

Submission to the Human  
Rights Consultation  
Committee

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## **PART ONE - Introduction**

The passage of the Australian Capital Territory's *Human Rights Act* 2004 was the first Bill or Charter of Rights in any Australian jurisdiction.<sup>1</sup> However, human rights and rights discourse has always played an important role in Victorian and Australian legal culture. Though ultimately rejected, a Bill of Rights was extensively discussed, debated and considered at the Constitutional Convention.<sup>2</sup> Further, attempts for a Federal Bill of Rights were made in 1944, 1973, 1985, 1988 and 2001. Attempts have also been made for State-based Bills of Rights in Queensland, New South Wales, South Australia and, of course, in Victoria. The idea, therefore, that human rights are somehow foreign to the Australian legal and political tradition is misguided. One might even suggest that human rights are the bad conscience of our existing legislative and judicial arrangements. Human rights have always been in the background of political and legal debate in this country and this state, surfacing sporadically but regularly, in Parliaments and the Courts.

Although Victorians can be justly proud of the largely welcoming, tolerant and prosperous society we have built together; there is still much that needs to be done to ensure that human rights are protected and that poverty and disadvantage are systematically addressed. We need, in other words, a more considered and systematised approach to dealing with human rights in this State. Just as discrimination cannot be adequately countered with piecemeal approaches,<sup>3</sup> issues of access to justice and the systematic addressing of poverty and disadvantage cannot be effectively engaged without a cogent legislative framework through which to analyse and combat the abuses of human rights that limit the expression of human potential. A Bill of Rights would provide such a legislative framework to enhance dialogue amongst the various branches of government and assist in creating a fairer Victoria.

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<sup>1</sup> The terms 'Bill of Rights' and 'Charter of Rights', despite containing subtle legal distinctions, have come to be used interchangeably in the human rights debates in Australia. We will be using the phrase 'Bill of Rights' simply because it is the most common expression.

<sup>2</sup> J La Nauze, *The Making of the Australian Constitution*, Melbourne: University of Melbourne Press, 1972, pp 227-32.

<sup>3</sup> Victorian Attorney-General, *New Directions for the Victorian Justice System 2004-14* (2004) p 56

Formulating a Bill of Rights in the Victorian context will be a necessarily multi-faceted and cautious process of creating the best model for the sharing of the burden of the protection of human rights between the various branches of government,<sup>4</sup> whilst engaging the imagination of Victorian communities.

**In this submission we will be focussing on question four - ‘What should be the role of our institutions of government in protecting human rights?’ – and question five – ‘What should happen if a person’s rights are breached?’ - of the Human Rights Consultation Community Discussion Paper, as well as question three – ‘If Victoria had a Charter of Human Rights, which rights should it protect?’ – where we will be focussing on the issue of economic, social and cultural rights.**

**PART TWO “What should be the role of our institutions of government in protecting human rights?”**

Formulating a Bill of Rights in Victoria will be a careful process of achieving the right balance between the branches of government in regards to the protection of human rights. What we want is effective *dialogue* between the Executive branch (the Government), the Legislative branch (the Parliament), and the Judicial branch (the Courts).

The Victorian Department of Justice in its ‘Human Rights in Victoria: Statement of Intent’ and in the Human Rights Consultation Community Discussion Paper has outlined a model of a Bill of Rights that would see a very limited role for the Courts, along the lines of the ACT’s *Human Rights Act 2004*. However, the government is clearly interested in a process of ‘dialogue’ between the branches of government and with and within the wider community.<sup>5</sup>

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<sup>4</sup> Carolyn Evans, ‘Responsibility for Rights: The ACT *Human Rights Act*’ (2004) 32 *Federal Law Review* 291 at 292.

<sup>5</sup> Victorian Department of Justice, ‘Human Rights in Victoria: Statement of Intent’ (May 2005) pp 2-3 (Henceforth ‘Statement of Intent’)

Dialogue, according to Peter Hogg and Allison Bushnell, occurs whenever ‘a judicial decision is open to judicial reversal, modification or avoidance.’<sup>6</sup> For example, section 3 of the United Kingdom’s *Human Rights Act 1998*, section 6 of New Zealand’s *Bill of Rights Act 1990* and section 30 of the ACT’s *Human Rights Act 2004* allow for the Court to interpret legislation in accordance with human rights, in preference to any incompatible interpretation. This will be what Hogg and Bushnell refer to ‘relatively minor’ amendments relating to those human rights the government decides to include in any Bill of Rights.<sup>7</sup> Of course, the Parliament is free at any stage to end the dialogue by legislating over the Courts (re)interpretation of the legislation and hence (re)assert its preferred interpretation.

We are somewhat concerned about the government’s apparent desire to limit the role of the Courts in the dialogue that ought to take place as a result of the introduction of a Bill of Rights in Victoria. Specifically, we are concerned about the government’s stated position that ‘the Government does not want to create new individual causes of action based on human rights breaches.’<sup>8</sup> While we will deal with the fallacy of such a position more thoroughly in the next section, for now we are concerned about this as one example of a reticence on the part of the government to see the Courts properly engaged with the process of human rights dialogue in Victoria. Whilst relying solely or too heavily on the Courts - or, for that matter, on any one branch of government - for human rights protection is an impediment to the development of a culture of human rights<sup>9</sup> in the Victorian government and the wider Victorian community, and the responsibility must be shared between the Executive, the Parliament, the Courts, and the wider community, Victoria’s Courts do have an important role to play in the protection and development of human rights. For example, given the absence of a Federal Bill of Rights in Australia and the absence of a Bill of Rights in Victoria, the common law – so-called ‘judge-made law’ – has played an important role in developing and protecting the human rights of Australians and Victorians.

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<sup>6</sup> Peter Hogg and Allison Bushnell, ‘The *Charter* Dialogue between Courts and Legislatures (Or perhaps the *Charter* of Rights isn’t such a bad thing after all)’ (1997) 35 *Osgoode Hall Law Journal* 75 at 79.

<sup>7</sup> *Id.* at 81.

<sup>8</sup> ‘Statement of Intent’ p 3.

<sup>9</sup> Janet McLean, ‘Legislative Invalidation, Human Rights Protection and s 4 of the New Zealand *Bill of Rights Act*’ [2001] *New Zealand Law Review* 421 at 448.

The common law was founded on the assumption of ongoing dialogue - 'constructive interaction', in other words<sup>10</sup> - between the Parliament and the courts. It therefore seems, given the immense burden that the common law has carried in the development and protection of rights in Victoria and Australia, very strange that the government would seek to limit the common law system of dialogue between Parliament and the Courts when it comes to the explicit matter of human rights. It is possible that such a desired course of action says one of two things. Either it is an admission that the common law has *failed* to protect to human rights<sup>11</sup> of Victorians and Australians and therefore it must be systematically replaced with something more responsive to the needs of the community. Or, it is an admission that the common law has worked *all too well* in protecting the rights of Victorians, often to the detriment of the government of the day.

However, we would prefer to see the matter in a far more nuanced way. There is an important and ongoing role to be played by the Courts in any Victorian human rights regime and the successes and failures of the common law system must be carefully reflected upon when deciding upon the appropriate system of dialogue to initiate between the institutions of government. While such a detailed survey is beyond the scope of this submission, we submit that a version of the existing common law-style form of dialogue where supremacy resides in a Parliament that welcomes and respects contributions made debates on rights by the judicial branch is one that has proved itself appropriate and well adapted to the Victorian and Australian legal system and community's attitudes, and so ought to be continued and not displaced under any human rights regime.

Further, although the Australian common law has played a unique role in articulating rights not expressly provided for in the Australian Constitution or legislation, it has never developed in isolation. The development of the Australian common law is first influenced by the English common law as well as, to a lesser extent, jurisprudence

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<sup>10</sup> Daryl Williams, 'Recognising Universal Rights in Australia' (2001) 24 *University of New South Wales Law Journal* 771 at 773.

<sup>11</sup> Megan Davis and George Williams, 'A Statutory Bill of Rights for Australia? Lessons from the United Kingdom' (2002) 22 *University of Queensland Law Journal* 1 at 15.

from other Commonwealth jurisdictions such as New Zealand, Canada and South Africa. All of these four jurisdictions now have Bills of Rights which will increasingly inform the development of the common law in these jurisdictions.<sup>12</sup> The presence of such a strong rights tradition in the United States has been a severe limitation on the applicability of United States' jurisprudence on the common law in Australia.<sup>13</sup> Thus, the Australian common law will either become increasingly isolated from its common law contemporaries or human rights will seep into the Australian legal system through their influence on the common laws of other, influential systems, most notably the United Kingdom.<sup>14</sup> Is it not far better for this to be controlled and guided by legislation that will produce an appropriate and adapted expression of human rights based on the needs of the Victorian people and government?

It is evident in much of the debate about human rights and Bills or Charters of Rights in Australia that much of the popular opinion on these matters is based on limited knowledge of the function of the United States Bill of Rights. Disturbingly, there seems to be some element of this evident in the reticence the Victorian government has shown towards the role of the Judicial Branch in any Bill of Rights. It would seem that fear of judicial review in a Bill of Rights – whether it be on the part of the government or wider community - comes from examples of so-called judicial activism in the invalidation of legislation by the United States Supreme Court.<sup>15</sup> Such fears are totally misplaced in the current debate and within the broader framework of the Anglo-Australian legal tradition. When the model for a Bill of Rights being considered is something very much akin to the United Kingdom's *Human Rights Act 1998*, New Zealand's *Bill of Rights Act 1990* and the ACT's *Human Rights Act 2004*, then it is incumbent upon those who profess greater knowledge of such issues to avoid emotive language based on the experiences of a

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<sup>12</sup> New South Wales Law Society Human Rights Committee, 'A Bill of Rights: Why Now? Why in NSW?' (2000) 38 (8) *Law Society Journal* 69 at 70.

<sup>13</sup> See, for example, the discussion of Mason and McHugh JJ on the problems that the presence of the United States' Bill of Rights poses for the use of American jurisprudence in the Australian context. *Deitrich v R* (1992) 177 CLR 292 per Mason and McHugh JJ at paras 21-5.

<sup>14</sup> New South Wales Law Society Human Rights Committee, 'A Bill of Rights: Why Now? Why in NSW?' (2000) 38 (8) *Law Society Journal* 69 at 70-1; J. J. Spigelman, 'Access to Justice and Human Rights Treaties' (2000) 22 *Sydney Law Review* 141 at 150.

<sup>15</sup> I Omar, 'Towards a Meaningful Discourse on Rights in Australia' (1996) 1 *Newcastle Law Review* 15 at 37.

really rather different jurisdiction with little relevance to the law or legal debate in Victoria.

For example, under the ACT's *Human Rights Act 2004* the issuing by a Court of a declaration of invalidity – a statement declaring any given law to be in breach of the rights contained in the *Human Rights Act 2004* - under section 32(2) does not affect the validity or operation of the law, nor does it affect anyone's rights. This is because section 32(3) insists that

- The declaration of invalidity does not affect –
- (a) the validity, operation or enforcement of the law; or
  - (b) the rights or obligations of anyone.

First of all, it must be noted that this is very different from the United States-style constitutionally-enshrined Bill of Rights that is the focus of so much negative discourse. Secondly, a declaration of invalidity clearly maintains parliamentary sovereignty. In response to such a declaration, the Attorney-General must, under s. 33(3), 'prepare a written response ... and present it to the Legislative Assembly not later than 6 months after the day the copy of the declaration is presented to the Legislative Assembly'. Thus, the declaration ensures legislative debate over the issue, and the legislature may respond by amending the law if it wishes after advice from the Attorney-General. We return to this issue of a declaration of incompatibility later in this section.

Other than the declaration of invalidity, there also exist in the relevant models of Bills of Rights interpretive clauses that compel the Courts to interpret ambiguous legislation to be – where reasonable – compatible with the rights contained in the Bill of Rights. Something akin, therefore, to the interpretive powers contained in section 6 of the New Zealand *Bill of Rights Act 1990*, or section 30 of the ACT *Human Rights Act 2004* would seem to be a necessary part of any Victorian Bill of Rights. This will especially be the case presuming that there will be no power granted to the Courts to invalidate legislation under any Victorian Bill of Rights. Equally, given that by legislating for a Bill of Rights the government clearly shows its desire to uphold human rights and create a culture of rights-compliance within government

and its apparatuses, clearly *some* power must be given to the Courts in order that they may act on legislation that violates the Bill of Rights *unintendedly*.

Thus, we can say that an interpretive provision is an excellent compromise between the power of legislative invalidation and allowing the apparatuses of government to simply ignore any Bill of Rights. Importantly, such a compromise allows the retention of Parliamentary sovereignty; ensuring that the final say on any given law remains in the hands of the popularly and democratically elected and accountable Parliament, whilst allowing the Court to act, where appropriate, to remove any ambiguity that might lead to violations of the Bill of Rights. In other words, we can assume that the State government only seeks to deliberately legislate in violation of the provisions of a Bill of Rights it enacts – perhaps through a statement of invalidity issued by the Attorney-General at the time of a Bill being introduced to the Parliament – and that the government presumably does not seek and would much prefer it not to be the case for the Bill of Rights to be violated accidentally, such as through ambiguous wording or misapplication by a government apparatus. Therefore, we can see that the inclusion of an interpretive clause in a Bill of Rights in no way threatens Parliamentary sovereignty in the State and in fact enhances it by allowing the Parliament and governments clear desire to create a culture of respect for human rights to win-out over any misunderstanding or misapplication of Parliament’s desires. For this reason, we need not fear the inclusion of an interpretive clause out of concern that it may lead to de facto invalidation or invalidation by stealth.<sup>16</sup> Far from being used as an alternative to the issuing of a declaration of invalidity or an attempt to legislate judicially and ‘avoid confrontation with the judiciary’,<sup>17</sup> interpretive clauses in statutory Bills of Rights - especially ‘soft’ statutory Bills of Rights such as the one proposed in Victoria - when seen in their correct light, are best understood as allies of Parliamentary sovereignty, not potential usurpers.

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<sup>16</sup> Tom Campbell ‘Interpretation Provisions in the ACT *Human Rights Bill 2003*’ paper presented at the Australian National University, Centre for International and Public Law seminar on the ACT *Human Rights Bill*, 17 December, 2003.

<sup>17</sup> *Ibid.*

However, the Courts are not the only branch of government that can effectively scrutinise the legislative actions and intentions of government. That role can and should also be performed by the Parliament.

Janet Hiebert – a key elucidator of the relationship between the judiciary, Parliament and the Executive in the context of the Canadian *Charter of Rights and Freedoms* – comments positively on Australia’s well-developed system of Parliamentary scrutiny of legislation that serves a similar role to that of the Judiciary under the Canadian *Charter*.<sup>18</sup> This is especially the case in Victoria where the Scrutiny of Regulations and Acts Committee exists. Under section 17(a)(i) of the *Parliamentary Committees Act 2003* (Victoria) the Committee is concerned with any legislation which:

... directly or indirectly –

- (i) trespasses unduly upon rights or freedoms;
- (ii) makes rights, freedoms or obligations dependent upon insufficiently defined administrative powers;
- (iii) makes rights, freedoms or obligations dependent upon non-reviewable administrative decisions;
- (iv) unduly requires or authorises acts or practices that may have an adverse effect on personal privacy within the meaning of the *Information Privacy Act 2000*;
- (v) unduly requires or authorises acts or practices that may have an adverse effect on privacy of health information within the meaning of the *Health Records Act 2000*;
- (vi) inappropriately delegates legislative power;
- (vii) insufficiently subjects the exercise of legislative power to parliamentary scrutiny;

This, it must be said, is an excellent platform to base any Parliamentary scrutiny of rights on. We are, for example, impressed with the recent review of legislation undertaken in Victoria by the Parliamentary Scrutiny of Acts and Regulations Committee, specifically its scrutiny of legislation relating to poverty. From this

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<sup>18</sup> Janet Hiebert, ‘A Hybrid-Approach to Protect Rights? An Argument in Favour of Supplementing Canadian Judicial Review with Australia’s Model of Parliamentary Scrutiny’ (1998) 26 *Federal Law Review* 115 at 116-7, 125-30.

review, the State government has seen fit to pledge to amend the *Vagrancy Act 1958*, citing the eminently just and reasonable reasoning that

[p]eople living in poverty find themselves subject to discrimination and legal requirements that rarely apply to other members of the community.<sup>19</sup>

This strikes us as the very sort of activity that ought to be continued and expanded upon under a Bill of Rights. Scrutiny of legislation focusing on, for example, poverty and discrimination would be enhanced and streamlined were the government to introduce a Bill of Rights that gave clearer expression to the sorts of rights and values that the Victorian community and, therefore, Victorian legislation ought to be incorporating and reflecting.<sup>20</sup>

The Committee is therefore already undertaking the sort of role that one would expect a Parliamentary Standing Committee concerned with scrutinising legislation from a human rights perspective under a human rights instrument would perform. Under the current legislative framework, however, the Committee is working – under section 17(a)(i) of the *Parliamentary Committees Act 2003* (Victoria) - with reference only to what Hiebert correctly identifies as ‘generic’ human rights,<sup>21</sup> rather than those specifically enunciated in a Bill of Rights.

An appropriate model may be found under section 38 of the *Human Rights Act 2004* (ACT) the Legislative Assembly Standing Committee on Legal Affairs must scrutinise every Bill from the perspective of the rights specifically contained in the *Human Rights Act 2004*.<sup>22</sup> Another model worth exploring for any Victorian Bill of Rights is that of the United Kingdom’s Joint Committee on Human Rights, which scrutinises and reports upon proposed legislation from the perspective of the United Kingdom’s human rights obligations. The UK’s Joint Committee on Human Rights first acknowledges the fields of human rights ‘engaged’ by a Bill, before stating the

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<sup>19</sup> Sate Government of Victoria, *A Fairer Victoria* (2005) p 29

<sup>20</sup> It is noteworthy, also, that despite its insistence on not considering the incorporation of economic, social and cultural human rights in a Bill of Rights (‘Statement of Intent’ pp 3-4), the government appears nevertheless to be aware of the human rights and broader legal issues surrounding poverty and open to productive dialogue with the legislature on these issues. Naturally, the inclusion of economic, social and cultural human rights in a Bill of Rights would enhance the ability of the legislature and government to reflect its policy commitments in legislation by giving a the legislature, any statutory human rights and the courts a clear set of criteria and increasingly well-developed international jurisprudence on these rights. We discuss this issue more in Part Four below.

<sup>21</sup> Hiebert, *supra* n 18 at 116.

<sup>22</sup> ACT *Human Rights Act 2004* s 38.

human rights obligations of the government as they currently stand, pointing out potentially problematic sections of the bill with reference to existing human rights obligations and, finally, recommending any amendments that might be required to bring the legislation into line with the government's human rights obligations. A similar process could be undertaken in Victoria by either the existing Scrutiny of Regulations and Acts Committee, or by a specially convened Human Rights Committee or Bill or Charter of Rights Committee. Such a Committee would ideally draw members from both the Legislative Assembly and the Legislative Council and would, of course, include members from a variety of political parties. Scrutiny of legislation would be based around the human rights included in the Bill of Rights and, where necessary, reference could be made to human rights and other jurisprudence in comparative jurisdictions if it is felt necessary, as might submissions from non-government organisations or the Minister themselves.<sup>23</sup> In a sense, this would simply be a refinement of the sort of role already carried out by the Scrutiny of Regulations and Acts Committee under the *Parliamentary Committees Act 2003 (Victoria)*, but it would also signal a new and abiding commitment by the government to a new era of self-scrutiny, human rights and dialogue between the government and the Parliament.

Despite the strong language of section 38 of the *Human Rights Act (ACT)* - '[t]he relevant standing committee must report to the Legislative Assembly about human rights issues raised by bills presented to the Assembly' - the next section of the *Act*, section 39 insists that:

A failure to comply with section 37 or section 38 in relation to a bill does not affect the validity, operation or enforcement of any Territory law.

This provision is problematic from the perspective of attempting to develop a culture of respect for human rights within both the government and the wider community. Changing the cultures of government and bureaucracy takes time; two years was allowed for the bureaucracy to come up to speed in the UK, and widespread ignorance was shown-up within the New Zealand bureaucracy.<sup>24</sup> Surely the basis for

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<sup>23</sup> As is sometimes the case with the United Kingdom's Joint Committee on Human Rights. See, UK Joint Committee on Human Rights, 'The Work of the Committee in the 2001-2005 Parliament' (April 2005) pp 21-3.

<sup>24</sup> Carolyn Evans, 'Responsibility for Rights: The ACT *Human Rights Act*' (2004) 32 *Federal Law Review* 291 at 300-1.

beginning to create a culture of respect for human rights is a culture founded on effective, open and honest interaction and dialogue between the branches of government. It is therefore deeply problematic that it is conceivable that where the government holds a strong enough majority to be able to pass legislation without great scrutiny of its content, nor strictly adhere to procedural norms, scrutiny of legislation by the appropriate Standing Committee may well become an optional luxury for the government. One could envisage potentially problematic pieces of legislation not being submitted by the government for scrutiny by the Legislative Assembly Standing Committee on Legal Affairs, if there is a chance that the Standing Committee may raise issues the government would prefer they did not. Were this the case, it may take breaches of the *Human Rights Act 2004 (ACT)* by state apparatuses to alert the general public or other branches of government to the human rights implications of a piece of legislation. This is the very situation that effective dialogue between branches of government is supposed to prevent.

It might be thought that s.39 simply preserves parliamentary sovereignty in the ACT. That is to an extent true. However, it may be here noted that Victoria, or the ACT, could probably entrench a compulsory system of legislative scrutiny of bills for human rights purposes, as it would relate to ‘the procedures’ of Parliament, a matter that may be successfully entrenched under section 6 of the *Australia Act*. Thus, it is open to the Victorian Parliament to make such scrutiny a compulsory part of the enactment of statutes. Parliamentary sovereignty is essentially maintained, as Parliament remains free to enact the Act regardless of the recommendations of the Standing Committee regarding the human rights compatibility of the law.

The ACT’s *Human Rights Act 2004* sets up a Human Rights Commissioner, in Part 6 (Sections 40-1), who is able to report on the effects of legislation to the Attorney-General. This will be especially important should interaction and dialogue within the legislative branch of government fail, especially due to reliance on section 39 that may well allow the executive to failure to comply with section 38. It is for this reason - and in the name of enhanced dialogue - that we suggest that there is a role for a Human Rights Commissioner in pre-enactment scrutiny of legislation in any Victorian Bill of Rights. This would expand the scope of dialogue beyond the limits

of the legislature at this important early stage and allow a theoretically non-partisan expert to report on the likely effects of the legislation on human rights. Of course, upholding Parliamentary Sovereignty means that the legislature is, of course, free to disregard the advice of the Human Rights Commissioner, should it so choose.

The model of the Human Rights Commissioner in the ACT is, we think, an excellent model of how a Human Rights Commissioner might work in Victoria, under a Victorian Bill of Rights. The ACT's Human Rights Commissioner is obligated under section 41 of the *Human Rights Act 2004* to

(1) (a) ... review the effects of Territory laws, including the common law, on human rights, and report in writing to the Attorney-General on the results of the review.

There is no reason why a Victorian Human Rights Commissioner could not carry out this important function. Indeed, the model of dialogue put forward by this section strikes us as something worth replicating in Victoria. The Victorian Attorney-General has even gone so far as to clearly state that the scrutiny of legislation is a good way to ensure that 'unintended discrimination does not occur.'<sup>25</sup> In scrutinising the common law of the ACT as well as legislation in his or her report to the Attorney-General, the ACT Human Rights Commissioner propels and creates dialogue between the branches of government, that otherwise may not have been noticed. The common law, of course, acts far slower and often only in rare and specific instances; it is "evolutionary rather than revolutionary."<sup>26</sup> It is quite possible for the common law to lie dormant, failing to attract the attention of the legislature.<sup>27</sup> In this sense, it is advisable for the common law to be routinely scrutinized by a Human Rights Commissioner who will report on the human rights implications of any problematic aspects of the common law to the Attorney-General. This provision can also be seen as an additional measure to ensure that the final say on human rights and other aspects of law remains with the Parliament. With a Human Rights Commissioner routinely scrutinising the common law from the

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<sup>25</sup> Victorian Attorney-General, *New Directions for the Victorian Justice System 2004-14* (2004) p 57.

<sup>26</sup> J Doyle and B Wells, 'How Far can the Common Law go towards protecting Human Rights?' in P Alston (ed) *Towards and Australian Bill of Rights* Canberra: Centre for International and Public Law, ANU and HREOC, 1994, pp 107-21 at 121.

<sup>27</sup> Infamous cases, in which the common law has been found wanting in terms of human rights protection, are *Duncan v Jones* [1936] 1 KB 249; *Malone v Metropolitan Police Commissioner* [1979] Ch 344, and *Dugan v Mirror Newspapers* (1978) 142 CLR 583.

perspective of human rights contained in the Bill of Rights, and reporting back to the Attorney-General, there is no reason why the government should have any problems identifying the law at any given time, and amending the law, should it feel it necessary.

Currently, the closest equivalent of the ACT's Human Rights Commissioner in Victoria is the Equal Opportunity Commission. Whilst the Equal Opportunity Commission performs some of the same tasks as the ACT's Human Rights Commissioner, such as educating the community about human rights, it does not carry out systematic reviews of legislation. However, this is not to say that such reviews are beyond the scope or competence of the Equal Opportunity Commission. Indeed, in 1998 the Equal Opportunity Commission was commissioned by the State government to produce a report on the status of same-sex relationships under the current law.<sup>28</sup> Equally, the Equal Opportunity Commission has issued a number of reports to Parliament concerning human rights. Some of these have concerned specific legislation, such as the *Marriage Legislation Amendment Bill 2004*<sup>29</sup> or section 107 of the *Equal Opportunity Act 1998 (Vic)*.<sup>30</sup> What is required, then, to bring this process up to the level of the ACT Human Rights Commissioner under the ACT's *Human Rights Act 2004* is clear legislative action, as part of any Bill of Rights, of legislation similar to Part 6 of the ACT's *Human Rights Act 2004* which, firstly, establishes a Human Rights Commissioner (section 40), and then outlines the role of the Human Rights Commissioner (section 41) including to

- (1) (a) ... review the effects of Territory laws, including the common law, on human rights, and report in writing to the Attorney-General on the results of the review.

Imagine 3-way dialogue between the Human Rights Commissioner, the Human Rights Standing Committee and the Attorney-General as representative of and as a

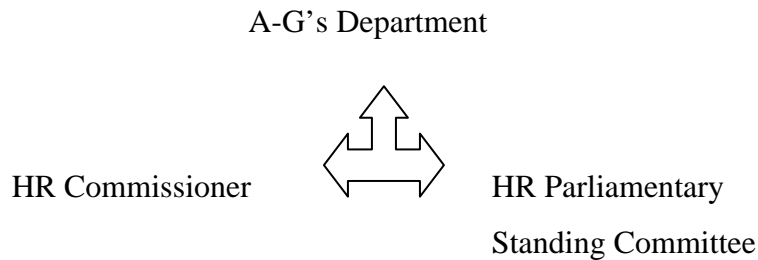
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<sup>28</sup> Victorian Equal Opportunity Commission, 'Same Sex Relationships and The Law' (1998).

<sup>29</sup> Victorian Equal Opportunity Commission et al, 'Joint Submission to the Senate inquiry into the Marriage Legislation Amendment Bill 2004', July 2004, <http://www.standuptoracism.com.au/default.asp?nc=2520&id=408>.

<sup>30</sup> Victorian Equal Opportunity Commission, 'Submission and recommendation to the Scrutiny of Acts and Regulations Committee's Review Discrimination in the Law pursuant to section 207 of the Equal Opportunity Act 1995', June 2004, <http://www.standuptoracism.com.au/default.asp?nc=2520&id=409>.

specific extension of the dialogue that must go on between all the branches of government.



At this stage, we now wish to return to the problems inherent in any Bill of Rights that seeks to limit the role of the judicial branch of government. Dialogue will be severely limited under any Bill of Rights model that seeks to exclude or devalue the contributions of the judiciary; including, quite possibly, the model vaguely sketched out by the Victorian government thus far in the debate. Given the government's reticence about allowing debate and discussion of rights in the Courts, the traditional notions of 'dialogue' as formulated in the context of Bills of Rights in Canada<sup>31</sup> and the UK will not work. The UK model of dialogue is based on the entirely reasonable assumption that the Courts will provide ongoing critique, discussion and development of existing human rights legislation.<sup>32</sup> With the Victorian government's desire to avoid Court-based dispute resolution and seeming refusal to allow individual causes of action under any Bill of Rights – similar to the limitations imposed on their Bill of Rights by the ACT government – it is clear that the common law and Westminster 'dialogue' model of rights protection is in danger of being short circuited.

So, the question is, who is going to be the other partner in the dialogue with the Parliament and Executive, if not the Judiciary? If it is to be a Human Rights Commissioner, then despite the step forward that the creation of such a position would nevertheless be, it would still be structurally problematic because a Human Rights Commissioner would be an appointment and apparatus of the Executive. The traditional concept of dialogue and, for that matter, Westminster style governance, is that dialogue is a discussion between the Executive, the Legislature and the

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<sup>31</sup> Hogg and Bushnell, *supra* n 6 at 79-81, *passim*.

<sup>32</sup> The same is essentially true of the Canadian model, with its override clause.

Judiciary. If an apparatus and appointment of the Executive replaces the Judiciary, then dialogue is limited. The logical conclusion of this new approach is conceivably a dialogue occurring entirely within the Executive.

If the government is too eager to keep human rights debate out of the Courts, then by doing so they will be sabotaging human rights dialogue as it exists in other, more established common law and Westminster systems and they will need to come up with new partners in dialogue. Equally, dialogue (or in its more formal form, ‘scrutiny’) located solely in the Executive and Parliament is problematic, due to the inherently political nature of those bodies.<sup>33</sup> In other common law, Westminster systems, it is a routine occurrence for rights to be developed through and with the Courts. Debate about the nature of rights in Victoria is an excellent way to develop a culture of human rights and human rights debate in Victoria, and the Courts are a transparent and high profile way of doing this.

Relying solely or too heavily on any one branch of government for human rights protection would be an impediment to the development of a culture of human rights<sup>34</sup> in the Victorian Government and the wider Victorian community. As James Baldwin once wrote, ‘all relationships that are not equal are perverse.’ Therefore, the responsibility must be shared between the Executive, the Parliament, the Courts, delegated authorities and the wider community through an effective and equal process of dialogue and discourse.

In that respect, we recommend that any proposed Bill of Rights allow for the Courts’ ‘declarations of incompatibility’, as in the ACT legislation. Indeed, we would recommend a stronger model, so that people are allowed to pursue claims based solely on human rights claims, unlike the model in the ACT, whereby human rights claims can only be made as ancillary or incidental claims in cases arising on other grounds.

### ***RECOMMENDATIONS UNDER PART TWO:***

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<sup>33</sup> Hiebert, *supra* n 18 at 124-5.

<sup>34</sup> McLean, *supra* n 9 at 448.

1. The proposed Bill of Rights allow for causes of action based on violations of the rights therein. The most severe court sanction would be a Declaration of Invalidity, resulting in consequences similar to those in the *Human Rights Act 2004* (ACT). The process would differ in that free-standing causes of action would exist under the Victorian legislation.
2. Inclusion of an interpretive clause in the Bill of Rights, explicitly directing courts to, if possible, interpret laws in accordance with human rights.
3. A specialist standing parliamentary committee be created to scrutinise Bills for their human rights impact. Alternatively, the existing Scrutiny of Regulations and Acts Committee could undertake this role. However, it is possible that that role could overburden that existing Committee. Consideration should be given to making this process compulsory for the passage of legislation.
4. A Human Rights Commissioner be established, along the lines of the similar position in the ACT.

### **PART THREE “What should happen if a person’s rights are breached?”**

Given that, as the Statement of Intent clearly states, ‘the Government does not wish to create new individual causes of action based on human rights breaches’<sup>35</sup> this part of the report will largely focus on the role that existing institutions might play with the advent of a Bill of Rights. However, we do not thereby imply our agreement with the government on this issue. Indeed, we explicitly disagreed on this point in the previous section.

Currently in Victoria, complaints can be made under the *Equal Opportunity Act 1995* (Vic). Insofar as any rights in the Bill of Rights pertain to discrimination, then it is hard to see how the Bill of Rights will alter the complaint process, other than to refine the meaning and manifestation of illegal discrimination. In this sense, the

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<sup>35</sup> ‘Statement of Intent’ p 3.

abiding sense we get is that not a great deal will change under a Bill of Rights. Rather than any feared glut of litigation under the Bill of Rights, it is far more sensible to believe that both a similar number and type of complaints – especially of those relating directly to discrimination – will be made; they will just be rearticulated or differently nuanced and attuned to the language of the Bill of Rights.

The experience of the ACT after the introduction of the *Human Rights Act 2004* appears to endorse the view that it is merely the expression of litigation, rather than its abiding content or the volume of litigation, that is altered by the introduction of a Bill of Rights. For example, in the case of *Merritt & The Commissioner for Housing*<sup>36</sup> before the Administrative Appeals Tribunal of the ACT, the applicant sought review of a decision to refuse her an ‘upgrade’ from Early [Housing] Allocation Category 2 to Category 1. The applicant argued that the area of the ACT in which she had been allocated housing, insofar as it was an often violent area prone to alcohol and other drug abuse was inappropriate for raising children. The applicant argued that in making the decision to refuse her an upgrade from Category 2 to Category 1 – and thus allow her and her family to relocate sooner – that the Statutory body, Housing ACT had acted in breach of section 11 of the *Human Rights Act 2004* (ACT) regarding family rights.<sup>37</sup>

The Administrative Appeals Tribunal held that section 30 of the *Human Rights Act 2004* (ACT) did not apply, since there was no ambiguity nor manifest absurdity or unreasonableness in the legislation,<sup>38</sup> and even if there were grounds to look to the *Human Rights Act 2004* (ACT), there was no reason to suppose the government agency was in breach of its obligations.<sup>39</sup> What concerns us here is not so much the outcome of the case so much as its articulation. For it is not, we submit, a case that would not have been brought were it not for the existence in the ACT of a Bill of Rights. Rather, were it not for a Bill of Rights or, for example, were a case on the same facts to be argued in Victoria or another jurisdiction without any Bill of Rights,

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<sup>36</sup> [2004] ACTAAT 37.

<sup>37</sup> Section 11 reads: (1) The family... is entitled to be protected by society  
(2) Every child has the right to the protection needed by the child because of being a child, without distinction or discrimination of any kind.

<sup>38</sup> [2004] ACTAAT 37 at para 52-3.

<sup>39</sup> [2004] ACTAAT 37 at para 53-5.

the case simply would have been argued on one of existing grounds known to administrative law such as failure to take into account all the relevant facts of the particular case.

Given this, we can say with some confidence that what will happen when a person's rights are breached by an apparatus of the state under any Bill of Rights will be very similar to what happens now when a person's rights are breached by an apparatus of the state, the recourse will be to seek review of the administrative decision. What may change will be the articulation of that appeal. If the government is especially concerned about the possible creation of new grounds of appeal then the onus is upon the government to see that the rights articulated in any Bill of Rights do not exceed the existing rights and freedoms that people can currently uphold against the state under existing laws. Were this to be the government's position, however, then it may quickly argue itself into a position of either absurdity or bad faith – seeking legitimacy in a document that merely rearticulates the status quo. A 'confirmatory', rather than 'amendatory' Bill of Rights, to use the words of United States Supreme Court Justice Antonin Scalia, that seeks merely to rephrase the status quo rather than remedy and repudiate the absence or abuse of rights in the past.<sup>40</sup> Needless to say, we would have serious doubts about the merit of such an undertaking.

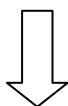
Another abiding question we would like to address at this stage is the relationship of the Bill of Rights between private parties. How, in other words, will the Bill of Rights operate *vertically* and how will it operate *horizontally*. Ought there be any cause of action – whether purely civil or otherwise – for a person whose human rights are violated not by the state or its agents (the vertical application of human rights protection) but by a private individual or entity (the horizontal application of human rights protection)?

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<sup>40</sup> Antonin Scalia, 'The Bill of Rights: Confirmation of Extant Freedoms or Invitation to Judicial Creation?' in Grant Huscroft and Paul Rishworth (eds) *Litigating Rights: Perspectives from Domestic and International Law* (Hart, Oxford, 2002) at p 20. See also, James Allan, 'Paying for the Comfort of Dogma' (2003) 25 *Sydney Law Review* 63.

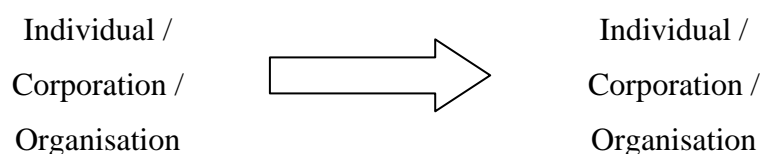
*Vertical operation* concerns the relationship between the individual and the State and its agents (eg government departments, police, courts, state schools, public hospitals, etc.)

State Apparatuses



Individual

*Horizontal operation*, however, concerns the relationship between private individuals or entities (corporations, organisations, private schools, private hospitals, etc.)



Traditionally, human rights rhetoric has focussed on protecting individuals from the state, which was seen to be the abiding violator of human rights. Increasingly, however, human rights discourse has come to recognise the private sector (the non-state sphere) is also a place where human rights abuses routinely occur as a result of the interactions between individuals and private entities; not just as a result of interactions between individuals or private entities and the state.

Another way to look at this issue is to ask, *for whom* and *against whom* do human rights apply? In Canada, for example, some rights have been extended to corporations.<sup>41</sup> Partly to discourage such a trend, section 6 of the ACT's *Human Rights Act 2004* insists that 'only individuals have human rights.' We endorse a section 6-type provision in the Victorian Bill of Rights, to avoid the possibility of abuse by powerful private sector agents, particularly corporations.

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<sup>41</sup> See Alan C. Hutchinson, 'Supreme Court Inc: The Business of Democracy and Rights' in Gavin W Anderson (ed) *Rights and Democracy: Essays in UK-Canadian Constitutionalism* (Blackstone Press, London, 1999) discussing *RJR MacDonald Inc v Canada (Attorney-General)* (1995) 3 SCR 199.

Again, in Canada, the *Charter of Rights and Freedoms* applies, under Section 32, to (a) the Parliament and Government of Canada and (b) the legislature and government of each province. Section 3 of the New Zealand *Bill of Rights Act 1990* holds accountable ‘any person in the performance of any public function, power or duty conferred or imposed on that person or body by or pursuant to the law.’ The United Kingdom’s *Human Rights Act 1998* applies only to public authorities. Section 6(1) holds that ‘[i]t shall be unlawful for a public authority to act in a way which is incompatible with a Convention right.’ Interestingly, this includes apparatuses of the State including the Police, state schools, public hospitals and even private corporations undertaking work for the State. Importantly, private bodies can be held accountable under the *Human Rights Act 1998* if they are undertaking work considered to be in the public interest that the State would otherwise be obligated to do.<sup>42</sup>

It would be most advisable for a Victorian Bill of Rights were to take the more expansive approach of the New Zealand and United Kingdom Acts, rather than the narrower focus of the ACT’s *Human Rights Act 2004*, primarily concerned as it is with scrutiny of government legislation. To take the more expansive approach would be to acknowledge the influence that both public authorities and private authorities engaged in work in the public sphere and public interest have and, accordingly, an acknowledgement of the role that these institutions must play in the provision of essential services to Victorians on a more equitable basis. Equally, here in Victoria, Equal Opportunity legislation has long functioned to protect human rights from abuses in the private sphere, especially in areas of employment and service provision.

Returning to the inevitable dialogue that will occur between branches of government, it is important to recognise that even under a more restrictive wording, a Bill of Rights that applies to the state and public authorities can still allow the development and application of human rights in the private sphere – within ‘horizontal’ relationships. There are numerous high profile examples of this from the United Kingdom where the *Human Rights Act 1998* and subsequent increasing influence of

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<sup>42</sup> For discussions see, Dawn Oliver, ‘The Frontiers of the State: Public Authorities and Public Functions under the *Human Rights Act*’ (2000) 10 *Public Law* 476.

European human rights norms has had a profound influence on the development of the common law. In *Douglas and Others v. Hello! Ltd*<sup>43</sup> in which Michael Douglas and Catherine Zeta-Jones sued *Hello!* magazine on the hitherto unrecognised grounds of a right to personal privacy, the Court of Appeal ruled that

Since the coming into force of the *Human Rights Act 1998*, the courts as a public authority cannot act in a way which is incompatible with a [European] Convention [for the Protection of Human Rights and Fundamental Freedoms] right...<sup>44</sup> That arguably includes their activity in interpreting and developing the common law, even where no public authority is a party to the litigation.<sup>45</sup>

Two years later, when supermodel Naomi Campbell sued MGN Ltd over publication in *The Mirror* newspaper of her attending a Narcotics Anonymous meeting, the influence of European human rights norms was thoroughly engrained in the discourse of the common law<sup>46</sup> both from *Douglas and Ors* and the earlier case of *Venables v. News Group Newspapers*.<sup>47</sup> Indeed, *Naomi Campbell v MGN Ltd* concerned the delicate balance between the rights to personal privacy and the rights of a free press, contained in sections 8 and 10 of the European Convention for the Protection of Human Rights and Fundamental Freedoms. We see no reason to believe why such important developments within human rights jurisprudence could not, nor should not, occur in Victoria under a Victorian Bill of Rights.

We recommend therefore that a Bill of Rights apply to the actions of all public agents, including courts. The latter would explicitly direct the development of the common law in accordance with human rights, in the fine tradition of cases such as *Mabo v Queensland (No. 2)*.<sup>48</sup>

Moving on, there would seem to us to be no reason why the Equal Opportunity Commission – perhaps working in tandem with a Human Rights Commissioner or

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<sup>43</sup> [2001] QB 967.

<sup>44</sup> Following section 6(1) of the European Convention for the Protection of Human Rights and Fundamental Freedoms.

<sup>45</sup> [2001] QB 967 at 1011.

<sup>46</sup> *Naomi Campbell v MGN Ltd* [2003] QB 633 at 658.

<sup>47</sup> [2001] HRLR 370.

<sup>48</sup> (1992) 175 CLR 1.

absorbed into the folds of a larger Human Rights Commission – could not continue to mediate and resolve matters of equal opportunity and discrimination under a Bill of Rights. The changes required to facilitate such a desirable remedial option would be minor. First, legislative change should be introduced to bring the Equal Opportunity Commission into the fold of the Bill of Rights. Second, specific mention of the possibility of recourse to the Equal Opportunity Commissioner in the Bill of Rights; as well as, perhaps, policy or legislative guidelines for the harmonious development of human rights *and* equal opportunity law in Victoria.

Equally, Victoria could easily avoid the situation where activist groups seek to use a Bill of Rights for advancing essentially political causes by following the limitations imposed by the UK's *Human Rights Act 1998* relating to the question of who can utilise the Human Rights Act before the Courts. The *Human Rights Act 1998* contains the necessary condition that in order to seek a remedy the complainant must be '(or would be)', following section 7 (1)(b), 'a victim of the unlawful act.' Such a provision inserted into a Victorian Bill of Rights would still allow individuals to articulate and assert their rights under the Bill of Rights before a Court or a mediating body such as the Equal Opportunity Commissioner and/or a Human Rights Commissioner, whilst avoiding the misuse of the Courts for the articulation of societal political grievances – legitimate though they may well be – which will remain within the sphere of the 'open and robust' and democratically accountable mechanisms of parliamentary politics.<sup>49</sup> However, provision should be made to allow the Human Rights Commissioner, and perhaps interested NGOs, to apply for amicus status in relevant cases. Amicus status is of course very different to plaintiff status.

### ***RECOMMENDATIONS UNDER PART THREE:***

1. The Victorian Bill of Rights allow *at least* for the articulation and influence of rights therein with regard to the resolution of claims based on existing causes of action. This includes rights in both the public and private sectors.

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<sup>49</sup> James Allan and Richard Cullen 'A Bill of Rights odyssey for Australia: The Sirens are Calling' (1997) 19 *University of Queensland Law Journal* 171 at 179.

2. The proposed Human Rights Commissioner play a role in conciliating and mediating disputes.
3. Standing be restricted to affected individuals, though amicus status could be granted to the Commissioner in court cases, and NGOs if the court believed that would be in the interests of justice.

#### **PART FOUR – If Victoria had a Charter of Human Rights, which rights should it protect?**

We now want to move on to examine the question ‘If Victoria had a Charter of Human Rights, which rights should it protect?’ We will be discussing the issue of economic, social and cultural rights – which the ACT Bill of Rights Consultative Committee argued in favour of including in the ACT *Human Rights Act*<sup>50</sup>. Implicit in this focus is that we believe civil and political rights should be covered, as articulated in the ICCPR and to the extent they are within the Victorian government’s jurisdiction.<sup>51</sup>

The Victorian Department of Justice insists that

[t]he primary purpose of this consultation is to identify those mechanisms that will strengthen Victorians’ enjoyment of their democratic rights... Those who are living in poverty and people from marginalised communities have often had the most need of the protection offered by the basic rights found in the ICCPR...<sup>52</sup>

This is an important (although somewhat oblique) recognition that human rights cannot be so simply differentiated. Democratic and civil rights, as the government seems to recognise, are often reliant on the existence of social and economic rights. Indeed, the division between civil and political rights (such as those contained in the ICCPR) and economic, cultural and social rights (such as those contained in the ICESCR) is entirely an artificial one, based on now-irrelevant Cold War divisions

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<sup>50</sup> ACT Bill of Rights Consultative Committee ‘Towards an ACT Human Rights Act’ May, 2003 <http://www.jcs.act.gov.au/prd/rights/index.html>;

<sup>51</sup> For example, a number of rights are ‘trumped’ by federal legislation under section 109 of the Constitution, such as the issue of compulsory racial vilification laws under article 20 ICCPR

<sup>52</sup> ‘Statement of Intent’ p 3.

between the Socialist bloc and Western Democratic bloc. Unfortunately, this division has coloured debates about human rights over the last fifty years. It is therefore unfortunate to think that such outmoded notions retain currency in the mind of legislators today.

The supposed difference between ICCPR rights and ICESCR rights is based on an outmoded assumption that the former are negative rights whereas the latter are positive rights. Negative rights generally require governments to refrain from human rights violating conduct, and it is felt that such obligations are easy and cost-free. Positive rights give rise to obligations to act positively, for example by expending resources, and are viewed as difficult and resource-intensive. However, ICESCR rights have both negative and positive aspects. For example, the Zimbabwean government's current practice of arbitrarily bulldozing houses is a clear 'negative' breach of the right to housing.

Indeed, insofar as the Statement of Intent calls for the Committee to 'focus on those areas that the government believes are most relevant to strengthening our democratic institutions and addressing disadvantage'<sup>53</sup> it would appear that economic and social rights are very much on the government's mind. The recently released policy statement *A Fairer Victoria* is evidence of this. As is the government's acknowledgement that:

Victoria still has unacceptably high levels of poverty, with increasing numbers of young families and working people experiencing financial hardship.<sup>54</sup>

Equally, such expressions of concern and policy statements would seem to indicate that issues of poverty and equality are very much issues which concern the Victorian public. It is puzzling to us, then, to read the following argument employed against the recognition of economic, social and cultural rights:

[t]he Government's primary purpose in this initiative is to adequately recognise, protect and promote those rights that have a strong measure of acceptance in the community.<sup>55</sup>

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<sup>53</sup> 'Statement of Intent' p 2.

<sup>54</sup> Victorian Government, *Growing Victoria Together: A Vision for Victoria to 2010 and Beyond* (2005) p 20.

Several points need to be made. First, are those rights ‘that have a strong measure of acceptance in the community’ the rights most in need of enshrining in legislation? Second, since this statement by its positioning within the Statement of Intent seeks to exclude economic, social and cultural rights,<sup>56</sup> on what basis does the government believe the rights to health, housing, food and water *do not* ‘have a strong measure of acceptance in the community?’ Third, if economic, social and cultural *do not* ‘have a strong measure of acceptance in the community,’ then why does the Victorian government seem to be so concerned with actively tackling issues of economic, social and cultural injustice and inequality? To include social, economic and cultural rights in a Bill of Rights would be a continuation of the current government’s positive and far-sighted statements that the Victorian government takes these issues seriously – economic justice, equality and progress, cultural respect and diversity – when it comes to formulating policies for good governance into the future. These rights are important to Victorians and they are clearly important to the Victorian government. It appears to us that the government’s rhetoric and clear policy commitments undermine its own attempts to downplay the importance of economic, social and cultural rights!

The government expresses its clear desire that in any adopted charter of bill of rights, ‘the sovereignty of Parliament is preserved’<sup>57</sup> and this is understandable on the basis that, firstly, this is a state-based bill of rights, rather than a Commonwealth bill of rights and, secondly, such an approach is thoroughly in keeping with the abiding Anglo-Australian tradition of parliamentary sovereignty. Further, the Department of Justice insists that ‘[l]egislating for the protection of ICESCR rights... can raise difficult issues of resource allocation[.]’<sup>58</sup> Equally, they argue that ‘Parliament, rather than the courts should continue to be the forum where issues of social and fiscal policy are scrutinised and debated.’<sup>59</sup> However, when scrutinised, none of

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<sup>55</sup> ‘Statement of Intent’ p 3.

<sup>56</sup> This sentence is located on p 3 of the ‘Statement of Intent’, directly after elucidation of the government’s direction to the Consultation Committee to focus on rights in the ICCPR and directly before the direction to the Committee to disregard the human rights contained in ICESCR.

<sup>57</sup> ‘Statement of Intent’ p 2.

<sup>58</sup> ‘Statement of Intent’ p 4.

<sup>59</sup> ‘Statement of Intent’ p 4.

these reasons are at all conclusive in arguing for the exclusion of economic and social rights in any charter.

First, given that the Bill of Rights will be an ordinary piece of legislation subject to alteration or repeal as the Parliament wills, there is no prima facie reason why economic and social rights ought be inherently less democratic or problematic than civil or political rights. Were the Bill of Rights to be a constitutionally enshrined model with the possibility of judicial invalidation of legislation then, perhaps, the government's reticence would be understandable. But given the proposed nature of the charter, we see no reason why economic and social rights ought be any more problematic than civil or political rights.

Neither does the argument that '[l]egislating for the protection of ICESC rights... can raise difficult issues of resource allocation'<sup>60</sup> invalidate the inclusion of economic and social rights in any charter. Core civil and political rights – indeed, all human rights insofar as the government is obliged to uphold them – 'raise difficult issues of resource allocation.' In the context of the right to housing, the Supreme Court of South Africa correctly noted in the case of *Government of the Republic of South Africa v. Grootboom*<sup>61</sup> that economic, social and cultural rights were not substantially different than civil and political rights in that 'many... civil and political rights... will give rise to similar budgetary implications [as socio-economic rights.]'<sup>62</sup> Equally, it was insisted that it was for the government to decide how it would manifest a reasonably policy to achieve an economic right such as, in the case of *Grootboom*, housing.<sup>63</sup> This is the standard approach that Courts take in dealing with issues of resource allocation. For another illustration, we return to the case of *Merritt & The Commissioner for Housing*<sup>64</sup> before the Administrative Appeals Tribunal of the ACT. It may well surprise advocates of the strict distinction between civil and political rights and economic, social and cultural rights that issues of resource allocation were raised not just under a very restricted civil and political rights-focussed Bill of Rights, but one in Australia. We, on the other hand, were not

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<sup>60</sup> 'Statement of Intent' p 4.

<sup>61</sup> [2000] BCLR 1169 (CC).

<sup>62</sup> [2000] BCLR 1169 (CC) at para 20.

<sup>63</sup> [2000] BCLR 1169 (CC) at para 66.

<sup>64</sup> [2004] ACTAAT 37.

surprised at all. We have briefly outlined the facts of the case in Part Three. Here, we are concerned with the fact that the Administrative Appeals Tribunal was concerned with the ACT government's management of housing. The tribunal declared, in relation to the ACT government's adherence to section 11 of the *Human Rights Act 2004*:

...there is no evidence that this family is not being afforded protection by society, or that any child is not being afforded "the protection needed by a child because of being a child, without distinction or discrimination of any kind". On the contrary, Ms Merritt and her family are being provided with accommodation at concessional rental, and Housing ACT has in place a range of measures to improve the social and physical environment of Illawarra Court.

Further, to grant Ms Merritt's request would very likely have the consequence that some other family or child in more urgent need of accommodation was unable to be assisted, which could itself constitute a breach of obligations under the *Human Rights Act 2004*.<sup>65</sup> Evident here is that issues of resource allocation are going to be an inherent part of any Bill of Rights. Remember also, that what is at stake here is *not* housing rights, but the civil rights of children and rights of families based on the ICCPR.<sup>66</sup>

Finally, the government's arguments that 'Parliament, rather than the courts should continue to be the forum where issues of social and fiscal policy are scrutinised and debated'<sup>67</sup> ought to be challenged. What is so special about economic and social rights that they ought be left sacrosanct to Parliament, whereas core civil and political rights – including, presumably, the workings of Victoria's democratic institutions themselves! - presumably are appropriate topics for discussion by the judiciary? Having established that the preferred model of the charter will be one that maintains Parliamentary supremacy, what is threatened by allowing the same

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<sup>65</sup> [2004] ACTAAT 37 at paras 53-4.

<sup>66</sup> *Human Rights Act 2004 (ACT)* Schedule 1.

<sup>67</sup> 'Statement of Intent' p 4.

*severely limited* amount of judicial scrutiny of economic and social rights as is allowed of civil and political rights?<sup>68</sup>

Rights are necessarily balanced against other rights. If the Courts and the public are to engage in debate and discussion to develop Victoria's human right's culture, it would be disadvantageous if they did not have a full spectrum of rights with which to converse. Further, given that the ACT Attorney-General is encouraged through section 37 (though not mandated, because of the operation of section 39) to consider the human rights contained in the *Human Rights Act 2004* in the course of preparing a compatibility statement, and the Supreme Court may well be required to consider the human rights contained in the Human Rights Act in the process of its scrutiny of legislation under section 32, the concern is that this will lead to an inevitable and further privileging of certain rights over others.<sup>69</sup> In a sense, the fact that the ACT government refused to include economic, social and cultural rights in the ACT's *Human Rights Act 2004* in spite of the ACT Bill of Rights Consultative Committee recommendation, and the fact that the Victorian government is discouraging submissions to the present human rights debate in Victoria from discussing economic, social and cultural rights are clear indications that they consider some (civil and political) rights more important than other (economic, social and cultural) rights. Having a clearly delineated hierarchy of rights is both the very thing that international human rights jurisprudence has sought to avoid and a clear rejection of the Victorian government's stated objective to address disadvantage and create a fairer Victoria.

A culture of human rights is, by necessity, a complex tapestry. In the past, it has been the case that measures or policies to combat social inequality and marginalisation have been opposed on the grounds of and using the language of classical civil liberties.<sup>70</sup> Thus, in order to be fully conversant both with human rights and the government's existing policies for alleviating inequality and

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<sup>68</sup> See generally, Paul Hunt, "Reclaiming Economic, Social and Cultural Rights", (1993) *Waikato Law Review* 141.

<sup>69</sup> Evans, *supra* n 4 at 296.

<sup>70</sup> Scott C and Macklem P, 'Constitutional Ropes of Sand or Justiciable Guarantees? Social Rights in a New South African Constitution' (1992) 141 *University of Pennsylvania Law Review* 1 at 31-6.

marginalisation, any Bill of Rights and, thus, human rights discourse in Victoria ought to include economic, social and cultural rights.

***RECOMMENDATIONS UNDER PART FOUR:***

1. Economic social and cultural rights, as articulated in the ICESCR and within the jurisdiction of Victoria, be included in any Bill of Rights for Victoria.