

A Human Rights Act for Australia

Citing Examples from the United Kingdom, New
Zealand, Victoria and the ACT

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ABSTRACT

Australia lacks a holistic instrument that protects human rights. Despite signing and ratifying many international treaties designed to protect human rights successive federal governments has failed to adequately enshrine these international obligations into domestic law. The current state of human rights protection in Australia is patchwork, representing potential failure to consider human rights in law making and policy development.

The constitution does not serve to effectively protect human rights as this was not the intention of its drafters. The common law cannot directly protect human rights as it is subservient to the express will of parliament. The above factors highlight the dangers of lacking an overarching human rights instruments and the need to address its absence. A dialogue model human rights act created at the federal level would serve to provide better practice for protecting human rights in Australia through removing the parliamentary monologue that exists in interpreting and applying human rights standards.

Existing human rights acts possess a commonality of human rights protected and mechanism of fostering dialogue. The human rights acts of New Zealand, The United Kingdom, Canada, Victoria, the A.C.T and chapter two of the South African constitution will provide guidance for developing a human rights act for Australia. They will also provide case studies against which the arguments for and against implementing a human rights act for Australia can be critically examined. Australia has its own unique separation of powers and constitutional system, therefore any legal challenges an Australia human rights acts would encounter will need to be examined in a more abstract and theoretical sense.

This thesis will present an argument for the adoption of a federal human rights act for Australia. Such an act should be based on provisions in other acts which are likely to assimilate and survive legal challenge in an Australian context. A human rights act will

reduce criticism from human rights treaty monitoring bodies, allow Australia to participate in the development of international human rights jurisprudence and allow a better consideration of rights in the provision of public services. Legitimate criticism of dialogue model human rights instruments will also be explored in order to illustrate the counter arguments and their lack of probative value. This thesis will conclude that for the reasons discussed above Australia needs a human rights act in order to develop best practice for human rights protection.

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Australia is one of the few remaining democracies to lack a holistic instrument that protects human rights, preferring to rely on the concepts of responsible government and representative democracy as methods of protection. This lack of protection becomes increasingly conspicuous when measured against various international treaties designed to protect human rights to which Australia is a party. This disparity between accepted international obligations and their domestic implementation represents the potential for Australia to become isolated from the developing international jurisprudence around human rights. The paucity of current rights protection coupled with examples of human rights violations further highlight the need to address this issue.¹

The constitution itself protects few rights serving largely as an instrument that delineates commonwealth heads of power, limiting the areas in which the federal parliament can legislate.² Due to the lack of an express declaration of rights there cannot be a definitive list of protected rights, however the most commonly agreed upon provisions are:

- S 51 (xxxi) Acquisition of property on just terms
- S 80 Trial by jury on indictment
- S 92 Freedom of trade, commerce and intercourse among the States to be absolutely free
- S 116 Freedom of religion
- S 117 Freedom from disability or discrimination based on state residency,³

¹ The most glaring examples being the suspension of the *Racial Discrimination Act 1975* (cth) and the allowance for indefinite detention under the *Migration Act 1958* (cth)

² David Hume and George Williams, *Human Rights under the Australian Constitution* (Oxford University Press, 2013) 113-14.

³ Jim McGinty, 'A Human Rights Act for Australia' (2010) *University of North Queensland Law Review* 1, 6-8.

This limited list offers little in the way of direct individual protection. The High Court has also read in a number of implied rights into the constitution the most recognised being freedom of political communication, expressed in both *Nationwide News Pty Ltd v Wills*,⁴ and *Capital Television Pty Ltd v Commonwealth*,⁵ and arguably inspired by the previous reasoning of Justice Lionel Murphy.⁶

Since federation numerous attempts have been made to protect human rights through either constitutional amendment or statute, most resulting in failure. A referendum in 1944,⁷ that would have created rights to freedom of speech, expression and religion in order to balance expanded commonwealth powers in a post-war environment was defeated. In 1988,⁸ a referendum to expand existing human rights in the constitution and extend them to apply to the states (trial by jury, freedom of religion and acquisition of property on just terms) was also defeated.⁹ The electorate has twice rejected the entrenchment of further rights into the constitution, both under different circumstances,¹⁰ illustrating the lack of support for a constitutional bill of rights.

Two attempts were made to introduce legislative bills of rights in 1973 and 1985 however the first did not proceed beyond introduction and the latter lapsed amid intense scrutiny and opposition.¹¹ One of the only major successful federal human rights initiatives was the establishment of the Human Rights Commission,¹² in 1981, which was enacted with bipartisan support. The Australian Human Rights Commission is Australia's national human

⁴ (1992) 177 CLR 1.

⁵ (1992) 177 CLR 106.

⁶ Michael Kirby, 'Lionel Murphy and the Power of Ideas' (1993) 18 *Alternative Law Journal* 121, 130-1.

⁷ Constitutional Alteration (*Post-War Deconstruction and Democratic Rights*) 1944.

⁸ Constitutional Alteration (*Rights and Freedoms*) 1988.

⁹ Above n 3, 73. This was perhaps the most heavily defeated of all the referendums in Australia's history.

¹⁰ The 1988 referendum was preceded by a constitutional review which recommended the inclusion of a new chapter in the constitution dedicated to protecting human rights.

¹¹ Peter Bailey, *The Human Rights Enterprise in Australia and Internationally* (LexisNexis Butterworths, 2009) 144-148.

¹² Later to become the Australian Human Rights Commission under the *Australian Human Rights Commission Act 1986* (Cth).

rights institution that operates independently of the Australian government and investigates infringements of anti-discrimination legislation and makes limited human rights findings.¹³

Rights in Australia are also protected indirectly through statutory interpretation by the common law principle of legality.¹⁴ When interpreting a statute a court will not impute an intention to abrogate basic individual human rights unless express language indicates this intention.¹⁵ The legislature would then suffer the political and public ramifications of abrogating fundamental human rights. Along with the human rights protected under the constitution and the various pieces of commonwealth anti-discrimination legislation, these three instruments represent the only methods through which human rights can be protected at the federal level.

Human rights protecting under the constitution is minimal and they have been given limited scope through High Court interpretation. Legislative protection of human rights is patchwork and fails to domestically implement Australia's various international human rights obligations. This thesis will argue that a federal Human Rights Act (HRA) is needed to address the inadequate protection of human rights in Australia. A dialogue model HRA that preserves parliamentary sovereignty,¹⁶ will better protect human rights, bring Australia into line with international human rights standards and create a culture of human rights in the public service. Such a model represents best practice for human rights protection in Australia that would not offend traditional notions of democracy and could be implemented in the foreseeable future.

In presenting this argument the following instruments will be liberally consulted:

¹³ Above n 10, 352-4.

¹⁴ Jennifer Corrin, 'Australia: A Country Report on Human Rights' (2009) 40 *Victoria University of Wellington Law Review* 37, 41.

¹⁵ Alexis Henry-Comley, 'The Principle of Legality: An Australian Common Law Bill of Rights' (2013) 15 *University of North Queensland Law Review* 83, 85-86.

¹⁶ Melissa Castan and Paul Gerber, *Contemporary Perspectives on Human Rights Law in Australia* (Thomson Reuters, 2013) 34. Parliamentary sovereignty means, in a positive sense, parliament can legally pass any law and that no body or authority can compete or have superior legislative authority than parliament.

- The International Covenant on Civil and Political Rights,¹⁷
- *Human Rights Act 1998* (UK)
- *Bill of Rights Act 1990* (NZ)
- *Charter of Human Rights and Responsibilities Act 2006* (Vic)
- *Human Rights Act 2004* (ACT)

There will also be scope, albeit more limited, to discuss these instruments:

- International Covenant of Economic, Cultural and Social Rights,¹⁸
- *Canadian Charter of Rights and Freedoms 1982*
- *South African Constitution ch 2, South African Bill of Rights*

Chapter one will discuss the content and form of existing HRA's, both international and domestic. HRA's include an enumeration of specific rights to be protected, the requirement of legislation to be interpreted in a rights consistent manner and the ability of courts to issue declarations of incompatibility when a rights consistent interpretation is not possible (amongst other common features). The content of and experiences under other HRAs will help shape any potential Australian HRA.

Chapter two will examine the potential legal challenges a dialogue HRA would meet in an Australian context. A declaration of incompatibility may not be an exercise of judicial power as it does not create binding rights or obligations on the parties involved. The interpretative scope allowed by a HRA may generate criticism of judicial activism due to Australia's strict separation of powers.

Chapter three will present and critically examine the arguments in favour of creating a HRA. These will include the reduction of criticism from international treaty monitoring bodies and

¹⁷ *International Covenant on Civil and Political Rights* (16 December 1966) 999 UNTS 171 (entered into force 3 January 1976). Hereinafter referred to as ICCPR.

¹⁸ *International Covenant on Economic, Social and Culture Rights* (16 December 1966) 993 UNTS 3 (Entered into force 3 January 1976). Hereinafter referred to as ICESCR.

greater consideration of human rights in the development of both legislation and policy.

Ultimately a dialogue model HRA allows each branch of government to contribute its unique strengths to the dialogue that surrounds the human rights debate in order to create a best practice of human rights protection.

Chapter four will present and critically examine the arguments against the creation of a HRA.

The arguments include the suggestion that the current state of human rights protection in Australia is adequate, the possibility of undermining traditional parliamentary sovereignty and the potential for judicial activism. The purpose of this chapter is to identify and explain these arguments whilst illustrating their weakness when compared to the opposing arguments and their failure to become substantiated in other jurisdictions with HRA's.

Chapter five will suggest possible content and structure for an Australian HRA based on other HRAs, legal challenges a dialogue HRA would face and the various for and against arguments. This chapter will also discuss why Australia has failed to enact a HRA whilst exploring the disparity behind the public support for one and the political opposition against such an instrument. The effect a potential HRA will have on administrative law will also be explored.

In this thesis the term human rights refers to the positive individual rights that recognise the inherent dignity and autonomy of the human person. These human rights may exist outside the confines of the legal system or realised upon their creation by a legislative body.¹⁹ A discussion on the origin of human rights is outside the scope of this thesis but when mentioned the term refers to the human rights positively recognised in international treaties, most commonly in this paper ICCPR and ICESCR. The term HRA refers to a single statutory instrument which encapsulates all legislatively protected human rights (drawing from the above treaties) via which all other legislation can be examined for compatibility with

¹⁹ Richard Stone, *Civil Liberties & Human Rights* (Oxford University Press, 2012) 4-5.

protected human rights. This instrument contains provisions which heighten the ability of the arms of government to protect human rights that will lead to a best practice of human rights protection for Australia.

Chapter I: Common Features of a Human Rights Act

Existing HRA's contain many common provisions and operate in comparable fashion. This chapter will explore the workings of existing HRA's and the commonality of protection mechanisms contained within them.

What Human rights are protected?

HRA's contain a list of enumerated rights that attract the protections offered in other parts of the instrument. Traditionally HRAs have only protected rights seen as civil or political in nature. Legislatures have been reluctant to allow judicial interpretation of rights that could be framed as economic, social or cultural.²⁰

The *Human Rights Act 1998* (UK),²¹ was enacted to 'bring rights home', referring to rights that the UK had bound itself to upholding under the *European Convention of Human Rights* (ECHR) that could not be adequately determined by domestic courts due to this lack of adequate human rights legislation.²² The UKHRA in s 1 states that it protects 'Convention Rights' which are the rights laid out in articles two to fourteen of the ECHR excluding article thirteen which serves to provide an effective remedy for a violation (this was the purpose for enactment of the UKHRA). These convention rights are restricted to civil and political rights,²³ as Baroness Hale commented when considering the enactment of the UKHRA,²⁴ '*the view that the central purpose of the ECHR is to protect the individual against the misuse of power*

²⁰ A notable exception is chapter 2 of the South African Constitution which protects nine economic, social and cultural rights including access to adequate housing, health-care, food, water and social security

²¹ Hereinafter UKHRA.

²² Sir Gerard Brennan, 'Introduction to Human Rights Law: Seminar Part II' (2007) 81 *Australian Law Journal* 248, 254.

²³ The ECHR grants rights to life, prohibition from torture, prohibition of slavery and forced labour, liberty and security, a fair trial, no punishment without law, respect of private and family life freedom of thought, conscious and religion, freedom of expression, freedom of assembly and association, to marry and a prohibition against discrimination.

²⁴ *YL v Birmingham City Council* [2007] 3 All ER 957, 972 [54].

by the state'. The UKHRA also benefits all legal persons,²⁵ be they natural or artificial so far as it is practicable.²⁶

The *Bill of Rights Act 1990* (NZ),²⁷ contains its protected rights in Part 2 which is titled 'Civil and Political rights'. The BORA covers the rights contained in the ICCPR with its application fixed against actions done by the branches of the government. ICCPR protects a broad range of human rights similar to those covered in the ECHR and list the rights considered to be non-derogable (cannot be limited) in Article 4(2).²⁸ The presence of the confusingly titled *Human Rights Act 1993* (NZ) should also be noted which does not replace the BORA but serves as anti-discrimination legislation specifically targeted outside the public sector.²⁹ Like the UKHRA the BORA applies to both individuals and corporations as s 29 prescribes the BORA as so far as practicable as benefiting all legal and natural persons.

The *Human Rights Act 2004* (ACT),³⁰ is similar to the UKHRA in that it protects civil and political rights but not economic, social or cultural rights.³¹ The ACTHRA provides in s 6 that only individuals have human rights therefore it does not protect corporations. Similarly the *Charter of Human Rights and Responsibilities Act 2006* (Vic),³² serves to mostly protect rights of a civil or political nature and only applies to persons specifically stating in s 6 that corporations do not have human rights.

²⁵ *R v Broadcasting Standards Commission ex parte BBC* [2001] QB 885, the UK Court of Appeal held that a company could have privacy rights.

²⁶ Pamela Tate, 'Protecting Human Rights in a Federation' (2007) 33 *Monash University Law Review* 220, 225.

²⁷ Hereinafter BORA

²⁸ The following rights are consider non-derogable: right to life, freedom from torture or cruel, inhuman and degrading treatment or punishment and freedom from medical or scientific experimentation without consent, freedom from slavery and servitude, freedom from imprisonment for inability to fulfil a contractual obligation, prohibition against the retrospective operation of criminal law, right to recognition before the law and freedom of thought, conscience and religion.

²⁹ Above n 10, 185-186.

³⁰ Hereinafter ACTHRA.

³¹ Brian Galligan and Emma Larking, 'Rights Protection: The Bill of Rights Debate and Rights Protection in Australia's States and Territories' (2007) 28 *Adelaide Law Review* 185.

³² Hereinafter VICHRA. Under s 19 of the charter the right to enjoy ones cultural, religious, racial or linguistic background is also protected whilst the distinct cultural rights of Aboriginal persons are specifically stated.

Limitations on Rights

Given that non-absolute rights may conflict and it is the responsibility of the parliament to 'balance' rights in a democracy HRA's often allow the limitation or derogation of certain rights whilst maintaining proportionality to a legislative or policy objective. This may be done through a general limitation provision applicable to all non-absolute rights or individual limitation provisions that are placed on specific rights

The Canadian Supreme Court has developed an instructive proportionality test from consideration of s 1 of the *Canadian Charter of Rights and Freedoms* which provides that rights be only subjected to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.³³ There must be a rational connection between the limitation and the objective, the limitation should impair the right as little as possible and there must be a proportional connection between the deleterious effect of a measure and the importance of its objective for the limitation to be justified.³⁴

Courts in the UK have developed a similar proportionality test to that which has emerged in Canadian jurisprudence.³⁵ A legislative objective must be sufficiently important to justify the limiting of a fundamental right where the measures used to meet the objective are rationally connected to it and in impairing the right do no more than is necessary in achieving the objective.³⁶ Article 15 of the ECHR allows the UK to make reservations and derogations

³³ H P Lee, 'A Federal Human Rights Act and the Reshaping of Australian Constitution Law' (2010) 33 *University of New South Wales Law Journal* 88, 99.

³⁴ *R v Oakes* [1986] 1 SCR 103, 139.

³⁵ Above n 29, 100.

³⁶ *De Freitas v Permanent Secretary of the Minister of Agriculture, Fisheries, Lands and Housing* [1999] 1 AC 69.

from certain rights,³⁷ in times of emergency. Derogation disregards a right completely while a reservation qualifies how a right will be protected.³⁸

The VICHRA in s 7(2) lays out a general limitation provision providing that rights can only be subject to reasonable limits as can be demonstrably justified in a free and democratic society. In seeking to limit a right the legislature must take into account all relevant factors including:

- The nature of the right
- The importance and purpose of the limitation
- The nature and extent of the limitation
- The relationship between the limitation and its purpose
- Any less restrictive means reasonably available to achieve the purpose the limitation seeks to achieve

In this sense the limitation test broadly corresponds to the proportionality test identified in *Oakes*.³⁹ The VICHRA also has a broad override deceleration under s 31 which allows the parliament to expressly declare that the charter not apply to a specific piece of legislation for a period of up to five years,⁴⁰ which can be renewed at any time.⁴¹ This override declaration has been criticised as a flawed device as more serious safeguards apply to limitations on rights rather than the ability to completely override rights.⁴² Parliament may be tempted to

³⁷ The non-derogable rights are the rights to life, prohibition to torture, prohibition to slavery and forced labour and no punishment without law.

³⁸ Above n 20, 48.

³⁹ *Re Application under the Major Crime (Investigative Powers) Act 2004* [2009] VSC 381, 147-148. It would seem that Canadian jurisprudence surrounding proportionality has been influential on the relevant provisions in both the UKHRA and VICHRA.

⁴⁰ s 31(7)

⁴¹ s 31(8).

⁴² 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, 452.

use the broad override declaration rather than limit individual rights as that method removes the judicial oversight on the human rights impact of legislation.

Another useful guide on limiting rights comes from the Siracusa Principles developed by the UN Commission on Human Rights.⁴³ This document provides definitions on what limitations and derogations of rights can be considered reasonable when applied in a non-arbitrary manner. Limitations on specific rights must be proportionate to achieving a legitimate objective which the principles provide must be prescribed by law, reasonable in a democratic society and for the promotion of:

- Public Order
- Public Health
- Public Morals
- National Security
- Public Safety
- Rights and Freedoms of Others
- Restrictions on Public Trial (to avoid prejudicial publicity that may harm the fairness of a trial)

The principles also detail when rights can be derogated from in situations of public emergency which are defined in limited circumstances and must be strictly required by the exigencies of the situation (proportionate).⁴⁴ The non-derogable rights contained in Article 4(2) ICCPR are reinforced by the principles which provide that they cannot be derogated from in times of public emergency.

⁴³ UN Commission on Human Rights, *The Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights*, 28 September 1984, E/CN.4/1985/4.

⁴⁴ The existence of a state's basic functioning and integrity must be threatened in all or part of a state, affecting the whole population in that area, so as to constitute a grave and imminent threat to the life of the nation (the situation cannot be one of economic difficulties)

The Interpretation of Legislation

The manner in which a HRA allows for other statutes to be interpreted by the judiciary is a controversial area to which the criticism of judicial activism is often attached. How much scope a court has in interpreting legislation to conform to human rights standards must be clearly identified lest the impermissible area of judicial legislation be entered.⁴⁵

The UKHRA provides in s 3(1) that in so far as is possible to do so, primary legislation must be read and given effect in a way which is compatible with convention rights. The case in which the House of Lords delineated between possible and impossible interpretations was *Ghaidan v Mendoza*.⁴⁶ The House of Lords determined that neither parliamentary intention nor the wording of the statutory text was the touchstone from which possible interpretations could be made. Instead interpretative possibilities were only limited by the underlying thrust of legislation measured against the intent of the parliament in enacting the UKHRA.⁴⁷

Moving away from the modern approach of statutory interpretation with regards to parliament's intention,⁴⁸ the UKHRA allows courts to '*change the meaning of enacted legislation, so long as that change of meaning does not displace a cardinal principle of the legislation or exceed the bounds of judicial competence.*'⁴⁹ The UKHRA has given Courts

⁴⁵ Claudia Geiringer, 'It's Interpretation Jim but not as we know it: Ghaidan v Mendoza, The House of Lords and Rights-Consistent Interpretation, (2005) 3 *Victoria University of Wellington Human Rights Research Journal* 1, 2.

⁴⁶ [2004] 2 AC 557. The House of Lords read in the words 'as if they were' in s 2(2) of the *Rent Act 1977* (UK) which granted a statutory tenancy to a surviving spouse. The interpretation included same sex de-facto couples within the definition of surviving spouse overturning a previous decision in *Fitzpatrick v Sterling Housing Association Ltd* [2001] 1 AC 27. This new interpretation brought compliancy between the *Rent Act 1977* (UK) and Article 8 of the ECHR which protects respect for a private home which arguably the legislation was violating in respect to same sex de-facto couples.

⁴⁷ Above n 38, 13. The intention of parliament in enacting the UKHRA had to be considered as the doctrine of implied repeal does not apply to it.

⁴⁸ John Burrows, 'The Changing Approach to the interpretation of Statutes' (2002) 33 *Victoria University of Wellington Law Review* 981, 988.

⁴⁹ Above n 38, 16

significant scope to interpret legislation in a manner which conforms to protected rights even allowing established precedent to be overturned.⁵⁰

Under s 6 of BORA courts are required to give legislation meaning which is consistent with the rights protected by BORA whenever such a meaning can be given. In *Quilter v Attorney General*,⁵¹ the Court of Appeal could not interpret the *Marriage Act 1955* (NZ) to include same-sex marriages as such an interpretation was clearly contrary to parliamentary intent and would have crossed the boundary into judicial lawmaking.⁵² The court emphasised the limits of its decision making noting that such a decision, relating to one of society's fundamental institutions, was the in the proper realm of the parliament.⁵³ In *Moonen v Film and Literature Board*,⁵⁴ the Court of Appeal held that the words 'promotes or supports' be given a definition that least infringed freedom of expression given the intent of parliament under the *Films, Videos and Publications Classification Act 1993* (NZ) was to create an objective test in order to determine what materials were objectionable under that act. In interpreting the BORA New Zealand courts have not been as adventurous as their U.K counterparts, displaying a reluctance to depart from modern statutory interpretation principles and interpreting legislation with stricter reference to parliament's intent.

⁵⁰ Above n 41. The previous decision in *Fitzpatrick v Sterling Housing Association Ltd* has ruled that the benefit offered to defacto couples under s 2(2) of the *Rent Act 1977* (UK) could not be extended to same sex defacto couples living in the same circumstances.

⁵¹ (1997) 4 HRNZ 170.

⁵² Above n 43, 178.

⁵³ Petra Butler, '15 Years of the NZ Bill of Rights: Time to Celebrate, Time to Reflect, Time to Work Harder' (2006) *Victoria University Human Rights Research* 14.

⁵⁴ (1999) 5 HRNZ 224.

Declarations of Incompatibility

Another common feature of HRA's is the ability of courts (normally a senior court) to issue a declaration of incompatibility when a rights consistent interpretation cannot be given to a statute. These do not serve to invalidate legislation that infringes rights but function as dialogue between the judiciary and parliament communicating the judiciary's opinion that a specific statute cannot be interpreted in a rights compliant fashion.⁵⁵

The UKHRA under s 4 allows a declaration of incompatibility to be issued by certain courts if a provision of a statute is incompatible with an ECHR right.⁵⁶ Between October 2000 and 2007 21 declarations were made, 12 of which were addressed by legislation, amendment or remedial order in order to resolve the identified incompatibility.⁵⁷ This represents how dialogue from the courts can initiate systemic reform to better protect rights.⁵⁸ It is important to note that this mechanism is not intended as an effective remedy for litigants/complaints.⁵⁹ However it represents longer term potential change for the legislature to address the identified inconsistency through formal response and public scrutiny.⁶⁰ It directs the parliaments notice to a human rights issue it may have overlooked. The most effective remedy for a litigant will be a rights compliant interpretation of a provision in question.

⁵⁵ Dominique Dalla-Pozza and George Williams, 'The Constitutional Validity of Declarations of Incompatibility in Australian Charters of Rights' [2007] *Deakin Law Review* 1, 3.

⁵⁶ UKHRA s 4(5) provides that the Supreme Court, the Judicial Committee of the Privy Council and the Court Martial Appeal Court, the High Court or Court of Appeal and the High Court of Justiciary may make declarations of incompatibility.

⁵⁷ Alice Rolls, 'Avoiding Tragedy: Would the Decision of the High Court in Al-Kateb have been any different if Australia has a Bill of Rights like Victoria' (2007) 18 *Public Law Review* 119, 135-9.

⁵⁸ Gabrielle McKinnon and Helen Watchirs, 'Five Years Experience of the Human Rights Act 2004 (ACT): Insights for Human Rights Protection in Australia' (2010) 33 *University of New South Wales Law Journal* 1, 161.

⁵⁹ Lady Justice Arden, 'The Interpretation of UK Domestic Legislation in the Light of European Convention on Human Rights Jurisprudence' (2004) 25 *Statute Law Review* 165, 167. It has been described as a 'booby prize' for litigants.

⁶⁰ Above n 49, 169

The power to issue a declaration of incompatibility (or declaration of inconsistent interpretation under the VICHRA) has been used more sparingly in both the ACT,⁶¹ and Victoria under the HRAs in these jurisdictions.⁶² Whether such a mechanism would be constitutionally valid in a federal HRA will be discussed in Chapter II paying close attention to experiences under the VICHRA given how other instruments may be of limited application to Australia due to our strict separation of powers.⁶³

BORA contains no provision that allows for a Court to make a declaration of incompatibility. However in *Moonen*,⁶⁴ the Court of Appeal stated that it had the power to make a declaration of statutory inconsistency which was reaffirmed by Justice Thomas in *R v Poumako*.⁶⁵ The NZ parliament responded with the *Human Rights Amendment Act 2001* (NZ) which allows the Human Rights Review Tribunal and other courts, on appeal, to make declarations of incompatibility in regards to s 19 of BORA (freedom from discrimination). This style of judicial activism should not be unwelcome as it represents the judiciary filling gaps in incomplete human rights legislation also noting that the New Zealand parliament was accepting of this action.⁶⁶

⁶¹ A deceleration was first sought in *SI v KS* (2005) 195 FLR 151.

⁶² First deceleration granted in *Momcilovic v The Queen* [2010] VSCA 50.

⁶³ Stefanie Wilkins, 'Constotutional limits on Bills of Rights Introduced by a State of Territory' (2007) 35 *Federal Law Review* 431, 437.

⁶⁴ Above n 46.

⁶⁵ (2000) 5 HRNZ 652.

⁶⁶ Above n 45, 10-12.

Role of the Legislature

Another objective of a dialogue HRA is to increase the level of parliamentary scrutiny around the human rights impact of proposed legislation. This mechanism acts to stimulate parliamentary debate and protect rights upon which legislation might unreasonably infringe.⁶⁷

The creation of a parliamentary committee whose role is to scrutinise all proposed bills against the framework of rights protected in the relevant HRA would be expected to meet this objective. This framework is critical as without it a committee would lack the necessary guidance as to what rights should be protected and the circumstances in which they can be legitimately limited.⁶⁸ In the UK this role is filled by the Joint Committee on Human Rights which contains both members of parliament and independent experts whose reports have induced changes in draft legislation,⁶⁹ and systematically influenced the preparation of legislation to be more aware of human rights.⁷⁰

Along with the considerations provided by the relevant committee any proposed legislation requires a compatibility statement from the member introducing it. This statement either provides a proposed bill is compatible with the rights protected under a HRA or details that the proposed legislation is incompatible with protected rights.⁷¹ If the member's statement expresses incompatibility then it must stipulate the nature and extent of incompatibility. Both these mechanisms are likely to cause the legislative impact on human rights to be identified and adequately considered at an early stage of statute development.⁷² Under BORA it is the

⁶⁷ Edward Santow, 'The Act that Dares not Speak its Name: The National Human Rights Consultation Report's Parallel Roads to Human Rights Reform' (2010) 33 *University of New South Wales Law Journal* 8, 24-25.

⁶⁸ Carolyn Evans and Simon Evans, 'Australian Parliaments and the Protection of Human Rights' (2007) 47 *Papers of Parliament* 17.

⁶⁹ Michael Tolley, 'Parliamentary Scrutiny of Rights in the United Kingdom: Accessing the Work of the Joint Committee on Human Rights' (2009) 44 *Australian Journal of Political Science* 41, 52-3.

⁷⁰ David Feldman, 'The Impact of Human Rights on the UK Legislative Process' (2004) 25 *Statute Law Review* 91, 94.

⁷¹ VICHRA s 28.

⁷² Above n 23, 227.

attorney general, not the individual member introducing a bill, who brings to the attention of parliament identified human rights inconsistencies in proposed legislation.⁷³

The final role of the legislature in the circular dialogue process is its responses to any declarations of incompatibility that emanates from the judiciary when they interpret legislation to unreasonably limit protected human rights. Under s 37 of the VICHRA within six months of a declaration of inconsistent interpretation the minister responsible for the introduction of the human rights inconsistent provision must prepare a written response and lay it before both houses of parliament with said declaration and cause both documents to be published in the government gazette. Ultimately the government may choose to amend the inconsistent legislation or retain the inconsistency as the dialogue model preserves parliamentary supremacy. However this public reporting process serves to increase the transparency of a government's human rights policy allowing the electorate to democratically express their opinion.⁷⁴

Role of the Executive

The executive can be defined as the branch of government applies and enforces the laws made by the legislature and interpreted by the judiciary. While independent from the judiciary senior members of the executive may also serve as members of parliament but will be accountable before the legislature for their actions in the executive. The executive plays a critical role in the dialogue model HRA as it is the branch of government that provides public services and is most likely to interact with groups or individuals whose rights are in the

⁷³ BORA s 7.

⁷⁴ Above n 16, 63-4.

greatest need of protection. The executive or anyone acting on its behalf must therefore be obliged to comply with the framework of rights set out in a HRA.⁷⁵

The obligation on public authorities to act in compliance with protected rights has been called the ‘cornerstone’ of the UKHRA.⁷⁶ While parliament may exclude itself from the operation of a HRA as it may be required to limit rights at times whilst adhering to proportionality,⁷⁷ it must possess the legal means to compel public authorities to respect human rights due to the high degree of interaction they have with the public.⁷⁸

The executive and public authorities must act in a manner that is compatible with human rights as well as accounting for human rights obligations in their decision making.⁷⁹ This obligation would likely have an impact on administrative law. The rights covered in a HRA framework may require proper consideration in a more onerous manner due to their express requirement for consideration in decision making.⁸⁰ The manner in which the obligations on the executive under a federal HRA would influence judicial review will be further discussed in chapter V.

The definition of public authorities needs to be broad in order to capture not only public servants and statutory bodies but also all entities that discharge functions of a public nature. This would allow a HRA to extend to obligating private corporations to which the executive contracts out the provision of public services to act compatibly with human rights and account for human rights in their decision making.⁸¹

⁷⁵ Above n 58, 17.

⁷⁶ Lord Bingham, ‘Dignity, Fairness and Good Government: The Role of a Human Rights Act’ (2009) 34 *Alternative Law Journal* 74, 75.

⁷⁷ The UKHRA exclude both houses of parliament, s 6.

⁷⁸ Above n 58, 18.

⁷⁹ VICHRA s 38 and ACTHRA s 40B(1)(b).

⁸⁰ Julie Debeljak, ‘Human Rights Responsibilities of Public Authorities under the Charter of Rights’ (Presentation delivered at the law institute of Victoria Charter of Rights Conference, Melbourne, 18 May, 2007) <<http://www.hrlc.org.au/files/XRA1F9XVTJ/Debeljak%20%20Obligations%20of%20Public%20Authorities.pdf>>

⁸¹ Above n 23, 227.

Remedies Available

What remedies should be made available when the executive fails to act compatibly or fails to consider the framework of rights under a HRA has been an area of serious contention. The main controversy has come from debate over whether public law or statutory damages should be available. It should be noted that a dialogue HRA prioritises the prevention of human rights infringements via its various mechanisms over the provision of traditional remedies for individuals who are victims of human rights violations.⁸²

BORA does not provide for any remedies should a court find that a protected right has been unreasonably infringed.⁸³ Available remedies have instead been developed by the Court of Appeal as envisaged in article 2(3)(b) of ICCPR.⁸⁴ In *Baigent's Case*,⁸⁵ the Court of Appeal created a remedy of damages for infringement of BORA which parliament chose not to curtail, accepting a report of the Law Commission that this remedy should be left to develop judicially.⁸⁶ The Court of Appeal had continued to award damages for violations of BORA rights including restriction of free movement, arbitrary arrest and unreasonable search and seizure.⁸⁷ The Court of Appeal also found that under BORA it had the ability to develop remedies of declaring evidence inadmissible and granting stay in proceedings when certain infringements occurred.⁸⁸

UK courts have recognised that despite non-monetary orders (decelerations or injunctions) providing a sufficient remedy to human rights infringements public policy demands that

⁸² Irina Kolodizner, 'The Charter of Rights Debate: A Battle of the Models' (2009) 16 *Australian International Law Journal* 219, 229.

⁸³ Above n 48, 8.

⁸⁴ This article provides any person claiming a remedy shall have the right to have it determined by a competent authority and the development of possible judicial remedies to their complaint.

⁸⁵ *Simpson v Attorney-General (Baigent's Case)* (1994)1 HRNZ 42, 73.

⁸⁶ New Zealand Law Commission Crown Liability and Judicial Immunity: *A Response to Baigent's Case and Harvey v Derrick* (NZLR R37, Wellington, 1997) 26-9.

⁸⁷ Andrew Butler and Petra Butler, *The New Zealand Bill of Rights Act: A Commentary* (LexisNexis, Wellington, 2005) ch 27.

⁸⁸ Above n 48, 12.

monetary compensation is required for wrongs to be properly remedied.⁸⁹ The UKHRA specifically allows for the award of damages, s 8(2). The ACTHRA contains no freestanding remedy to monetary compensation, however two sections provide for the award of compensation when their specific right is violated.⁹⁰ In the case of *Morro v Australian Capital Territory*,⁹¹ it was held that these sections were not declaratory in nature but created an independent right to compensation that stood outside the normal common law remedy.⁹² The VICHRA does not contain a general remedy of compensation nor does it grant a remedy of damages under specific sections.

Ultimately the allowance for monetary compensation under a HRA (either developed judicially or provided for in the instrument itself) should be influenced by the general comment of the United Nations Human Rights Committee which summarised that the obligation to provide an effective remedy to a violation of ICCPR rights will generally require the payment of appropriate compensation.⁹³ A HRA that lacked such a mechanism would not demonstrate adherence to the rule of law and would be self-defeating given that the enactment of a federal HRA should show commitment to domestically implementing international human rights jurisprudence.

Another element of HRA's is whether they include a free-standing cause of action. A free-standing or stand-alone provision in a HRA allows a claimant to bring an action against infringement of a protected right without the need for an additional cause of action. McHugh advocated a charter of rights that limited individual claims to those already established at law as the protection offered by HRAs is derived from the immunities they provide not the

⁸⁹ *Gorringe v Calderdale Metropolitan Borough Council* [2004] 1 WLR 1057, 1057.

⁹⁰ Compensation for unlawful detention s 18(7) and compensation for wrongful conviction s 23(2).

⁹¹ (2009) 168 ACTR 1.

⁹² Above n 49, 159.

⁹³ United Nations Human Rights Committee, General Comment No 32 [80] The Nature of the General Legal Obligation Imposed on State Parties to the Covenant, UN Doc CCPR/C/21Rev.1/Add.13 (2004) [16].

establishment of causes of action.⁹⁴ The VICHRA does not provide for stand-alone actions and there must be an additional cause of action for claims to be made under the charter. This would normally come from administrative law, such as failing to consider protected human rights when making a decision, or a claim under anti-discrimination legislation.⁹⁵

⁹⁴ Michael McHugh, 'A Human Rights Act, The Courts and The Constitution' (2009) 11 *Constitutional Law and Policy Review* 86, 9.

⁹⁵ Above n 16, 162.

Chapter II: Challenges to an Australian HRA

In the previous chapter common features of existing HRAs were discussed paying attention to those that would provide relevant guidance in implementing a federal HRA for Australia. This chapter will focus on the challenges some of these provision would face due to the constraining influence of the separation of powers imposed by the constitution and potential conflict between state and federal jurisdictions.

Validity of Declarations of Incompatibility

The High Court considered the validity of this mechanism in the case of *Momcilovic v R*,⁹⁶ in which an appeal from the Victorian Supreme Court was made concerning s 5 of the *Drugs, Poisons and Controlled Substances Act 1981 (Vic) (Drugs Act)* which was a deeming provision that effectively reversed the presumption of innocence protected by s 25(1) of the VICHRA.⁹⁷ The applicant was originally convicted in the Victorian County Court for trafficking in a drug of dependence under s 5 of the *Drugs Act* which deemed her in possession of the drug unless she proved to the court otherwise. The Victoria Supreme Court issued a declaration of inconsistent application under s 36(2) of the charter as the infringing section of the *Drugs Act* could not be read as compatible with the protected right of the presumption of innocence.

The appeal to the High Court was successful,⁹⁸ however the declaration of inconsistent interpretation was set aside as it infringed the separation of powers, specifically the

⁹⁶ (2011) 280 ALR 221.

⁹⁷ Will Bateman and James Stellios, 'Chapter III of the Constitution, Federal Jurisdiction and Dialogue Charters of Human Rights' (2012) 36 *Melbourne University Law Review* 1, 4.

⁹⁸ It was held that s 5 of the *Drugs Act* was not applicable to the provision under which the accused had been charged.

Boilermakers doctrine.⁹⁹ The VICHRA survived invalidation but its constitutional validity as well as that of any potential federal HRA was damaged.¹⁰⁰ All members of the court held that a declaration of inconsistent application does not represent an exercise of judicial power as it has no impact on the legal rights of the parties in dispute before the court.¹⁰¹ It could not be said to give rise or be referred to a matter of conferrable federal jurisdiction as it was not connected to an immediate right, duty or liability to be established by the determination of the Court.¹⁰² Importantly, however, Justices Crennan and Kiefel in dissent held that a declaration could be regarded as the exercise of power incidental to that of judicial power as it was ‘A statement or conclusion as to the interpretation of the Charter and the statutory provision in question’.¹⁰³ As it is connected to the question of interpretation a declaration becomes determinative of a matter, which is a valid area to which federal jurisdiction can be conferred. The reasoning of the High Court in *Momcilovic* indicates that declarations of incompatibility may not survive as valid mechanisms in State and Territory HRAs let alone a federal HRA. Due to the non-binding dialogue nature of a declaration that does not affect the rights, duties or liabilities of the parties involved it may be argued that a declaration has no bearing on the determination of the controversy before the Court.¹⁰⁴ Alternatively a definition of what constitutes a ‘matter’ in broader terms than those provided in *Re Judiciary* may allow the valid operation of the declaration mechanism.¹⁰⁵ In *Mellifont*,¹⁰⁶ the High Court was to restate the rule in *Re Judiciary* but omitted the requirement that the legal effect of a ruling had to be

⁹⁹ *R v Kirby: Ex parte Boilermakers Society of Australia* (1956) 94 CLR 254. Chapter III courts (including state courts exercising federal jurisdiction) can only exercise judicial powers or power incidental to the exercise of judicial power.

¹⁰⁰ Above n 85, 5.

¹⁰¹ Above n 84, 257.

¹⁰² *Re Judiciary and Navigation Acts* (1921) 29 CLR 257, 265.

¹⁰³ Above n 84, 390.

¹⁰⁴ Jim South, ‘The ‘Campaign for a National Bill of Rights: Would ‘Declarations of Incompatibility’ be Compatible with the Constitution’ (2007) 10 *Constitutional Law and Policy Review* 2, 3.

¹⁰⁵ Geoffrey Lindell, ‘The Statutory Protection of Rights and Parliamentary Sovereignty: Guidance from the United Kingdom?’ (2006) 17 *Public Law Review* 188, 206.

¹⁰⁶ (1991) 173 CLR 289. This case involved an appeal to the High Court on a point of law following a criminal trial that had been terminated by *Nolle Prosequi*. Due to the termination of prosecution and the appeal having no effect on the dismissal of the indictment there did not appear to be a ‘matter’ before the court.

immediate in order for it be in respect to a matter.¹⁰⁷ The Court found that a ruling on a point of law was influential and binding in a practical sense in that it referred to the subject matter of the legal proceedings at first instance whilst not playing a part in any subsequent determination.¹⁰⁸

The High Court in *Attorney General (Cth) v Alinta Ltd*,¹⁰⁹ reaffirmed that a matter could be found divorced from the immediacy of determining the rights, duties or liabilities of any parties to the controversy. These two decisions influenced Gageler to conclude:

[These decisions] strongly support the view that the making of a declaration of incompatibility will be characterised as an exercise of judicial power and that the fact the rights of neither party would be directly altered or affected by the declaration is of no consequence.¹¹⁰

These two cases are encouraging in suggesting that a declaration made in the course of pre-existing proceedings may be considered a valid use of judicial power however it should be noted that both were pre *Momcilovic* and both determined a controversy between the parties involved (a declaratory order in *Alinta* and a ruling on a point of law in *Mellifont*).¹¹¹

However a declaration can be seen as going beyond a mere advisory opinion which was determined to not constitute a matter in *Re Judiciary*. A declaration of incompatibility involves a determination as to the consistency of disputed legislation against the framework of protected human rights in an existing conflict between the parties involved, individuals and

¹⁰⁷ Helen Irving, 'The Dilemmas in Dialogue: A Constitutional Analysis of the NHRC's Proposed Human Rights Act' (2010) 33 *University of New South Wales Law Journal* 60, 69.

¹⁰⁸ Above n 93, 305.

¹⁰⁹ (2008) 233 CLR 542.

¹¹⁰ Stephen Gageler and Henry Burmester, 'In the Matter of Constitutional Issues Concerning a Charter of Rights: Supplementary Opinions', Solicitor-General Opinion Nos 40, 68 (2009), 26.

¹¹¹ Above n 94, 70-1.

the executive.¹¹² The High Court has previously been prepared to offer declaratory relief in controversies where there is only an attenuated link to an immediate right or duty.¹¹³

Arguably a declaration of incompatibility is also not divorced from the administration of the law as to render it determinative of a matter. Comparing the declaration mechanism to a situation where the constitutional validity of a piece of legislation is challenged, the law that is being administered in both situations is the law governing the controversy about the impugned law.¹¹⁴ Simon and Carolyn Evans commented that there is a distinct similarity between a declaration of incompatibility and applying to a court for a ruling that a statute is constitutionally valid; both serve to administer a law.¹¹⁵

Given the divergent opinions on what actually constitutes a ‘matter’ it is difficult to predict whether a declaration of incompatibility in a federal HRA would constitute a use of non-judicial power and therefore be unconstitutional. It has been suggested that including the requirement for the Attorney-General to be joined to a proceeding in which legislation is challenged as unreasonably restricting a HRA right would improve the chances of declarations of incompatibility being judged constitutionally valid.¹¹⁶ If a declaration was issued an available remedy to the parties would be to compel the Attorney-General to comply with the obligations contained in the HRA (tabling a response before parliament) which could be enforced by the issuing of an injunction.¹¹⁷ This would give the parties access to a right to be determined by the court, allowing declarations of incompatibility to fit within the narrower definition of what constitutes a ‘matter’.

¹¹² Above n 47, 22.

¹¹³ *Croome v Tasmania* (1997) 191 CLR 119. In this case a majority of the High Court referred to a right to a declaration of invalidity under s 109 of the Constitution provided that the claimant had a sufficient interest to raise a justiciable controversy, 127.

¹¹⁴ Above n 47, 22-3.

¹¹⁵ Above n 68.

¹¹⁶ Above n 29, 106

¹¹⁷ Above n 98, 20.

Despite the possibility of creating a binding remedy on the Attorney-General and the broader interpretations of what constitutes a matter in *Mellifont* and *Alinta* it remains uncertain that the declaration of incompatibility mechanism would survive constitutional challenge under a federal HRA given the High Court's decision in *Momlicovic*. The Honourable Michael McHugh summarised it well, saying:

Although it will be a close run thing, I think that the better view is that the High Court will hold that the incompatibility provisions of the legislation are invalid unless the High Court can be persuaded to adopt a more radical and functional approach to what is judicial power and what is a matter for the purpose of Chapter III of the Constitution than it has done in the past.¹¹⁸

The Interpretation Provision

The potential for judicial activism is a common criticism of HRAs given that there is an unclear line between proper judicial interpretation and improper judicial law-making, the latter representing an erosion of parliamentary authority.¹¹⁹ There is no clear definition for judicial activism however this attempt by Campbell has good merit:

(a) Not applying all and only such relevant, existing, clear, positive law as is available, and (b) making such decisions by drawing on his or her moral, political or religious views as to what the content of the law should be¹²⁰

However the interpretative provision of a HRA is phrased,¹²¹ it alters the common law position of statutory interpretation surrounding human rights,¹²² to one encompassing a strong

¹¹⁸ Above n 90, 15. He was discussing the proposed New Matilda Bill which now appears to be defunct.

¹¹⁹ Julie Debeljak, 'Parliamentary Sovereignty and Dialogue Under the Victorian Charter of Human Rights and Responsibilities: Drawing the Line Between Judicial Interpretation and Judicial Law-Making' (2008) 32 *Melbourne University Law Review* 422, 11.

¹²⁰ Tom Campbell, 'Judicial Activism: Justice or Treason' (2003) 10 *Octago Law Review* 307, 312.

¹²¹ The BORA says a rights consistent meaning shall be preferred to any other meaning, s 6. The UKHRA says so far it is possible a rights consistent meaning must be read and given effect against primary and subordinate legislation. The use of the word must in UKHRA as opposed to that of preferred under BORA has a stronger connotation and may indicate why UK Courts have been more activist in creating human rights compatible interpretations.

rebuttable presumption favouring human rights only abrogated by express statutory language that evidences parliamentary intention to limit protected human rights.¹²³ The purpose of the interpretative provision in a dialogue HRA is to allow the judiciary to express its expert opinion on whether protected rights are being unreasonably limited whilst allowing the legislature to retain its sovereign law making power.¹²⁴ A strong interpretive provision that favours human rights given that the jurisprudence of *Teoh* may have been somewhat weakened by *Re Minister for Immigration and Multicultural Affairs: Ex parte Lam*,¹²⁵ which represented a more cautious approach on the part of the High Court in considering international human rights standards.¹²⁶

The authority to create possible human rights compliant interpretations has caused the UK Courts to apply a broad discretion when interpreting legislation, however s 3 of the UKHRA does not allow for interpretations that contradicts the fundamental features of a statute.¹²⁷ Elements of parliamentary intention behind the legislation that apparently infringes human rights may be trumped by parliament's intention in enacting the UKHRA as the doctrine of implied repeal does not apply to it.¹²⁸ Ultimately the UK has surrendered a degree of sovereignty when it comes to legislating around protected human rights as it must defer to the jurisprudence of the European Court of Human Rights which has stewardship over the ECHR. The interpretations offered by UK courts have been bold and have crossed out of the

¹²² *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273. Where legislation is ambiguous an interpretation consistent with international human rights obligations is only preferable to one that is consistent.

¹²³ Above n 39, 50.

¹²⁴ Avoiding the possibility of the judiciary developing an ability to override or invalidate legislation, leading to a potential politicising of the judiciary. This is a clear distinction from the American judicial monologue that was recognised in *Marbury v Madison* (1803) 5 U.S 137.

¹²⁵ (2003) 195 ALR 502.

¹²⁶ Wendy Lacey, 'The End for *Teoh*? *Re Minister for Immigration and Multicultural Affairs; ex parte Lam*' [2011] *University of New South Wales Law Review* 46, 3.

¹²⁷ Francesca Klug and Claire O'Brien, 'The First Two Years of the Human Rights Act' [2002] *Winter Public Law* 649, 654.

¹²⁸ Aileen Kavanagh, 'Unlocking the Human Rights Act: The Radical Approach to Section 3(1) revisited' (2005) 3 *European Human Rights Law Review* 259, 269. The interpretative provision in the UKHRA applies whenever legislation was enacted, s 3(1). The same is true for the VICHRA as it applies to all statutory provision, s 32.

normal methods of statutory interpretation but arguably they have not crossed into the improper arena of judicial law-making as was initially feared.¹²⁹

The language used in BORA is different than that used in the UKHRA providing only that a rights compliant interpretation will be preferred only when it 'can' be given, s 6. This has been interpreted as requiring that a reasonable interpretation be given, one that does not offer a strained legislative interpretation.¹³⁰ Arguably the different perspectives on interpretation offer by the NZ and UK Courts are not simply the product of the wording of their HRA's,¹³¹ but the context from which they were enacted. BORA was introduced as an ordinary statute, a watered down version of an intended constitutionally entrenched bill that met with public disapproval.¹³² While The NZ Court of Appeal has seized the initiative to create remedies under BORA it has not used the s 6 interpretive provision as an invitation to perpetrate judicial activism.¹³³

The VICHRA contains an additional provision in its interpretation section that provides construing legislation as human rights compatible must be done in a manner that is consistent with their purpose, s 32(1). This additional requirement seems to be a codification of UK jurisprudence around the limits of interpretation which prevents a Court from defeating the 'underlying thrust' of parliament's intention in producing a rights compatible interpretation.¹³⁴ This section confirms that the judiciary cannot abrogate the overriding intention behind legislation to the extent that an interpretation allows an occurrence that the

¹²⁹ Danny Nicol, 'Are Convention Rights a No-Go Zone for Parliament?' [2002] *Autumn Public Law* 436, 442-3.

¹³⁰ *MOT v Noort* [1992] 3 NZLR 269, 272.

¹³¹ Above n 38, 18.

¹³² Claudia Geiringer, 'The Dead Hand of the Bill of Rights? Is the *New Zealand Bill of Rights Act 1990* a Substantive Legal Constraint on Parliament's Power to Legislate' (2007) 11 *Octago Law Review* 389, 389.

¹³³ Petra Butler, 'Human Rights and Parliamentary Sovereignty in New Zealand' [2004] 35 *Victoria University of Wellington Law Review* 341, 7.

¹³⁴ Above n 107, 50-1.

legislation clearly disallows.¹³⁵ It is important to acknowledge the clash of intentions that may occur between a HRA and potential rights infringing legislation given that the doctrine of implied repeal does not normally apply to HRAs. The intention behind the enactment of a HRA should prevail to the extent that legislation be read expansively or restrictively, the reading in of words and the modification of words can be performed by Courts in seeking a rights compatible interoperation except in cases where to do so would defeat a fundamental feature of the legislation.¹³⁶ This broad interpretative power is supported by understanding that rights consistent interpretation is the primary remedy offered under a HRA and failing to adopt a broad approach to interpretation will undermine the purpose behind this provision.¹³⁷

It is difficult to argue that the use of the word ‘consistently’ in the VICHRA creates a presumption that the judiciary favours the purpose of the infringing legislation over that of the charter.¹³⁸ Such a position would undermine the ability of the VICHRA to provide an effective remedy. Article 2(3) of ICCPR requires that states provide an effective remedy for violations of rights. A narrow approach to an interpretation provision would not be in keeping with the international rule of law provided for by ICCPR, therefore interpretation provisions must be approached broadly to ensure that effective remedies can be provided.¹³⁹

The potential for a broad interpretation provision in an Australian federal HRA to create controversy and criticism is high. The public and media in Australia have been fervently opposed to the notion of judicial activism with the decision in *Dietrich v The Queen*,¹⁴⁰ denounced as unwarranted judicial interference and the creation of the implied freedom of

¹³⁵ Pamela Tate, ‘Some Reflections on Victoria’s Charter of Human Rights and Responsibilities’ (2007) 52 *Australian Institute of Administrative Law Reform* 18, 28.

¹³⁶ Simon Evans and Carolyn Evans, ‘Legal Redress under the Charter of Human Rights and Responsibilities’ (2006) 17 *Public Law Review* 264, 268.

¹³⁷ Above n 39, 41-9. A declaration of incompatibility is by no means a complete remedy for the parties before the court (it is an element of dialogue) and issuing one should be a last resort for a Court.

¹³⁸ Above n 107, 52.

¹³⁹ *Ibid*, 54.

¹⁴⁰ [1992] HCA 57.

political communication lead the High Court to be criticised as acting beyond its proper function.¹⁴¹ This level of criticism has reached an inappropriate and irresponsible level at times,¹⁴² and it seems highly likely it will remain and be refocused if a federal HRA was to be introduced. Despite this criticism a federal HRA would require a broad interpretation provision in order to fully implement Australia's obligation to provide an effective remedy for human rights infringements. It is also important to note that judicial activism can be confused for judicial consensus which will often align to emerging public consensus about what unequal legal positions warrant change and reflect emerging trends around rights.¹⁴³

Heads of Power

A federal HRA if faced with constitutional challenge would likely use the external affairs power,¹⁴⁴ in order to defend its validity.¹⁴⁵ The obligations imposed by ICCPR and ICESCR would likely form the content of a federal HRA. Despite being a party to these treaties Australia operates a dualist approach to international law and provision of accepted treaties will not have binding legal effect until they are mirrored in domestic legislation¹⁴⁶. The external affairs power is broad in scope however prospective legislation which attempts to domestically implement Australia's international obligations must pass a characterisation test so that it conforms to the relevant treaty and carries its provisions into effect.¹⁴⁷ The test for validity under the external affairs power was laid down in *Victoria v Commonwealth*:

¹⁴¹ Leslie Zines, 'Judicial Activism and the Rule of Law in Australia' in Tom Campbell and Jeff Goldsworthy (eds), *Judicial Power, Democracy and Legal Positivism* (Ashgate Dartmouth, 1999) 391, 395-6.

¹⁴² Sir Anthony Mason, 'No Place in a Modern Democratic Society for a Supine Judiciary' (1997) 35 *Law Society Journal* 51, 1. At times it was argued that this criticism could be construed as inciting contempt of court.

¹⁴³ Justice Kirby, 'Swearing in and Welcome Speech, High Court of Australia' (1996) *Australian Law Journal* 274, 276. The consensus among the public and the judiciary in the earlier history of this nation that allowed for the unequal treatment of non-white Australians has long been abandoned.

¹⁴⁴ *Commonwealth of Australia Constitution Act 1900* (Imp) s 51(xxix).

¹⁴⁵ Above n 29, 93.

¹⁴⁶ *Koowarta v Bjelke-Petersen* (1982) 153 CLR 168, 193.

¹⁴⁷ *Tasmanian Dams Case* (1983) 158 CLR 1, 131.

When a treaty is relied on under s 51(xxix) to support a law, it is not sufficient that the law prescribes one of a variety of means that might be thought appropriate and adapted to the achievement of an ideal. The law must prescribe a regime that the treaty has itself defined with sufficient specificity to direct the general course to be taken by the signatory states.¹⁴⁸

Whilst rights under the ICCPR are specific in nature there is concern that the implementation of ICESCR into a federal HRA could be more problematic as they are phrased in general terms and may lack the required sufficient specificity.¹⁴⁹ This concern is debatable given the expansive interpretation with which the High Court has defined the external affairs power and the reticent expressed by certain justices against reversing this broad reading.¹⁵⁰

Arguably some of the rights encapsulated in ICESCR contain the sufficient specificity in their wording in order to direct a general course towards protecting them domestically.

Article 6(1) of ICESCR recognises the right to work while Article 6(2) provides a number of steps to be taken in the full realisation of this right which include the provision of technical, vocational and training programs. It would seem that the wording of this Article would meet the test for sufficient specificity required by the external affairs power for treaty obligations to be carried into domestic legislation. Arguably at least some of the rights framed under ICESCR could be included in a federal HRA if they conform to the test of sufficient specificity.

Federalism

The federal nature of Australia's political landscape may create barriers that prevent a federal HRA from effectively protecting the human rights of all Australians. Federalism seeks to protect against centralisation of power and encourage regional diversity yet it prevents human

¹⁴⁸ *Victoria v Commonwealth* (1996) 187 CLR 416, 418.

¹⁴⁹ Above n 98, 36.

¹⁵⁰ Above n 132, 572. Justice Dawson stated '*Considerations of practicality make it necessary that the law should, as far as possible, take a consistent course. The constant re-examination of concluded questions is incompatible with that aim*'.

rights instruments at one level of government from benefiting others.¹⁵¹ A federal HRA that applies to the states may also violate the doctrine of implied governmental immunities if it restricts or burdens the states in the exercise of their constitutional powers.¹⁵²

The National Human Rights Consultation Committee (NHRCC) recommended in its 2009 report that a federal HRA should not extend to state and territory authorities.¹⁵³ The logic behind this recommendation is that imposing binding legal obligations on the states and territories would likely generate significant public opposition and without it they would be free to pursue their own approaches to human rights protection.¹⁵⁴

This approach would not allow uniform human rights jurisprudence to develop in Australia,¹⁵⁵ especially considering State Courts hear the bulk of criminal matters where human rights issues are most often raised.¹⁵⁶ How non-uniform the development of the singular common law would be under federal HRA is debatable given that s 39(2) of the *Judiciary Act 1903* (Cth) invests State Courts with federal jurisdiction in certain matters. A federal HRA could be drafted so that when State Courts are exercising federal jurisdiction or state jurisdiction when federal jurisdiction could have been invoked they will be required to

¹⁵¹ James Stellios, 'Federal Dimensions to the ACT *Human Rights Act*' (2005) 47 *Australian Institute of Administrative Law Forum* 33, 39.

¹⁵² *Austin v Commonwealth* (2003) 215 CLR 185, 258. The interpretation of state laws consistently with protected human rights, the tabling of ministerial compatibility statements and parliamentary human rights committees may be a burden on states constitutional powers.

¹⁵³ *National Human Rights Consultation Report* (2009), Recommendation 20. This opinion was also expressed by the then Solicitor-General, Stephen Gageler, in Appendix E of the report.

¹⁵⁴ Justin Gleeson, 'A Federal Human Rights Act- What Implications for the States and Territories?' (2010) 33 *University of New South Wales Law Journal* 110, 110-1.

¹⁵⁵ Carolyn Evans and Simon Evans, *Australian Bills of Right: The Law of the Victorian Charter and the ACT Human Rights Act* (LexisNexis Butterworths, 2008) 155-6. Australia has a singular common law with the High Court at its hierarchal zenith. It would be inappropriate for state or territory courts to develop the common law in respect to their individual HRA as this would fracture the notion of uniform common law development.

¹⁵⁶ *Ibid* 132. The United Nations Human Rights Committee have expressed the view that federalism should not exclude the provision of an effective remedy for a human rights violations which is an obligation at international law.

develop the singular common law in accordance with the rights protected under a federal HRA.¹⁵⁷

An alternative would be to have a federal HRA apply equally across all jurisdictions in Australia. This holistic approach would serve to better protect rights and not threaten non-uniform development of the common law. Such an approach would not be in keeping with the purpose of the dialogue model as s 109 of the Constitution would serve to invalidate state laws that are inconsistent with the federal HRA whereas inconsistent federal laws would remain valid due to retention of parliamentary supremacy in the chosen model.¹⁵⁸ Whatever method used in a federal HRA it is clear that federalism will affect the uniformity of rights protection across Australia.¹⁵⁹

Another option for achieving uniform human rights protection across all Australian jurisdictions may be for the states to refer their power to legislate over human rights to the commonwealth government under s 51(xxxvii) of the Constitution. When powers are referred they will be read in a narrow fashion,¹⁶⁰ and may be limited by an expiry period,¹⁶¹ therefore this method may not offer the most robust protection of human rights holistically across Australia. Another alternative to achieving uniform human rights protection may be the creation of a federal HRA which is then mirrored by state legislation. Given the lack of coercion over the states and enormous political will required from all state governments in achieving this option it seems highly unlikely that it would succeed.

¹⁵⁷ Above n 136, 132-3. This would not give State Courts the ability to develop the common law in reference to a federal HRA in all matters before it.

¹⁵⁸ Rosalind Dixon, 'A Minimalist Charter of Rights for Australia: The UK or Canada as a Model' (2009) 37 *Federal Law Review* 335, 361.

¹⁵⁹ The essence of the dialogue model could be slightly more retained if parliament expressed that it did not intend to cover the field with a federal HRA (*Clyde Engineering Co Ltd v Cowburn* (1926) 37 CLR 466) so that only state laws that were directly inconsistent would be rendered invalid.

¹⁶⁰ *Thomas v Mowbray* (2007) 233 CLR 307, 208

¹⁶¹ *The Queen v Public Vehicles Licensing Appeal Tribunal (Tas.); Ex parte Australian National Airways Pty Ltd* (1964) 113 CLR 207.

Chapter III: The Arguments for a HRA

This chapter will focus on discussing the main arguments in favour of creating a federal HRA for Australia. Specifically these arguments address the advantages a HRA can deliver mainly improved methods of human rights protection and commitment to the internationally recognised standards of human rights protection. A Federal HRA would improve the domestic protection of human rights in the key areas:

- The formulation of new laws
- Directing the conduct of public authorities
- Interpretation of other legislation, both existing and future.¹⁶²

A Fill in Gaps:

Despite possessing (by comparison) a decent human rights record there is significant scope for improvement in the way rights are protected in Australia.¹⁶³ Currently the main Commonwealth statutes that serve to protect rights are:

- *Racial Discrimination Act 1975* (Cth)
- *Sex Discrimination Act 1984* (Cth)
- *Disability Discrimination Act 1992* (Cth)
- *Australian Human Rights Commission Act 1986* (Cth)
- *Privacy Act 1988* (Cth)
- *Age Discrimination Act 2004* (Cth).¹⁶⁴

¹⁶² Edward Santow, 'Impact of an Australian Human Rights Act on Refugee Law' (2009) 16 *Australian Journal of Administrative Law* 183, 183.

¹⁶³ Above n 65, 15.

¹⁶⁴ Above n 65, 42.

While these acts domestically implement some of Australia's international human rights obligations they do not do so to the full extent required by their relevant treaties. This seems divergent to the enthusiasm Australia displayed towards human rights shortly after the Second World War by being one of the original signatories to the *Universal Declaration of Human Rights 1948*.¹⁶⁵ The four specific anti-discrimination acts fall short of protecting against 'any' form of discrimination as required by Article 26 of ICCPR.¹⁶⁶ There is significant disparity between the protections offered by the international instruments to which Australia has acquiesced and the extent to which these protections have been domestically implemented. Anti-discrimination legislation has been narrowly drafted and therefore interpreted in a narrow manner by the Courts and has therefore failed to clearly define equality or provided achievable goals in realising equality.¹⁶⁷

These Acts are also fraught with exemption provisions, an example of which is s 37(d) of the *Sex Discrimination Act 2004 (Cth)* which allows for discrimination on the basis of gender in relation to the practices of a body established for religious purposes.¹⁶⁸ Such an exemption seems contrary to the text of the *Convention on the Elimination of All Forms of Discrimination Against Women* which calls on parties to take appropriate measures to eliminate practices based on the inferiority or superiority of either of the sexes.¹⁶⁹ These Commonwealth acts may also conflict with similar states anti-discrimination legislation creating a lack of uniformity in rights protection.¹⁷⁰

¹⁶⁵ Francine Johnson and Edward Santow, 'How Would an Australian Human Rights Act Impact Business' (2010) 38 *Australian Business Law Review* 7, 7.

¹⁶⁶ Elizabeth Evatt, National Implementation: The Cutting Edge of International Human Rights Law (*Law and Policy Paper 12*) (Centre for International and Public Law, Australian National University, Canberra, 1999) 20-1.

¹⁶⁷ Above n 16, 164-5.

¹⁶⁸ Hilary Charlesworth and Sara Charlesworth, 'The Sex Discrimination Act and International Law' (2004) 47 *University of New South Wales Law Journal* 21, 23-4.

¹⁶⁹ *Convention on the Elimination of All Form of Discrimination against Women*, Open for signature 18 December 1979, 1249 UNTS 13 (entered into force September 3 1981), Article 5.

¹⁷⁰ Beth Gaze, 'Context and Interpretation in Anti-Discrimination Law' [2002] 26 *Melbourne University Law Review* 325.

The weakness of current legislative human rights protection coupled with the paucity of rights protection contained in the constitution indicates the need for a holistic HRA that ‘rounds out’ these existing gaps. This ad hoc approach does not provide an effective check on executive and legislative power that may unreasonably infringe human rights, as Sir Anthony Mason commented:

Human rights are seen as a countervailing force to the exercise of totalitarian, bureaucratic and institutional power- widely identified as the greatest threats to liberty of the individual and democratic freedom in this century.¹⁷¹

This lack of holistic rights protection which gives potential to human rights abuses could be balanced out by the work of strong democratic institutions. Australia has an abundance of democratic institutions yet these may not be enough to ensure that human rights receive sufficient consideration and therefore adequate legislative protection.¹⁷² An example of this can be seen in the *Native Title Amendment Act 1998* (Cth) which reigned in rights affirmed in the *Wik*,¹⁷³ case providing that the *Racial Discrimination Act* was not to operate when there was clear legislative intention that native title rights be overridden.¹⁷⁴ A broad HRA that protected against all forms of discrimination may have prevented direct abrogation of native title rights, especially so soon after their realisation.¹⁷⁵ The NHRCR received the suggestion for multiple submissions that Australia’s democratic institutions do not always work effectively to protect human rights citing examples of required mandatory detention for asylum seekers, the deportation of Australian citizens on migration grounds and restrictions on personal liberty imposed by anti-terrorism legislation.¹⁷⁶

¹⁷¹ Sir Anthony Mason ‘A Bill of Rights for Australia’ (1989) 5 *Australian Bar Review* 79, 79.

¹⁷² Margaret McMurdo, ‘An Australian Human Rights Act: Quixotic Impossible Dream or Inevitable Natural Progression’ (2010) 13 *Southern Cross University Law Review* 37, 10.

¹⁷³ *Wik People’s v Queensland* (1996) 187 CLR 1.

¹⁷⁴ George Williams, *A Charter of Rights for Australia* (University of New South Wales Press Ltd, 2007) 45-6.

¹⁷⁵ A HRA would also have brought public attention to the suspension of native title rights and allowed judicial comment on the rights restriction imposed by the act.

¹⁷⁶ National Human Rights Consultation Report (2009), 265-6.

It is not submitted that a federal HRA would serve to prevent parliamentary erosion of existing or newly implemented rights as our traditional style of democracy requires that the supreme will of parliament not be abrogated. However an instrument that requires consideration of a broad range of human rights in the legislative process is likely to reduce restrictions on rights through increased scrutiny and accountability before the public. The absence of adequate parliamentary safeguards contained in Australia's ad hoc system of rights protection increases the likelihood of human rights infringements.¹⁷⁷ By removing complete consideration of rights from the parliament and allowing judicial comment, the protection of rights becomes independent of the political process and their consideration is open to another arm of government.¹⁷⁸

Dialogue Improves Government Accountability

A federal HRA would also serve to improve accountability of the legislature when it comes to necessary considerations of human rights in developing statute. The idea behind a dialogue model HRA is that it allows legislative response to Court decisions that involve determinations of human rights, hopefully motivating the legislature to achieve their original objective in a manner that is consistent with human rights.¹⁷⁹

The presence of both parliamentary supremacy and monopoly over rights in the Australian democracy cannot be sustained as the best practice of rights protection.¹⁸⁰ The judiciary

¹⁷⁷ David Malcolm, 'Human Rights- A Current Legal perspective' (Delivered at the Human Rights and the Protection of Innocence Symposium 26 March 2004) 26-7 <http://www.supremecourt.wa.gov.au/files/Human_Rights-Current_Legal_Perspective_%2026Mar04.pdf>.

¹⁷⁸ Terence Higgins, 'Australia's First Bill of Rights- Testing Judicial Independence and the Human Rights Imperative' (Delivered at the National press Club 3 March 2004) <<http://www.courts.act.gov.au/magistrates/page/view/313#higgins>>

¹⁷⁹ Peter Hogg, Allison Thornton and Wade Wright, 'A Reply on *Charter* Dialogue Revisited' (2007) 45 *Osgoode Hall Law Journal* 193, 194.

¹⁸⁰ 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, 2-3.

should be given a legitimate role to play in the protection of rights, utilising its expert skills,¹⁸¹ in the sense that parliament loses its monopoly over rights dialogue whilst retaining supreme legislative power.¹⁸² The skills of the courts come from applying general law to individual cases, paying attention to particular circumstances to ensure individuals are not unfairly prejudiced by law that is intended to serve the majority.¹⁸³ Removing the parliamentary monopoly over human rights has been stated by the European Court of Human Rights to better protect minority rights:

Democracy does not simply mean that the views of a majority must always prevail; a balance must be achieved which ensures the fair and proper treatment of minorities and avoids any abuse of the dominant position.¹⁸⁴

The benefit of having the judiciary participate in the dialogue around human rights is that the legislature will be able to reflect and respond accordingly when limitations upon protected rights are determined to be unreasonable. Judicial consideration of rights does not violate traditional notions of democracy, as Capelletti comments:

Far from being inherently antidemocratic and antimajoritarian, rights emerge as a pivotal instrument for shielding the democratic and majoritarian principles from the risk of corruption. Our democratic ideal is not one in which majoritarian will is omnipotent.¹⁸⁵

An example of this dialogue is the legislature's response to an interpretation the judiciary gives to legislation. If the parliament is unsatisfied with an interpretation the judiciary has given to a provision then it may choose to amend the relevant provision to specifically

¹⁸¹ Courts are more likely to consider the impact of legislation upon affected individuals who may have not been adequately considered in the majoritarian utilitarianism that parliament engages in.

¹⁸² Above n 156, 2.

¹⁸³ Jeremy Webber, 'A Modest (but robust) Defence of Statutory Bills of Rights' in Tom Campbell, Jeffery Goldsworthy and Adrienne Stone (eds), *Protecting Rights Without a Bill of Rights: Institutional Performance and Review in Australia* (Ashgate, 2006) 263, 276.

¹⁸⁴ *Young, James and Webster v United Kingdom* [1981] ECHR 4, 63. The judiciary is in a far better position to recognise and protect human rights of individuals than the legislature is.

¹⁸⁵ Mauro Cappelletti, 'Repudiating Montesquieu? The Expansion and legitimacy of "Constitutional Justice"' (1985) 35 *Catholic University Law Review* 1, 28.

preclude the first interoperation offered. However if the judiciary has identified a human rights infringement overlooked by the parliament then they may choose to leave the rights compliant interpretation intact. This can be seen in the NZ context where the Court of Appeal read in the remedy of damages to BORA which the parliament choose to let stand after consultation with the Law Commission.¹⁸⁶

The other dialogue that would occur between the judiciary and parliament results from the issuing of a declaration of incompatibility. Although not affecting the validity of the infringing legislation the declaration sends a strong public message to parliament that it should reconsider the encroachment on human rights it has created.¹⁸⁷

As of 31 July 2013 the UKHRA (which has been operating since 2 October 2000) has been used to issue 28 declarations of incompatibility of which 19 became final (not overturned on appeal). These 19 incompatibilities were responded to by the legislature in the following manner:

- 11 were remedies by later primary legislation
- 3 were remedied by a s 10 remedial order
- 4 had already been remedied at the time the declaration was made
- 1 was under consideration for how to apply a remedy.¹⁸⁸

This high rate of response, divorced from any legal obligation to adhere to declarations of incompatibility, indicates that in the UK dialogue stemming from the judiciary has caused parliament to reconsider the effect enacted legislation has on human rights. Acceptance of the judiciary's expert opinion and taking action to remedy incompatibilities reflects a legislature that is accepting of the advantages of the dialogue process. Due to the public profile attached

¹⁸⁶ Above n 76.

¹⁸⁷ Lord Walker, 'Problems of Human Rights Legislation: What Difference can a Human Rights Charter Make?' (2007) 81 *Australian Law Journal* 923, 925.

¹⁸⁸ Report to the Joint Committee on Human Rights on the Government Response to Human Rights judgements 2012-13, Ministry of Justice, 45.

to human rights a state must display a committed attitude to their protection (illustrated by engaging in the dialogue process) in order to justify itself to its citizens.¹⁸⁹ Legislative structures that promote inter-institutional dialogue between the different branches of government are preferable to a parliamentary or judicial monopoly over human rights protections.¹⁹⁰ Speaking about deficiencies in human rights protection in Australia, Debeljk was to comment about the rights monopoly held by parliament:

[the representative arms of government have a monopoly over human rights] This monopolistic power places rights-protective common law and statutory rules in a precarious position, and allows the international human rights regime to be manipulated as it suits political fortunes.

Dialogue is also generated through the mechanisms that increase scrutiny of bills in their pre-legislative stage (parliamentary committee and tabling of report by responsible minister). This open and transparent consideration of the effect prospective legislation may have on human right may at least cause parliament to realise the deleterious consequences of potential statute. The hostile nature of parliamentary debate does not always allow for proper consideration of the eventual negative consequences legislation may have on individuals,¹⁹¹ which may not become apparent until there is legal challenge through the courts. Senator Andrew Bartlett when speaking about the insertion of a private clause into the *Migration Act* in 2001,¹⁹² commented about the lack of appreciation that can surround law making:

They probably wanted bad law; they might not have wanted very bad law. We probably got extraordinarily appalling law and we do not even know if we have got it yet. We will not even know for another year or two, until we finally get a High Court case about what the hell this privative clause means.¹⁹³

¹⁸⁹ Martti Koskeniemi, 'Intolerant Democracies: A Response' (1996) 37 *Harvard Law Journal* 231.

¹⁹⁰ Julie Debeljak, 'The Human Rights Act 1998 (UK): The Preservation of Parliamentary Supremacy in the Context of Rights Protection' (2003) 9 *Australian Journal of Human Rights* 10, 2.

¹⁹¹ John Steyn, 'The Intractable Problem of the Interpretation of Legal Texts' (2003) 25 *Sydney Law Review* 5, 13.

¹⁹² *Migration Act 1958* (Cth) s 474. This privative clause reduced the access to judicial review in respect to migration and refugee determinations made under the act.

¹⁹³ Commonwealth, *Parliamentary Debates*, Senate, 27 June 2002, 3005.

The advantages of dialogue in encouraging additional parliamentary scrutiny and accountability is not limited to interactions between the judiciary and legislature. In the formulation of policy and the provision of public services the executive would also participate in the dialogue process, responding to human rights complaints from individuals and the Australian Human Rights Commission.¹⁹⁴ Civil society would also be encouraged to engage in the debate surrounding human rights issues when HRA mechanisms are put in place that increase the transparency of how legislation and policy affect human rights.¹⁹⁵

Improved Human Rights Protection

One of the major arguments in favour of creating a HRA is that it will enable better protection of human rights, largely through the operation of the interpretative provision which creates a rebuttable presumption that legislation is to be construed in a rights compliant fashion. A federal HRA that encompasses Australia's international obligations in domestic legislation may help to prevent interpretations of other statutes that are contrary to these obligations.¹⁹⁶

In *Al-Kateb v Godwin*,¹⁹⁷ the High Court held in a 4:3 split majority decision that s 196 and s 198 of the *Migration Act 1958* (Cth) were unambiguous and required the indefinite detention of Mr Al-Kateb who was a stateless individual that no other country would accept. Such a finding was grossly inconsistent with Australia's obligation under Articles 7,¹⁹⁸ and 9,¹⁹⁹ of ICCPR yet the majority of the High Court was unwilling to impute human rights compliant

¹⁹⁴ Andrew Byrnes, Hilary Charlesworth and Gabrielle McKinnon, *Bills of Rights in Australia: History, Politics and Law* (University of New South Wales Press, 2009) 51-4.

¹⁹⁵ Above n 45, 170.

¹⁹⁶ Above n 53, 119

¹⁹⁷ (2004) 219 CLR 562,

¹⁹⁸ No one shall be subject to torture inhumane or degrading treatment or punishment.

¹⁹⁹ Everyone has the right to liberty and security of person. No one shall be subject to arbitrary arrest or detention.

interpretation given the apparent express language of the statute with allowed for indefinite detention. The United Nations Human Rights Commission has indicated that when detention is carried out for immigration purposes and there is no prospect of removal in the foreseeable future it will constitute arbitrary detention, in breach of Article 9 of ICCPR.²⁰⁰

Those in dissent (Gleeson CJ, Gummow and Kirby JJ) found that the *Migration Act 1958* (Cth) was ambiguous as to whether an individual was to be held in indefinite detention when there was no real prospect of removal from Australia.²⁰¹ Those justices were able to then favour an interpretation in keeping with Australia's obligations under ICCPR using the jurisprudence of *Minister of Immigration v Teoh* and resolving that an intention to abrogate from a fundamental right was not present in the express wording of the legislation.²⁰²

If Australia possessed a federal HRA it is likely that the result in *Al-Kateb* would have been different and produced an outcome that was not incompatible with human rights. The requirements for visa eligibility and detention under the *Migration Act* would have been construed in reference to protected rights,²⁰³ mainly the right to liberty. Under the UKHRA courts have been empowered to interpret unambiguous legislation in a human rights compliant fashion,²⁰⁴ willing to read down language but only to the extent it does not contradict the underlying thrust of parliament's purpose in enacting the legislation.²⁰⁵ This is mirrored in s 32 of the VICHRA which does not require ambiguity before a human right interpretation can be offered. Looking at the Australian context Rolls commented that:

²⁰⁰ *Baban v Australia*, Communication No 1014/2001 (2003), 7.2.

²⁰¹ Above n 166, 575.

²⁰² *Coco v The Queen* (1994) 179 CLR 427. The common law principle of legality prevents an imputation that legislation is to violate fundamental human rights unless express wording indicates the contrary.

²⁰³ Above n 144, 185.

²⁰⁴ Hilary Charlesworth, 'Human Rights and Statutory Interpretation' in Stephen Bottomley and Suzanne Corcoran (eds), *Interpreting Statutes* (The Federation Press, 2005) 114.

²⁰⁵ In *R v A* (No 2) [2002] 1 AC 45 the House of Lords read down the language in a statute so as to only impose an evidentiary and not a legal burden against the adducing of evidence of a complaints sexual history in rape cases. It was held that a legal burden could infringe the accused's right to a fair trial.

If the *Charter* had applied in the *Al-Kateb* case, the majority judges would not have been able to avoid considering human rights issues. They would have been required to interpret the relevant provisions of the *Migration Act* compatibility with human rights.²⁰⁶

A federal HRA with an interpretative provision similar to that contained in the VICHRA and UKHRA,²⁰⁷ would allow the judiciary in Australia to do justice to human rights in a way not previously available.²⁰⁸ Such a provision allows the Courts to give stronger consideration to human rights,²⁰⁹ whilst allowing the legislature to retain its supremacy by positively or negatively responding to a Court's interpretation. If the purpose behind the *Migration Act* was to efficiently process visa applications and removed failed asylum seekers from Australia then an interpretation that disallowed indefinite detention would not have frustrated this purpose.²¹⁰ Such an interpretation would have been in keeping with the jurisprudence contained in the UKHRA and VICHRA and would have been obedient to Australia's obligations under ICCPR.

²⁰⁶ Above n 53, 131.

²⁰⁷ The interpretation provision in BORA and ACTHRA are arguably weaker and the NZ courts have been less aggressive in offering human rights compliant interpretations,

²⁰⁸ *Cachia v Faluyi* [2001] 1 WLR 1966.

²⁰⁹ An interpretation provision that requires Courts to consider human rights compliant interpretations in all circumstances not just in instances of ambiguous language codifies a strong human rights presumption. It is a stronger position than the offered in *Minister of Immigration v Teoh*.

²¹⁰ Above n 165, 133-4.

Creating a Culture of Human Rights

Creating a federal HRA would also improve the consideration placed on human rights compliance by those who supply public services (normally the executive). Holding authorities to directly enforceable high standards will help prevent abuses of power and foster policy change in the public service that take into account the circumstances of individuals who are in most need of assistance.²¹¹ Governments utilise diverse organisational arrangements to manage and deliver public services,²¹² so rights should be enforceable against all those party to these arrangements in order to develop a complete culture of rights.

The British Institute of Human Rights (BIHR) released a case study in 2008 examining the effect of UKHRA on the public service.²¹³ The report cites multiple real life examples where consideration of the rights protected under the UKHRA by members of the public service resulting in the improved treatment of those in need. In the first case study an older woman in a care facility was strapped into a wheelchair due to staff fearing she would injure herself if unrestrained. A consultant indicated that such treatment could be considering degrading and may be contrary to Article 3 of ECHR, noting the distressed state of the woman. The staff agreed the woman should be unstrapped and were then encouraged to support her in improving her mobility.²¹⁴

In another situation a learning disabled schoolgirl was denied transport to school despite it being the policy of the local authority to provide this, potentially discriminating against her and breaching her right to respect for private life. After attending a BIHR training session an independent parental supporter encouraged the girl's mother to challenge this decision using

²¹¹ Above n 136, 273-4.

²¹² Explanatory Memorandum, *Charter of Human Rights and Responsibilities Bill 2006* (Vic), p 4.

²¹³ British Institute of Human Rights, *Changing Lives* (2008).

²¹⁴ *Ibid*, 6.

rights based language and they were successful in having it reversed.²¹⁵ Such case studies illustrate the real impact a HRA has on individuals in everyday situations by requiring those who provide public service to meet their positive obligations to act in a human rights complaint manner.²¹⁶ A 2006 parliamentary review of the UKHRA supported the view that the quality of public services had been improved through the mechanisms in the act that require public authorities to consider the impact on human rights that their actions had.²¹⁷

Another way in which a federal HRA could further create a culture of rights would be to empower the Australian Human Rights Commission to review the effect of commonwealth legislation and the common law upon human rights. The ACTHRA in s 41 effectively gives the ACT Human Rights Commission,²¹⁸ authority to conduct human rights audits particularly into closed areas in which the government has total control and where rights abuses might otherwise go unnoticed.²¹⁹ Following an audit of the Quamby Juvenile Detention Centre in 2006 the ACT Chief Minister, Jon Stanhope, was to comment:

A perfect, practical example of a dialogue system at work. The process was conducted in such a collaborative way that by the time the final report was written, most of its recommendations had already been acted upon. This, surely, is a result worth any number of front-page Supreme Court judgements exposing rights abuses against juvenile offenders.²²⁰

The ACT government responded to this report in February 2008,²²¹ agreeing in full with 70 of the 98 recommendations contained in the report. The changes implemented following the report, including using all available detention facilities to reduce overcrowding, should be

²¹⁵ Above n 180, 15.

²¹⁶ Above n 180, 25-6.

²¹⁷ House of Lords and House of Commons Joint Committee on Human Rights, *The Human Rights Act: The DCA and Home Office Reviews* (32nd Report, 2005-6) November 2006.

²¹⁸ Established by the *Human Rights Commission Act 2005* (ACT)

²¹⁹ Above n 45, 163.

²²⁰ Jon Stanhope, 'ACT Human Rights Community Forum' (Speech delivered at the Human Rights Forum, Canberra, 1 May 2006).

²²¹ ACT Government, *Government Response to the Recommendations of the Report of the Human Rights Audit on the Operation of ACT Correctional Facilities under Corrections Legislation* (2007).

seen as a positive contribution to human rights protection arising from inter-institutional dialogue.²²² The ACTHRA has served as a catalyst for human rights audits providing a framework of protected rights against which territory legislation and institutions can be measured.²²³ This dialogue did not emanate from the judiciary but rather from an institution purposefully directed by the ACTHRA to measure human rights compliance, demonstrating that dialogue is not reserved for interaction between the Courts and Parliament.

The creation or improvement of a human rights culture is critical for the success for any potential HRA. The rights protected by a federal HRA will be limited in operation unless they coexist with a supportive legal, political and cultural environment. An example of this can be seen in the 1936 constitution of the Soviet Union which contained a bill of rights.²²⁴

Operating in isolation this instrument could do very little to protect rights when the rights culture needed to support it did not exist.

International Jurisprudence and Education

Australia has become intellectually isolated from international trends in the development of human rights jurisprudence.²²⁵ Of all the nations that previously relied upon the common law to protect human rights Australia remains alone in placing faith in this rebuttable method of protection. This is a difficult position to justify given other nations with similar legal systems have adopted human rights instruments that afford a better standard of rights protection.²²⁶

Australia is a party to the First Optional Protocol under ICCPR which provides an individual complaints mechanism which investigates claims that individual's rights under ICCPR have

²²² Above n 45, 165.

²²³ Above n 45, 164-5.

²²⁴ George Williams, *A Charter of Rights for Australia* (University of New South Wales Press Ltd, 2007) 87.

²²⁵ James Spigelman, 'Access to Justice and Human Rights Treaties' (2000) 22 *Sydney Law Review* 141, 150.

²²⁶ David Malcolm, 'A Human Rights Act for Australia' (2006) 8 *University of North Dame Australia Law Review* 9, 27-8.

been violated by a member state. The ability of this protocol to provide an effective remedy is questionable as it does not produce a binding resolution on the offending state. Malcolm commented that ‘*that the best an aggrieved Australian can hope for is a short-lived international embarrassment for the government*’.²²⁷ Arguably the only positive effect this mechanism had on Australian law was from the case of *Toonen v Australia*.²²⁸

This approach is out of keeping with current jurisprudence surrounding the right to a remedy under ICCPR. As discussed in Chapter II Article 2(3) of ICCPR requires that states provide an effective remedy for violations of rights contained in that instrument. The optional protocol cannot provide an enforceable domestic remedy let alone provide for damages as BORA and UKHRA does. The current access to a remedy for an infringement of internationally recognised human rights in Australia falls far short of what is provided for in other jurisdictions.

A federal HRA would allow international precedent involving human rights to play a more active role in the Australian Courts.²²⁹ The Canadian Supreme Court, The House of Lords and the New Zealand Court of Appeal have been developing jurisprudence around concepts of proportionality, limitation and interpretation which could be referred to in creating a federal HRA for Australia. This would cause Australian law to develop in a comparable manner to other similar democratic countries rather than allowing our human rights jurisprudence to remain sedentary.²³⁰

²²⁷ Ibid, 29.

²²⁸ CCPR/C/50/D/488/1992. This case resulted in the federal government enacting the *Human Rights Sexual Conduct Act 1994* (Cth) that legalised sexual relations between consenting adults throughout Australia, overriding archaic provision in Tasmania’s *Criminal Code Act 1924* (Tas) (s 122(a), s 122(b) and s 123) which criminalised sexual contact between consenting adult males. The UNHRC had held that such laws were an arbitrary interference with Mr Toonen’s right to privacy and had the effect of making him unequal before the law.

²²⁹ ACTHRA s31(1) and VICHRA s 32(1) specifically state that international law and the judgements of domestic, foreign, international courts and tribunals relevant to a human right may be considered in interpreting a statutory provision. Such a provision should be included in a federal HRA

²³⁰ Above n 3, 29.

The enactment of a federal HRA would also likely reduce criticism from UN treaty monitoring bodies and allow Australia to be seen as a legitimate contributor to the international human rights debate by enabling Australian Courts to comment on relevant rights issues.²³¹ Both the UN Human Rights Committee and the Committee on Economic, Social and Cultural Rights have been critical of Australia for failing to completely domestically implement rights and remedies under the relevant treaties they monitor. The absence of comprehensive legal framework at the federal level for the protection of human rights was the focus of their criticism.²³² These should not be seen as reasons in themselves to enact a HRA,²³³ but rather they are positive corollaries resulting from providing human rights with greater legal protection.

An Australian charter of rights may also serve to educate the majority of the Australian public about what rights are actually afforded protection in Australian law. Improvements in human rights education would also lead to an improved rights culture as the bureaucracy becomes more appreciative of human rights when providing public services.²³⁴ It may be difficult for citizen to accurately identify what rights they actually enjoy when they are scattered throughout statute and the common law. A 2006 survey found that the majority of Australians thought their human rights were already protected by a charter or bill. After being informed of the absence of an Australian charter of rights an even higher majority indicated they would be in favour of such an instrument.²³⁵ The 2009 NHRCC found a very high level of community support in favour of enacting a charter of rights or a human rights act for

²³¹ Above n 153, 277-8.

²³² Human Rights Committee, Consideration of Reports Submitted by States Parties Under Article 40 of the Covenant: Concluding Observations of the Human Rights Committee- Australia, UN Doc CCPR/C/AUS/Co/5 (2009). Committee on Economic, Social and Cultural Rights, Considerations of Reports Submitted by States Parties Under Articles 16 and 17 of the Covenant: Concluding Observations of the Committee on Economic, Social and Cultural Rights- Australia (22 May 2009).

²³³ Michael Kirby, 'Consensus and Dissent and the Proposal for an Australian Statute of Rights' (2008) 12 *Southern Cross University Law Review* 129, 145.

²³⁴ Above n 115, 35.

²³⁵ Above n 193, 67-8.

Australia,²³⁶ identifying that public opinion supports the arguments in favour of a human rights act.

²³⁶ 87.4 percent of submissions which discussed the option of enacting a HRA for Australia were in support of it.

Chapter IV: The Arguments against a HRA

This chapter will critically examine the main arguments that oppose the enactment of a HRA for Australia. Many of the arguments share similarities to arguments that opposed the enactment of a constitutionally embedded bill of rights for Australia. The flaws in these arguments will be identified in order to illustrate that a dialogue model federal HRA represents the best practice for rights protection in Australia.

Current Human Rights Protection is Adequate

Opponents of a HRA would suggest that current human rights protection in Australia is adequate and that our democratic institutions are well equipped to defend the individual rights of citizens.²³⁷ As stated in the introduction human rights, at a federal level, are protected by three instruments:

- The Constitution
- The Common Law
- Commonwealth legislation.²³⁸

The constitution protects very few rights and those that it does purport to protect are given limited scope.²³⁹ It is important to remember that the Constitution was never intended to preserve and enshrine the rights of the Australian people but rather share power between the

²³⁷ Julian Leaser, 'Responding to some Arguments in Favour of a Bill of Rights' in Ryan Haddrick and Julian leaser (eds), *Don't Leave Us with the Bill: The Case Against an Australian Bill of Rights* (The Menzies Research Centre Limited, 2009) 31, 52-6.

²³⁸ The free and independent press that operates in Australia is also seen as an institution that aids in preserving the freedoms of citizens.

²³⁹ *Adelaide Company of Jehovah's Witnesses Inc v Commonwealth* (1943) 67 CLR 116 and *Krygger v Williams* (1912) 15 CLR 366 both reveal that freedom of religion has been offered very narrow protection. The right to trial by jury under s 80 of the Constitution has been described as practically worthless as it only applies to charges made on indictment coupled with the fact the majority of criminal prosecution occur in the jurisdiction of the states. Geoffrey Sawyer, *Australian Federalism in the Courts* (Melbourne University Press, 1967) 19.

Commonwealth and the States.²⁴⁰ One prevalent issue that surrounded federation was the retention of adequate powers for the states, namely the ability to legislate restrictively in regards to local Aboriginal populations and to restrict the rights of other non-Europeans.²⁴¹

The Tasmanian Attorney General at the time of the first and second Constitutional Conventions, Inglis Clark, can be credited as the main proponent for the inclusion of express rights in the constitution. Clark envisioned a provision that would provide equal protection under the law for all Commonwealth citizens, however this was to only survive the drafting process as the weak s 117 which prohibits discrimination only on the basis of state residency.²⁴² Robert Garran, who chronicled the federation debates, dismissed the idea of securing human rights protection in the Constitution stating that they were ‘*an interference with state rights, on behalf of popular rights: an interference undoubtedly justifiable, if necessary, but if not necessary, better dispensed with*’.²⁴³ Given the weak protection offered by the express rights and the move away from creating implied rights which the High Court experimented with in the 1990’s, it is clear that the Constitution cannot serve as an effective instrument for protecting human rights due to the restrictive nature in which the High Court has interpreted the human rights it protects.²⁴⁴

The manner in which the common law protects rights is mainly through a developed doctrine of statutory interpretation.²⁴⁵ This has been described both as a ‘common law bill of rights’ or ‘the principle of legality’. Given the lack of an Australian HRA, with an interpretive

²⁴⁰ Above n 3, 6.

²⁴¹ Hilary Charlesworth, ‘Who Wins under a Bill of Rights?’ (2006) *The University of Queensland Law Journal* 39, 40. Examples would include the denial of mining licenses to Asian and African migrants without government permission and the arbitrarily unfair tests imposed by the *Immigration Restriction Act 1901* (Cth),

²⁴² Above n 2, 62-6.

²⁴³ Robert Garran, *The Coming Commonwealth: An Australian Handbook of Federal Government* (Kessinger Publishing, 1897) 173.

²⁴⁴ Sir Anthony Mason, ‘The Australian Constitution in Retrospect and Prospect’ in Geoffrey Lindell (eds), *Reflections on the Australian Constitution* (Federation Press Sydney, 2003) 216-7. The Australian Constitution has been described as frozen instrument when compared to the judicial development of human rights that has occurred in other common law countries.

²⁴⁵ James Spigelman, ‘The Common Law Bill of Rights’ in *Statutory Interpretation and Human Rights: McPherson Lecture Series* (University of Queensland Press, 2009), vol 3, 9.

provision that requires consideration of protected human rights when interpreting statute, the principle of legality remains the main tool by which the judiciary can defend the protection of human rights.²⁴⁶ The principle of legality provides that when interpreting legislation a court will not impute an intent to abrogate fundamental rights unless there appears an express intent to do so.²⁴⁷ The High Court expressed this principle in *Potter v Minahan*,²⁴⁸ and it was reinforced more recently in *Coco v The Queen*.²⁴⁹ Gleeson commented about the principle of legality, stating:

Courts will decline to impute to parliament an intention to abrogate or curtail fundamental human rights or freedoms unless such an intention is clearly manifested by unambiguous language, which indicates that parliament has directed its attention to the rights and freedoms in question, and has consciously decided upon abrogation or curtailment.²⁵⁰

Despite the presumption given to fundamental rights provided by the principle there is uncertainty regarding what actually constitutes a fundamental human right?²⁵¹ An example of this can be seen from *Australian Crime Commission v Stoddart*,²⁵² in which the High Court determined that no distinct or separate privilege existed against spousal incrimination in common law.²⁵³ The decision shows the difficulty of solely developing rights at common law as invariably the only tool a judge has at his or her disposal is the judicial history surrounding an alleged fundamental human right.²⁵⁴ A HRA would not suffer from this impediment as it would specifically list the human rights that are to be protected thus removing uncertainty as to what human rights are to be considered fundamental.

²⁴⁶ Wendy Lacey, *Implementing Human Rights Norms: Judicial Discretion & Use of Unincorporated Conventions* (Presidian Legal Publications, 2008) 49.

²⁴⁷ Above n 14, 85-6.

²⁴⁸ (1908) 7 CLR 277.

²⁴⁹ (1994) 179 CLR 427, 437.

²⁵⁰ Murray Gleeson, 'The Meaning of Legislation: Context, Purpose and Respect for Fundamental Rights' (2009) 20 *Public Law Review* 26, 33.

²⁵¹ Dan Meagher, 'The Common Law Principle of Legality in the Ages of Rights' (2011) 35 *Melbourne University Law Review* 449, 457-9.

²⁵² (2011) 244 CLR 554.

²⁵³ *Ibid*, 571.

²⁵⁴ Above n 14, 100.

The principle of legality and HRAs operate with the same interpretive presumption. Arguably HRAs codify and strengthen this principle by requiring that Courts consider interpretations that are in keeping with protected human rights even when legislation is unambiguous. When taking into account the other rights dialogue mechanisms contained in HRAs it is highly likely that a federal HRA would provide a more extensive and detailed procedure for protecting rights than that offered by the principle of legality.²⁵⁵ The principle of legality will be defeated by any express or implicit parliamentary desire to restrict rights, effectively preventing any judicial rights interpretation.²⁵⁶ This would not be the case under a HRA that requires the interpretation of all legislation with reference to protected rights.²⁵⁷

As discussed in Chapter III a number of commonwealth anti-discrimination statutes and other pieces of legislation serve to protect human rights in the federal jurisdiction. However these protections are ad hoc in nature, do not fully implement internationally recognised human rights norms and contain numerous provisions that limit their operation. Either on their own or in combination with the Constitution or the principle of legality, these statutes cannot serve to protect human rights to an adequate standard. An instrument that encourages dialogue in order to promote human rights protection is needed,²⁵⁸ before the methods of human rights protection in Australia could be described as adequate.

Some senior political figures (Robert Menzies, John Howard) have maintained that human rights in Australia are protected through the system of responsible and representative government laid out in the Constitution. This principle provides that executive government is responsible to parliament which in turn is responsible to the electorate who can exercise their displeasure against government action by voting against and hopefully defeating unpopular

²⁵⁵ Above n 14, 109.

²⁵⁶ Above n 16, 49.

²⁵⁷ A provision that allows parliament to suspend the operation of a HRA such as that which exists under VICHRA (s 31) would weaken any potential HRA and make it more akin to the principle of legality.

²⁵⁸ Anthony Gray, 'Constitutionally Protecting the Presumption of Innocence' (2012) 31(1) *University of Tasmania Law Review* 132.

governments.²⁵⁹ Sir Robert Menzies commented on this principle stating ‘*In short, responsible government in a democracy is regarded by us as the ultimate guarantee of justice and individual rights*’.²⁶⁰

Despite the praise the principle of responsible and representative government has received in the past it can no longer be said to adequately protect human rights (if it ever could). It merely reinforces the notion of parliamentary sovereignty, which if coupled with a parliamentary monologue over rights dialogue does not offer best practice for rights protection. The notion of parliamentary supremacy may also hide the notion of executive supremacy, a body that may be placed under less scrutiny than the parliament, nor can it be said to be more trustworthy than the judiciary.²⁶¹ Additionally elections occur far too infrequently to properly bring governments to account. Succinct criticism of this outdated principle was supplied by Debeljak:

There is no guarantee that the majority will act in the best interests of others, particularly minority groups, the marginalised or the unpopular. Human rights concerns are unlikely to be the motivating force behind electoral choices at the ballot box.²⁶²

²⁵⁹ Above n 16, 46-7.

²⁶⁰ Sir Robert Menzies, *Central Power in the Australian Commonwealth* (Cassell & Company Ltd, 1967) 54.

²⁶¹ John Uhr, ‘The Performance of Australian Legislatures in Protecting Rights’ in Tom Campbell, Jeffery Goldsworthy and Adrienne Stone (eds), *Protecting Rights Without a Bill of Rights institutional Performance and Reform in Australia* (Ashgate Publishing Limited, 2006) 41, 56.

²⁶² Above n 16, 47.

The Human Rights Record

We are in no particular need of foreign jurisprudence. We have a well-developed domestic sense of human rights. The danger here is that an inferior, or less well developed, view of human rights could be picked up in Australia.²⁶³

This quote from the former Prime Minister displays an opinion that human rights in Australia are well protected and attract higher standards of protection than that afforded to them in other countries. There is a measure of truth to this statement in the sense that Australia is by no means the worst violator of human rights. There is also compelling argument to suggest that Australia's democratic institutions have weathered the challenges since federation well, upholding a high standards of human rights protection as most political and social conflicts have been addressed via the rule of law and without recourse to violence.²⁶⁴ However Australia cannot be described as a leader in the defence of human rights, perhaps at only one time displaying notable courage in defending human rights.²⁶⁵ While resistance to change is instinctive of the 'if it ain't broke don't fix it' argument is a poor argument against the creation of an Australian HRA,²⁶⁶ as achieving excellence in human rights protection should be a goal of every democracy. Australia should be prepared to accept the jurisprudence developed in other jurisdictions that protect human rights to a higher standard than that currently enjoyed in Australia. It is bizarre to pretend that Australia is isolated from the rest of the world and cannot seek to improve domestic methods of human rights protections from observing international examples.

²⁶³ John Howard, 'Don't Risk What We Have' in Ryan Haddrick and Julian Leaser (eds), *Don't Leave Us with the Bill: The Case Against an Australian Bill of Rights* (The Menzies Research Centre Limited, 2009) 67, 71.

²⁶⁴ George Brandis, 'The Debate we didn't have to have: The Proposal for an Australian Bill of Rights' in Ryan Haddrick and Julian Leaser (eds), *Don't Leave Us with the Bill: The Case Against an Australian Bill of Rights* (The Menzies Research Centre Limited, 2009) 17, 17.

²⁶⁵ Above n 214, 145. The refusal to ban the communist party is the one example of multiple groups and institutions in positively defending human rights when the trend in other western democracies was contrary to this.

²⁶⁶ Geoffrey Robertson, *The Statute of Liberty How Australians can take back their rights* (Random House Australia Pty Ltd, 2009) 93.

Opponents of enacting an Australian HRA identify that the human rights consultation reports carried out by the states, territories and the federal government in the previous decade consistently recognised four areas in which concern about human rights was expressed:

- Industrial Relations
- Migration Detention
- Anti-Terrorism Laws
- The Northern Territory intervention.²⁶⁷

Issues in these areas of consternation were apparently addressed through the legislative and democratic processes without the presence of a HRA and represented reasonably attempts to balance rights.²⁶⁸ However the arguments suggesting that recent human rights infringements were adequately remedied are exceptionally weak and fail to address the reasons infringements occurred in the first place.

Mandatory detention is wholly unsavoury and violates multiple rights under the refugee convention,²⁶⁹ and ICCPR.²⁷⁰ Arguing that the eventual receipt of a Visa by Mr Al-Kateb demonstrates the effectiveness of Australia's democratic institutions in protecting human rights is baselessly without merit. Mandatory detention is still a reality under the *Migration Act* and the potential for further human rights violations fuelled by the strict wording of that statute remains.²⁷¹ UNHCR guidelines provide that detention of refugees should only occur in

²⁶⁷ Above 218, 35.

²⁶⁸ Mr Al-Kateb was eventually given a visa and other individuals who were unlawfully detained or deported (Cornelia Rau, Vivian Solon) were given significant compensation. Workchoices was replaced by the *Fair Work Act 2009* (Cth). Anti-terrorism legislation was justified and received bi-partisan support. The Northern Territory intervention was an attempt to protect the rights of vulnerable children in remote communities.

²⁶⁹ *Convention Relating to the Status of Refugees*, Opened for Signature 28 July 1951, 189 UNTS 137 (entered into force 22 April 1954).

²⁷⁰ Above n 16, 345.

²⁷¹ As argued in Chapter III a federal HRA would allow the judiciary to consider rights interpretations at first principles even when legislation is unambiguous. This would reduce the potential for interpretations that are inconsistent with human rights and when human rights inconsistent interpretations are not possible then the legislature would be put on notice through dialogue to reconsider the negative effects of an infringing statute.

exceptional circumstances,²⁷² yet in Australia immigration detention remains arbitrary and discriminates on a number of grounds.²⁷³ Continued indefinite detention does not serve any legitimate aim either assisting in immigration control or acting as a deterrent to those who seek asylum by unsafe means.²⁷⁴ A system that possessed the ability to assign indefinite detention that was not directed at any legitimate aim could not be said to give rise to an adequate human rights record. Arbitrary detention has increased negative consequences on the vulnerable, particularly those with mental health issues,²⁷⁵ potentially giving rise to additional human rights violations.²⁷⁶ Since *Al-Kateb* the protection attached to individual liberty by High Court jurisprudence has continued to weaken with only one justice (Heydon) expressing dissent in *Haskins v Commonwealth*,²⁷⁷ against the validity of detention ordered by an invalidly created court.²⁷⁸

When constructing and applying anti-terrorism legislation it is critical to adhere to human rights principles in order to maintain the moral high ground against those who actively seek to disregard them.²⁷⁹ Anti-terrorism legislation is often presented as a necessary trade-off between national security and human rights,²⁸⁰ for national security to be adequately

²⁷² Office of the UNHCR, UNHCR's *Guidelines on Applicable Criteria and Standards Relating to the Detention of Asylum Seekers* (February 1999) Guideline 3.

²⁷³ Above n 16, 346. Immigration detention could also be argued to be discriminatory on the grounds of nationality, race or religion. There is a correlation between groups held in immigration detention and specific nationalities, ethnicities and religions given that these migrants come from areas where acquiring an Australian visa may be unattainable.

²⁷⁴ Above n 16, 346-7.

²⁷⁵ Kathy Eagar and Janette Green, 'The Health of People in Australian Immigration Detention Centres' (2010) 192(2) *Medical Journal of Australia*, 65-70.

²⁷⁶ When migration detention is applied arbitrarily it has an increased negative effect on the vulnerable, such as children or those with mental illness. This gives potential for Article 7 (prohibition on cruel, inhuman or degrading punishment) of ICCPR to be breached.

²⁷⁷ (2011) 244 CLR 22.

²⁷⁸ Steven Churches, 'The Silent Death of Common Law Rights' (2013) 20 *Australian Journal of Administrative Law* 64, 65.

²⁷⁹ John Von Doussa, 'Reconciling Human Rights and Counter-Terrorism: A Crucial Challenge' (2006) 13 *James Cook University Law Review* 104, 105.

²⁸⁰ Such legislation often includes provisions that allow preventative detention and controlled orders that restrict individual movement or association. Control orders are created by Division 4 of the *Criminal Code Act 1995* (Cth) when a designated Court determines an individual is likely to engaged in terrorism related activity in the foreseeable future and Division 5 allows preventative detention orders when a subject is likely to engage in an act of terrorism in the immediate future. These provisions were inserted by the *Anti-Terrorism Act [No 2] 2005*

maintained there must be a corresponding decrease in the protection attached to human rights. The removal of normal procedural safeguards that surround the imposition of a control order raise serious human rights concerns.²⁸¹ The case of *Thomas v Mowbray* illustrated these concerns as Jack Thomas was acquitted of all terrorism charges yet was still made subject to restriction imposed by a control order, essentially subverting double jeopardy. Such use of control orders could be considered arbitrary and not connected to any legitimate policy or legislative objective. UN commentary was to affirm that control orders could not serve to replace detention and are only permissible in certain circumstances.²⁸² The *Anti-Terrorism Act (No 2) 2005* (Cth) has received ample criticism for the restrictions it places on rights noting the example of Mohammed Haneef,²⁸³ who was detained and interrogated upon what was revealed to be unconvincing evidence.²⁸⁴

Preventative detention orders also raise a number of serious human rights concerns.²⁸⁵ No legal challenge can be issued at the initial detention order and it may be more appropriate to charge with a terrorism offence given the weight of evidence needed to impose a detention order.²⁸⁶ Given the restrictive nature of the anti-terrorism provisions in the *Criminal Code 1995* (Cth) it is hard to argue that Australia's human rights record in this area justifies the arguments against enacting a HRA. A federal HRA would provide another check on the power of the executive and parliament which is of critical importance in terms of creating

(Cth). Such mechanism potentially infringe multiple human rights including freedom of movement, right to respect for private life and the right to a fair trial.

²⁸¹ The hearing is held *ex parte*, notice of hearing is only two days, civil standard of proof applies to an application for the continuation of a control order, a summary and not full reasons for the decision are supplied and relevant evidence may be withheld if its disclosure may prejudice national security.

²⁸² Martin Scheinin, Special Rapporteur, *Report of the Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms while Countering Terrorism, Australia; Study on Human Rights Compliance While Countering Terrorism*, UN Doc A/HRC/4/26/Add.3 (14 December 2006) para 37.

²⁸³ *Haneef v Minister for Immigration and Citizenship* (2007) 161 FCR 40.

²⁸⁴ Above n 14, 47.

²⁸⁵ Paul Fairall and Wendy Lacey, 'Preventative Detention and Control Orders Under Federal Law: The Case for a Bill of Rights' (2007) 31(3) *Melbourne University Law Review* 1072, 1077-9.

²⁸⁶ Above n 16, 436.

balanced anti-terrorism legislation which may be motivated by reactionary concerns that do not appreciate the human rights impact of such legislation.²⁸⁷

The *Northern Territory National Emergency Response Act 2007* (Cth) was the federal government's response to the Wild/Anderson Report which was set up to investigate allegations of child abuse in Aboriginal communities. The 'Northern Territory intervention' involved centralising a number of powers into the commonwealth's hand,²⁸⁸ and additionally disallowed the *Racial Discrimination Act* from applying to it whilst also reducing the protections and rights provided by other acts including the *Native Title 1993 Act* (Cth).²⁸⁹ This intervention invoked significant public debate as it did not specifically address the concerns identified in the Wild/Anderson report and restricted a number of human rights. The intervention disempowered individuals and the community (particularly restricting access to property) in the targeted area and did not seem to address the concerns raised in the report in a proportionate manner.²⁹⁰ Such a flagrant disregard for human rights perpetuated by the federal government does not indicate that Australia possesses a strong human rights record and Australia that would not benefit from the creation of a HRA.

²⁸⁷ This is being written at a time when new anti-terrorism legislation is being moved through the federal parliament that would significantly expand the powers of the Australian Federal Police. Daniel Hurst, 'Anti-terrorism Bill: Police to get power to secretly search suspect's house' *The Guardian* (online), 9 October 2014 <<http://www.theguardian.com/australia-news/2014/oct/09/anti-terrorism-bill-police-to-get-power-to-secretly-search-suspects-house>>.

²⁸⁸ These included the acquisition without compensation of all Aboriginal Land without compensation and the substitution of five year leases for 99 year leases.

²⁸⁹ Above n 11, 771.

²⁹⁰ Above n 11, 772-3.

Politicisation of the Judiciary

A common criticism of charters or statutes of rights is that they pervert the traditional power exercised by the judiciary as it sidelines the position of both the executive and parliament in attempting to deliver justice efficiently²⁹¹. The interpretative provision allows judges to effectively rewrite legislation thus frustrating the supremacy of parliament.²⁹² Given that judges are not elected and are therefore not accountable to constituents or before parliament (question time and committees are the measures through which members of the executive are accountable to parliament) it may not be appropriate for them to make law instead of merely interpreting it. Whether legislation is rights compatible and whether restrictions on rights are reasonable are questions that will be left to the unelected judiciary.²⁹³ Speaking about interpretations made by the House of Lords under the UKHRA, Professor James Allen was to comment:

The most senior judges of what was once considered to be the most interpretively conservative court in the common law world now tell us they can give other statutes, statutes they concede would otherwise be clear and unambiguous, the exact opposite meaning as that intended by the elected parliament.²⁹⁴

In forming interpretations with a power that authorises judicial lawmaking it is feared that judges would be unduly influenced by this new ability. Judicial activism would become a reality as judges would not evenly apply legal principles but instead be influenced by their personal opinions when they are consistently exposed to questions of a political and social

²⁹¹ Gerard Brennan, 'The Impact of a Bill of Rights and the Role of the Judiciary: An Australian Perspective' in Phillip Alston (ed), *Promoting Human Rights Through Bills of Rights* (Oxford University press, 1999) 454, 463.

²⁹² Christian Porter, 'Pluralism, Parliamentary Democracy and Bills of Rights' in Ryan Haddrick and Julian Leeser (eds) *Don't Leave us with the Bill: The Case Against an Australian Bill of Rights* (The Menzies Research Centre Ltd, 2009) 127, 139.

²⁹³ James Allen, 'What's Wrong About a Statutory Bill of Rights' in Ryan Haddrick and Julian Leeser (eds) *Don't Leave us with the Bill: The Case Against an Australian Bill of Rights* (The Menzies Research Centre Ltd, 2009) 83, 85.

²⁹⁴ *Ibid*, 87.

nature.²⁹⁵ The transfer of legislative power to the judiciary is a violation of the democratic process as the elected representatives have abdicated their responsibility to develop policy and legislation best suited for the majority.²⁹⁶

The politicisation of the judiciary is not an acceptable risk in attempting to reduce the negative rights based consequences that can result from strict majoritarian government.²⁹⁷

Another criticism is that the legislature will feel compelled to respond positively to declarations of incompatibility and acquiesce to all judicial decisions that involve human rights determinations, effectively creating a judicial monologue,²⁹⁸ an outcome that is not a goal of the dialogue model HRA. The high response rate of the UK parliament to declarations of incompatibility (discussed in chapter III) may offer some support to the argument that statutory charters of rights actually create a judicial monologue.²⁹⁹

In spite of these concerns there is significant evidence that Australian courts have made numerous determinations that have had extensive policy consequences in their development of the common law. It has done so without the presence of a HRA indicating that it has always been in the purview of the courts to interpret statute and develop the common law with reference to human rights.³⁰⁰ The case of *Mabo v Queensland (No 2)*,³⁰¹ is an excellent example of this as the High Court recognised that native title rights existed at common law and struck down the long standing doctrine of *Terra Nullis* as it perpetuated an immoral principle no longer supported by community standards. Justice Brennan commented that the law could be modified in order to make it conform to contemporary standards of human

²⁹⁵ Ian Callinan, 'In Whom Should we Trust' in Ryan Haddrick and Julian leaser (eds), *Don't Leave us with the Bill: The Case Against an Australian Bill of Rights* (The Menzies Research Centre Ltd, 2009) 73, 81-2.

²⁹⁶ Above n 161, 9.

²⁹⁷ Tom Campbell, 'Does anyone win under a Bill of Rights? A Response to Hilary Charlesworth's 'Who Wins under a Bill of Rights'' (2006) *University of Queensland law Journal* 55, 60.

²⁹⁸ Christopher Manfredi and James Kelly, 'Six Degrees of Dialogue: A response to Hogg and Bushnell' (1999) 37 *Osgoode Hall Law Journal* 513, 520-1.

²⁹⁹ James Allan, 'The Victorian *Charter of Human Rights and Responsibilities*: Exegesis and Criticism' (2006) 30 *Melbourne University Law Review* 906, 914.

³⁰⁰ Above n 229, 46.

³⁰¹ (1992) 175 CLR 1.

rights.³⁰² This decision has had long lasting policy effects, influenced the creation of native title legislation and was made without reference to an existing HRA. The destruction of the *Terra Nullis* myth should not be replaced by the fallacy that the judiciary cannot be active in securing better protection of human rights.³⁰³

Despite concerns that judges would go ‘mad with power’ if Australia was to enact a HRA, the argument of improper judicial lawmaking is difficult to maintain given the experience in other jurisdictions.³⁰⁴ The current balance of power surrounding human rights is weighted to heavily in favour of the legislature and a dialogue model HRA which grants extra tools to the judiciary is needed to create an equilibrium between the arms of government that results in best practice for human rights protection. The failure of successive federal governments to adequately protect human rights and implement international obligations into domestic law may have influenced the judiciary to comment about the need to address this imbalance.³⁰⁵

Fairall and Lacey commented on this imbalance, stating:

The situation in Australia is currently such that basic and fundamental freedoms are being eroded by a Parliament with increased legislative power and an all-powerful executive government with the political will to use them.³⁰⁶

The argument that bills or charters of rights represent an antithesis to the traditional democratic process cannot strictly apply to legislative bills of rights. The Parliament retains the power to reject judicial interpretation of human rights and is even capable of amending or repealing the HRA instrument itself.³⁰⁷ At the time of writing there is heated debate

³⁰² Ibid, 30.

³⁰³ Above n 270, 1096.

³⁰⁴ Above n 53, 28-9.

³⁰⁵ Michael Kirby, ‘The Role of the Judge in Advancing Human Rights by Reference to International Human Rights Norms’ (1988) 62 *Australian Law Journal* 514, 526. Anthony Mason made numerous references relating to the need for a constitutional or legislative bill of rights in order to address the growing imbalance of power between the arms of government (Michael McHugh has proffered similar arguments since his retirement from the High Court).

³⁰⁶ Above n 271, 1098.

³⁰⁷ Above n 229, 51.

surrounding the proposal that the UKHRA should be repealed, though it should be noted this has been an active issue for some time.³⁰⁸ The ultimate decision is always left to the parliament and the ‘weak’ form of judicial review offered by HRAs does not serve to invalidate infringing legislation but rather only brings infringements to the attention of Parliament and does not undermine the democratic process.³⁰⁹ HRAs do not transfer any power from the parliament to the judiciary but rather increase the accountability of parliament by granting the Courts tools with which the effects of legislation on human rights can be scrutinised.

The relationship between human rights and democracy should not be an antagonistic one. Adequate protections of human rights are necessary to ensure that the autonomy of minorities are not trampled under the weight of majoritarianism and legal positivism. The judiciary is not politicised but is empowered to give a more robust consideration to human rights when interpreting statute and developing the common law. The jurisprudence of other jurisdictions can aid the Australian judiciary in the application of a potential HRA in order to placate sceptics that such an instrument would stimulate judicial activism.

³⁰⁸ JC Finley, ‘Rights groups angered over David Cameron’s plans to repeal U.K.’s Human Rights Act’ *UPI* (online) 3 October 2014 http://www.upi.com/Top_News/World-News/2014/10/03/Rights-groups-angered-over-David-Camerons-plans-to-repeal-UKs-Human-Rights-Act/6751412332407/.

³⁰⁹ Above n 184, 61-2.

Villain's Charter and Excessive legislation

Another argument against HRAs is that they tend to serve the interests of the unsound members of a community whilst doing little to protect ordinary citizens.³¹⁰ Criticism has been made against the ACTHRA due to the prevalence of strict liability offences in territory law and its alleged inability to protect individuals from the actions of other individuals.³¹¹ The premise of this argument is that a requirement by judges to actively consider human rights in criminal matters will lead to fewer convictions. A HRA may weaken the protection the courts offer to the community as the interpretative provision requires that statute be interpreted as compatible with the right to a fair trial (except when parliament's intent would be frustrated),³¹² potentially improving the chances of an accused to escape conviction when legislation is read down to be compatible with this right. An example would be a legislative provision that removed the presumption of innocence or imposed an evidentiary burden on the accused being interpreted to have less effect and scope than parliament intended.³¹³

In spite of fears of a HRA becoming a villain's charter there is little evidence to suggest that a HRA will increase the number of acquittals based on technicalities or human rights considerations.³¹⁴ Arguments relating to the admissibility of evidence or illegal conduct by police are frequently made in criminal matters and the inclusion of certain rights (privacy, fair trial) in a HRA arguably only represents a codification of existing safeguards in the

³¹⁰ Bill Stefanik, 'A Reflection on the ACT Human Rights Act 2004' in Ryan Haddrick and Julian Leaser (eds), *Don't Leave us with the Bill; The Case Against an Australian Bill of Rights* (The Menzies Research Centre Limited, 2009) 309, 313.

³¹¹ *Ibid* 314-5.

³¹² In the VICHRA this right is contained in s 25 Rights in criminal proceedings. It provides for the right to be presumed innocent until proven otherwise amongst other protections.

³¹³ The deeming provision considered in *Momcilovic* which reversed the presumption of innocence may have been read down as not applying to certain offences but ultimately a declaration of inconsistent interpretation was sought.

³¹⁴ Consultation Committee for a Proposed WA Human Rights Act (WA Committee), *A WA Human Rights Act: Report of the Consultation Committee for a Proposed WA Human Rights Act* (2007), 54-7.

criminal justice system.³¹⁵ A five year review into the operation of the UKHRA found that it had had no significant impact on the criminal law or on the ability of government to deter and prevent crime.³¹⁶

While courts must serve to protect the general interests of the community these interests must be balanced,³¹⁷ against the need to protect individual's human rights in criminal matters.

Defendants can receive an acquittal based on reasons not related to their guilt or innocence regardless of whether a HRA exists that requires judges to consider human rights when administering a trial (allowing evidence, directions to the jury) and actually arise from legislative direction.³¹⁸ The right that critics fear may unfairly protect alleged unsavoury individuals is the right to a fair trial. However what is often overlooked is that this right does not require procedures and practice that favour an accused. Justice Whelan commented in *DPP v Mokbel*,³¹⁹ that interests of society in general and those affected by the trial other than the accused must be taken into consideration when determining fair conduct of a trial.³²⁰

The villain's charter argument hides another benefit that HRAs can bring. They may act as a stimulus to review practices within the arms of government that may not conform to accepted levels of human rights protection and as such serve to correct defects in procedural law.³²¹

Concern has also been raised over whether BORA could be perceived by the New Zealand public to represent a villain's charter.³²² A number of cases invoked public criticism against

³¹⁵ Ibid, 56.

³¹⁶ UK Department for Constitutional Affairs, *Review of the Implementation of the Human Rights Act*, July 2006.

³¹⁷ Notable examples from the UK where individual rights were afforded protection include *R v Secretary of State for the Home Department* [2002] UKHL 46 where the requirement for a member of the executive to determine minimum parole periods was determined to be incompatible with human rights. Also in *R v Secretary of State for the Home Department* [2001] UKHL 26 the practice of searching the legally privileged correspondence of prisoners in their absence was determined to unreasonably infringe human rights.

³¹⁸ Above n 54, 67.

³¹⁹ [2010] VSC 331

³²⁰ Ibid, 161.

³²¹ Andrew Byrnes, 'And some have bills of rights thrust upon them: The experience of Hong Kong's Bill of Rights' in Philip Alston (ed), *Promoting Human Rights Through Bills of Rights: Comparative Perspectives* (Clarendon Press, 2000) 318, 345-6.

BORA including the staying of proceedings involving serious offences, the quashing of thousands of drink driving convictions due to failure of police to advise of the right to legal representation and the award of significant compensation to prisoners for perceived minor rights violations.³²³ If the dialogue coming from the public suggests dissatisfaction with the protection granted to human rights by the courts (amounting to rogue/villain's charter criticism) then the parliament may respond to ensure,³²⁴ that the public does not lose faith in the benefits of a HRA. This criticism can be balanced through the awareness of a HRA vindicating other important human rights.³²⁵

Concern also exists that a HRA would produce excessive legislation, choking the court system and consuming the finite resources needed to administer the justice system efficiently. A HRA may create new causes of action in civil matters and new defences in a criminal context as individuals would seek to invoke its protection in every possible circumstance.³²⁶ Litigation could result from frivolous and unnecessary causes that seek to clarify protected rights that are framed vaguely or from politically motivated groups that seek to challenge government action.³²⁷

This argument, which is linked to the argument of villain's charter, has not been validated under existing HRAs in other jurisdictions as they have not resulted in an explosion of human rights based litigation.³²⁸ In its first seven years of operation the UKHRA was referred to in 50 cases before the courts,³²⁹ an amount that can hardly be said to constitute an explosion of litigation. The argument that a HRA would serve to financially benefit lawyers through

³²² Ivor Richardson, 'The New Zealand Bill of Rights: Experience and Potential, Including the Implications for Commerce' (2004) 10 *Canterbury Law Review* 259, 262.

³²³ Above n 49, 28.

³²⁴ Remembering that parliament retains supremacy under the dialogue model and can respond to dialogue.

³²⁵ Above n 53, 28.

³²⁶ Bill Stefaniak, 'A Reflection on the ACT *Human Rights Act 2004*' in Julian Leaser and Ryan Haddrick (eds), *Don't Leave us with the Bill: A Case against an Australian Bill of Rights* (The Menzies Research Centre Ltd, 2009) 309, 315.

³²⁷ Above n 147, 291-2.

³²⁸ Above n 147, 297.

³²⁹ Above n 306, 59.

increased litigation is also seriously flawed as the perceived litigation increase is not a reality and the lawyers who engage in human rights are often junior practitioners on modest salaries serving in a community role or more senior practitioners working in a *pro bono* capacity.³³⁰ A provision that required an existing cause of action in law to be met before the protections under a HRA could be invoked would aid in assuaging fears of a HRA potentially creating a culture of litigation.

A HRA may actually serve to decrease the amount of litigation that results from alleged human rights infringements. The mechanisms contained in a HRA that require the legislature to more carefully consider the human rights impact of potential legislation (parliamentary committee, members statement) would likely result in less legislation that unreasonably restricts protected rights. This would result in fewer matters concerning human rights coming before the courts due to the careful consideration parliament has had to apply to them therefore freeing up the limited time and resources available to the judiciary.

³³⁰ Above n 259, 158-60.

Chapter V: Implementing an Australian HRA:

The final chapter will focus on what provisions should be included in an Australian HRA in order for it to provide best practice human rights protection. The HRAs operating in other jurisdictions and the specific legal context in Australia that were discussed in the previous chapters will form the basis for selecting content for an Australian HRA. The effect a HRA may have on administrative law will also be discussed and reasons for the continuing failure to create an Australian HRA will also be explored.

What Human Rights to Protect?

Whilst it is commonly accepted that an Australian HRA should protect all civil and political rights laid out in Part III of ICCPR and maintain the non-derogable status of the rights that Article 4(2) lists, the NHRCC recommended that economic, social and cultural rights (ESC) should not be protected under an Australian HRA or if they were to be included that they should not be justiciable.³³¹ This position cannot be maintained if the goal of fully domestically implementing international human rights obligations is to be achieved. Both sets of rights have equal status in international law and the fulfilment of one category is closely linked to the other.³³²

The argument against the inclusion of ESC rights suggests that it is not appropriate for Courts to make determinations in matters that include the allocation of significant government resources as the competing priorities encapsulated in such human rights would complicate

³³¹ Above n 168, 366.

³³² Andrew Byrnes, 'Second-Class Rights yet again? Economic Social and Cultural Rights in the Report of the National Human Rights Consultation' (2010) 33(1) *University of New South Wales Law Journal* 193, 195.

decision making.³³³ This argument fails to consider modern jurisprudence which contends that ESC rights can be justiciable both at the international,³³⁴ and domestic level.³³⁵

Judicial remedies may be necessary in order for states to provide an effective remedy when ESC rights are violated in order that the human rights contained in ICSECR are adequately protected.³³⁶ Legislation may not provide complete protection for human rights, so generally worded provisions that allow Courts to provide judicial remedies for ESC rights will provide a safety net for the protection of those human rights.³³⁷

The Constitution of the Republic of South Africa Act 1996 (South Africa) under s 26(1) provides that everyone has the right to have access to adequate housing. The following subparagraph clarifies that this is to be achieved via reasonable legislative or other measures taking into account the availability of resources in order to achieve progressive realisation of this human right. This represents a malleable test for determining whether ESC rights are being adequately protected. This test is similar to that of proportionality discussed in relation to civil and political rights but realises that ESC rights are competitive in nature as they are achieved through finite resource allocation and take time to be fully implemented. Some will be directly applicable to individuals, others can be analysed as to the reasonableness of their progressive implementation while others (due to the availability of resources) will be left entirely to the domain of the parliament and the executive.³³⁸ This is supported by general

³³³ Ibid, 199-200. 7

³³⁴ The Optional Protocol to ICESCR allows individual communications to the ICESCR monitoring body (CESCR) to investigate and make recommendations from alleged nonfulfillment of ESC rights by member states. GA Res 63/117, UN GAOR, 63rd sess, 66th plen mtg, UN DOC A/RES/63/117 (5 March 2009).

³³⁵ South African Courts have developed useful jurisprudence in implementing ESC rights without infringing on the powers of the legislature

³³⁶ Committee on Economic, Social and Cultural Rights, *General Comment 9: The Domestic Application of the Covenant*, 19th sess, UN Doc E/C.12/1998/24 (3 December 1998) 9.

³³⁷ Above n 324, 204.

³³⁸ Above n 324, 205.

comment from Committee on Economic Social and Cultural Rights which identifies the rights protected under ICESCR as non-absolute.³³⁹

The human rights that would be generally applicable under ICESCR would be the ones where immediate judicial action could result in realisation of them (right to form trade unions, public holiday pay). Other human rights which involve matters of policy best left to the executive or parliament may be outside the proper judicial process as they go beyond the appropriate consideration of reasonable allocation of resources in order to achieve progressive realisation. The Honk Kong Court of First Instance held that a challenge to the government's air pollution policy could not be made under the right to health contained in ICESCR as this would involve interference in the political process.³⁴⁰

Despite some divergent opinion on the judicial enforcement of ESC human rights, experience from other jurisdictions demonstrate that at least some of the human rights contained in ICESCR can be judicially enforced and others considered by the judiciary.³⁴¹ The manner in which ESC rights are framed in the South African Constitution illustrates that the judiciary can make determinations relating to these human rights without entering a political area the public would not wish it to. Unfortunately consultations undertaken in Australia failed to properly consider the inclusion of ESC rights in human rights instruments,³⁴² with the South African example being regarded as an exception.³⁴³

The ACTHRA originally contained a provision that would have allowed for a review to consider the inclusion of ESC rights in the act yet to this date no such rights have been

³³⁹ Committee on Economic, Social and Cultural Rights, *General Comment No 18: Article 6 of the International Convention on Economic, Social and Cultural Rights*, 35th sess, Un Doc E/C.12/GC/18 (6 February 2006).

³⁴⁰ *Clean Air Foundation Ltd v Government of the Hong Kong SAR* [2007] HKCFI 757, 43.

³⁴¹ Above n 324, 208-9.

³⁴² State, territory and federal governments largely considered that ESC rights would have an uncertain effect and interfere in areas of policy. They failed to consider the limiting effect contained in the wording of s 26 of the South African Constitution.

³⁴³ ACT Department of Justice and Community Safety, Parliament of ACT, *Human Rights Act 2004: Twelve-Month Review-Report* (2006) 49.

inserted. ESC rights were to have been considered in reviews of a potential Tasmanian HRA,³⁴⁴ however such an instrument did not come to fruition. The

WA consultation recommended the inclusion of ESC rights and that they be protected in the same manner as civil and political rights although noting that administrative rather than judicial review would represent a more acceptable model to the legislature.³⁴⁵

Parliamentary reviews of the UKHRA were also to reject the traditional jurisprudence surrounding ESC rights (that they are inappropriate for judicial enforcement) recommending the inclusion of some ESC rights into the instrument, albeit in a qualified manner.³⁴⁶ This review and an additional 2008 review,³⁴⁷ recommended a model of progressive realisation for ESC rights with a limited role for the judiciary in reviewing government measures to implement these human rights that maintained separation of powers.³⁴⁸

The recommendations of Australian consultations committees that HRAs should contain ESC rights, similar recommendations by UK parliamentary reviews and examples from the South African Constitution indicate that any potential federal Australian HRA should protect at least some of the human rights covered by ICESCR. The judiciary has a role to play in the determination of human rights that create a positive obligation on the government to provide adequate standards of living to its citizens. Courts do not lack the expertise to make determinations in this area as they have a long tradition of examining ESC rights including protecting tenants from unlawful eviction, determining welfare entitlements and hearing claims of discrimination in education and the workplace.³⁴⁹

³⁴⁴ Tasmanian Law Reform Institute, *A Charter of Rights for Tasmania*, Final Report No 10 (2007) 122.

³⁴⁵ Above n 309, 87.

³⁴⁶ Joint Committee on Human Rights, *The international Covenant on Economic, Social and Cultural Rights*, House of Lords Paper 183, House of Commons paper No 1188, Session 2003-4 (2004), 22.

³⁴⁷ Joint Committee on Human Rights, *A Bill of Rights for the UK? A House of Lords Paper 165*, House of Commons Paper 150, Session 107-08 (2008).

³⁴⁸ *Ibid* 192.

³⁴⁹ Above n 324, 203.

A federal HRA should protect all the human rights contained in ICCPR and ICESCR. ESC rights should be framed in similar manner to the South African model which provides for a circumscribed role for the judiciary where the availabilities of resources and the holistic approach of legislation and policy must be considered. If it were deemed unacceptable to include all ESC rights then those that can be addressed immediately by judicial remedy should be included, such as the right to fair remuneration and the right not to be deprived of property other than in accordance with the law.

Provisions in a HRA

The federal government's response to the NHRCC report,³⁵⁰ rejected the dialogue model HRA recommended by the committee. However not all facets of the report were rejected and the federal government chose to create a Joint Parliamentary Committee on Human Rights.³⁵¹ This committee scrutinises all legislative bills and instruments for compliance with the seven core international human rights treaties considered by the NHRCC.³⁵² Such a body is a common feature in HRAs and an Australian federal HRA could amend the role of this committee to refer to the protected rights contained in a HRA rather than the broad ambit of treaties considered by the NHRCC. A provision that requires the minister responsible for a prospective bill to table a report indicating compliance or detailing any inconsistency with HRA rights should also be included.

Despite the potential legal challenges discussed in Chapter II a HRA should provide the ability for the Federal and High Court to issue declarations of incompatibility when rights compatible interpretations cannot be provided to legislation. Waldon identified two reasons

³⁵⁰ *Australia's Human Rights Framework* (2010); Robert McClland, 'Launch of Australia's Human Rights Framework' (Speech delivered at the National Press Club of Australia, Canberra, 21 April 2010).

³⁵¹ *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth).

³⁵² Above n 341, 8.

why the parliament and the courts may disagree about the application of rights. Parliament may believe that rights have no proper application in a given context contrary to judicial opinion (misgivings) or there may be disagreement as to the appropriate level of protection given to rights in specific contexts (disagreements).³⁵³ Whether the divergence of opinion is a misgiving or a disagreement the declaration of incompatibility mechanism provides an important dialogue tool to the judiciary that communicates to parliament that it should reconsider the negative impact of infringing legislation. To protect this mechanism from invalidation it should be drafted to join the Attorney-General as a party in proceedings where declarations are sought and make the declaration binding on the parties involved.³⁵⁴ This would allow the Attorney-General's obligation of tabling a response before parliament to be enforced by injunction therefore increasing the possibility of the mechanism to be considered determinative of a matter and therefore a proper exercise of judicial power.

The interpretative provision in an Australian HRA should allow the courts to interpret legislation where it is possible to do so with protected rights and not be subject to the doctrine of implied repeal. The judiciary should be able to consider the human rights impact of legislation even when its wording is not ambiguous, so long as an interpretation does not frustrate the purpose of a statutory provision.³⁵⁵ As discussed in chapter III an interpretation that did not allow for indefinite detention under the *Migration Act* would not have frustrated the legislative objective of efficiently managing migration to Australia and would have afforded greater justice in *Al-Kateb*.

Any Australian HRA should not contain a general override provision such as that possessed by the VICHRA under s 31. An override provision will reduce the amount of helpful dialogue that is created between the judiciary and parliament as the parliament will become motivated

³⁵³ Jeremy Waldon, 'Some Models of Dialogue Between Judges and Legislators' in Ian Brodie and Grant Hudcroft (eds), *Constitutionalism in the Charter Era* (LexisNexis Canada, 2004) 7.

³⁵⁴ Above n 147, 327-9.

³⁵⁵ Above n 21, 252.

by expediency and use the override mechanism rather than accepting judicial interpretation and then responding legislatively.³⁵⁶ This would serve to undermine dialogue (and rights protection) as the power of override suppresses informal dialogue that results from the back and forth between the parliament and judiciary.³⁵⁷ Limitation of rights should be confined to a general limitation provision similar to that contained in the VICHRA (does not apply to non-derogable rights) and specific limitations on individual rights when applicable (restricting the right to freedom of expression so individuals can defend their reputation through defamation actions). These can be referred to as external and internal limitations. The parliament should only be able to suspend the operation of a HRA by repealing the actual act itself and then suffering the public reaction from such a decision.³⁵⁸

An Australian HRA should only apply to individuals and not corporations. Human rights are needed to protect the interests of individuals and it is rare that corporations would benefit from a HRA.³⁵⁹ An existing cause of action should be required before a remedy can be provided for a breach of human rights. This will help in assuaging fears that a HRA will result in a torrent of litigation and will also provide additional validity to the declaration of incompatibility mechanism. A remedy of damages should also be available as doing so would be in keeping with the requirements of ICCPR and send a strong message to both public authorities and the international community that breaches of human rights are to be taken seriously and victims are provided with an effective remedy.³⁶⁰

A federal HRA should apply equally across Australia at the federal, state and territory levels. The need for human rights protection at the state and territory levels is of crucial importance

³⁵⁶ Above n 152, 342. s

³⁵⁷ Connor Gearty, 'Reconciling Parliamentary Democracy and Human Rights' (2002) 118 *Law Review Quarterly* 248, 254.

³⁵⁸ A general override provision severely damages the ability of a HRA to protect human rights as reasonable limitations to human rights are not considered and non-derogable rights could be potentially overridden.

³⁵⁹ Corporations may benefit from the right to privacy which would provide additional security to commercial activities or secrets.

³⁶⁰ Above n 147, 337.

given the level of public services and the number of criminal prosecutions that occur in these jurisdictions. This uniformity will represent a desire to conform to international human rights norms and offer equal protection of rights throughout Australia. The downside of equal protection is that s 109 of the constitution will invalidate state legislation that unreasonably infringes protected human rights while similar federal legislation will remain valid, a situation not in keeping with the dialogue model.

A provision stating that the federal HRA was not intended to cover the field may reduce the amount of state laws found inoperative and reduce the potential for the constitutional powers of the states to be restricted. This would also allow the states and territories to develop their own laws that protect human rights and are in keeping with international human rights norms. The states have been more proactive than successive federal governments in affording legislative protection to rights and they should not lose this ability. A federal HRA should also apply to the executive arm of government and all those who are contracted to provide public services.

The enactment of a federal dialogue HRA will bring substantial benefits to the protection of human rights in Australia. Fewer pieces of commonwealth and state legislation will unreasonably infringe protected human rights and the dialogue surrounding human rights between the arms of government will become more transparent to the public. The judiciary will become empowered to actively consider human rights in its decision making and become a more active participant in human rights dialogue. A culture of human rights will develop in the public service as public authorities are required to account for the human rights implications of their decision making. Australia will no longer be isolated from international jurisprudence and become a more legitimate contributor to human rights dialogue in an international context.

Administrative Law and Human Rights

A Federal HRA will impose substantive and procedural obligations on public authorities to both act compatibly with protected rights and properly consider,³⁶¹ them in their decision making.³⁶² Justice Emerton considered the obligations imposed by the term ‘proper consideration’ and concluded that it did not involve detailed legal analysis of protected rights but rather:

It will be sufficient in most circumstances that there is some evidence that shows the decision-maker seriously turned his or her mind to the possible impact of the decision on a person’s human rights and the implication thereof for the affected person, and that the countervailing interests or obligations were identified.³⁶³

The countervailing interest and obligations would involve consideration of the desired impact of the legislation or policy being applied in the administrative decision and whether it was reasonable for them to trump individual rights in the circumstances.³⁶⁴ The identification of countervailing interests represents the substantive obligation imposed on public authorities when applying human rights to their decision making process. Justice Bell reinforced the judgement in *Castles* but noted that the obligation on a decision maker to properly consider human rights would not be discharged, no matter how genuine their decision, if it did not comply with the relevant limitation provision in the VICHRA.³⁶⁵

³⁶¹ The ‘proper consideration’ obligation is contained in both VICHRA (s 38) and ACTHRA (s 40B) and reduces evidentiary complications when courts attempt to review whether public authorities have acted compatible with protected rights.

³⁶² Joanna Davidson, ‘Incorporation of Human Rights in Administrative Decision-Making: The Impact of Human Right Instruments in Victoria and the ACT’ (68) *Australian Institute of Administrative Law* February 2012, 44. Legislation must be given effect if it is incompatible with protected rights as the dialogue model preserves parliamentary sovereignty.

³⁶³ *Castles v Secretary to the Department of Justice* [2010] VSC 310, 186.

³⁶⁴ In this case the reasonableness of the limitation would have been found by weighing up the individual’s rights against the limitation factors found in s 7(2) VICHRA

³⁶⁵ *PJB v Melbourne Health (Patrick’s Case)* [2011] VSC 327, 312.

The possible effect of a HRA on administrative law has caused some concern regarding the proper role of the judiciary as it expands the scope with which administrative decisions can be reviewed allowing the concept of proportionality and the balancing of competing interests to be applied to such decisions. A concept of deference can be developed to maintain the separation between the judiciary and the executive and prevent administrative law descending into unprincipled merits review.³⁶⁶ The concept of deference is important as it is inappropriate for an appeal of a decision made on a proportionality ground to succeed merely because those reviewing it form a different opinion as to the whether rights were reasonably limited in the circumstances (second guessing). The finding of an error of law, such as the application of an incorrect test, would be a more appropriate ground for overturning an administrative decision. Deference recognises that in some areas it is inappropriate for the judiciary to review decisions that are in the proper purview of the executive which is better suited to balancing a wide variety of interests through applying proportionality.³⁶⁷

When assessing proper consideration of human rights a court is likely to place significant weight on the original decision makers reasoning if it can be showed they engaged in a weighing up exercise of the outcomes of their decision. The High Court has already recognised the importance of considering the original decision makers reasoning if it is well supported by relevant considerations and transparent.³⁶⁸

An example of similar deference can be seen from the case of *R (SB) v Governors of Denbigh High School*,³⁶⁹ where the House of Lords was willing to give significant weight to the decision of a high school to disallow some religious dress from being acceptable uniform after a comprehensive consultation was undertaken with community and religious leaders in

³⁶⁶ Above 357, 48.

³⁶⁷ *R v Director of Public Prosecutions; ex parte Kebliene* [2000] 2 AC 326, 381.

³⁶⁸ *Corporation of the City of Enfield v Development Assessment Commission and Another* (2000) 199 CLR 135, 153.

³⁶⁹ [2007] 1 AC 100.

choosing an acceptable uniform.³⁷⁰ In this instance the House of Lords recognised that the school governors were in a better position to balance competing interests (illustrated by the consultation) that a judicial body was. A similar position has been adopted by the Victorian Civil and Administrative Tribunal when considering s 38 of VICHRA (proper consideration), that deference be given to the original decision when it can be shown that competing rights were identified and the resulting limitation was reasonable and proportionate.³⁷¹

It has been submitted that the administrative law system in Australia serves as an effective protector of individual human rights and provides effective recourse to citizens when these rights are infringed.³⁷² An analysis of the administrative law as an effective method of human rights protection is beyond the scope of this thesis. However it is submitted that a HRA will improve the ability of administrative law in protecting human rights as decision makers would need to properly consider human rights and courts could scrutinise decisions against their impact on human rights.³⁷³ The principle of deference will prevent judicial review under a HRA entering the area of executive power, augmenting the administrative law in protecting human rights by increasing the transparency in the reasoning of decision makers.

³⁷⁰ Ibid 116.

³⁷¹ *Smith v Hobsons Bay City Council and Ors* (2010) 175 LGERA 221, 229. This case involved the installation of a screen on a balcony that a neighbour alleged if not installed would violate his right to privacy.

³⁷² Robin Creyke, 'The performance of Administrative Law in Protecting Rights' in Tom Campbell, Jeffery Goldsworthy and Adrienne Stone (eds), *Protecting Rights Without a Bill of Rights: Institutional Performance and Reform in Australia* (Ashgate Publishing Limited, 2006) 101, 125-131.

³⁷³ Above n 357, 53.

The Absence of a HRA

As mentioned previously Australia remains one of the only democratic countries without any bill or charter of rights either statutory or constitutional in nature. There may be a number of reasons that explain, but do not excuse, this gap in human rights protection.

Discussion surrounding human rights in England first began in earnest with the publication of William Blackstone's *Commentaries* in 1753.³⁷⁴ The influence of Blackstone was to spread to British colonies including Australia and the 13 American colonies. The concept of rights was to play a dominant part in the drafting on the U.S constitution but was beginning to fade from English (and emerging Australian jurisprudence) by the end of the 18th century.³⁷⁵ This reaction away from human rights may be attributed to the upheaval wrought by the French revolution which championed the abstract rights of man and the emergence of Jeremy Bentham's utilitarian school of thought which favoured parliamentary authority over natural rights.³⁷⁶

Legislatures guided by majoritarian principles would become the norm in both Britain and Australia, they would not protect human rights in a legal positive sense for another 200 years. The *Magna Carta* and the *Bill of rights 1689* should not be seen as true human rights instruments due to their conservative nature and the emphasis they placed on limiting royal but not parliamentary power (rather they served as a catalyst for the common law to expand its scope of human rights protection).³⁷⁷ The inheritance of legal positivism from Britain may have engendered Australian jurisdiction to be sceptical of human rights instruments both legislative and constitutionally entrenched.

³⁷⁴ Chapter one of the first book is entitled 'Of the Absolute Rights of Individuals' and deals with civil and political rights.

³⁷⁵ James Spigelman, 'Blackstone, Burke, Bentham and the *Human Rights Act 2004*' (2005) 26 *Australian Business Law Review* 1, 2.

³⁷⁶ *Ibid* 2-3.

³⁷⁷ Above n 11, 139.

Another reason for the lack of a rights charter in Australia may be the antagonistic struggle engaged in by the two major political parties over the issue. The Australian Labour Party (ALP) has traditionally been in favour of the introduction of a human rights instrument having made multiple attempts through legislation or constitutional amendment (see introduction). H.V Evatt, a prominent ALP figure post World War Two, helped in drafting the Universal Declaration of Human Rights and stressed the importance of international treaties in protecting human rights.³⁷⁸ On the other hand the Liberal Party of Australia has been opposed to any HRA or constitutional amendment to entrench human rights. Both Robert Menzies and John Howard fervently opposed any charter of rights for Australia believing that the concepts of representative democracy and responsible government provided adequate human rights protection.

The divergent stance by the two major political parties over the adoption of a charter of rights has caused all attempts to introduce one at the federal level to be frustrated by heated parliamentary debate and effective public counter campaigns.³⁷⁹ The only human rights instrument to be successfully introduced was the *Human Rights Commission Act 1981* (Cth) by the Fraser liberal government which despite being a positive step was criticised by the ALP who continued to favour a bill of rights.³⁸⁰

The potential legal challenges to a HRA identified in Chapter II may represent another reason why successive federal governments have lacked the political will to enact holistic statutory human rights protection. The declaration of incompatibility mechanism and the interpretation provision are the most contentious elements and may cause invalidation due to breach of the separation of powers doctrine. However invalidation is not certain and it would appear more likely than not that a HRA would survive constitutional challenge given the available

³⁷⁸ Annemarie Devereux, *Australia and the Birth of the International Bill of Human Rights 1946-1966*, (The Federation Press, 2005) 1.

³⁷⁹ Above n 11, 143-8.

³⁸⁰ Commonwealth, *Parliamentary Debates*, Senate, 8 November 1979, 2093.

guidance from other jurisdictions chiefly regarding allowable interpretations and the ability to make declarations of incompatibility binding on the parties involved. The level of public support should motivate parliament to ‘bite the bullet’ and enact a federal HRA despite the perceived challenges.

The above reasons may offer some explanation as to why Australia remains alone in not possessing a bill or charter of rights but they do not provide legitimate reasons for the continuing lack of such an instrument. The historical/cultural, political and legal (questionable) reasons that run counter to a HRA appear frivolous next to the benefits that can be wrought under one.

2014 should have been an historical year for human rights protection in Australia. This year marks the 10th anniversary of the ACTHRA and the eight year review into the operation of the VICHRA. Also 2014 would have seen a review of the 2009 National Human Rights Consultation Report which had recommended the creation of a dialogue model federal HRA for Australia. This recommendation was rejected by the Rudd government in favour of the watered down National Human Rights Framework which included some recommendations from the NHRCR. However under the current Liberal Coalition it is unlikely the findings of the report will be revisited. An opportunity was missed by not enacting a HRA in 2009 following the release of the NHRCR which recommended such a model.³⁸¹

Human rights protection in Australia remains incomplete. The constitution and the common law are not effective protectors of human rights due to the lack of express rights protection contained in the constitution and the ability of parliament's will to subordinate the common law. The protection of human rights through federal legislation remains at best a patchwork system that fails to domestically incorporate the complete range of internationally recognised human rights protections. Due to these failings human rights violations have occurred within Australia and the potential remains for further violations if this imbalance in human rights protection is not addressed. Former members of the High Court have expressed frustration that traditional methods of statutory interpretation coupled with ill-conceived federal legislation have resulted in unreasonable restrictions on human rights.

A dialogue model HRA would provide the judiciary with the tools to address the imbalance that exists in the protection of human rights whilst not infringing the separation of powers that exists in Australia. This model would allow the courts to interpret unambiguous legislation in a human rights compliant manner except where to do so would frustrate the intent of the legislature. The declaration of incompatibility mechanism allows the judiciary to

³⁸¹ The National Human Rights Framework appears to have been abandoned by the current federal government.

communication to the legislature that it may wish to reconsider a legislative provision that it believes unreasonably infringes protected human rights. Parliament would be forced to scrutinise potential legislation for human rights infringement and only limit protected human rights in reference to reasonable proportional restrictions. The actions of parliament in limiting human rights would become more transparent and face repercussions from the public if they could not be determined to be reasonable. Public authorities would have to account for human rights in their decision making, helping to develop a culture of rights in the public service. A dialogue model HRA would send a strong message to the international community that Australia is committed to protecting human rights and prevent Australia from becoming further isolated from developing international jurisprudence surrounding human rights. All these are positive effects that result from the enactment of a HRA and would represent a higher standard of human rights protection in Australia.

A dialogue model HRA represents best practice for the protection of human rights in Australia. The federal government, or a future federal government, should follow the example set by Victoria and the ACT and enact a HRA. This instrument should be based on the UKHRA and BORA models and include the provisions best suited for an Australian context. The protection of human rights should never be dominated by a political agenda and after a period on inactivity the need to review Australia's lack of human rights protection has come again. The benefits that can be wrought under a HRA are numerous, eclipse any alleged disadvantages and should be enjoyed by all members of the Australian community.

Reference List

Books:

- Phillip Alston (ed), *Promoting Human Rights Through Bills of Rights* (Oxford University press, 1999)
- Peter Bailey, *The Human Rights Enterprise in Australia and Internationally* (LexisNexis Butterworths, 2009)
- Stephen Bottomley and Suzanne Corcoran (eds), *Interpreting Statutes* (The Federation Press, 2005)
- Ian Brodie and Grant Hudscroft (eds), *Constitutionalism in the Charter Era* (LexisNexis Canada, 2004)
- Andrew Butler and Petra Butler, *The New Zealand Bill of Rights Act: A Commentary* (LexisNexis, Wellington, 2005)
- Andrew Byrnes, Hilary Charlesworth and Gabrielle McKinnon, *Bills of Rights in Australia: History, Politics and Law* (University of New South Wales Press, 2009)
- Tom Campbell and Jeff Goldsworthy (eds), *Judicial Power, Democracy and Legal Positivism* (Ashgate Dartmouth, 1999)
- Tom Campbell, Jeffery Goldsworthy and Adrinne Stone (eds), *Protecting Rights Without a Bill of Rights: Institutional Performance and Review in Australia* (Ashgate, 2006)
- Melissa Castan and Paul Gerber, *Contemporary Perspectives on Human Rights Law in Australia* (Thomson Reuters, 2013)
- Annemarie Devereux, *Australia and the Birth of the International Bill of Human Rights 1946-1966*, (The Federation Press, 2005)
- Carolyn Evans and Simon Evans, *Australian Bills of Right: The Law of the Victorian Charter and the ACT Human Rights Act* (LexisNexis Butterworths, 2008)

- Robert Garran, *The Coming Commonwealth: An Australian Handbook of Federal Government* (Kessinger Publishing, 1897)
- Ryan Haddrick and Julian leeser (eds), *Don't Leave Us with the Bill: The Case Against an Australian Bill of Rights* (The Menzies Research Centre Limited, 2009)
- David Hume and George Williams, *Human Rights under the Australian Constitution* (Oxford University Press, 2013)
- Wendy Lacey, *Implementing Human Rights Norms: Judicial Discretion & Use of Unincorporated Conventions* (Presidian Legal Publications, 2008)
- Geoffrey Lindell (eds), *Reflections on the Australian Constitution* (Federation Press Sydney, 2003)
- Sir Robert Menzies, *Central Power in the Australian Commonwealth* (Cassell & Company Ltd, 1967)
- Geoffrey Robertson, 'The Statute of Liberty How Australians can take back their rights' (Random House Australia Pty Ltd, 2009)
- James Spigelman, 'The Common Law Bill of Rights' in *Statutory Interpretation and Human Rights: McPherson Lecture Series* (University of Queensland Press, 2009)
- Richard Stone, *Civil Liberties & Human Rights* (Oxford University Press, 2012)
- George Williams, *A Charter of Rights for Australia* (University of New South Wales Press Ltd, 2007)

Cases:

- *Adelaide Company of Jehovah's Witnesses Inc v Commonwealth* (1943) 67 CLR 116
- *Al-Kateb v Godwin* (2004) 219 CLR 562
- *Attorney General (Cth) v Alinta Ltd* (2008) 233 CLR 542
- *Australian Crime Commission v Stoddart* (2011) 244 CLR 554
- *Baban v Australia*, Communication No 1014/2001 (2003)

- *Cachia v Faluyi* [2001] 1 WLR 1966
- *Castles v Secretary to the Department of Justice* [2010] VSC 310
- *Coco v The Queen* (1994) 179 CLR 427
- *Corporation of the City of Enfield v Development Assessment Commission and Another* (2000) 199 CLR 135
- *Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106
- *Clyde Engineering Co Ltd v Cowburn* (1926) 37 CLR 466
- *Croome v Tasmania* (1997) 191 CLR 119
- *De Freitas v Permanent Secretary of the Minister of Agriculture, Fisheries, Lands and Housing* [1999] 1 AC 69
- *Dietrich v The Queen* [1992] HCA 57
- *DPP v Mokbel* [2010] VSC 331
- *Ghaidan v Mendoza* [2004] 2 AC 557
- *Haskins v Commonwealth* (2011) 244 CLR 22
- *Koowarta v Bjelke-Petersen* (1982) 153 CLR 168
- *Krygger v Williams* (1912) 15 CLR 366
- *Mabo v Queensland (No 2)* (1992) 175 CLR 1
- *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273
- *Mellifont* (1991) 173 CLR 289
- *Momcilovic v R* (2011) 280 ALR 221
- *Momcilovic v The Queen* [2010] VSCA 50
- *Moonen v Film and Literature Board* (1999) 5 HRNZ 224
- *Morro v Australian Capital Territory* (2009) 168 ACTR 1
- *MOT v Noort* [1992] 3 NZLR 269
- *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1

- *PJB v Melbourne Health (Patrick's Case)* [2011] VSC 327
- *Potter v Minahan* (1908) 7 CLR 277
- *Quilter v Attorney General* (1997) 4 HRNZ 170
- *R v Broadcasting Standards Commission ex parte BBC* [2001] QB 885
- *R v Director of Public Prosecutions; ex parte Kebliene* [2000] 2 AC 326
- *R v Kirby: Ex parte Boilermakers Society of Australia* (1956) 94 CLR 254
- *R v Oakes* [1986] 1 SCR 103
- *R v Poumako* (2000) 5 HRNZ 652
- *R v Secretary of State for the Home Department* [2001] UKHL 26
- *R v Secretary of State for the Home Department* [2002] UKHL 46
- *R (SB) v Governors of Denbigh High School* [2007] 1 AC 100
- *Re Application under the Major Crime (Investigative Powers) Act 2004* [2009] VSC 381
- *Re Minister for Immigration and Multicultural Affairs: Ex parte Lam* (2003) 195 ALR 502
- *SI v KS* (2005) 195 FLR 151
- *Simpson v Attorney-General (Baigent's Case)* (1994)1 HRNZ 42
- *Smith v Hobsons Bay City Council and Ors* (2010) 175 LGERA 221
- *Tasmanian Dams Case* (1983) 158 CLR 1
- *The Queen v Public Vehicles Licensing Appeal Tribunal (Tas.); Ex parte Australian National Airways Pty Ltd* (1964) 113 CLR 207
- *Thomas v Mowbray* (2007) 233 CLR 307
- *Toonen v Australia* CCPR/C/50/D/488/1992
- *Victoria v Commonwealth* (1996) 187 CLR 416
- *Wik People's v Queensland* (1996) 187 CLR 1

- *YL v Birmingham City Council* [2007] 3 All ER 957

Government Material:

- ACT Department of Justice and Community Safety, Parliament of ACT, *Human Rights Act 2004: Twelve-Month Review-Report* (2006)
- ACT Government, Government Response to the Recommendations of the Report of the Human Rights Audit on the Operation of ACT Correctional Facilities under Corrections Legislation (2007)
- Commonwealth, *Parliamentary Debates*, Senate, 27 June 2002, 3005 (Andrew Bartlett)
- Commonwealth, *Parliamentary Debates*, Senate, 8 November 1979, 2093
- Consultation Committee for a Proposed WA Human Rights Act (WA Committee), *WA Human Rights Act: Report of the Consultation Committee for a Proposed WA Human Rights Act* (2007)
- Carolyn Evans and Simon Evans, 'Australian Parliaments and the Protection of Human Rights' (2007) 47 *Papers of Parliament* 17
- Stephen Gageler and Henry Burmester, 'In the Matter of Constitutional Issues Concerning a Charter of Rights: Supplementary Opinions', Solicitor-General Opinion Nos 40, 68 (2009)
- House of Lords and House of Commons Joint Committee on Human Rights, 'The Human Rights Act: The DCA and Home Office Reviews' (32nd Report, 2005-6) November 2006
- Joint Committee on Human Rights, *A Bill of Rights for the UK?*, A House of Lords Paper 165, House of Commons Paper 150, Session 107-08 (2008)

- Joint Committee on Human Rights, *The international Covenant on Economic, Social and Cultural Rights*, House of Lord Paper 183, House of Commons paper No 1188, Session 2003-4 (2004)
- *National Human Rights Consultation Report* (2009)
- New Zealand Law Commission Crown Liability and Judicial Immunity: *A Response to Baigent's Case and Harvey v Derrick* (NZLR R37, Wellington, 1997)
- Report to the Joint Committee on Human Rights on the Government Response to Human Rights judgements 2012-13, Ministry of Justice
- Tasmanian Law Reform Institute, *A Charter of Rights for Tasmania*, Final Report No 10 (2007) 122
- UK Department for Constitutional Affairs, *Review of the Implementation of the Human Rights Act*, July 2006

Journal Articles:

- James Allan, 'The Victorian *Charter of Human Rights and Responsibilities*: Exegesis and Criticism' (2006) 30 *Melbourne University Law Review* 906
- Lady Justice Arden, 'The Interpretation of UK Domestic Legislation in the Light of European Convention on Human Rights Jurisprudence' (2004) 25 *Statute Law Review* 165
- Will Bateman and James Stellios, 'Chapter III of the Constitution, Federal Jurisdiction and Dialogue Charters of Human Rights' (2012) 36 *Melbourne University Law Review* 1
- Lord Bingham, 'Dignity, Fairness and Good Government: The Role of a Human Rights Act' (2009) 34 *Alternative Law Journal* 74

- Sir Gerard Brennan, 'Introduction to Human Rights Law: Seminar Part II' (2007) 81
Australian Law Journal 248
- John Burrows, 'The Changing Approach to the interpretation of Statutes' (2002) 33
Victoria University of Wellington Law Review 981
- Petra Butler, '15 Years of the NZ Bill of Rights: Time to Celebrate, Time to Reflect, Time to Work Harder' (2006) *Victoria University Human Rights Research* 14
- Petra Butler, 'Human Rights and Parliamentary Sovereignty in New Zealand' [2004]
35 *Victoria University of Wellington Law Review* 341
- Andrew Byrnes, 'Second-Class Rights yet again? Economic Social and Cultural Rights in the Report of the National Human Rights Consultation' (2010) 33(1)
University of New South Wales Law Journal 193
- Tom Campbell, 'Judicial Activism: Justice or Treason' (2003) 10 *Octago Law Review*
307
- Tom Campbell, 'Does anyone win under a Bill of Rights? A Response to Hilary Charlesworth's "Who Wins under a Bill of Rights"' (2006) *University of Queensland law Journal* 55
- Mauro Cappelletti, 'Repudiating Montesquieu? The Expansion and legitimacy of "Constitutional Justice"' (1985) 35 *Catholic University Law Review* 1
- Hilary Charlesworth and Sara Charlesworth, 'The Sex Discrimination Act and International Law' (2004) 47 *University of New South Wales Law Journal* 21
- Hilary Charlesworth, 'Who Wins under a Bill of Rights?' (2006) *The University of Queensland law Journal* 39
- Steven Churches, 'The Silent Death of Common Law Rights' (2013) 20 *Australian Journal of Administrative Law* 64

- Alexis Henry-Comley, 'The Principle of Legality: An Australian Common Law Bill of Rights' (2013) 15 *University of Norte Dame Australia Law Review* 83
- Jennifer Corrin, 'Australia: A Country Report on Human Rights' (2009) 40 *Victoria University of Wellington Law Review* 37
- Dominique Dalla-Pozza and George Williams, 'The Constitutional Validity of Declarations of Incompatibility in Australian Charters of Rights' [2007] *Deakin Law Review* 1
- Joanna Davidson, 'Incorporation of Human Rights in Administrative Decision-Making: The Impact of Human Right Instruments in Victoria and the ACT' (68) *Australian Institute of Administrative Law* February 2012
- 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
- Julie Debeljak, 'Parliamentary Sovereignty and Dialogue Under the Victorian Charter of Human Rights and Responsibilities: Drawing the Line Between Judicial Interpretation and Judicial Law-Making' (2008) 32 *Melbourne University Law Review* 422
- 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, 'The Human Rights Act 1998 (UK): The Preservation of Parliamentary Supremacy in the Context of Rights Protection' (2003) 9 *Australian Journal of Human Rights* 10
- Rosalind Dixon, 'A Minimalist Charter of Rights for Australia: The UK or Canada as a Model' (2009) 37 *Federal Law Review* 335

- Kathy Eagar and Janette Green, 'The Health of People in Australian Immigration Detention Centres' (2010) 192(2) *Medical Journal of Australia*
- Simon Evans and Carolyn Evans, 'Legal Redress under the Charter of Human Rights and Responsibilities' (2006) 17 *Public Law Review* 264
- Elizabeth Evatt, National Implementation: The Cutting Edge of International Human Rights Law (*Law and Policy Paper 12*) (Centre for International and Public Law, Australian National University, Canberra, 1999)
- Paul Fairall and Wendy Lacey, 'Preventative Detention and Control Orders Under Federal Law: The Case for a Bill of Rights' (2007) 31(3) *Melbourne University Law Review* 1072
- David Feldman, 'The Impact of Human Rights on the UK Legislative Process' (2004) 25 *Statute Law Review* 91
- Brian Galligan and Emma Larking, 'Rights Protection: The Bill of Rights Debate and Rights Protection in Australia's States and Territories' (2007) 28 *Adelaide Law Review* 185
- Beth Gaze, 'Context and Interpretation in Anti-Discrimination Law' [2002] 26 *Melbourne University Law Review* 325
- Connor Gearty, 'Reconciling Parliamentary Democracy and Human Rights' (2002) 118 *Law Review Quarterly* 248
- Claudia Geiringer, 'It's Interpretation Jim but not as we know it: Ghaidqn v Mendoza, The House of Lords and Rights-Consistent Interpretation, (2005) 3 *Victoria University of Wellington Human Rights Research Journal* 1
- Claudia Geiringer, 'The Dead Hand of the Bill of Rights? Is the *New Zealand Bill of Rights Act 1990* a Substantive Legal Constraint on Parliament's Power to Legislate' (2007) 11 *Octago Law Review* 389

- Justin Gleeson, 'A Federal Human Rights Act- What Implications for the States and Territories?' (2010) 33 *University of New South Wales Law Journal* 110
- Murray Gleeson, 'The Meaning of Legislation: Context, Purpose and Respect for Fundamental Rights' (2009) 20 *Public Law Review* 26
- Anthony Gray, 'Constitutionally Protecting the Presumption of Innocence' (2012) 31(1) *University of Tasmania Law Review* 132
- Peter Hogg, Allison Thornton and Wade Wright, 'A Reply on *Charter* Dialogue Revisited' (2007) 45 *Osgoode Hall Law Journal* 193
- Helen Irving, 'The Dilemmas in Dialogue: A Constitutional Analysis of the NHRC's Proposed Human Rights Act' (2010) 33 *University of New South Wales Law Journal* 60
- Francine Johnson and Edward Santow, 'How Would an Australian Human Rights Act Impact Business' (2010) 38 *Australian Business Law Review* 7
- Aileen Kavanagh, 'Unlocking the Human Rights Act: The Radical Approach to Section 3(1) revisited' (2005) 3 *European Human Rights Law Review* 259
- Michael Kirby, 'Lionel Murphy and the Power of Ideas' (1993) 18 *Alternative Law Journal* 121
- Justice Kirby, 'Swearing in and Welcome Speech, High Court of Australia' (1996) *Australian Law Journal* 274
- Michael Kirby, 'Consensus and Dissent and the Proposal for an Australian Statute of Rights' (2008) 12 *Southern Cross University Law Review* 129
- Michael Kirby, 'The Role of the Judge in Advancing Human Rights by Reference to International Human Rights Norms' (1988) 62 *Australian Law Journal* 514
- Francesca Klug and Claire O'Brien, 'The First Two Years of the Human Rights Act' [2002] *Winter Public Law* 649

- Irina Kolodizner, 'The Charter of Rights Debate: A Battle of the Models' (2009) 16 *Australian International Law Journal* 219
- Martti Koskenniemi, 'Intolerant Democracies: A Response' (1996) 37 *Harvard Law Journal* 231
- Wendy Lacey, 'The End for Teoh? Re Minister for Immigration and Multicultural Affairs; ex parte Lam' [2011] *University of New South Wales Law Review* 46
- H P Lee, 'A Federal Human Rights Act and the Reshaping of Australian Constitution Law' (2010) 33 *University of New South Wales Law Journal* 88
- Geoffrey Lindell, 'The Statutory Protection of Rights and Parliamentary Sovereignty: Guidance from the United Kingdom?' (2006) 17 *Public Law Review* 188
- David Malcolm, 'A Human Rights Act for Australia' (2006) 8 *University of North
Dame Australia Law Review* 9
- Christopher Manfredi and James Kelly, 'Six Degrees of Dialogue: A response to Hogg and Bushnell' (1999) 37 *Osgoode Hall Law Journal* 513
- Sir Anthony Mason, 'No Place in a Modern Democratic Society for a Supine Judiciary' (1997) 35 *Law Society Journal* 51
- Sir Anthony Mason 'A Bill of Rights for Australia' (1989) 5 *Australian Bar Review* 79
- Jim McGinty, 'A Human Rights Act for Australia' (2010) *University of North
Dame Australia Law Review* 1
- Michael McHugh, 'A Human Rights Act, The Courts and The Constitution' (2009) 11 *Constitutional Law and Policy Review* 86
- Gabrielle McKinnon and Helen Watchirs, 'Five Years Experience of the Human Rights Act 2004 (ACT): Insights for Human Rights Protection in Australia' (2010) 33 *University of New South Wales Law Journal* 1

- Margaret McMurdo, 'An Australian Human Rights Act: Quixotic Impossible Dream or Inevitable Natural Progression' (2010) 13 *Southern Cross University Law Review* 37
- Dan Meagher, 'The Common Law Principle of Legality in the Ages of Rights' (2011) 35 *Melbourne University Law Review* 449
- Danny Nicol, 'Are Convention Rights a No-Go Zone for Parliament?' [2002] *Autumn Public Law* 436
- Ivor Richardson, 'The New Zealand Bill of Rights: Experience and Potential, Including the Implications for Commerce' (2004) 10 *Canterbury Law Review* 259
- Alice Rolls, 'Avoiding Tragedy: Would the Decision of the High Court in Al-Kateb have been any different if Australia has a Bill of Rights like Victoria' (2007) 18 *Public Law Review* 119
- Edward Santow, 'The Act that Dares not Speak its Name: The National Human Rights Consultation Report's Parallel Roads to Human Rights Reform' (2010) 33 *University of New South Wales Law Journal* 8
- Edward Santow, 'Impact of an Australian Human Rights Act on Refugee Law' (2009) 16 *Australian Journal of Administrative Law* 183
- James Spigelman, 'Access to Justice and Human Rights Treaties' (2000) 22 *Sydney Law Review* 141
- James Spigelman, 'Blackstone, Burke, Bentham and the *Human Rights Act 2004*' (2005) 26 *Australian Business Law Review* 1
- Jim South, 'The 'Campaign for a National Bill of Rights: Would 'Decelerations of Incompatibility' be Compatible with the Constitution' (2007) 10 *Constitutional Law and Policy Review* 2

- James Stellios, 'Federal Dimensions to the ACT *Human Rights Act*' (2005) 47 *Australian Institute of Administrative Law Forum* 33
- John Steyn, 'The Intractable Problem of the Interpretation of Legal Texts' (2003) 25 *Sydney Law Review* 5
- Pamela Tate, 'Protecting Human Rights in a Federation' (2007) 33 *Monash University Law Review* 220
- Pamela Tate, 'Some Reflections on Victoria's Charter of Human Rights and Responsibilities' (2007) 52 *Australian Institute of Administrative Law Reform* 18
- Michael Tolley, 'Parliamentary Scrutiny of Rights in the United Kingdom: Accessing the Work of the Joint Committee on Human Rights' (2009) 44 *Australian Journal of Political Science* 41
- John Von Doussa, 'Reconciling Human Rights and Counter-Terrorism: A Crucial Challenge' (2006) 13 *James Cook University Law Review* 104
- Lord Walker, 'Problems of Human Rights Legislation: What Difference can a Human Rights Charter Make?' (2007) 81 *Australian Law Journal* 923
- Stefanie Wilkins, 'Constitutional limits on Bills of Rights Introduced by a State of Territory' (2007) 35 *Federal Law Review* 431

Legislation:

- *Age Discrimination Act 2004* (Cth)
- *Anti-Terrorism Act (No 2) 2005* (Cth)
- *Australian Human Rights Commission Act 1986* (Cth)
- *Bill of Rights Act 1990* (NZ)
- *Canadian Charter of Rights and Freedoms 1982*
- *Charter of Human Rights and Responsibilities Act 2006* (Vic)

- *Commonwealth of Australia Constitution Act 1900* (Imp)
- *Constitution of the Republic of South Africa Act 1996* (South Africa)
- *Constitutional Alternation (Post-War Deconstruction and Democratic Rights)* 1944
- *Constitutional Alteration (Rights and Freedoms)* 1988
- *Criminal Code 1995* (Cth)
- *Criminal Code Act 1924* (Tas)
- *Disability Discrimination Act 1992* (Cth)
- *Drugs, Poisons and Controlled Substances Act 1981* (Vic)
- *Explanatory Memorandum, Charter of Human Rights and Responsibilities Bill 2006*
(Vic)
- *Films, Videos and Publications Classification Act 1993* (NZ)
- *Human Rights Act 1993* (NZ)
- *Human Rights Act 1998* (UK)
- *Human Rights Act 2004* (ACT)
- *Human Rights Amendment Act 2001* (NZ)
- *Human Rights Commission Act 1981* (Cth)
- *Human Rights Sexual Co duct Act 1994* (Cth)
- *Immigration Restriction Act 1901* (Cth)
- *Judiciary Act 1903* (Cth)
- *Marriage Act 1955* (NZ)
- *Migration Act 1958* (Cth)
- *Native Title 1993 Act* (Cth)
- *Native Title Amendment Act 1998* (Cth)
- *Northern Territory National Emergency Response Act 2007* (Cth)
- *Privacy Act 1988* (Cth)

- *Racial Discrimination Act 1975* (Cth)
- *Rent Act 1977* (UK)
- *Sex Discrimination Act 1984* (Cth)

Newspaper Articles (online):

- Daniel Hurst, 'Anti-terrorism Bill: Police to get power to secretly search suspect's house' *The Guardian* (online), 9 October 2014 <
<http://www.theguardian.com/australia-news/2014/oct/09/anti-terrorism-bill-police-to-get-power-to-secretly-search-suspects-house>> (accessed 10 October 2014)
- JC Finley, 'Rights groups angered over David Cameron's plans to repeal U.K.'s Human Rights Act' *UPI* (online) 3 October 2014
http://www.upi.com/Top_News/World-News/2014/10/03/Rights-groups-angered-over-David-Camersons-plans-to-repeal-UKs-Human-Rights-Act/6751412332407/
(accessed 11 October 2014)

Other:

- British Institute of Human Rights, *Changing Lives* (2008)

Speeches:

- Julie Debeljak, 'Human Rights Responsibilities of Public Authorities under the Charter of Rights' (Presentation delivered at the law institute of Victoria Charter of Rights Conference, Melbourne, 18 May, 2007)

<http://www.hrlc.org.au/files/XRA1F9XVTJ/Debeljak%20%20Obligations%20of%20Public%20Authorities.pdf>>

- Terence Higgins, 'Australia's First Bill of Rights- Testing Judicial Independence and the Human Rights Imperative' (Delivered at the National press Club 3 March 2004)
<<http://www.courts.act.gov.au/magistrates/page/view/313#higgins>>
- David Malcolm, 'Human Rights- A Current Legal perspective' (Delivered at the Human Rights and the Protection of Innocence Symposium 26 March 2004) <
[http://www.supremecourt.wa.gov.au/ files/Human_Rights-Current_Legal_Perspective_%2026Mar04.pdf](http://www.supremecourt.wa.gov.au/files/Human_Rights-Current_Legal_Perspective_%2026Mar04.pdf)>
- *Australia's Human Rights Framework* (2010); Robert McClland, 'Launch of Australia's Human Rights Framework' (Speech delivered at the National Press Club of Australia, Canberra, 21 April 2010)
- Jon Stanhope, 'ACT Human Rights Community Forum' (Speech delivered at the Human Rights Forum, Canberra, 1 May 2006)

Treaties:

- *Convention on the Elimination of All Form of Discrimination against Women*, Open for signature 18 December 1979, 1249 UNTS 13 (entered into force September 3 1981)
- *Convention Relating to the Status of Refugees*, Opened for Signature 28 July 1951, 189 UNTS 137 (entered into force 22 April 1954)
- *International Covenant on Civil and Political Rights* (16 December 1966) 999 UNTS 171 (entered into force 3 January 1976)

- *International Covenant on Economic, Social and Culture Rights* (16 December 1966)
993 UNTS 3 (Entered into force 3 January 1976)
- *Optional Protocol to the International Covenant on Economic, Social and Culture Rights* GA Res 63/117, UN GAOR, 63rd sess, 66th plen mtg, UN DOC A/RES/63/117 (5 March 2009)
- *Universal Declaration of Human Rights*, GA Res 217A (III), UN GAOR, 3rd session, 183 plen mtg, UN Doc A/810 (10 December 1948)

United Nations Materials:

- UN Commission on Human Rights, *The Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights*, 28 September 1984, E/CN.4/1985/4
- United Nations Human Rights Committee, General Comment No 32 [80] The Nature of the General Legal Obligation Imposed on State Parties to the Covenant, UN Doc CCPR/C/21Rev.1/Add.13 (2004) [16]
- Committee on Economic, Social and Cultural Rights, *General Comment 9: The Domestic Application of the Covenant*, 19th sess, UN Doc E/C.12/1998/24 (3 December 1998)
- Committee on Economic, Social and Cultural Rights, *General Comment No 18: Article 6 of the International Convention on Economic, Social and Cultural Rights*, 35th sess, Un Doc E/C.12/GC/18 (6 February 2006)
- Human Rights Committee, Consideration of Reports Submitted by States Parties Under Article 40 of the Covenant: Concluding Observations of the Human Rights Committee- Australia, UN Doc CCPR/C/AUS/Co/5 (2009).

- Committee on Economic, Social and Cultural Rights, Considerations of Reports Submitted by States Parties Under Articles 16 and 17 of the Covenant: Concluding Observations of the Committee on Economic, Social and Cultural Rights- Australia, UN Doc E/2010/22
E/C.12/2009/3 (22 May 2009).
- Office of the UNHCR, UNHCR's *Guidelines on Applicable Criteria and Standards Relating to the Detention of Asylum Seekers* (February 1999) Guideline 3
- Martin Scheinin, Special Rapporteur, *Report of the Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms while Countering Terrorism, Australia; Study on Human Rights Compliance While Countering Terrorism*, UN Doc A /HRC/4/26/Add.3 (14 December 2006)