

THE ACT THAT DARES NOT SPEAK ITS NAME: THE NATIONAL HUMAN RIGHTS CONSULTATION REPORT'S PARALLEL ROADS TO HUMAN RIGHTS REFORM

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I INTRODUCTION

Australia is on the cusp of embarking on human rights reform. The reform process began with the National Human Rights Consultation ('NHRC'), which was announced by the Commonwealth Attorney-General on 10 December 2008, the 60th anniversary of the *Universal Declaration of Human Rights*.¹ Undertaken by an independent committee chaired by Father Frank Brennan ('NHRCC'),² the NHRC was a public inquiry that emphasised community involvement. The NHRCC's Report, released on 8 October 2009, contains recommendations on how better to protect and promote human rights in Australia.³ On 21 April 2010, the Australian government provided its response to the Report.⁴

Throughout the NHRC, the most hotly debated question was whether Australia should introduce a national Human Rights Act ('HRA'). That question was considered at length in the Report, with the NHRCC recommending the introduction of a HRA that adopts the principal features of the 'dialogue' model of human rights legislation.⁵ While there was strong support for a HRA among

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1 GA Res 217A (III), UN GAOR, 3rd sess, 183rd plen mtg, UN Doc A/Res/217A (10 December 1948) ('*Universal Declaration*').

2 The other members of the NHRCC were the broadcaster, Mary Kostakidis, the former Australian Federal Police commissioner, Mick Palmer, and the Indigenous barrister, Tammy Williams. Phillip Flood was described in the Report as the 'alternate' committee member, and participated at various stages of the Consultation process, including when any of the other members were unavailable.

3 National Human Rights Consultation Committee, *National Human Rights Consultation Report* (2009) ('Report').

4 See Australian Government, *Australia's Human Rights Framework* (2010); Robert McClelland, 'Launch of Australia's Human Rights Framework' (Speech delivered at the National Press Club of Australia, Canberra, 21 April 2010).

5 The main features of the 'dialogue' model are summarised in Part II of this article.

submissions and in independent opinion polling commissioned by the NHRCC,⁶ this remains a politically divisive issue.⁷ Citing this divisiveness, the Australian government did not endorse the NHRCC's proposed HRA, preferring to proceed without a HRA, with a view to reconsidering the matter in 2014.⁸ Instead, the government announced the Human Rights Framework, which would involve:

- (i) changes to the way in which draft legislation is scrutinised against human rights standards in the parliamentary committee system;
- (ii) increased funding for human rights education and training, to be carried out by the Australian Human Rights Commission and non-government organisations; and
- (iii) a National Action Plan on human rights, designed to improve public service understanding of human rights.⁹

To some degree, the Human Rights Framework draws on other elements of the Report's human rights reform strategy. In particular, both the Report and the Framework emphasise the importance of human rights education,¹⁰ and of reforming the pre-legislative scrutiny of new laws against human rights standards.¹¹ Another core element of the Report's reform strategy is a proposal to amend a number of existing laws relating to the interpretation of legislation and administrative decision-making. The Framework does not take up this proposal, but neither does it foreclose this option. In light of the government's preference for pursuing human rights reform that avoids controversy and division, and given the review of human rights that is foreshadowed for 2014, such reforms remain worthy of academic analysis.

While the Human Rights Framework might have neutralised criticism among HRA opponents, the government's decision to eschew significant legislative reform, and in particular to defer further consideration of a HRA, was itself controversial. Immediately following the Framework's release, the government faced strong criticism from human rights advocates, who called on the

6 Among submissions: 29 153 (83 per cent) supported a HRA; 4203 (12 per cent) were opposed; and 1628 (5 per cent) expressed no view on this issue. In the opinion polling: 57 per cent supported a HRA; 14 per cent were opposed; and 30 per cent were neutral. See National Human Rights Consultation Committee, above n 3, 264, 390.

7 For example, during the NHRC, the federal Opposition expressed its formal opposition to a HRA: George Brandis on behalf of the federal Opposition, Submission to National Human Rights Consultation Committee, *National Human Rights Consultation*, 15 June 2009.

8 See Australian Government, above n 4, 1, 11; Robert McClelland, above n 4, 3.

9 Australian Government, above n 4, 3.

10 See National Human Rights Consultation Committee, above n 3, xxix (Recommendations 1–2); *ibid* 5–6. This article does not consider in detail the Report's recommendations regarding education and the more targeted reforms.

11 See National Human Rights Consultation Committee, above n 3, xxxi (Recommendations 6–7); Australian Government, above n 4, 8.

government to reconsider its position on a HRA and other legislative reform.¹² But even if the government were to change its position, and to introduce a Human Rights Bill in Parliament, the Opposition's current policy suggests that it would resist such reform. If not ultimately defeated, the Bill would likely face a considerable delay as it is debated extensively in each House of Parliament.¹³

For these reasons, this article puts to one side the already well ventilated question of whether a HRA should be adopted.¹⁴ Instead, it concentrates on some of the Report's other recommendations for human rights law reform. In particular, this article addresses the relationship between the Report's proposal for a HRA, and a second set of 'parallel' recommendations. The second set of recommendations, when taken together, would amend existing laws in such a way as to introduce many key features of the Report's proposed HRA, but outside the rubric of a HRA. Part II of this article considers briefly why the NHRCC took this unusual approach of proposing a second set of recommendations that would appear to be superfluous in the event that a HRA is introduced. Given that a HRA is unlikely to be introduced in the short term, but other human rights reform seems more palatable, the remaining Parts consider the four key features of the dialogue model, comparing and contrasting how those features would operate if introduced independently of a HRA.

Two main conclusions are drawn from this analysis. First, there are many subtle, but important, differences between the two sets of recommendations. In turn, this would lead to significantly different policy outcomes if implemented. Secondly, if the government proceeds with its evident policy of disaggregating the various HRA elements and introducing some or all of them independently of a HRA, it would be highly unlikely to achieve as successfully the human rights reform objectives set out in the Report or in the government's Human Rights Framework. In short, even if the parallel set of recommendations were implemented in their entirety, they would produce an *ersatz* HRA, one that protects human rights far less effectively than a HRA could.

II BUILDING PARALLEL ROADS TOWARDS HUMAN RIGHTS REFORM

At first blush, it is perplexing that the Report contains one set of recommendations that sketches the structure and operation of a proposed HRA, and a parallel set that, when taken together, appears to mimic key features of the

12 See, eg, Nicola Berkovic and Chris Merritt, 'A-G Spineless, Say Human Rights Groups', *The Australian* (Sydney), 22 April 2010, 2; Sarah Joseph, 'Stance on Human Rights Has Everything – Except a Charter', *The Age* (Melbourne), 22 April 2010, 21; Noel Towell, 'Govt Failure on Rights Act Angers Experts', *The Canberra Times* (Canberra), 22 April 2010, 7; Kirsty Needham, 'Outcry over Rights Act', *The Age* (Melbourne), 22 April 2010, 12.

13 See Brandis on behalf of the federal Opposition, above n 7.

14 For disclosure, my submission to the NHRC favoured a HRA that adopts the essential features of the 'dialogue' model of human rights statute: Edward Santow, Submission to National Human Rights Consultation Committee, *National Human Rights Consultation*.

proposed HRA, albeit in a muted form. Prima facie, the second set of recommendations seems unnecessary if the Australian Parliament enacts the NHRCC's preferred HRA. However, if (as presently seems the case) the government does not want a HRA, why would it introduce a reform template that appears closely to resemble the HRA it has just rejected? The NHRCC does not explicitly answer these questions, nor does it explain its decision to propose these two overlapping sets of recommendations. However, in acknowledging the continued division on the desirability of a HRA,¹⁵ the NHRCC appears to hint at the most logical explanation for its approach. That is, the NHRCC seems to have recognised that while a HRA might not be politically feasible at present, this should not stop the Australian government from implementing the key features of the dialogue model more stealthily, and in a way that is less likely to exacerbate the existing divisions.

In the immediate aftermath of the Report's release, the dominant response from key stakeholders was to praise or decry, with equal vehemence, the proposed HRA.¹⁶ Curiously, relatively few people commented on the parallel set of recommendations.¹⁷ This might suggest that, because the debate on a HRA is highly emotive,¹⁸ debating the constituent elements of a HRA without mentioning the words 'Human Rights Act' is more conducive to achieving a consensus. After all, many of those most strongly opposed to a HRA do not oppose, indeed some even support, key elements of a HRA, provided that those elements are not introduced as part of a HRA.¹⁹

15 National Human Rights Consultation Committee, above n 3, 378. See also Australian Government, above n 4, 1.

16 Among those in favour, see, eg, Australian Council of Social Service, 'Human Rights Report Paves Way for Better Protections for Marginalised Australians' (Press Release, 8 October 2009); Australian Human Rights Commission, 'Let's Act on Report Recommendations and Bring Human Rights Home' (Press Release, 8 October 2009). Among those opposed, see, eg, George Brandis, 'Don't Change Our Democratic System without a Referendum: Brandis' (Press Release, 8 October 2009); Paul Kelly, 'Human Rights Report Poisoned Chalice', *The Australian* (Sydney), 10 October 2009.

17 Even among the commentary about the parallel set of recommendations, there seems greater equivocation. For example, the Centre for Independent Studies, which is strongly opposed to a HRA, describes the parallel set of recommendations as offering 'an equally pervasive alternative with the same effect [as a HRA]', but devotes relatively little space in its report to discussing the specific reforms and does not explicitly rule out these recommendations: Elise Parham, *Behind the Moral Curtain: The Politics of a Charter of Rights* (2010) 18. As explained below, I believe it an overstatement to argue that the parallel set of recommendations will have an impact equal to the proposed HRA. However, it is worth noting that the former head of the Administrative Law Section of the Department of Prime Minister and Cabinet described the Report as containing a 'Trojan horse': Margaret Kelly, 'Brennan Report Is a Trojan Horse', *The Australian* (Sydney), 19 March 2010, 12.

18 See, eg, Richard Ackland, 'Hysteria Revisited: 25 Years Later the World Still Spins', *Sydney Morning Herald* (Sydney), 20 November 2009, 19. The emotive nature of the debate is reflected in many of the opinion pieces published for and against. Cf, eg, Allan's claim that a HRA would be 'crazy' with Robertson's claim that the case for a HRA is 'self-evident': James Allan, 'Don't Entrust Liberty to Madcap Judges', *The Australian* (Sydney), 17 July 2008, 14; Geoffrey Robertson, 'Comment: Bill of Rights', *The Monthly* (Melbourne), November 2009, 13.

19 See, eg, Tom Campbell and Nicholas Barry, Submission to National Human Rights Consultation Committee, *National Human Rights Consultation*; Brandis on behalf of the federal Opposition, above n 7.

If it is correct that a reason for the parallel sets of recommendations was to provide a blueprint for reform that neutralises some of the divisiveness in the public discourse, then this seems partly an exercise in marketing. To use an analogy: a chef who serves sausage of congealed blood could call her dish either ‘blood sausage’, a name that reveals its true nature but at the risk of repelling squeamish diners; or she could choose the dish’s more common name, ‘black pudding’, thereby obfuscating its true nature but not alienating those of a delicate sensibility. The chef is aware that the proof of the pudding (black or otherwise) is in the eating, but she believes that if she can circumvent the diner’s irrational squeamishness at the name of the dish, then the diner will be beguiled by the *substance* of the dish, its taste.

A lawyer – at least a hardy lawyer, impervious to the distraction of marketers’ terminology – might be inclined to conclude that, in offering these parallel recommendations, the NHRCC was adopting a similar marketing technique. One must therefore ask the following questions. What is the true nature of the second set of recommendations? To what extent is it likely to mirror the operation of a HRA? And is the Australian government likely to achieve the Report’s reform objectives solely by pursuing the second set of recommendations, as foreshadowed in the Human Rights Framework? After summarising the main features of the dialogue model of a HRA, the remaining Parts of this article address these questions.

A The ‘Dialogue’ Model

Human rights can be protected by many forms of legislation. One common form of legislation protects a single human right, such as the right to privacy or freedom from racial discrimination.²⁰ Such legislation deals with a broad variety of situations, but only in relation to one particular right. Another form of human rights legislation protects one or more rights with reference to a particular *activity*. For instance, employment laws often protect against conduct that would breach multiple human rights, but only to the extent that the conduct occurs in the workplace.²¹ Both of these legislative forms are common in Australia and elsewhere, and are now almost entirely without controversy.

A third form of human rights law is a *general* statute that seeks to articulate the human rights that are of greatest significance in a particular jurisdiction, and accords those rights special protection. Often referred to as a ‘Bill of Rights’, ‘Human Rights Act’ or ‘Charter of Human Rights’, such laws can be constitutionally entrenched or subject to parliamentary amendment in the usual way. Historically, there have been several unsuccessful attempts to enact a

20 See, eg, *Privacy Act 1988* (Cth); *Racial Discrimination Act 1975* (Cth).

21 See, eg, *Industrial Relations Act 1996* (NSW).

general human rights statute by the federal Parliament.²² In short, this form of human rights law has long generated controversy in Australia's federal legal and political landscape. In contrast, such laws are almost ubiquitous overseas,²³ and in the last decade the Australian Capital Territory and Victoria each enacted a general human rights statute.

By recommending a HRA that adopts the essential features of the 'dialogue' model,²⁴ the Report was referring to a subspecies of the general human rights statute. The dialogue model differs in operation and emphasis from some of the oldest and most well-known human rights statutes, such as the *United States Bill of Rights* or the German *Grundgesetz* (Basic Law). The term 'dialogue model' – or, to use its full name, 'constitutional dialogue model' – was first used to describe the operation of the *Canadian Charter of Rights and Freedoms*.²⁵ The word 'dialogue' denotes that each of the three arms of government has a role to play in relation to human rights protection, and that to some extent at least their roles should be integrated. The basic operation of the *Canadian Charter* was hugely influential on the development of the respective human rights statutes in the United Kingdom ('UK'), New Zealand, Victoria and the Australian Capital Territory ('ACT').²⁶ These later statutes all adopt this basic framework, but they differ in one important respect from the *Canadian Charter*. That is, while the *Canadian Charter* is part of Canada's entrenched *Constitution*, the human rights statutes in the other four jurisdictions are ordinary Acts of Parliament and are not constitutionally entrenched. Unquestionably, when the NHRCC recommended a HRA 'based on the "dialogue" model', it was in fact referring to these statutory variants of the original Canadian exemplar. So much is implicitly clear from the text accompanying the relevant recommendations, as well as the NHRCC's terms

22 The inclusion of a constitutionally-entrenched federal Bill of Rights was considered but rejected during the Constitutional Conventions of the 1890s. In 1929, a proposal for a constitutional Bill of Rights was rejected at the parliamentary committee stage. In 1944, then Attorney-General H V Evatt proposed another constitutional Bill of Rights, but this was rejected at the referendum stage. More recently, strong consideration was given on a number of occasions to introducing a general human rights statute in ordinary legislation, but all such Bills were either defeated or discontinued. Specifically, the Australian Labor Party introduced the Human Rights Bill 1973 (Cth), the Australian Bill of Rights Bill 1984 (Cth) and the Australian Bill of Rights Bill 1985 (Cth). In addition, Members of the Australian Democrats introduced the Human Rights Bill 1982 (Cth) and the Parliamentary Charter of Rights and Freedoms Bill 2001 (Cth), and the Independent Member, Dr Andrew Theophanous, introduced the Australian Bill of Rights Bill 2001 (Cth). See generally Brian Galligan and Emma Larking, 'Rights Protection: The Bill of Rights Debate and Rights Protection in Australia's States & Territories' (2007) 28 *Adelaide Law Review* 177, 182–4; Andrew Byrnes, Hilary Charlesworth and Gabrielle McKinnon, *Bills of Rights in Australia: History, Politics and Law* (UNSW Press, 2009) ch 2.

23 George Williams, *A Charter of Rights for Australia* (UNSW Press, 2007) 16–17.

24 National Human Rights Consultation Committee, above n 3, xxxiv (Recommendation 19).

25 *Canada Act 1982* (UK) c 11, sch B pt I ('*Canadian Charter*'). For a discussion of the operation of the *Canadian Charter*, see Peter W Hogg and Allison A Bushell, 'The *Charter* Dialogue Between Courts and Legislatures (Or Perhaps the *Charter of Rights* Isn't Such a Bad Thing after All)' (1997) 35 *Osgoode Hall Law Journal* 75.

26 See *Human Rights Act 1998* (UK) c 42; *New Zealand Bill of Rights Act 1990* (NZ); *Charter of Human Rights and Responsibilities Act 2006* (Vic); *Human Rights Act 2004* (ACT).

of reference, which expressly prohibited the NHRCC from proposing a ‘constitutionally entrenched bill of rights’.²⁷

Four features of the dialogue model are especially significant. They relate to: (i) the articulation of a list of protected human rights; (ii) the imposition of obligations on the executive arm of government; (iii) the interpretation of other laws compatibly with protected rights; and (iv) the enhancement of parliamentary scrutiny in respect of human rights. Each of these key features is reflected in the UK, New Zealand, Victoria and ACT statutes referred to extensively by the NHRCC, and in the Report’s proposed HRA.²⁸ These features are also central to the parallel set of recommendations that do not require the enactment of a HRA. The following Parts will compare and contrast these four key features in the two overlapping sets of recommendations.

III PROTECTED RIGHTS

Like almost all other models of general human rights statutes, the dialogue model articulates a number of human rights that are given special legal protection (‘protected rights’). As with the *Human Rights Act 1998* (UK) c 42, which is designed to incorporate the *Convention for the Protection of Human Rights and Fundamental Freedoms*²⁹ (known commonly as the *European Convention on Human Rights*), the Report recommends that an Australian HRA should give primacy to making civil and political rights legally enforceable, albeit adopting the orthodox principle of international law that distinguishes between derogable and non-derogable civil and political rights.³⁰ In the parallel set of recommendations, the NHRCC proposes that, ‘regardless of whether a Human Rights Act is introduced’, the federal government should compile an interim, and after two years, a definitive ‘list of rights for protection and promotion’.³¹ The Human Rights Framework makes no mention of this recommendation, nor does it provide any new official list of Australia’s human rights obligations.

However, in the event that the Report’s recommendations in this regard are revisited, it is necessary to bear in mind a number of matters. First, the NHRCC clearly anticipates that the protected rights in the proposed HRA would be similar, but not identical, to those in the interim/definitive list. A HRA would protect fewer rights than the interim/definitive list. While permitting rights

27 National Human Rights Consultation Committee, above n 3, 383.

28 See *ibid* xxxvii–xxxviii, 370–7 (Recommendations 26–31 and accompanying text).

29 Opened for signature 4 November 1950, 213 UNTS 222 (entered into force 3 September 1953).

30 National Human Rights Consultation Committee, above n 3, xxxv–xxxvii (Recommendations 23–5).

31 *Ibid* xxx–xxxi (Recommendation 5). It seems implicit in the Report that the ‘definitive’ list would cover a greater number of human rights than the ‘interim’ list, and both the interim and definitive lists would provide effective legal protection to a greater number of rights than the NHRCC’s proposed HRA. The key difference between the proposed HRA on one hand, and the interim and definitive lists on the other, is the legal protection afforded to economic and social rights. For this reason, and to facilitate comparison with the HRA, this article refers to the interim and definitive lists as a single compendious list (‘interim/definitive list’).

beyond those in the *International Covenant on Civil and Political Rights*³² to be protected and promoted in the HRA,³³ the Report said that economic and social rights, if included, must *not* be enforceable by the judiciary, and it omitted reference to many rights not listed in the *ICCPR*.³⁴ In contrast, the NHRCC stated that the interim list should go beyond *ICCPR* rights, and proposed a non-exhaustive list of economic and social rights that should also be included, namely:

The following rights from the *International Covenant on Economic, Social and Cultural Rights* that were most often raised during the Consultation: the right to an adequate standard of living (including food, clothing and housing); the right to the highest attainable standard of health; and the right to education.³⁵

The NHRCC insisted on several caveats in respect of the level of protection given in a HRA to rights listed in the *International Covenant on Economic, Social and Cultural Rights*,³⁶ but many of those caveats were not proposed in respect of the interim/definitive list.

The reason for this discrepancy is not immediately clear; however, it might stem from a concern about the constitutionality of the legislative protection of rights listed in the *ICESCR*. The NHRCC was avowedly anxious to ‘consider only those options [for reform] that were constitutionally watertight’.³⁷ To this end, the NHRCC sought advice from the Commonwealth Solicitor-General on the inclusion in a HRA of certain rights listed in the *ICESCR*. That advice, which the NHRCC accepted, concluded that there is ‘considerable difficulty concerning the ability of a court in the exercise of judicial power to interpret and enforce’ rights such as the right to an adequate standard of living, the right to health and the right to education, because this task may not ‘involve the application of criteria and standards that are sufficiently definite’ to pass constitutional muster.³⁸ Putting to one side whether this conclusion is constitutionally sound,³⁹

32 Opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) (*‘ICCPR’*).

33 Specifically, the NHRCC referred to: *International Covenant on Economic, Social and Cultural Rights*, opened for signature 16 December 1966, 993 UNTS 3 (entered into force 3 January 1976); *International Convention on the Elimination of All Forms of Racial Discrimination*, opened for signature 7 March 1966, 660 UNTS 195 (entered into force 4 January 1969); *Convention on the Elimination of All Forms of Discrimination against Women*, opened for signature 1 March 1980, 1249 UNTS 13 (entered into force 3 September 1981); *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, opened for signature 10 December 1984, 1465 UNTS 85 (entered into force 26 June 1987); *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990); *Convention on the Rights of Persons with Disabilities*, opened for signature 30 March 2007, [2008] ATS 12 (entered into force 3 May 2008). See National Human Rights Consultation Committee, above n 3, xxxii–xxxiii (Recommendation 13).

34 See National Human Rights Consultation Committee, above n 3, xxxiv (Recommendation 17), xxxv–xxxvii (Recommendations 22–5).

35 *Ibid* xxx (Recommendation 5). As noted above, it can be assumed that the definitive list would include *at least* these economic and social rights.

36 Opened for signature 16 December 1966, 993 UNTS 3 (entered into force 3 January 1976) (*‘ICESCR’*).

37 National Human Rights Consultation Committee, above n 3, 373.

38 Stephen Gageler and Henry Burmester, *In the Matter of Constitutional Issues Concerning a Charter of Rights: Supplementary Opinion*, Solicitor-General Opinion Nos 40, 68 (2009) [17].

it is difficult to reconcile the disinclination towards the protection of *ICESCR* rights in a HRA but the inclusion of some *ICESCR* rights in the interim/definitive list. Even if one accepts the Solicitor-General's argument, the inclusion of *ICESCR* rights in this list will inevitably involve some judicial interpretation of those rights, because the interim/definitive list will be a trigger for the operation of other important legislation.⁴⁰ This would seem inevitably to lead to the judicial interpretation of at least certain *ICESCR* rights – something that the NHRCC seemed intent on avoiding.

Secondly, the Report does not state the precise purpose, or the full legal significance, of its proposed interim/definitive list of rights. As discussed in Parts IV and V of this article, the NHRCC proposes that other legislation refer to the interim/definitive list of rights, and so certain legal consequences will arise by operation of those other laws. Presumably, part of the rationale in creating a readily identifiable, public list of core human rights is for educational purposes. The interim/definitive list seems intended to contribute to the NHRCC's goal of educating the public and acculturating the public service on the protection of human rights.⁴¹ In this sense, it might be compared with a HRA, given the well-acknowledged role that Bills of Rights can play in giving an official imprimatur to certain protected rights.⁴² However, without enshrining these rights in legislation, there is a risk that the educational and cultural impact of the interim/definitive list will be reduced. Such a conclusion is reinforced by a compelling body of research that suggests that enshrining a norm in law is critical to promoting adherence to that norm.⁴³

Thirdly, and perhaps most significantly, the Report is vague on the manner by which the interim/definitive list will be promulgated. In any general human rights statute, and certainly under the dialogue model, the protected rights would be included in the statute itself. By including the list of protected rights in legislation, Parliament would control which rights should be given legislative protection and which should not. However, in recommending that this responsibility be borne by the 'Federal Government', the Report implies that the compilation and promulgation of the interim/definitive list should be by executive fiat alone. This would be undesirable as it would lack the democratic safeguard, and legitimacy, provided by a parliamentary vote. The interim/definitive list is indispensable to the operation of the amendments proposed by the NHRCC to other existing legislation.⁴⁴ Consequently, and in

39 This is a question I have addressed elsewhere: see Edward Santow, 'Rights, Reform and the *Australian Constitution*: A Reflection on the Human Rights Consultation and Report' (Paper presented at the Centre for Comparative Constitutional Studies 21st Anniversary Conference, Melbourne, 27 November 2009).

40 See below Parts IV–V.

41 See National Human Rights Consultation Committee, above n 3, ch 6.

42 Williams, above n 23, 91–2.

43 For a good recent article that summarises the existing body of research in this area, and extends it by considering multiple ethnic groups, see Amir N Licht, 'Social Norms and the Law: Why Peoples Obey the Law' (2008) 4 *Review of Law and Economics* 715.

44 Those amendments to other legislation – and especially the *Administrative Decisions (Judicial Review) Act 1977* (Cth) and the *Acts Interpretation Act 1901* (Cth) – are discussed in Parts IV and V respectively.

light of the significant legal consequences that will flow from the composition of the interim/definitive list of rights, it seems appropriate for greater scrutiny to be placed on the composition of the list. As Lord Thomas Bingham suggested extra-judicially in the UK context, if rights are genuinely ‘fundamental’, they ought properly to be ‘directly and expressly recognised in domestic law’.⁴⁵ Even assuming that the government is guided by Australia’s international human rights law obligations, and especially those arising under treaties to which Australia is a party, the approach proposed by the NHRCC does not sit comfortably with one of the axiomatic principles of Australian law – namely, that in order to become part of domestic law, human rights principles must be expressly incorporated by legislation.⁴⁶ Consequently, it would be preferable for any interim/definitive list of human rights to be expressed in an Act of Parliament.

IV OBLIGATIONS ON THE EXECUTIVE

The Report recommends imposing obligations on the executive to act in accordance with human rights, and to consider the impact of rights in decision-making. While recognising the importance of considering human rights in administrative decision-making,⁴⁷ the Human Rights Framework does not specifically endorse any of the Report’s recommendations in this area. However, these recommendations are worthy of consideration as they are crucial to bringing about change in public service behaviour, and likely will be the subject of further consideration, at least in the review mooted for 2014.

A key feature of the dialogue model is that it imposes on the executive arm of government, and anyone acting on behalf of the executive, a limited obligation to comply with the protected rights set out in the HRA itself. The Report recommends that its proposed HRA require ‘public authorities’ – that is, the executive branch of government – to: (a) ‘act in a manner compatible with human rights (other than economic and social rights)’ and (b) ‘give proper consideration to relevant human rights (including economic and social rights) when making decisions’.⁴⁸ Moreover, if a public authority breaches an individual’s protected rights under the HRA, the individual would be able to obtain any of ‘the usual suite of remedies’ including damages,⁴⁹ but more commonly the remedies in section 75(v) of the *Australian Constitution* and the prerogative writs.

Taking requirement (a) above as an obligation on the executive to comply with the protected rights, it is striking that there is no equivalent in the Report’s parallel set of recommendations. The NHRCC considered the imposition of such

45 Lord Bingham, ‘Dignity, Fairness and Good Government: The Role of a *Human Rights Act*’ (2009) 34 *Alternative Law Journal* 74, 75.

46 *Dietrich v The Queen* (1992) 177 CLR 292, 305.

47 Australian Government, above n 4, 10.

48 National Human Rights Consultation Committee, above n 3, xxxviii (Recommendation 30).

49 *Ibid* xxxviii (Recommendation 31).

a requirement, adverting to submissions that proposed that the *Administrative Decisions (Judicial Review) Act 1977* (Cth) ('*ADJR Act*') be amended to provide that 'failure to act consistently with' protected rights would be a ground of judicial review.⁵⁰ Ultimately, the NHRCC seems to have rejected this proposal, as it was not the subject of a recommendation, nor was it discussed in the NHRCC's findings or in the Human Rights Framework.

If, as would seem the case, these parallel recommendations are intended to be implemented in the event that a HRA is not enacted, then this is a significant omission rendering the protections afforded by the parallel recommendations less rigorous than those in the proposed HRA. The primary responsibility for complying with human rights rests with the government, which is a logical consequence of the high degree of control that governments exert over the lives of the people subject to their jurisdiction. Requirement (a) is the most direct way of ensuring that the government can be held to account in exercising its broad powers in accordance with protected rights. Almost all general human rights statutes include some kind of encapsulation of requirement (a). Requirements of this nature have been ascribed special significance in non-dialogue model human rights statutes, such as the US *Bill of Rights*, as well as dialogue HRAs. For example, this requirement has been described as 'the cornerstone' of the *Human Rights Act 1998* (UK) c 42,⁵¹ and as prescribing 'a new norm of conduct for [Victorian] "public authorities"' under the *Charter of Human Rights and Responsibilities Act 2006* (Vic).⁵²

Without an express obligation on the executive to act compatibly with protected rights, there will remain a substantial lacuna in the protection of human rights in Australian law, because those subject to government authority will lack the legal means to compel the executive to respect their human rights. This is not to say that a direct obligation, as in the proposed HRA, necessarily would compel a specific result in every individual case. Individual cases brought under a HRA frequently raise issues of conflicting rights, or situations in which a human right might lawfully be derogated from or impinged. Nevertheless, a direct obligation to comply with protected rights imposes an obligation that is more difficult to circumvent than the alternative obligation in the *ADJR Act*, discussed below.

Moreover, individuals relying solely on the *ADJR Act* (as amended) would not be able to obtain financial reparation when their rights are violated, as the *ADJR Act* does not permit a court to award damages in the event that a ground of review is made out.⁵³ Consequently, individuals would be limited to a narrower set of remedies such as quashing the decision or requiring that it be remade. These limitations would leave Australia in continued breach of its international law obligations. The United Nations Human Rights Committee has stated that parties to the *ICCPR* (of which Australia is one) are required to

50 Ibid 183. The submissions referred to were by Kate Eastman and Michael Byrnes.

51 Bingham, above n 45.

52 Alistair Pound and Kylie Evans, *An Annotated Guide to the Victorian Charter of Human Rights and Responsibilities* (Lawbook, 2008) [190].

53 *Park Oh Ho v Minister of State for Immigration and Ethnic Affairs* (1989) 167 CLR 637.

make reparation to individuals whose [ICCPR] rights have been violated. Without reparation to individuals whose [ICCPR] rights have been violated, the obligation to provide an effective remedy ... is not discharged. In addition to the explicit reparation required by [articles 9(5) and 14(6)], the Committee considers that the [ICCPR] generally entails appropriate compensation. The Committee notes that, where appropriate, reparation can involve restitution, rehabilitation and measures of satisfaction, such as public apologies, public memorials, guarantees of non-repetition and changes in relevant laws and practices, as well as bringing to justice the perpetrators of human rights violations.⁵⁴

Such a situation would reflect poorly on Australia's adherence to the rule of law. One might mount a plausible argument that the absence of a means to ensure compliance with human rights arising only under international, as distinct from domestic, law would represent merely a minor infringement of the rule of law, or perhaps no infringement at all.⁵⁵ However, where certain human rights *are* recognised in Australian domestic law as legal rights, and this would be the case by the reference to the interim/definitive list in other legislation, the rule of law encourages the removal of impediments to an individual's ability to enforce those rights. With only limited capacity for enforcement under the parallel set of recommendations, there is a risk of arbitrariness in the level of respect accorded by the executive to protected rights, and any such arbitrariness is inimical to the rule of law.⁵⁶ In Australia, where the rule of law is a fundamental 'assumption' underlying its system of constitutional government,⁵⁷ it would be unfortunate to allow such a departure from the rule of law.

In contrast, requirement (b) above – obliging the executive to give proper consideration to protected rights – does have an analogue in the parallel set of recommendations. Recommendation 11 states that the *ADJR Act* should be 'amended in such a way as to make the definitive list of Australia's international human rights obligations a relevant consideration in government decision making'.⁵⁸ The *ADJR Act* codifies the common law obligation that, when exercising government power, decision-makers must take into account all

54 United Nations Human Rights Committee, *General Comment No 31 [80] The Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, UN Doc CCPR/C/21/Rev.1/Add.13 (2004) [16].

55 See, eg, Justice McHugh's dissenting judgment in *Minister of State for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273, 316, in which he said:

The ratification of a treaty is not a statement to the national community. It is, by its very nature, a statement to the international community. The people of Australia may note the commitments of Australia in international law, but, by ratifying the Convention, the Executive government does not give undertakings to its citizens or residents. The undertakings in the Convention are given to the other parties to the Convention. How, when or where those undertakings will be given force in Australia is a matter for the federal Parliament. This is a basic consequence of the fact that conventions do not have the force of law within Australia.

56 See, eg, Lord Irvine, 'The Impact of the Human Rights Act: Parliament, the Courts and the Executive' [2003] *Public Law* 308, 324; Jeffrey Jowell, 'The Rule of Law Today' in Jeffrey Jowell and Dawn Oliver (eds), *The Changing Constitution* (Oxford University Press, 5th ed, 2004) 5, 7. In the context of Australian human rights law, see Sir Gerard Brennan, 'The Constitution, Good Government and Human Rights' (Speech delivered at the Human Rights Law Resource Centre Seminar, Melbourne, 12 March 2008) 5.

57 See *Australian Communist Party v Commonwealth* (1951) 83 CLR 1, 193 (Dixon J).

58 National Human Rights Consultation Committee, above n 3, xxxii.

‘relevant considerations’.⁵⁹ Where the decision-maker fails to take a relevant consideration into account in the decision-making process, the decision or conduct will be unlawful. However, the force of this requirement is diluted somewhat in that taking a right into account does not imply that the decision-maker is *bound* to act in a way that protects that right.

A decision-maker bound by the *ADJR Act* is required to give the relevant matter ‘proper, genuine and realistic consideration’,⁶⁰ but this procedural requirement is limited in a number of ways. First, the decision-maker must ultimately reach a decision based on *all* relevant considerations, and the *ADJR Act* does not state how much weight it should give to human rights considerations. The fact that legislation usually requires, or at least permits, decision-makers to take into account multiple considerations (some of which might conflict with the enjoyment of certain human rights) dilutes the significance that the decision-maker is required to attach to the human rights consideration. Moreover, the ACT and Victorian human rights statutes both contain a procedural obligation to consider human rights in administrative decision-making.⁶¹ According to Julie Debeljak, the corresponding obligation in those statutes, which *expressly* requires ‘proper’ consideration, is more onerous than what is required under the *ADJR Act*. She argues that the obligation under the Victorian statute ‘may translate into human rights being a *dominant* relevant consideration and may allow courts to assess whether sufficient weight is given to the relevant human rights consideration’.⁶² This remains to be seen, but one might safely conclude that while the additional obligation in the *ADJR Act* would alter the decision-making process, it would do so in a modest, incremental way.

There is another important in-built limitation in the reach of Recommendation 11, which flows from the recommendation being cast as an amendment to the *ADJR Act*. While the *ADJR Act* is the main statute governing judicial review of Commonwealth government action, and its application is broad, covering ‘the vast bulk of Commonwealth bureaucratic decision-making so far as that is directed specifically at individuals’,⁶³ its reach is not total. It only applies to action on the part of the Commonwealth that meets its jurisdictional and justiciability limitations, which are relatively onerous. The *ADJR Act* does not apply to certain administrative decisions, such as those made in the exercise

59 *ADJR Act* ss 5(2)(b), 6(2)(b). At common law, see, eg, *R v Australian Broadcasting Tribunal; Ex parte Hardiman* (1980) 144 CLR 13.

60 *Hindi v Minister for Immigration and Ethnic Affairs* (1988) 20 FCR 1, 13 (Shephard J). A detailed analysis of this requirement, and alternative formulations for its expression, is provided in Robin Creyke and John McMillan, *Control of Government Action* (LexisNexis Butterworths, 2nd ed, 2009) 669–70 [9.4.20].

61 See *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 38(1); *Human Rights Act 2004* (ACT) s 40B(1)(b).

62 Julie Debeljak, ‘Human Rights Responsibilities of Public Authorities under the *Charter of Rights*’ (Presentation delivered at the Law Institute of Victoria Charter of Rights Conference, Melbourne, 18 May 2007) 13 (emphasis added).

63 Mark Aronson, Bruce Dyer and Matthew Groves, *Judicial Review of Administrative Action* (Thomson Reuters, 4th ed, 2009) 53.

of the prerogative power. Instead such decisions are usually reviewable under section 75 of the *Australian Constitution* or under a specific statutory scheme – neither of which would be covered by this recommendation of the NHRCC.

This means, for example, that even if the *ADJR Act* already had been amended in the way proposed by the NHRCC, the Australian government would *not* have been required to take into account protected rights in determining how to act in a situation like the so-called *MV Tampa* affair of 2001, because those actions were held to have involved the exercise of prerogative, as distinct from statutory, power.⁶⁴ The fact that certain Commonwealth legislation is expressly excluded from the ambit of the *ADJR Act* is perhaps even more significant. One such law is the *Migration Act 1958* (Cth), under which refugee and immigration detention decisions are made. Given the deleterious impact that those decisions can have on individuals' human rights, and the strong concern expressed in the Report that such decisions should be made with greater sensitivity for the human rights of those affected,⁶⁵ it is unfortunate that Recommendation 11 would have no direct bearing on such decision-making.

V INTERPRETING LAWS THROUGH A HUMAN RIGHTS FILTER

The most striking feature of the dialogue model is its requirement for other laws to be interpreted consistently with protected rights. Where a law can sensibly be interpreted compatibly with protected rights, the HRA will mandate this interpretation. However, where a court finds a law to be irreconcilably inconsistent with a protected right or rights, the impugned law would stand, and the court would have no power to invalidate it. In other words, unlike where a court determines the constitutionality of legislation, a dialogue model HRA does not give the judiciary a *Marbury v Madison*-type power to render inoperable a law that is incompatible with human rights.⁶⁶ This is one of the most noteworthy features of the dialogue model because it allows Parliament consciously to derogate from protecting human rights in particular legal contexts, thereby privileging the legislature's views on questions of human rights above those of the executive and judiciary. As Stephen Gardbaum has observed, the dialogue model 'decouple[s] judicial review from judicial supremacy by empowering legislatures to have the final word'.⁶⁷

The Report's proposed HRA would

contain an interpretative provision ... that requires federal legislation to be interpreted in a way that is compatible with the human rights expressed in the Act and consistent with parliament's purpose in enacting the legislation. The

64 See *Ruddock v Vadarlis* (2001) 110 FCR 491.

65 National Human Rights Consultation Committee, above n 3, 119–120.

66 *Marbury v Madison*, 5 US (1 Cranch) 137 (1803).

67 Stephen Gardbaum, 'The New Commonwealth Model of Constitutionalism' (2001) 49 *American Journal of Comparative Law* 707, 709.

interpretative provision should not apply in relation to economic, social and cultural rights.⁶⁸

This recommendation reflects the NHRCC's preference that the interpretive provision in its HRA should be made explicitly subject to any overriding intent of Parliament. In this way, the provision would mirror the respective interpretive provisions in the Victorian and ACT statutes,⁶⁹ and it would differ from the corresponding UK provision, which makes no direct reference to parliamentary intent as a limit on the power of a court to use the interpretive provision to ensure that other legislation operates compatibly with protected rights.⁷⁰ The reason for this choice lay in the Solicitor-General's advice that the UK courts had a tendency to use section 3 of the *Human Rights Act 1998* (UK) c 42 to 'redraft legislation' in a manner that would be incompatible with judicial power under Chapter III of the *Australian Constitution*, whereas the Victorian and ACT provisions do not suffer from this defect.⁷¹

In the parallel set of recommendations, the Report proposes that

in the absence of a federal Human Rights Act, the *Acts Interpretation Act 1901* (Cth) be amended to require that, as far as it is possible to do so consistently with the legislation's purpose, all federal legislation is to be interpreted consistently with the interim list of rights and, later, the definitive list of Australia's human rights obligations.⁷²

The operation of the corresponding Recommendations 28 and 12 above seems exactly the same. In other words, the NHRCC proposes that the *Acts Interpretation Act 1901* (Cth) ('*Acts Interpretation Act*') be amended to include an interpretive provision that would be functionally identical to the interpretive provision in its proposed HRA: both would require other laws to be interpreted consistently with protected rights, subject to what is logically 'possible' and the 'purpose' of the law in question.

What distinguishes these two recommendations is the scope of human rights protection provided in the HRA and non-HRA regimes. That is, the interpretive provision in the HRA would operate in respect of the HRA-protected rights, whereas the corresponding *Acts Interpretation Act* provision would operate with reference to the rights in the proposed interim/definitive list. As noted above, the proposed HRA would protect fewer human rights than would be set out in the interim/definitive list, with the latter expressly to include some *ICESCR* rights that are not judicially enforceable under the HRA – such as the right to an

68 National Human Rights Consultation Committee, above n 3, xxxvii (Recommendation 28).

69 See *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 32; *Human Rights Act 2004* (ACT) s 30.

70 See *Human Rights Act 1998* (UK) c 42, s 3(1).

71 Gageler and Burmester, above n 38, [13]. This advice was accepted by the NHRCC: see National Human Rights Consultation Committee, above n 3, 372–3. The recent decision of *R v Momcilovic* [2010] VSCA 50 highlights the subtle, but important, differences in the judicial approach adopted with reference to the Victorian interpretive provision, when compared with the UK courts' approach to the corresponding provision in the *Human Rights Act 1998* (UK) c 42.

72 National Human Rights Consultation Committee, above n 3, xxxii (Recommendation 12).

adequate standard of living, to the highest attainable standard of health, and to education.⁷³

The reason for this discrepancy is difficult to discern. The NHRCC provided two reasons for excluding *ICESCR* rights from being judicially enforceable via an interpretation provision in its proposed HRA. First, it was concerned that this would involve the courts in questions of resource allocation and in complex matters of federal–state relations – both being matters on which courts have limited expertise or indeed constitutional competence.⁷⁴ Secondly, as discussed earlier, the NHRCC accepted the Solicitor-General’s view that some, if not all, *ICESCR* rights ‘would be likely to be regarded by the High Court as lacking “sufficient specificity” to support the making of a law under the external affairs power’ and that certain *ICESCR* rights would not contain ‘criteria or standards that are sufficiently definite’ for the exercise of judicial power.⁷⁵

While evaluating the correctness of the Solicitor-General’s constitutional advice is beyond the scope of this article,⁷⁶ it is nevertheless perplexing that these considerations compelled the NHRCC to the conclusion that the interpretive provision in its proposed HRA could not operate by reference to any *ICESCR* rights, but an identical provision in the *Acts Interpretation Act* could, indeed *should*, do just this. If one accepts the NHRCC’s argument that, for constitutional and political reasons, a Chapter III court cannot use this interpretive provision in the HRA to interpret laws compatibly with *ICESCR* rights, then this same argument must surely apply equally if the identical provision were to appear elsewhere – be it the *Acts Interpretation Act* or any other statute.

In any event, neither of these recommendations in the Report are taken up in the Human Rights Framework. This might stem from an aversion to the incorporation of such a recognisable feature of a HRA, but if that was the government’s motivation, the government has not said so explicitly. Instead, the Framework simply states the government’s policy not to give the courts any ‘additional powers to strike down or amend legislation’ in this area.⁷⁷ Given that the NHRCC was at pains to comply with this objective in formulating its own recommendations, this statement by the government seems something of a non-sequitur, and insufficient justification for avoiding this sort of reform.

A Interpretation and Declarations of Incompatibility

As a corollary to the limited interpretive power given to the courts under the proposed HRA, the Report recommends that, where the High Court determines that a law is incompatible with a protected right or rights, it should be able to make a ‘declaration of incompatibility’, which would notify the government of

⁷³ Ibid xxx–xxxi (Recommendation 5), xxxv (Recommendation 22).

⁷⁴ Ibid 365–6.

⁷⁵ Gageler and Burmester, above n 38, [9], [17]. See also discussion in *ibid* 303, 316–17, 365.

⁷⁶ For further discussion of this question see Santow, above n 39; Katharine G Young, ‘The Minimum Core of Economic and Social Rights: A Concept in Search of Content’ (2008) 33 *Yale Journal of International Law* 113.

⁷⁷ Australian Government, above n 4, 10.

the incompatibility and require a public response.⁷⁸ There are equivalent provisions in each of the UK, Victorian and ACT statutes.⁷⁹ By contrast, the *New Zealand Bill of Rights Act 1990* (NZ) does not grant the courts a general power along these lines.⁸⁰ However, the New Zealand courts have started to develop a common law power to issue such declarations,⁸¹ although legislation probably would be needed to require the executive or legislative branches of government to respond in the manner prescribed in Victoria and the ACT.

The parallel set of recommendations does not propose a power to issue declarations of incompatibility in relation to judicial interpretations made under the amended *Acts Interpretation Act*. In the absence of a HRA, it is difficult to predict whether the Australian courts would develop their own form of declaration, as per the developing approach in New Zealand. However, the beauty of the mechanism in the proposed HRA is that it prevents the executive and legislative branches of government from simply ignoring a court's finding of incompatibility, and instead, requires the responsible Minister to respond and publicly justify the law in question, even if there is no intention to amend or repeal the law. Such institutional dialogue can still occur in the absence of a declaration of incompatibility mechanism, but without this prompt it is much more likely to be ad hoc.

VI ENHANCED PARLIAMENTARY SCRUTINY

While many other reforms proposed by the NHRCC were not endorsed by the Human Rights Framework, the government did express enthusiasm for revamping the parliamentary system for scrutinising draft legislation.⁸² As discussed below, these changes draw heavily on the Report's recommendations, but their introduction in a more limited way, and especially in the absence of many core features of the NHRCC's proposed human rights regime, would be likely to deprive this reform of much of its impact.

One of the objectives of the dialogue model, which was generally applauded in the NHRC process, is that it contains measures to improve how Parliament considers the human rights impact of the laws it creates, with a view to drafting new legislation that is more responsive to human rights.⁸³ Primarily, a HRA seeks to achieve this aim by requiring Parliament to scrutinise any draft law

78 National Human Rights Consultation Committee, above n 3, xxxvii (Recommendation 29).

79 *Human Rights Act 1998* (UK) c 42, s 4; *Charter of Human Rights and Responsibilities Act 2006* (Vic) ss 36–7; *Human Rights Act 2004* (ACT) ss 32–3.

80 A more limited power is granted to the Human Rights Review Tribunal in relation to the making of declarations in respect of equality rights under *New Zealand Bill of Rights Act 1990* (NZ) s 19.

81 See *R v Poumako* [2000] 2 NZLR 695, 717 [95] (Thomas J); *Moonen v Film & Literature Board of Review* [2000] 2 NZLR 9.

82 Australian Government, above n 4, 8.

83 See, eg, Byrnes, Charlesworth and McKinnon, above n 22, 165; Paul Rishworth et al, *The New Zealand Bill of Rights* (Oxford University Press, 2003) 26.

against the HRA-protected rights.⁸⁴ The dialogue model thus emphasises the pre-legislative scrutiny of Bills by the legislature itself, thereby providing a self-correcting, prophylactic mechanism in relation to the drafting of new laws that might impinge unnecessarily on human rights. Moreover, where a new law is intended to abrogate a right or rights set out in the HRA, the responsible Minister is required to publicly justify this approach, the objective being to stimulate debate and democratic engagement with the human rights impact of new legislation.

Under the various iterations of the dialogue model, a new or existing committee of Parliament is given primary responsibility for this enhanced process of legislative scrutiny. The exemplar that found favour in the Report was the UK's Joint Committee on Human Rights ('JCHR'), a committee that draws its membership from the Houses of Commons and Lords, as well as obtaining such independent expertise as it requires.⁸⁵ Both sets of parallel recommendations rely on the establishment of an Australian JCHR, which would also draw its members from both Houses of the federal Parliament and would presumably operate in a manner similar to the UK committee of the same name.⁸⁶ This is also the model favoured by the Human Rights Framework.

In relation to a HRA, the NHRCC made two further recommendations:

Recommendation 26

The Committee recommends that any federal Human Rights Act require statements of compatibility to be tabled for all Bills introduced into the Federal Parliament, all Bills before the third reading (so as to allow scrutiny of amendments) and legislative instruments as defined by the *Legislative Instruments Act 2003*.

Recommendation 27

The Committee recommends that any federal Human Rights Act empower the proposed Joint Committee on Human Rights to review all Bills and the relevant legislative instruments for compliance with the human rights expressed in the Act.

In the parallel set of recommendations, Recommendations 6 and 7 seem functionally identical to Recommendations 26 and 27 above. This means that, in relation to parliamentary scrutiny, the parallel sets of recommendations are essentially the same as the HRA recommendations, though, of course, the proposed JCHR would be able to scrutinise Bills of Parliament against the interim/definitive list of rights, with its broader scope regarding economic and social rights, than under the narrower HRA.⁸⁷ The Human Rights Framework

⁸⁴ See, eg, *Charter of Rights and Responsibilities Act 2006* (Vic) s 30.

⁸⁵ The inaugural legal adviser to the UK's JCHR was the highly-respected David Feldman (now Rouse Ball Professor of English Law at the University of Cambridge). He was followed in this position by the highly credentialled barrister, Murray Hunt.

⁸⁶ See National Human Rights Consultation Committee, above n 3, xxxi (Recommendation 7), 174.

⁸⁷ One curious anomaly is worth noting: the Report clearly intended that, in relation to enhanced parliamentary scrutiny, it intended that the parallel sets of recommendations were not alternatives; rather that both should be followed: *ibid* 370. This would mean that, in relation to the rights not covered by the HRA but included in the interim/definitive list, there might be a different means for reconciling competing rights and interests, or no guidance at all.

seems implicitly to support Recommendations 6 and 7, with the government committing to the establishment of a JCHR that ‘will scrutinise Bills and legislative instruments for consistency with the seven core UN human rights treaties to which Australia is a party’, and to introducing a requirement that new Bills of Parliament and subordinate legislation be accompanied by a statement outlining their compatibility with the rights set out in these treaties.⁸⁸

In light of this, one must ask two related questions. To what extent would these proposals for a JCHR differ from the status quo? And can this enhanced form of parliamentary scrutiny be successfully achieved in the absence of a HRA?

Parliamentary committees already consider the human rights impact of draft legislation, albeit in a largely ad hoc manner. Federally, the most specific requirement is Standing Order 24(1)(a), which requires the Senate Standing Committee for the Scrutiny of Bills to report on, inter alia, whether proposed laws:

- (i) trespass unduly on personal rights and liberties;
- (ii) make rights, liberties or obligations unduly dependent upon insufficiently defined administrative powers;
- (iii) make rights, liberties or obligations unduly dependent upon non-reviewable decisions⁸⁹

There are a number of problems with the current mode of human rights scrutiny within Parliament. First, the Committee is not guided as to which human rights should be considered in this process.⁹⁰ Secondly, neither in Standing Order 24(1)(a) nor elsewhere is there a detailed framework to guide how Bills should be scrutinised against human rights principles. Research has shown that, in the absence of such a framework, Parliaments sometimes give only scant attention to the human rights impact of even draconian laws.⁹¹ Moreover, as human rights are rarely absolute, it is important to have a carefully-constructed, transparent and principled means of reconciling competing human rights, and of dealing with

88 Australian Government, above n 4, 8. At 4, the Framework makes clear that the seven treaties are the same as those seen as core by the NHRCC, namely: *ICCPR*; *ICESCR*; *International Convention on the Elimination of All Forms of Racial Discrimination*, opened for signature 7 March 1966, 660 UNTS 195, 5 ILM 352 (entered into force 4 January 1969); *Convention on the Elimination of All Forms of Discrimination against Women*, opened for signature 1 March 1980, 1249 UNTS 13, 19 ILM 33 (entered into force 3 September 1981); *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, opened for signature 10 December 1984, 1465 UNTS 85 (entered into force 26 June 1987); *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990); *Convention on the Rights of Persons with Disabilities*, opened for signature 30 March 2007, [2008] ATS 12 (entered into force 3 May 2008).

89 Commonwealth of Australia, Standing Order of the Senate O 24(1)(a).

90 This point was made in submissions by George Williams and myself to the House Standing Committee on Procedure’s *Inquiry into the Effectiveness of the House Committees*, available at Parliament of Australia House of Representatives House Standing Committee on Procedure, *Standing Committee on Procedure: Inquiry into the Effectiveness of House Committees: Submissions* (12 February 2010) Parliament of Australia <www.aph.gov.au/house/committee/proc/committees2/subs.htm>. As at writing, the Committee’s report for this Inquiry has yet to be tabled in Parliament.

91 See, eg, Simon Evans and Carolyn Evans, ‘Australian Parliaments and the Protection of Human Rights’ (2007) 47 *Papers on Parliament* 17.

derogation from human rights in favour of other interests. Well-drafted anti-terrorism laws, for instance, need to strike an appropriate balance between protecting the rights of an accused terrorist, and protecting Australia from terrorist attack.

The Report's recommendations, apparently endorsed in the Human Rights Framework, would remedy the first of these problems, because the rights under consideration would be listed either in the HRA or in some readily discernible form, such as the interim/definitive list. However, the Report provides little detail on how the proposed JCHR should carry out its functions, nor on the basis for drafting and considering ministerial statements of compatibility that accompany new Bills. On the other hand, if the enhanced parliamentary scrutiny mechanisms were introduced in the context of a HRA, much of this guidance would flow naturally from key provisions of a dialogue model HRA, which in turn is based on key principles of international law. The proposal for a JCHR in the Human Rights Framework is very brief – explained in less than a page – and so we can assume that the government intends to adopt the approach sketched in the Report, and summarised in Recommendations 6 and 7.

Two relevant features of the proposed HRA, which are not present in the corresponding parallel recommendation, are especially important. First, the NHRCC's proposed HRA imports the distinction between derogable and non-derogable rights that exists in the *ICCPR*.⁹² This distinction means that certain human rights are absolute in the sense that it is never permissible to derogate from them, whereas other rights may be subject to derogation in certain circumstances. Secondly, when considering the impact of a law on derogable rights, the Report recommends that Parliament should subject itself to the same limitations that are set out in the Victorian and ACT human rights statutes.⁹³ The relevant Victorian provision, which is substantively the same as the corresponding ACT provision,⁹⁴ states:

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

- (a) the nature of the right; and
- (b) the importance of the purpose of the limitation; and
- (c) the nature and extent of the limitation; and
- (d) the relationship between the limitation and its purpose; and
- (e) any less restrictive means reasonably available to achieve the purpose that the limitation seeks to achieve.⁹⁵

The Canadian, UK and New Zealand human rights statutes all possess their own limitation provisions, although these are expressed in more peremptory

92 National Human Rights Consultation Committee, above n 3, 366–70, xxxv–xxxvii (Recommendations 24–5).

93 Ibid xxxv (Recommendation 23).

94 *Human Rights Act 2004* (ACT) s 28. In fact, both the Victorian and ACT provisions borrow from the wording in *Constitution of the Republic of South Africa 1996 Act* (South Africa) s 36.

95 *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 7(2).

terms, and tend to focus on the limitation of that which is reasonable in a free and democratic society.⁹⁶ However, judicial interpretation of these provisions tends to import the further limitations set out in sections 7(2)(a)–(e) in any event.⁹⁷ All of these limitations find their basis in international law.⁹⁸

If the recommendations for enhanced parliamentary scrutiny are introduced without a HRA, this would necessitate further considerations. Neither the Report nor the Human Rights Framework proposes any equivalent or corresponding principles that should be applied by the JCHR, Ministers or the Parliament more generally when considering conflicting rights or the need to derogate from certain human rights. If the JCHR carries out its scrutiny function without reference to the relevant international law principles, then a critical weakness in the existing system of parliamentary scrutiny will have been transposed onto the new system. Hence, it would be necessary to set out, in the law governing the mechanism for enhanced parliamentary scrutiny, the same principles regarding derogation and limitation that would apply in the HRA. Moreover, as these limitation provisions apply equally to the courts' proposed new interpretive power,⁹⁹ a failure to provide such guidance would undesirably increase the discretion of the judiciary in this area. As a result, if the government were later to follow the Report's recommendation to expand the interpretive power of courts, it would also need to provide for corresponding derogation and limitation principles in the *Acts Interpretation Act*.

However, even if this were to occur, the question remains whether such a system would be undermined by the absence of the broader rubric of a HRA, and especially by the inability of the courts to express a view on laws that might be incompatible with protected rights. I believe that enhanced parliamentary scrutiny without a HRA would be inferior, but I will deal first with some counter-arguments.¹⁰⁰

Some have argued that enhanced parliamentary scrutiny without a HRA – at least, without giving the judiciary a role – would be preferable because it would '[free] human rights discourse from the narrow confines of the judicial approach ... leading to a broader moral and political human rights discourse' among the executive and legislature,¹⁰¹ and it would be more in keeping with Australia's traditional approach to human rights, which privileges the role of Parliament in such questions.¹⁰² In addition, opponents of enhanced parliamentary scrutiny *under a HRA* argue that the other HRA features, and especially the prospect of judicial review, can make the parliamentary process highly legalistic, such that

96 See *Canadian Charter* s 1; *New Zealand Bill of Rights Act 1990* (NZ) s 5. The UK statute does not possess a limitation clause of this nature as such, but such limitations are built into certain of the protected rights: see *Human Rights Act 1998* (UK) c 42, sch 1.

97 See, eg, *R v Oakes* [1986] 1 SCR 103, 138–9, as discussed in Hogg and Bushell, above n 25, 84–5.

98 See, eg, *Universal Declaration* art 29(2); *ICCPR* art 22(2).

99 See discussion of the proposed interpretive power in the HRA and *Acts Interpretation Act 1901* (Cth) in Part V above.

100 See, eg, Campbell and Barry, above n 19; Brandis on behalf of the federal Opposition, above n 7.

101 Campbell and Barry, above n 19, 11.

102 *Ibid* 14.

Ministers and the proposed JCHR would attempt to second-guess the judgments of a court on questions of human rights, rather than bringing to bear their own analysis of the issues.¹⁰³ Tom Campbell and Nicholas Barry suggest that the problem is most acute where a court rules that a law is incompatible with a particular right or rights, and that ‘in practice’ this will lead to a ‘a significant transfer of power to the unelected judiciary’ because

to ignore a declaration of incompatibility seems out of keeping with the spirit of the [dialogue] model, and will lead to an impression that the government is arrogant, out-of-touch, and cavalier when it comes to human rights issues.¹⁰⁴

With respect, the claimed benefits of this alternative approach, and the concerns expressed regarding enhanced parliamentary review under a HRA, seem over-stated. The Australian Parliament has long been unafraid to substitute its own view – even on questions that have a human rights or moral dimension – for those of the courts. For instance, Parliament responded to the High Court decisions in *Mabo v Queensland [No 2]*¹⁰⁵ and *Wik Peoples v Queensland*,¹⁰⁶ establishing land rights for Indigenous people, by passing new legislation that set parameters around and limited these judicially-articulated rights.¹⁰⁷ Moreover, where an Australian court interprets a provision in a way that Parliament does not like, it is not uncommon for Parliament to amend the provision in question, and to include in the explanatory material, and sometimes even in the amending Act itself, a note that expressly evinces Parliament’s intention to overcome the judicial decision in question.

The fact that Parliament, and especially the party forming government, is likely to face pressure to amend a law that a court finds incompatible with human rights is no bad thing. It has been suggested that where Parliament repeals or makes any amendment in response to a judicial declaration of incompatibility, this constitutes undesirable deference by the legislature to the judiciary.¹⁰⁸ It is true that, if a Parliament’s response were always immediately to repeal the impugned law, this might suggest that judicial decisions exert an intolerable pressure that the Parliament has no real capacity to resist. However, this has not been the experience in HRA jurisdictions. While the UK Parliament has responded to all declarations of incompatibility issued in the decade since the *Human Rights Act 1998* (UK) c 42 was introduced, the response has often been nuanced. Take the decision in *A v Secretary of State for the Home Department* [2004] UKHL 56, concerning legislation under which terrorist suspects were detained without trial. The UK Parliament responded to the judicial declaration

103 See, eg, James Allan, ‘The Victorian *Charter of Human Rights and Responsibilities*: Exegesis and Criticism’ (2006) 30 *Melbourne University Law Review* 906, 920.

104 Campbell and Barry, above n 19, 6. See also James Allan, ‘What’s Wrong about a Statutory Bill of Rights?’ in Julian Leaser and Ryan Haddrick (eds), *Don’t Leave Us with the Bill: The Case against an Australian Bill of Rights* (2009) 83, 92–3.

105 (1992) 175 CLR 1.

106 (1996) 187 CLR 1.

107 The key legislation being the *Native Title Act 1993* (Cth), which preceded *Wik*, and the amending Acts of 1998 and 2007: *Native Title Amendment Act 1998* (Cth); *Native Title Amendment Act 2007* (Cth).

108 See, eg, Allan, above n 103, 83, 93.

of incompatibility in this case not by repealing the impugned detention provisions outright, but by replacing them with a 'control order' regime, which was designed to achieve the original counter-terrorist objective without impinging so far on protected rights.¹⁰⁹

Similarly, in the period 1982–97, 80 per cent of cases in which a law was invalidated under the *Canadian Charter*, with its strong-form power of judicial review, were followed by a legislative response. Among those legislative responses, 85 per cent involved an amendment to the law in question – usually in a way that was consistent with the impugned law's original objective.¹¹⁰ These UK and Canadian experiences suggest that Parliaments are not cowed into submission when a court finds a law to be incompatible with protected rights, but rather that in a large number of situations the legislature will press ahead with its legislative program, but do so in a way that is less likely to infringe those rights. This seems a desirable result.

The UK JCHR is undoubtedly at least a moderately influential parliamentary committee, and some of its reports have induced changes in draft legislation.¹¹¹ But the crucial question here is whether the JCHR would have been more or less influential if it existed independently of a HRA framework. Obviously, it is impossible to do an accurate counter-factual analysis, because we cannot know whether Parliament would have been as responsive to a similar committee, or even simply to similar arguments put by others, in the absence of a HRA.

However, this seems unlikely for three reasons. First, parliamentary debate in the UK, as in Australia, has long involved consideration of human rights. However, as Lord Anthony Lester has suggested, the establishment of the JCHR within the *Human Rights Act 1998* (UK) c 42 rubric has made 'human rights scrutiny ... systematic, influencing the preparation of legislation in Whitehall and the legislative process itself'.¹¹² Secondly, while noting that the UK's JCHR has so far given insufficient attention to this issue, Michael Tolley argues that the JCHR's work in considering the government's response to declarations of incompatibility is 'perhaps ... its greatest contribution to the new human rights regime'.¹¹³ This stands to reason because the JCHR is in a privileged position to monitor and contribute to the legislature's part of the human rights dialogue on

109 See *Prevention of Terrorism Act 2005* (UK) c 2.

110 Hogg and Bushell, above n 25, 75, 97–101.

111 Perhaps the most comprehensive UK report, carried out by Francesca Klug, disclosed a relatively strong recognition among parliamentarians of the work of the JCHR, as indicated by the number of substantive references to its work in parliamentary debate. The report could detect only a modest influence (3 per cent of the Bills under consideration) in terms of inducing amendments to Bills. See Francesca Klug, 'Report on the Working Practices of the JCHR' in Joint Committee on Human Rights, *Twenty-Third Report*, House of Lords Paper No 1575, House of Commons Paper No 239, Session 2005–06 (2006) [9.5]–[9.8]. See also Michael C Tolley, 'Parliamentary Scrutiny of Rights in the United Kingdom: Assessing the Work of the Joint Committee on Human Rights' (2009) 44 *Australian Journal of Political Science* 41, 52–3.

112 Lord Anthony Lester, 'The *Human Rights Act 1998*: Five Years On' [2004] *European Human Rights Law Review* 258, 262. A similar point is made in David Feldman, 'The Impact of Human Rights on the UK Legislative Process' (2004) 25 *Statute Law Review* 91, 94.

113 Tolley, above n 111, 49.

the most contentious issues. Such work would be impossible in the absence of a HRA because the courts would not have a role in declaring laws incompatible with protected rights. Thirdly, the prospect of judicial review is itself important because it contributes to ‘open government’, by making the legislature aware that its views on human rights compatibility are subject to a form of intermediate review by the judiciary, an imperfect but nevertheless independent arbiter, with expertise in the interpretation of laws and rights.¹¹⁴ The rationale behind enhanced parliamentary scrutiny is not simply to delegate this task to parliamentarians, who would then go about their business behind closed doors. Instead, it is designed to promote accountability in respect of laws that impact on human rights, with the government required publicly to justify those aspects of its legislative program that touch on human rights, or to amend that program accordingly.¹¹⁵

None of the above is intended to suggest that enhanced parliamentary scrutiny, when carried out under a HRA, is perfect or even necessarily a substantial improvement on the status quo. One potential problem with *any* system of parliamentary scrutiny is that it can lead to a veneer of enhanced parliamentary scrutiny, with the government asserting, without explaining its reasons, that a Bill or policy is compatible with protected rights,¹¹⁶ or worse still, paying lip service to the human rights analysis they are supposed to undertake without giving it any genuine consideration. It can lead also to the inverse of this problem, with governments overly fearful of judicial rebuke on human rights issues and thus ‘Charter-proofing’ new laws, to use Janet Hiebert’s term, in a way that unnecessarily inhibits the legislature.¹¹⁷ Another problem is that, even with appropriate guidance, there is no guarantee that Ministers or a parliamentary committee will come to the ‘correct’ conclusion when seeking to reconcile competing rights and interests. For instance, as Grant Huscroft has persuasively argued,¹¹⁸ the Attorney-General of New Zealand’s view that compulsory health-warning labels on alcoholic beverages would infringe the freedom of expression of beverage producers was premised on an idiosyncratic understanding of that freedom, and one that gave scant regard to the compelling interest of promoting public health. A further problem, as Debeljak has shown, is that it can be difficult

114 See, eg, Feldman, above n 112, 112.

115 Julie Debeljak, ‘Parliamentary Sovereignty and Dialogue under the Victorian *Charter of Human Rights and Responsibilities*: Drawing the Line between Judicial Interpretation and Judicial Law-Making’ (2007) 33 *Monash University Law Review* 9, 66.

116 Feldman, above n 112, 105.

117 Janet L Hiebert, *Charter Conflicts: What is Parliament’s Role?* (McGill-Queen’s University Press, 2002) 224. Writing in the Canadian context, Hiebert also observed that this is a risk that is not always realised. In the UK context, see Janet L Hiebert, ‘Parliamentary Bills of Rights: An Alternative Model?’ (2006) 69 *Modern Law Review* 7, 23–4.

118 Grant Huscroft, ‘Is the Defeat of Health Warnings a Victory for Human Rights? The Attorney-General and Pre-Legislative Scrutiny for Consistency with the *New Zealand Bill of Rights*’ (2003) 14 *Public Law Review* 109.

for the judiciary and the legislature each to strike the appropriate balance between deference and forcefulness in the dialogue process.¹¹⁹

Such problems can arise under either a HRA rubric, or a system of enhanced parliamentary scrutiny introduced in the absence of a HRA. While there is no perfect answer to these problems, there is evidence to suggest that in a well-run system, where the scrutiny mechanism is well-understood and accepted, and where the scrutiny process is transparent and governed by clear rules, enhanced parliamentary scrutiny can have a positive impact on law-making by better tailoring laws to respect human rights.¹²⁰ As I have argued above, the problems here identified are likely to be less acute under a HRA rubric, as compared with one that operates without a HRA framework.

VII CONCLUSION

The NHRCC's creation of parallel sets of recommendations represents an understandable compromise, because it gives the Australian government an opportunity to introduce some or all of the key features of the dialogue model without risking the political divisions that seem likely to impede any attempt to introduce a HRA. In April 2010, the government indicated that, in the short term at least, it does not intend to introduce a HRA, nor to pursue the full set of parallel recommendations discussed in this article. Indeed, the only one of the four human rights reforms discussed in this article that it intends to adopt immediately is the recommendation to enhance pre-legislative scrutiny of human rights via a new joint parliamentary committee. If that turns out to be the totality of Australia's human right law reform, then the NHRC will have led to exceptionally modest reform. On the other hand, if the government were to abandon a HRA, but nevertheless to pursue the remaining recommendations in the parallel set, this would bring meaningful change to Australia's human rights regime. However, I have argued that many things would be lost by accepting even that compromise.

First, there are subtle, yet significant, differences between the corresponding elements of the parallel sets of recommendations. For example, it is likely that the interim/definitive list of human rights would be broader, in that it would contain certain economic and social rights excluded from the HRA, and yet its precise legal status remains unclear. This anomaly is thrown into relief by the Report recommending that the courts be prevented from exercising an interpretive power with respect to economic and social rights *under the HRA*, but conversely recommending that the courts should be given precisely this power under the *Acts Interpretation Act* in respect of rights on the interim/definitive list. Moreover, the Report implies that the interim/definitive list of rights should be promulgated by executive fiat, which would deprive the list of the greater

¹¹⁹ See Debeljak, above n 115.

¹²⁰ See, eg, Hogg and Bushell, above n 25, 99–105; Klug, above n 111.

democratic legitimacy and publicity that would flow from legislative incorporation.

Secondly, many of the parallel recommendations represent considerably muted versions of the corresponding HRA provisions. For example, whereas the proposed HRA would require the executive to act compatibly with protected rights, the parallel recommendations would require only that protected rights be taken into account (but not necessarily adhered to) in the decision-making process. Similarly, the absence of guidance on how human rights may be limited or derogated from denies the three arms of government access to the considerable body of international and comparative law on this subject, leaving them too much latitude in statutory drafting and interpretation. This feature assumes added significance given the government's present focus on measures to improve the drafting and consideration of draft Bills of Parliament.

Finally, while a HRA would provide a broad-ranging legislative structure for human rights in Australia, the parallel set of recommendations and the Human Rights Framework are both far more piecemeal and each contains significant gaps. By way of illustration, the Report's proposed *ADJR Act* amendments would have no impact on the considerable amount of government decision-making that occurs outside that Act's jurisdiction, and the Human Rights Framework does not even contemplate substantive law reform in this area. If the Framework represents the end of the road for human rights reform in Australia, or if the government were to continue to pick and choose which features of the HRA to introduce, the prospect of Australia achieving an effective and comprehensive human rights regime remains remote.