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Submission to the National Human Rights Consultation Committee

June 2009

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8 June 2009

Dear Consultation Committee,

This submission has been prepared by a group of postgraduate law students and Law Faculty members from the University of Oxford, under the auspices of Oxford Pro Bono Publico ('OPBP').

OPBP is a group of law postgraduate and Law Faculty members dedicated to the practice of public interest law on a pro bono basis. Specifically, the function of the OBPB is to assist in the preparation of research briefs, expert opinions, amicus curiae and policy submissions, generally under the direction of practicing solicitors and barristers who are themselves acting on a pro bono basis. We have worked over the last five years on a number of diverse, high profile human rights and public interest cases. These include providing an expert opinion on the legality of the Israeli separation barrier, investigation into the legal status of prisoners held at Guantanamo Bay, and research on the treatment of homosexuals in the US military for litigation in the US Federal Court.

This submission is made by OPBP in its own capacity. It arises out of a desire of members of the Oxford Law Faculty to engage in the current debate in relation to the protection of human rights in Australia, and contribute to the important initiative of a National Human Rights Consultation. Many of those who have participated in the project are Australian citizens, with additional expertise provided by postgraduate students and Faculty members researching in the field of human rights and public law in comparable jurisdictions, including the UK, New Zealand and Canada.

This submission has focused on the third question posed in the Committee's terms of reference: How could Australia better protect and promote human rights? Given the specific expertise and interests of the students and Faculty involved in the preparation of the submission, and the geographic location of the group, we considered that the most valuable and appropriate contribution that OPBP could make would be to ground a submission in the experience of the UK in the adoption of the *Human Rights Act 1998* (UK). We believe that the UK experience offers some valuable lessons in relation to the incorporation and implementation of a domestic human rights instrument. Our main purpose has therefore been to provide a thoroughly researched brief to the Committee on the UK experience and specifically the lessons that Australia can derive from that experience.

An ancillary issue arose during the preparation of the submission, which relates to the extent to which the UK model may or may not be appropriate in the Australian constitutional context. In light of recent debates, we have also looked in some detail the concerns that have been raised about the constitutionality of a legislative dialogue model if introduced into an Australian federal system. In this regard, OPBP has been extremely fortunate to have the benefit of the expertise and insight of Professor Cheryl Saunders, current Visiting Fellow at Corpus Christi College, University of Oxford.

We hope that this submission is of assistance to the Committee.

Yours sincerely,

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- **Mr Philip Lynch**, Director of the Australian Human Rights Law Resource Centre, for his review of the submission;
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Contents

Glossary

AHRC	Australian Human Rights Commission
EHRC	Equality and Human Rights Commission
ECHR	European Convention of Human Rights
ECtHR	European Court of Human Rights
ESC	European Social Charter
HRA	Human Rights Act 1998 (UK)
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICCPR	International Covenant on Civil and Political Rights
JCHR	Joint Committee on Human Rights (UK Parliament)
NZBORA	Bill of Rights Act 1990 (NZ)
OPBP	Oxford Pro Bono Publico
UK	United Kingdom

Introduction

This submission has been prepared by a group of postgraduate law students and Law Faculty members from the University of Oxford, under the auspices of Oxford Pro Bono Publico ('OPBP').

This submission has focused on the third question being investigated by the Committee: How could Australia better protect and promote human rights? Given the specific expertise and interests of the students and Faculty involved in the preparation of the submission, and the geographic location of the group, we considered that the most valuable and appropriate contribution that OPBP could make would be to ground a submission in the experience of the UK in the adoption of the *Human Rights Act 1998* (UK).

We believe that the UK experience offers some valuable lessons in relation to the incorporation and implementation of a domestic human rights instrument. The UK experience is particularly relevant in circumstances where the Federal Government has indicated that it is not willing to consider, at this stage, a constitutional model for the protection of human rights.

The main purpose of this submission is to provide the Committee with a thoroughly researched brief on the UK experience and, more specifically, the lessons that Australia might derive from that experience. As such, it covers both the benefits that might be derived from a similar instrument, and the areas where Australia might improve on the UK model. There are significant differences in the UK and Australian domestic legal systems. To the extent possible, these differences have been taken into account. However, the combination of these differences and the specific weaknesses found in the UK model justified, at times, consideration of other jurisdictions, including Canada, New Zealand and South Africa.

Additionally, an ancillary issue arose during the preparation of the submission that relates to the applicability of the UK model to the Australian constitutional context. With respect to this, we have looked in some detail at the concerns that have been raised about the constitutionality of a legislative dialogue model if introduced into an Australian federal system.

Part 1 of the submission considers some of the popular arguments made for and against an Australian Charter of Human Rights that also emerged in the debates over the *Human Rights Act 1998* (UK), and considers the extent to which those arguments were borne out by the United Kingdom's experience. We conclude that much of the fear over the potential impact of a Charter of Rights is unwarranted, and much of its benefit lies in the adaptation of the culture of government, rather than creating a culture of litigation.

Part 2 of the submission considers the substantive details of a statutory human rights instrument, referred to throughout the submission as the 'Australian Charter of Human Rights'. We consider what rights should be included in such an instrument, the roles and responsibilities of Federal Parliament, the obligations on public bodies, the role of the courts (including the constitutional dimensions of any new functions given to judges), and the role of the Australian Human Rights Commission. We also consider certain specific details of legal protection of human rights: standing to bring a human rights claim, remedies for human rights violations, and the status of the common law. Finally, we consider the vexed issue of the applicability of a federal human rights instrument to the Australian States.

Oxford Pro Bono Publico, University of Oxford, 8 June 2009

Executive Summary

This submission has been prepared by a group of postgraduate law students and Law Faculty members from the University of Oxford, under the auspices of Oxford Pro Bono Publico ('OPBP').

The main purpose of this submission is to provide the Committee with a thoroughly researched brief on the UK experience and, more specifically, the lessons that Australia might derive from that experience. As such, it covers both the benefits that might be derived from a similar instrument, and the areas where Australia might improve on the UK model. There are significant differences in the UK and Australian domestic legal systems. To the extent possible, these differences have been taken into account. However, the combination of these differences and the specific weaknesses found in the UK model justified, at times, consideration of other jurisdictions, including Canada, New Zealand and South Africa.

Additionally, an ancillary issue arose during the preparation of the submission that relates to the applicability of the UK model to the Australian constitutional context. With respect to this, we have looked in some detail at the concerns that have been raised about the constitutionality of a legislative dialogue model if introduced into an Australian federal system.

This submission is not intended to provide a comprehensive raft of recommendations in relation to the incorporation and implementation of a domestic human rights instrument. Rather, the submission and its recommendations are circumscribed by the core purposes outlined above.

A **summary of the recommendations** made in this submission are set out below.

Recommendation 1:
An Australian Charter of Human Rights should, at a minimum, incorporate the rights contained in the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights, as well as any additional specific rights that the Australian community identifies as particularly worthy of protection.

Recommendation 2:
An Australian Charter of Human Rights should incorporate a process that requires that all bills and amendments presented to parliament be accompanied by a statement of compatibility that indicates whether the Bill or amendment is compatible with human rights, and the reasoning and evidence to support this conclusion.

Recommendation 3:
An Australian Charter of Human Rights should make provision for a joint parliamentary committee, comprised of members of both Houses of Parliament, with the responsibility of reviewing all bills and amendments presented to parliament for potential human rights implications. That Committee should be supported by its own legal adviser and staff, and be empowered to seek independent evidence in relation to its inquiries.

Recommendation 4:
An Australian Charter of Human Rights should incorporate a process whereby all policy documents submitted by departments to Cabinet be accompanied by an impact statement assessing their compatibility with human rights.

Recommendation 5:
An Australian Charter of Human Rights should impose both procedural and substantive obligations on public authorities. Procedural obligations should require public authorities to give proper consideration to human rights when making decisions and implementing legislation. Substantive obligations should require public authorities to act in a manner that is compatible with the human rights enumerated with the Charter.

Recommendation 6:
An Australian Charter of Human Rights should contain an independent cause of action in respect of an act or decision of a public authority, where that act or decision is allegedly unlawful under the Charter.

Recommendation 7:
An Australian Charter of Human Rights should include a list of factors that a court can take into account in determining whether or not an entity is 'public authority', including an express acknowledgement that contracting between the state and private bodies falls within the ambit of the Charter.

Recommendation 8:
An Australian Charter of Human Rights should be an Act of the Commonwealth Parliament, aimed at encouraging dialogue among the executive, the legislature and the judiciary. It should follow either the legislative dialogue model or the Canadian legislative model, with any model adopted taking into account the nuances of the Australian constitutional system.

Recommendation 9:
An Australian Charter of Human Rights should contain a provision requiring legislation to be interpreted compatibly with the human rights enumerated. The provision could be drafted as follows: 'So far as it is possible to do so consistently with its purpose, a Commonwealth law must be interpreted in a way that is compatible with the human rights set down in this Act'.

Recommendation 10:
If an Australian Charter of Human Rights adopts a legislative dialogue model, it should contain a mechanism allowing a court to make a declaration of incompatibility.

Recommendation 11:
If an Australian Charter of Human Rights employs a declaration of incompatibility style of judicial review, it should contain a provision requiring the government to table a copy of, and its response to, such declarations within a specified time period.

Recommendation 12:
An Australian Charter of Human Rights should be accompanied by an expansion in the mandate of the Australian Human Rights Commission to all rights contained in the Charter. The Commission should be given law enforcement powers to complement its promotional role.

Recommendation 13:
An Australian Charter of Human Rights should include a broad standing rule to bring a claim in respect of an act or decision of a public authority, where that act or decision is allegedly unlawful under the Charter. That rule should require that a person or group has a sufficient interest in the matter, in keeping with the standard applicable in administrative law. An Australian Charter of Human Rights should also contain a provision for public interest standing.

Recommendation 14:
An Australian Charter of Human Rights should expressly confer a remedial jurisdiction on courts, empowering them to provide a just and effective remedy in the circumstances.

Recommendation 15:
An Australian Charter of Human Rights should include courts in the definition of a public authority.

Recommendation 16:
An Australian Charter of Human Rights should, insofar as constitutionally permissible, adopt mechanisms extending its operations to the Australian States. In this respect, it may be possible for the Commonwealth to legislate to prevent States from acting in any way inconsistent with the human rights enumerated in the Charter, while exempting States that have enacted their own equivalent human rights instruments.

PART 1: REFLECTIONS FROM THE UNITED KINGDOM

1. The United Kingdom experience and its relevance for the Australian debate

The experience of the United Kingdom in adopting the *Human Rights Act 1998* (UK) ('HRA') provides a valuable illustration of arguments both for and against the proposition that Australia should move towards a form of statutory human rights protection. Now more than ten years after its enactment, and nine years since it entered into force, the HRA has demonstrated the positive effects of such rights protection, namely increased attention to human rights in policy formation as well as government action, and domestic rather than international consideration and adjudication of rights. Furthermore, the major negative effects predicted of the HRA—a flood of litigation, a legalisation of the political debate, and the inhibition of rights development—have not eventuated.

1.1 A human rights charter will increase the attention paid to human rights in policy formation and government action

Like Australia, the UK prior to the enactment of the HRA had given no statutory protection to human rights. Those rights that were recognised were protected by way of the common law, at the discretion of judges, which resulted in a piecemeal approach that insufficiently protected the rights in question. As Lord Bingham observed, 'If the rights and freedoms embodied in the [European Convention of Human Rights] were, as described, 'fundamental', it was a grave defect that they were not fully protected in domestic law'.[1]

In the absence of overarching statutory or constitutional protection, rights can be overridden inadvertently or carelessly as well as purposively or even surreptitiously. It is argued that existing Australian common law protections are able to be 'too easily overridden, including thoughtlessly, by the legislature'[2] and that 'the common law is not as invincible a safeguard against violations of fundamental rights as it was once thought to be'.[3] Such considerations must be added to the reality that parliamentarians are 'under-resourced, too time poor, too unsure about rights and too under the control of the executive to play the role in scrutinising legislation for breaches of human rights'.[4] In the second reading of the HRA in the House of Lords the Lord Chancellor, Lord Irvine of Lairg, stressed that an unwritten constitution, no matter whether it protected some rights already, was not fully sufficient to protect individuals from human rights violations:

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[1] Lord Thomas Bingham, 'Dignity, Fairness and Good Government: The Role of a Human Rights Act' (Speech to the Human Rights Law Resource Centre, Melbourne, 9 December 2008).
<http://www.hreoc.gov.au/legal/seminars/speeches/bingham_dec08.html> accessed 14 May 2009.
[2] Justice Michael Kirby, 'An Australian Charter of Human Rights' (2008) 31 Australian Bar Review 149.
[3] George Williams, 'The Federal Parliament and the Protection of Human Rights' (Research Paper 20, Australian Parliament, Law & Bills Digest Group, 11 May 1999).
[4] Carolyn Evans, 'State Charters of Human Rights: The Seven Deadly Sins of Statutory Bill of Rights Opponents' (Speech delivered at the Gilbert+Tobin Centre Conference, University of New South Wales, 16 Feb 2007).

> The traditional freedom of the individual under an unwritten constitution to do himself that which is not prohibited by law gives no protection from misuse of power by the state, nor any protection from acts or omissions of public bodies which harm individuals in a way that is incompatible with their human rights under the convention.[5]

As Lord Bingham noted, a domestic human rights instrument aims, in part, to protect those minorities whose interests may be overlooked in the representative political process.[6] In the UK, this protection has operated clearly in property and relocation cases concerning gypsies and travellers. Since the implementation of the HRA, these minority groups have had to be taken into account when making policy decisions concerning zoning.[7] The British Institute of Human Rights has documented the way in which the HRA has operated to help those who were disadvantaged and excluded from society. In particular, it highlights the way in which human rights language can protect dignity, challenge discrimination, promote participation and take positive steps to protect human rights.[8] The language and idea of human rights, when brought into the mainstream, has helped human rights to have a life beyond the courtroom in the UK, and has been used to secure changes to unfair government policies and procedures. In particular, it has helped raise awareness, and offered a practical tool for individuals to protect their rights.[9]

The Department of Constitutional Affairs has found that 'the [Human Rights] 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'.[10] In this way, the HRA has enabled the public and courts to look behind the decisions of public authorities, and thus has improved transparency and accountability. Through the HRA, and the correlative promotion of human rights in society, individuals are better equipped to invoke their rights.

One particularly important aspect of this incorporation has been the concept of mainstreaming human rights. Involving human rights issues in all areas of policy, and all policy decisions, can ensure that rights are not only better understood, but also more widely respected. Murray Hunt, the Legal Adviser to the Joint Committee on Human Rights ('JCHR') has noted his view that the framework established by the HRA has noticeably improved the literacy of parliamentarians with respect to human rights issues.[11]

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[5] Hansard HL vol 582 column 1228 (3 November 1997).
[6] Lord Bingham (n 1).
[7] Department of Constitutional Affairs, 'Review of the Implementation of the Human Rights Act' (Report, 25 July 2006) <http://www.dca.gov.uk/peoples-rights/human-rights/pdf/full_review.pdf> accessed 14 May 2009.
[8] British Institute of Human Rights, 'The Human Rights Act - Changing Lives' (Report, 7 July 2008) <http://www.bihr.org.uk/sites/default/files/The%20Human%20Rights%20Act%20-%20Changing%20Lives.pdf> 14 May 2009, 6.
[9] British Institute of Human Rights (n 8) 5.
[10] Department of Constitutional Affairs (n 7) 4.
[11] Murray Hunt, 'The UK Human Rights Act as a "Parliamentary Model" of Rights Protection: Lessons for Australia', (Speech to the Australian Human Rights Commission, 17 February 2009) <http://www.hreoc.gov.au/letstalkaboutrights/events/Hunt_2009.html> accessed 14 May 2009.

1.2 A human rights instrument will 'bring rights home' and allow them to be considered in domestic courts, not just international tribunals

Concern has been expressed about Australia's uniqueness among western democracies in lacking a national human rights instrument. This fact is said to sit uncomfortably with Australia's ratification of the International Covenant on Civil and Political Rights ('ICCPR'), the International Covenant on Economic, Social and Cultural Rights ('ICESCR') and other human rights instruments.[12]

The idea of 'bringing rights home' was one of the avowed aims of the HRA. It was thought that the adjudication and enforcement of the European Convention of Human Rights ('ECHR') by the European Court of Human Rights ('ECtHR') involved minimal British input, which led to the perception that rights contained in the ECHR were not 'British rights'.[13] In fact, the development by the ECtHR of the 'margin of appreciation' doctrine presupposed the prior domestic consideration of rights issues: the ECtHR does not place itself in the position of the domestic government, but instead examines the national decision with discretion as to the different ways rights contained in the ECHR are interpreted in societies with varying philosophical, social and historical considerations.[14] The White Paper referred specifically to the fact that the majority of other ECHR signatories (and countries of common law tradition) had taken steps to ensure the protection of human rights domestically.[15]

In the second reading of the Bill in the House of Lords, the Lord Chancellor stated that the HRA would 'allow British judges for the first time to make their own distinctive contribution to the development of human rights'.[16] This argument presupposes that domestic judges are in a better position than international or regional judges to evaluate domestic circumstances, on the basis of 'familiarity with our laws and customs and of sensitivity to practices and procedures taken'.[17] There is the additional benefit that if a case is later taken before an international body, that body will then have the benefit of a domestic judgment addressing the issue.

In addition to concern that rights were not being protected in the domestic context, there were also practical concerns about the cost and delay associated with proceedings in the ECtHR. Aside from the development of a rights jurisprudence in the UK, one of the major advantages of the HRA has been the ability for citizens to bring human rights claims in domestic courts, rather than having to go to a regional or an international body to have their disputes resolved. The concept of 'bringing rights home' has been particularly important in the UK experience. As Lord Bingham put it, it is essential that the legal system:

> …command the confidence of the public as one which is inclusive, belongs to them and affords a remedy for obvious wrongs. It is destructive of such confidence if there is a justified belief that for a significant category of serious wrongs the domestic court can offer no remedy and the disappointed litigant is obliged to go away and seek this superior justice abroad.[18]

Additional practical benefits have resulted from 'bringing rights home' in the UK. Following the enactment of the HRA, applicants in the UK have access to justice in a more direct, economic and convenient fashion.

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[12] Including particularly the Convention on the Elimination of all forms of Racial Discrimination, Convention on the Elimination of all forms of Discrimination Against Women and the Convention on the Rights of the Child.

[13] Williams (n 3) [1.14]; Lord Thomas Bingham 'The European Convention on Human Rights: Time to Incorporate' in *The Business of Judging: Selected Essays and Speeches* (OUP, Oxford 2000) 137.

[14] *Handyside v UK* (Application no. 5493/72) (1976) Series A no 24 (ECtHR).

[15] Secretary of State for the Home Department, 'Rights Brought Home: The Human Rights Bill' (Cm 3782, 1997) (UK) [1.13] and [1.15].

[16] Hansard HL vol 582 column 1227 (3 November 1997) (Lord Irvine of Lairg LC).

[17] Secretary of State for the Home Department (n 15) [1.18].

[18] Lord Bingham 2008 (n 1) 2-3.

1.3 Debunking myths about the incorporation and implementation of a statutory human rights instrument

1.3.1 A human rights instrument will, if legally enforceable, create a flood of litigation at large expense

Predictions of a significant increase in rights based litigation and fears of flow-on costs to government and business has been a commonly expressed concern in the Australian debate.[19] A similar concern was expressed in the UK. Prior to the HRA coming into force, it was anticipated that there would be a dramatic increase in the number of cases brought before the courts, which would have widespread effect on UK business. Reports were made of City law firms preparing for the flood of litigation which would follow the implementation of the HRA.[20]

This risk certainly has not eventuated. The Report of the Administrative Court of England and Wales April 2001 to March 2002 stated that there was no evidence that the HRA had increased the numbers of cases lodged, nor that hearing times had been lengthened as a result of the Act being pleaded.[21] It was also found that there was no discernable increase in the cost of litigation as a result of the Act.[22] Indeed, the Human Rights Act Research Project, in its report 'Briefing: Year One of the *Human Rights Act*: Bringing rights home to communities in the UK', concluded:

> Human rights points have almost always been raised in cases which would have been taken anyway, using traditional legal grounds of challenge. In other cases, judges have found human rights principles to reinforce the result reached, rather than radically alter it. There has therefore been less the forecasted legal revolution, and more the first steps in a process of subtly weaving human rights principles into the fabric of existing UK law.[23]

The Research Project also found that in 297 cases brought between October 2000 and December 2001, the HRA affected the outcome reasoning or procedure in 207 cases, but that human rights claims have only been upheld in 56 cases, mostly involving the duty of public authorities to act in compliance with rights contained in the ECHR.[24] This research confirms the conclusion of Lord Falconer that, '[t]he impact of the Human Rights Act upon the development of UK law has been significantly less, *and significantly less negative*, than some predictions made for it'.[25]

Lord Bingham recently noted '[b]efore [the HRA] came into force there was indeed a worry that the courts would be swamped by an uncontrollable flood of claims. This has not happened. There have been a considerable number of claims under the [HRA], but they have been manageable and the pickings have not been rich'.[26]

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[19] Bob Carr has asked: '… while the Courts are swamped with thousands of Bill of Rights cases, where will the ordinary person go for justice? The Courts will be made even more inaccessible and the cost of running the court system will increase'. See Bob Carr, 'The Rights Trap: How a Bill of Rights would undermine Freedom' (2001) (Winter Issue) Policy 19, 21 <http://www.cis.org.au/Policy/winter01/polwin01-4.pdf> accessed 14 May 2009.

[20] Clayon Hirst, 'Rights Act to spark Litigation Boom' *The Independent* (London 20 August 2000) <http://www.independent.co.uk/news/business/news/rights-act-to-spark-litigation-boom-711930.html> accessed 12 April 2009.

[21] Administrative Court of England and Wales, 'Report for the Period April 2001 to March 2002' (2003) <http://www.hmcourts-service.gov.uk/docs/annual_review_0102.pdf> accessed 14 May 2009.

[22] Human Rights Law Resource Centre, 'The National Human Rights Consultation: Engaging in the Debate' <http://www.hrlrc.org.au/files/hrlrc-the-national-human-rights-consultation-engaging-in-the-debate.pdf> accessed 14 April 2009 ('Engaging in the Debate') 8.

[23] Human Rights Act Research Project, 'Briefing: Year One of the Human Rights Act 1998: Bringing Rights Home to Communities in the UK' <http://www.doughtystreet.co.uk/hrarp/pdfs/HRARPbriefing110102logo.pdf> accessed 12 April 2009.

[24] Human Rights Act Research Project (n 23) 1.

[25] Department of Constitutional Affairs (n 7) 3 (emphasis added).

[26] Lord Bingham 2008 (n 1) 9. See further, Department of Constitutional Affairs (n 7).

1.3.2 A human rights instrument will legalise political debate and impede changing conceptions of rights over time

A number of arguments exist regarding the democratic appropriateness of a judicially enforced form of rights protection. At the foundation of most of these arguments is the proposition that a statutory human rights instrument, should it transfer significant power to the unelected judiciary, would be in some way 'undemocratic' or run counter to the Westminster tradition of parliamentary sovereignty.[27] In doing so, it would legalise political debates, and ossify the development of rights.

Opponents of a statutory human rights instrument in Australia have stressed the importance of strong democratic institutions rather than legal remedies as the primary protection against human rights abuses. The UK experience demonstrates that in an environment where public institutions are strong and responsive to those whom they serve, statutory rights protection can support and reinforce the existing political system by promoting a cultural respect for human rights and improving the provision of public services. It also demonstrates the need to have in place mechanisms to identify human rights violations across the board, rather than limiting attention to exceptional, high profile cases.

According to the HRA, courts cannot overrule parliament's will as embodied in legislation. Rather, they are empowered to make a declaration of incompatibility. In the UK there have been 26 declarations of incompatibility, 7 of which have been overturned on appeal. With respect to 17 of the remaining 19 decisions, the parliament has subsequently acted to amend the relevant legislation to bring it into line with the rulings. The Government is currently considering its position in relation to the most recent two declarations of incompatibility.[28]

This experience demonstrates that judicial declarations of incompatibility may have significant political weight. Furthermore, if failing to act on such declarations is not politically feasible, this suggests that failing to act is inconsistent with a community's expectation of their elected officials. The UK model has been described as one that seeks to establish a 'culture of justification',[29] not one that limits parliamentary involvement in human rights issues, but one that enhances its role and deepens the role of the legislature in reviewing and balancing human rights concerns. UK experience has also shown that neither politicians nor the press have hesitated to express critical views on rights issues. In a healthy democracy judges are unlikely to be the sole or even primary influence on public opinion as to the application of human rights. Judicial opinion is one factor among many required to be weighed by parliament in deciding whether to act upon declarations of incompatibility.

Furthermore, an Australian Charter of Human Rights would not pre-empt the accommodation of changing conceptions of rights. Regardless of the political difficulty of amending a charter, there are numerous examples of guarantees of rights that have proved capable of adapting to changing conceptions, and continue to remain relevant. The ECHR was signed in 1950, fifty years before the HRA came into force, and yet still remained of sufficient relevance to be enacted domestically. This is partly because of the way in which the ECtHR has interpreted this Convention. The ECtHR has seen the Convention as a 'living tree' and interpreted the rights which it contains in light of current circumstances and social conditions.[30] As emphasised by

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[27] Bob Carr argues that a '… menu of abstractions—that is, any attempt to list rights—wrenches from the cabinet table and the legislature and delivers to the courtroom things that ought to be determined by governments'. See Bob Carr, 'Lawyers are already Drunk with Power' *The Australian* (Sydney 24 April 2008). See also John Hatzistergos, 'A Charter of Rights or Wrongs' (Speech at Sydney Institute, 10 April 2008), describing a Charter as '… transforming social and political questions into legal ones… [which] threatens to harm the integrity of both institutions'.

[28] Hunt (n 11).

[29] Hunt (n 11).

[30] See for example, *Tyrer v UK* (Application No 5856/72) (1978) Series A no 26 (ECtHR) [31].

Lord Bingham, while the meaning of the Articles themselves never change, their application responds to contemporary conditions.[31]

1.5 Conclusions

This is not an exhaustive rehearsal of the cases for and against statutory protection of human rights in Australia. However, the arguments outlined above do demonstrate that the passage of the HRA has resulted in benefits to the UK, while accusations of potential harm levelled against the instrument have either not come to pass or proved surmountable. A statutory human rights instrument can increase the attention paid to human rights in policy formulation and government action; it can 'bring rights home' and allow the development of a domestic rights jurisprudence in domestic courts. But the HRA has not opened the floodgates to vexatious rights litigation or impeded public and political discussion of human rights.

In the next section, continuing to draw on lessons derived from the UK experience, we turn our attention to the particular form that a statutory human rights instrument could take in the Australian context.

[31] Lord Bingham 2008 (n 1) 8.

PART 2: AN AUSTRALIAN CHARTER OF HUMAN RIGHTS

2. What rights should be protected in an Australian Charter of Human Rights?

The UK experience offers some valuable lessons with regard to the question of what rights should be protected in an Australian Charter of Human Rights. Both the parallels with the Australian situation and the extent to which the latter can be distinguished are informative. The protection of rights in the UK can be divided into roughly two chronological phases: one preceding the HRA; and one that has been gathering momentum since the HRA came into force in the year 2000. Each phase has a distinct background in terms of the pressures influencing the question of what rights should be protected.

This section sets out the legislative and ideological motivations behind each phase of the UK experience. It then assesses the implications of the UK experience for Australia with a view to comparing the advantages and disadvantages of two alternatives: the wholesale implementation of Australia's existing obligations under international law treaties; or the development of a 'home grown' instrument. These options are by no means mutually exclusive. However, there are certain constraints in both international and Australian law that bear upon the extent to which one approach can be supplemented by the other. These are canvassed below.

2.1 The Human Rights Act movement and its limits

The first phase of the UK experience involved the 'HRA movement', which focused narrowly on implementing the ECHR, a treaty of the Council of Europe and a justiciable regional civil and political rights instrument.

The ECHR is confined to civil and political rights, with two minor exceptions. Articles 1 and 2 of the First Protocol (adopted by the UK) deal with the right to peaceful enjoyment of possessions and the right to education, respectively. It is worth noting that the ECtHR has also recognised the social and economic aspects of rights of a number of classically civil and political rights, such as the right to life (Article 2) and the right to a fair trial (Article 6), moving beyond negative duties to recognise positive obligations upon State parties.[32]

The rights in the HRA are identical to the rights in the ECHR, except that the HRA does not include Articles 1 and 13 of the ECHR. Article 1 states that rights and freedoms in the ECHR shall be secured to all people within the jurisdiction. Article 13 provides for the right to an effective remedy. The Government felt that including these provisions would be redundant given that under the HRA, rights contained in the ECHR would be justiciable in domestic courts open to all. Since 1966, UK citizens have been able to enforce their rights under the ECHR in the ECtHR. However, until the introduction of the HRA, there was no way of directly enforcing these rights in UK courts, despite the admissibility requirement that domestic remedies be exhausted and the concept of margin of appreciation employed by the ECtHR presupposing a national response.[33] Hence, the idea of 'bringing rights home' gained political traction, as discussed above in Section 1.2.

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[32] On article 2, see *LCB v UK* (App No 23413/94) ECHR 1998-III 76, [36]; *Osman v UK* (2000) 29 EHRR 245, [1]-[2]; *Cyprus v Turkey* (2002) EHRR 30, [219]. On article 6, see *Airey v Ireland* (1979) 2 EHRR 35, [26].

[33] Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended) (ECHR) art 35.

The UK's other international and regional human rights obligations, particularly those under non-justiciable human rights instruments such as the ICESCR and the European Social Charter ('ESC') were marginalised in the debate, despite the State having been bound by both instruments for many years.[34] There was minimal community consultation in the development of the HRA, and while the Government acknowledged the existence of other international obligations,[35] no obligations beyond the ECHR were discussed in the final White Paper. The Government indicated that the civil and political rights in the ECHR were 'well tried and tested' in the judicial arena and were rights 'with which people in [the UK] are plainly comfortable'.[36] This statement implicitly distinguishes economic, social and cultural rights from health, education, food, water, housing, work, welfare and so forth, which are typically considered non-justiciable.

2.2 The Bill of Rights movement

The second phase of the UK experience has been the 'Bill of Rights movement', a broader public and political discussion motivated by the apparent limitations and failings of the HRA and drawing in aspects of the human rights landscape neglected in the pre-HRA debate.

Perhaps the most striking feature of the current Bill of Rights debate in the UK is cross-party support for 're-engagement'. This arguably reflects a certain dissatisfaction with the HRA as it stands. The Bill of Rights debate in the UK has emphasised the need for both a more comprehensive and localised statement of common social values, not necessarily limited to justiciable rights. It is recognised across the party political divide that a Bill of Rights serves important purposes beyond individual rights enforcement. If properly participatory, it can stimulate an engaged and more productive citizenship and society. The political rhetoric surrounding the Bill of Rights movement has also focused on 'responsibilities' and the tension between individual rights and the public interest.[37]

Notwithstanding certain proposals to the contrary, it is not politically viable that revision of the HRA or the development of a new Bill of Rights should involve any retraction from the ECHR. Given the UK's continuing engagement with Europe, it seems that any changes will be in the direction of 'ECHR-plus'—expanding domestic human rights protection beyond that instrument to encompass, in particular, obligations in relation to economic, social and cultural rights.

The JCHR has recently issued a report indicating that there is widespread support for the inclusion of economic, social and cultural rights in a domestic human rights instrument and that the crux of debate concerns their form.[38] Options mooted within the report include fully justiciable and legally enforceable rights, at one end of the spectrum; and unenforceable directive principles of state policy, akin to those in the Indian and Irish Constitutions, at the other. The JCHR proposed as a middle route an approach analogous to that taken in the South African Constitution: a duty of progressive realisation by reasonable legislative and other measures, within available resources, admitting a restricted judicial role in terms of the assessment of what is 'reasonable'.[39]

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[34] The UK signed the International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966, entered into force 3 January 1976) 993 UNTS 3 (ICESCR) in 1968 and ratified it in 1976. The UK ratified the European Social Charter (adopted 18 October 1961) entered into force 28 November 1969) ETS 035 in 1962.
[35] Secretary of State for the Home Department (n 15) [1.3].
[36] Secretary of State for the Home Department (n 15) [1.3].
[37] This report has not engaged with the recent material regarding the inclusion of 'responsibilities' in any detail.
[38] Joint Committee on Human Rights, 'A Bill of Rights for the UK?' (29th Report, 2008–09 Session) HC (2008–09) 150-I, HL (2008–09) 165-I <http://www.publications.parliament.uk/pa/jt200708/jtselect/jtrights/165/165i.pdf> accessed 28 May 2009 (JCHR 2008) 43-56.
[39] JCHR 2008 (n 38) 158–97.

In the recent Green Paper *Rights and Responsibilities: Developing Our Constitutional Framework*,[40] the UK Government reiterated its position (previously articulated in reporting to the UN and Council of Europe) that economic, social and cultural rights should be matters for the political process, rather than the courts.[41] Although the Government continues to oppose new and individually enforceable legal rights in a Bill of Rights, it has expressed a clear interest in articulating the guarantees of the welfare system, particularly in relation to healthcare and the well-being of children. Indeed, the Green Paper describes the foundation of the National Health Service as a 'landmark' development and along with the Magna Carta, an example of 'the proud traditions of liberty on which ... [the] current framework of democratic rights and responsibilities is built'.[42]

The UK Bill of Rights movement is currently focused on domestic concerns. However, the situation with respect to economic, social and cultural rights may be affected by developments that have occurred, and will continue to occur, at a regional level. Since the introduction of the HRA, two rights instruments dealing with economic, social and cultural rights have emerged at the EU level. Contemporaneously with the introduction of the HRA in 1998, the UK ratified the Social Chapter of the Treaty of Amsterdam 1997, relating primarily to workers' rights and non-discrimination. The Social Chapter was integrated into the Treaty Establishing the European Community as Title XI and thus has binding force as Community law. Two years later the UK became a signatory to the Charter of Fundamental Rights of the European Union 2000.

As it currently stands, the Charter is only a political declaration. Nevertheless, it is noteworthy in that it is a negotiated instrument that encompasses both civil and political rights and economic, social and cultural rights. This represents an important move beyond the divide created by the ICCPR and the ICESCR, and replicated between the ECHR and the ESC. The Charter is intended to include the whole range of rights common to the EU member states, from the international (ICCPR and ICESCR) and regional (ECHR and ESC) instruments discussed above to the Social Chapter, environmental rights and other instruments created in the EU machinery. It also draws upon the constitutional traditions of the member states and the case law of the European Court of Justice. The Lisbon Treaty 2007, which is currently open for ratification by member states, proposes to give the Charter legal value that makes it enforceable in the European Court of Justice.[43]

2.3 Lessons for Australia from the United Kingdom

The UK experience suggests two basic options for Australia in relation to which rights to protect under a national instrument. First, Australia may opt to directly import and implement the rights and obligations set out in existing international instruments to which it is party. Obvious candidates are the ICCPR and the ICESCR. This would be done under the external affairs power in s 51(xxix) of the Constitution. Alternatively, rights could be developed from the ground up; inspired and informed by such instruments, but unconstrained in terms of content or form. If this option is taken, careful consideration will have to be given to whether the external affairs power supports the provisions or whether they need to be supported by another Commonwealth head of power or a referral from the States. This is discussed further in Section 10 below.

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[40] J Straw, M Wills (eds) 'Rights and Responsibilities: Developing Our Constitutional Framework' (Secretary of State for the Home Department, 29 April 2009) [3.52].

[41] Straw and Wills (n 40) [3.52].

[42] Straw and Wills (n 40) [1.11].

[43] Charter of Fundamental Rights of the European Union [2000] OJ, C364/1 art 1.8. Although the UK has endorsed the Lisbon Treaty, it is likely that as a result of current resistance by a number of member states, particularly Ireland, the Charter will not immediately move from a purely political declaration to binding community law. In any event, it is important to note that the UK has signed a Protocol on the Application of the Charter to Poland and to the UK, preventing the Charter from increasing the jurisdiction of any court and, in particular, precluding the creation of justiciable rights beyond those expressly provided for in national law.

2.3.1 Importing the ICCPR

There is no direct parallel in terms of an international or regional human rights instrument that stands in relation to Australia as the ECHR does to the UK. Nevertheless, Australia is a party to a number of UN instruments, having ratified the ICCPR in 1980 and the ICESCR five years earlier, in 1975. Australia has also ratified the Optional Protocol to the ICCPR, thereby allowing individuals within Australian jurisdiction to access the complaint mechanism provided by the Human Rights Committee.

The ICCPR has been mooted as a template for a domestic human rights instrument in Australia, as the ECHR was for the UK. While there are not the same practical pressures of an external court in the Australian context, the UK experience demonstrates many of the advantages of working with an existing instrument as the basis for national human rights legislation—particularly an international agreement to which the nation has been committed in good faith for some time. The provisions in the ECHR have been subject to academic, political and judicial discourse for some 50 years. The same might be said of the ICCPR and the ICESCR, whilst acknowledging the absence of systematic judicial attention.

2.3.2 Considering the ICESCR

Even before engaging with the advantages and disadvantages of modeling an Australian human rights instrument on the ICCPR, the question arises as to why its counterpart and complement, the ICESCR, to which Australia first committed, should not also be drawn upon. Both agreements were the products of extensive and inclusive negotiation at the international level and have been almost universally ratified. Assuming the desirability of a national human rights instrument, to privilege the ICCPR over the ICESCR as a source and model of rights protection is arguably inconsistent with the indivisibility and interdependence of all rights, which 'derive from the inherent dignity of the human person', as well as the duties of both States and individuals that follow.[44] This indivisibility and interdependence is emphasised in the instruments' drafting history, affirmed in their respective preambles and reflected in their structure as complements.[45]

Most civil and political rights presuppose basic economic, social and cultural rights or, at the very least, are somewhat empty in their absence. For example, protection from unlawful or arbitrary interference with the home may be of little use to those without adequate housing.[46] Civil and political rights may both facilitate the realisation of and significantly enhance economic, cultural and social rights. For example, freedom of expression and association can give the poorest a voice to assist their situation. The inverse is also often true. For example, the right to education assists to further strengthen every voice. Notwithstanding popular assumptions to the contrary, the duties to which both civil and political rights and economic, cultural and social rights give rise also defy strict differentiation. So called 'negative duties' of restraint or non-intervention, as well as 'positive duties', demanding active measures on the part of the State, derive from both sets of rights. For example, just as concrete steps must be taken to ensure the right to a fair trial, the right to adequate housing may in certain circumstances give rise to a duty of restraint.[47]

The UK chose to incorporate the ECHR alone, despite its obligations under the ESC. Yet the British experience with the HRA and the current Bill of Rights inquiry suggests that one of the most significant drawbacks in transposing rights directly from the ECHR was that it failed to address the indivisible and inter-related economic, social and cultural rights. The extent to which

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[44] International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR) Preamble; ICESCR (n 34) Preamble.
[45] UNGA Res 421 (V) (4 December 1950) s E.
[46] ICCPR (n 44) art 17; ICESCR (n 34) art 11.
[47] Sandra Fredman, *Human Rights Transformed* (OUP, Oxford 2008) 66–9 (fn 8), citing the Committee on Economic, Social and Cultural Rights 'General Comment 4: The Right to Adequate Housing' (1991) UN Doc No E/1992/23, [8(a)].

UK courts, like the ECtHR, have shown an increasing preparedness to recognise the social and economic aspects of civil and political rights enshrined in the HRA as giving rise to positive duties, might be understood as a case of the judiciary stepping in where the legislature has failed to act.[48] The articulation of social and human rights in a human rights instrument would shift the power back to the legislature and ensure a more structured judicial response. Australia is fortunate to have the opportunity to embrace or draw upon a more comprehensive range of human rights from the outset, moving beyond entrenched, yet arguably ill-founded, distinctions between civil and political rights on the one hand, and economic, social and cultural rights on the other.

As a final point, we draw the Committee's attention to the Concluding Observations of the Committee on Economic, Social and Cultural Rights in relation to Australia's compliance with the ICESCR (released 22 May 2009):

> The Committee regrets that the Covenant has not yet been incorporated into domestic law by the State party, despite the Committee's recommendations adopted in 2000 (E/C.12/1/Add.50). It notes with concern the lack of a legal framework for the protection of economic, social and cultural rights at the Federal level, as well as of an effective mechanism to ensure coherence and compliance of all jurisdictions in the Federation with the State party's obligations under the Covenant.[49]

The Committee made the following recommendation:

> Bearing in mind the provisions of article 28 of the Covenant, the Committee reiterates that the principal responsibility for its implementation lies with the State party's Federal government and recommends that it: a) enact comprehensive legislation giving effect to all economic, social and cultural rights uniformly across all jurisdictions in the Federation; b) consider the introduction of a Federal charter of rights that includes recognition and protection of economic, social and cultural rights, as recommended by the Australian Human Rights Commission; c) establish an effective mechanism to ensure the compatibility of domestic law with the Covenant and to guarantee effective judicial remedies for the protection of economic, social and cultural rights.

2.3.3 Constitutional context

International obligations may be said to create a tabula rasa for the development of an Australian Charter of Human Rights. Australia can import its obligations under the ICCPR and ICESCR. Alternatively, it can develop a 'home grown' human rights instrument, where the rights are articulated differently and potentially more broadly. Regardless of which approach is taken, it is important to bear in mind the constitutional context.

Although it is not constitutionally necessary that either treaty be incorporated in full,[50] an 'à la carte' approach to human rights protection may undermine the universality, indivisibility, interdependence and interrelatedness of the rights in question. It may also be at odds with Australia's obligation to perform in good faith the treaties by which she is bound under international law.[51] In domestic law, undue selectivity may offend the requirement that the implementing legislation remain capable of being considered reasonably 'appropriate and adapted' to the purpose of giving effect to the treaty or treaties in question.[52]

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[48] For example, in respect of Human Rights Act 1998, sch 1, art 3, see *R v Secretary of State for the Home Department, ex p Limbuela* [2005] UKHL 66; [2006] 1 AC 396, [46] (Lord Bingham), [92] (Lord Brown).

[49] Committee on Economic, Social and Cultural Rights, 'Concluding Observations of the Committee on Economic, Social and Cultural Rights' (22 May 2009) <http://www2.ohchr.org/english/bodies/cescr/docs/AdvanceVersions/E-C12-AUS-CO-4.doc> accessed 27 May 2009.

[50] *Commonwealth v Tasmania* (1983) 158 CLR 1 (HCA) 268 (Deane J).

[51] Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331, 8 ILM 679, art 26.

[52] *Cunliffe v Commonwealth* (1994) 182 CLR 272 (HCA) 296; *Commonwealth v Tasmania* (n 50) 260.

2.4 Conclusions

The current debate in the UK regarding the replacement or supplementation of the HRA with a Bill of Rights has in part been motivated by the concern that the direct implementation of the ECHR without any uniquely 'British' input has failed to adequately reflect British interests, concerns and values, as well as to accommodate some important institutions, such as trial by jury and aspects of data protection.[53] The extensive consultation process in which the Australian Government is currently engaged will undoubtedly go a long way towards forestalling similar objections, ensuring both ownership and sensitivity to the Australian social, political and legal landscape. The consultation may identify rights that are particularly worthy of protection in the Australian context. An example from another jurisdiction is the specific protection of minority language rights in the Canadian Charter of Rights and Freedoms. The Committee should carefully consider any uniquely Australian issues identified in the consultation process. By minimising similar engagement in the HRA movement, the UK effectively opened itself up to the current Bill of Rights inquiry.

Perhaps the most significant advantage of a home grown instrument is that it can be structured to reflect the indivisibility of rights. The South African Constitution and the EU Charter of Fundamental Rights are good examples of this, where rights drawn from existing instruments are rearranged and similar issues are merged together. The South African Constitution also brings the positive and negative duties of the two international Covenants together in a general provision demanding that the State 'respect, protect, promote and fulfill' all rights.[54] Independent drafting can also provide greater clarification on limitations, by clearly setting out where it is possible to have legislative restriction of rights, both generally and in relation to specific rights. This has been identified as a shortfall in the ECHR which was transferred to the HRA.[55]

For the reasons discussed above regarding the indivisibility of rights, including those already recognized at the international level, it would be preferable to take steps towards the protection of rights beyond the confines of the ICCPR to include economic, social and cultural rights as embodied in the ICESCR as well as any specific Australian rights that emerge from this consultation process.

Recommendation 1:
An Australian Charter of Human Rights should, at a minimum, incorporate the rights contained in the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights, as well as any additional specific rights that the Australian community identifies as particularly worthy of protection.

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[53] JCHR (n 38) 75.
[54] Constitution of the Republic of South Africa Act 108 of 1996 (amended) s 7(2).
[55] See Sydney Kentridge, 'The Incorporation of the European Convention on Human Rights' in Jack Beatson, Christopher Forsyth, Ivan Hare (eds) *Constitutional Reform in the United Kingdom: Practice and Principles* (Hart, Oxford 1998) 69.

3. The role and responsibilities of Federal Parliament under an Australian Charter of Human Rights

Parliament occupies a vital place in human rights protection, in its functions of oversight of the executive and scrutinising and amending legislation. Even if judicial review of executive action and legislation on human rights grounds is provided for under an Australian Charter of Human Rights (as we suggest below), this by no means displaces the role of parliament in the protection of human rights. First, most legislation and policy will not be challenged before a court. Second, judicial human rights review occurs after the fact, whereas an attentive and careful parliament can prevent human rights violations from occurring in the first place. Third, the balancing of rights against other rights and against important public policy can be a delicate, and at times controversial, undertaking. Courts in other countries are cautious when considering legislation enacted by parliament. In the UK, judges have demonstrated an awareness of the need for caution when their constitutional competence overlaps that of parliament. Parliament's decision therefore effectively may be the determinative decision, even where legislation is subject to judicial review. Fourth, parliament can actively promote and advance human rights through legislation and policy, whereas judges are much more limited in what they can achieve. Finally, under a statutory human rights instrument it is either for parliament to decide whether to amend or repeal an incompatible law, or to consider whether it wishes to reinstate a law to operate notwithstanding a judicial decision that is inconsistent with human rights. Ultimately, human rights protection rises no higher than the protection parliament is willing to afford.

Yet, at the same time, parliament in a Westminster democracy faces systemic problems in performing its constitutional task of review and assent, namely, the lack of time, information and resources for scrutiny, as well as the power of the executive over parliament. Bearing all this in mind, it is important that an Australian Charter of Human Rights seeks to enhance parliamentary scrutiny on human rights grounds. This requires new mechanisms to ensure that parliamentarians can and do take human rights matters seriously.

Below we consider how the UK has sought to improve parliamentary protection of human rights, the extent to which it has been successful, and to what extent (and in what way) these mechanisms could be adopted in the Federal Parliament.

3.1 Parliamentary scrutiny in the United Kingdom

Like the statutory human rights instruments adopted in Canada and New Zealand, the HRA includes mechanisms directed towards informing and enabling parliamentary consideration of human rights in the legislative process. The HRA adopts three principal mechanisms designed to strengthen parliament's ability to provide robust scrutiny of human rights:

3.1.1 Ministerial statements of compatibility

As in New Zealand,[56] Victoria,[57] and the Australian Capital Territory,[58] the HRA requires each Bill presented to parliament to be accompanied by a statement of human rights compatibility.[59] If such a statement cannot be made, the minister must state that he or she is unable to make a statement of compatibility.[60] Parliament remains competent to enact legislation that is incompatible with human rights. However, this mechanism requires the executive to consider the human rights implications of a proposed bill prior to introducing the bill into parliament; and alert parliament accordingly.[61]

Requiring ministerial statements of compatibility has had a significant and beneficial effect at the early stages of legislative drafting, with attention now being systematically paid to human rights implications. However, the later inclusion of reasons accompanying a statement of compatibility (which are now included in Explanatory Memoranda) has proved important to the informative function of these statements, as well as allowing for scrutiny of whether the statement of compatibility is a sound one.

3.1.2 Parliamentary Joint Committee of Human Rights

Where the UK has moved beyond the previous models provided by Canada and New Zealand is in the creation of a new parliamentary committee specifically responsible for matters relating to human rights. The JCHR, consisting of six members from each House, has its own independent legal adviser and is responsible for a wide range of matters relating to the protection and promotion of human rights in the UK.

One of the vital tasks that the JCHR performs is to actively scrutinise ministerial statements of compatibility. The role of the JCHR is not to conclude definitively whether the proposed legislation is compatible with human rights, but rather to bring to parliament's attention any risks of human rights violation, and the JCHR have at many points disagreed with ministers on their evaluation of legislation. What the experience of Canada, New Zealand and the UK taken together demonstrate is that it is important to have a committee to 'go behind' a ministerial statement of compatibility, to avoid these statements risk becoming a rubber stamp and not especially useful in providing information.[62]

In performing its role, the JCHR will often seek written submissions from ministers, legal practitioners, human rights advocates and non-governmental organisations.[63] After a recent

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[56] Bill of Rights Act 1990 (NZ) s 7 ('NZBORA').

[57] Charter of Rights and Responsibilities Act 2006 (Vic) s 28.

[58] Human Rights Act 2004 (ACT) s 37.

[59] Human Rights Act 1998 (UK) s 19 provides that:

(1) A Minster of the Crown in charge of a Bill in either House of Parliament must, before Second Reading of the Bill—

(a) Make a statement to the effect that in his view the provisions of the Bill are compatible with the Convention rights ("a statement of compatibility"); or

(b) Make a statement to the effect that although he is unable to make a statement of compatibility the government nevertheless wishes the House to proceed with the Bill.

(2) The statement must be in writing and be published in such manner as the Minister making it considers appropriate.

[60] UK Human Rights Act (n 59) s 19(2). The UK differs from New Zealand and the ACT, which require the statement to be prepared by the federal Justice Minister or the Attorney-General. The UK allows for such a statement to be delivered by the minister sponsoring the bill, an approach which has been followed in Victoria.

[61] As a matter of practice, this statement accompanies the bill at Second Reading. Sometimes amendments made to a bill during the legislative process may affect the statement of compatibility. In these circumstances, the statement of compatibility should be revised.

[62] Janet L Hiebert, 'Parliament and the Human Rights Act: Can the JCHR help facilitate a Culture of Rights?' (2006) 4 Int'l J Const Law 1, 7–10.

[63] Michael C Tolley, 'Parliamentary Scrutiny of Human Rights in the United Kingdom: Assessing the Work of the Joint Committee on Human Rights' (2009) 44 Australian Journal of Political Science 41, 45.

inquiry into its own working practices,[64] the Committee has decided to expand this evidence gathering role. This ability of civil society groups, experts, and individuals to provide information to parliament enhances democratic participation in human rights protection, as well as providing information independent of government by which legislation and policy can be assessed.

The JCHR aims to complete its reports prior to the Second Reading of a bill.[65] This ensures that the reports are available for the Second Reading debate. The JCHR has also been able to contribute productively where permitted to the drafting of bills, allowing it to suggest amendments directly to government departments. The Committee has found that it is much easier to have amendments accepted at this stage than after a bill has been introduced into parliament, when the government becomes less cooperative and accepting of criticism.[66] The JCHR initially undertook to report on every bill. It has, more recently, indicated that it would be more selective in its review.

3.1.3 Declarations of incompatibility

The declaration of incompatibility mechanism, discussed further in Section 5 below, allows higher courts in the UK to alert the other branches of government where a law violates human rights (that is, those rights under the ECHR) and the court has not been able to interpret the legislation so as to rectify the human rights violation. The HRA does provide for a 'fast-track' remedial procedure in the event of a declaration of incompatibility, under which the government may amend or repeal legislation in response to a declaration of incompatibility, with the vote of the majority of both houses of parliament.[67]

There were concerns that extensive use of the remedial procedure in the HRA, which does not permit parliamentarians to table amendments so as to expedite the legislative process, would undermine parliament's role. However, the remedial process has been used only once to respond to a declaration of incompatibility (in relation to the *Mental Health Act 1983*). Instead the practice is to pass new legislation through the ordinary legislative process, with full debate and capacity for amendments. This can largely be explained by the fact that, despite talk of remedial orders as a 'fast track' remedial procedure, in truth the process for a remedial order—as a result of procedural checks and constraints—is in fact so slow that the adoption of the 'normal' remedial order route would prove ineffective. Schedule 2 of the HRA provides a special 'urgent procedure', which was in fact used in respect of the declaration of incompatibility concerning the *Mental Health Act 1983*. The JCHR has recommended amendments to s 10 and sch 2 of the HRA, which have not been made.[68]

Declarations of incompatibility have not in general been particularly high profile amongst the public and media. There have been a few exceptions, such as the decision in relation to indefinite detention of terrorist suspects. The idea of using this mechanism to notify parliament has been undermined by the lack of any mechanism to ensure parliament is informed. The *Victorian Charter of Human Rights and Responsibilities 2006* (Vic) has improved on the HRA model in this regard: s 37 requires that within six months of receiving a declaration of inconsistent interpretation, the relevant minister must prepare a written response and table that response before parliament. The JCHR has recommended that the UK Government be placed under an obligation to report declarations of incompatibility to parliament.

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[64] Francesca Klug, 'Report on the Working Practices of the JCHR' in Joint Committee on Human Rights (23rd Report, 2005–06 Session) HC (2005–06) 1575, HL (2005–06) 239 (JCHR 2005) Appendix 1.
[65] Klug (n 64) [6.6].
[66] Klug (n 64) [8.5].
[67] UK Human Rights Act (n 59) s 10, sch 2.
[68] Joint Committee on Human Rights, 'The Making of Remedial Orders' (7th Report, 2001–02 Session) HC (2001–02) 473, HL (2001–02) 58 (JCHR 2001).

3.2 Parliamentary scrutiny in Australia

The Federal Parliament relies on the work of parliamentary committees to scrutinise bills from a variety of perspectives and report to parliament. No single committee is currently responsible for scrutinising legislation for compatibility with human rights. Committees will generally enter into private negotiations with the sponsoring minister in order to resolve any issues of concern. Should this prove unsuccessful, the Committee may then recommend parliamentary deliberation on amendments to any offending provisions and, in the case of regulations, recommend that the Senate disallow the legislation in its current form.

The Legal and Constitutional Committee regularly reports on the human rights implications of proposed legislation, such as when it raised concerns that the *Anti-Terrorism Bill (No. 2) 2005* did not provide for adequate access to courts, reasons for detention, or a fair hearing.[69] As a result of the Committee's report, the Government introduced 74 amendments which limited the scope of the legislation so as to better protect human rights.[70] In addition, the Regulations and Ordinances Committee is responsible for ensuring that all delegated legislation introduced into the Senate does not 'trespass unduly upon personal rights or liberties', whilst the Scrutiny of Bills Committee performs the same function for primary legislation.

3.2.1 Strengths and weaknesses of the Australian approach to parliamentary scrutiny

The bicameral structure of the Federal Parliament and the function of the Senate Committees in particular have provided some checks in the federal legislative process. The technical, non-partisan approach of the committees has on occasions proved successful in persuading the government to accept amendments to legislation so as to minimise or avoid impact on human rights where public and political dissent on the floor of the Senate may have failed to do so.[71]

There is however room for improvement. There are five identified weaknesses in the current system of parliamentary scrutiny of legislation in the Australian federal context:

a) *Party discipline*: Tight party discipline is a central feature of Australian politics. Consequently, parliamentarians will generally vote in the manner directed by the party whip, even in relation to minor amendments. Parliamentary committees may not be able to transcend partisan politics if departure from the party line impairs the advancement of the political careers of committee members.[72]

b) *The inadequacy of Explanatory Memoranda*: In March 2003 the Senate Standing Committee for the Scrutiny of Bills observed that the Explanatory Memoranda that accompanied bills did not provide sufficient explanation for why the executive elected to support legislation that potentially infringed human rights.[73] Often the information provided in the Explanatory Memoranda is insufficient for the committees to satisfy themselves that the legislation does not affect personal rights and liberties.[74]

c) *Time constraints*: Scrutinising legislation is a part-time activity for committee members, and MPs have a range of demands on their time. When an MP's prospects for re-election depend on his or her ability as a constituency representative, the time-consuming, often

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[69] Simon Evans, 'The Australian Senate' (International Association of Centres for Federal Studies, 29 June 2006–1 July 2006) 25.
[70] Senator Andrew Murray, 'Parliamentary Committees and the Protection of Human Rights: a Partial Evaluation', (International Conference on Legislatures and the Protection of Human Rights, Melbourne, 20–22 July 2006).
[71] Evans (n 69) 19.
[72] Carolyn Evans, Simon Evans, 'The Effectiveness of Australian Parliaments in the Protection of Rights' (International Conference on Legislatures and the Protection of Human Rights, Melbourne, 20–22 July 2006) 3.
[73] Senate Standing Committee for the Scrutiny of Bills, Parliament of Australia, *The Quality of Explanatory Memoranda Accompanying Bills* (2004) 70.
[74] Senate Standing Committee for the Scrutiny of Bills (n 73) 70.

technical task of scrutinising legislation may assume a lower priority. This is a further reason why the Senate has been a more effective house of review than the House of Representatives.

d) *Inadequate provision for human rights-based scrutiny*: Where committees have been entrusted with examining whether a bill 'trespasses unduly upon personal rights or liberties', there has been no consensus over what the phrase actually means. This has led committees to adopt a rather conservative view of rights—a 'lowest common denominator' approach.[75]

e) *Weak scrutiny committees*: As scrutiny committees seek to inform the debate, rather than direct it, their reports have been criticised for being 'tepid'.[76] They have been accused of being 'toothless tigers' in protecting human rights against a government intent on sacrificing them to pursue a weightier public interest.[77]

The weaknesses in the legislative processes in relation to the protection of human rights form part of the case for why a second, independent check on government is warranted. An Australian Charter of Human Rights provided by an Act of Parliament would allow for a second check on the conduct of the executive and a second check on whether legislation that abridges or restricts rights does so in a way that is justifiable in a democratic society.

Such a Charter of Rights also provides an opportunity to enhance the existing mechanisms of parliamentary scrutiny, which we will consider below. Not all the above weaknesses are readily curable, since some of them arise from entrenched institutional features of the Australian political system. However, there is scope for modest improvements.

3.3 Conclusions

The UK has traditionally faced very similar weaknesses in its system of parliamentary scrutiny to the five weaknesses mentioned above. Developments in the UK have served to address the lack of information in Explanatory Memoranda and the lack of provision for human rights scrutiny. On the basis of the UK's experience, we recommend that the Federal Parliament introduce:

a) A requirement that all policy documents submitted by departments to Cabinet be accompanied by a human rights impact statement assessing the compatibility of the policy initiatives with human rights and proposing means by which any potential infringements may be prevented or minimised.
b) A requirement that all bills and amendments presented to parliament be accompanied by a statement of compatibility that indicates whether the bill or amendment is compatible with human rights and the reasoning and evidence to support this conclusion (for example, evidence as to why a restriction on rights is justified in a democratic society).
c) The establishment of a joint parliamentary committee of both houses with the responsibility of reviewing all bills and amendments presented to parliament for potential human rights implications. It is important that this committee is supported by its own legal adviser and staff. It is also important that this committee be empowered and encouraged to seek independent evidence in relation to its inquiries.
d) If there is an Australian Charter of Human Rights providing for judicial review and employing a declaration of incompatibility style of review, then we recommend a provision requiring the government to table a copy of such declarations within a

[75] Senate Standing Committee for the Scrutiny of Bills (n 73) 4.
[76] Senate Standing Committee for the Scrutiny of Bills (n 73) 4.
[77] Bryan Horrigan, 'Improving Legislative Scrutiny of Proposed Laws to Enhance Basic Rights, Parliamentary Democracy, and the Quality of Law-Making' in Tom Campbell, Jeffrey Goldsworthy, Adrienne Stone (eds), *Protecting Rights Without a Bill of Rights: Institutional Performance and Reform in Australia* (Ashgate, Aldershot 2006).

specified time period, and to table a written response to the declaration within a specified time period.

We stress however that these are only modest reforms. The challenges faced by parliamentarians with respect to time constraints which prevent proper appraisal of legislation, and the weakness of scrutiny committees relative to the government will remain even if the above recommendations are implemented. Addressing these problems requires more imaginative and bolder reform of our democratic institutions. Over time, if the JCHR successfully functions as an avenue for public participation in the legislative process, and forms a useful source of advice and information for parliamentarians, then it could herald a more participatory democratic system.

Recommendation 2:
An Australian Charter of Human Rights should incorporate a process that requires that all bills and amendments presented to parliament be accompanied by a statement of compatibility that indicates whether the Bill or amendment is compatible with human rights, and the reasoning and evidence to support this conclusion.

Recommendation 3:
An Australian Charter of Human Rights should make provision for a joint parliamentary committee, comprised of members of both Houses of Parliament, with the responsibility of reviewing all bills and amendments presented to parliament for potential human rights implications. That Committee should be supported by its own legal adviser and staff, and be empowered to seek independent evidence in relation to its inquiries.

Recommendation 4:
An Australian Charter of Human Rights should incorporate a process whereby all policy documents submitted by departments to Cabinet be accompanied by an impact statement assessing their compatibility with human rights.

4. The obligations on 'public authorities' under an Australian Charter of Human Rights

This section considers the human rights obligations that should be imposed on policy makers and the providers of public services, generally defined as 'public authorities'. There are two separate but related issues:

a) what obligations should a public authority have; and
b) the scope of the definition of a public authority.

A sub-question of the second issue is whether or not courts should be included within the definition of a 'public authority'. This specific issue is dealt with in Section 9 below.

4.1 The obligations on a public authority

Public authorities should be bound to act in accordance with the human rights enumerated within an Australian Charter of Human Rights unless specifically authorised not to do so by parliament. In passing a domestic human rights instrument, parliament will make clear its intent that public authorities act in accordance with human rights and, through the provision of a cause of action, can enlist the courts in ensuring that public authorities do in fact act in accordance with those obligations.

An Australian Charter of Human Rights should impose both procedural and substantive obligations on public authorities. The procedural obligation should require public authorities to give proper consideration to human rights when making decisions and implementing legislation. The substantive obligation should require public authorities to act in a manner that is compatible with the human rights enumerated with the Charter. This dual characterisation of obligations is consistent with the position adopted in Victoria,[78] and the Australian Capital Territory.[79]

In contrast, the HRA focuses on the substantive obligations of public authorities.[80] This result is suggested by the text itself and has been confirmed by the House of Lords in *Belfast City Council v Miss Behavin' Ltd*.[81] This means that provided the decision of a public authority does in fact comply with provisions of the Act, it does not matter whether the rights in question were taken into account by it. This approach has been subject to criticism for failing to foster a culture of rights in the administration. For this reason we consider it preferable that obligations of consideration as well as obligations of compliance be placed upon local authorities.

A further difference between the model adopted in Victoria and the model initially adopted in the Australian Capital Territory,[82] and the model adopted under the HRA, is that the latter provides a freestanding cause of action for breaches of obligations by public authorities. The Victorian instrument does not provide an independent cause of action for a human rights violation, requiring an individual to have a separate cause of action to which they must 'piggy back' their claim. In addition to the uncertainty and complexity this introduces, this approach increases the difficulty of vindicating the rights in question, and ultimately limits the effectiveness of a statutory human rights instrument. In Part 1 we acknowledged the fear that a freestanding cause of action may 'open the floodgates' to human rights litigation, and that this could result in considerable cost to the government and public authorities. This clearly has not eventuated in the UK, despite the availability independent cause of action.

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[78] Victoria Charter of Rights and Responsibilities (n 57) s 38(1).
[79] ACT Human Rights Act (n 58) s 40B(1).
[80] UK Human Rights Act (n 59) s 6.
[81] *Belfast City Council v Miss Behavin' Ltd* [2007] 1 WLR 1420.
[82] Although, we note that this has recently been amended to provide for a free-standing cause of action. See ACT Human Rights Act (n 58) s 40C.

In these circumstances we are of the view that an Australian Charter of Human Rights should contain an independent cause of action for a breach of the rights enumerated within the Charter.

4.2 Defining a 'public authority'

Section 6(1) of the HRA makes it unlawful for a 'public authority' to act in a way that is incompatible with the human rights protected within the Act. Section 6(3)(b) of the HRA defines a public authority as including 'any person whose functions are functions of a public nature'. The Act effectively creates two separate definitions of public authorities: pure public authorities, such as government departments, which are always bound whatever the nature of their act; and hybrid bodies which are caught because certain of their functions are of a public nature within the meaning of s 6(3)(b).

The House of Lords had made it clear in an early case concerning s 6 that there should be a 'generously wide' interpretation of 'public authority' and 'functions of a public nature'[83] under the Act. Notwithstanding this pronouncement the courts have faced persistent problems regarding the definition of hybrid public authorities and the particular circumstances of contracting out governmental functions. Beginning with a series of Court of Appeal judgments[84] and culminating with the recent House of Lords decision in *YL v Birmingham City Council*[85] the courts have pursued a highly restrictive interpretation of hybrid public authority.

The facts of *YL* exemplify this problem acutely. In that case a local authority had contracted out the provision of residential accommodation for the elderly to an independent provider of health and social care services. The provider was not considered by the House of Lords to fall within the ambit of s 6. It was held by the majority that the actual provision of accommodation as opposed to regulation and supervision pursuant to statutory rules was not an inherently public function. As a result, the care home was not subject to the provisions of the HRA and its residents were denied the rights protection they would have been accorded had the local authority performed this function itself.

Against this background, in March 2007 the JCHR published a report entitled *'The meaning of public authority under the Human Rights Act'*.[86] The Joint Committee stated:

> In a series of cases our domestic courts have adopted a more restrictive interpretation of the meaning of public authority, potentially depriving numerous, often vulnerable people…from the human rights protection afforded by the Act. We consider that this is a problem of great importance, which is seriously at odds with the express intention that the Act would help to establish a widespread and deeply rooted culture of human rights in the UK. [87]
>
> …
>
> In an environment where many services previously delivered by public authorities are being privatised or contracted out to private suppliers, the law is out of step with reality. The implications of the narrow interpretation…are particularly acute for a range of particularly vulnerable people in society…[88]

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83 *Aston Cantlow and Wilmcote with Billesley Parochial Church Council v Wallbank* [2003] UKHL 37, [2004] 1 AC 546, [11].

84 *Poplar Housing v Donoghue* [2001] EWCA Civ 595, [2002] QB 48, [67]; *R v Leonard Cheshire Foundation, exp Heather* [2002] EWCA Civ 366, [2002] 2 All ER 936, [15].

85 [2007] UKHL 27, [2008] 1 AC 95 ('*YL v Birmingham City Council*').

86 The House of Lords and House of Commons Joint Committee on Human Rights, 'The Meaning of "Public Authority" under the Human Rights Act' (9th Report, 2006–07 Session) HC (2006–07) 410, HL (2006–07) 77 (JCHR 2007) 4.

87 JCHR 2007 (n 86) 7-8.

88 JCHR 2007 (n 86) 25.

The Green Paper *Rights and Responsibilities: Developing Our Constitutional Framework*, has signaled that '[t]he government is considering…whether the definition of public authority in the Human Rights Act should be clarified following the House of Lord's ruling in the case of *YL*'. [89]

Largely in response to the difficulties that have arisen as a result of the ambiguity inherent in s 6 of the HRA, the *Charter of Rights and Responsibilities Act 2006* (Vic) adopted a more prescriptive definition of a 'public authority'.[90] Section 4 of the *Charter of Rights and Responsibilities Act 2006* (Vic) contains a comprehensive definition of 'public authority' which, in broad terms, is broken into two categories:

a) *core public authorities*: specified public entities including public officials within the meaning of the *Public Administration Act 2004* (Vic), the Victoria Police, a minister, local council members, members of parliamentary committees, an entity prescribed by regulation and, importantly, an entity established by a statutory provision that has functions of a public nature; and
b) *functional public authorities*: entities whose functions are or include functions of a public nature, when it is exercising those functions on behalf of the State or a public authority (whether under contract or otherwise).[91]

The second category, and the express reference to contracting out within the Act, is significant for the private sector, particularly given modern government practice. The Explanatory Memorandum to the Victorian Bill states that the inclusion of functional public authorities:

> …reflects the reality that modern government utilise diverse organisational arrangements to manage and deliver government services. The Charter applies to 'downstream' entities, when they are performing functions of a public nature of another public authority.[92]

In the Second Reading Speech to the Bill, the Minister stated that '… the obligation to act compatibly with human rights should apply broadly to government and to bodies exercising functions of a public nature'.[93]

In its consideration of who the Charter should apply to, the Human Rights Consultation Committee made the following comments:

> It is already a common feature of government contracts and funding arrangements that organisations be required to act lawfully in regard to occupational health and safety, equal opportunity and similar obligations. Requiring compliance with human rights standards would be a natural progression in this process of ensuring the best possible outcomes for the people of Victoria, irrespective of which organisation is carrying out the public or government function.[94]

Section 4(2) sets out a list of factors that may be taking into account in ascertaining whether or not a *function is of a public nature*. The factors are:

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[89] Straw and Wills (n 40) 56.

[90] Department of Justice of the State of Victoria, 'Rights, Responsibilities and Respect: Report of the Human Rights Consultation Committee' (December 2005). <http://www.justice.vic.gov.au/wps/wcm/connect/DOJ+Internet/resources/file/eb98104a8a0dff9/HumanRightsFinal_FULL.pdf> accessed 28 May 2009 ('Rights, Responsibilities, and Respect').

[91] Victoria Charter of Rights and Responsibilities (n 57) ss 4(1) sub-ss (a)–(h); s 4(1)(c).

[92] Parliament of Victoria, *Explanatory Memorandum to Charter of Human Rights and Responsibilities Bill 2006* (2006) <http://hrlrc.org.au/files/VXQVJ79BDG/Charter%20EM.pdf> accessed 28 May 2009, 4.

[93] Parliament of Victoria, *Parliamentary Debates*, Legislative Assembly, 4 May 2006, 1293 (Robert Hulls, Attorney-General).

[94] Rights, Responsibilities, and Respect (n 90) 56.

a) that the function is conferred on the entity by or under a statutory provision (eg the Transport Accident Commission, conferred its power by the *Transport Accident Act 1983* (Vic));
b) that the function is connected to or generally identified with functions of government (eg a private corrections centre);
c) that the function is of a regulatory nature (eg the Law Institute of Victoria);
d) that the entity is publicly funded to perform the function (eg a public high school); and
e) that the entity that performs the functions is a company (within the meaning of the *Corporations Act 2001* (Cth)), all of the shares in which are held by or on behalf of the State (for example, Yarra Valley Water, South East Water and City West Water).

Although a useful starting point, the above list is not exhaustive.[95] Further, as noted earlier, the existence of any of these factors does not necessarily dictate that the function is one of a public nature. In this regard, the Explanatory Memorandum states:

> In a particular case, other factors may be equally or more important in determining the nature of the function. Similarly, the fact that one or more of the factors exist in relation to a function, does not necessarily mean that the function is one of a public nature.[96]

We are of the view that the Victorian approach to the understanding of what constitutes a public authority is preferable to that utilised by the HRA for two reasons. Firstly, the provision of a non-exhaustive list of factors that a court can take into account is preferable to ambiguous reference to entities performing 'functions of a public nature', as reflected in s 6 of the HRA. We also note the possibility of specifying certain functions that 'are taken to be of a public nature', as has recently been proposed in the Australian Capital Territory [97] Second, the specific reference to the exercise of '…functions on behalf of the State or a public authority (whether under contract or otherwise)' in the Victorian Charter emphasizes the relative unimportance of whether a function has been contracted out when considering the rights protection of individuals.

4.3 Conclusions

An Australian Charter of Human Rights should impose both procedural and substantive obligations on public authorities. The procedural obligation should require public authorities to give proper consideration to human rights when making decisions and implementing legislation. The substantive obligation should require public authorities to act in a manner that is compatible with the human rights enumerated with the Charter.

An Australian Charter of Human Rights should contain an independent cause of action for a breach of the rights enumerated within the Charter.

Finally, the definition of a 'public authority' should both provide a list of factors that a court can take into account in determining whether or not an entity is performing functions of a public nature and make explicit reference to the fact that 'contracting out' arrangements fall within the ambit of Charter protection.

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95 Victoria Charter of Rights and Responsibilities (n 57) s 4(3).
96 Explanatory Memorandum (n 92) 5.
97 See Human Rights Amendment Act 2008 (ACT) s 7.

Recommendation 5:
An Australian Charter of Human Rights should impose both procedural and substantive obligations on public authorities. Procedural obligations should require public authorities to give proper consideration to human rights when making decisions and implementing legislation. Substantive obligations should require public authorities to act in a manner that is compatible with the human rights enumerated with the Charter.

Recommendation 6:
An Australian Charter of Human Rights should contain an independent cause of action in respect of an act or decision of a public authority, where that act or decision is allegedly unlawful under the Charter.

Recommendation 7:
An Australian Charter of Human Rights should include a list of factors that a court can take into account in determining whether or not an entity is 'public authority', including an express acknowledgement that contracting between the state and private bodies falls within the ambit of the Charter.

5. The role of the courts under an Australian Charter of Human Rights

Here we are concerned with the role of the courts in the interpretation of legislation.[98] In this respect, a domestic human rights instrument may take a number of forms. Four potential models that could be considered by Australia are:

a) a constitutionally entrenched model subject to extant forms of constitutional review (such as the South African Constitution);
b) a constitutional model with a parliamentary override provision (such as the Canadian Charter of Rights and Freedoms);
c) a legislative model of the type employed by the United Kingdom (which we will refer to as the 'legislative dialogue' model);[99] and
d) a legislative model of the type employed by Canada in the *Canadian Bill of Rights 1960*.

In circumstances where the National Human Rights Consultation Committee has limited its terms of reference to consideration of a legislative instrument, this submission does not consider (a) or (b). We find it disappointing that the Committee was not given a broader mandate. There are reasons to suggest that a constitutional instrument may be the preferable option in the Australian context. The Australian democratic system is already familiar with constitutional judicial review. Further, comparative experience tells us that a constitutional model of human rights protection has been preferred for countries that had a pre-existing constitution.[100]

However, in view of the Consultation's terms of reference, this submission will focus its attention on (c) and (d).

Over the past few months there have been a number of questions raised as to the constitutionality of a legislative dialogue model in the Australian federal context.[101] As the Committee is aware, on 22 April 2009 the Australian Human Rights Commission convened a meeting of Australian constitutional and human rights lawyers to discuss the constitutional implications of an Australian Human Rights Act. The unanimous view of that meeting was that an Australian Human Rights Act can be drafted in a manner that would be constitutionally valid.[102] Of particular relevance to this section, it was agreed that there is no constitutional impediment to the incorporation of a statutory human rights instrument if that instrument, among other things, adopted the following approach to judicial review:

> If a court found that it could not interpret a law of the Commonwealth in a way that is consistent with the rights identified in the Act, a statutory process could apply to bring this finding to the attention of Federal Parliament and require a government response.
>
> An example of a possible process is as follows:

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[98] As distinct from the role of the courts in a claim against an unlawful action by a public authority. This is discussed in Sections 4 and 7 of this submission.

[99] The authors acknowledge that the phrase 'dialogue' can be used in several ways, and has been used in relation to a variety of human rights instruments. However, for the sake of brevity, we have adopted the term 'legislative dialogue model' in this submission to refer to the type of judicial review adopted in the UK HRA, where there is an interpretative power and a non-binding judicial declaration of incompatibility where a law cannot be interpreted in accordance with protected rights.

[100] Eg Germany and South Africa.

[101] For example, Michael McHugh, 'A Human Rights Act, the Courts and the Constitution' (Presentation given at the Australian Human Rights Commission, 5 March 2009).
<http://www.humanrightsconsultation.gov.au/www/nhrcc/RWPAttach.nsf/VAP/(3273BD3F76A7A5DEDAE36942A54D7D90)~McHugh2009_+paper.pdf/$file/McHugh2009_+paper.pdf> accessed 10 May 2009, 44.

[102] Australian Human Rights Commission, 'Constitutional Validity of an Australian Human Rights Act' (2009) <http://www.hreoc.gov.au/letstalkaboutrights/downloads/roundtable.doc> accessed 15 May 2009.

> *The Australian Human Rights Commission would be empowered, at the request of a party to the proceeding or of its own motion, to notify the Attorney-General of a finding of inconsistency. The Attorney-General would be required to table this notification in Federal Parliament. The government would be required to respond to the notification within a defined period (for example, 6 months).*
>
> Following the government's response, parliament might decide to amend the law in question to ensure its consistency with the Act. It would not, however, be required to do so.

We are concerned that this proposal sacrifices the important function that declarations of inconsistency/incompatibility play in a system that adopts a legislative dialogue model, effectively stripping away the 'dialogue' between the courts and the legislature. It seems inherently artificial to separate out the task of interpreting legislation and the task of declaring legislation to be inconsistent with human rights. Both tasks fall within the remit of an independent judiciary, rather than a body such as the Australian Human Rights Commission. Past experience in Australia has shown that where politically expedient, the government has simply dismissed the views of the Commission. As a matter of practice, the proposed approach also places a considerable burden on the Australian Human Rights Commission to monitor judicial decisions and ascertain when legislation has not been capable of rights-consistent interpretation.

We are of the view that such a sacrifice is not necessary on constitutional grounds, and that it is possible for a dialogue model, incorporating a declaration of incompatibility provision, to be drafted in a manner that is constitutional within the Australian federal context.

After providing a brief overview of the legislative dialogue model, we look in detail at the concerns that have been raised about the constitutionality of this particular model if introduced into an Australian federal system. We also consider the implications of the doctrine of 'implied repeal'.

This section will then turn its consideration to the Canadian Bill of Rights legislative model. This model, which effectively renders inconsistent legislation 'inoperative', does not give rise to the same constitutional issues that derive from adopting a declaration of inconsistency/incompatibility mechanism. It provides an alternative which may therefore be preferred. However, it does give rise to separate issues in relation to the doctrine of implied repeal, which will also be considered in this context.

5.1 Legislative dialogue model: a 'snapshot'

The legislative model has been adopted in various forms in the UK,[103] New Zealand,[104] Victoria,[105] and the Australian Capital Territory.[106] Under this model, the Australian Charter of Human Rights would be enacted as an ordinary piece of legislation. Any subsequent legislation that violates the rights contained within the Act would not be invalidated, and the Act itself can be amended by passing ordinary amending legislation.

The phrase 'dialogue' refers to the relationship between the court and the legislature, whereby the courts draw the attention of the legislature to legislation which violates the broadly-worded rights protected within the instrument. Whether, and how, to respond is left to the government and the legislature. This weak form of judicial review recognises that some applications of human rights principles may be fiercely contested, and ultimately prioritises the opinion of the political branches as to what is a justified encroachment into individual rights and what is not.

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[103] UK Human Rights Act (n 59).
[104] NZBORA (n 56).
[105] Victoria Charter of Rights and Responsibilities (n 57).
[106] ACT Human Rights Act (n 58).

In the UK there are effectively two facets to judicial review of legislation. First, an interpretive power under s 3. Secondly, the ability to make a declaration of incompatibility, under s 4, where legislation cannot be interpreted in a manner compatible with the rights enumerated within the HRA.

Section 3(1) of the HRA provides that '[s]o far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with the [ECHR] rights'. In interpreting legislation, the court is required to take into account relevant jurisprudence from the ECtHR.[107]

If a court is satisfied that a provision of primary or subordinate legislation is incompatible, it may make a declaration of incompatibility under s 4(1). A declaration of incompatibility does not affect the validity of the provision in question.[108] As discussed in Section 1, the experience in the UK demonstrates that judicial declarations of incompatibility may have significant political weight. As noted above, in the UK there have been 26 declarations of incompatibility, 7 of which have been overturned on appeal. With respect to 17 of the remaining 19 decisions, the parliament has subsequently acted to amend the relevant legislation to bring it into line with the ECHR. The Government is currently considering its position in relation to the most recent two declarations of incompatibility.[109]

The relationship between s 3 and s 4 of the HRA has given rise to some difficulty in the UK. The rule which the United Kingdom has adopted with respect to the 'so far as possible to do so' requirement in s 3(1) is that courts should not adopt a meaning which is inconsistent with a fundamental feature of the legislation: *Ghaidan v Godin-Mendoza*.[110] However, this seems to be countered by a view that s 4 declarations of incompatibility should be used as a measure of last resort.[111]

This difficulty has been picked up in the Victorian and Australian Capital Territory instruments, which make express reference to 'purpose' of the legislation, thereby constraining the courts' interpretation.[112] For example, the Charter of Rights and Responsibilities Act 2006, s 32(1), provides that 'so far as it is possible to do so consistently with their purpose, all statutory provisions must be interpreted in a way that is compatible with human rights'. The Explanatory Memorandum indicates that the reference to statutory 'purpose' is to ensure that 'courts do not strain the interpretation of legislation so as to displace parliament's intended purpose or interpret legislation in a manner which avoids achieving the object of the legislation'.

This is discussed further below at 5.2.4, in the context of the constitutional constraints on judicial interpretation in Australia.

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[107] UK Human Rights Act (n 59) s 2(1)(a).
[108] The Victoria Charter of Rights and Responsibilities (n 57) and the ACT Human Rights Act (n 58) contain similar provisions. Rather curiously, the Victorian equivalent is called a 'declaration of inconsistent interpretation'. See Victoria Charter of Rights and Responsibilities (n 57) s 36.
[109] Hunt (n 11).
[110] [2004] UKHL 30, [2004] 2 AC 557.
[111] *Ghaidan* (n 110) [38]–[40], [46]–[50].
[112] ACT Human Rights Act 2004 (n 58) s 30(1).

5.2 Potential constitutional issues arising under a legislative dialogue model

It has been suggested that elements of the legislative dialogue model may be constitutionally invalid if introduced into the Australian federal context. Unlike the UK, Australia has a written constitution that enshrines the separation of legislative, executive and judicial power. An Australian Charter of Human Rights would have to be consistent with the separation of powers. Two closely related limits are placed on federal courts by the constitutional separation of powers. The first is a jurisdictional limitation: federal courts can only exercise jurisdiction with respect to 'matters'.[113] The second is a functional limitation: with respect to a 'matter', federal courts can only exercise judicial power. In practice, the principles governing these two constraints are often indistinguishable. In this section both constraints are addressed, however the analysis is principally conducted through the rubric of judicial power. This section then considers the implications of these constitutional limitations for a declaration of incompatibility provision and a consistent interpretation provision of an Australian Charter of Human Rights.

5.2.1 A 'matter'?

Chapter III of the Australian Constitution imposes a limitation on the jurisdiction of federal courts, including the High Court. These courts are only capable of exercising jurisdiction with respect to 'matters'. Commonwealth legislation cannot empower courts to address legal questions that do not arise from matters.

The High Court has stated that a matter is a legal controversy where the rights or obligations of a party must be determined:

> …there can be no matter... unless there is some immediate, right, duty or liability to be established by the determination of the Court... [The legislature] cannot authorize this Court to make a declaration of the law divorced from any attempt to administer that law... we can find nothing in Chapter III of the Constitution to lend colour to the view that Parliament can confer power or jurisdiction upon the High Court to determine abstract questions of law without the right or duty of any body or person being involved.[114]

Subsequent jurisprudence has not departed from this basic conception of what constitutes a matter, although the application of these principles has proved difficult. For present purposes, it is sufficient to observe that a direct action in which a person alleged that an existing statute were inconsistent with a given human right would not constitute a matter. It would be 'a request for a declaration of the law divorced from any attempt to administer the law'. For this reason, a cause of action in the Australian Charter of Human Rights to obtain a judicial declaration of incompatibility would almost certainly be unconstitutional.

A mechanism allowing for a declaration of incompatibility should only be available when the interpretation of a statute is at issue in an otherwise existing matter; it should not be available for abstract review.

The question then arises as to whether the issuing of a declaration of incompatibility is an exercise of judicial power with respect to the underlying matter or, alternately, whether it would be an attempt to exercise non-judicial power with respect to a question distinct from the underlying matter.

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[113] Constitution of Australia, ss 73–7.

[114] *Re Judiciary and Navigation Acts* (1921) 29 CLR 257 (HCA) 266–7.

5.2.2 Judicial power in general

There is no precise test by which judicial power can be identified. A common starting point is the definition proposed by Griffith CJ in *Huddart, Parker & Co Pty Ltd v Moorehead*:

> I am of the opinion that the words 'judicial power' as used in sec 71 of the Constitution mean the power which every sovereign authority must of necessity have to decide controversies between its subjects, or between itself and its subjects, whether the rights relate to life, liberty or property. The exercise of this power does not begin until some tribunal which has power to give a binding and authoritative decision (whether subject to appeal or not) is called upon to take action.[115]

Writing extra-judicially, the Hon Michael McHugh has suggested that an important indicator of whether a given function leads to a binding, authoritative decision is whether the resulting order is enforceable by the parties to the underlying matter.[116]

Another central concern in the High Court's jurisprudence on judicial power is to distinguish between the function of determining what the law *is* and the function of proposing what the law should be. In *Precision Data Holdings v Wills*, the unanimous Court adopted the following passage from *Re Ranger Uranium Mines*:

> The power of inquiry and determination is a power which properly takes its legal character from the purpose for which it is undertaken. Thus inquiry into and determination of matters in issue is a judicial function if its object is the ascertainment of legal rights and obligations. But if its object is to ascertain what rights and obligations should exist, it is properly characterized as an arbitral function when performed by a body charged with the resolution of disputes by arbitration.[117]

In *Wilson v Minister for Aboriginal and Torres Strait Islander Affairs* the majority found that requesting a judge, in her personal capacity, to prepare an advisory opinion for government was incompatible with her judicial office.[118] Once again, the Court's reasoning centred on the nature of the function conferred. The judge had been required 'to furnish advice to the Minister upon a question of law... [T]he giving of executive or advisory opinions on questions of law is quite alien to the judicial power of the Commonwealth.'[119]

5.2.3 Judicial power: Declarations of incompatibility

There are three cases that provide specific guidance on how the High Court might approach the question of whether a declaration of incompatibility provision provides for an exercise of judicial power. All three cases concern declaratory remedies in different forms.

In *Bass v Permanent Trustee Co Ltd* the six judge majority suggested that the basic requirements of an exercise of judicial power had the characteristics of providing:

a) a conclusive or final decision;
b) on the basis of concrete or established facts;
c) which aims to quell a controversy.[120]

It appears that the Court in *Bass* felt that all three criteria should be met cumulatively in order for a given function to be characterised as an exercise of 'judicial power'.

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[115] (1909) 8 CLR 330 (HCA) 357.
[116] McHugh (n 101) 49.
[117] *Precision Data Holdings v Wills* (1991) 173 CLR 167 (HCA) 188.
[118] (1996) 189 CLR 1 (HCA).
[119] *Wills* (n 117) 19.
[120] [1999] HCA 9, 198 CLR 334, [45].

The majority expressly considered the conditions under which the giving of a declaratory judgment would amount to an exercise of judicial power. They found that the judicial power to make a declaratory judgment arises only in concrete factual scenarios to resolve an actual controversy between parties.[121]

The authority of *Bass* was relied upon in *Solomons v District Court of New South Wales.*[122] In *Solomons*, the High Court considered a procedure by which a successful criminal defendant could be granted a certificate by the New South Wales District Court, which would entitle him to recover legal costs. The majority held that the issuing of a certificate, after the criminal case had already been resolved, 'would be productive of futility, not the resolution of any claim or controversy'.[123] This lack of connection to the resolution of a controversy was not redeemed by the fact that the issue arose in a concrete factual scenario. However, the breadth of the authority of *Solomons* is unclear. A decisive factor in the case was that the criminal charge was based in federal law, and the certificate was provided for, separately, by state law. This jurisdictional issue was important in the majority's reasoning, in that the granting of the state cost certificate was not part of the resolution of the federal criminal controversy.

In contrast, in *Mellifont v Attorney-General (Queensland),* the High Court held that granting a declaratory judgment in appeal on a question of law raised directly in an underlying dispute was an exercise of judicial power. This conclusion was reached notwithstanding the fact that the underlying criminal dispute constituting the relevant 'matter' had been resolved. The case arose when the High Court was petitioned to exercise appellate jurisdiction over decisions of the Queensland Court of Criminal Appeal, a decision which had arisen from a procedure which enabled the Attorney General of Queensland to refer a point of law to the Court of Criminal Appeal in cases where an accused person had been acquitted of a charge. The High Court could only hear appeals from decisions made in the exercise of judicial power by the Court of Criminal Appeal. The High Court held that this procedure for obtaining a 'correct statement of the law' was within judicial power. The Court said:

> Although the indictment itself cannot serve as a vehicle for the further determination of the charge in consequence of the statement by counsel for the Crown and the subsequent filing of the nolle prosequi, the reference and the decision on the reference arise out of the proceedings on the indictment and are a statutory extension of those proceedings... In this situation, the decision on the reference was made with respect to a 'matter' which was the subject-matter of the legal proceedings at first instance and was not divorced from the ordinary administration of the law. The decision is therefore to be distinguished from the abstract declaration sought by the Executive in *re Judiciary and Navigation Acts*. That opinion was academic, in response to an abstract question, and hypothetical in the sense that it was unrelated to any actual controversy between parties.[124]

Having surveyed these three cases it is not possible to say whether a declaration of incompatibility provision would be an exercise of judicial power. It is certainly no surprise then, that distinguished commentators have taken different views on this question.[125]

In the terms of *Bass*, a declaration of incompatibility:

a) would be a final decision and, presumably, would be a conclusive decision on the construction of the given statute in light of the Australian Charter of Human Rights as a whole;

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[121] *Bass* (n 120) 356.
[122] [2002] HCA 47, 211 CLR 119.
[123] *Solomons* (n 122) 136.
[124] *Mellifont v A-G (Qld)* (1991) 173 CLR 289 (HCA) 304.
[125] Cf McHugh (n 101) 18 to Dominique Dalla-Pozza, George Williams, 'The Constitutional Validity of Declarations of Incompatibility in Australian Charters of Rights' (2007) 12 Deakin Law Review 1; Pamela Tate, 'Victoria's Charter of Human Rights and Responsibilities: A Contribution to the Debate on a National Charter' (address delivered at the Commonwealth Law Conference, Hong Kong, 6 April 2009) 15.

b) would arise from the legal analysis of established facts, rather than hypothetical determination;
c) may or may not aim at quelling the controversy between the parties.

Following the reasoning in *Bass*, the first two criteria seem to be satisfied. The question of constitutionality would turn on the extent to which a declaration of incompatibility is connected to resolving the controversy between the parties. Here *Mellifont* seems the case that is most on point. As in *Mellifont*, a declaration of incompatibility is a final declaration on the construction of a statute that is at issue in a matter. As in *Mellifont*, the process of statutory construction is central in quelling the controversy and determining the rights of the parties in the underlying matter, but the declaratory remedy itself does not affect the rights of the parties to the matter.

This approach would depend on the court treating the fact that the declaratory remedy is not enforceable between the parties as only one element in the overall characterization—as it was in *Mellifont*—rather than the decisive criterion—as suggested by the Hon Michael McHugh. The view that the enforceability of a declaration is not a decisive criterion for the exercise of judicial power is supported by *Brandy v HREOC*.[126] In that case the four judge majority said: 'it is not essential to the exercise of judicial power that the tribunal should be called upon to execute its own decision'.[127]

An additional argument in favour of constitutionality is that a declaration of incompatibility conforms to the policy rationale behind the separation of powers. In issuing a declaration the court would be exercising legal expertise in the construction of statutes, rather than providing advice to government. To this effect, McHugh J has held that '[t]he exercise of judicial power often involves the making of orders upon determining that a particular fact or status exists.'[128]

In light of this analysis the following conclusions and recommendations can be made:

a) A declaration of incompatibility should be available in a matter only if argument has been heard on whether the legislation can be interpreted in a way that is compatible with human rights on the facts of the case.
b) Such a declaration of incompatibility provision would probably be constitutional.
c) The declaration of incompatibility mechanism should be drafted as simply as possible, so that the procedures and orders involved do not give the court a role in redrafting the incompatible statute.
d) Nevertheless, a risk of unconstitutionality remains. Therefore, a declaration of incompatibility provision should be drafted in a way that allows it to be severed from the Australian Charter of Human Rights, if unconstitutional.
e) Our recommendation is that the provision read:

> 'If a Court is satisfied that legislation, or subordinate legislation, cannot be interpreted in a way that is compatible with a right set down in this Act, it may make a declaration of incompatibility.'

[126] (1995) 183 CLR 245 (HCA).
[127] *Brandy* (n 126) 269.
[128] *Fardon v Attorney-General (Qld)* [2004] HCA 46, 223 CLR 575 [34] cited with approval in *Thomas v Mowbray* [2007] HCA 33, 233 CLR 307, [15].

5.2.4 Judicial power: Interpretation of statutes compatible with human rights

Writing extra-judicially, the Hon Michael McHugh has also suggested that a provision of an Australian Charter of Human Rights that required Commonwealth legislation to be interpreted compatibly with human rights would risk involving courts in unconstitutional 'rewriting' of legislation.[129] The basis for this supposed unconstitutionality is that requiring courts to interpret legislation contrary to the intention of parliament would be to impose a quasi-legislative function on courts, beyond the scope of judicial power. This was not an issue in the UK as the UK has no strict constitutional separation of powers.

There is a spectrum ranging from permissible judicial techniques of construction and interpretation to impermissible quasi-legislative functions. For example, in *Strickland v Rocla Concrete Pipes Ltd* the general legislation in question had been drafted to operate by the cumulative effect of different constitutional heads of power, each supporting spheres of operation of the statute. The Court held that the Commonwealth lacked the power to legislate generally. It then held that the scheme of the Act was too complex for the court to read down or sever sections of the legislation as required by the *Acts Interpretation Act 1901*(Cth). Therefore, the entire Act was invalid.

The High Court has already developed an interpretative doctrine that fundamental rights are not overridden by statute unless the statute is clear in its intention to do so. Unless parliament makes unmistakably clear its intention to abrogate or suspend a fundamental freedom, the courts will not construe a statute as having that operation.[130] The range of 'fundamental rights' protected by this principle is unclear. It is almost certainly a narrower range of rights than would be contained in an Australian Charter of Human Rights. Nevertheless, the principle shows that a judicial preference for rights compatible interpretations is consistent with the exercise of judicial power.

For the purpose of drafting an Australian Charter of Human Rights, it is unnecessary to define the limit imposed on the interpretative licence of courts by the concept of judicial power. Under both the common law and the *Acts Interpretation Act 1901* (Cth) it is accepted that legislation should be interpreted according to its purpose. A consistent interpretation provision can be drafted to allow courts the widest possible freedom to interpret legislation compatibly with human rights, without infringing the constitutional boundary.

Our recommendation is that the consistent interpretation provision should read:

> 'So far as it is possible to do so consistently with its purpose, a Commonwealth law must be interpreted in a way that is compatible with the human rights set down in this Act.'

This provision would still leave courts considerable scope to pursue human rights compatible interpretations. All legislation has some degree of indeterminacy. Courts regularly illustrate that a range of interpretations are plausible by handing down split decisions. The proposed provision is still likely to allow for courts to advance human rights consistent interpretations in these circumstances. For example, it unlikely that *Ghaidan v Godin-Mendoza*, a case regularly taken to epitomise the expansive approach to human rights-consistent interpretation taken under the HRA, would have been decided differently under the proposed provision.[131] The case involved the housing rights of a tenant's homosexual partner. The statute provided a right of succession to a person who had lived with the tenant 'as his or her wife or husband'. It was clear that this phrase covered a heterosexual de facto partner. The question was whether this phrase should be construed to cover a homosexual partner. It is no stretch to suggest that a person in a de facto homosexual relationship is living with someone 'as wife' or 'as husband'. This is compatible with

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[129] McHugh (n 101) 27.
[130] *Re Bolton Ex parte Beane* (1987) 162 CLR 514 (HCA) 523 (Brennan J), cited with approval in *Coco v R* (1994) 179 CLR 427 (HCA) 437 (Mason CJ, Brennan, Gaudron, McHugh JJ).
[131] *Ghaidan* (n 110).

the most likely characterization of the purpose of the statute—to secure the housing rights of de facto partners.

For these reasons, a provision requiring the courts to interpret legislation compatibly with human rights could be drafted consistently with the exercise of judicial power and still be effective in protecting human rights.

5.4 The risk of implied repeal if Australia adopted a legislative dialogue model

There is a risk that subsequent legislation that is inconsistent with human rights could be taken to impliedly repeal an Australian Charter of Human Rights. The basis for this concern is the principle of construction that:

> Where the provisions of two statutes are in conflict, so much so that they cannot be reconciled one with the other, there is a consequential need to resolve the problem created by the conflict. In the case of conflicting statutes enacted by one legislature the problem is resolved by regarding the later statute as impliedly repealing the earlier statute to the extent of the inconsistency.[132]

The risk of implied repeal if an Australian Charter of Human Rights took the form of a dialogue model is low. The provision of an Australian Charter of Human Rights that requires courts to interpret legislation compatibly with human rights, so far as possible, is unlikely to be vulnerable to implied repeal. The process of ascertaining whether later legislation may be interpreted compatibly with the earlier Australian Charter of Human Rights differs little from the process of construction by which a court would determine if any later statute can be reconciled with an earlier statute. If a later statute can be interpreted compatibly with human rights there is no conflict between the two statutes. If a later statute cannot be interpreted compatibly with human rights there is also no conflict between the two statutes. This is because under a dialogue model, the Australian Charter of Human Rights will yield to any legislation that cannot be interpreted compatibly with human rights. There being no potential for conflict between the Australian Charter of Human Rights and later law, there is no risk of implied repeal.

Further, the provision of an Australian Charter of Human Rights that requires public authorities to act consistently with human rights is unlikely to be vulnerable to implied repeal, even by broad statutory grants of discretion. The principles of the Charter of Human Rights would act as general limits to these discretions, in the same way that the *Administrative Decisions (Judicial Review) Act 1977* (Cth) operates as a valid limit on subsequent grants of public power.

5.5 The Canadian legislative model

Before the adoption of the Canadian Charter of Rights and Freedoms in 1982, Canada had a statutory bill of rights in the form of the *Canadian Bill of Rights 1960* ('the Bill of Rights'). In the Canadian context, this form of rights instrument was considered to be too weak, paving the way for the later constitutional Charter. Largely, this was the result of timid judicial use of the Bill of Rights. The Bill of Rights is still technically in force in Canada, but the adoption of the Charter has rendered it essentially obsolete. However the instrument itself was an innovation, and one which may be better suited to Australia's constitutional context.

The Bill of Rights was enacted by the Federal Parliament in 1960 as an ordinary statute, and was thus made applicable only to federal laws. The operation of the Bill of Rights is set out in s 2, which states that:

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[132] *University of Wollongong v Metwally* (1984) 158 CLR 447 (HCA) 463 (Mason J).

> Every law of Canada shall, unless it is expressly declared by an Act of the Parliament of Canada that it shall operate notwithstanding the Canadian Bill of Rights, be so construed and applied as not to abrogate, abridge or infringe or to authorize the abrogation, abridgment or infringement of any of the rights or freedoms herein recognized and declared, and in particular, no law of Canada shall be construed or applied so as to…

Legislation cannot actually be struck down by the judiciary for violating the Bill of Rights, as the bill was not an entrenched constitutional document that takes precedence over ordinary legislation. The operation of the Bill of Rights instead turns on the meaning given to the words 'construed and applied as not to…'. This language was interpreted by the Supreme Court in *R v Drybones*[133] to mean that courts should construe a statute to avoid as far as possible any conflict with the Bill of Rights, but if such conflict cannot be avoided by interpretation, they should then hold the statute to be 'inoperative'.[134] The notion of 'inoperativity' is drawn from Canadian constitutional law on the division of powers: as explained by Ritchie J in *Drybones*, the effect on the inconsistent statute is 'somewhat analogous to a case where valid provincial legislation in an otherwise unoccupied field ceases to be operative by reason of conflicting federal legislation'.[135] Although the Bill of Rights is not a constitutional instrument, it is nevertheless generally regarded as more powerful than an ordinary statute: in *Hogan v The Queen*[136] it was described as a 'quasi-constitutional instrument'.

The concept of 'inoperativity' is different from invalidation—the law is not struck down, its operation is simply suspended, or it is deemed not to apply in a particular case. If the government wants the legislation to apply in a subsequent case, it can pass an amendment to the legislation providing that the legislation, or a specific provision, shall operate 'notwithstanding' the Bill of Rights. This type of provision would require the government to state its intention expressly. This process places an imperative on the government and parliament to respond in the wake of a judicial decision if they wish the law to continue to operate. This is in contrast to a declaration of incompatibility which provides mores scope for government to 'drag its feet' and delay its response even if it has no strong justification for doing so. The 'inoperativity approach' also has the distinct advantage of actually providing a remedy to a victim of a human rights violation, unlike a declaration of incompatibility. In the latter case, while the law may be changed in the future, the actual victim may be left with no remedy.

5.6 The risk of implied repeal if Australia adopted the Canadian legislative model

The principle of implied repeal is of greater importance to a *Canadian Bill of Rights*-style instrument. To function properly, such a Charter would have to render inconsistent future legislation inoperative. To do this the Charter would have to override the normal principle of statutory construction: that later legislation impliedly repeals inconsistent earlier legislation. This would be done via a provision stating that the Australian Charter of Human Rights was to prevail over inconsistent legislation unless the later statute was explicitly specified to operate notwithstanding its incompatibility with the Australian Charter of Human Rights. This type of provision can be understood as a type of 'manner and form' requirement, as it is a procedural rule on future legislation (though not a substantive limitation).

The use of a manner and form requirement could raise constitutional concerns. In *Attorney-General (WA) v Marquet*[137] the High Court was faced with a manner and form provision that required laws amending Western Australian electoral boundaries to be passed by an absolute majority of parliament. On the facts of the case, the majority held that the manner and form

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[133] [1970] SCR 282.
[134] Peter Hogg, *Constitutional Law of Canada* (loose-leaf edn Thomson Carswell, Scarborough 2007) 32–5.
[135] *Drybones* (n 133) 294–5.
[136] [1975] 2 SCR 574.
[137] [2003] HCA 67, 217 CLR 545.

clause was valid because it was imposed by Commonwealth legislation, to which the Western Australian parliament was 'relevantly subordinate'.[138] The four majority judges did not decide whether the West Australian parliament could have bound itself by such a law.[139] Kirby J, in the minority, held that State legislature could not have imposed such a restriction on itself.[140] Commentators have since argued that the *Marquet* judgment suggests that the neither the States nor the Commonwealth would be able to bind themselves by manner and form requirement.[141] In *Thomas v Mowbray* Hayne J confronted the issue more directly, stating that a '… provision of federal law which purports to fetter the Federal Parliament in its future action … is invalid. The Federal Parliament may not fetter the future exercise of its legislative powers. It has no power to do so'.[142]

However, the discussion of manner and form requirements has focused on cases where the relevant 'manner' provisions impose more demanding voting requirements for the repeal of a given law and hence make the law more difficult to repeal or amend by a future parliament. Such provisions give rise to real concerns about fettering a future parliament. There is a distinction between a provision that imposes voting requirements for repeal and one that requires repeal by use of explicit words in normal legislation, passed pursuant to *normal* legislative procedures. The former fetters the future exercise of powers, the latter only requires that the parliament is clear in the exercise of its normal powers in the future. On this basis, a provision requiring repeal to be in the specified 'form' of a notwithstanding clause might be thought of as establishing a principle of construction, rather than unconstitutionally entrenching a statute. As long as the Australian Charter of Human Rights is itself a normal act of parliament, and can be repealed or amended through ordinary legislative processes by a future parliament, then we argue that the Act will not fetter the Federal Parliament in a way that would be unconstitutional.

5.6 Conclusions

In the absence of any consideration of the possible introduction of a constitutional human rights instrument, we are of the view that an Australian Charter of Human Rights should be an Act of the Commonwealth Parliament.

We are of the view that the legislative dialogue model is a preferable model for an Australian Charter of Human Rights. The legislative dialogue model has been adopted in various forms by the UK,[143] New Zealand,[144] Victoria,[145] and the ACT.[146] This model therefore has the benefit of being tested in Australia, and in two comparable jurisdictions. In the UK the adoption of a dialogue model has proven to create important systemic change, allowing the courts to declare legislation to be incompatible with human rights, and providing political incentive for parliament to review the legislation in question.

An Australian Charter of Human Rights should contain an interpretative provision. Given constitutional constraints, we recommend that the consistent interpretation provision should read:

> 'So far as it is possible to do so consistently with its purpose, a Commonwealth law must be interpreted in a way that is compatible with the human rights set down in this Act.'

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[138] *Marquet* (n 137) [68].
[139] *Marquet* (n 137) [68].
[140] *Marquet* (n 137) [155].
[141] Tony Blackshield, George Williams, *Australian Constitution Law and Theory: Commentary and Materials* (4th edn The Federation Press, Sydney 2006) 518.
[142] *Mowbray* (n 128) [456].
[143] UK Human Rights Act (n 59).
[144] NZBORA (n 56).
[145] Victoria Charter of Rights and Responsibilities (n 57).
[146] ACT Human Rights Act (n 58).

A key feature of the legislative dialogue model is the ability of a court to declare that legislation is inconsistent with the rights enumerated within a human rights instrument. We are of the view that an Australian Charter of Human Rights should contain such a mechanism. In light of the discussion set out above, we believe that it is possible that such a mechanism, if carefully drafted, is likely to be considered constitutional in the Australian federal context. An example of such a provision could read:

> 'If a Court is satisfied that legislation, or subordinate legislation, cannot be interpreted in a way that is compatible with a right set down in this Act, it may make a declaration of incompatibility.'

If however, it were decided that an Australian Charter of Human Rights would not contain a mechanism for a declaration of incompatibility, then we argue that it is preferable to adopt the approach taken by the Canadian legislative model. Such a model would not fetter a future parliament in an impermissible way, but would require parliament to make clear when laws are intended to operate despite their inconsistency with an Australian Charter of Human Rights.

Recommendation 8:
An Australian Charter of Human Rights should be an Act of the Commonwealth Parliament, aimed at encouraging dialogue among the executive, the legislature and the judiciary. It should follow either the legislative dialogue model or the Canadian legislative model, with any model adopted taking into account the nuances of the Australian constitutional system.

Recommendation 9:
An Australian Charter of Human Rights should contain a provision requiring legislation to be interpreted compatibly with the human rights enumerated. The provision could be drafted as follows: 'So far as it is possible to do so consistently with its purpose, a Commonwealth law must be interpreted in a way that is compatible with the human rights set down in this Act'.

Recommendation 10:
If an Australian Charter of Human Rights adopts a legislative dialogue model, it should contain a mechanism allowing a court to make a declaration of incompatibility.

Recommendation 11:
If an Australian Charter of Human Rights employs a declaration of incompatibility style of judicial review, it should contain a provision requiring the government to table a copy of, and its response to, such declarations within a specified time period.

6. The role of the Australian Human Rights Commission

Human rights reform is of course about more than the protection of legal rights by courts: it is also about the promotion of a culture of awareness of and respect for human rights within the various arms and levels of government, within the public and private sector more broadly, and among the public as a whole. Typically, the institutional vehicle for the promotion of a human rights culture is an independent human rights commission.

The UK experience indicates the importance of an independent statuory authority to pursue the goal of a human rights culture, and that Australia is fortunate to have an established human rights commission. The establishment of a UK Commission—the Equality and Human Rights Commision ('EHRC') on 1 October 2007—came almost a decade after the enactment of the HRA. In 2003, the JCHR considered the need for a new Commission in the light of the experience of the HRA and found that the case was 'compelling'.[147]

The JCHR noted that the HRA was intended to usher in a culture of human rights which emphasised not simply the non-interference by public bodies with people's rights, but also a more positive concept of rights. Government intended that public bodies would take positive steps to protect these rights, and that their practices, policies and goals would be shaped around a respect for human rights. It was also hoped that there would be an improvement in people's awareness of, understanding of, and thus capacity to take advantage of, their rights. Further, the JCHR noted that government could not be the 'sole advocate' of a culture of human rights; since human rights mediate the relationship between the citizen and the State, a government could not be an impartial champion of such rights. The JCHR listened to a wide range of evidence and found that the development of a culture of respect for human rights had in fact faltered in the UK and that, following the passage of the HRA, awareness of human rights was 'ebbing' both among UK public bodies and the public generally. Litigation under the HRA was essentially a measure of last resort, and not the best means of developing a human rights culture. Accordingly, the Joint Committee found that the establishment of an independent Human Rights Commission was essential.

6.1 The Australian Human Rights Commission and the Equality and Human Rights Commission compared

The Australian Human Rights Commission ('AHRC') is an independent statutory organisation with a range of functions and responsibilities, both promotional and relating to law enforcement. As regards its promotional work, the AHRC raises public awareness about human rights through education programmes for schools, employers, the legal profession and the wider community. The AHRC influences policy via the provision of advice to parliament and government. It also undertakes research and holds public inquiries into important human rights, particularly those relating to issues of discrimination. As regards its law enforcement functions, the AHRC provides legal advice before courts, both as an *amicus curiae* and by way of intervention in judicial proceedings.[148] The AHRC can also investigate and resolve complaints brought by individuals concerning alleged breaches of human rights (in particular discrimination and harassment) by way of a process of conciliation. Although the outcome of conciliation is not legally binding, the

[147] Joint Committee of Human Rights 'The Case for a Human Rights Commission' (6th Report, 2002–03 Session) HC (2002–03) 489, HL (2002–03) 489 <http://www.publications.parliament.uk/pa/jt200203/jtselect/jtrights/67/67.pdf> accessed 18 April 2009, 5.

[148] Australian Human Rights Commission, 'Infosheet: About the Australian Human Rights Commission' <http://www.humanrights.gov.au/about/publications/brochure/info_sheet2007.html> accessed 18 April 2009.

process is nevertheless conducted in the shadow of the law. At present, the AHRC's main focus is on those aspects of human rights which relate to discrimination and harassment.[149]

Within the UK, the new EHRC opened on 1 October 2007.[150] The EHRC is an independent statutory organisation established under the Equality Act 2006 (UK). The EHRC has taken over the responsibilities of three previous commissions, namely, the Equal Opportunities Commission, the Commission for Racial Equality, and the Disability Rights Commission. The EHRC builds on the work of these previous commissions, and also assumes responsibility for other aspects of equality (such as age and sexual orientation), as well as human rights more broadly. This focus on issues of discrimination and equality, partly a consequence of the EHRC's institutional origins, suggests important parallels between the EHRC and the AHRC.

The EHRC has a wide range of promotional duties encompassing both human rights issues generally, and also those human rights issues which have an equality or discrimination dimension.[151] These functions overlap largely with those of the AHRC: raising public awareness of human rights; holding inquiries and commissioning research; monitoring government progress and seeking to influence government policy where human rights concerns are at stake. However, the EHRC enjoys a wider range of legal powers than the AHRC. Beyond providing assistance to individuals involved in legal proceedings and intervening as a third party in judicial proceedings, the EHRC can institute legal proceedings itself. Although the competence of the EHRC is limited in some respects to those human rights cases involving an equality/discrimination dimension,[152] the EHRC can institute judicial review or intervene in judicial proceedings in free-standing human rights cases.

6.2 The potential role of the Australian Human Rights Commission under an Australian Charter of Human Rights

The UK experience provides some guidance for what type of functions the AHRC may be given if Australia adopts a statutory human rights instrument.

6.2.1 Promoting the goals of an Australian Charter of Human Rights

If an Australian Charter of Human Rights is introduced, the AHRC should adopt responsibilities in relation to the Charter in line with its existing responsibilities in relation to major discrimination legislation. It is not feasible to expect a central Commission to handle all issues relating to human rights promotion. Human rights awareness will also be promoted, for example, by non-governmental organisations and community groups. The promotional responsibilities of a Commission will be strengthened through coordination and cooperation with these other groups. But having a central Commission is valuable as it constitutes a highly visible face, an authoritative resource, and a first port-of-call in the area of human rights. The AHRC can play a crucial role in ensuring Australians are well-informed of their rights under an Australian Charter of Human Rights, as well as serving as a check on scare-mongering and false impressions of what the

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[149] In particular, the AHRC has a responsibility for administering the following Australian federal laws: Age Discrimination Act 2004 (Cth), Disability Discrimination Act 1992 (Cth), Racial Discrimination Act 1975 (Cth), Sex Discrimination Act 1984 (Cth), and Human Rights and Equal Opportunity Commission Act 1986 (Cth).

[150] The EHRC only has responsibility for Great Britain—i.e. England, Wales and Scotland. In Northern Ireland, there exists the Equality Commission for Northern Ireland, established under the Northern Ireland Act 1998. The following discussion will mainly limit itself to the EHRC.

[151] EHRC <http://www.equalityhumanrights.com/en/aboutus/whatwedo/pages/whatwedo.aspx> accessed 18 April 2009.

[152] The EHRC can provide assistance to individuals who are or may become party to legal proceedings only where there is an equality dimension to the proceedings, but not in respect of free-standing human rights cases. The EHRC can make arrangements for conciliation only in respect of disputes involving an equality dimension. See Equality Act 2006 (UK) ss 27–8.

Charter requires. The AHRC can also continue to monitor government and to suggest how policies and laws can better respect and promote human rights.

6.2.2 Powers to initiate and intervene in legal proceedings

Consideration must also be given to the law enforcement powers of an AHRC with an expanded mandate under an Australian Charter of Human Rights.

The JCHR, when clarifying what the structure and functions of the new UK Commission ought to be, argued that the primary function of the new Commission ought to be promotional. It was concerned that a Commission which takes a leading role in respect of law enforcement and individual human rights proceedings faces a draining of its resources from its promotional work, as evidenced by the experience of the Equality Commission for Northern Ireland.[153] The JCHR nonetheless argued that the EHRC should be able to act as a third party intervener, and that it should be able to support and institute cases of national importance, but intended that these powers would underpin the EHRC's primary promotional functions. As has been noted previously, the EHRC has been given considerable law enforcement powers. The EHRC regards its law enforcement role as complementing its main promotional work, in line with the recommendations of the JCHR.

Since it is an authoritative national resource for human rights issues, and equality issues in particular, intervention by the Australian Human Rights Commission will be valuable for cases under an Australian Charter of Human Rights. Intervention can assist the court in dealing with the wider balancing questions that are typically raised in human rights cases.[154] The JCHR's view in relation to the EHRC was emphatic, noting that the knowledge and expertise of an authoritative, independent human rights commission *needed* to be made available to the courts through intervention proceedings.[155] These same considerations ought to apply to the AHRC, whose existing capacity to intervene in judicial proceedings in discrimination proceedings ought to be expanded to proceedings involving the full range of human rights cases under a Federal Charter.

At present the AHRC cannot initiate judicial proceedings in its own right. If, as we propose, an Australian Charter of Human Rights provides for a cause of action for human rights violation by a public body, it would be appropriate for the AHRC to be able to bring judicial proceedings in its own right.

As noted, the EHRC enjoys a statutory power to initiate judicial review claims concerning the actions of public authorities where such actions have led, or are likely to lead, to a violation of human rights protected by the HRA. The JCHR's reasoning in recommending that the EHCR enjoy this power is instructive for the Australian position.[156] Above all, the Committee emphasised that there is a wider public interest in ensuring that public authorities comply with human rights law. Accordingly, it would be 'indefensible' if a situation arose where a commission, expressly charged with promoting and protecting human rights, had identified serious threats to those rights but lacked the ability to avert or challenge such threats.[157] As regards the concern that the Commission's power to initiate claims may lead to excessive litigation, the JCHR recognised two compelling counter-arguments. First, a responsible commission whose primary function is promotional, and not law enforcement, will itself not wish to see its resources drained from its promotional work in order to bring judicial claims. The JCHR noted that the EHRC is

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[153] Joint Committee of Human Rights, 'Commission for Equality and Human Rights: Structure, Functions and Powers' (11th Report, 2003–04 Session) <http://www.publications.parliament.uk/pa/jt200304/jtselect/jtrights/78/78.pdf> accessed 18 April 2009 (JCHR 2003) [67].
[154] JCHR 2003 (n 153) [79].
[155] JCHR 2003 (n 153) [79].
[156] JCHR 2003 (n 153) [90]–[93].
[157] JCHR 2003 (n 153) [91].

accountable to government, parliament and the courts regarding the way in which it exercises its powers.[158] In particular, the courts must themselves give permission for judicial review to proceed. There is no evidence that the EHRC has behaved irresponsibly in bringing claims of its own. Secondly, there are clear preventative benefits to allowing a commission to bring a claim *before* individuals are the subject of a human rights violation.[159]

Administrative law in both Australia and the UK has always provided the Attorney-General with standing to seek judicial review of public authorities, in order to uphold the public interest in having public officials obey the law. As the role of Attorney-General has become more politicised—in Australia it is one of the senior ministerial positions—the expectation that the Attorney-General's standing fulfills this objective has waned. Only rarely is this power used. The AHRC, as an independent body, can fulfill this function of ensuring that public bodies obey the Australian Charter of Human Rights, and should be empowered to do so.

6.3 Conclusions

We recommend that:

a) The AHRC's mandate be expanded, in order that it can move from its present focus on discrimination cases to the full range of human rights cases under an Australian Charter of Human Rights. This expansion has worked successfully in the UK under the EHRC.
b) This expansion in the AHRC's mandate should not be delayed, but should be contemporaneous with the passage of an Australian Charter of Human Rights. The UK experience indicates that delay can lead to a loss of momentum as regards human rights reform, particularly in relation to more positive aspects of human rights protection.
c) The AHRC's role should remain primarily promotional but it should be given expanded law enforcement powers to complement its promotional role. These powers should include the right to intervene in human rights cases and to bring judicial proceedings where there is a public interest in doing so.

Recommendation 12:
An Australian Charter of Human Rights should be accompanied by an expansion in the mandate of the Australian Human Rights Commission to all rights contained in the Charter. The Commission should be given law enforcement powers to complement its promotional role.

[158] JCHR 2003 (n 152) [90].
[159] JCHR 2003 (n 152) [91].

7. Standing

If, as we recommend, an Australian Charter of Human Rights includes a free-standing cause of action against public bodies for a violation of human rights, then the question arises as to *who* has standing to bring such a cause of action.

As a preliminary matter, it is assumed that an Australian Charter of Rights would apply to all people within the jurisdiction of Australia regardless of their status as Australian citizens or permanent residents.

Standing has particular significance for the enforcement of human rights law. A narrow victim-based standing rule prevents a concerned observer or civil society organisation from bringing a cause of action in relation to victims who are unwilling (eg, because of fear) or unable (eg, because they do not understand their treatment to be oppression) to bring a case themselves. It may also prevent some breaches of human rights from being adjudicated, for instance, because the victims do not realise they are victims (eg, unlawful surveillance).

The UK adopted a victim-based standing rule under the HRA but judicial interpretation at the European level, a gradual expansion of intervention rules at a domestic level and recently introduced public interest standing for the EHRC (see Section 6 above), have addressed some of the concerns raised by a victim-based rule. However, alternative approaches are available, which provide directly for public interest standing, and we suggest that this is more suited to the context and purpose of an Australian Charter of Human Rights.

7.1 Standing under the HRA

Under the HRA standing to bring an action against a public authority is limited to those who are 'victims' of a violation of Convention rights.[160] In interpreting this rule, the relevant standard is whether a person is a victim of human rights violation under Article 34 of the ECHR.[161] Article 34 grants a remedy to 'any person, non-governmental organisation or group of individuals claiming to be the victim of a violation' of Convention rights. According to the case law that has developed on this standing provision, anyone affected, or potentially affected, by the unlawful act would be considered a victim.

In instituting this standing rule, the HRA departs from the general, broader standing rule in UK administrative law, which requires an applicant to have a 'sufficient interest' to bring an action.

On the other hand, by incorporating the ECHR standing test, the UK adopted a broad interpretation of who is a 'victim' of a human rights violation, as it has been developed by the ECtHR. The interpretation of the 'affected or potentially affected' requirement extends to:

a) Situations where the challenged measures have not been specifically implemented or applied against a person, but nonetheless they are affected by them. In *Klass v Federal Republic of Germany*,[162] the applicants challenged a system of secret surveillance, where they could not prove evidentially that the system had been applied against them, but

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[160] Section 7(1): 'A person who claims that a public authority has acted (or proposes to act) in a way which is made unlawful by section 6(1) may—

(a) bring proceedings against the authority under this Act in the appropriate court or tribunal, or

(b) rely on the Convention right or rights concerned in any legal proceedings,

but only if he is (or would be) a victim of the unlawful act.'

[161] Section 7(7): 'For the purposes of this section, a person is a victim of an unlawful act only if he would be a victim for the purposes of Article 34 of the Convention if proceedings were brought in the European Court of Human Rights in respect of that act.'

were able to prove that the system had the potential to be applied against them. In *Dudgeon v UK*,[163] the applicant was able to challenge a law criminalising homosexual activities based on the existence of the law and the limited threat that it could be applied against him, even though he had not personally been prosecuted for his activities. These types of situations call for an expansive approach to the idea of being 'affected' by an unlawful act, else there is a risk that significant human rights violations will go unchallenged.

b) Applications from relatives and dependants of the actual victim where the latter is unable to bring a personal claim.[164] This is particularly important in relation to the right to life, where a victim's life has been taken.[165]

Additionally, as discussed in the previous section, the EHRC, created in 2007, has powers to bring actions in the public interest, which provides an independent body to ensure that human rights law is respected by public bodies.

Both the interpretative breadth given to the victim requirement and the recent inclusion of public interest standing for the EHRC address some of the concerns about ensuring that public bodies are held to their legal obligations.

7.2 Applicability of the United Kingdom's experience to Australia

The standing provision adopted under s 7 of the HRA, and its direct incorporation of the ECHR victim test relates closely to the Act's function of incorporating the ECHR into UK law. The government's understanding at the time of using the mechanism to pre-empt adverse decisions at Strasbourg serves to explain why a broader standing test was not adopted.

Australia is not limited in this manner, and can instead choose a standing test that is appropriate to the desired function of an Australian Charter of Human Rights. In particular, there is a strong case to be made that weak judicial review, aimed at generating accountability and public debate, is better fit with a broad standing rule. The Australian Capital Territory Consultation Committee, having examined the UK's position on standing, recommended that, in relation to the interpretation of a statute or a declaration of incompatibility, there should be no special standing provision. The Committee further recommended that, in relation to the actions of public authorities, a person should be an *aggrieved person*, defined to mean a person who has an interest beyond a member of the general public and beyond a person simply holding the belief that a type of conduct should be prevented; but this interest need not be a pecuniary or property interest.

In their final form however, the Australian Capital Territory and Victorian instruments have not specifically addressed standing. As noted earlier, neither Act in its initial form[166] provided an independent cause of action for a human rights violation; each requiring a person to have a separate cause of action to which they may attach (or 'piggy-back') a claim that their rights under the respective instruments have been violated. The ostensible position is that, under these instruments, the relevant standing test from existing administrative law has been implemented, in relation to whatever type of primary claim a person is making to the court.

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[162] (1978) 2 EHRR 214 (ECtHR).
[163] (1982) 4 EHRR 149 (ECtHR).
[164] *R v Secretary of State for the Home Department, exp Holub* [2001] 1 WLR 1359 (CA Civ).
[165] Eg *McCann v United Kingdom* (1995) 21 EHRR 97 (ECtHR).
[166] Although, as noted above, the Australian Capital Territory Human Rights Act 2004 has recently been amended to provide for a free-standing cause of action. See ACT Human Rights Act (n 58) s 40C.

7.3 Improving on the approach of the United Kingdom

There is a good case to be made for broader standing rules than those in the UK and for allowing civil society groups to bring actions. There is a systemic concern relating to the nature of human rights adjudication if standing is narrow. The arguments and evidence of the two parties to the litigation may be insufficient to provide full information to the court. A narrow focus on the violation of the rights of a specific claimant can prevent arguments being made about how laws are applied generally, or how particular systemic practices operate, because such arguments go beyond the personal subjective interest of the claimant.[167] If only affected victims may bring cases, the scope of cases arguably will be narrower because counsel likely will seek to do what increases the chances of having their clients' specific injustice lifted. Furthermore, civil society organisations can often present better legal arguments, afford better legal advice and undertake broader research. Certainly, an independent human rights commission can in principal perform these functions, but such an organisation would have limited resources. As discussed above, the EHRC has deliberately limited itself in the use of its legal powers in order not to divert resources from its overall goal of promotion. Civil society organisations can complement the public interest function of a human rights commission.

The common rationale for excluding standing for civil society groups is that a broad standing test would generate a flood of litigation. However, these groups can play a valuable role in 'sifting cases', identifying test cases with a good chance of success and mitigating the risk of a flood of ill-prepared or ill-advised individual applications.[168] By bringing a well-focused case early on, and by providing factual and legal expertise, a specialist group can make matters easier for the courts and assist the development of the law.[169]

In the public law context, the Australian Law Reform Commission[170] has similarly rejected the 'floodgates' arguments that courts would be inundated with litigants if standing rules were broad. In its 1996 report on standing to sue for public remedies, the Commission noted the courts' general powers to strike out proceedings which are frivolous, vexatious or an abuse of process. This is an important safeguard that will continue to exist even if broad standing is granted under an Australian Charter of Human Rights.

Some legal systems have minimised the problem of standing through the partial solution of generous intervention rules, and commonly allow amicus briefs. The UK has been slow to adopt these techniques, but prior to the HRA, the House of Lords began to allow civil liberties groups to address them on carefully defined issues (though it remains in the court's discretion to allow amicus briefs). As a consequence, major NGOs, such as Liberty (the National Council for Civil Liberties) have been able to intervene in a wide range of important cases under the HRA.

Alternatively, in Canada, the constitutional case law of the Canadian Supreme Court has developed a discretionary public interest standing. The courts have a power to grant 'public interest standing' where three tests are satisfied:

a) there is a justiciable case;
b) there is a serious issue at stake; and
c) there is no other avenue or party to test the legality of government action.[171]

A third alternative is provided by the South African Constitution which formally provides for broad standing as a matter of right. Standing under s 38 includes:

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[167] The ECtHR offers mixed experience in this regard. See Joanna Miles, 'Standing under the Human Rights Act' (2000) 59 Cambridge Law Journal 133, 139.
[168] Miles (n 167) 145.
[169] Miles (n 167) 145, 147.
[170] Australian Law Reform Commission, 'Beyond the Doorkeeper: Standing to Sue for Public Remedies' (Report No 78, AGPS 1996).
[171] See *Finlay v Canada (Minister of Finance)* [1986] 2 SCR 607.

a) anyone acting in their own interest;
b) anyone acting on behalf of another person who cannot act in their own name;
c) anyone acting as a member of, or in the interest of, a group or class of persons;
d) anyone acting in the public interest; and
e) an association acting in the interest of its members.

Some people have expressed concerned with the individualised and atomised conception of justice that a human rights culture may entail. But this is far from inevitable. Both the Canadian and South African rules reflect an approach to human rights that see these values not foremostly as a dispute between an individual and the State, the resolution of which is only relevant to those parties; but sees the respect for human rights as a principle of good government and a matter for public concern. If we think of human rights as a code for government practice, and a matter of securing care and a culture of justification in the exercise of public power, then an expansive standing rule will better secure that outcome, by emphasising human rights as a matter of community concern and good government.

7.4 Conclusions

We recommend that an Australian Charter of Human Rights should include a broad standing rule for challenges to legislation on the grounds of incompatibility with human rights. We believe this is the best fit with the public awareness and dialogue purpose of a legislative human rights instrument. Rather than limit standing to challenge legislation, any improper or vexatious litigation can be dismissed via the courts' general powers to strike out proceedings which are frivolous, vexatious or an abuse of process.

It has been recommended earlier in this submission that an Australian Charter of Human Rights should provide an independent cause of action for a breach of human rights law by a public body. If this proposal is followed, then it would be best to provide for an explicit standing rule in the Charter of Human Rights itself. There is no consistent standing rule in federal judicial review that could be easily relied upon for a Charter of Human Rights, as standing rules vary depending on the remedy sought.[172]

We recommend that the general standing rule to claim a human rights violation by a public authority should be that a person or group has a sufficient interest in the matter, in keeping with one well-known standard in administrative law. We also recommend that the court be empowered to grant public interest standing on the basis of a test similar to the public interest standing test under Canadian constitutional law. An additional safeguard, by virtue of constitutional requirements relating to the exercise of judicial power, is that any public interest standing rule would necessarily be limited to justiciable 'matters' (discussed above in Section 5). This would limit actions under an Australian Charter of Human Rights to cases where there has been an act or omission by a public official that allegedly violates a right. The provision for public interest standing, based on clear rules to ascertain whether such standing is necessary, is a well-placed compromise between the broad and narrow standing rules in South Africa and the UK respectively.

[172] Roger Douglas, 'Standing' in Matthew Groves, HP Lee (eds), *Australian Administrative Law: Fundamentals, Principles, and Doctrine* (Cambridge, CUP 2007) 158; Michael Head, *Administrative Law:: Context and Critique* (2nd edn Federation Press, Sydney 2008) 122–8.

Recommendation 13:
An Australian Charter of Human Rights should include a broad standing rule to bring a claim in respect of an act or decision of a public authority, where that act or decision is allegedly unlawful under the Charter. That rule should require that a person or group has a sufficient interest in the matter, in keeping with the standard applicable in administrative law. An Australian Charter of Human Rights should also contain a provision for public interest standing.

8. Remedies

Much of the preceding discussion has focused on the interrelationship between human rights and legislation, proposed or enacted. However, a properly functioning human rights document is also one which ensures that executive actions comport with its guarantees. To this end, a remedial jurisdiction is an essential and pivotal part of any document which aims to protect human rights effectively. The question that arises from this is whether remedial jurisdiction should be provided for expressly or alternatively should be left to the courts to develop. We suggest below that, while statutory authority is not necessary for a functioning remedial regime to develop, statutory authority for such development is desirable. Finally, we address the question of what types of remedies should be provided for. We recommend a broad remedial jurisdiction, similar to that in the UK, Canada and South Africa. Specific prescription of the types of orders that a court could make in order to redress rights violations is unnecessarily restrictive.

8.1 The desirability of a remedial jurisdiction

A remedial jurisdiction is important to allow victims of a breach of human rights to take action to vindicate their rights. In the words of the former President of the New Zealand Court of Appeal: 'A statement of fundamental human rights would be a hollow shell and the enactment of a Bill of Rights an elaborate charade if remedies were not available for breach.'[173]

Further, an effective remedial jurisdiction is essential if an Australian Charter of Human Rights is to comply with Australia's obligations under the Universal Declaration of Human Rights and other core human rights treaties. The Universal Declaration provides that '[e]veryone has the right to an effective remedy by the competent national authorities for acts violating the fundamental rights granted him by the constitution or by law',[174] and the ICCPR, to similar effect, provides that:

> … Each State Party to the present Covenant undertakes:
> (a) To ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity;
> (b) To ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy;
> (c) To ensure that the competent authorities shall enforce such remedies when granted. [175]

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[173] *R v Goodwin* [1993] 2 NZLR 153 (CA) 191. To similar effect, Casey J has suggested that a Bill of Rights would be '… no more than legislative window-dressing, of no practical consequence, in the absence of appropriate remedies for those whose rights and freedoms have been violated'. See *Simpson v A-G (Baigent's Case)* [1994] 3 NZLR 667 (CA) 691.
[174] Universal Declaration of Human Rights (adopted 10 December 1948 UNGA Res 217 A(III) (UDHR) art 8.
[175] ICCPR (n 44) art 2(3). It is noted that Australia entered a reservation to this article to the effect that its realisation would be in accordance with Australian constitutional processes, respecting the division of authority between federal and state governments. This reservation does not alter the core of the obligation. Article 9(5) also provides a specific right to compensation for those who have been subject to unlawful arrest or detention and Article 14(6) provides a right to compensation in cases of wrongful conviction. The UN Committee on Economic, Social and Cultural Rights in its General Comment No 9 has noted that a similar obligation to develop the possibilities for judicial remedies obtains under the ICSECR. See Committee on Economic, Social and Cultural Rights 'General Comment 9: The Domestic Application of the Covenant' (1998) UN Doc No E/C.12/1998/24.

8.2 Express statutory provision for remedies

Most written constitutions and domestic bills of rights make explicit provision for a remedy in case of breach.[176] To give some prominent examples, the Canadian Charter of Rights and Freedoms provides that:

> 24. (1) Anyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances.
> …
> (2) Where, in proceedings under subsection (1), a court concludes that evidence was obtained in a manner that infringed or denied any rights or freedoms guaranteed by this Charter, the evidence shall be excluded if it is established that, having regard to all the circumstances, the admission of it in the proceedings would bring the administration of justice into disrepute.

The South African Constitution provides that a court 'may grant appropriate relief, including a declaration of rights'.[177] The HRA under s 8, also gives the courts a broad power: 'in relation to any act (or proposed act) of a public authority which the court finds is (or would be) unlawful, it may grant such relief or remedy, or make such order, within its powers as it considers just and appropriate'. However, the court is not to award damages unless, taking account of all the circumstances of the case, the court is satisfied that 'the award is necessary to afford just satisfaction' to the victim.

A decision not to include an explicit remedies clause does not necessarily foreclose the possibility for judicial development of remedies. The lack of an explicit remedies provision in the German Basic Law or in the United States and Irish Constitutions did not prevent the senior courts of these countries from inferring a 'power to order appropriate remedies where a violation of constitutional rights has occurred'.[178] Nor did the absence of a statutory remedial provision prevent the New Zealand courts from developing an extensive remedial jurisdiction under the *New Zealand Bill of Rights Act 1990* ('NZBORA').

The New Zealand example deserves examination, as it demonstrates how human rights can be protected, even within the constraints of a non-supreme, statutory Bill of Rights.[179] The original proposal for the NZBORA[180] included an explicit remedies clause modelled on s 24(1) of the Canadian Charter (quoted above). This clause did not appear in the New Zealand Bill of Rights Bill 1989 as introduced to parliament, for reasons which are not clearly apparent.[181] In any event, New Zealand courts became active in developing a remedial jurisdiction and invoked the NZBORA in support of awarding remedies that, 'if not new, at least have an expanded scope'.[182] The decision not to include an explicit remedies provision was interpreted as evincing a choice to leave the courts' remedial jurisdiction unconstrained.[183] The courts reasoned that parliament would not have intended for the NZBORA to be toothless,[184] and that a failure to award an

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[176] See Dinah Shelton, *Remedies in International Human Rights Law* (2nd edn Oxford University Press, Oxford 2005) 27–30.
[177] Constitution of South Africa (n 54) s 38.
[178] Andrew S Butler, Petra Butler, *The New Zealand Bill of Rights Act: A Commentary* (LexisNexis NZ, Wellington 2005) 966.
[179] The New Zealand Bill of Rights Act 1990 was essentially a compromise document, following the rejection of a proposed supreme law Bill of Rights. For discussion of the background and implementation of the NZBORA, see Sir Kenneth Keith '"Concerning Change": The Adoption and Implementation of the New Zealand Bill of Rights Act 1990' (2000) 31 Victoria University of Wellington Law Review 721; Paul Rishworth 'The Birth and Rebirth of the Bill of Rights' in Grant Huscroft, Paul Rishworth (eds), *Rights and Freedoms* (Brookers, Wellington 1995).
[180] Geoffrey Palmer, *A Bill of Rights for New Zealand: A White Paper* (Government Printer, Wellington 1985).
[181] See the discussion in Butler and Butler (n 178) 968–9.
[182] Paul Rishworth, Grant Huscroft, Scott Optican, *The New Zealand Bill of Rights* (Oxford University Press, Oxford 2003) 811.
[183] See *Baigent's Case* (n 173) 718.
[184] Or, in the courts' words, a 'hollow shell' an 'elaborate charade' or mere 'window dressing'. See *R v Goodwin* [1993] 2 NZLR 153 (CA) 191; *Baigent's Case* (n 173) 691.

effective remedy for breaches would be inconsistent with the objectives of the NZBORA, expressed in the Long Title as to 'affirm, protect and promote human rights and fundamental freedoms in New Zealand' and '[t]o affirm New Zealand's commitment to the International Covenant on Civil and Political Rights'.[185]

In *Baigent's Case*[186] the New Zealand Court of Appeal held that monetary damages could be awarded for violations of the NZBORA. While there was no explicit statutory authorisation for this move, *Baigent's Case* ought not to be viewed as an example of unjustified judicial activism. Indeed, following the Court of Appeal's decision, the Law Commission was invited by the Government to consider the development and make recommendations. It did so, and reported to the Minister of Justice that the development was positive, and should not be countered by amending legislation.[187] The Government accepted this advice and did not propose any amending legislation.

A similar development occurred in the criminal sphere. While the NZBORA does not contain an explicit provision authorising the exclusion of evidence in a criminal trial where that evidence was obtained in breach of the defendant's rights,[188] the Court of Appeal developed this as a remedial possibility at an early stage.[189]

The New Zealand experience demonstrates that the courts can develop a functional remedial regime in the absence of statutory guidance. One might conclude that an Australian Charter of Human Rights could remain silent on the question of remedies, secure in the knowledge that the courts would develop an effective remedial process. However, this result is far from certain. An Australian court determining the question presented to the New Zealand Court of Appeal in *Baigent's Case* may reach the opposite conclusion—that the absence of a remedial provision in the Charter of Rights restrains its ability to grant a remedy.[190] Therefore, if a remedial jurisdiction is anticipated, it is preferable to provide for this explicitly in the Bill of Rights.

8.3 Types of remedies

The question at this point is: in what terms ought the courts be empowered to remedy breaches?

A range of remedies may be considered—from the issue of declaratory judgments, through to the grant of compensatory, punitive or exemplary damages, non-monetary remedies, the exclusion of evidence, a grant of a writ of habeas corpus, or an award of costs.[191] However, anticipating in advance the full range of circumstances in which rights might be breached, and therefore attempting to predict the remedial powers that may be necessary, is an impossible task. This is perhaps reflected in the fact that most comparable jurisdictions do not attempt to do so. To this end, the ICCPR, HRA, Canadian Charter of Rights and Freedoms and South African Constitution all require or empower courts to provide a remedy that is just and appropriate in the circumstances, without any prescription as to what form such a remedy may take. Human rights

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185 See *Baigent's Case* (n 172) 717–18.

186 *Baigent's Case* (n 173). See the discussion in P Butler, 'Human Rights and Parliamentary Sovereignty in New Zealand' (2004) 35 Victoria University at Wellington Law Review 341, 348–50.

187 Petra Butler 'Australian Bills of Rights: The ACT and Beyond: Lessons from New Zealand' (Conference Paper, 2006) <http://acthra.anu.edu.au/articles/Butler%20P-%20lessons%20from%20NZ.pdf> accessed on 29 May 2009, 5.

188 As in Canada, see Canadian Charter of Rights and Freedoms, s 24(1).

189 See *R v Kirifi* [1992] 2 NZLR 257 (CA).

190 Butler and Butler have noted that the New Zealand experience could easily have been different: 'a differently constituted Court of Appeal, approaching BORA against the background of its legislative history, might have adopted a much more conservative approach to remedies, utilizing only those remedies generally available at common law and exercising them by reference to criteria established by the common law, with no re-weighing of interests to reflect the new statutory status of the guaranteed rights'. See Butler and Butler (n 178) 1111–12.

191 Shelton (n 176) 199-361.

violations may call for innovative remedies, which may include apologies, rehabilitation, satisfaction, and guarantees of non-repetition.

Any requirement that an individual have a freestanding cause of action (e.g. in tort) before a human rights action can accrue should be strongly resisted as inconsistent with the nature of human rights protection. Justice Blanchard of the New Zealand Supreme Court has drawn attention to the important distinction in the function of remedies for human rights violation and the function of common law damages or equitable compensation.[192] This echoes the conclusion reached by Justice Ackerman of the South African Constitutional Court after surveying the judicial practice in the United States of America, Canada, the UK, Trinidad and Tobago, New Zealand, Ireland, India, Sri Lanka, Germany and the ECtHR: that remedies for the violation of human right are public law remedies that differ fundamentally from remedies granted between private citizens.[193]

8.4 Conclusions

In light of the above discussion we recommend that an Australian Charter of Human Rights expressly confers a remedial jurisdiction on courts. This remedial jurisdiction should be a general one: empowering courts to provide a just and effective remedy in the circumstances.

Recommendation 14:
An Australian Charter of Human Rights should expressly confer a remedial jurisdiction on courts, empowering them to provide a just and effective remedy in the circumstances.

[192] *Taunoa v A-G* [2008] 1 NZLR 429 (NZSC) [259]: In relation to public law remedies, 'making amends to a victim is generally a secondary or subsidiary function. It is usually less important than bringing the infringing conduct to an end and ensuring future compliance with the law by governmental agencies and officials, which is the primary function of public law.'
[193] *Fose v Minister of Safety and Security* 1997 (3) SA 786 (CC) [55].

9. The position of the common law and the horizontal application of human rights

This section concerns two closely related issues. First, how should an Australian Charter of Human Rights affect the common law; and second, how, if at all, should such an Act impact on legal relationships between private individuals (sometimes termed the 'horizontal' application of human rights). Here we recommend the approach taken by the UK under the HRA as enabling the effective protection of enshrined rights and the values underlying those rights, while preserving the coherence and certainty essential to the effective operation of the common law.

9.1 The United Kingdom experience: s 6 of the HRA

It is important to recognise that a convergence between the common law and rights under the ECHR was apparent prior to the HRA coming into force.[194] The former Lord Chief Justice, Lord Woolf, has indeed gone as far as to suggest that human rights would eventually have been absorbed into the common law even without the enactment of the HRA, as a result of 'the changing legal environment and the increased importance attached to the rule of law around the globe'.[195] Pre-HRA examples of this convergence include the common law of libel[196] and the common law test of bias.[197] A post-HRA example is the House of Lords decision in *A (No 2) v Secretary of State for the Home Department*,[198] regarding the admissibility of evidence obtained by torture, and decided on the basis of common law principles thought to pre-date the HRA.

The starting point for any discussion of the position under the HRA is s 6(1), which provides that 'it is unlawful for a public authority to act in a way which is incompatible with a ECHR right'. Section 6(3)(a) explicitly incorporates courts and tribunals into the definition of 'public authority', so that when UK courts and tribunals are undertaking their judicial role—including when applying or developing the common law—they must do so in a manner compatible with enshrined rights contained in the ECHR.

Prior to the HRA coming into force, the legal implications of the s 6 duty on the courts were a source of much academic debate. At least in theory, the obligation might have been interpreted in a number of different ways. It could, for example, have been found to be a relatively weak obligation merely to have regard to human rights principles, among other factors, when interpreting the common law; as imposing a stronger obligation requiring the courts to actively develop the common law to ensure compatibility in all circumstances; or, as was suggested by some, it could have been interpreted as a radical directive to re-consider entire bodies of settled common law principles and as requiring the creation of new causes of action between private individuals for *inter se* breaches of their human rights.[199]

The courts have, in practice, adopted a middle course, which has been termed "indirect horizontal effect'.[200] This can be illustrated by reference to the post-HRA case law on the

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[194] Department of Constitutional Affairs (n 7) 11.

[195] See Lord Harry Woolf, 'Has the Human Rights Act made Judicial Review Redundant?' (ALBA Annual Lecture, 23 November 2005) cited in Department of Constitutional Affairs (n 8) 11.

[196] *Reynolds v Times Newspapers* [2001] 2 AC 127.

[197] *Lawal v Northern Spirit* [2003] UKHL 35, [2004] 1 All ER 187.

[198] [2005] UKHL 71, [2006] 2 AC 221.

[199] See, in particular, Sir William Wade 'The United Kingdom Bill of Rights' in Beatson, Forsyth, and Hare (n 55); Murray Hunt, 'The Horizontal Effect of the Human Rights Act' [1998] PL 423; Sir Richard Buxton, 'The Human Rights Act and Private Law' (2000) 116 LQR. 48; Gavin Phillipson, 'The Human Rights Act, "Horizontal Effect" and the Common Law: A Bang or a Whimper?' (1999) 62 MLR 824.

[200] For example, Gavin Phillipson, 'Transforming Breach of Confidence? Towards a Common Law Right of Privacy under the Human Rights Act' (2003) 66 MLR 726, 729.

common law tort of breach of confidence, which engages the competing considerations of the right to freedom of expression in ECHR Article 10, and the right to private and family life in ECHR Article 8. Lord Woolf CJ has described how the court is able to give effect to the s 6 duty by 'absorbing the rights which Arts 8 and 10 protect into the long-established action for breach of confidence…giving a new strength and breadth to the action so that it accommodates the requirements of these articles'.[201] In the leading House of Lords case of *Campbell v MGN Limited*,[202] their Lordships were unanimous in describing the process as a balancing of values underlying enshrined human rights, with inevitable implications for the development of the common law.[203]

The steps taken by the courts in this area have been described as a 'potentially radical transformation of the ability of the confidence action to protect privacy'.[204] However, the courts have not gone so far as to create a new freestanding tort of breach of privacy. And whilst there is no doubt that the impetus for the development of the tort of breach of confidence has derived in significant part from Convention rights, it would be wrong to suggest that other influences have not also been at work. To give just one example, the opinion of Gleeson CJ in the Australian High Court case of *Australian Broadcasting Corpn v Lenah Game Meats Pty Ltd*[205] has featured prominently in the judicial reasoning behind the development of the law.[206]

The courts' interpretation of the s 6 duty can therefore be seen to have intensified and systemised the pre-existing imperative towards convergence with the general values underlying rights contained in the ECHR. However, the duty has been interpreted as neither mandating the judicial legislation of novel causes of action between private individuals, nor imposing any absolute duty to radically reform the common law overnight. It also does not appear to have displaced or necessarily relegated the importance of other sources of persuasive authority that the courts have traditionally relied upon to develop the common law.

9.2 Other jurisdictions

The role of the courts in the UK is not unusual among domestic constitutional arrangements protecting human rights. The NZBORA[207] and the South African Constitution[208] also explicitly declare the judiciary to be bound by enshrined rights, to similar effect. In Canada, despite s 32(1) of the Canadian Charter of Rights and Freedoms appearing to exclude the courts from the definition of public authorities bound by Charter rights, in *RWDSU v Dolphin Delivery Ltd*,[209] the Canadian Supreme Court ruled that, pursuant to the courts' constitutional duties, 'the judiciary ought to apply and develop the principles of the common law in a manner consistent with the fundamental values enshrined in the Constitution'.[210]

This judicial role is reflected in a broader consensus that 'indirect horizontal effect' should be given to human rights. Even in South Africa, where the Bill of Rights appears to sanction a stronger species of horizontal application,[211] the courts have in practice effected only a moderate species of indirect horizontality akin to the UK position.[212] Likewise, in Germany, the courts have developed a doctrine of '*mittelbare drittwirkung*' requiring all public authorities to give effect

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[201] *A v B plc* [2003] QB 195 (CA Civ) 202.
[202] [2004] UKHL 22, [2004] 2 AC 457.
[203] See in particular *Campbell* (n 202) [36] (Lord Hoffmann).
[204] Phillipson 2003 (n 199) 728.
[205] [2001] 208 CLR 199.
[206] See, eg, *Campbell* (n 202) [22], [73], [93]–[94], [96], [135]–[136], [166].
[207] (n 56) s 3(a).
[208] (n 54) s 8(1).
[209] [1986] 2 SCR 573.
[210] *Dolphin* (n 208) [39] (McIntyre J).
[211] Section 8(2) binds 'natural or a juristic person if, and to the extent that, it is applicable, taking into account the nature of the right and the nature of any duty imposed by the right.'
[212] See in particular *Du Plessis v De Klerk* (1996) 3 SA 850 (CC).

to an 'objective system of values' radiating from constitutionally entrenched rights, including when the courts adjudicate on private law disputes.[213]

9.3 Australia and the 'single common law' doctrine

The position adopted in the two Australian state human rights instruments enacted to date departs from this consensus. The interpretation obligation in s 32(1) of the Victorian Charter of Human Rights and Responsibilities Act 2006 is limited to 'statutory provisions' thus excluding the common law, and while the Charter does contain a duty equivalent to s 6 of the HRA 1998 (in s 38), s 4(j) of the Charter explicitly excludes 'courts and tribunals' from the definition of 'public authority' when exercising judicial, as opposed to administrative, functions. This exclusion is mirrored in the recently inserted s 5A of the ACT Human Rights Act 2004. The principal reason for the exclusion is evident from the Report of the Victorian Human Rights Consultation Committee, which took the view that the 'Single Common Law' doctrine 'means that, while the Victorian courts may be bound by the Charter as institutions, there is a limited capacity for them to be required to apply the rights in the development of the common law…because no one State can change the 'unified common law' of Australia'.[214] However, this problem does not arise in respect of a federal human rights charter.

The further concern has been raised that a duty on the courts to develop the common law in accordance with enshrined human rights could 'present problems for consistency in the development of the law…similar fact situations could give rise to different reasoning or decisions in different courts… [so as to]… undermine consistency, which is critical to the effective functioning of the legal system'.[215]

This concern appears misplaced. First, there is no reason, in principle, why a shift in the values guiding the development of the unified common law ought necessarily to lead to greater inconsistency. Second, this concern is not borne out by the UK experience. As described above, prior to the enactment of the HRA, the courts were already increasingly recognizing human rights principles in the common law. In addition, akin to the current approach in Australia,[216] an uncertain and limited account of human rights principles in treaty and customary international law was permitted in particular contexts. The more systematic consideration of human rights introduced by s 6 arguably regularized the position so as to benefit legal certainty and enhance the coherence of the common law. The moderate approach of the courts both in the UK and abroad further serves to allay the concern that a duty to act in accordance with enshrined rights, or permitting a degree of horizontal effect to such rights, would detrimentally undermine legal certainty.

9.4 Conclusions

The twin issues of the relationship between the common law and protected rights and the extent of horizontal application of those rights, implicate a number of competing considerations. On the one hand the question of the effective protection of rights, and the values underlying rights, is engaged. Imposing a duty on the courts to develop or interpret the common law in accordance with these rights and values clearly facilitates effective protection. To an extent such a duty may also simply intensify and systematise an existing trend within the common law. On the other hand, considerations of legal certainty and the coherence of the common law are also engaged. A

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[213] See in particular, *Lüth* (BVerfGE 7, 198 ff). See also a discussion of this case in Dawn Oliver, Jörg Fedtke (eds) *Human Rights and the Private Sphere* (Routledge-Cavendish, Abingdon 2007) 142–3.

[214] Rights, Responsibilities and Respect (n 90) [3.4.1].

[215] Engaging in the Debate (n 22) 60.

[216] Engaging in the Debate (n 22) 25–6

radical interpretation of a duty to develop or interpret the common law would undoubtedly call into question settled common law principles.

It is submitted that the position in the UK under the HRA has much to commend it in terms of the balance struck between these competing considerations. The s 6 duty on the courts when exercising their judicial functions has enabled the systematic protection of the values underlying enshrined Convention rights, though not to the exclusion of other relevant considerations. However, by adopting a moderate model of indirect horizontality and refusing to countenance novel private causes of action, the courts have ensured that this protection does not come at the expense of legal certainty. In view of the consensus of approach across other key jurisdictions, and the shared foundations and continuing parallels between the English and Australian common law and judiciary, there seems little to suggest that, were the UK position to be adopted by Australia, the result would be any different.

We therefore recommend that an Australian Charter of Human Rights adopt the UK position and impose a duty on courts to develop the common law in accordance with enshrined rights thereby permitting a degree of indirect horizontality of rights. This can be achieved by including courts in the definition of public authorities under a duty to act compatibly with enshrined rights, or by expressly including the common law within the scope of the courts' duty to interpret laws consistently with enshrined rights.

Recommendation 15:
An Australian Charter of Human Rights should include courts in the definition of a public authority.

10. The application of an Australian Charter of Human Rights to the States

Ideally, an Australian Charter of Human Rights should apply to both the Commonwealth and the States. The majority of public policy in areas such as education, health, transport and housing is delivered by State public authorities. Preventing both State and the federal public authorities from acting incompatibly with human rights would ensure far broader protection of human rights than binding only federal public authorities. For the same reason it would be preferable if both State and federal law were interpreted compatibly with human rights.

A uniform national human rights regime would also have a number of practical advantages. The first is simplicity. The second is consistency in the interpretation of common language in statutes of different jurisdictions within the Australian federation. Identical legislation is enacted by the Commonwealth and the States on a number of different subject matters.

However, there are limits on the ability of the Commonwealth to bind States. Any attempt of the Commonwealth to extend the reach of an Australian Charter of Human Rights to the States:

a) would need to be within the legislative power of the Commonwealth under s 51 of the Constitution. The only power that could support an Australian Charter of Human Rights as it applied to the States would be the external affairs power;
b) would need to render inconsistent State law inoperative via s 109 of the Constitution; and
c) would need to respect the limits on Commonwealth power implied by the doctrine of 'intergovernmental immunities'.

This section of the submission provides a brief overview of the law on each of these three points. It then applies the relevant legal principles to determine whether different provisions of an Australian Charter of Human Rights could constitutionally be extended to bind the States. The conclusion of this analysis is that the Commonwealth could not impose all the provisions of an Australian Charter of Human Rights, as we envisage it, on the States.

In its final part, this section examines mechanisms by which the Commonwealth could seek to extend the operation of an Australian Charter of Human Rights to the States, within the bounds imposed by the Constitution.

10.1 The Constitutional principles

10.1.1 Section 51 (xxix)

Under the external affairs power the Commonwealth has legislative powers to enact laws implementing an international treaty. A Commonwealth law purporting to implement an international treaty must be in conformity with the treaty. The test is that:

> …the law must be reasonably capable of being considered appropriate and adapted to implementing the treaty. Thus, it is for the legislature to choose the means by which it carries into or gives effect to the treaty provided that the means chosen are reasonably considered appropriate and adapted to that end.[217]

[217] *Victoria v Commonwealth* (1995) 187 CLR 416 (HCA) 487.

The external affairs power will also support laws that partially implement a treaty and laws implementing a treaty that interfere in areas that would otherwise be the exclusive prerogative of the States.[218] For example, the ICCPR places an obligation on all parties to the Covenant 'to respect and to ensure to all individuals within its territory'.[219] On this basis, measures that are appropriate and adapted to ensuring that the human rights enumerated in the ICCPR are respected by the States are *prima facie* within Commonwealth power.

10.1.2 Section 109

Section 109 is the means by which Commonwealth law achieves 'supremacy' over State law. If a valid Commonwealth law is inconsistent with a State law then the State law is inoperative to the extent of the inconsistency.[220] Inconsistency is not limited to a situation where there is a strict impossibility of simultaneous compliance with both the State and the federal law. There is inconsistency if a Commonwealth law confers a legal right which the State law diminishes, or if the Commonwealth intends to 'cover the field' in the area—to the exclusion of competing regulatory systems.[221] When two laws are inconsistent the State law is automatically inoperative.

10.1.3 Intergovernmental immunities

The immunity of State governments from certain forms of legislative interference by the Commonwealth is implied by the federal structure of the Constitution. The doctrine protects States themselves, as functioning governments, rather than State law per se. The principle of inter-governmental immunities does not provide a general immunity from Commonwealth law to the public authorities of States, or the employees of States. The basic principle is that, relying on its affirmative s 51 powers, the Commonwealth can bind state governments, and all their constituent authorities, subject to the limit set by the principle of intergovernmental immunities. Previously, the immunity of State governments was thought to have two limbs:

> This review of the authorities shows that the principle is now well established and that it consists of two elements: (1) the prohibition against discrimination which involves the placing on the States of special burdens or disabilities; and (2) the prohibition against laws of general application which operate to destroy or curtail the continued existence of the States or their capacity to function as governments.[222]

However, the current view is that there is one single limitation, which protects the capacity of a State to function as a government:

> There is, in our view, but one limitation, though the apparent expression of it varies with the form of the legislation under consideration. The question presented by the doctrine in any given case requires assessment of the impact of particular laws by such criteria as 'special burden' and 'curtailment' of 'capacity' of the State 'to function as governments'. These criteria are to be applied by consideration not only of the form bust also 'the substance and actual operation' of the federal law.[223]

The practical boundary of the 'capacity to function as a government' principle is uncertain. That said, jurisprudence suggests it protects the basic institutional relationships that constitute State government and the ability of States to determine which individuals perform what functions within these basic institutional arrangements. *In Re Australian Education Union* the Court said:

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[218] *Commonwealth v Tasmania* (n 50).
[219] ICCPR (n 44) art 2(1).
[220] *Carter v Egg and Egg Pulp Marketing Board (Vic)* (1942) 66 CLR 557 (HCA) 573.
[221] Blackshield and Williams (n 141) 376.
[222] *Queensland Electricity Commission v Commonwealth* (1985) 159 CLR 192 (HCA) 217 (Mason J).
[223] *Austin v Commonwealth* [2003] HCA 3, 215 CLR 185, [124].

> In our view, also critical to a State's capacity to function as a government is its ability, not only to determine the number identity of those whom it wishes to engage at the higher levels of government, but also to determine the terms and conditions on which those persons shall be engaged. Hence Ministers ... and judges would clearly fall within that group.[224]

10.2 The ability of the Commonwealth to bind the States

10.2.1 Can the Commonwealth legislate for the interpretation of primary State law?

A basic principle of federal government is that the Commonwealth is unable to control State's exercise of State legislative power. The six judge majority in the *Native Title* case said: '[n]or does the Parliament of the Commonwealth have power directly to control the content of a State law'.[225]

This is neither due to the construction of s 51, nor to the application of the principle of intergovernmental immunity. Rather, s 107 of the Constitution invests the States with the power to make laws, save only where power on a topic is exclusively conferred on the Commonwealth or expressly withdrawn for the States by the Constitution. The Commonwealth may render State law inoperative by virtue of the operation of s 109, but it cannot withdraw the ability of States to make law.[226] On this basis, an attempt by the Commonwealth to stipulate that State law should be interpreted compatibly with human rights as laid down in Commonwealth law would probably be unconstitutional.

10.2.2 Can the Commonwealth impose a declaration of incompatibility mechanism on State courts exercising State jurisdiction?

A declaration of incompatibility procedure could not function satisfactorily without a consistent interpretation provision. Thus, the question of whether the Commonwealth could impose a declaration of incompatibility procedure on State courts would only arise in the unlikely event that the Commonwealth could legislate for State law to be interpreted compatibly with human rights.

A declaration of incompatibility procedure would also be likely to breach the principle of intergovernmental immunities. A declaration of incompatibility would affect the relationship between the State legislature and the State judiciary in altering the process of interpretation of State law. It would also impose positive procedural obligations on the State Attorney-General. Both effects go to the core functions of a State as a self-governing unit. They are far deeper interferences with a State than the interference with State judge's superannuation payments that was found to be impermissible in *Austin*.[227] An attempt by the Commonwealth to introduce a declaration of incompatibility mechanism with respect to State law would almost certainly be unconstitutional.

10.2.3 Can the Commonwealth prevent State public authorities from acting in a way that is incompatible with human rights?

The Commonwealth could clearly rely on the external affairs power to prevent State public authorities from acting in a way that was inconsistent with the human rights listed in the ICCPR. Such a provision would be appropriate and adapted to ensuring that that these rights were respected within Australia's territory. In general, s 109 would not be required, State authorities would simply be bound by Commonwealth law. If State law required State public authorities to

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[224] *Re Australian Education Union; Ex p Victoria* (1995) 184 CLR 188 (HCA) 233.
[225] *Western Australia v Commonwealth* (1995) 183 CLR 373 (HCA) 464.
[226] *WA v Commonwealth* (n 226) 464.
[227] *Austin* (n 223).

act inconsistently with human rights then it would be rendered inoperative by s 109 to that extent.

With respect to most public authorities, there would be no issue of intergovernmental immunity. The Commonwealth is capable of passing laws that affect State public authorities.[228] The only issue would be whether the Commonwealth can bind senior State government officials—ministers and judges for example—in the discharge of their official functions. The authority of *Austin* suggests that it could not. On the other hand, s 9 of the *Racial Discrimination Act 1975* (Cth) forbids any person from committing an act of racial discrimination. The Act binds the Crown in right of the States, and there is nothing in the text of the Act to suggest that persons carrying out official functions on behalf of States are exempt from s 9. To our knowledge, this section has not been subject to constitutional challenge.

In the absence of certainty on this point, there are two possible options:

a) The Commonwealth could forbid State public authorities from acting incompatibly with human rights but exempt senior public officials of States; or
b) The Commonwealth could forbid State public authorities from acting incompatibly with human rights, accepting a risk that the provision could be read down if subject to Constitutional challenge.

10.2.4 Can the Commonwealth override State law that is incompatible with human right?

The Commonwealth could clearly rely on the external affairs power to override State law that was inconsistent with the human rights listed in the ICCPR or ICESCR. Such a provision would be appropriate and adapted to ensuring that that these rights of individuals were respected within Australia's territory. The operation of s 109 would be straightforward: State law that was inconsistent with human rights would be inoperative.

Although such a provision in Commonwealth law would potentially affect a broad array of State legislation, it would not interfere with the basic working of State government. The plenary powers of State legislature would remain. The basic institutions of the legislature, executive and judiciary of the States would continue to operate in the same way and with the same powers. Therefore, there would be no breach of intergovernmental immunity.

10.3 Conclusions

On any view, it would be impossible for the Commonwealth to impose an Australian Charter of Human Rights on the States which duplicates our preferred structure. It is highly unlikely that the Commonwealth could provide that State laws should be interpreted consistently with human rights, or implement a declaration of incompatibility mechanism with respect to State law. This constitutional situation poses a serious challenge to effective human rights protection in Australia. There are at least four possible ways that the Commonwealth could seek to circumvent this constitutional limitation and extend the coverage of human rights protection to the States:

1. <u>The Commonwealth could legislate solely to bind the Commonwealth and try to encourage the States to adopt equivalent legislation.</u>

Advantages: Simple, constitutional and respectful of the States as political institutions.

[228] For example, *Re Australian Education Union* (n 224).

Disadvantages: Relies on political will at a State level, which may be lacking; no mechanism to ensure that State legislation is consistent with the Commonwealth approach; a cooperative national patchwork could be undone by one unsympathetic State government at any point in the future.

2. The Commonwealth could legislate solely to bind the Commonwealth and make the grant of federal money to the States conditional on the States enacting equivalent legislation.

Advantages: More likely to compel States to enact equivalent legislation, as States rely on grants of money from generated through federal taxation.

Disadvantages: Politicises human rights protection; likely to antagonize States that are unwilling participants in the system; unrealistic, because Commonwealth is likely to have higher policy priorities when negotiating annual funding arrangements with the States.

3. The Commonwealth could legislate to prevent States from acting inconsistently with human rights

Advantages: Constitutional

Disadvantages: Holds States to a higher standard than the Commonwealth, in that State legislation that is incompatible with human rights would be invalid while Commonwealth legislation that is incompatible with human rights would only be subject to a declaration of incompatibility.

4. The Commonwealth could legislate to prevent States from acting inconsistently with human rights, but exempt States that enacted a human rights act equivalent to the Australian Charter of Human Rights.

Advantages: Probably constitutional; provides legal incentive for States to enact equivalent legislation, without making human rights protection an issue in the wider political bargaining of Commonwealth-State relations; Victoria and Australian Capital Territory already have human rights instruments that could be adopted as a platform.

Disadvantages: Added complexity, particularly in determining whether a State human rights act meets the standard for exemption from the Commonwealth act; States that are unable or unwilling to enact human rights legislation would be held to a higher standard than the Commonwealth; small risk of unconstitutionality.

In our view, the best course of action would be for the Commonwealth to legislate to prevent the States from acting in any way that is inconsistent with human rights, while exempting States that had enacted their own statutory human rights instrument broadly equivalent to the Australian Charter of Human Rights.

It is likely that a statutory framework of this sort would be constitutional. The external affairs power is broad enough to support Commonwealth power to bind the States. It follows that s 51 is broad enough to provide exemption for certain States, provided the exemption itself is reasonably appropriate and adapted to implementing the treaty in question.

It is unlikely that there would be constitutional problems with exempting States from the Australian Charter of Human Rights if they enacted equivalent human rights legislation. A rollback provision that was added to the *Racial Discrimination Act 1975* (Cth) was considered in

University of Wollongong v Metwally.[229] The new s 6A provided that Commonwealth legislation and equivalent State legislation were intended to be operate concurrently. The High Court had previously determined that the Commonwealth act covered the field, to the exclusion of State law. However, both the majority and dissenting judges agreed that the Commonwealth could provide for the prospective operation of consistent State and federal law. *Metwally* shows that it is perfectly constitutional for the Commonwealth to completely occupy a legislative area, to the exclusion of States, and then permit the operation of defined and limited classes of consistent State legislation.

Current Commonwealth environment protection legislation demonstrates a relationship between the Commonwealth and the States similar to that which we envisage leading to the introduction of equivalent human rights legislation in all Australian jurisdictions. Chapter 2 of the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) requires Commonwealth approval for any action that is likely to have certain effects on the environment. Thus Chapter 2 prevents the States acting without Commonwealth approval. However, Chapter 3, Part 5 provides that Commonwealth approval is not required if the Commonwealth has made a bilateral management agreement with a State with respect to the specific actions in question. In practice, the basic requirement of approval prevents States from acting alone forcing States to engage with the Commonwealth on the subject of environmental protection. The bilateral agreement provisions allow the Commonwealth to devolve the management of certain environmental issues to the States if it is satisfied that the State regulatory framework is sufficiently robust.

As a result of the analysis above, we propose the following basic structure as a starting point for drafting:

Section X

1 This Section binds the crown in right of the States.

2 It is unlawful for a State or Territory, or a public authority of a State or Territory, to do any act that is incompatible with the rights set down in this Act.

Section Y

1 Section X does not apply to a State or Territory if a law of that State or Territory:

a) Protects the human rights set out in this Act; and

b) Protects those human rights from infringement by that State or Territory in a manner and to an extent that is substantially identical to the manner and extent of protection provided to human rights from infringement by the Commonwealth; and

c) Protects those human rights from infringement by a public authority of that State or Territory in a manner and to an extent that is substantially identical to the manner and extent of protection provided to human rights from infringement by a public authority of the Commonwealth..

2 The Commonwealth Attorney-General may certify that a law of a State meets the requirements of Section Y (1)).

[229] (1984) 158 CLR 447 (HCA).

Recommendation 16:
An Australian Charter of Human Rights should, insofar as constitutionally permissible, adopt mechanisms extending its operations to the Australian States. In this respect, it may be possible for the Commonwealth to legislate to prevent States from acting in any way inconsistent with the human rights enumerated in the Charter, while exempting States that have enacted their own equivalent human rights instruments.