

A HUMAN RIGHTS ACT FOR AUSTRALIA

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Abstract

This article provides a pro human rights Act overview of the legal and practical issues associated with the current debate on human rights. The desire to discriminate against Indigenous and Asian peoples denied Australia an American style bill of rights at the time of the federation. Today, limited formal human rights protection leaves Australia as the only democracy in the world without a human rights Act. Unlike the republic debate, the model is substantially agreed - incorporating rights from Australia's seven major international treaties into domestic law while preserving parliamentary sovereignty. Absent a human rights Act, Chapter III of the *Constitution* and the federal human rights framework offer the most prospective areas for human rights development in Australia.¹

I INTRODUCTION

Most Australians take their civil, political and economic rights largely for granted, without realising there is at best a tenuous framework in the Australian legislature and courts to support those rights. There is no bill of rights in Australia's *Constitution*, nor is such a charter enshrined in any Commonwealth enactment. When our perceived rights are challenged or threatened, we in Australia rely heavily on the courts to rein in excess or abuse of power, to rescind or remit poor government decisions and to afford justice. This is the case whether we are Australian citizens, permanent residents, legitimate visitors or asylum seekers. Politicians, the media and members of the community 'barrack from the sidelines'.

This article explores the concept of a legislative framework for the protection of human rights in Australia, along models developed and adopted by Commonwealth Parliaments in the United Kingdom² and

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1 Submissions to the National Human Rights Consultation Committee are acknowledged as valuable sources for this article.

2 *Human Rights Act 1998* (UK).

New Zealand,³ and by the Parliaments of the State of Victoria⁴ and the Australian Capital Territory,⁵ and it concludes that a human rights Act would be both a protective and preventative measure.⁶

Safeguarding human rights is important. Of equal importance is the establishment of a culture of respect for human rights in the community, in the administration of government and in politics.

II HISTORICAL CONTEXT

Australia did not receive a bill of rights with the federation compact which created the Australian *Constitution* and Nation, at least in part, because of a strong desire to deny human rights to indigenous Australians and Asian workers.

At the 1891 Constitutional Convention the Tasmanian Attorney-General, Andrew Inglis Clark, provided a draft constitution which drew extensively from the US *Constitution*.⁷ With respect to human rights he proposed the inclusion of four rights, three of which ultimately survived into the final draft — trial by jury (s 80); right to privileges and immunities of state citizenship (s 117); freedom and non-establishment of religion (s 116); and equal protection under the law.⁸ This final provision did not survive the constitutional conventions which followed. In the 1890s there were three essential arguments opposing the incorporation of a bill of rights into the *Constitution*:⁹

- a) Such guarantees of human rights were unnecessary with representative and responsible governments;
- b) A bill of rights could potentially affect colonial laws that restricted the employment of Asian workers; and
- c) The lack of constitutional protection of human rights was proof of the document's modernity and democratic character.

Perhaps Australia's evolution as a nation, with no recent memory of struggle against tyranny, and no need to fight a civil war on principles and rights, influenced this approach.

3 *Human Rights Act 1993* (NZ).

4 *Charter of Human Rights and Responsibilities Act 2006* (Vic).

5 *Human Rights Act 2004* (ACT).

6 See Jim McGinty (Attorney-General), 'Statement of Intent by the Western Australian Government: A WA *Human Rights Act*' (2007) 2, 2.

7 Andrew Byrnes, Hilary Charlesworth and Gabrielle McKinnon, *Bills of Rights in Australia: History, Politics and Law* (2008) 24.

8 *Ibid.*

9 *Ibid* 25.

The intent of the founding fathers to discriminate and thereby breach human rights was clearly evinced by two actions. First, the *Constitution* did not give full recognition and citizenship rights to indigenous Australians. Second, one of the first pieces of legislation passed by the new federal Parliament was directly intended to take away the human rights of many people who might wish to migrate to the new Commonwealth of Australia. In 1901, one of the first bills to be passed by the new Parliament was the *Immigration Restriction Act 1901*. This was the forerunner of the White Australia Policy. It imposed a language test designed to exclude all non-white Europeans from Australia. Listening to the public debate about a human rights Act today, it is clear that the motivation of many who oppose codification of human rights is to discriminate against and deny human rights to sections of the population.

The first significant national development concerning human rights came in 1942. The then Labor Attorney-General, Dr HV Evatt, urged for an Australian constitutional convention to support the incorporation into the *Constitution* of freedoms articulated the previous year by US President F D Roosevelt, namely:

- freedom of speech and expression;
- freedom of religion;
- freedom from want; and
- freedom from fear.¹⁰

World War II prevented the Constitution Alteration (War Aims and Reconstruction) Bill 1942 from being put to a referendum.¹¹ In 1944 a referendum to extend the centralised planning powers of the wartime administration into the post war period was put to the people.¹² To balance the centralised planning powers, the proposal included an enhancement of human rights, including a constitutional guarantee of freedom of speech and the extension of religious tolerance to the States.¹³ The referendum was decisively lost.¹⁴

In 1973, shortly after the election of the Whitlam Labor Government, Australia signed the two major international human rights instruments – the *International Covenant in Civil and Political Rights* ('ICCPR') and the *International Covenant on Economic, Social and Cultural*

10 Ibid 26.

11 Ibid.

12 Ibid 26-27.

13 Ibid 27.

14 Ibid.

Rights ('ICESCR').¹⁵ The new government then introduced the Human Rights Bill 1973 into Parliament in order to fulfil its obligations under the ICCPR. This Bill included rights to: non-discrimination; equal protection of the law; freedom of thought, expression and movement; vote; privacy; and certain procedural rights.¹⁶ In his second reading speech, Attorney-General Lionel Murphy suggested that the Human Rights Bill 1973 was a prelude to a constitutional amendment.¹⁷ The Bill proved to be highly controversial, with opponents criticising it on three primary grounds – that it was unnecessary in Australia's parliamentary democracy; that it would politicise the judiciary; and that it would undermine the rights of the States.¹⁸ The Bill lapsed with prorogation of Parliament in 1974 and was not reintroduced.¹⁹

In 1981, the Fraser Liberal Government introduced the *Human Rights Commission Act*, reasoning that there was no need for a comprehensive bill of rights to implement the ICCPR:

[h]aving regard to the existence of such safeguards as the common law, statutory and procedural remedies, ... the system of representative and responsible government, the rule of law, the independence of the judiciary and the freedom of the press...²⁰

The legislation created the Human Rights Commission and provided administrative remedies for violation of some internationally recognized rights by the Commonwealth Government.²¹

The Hawke Labor Government was elected in 1983. The following year Attorney-General Gareth Evans circulated a draft Bill of Rights which required the interpretation of ambiguous provisions of Commonwealth and state legislation in a manner that promoted human rights.²² The protected rights were declared to have the status of Commonwealth law, which meant that they would prevail over prior federal and all state legislation.²³ Subsequent Commonwealth legislation could declare that its provisions were to operate notwithstanding the Bill of Rights.²⁴ The Human Rights Commission was empowered to investigate complaints about state or Commonwealth governments' actions in breach of the Bill

15 Ibid 28.

16 Ibid.

17 Ibid.

18 Ibid 29.

19 Ibid.

20 Ibid 30.

21 Ibid.

22 Ibid 31.

23 Ibid and see s 109 of the *Australian Constitution*.

24 Ibid.

of Rights and to resolve complaints through conciliation, settlement or reporting to Parliament.²⁵

The proposal brought strong attacks from WA Premier Brian Burke and Queensland Premier Joh Bjelke-Peterson based on states' rights.²⁶ After an early election in December 1984, the government lost its appetite for comprehensive human rights reform. A Human Rights Bill, limited to the Commonwealth, failed to gain parliamentary support in 1985.

In 1988 a constitutional referendum saw the following four issues involving human rights rejected overwhelmingly by the Australian people:

- fair elections – one vote one value;
- freedom of religion guarantee extended to the States;
- acquisition of property on just terms extended to the States; and
- trial by jury extended to the States.²⁷

A constitutional convention at that time recommended a comprehensive Bill of Rights, but the political momentum had been lost.

The next significant development occurred in the new century with the ACT, and then Victoria, enacting their respective human rights legislation. The *Human Rights Act 2004* (ACT) and the *Charter of Human Rights and Responsibilities Act 2006* (Vic) were followed by reviews in Tasmania and Western Australia which both recommended legislative change,²⁸ although both States have now lost the political momentum for human rights legislation.

The election of the Rudd Labor Government in 2007 included a policy of support for greater human rights protection and it appeared that there was sufficient political momentum to achieve a human rights Act. Father Frank Brennan was appointed to chair the National Human Rights Consultation. It reported in September 2009, recommending a minimalist model akin to the ACT and Victorian legislation, but with some notable variations.²⁹ In April 2010 the Federal Attorney-General responded by rejecting the key legislative recommendations proposed by Brennan and released Australia's Human Rights Framework. This framework proposed greater human rights education and engagement, protection through parliamentary processes including a Joint Parliamentary Committee on

25 National Human Rights Consultation Committee, *Report of the National Human Rights Consultation Committee* (2009) 234.

26 Byrnes, Charlesworth and McKinnon, above n 6, 31.

27 Byrnes, Charlesworth and McKinnon, above n 6, 33.

28 National Human Rights Consultation Committee, above n 25, 237.

29 Ibid.

Human Rights and a statement of compatibility with human rights to accompany all new legislation, and other administrative procedures to achieve higher levels of human rights observance.

A pattern has emerged in Australia over the last seventy years that sees newly elected Labor Governments attempting to legislate to bring international human rights into Australian domestic law and to provide mechanisms for their enforcement. These endeavours have all floundered and failed because of lack of political will, the pressures of the political environment, or lack of public support. Equally, the Liberal Party has been consistent in opposing legislative protection of human rights over this time.

History tells us that if Australia is one day to get a human rights Act, it will be proposed by a Labor Government, opposed by the Liberal Party, and will then require two other things to be present: strong conviction or political will by the Attorney-General of the day, and the balance of power in the Senate being held by a party which supports human rights legislation.

III EXISTING AUSTRALIAN HUMAN RIGHTS PROTECTION

A *Express Constitutional Provisions*

Australia's *Constitution* does not comprehensively protect human rights. Perhaps because our *Constitution* arose peacefully and out of a desire to share powers between the Commonwealth and the States, it did not seek to protect the individual from the powers of government. It is a *Constitution* which speaks about powers of governments, not about government relations with its citizens.

The *Constitution* protects only a narrow spectrum of rights. Its protection is limited to three civil and political rights and two economic rights. Their limited wording and narrow judicial interpretation have further restricted their effect as discussed below.

1 *Trial by Jury*

Section 80 of the *Constitution* provides that 'the trial on indictment of any offence against any law of the Commonwealth shall be by jury...'. There are two obvious limitations in the text. Firstly, the Parliament, in its absolute discretion can determine whether an offence is to be prosecuted on indictment or summarily – the latter avoiding the trial by jury requirement. Secondly, the provision does not extend to the states where the overwhelming majority of criminal prosecutions occur. These limitations led Barwick CJ to observe that 'what might have been

thought to be a great constitutional guarantee has been discovered to be a mere procedural provision'.³⁰ Geoffrey Sawyer also commented that the constitutional guarantee 'has been in practice worthless'.³¹

2 *Freedom of Religion*

Section 116 of the *Constitution* provides:

The Commonwealth shall not make any law for establishing any religion, or for imposing any religious observance, or for prohibiting the free exercise of any religion, and no religious test shall be required as a qualification for any office of public trust under the Commonwealth.

This section appears to provide for freedom of religion. That appearance is illusory for two reasons. Firstly, this inhibition on Commonwealth power does not apply to the States. There is no prohibition on individual States passing laws that infringe on freedom of religion. Secondly, although the High Court has interpreted the term 'religion' broadly to include faiths beyond the established religions, the court has interpreted the protection offered by s 116 narrowly.³² In *Krygger v Williams*, the High Court held that the imposition of compulsory military training on a conscientious objector did not infringe s 116. Griffiths CJ stated that 'a law requiring a man to do an act which his religion forbids ... does not come within the prohibition of s 116'.³³

In *Kruger v Commonwealth* ('*Stolen Generations Case*')³⁴ it was argued that the *Aboriginals Ordinance 1918* (NT), which authorized taking of Aboriginal children from their families, was a violation of s 116. This, it was argued, was because the ordinance had the consequence of prohibiting the free exercise of Aboriginal beliefs. The High Court held that s 116 did not protect any freestanding right of freedom of religion. Instead, it only prevents the Commonwealth from passing laws that have 'the purpose of achieving an object which s 116 forbids'.³⁵ In other words, provided the purpose of the law is to achieve an object that is not forbidden by s 116, such as the purported protective removal of 'half-caste' children, then even if the law might grossly and disproportionately inhibit freedom of religion for indigenous people, it will not infringe s 116.

30 *Spratt v Hermes* (1965) 114 CLR 226, 244.

31 Geoffrey Sawyer, *Australian Federalism in the Courts* (1967) 19.

32 *Adelaide Company of Jehovah's Witnesses Inc v Commonwealth* (1943) 67 CLR 116.

33 *Krygger v Williams* (1912) 15 CLR 366, 369.

34 *Kruger v Commonwealth* (1997) 190 CLR 1.

35 *Kruger v Commonwealth* (1997) 190 CLR 1, 40.

The narrowness of the putative ‘freedom of religion’ can be contrasted with Article 18 (1) and (3) of the ICCPR:

Art 18(1)

Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have or to adopt a religion or belief of his choice, and freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching.

Art 18(3)

Freedom to manifest one’s religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others.³⁶

3 *Rights of Out of State Residents*

Section 117 of the *Constitution* provides that a resident of one state must not be subjected, in any other state, to ‘any disability or discrimination which would not be equally applicable’ if he or she were a resident of that other state. This protection is worthy, but of limited practical utility given that such discrimination is rarely a problem.

4 *Freedom of Interstate Trade*

Section 92 of the *Constitution* provides that interstate trade ‘shall be absolutely free’. This is the first protected economic right. This section has been used to strike down protectionist laws in the sense of adversely discriminating against residents of a particular state or territory in a way that is not reasonably considered necessary.³⁷

5 *Acquisition of Property*

Section 51 (xxxix) of the *Constitution* provides that the acquisition of property by the Commonwealth (but not the States) must be on just terms. The High Court appears to have generously interpreted economic rights in favour of corporations, but narrowly interpreted civil and political rights for individuals.³⁸

B *Implied Constitutional Provisions*

The *Constitution* is silent on the recognition and protection of other rights. However, the High Court has derived a small number of implied rights from the structure, text or doctrinal assumptions of the *Constitution*. These are set out below.

³⁶ *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 5, (entered into force 23 March 1976).

³⁷ See *Betfair Pty Ltd v Western Australia* (2008) 234 CLR 418.

³⁸ See *Minister of Army v Dalziel* (1944) 68 CLR 261.

1 *Freedom of Political Communication*

In a series of cases in the 1990s, which culminated in *Lange v Australian Broadcasting Commission*,³⁹ the High Court found an implied freedom of political communication derived from the constitutional doctrine of representative and responsible government. The test for constitutionality involves two limbs.⁴⁰ First, does the law effectively burden freedom of communication about government or political matters? Second, is the law reasonably appropriate and adapted to serve a legitimate end comparable with the maintenance of representative and responsible government?

Despite being constitutionally entrenched, this implied freedom of political communication is not as robust or as broad as a general right to freedom of expression. Firstly, the implied right only protects political communication. It does not protect freedom of expression more generally. Secondly, this implied freedom does not confer a freestanding right. It has been interpreted negatively to be a prohibition on legislative or executive interference rather than a recognition and enlargement of a positive right.

2 *Implied Right to Vote*

On its face s 41 of the *Constitution* might appear to confer a right to vote, but this is not how it has been interpreted.⁴¹ More use has been made of the s 24 requirement that parliamentarians be ‘directly chosen by the people of the Commonwealth’. In *Roach v Electoral Commissioner* the High Court held that a blanket ban disenfranchising all prisoners was unconstitutional. Gleeson CJ explained:

Because the franchise is critical to representative government, and lies at the centre of our concept of participation in the life of the community, and of citizenship, disenfranchisement of any group of adult citizens on a basis that does not constitute a substantial reason for exclusion from such participation would not be consistent with choice by the people.⁴²

This interpretation confers a narrower right to vote than human rights law would require. Further, in *McGinty v Western Australia*,⁴³ the High Court held that the *Constitution* did not protect against a dilution of the franchise by vote weighting — a proposition which would fall foul of the equal suffrage requirement of Article 25 of the ICCPR.

39 (1997) 189 CLR 520.

40 *Lange v Australian Broadcasting Commission* (1997) 189 CLR 520, 567.

41 See *R v Pearson; Ex Parte Sipka* (1983) 152 CLR 254.

42 (2007) 233 CLR 162, 174.

43 (1996) 186 CLR 140.

3 *Chapter III Implied rights*

The High Court derives some human rights protections from the constitutional separation of judicial power from legislative and executive power. These implied rights relate to judicial processes. It ensures that the judiciary is independent and free. It prevents the other arms of government from arrogating judicial functions.

In *Kable v Director of Public Prosecutions*,⁴⁴ the High Court used Chapter III of the *Constitution* to overturn a NSW State law providing for the preventive detention of one person – Mr Kable. The rationale of the decision was that there was a constitutional prohibition on state Parliaments conferring powers on state courts, which also exercise commonwealth judicial power, inconsistent with the exercise of Commonwealth judicial power.

In *Dietrich v R*,⁴⁵ the High Court, relying on Chapter III, held that the entitlement to a fair trial required that an indigent person accused of a serious crime be provided with legal representation or the trial should not proceed. More recently, in *Kirk v Industrial Court of NSW*,⁴⁶ the High Court used Chapter III to overturn state legislative attempts to use ‘privative clauses’ to oust jurisdictional error from the jurisdiction of state Supreme Courts.

In the 1990s the High Court used implied rights jurisprudence to find constitutionally protected civil and political human rights in the Constitution derived from representative and responsible government. Today the most prospective area in the High Court’s jurisprudence, from a human rights perspective, is to be found in Chapter III.⁴⁷

In the absence of a human rights Act, it is highly likely that the High Court will continue to develop Chapter III as the source of implied rights to the judiciary and judicial proceedings.

C *Democratic Institutions as Protectors of Rights*

In 1967 Prime Minister Robert Menzies said:

Should a Minister do something which is thought to violate fundamental human freedom he can be promptly brought to account in Parliament. If his Government supports him, the Government may be attacked, and, if necessary be defeated. And if that ... leads to a new General Election, the people will express their judgement at the polling booths. In short, responsible Government in a democracy is regarded by [Australians] as the ultimate guarantee of justice and individual rights.⁴⁸

44 (1996) 189 CLR 51.

45 (1992) 177 CLR 292.

46 (2010) HCA 1.

47 See, *South Australia v Totani* [2010] HCA 39.

48 Byrnes, Charlesworth and McKinnon, above n 7, 35.

This is the classic statement of representative government as the best means of human rights protection. While this is perfectly correct in theory, practice is often different. The operation of the party system in Parliament means that government ‘numbers’ can be and often are used to protect its own members. The interests of the party usually take precedence and votes are usually taken along party lines. Elections would rarely focus on one issue. They tend to deal with matters most important to the majority and therefore provide little by way of protection of individual rights. However, there are today a number of parliamentary structures which play a role in human rights protection.

Parliament itself, regular elections, the ombudsman, freedom of information, judicial review of administrative decisions and anti-corruption bodies all play a role in protecting and enhancing the transparency and efficacy of government and human rights.

As indicated earlier, in April 2010 Federal Attorney-General Robert McClelland announced a number of administrative changes to human rights protection in Australia and released Australia’s Human Rights Framework, in response to the report delivered by the National Human Rights Consultation Committee in September 2009. This framework delivered five initiatives:⁴⁹

- (a) The government reaffirmed its commitment to promoting awareness and understanding of human rights in the Australian community and the seven major human rights treaties to which Australia is a party.⁵⁰
- (b) The government provided funding and educational programmes across the community, including primary and secondary schools and the Commonwealth public sector, for human rights issues.

⁴⁹ Commonwealth of Australia, *Australia’s Human Rights Framework* (2010), 3.

⁵⁰ *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976); *International Covenant on Economic, Social and Cultural Rights*, opened for signature 16 December 1966, 999 UNTS 3 (entered into force 3 January 1976); *Convention on the Elimination of all forms of Racial Discrimination*, opened for signature 21 December 1965 660 UNTS 195 (entered into force 4 January 1969); *Convention on the Elimination of all forms of Discrimination against Women*, opened for signature 18 December 1979, 1249 UNTS 13 (entered into force 3 September 1981); *Convention against Torture and other Cruel, Inhuman and Degrading Treatment or Punishment*, opened for signature 10 December 1984, 1465 UNTS 85 (entered into force 26 June 1987); *Convention on the Rights of the Child*, opened for signature 20 November 1989 1577 UNTS 3 (entered into force 2 September 1990); *Convention on the Rights of Persons with Disabilities*, opened for signature 24 January 2007, A/RES/61/106.

- (c) An action plan on human rights was initiated to facilitate greater engagement with the United Nations.
- (d) Importantly, two parliamentary measures to improve scrutiny of new laws for consistency with Australia's human rights obligations were introduced. The first is a Parliamentary Joint Committee on Human Rights to scrutinize bills and legislative instruments for consistency with the seven core United Nations human rights treaties. The second is statements of compatibility with human rights that would accompany each new bill introduced into Parliament and delegated legislation subject to disallowance.
- (e) Legislation, policies and practices of government would be reviewed for compliance with human rights, including legislation to harmonize and consolidate Commonwealth anti-discrimination laws to remove unnecessary regulatory overlap, address inconsistencies and make the system more user friendly.

While falling well short of providing comprehensive human rights recognition and protection, these initiatives will contribute to a human rights culture within the executive and legislative arms of government.

D *Commonwealth Statutory Protection*

Commonwealth legislative protection of human rights is broader in scope and more robust in application than constitutional protections, but it is still only piecemeal in its coverage. While some rights, such as the right not to be discriminated against on the grounds of race, sex, age and disability are protected by legislation,⁵¹ other rights receive only limited or indirect protection. Additionally, legislation such as the *Privacy Act 1988* (Cth), the *Freedom of Information Act 1982* (Cth) and the *Administrative Appeals Tribunal Act 1975* (Cth) provide some protection and fair treatment in the determination of rights.⁵²

51 See *Sex Discrimination Act 1984* (Cth); *Racial Discrimination Act 1984* (Cth); *Age Discrimination Act 2004* (Cth); *Disability Discrimination Act 1992* (Cth).

52 See National Human Rights Consultation Committee, above n 25, 117.

E *State and Territory Laws*

Human rights protections are at their most comprehensive in the ACT and Victoria. The *Human Rights Act 2004* (ACT) was ground breaking in Australia and gives statutory protection to an express list of civil and political rights. The *Charter of Rights and Responsibilities Act 2006* (Vic) operates in a substantially similar fashion. Importantly, unlike the scattered and piecemeal protections available in other Commonwealth, state and territory statutes, these human rights Acts focus on the rights of the individual in respect to state and territory governmental decision making. Other state and territory legislation provide for anti-discrimination and equal opportunity rights.⁵³

Criticisms of statutory protection of human rights in Australia, other than the ACT and Victoria, are that:

- a) It provides incomplete human rights coverage. For example, rights regarded internationally as fundamental to human liberty and dignity, such as freedoms of expression, association and assembly are not protected.
- b) Human rights issues often arise only indirectly under legislation. This does not allow consideration of whether government actions impinge disproportionately on human rights.
- c) Fragmenting human rights protections across a host of different laws undermines the status of human rights in our legal system.

F *Common Law Protections*

Some human rights are enshrined in common law principles which are established and applied by the courts. For example, the right to a fair trial requires biased judges to excuse themselves.⁵⁴ The common law also includes a rebuttable presumption that Parliament did not intend to abrogate a number of existing civil, political and economic rights.⁵⁵ That presumption extends to many aspects of judicial fairness and due process, as well as provide support for such freedoms as personal liberty, movement, speech, religion and property rights.⁵⁶

53 See *Discrimination Act 1991* (ACT); *Anti-Discrimination Act 1977* (NSW); *Anti-Discrimination Act 1996* (NT); *Anti-Discrimination Act 1991* (Qld); *Equal Opportunity Act 1995* (Vic); *Equal Opportunity Act 1984* (WA).

54 See *R v Commonwealth Conciliation and Arbitration Commission; Ex parte Angliss Group* (1969) 122 CLR 546.

55 See *Coco v The Queen* (1994) 179 CLR 427.

56 See James Spigelman, *Statutory Interpretation and Human Rights* (3rd ed, 2008) 27-29.

The 'Common Law Bill of Rights' is valuable but limited. We cannot rely on the common law to protect human rights because:

- a) It fails to acknowledge and protect many rights recognized at international law and valued by the Australian community such as freedom of association, the right to work and to enjoy fair conditions of work and the right to family life;
- b) The common law protects human rights by way of presumption, not a binding rule, as explained in *Coco v The Queen*:
The courts should not impute to the legislature an intention to interfere with fundamental rights. Such an intention must be clearly manifested by unmistakable and unambiguous language. General words will rarely be sufficient for that purpose if they do not specifically deal with the question because, in the context in which they appear, they will often be ambiguous on the aspect of interference with fundamental rights.⁵⁷
In other words, the presumption in favour of human rights will be overridden by clear language. As McHugh J, said in *Al-Kateb v Godwin*:
the justice or wisdom of the course taken by the Parliament is not examinable in this [the High Court] or in any other domestic court. It is not for courts, exercising federal jurisdiction, to determine whether the course taken by Parliament is unjust or contrary to basic human rights. The function of the courts in this context is simply to determine whether the law of the Parliament is within the powers conferred on it by the Constitution.⁵⁸
- c) In the absence of legislation clearly articulating rights, judgements that concern human rights will often turn on complicated technical and interpretive issues involving precedent rather than squarely addressing the human rights issue at stake.
- d) Often the close decisions in a split High Court reflect the uncertain nature and status of judge-made rights and the democratic and constitutional confusion continuing to obscure the appropriate weight to give these rights in statutory interpretation.
- e) Courts can only deal with cases that come before them. This militates against comprehensive human rights protection.

There is real irony in the critics of statutory human rights protection relying on the judge-made common law as the reason why we do not need a human rights Act made by the democratic process through Parliament.

57 (1994) 179 CLR 427, 437 (Mason CJ, Brennan, Gaudron and McHugh JJ).

58 (2004) 219 CLR 562, 595.

G *Australian Human Rights Commission*

The Australian Human Rights Commission ('AHRC'), formerly the Human Rights and Equal Opportunity Commission ('HREOC'), has the following functions:

- a) It conducts inquiries into issues of national importance. For example, the rights of children in immigration detention centres and the stolen generations;
- b) It assists courts in cases involving human rights principles;
- c) It advises government on the development of laws, programmes and policies to protect human rights;
- d) It raises public awareness through education and public discussion; and
- e) It investigates and conciliates complaints arising under federal anti-discrimination legislation.⁵⁹

The limited powers of the AHRC means that it can only provide recommendations to the government and that it cannot provide effective or enforceable remedies to the individuals who are victims of human rights breaches.⁶⁰

H *International Human Rights Mechanisms*

There are a range of international strategies available to individuals and organizations seeking to promote human rights in Australia. These include international human rights monitoring and reporting as well as complaint and inquiry mechanisms. The outcomes of these processes serve a useful, but not enforceable, purpose of adding another political pressure point to the domestic debate about human rights. These processes focus international attention on Australia's human rights performance. A domestic tribunal set up to hear cases alleging human rights breaches, with enforceable remedies, would overcome these serious deficiencies of having to rely on international mechanisms.

59 Australian Human Rights Commission, *Functions* <<http://www.hreoc.gov.au/about/functions/index.html>> at 22 October 2010.

60 National Human Rights Consultation Committee, above n 25, 191.

IV WHAT MODEL SHOULD BE ADOPTED?

There are powerful arguments as to why Australia should not adopt the United States or South African model of a constitutionally entrenched Bill of Rights. The history of constitutional amendment in Australia shows that a complex proposal, which lacks bipartisan and broad community support, would almost certainly fail. Section 128 requires that a majority of voters in a majority of states approve a proposal to amend the *Constitution*.⁶¹ Especially in relation to rights, any proposal to pursue a constitutional model would be an exercise in futility. In the past, states' rights have prevailed over human rights in Australian referenda. The public debate in Australia, whenever human rights protection is raised, appears to favour a democratic model rather than a judicial model. An independent judiciary empowered to invalidate legislative and executive actions which violate human rights would be a powerful symbol of government commitment to human rights, but does not appear to enjoy wide community support.

Finally, a non-judicial model allows greater flexibility to accommodate changed circumstances and community values. Flexibility is a two edged sword. It makes rights less secure and can work against human rights protection in an adverse political climate. On the other hand, flexibility means an easier adaption to reflect future changes in the concept of human rights.

Another argument against the constitutional model is that it politicises the judiciary and judicial appointment process. This is a debatable proposition. Greater political and public focus on judicial appointments and calling on the judiciary to adjudicate on rights could benefit the judiciary and the community.

The favoured human rights protection model for Australia is the 'dialogue' model based on recent Australian experience and that of relevant jurisdictions in the United Kingdom ('UK') and New Zealand.⁶² The dialogue model places responsibility on each of the three arms of government to play a role in human rights protection while preserving parliamentary sovereignty.

⁶¹ *Australian Constitution* s 128.

⁶² See National Human Rights Consultation Committee, above n 25, 241

A Key Elements of the Dialogue Model

1 Incorporation of Rights to be Protected into Domestic Law

This raises the important question of which rights should be protected. There are two broad options available:

- a) As a minimum, the ICCPR rights. This is the approach in ACT, Victoria, New Zealand and UK.⁶³
- b) The rights contained in the seven major international covenants and conventions to which Australia is a party. This is the approach advocated by the National Human Rights Consultation Committee and adopted by the Commonwealth Government in Australia's Human Rights Framework.⁶⁴

A distinction is commonly made between civil and political rights on the one hand and economic, social and cultural rights on the other.

ICCPR rights are those that protect individuals from the power of the state and enable individuals to fully participate in the civil and political affairs of the state. They include the rights to: life; not to be subjected to torture or ill-treatment; not to be held in slavery; liberty and security of the person; freedom of movement; equality before the law; a fair trial; freedom of thought, conscience and religion; peaceful assembly; freedom of association; marriage and family; participate in public affairs; and for minorities, the right to enjoy their own culture, religion and language.⁶⁵ ICESCR rights are sometimes seen as lofty ideals, rather than the specific ICCPR rights which are more amenable to adjudication and enforcement.

The ICESCR includes rights to an adequate standard of living and to adequate food, water and sanitation. The ICESCR also forbids economic and social exploitation of children and requires all nations to co-operate to end world hunger.⁶⁶

The South African human rights legislation includes both ICCPR and ICESCR rights.⁶⁷ The Western Australian Human Rights Consultation

63 National Human Rights Consultation Committee, above n 25, 241-262.

64 Commonwealth of Australia, *Australia's Human Rights Framework* (2010), 4.

65 *International Covenant on Civil and Political Rights* (1966), opened for signature 16 December 1966, 999 UNTS 171, arts 6(1), 7, 8(1), 9(1), 12(1), 14(1), 18(1), 21, 22, 23(2), 25-27 (entered into force 23 March 1976).

66 *International Covenant on Economic, Social and Cultural Rights*, opened for signature 16 December 1966, 999 UNTS 3 (entered into force 3 January 1976).

67 The Constitution of South Africa, Chapter II, Bill of Rights.

Committee recommended the inclusion of both.⁶⁸ While the National Human Rights Consultation Committee recommended the inclusion of both, ICESCR rights were to be neither obligatory nor justiciable.⁶⁹

Despite the weight of precedent not supporting the full inclusion of ICESCR rights in an Australian human rights Act, there are five arguments in support of their inclusion:

- a) To persons living in poverty, the economic, social and cultural rights are arguably more immediately important than civil and political rights;
- b) Human rights do not exist in isolation; they are interdependent. The enjoyment of economic social and cultural rights is crucial to the enjoyment of civil and political rights;
- c) Recognition of the interdependence of human rights in legislation would improve decision making and policy formation;
- d) Social and economic policy should be developed, interpreted and applied compatibly with social and economic rights. For example, it is better that courts apply Residential Tenancies legislation consistently with the ICESCR right to adequate housing than in a manner that has no regard to or is inconsistent with this fundamental human right, as is currently the case; and
- e) The arbitrary division of rights does not make any sense to the person whose rights are violated, or who is experiencing marginalization or disadvantage.⁷⁰

Finally, those opposed to the inclusion of ICESCR rights in a human rights Act argue that matters of resource allocation are appropriately dealt with by the Parliament and not the courts. In my view the criticism is misconceived. Under the proposed model the courts cannot strike down legislation. Parliamentary sovereignty is preserved. Courts daily involve themselves in adjudicating matters involving resource allocation. The decision in *Clarke v Commissioner for Taxation*,⁷¹ for example, had immediate resourcing implications for the federal treasury. As Kirby J said in *Kartinyeri v Commonwealth*:

Arguments of inconvenience and potential political embarrassment for the Court fall on deaf judicial ears ... This Court, of its function, often finds itself required to make difficult decisions which have large economic, social and political consequences.⁷²

68 Consultation Committee for a Proposed WA Human Rights Act, *A WA Human Rights Act: Report of the Consultation Committee for a Proposed WA Human Rights Act* (2007) iv-v.

69 See National Human Rights Consultation Committee, above n 25, xxxiv-xxxviii.

70 See National Human Rights Consultation Committee, above n 25, 79-83.

71 (2009) 240 CLR 272.

72 (1998) 195 CLR 337, 414.

A different approach could be adopted to ICESCR rights in any proposed legislation. A lesser standard of review could take into account the nature of the rights in question, competing interests at stake, and appropriate limits on the judicial approach by reference to reasonableness and limited resources available to government. As the South African Constitutional Court explained in *Government of South Africa v Grootboom*:

A court considering reasonableness will not enquire whether other or more desirable or favourable methods could have been adopted, or whether public money could have been better spent ... It is necessary to recognize that a wide range of possible measures could be adopted by the state to meet its obligations. Many of these could meet the test of reasonableness.⁷³

Human rights are generally not absolute. For example, freedom of speech has reasonable limits placed on it by the law of defamation.⁷⁴ Most human rights are subject to similar reasonable restrictions based on the concepts of necessity and proportionality.

However, some human rights are seen as absolute and not subject to any limitation. The National Human Rights Consultation Committee recommended that seven civil and political rights be prescribed in the proposed human rights Act as ‘non-derogable’ and ‘without limitation’, consistent with international law:

- right to life – the death penalty may not be imposed for any offence;
- protection from torture and cruel, inhuman and degrading treatment;
- freedom from slavery and servitude;
- freedom from retrospective criminal law;
- freedom from imprisonment for inability to fulfil a contractual obligation;
- freedom from coercion or restraint in relation to religion and belief; and
- right to a fair trial.⁷⁵

2 *Parliamentary Sovereignty*

Parliamentary sovereignty is preserved by giving Parliament the ability to legislate as it wishes in order to support or override human rights.

⁷³ (2001) 1 SA 46, [41].

⁷⁴ See *Lange v Australian Broadcasting Commission* (1997) 189 CLR 520.

⁷⁵ See National Human Rights Consultation Committee, above n 25, xxxv-vi.

3 *Compatibility Statement*

Each Bill, and subordinate legislation subject to disallowance, is to be accompanied by a statement by the Attorney-General that the instrument is compatible with human rights, or if not, where and why the instrument breaches established human rights. Compatibility statements are now part of ACT and Victorian parliamentary practice and are proposed to be part of Commonwealth parliamentary practice.⁷⁶

4 *Parliamentary Committee to Oversee Human Rights Issues*

As a result of the announced Australian Human Rights Framework, a joint parliamentary committee will be established in the Commonwealth Parliament to exercise this function. Such committees already exist under the human rights laws of the ACT and Victoria.

5 *Judicial Interpretation*

The National Human Rights Consultation Committee recommended that the human rights Act contain an interpretive provision that requires federal legislation to be interpreted by the courts in a way that is compatible with the human rights expressed in the Act and consistent with Parliament's purpose in enacting the legislation. This interpretive provision was not to apply to economic, social and cultural rights if they were to be included in the legislation.⁷⁷

6 *Declaration of Incompatibility*

Courts adjudicating human rights matters are given the limited power of issuing a declaration that the impugned legislation violates the human rights expressed in the Act. The effect of the declaration is that the legislation remains valid and enforceable, but the issue is referred back to the Parliament for its consideration. The National Human Rights Consultation Committee recommended that this power be reserved exclusively to the High Court and that if this was not practicable, then no court be given this power. The ACT and Victorian legislation vests this function in state courts. It is not clear why the National Human Rights Consultation Committee made such an obviously unworkable recommendation. Any federal court could easily and responsibly exercise this function.

7 *Public Sector Compatibility*

Public sector agencies would be required to act in a manner compatible with human rights enumerated in the Act, other than economic and social rights, and to give proper consideration to relevant human rights when making decisions.

⁷⁶ See *Human Rights Act 2004* (ACT), *Charter of Human Rights and Responsibilities Act 2006* (Vic); National Human Rights Consultation Committee, above n 25, xxxiv-xxxviii.

⁷⁷ National Human Rights Consultation Committee, above n 25, xxxvii.

The National Human Rights Consultation Committee recommended that the provisions of any human rights Act be limited to Commonwealth laws and not extend to the states.⁷⁸ The difficulty with this recommendation lies in the fact that overwhelmingly the public sector services most likely to attract attention of a human rights Act are those provided by the State and Territory Governments and not the Commonwealth. Mental health, public health care, public housing, children's services and education, public transport and criminal justice are all areas of state and territory service delivery and therefore not caught by the proposal.

As the Commonwealth is a significant funder of many of these services, it is possible that the Commonwealth Government might use its financial powers, especially those in s 96 of the *Constitution*, to impose human rights compliance as a grant condition. However, this unduly complicates and fragments the basis of human rights protection and has not been proposed, as yet, by the Commonwealth. Also, Article 50 of the ICCPR and Article 28 of the ICESCR require that human rights protections extend to all parts of federal states, that is, Australian state and territory jurisdictions. Limiting the proposed human rights Act to the Commonwealth will leave Australia in breach of its international law obligations.

A simpler and more effective approach would have been to enact a national law which, by virtue of s 109 of the *Constitution*,⁷⁹ would have required human rights compliance throughout the nation by all public sector bodies. Perhaps this minimalist and timid recommendation was based on concern about the states' rights arguments which prevailed in the past.

However, there are two significant practical problems which confront the ideal of national uniformity in human rights protection:

- a) If the dialogue model was adopted, there could be different consequences for federal and state laws arising from incompatibility. Section 109 of the *Constitution* would render void a state law which was inconsistent with a right protected by a Commonwealth human rights Act. By contrast, an impugned Commonwealth law would continue to operate pending reconsideration by Parliament.
- b) Under the doctrine of implied intergovernmental immunities, the Commonwealth could not legislate to restrict or burden a state in the exercise of its constitutional powers or to curtail its capacity to operate as government.⁸⁰

78 National Human Rights Consultation Committee, above n 25, 303.

79 When a law of a State is inconsistent with a law of the Commonwealth, the latter shall prevail, and the former shall, to the extent of the inconsistency, be invalid.'

80 See *Melbourne Corporation v Commonwealth* (1947) 74 CLR 31.

Constitutional limitations could mean that significant elements of a Commonwealth human rights Act do not apply at a state level. State courts may not be able to be required to interpret rights consistently with the Commonwealth Act. State ministers may not be able to be required to provide statements of compatibility to state Parliaments. State Parliaments may not be able to be required to establish a parliamentary human rights committee.

8 *Remedies for Breaches of Human Rights*

Remedies should be available to an individual complaining of a human rights breach. The scope of those remedies is, however, variable. In the ACT, the remedies available include those usually exercised by the Supreme Court, other than damages.⁸¹ The National Human Rights Consultation Committee recommended that damages be available for human rights breaches by a federal agency and that an independent cause of action be available to an individual adversely affected by a human rights breach other than in relation to economic, social and cultural rights.

B *Advantages of the Dialogue Model*

1 *Involvement of all levels of Government in Addressing Human Rights Issues*

The success of the civil rights movement in the United States since the 1950s is attributable significantly to the combined actions of: the judiciary, with decisions such as *Brown v Board of Education*;⁸² the legislature, with laws such as the *Civil Rights Act* (1964); the executive, with its various actions; and the community, which provided many activists to advocate the cause. Collectively these bodies made the reforms which were founded in the most basic human rights principles of equality and non-discrimination.

These principles, actions and reforms also arguably enabled the election of President Barack Obama in 2008. Any attempt to deny the judiciary or any other arm of government or the community a valid role in human rights determination will deny the community the most effective means of human rights advancement.

2 *Preservation of Parliamentary Sovereignty*

The Australian view of human rights involves a trust in the ability of the democratically elected Parliament to respond to public opinion as a means

⁸¹ *Human Rights Act 2004* (ACT) s 40C(4).

⁸² 347 US 483 (1954).

of protecting human rights. Under this model, a human rights Act would be an ordinary Act of Parliament, not one which invalidates other laws, other than would be achieved by ordinary principles of interpretation. A declaration of incompatibility made by the courts would not have the effect of invalidating the incompatible statute. Rather, it would provide a mechanism for the Parliament to re-consider the law in the light of the human rights issues.

3 *Flexibility*

The ease of amendment will enable the human rights Act to keep pace with society and its values.

4 *Compliance*

The declaration of incompatibility is a strong political incentive for the Parliament to review the law to ensure compliance with human rights.

C Disadvantages of the Dialogue Model

The ease of amendment means that the rights are less secure than if they were constitutionally entrenched. The declaratory relief may be cold comfort to the litigant if the offensive law is not struck down and no political action is taken to amend the law. The success of the model is reliant on political support from the legislature.

Hybrid proposals, containing elements of the constitutional and dialogue models such as the Canadian legislative approach, could also be considered. However, in view of their complexity and need for public acceptance, any successful human rights legislation should be based on the dialogue model.

V CULTURAL CHANGE OUTSIDE THE COURTS – THE AUSTRALIAN AND UK EXPERIENCE

Human rights laws are important in changing the values of and approach by public servants in dealing with people. The practical educative effect of new human rights laws can be gauged in the United Kingdom where the *Human Rights Act 1998* has now been in operation for a decade, and in the ACT and Victoria where the law has been in force for a shorter period of time. Based on these experiences, the major beneficiaries of human rights legislation are those people with particular needs who are users of government provided services, such as health care; mental health; aged care; disability services; children's services such as education; public transport; public housing, and women and children fleeing domestic violence.

The British Institute for Human Rights, in its publication *The Human Rights Act - Changing Lives*,⁸³ documents case studies of ordinary people going about their day to day lives and the way in which they are benefitting from the *Human Rights Act 1998*. These case studies illustrate how the language and ideas of human rights have influenced behaviour by government service providers.⁸⁴ Similarly, in Australia, the Human Rights Law Resource Centre has documented case studies to similar effect in its publication *Case Studies: How a Human Rights Act Can Promote Dignity and Address Disadvantage*.⁸⁵

The protection of human dignity is central to the human rights Acts. Dignity is protected by specific human rights, including the prohibition of inhuman and degrading treatment, and the right to respect for private life. As an example, the practical application of this concept afforded a distressed older woman the right not to be strapped to her wheelchair and instead to be offered support to gain mobility.⁸⁶

A change in government policy which enabled a 13 year old boy with Aspergers Syndrome to receive disability support, restored his ability to participate in public life.⁸⁷ The right to protection of her family life informed the decision by a public housing authority to grant a lease to a mother and her children enabling them to remain in their home after their grandmother, the leaseholder, died.⁸⁸

The importance of considering the full circumstances of a person's position is a priority of the human rights Act. The reversal by a local authority of its decision to separate an elderly married couple after the husband fell ill and was taken into a care home resulted in accommodation being provided to house them together.⁸⁹

Such examples, and there are many more of them, indicate that the biggest impact of human rights legislation will be felt in the culture of the public service. Clients of public sector agencies can expect services that display respect for individuals and their dignity.

83 British Institute of Human Rights, *The Human Rights Act - Changing Lives* (2nd ed, 2008).

84 See British Institute of Human Rights, above n 83.

85 Human Rights Law Resource Centre, *Case-Studies* <<http://www.hrlrc.org.au/content/topics/national-human-rights-consultation/case-studies>>at 20 October 2010.

86 British Institute of Human Rights, above n 83, 6.

87 Human Rights Law Resource Centre, above n 85.

88 Human Rights Law Resource Centre, above n 85.

89 British Institute of Human Rights, above n 83, 14. These cases and others like them can also be found in the Human Rights Law Resource Centre, above n 85 and in Geoffrey Robertson, *Statute of Liberty* (2009).

Women, people with disabilities, the mentally ill, the elderly and other disadvantaged groups are vulnerable to ill-treatment. These forms of ill-treatment may not be considered ‘discriminatory’ and therefore fall outside the protection offered by existing anti-discrimination legislation.

Human rights Acts provide a framework, based on proportionality, to balance competing rights. They contain within them a mechanism for weighting the rights of individuals against each other or against the rights and interests of the community as a whole, to assist public sector service providers to make decisions which balance competing rights.

Most importantly, an improved culture of respect for human rights has emerged within the public sector. This is not confined to legally enforceable rights which are subject to judicial determination, but includes the attitudes and approaches adopted by bureaucrats in their daily work performance.

VI TEN GOOD REASONS IN SUPPORT OF A HUMAN RIGHTS ACT

In short there are 10 good reasons why Australia should adopt a human rights Act as part of our law.

1 *Greater Protection of the Human Rights of all Australians*

This is the first and most obvious reason. Human rights are not given comprehensive legal protection in Australia. Coverage is fragmented and ad hoc. Many basic rights remain unprotected. Further, most of the statutory and common law protections can potentially be removed; while other protections are not enforceable, for example, those afforded by international human rights law that have not been incorporated into domestic law.

Australia generally measures well against other countries in terms of human rights observance. Democratic institutions and a high standard of living mean that most Australians do not often have to reflect on human rights issues. However, elections usually reflect the will of the majority, and human rights abuses are usually felt by minorities who do not enjoy that high standard of living and who are often disadvantaged, marginalised and unpopular. A human rights Act would strengthen human rights protection by incorporating into Australia’s domestic law those values to which we all ascribe.

2 *Encouragement and Furtherance of a Human Rights Culture in the Parliament, the Public Service, the Judiciary and in the Broader Community*

In Australia, compared with the United States and Europe, human rights are generally raised in the context of people living at the margins of society and

the 'undeserving'. For this reason human rights are not generally a priority or valued issue for the community. The educative effect of a human rights Act on society and its institutions would hopefully see a new respect for the importance of upholding and promoting human rights.

3 *Promotion of a More Egalitarian Society*

Australia prides itself on being a land of equality and opportunity - a land where we lend a helping hand to those in need. The growing unequal distribution of wealth has placed pressure on that ethos. The gap between the very rich and the very poor is vast and growing. A human rights Act would offer greater protection to the marginalised and directly address disadvantage by requiring government to consider human rights in its resource allocation decisions.

4 *Respect and Empowerment for Individuals*

A human rights Act would require greater respect be shown to individuals and would provide a mechanism for empowerment of individuals in their dealings with big and powerful government. The Honourable Fred Chaney, who chaired the Human Rights Consultation Committee for the Western Australian Government in 2007, saw increased respect for human dignity as one of the most important arguments in support of a human rights Act: 'If a WA Human Rights Act was binding on government and the way it treated people it could meet many of the concerns raised.'⁹⁰ Greater respect for individual human beings would undoubtedly enhance the quality of service delivery by government to all members of the community, but especially the marginalised and powerless.

5 *Parliamentary Sovereignty*

Contrary to the arguments advanced by some who oppose a human rights Act, parliamentary sovereignty would be enhanced. Three factors would ensure that the workings of a democratic parliament and its supremacy over the other arms of government would be strengthened and entrenched by the existence of a human rights Act:

- a) The model proposed for Australia expressly disavows the US model of a constitutionally entrenched Bill of Rights, which gives the courts the power to override legislation. This is the clearest statement possible of parliamentary sovereignty.
- b) Three components of the so called 'dialogue' model clearly state that it is for the democratically elected Parliament, and not the courts, to determine the human rights of the people:

⁹⁰ Consultation Committee for a Proposed WA Human Rights Act, above n 68, iii.

- A statement of compatibility to accompany all new legislation in the Parliament;
- A parliamentary committee to oversee human rights issues; and
- The courts will be limited to a declaration of incompatibility, with no power to declare legislation void on the grounds of human rights incompatibility. The offending legislation would then be referred back to the Parliament for consideration of what action, if any, should be taken.

These processes will direct the attention of the Parliament to issues which arguably receive scant if any attention presently.

- c) Parliamentary debates will be better informed than at present. Including a definitive statement of internationally endorsed minimum standards of rights protections will lead to a broader discussion and a higher standard of debate. The result is an enhanced parliamentary process in the eyes of the broader community.

6 *Better Law Making*

A failure to properly consider and give due weight to the effect of legislation on the human rights of people affected by the law can very easily result in bad laws.

From time to time legislators are tempted to bring in legislation which deals harshly with marginalized or unpopular people so that the politician will look 'tough' in the eyes of the community. This is frequently the case when laws deal with indigenous people, asylum seekers, prisoners, criminals and others who are not seen as 'mainstream'. Such legislation has a detrimental effect on the community in two ways. Firstly, the human rights of all are debased, and secondly, the community becomes accustomed to accept human rights breaches as normal and acceptable.

The mechanisms in the human rights legislation proposed for Australia will ensure that those drafting legislation, as well as those responsible for its policy underpinnings, properly consider the human rights issues raised by legislation before it is introduced. Further parliamentary committee and judicial oversight will act as a strong incentive to get the legislation onto a principled basis before it is introduced into the Parliament, and if need be, amended during the course of its passage through the Parliament.

7 *An End to Isolation*

Australia's jurisprudence will develop in a way not isolated from the rest of the world. At present, the Australian judicial system is incapable of addressing human rights breaches that are permitted by Commonwealth

laws if legislation comes within a constitutional head of power, or at all, with respect to state laws. For example, in a series of cases relating to asylum seekers in 2004, the High Court ruled that the Australian Government may lawfully hold vulnerable children in mandatory detention: *Re Woolley*;⁹¹ that it may detain 'unlawful non-citizens' in circumstances where the detention is cruel, inhuman and degrading: *Bebrooz v Department of Immigration and Multicultural Affairs*;⁹² and that such people may be detained indefinitely: *Al-Kateb v Godwin*.⁹³ Each of these propositions represents a fundamental breach of human rights which our judicial system is unable to remedy.

There is, however, some light in this debate. While Australian courts are limited to determining technical questions about statutory authorisation and the purposes of detention, Australia's international human rights obligations may provide guidance as persuasive extraneous material when resolving ambiguities in legislation. In *Minister for Immigration and Ethnic Affairs v Teob*, Mason CJ and Deane J said: 'Parliament, prima facie, intends to give effect to Australia's obligations under international law'.⁹⁴

Additionally, international human rights law has been instrumental in the development of the common law. Perhaps the best recent example is *Mabo v Queensland (No 2)*⁹⁵ where human rights principles and jurisprudence helped determine indigenous peoples right to native title. Brennan J stated:

The common law does not necessarily conform with international law, but international law is a legitimate and important influence on the development of the common law, especially when international law declares the existence of universal human rights.⁹⁶

Judges have historically referred to international law in interpreting the Commonwealth *Constitution*. However, the prevailing position is that the *Constitution* is not to be read as subject to principles of international law.⁹⁷ Nevertheless, international law may provide evidence of contemporary circumstances and values that provide the context for constitutional interpretation.⁹⁸

91 (2004) 225 CLR 1.

92 (2004) 219 CLR 562.

93 (2004) 219 CLR 486.

94 (1995) 183 CLR 273, 287.

95 (1992) 175 CLR 1.

96 *Mabo v Queensland (No 2)* (1992) 175 CLR 1, 29.

97 *Al-Kateb v Godwin* (2004) 219 CLR 562, 595.

98 *Singh v Commonwealth* (2004) 209 CLR 335.

By contrast, in other jurisdictions such as the UK, the ‘structure of judicial reasoning’ has been changed by the advent of the *Human Rights Act 1998* (UK).⁹⁹ These courts can consider substantive human rights questions, based on proportionality and necessity, when adjudicating such matters.

The existence of a human rights Act in Australia would also change the structure of judicial reasoning to accord more with international jurisprudence in two ways. Firstly, international precedent would assume prominence in determining Australian human rights cases. Australian law would more likely develop in harmony with comparable democratic nations rather than at odds with the rest of the world. Secondly, the dialogue model proposed an amendment to the *Acts Interpretation Act 1901* (Cth) which would require a court to favour a human rights interpretation consistent with the purpose of the legislation where there was ambiguity.

Of necessity, this interpretative change would see increased reference to international precedent and more outcomes which are ‘rights based’ than the present interpretative approach. As the Chief Justice of the NSW Supreme Court James Spigelman said in 1998, ‘Australian common law is threatened with a degree of intellectual isolation that many would find disturbing’.¹⁰⁰

8 *To Honour Australia’s International Obligations*

At present, Australia is in breach of obligations which it voluntarily undertook when it ratified various international human rights treaties. Article 2(2) of the ICCPR requires each country which voluntarily becomes party to the covenant to enact the provisions into the domestic law of that country. Article 2(1) of the ICESCR requires each country to take all appropriate means, particularly legislative measures, to progressively realize the rights contained in the covenant. Treaties are not self-executing in Australia and the act of ratification by the Australian Government does not itself implement the treaty into Australian law.

None of the human rights treaties to which Australia is a signatory have been fully incorporated into Australian domestic law. They have either been implemented partially, leaving many gaps and inconsistencies, or not at all. Australia’s failure to incorporate these treaty provisions into domestic law gives rise to a number of legal and political consequences:

⁹⁹ Helen Fenwick, *Civil Liberties and Human Rights* (4th ed, 2007) 133-134.

¹⁰⁰ James Spigelman, ‘Rule of Law - Human Rights Protection’ (Speech delivered at the 50th Anniversary of the Universal Declaration of Human Rights National Conference Human Rights and Equal Opportunity Commission, Sydney, 10 December 1998).

- a) We are in violation of the international law requirement to take the necessary procedural measures to incorporate these human rights protections into our domestic legal system.
- b) Australia is in breach of the international law obligation to protect and promote these substantive rights.
- c) As a consequence of the absence of such legislation, and unlike other jurisdictions, compliance with human rights in Australia is not currently a measure for determining the lawfulness or appropriateness of government action and policy. Further, the courts cannot adequately consider whether the government has infringed human rights.
- d) Abiding by agreed norms of international law carries moral force and political significance. It demonstrates respect for the rule of law in the international community. It also militates against charges of hypocrisy being levelled against Australia when it calls on other nations to improve their human rights records and, more specifically, when it calls on other nations to incorporate human rights treaties into their domestic law.

9 Provision of an Australian Forum for Allegations of Australian Human Rights Breaches

Currently the only avenue open to some Australians whose rights are violated is to complain to the United Nations Human Rights Committee and expose to the full glare of international publicity, matters better dealt with by Australian law. A human rights Act would enable Australian courts to adjudicate on Australian cases in Australia.

10 Enhancement of Australia's Reputation as a Good International Citizen

Australia is now the only democratic country in the world that does not have human rights systematically protected by legislation of some form. Professor George Williams has reported that few nations, democratic or not, lack human rights legislative protection:

Apart from nations in the midst of political upheaval or under military rule, such as Burma and Thailand, the only nations without some form of charter of rights are Bhutan and Brunei.¹⁰¹

Not only is Australia at odds with the rest of the world when it comes to statutory protection of human rights protection, it is also in breach of international law in so doing. At a minimum, a national human rights Act would enable Australia to say it complies with international law.

101 George Williams, *A Charter of Rights for Australia* (3rd ed, 2007) 16-17.

VII CONCLUSION

The case against a human rights Act for Australia was clearly stated in 2000 by the then Prime Minister John Howard when he told ABC radio that Australia's human rights record is 'quite magnificent' when 'compared to the rest of the world'.¹⁰² The official position of the Howard Liberal Government was that:

Australia's strong democratic institutions, the Constitution, the common law and current legislation, including anti discrimination legislation at the Commonwealth, State and Territory levels, protect and promote human rights in Australia. For these reasons, the Australian Government is not convinced of the need for a Bill of Rights in Australia.¹⁰³

However, these existing legal protections are piecemeal, often weak, with no real remedy, and too limited to protect human rights adequately.

That Australia is both in breach of its international law obligations and the only democracy in the world without some form of human rights Act suggest that this view is out of step with modern world reality. Thanks to recent developments in the United Kingdom, New Zealand and more particularly in the ACT and Victoria we now have a model for human rights protection in Australia.

The National Human Rights Consultation Committee, and Australia's Human Rights Framework, which it spawned, provided a minimalist, even timid, approach to the issue of human rights protection. The National Human Rights Consultation Committee endorsed the 'dialogue' model. At least as the debate progresses, the sorts of problems which have bedevilled the Australian republic debate will not present difficulties to the human rights debate. While the republic model remains highly contentious and arguably the most significant barrier to Australia becoming a republic, the model for human rights protection is now substantially settled, with some scope for debate as to detail.

Australia's Human Rights Framework is implementing several of the key elements of the dialogue model into Australian parliamentary practice. Those elements of the model which remain to be implemented are both the most significant and difficult. Human rights legislation, including declarations of incompatibility and the interpretive mechanism, remain

¹⁰² Sally Sara, Interview with John Howard, Prime Minister of Australia (ABC Radio, AM Program, 18 February 2000).

¹⁰³ Commonwealth of Australia, Common Core Document forming Part of the Reports of States Parties - Australia incorporating the Fifth Report under the International Covenant on Civil and Political Rights and the Fourth Report under the International Covenant on Economic, Social and Cultural Rights (2007) [83].

outstanding, as does the extension of comprehensive human rights law to the states and territories.

If an evolutionary approach to human rights protection is supported, the Human Rights Framework provides an important step forward, particularly in its identification of the human rights contained in the seven conventions and covenants as the rights to be protected. Human rights law is more about attitudes and values than strict legal causes of action and remedies. As Professor George Williams has pointed out:

In fact the most important contribution a charter of rights can make is not the benefit it brings to the small number of people who succeed in invoking rights in court, it is how it can help to prevent the making of bad laws and how it can be used to educate, shape attitudes and bring hope and recognition to people who are otherwise powerless.¹⁰⁴

What remains is the election of a government with political will and propitious circumstances to see Australia join the rest of the world with a strong human rights culture and equally strong legal protection.

¹⁰⁴ George Williams, 'A Charter of Rights for Australia' *Debate* (Issue 4, March 2009) 8.