



**Dr Ben Saul** BA (Hons) LLB (Hons) *Sydney* DPhil *Oxford*, Barrister  
*Director, Sydney Centre for International and Global Law*

Law Building F10  
Sydney University NSW 2006  
Australia  
Tel: +61 2 9351 0354  
Facsimile: + 61 2 9351 0200  
Email: bsaul@usyd.edu.au

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National Human Rights Consultation Secretariat  
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*Online submission*

Dear National Human Rights Consultation

Please accept this submission to your consultation. I am Director of the Sydney Centre for International Law, a leading centre of research and policy on human rights in Australia and the Asia-Pacific region. **In summary, this submission argues as follows:**

1. Australia should adopt either a constitutional bill of rights or a justiciable statutory bill of rights, with a new cause of action allowing individuals to enforce their rights, strong remedial powers (including compensation), and a judicial power to declare legislation inoperative if it is inconsistent with a human right in the bill.
2. A justiciable constitutional or statutory bill is preferable to a weaker 'dialogue' model (such as that in the UK, Victoria and ACT) because those weaker models reconceptualise rights as mere political privileges – offering less protection for rights – and indeed provide little additional to the current level of human rights protection in Australia.
3. The problem of human rights protection in Australia is that politicians currently have too much power and deserve less' while judges do not have enough power and ought to exercise more. A justiciable bill of rights would rebalance the constitutional distribution of power to better safeguard both individual and public interests.
4. A justiciable bill of rights would not require judges to apply overly vague or political standards which would politicise the judiciary. Far from it: empowering judges to better protect rights would *enhance* the legitimacy of the judiciary and *increase* public confidence in the justice system.
5. Economic, social and cultural rights should be included in a bill of rights alongside economic social and cultural rights, and rights generally should be justiciable;

6. A bill of rights should impose an obligation to respect rights not only public authorities but also on private actors;
7. There should be a general limitations provision applicable to all rights, except those treated as non-derogable under international human rights law (with the addition of freedom from arbitrary detention);
8. The Commonwealth Ombudsman should be empowered to review governmental action and decisions for non-compliance with human rights obligations;
9. There is no need for a 'Charter of Human Responsibilities' or 'Duties', since these are implicit in a proper understanding of human rights law itself;
10. The language of an Australian bill of rights should follow the agreed language of international human rights treaties so far as possible, so that Australia can avail itself of the relevant international jurisprudence in interpreting and applying rights.

## Introduction

Since the Federal Government announced its national consultation on human rights protection last year, there has been a startling lack of ambition and boldness amongst those who support a bill of rights for Australia. The dominant model on the table appears to be the weak "dialogue" statute found in Britain, Victoria and the ACT, under which there are no new causes of action, no remedial rights to compensation, and no power of judges to declare legislation inoperative where it is inconsistent with human rights.

Most advocates of bills of rights in Australia appear to be satisfied with this model. Writing in the *Sydney Morning Herald* in January 2009, Susan Ryan, chair of the Human Rights Act for Australia Campaign, responded to opponents of bills of rights who object that political power would be transferred to unelected judges:

These arguments could only apply if a constitutional US-type bill was being proposed. But such a bill has been ruled out of the Government's human rights consultation and ruled out by more than 70 community organisations in a human rights network I have been working with.<sup>1</sup>

Strategically, as in the republican debate in the 1990s, a statutory dialogue model is attractive because a small target is thought more likely to gain wider political support. It seeks to neuter a widespread concern about out of touch judges usurping the role of a democratic parliament, instead of confronting such ill-informed fear-mongering head-on.

Yet, by failing to respond in a principled way to those criticisms, the supporters of a small target bill of rights lend dangerous legitimacy to the fallacies spouted by opponents of *any* bill of rights, who object to any new rights-based judicial powers – even dialogic ones. Those who ought to be at the forefront of developing progressive human rights protections have regrettably fettered themselves by a super abundance of caution, which does not well serve the cause of the strongest possible human rights protection in Australia.

Such a strategy renders arguments for a constitutional bill of rights heretical. It also marginalizes the next best thing: a justiciable statutory bill based (but improving) on the 1960 Canadian Bill of Rights, which could include 'manner and form' provisions to render inoperative federal legislation which conflicts with the rights contained in the Bill.<sup>2</sup>

## The Lack of Bold Vision of Rights Protection

Let me start with a stark comparison between the political commitment to human rights by the Rudd Government in Australia the Obama administration in the United States. In 2008, faced with the absence of a federal bill of rights for over a century since Federation, the Rudd Government announced a protracted inquiry into how to better protect rights in Australia, the recommendations of which will be considered by the Government towards the end of its first term, realistically consigning any implementation until after an election.

No strong leadership there: just part of the usual blizzard of inquiries and consultations launched by this government on a range of issues, with human rights treated no more significantly than petrol or grocery prices. While governing through long-winded inquiries might be seen as a strengthening of participatory democracy and consensus-building in the community, on the other hand there comes a point where inquiries begin to look like a strategy for deflecting difficult choices, and endless consultation wears thin.

Almost every other liberal democracy has had some form of bill of rights for decades, if not centuries; the legal issues are well known and not particularly difficult; there are a plethora of international treaties to guide the shape of a domestic bill; there have been numerous previous inquiries here and overseas about bills of rights; and one wonders what yet another inquiry can add, other than polarising political positions for and against a bill of rights.

In contrast to the typically Australian lethargy on a bill of rights, contrast the commitment embodied in President Obama's Inaugural Address in January 2009:

...we reject as false the choice between our safety and our ideals. Our founding fathers, faced with perils that we can scarcely imagine, drafted a charter to assure the rule of law and the rights of man, a charter expanded by the blood of generations. Those ideals still light up the world, and we will not give them up for expedience's sake.

**On that view, rights matter; they are not up for negotiation, compromise or long-winded consultation, only to result in (if anything) a weak statutory dialogue.** It is self evident to the peoples of countries founded in 'blood' or violence that human rights should enjoy the strongest possible constitutional protection – whether the US emerging from revolutionary violence, Germany rebuilding itself from the excesses of Nazism, or South Africa overcoming systematic apartheid and racial discrimination.

**The strong protection of rights is regarded as a key characteristic that signifies a break with the past and a shedding of the arbitrariness of the old order. In places where rights matter, they are grounded in the experience of systemic violations which have shown the peoples of those countries the importance of rights.**

**In contrast, those who have been most frequently victims of human rights abuses have never held the reigns of power in Australia:** whether Asian or Pacific labourers at federation, indigenous Australians, asylum seekers, racial or religious minorities, the homeless, or now suspected terrorists.

**Instead, our approach to rights has often been driven by a majoritarian conception of the common good, in which democracy is primarily concerned to protect ‘mainstream’ interests:** the battlers, middle Australia, families, and so on. No wonder many of our politicians are against rights or indifferent to them – most politicians do not come from those groups. We just don’t *get it* as those whose rights are systematically violated get it.

Some argue that parliament and the common law already protect rights, in which case one wonders why there is such staunch opposition to a bill of rights if it would simply positively reinforce the existing law. In a recent speech,<sup>3</sup> Liberal Senator George Brandis used the High Court’s *Al-Kateb* case to illustrate that where there is a gap in human rights protection in Australia, a bill of rights is still unnecessary because “political action and law reform” fix it, as when detention laws were amended in response to that unsatisfactory decision.

But he evidently does not understand human rights well, or mischaracterises them: the government’s response to *Al-Kateb* did improve detention, but it still remains *arbitrary* under human rights law – it was just made *less* arbitrary. Every person arriving without immigration permission is still indiscriminately locked up, regardless of whether they are a flight risk, a security threat, or risk to public health. They are detained for up to 90 days, which unnecessary to identify them; in other democracies, it takes a few days or a week.

**Our Parliament has decided that administrative convenience outweighs the right to liberty and freedom from arbitrary detention, which is precisely the kind of political interference which human rights law is designed to safeguard against.** Similar judgments have been made by the parliament in counter-terrorism law, anti-bikie legislation, and so on.

Of course, under a dialogic bill of rights, little would change: parliament could continue to override rights where it saw fit, particularly in a parliament which often does not appear to value liberty as highly as human rights law does. **Democratic parliaments do *not* always get it right: sometimes they transgress what ought to be regarded as ultimate moral limits on political authority, and one cannot be confident in their chivalric powers of self-restraint.**

## **A Statutory Dialogue Model Does Not Give Us Much**

The first feature of a dialogue model is that it may require statutes to be interpreted consistently with human rights as far as possible. In large part, that is already supposed to happen: there is good legal authority that ambiguous statutes should be interpreted consistently with international law, particularly human rights (and the common law should also be developed consistently with international law where possible). So, little is gained through an express direction to that effect in a dialogue model, other than making human rights standards more familiar to those many judges who seem comfortable with statutes but who are suspicious or sceptical of, or untrained in, or unaware of, international law.

The second feature of a dialogue model is that it would enable courts to issue a declaration of incompatibility, where it is not possible to interpret the statute consistently with rights. Of course, most new legislation is already assessed in the arena of public debate according to human rights standards: a plethora of NGOs, academics and so on extensively analyse laws affecting rights in controversial areas according to human rights standards; parliamentary committee debates report on such matters and make recommendations; some parliamentarians think rights are important and others are not so persuaded.

A declaration of incompatibility simply shifts the centre of gravity of the human rights debate about a law to the courts, in addition to whatever is going on in civil society and in parliament. Now there is nothing wrong with an advisory opinion of that kind (and there are ways of ensuring they are constitutionally valid). A court's declaration may send a powerful signal to the government that it has overstepped the mark, except that only procedural consequences follow (parliament must respond within a certain time period) and not any substantive obligation to change the law.

Sometimes a declaration may convince the government to change the law, and sometimes not; it depends on the political wind on the day, just as with Australia's responses to the non-binding views of UN human rights treaty bodies. It requires governments to take seriously the non-binding but persuasive views of judges, to accord the ideal of rights due respect, and not to depart too readily from reasoned opinions about the impact of laws.

In a democracy in which parliamentarians have a heritage of framing legislative discussions around rights-based principles and value systems, where there is a political culture that is sympathetic to rights, one might have confidence that judicial declarations of this kind might have the desired effect.

In Australia, one is not so sure; there is such a deep rooted scepticism of international human rights amongst many politicians on both sides of the political spectrum; legislative debates are often quarantined from rights based considerations; quite a few politicians are openly hostile to them; and there is a prevailing attitude that parliament is democratic and that its views accordingly matter more than those of the courts, particularly because parliament can often overturn judicial decisions which it does not like.

Perhaps a dialogic charter would have the effect of civilising politics – one can only hope – and therein lies part of its value. But there is an equal chance that many politicians would continue to thumb their noses at such decisions – binding High Court decisions cop enough flack already, let alone decisions which have no binding effect and would therefore be likely to be accorded even less respect by some politicians.

**The upshot is that the dialogue model is potentially – depending on its political reception – a fairly tepid or insipid way of protecting rights – it values them chiefly according to political preferences and priorities, rather than recognising their inherent importance, above the fray of political bargaining, horse trading, negotiation and opinion polls. Rights become transformed into rebuttable presumptions, blown about in the political winds.**

In enabling parliament to override human rights where it wishes, the dialogue model gives us nothing more than an expanded form of the *Racial Discrimination Act 1975* (Cth), as we have seen it applied to the Northern Territory Intervention: **rights are valuable only so long as they don't get in the way of politics, which becomes the ultimate litmus test of what matters in society – not whether some rights are so important that they ought not to be overridden.** Perversely, under the Victorian Charter, even freedom from torture is not regarded as absolute (as it is under international law), but rather can be suspended in the ordinary way by the override mechanism.

One redeeming quality of a dialogue model is its prevention function. The obligation it would impose on public servants (and why not private actors? This limitation too reflects the lack of ambition of its proponents) to comply with human rights standards is arguably more important to the daily business of government than whether any legal consequences (such as compensation) flow from violations.

Requiring people (whether policy officers or fisheries inspectors) to think about protecting rights in their interactions can only improve human rights protection. From an administrative law point of view, it involves a better structuring of the proper considerations which ought to be taken into account in the exercise of (public) power, many of which are already part and parcel of good public administration.

## **Parliamentary Sovereignty Is Not Threatened**

Senator Brandis asserted the old furphy in March 2009 that a justiciable bill of rights “would inevitably result in a fundamental rebalancing of our constitution away from parliament towards the judiciary, with dangerous consequences for both”, and a “significant transfer of power from elected Parliaments to unelected judges”.

**Yet, it has never been the case under the Australian Constitution that sovereignty is vested exclusively in the parliament.** Doctrinally that is what sets Australian democracy apart from its British ancestor: with an unwritten constitution, the absolute sovereignty or supremacy of parliament was a defining characteristic of classic English constitutionalism.

**That was never the case in Australia, where the drafters of our Westminster constitution deliberately departed from that model by limiting the sovereignty of parliament in various ways:** not only by closely defining the powers, functions and authority of the parliament to legislate, but also **by decentralising power in a separation of powers which was more rigid than its British counterpart, including by vesting certain powers exclusively in the judiciary.**

**The point of the separation of powers is the division or sharing of sovereignty: majoritarian democracy only protects human beings so far; it is the constraints or limitations on power accepted by democracies that enable democracy to flourish and sustain itself over time, in a manner which is inclusive of all and not premised on the arbitrary exclusions or unequal treatment of groups that the majority does not like.**

Further, David Feldman has responded to criticisms of the judiciary's lack of democratic legitimacy by arguing that legitimacy can arise independently from democracy. **Judicial decisions gain their own legitimacy from reference to relatively clear and predictable legal standards and the independence of courts from political processes. In addition, in my view courts derive legitimacy from their constitutional role in constraining the arbitrary or unlawful exercise of power,** a role entrusted to the courts through our democratic constitutional settlement.

There is nothing inherent or innate about the respective roles of the legislature and the courts: the separation of powers is a dynamic and fluid doctrine which does and is capable of changing according to the prevailing needs of society. **A democracy may properly elect to assign certain powers of restraint to the judiciary, including through a constitutional bill or a justiciable statutory model,** because it is rightly sceptical of overly broad legislative power.

## **Rights Are Not Too Vague or Political For Judges**

It is often further asserted that human rights standards are wide, vague or ambiguous, admitting a range of possibilities which demands the making of political choices. As Senator Brandis puts it, they are “expressed at such a level of generality that often they amount to little more than political slogans”. **Yet, rights are only general if one lacks a body of law that gives them content, which is obviously the case in a country which lacks a bill of rights.**

The obvious answer to this tedious objection is that **Australia could readily draw upon the rich vein of international and comparative jurisprudence from those many democracies which directly apply human rights.** This is incidentally an important reason why any Australian bill ought *not* to depart from the accepted language of international treaties, so that the jurisprudence can assist in providing relative certainty in an Australian context.

It is often further objected that because rights are so vague and indeterminate, they transfer to judges subjective control over what should be political choices, and that judges lack expertise in such policy-based decision making or discretionary balancing of interests.

Yet, this criticism equally applies to many other well-accepted legal concepts applied by the courts, such as tests of reasonableness, equity, fairness, justice and so forth, which mask broad discretionary power, yet which have long been accepted as the work of judges. **This objection is grounded in a fundamental misunderstanding of the judicial function, which in reality involves the exercise of a range of different discretions, rather than the automatic or technical application of precise and limited legal rules.**

**There are plenty of wide discretions which already exist under statute or the common law and which judges routinely apply.** For instance, in the High Court's anti-terrorism control orders case, *Thomas v Mowbray* [2007], Gleeson CJ observed (at paras 19-27) that the common law, constitutional law, contract, real property, and trade practices commonly use concepts of reasonableness and proportionality (concepts which are incidentally at the heart of human rights law reasoning) and which are not “inherently too vague for use in judicial decision-making”.

**Parliament can equally be criticised for being an inappropriate forum for making certain policy decisions about human rights, for example, because political pressures render parliaments more susceptible to trading away individual rights to appease the majoritarian clamour; because legislators are susceptible to NGO or lobbyist pressure which distorts outcomes; or because party politicians are beholden to sectarian interests, whether big business or trade unions or green groups.**

Senator Brandis also objects that the wide policy choices which judges would be required to make would politicise the judiciary and undermine the courts' reputation for neutrality. **Yet conversely, the failure of the courts to remedy rights violations already exposes it to greater ridicule and contempt: many Australians were deeply ashamed that our High Court was forced into accepting that indefinite detention without charge could arise under an Australian statute, and that our constitutional court was powerless to prevent it.**

Likewise, a law to the detriment of any race could potentially be perfectly constitutional under our Constitution's 'race' power, which never ceases to astound visitors from other democracies where the prospect of systematic racial discrimination has been unthinkable ever since the Nazis were defeated.

## **Politicians Have Too Much Power and Judges Have Too Little**

We have not yet achieved the optimal division of powers between politicians and judges in respect of the fundamental protection of human beings. The depth of hostility towards incorporating international human rights standards into Australian law is perplexing. **Human rights are *minimum* standards only – a floor not a ceiling – and that is why suggestions that they interfere in democratic politics are so odious. Democracies should in most cases be performing *far above* the minimum standards. When they are not, something is going seriously wrong in those political communities.**

One problem in the framing of objections to bills of rights generally in Australia is that the arguments are too often couched in the abstract, as a simple assertion that rights are vague, ambiguous, political, best decided by parliament and so on. There is seldom specific attention to why codifying particular rights would be problematic.

For instance, I believe that parliament should never be entitled to torture a person, and I believe that a judge properly ought to have power to forbid it and to compensate victims.

I believe that an Australian court ought to be able to order the government to provide public housing for those who are living homeless and destitute on the streets. I cannot believe that this would impose undue interference in resource distribution priorities by the government, since avoidance of destitution is surely a *minimum* duty of any functioning government. If we can afford to spend \$100 billion on new defence procurements at a time of global financial crisis, we can surely afford to put a roof over the head of everyone who needs it – if we agree that rights are rights, and not vague and tradeable political commodities.

Likewise I believe that a court ought to be able to prevent the government from imposing punitive visa conditions on a person which deny them income and housing support, medical care, and work rights, thus leaving them destitute and treating them in an inhuman and degrading manner. I believe it should not matter that they are not Australian citizens.

Further, I believe that a court should be able to order the release of a person from an immigration detention centre when they have been detained there purely for administrative convenience, and not because they pose any risk to anyone. I think it is reasonable to expect any government not to detain a person arbitrarily and without strong justification.

Equally I believe that the parliament should not interfere arbitrarily in freedom of expression, as it has done in counter-terrorism reforms to sedition and classification laws, and that a judge ought to be able to provide a remedy for such interference. The sedition offences, for example, prohibit certain incitements even where it has no likelihood or probability of actually resulting in the violence incited, and which would be incompatible with the US constitutional law test for the protection of free speech.

**Once you drill down into the specific rights in question, much of what is claimed to involve heated political contestation evaporates – precisely because so much of human rights law is about *minimum*, not maximum standards. The zone of disputation is surprisingly narrow if the debate is discussed at the right-by-right level, rather than rhetorically or polemically.**

Certainly the protection of some rights involves difficult resource allocation choices, in which governments are typically better experienced than courts. Yet, as the South African experience demonstrates, it is possible to balance these interests by giving courts powers in relation to rights while simultaneously ensuring that the courts only require governments to do what is reasonable within prevailing resource limits and policy constraints.<sup>4</sup>

## **Substantive Rights: Justiciable Economic and Social Rights**

Any federal bill of rights should include the full range of both civil/political and economic, social and cultural rights, arising under the ICCPR and ICESCR. Notwithstanding the complications of federalism in the delivery of social services (including education, health care, housing and welfare), it is still possible to recognise justiciable economic and social rights *to the degree that* federal decisions, action and legislation impacts on those rights. Given that human rights are indivisible, affording socio-economic rights enables people to enjoy all other (civil and political) rights, which cannot be enjoyed if a person goes without food, water, clothing or shelter, and so on.

It is commonly objected that such rights are not easily amenable to judicial enforcement, since they involve questions of policy choice and resource allocation. Three important arguments can be made in response. First, if a 'weaker' dialogue model for protecting rights is adopted, as envisaged by this Bill, then the basis of this objection largely disappears. Under a 'declaration of incompatibility' (or 'declaration of inconsistent interpretation') model, the courts are not empowered to strike down legislation or to compel governments to allocate resources to remedy violations of economic, social or cultural rights.

Secondly, this objection has always been misleading. The courts already decide questions of resource allocation on a daily basis, as when they: (a) award large compensatory damages against the government, thus depriving it of control over significant resources; (b) prohibit certain governmental action (whether in the fields of construction, trade, finance, taxation and so on), possibly resulting in significant economic loss to government; or (c) are faced with ambiguity in the law and decisions must be made between competing policies and public interests, some of which may have starkly different economic consequences for governments.

Further, judicial protection of civil and political rights (such as those arising under the International Covenant on Civil and Political Rights 1966 ('ICCPR')) – which *are* commonly considered justiciable – may equally involve intervention in resource allocation, indicating that distinguishing between ICCPR and ICESCR rights on the basis of their supposed judicial enforceability is not sustainable. In 2004, for example, the UK House of Lords found that UK legislation depriving asylum seekers of welfare support, thus rendering them potentially destitute or homeless, amounted to inhuman or degrading treatment contrary to article 3 of the European Convention on Human Rights: *Adam v Secretary of State for the Home Department* [2005] UKHL 66.

Thirdly, while an argument for 'progressive realization' of economic and social rights may be compelling in relation to developing countries, it cannot be said that an economically prosperous and highly developed country such as Australia cannot yet afford to protect these basic rights. It is important to emphasise that international human rights law establishes *minimum* international standards of treatment, so that in most cases the level of economic and social rights enjoyed in developed countries will already exceed the minimum international standard. Consequently, such rights should only become an issue in Australia in quite serious cases where the government is failing to uphold even these basic levels of treatment. In such cases, deference to parliamentary sovereignty is not appropriate, where parliament itself is responsible for violating basic rights.

It is often further objected that rights are so vague and indeterminate that they transfer to judges subjective control over what are really political choices. Yet, this criticism equally applies to many other well-accepted legal concepts applied by the courts, such as tests of reasonableness, equity, fairness, justice and so forth, which mask broad discretionary power. This objection is grounded in a fundamental misunderstanding of the judicial function, which in reality involves the exercise of a range of discretions, rather than the automatic or technical application of precise and limited legal rules.

**Other countries have found workable ways to properly accommodate resource and policy issues within a justiciable bill of rights.** In *Grootboom v Oostenberg Municipality and Others*, the South African Constitutional Court required the country's housing program to provide relief for people living in intolerable conditions or crisis situations. **The Court has devised a principled but pragmatic approach which holds that the justiciability of such rights is to be assessed according to a 'reasonable measures' standard, in which the relevant issue is considered in its social, economic and historical context and within the available resources and institutional capacity of government.**

Endorsing the South African approach, the UK Joint Committee on Human Rights agrees that economic and social rights can be made justiciable without threatening principles of democratic accountability and separation of powers, as long as they are confined ‘within narrow parameters, so as to allow courts to respond only to very serious or large scale violations’: see Report of the UK Joint Committee on Human Rights (2007-8) at 48.

## Scope of Application: Public Bodies

It is most common for bills of rights to be directed towards the control of public power: see, eg, s 3 of the *New Zealand Bill of Rights 1990*; s 6 of the UK Human Rights Act 1998; and s 32 of the Canadian Charter of Rights and Freedoms 1992.

If a bill of rights is to be limited to control of rights violations by public authorities, it is desirable for the definition of public bodies to be given a wide meaning, to include those who exercise ‘hybrid’ or devolved public power, such as corporatised public entities; private contractors performing public functions; or those recognised as performing functions in the public interest: see *Response by Liberty and the Oxford Public Interest Lawyers to the UK Joint Committee on Human Rights, Inquiry into the meaning of ‘public authority’ under the Human Rights Act 1998*, May 2003.

## Scope of Application: Private Actors

This submission supports extending the application of a bill of rights beyond public authorities to cover private actors (individuals, corporations, and other groups or entities) which infringe human rights. Traditionally, most national or federal bills of rights have been limited to controlling rights violations by public authorities because under international human rights treaties, only States expressly owe legal obligations to protect rights. In contrast, private persons are not parties to human rights treaties, which do not have ‘direct horizontal effects’ in international law and are not regarded as substitutes for domestic criminal law: UN Human Rights Committee, *General Comment No 31: Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, 26 May 2004, UN Doc CCPR/C/21/Rev.1/Add.13, ¶18.

Nonetheless, in implementing the duty to ‘ensure’ rights, States must protect individuals from private violations of rights ‘in so far as they are amenable to application between private persons or entities’: *UNHRC, General Comment No 31*, ¶18. This may require States to take positive measures of protection (including through policy, legislation and administrative action), or to exercise due diligence to prevent, punish, investigate or redress the harm or interference caused by private acts.<sup>1</sup> These duties are related to the duty to ensure effective remedies for rights violations: see ICCPR, art 2(3).

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<sup>1</sup> *Velasquez Rodriguez*, IACHR, Ser C, No 4, (1988) 9 Human Rights LJ 212, ¶¶172-173; T Buergenthal, ‘To Respect and to Ensure: State Obligations and Permissible Derogations’, in L Henkin (ed), *The International Bill of Rights* (Columbia Univ Press, NY, 1981), 72, 77-78; A Clapham, *Human Rights in the Private Sphere* (Clarendon, Oxford, 1996), 105-106, 119; D Shelton, ‘Private Violence, Public Wrongs, and the Responsibility of States’ (1990) 13 *Fordham Intl LJ* 1; G Sperduti, ‘Responsibility of States for Activities of Private Law Persons’, in R Bernhardt (ed), *Encyclopedia of PIL*, Installment 10 (1987), 373, 375.

Thus non-State actors such as individuals or corporations are indirectly regulated by human rights law, by virtue of the duties on States to 'protect' and 'ensure' rights. For this reason, '[m]uch of the significance of the State/non-State (public-private) distinction with respect to the reach of international law... collapses': H Steiner, 'International Protection of Human Rights', in M Evans (ed), *International Law* (OUP, Oxford 2003), 757, 776. Even so, where a private act is not attributable to the State, the State cannot be held responsible for the act itself, but only for its own failures to exercise due diligence in preventing the resulting rights violations or responding appropriately to them: *Velasquez-Rodriguez*, ¶¶172-173. Thus in the absence of State involvement in private violation, the State can only be held responsible for its own failures or omissions, not for the private violation itself.

While private persons are not directly legally responsible for rights violations, neither are they left entirely unregulated. The UDHR preamble states that 'every individual... shall strive... to promote respect for these rights and freedoms... to secure their universal recognition and observance', reiterated in UN resolutions: *preambles to UNGA resolution 48/22 (1993); UN Commission on Human Rights resolutions 1995/43; 1996/47; 1997/42; 1998/47; 1999/27; 2000/30; 2001/37*. Article 29(1) of the UDHR further recognises that 'everyone has duties to the community', and the *travaux préparatoires* support the view that individuals must respect human rights: Clapham, 97-98. Similarly, the preambles to the ICCPR and ICESCR state that 'the individual, having duties to other individuals and to the community to which he belongs, is under a responsibility to strive for the promotion and observance of... rights'.

These preambular injunctions, UDHR provisions and resolutions are not binding. Common article 5(1) of the ICCPR and ICESCR states, however, that nothing in those treaties

may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms recognized herein or at their limitation to a greater extent than is provided for....

That provision is legally binding and, like humanitarian law instruments directed towards controlling individual conduct, are addressed directly to individuals and groups. Developments in customary human rights law have also tended towards increasing control of private actors.

If the objective of human rights law is the protection of human dignity, it is logical that remedies be available for violations of human rights whether committed by public or private actors. The criminal law and civil law remedies will not always provide sufficient redress for the violation of rights by private actors, and it is vital that Australians can seek remedies against other citizens. It is recommended that a federal bill of rights incorporate a provision equivalent to article 8(2) of the Constitution of South Africa 1996, Chapter 2 (Bill of Rights):

8. (1) The Bill of Rights applies to all law, and binds the legislature, the executive, the judiciary and all organs of state.
- (2) A provision of the Bill of Rights binds a natural or a juristic person if, and to the extent that, it is applicable, taking into account the nature of the right and the nature of any duty imposed by the right.
- (3) When applying a provision of the Bill of Rights to a natural or juristic person in terms of subsection (2), a court

- a. in order to give effect to a right in the Bill, must apply, or if necessary develop, the common law to the extent that legislation does not give effect to that right; and
  - b. may develop rules of the common law to limit the right, provided that the limitation is in accordance with section 36(1).
- (4) A juristic person is entitled to the rights in the Bill of Rights to the extent required by the nature of the rights and the nature of that juristic person.

## **Need for a General Limitations Provision**

Any bill should contain any general limitation clause outlining the circumstances in which it is permissible to limit or restrict a particular human right, as in s 7(2) of the Victorian Charter of Human Rights and Responsibilities:

A human right may be subject under law only to such reasonable limits as can be demonstrably justified in a free and democratic society based on human dignity, equality and freedom, and taking into account all relevant factors including-

- (a) the nature of the right; and
- (b) the importance of the purpose of the limitation; and
- (c) the nature and extent of the limitation; and
- (d) the relationship between the limitation and its purpose; and
- (e) any less restrictive means reasonably available to achieve the purpose that the limitation seeks to achieve.

Where a right is properly subject to such lawful limitations, relevant legislation and the conduct of public officials would not be regarded as incompatible with human rights, such that it would not be necessary for parliament to legislate to specifically override human rights. A general limitation provision would supply a mechanism for balancing rights against other interests within the framework of human rights law itself, rather than outside of it.

It is therefore recommended that a general limitation clause be included in any bill. However, not all rights should be subject to the same general limitations clause. For instance, under international human rights law, freedom from torture is an absolute right which cannot be limited in any circumstances, even in a public emergency or for counter-terrorism purposes. It is very unfortunate that the Victorian Charter permits freedom from torture to be limited in the same way as other rights. Not only is this unprecedented, it is contrary to Australia's international human rights obligations and finds no support in public policy considerations. There are very strong legal, ethical, and political reasons for absolutely prohibiting torture.

## **Role of the Commonwealth Ombudsman**

Section 15(1) of the Ombudsman Act 1976 (Cth) provides that following an investigation under the Act, the Ombudsman may form the opinion that an action which has been investigated:

- (i) appears to have been contrary to law;
- (ii) was unreasonable, unjust, oppressive or improperly discriminatory;

- (iii) was in accordance with a rule of law, a provision of an enactment or a practice but the rule, provision or practice is or may be unreasonable, unjust, oppressive or improperly discriminatory;
- (iv) was based either wholly or partly on a mistake of law or of fact; or
- (v) was otherwise, in all the circumstances, wrong; ...

To better monitor human rights compliance by public officials, this section of the *Ombudsman Act* could be amended to add a new subsection as follows:

- (vi) was inconsistent with the enjoyment of a human right.

Providing this alternative to judicial enforcement of rights violations would help alleviate pressure on the courts, and potentially resolve a large number of human rights complaints in the manner characteristic of the Ombudsman – speedy, informal, cheap, and based on ‘cooperative compliance’ rather than an adversarial approach.

A special human rights unit could be established – and adequately staffed and resourced – within the Ombudsman to deal with such matters, which could complement the existing powers of the Australian Human Rights Commission, and better embed human rights compliance into the existing tenets of good public administration.

A similar recommendation to the Victorian consultative committee on a Charter of Human Rights for Victoria was endorsed by the Victorian Government and is included as a consequential amendment to s 13(1) of the *Ombudsman Act 1973 (Vic)*, in the Schedule to the *Charter of Human Rights and Responsibilities Act 2006 (Vic)*.

## Brief Comments on Particular Rights

This submission does not deal in detail with the rights in the Bill, but makes some short comments on two particular rights.

### (a) Right to Liberty and Security of Person

Consideration should be given to specifying precisely the grounds on which detention is lawful in relation to the right to liberty and security of person (in clause 21 of the Bill), as in article 5 of the European Convention on Human Rights (and which is reflected in the Human Rights Act 1998 (UK)):

1. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:
  - (a) the lawful detention of a person after conviction by a competent court;
  - (b) the lawful arrest or detention of a person for non-compliance with the lawful order of a court or in order to secure the fulfilment of any obligation prescribed by law;
  - (c) the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority of reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so;

- (d) the detention of a minor by lawful order for the purpose of educational supervision or his lawful detention for the purpose of bringing him before the competent legal authority;
- (e) the lawful detention of persons for the prevention of the spreading of infectious diseases, of persons of unsound mind, alcoholics or drug addicts, or vagrants;
- (f) the lawful arrest or detention of a person to prevent his effecting an unauthorized entry into the country or of a person against whom action is being taken with a view to deportation or extradition.

Particularisation is preferable to preserving the vague, open-ended and manipulable requirements in the ICCPR, that detention merely not be “arbitrary” and be based on (any) “grounds... established by law”. While the list of grounds in the European Convention may require modification, the use of determinate grounds for depriving a person of liberty is clearer preferable to permitting detention which satisfies the lower, open-ended standard in the ICCPR.

## **(b) Fair Trial**

In Australia, it is critically important to extend the limited right to a fair hearing in criminal cases or a (civil) “suit at law” (in Article 14 of the ICCPR) to encompass administrative hearings in which rights or obligations at law are determined. Such an extension would recognise the rapid growth of the modern bureaucratic State has involved increasing regulation of individual rights and obligations by administrative bodies which are not courts. This includes situations where legal rights or obligations are determined by administrative decision-makers or department officers outside a tribunal setting.

While administrative decisions may not require the same standards of a fair hearing as more formal criminal, civil or tribunal processes, consideration should nonetheless be given whether to extend the right to a fair hearing to encompass administrative decisions, perhaps specifying some minimum protections. An expanded right of this kind is more accurately described as a right to a ‘fair hearing’ (rather than a fair trial).

## **A Charter of Responsibilities?**

It is unnecessary to ‘balance’ a bill of rights with a ‘Charter of Responsibilities’. Human rights law already implies correlative duties or obligations owed towards other individuals and to the community. The common preamble to the ICCPR and ICESCR state that

the individual, having duties to other individuals and to the community to which he belongs, is under a responsibility to strive for the promotion and observance of the rights recognized in the present Covenant...

Further, article 29 of the UDHR recognises that ‘Everyone has duties to the community in which alone the free and full development of his personality is possible.’ These exhortations are implicitly reflected in the binding limitations clauses in the ICCPR and ICESCR, which recognise that individual rights cannot be asserted to the detriment of overriding public goods.

The concept and practice of “human responsibilities” has proven open to abuse and manipulation, and is frequently deployed to unjustifiably repress legitimate rights claims. Human “duties” or “responsibilities” are already well integrated into codes of public morality. Legal codification of “responsibilities” would unnecessarily interfere in, stagnate or ossify concepts which are better left to be regulated by social morality and public ethics. (See Ben Saul, ‘In the Shadow of Human Rights: Human Duties, Obligations and Responsibilities’ (2001) 32 Columbia Human Rights Law Review 565, available on request.)

## Drafting Considerations

While there may be advantages in simplifying and modernizing some of the language inherited from the ICCPR and ICESCR, and in drafting a Charter in plain English, on balance it is undesirable to depart too far from the well-known language of international treaties. A wealth of international and comparative jurisprudence has developed to assist in the interpretation of specific human rights, and there is the danger that such assistance will be lost or much diminished if rights in Australia are reformulated in autochthonous legal language. There is, however, a trend towards modernisation of the language in new bills of rights in other Australian jurisdictions which could generate interpretive synergies.

## Conclusion

**I would caution against settling for a weak dialogue model of human rights protection. Its weaknesses cannot possibly satisfy those to whom human rights matter most – those who are victims of rights violations, and who are seldom well positioned (unlike business, lobbyists, trade unions and so forth) to engage in the political process to extract concessions.**

The litmus test of any government’s commitment to human rights is its preparedness to expend political capital to secure fundamental changes, which may not necessarily appeal to majoritarian sentiment, or to the usual cacophony of shock jocks and ideologues. Political capital is greatest in the government’s first term, while it is still popular and has not started the slide into decline, as governments eventually do as they accumulate mistakes over time.

The government has an unprecedented chance not only to put right what was so out of balance under the previous government, but to show real leadership in developing a progressive human rights agenda in Australia. It should not waste that opportunity by delaying on the question of a bill of rights, or by settling for an insipid dialogue.

The government might be pleasantly surprised by how warmly a justiciable or constitutional bill of rights might be received in the community, if one is willing to look beyond the thousands of tedious form letters for and against human rights which have been mobilised by advocacy groups. The state and territory consultative processes have shown overwhelming support, while the previous government’s intransigence on human rights accounts for part of the public’s turn against it – and against the belief that parliament or a dialogue model is an adequate guarantor of our liberty.

Please be in touch if you require any further information or assistance.

Yours sincerely



## Notes

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<sup>1</sup> Susan Ryan, 'Law to bring level playing field', *Sydney Morning Herald*, 18 January 2009.

<sup>2</sup> See George Winterton, 'Can the Commonwealth Parliament Enact "Manner and Form" Legislation?' (1980) 11 *Federal Law Review* 167-202.

<sup>3</sup> Hon Senator George Brandis SC, 'The Case against a Statutory Bill of Rights', Address to the Queensland Law Society, 28 March 2009.

<sup>4</sup> See *Grootboom v Oostenberg Municipality and Others*, 2000 (11) BCLR 1169 (CC); 2001 (1) SA 46 (CC).