

Submission to the National Human
Rights Consultation

Liberty Victoria

June 2009

A. Introduction

Liberty Victoria has a long and proud history of campaigning for civil liberties and human rights for more than 70 years. Officially known as the Victorian Council of Civil Liberties Inc, its lineage extends back to the Australian Council for Civil Liberties (ACCL). The ACCL, formed in Melbourne in 1936 by historian Brian Fitzpatrick and a number of prominent writers, artists, lawyers and academics, determined to offer ‘a means of expression to those people in all parties who believe that social progress may be achieved only in an atmosphere of liberty.’ Brian Fitzpatrick was the ACCL’s General Secretary for twenty-six years and helped to form the Victorian Council for Civil Liberties before his death in 1965.

Throughout its history, Liberty Victoria has defended the right of individuals and organisations to free speech, freedom of the press and of assembly, and freedom from discrimination on the grounds of race, religion or political belief. It has operated in accord with the ACCL’s original platform, working not only to defend existing civil liberties and oppose their limitation, but to campaign for the ‘enlargement of these liberties.’ We are now one of Australia’s leading civil liberties organisations.

Over the years, Liberty Victoria has campaigned on numerous federal civil liberties and human rights issues, for example we have campaigned for Aboriginal land rights, the right to privacy in the face of the threat of the Access Card and compulsory DNA sampling. Liberty challenged the numerous waves of terror legislation at Federal and State level following the 2001 September 11 terrorist attacks. Following Liberty Victoria’s crucial role in litigating on behalf of the asylum seekers aboard *The Tampa*, Liberty continues to lobby politicians and publically campaign for the humane and just treatment of asylum seekers.

We aim to inform and influence public debate and government policy on a range of human rights and civil liberties issues. In line with this aim Liberty organises dinners, seminars and other events on topical matters concerning civil liberties and human rights. We prepare submissions to government, support court cases defending infringements of civil liberties, issue media releases and seek to inform Australian society through our website and other educational materials.

In co-operation with the Public Interest Law Clearing House (PILCH), Liberty founded the respected Human Rights Law Resource Centre. Liberty Victoria has been a major sponsor of the Human Rights Arts and Film Festival since its inception in 2007. In 2008 and 2009, as part of its educational role, Liberty assisted in producing ‘The Gist of It,’ a series of short internet videos which aim to provide key facts on current constitutional and political issues, and thereby empower the public to participate in debate on those issues (www.thegistofit.com.au)

Liberty played a key role in lobbying the Victorian government to introduce the *Charter of Rights and Responsibilities Act 2006*, and we call on the Federal Government to enact an Australian Human Rights Act. In line with our support for an Australian Human Rights Act our theme this year is *Write in Human Rights*.

B. A Human Rights Act?

Australia is the only Western democracy without some kind of Human Rights Act or Charter of Rights.¹

Though the Commonwealth Constitution contains some limited rights, such as the right to freedom of interstate trade and movement and the right to freedom of communication on public and political matters, there is no comprehensive Human Rights Act or Charter. Not only does this leave human rights and civil liberties vulnerable to curtailment and abrogation, it also means that Australia has not comprehensively implemented in domestic law its human rights obligations under international law. Liberty believes that Australia should meet its international human rights obligations without limitation. Australia is currently a party to the following international human rights conventions:

- *The International Covenant on Civil and Political Rights (ICCPR)*
- *The International Covenant on Economic, Social and Cultural Rights (ICESCR)*
- *The International Convention against Torture*

¹ In this submission, the term Human Rights Act is preferred to the term Charter of Rights. The terms may, however, be used interchangeably. Liberty supports either. The underlying idea of both is that what is proposed is the introduction of a statutory model of human rights protection.

- *The International Convention for the Elimination of Racial Discrimination (CERD)*
- *The International Convention for the Elimination of Discrimination against Women*
- *The International Convention on the Rights of the Child*
- *The International Convention on the Rights of People with Disabilities*

However, although Australia has signed and ratified these treaties and thereby become bound under international law to adhere to them, they have not been fully implemented in Australian domestic law by legislation. Thus Australians do not enjoy the full protection of these international rights in Australian law.

These conventions are fundamentally important international instruments agreed to by a majority of countries to protect basic human rights. Each one should be fully enacted into Australian domestic law. At present, however, these international conventions are only sporadically incorporated in Australian law, leaving Australians with an inadequate and partial scheme of human rights protection.

Liberty commends the government for conducting this National Human Rights Consultation to determine how best to protect human rights in Australia. Liberty believes further that the Commonwealth Government should embrace the protection not just of civil and political rights but also the protection of economic, social and cultural rights.

C. Competing Models

There are a number of competing models for the legal recognition of civil liberties and human rights. According to the traditional, constitutional view, the sovereignty of Parliament is the surest safeguard of civil liberties. This view draws on Parliament's historical role in breaking the tyranny of executive government but overlooks the latter day failures of Parliament to hold the executive to account and the frequent abrogation of human rights by legislation.

In contrast, the *Canadian Charter of Rights and Freedoms* provides for comprehensive human rights protection. Under this model, rights are entrenched in

the constitution and legal action can result in rulings that legislation and executive acts are invalid. Critics of this model say, however, that because it is entrenched constitutionally, it hands too much power to unelected judges. We return to this argument presently.

The statutory Human Rights Act model, adopted in the United Kingdom, New Zealand, Victoria and the ACT, takes a more limited approach. It preserves the sovereignty of Parliament but requires legislation to be interpreted, and government departments to act, in accordance with legislated human rights.

There is much debate about which is the best model. Liberty takes the view that the most suitable model for contemporary Australia is a statutory Human Rights Act. It has therefore enthusiastically supported the *Victorian Parliament's Charter of Rights and Responsibilities Act 2006*. It urges the Commonwealth Parliament to pass similar legislation.

Liberty considers that the arguments most frequently levelled against a *Human Rights Act* are misplaced. Such arguments proceed principally upon the basis that a *Human Rights Act* will take power from the peoples' elected representatives and confer it upon an unelected judiciary. Under the *Human Rights Act* model, however, the judiciary is not able to invalidate legislation as inconsistent with human rights. It is only empowered to interpret legislation in accordance with human rights and, if it finds legislation to be inconsistent with a human right, to make a finding to that effect. It will be then for the Parliament to decide whether or not the law infringing upon human rights should be amended or repealed.

Liberty believes that a federal *Human Rights Act* should contain the following categories of rights:

Personal Rights such as the right to life, liberty and security; the right to freedom from torture and other forms of cruel, inhuman or degrading treatment.

Civil and Political Rights such as freedom of expression, assembly, association and movement; the right to vote; and the right not to be discriminated against by reason of age, sex, nationality, ethnic origin, political opinion, sexual orientation, disability, genetic characteristics and other similar grounds.

The Rights of Individuals in Groups such as the right to privacy, the right to marry and form a family, the right to property; and the right to pursue one's own customs and culture.

Legal Rights such as the right not to be arbitrarily detained and the right to fair trial.

Economic and Social Rights such as the rights to health, education, social security, housing and an adequate standard of living.

Indigenous Rights including cultural rights; the rights to practise and revitalize their spiritual and cultural traditions, customs and ceremonies.

D. Australia should have a Human Rights Act

Human rights—the notion that “All human beings are born free and equal in dignity and rights”, the framework for a social order built on respect and dignity—are fundamental to democracy.

Australia has consistently argued on the world stage for over sixty years that human rights are fundamental, that human rights are the basis of world peace and international cooperation. Australia championed the inclusion of human rights as a basis for the Charter of the United Nations, and Australia's Dr H.V.Evatt was President of the General Assembly which adopted the Universal Declaration of Human Rights on 10 December 1948.

Australia needs a *Human Rights Act* because human rights are the foundation of world peace, as we have consistently told other nations.

Australia needs a *Human Rights Act* because it is part of our commitment to “promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion” as we agreed in Article 1.3 of the UN Charter.

Australia needs a *Human Rights Act* “to reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women” as we agreed in the Preamble to the Charter of the United Nations.

Restore our reputation

Australia—as a nation and each time with the express consent of the States—has freely promised the world, by becoming a party to the legally binding treaties that are collectively known as the International Bill of Rights, that it will respect, protect and fulfil the human rights of all in this country. But it has not guaranteed this in law except in a piecemeal and ad hoc way, with many gaps and delays and much backsliding.

Australia needs a *Human Rights Act* because it will join us to the international human rights framework for which Australia has argued and which we continue to support in principle. This establishes a consistent, internationally agreed and non-partisan legal infrastructure and jurisprudence. Australia needs a *Human Rights Act* to bring home these rights we have championed on the world stage.

UN Human Rights Treaty Committees have generally been positive about Australia's human rights record. There can be little doubt, on a close reading of the Committees' concluding observations, that Australia's performance of its obligations under each of the six treaties is regarded in a reasonably favourable light.

At the same time, it is also clear that each Committee has become more critical of Australia's human rights performance than it had been in reports issued in the early 1990s. Although the earlier reports had canvassed similar issues, when the negative side of the ledger is considered it is apparent that every committee has concluded that Australia's fulfilment of its international treaty obligations has not been as effective or comprehensive as it had been in the preceding reporting period.

The six Committees' criticisms of Australia's human rights performance have strong common threads. The criticisms are not the product of a rogue member or two or even a rogue committee or two but have been consistent and concerted. Three such threads in particular stand out.

First, Australia has been criticised because it has not taken sufficient steps to ensure that the comparative disadvantage of and discrimination against its indigenous peoples is eliminated. In this regard, the significant differences between Aboriginal and non-Aboriginal people's standards of health, education and housing; the introduction of mandatory sentencing; the high rate of Aboriginal incarceration and

the lack of effective reconciliation with and compensation for the members of the Stolen Generations were marked out consistently for adverse comment.

Secondly, Australia has been criticised because of its treatment of people seeking asylum. The policy of mandatory detention of those requesting refugee status; the isolated and harsh circumstances of their detention; and the lack of legal and social entitlements afforded them, even after refugee status has been conferred, have been the subjects of deep concern. The Pacific Solution, the introduction of the system of temporary protection visas for people the legality of whose claims for asylum have been recognised, the deliberately discriminatory treatment of on-shore refugees in relation to entitlements to social security, education and employment, and the constriction of legal avenues for review of immigration decisions have all been the subject of harsh comment.

Thirdly, Australia has been criticised because, unlike very other Western democracy, it has not entrenched human rights protections comprehensively either constitutionally or in statute and it has not incorporated the provisions of a number of the UN human rights conventions and protocols in domestic law in a manner that would provide an individual whose rights had been infringed with an appropriate and accessible domestic remedy.

None of the criticisms levelled by the Committees could be regarded as either surprising or particularly wide of the mark. Almost every expression of concern raised by the Committees had previously been the subject of intense political discussion and debate within Australia itself.

As the former Human Rights Commissioner, Professor Chris Sidoti, remarked in evidence before the Joint Parliamentary Committee on Foreign Affairs, Defence and Trade:

“Over the last two years, Australia has been criticised repeatedly by every one of the six human rights treaty committees for shortcomings in our performance. Those shortcomings are not necessarily the performance of the present Australian Government. Many arise from historical factors the present Government inherited. But that fact does not take away from the defensive hypersensitivity of the present Government to criticisms when they have been

delivered....Not once has a treaty committee expressed a view on a particular Australian human rights issue that is at variance with the views expressed previously and repeatedly by the Australian Human Rights Commission itself and human rights groups within Australia. The simple fact is that if Australian governments had listened to the official body set up by the parliament to advise on these matters, then the international treaty committees would have had no cause to criticise Australia. It is very much a matter of blaming the messenger in the attacks we have seen on the treaty committees.”²

It needs plainly to be acknowledged that the present Government carries with it a vastly different attitude to compliance with its international human rights treaty obligations. This has been exemplified, among other things by its ratification of the new International Convention on the Rights of Persons with Disabilities; its professed intention to ratify the Optional Protocol against Torture and the Optional Protocol to the International Convention on the Elimination of Discrimination against Women; and its significant changes to immigration and refugee law. No doubt too, the Government’s announcement of the present consultation will be greeted with international approval.

United National Treaty Bodies Call on Australia to Entrench Human Rights

This year the UN Human Rights Committee and the Committee on Economic, Social and Cultural Rights conducted formal reviews of Australia’s record of compliance with the *International Covenant on Civil and Political Rights* and the *International Covenant on Economic, Social and Cultural Rights*. Both Committees called on Australia to enact Federal human rights legislation.³ The Committee against Torture⁴ and the Special Rapporteur on the Promotion and Protection of Human Rights and

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³ HRC, *Concluding Observations: Australia*, [23], UN Doc CCPR/C/AUS/CO/5, 2 April 2009; CESCR, *Concluding Observations of the Committee on Economic, Social and Cultural Rights: Australia*, [14], [36], UN Doc E/C.12/1/Add.50 (2000).

⁴ Committee against Torture, *Concluding Observations of the Committee against Torture: Australia*, [9]–[10], UN Doc CAT/C/AUS/CO/1 (2008).

Fundamental Freedoms while Countering Terrorism⁵ have also expressed concerns about Australia's lack of legislative human rights protections.

Better Government

Australia needs a *Human Rights Act* because an Act will lead to better government in our constitutional democracy. Such legislation will contribute to the protection of peoples' fundamental human rights in the following ways.⁶

1. An HRA will act as a measured constraint upon executive power. The Act will make it unlawful for public authorities to act in manner that is inconsistent with fundamental human rights. Most often it is not legislation itself that trenches upon an individual's rights but the actions of government departments and agencies. The Departments of Immigration, Social Security and Veterans' Affairs are three examples of agencies which have day to day dealings with members of the public. The quality and timeliness of services provided by such agencies will improve significantly should they be subject to regular review according to human rights related criteria.
2. The HRA would provide a benchmark for legislation. As argued in the previous section, the processes of internal and parliamentary pre-legislative scrutiny, including the scrutiny by parliament of policy papers and bills with a view to engendering more informed parliamentary debate, will have a substantial, beneficial impact upon parliamentary debate and discussion.
3. Through its requirement that legislation be interpreted, as far as possible, so as to be compliant with human rights standards, an HRA will introduce elements of principle into the interpretation and application of legislation. This interpretative obligation will have an impact not only upon courts but also upon government departments and agencies to read and give

⁵ Martin Scheinin, *Report of the Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms while Countering Terrorism, Australia: Study on Human Rights Compliance while Countering Terrorism*, [10], UN Doc A/HRC/4/26/Add.3 (2006).

⁶ See to similar effect Rishworth, P., Huscroft, G., Optican S., and Mahoney, R. (2003), *The New Zealand Bill of Rights*, Oxford: Oxford University Press, pp.22-23.

effect to human rights principles in law, policy and practice.

4. The HRA will be a source of remedies for infringements of fundamental human rights. Under the model proposed, as in the UK, individual will be able to take legal action against public authorities to obtain redress where their human rights have been violated. The very fact that such action may be contemplated can be expected to have a disciplining effect upon officials involved in the provision of public services. The provision of damages for breach should be considered a last resort and the HRA's terms should therefore include the capacity for courts to order that the parties engage in alternative dispute resolution where this seems most appropriate.

The interaction between the executive, the parliament and the judiciary in making their distinctive contributions to the protection of human rights will add a new dimension to public deliberation not only about human rights but also about public and political matters more generally. Concern for the protection of human rights may be expected, as in other countries, to assume a new prominence in public deliberation. The media too will focus more intensively on evaluating the performance of government with human rights considerations in mind. This, more principled, discussion of public policies and practices will contribute markedly to more reasoned and informed, democratic deliberation.

Similarly, it is clear that, after only two years, the Victorian Charter is having a beneficial effect on public administration, on parliamentary process, on the conduct of government departments and local government in their interactions with the public, on the ability of advocates to advocate for the disadvantaged and on community education about human rights.

Victorian Case Study: Local Council considers Human Rights in its Community Plan.⁷

A local council which is bound by the Victorian *Human Rights Act and Responsibilities* released a draft copy of its four-year community plan that identifies community needs, priorities and strategies; and actions for new and improved community services, facilities and programs to be implemented by the council over the life of the plan.

A local community group expressed concern that nowhere did the draft plan refer to human rights or the council's obligations in relation to rights. The group recommended that council include explicit reference to rights and included particular reference to rights in relation to age, Indigenous identity and disability.

The council adopted most of the group's recommendations and as a result:

- (a) undertook to review its decision-making processes;
- (b) considered its obligation to ensure equality in the provision of, and access to council services and facilities;
- (c) reviewed its code of conduct for staff and councillors; and
- (d) considered how best to proactively promote consultation and feedback opportunities via a range of accessible means.

Recognise and Respond to Violations

Australia needs a *Human Rights Act* because without it we have no systematic way of avoiding—or at least properly debating—the violations of human rights that have occurred in Australia's recent history, such as indefinite detention without charge or trial, complicity in torture, indigenous deaths in custody, the theft of indigenous children, and attacks on fair trial in the context of anti-terrorism legislation.

These are just the most publicized examples of human rights violations in this country. And as such, they do not in the least describe the full nature and extent of

⁷ Victorian Equal Opportunity and Human Rights Commission. 'Your Rights, Your Stories' at <http://www.humanrightscommission.vic.gov.au/human%20rights/your%20rights%20your%20stories/>

infringements of human rights, both great and small, experienced by many other groups and individuals.

Similar accounts may be and have been produced in relation, for example, to the plight of the elderly and their care, or the lack of it, in nursing homes and hostels; the disaster of young children inadequately defended by state systems of child protection against parental abuse, institutional neglect, child pornographers, and even perhaps, child traffickers; people of the Islamic faith denigrated by reference to terrorist acts in relation to which they have not the faintest connection; the frank neglect of people with mental illness and intellectual disability; the mistreatment of prisoners and others in detention, not least in private facilities; the continuing legal and societal discrimination against people who are gay, lesbian or trans-gendered; and the very many people in the community whose privacy is invaded by over-zealous law enforcement officials, whether public or private.

Even this list is far from comprehensive. The recent Chaney inquiry into the rights of Western Australians, for example, identified no less than 34 different examples of cases where that State's citizens' rights may have been abused. And for reasons of space we have made no comment yet upon the manifest problems that exist in securing Australians' economic and social rights: lifting Australians out of poverty, providing a good education, assuring the provision of adequate health services; tackling homelessness; attacking youth unemployment and ensuring a decent minimum standard of living for all. A Human Rights Act cannot be a panacea in these respects. Nirvana should not be expected. But it may just provide one, additional leg-up to those in our society who are most in need of it.

There is no doubt that Australia remains a lucky country. But we cannot afford to be complacent. Problems exist here of a magnitude that easily underpins the case for greater legal protection for fundamental human rights. We kid ourselves if we believe otherwise. The adoption of an Australian Human Rights Act is imperative now, even though it must be frankly admitted that it will make but a modest contribution to the resolution of many of the difficulties identified here.

Human rights legislation formalises and facilitates the assessment of laws, policies and practices against basic standards of fairness and decency. Without such a framework, violations of basic rights may go unrecognised and un-remedied.

Australian Case Study: Law Silent on Certain Types of Discrimination⁸

Olga has an intellectual disability which impairs her speech. She is a regular visitor to her local public library. Lately, a group of young men who also frequent the library have subjected her to continual teasing, verbal insults and imitation of her speech. On visiting her local community legal centre, Olga was informed that, unfortunately, she was not entitled to redress for this behaviour under either state or federal anti-discrimination law.

Australian Case Study: Solitary Confinement of a Mentally Ill Prisoner⁹

Scott Simpson committed suicide while in custody. At the time of his death, he was suffering from paranoid schizophrenia, yet had no anti-psychotic medication in his system. Mr Simpson's admission into a prison hospital facility for treatment had been repeatedly delayed. Despite being found not guilty of a criminal offence on the grounds of mental illness, he was being kept in solitary confinement in a high security prison.

Strengthen protections

Australia needs a *Human Rights Act* because a *Human Rights Act* will improve our national ability to analyse and debate policy choices in a way that respects the human dignity of all, and transparently assesses the proportionality of measures proposed, and the balancing process that must be undertaken at the boundaries between different human rights, or different groups of people.

Australia needs a *Human Rights Act* because human rights matter, and a *Human Rights Act* will provide a focus, just as the UDHR, and the ICCPR and ICESCR did

⁸ *Freedom, Respect, Equality, Dignity: Action - NGO Submission to the Human Rights Committee* (September 2008) available at <http://www.hrlrc.org.au/our-work/law-reform/ngo-reports/> p. 55.

⁹ Inquest into the Death of Scott Ashley Simpson (Unreported, New South Wales Coroner's Court, Pinch SM, 17 July 2006), available at [http://www.agd.nsw.gov.au/lawlink/Coroners_Court/ll_coroners.nsf/vwFiles/SimpsonInquest.doc/\\$file/SimpsonInquest.doc](http://www.agd.nsw.gov.au/lawlink/Coroners_Court/ll_coroners.nsf/vwFiles/SimpsonInquest.doc/$file/SimpsonInquest.doc).

on the world stage, for the systematic development of a human rights framework for our legal and political systems so that Australia can develop, as it has urged on the world stage, a human rights culture.

Australia needs a *Human Rights Act* because at present human rights are not adequately protected in Australia, and they should be. We have promised the world that we will protect and fulfil human rights comprehensively in Australia, and we have not done so. We need a *Human Rights Act* to set out that for which we aim and the machinery through which this may be achieved.

Victorian Case Study: Melbourne Custody Centre Guidelines Updated to Improve Protection of Human Rights¹⁰

In 2007, there was an incident of excessive use of force by staff against a detainee, in breach of the detainee's human rights at the Melbourne Custody Centre ('MCC'). Following the incident, Victoria Police held workshops with GEO staff and facilitated risk assessment workshops to examine all aspects of the MCC's operation. The risk assessment led to modifications to guidelines and staff training aimed to better protect detainee's human rights. The modifications included: changes to search procedures (to ensure a person is never fully naked during the search); changes to reception processes that involve collecting personal information to enhance privacy; and increased responsiveness to detainees' needs associated with religious beliefs.

Victorian Case Study: Young Woman Gains Access to Disability Support Services¹¹

A 19 year old woman with cerebral palsy was left housebound and alone while the Government was acting particularly slowly in responding to her request for disability support services. Her advocate noticed that her mental state was deteriorating as a result and wrote to the relevant Government department citing the woman's right not

¹⁰ Victorian Equal Opportunity & Human Rights Commission, *Emerging Change: The 2008 Report on the Operation of the Human Rights Act and Responsibilities* (2009).

¹¹ Human Rights Law Resource Centre, Case Studies: How a Human Rights Act can Promote Dignity and Address Disadvantage, available at: <http://www.hrlrc.org.au/content/topics/national-human-rights-consultation/case-studies/>

to be treated in a cruel, inhuman or degrading way and her right to privacy. The woman's advocate noted that a person's private life is affected when they are unable to participate in the community or access social, cultural and recreational activities.

Soon after the women's advocate contacted the Government department, the young woman was deemed eligible for support services and placed on the waiting list for case management.

Social inclusion

Explicit human rights standards and informed public conversation are vital to the development of a human rights culture within which social inclusion becomes the norm, and social exclusion is systematically challenged and eliminated. Australia needs a *Human Rights Act* because it will make explicit the standards we have set ourselves, and the framework for meeting those standards with minimum inconsistency and maximum respect for the dignity of our people.

Inclusive government requires that every citizen be treated with equal respect and concern. Consequently it will not be right to deny any person their basic liberty or basic opportunity.

Every person's basic liberty, therefore, should be secured by society and governments' observance of their fundamental human rights - rights such as freedom of speech, religion and conscience, due process and equal protection under the law. Similarly, every person should be entitled to basic opportunity, to such things as decent work, adequate health care, education, housing and social security. The provision of such entitlements places a floor under people's capacity to participate in society. It contributes to securing genuine and meaningful equality of opportunity. It confers on them capabilities which, in other circumstances, they may not have been able to develop.

Human rights legislation can also facilitate the fair resolution of conflict between people of different customs and cultures. It sets down ground rules by reference to which inter-cultural dialogue may be promoted and in accordance with which such conflict may be mediated and resolved. It provides a fair framework within which competing interests and values may be reconciled. It sets the foundation for

constructive social and political deliberation. By reference to human rights, everyone has a starting point from which to participate in the life and current of community.

A *Human Rights Act* will provide the framework for advocates to work with government and agencies to develop the practical human-rights approach to service delivery that promotes social inclusion.

We need a *Human Rights Act* as one basis for the informed public conversation that lies at the heart of a deliberative democracy.

UK Case Study: Staff refuse to clean up a man's bodily waste¹²

A man detained in a maximum security mental health hospital was placed in seclusion where he repeatedly soiled himself. Staff declined to clean up the faeces and urine or to move the man to another room, claiming that he would simply make the same mess again, and any intervention was therefore pointless.

The man's advocate invoked human rights arguments to challenge this practice. He argued that this treatment breached the man's right not to be treated in an inhuman and degrading way, and his right to respect for private life. These arguments were successful and the next time he soiled himself, the man was cleaned and moved to a new room.

UK Case Study: Non-English speakers sectioned without an interpreter¹³

A mental health hospital had a practice of sectioning asylum seekers who spoke little or no English without the use of an interpreter. Members of a user-led mental health befriending scheme used human rights language to successfully challenge this practice. They argued that it breached the asylum seekers' right not to be discriminated against on the basis of language and their right to liberty.

¹² British Institute for Human Rights, *The Human Rights Act - Changing Lives* (2008), available at: <http://www.bihhr.org.uk/sites/default/files/BIHR%20Changing%20Lives%20FINAL.pdf>.

¹³ Ibid.

E. Arguments against a Human Rights Act

- **The *Human Rights Act* would “transfer power to unelected judges”**

The Courts already determine controversies which include moral and political dimensions and issues of public policy. Where no express guidance is provided by Parliament, they do so by reference to “policy considerations”.

Far from transferring power to unelected judges, the statutory model of a *Human Rights Act* provides greater Parliamentary guidance for judicial officers than currently exists. Rather than “policy considerations” being at large, they will be subject to the specific guidance of the human rights principles in the *Human Rights Act*.

Like the *Acts Interpretation Act* 1901, any *Human Rights Act* would give guidance from the Parliament to the courts as to how to interpret legislation and apply the law. At present, when “policy” issues arise, the courts do not have clear guidance from Parliament as to what those policies should be. A *Human Rights Act* would provide such parliamentary guidance. As Sir Gerard Brennan has said, “[t]he genius of the [Victorian] *Human Rights Act* is the solution of the problem which beset earlier models, namely, the risks of transferring political power to the judiciary. The *Human Rights Act* has brought the judiciary into constructive dialogue with the Parliament, but that is no more than utilising the interpretative skills of the courts to promote good government in the interests of the community.”¹⁴

In fact, under the statutory model proposed, the powers of the Parliament, rather than being diminished, would be substantially enhanced. This is because the Act would strengthen the Parliament’s capacity to scrutinize executive action and hold government to account. The enactment of the legislation would mean that Parliament would be provided with new means and opportunities to check legislation, policy and

¹⁴ The Hon Sir G Brennan AC KBE, “The Constitution, Good Government and Human Rights”, 12 March 2008, pages 22-23, available at <http://www.hrlrc.org.au>. See also the statement made by the Victorian Attorney-General, the Hon R Hulls MP, during the Second Reading Speech for the Human Rights Act Bill, Legislative Assembly, *Hansard*, 4 May 2006, at page 1293; and Department for Constitutional Affairs (UK), *Review of the Implementation of the Human Rights Act* (July 2006), page 1, which concluded that there had been no significant alteration of the constitutional balance between the Parliament, the Executive and the Judiciary.

programmes against internationally and nationally agreed human rights criteria.

The model being proposed is preventative not reactive. The idea is that the Act would inform the consideration of legislation and policy, through the establishment of systems of pre-legislative governmental and parliamentary scrutiny, and in this way make it far less likely that subsequent litigation will ensue. This has been the practical experience in Canada, New Zealand and the United Kingdom. Similar evidence has now emerged in relation to the experience in the ACT and Victoria.¹⁵

Speculation that there will be a substantial and constitutionally undesirable shift of political power from the parliament to the judiciary, remains simply that – speculation. There is no evidence in comparable jurisdictions that any such significant seepage has occurred.

- **The *Human Rights Act* will give rise to a “flood of litigation”**

The dialogue model emphasises the protection of rights through policy development and administrative practices rather than through litigation. Experience to date in the various jurisdictions where they have been introduced shows that *Human Rights Acts* do not lead to a flood of litigation. International experience with statutory human rights legislation simply does not bear out the worst fears of its critics. There is a significant, but not alarming, increase in court cases. And while a few specialists may make a good living from human rights law its rewards are not nearly as lucrative as those in many other legal fields, particularly in commercial litigation. The 5 year review of the Human Rights Act in Britain concluded that a substantial body of case law had been generated but this represented no more than 2 per cent of all cases determined by the courts. The Human Rights Act had been considered in about one-third of cases before the nation’s highest court but could be said to have affected the outcome in only one tenth.¹⁶

See further Charlesworth H., Byrnes A. and MacKinnon C. *Bills of Rights in Australia*, University of New South Wales Press 2009.

¹⁶ Review of the Implementation of the Human Rights Act, Department of Constitutional Affairs (UK), July, 2006, pp.10-11.

Such figures as are available from the experience of the first year of the Victorian Charter of Rights and Responsibilities paint a broadly similar picture. In 2008, Victorian courts mentioned the Charter in 46 matters. Twenty-three of them were in the Supreme Court or the Court of Appeal, 20 were in the Victorian Civil and Administrative Tribunal (in a variety of Lists including discrimination, guardianship and domestic building) and 3 of them were matters heard by the Mental Health Review Board. However, in 25 of those decisions, although the judges referred to the Charter, it was not considered substantively. Furthermore, in 7 of those 25 matters, the Charter did not apply to proceedings at all. No declarations of incompatibility were issued in the first year.

The Victorian *Human Rights Act* is not intended to create any new, independent cause of action and does not entitle a person to an award of damages for a breach of their human rights.¹⁷ Rather, the *Human Rights Act* provides an additional ground of relief where a person otherwise has a right to claim some relief or remedy. Although the provisions of the *Human Rights Act* relating to court and tribunal proceedings have been in force for over a year,¹⁸ there has been only a small number of reported cases in which the *Human Rights Act* has been raised. Some of these have given only passing reference to it. In the majority of cases where a *Human Rights Act* ground has been raised, it has been unsuccessful. There are only a few cases in which a *Human Rights Act* argument been successful and, in those cases, the person raising the argument has also succeeded on other grounds.

The emphasis on policy development and administration also impacts upon the groups most likely to be significantly affected by a *Human Rights Act*. The United Kingdom Department for Constitutional Affairs found that the UK HRA had had “a positive and beneficial impact upon the relationship between the citizen and the State, by providing a framework for policy formulation” and by leading “a shift away from inflexible or blanket policies towards those which are capable of adjustment to recognise the circumstances and characteristics of individuals.”¹⁹ The Twelve Month

¹⁷ See s 39 of the Victorian Human Rights Act; *Sabet v Medical Practitioners Board of Victoria* [2008] VSC 346 at [104]-[105].

¹⁸ Divisions 3 and 4 of Part 3 of the Human Rights Act came into operation on 1 January 2008: see s 2.

¹⁹ Department for Constitutional Affairs (UK), *Review of the Implementation of the Human Rights Act* (July 2006), pages 4, 19.

Review of the ACT HRA drew similar conclusions.²⁰ In light of this experience in other jurisdictions, the groups most likely to see real benefit from a *Human Rights Act* are disadvantaged or vulnerable groups whose rights depend heavily on the delivery of services and the exercise of powers by public authorities and therefore on good policy development and the implementation of policies and powers by public authorities in a manner that is sensitive to individual circumstances. This would include groups such as homeless persons, persons with physical or mental disabilities, the elderly, children, asylum seekers and so on. As immigration and asylum is a matter of federal law, this is an area which can only be affected by a federal *Human Rights Act*, rather than State or Territory *Human Rights Acts*.

- **A Human Rights Act protects only the interests of a small, vocal and undeserving minority**

The argument about minorities tends to boil down to an assertion that human rights legislation will be used primarily by highly unpopular and undeserving minorities, such as terrorists, criminals, prisoners, social security cheats and other assorted villains. The facts of litigation in other countries, however, do not bear this assertion out. It does appear to be the case that in the first two years or so after the introduction of human rights legislation, there is a spike in the number of challenges to criminal procedures that are brought to the courts. And terrorism cases attract enormous publicity. However, once a set of precedents has been established in that time, such cases enter into an equally steep decline.

What then ensues is what one would expect. That human rights cases are brought principally in the context of complaints alleging harmful administrative decisions or actions by governmental agencies and their staff. The 5 year review of the UK Human Rights Act concluded that it was a myth to think that the Act is utilized principally by those who do not merit its protections:

“Many myths have grown up around the Human Rights Act since its enactment in 1998. Commentators have blamed human rights for a range of ills, but in particular for giving undeserving people a means of jumping the

²⁰ Department of Justice and Community Safety (ACT), *Twelve Month Review of the Human Rights Act 2004* (June 2006), pages 13-15.

queue and getting their interests placed ahead of those of decent hard-working folk. Part of this is attributable to deliberate political campaigns...

There are three different types of myths in play. First, there are those which derive from the reporting of the launch of cases but not their ultimate outcomes. These leave the impression in the public mind that a wide range of claims are successful when in fact they are not... Secondly, there are the pure urban myths: instances of situations in which someone has said that human rights require some bizarre outcome or other and this is subsequently trotted out as an established fact. Finally, there are rumours and impressions which take root through a particular case or decision, and which then provide the backdrop against which all subsequent issues of the type in question are played out.”²¹

A federal *Human Rights Act* is unlikely to become a “villain’s Charter”.²² Although it may be expected that criminal cases would form a large proportion of cases raising *Human Rights Act* issues, a review by the Department for Constitutional Affairs found that the UK HRA had had no significant impact on the criminal law, although it had had an impact on counter-terrorism legislation.²³ This is due, in part, to the fact that, in general, the criminal law already strikes a fair balance between the rights of the community and the rights of accused persons.

In short, neither in theory nor practice can it properly be said that a Human Rights Act’s effect will be to promote the interests of unpopular or undeserving minorities although members of such groupings may, like everyone other member of the community, seek protection of their human rights in accordance with its terms.

²¹ Review of the Implementation of the Human Rights Act, Department of Constitutional Affairs (UK), July 2006, pp.29-30. Note too that Jack Straw, the UK Minister for Justice, was misquoted as having said that the UK Act had become a villain’s Charter. He actually said that following a small number of cases, some had reached the conclusion that it had become a villain’s Charter.

²² See, eg, Department for Constitutional Affairs (UK), *Review of the Implementation of the Human Rights Act* (July 2006), pages 1, 13, referred to above.

²³ Department for Constitutional Affairs (UK), *Review of the Implementation of the Human Rights Act* (July 2006), pages 1, 13.

- **What impact might the recognition of a right to life in a federal *Human Rights Act* have on issues such as abortion and euthanasia?**

The criminalisation of abortion and euthanasia are matters of State criminal law, and are in Liberty's opinion, best kept in the parliamentary sphere. Assuming that the legal force of the rights set out in a federal *Human Rights Act* would be limited to the interpretation of Commonwealth legislation, there should be no effect on these laws.

Freedom of religion and freedom of expression may also affect the law relating to abortion or euthanasia in less direct ways, as has been demonstrated by the recent debates concerning the *Abortion Law Reform Bill 2008* (Vic). Clause 8 of that Bill required a health practitioner who has a conscientious objection to carrying out an abortion to inform a patient of their objection (clause 8(1)(a)) refer a patient to a practitioner who does not have such an objection (clause 8(1)(b)). It also required health practitioners to perform an abortion in an emergency situation where it is necessary to preserve the life of the pregnant woman (clause 8(2)). A concern has been raised that the clause would compel Catholic health practitioners to act in a manner inconsistent with their religious beliefs.

The first point to be noted, in this regard, is that the Victorian *Charter of Human Rights and Responsibilities* had no bearing on the resolution of this question. This is because, in accordance with s.48 of the Charter, it has no application to any law with respect to abortion.

Even if it had, however, another important legal issue would have arisen. This is posed by s 7(2) of the Victorian *Charter*: that is, whether the restriction is a "reasonable limit" that "can be demonstrably justified in a free and democratic society" taking into account the criteria set out in s 7(2)(a)-(e).²⁴ In essence, that requires an assessment of whether s.8 of the *Abortion Law Reform Act* strikes a fair balance between the fundamental importance of freedom of conscience and religion, on the one hand, and the importance of ensuring that the rights of pregnant women, on the other, are respected and that women are given access to advice about all of the options available to them under the law. In particular, a court would have to consider whether there were

²⁴ They are: (a) the nature of the right; (b) the importance of the purpose of the limitation on the right; (c) the nature and extent of the limitation; (d) the relationship between the limitation and its purpose; and (e) whether there are any less restrictive means reasonably available to achieve the purpose that the limitation seeks to achieve.

any alternative means reasonably available for achieving the purpose of s.8 that were less restrictive of a health practitioner's freedom of religious expression.²⁵ This does not mean that anything other than the *least* restrictive means will be incompatible with the *Human Rights Act*. Rather, a court considering the question would be required to consider whether the chosen means fall within "a range of reasonable alternatives".²⁶ In this light, it is perhaps unfortunate that the Charter did not apply. If it had, perhaps there would have been a much more informed and considered parliamentary and public debate, founded upon the competing human rights considerations in question.

- **What impact might the recognition of a right to equality and protection from discrimination in a federal *Human Rights Act* have on the ability of religious bodies to discriminate on the basis of religion?**

Under a dialogue model of a federal *Human Rights Act*, only "public authorities" would be subject to an obligation to act compatibly with human rights. Religious bodies would therefore only be required to act compatibly with rights such as the right to equality and the freedom from discrimination, as well as any other relevant rights, if they were first found to be a "public authority".

A federal *Human Rights Act* might exempt religious bodies from the operation of an otherwise general obligation to act compatibly with human rights, as is done in s 38(4) of the Victorian *Human Rights Act*. Or it might contain specific exceptions permitting discrimination on religious grounds by religious bodies in certain circumstances. For example, the definition of "discrimination" in the Victorian *Human Rights Act*²⁷ picks up the definition of "discrimination" in the *Equal Opportunity Act 1995* (Vic) which permits discrimination on religious grounds by religious schools²⁸ and religious bodies.²⁹ Even in the absence of an express exception, it is unlikely that religious bodies would constitute "public authorities". This would, of course, depend upon the definition that is ultimately adopted. Under the Victorian *Human Rights Act* and the

²⁵ Section 7(2)(e) of the Victorian Human Rights Act.

²⁶ See, eg, *Sabet v Medical Practitioners Board of Victoria* [2008] VSC 346 at [188].

²⁷ In s 3(1) of the Victorian Human Rights Act.

²⁸ See, eg, ss 38 and 76 of the *Equal Opportunity Act 1995* (Vic); and s 38 of the *Sex Discrimination Act 1995* (Cth).

²⁹ See, eg, s 75 of the *Equal Opportunity Act 1995* (Vic); and s 37 of the *Sex Discrimination Act 1995* (Cth)

ACT HRA,³⁰ there are essentially two kinds of public authorities: “standard” public authorities such as Ministers or police officers and “functional” public authorities. Religious bodies would not be “standard” public authorities.³¹ Whether they may be “functional” public authorities would depend upon whether the *particular act or decision in question* can be described as a “function of a public nature” and whether it was done “for” or “on behalf of” the State or Territory or another public authority. In *R (A) v Partnerships in Care Ltd*,³² the applicant was a publicly funded patient who had been compulsorily admitted to a private psychiatric hospital. She challenged the hospital’s decision to change the focus of her ward, which resulted in some facilities required for her treatment being unavailable, as an infringement of certain of her human rights. Because the hospital was required by relevant legislation to provide adequate treatment facilities, the court held that the hospital was acting as a public authority when it made the decision in question. However, a private hospital would *not* be a public authority for all of its activities. For example, it is unlikely that the hiring of staff by a private religious hospital would be a function “of a public nature” undertaken “for or on behalf of” the State or Territory concerned. A line might be drawn, although in some cases it would not be a clear one, between activities undertaken as part of the regulation of the hospital’s own internal affairs and activities undertaken as part of the provision of treatment to the public.

³⁰ Part 5B of the ACT HRA, which was introduced by the *Human Rights Amendment Act 2008* (ACT) and will come into force on 1 January 2009, imposes similar obligations on public authorities to those in the Victorian Human Rights Act.

³¹ See *Aston Cantlow v Wallbank* [2004] 1 AC 546, where the House of Lords held that a local church council exercising compulsory statutory powers was not a public authority under the UK HRA. See also M Wilcox, *An Australian Human Rights Act* (1993), page 251, where it is said that, despite the statutory background of the laws governing the Anglican Church, it is unlikely that the rules concerning eligibility for the priesthood are made pursuant to a “public” function or power.

³² [2002] 1 WLR 2610.

F. A Human Rights Act for Australia

Liberty believes that an Australian *Human Rights Act* should be founded upon the models presently in operation in the UK and New Zealand. More particularly, the Act should have the following features.

- *The Act should take the form of an ordinary parliamentary enactment.*

Consistent with the consultation panel's terms of reference, we do not propose to advance the case for constitutionally entrenched human rights provisions. In the first instance, it is appropriate to state the rights in an Act of Parliament. In this way, the sovereignty of parliament may be preserved while, at the same time, the government, the parliament and the judiciary may each play a part in the scrutiny and protection of human rights. Further, a statutory model allows for a measure of flexibility with respect to the content of human rights and their progressive development over time, unavailable constitutionally. In a statutory model it will again be for the Parliament to determine how best to encapsulate and legislate for existing and emerging human rights.

- *The Act should set down the civil and political rights, and the economic and social rights to which all Australians will be entitled.*

The Act should provide for the protection of the rights of all Australians in a manner consistent with the international human rights obligations Australian governments of all political complexions have previously agreed to. These are contained principally in the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights. The rights therein are elaborated in the UN's five associated conventions concerned with racial discrimination, discrimination against women, torture and the rights of children and people with disabilities.

So, as noted previously, the Australian *Human Rights Act* should protect the following six categories of rights:

Personal Rights such as the right to life, liberty and security; the right to freedom from torture and other forms of cruel, inhuman or degrading treatment.

Civil and Political Rights such as freedom of expression, assembly, association and movement; the right to vote; and the right not to be discriminated against by reason of age, sex, nationality, ethnic origin, political opinion, sexual orientation, disability, genetic characteristics and other similar grounds.

The Rights of Individuals in Groups such as the right to privacy, the right to marry and form a family, the right to property; and the right to pursue one's own customs and culture.

Legal Rights such as the right not to be arbitrarily detained and the right to fair trial.

Economic and Social Rights such as the rights to health, education, social security, housing and an adequate standard of living.

Indigenous Rights including cultural rights; the rights to practise and revitalize their spiritual and cultural traditions, customs and ceremonies.

Liberty is strongly in favour of the inclusion of at least these basic economic and social rights. Ever since the drafting of the UDHR, it has been recognized that fundamental human rights are indivisible. It is difficult if not impossible to exercise civil and political rights if one is sick, uneducated, poor, homeless or in some other way profoundly disadvantaged. The two classes of rights must necessarily travel together. It is entirely artificial and, in fact, potentially damaging to separate them and treat the first class as if it is preferred to the second. We recognize that economic and social rights are not justiciable in the same way as civil and political rights.

It is entirely possible, however, to structure their review in a manner that will strike an appropriate balance between the entitlement to exercise them and the resource consequences and constraints necessarily experienced by government in seeking to provide that entitlement. A Court may, for example, be instructed to take explicit account of such resource constraints in determining whether legislation is consistent with the rights in question. There is further ample

experience in other jurisdictions and the academic literature that points the way to effecting this balance appropriately. We note also that whenever polled on the issue, Australians appear firmly of the view that economic and social rights are important and ought to be given adequate weight and protection.

- *The Act should provide that as far as possible, consistent with its purpose, all legislation should be interpreted in a manner that is consistent with the protection of the rights which it recognizes.*

As in the UK, the aim of this human rights legislation should be primarily preventative. Consequently, it is undesirable that a Court should find that legislation is inconsistent with human rights except where such inconsistency is manifest and unavoidable. The mechanism for doing so, in other parallel jurisdictions, is to insert an interpretative provision instructing the Courts to read legislation consistently with human rights. So as to avoid constitutional difficulties and to ensure that the Courts may not embark on a process of judicial legislation, we favour the formulation of an interpretative provision which follows that in the Victorian *Charter of Human Rights and Responsibilities*. This provides that legislation should be interpreted in a manner consistent with the protection of human rights as far as possible ‘consistent with its purpose’.

- *The Act should provide that where a Court cannot find that legislation is capable of interpretation in a manner consistent with human rights, a process of governmental and parliamentary reconsideration is initiated.*

Under the UK *Human Rights Act*, Courts may issue what are known as ‘declarations of incompatibility’. Once issued, such a declaration is communicated to the Chief Law Officer, for further consideration by the Parliament. In Australia, a possible constitutional problem has been identified with this process. To render the process free from constitutional doubt, therefore, Liberty supports the mechanism proposed by the Australian Human Rights Commission and endorsed by a meeting of constitutional scholars and

lawyers hosted by the Commission.³³ According to this process, where a Court makes a finding of inconsistency, a party to the proceedings in question may notify the Commission of the finding, or the Commission determine that a finding has been made. In either case, the Commission shall then have a duty to report the fact of the finding to the Attorney-General. The Attorney shall then be required to report the finding to the Parliament. Within six months after that report, the Parliament must reconsider the legislation that has been challenged and form a view as to whether or not it should be amended to bring in line with the human rights set down in the *Human Rights Act*.

- *The Act should provide for all three branches of government – the executive, the parliament and the judiciary – to share the responsibility for protecting and advancing human rights.*

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, however, demonstrated certain flaws in this process. So, for example, statements 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.

³³ See Catherine Branson SC, President of the Australian Human Rights Commission, Statement Issued May 6, 2009.

The great virtue of the statement 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.

Under a *Human Rights Act*, the role of Parliament in scrutinizing legislation and policy having an impact on human rights will be 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.

As noted previously, the *Judiciary’s* principal role is 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 *Human Rights Act* 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.

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 *Human Rights Act* should provide for a process of governmental and parliamentary review of the that legislation. As stated previously Liberty endorses the model for such review proposed by a meeting of prominent constitutional lawyers convened by Catherine Branson QC, President of the Australian Human Rights Commission. That model is summarized in a statement issued by the President on May 6 of this year.³⁴

³⁴ 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.

It is sometimes asserted by opponents of a *Human Rights Act*, that the preservation of parliament's final say on legislation is illusory. It is asserted that this is, first, because no government will be willing to contradict a court's finding of inconsistency by refusing to amend legislation and, secondly, because even if it did wish to persist with legislation, a government would be incapable of maintaining the legislation in the face of a Senate which it did not control.

In relation to the first point, it should be conceded that a parliament will be reluctant to affirm legislation in the face of a Court's finding of inconsistency. But that is as it should be. A decision to proceed with legislation that has been found inconsistent with fundamental human rights is not one to be taken lightly and should be the subject of intensive parliamentary reconsideration. On the other hand, a government that was unwilling to override or constrain a human right in circumstances of national emergency or a major risk to public health would be derelict. It should not be supposed that either government or parliament would be so pusillanimous in exceptional circumstances of this kind.

In relation to the second point, it may be that a government would find it difficult to maintain support for legislation that had been found inconsistent by a Court if it did not retain control of the Senate. There are two responses to this, however. First, under the current model *Human Rights Act* proposed, no new legislation would be required to affirm an existing, inconsistent Act. So, the prospect of Senate defeat would be raised only if an amendment to the inconsistent legislation were moved by the Opposition or in a private members' bill. But such a bill would presumably meet significant resistance in the House of Representatives over which the government would have control. If anything, therefore, this constitutes a strong argument for a requirement that

a Government should re-submit its existing legislation for parliamentary review after a finding of inconsistency has been made. Otherwise, seemingly, nothing might be done.

Secondly, it makes little sense to complain that the Senate might refuse to endorse government legislation that has been found inconsistent with human rights. If that were the case, it would simply mean that the Parliament had asserted its sovereignty in a way that had resulted in the defeat of a governmental motion. But this would be no less an exercise of sovereignty for that. The sovereignty is that of the Parliament and not the Government.

We recommend finally that an Australian *Human Rights Act* should provide 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 shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity...”

The *Human Rights Act* should, therefore, set out an inclusive list of the remedies that may be available. It would be reasonable to provide that 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.

G. The Role of the Australian Human Rights Commission under the Human Rights Act

The Australian Human Rights Commission (AHRC) should have the following functions under an Australian *Human Rights Act*.

- **Annual Report to Attorney General**

The AHRC should produce and present to the Attorney General, for his or her subsequent tabling in Parliament, an annual report examining the operation of the Act over the previous 12 months. This report should, amongst other things, report on the progress by public authorities and those that act for them, on the implementation of the Act, highlighting achievements made and indicating where progress is required.

As the VEOHRC says in its second report to the Victorian Attorney General, on the operation of the Victorian Act,

“developing a mature human rights culture will not happen overnight ... it is surprising that we have made as much progress as we have in just two years ... In many instances, this progress is not dramatic or spectacular – but it is groundbreaking nevertheless...these impacts range from reinvigorating existing practices through substantial changes in the way organisations operate , make decisions, deliver services and deal with people” (VEOHRC, 2009).

It is very important that an independent body, such as the AHRC, be able to document the progress of the implementation of the Act transparently.

- **Review the Effect of Commonwealth Law on Human Rights**

The AHRC should, every four years review the effect of Commonwealth law and the common law on human rights and report to the Attorney General on the results of this review. This review should include findings of inconsistency between the Act and the implementation of other Commonwealth laws and the common law that have been brought to its attention either by the Courts or the public. It should also comment on what actions are required to overcome such inconsistencies.

- **Review Government Departments**

When requested by a Minister of the Australian Government, the AHRC should review a government department for the consistency of its policies, programmes and practices with the Act. It is desirable that every government department would be so reviewed every four years.

- **Education about Human Rights**

While people in Australia have a good appreciation of the concepts and values that underlie ideas of “a fair go” they don’t necessarily associate these with human rights. Significant education initiatives are required to raise the level of understanding amongst the people of Australia of the role and implications of human rights in contemporary Australian life.

The AHRC already has responsibility for education in relation to equal opportunity and human rights but this needs to be expanded to require it to expressly work to raise the level of understanding of the importance and implications of human rights for the daily lives of people in Australia.

- **Intervene in Proceedings before a Court**

Given the lack of jurisprudence in Australia on human rights matters the AHRC should be given ability, similar to that given to the VEOHRC, to intervene as of right in any proceedings where a question of law arises in relation to the application of the Acts. This will enable the AHRC to provide its considerable experience and thus assist human rights related proceedings.

- **Notify Findings of Inconsistency**

When a court finds that it cannot interpret a law consistent with the Act the AHRC should be empowered, on the request of a party to the proceeding, or of its own motion, to notify the Attorney General of a finding of inconsistency.

- **Review of the Act**

Given the importance of the Act and its intention to ensure that all people in Australia can live their lives with dignity, without humiliation, and thus its potential to improve the lives of many people in this country it is important that the implementation of the

Act be reviewed at periodic intervals to either adjust and/or confirm its legislative intentions. It is desirable that such review be held after three years and then after a further five years from the commencement of this Act. The AHRC should assist the Attorney General to conduct these reviews.

- **Systemic Human Rights Abuses and Periodic Reporting**

Reports from both the commonwealth and state human rights and equal opportunity commissions indicate that much systemic abuse of human rights goes unreported and unaddressed, through fear of reprisals, cost and public exposure. The AHRC should have a general power to conduct independent inquiries when it becomes aware that human rights abuses may be occurring and to report to the Attorney General on the outcome of its investigations.

- **Funding**

The AHRC should be appropriately funded to enable it to undertake these responsibilities.

Conclusion

In conclusion, Liberty is strongly of the view that the Commonwealth Government should now proceed to enact a *Human Rights Act* for Australia.

The adoption of an Australian Human Rights Act is imperative now, even though it must be frankly admitted that it will make but a modest contribution to the resolution of many of the difficulties identified here.

The former President of Liberty, Julian Burnside, in arguing the case, has written recently that:

“These things (infringements of fundamental human rights) should not be acceptable in this society. A bill of rights articulates the basic assumptions on which a society is founded, and ensures that those assumptions are respected by the parliament. It is sometimes objected that a bill of rights transfers power from the democratically elected parliament to unelected judges. But that is a facile answer, because a bill of rights is itself a profoundly important expression of the will of the people. It is a constraint that is necessary at those times when fear and populism make majoritarian rule look like mob-rule. A bill of rights that gives effect to enduring social values is the only protection for the unpopular minority, especially in times of social stress.

By declaring the moral limits to what parliament may do, our willingness to enact a bill of rights identifies what sort of people we are.”³⁵

This sentiment encapsulates the gist of the argument in this submission too.

³⁵ Burnside, J (2007), *Watching Brief: Reflections on Human Rights Law and Justice*, Melbourne: Scribe Publishing, pp. 176-77.