HUMAN RIGHTS IN AUSTRALIA: FURTHER THOUGHTS ON WHAT A FEDERAL *HUMAN RIGHTS ACT* WOULD LOOK LIKE

CASTAN CENTRE HUMAN RIGHTS LAW CONFERENCE 22 JULY 2022

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1 I am speaking from the traditional land of the Boonwurrung/Bunurong and Wurundjeri Woi Wurrung peoples of the Eastern Kulin Nation — South East Melbourne. I acknowledge the Traditional Owners of the land and pay my respects to the Elders both past and present.

2 In 2008 I gave a lecture in honour of Michael Kirby that I bravely called, *Human Rights in Australia: What Would a Federal Charter of Rights Look Like?*[2] This was in the first flush of enthusiasm after the passing of Victoria's *Charter of Human Rights and Responsibilities* ('*Charter*') in 2006. The A.C.T. had recently passed a series of amendments to its *Human Rights Act 2004* that closely reflected some of the terms of the Victorian *Charter*.[3] Recommendations for the enactment of a State-based Charter had been made by the Western Australian Consultation Committee[4] and the Tasmanian Law Reform Institute.[5] At the Commonwealth level, consultation was about to begin by the National Human Rights Consultation Committee chaired by Father Frank Brennan.[6]

3 In the Kirby lecture I observed that it was timely to consider some of the legal

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2 Pamela Tate SC, 'Human Rights in Australia: What Would a Federal *Charter of Rights* Look Like?' (2009-10) 13 *S. Cross U. L. Rev* 1.

3 See the *Human Rights Amendment Act 2007* (A.C.T.), s 4 (inserting s 28(2)); s 5 (substituting a new s 30); s 6 (substituting a new s 34); s 7 (inserting a new Part 5A).

4 *Report of the Consultation Committee for a Proposed Western Australian Human Rights Act* (November 2007) Recommendation 1.

5 Tasmania Law Reform Institute, *A Charter of Rights for Tasmania* (Report No 10, October 2007), Recommendation 2.

6 In November 2008 the Rudd Government established the National Human Rights Consultation Committee that recommended the enactment of a federal *Human Rights Act* along the lines of that passed by the ACT.

issues that might arise from the prospect of a federal *Charter of Rights*. By a federal *Charter of Rights,* I meant legislation passed by the Commonwealth Parliament that incorporates international human rights standards into domestic law, in a comprehensive and not piecemeal fashion.

4 In the Kirby lecture I was concerned with constitutional issues relating to the source of legislative power that might be available to the Commonwealth Parliament. I was also interested in identifying any constraints governing federal human rights protection, flowing either from the need for the Commonwealth Parliament to find a suitable head of power or from implications derived from the Constitution.

5 In the 14 years that have passed since the Kirby lecture, my interest in seeking to establish a constitutionally robust federal human rights law has not diminished. I would like to have another stab at it. Hence the title of my presentation today, '*Human Rights in Australia: Further Thoughts on What a Federal Human Rights Act Would Look Like*'.

6 With respect to the terminology of the title of the legislation, legal issues arise whether the legislation is called a *Charter of Rights* or a *Human Rights Act*. For this talk I have preferred to refer to any potential federal legislation as a *Human Rights Act*. I suspect ultimately which terminology might be chosen would depend on non-legal political considerations. I leave those considerations to the politicians.

7 I still subscribe to some of the observations I made in 2008 but I would like to expand upon them having had the opportunity for more wide-ranging reflection. I have also modified my 2008 position on certain issues in the light of the lessons the caselaw has taught us.

8 At the Castan Conference last year, Professor Ros Croucher, the President of the Australian Human Rights Commission, described the lack of a federal *Human Rights Act* as unfinished legal architecture in the Commission's jurisdiction. She described the Commission's jurisdiction as like a doughnut – with a hole in the

middle.[7] There is a gap that needs to be filled. I applaud Ros's commitment to the enactment of a federal *Human Rights Act*.

9 The commitment by the Australian Human Rights Commission follows the recommendation by the UN Human Rights Committee, in its December 2017 report, that Australia should enact comprehensive legislation giving full legal effect to all the provisions of the International Covenant on Civil and Political Rights ('the ICCPR') across all State and territory jurisdictions.[8]

10 The Human Rights Law Centre has also urged the enactment of an Australian *Charter of Rights*. The Centre has identified 101 cases where the current human rights protection in Australia, that is, the ACT *Human Rights Act,* Victoria's *Charter,* and Queensland's *Human Rights Act 2019*, have successfully empowered people whose rights were threatened or breached.[9]

11 In light of those commitments, I believe it is worth revisiting the issues I discussed in the Kirby lecture and examining with some precision what form statutory federal human rights protection might validly take.

12 My talk today addresses four issues. I want to start by identifying, as I did in 2008, the source of legislative power that might be available to the Commonwealth Parliament to enact the relevant legislation and, importantly, how that source might shape the content of the legislation. The second issue I want to discuss is the likely coverage of federal human rights protection — that is, whether a federal Act could apply not only to Commonwealth public authorities but also to public authorities of the States. Third, I will consider whether a federal *Human Rights Act* could validly include a power, conferred on a court, to make a Declaration of Incompatibility. I ask what the pitfalls of including that power might be and whether there are implications more generally for the adoption of a 'dialogue' model of human rights

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7 Professor Roslyn Croucher, '*Bringing rights home – mapping an agenda on promoting, protecting and fulfilling human rights in Australia*', 7.

8 Human Rights Committee, UN Doc CCPR/C/AUS/CO/6, [6].

9 Human Rights Law Centre, *Charters of Human Rights Make Our Lives Better.*

protection. In the fourth and final segment I will address what I regard as the success story of the Victorian *Charter*, namely, the manner in which the courts have enforced the substantive and procedural obligations on public authorities; that is, the obligation to act compatibly with human rights and the obligation to give proper consideration to human rights in their decision-making processes.

(1) Source of Legislative Power

13 Let me turn then to the first issue, that of identifying a source of legislative power for the Commonwealth Parliament. In this context, it is relevant that Australia has ratified the ICCPR[10] and the International Covenant on Economic, Social and Cultural Rights[11] ('the ICESCR').[12] As will be well known to this audience, the rights recognised in the ICCPR are those traditionally associated with individual liberty, fair hearings, and political participation.[13] The rights recognised in the ICESCR include the right to education,[14] the right to an adequate standard of living for oneself and one's family, including adequate housing,[15] and the right of everyone to the enjoyment of physical and mental health.[16]

14 As a generalisation, civil and political rights were typically seen as creating negative duties on behalf of a State not to infringe the rights. By contrast, economic, social, and cultural rights were seen as fundamentally different, relating to resource allocation and as giving rise expressly to a positive duty of progressive realisation.[17]

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10 International Covenant on Civil and Political Rights, opened for signature 16 December 1966, (entered into force 23 March 1976). Australia ratified the ICCPR on 13 August 1980.

11 International Covenant on Economic, Social and Cultural Rights, opened for signature 16 December 1966 (entered into force 3 January 1976). Australia ratified the ICESCR on 10 December 1975.

12 The ICCPR and the ICESCR were adopted in 1966 by the United Nations and grew out of the Universal Declaration of Human Rights which had been adopted 18 years earlier, in 1948, by the Third General Assembly of the United Nations.

13 For example, ICCPR articles 9, 14, 25.

14 ICESCR, Art 13.

15 Ibid, Art 11.

16 Ibid, Art 12.

17 Ibid, Art 2(1).

However, it is now accepted that in certain circumstances ICCPR rights may give rise to positive obligations and economic social and cultural rights may be protected by negative obligations, for example, the prohibition on the discriminatory provision of health services.[18] This is how the right to health services is dealt with in Queensland's *Human Rights Act*.[19] There is a growing acceptance that there is no blanket division between the rights under these two international Covenants and a recognition of the interdependence and 'interconnectedness of rights under the ICCPR and [under] other international instruments'.[20]

15 The effect of Australia's ratification of these two Covenants is that they provide a basis for the making of laws by the Commonwealth Parliament pursuant to the external affairs power under the Commonwealth Constitution.[21] Ratification of an international treaty by Australia is an act taken by the executive government that has no direct legal effect under domestic law — this requires specific legislation.[22] However, entering into a treaty has immense legal significance because the scope of the external affairs power extends to passing laws that carry into effect a treaty.[23] This is so even where the subject-matter of a treaty is independent of any of the

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18 Paula Gerber and Melissa Castan, *Critical Perspectives on Human Rights Law in Australia* (Law Book Co, 2021), 139 [6.30].

19 *Human Rights Act 2019* (Qld), s 37(1): 'Every person has the right to access health services without discrimination'. See also the *Human Rights Act 2004* (ACT) s 27Awhich confers a right to education limited to the immediately realisable limit aspect of 'enjoy[ing] those rights without discrimination'.

20 Rishika Sanghai, *Olga Tellis v Bombay Municipal Corporation: The Supreme Court of India and the Interconnectedness of Rights*: IACL-AIDC Blog (16 June 2022). Sanghai refers to the Human Rights Committee General Comment 36 [26] on the right to life under the ICCPR that, as he put it, interpreted 'the right to life as a right to a dignified life, including access to housing, shelter and food … and highlighted the interconnectedness of rights under the ICCPR and other international instruments'.

21 Section 51(xxix). There may be other sources of legislative power, but the external affairs power is likely to be the most obvious suitable candidate. Similar reasoning applies to the other international conventions that make up the seven core international human rights treaties to which Australia is a party. The seven core international human rights treaties to which Australia is a party are the ICCPR, the ICESCR, the *International Convention on the Elimination of all Forms of Racial Discrimination*, the *Convention on the Elimination of all Forms of Discrimination against Women*, the *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment of Punishment*, the *Convention on the Rights of the Child*, and the *Convention on the Rights of persons with Disabilities*.

22 *Dietrich v The Queen* (1992) 177 CLR 292, 305 (Mason CJ and McHugh J).

23 *Commonwealth v Tasmania* (1983) 158 CLR 1, 131 (Mason J).

heads of legislative power conferred by the Constitution upon the Commonwealth Parliament. The rationale is that conducting international relations and honouring international agreements, by observing and carrying into effect those agreements, lie at the centre of a nation's external affairs.[24]

16 The ratification of the ICCPR and the ICESCR thus provides the Commonwealth with a secure foundation, via the external affairs power, for enacting a federal *Human Rights Act.*

17 If a Commonwealth law is enacted in reliance on the treaty-implementing aspect of the external affairs power, then to be valid it must satisfy an important constraint. It must pass the test of being reasonably capable of being considered appropriate and adapted to implementing the relevant international agreement.[25] The law 'must validly implement the terms of the treaty at least to a substantial degree so as not to be substantially inconsistent with the treaty'.[26] In this way the terms of a treaty help to shape the content of the legislation the Commonwealth Parliament can pass to carry it into effect.

18 One of the notable features of the ICCPR is the significant obligations Article 2 imposes on State parties to the Convention to provide an effective remedy, to provide for the adjudication of the rights, and to provide the means of enforcement. It is worth considering the terms of article 2.3 in full:

> Each State Party to the present Covenant undertakes:
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> (a) To ensure that any person whose rights or freedoms as herein recognised are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity;
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> (b) To ensure that each person claiming such a remedy shall have his

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24 Ibid 258 (Deane J).

25 *Victoria v Commonwealth (Industrial Relations Act case)* (1996) 187 CLR 416, 487, 509 (Brennan CJ, Toohey, Gaudron, McHugh and Gummow JJ), *Zheng v Commissioner of Australian Federal Police* (2019) 387 ALR 315, 340 [112]-[113] (Parker J, with whom Kourakis CJ and Kelly J agreed) ('*Zheng*'); *NG v Commissioner of the Australian Federal Police* [2022] WASCA 48 [188], [197].

26 *Zheng* (2019) 387 ALR 315, 327 [42].

right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy;

(c) To ensure that the competent authorities shall enforce such remedies when granted.

19 These obligations occupy a central place within the ICCPR and mandate a 'minimum requirement of effectiveness with regard to domestic remedies'.[27] Priority is to be given to the development of judicial remedies.[28]

20 It is, in my view, more than arguable that Commonwealth legislation enacted on the basis that it is giving effect to the ICCPR, thereby enlivening the external affairs power, would need to discharge the obligations in article 2.3 to avoid the risk of substantial inconsistency with the treaty. Such inconsistency would deny constitutional validity to the legislation.

21 In other words, for a federal *Human Rights Act* to be reasonably capable of being considered appropriate and adapted to implementing the ICCPR the legislation would be required to implement each of the undertakings in article 2.3.

22 It follows that a Commonwealth *Human Rights Act* would need to include a stand-alone cause of action that entitles a claimant to come before a court, or a properly independent and impartial administrative tribunal, to have an alleged infringement of rights adjudicated. There would need to be direct access to an appropriate forum for the adjudication of the claim. The legislation could not include a requirement for a claimant to have a separate cause of action that is not a human-rights breach. Such a requirement is present under the Victorian *Charter*[29] and Queensland's *Human Rights Act*.[30] It means that a human rights breach always has to 'piggyback' upon a separate ground of unlawfulness. It is an obstacle to the

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27 Manfred Nowak, *UN Covenant on Civil and Political Rights: CCPR Commentary* (2nd revised edition (2005), 63.

28 Ibid 64.

29 *Charter*, s 39(1).

30 *Human Rights Act 2019* (Qld) s 59(1).

vindication of a rights-claim.

23 Under the A.C.T. *Human Rights Act* there is no requirement for a claimant to have a separate cause of action that does not involve a breach of human rights.[31] By way of example, in the 2022 decision of *Davidson v Director-General, Justice and Community Safety Directorate*,[32] a prisoner with bipolar disorder brought a proceeding in the ACT Supreme Court as a result of being placed in solitary confinement for 63 days without access to the exercise yard. It was known to the prison authorities that the prisoner used exercise as a coping mechanism. The Court held that the prison authorities had acted incompatibly with the prisoner's right to humane treatment when detained. The Court noted that under the ACT's *Human Rights Act* the prisoner could start a proceeding in the Supreme Court on the basis of a breach of human rights alone and that this 'is different to the equivalent provisions in Victoria and Queensland which explicitly require a plaintiff to have a separate right to relief outside the human rights legislation'.[33]

24 In my view, a Commonwealth *Human Rights Act* would have to reflect the A.C.T. model and invest federal courts,[34] or independent administrative tribunals, with jurisdiction to hear and determine legal proceedings alleging the infringement of human rights without the plaintiff having to show that they have another cause of action involving a separate claim of unlawfulness.

25 An associated question arises as to whether a valid Commonwealth *Human Rights Act* could include a prohibition on an award of general damages, as do the Acts in all three Australian jurisdictions that have human rights protection.[35] The

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31 *Human Rights Act 2004* (ACT) s 40C (2).

32 [2022] ACTSC 83 ('*Davidson*').

33 *Davidson* [2022] ACTSC 83, [425] (Loukas-Karlsson J, recording the plaintiff's observation).

34 The *Human Rights Act 2004* (ACT) permits proceedings to be brought in the Supreme Court: s 40C.

35 *Charter* s 39(3), *Human Rights Act 2004* (ACT) s 40C(4), *Human Rights Act 2019* (Qld) s 59(3). I raised this issue in the 2008 lecture as well. The *Human Rights Act 2004* (ACT) does provide for monetary compensation to be paid for wrongful arrest, detention or conviction but excludes awards of general damages: ss 18(7), 23, 40C(4).

answer to that question depends on whether one sees the other available forms of relief as sufficient to amount to 'effective remedies'.

26 Non-monetary forms of relief would most likely include mandatory and prohibitory injunctions. This would be in addition to declarations that a public authority has acted unlawfully by breaching its human rights obligations. Views differ on whether these forms of relief alone are sufficient to amount to effective remedies.

27 On the one hand, these remedies seek to achieve the important purposes of bringing infringing conduct to an end; vindicating rights; and ensuring future compliance with human rights standards by deterring repetitions of unlawful conduct.

28 On the other hand, there have been circumstances where courts in other jurisdictions have concluded that only damages could amount to an effective remedy. In the famous case of *Simpson v Attorney-General,*[36] under New Zealand's *Bill of Rights Act 1990* (the 'BORA'), the New Zealand Court of Appeal concluded that, as a matter of discretion, an award of damages ought to be granted so as to provide an effective remedy in the circumstances for the unlawful search and seizure.[37]

29 Awards of discretionary public law damages in New Zealand, under the BORA, take into account a range of factors including the nature of the right that has been breached, the seriousness of the breach, whether the breach caused any damage or loss, the defendant's response to the breach, any relief awarded on a related cause of action, and public interest factors such as the impact on the public purse.[38] These type of factors will soon govern the award of damages in the United Kingdom if, as looks likely, the UK *Human Rights Act 1998* is repealed and replaced by a 2022 British

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36 *Simpson v Attorney-General (Baigent's case)* [1994] 3 NZLR 667.

37 Ibid 676 (Cooke P).

38 Andrew Butler and Petra Butler, *The New Zealand Bill of Rights Act: A Commentary* (Butterworths, 2nd ed, 2015) 1532 ('Butler & Butler').

Bill of Rights.[39] In any event, in the UK, awards of damages in this context do not reflect awards in tort[40] and are in effect seen as a remedy of last resort.[41]

30 No doubt if a federal *Human Rights Act* was enacted in Australia, and it conferred a discretionary power to award public law damages for breach, the power could be suitably drafted by the Commonwealth so that it would be exercised taking into account a range of factors considered appropriate.

31 The obligation under the ICCPR to provide for effective remedies could be honoured.

32 Let me now address the question of the potential coverage a federal *Human Rights Act* might enjoy.

(2) Coverage: could a federal *Human Rights Act* apply to the States?

33 When considering the constitutionality of a Commonwealth law, it is tempting to focus solely on the search for a source of legislative power. However, it is also important to consider whether there might be any implied constraint in the Constitution that would invalidate the law even if a source of power can be identified. We are all now well familiar with the constraint that arises from the implied freedom of political communication but there is another constraint that has a direct bearing on the relationship between the Commonwealth and the States, namely, the *Melbourne Corporation* doctrine.[42]

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39 The public interest factors that will be required to be taken into account by a court under s 18 of the *Bill of Rights Bill 2022* (UK) include anything done by the public authority to avoid acting incompatibly and the impact the award would have on the ability of the public authority to perform its functions.

40 *R (Greenfield) v Secretary of State for the Home Department* [2005] 1 WLR 673, 684 [19] (Lord Bingham).

41 *Human Rights Act 1998* (UK), s 8(3) provides that 'No award of damages is to be made unless, taking account of all the circumstances of the case, including – (a) any other relief or remedy granted … the court is satisfied that the award is necessary to afford just satisfaction to the person in whose favour it is made'.

42 *Melbourne Corporation v Commonwealth* (1947) 74 CLR 31. I am indebted to Justice Janine Pritchard for first suggesting that the *Melbourne Corporation* doctrine might be significant in this context.

34 According to this doctrine, the Commonwealth cannot validly enact a law that imposes a special burden on the States so as to impair their capacity to function as independent systems of government.[43] The concept of federalism, to which the High Court has recently recommitted, is that of a central government and a number of States separately organised.[44] It is central to federalism to preserve the continuing existence of the States as independent entities. *Melbourne Corporation* is a doctrine of inter-governmental immunities.[45] It recognises that legislative or executive action by the Commonwealth cannot destroy, curtail, or interfere with the capacity of the States to operate as independent governments.[46] Much may depend on the magnitude of the burden imposed on the States by the federal law.[47]

35 The question arises whether a federal *Human Rights Act* could apply to State public authorities. Could there be a single over-arching Commonwealth human rights law that applied to all public authorities throughout Australia? The UN Human Rights Committee recommended that there be comprehensive human rights protection, giving full effect to the ICCPR, across all jurisdictions in Australia.[48] Could that recommendation be acted upon by the Commonwealth Parliament acting alone?

36 In my view the answer is 'no'.

37 The obligations imposed on public authorities by, for example, Victoria's *Charter*, are stringent and far-reaching. 'Public authorities' include Ministers, MPs, as well as all public servants, statutory authorities, local councils, local police, and entities whose functions are of a public nature when acting on behalf of the State.[49]

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43 *Austin v The Commonwealth* (2003) 215 CLR 185.

44 *Spence v Queensland* (2019) 268 CLR 355, 386 [6], 418 [100] (Kiefel CJ, Bell, Gageler and Keane JJ) referring to *Melbourne Corporation v Commonwealth* (1947) 74 CLR 31, 82.

45 *Spence v Queensland* (2019) 268 CLR 355, 386 [6], 401 [46].

46 Ibid 418 [100].

47 Ibid 496 [314] (Edelman J).

48 See [9] above.

49 See the definition of 'public authority' under Victoria's *Charter*, s 4. See also the definition of 'public entity' in Queensland's *Human Rights Act*, s 9. To avoid confusion, whenever I refer to

Their conduct is governed by the obligation to act compatibly with human rights. Their decision-making processes must properly take human rights into account.

38 Furthermore, Members of Parliament have other obligations in addition to those they must discharge by reason of being public authorities. Whenever legislation is introduced, the MP who introduces the Bill must consider whether it is compatible with human rights and table a reasoned statement in the Parliament explaining the compatibility, or the nature and extent of any incompatibility.[50]

39 A Commonwealth *Human Rights Act* would most likely seek to impose obligations of the same character upon public authorities. These are potentially onerous obligations. If the Act purported to apply to State public authorities across Australia it would, in my view, be imposing a special burden on the States.

40 Furthermore, if a federal *Human Rights Act* sought to impose the additional obligations on MPs I described, including a requirement for the tabling in all State Parliaments of reasoned compatibility statements, the burden imposed by the Act would lie on the very process by which the States make laws. It would require that, as part of the State's law-making process, State MPs were obliged, at the direction of the Commonwealth, to make an assessment of the compatibility with human rights of each Bill that was introduced into the State Parliament.

41 The magnitude of the burden that would be imposed on the States is apparent, both in its breadth and depth. Most significantly, the burden would be imposed by a Commonwealth law. Even where there is a pre-existing similar obligation on public authorities, such as in Victoria and Queensland, it would be

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human rights legislation, I indicate the jurisdiction.

50 *Charter* s 28. See also *Human Rights Act 2019* (Qld) s 38. In Victoria there is also a scrutiny function performed by the Scrutiny of Acts and Regulations Committee which reports to Parliament as to whether a Bill is compatible with human rights. Queensland's Portfolio Committee performs a similar function: *Human Rights Act 2019* (Qld) s 39. There is also an existing requirement under the *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth) for all new Bills of the Commonwealth Parliament, and disallowable legislative instruments, to be accompanied by a statement of compatibility, assessed against the rights and freedoms recognised in the seven core international human rights treaties that Australia has ratified.

relevant that source of the new obligations was a law passed by the Commonwealth Parliament. The States would not have the power to amend that legislation, and adjust the obligations, as they see fit. In my view, it can be inferred that the burden imposed would interfere with the capacity of the States to function as independent entities. If so, in so far as a Commonwealth *Human Rights Act* purported to apply to the States, it would be struck down as invalid. A federal *Human Rights Act* could not extend to State public authorities.

42 It follows that any valid Commonwealth *Human Rights Act* would be confined in its lawful coverage to Commonwealth Ministers, MPs, public servants, statutory authorities and so on. This would no doubt be a remarkable piece of legislation and one to be applauded but it would not remedy all the human rights deficiencies of public administration throughout Australia. A federal *Human Rights Act* would not be a single comprehensive nationwide law. It would not ensure that all daily infringements of human rights in Australia would be actionable.

43 In 2008 I hinted at the idea that obtaining legislative coverage to all the jurisdictions in Australia might require significant co-operation. To take the idea further, what might emerge is a co-operative statutory scheme of national uniform human rights laws, somewhat reflecting the model of our Uniform Evidence legislation or our uniform defamation laws. Each participating jurisdiction could enact a broadly standardised Act. This measure would most likely require much inter-governmental negotiation. Uniformity would be promoted by jurisdictions entering into an inter-governmental agreement to the effect that the laws are intended to remain uniform, or substantially so.[51]

44 I want to move then from the thorny issue of coverage to the even thornier issue of whether a federal *Human Rights Act* could validity confer on a federal court

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51 For example, each State and Territory is a party to the Model Defamation Provisions Intergovernmental Agreement. The consolidated Model Defamation Provisions were prepared by the Parliamentary Counsel's Committee and approved by the Standing Committee of Attorneys-General. Amendments were approved by the Council of Attorneys-General in 2020.

the power to make a Declaration of Incompatibility.

Declarations of Incompatibility & The Dialogue Model

45 A Declaration of Incompatibility is a statement by a court expressing its conclusion that a statutory provision cannot be interpreted compatibly with human rights. As is well known, Declarations of Incompatibility do not invalidate legislation. The orders the court will make to resolve the controversy before it will be made in accordance with the interpretation the court feels compelled to adopt despite its incompatibility with certain rights. A Declaration of Incompatibility has no impact upon the relief that binds the parties. The same device is characterised as a Declaration of Inconsistent Interpretation under Victoria's *Charter* and I will refer to them interchangeably and simply as a DOI.

46 The force of a DOI is conceived to lie in the accountability mechanism it generates with respect to the executive government. Under Victoria's *Charter,* the accountability mechanism involves the State Attorney-General being required to give a copy of the DOI to the relevant Minister administering the statutory provision in question. The Minister then has 6 months in which to prepare a written response and to lay the DOI and the response before each House of Parliament and publish both in the Government Gazette. This interaction was envisaged as at least one of the central elements of the 'dialogue' model of human rights legislative protection in Victoria,[52] although, as Julie Debeljak has noted, 'no *single* Charter mechanism, let alone [a DOI], can be considered *the* dialogue mechanism'.[53]

47 There was no doubt hope in Victoria, at the time the *Charter* was enacted in 2006, that dialogue would lead to the offending legislation being amended, just as it has done to a large extent in the United Kingdom.[54]

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52 Brett Young, *From Commitment to Culture – The 2015 Review of the Charter of Human Rights and Responsibilities Act 2006*, 138-39.

53 Julie Debeljak, 'Who is sovereign now? The Momcilovic Court hands back power over human rights' (2011) 22 *Public Law Review* 15, 39.

54 *Human Rights Act 1998* (UK), s 10. The Constitutional law scholar Mark Eliot has recently observed, in commenting upon the likely repeal of the UK *Human Rights Act* and its

48 In the Kirby lecture I took the view that conferring the power on a court to make a DOI would not risk a federal *Charter* becoming invalid. As the issue would only arise in the course of ordinary litigation between parties, when a court was attempting to find a compatible interpretation of a statute, there would be no risk of invalidity due to the absence of a justiciable controversy, a 'matter', before the court.[55]

49 I also expressed the view, in a different context,[56] that the power to make a DOI was at least incidental to the exercise of judicial power and thus a power that could be lawfully conferred upon a federal court, including the High Court. Up until 2011 many public lawyers took the same view. At that time the question was genuinely open and indeterminate. Its resolution by the High Court could have gone one way or the other.

50 The problem for all of us who sought to assert the validity of the conferral of a power to make a DOI upon a federal court is that the issue was resolved, forcefully, by the High Court in 2011, in *Momcilovic v The Queen*.[57] Unfortunately for us, the resolution was that a DOI-making power cannot be validly conferred for use in a federal setting, that is, it cannot be validly conferred upon a federal court nor upon a State court exercising federal jurisdiction.

51 There were four relevant central propositions endorsed in *Momcilovic*. A majority of the High Court held: (1) that the power to make a DOI does not involve

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replacement by a British *Bill of Rights*, 'To date … corrections have tended to be made (either by Minister [under a special power to make regulations correcting offending legislation] or by Parliament) as a matter of course, given that failure to do so would imply a breach of the UK's international obligations and the risk of litigation before (and an adverse judgment from) the Strasbourg Court': Mark Eliot, *The UK's (new) Bill of Rights – Public Law for Everyone* (June 22-23, 2022). He goes on to lament that the new Bill of Rights appears to reveal a 'greater willingness on the Government's part to tolerate —indeed, celebrate — divergence from the ECHR regime'. See also Beatson, Grosz, Hickman, Singh and Palmer, *Human Rights: Judicial Protection in the United Kingdom* (Thomson, Sweet & Maxwell, 2008), 517 [5-146], 522 [5-154].

55 Pamela Tate SC, 'Human Rights in Australia: What Would a Federal *Charter of Rights* Look Like?' (2009-10) 13 *S. Cross U. L. Rev* 1, 22.

56 Pamela Tate SC, 'Protecting Human Rights in a Federation' (2007) 33 *Monash University Law Review* 217, 234.

57 (2011) 245 CLR 1 ('*Momcilovic*').

the exercise of judicial power[58] because all matters will have been decided between the parties before it is made, it does not bind the parties, and it has no legal effect upon the validity of the statute in question. Equally as importantly, the majority held: (2) it is not a power that is incidental to the exercise of judicial power;[59] (3) the power to make a DOI cannot be validly conferred on a federal court;[60] and (4) the power cannot be validly exercised by a State court in the exercise of federal jurisdiction.[61]

52 French CJ made an observation about the possibility of a court making a DOI after the proceedings were determined.[62] The primary limit of this observation is that it can have no bearing on the operation of a federal *Human Rights Act*. French CJ was referring to a State Court of Appeal. The observation could apply only to State courts because the power to make a DOI had been held to be neither a judicial power, not incidental to judicial power, and only State courts can exercise such powers, States not being subject to the strict separation of powers that applies to the Commonwealth. French CJ's observation is limited to an application that, within the context of State courts, at least when they are not exercising federal jurisdiction, a DOI is 'not an impermissible exercise of non-judicial power'.[63]

53 When I say that the majority found that a DOI does not involve the exercise of

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58 Ibid, 65 [89] (French CJ), 96 [184] (Gummow J), 123 [280] (Hayne J), 241 [661] (Bell J).

59 Ibid, 65 [90] - 66 [91] (French CJ), 96-7 [187] Gummow J, 123 [280] (Hayne J), 241 [661] Bell J.

60 Ibid, 66 [92] (French CJ), 96 [183] (Gummow J), 123 [280] (Hayne J), 241 [661] (Bell J).

61 Ibid, 70 [100] (French CJ), 99 [201]-[202] (Gummow J), 123 [280] (Hayne J), 241 [661] (Bell J). The circumstances in *Momcilovic* attracted federal jurisdiction because the defendant was resident in Queensland when charged and this attracted the diversity jurisdiction under s 75(iv) of the Constitution.

62 French CJ said: '[T]here is no reason in principle why the Court of Appeal, having exhausted its functions in the exercise of federal jurisdiction .. could not proceed to exercise the distinct non-judicial power … to make a declaration of inconsistent interpretation': *Momcilovic* (2011) 245 CLR 1, 70 [101].

63 Julie Debeljak, 'Proportionality, Rights-Consistent Interpretation and Declarations under Victoria's Charter of Human Rights and Responsibilities: The Momcilovic Litigation and Beyond' (2014) 40(2) *Monash University Law Review* 340, 355, 371. Debeljak notes (at 354) that her analysis of *Momcilovic* does not seek to extend to a discussion of 'the (in)validity of *Charter*-like provisions *if* enacted by a future federal Parliament'. See further Will Bateman and James Stelios, 'Chapter III of the Constitution, Federal Jurisdiction and Dialogue Charters of Rights', (2012) 36 *Melbourne University Law Review* 1, 13-15.

judicial power, nor is incidental to it, I am referring to the judgment of French CJ[64] with whom Bell J relevantly agreed,[65] and that of Gummow J,[66] with whom Hayne J relevant agreed.[67] Gummow and Hayne JJ went further and held that a DOI is *Kable*-invalid. In their view the power to make a DOI cannot lawfully be conferred on a State court exercising State jurisdiction,[68] let alone a federal court. In this respect they did not win the support of their colleagues.[69]

54 In this talk, I am leaving Heydon J completely to one side, finding as he did that the whole *Charter* was invalid.[70] Fortunately, he was alone in that conclusion and the Court was careful to point out that the power to make a DOI was severable from the remainder of the *Charter*. As Gummow J put it, '[t]his is not a case where the balance of the Charter would operate differently by reason of the absence of the particular remedy created by [the power to make a DOI]; 'the balance of the Charter is not so "bound up" [with the DOI] that one can fairly say that the former cannot stand without the continued operation of the latter'. [71]

55 It follows that in considering what a federal *Human Rights Act* would look like we have to confront the fact that 2011 was a definitive moment for the viability of including within a federal Act the power to make a DOI. Academic commentary or advice on this issue that precedes 2011 has to be treated with caution. We cannot pretend that *Momcilovic* never happened, much as we may like to. What I want to see, and I am sure all of you do as well, is a federal *Human Rights Act* that is constitutionally robust, one that could withstand any challenge brought to it.

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64 *Momcilovic* (2011) 245 CLR 1, 65 [89], 65 [90] - 66 [91] (French CJ).

65 Ibid 241 [661] (Bell J).

66 Ibid 96 [184], 96-7 [187] (Gummow J).

67 Ibid 123 [280] (Hayne J).

68 Ibid 86 [146(vii)], 97 [188], (Gummow J), 123 [280] (Hayne J).

69 Ibid 167-8 [95]-[97] (French CJ), 228 [603] (Crennan and Kiefel JJ), 241 [661] (Bell J).

70 Ibid 184 [456]. Heydon J held, in the alternative, that at least the power to make a DOI was invalid: 185 [457].

71 Gummow J 97 [189] and 123 [280] (Hayne J). The invalidity (and severance) extends to ss 33, 36 and 37 of the *Charter*.

56 In my view, including the power to make a DOI in a future federal *Human Rights Act* would be, to speak colloquially, playing with fire. It would inevitably attract a legal challenge and a risk that the sections of the Act conferring that power and the associated provisions would be declared constitutionally invalid. Nobody amongst us would want that. A much better alternative, it seems to me, is simply to omit this power as not well suited to the Australian constitutional context.

57 There are also inconvenient truths in some of the general observations made in *Momcilovic*. The first relates to the language of 'declaration'. All of the judges, without exception,[72] point to the fundamental understanding in Australian law, that declarations can only be made in the exercise of judicial power. This was confirmed by Mason CJ, Dawson, Toohey and Gaudron JJ in *Ainsworth v Criminal Justice Commission,* that the power to order declaratory relief 'is confined by the considerations which mark out the boundaries of judicial power'.[73] For the majority in *Momcilovic*, having found that the making of a DOI does not involve the exercise of judicial power, nor is it incidental to that exercise, it followed inevitably that the language of 'declaration' was inapt.

58 What is as telling, however, are the observations of Crennan and Kiefel JJ about the language of 'declaration'. They agreed with the majority, most emphatically, that the making of a DOI 'is not an exercise of judicial power'.[74] They are in the minority, however, in holding that the making of a DOI is incidental to the exercise of judicial power.[75] Functions that are incidental to the judicial function may be conferred upon federal courts.[76] But their reasons do not support any proposal for the inclusion of a DOI-making power in a federal *Human Rights Act*.

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72 *Momcilovic* (2011) 245 CLR 1, 64 [88] (French CJ), 94-5 [179] (Gummow J), 123 [280] (Hayne J), 221 [583] (Crennan and Bell JJ), 241 [661] (Bell J). (See also 185 [457] (Heydon J).)

73 *Ainsworth v Criminal Justice Commission* (1992) 175 CLR 564, 581-2.

74 *Momcilovic* (2011) 245 CLR 1, 222 [584].

75 Ibid 223 [589], 224 [591]. They nevertheless held that it was not appropriate that the DOI was made in part because it placed the Court of Appeal in a position where it acknowledged that the trial in the County Court was incompatible with the defendant's rights while at the same time upholding the conviction: 228-9 [804].

76 Ibid 224 [591].

59 First, they state that although the measure is described as a 'declaration', 'it cannot have the status of a[n ordinary] declaratory order granting relief',[77] for example 'a declaration of the rights of parties to litigation'.[78]

60 Crennan and Kiefel JJ go on to say that the reference to the making of a 'declaration' in the context of a DOI is 'inaccurate'.[79] They remark that the term is 'ambiguous' because it is the same word that is traditionally used for orders of the court that are binding on the parties to the litigation, but a DOI is not. They state that the power ought not be clothed in language that is expressive of a remedy. In their words, a DOI:

> is not an order of the [court]. … It is no more than a statement by the Supreme Court that, following upon its interpretation of a statutory provision in the context of the Charter, it has found the provision to be inconsistent with one or more Charter rights.[80]

61 They went further and said:

> It is not uncommon for judges to incidentally pass comments upon conclusions they have reached about defects in legislation in the course of their reasons.[81]

62 They cite as an example the incidental comments made in passing by Mason CJ, Deane and Gaudron JJ in *Georgiadis v Australian and Overseas Telecommunications Corporation*[82] that amount to speculation about the circumstances in which a law might or might not be characterised as a law with respect to the acquisition of property to which the constitutional guarantee of just terms attaches.[83]

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77 Ibid 205 [519].

78 Ibid 205 fn 893. These ordinary types of declarations are made especially in public law cases, including in many *Charter* cases such as the *Certain Children Case* (*Certain Children (by their Litigation Guardian Sister Marie Brigid Arthur) v Minister for Families and Children [No 2]* (2017) 52 VR 441, 598 [550], 608 [588(a)]) and the recent case of *Minogue* [2021] VSCA 358 [96], [102], [363]-[364]. See further *Bare v IBAC* (2015) 48 VR 129, 237 [329].

79 *Momcilovic* (2011) 245 CLR 1207 [534].

80 Ibid 207 [535].

81 Ibid 227 [600].

82 (1994) 179 CLR 297, 308.

83 Ibid 308. The Court also gave as further examples of such comments *Cunliffe v The Commonwealth* (1994) 182 CLR 272, 304-5 (Mason CJ) and *Plaintiff S157/2002 v the Commonwealth* (2003) 211 CLR 476, 538 [176] (Callinan J).

63 The upshot is that the only judges in *Momcilovic* who were prepared to uphold the validity of the DOI-making power in a federal setting, that is, a federal court or a State court exercising federal jurisdiction, did so because they treated the power as equivalent to a power to make ancillary comments about the deficiencies in legislation that comes before a court. No complaint can be made that a court lacks that power. Ancillary comments of that sort can be, and are, made by federal courts, and State courts exercising federal jurisdiction, without concern.

64 On this understanding, a power to comment that a statutory provision cannot be interpreted compatibly with human rights is not something that needs to be expressly conferred by a *Human Rights Act*. The power is part and parcel of the process of interpretation that a court ordinarily undertakes. No more and no less. But a comment about incompatibility has no greater standing than an ancillary remark. This is not the hoped-for measure that was thought might lie at, or near, the heart of statutory human rights protection.

65 Furthermore, the belief that any legislation in Australia found to be incompatible with human rights would be amended to make it human rights compliant,[84] as has largely occurred in the UK, is not well supported by the facts.

66 My own experience of State and Commonwealth legislative responses to judgments upholding liberty or due process rights, is for the respective Parliament to enact legislation, expeditiously and sometimes at lightning speed, but not in support of those rights. Rather, it has been to introduce, explicitly, restraints on the liberty right and restrictions on the right to a fair hearing.

67 Let me give you some examples. In *RJE v Secretary to the Department of Justice*[85] a rights-consistent interpretation was adopted relating to the likelihood of reoffending in the context of the threshold that had to be met to detain an offender after the expiry of their sentence, under the *Serious Sex Offenders Monitoring Act 2005*

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84 See [47] above.

85 (2008) 21 VR 526 ('*RJE*').

(Vic).[86] The Court held that 'likely' meant 'more likely than not'. The threshold for post-sentence detention was thereby significant. In response to the decision in *RJE,* which was delivered on 18 December 2008, the Victorian Parliament passed the *Serious Sex Offenders Monitoring Amendment Act 2009*, assented to on 10 February 2009. This amended the legislation so that 'likely' could be understood 'on a lower threshold than a threshold of more likely than not'.[87] The consequence was that more prisoners could be detained after their sentences had expired.

68 In 2014, in *Zhao v Commissioner Australian Federal Police,*[88] the Court of Appeal held that a court might order a stay of forfeiture proceedings, commenced under the *Proceeds of Crime Act 2002* (Cth), where the subject matter of the forfeiture proceedings was substantially the same as the subject matter of concurrent criminal proceedings. Without a stay the Crown might be advantaged in a way that rendered the criminal trial unfair.

69 In 2016, the Commonwealth Parliament enacted the *Crimes Legislation Amendment (Proceeds of Crime and Other Measures) Act 2016* which provided that a court must not stay forfeiture proceedings on the ground that criminal proceedings have been instituted or commenced 'even if the circumstances pertaining to the POCA [*Proceeds of Crime Act*] are or may be the same as, or substantially similar to, the circumstances pertaining to the criminal proceedings'.[89] It would seem that the Parliament was prepared to accept any consequential unfairness in the criminal trial that might be derived from the Crown obtaining a forensic advantage.

70 Admittedly these examples of legislative responses to judicial decisions occurred outside of a formal statutory human rights context.[90] It may be that

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86 Section 11.

87 Section 11 was amended by the insertion of sub-s (2B).

88 (2014) 43 VR 187 ('*Zhao*').

89 The *Crimes Legislation Amendment (Proceeds of Crime and Other Measures) Act 2016* repealed s 319 of the *Proceeds of Crime Act 2002* Cth) and substituted a new s 319.

90 The majority judgment of Maxwell P and Weinberg JA in *RJE v Secretary to the Department of Justice* (2008) 21 VR 526, which held that the interpretation that produced the least infringement of common law rights, was arrived at independently of the *Charter.*

whatever process leads to the passing of a federal *Human Rights Act* would be sufficient to alter the parliamentary culture. I sincerely hope so.

71 The misgivings expressed in *Momcilovic* by all members of the Court about DOIs also prompted them to criticise the 'dialogue' model of human rights protection as an inappropriate model or metaphor for Australia. The Chief Justice held that the metaphor was 'inapposite .. distract[ing] from recognition of the subsisting constitutional relationship between the three branches of government'.[91] He added, for good measure, that '[a]t worst, it points misleadingly in the direction of invalidity'.[92] Gummow J remarked that '[r]eferences to "dialogue" … are apt to mislead … [and rest] upon false assumptions of homogeneity between disparate constitutional systems, and at the expense of analysis of doctrines well established in this Court'.[93] Crennan and Kiefel JJ remarked that '[a] "dialogue" is an inappropriate description of the relations between the Parliament and the courts'.[94]

72 It may be that the time has come to accept that the constitutional framework in Australia is truly distinctive. This is especially so given the importance in Australian public law of the distinction between judicial and non-judicial power. It is evident in the strict separation of powers at the federal level. That separation sits uneasily with a model of a federal *Human Rights Act* that envisages interaction between the legislature, the executive, and the courts that involves an agreement to engage in a serious and harmonious 'conversation' with each other. Perhaps in Australia we should try instead for our own distinctive model of human rights protection without adopting the mechanism of a DOI or the language of 'dialogue' used to reflect institutional arrangements in other jurisdictions.

73 I now wish to move from what, in my view, should be omitted from a federal *Human Rights Act* to what I think, very enthusiastically, should be included. I want

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91 *Momcilovic* (2011) 245 CLR 1, 67-8 [95] (French CJ).

92 Ibid 68 [95] (French CJ).

93 Ibid 84 [146 (iii)] (Gummow J).

94 Ibid 207 [534] (Crennan and Kiefel JJ).

to focus upon a much more positive aspect of human rights legislative protection, namely, the obligations they impose on public authorities.

74 To illustrate how stringent these obligations are, I want to focus upon the recent Court of Appeal decision, *Thompson v Minogue*.[95]

The Obligation on Public Authorities

75 The major success story of the *Charter* is, in my view, the manner in which the obligations it imposes on public authorities have been judicially understood and enforced. The recent decision of the Court of Appeal in *Minogue* has crystallised both the procedural obligation, that is, the obligation on public authorities to give 'proper' consideration to human rights in making their decisions, and the substantive obligation, the obligation on public authorities to act compatibly with human rights. It has also clarified the role of the court and the tasks the court is empowered to carry out. It is an immensely important decision.

76 The circumstances of *Minogue* involved a prisoner, Craig Minogue, challenging the lawfulness of two aspects of a regime of random drug testing at Barwon prison. The regime involved making prisoners submit to random urine tests. Prisoners were required to provide a urine sample in the presence of a prison officer. The regime also involved strip searches before the urine tests.

77 Minogue brought proceedings for judicial review in the Supreme Court alleging that the Governors of Barwon prison and the Secretary to the Department of Justice and Community Safety were public authorities who, relevantly, on two occasions, in directing him to submit to random urine tests and strip searches, breached both their obligations under the *Charter* to give proper consideration to his human rights and to act compatibly with them.[96] The relevant rights engaged in the circumstances were the right to privacy,[97] and the right to be treated with dignity

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95 [2021] VSCA 358 ('*Minogue*').

96 *Charter* s 38(1).

97 *Charter* s 13(a).

when in detention.[98]

78 The Court of Appeal held that in making the directions for the random urine tests and the strip searches the public authorities had given proper consideration to Minogue's rights.[99] There was no breach of the procedural obligation because the now well-established four-stage test was satisfied. This is the test, articulated in *Bare v IBAC*,[100] and confirmed in *HJ v IBAC*,[101] that requires a decisionmaker to: (1) understand in general terms which of the rights of the person affected by the decision may be relevant and whether those rights will be interfered with by the decision, and, if so, how; (2) seriously turn their mind to the possible impact of the decision on a person's human rights and the implications for the affected person; (3) identify the countervailing interests or obligations; and, most importantly, (4) balance competing private and public interests as part of the exercise of justification. To give 'proper' consideration to human rights a public authority must do all four things.

79 Somewhat controversially, but in recognition of the need for human-rights decision-making to become a routine part of public administration, the Court held that the fourth step does not necessitate a decision-maker considering each of the well-known elements of proportionality set out in s 7(2) of the *Charter*.[102] A decision-maker *may* deal with each element of s 7(2), for example, the nature and extent of the interference with the right[103] and whether there are any less restrictive means reasonably available to achieve the same purpose,[104] but they do not *need* to deal separately and expressly with each of these elements[105] to give 'proper' consideration

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98 *Charter* s 22(1).

99 *Minogue* [2021] VSCA 358, [192]-[201].

100 (2015) 42 VR 129, 223 [288]-[289].

101 [2021] VSCA 200, [155].

102 *Minogue* [2021] VSCA 358 [87].

103 *Charter*, s 7(2)(c).

104 *Charter*, s 7(2)(e).

105 *Minogue* [2021] VSCA 358 [89].

to the rights.[106]

80 The focus of the Court of Appeal was on the substantive obligation — how the public authority conducted itself. Importantly, it distinguished sharply between the directions for the random urine tests and the strip searching that generally preceded those tests.

81 The Court held that random urine testing in the prison was justified because it was addressing a serious drug use problem at Barwon prison, and it was reasonable and proportionate to protect the rights of all the prisoners to life and their personal safety and security. There was no other alternative, reasonably available, that would achieve the same level of deterrence. The Court of Appeal held the limits placed on the dignity right by the random urine testing regime were justified.[107]

82 However, the strip searches were another matter entirely. As far as the substantive obligation was concerned, the Court agreed with the primary judge, Richards J, that the manner in which the strip searches were carried out was incompatible with Minogue's rights to dignity and privacy. The Court held that the strip searches interfered with, or limited, Minogue's dignity right, and encroached on his right to privacy by extending beyond what was reasonably necessary to deter prisoners from drug and alcohol use.[108]

83 The protocol at Barwon prison for strip searching required the removal of all clothing while facing a prison officer. Prisoners had to bend over and part their buttocks to show that they were not concealing contraband. By contrast with Barwon prison, in some female prisons this would only occur when it was a 'targeted' strip search of a particular suspected prisoner and not part of a regime of

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106 Craig Minogue is challenging this reasoning in an application for special leave to the High Court.

107 *Minogue* [2021] VSCA 358 [272] [273], [276]. With respect to the regime of urine testing, the Court's focus was on the dignity right because the privacy right was not engaged, that right being confined to arbitrary interferences and the regime of random urine testing was held not to be arbitrary.

108 The right of Minogue not to have his privacy arbitrarily interfered with was thus engaged.

random drug testing.

84 The Court accepted that the searches were carried out for the important purpose of avoiding adulteration of a person's sample, or the substitution of another person's sample, thereby assisting the security of the prison and the safe custody and welfare of prisoners. However, it considered that the strip searching was highly invasive and demeaning and that it amounted to a severe limitation on Minogue's privacy and dignity rights.

85 There was evidence of alternative search methods that were clearly less restrictive. These included top/bottom strip searches which involved a person being searched, with the same checks as for a full strip search, but with only half the clothes being removed at any one time. This technique was used in some female prisons. There was also a recognition in the prison regulations of the need for flexibility to take into account gender, age, disability, religion, language, and culture. In some prisons low-dose X-ray body scans were used. All of these measures indicated that there were less restrictive means reasonably available to the public authorities to achieve the important purpose of prison security and prisoner welfare.

86 The Court also remarked that, given that random urine tests were always conducted without warning, and with at least one officer watching the sample being delivered, the requirement that strip searches be conducted prior to a random urine test was seen as excessive. The Court concluded that the limits imposed on the privacy and dignity rights were not proportionate to achieve their purpose; the limits were unjustified.[109]

87 More generally, the Court confirmed that the obligation on a public authority to act compatibly with human rights is a stringent obligation requiring greater scrutiny of the conduct of the public authority than is usually applied in judicial review proceedings.[110] It went further and held that, with respect to the substantive

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109 *Minogue* [2021] VSCA 358 [283], [288], [295], [349]-[359].

110 *Minogue* [2021] VSCA 358 [97].

obligation, there is no particular deference to be afforded to the public authority, the original decision-maker.[111]

88 The role of the Court is to make an objective determination of whether the public authority's conduct is compatible with relevant human rights. In assessing compatibility, it can rely on evidence beyond that which was before the public authority.

89 The Court is engaging in an exercise of determining for itself, on the evidence before it, whether the conduct is compatible with a relevant human right or is a disproportionate interference with that right. In doing so, it is neither engaging in merits review nor judicial review; it is an objective determination of the application of a statutory standard.[112]

90 This is strong and well-supported reasoning. This development supports the inclusion within any federal *Human Rights Act* of similar obligations. The *Minogue* case illustrates that the obligations imposed on public authorities by statutory human rights protection are a significant additional constraint aimed at ensuring good public administration. These obligations could become the fundamental core of a federal *Human Rights Act*.

Conclusion

91 In summary, I hope this talk has provided some understanding of the likely sources of legislative power the Commonwealth Parliament can rely upon to enact a federal *Human Rights Act*, the potential coverage of such legislation, and what measures it may, or may not, include if a federal *Human Rights Act* is to be constitutionally robust.

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111 *Minogue* [2021] VSCA 358 [72], [260(c)].

112 *Minogue* [2021] VSCA 358 [98]-[100].

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