124</sup> Section 71 *Supreme Court Act 1970*.

<sup>125</sup> *Prisoners A to XX v State of NSW* (1995) 38 NSWLR 622.

140. Following the 2001 Standing Committee’s 2001 Inquiry into a New South Wales Bill of Rights, the New South Wales Parliament established a Scrutiny of Bills Committee which was to examine and report to Parliament on whether New South Wales legislation “*unduly trespasses on personal rights and liberties*”.<sup>126</sup> While the Committee has reported on some such trespasses, these have concerned a relatively limited number of rights, and have not taken place as part of an articulated and coherent human rights analysis. In addition, the process has been avoided on a number of occasions, effectively preventing any detailed Parliamentary consideration of the human rights implications of important bills. The process has also been ineffective in influencing the amendment of legislation in a number of cases where the bill has been particularly politically contentious. A number of bills with human rights implications have been passed within 48 hours of introduction, providing insufficient time for the Committee to consider and report.<sup>127</sup> The *Crimes (Serious Offenders) Bill 2006* is an example. The Committee later voiced its concerns that the bill adversely affected rights concerning retrospectivity, deprivation of liberty, the criminal standard of proof, double jeopardy and the disclosure of privileged communications.<sup>128</sup>

***The NSW laws about organisations: the so-called “bikie” laws***

141. The trend of rapid introduction and passage of legislation has continued in New South Wales with the recent passage of the *Crimes (Criminal Organisations Control) Act 2009*, which as noted above was passed less than 24 hours after its introduction.<sup>129</sup> The Legislation Review Committee was able to report only after the enactment of the legislation, and drew attention to a range of significant human rights issues that were raised by the Act.<sup>130</sup> The Act permits the Police Commissioner to apply to an “*eligible judge*” (one personally vetted by the Attorney General by way of a

<sup>126</sup> Section 8A of the *Legislation Review Act 1987*.

<sup>127</sup> See p 3 of the Committee’s *Annual Review 2005-2006*.

<sup>128</sup> *Ibid.* With respect to less urgent bills, a process of dialogue between Committee and Government has occurred: see comments with respect to the *Crimes (appeal and Review) Amendment (Double Jeopardy) Bill 2006* in *Legislation Review Digest 15 of 2006*.

<sup>129</sup> The Bill was introduced into and passed by both Houses on 2 April 2009, and received assent on 3 April 2009.

<sup>130</sup> Legislation Review Committee, *Legislation Review Digest No 5 of 2009*, 4 May 2009. Amendments to the Act were introduced into Parliament on 6 May 2009 in the form of the *Criminal Organisations Legislation Amendment Bill 2009*, and were passed by the Legislative Assembly on 6 May, and by the Legislative Council on 13 May 2009. The Legislation Review Committee reported its concerns about the content of the amendment Bill on 12 May 2009: *Legislation Review Digest No 6 of 2009*, 12 May 2009.

declaration to that effect under s 5) for a declaration that a particular organisation is a “*declared organisation*” under the Act: s 6. A hearing is held, but the Police Commissioner may object to any person specified as a member of the organisation being present while “*criminal intelligence*” is disclosed: s 8(3). Further, a judge who makes a declaration or a decision on an application is not required to give reasons: s 13(2). Even if the judge does make a declaration or a decision, he or she must maintain the confidentiality of the “*criminal intelligence*” information: s 28.

142. The effect of a declaration or decision that an organisation is a declared organisation is that the Court may then make a control order against a person who is a member of the declared organisation, including an interim control order, which may be made in the absence of the person. Such a person is a “*controlled member*”. Section 26(1) provides that a controlled member of a declared organisation who “*associates*” with another controlled member of the declared organisation is guilty of an offence. The penalty is up to 2 years for a first offence or 5 years for any subsequent offence. A defendant bears an onus of establishing, in relation to particular kinds of associations (such as between close family members) that the association is “*reasonable in the circumstances*”: s 26(5). “*Associate*” is defined to mean “*to be in company with*” or to “*communicate by any means*”: s 3. The prosecution is not required to provide any particular reason for the association.
143. Aside from the procedural lopsidedness (and unfairness) of the process of obtaining a declaration and a control order, including the fact that the intended controlled member may never have the opportunity to know the case against him or her, the legislation clearly burdens the freedom of association with other persons.

***Responding to the arguments against an Australian charter of rights: Criticisms of bills/charters of rights, and Lord Bingham’s response***

144. Proposals for a charter or bill of rights in Australia have attracted criticism. The Bar Association considers that much of this criticism is misconceived and has been the product of misrepresentation and misunderstanding. Nonetheless, some of the points raised are serious and require a response.
145. In an important lecture entitled “*Dignity, Fairness and Good Government: The Role of a Human Rights Act*”, delivered at a forum hosted by the Supreme Court of New

South Wales and the New South Wales Bar Association on 11 December 2008, Lord Bingham, Senior Law Lord, addressed the main criticisms which have been directed at the UK *Human Rights Act 1988*. Many of the points made by Lord Bingham are pertinent to the current debate in Australia.

*No need for a bill of rights?*

146. The first criticism identified by Lord Bingham is that it is sometimes argued that the UK *Human Rights Act* is unnecessary, as common law and statute can readily be interpreted and applied to provide the protection that is needed. The same argument is made in Australia along the lines of “*If it ain’t broke don’t fix it*”.
147. Lord Bingham’s response to such arguments is that whilst this is true up to a point, the common law and statute have not always provided adequate protection, as evidenced by the British record of failure before the European Court of Human Rights (**ECHR**) in Strasbourg before 2000, when the *Human Rights Act* came into force in the United Kingdom. This submission has likewise sought to identify some of the limitations of common law protections and presumptions, and principles of statutory interpretation in protecting fundamental human rights in Australia.
148. Further, although the supervisory machinery of the UN human rights committees or treaty bodies differs structurally from the compulsory jurisdiction of the ECHR, it is also relevant that Australia has suffered some significant losses before those treaty bodies competent to receive individual communications from persons subject to Australian jurisdiction. Examples have been provided above in this submission. One example is *Toonen v Australia*,<sup>131</sup> the first decision after Australia’s accession to the First Optional Protocol to the ICCPR in 1991. In that case, the Human Rights Committee concluded that provisions of the *Tasmanian Criminal Code* (ss 122(a) and (c) and 123) which criminalised all sexual contact between consenting male adults in private breached article 17 of the ICCPR.

*Parliamentary sovereignty*

149. The second criticism is that the effect of the UK *Human Rights Act* is to undermine the sovereignty of Parliament. Lord Bingham does not find this point entirely easy to

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<sup>131</sup> Views on Communication, No 488/1992, adopted 31 March 1994.

understand, especially having regard to the fact that the Act was carefully devised to preserve parliamentary sovereignty. Lord Bingham refers in particular to the device of declarations of incompatibility employed in the UK Act which do not affect the validity of the statute in question, and hence preserve parliamentary sovereignty.<sup>132</sup>

150. Earlier debate in Australia about declarations of incompatibility and the so-called “*dialogue model*” (discussed below in this submission) was attended by some doubt about whether in the different constitutional context in Australia, such a model would be within federal constitutional power.
151. However, on 22 April 2009, a Roundtable on a Human Rights Act and the Constitution, hosted by the Australian Human Rights Commission, confirmed the constitutionality of a “*finding of inconsistency*” mechanism (discussed further below) which, like declarations of incompatibility, would not result in any invalidity. According to the statement issued by the participants at the roundtable, entitled “*Constitutional validity of an Australian Human Rights Act*”, if a court found that it could not interpret a law of the Commonwealth in a way that is consistent with the rights identified in the Act, a statutory process could apply to bring this finding to the attention of Federal Parliament and require a government response.
152. Under this model, the courts do not have the last say. The most they can do is make a finding of inconsistency in response to which, as the Honourable Sir Gerard Brennan AC KBE QC has observed, the “*political branches of government may repeal, amend or leave standing the incompatible provision. Political responsibility remains with the political branches. The traditional separation of powers is unaffected*”.<sup>133</sup>

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<sup>132</sup> It should also be noted that, in relation to the powers of the Scottish National Assembly and the Welsh Assembly, the constitutional settlement of which the UK *Human Rights Act* forms a part limits the powers of those legislative bodies by reference ECHR, so that a legislative instrument adopted by them that is inconsistent with ECHR rights is invalid on constitutional *ultra vires* grounds. See s 29 of the *Scotland Act 1998*, which provides:

“(1) An Act of the Scottish Parliament is not law so far as any provision of the Act is outside the legislative competence of the Parliament.

(2) A provision is outside that competence so far as any of the following paragraphs apply—

...

(d) it is incompatible with any of the Convention rights or with Community law,”

See the discussion by the Inner House of the Court of Session in *Somerville & Ors v The Scottish Ministers* [2006] ScotCS CSIH 52. In relation to Wales, see the similar provision made by s108(6) of the *Government of Wales Act 2006*.

<sup>133</sup> Hon Sir Gerard Brennan, “The Constitution, Good Government and Human Rights” (12 March 2008), at 22.

153. The Honourable Michael McHugh AC QC has suggested another model which proceeds on the basis of direct incorporation of the ICCPR and the ICESCR. The Bar Association commends this model (discussed below further) to the National Human Rights Consultation.
154. Such a model would give effect to Australia's international treaty obligations by empowering courts invested with federal jurisdiction to hold that State and Territory legislation that is inconsistent with the human rights legislation is invalid, and that federal legislation is to be read subject to the *Bill of Rights Act* that gives effect to those international covenants. Mr McHugh suggests that a human rights legislative model on these lines would have only a minimal effect on parliamentary sovereignty. Under such model, it would be open to the Parliament of the Commonwealth to insert in any federal legislation a clause requiring the courts to give effect to the particular legislation notwithstanding the enactment of the human rights legislation. And, of course, it would be open to the Parliament after any decision with which it disagreed to insert such a clause in the legislation which the court had said should be ignored in determining rights and obligations.

*Undemocratic?*

155. A third criticism of the UK *Human Rights Act* to which Lord Bingham refers is that the process established by the Act is undemocratic since it permits decisions of the nation's representatives in Parliament to be challenged by unelected judges. The same criticism is made in Australia by opponents to a bill of rights. For example, Sir Harry Gibbs has expressed the position as follows:

*"... it is certainly not democratic that decisions on matters of social and economic policy should be made by unelected judges who are not accountable for their decisions except to their own consciences."*<sup>134</sup>

156. In the context of debate in the United Kingdom, Lord Bingham's response to such criticism is as follows:

*"But if one asks what authority these unelected judges have for departing from their usual role of seeking to give the words of a statute the meaning which Parliament intended its words to bear, the answer is clear: they have the authority of a mandatory instruction issued to them by Parliament itself. To*

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<sup>134</sup> Samuel Griffith Society "Chapter Seven: Does Australia Need a Bill of Rights?" (Vol 6).



*determine whether it is possible to read and give effect to primary and subordinate legislation in a way which is compatible with Convention rights of course calls for what may be a difficult and controversial exercise of judgment, but judgment is what judges are paid to exercise, even if unelected.”*

157. At the same time, Lord Bingham acknowledges the obvious truth from which the Bar Association does not resile: in one sense any bill of rights may have some undemocratic elements in that it is counter-majoritarian. Its purpose is to give a measure of protection to minorities who lack the strength and the representation to obtain protection through the political process: prisoners, mental patients, Roma, gay men and lesbians, asylum-seekers, despised racial or religious minorities and the like. As Chief Justice Sir John Latham observed in *Adelaide Company of Jehovah’s Witnesses Inc v The Commonwealth*<sup>135</sup> of s 116 of the Constitution, it should not be forgotten that such a provision is not required for the protection of the religion of a majority: *“The religion of the majority of the people can look after itself. Section 116 is required to protect the religion (or absence of religion) of minorities, and, in particular, of unpopular minorities.”*
158. The Honourable Michael McHugh AC QC has observed that the argument that a bill of rights should not be adopted because it is essentially undemocratic rests on a dubious assumption as to the capacity of the existing institutions of government to protect human rights. Those who criticise the undemocratic nature of a bill of rights assume that the executive is accountable to the legislature (through the Westminster system of responsible government); and that the legislature is democratically accountable to the people; and that the people will exercise their ultimate democratic control over the legislature and executive to prevent abuse of human rights by those organs of government.
159. Mr McHugh’s response is that *“[w]hether we like to admit it or not, the much trumpeted Westminster system of [responsible] government no longer works satisfactorily in Australia, if it ever did. The reasons are not hard to find.”* As to those reasons:
- (a) Mr McHugh refers in particular to the growth of the party system *“with the express or tacit understanding that members of the party must follow the party*

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<sup>135</sup> (1943) 67 CLR 116 at 124.

*line” which means that most elected members of Parliament have no independent decision making power. Consequently, the executive government dominates the parliament, and the legislature therefore imposes no material check on executive power;*

- (b) Mr McHugh also expresses doubt about the extent to which the democratic will of the people can be relied upon to protect human rights. He opines that *“public opinion is often transient and poorly informed. Given the ascendancy of the spin doctors, the rise of the shock jocks, the dominance of the 30 second television grab, the decline of the newspaper as an organ of record and the sanitized annual Conferences of political parties that permit little dissent, it could hardly be otherwise. But ill informed or unwise public opinion is no friend of human rights because it leads too easily to support for laws and policies that undermine those rights.”*

160. The Bar Association respectfully concurs in the view of Mr McHugh that:

*“Some mechanism is needed that is not hostage to the changing tides of public opinion and that will ensure the protection of human rights, irrespective of public opinion at a particular time. I can think of no better mechanism than a national Bill of Rights.”*<sup>136</sup>

161. Further, the Bar Association submits that criticism of bills of rights as undemocratic is based on an unduly narrow understanding of democracy. It assumes that democracy simply comprises majority rule, such that any curtailment of the majority will of parliament is undemocratic and wrong.<sup>137</sup> However, other models of democracy posit a system under which majority rule is properly balanced against (and constrained by) the protection of individual rights. The prominent liberal philosopher Professor Ronald Dworkin is an exponent of this view.<sup>138</sup>

*Too much power to the judges?*

<sup>136</sup> M McHugh AC QC “A Human Rights Act – the Courts and the Constitution”, 5 March 2009, Address to the Australian Human Rights Commission, page 43.

<sup>137</sup> Mac Darrow & Philip Alston, ‘Bills of rights in comparative perspective’ in Alston *Promoting Human Rights Through a Bill of Rights*, 465, 498 (quoting R Dworkin). See also Hilary Charlesworth, ‘Who wins under a bill of rights?’ (2006) *University of Queensland Law Journal* 39, 52-3; Andrew Byrnes, Hilary Charlesworth and Gabrielle McKinnon, “*Bills of Rights in Australia – History, politics and law*”, at 57-58.

<sup>138</sup> Ronald Dworkin, *A Bill of Rights for Britain*, Chatto & Windus, 1990, at 13, citing French historian François Furet.

162. A fourth criticism of the UK *Human Rights Act* is that it gives too much power to the judges to make decision of a sensitive and personal nature. This argument is also frequently raised in Australia where a mistrust of the judiciary underlies much of the anti-bill of rights debate. For example, former New South Wales Premier Bob Carr has argued that:

*“Most modern bills of rights include a clause recognising that rights may be subject to such reasonable limits ‘as can be demonstrably justified in a free and democratic society’. This is clearly a policy decision not a judicial issue. If a bill of rights were enacted, it would then be up to a court to decide whether freedom of speech should be limited to pornography, tobacco advertising, solicitation for prostitution and the publication of instructions on how to make bombs.”*<sup>139</sup>

163. Similarly, the Honourable Justice Handley AO opined upon his retirement from the New South Wales Court of Appeal that the general language used in human rights acts are a *“blank canvas onto which judges can and do project their moral and political views”*.<sup>140</sup>
164. The Bar Association submits that Lord Bingham’s response to such criticism is persuasive:

*“But the judges are still making what are distinctively judicial decisions. They have to establish the facts, which are often crucial. They have a text, contained partly in the Act and partly in the Convention rights scheduled to the Act. They have principles of interpretation to apply, some of them deriving from domestic sources, some from Strasbourg and other international sources. They have a body of precedent to work on, some of it from Strasbourg, some domestic, some from other sources, some of it binding, some not. The task which the judges perform is not different in kind from their conventional role, and they have of course to give reasons, based on the text, the principles of interpretation and the authorities, for reaching whatever conclusion they do. They are not metamorphosed into legislators. Nor is any decision made by a judge which is not in the last resort made by a judge under the preexisting regime.”*

165. In the Australian context, a particular answer to such criticism is provided by the considerable jurisprudence from the European Court of Human Rights, the Supreme Court of Canada, now the House of Lords, as well as the United Nations human rights treaty bodies which defines the content and limits of particular human rights, and in particular, applies the principle of proportionality. The suggestion that Australian

<sup>139</sup> “The rights trap: How a bill of rights could undermine freedom” *Policy* Vol 17 No 2, (2001) p 19.

<sup>140</sup> Reply to the address on the retirement of the Honourable Justice Handley AO, 15 December 2006. [http://www.lawlink.nsw.gov.au/lawlink/Supreme\\_Court/ll\\_sc.nsf/pages/SCO\\_spigelman151206](http://www.lawlink.nsw.gov.au/lawlink/Supreme_Court/ll_sc.nsf/pages/SCO_spigelman151206).

courts would be unguided or are institutionally ill-equipped to apply similar principles and jurisprudence would be given little weight.

166. Broadly stated rights enacted in legislation are not unfamiliar to Australian judges: consider, for example, the *Native Title Act 1993* (Cth), the *Racial Discrimination Act 1975* (Cth) and the *Trade Practices Act 1974* (Cth). At common law, the courts have been defining the scope of the duty of care in negligence for over 100 years. As many civil and political rights were once drawn from the common law, their application will be familiar to Australian judges. The right to a fair trial, for example, traverses well established principles of procedural fairness, including freedom from biased decision making and the right to be heard. Experience under the ACT *Human Rights Act* and the Victorian Charter confirms this.
167. The retired High Court justice, the Honourable Michael Kirby AC CMG has commented:

*“Nevertheless, it has to be conceded that any application of a statement of fundamental principles is bound to present borderline cases. Upon such cases intelligent people can often disagree. Drawing lines is something that judges do every day of their lives. The appellate process and academic and civic criticisms demonstrate that the lines are often disputed. Sometimes they are strongly contested. That is just the nature of a rule of law in society.”*<sup>141</sup>

168. Again, the experience from the United Kingdom is salutary. There, the courts have refused to be drawn into areas which they consider are properly matters for the parliament or the executive.<sup>142</sup> For example, in *A v Secretary of State for the Home Department*<sup>143</sup> Lord Nicholls observed:

*“[W]hen carrying out their assigned task the courts will accord to Parliament and ministers, as the primary decision-makers, an appropriate degree of latitude. The latitude will vary according to the subject matter under consideration, the importance of the human right in question, and the extent of the encroachment upon that right. The courts will intervene only when it is apparent that, in balancing the various considerations involved, the primary decision-maker must have given insufficient weight to the human rights factor.”*

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<sup>141</sup> Kirby J, “The National Debate About a Charter of Rights & Responsibilities – Answering Some of the Critics”, 21 August 2008.

<sup>142</sup> See also (*Pro-Life Alliance*) v *British Broadcasting Authority* [2004] 1 AC 185 at [74-77]; and the discussion in the Department of Constitutional Affairs UK, *Review of the Implementation of the Human Rights Act July 2006* at 4 and 12.

<sup>143</sup> [2005] 2 AC 68 at [80].

*Involvement of the judges in political controversy*

169. A fifth and related criticism identified by Lord Bingham is that the UK *Human Rights Act* is a source of mischief because it involves the judges in political controversy and makes for conflict between the Government and the judiciary. In response to such criticism, Lord Bingham observes that the Courts have also given judicial review decisions, independently of the *Human Rights Act*, which have been very unpopular with the Government.
170. The Bar Association submits that, as Lord Bingham observes, there is an inevitable and proper tension between the two arms of government. Whilst governments may have no greater appetite for losing cases than any other litigant, perhaps even less, losing cases on occasion is part of the price to be paid for the rule of law. There should be nothing inherently controversial about courts exercising a power of review over legislation and executive action by reference to prescribed constitutional or legislative norms. That is a conventional incident of the separation of powers and the rule of law.
171. As the Honourable Sir Gerard Brennan AC KBE QC has observed: *“Of course, if the court, construing a provision in accordance with the legislature’s directions, concludes that an executive action is in disconformity with statutory power, the court will review the executive action and grant the appropriate remedy. But jurisdiction to review executive action for disconformity with statutory power is a commonplace in our constitutional arrangements, applying the rule of law to government as well as to the governed.”*<sup>144</sup>
172. There is also a concern expressed that the involvement by the judiciary in determinations which are politically controversial will undermine public respect for the integrity and impartiality of the judiciary (and thereby generally undermine respect for the rule of law). While the politically controversial nature of some judicial decisions on human rights must be accepted, the Bar Association considers that it is

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<sup>144</sup> Hon Sir Gerard Brennan, “The Constitution, Good Government and Human Rights” (12 March 2008), at 20, referring to *Church of Scientology v Woodward* (1982) 154 CLR 25; *Attorney General (NSW) v Quin* (1990) 170 CLR 1 at 35-36.

unlikely that such an outcome would materially undermine respect for the judiciary and the rule of law. It can be reasonably anticipated that the introduction of an Australian charter of rights would be accompanied by a deepening public understanding about the role of such a charter within a democracy. That understanding would likely substantially address concerns that an Australian charter of rights would corrupt respect for the judiciary and the rule of law for a number of reasons:

- (a) first, controversial decisions about human rights would comprise a small fraction of judicial case-load;
- (b) second, a degree of tension between the judiciary and the other organs of government is a not unfamiliar incident of the democratic system;
- (c) third, questions of human rights do not provide a vehicle for the unfettered expression of a judge's idiosyncratic political and moral preferences. Rather, such questions are determined within a framework of progressively refined precedent and principle, which constrain the expression of a judge's personal values;
- (d) fourth, judicial determinations on human rights are not fundamentally different from many other judicial determinations made by reference to open-textured legal norms; and
- (e) fifth, the risks associated with politically maverick judges are substantially minimised by the fact that the legislature always has the final say on matters of human rights where a bill of rights takes statutory form.

*The wrong rights?*

- 173. A sixth criticism sometimes made of the UK Act is that it gives domestic effect to the wrong rights, either because the ECHR to which the United Kingdom acceded in 1951 is now nearly 60 years old and looking rather dated, or because it does not give effect to distinctively British rights.
- 174. In Australia, critics similarly argue that the ICCPR and the ICESCR which were adopted in 1966 have been overtaken by events or do not reflect Australian values. In

the case of the UK *Human Rights Act*, Lord Bingham regards neither of these arguments as persuasive. The Bar Association submits that in the Australian context, as well, neither argument is particularly compelling. Adopting Lord Bingham's response, the age of the treaties is not very relevant since the articles are expressed (like chapter 39 of Magna Carta 1215) in very broad terms, and would be treated in their interpretation as living instruments. The Universal Declaration of Human Rights which was adopted in 1948, contains the genesis of almost all the rights articulated in the ICCPR and the ICESCR, is widely recognised as constituting international customary law, and provides the basis for the work of the United Nations' Human Rights Council and other Charter based human rights bodies. Since the adoption in 1966 of the ICCPR and the ICSECR, the international community has adopted a series of further instruments (each of which has been ratified by Australia) which confirm the ongoing relevance of the standards articulated in the international covenants (see, for example, the preamble to the CRC adopted in 1990, and to the more recent CRPD).

175. The second argument – essentially a culturally relativist one - is also misplaced. As Lord Bingham comments in relation to the UK *Human Rights Act*, in the land which gave birth to Magna Carta and the Bill of Rights 1689, there is nothing antithetical to the UK Constitution in the notion of a bill or charter of rights.
176. Similarly, there is nothing un-Australian about the content of the ICCPR and the ICESCR to which Australian negotiators made significant contributions. By becoming party to each treaty, Australia has assumed binding international obligations under them. For many years, Australia has submitted periodic reports to the United Nations Human Rights Committee and the Committee on Economic, Social and Cultural Rights on implementation of its obligation under each treaty. Since 1991, Australia has accepted the scrutiny of the Human Rights Committee in relation to individual communications. As Brennan J observed in *Mabo v Queensland (No 2)*:<sup>145</sup>

*“Whatever the justification advanced in earlier days for refusing to recognize the rights and interests in land of the indigenous inhabitants of settled colonies, an unjust and discriminatory doctrine of that kind can no longer be accepted. The expectations of the international community accord in this respect with the contemporary values of the Australian people. The opening up*

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<sup>145</sup> (1992) 175 CLR 1 at 42.

*of international remedies to individuals pursuant to Australia's accession to the Optional Protocol to the International Covenant on Civil and Political Rights brings to bear on the common law the powerful influence of the Covenant and the international standards it imports. The common law does not necessarily conform with international law, but international law is a legitimate and important influence on the development of the common law, especially when international law declares the existence of universal human rights."*

*A field day for lawyers?*

177. A further criticism of the *Human Rights Act* identified by Lord Bingham is that it provides a field day, and rich pickings, for lawyers. A similar sentiment is expressed very strongly by many opposed to a bill of rights in Australia, including by the former NSW Premier Bob Carr who has argued that: "*The main beneficiaries of a bill of rights are the lawyers who profit from the legal fees that it generates and the criminals who manage to escape imprisonment on the grounds of a technicality*".<sup>146</sup>
178. The Bar Association submits that in this regard, UK experience is again salutary and should restore some perspective to the debate in Australia. According to Lord Bingham, before the UK Act came into force, there was a worry that the courts would be swamped by an uncontrollable flood of claims. However, this has not happened. Whilst there have been a considerable number of claims under the Act, they have been manageable and the pickings have not been rich.
179. In the United Kingdom, human rights issues have most frequently arisen in litigation already on foot. The Department of Constitutional Affairs' July 2006 *Review of the Implementation of the Human Rights Act* reported that the UK Act has had a greater effect on the operation of government departments, and a negligible effect on criminal law. Earlier statistics revealed that the Act was raised in fewer than 0.5% of criminal cases in the Crown Court. In the first 14 months of its operation, the Act was relied on in 2997 cases and arguments based on the Act upheld in 56.<sup>147</sup> The Department concluded that arguments that the *Human Rights Act* has significantly altered the

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<sup>146</sup> "The rights trap" op cit, at 20-21.

<sup>147</sup> Department of Constitutional Affairs, *Human Rights Act 1988: Impact on Court Workloads*, 14 November 2005.



constitutional balance between Parliament, the Executive and the Judiciary had “*therefore been considerably exaggerated*”.<sup>148</sup>

180. The Bar Association respectfully concurs in the view of Lord Bingham that ultimately such criticisms do not amount to very much. As Lord Bingham concluded his lecture:

*“They do not begin to outweigh the very real benefit which the Act confers by empowering the courts to uphold certain very basic safeguards even – indeed, particularly – for those members of society who are most disadvantaged, most vulnerable and least well - represented in any democratic representative assembly. Decisions have undoubtedly been made in the UK which have, in my view, been beneficial and which would not - in some cases could not – have been made without the mandate given by the Act.”*

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<sup>148</sup> Id at page 4.

**QUESTION THREE: HOW COULD AUSTRALIA BETTER PROTECT AND PROMOTE HUMAN RIGHTS?**

181. The Bar Association supports the adoption of a statutory bill or charter of rights as the best means of better protecting and promoting human rights in Australia.
182. In this part, the Bar Association addresses the nature of the obligations an Australian charter of rights might impose upon the various organs of the Commonwealth and State and Territory governments, relevantly:
- the Judiciary (addressing the role of courts and tribunals);
  - the Executive;
  - Ministers; and
  - the Parliament.
183. In addition to imposing obligations on the various branches and agencies of government, an Australian charter of rights should also make specific provision for remedies for violations of protected rights.

***Judiciary and the role of courts and tribunals***

184. The Bar Association supports the imposition of an interpretive obligation which would require courts and tribunals to interpret legislation in a manner consistent with the specified human rights, so far as the language of the legislation permits. The Bar Association notes paragraphs 122 to 128 of the Law Council's submission.
185. While the formulation of such an interpretive obligation differs in the bills/charters of rights of different jurisdictions, in broad terms, the rationale may be described as follows:

*“[the] interpretive role is consistent with the preservation of parliamentary sovereignty... it ensures that the final say on the law remains in the hands of Parliament while allowing a court to act, where appropriate, to remove any ambiguity that might lead to violations of the Charter. An interpretive provision assumes that the [Government] would only seek to deliberately legislate in violation of the Charter through a statement of incompatibility issued by the Attorney-General at the time of a Bill being introduced to the*

*Parliament. It can prevent the Charter being violated accidentally through ambiguous wording or misapplication by a government body...*<sup>149</sup>

186. The “*interpretive duties*” that appear in various statutory bills of rights have been formulated in a variety of terms. For example, s 3 of the UK *Human Rights Act* provides:

*“So far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with the Convention rights.”*

187. In contrast, s 32(1) of the Victorian Charter provides:

*“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”* (emphasis added).

188. Section 30 of the *Human Rights Act 2004* (ACT) is also limited by reference to consistency with purpose:

*“So far as it is possible to do so consistently with its purpose, a Territory law must be interpreted in a way that is compatible with human rights.”*<sup>150</sup>

189. Those textual differences may have implications for the scope and operation of the interpretative clause.

190. The UK provision was discussed in *Ghaidan v Godin-Mendoza*<sup>151</sup> (**Ghaidon**), where Lord Nicholls of Birkenhead, who delivered the principal speech, said:

*“But once it is accepted that section 3 may require legislation to bear a meaning which departs from the unambiguous meaning the legislation would otherwise bear, it becomes impossible to suppose Parliament intended that the operation of section 3 should depend critically upon the particular form of words adopted by the parliamentary draftsman in the statutory provision under consideration. That would make the application of section 3 something of a semantic lottery. If the draftsman chose to express the concept being enacted in one form of words, section 3 would be available to achieve Convention-compliance. If he chose a different form of words, section 3 would be impotent.*

*From this the conclusion which seems inescapable is that the mere fact the language under consideration is inconsistent with a Convention-compliant*

<sup>149</sup> Report of the Human Rights Consultation Committee on the proposed Victorian Charter, The “*statement of incompatibility*” mechanism is discussed further below.

<sup>150</sup> *Human Rights Amendment Act 2008* (ACT).

<sup>151</sup> [2004] 2 AC 557.

*meaning does not of itself make a Convention-compliant interpretation under section 3 impossible. Section 3 enables language to be interpreted restrictively or expansively. But section 3 goes further than this. It is also apt to require a court to read in words which change the meaning of the enacted legislation, so as to make it Convention-compliant. In other words, the 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."*<sup>152</sup>

191. In *R v Fearnside*<sup>153</sup> the ACT Court of Appeal held that s 30 of the *Human Rights Act 2004* (ACT) requires a different approach. At [89], Besanko J (with Gray and Penfold JJ agreeing) said:

*"In its present form, s 30 appears to give the Court a broader power to adopt an interpretation of a Territory law which is consistent with a relevant human right. I am conscious of the fact that discussing the matter in the abstract is of limited assistance. Nevertheless, I think s 30 would enable a Court to adopt an interpretation of a legislative provision compatible with human rights which did not necessarily best achieve the purpose of that provision or promote that purpose, providing the interpretation was consistent with that purpose. On the other hand, I do not think s 30 authorises and requires the Court to take the type of approach taken by the House of Lords in *Ghaidan*. There is no reference to purpose in s 3(1) of the United Kingdom Act and the primary constraint in that subsection is stated in terms of what is or is not possible. By contrast, under s 30 in the HRA the purpose or purposes of the legislative provision must be ascertained through well-established methods, and the interpretation adopted by the Court must be consistent with that purpose or those purposes."*

192. The issue has been noted (but not yet determined) in relation to the Victorian Charter.<sup>154</sup>
193. The Bar Association notes that the difference in approach may be more apparent than real for the following reasons. First, decisions of the House of Lords after *Ghaidan* suggest that its approach to interpretation is not as radical as first it seems. For example, in *R (Wilkinson) v Inland Revenue Commissioners*<sup>155</sup> Lord Hoffman (with whom the other Law Lords including Lord Nicholls agreed) said (at [17]):

*"I do not believe that section 3 of the 1998 Act was intended to have the effect of requiring the courts to give the language of statutes a contextual meaning. That would be playing games with words. The important change in the process*

<sup>152</sup> At [31]-[32], emphasis added.

<sup>153</sup> [2009] ACTCA 3, In *Casey v Alcock* [2009] ACTCA 1 (23 January 2009), [108] Besanko J had made similar comments, with which Refshauge J had expressed agreement (at [120]).

<sup>154</sup> See *RJE v Secretary to the Department of Justice* [2008] VSCA 265 at [118]-[119] per Nettle JA.

<sup>155</sup> [2006] 1 All ER 529.

*of interpretation which was made by section 3 was to deem the Convention to form a significant part of the background against which all statutes, whether passed before or after the 1998 Act came into force, had to be interpreted... There is a strong presumption, arising from the fundamental nature of Convention rights, that Parliament did not intend a statute to mean something which would be incompatible with those rights. This of course goes far beyond the old-fashioned notion of using background to "resolve ambiguities" in a text which had notionally been read without raising one's eyes to look beyond it. The Convention, like the rest of the admissible background, forms part of the primary materials for the process of interpretation. But, with the addition of the Convention as background, the question is still one of interpretation, i.e. the ascertainment of what, taking into account the presumption created by section 3, Parliament would reasonably be understood to have meant by using the actual language of the statute (emphasis added)."*

194. Second, even if a provision were to be enacted in the same terms as s 3 of the UK *Human Rights Act 1998*, an Australian court would be unlikely to give it the extended scope seemingly contemplated in *Ghaidan*. That follows from the fact that the Australian Constitution entrenches a separation of powers between the Parliament and the judiciary. As such, the judiciary cannot, under guise of statutory interpretation, be directed to undertake a task effectively involving some form of legislative function, as that function is reserved to the Parliament.<sup>156</sup> In those circumstances, as has been recently argued by the Honourable Michael McHugh AC QC:

*"It seems probable that, to keep [such an interpretive provision] consistent with the doctrine of the separation of powers, the High Court would give [it] a meaning that was little different from the wording of s.32 of the Victorian Charter and s.30 of the ACT Human Rights Act. That is, it would hold that, on its proper construction, [such a provision] required legislation to be interpreted in a way that is compatible with human rights only when such an interpretation was consistent with the purpose of the legislation. The Court could do this by interpreting the words "[s]o far as it is possible to do so" as being limited to an interpretation that was not inconsistent with the purpose of the legislation."*<sup>157</sup>

195. Third, it seems likely that "*purpose limited*" provisions like that in the Victorian Charter may well yield similar results in the types of matters considered by United Kingdom courts. For example, the issue in *Ghaidan* arose from the *Rent Act 1977*(UK), which provided that, upon the death of the original tenant, their spouse became entitled to a statutory tenancy. "*Spouse*" was defined in a non-exhaustive fashion to include a person who was living with the original tenant "*as his or her wife*

<sup>156</sup> See eg *Bank of New South Wales v The Commonwealth* (1948) 76 CLR 1 at 354 and 375.

<sup>157</sup> M McHugh AC QC "A Human Rights Act – the Courts and the Constitution", 5 March 2009, Address to the Australian Human Rights Commission, page 28.

*or husband*". As various members of the House observed, those provisions could readily be construed to accommodate the surviving member of a same sex couple using relatively orthodox approaches to construction and without doing violence to the Parliamentary intention underlying the statute: Lord Steyn at [51] (accepting that the words "*as his or her wife or husband*" in the statute could be construed to mean "*as if they were his wife or husband*", Lord Rodger at [128] (adopting a broad construction of the word "*spouse*") and Baroness Hale at [144] (adopting a broad construction of the term "*as husband and wife*"). That is certainly how *Ghaidan* has been understood in later matters: see *Wilkinson* at [18] per Lord Hoffman.

196. Nevertheless, to avoid potential litigation about the scope of an interpretation clause in an Australian charter of rights, the Bar Association recommends that a clause in similar terms to the Victorian Charter and the *Human Rights Act 2004* (ACT) be considered. The Bar Association considers that such a provision would be interpreted in the manner discussed in *Fearnside*: that is, it would require a Court to adopt an interpretation of a legislative provision compatible with human rights which did not necessarily best achieve the purpose of that provision or promote that purpose, providing the interpretation was consistent with that purpose.
197. Issues have also arisen as to how an interpretation clause might interact with such a provision. In *R v Hansen*<sup>158</sup>, the majority of the New Zealand Supreme Court favoured an approach whereby the interpretive provision and the interpretation clause operate together. The following convenient summary of the process was adopted by Tipping J (at [92]):

*“Step 1. Ascertain Parliament’s intended meaning.*

*Step 2. Ascertain whether that meaning is apparently inconsistent with a relevant right or freedom.*

*Step 3. If apparent inconsistency is found at step 2, ascertain whether that inconsistency is nevertheless a justified limit in terms of s 5 [the limitation clause equivalent to s7 of the Charter of Human Rights and Responsibilities Act 2006 (Vic)].*

*Step 4. If the inconsistency is a justified limit, the apparent inconsistency at step 2 is legitimised and Parliament’s intended meaning prevails.*

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<sup>158</sup> [2007] 3 NZLR 1.

*Step 5. If Parliament's intended meaning represents an unjustified limit under s 5, the Court must examine the words in question again under s 6 [the interpretation clause equivalent to s32 of the Charter of Human Rights and Responsibilities Act 2006 (Vic)], to see if it is reasonably possible for a meaning consistent or less inconsistent with the relevant right or freedom to be found in them. If so, that meaning must be adopted.*

*Step 6. If it is not reasonably possible to find a consistent or less inconsistent meaning, [the Act] mandates that Parliament's intended meaning be adopted.”<sup>159</sup>*

198. Although yet to be conclusively determined, there appears to be support for a similar approach to the Victorian Charter<sup>160</sup> and the *Human Rights Act 2004* (ACT).<sup>161</sup> A similar approach also appears to be followed in the United Kingdom.<sup>162</sup>
199. As noted above, it is the Bar Association's view that human rights (with some exceptions) are not absolute. Rights need to be balanced against each other and against other competing public interests. That process should be reflected in the important process of interpretation by the courts in the manner described by Tipping J in *Hansen*. Given that some ambiguity appears to have arisen in similar statutory contexts, the Bar Association suggests that those matters might be the subject of an express provision in an interpretation clause in an Australian charter of rights.

#### *Legislation pre-dating the Charter*

200. The interpretive provision in s 3 of the UK *Human Rights Act* expressly provides that it applies to the interpretation of legislation pre-dating the Act (see s 3(2)). Similarly, s 49 of the Victorian Charter makes plain that its operative provisions apply to all enactments and statutory instruments, whether pre or post-dating the enactment of the Charter.
201. The Bar Association considers that a similar provision ought to be included in any Australian charter of rights. Of course, that may require settled authority on particular

<sup>159</sup> See also Blanchard J [60] and McGrath J [192].

<sup>160</sup> *RJE v Secretary to the Department of Justice* [2008] VSCA 265 at [115]-[116] per Nettle JA (referring to the judgment of Sir Anthony Mason NPJ in *HKSAR v Lam Kwong Wai and Lam Ka Man* [2006] HKCFA 84, where the Hong Kong Court of Final Appeal adopted this methodology). See also *Kracke v Mental Health Review Board & Ors (General)* [2009] VCAT 646 where Bell J at [80] expressed agreement with the approach of Nettle JA.

<sup>161</sup> *R v Fearnside* [2009] ACTCA 3 at [89] per Besanko J, with whom Gray and Penfold JJ agreed.

<sup>162</sup> See eg *Poplar Housing and Regeneration Community Association Ltd v Donoghue* [2002] QB 48 at [75] per Lord Woolf CJ.

provisions to be re-visited.<sup>163</sup> However, that will simply ensure internal consistency within the federal legal order as a whole.

### *The Executive*

202. The Bar Association considers that an Australian charter of rights should impose certain obligations upon the executive by reference to the concept of a “*public authority*”. In terms of the formulation of the duty to be imposed upon such authorities, the Bar Association considers that the provisions of the Victorian Charter, the UK *Human Rights Act* and the *Human Rights Act 2004* (ACT) provide useful precedents.

203. Section 6(1) of the UK *Human Rights Act* provides:

*“It is unlawful for a public authority to act in a way which is incompatible with a Convention right.”*

204. Section 38(1) of the Victorian Charter provides:

*“Subject to this section, 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.”*<sup>164</sup>

205. The Bar Association considers that the inclusion in the Victorian Charter and the *Human Rights Act 2004* (ACT) of the “*second limb*” (requirement to give proper consideration to a relevant human right) is likely to confer a useful process right. The House of Lords has stated that “*the question is ... whether there has actually been a violation of ... rights and not whether the decision-maker properly considered the question of whether ... rights would be violated or not*”: *Belfast City Council v Miss Behavin' Ltd* [2007] UKHL 19; [2007] at 13. See also *R (on the application of Begum) v Governors of Denbigh High School* [2006] UKHL 15 at 26-34. Accordingly, the Bar Association supports the approach adopted in Victoria and the ACT.

### *Free standing or contingent right?*

206. Curiously (and unlike the position under the UK *Human Rights Act*) the right to seek a remedy regarding acts which are unlawful under s 38(1) of the Victorian Charter is

<sup>163</sup> See eg *RJE v Secretary to the Department of Justice* [2008] VSCA 265 at [114] and [119] per Nettle JA.

<sup>164</sup> See similarly s 40B of the *Human Rights Act 2004* (ACT).



contingent upon a person being able to “*seek*” such a remedy on pre-existing grounds: see s 39(1). It has been suggested that the non-Charter ground must at least have sufficient merit to survive a strike out application.<sup>165</sup>

207. The reasons for that approach are not apparent. Indeed, s 40C of the ACT *Human Rights Act*, which was inserted in the Act by the 2008 amendments, provides simply that a person who alleges that a public authority has failed to carry out its duties under s 40B of the Act (to act in a way that is compatible with human rights or to give proper consideration to a relevant human right in making a decision) may commence proceedings based on that claim alone.
208. The Bar Association considers that if the executive (and others falling within the concept of “*public authorities*”) are to act in a manner compatible with human rights, then the enforcement of those rights should not be contingent upon whether one, coincidentally, happens to have another basis for impugning executive action.
209. As with the interpretive duty upon courts discussed above, it is the Bar Association’s view that a clause imposing duties on public authorities in an Australian charter of rights should be read with the general limitation clause. That is, an act of a public authority would not be incompatible with human rights if it can be demonstrably justified as a reasonable or proportionate limitation or restriction (however the test be expressed). Given that some controversy has arisen regarding the interpretation provision in the *New Zealand Bill of Rights Act* (see *Hansen* discussed above), it may be prudent to make that requirement explicit.
210. Each of the UK Act, Victorian Charter and ACT Act contains specific limitations on the duties which apply to public authorities. The first such limitation makes clear that Parliament may require a public authority to act in a manner which is incompatible with human rights.
211. For example, s 6(2) of the UK *Human Rights Act* provides:

*“Subsection (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*

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<sup>165</sup> P Tate *A Charter of human rights and responsibilities: A practical introduction* Presentation to the Victorian Bar, 7 March 2007, para 96(8).

*law, the public authority could not reasonably have acted differently or made a different decision.”*

212. The Bar Association supports the inclusion of such a limitation (although, in light of the comments above, it may be unnecessary to refer specifically to decisions). The limitation “*could not reasonably have acted differently*” is likely to be largely confined to occasions where the authority had no discretion to act in a manner compatible with human rights.<sup>166</sup> However, given that the concept of reasonableness is somewhat uncertain, the Bar Association considers that it would be preferable to delete the word “*reasonably*” to make that clear.

213. A second possible species of limitation excludes acts of a “*private nature*”. For example, s 38(3) of the *Victorian Charter* provides:

*“This section does not apply to an act or decision of a private nature.”*

214. The Bar Association submits that a distinction should be drawn between so called “*core*” public authorities (eg public servants, ministers, statutory authorities etc), and those entities and persons who are included in the concept of public authority by reason of the fact that they exercise functions of a public nature. In particular, it should be made clear that whenever a core public authority acts in an official capacity, those acts are caught by the obligation to act compatibly with human rights. One might otherwise see attempts to argue that, say, acts relating to purely commercial matters are private in nature, and excluded from the obligation.

215. The Bar Association supports a limitation of this second kind, subject to a clarification of the kind referred to above.

#### *Human rights impact statements*

216. The Bar Association supports the imposition of an obligation on the executive to prepare a “*Human Rights Impact Statement*” for proposed legislative changes, policy developments and other significant proposals. Such a recommendation was made by the Human Rights Consultation Committee in relation to the proposed Victorian Charter.

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<sup>166</sup> A similar interpretation is suggested by Pound and Evans - see *An Annotated Guide to the Charter of Human Rights and Responsibilities*(2008) Thomson Law Book Co at p245.

217. For legislative changes and policy and other proposals, the responsible Minister should ensure that a Human Rights Impact Statement is included in Cabinet submissions. The requirement for and details of such a statement should be set out in the Cabinet Handbook. The statement should include:
- a statement of the purpose of the Bill, policy or proposal;
  - a statement of its effect upon any of the human rights in the charter of human rights; and
  - a statement of any limitation placed upon any human right in the charter, the importance and purpose of the limitation, the nature and extent of the limitation, the relation between the limitation and its purpose, and whether there is any less restrictive means to achieve the purpose.
218. In Victoria, the Consultative Committee specifically recommended that such a requirement be included in the Cabinet Handbook, rather than in the Charter. However, there is no reason that an obligation to prepare a statement of that nature could not be included as a provision of an Australian charter of rights. Such an obligation would be useful in alerting the Commonwealth executive to unforeseen consequences of particular policies and decisions upon human rights. As such, the preparation of such a statement has the potential to avoid inadvertent infringements of the rights to be protected by the charter. It may also have the effect of avoiding unnecessary litigation.
219. It could be made clear that the failure to prepare such a statement does not affect the validity, operation or enforcement of any Bill that becomes an Act, any other statutory provision or executive action (see, for example, s 29 of the Victorian Charter).
220. It would be necessary to determine the level of decision making to which such an obligation attached. Practically, it could not apply to every decision throughout government. However, in the view of the Bar Association, it would be appropriate to extend the obligation beyond Cabinet decision making (as recommended by the Victorian Consultative Committee) to apply to decisions taken by individual Ministers.

*Human rights audits*

221. A further means by which the executive and other agencies of government might proactively seek to ensure that their policies and actions are compatible with human rights is to engage in a human rights auditing process.

222. Under the Victorian Charter, the Victorian Equal Opportunity and Human Rights Commission has the following function:

*“...when requested by a public authority, to review that authority's programs and practices to determine their compatibility with human rights (s41(c)).”*

223. The benefits of such a function were described in the report of the Victorian Consultative Committee as follows:

*“By providing assistance in this style of auditing, government departments can gain the benefit of the Human Rights Commissioner’s expertise in making a comprehensive assessment of specific areas. This is of great benefit to departments in terms of identifying and finding solutions to difficult human rights problems. It also helps to spread knowledge about how to achieve policy aims within human rights standards, making a positive contribution towards including human rights across the whole of the public sector”<sup>167</sup>*

224. The Consultative Committee recommended that such a process be voluntary (as reflected in the terms of s 41(c)), although consideration was to be given to conferring coercive powers after the first four years of the Charter.<sup>168</sup>

225. As noted above, at a Commonwealth level, the Australian Human Rights Commission (formerly HREOC) already has the power to inquire into any act or practice that may be inconsistent with or contrary to human rights: s 11(1)(f) of the HREOC Act. The definitions of “act” and “practice” include those acts or practices done by or on behalf of the Commonwealth or under an enactment: see s 3. The Commission has powers to obtain information and documents and examine witnesses for the purposes of the exercise of those functions: ss 21 and 22. Those powers have been used to prepare broad ranging reports on systemic human rights issues, such as the report of the National Inquiry into Children in Detention in 2004.

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<sup>167</sup> See p 106 of the Report.

<sup>168</sup> See p 107 of the Report.

226. Given that the exercise of coercive powers of such nature appears to be accepted at a Commonwealth level, the Bar Association considers that there seems little reason to limit a human rights auditing function to cases where the Commonwealth department or agency agrees to participate in such a process. Indeed, if anything, matters of significant concern are more likely to arise with those agencies that are unwilling to engage in such a process.

*Annual reports*

227. Section 5 of the *Annual Reports (Government Agencies) Act 2005* (ACT) requires that the chief executive of each administrative unit must include in their annual report

*“...a statement describing the measures taken by the administrative unit during the financial year to respect, protect and promote human rights”.*

228. The Bar Association considers that such an obligation ought be considered at a Commonwealth level. Although perhaps less effective than the other measures described above, it would require agencies to consider (at least once a year) how they are progressing in their efforts to act consistently with and promote the rights protected by an Australian charter of rights.

*Ministers (and private members of Parliament)*

229. In essence, a “*statement of compatibility*” is a statement upon introduction of a Bill into a House of Parliament that the proposed Bill is or is not compatible with the human rights specified in a statutory charter of rights.
230. The requirement to prepare a statement of compatibility is intended to be a means of promoting dialogue about the human rights issues arising from proposed legislation.<sup>169</sup> The Bar Association considers that the preparation of statements of compatibility would facilitate more rigorous consideration by Parliament of the manner in which legislation is likely to affect the human rights of people in Australia.
231. However, the preparation of such a statement is also likely to have wider consequences, reaching further back in the legislative process. In the case of a Government Bill, the statement of compatibility would be considered by Cabinet and

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<sup>169</sup> Pound and Evans, *An Annotated Guide to the Charter of Human Rights and Responsibilities*(2008) Thomson Law Book Co at p 206.

those public officials with responsibility for the Bill prior to its introduction to the Parliament. As such, it would provide a prompt to the Government to consider the human rights implications of its legislative agenda.

232. The requirement to prepare a statement of compatibility is a feature of many statutory bills of rights. For example, s 28 of the Victorian Charter provides:

*“(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.*

*(2) A member of Parliament who introduces a Bill into a House of Parliament, or another member acting on his or her behalf, must cause the statement of compatibility prepared under subsection (1) to be laid before the House of Parliament into which the Bill is introduced before giving his or her second reading speech on the Bill.*

*Note The obligation in subsections (1) and (2) applies to Ministers introducing government Bills and members of Parliament introducing non-government Bills.*

*(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.”*

233. The Victorian provision differs from the equivalent provisions in the UK *Human Rights Act* (see s 19) and the *Human Rights Act 2004* (ACT) (see s 37) in a number of significant respects. First, the Victorian provision applies to all Bills, whether introduced by a Minister or a private member. In the Bar Association’s view, such approach should be adopted at a Commonwealth level.

234. Second, subsection 3 of s 28 of the Victorian Charter requires the relevant member to identify if in his or her opinion a Bill is compatible with human rights, how it is compatible. This avoids the possibility of one-line statements of compatibility (which was, at least initially, the practice of the ACT Government). However, the Bar Association considers that the obligation might be made clearer if the Commonwealth provision were to state:

*“whether, in the member's opinion, the Bill is compatible with human rights and, if so, the reasons why it is compatible”*

235. Subject to the abovementioned qualification, the Bar Association is of the view that a provision similar to s 28 of the Victorian Charter should be enacted at the Commonwealth level.
236. A similar obligation is imposed in respect of subordinate legislation by s12A of the *Subordinate Legislation Act 1994* (Vic). The Bar Association supports inclusion of a similar obligation either in an Australian charter of rights or in the *Legislative Instruments Act 2003* (Cth).

### **Parliament**

237. An obligation related to the preparation of statements of compatibility is created by s 30 of the Victorian Charter which provides:

*“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.”*

238. The purpose of the requirement is to further enhance Parliamentary scrutiny of human rights issues, as was discussed by the Victorian Consultative Committee at p 76:

*“The Committee received many submissions that stated that once new legislation is introduced into Parliament, a parliamentary committee should scrutinise the legislation and report on its compatibility with the Charter. It was recognised that such a committee can facilitate a more robust debate by providing a clear statement to Parliament about a Bill’s consistency with the Charter. The Australian Human Rights Centre said that such a committee could contribute to a deeper and more considered form of deliberation on the rights implications of all Bills.”*

239. The Bar Association agrees with those comments, and considers that such a mechanism would be of considerable assistance at a Commonwealth level. One issue that would require further consideration the form of committee. It is the view of the Bar Association that the Committee should be a joint committee of both Houses of Parliament. Unlike in Victoria, there is no joint committee of the Commonwealth Parliament that might readily fill such a role. It would therefore be desirable to constitute a new committee for that purpose (either under the standing orders, by

resolution or through legislation). That joint vommittee should also be given responsibility for scrutinising delegated legislation (see above).

240. The Bar Association also considers that there should be a requirement upon the member introducing a Bill to ensure, as far as is reasonably possible, that the committee had adequate time to consider and report upon it prior to any vote being taken.
241. In the Bar Association's view, there should not be a prescriptive approach to the procedure of such a joint committee. In the case of some draft legislation, it would be appropriate for the committee to seek submissions from the public and conduct public hearings. However, many Bills (particularly those that raise no human rights issue) will not fall into that category. The Bar Association envisages that the joint committee would seek assistance from relevant government departments and those with specialised knowledge (eg the Australian Human Rights Commission).

### ***Remedies for alleged violations of rights***

242. Article 2 of the ICCPR requires Australia to provide an effective remedy to a person whose rights have been violated. The remedies must be determined by a competent judicial, administrative or legislative authority and must be enforceable. The UN Committee on Economic, Social and Cultural Rights has also stated that there is an obligation to provide remedies for alleged violations of the ICESCR, a view consistent with both the purpose of the treaty and general principles of international law. The nature of remedies available to a person who has had his or her human rights breached or infringed will depend very much on the nature of the rights given to the person concerned and the manner and context in which the right may be asserted. For example, where an alleged breach arises in the context of existing court or tribunal proceedings, the remedies normally available in such proceedings may be appropriate and available. On the other hand, where a claim is based directly on a violation of a human rights statute, the remedies available may not be as extensive. This is certainly the case where the statute itself limits the availability of certain remedies or restricts the circumstances in which they may be granted.



### **Administrative remedies**

243. For individuals aggrieved by the conduct of a public authority, an Australian charter of rights should provide an informal process that is quick, inexpensive and will secure an effective resolution for all parties. One option would be to establish a scheme similar to that which operates under Part IIB of the HREOC Act. Under Part IIB, the Commission receives complaints of alleged unlawful discrimination. The Commission investigates the complaint and attempts to conciliate the complaint. If the complaint resolves at conciliation, the parties achieve a private confidential resolution (unless otherwise agreed). Each party bears their own costs. If the President of the Commission forms the view that the complaint cannot be conciliated or should be terminated for other reasons, the President terminates the complaint. Once the complaint is terminated, the complainant may elect to commence proceedings in the Federal Court or Federal Magistrates Court with respect to the alleged unlawful discrimination. The Court then determines the claim. Any such hearing would be subject to the rules of the Court, the rules of evidence, and costs rules would also apply.
244. The Bar Association does not support a model which encourages litigation to be commenced before the parties are provided with an opportunity to conciliate or mediate claims where that is possible. Litigation should be a last resort and available only if mediation has failed. At that stage, the appropriate forum is the Federal Court.

### **A right of action for breach of a statutory bill of rights**

245. The Bar Association refers to the Law Council's submissions with respect to a "*direct right of action*".<sup>170</sup> The Bar Association submits that a direct right of action should be available to a person aggrieved or in some cases, a person representing the aggrieved person. The Bar Association notes that the issue of standing is important, but considers that in the area of human rights protection standing requirements should not be overly prescriptive. Section 46P(2) of the HREOC Act is a helpful model with respect to standing to bring a human rights claim.

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<sup>170</sup> Law Council's submission, paragraphs 129 – 131.

**Remedies generally, and the availability of compensation or damages**

246. In other jurisdictions, a wide range of remedies has been available to courts and tribunals under statutory bills of rights. These include a simple declaration that a right has been breached, the exclusion of evidence obtained as the result of a serious breach of human rights, a reduction in sentence to reflect an unreasonable delay in bringing a person to trial, a temporary or permanent stay of proceedings, the quashing of a conviction or an administrative decision, an order for reinstatement, or an award of compensation or damages. Often a claim based on a bill of rights ground will co-exist with an action based on some other ground (such as tort) for which the same or even additional remedies may be available.
247. The Bar Association considers that the availability of a range of remedies is necessary for a flexible and tailored response to specific violations of human rights.
248. At present, under both the ACT *Human Rights Act* and the Victorian Charter, damages are excluded as an available remedy for a claim based on a failure by a public authority to act consistently with the Act or Charter (though this does not exclude the possibility of an award of damages under a parallel cause of action based on the same facts).
249. The Bar Association notes that in its submission to the National Human Rights Consultation, the Law Council does not support a right of direct action resulting in damages for breaches of human rights. The Bar Association has previously advocated a similar position. However, having had the opportunity to reflect upon its position, the Bar Association now considers that a preponderance of arguments weigh in favour of the recognition of a statutory right to damages for a breach of human rights.
250. In this connection, the Bar Association notes that the Commonwealth already provides for a person aggrieved with the right to seek damages for unlawful discrimination in a federal court under its suite of anti-discrimination legislation: *Racial Discrimination Act 1975*, the *Sex Discrimination Act 1984*, the *Disability Discrimination Act 1992*, the *Age Discrimination Act 2004*, and (procedurally) the *Human Rights and Equal Opportunity Commission Act 1986*.

251. By contrast, the UK *Human Rights Act* makes explicit provision for an award of damages, and under the New Zealand *Bill of Rights Act*, damages (or compensation) are available for breaches of the legislation.<sup>171</sup>

252. Likewise, s 8 of the UK *Human Rights Act* provides in part:

*“8 Judicial remedies*

*(1) In relation to any act (or proposed act) of a public authority which the court finds is (or would be) unlawful, it may grant such relief or remedy, or make such order, within its powers as it considers just and appropriate.*

*(2) But damages may be awarded only by a court which has power to award damages, or to order the payment of compensation, in civil proceedings.*

*(3) No award of damages is to be made unless, taking account of all the circumstances of the case, including—*

*(a) any other relief or remedy granted, or order made, in relation to the act in question (by that or any other court), and*

*(b) the consequences of any decision (of that or any other court) in respect of that act,*

*the court is satisfied that the award is necessary to afford just satisfaction to the person in whose favour it is made.*

*(4) In determining—*

*(a) whether to award damages, or*

*(b) the amount of an award,*

*the court must take into account the principles applied by the European Court of Human Rights in relation to the award of compensation under Article 41 of the Convention.”*

253. It can be seen that part of the rationale for providing for the availability of damages is to ensure that the United Kingdom’s obligation under article 13 of the ECHR to provide an effective remedy for a violation of a Convention right is given effect to, and is aligned with the power of the European Court of Human Rights to award “*just*

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<sup>171</sup> Damages are also available under s 3 of Ireland’s *European Convention on Human Rights Act 2003*, which is closely modelled on the UK *Human Rights Act*. Section 3(2) provides: “(2) A person who has suffered injury, loss or damage as a result of a contravention of subsection (1), may, if no other remedy in damages is available, institute proceedings to recover damages in respect of the contravention in the High Court (or, subject to subsection (3), in the Circuit Court) and the Court may award to the person such damages (if any) as it considers appropriate.”

*satisfaction*” to a person whose rights have been violated.<sup>172</sup> Australia’s obligations under various international human rights treaties are to similar effect.

254. As of 2006, according to a review by the UK Department of Constitutional Affairs, damages awards under the UK *Human Rights Act* had been made in only three cases: one involved the award of £10,000 “*to two claimants to reflect the impact on the profoundly disabled wife of living in unsuitable accommodation*”; damages of £750 to £4,000 were awarded “*for delays in [mental health review] tribunal hearings*”; and damages of £15,000 and £35,000 respectively were awarded in respect of the distress of a witness “*who was murdered due to inadequate police protection and despite pleas to the police for greater protection*’ and in respect of his parents” “*own grief and suffering*”, respectively.<sup>173</sup>

255. In a passage that reflects the general approach of the UK courts, the Court of Appeal for England and Wales in *Anufrijeva v London Borough of Southwark* commented:<sup>174</sup>

“52. ... *The remedy of damages generally plays a less prominent role in actions based on breaches of the articles of the Convention, than in actions based on breaches of private law obligations where, more often than not, the only remedy claimed is damages.*

53. *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.. . .*

56 ... *Damages are not an automatic entitlement but, as Scorey and Eicke also indicate, a remedy of "last resort"*”

256. More recently the Law Commission for England and Wales has summarised the position:<sup>175</sup>

“*An award of monetary compensation for a breach of Convention rights does not follow as of right as it does in a negligence action. On the contrary, damages are awarded only exceptionally rather than as a rule. The court should not award damages unless they are “necessary to afford just*

<sup>172</sup> See generally The Law Commission and the Scottish Law Commission, *Damages under the Human Rights Act 1998*, Cmd 4853, October 2000.

<sup>173</sup> Helen Fenwick, *Civil Liberties and Human Rights* (4th ed 2007) at 247.

<sup>174</sup> [2003] EWCA Civ 1406, [2004] QB 1124, [53], [56]. See also *R (on the application of Greenfield) v Secretary of State for the Home Department* [2005] UKHL 14, [2005] 1 WLR 673, [9] (endorsing statement in *Anufrijeva*).

<sup>175</sup> Law Commission, *Administrative Redress: Public Bodies and the Citizen*, Consultation Paper No 187 (2008), [3.181]-[3.183] (citations omitted).

*satisfaction”, having regard to all the circumstances including any other relief or remedy given. . .*

*The other point to note about the availability of damages under section 8 is that where a court does decide to award damages, it should not seek to imitate the approach to quantification adopted in negligence. Rather, the correct approach [is that] . . . applicants should, as far as possible, be returned to the same position as if their Convention rights had not been violated and some regard should be had to manner in which the violation took place.*

*Whereas at common law damages are quantified by reference to general brackets or guidelines, under section 8 HRA the level of compensation remains discretionary – it should be no more than is “equitable” in the circumstances. It is notable that compensation for non-pecuniary losses in particular remains modest and involves an explicit balancing exercise between the need to ensure respect for human rights and the need to recognise that public resources are limited. There is little doubt that the courts’ awareness of public finances has had a tempering effect on the levels of compensation.”*

257. While the reference point for the UK *Human Rights Act* is the provision of the ECHR, there is no reason to doubt that Australian courts would adopt a similarly modest approach, and recognise the limited nature of public resources.

258. In the case of New Zealand, although the *Bill of Rights Act* makes no explicit provision for awards of damages, the New Zealand Court of Appeal held in *Simpson v Attorney-General*<sup>176</sup> (*Baigent’s case*) that the courts did have the power to award compensation for violations of the Act in certain circumstances. The decision was criticized at the time as involving an interpretation of the Act contrary to the intent of the Parliament when it enacted it, and in 1995 the Minister of Justice requested the New Zealand Law Commission to review the appropriateness of damages as an available remedy under the *Bill of Rights Act* as part of the Commission’s inquiry into Crown liability.<sup>177</sup> The Law Commission concluded that “[n]o legislation should be introduced to remove the general remedy for breach of the *Bill of Rights Act* held to be available in *Baigent’s case*”<sup>178</sup> for three main reasons:

*“the need to provide an effective remedy for breaches of rights under the Bill of Rights Act;*

*the development of common law remedies to protect rights and interests*

<sup>176</sup> [1994] 3 NZLR 667.

<sup>177</sup> New Zealand Law Commission, *Crown Liability and Judicial Immunity A response to Baigent’s case and Harvey v Derrick*, Report 37, May 1997, available at <http://www.austlii.edu.au/nz/other/nzlc/report/R37/>.

<sup>178</sup> *Ibid* at [4].

*similar to those in the Act, is likely to be slow and sporadic;*

*international law supports linking remedies to rights.”*<sup>179</sup>

259. The New Zealand Government accepted this recommendation and has not legislated to reverse the result in *Baigent’s case*. In its report, the Law Commission wrote:<sup>180</sup>

*“While the Act does state new rights, in very large measure it re-states existing rights, although at times giving them greater precision. In most, but not all cases of breach, the courts will be able to provide a remedy from their existing armoury. The Court of Appeal in Baigent’s case took the view that provision of an appropriate remedy is a critical aspect of giving substance to the Act. Without appropriate remedies, the Act would not be what the executive proposed and Parliament purported to enact: a statement of fundamental rights of New Zealanders, which would constrain the power of the state (in the absence, of course, of legislation inconsistent with the Act – s 4). Appropriate remedies – including the rejection of evidence, the ordering of habeas corpus, the terminating of a trial, the declaration of illegality, the award of a monetary remedy – are all essential means of emphasising that the state is subject to the law. The provision of sanctions adds to the recognition of the Act as an overarching set of principles by which all New Zealanders, including decision-makers, are guided and protected.”*

260. The Law Commission carefully reviewed claims that allowing such a right would lead to a significant expansion of awards of damages against the government and public authorities. It concluded that in many cases there were already existing causes of actions for which damages were an available remedy that overlapped with Bill of Rights claims. In the context of claims against the police, the major areas of concern, that the *“limited residual character of the compensation remedy is supported by the fact that similar, additional remedies in comparable countries have not produced a major increase in state liability.”*<sup>181</sup>

261. In their review of experience under the New Zealand *Bill of Rights Act*, Butler and Butler note that awards of compensation under the Act have generally ranged from

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<sup>179</sup> Ibid at [74].

<sup>180</sup> Ibid at [76].

<sup>181</sup> “Likely Consequences of *Baigent’s Case* in Fact: The New Zealand position”, *ibid*, Appendix A, [A24].

nominal amounts to awards of around NZ\$55,000<sup>182</sup>, though each of the two awards they refer to at the upper end of that scale were significantly reduced on appeal.<sup>183</sup>

262. In *Taunoa v Attorney General*<sup>184</sup> the New Zealand Supreme Court considered the principles that should apply in relation to the award of compensation under the *Bill of Rights Act* at some length. Tipping J sought to give an overview of the principles that should apply:

*“[255] For some breaches, however, unless there is a monetary award there will be insufficient vindication and the victim will rightly be left with a feeling of injustice. In such cases the court may exercise its discretion to direct payment of a sum of monetary compensation which will further mark the breach and provide a degree of solace to the victim which would not be achieved by a declaration or other remedy alone. This is not done because a declaration is toothless; it can be expected to be salutary, effectively requiring compliance for the future and standing as a warning of the potentially more dire consequences of non-compliance. But, by itself or even with other remedies, a declaration may not adequately recognise and address the affront to the victim. . . .*

*[256] It may be entirely unnecessary or inappropriate to award damages if the breach is relatively quite minor or the right is of a kind which is appropriately vindicated by non-monetary means, such as through the exclusion of improperly obtained evidence at a criminal trial. It may also be unnecessary if a damages award under another cause of action has adequately compensated the victim, especially so where that award has a component of aggravated damages. In such a case there is nothing to be gained by way of vindication by adding a nominal sum for the Bill of Rights breach.*

*[257] In other cases, however, non-Bill of Rights damages may not be available since the only actionable wrong done to the plaintiff is the Bill of Rights breach. Then a restrained award of damages may be required if without them other Bill of Rights remedies will not provide an effective remedy.*

*[258] When, therefore, a court concludes that the plaintiff’s right as guaranteed by the Bill of Rights Act has been infringed and turns to the*

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<sup>182</sup> One outlier case involved the seizure of a helicopter and rifle leading to an award of over \$360,000.

However, on appeal the Court of Appeal held that there was no unreasonable seizure, and therefore did not need to address the appropriateness of the damages award: *Attorney-General v P F Sugrue Ltd* [2003] NZCA 204.

The Privy Council dismissed an appeal from the decision of the Court of Appeal: [2005] UKPC 44.

<sup>183</sup> The first case was *Minister of Immigration Anor v Udompun* [2005] NZCA 128, [2005] 3 NZLR 204. Leave to appeal was refused by the Supreme Court in *Udompun v Minister of Immigration and New Zealand Police* [2006] NZSC 1. At [7], the Supreme Court observed that it was not persuaded in the case of a reduced award of \$4,000 for single breach of the Bill of Rights “that it could arguably be said that the award was outside the range properly open to the Court or the authorities.” The second case was *Taunoa v Attorney-General* [2007] NZSC 70, in which the Supreme Court reduced an award of \$55,000 to \$34,000.”

<sup>184</sup> [2007] NZSC 70.

*question of remedy, it must begin by considering the non-monetary relief which should be given, and having done so it should ask whether that is enough to redress the breach and the consequent injury to the rights of the plaintiff in the particular circumstances, taking into account any non-Bill of Rights damages which are concurrently being awarded to the plaintiff. It is only if the court concludes that just satisfaction is not thereby being achieved that it should consider an award of Bill of Rights Act damages. When it does address them, it should not proceed on the basis of any equivalence with the quantum of awards in tort. . . . The sum chosen must, however, be enough to provide an incentive to the defendant and other State agencies not to repeat the infringing conduct and also to ensure that the plaintiff does not reasonably feel that the award is trivialising of the breach.”*

263. In a 2008 article, Geoff McLay comments that the “revolution” that “appeared to be in the offing” as a result of *Baigent’s* case never happened:

*“[I]n terms of awarding explicitly compensation or damages under the New Zealand Bill of Rights, the record is extremely thin. There is one major exception and a reasonable number of minor awards.”*<sup>185</sup>

264. Similarly, Juliet Philpott, in a comparative analysis of the approach taken by the UK and New Zealand courts, writes that “[a]s in other jurisdictions, the courts in both the United Kingdom and New Zealand have adopted a conservative approach to damages awards for breaches of fundamental rights. . . . That is, in circumstances where public law compensation would be an effective remedy, if another remedy would effectively address the violation, this will be preferred. Moreover, the courts have stipulated that, even when damages are awarded, they are to be modest.”<sup>186</sup>

### ***Findings of inconsistency, and the so called dialogue model***

265. A common feature of recent human rights enactments embodying a so-called “dialogue model” is the power given to courts to make “declarations of incompatibility”. Such feature is found, for example, in s 36(2) of the Victorian Charter (called a “declaration of inconsistent interpretation”), s 32(2) of the *Human Rights Act 2004* (ACT), and s 4 of the UK *Human Rights Act*.
266. Section 36 of the Victorian Charter is in the following terms:

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<sup>185</sup> Geoff McLay, “Damages for Breach of the New Zealand Bill of Rights – Why Aren’t They Sufficient Remedy?” [2008] *New Zealand Law Review* 333, 334-335.

<sup>186</sup> Juliet Philpott, “Damages under the United Kingdom’s Human Rights Act and the New Zealand Bill of Rights Act 1990” (2007) 5 *New Zealand Journal of Public and International Law* 211, 227.



“36(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. ...*

(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.”*

267. Pursuant to s 36(6), the Supreme Court must cause a copy of a declaration of inconsistent interpretation to be given to the Attorney-General. Section 36(7) requires the Attorney-General as soon as reasonably practicable to 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. Within 6 months after receiving a declaration of inconsistent interpretation, the relevant Minister must prepare a “*written response to the declaration*” and cause a copy of the declaration and his or her response to be laid before each House of Parliament and published in the Government Gazette: s 37.

268. Section 32 of the *Human Rights Act 2004* (ACT) provides, *inter alia*:

“(2) *If the Supreme Court is satisfied that the Territory law is not consistent with the human right, the court may declare that the law is not consistent with the human right (the **declaration of incompatibility**).*

(3) *The declaration of incompatibility does not affect—*

(a) *the validity, operation or enforcement of the law; or*

(b) *the rights or obligations of anyone.*

(4) *The registrar of the Supreme Court must promptly give a copy of the declaration of incompatibility to the Attorney-General.”*

269. Section 33 makes provision in relation to action by the Attorney-General on receiving a declaration of incompatibility.

270. Section 4 of the UK *Human Rights Act* provides, *inter alia*, as follows in relation to declarations of incompatibility:

- “(2) *If the court is satisfied that the provision is incompatible with a Convention right, it may make a declaration of that incompatibility. ...*
- (6) *A declaration under this section (“a declaration of incompatibility”)—*
- (a) *does not affect the validity, continuing operation or enforcement of the provision in respect of which it is given; and*
- (b) *is not binding on the parties to the proceedings in which it is made.”*

271. A further proposal for a declaration of incompatibility mechanism is found in ss 51 and 52 of the so-called “*New Matilda Bill*” or model federal Human Rights Bill produced by the Human Rights Act for Australia Campaign. Section 51(4) of the *New Matilda Bill* is in relevantly identical terms to s 4(6) of the UK *Human Rights Act*.

272. During the course of the National Human Rights Consultation, some concern was raised as to whether a declaration of incompatibility mechanism contained in a federal charter of rights would fall foul of the Constitution. Two related issues were identified:

- (a) whether the making of a declaration of incompatibility by a court exercising federal jurisdiction would constitute an exercise of judicial power within Chapter III of the Constitution; and
- (b) whether the making of a declaration of incompatibility would involve a “*matter*” within the meaning of sections 75, 76 and 77 of the Constitution.<sup>187</sup>

273. Addressing, in particular, the declaration of incompatibility mechanism or so-called “*dialogue procedures*” contained in ss 51 and 52 of the *New Matilda Bill* (which, as noted above, are based on the UK Act), in a paper presented at the Australian Human Rights Commission on 5 March 2009 the Honourable Michael McHugh QC AC

<sup>187</sup> The issues are discussed more fully in the following articles: Solicitor-General for Victoria, Pamela Tate SC, “Protecting Human Rights in a Federation” (2007) 33 *Monash Law Review* 220 at 234-241; Dominique Dalla-Pozza and George Williams, “The constitutional validity of declarations of incompatibility in Australia charters of rights” (2007) 12(1) *Deakin Law Review* 1; Stephanie Wilkins, “Constitutional Limits on Bills of Rights introduced by a State or Territory” (2007) 35 *Federal Law Review* 431; The Hon Michael McHugh AC, QC “A Human Rights Act, the courts and the Constitution” (paper presented on 5 March 2009); and Solicitor-General for Victoria, Pamela Tate SC “Victoria’s Charter of Human Rights and Responsibilities: A Contribution to the Debate on a National Charter” paper delivered at Commonwealth Law Conference, Hong Kong, 6 April 2009. See also the Law Council of Australia’s submission to the National Human Rights Consultation at paragraphs 162 to 213.

commented that unlike the United Kingdom, Australia has a written constitutional separation of legislative, executive and judicial power to which all federal legislation must conform. The arguments concerning the constitutional validity of ss 51 and 52 that set up the declaration of incompatibility mechanism or dialogue procedures of the New Matilda Bill are lengthy, technical, complex and difficult. It is unnecessary to expose them in the present submission, other than to note that the arguments for and against the constitutional validity of the dialogue model of human rights protection are presented in an Appendix to Mr McHugh's paper.

274. Of most significance for present purposes is that on 22 April 2009 the President of the Australian Human Rights Commission the Honourable Catherine Branson QC convened a roundtable of eminent constitutional law experts to discuss the constitutional implications of an Australian Human Rights Act. The roundtable was attended by amongst others Michael McHugh QC AC and Sir Anthony Mason AC KBE.<sup>188</sup> According to Ms Branson, the principal concern of the roundtable had been that it might be unconstitutional for a court to issue a declaration of incompatibility, a common feature of Human Rights Acts elsewhere: "*The Australian Constitution prevents a court exercising federal jurisdiction, such as the High Court, from making an order that does not directly affect any person's rights*". Ms Branson said the roundtable agreed that this concern could be addressed by taking the courts out of the notification process: "*Instead, an independent body such as the Australian Human Rights Commission could keep a watch on cases and notify the Parliament through the Attorney-General if a court were unable to interpret the legislation in a way that was compatible with the Human Rights Act*".<sup>189</sup>

275. A statement was subsequently adopted recording the consensus reached by those at the meeting. In relation to the issue of declarations of incompatibility, the statement provided as follows:

***"6. The Government to respond publicly if a court finds that a law is inconsistent with human rights"***

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<sup>188</sup> The meeting was convened on 22 April 2009 by Commission President the Hon Catherine Branson QC. Other attendees included Victorian Solicitor-General Pamela Tate SC, Bret Walker SC, Professors George Williams, Spencer Zifcak and Associate Professors James Stellios, Kristen Walker and Anne Twomey.

<sup>189</sup> "Constitution poses no obstacle to national Human Rights Act", 6 May 2009, [http://www.hreoc.gov.au/about/media/media\\_releases/2009/32\\_09.html](http://www.hreoc.gov.au/about/media/media_releases/2009/32_09.html).

*If a court found that it could not interpret a law of the Commonwealth in a way that is consistent with the rights identified in the Act, a statutory process could apply to bring this finding to the attention of federal Parliament and require a government response.*

*An example of a possible process is as follows:*

*The Australian Human Rights Commission would be empowered, at the request of a party to the proceeding or of its own motion, to notify the Attorney-General of a finding of inconsistency. The Attorney-General would be required to table this notification in federal Parliament. The Government would be required to respond to the notification within a defined period (for example, 6 months)."*

276. The Bar Association is confident that the statement issued by the roundtable removes any residual doubt concerning the constitutionality of the making of a "*finding of inconsistency*" by a court exercising federal jurisdiction. The Bar Association submits that findings of inconsistency offer a constitutionally sound and valuable mechanism to send a message to Parliament of the court's view that a Commonwealth law is inconsistent with human rights, and to require a response from Parliament to such a finding. This response could take the form of an amendment to the law or its repeal, or a decision to take no action.
277. Plainly, the effect of a finding of inconsistency would not be to invalidate the impugned legislation in whole or in part, nor to otherwise affect its operation or enforcement. For this reason, the approach has been described as preserving parliamentary sovereignty as it requires Parliament to make the final decision on the maintenance of a law that is inconsistent with human rights.
278. Accordingly, the Bar Association submits that the inclusion of a finding of inconsistency mechanism in a federal charter of rights ought be entirely uncontroversial. However for reasons developed below, the Bar Association supports a slightly different model, referred to in this submission as "*the direct incorporation model*".

***The direct incorporation model – the Bar Association's preferred model***

279. In its submission to the National Human Rights Consultation, the Law Council of Australia supports a legislative model referred to as "*a dialogue model*" and which incorporates a "*finding of inconsistency*" mechanism as described above. The Law

Council's submission is based on the Policy Statement on a Federal Charter or Bill of Rights adopted by the Law Council on 29 November 2008 (see paragraph 213 of the Law Council's submission to the National Human Rights Consultation, dated 6 May 2009). At the same time, however, the Law Council encourages the Consultation Committee to consider other legislative models for the protection of human rights at the federal level.

280. The New South Wales Bar Association has previously expressed support for the position of the Law Council, and in particular for the so-called dialogue model. However, since the Law Council adopted its Policy Statement in late 2008, the former High Court justice and president of the Bar Association, the Honourable Justice Michael McHugh AC QC, has expressed support for a so-called “*direct incorporation model*” of human rights protection.<sup>190</sup> The Bar Association has carefully considered the case for direct incorporation, and for the reasons set out below now considers that this approach offers a superior form of statutory protection.
281. In his speech delivered at the Australian Human Rights Commission on 5 March 2009, referred to elsewhere in this submission,<sup>191</sup> Mr McHugh raised doubt about whether *Al Kateb v Goodwin*<sup>192</sup> would have been decided differently and Mr Al Kateb fared better if a bill had been in force as a federal enactment containing a similar interpretive clause to that proposed in s 49(1) of the New Matilda Bill. Section 49(1) (which is in relevantly similar terms to that supported in the Law Council of

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<sup>190</sup> M McHugh AC QC “A Human Rights Act – the Courts and the Constitution”, 5 March 2009, Address to the Australian Human Rights Commission.

<sup>191</sup> The model proposed is similar in its operation to previous statutory bills of rights that have been proposed and in some cases introduced into the Commonwealth Parliament: see, Byrnes, Charlesworth and McKinnon, *Bills of Rights in Australia*, 27-34. One of these, the *Parliamentary Charter of Rights and Freedoms Bill 2001 [2008]*, originally introduced by the Australian Democrats, is in fact still before the Senate, having been restored to the Notice Paper in February 2008. A similar model also operated in Hong Kong under the *Hong Kong Bill of Rights Ordinance 1991*. The Hong Kong Bill of Rights regime comprised an ordinary statute that required pre-existing legislation to be read consistently with ICCPR rights and, if that were not possible, the Ordinance repealed the earlier provisions to the extent of the inconsistency; it also provided that future legislation should be interpreted in accordance with the protected rights. For post-Bill of Rights Ordinance enactments, this was overlaid by constitutional protection, under the Letters Patent until 30 June 1997 and under the Hong Kong Basic Law from 1 July 1997, which subjected laws to constitutional scrutiny and declarations of invalidity against the ICCPR (Letters Patent) and the ICCPR and ICESCR (Basic Law), respectively. See generally Andrew Byrnes, “Hong Kong’s Bill of Rights Experience and its (Ir)relevance to the ACT Debate over a Bill of Rights”, in Christine Debono and Tania Colwell (eds), *Comparative Perspectives on Bills of Rights* (NISSL and CIPL, 2004) 33-48, available at <http://law.anu.edu.au/nissl/borhk.pdf>; Andrew Byrnes, “And Some Have Bills of Rights Thrust Upon Them: The Experience of Hong Kong’s Bill of Rights”, in Philip Alston (ed), *Promoting Human Rights Through Bills of Rights: Comparative Perspectives* (Oxford: Clarendon Press, 1999), chapter 9, 318-391; and Johannes Chan, ‘Constitutional Protection of Human Rights: The Hong Kong Experience’, paper presented at Protecting Human Rights Conference 2008, University of Melbourne, 3 October 2008.

<sup>192</sup> (2004) 219 CLR 562.

Australia's submission to the National Consultation at paragraph 128), and provides that: "*So far as it is possible to do so, primary and subordinate legislation must be read and given effect in way which is compatible with human rights*".

282. As is well-known (and discussed elsewhere in this submission), in *Al Kateb* the High Court held by a 4 - 3 majority which included McHugh J (as he then was) that despite the fact that Mr Al Kateb could not be deported and the Minister would not grant him a visa, the terms of the *Migration Act* required his continued detention. The minority which included Gleeson CJ held that Mr Al Kateb could not be detained for as long as he could not be deported. Chief Justice Gleeson (in dissent) held that the period of detention of Al Kateb was defined by reference to the fulfillment of the purpose of removal under s 198 of the *Migration Act*. If that purpose could not be fulfilled, the choice lay between treating the detention as suspended, or as indefinite. In resolving questions raised by the legislative silence, Gleeson CJ said resort could, and should, be had to the fundamental principle of statutory interpretation that Courts do not impute to the legislature an intention to abrogate or curtail certain human rights or freedoms unless such an intention is clearly manifested by unambiguous language which indicates that the legislature has directed its attention to the rights or freedoms in question, and has consciously decided upon abrogation or curtailment.
283. However, McHugh J, in the majority, took the view that the plain purpose of the legislation was that an unlawful entrant into Australia such as Mr Al Kateb had to be detained in immigration detention until that person was either given a visa or deported. McHugh J considered that the introduction of issues of suspension of detention was not an application of the fundamental principle of construction to which the Chief Justice referred, but an amendment of the imperative terms of ss 196 and 198 of the *Migration Act*.
284. Without descending into a critique of the decision of the majority in *Al Kateb*, it is clearly unfortunate that the application of what are regarded as fairly uncontentious principles of statutory interpretation produced a result which Mr McHugh who was in the majority has said he deplored and regards as tragic. The Bar Association concurs in the view of Mr McHugh that the case of Mr Al Kateb shows a weakness in the dialogue model of human rights protection and that, on any view, the interpretive provisions of the dialogue model are suboptimal.

285. As Mr McHugh has observed, apart from the right of action against public authorities, the dialogue model creates no rights or causes of action. As a result, those whose human rights have been infringed have no remedies for infringements of those rights in cases where there is a violation required by the provisions of a statute. They cannot obtain damages or injunctions to restrain the conduct that infringes their rights. This is a breach of article 2(3) of the ICCPR which provides that, if a person's rights under that Covenant have been violated, that person has a right to an effective remedy. Under article 2, each State Party undertakes to ensure that any person whose rights or freedom is violated shall have an effective remedy and that the person claiming such a remedy shall have his or her right determined by a competent judicial, administrative or legislative authorities, or by another competent authority provided by the legal system of the State.
286. Accordingly, the Bar Association now considers that instead of the so-called dialogue model, Parliament should give effect to the ICCPR and the ICESCR by interpretive legislation that empowers courts invested with federal jurisdiction to hold that legislation that is inconsistent with the human rights legislation is invalid in the case of State and Territory legislation and that, in the absence of a sufficiently clear statement to the contrary, all federal legislation is to be read subject to the human rights legislation of the Parliament.
287. The result of such a direct incorporation model would be that private citizens would have judicially enforceable human rights not affected by State, Territory or federal legislation inconsistent with those rights, and would have immediate judicial remedies for breaches of those rights.
288. As Mr McHugh has commented, a legislative model along these lines, directly incorporating the ICCPR and the ICESCR, would have only a minimal effect on parliamentary sovereignty since it would be open to the Parliament of the Commonwealth to insert in any federal legislation a clause requiring the courts to give effect to that particular legislation, notwithstanding the enactment of the human rights legislation. It would also be open to the Parliament after any decision with which it

disagreed to insert a clause in the legislation which the court had said should be ignored in determining rights and obligations.<sup>193</sup>

289. In the submission of the Bar Association, the direct incorporation approach provides a superior form of statutory protection to the dialogue model. Not only does the dialogue model confer at best only marginally more protection than common law principles of statutory interpretation, its other deficiencies include the lack of judicially enforceable remedies except as against public authorities of the Commonwealth. The significant advantages of the dialogue model in improving the human rights components and analysis in policymaking and the legislative process would also be present in a direct incorporation model. This would include features such as reasoned statements of compatibility, a specific parliamentary scrutiny function, and other features intended to promote a culture of human rights more broadly.

### ***Other matters to be included in an Australian charter of rights***

#### *Intervention*

290. The Bar Association supports a provision in an Australian charter of rights providing for intervention by the Attorney-General for the Commonwealth, as of right and the Australian Human Rights Commission, with the leave of the relevant court or tribunal.

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<sup>193</sup> In his paper, the Hon Mr McHugh AC QC mentions, for example, the notwithstanding clause contained in the Canadian Bill of Rights, the precursor to the Canadian Charter of Rights and Freedoms which was enacted by the Canadian Parliament on 10 August 1960. It was the earliest expression of human rights law at the federal level in Canada (although an implied bill of rights had already been recognised: for example, *Reference Re Alberta Statutes* [1938] SCR 100; *Switzman v Elbling* [1957] SCR 285; and *Saumur v The City of Quebec* [1953] 2 SCR 299. The notwithstanding wording of section 2 of the Bill of Rights begins as follows: “2 Every law of Canada shall, unless it is expressly declared by an Act of the Parliament of Canada that it shall operate notwithstanding the Canadian Bill of Rights, be so construed and applied as not to abrogate, abridge or infringe or to authorize the abrogation, abridgment or infringement of any of the rights or freedoms herein recognised and declared...” The Solicitor General for Victoria Pamela Tate has suggested that the “*McHugh alternative*” could face constitutional difficulties if the notwithstanding clause requirement was considered to constitute a “*manner and form*” direction to federal Parliament: Pamela Tate SC, Victoria’s Charter of Human Rights and Responsibilities: A Contribution to the National Charter Debate”, speech delivered at the meeting of the Commonwealth Lawyers Association 6-7 April 2009, Hong Kong, pp 18-19. Whilst it may well be that a notwithstanding clause in similar terms to s 2 of the Canadian Bill of Rights would encounter “*manner and form*” problems, Mr McHugh’s proposal does not involve any such clause. Rather, his reference to the Canadian approach is by way of illustration. Rather, Mr McHugh’s suggestion is that in the absence of a sufficiently clear statement to the contrary, all federal legislation be read subject to the human rights legislation. Such an essentially interpretive device is familiar in interpretation legislation, and would not encounter “*manner and form*” difficulties.



*Review of the charter*

291. The Bar Association suggests that there be provision for review of the provisions of an Australian charter of rights after a period of 5 years.

\* June 2009