AUSTRALIAN HUMAN RIGHTS CENTRE (AHRCentre)[*]

SUBMISSION TO THE

NATIONAL HUMAN RIGHTS CONSULTATION COMMITTEE

15th June 2009

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[*]The Australian Human Rights Centre (AHRCentre) is an inter-disciplinary research and teaching institute. Established in 1986, the Centre develops and undertakes interdisciplinary research projects across a number of disciplines, with a particular focus on economic, social and cultural rights. Currently, its research projects focus on business and human rights, international human rights and humanitarian law, health and human rights, the impact of climate change on human rights, and trade, human rights and development.

In developing human rights educational initiatives (including seminar programs, human rights courses and internships) and publishing the *Australian Journal of Human Rights*, the *Human Rights Defender* and occasional papers and publications, the AHRCentre provides a forum for domestic and international scholarship and debate on contemporary human rights issues.

15 June 2009

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Dear Committee members

We write to you at a time when Australia has emerged from just over a decade of significant human rights erosion, a process which gained regrettable momentum over a comparatively short period with damaging domestic and international consequences. That period saw our status as a respected global citizen promoting universal rights and freedoms plummet as we interned desperate refugees in burgeoning detention camps, described by former Chief Justice of India and special representative of the UN High Commissioner for Human Rights, P N Bhagwati, as "inhuman and degrading"; as we refused to sign the Kyoto Protocol and so retain our standing as the developed world's highest per capita greenhouse polluter; as we refused to apologise to victims of dispossession and unspeakable abuse, and dismiss the existence of the 'Stolen Generations'; as we failed to remonstrate in the strongest possible terms against the imposition of the death penalty on our own citizens when executed on foreign shores.

Nine years ago, Justice Arthur Chaskalson, President of the International Commission of Jurists and former inaugural President of the new South African Constitutional Court, addressed a Sydney dinner. He said:

> [F]irst incursions into the protection of human rights are often the most dangerous, for they begin a process of erosion which is difficult to stop once it has begun.

A. The need for a progressive model of rights protection adapted to the Australian experience

As Australia begins the process of clawing back some of the rights and freedoms which have been significantly eroded in the last ten years and resurrecting its standing as a leader in human rights promotion and protection, the initiation of the National Human Rights Consultation offers a critical opportunity to create a comprehensive, progressive and enduring mechanism which will set human rights boundaries for the conduct and operations of government and other agencies and afford maximum protection to all those who live in Australia.

This opportunity arises at a time when we can learn from the various contemporary models of rights protection in Canada, United Kingdom, New Zealand, South Africa, Ireland, Hong Kong, and in the Australian jurisdictions of Victoria and the Australian Capital Territory. We note that many of the submissions to the Committee propose a model of human rights protection based on the United Kingdom 'dialogue' model (in keeping with the stipulation in the Committee's terms of reference that 'the options identified should preserve the

sovereignty of the Parliament and not include a constitutionally entrenched bill of rights.') Our concern is that we use this opportunity to develop a model of human rights protection which is unique to and appropriately reflects the Australian experience and builds on, rather than mimics, a model which seeks to prioritise parliamentary sovereignty over individual and collective human rights in Australia.

B. Reasons for and functions of a federal bill of rights

The Centre is aware that a large number of organizations have made detailed submissions to the Committee about the limitations in Australia's existing legal and political system for effectively protecting and ensuring full enjoyment of human rights and fundamental freedoms; many of these argue that a bill of rights is needed as a critical component of efforts to improve the existing system. The Centre shares the view held by many commentators (including the NSW Bar Association, the Law Council of Australia, the Human Rights Law Resource Centre, and the Gilbert + Tobin Centre of Public Law at this university) that current legal and actual protections of human rights in Australia are piecemeal, inadequate, and fall short of fulfilling our international obligations. The Centre endorses calls for the adoption of a bill of rights, but does not intend to traverse in any detail the inadequacies in the present system for the protection of human rights in light of the extensive discussion of these issues in recent literature and submissions to the Consultation Committee.

This submission briefly reiterates the broad argument in support of a bill or charter of rights, and addresses a number of issues in relation to which the Centre has specific expertise and which so far may not have received attention in the public debate and submissions that we believe they merit.

In our view, there are at least four important functions that a bill of rights could perform, each of which is important and which cumulatively make a compelling case for adoption. These are:

- a *symbolic* function or statement of values and aspirations broadly agreed to by the Australian community as a whole
- the *promotion of human rights-aware policy-making and legislation* that ensures a higher level of human rights consistency in law and public policy – which will contribute to better laws and policies
- *remedying* some of the significant gaps in our system of legal and Parliamentary protections of human rights
- *providing a tool* which people can use in everyday situations to seek remedies for the indignities and violations of rights to which many marginalised or disempowered members of our community are subject.

C. The principles that should underpin assessment of the desirability of a bill of rights

The Centre submits that it is important that any bill of rights be guided by the principle of seeking to give effect to the international human rights obligations which Australia has assumed by providing their effective legal or administrative protection and by affording accessible remedies to those who are disadvantaged by a failure on the part of the State to respect, protect or fulfil them.

Additionally, the Centre supports a model that will involve a meaningful role for the three arms of government, each retaining their own sphere of responsibility but also subject to being held accountable by the other branches of government and independent bodies for the manner in which they carry out their respective responsibilities.

The Committee has invited advocates of a bill of rights to demonstrate that a bill of rights would lead to better protection of human rights by showing that it would have made a difference in specific, concrete cases. We believe that there are many such cases, particularly in relation to the delivery of public and private services – the case studies collected in the United Kingdom and more recently in Australia demonstrate that this is so. Yet, while this is an important component of any overall assessment of the utility of a bill of rights, any assessment of the benefits a bill of rights might bring must go beyond the individual case and undertake a more sophisticated inquiry into its systemic impact.

A more organic assessment is particularly important when it comes to discussions about cases in which Australian courts have had no option but to apply what critics argue (and courts may agree) is rights-violative legislation. Here the important question is *not* so much whether a 'dialogue' human rights act which permits either rights-consistent interpretation or a declaration of inconsistency, would have made a difference in a given case. In some cases it may have (if the legislation has some scope for being (re)interpreted to protect rights); in others it may not have (where the legislation is clearly, and possibly deliberately, inconsistent with rights).

The inquiry should focus not so much on the remedial possibilities at the curial stage of the process – reached, after all, as the last stage in the process of the development, adoption and application of law – but on what might happen at the earlier stages. If a bill of rights were adopted which required both the executive and the legislature to systematically and substantively incorporate human rights norms into the development and drafting of legislation, then the rights-inconsistent legislation may never be passed in the first place. If it is, then under a dialogue model, there is little the courts can do if Parliament's intention is clearly expressed. As we point out below, that is the flaw in the dialogue model, with all its advantages; a 'repeal' model, however, would provide the courts with the option to assert their considered views on the content of the human rights in question.

D. The limitations of 'dialogue' as a mechanism for extensive rights protection

The Centre notes the broadly held view that in the current political climate a constitutionally entrenched model of rights protections is unlikely to win the day, and recognizes that consideration of such an option was excluded from the scope of the Committee's mandate. In our view, at this stage in Australia's history and given the emergence of contemporary international and domestic developments in human rights protection, it would be a missed opportunity, and perhaps a regressive step, for the Australian government to introduce a model of rights protection which falls short of:

- providing access to the full range of internationally guaranteed rights accepted by Australia, including in particular economic, social and cultural rights and the rights of Indigenous people; and
- ensuring that those intended to benefit from its operations have the capacity to assert and enforce their rights and secure an effective remedy in the event of their breach.

The AHRCentre considers that the model to be adopted should include many of the features of the so-called 'dialogue' models, but go beyond them – in particular by providing not only that all laws should be construed in conformity with the rights guaranteed in a human rights statute but also that if an existing law cannot be so interpreted, then a court may declare it repealed to the extent of any inconsistency.

The distinctive feature of a statutory bill of rights based on the dialogue model is that it does not provide for the repeal of primary legislation which cannot reasonably be interpreted in a human rights-consistent manner -- the dialogue model rather establishes a procedure for drawing such inconsistencies to the attention of the executive and the legislature, for reconsideration. The legislature's original decision thus stands, unless the legislature decides to change its views in the light of the court's analysis. (The position is different in relation to inconsistent delegated legislation, which a court can declare to be invalid in certain circumstances). Thus, the primacy of Parliament is retained, a critical consideration for those opposed to constitutional bills of rights, many of whom are concerned to maintain the pre-eminence of the elected legislature.

At the same time, the dialogue model essentially leaves intact a significant drawback of majoritarian democratic systems, namely that the rights of marginalized and powerless minorities can still be overridden through the parliamentary process, notwithstanding the addition of some parliamentary and judicial speed-humps on the way. The dialogue model provides no formal way of overriding a majoritarian legislature's decision to override the rights of vulnerable and politically powerless minorities: many have doubted, for example, whether such a model would have helped in the locus classicus of *Al Kateb* to avoid, at the judicial stage, the impact of a clearly expressed rights-violative legislative intent, or even at the earlier stages of the development of the relevant legislation.

E. In support of a stronger model of rights protection

Some opponents of a stronger bill of rights might consider that the occasional excess of legislative zeal and violation of the rights of powerless minorities that are not preempted or redressed through existing political routes, are simply the price we have to pay for the overall benefits of a democratic system and its existing allocation of institutional power between the executive, legislature and the courts. But the possibilities of significant rights violations and their actual occurrence – with egregious examples in recent years – has led us to propose that serious consideration should be given to a stronger model of statutory protection which recognizes the different roles of the legislative and the judicial process in relation to human rights considerations, and reflects the complementary role of each.[1]

There are a number of models of this sort in common law jurisdictions, including the *Canadian Bill of Rights 1960* and the *Hong Kong Bill of Rights Ordinance 1991.*

Canadian Bill of Rights
The Canadian Bill of Rights (still in force in 2009) is an ordinary statute that sets out a range of civil and political rights. These are similar in substance to those contained in the ICCPR, though not in the exact terms of the treaty (which, though largely drafted by that time, was not adopted until 1966). Section 2 of the Act provides:

[1] See Jeremy Webber, "A Modest (but Robust) Defence of Statutory Bills of Rights" in Tom Campbell, Jeffrey Goldsworthy and Adrienne Stone (eds), *Protecting Rights Without a Bill of Rights: Institutional Performance and Reform in Australia* (2006) 263-287.

2. 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

(a) authorize or effect the arbitrary detention, imprisonment or exile of any person;

(b) impose or authorize the imposition of cruel and unusual treatment or punishment;

(c) deprive a person who has been arrested or detained

(i) of the right to be informed promptly of the reason for his arrest or detention,

(ii) of the right to retain and instruct counsel without delay, or

(iii) of the remedy by way of *habeas corpus* for the determination of the validity of his detention and for his release if the detention is not lawful;

(d) authorize a court, tribunal, commission, board or other authority to compel a person to give evidence if he is denied counsel, protection against self crimination or other constitutional safeguards;

(e) deprive a person of the right to a fair hearing in accordance with the principles of fundamental justice for the determination of his rights and obligations;

(f) deprive a person charged with a criminal offence of the right to be presumed innocent until proved guilty according to law in a fair and public hearing by an independent and impartial tribunal, or of the right to reasonable bail without just cause; or

(g) deprive a person of the right to the assistance of an interpreter in any proceedings in which he is involved or in which he is a party or a witness, before a court, commission, board or other tribunal, if he does not understand or speak the language in which such proceedings are conducted.

Section 2 of the Canadian Bill of Rights Act does not explicitly state that a law which cannot be interpreted consistently with the guaranteed rights is inoperative or repealed. However, in 1969 the Supreme Court of Canada held that the *Canadian Bill of Rights Act* rendered "inoperative" a provision of the *Indian Act* that conflicted with the right to equality in the Bill of Rights.[2] While the Supreme Court thus settled the controversy about the effect of the Canadian Bill of Rights, apparently there have been no other court cases in which the Act is held to have rendered inoperative a statutory provision (since the 1980s, the constitutionally-based Canadian Charter of Fundamental Rights and Freedoms has done that work).

Hong Kong Bill of Rights Ordinance 1991

By contrast, the *Hong Kong Bill of Rights Ordinance 1991* was much clearer: if prior legislation could not be interpreted in conformity with ICCPR rights as applied to Hong Kong, it was repealed to the extent of the inconsistency. In relation to future legislation the Ordinance contained an interpretive provision only (this was supplemented by

[2] *R v Drybones* [1970] SCR 282

constitutional level protection for subsequent legislation[3]). The original versions of sections 3 and 4 of the Hong Kong Bill of Rights Ordinance (now repealed) provided:

> **3. Effect on pre-existing legislation**
>
> (1) All pre-existing legislation that admits of a construction consistent with this Ordinance shall be given such a construction.
>
> (2) All pre-existing legislation that does not admit of a construction consistent with this Ordinance is, to the extent of the inconsistency, repealed.
>
> **4. Interpretation of subsequent legislation**
>
> All legislation enacted on or after the commencement date shall, to the extent that it admits of such a construction, be construed so as to be consistent with the International Covenant on Civil and Political Rights as applied to Hong Kong.

Under each of these statutes, inconsistent (prior) legislation was repealed or rendered "inoperative" to the extent of the inconsistency, and the courts were able to provide appropriate remedies in such a case (as well as having the power to "read down" statutes to avoid inconsistencies and to grant other remedies). Legislation enacted subsequently was to be interpreted in accordance with the statute.

Adoption of a model of this sort would avoid the uncertainty and problems arising from the possible unconstitutionality of declarations of incompatibility in the Commonwealth context, and would also mean that the statute would unambiguously provide a domestic remedy for a violation of an internationally guaranteed set of rights. It would thus mean that a remedy would need to be sought before Australian courts in a case challenging the consistency of a statutory provision with a human right, before a case could be brought before a United Nations human rights treaty body.[4] It would thus provide Australian institutions with the first opportunity to remedy an alleged violation of a right. It would not undermine parliamentary supremacy because the Commonwealth legislature could always act to override the decision of the court if upon reflection it considered the courts had got it wrong.

The possible drawback of such a model is that it may be viewed as transferring additional power and responsibility to the judiciary and thereby impinging on the current role of Parliament – it is the court's decision which stands unless Parliament acts, rather than the converse (the case under a dialogue model). However, the major impact of this type of human rights act, as with a dialogue model, would be on the behaviour of the executive and legislative branches. Indeed, the possibility of a judicial finding of inconsistency that

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[3] Now contained in the Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China, which constitutionalises the provisions of the ICCPR and ICESCR, and international labour conventions as applied to Hong Kong, and provides additional rights protections. The case law under the Hong Kong human rights protections is still the largest body of English language, common law ICCPR-based jurisprudence available and can be accessed through www.hklii.org.

[4] If it were clear that the only available 'remedy' in a particular case were a declaration of incompatibility, there is considerable doubt as to whether under international law that possibility would constitute an available and effective domestic law remedy that must be exhausted before a case can be taken to an international body: see *Burden v United Kingdom*, European Court of Human Rights, Grand Chamber, judgment of 29 April 2008, [36]-[45]

invalidated part of a statute might focus the legislative mind on ensuring that a full rights analysis and assessment is done – thus, ironically, reducing the chance that a court might find that there is an inconsistency.

Even where a case came before a court, a finding that legislation had been partially or wholly repealed would be a relatively infrequent occurrence – most of the remedies provided by courts for actual or threatened breaches of human rights under statutory human rights acts take other forms, responsive to the particular violation alleged. For example, these might involve exclusion of evidence where it has been obtained in egregious violation of protected rights; the grant of a stay of proceedings if a person can no longer receive a fair trial due to unreasonable delay; a reduction in sentence where a person has not been brought to trial within a reasonable time; or a declaration that a particular act or omission was inconsistent with human rights. In a case seeking to have a statutory provision declared inconsistent with human rights, the court would first be required to see whether there was a reasonable, human rights-consistent interpretation of the statutory provision open to it, before considering whether the provision had been repealed.

The situation is more complicated in relation to legislation enacted after the commencement of a statutory human rights act, since according to conventional constitutional theory a human rights act cannot limit the power of a subsequent legislature, though a stipulation as to rights-consistent interpretation would be effective as an interpretation provision. In this case, it may be necessary to retain the proposal for a procedure such as a declaration or finding of inconsistency for such category of legislation, to ensure that it returns to parliament for further consideration.[5]

F. The AHRCentre proposed model: combining elements of the 'dialogue' and repeal models

The model supported by the Centre draws on what we consider to be the beneficial elements of the two major non-constitutional models of human rights legislation in comparable jurisdictions in the past few decades, the 'dialogue' models (UK, Ireland, ACT, Victoria) and the statutory repeal model (Canadian Bill of Rights, Hong Kong Bill of Rights Ordinance). The model proposed by the Centre (and by some others):

- builds in human rights as an essential part of the framework for policy-making by the executive and for the legislative process;
- allows the courts to deal with cases in which the process of majoritarian law-making have fallen short of the those human rights standards the Legislature has itself vowed to observe; and
- preserves the option for the elected legislature to reassert its view of what constitutes a permissible restriction on the enjoyment or rights (or to override rights) in response to a reasoned and particularized examination by a court of how a particular law in practice affects the protected rights of an individual or group.

The Centre supports the enactment of a Commonwealth statutory bill of rights (the Human Rights Act) that:

[5] If a Commonwealth statute were expressed to apply to State laws and institutions, the effect of s 109 of the Constitution would be that the Commonwealth human rights statute would prevail over any inconsistent prior or subsequent State law, to the extent of the inconsistency.

(a) includes civil, political, economic, social and cultural rights and Indigenous rights, with the formulation of these rights to be based closely on the international human rights treaties to which Australia is a party – in particular the ICCPR and ICESCR, but other relevant treaties should also be drawn on and be explicitly identified as relevant interpretive sources;
(b) binds both the Commonwealth and the States (to the extent constitutionally possible);
(c) explicitly requires that public authorities and private bodies performing public functions comply with the rights guaranteed by the Human Rights Act and provides for a direct right of action against them where a person alleges a failure to execute that duty;
(d) provides for a reasoned statement of compatibility to be provided by the responsible Minister or private member in relation to any bill introduced into the Commonwealth Parliament;
(e) establishes a Parliamentary Human Rights Committee to carry out the function of scrutinising the consistency of all bills with the provisions of the Human Rights Act (or confers that function on an existing committee), as well as monitoring the implementation of Australia's international human rights treaty obligations – the UK Parliamentary Joint Committee on Human Rights would be an appropriate model;
(f) provides that all legislation – both legislation pre-existing and post-dating the Human Rights Act -- should be interpreted consistently with it, so far as is possible and consistently with the purpose of that legislation;
(g) provides that relevant international and comparative jurisprudence should be taken into account in the interpretation of the Human Rights Act;
(h) provides that (pre-existing) legislation that cannot be so interpreted is repealed to the extent of the inconsistency;
(i) provides that where a law is repealed due to an inconsistency with the Human Rights Act it be brought to the attention of the Parliament;
(j) provides that all courts and tribunals may provide appropriate remedies for actual or threatened infringements of the Human Rights Act, including damages or compensation where the power to award damages or compensation is otherwise within the power of that court of tribunal;[6]
(k) confers on the Australian Human Rights Commission the power to receive and investigate allegations that the rights of persons guaranteed by the Human Rights Act have been infringed;
(l) amends the Ombudsman Act 1976 (Cth) to provide that a failure to comply with the Human Rights Act will be a form of maladministration within the meaning of the former Act;
(m) provides for the concluding observations, decisions or reports relating to Australia of relevant United Human rights treaty bodies or other international bodies dealing with human rights issues (including the International Labour Organization) to be laid before the Parliament and considered by the appropriate Parliamentary Committee; and
(n) provides for a review of the Act after 5 and 10 years from the date of its commencement.

[6] This is the case in the UK, Ireland and New Zealand (although not in the ACT or Victoria). The experience in the three jurisdictions mentioned has been that, as public law damages, awards have not been frequent and have been moderate, with the courts exercising considerable caution in making such awards.

G. The operation of the proposed statutory bill of rights

The proposed statutory bill of rights will operate in many aspects in the same way as a dialogue model. So far as the development and enactment of legislation passed after the commencement of the bill of rights are concerned, the requirements in relation to the consideration of human rights issues by the executive and legislature, certification of compatibility, consideration by a Parliamentary committee, and the interpretive mandate, will be essentially the same. The major differences in operation arise from the fact that **the proposed statutory bill of rights will repeal prior inconsistent legislation, but contain an interpretive mandate for subsequent legislation.** Accordingly, it will operate differently in relation to the two categories of laws so far as review of court decisions by the Commonwealth Parliament is concerned. Where a court holds that pre-existing legislation cannot be interpreted consistently with the statutory bill of rights, the statute will be repealed to the extent of that inconsistency – the matter can then return to Parliament for the legislature to consider whether to reenact the provision in a manner consistent with human rights. Where a court holds that subsequent legislation cannot be interpreted consistently with the statutory bill of rights, it will not be able to hold it repealed, and will merely be able to make a finding or issue a declaration of incompatibility/inconsistency. This would go back to the Parliament for its reconsideration, as it would under the existing dialogue models.[7]

H. Bills of rights: impact on executive and legislative procedures and the consideration of human rights issues

In our submission the introduction of an appropriately designed statutory bill of rights – whether based on a dialogue model or a repeal model – can significantly contribute to the focus on human rights issues and the quality of human rights analysis undertaken within government and in the legislative process. While our preference is for the stronger version of statutory human rights act (a repeal model), in our view the adoption of either form of statutory bill of rights would significantly contribute to bringing about a more coherent, sustained and focused attention to human rights both in the executive branch as well as in the legislature. The experience from the United Kingdom, New Zealand, the ACT and Victoria provides a solid empirical basis for such a conclusion, and the efforts of the executive and legislature to avoid judicial findings of human rights inconsistency in jurisdictions such as Hong Kong, South Africa and Canada Bill of Rights, are equally stringent.

The experience in the United Kingdom, the ACT and Victoria within the last decade has shown that a human rights act which has the combination of features set out above can contribute to a much greater focus on and more coherent analysis of human rights issues in the legislative process. There is considerable evidence in all three jurisdictions of an increased executive and Parliamentary focus on human rights issues in the legislative process. It is still early days in these jurisdictions and it may take considerable time before the effects of the human rights legislation on bureaucratic culture are fully felt. In addition there has as yet been relatively little research carried out in those jurisdictions that

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[7] If a Commonwealth statutory bill of rights were extended to State legislation, then both pre-existing and subsequent legislation could be overridden by virtue of s 109 of the Constitution. If a State legislature wished to pursue its original goal, the only option would be to enact legislation consistent with the relevant human rights, if that were possible.

examines the internal processes of government (some has been undertaken in the ACT, where assessments of the 'invisible' impact of the ACT Human Rights Act are positive).

There are clear indications that this new analytical framework and scrutiny has led to substantial changes in proposed legislation within the executive and in the legislature in the ACT, in particular.[8] Research on the operation of the ACT Human Rights Act shows:[9]

> One of the clearest effects of the Act has been to improve the quality of law-making in the Territory, to ensure that human rights concerns are given due consideration in the framing of new legislation and policy, and that rights are not sacrificed in the pursuit of other community objectives. The development of new laws by the Executive has clearly been shaped by the requirement to issue a statement of compatibility for each new bill, and the approach of government has been influenced by a robust dialogue with the legislature, the Scrutiny Committee and the Human Rights Commissioner. These improved laws may have tangible benefits over the longer term, particularly in the form of additional safeguards for vulnerable individuals in the community, including children in the care and protection system, those in the criminal justice and corrections system, the mentally ill, and others dependent upon government services. Although human rights case law has not yet developed to a sophisticated level in the ACT, at times the courts have also played a valuable role in considering the human rights implications of legislation and procedure, and in moderating the effect of bureaucratic decisions that have unfairly affected the rights of individuals.

In Australia there is thus clear evidence that in the ACT and Victorian legislatures there is considerably more explicit analysis of legislative proposals in human rights terms than previously, both in the legislative scrutiny procedures but also in the debate.[10]

The impact that a well-designed bill of rights can have in the legislative process is keenly apparent when one compares the ACT and Victorian legislatures' records since the adoption of their human rights legislation, with the NSW Parliament's performance. In 2001 the NSW Parliamentary inquiry into the desirability of a bill of rights for NSW rejected the need for a statutory or any other form of bill of rights, taking the view that the most effective way to ensure that the possibility of rights violations (which it accepted did occur) was eliminated or reduced was to strengthen the Parliamentary process of scrutiny of bills. The Parliament established a Legislation Review Committee to carry out this scrutiny function and conferred on it a traditional common law scrutiny mandate, rather than an explicit human rights mandate. The NSW Committee's mandate is similar to that of the Senate Committee for the Scrutiny of Bills and confers on the Committee the function of reporting on whether a bill "by express words or otherwise:

> (i) trespasses unduly on personal rights and liberties, or
> (ii) makes rights, liberties or obligations unduly dependent upon insufficiently defined administrative powers, or
> (iii) makes rights, liberties or obligations unduly dependent upon non-reviewable decisions, or
> (iv) inappropriately delegates legislative powers, or

[8] Andrew Byrnes, Hilary Charlesworth and Gabrielle McKinnon, *Bills of Rights in Australia: History, Politics and Law* (UNSW Press, 2009), Chapter 4
[9] Ibid
[10] Ibid, Chapter 5

> (v) insufficiently subjects the exercise of legislative power to parliamentary scrutiny."[11]

The primary focus of this mandate appears to be a range of traditional civil liberties concerns, such as the presumption of innocence and reverse burdens of proof, the privilege against self-incrimination, protection against arbitrary arrest or excessive entry, search and seizure provisions. While potentially a valuable mechanism, the track record of the Committee falls short of the expectations detailed human rights analysis of bills to which its statement of the scope of its mandate might give rise. The problem is not just the lack of an explicit human rights mandate (since the Committee has claimed that it can take into account internationally guaranteed rights, though it rarely does so). In our view, what is needed is not just an explicit human rights mandate for a Parliamentary committee of this sort, but the possibility that decisions of the legislature will be subject to careful external judicial review. This might take the form of a dialogue model review or a stronger model, but both the normative framework of a bill of rights and the possibility of judicial review are essential to the effective operation of both the Parliamentary process in carrying out its function and duty of ensuring the implementation of human rights.

I. The inclusion of economic, social and cultural rights

The proposed AHRCentre model would include civil, political, economic, social and cultural rights and Indigenous rights, with the formulation of these rights to be based closely on the international human rights treaties to which Australia is a party – in particular the ICCPR and ICESCR, but other relevant treaties should also be drawn on and be explicitly identified as relevant interpretive sources;

In our view, the inclusion of economic, social and cultural rights in a Human Rights Act is essential to the effective enjoyment of many of the civil and political rights. The right to vote and freedom of expression are dependent on the realisation of the right to education; the right to be treated equally and not to be discriminated against is often dependent on the right to health and the right to social security. The primary (recurring) argument against the inclusion of economic and social rights is that judicial consideration and enforcement of these rights would entail the application of positive duties on the state to effect certain social and economic outcomes. Those opposed to the inclusion of economic and social rights assert that the application of such positive duties would result in the judiciary 'usurping' the power of government to formulate social policy and determine budgetary and resource allocations in breach of the separation of powers doctrine.

Apart from contending that the effective exercise of civil and political rights is frequently dependent on the parallel implementation of economic and social rights, we endorse the view of the South African Constitutional Court in *Re Certification of the Constitution of the Republic of South Africa*1996.[12] In dismissing objections to the inclusion of economic and social rights in the South African Bill of Rights, the Court held:[13]

> It is true that the inclusion of socio-economic rights may result in courts making orders which have direct implications for budgetary matters. However, even when a court enforces civil and political rights such as equality, freedom of speech and the right to a fair trial, the

[11] *Legislation Review Act 1987*, s 8A
[12] *Ex Parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa*,1996 (4) SA 744 (CC) [76] - [78]
[13] Ibid [77]

> order it makes will often have such implications. A court may require the provision of legal aid, or the extension of state benefits to class of people who formerly were not beneficiaries of such benefits. In our view it cannot be said that by including socio-economic rights within a bill of rights, a task is conferred upon the courts so different from that conferred upon them by a bill or rights that it results in a breach of the separation of powers.

Furthermore, the South African Constitution and the Constitutional Court in its case law have adopted a more sophisticated approach to the implementation of economic, social and cultural rights and the appropriate form of judicial review of the state's fulfillment of those obligations under the Constitution. In general this embodies a form of 'reasonableness' review of government action rather than a focusing on an individual right directly to enforce positive duties imposed by economic and social rights which entitle individuals to the direct provision of essential, basics goods and services (minimum core obligations). The touchstone of the courts' inquiry is whether the steps taken by the state in the progressive realisation of these rights are considered reasonable (which will include an assessment of available resources). This approach has commended itself to a number of the recent Australian consultations on bills of rights (ACT, Tasmania and Western Australia), and similar approach has been endorsed by the UK Joint Parliamentary Committee on Human Rights.

The days when economic, social and cultural rights could be dismissed as ersatz rights involving only obligations of progressive implementation which were vague and not in any respect judicially enforceable or reviewable are long gone: the major theoretical and practical developments of the past thirty years in international and constitutional practice, case law, and academic writing[14] put beyond any real doubt that this category of rights belong in any modern bill of rights that aspires to respond to the real needs of the people of Australia.

Please contact us if you would like to discuss any of these issues further.

Yours sincerely

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[14] See generally Malcom Langford (ed), *Social Rights Jurisprudence: Emerging Trends in International and Comparative Law* (Cambridge University Press, 2009)