

Submission to the Victorian
Human Rights Consultation
Committee

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Melbourne

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The content of this submission represents the views and opinions of the Mallesons Stephen Jaques Human Rights Law Group in Melbourne, and does not represent the views of Mallesons Stephen Jaques or the views of the firm's clients.

A Executive Summary

In answer to the questions raised by the Victorian Human Rights Consultation Committee, we make the following recommendations.

Question 1: Is change needed in Victoria to better protect human rights?

It is a matter for government policy as to whether change is needed in Victoria to better protect human rights. That said, we submit that one issue which should be considered is whether change is required as a result of Australia's ratification of international human rights treaties. We consider it is arguable that this is the case. In any event, we submit that adoption of a charter or bill of rights in Victoria ("**Charter of Human Rights**") would be consistent with Australia's ratification of these treaties.

Question 2: If change is needed, how should the law be changed to achieve this?

We propose the creation of a Charter of Human Rights.

Question 3: If Victoria had a Charter of Human Rights, what rights should it protect?

We submit that all of the civil and political rights recognised in the International Covenant on Civil and Political Rights ("**ICCPR**"), other than those which do not fall within the power of the Victorian legislature, should be protected under the proposed Charter of Human Rights.

We submit that all of the economic, social and cultural rights recognised in the International Covenant on Economic, Social and Cultural Rights ("**ICESCR**") should be protected under the proposed Charter of Human Rights, and given equal status with the civil and political rights recognised in the ICCPR.

Question 4: What should be the role of our institutions of government in protecting human rights?

We submit that the Charter of Human Rights should impose the following requirements on each of the branches of government:

- (a) the Legislature:
 - (i) a legislative committee should review and report on any potential incompatibility of proposed legislation with the Charter of Human Rights; and
 - (ii) a legislative committee, or the Attorney General, should produce a substantive report in response to any judicial Declaration of Incompatibility.
- (b) the Executive:

- (i) all acts of the Executive should comply with the Charter of Human Rights;
 - (ii) public bodies should be subject to regular auditing and reporting in relation to compliance with the Charter of Human Rights;
 - (iii) a Minister who introduces proposed legislation should prepare a substantive report as to the compatibility of the bill with the Charter of Human Rights; and
 - (iv) where a judicial Declaration of Incompatibility has been made, the Attorney-General should table the Declaration in Parliament, and produce a report in response (unless this role is given to the Legislature).
- (c) the Judiciary:
- (i) Victorian courts and tribunals should be required to interpret Victorian law in a way that is consistent with the Charter of Human Rights; and
 - (ii) where this is not possible, the Courts should have the power to issue a Declaration of Incompatibility, which does not affect the validity or operation of any law.

Question 5: What should happen if a person's rights are breached?

We submit that where the State, its agents or any other person or body acting in a public function, has breached the Charter of Human Rights, a person adversely affected by such conduct should be entitled to:

- (a) a declaration that such conduct amounts to a breach;
- (b) an injunction to restrain any continuing breach;
- (c) damages as compensation where loss can be proven;
- (d) remedies in the nature of certiorari, mandamus or prohibition where the exercise of executive power fails to consider the Charter of Human Rights; and
- (e) standing to apply to the Courts for a non-binding Declaration of Incompatibility.

Question 9: If Victoria introduced a Charter of Human Rights, what should happen next?

We submit that the Charter of Human Rights should be reviewed 2 years after its commencement, and again after 5 or 6 years.

B Background

The current community consultation process on a Charter of Rights for Victoria was a major initiative in the Attorney-General's *Justice Statement*, released in 2004. On 18 April 2005, Attorney-General Rob Hulls announced the establishment of a Human Rights Consultation Committee ("**the Committee**"). The Committee is required to report back to the Government by 30 November 2005.

The Committee has released a Human Rights Consultation Community Discussion Paper ("**the Discussion Paper**"), seeking submissions from the community by 1 August 2005. The Discussion Paper poses 10 key questions as a starting point for debate ("**the 10 key questions**").

The Mallesons Stephen Jaques Human Rights Law Group was established in 2001. The aim of the group is to systematically broaden and deepen the firm's expertise in human rights law and corporate social responsibility issues. We welcome this opportunity to engage in community dialogue on human rights by making a submission to the Committee. Our submission addresses those key questions that have a specific legal focus, namely questions 1 to 5 and question 9.

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C Submission

Our submission in relation to questions 1 to 5 and question 9 of the 10 key questions is as follows.

1 Is change needed in Victoria to better protect human rights?

Recommendation

It is a matter for government policy as to whether change is needed in Victoria to better protect human rights. That said, we submit that one issue which should be considered is whether change is required as a result of Australia's ratification of international human rights treaties. We consider it is arguable that this is the case. In any event, we submit adoption of a Charter of Human Rights would be consistent with Australia's ratification of these treaties.

1.1 International protection of human rights

The Universal Declaration of Human Rights ("**UDHR**"), adopted and proclaimed by the United Nations General Assembly on 10 December 1948, was the first international document consolidating human rights and freedoms

and explicitly recognising “*the inherent dignity and ... the equal and inalienable rights of all members of the human family*”.¹

Subsequent to the adoption of the UDHR, the UN Commission on Human Rights produced two multilateral human rights treaties, the ICCPR and the ICESCR. Both treaties were adopted by the General Assembly in 1966, and received the requisite number of ratifications to come into force in 1976.

The UDHR, ICESCR and ICCPR, along with the two optional protocols to the ICCPR, constitute the “international bill of human rights”² - hence their relevance to the development of any charter or bill of rights at a domestic level. The UDHR does not expressly impose any international obligations on nations. International human rights obligations arise from the ICCPR and the ICESCR.

1.2 Australia’s international human rights obligations

Australia is an original signatory to the UDHR and ratified the ICCPR in 1980,³ acceded to the First Optional Protocol to the ICCPR (“**First Optional Protocol**”) in 1991 and the Second Optional Protocol to the ICCPR in 1990, and ratified the ICESCR in 1976.⁴

Upon ratification, Australia is obliged under the *Vienna Convention on the Law of Treaties* to give effect to all provisions of the ICCPR and the ICESCR (other than the specific provisions in relation to which it lodged reservations).⁵ Although the UN Human Rights Committee (“**UN HRC**”) has a role to play in considering cases of non-compliance with the ICCPR, the primary responsibility for compliance with both treaties is at the domestic level.⁶

Under Article 2(2) of the ICCPR, a State Party undertakes to

adopt such legislative or other measures as may be necessary to give effect to the rights recognized in the present Covenant.

Article 2(3) further provides that State Parties to the ICCPR must ensure that people whose rights are violated have an effective remedy. Complaints should be determined by “competent judicial, administrative or legislative authorities”,⁷ and a remedy, if granted, should be enforced.

¹ Preamble, UDHR.

² UN HCHR Fact Sheet “The International Bill of Human Rights”, <http://www.unhchr.ch/html/menu6/2/fs2.htm> (Accessed on 3 August 2005).

³ Australia ratified the ICCPR on 13 November 1980, but lodged a number of reservations. Reservations are statements where a State Party attempts to modify the legal effect of provisions of the treaty as they apply to the State, essentially putting the other parties to the treaty on notice as to how the state will interpret the particular provisions. Many of these have since been withdrawn, with those remaining being reservations in relation to Article 10 (persons deprived of liberty), Article 14 (right to a fair trial) and Article 20 (propaganda for war).

⁴ Australia did not lodge any reservations or declarations when it ratified the ICESCR on 10 March 1976.

⁵ Article 26, Vienna Convention on the Law of Treaties (which came into force on 27 January 1980).

⁶ See for example the requirement that individuals must have exhausted all domestic remedies before they can bring a case before the UN HRC: Article 5(2)(b) of the First Optional Protocol.

⁷ Article 2(3), ICCPR.

Under Article 2(1) of the ICESCR, a State Party undertakes to

*take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures.*⁸

International obligation to protect human rights at a state and territory level

The Commonwealth's authority to ratify international treaties, and in doing so to accept the obligations contained therein, derives from the external affairs power in the *Commonwealth of Australia Constitution Act* (“**Australian Constitution**”).⁹

Further, both the ICCPR and the ICESCR are expressed to extend to all parts of a federal state such as Australia. Article 50 of the ICCPR and Article 28 of the ICESCR both state that

The provisions of the present Covenant shall extend to all parts of federal states without any limitations or exceptions.

On ratifying the ICCPR, Australia also made the following declaration:¹⁰

*Australia has a federal constitutional system in which legislative, executive and judicial powers are shared or distributed between the Commonwealth and the constituent States. The implementation of the treaty throughout Australia will be effected by the Commonwealth, State and Territory authorities having regard to their respective constitutional powers and arrangements concerning their exercise.*¹¹

This declaration expressly recognises the need for the states and territories to implement the provisions of the ICCPR.¹² In ratifying both treaties, the Commonwealth clearly intended for the states and territories to give effect to the provisions they contain.

In this context, it is arguable that the Commonwealth has the power to impose such obligations on the states. Legislative acts of the Commonwealth can bind the states to the extent that those acts do not discriminate, or operate to

⁸ The Committee on Economic, Social and Cultural Rights has emphasised that “*although the full realization of the relevant rights may be achieved progressively*”, Article 2(1) requires immediate targeted steps to be taken towards meeting the ICESCR obligations: *Report of the Committee on Economic, Social and Cultural Rights*, E/1991/23, pp 83-87.

⁹ Australian Constitution, s 51(xxix).

¹⁰ A declaration gives notice of a State's interpretation of a treaty, but has no legal effect: Joseph, S, Schultz, J & Castan, M, *The International Covenant on Civil and Political Rights: Cases, Materials, and Commentary*, Oxford University Press, Oxford, 2000, p 601.

¹¹ No such declaration was made upon ratifying the ICESCR.

¹² O'Neill, N, Rice, S & Douglas, R, *Retreat from Injustice: Human Rights Law in Australia* (2nd edn 2004), Federation Press, Sydney, p 144.

destroy or curtail the continued existence of the states or their capacity to function as governments.¹³

Executive acts of the Commonwealth, in respect of international treaties, may also impose obligations on the states. Historically, the power to enter into treaties was exercised by the sovereign.¹⁴ Today, when the Commonwealth enters into an international treaty, it does so in right of the Crown (in all her emanations), on behalf of the people of Australia.¹⁵ The concept of indivisibility of the Crown derives from the constitution, and from the theory of agency.¹⁶ While this concept has been criticised for its failure to take into account responsibilities and liabilities of different governments within the Federation,¹⁷ in the international context it makes practical sense. In Leslie Zines' words, "Australia speaks to the world with one voice, and that is the voice of the Commonwealth".¹⁸

The political and legal sovereignty of Australia resides in the people of Australia.¹⁹ The people of Australia, through the Australian Constitution (the "compact of the Australian people"²⁰), have devolved sovereignty to two levels of government. Given that it is the Commonwealth that is allocated the power to enter into treaties under the external affairs power in the Constitution, it is arguable that the act of the Commonwealth in so doing should also operate to affect other levels of government that have legislative power to implement such treaties.

It is also relevant to note that the treaty monitoring bodies established under the ICCPR and ICESCR have regard to the executive and legislative activities of the states of Australia. For example, in the Concluding Observations of the Human Rights Committee on Australia in 2000, the Committee referred to mandatory sentencing laws in Western Australia and the Northern Territory.²¹ In the Concluding Observations of the Committee on Economic, Social and Cultural Rights on Australia in 2000, the Committee referred to residential tenancies legislation in New South Wales.²² The Committees have urged federal states to ensure that the Covenant rights are enforceable within their provinces and territories through legislation or policy measures and the establishment of independent and appropriate monitoring and adjudication mechanisms.²³

¹³ *Re Australian Education Union; Ex parte Victoria* (1995) 184 CLR 188 at 231.

¹⁴ Senate Legal and Constitutional Committee, *Trick or Treaty? Commonwealth Power to Make and Implement Treaties* (1995), ch 4.

¹⁵ Sovereignty resides in the people of Australia: *McGinty v Western Australia* (1996) 186 CLR 140, 275 (McHugh J), 275 (Gummow J).

¹⁶ Zines, L, *The High Court and the Constitution* (1981), 254.

¹⁷ *State Authorities Superannuation Board v Commissioner of State Taxation (WA)* (1995) 189 CLR 253 at 289-290 (McHugh and Gummow JJ).

¹⁸ Zines, above n 16, p 220.

¹⁹ *Australian Capital Television v Commonwealth of Australia* (1992) 177 CLR 106, 137 (Mason CJ).

²⁰ *Stevens v Head* (1993) 176 CLR 433, 460-61 (Deane J), 463-64 (Gaudron J).

²¹ Concluding Observations of the Human Rights Committee: Australia 24 July 2000, A/55/40.

²² Concluding Observations of the Committee on Economic, Social and Cultural Rights: Australia 1 September 2000, EC.12/1/Add.50.

²³ See, eg Concluding Observations of the Committee on Economic, Social and Cultural Rights: Canada 4 December 1998 E/C.12/1/Add.31, para 52; Concluding Observations of the

It is, of course, a matter of government policy as to whether change is needed in Victoria to better protect human rights. That said, we submit that one issue which should be considered is whether change is required as a result of Australia's ratification of international human rights treaties. We consider it is arguable that this is the case. In any event, we submit adoption of a Charter of Human Rights in Victoria would be consistent with Australia's ratification of these treaties.

1.3 Protection of human rights in Australia

In Australia the implementation of international treaties requires a specific act of transformation into domestic law, as ratification alone does not give the provisions of a treaty the force of domestic law.²⁴

This means that enabling legislation must be enacted by federal and state and territory parliaments to give legal force to the obligations of the ICCPR and the ICESCR. Except for certain limited implementation through the legislation described below, this has generally not occurred in relation to the human rights treaties that Australia has ratified.

First Optional Protocol to the ICCPR

Australia acceded to the First Optional Protocol on 25 December 1991. By doing so, Australians who have exhausted domestic remedies may lodge a communication with the UN HRC alleging a violation of their rights under the ICCPR. There is no scope for enforceable remedies to arise from a decision of the UN HRC.²⁵

Legislative implementation of the ICCPR

The ICCPR has been attached as a schedule to the *Human Rights and Equal Opportunity Commission Act 1986* (Cwth) ("**HREOC Act**"), allowing access to a domestic complaints mechanism operated by the Human Rights and Equal Opportunity Commission ("**HREOC**"). This is in addition to the international complaints process under the First Optional Protocol. However both these mechanisms provide, at best, an unenforceable remedy.²⁶ Further, the Full Federal Court has held that simply including the ICCPR as a schedule to the HREOC Act is not sufficient to satisfy the requirement to enact it into domestic law.²⁷

Committee on Economic, Social and Cultural Rights: Australia 1 September 2000, EC.12/1/Add.50.

²⁴ See *Dietrich v The Queen* (1992) 177 CLR 292; *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273.

²⁵ For example in *A v Australia*, Communication No 560/1993 the UN HRC found that A, a Cambodian, had been held in immigration detention for longer than necessary, which therefore amounted to arbitrary detention, and recommended that the Australian Government pay him compensation. However the Australian Government rejected the UN HRC's view and recommendation, and took no further action on the matter.

²⁶ O'Neill, et al, above n 12, p 178.

²⁷ *Minogue v Williams* [2000] FCA 125. Note however that the Full Court of the Family Court recognised in 2003 that the inclusion of the Convention on the Rights of the Child as a schedule to the HREOC Act may give it "special significance": *B & B v Minister for Immigration & Multicultural & Indigenous Affairs* [2003] FamCA 451. On appeal to the High Court this issue was not resolved: *Minister for Immigration and Multicultural and Indigenous Affairs v B* [2004] HCA 20.

A limited number of statutes give protection to, refer to, or are based on, certain aspects of the ICCPR.²⁸ However the only piece of federal, state or territory legislation specifically incorporating and giving effect to the majority of substantive rights contained in the ICCPR is the Australian Capital Territory (“ACT”) *Human Rights Act 2004* (“ACT HRA”).

Legislative implementation of the ICESCR

Unlike the ICCPR, the ICESCR is not incorporated into the HREOC Act, and therefore there is no opportunity to make a complaint to HREOC in relation to the rights under the ICESCR. Furthermore there is no international complaints mechanism for the ICESCR,²⁹ although the UN has established a Working Group to consider an optional protocol to the ICESCR.³⁰

Therefore although the provision of services such as health and education is consistent with the ICESCR obligations, there is no guarantee that a right to such services will be protected over time without a more formalised system of protection.

Constitutional protection of rights

The Australian Constitution expressly protects a small number of rights, including certain property rights,³¹ the right to trial by jury,³² the right relating to free exercise of religion,³³ and the right not to be discriminated against based on state residence.³⁴ The Australian Constitution also confers the right to vote in federal elections, although the High Court has interpreted this provision narrowly.³⁵

Certain rights are implied in the Australian Constitution. In *Australian Capital Television Pty Ltd v Commonwealth*³⁶ the High Court held that the freedom of political communication could be implied from sections 7 and 24.

²⁸ These include the following acts: *Human Rights (Sexual Conduct) Act 1994* (Cwth), *Disability Discrimination Act 1992* (Cwth), *Privacy Act 1988* (Cwth), *Racial Discrimination Act 1975* (Cwth), *Sex Discrimination Act 1984* (Cwth), *Disability Discrimination Act 1992* (Cwth), *Age Discrimination Act 2004* (Cwth), *Evidence Act 1995* (NSW), *Evidence Act 2001* (Tas), *Evidence Act 1995* (Cwth), *Law Reform Commission Act 1973* (Cwth), *Human Rights and Equal Opportunity Commission Act 1986* (Cwth), *Crimes (Torture) Act 1988* (Cwth) and *Criminal Code Act 1995* (Cwth).

²⁹ O'Neill, et al, above n 12.

³⁰ Commission on Human Rights, *Question of the realization in all countries of the economic, social and cultural rights contained in the Universal Declaration of Human Rights and in the International Covenant on Economic, Social and Cultural Rights, and study of special problems which the developing countries face in their efforts to achieve these human rights*, Resolutions 2003/18 and 2004/29.

³¹ Australian Constitution, s 51(xxxi).

³² Australian Constitution, s 80. Note however that the practical effect of s 80 has been limited by the High Court's interpretation of the protection. In *R v Archdall and Roskrugge; Ex Parte Carrigan* (1928) 41 CLR 128 the Court held that the Commonwealth can effectively choose when an accused will be given a jury trial by determining whether or not a trial is to be "on indictment". For further discussion on the utility of s 80 see Sawer, G. *Australian Federalism in the Courts*, Melbourne University Press, (1967) Melbourne.

³³ Australian Constitution, s 116.

³⁴ Australian Constitution, s 117.

³⁵ *R v Pearson; ex parte Sipka* (1983) 152 CLR 25 4.

³⁶ (1992) 177 CLR 106.

Judicial recognition of rights

There are a number of traditional common law doctrines, mainly in the law of criminal procedure, that recognise basic human rights. Among others, these include the privilege against self-incrimination³⁷ and the right not to be subjected to arbitrary imprisonment.³⁸

In more recent times, the High Court has recognised the role that international human rights standards can play in domestic law. In *Mabo v Queensland (No 2)*³⁹ Justice Brennan said that Australia's accession to the First Optional Protocol

*brings to bear on the common law the powerful influence of the Covenant and the international standards it imports. The common law does not necessarily conform with international law, but international law is a legitimate and important influence on the development of the common law, especially when international law declares the existence of universal human rights.*⁴⁰

A controversial instance of the judiciary giving effect to international human rights principles was in *Minister for Immigration and Ethnic Affairs v Teoh*,⁴¹ where the High Court held that ratification of a treaty would give rise to a legitimate expectation that government decision makers would take into account the provisions of the treaty when making administrative decisions (“**Legitimate Expectations Doctrine**”). This would be the case even where the treaty is not specifically incorporated into Australian law.

The High Court has since indicated that if the Legitimate Expectations Doctrine is relied upon in a future case, it is likely the doctrine will be overturned.⁴² As such, there is little indication that the judiciary is prepared, without further legislative action by the Government, to recognise Australia's human rights obligations under international law.

Specific protection of rights in Victoria

The key statute protecting human rights in Victoria is the *Equal Opportunity Act 1996* (Vic) (“**EO Act**”), which aims to promote equal recognition and acceptance among all people, as well as eliminate discrimination and sexual harassment. Other Victorian legislation also contains provisions relating to certain rights.⁴³

While the protections provided by this legislation are important, they do not cover all of the rights contained in the ICCPR and the ICESCR. In addition, even where a right is recognised under current legislation, it is not always possible to achieve an effective remedy for a breach of that right.

³⁷ *Sinclair v R* (1946) 73 CLR 316 at 337; *R v Wheeler* [1917] 1 KB 283.

³⁸ *Christie v Leachinsky* [1947] AC 573 at 587; *Trobridge v Hardy* (1955) 94 CLR 147 at 152.

³⁹ (1992) 175 CLR 1.

⁴⁰ *Ibid* at 42.

⁴¹ (1995) 183 CLR 273.

⁴² *Re Minister for Immigration and Multicultural Affairs; ex parte Lam* [2003] HCA 6.

⁴³ See for example, the following acts *Racial and Religious Tolerance Act 2001* (Vic), *Information Privacy Act 2000* (Vic), *Freedom of Information Act 1982* (Vic), *Evidence Act 1958* (Vic) and *Crimes Act 1958* (Vic).

Deficiencies in rights protection

The extent of domestic human rights protection outlined above is limited when considered in light of the extensive protections contained in the ICCPR and the ICESCR. As Victorian laws are not subject to the limited protections provided by the Australian Constitution, the need for the Victorian Parliament to implement specific and consolidated rights protection is even greater than at the federal level.

The UN HRC has also recognised the deficiencies in Australia’s domestic rights protection. In its Concluding Observations on Australia’s third and fourth periodic reports regarding implementation of the ICCPR, the UN HRC stated that

*there remain lacunae in the protection of Covenant rights in the Australian legal system. There are still areas in which the domestic legal system does not provide an effective remedy to persons whose rights under the Covenant have been violated.*⁴⁴

The UN HRC further stated that Australia should “take measures to give effect to all Covenant rights and freedoms”.⁴⁵

Similarly, the UN Committee on Economic, Social and Cultural Rights stated in response to Australia’s third periodic report on the implementation of the ICESCR that:

*the Covenant continues to have no legal status at the federal **and state** level, thereby impeding the full recognition and applicability of its provisions.*⁴⁶

1.4 Protection of human rights in other jurisdictions

There are a number of jurisdictions where human rights protection is stronger and provided in a more formal manner than in Victoria:

- the ACT, under the ACT HRA;
- Canada, under the Canadian Charter of Fundamental Rights and Freedoms, which forms part of the Canadian *Constitution Act 1982* (“**Canadian Charter**”);
- New Zealand, under the *Bill of Rights Act 1990* (“**NZ BORA**”);
- South Africa, under the *Constitution of the Republic of South Africa 1996* (“**South African Constitution**”); and
- the United Kingdom (“**UK**”), under the *Human Rights Act 1998* (“**UK HRA**”).

⁴⁴ Concluding Observations of the Human Rights Committee: Australia 24 July 2000, A/55/40, paras 498-528.

⁴⁵ Ibid.

⁴⁶ Concluding Observations of the Committee on Economic, Social and Cultural Rights: Australia 1 September 2000, EC.12/1/Add.50 [emphasis added].

A comprehensive overview of each of these jurisdictions is beyond the scope of this submission, however examples of the way in which these jurisdictions protect human rights are used throughout this submission where they are relevant.

2 If change is needed, how should the law be changed to achieve this?

Recommendation

We propose the creation of a Charter of Human Rights.

2.1 Why a charter of rights?

We submit that there are compelling reasons for creating a Charter of Human Rights.

As discussed in section 1, legal protection for human rights in Victoria currently exists in a patchwork of constitutional guarantees and common law principles, as well as certain statutes.⁴⁷ A Charter of Human Rights will serve the dual purpose of:

- (a) clearly incorporating Victoria's human rights obligations under international treaties into domestic law; and
- (b) succinctly yet comprehensively stating the fundamental human rights and freedoms of Victorians in one document that is easily accessible to the general public.

In addition to these legal features, a Charter of Human Rights in Victoria would:

- (a) play an educative role in raising community awareness of human rights, thus fostering a "rights" culture;⁴⁸
- (b) promote human rights dialogue within and between:
 - (i) the executive, legislature and judiciary; and
 - (ii) the three branches of government and the general public.

(this point was emphasised by the drafters of the UK HRA,⁴⁹ and again in the ACT bill of rights consultation process⁵⁰);

⁴⁷ These include *Racial Discrimination Act 1975* (Cwth); *Sex Discrimination Act 1984* (Cwth); *Disability Discrimination Act 1992* (Cwth); *Age Discrimination Act 2004* (Cwth); *Equal Opportunity Act 1995* (Vic); *Racial and Religious Tolerance Act 2001* (Vic).

⁴⁸ Justice Michael Kirby, "A Bill of Rights for Australia - But do we need it?" 14 December 1997. <http://www.lawfoundation.net.au/resources/kirby/papers/19971214_austlaw.html> (Accessed on 12 July 2005).

⁴⁹ As Former British Home Secretary, Jack Straw explained, "Parliament and judiciary must engage in serious dialogue about the operation and developments of the rights in the Bill ... this dialogue is the way we can ensure the legislation is a living development that assists our citizens": *United Kingdom Hansard*, 314 HC 1141 (24 June 1998).

- (c) provide a set of minimum standards to which public decision-making and policy development must conform, thereby promoting the development of a regime under which governments are made more accountable through being held to a set of standards, and encouraging greater participation, democracy, accountability and transparency; and
- (d) codify the shared community value that everyone should be given a “fair go”.⁵¹

Utility of a Charter of Human Rights at the state level

We submit that action to protect human rights should be commenced at the state level. Despite its jurisdictional limitations, a Charter of Human Rights in Victoria could, together with the ACT HRA, lead the way among the remaining states and territories in promoting awareness and respect for human rights.

It appears highly unlikely that a Charter of Rights will be enacted at a federal level in the near future.⁵² Nevertheless, a Victorian Charter of Human Rights may potentially pave the way for more comprehensive and formal recognition of and protection for the rights of individuals at the federal level. Precedent for such a “bottom up” process can be found in Canada, where the enactment of the *Human Rights Code* by the Province of Ontario in 1962 and other provincial charters⁵³ eventually led to the constitutional enshrinement of the Canadian Charter in 1982.

In addition, given the nature of federalism in Australia, even if a Charter of Human Rights existed at the federal level it would not provide protection for human rights in areas over which the Commonwealth does not have jurisdiction. A Charter of Human Rights at the state level is arguably needed in these residual areas.

2.2 What form should the Charter of Human Rights take?

The Charter of Human Rights could take a number of forms. It could be enshrined in a national constitution, as in the United States,⁵⁴ Canada,⁵⁵ and

⁵⁰ *Towards an ACT Human Rights Act: Report of the ACT Bill of Rights Consultative Committee*, May 2003, pp 2, 61-63.

⁵¹ Rob Hulls, cited by Kenneth Nguyen, “Hulls push for bill of rights”, *The Age*, 20 March 2005.

⁵² For example Attorney General Philip Ruddock has expressed his view that Australia does not need a bill of rights: see transcript of Lateline television program on 24 February 2005, <<http://www.abc.net.au/lateline/content/2005/s1310553.htm>> (Accessed on 12 July 2005). Earlier, Prime Minister John Howard described in a Sydney radio interview the idea of an Australian Capital Territory bill of rights as “ridiculous”: see transcript of interview with John Laws, Radio 2UE, on 8 March 2004, <<http://www.pm.gov.au/news/interviews/Interview738.html>> (Accessed on 13 July 2005).

⁵³ These include the *Human Rights Act* in each of Nova Scotia in 1963, Alberta in 1966, New Brunswick in 1967, Prince Edward Island in 1968; and the Saskatchewan *Human Rights Code* of 1979.

⁵⁴ *Constitution of the United States of America*.

⁵⁵ Canadian Charter.

South Africa,⁵⁶ or it could be contained in a legislative instrument, such as in New Zealand,⁵⁷ the UK,⁵⁸ and the ACT.⁵⁹

Victoria does not have the option of following a United States or Canadian model of a constitutionally enshrined Charter of Human Rights. In Victoria a Charter of Human Rights could be adopted:

- (a) as an “ordinary” act of Parliament; or
- (b) as an “entrenched” act of Parliament.

An entrenched act of Parliament would require certain conditions such as a specified majority or a referendum to be satisfied for it to be repealed or amended. For example, the Victorian Constitution requires a three-fifths majority of Parliament in order to be amended or repealed.⁶⁰

We submit that a Charter of Human Rights should take the form of an ordinary act of Parliament. This means that the Victorian Parliament would have the power to amend or repeal a Charter of Human Rights in the same way as any other act of Parliament. There would be significant political pressures against winding back the protections provided under a Charter of Human Rights. Given this likely political limitation, there may in practical terms be little difference between an ordinary and an entrenched Act.

The key advantage of a Charter of Human Rights in this form is that it preserves flexibility for future developments in human rights protection. It will also allow for easy incorporation into law of any suggestions arising from short and/or long term reviews of the Charter of Human Rights.

3 If Victoria had a Charter of Human Rights, what rights should it protect?

Recommendation

We submit that all of the civil and political rights recognised in the ICCPR, other than those which do not fall within the power of the Victorian legislature, should be protected under the proposed Charter of Human Rights.

We submit that all of the economic, social and cultural rights recognised in the ICESCR should be protected under the proposed Charter of Human Rights, and given equal status with the civil and political rights recognised in the ICCPR.

⁵⁶ South African Constitution.

⁵⁷ NZ BORA.

⁵⁸ UK HRA.

⁵⁹ ACT HRA.

⁶⁰ *Constitution Act 1975* (Vic), s 18.

3.1 Which rights require protection?

The following considerations suggest that a Victorian Charter of Human Rights should cover economic, social and cultural rights as well as civil and political rights:

- (a) The Vienna Declaration and Program of Action (“**Vienna Declaration**”)⁶¹ reaffirmed the “universal, indivisible, interdependent and interrelated” status of all human rights. The Vienna Declaration called for the international community to:

*treat human rights globally in a fair and equal manner, on the same footing, and with the same emphasis. ... [I]t is the duty of States, regardless of their political, economic and cultural systems, to promote and protect all human rights and fundamental freedoms.*⁶²

- (b) We are not aware that the Australian Government has taken an inconsistent approach. On the contrary, the Department of Foreign Affairs and Trade’s *Human Rights Manual 2004* states:

*In Australia’s view, the [UDHR] does not rank or prioritise some rights above others or impose preconditions on the enjoyment of some of these rights. As far as Australia is concerned, all the rights in the [UDHR] are closely interrelated, interdependent and, above all, indivisible.*⁶³

- (c) Economic, social and cultural rights are arguably fundamentally linked to civil and political rights. For example, enjoyment of the right to life⁶⁴ is inherently related to the right to an adequate standard of living, including adequate food, clothing and housing.⁶⁵

Further, the enjoyment of fundamental economic, social and cultural rights may be a necessary precondition for the enjoyment of civil and political rights. To take one relevant example, homeless people in Victoria may experience a range of human rights violations.⁶⁶ The most obvious right not enjoyed by homeless people is the right to adequate housing.⁶⁷ A number of other economic, social and cultural rights may also be affected, such as the right to health and the right to social security. But civil and political rights are also likely to be affected. The right to vote, the right to privacy, the right to life, the right to liberty and security, the right to be treated with dignity and respect, the right to freedom of expression and the right to a fair

⁶¹ The Vienna Declaration, adopted by consensus at the 1993 World Conference on Human Rights in Vienna, involved 171 States reaffirming their commitment to the UDHR and the protection of human rights in general.

⁶² Vienna Declaration, para 5.

⁶³ at Chapter 2 “The Nature of Human Rights”:
http://www.dfat.gov.au/hr/hr_manual_2004/chp2.html (Accessed on 16 July 2005).

⁶⁴ ICCPR, Article 6.

⁶⁵ ICESCR, Article 11.

⁶⁶ See the Homelessness and Human Rights Law Reform Kit produced by PILCH at
<http://www.pilch.org.au/> (Accessed on 16 July 2005).

⁶⁷ ICESCR, Article 11.

hearing may all be affected by an initial violation of the right to adequate housing.

- (d) Different jurisdictions have resolved the issue of which rights need protection in different ways. The NZ BORA includes a selection of the civil and political rights from the ICCPR.⁶⁸ The ACT HRA similarly includes most, but not all, of the rights set out in the ICCPR.⁶⁹ The South African Constitution includes additional civil and political rights not protected in other jurisdictions,⁷⁰ as well as economic, social and cultural rights which are protected by the ICESCR.⁷¹
- (e) The decision as to which rights will be protected by a Charter of Human Rights should be based on relevant international obligations. The fact that Australia has ratified both the ICCPR and the ICESCR suggests the inclusion of economic, social and cultural rights alongside civil and political rights.

We turn to consider separately the extent to which a Victorian Charter of Human Rights might cover civil and political rights on the one hand and economic, social and cultural rights on the other.

3.2 Protection of civil and political rights

The substantive civil and political rights protected by the ICCPR are set out in Article 1 and Part III of the ICCPR.

We submit that all the rights contained in the ICCPR should be protected, to the extent possible given the constraints on state law-making as a result of the division of legislative powers under the Australian Constitution.

The further the rights set out in the Charter of Human Rights align with the original ICCPR wording, the more assistance can be gained from the extensive jurisprudence that has developed in relation to the rights contained in the ICCPR.⁷² This will aid not only the judiciary where they are required to consider or apply provisions of a Charter, but also the legislature when it is considering the compatibility of legislation, and, just as importantly, the general community.

⁶⁸ For example, the prohibition of slavery in Article 8 and the right to marry in Article 23 of the ICCPR are not included in the NZ BORA.

⁶⁹ For example, the right to self-determination in Article 1 of the ICCPR is not included in the ACT HRA.

⁷⁰ For example, sexual orientation is a prohibited ground of discrimination (s 9(3)).

⁷¹ These include, for example, the right to housing (s 26) and the right to health care, food, water and social security (s 27).

⁷² The UN HRC has built up a significant jurisprudence on the interpretations of the provisions of the Covenant. It has also developed General Comments on the meaning of the various provisions of the ICCPR, which give a detailed explanation of the content of the rights. Also of considerable assistance will be the court decisions from overseas jurisdictions, such as Canada, New Zealand, South Africa and the UK, as well as regional human rights bodies such as the European Court of Human Rights and the Inter-American Court of Human Rights.

Where appropriate it may be necessary to depart from the ICCPR wording to take into account the specific circumstances of Victoria and the Victorian people, as has been done in other jurisdictions.⁷³

3.3 Protection of economic social and cultural rights

The substantive economic, social and cultural rights protected by the ICESCR are set out in Article 1 and Part III of the ICESCR. Key rights protected by the ICESCR include the right to work, the right to an adequate standard of living, the right to the highest attainable standard of health and the right to education.

Under international law, Victoria is obliged to take steps to achieve progressively the full realisation of all the rights contained in the ICESCR. We submit that the rights contained in the ICESCR should be included in the Charter of Human Rights.

The normative development of economic, social and cultural rights has proceeded more slowly than that of civil and political rights. This may be attributed to the lack of an individual complaints mechanism attaching to the ICESCR,⁷⁴ and ambiguities associated with the duty under the ICESCR for a state party to “take steps ... to the maximum of its available resources, with a view to achieving progressively the full realisation of the rights recognised in the present Covenant”.⁷⁵

However, clarity regarding the content of economic, social and cultural rights has been achieved through three avenues:

- (a) the UN Committee on Economic, Social and Cultural Rights (“**UN CESCR**”) has elaborated on many of the rights through the production of 15 General Comments which, together with the UN CESCR’s Concluding Observations on states parties’ reports, have helped to more comprehensively articulate the content of the ICESCR rights and the nature of state parties’ obligations;
- (b) academics and NGOs have contributed significantly to the normative development of economic, social and cultural rights;⁷⁶ and
- (c) a significant expansion in jurisprudence on economic, social and cultural rights has occurred in recent years, following greater constitutional and domestic recognition of those rights.⁷⁷

⁷³ For example, the ACT HRA. See also the discussion in *Towards an ACT Human Rights Act: Report of the ACT Bill of Rights Consultative Committee*, May 2003, pp 90-93.

⁷⁴ Note however that the Commission on Human Rights has established an open-ended working group to consider options regarding the elaboration of an optional protocol to the ICESCR.

⁷⁵ ICESCR, Article 2(1).

⁷⁶ For example, the Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights (1986), and the Maastricht Guidelines on Violations of Economic, Social and Cultural Rights (1997) were produced by experts in international law. These documents analyse the particular content of various economic, social and cultural rights, and establish a comprehensive and methodological approach to those rights based on the obligations to respect, protect and fulfil rights.

⁷⁷ See for example the decision of the South African Constitutional Court in *Government of the Republic of South Africa v Grootboom* (2000) 11 BCLR 1169.

We submit that consideration should be given to a Victorian Charter of Human Rights concerning economic, social and cultural rights.

4 What should be the role of our institutions of government in protecting human rights?

Recommendation

We submit that the Charter of Human Rights should impose the requirements set out in paragraph 4.1 below on each of the branches of government.

4.1 Overview

We submit that a Charter of Human Rights should apply to each branch of the government, as is set out in the Canadian Charter.⁷⁸ Further, a Charter of Human Rights should expressly apply to any other person or body (including private organisations) performing a public function, as is the case in New Zealand,⁷⁹ and the UK.⁸⁰ This will ensure that the Charter serves as a set of minimum standards for public decision-making, encouraging more accountable governance.

In outline, we submit that a review of the operation of Charters of Human Rights in other jurisdictions indicates that appropriate protection for human rights would be best achieved by a Charter of Human Rights that imposed the following requirements on each of the branches of government:

- (a) the Legislature:
 - (i) a legislative committee should review and report on any potential incompatibility of proposed legislation with the Charter of Human Rights (see discussion in paragraph 4.5 below); and
 - (ii) a legislative committee should produce a substantive report in response to any judicial Declaration of Incompatibility (unless this role is given to the Attorney-General) (see discussion in paragraph 4.7 below);
- (b) the Executive:
 - (i) all acts of the Executive should comply with the Charter of Human Rights (see discussion in paragraph 4.4 below);

⁷⁸ Canadian Charter, s 32.

⁷⁹ Section 3 of the NZ BORA provides that the NZ BORA applies to acts done “(a) By the legislative, executive, or judicial branches of the government of New Zealand; or (b) By any person or body in the performance of any public function, power or duty conferred or imposed on that person or body by or pursuant to law”.

⁸⁰ Section 6 of the UK HRA provides that it is unlawful for a “public authority” to act incompatibly with a right protected under the Act. “Public authority” is broadly defined to include a court or tribunal and any person whose function is of a public nature, but excludes the Houses of Parliament or a person exercising functions in connection with proceedings in Parliament.

- (ii) public bodies should be subject to regular auditing and reporting in relation to compliance with the Charter of Human Rights (see discussion in paragraph 4.4 below);
 - (iii) a Minister who introduces proposed legislation should prepare a substantive report as to the compatibility of the bill with the Charter of Human Rights (see discussion in paragraph 4.5 below);
 - (iv) where a judicial Declaration of Incompatibility has been made, the Attorney-General should table the Declaration in Parliament, and produce a report in response (unless this role is given to the Legislature) (see discussion in paragraph 4.7 below);
- (c) the Judiciary:
- (i) Victorian courts and tribunals should interpret Victorian law in a way that is consistent with the Charter of Human Rights (see discussion in paragraph 4.6 below); and
 - (ii) where this is not possible, the Courts should have power to issue a Declaration of Incompatibility, which does not affect the validity or operation of any law (see discussion in paragraph 4.7 below).

Certain human rights may be justifiably restricted in limited circumstances. Any executive, judicial and legislative consideration of the rights protected by a Charter of Human Rights will need to take into account any limitations it allows those rights to be subject to (see discussion in paragraph 4.2 below).

International jurisprudence should be considered in determining whether legislation is compatible or consistent with the Charter of Human Rights, following the example of the ACT⁸¹ and UK⁸² regimes.

4.2 Justified limitation of rights

There are circumstances in which it may be appropriate to allow certain rights to be infringed. The ICESCR and the ICCPR both expressly provide that some of the rights they recognise may be subject to certain limitations.⁸³

A Charter of Human Rights should expressly indicate:

- (a) what rights may be limited; and

⁸¹ ACT HRA, s 31.

⁸² UK HRA, s 2.

⁸³ Article 4 of the ICESCR provides that the rights it recognises may only be subject to such limitations as are determined by law, and only on the condition that the limitation is compatible with the nature of the rights limited and solely for the purpose of promoting general societal welfare. Article 4 of the ICCPR similarly provide that in a time of public emergency, state parties may take measures which derogate from their ICCPR obligations, but only to the extent strictly required by the situation, and provided that such measures are not inconsistent with their other obligations under international law. This derogation must not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin, and a number of rights set out in the ICCPR are not subject to this provision.

- (b) under what circumstances, and to what extent, rights may be limited.

The ACT, Canada and New Zealand all have provisions which allow for limitations of the rights they recognise.⁸⁴ For example, in the ACT, s 28 of the ACT HRA provides that the rights it protects may be subject only to reasonable limits set by laws that can be demonstrably justified in a free and democratic society. However, the Explanatory Statement acknowledges that some rights are absolute, such as the right to torture, and are therefore not subject to any limitation.⁸⁵

We submit that the rights protected by the Charter should be subject to no further limitation than is expressly provided for in the Conventions from which our obligations derive. In the interests of clarity and certainty we submit that such limitations should be set out in the Charter in a manner similar to that found in the ICCPR and the ICESCR.

In particular the Charter of Human Rights should specify which rights are absolute and therefore not subject to any limitation, as this should not be a matter for judicial discretion.

4.3 The Compatibility Test

Any process of assessing whether legislation is consistent or compatible with the Charter must involve asking two questions (“**Compatibility Test**”):

- (a) is there an infringement of any one or more of the rights protected by the Charter? and if so
- (b) does this infringement go further than is permissible under the justifiable limitations permitted by the Charter?

Legislation will only be inconsistent or incompatible where the answer to both questions is positive.

The Charter of Human Rights should expressly provide that in answering these questions regard is to be had to international human rights jurisprudence.⁸⁶

Determining whether an infringement comes within a justifiable limitation

While there has been no judicial consideration of the justifiable limitations clause in the ACT HRA, international jurisprudence shows how the second limb of the Compatibility Test has worked in practice. In Canada it is seen as a test of necessity and proportionality.⁸⁷ The courts look at the importance of

⁸⁴ Section 1 of the Canadian Charter and section 5 of the NZ BORA both provide that the rights they protect are subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

⁸⁵ The Explanatory Statement to the ACT HRA otherwise does not specify which rights are to be considered absolute, and which are not, but it does say that it is not intended that the rights will be subject to any greater limitation than is expressed in the ICCPR. While it has been relevant to consideration of proposed legislation, to date there has been no litigation expressly dealing with s 28.

⁸⁶ See for example ACT HRA, s 31; UK HRA, s 2.

⁸⁷ See *R v Oakes* [1986] 2 SCR 713 and *R v Edwards Brookes and Art Ltd* (1986) 28 CRR 1.

the objective which the limitation is intended to promote, how proportional and appropriate the limiting method is, and how effective it is likely to be.

For example, where a Canadian man challenged legislation banning possession of child pornography, the Supreme Court of Canada recognised that the relevant law did infringe the guarantee of freedom of expression, but determined that it was justifiable given the harm that possession of child pornography can cause to children.⁸⁸ Such harm was seen as being so serious in the eyes of society that it outweighed the infringement of personal rights imposed by the legislation.

4.4 Government to act consistently with the charter

The NZ BORA applies to acts done by the legislative, executive or judicial branches of government, or by any person or body in the performance of any public function, power, or duty conferred or imposed on that person or body or pursuant to law.⁸⁹ The UK HRA has a similar provision,⁹⁰ while the ACT HRA applies to all ACT acts and statutory instruments.⁹¹

We submit that if the application of the Charter of Human Rights is limited in its application to Victorian laws, and not expressly stated to apply to all actions in the course of carrying out a public function, it will not adequately protect human rights.

Therefore the Charter of Human Rights should include a provision similar to that in the NZ BORA, which provides that all public bodies, individuals acting in a public role, and private bodies carrying out a public function are required to act in a manner that is consistent with the Charter.

In addition, all of the bodies mentioned above which must act consistently with the Charter should be required to be audited and to report on how they have implemented, and complied with, the Charter of Human Rights in their annual reports. This will further promote awareness of human rights among the government and other bodies performing public functions.

We further submit that the Charter of Human Rights should provide that it must be considered when making a decision operating in law to determine a question affecting the rights of any person or to grant, deny, terminate, suspend or alter a privilege or licence, including a refusal or failure to perform a duty or to exercise a power to make such a decision.⁹² Such a provision should allow for judicial review of administrative decisions that fail to take into account the Charter of Human Rights.

⁸⁸ *R v Sharpe* [2001] 1 SCR 45.

⁸⁹ NZ BORA, s 3.

⁹⁰ UK HRA s 6(1) provides that it is unlawful for a public authority to act in a way which is incompatible with the rights set out in the HRA. Section 6(3) provides that "public authority" includes "any person certain of whose functions are functions of a public nature".

⁹¹ ACT HRA, s 29.

⁹² Based on the *Administrative Law Act 1978 (Vic)*, s 2.

4.5 Review of proposed legislation

A number of jurisdictions, including New Zealand,⁹³ the UK,⁹⁴ and the ACT,⁹⁵ have recognised the importance of a process for assessing whether proposed legislation is compatible with the Charter of Rights. For example, in the ACT the Attorney-General must state whether a bill presented to the Legislative Assembly by a Minister is or is not consistent with human rights,⁹⁶ and a standing committee must report to Parliament about human rights issues raised by the bill.⁹⁷

However, there are differences between the different regimes as to:

- (a) who must prepare the statement: the Attorney-General (as in NZ and the ACT) or the Minister introducing the Bill (as in the UK);
- (b) whether the review process applies to all bills (as in New Zealand) or only to bills proposed by a Minister (as in the ACT and the UK); and
- (c) whether there is an additional layer of review for compatibility with human rights by a parliamentary scrutiny committee (as in the ACT).

We submit that Victoria should, as in the ACT, adopt a dual bill review process that requires:

- (a) the Minister in charge of a bill in either House of Parliament to state whether in his or her view the proposed bill is or is not compatible with the rights protected under the Charter of Human Rights; and
- (b) additional scrutiny by a special parliamentary committee.

Minister's statement as to whether the legislation is compatible

There should be a requirement that the Minister is required to outline the reasoning behind their statement. This will promote more extensive Ministerial discussions at the policy making stage about any likely impact on human rights.

Parliamentary committee scrutiny

The Scrutiny of Acts and Regulations Committee (“SARC”) has scrutinised proposed legislation in relation to undefined rights and freedoms since 1992.⁹⁸ We propose that the SARC’s terms of reference be formally expanded to enable the SARC to undertake effective evaluation of the compatibility of proposed legislation with the Charter of Human Rights.

⁹³ In New Zealand, the Attorney-General must notify the House of Representatives of any provision in any Bill introduced that appears to be inconsistent with the rights in the NZ BORA: NZ BORA, s 7.

⁹⁴ In the UK, a Minister in charge of a bill in either House of Parliament must, before the second reading of the bill, state whether in their view, the proposed bill is or is not compatible with the rights protected under the UK HRA: UK HRA, s 19.

⁹⁵ See ACT HRA Part 5.

⁹⁶ ACT HRA, s 37.

⁹⁷ ACT HRA, s 38.

⁹⁸ *Parliamentary Committees Act 2003* (Vic), s 17(a).

The Charter of Human Rights should clarify that “rights and freedoms” in section 17 of the *Parliamentary Committees Act 2003* include, at a minimum, the rights protected under a Victorian charter. The Charter of Human Rights should further require the SARC to consider the two-step Compatibility Test set out at paragraph 4.3 above. The scrutiny process ideally should be public and informed by relevant opinion from interested members of the community.

4.6 Interpretation of legislation

Victorian courts and tribunals should be expressly bound to interpret Victorian laws in light of the rights protected under the Charter of Human Rights. Such a duty will ensure that Victorian laws operate consistently with rights protected under the Charter of Human Rights.

Similar “consistent interpretation” clauses can be found in the NZ BORA,⁹⁹ the UK HRA¹⁰⁰ and the ACT HRA.¹⁰¹ Although the provisions in these acts appear substantially similar, we submit that a Charter of Human Rights should follow the ACT example as it provides more detailed guidance on the exercise of the power. We submit that, based on the ACT HRA, the Charter of Human Rights should provide that:

- (a) in working out the meaning of a Victorian law, an interpretation that is consistent with human rights is as far as possible to be preferred; and
- (b) as in the ACT HRA, “*working out the meaning of a law*” should be defined to mean:
 - (i) resolving an ambiguous or obscure provision of the law; or
 - (ii) confirming or displacing the apparent meaning of the law; or
 - (iii) finding the meaning of the law when its apparent meaning leads to a result that is manifestly absurd or is unreasonable; or
 - (iv) finding the meaning of a law in any other case.

While it is important that Victorian laws operate in a manner that is compatible with the Charter of Human Rights, it is also important to balance this objective with the need to respect the principle of parliamentary sovereignty. Where an interpretation that is consistent with the Charter of Human Rights would frustrate the clear and unambiguous intention of Parliament, it is important that courts and tribunals do not override Parliament’s intent in adopting the former position. In such a case, the court should not ignore the legislature’s clear and unambiguous intent, but should make a Declaration of Incompatibility (as discussed in paragraph 4.7 below).

In addition, we submit that where Parliament intentionally places a limit on a Charter right, this limitation should be read - as far as possible - in a manner that is consistent with the Charter of Human Rights. In the absence of clear

⁹⁹ NZ BORA, s 6.

¹⁰⁰ UK HRA, s 3.

¹⁰¹ ACT HRA, ss 30(1) and 30(3).

language by Parliament, the limitation should not be read so broadly that the right has no application at all.¹⁰²

4.7 Judicial Declaration of Incompatibility

We submit that where the Supreme Court of Victoria has considered both steps of the Compatibility Test set out in paragraph 4.3 above, and determines that it is not possible to interpret the legislation in a manner that is consistent with the Charter of Human Rights, then the Court should have the power to make a declaration that informs parliament that:

- (a) the Court believes that the legislation is incompatible with the Charter; and
- (b) the law should be revisited, either to remove the inconsistency or to state a clear intention (accompanied by substantive reasons) as to why rights are to be limited.

In contrast to the United States and Canadian systems, any declaration made should not affect the validity, operation or enforcement of the law or the rights or obligations of any person. Our submission in this regard is based on a dual recognition that:

- (a) giving an unelected judiciary the final say on human rights may stifle human rights dialogue and debate; and
- (b) in the Australian system of parliamentary democracy, the protection of human rights is ultimately a matter for the elected legislature.

The ACT,¹⁰³ New Zealand¹⁰⁴ and the UK¹⁰⁵ all give their superior courts the power to make a declaration of incompatibility which does not affect the validity of the legislation.

While such judicial declarations will not directly affect legal rights and obligations, we submit that they will nevertheless generate media and public scrutiny of the Government's actions, thus engendering political debate regarding human rights, and improving legislative (and, indirectly, executive) accountability.

¹⁰² For example, in New Zealand, this principle was set out by the Court of Appeal in *Sullivan v Ministry of Fisheries* [2002] 3 NZLR 721. This case dealt with Fisheries legislation that limited the right to silence by requiring a person to answer questions in certain circumstances. The court held that the "limitations on fundamental rights should not be construed expansively having regard to s 6 [of the NZ BORA]. ... Just because the Fisheries Act gives power to question, with a concomitant implied power to detain for that purpose, and a duty to answer, it does not mean that a person questioned is to be denied the right to legal consultation and advice; nor that the person interrogated is obliged to answer effusively rather than strictly correctly. Persons interviewed cannot be required to ... facilitate their own conviction, beyond compliance with a duty to give honest answers which meet the question".

¹⁰³ ACT HRA, s 32.

¹⁰⁴ In New Zealand, there is no express statutory provision to this effect. However, the courts have suggested in *Moonen v Film and Literature Board of Review* [2000] 2 NZLR 9; [2000] 4 LRC 158 and per Thomas J (in dissent) in *R v Pomuako* [2000] 2 NZLR 695 that a declaration of incompatibility is a valid remedy under the NZ BORA. Since *Pomuako*, there has been no opportunity for the Court of Appeal to clarify where it stands on this issue.

¹⁰⁵ UK HRA, s 4.

Indeed, as a result of the New Zealand Court of Appeal finding that it has the implied power to make declarations of inconsistency, a detailed regime has been put in place in the New Zealand public service to facilitate human rights compliance.¹⁰⁶

Effect of a Declaration of Incompatibility

Any person whose rights have been adversely affected by a legislative provision that is not compatible with the Charter of Human Rights should have standing to seek a Declaration of Incompatibility.

Where the Supreme Court considers whether to make a Declaration of Incompatibility, the Crown should have an express right to intervene, via provisions similar to those in the UK HRA¹⁰⁷ and ACT HRA.¹⁰⁸

Where a Declaration of Incompatibility is made, the following should occur:

- (a) the Attorney-General should be required to table the Declaration of Incompatibility in parliament;
- (b) a substantive report should be prepared in response to the Declaration of Incompatibility, setting out whether it is agreed that the legislation is incompatible with the Charter, and if not, reasons why the legislation is compatible. Such report could be prepared by the Attorney-General or by a legislative committee; and
- (c) the Attorney-General should be empowered to make an order to amend or repeal the legislation as required to remove the incompatibility.

Precedent for the above proposal exists in the ACT¹⁰⁹ and the UK.¹¹⁰

We submit that in order to produce more than a mere unsubstantiated denial, and to promote engaged debate about human rights, it is important to require the preparation of a response of some substance.

Any amendment to, or repeal of, legislation following a Declaration of Incompatibility should only take effect from the date of the amendment or repeal.

¹⁰⁶ This regime provides that all submissions to Cabinet committees on policy proposals and government bills must include a statement on the consistency of the submission with the NZ BORA, and papers seeking a priority on the Government's legislation programme typically include a statement on any inconsistencies with the NZ BORA.

¹⁰⁷ UK HRA, s 5.

¹⁰⁸ ACT HRA, ss 34 and 35.

¹⁰⁹ In the ACT, the Attorney-General must present a copy of any declaration of incompatibility to parliament within 6 days of receiving it, and then must present a written response within 6 months: ACT HRA s 33. To date there have been no declarations of incompatibility issued.

¹¹⁰ In the UK, a Minister of the Crown may, if he or she considers there are compelling reasons to do so, by order, make necessary amendments to the legislation to remove the incompatibility: UK HRA ss 10(2) and 10(3).

5 What should happen if a person's rights are breached?

Recommendation

We submit that where the State, its agents or any other person or body acting in a public function, has breached the Charter of Human Rights, a person adversely affected by such conduct should be entitled to:

- (a) a declaration that such conduct amounts to a breach;
- (b) an injunction to restrain any continuing breach;
- (c) damages as compensation where loss can be proven;
- (d) remedy in the nature of certiorari, mandamus or prohibition; and
- (e) standing to apply for a non binding Declaration of Incompatibility.

5.1 Right to an effective remedy

Based on Australia's obligation under international law to facilitate the right to an effective remedy,¹¹¹ together with precedents for individual remedies set in Canada¹¹² and New Zealand,¹¹³ we submit that the Charter of Human Rights should recognise and give content to the right to an effective remedy.

Individual remedies for violations of human rights should be enforceable against the State and its agents. Remedies should equally be enforceable against private bodies acting in a public capacity. In the UK HRA a broad concept of "public authority" is used to cover these various entities.¹¹⁴

The legal foundation for individual remedies is the public law duty of the Crown to ensure compliance with the Charter of Human Rights.¹¹⁵ The provision of individual remedies emphasises the role of the executive as a model of Charter compliance. Ensuring the State and its agents comply with the highest standards of human rights protection will assist in achieving recognition and respect for human rights through all levels of society.

A review of the experience in analogous jurisdictions indicates that the inclusion of individual remedies will not open the "floodgates" of litigation. In some instances, an initial increase in litigation has occurred in the area of

¹¹¹ The right to an effective remedy is guaranteed under the ICCPR (art 2(3)). This right includes the right to have such a remedy enforced (ICCPR art 2(3)(c)). The European Court of Human Rights has held that the analogous obligation under art 13 of the European Convention of Human Rights means more than the *existence* of a judicial remedy. In *Chahal v United Kingdom* (1996) 23 EHRR 413 at [145] the European Court held that an "effective remedy" required "*the provision of a domestic remedy allowing the competent national authority both to deal with the substance of the relevant ... complaint and to grant appropriate relief*".

¹¹² Remedies are available under the Canadian Charter, s 24.

¹¹³ Remedies have been judicially recognised under the NZ BORA, see for example *Simpson v Attorney-General (Baigent's case)* [1994] 3 NZLR 667.

¹¹⁴ UK HRA, s 6(3).

¹¹⁵ Such a duty was discussed in *Baigent's case*, above n 113.

criminal law, although this has not been sustained over time.¹¹⁶ In any case, it is arguable that criminal law and procedure represents an area of law in which individuals are particularly vulnerable, and thus require the protection a Charter of Human Rights would offer. The New Zealand experience indicates that police procedures have improved in light of litigation permitted under the NZ BORA.¹¹⁷

It is essential that the Charter of Human Rights clearly defines the remedies that are available for conduct that is inconsistent with the Charter. One criticism of the New Zealand regime has been that it is silent on the question of remedies. The judiciary has been forced to “fill in the gaps” to provide solutions for the practical problems overlooked in the drafting of the NZ BORA. In order to prevent similar legal uncertainty, an exhaustive regime of effective remedies should be set out.

5.2 Declaration, injunction or damages

Where conduct by the State or its agents constitutes a breach of the Charter of Human Rights, a person who has been adversely affected by that conduct should have standing to seek, and the Court should be empowered to grant:

- (a) a declaration that such conduct amounts to a breach;
- (b) an injunction to restrain any continuing breach; and
- (c) damages as compensation where loss can be proven.

Based on the New Zealand experience, loss for which compensation may be payable should include physical injury, damage to property, loss of liberty, economic loss and legal costs.¹¹⁸

5.3 Prerogative writs

The Charter of Human Rights should expressly require that all administrative decisions made in Victoria must have regard to the Charter of Human Rights. The effect of this provision will be that any person affected by such a decision where the Charter of Human Rights has not been taken into account as a relevant consideration will have standing to bring proceedings for relief or remedy in the nature of certiorari, mandamus or prohibition, for a declaration of invalidity, or for an injunction in relation to the decision.

Merits review of decisions will therefore be available where legislation already provides for the VCAT to review decisions of an administrative character for failing to take into account relevant considerations. This may require a commitment on the part of the Victorian Government to ensure adequate education of VCAT Members in human rights jurisprudence.

¹¹⁶ Thomas, E.W. "A Bill of Rights: The New Zealand Experience" in Debono, C. & Colwell, T. (eds) *Comparative Perspectives on Bills of Rights*, National Institute of Social Sciences & Law, Canberra, 2004.

¹¹⁷ Ibid.

¹¹⁸ *Baigent's case*, above n 113.

5.4 Non binding declaration of incompatibility

As discussed in paragraph 4.7 above, we submit that the Victorian Supreme Court should have the power to make a declaration of incompatibility where legislation cannot be interpreted consistently with the Charter of Human Rights. Any declaration made should not affect the validity, operation or enforcement of the law or the rights or obligations of any person.

9 If Victoria introduced a Charter of Human Rights, what should happen next?

Recommendation

We submit that the Charter of Human Rights should be reviewed 2 years after its commencement, and again after 5 or 6 years.

9.1 Further review of the operation of the charter

There is limited precedent for the introduction of a Charter of Rights in Australia. As such, and with understandable community concern about the impact of a charter of rights, we submit that the Charter of Human Rights should remain flexible.

The ACT HRA is subject to review after one year of operation.¹¹⁹ This review must consider the inclusion of economic, social and cultural rights, which were not included in the current act despite a recommendation to the contrary by the ACT Consultative Committee.¹²⁰

It is important not to wait too long before an initial review of a Charter of Human Rights, but this must be balanced against the benefit of waiting in order to have access to a wider range of information and experience, thus enabling a better assessment of the effectiveness of the Charter of Human Rights. We submit that there should be an initial review after two years, and another after 5 or 6 years. Such reviews should be wide-ranging and consider both the content of the rights that are protected and the manner in which they are protected.

We submit that our proposal as a whole is an appropriate, realistic and workable framework for securing adequate protection of human rights for all people in Victoria.

¹¹⁹ ACT HRA, s 43.

¹²⁰ *Towards an ACT Human Rights Act: Report of the ACT Bill of Rights Consultative Committee*, May 2003, p 3.