

Human Rights Inquiry

**Submission to Legal Affairs and Community Safety Committee, Queensland
Parliament**

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Introduction

The Castan Centre for Human Rights Law thanks the Legal Affairs and Community Safety Committee (the Committee) for the opportunity to comment on its present inquiry into the desirability of a Human Rights Act for Queensland.

We believe that Queensland should indeed enact specific human rights legislation. The human rights charters in the ACT and Victoria have been successful in protecting the rights of those jurisdictions' most vulnerable people, and have in no way developed into the 'lawyers' picnic' predicted by those opposed to legislative human rights protection.¹

The submission to this inquiry from Professor George Williams and Daniel Reynolds identifies the most pressing technical issues which have emerged from the ACT and Victorian experience, and suggests sensible solutions. As such, this submission focuses on making the case for a Human Rights Act by identifying gaps in rights protection and addressing potential opponents' arguments. It also outlines the differences between the various statutory models of rights protection adopted in the UK, Victoria, the ACT and New Zealand for the information of the Committee. Finally, it explains the rationale behind our recommendations.

Recommendations in Brief

The Castan Centre urges the Committee to recommend that Queensland enact a Human Rights Act similar to the *Human Rights Act 2004* (ACT) and the *Charter of Human Rights and Responsibilities Act 2006* (Vic).

However, by drawing on the experience of comparable jurisdictions, Queensland can avoid some potential pitfalls and improve on existing models. The essential features of a Human Rights Act for Queensland (in addition to the typical list of protected rights drawn from the International Covenant on Civil and Political Rights (ICCPR)) should be:

- Protection for economic, social and cultural rights (see further below on the justiciability of these rights),
- A limitation clause which details grounds for rights limitation (similar to Victoria's) but which also excludes absolute rights, such as freedom from torture and other cruel, inhuman and degrading treatment or punishment;
- Clear statements of who has human rights (only individuals) and who has obligations under the Human Rights Act (public authorities);

¹ See Williams and Reynolds submission to the present inquiry, p2; also Human Rights Law Centre Submission, pp17-18.

- A free-standing right of action for breaches (such as has been introduced in the ACT, but which does not yet exist in Victoria) with a comprehensive range of available remedies;
- An interpretive clause which empowers the courts to apply the law consistently with human rights whenever possible (and to make Statements of Inconsistent Interpretation when that is not possible);
- No unnecessary provision for Parliament to be able to override judicial rights decisions (it is not needed unless the courts can strike down legislation), and
- A mandate for a parliamentary human rights scrutiny committee (properly funded for a heavy workload involving scrutiny of every piece of new legislation, and provided with expert human rights legal advice) plus a requirement that each new piece of legislation introduced into the Queensland Parliament be accompanied by a Statement of Compatibility with Human Rights (this is already a requirement not only in the ACT and Victoria, but also in the Commonwealth jurisdiction²).

The Castan Centre also supports the Human Rights Law Centre's submission that human rights legislation is not enough on its own.³ Engagement with, and respect for, human rights on the part of public authorities can only be achieved through education programs. Funding must also be provided for public education so that those who might benefit from a Human Rights Act know about it.

The final section of this submission elaborates on these recommendations.

Gaps in Human Rights Protection

Across Australia

Along with most other Western democracies, Australia is party to several major UN human rights treaties which require it to respect, protect and fulfil various rights. However, these treaties do not become enforceable unless they are incorporated into Australian law. Unlike comparable nations, and despite recommendations from the UN Human Rights Council's

² See *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth).

³ See Human Rights Law Centre submission, pp8-9.

Universal Periodic Review,⁴ UN Human Rights Treaty Bodies⁵ and the National Human Rights Consultation Committee,⁶ Australia has to date not adopted a national Human Rights Act.

Australia has largely incorporated the Convention on the Elimination of All Forms of Racial Discrimination (CERD), parts of the Convention on the Elimination of All Forms of Discrimination Against Women, the Convention on the Rights of the Child (CRC) and the Convention Against Torture into domestic law, as well as parts of the Genocide and Refugee Conventions.⁷

Through what has aptly been called an ‘intricate patchwork of...laws and institutional arrangements,’⁸ many of the fundamental rights in the primary UN treaties – the ICCPR and the International Covenant on Economic, Social and Cultural Rights (ICESCR) – enjoy some level of protection in Australia.

The common law provides relatively strong protection for certain rights, such as fair trial rights, but has demonstrably fallen short in protecting even some of the most fundamental civil rights, such as freedom from arbitrary detention.⁹ Some of these gaps in protection for vulnerable groups, including detainees and LGBTI people, have become obvious at the national level and have engendered a great deal of legal and political debate.

At the State and Territory level, there is even more law and administration with the potential to affect people’s rights directly. For example, State and Territory Governments have primary responsibility for policing, prisons, health and education – typically fields which generate human rights claims in other jurisdictions. Any instance in which public authorities interact with people gives rise to some potential for rights abuses, and where those authorities act outside their powers (or are granted overly broad powers), the chances for abuse increase.

⁴ See *Draft Report of the Working Group on the Universal Periodic Review: Australia*, UN Doc A/HRC/WG.6/23/L.11 (20 November 2015), paras 136.70-136.73. See also Australia’s response: ‘Australia does not propose to alter its federal model of Parliamentary supremacy through the introduction of a judicially enforceable Human Rights Act,’ UN Doc A/HRC/31/14/Add.1 (29 February 2016), para 14.

⁵ See eg Concluding Observations of the Human Rights Committee on Australia, 95th sess, UN Doc CCPR/C/AUS/CO/5 (2 April 2009) para 8.

⁶ See Australian Government, *National Human Rights Consultation Report*, September 2009: <http://pandora.nla.gov.au/pan/94610/20100324-0000/www.humanrightsconsultation.gov.au/www/nhrcc/nhrcc.nsf/Page/Report_NationalHumanRightsConsultationReportDownloads.html#pdf>, Recommendation 18.

⁷ See *Racial Discrimination Act 1975* (Cth); *Sex Discrimination Act 1984* (Cth); *Crimes (Torture) Act 1988* (Cth); *Criminal Code Act 1995* (Cth) Div 274; *Family Law Act 1975* (Cth); *Genocide Convention Act 1949* (Cth); *Migration Act 1958* (Cth).

⁸ See Byrne et al, *Bills of Rights in Australia: history, politics and law* (UNSW Press, Sydney, 2009), 36.

⁹ See Australian Law Reform Commission, *Traditional Rights and Freedoms – Encroachments by Commonwealth Laws* (ALRC Report 129): <<http://www.alrc.gov.au/publications/freedoms-alrc129>>.

In Queensland

Both the ICCPR¹⁰ and the ICESCR¹¹ provide that international human rights obligations extend to all parts of federated countries such as Australia. As such, it is incumbent on Australian State and Territory governments to ensure that their own laws and practices are human rights-compliant to avoid breaches of international law attributable to the federation as a whole.

Queensland's record on human rights protection, like those of every Australian jurisdiction, is mixed. There are areas in which Queensland leads the way – for example the State has the tightest controls on solitary confinement in prisons¹² and (after a hiatus between 2012 and 2015) provides for official ceremonies to celebrate same-sex civil unions.

The current Queensland inquiries into expungement of historical convictions for consensual gay sex¹³ and the need for a Human Rights Act are also positive steps for human rights.

However, in other areas such as anti-protest laws (which engage freedom of speech) and anti-motorcycle gang laws (which affect freedom of association and fair trial rights),¹⁴ Queensland has some of the most stringent limitations on civil and political rights in Australia.

Queensland is also the only State to have prosecuted a couple for procuring an abortion in recent times.¹⁵ It is the only State in which the 'gay panic' provocation defence still stands, in which gay couples cannot adopt, and in which the age of consent for anal sex is higher than for other sex.¹⁶ Only in Queensland is a 17 year old child be treated as an adult in the criminal justice system in defiance of the CRC.¹⁷

There have been at least three complaints to the UN Treaty Bodies which have found incompatibilities between Queensland and international law.

- In 1998, Patrick Coleman was fined and detained for making public arguments concerning land rights and mining in the Townsville mall.¹⁸ Arguments about

¹⁰ See article 50.

¹¹ See article 28.

¹² See *Corrective Services Act 2006* (Qld) s 121.

¹³ See QLRC, *Current reviews*: <<http://www qlrc.qld.gov.au/current-reviews>>.

¹⁴ It is acknowledged that there is currently a proposal to replace the anti-motorcycle gang laws with broader anti-organised crime laws is acknowledged.

¹⁵ See Carlisle, 'Crown kicks own goal in Qld abortion trial,' *ABC News Online*, 15 October 2010: <<http://www.abc.net.au/news/2010-10-15/crown-kicks-own-goal-in-qld-abortion-trial/2298608>>.

¹⁶ See Remeikis, 'Queensland lagging behind nation on social justice issues,' *Brisbane Times*, 25 July 2015: <<http://www.brisbanetimes.com.au/queensland/queensland-lagging-behind-nation-on-social-justice-issues-20150724-gik6po.html>>.

¹⁷ The UN Special Rapporteur on Torture identified this practice as inconsistent with international law in a 2015 report to the UN Human Rights Council on children deprived of their liberty around the world – see <<http://hrlc.org.au/ausyouthjusticepracticesarefailing>>.

¹⁸ See *Coleman v Australia*, UN Doc CCPR/C/87/D/1157/2003, Views of 10 August 2006.

freedom of assembly and expression were rejected by the Queensland courts, because these rights were – and still are – not protected by either legislation or common law. The implied freedom of political communication in the Commonwealth Constitution was held not to apply to his case. The Human Rights Committee found that Coleman had been disproportionately punished for expressing his opinions, and that Australia had therefore breached article 19 of the ICCPR. Neither the Australian nor the Queensland Government has done anything to remedy this breach.¹⁹

- In 2003, the UN Committee on the Elimination of Racial Discrimination considered a complaint from Stephen Hagan about the use of the word ‘nigger’ on a sign attached to a football stand in Toowoomba.²⁰ The UN Committee held that this breached the CERD and recommended the sign be removed. Four years later the stand was demolished, but not in response to the finding of a human rights breach, which both the Queensland and Australian Governments denied.²¹
- In 2010, the UN Human Rights Committee found that holding sex offender Robert Fardon in prison indefinitely beyond the completion of his prison term breached guarantees of due process and the prohibition on retrospective punishment in the ICCPR.²² The *Dangerous Prisoners (Sexual Offenders) Act 2003* (Qld) provides for such indefinite detention, with annual ‘dangerousness’ reviews. Almost four years after the UN Committee’s Views were published, the Queensland Court of Appeal did order that Fardon be released into supervised accommodation, but once again the Queensland Government was strongly opposed to Fardon’s attempt to assert his human rights.²³

The outcomes of these confirmed human rights breaches would not necessarily have been different if Queensland had a Human Rights Act (which would maintain parliamentary sovereignty), but the complainants would at least have been able to test their rights claims in a domestic court, an opportunity afforded citizens in most other democratic jurisdictions.

Finally, taking a broader view of the polity, Queensland’s lack of a House of Review in its Parliament means that the potential for the executive to dominate is heightened compared with other states and territories. This increases the need for scrutiny so that majority government does not run roughshod over the rights of vulnerable minorities. A Human Rights Act, with a complementary role for a parliamentary rights scrutiny committee, would provide valuable oversight.

¹⁹ See Remedy Australia, Coleman case briefing: <<http://remedy.org.au/cases/8>>.

²⁰ See *Hagan v Australia*, UN Doc CERD/C/62/D/26/2002, Views of 20 March 2003.

²¹ See Remedy Australia, Hagan case briefing: <<http://remedy.org.au/cases/15>>.

²² See *Fardon v Australia*, UN Doc CCPR/C/98/D/1629/2007, Views of 18 March 2010.

²³ See Remedy Australia, Fardon case briefing: <<http://remedy.org.au/cases/11>>.

Arguments against a Human Rights Act

Opponents of Human Rights Acts in Australia rarely argue that Australians do not need any legal protection for their rights. Their objection centres instead on the proposition that Australians' rights are already adequately protected by existing laws and by our parliamentary system of government.²⁴

However, there is generally no requirement, outside the ACT and Victoria, for public officials to act in accordance with human rights in making decisions which affect the lives of individuals, substantively or procedurally. Individuals, particularly the vulnerable, such as the elderly, children, the homeless, prisoners/detainees and the mentally ill, are susceptible to being treated as problems to be dealt with rather than persons with human rights that deserve respect when decisions are made that affect their lives (eg their health, housing or liberty). Even if such decisions are so objectively unreasonable as to enliven administrative law remedies, these remedies generally apply to regulate the procedural aspects, rather than the substantive aspects, of public decision-making. Such remedies often cannot right the relevant wrongs.

There are numerous other arguments against a Human Rights Act. We address the most prominent of these in turn.

First Argument: A Human Rights Act hands too much power to judges²⁵

One of the most vocal arguments against a Human Rights Act is that it hands too much power to an unelected judiciary from a democratically elected and accountable Parliament.²⁶ This argument undoubtedly applies with greater force to constitutionally entrenched Bills of Rights. Since that option is not currently under consideration, we do not address the argument in that context. However, we do note that Canada has a model whereby rights are constitutionally protected, yet parliamentary sovereignty is preserved by way of a 'notwithstanding' clause, which allows national and provincial Parliaments to override the Canadian Charter.

It is also argued that legislative Bills of Rights hand too much power to judges. This argument seems dubious, given that legislative Bills of Rights can be overridden by

²⁴ See eg Allan, 'Siren Songs and Myths in the Bill of Rights Debate,' *Papers on Parliament* No 49, August 2008.

²⁵ For more in depth analysis of the institutional design question and how it impacts on parliamentary sovereignty, see Julie Debeljak, 'Parliamentary Sovereignty and Dialogue under the Victorian *Charter on Human Rights and Responsibilities*: Drawing the Line Between Judicial Interpretation and Judicial Law-Making' (2007) 33 *Monash University Law Review* 9; Julie Debeljak, 'Mission Impossible: "Possible" Interpretations under the Victorian Charter and Their Impact on Parliamentary Sovereignty and Dialogue' in Marius Smith (ed), *Human Rights 2006: The Year in Review* (Castan Centre for Human Rights Law, Melbourne, 2007) 169; Julie Debeljak, 'Rights Protection Without Judicial Supremacy: A Review of the Canadian and British Models of Bills of Rights' (2002) 26 *Melbourne University Law Review* 285; Julie Debeljak, *Human Rights and Institutional Dialogue: Lessons for Australia from Canada and the United Kingdom* (PhD Thesis, Monash University, 2004).

²⁶ See Allan, above n 24.

Parliaments by later legislation, as can judicial interpretations under such legislation. In fact, the legislative models adopted in the UK, NZ, Victoria and the ACT do not repeal prior inconsistent legislation (unlike most legislation, which automatically overrides prior inconsistent legislation).

Do Declarations of Incompatibility/Inconsistency (by which the Supreme Court declares that a law cannot be interpreted consistently with human rights) pose a threat to parliamentary sovereignty? In the UK, the Parliament has thus far responded to most such Declarations by revisiting the legislation, even though it is not under any constitutional or legal obligation to do so.²⁷ Is it arguable that this power effectively leaves Parliaments with little choice but to comply – ie that Parliaments are effectively snookered by such Declarations as they cannot fail to respond to a charge of human rights abuse by judges.

We believe that such an argument is fallacious in respect of legislative Bills/Charters of Rights. Any response, active or passive, by a Parliament to a Declaration of Inconsistency or a judicial interpretation of an Act, is a response by the democratically elected arm of government. If it is feared that Parliaments will automatically ‘cave in’ to judicial interpretations, that fear betrays a lack of trust in Parliaments rather than judges. We submit that executive governments and Parliaments are unlikely to respond to judicial interpretations that they believe to be utterly untenable, or so politically unpopular as to jeopardise the position of the government of the day. Surely, it is also plausible that the UK Parliament has responded as it has agreed with the courts’ assessments that certain legislation is flawed.²⁸ Furthermore, the UK Parliament has an added incentive to comply with Declarations of Incompatibility that does not exist in Australia. That is that the matter might otherwise be pursued before the European Court of Human Rights: the UK is bound by international law to follow its decisions.²⁹

In any case, Australian parliaments have already exhibited a willingness to explicitly depart from human rights standards. For example, the Australian Parliament explicitly set aside the *Racial Discrimination Act* in providing for the Northern Territory intervention. In *RJE v Dept of Justice, AG and VEOHRC*,³⁰ the majority in the Victorian Court of Appeal read a statutory provision in accordance with the common law right to liberty, while Nettle J came to the same conclusion relying on provisions of the Victorian Charter. The legislation concerned Extended Supervision Orders for serious sex offenders. The Victorian Parliament acted promptly and unanimously to amend the legislation, so as to undo the effect of the Court’s

²⁷ See London School of Economics, Centre for the Study of Human Rights, *Declarations of Incompatibility under the Human Rights Act 1998* (April 2013):

<<http://www.lse.ac.uk/humanRights/documents/2013/incompatibilityHRA.pdf>>.

²⁸ Andrew Byrnes, Hilary Charlesworth and Gabrielle McKinnon, *Bills of Rights in Australia* (UNSW Press, 2009), 61.

²⁹ While Australia is bound by the UN treaties, it is not strictly bound to follow the rulings of the UN treaty bodies.

³⁰ [2008] VSCA 265.

human rights-respecting interpretation and make the system harsher, and less human rights compliant, for serious sex offenders.³¹ It is no certainty that Australian Parliaments would be as 'compliant' as the UK Parliament, especially given that Australia is not similarly liable to legally binding international oversight from a regional human rights court.

A final facet of this argument concerns the idea that judges, in pronouncing legislation to be incompatible, are somehow undermining the will of the people. In fact, a regime will often require mere tweaking to become human rights compliant, such as the addition of greater procedural safeguards, rather than wholesale changes. For example, Australia has often been found in breach of the ICCPR in respect of its mandatory detention laws. These findings have not however dictated that Australia cannot detain people for immigration purposes. The cases required that the individual circumstances of each detainee be considered in order to determine if ongoing detention was warranted, in contrast to the blanket system of ongoing detention. The Australian Government in fact implemented this approach in 2008, although arguably it was never fully translated into policy, practice, and legislative change.³²

The 'unelected' judiciary

Much has been made of the unelected and unrepresentative nature of the Australian judiciary. The 'unelected' nature of the judiciary has been used in public debate as a disparaging aspect. Just as one, however, can label the judiciary as 'unelected,' one can label it as 'apolitical,' 'independent,' 'impartial,' or 'a judiciary not beholden to any political constituency.'

We doubt that critics are in fact arguing that our judiciary should be elected. Nevertheless, we would like to highlight the following research findings on aspects of elected judicial officials in the United States. Research projects uncovered a disturbing trend in elected judges making findings that favoured in-state residents (whose vote is needed to maintain office) compared to out-of-state residents (who have no vote).³³ A 2008 investigation into 181 court cases in Louisiana found evidence of significant bias by judges towards those who had donated to their campaigns.³⁴ These findings underline the fact that the 'unelected' nature of the Australian judiciary, along with security of tenure, are highly desirable features of our governmental system.

³¹ *Serious Sex Offenders Monitoring Amendment Act* (Vic) 2009.

³² See Australian Human Rights Commission, *2008 Immigration Detention Report*, available at http://www.hreoc.gov.au/human_rights/immigration/idc2008.html#Heading147; also *National Inquiry into Children in Immigration Detention 2014*: <<https://www.humanrights.gov.au/our-work/asylum-seekers-and-refugees/national-inquiry-children-immigration-detention-2014>>.

³³ See Alexander Tabarrok and Eric Helland, 'Court Politics: The Political Economy of Tort Awards' (1999) 42 *Journal of Law and Economics* 157, at 186.

³⁴ Vernon Valentine Palmer and John Levensis, 'The Louisiana Supreme Court in Question: An Empirical and Statistical Study of the Effects of Campaign Money on the Judicial Function' (2008) 82 *Tulane Law Review* 1291.

Indeed, the independence of the judiciary is a vital part of the Australian system of government. It is for precisely this reason that judges already have oversight over governmental actions, as the judiciary is in a position to give sober and detailed consideration to the legality of any given action without fear of being ‘thrown out’ of office by populist sentiment. The fact that governmental action is already subject to this form of independent judicial scrutiny is a vital pillar of the rule of law in Australia and a key reason for the separation of powers. Depending on the model adopted, the likely effect of a statutory Human Rights Act would be merely to provide additional criteria (namely compliance with human rights) to the exercise of judicial scrutiny of government action.

Judicial accountability and decision-making

Of course, the judiciary is not as directly accountable as our elected representatives, in the sense that they are not subjected to election. However, judges are nevertheless accountable in different ways.

Judges must issue reasoned judgments, which are almost always open to being overturned on appeal, or reversed by legislation, or, in the case of Declarations of Incompatibility, ignored by the Parliament. Judicial decisions are also based on precedent, and changes to the pre-existing law are usually small, incremental and thoroughly reasoned. A judge does not justify his or her decision on the basis that he or she is simply doing what he or she thinks ‘is right.’³⁵ A related issue is that judgments should be crafted according to arguments presented openly in court, or in public documents (eg statements of claim, pleadings).

In contrast, consider decision-making processes within the executive government. Such decisions are not necessarily transparent or reasoned. In fact, Cabinet documents are sealed for 10-20 years.³⁶ The process of policy formulation, or the real motivations behind a Cabinet decision, may be concealed for some time. Furthermore, it is legitimate in many instances for politicians to make decisions after being influenced by behind-the-scenes lobbying.

Of course, in many cases executive policy must be approved by Parliament. Legislation is debated, and is often subjected to scrutiny by parliamentary committees. In particular, an important bulwark against executive power at the federal level is the Senate, where the government often lacks a majority. Nevertheless, the wishes of the executive government

³⁵ In contrast, note that former Prime Minister Howard, in the ABC Documentary series *The Howard Years* explained a number of decisions on the basis that he did what he thought was right. Tony Blair and George W. Bush have expressed similar sentiments. (We focus on ex-leaders because they tend to be more frank about their decision making bases than current leaders).

³⁶ The secrecy period depends on the date of the Cabinet material’s creation due to changes in the law – see: <<http://www.cabinet.qld.gov.au/cabinet.aspx>>.

prevail more often than not (just as in unicameral jurisdictions like Queensland). In any case, as noted, most judicial decisions can be subjected to legislative scrutiny and may be reversed, sometimes with retrospective effect, by legislatures.³⁷ Furthermore, some legislation (including, over the last few years, legislation which seriously infringes rights) is enacted very quickly without proper debate or consideration.³⁸

Our point here is not to impugn decision-making in the legislature and the executive. It is to note that an important level of transparency and accountability is imposed on judges via the judicial decision-making process. Those processes, it is submitted, compare well in terms of transparency and accountability to those of the executive. Both processes may be subjected to oversight by the legislature.

Protection of individuals and minorities

Judges are able to address human rights in individual situations, unlike the broad brush approach taken by legislatures. That is, judges are able to address those situations where individuals may have, perhaps inadvertently, been unfairly caught in the cracks of legislation.³⁹ Perhaps the asylum seeker Mr Al-Kateb was such a person: it seems doubtful that the legislature had contemplated the possibility that a person might be detained forever despite a willingness to be deported.⁴⁰ In that case, the executive was ultimately willing to act to release him, but only after it had proven its point in litigation, manifesting some arbitrariness in the timing of its decision to release him.

Furthermore, the judiciary can offer better protection to vulnerable minorities, who might lack political traction. While human rights attach to all, majorities are more able to influence parliaments to protect and respect their rights, compared to minorities. Unpopular minorities, such as criminals, alleged criminals or the homeless are particularly vulnerable as majorities may actively wish to suppress their rights. Minority rights may also be misunderstood, such that majorities fear that recognition of such rights harm their own interests.⁴¹ Finally, minority rights may simply not be of sufficient interest to majorities so as to motivate their vote: there are fewer votes, for example, in rights for refugees or the mentally ill compared to economic policies. If human rights are left solely in the hands of Parliaments, minorities may be required to wait patiently for majorities to be motivated

³⁷ See *Nicholas v R* (1998) 193 CLR 173, for an example of a court decision being retrospectively reversed by legislation.

³⁸ See George Williams, 'The Legal Assault on Australian Democracy,' Sir Richard Blackburn Lecture, ACT Law Society, 12 May 2015: <<http://www.cla.asn.au/News/legal-assault-on-australian-democracy>>.

³⁹ Jeremy Webber, 'A modest (but robust) defence of statutory bills of rights', in Tom Campbell, Jeffrey Goldsworthy and Adrienne Stone (eds), *Protecting Rights without a Bill of Rights* (Ashgate, 2006) 275-78.

⁴⁰ Indeed, the minority in *Al-Kateb v Godwin* [2004] HCA 37 (Gleeson CJ, Gummow and Kirby JJ) found that the legislation did not authorise detention in such circumstances.

⁴¹ It is submitted that this is the case with regard to native title legislation.

enough to prompt or tolerate change. That can take a long time, and leave many human rights abuses unaddressed along the way.

Human rights are 'too political' for judges

It has been argued that human rights are simply too 'political' or 'discretionary' for judges to be involved. It is true that the perimeters of most human rights are limited by vague measurements such as 'reasonableness,' 'necessity,' or 'minimal impairment.' The argument runs that such decisions are inherently political and should therefore be left to the politically accountable arms of government.⁴²

In response, we note the following. First, judges commonly have to apply vague standards in their decision-making. The 'reasonable person' test has long been a part of tort law. The 'reasonably appropriate and adapted' test of proportionality peppers constitutional law.⁴³ Government decisions can also be invalidated on the ground that they were so unreasonable that no reasonable decision-maker could have come to that conclusion.⁴⁴

Secondly, political issues are commonly presented before courts. Prominent historical examples include the High Court's consideration of the constitutionality of legislation concerning the abolition of the Communist Party in the 1950s, bank nationalisation, introduction of a uniform income tax system, the proposed 'Gordon below Franklin' dam in Tasmania, mandatory detention/transfer of asylum seekers, Work Choices and funding for school chaplains. These were all issues of massive political and even electoral importance to governments. It is impossible to quarantine the judiciary from political issues.

Thirdly, the tests of limiting human rights would not be applied in a vacuum. Australia, speaking metaphorically in a legal sense, is not an island. There is a wealth of comparative and international jurisprudence to draw from in deciding if a certain action or omission breaches human rights, particularly but not exclusively in the area of civil and political rights. Australia is of course not bound by those precedents, but they would be highly instructive for judges making human rights decisions. Australia is not so fundamentally different from, for example, the UK, Canada or Europe, as to preclude the likely applicability of that comparative jurisprudence in a local context. Indeed, the ACT and Victorian Charters (and

⁴² See eg Waldron, *Law and Disagreement* (OUP, 1999), Part III – Rights and Judicial Review; also Allan, 'Oh That I Were Made Judge in the Land,' (2002) 30(3) *Federal Law Review* 561.

⁴³ See eg *McCloy v NSW* [2015] HCA 34, in which the appropriateness of political donation laws is considered by the High Court (see in particular combined judgment of French CJ and Kiefel, Bell and Keane JJ, para 129).

⁴⁴ *Associated Provisional Picture Houses Ltd v Wednesbury Corp* [1948] 1 KB 223.

the UKHRA) explicitly direct judges to refer to international and comparative human rights jurisprudence in interpreting legislation.⁴⁵

Fourthly, not every human rights issue is as controversial as, for example, abortion, euthanasia or same sex marriage. Indeed, human rights case law often concerns procedural rights arising from the right to fair trial, rights which the judiciary is uniquely qualified to implement.⁴⁶

Second Argument: A Human Rights Act would cause an undesirable increase in litigation

Critics argue that a Human Rights Act, if it permitted a free-standing cause of action, would increase litigation, an undesirable consequence given overcrowded courts and the expense of litigation. This criticism is possibly motivated by the US precedent – a large proportion of US constitutional litigation arises from its federal Bill of Rights. However, the US is not a useful comparator in this regard, as it is an excessively litigious society. Such litigiousness is promoted by unique features of its legal system apart from a constitutional Bill of Rights, such as the fact that losers rarely pay costs, as well as a propensity for its courts to award massive damages.

A better comparator is the UK. A 2006 government review of the UK Human Rights Act reported that only 2% of appellate cases concerned major human rights issues.⁴⁷ In 2009 the proportion of human rights cases had actually declined further.⁴⁸ An earlier study in Scotland found that human rights arguments were raised in 0.25% of criminal cases, and ‘a tiny fraction’ of the total criminal and civil caseload.⁴⁹

Furthermore, experience thus far from the ACT and Victoria indicates that the impact of their respective charters on litigation has been minimal. In the first four years of the ACT Human Rights Act, the Charter was raised in only 66 reported cases, mostly in a minor or incidental argument.⁵⁰ From 2009-2014 the Act was mentioned in 110 Supreme Court decisions – still under 10% of total reported decisions.⁵¹ In 2008, the Victorian Charter was

⁴⁵ See, eg, UKHRA, s 2(1); Victorian Charter, s 32(2); ACTHRA, s 31(1) (the latter notes that judges ‘may’ consider international and comparative jurisprudence in interpreting legislation).

⁴⁶ Helen Irving, ‘Off the Charter’, *Australian Literary Review*, 1 April 2009. It is likely that procedural human rights prompt more litigation than other human rights in those jurisdictions with Bills of Rights.

⁴⁷ Byrnes, Charlesworth and McKinnon, above n 28, p 65, citing Department for Constitutional Affairs (UK), *Review of the Implementation of the Human Rights Act*, at p. 10.

⁴⁸ See Human Rights Law Centre submission, p18.

⁴⁹ Byrnes, Charlesworth and McKinnon, above n 28, 65-66 citing Tom Mullen et al, ‘Human Rights in the Scottish Courts’ (2005) 32 *Journal of Law and Society* 148, 152.

⁵⁰ Ibid, 66.

⁵¹ See ACT Human Rights and Anti-discrimination Commissioner, *Look Who’s Talking: A Snapshot of Ten Years of Dialogue under the Human Rights Act 2004*: <<http://hrc.act.gov.au/wp-content/uploads/2015/03/HRA-10-yr-snapshot-HRDC-webversion.pdf>>, at p5.

discussed in only 5 judgments of the Court of Appeal, 15 by the Supreme Court, and 17 judgments of the Victorian Civil and Administrative Tribunal (VCAT).⁵² The average overall number of Charter cases was 47 per year between 2006-2012, declining to 24 per year in 2013-2014.⁵³ Of course, the Victorian Charter numbers are influenced by the lack of an independent cause of action.

Third Argument: There are no rights without responsibilities

We basically agree with this contention, but it is overstated. Very few rights are absolute.⁵⁴ In international law, qualifications to rights, such as freedom of expression or freedom of religion, are permitted by reasonable measures designed to achieve certain legitimate ends, including the rights of others (so, for example, one's right to privacy does not permit abuse of someone else inside one's home), public order (eg freedom of assembly does not permit riotous behaviour), national security (eg freedom of expression does not compel the publication of legitimately classified information), public morals (eg freedom of expression does not permit the publication of child pornography), and public health (eg freedom of movement allows for quarantines in certain medical emergencies).

Though the language of 'responsibilities' is not used, one's rights are largely limited by one's responsibilities to others and to society. That is, the qualifications to rights essentially take account of the legitimate responsibilities that may be imposed on a person. For example, one has a responsibility not to start a riot, so human rights law recognises no 'right to riot.' Indeed, it is well recognised that one's right to freedom of assembly may be legitimately limited by proportionate measures to prevent riots.

However, we disagree with the premise that fulfilment of one's responsibilities is a precondition to recognition of one's rights. This contention is addressed under the next subheading.

A Human Rights Act is a 'villains' charter'

A related argument is that a Human Rights Act would be abused by villains or criminals. In response, we say the following.

⁵² Erica Contini, Castan Centre project officer, compiled this figures from examining data on the AUSTLii website: <www.austlii.edu.au> in early January 2009.

⁵³ See Law Institute of Victoria, *Charter Case Audit* (December 2014 update): <<http://www.liv.asn.au/For-Lawyers/Submissions-and-LIV-projects/Charter-Case-Audit>>.

⁵⁴ Examples of such rights include the right to be free from torture, cruel inhuman and degrading treatment or punishment, and the right to be free from slavery and servitude.

First, the use of human rights arguments by criminals or suspected criminals is most likely to arise in the context of criminal procedure laws, such as the right to fair trial, or pre-trial procedural rights concerning arrest and bail. The judiciary already deals with such issues, and has in fact increasingly uncovered such rights within the common law. To the extent that arguments are vexatious, the judiciary has long developed techniques to deal with such litigants.⁵⁵

Secondly, human rights are premised on the idea that human beings have human rights simply by virtue of being human: this is an idea long promoted by Australia at the international level. Thus, criminals have the same human rights as others, and, importantly, the same *limits* to their human rights as others.⁵⁶ There is no human right to commit crime, or to harm others: important limits to one's human rights include the safeguarding of the 'rights of others' and 'public order.' However, the fact that a person has committed a crime does not deprive that person of his or her rights. We doubt the 'rogues' charter' critics are seriously maintaining that criminals or suspected criminals should be subjected to arbitrary (as opposed to justified) arrest, unfair (as opposed to fair) trial, or inhumane (as opposed to humane) treatment.

It is a slippery slope to argue that the rights of criminals should be reduced, or not recognised. How does one distinguish criminals from criminal suspects, and therefore from those who are mistakenly suspected? If criminals have no rights, criminal suspects and those wrongly suspected would also be highly vulnerable to rights abuses. In this respect, we draw the Committee's attention to instances of grave miscarriages of justice, facilitated by confessions beaten out of the protagonists, such as the wrongful convictions of the terrorism suspects known as the 'Guildford 4' and 'Birmingham 6' in the UK. We also remind the Committee of the farcical detention, charge, and deportation of Dr Haneef in 2007.

Criminal procedure rights and other human rights may occasionally inconvenience the process of criminal investigation. However, the rights which protect criminals and criminal suspects in fact protect us all. They are also functional in that they promote good policing practices, helping to minimise the instances of the arrest or conviction of innocents, or maltreatment of persons, whether guilty or innocent.

We conclude on this point by stressing that we are all more vulnerable to rights abuses if a lesser standard of human rights protection is tolerated with regard to any person or group.

⁵⁵ Byrnes, Charlesworth and McKinnon, above n 28, 66.

⁵⁶ Some might be surprised at our assertion here, noting for example that prisoners do *not* have the same rights: for example, they do not have the same rights to freedom of movement or privacy as the general population. However, this discrepancy is explained by well recognised limits to rights, which apply to everybody. *Anybody's* freedom of movement can be limited by legitimate measures to protect public order. Clearly, public order requirements suffice to limit the freedom of movement of anybody who is lawfully and reasonably detained in prison.

Fourth Argument: Judicial involvement would harm human rights

Another argument against a Human Rights Act is that the involvement of the judiciary can actually harm the cause of human rights. The judiciary tends to be comprised of individuals from more privileged sectors of society, and is arguably less well placed than the more diverse members of the legislature to understand or empathise with the plights of the vulnerable. Judicial interpretation may serve to entrench the rights of the powerful at the expense of the interests of the weak, by, for example, striking down progressive legislation. For example, the Canadian Supreme Court (in)famously upheld a cigarette company's right to free speech in allowing it to refrain from placing compulsory unattributed health warnings on cigarette packets, and to partially advertise its products in *RJR MacDonald v Canada (Attorney General)*.⁵⁷ The Canadian Supreme Court also struck down legislation which restricted access to private health insurance, which was apparently designed to ensure improvement to the public health system.⁵⁸ Likewise, in 2013 the US Supreme Court invalidated a progressive regulation requiring employers to provide female employees with free contraception via health insurance.⁵⁹ Finally, the social outcomes of the celebrated ACTV case in Australia, where the High Court first confirmed the existence of an implied freedom of political communication,⁶⁰ are debatable. The result of the case is that broadcast political campaign advertising remains permissible, handing a huge advantage to wealthier political parties, and increasing the influence of large donors.⁶¹

It is of course concerning if judges are striking out 'good'⁶² legislation under Bills of Rights powers. However, legislative models do not allow for 'striking out' of laws. Secondly, some of the above cases indicated the relevant legislation would be constitutional if tweaked, rather than changed wholesale. A revised version of tobacco ad bans, including a requirement for large compulsory government warnings, was upheld by the Supreme Court in *AG v JTI MacDonald Corp.*⁶³ The health care decision is arguably justifiable on the basis that the Court was motivated by Canada's extended waiting lists to uphold the private option, which would shorten those waiting lists. There was no right of access to private health insurance per se, only a right in circumstances where the public health scheme was inadequate. Arguably, the case constituted a timely wake-up call to Quebec regarding the state of its public health system, rather than a decision which undermined that system. In

⁵⁷ [1995] 3 SCR 199.

⁵⁸ *Chaoulli v. Quebec (Attorney General)* [2005] 1 SCR 791.

⁵⁹ *Burwell v Hobby Lobby Stores Inc.* 573 US ____ (2014)

⁶⁰ *Australian Capital Television v Commonwealth* (1992) 177 CLR 106 ('ACTV').

⁶¹ See Sarah Joseph, 'Political advertising and the Constitution' in Glenn Patmore and Gary Jungwirth (eds), *The Big Makeover: A New Australian Constitution* (Labor Essays 2002) ch 2. See also ACTV 177 CLR 106, dissenting judgment of Brennan J at 160-61.

⁶² Of course, we do not assume that everyone will agree that the legislation struck down in these cases was 'good' legislation. In this respect, please note the last paragraph in this section.

⁶³ [2007] 2 SCR 610.

any case, Quebec could have re-enacted the relevant legislation under the ‘notwithstanding’ clause if the political will was strong. The *ACTV* decision too left open the possibility of new legislation which banned broadcast ads but nevertheless complied with the Constitution.⁶⁴

A related argument is that judicial interpretation may serve to legitimise human rights abuses. For example, severe control order regimes in respect of terrorist suspects in the UK have been upheld as consistent with the UHKRA.⁶⁵ These decisions may seem harmless, in that the human rights situation is not made worse by the judiciary, as it is merely upholding schemes put in place by the legislature. However, the legitimisation may serve to stymie legitimate political debate about reform.

The legitimisation argument could be overblown in terms of assumptions about the effect of judicial decisions on public debate. The famous *Roe v Wade* decision arguably stoked the fires of the abortion debate in the US, while *Mabo* and *Wik* prompted significant debate over native title in Australia. Court decisions do not, it is submitted, close off debate, though they probably alter the terms of such debate. We believe this is a risk worth taking, in light of the existing deficient protection of human rights in Australia generally.

Balanced against such ‘bad’ judgments are judgments which, it is submitted, pushed a reluctant legislature to act, and which were ‘wins’ for the human rights of the underprivileged, such as *Mabo 2*,⁶⁶ *Brown v Board of Education*⁶⁷ in the United States, and significant advances concerning the rights of the mentally ill in the UK.⁶⁸ Furthermore, the inclusion of economic social and cultural rights in a Human Rights Act, alongside civil and political rights (as recommended by the present submission), will help to temper any judicial tendency to neglect the rights of the socially and economically excluded.

Finally, this fourth argument against judicial involvement in human rights demonstrates that the outcomes that eventuate under a Human Rights Act cannot be presumed to consistently conform to a leftist political agenda, contrary to the presumptions of some of the most trenchant critics of a Human Rights Act.⁶⁹

⁶⁴ Joseph, above n 61, 53-54.

⁶⁵ See, eg, K D Ewing and Joo-Cheong Tham, ‘The Continuing Futility of the Human Rights Act’ [2008] *Public Law* 668.

⁶⁶ [1992] HCA 23.

⁶⁷ 347 US 483 (1954).

⁶⁸ See, eg, *R (on the application of H) v Mental Health Review Tribunal for the North and East London Region* [2001] EWCA Civ 415.

⁶⁹ Contrast Paul Kelly, ‘Rights bill won’t pay’, *The Australian*, 27 May 2009.

Legislative Models

The government has explicitly excluded the idea of constitutionally protected human rights from the current inquiry. Such protection is of course the strongest form of legal protection available. However, there are several jurisdictions which have now adopted a (non-entrenched) statutory model to preserve the sovereignty of their parliaments. The following is a brief overview of these models.

The UK

The United Kingdom's Human Rights Act 1998 (UKHRA) was enacted to give effect to the United Kingdom's human rights obligations under the European Convention on Human Rights. The UKHRA has the following features.

- **Statements of compatibility by government upon introduction of bill:**

Under s 19, Ministers in charge of Bills must make a statement to the effect that the Bill conforms with Convention rights ("statement of compatibility"). Alternatively, the statement can indicate that the Bill is not compatible but the government nevertheless wishes to proceed with it. Section 19 therefore enforces a regime whereby those who introduce legislation must consider whether the Bill is compliant with human rights. A failure to comply with s 19 does not render the subsequent legislation invalid.

- **Scrutiny of Bill:**

There is no mandatory pre-legislative scrutiny of bills by any body, apart from the government pursuant to s 19 (above), prior to enactment. However, Bills are routinely scrutinised in such terms by the Joint Parliamentary Committee on Human Rights.⁷⁰

- **Binds public authorities:**

Under s 6, public authorities are required to act in compliance with Convention rights, unless otherwise compelled by legislation. A public authority includes courts and tribunals, any person whose functions are those of a public nature, but it excludes either House of Parliament, or a person exercising functions in connection with a parliamentary proceeding.

- **Interpretative clause:**

⁷⁰ See *Homepage*, Parliamentary Committee
<http://www.parliament.uk/parliamentary_committees/joint_committee_on_human_rights.cfm> at 27 May 2009.

Under s 3, courts must interpret primary and subordinate legislation in accordance with Convention rights “so far as it is possible to do so”.

In *Ghaidan v Godin-Mendoza*,⁷¹ the House of Lords held that s 3 allowed courts to interpret legislative provisions “restrictively or expansively”, “to read in words”, and to “modify the meaning” of words, to make legislation rights-compliant.⁷² Their Lordships held, however, that s 3 does not allow an interpretation that is “inconsistent with a fundamental feature” of the relevant legislation – an interpretation must be “compatible with the underlying thrust of the legislation being construed” and “must ... ‘go with the grain’”.⁷³

- **Statements of Incompatibility:**

If a court believes that a legislative provision is incompatible with a Convention right, and cannot be interpreted so as to conform, it may issue a declaration of incompatibility under s 4. Such Declarations do not affect the validity or operation of the legislation, nor are they binding on the parties to the proceedings in which the Declaration is made. Rather, a declaration acts as an alarm bell of sorts, alerting the executive and parliament about the judicial view on human rights compatibility.

In response, the Parliament may respond by amending the legislation. Under section 10, where there are compelling reasons to do so, the relevant Minister may respond by removing the incompatibility by statutory instrument. That statutory instrument must be confirmed by Parliament within 120 days. However, there is provision for a fast track procedure, whereby the instrument comes into force immediately, but ceases to have effect after 120 days unless approved by Parliament.⁷⁴

Parliament and the government may of course respond by doing nothing, and leave the incompatible legislation in place. In most cases thus far where the

⁷¹ [2004] 2 AC 557 (*Ghaidan*).

⁷² [2004] 2 AC 557, paras 32–33. Lord Rodger agreed with these propositions (paras 121 and 124), as did Lord Millett (para 67). See further Julie Debeljak, ‘Parliamentary Sovereignty and Dialogue under the Victorian *Charter on Human Rights and Responsibilities*: Drawing the Line Between Judicial Interpretation and Judicial Law-Making’ (2007) 33 *Monash University Law Review* 9, 44–45.

⁷³ *Ghaidan* [2004] 2 AC 557, para 33. Lord Rodger agreed with these propositions (para 121), as did Lord Millett (para 67). See further Julie Debeljak, ‘Parliamentary Sovereignty and Dialogue under the Victorian *Charter on Human Rights and Responsibilities*: Drawing the Line Between Judicial Interpretation and Judicial Law-Making’ (2007) 33 *Monash University Law Review* 9, 44–45.

⁷⁴ If Parliament fails to approve such a remedial order, actions taken under the order while it was in force remain lawful.

Supreme Court (formerly House of Lords Judicial Committee) has issued a declaration of incompatibility, the relevant legislation has been amended.⁷⁵

- **Independent cause of action:**

Section 7, when read with section 6, creates the following means of redress:

- a) A cause of action against public authorities which act incompatibly with Convention rights. This is a proceeding for breach of statutory duty, the statute being the UKHRA itself;⁷⁶
- b) A ground of judicial review of administrative action. Section 6(1) introduces a new ground of illegality, that being acting in a way that is incompatible with Convention rights (or a failure to comply with Convention rights); and
- c) An unlawful act can be relied on in any legal proceeding, whether it is a defence to proceedings brought by public authorities (criminal or civil), or as the basis for an appeal against a decision of any court or tribunal.⁷⁷

- **Override provision:**

The UKHRA incorporates the European Convention on Human Rights into UK law. Under the ECHR, the UK is permitted to derogate from its obligations in times of public emergency subject to various conditions. A valid derogation means that the UK's obligations under the provisions derogated from are suspended. Section 14 of the UKHRA acknowledges that the UK can derogate from its ECHR obligations, such that the relevant provisions have no effect under the UKHRA until the derogation is amended or removed. Derogations may remain in force for five years, unless extended by the relevant Minister.

- **Specialist human rights body:**

Not attached to the Act. The Equality and Human Rights Commission was established in 2007 under the Equality Act 2006; it does have some functions

⁷⁵ See above n 27. Also NB this 'negative' response by parliament to maintain a law contrary to human rights is different from the requirements under the Canadian Constitution, where a Parliament must act positively to retain a law that has been found to breach the Charter: see Julie Debeljak, *Human Rights and Institutional Dialogue: Lessons for Australia from Canada and the United Kingdom* (PhD Thesis, Monash University, 2004), 418-19; Julie Debeljak, 'Submission to the Consultation Committee for the Proposed Human Rights Act', submitted to the *Western Australian Consultation Committee for the Proposed Human Rights Act*, 31 August 2007, 30-31.

⁷⁶ UKHRA, s 7(1)(a).

⁷⁷ UKHRA, ss 7(1)(b) and 7(7) read together. Special provisions relate to judicial acts which are unlawful under s 9. Proceedings may only be brought by way of appeal or by application for judicial review.

regarding the UKHRA, such as promoting understanding of the Act, holding inquiries and commencing judicial review proceedings under the Act.⁷⁸

Victoria

The *Victorian Charter of Human Rights and Responsibilities Act* (2006) (Charter) protects civil and political rights, and is explicitly based on the ICCPR.

- **Statements of compatibility by government upon introduction of bill:**

Under s 28, the person who introduces a Bill into Parliament must prepare a statement on whether the Bill is compatible with the Charter, including reasons. If the Bill is incompatible, the extent of the incompatibility, with reasons, must be explained. Failure to comply with s 28 does not render subsequent legislation invalid.

- **Scrutiny of Bill**

Under s 30, the Scrutiny of Acts and Regulations Committee must report to Parliament on the extent of a Bill's compatibility with the Charter. Non-compliance with s 30 does not result in invalidity.

- **Binds public authorities:**

Under s 38, the Charter renders it unlawful for public authorities to act in a way that is incompatible with the Charter, and requires public authorities to give proper consideration to human rights when making decisions. This duty does not apply if the public body is compelled to act otherwise by State or federal legislation.

- **Override provision:**

Under s 31, the Parliament may expressly declare that an Act is not subject to the Charter. A person who introduces a Bill containing an override declaration must submit a statement explaining the need for that declaration, which should only be made in exceptional circumstances. The Charter has no application to Acts which contain such a declaration (so, for example, the interpretative clause does not apply). Override declarations last for five years, and may be re-enacted.

- **Interpretative clause:**

Under s 32, courts should interpret statutory provisions compatibly with human rights, so far as possible to do so consistently with the law's purpose.

⁷⁸ See <<http://www.equalityhumanrights.com/en/Pages/default.aspx>>.

- **Statements of Incompatibility:**

Under s 3, the Supreme Court may issue a Declaration of inconsistent interpretation if it believes a statutory provision cannot be interpreted in accordance with human rights. Such a declaration does not affect the validity or operation of a law.

The Attorney General is required to table a response in Parliament within six months of receiving notice of such a declaration. Such a response could include a decision to take no action, or to propose amendments to the law. Failure to comply with this duty does not render any law invalid or inoperable.

- **Independent cause of action:**

Under s 39, there is no independent cause of action available to a person whose rights under the Charter have been violated. However, an action against a breach of human rights by a public authority can be “piggybacked” onto another cause of action. Damages are not available for breach of the Charter.

- **Specialist human rights body:**

Yes. The Victorian Equal Opportunity and Human Rights Commission has an educative and advisory role (s 41), and may intervene in court proceedings which concern the Charter (s 40). It may audit laws to assess their compliance with the Charter at the request of the Attorney General, rather than at its own initiative (s 41).⁷⁹

The ACT

The ACT *Human Rights Act* 2004 (ACTHRA) is also based on the ICCPR. The features of the ACTHRA are:

- **Statements of compatibility by government upon introduction of bill:**

Under s 37, the Attorney General must state whether a Bill introduced into the Legislative Assembly is compatible with human rights. If it is not compatible, the Attorney General should outline the extent of the incompatibility. Non-compliance does not render subsequent legislation void.

- **Scrutiny of Bills:**

⁷⁹ Furthermore, the Victorian Ombudsman may inquire into or investigate administrative actions which are not compatible with the Charter: *Ombudsman Act* 1973 (Vic), s 13(1A).

Under s 38, relevant standing committees of the Legislative Assembly independently report to the Assembly on the human rights issues raised by Bills presented to it. Non-compliance does not render legislation void.

- **Binds public authorities:**

Under s 40B, public authorities must act consistently with human rights, unless compelled not to do so under other legislation. Under s 40D, private bodies may opt in to be similarly bound by human rights obligations.

- **Override provision:** No

- **Interpretative clause:**

Under s 30, courts must interpret Territory laws compatibly with human rights, “so far as it is possible to do so consistently with” the purpose of the law.

- **Statements of Incompatibility:**

Under s 32, the Supreme Court of the ACT may make Declarations of Incompatibility in regard to legislation which cannot be interpreted so as to be compatible with human rights. Under s 33, the Attorney General is required to respond to such a Declaration by written response in the Legislative Assembly within 6 months. Such a Declaration does not impact on the validity of the relevant legislation, nor does the failure by the AG to comply with his or her s 33 duties.

- **Independent cause of action:**

Under s 40C, independent causes of action lie against public authorities who fail in their duties to observe human rights from human rights victims. Such persons may also rely on human rights in other legal proceedings if relevant. Any relief may be granted other than damages.

- **Specialist human rights body:**

Yes. The Human Rights Commissioner advises the AG on implementation of the Act, and reviews the effect of ACT laws on human rights (s 41). He or she may also intervene in cases which concern the interpretation of the Act (s 36).

New Zealand

The New Zealand Bill of Rights Act 1990 contains rights based on the ICCPR. The features of the NZ Bill of Rights are:

- **Statements of compatibility by government upon introduction of bill:**

Under s 7, the Attorney-General should make a statement to Parliament if a Bill appears to be inconsistent with the Bill of Rights. Failure to comply with s 7 does not render subsequent legislation invalid.

- **Scrutiny of Bill:** No

- **Binds public authorities:**

Under s 3, the Bill of Rights applies to acts done by public bodies.

- **Interpretative clause:**

Under s 6, courts should favour an interpretation of a statute that is consistent with the Bill of Rights, where that statute can be given a consistent meaning.

- **Declarations of Incompatibility or Inconsistent Interpretation:** No

- **Independent cause of action:** No

- **Override provision:** No

- **Specialist human rights body:**

Not attached to the Act. The Human Rights Commission of New Zealand does however have various human rights functions.⁸⁰

Recommendations in Detail

Which rights should be protected?

The Castan Centre endorses the inclusion of all of the rights recognised in both the ICCPR and ICESCR, including the right of self-determination, as explained below.

Economic, Social and Cultural Rights

We recommend that all of the rights from both Covenants be included. State Governments have direct responsibility for many of the rights protected under the ICESCR, for example the rights to education, health and housing.

We will not include here the arguments in favour of including civil and political rights. These are the rights that have been included in the above-mentioned Charters of Rights. It seems likely that the Queensland Government will agree to include civil and political rights if it in

⁸⁰ See <<http://www.hrc.co.nz/home/default.php>>.

fact decides to adopt a Human Rights Act. Rather, we will focus our arguments on the need to include economic social and cultural rights (ESC rights) alongside civil and political rights.

The two sets of rights are indivisible, interdependent, and equally important.⁸¹ One is not fully integrated into society if one suffers, for example, from malnutrition, a lack of access to shelter, or a lack of access to health facilities. Civil and political rights and ESC rights are also closely related in many respects. The social right to an adequate standard of health for example is crucial to enjoyment of the civil right to life. The civil right to free expression is immeasurably enhanced by a social right to decent education. The inclusion of civil and political rights without economic social and cultural rights however could risk the elevation of the former rights at the potential expense of the latter, when such rights might clash. For example, inclusion of ESC rights in the Canadian Charter may have led to a greater appreciation by the courts of rights to health compared to the right of freedom of expression in the case of *RJR MacDonald* (concerning tobacco advertising).

Under the ICCPR, States' obligations are immediate, whereas obligations under the ICESCR are softer. States are obliged under Article 2(1) of ICESCR to *progressively* guarantee the rights therein, subject to resource availability. The softness of the obligation has led some to question whether ESC rights are concrete enough to enable findings of violation by a court.

The Maastricht Guidelines, adopted by a group of ESC rights experts in 1997, identified a number of violations of the ICESCR. These are:⁸²

Active Violations

Violations of economic, social and cultural rights can occur through the direct action of States or other entities insufficiently regulated by States. Examples of such violations include:

- (a) The formal removal or suspension of legislation necessary for the continued enjoyment of an economic, social and cultural right that is currently enjoyed;
- (b) The active denial of such rights to particular individuals or groups, whether through legislated or enforced discrimination;
- (c) The active support for measures adopted by third parties which are inconsistent with economic, social and cultural rights;
- (d) The adoption of legislation or policies which are manifestly incompatible with pre-existing legal obligations relating to these rights, unless it is done

⁸¹ *Universal Declaration of Human Rights* 1948; *International Covenant on Civil and Political Rights*, preamble; *International Covenant on Economic, Social and Cultural Rights*, preamble; *Vienna Declaration and Programme of Action* 1993 (World Conference on Human Rights, Vienna, 14-25 June 1993) para 5, UN Doc A/Conf.157/23.

⁸² *Maastricht Guidelines on Violations of Economic, Social and Cultural Rights* (Maastricht, January 22-26, 1997) paras 14 and 15.

with the purpose and effect of increasing equality and improving the realisation of economic, social and cultural rights for the most vulnerable groups;

(e) The adoption of any deliberately retrogressive measure that reduces the extent to which any such right is guaranteed;⁸³

(f) The calculated obstruction of, or halt to, the progressive realisation of a right protected by the Covenant, unless the State is acting within a limitation permitted by the Covenant or it does so due to a lack of available resources or force majeure;

(g) The reduction or diversion of specific public expenditure, when such reduction or diversion results in the non-enjoyment of such rights and is not accompanied by adequate measures to ensure minimum subsistence rights for everyone.

Violations by Omission

Violations of economic, social, cultural rights can also occur through the omission or failure of States to take necessary measures stemming from legal obligations.

Examples of such violations include:

(a) The failure to take appropriate steps as required under the Covenant;

(b) The failure to reform or repeal legislation which is manifestly inconsistent with an obligation of the Covenant;

(c) The failure to enforce legislation or put into effect policies designed to implement provisions of the Covenant;

(d) The failure to regulate activities of individuals or groups so as to prevent them from violating economic, social and cultural rights;

(e) The failure to utilise the maximum of available resources towards the full realisation of the Covenant;

(f) The failure to monitor the realisation of economic, social and cultural rights, including the development and application of criteria and indicators for assessing compliance;

(g) The failure to remove promptly obstacles which it is under a duty to remove to permit the immediate fulfilment of a right guaranteed by the Covenant;

⁸³ In *General Comment 3 on The Nature of States Parties Obligations*, U.N. Doc. E/1991/23, annex III at 86 (1991), the Committee on Economic Social and Cultural Rights states at para 9 that “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”.

- (h) The failure to implement without delay a right which it is required by the Covenant to provide immediately;
- (i) The failure to meet a generally accepted international minimum standard of achievement, which is within its powers to meet;
- (j) The failure of a State to take into account its international legal obligations in the field of economic, social and cultural rights when entering into bilateral or multilateral agreements with other States, international organisations or multinational corporations.

Indeed, ESC rights are justiciable: there is simply too much evidence to argue the contrary.⁸⁴ Courts across the world, largely in States that are poorer than Australia, have rendered numerous decisions on ESC rights.⁸⁵ Furthermore, the UN Committee on Economic Social and Cultural Rights has issued numerous General Comments which add flesh to the bare bones of the words of the ICESCR, and since 2014 (after the entry into force of the Optional Protocol to ICESCR, which allows individuals to submit complaints to the Committee regarding breaches of their ICESCR rights) it has begun to issue jurisprudence as well, just like the Human Rights Committee.⁸⁶

States have obligations to respect, protect, and fulfil all of their human rights obligations, whether they concern civil and political rights, or ESC rights. Some of the most advanced jurisprudence on ESC rights has emerged from South Africa. South African courts have essentially inquired into whether a particular act or omission by the government is rational or reasonable.⁸⁷ This type of decision-making is not foreign in Australia; it arises in the context of administrative law.

It has been argued that ESC rights considerations will inappropriately involve the judiciary in decisions regarding resource allocation. However, our judiciary commonly considers complex matters relating to government policy, many of which have significant resource implications (eg cases concerning taxation, acquisition of property).⁸⁸ Courts already have significant jurisdiction over ESC rights in the context of anti-discrimination law at both the federal and State levels. Finally, a court may simply decide that a certain situation viz a particular individual, for example the fact of a person living in squalor without access to

⁸⁴ See Malcolm Langford, 'The Justiciability of Social Rights: From Practice to Theory' in Malcolm Langford (ed), *Social Rights Jurisprudence: Emerging Trends in International and Comparative Law* (CUP, 2008) 3, 4.

⁸⁵ See generally, Malcolm Langford (ed), above.

⁸⁶ CESCR jurisprudence is available at: <<http://juris.ohchr.org/en/search/results?Bodies=9&sortOrder=Date>>.

⁸⁷ See eg *Soobramoney v Minister of Health (Kwazulu-Natal)* 1997 (12) BCLR 1696 (CC); *Government of South Africa v Grootboom* 2000 (11) BCLR 1169 (CC); *Minister of Health v Treatment Action Campaign* (2002) 5 SA 721 (CC).

⁸⁸ See Paul Hunt, 'Reclaiming Economic Social and Cultural Rights' (1993) *Waikato Law Review* 141, 154-57.

housing, is a breach of ESC rights: it is then up to the government to decide how to fix that situation.⁸⁹

The inclusion of ESC rights will provide a basis upon which embedded human rights problems can be addressed. Such an approach is consistent with the recent expression of human rights found in the *Charter of Fundamental Rights of the European Union* (2000) and the *Convention of the Rights of Persons with Disabilities* (2006). Both of these documents provide a template for an inclusive iteration of civil and political, and economic, social, and cultural rights. A new Human Rights Act without economic social and cultural rights would fall short of contemporary human rights standards.

Self-determination

We recommend inclusion of the right of self-determination, which is recognised in Article 1 of both Covenants. The right of self-determination should be viewed as a right which facilitates relations between peoples and their government. Self-determination is the right of peoples to a system that respects and facilitates their political, social and economic participation.

Recognition of the right of self-determination would affect most profoundly (but not exclusively) the rights of Indigenous peoples in Queensland. Historically, Indigenous peoples all over Australia have not been treated by government as legitimate political and economic entities.⁹⁰ This historical ‘wilful blindness’ has generated fundamental flaws in the foundations of the Australian legal and political system concerning indigenous peoples and their place in our political and social structure. Indigenous Australia’s history is one of policies being imposed without consent or even consultation, ranging from *terra nullius* (which denied their existence) to the infamous policy of removing Indigenous children from their families to more recent examples such as the Northern Territory intervention. Other groups have not been treated with such apparent ongoing disdain.

This historically entrenched exclusion is exacerbated by continuing disadvantage, some of which is a legacy of explicit and egregious discriminatory laws and policies. Indigenous peoples are the most disadvantaged in Australia in terms of health, education, economic participation, political participation, property rights and representation in criminal justice system. Their disadvantage is extreme in comparison to non-Indigenous people in Australia, and in comparison to Indigenous peoples in comparable countries such as Canada, New Zealand, and the United States.

⁸⁹ Ibid 157.

⁹⁰ In contrast, note how treaties were concluded in other settler States, such as New Zealand and the US.

Recognition of a right of self-determination would provide evidence that Queensland is committed to political and social structures that embrace the equal participation of a historically excluded group. A practical example of self-determination is the use of Koori courts in Victoria, whereby Koori elders are involved in decisions made regarding Indigenous peoples in the criminal process.⁹¹ The Koori court example demonstrates that self-determination is not an exclusively territorial concept nor is it a concept that threatens the rights of non-Indigenous Australians. Unfortunately, the Queensland equivalents (the Murri courts) were closed in 2012.⁹²

Limits to rights

Most of the rights in a Queensland Human Rights Act should be protected subject to reasonable limitations. Most civil and political rights could be subjected to a general limitation clause similar to that in the Victorian Charter, while economic social and cultural rights could be further limited by a notion of progressive realisation and available resources, as in the ICESCR.

However, those rights which are absolute at the international level should be recognised as absolute and excluded from the operation of the general limitations clause. These include the right to be free from torture and other cruel, inhuman and degrading treatment or punishment, and the right to be free from slavery and servitude. No civilised society should countenance the qualification of such rights.⁹³

Who has human rights?

We recommend that the rights be restricted to natural persons only (as they are in Victoria⁹⁴ and the ACT⁹⁵). Corporations do not, as such, have human rights, because human rights derive from the inherent dignity of the human person. This provision will also help to ensure that the Bill of Rights does not serve to entrench the powerful positions in society of the already powerful. This is not a criticism of corporate interests; it is simply to emphasise that the most important effect of a Human Rights Act is to increase the capacities of the

⁹¹ See <<https://www.countycourt.vic.gov.au/county-koori-court>>.

⁹² It is acknowledged that the Mornington Island Restorative Justice Project and the Remote Justices of the Peace Magistrates Court Program maintain the spirit of courts which promote self-determination, albeit with a more limited scope than the Murri Court program.

⁹³ See further, Julie Debeljak, 'Balancing Rights in a Democracy: The Problems with Limitations and Overrides of Rights under the Victorian *Charter of Human Rights and Responsibilities Act 2006*' (2008) 32 *Melbourne University Law Review* 422, 433-35.

⁹⁴ See *Charter of Human Rights and Responsibilities Act 2006* (Vic), s 6.

⁹⁵ See *Human Rights Act 2004* (ACT), s 6.

vulnerable and marginalised. The exclusion of corporations as rights-holders would also serve to reduce litigation in the human rights field.

The Human Rights Act should extend protection to anyone subject to Queensland Government jurisdiction or within its control (eg interstate residents interacting with Queensland law).

Who has duties to observe human rights?

Queensland ‘public authorities’ should be bound to abide by human rights, as well as private bodies acting in a public capacity. While there are strong arguments that private bodies, especially powerful bodies such as corporations and/or the media, should also have duties to respect human rights, we believe that such issues should be dealt with in separate legislation.⁹⁶ However, we endorse the ACT approach of allowing such bodies to opt in and undertake the same human rights duties as public bodies, as in s 40D of the ACTHRA. Private bodies may wish to do so, for example, to demonstrate their bona fides in the arena of corporate social responsibility.

A question arises as to whether courts should be required to abide by human rights when making decisions. If so, this can lead to human rights influencing the development of the common law, as has occurred in the UK,⁹⁷ a desirable outcome in our view.

Independent cause of action

A Queensland Human Rights Act should provide for independent causes of action modelled on the UK HRA, including access to damages, after a ‘cooling off’ period. The period would give public authorities time to adjust to the Bill of Rights, and could be as long as two years. The Victorian approach of limiting causes of action to those which can be ‘piggybacked’ on another claim generates unwieldy, and as yet unresolved, issues, such as how strong the other claim has to be, or whether an administrative law action based solely on a public body’s failure to comply with the Charter is allowed. The official review of the Charter in 2015 recommended that a direct cause of action (similar to section 40B of the *Human Rights Act 2004* (ACT)) be inserted.⁹⁸ An independent cause of action is necessary to ensure that victims of breaches of human rights are able to access effective local remedies to redress human rights abuses.

⁹⁶ The Castan Centre would strongly support separate legislation in that regard.

⁹⁷ *Campbell v Mirror Group Newspapers Ltd* [2004] UKHL 22.

⁹⁸ See Brett Young, *From Commitment to Culture – The 2015 Review of the Charter of Human Rights and Responsibilities Act 2006*: <http://assets.justice.vic.gov.au/justice/resources/3848843f-afd1-47a5-9279-1a1a87ac2aad/report_final_charter_review_2015.pdf>, Recommendation 27.

Interpretative clause

Courts should be instructed to interpret all legislation in accordance with the Human Rights Act, so long as such an interpretation is possible taking into account the purpose of the relevant statute. The interpretative clause should also specify that international instruments on which the Act is based and relevant international human rights jurisprudence may be considered.

The following consequence of the interpretative clause must be noted. If primary legislation is interpreted compatibly with human rights, yet delegated legislation enacted under that primary legislation cannot be interpreted compatibly, the result will be a judicial finding that the delegated legislation is *ultra vires* and invalid. The same consequence could apply to an incompatible act or omission performed under the legislation: such acts or omissions would also be *ultra vires* and consequently unlawful. The restraint of actions by the executive branch of government that violate human rights, whether in enacting delegated legislation or in performing administrative functions, is an entirely appropriate objective for a Human Rights Act. Indeed, the ability to strike out delegated legislation that does not conform with human rights enacted by the Parliament simply gives effect to the principle of Parliamentary sovereignty. The effect of a Bill of Rights on secondary legislation should be made clear, along the lines of sections 3 and 4 of the UKHRA.

Statements/Declarations of Inconsistent Interpretation

Where interpretation in accordance with the human rights in the Act is impossible, the higher courts should be empowered to issue Statements of Inconsistent Interpretation, in line with the Victorian/ACT Declarations model. Upon issuance of such a Statement, the Minister should be required to respond within six months. A valid response might include recommendations for amendment of legislation, or a recommendation to leave things as they are.

Override provision

Victoria's override provision permits the government to explicitly remove legislation from the rubric of the Charter. We do not recommend the inclusion of an override provision of the type included in the Victorian Charter. We note that such a provision was not thought to be necessary in the ACT.

An override provision is included in Canada's constitutional model in order to preserve parliamentary sovereignty, as the Canadian courts have power to invalidate rights-incompatible legislation. Parliamentary sovereignty is preserved in the non-constitutional models on offer in the UK, New Zealand, the ACT and Victoria. Accordingly, there is no need to additionally provide for an override provision in the Victorian Charter, or in a Queensland Human Rights Act.⁹⁹

Legislative scrutiny

We recommend the inclusion of a requirement that all persons introducing Bills in the Queensland Parliament be required to make a statement of whether the Bill complies or does not comply with human rights, with reasons attached. Separate scrutiny of the Bill's compliance with the Act should be provided by an appropriate legislative committee (formed for the task, like the Commonwealth Joint Committee on Human Rights, or pre-existing like the Victorian Scrutiny of Act and Regulations Committee).

Ideally, a new committee should be constituted with the sole responsibility of monitoring compliance with the Human Rights Act, to ensure that this important oversight role is conducted in a rigorous and timely fashion. It should be accorded the time and resources necessary for the mammoth task of reviewing every new piece of legislation for rights compatibility, including specialist advice from an expert in international human rights law. It should also be able to inquire into human rights issues in Queensland more generally. The UK's Joint Committee on Human Rights is a good example in this regard.

Such a system would compel the executive to consider human rights issues explicitly when introducing legislation. A failure to comply with these provisions would not however result in invalidity of the law.

Role of Anti-discrimination Commission

The Anti-discrimination Commission Queensland should play a major role in the implementation of a Human Rights Act. Its mandate should be extended to have powers under the Act, for example to review laws and intervene in cases where human rights are in issue.

The Commission should also be mandated (and resourced) for the vital task of building a human rights culture in Queensland – especially for the training of parliamentarians, public

⁹⁹ See further, Julie Debeljak, 'Balancing Rights in a Democracy: The Problems with Limitations and Overrides of Rights under the Victorian *Charter of Human Rights and Responsibilities Act 2006*' (2008) 32 *Melbourne University Law Review* 422.

servants and other public officials, but also for public education so that Queenslanders know what it offers them.

Finally, the Commission should be mandated to produce a report on the operation of the Human Rights Act, as the Victorian Equal Opportunity Commission does each year.¹⁰⁰ These reports are an invaluable mechanism for tracking the progress of the Charter's implementation.

A human rights culture

Importantly, a Human Rights Act would help to provide remedies for human rights violations, as well as contribute to the development of a greater respect for human rights within Government. The experience of Victoria with its Charter has been that creating a human rights culture is even more important than providing legal remedies, and is crucial for the achievement of real improvements in people's lives. In recognition of this, the 2015 Charter Review strongly emphasised the need for sustained education and political commitment.¹⁰¹

Empirical research has shown that a key factor in successfully creating a culture of human rights is educating people about human rights.¹⁰² Such education should begin early (in primary school) and continue throughout life. The same research also demonstrated that a key to successful human rights education is a domestic Human Rights Act (or equivalent) on which to ground the education. Relying simply on international human rights instruments such as the Universal Declaration of Human Rights is not as effective as education that takes place in conjunction with a 'home grown' law with which people can connect.

¹⁰⁰ See: <<http://www.humanrightscommission.vic.gov.au/index.php/our-resources-and-publications/charter-reports>>.

¹⁰¹ See Charter Review, above n 98, Recommendations 1-11.

¹⁰² See Paula Gerber, *From Convention to Classroom: The Long Road to Human Rights Education* (2008 VDM Publishers, Germany).