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A HUMAN RIGHTS ACT FOR NEW SOUTH WALES?

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1. INTRODUCTION

1.1 I am honoured by the Australian Catholic University's invitation to deliver this annual lecture in memory of the late Honourable Barry O'Keefe AM QC.

1.2 Professor Patrick Keyzer, the Dean of the Thomas More Law School has acknowledged the presence of distinguished guests who join us today. However, I would like to personally acknowledge the presence of a number of people here today. Firstly, I warmly welcome Mrs Jan O'Keefe, the late Barry O'Keefe's wife who contributed to the public service of her husband. I acknowledge the presence of the Chancellor of the University, the Honourable Martin Daubney AM KC who post his retirement from the Queensland Supreme Court has been active in protecting and advocating for human rights.

1.3 Finally and most importantly, I acknowledge and congratulate the students of the University's Thomas More Law School who are here this evening. You are the future of the administration of justice in Australia. I commend to each of you the life and career of Barry O'Keefe as an exemplar of what each of us can do to serve the community in our role as lawyers.

1.4 Much has been said and written about the Honourable Barry O'Keefe and his contribution to public service. As has been previously observed by Barry's son Philip, and Barry's friend Kevin McCann, his life was a testament to service and resolve.

1.5 We all know about Barry O'Keefe's public service as a Justice of the Supreme Court of NSW, as the Commissioner of the NSW Independent Commission Against Corruption, and then his second period of service on the Supreme Court of NSW sitting in the Common Law Division and in the NSW Court of Criminal Appeal as well as from time to time, the NSW Court of Appeal. In each of these roles, he served with integrity and compassion.

1.6 Barry also served as President of the NSW Bar Association from 1990 until 1991 and on the Executive of the Law Council of Australia from 1992 to 1993. As someone who has recently served as President of both bodies, I have been privy to the enormous contribution which Barry made in these roles to the protection of the rights of members of the community on matters such as the right to a fair trial and freedom from arbitrary arrest or detention. In these roles he was not just an advocate for the legal profession, but also was an advocate for the protection of the human rights of Australian citizens which brings me to the topic of today's memorial lecture.

2. A NATIONAL BILL OF RIGHTS

2.1 Australia sits as an anomaly among comparable democratic countries in not adopting a bill of rights at a national level, whether as a creature of statute or enshrined in the Commonwealth *Constitution*.[1]

2.2 There has long been a debate about whether Australia should adopt a national bill of rights. That debate spans as far back, on one view, to 1944 when the then Labor government sought to amend the *Constitution* via a referendum to restrict the Commonwealth's legislative powers for a period of 5 years after the second world war. These restrictions included an express power that "Neither the Commonwealth nor a State may make any law for abridging the freedom of

[1] Rosalind Dixon, "An Australian (partial) Bill of Rights" (2016) 14 *International Journal of Constitutional Law* 80.

speech or of expression" (proposed s 60A(2) of the *Constitution*).[2] The referendum failed.

2.3 More recently, in 2008, the then Labor government under Kevin Rudd established the National Human Rights Consultation Committee to inquire into human rights protection in Australia. The following year, the Committee recommended Australia to adopt a federal Human Rights Act that was based on a "dialogue" model.[3] The government rejected this proposal, seemingly on the basis that it may "divide", rather than "unite", the community and create "an approach that is divisive or…an atmosphere of uncertainty or suspicion in the community".[4] In fact, I would contend it has been the absence of a federal Human Rights Act that has caught division in the Australian community when it comes to matters of religious freedom, freedom of expression and the equal treatment of all persons regardless of their sex, sexual orientation and race.

2.4 The debate about the need for a national bill of rights continues today.[5] Just yesterday, the President of the Australian Human Rights Commission launched its proposed model for a national human rights act.[6] It is hoped that the current Attorney-General Mark Dreyfus KC will take this historic report to Cabinet and seek its endorsement to pursue the recommendation of the Australian Human Rights Commission. Whilst I am a strong supporter of a Voice to Parliament, it is my respectful view that a National Human Rights Act would have a stronger impact on the lives of First Nations People and indeed all Australians. However, I am troubled that there appears to be little political will or energy in the Commonwealth Parliament to legislate for, or constitutionally enshrine, a National Bill of Rights.

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[2] The proposed amending Act was the Alteration (Post-War Reconstruction and Democratic Rights) Bill 1944 (Cth).
[3] National Human Rights Consultation, "National Human Rights Consultation Committee Report" (September 2009) – see Recommendations 18 and 19.
[4] Commonwealth of Australia, "Australia's Human Rights Framework" (April 2010), 1.
[5] Rosalind Dixon, "A Minimalist Charter of Rights for Australia: the UK or Canada as a Model?" (2009) 37 *Federal Law Review* 335.
[6] Australian Human Rights Commission, "A Human Rights Act for Australia" (2023).

3. A BILL OF RIGHTS IN THE STATE AND TERRITORIES

3.1 There has been relatively more political energy at the state and territory level, or in at least some states and territories, to enact a bill of rights.

3.2 Indeed, Brian Galligan and Emma Larking have lamented that an advantage of the federal system is that it "provides multiple centres of government" and "multiple entry points for activists and citizens to influence policy" such that if one arena is "uncongenial or their entry blocked, people and groups can shift their attention to another sphere of government".[7]

3.3 This rings true in the human rights context. Unlike the Commonwealth, the Australian Capital Territory was the first jurisdiction in Australia to enact a bill of rights in the form of the *Human Rights Act 2004* (ACT), with Victoria following suit in 2016 with the *Charter of Human Rights and Responsibilities Act 2006* (VIC) (**Victorian Charter**). Queensland has also joined too with its *Human Rights Act 2019* (QLD) coming into effect from 1 January 2020.

<u>New South Wales</u>

3.4 New South Wales does not have an equivalent bill of rights and, similar to the Commonwealth level, there is degree of political inertia for any reform on this issue.

3.5 In 1999, because of the work of the visionary NSW Attorney-General Jeff Shaw QC, the Standing Committee on Law and Justice in New South Wales undertook an inquiry into and reported on whether it was appropriate and in the public interest to enact a legislative bill of rights in the state. However, the Standing Committee recommended that it was not in the public interest for the New South Wales government to enact a statutory bill of rights. This was

[7] 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, 184.

because of its concern that a national bill would "change…the respective roles of the Judiciary and the Parliament" and "undermine the legitimacy of both institutions, in return for a largely uncertain impact on the protection of human rights".[8] Instead, the Standing Committee recommended that a parliamentary Scrutiny of Legislation Committee be established to carry out a pre-legislative review process to Bills to ensure that Bills do not unduly trespass on rights and liberties.[9]

3.6 In 2002, the *Legislation Review Amendment Act 2002* (NSW) was passed to expand the role of the Regulation Review Committee (which was re-named as the "Legislation Review Committee"). Its role included considering any Bills introduced into Parliament and reporting to both Houses of Parliament as to whether any such Bill (by express words or otherwise) – *inter alia* – trespassed unduly on personal rights or liberties, or made rights, liberties or obligations unduly dependent upon insufficiently defined administrative powers or non-reviewable decisions.[10] The Legislation Review Committee still holds that function today – ultimately, its role is to advise the NSW Parliament regarding human rights but its advisory nature is limited and there is a lack of transparency as to how it conducts its work. For example, it cannot question the policy or legislative intent of legislation, conduct hearings or receive public submissions.[11]

3.7 In 2006, as a consequence of extraordinary anti-terrorism security legislation and in light of the Cronulla race riots in 2005, Bob Debus – the then NSW Labor Attorney-General – announced his support for a charter of rights based on that in the Australian Capital Territory. It was envisaged that the charter would allow courts to consider whether any New South Wales laws infringed basic human freedoms. The proposal also extended to guaranteeing freedoms such as

[8] Standing Committee on Law and Justice, "A NSW Bill of Rights" (Report 17, October 2001), [7.3].
[9] Standing Committee on Law and Justice, "A NSW Bill of Rights" (Report 17, October 2001), [8.47].
[10] *Legislation Review Act 1987* (NSW) s 8A.
[11] Joseph Cho, "NSW Parliament's Oversight of Human Rights in the First Year of the COVID-19 Pandemic" (2021) 47 *Alternative Law Journal* 67, 69.

the right to a fair trial, the freedom of assembly, property rights, and freedom from torture and racial discrimination.[12]

3.8 In 2007, Attorney-General John Hatzistergos who had succeeded Bob Debus rejected a charter of rights for New South Wales.[13] Regrettably, he departed from the path taken by his predecessors Jeff Shaw QC and Bob Debus who were both respected Attorneys-General. Mr Hatzistergos asserted that a charter would move the debate about human rights from the political into the judicial arena, thereby threatening judicial independence. He also asserted that a charter would convert community values to "legal battlefields".[14] As I will expand upon later, this view is misconceived and ought be rejected.

3.9 That was more than a decade ago. It is now time for New South Wales to enact a legislative bill of rights. It should be a priority of the NSW Parliament after the State Election on 25 March 2023. And that is what I want to focus on today.

4. NEW SOUTH WALES SHOULD ADOPT A BILL OF RIGHTS

4.1 We are now living in unsettled times. Some may call it a "brave new world", a world where it has become ever more so important for our human rights and freedoms to be protected and not eroded. Putting aside the broader international stage such as the war in Ukraine, the "brave new world" we now inhabit is home to numerous human rights issues arising from – to just a name a few – the COVID-19 pandemic, political protests, deaths in custody, refugees and asylum seekers, LGBTQI+ rights, and law and order politics. Enacting a bill of

[12] Jonathan Pearlman, "Charter of Rights plan to be put to Cabinet" (20 March 2006) *Sydney Morning Herald*, <https://www.smh.com.au/national/charter-of-rights-plan-to-be-put-to-cabinet-20060320-gdn6vd.html>.
[13] Jonathan Pearlman, "Attorney-General Rejects Charter of Rights for NSW" (18 April 2007), *Sydney Morning Herald*, <https://www.smh.com.au/national/attorney-general-rejects-charter-of-rights-for-nsw-20070418-gdpxrx.html>.
[14] Alex Bosell, "A-G rejects 'dangerous' Rights Charter" (11 April 2008), *Australian Financial Review* <https://www.afr.com/companies/professional-services/a-g-rejects-dangerous-rights-charter-20080411-jctvt>.

rights in New South Wales is crucial to our society upholding core democratic values of dignity, equality, fairness and freedom.[15]

4.2 That is the reason why the time is right for a legislative bill of rights in New South Wales. I will first briefly outline what is a "bill of rights", and then touch upon some of the arguments for and against a bill and, in that context, draw on the experiences of other states and territories. I will conclude by focusing on some examples of cases in Victoria and Queensland where their human rights legislation have had a meaningful impact on protecting human rights.

5. SO, WHAT IS A BILL OF RIGHTS?

5.1 A bill of rights is an instrument that "set[s] out a broad set of 'fundamental' rights and grant these an overarching status within domestic law".[16] The strength of any bill of rights depends on:

(a) its form, such as whether it is in the form of legislation or constitutionally enshrined;

(b) its substantive scope of rights protection;

(c) the status of human rights as compared to other legal rights and interests;

(d) the power and responsibilities of the three arms of government; and

(e) the extent to which the instrument itself is entrenched against any repeal or amendment.

[15] Pauline Wright and Stephen Kiem SC, Law Council of Australia, "No Time like the Present to Protect our Human Rights" (Speech, National Press Club, Canberra, 18 November 2020).
[16] David Erdos, "The Rudd Government's Rejection of an Australian Bill of Rights: a Stunted Case of Aversive Constitutionalism?" (2012) 65 *Parliamentary Affairs* 359, 361.

5.2 The United States and Canada, for example, each have a constitutionally entrenched bill of rights, being respectively the Bill of Rights (the first 10 amendments to the United States Constitution) and the *Canadian Charter of Rights and Freedoms*. The United Kingdom has a statutory bill of rights (the *Human Rights Act 1998* (UK)) whereas in New Zealand, the *New Zealand Bill of Rights Act 1990* (NZ) is a statute that forms part of its uncodified constitution.

5.3 New South Wales has a written constitution, the *Constitution Act 1902* (NSW), which provides for the powers of the legislature, the executive and the judiciary. There is, therefore, theoretically a choice between enacting a legislative bill of rights or a constitutional bill of rights in New South Wales.

5.4 In this connection, the act of enshrining a bill of rights into the Constitution could signal the fundamental importance of human rights in society. This is because a constitutional bill of rights in New South Wales might at least give the perception of it being a "higher law"; the constitution being a document that is perceived to have "a higher status than ordinary legislation and which cannot be altered without undertaking a particularly arduous process".[17]

5.5 However, that is not in reality accurate. Unlike the Commonwealth *Constitution* which is "rigid" by reason that any amendment requires a referendum under s 128, the New South Wales Constitution is relatively flexible. Subject to the Commonwealth *Constitution*, the States have full legislative power under s 2 of the *Australia Act 1986* (Cth) and *Australia Act 1986* (UK). Only a limited category of State laws relating to the "constitution, powers or procedure" of the State Parliament can be the subject of a "manner or form" requirement and therefore, subject to some level of entrenchment. The manner or form requirements may require a referendum of the people or approval by a special majority of members of Parliament.

[17] Anne Twomey, "The Dilemmas of Drafting a Constitution for a New State" (2013) 28 *Australasian Parliamentary Review* 17, 18.

5.6 Laws concerning human rights, however, are not laws relating to the "constitution, powers or procedure" of the State Parliament and are, thus, not subject to any "manner or form" requirements.[18] As such, any bill of rights in the New South Wales Constitution can be easily amended, modified or repealed.

5.7 With the relative ease of amending and modifying the New South Wales Constitution, any argument that a constitutionally enshrined bill of rights will be fixed in time and not able to be amended easily to reflect a changing and contemporary society falls away.

5.8 In my view, it is sufficient to simply legislate for a bill of rights in New South Wales, as opposed to enshrining it in the state Constitution. The reason for this is a practical one. The issue of human rights is vexed. It is an issue that is politically charged and can be heavily politicised. It also has the capacity to garner strong views from proponents and opponents. Politically, it may be easier to enact new legislation instead of "amending" the Constitution which, to a section of the public, may understandably appear as drastic and significant and, in turn, may be employed as a means to resist against introducing any bill of rights. We have seen this with community reaction to the current debate about the Voice to Parliament.

6. SO WHY SHOULD NEW SOUTH WALES HAVE A BILL OF RIGHTS?

6.1 There is a myriad of reasons why New South Wales should have a legislative bill of rights.

[18] Anne Twomey, "The Dilemmas of Drafting a Constitution for a New State" (2013) 28 *Australasian Parliamentary Review* 17, 19.

Patchy framework of protections

6.2 The chief reason is that Australia presently protects human rights in a "piecemeal" fashion, "drawn together from a range of disparate sources".[19] The Commonwealth *Constitution* protects some human rights through its express guarantees and implied rights,[20] including:

(a) the right to vote;[21]

(b) acquisition of property on just terms;[22]

(c) trial by jury for indictable offences against a Commonwealth law;[23]

(d) the freedom of interstate trade, commerce and intercourse within the Commonwealth;[24]

(e) the freedom of religion;[25] and

(f) the implied freedom of political communication.[26]

6.3 These rights are few and far in between and arguably inadequate in today's society. For example, the implied freedom of political communication is understood not to be a "personal right or freedom" but merely as a freedom "affecting communication on the subjects of politics and government more

[19] Paul T Babie, "Australia's "Bill of Rights"" (2021) 97 *University of Detroit Mercy Law Review* 187, 189.
[20] For a summary, see: Chief Justice Robert French, "Protecting Human Rights without a Bill of Rights" (Speech, John Marshall Law School, Chicago, 26 January 2010).
[21] Commonwealth *Constitution* s 41; *Rowe v Electoral Commissioner* (2010) 243 CLR 1.
[22] Commonwealth *Constitution* s 51(xxxi).
[23] Commonwealth *Constitution* s 80.
[24] Commonwealth *Constitution* s 92.
[25] Commonwealth *Constitution* s 116.
[26] *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106; *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520; *McCloy v New South Wales* (2015) 257 CLR 178; *LibertyWorks Inc v Commonwealth of Australia* [2021] HCA 18.

generally and as effecting a restriction on legislative power which burdens communications on those subjects".[27]

6.4 Moreover, short of a referendum to insert, amend or repeal a right in the Commonwealth *Constitution* (s 128) or any "new" implication of a right or freedom by the courts, the *Constitution* is relatively inert and largely immune from responding to the changing social values and norms of modern society. This is so even if the *Constitution* were to be construed as a "living tree".[28] It follows that the rights provided for in the *Constitution* are largely fixed in time.

6.5 There is also a suite of legislation at the Commonwealth level and in New South Wales that seek to protect specific human rights. For example, at the Commonwealth level, there are laws governing privacy laws[29] and protecting rights relating to work conditions and fair wages.[30] In New South Wales, there is legislation that proscribes discrimination on the basis of age,[31] disability,[32] race[33] and sex,[34] as well as legislation that governs privacy[35] and information.[36]

6.6 Additionally, the common law protects various civil and political rights. For example, client legal privilege, the right to a fair trial,[37] procedural fairness,[38] and the presumption of innocence.[39] The common law has also developed principles of statutory interpretation that are designed to protect fundamental rights. One such principle is the principle of legality, which provides that unless Parliament makes unmistakably clear its intention to abrogate a fundamental

[27] *Unions NSW v State of New South Wales* (2013) 252 CLR 530 at [52]; *McCloy v New South Wales* (2015) 257 CLR 178 at [30]; *Brown v The State of Tasmania* (2017) 261 CLR 328 at [90].
[28] See Leslie Zines, "Dead Hands or Living Tree? Stability and Change in Constitutional Law" (2004) 25 *Adelaide Law Review* 3.
[29] *Privacy Act 1988* (Cth).
[30] *Fair Work Act 2009* (Cth).
[31] *Age Discrimination Act 2004* (NSW).
[32] *Disability Discrimination Act 1992* (NSW).
[33] *Racial Discrimination Act 1975* (NSW).
[34] *Sex Discrimination Act 1984* (NSW).
[35] *Privacy and Personal Information Act 1998* (NSW).
[36] *Freedom of Information Act 1989* (NSW).
[37] *Dietrich v The Queen* (1992) 177 CLR 292.
[38] *Kiao v West* (1985) 159 CLR 550; *Minister for Immigration and Border Protection v WZARH* (2015) 256 CLR 326.
[39] *Carr v Western Australia* (2007) 232 CLR 138; *Lee v The Queen* (2014) 253 CLR 455.

freedom, a court will not construe a statute as having that operation.[40] Another is that, in the case of ambiguity, a court should favour a construction of a statute that accords with the obligations of Australia under an international treaty.[41]

6.7 The issue, however, is that whilst the "common law is a living system of law, reacting to new events and new ideas, and so capable of providing the citizens…with a system of practical justice relevant to the times in which they live",[42] it nonetheless develops slowly and incrementally. The constant changes in current modern society move at a much faster pace than the development of the common law. *A fortiori*, at times, it can move even faster than the period of time it takes for a matter to finalise from commencing a proceeding to it being determined by way of judgment. Furthermore, judicial decisions often have the outcome of protecting human rights, but human rights concepts have played no role because "protection of individual interests is…merely a consequence of applying constitutional principles that are intended to protect other systemic or public interests".[43]

6.8 Indeed, judges are limited in the development of the common law – they can only determine the specific factual and legal issues in the matter brought before the courts.[44] Even so, judges are sometimes reluctant to invoke legal principles to protect human rights – an example of this is the reluctance to introduce a tort for invasion of privacy.[45]

6.9 As such, the haphazard patchwork of rights sourced from the Commonwealth *Constitution*, various pieces of legislation and the common law does not confer sufficient protection of human rights. Some fundamental rights enjoy a degree

[40] *Re Bolton; Ex parte Beane* (1987) 162 CLR 514; *Coco v The Queen* (1994) 179 CLR 427.
[41] *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1.
[42] *Kleinwort Benson Ltd v Lincoln City Council* [1999] 2 AC 349 at 377 (Lord Goff of Chieveley).
[43] George Williams, "The High Court, the Constitution and Human Rights" (2015) 21 *Australian Journal of Human Rights* 1, 6-7.
[44] Justice Kirby, "A Bill of Rights for Australia – but do we need it?" (1997) 21 *Commonwealth Law Bulletin* 276, 281.
[45] *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd* (2001) 208 CLR 199; *Grosse v Purvis* [2003] QDC 151; *Doe v Australian Broadcasting Corporation* [2007] VCC 281; *Giller v Procopets* (2008) 24 VR 1 cf. *Glencore International AG v Commissioner of Taxation* (2019) 265 CLR 646.

of protection, whilst others are not protected at all. The patchwork leaves gaps. A bill of rights in New South Wales will make clear which rights and freedoms are protected. This is essential to ensuring that New South Wales legislation uphold the fundamental and basic values of dignity, equality and fairness.

6.10 In this respect, it is interesting to note that in the 6 month community consultation that preceded the introduction of the Victorian Charter, 84% of participants wanted to see the law changed to better protect their human rights. This reflected their aspiration to live in a society that strove for the values that they held dear, such as equality, justice and a "fair go" for all.[46] Although this data is from 2005, I see no reason why there would not be a similar sentiment in the New South Wales community today.

Access

6.11 A second reason why New South Wales should enact a legislative bill of rights is that it will help ameliorate the present ambiguity as a result of the different sources of law providing for human rights protection.

6.12 A bill of rights will allow members of the public to readily identify and understand their rights and freedoms, as opposed to having to penetrate through the morass of case law, Commonwealth and State legislation, and the Commonwealth *Constitution*. There is also the added overlay of international law. Put another way, an ordinary member of the public should be able to pick up a document (bill of rights) and get an understanding of his, her or its rights and freedoms. This will help improve access to justice, such as to any remedies where a right has been infringed.

6.13 Relatedly, a bill of rights will help empower some disenfranchised or disadvantaged sections of the community. Even today, there are still many

[46] George Williams, "The Victorian Charter of Human Rights and Responsibilities: Origin and Scope" (2007) 30 *Melbourne University Law Review* 880.

groups in the community whose rights continue to be denied. These include First Nations people, as well as the handicapped, ethnic minorities, children, women and LGBQTI+ people. A bill of rights would "raise the consciousness of the rights" of these individuals in Australia.[47]

Human Rights Culture

6.14 The third reason relates to the socio-legal role a bill of rights has. As opposed to merely being a legal document open for interpretation, a bill of rights can prompt social change and promote dialogue amongst the Australian community, and between the community and Parliament or public authorities, on human rights values and principles.[48] Human rights law aim to "modify human interaction in such a way as to simultaneously impose obligations on public authorities and provide members of the community with human rights protections".[49]

6.15 A bill of rights highlights the fundamental importance of human rights – it would be the New South Wales Parliament's clear statement of the fundamental rights and freedoms to which the state is committed.[50] It can help inculcate a human rights culture in the Australian psyche and be an "extremely powerful tool for furthering…human rights dialogue and education".[51] The absence of a bill of rights makes it difficult to create a "strong rights-respecting culture" and has "weakened the position of rights compared to other interests" and other public policy goals.[52]

6.16 In this respect, the idea of a community based upon a "culture of values and human right" was a common theme in the community consultations in Victoria,

[47] Justice Kirby, "A Bill of Rights for Australia – but do we need it?" (1997) 21 *Commonwealth Law Bulletin* 276, 281.
[48] Russell Solomon, "A Socio-Legal Lens on the Victorian Charter" (2013) 38 *Alternative Law Journal* 152, 155.
[49] Anita Mackay, "Operationalising Human Rights Law in Australia: Establishing a Human Rights Culture in the New Canberra Prison an Transforming the Culture of Victoria Police" (2014) 31 *Law in Context* 261, 293.
[50] Australian Human Rights Commission, "National Human Rights Consultation" (Submissions, June 2009), [230].
[51] Australian Human Rights Commission, "National Human Rights Consultation" (Submissions, June 2009), [232]
[52] George Williams and Lisa Burton, "Australia's Exclusive Parliamentary Model of Rights Protection" (2013) 34 *Statute Law Review* 58,

as was the community desire to not just have a new law but "something that could help build a society in which government, Parliament, the courts and the people themselves have an understanding of, and respect for, basic rights and responsibilities".[53] Similarly, the Australian Capital Territory Consultative Committee's report opined about the importance of a human rights culture as an objective of the *Human Rights Act 2004* (ACT):[54]

> While a bill of rights has legal significance, its primary purpose should be to encourage the development of a human rights-respecting culture in ACT public life and in the community generally.

The human rights and freedoms to be protected

6.17 A bill of rights in New South Wales should, as a minimum, protect rights and freedoms including those in relation to:

(a) right to equality, equal protection of the law without discrimination, and equal protection against discrimination;

(b) protection from torture, or cruel, inhuman or degrading treatment or punishment;

(c) freedom from forced labour and slavery;

(d) freedom of movement, peaceful assembly and association;

(e) freedom of thought, conscience, religion and belief;

(f) right to take part in public life;

[53] George Williams, "The Victorian Charter of Human Rights and Responsibilities: Origin and Scope" (2007) 30 *Melbourne University Law Review* 880.

[54] ACT Bill of Rights Consultative Committee, "Towards an ACT Human Rights Act" (2003), 41.

(g) right to privacy (I interpolate to note that the Commonwealth Attorney-General has recently recommended introducing a statutory tort for serious invasions of privacy);[55]

(h) cultural rights generally and that of Aboriginal and Torres Strait Islanders peoples;

(i) right to liberty and security and, if liberty is deprived, protection from inhumane treatment;

(j) freedom from arbitrary arrest or detention,

(k) rights in civil and criminal proceedings such as a right to fair and public hearing;

(l) right to education, access to health services and life; and

(m) LGBTQI+ issues.

6.18 Critics argue that any bill of rights that seeks to enumerate a list of rights will be vague, amorphous and emotively appealing.[56] This, however, should not impede the introduction of a bill of rights. As with any piece of statute, there can be community engagement and public submissions in order to help define and give colour to the contents of the law including that of human rights. Moreover, vague or amorphous concepts are commonplace in the law, whether it is in the context of contractual, statutory or constitutional interpretation. Meaning can be attributed by way of common law or statutory interpretative devices, or legislative definitions, and can be adapted as time goes by.

[55] Commonwealth Attorney-General's Department, "Privacy Act Review" (Report 2022), 180.
[56] James Allan, "Why Australia does not have, and does not need, a National Bill of Rights" (2012) 24 *Journal of Constitutional History* 35, 39.

Recent examples where human rights have been impacted

6.19 There have been various recent issues in New South Wales that have touched upon human rights and freedoms and, which a bill of rights may have had some role in shaping the outcome.

6.20 *First*, on 20 January 2023, Australia missed another deadline to implement the *Optional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment* (**OPCAT**). Australia ratified OPCAT in 2017 under the Turnbull government. By 20 January 2023, all States and Territories were required to have implemented oversight regimes or national preventive mechanisms to monitor human rights protections in police cells, jails, mental health facilities and other institutions where people are in detention.

6.21 However, New South Wales has failed to implement these regimes/mechanisms due to an apparent funding issue with the Commonwealth.[57] This disgraceful failure follows the NSW Government's obstinate refusal in October 2022 to permit the United Nations Subcommittee on Prevention of Torture access to state-run places of detention,[58] this constituting a breach by Australia of its obligations under OPCAT.[59]

6.22 In my view, had New South Wales enacted a bill of rights, things may have been different. A bill of rights might have focused the government and public's minds as to the importance of the right to liberty, as well as protection from

[57] Matthew Doran, "Australia Misses Another Deadline to Implement International Anti-torture Treaty" (20 January 2023), *ABC News* <https://www.abc.net.au/news/2023-01-20/australia-misses-deadline-to-implement-anti-torture-agreement/101874602#:~:text=Australia%20signed%20up%20to%20a,Queensland%20have%20missed%20the%20deadline>.

[58] Erin Handley, "UN Torture Prevention Body Suspends Australia trip citing "clear breach" of OPCAT Obligations" (24 October 2022), *ABC News* <https://www.abc.net.au/news/2022-10-24/opcat-un-torture-prevention-suspends-australia-trip-clear-breach/101569880>.

[59] United Nations, "UN torture prevention body suspends visit to Australia citing lack of co-operation" (23 October 2022) <https://www.ohchr.org/en/press-releases/2022/10/un-torture-prevention-body-suspends-visit-australia-citing-lack-co-operation>.

torture, or cruel, inhuman or degrading treatment or punishment. Indeed, a report on the 5 year review of the *Human Rights Act 2004* (ACT) found that:[60]

> [o]ne of the clearest effects of the [Act] has been to improve the quality of law-making in the Territory, to ensure that human rights concerns are given due consideration in the farming of new legislation and policy.

6.23 *Secondly*, the New South Wales government's response to the ever-evolving COVID-19 pandemic triggered a litany of legislation,[61] regulations and Public Health Orders,[62] and amendments to those instruments. These instruments imposed significant incursions into private life that were "socially transformative".[63] These included mandatory lockdowns,[64] mandatory quarantine,[65] closure of non-essential premises,[66] restrictions on public gatherings,[67] mandatory self-isolation,[68] stay at home requirements,[69] restricted access to aged care facilities and health settings,[70] and wearing face coverings.[71]

6.24 Naturally, the unprecedented nature of the pandemic required "quick, decisive and effective action"[72] to be taken and the appropriateness of the measures is not a matter that I wish to opine on. However, quite clearly these measures affected, for example, freedom of movement and association, which have been the subject of litigation.[73]

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[60] The ACT Human Rights Act Research Project and the Australian National University, "A Report to the ACT Department of Justice and Community Safety" (Report, May 2009), 6.

[61] For example, *COVID-19 Legislation Amendment (Emergency Measures) Act 2020*, *COVID-19 Legislation Amendment (Emergency Measures—Treasurer) Act 2020*.

[62] For example, *Public Health (COVID-19 General) Order 2021*, *Public Health (COVID-19 Self-Isolation) Order 2020*, *Public Health (COVID-19 Public Events) Order 2020*, *Public Health (COVID-19 Mandatory Face Coverings) Order 2021*.

[63] Joseph Cho, "NSW Parliament's Oversight of Human Rights in the First Year of the COVID-19 Pandemic" (2021) 47 *Alternative Law Journal* 67, 71.

[64] For example, *Public Health (COVID-19 Northern Beaches) Order 2020* (NSW).

[65] For example, *Public Health (COVID-19 Air Transportation Quarantine) Order 2020* (NSW).

[66] For example, *Public Health (COVID-19 Gatherings) Order (No 2) 2020* (NSW).

[67] *Public Health (COVID-19 Restrictions on Gathering and Movement) Order 2020* (NSW).

[68] For example, *Public Health (COVID-19 Self-Isolation) Order 2020* (NSW).

[69] *Public Health (COVID-19 Restrictions on Gathering and Movement) Order 2020* (NSW).

[70] *Public Health (COVID-19 Residential Aged Care Facilities) Order 2020* (NSW).

[71] For example, *Public Health (COVID-19 Mandatory Face Coverings) Order 2021* (NSW).

[72] Kylie Evans and Nicholas Petrie, "COVID-19 and the Australian Human Rights Acts" (2020) 45 *Alternative Law Journal* 150, 175.

[73] For example, *Palmer v The State of Western Australia* (2021) 272 CLR 505 (s 92 of the Constitution);

6.25 Moreover, during the pandemic, New South Wales Police arrested and fined six protestors at a Black Lives Matter protest in July 2020.[74] Potential issues that may have arisen were: (i) whether that impinged on the freedom of expression, peaceful assembly and association and the right to take part in public life; and (ii) whether the detention increased a person's risk of contracting the Covid-19 virus so as to constitute a breach of the requirement for humane treatment while liberty is being deprived or even the protection against cruel, inhuman or degrading treatment.[75] More broadly, New South Wales Police issued tens of thousands of fines during the pandemic, of which Revenue NSW subsequently cancelled over 33,000 fines on the basis that the fines were invalid.[76]

6.26 It would have been interesting to see what impact a legislative bill of rights in New South Wales would have had if one existed during the height of the pandemic and, specifically, whether any of the measures imposed might have been pared back to be less intrusive on rights and freedoms.

6.27 *Thirdly*, both the current New South Wales government[77] and the opposition[78] have publicly supported measures to ban conversation therapy in the state. No doubt this will be a live issue if and when a ban is imposed.

6.28 Every person should have the right to freedom of thought, equal protection against discrimination, and not be treated in a cruel, inhuman or degrading way, or subjected to medical or scientific treatment without the person's free and

[74] David Marin-Guzman, "Black Lives Matter Protest Called off Following Arrests" (28 July 2020), *Australian Financial Review* <https://www.afr.com/policy/health-and-education/black-lives-matter-protest-called-off-following-arrests-20200728-p55g67>.
[75] Kylie Evans and Nicholas Petrie, "COVID-19 and the Australian Human Rights Acts" (2020) 45 *Alternative Law Journal* 150, 177.
[76] Maryanne Taouk, "Revenue NSW cancels more than 33,000 COVID-19 fines after Supreme Court" (29 November 2022) *ABC News* <https://www.abc.net.au/news/2022-11-29/revenue-nsw-cancels-33-121-covid-19-fines/101710632>.
[77] Lucy Cormack, "'Bring to an End Harmful Practices': Premier to back Ban on Gay Conversion Practices" (17 February 2023) *Sydney Morning Herald* <https://www.smh.com.au/politics/nsw/bring-to-an-end-harmful-practices-premier-to-back-ban-on-gay-conversion-practices-20230216-p5cl3c.html>.
[78] Mary Ward, "Minns back Ban on 'dangerous and damaging' Gay Conversion Therapy" (11 February 2023) *Sydney Morning Herald* <https://www.smh.com.au/politics/nsw/minns-backs-ban-on-dangerous-and-damaging-gay-conversion-therapy-20230211-p5cjqd.html>.

informed consent. The use of conversion therapy perpetuates the offensive notion that LGBTQI+ people require some need for fixing by methods such as aversion therapy, forced medication, beatings, lobotomy, castration and clitoridectomy.[79]

6.29 However, there is likely to be debate as to how any ban is to be balanced against religious organisations wishing to exercise their freedom of thought, religion and belief in respect of LGBTQI+ issues. In this respect, Premier Perrottet and Opposition Leader Minns have assured religious leaders that a ban on gay conversion therapy will not infringe the right of religious figures to pray and preach on matters pertaining to sexuality.[80]

6.30 The Australian Capital Territory has passed the *Sexuality and Gender Identity Conversion Practices Act 2020* (ACT) (which took effect from 4 March 2021) criminalising sexuality or gender identity conversion therapy on a "protected person" (being a child or person with impaired decision-making ability in relation to a matter relating to the person's health or welfare" (s 8 and Dictionary)). The legislation operates in tandem with s 10 of the *Human Rights Act 2004* (ACT) which protects a person from treatment in a cruel, inhuman or degrading way.

6.31 In August 2020, Queensland also criminalised "conversion therapy"[81] carried out by a person who is health service provider.[82] This ban is in addition to s 17 of the *Human Rights Act 2019* (QLD) which protects a person from treatment in a cruel, inhuman or degrading way. Unlike the Australian Capital Territory,

[79] Christoffer Aguilar, UNSW Human Rights Institute, "What the Queensland and ACT bans on Conversion Therapy mean for LGBTQI+ Australians" <https://www.humanrights.unsw.edu.au/news/what-queensland-and-act-bans-conversion-therapy-mean-lgbtqi-australians>.
[80] Michael Coziol, "'We won't ban preaching': Perrottet puts caveats on gay conversion law" (23 February 2023) *Sydney Morning Herald* <https://www.smh.com.au/politics/nsw/we-won-t-ban-preaching-perrottet-puts-caveats-on-gay-conversion-law-20230222-p5cmtc.html>.
[81] As defined in *Public Health Act 2005* (QLD) s 213F.
[82] *Public Health Act 2005* (QLD) s 213H.

Queensland only proscribes such conduct by a medical practice only – the ban does not extend to religious organisations.

7. THE MODEL FOR A HUMAN RIGHTS BILL THAT SHOULD BE ADOPTED IN NEW SOUTH WALES

7.1 I now would like to turn to the model that New South Wales should adopt and discuss this by reference to what is currently enacted in Victoria and Queensland. I also want to, in this context, also explain why some of the concerns raised by opponents to a bill of rights can be dispelled.

7.2 New South Wales should adopt a "dialogue" model like that of its Victorian, Queensland and Australian Capital Territory counterparts, which – unlike for example the *Canadian Charter of Rights and Freedoms* – is not constitutionally entrenched but simply a statutory bill of rights.[83] Broadly, under a "dialogue" model, each of the three branches of government have a role to play in protecting and promoting human rights. There is dialogue between the three branches of government concerning human rights. However, Parliament has the final or ultimate say on the validity of legislation vis-à-vis human rights, thereby maintaining Parliamentary sovereignty or supremacy.[84]

7.3 There are some key features that are similar or the same across the three different regimes.

Compatibility with human rights

7.4 *First*, like Victoria, Queensland recognises that human rights are not absolute. This is an important recognition – every right must always be balanced against the interests of the wider community. There are times where individual interests

[83] Bruce Chen, "Revisiting Section 32(1) of the Victorian *Charter*: Strained Constructions and Legislative Intention" (2020) 46 *Monash University Law Review* 174, 175.
[84] Kent Blore and Brenna Booth-Marxson, "Breathing Life into the *Human Rights Act 2019* (QLD): The Ethical Duties of Public Servants and Lawyers Acting for Governments" (2022) 41 *The University of Queensland Law Journal* 1, 3.

might not prevail over those of the community, and vice versa.[85] The COVID-19 pandemic represented a time where individual interests had to yield to those of the community.

7.5 In this vein, s 13(1) of the *Human Rights Act 2019* (QLD) provides that a "human right may be subject under law only to reasonable limits that can be demonstrably justified in a free and democratic society based on human dignity, equality and freedom". Section 13(2) then provides for 7 non-exhaustive factors that a court may consider in deciding whether a limit on a human right is reasonable and justifiable, such as the nature of the human right, the nature and purpose of the limitation (including whether it is consistent with a free and democratic society based on human dignity, equality and freedom), and whether there are any less restrictive and reasonably available ways to achieve the purpose. It is envisaged that courts will apply a proportionality test when applying s 13(2).[86]

7.6 An equivalent provision exists in s 7(2) of the Victorian Charter, albeit that the list of relevant factors only includes 5 non-exhaustive factors.

7.7 The Queensland provisions make clear that the concept of "compatibility with human rights" is linked to other aspects of the *Human Rights Act 2019* (QLD). Specifically, s 8 provides that "An act, decision or statutory provision is compatible with human rights if the act, decision or provision" either (a) "does not limit a human right", or (b) "limits a human right only to the extent that it is reasonable and demonstrably justifiable in accordance with section 13". This language of "compatible with human rights" in s 8 (as judged by reference to the proportionality test in s 13) is found in other provisions of the *Human Rights Act 2019* (QLD), such as the statutory interpretative clause (s 48), statement of

[85] Paul T Babie, "Australia's "Bill of Rights"" (2021) 97 *University of Detroit Mercy Law Review* 187, 202.
[86] Explanatory Notes to the Human Rights Bill 2018 (Qld), 5.

compatibility (s 38) and obligations of public entities (s 58). I will touch upon those different aspects shortly.

7.8 This link in s 8 is crucial. It seeks to address the vexed issue in relation to the Victorian Charter, which does not contain an equivalent s 8. In the absence of a definition of a "compatible with human rights" in the Victorian Charter, the relationship between s 13 and the other operative provisions of the Victorian Charter has been the subject of constitutional challenge in the High Court in *Momcilovic v The Queen* (2011) 245 CLR 1 (***Momcilovic***). The Court was deeply divided and it is difficult to identify the binding ratio from that decision.[87]

Critics of the proportionality analysis

7.9 I pause here to focus on the proportionality analysis that is contemplated in s 13(2) of the *Human Rights Act 2019* (QLD). Putting aside the potential constitutional issues associated with a proportionality analysis,[88] some opponents to a bill of rights are discontent with the notion of proportionality being employed in a human rights context. However, as I have stated above, the very nature of human rights is that it is not absolute – they need to be balanced against other protected rights (such as contractual rights) and they may conflict with other "non-protected values".[89] It is the ability to restrict rights that helps establish an "institutional dialogue about rights between the three arms of government" rather than simply "representative or judicial monologues about rights".[90]

[87] Bruce Chen, "The *Human Rights Act 2019* (QLD): Some Perspectives from Victoria" (2020) 45 *Alternative Law Journal* 4, 6.
[88] *Momcilovic v The Queen* (2011) 245 CLR 1 at [34]-[36] (French CJ), [408]-[409] (Hayne J), [431] (Heydon J dissenting), [559]-[561], [572]-[575] (Crennan and Kiefel JJ).
[89] Julie Debeljak, "Balancing Rights in a Democracy: the Problems with Limitations and Overrides of Rights under the Victorian *Charter of Human Rights and Responsibilities Act 2006*" (2008) 32 *Melbourne University Law Review* 422, 424.
[90] Julie Debeljak, "Balancing Rights in a Democracy: the Problems with Limitations and Overrides of Rights under the Victorian *Charter of Human Rights and Responsibilities Act 2006*" (2008) 32 *Melbourne University Law Review* 422, 424.

7.10 Indeed, courts have recently and on various occasions employed what is coined the "structured proportionality"[91] test to determine and adjudicate complex issues. For example, the High Court in *McCloy v New South Wales* (2015) 257 CLR 178 (by majority)[92] and *Comcare v Banerji* (2019) 267 CLR 373[93] adopted a structured proportionality test to determine whether a burden on the implied freedom of political communication was justified. So too did the majority of the High Court in *Palmer v Western Australia* (2021) 272 CLR 505 concerning the freedoms under s 92 of the *Constitution*.

7.11 Clearly, proportionality analysis is not something that is foreign to courts. The proportionality analysis considered in the above referred cases have been informed by those employed in the human rights context such as that in the *Canadian Charter of Rights and Freedoms* and the European Convention on Human Rights.[94] It is not a "perfect method"[95] and other judges such as Gageler J are in favour of a less structured approach to proportionality[96] and instead in favour of something more akin to a "categorisation" approach".[97]

7.12 However, no method is perfect and "some method is necessary if lawyers and legislators are to know how the question of justification is to be approached in a given case"[98] Indeed, Gageler J recognised that proportionality adds transparency:[99]

> Proportionality provides a uniform analytical framework for evaluating legislation which effects a restriction on a right or freedom. It is not suggested that it is the only criterion by which legislation that restricts a freedom can be tested. It has the advantage of transparency. Its structured

[91] Blore, "Proportionality under the *Human Rights Act 2019* (QLD): when are the factors in s 13(2) necessary and sufficient and when are they not?" p.435.
[92] At [2] (French CJ, Kiefel, Bell and Keane JJ).
[93] At [32]-[38] (Kiefel CJ, Bell, Keane and Nettle JJ).
[94] *McCloy v New South Wales* (2015) 257 CLR 178 at [140] (Gageler J).
[95] *Palmer v Western Australia* (2021) 272 CLR 505 at [56] (Kiefel CJ and Keane J).
[96] See, for example, *McCloy v New South Wales* (2015) 257 CLR 178 at [142]-[145].
[97] *Tajjour v New South Wales* (2014) 254 CLR 508 at [151]; *McCloy v New South Wales* (2015) 257 CLR 178 at [153]; *Brown v The State of Tasmania* (2017) 261 CLR 328 at [164].
[98] *Palmer v Western Australia* (2021) 272 CLR 505 at [56] (Kiefel CJ and Keane J).
[99] *McCloy v New South Wales* (2015) 257 CLR 178 at [75].

> nature assists members of the legislature, those advising the legislature, and those drafting legislative materials, to understand how the sufficiency of the justification for a legislative restriction on a freedom will be tested. Professor Barak suggests that "members of the legislative branch want to know, should know, and are entitled to know, the limits of their legislative powers".

7.13 When introduced into the human rights context, proportionality analysis can help promote transparency and a greater focus on the impact of legislation on human rights and freedoms.

Interpretative provision and the declaration of incompatibility or inconsistent interpretation

7.14 The second key feature that I want to speak to is the interpretative provision and the statement or declaration of incompatibility.

7.15 In relation to the interpretative provision, s 32(1) of the Victorian Charter provides that "So far as it is possible to do so consistently with their purpose, all statutory provisions must be interpreted in a way that is compatible with human rights".

7.16 In relation to the declaration of incompatibility or inconsistent interpretation, s 36(2) of the Victorian Charter allows the Supreme Court to make a declaration of inconsistent interpretation if it is of the opinion that a statutory provision cannot be interpreted consistently with a human right. Within 6 months after receiving a declaration of inconsistent interpretation, the relevant Minister must prepare a written response to it and cause a copy of the declaration and the response to be laid before each House of Parliament and be published in the Gazette (s 37). The equivalent provisions in the *Human Rights Act 2019* (QLD) are ss 53, 54 and 56.

7.17 The main grievances of critics about these two key features have centred largely on undermining sovereignty or supremacy of an elected Parliament in favour

of an unelected judiciary[100] and the related notion of politicising the judiciary. For example, Justice Handley submitted to the inquiry in New South Wales:[101]

> Giving a court the power to declare and enforce human rights in terms of the international conventions would give unelected judges a blank cheque to decide what, in many cases, are really political questions. Their decisions could have an unexpected impact on the State's budget in ways that would be outside the control of the government. Australia is essentially a free and democratic society which does not need this type of legislation. All these questions should remain the responsibility of the elected government, and be subject to the restraints and constraints of the democratic process.

7.18 The argument goes that "if the people have basic rights in their heart…it will be reflected in the laws enacted by Parliament" and that in Australia, where "parliamentary democracy usually works reasonably well, we can trust the legislators".[102]

7.19 As to politicising the judiciary,[103] critics have argued that issues of human rights involve matters of public policy that ought to be matters dealt with by an elected Parliament. It would amount to a "form of judicial imperialism"[104] for great power to be transferred from elected representatives of the people to judges who may be ill-equipped to decide issues of human rights and may even infuse their own personal beliefs or morality when deciding cases concerning human rights. Further, if judges are to make decisions with policy implications, then judicial decisions would be seen as "political" and therefore, undermine public confidence in judicial decisions and, in turn, the rule of law.[105]

7.20 In my view, those concerns are exaggerated.

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[100] Standing Committee on Law and Justice, "A NSW Bill of Rights" (Report 17, October 2001), [6.6]
[101] Standing Committee on Law and Justice, "A NSW Bill of Rights" (Report 17, October 2001), [6.6]
[102] Justice Kirby, "A Bill of Rights for Australia – but do we need it?" (1997) 21 *Commonwealth Law Bulletin* 276, 278.
[103] For example: James Allan, "Why Australia does not have, and does not need, a National Bill of Rights" (2012) 24 *Journal of Constitutional History* 35, 40.
[104] Justice Kirby, "A Bill of Rights for Australia – but do we need it?" (1997) 21 *Commonwealth Law Bulletin* 276, 278.
[105] Standing Committee on Law and Justice, "A NSW Bill of Rights" (Report 17, October 2001), [6.13].

7.21 *First*, s 36(5) of the Victorian Charter makes plain that a declaration of inconsistent interpretation in s 32 does not affect, in any way, the validity, operation or enforcement of an Act or provision of Act that is incompatible with a human right. Nor does it affect the validity of a subordinate instrument made under such an Act. It also does not create in any person any legal right or give rise to any civil cause of action. The equivalent provision in the *Human Rights Act 2019* (QLD) is s 48. Thus, ultimately, Parliament has the final say. It can hardly be said that Parliamentary sovereignty is undermined.

7.22 *Secondly*, even if a court was empowered to strike down legislation that is not compatible with a human right, at a level of principle, this is no different to a court striking down or invalidating legislation or delegated legislation on, for example, constitutional or administrative law grounds.

7.23 Courts are often required to decide on the validity of legislation. For example, in *North Australian Aboriginal Justice Agency Ltd v Northern Territory* (2015) 256 CLR 569, the High Court was required to determine the validity of various provisions in the *Police Administration Act 1978* (NT) on the basis that it conferred on the executive a power to detain which was penal or punitive in character and, if passed by the Commonwealth, would be beyond the powers of the Commonwealth under s 122 of the *Constitution*.

7.24 And, in *Alexander v Minister for Home Affairs* [2022] HCA 19, the High Court found that s 36B of the *Australian Citizenship Act 2007* (Cth) (which allowed the Minister to determine that a person ceased to be an Australian citizen) was invalid for infringing the separation of powers under Ch III of the *Constitution* (as well as, in *obiter*, whether the naturalization and aliens heads of power in s 51(xix) of the *Constitution* supported s 36B).

7.25 *Thirdly*, courts are also commonly tasked to rule on legal issues that have a strong political undertone or the subject of significant political debate. That has

never detracted from a judge's task to impartially decide a case.[106] That is, the task of a judge in all cases, irrespective of the underlying issue, remains the same – to impartially identify the facts based on evidence and apply the law as to those facts to reach an outcome. As Justice Stein aptly said:[107]

> Such a label [politicisation of the judiciary] is misconceived. Charters or Bills of Rights have not, for example, politicised the courts of New Zealand or Canada. There is a good reason why this is so. Courts have always been reviewers and interpreters of the rules by which society operates, that is through legislation. Nothing about the institutional arrangements of courts changes with the introduction of Charters of Right.
>
> It's a funny thing about the politicisation argument. It is an argument rarely used where courts prevent rights. However when courts interpret rights expansively, critics say they are 'politicised'.

7.26 There have been numerous cases in which the High Court has been asked to rule on the validity of legislation or instruments where the underlying subject matter was politically charged. An example is:

(a) *Plaintiff M70/2011 v Minister for Immigration and Citizenship* (2011) 244 CLR 144, where the majority of the High Court invalidated the Minister's declaration of Malaysia as a country to which asylum seekers ("offshore entry persons") could be taken for processing of their asylum claims, made under s 198A of the *Migration Act 1958* (Cth). This was because Malaysia was not legally bound by international law (such as the *Convention Relating to the Status of Refugees*) or its own domestic law to, *inter alia*, provide access for asylum seekers to effective procedures for applying for protection, and provide protection for asylum seekers given refugee status pending their voluntary return to their country of origin or settlement in another country. This decision was made in context of a highly politically

[106] Murray Gleeson, "The Role of a Judge in a Representative Democracy" (4 January 2008); Murray Gleeson, "The Role of the Judge and Becoming a Judge" (Speech, Sydney, 16 August 1998).
[107] Standing Committee on Law and Justice, "A NSW Bill of Rights" (Report 17, October 2001), [5.66].

sensitive debate on asylum seekers and the Gillard Government's "Malaysia Solution". Further, underlying this are the rights to liberty and life; and

(b) *New South Wales v Commonwealth* (2006) 229 CLR 1 ("**WorkChoices Case**"), where the majority of the High Court found that the *Workplace Relations Amendment (Work Choices) Act 2005* (Cth) was constitutionally valid under ss 51(xx) (corporations) and 51(xxxv) (conciliation and arbitration regarding settlement of industrial disputes) of the *Constitution*. The amendments were politically contentious, particularly in the lead up to the 2007 federal election during which the then Opposition Leader, Kevin Rudd, vowed to abolish the amendments.[108] The amendments were also strongly opposed by the left side of politics and trade unions for stripping away basic employee rights.

7.27 What the above cases demonstrate is that, being the third branch of government, The simple fact is the judiciary is already involved to some extent in politics but not "party politics". Therefore, to assert that a "bill of rights would make the courts political is naïve". As Kirby J has opined:[109]

> Courts must necessarily decide cases in the event of controversy, where power lies, ie between the Federal Parliament and the State or elsewhere. What is necessary is a recognition of the inherently political nature of the judicial branch of government and a harnessing of that function to ensure that judges, above party politics, protect the basic fundamentals of all the people living in our form of society.

7.28 Similarly, French CJ has opined in the context of the Victorian Charter:[110]

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[108] Misha Schubert, "Rudd intends to rip up, repeal or rid us of IR laws" (3 February 2007) *The Age* <https://www.theage.com.au/national/rudd-intends-to-rip-up-repeal-or-rid-us-of-ir-laws-20070203-ge450y.html>; *The Age* "Rudd dismantles WorkChoices" (18 December 2007) <https://www.theage.com.au/national/rudd-dismantles-workchoices-20071218-ge6iqz.html>.

[109] Justice Kirby, "A Bill of Rights for Australia – but do we need it?" (1997) 21 *Commonwealth Law Bulletin* 276, 280.

[110] *Momcilovic v The Queen* (2011) 245 CLR 1 at [76].

> The Court must decide the cases which come before it according to law. If the Parliament has enacted a valid law which cannot be interpreted consistently with a human right, the Court must nevertheless decide the case according to that law and not according to its view of what the law should be, whether by reference to the protection of human rights or otherwise.

7.29 *Fourthly* and related to the above point, the "important truth of human rights protection" is that all three branches of government "[s]hare an equally legitimate role in the interpretation and imposition of limitations upon rights". The dialogue between all three branches enables the judiciary to comment upon the adequacy of legislation or the actions of the executive; the legislature can choose to respond to it by, for example, amending legislature or administrative practices. It may take the opposite view and ignore or reject a declaration of incompatibility.[111]

7.30 As Babie opines,[112] a bill of rights will affect in some way the distribution of power between the three branches of government, but the dialogue is an "inherent dimension of the institutional interpretation of the three branches" and the judiciary acts as an "additional brake or restraint" on the excesses of power of Parliament and the executive.[113] These checks and balances ensure that the other branches of government are held to account for their actions, guard against any misuse, arbitrary, capricious or abuse of power and therefore, protects the liberty and rights of individuals.[114]

7.31 *Fifthly*, the dialogue model adopted in Victoria, Queensland and the Australian Capital Territory is a "weak" [115] or "soft" one because the judiciary is not empowered to invalidate legislation on the basis of incompatibility with human

[111] Paul T Babie, "Australia's "Bill of Rights"" (2021) 97 *University of Detroit Mercy Law Review* 187, 203.
[112] Paul T Babie, "Australia's "Bill of Rights"" (2021) 97 *University of Detroit Mercy Law Review* 187, 204.
[113] *Marbury v Madison* 5 U.S. 137 (1803); *Kirk v Industrial Relations Commission* (2010) 239 CLR 531 (based on Ch III of the *Constitution* (Australia)).
[114] Eric Barendt, "Separation of Powers and Constitutional Government" (1995) *Public Law* 599; Justice Dyson Heydon, "Are bill of rights necessary in common law systems" (Speech, 23 January 2013).
[115] Paul T Babie, "Australia's "Bill of Rights"" (2021) 97 *University of Detroit Mercy Law Review* 187, 204.

rights. In my view, at least in Victoria, this may now be *too* weak since the chilling effect of the High Court's decision in *Momcilovic:*

(a) a majority of the High Court (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ, Heydon J dissenting)[116] held that the interpretative provision in s 32(1) of the Victorian Charter of Rights did not have a "remedial" effect. That is, unlike the United Kingdom, s 32(1) did not permit a Court to depart from the ordinary meaning (literal or grammatical meaning) of a provision so as to interpret a provision as being compatible with a human right. This would otherwise confer on the Court a function of a law-making character; and

(b) all members of the High Court held that an exercise of power under s 36 (concerning the declaration of inconsistent interpretation) was not judicial in nature because it had no impact on the legal rights of the parties in dispute before the court.[117] Nor did it set down guidance for the disposition of future cases involving similar principles of law.

7.32 Interestingly, French CJ rejected the characterisation of the declaration of inconsistent interpretation as constituting a "dialogue between the three arms of government". Although, it provided a mechanism by which the judiciary directed the attention of the legislature, through the executive, to a "disconformity between a law of the State and a human right set out in the Charter", the metaphor of dialogue was inapposite because it distracted from the "recognition of the subsisting constitutional relationship between the three branches of government" and pointed "misleadingly in the direction of

[116] *Momcilovic v The Queen* (2011) 245 CLR 1 at [46], [62] (French CJ), [146], [170]-[171] (Gummow J), [280] (Hayne J), [544]-[545] (Crenann and Kiefel JJ), [684] (Bell J). Heydon J dissented at [450].
[117] [*Momcilovic v The Queen* (2011) 245 CLR 1 at 80], [89], [95] (French CJ), [178] (Gummow J), [280] (Hayne J), [457] (Heydon J), [584] (Crennan and Kiefel JJ), [661] (Bell J).

invalidity".[118] Crennan and Kiefel JJ were of a similar view, finding that "dialogue" was an "inappropriate description".[119]

7.33 Since *Momcilovic*, intermediate courts have understood s 32(1) as equating with the common law principle of legality, except with a "wider field of application".[120] The High Court has expressly reserved judgment on this issue.[121] Therefore, it has been held that:[122]

(a) if the words of a statute are clear, the court must give them that meaning.

(b) if the words of a statute are capable of more than one meaning, the court should give them whichever of those meanings best accords with the human right in question.

(c) however, it is not permissible for a court to attribute a meaning to a provision that is inconsistent with both the grammatical meaning and the apparent purpose of the enactment.

(d) section 32(2) "does not allow the reading in of words which are not explicit or implicit in a provision, or the reading down of words so far as to change the true meaning of a provision".[123]

7.34 As a result, *Momcilovic* has meant that s 32(1) is rarely used. If used, it is to fortify constructions of legislation using principles of statutory interpretation

[118] *Momcilovic v The Queen* (2011) 245 CLR 1 at [95].
[119] *Momcilovic v The Queen* (2011) 245 CLR 1 at [534].
[120] *Momcilovic v The Queen* at [51] (French CJ).
[121] *Minogue v State of Victoria* (2018) 264 CLR 252 at [55] (Kiefel CJ, Bell, Keane, Nettle and Edelman JJ).
[122] *Salveski v Smith* (2012) 34 VR 206 at [23], [45]; *Carolan v The Queen* (2015) 48 VR 87 at [46]; *Harkness v Roberts* [2023] VSC 10 at [34].
[123] *Salveski v Smith* (2012) 34 VR 206 at [45].

not otherwise based on s 32(1).[124] The role of s 32(1) is in some respects otiose. The Victorian Charter is, thus, fairly weak.

7.35 It is likely that the Queensland courts will interpret its equivalent provision in s 48 of the *Human Rights Act 2019* (QLD) in a similar way. This is so particularly where the Explanatory Notes states:[125]

> First, the emphasis on giving effect to the legislative purpose means that the provision does not authorise a court to depart from Parliament's intention. However, a court may depart from the literal or grammatical meaning of the words used in exceptional circumstances.

7.36 Note however that there is an exception for "exceptional circumstances". What those constitute remain to be seen.

7.37 It is apparent that the courts have been hamstrung in their ability to construe legislation in compatibility with human rights. It is counter-intuitive to provide an interpretative provision in a bill of rights, yet curtail the ambit and application of that interpretative provision to one that is akin to the principle of legality (with some apparent "wider field of application") or one to merely confirming a construction of statute arrived using pre-existing canons and principles of statutory construction.

7.38 The question that must be asked is "what is the point of having an interpretative provision in the first place then?". In my view, any bill of rights adopted by New South Wales should give the courts a real and meaningful means of statutory interpretation – that is, an interpretative provision that allows for remedial interpretations so as to ensure that statutory provisions can be interpreted consistently and compatibility with human rights.

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[124] Bruce Chen, "The *Human Rights Act 2019* (QLD): Some Perspectives from Victoria" (2020) 45 *Alternative Law Journal* 4, 6; Bruce Chen, "Revisiting Section 32(1) of the Victorian *Charter*: Strained Constructions and Legislative Intention" (2020) 46 *Monash University Law Review* 174.

[125] Explanatory Notes to the Human Rights Bill 2018 (Qld), 30.

Statement of compatibility by the minister

7.39 The third and final key feature that I want to touch upon is the statement of compatibility.

7.40 Section 28 of the Victorian Charter provides that a member of Parliament who proposes to introduce a Bill into a House of Parliament must cause a statement of compatibility to be prepared in respect of that Bill. That statement must state whether the Bill is compatible with human rights and if so, how, and if not, the nature and extent of the incompatibility. A failure to comply with s 28 in relation to any Bill that becomes an Act does not affect the validity, enforcement, or operation of that Act (s 29). Analogous provisions are found in ss 38 and 41 of the *Human Rights Act 2019* (QLD).

7.41 This is a key feature of a bill of rights, often I think overlooked by the apparent issues of parliamentary sovereignty and judicial politicisation in respect of a statement of incompatibility (or declaration of inconsistent interpretation). What a Ministerial statement of compatibility entails is the focusing by Parliament of how proposed laws interact with human rights. It provides for some transparency and accountability on new laws to be proposed vis-à-vis human rights.

7.42 Furthermore, as articulated by Russell Solomon, the "least understood yet arguably most significant" dialogue arising from a bill of rights is that between the parliament and the community.[126] That dialogue enables members of the community and public to engage with law-makers to see how human rights and freedoms are taken into account (if at all) in the process of making law. It allows "members of the community, often led by advocates, fulfilling a role of prodding the parliament and government in the direction of greater adherence to human rights principles" and thus, enhances accountability and the

[126] Russell Solomon, "A Socio-Legal Lens on the Victorian Charter" (2013) 38 *Alternative Law Journal* 152, 153.

responsiveness of government. Through this, a human rights culture can be nurtured.[127]

7.43 And, finally, human rights culture is nurtured by other provisions in the Victorian Charter that make it unlawful for a public authority to "act in a way that is incompatible with a human right or, in making a decision, to fail to give proper consideration to a relevant human right" (s 38(1)) (see also s 58(1) of the *Human Rights Act 2019* (QLD)).

8. HUMAN RIGHTS CASES IN VICTORIA AND QUEENSLAND

8.1 In the final section, I wish to highlight some cases in Victoria and Queensland where their bill of rights has had a real impact on complex legal issues.

Victoria

8.2 In November 2022, the Judicial College of Victoria identified over 150 decisions published by the Supreme Court of Victoria which has cited provisions from the Charter.[128]

8.3 One example is *Thompson v Minogue a* 2021 Victorian Court of Appeal judgment [2021] VSCA 358. In that case, Dr Minogue was a prisoner serving a life term. He was directed by Corrections Victoria to submit to a strip search and random urine tests. In a judicial review proceeding at first instance,[129] Richards J found that:

(a) the direction to submit a random urine test was authorised by s 29A of the *Corrections Act 1986* (VIC). However, proper consideration had not been given to relevant human rights in making that direction in breach of s 38(1) of the Victorian Charter. Further, the direction to

[127] Russell Solomon, "A Socio-Legal Lens on the Victorian Charter" (2013) 38 *Alternative Law Journal* 152, 153.
[128] Judicial College of Victoria, "Victoria human rights/Charter case collection" (November 2022).
[129] *Minogue v Thompson* [2021] VSC 56.

submit a random urine test was incompatible with Dr Minogue's right to privacy (s 13(a)) and his right to be treated humanely and with respect for the inherent dignity of the human person (s 22(1)), also in breach of s 38(1); and

(b) the strip search was not authorised by reg 87(1)(d) of the *Corrections Regulations 2019* (VIC). Moreover, as with the direction to submit a random urine test, proper consideration was not given to relevant human rights in breach of s 38(1), and the direction was incompatible with his rights under ss 13(a) and 22(1).

8.4 Richards J granted declaratory relief and injunction to prevent future breaches.[130]

8.5 On appeal, the Court of Appeal allowed the appeal in part in respect of the direction to submit to the random urine test, but upheld Richard J's findings that the strip searches were incompatible with Dr Minogue's human rights in ss 13(a) and 22(1), in breach of s 38(1).[131] The Court found that the "highly intrusive nature of the strip searches coupled with the requirement that they always be conducted prior to a random urine test in circumstances where that test is conducted without warning and with at least one officer watching the sample being delivered meant that they were excessive". There were also less restrictive means reasonably available to achieve the purpose pursued by Corrections Victoria (to reduce prevalence of drug use in the prison). This excessive nature meant that the interference with the privacy of the prisoners extended beyond what was reasonably necessary to achieve the purpose. Thus, it was unreasonable in the sense of not being proportionate to the legitimate aim to be achieved.[132] Special leave was refused.

[130] *Minogue v Thompson (No 2)* [2021] VSC 209.
[131] *Thompson v Minogue* (2021) 294 A Crim R 216.
[132] *Thompson v Minogue* (2021) 294 A Crim R 216 at [318](b).

8.6 The second example is *Certain Children by their Litigation Guardian Sister Marie Brigid Arthur v Minister for Families and Children* [2016] VSC 796; (2016) 51 VR 473. In that case, the plaintiffs were a group of young persons who were on remand at Grevillea Youth Justice Precinct. The children commenced judicial review proceedings seeking the Court to declare invalid or quash:

(a) two orders that established the Grevillea unit as a remand centre and as a youth justice centre under s 478(a) and (c) of the *Children, Youth and Families Act 2005* (VIC); and

(b) the decision to transfer the children from Parkville (where there was significant property damage due to riots) to the Grevillea unit.

8.7 Garde J described the "harsh and austere" conditions at Grevillea, which included:

(a) limited aids and equipment at the centre;

(b) bedrooms being fitted with porcelain bowls and sinks which were a "considerable risk". One young person self-harmed using the sink;

(c) risks of climbing and a lack of fire systems;

(d) completely enclosed common areas without natural light or air flow;

(e) children were required to be locked down for long periods of time to prevent them from associating with other children with whom they may not be able to associate safely. This was because the design of the unit did not permit individuals or groups of individuals to be separated from one another without reliance on lockdown procedures or isolation;

(f) all children experienced lockdown conditions for minimum periods of 20 hours per day and on some days, they were only allowed out of their cells for less than one hour per day. These cells were formerly used for high security adult prisoners;

(g) use of handcuffs to escort children to and from the exercise yard;

(h) use of threats, including that of physical harm to the children;

(i) lack of adequate place for schooling; and

(j) lack of family visits or access to religious services or advisers.

8.8 Garde J found that various human rights under the Charter were engaged, namely: (i) a child's right to such protection as is in his or her best interests (s 17(2)); (ii) the right to be protected from cruel, inhuman or degrading treatment (s 10(b)); and (iii) the right to humane treatment and respect for dignity when deprived of liberty (s 22(1)).

8.9 His Honour concluded that:

(a) in advising the Governor in Council to make the orders establishing the Grevillea unit, the Minister had failed to engage at all with the rights under the Victorian Charter or indeed any human rights, in contravention of s 38(1) (at [203]); and

(b) the decision was substantively incompatible with human rights. The Department's concern was that Parkville was seriously damaged and significant capacity had been lost and that, therefore, this justified the establishment of Grevillea as a remand centre and youth justice centre. The Department was focused on coping with the circumstances at Parkville, the pursuit of their view that tougher measures were needed, and that the perpetrators of the damage had to face serious

consequences (at [220]). No one had turned their minds to the impact of the establishment of the new facilities on young persons. As a result, the impact on human rights of the children was "unplanned and largely unforeseen". There was evidence of the impact on human rights or consideration of any less restrictive means available (at [221]-[222]). The measures were not proportionate. Thus, the decision "exceeded the reasonable limits that can be demonstrably justified in a free and democratic society based on human dignity, equality and freedom after taking into account" the factors in s 7(2) (at [223]).

8.10 His Honour declared that the decisions contravened s 38(1) but did not decide whether the decisions were invalidated as such an issue should be finally decided by the appellate courts at a future time (at [227]).

8.11 The defendants appealed. The appeal was dismissed (*Minister for Facilities and Children v Certain Children by their Litigation Guardian Sister Marie Brigid Arthur* [2016] VSCA 343; (2016) 51 VR 597). However, the issue of whether there was a contravention of s 38(1) was not an issue dealt with on appeal.

Queensland

8.12 In *Waratah Coal Pty Ltd v Youth Verdict Ltd* [2020] QLC 33, the plaintiff applied for a mining lease and an environmental authority to develop a thermal coal mine. The defendant objected to the application including that to grant the applications would not be compatible with human rights, such as those concerning recognition and equality before the law (s 15), the right to life (s 16), property rights (s 24), and cultural rights of Aboriginal and Torres Strait Islanders Peoples (s 28).

8.13 The plaintiff sought to strike out the objections on the basis that it was beyond the Land Court's jurisdiction to consider objections based on the *Human Rights Act 2019* (QLD).

8.14 The Land Court dismissed the strike out application, finding that the objections were within jurisdiction. This was because the Land Court was bound by s 58(1)(a), which rendered it unlawful for a "public entity" to "act or make a decision in a way that is not compatible with human rights". In reasoning to this conclusion, the President of the Land Court found that:

(a) the Land Court was a "public entity" when fulfilling its functions under either the *Mineral Resources Act 1989* (QLD) (**MRA**) or the *Environmental Protection Act 1994* (QLD) (**EPA**) for the impugned applications; and

(b) the making of a recommendation by the Land Court under the MRA and its objections decisions under the EPA constituted an "act" or "decision" within the meaning of s 58(1)(a).

8.15 Because the Land Court was required to comply with the requirements of s 58(1)(a) when fulfilling its functions, it had jurisdiction to entertain the objections based on the *Human Rights Act 2019* (QLD).

8.16 This case is interesting because it highlights the importance of human rights, such as cultural rights, in relation to decisions of public entities, such as the Land Court, in application and approval processes. This is likely to gain more traction in a context where climate change and giving a Voice to First Nations People are prominent current issues.

8.17 In light of the positive impact of the *Human Rights Act 2019* (QLD), it is disappointing that the Queensland government is seeking to override the *Human Rights Act 2019* (QLD). On 21 February 2023, the Queensland government introduced into Parliament[133] the Strengthening Community Safety

[133] Rachel Riga, "Queensland premier says breach of bail will be reintroduced as offence for young offenders" (20 February 2023) *ABC News* <https://www.abc.net.au/news/2023-02-20/breach-of-bail-to-become-offence-qld-youth-crime-strategy/102000228>.

Bill 2023 (QLD) in order to amend s 29(2)(a) of the *Bail Act 1980* (QLD) so as to make it a criminal offence for children to breach their bail conditions (which is the same offence as an adult). In so doing, the Queensland government is seeking to override the *Human Rights Act 2019* (QLD), which it openly accepts is incompatible with human rights, in order to protect community safety.[134]

8.18 In the statement of combability (as required under s 38 of the *Human Rights Act 2019* (QLD)), Mark Ryan MP states:[135]

> The Government acknowledges that this proposed amendment is incompatible with the right of children to protection in their best interests in section 26(2) of the HR Act.
> The amendment may make it more likely that children will be detained pending trial and for that reason is inconsistent with international standards about the best interests of the child.
>
> The purpose of the proposal is to ensure that young people comply with bail conditions. That is an important and legitimate purpose. However, because it appears that less restrictive options are available to achieve the same purpose, the proposal limits human rights in a way which is not justified. Less restrictive alternatives may include, for example, providing additional bail support to young people.
>
> However, the Government considers that this measure is needed to respond to the small cohort of serious repeat young offenders who engage in persistent and serious offending, in particular, offending which occurs while on bail.
>
> For this reason, the Government considers that it is necessary, in this exceptional case, to override the HR Act…

8.19 It is unfortunate that the Queensland government are responding, in a kneejerk reaction way to a law and order issue that will cause harm to children.

8.20 At the same time, however, the requirement to prepare a statement of combability for the Strengthening Community Safety Bill 2023 (QLD) under

[134] Ben Smee, "Queensland's plan to override human rights law 'deeply concerning', commissioner says" (22 Febraury 2023) *The Guardian* <https://www.theguardian.com/australia-news/2023/feb/22/queenslands-plan-to-override-human-rights-law-deeply-concerning-says-commissioner>.
[135] Statement of Compatibility for the Strengthening Community Safety Bill 2023.

s 38 of the *Human Rights Act 2019* (QLD) has increased transparency as to the reasoning process of the government and allows for more informed dialogue on the issue as between the government and the community.

9. CONCLUSION

9.1 The "time is ripe for a bill of rights"[136] in New South Wales. We need to protect the values that we hold dear in our society to ensure dignity, equality, fairness and freedom, and that the rights of First Nations People, children and minority groups are adequately protected. It should not take some major event, or egregious or flagrant disregard or breach of human rights, to be the "political trigger"[137] for an adoption of a bill of rights in this state. Indeed, we should be doing all we can to prevent that by legislating for a bill of rights now.

9.2 As Kirby J recognises, no one "says that a bill of rights alone will protect the rights of the people", but nor does the majoritarian democracy in Parliament.[138] Even a modern democracy such as Australia and its constituent states and territories are imperfect. There is always room for improvement, which includes room for a legislated bill of rights in New South Wales.

9.3 At the end of the day, as Nelson Mandela once said, "To deny people their human rights is to challenge their very humanity". The choice rests with all of us.

9.4 Once again, I congratulate each of the law students here today on their achievements to date. Each of you are the future guardians of the rule of law in Australia.

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[136] Irina Kolodizner, "The Charter of Rights Debate: a Battle of the Models" (2009) 16 *Australian International Law Journal* 219.

[137] David Erdos, "The Rudd Government's Rejection of an Australian Bill of Rights: a Stunted Case of Aversive Constitutionalism?" (2012) 65 *Parliamentary Affairs* 359, 368.

[138] Justice Kirby, "A Bill of Rights for Australia – but do we need it?" (1997) 21 *Commonwealth Law Bulletin* 276, 282.