SUBMISSION TO THE NATIONAL HUMAN RIGHTS CONSULTATION

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INTRODUCTION

1. This submission is based on the practical experience of the authors in the associated areas of human rights and administrative law. As a great deal of the current debate has focused on the ideological, rather than practical, issues surrounding a national Human Rights Act, the authors considered that it may be helpful to the Consultation process if we focused on some of these practical issues. In particular, the authors contend that an underlying concept of human rights – that no arbitrary barrier should be allowed to stand between a person and his or her aspirations – is not a seriously deniable proposition.[1] In practice, that concept translates to human rights operating to empowering the powerless, and to giving a voice to the voiceless, in a manner that leads to a fairer and more just society.

2. The National Human Rights Consultation Background Paper poses three key questions:

   2.1. Which human rights (including corresponding responsibilities) should be protected and promoted?

   2.2. Are these human rights currently sufficiently protected and promoted?

   2.3. How could Australia better protect and promote human rights?

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1 See the discussion at 9 of *Human Rights and the Judicial Role* delivered by Justice Abella (now a member of the Supreme Court of Canada) on 23 October 1998 and published by the Australian Institute of Judicial Administration Inc.

3. The focus of this submission will be on the second and third of these questions. We suggest that the full range of civil and political rights should be protected and promoted in Australia through the enactment of a statutory bill or charter of rights similar in form to the *Human Rights Act 2004* (ACT) (**the ACT HRA**) and the *Charter of Human Rights and Responsibilities Act 2006* (Vic) (**the Victorian Charter**). In the remainder of this submission we refer to the proposed statute as a national Human Rights Act. An Act of this nature, which will give effect to Australia's international treaty obligations, is in our view the best available means of protecting and promoting these human rights for two principal reasons:

   3.1. First, early experience under the ACT HRA and the Victorian Charter, and experience in other jurisdictions where similar legislation has been in force for longer, demonstrates that these Acts can have real, practical and beneficial effects for the most vulnerable and disadvantaged members of society.

   3.2. Secondly, such an Act would be consistent with the existing legal and constitutional structures in Australia through which analogous rights, interests and legitimate expectations of individuals are protected. A national Human Rights Act would enhance these structures, rather than undermine them. It is also desirable that a consistent body of legal principles and procedures be developed and applied across Australia.

WHICH HUMAN RIGHTS (INCLUDING CORRESPONDING RESPONSIBILITIES) SHOULD BE PROTECTED AND PROMOTED?

4. A national Human Rights Act should protect the civil and political rights contained in the *International Covenant on Civil and Political Rights* (**the ICCPR**), expressed in a manner similar to that in the Victorian Charter and the ACT HRA. In particular, the Act should recognize and protect the distinct cultural rights of the indigenous people of Australia. Possible formulations of indigenous cultural rights may be found in section 19 of the Victorian Charter, Article 27 of the ICCPR and Article 31 of the United Nations Declaration on the Rights of Indigenous Peoples.

5. While we acknowledge the force of arguments for and against the inclusion of a range of economic, social and cultural rights in a national Human Rights Act, we consider that the most desirable, and practically achievable, approach at this time is to limit the Act to the protection of civil and political rights. The possibility of including economic, social and cultural rights at some later stage might be expressly referred to in the Act, as has been done in the Victorian Charter.[2]

ARE HUMAN RIGHTS CURRENTLY SUFFICIENTLY PROTECTED AND PROMOTED?

6. Many of those who are opposed to an Australian bill of rights, or are unconvinced of the need for one, claim that its proponents have yet to establish that human rights are not adequately protected in Australia. Such statements echo similar claims made in the United Kingdom prior to the enactment of the *Human Rights Act 1998* (UK) ("**the UK HRA**"). However, in a recent speech given by Lord Bingham, former Senior Law Lord of the United Kingdom, his Lordship noted that "[b]y the 1990s, however, there was no longer room for complacency in Britain…".[3] His Lordship then set out a catalogue of cases where British laws or practices had been found by the European Court of Human Rights to be in breach of the *European Convention on the Protection of Human Rights and Fundamental Freedoms*.

7. We have annexed a copy of Lord Bingham's speech, "*Dignity, Fairness and Good Government: The Role of a Human Rights Act*", to this submission. The speech, given by the English equivalent of the Chief of Justice of Australia, offers an articulate enunciation of the English domestic experience, which would be difficult to distinguish from what might be expected in Australia.

8. Australia, like Britain, is a nation in which the rule of law and human rights are respected. The majority of people enjoy a high standard of living. Nonetheless, it must be accepted that in Australia, too, there is no room for

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2 See section 44, which requires the Victorian Human Rights and Equal Opportunity Commission to consider the potential inclusion of economic, social and cultural rights in its four year review of the operation of the Charter.

3 Lord Bingham, "Dignity, Fairness and Good Government: The Role of a Human Rights Act", speech given to the Human Rights Law Resource Centre, Melbourne, 9 December 2008, page 1.

complacency. There are many people in Australia who suffer affronts to their dignity, large and small, and violations of their basic rights as human beings in a civilized society. Some of these cases are well known. Others go unnoticed by the general public.

9. We suggest that the question whether human rights are currently sufficiently protected and promoted in Australia is therefore best answered by looking to the ways a national Human Rights Act can *enhance* the fairness of our society by improving the protections afforded to the dignity and human rights of vulnerable and disadvantaged members of society. Early experience under the ACT HRA and the Victorian Charter, and experience in other jurisdictions where similar legislation has been in force for much longer, demonstrates that these Acts can have genuine positive advantages in this regard, without any demonstrated disadvantages.

10. A 2006 report by the United Kingdom Department for Constitutional Affairs found that the UK HRA:

> "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 formulation 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 the policy and by those putting it into effect. In particular, the evidence provided to the DCA by [other Government] Departments shows how the Act has led to a shift away from inflexible or blanket policies towards those which are capable of adjustment to recognise the circumstances and characteristics of individuals."[4]

11. A 2008 report by the British Institute of Human Rights, entitled *The Human Rights Act – Changing Lives* (a copy of which is annexed), examined the impact of the UK HRA through 31 case studies, some of which are referred to below. In the introductory summary to its report, the BIHR stated:

> "The case studies … demonstrate that ordinary people going about their day-to-day lives are benefiting *from* the law, without resorting *to* the law…

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[4] Department for Constitutional Affairs (UK), *Review of the Implementation of the Human Rights Act* (July 2006), at page 4, available at www.justice.gov.uk/guidance/humanrights.htm.

> Too often the Human Rights Act is associated with technical legal arguments or perceived to be limited to high profile – and sometimes spurious – claims by celebrities and criminals. These case studies reveal a very different picture. They show how groups and people themselves are using not only human rights law, but also the language and ideas of human rights to challenge poor treatment and negotiate improvements to services provided by public bodies…
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> The case studies cover a wide range of people in a variety of situations. They show how human rights can be used by and on behalf of younger people, older people, victims of domestic violence, parents, disabled people, people living with mental health problems, asylum seekers, and others facing discrimination and exclusion."[5]

12. The "learning and conclusions" which the BIHR drew from these case studies included the following:

> "The language and ideas of human rights have a dynamic life beyond the courtroom. We often associate human rights with lawyers. However, these examples show that a wide range of other individuals and organisations, including advocates, family members, user-led support groups, service users themselves, frontline service providers and managers, those responsible for commissioning services from the private and third sectors, and public sector service providers can use this language to improve people's experience of public services and their quality of life generally.
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> … [T]he language and ideas of human rights … has wider resonance and value across a broad range of sectors, including in the provision of health services to people with mental health problems, balancing the rights of people with learning disabilities, and other areas such as challenging the response of public bodies to women and children who have fled domestic and sexual violence."[6]

13. The impact of the Victorian Charter has not, to date, been most apparent in the decisions of courts and tribunals. There may be a number of reasons for this. The most obvious is that the provisions of the Charter which enable it to be raised in legal proceedings have only been in force since 1 January 2008. A second reason is that it was the intention of the drafters of the Charter that it should promote the protection of human rights in Victoria as far as it was possible to do so by ensuring that "human rights are observed in administrative practice and the development of policy within the public

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5 British Institute of Human Rights, *The Human Rights Act – Changing Lives* (December 2008, 2nd ed), page 5, available at www.bihr.org.uk.

6 Ibid, page 24.

sector without the need for recourse to the courts".[7] Accordingly, significant advances in government protection of human rights have occurred by appropriate steps being taken to ensure human rights are protected by cultural and procedural change at the executive and parliamentary levels of government, thereby obviating the need for litigious outcomes.

14. In the following paragraphs, we offer examples of particular cases, from Victoria and elsewhere, in which the existence of human rights legislation has made a practical difference to the most marginalised, and least protected, members of society. We start with an extract from Lord Bingham's speech, to which we have referred above, where his Lordship discusses the benefit of the Human Rights Act as a result of the courts being empowered to uphold basic safeguards for those members of society who are most disadvantaged, most vulnerable and least well-represented:[8]

> "Examples are plentiful, but among those which spring readily to mind are the ordering of a public enquiry into the beating to death of a young Asian detainee by a rabidly racist and violent detainee put into the same cell at a young offenders' institution;[9] a finding that the conditions in which prisoners were held at Barlinnie Prison in Glasgow amounted to inhuman or degrading treatment or punishment;[10] a finding that the indefinite detention of a foreign national suspected of association with terrorism without charge or trial was disproportionate, irrational and discriminatory;[11] a finding that an 18-hour curfew, coupled with stringent restrictions on where the subject could go, whom he could meet and whom he might speak to, amounted to an unlawful deprivation of liberty;[12] a finding that temporary judges in Scotland lacked the security necessary to make them appear to be an independent and impartial tribunal;[13] an order restraining the return of a mother and child to Lebanon, where the child would be required to live with a violent father she had never met;[14] a finding that the police had unlawfully interfered

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7 Second Reading Speech for the Bill for the Victorian Charter, Victoria, Legislative Assembly, *Debates* (4 May 2006), Vol 470, page 1293, Mr Hulls (Attorney-General).

8 Lord Bingham, "Dignity, Fairness and Good Government: The Role of a Human Rights Act", speech given to the Human Rights Law Resource Centre, Melbourne, 9 December 2008, page 9.

9 *R (Amin) v Secretary of State for the Home Department* [2003] UKHL 51; [2004] 1 AC 653.

10 *Napier v Scottish Ministers* 2005 1 SC 229.

11 *A and others v Secretary of State for the Home Department* [2004] UKHL 56; [2005] 2 AC 68.

12 *Secretary of State for the Home Department v JJ* [2007] UKHL 45, [2008] 1 AC 385.

13 *Starrs and Chalmers v Procurator Fiscal, Linlithgow*, Appeal Court, High Court of Justiciary, Appeal No 1821/99.

14 *EM (Lebanon) v Secretary of State for the Home Department (AF (A Child) and others*

> with a demonstration against the Iraq war outside a Royal Air Force base in Gloucestershire;[15] and an order condemning as discriminatory and disproportionate a scheme requiring immigrants seeking to marry otherwise than under the rites of the Church of England to obtain the consent of the Secretary of State.[16] These examples could, as I say, be multiplied. I do not for my part doubt that such decisions enhance the fairness, decency and cohesiveness of the society in which we live in the United Kingdom."

15. **Mental health.** A mentally ill man was subject to involuntary treatment orders and community treatment orders which required him to undergo compulsory medical treatment. The drugs administered as part of this treatment had adverse side effects. The *Mental Health Act 1986* (Vic) required the Mental Health Review Board to review compulsory treatment orders within specified time limits. In this case, the Board had failed, through administrative oversight, to review the orders made in respect of the applicant for more than a year. It was not an isolated incident. The Victorian Civil and Administrative Tribunal made a declaration that the failure to conduct the reviews within the specified times breached the applicant's right to a fair hearing within a reasonable period of time.[17]

16. **Mental health.** In an early case under the United Kingdom *Human Rights Act 1998* ("**UK HRA**"), the Court of Appeal made a declaration that certain provisions of the *Mental Health Act 1983* (UK) were incompatible with the patient's right to liberty because, in essence, they did not require the Mental Health Review Tribunal to discharge a patient who had been involuntarily admitted to a mental hospital even though it could not be shown that the patient continued to suffer from a mental disorder.[18] The legislation was subsequently amended.

17. **Mental health.** M was a woman who had developed a mental health disorder, which her treating physicians considered to have resulted from

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intervening) [2008] UKHL 64; [2008] 3 WLR 931.

15 *R (Laporte) v Chief Constable of Gloucestershire Constabulary* [2006] UKHL 55; [2007] 2 AC 105.

16 *R (Baiai) v Secretary of State for the Home Department (Nos 1 and 2) (Joint Council for the Welfare of Immigrants intervening)* [2008] UKHL 53; [2008] 3 WLR 549.

17 *Kracke v Mental Health Review Board* [2009] VCAT 646.

18 *R (H) v Mental Health Review Tribunal, North & East London Region* [2001] EWCA Civ 415; [2002] QB 1.

having been sexually abused during childhood by her adoptive father. She was liable to compulsory detention under the UK *Mental Health Act*. The High Court made a declaration that certain provisions of the Act were incompatible with M's right to private life because they resulted, regardless of the patient's wishes, in her adoptive father being designated as her "nearest relative" and having a role in relation to her detention and treatment.[19] The incompatibility had already been identified by the government but had not yet been rectified.

18. **Public housing.** A public housing tenant with young children was given a notice to vacate by the Director of Housing after three small cannabis plants had been planted by her partner on the premises. The Victorian Civil and Administrative Tribunal made a possession order in favour of the landlord even though it was uncertain to whom the plants belonged. The tenant appealed to the Supreme Court. The only questions on appeal arose under the Victorian Charter. The tenant argued that eviction of her and her children was a disproportionate response in the circumstances and infringed her right to respect for her home and family. The case was able to be settled before the hearing of the appeal and the tenant and her children were permitted to remain in their home, rather than being made homeless.[20]

19. **Public housing.** In the ACT, a single mother of two children was not entitled to remain in her mother's public housing property when her mother died, as the lease had been in her mother's name. The children had always lived in the house, had close links with the local community including school and friends and were at risk of being removed from their mother if she did not have a home for them. Advocates cited the right to protection of family life to the public housing authority, which granted a lease over the house to the mother.[21]

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19 *R (M) v Secretary of State for Health* [2003] EWHC Admin 1094.

20 Source: Human Rights Law Resource Centre.

21 Source: Human Rights Law Resource Centre, *Case Studies: How a Human Rights Act can Promote Dignity and Address Disadvantage*, available at www.hrlrc.org.au; and the ACT Welfare Rights and Legal Centre.

20. **Refugees.** UK legislation permitted welfare support provided to applicants for asylum to be withdrawn if the Home Secretary was not satisfied that the applicants had made their claim for asylum as soon as reasonably practicable after their arrival in the UK, subject to a duty to provide support where a failure to do so would breach an applicant's rights under the European Convention on Human Rights ("**ECHR**").[22] In *R (Limbuela) v Home Secretary*,[23] the three applicants had made their claims for asylum on the day of arrival or the day after. The Home Secretary decided not to provide welfare support. The House of Lords held that the Home Secretary was not under a "general public duty to house the homeless or provide for the destitute", but that a refusal to provide support may constitute inhuman and degrading treatment in breach Article 3 of the ECHR where "a late applicant with no means and no alternative sources of support, unable to support himself, is, by the deliberate action of the state, denied shelter, food or the most basic necessities of life".[24]

21. A similar situation arose in Australia where a husband and wife, both seeking visas to remain in Australia, were prohibited by the *Migration Act 1958* (Cth) and the *Migration Regulations 1994* (Cth) from working or from receiving any form of social security. They were reduced to reliance entirely on charity and begging to provide for themselves and their young child. The husband was twice discovered to be working, in order to provide for his family, and was placed in detention. An application to the Federal Court was resolved by consent.[25] Had there been a national Human Rights Act, the manner in which the Regulations and the decisions of the Minister's delegate affected many of the family's human rights – including the right to the protection of the family, the protection of children, and protection from inhuman and degrading treatment – may have been able to be identified at a much earlier stage and prevented a plainly unacceptable situation from arising.

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22 *The European Convention for the Protection of Human Rights and Fundamental Freedoms 1950*.

23 [2006] 1 AC 396; [2005] UKHL 66.

24 [2006] 1 AC 396; [2005] UKHL 66 at [7]-[8] per Lord Bingham. See also *R (Q) v Home Secretary* [2003] EWCA Civ 364, [2004] QB 36.

25 *De Silva v Minister for Immigration and Multicultural Affairs* [2001] FCA 962.

22. **Refugees and family life**. In a number of cases in the United Kingdom, the right to respect for the family has been invoked, in some cases successfully, in proceedings in which the deportation of asylum seekers would have resulted in their forced separation from close family members, such as parents, spouses and children, who were British citizens or had been granted asylum.[26] In some of these cases, the asylum seekers had sought to remain in the UK to care for close relatives suffering from physical or mental illness. In *B (Jamaica) v Home Secretary*,[27] a Jamaican woman overstayed her visa in the UK, was subsequently joined by her two daughters, and then met and married a British citizen who had lived in the UK all his life. The Court of Appeal allowed an appeal against the mother's deportation. Lord Justice Sedley said:

> "In substance, albeit not in form, [the husband] was a party to the proceedings. It was as much his marriage as the appellant's which was in jeopardy, and it was the impact of removal on him rather than on her which, given the lapse of years since the marriage, was now critical… He was entitled to something better than the cavalier treatment he received… It cannot be permissible to give less than detailed and anxious consideration to the situation of a British citizen who has lived here all his life before it is held reasonable and proportionate to expect him to emigrate to a foreign country in order to keep his marriage intact."[28]

23. **Children and family life.** Following the death of her husband, a woman with mental health problems was placed in 24 hour care and her children were placed into foster care. The children's visits to their mother were gradually reduced to one per week, because the care authority had insufficient staff numbers, which caused great distress to the children and their mother. After the mother's advocate invoked the children's right to respect for their family life, the children's visits were subsequently restored to three per week and the manager of the care authority personally saw to it that the visits took place.[29]

24. **Children and family life.** A woman living in poverty left her partner after discovering he had been abusing their children. She and the children were

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26 See, eg, *Huang v Home Secretary* [2007] 2 AC 167, [2007] UKHL 11; *Beoku-Betts v Home Secretary* [2008] UKHL 39, [2009] 1 AC 115; *R (Ahmadi) v Secretary* [2005] EWCA Civ 1721; *Miao v Home Secretary* [2006] INLR 473.

27 [2007] EWCA Civ 1302.

28 [2007] EWCA Civ 1302 at [20].

29 Source: BIHR, *Changing Lives* report, page 13, Case Study 15.

placed in temporary accommodation but were regularly moved. Eventually, the woman was told by social workers that she was an "unfit" parent because she was unable to provide stability for her children and that her children would have to be placed in foster care. After raising the right of the mother and her children to protection of their family life, the family was permitted to remain together and stable accommodation was found for them.[30]

25. **Privacy.** A man suffering from depression had attempted to commit suicide in a public street. His attempt had been captured by a CCTV camera installed by a local council. The CCTV operator alerted the police who detained the man under the UK *Mental Health Act* and obtained medical assistance for him. The local council subsequently broadcast part of the CCTV footage on television in order to publicise the benefits of CCTV cameras for the deterrence of crime. The events occurred prior to the enactment of the UK HRA and the man obtained no remedy in the UK courts. He took his case to the European Court of Human Rights, which found that his right to privacy had been infringed because there were other means available to the council and the police of achieving the same objective and which would have been less invasive of his privacy, such as masking the man's identity.[31]

26. **Privacy.** A mother and her 21 year old son, who had cerebral palsy and severe arrested social and intellectual development, were strip searched when they came to visit a close relative in prison. The prison officers who carried out the search failed to comply with written procedures, including by leaving open the blinds of the room in which the mother was searched and by requiring both the mother and her son to remove all of their clothes rather than from only half of their body at a time. Again, because the events occurred prior to the enactment of the UK HRA, they obtained no remedy in the UK courts (other than for battery as a result of a prison officer touching the son's genitals). The European Court of Human Rights subsequently held that the searches had violated the applicants' right to privacy because, although searching visitors was a legitimate means of preventing the smuggling of drugs into the prison, "the application of such a highly invasive and potentially debasing

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30 Source: BIHR, *Changing Lives* report, page 18, Case Study 24.

31 *Peck v UK* (2003) 36 EHRR 41; [2003] ECHR 43.

procedure to persons who are not convicted prisoners or under reasonable suspicion of having committed a criminal offence must be conducted with rigorous adherence to procedures and all due respect to their human dignity."[32]

HOW COULD AUSTRALIA BETTER PROTECT AND PROMOTE HUMAN RIGHTS?

27. A statutory Human Rights Act similar in form to the Victorian Charter and the ACT HRA offers the best available and practically achievable model for improving the protection and promotion of human rights at federal level in Australia.

28. The Victorian Charter and the ACT HRA, as well as the UK HRA on which the Australian Acts were closely modeled, have four principal operative features in common. They contain:

    28.1. procedures relating to the enactment of new legislation, including ministerial statements of compatibility (or incompatibility) and scrutiny of bills on human rights grounds;[33]

    28.2. an obligation on "public authorities" to act compatibly with human rights, coupled with an ability for individuals to raise the question of a public authority's compliance with this obligation in legal proceedings;[34]

    28.3. an obligation to interpret all primary and subordinate legislation compatibly with human rights so far as it is possible to do so, coupled with a power to declare that a statutory provision is incompatible with a particular right or rights but which does not have any effect on the continuing validity of the legislation in question;[35] and

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32 *Wainwright v UK* [2006] ECHR 807, (2007) 44 EHRR 809 at [44].

33 See sections 28 and 30 of the Victorian Charter; and sections 37 and 38 of the ACT HRA.

34 See sections 38 and 39 of the Victorian Charter; and sections 40B and 40C of the ACT HRA.

35 See sections 32 and 36 of the Victorian Charter; and sections 30 and 32 of the ACT HRA.

28.4. a range of civil and political rights which, for the most part, are not absolute and may be limited where it is reasonably necessary to do so.[36]

29. One of the main criticisms of proposals for an Australian bill of rights is that it would severely undermine the separation of powers because it would result in a transfer of political power over issues of economic and social policy from Parliament to the judiciary. In our view, a national Human Rights Act which possessed the four features identified above would not have such an effect. As Sir Gerard Brennan has said in relation to the Victorian Charter:

> "The genius of the Charter is the solution of the problem which beset earlier models, namely, the risks of transferring political power to the judiciary. The Charter has brought the judiciary into constructive dialogue with the Parliament, but that is no more than utilising the interpretative skills of the courts to promote good government in the interests of the community."[37]

30. Leaving aside for the moment the power to make "declarations of incompatibility", these four principal features sit well with the existing legal and constitutional structures at the federal level in Australia. Before examining these four features in slightly more detail, some general comments should be made about the argument concerning the separation of powers.

31. First, because the Human Rights Act would intersect with federal administrative law, it is significant that the existing federal administrative law framework (eg s 75(v) of the Commonwealth Constitution and the *Administrative Decisions (Judicial Review) Act 1977* (Cth) ("**ADJR Act**") together with the experience of the Federal Court of Australia in these areas) will ensure that the procedural and substantive changes flowing from a national Human Rights Act will operate effectively and seamlessly within the existing legal framework.

32. Secondly, it is important to note in this context that the 2006 report by the United Kingdom Department for Constitutional Affairs found that the UK

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[36] See section 7 of the Victorian Charter; and section 28 of the ACT HRA.

[37] The Hon Sir G Brennan AC KBE, "The Constitution, Good Government and Human Rights", 12 March 2008, pages 22-23, available at http://www.hrlrc.org.au.

HRA (after almost six years of operation) had not significantly altered the constitutional balance between the Parliament, the Executive and the Judiciary.[38] There is no reason to think that the situation could be any different in Australia which, unlike the UK, has a constitutionally entrenched system of separation of powers. Certainly, the experience in the ACT and Victoria to date, although only brief, does not suggest there has been, or is likely to be, any seismic shift in the constitutional balance.

33. Thirdly, most criticisms of this sort focus on the separation of powers between the Parliament and the judiciary and the effect that the power given to courts to interpret legislation compatibly with human rights may have on the constitutional balance between these two branches of government. As we later explain, that separation is not threatened in any way by a national Human Rights Act. However, very little attention is given to the executive government. Yet the absence of a strict separation of powers between the Parliament and the executive in Australia and the increasing legal, economic and social complexity of modern government has led to the increasing centralization of power in the executive government. The executive government, through the making of delegated legislation and administrative decision-making, can and does impact upon the lives – and rights – of very many Australians in countless ways every day. Although the executive remains subject to the supervision of the Parliament and to judicial review by the courts, these methods of supervision have their limitations. Sir Gerard Brennan said, over ten years ago:[39]

> "Administrative decision-making … has become so complex and voluminous that it has outstripped parliamentary capacity for effective supervision. The technical procedure for seeking judicial review of administrative action at common law is cumbersome and, in any event, judicial review cannot alter a decision which, though valid, is not the correct or preferable decision that ought to be made in the particular case. Sir Anthony Mason pointed out that administrative decisions were made by officers lacking independence from the

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38 Department for Constitutional Affairs (UK), *Review of the Implementation of the Human Rights Act* (July 2006), pages 1, 10.

39 The Hon Sir Gerard Brennan, "The Parliament, the Executive and the Courts: Roles and Immunities" (1997) 9 *Bond Law Review* 136 at 145, quoted in R Merkel, "Separation of Powers – A Bulwark for Liberty and a Rights Culture" (2005) 68 *Saskatchewan Law Review* 129 at 132.

> Executive Government and subject to political or bureaucratic influence, that they were not usually made in public, that the reasons for decision were usually unstated, that the requirements of natural justice were not always observed and that the individual's claims of justice were often subordinated to public policy."

34. Similar comments may be made about delegated legislation that is promulgated by the executive government. Although legislative instruments are subject to scrutiny and disallowance by Parliament,[40] the sheer volume and complexity of such instruments raises concerns about the ability of Parliament effectively to supervise the propriety of all of the delegated legislation that is made.

35. A national Human Rights Act can go a long way toward addressing these concerns in ways which pose no threat to, but rather give effect to, the maintenance of the separation of powers in Australia. In particular, the imposition of obligations on "public authorities" to act compatibly with human rights can have a very significant impact on the development and implementation of policy by the executive and can help to ensure that administrative decision-makers exercise their powers in a manner compatibly with human rights and in a way that is sensitive to the circumstances of individual cases and respectful of the dignity of the individuals concerned.

36. In the following paragraphs of this section of our submission, we offer some observations on the manner in which the four principal features of a national Human Rights Act would fit into the existing legal landscape at the federal level.

Consideration of human rights in the enactment of new legislation

37. **Ministerial statements of compatibility.** A national Human Rights Act should ensure that Ministers introducing a Bill into Parliament must make a reasoned statement that the Bill is either compatible or incompatible with the human rights set out in the Act. This is a novel procedure introduced by the UK, ACT and Victorian Acts. It ensures that the executive government

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40 See Part 5 of the *Legislative Instruments Act 2003* (Cth).

considers the human rights implications of every new piece of legislation and draws them to the attention of the Parliament.

38. **Scrutiny of Bills on human rights grounds.** The Senate Scrutiny of Bills Committee already examines all Bills and reports to the Senate as to whether the Bills trespass unduly on personal rights and liberties or affect rights and liberties in other specified ways.[41] A national Human Rights Act would provide an obligatory, and a more concrete, framework for the conduct of this function because it would expressly set out for the benefit of both Houses of Parliament the relevant rights and the criteria by which the reasonableness of any interference with those rights are to be assessed.

Ensuring the observance of human rights by the executive government

39. A national Human Rights Act should oblige all "public authorities"[42] to act compatibly with human rights and should permit a public authority's compliance with these obligations to be raised in any proceedings in a federal court (and in any court exercising federal jurisdiction).[43] Provisions of this nature would sit well with the existing structures for the review of administration decisions at the federal level in Australia.

40. **Obligations of public authorities.** Most human rights issues arise in the context of criminal prosecutions or administrative law proceedings in which individuals (or other entities) seek judicial review of administrative acts and decisions. At the federal level in Australia, applications for judicial review may be made to the federal courts under a range of laws, including the ADJR Act (which enables applicants to seek review of decisions of an administrative character made under an enactment) and section 75(v) of the Commonwealth Constitution (which gives the High Court original

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41 See Order 24 of the Senate Standing Orders.

42 That concept be defined broadly in order, as was said in the Explanatory Memorandum to the Bill for the Victorian Charter, to reflect that "modern governments utilise diverse organisational arrangements to manage and deliver government services": see the Explanatory Memorandum to the Charter of Human Rights and Responsibilities Bill 2006 (Vic), page 4. The definitions in section 4 of the Victorian Charter or section 40 of the ACT HRA provide useful precedents.

43 See, eg, section 40C of the ACT HRA.

jurisdiction to hear matters in which certain remedies are sought against an "officer of the Commonwealth").[44]

41. Of the traditional administrative law grounds of review, one of the most frequently used is that a decision-maker failed to take into account a relevant consideration. What considerations are relevant to a particular decision may be left to be determined from the subject matter, context and purpose of the Act which confers power on the decision-maker, or they may be spelt out by the Act. The empowering Act may also stipulate the weight to be given to particular considerations.[45] The High Court has also recognised the existence of a requirement to treat Australia's international treaty obligations as relevant considerations[46] and, absent statutory or executive indications to the contrary, administrative decision makers are expected to act conformably with Australia's international treaty obligations.

42. In the field of administrative law, a national Human Rights Act, which required public authorities to act compatibly with human rights, would make human rights a relevant consideration in all administrative decision-making by public authorities and would make clear that such rights must be given real and genuine consideration.[47] It may in some cases require courts to engage in closer scrutiny of executive action than they would presently do, but for the reasons we discuss below in relation to reasonable limits on human rights, we do not consider that this would result in any significant shift in the balance presently existing between the courts and the executive in the area of administrative law. It would not affect the traditional focus of courts engaged in judicial review on the *legality* of administrative action, rather than on the merits of particular decisions. As Lord Steyn, a member of the House of Lords, said in the well-known case of *R v Home Secretary; Ex parte Daly*:[48]

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44 The High Court's s 75(v) jurisdiction may also be exercised by the Federal Court of Australia.

45 *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1986) 162 CLR 24 at 40-41.

46 *Minister for Immigration and Ethnic Affairs v Tech* (1995) 183 CLR 273.

47 S Evans and C Evans, "Legal Redress under the Victorian Charter of Human Rights and Responsibilities" (2006) 17 *Public Law Review* 264 at 278.

48 [2001] 2 AC 532; [2001] UKHL 26 at [28].

> "This does not mean that there has been a shift to merits review. On the contrary, . . . the respective roles of judges and administrators are fundamentally distinct and will remain so."

43. **Enforcing the obligations of public authorities.** The ability of an ordinary citizen to challenge the legality of a government decision affecting their rights, interests or legitimate expectations before an independent and impartial court is a fundamental aspect of the rule of law and of the liberty all persons on Australian. In order to ensure that a national Human Rights Act gives real practical force to the rights set out in it, an individual must be able to bring a claim that a public authority has failed to comply with its obligation to act compatibly with human rights before a court and have it adjudicated upon.

44. Such a claim should not be limited to situations where an individual also has a claim that the authority has also infringed some other existing law; for example, that the authority's decision was unlawful on traditional administrative law grounds or that the authority also breached its duty of care. Although human rights issues will normally arise in conjunction with other claims, they should also be capable of constituting a stand alone cause of action if need be. Section 40C of the ACT HRA, which is modeled on section 7(1) of the UK HRA, provides a useful precedent. It permits a person who alleges that he or she has been a victim of a contravention by a public authority of its human rights compliance obligations to (a) start a proceeding in the Supreme Court against the public authority; or (b) to rely on the person's rights under the HRA in other legal proceedings. This is to be preferred to section 39 of the Victorian Charter, which is complex in its drafting and uncertain in its effect, but which was designed to ensure that the Charter would not create any free-standing cause of action.[49]

45. **Delegated legislation.** We have referred above to the proliferation of delegated legislation made by the executive government (or some other public body) and the impact it may have on the rights of individuals. Delegated or subordinate legislation may only be made where an Act of Parliament confers power to do so. Where a provision of delegated

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[49] Explanatory Memorandum to the Bill for the Victorian Charter, page 28.

legislation goes beyond the scope of the empowering provision, or is not reasonably proportionate to the purpose sought to be achieved by the empowering provision, it will be invalid.[50]

46. In the same way, delegated legislation which cannot be interpreted compatibly with the human rights set out in a national Human Rights Act should be held to be invalid (unless it is necessary to give effect to a provision of an Act of Parliament which is itself incompatible with a human right). There is no constitutional difficulty with this proposal. On the contrary, it ensures that the sovereignty of Parliament, as expressed in a national Human Rights Act, is not undermined by the executive government making delegated legislation which is incompatible with the human rights that Parliament has legislated to protect.

Interpretation of legislation compatibly with human rights

47. This brings us to the issue of interpretation of legislation compatibly with human rights. There is a common law principle of statutory interpretation, which has been well established in Australia for over a century, that the courts will presume that Parliament did not intend to curtail fundamental rights unless it does so clearly and unambiguously. This principle has led to the High Court interpreting statutory provisions in the manner which least intrudes on human rights and to reading down general statutory powers so as to make them consistent with human rights.[51]

48. The interpretive obligations in both the ACT HRA and the Victorian Charter require statutory provisions to be interpreted compatibly with human rights so far as it is possible to do consistently with their purpose.[52] These obligations are clearer and more specific than the existing common law presumption – as they must be if they are to have some practical effect.

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50 See, eg, *Shanahan v Scott* (1957) 96 CLR 245 at 250; *South Australia v Tanner* (1988) 166 CLR 161 at 165; *Patmore v Independent Indigenous Advisory Committee* (2002) 122 FCR 559 at 573 [50]-[52].

51 See, for example, *Potter v Minahan* (1908) 7 CLR 277, 304; *Ex parte Walsh and Johnson; In re Yates* (1925) 37 CLR 36 at 93; *Bropho v Western Australia* (1990) 171 CLR 1 at 18; *Coco v The Queen* (1994) 179 CLR 427, 437-438; *Plaintiff S157 v Commonwealth* (2003) 211 CLR 476, 492 [30]; *Al-Kateb v Godwin* (2004) 219 CLR 562, 577 [20].

52 Section 30 of the ACT HRA; and section 32 of the Victorian Charter.

Importantly, however, they are entirely consistent with that presumption and with the courts' constitutional role as interpreters of legislation, as we endeavour to explain below.

49. **Declarations of incompatibility.** There has been considerable academic discussion and public debate as to whether the conferral of power on federal courts to make a declaration that a statutory provision is incompatible with, or cannot be interpreted consistently with, a relevant human right would be constitutional. We understand that the National Consultation Committee will take advice from the Solicitor-General on this point and we make no comment about it other than to say, if it is considered likely that such a power might be found to be unconstitutional, the proposed model of a national Human Rights Act can stand, and operate effectively, in the absence of such a power.

50. **Effect on the separation of powers.** It has been said that these interpretative provisions undermine the sovereignty of Parliament and the separation of powers. The argument is based primarily on two points: that the UK courts have said that the equivalent interpretative obligation in the UK HRA may require courts to depart from the intention of the Parliament[53] and that, in all cases where a declaration of incompatibility has been made, Parliament has amended the legislation in question. In our view, this argument is misconceived. The overall effect of the interpretative provisions in the ACT HRA and the Victorian Charter is to preserve Parliamentary sovereignty. This may be explained in the following way.

51. By placing an interpretative obligation in a national Human Rights Act, *Parliament* would be directing the courts that if, in a particular case, a court considers that a statutory provision would be incompatible with a person's human rights, it must be interpreted so as to avoid that incompatibility. Parliament would also set the limits to that interpretative obligation: the interpretation must be possible and it must be consistent with the purpose of the provision. Accordingly, the courts are only empowered to interpret an

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53 See *Ghaidan v Godin-Mendoza* [2004] 2 AC 557; [2004] UKHL 30 at [29]-[30], [40] and [67].

Act in a way that is consistent with its purpose having regard to the language employed by the legislature.[54]

52. It should be noted that the interpretative provision in the UK HRA does not contain the express qualification about consistency with the purpose of the statutory provision in question. Whether that qualification means that the ACT and Victorian provisions do not go as far as the UK provision remains an open question.[55]

53. In any event, whatever the strength of the interpretative obligation, the fact remains that if a court applied it in any particular case to interpret a statutory provision in a "rights-compatible" way, and Parliament did not agree with that interpretation, Parliament could override it by the ordinary processes. Similarly, if a court considered that a statutory provision could *not* be interpreted compatibly with human rights and consistently with its purpose, the provision would remain valid and Parliament would be under no obligation to amend it.

54. The suggestion that the UK experience shows that Parliament must be under a *de facto* political obligation to amend legislation in response to a declaration of incompatibility, and that to fail to do so would be "political suicide", cannot be accepted as an argument that parliamentary sovereignty is undermined. No doubt the courts' declarations have had an impact, as they ought to have, but the range of factors contributing to the UK experience has been more complex. For example, in the UK, a failure to respond to a judicial declaration of incompatibility is likely to lead to an adverse decision in the European Court of Human Rights. That Court has the power to award compensation for breaches of the ECHR and its decisions are binding on the

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54 This is consistent with section 15AA of the Acts Interpretation Act 1903 (Cth) which requires the Court to interpret legislation in a manner that gives effect to its statutory purpose, provided that such an interpretation is open on the language employed by the legislature.

55 Compare, eg, the different views expressed on this point by the Court of Appeal of the ACT Supreme Court in *Casey v Alcock* [2009] ACTCA 1 at [103]-[108] and *R v Fearnside* [2009] ACTCA 3 at [80]-[89] and by Bell J, as President of the VCAT, in *Kracke v Mental Health Review Board* [2009] VCAT 646 at [230]. The New Zealand Supreme Court has also refused to apply a similar interpretative provision with the same force as has been done in the UK: compare the different results in *R v Lambert* [2002] 2 AC 545, [2001] UKHL 37 and *R v Hansen* [2007] 3 NZLR 1, [2007] NZSC 7.

government. That situation has no legal counterpart in Australia. An adverse decision may also lead to subsequent pressure from the Council of Europe to amend the legislation in question. In addition, some of the provisions declared by the courts to be incompatible with the UK HRA had already been identified as requiring amendment, either as a result of decisions of the European Court of Human Rights or by the government of its own accord. Critics of the UK model do not admit it, but the response of the UK government to decisions made under the UK HRA might actually exhibit the government's commitment to its own legislation,[56] to the ECHR and to human rights.

55. The British experience in this regard is unlikely to be repeated in Australia (particularly if there is to be no formal declaration of incompatibility procedure in a national Human Rights Act). It is disingenuous to suggest, for example, that the executive government and the Parliament would automatically amend every piece of legislation declared by a domestic court to be incompatible with human rights rather than risk an adverse decision on an individual communication to the UN Human Rights Committee. Decisions of the UN HRC have nothing like the influence on government policy in Australia that decisions of the European Court of Human Rights have had on government policy in the UK. And the Commonwealth Parliament has on several occasions enacted legislation to overturn the effect of judicial decisions (other than those involving the interpretation of the Constitution) that the government did not like.

56. In the end, however, the argument against these interpretative provisions comes to this: that Parliament can only be truly sovereign if it is able to legislate free from the possibility that a court might come to the view that, in a particular case, a particular statutory provision infringes upon an individual's human rights. What sort of sovereignty is this? Why *should* the executive government and the Parliament not be required by legislation enacted by the Parliament to consider the issue of incompatibility (ie, that a statutory provision is incompatible with human rights) as determined by a

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56 The Labour government has been in power in the UK since the enactment of the UK HRA in 1998.

court, a co-equal branch of government? Indeed, the appropriate mechanism for ensuring parliamentary sovereignty is for Parliament, if it wishes to enact legislation incompatible with human rights, to be aware that that is what it is doing. Further, it is not uncommon for the courts to inform Parliament in a judgment that particular laws have adversely impacted on human rights in a way that may have been unintended. Finally, as any requirement will be imposed by Parliament, it is misconceived to claim that this issue concerns Parliamentary sovereignty at all.

Reasonable limits on rights

57. Both the ACT HRA and the Victorian Charter contain a provision that human rights may lawfully be subject to such "reasonable limits" that "can be demonstrably justified in a free and democratic society".[57] In any case in which an individual claims that a public authority has acted incompatibly with a human right, or that a statutory provision is incompatible with a human right, the court must apply this general limitations clause. If the public authority or the statutory provision has imposed some limit on a person's ability to enjoy or exercise their human rights, but the limitation can be demonstrably justified as a reasonable one in a free and democratic society, there will be no "incompatibility".

58. We make three comments about the significance of this general limitations clause.

59. First, the general limitations clause acknowledges that human rights are not absolute guarantees but can lawfully be subject to certain limits in order to protect and promote the rights of others and the rights and interests of the community in general. It gives effect to the notion that human rights come with responsibilities. In this respect, both the European Court of Human Rights and the House of Lords have said that the clause provides for "the striking of a

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[57] Section 7(2) of the Victorian Charter; and s 28 of the ACT HRA.

fair balance between the rights of the individual and the interests of the community which is inherent in the whole of the European Convention".[58]

60. Secondly, similar formulations appear in the human rights instruments in Canada, New Zealand and South Africa. In each of these jurisdictions the courts have found that they give rise to a carefully and clearly structured "proportionality" test. The same test is also applied under the UK HRA. Experience in these common law jurisdictions has shown that this test is capable of judicial application. There is no reason to think that courts in Australia would not also be capable of applying this test in a judicial manner. Concepts of reasonableness and proportionality are well known to Australian law, including Australian constitutional law.[59] The federal courts are accustomed to and capable of applying them.

61. A recent example arose in the case of *Thomas v Mowbray*,[60] in which the High Court considered the constitutional validity of legislation which required federal courts to make an assessment, among other things, of whether the making of an "interim control order" in respect of a terrorist suspect was "reasonably necessary, and reasonably appropriate and adapted, for the purpose of protecting the public from a terrorist act". A majority of the Court held that the legislation was valid. In their view, these concepts were not too vague, or too concerned with matters of "policy", as to be incapable of being properly assessed by a federal court.

62. Another recent example arose in *Osland v Secretary Department of Justice*,[61] in which consideration was given to the principles governing the Victorian FOI provision enabling the public disclosure of exempt documents if that was required by "the public interest". In both the High Court and the Court of

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58 *Sporrong and Lonnroth v Sweden* (1982) 5 EHRR 35 at [69]; *R (Razgar) v Home Secretary of State for the Home Department* [2004] UKHL 27, [2004] 2 AC 368 at [20]; *Huang v Home Secretary* [2007] UKHL 11, [2007] 2 AC 167 at [19].

59 See, eg, *Castlemaine Tooheys Ltd v South Australia* (1994) 169 CLR 436 at 472-473; *Lange v Australian Broadcasting Corp* (1997) 189 CLR 520 at 567; *Coleman v Power* (2004) 220 CLR 1; *Roach v Electoral Commissioner* (2007) 233 CLR 167 at [85]; and *Thomas v Mowbray* (2007) 233 CLR 307 at [100], where Gummow and Crennan JJ said that the term "reasonable" "has provided what is the great workhorse of the common law".

60 (2007) 233 CLR 307.

61 (2008) 234 CLR 275 and on remitter to the Victorian Court of Appeal [2009] VSCA 69.

Appeal no difficulty or incongruity was regarded as arising by reason of this requirement having to be determined by the courts.

63. Thirdly, although a proportionality test may in some cases involve courts engaging in closer scrutiny of the meaning of legislation or of the validity of executive action than they presently do, courts are only required to consider whether the means chosen by Parliament or by the public authority are "within a range of reasonable alternatives"[62] available to them to achieve the end sought to be achieved. Moreover, it may be expected that, consistently with overseas experience, the courts will accept that the Parliament and public authorities must in certain areas be accorded a "discretionary area of judgment" as to what is, or is not, compatible with human rights. Put simply, where the legislation in question concerns matters of "broad social policy" or "sensitive areas of ethical judgment", it is less likely that the courts will intervene.[63] In *Huang v Home Secretary*,[64] the House of Lords said that this process was no more than the "performance of the ordinary judicial task of weighing up the competing considerations on each side and according appropriate weight to the judgment of a person with responsibility for a given subject matter and access to special sources of knowledge and advice."

Other features of the legislation

64. **Protective costs orders (PCO's)**. Human rights will be of little avail if there is no effective access to them. Costs are undoubtedly a substantial impediment to that access. One of the best examples the authors can give is the recent High Court case of *Roach v Electoral Commission*,[65] which is one of the most significant decisions protecting representative government in Australia. The case only came about because one prisoner was prepared to undertake the costs risk of failure. Previously, the possibility of politicians and others becoming plaintiffs in the proceeding had come to nothing

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62 *Sabet v Medical Practitioners Board of Victoria* [2008] VSC 346 at [188].

63 There are numerous authorities to this effect: see, eg, *R v Director of Public Prosecution; Ex parte Kebilene* [2002] 2 AC 326 at 380-381; *R (ProLife Alliance) v BBC* [2004] 1 AC 185 at [132]-[138]; and *Evans v Amicus Healthcare Ltd* [2004] 3 WLR 681; [2004] 3 All ER 1025 at [63]-[64], [110].

64 [2007] 2 AC 167, [2007] UKHL 11, at [16].

65 (2007) 233 CLR 162.

because of their fear of the general statutory discretion of a court to make adverse costs orders against the losing party.

65. In the United Kingdom the Courts have established a jurisdiction in public interest matters to make PCO's,[66] which are orders that:

(a) there is to be no order made as to the costs of the parties in the proceeding;

(b) there is to be no order made in the proceeding as to the costs to be paid by a specified party; or

(c) the costs to be paid by a particular party in the proceeding is not to exceed an amount that is specified in the order.

66. In the 2008 decision in *Compton*, the majority judgment moved away from the earlier pre-condition approach to PCO's to a more general discretionary approach. The authors believe that the United Kingdom jurisdiction has not yet been acted upon in Australia, although there is no reason why it should not be. In the context of a national Human Rights Act, as opposed to more generally, the authors contend that a specific Human Rights PCO (which can be defined as set out in the preceding paragraph) should be provided for in the Act in the following terms:

"A. In determining whether to make a protective costs order, the Court must take into account whether:

(a) the issues raised, or likely to be raised, in the proceeding are of general public importance;

(b) it is in the public interest that those issues be determined by the Court;

(c) unless a protective costs order is made, it is unlikely that the applicant for the order will prosecute or defend the proceeding (as the case may be); and

(d) having regard to:

(i) the financial resources of the parties to the proceeding;

(ii) the costs that are likely to be incurred by the parties to the proceeding;

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66 See, for example, *R (on the application of Compton) v Wilshire Primary Care Trust* [2009] 1 All ER 978 (Compton).

(iii) the nature and extent of any private or pecuniary interest that the applicant for the protective costs order has in the outcome of the proceeding;

(iv) any prejudice the respondent to the application may suffer if the order is made; and

(v) any other matters considered by the Court to be relevant

it is fair and just to make a protective costs order.

B. A protective costs order:

(a) may be made on such terms and conditions as to the Court seems fit;

(b) is always subject to any further or other order of the Court."

67. The approach of specifically providing for discretionary Human Rights PCO's can be the means by which a national Human Rights Act ensures that costs do not unduly impede access to justice.

68. **Exceptions and exclusions to the coverage of the Act.** Under any legal system which offers some protection of rights and freedoms, there arise cases which touch upon issues of particular political sensitivity. In the federal context, one such issue may be whether Commonwealth legislation regarding terrorism and security might be inconsistent with rights such as the right to liberty and to a fair trial and, as a consequence, should be excluded from the operation of a national Human Rights Act. It is important that a national Human Rights Act does not exclude such issues or areas of law from its application. The Victorian experience in relation to the recently enacted *Abortion Law Reform Act 2008* (Vic) illustrates a good reason for not doing so.[67]

69. Section 8(a)(b) of that Act imposes a compulsory referral obligation upon a medical practitioner who holds a conscientious objection to the practice of abortion. Some commentators have said that the enactment of this provision showed that the Charter is an ineffective instrument for the protection of rights. But the Charter simply did not apply to the *Abortion Law Reform Act*. Section 48 of the Victorian Charter provides that "[n]othing in this Charter

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67 The criminalisation of abortion is a matter of State criminal law. Assuming that a national Human Rights Act would be limited to the interpretation of Commonwealth legislation, it would not affect State laws on this issue. We use the Victorian experience in relation to this issue simply to illustrate the point.

affects any law applicable to abortion or child destruction, whether before or after the commencement of Part 2." When the Victorian Government introduced the *Abortion Law Reform Bill* into Parliament, it took the view, rightly or wrongly, that this "savings provision" meant that it did not need to make a statement of compatibility (or incompatibility) in relation to the Bill, as it would otherwise have been required to do by section 28 of the Charter. The absence of a section 28 statement did not prevent the human rights implications of the Bill, and particularly the compulsory referral obligation, from being debated in Parliament, but the making of such a statement would certainly have assisted that debate and may have made the Government's position clearer.

70. These failings were brought about by the fact that Parliament excluded certain areas of law from the general operation of the Charter. If there were no such exception, the Charter would provide Victorian courts with appropriate tools to address the issue brought before it. A court could consider whether the section can be interpreted compatibly with human rights (under section 32 of the Charter) and, if not, could make a declaration of inconsistent interpretation (under section 36). But if a court came to the conclusion that section 8(1)(b) was incompatible with human rights and made a declaration to that effect, the legislation would remain in force. Critics may decry such a result, or they may claim that statutory charters of rights transfer power to "unelected judges", but they cannot – logically and consistently – do both. In any event, Parliament may in any particular statute provide that the national Human Rights Act is not to apply. It has done this on three occasions involving the *Racial Discrimination Act 1975* (Cth)[68] and on each of those occasions there was a legitimate and robust debate about it doing so. This course, rather than a general exemption from the national Act, is the preferable solution to this issue.

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68 In respect of the Wik amendments, the Hindmarsh Island legislation and the recent NT Intervention.

CONCLUSION

71. We have attempted in this submission to put forward some of the benefits of a national Human Rights Act and to respond to some of the arguments made against it. It is not possible here to deal with all of those arguments, but we refer again to the speech made by Lord Bingham, in which he responded to ten criticisms that have been made of the UK HRA. Many of these same criticisms have been made in relation to a proposed national Human Rights Act in Australia. His Lordship concluded that the criticisms:[69]

> "do not, in my opinion, amount to very much. They do not begin to outweigh the very real benefit which the Act confers by empowering the courts to uphold certain very basic safeguards even – indeed, particularly – for those members of society who are most disadvantaged, most vulnerable and least well-represented in any democratic representative assembly. Decisions have undoubtedly been made in the UK which have, in my view, been beneficial and which would not - in some cases could not – have been made without the mandate given by the Act."

72. We disagree with claims made by people who have enjoyed high office and positions of privilege in our nation that it is enough to say that "society is reasonably fair".[70] and that individuals whose rights are infringed simply have to "make do". It is unlikely that such privileged persons will need, or will ever seek, the protection afforded by a Human Rights Act, as they already enjoy those rights. However, as we all know, no system of government is ever perfect. It can always be improved.

73. In addition to the examples that we have cited of the positive effects of a national Human Rights Act, we expect that the Committee will have received many submissions from individuals who, unlike many of the Charter's privileged opponents (or its privileged proponents), have their own stories to relate of prejudice, of disadvantage, of discrimination, or of other injustices and denials of their rights. These are the people whose views should carry particular weight in the Consultation, as it is the ongoing

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69 Ibid, pages 9-10.

70 A statement attributed to former federal Minister the Hon Dr Gary Johns, and quoted by the Hon Chief Justice Paul de Jersey, AC, "A Reflection on a Bill of Rights", in J Leeser and R Haddrick, *Don't Leave Us with the Bill: The Case Against an Australian Bill of Rights* (2009, Menzies Research Institute), Ch 1, page 5.

protection of those people's rights that best demonstrates the need for the new national Human Rights Act.

74. The authors are prepared to speak to their submission if invited to do so by the Committee.

Ron Merkel

Alistair Pound

15 June 2009

Annexed Documents

1. Justice Abella, "*Human Rights and the Judicial Role*", 23 October 1998 (published by the Australian Institute of Judicial Administration Inc).

2. Lord Bingham, "*Dignity, Fairness and Good Government: The Role of a Human Rights Act*", 9 December 2008.

3. British Institute of Human Rights, *The Human Rights Act – Changing Lives* (2008).