

NSW BAR ASSOCIATION

HUMAN RIGHTS COMMITTEE

OPTIONS PAPER FOR A CHARTER OF HUMAN RIGHTS FOR NSW

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EXECUTIVE SUMMARY

1. The Bar Association resolved on 4 May 2006 to support the Attorney-General's call for a community consultation with respect to a charter of human rights for NSW. It sought from its Human Rights Committee an options paper considering the models that are available and which one the Committee recommended.
2. The Committee found that the debate about a human rights act has significantly changed since the matter was last considered by the Bar Association in 2001. Statutory charters of human rights have been passed in Victoria and the ACT and the UK *Human Rights Act* 1998 has had almost 7 years of operation. Security legislation passed in the 6 years since September 11, 2001 has significantly infringed on the human rights of individuals and there has been a call for protection of those rights by legislative enactment.
3. The protection of human rights at both the State and federal levels is both ad hoc and limited. While there are important protections against certain areas of discrimination, there is no comprehensive statute which protects the human rights of those in NSW. Those seeking to protect their rights must rely on limited constitutional and common law protections and presumptions, single issue statutes and statutory interpretation. Complaint to a United Nations committee is exceedingly slow and the result is unenforceable and often ignored.
4. Whilst some countries such as South Africa and Canada have opted to entrench the observance of human rights in their constitutions, a number of common law countries have instead opted for statutory protection of human rights. The model adopted in the UK and New Zealand, and followed in Victoria and the ACT, does not restrict parliament from passing laws which infringe human rights nor are courts given the power to invalidate legislation. A court, however, must interpret legislation in accordance with human rights where possible and public authorities must act in accordance with human rights. Where statute and a human right truly conflict the former must prevail. The statutory model prefers a 'dialogue' between the courts, parliament and the public. Where a court holds an enactment to be inconsistent with a human right, parliament must table the declaration and its response. When a bill is introduced to parliament the Minister must state whether the legislative measure infringes human rights and why it does so.
5. Those who argue for a statutory model point to the importance of protecting fundamental rights against the gradual erosion of such rights by the legislature. Many say the model strikes the appropriate balance between democratic and individual rights by the use of a dialogic model which protects individual rights but maintains parliamentary sovereignty. Those in favour say that there are many 'rights' that the people of New South Wales assume are protected but which are inadequately protected or not at all and a charter of rights and responsibilities would enhance protection. Arguments against the model centre on an unwarranted transfer of power from the legislature to the judiciary but also point to the inappropriateness and inability of courts to make policy decisions. Others have argued that human rights protections of this sort foment dissent and lead to an increase in litigation.

6. The Committee found that the statutory model in fact transfers power to individuals rather than to the courts. Parliament retains control over the protection of rights and may enact laws infringing those rights where the situation demands it. The availability of considerable jurisprudence exploring the limits of enumerated rights, including the use of important principles such as proportionality, makes the process of defining and protecting rights particularly judicial. Recent government statistics and analyses about the effect of the UK *Human Rights Act* do not support the criticism that litigation will increase. In the UK the *Human Rights Act* was raised in a number of criminal cases but successfully in less than 1%. Also, there have been only 12 successful declarations of incompatibility since 2000.
7. Australia has become increasingly isolated within the common law world. Almost all common law countries have adopted some form of constitutional or legislative protection for human rights. With Victoria and the ACT passing specific human rights acts, and Western Australian and Tasmania considering their own, NSW may well be further isolated within Australia.
8. The Committee's preferred model is that of statutory enactment typified by the UK and Victorian models but with some differences. The Committee prefers a wider number of rights than those protected in Victoria. However, it also recognises the political wisdom of consistency in the legislation.
9. The Human Rights Committee recommends that the Bar Association supports the adoption of a statutory charter of human rights for NSW. The model recommended by the Human Rights Committee in this memorandum is as follows:
 - Maintenance of the sovereignty of the NSW Parliament;
 - Enactment by statute;
 - Protection of the following rights (taken from the Victorian Charter adapted in accordance with NSW law): equality before the law, right to life, protection from torture or cruel, inhuman and degrading treatment, freedom from forced work (slavery, servitude or compulsory labour), freedom of movement, protection of privacy and reputation, freedom of thought, conscience, religion, belief, expression, peaceful assembly and freedom of association, protection of families and children, right to take part in public life, cultural and property rights, right to liberty and security of person, right to humane treatment when deprived of liberty, right to a fair hearing, rights in criminal proceedings, right not to be tried or punished more than once, rights in relation to retrospectivity of criminal laws;
 - Public authorities and those exercising a public power be required to act in accordance with human rights unless required by statute to act otherwise;
 - Requiring a court to interpret all legislation in accordance with human rights so far as it is possible to do so consistently with the legislation's purpose;
 - Conferring power on a court to issue a declaration of inconsistent interpretation where a NSW statute contravenes or allows for contravention of a human right but that such declaration shall not invalidate any provision of the statute;

- Requiring that a declaration of inconsistent interpretation be communicated to the Attorney-General to be laid before parliament;
- Requiring a member introducing a Bill to deliver a reasoned statement to parliament as to whether the bill is compatible with human rights or not;
- Permitting the Ombudsman to inquire into or investigate whether an administrative act is incompatible with a human right; and
- Incorporating a review mechanism 5 years after commencement to ascertain whether additional rights should be added to the charter and whether human rights might more adequately be enforced.

NSW BAR ASSOCIATION

HUMAN RIGHTS COMMITTEE

OPTIONS PAPER FOR A CHARTER OF HUMAN RIGHTS FOR NSW

1. On 4 May 2006 Bar Council resolved that the Bar Association would support a community consultation process without indicating whether it supported or opposed a “charter” of human rights. Council further resolved that its Human Rights Committee be asked to:
 - (a) prepare an options paper for it to consider the pros and cons of there being a charter; and
 - (b) if the Bar Association is to support such a charter, which of the various models it might support.
2. The resolution followed an announcement by the Attorney-General of NSW that he intended to propose to Cabinet that there be a community consultation in NSW as to whether NSW should have a ‘Charter of Human Rights.’
3. On 19 April 2007 the Bar Council considered an earlier version of an options paper produced by the Human Rights Committee and resolved that it was disposed to support the adoption of a statutory charter of human rights for NSW.
4. The Committee has taken into account the matters raised in and after the debate in Council and the options paper has been revised.

Introduction

5. In recent years Australia has become increasingly isolated in the common law world due to the absence of a specific statutory or constitutionally based mechanism for the protection of human rights. Two factors particularly have caused human rights protection to be prominent in recent public discussions of

rights. First, the United Kingdom, Victoria and the ACT have all passed human rights charters which have had wide ramifications for the law especially in the UK. Secondly, all common law countries including Australia, at both State and federal levels, have passed increasingly strident anti-terrorism legislation in the wake of September 11, 2001 raising strong concerns about the protection of the human rights of individuals. This has been highlighted by the treatment of David Hicks and, most recently, the detention of Dr Mohamed Haneef.

6. In the period prior to September 11, 2001 the NSW Standing Committee on Law and Justice conducted an inquiry into whether NSW should have a Bill of Rights.¹ It recommended against a statutory Bill of Rights being introduced in NSW but did recommend that a Scrutiny of Bills Committee be established and that the *Interpretation Act* 1987 be amended to allow a court to take international treaties and conventions into account when an ambiguity arose in legislation. The Premier replied two weeks later accepting the first recommendation and rejecting the second.² The Bar Association made submissions³ to the inquiry which, in short, were that the enactment of rights was a matter for the legislature but that there were various difficulties in the enactment of such rights. The overall tenor of the submission was opposed to a bill or rights for NSW and some of the issues identified in it are taken up below. The Human Rights Committee believes that notwithstanding the position taken on behalf of the Bar in 2001 there is now a reasonable and sound basis to revisit the arguments put at that time in 2006. The then Chair of the Standing Committee, the Hon Ron Dyer, now supports a charter of rights for NSW.⁴
7. After 2001 the Commonwealth passed a number of amendments to the *Australian Security and Intelligence Organisation Act* 1979 and its *Criminal Code* 1995 which have included wide new powers for the police and

¹ A NSW Bill of Rights: Report of the Standing Committee on Law and Justice, NSW Parliament, October 2001

² The Hon Bob Carr MLA, Premier to the Hon MR Egan MLC, Treasurer, 21 October 2001.

³ "Inquiry into a NSW Bill of Rights: Submission from the NSW Bar Association to the Legislative Council Standing Committee on Law and Justice"

⁴ R. Dyer "Should Australia have a Bill of Rights? Time for debate"
<http://evatt.labor.net.au/publications/papers/159.html>

intelligence services. Concerns have been raised by a number of legal bodies, including the Law Council of Australia and the NSW Bar Association, about the human rights ramifications of the new measures. The *Anti-Terrorism Act (No 2) 2005 (Cth)* sparked much debate about preventative detention (without trial), control orders and sedition. Further provisions include detention of non-suspects for questioning and wide telecommunications interception powers.

8. The operation of the anti-terrorism and migration laws with respect to Dr Mohamed Haneef has drawn particular criticism from the Australian Bar Association and the Law Council of Australia about the protection of the rule of law and Dr Haneef's human rights.
9. Lawyers have also been concerned about the new laws which allow for executive certificates of evidence to be used in court by a prosecutor, for restrictions on the ability of counsel for defendants to obtain evidence proffered against an accused and for security clearance required for defence counsel. NSW has enacted reciprocal and related legislation in its *Terrorism (Police Powers) Act 2002*. As recently as 22 July 2007 the NSW Premier announced additional search warrant powers in terrorism cases, proposed limiting applications for bail and increased powers for police to take DNA samples from those suspected of a criminal offence.
10. At the same time as the ACT government passed its *Human Rights Act 2004* which passed into ACT law the rights set out in the *International Covenant on Civil and Political Rights 1966*. A year after its passage in the ACT the Victorian Government commenced a process of community consultations for a "charter" of human rights for Victoria. That consultation finished at the end of 2005 and an overwhelming number of submissions (84%) were in favour of protecting human rights. The Victorian Attorney-General accepted the recommendation for legislation to be enacted for a charter of rights incorporating principally the rights set out in the *International Covenant on Civil and Political Rights 1966*. The *Charter of Human Rights and Responsibilities Act 2006* passed through the Victorian parliament with little

controversy⁵ and partly commenced on 1 January 2007.⁶ Both WA and Tasmania are undertaking public consultations about whether those States should enact a charter of rights.

11. In 2006 the first in depth analyses of the operation of the UK *Human Rights Act* 1998 were released. Some of the important findings of the UK Department of Constitutional Affairs review⁷ are that the *Human Rights Act* has not led to an increase in litigation and the impact of the Act on criminal law has been negligible. A recent report of the House of Lords and House of Commons Joint Standing Committee on Human Rights has condemned as unfounded attempts by some senior Ministers to scapegoat the *Human Rights Act* when there have, in fact, been specific failures in administration.⁸
12. This paper is divided into the following parts:
 - A. Current protection of human rights in Australia and NSW;
 - B. The available models from overseas and Australia for the protection of human rights by constitutional entrenchment or statutory enactment;
 - C. Arguments for and against a statutory model;
 - D. The identification of appropriate rights for inclusion in a charter of rights;
 - E. Miscellaneous issues;
 - F. The Committee's preferred model for NSW; and
 - G. The Committee's recommendation.

⁵ Tasmania also recently commenced a consultation through its Law Reform Institute on whether to introduce a Charter of Rights: <http://www.law.utas.edu.au/reform/>

⁶ The Victorian Charter will not fully commence until 1 January 2008.

⁷ Department of Constitutional Affairs UK, *Review of the Implementation of the Human Rights Act*, July 2006

⁸ *The Human Rights Act: the DCA and Home Office Reviews*, 7 November 2006, p 3. The Joint Committee is comprised of tri-partisan members.

A. CURRENT PROTECTION OF HUMAN RIGHTS IN AUSTRALIA

13. The current Australian federal model for the protection of human rights comprises the following elements: protections in international law including monitoring by international committees, very limited federal constitutional protection, statutory schemes for the protection of specific rights, common law protections and presumptions, and, of course, institutions of Parliamentary democracy. As is set out below, the current protection of human rights is *ad hoc* and limited - it is ripe for rationalisation and a comprehensive approach similar to that in other common law countries which share Australia's legal foundations.

International dimensions of the protection of human rights in Australia

14. 'Human rights' are concerned with the inherent dignity and security of all human beings. The law plays a role in defining those human rights, and providing legal protection of them. While there might be legitimate debate about what are human rights and which rights should be recognised, the term has become synonymous with the human rights documented in various well established international human rights instruments.
15. The key international human rights instruments are:
- the *Universal Declaration of Human Rights* adopted by the United Nations General Assembly in 1948;
 - the *International Covenant on Civil and Political Rights* ("ICCPR") and the *International Covenant on Economic, Social and Cultural Rights* ("ICESCR"), both of which were adopted by the United Nations General Assembly in 1966 and which came into force in 1976. Australia has been a party to these treaties – and therefore bound by them as a matter of international law – for more than a quarter of a century.⁹
16. The ICCPR contains rights such as the right not to be subjected to torture or to cruel, inhuman or degrading treatment or punishment, the right to liberty, the

⁹ The ICESCR entered into force in Australia on 10 March 1976 and the ICCPR on 13 November 1980.

right to a fair trial, freedom of expression, freedom of movement, freedom from discrimination, and equality before the law. The ICESCR contains human rights such as the rights to health, education and housing.

17. Both the ICCPR and ICESCR ensure that the rights recognised in each covenant are recognised without distinction as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. Both covenants contain provisions regarding special assistance to and protection of the family unit, of children and of the right of all people to participate in public and cultural life. Each state party undertakes to adopt such legislative or other measures as will give effect to the rights recognized in each of the two covenants.
18. Following the adoption of the ICCPR and the ICESCR, the UN moved to adopt human rights protections specific to particular groups in society and expanding on the foundation rights found in the Covenants. The following multilateral treaties were adopted by the UN and have been ratified by Australia:
 - *International Convention on the Elimination of All Forms of Racial Discrimination* 1965 (“CERD”);
 - *Convention on the Elimination of All Forms of Discrimination Against Women* 1979 (“CEDAW”);
 - *Convention on the Rights of the Child* 1989 (“CRoC”);
 - *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* 1984 (“CAT”).
19. While the former Chief Justice of Australia has acknowledged that international law has always been a source of Australian domestic law,¹⁰ international human rights laws are not automatically part of Commonwealth or New South Wales law. They have no direct legal effect upon the rights and duties of individuals.¹¹ Neither Commonwealth nor New South Wales

¹⁰ Mason A "International Law as a Source of Domestic Law" in Opeksin B and Rothwell D *International Law and Australian Federalism* Melbourne University Press, 1997 at 210.

¹¹ *Kioa v West* (1985) 159 CLR 550 at 570, *S & M Motor Repairs Pty Ltd v Caltex (Oil) Pty Ltd* (1988) 12 NSWLR 358 at 580 - 2.

legislation, which is otherwise valid, can be held invalid solely on the ground that it is inconsistent with international law.¹²

20. At present, the only way in which a person may directly seek redress for an alleged violation of the human treaties accepted by Australia is to submit a complaint to one of the United Nations committees whose competence to receive such complaints Australia has accepted. These are the committees established under the ICCPR, CAT and CERD. The Optional Protocol to the ICCPR, which Australia has ratified, permits individuals to make complaints to the Human Rights Committee, a body of independent experts established by the ICCPR. Complaints may only be made once all available legal remedies available in the Australian domestic legal system have been exhausted. The Committee receives written complaints and, in response, submissions from the relevant country and makes a decision on the papers. Similar procedures have been accepted by Australia under CAT and CERD. While the decisions of such committees are structured like judicial decisions, the decisions themselves are not formally binding as a matter of international law. Accordingly, the Australian government (among others) have felt free to refuse to implement them – indeed, in some cases to reject them outright.¹³
21. The Human Rights Committee has commented on the absence of Australian laws to give effect to the ICCPR.¹⁴ One argument advanced in the UK context – and equally applicable to the Australia – is that the existence of a domestic charter of rights which allows human rights guarantees to be raised directly before domestic courts reduces the likelihood that a successful challenge may be brought at the international level. That is, Australian courts have the opportunity to remedy any alleged breaches of rights rather than forcing a person to approach UN committee in Geneva.

¹² *Chu Kheng Lim v Minister for Immigration* (1992) 176 CLR 1 at 37-8, 52 and 74, *Horta v Commonwealth* (1994) 181 CLR 183.

¹³ This is an important difference with the UK since, as a matter of international law, judgments of the European Court of Human Rights are binding upon it. A failure to follow a decision would bring it into disrepute with the other members of the ECHR's governing body the Council of Europe. The Council's members include all the members of the European Union.

¹⁴ See *C v Australia* Communication 900/1999.

22. Such international instruments have a role to play with respect to the interpretation of statutes in the event of ambiguity or specific incorporation which is discussed below.

Constitutional Protections

23. The Australian Constitution was not intended to be a source of human rights. Nor was it intended to protect the human rights of Australian citizens or those within the jurisdiction of Australia.¹⁵
24. The Constitution provides some limited express human rights protections: with respect to the acquisition of property on just terms (section 51(xxxi)), trial by jury for an indictable offence (section 80), freedom of religion (section 116) and non-discrimination between residents of States (section 117).
25. Some of the implied 'rights' found in the Constitution operate as a restraint on the Commonwealth's power to legislate in a manner which impairs freedom of political communication and freedom of movement. Recent jurisprudence concerning Chapter III of the Constitution may be a further source of human rights protections in the context of fair trial and procedural rights.¹⁶ Any such source of the right to a fair trial has no application to the States.
26. To the extent that State laws may impair human rights protected by Commonwealth law, section 109 of the Constitution operates to invalidate such State laws.¹⁷
27. The New South Wales Constitution does not expressly or impliedly deal with the human rights of individuals or groups vis-à-vis the State,¹⁸ except as to the democratic structures of NSW, for example in relation to elections, parliament, the governor and the judiciary. Such rights, whilst of vital importance to our democracy, do not exhaust the rights that citizens may value and therefore seek to have protected in a charter of rights.

¹⁵ Williams G *Human Rights under the Australian Constitution* OUP Melbourne 1999.

¹⁶ Hon Justice MH McHugh AC *Does Chapter III of the Constitution protect substantive as well as procedural rights?*, Sir Maurice Byers Lecture delivered on 17 October 2001.

¹⁷ *Koowarta v Bjelke-Petersen* (1982) 153 CLR 168, and *Australian Postal Commission v Dao* (1987) 70 ALR 449.

¹⁸ *Kable v DPP* (1995) 36 NSWLR 374 per Mahoney J at 388 and Clarke JA at 395).

Protection by Specific Statute

28. Amongst federal laws there is no one enactment that comprehensively protects the human rights found in the international human rights instruments which Australia has accepted as binding. A multitude of statutes affect specific rights in different ways the enumeration of which is beyond this paper.
29. However, the *Human Rights and Equal Opportunity Commission Act 1986* (Cth) (“HREOC Act”) establishes a specific Commission charged with receiving complaints, conducting inquiries and providing recommendations to government on those complaints and other human rights issues. It does not have the power to enforce human rights. The human rights set out in the ICCPR form “human rights” under the HREOC Act and the ICCPR is Schedule 2 to the Act.
30. Complaints about the breach of a human right by a federal authority may be made to the Commission, which may investigate the complaint, make findings and report to the Attorney-General including any recommendation. The report is to be laid before the House of Representatives but any recommendation made by the Commission is not binding. Due primarily to the lack of a binding decision, and the delays that occur, the procedure is seldom used.¹⁹ Reports laid before Parliament attract little public attention.
31. The Commission is also responsible for investigating complaints of discrimination for alleged contraventions of federal discrimination laws which incorporate, in part, some of the international instruments to which Australia is a party. The federal statutes are the *Racial Discrimination Act 1975* (relying on CERD) and the *Sex Discrimination Act 1984* (relying on CEDAW), *Disability Discrimination Act 1992* (relying on ICCPR, ICESCR and ILO 111²⁰), and the *Age Discrimination Act 2004* (relying on ICCPR and ILO 111).

¹⁹ In 2005-2006 less than 3% of 1400 complaints received related to ICCPR rights with the vast majority concerning federal discrimination statutes: *HREOC Annual Report 2005-2006* p 70, 87. These statistics are consistent with previous years. Less than 9% of all complaints under the HREOC Act (excluding discrimination complaints but not limited to the ICCPR) were referred for inquiry and possible report: p89. A total of 4 reports with respect to violations of the ICCPR were laid before Federal Parliament in 2005-2006: pp92-94.

²⁰ The *Discrimination (Employment and Occupation) Convention 1958* is Schedule 1 to the HREOC Act.

If the Commission is unable to conciliate these complaints, proceedings may be commenced in the Federal Court or Federal Magistrates Court to have the complaint of discrimination determined.²¹ The suite of discrimination statutes mentioned is the best example of a regime to enforce human rights in federal law.

32. Other Commonwealth enactments that provide for specific rights include the *Crimes (Torture) Act* 1988, the *Privacy Act* 1988 and the *Human Rights (Sexual Conduct) Act* 1994. Further isolated and specific rights exist in individual pieces of legislation none of which protect rights in the general way found in the Victorian Charter or the ACT Human Rights Act. An example will assist. Section 138(3)(f) of the *Evidence Act* 1995 (Cth) provides that evidence which may have been obtained in contravention of a person's rights under the ICCPR is a factor that a court may take into account when deciding whether to exercise its discretion to admit evidence obtained by an impropriety or contravention of Australian law. In partial compliance with Australia's obligations under both the ICCPR and CAT the *Crimes (Torture) Act* 1988 (Cth) makes torture a criminal offence.²²

Statutory interpretation

33. General principles of statutory interpretation may also provide some incidental protection for human rights by permitting courts to interpret limited statutory provisions in accordance with human rights standards.
34. It is a long-established principle that a statute is to be interpreted and applied, so far as its language admits, in a manner which is consistent with established rules of international law and which accords with Australia's treaty obligations.²³ The approach is not limited in its application to ambiguous

²¹ Section 46PO HREOC Act.

²² Section 6.

²³ *Jumbunna Coal Mine NL v Victorian Coal Miners' Association* (1908) 6 CLR 309 at 363; *Lim* at 38 per Brennan, Deane and Dawson JJ. *Dietrich v The Queen* (1992) 177 CLR 292 at 306 per Mason CJ and McHugh J; *John Fairfax Publications v Doe* (1995) 37 NSWLR 81 at 90 per Gleeson CJ. See also *Maxwell on the Interpretation of Statutes* (7th Ed, 1929) at 127; Pearce & Geddes, *Statutory Interpretation In Australia* (5th ed 2001) at [5.14].

statutory provisions.²⁴ Rather, wherever the language of a statute is susceptible of a construction which is consistent with the terms of the relevant international instrument and the obligations which it imposes on Australia, that construction must prevail.²⁵

35. More recently, in New South Wales, Chief Justice Spigelman has commented that the greater salience being given to human rights considerations is reflected in the emergence of what has come to be called “the principle of legality”.²⁶
36. The principle of legality identifies the higher purpose of a number of principles of the law of statutory interpretation. The words “the principle of legality” were introduced into contemporary discourse by Lord Steyn, being a phrase he found in the 4th edition of *Halsburys Laws of England*, where it was employed as equivalent to the traditional phrase “the rule of law”.²⁷ It has subsequently been adopted in Australia, first by Chief Justice Gleeson writing extra-judicially²⁸ and subsequently in a number of judgments: see *Al-Kateb v Godwin*²⁹ and *Electrolux Home Products Pty Ltd v Australian Workers’ Union*.³⁰ It has also been adopted by Chief Justice Elias in New Zealand.³¹
37. In the case which established the “principle of legality” as a unifying principle in English law, *R v Secretary of State for the Home Department; Ex parte Simms*,³² Lord Hoffman said:

“[T]he principle of legality means that Parliament must squarely confront what it is doing and accept the political costs. Fundamental

²⁴ *Brown v Classification Review Board* (1998) 154 ALR 67 at 78 per French J; *Secretary of State, Ex Parte Simms* [2000] 2 AC 115 at 130 per Lord Steyn, 131 per Lord Hoffman.

²⁵ *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273 at 287 per Mason CJ and Deane J. See also *Kartinyeri v Commonwealth* (1998) 195 CLR 337 at 384 per Gummow and Hayne JJ; Spigelman, 'Access to Justice and Human Rights Treaties' (2000) 22 *Sydney Law Review* 141 at 149.

²⁶ For example, Statutory Interpretation And Human Rights, address to the Pacific Judicial Conference by the Hon JJ Spigelman AC, Vanuatu, 26 July 2005; also J J Spigelman, "Principle of Legality and the Clear Statement of Principle" (2005) 79 ALJ 769.

²⁷ See *R v Secretary of State for the Home Office; Ex parte Pierson* [1998] AC 539 at 587. *Halsbury's Laws of England* (4th ed) Reissue vol 8(2) (1996) para 6

²⁸ Murray Gleeson, *The Rule of Law and the Constitution Boyer Lectures* (2000) ABC Books pp2, 5 (2004) 219 CLR 562 at [19]

²⁹ (2004) 209 ALR 116 at [21], [23]

³⁰ *R v Pora* [2001] 2 NZLR 37 at 53.

³¹ *R v Pora* [2001] 2 NZLR 37 at 53.

³² [2000] 2 AC 115

rights cannot be overridden by general or ambiguous words. This is because there is too great a risk that the full implications of their unqualified meaning may have passed unnoticed in the democratic process. In the absence of express language or necessary implication to the contrary, the courts therefore presume that even the most general words were intended to be subject to the basic rights of the individual. In this way the courts of the United Kingdom, though acknowledging the sovereignty of Parliament, apply principles of constitutionality little different from those which exist in countries where the power of the legislature is expressly limited by a constitutional document.”³³

38. This passage has been quoted with approval by Gleeson CJ, Kirby J, Spigelman CJ and Elias CJ and Poras J.³⁴ In *Al-Kateb* Gleeson CJ said at [19]:

"Where what is involved is the interpretation of legislation said to confer upon the Executive a power of administrative detention that is indefinite in duration, and that may be permanent, there comes into play a principle of legality, which governs both Parliament and the courts. In exercising their judicial function, courts seek to give effect to the will of Parliament by declaring the meaning of what Parliament has enacted. Courts do not impute to the legislature an intention to abrogate or curtail certain human rights or freedoms (of which personal liberty is the most basic) unless such an intention is clearly manifested by unambiguous language, which indicates that the legislature has directed its attention to the rights or freedoms in question, and has consciously decided upon abrogation or curtailment. That principle has been re-affirmed by this Court in recent cases.³⁵ It is not new. In 1908, in this Court, O'Connor J referred to a passage from the fourth edition of *Maxwell on Statutes* which stated that '[i]t is in the last degree improbable that the legislature would overthrow fundamental principles, infringe rights, or depart from the general system of law, without expressing its intention with irresistible clearness'.³⁶"

39. In a speech published in the Australian Law Journal Spigelman CJ gave as manifestations of the principle of legality the presumptions that Parliament did not intend include: to invade fundamental rights, freedoms and immunities; to restrict access to the courts; to abrogate the protection of legal professional privilege; to exclude the right to claims of self-incrimination; to permit a court

³³ At 131

³⁴ In *Plaintiff S157/2002 v The Commonwealth* (2003) 211 CLR 476 at 30; *Al-Kateb* supra at [19] at fn 11, by Kirby J in *Daniels Corporation v ACCC* (2002) 213 CLR 543 at 582, by Spigelman CJ in *Lodhi v Regina* [2006] NSWCCA 121 at [32]ff, and by Elias CJ and Tipping J in *R v Pora* [2001] 2 NZLR 37 at 53.

³⁵ *Coco v The Queen* (1994) 179 CLR 427; *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476 at 492 [30]

³⁶ *Potter v Minahan* (1908) 7 CLR 277 at 304. See also *R v Secretary of State for the Home Department; Ex parte Pierson* [1998] AC 539 at 587-589 per Lord Steyn; *R v Secretary of State for the Home Department; Ex parte Simms* [2000] 2 AC 115 at 131 per Lord Hoffmann

to extend the scope of a penal statute; to deny procedural fairness to persons affected by the exercise of public power; to give immunities for governmental agencies a wide application; to interfere with vested property rights; to alienate property without compensation; and to interfere with equality of religion.³⁷

40. The limit of the application of the principle of legality in statutory interpretation - particularly with respect to protecting fundamental rights - was clearly exhibited in *Al-Kateb*. The majority held that because they could find no ambiguity there was no need to turn to the application of the relevant international instrument and the statutory right to detain a person indefinitely was unaffected.³⁸ Further, in *Re Woolley*³⁹ the High Court considered that Parliament had made clear its intention to permit the detention of children (in contravention of Australia's obligations under the *Convention on the Rights of the Child*) and as such there was no interpretive space to construe the legislation in a human rights-consistent manner despite a willingness by some judges to do so.

Common Law Protections and Presumptions

41. The common law has an important but limited role to play in the protection of human rights. It is trite law that a common law right may not be overridden by statute unless by clear words or necessary intendment.⁴⁰ As is evident the protection of such rights is limited by decision of Parliament and is easily abrogated by clear words. The right to liberty and the right to own property are examples of such well recognised rights. The former is protected by the ancient writ of habeas corpus preserved in NSW by the *Supreme Court Act* 1970.⁴¹ Others are in foundation statutes such as *Magna Carta* 1297, *Habeas Corpus Acts* of 1640, 1679 and 1816, the *Act of Settlement* and the *Bill of Rights Act 1688*.⁴² Still further rights have received modern recognition such

³⁷ "Principle of Legality and the Clear Statement of Principle" (2005) 79 ALJ 769

³⁸ McHugh J at [35], Hayne J at [239], Callinan at [298]

³⁹ (2004) 210 ALR 369, [2004] HCA 49 see McHugh J at [107] ff, Kirby J at [195] ff

⁴⁰ See, for example, *Coco v Queen* (1993) 179 CLR 427 at 437

⁴¹ Section 71.

⁴² See s.6 of the *Imperial Acts Application Act 1969* and Schedule 2 therein.

as the existence of native title rights in *Mabo v Queensland*⁴³ and the right to a fair trial in *Dietrich v R*.⁴⁴ Other attempts to have rights such as privacy and freedom of speech confirmed as common law rights have failed. Whilst the common law has operated to protect some human rights to an extent, the state of the existing law is such that it is not always open to judges to make decisions that will best give effect to human rights. Efforts that are made are often piece-meal.

42. In the Report of the ACT Bill of Rights Consultative Committee the Committee listed the satisfaction of some commentators with the sufficiency of common law protections.⁴⁵ While one should not underestimate the importance of the common law in protecting certain rights that does not exclude the limited number of such rights and their vulnerability to a legislature intent on their repeal or limitation.
43. In theory, the common law may adapt to changing circumstances and operate to protect rights. In practice there are very few examples where courts have been prepared to use human rights principles to develop the common law, notwithstanding Brennan J's observation in *Mabo* that "[a] common law doctrine founded on unjust discrimination in the enjoyment of civil and political rights demands reconsideration."⁴⁶

Administrative Law and Human Rights

44. In 1995, the High Court's decision in *Minister for Immigration and Ethnic Affairs v Teoh*⁴⁷ held that the ratification of an international instrument may create a legitimate expectation that an administrative decision take into account relevant treaty rights in making a decision. The *Teoh* decision has been controversial: there have been a number of attempts to legislate against the presumption of a legitimate expectation (including a successful one in South Australia), and a number of members of the present High Court

⁴³ (1992) 175 CLR 1

⁴⁴ (1992) 177 CLR 292

⁴⁵ At [2.70]

⁴⁶ (1992) 175 CLR 1 at 42

⁴⁷ (1995) 183 CLR 273

indicated in *Minister for Immigration; ex parte Lam* that they disapproved of the decision.⁴⁸

Protection for Human Rights in New South Wales

45. The patchwork of human rights protections available in the federal sphere is mirrored in NSW. In lieu of a comprehensive instrument protecting human rights there are ad hoc and limited protections available depending of the nature of the right and the classification of the person. These are considered briefly below.
46. In addition to federal anti-discrimination protections NSW also has the *Anti-Discrimination Act 1977* (NSW) which prohibits discrimination on the certain grounds some not covered in federal statute.⁴⁹ While that Act establishes an Anti-Discrimination Board it does not have a human rights remit and must limit itself to the conciliation of discrimination complaints and certain inquiries. It does not have the same powers as HREOC to investigate and report on contraventions of the ICCPR.
47. There are, of course, no specific protections for human rights in NSW other than those in piecemeal statutes. Further, the NSW Court of Appeal has rejected⁵⁰ a fundamental rights doctrine described elsewhere by Sir Robin Cooke in *Fraser v State Services Commission*⁵¹ as those “common law rights [which] *may go so deep* that even Parliament cannot be accepted by the Courts to have destroyed them.” In the *BLF Case* the Court of Appeal upheld the Diceyan vision of the supremacy of Parliament and rejected the doctrine of fundamental rights as being available to strike down legislation (used in that case to deregister the BLF).⁵²
48. The *parens patriae* jurisdiction of the Supreme Court allows for the protection of certain persons who are particularly vulnerable. The jurisdiction is limited to narrow classes of persons (for example, minors and the mentally ill) and

⁴⁸ (2003) 214 CLR 1. See, for example, McHugh and Gummow JJ at [97] to [102]

⁴⁹ Such as homosexuality, transgender and HIV/AIDS.

⁵⁰ *BLF v Minister Industrial Relations* (1986) 7 NSWLR 372 at 387 per Street CJ, 405 per Kirby P

⁵¹ [1984] 1 NZLR 116 at 121

⁵² Street CJ at 387

may be characterised as welfare-oriented rather than rights-oriented. The Supreme Court's jurisdiction interacts with various related powers such as those under the *Protected Estates Act* 1983 (whether a person is capable of managing their own affairs), the *Guardianship Act* 1987, Part XVI Div 2 of the *Conveyancing Act* 1919 (powers of attorney) and the *Mental Health Act* 1990 (discharge of patients).

49. The writ of habeas corpus maintains its strength⁵³ but its expansion to judicially review the conditions of prisoners in detention has been rejected by the NSW Court of Appeal in a case concerning the provision of condoms to prisoners to prevent contraction of HIV/AIDS.⁵⁴
50. Following the Standing Committee's 2001 inquiry into a NSW Bill of Rights the Parliament established a Scrutiny of Bills Committee which was to examine and report to Parliament on whether NSW legislation "unduly trespasses on personal rights and liberties".⁵⁵ While the Committee has reported on such trespasses the process has been ineffective in influencing the amendment of legislation where the bill is politically contentious. A number of bills with human rights implications have been passed within 48 hours of introduction providing insufficient time for the committee to consider and report before passage.⁵⁶ In the case of the Crimes (Serious Offenders) Bill 2006, for example, the legislation was passed before the Committee could report. The committee later voiced its concerns that the bill adversely affected rights concerning retrospectivity, deprivation of liberty, departing from the criminal standard of proof, double jeopardy and the disclosure of privilege communications.⁵⁷
51. The *Privacy and Personal Information Protection Act* 1998 (NSW) creates rights in relation to the protection of personal information held by NSW agencies but its protection of privacy rights is limited.

⁵³ Section 71 *Supreme Court Act* 1970

⁵⁴ *Prisoners A to XX v State of NSW* (1995) 38 NSWLR 622

⁵⁵ Section 8A *Legislation Review Act* 1987

⁵⁶ See p 3 of the Committee's *Annual Review 2005-2006*.

⁵⁷ *Ibid.* With respect to less urgent bills a process of dialogue between Committee and Government has occurred: see comments with respect to the Crimes (appeal and Review) Amendment (Double Jeopardy) Bill 2006 in *Legislation Review Digest 15 of 2006*.

Summary

52. The brief discussion above illustrates that both federal and NSW laws are *ad hoc* and limited with respect to the protection of human rights. NSW lacks unifying human rights legislation with respect to human rights which many lawyers and non-lawyers regard as fundamental to the balance to be struck between the operation of a democracy and the rights of individuals.

B. MODELS AVAILABLE FOR THE PROTECTION OF HUMAN RIGHTS

53. The countries of the common law world have chosen to protect human rights in two ways: constitutional entrenchment or statutory enactment. Constitutional entrenchment has been used in both USA and, more recently, in Canada. However, constitutional entrenchment has not found favour elsewhere and the UK, New Zealand and now the ACT and Victoria have preferred the legislative enactment of human rights. Both models are considered below but it is clear that constitutional entrenchment is not likely to be favourably considered by the NSW Government.

54. The rights found in the modern manifestation of a bill of rights are based generally on the rights found in the ICCPR. However, important rights characterised as economic, social and cultural rights have been included in the *Constitution of the Republic of South Africa* 1996 and to a lesser extent the *Canadian Constitution Act 1982*⁵⁸ as well as the *Victorian Charter of Human Rights and Responsibilities Act 2006*.⁵⁹

55. The similarity of the rights enacted in various common law countries has enabled the courts of superior jurisdiction to inform and develop their respective understanding of specific rights.

⁵⁸ The relevant part of the *Constitution Act 1982* (Can) also being known as the *Canadian Charter of Rights and Freedoms*.

⁵⁹ See ss. 16, 18 of *Charter of Human Rights and Responsibilities 2006*, s. 11 *Human Rights Act 2004* (ACT), see also the right to minority languages in s.23 and aboriginal rights in s. 35 of the *Constitution Act 1982* (Can).

Constitutional entrenched models

56. In the common law world many countries have chosen to incorporate human rights into their respective constitutions: these include in particular the USA, Canada and South Africa. While the Canadian and South African models are similar, the USA model dates from an earlier age of constitutionalism and is considerably different.

(a) *United States Constitution and Bill of Rights*

57. The human rights protections available under the Constitution of the United States date from the end of the 18th Century and draw on the *Declaration of the Rights of Man* 1789 adopted by the National Assembly of France during the French Revolution. Specific rights were incorporated into the Constitution first by the *Bill of Rights* 1791 (Amendments 1-10), the Civil War Amendments (Amendments 11-14), and subsequent amendments. Commonly known rights include:

- Freedom of speech, association and religion (the first amendment);
- Right to be free from unreasonable search and seizure (the fourth amendment)
- Right to due process including the privilege against self-incrimination and protection from double jeopardy (the fifth amendment);
- The equal protection clause (the fourteenth amendment).

58. Due to the constitutional incorporation of those rights, a court may strike down a law, whether state or federal, which contravenes those rights. The level of scrutiny given to a particular measure which offends a constitutional right depends on the type of right. For example, a state measure which discriminates against persons of a particular race and prima facie violates the equal protection clause would attract the highest level of scrutiny, called “anxious scrutiny”, by a court.

59. The protections for human rights under the US *Constitution* have been the subject of the most criticism because of the ability and flexibility given to courts to thwart government action or legislation. Criticism has also been

levelled at the lack of determinacy in how the choices made by a democratically elected parliament or executive may be undermined by the courts. In many ways this is a political argument about the balance between individual rights enforced by the judiciary and democratic power wielded by the legislature or executive.

(b) *Canadian Charter of Fundamental Rights and Freedoms*

60. In 1982 Canada incorporated into its *Constitution Act 1982* through the *Canadian Charter of Fundamental Rights and Freedoms* comprehensive protection for human rights.⁶⁰ While the *Canadian Charter* includes many of the well established civil rights, it also includes specific language rights reflecting the presence of both Anglophones and Francophones and the distinct rights of aboriginal peoples.
61. The *Canadian Charter* deals with the limits that may be imposed on the enjoyment of human rights in section 1. Rights are protected but they are not unlimited. Rights are susceptible to reasonable limitations prescribed by law if such limitations are “demonstrably justified in a democratic society”. This allows for the accommodation of legitimate limitations on free speech such as laws against defamation, pornography, and misleading advertising. The test is applied by the courts in reviewing whether a particular measure infringes a right. The terms of section 1 replicates a fundamental principle of human rights jurisprudence – the concept of proportionality. Equivalent provisions are found in the UK *Human Rights Act 1998*,⁶¹ the ACT *Human Rights Act 2004*⁶² and the Victorian Charter.⁶³
62. It should be pointed out, however, that the *Canadian Charter* maintains the supremacy of parliament. Section 33 allows parliament to specify that a law is valid notwithstanding that it offends a relevant provision of the *Charter* (the “notwithstanding clause”). The provision may be used for most but not all rights. Section 33 may be invoked prospectively at the time of the enactment

⁶⁰ The Canadian Charter succeeded earlier statutory protections in the *Canadian Bill of Rights 1960*.

⁶¹ Frequently incorporated with respect to a specific right, eg Article 8(2) of the ECHR (respect for one’s privacy, family life and home): see *Kay v Lambeth London Borough Council* [2006] 2 WLR 570.

⁶² Section 28

⁶³ Section 7

of a statute which is thought to be inconsistent with the *Charter*, or following a declaration by the courts of the invalidity of a statute or a provision of a statute. Such a declaration lasts for a period of 5 years, and may be renewed for further periods of five years. The notwithstanding clause has been used only on a handful of occasions since the adoption of the Charter.⁶⁴ The effect of such a mechanism is, some argue, to allow for dialogue between judiciary and legislature. Laws struck down by the court are then likely to be debated in parliament in the light of judicial examination of the relevant infringement of a human right. This dialogue is common in Canada and, as we will see, occurs also in the operation of the *Human Rights Act 1998* (UK).

63. Canadian courts have the ability to utilise their jurisdiction appropriately to protect a Charter right.⁶⁵ Charter rights may be enforced through interpreting the common law or a statute in a manner consistent with the Charter.

(c) *South African Constitution*

64. The *Constitution of the Republic of South Africa 1996* was passed in the post-apartheid era. It contains civil and political rights similar to the ICCPR and the *Canadian Charter* but adds further rights typically found in ICESCR such as the right to education, language and culture, health, housing and social security. Similar to the *Canadian Charter* the South African *Constitution* limits rights where it is reasonable and justifiable in a democratic society to do so.⁶⁶ A person, including a juristic person, may enforce any such right in a competent court.⁶⁷ In this way it operates in a similar fashion to the *Canadian Charter*.⁶⁸

65. The *Canadian Charter* and the South African *Constitution* are legitimately seen as the high-water mark in human rights protection. Both avoid the pitfalls of the US model, and the *Canadian Charter* allows for the supremacy

⁶⁴ Library of Parliament (Canada), “The Notwithstanding Clause of the Charter”, PRB 194E, revised May 2005, <http://www.parl.gc.ca/information/library/PRBpubs/bp194-e.htm>

⁶⁵ The Supreme Court has interpreted the operation of the Charter so that it fits seamlessly within current procedures: an alleged Charter violation relating to the obtaining of evidence, for example, may be ruled on in the normal way by the judge who is hearing the matter: PW Hogg *Constitutional Law of Canada* (1999) Carswell p 798.

⁶⁶ Section 36.

⁶⁷ Section 38.

⁶⁸ Save that there is no explicit override clause.

of parliament where the judiciary is out of step with the legislature. In representing the strongest form of protection they have been seen as a model for Australia – whether at state or federal level – by those wishing to provide strong protection for human rights such as the Bar Council of Victoria.⁶⁹

Statutory Enactment of Human Rights

66. A number of countries have chosen a different path for the protection of human rights, preferring inclusion of human rights protection in statute rather than through constitutional entrenchment.⁷⁰ A recent important example is the *New Zealand Bill of Rights Act 1990* which in turn influenced the incoming UK Blair Government. The Blair Government included passage of such legislation in its 1997 election manifesto and the *Human Rights Act 1998* (UK) was passed the following year, although it did not commence until 2000. It is the UK model, rather than the New Zealand model, which has been most influential in shaping the enumeration of rights and the manner of their protection in human rights charters adopted recently in Australia. The *Human Rights Act 2004* (ACT) and the *Charter of Human Rights and Responsibilities Act 2006* (Vic) both adopt the UK model with some important differences which are noted below.

(a) *New Zealand Bill of Rights Act 1990*

67. The *New Zealand Bill of Rights* adopts a minimalist model.⁷¹ It reproduces a number of rights found generally in the ICCPR in a reduced form. The Act omits a number of common rights such as the right to liberty, fair trial and family life, but includes a right to vote in elections and a right to refuse medical treatment. All rights may be subject to reasonable limitations “demonstrably justified in a free and democratic society”. The *Bill of Rights* does not affect other enactments, although the interpretation of any act consistent with the rights and freedoms contained in the *Bill of Rights* is to be

⁶⁹ Submission to the Victorian Human Rights Consultation Committee

⁷⁰ Hong Kong is another common law jurisdiction that recently introduced an ICCPR-based Bill of Rights, with both statutory and entrenched elements: see the *Hong Kong Bill of Rights Ordinance 1991*

⁷¹ At least in the number of protected rights.

preferred. It prohibits a court from holding that a statutory provision is invalid or ineffective because it contravenes a provision of the *Bill of Rights*.

68. The New Zealand *Bill of Rights* emerged after an analysis in 1987 of the protection of such rights by the Justice and Law Reform Select Committee. The Committee was influenced by the then recent passage of the *Canadian Charter* but it determined that, in the absence of a written constitution, a power should not be given to the judiciary to override legislation. Case law developed since the commencement of the *Bill of Rights* has allowed for damages to be awarded in certain cases where a right or freedom has been infringed.⁷²

(b) *United Kingdom Human Rights Act*

69. The UK Government's policy which included a Human Rights Act was called "Bringing Rights Home". The principal rationale for the new legislation was to enable UK to determine violations of European Convention on Human Rights ("ECHR") rather than forcing complainants to make application to the European Court of Human Rights in Strasbourg.

70. The European Convention on Human Rights⁷³ was adopted by the Council of Europe in 1950⁷⁴ far ahead of the United Nations adoption of the ICCPR and ICESCR. Individual complaints have been made to the European Court of Human Rights in Strasbourg for more than 40 years and, as a result, there is a wealth of jurisprudence. The enumerated rights in the ECHR are largely identical to the rights in the ICCPR.

71. The UK *Human Rights Act* 1998 enacts into domestic law the rights found in the ECHR.⁷⁵ Those rights include all the commonly recognised civil and

⁷² *Simpson v Attorney-General* [1994] 3 NZLR 667 "*Baigent's Case*".

⁷³ Although the Convention is commonly reduced to the European Convention on Human Rights its true title is the *Convention for the Protection of Human Rights and Fundamental Freedoms*.

⁷⁴ As the EU requires human rights to be protected by its new members the coverage of the ECHR now includes most of Eastern Europe as far as Russia and Turkey.

⁷⁵ The *Human Rights Act 1998* enacts Articles 2-12 and 14 of the ECHR and also protects certain rights found in the First and Sixth Protocols to the ECHR: s.1. Those rights are: the right to life, prohibition of torture, prohibition of slavery and forced labour, right to liberty and security, right to a fair trial, no punishment without law, right to privacy and family life, freedom of thought, conscience and religion, freedom of expression, freedom of assembly and association, right to marry, prohibition of

political rights, the right to privacy and family life, the right to marry, to free elections, to education and the protection of property together with the abolition of the death penalty.⁷⁶ Both primary and subordinate legislation are to be read and given effect in a way compatible with the enumerated rights.⁷⁷ However, the validity, operation or enforcement of incompatible legislation is not affected.⁷⁸ A court faced with incompatibility is restricted to granting a declaration that the relevant statute is incompatible with a Convention right – the so-called “declaration of incompatibility”.⁷⁹ As of 1 August 2006, UK courts had made some 20 declarations of incompatibility: 8 of these were overturned on appeal, while steps were or had already been taken to remove the incompatibility in the other 12 cases.⁸⁰

72. The purpose of a declaration of incompatibility is to set up a dialogic process between the courts and Parliament. The Act provides a Minister with the power to amend legislation by disallowable statutory instrument in his or her discretion where a court has made a declaration of incompatibility. In that way parliament retains its pre-eminence and control and the courts are restricted from declaring legislation invalid.⁸¹
73. It is unlawful for a public authority to act incompatibly with a Convention right.⁸² A public authority is any person who has functions of a public nature and includes a court.⁸³ A person who is a victim of an unlawful act may commence proceedings, raise the issue in an application for judicial review or rely on a Convention right in any proceedings.⁸⁴ The public authority may resist an adverse finding if the relevant act was giving effect to a legislative provision that could not be compatibly interpreted otherwise.⁸⁵ While damages

discrimination, protection of property from dispossession except in the public interest, right to education, right to free elections and abolition of the death penalty save in times of war.

⁷⁶ Section 1(1).

⁷⁷ Section 3(1)

⁷⁸ Section 3(2)

⁷⁹ Section 4(2)

⁸⁰ UK Department of Constitutional Affairs, *Declarations of Incompatibility made under section 4 of the Human Rights Act 1998* (as of 1 August 2006), <http://www.dca.gov.uk/peoples-rights/human-rights/pdf/decl-incompat-tabl.pdf>

⁸¹ Sections 10(2) and 20(1), (5)

⁸² Section 6(1)

⁸³ Section 6(1), (3)

⁸⁴ Section 7(1)

⁸⁵ Section 6(2)

for a breach of a convention right are available from a competent court such awards may only be made after consideration of other relief granted.⁸⁶

74. An important part of the UK Scheme is the public statement of the effect of new legislation on human rights. A Minister introducing legislation must make a statement to parliament that the bill is consistent with Convention or right or, if it is not, that the government nonetheless wishes to proceed with the bill.⁸⁷ Again the sovereignty of parliament is protected but transparency of legislation and its effects on human rights are enhanced.

75. In a report from the UK Department of Constitutional Affairs released in July 2006 the Department determined that the *Human Rights Act* 1998 had no significant impact upon criminal law.⁸⁸ The report considered that the impact of the Act on the development of policy had been significant but beneficial:

“[T]he Human Rights Act can be shown to have had a positive and beneficial impact upon the relationship between the citizen and the State, by providing a framework for policy formation which leads to better outcomes, and ensuring that the needs of all members of the UK’s increasingly diverse population are appropriately considered both by those formulating policy and by those putting it into effect.”⁸⁹

76. The report pointed to a number of myths about the effect and operation of the Act and the UK Government reaffirmed its commitment to the ECHR and says it will work for greater implementation.⁹⁰ The *Human Rights Act* 1998 has not led to burgeoning litigation: in the five years since its enactment there were 11 declarations that legislation was incompatible with a Convention right and a further 12 occasions when legislation was interpreted in a way compatible with the Convention.⁹¹

⁸⁶ Section 8(3), (4)

⁸⁷ Section 19(1)

⁸⁸ Department of Constitutional Affairs UK, *Review of the Implementation of the Human Rights Act*, July 2006, p 1

⁸⁹ At p.35

⁹⁰ At p. 1

⁹¹ At p. 4 *Review of the Implementation of the Human Rights Act*. The reference to successful declarations of incompatibility does not include those overturned on appeal.

(c) *Australian Capital Territory's Human Rights Act 2004*

77. The Australian Capital Territory introduced Australia's first modern bill of rights in 2004, following the report of an independent committee that recommended the adoption of a more widely-ranging bill of rights than was eventually adopted (in particular the Consultative Committee argued for the inclusion of economic, social and cultural rights). The *Human Rights Act 2004* (ACT) draws extensively on the model of the UK Human Rights Act, though it diverges from the UK Act in a number of important respects. The Act thus provides that statutes are to be interpreted consistently with human rights where reasonably possible (and without frustrating the legislative purpose of the Act being interpreted). If such an interpretation cannot reasonably be adopted, a court is not empowered to declare a statute invalid of the inconsistency with human rights.⁹² All that the Supreme Court may do is make a declaration of incompatibility, requiring the matter to be brought before the legislature so that it can consider its response. There is no provision explicitly binding public authorities to act in accordance with the Act, nor is there a direct right of action based on allegations of violation of the Act.⁹³ There is no specific right to damages for contravention of a right.
78. Since its introduction, there have been relatively few cases in the ACT courts though a number of commentators have observed that practitioners have not yet realised the full potential of the Act.⁹⁴ Commentators, government officials and legislators have noted that the most significant impact of the ACT Human Rights Act has been in the policy-making and in the legislative processes, with the effect of ensuring that human rights considerations are taken more

⁹² Though a court may find that secondary legislation is invalid if it exceeds the delegated legislative powers conferred by a statute read in a human rights-consistent manner.

⁹³ For a comprehensive collection of primary and secondary materials on the Human Rights Act 2004 (ACT), see the ACT Human Rights Act project website: <http://acthra.anu.edu.au/index.html>

⁹⁴ See, for example, "Practising Criminal Law under the Human Rights Act - No Rogue's Charter", speech given by Justice Terry Connolly at the Conference of Australian Prosecutors, Canberra, 14 July 2005, http://www.courts.act.gov.au/supreme/content/connolly_j.asp?textonly=no.

explicitly and full into account during the formulation of government policy and the drafting of legislation than was previously the case.⁹⁵

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

79. The Victorian *Charter of Human Rights and Responsibilities Act 2006* draws heavily upon the structure provided by the UK *Human Rights Act 1998*. All legislation must be interpreted in a way that is compatible with the rights set out in the Charter.⁹⁶ However, where there is inconsistency between a human right and a statute the validity of the legislation is not affected.⁹⁷ The Supreme Court may make a declaration of inconsistency⁹⁸ but such a declaration does not affect the validity of the legislation nor does it give the aggrieved person a cause of action.⁹⁹

80. Importantly, the Victorian legislation introduces a detailed proportionality test at section 7. A human right may only be limited by law as can be demonstrably justified in a free and democratic society. The definition draws directly on the formula found in human rights jurisprudence. In consideration of the absence of application of this fundamental principle in Australian courts¹⁰⁰ the matters to be applied in determining proportionality are wisely set out in s.7.

81. Public authorities are treated in a similar way to the UK *Human Rights Act 1998*. That is, a public authority is required to act in accordance with the human rights set out in the Charter unless it could not have reasonably acted differently.¹⁰¹ The authority is also required to give human rights proper consideration in making a decision.¹⁰² The Charter limits the granting of relief for the breach of a human right to cases where proceedings are available

⁹⁵ See ACT Department of Justice and Community Safety, *Human Rights Act 2004: Twelve-Month Review – Report* (June 2006),

http://www.jcs.act.gov.au/HumanRightsAct/Publications/twelve_month_review.pdf

⁹⁶ Section 32(1)

⁹⁷ Section 32(3)

⁹⁸ Section 36(2)

⁹⁹ Section 36(5)

¹⁰⁰ Save for in constitutional matters.

¹⁰¹ Section 38(1), (2)

¹⁰² Section 38(1)

already for illegality.¹⁰³ So, for example, if judicial review is available for an error of law by a public authority then the applicant may seek a remedy in the nature of a prerogative writ for the breach of a human right. However, damages for breach of a human right are specifically excluded.¹⁰⁴

82. The role of Parliament is crucial to the operation of the Charter. If the Supreme Court has made a declaration of inconsistency the relevant Minister must prepare a written statement in response to parliament and lay it before both houses.¹⁰⁵ With respect to new legislation the Minister introducing the legislation must either make a declaration of compatibility with human rights and lay it before both houses of parliament¹⁰⁶ or utilise the override provisions. Parliament may expressly declare, in exceptional circumstances, that a provision has effect notwithstanding that it is incompatible with human rights.¹⁰⁷
83. The drafters of the Victorian legislation chose not to annex the rights set out in the ICCPR to the Act as the UK legislators did with the relevant provisions of the ECHR but instead it chose to “modernise” the language¹⁰⁸ and change it to suit, in some cases, the state of Victorian law as at the date of enactment. The majority of the rights are those which have appeared elsewhere and comprise the common and well understood civil and political rights.¹⁰⁹ Some additional rights are: taking part in public life and cultural rights for indigenous people. The consultative committee and drafters of the bill were criticised for not including ICESCR rights or an indigenous right to self-determination but this is dealt with through reviews 4 and 8 years after enactment.¹¹⁰

¹⁰³ Section 39(1)

¹⁰⁴ Section 39(3)

¹⁰⁵ Section 37

¹⁰⁶ Section 28(2)

¹⁰⁷ Section 31(1)

¹⁰⁸ An approach taken from the *Human Rights Act 2004* (ACT).

¹⁰⁹ Equality before the law, the right to life, freedom from torture, freedom from forced work, freedom of movement, privacy and reputation, freedom of thought, conscience, religion, freedom of expression, peaceful assembly and association, protection of families and children, property rights, right to liberty and security of the person, human treatment once deprived of liberty, children in the criminal process, right to a fair hearing, rights in criminal proceedings, protection against double jeopardy and protection against retrospective criminal laws: ss. 8-27.

¹¹⁰ Sections 44 and 45. The possible addition of rights drawn from ICESCR, CEDAW and CROC and the right to self-determination are also specifically to be considered in such a review.

84. There exists now a reasonable body of human rights statutes in common law countries with systems of law sufficiently similar to ours to allow for the Committee to propose a legislatively enacted Charter of rights for NSW.

C. ARGUMENTS FOR AND AGAINST A STATUTORY MODEL

85. As has been set out in Section B to this paper, there are fundamental rights which are recognised at both the level of international law and domestically in most parts of the common law world which are not enforceable in NSW. The common law of NSW and its statutory laws are both *ad hoc* and inadequate to protect human rights. It is the protection of those fundamental rights which are crucial to achieving the appropriate balance between a properly functioning democracy and individual rights. It is particularly in testing times – such as societies facing the threat of terrorism – that democratic institutions may enact laws in the name of the majority which unduly infringe upon the legitimate rights of individuals.
86. A review of the rights set out in the ICCPR, the *Human Rights Act 1998* (UK), the *Human Rights Act 2004* (ACT) and the *Charter of Human Rights and Responsibilities Act 2006* (Vic) reveals a list of rights which are familiar to Australians and hardly to be considered novel. In many ways the rights protected are a reinstatement of common law rights which have been steadily whittled away by successive parliaments, sometimes for short-term political gain.
87. While Australians have been content to rely on the democratic system to protect rights in the past, many of us have been concerned at just how vulnerable those rights are in the face of a legislature intent on restricting them. Lawyers are familiar with the criminal law “auctions” that occur before State elections¹¹¹ and we have seen increasingly more strident anti-terrorism laws introduced in a similar rush to legislate at both the state and the federal level. Many of us are troubled that precious rights maintained or taken for granted

¹¹¹ The recent proposal to include community members on the Judicial Commission being an obvious example

over centuries have been and will be drastically eroded in the name of defeating the threat of terrorism.¹¹²

88. Those concerns have been borne out by violations of human rights that highlight the inadequacy of current law at both the State and the federal levels.. In the immigration area the decisions of the High Court in *Al- Kateb v Godwin*¹¹³ and *Minister for Immigration and Multicultural Affairs v Al Khafaji* (indefinite detention of “unlawful non-citizens”),¹¹⁴ *Re Woolley ex parte Applicants M276/2003 by their next friend GS*¹¹⁵ and *Minister for Immigration and Multicultural and Indigenous Affairs v B*¹¹⁶ (indefinite detention of their children) are good illustrations of what Michael McHugh AC QC has called “the failure of our parliamentary democracy in recent years to adequately protect human rights in the area of immigration”.¹¹⁷ At a state level, political debate about arbitrary detention, fair trial and fair dealings with the police, double jeopardy, protection from self-incrimination and protection against retrospective criminal laws is uninformed and unconstrained by statutory protection of civil rights. The experience of the United Kingdom – which has been subject to international scrutiny by the Strasburg organs for decades and which is still identifying flaws in its legal system – shows that a charter of rights not only serves to review existing laws for rights-consistency but also provides protection against excesses yet to come.
89. Support for the protection of human rights is mature at the international level and has seen domestic incorporation in the vast majority of European states (including the UK) and in North America. Australia is increasingly isolated amongst the legal systems with which it enjoys a shared history in its failure to

¹¹² An example is the ability of a court to impose a control order (including a home detention like order) upon a person when a person has not been found guilty of a criminal offence nor the has the criminal standard been reached with respect to the imposition of such an order: *Anti-Terrorism Act (No. 2) 2005* (Cth) Schedule 4.

¹¹³ (2004) 219 CLR 562

¹¹⁴ *Minister for Immigration and Multicultural and Indigenous Affairs v Al Khafaji* (2004) 219 CLR 664

¹¹⁵ *Re Woolley; ex parte Applicants M276/2003 by their next friend GS* (2004) 79 ALJR 43; (2004) 210ALR 369.

¹¹⁶ *Minister for Immigration and Multicultural and Indigenous Affairs v B* (2004) 78 ALJR 737; (2004) 206 ALR 130.

¹¹⁷ In a speech delivered to the Victorian Bar during Law Week 2007

protect fundamental human rights. Now NSW looks like it will be left behind by the actions of other States to enact such rights.

90. Notwithstanding these concerns there have been a number of prominent jurists and commentators who oppose a charter or bill of rights whether constitutionally or statutorily entrenched. Amongst those are former NSW Premier the Hon Bob Carr, former Chief Justice of the High Court Sir Harry Gibbs and Professor James Allan.

91. The principal argument raised against bills (or charters) of rights is that human rights charters involve a transfer of power to “unelected judges”, which, by definition, is undemocratic.¹¹⁸ Former Premier Bob Carr argued that,

“... Most modern bills of rights include a clause recognising that rights may be subject to such reasonable limits ‘as can be demonstrably justified in a free and democratic society’. This is clearly a policy decision not a judicial issue. If a bill of rights were enacted, it would then be up to a court to decide whether freedom of speech should be limited to pornography, tobacco advertising, solicitation for prostitution and the publication of instructions on how to make bombs.”¹¹⁹

92. Sir Harry Gibbs expressed the position succinctly:

“... it is certainly not democratic that decisions on matters of social and economic policy should be made by unelected judges who are not accountable for their decisions except to their own consciences.”¹²⁰

93. The basis of the argument is that, as the rights in any charter or bill of right are broadly stated, the judiciary will be charged with determining the parameters of the right in question. Judges may be tempted to pronounce on issues on which they have no particular expertise or capacity and may (wittingly or unwittingly) be drawn into the political debate. Indeed Justice Handley opined on his retirement that the general language used in human rights acts are a

¹¹⁸ See, for example, the writings of James Allan, Garrick Professor of Law at Queensland University and self-proclaimed “bills of rights sceptic”.

¹¹⁹ “The rights trap: How a bill of rights could undermine freedom” *Policy* Vol 17 No 2, (2001) p 19

¹²⁰ Samuel Griffith Society “Chapter Seven: Does Australia Need a Bill of Rights?” (Vol 6)

“blank canvas onto which judges can and do project their moral and political views”.¹²¹

94. Professor Allan argues that the fact that such rights are considered to be fundamental means that courts in jurisdictions such as Canada, the USA and New Zealand have given the rights a wide interpretation beyond that intended by the framers of the rights. He opines that an Australian bill if rights “would be interpreted by the Australian judges so as to give those same judges a significant increase in power vis-à-vis the elected branches of government.”¹²²
95. In a recent development of this argument in the *Sydney Morning Herald* Professor Allan stated that the power given to judges to interpret legislation was so wide that “‘black’ can be read to mean ‘virtually white’ or ‘men and women’ to mean ‘men and men’”.¹²³ That is an apparent reference to the House of Lords decision in *Ghaidan v Godin-Mendoza*,¹²⁴ where tenancy succession legislation which favoured a spouse was read to include a homosexual spouse.¹²⁵ (Contrast the New Zealand Court of Appeal decision in *Quilter v Attorney-General*¹²⁶ where the *Marriage Act* 1955 was interpreted, in accordance with the NZ Bill of Rights, not to allow marriage between persons of the same sex.)
96. Some opponents argue that existing constitutional and statutory protections are sufficient (“if it ain’t broke, don’t fix it”). In many ways this is an extension of the argument that such matters are best left to parliament for piecemeal development.
97. Some stress that bills of rights excessively legalise human rights, thereby failing to emphasis the importance of political, cultural and social change for the protection of human rights and producing an undue focus only on those rights commonly assumed to be justiciable.

¹²¹ Reply to the address on the retirement of the Honourable Justice Handley AO, 15 December 2006. http://www.lawlink.nsw.gov.au/lawlink/Supreme_Court/ll_sc.nsf/pages/SCO_spigelman151206

¹²² “Paying for the Comfort of Dogma” [2003] Sydney Law Review 4

¹²³ “All bets are off when a bill of rights comes in” 24 April 2006 Sydney Morning Herald.

¹²⁴ [2004] UKHL 30; 2AC 557

¹²⁵ The statute referred to a person living with a tenant as his or her ‘husband’ or ‘wife’. In *Ghaidan* the House of Lords considered that the gender of the spouse was not a principal aim of the statute and should be contrasted with a statute governing marriage.

¹²⁶ [1998] 1 NZLR 523

98. Opponents sometimes argue that bills of rights lead to an increase in litigation (including vexatious and frivolous suits) and the costs of proceedings. This argument has been made numerous times by the former NSW Premier on the basis *inter alia* that in New Zealand the Bill of Rights has been cited in a large number of criminal cases.¹²⁷ Likewise in the UK the *Human Rights Act 1998* has been cited in a large number of cases.¹²⁸
99. Sir Harry Gibbs argued that bills of rights “freeze” the development of rights, and limit their capacity to adapt to new circumstances because of the inflexibility of enumerated human rights. The argument is perhaps more apt for constitutionally entrenched bills of rights. Sir Harry says that in the USA this has meant that the law governing appeals from juries has been frozen in the 18th century.¹²⁹
100. Sir Harry also argued that there is a degree of unpredictability in enacting rights which are widely drafted because it is the judiciary which must interpret the right. He prefers the certainty of specifically drafted legislation with detailed procedural safeguards. For example, the *Crimes (Search Warrants and Powers of Arrest) Act 1994* is to be preferred in his opinion to the right to be “secure against unreasonable search and seizure”.
101. Some assert that charters only protect the rights of minorities or special interest groups at the expense of the general community (including familiar claims that bills of rights are “rogues’ charters” or “criminals’ charters”). Former Premier Bob Carr argues that:
- “The main beneficiaries of a bill of rights are the lawyers who profit from the legal fees that it generates and the criminals who manage to escape imprisonment on the grounds of a technicality.”¹³⁰
102. The argument that bills of rights primarily transfer power from democratically elected parliaments to “unelected” judges is, the Committee believes, misconceived. A bill of rights protects individuals and minorities against the

¹²⁷ “The rights trap” at 20-21

¹²⁸ As the statistics reveal that there has not been an inordinate increase in litigation overall it is likely that such cases would have been argued in any event.

¹²⁹ Sir Harry Gibbs op cit

¹³⁰ Bob Carr op cit at 21

will of the majority expressed through a parliament. If anything, limited power is transferred to individuals (only) where fundamental rights are threatened. In the statutory model preferred by the Committee the rights are enacted by parliament and may be reviewed, amended or repealed by parliament. The NSW Parliament has proved itself to be a remarkably robust institution and is unlikely to be reluctant to enact subsequent legislation which overrides a human right where it considers it is in the public interest to do so.

103. The argument about transfer of power to the courts is no doubt based on the constitutional decisions of US courts striking down government measures. The rights protected by the US Constitution are few and are not susceptible of easy amendment. There is little guidance in the US Constitution as to the interpretation of those rights and little reflection of modern day changes in attitude to specific rights. The result has meant an inordinate reliance upon the US judiciary to determine specific rights and, of most concern, the inability of Federal and State legislatures to overturn decisions on constitutional rights which are very much matters of debate in those legislatures. Some say that the US Supreme Court is deciding policy rather than acting judicially.
104. The Committee prefers the statutory model (to the constitutional model) because of the sophisticated way in which it reconciles human rights with the sovereignty of a democratically elected parliament. As much as can be done is done to protect those rights without constraining the parliament. However, where those rights must yield to the democratic will, the model used merely requires that the government consider the effect upon human rights and state publicly the effect on those rights of the legislative measure. Perhaps that will constrain the legislature in a given situation but the Committee believes the model benefits the protection of important rights. After all, parliament is the pre-eminent public institution where the effects of proposed legislation can be exposed to the public's gaze. In the result, if rights are to be removed or infringed, then the parliament must account to the people of NSW for doing so.
105. In the statutory model the courts are not given power to invalidate legislation. If the UK and Victorian model is followed, a finding and declaration of incompatibility by a court merely require the matter to be reported to

Parliament for its consideration and any action it deems appropriate (including refusing to follow the finding of the court).¹³¹ As the supremacy of the parliament is enshrined and protected in the legislative model, the argument that legislating for human rights is anti-democratic becomes difficult to maintain.

106. A related argument is that the judiciary will be asked to determine matters of policy more properly decided by the legislature. The argument is made with respect to determining the limits that may legitimately be placed on a human right. The answer to that criticism is provided by the considerable jurisprudence defining the limits of the rights and applying the principle of proportionality. That test traverses well established jurisprudence about the nature of the test in the European Court of Human Rights, the Canadian Supreme Court and now the House of Lords. To argue that NSW courts will be unguided or are ill-equipped to apply a similar test is unsustainable. To assist in the interpretation of the Victorian Charter a detailed test of the principle of proportionality is provided.¹³² Because of the unfamiliarity of NSW judges with that principle, the Committee believes a like formulation should be incorporated into a NSW Charter.
107. It is true that some of the rights are wide and that there is a need for judicial determination of the parameters of such rights. Three points may be made. First, many rights include specific exceptions which allow for specified limits to be placed on the right. In the Victorian Charter freedom of expression may be limited by lawful restrictions to respect the rights and reputations of others or where it is necessary for national security, public order, public health or public morality.¹³³ Secondly, broadly stated rights are already the subject of legislation such as in the *Native Title Act 1993*, the *Racial Discrimination Act 1975* and *Trade Practices Act 1974*¹³⁴ where the courts have been left to determine the outlying limits of the rights expressed in that legislation. At

¹³¹ Section 37 of the Victorian Charter requires the executive to cause a copy of the declaration and the government's response to be laid before both houses of parliament within 6 months of being made.

¹³² Section 7

¹³³ Section 15(3) of the Victorian Charter.

¹³⁴ See particularly the role of the courts in defining misleading or deceptive conduct and unconscionability.

common law the courts have been defining the scope of the duty of care in negligence for over 100 years. Thirdly, given the amount of jurisprudence available elsewhere there is an appropriate structure available for the judicial determination of rights without straying into policy considerations. Indeed the courts in the UK have refused to be drawn into areas which they consider are properly matters for the parliament or the executive to determine and in such cases have deferred to them.¹³⁵

“...[W]hen carrying out their assigned task the courts will accord to Parliament and to ministers, as the primary decision makers, an appropriate degree of latitude. The latitude will vary according to the subject matter under consideration, the importance of the human right in question, and the extent of the encroachment upon that right. The courts will intervene only when it is apparent that, in balancing the various considerations involved, the primary decision maker must have given insufficient weight to the human rights factor.”¹³⁶

108. As many of the civil and political rights were once drawn from common law rights the application of the rights will be familiar to judges. The right to a fair trial, for example, traverses well established principles of procedural fairness including freedom from biased decision making and the right to be heard. The concerns about courts taking decisions in relation to economic and social rights that may have significant budgetary or other implications (themselves overstated in any event) have not been realised.¹³⁷
109. The UK experience has also been instructive as to the effect of a charter on litigation. Rather than an increase in human rights specific litigation, what has occurred is that human rights issues have arisen frequently in litigation already on foot for other purposes. That is, human rights issues are commonly being argued in UK courts but as part of other litigation. The Department of Constitutional Affairs’ recent report states that the UK *Human Rights Act 1998* has had a greater effect on the operation of government departments and a negligible effect on criminal law. Earlier statistics released revealed that the

¹³⁵ *R (Pro-Life Alliance) v British Broadcasting Authority* [2004] 1 AC 185 at [74-77] and see the discussion in the *DCA Review of the Implementation of the Human Rights Act* op cit at p12.

¹³⁶ *A v Secretary of State for the Home Department* [2005] AC 68 at [80] per Lord Nicholls

¹³⁷ As is considered below with respect to which rights should be protected some decisions do have an effect on allocative decisions but such judicial decisions must, first, be distinguished from allocative decisions per se and, secondly, be seen in the light of common law and commercial actions which have serious allocative effects for government and private organisations.

Act was raised in less than 0.5% of criminal cases in the Crown Court. In the first 14 months of its operation the Act was relied on in 2997 cases and arguments based on the Act upheld in 56.¹³⁸ The Department concluded that,

“Arguments that the Human Rights Act has significantly altered the constitutional balance between Parliament, the Executive and the Judiciary have therefore been considerably exaggerated.”¹³⁹

110. The rigidity of human rights is an argument often used by non-lawyers. Human rights jurisprudence and indeed the international instruments and domestic incorporation have always allowed for the restriction of rights where such restrictions are justifiable in a democratic society. There is no broad conflict between laws against defamation, obscenity, pornography and the freedom of expression because all those matters are generally seen as justifiable. Where there remains conflict, the principle of proportionality guides the judicial hand in determining the correct balance.
111. A further argument put against State enactment of human rights protections is that it is really a matter for the federal legislature.¹⁴⁰ While such national protections are clearly preferable for consistency across jurisdiction (should such laws apply to the States) that has not always been the way in which legislative protections have developed in a federation. In this area of the law, for example, some States passed legislation prohibiting disability discrimination long before the Commonwealth enacted the *Disability Discrimination Act 1992 (Cth)*. As the federal government has specifically refused to pass broad-based human rights protections the ACT, Victoria, Tasmania and now NSW have expressed a desire to enact State-based protections.
112. The argument that a bill of rights is merely a “rogues’ charter” is simply ill informed. The same argument could be made of the procedural protections

¹³⁸ *Human Rights Act 1998: Impact on Court Workloads*, Department of Constitutional Affairs, 14 November 2005

¹³⁹ *DCA Review of the Implementation of the Human Rights Act* p. 4

¹⁴⁰ There are still some areas of State government that may not be reached by federal legislative power. It may also be noted that in the United States, every State has its own constitution and these provide a variety of human rights guarantees in the area of State responsibilities. While State constitutions are themselves subject to the federal Constitution, in many cases they provide more extensive protections than the federal Constitution.

applied to persons accused of a criminal offence. The rights in a proposed charter apply to all individuals and the sheer diversity of people who have sought to defend their rights in human rights jurisprudence fatally undermines this criticism.

113. A charter of rights in NSW will be an important safeguard and foundation for arguments frequently raised by the Bar Association concerning the rule of law and the rights of individuals, recent examples of which include:

- The placing of limitations on the right to double jeopardy: right to a fair trial/prohibition on double jeopardy;¹⁴¹
- Criminalisation of the storage of reproductive material by prisoners for reproductive purposes:¹⁴² right to privacy and family life, right to liberty, freedom from cruel inhuman and degrading punishment; right to equality;
- The rights to equal participation in the legal profession of female barristers, indigenous barristers and barristers with disabilities: right to equality;¹⁴³
- The making of unreasonable extensions of a detention of a person for questioning with respect to terrorism prior to charging: right to liberty;¹⁴⁴
- The passage of prisoner specific legislation to override a court imposed sentence in cases such as *Kable*¹⁴⁵ and *Fardon*¹⁴⁶ and “extended supervision” orders for sexual offenders:¹⁴⁷ right to liberty, prohibition of double jeopardy;

¹⁴¹ *Crimes (Appeal and Review) Amendment (Double Jeopardy) Act 2006* (NSW)

¹⁴² *Correctional Services Legislation Amendment t 2006*

¹⁴³ See the Bar’s Model Equal Opportunity Briefing Policy and model Sexual Harassment Policy; [work of the Bar Equal Opportunity Committee and work of the Indigenous Barristers Strategy Working Party of the NSW Bar Association.](#)

¹⁴⁴ Sections 23A and 23D of the *Crimes Act 1914* (Cth) do not require a judicial officer acting in personam to consider the right to liberty of the person detained for questioning.

¹⁴⁵ *Community Protection Act 1994* (NSW) and see *Kable v DPP* (1996) 189 CLR 51

¹⁴⁶ *Dangerous Prisoners (Sexual Offenders) Act 2003* (Qld). See also the case of John Lewthwaite facing a further 12 months imprisonment for breach of parole related to an indecent exposure charge.

¹⁴⁷ See *Crimes (Serious Sexual Offenders) Act 2006* (NSW)

- Prominent publication of photographs of Patrick Power’s house after he was charged: right to privacy, right to be presumed innocent/fair trial;¹⁴⁸ and
 - Current proposals to increase the independence of decision making for forensic patients found not guilty by reason of mental illness under the *Mental Health Act 1990*: right not to be arbitrarily deprived of one’s liberty.
114. The statutory model of a charter of rights preferred by the Committee achieves an appropriate balance between the continued sovereignty of parliament and the protection of fundamental human rights. The model establishes a dialogue between the courts and parliament to reinforce the principle that the actions of the executive and legislature are subject to the scrutiny of the courts when human rights are threatened. Parliament is given an opportunity to reply to a declaration of inconsistency by a court but is not required to accept a court’s assessment that a right has been infringed. Similarly, when a bill is introduced into parliament which has adverse ramifications for a human right then it is beneficial for public understanding and discussion of whether the right should be overborne that the Minister introducing the bill state publicly the effect of the bill on the human right.

D. IDENTIFICATION OF RIGHTS FOR INCLUSION IN A CHARTER

115. The rights protected by a NSW charter of rights need to be identified. The Committee recognises that there is considerable force in the argument that a NSW charter should protect, as a minimum, the same rights which are protected in the Victorian Charter and the ACT Human Rights Act so that the protections are generally uniform. It is beyond the scope of this paper to discuss each right but the drafting of each right should be based on the language of the international covenants which Australia has ratified and adjusted, where necessary, in accordance with NSW law.

¹⁴⁸ Bar Association press release 25 July 2006.

116. It is a fundamental aspect of any charter that rights may be legitimately limited in a democratic society. The power to limit rights is specifically expressed in s.7 of the Victorian Charter and the Committee considers that there is merit in adopting the Victorian approach which has greater clarity and ease of application than positions adopted elsewhere.

117. The following list of rights recommended for incorporation are taken from the Victorian Charter and any limitation specified in it should be reproduced in any NSW legislation:

- Right to life¹⁴⁹
- Right to liberty and security of the person
- Right to vote and be elected
- Freedom of expression
- Freedom of association and peaceful assembly
- Freedom of movement
- Freedom of thought, conscience, religion and belief
- Equality before the law
- Protection from torture and cruel, inhuman or degrading punishment
- Freedom from discrimination on the grounds protected by the *Anti-Discrimination Act 1977*
- Right not to be tried or punished more than once
- Right to a fair trial
- Rights in criminal proceedings¹⁵⁰
- Protection from retrospective criminal laws
- Freedom from slavery, servitude and forced or compulsory labour
- Freedom from deprivation of property
- Cultural rights
- Protection of families and children
- Right to privacy and reputation
- Protection for children in the criminal process

¹⁴⁹ The Committee supports the approach in the Victorian Charter that a NSW charter should not affect any laws applicable to abortion

¹⁵⁰ The rights in s.25 of the Victorian Charter include the presumption of innocence, prompt informing of any charge, adequate time to prepare a defence, trial without reasonable delay, appropriate provision of legal aid, ability to subpoena, examine and cross-examine witnesses, protection from self-incrimination, right to appeal from conviction and sentence.

118. The Committee supports proposals for a wide process of community consultation in order to determine with precision the rights that should be specifically protected in a NSW charter.

Inclusion of economic, social and cultural rights

119. While most of the rights in the UK *Human Rights Act* 1998, the ACT Human Rights Act and the Victorian Charter may be characterised as civil and political rights, some rights included, such as the rights to property, not to be forced to work and to participate in cultural and public life are properly characterised as economic, social and/or cultural rights. One economic right, the right to property, recognised in the Victorian Charter, could be strengthened by a provision that if private property is taken for public use, just compensation is to be paid, as provided for in the Fifth Amendment to the United States Constitution. The Victorian Charter also recognises the cultural rights of indigenous Australians which we consider separately in the next section of this paper.
120. On a number of occasions Australian courts and tribunals have considered economic, social and cultural rights. For example, there has been specific consideration of the right to work,¹⁵¹ the right to adequate housing,¹⁵² recognition of the family as the fundamental group in society,¹⁵³ discussion of the right to social security¹⁵⁴ and the right to strike.¹⁵⁵
121. Concern that economic, social and cultural rights are really questions about resource allocation not suitable for courts has been dispelled by the ICESCR Committee and reinforced by recent jurisprudence from South Africa. Both have identified a limited and legitimate role for the courts to play. The ACT Committee recommended, without success, the inclusion of such rights in the ACT Human Rights Act.¹⁵⁶

¹⁵¹ *Wickham v Canberra District Rugby League Football Club Ltd* [1988] SCACT 95; *Communications Electrical v WA Electronic Energy Specialty Alloys Pty Ltd* (1995) IRCA Madgwick J

¹⁵² *Sheather v Daley* [2003] NSWADT 51

¹⁵³ *McBain v State of Victoria* (2000) 177 ALR 320 (Sundberg J)

¹⁵⁴ *Secretary Department of Social Security v Dagher* (1997) AAT

¹⁵⁵ *Victoria v McBean* (1996) 138 ALR 456 Full Court of the Federal Court

¹⁵⁶ At [5.12]

122. Inclusion of economic, social and cultural rights in a Charter of rights for NSW would be consistent with the recommendations of the ACT Bill of Rights Consultative Committee, appointed in April 2002 to inquire into a possible bill of rights for the ACT.¹⁵⁷ The ACT Committee recommended *inter alia*:

“... that the rights set out in the two major human rights treaties to which Australia is a party, the ICESCR and ICCPR, should be protected by the Human Rights Act in so far as they are within the jurisdiction of the ACT.” (Recommendation 10)

123. As noted by the ACT Committee, the South African Constitution is striking for its broad coverage of rights¹⁵⁸, including socio-economic rights. The South African Constitutional Court has developed an extensive jurisprudence in relation to the normative content and implementation of economic, social and cultural rights.¹⁵⁹ But South Africa is not alone. The South African jurisprudence now combines with over 30 decisions of the UK courts with respect to the right to education¹⁶⁰, the right to property and the right to housing.¹⁶¹

124. The UN Committee on Economic, Social and Cultural Rights has also produced helpful jurisprudence in relation to the content and implementation of economic, social and cultural rights, confirming that the ICESCR provides for progressive realisation and acknowledges the constraints due to the limits of available resources.¹⁶² The UN Committee has recognised that resource constraints can render it impossible for a State to comply fully with its obligations under the ICESCR. However, in such circumstances, the State has the burden of justifying that every effort has been made to use all available

¹⁵⁷ “Towards an ACT Human Rights Act: Report of the ACT Bill of Rights Consultative Committee”, May 2003, para 3.28

¹⁵⁸ Towards an ACT Human Rights Act: Report of the ACT Bill of Rights Consultative Committee, May 2003, para 3.28.

¹⁵⁹ For example, *Further Certification of the Constitution of The Republic of South Africa, 1996* CCT23/96; (1996) 10 BCLR 1253, paras 77-78; *Soobramoney v Minister of Health (Kwazulu-Natal)* (1997) 12 BCLR 1696 (CC) and see discussion in H Steiner, “Social Rights and Economic Development; Converging Discourses” (1998) 4 *Buff HRLR* 25 at 30-34; *Government of the Republic of South Africa v Grootboom* (2001) (1) SA 46 (CC); *Minister of Health v Treatment Action Campaign* (2002) 10 BCLR 1033 (CC).

¹⁶⁰ See, for example, *T v Special Educational Needs Tribunal* [2002] EWHC 1474; *R v Secretary of State for Education and Employment* [2001] EWHC Admin 960 [2002] ELR 214;

¹⁶¹ See, for example, *Kay v Lambeth London Borough Council* [2006] UKHL 10

¹⁶² General Comment No 3

resources in order to satisfy, as a matter of priority, its obligations.¹⁶³ According to the UN Committee's jurisprudence, under no circumstances is non-compliance with certain core, non-derogable obligations justifiable. These include the provision on a non-discriminatory basis of access to health facilities, goods and services, especially for vulnerable or marginalised groups; access to minimum essential food which is nutritionally adequate and safe, to basic shelter, housing and sanitation, and an adequate supply of safe and potable water; to essential drugs; and the adoption and implementation of a public health strategy and plan of action, addressing the health concerns of the whole population, including methods such as indicators and benchmarks by which progress can be monitored, and giving particular attention to vulnerable and marginalized groups.

125. The jurisprudence of the South African Constitutional Court and the ICESCR Committee has confirmed the importance of restraint on the part of courts in adjudicating upon the reasonableness of measures taken to implement economic, social and cultural rights. For example, that Court has recognised that responsibility for making the difficult decisions in relation to the health budget and priorities lies with the political organs and the medical authorities. In *Soobramoney* the Court commented: “A court will be slow to interfere with rational decisions taken in good faith by the political organs and medical authorities whose responsibility it is to deal with such matters.”¹⁶⁴ This does not mean that in appropriate cases courts will not conclude that resource allocation is unreasonable and contrary to the right to health. As the Court observed in the *Treatment Action Campaign case*,¹⁶⁵

“... the Constitution contemplates rather a restrained and focused role for the courts, namely, to require the state to take measures to meet its constitutional obligations and to subject the reasonableness of these measures to evaluation. Such determinations of reasonableness may in fact have budgetary implications, but are not in themselves directed at rearranging budgets.”

¹⁶³ General Comment No 14

¹⁶⁴ Para 29.

¹⁶⁵ (2002) 10 BCLR 1033 (CC).

126. Adjudicating on human rights involves determining whether a human right has been infringed and is not an exercise of discretion. It is a decision on a question of objective fact, requiring informed and considered judgment.¹⁶⁶ In human rights cases in the UK, Canada and Hong Kong the courts have time and again reinforced the principle that the courts must afford great deference to the legislature on issues of policy because inter alia that is a realm properly assigned to elected representatives.¹⁶⁷
127. We observe that legislative recognition of economic, social and economic rights has a wider social effect. The experience in the UK, and now in the ACT and Victoria, is that if a rights-based approach is adopted in policy making, then the quality of decision-making at the level of both the executive and the legislature will be enhanced.
128. The Human Rights Committee generally favours the inclusion of the ICESCR rights in a NSW charter of human rights. However, the Committee recognises that such rights may not enjoy the same level of support as civil and political rights. That has been the experience in the ACT and Victoria. The Committee also recognises that there are real political obstacles that lie in the path of legislating for some rights that require allocation of Government resources for their enforcement. In addition, there is a strong argument for consistency in the rights protected by legislation in Australia.

Recognition of Indigenous Rights

129. The Human Rights Committee recommends the adoption of indigenous rights incorporating the equivalent to s.19 of the Victorian Charter (which recognises and protects cultural rights¹⁶⁸) in advance of a more detailed assessment of which rights drawn from the Declaration of the Rights of Indigenous People

¹⁶⁶ Cf *Singer v Berghouse* (1994) 181 CLR 201 at 211; *Vetter v Lake Macquarie City Council* (2001) 202 CLR 439 at 477 [108] Hayne J

¹⁶⁷ See *Liberman v Quebec* [1997] 3 SCR 569 at 605-606; *Attorney-General of Hong Kong v Lee Kwong-kut* [1993] AC 951 at 975; *Wilson v Secretary of State for Trade and Industry* [2003] UKHL 40 at [69-70] Lord Nicholls.

¹⁶⁸ Section 19(2) states that “Aboriginal persons hold distinct cultural rights and must not be denied the right, with other members of their community – (a) to enjoy their identity and culture; and (b) to maintain and use their language; and (c) to maintain their kinship ties; and (d) maintain their distinctive spiritual, metrial and economic relationship with the land and weaters amd other resources with which they have a connection under traditional laws and customs.”

should be adapted and incorporated for NSW use. The Human Rights Committee will consult with the Indigenous Barristers Strategy Working Party and encourage the NSW government to consult indigenous people directly on this issue.

130. In the Committee's view, there is a widespread desire amongst the people of NSW to ensure that the rights of Aboriginal and Torres Strait Islander peoples are accorded respect and dignity and a provision such an approach would promote this.
131. The general human rights framework, especially the right to self-determination, and the economic, social and cultural rights contained in it, would offer particular protection to indigenous people.¹⁶⁹ However, in light of specific normative developments internationally concerning the rights of indigenous peoples, reflected, *inter alia*, in ILO Convention Concerning Indigenous and Tribal Peoples in Independent Countries (No 169) and the United Nations Declaration on the Rights of Indigenous Peoples adopted by the Human Rights Council, the Committee considers that there should be specific recognition in a NSW charter of the rights of indigenous peoples. In this regard, the Bar Human Rights Committee does not consider that a provision similar to Article 27 of the ICCPR concerning the rights of persons belonging to ethnic, linguistic, and religious minorities is appropriate or adequate to guarantee the specific rights of indigenous peoples deriving from their specific historical experiences, identities and aspirations.¹⁷⁰
132. The Victorian Charter recognises the right of indigenous people to enjoy their identity and culture, language, kinship ties as well as to maintain their "distinctive spiritual, material and economic relationship with the land and water and other resources" under traditional law and custom.

¹⁶⁹ *Towards an ACT Human Rights Act: Report of the ACT Bill of Rights Consultative Committee*, May 2003, recommendation 11.

¹⁷⁰ Cf in Victoria, *Report of the Human Rights Consultation Committee*, p 40.

133. Recognition of specific indigenous rights would be consistent with significant constitutional and legislative developments in many countries.¹⁷¹ In Aotearoa/New Zealand the Waitangi Tribunal investigates claims of infringements of Maori rights under the 1830 Treaty of Waitangi. In Canada, section 35(1) of the *Constitution Act* 1982 provides: “*The existing Aboriginal and treaty rights of the Aboriginal peoples of Canada are hereby recognized and affirmed.*” Constitutional recognition in Canada has meant that Aboriginal and treaty rights can only be altered or terminated by consent or by constitutional amendment.¹⁷² Laws contravening s 35(1) can be set aside under s 52(1) of the *Constitution Act* 1982. Section 35(2) provides that the reference in s 35(1) to “treaty rights” includes rights that now exist by way of land claims agreements or may be so acquired. This provision has afforded the basis upon which regional agreements negotiated by Aboriginal peoples in Canada have been invested with constitutional status. Decisions of the Canadian Supreme Court have provided a firm legal foundation for the recognition and protection of Aboriginal and treaty rights.¹⁷³

E. MISCELLANEOUS ISSUES

134. The legislative model for a charter proposed by the Human Rights Committee and set out in the next section replicates the model accepted in Victoria and the ACT and, to an extent, that found in the UK and New Zealand. It is not

¹⁷¹ See annual country reports in International Workgroup on Indigenous Affairs, *The Indigenous World*, Copenhagen; J Anaya, *Indigenous Peoples in International Law*, Oxford University Press 1996, 133 ff; L R Barroso, “The Saga of Indigenous Peoples in Brazil: Constitution, Law and Policies” (1995) 7 *St Thomas Law Review* 645; M Gonzales de Pazos, “The Chiapas Uprising and the Negotiating Process” (1995) 7 *St. Thomas Law Review* 685; J E Brady, “The Huaorani Tribe of Ecuador: A Study in Self-Determination for Indigenous Peoples” (1997) 10 *Harvard Human Rights Journal* 291; A Palma Capera, “From Centuries of Patience Towards Becoming National Protagonists”, in L van der Vlist, *Voices of the Earth: Indigenous Peoples, New Partners and the Right to Self-Determination in Practice*, International Books, Netherlands Centre for Indigenous Peoples, 1994, 124; V Mariqueo Q, “Chile: The New Law for the Indigenous Communities”, *Indigenous Affairs*, No 2, Apr/May/Jun 1995, 34.

¹⁷² D Sanders, “Pre-Existing Rights: The Aboriginal Peoples of Canada (Sections 25 and 35)”, in G-A Beaudoin/E Ratushny, *Canadian Charter of Rights and Freedoms* (2 ed), Carswell, Toronto, 1989, 707, at 733.

¹⁷³ In 1990 in *Sparrow v The Queen*, the Supreme Court held that s 35 constitutionalises at least part of the rights traditionally associated with the common law of Aboriginal title, including practices that form an integral part of an Aboriginal community’s distinctive culture (in that case, sea fisheries): [1990] 4 WWR 410, 1 SCR 1075.

proposed to traverse once more the arguments in support of each part of the proposed model. However, there remain some miscellaneous issues which should be included and are addressed in this section. Those issues concern the award of damages for breach of a human right and the role of related institutions.

Awards of Damages

135. In the UK and New Zealand damages may be awarded for a breach of a human right only where other remedies are not appropriate. Other suitable remedies include interpretation of legislation in accordance with human rights, declaratory or injunctive relief, and declaration of incompatibility. In the UK, the court may award damages for the unlawful act of a public authority if the award of damages is just and appropriate.¹⁷⁴ In Victoria damages are specifically prohibited¹⁷⁵ and in the ACT no provision is made for them to be awarded.
136. There is a requirement in Article 2(3) of the ICCPR (binding on Australia) that Australia must “ensure that any person whose rights or freedoms ... are violated shall have an effective remedy.” In the Human Rights Committee’s authoritative *General Comment No 31* on “effective remedies” it stated that the ICCPR “generally entails appropriate compensation” for a breach of a right although that need not necessarily be monetary.¹⁷⁶
137. A reasonable argument against the inclusion of a right to damages is that there would not be consistency with Victoria and the ACT. Further, a right to damages may attract litigation for collateral gain and could impose an additional cost burden upon government. It is against the trend of the NSW Government to limit civil litigation and maintain the cap on damages under the *Anti-Discrimination Act 1977* to \$40,000. It is unlikely to attract political support.
138. If damages are to be available, the Committee considers that they should be limited to unlawful acts of a public authority where other remedies are

¹⁷⁴ Section 8(5) of the Act.

¹⁷⁵ Section 39(3)

¹⁷⁶ At [16]

inappropriate (as in the UK) and should not be awarded where a court merely declares that legislation is incompatible with human rights in keeping with the dialogic model adopted in the UK, Victoria and the ACT. That is, where a declaration of incompatibility is made, the law remains valid and there is no basis for an award of damages.

Role of the Ombudsman and the Anti-Discrimination Board

139. Useful roles may be played by other government institutions to support a human rights culture in the NSW public service. In Victoria the Ombudsman's powers have been augmented so that he or she may inquire into and investigate whether an administrative action is incompatible with a human right.¹⁷⁷ That provision is worthy of replication. In addition the Victorian Charter augments the role of its Equal Opportunity Commission to provide education about human rights and to review the effect of statute and the common law on human rights when requested by the Attorney-General.¹⁷⁸ Similar powers are provided to the ACT Human Rights Commissioner.¹⁷⁹ Such powers could also be given to the Anti-Discrimination Board in NSW.

F. PREFERRED MODEL FOR NSW

140. The Human Rights Committee recommends the adoption of a charter of rights for NSW with the following features:
- (a) Maintenance of the sovereignty of the NSW Parliament;
 - (b) Enactment by statute;
 - (c) Protection of the following rights (taken from the Victorian Charter adapted in accordance with NSW law): equality before the law, right to life, protection from torture or cruel, inhuman and degrading treatment, freedom from forced work (slavery, servitude or compulsory labour), freedom of movement, protection of privacy and reputation, freedom of thought, conscience, religion, belief, expression, peaceful assembly and freedom of association, protection of families and children, right to take part in public life, cultural and property rights, right to liberty and security of person, right to humane treatment when deprived of liberty,

¹⁷⁷ Section 13(1A) *Ombudsman Act 1973* (Vic)

¹⁷⁸ Section 41(b), (d) of the Victorian Charter.

¹⁷⁹ Section 27(2) *Human Rights Commission Act 2005* (ACT)

right to a fair hearing, rights in criminal proceedings, right not to be tried or punished more than once, rights in relation to retrospectivity of criminal laws;

- (d) Requiring public authorities and those exercising a public power be required to act in accordance with human rights unless obliged by statute to act otherwise;
- (e) Requiring a court to interpret all legislation in accordance with human rights so far as it is possible to do so consistently with the legislation's purpose;
- (f) Conferring power on a court to issue a declaration of inconsistent interpretation where a NSW statute contravenes or allows for contravention of a human right but that such declaration shall not invalidate any provision of the statute;
- (g) Requiring that a declaration of inconsistent interpretation be communicated to the Attorney-General to be laid before parliament;
- (h) Requiring a member introducing a Bill to deliver a reasoned statement to parliament as to whether the bill is compatible with human rights or not;
- (i) Permitting the Ombudsman to inquire into or investigate whether an administrative action is incompatible with a human right; and
- (j) Incorporating a review mechanism 5 years after commencement to ascertain whether additional rights should be added to the charter and whether human rights might more adequately be enforced.

G. COMMITTEE'S RECOMMENDATION

141. The Human Rights Committee recommends that the Bar Association supports :

1. *the enactment of a statutory charter of human rights for NSW and.*
2. *the model recommended by the Human Rights Committee in its memorandum dated 24 July 2007.*

24 July 2007