



**MONASH** University  
Castan Centre for Human Rights Law



**Castan Centre for Human Rights Law  
Monash University  
Melbourne**

**Submission to the National Human Rights Consultation**

## Table of Contents

<b>Introduction</b> .....	3
<b>Current Protection of Human Rights in Australia</b> .....	4
<i>Constitutional Protection</i> .....	4
<i>Legislative Protection of Rights</i> .....	4
<i>Common Law</i> .....	5
<i>International Law</i> .....	6
<i>Gaps in Existing Protection</i> .....	8
<i>Actual Violations</i> .....	10
<b>Models of Bills of Rights</b> .....	14
<i>Constitutional Protection</i> .....	14
<i>Legislative Models</i> .....	15
<i>United Kingdom - Human Rights Act 1998</i> .....	15
<i>New Zealand – Bill of Rights Act 1990</i> .....	18
<i>Australian Capital Territory – Human Rights Act 2004</i> .....	19
<i>Victoria – Victorian Charter of Human Rights and Responsibilities Act (2006)</i> .....	20
<b>Arguments against a Bill of Rights</b> .....	22
<b><i>First Argument: A Bill of Rights hands too much power to judges</i></b> .....	22
<i>Parliament retains sovereignty with legislative Bill of Rights</i> .....	22
<i>The “unelected” judiciary</i> .....	24
<i>Judicial accountability and decision-making</i> .....	24
<i>Protection of individuals and minorities</i> .....	25
<i>Human rights are “too political” for judges</i> .....	26
<b><i>Second Argument: A Bill of Rights would cause an undesirable increase in litigation</i></b> .....	27
<b><i>Third Argument: There are no Rights without Responsibilities</i></b> .....	28
<i>A Bill of Rights is a Villains’ charter</i> .....	29

<b><i>Fourth Argument: Judicial involvement would harm human rights</i></b> .....	30
<b>Constitutional Issues</b> .....	33
<b><i>The possible entrenchment of a federal Bill of Rights</i></b> .....	33
<b><i>The doctrine of separation of judicial power</i></b> .....	34
<b><i>Interpretative Clauses</i></b> .....	35
<b><i>Declarations of Incompatibility</i></b> .....	35
<b><i>Heads of Power</i></b> .....	38
<b><i>Federalism and a Bill of Rights</i></b> .....	38
<b>Recommendations</b> .....	41
<b><i>What rights should be protected?</i></b> .....	41
<b><i>Economic Social and Cultural Rights</i></b> .....	42
<b><i>Self Determination</i></b> .....	45
<b><i>Right to Property</i></b> .....	46
<b><i>Limits to Rights</i></b> .....	47
<b><i>Who has human rights?</i></b> .....	47
<b><i>Who has duties to observe human rights?</i></b> .....	48
<b><i>Legislative Scrutiny</i></b> .....	49
<b><i>Override Provision</i></b> .....	49
<b><i>Interpretative clause</i></b> .....	50
<b><i>Statements of Inconsistent Interpretation</i></b> .....	51
<b><i>Independent Cause of Action</i></b> .....	51
<b><i>Role of Australian Human Rights Commission</i></b> .....	51
<b><i>A human rights culture</i></b> .....	52
<b>Summary of Recommendations</b> .....	53

## 1. Introduction

**[1.1]** Since World War II, successive Australian governments have generally been committed to the protection and promotion of human rights. For example, Australia played a prominent role in the adoption of the Universal Declaration of Human Rights in 1948.<sup>1</sup> It is a party to seven of the nine universal human rights treaties: the International Covenant on Civil and Political Rights 1966 (ICCPR), the International Covenant on Economic Social and Cultural Rights 1966 (ICESCR), the International Convention on the Elimination of all Forms of Racial Discrimination 1965 (CERD), the Convention on the Elimination of all Forms of Discrimination against Women 1979 (CEDAW), the Convention against Torture and other Cruel Inhuman and Degrading Treatment or Punishment 1984 (CAT), the Convention on the Rights of the Child 1990 (CRC), and the Convention on the Rights of Persons with Disabilities 2006 (CPD).<sup>2</sup> It is also a party to six Optional Protocols to those treaties,<sup>3</sup> as well as the Genocide and Refugee Conventions.<sup>4</sup> Australia also allows for individual communications under four of these treaties, the ICCPR, CAT, CERD and CEDAW. The Rudd government recently endorsed the Declaration on the Rights of Indigenous Peoples. The protection and promotion of human rights also accords with Australia's liberal democratic values.

**[1.2]** Therefore, our submission will proceed on the basis that Australia is a supporter of the notion that individuals should enjoy human rights. However, without protection, human rights are vulnerable and ephemeral. It is assumed Australia does not believe human rights to be expendable, or that they are so amorphous as to be non-existent, or that they are merely idealistic or ideological goals. Australia has long been misleading its international counterparts if our assumptions are wrong.

**[1.3]** The relevant question, therefore, is not whether human rights should be protected in Australia, but rather: what is the most appropriate way to protect such rights? Should such protection rely essentially on Australian Parliaments, or should protection be supplemented by judicial involvement in human rights protection under a federal Bill of Rights?

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<sup>1</sup> See generally, Anne Marie Devereux, *Australia and the Birth of the International Bill of Rights* (Federation Press, 2005).

<sup>2</sup> Australia is yet to ratify the *International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families* 1990 and the *International Convention for the Protection of All Persons from Enforced Disappearance* 2006.

<sup>3</sup> *Optional Protocol to the International Covenant on Civil and Political Rights* 1966; *Second Optional Protocol to the International Covenant on Civil and Political Rights* 1989; *Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* 2002; *Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict* 2000; *Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography* 2000; and *Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women* 1999.

<sup>4</sup> *Convention on the Crime and Punishment of the Crime of Genocide* 1948; *Convention relating to the Status of Refugees* 1951.

## 2. Current Protection of Human Rights in Australia

### ***Constitutional Protection***

**[2.1]** The strongest legal protection of human rights arises when rights are entrenched in a constitution which prevails over ordinary legislation.

**[2.2]** The Australian Constitution contains very few individual rights, and some of the rights protected are not, strictly speaking, human rights. Examples of such individual rights include ss 51(31) (entitlement to just terms if one's property is compulsorily acquired by Commonwealth legislation), 80 (right to trial by jury for indictable Commonwealth offences), 92 (freedom of interstate trade and intercourse),<sup>5</sup> 116 (freedom of religion), and 117 (right of non-discrimination on the basis of interstate residence). Sections 51(31), 80 and 116 bind only the Commonwealth, while ss 92 and 117 effectively bind only the States.<sup>6</sup> Several implied rights also protect human rights, notably the implied right of political communication and derivative rights,<sup>7</sup> including a limited right to vote.<sup>8</sup> Some due process rights may also be derived from implications regarding the separation of judicial powers.<sup>9</sup>

**[2.3]** This catalogue of rights hardly equates with comprehensive coverage. Furthermore, some of these rights have arguably been interpreted narrowly. For example, no law has ever been struck down for breach of freedom of religion in s 116.<sup>10</sup>

**[2.4]** Similarly, no State constitution effectively entrenches human rights.

### ***Legislative Protection of Rights***

**[2.5]** At the federal level, there is no comprehensive legislative Bill of Rights. Indeed, Australia is the only Western liberal democracy that lacks a Bill of Rights.<sup>11</sup>

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<sup>5</sup> "Intercourse" includes movement between the States, thus providing some constitutional protection for freedom of movement.

<sup>6</sup> It is however theoretically possible for ss 92 and 117 to bind the Commonwealth. The Commonwealth is far less likely than a State to pass legislation that inherently favours the people of a particular State.

<sup>7</sup> It is possible that further political rights might be derived from the core right to political speech, such as right of political assembly or association. The existence and scope of such derivative rights has not been confirmed by a High Court majority. See Sarah Joseph and Melissa Castan, *Federal Constitutional Law: A Contemporary View* (LBC, 2006, 2<sup>nd</sup>ed), 428-31.

<sup>8</sup> See *Roach v Electoral Commissioner* (2007) 233 CLR 162.

<sup>9</sup> Joseph and Castan, above n 7, ch 6.

<sup>10</sup> *Ibid* 378-84.

<sup>11</sup> Israel does not have a written Bill of Rights, but extensive rights have been implied into its "Basic Laws" by its Supreme Court: see David Kretzmer, 'Basic Laws as a surrogate Bill of Rights: The case of Israel', in Philip Alston (ed), *Promoting Human Rights through Bills of Rights* (OUP, 1999) 75.

[2.6] However, certain legislation provides for rights protection and realisation, such as legislation regarding anti-discrimination, the regulation of police powers, aboriginal heritage and native title, privacy, administrative law, admissibility of evidence and elections. Certain economic and social entitlements are provided under, for example, social security, health and education legislation.

[2.7] At the State and Territory levels, two jurisdictions (Victoria and the ACT) have Human Rights Charters, providing for some protection of civil and political rights, as detailed below. Furthermore, human rights-like protections are provided for under State legislation regarding, for example, police powers, non-discrimination, criminal and civil procedure, legal aid, administrative law, social security and elections.

[2.8] There are also institutions which provide for limited human rights protection, such as the Australian Human Rights Commission, equivalent State institutions (which tend to focus on anti-discrimination outside Victoria and the ACT), and ombudsman institutions.

### **Common Law**

[2.9] It is often claimed that the common law provides significant protection for human rights.<sup>12</sup> Certainly, some common law rights overlap considerably with human rights.<sup>13</sup> For example, the tort of false imprisonment overlaps with the freedom from arbitrary detention. One's right to reputation can be protected under the law of defamation, and trespass (to the person and to property) incidentally protects several human rights, such as the right to privacy. Relatively recent developments include the uncovering of a common law right to fair trial (though the content thereof remains unclear) by the High Court in *Dietrich v R*,<sup>14</sup> the recognition in the common law of native title rights in *Mabo v Queensland (no 2)*,<sup>15</sup> and the development of a tort of breach of privacy.<sup>16</sup>

[2.10] However, it must be noted that the common law's role as a protector of human rights is patchy. Decisions such as *Victoria Park Racing and Recreation Grounds Club v Taylor*<sup>17</sup> and *Malone v Metropolitan Police Commissioner*<sup>18</sup> (indicating there is no common law right to

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<sup>12</sup> It is submitted that Gerard Brennan, 'The Constitution, Good Governance and Human Rights' (Paper presented at the Human Rights Law Resources Centre Seminar, 12 March 2008) 3, 21, exhibits a very idealistic view of the common law as a protector of human rights, as is the case with many current and former judges.

<sup>13</sup> See generally, Nick O'Neill, Simon Rice, and Roger Douglas, *Retreat from Injustice: Human Rights Law in Australia* (Federation Press, 2004) Ch 5.

<sup>14</sup> (1992) 177 CLR 292.

<sup>15</sup> (1992) 175 CLR 1.

<sup>16</sup> See *Grosse v Purvis* [2003] QDC 151 and *Doe v Australia Broadcasting Corporation* [2007] VCC 281.

<sup>17</sup> (1937) 58 CLR 479.

<sup>18</sup> [1979] Ch 344.

privacy); *Dugan v Mirror Newspapers*<sup>19</sup> (no right of action in defamation to a person who had committed a capital crime); and *Duncan v Jones*<sup>20</sup> (no common law right to freedom of assembly) do not reflect well on the common law's capacity to protect human rights.<sup>21</sup> O'Neill et al detail how the common law historically failed to protect the rights of women,<sup>22</sup> for example, by excluding women from certain professions, from public office and the right to vote. At common law, a woman's property rights became those of her husband upon marriage. Indeed, the Supreme Court of NSW in *Ex parte Ogden*<sup>23</sup> found that a married woman was simply not recognized as a person under the law. Until *R v L*,<sup>24</sup> the common law did not recognize the crime of rape perpetrated by a husband upon his wife. Most of these injustices were amended by statute, though some were belatedly cured by more enlightened courts, as in the case of *R v L*.

**[2.11]** Furthermore, beyond property rights, where it historically provides for strong protection, the common law does not provide any protection for economic, social and cultural rights, possibly to the excessive disadvantage of the vulnerable and the poor.

**[2.12]** The common law does not provide for significant human rights protection. In any case, innovative common law protection is reliant upon the willingness of judges to innovate. Indeed, the overturning of a particularly egregious and discriminatory doctrine, *terra nullius*, in the *Mabo 2* case (and the extension of native title rights in the subsequent *Wik* case) was criticized by some for its allegedly inappropriate level of judicial activism.<sup>25</sup>

### ***International Law***

**[2.13]** Australia is a party to numerous international treaties, and is bound under international law to comply with those treaties. However, treaties do not become enforceable in Australian law unless they are incorporated into Australian law by legislation. Australia has largely incorporated CERD, parts of CEDAW, the CRC and the CAT into Australian law, as well as parts

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<sup>19</sup> (1978) 142 CLR 583.

<sup>20</sup> [1936] 1 KB 218.

<sup>21</sup> Note also the common law powers of magistrates to issue 'binding over' orders, which ensure that they keep the peace. Such orders were used extensively in the 1980s in the UK to target striking miners, and others protesting against certain policies of the Thatcher government.

<sup>22</sup> O'Neill et al, above n 13, 115-28.

<sup>23</sup> (1893) 14 NSWLR 86.

<sup>24</sup> (1992) 174 CLR 379.

<sup>25</sup> Such criticisms are recorded in, for example, HP Lee, 'Subverting Judicial Independence' (1998) 1 *Constitutional Law and Policy Review* 55, 56; Sir Anthony Mason, 'The State of the Judicature' (1994) 68 *Australian Law Journal* 125, 133; Sir Anthony Mason, 'No Place in a Modern Democratic Society for a Supine Judiciary' (1997) 35 *Law Society Journal* 51.

of the Genocide and Refugee Conventions.<sup>26</sup> Notably, it has not incorporated either of the two most comprehensive human rights treaties, the ICCPR and the ICESCR.

**[2.14]** In *Minister for Immigration v Teoh*,<sup>27</sup> the High Court found that individuals have a legitimate expectation that government bodies will abide by Australia's international legal obligations when making decisions that affect them. *Teoh* confirmed the existence of procedural rights that government bodies would take treaty obligations into account in making decisions, rather than substantive rights that treaty obligations would actually be respected. *Teoh* has never been applied in any case since to invalidate a government action. Indeed, successive Australian governments have sought to neutralise this decision by an executive indication to the contrary,<sup>28</sup> as well as the introduction of proposed legislation to reverse the decision.<sup>29</sup> Furthermore, recent obiter statements by four High Court judges have criticised the *Teoh* decision, signalling that it may not survive a direct challenge.<sup>30</sup>

**[2.15]** Individuals may currently make complaints to international bodies over alleged violations by Australia of their rights under four international treaties, the ICCPR, the CAT, CERD and CEDAW. Australia has been the subject of adverse findings by all of the relevant treaty bodies,<sup>31</sup> except the CEDAW Committee.<sup>32</sup> Furthermore, Australia is required to submit periodic reports under all of the UN human rights treaties to which it is a party, and receives "concluding observations" on these reports, which act as a report card on its implementation of the relevant treaty. Concluding observations contain recommendations for action to bring Australia into greater compliance with the relevant treaty. Australia's human rights performance has also been found to be wanting through this process.<sup>33</sup> It may be noted that the lack of comprehensive human rights protection in Australia's domestic legal system in the form of

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<sup>26</sup> *Racial Discrimination Act 1975* (Cth); *Sex Discrimination Act 1984* (Cth); *Crimes (Torture) Act 1988* (Cth); *Family Law Act 1975* (Cth); *Genocide Convention Act 1949* (Cth); *Migration Act 1958* (Cth).

<sup>27</sup> (1995) 183 CLR 273.

<sup>28</sup> The legal effect of the executive statements is unclear.

<sup>29</sup> See, eg, *The Administrative Decisions (Effect of International Instruments) Bill 1996* (Cth) (lapsed). To date, only South Australia has enacted legislation which purportedly reverses *Teoh*: *Administrative Decisions (Effect of International Instruments) Act 1995* (SA).

<sup>30</sup> See *Minister for Immigration and Multicultural Affairs; Ex parte Lam* [2003] HCA 6. The relevant four judges were McHugh, Gummow, Hayne and Callinan JJ.

<sup>31</sup> See Sarah Joseph, 'The Howard Government's record of engagement with the international human rights system' (2008) 27 *Australian Yearbook of International Law* 45, 49-53.

<sup>32</sup> Australia only acceded to the Optional Protocol to CEDAW in December 2008.

<sup>33</sup> See Joseph, above n 31, 53-58. The most recent Concluding Observations are those of the United Nations Human Rights Committee, *Concluding Observations of the Human Rights Committee: Australia*, 95<sup>th</sup> sess, UN Doc CCPR/C/AUS/CO/5 (2 April 2009) and the Committee on Economic Social and Cultural Rights, *Concluding Observations*, UN doc E/C.12/AUS/CO/4.

constitutional protection, a Bill of Rights or similar, is a perennial criticism of Australia in the concluding observation process.<sup>34</sup>

**[2.16]** However, the findings of such bodies are not legally binding in international law, though States have a duty to engage with the treaty bodies in good faith.<sup>35</sup> Under the Howard government, Australia routinely failed to implement the findings of these bodies.<sup>36</sup> These international avenues cannot substitute for effective domestic protection of human rights. In any case, it is surely preferable for Australia, with its robust legal and political system, to provide for its own protection of human rights, rather than to rely on the supervision of international bodies. Indeed, the system of international human rights law is premised on the assumption that countries will use their domestic legal systems and administrative actions to achieve the realisation of human rights; the international avenues of scrutiny are intended to evaluate performance in that respect, as opposed to providing substantive human rights protection themselves.

### ***Gaps in Existing Protection***

**[2.17]** What are the gaps in actual protection of human rights in Australia? While rights might not be protected in human rights language such as “the right to life” or “freedom from torture”, laws can nevertheless operate to provide effective protection against breaches of such rights. Torture, for example, is undoubtedly a breach of Australian criminal law.

**[2.18]** Nevertheless, existing protections are piecemeal and selective.<sup>37</sup> For example, although torture is effectively prohibited in Australian law, it is not certain that all forms of cruel inhuman and degrading treatment are prohibited, as required under international law.<sup>38</sup> In the *Benbrika* terrorism trial, the defendants were held in the following conditions of detention while on remand: long periods of isolation (up to 23 hours a day in their cell for a number of months); permission to associate only in groups of a maximum of three; travel each day to court for 60 km while handcuffed and shackled, such that they would not be able to use a paper bag in the case of motion sickness; and strip searching during the trial twice a day.<sup>39</sup> Evidence

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<sup>34</sup> The most recent example is the *Concluding Observations of the Human Rights Committee on Australia*, 95<sup>th</sup> sess, UN Doc CCPR/C/AUS/CO/5 (2 April 2009) para 8.

<sup>35</sup> See, eg, United Nations Human Rights Committee, *The Obligations of States Parties under the Optional Protocol to the International Covenant on Civil and Political Rights*, General Comment 33, UN Doc CCPR/C/GC/33 (5 November 2008) paras 11-15.

<sup>36</sup> See generally, Joseph, above n 31. It is premature to evaluate the record in this regard of the Rudd government.

<sup>37</sup> Andrew Byrnes, Hilary Charlesworth and Gabrielle MacKinnon, *Bills of Rights in Australia* (UNSW Press, 2009) 36.

<sup>38</sup> See, eg, ICCPR Article 7 and CAT Article 16.

<sup>39</sup> See *R v Benbrika* [2008] VSC 80 (20 March 2008). See also *Raad v DPP* [2007] VSC 330, para 6. Note also that the UN Working Group on Arbitrary Detention expressed concern over the long term remand conditions of these prisoners, as did the UN Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms while Countering Terrorism. See National Association of Community Legal Centres, *Freedom Respect*

of psychological repercussions was introduced at their trial, and these conditions were ultimately found by a judge to be a breach of common law requirements regarding a fair trial. It is instructive that the judge had to rely on common law fair trial requirements to order a change in conditions: this means that such conditions for detainees might not be challengeable in cases where a person is detained for purposes other than facing trial, such as immigration detention, initial detention upon arrest, or detention in a mental health facility.

**[2.19]** We also draw the Committee's attention to the conditions of detention that were found by the Human Rights Committee to breach the right of detainees to humane treatment under Article 10(1) of the ICCPR in *Brough v Australia*.<sup>40</sup> Brough was a 16 year old Aboriginal boy arrested in New South Wales in early 1999. He was confined for two periods, of 48 and 72 hours respectively, in solitary confinement, and his clothes and blanket were removed to prevent his possible suicide in custody. While in confinement, artificial light was on 24 hours a day. He was administered anti-psychotic medicine, Largactyl, without his consent and without a proper assessment of whether the drug was appropriate. No domestic remedies were available to Brough to challenge those conditions, hence he sought and received vindication from a ruling of the UN Human Rights Committee. The HRC found that the conditions of Brough's detention breached his rights to humane treatment in detention (Article 10(1), ICCPR), in conjunction with his rights to protection as a minor (Article 24, ICCPR). Similarly, accounts of the distress and psychological problems caused to asylum seekers in mandatory detention, without access to adequate legal redress, have proliferated.

**[2.20]** 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 or other detainees, or 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, their houses, or their 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.

**[2.21]** Examples of some other rights for which there is no specific protection in Australia include the right to compensation for miscarriage of justice (Article 14(6) ICCPR),<sup>41</sup> the

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*Equality Dignity: Action: NGO Submission to the Human Rights Committee: Australia's Compliance with the International Covenant on Civil and Political Rights (2008) 88 (hereinafter "NGO Submission on ICCPR").*

<sup>40</sup> UN Doc CCPR/C/86/D/1184/2003 (27 April 2006).

<sup>41</sup> NGO Submission on ICCPR, above n 39, 157.

prohibition on the use of evidence obtained by torture,<sup>42</sup> and numerous aspects of economic social and cultural rights.<sup>43</sup>

### **Actual Violations**

[2.22] In the absence of constitutional protection of rights, it is clearly possible for Australian governments to pass legislation which breaches human rights. It is submitted that the following recent legislation (some now amended or repealed) breaches human rights (the following are by way of example, rather than comprehensive) or is, at the very least, highly suspect:

- Mandatory detention of asylum seekers and unlawful arrivals, including children. We draw specific attention here to the High Court's decision in *Al-Kateb v Godwin*,<sup>44</sup> where the potential indefinite detention under the *Migration Act* 1958 (Cth) of a stateless Palestinian asylum seeker, who was willing to be deported but who lacked a State willing to take him, was found to be constitutional by the High Court. This case demonstrates how the Australian political and legal system tolerates extreme human rights abuses, such as the indefinite detention of a person who had committed no crime.
- Aspects of Australian anti-terrorism laws, such as ASIO powers to detain non-suspects, reversal of presumption in bail applications for terrorist suspects, vague offences, overly broad definition of "terrorist offences" including offences related to "terrorist organisations", excessive search powers in "prescribed security zones", and discriminatory application of extraterritorial aspects of anti-terrorism offences.<sup>45</sup>
- Mandatory sentencing laws in the Northern Territory and Western Australia, allowing for application of disproportionate sentences.
- Removal of application of the *Racial Discrimination Act* in respect of Northern Territory intervention.<sup>46</sup>
- Discriminatory laws in respect of social security regarding same sex couples.
- Onerous evidential requirements regarding native title claims.<sup>47</sup>
- Anti-gang legislation in NSW and South Australia.

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<sup>42</sup> Ibid 89.

<sup>43</sup> See generally, National Association of Community Legal Centres, *Freedom Respect Equality Dignity: Action: NGO Submission to the UN Committee on Economic, Social and Cultural Rights: Australia* (2008).

<sup>44</sup> (2004) 219 CLR 562.

<sup>45</sup> Sarah Joseph, 'Australian Counter-Terrorism Legislation and the International Human Rights Framework' (2004) 27 *University of New South Wales Law Journal* 428.

<sup>46</sup> Concluding Observations of the Human Rights Committee on Australia, UN Doc CCPR/C/AUS/CO/5 (2 April 2009), para 14.

<sup>47</sup> Committee on Economic Social and Cultural Rights, *Concluding Observations*, UN doc E/C.12/AUS/CO/4, para 32

- Legislation in NSW which recently abolished the right against double jeopardy in certain circumstances.<sup>48</sup>
- Legislation which limited freedom of assembly in relation to the recent APEC meetings and World Youth Day celebrations in NSW.<sup>49</sup>
- Limitations on the rights of freedom of association for unionists, or aspiring unionists, in the building and construction industry,<sup>50</sup> as well as general restrictions on the right to strike.

**[2.23]** It is also submitted that the following actions, authorized under Australian law, breached human rights:

- The pre-charge detention of Mohammed Haneef for 12 days.<sup>51</sup>
- Refoulement of persons who were allegedly subsequently killed or tortured upon return to the relevant State, when such treatment was foreseeable.<sup>52</sup>
- Deportation of persons without regard to their mental health and family circumstances, as in the case of the deportation of Stefan Nystrom, who was deported at the age of 32 due to his criminal record, despite the fact that he had lived in Australia since the age of 25 days.<sup>53</sup>
- Alerting Indonesian authorities to Australian drug traffickers known as the “Bali 9”, knowing that they could face the death penalty in Indonesia, instead of allowing for their apprehension upon arrival in Australia (especially when four of the Bali 9 were on the plane that would have brought them to Australia).<sup>54</sup>
- The holding of children in detention centres designed for adults.<sup>55</sup>
- Curfews for young people under State legislation.<sup>56</sup>
- Unwanted medical treatment administered to people with mental illness, in contravention of the internationally recognised obligation to provide medical treatment with free and informed consent.

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<sup>48</sup> *Crimes (Appeal and Review) Amendment (Double Jeopardy) Act 2006 (NSW)*.

<sup>49</sup> NGO Submission on ICCPR, above n 39, 194-96.

<sup>50</sup> See *Building and Construction Industry Improvement Act 2005 (Cth)*.

<sup>51</sup> John Clarke, *Report of the Inquiry into the Case of Dr Mohamed Haneef Volume 1* (2008).

<sup>52</sup> See Anne Barrowclough, ‘Afghan Asylum seekers sent home by Australia ‘killed by Taleban’’, *The Times* (London), 27 October 2008, <<http://www.timesonline.co.uk/tol/news/world/article5025923.ece>>.

<sup>53</sup> NGO Submission on ICCPR, above n 39, 144. See also material regarding the deportation of Robert Jovicic at 147.

<sup>54</sup> Note the thinly veiled reference in Concluding Observations of the Human Rights Committee on Australia, UN Doc CCPR/C/AUS/CO/5 (2 April 2009) para 20.

<sup>55</sup> NGO Submission on ICCPR, above n 39, 215.

<sup>56</sup> NGO Submission on ICCPR, above n 39, 226.

**[2.24]** The following omissions also breach human rights:

- Continuing Indigenous disadvantage, eg. in the area of rights to life and health. The life expectancy of Indigenous Australians is far less than that of non-Indigenous Australians, and of Indigenous peoples in other Western countries.<sup>57</sup> Indigenous persons also continue to constitute one of the most imprisoned groups in the world.<sup>58</sup> Note also the general deficiency in the enjoyment by Indigenous peoples of economic social and cultural rights in Australia.
- Lack of dental care on the public health system.
- Lack of paid maternity leave<sup>59</sup>
- Inadequate health services in prisons<sup>60</sup>
- The absence or serious under funding of health services.<sup>61</sup>
- The multiple human rights abuses, including institutionalised discrimination experienced by people with mental illness in Australia.<sup>62</sup> One may note that a disproportionate number of people with mental illness are among the homeless,<sup>63</sup> and among those represented in the criminal justice system.<sup>64</sup>
- Care and treatment of people with mental illness in forensic custody is often inadequate.<sup>65</sup>
- Age appropriate facilities for young people with mental illness are rarely available.<sup>66</sup>

**[2.25]** The above commentary demonstrates that human rights are not currently adequately protected in Australia, as human rights abuses persist without legal remedy. If, in accordance with our initial assumptions, the government genuinely has an interest in providing for

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<sup>57</sup> NGO Submission on ICCPR, above n 39, 73-76.

<sup>58</sup> NGO Submission on ICCPR, above n 39, 109 – Indigenous peoples make up 2% of the Australian population, yet they constitute 24% of the total prison population.

<sup>59</sup> Committee on Economic Social and Cultural Rights, *Concluding Observations*, UN doc E/C.12/AUS/CO/4, para 21

<sup>60</sup> Committee on Economic Social and Cultural Rights, *Concluding Observations*, UN doc E/C.12/AUS/CO/4, para 29

<sup>61</sup> Senate Select Committee on Mental Health, *A National Approach to Mental Health: From Crisis to Community, First report* (March 2006).

<sup>62</sup> Human Rights and Equal Opportunity Commission, *Human Rights and Mental Illness: Report of the National Inquiry into the Human Rights of People with Mental Illness* (1993).

<sup>63</sup> Australian Human Rights Commission, *Not for Service: Experiences of injustice and despair in mental health care in Australia* (Mental Health Council of Australia, Brain and Mind Research Institute HREOC, 2005).

<sup>64</sup> Recent estimates suggest a total Australian prison population of around 25,000 people, approximately 5000 inmates suffer serious mental illness. P. R. Ogloff et al, *The Identification of Mental Disorders in the Criminal Justice System* (Australian Institute of Criminology, March 2007).

<sup>65</sup> Forensicare, Submission to Senate Select Committee on Mental Health (May 2005) 21; Senate Select Committee on Mental Health, 6 July 2005.

<sup>66</sup> *Not for Service Report*, above n 63.

adequate human rights protection, reform is necessary. We believe the most effective means of providing for greater protection is to enact a Bill of Rights which is enforceable in the courts.

### 3. Models of Bills of Rights

#### *Constitutional Protection*

[3.1] The government has explicitly removed the idea of constitutionally protected human rights from the current inquiry. Such protection is of course the strongest form of legal protection available. We briefly mention both the US and Canadian models,<sup>67</sup> while acknowledging that the constitutional model is not currently “on the table” in Australia.

[3.2] In the US, the constitutional Bill of Rights prevails over all US and State legislation. The Bill of Rights itself is over 200 years old, containing rights which are not recognized in the modern day, such as the second amendment “right to bear arms”, and contains no explicit limitations, leaving these to be implied by courts. The result has been, arguably, an overly strong Bill of Rights: for example, freedom of speech is clearly stronger under the US Bill of Rights than it is in international human rights law.<sup>68</sup>

[3.3] In Canada, the *Charter of Rights and Freedoms* has constitutional status, and allows for Acts of Parliament of both the Canadian and provincial governments to be struck down due to inconsistency with Charter standards. In contrast to the US, limitations to rights are explicitly written into the Charter. Parliamentary sovereignty is preserved by the “notwithstanding clause”: Canadian parliaments can expressly override the application of the Charter when enacting legislation. The notwithstanding clause has been utilized by Canadian provincial governments on a number of occasions.<sup>69</sup> The Castan Centre believes that this allowance for parliamentary departure from judicial decisions is appropriate.

[3.4] While it is conceded that such protection would be very difficult to achieve in practice, due to onerous constitutional amendment provisions and the clear lack of political will on the part of the current government (and several States), we note that the Castan Centre would be in favour of constitutional protection, particularly of the sort afforded in Canada, as opposed to the type of constitutional protection afforded in the US.

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<sup>67</sup> We have refrained from extensive commentary on constitutional models due to the limited terms of reference for the present inquiry. However, for readers interested in investigating constitutional models, we note that such models are very common in constitutions throughout the world, particularly in newer constitutions, and we urge anyone pursuing this line of inquiry not to focus narrowly on the United States and Canada as the models best known to Australian audiences, but to consider best practice models from around the world.

<sup>68</sup> For example, hate speech is prohibited under Article 20 ICCPR yet protected under US constitutional law: see *RAV v City of St Paul*, 505 US 377 (1992).

<sup>69</sup> See, eg, Tsvi Kahana, ‘The Notwithstanding Mechanism and Public Discussion: Lessons from the Ignored Practice of Section 33 of the *Charter*’ (2001) 44 *Canadian Public Administration* 255.

## **Legislative Models**

**[3.5]** Legislative Bills of Rights, that is Human Rights charters contained in ordinary rather than constitutional legislation, have been enacted in a number of jurisdictions.<sup>70</sup>

### *United Kingdom - Human Rights Act 1998*

**[3.6]** 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.<sup>71</sup>

- **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

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<sup>70</sup> These models are discussed in much greater depth in the separate submission of Castan Centre Deputy Director, Julie Debeljak. See also : 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, 'The *Human Rights Act 2004* (ACT): A Significant, Yet Incomplete, Step Toward the Domestic Protection and Promotion of Human Rights' (2004) 15 *Public Law Review* 169; Julie Debeljak, 'Rights and Democracy: A Reconciliation of the Institutional Debate', in Tom Campbell, Jeffrey Goldsworthy and Adrienne Stone (eds), *Human Rights Protection: Boundaries and Challenges* (Oxford University Press, Oxford, 2003) 135; 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.

<sup>71</sup> See *Homepage*, Parliamentary Committee

<[http://www.parliament.uk/parliamentary\\_committees/joint\\_committee\\_on\\_human\\_rights.cfm](http://www.parliament.uk/parliamentary_committees/joint_committee_on_human_rights.cfm)> at 27 May 2009.

excludes either House of Parliament, or a person exercising functions in connection with a parliamentary proceeding.

- **Interpretative clause:**

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*<sup>72</sup>, 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.<sup>73</sup> 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’”.<sup>74</sup>

- **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 s 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.<sup>75</sup>

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<sup>72</sup> [2004] 2 AC 557 (*Ghaidan*).

<sup>73</sup> [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.

<sup>74</sup> *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.

<sup>75</sup> If Parliament fails to approve such a remedial order, actions taken under the order while it was in force remain lawful.

Parliament and the government may of course respond by doing nothing, and leave the incompatible legislation in place. In all cases thus far where the House of Lords has issued a declaration of incompatibility, the relevant legislation has been amended.<sup>76</sup>

- **Independent cause of action:**

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

- a) A new cause of action against public authorities which act incompatibility with Convention rights. This is a proceeding for breach of statutory duty, the statute being the UKHRA itself;<sup>77</sup>
- b) A new 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.<sup>78</sup>

- **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.

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<sup>76</sup> Note that 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.

<sup>77</sup> UKHRA, s 7(1)(a).

<sup>78</sup> 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.

- **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 regarding the UKHRA, such as promoting understanding of the Act, holding inquiries and commencing judicial review proceedings under the Act.<sup>79</sup>

### *New Zealand – Bill of Rights Act 1990*

**[3.7]** 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.<sup>80</sup>

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<sup>79</sup> See <<http://www.equalityhumanrights.com/en/Pages/default.aspx>>.

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

## *Australian Capital Territory – Human Rights Act 2004*

[3.8] 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:**

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).

*Victoria – Victorian Charter of Human Rights and Responsibilities Act (2006)*

**[3.9]** 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.

- **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 6 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).<sup>81</sup>

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<sup>81</sup> 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).

## 4. Arguments against a Bill of Rights

[4.1] There are numerous arguments against a Bill of Rights. We address the most prominent of these in turn.

### ***First Argument: A Bill of Rights hands too much power to judges***<sup>82</sup>

#### *Parliament retains sovereignty with legislative Bill of Rights*

[4.2] The most vocal argument against a Bill of Rights is that it hands too much power to an unelected judiciary from a democratically elected and accountable Parliament. This argument undoubtedly applies with greater force to some constitutionally entrenched Bill of Rights. Given that 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 the “notwithstanding” clause, which allows national and provincial Parliaments to override the Canadian Charter.

[4.3] 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 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).

[4.4] Do Declarations of Incompatibility (or Declarations of Inconsistency) pose a threat to parliamentary sovereignty? In the UK, the Parliament has thus far responded to every such Declaration by rewriting the legislation, even though it is not under any constitutional or legal obligation to do so. 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.

[4.5] We believe that such an argument is fallacious in respect of legislative Bills 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

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<sup>82</sup> For more in depth analysis of the institutional design question and how it impacts on parliamentary sovereignty, see Julie Debeljak’s submission. 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; 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).

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 jeopardize 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.<sup>83</sup> 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 in international law to follow its decisions.<sup>84</sup>

**[4.6]** 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*,<sup>85</sup> 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 human rights-respecting interpretation and make the system harsher, and less human rights compliant, for serious sex offenders.<sup>86</sup> 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.

**[4.7]** A final 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 was often found in breach of the ICCPR in respect of its mandatory detention laws. These findings did not however dictate that Australia could not 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 Rudd government has in fact implemented this change.<sup>87</sup>

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<sup>83</sup> Byrnes, Charlesworth and McKinnon, above n 37, 61.

<sup>84</sup> While Australia is bound by the UN treaties, it is not strictly bound to follow the rulings of the UN treaty bodies.

<sup>85</sup> [2008] VSCA 265.

<sup>86</sup> *Serious Sex Offenders Monitoring Amendment Act* (Vic) 2009.

<sup>87</sup> We note however that the change has not been fully translated into policy, practice, and legislative change. See Australian Human Rights Commission, *2008 Immigration Detention Report*, available at <[http://www.hreoc.gov.au/human\\_rights/immigration/idc2008.html#Heading147](http://www.hreoc.gov.au/human_rights/immigration/idc2008.html#Heading147)>.

### *The “unelected” judiciary*

**[4.8]** 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 of the judiciary. 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”.

**[4.9]** We doubt that critics are in fact arguing that our judiciary should be elected. Nevertheless, we note 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).<sup>88</sup> A more recent investigation into 181 court cases in Louisiana found evidence of significant bias by judges towards those who had donated to their campaigns.<sup>89</sup> 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.

**[4.10]** 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 Bill of Rights 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*

**[4.11]** 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.

**[4.12]** 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

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<sup>88</sup> See Alexander Tabarrok and Eric Helland, ‘Court Politics: The Political Economy of Tort Awards’ (1999) 42 *Journal of Law and Economics* 157, at 186.

<sup>89</sup> Vernon Valentine Palmer and John Levendis, ‘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.

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”.<sup>90</sup> 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).

**[4.13]** 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 thirty years. 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.

**[4.14]** Of course, in most 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 prevail more often than not. In any case, as noted, most judicial decisions can be subjected to legislative scrutiny and may be reversed, sometimes with retrospective effect, by legislatures.<sup>91</sup> Furthermore, some legislation is enacted very quickly without proper debate or consideration.<sup>92</sup>

**[4.15]** 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*

**[4.16]** Judges are able to address human rights in individual situations, unlike the broadbrush 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.<sup>93</sup> Perhaps Mr Al-Kateb was such a person: it seems doubtful that the legislature had

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<sup>90</sup> 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).

<sup>91</sup> See *Nicholas v R* (1998) 193 CLR 173, for an example of a court decision being retrospectively reversed by legislation.

<sup>92</sup> See George Williams, ‘Wisdom of politicians is frail shield for our rights’, *Sydney Morning Herald*, 2 June 2009, citing the limited legislative scrutiny of the Northern Territory intervention legislation.

<sup>93</sup> 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.

contemplated the possibility that a person might be detained forever despite a willingness to be deported.<sup>94</sup> 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.

**[4.17]** 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.<sup>95</sup> 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 enough to prompt or tolerate change. That can take a long time, and leave many human rights abuses unaddressed along the way.<sup>96</sup>

*Human rights are “too political” for judges*

**[4.18]** 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”.<sup>97</sup> The argument runs that such decisions are inherently political and should therefore be left to the politically accountable arms of government.

**[4.19]** 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.<sup>98</sup> 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.<sup>99</sup>

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<sup>94</sup> Indeed, the minority (Gleeson CJ, Gummow and Kirby JJ) found that the legislation did not authorize detention in such circumstances.

<sup>95</sup> It is submitted that this is the case with regard to native title legislation.

<sup>96</sup> For example, while the Castan Centre applauds recent changes which delivered equality to same sex couples in terms of certain social security entitlements, we maintain that such reform was long overdue.

<sup>97</sup> For more detail, we refer the Committee to the submission of Dr Julie Debeljak, Deputy Director of the Castan Centre.

<sup>98</sup> See Joseph and Castan, above n 7, 471-78.

<sup>99</sup> *Associated Provisional Picture Houses Ltd v Wednesbury Corp* [1948] 1 KB 223.

[4.20] 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 nationalization, introduction of a uniform income tax system, the proposed "Gordon below Franklin" dam in Tasmania, mandatory detention for asylum seekers and Work Choices. These were all issues of massive political and even electoral importance to governments. It is impossible to quarantine the judiciary from political issues.

[4.21] 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, so as to preclude the likely applicability of that comparative jurisprudence in a local context. Indeed, the ACT and Victorian Charters (and the UKHRA) explicitly direct judges to refer to international and comparative human rights jurisprudence in interpreting legislation.<sup>100</sup>

[4.22] 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.<sup>101</sup>

### ***Second Argument: A Bill of Rights would cause an undesirable increase in litigation***

[4.23] Critics argue that a Bill of Rights, 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 such 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.

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<sup>100</sup> 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).

<sup>101</sup> 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.

[4.24] 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.<sup>102</sup> 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.<sup>103</sup>

[4.25] 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 Bill of Rights, the Charter was raised in only 66 reported cases, mostly in a minor or incidental argument.<sup>104</sup> Of course ACT figures could increase with the introduction of a free-standing cause of action. In 2008, the Victorian Charter was 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).<sup>105</sup> 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***

[4.26] We basically agree with this contention, but it is overstated. Very few rights are absolute.<sup>106</sup> 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, eg, 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 does allow for quarantines in certain medical emergencies).

[4.27] 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 recognizes no “right to riot”. Indeed, it is well recognized that one’s right to freedom of assembly may be legitimately limited by proportionate measures to prevent riots.

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<sup>102</sup> Byrnes, Charlesworth and McKinnon, above n 37, p 65, citing Department for Constitutional Affairs (UK), *Review of the Implementation of the Human Rights Act*, at p. 10.

<sup>103</sup> *Ibid*, 65-66 citing Tom Mullen et al, ‘Human Rights in the Scottish Courts’ (2005) 32 *Journal of Law and Society* 148, 152.

<sup>104</sup> *Ibid*, 66.

<sup>105</sup> Erica Contini, Castan Centre project officer, compiled this figures from examining data on the Austlii website: <[www.austlii.edu.au](http://www.austlii.edu.au)> in early January 2009.

<sup>106</sup> 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.

[4.28] 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 Bill of Rights is a Villains' charter*

[4.29] A related argument is that a Bill of Rights would be abused by villains or criminals. In response, we say the following.

[4.30] 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.<sup>107</sup>

[4.31] 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.<sup>108</sup> 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.

[4.32] It is a slippery slope to argue that the rights of criminals should be reduced, or not recognized. 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.

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<sup>107</sup> Byrnes, Charlesworth and McKinnon, above n 37, 66.

<sup>108</sup> 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 recognized 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.

**[4.33]** 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 minimize the instances of the arrest or conviction of innocents, or maltreatment of persons, whether guilty or innocent.

**[4.34]** 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.

***Fourth Argument: Judicial involvement would harm human rights***

**[4.35]** Another argument against a Bill of Rights 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)*.<sup>109</sup> The Canadian Supreme Court recently struck down legislation which restricted access to private health insurance, which was apparently designed to ensure improvement to the public health system.<sup>110</sup> 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,<sup>111</sup> 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.<sup>112</sup>

**[4.36]** It is of course concerning if judges are striking out "good"<sup>113</sup> legislation under Bills of Rights powers. However, legislative models do not allow for "striking out" of laws. Secondly, all 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*

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<sup>109</sup> [1995] 3 SCR 199.

<sup>110</sup> *Chaoulli v. Quebec (Attorney General)* [2005] 1 SCR 791.

<sup>111</sup> *Australian Capital Television v Commonwealth* (1992) 177 CLR 106 ('ACTV').

<sup>112</sup> 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.

<sup>113</sup> 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.

*MacDonald Corp.*<sup>114</sup> 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 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.<sup>115</sup>

**[4.37]** A related argument is that judicial interpretation may serve to legitimize 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.<sup>116</sup> 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 legitimization may serve to stymie legitimate political debate about reform.

**[4.38]** The legitimization 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 may 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.

**[4.39]** Balanced against such "bad" judgments are judgments which, it is submitted, pushed a reluctant legislature to act, and were "wins" for the human rights of the underprivileged, such as *Mabo 2* and *Brown v Board of Education*<sup>117</sup> in the United States, and significant advances concerning the rights of the mentally ill in the UK.<sup>118</sup> Furthermore, the inclusion of economic social and cultural rights in a Bill of Rights, alongside civil and political rights (as recommended below), will help to temper any judicial tendency to neglect the rights of the socially and economically excluded.

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<sup>114</sup> [2007] 2 SCR 610.

<sup>115</sup> Joseph, above n 112, 53-54.

<sup>116</sup> See, eg, K D Ewing and Joo-Cheong Tham, 'The Continuing Futility of the Human Rights Act' [2008] Public Law 668.

<sup>117</sup> 347 US 483 (1954).

<sup>118</sup> See, eg, *R (on the application of H) v Mental Health Review Tribunal for the North and East London Region* [2001] EWCA Civ 415.

**[4.40]** Finally, this fourth argument against judicial involvement in human rights demonstrates that the outcomes that eventuate under a Bill of Rights cannot be presumed to consistently conform to a leftist political agenda, contrary to the presumptions of some of the most trenchant critics of a Bill of Rights.<sup>119</sup>

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<sup>119</sup> Contrast Paul Kelly, 'Rights bill won't pay', *The Australian*, 27 May 2009.

## 5. Constitutional Issues

[5.1] There are considerable constitutional issues which apply in the context of a Commonwealth legislative Bill of Rights, which do not apply in regard to the comparative jurisdictions with legislative models noted above. The Commonwealth has considerable restrictions on its legislative powers imposed by the Commonwealth Constitution, unlike the UK and New Zealand, which have flexible unwritten constitutions. While the Parliaments of Victoria and the ACT are bound by the Commonwealth Constitution, relevant restrictions on their powers, notably the doctrine of separation of judicial powers, are not as comprehensive as those imposed at the Commonwealth level.

### *The possible entrenchment of a federal Bill of Rights*

[5.2] We recognize that the federal government has removed constitutional protection of human rights from the ambit of the current inquiry. However, the removal of constitutional options does not totally remove the possibility of an entrenched Bill of Rights at the federal level.

[5.3] It is ordinarily assumed that a legislative Bill of Rights could not affect the validity of subsequent federal laws. However, it might be possible for a Bill of Rights to impact on later laws via the incorporation of a “manner and form” provision into the legislation. Such a provision could dictate that the federal Bill of Rights prevails over later laws, unless they are enacted in a particular manner or form. For example, a Bill of Rights might require that future inconsistent legislation be enacted by a special majority of parliament (eg absolute majority instead of simple majority, 60% of votes in upper and lower house instead of simple majority), a referendum, or a requirement that future inconsistent legislation be enacted in a particular form (eg inclusion in legislation of an express declaration that legislation apply notwithstanding the Bill of Rights).

[5.4] There is considerable doubt over whether the Commonwealth can be constitutionally bound by manner and form provisions in ordinary (non-constitutional) legislation. The Commonwealth has enacted only one manner and form provision, s 15 of the *Australia Act 1986* (Cth), which purports to entrench the *Australia Act*: the efficacy of s 15 has never been tested.

[5.5] Section 1 of the Constitution vests federal legislative power in the Commonwealth Parliament, an institution comprised of the two Houses of Parliament and the Governor-General. Arguably, ss 1 and 53 (which specifies that the powers of the two Houses are equal except in respect of money bills) anticipate that all legislation can be enacted by the ordinary legislative procedure (simple majority in both Houses plus Crown assent), except where the

Constitution provides for an alternative procedure.<sup>120</sup> However, George Winterton has suggested that the Commonwealth inherited the British Parliament's powers in respect of manner and form provisions, given that the Constitution does not explicitly remove such powers.<sup>121</sup> Winterton suggests, perhaps controversially, that the British Parliament could indeed enact binding manner and form provisions,<sup>122</sup> ergo such powers were inherited by the Commonwealth Parliament.

**[5.6]** We append Winterton's article to our submission. In essence, he raises the possibility, which we believe to be plausible, that a federal Bill of Rights could in fact entrench human rights norms by requiring later inconsistent laws to be enacted by way of a more restrictive procedure than the current ordinary procedure. The less onerous that procedure, the more likely it will be constitutional. Therefore, it could be possible for the Commonwealth to enact a "notwithstanding" clause, requiring later inconsistent legislation to explicitly override the Bill of Rights in order to be operative. Such a provision could provide enhanced protection for human rights in Australia if it successfully entrenched the human rights requirement of such a Bill.

**[5.7]** We recognize the constitutional uncertainty regarding this issue, and will proceed now to discuss the constitutional issues related to a statutory Bill of Rights that is not entrenched.

### ***The doctrine of separation of judicial power***

**[5.8]** The Commonwealth Constitution imposes a very strict doctrine of separation of judicial powers at the federal level. Judicial power cannot be vested in non-judicial bodies.<sup>123</sup> Furthermore, non-judicial power cannot be vested in federal judicial bodies according to the *Boilermakers* doctrine.<sup>124</sup> To the extent that a legislative Bill of Rights vests non-judicial power in federal courts, it would be invalid. An exception to that rule is that courts may exercise powers that are incidental to their exercise of judicial power<sup>125</sup> – this exception is potentially relevant to present discussion, and is referred to below.

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<sup>120</sup> Alternative procedures are provided for in s 57 (providing for onerous conditions for the House of Representative to bypass the Senate) and the restrictive procedure in s 128 which provides a special procedure for amending the Constitution.

<sup>121</sup> George Winterton, 'Can the Commonwealth Parliament enact "Manner and Form" Legislation?' (1980) 11 *Federal Law Review* 167.

<sup>122</sup> At the least, the UK's apparent surrender of sovereignty to the European Union under the *European Communities Act 1973* (UK) challenges previous notions of the absolute sovereignty of each and every UK Parliament.

<sup>123</sup> *NSW v Commonwealth (the Wheat case)* (1915) 20 CLR 54.

<sup>124</sup> *R v Kirby; Ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254.

<sup>125</sup> *R v Joske; Ex parte Australian Building Construction Employers and Builders' Labourers' Federation* (1974) 130 CLR 87.

[5.9] By way of contrast, it may be noted that the doctrine of separation of powers is much weaker at the State level.<sup>126</sup> State courts can exercise non-judicial power, apart from power that is totally anathema to their role as courts. At the Commonwealth level, the presumption is that all non-judicial powers are excluded from federal courts, with few exceptions.

### ***Interpretative Clauses***

[5.10] The Victorian clause, upon which the ACT clause is based,<sup>127</sup> is, according to the committee that drafted it, a codification of the UK position from *Ghaidan*.<sup>128</sup> As discussed above, the House of Lords in *Ghaidan* indicated that the s 3 interpretative clause is constrained by the purposes of the legislation being interpreted. However, former High Court judge Michael McHugh has recently expressed his view that the UK interpretative clause is not apparently constrained by the purpose of the legislation, and that such interpretation would be unconstitutional in Australia as a breach of the separation of judicial powers doctrine, as it would amount to a judicial rewriting of legislation.<sup>129</sup> We respectfully disagree with McHugh's interpretation of *Ghaidan*.<sup>130</sup>

[5.11] In any case, we believe that a Victorian-type clause in federal legislation would be read by judges so as to conform with their constitutional powers.

### ***Declarations of Incompatibility***

[5.12] In both the ACT and Victoria, Supreme Courts are empowered to make formal declarations (Declarations of Incompatibility in the ACT and Declarations of Inconsistent Interpretation in Victoria) to the effect that a statutory provision is not compatible with human rights. These statements do not render the relevant statutes invalid. They set in train a duty on the government to respond in Parliament within six months: the response could entail proposed legislative amendments, or maintenance of the status quo.

[5.13] A query has arisen as to whether an equivalent power would be valid at the federal level. The argument runs that the power to issue such declarations, which arguably lack legal consequence (beyond the duty of the government to respond in some way), may equate with

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<sup>126</sup> See generally, Joseph and Castan, above n 7, ch 6.

<sup>127</sup> The ACT Act was amended to copy the Victorian model.

<sup>128</sup> Report of the Human Rights Consultation Committee, *Rights, Responsibilities and Respect*, 82-84.

<sup>129</sup> Michael McHugh, 'A Human Rights Act, the Courts and the Constitution' (presentation at the Australian Human Rights Commission, 5 March 2009) 23-27, available at: <[http://www.hreoc.gov.au/letstalkaboutrights/events/McHugh2009\\_%20paper.doc](http://www.hreoc.gov.au/letstalkaboutrights/events/McHugh2009_%20paper.doc)>.

<sup>130</sup> Please see, on this point, the submission of Dr Julie Debeljak, Deputy Director, Castan Centre for Human Rights Law. 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, 40-56.

the investiture of non-judicial powers in federal courts. It has also been stated that such Declarations may equate with advisory opinions: federal courts have no powers to issue advisory opinions.<sup>131</sup>

**[5.14]** The arguments in favour of the constitutionality of such clauses,<sup>132</sup> and against such constitutionality,<sup>133</sup> have been canvassed in considerable detail elsewhere. We will not repeat those arguments.<sup>134</sup> It is fair to say that we cannot be sure that a Victorian-type clause would pass constitutional muster at the federal level, nor can we be sure that it would not.

**[5.15]** Of course, it is unwise to pass a law that is clearly unconstitutional. However, it is common for governments to pass laws that *might* be unconstitutional: this is a natural process given that not all constitutional nooks and crannies have or ever will be explored. We do not believe that a provision regarding “statements of compatibility” by judges in a federal Bill of Rights is so obviously unconstitutional as to render its enactment unwise.<sup>135</sup> We do not support the contention that the proposed model be “constitutionally watertight”, given the inevitable uncertainties over the parameters of constitutionality – this is not a standard required of legislation generally; we do not see why it should be applied in the area of human rights. It is entirely appropriate for Parliament to enact legislation that is plausibly within its constitutional power and to leave it to the High Court to adjudicate on arguments that the provision is invalid. To refrain from doing so would be to render the Commonwealth Parliament unnecessarily timid in deference to an objection that might ultimately prove unfounded. The *Race Discrimination Act 1975*, for example, legislation which was necessary to counter practices which are now recognised as abhorrent, would not have been enacted had the Commonwealth Parliament balked at testing the (the unconfirmed) boundaries of the external affairs power.<sup>136</sup>

**[5.16]** It is arguable that the power to issue such declarations might be incidental to the exercise of judicial power, namely the judicial power of interpreting laws (in this instance, the judicial power of interpreting laws in accordance with human rights). That is, if a judge *de jure* finds that a law is simply incapable of being interpreted in a way that is compatible with human

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<sup>131</sup> See *Re Judiciary and Navigation Acts (Advisory Opinions Case)* (1921) 29 CLR 257. See also Brennan, above n 12, 23.

<sup>132</sup> Dominique Dalla-Pozza and George Williams, ‘The Constitutional Validity of Declarations of Incompatibility in Australian Charters of Rights’ (2006) 12 *Deakin Law Review* 1.

<sup>133</sup> Michael McHugh, above n 129.

<sup>134</sup> We anticipate that other organizations or individuals will submit the detailed arguments. We can provide appropriate readings, such as those cited directly above, upon request.

<sup>135</sup> We note, perhaps controversially, that a challenge to the constitutionality of such a provision could pave the way to a challenge to the *Boilermakers* doctrine. The Castan Centre would not be adverse to the overturning of the *Boilermakers* precedent (precluding the vesting of non-judicial powers in federal courts). We do not believe that that case’s precedent is a necessary or desirable constitutional outcome. See also *Re Wakim; Ex parte McNally* (1999) 198 CLR 511.

<sup>136</sup> See *Koowarta v Bjelke-Petersen* (1982) 153 CLR 168.

rights, the judge is *de facto* finding that the law is incompatible with human rights. The statutory based “declaration” mechanism simply formalizes that process and may be justified under the incidental power.

**[5.17]** If the formal, statutory based “declaration” mechanism is in fact unconstitutional for being non-judicial and not incidental to the exercise of judicial power, an alternative process could be the following:

- judges are directed to interpret statutory provisions, where possible, compatibly with human rights;<sup>137</sup>
- where a question of law arises that relates to the application of the Charter or a question arises with respect to the interpretation of a statutory provision compatibly with the Charter, the AG and AHRC are given notice and empowered to intervene if they wish to do so;<sup>138</sup>
- where, after appeals are exhausted, the final judicial decision is that the statutory provision cannot be interpreted compatibly with human rights, the Attorney General must:
  - o as soon as reasonably practicable, inform the Minister administering the relevant statutory provision;<sup>139</sup> and
  - o within six months of that judicial decision, prepare a written response to the judicial decision and table the judicial decision and the written response in both Houses of Parliament.<sup>140</sup>

**[5.18]** Of course, such a mechanism resembles the Victorian mechanism (without the potentially problematic formal declaration mechanism) and would yield virtually identical outcomes. However, the power to indicate that a law is incompatible is tied to the power of interpretation, thus either bringing it within the ambit of judicial interpretation proper, or within the ambit of powers incidental to the judicial power of interpretation. Any perceived non-judicial exercises of power attached to informing the executive and parliament of the judicial view of the rights-compatibility of the statutory provision fall squarely with the executive.

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<sup>137</sup> See UKHRA, s 3, Victorian Charter, s 32, ACTHRA, s 30.

<sup>138</sup> See Victorian Charter, ss 34, 35, and 40; ACTHRA, ss 35 and 36.

<sup>139</sup> See Victorian Charter, s 36(7); ACTHRA, s 32(4).

<sup>140</sup> See Victorian Charter, s.37 and ACTHRA, s 33.

## ***Heads of Power***

[5.19] The Commonwealth needs express constitutional authorization in order to enact any law including a Bill of Rights. If the Bill is intended to only apply in the federal sphere (ie impacting on federal public officials and federal laws only), constitutional authority would arise from s 52(2) (power over the federal public service) and s 51(29) (the external affairs power).

[5.20] Under s 51(29), the Commonwealth has the power to enact legislation to implement its international treaty obligations, including its human rights obligations.<sup>141</sup> Indeed, the external affairs power gives the Commonwealth power to enact a Bill of Rights which would have constitutional effect in the States, given that Commonwealth laws prevail over inconsistent State legislation by virtue of s 109 of the Commonwealth constitution.

[5.21] Under s 51(29), laws must “conform” to the relevant treaty obligation. That is, they should be proportionate to that obligation, and should at the very least not undermine the obligation. Partial implementation of a treaty is permissible.<sup>142</sup> The principle of conformity could be relevant, as noted below, to any provision in a Bill of Rights designed to constrain its effectiveness and thereby undermine the obligation, such as an override provision.<sup>143</sup>

## ***Federalism and a Bill of Rights***

[5.22] As just stated, the Commonwealth has the constitutional power to enact a Bill which overrides State laws. Such an outcome is perhaps justified from an international legal perspective, given that the Commonwealth is bound in international law to ensure respect for human rights by all governmental entities in Australia: federal, State and Territory.<sup>144</sup> Indeed, the first finding of a violation against Australia under an individual complaints process, *Toonen v Australia*, concerned two anti-gay laws enacted by Tasmania. The Commonwealth Parliament responded by overriding the Tasmanian law after it became clear that Tasmania would not swiftly repeal the laws itself.<sup>145</sup>

[5.23] However, comprehensive human rights legislation would have a massive impact on the federal balance of power, given that it would impact in many or even most spheres of State

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<sup>141</sup> See Joseph and Castan, above n 7, ch 4.

<sup>142</sup> Ibid 125-26.

<sup>143</sup> The issue would not necessarily arise however, with regard to the notwithstanding clause raised at para 5.2-5.7. The purpose of that clause, a restrictive procedure, would be to *restrict* Parliament’s power to override the Bill of Rights by the process of implied repeal, and would in our opinion conform to Australia’s international human rights obligations. An override provision of the type contained in the Victorian Charter does not restrict Victoria’s power at all; it simply limits the applicability of the Act and could therefore raise conformity issues if replicated at the federal level.

<sup>144</sup> See also, eg, ICCPR, Article 50.

<sup>145</sup> See *Human Rights (Sexual Conduct) Act 1994* (Cth).

law. It is unlikely, politically, that such a Bill would be enacted without extensive discussion with the State governments. Are there less intrusive ways in which such a Bill could impact on the States? The following factors should be borne in mind:

- (a) A federal law which overrode inconsistent legislation could be enacted along with a “notwithstanding” clause, whereby the Commonwealth could declare the Bill of Rights inapplicable to State laws which explicitly reject the applicability of the Bill. This model would be close to the Canadian model, except that the legislation would not prevail over inconsistent federal legislation. The Castan Centre would be happy with such a model.<sup>146</sup>
- (b) If the legislation was to impact on State legislation, the Commonwealth should ensure that existing Bills of Rights at State and Territory level are allowed to co-exist, just as State anti-discrimination legislation sits alongside like Commonwealth legislation in areas such as race and sex discrimination.<sup>147</sup>
- (c) It would likely be unconstitutional for a federal law to require State public servants to abide by human rights when performing functions under State legislation, or to direct courts to interpret State legislation in a way that is compatible with human rights. Such duties would likely breach the doctrine of intergovernmental immunities in the Commonwealth constitution (ie that the Commonwealth and the States cannot unduly interfere with each other’s governmental organs).<sup>148</sup>
- (d) The Australian Human Rights Commission could be given the power to examine State laws for compliance with human rights as defined in the federal Bill of Rights. Its reports on such matters could then be tabled in the Federal Parliament. Such a provision, if submitted, would probably be authorized under s 51(29) of the Constitution. Such a power would involve a level of “interference” by a federal body in State legislation, authorized by federal law. However, we doubt that the interference would be so severe as to breach the doctrine of implied intergovernmental immunities. The utility of this process would be to allow the AHRC to bring State laws that breach human rights to the attention of the Federal Parliament, which might then choose to override particular laws, as it did with the Tasmanian anti-gay laws after the *Toonen* decision, or to at least engage in some dialogue with a State over the relevant law. This process would provide

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<sup>146</sup> This model is favoured by McHugh, above n 129, 36.

<sup>147</sup> *Racial Discrimination Act 1975* (Cth) s 6A; *Sex Discrimination Act 1984* (Cth) ss 10, 11, 11A.

<sup>148</sup> Such a direction would in our view amount to the Commonwealth instructing State public servants and judges on how to perform their functions under State legislation. Given that such a system would be hugely controversial and would be constitutionally suspect, this route is not recommended. Such a system would not be much less controversial than simply overriding State legislation in the arena of human rights, which seems to rest on a more sound constitutional footing.

for an alternative avenue of scrutiny of State laws that breach human rights. Given the existence of international obligations upon the Commonwealth to ensure State compliance with human rights, we believe that such a system would be justified and constitutional.

**[5.24]** It should be noted that a federal Bill of Rights that binds the Commonwealth but does not bind the States would not enable Australia to comply fully with its obligations under international human rights law.<sup>149</sup> Under international law, the national government of a federal state is held responsible for compliance with international legal obligations by all levels of government in that country. In the absence of diligent monitoring of State laws by the Commonwealth and a willingness to override individual laws that conflict with human rights, a Commonwealth-only model can only go part of the way towards ensuring compliance with Australia's international human rights obligations.

**[5.25]** It should be further noted that a system whereby human rights applied in the federal arena but not the State arenas might not be politically sustainable in the long term. There would likely be agitation for Bills of Rights in those States or Territories which lacked one, or for a federal Bill of Rights that overrode the States, as people would be frustrated with having a form of redress for human rights abuses in some areas of life, but not others. Such frustration would be magnified by a general lack of understanding of the federal balance of powers. Therefore, we would recommend that the Commonwealth government place human rights on the agenda of COAG meetings, if it enacts its own Bill of Rights.

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<sup>149</sup> We note for example that a number of the concerns raised above regarding the current state of Australian law concern state rather than federal issues. See above paras 2.17-2.25.

## 6. Recommendations

**[6.1]** We recommend that a Bill of Rights be adopted by the Commonwealth Parliament. The following models would be endorsed by the Castan Centre, but we acknowledge the unlikelihood of their adoption.

1. Constitutional model – insertion of rights into the Constitution which bind both the federal and State parliaments.

The Constitutional model is explicitly outside the terms of the consultation. It could represent the next stage of Australian human rights protection.

2. Federal Bill of Rights which overrides State legislation, but which includes a notwithstanding clause (allowing States to enact laws “notwithstanding” the Bill of Rights, as in Canada).

Such a model is politically unlikely given the lack of intergovernmental discussion on this issue at this stage. It could represent the next stage of Australian human rights protection.

3. Bill of Rights containing a notwithstanding clause, requiring that future inconsistent federal law be explicitly enacted “notwithstanding” the Bill of Rights in order to be operable. This was the model in place in Canada between 1960 and 1982.<sup>150</sup>

We recognize that such a model is constitutionally uncertain. We would be pleased for the Committee however to seek and receive legal advice on this issue, as we believe that the possible availability of this option is under-appreciated.

4. A combination of options 2 and 3

See above

**[6.2]** We proceed to outline a statutory non-entrenched model for a Bill of Rights, due to the greater likelihood of the adoption of such at this point in time. We note that many of the points made below would apply to the above models (eg issues regarding the rights to be protected).

### ***What rights should be protected?***

**[6.3]** The Castan Centre endorses the inclusion of all of the rights recognized in both the ICCPR and ICESCR, including the right of self determination.

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<sup>150</sup> *Canadian Bill of Rights*, SC 1960, c 44.

### *Economic Social and Cultural Rights*

**[6.4]** We recommend that all of the rights from both Covenants should be included. While the federal government may lack specific constitutional power over the content of some of the rights therein (eg the rights to housing or food in Article 11 ICESCR), it can wield considerable power over such areas under the broad interpretations of existing heads of power,<sup>151</sup> as well as under its incidental powers. Therefore, federal laws are likely to impact on all of rights within these two Covenants.

**[6.5]** 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 Bills of Rights. It seems likely that the government will agree to include civil and political rights if it in fact decides to adopt a federal Bill of Rights. Rather, we will focus our arguments on the need to include economic social and cultural rights (“ESC rights”) alongside civil and political rights.

**[6.6]** The two sets of rights are indivisible, interdependent, and equally important.<sup>152</sup> 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).

**[6.7]** 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.

**[6.8]** The Maastricht Guidelines, adopted by a group of ESC rights experts in 1997, identified a number of violations of the ICESCR. These are:<sup>153</sup>

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<sup>151</sup> Eg, *New South Wales and Ors v The Commonwealth* (2006) 229 CLR 1.

<sup>152</sup> *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.

<sup>153</sup> *Maastricht Guidelines on Violations of Economic, Social and Cultural Rights* (Maastricht, January 22-26, 1997) paras 14 and 15.

### *Violations through acts of commission*

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 with the purpose and effect of increasing equality and improving the realization 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;<sup>154</sup>
- (f) The calculated obstruction of, or halt to, the progressive realization 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 through acts of 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;

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<sup>154</sup> 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”.

- (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 utilize the maximum of available resources towards the full realization of the Covenant;
- (f) The failure to monitor the realization 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;
- (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 organizations or multinational corporations.

**[6.9]** Indeed, ESC rights are justiciable: there is simply too much evidence to argue to the contrary.<sup>155</sup> Courts across the world, largely in States that are poorer than Australia, have rendered numerous decisions on ESC rights.<sup>156</sup> 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. The UN by consensus adopted the Optional Protocol to ICESCR in December 2008, which will allow individuals to submit complaints to the Committee regarding breaches of their ICESCR rights by States that have ratified the Protocol when it comes into force.

**[6.10]** States have obligations to respect, protect, and fulfil all of their human rights obligations, whether they concern civil and political rights, or ESC rights. We endorse the comments of Julie Debeljak, Deputy Director of the Castan Centre, who has put forward a separate submission to the Committee, in her explanation of these tripartite duties.<sup>157</sup>

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<sup>155</sup> 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.

<sup>156</sup> See generally, Malcolm Langford (ed), above n 155.

<sup>157</sup> See submission of Dr Julie Debeljak.

**[6.11]** Some of the most advanced jurisprudence on ESC rights has emerged from South Africa. As explained by Dr Debeljak, South African courts have essentially inquired into whether a particular act or omission by the government is rational or reasonable.<sup>158</sup> This type of decision-making is not foreign in Australia; it arises in the context of administrative law.

**[6.12]** 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).<sup>159</sup> 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 housing, is a breach of ESC rights: it is then up to the government to decide how to fix that situation.<sup>160</sup>

**[6.13]** The inclusion of ESC rights in an Australian Charter 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 *Declaration of the Rights of Persons with Disabilities* (2007). Both of these documents provide a template for an inclusive iteration of civil and political, and economic, social, and cultural rights. A federal Bill of Rights absent of economic social and cultural rights will fall short of contemporary human rights standards.

### *Self Determination*

**[6.14]** We recommend inclusion of the right of self determination, which is recognized in Article 1 of both Covenants. The right of self determination is often mistakenly viewed as a threat to the territorial integrity of a State. However, this right is not exclusively concerned with the right of secession.<sup>161</sup> It is better 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.

**[6.15]** Recognition of the right of self determination would affect most profoundly (but not exclusively) the rights of indigenous peoples in Australia. Historically, Indigenous peoples in Australia have not been treated as legitimate political and economic entities.<sup>162</sup> This historical

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<sup>158</sup> See submission of Dr Julie Debeljak.

<sup>159</sup> See Paul Hunt, 'Reclaiming Economic Social and Cultural Rights' (1993) *Waikato Law Review* 141, 154-57.

<sup>160</sup> *Ibid* 157.

<sup>161</sup> *Declaration on the Rights of Indigenous Peoples*, UN GAOR, 61<sup>st</sup> sess, art 46(1), UN Doc A/61/L.67.

<sup>162</sup> In contrast, note how treaties were concluded in other settler States, such as New Zealand and the US.

“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 of the abolition of ATSIC<sup>163</sup> and the Northern Territory intervention. Other groups have not been treated with such apparent ongoing disdain.<sup>164</sup>

**[6.16]** 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.

**[6.17]** Recognition of a right of self determination would provide evidence that Australia 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 Koorie courts in Victoria, whereby Koorie elders are involved in decisions made regarding Indigenous peoples in the criminal process. The Koorie 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.

**[6.18]** Recognition of a right to self determination would constitute a significant stepping stone towards true reconciliation in Australia. It would signal that a Bill of Rights was truly meant to embrace rights for Indigenous peoples along with all others in Australia.

### *Right to Property*

**[6.19]** We do not support the inclusion of a right to property in a federal Bill of Rights. The right is not included in either the ICCPR or the ICESCR. Without a treaty basis, the Commonwealth may lack a head of power to provide for such a right.<sup>165</sup> In any case, we believe that s 51(31) of

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<sup>163</sup> ATSIC was seen by many as a corrupt and failed organisation. However, it also consisted of 17 regional councils and a central body which provided Indigenous peoples with representational strength.

<sup>164</sup> Contrast the abolition of local councils, such as that in the Kennett era in Victoria. Those local council were quickly restored, unlike ATSIC.

<sup>165</sup> The Commonwealth may have power to enact statutes in areas of “international concern” under the external affairs power, so Article 17 of the *Universal Declaration of Human Rights* 1948 (which is not an international treaty) may provide a foundation for the federal protection of property rights. No law has yet been upheld on this basis. See Joseph and Castan, above note 7, 127-130.

the Constitution, which prohibits the compulsory acquisition of property by the federal government without the furnishing of just terms, provides adequate protection for property rights at the federal level.

### ***Limits to Rights***

**[6.20]** Most of the rights in a federal Bill of Rights should be subjected 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 realization and available resources, as in the ICESCR.

**[6.21]** However, those rights which are absolute at the international level should be recognized as absolute at the federal level and excluded from the operation of the general limitations clause. These 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. No civilized society should ever be required to qualify such rights.<sup>166</sup>

### ***Who has human rights?***

**[6.22]** We recommend that the rights be restricted to natural persons only. 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 to note that the most important effect of a Bill of Rights is to increase the capacities of the vulnerable and marginalized. The exclusion of corporations as rights-holders would also serve to reduce litigation in the human rights field.

**[6.23]** Australia's international obligations are not limited to its own citizens.<sup>167</sup> Therefore, we strongly recommend that the protection be extended to all person within Australia's territory and jurisdiction rather than be restricted to Australian citizens.

**[6.24]** The Bill of Rights should extend protection to those who are subject to Australia's jurisdiction but are outside Australia's territory. A person who is under the effective control of Australian public bodies, even if outside Australia, is within Australia's jurisdiction.<sup>168</sup> Such

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<sup>166</sup> 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.

<sup>167</sup> United Nations Human Rights Committee, *the position of aliens under the covenant*, General Comment 15, UN Doc U.N. Doc. HRI/GEN/1/Rev.1 at 18 (1994) (4 November 1986).

<sup>168</sup> United Nations Human Rights Committee, *The Nature of the General Legal Obligation Imposed on States parties to the Covenant*, General Comment 31, UN Doc CCPR/C/21/Rev.1/Add.13 (26 May 2004) para 10.

people might include those who need to renew passports at Australian consulates abroad: arbitrary denial of a passport would constitute a breach of a person's rights.<sup>169</sup>

**[6.25]** Another example would include people who are detained by, or otherwise under the control of, Australia's armed forces overseas. Australia's armed forces (and others) are already subject to extraterritorial obligations not to breach international humanitarian law, or commit the gravest human rights offences, under the *Criminal Code* 1995 (Cth), in offences introduced under the *International Criminal Court (Consequential Amendments) Act* 2002 (Cth). International humanitarian law and human rights law complement each other in times of armed conflict, though the former prevails over the latter in case of any conflict.<sup>170</sup> The addition of extraterritorial responsibilities under a Bill of Rights would likely have the greatest impact outside the arena of armed conflict (eg in the context of a peacekeeping mission).

**[6.26]** Intra-territorial actions may give rise to violations of the rights of persons which occur outside Australia. This circumstance does not concern extraterritorial obligations, but rather involves responsibility for the extraterritorial consequences of intra-territorial decisions. Thus, public officials in Australia should not make decisions which foreseeably harm the rights of persons abroad. A classic example is the duty of non-refoulement, an obligation familiar under refugee law. Nor, for example, should Australian agents take actions which are likely to expose a person to a death sentence in another State.<sup>171</sup>

### ***Who has duties to observe human rights?***

**[6.27]** Public authorities at the federal level should be bound to abide by human rights, as well as private bodies acting in a federal 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.<sup>172</sup> 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.

**[6.28]** 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

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<sup>169</sup> See, eg, *Lopez Burgos v Uruguay*, UN Doc CCPR/C/OP/1 at 88 (1984).

<sup>170</sup> *Legality of the Threat or Use of Nuclear Weapons (Advisory Opinion)* [1996] ICJ Rep 225, para 25; *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory (Advisory Opinion)* [2004] ICJ Rep 136, paras 105-06.

<sup>171</sup> *Judge v Canada*, UN Doc CCPR/C/78/D/829/1998 (2003). See also Concluding Observations of the Human Rights Committee on Australia, UN Doc CCPR/C/AUS/CO/5 (2 April 2009) para 20.

<sup>172</sup> The Castan Centre would strongly support separate legislation in that regard.

common law, as has occurred in the UK,<sup>173</sup> a desirable outcome in our view. The High Court has stated that there is a common law of Australia, not a common law of each state.<sup>174</sup> Therefore, a statutory Bill of Rights that affected the common law could not be said to be objectionable on federalist grounds. We therefore recommend that courts that are exercising federal jurisdiction, or that are making decisions under common law, be classified as ‘public authorities’ for the purposes of obligations under the Bill of Rights.

### ***Legislative Scrutiny***

**[6.29]** We recommend the inclusion of a requirement that all persons introducing Bills in the Federal 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. Indeed, we recommend that a new committee should be constituted with the sole responsibility of monitoring compliance with the Bill of Rights, to ensure that this important oversight role is conducted in a rigorous and timely fashion. Such a system would force the executive to explicitly consider human rights issues when introducing legislation. A failure to comply with these provisions would not however result in invalidity of the law.

### ***Override Provision***

**[6.30]** 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.

**[6.31]** 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 and Victoria, and proposed federally. Accordingly, there is no need to additionally provide for an override provision in the Victorian Charter, or in a federal Bill of Rights.<sup>175</sup>

**[6.32]** Furthermore, an override clause that allows Parliament the latitude to remove laws completely from the ambit of the Act is possibly unconstitutional for lack of a head of power. Section 51(29) does not authorize laws which undermine a treaty obligation. While partial implementation of a treaty obligation is permissible (eg the extension of human rights

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<sup>173</sup> *Campbell v Mirror Group Newspapers Ltd* [2004] UKHL 22.

<sup>174</sup> *Farah Constructions Pty Ltd v Say-Dee Pty Ltd* [2007] HCA 22, para 135.

<sup>175</sup> 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.

obligations to federal bodies rather than all bodies), a provision that blatantly facilitates the passage of legislation which breaches human rights undermines those treaty obligations, and may therefore fall outside s 51(29). Such a provision might be constitutional to the extent that it concerns the federal public service under s 52(2) (relieving them of the obligation to act in conformity with human rights) and ss 76 and 77 (power to confer federal jurisdiction in respect of the legislation).

**[6.33]** If an override clause is felt to be necessary, we recommend a clause that mirrors the derogation clause in s 14 of the UKHRA. Australia is permitted to derogate from its obligations in certain circumstances under the ICCPR. If Australia enters a valid derogation under the ICCPR, then it may pass legislation in conformity with that derogation, which temporarily relieves it of specified ICCPR obligations. This override clause would be much narrower than that in the Victorian Charter, as derogations are only permitted in times of public emergency, and certain rights may never be derogated from.<sup>176</sup>

**[6.34]** It may be noted that the ICESCR contains no specific derogation clause, so it is probable that derogation is not permissible under that treaty. Therefore, we would recommend that a derogation clause did not extend to rights in the ICESCR. In any case, derogation should never be necessary, given that a State's ICESCR obligations are constrained by its available resources.<sup>177</sup> Therefore, any fluctuation in resources necessitated by an emergency would justify a fluctuation in Australia's ability to provide for economic, social and cultural rights.

### ***Interpretative clause***

**[6.35]** Courts should be instructed to interpret all federal legislation in accordance with the human rights in the Bill, so long as such an interpretation is possible taking into account the purpose of the relevant statute.

**[6.36]** 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

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<sup>176</sup> See ICCPR, Article 4 and United Nations Human Rights Committee, *States of Emergency (article 4)*, *General Comment 29*, UN Doc CCPR/C/21/Rev.1/Add.11 (31 August 2001). 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.

<sup>177</sup> Manisuli Ssenyonjo, 'Economic Social and Cultural Rights: An Examination of State Obligations', in Sarah Joseph and Adam McBeth (eds), *Human Rights: A Research Handbook* (Edward Elgar, UK, forthcoming, 2009), copy on file with the Castan Centre.

of government that violate human rights, whether in enacting delegated legislation or in performing administrative functions, is an entirely appropriate objective for a Bill of Rights. 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 ss 3 and 4 of the UKHRA.

### ***Statements of Inconsistent Interpretation***

**[6.37]** Where interpretation in accordance with the human rights in the Bill is impossible, the higher federal and State courts should be empowered to issue Statements of Inconsistent Interpretation. Upon issuance of such a Statement, the Minister would 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.

**[6.38]** We note alternative ways of achieving this outcome, above at para 5.17, in case of constitutional problems in this regard. However, we recommend that the Victorian/ACT models of Declarations be adopted in the first instance, as it is quite plausible that that model is constitutional.<sup>178</sup>

### ***Independent Cause of Action***

**[6.39]** The federal Bill of Rights 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. 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.

### ***Role of Australian Human Rights Commission***

**[6.40]** The AHRC must play a major role in the implementation of a federal Bill of Rights. Its mandate should be extended to have powers with regard to all of Australia’s international human rights treaty obligations, including for example the ICESCR, rather than only those

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<sup>178</sup> See Dalla-Pozza and Williams, above n 132.

treaties currently scheduled in the *Human Rights and Equal Opportunity Commission Act 1986* (Cth).<sup>179</sup>

**[6.41]** Furthermore it should have enhanced powers to:

- a) review federal laws for compliance with human rights and table reports in federal Parliament at its own initiative.
- b) review State laws for compliance with human rights and table reports in federal Parliament (see above) at its own initiative.
- c) intervene in cases where the federal Bill of Rights is at issue.
- d) play an educative role in the community on human rights.
- e) conduct training for the community and for federal departments on human rights.
- f) table annual reports on the implementation of the federal Bill of Rights.

### ***A human rights culture***

**[6.42]** Importantly, a federal Bill of Rights would help to generate more remedies for human rights violations, as well as a greater human rights culture within all arms of the federal government, and a mechanism that might help to promote dialogue between the federal and State governments on human rights.

**[6.43]** Empirical research has shown that a key factor in successfully creating a culture of human rights is educating people about human rights.<sup>180</sup> 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 Bill of Rights 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” Bill of Rights that people can connect with.

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<sup>179</sup> *Convention concerning Discrimination in respect of Employment and Occupation 1958; International Covenant on Civil and Political Rights 1966* and the following declarations: *Declaration of the Rights of the Child 1924; Declaration on the Rights of Mentally Retarded Persons 1971; Declaration on the Rights of Disabled Persons 1975.*

<sup>180</sup> See Paula Gerber, *From Convention to Classroom: The Long Road to Human Rights Education* (2008 VDM Publishers, Germany).

## 7. Summary of Recommendations

[7.1] See para 6.1 for a summary of our preferred models for Bills of Rights. The following points summarise our recommendations regarding a statutory Bill of Rights, if the para 6.1 options are not taken up. Recommendations 1, 2, 3, 9 and 10 apply regardless of the model adopted.

1. The Bill of Rights should protect civil and political rights, economic social and cultural rights, and the right to self determination. These are the rights recognized in the ICCPR and the ICESCR. The limits to rights recognized in those treaties should be reflected in the Bill of Rights. There should be no express right to property.
2. Rights should attach to natural persons only, and not artificial entities like corporations. Rights should not be limited to citizens, but should extend to all within jurisdiction.
3. The Bill of Rights should extend to those outside Australia's territory who are under the effective control of Australian authorities. It should also extend to those outside its jurisdiction whose rights have been harmed by actions taken by Australian authorities within Australian territory.
4. Public authorities at the federal level should be bound to abide by human rights, including courts when exercising federal jurisdiction, or in developing the common law. Private bodies should not be bound unless they are acting in a federal public capacity, or unless they 'opt in' (as under s 40D of the ACTHRA).
5. All Bills introduced into the Federal Parliament should be accompanied by a reasoned statement on whether the Bill complies or does not comply with human rights. Separate scrutiny of Bills should be provided by a newly constituted Parliamentary committee with the sole responsibility of monitoring compliance with the Bill of Rights.
6. There should be no override provision, unless it is tied to Australia's power to derogate from its ICCPR obligations (note that derogation is not permitted or necessary under the ICESCR).
7. There should be a requirement for judges to interpret federal statutes in accordance with the Bill of Rights, so far as is possible to do so taking into account the purpose of the relevant statute. This interpretative requirement will mean that delegated legislation which cannot be interpreted compatibly with human rights will be found to be ultra vires and void, unless such delegated legislation is necessarily authorised by the relevant primary legislation (this is only likely to arise if the primary legislation is itself incompatible with human rights).

8. Judges should be empowered to declare that statutes are inconsistent with the Bill of Rights if it is not possible to interpret them compatibly with the Bill of Rights. Such statements should trigger an obligation on the relevant Minister to officially respond within six months.

9. The powers of the Australian Human Rights Commission should be enhanced, as detailed at para 6.41.

10. A key component in the government's strategy to protect human rights must be the enhancement of human rights education in Australia, especially in schools.