Human Rights Act for Australia Campaign

A Model Statute

Human Rights Act for Australia Campaign Committee
Chair: Susan Ryan AO
18/166 Arden St Coogee 2034
Contacts: 02 96641020
Mobile: 0417 444 926
www.humanrightsact.com.au ....sryan2@bigpond.net.au

Preface

On 5 October 2005, several hundred people gathered in the Sydney Town Hall for the launch of the community campaign for a human rights act for Australia. The launch was performed by former Australian Prime Minister, the Right Honourable Malcolm Fraser ACT. The meeting was addressed by several eminent Australians, all favouring such a law. Details of this and subsequent meetings and contributions are available on our website www.humanrightsact.com.au

A voluntary committee known then as the *New Matilda* human rights act campaign had invited the community to consider the case for an Australian human rights act. Professor Spencer Zifcak presented a model bill drafted to include the rights proposed to be protected and the processes by which such protection would be implemented. The model bill was posted on the campaign website and more than two hundred submissions and suggestions for inclusions and amendments were received.

The committee sponsored further public meetings to discuss the model bill and its purposes in all capital cities, many regional centres, small towns and suburbs. Discussions were held with dozens of groups representing churches, legal bodies, refugee advocates and a range of welfare bodies. Many individuals gave us the benefit of their experiences and their views.

Prior to the last federal election, the committee had conducted over 60 face to face meetings with federal parliamentarians, across all parties, and sent copies of the draft bill and other material supporting the case to all MP's and senators.

In March 2007, under the sponsorship of Senator Trish Crossin, a version of our model bill was prepared in readiness for its introduction to the Senate. Following the change of government, the committee continued this advocacy and in particular urged the

government to establish the national consultation. Our community consultation continues up to the present.

The model bill has been amended to reflect the input of the community since 2005, and the recently published, considered views of constitutional experts.

This model statute forms the core of our submission to the national consultation.

The Campaign

Our volunteer committee started this campaign in 2005 in reaction to the numerous and grave violations of human rights then current in Australia, caused by the actions of government and its agents,

In particular the committee, later named the Human Rights Act for Australia Campaign Inc, HRAAC, was aware that the treatment of adults and children in mandatory immigration detention violated rights which Australia has committed to in signing and ratifying international rights instruments, including the rights of the Child, the Refugee convention, the UN convention on Civil and Political Rights and the UN convention on Economic, Social and Cultural Rights.

The historic role Australia had played in drafting and securing the Universal Declaration of Human Rights 1948 was desecrated by the actions of the Commonwealth in relation to asylum seekers. Along with many other Australians, we formed the view, therefore, that in order to protect human rights effectively in Australia, we needed a commonwealth law, putting into statute that range of human rights which Australia had ratified internationally.

As the government of the day was unresponsive to this need, we set about informing the community and gaining its support for such a law. To demonstrate how such a law would work, Professor Spencer Zifcak, assisted by other human rights law experts, drafted a model bill.

We were encouraged by human rights laws enacted in the ACT and Victoria, and by positive inquiries in Tasmania and Western Australia. We were more encouraged by the numerous conversations we had with people all over Australia from very diverse backgrounds.

Our experiences over nearly four years of this community conversation have reinforced our belief that Australia, to protect rights effectively, must have a specific law such as we propose.

In our experience, when Australians become aware that we lack this protection and understand how such a measure would strengthen not only rights protection but create a greater understanding of rights in our community, they strongly favour such a reform. They see a particular value in such a law educating our increasingly diverse multicultural community in the recognition of and respect for all acknowledged rights.

Mistreatment of the mentally ill, discrimination of many kinds against the disabled, the lack of dignity in the treatment of many of our vulnerable old people ,and the appalling disadvantages suffered by indigenous Australians, all these realities cry out for stronger legal recognition and protection of human rights. People understand this.

In the background to our conversations we were always conscious of relevant international experience. We considered the fact that Australia is now the only democracy without a specific law to protect the rights of the individual against ths state, and studied the effects of such laws in similar systems, especially in the UK. We see no good reason why individuals living in Australia should be denied the real and important protections afforded to people in the UK by the UK Human Rights Act 1998.

We have met with very little opposition to our proposal. Such opposition as has been voiced relies on misunderstandings of what we propose. A reading of our model bill should assure the inquiry panel that the main criticism, namely that a *Human Rights Act* would necessarily remove law-making power from the parliament to "unelected judges" cannot be sustained. Our model is built on the sovereignty of parliament.

Other alleged negative outcomes of a human rights law, such as financial exploitation by the legal profession, or the flooding of courts with trivial complaints are not supported by experience in the UK, New Zealand, the ACT or Victoria.

Constitutional questions have been posed. We have answered these in our model statute, the terms of which are explained in more detail in this submission.

The basic position of opponents is that the status quo regarding human rights protection in Australia is good enough, and could not be improved by a specific law. The well-documented cases of children and people in mandatory immigration detention, the

mistreatment of people with mental illness, the continuing, appalling circumstances of many indigenous communities, and the tragic stories of events in some of our nursing homes and accommodation for the disabled belie this complacency.

We submit to the panel, the following draft model statute and explanatory memorandum, in the hope that the panel will accept our argument that human rights protection would be greatly enhanced by such a law and that this model fits without problem into Australia's constitutional and parliamentary arrangements.

We also believe that when implemented the provisions of this statute will maintain the parliament's position as the primary monitor and protector of rights in Australia, and, at the same time, create within parliament, the executive, the judiciary and the community a robust human rights culture and conversation.

The Model Human Rights Statute

Explanatory Paper

Introduction

The model statute presented here was written over several months, during 2005-2006. As will have been gathered from the preceding sections it is the product not only of extensive research but also of extended consultation. The present section of this submission is designed to act as an explanatory accompaniment to the draft statute proposed here.

The model statute was written by Professor Spencer Zifcak. It was not his work alone, however. In the course of its writing detailed comments were obtained from experts in the field, both in Australia and overseas. It is therefore appropriate that their

contribution be acknowledged from the outset. The Campaign was greatly assisted in this way by:

Professor Philip Alston (NYU)

Julian Burnside QC

Professor Hilary Charlesworth (ANU)

Jo Szwarc (Foundation for the Prevention of Torture)

Brian Walters SC

Helen Watchirs (ACT Human Rights Commssioner)

Professor George Williams (UNSW)

The model statute was also altered in response to almost 200 submissions received by the Human Rights Act for Australia Campaign during the course of its consultation process. The authors of those submissions are, unfortunately, too numerous to mention though their contribution was substantial.

Background

The model statute is based largely upon the Human Rights Act (1998) (UK). In particular it draws its 'dialogue' model of enforcement from the innovations first embodied in that Act. Nevertheless, there are significant differences.

Whereas the list of rights in the UK Act is that found in the European Convention on Human Rights, the rights embodied here have been drawn from and build on catalogues contained in many other international and national human rights instruments. They have been drawn in such a way as to reflect and respond to the needs of and problems in contemporary Australian society. In drafting these provisions, particular care has been taken to ensure that the lessons of human rights jurisprudence elsewhere have been incorporated, as far as possible to ensure that interpretative problems will be minimized. The whole statute has been written in plain English to make it as accessible and readable as possible.

The enforcement machinery has been adapted to suit the circumstances of Australia's Westminster system of government and also to be consistent with the Australian Constitution.

The statute declares the basic rights and freedoms inherent in our common humanity. It reflects the ethical values of a modern democratic society governed under

the rule of law – a society in which individual and minority rights must, from time to time, be protected against the tyranny of majorities and the abuse of public powers.

The statute does not challenge the doctrine of parliamentary supremacy by empowering the courts to strike down Acts of Parliament. Instead it establishes a process through which a court's decision that it cannot interpret impugned legislation in a manner consistent with the human rights set down, triggers automatically an in-depth procedure for governmental and parliamentary review. This compromise enables the executive and legislative branches collaboratively to choose an appropriate remedy for the injustice identified by the courts.

The statute requires public bodies and officials to exercise their powers in accordance with the listed rights and freedoms, and in the light of principles such as necessity and proportionality. Where they fail to do so, the courts may fashion an effective remedy. .

For good constitutional reasons, based on the democratic imperative of the separation of powers, the courts must take care not to act in place of the executive and legislative branches. Equally, however, the independent and impartial judiciary has a duty to protect fundamental right where that is necessary.

The statute provides that the courts should endeavour, through a process of interpretation familiar in common law jurisdictions, to imply human rights safeguards in legislation and to give a restricted meaning to broadly based public powers where these interfere disproportionately with basic rights and freedoms.

The statute does not, however, depend only upon the judiciary to secure and protect human rights. Nor does it create a government of unelected judges. It is holistic in its organizing principles, engaging the responsibility of all three branches of government to act in a way that is compatible with fundamental civil, political, economic and social rights. It reflects the reality that power must be shared to meet the changing needs of an ever more complex society.

The Preamble

The Preamble to the model statute founds the human rights contained in it on the idea of human dignity. Dignity, in turn, is denied wherever the free exercise of one' s

reason, conscience and belief – in other words one's agency – is undermined. Michael Ignatieff put the matter eloquently:

> "Such grounding as modern human rights requires, I would argue, is based on what history tells us: that human beings are at risk of their lives if they lack a basic measure of free agency; that agency itself requires protection through internationally agreed standards; that these standards should entitle individuals to oppose and resist unjust laws and orders within their own states; and finally, that when all other remedies have been exhausted these individuals have the right to appeal to other peoples, nations and international organizations for assistance in defending their rights."[1]

The Preamble declares, therefore, that all Australians are entitled to pursue their individual purposes without undue or arbitrary interference from the State. It defines the essential rights and freedoms required to ensure that one's agency is protected by reference to the catalogue of rights contained in the Universal Declaration of Human Rights.

Importantly, however, it also makes clear reference to citizens' corresponding responsibilities. Breaking from most human rights instruments it makes explicit the most important of these. Drawing upon the debates leading up to the adoption of the Universal Declaration it affirms that all have a responsibility to respect the rights of others, observe the law, engage in useful activity and accept the burdens and sacrifices demanded for the common good. Citizens, however, are not the only ones who must assume responsibilities for the protection of rights and the advancement of society. Government too must share the burden. Consequently, the Preamble also defines the government's responsibilities: to create the economic, social, cultural and environmental conditions in which all people may develop their physical, mental and moral capabilities.

The Preamble concludes with an affirmation of peoples' fundamental equality. In accordance with this principle, all are entitled equally to the rights contained in the statute without discrimination. In this it goes beyond the conventional grounds of discrimination

---

[1] Ignatieff M. *Human Rights as Politics and Idolatry,* Princeton University Press, 2001, p.55

to include in addition protection against discrimination by reason of a person's genetic characteristics and gender identity.

The Rights and Freedoms

The rights and freedoms enumerated in the model statute are those embraced by the Universal Declaration of Human Rights and its principal associated international Covenants and Conventions. The stated object of the statute, therefore, is to protect and promote the human rights contained in these international instruments. These are the Covenants on Civil and Political Rights and Economic and Social Rights, and the Conventions in relation to the rights of women, children, people with disabilities, and refugees; the elimination of racial discrimination; and protection from torture and other forms of cruel, inhuman or degrading treatment.

It is important to note in this regard that the rights set down here travel no further than those in Covenants and Conventions to which Australian governments of all political persuasions have committed this country to observe and respect. There is no sense, then, in which the catalogue of rights enumerated here may be regarded as politically skewed and far less as one representing some 'soft left' political or social agenda.

Again, consistently with the principles underlying the international human rights instruments, the human rights set down here are just that – 'human' rights. Only natural persons, therefore, can possess human rights. The statute does not confer rights upon legal persons such as corporations.

The model statute is to operate only in relation to Commonwealth and Territory law. Consequently, there is a specific provision excluding its application to State law. There remains the question of the applicability of s.109 of the Australian Constitution. Should this be a matter of concern, there remains the straightforward option of including a provision in a Human Rights Act which states expressly that the Act is not intended to 'cover the field'. This would allow Commonwealth and State laws to co-exist without interference from one another. At the same time, the States could be given the choice of 'opting in' to Commonwealth arrangements.

Further, to underpin a certain measure of flexibility in the development and recognition of human rights, the statute makes it clear that the fact that a right is not included in its catalogue can in no way be held to abrogate or restrict the operation of any such right.

Finally, the model legislation affirms that its rights may be limited in certain circumstances. Picking up the words contained in the Canadian Charter of Rights and Freedoms, and many other more recent human rights instruments, it avers that its rights and freedoms are subject to limitations, but only 'to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society'. It then sets down a number of criteria in relation to which a judgment as to the reasonableness of a limit may be made.

Civil and Political Rights

In this section we draw attention to civil and political rights and freedoms contained in the model that are either innovative or hold some special significance.

The first of the rights set down is **the right to life**. In this model statute this right, as with every other right, is expressed to be applicable to natural persons.

Originally, the right was qualified by a provision like that in the Victorian *Charter of Rights and Responsibilities* 2006. S.48 of that legislation provides that the Charter shall not be applicable to any law with respect to abortion. However, following recent events in Victoria, which resulted in the Charter having no application to compulsory referral provisions contained in the Victorian *Abortion Law Reform Act,* the alternative – of having the right to life in the statute apply only to natural persons - has been preferred.

Had this qualification with respect to natural persons been stipulated in the Victorian Charter instead of the blanket exemption, the compulsory referral provisions in the Victorian *Abortion Law Reform Act* would properly have been subject to Charter review.

It is crucial to note that this formulation makes no assumption as to the time at which life begins and hence contains no related implication with respect to the adoption of laws with respect to abortion. Instead, the provision operates so as to ensure that any law with respect to abortion would be considered and determined, as it is now, in accordance with parliamentary legislation or the common law.

The **right to liberty and security of the person** reflects Article 9 of the ICCPR. In the model statute two further important clauses are added. These are, first, the right to remain silent and, secondly, the right to consult with a lawyer of their choice.

Clause 16 with respect to the **rights of children in the criminal process** reflects Article 10 of the ICCPR in so far as it applies to children. It also contains a provision reflecting the Article 40(2)(ii) of the Convention on the Rights of the Child which provides that a child shall have legal or other appropriate assistance in the preparation and presentation of his or her defence. To this there is added a general provision requiring that a child convicted of a criminal offence shall be kept in conditions that are appropriate to his or her age. Similarly, clause 18 requires that children have the right to be tried in accordance with procedures that take account of their age and the desirability of promoting their rehabilitation.

Clause 20 embodies **the right not to be tried or punished more than once**. However, it qualifies the right by providing that a person acquitted of an offence will not be precluded from by the rule against double jeopardy from being prosecuted again for substantially the same offence in two circumstances: where the discovery of new and compelling evidence makes a retrial necessary in the interests of justice; or where the original acquittal was tainted.

The **right to recognition and equality before the law** is contained in Clause 22. It provides that everyone has the right to recognition as a person before the law and that everyone is equal before the law and is entitled equally to its protection. No one, therefore, shall be discriminated against on a prohibited ground. The grounds prohibited reflect those contained in the ICCPR but five additional ones are specified: discrimination on the basis of genetic characteristics, disability, sexual orientation and gender identity. These reflect more modern conceptions of equality and corresponding sources of discrimination. The ICCPR permits additional grounds of discrimination to be relied upon.

The right to privacy in Clause 23, similarly, identifies more modern potential sources of privacy invasion. So, to conventional sources of privacy invasion two more are added: the right not to have one's movements made subject to unnecessary or unreasonable surveillance; and the right not to have one's personal information

(including physical and biometric information) collected, used, stored or disclosed except in accordance with law.

The **right to marry** (Clause 24) is expressed as the right of all men and women of marriageable age to marry and to found a family. The definition of marriage is left to statute law, in particular the *Family Law Act (Cth).* That definition, in other words, will remain a matter for the Parliament to decide upon.

Clause 26 sets down the **rights of children.** It reflects the terms of the International Convention on the Rights of the Child. It affirms that the child's best interests are to be paramount in any matter concerning a child.

The provision also draws from Article 28 of the Constitution of South Africa in particular in providing that a child has the right to a name and nationality from birth; to family, parental or appropriate alternative care if removed in accordance with law from a family environment; and the right to be protected from maltreatment, neglect, abuse or degradation.

The model statute provides for **freedom of expression,** by stipulating that everyone has such a right which includes the freedom to seek, receive and impart information and ideas of all kinds. The right is qualified by reference to such restrictions as are necessary for the respect of the rights and reputation of others and for the protection of national security or public order or of public health or morals.

However these restrictions in turn are qualified by the necessity to preserve and strengthen, as far as possible and appropriate, the freedom to take part in debate and discussion concerning matters of public interest. That freedom is assured so long as participants do so without malice. The provision seeks to ensure that a fair balance is effected between the right of a person to protect their honour and reputation and the competing right of a person to take part actively in debate with respect to public and political affairs.

The statute also provides that freedom of expression may be restricted so as to outlaw speech that advocates national, racial, or religious hatred. Such speech may be restricted, however, only in so far as it is intended or is likely to incite violence. Here again, the qualification is framed so as to allow the maximum space for the expression of political and social opinion.

The **right to take part in public life** incorporates the rights to take part in the conduct of public affairs; the right to vote and to be elected; and to have access on equal terms to public service and public office. Note, however, that the right to vote is qualified by the terms of s.30 of the Australian Constitution, based on the law of the States. Similarly, the right to stand for election is qualified by the terms of ss.34 and 44 of the Constitution which provide that persons holding dual nationality are disqualified from election to the Federal Parliament. The model statute must therefore be read as subject to these constitutional provisions.

The clause with respect to the **rights of cultural, religious and linguistic minorities** is straightforward. Note, however, that these rights are qualified by saying that they may not be exercised in a manner inconsistent with any of the other human rights set down in the Act. So, for example, female circumcision would not be permitted as it constitutes a breach to a person's right to security, and may constitute cruel or inhuman treatment.

Reflecting recent human rights concerns in Australia, the model law makes provision for the **right to asylum** and to protection in the event of removal, expulsion or extradition from Australia. In this regard it should be noted first, that the right is expressed to relate directly to the provisions of the International Convention relating to the Status of Refugees and its associated protocol. The right to asylum is to be understood, therefore, as reflecting directly that right which is conferred by the international convention. Secondly, the right is expressed as one that entitles a person to have his or her claim for refugee status heard and determined 'within Australia's jurisdiction'. This clarification is inserted so as to avoid the prospect that an Australian government might seek to evade its international obligations by depositing asylum-seekers in adjacent countries or in places excised from Australian territory by migration regulations.

The companion provision relating to forced expulsion reflects international human rights law by providing that no person should be expelled extends in circumstances in which it is likely that they would face the death penalty, torture or cruel treatment in the country to which they are being sent.

The provision with respect to the **rights of indigenous peoples** has been drafted after extensive consultation. It is based primarily upon provisions presently contained in the UN Declaration of the Rights of Indigenous Peoples, a Declaration the present Government has recently endorsed.

This draft of the model statute includes a new provision concerning the **rights of people with disabilities.** The provision is derived from and reflects the terms of the UN International Convention on the Rights of People with Disabilities to which Australia recently became a party.

Economic and Social Rights

In its second segment, the model statute's enumeration of rights contains a short list of Economic and Social rights. These are the **rights to education, work, an adequate standard of living, health and social security**. These rights reflect the core rights set down in the International Covenant on Economic, Social and Cultural Rights.

We take the view that fundamental human rights are indivisible and consequently that no artificial distinction should be made between civil and political rights on the one hand and economic and social rights on the other. Unless people's core economic and social rights are guaranteed, at least to some minimally adequate level, it is difficult to see how their civil and political rights could be exercised in any minimally effective way. In recent polling undertaken by prior inquiries at State and Territory level, respondents have been clear that they regard a guarantee of economic and social rights as being equally if not more important than the equivalent guarantee of civil and political rights. Extensive public opinion polling undertaken by Professor Michael Salvaris at RMIT only serves to strengthen this conclusion.

At the same time, however, it is fair to acknowledge that economic and social rights will, necessarily because of their character, be enforceable in a somewhat different way. For this reason, the model statute provides in Clause 41, that such rights are subject to progressive realization. Consequently, in a case that requires the application of economic and social rights, a court must consider, first, the benefit or detriment to the applicant of their recognition or non-recognition and, secondly, the estimated governmental expenditure required to realize the right in question, before determining that a law is inconsistent with the right.

We recognize that governments have traditionally been reluctant to include economic and social rights in legislation providing for human rights protection. Nevertheless, we believe that that position is wrong in principle and that the inclusion of economic and social rights is a matter that should at least be widely debated and discussed before their exclusion on any political grounds is considered.

The rights section of the model statute concludes with one important qualification – that certain rights may be curtailed in a public emergency (Clause 42). We recognize that we live, presently, in a society where the threat of terrorism is real. It is conceivable that, in response to a serious terrorist attack, the Federal Government may decide that it is appropriate to declare a state of emergency. Similarly, a state of emergency may be declared upon the outbreak of a serious infectious disease. In these circumstances, we recognize that there may be a necessity to curtail the exercise of individual rights in the wider community interest.

Any such emergency would need to be such as to threaten the life of the nation, and its existence would need to be publicly proclaimed. Any curtailment of rights consequent upon such a proclamation should be the minimum necessary in order to meet the emergency so defined and declared.

Even in an emergency, however, it is generally recognized in international human rights law that some rights are so fundamental that they should not be subject to derogation in any circumstance. The model statute lists such rights in the second sub-section of the public emergency clause. They include the right to life, the right to be free from torture, the right to be free from slavery, the right to fair trial and the freedoms of thought, conscience, religion and belief.

The Enforcement Machinery

The model statute's enforcement machinery is based on that in the United Kingdom Human Rights Act. In that, it resembles both the ACT *Human Rights Act* and the Victorian *Charter of Rights and Responsibilities*. This is a 'dialogue' model of enforcement in which the parliament, the executive and the judiciary are equally involved in assuring the observance and protection fundamental rights. In what follows, a brief description and analysis is provided of the role of each of the three branches, as set down in the model statute.

The Executive

The Executive's contribution to the review of Commonwealth legislation is contained in the obligation imposed upon the Attorney-General to prepare a statement of compatibility. The statement must state the Attorney's view as to whether the particular legislation being introduced to the Parliament is compatible with human rights.

Early experience in the UK demonstrated certain flaws in this process. So, for example, statement of compatibility were often tabled when consisting of only a line or two, saying simply that legislation was compatible or incompatible. Such statements would clearly be inadequate. For this reason, the model statute makes it clear that when such a statement of compatibility is made, the reasoning behind it should also be made clear. Further, when a statement is made indicating that legislation is incompatible with human rights, it must make explicit which provisions of that legislation will operate, despite that incompatibility. In order to close another gap which has become evident in ACT practice, the statute provides that compatibility statements should also be provided in relation to amendments moved from the floor or the House.

The great virtue of this process , as the UK experience has demonstrated clearly, is that it provokes a detailed consideration of the human rights implications within government itself. Consequently, the quality of legislation has been very substantially improved. If the objective is, as it should be, to curtail breaches of human rights, detailed examination of this kind within government should act as a significant preventative measure.

The Parliament

Under the model statute, the role of Parliament in scrutinizing legislation and policy having an impact on human rights is substantially strengthened. This result is achieved by creating a Joint Standing Committee on Human Rights. The Standing Committee is given a wide brief. It would not only examine legislation for compatibility but could also initiate human rights related inquiries of its own motion. The Committee's primary purpose would be to inform parliamentary debate upon legislation affecting human rights. Beyond that, however, it might also undertake pre-legislative scrutiny of key policy documents such as White and Green papers. And where a particular matter of human

rights concern is raised it may contribute to a review of that concern by initiating its own inquiries and providing its own reports.

In this respect, the model statute has been influenced strongly by the evident success and effectiveness of the work of the Joint Parliamentary Committee on Human Rights in the Parliament of the United Kingdom. Even a cursory glance at the range of work undertaken by that Committee and the excellence of its research and reports should be enough to persuade one that some similar mechanism may produce very significant benefits for Australian parliamentary practice.

In this regard, it is worth noting, however, that the success of the UK Parliamentary Committee is predicated upon the existence of legislated human rights protection. Without such a legal foundation, the strength of Committee review would be very substantially weakened. Asked recently at a forum hosted by the Australian Human Rights Commission whether the Joint Committee in the UK could have operated as effectively as it has without the backing of an enforceable UK Human Rights Act, its Secretary Murray Hunt stated unequivocally that it could not have done so.

The same would plainly be true of any proposal to draft some unenforceable declaration of rights in relation to which a 'Council of Eminent Persons' might examine laws presented to the Parliament. Unless the law of human rights is made legally enforceable, such mechanisms can be expected to have only the most marginal relevance to parliamentary scrutiny, debate and decision. Only if an applicant may, in the last resort, approach the courts for a remedy when their rights have been infringed will pre-legislative scrutiny of the kind advanced here be successful.

The Judiciary

In the model statute, as in the UK Human Rights Act, the judiciary is instructed, as far as possible, to interpret legislation in a way that is consistent with human rights. A very substantial jurisprudence has developed with respect to this interpretative obligation in the United Kingdom. The first substantive consideration of the parallel provision in the Victorian Charter of Rights and Freedoms has also recently been handed down in the case of *Kracke v Mental Health Review Board* (2009) (per Justice Kevin Bell). We would encourage the inquiry panel to read the decision as it is the most comprehensive consideration of human rights legislation of the kind proposed here yet issued in this

country. Given such extensive consideration, it is not intended to duplicate similar examination here.

It should be noted, however, that the interpretative provision in the model statute departs from the formulation in the United Kingdom, and is consonant with that in Victoria, by providing that:

> 'So far as it is possible to do so, *consistently with its purpose*, …legislation must be read and given effect in a way which is compatible with human rights. '

The inclusion of the italicized words has been prompted by the doubt expressed by former Justice of the High Court, Michael McHugh about the constitutional validity of a formulation in their absence. Their inclusion ensures that no constitutional problem of the kind identified by Mr McHugh will arise.

Where a court finds that it is unable to interpret the provisions of particular legislation in a manner consistent with the human rights set down in a statute of the kind proposed here, the model statute then provides for a process of governmental and parliamentary review of the that legislation. The panel will be aware that constitutional doubt has been raised with respect to the issue by a superior court of what is known as a 'Declaration of Incompatibility'. Although we are of the view that much the stronger argument is that the issue of such a Declaration by a federal court would pass constitutional muster, we have chosen to draft the relevant review provisions to avoid any constitutional doubt. In doing so we have adopted the solution agreed to by a meeting of prominent constitutional lawyers convened by Catherine Branson QC, President of the Australian Human Rights Commission. That solution is summarized in a statement issued by the President on May 6 of this year.[2]

There is not space here to articulate in detail the reasoning behind the adoption of the alternative procedure suggested. It suffices to say that the new provisions of the model statute reflect exactly the consensus reached at that meeting. For that reason, we are confident that the new provisions raise no constitutional doubt.

---

[2] Catherine Branson QC, President of the Australian Human Rights Commission, Press Release, May 6, 2009 and accompanying statement by 13 constitutional experts.

Beyond this, it is important to emphasize that it is critical to the preservation of parliamentary sovereignty that the Parliament have the final say on whether or not legislation should be amended where a finding of inconsistency is made. The review provisions now set down in the model statute provide an effective process through which such a parliamentary re-consideration of legislation may occur.

Action against Public Authorities

We note, finally, that the model statute, as in the UK but not in Victoria, provides that an individual who alleges that their human rights have been infringed may bring an action against a public authority requesting appropriate relief or remedy. This is consistent with the terms of Article 2(3) of the International Covenant on Civil and Political Rights which provides that:

> "Each State Party to the present Covenant undertakes to…ensure that any person whose rights or freedoms as herein recognized are violated hall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity…"

Clause 56 of the model statute then sets out an inclusive list of the remedies that may be available. An award of damages is to be made only where a court considers that such an award is necessary to provide just satisfaction to the person aggrieved.

Conclusion

The Human Rights Act for Australia Campaign is pleased to be able to provide human rights consultation panel with this submission. As far as we are aware, this is the only submission that the panel will receive that sets down exactly what a model Human Rights Act for Australia might look like. We trust that this approach will be helpful and are very willing to answer any questions either individually or in public hearings as the panel may wish us to address.

Susan Ryan AO

Spencer Zifcak, Professor of Law

on behalf of the Campaign Committee.