



LEGISLATIVE COUNCIL

THE HON. PETER PRIMROSE PRESIDENT OF THE LEGISLATIVE COUNCIL

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Copy: The Secretary
Standing Standing Committee on Administration and Procedure
ACT Legislative Assembly
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Dear Mr Rattenbury

**Inquiry into the appropriate mechanisms to coordinate and evaluate the
implementation of the Latimer House Principles in the governance of the ACT**

I refer to your correspondence dated 29 March 2009 inviting the New South Wales Legislative Council to make a submission to the above inquiry.

I apologise for the delay in replying.

Please find a submission on behalf of the New South Wales Legislative Council attached.

Your sincerely

Peter Primrose
President

ACT STANDING COMMITTEE ON ADMINISTRATION AND PROCEDURE

INQUIRY INTO THE APPROPRIATE MECHANISMS TO COORDINATE AND EVALUATE THE IMPLEMENTATION OF THE LATIMER HOUSE PRINCIPLES IN THE GOVERNANCE OF THE ACT

Submission by the New South Wales Legislative Council

The New South Wales Legislative Council is not aware that implementation of the Latimer House Principles has specifically been addressed by any level of government in New South Wales. Any move to do so would presumably require a whole-of-government approach requiring coordination and assistance across all three branches of government.

However, it may be observed that in many respects, the New South Wales system of government already meets many of the objectives set out in the Latimer House Principles. Although the new South Wales *Constitution Act 1902* does not prescribe any formal separation of the powers and functions of the parliament, the executive and the judiciary, nevertheless, by convention, a strict separation of powers is maintained between the parliament and the executive on the one hand, and the judiciary. One of the principles of the rule of law in New South Wales is that the courts in New South Wales and ultimately the High Court of Australia have the responsibility for interpreting legislation and determining whether it is within the powers conferred by the *Constitution Act 1902*. The independence of the judiciary is entrenched under part 9 of the *Constitution Act 1902*.

By contrast, a separation of powers is not maintained between the executive and the legislature. Under the Westminster system, as adopted in New South Wales, the executive government is formed out of the members of Parliament, and the government is made in the lower House. Nevertheless, the system of responsible government as adopted in New South Wales does provide an effective mechanism for the accountability of the executive government to the Legislative Council in its capacity as a 'House of Review', as was observed and endorsed by the High Court in *Egan v Willis*.¹

In other areas, however, it may be observed that the New South Wales system of government does not meet the objectives set out in the Latimer House Principles. The absence of any formal separation of powers has caused some to question whether New South Wales could benefit from the introduction of a bill or charter of rights, similar to those adopted in other jurisdictions such as New Zealand, the United Kingdom, Victoria and the ACT. I enclose a copy of a recent discussion paper published by the NSW Parliamentary Library on the matter,² together with an earlier report into the matter by the Legislative Council's Standing Committee on Law and Justice³.

¹ (1998) 195 CLR 424

² Griffith, G. "Charter of Rights Update", *E-Brief 1/09*, NSW Parliamentary Library Research Service, January 2009.

³ Standing Committee on Law and Justice, *A NSW Bill of Rights*, Report No. 17, October 2001.

Another area of recent debate in the New South Wales Legislative Council that goes to the Latimer House Principles is the funding arrangements for the Parliament. As you would doubtless be aware, the Hon David Hawker, the former Speaker of the House of Representatives, has taken particular interest in the desirability of parliament having a degree of control over its resources and independence of the executive government as a result. In his pursuit of this issue, Mr Hawker has taken a keen interest in the implementation of the Latimer House Principles.⁴

Accordingly, there are objectives set out in the Latimer House Principles which remain outstanding in New South Wales.

With this in mind, the New South Wales Legislative Council will be watching the steps taken by the ACT Legislative Assembly in assessing the implementation of the Latimer House Principles with considerable interest.

⁴ See for example Hawker, D. 'Funding arrangements for the Parliament of Australia: A view to the future', Democratic Audit of Australia, Discussion Paper 5/07 (March 2007), p 2.

E – BRIEF



NSW Parliamentary Library Research Service

January 2009 E-Brief 1/09

Charter of Rights Update

by Gareth Griffith

1 The National Human Rights Consultation

On 10 December 2008 the Commonwealth Attorney General, Robert McClelland, launched the National Human Rights Consultation, which is intended to 'seek the views of the Australian community on how human rights and responsibilities should be protected in the future'. Mr McClelland added:

For many this means a discussion about whether or not Australia should adopt a national charter of rights. I expect there to be robust discussion both for and against a national charter.

As part of this process, a Committee has been appointed, chaired by Father Frank Brennan and comprising former SBS newsreader Mary Kostakidis, former Australian Federal Police commissioner Mick Palmer and indigenous barrister Tammy Williams. By its terms of reference, the Committee will ask the Australian community:

- Which human rights (including corresponding responsibilities) should be protected and promoted?
- Are these human rights currently sufficiently protected and promoted?
- How could Australia better protect and promote human rights?

The Committee is to report to the Commonwealth Government by 31 July 2009.

2 What is a Charter of Rights?

It is clear that a Bill of Rights, along the lines of the United States model, is not an option with much (if any) chance of emerging from this consultation process. The likely option rather is a Charter of Rights, similar to that in place in Victoria. What is the difference?

Basically, the US Bill of Rights model is one that is entrenched in the constitution and provides the courts with the power to strike down legislation. Under this model the courts, not Parliament, are the ultimate arbiters in conflicts over human rights. It is the judges who are given the last word.

This can be contrasted with the statutory model in place in New Zealand, the United Kingdom, Victoria and the ACT. In all these cases the relevant human rights statute is an ordinary piece of legislation which can be amended or repealed by the usual parliamentary processes. They are not constitutionally entrenched therefore.

Nor do these statutes provide the courts with the last word in human rights conflicts. The courts in New Zealand cannot strike down legislation that is inconsistent with the Bill of Rights Act 1990. The Act operates

only as a statement of preferred interpretation in relation to public legislation and public actions.¹ It cannot override other inconsistent legislation, either expressly or by implication.

Likewise, under the United Kingdom's Human Rights Act 1998, which incorporates the major rights found in the European Convention on Human Rights and Fundamental Freedoms into domestic law, the courts have no power to declare primary legislation invalid. Instead, the courts are granted the power to make a 'declaration of incompatibility' (s 4), the making of which can allow a Minister to seek parliamentary approval for a remedial order to amend legislation to bring it into line with Convention rights (s 10).

Provision for the making of a 'declaration of incompatibility' constitutes a major innovation in this area of the law. It has been followed under the Victorian Charter of Human Rights and Responsibilities Act 2006 (s 36), and under the ACT's Human Rights Act 2004 (s 32). If any human rights model is to be adopted federally, it is likely to be this 'Charter' model, or one based on it.

3 Arguments for and against

The Victorian Charter of Human Rights was based on the November 2005 report of the Human Rights Consultation Committee, chaired by Professor George Williams. The report summarised arguments for a State Charter thus:

- The current protection of human rights is inadequate.
- Additional protection is needed for disadvantaged and marginalised people.
- A Charter would deliver practical benefits by setting

minimum standards for government.

- A Charter would modernise our democracy and give effect to Australia's human rights obligations.
- A Charter would educate people about their rights and responsibilities.

The same report summarised arguments *against* a State Charter thus:

- Our human rights are adequately protected – 'if it ain't broke don't fix it'.
- A Charter would make no practical difference.
- A Charter would give too much power to judges.
- Human rights are a matter for Parliament.
- A Charter might actually restrict rights.
- A Charter would create a selfish society.
- A law is not the best way to protect and promote rights.
- A Federal Charter rather than a State Charter is needed.

By reference to such issues as the *Al-Kateb* case² and the Commonwealth's anti-terror laws, Williams argues that

Australia is out of step with comparable nations such as Canada, New Zealand and the United Kingdom in the protection of human rights. We have fallen behind.³

Professor Hilary Charlesworth, a moving force behind the ACT Human Rights Act, writes:

In practice the human rights dimensions of political issues are not regularly discussed in Australian

parliaments and the major political parties are regularly in agreement on the groups whose freedoms need to be restricted. Parliamentary dialogue about human rights is limited and impoverished.⁴

The building of a 'culture of rights' is argued for, affecting not only the courts but also the Parliament and the Executive.

On the other side of the debate, the NSW Attorney General, John Hatzistergos, argues that a Bill or Charter of rights 'would move rights claims out of the political arena, turning them into legal claims', thereby shifting the 'primary power for making decisions about rights' from parliaments to the courts. He continues:

To put it simply: parliaments are institutions specially designed for consultation on, discussion and resolution of difficult political questions. On the other hand, the judicial branch of government is set up in a different manner to achieve different ends: the adjudication of private conflicts and the application of law. By transforming social and political questions into legal ones, a Charter of Rights threatens to harm the integrity of both institutions.⁵

The case on behalf of Australian Parliaments 'paying attention to the rights of minorities' has been made by Joo-Cheong Tham and Keith Ewing, who say that 'a dim view of parliamentary protection of human rights fits badly with the record of parliamentary committees in reviewing and influencing Australia's counter terrorism laws'.⁶ They also argue that the terms of the rights debate are loaded in favour of the courts, which are looked upon as forums of 'principle', whereas Parliaments

operate in the political realm of 'compromise'.⁷

As formulated by Professor Andrew Ashworth, the basic question is whether it is

satisfactory to leave the protection of individual rights in the hands of elected politicians, or is it preferable to introduce the safeguard (and the constraints) of human rights legislation?⁸

4 Dialogue between Parliament and the courts

A major issue in the debate about bills or charters of rights in Westminster systems of parliamentary government is the concern that they shift power away from elected parliamentarians and towards unelected judges. In doing so, it is argued, bills of rights undermine a key feature of parliamentary government, namely the doctrine of parliamentary sovereignty or supremacy.

This was a particular concern in the United Kingdom. The issue was also debated in the lead up to the Canadian *Charter of Rights and Freedoms of 1982*. Like the US Bill of Rights, the Canadian Charter is entrenched in the constitution. Under it, legislation can be declared unconstitutional and therefore invalid. To that extent, Canada embraced the 'American equation of judicial review with judicial supremacy'.⁹

However, the Canadian Charter departs from the US model by its inclusion of a legislative override or 'notwithstanding' clause (s 33). This means that, by express enactment of ordinary legislation, the national Parliament or a provincial legislature may set aside a judicial finding of unconstitutionality, thereby preserving

in theory the supremacy of democratically elected institutions over the unelected courts.¹⁰ The 'override' provision can be seen as one step towards a 'dialogue' between the Parliaments and the courts.¹¹ Admittedly, the device is rarely used (never federally) and has been described as 'extremely unpopular'.¹²

Another novel feature of the Canadian Charter, also said to facilitate a dialogue between the courts and parliaments, is the general limitation clause, guaranteeing the rights and freedoms set out in the Charter '*subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society*' (s 1).¹³ In the words of McLachlin CJ:

To justify the infringement of a Charter right, the government must show that the infringement achieves a constitutionally valid purpose or objective, and that the chosen means are reasonable and demonstrably justified...¹⁴

The UK *Human Rights Act 1998* does not contain either a 'justified limits' clause or an 'override' provision. Rather, the central mechanism by which it seeks to facilitate a dialogue between Parliament and the courts is by means of the 'declaration of incompatibility'.

It is in terms of a 'dialogue' that current arguments for a charter of rights at the national and State level in Australia are framed.¹⁵ As the Minister said in the Second Reading speech for the Victorian Charter of Human Rights:

This bill is based on human rights laws that now operate successfully in the Australian Capital Territory, the United Kingdom and New Zealand. Importantly, it is nothing

like the United States Bill of Rights. This bill promotes a dialogue between the three arms of the government – the Parliament, the executive and the courts – while giving Parliament the final say.¹⁶

The executive arm of government is also included in this dialogue model therefore. The Victorian Human Rights Consultation Committee report stated that a Charter would 'create a new dialogue on human rights between the community and government':

The Charter would mean that rights and responsibilities would be taken into account from the earliest stages of government decision-making to help prevent human rights problems emerging in the first place.¹⁷

5 Key features of Victoria's Charter of Human Rights

The passing of human rights Acts and Charters in various Westminster style political systems can be seen in an evolutionary light, as a process of adaptation and refinement towards what Charter supporters call a 'parliamentary rights model'.¹⁸ Certainly, the Victorian Charter of Human Rights can be viewed from this standpoint, as adopting the main features on offer in other comparable jurisdictions. The rights protected under the Charter are the standard civil, political and legal rights found in such instruments. These include: the right to life (s 9); the right to privacy and reputation (s 13); cultural rights (s 19); and rights in criminal proceedings (s 25).

In terms of the dialogue between parliamentary supremacy and judicial review the Charter includes all the major structural features in those models, while adding a few innovations of its own.

Justified limits: By s 7, human rights may be subject to such 'reasonable limits as can be demonstrably justified in a free and democratic society...'. A novel feature is that certain factors to be taken into account are listed, based on the tests formulated in the leading Canadian case of *R v Oakes* [1986] 1 SCR 103.¹⁹

Override by Parliament: By s 31, the Parliament is provided with the power to expressly declare that an Act or a provision 'has effect despite being incompatible with one or more of the human rights or despite anything else set out in this Charter'. Following the Canadian template, the Victorian 'override' provision is subject to a 5-year sunset clause. Unlike its Canadian counterpart, s 31(4) of the Victorian Charter expressly states:

It is the intention of Parliament that an override declaration will only be made in exceptional circumstances.

Declarations of inconsistent interpretation: By s 36(2), there is express provision for the making of declarations of inconsistent interpretation, which are 'basically equivalent to declarations of incompatibility found under the UK and ACT statutes. Subject to any relevant override declaration, these declarations of inconsistent interpretation apply to a statutory provision which 'cannot be interpreted consistently with a human right'. By s 36(5), such declarations will not affect the validity or operation of the statutory provision in question.

By s 37, within 6 months the relevant Minister must prepare a written response and cause this to be laid before each House and published in the Government Gazette.²⁰

Pre-enactment scrutiny: By s 28, members introducing government and non-government bills alike must make a 'statement of compatibility' with the Charter. However, by s 29 a failure to comply with that requirement will not affect the validity of the relevant statute.

Further scrutiny is provided for by s 30 which requires the Scrutiny of Acts and Regulations Committee to consider all bills and to report on their compatibility with human rights.²¹

Interpretation: Based on s 3 of the UK legislation, s 32(1) of the Charter provides:

So far as it is possible to do so consistently *with their purpose*, all statutory provisions must be read and given effect to in a way that is compatible with human rights. (emphasis added)

The Consultation Committee explained that the reference to 'purpose' was to provide the courts 'with clear guidance to interpret legislation to give effect to a right so long as that interpretation is not so strained as to disturb the purpose of the legislation in question'.²²

Public authorities: In keeping with the view that human rights instruments regulate the relationship between individual persons and the governmental organs of the state, the Charter directs its attention to the regulation of public authorities, a term that is defined broadly in s 4 beyond core government bodies to include all entities exercising public functions 'on behalf of the State or a public authority (whether under contract or otherwise)' (s 4(1)(c)).²³ An exemption is made for religious bodies, but otherwise under s 38:

it is unlawful for a public authority to act in a way that is incompatible with a human right or, in making a decision, to fail to give proper consideration to a relevant human right.

The Second Reading speech commented in this context that 'The experience in other jurisdictions that have used this model is that it is in the area of administrative compliance that the real success story of human rights lies'.

Remedies: The Charter creates no new causes of action for breaches of human rights. However, by s 39 existing causes of action available against public authorities are also available in respect of breaches of the Charter. By s 39(3), damages are not to be awarded in such cases.²⁴

6 The Victorian Charter and ACT Human Rights Act in operation

With the Victorian Charter only coming into full effect on 1 January 2008 it is rather early to speculate on its operation.²⁵ One comment to make is that its protection of the right to life did not prevent the enactment of the *Abortion Law Reform Act 2008*.²⁶

The ACT *Human Rights Act 2004* came into force on 1 July 2004. As to its operation, Byrnes, Charlesworth and McKinnon comment that it has not led to an 'increase in unmeritorious litigation'. They add:

Some supporters may have hoped for a more energetic invocation of the Act in the courts, and its low public visibility has led to charges that the legislation is mere symbolism or even a hoax. But the real story is more complex, and lies primarily in the impact of the legislation on the policy-making and

legislative processes rather than in the courts.²⁷

In terms of legislation, it is argued that the best example of the effect of the ACT Human Rights Act was in relation to counter-terrorism laws. Byrnes et al explain that, while the ACT Government was committed to introducing parallel laws, it was critical of the Commonwealth's 2005 anti-terrorism statute. Instead, it prepared legislation that it considered human-rights compliant', which included

provisions for judicial oversight of preventive detention orders, the exclusion of children from the preventive detention regime, and the omission of draconian penalties for disclosing the fact of detention.²⁸

According to Charlesworth, the ACT's 2006 anti-terrorism Act 'provides more legal safeguards than those of the Commonwealth or other states and territories'.²⁹

7 Developments in other Australian jurisdictions

Similar consultation processes to those in Victoria and the ACT have been conducted in Tasmania and Western Australia.

Published in October 2007, the Tasmanian Law Reform Institute's report *A Charter of Rights for Tasmania* recommended, initially at least, a non-entrenched, statutory Charter. Published in November 2007, the *Report of the Consultation Committee for a Proposed WA Human Rights Act* found that, of the 377 written submissions received, 50% were in favour of a WA Human Rights Act, 34% were opposed, and 16% did not express a clear view either way. The Consultation Committee reported in favour of a Human Rights Act for WA, in the form of ordinary legislation.

In NSW, the 2001 report of the Legislative Council Law and Justice Committee recommended against a NSW Bill of Rights. Instead, as a result of the report, the Legislation Review Committee was established to consider the impact of bills and regulations on 'personal rights and liberties'.

8 The UK Human Rights Act in operation

An important point of comparison for the consultation processes conducted in different Australian jurisdictions is the UK's *Human Rights Act 1998*. The Victorian Consultation Committee report said the UK Act

has been a success without giving rise to the litigation and other problems sometimes associated with the United States Bill of Rights. Its law has also proved effective in balancing issues such as the need to fight terrorism with the democratic and other principles required for a free society.³⁰

A broad overall assessment of the UK Act is difficult and, in the nature of things, is likely to suggest alternative conclusions. Particular areas of the law can be selected, or certain cases, to bolster different arguments.³¹

In the area of administrative law supporters of the Act point, for example, to the case of an elderly couple separated when the husband was admitted to a residential care home and the wife was told she did not fit the health criteria to be allowed to live with him. Human rights arguments about respect for family life were used to change the administrative decision.³² For Edward Santow, 'This example shows how a charter can help protect people's dignity in small but very significant ways...'³³

A particular focus of inquiry into the UK Act is on the way the courts have interpreted counter-terrorism laws, with arguments presented on both sides of the ledger.³⁴ The issue of continuing judicial deference to the Executive is raised in this context, as is the tendency of the courts to reduce big matters of public policy to narrow, technical questions of law.³⁵

Contrary to the 'judicial deference' line of argument, for Professor Anthony King the Human Rights Act has contributed to a more activist judiciary in the UK. He writes that the judges have become the Government's 'assertive and sometimes unruly tormentors'.³⁶ Controversial has been the approach taken by the courts to s 3 of the Act (the interpretation section), most notably in *Ghaidan v Mendoza* [2004] 3 All ER 411. In a later case, Lord Hope said:

So long as it is possible to do so, the interpretive obligation enables the courts to give a meaning to legislation which is compatible [with Convention rights] even if this appears to differ from what Parliament had in mind when enacting it.³⁷

At the risk of over-simplification, most legal academics and lawyers seem to support the Human Rights Act, while public opinion, and the media tend to come down on the other side. Popular opinion has been influenced by high profile cases in which the Act has apparently contributed to controversial outcomes. Lord Walker of Gestingthorpe, one of the Law Lords, acknowledged in this respect that 'the UK Act has not had a particularly warm welcome', adding:

Prominent members of both the Labour Party and the Conservative Party have recently spoken in favour

of repealing it or drastically amending it.³⁸

In 2007 Conservative leader David Cameron called for the abolition of the Act. This followed a ruling preventing the deportation to Italy of convicted murderer Learco Chindamo, on the ground of his right to family life.³⁹ Earlier, human rights considerations were blamed for the paroling of serial sex offender, Anthony Rice, who killed a woman following his release.⁴⁰

In the opinion of the parliamentary Joint Committee on Human Rights,⁴¹ the Anthony Rice and other problem cases were instances of the 'misinterpretation or misapplication' of the Act. According to its report:

none of the three cases we have discussed so far - the Afghani hijackers judgment, the failure to consider foreign prisoners for deportation, and the Anthony Rice case - demonstrates a clear need to consider amending the Act. In each case, the Human Rights Act has been used as a convenient scapegoat for unrelated administrative failings within Government.⁴²

In July 2006 the Department of Constitutional Affairs released its review of the Act in which it sought to dispel myths and misunderstandings. One among several supportive conclusions was that the Act 'can be shown to have had a positive and beneficial impact upon the relationship between the citizen and the State...'.⁴³

Clearly, the Act's impact is a complex and contested issue. Foreshadowing amendment to the Act, its architect Jack Straw said recently he was 'greatly frustrated' by the way it was interpreted 'in some very few judgments':

The justice secretary also said that he could understand why the Act was seen as a 'villains' charter' by its critics.⁴⁴

As to whether human rights are in fact better protected, there is sure to be dispute. Reflecting on the current state of play in the UK, at a time when the need to balance individual freedom with security is particularly acute, the constitutional lawyer Elizabeth Wicks commented:

There is unmistakable irony in the coincidence that, in this human rights age, when individual rights are codified, protected and relied upon to an unprecedented extent, the threat to our liberty is greater than it has been for centuries: detention without trial; erosion of trial by jury; identity cards, restrictions on free speech.⁴⁵

9 Responses to the National Human Rights Consultation

Responses to the launch of this consultation process have been predictably varied. Both the former and current Presidents of the Australian Human Rights Commission express support for a Charter of Rights. John von Doussa writes:

I am now convinced that the best way to ensure that all three arms of government – the executive, the legislature and the judiciary – take care when they make decisions that have an impact on basic human rights is to introduce a statutory charter of rights. The old argument that the current system is working well just does not stand up.⁴⁶

Likewise, Catherine Branson comments:

Recent history tells us we cannot always trust Parliament to pay sufficient regard to the protection of

the human rights of everyone. A charter of rights will help prevent human rights breaches by ensuring politicians turn their minds to the human rights implications of laws they are framing.⁴⁷

The Public Interest Law Clearing House acting executive director, Mat Tinkler, said present laws failed to adequately protect the homeless, asylum seekers, people with a disability and racial and religious minorities, and a charter would 'improve the accountability of government and entrench the quintessential Australian sense of a fair go for all'.⁴⁸

The Law Council of Australia's president-elect, John Corcoran, said that despite limited constitutional, statutory and common law protections, there was 'a significant gap in human rights protection in Australia at the federal level'.⁴⁹

For Edward Santow, director of the Charter of Human Rights Project at the Gilbert + Tobin Centre of Public Law, such a charter

would guide Parliament in drafting new laws, and it would set out principles that public servants would be required to follow in the action they take in our name and for our benefit.⁵⁰

Hilary Charlesworth has commented that her 'argument is not that parliaments are inherently "less suited than courts to making human rights decisions", but rather that, at least in Australia, they are currently less likely to do so'.⁵¹

For Charter sceptics such as Greg Craven the consultation process is the latest attempt by the 'rights mafia' to foist some kind of bill of rights upon an

unwilling Australian public.⁵² 'There is no community demand for it, or demonstrated case', concludes the Shadow federal Attorney-General George Brandis.⁵³

Who profits, Janet Albrechtsen asks? To which her answer is lawyers and political activists, the very people likely to dominate the consultation process.⁵⁴ Paul Kelly writes of the 'charter of rights' culture which, in his view, 'almost totally infects Australia's legal system, from university tuition to the High Court'. By depicting Australia's democracy as a form of 'majoritarian tyranny', Kelly writes:

This corrosive culture cannot conceive that representative democracy is the best means of guaranteeing human rights.⁵⁵

Likewise, *The Australian* commented:

But there is a good reason for the lack of any widespread public agitation in favour of a bill of rights. Whatever the shortcomings of the Australian political and judicial systems, we think it works better than most. And the wrongs of a bill would outweigh its rights.⁵⁶

For the NSW Attorney General, John Hatzistergos, the claim that a charter would promote dialogue between Parliament and the courts is misleading:

The priority of Parliament must always be to maintain a dialogue with the electorate, not with another unelected government institution.⁵⁷

Former High Court judge Ian Callinan said:

Even a charter of rights would give courts a disproportionate power in relation to essentially political questions.⁵⁸

Many rights are 'political' says Associate Professor Helen Irving, 'They rest on controversial propositions, matters open to reasonable disagreement, issues that should properly be debated in the public arena'.⁵⁹

Irving further warns that the constitutional prohibition on the High Court giving advisory opinions may be a technical obstacle to the introduction of a charter at the national level:

Paradoxically, the very attempt to protect Parliament by empowering the courts to make 'declarations' [of incompatibility] may itself prove unconstitutional.⁶⁰

The technical issues concerned arise from Chapter III of the Commonwealth Constitution, in particular the requirement that courts exercising federal jurisdiction can only do so in respect to a 'matter'. In terms of the separation of powers at the federal level, the High Court's interpretation of 'matter' is used to define the limits of the judicial role.⁶¹ Whether doubts about the constitutionality of declarations of incompatibility prove to be a legal red herring remains to be seen.

¹ Section 6 of the Act provides that 'Wherever an enactment can be given a meaning that is consistent with the rights and freedoms contained in this Bill of Rights, that meaning shall be preferred to any other meaning'.

² In *Al-Kateb v Godwin* (2004) 219 CLR 562 the High Court held by a 4:3 majority that failed asylum seekers who have nowhere to go can be kept in immigration detention indefinitely. Provided the Immigration Minister retained the intention of eventually deporting such people, detention would remain valid.

³ G Williams, *A Charter of Rights for Australia*, UNSW Press 2007, p 19.

⁴ H Charlesworth, 'Democratic objections to bills of rights', *The Sydney Papers*, Winter 2008, p 126.

⁵ J Hatzistergos, 'A charter of rights or a charter of wrongs?' *Speech to the Sydney Institute*, 10 April 2008.

⁶ JC Tham and K Ewing, 'Limitation of a Charter of Rights in the age of counter-terrorism' (2007) 31 *Melbourne University Law Review* 462 at 476 and 482.

⁷ *Ibid* at 473.

⁸ A Ashworth, 'Human rights and criminal justice in the UK' (2004) 23(2) *University of Tasmania Law Review* 151 at 175.

⁹ JL Hiebert, 'Parliamentary Bills of Rights: an alternative model' (2006) 69 *Modern Law Review* 7 at 11.

¹⁰ The 'override' provision was part of a political compromise to ensure the support of the provinces for the Charter - G Griffith, *A Charter of Rights for NSW? The Continuing Debate*, NSW Parliamentary Library Briefing Paper No 5/06, p 18.

¹¹ A Byrnes, H Charlesworth and C McKinnon, *Bills of Rights in Australia: History, Politics and Law*, UNSW Press 2009, p 52.

¹² Hiebert, n 9, p 11. It is less unpopular in Quebec, Hiebert adds.

¹³ Griffith, n 10, p 19. P Faris and M Bagaric, *Human Rights Charters in Australia*, Sandstone Academic Press 2008, Ch 4.

¹⁴ *Sauvé v Canada (Chief Electoral Officer)* [2002] 3 SCR 519 at para 7.

¹⁵ See for example Report of the ACT Bill of Rights Consultative Committee, *Towards an ACT Human Rights Act*, May 2003, p 61.

¹⁶ *VPD*, 4 May 2006, p 1290. A similar formulation was adopted in the UK - *Hansard*, HC, vol 314, col 1141 (24 June 1998).

¹⁷ Human Rights Consultation Committee, *Rights, Responsibilities and Respect*, p iii.

¹⁸ A Pound and K Evans, *An Annotated Guide to the Victorian Charter of Human Rights and Responsibilities*, Lawbook Co 2008, p 8 and citing JL Hiebert, n 9.

¹⁹ Griffith, n 10, p 19 and p 65. The list of factors is non-exclusive.

²⁰ The Consultation Committee recommended that the proposed Human Rights Scrutiny Committee review each declaration and report to the Houses within 3 months, thereby enhancing the direct engagement of Parliament with human rights issues - Griffith, n 10, p 64.

²¹ The Consultation Committee had recommended the establishment of a

- Human Rights Scrutiny Committee, similar to the UK's Joint Committee on Human Rights.
- ²² Human Rights Consultation Committee, n 17, pp 82-83. For a commentary on s 3 of the UK Act see – Griffith, n 10, pp 45-46. For a commentary on the ACT legislation and its amendment in 2008 see – Byrnes, Charlesworth and McKinnon, n 11, p 84. For a critical commentary on an earlier use of the 'reading down provision' in *SI v KS* [2005] ACTSC 125 see – J Allan, 'The Victorian Charter of Human Rights and Responsibilities', *New Zealand Law Journal*, May 2008, 173.
- ²³ Parliament is not a 'public authority' for this purpose; nor are courts or tribunals, 'except when acting in an administrative capacity' - C Evans and S Evans, *Australian Bills of Rights*, LexisNexis Butterworths 2008, pp 19-21.
- ²⁴ Relevant issues are discussed in S Evans and C Evans, 'Legal redress under the Victorian Charter of Human Rights and Responsibilities' (2006) 17(4) *Public Law Review* 264.
- ²⁵ But see Byrnes, Charlesworth and McKinnon, n 11, pp 123-138. For a critical appraisal see – Allan, n 22. *Sabet v Medical Practitioners Board* [2008] VSC 346 is a recent case dealing with s 25(1) of the Charter (the presumption of innocence). It was held that the presumption only applies to criminal proceedings. It does not apply to the decisions of the Medical Practitioners Board. However, the Board was held to be a 'public authority' for the purposes of the Charter.
- ²⁶ See K Simon, *Recent developments in abortion law*, NSW Parliamentary Library E-Brief, No 8/08. By s 9(2) of the ACT's *Human Rights Act 2004* the right to life only 'applies to a person from the time of birth'.
- ²⁷ Byrnes, Charlesworth and McKinnon, n 11, p 86.
- ²⁸ *Ibid*, p 95.
- ²⁹ Charlesworth, n 4, p 130.
- ³⁰ Human Rights Consultation Committee, n 17, p ii.
- ³¹ Griffith, n 10, pp 42-58.
- ³² Charlesworth, n 4, p 131.
- ³³ E Santow, 'A fortress of dignity from broad input', *The Australian Financial Review*, 12 December 2008.
- ³⁴ Critical is KD Ewing, 'The futility of the Human Rights Act' [2004] *Public Law* 829; supportive is Lord Lester, 'The utility of the Human Rights Act: a reply to Keith Ewing' [2005] *Public Law* 249.
- ³⁵ Griffith, n 10, pp 48-50. One critical view is that recent 'control order cases' show a need for 'less loose talk about "rights", and more serious talk about how to create powerful representative institutions' - K Ewing and JC Tham, 'The continuing futility of the Human Rights Act' [2008] *Public Law* 668 at 693.
- ³⁶ A King, *The British Constitution*, Oxford University Press 2007, p 346.
- ³⁷ *R (Jackson) v Attorney General* [2006] 1 AC 262 at para 105. The issues are discussed in A Rolls, 'Avoiding tragedy: would the decision of the High Court in Al-Kateb have been any different if Australia had a Bill of Rights like Victoria?' (2007) 18(2) *Public Law Review* 119.
- ³⁸ Lord Walker of Gestingthorpe, 'Problems of human rights legislation: what difference can a human rights charter make' (2007) 81 *Australian Law Journal* 923 at 930.
- ³⁹ ECHR, Art 8. Aged 15 in 1995, Chindamo committed a notorious murder. He had not lived in Italy since he was 5 years of age. The original decision was made by the Asylum and Immigration Tribunal and confirmed in October by the High Court.
- ⁴⁰ *BBC News*, 'Human rights "blaming" under fire', 14 November 2006.
- ⁴¹ For an assessment see - F Klug and K Starmer, 'Standing back from the Human Rights Act: how effective is it five years on?' [2005] *Public Law* 716; JL Hiebert, 'Interpreting a Bill of Rights: the importance of legislative rights review' (2005) 35 *British Journal of Political Science* 235.
- ⁴² Joint Committee on Human Rights, *Thirty Second Report*, Session 2005-06, para 40.
- ⁴³ Department of Constitutional Affairs, *Review of the Implementation of the Human Rights Act*, July 2006, p 35.
- ⁴⁴ A Sparrow, 'Jack Straw plans rebalance of Human Rights Act', *Guardian.co.uk*, 8 December 2008. See also 'Comment' in the *Daily Mail*.
- ⁴⁵ E Wicks, *The Evolution of a Constitution*, Hart Publishing 2006, pp 200-201.
- ⁴⁶ J von Doussa, 'Bill of rights is essential to best serve human rights', *SMH*, 9 October 2008.
- ⁴⁷ C Branson, 'What Australia needs for Christmas is a charter of human rights', *SMH*, 10 December 2008.
- ⁴⁸ J Eyers, 'Rights charter builds support', *The Australian Financial Review*, 12 December 2008.
- ⁴⁹ *Ibid*.
- ⁵⁰ Santow, n 33.
- ⁵¹ Charlesworth, n 4, p 127.

- ⁵² G Craven, 'Beware hidden agendas', *The Australian Financial Review*, 12 May 2008.
- ⁵³ M Grattan, 'Opposition flags bills of rights fight', *The Age*, 11 December 2008.
- ⁵⁴ J Albrechtsen, 'Keep the power with the people, not lawyers', *The Australian*, 10 December 2008.
- ⁵⁵ P Kelly, 'Uncharted waters', *The Australian*, 13 December 2008.
- ⁵⁶ 'A bill to dodge', *The Australian*, 3 October 2008.
- ⁵⁷ J Hatzistergos, 'Legislation is not the key to human rights', *The Australian*, 12 December 2008.
- ⁵⁸ P Maley and C Kerr, 'Critics read the rights act over panel', *The Australian*, 11 December 2008.
- ⁵⁹ H Irving, 'Might a right, but let's not bill the rest', *SMH*, 9 December 2008.
- ⁶⁰ Ibid.
- ⁶¹ J South, 'The campaign for a national Bill of Rights: would "declarations of incompatibility" be compatible with the Constitution?' (2007) 10(1) *Constitutional Law and Policy Review* 2; G Lindell, 'The statutory protection of rights and parliamentary sovereignty: guidance from the United Kingdom?' (2006) 17 *Public Law Review* 188. Authority holds that a 'matter' requires 'some immediate right, duty or liability to be established by the determination' of a court. One argument is that declarations of incompatibility operate in the absence of a right, where this has been extinguished or overridden by legislation.

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