SUBMISSION OF THE VICTORIAN BAR IN RESPONSE TO THE NATIONAL HUMAN RIGHTS CONSULTATION

Introduction

This submission is made on behalf of the Victorian Bar. The Bar Council of the Victorian Bar has endorsed this submission, which was prepared by the Bar's Human Rights Committee. The members of that Committee are listed in Appendix A to this submission.

The range of views held by individual members of the Victorian Bar about the desirability, and structure, of a federal bill of rights no doubt reflects the range of views generally held within the Australian community. Notwithstanding such a range, the role of barristers in the administration of justice, and the particular experience of Victorian barristers in the light of the *Charter of Human Rights and Responsibilities Act* 2006 (Vic) (the **Victorian Charter**) means the Bar Council considers it appropriate to put forward a single submission on behalf of the Bar.

The structure of the submission follows the three questions posed by the terms of reference for the National Human Rights Consultation. It also has a particular focus of the Victorian Charter.

Consultation Framework

1. The National Human Rights Consultation terms of reference state that options for the promotion of human rights should preserve the sovereignty of the Parliament and not include a constitutionally entrenched bill of rights.[1]

2. The options identified in the NHRC background paper are (1) changes to parliamentary processes and administrative decision-making, (2) changes to the legal framework by strengthening existing anti-discrimination laws, the enactment of a Human Rights Act, enhancing the role of the Human Rights Commission, and (3) human rights awareness community programs.[2]

SUMMARY OF THE BAR'S SUBMISSION

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1 NHRC Background Paper p. 16.

2 NHRC Background Paper pp. 12-14.

3. The Victorian Bar favours the enactment of a federal Human Rights Act.[3] It sees such legislation as the best foundation for better promotion of human rights in Australia, as well as better protection.

Question 1 - Which Human Rights And Responsibilities Should Be Protected?

4. A federal Human Rights Act ought to protect economic, social and cultural rights as well as civil and political rights. The Bar accepts it may be appropriate to have more limited enforcement mechanisms for many economic, social and cultural rights but nevertheless considers those rights are so important that a federal Act should include them.

5. The starting point is for Australia to enact legislative measures that reflect, and protect, each right in each international instrument to Australia is a party, unless there is a compelling reason not to do so. In other words, there ought be a rebuttable presumption in favour of protecting all the rights in respect of which Australia has undertaken to the international community to uphold and protect.

6. In an Australian federal context, self-determination and indigenous rights, and cultural rights (ICCPR[4], art. 27) and substantive equality (ICCPR, art. 26) are particularly important. The Victorian Bar submits that any federal Human Rights Act should give prominence to indigenous rights and should prefer the text of Art 31 of the UN Declaration on the Rights of Indigenous Peoples to the formulation adopted in the Victorian Charter.

7. The Victorian Bar supports the limitation of rights to individuals (human beings). However it considers that in an Australian federal Human Rights Act recognition of collective indigenous rights is appropriate and important.

Question 2 - Are Human Rights Sufficiently Protected And Promoted?

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3 The Bar notes the submission of the Law Council of Australia dated 6 May 2009, which also supports the introduction of a federal Human Rights Act.

4 International Covenant on Civil and Political Rights.

8. The Victorian Bar is of the view that human rights, in particular those rights that Australia is obliged to protect under international law, are not sufficiently protected by Australia's legal system at present. Human rights are currently poorly protected in Australia, by a patchwork of the Constitution, the common law and various Commonwealth and State statutes. While the Commonwealth Parliament does on occasion *consider* human rights, it has no obligation to do so.

9. The response to the question of whether human rights are sufficiently protected in Australia can be informed by the assessments of the United Nations Human Rights Commission (**UNHRC**). Both the general reports and those specific to individuals demonstrate that the UNHRC clearly sees Australia's human rights protection as faring poorly.

Question 3 - How Could Australia Better Protect And Promote Human Rights?

10. There is no real doubt that the Commonwealth has the necessary legislative power to enact a Human Rights Act. The legislative power to do so would derive primarily from ss 51(xxix) and 61 of the Constitution (when read together with s 51(xxxix)).

11. The Victorian Bar considers that, on balance, it is desirable to include in a federal Human Rights Act a mechanism for formally bringing into Parliament a judicial conclusion that particular legislation is incompatible with rights Parliament has chosen to protect through the mechanism of human rights legislation. However, this feature is not *essential* for the functioning of human rights legislation.

12. There are differing views on the validity of conferring the power to make a declaration of incompatibility on a federal court. In the Victorian Bar's view, the power to make a declaration of incompatibility is a power of a judicial kind, at least where the proceeding otherwise involves the determination of a controversy between parties. The Victorian Bar recommends that the term "declaration" not be used if such a remedy is adopted. The term "statement of incompatibility" would be preferable.

13. On the other hand, the Bar considers that there is doubt whether the Commonwealth could confer jurisdiction on a court to hear and determine a proceeding in which the only issue was whether a statement of incompatibility ought to be made.

14. If concerns about validity are regarded as sufficiently serious to preclude a statement of incompatibility process being adopted, two alternative mechanisms could be considered. First authorising the Human Rights Commission to forward a copy of a relevant decision to the Attorney-General on the application of a party or of its own motion. The Attorney or the responsible Minister could then be required to table the decision in Parliament together with a response. Second, the Human Rights Commission could be given the power to consider whether a statute is incompatible with the Human Rights Act. If the Commission decides that there is an incompatibility, it would then have a duty to inform the Attorney of its decision; and the Attorney would have a duty to table the decision, and a response to it, in Parliament.

15. The Victorian Bar does not consider there are any constitutional problems with an interpretative provision, whether one like the Victorian Charter or the UK *Human Rights Act*.

16. The effect of a federal Human Rights Act on State and Territory laws by reason of s 109 of the Constitution will depend on the breadth of the federal legislation. A model similar to the Victorian Charter (binding Commonwealth public authorities, courts and tribunals) would encounter little difficulty because of s 109. However if the Commonwealth decides that it wishes to enact a Human Rights Act which is binding upon all people within Australia and all Australian governments, then although s 51(xxix) would provide a head of power that would support such a law, there are real concerns as to the extent that such a law could validly impose obligations upon State governments. Whatever model is adopted, clear provisions indicating a legislative intention not to exclude or limit the operation of a law of a State (or Territory) that furthers the objects of the International Covenant on Civil and

Political Rights (**ICCPR**) and / or other relevant rights conventions should be included.

17. Express provision relating to limitations on rights should be included in a federal Human Rights Act. The Victorian Bar supports a limitation provision of the kind found in the Canadian Charter, rather than in the Victorian Charter, but sees no need for an express provision in any federal Human Rights Act in relation to responsibilities. Nor does the Victorian Bar consider it necessary that the title of the legislation refer to responsibilities.

18. The Victorian Bar recommends the enactment of an express provision applicable to a federal Human Rights Act that recognises the principles set out in paragraph 57 below.

19. Drawing on the Bar's experience with the Victorian Charter to date, it can be said that the Victorian model has both strengths and weaknesses. This submission identifies those matters in paragraphs 118 to 121.

QUESTION 1: WHICH HUMAN RIGHTS AND RESPONSIBILITIES SHOULD BE PROTECTED?

A Commonwealth Human Rights Act

20. The enactment of a federal Human Rights Act will most likely be supported by s 51(xxix) of the Commonwealth *Constitution* (the external affairs power). Thus it is appropriate and necessary to focus on those rights protected by international human rights treaties to which Australia is a party as the starting point for a consideration of which human rights ought to be protected by such an Act, if one is to be adopted.

21. The chief international instruments to which Australia is a party that have been identified to support a federal Human Rights Act are the ICCPR and the International Covenant on Economic, Social and Cultural Rights (**ICESCR**).

22. Other international instruments protecting core human rights include the Convention on the Elimination of All Forms of Discrimination against Women (**CEDAW**), implemented by the *Sex Discrimination Act* 1984 (Cth), the Convention on the Rights of the Child (**CRC**) and the International

Convention on the Elimination of All Forms of Racial Discrimination (**CERD**), implemented by the *Racial Discrimination Act* 1975 (Cth). The *Age Discrimination Act* 2004 (Cth) and the *Disability Discrimination Act* 1992 (Cth) cover discrimination on the grounds of age or disability.

23. Instruments such as CERD and the ICCPR (art. 27) make provision for the non-discriminatory treatment of the rights of racial and ethnic groups. In 2007 the United Nations adopted the Declaration on the Rights of Indigenous Peoples. On 3 April 2009, Australia supported its adoption, after having initially voted against it under the previous federal government.

Civil and Political Rights

24. The existing human rights charter statutes in Australia, the *Human Rights Act* 2004 (ACT) and the Victorian Charter draw upon and are confined to civil and political rights provided for in the ICCPR (see attached Table reproducing Schedule 1 to the ACT statute with cross-references to the Victorian Charter).

25. The Victorian Consultation Committee established to consider the enactment of a statutory Charter in Victoria noted the following:

    (a) that there was overwhelming support for the protection of certain civil and political rights, such as the right to vote, to expression and peaceful assembly (95 per cent of submissions);

    (b) that other rights such as the right to be free from torture, to liberty and security of the person, and to freedom of association had come into sharper focus in more recent times;

    (c) that alignment with the ICCPR had the advantage of bringing with it international jurisprudence on the Convention;

    (d) that the ACT *Human Rights Act* had adopted the ICCPR; and

    (e) that it was beneficial to have uniformity in the content and expression of protected rights.

It concluded that the ICCPR was the appropriate starting point for a human rights charter statute.[5] The Bar agrees, but as set out below, urges that economic, social and cultural rights also be included.

26. The Victorian Consultation Committee paid particular attention to the following specific rights contained in the ICCPR that might be thought to be controversial:

    (a) the right to life, and when life begins (art. 6);

    (b) measures of substantive rather than formal equality (art. 26);

    (c) property rights (only touched on by art. 26 of the ICCPR in the context of non-discrimination);

    (d) self-determination and indigenous rights, and cultural rights (art. 27); and

    (e) the right to found a family (art. 23).

27. The Bar recognises the inclusion of one or more of these rights may be controversial, but submits that in an Australian federal context self-determination and indigenous rights, and cultural rights (art. 27) and substantive equality (art. 26) are particularly important.

28. Some other ICCPR rights were not included in the recommendations of the Victorian Consultation Committee on the basis they were considered inapplicable to local circumstances, such as:

    (a) the abolition of the death penalty (art. 6);

    (b) military service (art. 8);

    (c) those relating to juvenile offenders (art. 10); and

    (d) compensation for unlawful detention and conviction (arts. 9 and 14).

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5 Report of the Human Rights Consultation Committee, *Rights, Responsibilities and Respect* [2.2.1], [2.3].

29. In a federal context, the Bar submits consideration should be given to including each of these rights as well as a non discriminatory formulation of the right to marry (art. 23).

30. Other rights were modified by omitting references to other international instruments (arts. 6 and 22 referring to Genocide and ILO Conventions in the context of the right to life and freedom of association) or by adding specific exceptions (for example, art. 12 in relation to restrictions on movement).[6] In the result, the Victorian Charter more or less followed the content of the ACT statute – see attached Table.

31. The Victorian Charter adopts a criterion of substantive equality by allowing for affirmative action or special measures in connection with the right to equal protection of the law.[7] It recognises that the essence of discrimination is the unequal treatment of equals or the equal treatment of those who are not equals, where the differential treatment and unequal outcome is not the product of a distinction which is appropriate and adapted to the attainment of a proper objective.[8]

Rights of Indigenous Peoples

32. Section 19 of the Victorian Charter deals with cultural rights. Sub-section 19(1) is based on art. 27 of the ICCPR and protects the practice of religion and the use of language by persons with particular cultural, religious, racial or linguistic backgrounds. Sub-section 19(2) recognises that Aboriginal peoples have distinct cultural rights. It provides that Aboriginal persons must not be denied the right, with other members of their community, to (a) enjoy their identity and culture, (b) maintain and use their language, (c) maintain their kinship ties, and (d) maintain their spiritual, material and economic

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6 Report of the Human Rights Consultation Committee, *Rights, Responsibilities and Respect* [2.4]-[2.5].

7 *Charter of Human Rights and Responsibilities Act* 2006 (Vic), s 8(4).

8 Tate, *Human Rights in Australia: What would a Federal Charter of Rights look like?* Michael Kirby Lecture Series 2008, 14 March 2008, p. 12 referring to *Street v Queensland Bar Association* (1989) 168 CLR 461, 571; and see also *Austin v Commonwealth* (2003) 215 CLR 185, 247 [118].

relationship with the land and waters and other resources with which they have "a connection under traditional laws and customs."

33. It might be argued that the employment of the concept of "connection under traditional laws and customs" by s 19(2)(d) of the Victorian Charter could carry with it the kind of requirement found in native title law that such laws and customs have their origins in pre-sovereignty indigenous social structures, and have been observed continually without substantial interruption since the change in sovereignty, which some contemporary indigenous communities may be unable to establish.[9] And some rights to control the cultural knowledge that connects Aboriginal peoples and Torres Strait Islanders with country are not recognised under Australian law as rights in relation to land, albeit they may find protection in laws respecting confidential information, copyright and fiduciary duties.[10] The protection of property rights under s 20 of the Victorian Charter may, to the extent it covers the property rights of Aboriginal Peoples and Torres Strait Islanders, depend on those rights being recognised and enjoyed under municipal law, as is the case with the protection afforded by the *Racial Discrimination Act*.[11]

34. Article 31 of the UN Declaration on the Rights of Indigenous Peoples may take a less restrictive approach. It provides that:

> *Indigenous peoples have the right to maintain, control, protect and develop their cultural heritage, traditional knowledge and traditional cultural expressions, as well as the manifestations of their sciences, technologies and cultures, including human and genetic resources, seeds, medicines, knowledge of the properties of fauna and flora, oral traditions, literatures, designs, sports and traditional games and visual and performing arts. They also have the right to maintain, control, protect and develop their intellectual property over such cultural heritage, traditional knowledge, and traditional cultural expressions.*

35. The Victorian Bar submits that any federal Human Rights Act should give prominence to indigenous rights and should prefer the text of art 31 of the UN

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9 Cf. *Native Title Act* 1993 (Cth), s 223 definition of native title, and *Yorta Yorta v Victoria* (2002) 214 CLR 422, 444-5 [46]-[47].

10 *Western Australia v Ward* (2002) 213 CLR 1, 84-5 [59]-[61].

11 *Mabo v Queensland [No.1]* (1988) 166 CLR 373, 211, 217-8.

Declaration on the Rights of Indigenous Peoples to the formulation adopted in the Victorian Charter.

Economic, Social and Cultural Rights

36. The inclusion of economic, social and cultural rights in domestic Bills of Rights is sometimes considered to be controversial. Reasons against their inclusion include the aspirational character of some rights contained in the ICESCR and arguments that courts would be asked to determine resource allocation issues.[12]

37. The review provisions of former s 43 of the *Human Rights Act* 2004 (ACT) required further consideration on whether to include in that Act some or all of the rights protected by the ICESCR. The ACT Consultative Committee recommended their inclusion, but the ICESCR rights were not incorporated into the ACT *Human Rights* Act in subsequent amendments.[13]

38. The Victorian Consultation Committee had noted that there was substantial support for the inclusion of economic, social and cultural rights (41 per cent of submissions), but noted such rights are not included in human rights charters in New Zealand, Canada or the United Kingdom (they are included in South Africa). The Committee recommended that they "not now be included" in the Victorian Charter as the "journey is in its early days."[14] Section 44 of the Victorian Charter requires a review by 1 October 2011 that considers the inclusion of rights under the ICESR, the CRC, and CEDAW.

39. More recently, the UK Parliamentary Committee on Human Rights has recommended the inclusion of rights to health, housing, and an adequate standard of living in a Bill of Rights with a standard of judicial review of "progressive realisation" by government within available resources, reflecting the terms of art. 2(1) of the ICESR, with a view to reviewing the experience

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12 Human Rights Law Resource Centre, *The National Human Rights Consultation – Engaging in the Debate* pp. 43-46.

13 HRLRC, p. 47.

14 Report of the Human Rights Consultation Committee, *Rights, Responsibilities and Respect* [2.2.2].

after a period and considering whether to add other social and economic rights.[15]

40. The Draft Human Rights Bill prepared for New Matilda includes ICESR rights relating to education (art. 13), work (art. 6), living standards (art. 11), health (art. 12) and social security (art. 9) – see attached Table. These rights are expressed in the Bill to be subject to progressive realisation such that resources available to government may limit their realisation, and the courts must consider benefit/detriment issues before making a determination of incompatibility (clause 42). The Bill also includes rights to asylum and protection covered by the International Convention Relating to the Status of Refugees within protected civil and political rights.

41. Although the inclusion of economic, social and cultural rights may be seen by some as controversial, they are treated as universal human rights at the international level and are considered to be fundamental to the securing of civil and political rights.[16] Further:

    (a) Some rights expressed in the ICESCR are less aspirational in character and more rule like, and are civil in nature e.g. the right to equal pay for equal work (art. 7(a)(i)) and the right to form trade unions (art. 8(1)(a)), but may overlap, in any event, similar rights protected by the ICCPR e.g. the right to enjoy rights without distinction (art. 2(1)) and freedom of association (art. 22).

    (b) Some Commonwealth anti-discrimination laws already make provision for economic, social and cultural rights e.g. the rights protected by ss 9-10 of the *Racial Discrimination Act* include the economic, social and cultural rights referred to in art. 5(e) of CERD respecting rights to housing, public health, social security etc.

42. Two related arguments are often put forward by those opposing the protection of economic, social and cultural rights:

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15 Joint Committee on Human Rights, *A Bill of Rights for the UK?* pp. 5-36.

16 HRLRC p. 44.

(a) that Parliament, rather than the courts, should decide issues of social and fiscal policy; and

(b) that economic, social and cultural rights raise difficult issues of resource allocation unsuited to judicial intervention.

But these arguments are basically about justiciability – civil and political rights have historically been considered to be justiciable, whereas economic, social and cultural rights have not, supposedly because of the absence of certain qualities that go to make up a "right".

43. In human rights discourse, a justiciable right is said to be one that is stated in the negative, cost-free, immediate and precise, whereas a non-justiciable right is said to impose positive obligations, is costly, is to be progressively realised and is vague. The argument has been that civil and political rights fall within the former category; economic, social and cultural rights fall within the latter. But these are artificial distinctions; all rights have positive and negative aspects, have cost-free and costly components, are certain of meaning with vagueness around the edges, and so on.[17]

44. The right to life is often treated as a classic civil and political right. Governments have a duty to *respect* the right to life, which is a largely negative, cost-free duty not to take life. Governments also have a duty to *protect* the right to life. This entails a partly negative and partly positive, and partly cost-free and partly costly, function to regulate society so as to diminish the risk that third parties will take each other's lives. And Governments have a duty to *fulfil* the right to life, which entails positive and costly roles, such as to ensure low infant mortality, to ensure adequate responses to epidemics, and so on.

45. The right to adequate housing is often treated as a classic economic and social right. Governments have a duty to *respect* the right to adequate housing,

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17 See Debeljak, *Submission to the Consultation Committee for a Proposed Western Australian Human Rights Act*, 2008, at p. 5; and more generally Warner, "An Ethics of Human Rights" (1996) 24 *Denver Journal of International Law and Policy* 395; Hunt, "Reclaiming Economic, Social and Cultural Rights" (1993) *Waikato Law Review* 141.

which is a largely negative, cost-free duty, such as not to forcibly evict people. Secondly, governments have a duty to *protect* the right to adequate housing, which involves a partly negative and partly positive, partly cost-free and partly costly, function such as to regulate evictions by third parties, like landlords and developers. Thirdly, governments have a duty to *fulfil* the right to adequate housing, which is a positive and costly role, such as to house the homeless and ensure a sufficient supply of affordable housing.

46. The Human Rights Law Resource Centre suggests a possible compromise that breaches and remedies differ according to whether the right in question is a civil or political right, or an economic, social or cultural right; with court remedies being confined to the infringement of civil and political rights and administrative complaint mechanisms being available for the violation of economic, social or cultural rights.[18]

47. The Victorian Bar supports such an approach. It is important to understand that in a practical sense, denial of or prejudice to ICESCR rights such as education, health and housing might be said to have a more fundamental effect on a broader range of the community than, in a social democracy such as Australia's, the observance of civil and political rights.

Limitations and Responsibilities

48. Human rights pertain to the rights of natural persons, and most rights provided for in the ICCPR can extend to citizens and non-citizens alike.[19] The ACT and Victorian statutes provide that only individuals have human rights.[20] But the rights of humans may be enjoyed through corporate agency and may be infringed in connection with their associations, corporate or otherwise, with others.[21] The Victorian Bar supports the limitation of rights to individuals, but

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18 HRLRC p. 48.

19 HRLRC p. 49.

20 *Human Rights Act* 2004 (ACT), s 6; *Charter of Human Rights and Responsibilities Act* 2006 (Vic), s 6(1).

21 E.g. *Koowarta v Bjelke-Petersen* (1982) 153 CLR 168; *Gerhardy v Brown* (1985) 159 CLR 70. And more recently, what is considered discriminatory legislation with respect to indigenous land rights held through statutory corporate trusts wrought by the *Northern Territory National Emergency Response Act* 2007 (Cth).

considers that in an Australian Human Rights Act some recognition of collective indigenous rights is appropriate and important given the nature of those rights.

49. It is generally accepted that most, if not all, rights are not absolute.[22] The mechanism chosen for recognising appropriate limits on rights can be express or implied. Given that Australia now has the benefit of extensive jurisprudence on limitations on rights from international and comparative sources, the Victorian Bar submits that an express provision relating to limitations on rights should be included in a federal Human Rights Act.

50. The ACT and Victorian statutes make general provision for reasonable and proportional limitations on all protected rights.[23] The general limitation provision asks whether:

(a) the objective of the legislation containing the limitation is pressing and substantial;

(b) whether there is a rational connection between the legislation and its objective;

(c) whether the legislation minimally impairs the right or freedom at stake; and

(d) whether the deleterious effect of the breach is outweighed by the salutary effect of the legislative limitation.[24]

51. In addition, the Victorian Charter, following art. 19(3) of the ICCPR, recognises special duties and responsibilities attaching to the right of freedom

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22 Report of the Human Rights Consultation Committee, *Rights, Responsibilities and Respect* [2.6]. And see *Bropho v Western Australia* (2008) 169 FCR 59, 82 [80] citing report to the Economic and Social Council of the United Nations Commission on Human Rights, E/CN/1993/15 at [461] in relation to the right to own property alone or in association with others under art. 5 of CERD.

23 *Human Rights Act* 2004 (ACT), s 28; *Charter of Human Rights and Responsibilities Act* 2006 (Vic), s 7.

24 McHugh 5 March 2009, p. 7 referring to *Canada (Attorney-General) v Hislop* [2007] 1 SCR 429 at [44].

of expression such that the right may be subject to lawful restrictions reasonably necessary to respect the rights and reputation of other persons or for the protection of national security, public order, public health or public morality.[25]

52. In contrast, the Canadian Charter of Rights contains a simpler limitation clause, as follows:

> *The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.*

53. The Victorian Bar supports a legislative regime that includes a limitation provision of the kind found in the Canadian Charter, rather than the Victorian Charter. The Victorian model (in s 7) could operate inflexibly (especially in the statement of compatibility process) and could tend to encourage a "tick the box" mentality. The Bar considers it preferable to enact a less prescriptive limitation provision, which it believes will allow for continuing judicial development of the concept of demonstrable justification and will encourage Parliament to consider the concept as a whole rather than the prescribed integers.

54. As the protection of human rights carries with it responsibilities on the part of governments, and all members of society, to respect the rights of others, a statement of separate or corresponding responsibilities has been considered unnecessary. In other words, the responsibility to respect rights is implicit in the recognition of human rights[26] and the Victorian Bar sees no need for an express provision in any federal Human Rights Act in relation to responsibilities. Nor does the Victorian Bar consider it necessary that the title of the legislation refer to responsibilities.

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25 *Charter of Human Rights and Responsibilities Act* 2006 (Vic), s 15(3).

26 Report of the Human Rights Consultation Committee, *Rights, Responsibilities and Respect* [2.2.4]; Joint Committee on Human Rights, *A Bill of Rights for the UK?* p. 72.

Conclusions

55. The international rights instruments to which Australia is a party oblige Australia to secure the realisation and enjoyment of human rights by legislative measures[27] and to provide effective remedies for the violation of human rights.[28] Recently, the United Nations Human Rights Committee questioned why Australia does not have, at the federal level, legislation to implement all the provisions of the ICCPR and whether Australia envisages introducing constitutional or legislative protection of human rights at the federal level.[29] The failure to provide such comprehensive legislative measures may put Australia in breach of its international obligations.[30] The starting point is for Australia to enact legislative measures that reflect, and protect, each right in each international instrument to Australia is a party, unless there is a compelling reason not to do so. In other words, there ought be a rebuttable presumption in favour of protecting all the rights in respect of which Australia has undertaken to the international community to uphold and protect.

56. The Commonwealth should, then, provide effective protection in domestic law for all human rights contained in international treaties that Australia has ratified, including the ICCPR and the ICESCR. The Bar recognises protection of all or some ICESR rights may be by way of different mechanisms, whether through "progressive realisation" or by recourse only to administrative mechanisms. However those rights should be included because they are, after all, recognized and accepted as international human rights and Australia has ratified international conventions that contain those rights.

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27 *ICCPR*, art 2(2); *ICESCR*, art 2(1); *CERD*, art 2(1); *CEDAW*, art 2; Convention Against Torture (CAT), art 2; Convention on the Rights of the Child (CROC), art 3(2).

28 *ICCPR*, art 2(3); *CERD*, art 6; *CEDAW*, arts 2-4; *CAT*, art 14.

29 94th Session Geneva, CCPR/C/AUS/Q/5 24 November 2008. Replies by Australia were given on 19 January 2009, which included reference to the present consultative process on a legislative human rights charter: CCPR/C/AUS/Q/5/Add.1

30 Evatt 'The Impact of International Human Rights on Domestic Law' in Grant et al (eds), *Litigating Rights: Perspective from Domestic and International Law* (2002), 294, 303.

57. When identifying the human rights that should be protected, it is important to recognise that the scope of the rights should not be limited by any originalist notions, nor should they receive any narrow construction. Further, in recognition of the fact that there are textual deficiencies and ambiguities in the rights as expressed in international conventions – such as whether the right to freedom of expression includes the right of access to government information[31] and whether equality rights protect formal or substantive equality – the Victorian Bar sees merit in the enactment of an express interpretation provision applicable to the Human Rights Act that recognises the following principles:

(a) the interpretation of human rights is evolutionary, dynamic and responsive to changing social and economic conditions and human rights are not to be interpreted according to originalist notions of their meaning at the time of adoption of the international convention;[32]

(b) any human rights Act should be interpreted as a living instrument and the rights protected under it should be applied in context and in the light of present day conditions;[33]

(c) human rights (like constitutional guarantees of rights) are founded on particular principles including that human rights are essential in a democratic society. Those principles support a liberal and beneficial construction of the scope and content of the rights;[34]

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31 See *Criminal Lawyers' Association v Ontario (Public Safety and Security)* (2007) 86 OR (3d) 259; *Sdruzeni Jihoceske Matky v Czech Republic*, ECtHR application no 19101/03; *Claude-Reyes v Chile*, Inter-American Court of Human Rights, 19 September 2006; *SP Gupta v Union of India* [1982] AIR 149

32 *Kracke v Mental Health Review Board* [2009] VCAT 646 at [33] (Bell J).

33 *Judge v Canada*, Communication no 829/1998, CCPR, 78th sess, UN Doc CCPR/C/78/D/829/1998 (2002) [10.3]; *Kracke v Mental Health Review Board* [2009] VCAT 646, [31].

34 *Minister of Home Affairs v Fisher* [1980] AC 319, 328; *Hunter v Southam Inc* [1984] 2 SCR 145, [16].

(d) human rights should be interpreted and applied in manner which renders them "practical and effective, not theoretical and illusory";[35]

(e) human rights are interdependent and indivisible and should be construed so as to complement and reinforce each other;[36]

(f) human rights that are expressed in the terms of rights contained in international conventions will be construed according to the obligation of good faith contained in the *Vienna Convention on the Law of Treaties*.[37]

QUESTION 2: ARE HUMAN RIGHTS SUFFICIENTLY PROTECTED AND PROMOTED?

58. The Victorian Bar is of the view that human rights are not sufficiently protected under Australian law.[38]

59. Human rights are currently poorly protected in Australia, by a patchwork of the Constitution, the common law and various Commonwealth and State statutes. The rights protected are often inconsistent with each other and in some cases do not conform with Australia's international obligations.[39] Parliament while it does on occasion *consider* human rights has no obligation to do so.

60. Examples of area where it is arguable that Australia has failed to protect human rights include:

(a) Australia's **mandatory detention policy**, and the inclusion in that policy of the detention of children.

(b) There is no protection in Commonwealth law against discrimination based on **sexual orientation**.

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35 *Goodwin v United Kingdom*, application no 28957/95, 11 July 2002, [74] (ECtHR).

36 See, eg, *Dubois v R* [1985] 2 SCR 350.

37 *Kracke v Mental Health Review Board* [2009] VCAT 646, [29].

38 The Victorian Bar submission focuses on legal protections only. It thus makes no submissions in relation to the promotion of human rights.

39 See e.g. the discussion in the Human Rights Law Resource Centre Report "The National Human Rights Consultation – Engaging in the Debate" pages 22-31.

(c) The Commonwealth's **intervention legislation in the Northern Territory** and the suspension of the *Racial Discrimination Act* in relation to the intervention.

(d) There is no requirement for **paid maternity** or parental **leave**.[40]

(e) Australia's broad **anti-terrorism laws**.

61. The response to the question of whether human rights are sufficiently protected in Australia should also be informed by (and at least partially assessed by reference to) outside objective assessments. One source of such assessments is the UNHRC. Australia is a founding member and has a proud tradition of leadership in the Commission and of ratification of the important instruments. Australia has not adopted or ratified each and every human rights instrument, and this fact is the subject of some UNHRC reports.

62. The UNHRC has two main ways it renders its assessments of nations' performances in their compliance with UN Conventions and norms covering human rights – general reports and specific reports. The general reports are the result of visits by delegations to the country concerned to observe and assess compliance, usually in respect of a particular convention or group of obligations or sometimes based on submissions made by the country concerned. Specific reports are usually the result of "communications" (complaints) by individuals to the UNHRC complaining of breaches by a nation of particular obligations which result in specific findings applicable to that case. Australia has fared poorly in both.

UN General Reports

63. Over the past few years Australia has been the subject of a number of general reports, in only one of which (1997 on Religious Tolerance) might it be said that Australia passed with anything like an acceptable mark.

64. The most recent report in April **2009** of the **UNHRC**[41] made some positive observations about the National Human Rights Consultation and the Apology to the Stolen Generations. However the UNHRC still critically observed:

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40 Although there was introduced in the most recent federal budget a provision for paid maternity and parental leave (to be phased in by 2011).

(a) the lack of legal protection of human rights at the national level - the Committee recommended the enactment of comprehensive human rights and equality legislation, such as a Human Rights Act;

(b) the incompatibility of aspects of Australian counter-terrorism law, policy and practice with fundamental human rights - the Committee recommended amendment of the Criminal Code, the *Anti-Terrorism Act* 2004 and ASIO legislation;

(c) the continued suspension of the *Racial Discrimination Act* in relation to the Northern Territory Intervention - the Committee called for re-design of the Intervention in direct consultation with Indigenous peoples and conformity with international human rights obligations;

(d) the need to establish an adequately resourced national Indigenous representative body;

(e) the need to make adequate reparations to the Stolen Generations - the Committee urged Australia to establish a national compensation scheme;

(f) the need to take further steps to address ongoing issues of violence against women and homelessness;

(g) the need to take "urgent and adequate measures, including legislative measures, to ensure that nobody is returned to a country where there are substantial grounds to believe that they are at risk of being arbitrarily deprived of their life or being tortured or subjected to other cruel, inhuman or degrading treatment or punishment";

(h) the co-operation of Australian law enforcement officials with overseas agencies, which may expose Australians to the real risk of the death penalty - the Committee urged Australia to enact legislation to ensure that no person is extradited to a country where they may face the death penalty and also to ensure that Australian law enforcement officers do not provide assistance in the investigation of crimes (such as the Bali 9) which may expose people to the death penalty;

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[41] CCPR/C/AUS/CO/5 2 April 2009

(i) the excessive use of force by police without adequate oversight, including the use of TASER guns and lethal force;

(j) the continued policy of mandatory immigration detention and the use of Christmas Island as a remote detention facility - the Committee urged Australia to abolish mandatory immigration detention, close Christmas Island and enact new migration legislation which respects fundamental rights;

(k) the need to increase access to justice and legal aid, particularly for Indigenous Australians; and

(l) the importance of establishing a comprehensive national human rights education program.

65. In **2008** the UN **Committee Against Torture**:[42]

(a) reported that Australia did not have a federal offence in relation to torture occurring within Australia and there were gaps in the State laws against torture. Further, it observed that the *Crimes (Torture) Act 1988* (Cth) does not contain any provision criminalizing cruel, inhuman or degrading treatment. It also observed that the Convention Against Torture and other Cruel and Inhuman or Degrading Treatment or Punishment had only partially been incorporated into Australian federal law.

(b) noted with concern the expansion of powers given to ASIO which posed difficulties in compliance with the Convention because of limitations imposed on the right to a lawyer, judicial review, renewable detention and secrecy surrounding preventative detention and control orders introduced by the *Anti-Terrorism Act (No.2)* 2005.

(c) expressed concern about conditions of detention of those non-convicted terror suspects and about mandatory detention of illegal immigrants, both as to their conditions and the period of detention until dealt with.

(d) called for an extended mandate for HREOC (now the Human Rights Commission). This report came relatively soon after the Hicks affair

42 CAT/C/AUS/CO/3 22 May 2008.

and noted that under no circumstances could a State party resort to diplomatic assurances as a safeguard against torture or ill-treatment; it also noted that Australia might have failed to establish its jurisdiction in some cases where Australian nationals have been victims of acts of torture abroad.

(e) noted that extradition was not prohibited where there were substantial grounds to believe extradition may breach the person's rights under the convention. This issue became live in some specific cases brought to the UNHRC about which more is said later. Inadequate training and education on the convention was lamented.

(f) noted the absence of uniform legislation to exclude evidence obtained by torture.

66. In **2006** the UN Special Rapporteur on **Inadequate Housing** reported[43] on Australia's implementation of UN General Assembly Resolution 60/251 of 15 March 2006. He concluded that Australia had failed to implement the resolution concerning adequate housing (as a component of the right to an adequate standard of living). He noted in particular the disadvantage in this respect of Indigenous Australians. He observed there was no national policy framework against which the outcomes of government programmes could be assessed.

67. In **2006** the Committee on the **Elimination of Discrimination Against Women** reported[44] that women were not protected in Australia appropriately. The CEDAW had not been implemented and nor were the rights thereunder guaranteed in Australia. It noted that the *Sex Discrimination Act* allowed for special measures, but noted with concern that Australia did not support the adoption of targets or quotas to promote greater participation by women. And it noted that Indigenous women were particularly under-protected and disadvantaged.

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43 A/HRC/4/18/Add.2 11 May 2006.

44 CEDAW/C/AUL/CO/5 3 February 2006.

68. In **2005** the Committee on the **Rights of the Child** reported[45] on many unsatisfactory cases of child abuse and exploitation and concluded far more could and should be done to protect children in Australia. For example:

(a) corporal punishment can still be legally used in Australia, justified as "reasonable chastisement";

(b) children were in immigration detention;

(c) the number of homeless children was serious;

(d) there remained problems with child sex exploitation and substance abuse;

(e) Indigenous children remained over-represented in juvenile detention centres and amongst those with a parent in jail.

The Committee was also concerned about the age of criminal responsibility being as low as 10 years.

69. Racial **discrimination** has been the subject of two recent reports. In **2002** the UN Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance reported[46] that aboriginal reconciliation had not been meaningfully advanced. In **2005** the Committee on the Elimination of Racial Discrimination reported[47] that this was still the case. Indeed, it specifically noted the high number of Aboriginal deaths in custody. It also noted no entrenched guarantee against racial discrimination. It reported with concern reports of prejudice against Arabs and Muslims had increased and that anti-terrorism laws may have indirect discriminatory affects against Arabs and Muslims. It also noted that complaints under the *Racial Discrimination Act* had proved difficult to establish racial discrimination, although racial hatred had been successfully litigated. Temporary protection visas were very limiting in what they allowed holders to do.

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45 CRC/C/15/Add.288 20 October 2005.

46 E/CN.4/2002/24/Add.1 26 February 2002.

47 CERD/C/AUS/CO/14 14 April 2005.

70. In **2002** the Commission on Human Rights published the report[48] of the Working Group on **Arbitrary Detention** which concluded that the compulsory and extended detention of asylum seekers was indiscriminate, lacked juridical control and had a particularly detrimental effect on the vulnerable, especially children, and the form of detention was similar to prison conditions and in some cases worse than prison. It was concerned about such detention being justified on the basis of deterrence. It noted that such a system was not practised by any other country in the world containing the features of mandatory, automatic, indiscriminate and indefinite detention without real access to court challenge.

71. In **1997** the Special Rapporteur on **Religious Discrimination** reported[49] overall positively on Australian religious tolerance but noted that certain minorities were unfairly discriminated against, including Muslims and Aborigines and observed that most such intolerances were not religious but racial. He recommended that education could play a prime role in preventing intolerance. Such education, he recommended, should include educating the media.

72. In **1993** the Committee on **Economic, Social and Cultural Rights** reported[50] that it was concerned (inter alia) about disadvantaged groups in the educational system, lack of opportunities for those with disabilities, the effects of funding accorded to non-government schools on the quality of education in government schools, Aborigines' opportunities to fully involve themselves in creating awareness of their cultural heritage.

UN Specific Reports

73. Individuals are entitled to lodge complaints directly with the UNHRC under relevant Conventions, but only if they have first exhausted local remedies. Thus some complaints fail at the first hurdle (no exhaustion of local remedies). Others fail because the complaint misses the mark in identifying a relevant

48 E/CN.4/2003/8/Add.2 24 October 2002.

49 E/CN.4/1998/6/Add.1 4 September 1997.

50 E/C.12/1993/9 3 June 1993.

right or because of other filtering provisions. Once these hurdles are overcome, the merits are considered by the Committee and findings are made and, if the nation concerned is a party to the enforcement procedures (the Optional Protocol, to which Australia is a party), orders can also made. Naturally, some complaints lodged are trifling, or hopeless. We do not deal with those here. Neither do we deal with cases which failed for whatever reason. We have reviewed only some of the cases relating to Australia going back to 2003.

74. ***Saed Shams & Ors*** 20 July 2007[51] was a case concerning asylum seeker detention. The Committee concluded that the detention was arbitrary contrary to art. 9(1), (4) ICCPR and a breach of art. 2(3) (ineffective remedies). The detainees were ultimately given humanitarian visas (after between 3 and over 4 years of detention). The conditions of detention were found to include being held incommunicado, solitary confinement, denial of access to visitors, denial of regular exercise, denial of access to medication, telephone calls, legal advice, sprayed with capsicum spray, handcuffed, beaten, denial of privacy and denial of access to substantive judicial review. The Committee concluded that one of the effective remedies should be compensation.

75. ***Lucy Dudko*** 23 July 2007[52] involved a criminal trial and appeal. The case failed but the Committee agreed that there had been some breaches of art. 14(1) (equality before the law) arising from a hearing in the absence of an unrepresented litigant who was in custody.

76. ***Danyal Shafiq*** 31 October 2006[53] was a deportation case where the complainant feared what would happen to him if deported back to Bangladesh. He had been in immigration detention for over 7 years. This was held by the Committee to amount to arbitrary detention contrary to art.9(1), (4) ICCPR and that he had been denied an effective remedy contrary to art. 2(3)(a). Specifically, the Committee re-iterated that a State party should not detain

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51 CCPR/C/90/D/1255, 1256, 1259, 1260, 1266, 1268, 1270 & 1288/2004 11 September 2007.

52 CCPR/C/90/D/1347/2005 29 August 2007.

53 CCPR/C/88/D/1324/2004 13 November 2006.

anyone beyond the period for which it can provide appropriate justification. Detention must be periodically reviewed and it was not.

77. ***Patrick Coleman*** 17 July 2006[54] was a public speaker delivering an address in a pedestrian shopping mall without a permit. He spoke on a range of subjects including a bill of rights, freedom of speech and mining and land rights. He was charged by the local council with taking part in a public address without a permit. He was convicted in the Magistrates' Court and fined $300 (with 10 days' imprisonment in default) plus costs. His appeal failed, despite the provisions of s.5(1) of the *Peaceful Assemblies Act* 1992 (Qld). He publicly spoke again, and was arrested for non-payment of the fine and imprisoned for five days. He was also charged with obstructing police on the basis of sitting on the ground and refusing to voluntarily accompany the police, for which he was jailed but released the same day. Coleman exhausted his local remedies, ultimately being refused special leave to appeal to the High Court. Coleman complained that the whole affair amounted to an unfair gag on his freedom of speech (as did the by-law itself). The Committee concluded that there was a violation of art. 19(3) (freedom of speech).

78. ***Young v Australia (Human Rights Committee Communication No. 941/2000)*** In 1999, Mr Edward Young took a complaint against Australia to the Human Rights Committee. Young was in a same-sex relationship with his partner, a war veteran, for 38 years. His partner died at the age of 73, after being cared for in his final years by Young. Young applied for a pension as a veteran's dependant. Had they been an opposite-sex couple, he would have been entitled to the pension. But under the then current Australian veterans' entitlements laws, same-sex couples were not entitled to the same veterans pensions as opposite-sex couples. The Committee found that Mr Young had been discriminated against under art. 26 of the ICCPR and was entitled to an effective remedy, including the reconsideration of his pension application. The Committee noted that Australia is obliged to ensure that similar violations of the Covenant do not occur in the future.

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54 CCPR/C/87/D/1157/2003 10 August 2005.

79. ***Ali Aqsar Bakhtiyari*** 29 October 2003[55] was an immigration detention case with a long history up to the High Court on more than one occasion. It had much press attention partly because of his brother's self harm in Woomera to bring his brother's family's plight to the notice of the public. However, despite many examples of the complainant having lied, the Committee still found that the detention was arbitrary, contrary to art. 9(1). Detention is susceptible to being characterised as arbitrary, regardless of the undesirability of the person involved, if it has the features (as mentioned in the 2002 Arbitrary Detention report discussed above) of being mandatory, automatic, indiscriminate and indefinite, without real access to court challenge. Here, the inability to challenge detention which was or had become a breach of art. 9(1) was itself a breach of art. 9(4). The Committee also concluded that the intention to deport the complainant would also be a breach of arts. 17, 23 and 24 (family rights).

QUESTION 3: HOW COULD AUSTRALIA BETTER PROTECT AND PROMOTE HUMAN RIGHTS?

80. Consideration needs to be given to the constitutional issues relevant to any federal Human Rights Act in light of Australia's federal system and the operation of the Commonwealth *Constitution*, both of which make the context different from that operating in the UK, New Zealand and Victoria. The constitutional issues that may arise depend very much upon the form of the Human Rights Act that is enacted.

81. This submission addresses some of the constitutional issues that may arise if the Commonwealth decides to enact a Human Rights Act that shares the essential features of the Victorian Charter. The submission addresses the following issues:

(a) whether the Commonwealth Parliament has legislative power to enact a Human Rights Act of a kind similar to the Victorian Charter;

(b) whether the inclusion in a federal Human Rights Act of a "declaration of incompatibility" or similar remedy would be constitutionally valid;

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55 CCPR/C/79/D/1069/2002 6 November 2003.

(c) whether the inclusion in a federal Human Rights Act of an interpretive principle directed at Courts would be constitutionally valid; and

(d) the effect of a federal Human Rights Act on State laws.

82. The submission then concludes with a discussion of the strengths and weaknesses of the Victorian Charter.

Head of Power

83. There is little doubt that the Commonwealth Parliament could enact a Human Rights Act of a kind similar to the Victorian Charter. The legislative power to do so would derive primarily from ss 51(xxix) and 61 of the *Constitution*.

84. It is settled law that s 51(xxix) of the *Constitution* empowers the Commonwealth Parliament to make laws that give effect to Australia's obligations under international law, including those arising from treaties.[56]

85. Parliament has considerable discretion in determining the appropriate means to give effect to an international obligation. The test for validity is whether a particular law is "reasonably capable of being considered appropriate and adapted" to giving effect to such an obligation.[57] That formula (rather than a simple "reasonably appropriate and adapted") emphasises that the Parliament has a "margin of appreciation" in choosing the means to give effect to an international obligation.[58]

86. Australia has international obligations under a significant number of human rights treaties, the most important of which are the ICCPR and the ICESCR.

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56 *Victoria v Commonwealth (The Industrial Relations Act Case*) (1996) 187 CLR 416, 486-488; *The Tasmanian Dam Case* (1983) 158 CLR 1; *Richardson v Forestry Commission* (1988) 164 CLR 261.

57 *The Industrial Relations Act Case* (1996) 187 CLR 416 at 486-488; *The Tasmanian Dam Case* (1983) 158 CLR 1, 259 per Deane J. See also at 172 per Murphy J, 232 per Brennan J; *Richardson v Forestry Commission* (1988) 164 CLR 261 at 289, 300, 312, 342.

58 *Richardson v Forestry Commission* (1988) 164 CLR 261 at 312; *Cunliffe v Commonwealth* (1994) 182 CLR 272 at 325.

87. It is very likely that all of the rights that the Commonwealth would wish to include in a federal Human Rights Act would be set out in one or other of the above conventions. If, however, other rights were sought to be included, Australia has important obligations under a series of other human rights treaties, including for example CEDAW, CRC, the Convention relating to the Status of Refugees and CERD.

88. If the Commonwealth Parliament enacted a Human Rights Act of a kind similar to the Victorian Charter, the rights that Act enshrined would mainly be of a kind that are protected under the ICCPR and the ICESCR.[59] Accordingly, provided that the Human Rights Act was drafted in a way that is reasonably capable of being seen as appropriate and adapted to giving effect to Australia's international obligations under the ICCPR and ICESCR (as it would be, if it was modeled on the Victorian Charter), it would be supported by s 51(xxix) of the *Constitution*.

89. In addition to the power conferred on Parliament under s 51(xxix) of the *Constitution*, the Commonwealth probably also has the necessary legislative power under s 61 of the *Constitution*, when read together with s 51(xxxix). That follows because, if a federal Human Rights Act followed the model of the Victorian Charter, its primary operation would be to impose an obligation to act consistently with human rights on the Commonwealth Executive itself (ie Ministers, their Departments, and the various statutory and other agencies that might be defined as "public authorities").

90. For the above reasons, there is no real doubt that the Commonwealth has the necessary legislative power to enact a Human Rights Act. To the extent that constitutional issues arise, they arise as a result of issues to do with implied limitations on power, or because of the consequences of the exercise of legislative power, rather than as a result of absence of legislative power.

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[59] There are some rights protected by the Victorian Charter, such as cultural rights (s 19), that are not found in the ICCPR, but those rights could validly be included in a Commonwealth *Human Rights Act*, if that was thought desirable, as laws implementing Australia's obligations under the ICESCR. As discussed earlier in this submission, the Victorian Bar supports the incorporation of such rights into a federal *Human Rights Act*.

Validity of a "Declaration of Incompatibility"

91. Several jurisdictions with statutory human rights protection have included in the relevant legislation provision for a Court to make what is called a "declaration of incompatibility" (UK *Human Rights Act*, s 4) or a "declaration of inconsistent operation" (Victorian Charter s 36).[60] Other jurisdictions have not included such provision (New Zealand; Canada prior to the constitutional reforms).

92. Such a declaration does not affect the rights and liabilities of the parties to the matter in which it was made (other than in the limited sense that it may produce a res judicata on the question of incompatibility). Rather, it triggers a process by which the responsible Minister is required to table in Parliament the declaration and a response to it. This performs two valuable functions:

    (a) alerts the Parliament, and hence the broader community, to the fact that an Act of Parliament is incompatible with the rights protected in the relevant human rights legislation; and

    (b) it offers Parliament the opportunity to remedy that incompatibility, if it sees fit.[61]

93. The Victorian Bar considers that, on balance, it is desirable to include in a federal Human Rights Act some mechanism for formally bringing into Parliament a judicial conclusion that particular legislation is incompatible with rights Parliament has chosen to protect through the mechanism of human rights legislation. However, the Bar notes this feature is not essential for the functioning of human rights legislation.

94. If such a mechanism is to be adopted, two questions arise:

    (a) First, where the function is conferred upon a federal court, is it constitutional?

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60 For convenience, this submission adopts the term "declaration of incompatibility.

61 We note that, in the UK, Parliament has generally remedied the legislation found to be incompatible.

(b) Second, if there are constitutional concerns, could these be overcome by conferring the function on a non-judicial body?

Constitutional validity of a declaration power conferred upon a federal court

95. There are differing views on the validity of conferring the power to make a declaration of incompatibility on a federal court. In general, the debate has centred on whether the making of a declaration of incompatibility is an exercise of judicial power or not — if it is not, as some have argued, then the power to make such a declaration cannot be conferred on a federal court.[62]

96. Particular concern has been generated by the fact that, in the UK *Human Rights Act*, declarations are stated not to bind the parties. It is an incident of federal judicial power that its exercise determines a dispute between parties in a manner binding upon them. Arguably, a declaration of incompatibility has no such operation.

97. However, in the Victorian Bar's view, on balance the power to make a declaration of incompatibility is a power of a judicial kind, at least where the proceeding otherwise involves the determination of a controversy between parties.[63] It is difficult to envisage a situation in which such a declaration would be sought standing alone, in any event, in the absence of such a controversy.

98. In substance, in that context a declaration of incompatibility is simply a statement of a particular step in the Court's reasoning necessary for its determination of the matter before it. So understood, it is part of the exercise of judicial power, namely the resolution of the matter.

99. In the Victorian Bar's view, the name "declaration" has caused some confusion about the nature of the exercise that the Court is required to undertake. The name suggests that a declaration of incompatibility is in the

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62 This concern has been expressed by Justice Gummow and by former Chief Justice Brennan and former Justice McHugh (see, for example, *Australian Financial Review*, 20 March 2009).

63 There would, in such circumstances, be a "matter" for the court to resolve: see, eg, *Re McBain* (2002) 209 CLR 372.

nature of a declaration in the sense of the traditional legal remedy of declaring the rights and duties of parties to a proceeding. It is clearly not such a creature. Rather, it is simply a statement of the Court's finding on a particular issue as part of its determination of the larger matter in respect of which it is exercising jurisdiction. The Victorian Bar recommends that the term "declaration" not be used if such a remedy is adopted; rather, the term "statement of incompatibility" would be preferable.

100. The Victorian Bar sees no constitutional obstacle to requiring the Court to state such a finding (arguably, it has a duty to do so as an aspect of its duty to provide reasons for its decision) and to transmit the finding of incompatibility to the Attorney-General (as provided for in the Victorian Charter).

101. On the other hand, the Bar considers that there is doubt whether the Commonwealth could confer jurisdiction on a court to hear and determine a proceeding in which the only issue was whether a declaration of incompatibility ought to be made.

An alternative mechanism

102. If concerns about validity are regarded as sufficiently serious to preclude the adoption of provisions such as those included in the Victorian Charter, we are of the view that the purpose of a "declaration of incompatibility" can be achieved by an alternative mechanism that would be constitutionally valid.

103. It remains the case that, in applying the interpretive provision, a Court will need to articulate its reasons and, if it cannot interpret an Act so as to be compatible with the protected rights, it will need to say so. Where such a finding is made, it would be possible, for example, to authorise or require the Human Rights Commission to forward a copy of such a decision to the Attorney-General on the application of a party or of its own motion. The Attorney or the responsible Minister could then be required to table the decision in Parliament together with a response. Given that findings of

incompatibility are intended to be, and are likely to be, quite rare, this obligation would not be unduly onerous.[64]

104. It would also be possible, in place of a proceeding for a bare declaration of incompatibility being brought in the Courts (which as indicated above faces constitutional difficulties), for another body, for example, the Human Rights Commission, to be given the power to consider whether a statute is incompatible with the federal Human Rights Act. If the Commission decides that there is an incompatibility, it would then have a duty to inform the Attorney of its decision; and the Attorney would have a duty to table the decision, and a response to it, in Parliament.[65]

Validity of an Interpretation Clause

105. There is no real doubt that Parliament may enact legislation relating to statutory interpretation.

106. The Victorian Bar notes that former Justice McHugh has raised the question whether a strong version of such a provision, analogous to the provision found in the UK *Human Rights Act*, would require the courts in substance to exercise legislative power, which they are not, constitutionally, permitted to do. The Victorian Bar does not consider that there is a constitutional problem of this kind in relation to the UK interpretive provision, in light of the jurisprudence of the House of Lords on this issue, which has expressly noted that the task of the Courts pursuant to an interpretive direction is not to legislate, but to

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64 This course was proposed as a clearly constitutional alternative to a judicial declaration by a meeting of constitutional experts convened by the Human Rights Commission (including former Justices of the High Court Sir Anthony Mason and Mr Michael McHugh).
See www.humanrights.gov.au/letstalkaboutrights/roundtable.html.

65 This mechanism would be analogous to the current function of conferred on the Human Rights Commission by s 11(1)(e) of the *Human Rights and Equal Opportunity Commission Act 1986* (Cth) to:

> examine enactments, and (when requested to do so by the Minister) proposed enactments, for the purpose of ascertaining whether the enactments or proposed enactments, as the case may be, are, or would be, inconsistent with or contrary to any human right, and to report to the Minister the results of any such examination.

interpret.[66] Similarly there is no constitutional issue with the Victorian provision.

Effect of a Federal Charter on State Laws

107. If the Commonwealth Parliament passes a Human Rights Act, it is likely that a series of questions will arise in relation to the effect of the Human Rights Act on State and Territory laws. Those questions will arise both in relation to State human rights legislation (such as the Victorian Charter, the ACT *Human Rights Act* and State anti-discrimination laws) and in relation to other State and Territory laws.

108. The effect of a federal Human Rights Act on State and Territory laws is better described as constitutional consequences of the enactment of a Human Rights Act, rather than as constitutional issues relating to the enactment of such a law.

109. The impact of a federal Human Rights Act on state laws arises from s 109 of the Commonwealth *Constitution*, which provides:

> *When a law of a State is inconsistent with a law of the Commonwealth, the latter shall prevail, and the former shall, to the extent of the inconsistency, be invalid.*

110. While s 109 says nothing about inconsistency with Territory laws, broadly similar principles as apply under s 109 also apply to inconsistency between Commonwealth laws and Territory laws[67], notwithstanding the fact that in that latter context the issue is one of repugnancy between laws of the same legislature (the Self-Government Acts for the territories being products of the exercise of Commonwealth legislative power under s 122 of the *Constitution*).

111. For the purposes of s 109 of the Constitution, it is well established that a law of a State will be inconsistent with a law of the Commonwealth where:

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66 See, eg, *Ghaidan v Godin-Mendoza* [2004] UKHL 30.

67 See, e.g., *Northern Territory v GPAO* (1999) 196 CLR 553 at 580-582.

(a) simultaneous obedience to both laws is impossible;[68]

(b) where one law takes away a right, power or authority conferred by the other law;[69]

(c) where the State law would alter, impair or detract from the operation of the Commonwealth law or the exercise of a power under the Commonwealth law;[70] or

(d) where a law of a State enters a field that the law of the Commonwealth was intended to cover exclusively or exhaustively.[71]

112. If the Commonwealth enacts a Human Rights Act that is similar to the Victorian Charter, it may be that it would be rare for that Human Rights Act to be inconsistent with state laws in any of the ways just identified. That follows because if it followed the Charter model the primary effect of the Human Rights Act would be:

(a) to influence the interpretation of Commonwealth legislation; and

(b) to require the Commonwealth government and its various statutory and other agencies to comply with human rights.

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68 See, for example, *McBain v State of Victoria* (2000) 99 FCR 116; *Clyde Engineering Co Ltd v Cowburn* (1926) 37 CLR 466; *R v Licensing Court of Brisbane; Ex parte Daniell* (1920) 28 CLR 23; *Blackley v Devondale Cream (Vict) Pty Ltd* (1968) 117 CLR 253 at 258-259.

69 *Botany Municipal Council v Federal Airports Corporation* (1992) 175 CLR 453 at 464.

70 *Telstra Corporation v Worthing* (1999) 197 CLR 61 at 76, approving *Victoria v Commonwealth (The Kakariki)* (1937) 58 CLR 618 at 630-631 (Dixon J). See also *Miller v Miller* (1978) 141 CLR 269 at 275; *Colvin v Bradley Bros Pty Ltd* (1943) 68 CLR 151 at 160, 161, 163; *Mabo v Queensland (No 1)* (1988) 166 CLR 186; *Yanner v Eaton* (1999) 201 CLR 351; *Commonwealth v Western Australia* (1999) 196 CLR 392 at [59]-[62], [139], [259].

71 *Workchoices* (2006) 229 CLR 1 at 167-169; *Western Australia v Commonwealth (Native Title Act Case)* (1995) 183 CLR 373 at 465-468; *P v P* (1994) 181 CLR 583 at 602-603; *Commonwealth v Western Australia* (1999) 196 CLR 392 at [55]; *Wenn v Attorney-General (Vic)* (1948) 77 CLR 84 at 108-109; *Ex parte McLean* (1930) 43 CLR 472 at 483.

113. State legislation ordinarily would not attempt to address either of the above topics. For that reason, inconsistency may be rare.

114. If, on the other hand, the Commonwealth decides that it wishes to enact a Human Rights Act which is binding upon all people within Australia and all Australian governments, while s 51(xxix) would provide a head of power that would support such a law, other problems would arise. Those problems would include:

(a) doubts as to the extent that such a law could validly impose obligations upon State governments, and in particular whether a Human Rights Act would impair the capacity of a State to function as a government or curtail or interfere with the exercise of constitutional power by a State;[72]

(b) at least as part of (a), doubts as to whether the Commonwealth can validly legislate for the interpretation of State legislation (apart from the effect on State legislation of otherwise valid Commonwealth laws under s 109); and

(c) the possibility that large numbers of State laws would be held to be invalid because they were inconsistent with the federal Human Rights Act.

115. Given the doubts as to the extent that such a law could validly impose obligations upon State governments, it would be desirable for the Commonwealth to ensure that any federal Human Rights Act does not invalidate State laws that are designed to ensure that State governments act consistently with human rights. The Commonwealth could achieve that objective by including in the Human Rights Act a clear statement that the Human Rights Act was not intended to exclude or limit the operation of a law

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[72] See, e.g. *Melbourne Corporation v The Commonwealth* (1947) 74 CLR 31; *Queensland Electricity Commission v The Commonwealth* (1985) 159 CLR 192; *Re Australian Education Union; Ex parte Victoria* (1995) 184 CLR 188 at 233; *Austin v The Commonwealth* (2003) 215 CLR 185, Gleeson CJ at 217-218 [24]-[26]; Gaudron, Gummow and Hayne JJ at 249 [124], 257-259 [143]-[145]; McHugh J at 281-283 [223]-[227]; Kirby J at 301-302 [281]-[284].

of a State (or Territory) that furthers the objects of the ICCPR and or other relevant rights conventions and is capable of operating concurrently with the Human Rights Act.

116. Legislative provisions of the above kind have been employed in the past in a variety of contexts[73], including in order to ensure that Commonwealth anti-discrimination legislation does not invalidate equivalent State legislation.[74] In that context, such provisions have been held to be effective to prevent inconsistency from arising under s 109 of the Constitution. As Mason J observed in *Palmdale-AGCI Ltd v Workers' Compensation Commission (NSW)*:[75]

> *a Commonwealth statute may provide that it is not intended to make exhaustive or exclusive provision with respect to the subject with which it deals thereby enabling State laws, not in direct conflict with a Commonwealth law, to have an operation.*

117. Similarly, it should be made clear that, except by virtue of s 109 inconsistency, a Commonwealth Human Rights Act does not purport to direct courts as to how State legislation is to be interpreted.

Strengths and Weaknesses of the Victorian Charter

118. The Victorian Charter has now been in full operation for a period of some 18 months. The Victorian Bar is thus in a position to make some assessment of its strengths and weaknesses, as perceived by members of the Bar who have been involved in advice or litigation concerning the operation of the Victorian Charter.

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73 See, e.g., *Water Act 2007* (Cth).

74 As had been held to have occurred in *Viskauskas v Niland* (1983) 153 CLR 280, when the High Court ruled that Pt II of the *Anti-Discrimination Act* 1977 (NSW), which dealt with racial discrimination, was inconsistent with the Racial Discrimination Act 1975 (Cth), which was held to have covered the field. That result was reversed by legislation the validity of which was upheld (although with prospective effect only) in *University of Wollongong v Metwally* (1984) 158 CLR 447. See also *Australian Postal Commission v Dao (No 2)* (1986) 6 NSWLR 497.

75 (1977) 140 CLR 236, 243. See also *University of Wollongong v Metwally* (1984) 158 CLR 447, 456, 461; *R v Credit Tribunal; Ex parte General Motors Acceptance Corporation* (1977) 137 CLR 545, 562-564.

119. However, the Victorian Bar does not consider it appropriate or necessary to go into detail as to the drafting of a federal Human Rights Act at this stage of the consultative process. It is sufficient, at this stage, simply to identify strengths and weaknesses of the existing model in broad terms.

Strengths

120. The following aspects of the Victorian Charter are positive features that should be retained in any federal Human Rights Act:

(a) An interpretive provision.

(b) A power to make statement of incompatibility, either by a court in question or, if necessary, by some other body.

(c) The imposition of a binding obligation on public authorities to give effect to the rights protected by the Victorian Charter.

(d) An obligation on the executive to table a statement of compatibility when introducing legislation into Parliament. The Victorian Bar observes that there is, as yet, no empirical evidence of the effectiveness of this mechanism in Victoria. Such a mechanism will not be a strength if the executive statement adopts too flexible an approach to when legislation is compatible and if the Parliament does not scrutinise such statements[76]. However, this mechanism has the potential to improve protection of human rights.

Weaknesses

121. While the Victorian Charter provides an appropriate starting point as a model for a federal Human Rights Act, it has a number of weaknesses that could be improved upon in a federal Act:

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[76] Likewise, if other scrutiny measures are not adhered to by Parliament, then the purpose of such provisions is frustrated: see the criticisms of the Scrutiny of Acts and Regulations Committee in its *Alert Digest Nos 1 & 2 of 2009,* in relation to the introduction and passage of the *Serious Sex Offenders Monitoring Amendment Act* 2009 (legislation with important human rights issues involved in it) without compliance with s 30 of the Victorian Charter.

(a) The remedy provisions are somewhat obscure and should, in a federal Act, be made clearer. Further, a free-standing remedy against public authorities based solely on a breach of the protected rights should be provided. Judicial protection of human rights will not always sit comfortably with judicial review proceedings or any other kind of proceeding to which, under the Victorian model, a Charter cause of action must attach.

(b) Section 38 of the Victorian Charter requires public authorities not to act in a way that is "incompatible" with human rights, and to give "proper" consideration to human rights – the meaning of both obligations is obscure. The first sounds substantive but it presumably involves application of the s 7 analysis. On the other hand, if it is substantive, what is added by the need to give proper consideration? The word "proper" might itself imply a substantive obligation. It would be clearer, at least, if s 38 obliged public authorities to act in a way that protects and promotes human rights, subject to such limitations as may be permitted in accordance with s 7(2).

(c) The application of the Charter to courts and tribunals (pursuant to s 6(2)(b) of the Victorian Charter) is obscure and has not yet been resolved. The Victorian Bar contends that, at a federal level, a Charter should apply in its entirety to courts and tribunals, although courts should not be regarded as public authorities when exercising judicial power. Rather, a court would simply be bound by the statute and if it erred in the application of the statute, an appeal would lie.

(d) Recognising the Attorney-General's interest in being involved in proceedings raising Charter issues, the Victorian Bar nonetheless observes that such involvement has generally extended the time taken in court and the resources required to bring a Charter action[77]. It has a disproportionate effect on individual applicants and plaintiffs, and on

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77 The experience of counsel is that there can be considerable duplication between the Attorney General and government respondents. Alternatively, differences in approach to Charter issues can lead to two large teams of lawyers representing government interests.

defendants in criminal proceedings. Anecdotally, the Victorian Bar is aware that counsel and clients sometimes refrain from running Charter arguments because of the extra delay and expense involved. It is inappropriate to rely yet again on the goodwill of the profession (and the Bar in particular) through pro bono work to raise human rights issues. Consideration should be given to whether the Attorney-General must seek leave to appear. Further, consideration must be given to appropriate funding for Charter matters, especially where the Attorney-General intervenes.

(e) The requirement of notice to the Attorney-General both at the initial stage of a proceeding when a Charter issue is raised and again if a Court is "considering" making a declaration of incompatibility is cumbersome and possibly time- and resource-consuming. A single notification ought to be sufficient.

(f) The intervention role of the Victorian Human Rights and Equal Opportunity Commission has not been as successful as it should have been, because of the inadequate funding to the Commission to perform this role. The reality of litigation involving human rights issues will often be that plaintiffs/applicants are substantially under resourced to present these arguments. The Commission can offer an independent perspective from government but it must be properly resourced to do so. At federal level it will be equally important to ensure that if an intervention role of given to the Australian Human Rights Commission, it is adequately funded to fulfil it.

The Bar acknowledges with gratitude the assistance of the Victorian Bar Council Human Rights Committee in the preparation of this submission.

25 May 2009

JOHN DIGBY QC
Chairman
Victorian Bar Council

TABLE — RIGHTS PROTECTED IN STATUTORY CHARTERS

Human Rights Act 2004 (ACT) Part 3
Charter of Human Rights and Responsibilities Act 2006 (Vic) Part 2
And proposed *Human Rights Bill* 2006 (New Matilda)

ICCPR art	Description	ACT sec	Vic sec	HRB sec
16	right to recognition as person	8 (1)	8(1)	23[78]
2 (1)	right to enjoy rights without distinction etc	8 (2)	8(2)	
26	equality before law and equal protection	8 (3)	8(3)[79]	
6 (1)	right to life	9 (1)[80]	9	11
7	protection from torture and cruel, inhuman or degrading treatment etc	10	10	12-13[81]
23 (1)	protection of family	11 (1)	17(1)	25
24 (1)	protection of children	11 (2)	17(2)	27
17 (1)	privacy and reputation	12	13	24
12 (1)	freedom of movement	13	12	31
18 (1), (3)	freedom of thought, conscience and religion	14 (1)	14(1)	28
18 (2), (3)	no coercion to limit religious freedom	14 (2)	14(2)	
21	peaceful assembly	15 (1)	16(1)	29
22	freedom of association	15 (2)	16(2)[82]	
19 (1)	right to hold opinions	16 (1)	15(1)	
19 (2), (3)	freedom of expression	16 (2)	15(2)[83]	30
25	taking part in public life	17	18	
9	right to liberty and security of person	18 (1)-(7)	21(1)-(7)	15

78 Cites also ICCPR art. 26 and ICESR art. 2

79 Vic adds s 8(4) special measure exception

80 ACT adds s 9(2) as from birth

81 Adds human genome citing ICCPR art. 7 and UN Declaration

82 Vic adds s 16(2) specific reference to trade unions

83 Vic adds s 15(3) lawful restriction limitation

11	no imprisonment for contractual obligations	18 (8)	21(8)	
10 (1), (2) (a)	humane treatment when deprived of liberty	19	22	15
10 (2) (b), (3)	children in the criminal process	20	23	16
14 (1)	fair trial	21	24	18
14 (2)	rights in criminal proceedings	22 (1)	25(1)	19
14 (3)	minimum guarantees for those charged	22 (2)	25(2)	
14 (4)	rights of child charged	22 (3)	25(3)	
14 (5)	right of review	22 (4)	25(4)	
14 (6)	compensation for wrongful conviction	23		20
14 (7)	right not to be tried or punished more than once	24	26	21
15 (1)	retrospective criminal laws	25	27	22
8 (1), (2), (3) (a), (3) (c)	freedom from forced work	26	11	14
27	rights of minorities and indigenous peoples	27	19(1)[84]	33, 37[85]
25	taking part in public life	-	18	32
26	property rights	-	20	36
23	right to marry			26
12	freedom of movement			31
ICSR[86]	right to asylum			34
ICSR	protection in the event of removal, expulsion or extradition			35
ICESR art 13	education			38

[84] Vic adds s 19(2) rights of members of Aboriginal communities

[85] Cites also ICESR art. 1

[86] International Convention Relating to the Status of Refugees

ICESR art 6	work	39
ICESR art 11	adequate standard of living	40
ICESR art 12	physical well being and health	41
ICESR art 9	social security	42

APPENDIX A: VICTORIAN BAR HUMAN RIGHTS COMMITTEE

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Julian Burnside QC

Alexandra Richards QC

Glenn McGowan SC

Dr Ian Freckelton SC

Sturt Glacken SC

Stephen McLeish SC

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