LEGISLATIVE COUNCIL STANDING COMMITTEE ON LAW AND JUSTICE

INQUIRY INTO A NSW BILL OF RIGHTS

SUBMISSION OF AUSTRALIAN LAWYERS *for* HUMAN RIGHTS

30 March 2000

This is a public document

Australian Lawyers *for* Human Rights Inc (ALHR) is a network of Australian lawyers active in furthering awareness and advocacy of human rights in Australia.

Through training, publications and advocacy, ALHR promotes the practice of human rights law in Australia, and works with Australian and international human rights organisations to achieve this aim.

Table of Contents

		Page No.
Executive Summary		3
Section 1: *Human Rights Protections in NSW*		7
1.	Overview	7
2.	Commonwealth Constitutional Protections	7
3.	Statutory Protections	8
4.	Common Law	11
5.	International Remedies	13
6.	ALHR Submission on the Nature of Rights to be Protected	14
Section2: *The Constitutional Status of the NSW Bill of Rights*		16
1.	Overview	16
2.	Ordinary Act of Parliament	17
3.	Constitutional Amendment	18
4.	ALHR Submission on the Constitutional Status of the NSW Bill of Rights	20
Section 3: *Limitations on NSW Bill of Rights Guarantees*		21
1.	Overview	21
2.	Notwithstanding Clauses	22
3.	Reasonable Limits Clauses	23
4.	ALHR Submission on Limitations on NSW Bill of Rights Guarantees	24
Section 4: *To Whom Should the NSW Bill of Rights Apply?*		25
1.	Overview	25
2.	Historical Context and the Traditional Approach	26
3.	Survey of Other Jurisdictions	26
4.	The Public/Private Divide	32
5.	Distinguishing Public from Private Power	36
6.	ALHR Submission on the Public/Private Divide	38
Section 5: *Enforcement and Remedies*		39
1.	Overview	39
2.	Models of Enforcement	40
3.	Survey of Enforcement Mechanisms Used in Other Jurisdictions	42
4.	ALHR Submission on Enforcement and Remedies	47
5.	Implications of Adopting a Complaints-Based Approach to Enforcement	48
6.	Summary of Specific and Workable Provisions for Implementation and Enforcement of the NSW Bill of Rights	52

Executive Summary

ALHR believes that an appropriately drafted and implemented Bill of Rights

- will be an important tool by which individuals in NSW could seek redress and vindication when their rights have been violated, and by which traditionally disadvantaged groups can gain access to the political process
- will have important educative and symbolic effects, empowering the traditionally disempowered and creating a more rights-based culture in NSW
- will develop community and governmental awareness and understanding of peoples' rights, ensuring that more care is taken in ensuring their protection.

ALHR submits that an appropriately drafted and implemented Bill of Rights:

- is an important tool for individuals to seek redress and vindication when their rights have been violated, and by which traditionally disadvantaged groups can gain access to the political process
- will have important educative and symbolic effects, giving voice to the traditionally disempowered and creating a more rights-based culture in NSW
- will develop community and governmental awareness and understanding of peoples' rights, ensuring that more care is taken to protect those rights
- will bring NSW into line with most modern western liberal democracies, most of which have a Bill of Rights as part of their political and legal arrangements.

The political and philosophical arguments for and against the introduction of a Bill of Rights have been rehearsed in exhaustive detail elsewhere, and ALHR does not propose to enter into this debate in the present submission. ALHR believes that New South Wales has an important role to play in promoting and protecting the rights of people in the State.

By their very nature, rights require remedies. The recognition of this symbiotic relationship between right and remedy is the guiding principle which informs ALHR's submission. The focus of ALHR's submission is the scope, implementation and enforcement of the NSW Bill of Rights: the 'mechanics' of the Bill of Rights. Consequently, ALHR's submission does not address all of the terms of reference, focusing instead on those terms of reference which consider the appropriate form and scope the NSW Bill of Rights.

ALHR's submission is organised as follows.

Section 1:

Section 1 addresses term of reference (a).

This section considers the current mechanisms by which individuals' rights and freedoms are protected in NSW, examining the limited protections afforded by the Commonwealth Constitution, Commonwealth and NSW anti-discrimination legislation, and the common law.

ALHR submits that:

- Human rights legal protections in NSW are limited and incomplete when measured against existing international human rights. In many instances there is no mechanism for challenge when individual rights are violated.
- International human rights law serve a useful starting point but it is not adequate simply to "cut and paste" the International Covenant on Civil and Political Rights (ICCPR) into NSW law.
- ICCPR provisions must be restated to suit the particular social, cultural and political context of NSW, and to take account of developments in rights jurisprudence and theory which have occurred in the time since the ICCPR was first introduced.

Section 2:

Section 2 addresses terms of reference (e), (f) and (g).

ALHR considers how a Bill of Rights could be introduced in NSW, examining the various arguments for and against introducing the Bill of Rights by ordinary legislation, and by constitutional entrenchment.

ALHR submits that:

- The Bill of Rights should not only be constitutionalised, but also be doubly entrenched. A constitutionally entrenched Bill of Rights would also have an important symbolic effect.

Section 3:

Section 3 addresses term of reference (h).

This section considers limitation clauses and discusses the two most common types of limitations employed in relation to guarantees of rights - "notwithstanding clauses" and "reasonable limits clauses."

ALHR submits that:

- The NSW Bill of Rights will guarantee and protect fundamental human rights, and so should be an enduring instrument and one which is not liable to day-to-day alteration or repeal.

- The NSW Bill of Rights should be constitutionally entrenched, and ALHR suggests an appropriate provision.
- A "reasonable limits clause" should be included,
- A "notwithstanding clause" should not be included.

Section 4:

Section 4 addresses term of reference (f).

ALHR considers the appropriate scope of application of the NSW Bill of Rights, focusing on whether the NSW Bill of Rights should only apply to the State ("public" power), or whether it should it apply more widely to regulate "private" entities and individuals as well.

ALHR submits that:

- The NSW Bill of Rights should not recognise a distinction between public and private power, and consequently should apply to both public and private entities and individuals.

Section 5:

Section 5 addresses terms of reference (g) and (i).

ALHR considers how the Bill of Rights will be enforced, and submits that:

- The NSW Bill of Rights must extend beyond a mere declaration of principle.
- There should be a legislative requirement on courts to construe legislation in a manner which is compatible with international instruments, but the enforcement of rights should not be limited to an interpretative principle alone.
- The NSW Bill of Rights must contain appropriate enforcement mechanisms to properly guarantee and protect the rights it proclaims.
- The NSW Bill of Rights should be supported by a mixed "watchdog" and complaints-based enforcement approach.
- Specific and workable provisions can be made to implement this enforcement approach using existing institutions.

Further in Section 5, ALHR also considers how to mitigate the so-called "individualistic" nature of a complaints-based Bill of Rights enforcement system, and submits that:

- The NSW Bill of Rights should adopt a wide approach to standing.

- The NSW Bill of Rights should contain a provision similar in terms to that contained in section 38 of the South African Constitution which lists categories of people who may allege that a right in the Bill of Rights has been infringed or threatened.

Further in Section 5, ALHR considers how to ensure that the Bill of Rights is capable of addressing systemic violations of rights, and submits that:

- The NSW Bill of Rights should expressly enable courts to order both negative and positive remedies, and to order systemic relief.

Finally in Section 5 of its submission, ALHR considers the judicial history of State or Crown immunity from legal action, and submits that:

- The Crown should not have immunity from claims under the NSW Bill of Rights.
- The NSW Bill of Rights should include a provision similar in terms to section 27(3) of the New Zealand Bill of Rights Act 1990 which overrides Crown immunity.

Section 1

Human Rights Protections in NSW

Term of reference addressed in this Section:

(a) Whether the rights declared in the International Covenant on Civil and Political Rights should be incorporated into domestic law by such a Bill of Rights

1 OVERVIEW

For the purposes of this submission, ALHR defines 'human rights' by reference to the international human rights conventions to which Australia is a party,and to the many United Nations declarations which address human rights concerns for specific groups.[1]

Currently, the rights of individuals living in NSW are protected only through an incomplete patchwork of limited Commonwealth Constitutional guarantees, Commonwealth and NSW legislative enactments and common law principles and presumptions. Each of these is examined below.

2 COMMONWEALTH CONSTITUTIONAL PROTECTIONS

The Commonwealth Constitution provides only a few limited guarantees of individual rights. Many of these guarantees are not expressed in terms of rights, but rather, as prohibitions on federal or State legislative power. For example:

- Section 51(xxxi) provides that the Commonwealth may only compulsorily acquire property if it does so on just terms. Thus, the Constitution is said to confer a right to compensation on just terms where the Commonwealth compulsorily acquires property.
- Section 80 provides that trials for federal indictable offences must be before a jury, thus conferring what some describe as a limited right to trial by jury.
- Section 116 prohibits the Commonwealth from making laws with respect to the establishment of, or prohibition on the exercise of, religion, thereby conferring a limited right of freedom of religion at the federal level.

[1] For a list of the relevant instruments see the United Nations Human Rights Commissioner's home page at http://www.unhchr.ch/html/intlinst.htm.

- Section 117 protects residents of one State from special disability or discrimination, based upon residence, in other States.
- Based on the text and structure of the Constitution, the High Court has also found that the Constitution contains an implied right to freedom of political communication.[2]

The High Court has recently interpreted Chapter III as giving rise to what might be described as some limited due process guarantees in relation to the exercise of judicial power. The separation of powers doctrine restrains both Commonwealth and State Parliaments from legislating to impair the proper exercise of judicial power. While the implications derived from Chapter III of the Constitution do not create direct rights for individuals, they do provide some limited due process rights.[3]

The Commonwealth Constitution's failure to more comprehensively guarantee rights has been explained as a consequence of the institution of responsible government. As former Prime Minister Robert Menzies once explained:

> Should a Minister do something which is thought to violate fundamental human freedoms he can promptly be brought to account in Parliament. If his Government supports him, the Government may be attacked, and if necessary, defeated. And if that…leads to a new General Election, the people will express their judgment at the polling booths. In short, responsible government in a democracy is regarded by us all as the ultimate guarantee of justice and individual rights.[4]

The failure of the Commonwealth Constitution to more fully protect individual rights has also been explained in terms of State rights, and the suspicion that a Commonwealth Bill of Rights could be used to limit the States' powers.

3 STATUTORY PROTECTIONS

Some Commonwealth and NSW statutes also operate to protect human rights, through:

- expressly protecting particular human rights; or
- as a result of their indirect operation.

[2] *Nationwide News v Wills* (1992) 177 CLR 1; *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106*; Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520.
[3] *Polyukhovich v Commonwealth* (1991) 172 CLR 501 at 703-704; *Kable v Director of Public Prosecutions* (1997) 189 CLR 1; *Nicholas v The Queen* (1998) 193 CLR 173 and *Re Nolan; ex parte Young* (1991) 172 CLR 460 at 496.
[4] R Menzies, *Central Power in the Australian Commonwealth* (London: Cassell, 1967) at 54 cited in H Charlesworth, "The Australian Reluctance About Rights" (1993) 31 *Osgoode Hall Law Journal* 195 at 198.

3.1 Express protection of particular human rights

There is no one enactment which protects human rights in Australia on a national basis. Certain human rights are protected by Commonwealth and NSW anti-discrimination legislation. At the Commonwealth level, the anti-discrimination legislation is comprised of the *Racial Discrimination Act* 1975, the *Sex Discrimination Act* 1984, *Disability Discrimination Act* 1992, and the *Human Rights and Equal Opportunity Commission Act* 1986.

These enactments give effect to some of Australia's international human rights obligations, although only in a limited way. For example, the *Human Rights and Equal Opportunity Commission Act* 1986 defines human rights by reference to the International Covenant on Civil and Political Rights (ICCPR**),** but it limits complaints about breaches of ICCPR rights to acts and practices of Commonwealth agencies. It further limits the remedies available if there is a breach of ICCPR rights: the 'remedy' is a report prepared by the Human Rights Commissioner and tabled in Parliament.

At a Commonwealth level, there are enactments which protect specific human rights but in a limited way. Examples include:

- the *Human Rights (Sexual Conduct) Act* 1984 which was enacted in response to the United Nations Human Rights Committee's findings in *Toonen v Australia* in relation to sexual privacy;
- the *Privacy Act* 1988 (Cth), which guarantees the rights in Article 17 of the ICCPR with respect to personal information handled by Commonwealth government agencies.

The legislative landscape in New South Wales is similar. The major human rights enactment is the *Anti-Discrimination Act* 1977. In addition to anti-discrimination laws, in NSW the *Disability Services Act* 1993 also sets out a range of non-enforceable principles relating to the treatment of people with disabilities. The *Privacy and Personal Information Protection Act* 1998 (NSW) extends privacy protections to the State level.

3.2 Protection of human rights through indirect operation

A number of pieces of legislation which are not expressly designed to protect human rights nevertheless have the effect of protecting particular human rights in some limited circumstances. Some examples include the *Freedom of Information Act* 1982 (Cth), the *Freedom of Information Act* 1989 (NSW) and the *Evidence Act* 1995 (Cth and NSW). In the *Evidence Act* 1995, for instance, section 138(1) gives judges the discretion to exclude evidence which was illegally or improperly obtained in contravention of an Australian law. In determining whether to exercise the discretion to exclude, section 138(3)(f) provides that judges can consider whether the contravention was contrary to or inconsistent with a right recognised by the ICCPR.

The *Family Law Act* 1975 (Cth) adopts the "best interests" principles which underpin the Convention on the Rights of Child. The requirement to take into account the best interests of a child in decisions concerning children offers a measure of human rights protection for a child's rights.

3.3 The limits of legislative protection

The legislation described above, while effective in some cases, is inadequate as a system of human rights protection, when measured against the rights found in the numerous international human rights instruments to which Australia is a party. The legislation protects only a very limited range of individual rights, leaving fundamental rights such as freedom of speech, peaceful assembly, the right to vote, and all economic, social and cultural rights, unprotected.

Neither the Federal nor the NSW anti-discrimination legislation is adequate in dealing with problems of systematic discrimination, and in promoting substantive equality, as opposed to merely formal equality. Firstly, the remedies offered under the Commonwealth discrimination laws offer limited protection, because any findings of discrimination and orders made are not unenforceable. The position will change on 13 April 2000, when the Federal Court of Australia assumes the jurisdiction for determining complaints of discrimination, although this mechanism raises some concerns about accessibility.

Secondly, the various legislation provide causes of action only for certain specifically enumerated grounds, and apply only in a limited range of situations. The *Sex Discrimination Act* 1984 (Cth), for example, lists protected grounds such as sex, marital status and pregnancy, and only prohibits discrimination in fields such as employment, education, accommodation and the provision of goods and services. This Act, like other anti-discrimination legislation, contains a number of critical exemptions including religious, charity and voluntary bodies.

Some pieces of anti-discrimination legislation completely lack enforcement mechanisms. For example section 25(1) of the *Disability Services Act* 1993 (NSW) expressly provides that nothing in section 3 (which sets out the objects of the Act), nor anything in Schedule 1 (which sets out the principles to be applied when providing services to people with disabilities) "gives rise to, or can be taken into account in, any civil cause of action." Nor does the Act create any criminal offences. To a large extent then, the Act is rendered no more than an unenforceable statement of principle.

Another key weakness of all legislative human rights protections in Australia is that they are contained in ordinary Acts of Parliament, and are therefore subject to amendment or repeal at any time. Although it may at times be politically difficult for governments to amend or repeal these provisions, day-to-day political constraints alone are not sufficient to ensure individual rights in Australia.

4 COMMON LAW

4.1 General law

Generally the common law does not directly guarantee rights and freedoms, notwithstanding that the common law looks to the limited catalogue of rights enumerated in the *Magna Carta* and the *Bill of Rights* Act 1689 (UK) as a source of common law protection. Rather, in limited respects the common law operates indirectly to protect certain of an individual's rights.

For example, overarching institutional principles like 'rule of law' and 'judicial independence' are said to play an indirect role in the protection of rights, as are the development of procedural principles found in administrative law and statutory interpretation.[5] Additionally, certain causes of action, such as the torts of trespass to the person and unlawful imprisonment, can be invoked by individuals to vindicate their rights. The courts also have some discretions which can be used to protect rights, including, for instance, the discretion to exclude illegally or improperly obtained evidence.

In the early 1990s, the High Court was increasingly receptive to the idea that international law, and more specifically, international human rights law, could influence the development of the common law. In *Mabo*, the High Court said:

> international law is a legitimate and important influence on the development of the Common Law, especially when international law declares the existence of universal human rights.[6]

International law has been used to develop new rights in the common law. For example, in *Dietrich v The Queen*, the High Court invoked principles of international human rights law to identify a common law right to a fair trial.[7]

In *J v Lieschke*, Deane J said that:

> those rights and authority have been properly recognised as fundamental (see, e.g., *Universal Declaration of Human Rights*, Arts. 12, 16, 25(2) and 26(3))...They have deep roots in the common law. In the absence of an unmistakable legislative intent to the contrary, they cannot properly be modified or extinguished by the exercise of administrative or judicial powers otherwise than in accordance with the basic requirements of natural justice.[8]

[5] See Charlesworth, *supra* note 4 at 201-202.
[6] *Mabo & Others v Queensland (No. 2)* (1992) 175 CLR 1 at 42 per Brennan J.
[7] *Dietrich v The Queen* (1992) 177 CLR 292.
[8] (1986) 162 CLR 447 at 463.

However, Australia has rejected the fundamental rights doctrine.[9] This doctrine is based on the notion that some common law rights may go so deep that even Parliament cannot legislate to destroy them.[10] So while there may be rights which are deeply rooted in the common law of Australia, they are not immune from legislative intervention.

4.2 Administrative law

In *Minister for Immigration and Ethnic Affairs v Teoh*, the High Court applied the International Convention on the Rights of the Child to protect the applicant's interests even though it had not been implemented by domestic legislation.[11] The *Teoh* case demonstrates the fragility of the protection of rights at common law, as the High Court's power to use such international agreements was effectively rescinded by a media release from the Federal Attorney General.[12]

4.3 Statutory interpretation

Common law rules and presumptions of statutory interpretation also operate to protect human rights in some circumstances. Judicial references to international human rights instruments are increasing, with some encouragement from Justice Kirby, who often refers to the Bangalore Principles. The use of international human rights standards was considered in *R v Swaffield; Pavic v The Queen* where Kirby J said:

> In judging whether a right is fundamental, regard might be had to any relevant constitutional or statutory provisions and to the common law ... It is also helpful, in considering fundamental rights, to take cognisance of international statements of such rights, appearing in instruments to which Australia is a party, particularly where breach of such rights give rise to procedures of individual complaint.
>
> These provisions reflect notions with which Australian law is generally compatible. To the fullest extent possible, save where statute or established common law authority is clearly inconsistent with such rights, the common law in Australia, when it is being developed or re-expressed, should be formulated in a way that is compatible with such international and universal jurisprudence.[13]

[9] *Kable v Director of Public Prosecutions* (1995) 36 NSWLR 374 at 375 and see generally Justice Kirby's speech on 5 April 1997 "The Struggle for Simplicity, Lord Cooke and Fundamental Rights".
[10] *Fraser v State Services Commission* [1984] 1 NZLR at 121 and *Taylor v New Zealand Poultry Board* [1994] 1 NZLR 394 at 398.
[11] *Minister For Immigration And Ethnic Affairs v Teoh* (1995) 183 CLR 273.

Other principles of statutory interpretation which operate to protect human rights include:

- the presumption that legislation should be construed to prevent breaches of human rights;[14] and
- the presumption that the Legislature intended to legislate in accordance with its international human rights obligations and legislation should be construed accordingly.[15]

4.4 The limits of common law protection

Ultimately, the common law contains very few direct rights guarantees, and to the extent that it does protect rights, largely does so only indirectly. Moreover, the protective value of the common law is significantly compromised by its vulnerability to legislative change, and its traditional reliance on negative remedies.[16]

Common law rights stand in a precarious position given the uncertainties associated with the development of the common law. History shows that the availability, scope and application of rights can vary according to changes in the composition of a court. Moreover, in articulating rights, judges tread an uncertain path, sometimes leaving the judiciary open to charges that the democratic system is being usurped by an "unelected and unaccountable" judiciary. Rights "discovered" by the judiciary also have little symbolic or educative effect since their existence is not known prospectively and they are not publicised widely.

5 INTERNATIONAL REMEDIES

Where no Australian legal remedies are available or an Australian remedy is ineffective to protect human rights, there are, in certain circumstances, procedures by which an international human rights remedy may be obtained. A complaint may be lodged with one of the specialist international human rights committees. There are three main international committees which receive individual complaints:

- the Human Rights Committee, established under the First Optional Protocol to the ICCPR;

---

[12] Joint statement by the Minister for Foreign Affairs, Senator Gareth Evans and the Attorney-General, Michael Lavarch, *International Treaties and the High Court Decision in Teoh*, 10 May 1995.

[13] *R v Swaffield; Pavic v The Queen* (1998) 151 ALR 98 at 136 – 137.

[14] See *Re Bolton; ex parte Beane* (1987) 162 CLR 514 at 523; *Bropho v State of Western Australia* (1990) 171 CLR 1 at 17-18; *Coco v The Queen* (1994) 179 CLR 427 at 436-438; *Commissioner of Taxation (Cth) v Citibank Ltd* (1989) 20 FCR 403 at 433; and *Taciak v Commissioner of the Australian Federal Police* (1995) 131 ALR 319 at 330-333.

[15] See K Eastman and Ronalds in D Kinley, eds, *Human Rights in Australian* Law at pages 321 – 327 and also *Dietrich v The Queen* (1992) 177 CLR 292 at 306, 438-349; *Minister of State for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273 at 287, 301-302, 315; *Newcrest Mining (WA) Limited v Commonwealth of Australia* (1997) 147 ALR 42 at 147; *Kable v DPP* (1995) 36 NSWLR 374 at 395.

[16] The limitations of negative remedies in protecting human rights are examined in more detail in Section 4 of this Submission.

- the CERD Committee established under the Convention on the Elimination of All Forms of Racial Discrimination (CERD); and
- the Torture Committee established under the Convention Against Torture (CAT).

When Australia ratified the First Optional Protocol to the ICCPR on 25 December 1991 it recognised the competence of the Human Rights Committee to receive and consider communications from individuals subject to Australia's jurisdiction.[17]

While international remedies are available, it takes time to pursue the remedies and any findings that human rights are violated or recommendations as to appropriate redress are not binding on the Commonwealth.

6 ALHR SUBMISSION ON THE NATURE OF RIGHTS TO BE PROTECTED

The above survey of existing human rights protections reveals a limited and incomplete patchwork of human rights protections for individuals living in NSW. In many instances there is no mechanism for challenge or remedy when individual rights are violated.

In the absence of any common law doctrine of fundamental rights, and OF any legislative commitment to across-the-board human rights protections, there is a “black hole”. This blackhole has recently been highlighted in the recent debate over mandatory sentencing, which has been characterised by a stand off between the judiciary and the legislature. This black hole also means that where individual's rights have been violated, their only forums for redress and vindication are international ones.

Effective protection of human rights in NSW requires a Bill of Rights which is a comprehensive, but not necessarily exhaustive, statement of human rights. A starting point for an examination of human rights is the relevant international instruments. In this respect, the ICCPR sets out the core human rights in the area of civil and political rights, but with the Universal Declaration of Human Rights (UDHR), and the International Covenant on Economic, Social and Cultural Rights (ICESCR), and the First Optional Protocol to the ICCPR, it is only one component of the “International Bill of Human Rights”,[18] and only one of a number of important international instruments.[19]

---

[17] For a more detailed discussion about lodging a communication and accessing these committees, see H Charlesworth, "Australia's Accession to the First Optional Protocol to the International Covenant on Civil and Political Rights" (1991) 18 *Melbourne University Law Review* 428; C Chinkin, "Using the Optional Protocol: The Practical Issues" (1993) 3 *Aboriginal Law Bulletin* 6; K Eastman, "International Human Rights Remedies", Chapter 15.3, *Lawyers Practice Manual (NSW)* Law Book Company; and S Pritchard & N Sharp, *Communicating with the Human Rights Committee. A Guide to the Optional Protocol to the International Covenant on Civil and Political Rights* (Sydney: Australian Human Rights Information Centre, 1996).

[18] The Universal Declaration of Human Rights, adopted by the UN General Assembly on 10 December 1948, represented the first step in the development of a comprehensive international human rights system and contains a basic catalogue of human rights. As a declaration of the UN General Assembly, the Universal Declaration does not have the status of a

A Bill of Rights should not be limited to the rights enumerated in the ICCPR. Similarly, a Bill of Rights does not have to adhere the strict terms of the ICCPR or other international instruments. A "cut and paste" of international instruments will not provide effective rights protections. At the very least, the ICCPR provisions must be restated to suit the particular social, cultural and political context of NSW, and to take account of developments in rights jurisprudence and theory which have occurred in the time since the ICCPR was first introduced.

---

legally binding treaty. Over the years, however, the Declaration has acquired exceptional moral force and most of its provisions are said to possess the status of customary international law. In 1966, the ICCPR and the International Covenant on Economic, Social and Cultural Rights (**ICESCR**) both came into force in 1976. As multilateral treaties, they are legally binding on all the States party to them. The Universal Declaration and the two Covenants, together with the First Optional Protocol to the ICCPR, have become known as the "International Bill of Rights".

[19] In addition to the "International Bill of Rights", a range of other instruments have been adopted which deal with specific categories of human rights, or the human rights concerns of particular groups. Such instruments include the Convention on the Elimination of All Forms of Racial Discrimination, the Convention on the Elimination of All Forms of Discrimination Against Women, the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, and the Convention on the Rights of the Child.

Section 2

The Constitutional Status of the NSW Bill of Rights

Terms of Reference addressed in this Section:

(e) in what circumstances Parliament might exercise its ultimate authority to override basic rights declared in a Bill of Rights and what procedures need to be put in place to ensure that any such overriding legislation complies with the Bill of Rights

(f) the circumstances, if any, in which a Bill of Rights should be binding on individuals as distinct from the Legislative, Executive and Judicial arms of Government and persons or bodies performing a public function or exercising a public power under legislation.

(g) the extent and manner in which the rights declared in a Bill of Rights should be enforceable.

1 OVERVIEW

There are two mechanisms by which a Bill of Rights could be introduced by the NSW Parliament:

- by an ordinary Act of Parliament; or
- by constitutional amendment.

Each of these methods is described more fully below, and their respective advantages and disadvantages are evaluated.

A Bill of Rights is designed to guarantee and protect fundamental human rights. It must therefore be an enduring instrument and one which is not liable to day-to-day alteration or repeal. The Bill of Rights should not only be constitutionalised, but also be doubly entrenched. A constitutionally entrenched Bill of Rights would also have an important symbolic effect.

The constitutional status of an entrenched Bill of Rights would indicate the Government's commitment to enduring human rights protection, and would empower the citizens of NSW to take concrete steps to protect and vindicate their rights.

2. ORDINARY ACT OF PARLIAMENT

2.1 Legislative power

Pursuant to section 5 of the *New South Wales Constitution Act* 1902 (the NSW Constitution), the NSW Parliament has the legislative power to introduce a statutory Bill of Rights which would operate as an ordinary Act of Parliament. Section 5 provides that:

> The legislature shall, subject to the Commonwealth of Australia Constitution Act, have the power to make laws for the peace order and good government of New South Wales in all cases whatsoever.

The NSW Parliament's legislative power is fettered only by the requirement that its laws be for the peace, order and good government of the State,[1] and by the fact that it is subject to the Commonwealth Constitution.[2] Thus, the NSW Parliament could introduce a Bill of Rights as readily as the Federal government introduced anti-discrimination legislation, New Zealand introduced its Bill of Rights in 1990, and the UK introduced its Human Rights Act in 1998.[3] The Federal government unsuccessfully attempted to introduce an Australian Bill of Rights by statutory means in 1973.[4]

The chief advantage of a statutory Bill of Rights lies in the ease with which it could be implemented. The NSW Parliament would simply follow its usual legislative procedures. But the disadvantage of a statutory Bill of Rights is that the NSW Parliament could amend or repeal the Bill of Rights at any time without recourse to any special procedures. This could lead to a lack of stability, and undermine the enduring nature of the rights protections it conferred.

2.2 'Semi-constitutional' legislation

AN important trend relating to human rights enactments in some jurisdictions is that the courts, when interpreting these enactments, have accorded them special status. This status has sometimes been described as 'semi-constitutional'. For instance, the *New Zealand Bill of Rights Act* 1990 has been

---

[1] The High Court has held that the power to make laws for "the peace order and good government of New South Wales" includes the power to alter the structure of the Parliament, including the manner and form of legislating. See *Clayton v Heffron* (1961) 105 CLR 214. The Court reasoned that this did not contravene the principle of parliamentary supremacy since Parliament would retain its legislative powers, but the way in which the power could be exercised would be limited in certain circumstances. As Professor Lumb explains:

> The result of this doctrine is that under the powers conferred by the Constitution Acts to make laws the various state legislatures can introduce fetters into their legislative structure which will control not only constitutional legislation falling outside s 5 of the Colonial Laws Validity Act but also ordinary legislation. It is under this power that a Bill of Rights could be introduced into the Constitution of a state and could be entrenched by requiring a referendum for its modification or repeal.

RD Lumb, *The Constitutions of the Australian States*, 3rd ed, (Brisbane: University of Queensland Press, 1972) at 102-103.

[2] By virtue of section 106 of the Commonwealth Constitution.

[3] *New Zealand Bill of Rights Act* 1990 (NZ) and *Human Rights Act* 1998 (UK).

[4] *Human Rights Bill* 1973 (Cth).

treated by the New Zealand Courts has a fundamental constitutional document which must be given a purposive interpretation.[5]

Similarly the *Racial Discrimination Act* 1975 (Cth) has been regarded as occupying a special position in Australia's legal arrangements. This is largely a result of section 10(1) of the Act which operates to override all inconsistent State and federal laws. Section 10(1) provides:

> If, by reason of, or of a provision of, a law of the Commonwealth or of a State or Territory, persons of a particular race, colour or national or ethnic origin do not enjoy a right that is enjoyed by persons of another race, colour or national or ethnic origin, or enjoy a right to a more limited extent than persons of another race, colour or national or ethnic origin, then, notwithstanding anything in that law, persons of the first-mentioned race, colour or national or ethnic origin shall, by force of this section, enjoy that right to the same extent as persons of that other race, colour or national or ethnic origin.

3. CONSTITUTIONAL AMENDMENT

3.1 An unentrenched constitutional instrument

A Bill of Rights could be introduced into NSW by incorporating it into the NSW Constitution. However, unless the Bill of Rights was entrenched, a constitutional Bill of Rights would have only the same legal effect and operation as an ordinary piece of legislation. Accordingly it could be amended or replaced as easily as an ordinary piece of legislation.

In contrast with the Commonwealth Constitution, which can only be altered only pursuant to the referendum procedures set out in section 128, State constitutions, including the NSW Constitution, are flexible documents and can be amended or altered in the same way as any other legislation. In fact, constitutional amendment can occur even where there is no explicit intention to alter the Constitution expressed in the amending Act of Parliament.[6] As the House of Lords once observed, the State constitution Acts occupy "the same position as a *Dog Act*, or any other Act, however humble its subject matter".[7]

An unentrenched constitutional Bill of Rights is procedurally no different from an ordinary Act of the NSW Parliament: it could be introduced into the NSW Constitution by an ordinary Act of Parliament, and it could also be amended or repealed in the same way.

[5] J Elkind, *New Zealand's Experience with a Non-Entrenched Bill of Rights*, in P Alston, *Towards and Australian Bill of Rights* (Canberra: Centre for International and Public Law, Australian National University, 1994) at 252.

3.2 An entrenched constitutional instrument

It can be made more difficult to amend or repeal a constitutional Bill of Rights by "entrenching" it. A Bill of Rights would have the protection of 'single entrenchment' if it were accompanied by a procedural protection stating that "the Bill of Rights cannot be amended or repealed unless procedure *[X]* is followed".[8] Subject to the requirement that the Parliament not abrogate or delegate its powers (discussed below), the Parliament can nominate any number of procedures: the two most common forms are a two-thirds majority of a joint sitting of both houses of Parliament, and a referendum.

However, single entrenchment provides only a superficial appearance of rigidity since the procedural provision can itself be amended or repealed by a subsequent simple Act of Parliament. Once the procedural protection is amended or repealed, a further simple Act of Parliament could amend or repeal the Bill of Rights itself. Despite this limitation, sections of the NSW Constitution have been singlely entrenched.[9]

A more secure form of procedural protection can be introduced by "double entrenchment". In such cases, the procedural protection is applied not only to the substantive provisions of the Bill of Rights, but also to the procedural protection itself. A Bill of Rights, for example, could be doubly entrenched by the following constitutional amendments, effected by ordinary legislation in the NSW Parliament:

> **s 57 NSW Bill of Rights**
>
> s 57(1)
>
> The rights to [substantive provisions enumerated in the Bill of Rights]… are hereby declared to be part of the laws of New South Wales.
>
> s 57(2)
>
> A Bill which purports to amend or repeal these rights is void unless it is passed by both houses and is approved by a majority of electors voting at a referendum on the bill.
>
> s 57(3)
>
> A Bill which purports to amend this section of the Constitution is void unless it is passed by both houses and is approved by a majority of electors voting at a referendum on the bill.

---

[6] *McCawley v The King* [1920] AC 691, 704. Affirmed in *Union Steamship Co v King* (1988) 166 CLR 1.
[7] *McCawley v The King* [1920] AC 691 at 704.
[8] *A-G v Trethowan* (1931) 44 CLR 394.
[9] Sections 7A and 7B give procedural protections to (that is, entrench) several crucial aspects of the democratic process and parliamentary structure by requiring a referendum before the bills can be assented to by the Governor. Section 7A provides that a Bill to abolish or alter the NSW Constitution or powers of the Legislative Council must not be presented for assent until approved by referendum, and section 7B provides that a Bill to extend the life of the Legislative Assembly beyond 4 years, or a Bill that alters the system of compulsory voting, the distribution of electorates or the conduct of elections must not presented for assent until it has been approved by electors at a referendum.

In this example, neither the substantive provisions, nor the procedural protection, can be amended or repealed unless the specified procedure is followed.

There are however limits on the procedural requirements that may be introduced. The most important of these is the doctrine that a legislature cannot abrogate or delegate its power to make laws.

A very strict procedural requirement, such as the approval of 90% of electors at a referendum, would likely be declared void since it effectively amounts to a prohibition on repeal, and compromises the NSW Parliament's power to legislate. It is difficult to determine the point at which a procedural requirement becomes too burdensome as there is only limited case law on the point, but the two standard protections mentioned above (a two-thirds majority of joint sitting and majority at referendum) pose little risk of infringing this limitation.

4. ALHR SUBMISSION ON THE CONSTITUTIONAL STATUS OF THE NSW BILL OF RIGHTS

For the reasons outlined above, ALHR submits that the NSW Bill of Rights should not only be constitutionalised, but also doubly entrenched.

Section 3

Limitations on NSW Bill of Rights Guarantees

Terms of Reference addressed in this Section:

(e) in what circumstances Parliament might exercise its ultimate authority to override basic rights declared in a Bill of Rights and what procedures need to be put in place to ensure that any such overriding legislation complies with the Bill of Rights.

(h) whether a Bill of Rights should be subject to any reasonable limits prescribed by law that are demonstrably justifiable in a free and democratic society.

1 OVERVIEW

Although a Bill of Rights generally lays down universally applicable basic rights, many Bills of Rights also make limited provision for the derogation from those rights in certain circumstances

A number of countries have adopted Bills of Rights which incorporate various limits on the enforcement of the rights they enumerate. The two most common forms of derogation are:

- "notwithstanding clauses"; and
- "reasonable limits clauses".

The types of clauses are generally only to be found accompanying Bills of Rights which are judicially enforceable. The Canadian Charter of Rights and Freedoms, for example, explicitly incorporates both a reasonable limits clause and a notwithstanding clause.

The question of whether a derogation mechanism is appropriate depends on the content, status and enforceability of the Bill of Rights. There would be little point in providing a derogation mechanism if the rights given in the Bill of Rights were enforceable. As ALHR submits below that the rights in the NSW Bill of Rights should be enforceable, it is necessary to consider the issue of derogation.

2 NOTWITHSTANDING CLAUSES

Section 33(1) of the Canadian Charter of Rights and freedoms, the 'notwithstanding clause' provides that:

> Parliament or the legislature of a province may expressly declare in an Act of Parliament or of the legislature, as the case may be, that the Act or a provision thereof shall operate notwithstanding a provision included in section 2 or sections 7 to 15 of this Charter.

Two points should be noted about the Canadian notwithstanding clause. Firstly, the clause reflects a political compromise designed to help maintain the federal balance in Canada. Second,ly the derogation mechanism operates only in respect of certain specifically identified rights, and does not allow the legislatures to derogate from all Charter-guaranteed rights generally.

The Commonwealth's 1973 *Human Rights Bill* included a notwithstanding clause which provided that a Commonwealth statute could specifically provide that it was to operate notwithstanding that it breached the Bill of Rights.[1]

Nevertheless, the idea of 'notwithstanding clauses' was later rejected in Australia. In 1987, the Advisory Committee on Individual and Democratic Rights recommended to the Constitutional Commission the inclusion of a 'notwithstanding clause' in a Bill of Rights. However, the Constitutional Commission's final report recommended that no such provision be included since the power to opt out or override constitutional guarantees "is inconsistent with the whole process of entrenching rights in the constitution."[2]

The Canadian experience with the notwithstanding clause has shown that the notwithstanding clause is of limited practical significance because, politically, it has proved unattractive to invoke the clause and this has deterred the Provinces from doing so.[3] McKenna observes:

> The inclusion of a parliamentary override clause may make an entrenched Bill of Rights more palatable… but its effectiveness is questionable. For example, in Canada and New Zealand, override clauses have rarely been used and their insertion sits at odds with the anti-majoritarian purpose of an entrenched Bill of Rights – namely that human rights should be beyond the reach of parliamentary majorities seeking to intrude upon rights for political expedience.[4]

---

[1] Section 5(3) of the *Human Rights Bill* 1973.

[2] Constitutional Commission, *Final Report of the Constitutional Commission*, (Canberra: AGPS, 1988) at 492.

[3] In this case, notwithstanding clause has only been invoked once - by Quebec – in the history of the Charter. Recently, however, Alberta has threatened to invoke the case in response to the decision in *Vriend* in which the Canadian Supreme Court confirmed that one of the analogous grounds attracting the section 15 equality guarantees was sexuality. Despite Alberta's rhetoric, it has taken no steps to invoke section 33(1) of the Charter.

[4] M McKenna, *The Need for a New Preamble to the Australian Constitution and/or a Bill of Rights*, Research Paper 12 (Department of the Parliamentary Library, 1996 – 1997) at 20

A notwithstanding clause can present a dangerous threat. McKenna points out that, "override clauses may be invoked by Parliament at the very moment protection of human rights is most under threat."[5] A notwithstanding clause would also undermine the symbolic significance of the government's commitment to human rights.

3 REASONABLE LIMITS CLAUSES

One popular criticism of a Bill of Rights is that it has potential to lead to "far-fetched" results in some circumstances. Some Bills of Rights have responded to this criticism by including a general limitation on the judicial application of the substantive rights contained in it.

The most common provision is that the rights contained in the document are subject to 'such reasonable limits as may be justified in a democratic society'. For example, section 1 of the Canadian Charter of Rights and Freedoms provides that:

> The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

The *New Zealand Bill of Rights Act* 1990 contains a similar provision:

> the rights and freedoms contained in this Bill of Rights may be subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

The South African Constitution contains a similar provision.[6]

In Canada, there is case law concerning the proper interpretation and application of the reasonable limitation clause. The Canadian Supreme Court has held [7] that the objective of the law purporting to override the Charter must be identified, and must be of sufficient importance to warrant overriding a constitutionally protected right or freedom. It must relate to concerns which are "pressing and substantial". Further, the means chosen to pursue that objective must be reasonable and demonstrably justified. They must be rationally connected to the objective; impair "as little as possible" the right or freedom in question; and represent a proportionality between the effects of the measures and the objective.

The Australian legal system is already familiar with the balancing exercise that a reasonable limits clause would require. For example, some constitutional questions are resolved through the invocation of a proportionality test.

---

[5] *Ibid* at 20.
[6] Section 36(1) of the *Constitution of the Republic of South Africa* 1996.

4 ALHR SUBMISSION ON LIMITATIONS ON NSW BILL OF RIGHTS GUARANTEES

ALHR submits that a 'notwithstanding clause' should not be included in the NSW Bill of Rights. Canada's notwithstanding clause is a product of a political compromise to maintain the federal balance. There are federalism issues in NSW context, and accordingly, a notwithstanding clause cannot be justified.

ALHR submits that a "reasonable limits clause" should be included because it facilitates the balancing of competing public interests.

ALHR supports a "reasonable limits clause" in similar terms to the Canadian and New Zealand models, but with the express qualification that when rights are limited pursuant to this clause, they are limited to the smallest degree possible.

[7] *R v Oakes*, [1986] 1 SCR 103.

Section 4

To Whom Should the NSW Bill of Rights Apply?

Term of Reference addressed in this Section:

(f) the circumstances, if any, in which a Bill of Rights should be binding on individuals as distinct from the Legislative, Executive and Judicial arms of Government and persons or bodies performing a public function or exercising a public power under legislation.

1 OVERVIEW

In this Section, ALHR addresses the issue of the appropriate scope of application of the NSW Bill of Rights. This Section is organised in the following way:

- In Part 2, ALHR examines traditional understandings about the nature and function of Bills of Rights, and identifies the historical factors which have led to the assumption that Bills of Rights should apply only to restrain the exercise of State power.
- In Part 3, ALHR examines the approaches taken by other jurisdictions to the scope of application of a Bill of Rights. ALHR also points to developments in the jurisprudence of these jurisdictions which have extended the application of the Bill of Rights.
- In Part 4, ALHR briefly considers the political and social developments in NSW which have left individuals increasingly vulnerable to abuses of 'private' power. ALHR examines how the fields of administrative law, international human rights law and domestic discrimination law have responded to these developments by regulating "private" power in order to protect the public interest and human rights.
- In Part 5, ALHR argues that because human rights require constant protection, and are equally vulnerable to violation from both public and private sectors, the NSW Bill of Rights should apply to all individuals and entities regardless of whether they are State or non-State (public or private) bodies.

2 HISTORICAL CONTEXT AND THE TRADITIONAL APPROACH

Domestic and international human rights instruments are a product of their political, social, and historical context. The US Bill of Rights, for example, emerged at a time where unrestrained State power was perceived as the greatest threat to individual rights and freedoms when the first strands of liberal democratic thought were emerging. The US Bill of Rights was therefore directed at the State and, more precisely, at restraining the exercise of State power.

Since this time, classical liberal theory has been a powerful guide in the development of many domestic and international human rights instruments. In particular, two key principles have influenced the nature of these instruments.

Firstly, many human rights instruments have been directed only to the exercise of State power: the central idea underpinning most domestic Bills of Rights is that individuals (and sometimes groups) hold rights against the State, rather than against "private" entities. In identifying the exercise of "State" power, most human rights instruments have operated in a formalistic way. They concentrate on the nature of the institution or body that is exercising the power, rather than on the nature of the power exercised. In this approach The relevant question is whether the institution, body or individual exercising the power is sufficiently connected to the State so as to be classified as exercising State power. If there is sufficient connection, the human rights instruments will apply. The long standing assumption behind a Bill of Rights, that individuals need protection only from the State is questioned in this section.

Secondly, many human rights instruments operate negatively, that is, they operate only to restrain State power, and do not require the State to act positively in order to guarantee or protect human rights or freedoms. This approach is examined in greater detail in Section 4.

3 SURVEY OF OTHER JURISDICTIONS

3.1 US Bill of Rights

The US Bill of Rights does not contain an express provision which specifies the scope of the Bill's application.[1] Originally the US Bill of Rights was understood as applying only to Federal power. However, through a process of constitutional interpretation involving the fourteenth amendment, the US Supreme Court has held that many articles of the US Bill of Rights operate also to constrain State power.

[1] More recent domestic human rights instruments contain express provisions outlining the scope of application of the instruments. These are discussed in more detail below.

The scope of application of the US Bill of Rights was determined by recourse to first principles and through the evolution of the 'state action' doctrine. This doctrine maintains that action by state is a pre-requisite to the assertion of rights enumerated in the US Bill of Rights. The key question is: what amounts to state action? In *Shelly v Kraemar*, Chief Justice Vinson said state action "refers to exertions of state power in all its forms". [2] In this case, the US Supreme Court held that state action can extend to judicial action: "The judicial action in [the present] case bears the clear and unmistakable imprimatur of the State,"[3] and for that reason, a court could not enforce a restrictive covenant, which otherwise satisfied common law requirements, if it was racially motivated and violated the protections set out in the fourteenth amendment.

While it is clear that legislative, executive, and judicial acts amounts to state action, the question is less clear at the margins, and the problem of how to satisfactorily distinguish between public and private power remains. The uncertainty surrounding the precise ambit of the 'state action' doctrine is clearest in cases of pure State *in*action. The question here is: did the State, in failing to act, breach rights guaranteed by the Bill of Rights? This was the central issue in *DeSheney v Winnebago County Department of Social Services*.[4]

In this case, social workers working for Winnebago County began receiving reports that a father was physically abusing his son. While the caseworkers documented these incidents, they took no action to remove him from his father's custody. When the boy was 4 years old, his father beat him so severely that he suffered permanent brain injuries that left him profoundly retarded and confined him to an institution for life. An action was brought on behalf of the boy and his mother claiming that the State's conduct deprived the boy of his liberty in violation of the Due Process Clause of the fourteenth amendment.

The majority of the US Supreme Court struck this action out on the ground that nothing in the language of the Due Process Clause itself requires the State to protect the life, liberty, and property of its citizens against invasion by private actors. The clause is a limitation on the State's power to act, not a guarantee of minimal levels of safety and security, and the State does not have an obligation to take positive action to prevent private entities from violating the rights of others. This decision may be contrasted with the approach taken to the European Convention of Human Rights, where the Court and the Commission of Human Rights have held that, in some circumstances, the State has a positive obligation to act to prevent private rights abuses.

---

[2] *Shelly v Kraemar*, 334 US 1 (1948).

[3] *Shelly v Kraemar*, 334 US 1 at 20, fn 14 (1948). See also *New York Times v Sullivan*, 376 US 254 (1964) where the US Supreme Court applied the state action doctrine to hold that the common law of defamation was subject to the rights enumerated in the US Bill of Rights.

[4] *DeSheney v Winnebago County Department of Social Services*, 489 US 189 (1989).

3.2 European Convention on Human Rights

The Europe Convention on Human Rights (ECHR) only applies to the State parties to it. Article 1 provides that:

> The Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section 1 of this Convention.

However, the Court and the Commission of Human Rights have extended the scope of application of the ECHR by interpreting it so as to make States responsible in certain situations where the immediate rights violation is by a private party.

In *Marckx v Belgium*,[5] the Court held that a State's Article 8 duty not to interfere with the exercise of the right to privacy and family life may encompass positive obligations, for instance, legislating in a way which is compatible with that right. In *X and Y v The Netherlands*, the Court went further, holding that this positive obligation may require the State to adopt "measures designed to secure respect for private life even in the sphere of relations of individuals between themselves."[6] And in the *Mrs W* series of cases, the Commission suggested that the State could be held responsible for violating the protected right to life by failing to prevent terrorist groups from assassinating citizens.[7]

In extending the obligations held by the State, the Court and Commission have challenged the traditional understanding of the role of the State, thereby blurring the public/private divide, and the understanding that a Bills of Rights confers only negative remedies against the State.

3.3 Canadian Charter of Rights and Freedoms 1982

Section 32 of the *Canadian Charter of Rights and Freedoms* 1982[8] (Canadian Charter) sets out the scope of application of the Charter, and makes it clear that it applies only to the exercise of State power narrowly defined. Section 32(1) provides:

> This Charter applies
>
> (a) to the Parliament and government of Canada in respect of all matters within the authority of Parliament including all matters relating to the Yukon Territory and Northwest Territories; and

[5] *Marckx v Belgium*, Series A, vol 31, para 31. See also *Airey v Ireland*, Series A, vol 32, para 32; *Young, James and Webster v United Kingdom*, Series A, vol 44, paras 48-49 (responsibility of State for alleged breach of Articles 9 to 11 negated by the enactment of legislation).

[6] Series A. vol. 91, para 23.

[7] *Mrs W v United Kingdom* (1983) 32 D & R 10 and *Mrs W v Ireland* (1983) 32 D & R 211. The Inter-American Court on Human Rights reached a similar position in the *Velasquez-Rodriguez* case, reprinted in (1988) 9 *Human Rights Law Journal* 212, holding that States party to the Inter-American Convention on Human Rights are bound to take reasonable measures to protect private individuals against harm from others and to prevent recurrence of such unlawful conduct.

[8] Part I of the *Constitution Act* 1982 (Can).

(b) to the legislature and government of each province in respect of all matters within the authority of the legislature of each province.

Section 32 is a narrow provision, with the result that the Canadian Charter's protections extend only to Acts of Parliament, and executive or administrative acts and decisions of government, including local government; the Canadian Supreme Court has held that the Canadian Charter does not extend to the judiciary.[9] In consequence, the Canadian Charter does not operate to constrain common law rules, in contrast with the broader US approach where the state action doctrine has been defined to encompass the acts of the judiciary as acts of the government.

3.4 New Zealand Bill of Rights Act 1990

Like many other more recent Bills of Rights, the *New Zealand Bill of Rights Act* 1990 (NZ Bill of Rights), expressly sets out the scope of application of the Act. Section 3 provides:

> This Bill of Rights applies only to acts done -
>
> (a) by the legislative, executive, or judicial branches of the government of New Zealand; or
>
> (b) by any person or body in the performance of any public function, power, or duty conferred or imposed on that person or body by or pursuant to law.

Controversy has arisen regarding whether the common law qualifies as an 'act done by the judicial branch of the government', and whether the common law must give way to the rights in the Bill of Rightsin the event of inconsistency.[10]

Section 3(a) is a manifestation of the traditional attitude that Bills of Rights should operate to constrain the power of the three arms of government, what the US would term "state action". However, section 3(b) of the NZ Bill of Rights moves away from formalistic classifications, and concentrates instead on the substantive nature of the power exercised. Thus the issue is: what is the "public function, power or duty… conferred… by or pursuant to law."? Depending on how expansively this criterion is interpreted, the scope of application of the NZ Bill of Rights is potentially quite broad. For instance a statutory energy utility, although corporatised, could fall within the ambit of the Bill's application.

---

[9] *Dolphin Delivery (Retail, Wholesale & Department Stores Union) v Dolphin Delivery Ltd* (1986) 33 DLR (4th). MacIntyre J at 196 said, "While in political science terms it is probably acceptable to treat the courts as one of the three fundamental branches of Government, that is, legislative, executive and judicial, I cannot equate for the purposes of Charter application the order of a court with an element of governmental action."

[10] For commentators who argue that the *New Zealand Bill of Rights Act* 1990 does not operate to constrain the common law, see P Risworth, "The Potential of the New Zealand Bill of Rights" [1990] *New Zealand Law Journal* 68, and D Paciocco, "The New Zealand Bill of Rights Act 1990: Curial Cures for a Debilitated Bill" [1990] *NZ Recent Law Review* 353. For commentators who argue that the *New Zealand Bill of Rights Act* 1990 does constrain the common law, see A S Butler, "The New Zealand Bill of Rights and private common law litigation" [1991] *New Zealand Law Journal* 261.

3.5 South African Bill of Rights

Chapter 2 of the *South African Constitution Act* 1993 contains the South African Bill of Rights, and section 8 sets out the scope of its application:

> (1) The Bill of Rights applies to all law and binds the legislature, the executive, the judiciary, and all organs of state.
>
> (2) A provision of the Bill of Rights binds natural and juristic persons if, and to the extent that, it is applicable, taking into account the nature of the right and of any duty imposed by the right.
>
> (3) In applying the provisions of the Bill of Rights to natural and juristic persons in terms of subsection (2), a court -
>
> (a) in order to give effect to a right in the Bill, must apply, or where necessary, develop, the common law to the extent that legislation does not give effect to that right; and
>
> (b) may develop rules of the common law to limit the right, provided that the limitation is in accordance with section 36(1).
>
> (4) Juristic persons are entitled to the rights in the Bill of Rights to the extent required by the nature of the rights and of the juristic persons.

Section 8(1) reflects the traditional 'state action' approach. However sections 8(2) and 8(3) represent an extension of the application of the Bill of Rights, potentially much broader than the extension in the NZ Bill of Rights. These sections require that a substantive rather than a formal approach be taken in determining the proper scope of application of the Bill of Rights. Depending on the nature of the right involved, the Bill of Rights may apply to all private entities. Of all domestic Bills of Rights, South Africa's is the most far-reaching.

3.6 UK Human Rights Act 1998

Section 6 of the *Human Rights Act* 1998 (UK) (**UK Human Rights Act**) sets out the scope of application of the Act, and section 6 provides that:

> (1) It is unlawful for a public authority to act in a way which is incompatible with a Convention right.
>
> (2) Subsection (1) does not apply to an act if-
>
> (a) as the result of one or more provisions of primary legislation, the authority could not have acted differently; or

(b) in the case of one or more provisions of, or made under, primary legislation which cannot be read or given effect in a way which is compatible with the Convention rights, the authority was acting so as to give effect to or enforce those provisions.

(3) In this section "public authority" includes-

(a) a court or tribunal, and

(b) any person certain of whose functions are functions of a public nature, but does not include either House of Parliament or a person exercising functions in connection with proceedings in Parliament.

(4) In subsection (3) "Parliament" does not include the House of Lords in its judicial capacity.

(5) In relation to a particular act, a person is not a public authority by virtue only of subsection (3)(b) if the nature of the act is private.

(6) "An act" includes a failure to act but does not include a failure to-

(a) introduce in, or lay before, Parliament a proposal for legislation; or

(b) make any primary legislation or remedial order.

There is considerable debate regarding the proper interpretation of section 6 and, consequently, the proper scope of application of the UK Human Rights Act. Some commentators argue that the Act will require a court to give judgment in a way which is compatible with Convention rights in all cases – whatever the nature of the bodies involved.[11] Others argue that because the UK Human Rights Act requires courts and tribunals to take into account Court and Commission of Human Rights decisions, the Act will be as widely applied as the ECHR. On this view, the UK Human Rights Act could apply to compel the state to take positive action to protect individuals where their rights are threatened by other individuals.

Like its more recent counterparts, the UK Human Rights Act also applies beyond the three arms of government: the Act to "public authorities", defined to include "any person certain of whose functions are functions of a public nature". Accordingly, the UK Human Rights Act could apply to completely private entities so long as they are performing functions of a public nature. Depending on how broadly "public nature" is defined, the UK Human Rights Act could have a very wide scope of application.

[11] See W Wade, "The United Kingdom's Bill of Rights", in Cambridge Centre for Public Law, *Constitutional Reform in the United Kingdom: Practice and Principles* (Oxford, 1998). Sir William Wade points out that section 6(3) included courts and tribunals in the list of public authorities which are required by section 6(1) to respect Convention rights. He argues

3.7 Conclusion on scope of application of domestic Bills of Rights

All of the Bills of Rights surveyed above do attempt to draw a distinction between State and non-State action, often doing so by distinguishing between "public" powers and functions on the one hand, and "private" powers and functions on the other. At one end of the spectrum lies the Canadian approach which limits the application of the Canadian Charter to Federal and Provincial legislative and executive Acts. In the middle, the ECHR human rights guarantees extend to compel the State to act in particular circumstances to regulate the affairs of private actors if this will guarantee the rights enumerated in the Convention. Towards the other end of the spectrum lies the South African Bill of Rights which, depending on the nature of the right involved, will potentially apply to all individuals and entities in South Africa regardless of whether they are exercising a "public" function or not.

This review of various jurisdictions' Bills of Rights makes clear that there is no neat or simple divide between public and private power. Each jurisdiction has grappled with the issue of where State power ends and private power commences, and each jurisdiction has taken a different approach. This raises the important, but until recently, much neglected question, of whether there is in fact any utility in drawing a distinction between public and private power. ALHR explores this question in the Parts 4 and 5 of this Section.

4 THE PUBLIC/PRIVATE DIVIDE

4.1 Overview

In this Part, ALHR briefly considers political and social developments in NSW, noting that increased privatisation and the growth of large corporations and other entities have left individuals vulnerable to rights abuses from the so-called "private sector". ALHR examines how the fields of administrative law, international human rights law and domestic discrimination law have responded to these developments. Each of these areas of law has rejected the rigid classification of power as public or private, and has acknowledged that rights protection often requires that the law apply to traditionally understood "private" entities.

Drawing on these legal developments, ALHR submits in part 5 that in the modern political and social environment, there is no utility in drawing a distinction between public and private power for the purposes of rights protection. Individuals' rights require constant protection from intrusions and violations from both the so-called "public" and "private" spheres.

---

that the duty "to recognise and enforce the convention rights…subject only to contrary primary legislation…will be a

4.2 The Modern Political and Social Context

Over the last 50 to 100 years, two related developments have fundamentally altered the relationship between the state and the individual. The first of these is the privatisation of government functions, and the second is the growth of large corporations and other organisations which exercise power and control over individuals and affect their lives in many important ways. As a result, the citizen is left vulnerable to intrusive and wide-ranging powers which affect many of their rights, powers which are wholly unconnected with the State.

The last fifty years have been characterised by the corporatisation and privatisation of many traditionally conceived government functions. Private enterprises now own and operate prisons, hospitals, mental health facilities, schools, and essential services utilities such as water, gas, electricity and telecommunications. As these functions fall into the control of private organisations, traditional checks and balances which applied to government are removed.

Corporations and other privately constituted organisations such as trade unions, professional disciplinary tribunals, political parties and sporting clubs, make decisions and take actions which affect the lives of large groups of citizens in many important ways. Relationships between individuals and these bodies are often ongoing, and are often characterised by the individual's dependency on the body, and little practical choice on the individual's behalf. For example banks, trade unions, and employers often exercise coercive powers over individuals, affecting their political and economic rights.

The implications of these dual developments is summarised by Andrew Clapham:

> the emergence of new fragmented centres of power, such as associations, pressure groups, political parties, trade unions, corporations, multinationals, universities, churches, interest groups, and quasi-official bodies, has meant that the individual now perceives authority, repression, and alienation in a variety of new bodies, whereas once it was only the apparatus of the State which was perceived in the doctrine to exhibit these characteristics. This societal development has meant that the definition of the public sphere has had to be adapted to include these new bodies and activities.[12]

A rights protection strategy that focuses only on State or "public" power leaves the citizenry increasingly vulnerable to the exercise of other forms of power which are just as invasive and potentially tyrannical as the powers that where once exercised by the State.

---

statutory duty in all proceedings, whether the defendant is a public authority or a private person." *Ibid* at 63.

[12] A Clapham, *Human Rights in the Private Sphere* (Oxford: Clarendon Press, 1993) at 137.

Modern political and social realities mean that we must question the utility of the public/private divide, and ask whether it is possible to meaningful protect meaningfully human rights and freedoms if their protections apply to the decreasing sphere of State power.

4.3 Legal developments concerning the public/private divide

The modern developments identified above have in fact challenged the traditional understanding of the public/private divide in many fields of law. Each of these fields is rejecting, to varying degrees, the rigid classification of power as either public or private, and each acknowledges that the protection of individuals' rights require that the law apply to traditionally understood "private" entities.

4.4 Challenging the public/private divide in administrative law

The public/private divide is central to the theory and practice of administrative law. It affects, for instance, whether decisions or actions can be reviewed, questions of standing,[13] and whether an organisation or individual is subject to freedom of information obligations or privacy law. However both the theory and practice of administrative law reveal that no clear distinction can be found between public and private power.

Traditionally, administrative lawyers classified of power as public or private by reference to the source of that power. However this source-based approach has become increasingly redundant in light of the trend towards privatisation, because increasingly fewer "public" powers and functions can be sourced to statute.

Administrative law's general response to this has been to expand the definition of public power or public functions by concentrating more on the nature of the function or power, and less on the source of that power or function. In *R v Panel on Take-overs and Mergers, ex parte Datafin*, where the Court of Appeal held that an unincorporated body set up, with the support of government, to provide a self-regulatory mechanism for the London financial market, was a "public body" and hence was subject to judicial review. The Court held that the important issue was the nature of the body's function rather than the source of its power, and held that the regulation of the market place was a

[13] Private individuals and organisations can only seek to enforce a law where they can show some special interest distinct from that of the public at large, and which the courts think worthy of protection. Standing to seek injunctions and declarations depends in part upon whether the power exercised affects public or private rights and special rules of standing apply where public law issues are litigated, and See M Allars, "Private Law But Public Power: Removing Administrative Law Review From Government Business Enterprises" (1995) 6 *Public Law Review* 44 at 73; G Airo-Farulla, "'Public' and 'Private' in Australian Administrative Law" (1992) 3 *Public Law Review* 186 at 193 and *Australian Conservation Foundation v Commonwealth* (1980) 146 CLR 493.

public function.[14] This, however, simply begs the question of what can be defined as a "public function", and no single test has yet been consistently proposed.[15]

4.5 Challenging the public/private divide in international human rights law

Traditionally, international law has been understood as applying to States rather than to individuals or to private bodies within these States. However recent developments in international human rights law are challenging this understanding, as the international community acknowledges that some of the greatest threats to human rights come from the exercise of private power rather than through the acts and omissions of States.

There are two main ways in which international human rights law has developed to attach a responsibility to private bodies and individuals. First, international agreements have imposed obligations on States to take positive action to regulate the interactions of individuals where these interactions may lead to the violation of human rights. The International Convention on the Elimination of All Forms of Racial Discrimination (CERD) and the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) stand out as examples. CERD, for example, provides that:

> Each State Party shall prohibit and bring to an end, by all appropriate means, including legislation as required by circumstances, racial discrimination by any persons, groups or organisations.

Second, the international community has targeted individuals directly. The establishment of International War Crimes Tribunals is only one example.

4.6 Challenging the public/private divide in domestic discrimination law

Commonwealth anti-discrimination legislation is recognition that individuals are vulnerable to discrimination in private spheres such as employment and commerce. Accordingly it regulates certain "private" relationships. For example, the *Disability Discrimination Act* 1992 (Cth) operates to prohibit disability discrimination in the areas of employment, accommodation, education, access to

[14] Lloyd LJ said that "the source of the [body's] power will often, perhaps usually, be decisive", in the sense that a body with a statutory source of power will usually be subject to judicial review, which a body with a contractual source will not. However, he said, "in between these extremes there is an area in which it is helpful to look not just at the source of the power but at the nature of the power. If the body in question is exercising public law functions, or the exercise of its functions have public law consequences, the that may…be sufficient to bring the body within the reach of judicial review." *R v Panel on Take-overs and Mergers, etc parte Datafin* [1987] QB 815 at 847.

[15] See N Bamforth, "The Application of the Human Rights Act 1998 to Public Authorities and Private Bodies" (1999) 58 *Cambridge Law Journal* 159 at 161-162. For instance, one test of public function is whether a body exercises monopoly regulatory power, while another concentrates on whether the state would have performed the function had the private body not intervened. *Ibid* at 161-162.

premises, clubs and sports, and in the provision of goods, facilities, services and land, as well as in the administration of Commonwealth laws and programs. The *Sex Discrimination Act* 1984 (Cth) operates to prohibit sex discrimination in the areas of employment, accommodation, education, and the provision of goods, facilities, services, the disposal of land, the activities of clubs and the administration of Commonwealth laws and programs, and the *Racial Discrimination Act* 1975 (Cth) has a similar scope.

The *Anti-Discrimination Act* 1977 (NSW) regulates certain private dealings: the Act prohibits discrimination at work, in education, accommodation and registered clubs, and in the provision of goods and services.

5 DISTINGUISHING PUBLIC FROM PRIVATE POWER

There are three main methods of distinguishing public from private power:

- a formal classification approach
- a source-based approach, and
- an approach which concentrates on the nature of the power.

None of these approaches provides a satisfactory method by which to distinguish public from private power.

Under a formalist classification, power can be classified as 'public' simply if it is exercised by a State institution. This approach is subject to two important criticisms. First and most fundamentally, it lacks any explanatory power. In the words of Geoffrey Airo-Farulla:

> If one argues either that anything done by a State institution must be "public", because of the very nature of the State; or that the question depends on the nature of the relationships entered into by the State, one is employing formalist classifications. These classifications do not themselves explain why one or the other was chosen. They are not ends in themselves. Simply focusing on the nature of the institution, or on the nature of the relationships it enters into, is a rhetorical device which disguises the ends which it is sought to achieve by making such a choice.[16]

Second, invoking notions of the State in order to define public power is becoming increasingly irrelevant in the era of privatisation.

The second approach to distinguishing public from private power involves investigating the source of the power. At one time this method of analysis held sway in administrative law: a power could be

[16] Airo-Farulla *supra* note 13 at 188 – 189.

classified as public if it was sourced statutorily, and as private if sourced to a contract This approach is both under- and over-inclusive. It is over-inclusive because, if applied broadly, it could bring into public law the activities of any private body which is regulated to some extent by statute.[17] It is under-inclusive because it neglects to regulate any privately-sourced powers, regardless of their impact on the public interest.

The third way of distinguishing between public and private power involves analysing the nature of the power exercised. The difficulty here lies in articulating the criteria by which a power may be said to be public.[18] In New Zealand there is debate concerning whether the *New Zealand Bill of Rights Act* 1990 constrains the common law, and whether acts of the judiciary should properly be classified as "government acts." Butler asks "what is a 'government function'? Surely, the function of government is, at the very least, the protection of one citizen (in his life, person, property, and other rights) from attack by another citizen."[19] In contrast, Paciocco writes, "[t]he mere employment by the Court of a rule that is applicable because of the act or omission of a private individual, or the rendering of judgment between private litigants" is not a government function. Courts are not carrying on a governmental function when employing rules to adjudicate disputes."[20]

None of the approaches listed above satisfactorily resolve the question of when the power can be classified as public or private. In the words of Andrew Clapham,

> In practice it is impossible to differentiate the private from the public sphere. Even if we feel we can distinguish between the two, such difficult decisions leave a lacuna in the protection of human rights, and can in themselves be particularly dangerous.

In administrative law, Margaret Allars, acknowledges that much work remains to be done on how to identify and distinguish public power from private power.[21]

By concentrating on how to define public or State power we are asking the wrong question. We need to start asking the right question:

> Ultimately what is in issue is the usefulness of a public/private distinction…[W]e need to abandon the use of formalist criteria for the scope of administrative law principles, and to ask instead to what extent the values which those principles seem to

[17] See J Beatson, "Public and Private in English Administrative Law" (1987) 103 *Law Quarterly Review* 35 at 47.
[18] See *Ibid* at 50-51, and in the context of international human rights, and the futility of distinguishing between public and private power, see Clapham, *supra* note 12 at 13.
[19] A Butler, "The New Zealand Bill of Rights Act and private common law litigation" [1991] *New Zealand Law Journal* 261at 262.
[20] D Paciocco, "The New Zealand Bill of Rights Act 1990: Curial Cures for a Debilitated Bill" [1990] *NZ Recent Law Review* 353 at 360.
[21] Allars *supra* note 13 at 51. However, she goes on to argue that decisions about collectively consumed essential resources such as water, gas, and electricity are exercises of public power.

> embody…should be extended to all bureaucratic structures which undoubtedly exercise power over our lives today.[22]
>
> If we reject the category of "organ of the State" as meaningless and dangerous, and complain that its use leads to contradictory and incoherent results, then we need to find a new framework with which to understand the operation of the rights in question.[23]

The real question should be that posed by Andrew Clapham – how can human rights legislation best promote and protect human dignity and democracy.[24]

6 ALHR SUBMISSION ON THE PUBLIC/PRIVATE DIVIDE

ALHR submits that the most satisfactory resolution of the issue is to do away with the distinction between public and private power altogether. The practical implication of this would be to apply the Bill of Rights to both public and private power.

A decision to apply the NSW Bill of Rights to both public and private law receives powerful support if we examine the nature of human rights more generally. People have human rights by virtue of their inherent human dignity. This means that individuals always have human rights.

Whether human rights are protected and enforced should not depend on who or what is exercising the power which affects them. Whether the rights violator be public or private, a violation of a human right remains a violation of a human right.

> [I]n a situation where the justification for the right in question concerns [human] dignity, then rights must be protected even in the absence of a public element – inhuman treatment threatens dignity in every circumstance.[25]

Moreover, applying the Bill of Rights to both the State and private entities is theoretically consistent with one of the most fundamental of our rule of law principles. As AV Dicey insisted, a hallmark of rule of law is that both citizens and State officials are subject to the same rules of "ordinary" law.[26]

---

[22] Airo-Farulla *supra* note 13 at 199.
[23] Clapham *supra* note 12 at 136.
[24] Clapham *supra* note 12 at 145. According to Andrew Clapham, democracy denotes broadly procedural values designed to ensure equal access to the democratic process and dignity refers to the capacity of each individual to achieve self-fulfilment. *Ibid* at 148.
[25] *Ibid* at 146-147.
[26] AV Dicey, *Laws of the Constitution*, 8th ed.

Section 5

Enforcement and Remedies

Terms of Reference this Section addresses:

(f) the extent and manner in which the rights declared in a Bill of Rights should be enforceable.

(i) whether there should be a legislative requirement on courts to construe legislation in a manner which is compatible with international human rights instruments.

1. OVERVIEW

The enforcement of a Bill of Rights, and the effectiveness of any remedies, are critical issues. This Section focuses on how the NSW Bill of Rights should be implemented and enforced.

It is antithetical to the very idea of rights protection to confer a right without conferring a remedy by which that right may be enforced. Any NSW Bill of Rights must extend beyond a mere declaration of principle. The NSW Bill of Rights must contain appropriate enforcement mechanisms in order to properly guarantee and protect the rights it proclaims.

This simple proposition has been recognised by the common law since at least the early 18th century. In *Ashby v White*, Chief Justice Holt explained:

> If the plaintiff has a right, he must of necessity have a means to vindicate and maintain it, and a remedy if he is injured in the enjoyment of it; and indeed it is a vain thing to imagine a right without a remedy…want of right and want of remedy are reciprocal.[27]

More recently, the Canadian Supreme Court made the same observation:

> To create a rights without a remedy is antithetical to one of the purposes of the Charter which surely is to allow Courts to fashion remedies when constitutional infringements occur.[28]

This Section is organised in the following way:

- Part 2 outlines the main approaches that can be taken to Bill of Rights enforcement.
- Part 3 surveys the enforcement measures adopted by a number of other jurisdictions with Bills of Rights.

[27] *Ashby v White* (1703) 2 Ld Ramy 938 at 953; 92 ER 126. This passage recalls the Latin maxim, *ubi jus ibi remedium* – for the violation of every right, there must be a remedy.

- Part 4 sets out ALHR's preferred enforcement approach, recommending the adoption of a mixed "watchdog" and court-based approach to the enforcement of the Bill of Rights.
- Part 5 considers the court-based enforcement approach in more detail, and ALHR makes recommendations relating to the laws of standing, the courts' remedial powers and the doctrine of Crown immunity.

2. MODELS OF ENFORCEMENT

2.1 Three main approaches to enforcement

The three main approaches to the enforcement of Bills of Rights are:

- an interpretive approach;
- a "watchdog" approach; and
- a complaints-based approach.

These approaches are not mutually exclusive and, as the review of other jurisdictions' enforcement mechanisms below demonstrates, some jurisdictions employ more than one of these approaches in order to enforce their human rights guarantees. The approach adopted will also depend on the constitutional status of the Bill of Rights. If, for instance, the NSW Bill of Rights was constitutionalised, the courts could be given the power to declare legislation inconsistent with the Bill of Rights to be unconstitutional and therefore invalid.

The question of enforcement is intertwined with the question of the scope of application of the Bill of Rights. The interpretive approach, for instance, is not likely to be appropriate if the NSW Bill of Rights applies to both the State and private individuals, as ALHR submits that it should.

2.2 An interpretive approach

This is a minimalist approach, where no new enforcement mechanisms are created. No legal sanctions are created, and no legal redress is available, when an individual's rights are violated. An interpretive approach could take a number of forms:

- The Bill of Rights could include an express provision which largely mirrors the common law position: the arms of government, and other entities (if the Bill of Rights applies to them), are required to makes decisions and to act in a manner which is consistent with the rights in the Bill

[28] *Nelles v Ontario* [1989] 2 SCR 170 at 196 per Lamer J.

of Rights. This, however, would merely be a directive provision, and would lack any true enforcement power: there would be no legal consequence if an entity ignored this provision.

- The Bill of Rights could create a rule of statutory interpretation to the effect that all legislation be given a beneficial interpretation. If more than one interpretation is available with respect to a piece of legislation, the one which results in the legislation conforming with the rights in the Bill of Rights must be preferred.
- The Bill of Rights could give the courts power to declare that action or decisions, including legislation, are "inconsistent" with the Bill of Rights. For instance, section 3 of the UK *Human Rights Act* operates in this manner with respect to legislation. However the courts stop at the point of making this declaration, and do not have the power to order that the legislation is void.

An extreme version of the interpretive approach could provide an effective enforcement mechanism. If the Bill of Rights was constitutionalised, courts would have the power to strike down legislation inconsistent with the constitutionally guaranteed rights. However this type of 'interpretive' approach is better described as a court-based approach, because the court is enforcing the Bill of Rights.

2.3 A "watchdog" approach

This is an active approach, where a body has responsibility to administer and supervise the Bill of Rights. It could be a body akin to the Human Rights and Equal Opportunity Commission (HREOC) at the Federal level or, in a non-human rights context, the Australian Competition and Consumer Commission (ACCC).

This body would be charged with taking steps to implement the Bill of Rights, and consequently would have monitoring, supervisory, promotional and educative functions. It would also have prosecutorial, conciliatory and enforcement functions.

A conciliatory approach would be taken in the first instance and then, if this failed, adjudication would follow, culminating in the body making a finding as to whether there has been a violation. If there has been a violation, the body would have the power to order damages, prohibitive, reparative or corrective action.

One useful example of the "watchdog" approach can be found in the South African Human Rights Commission:

> (1) The Human Rights Commission must -
>
> (a) promote respect for human rights and a culture of human rights;
>
> (b) promote the protection, development and attainment of human rights; and
>
> (c) monitor and assess the observance of human rights in the Republic.

(2) The Human Rights Commission has the powers, as regulated by national legislation, necessary to perform its functions, including the power -

(a) to investigate and to report on the observance of human rights;

(b) to take steps to secure appropriate redress where human rights have been violated;

(c) to carry out research; and

(d) to educate.

(3) Each year, the Human Rights Commission must require relevant organs of state to provide the Commission with information on the measures that they have taken towards the realisation of the rights in the Bill of Rights concerning housing, health care, food, water, social security, education, and the environment.

2.4 A complaints-based approach

A complaints-based approach involves enabling individuals or groups of individuals to initiate complaints. A strict adversarial model is unlikely to secure the most effective or speedy resolution of human rights breaches; a range of appropriate dispute resolution measures would best be used in the resolution of human rights complaints. The measures should include access to a court or tribunal which can determine a complaint and make enforceable remedial orders.

Under this approach the NSW Bill of Rights would contain provisions giving the courts and the NSW Administrative Decisions Tribunal the power to enforce the NSW Bill of Rights, through the creation of new causes of action. A similar model may be found in the Canadian *Charter of Rights and Freedoms* and the *Human Rights Act* 1998 (UK). The complaints-based enforcement approach is discussed in more detail in Parts 4 and 5 of this Section.

3 SURVEY OF ENFORCEMENT MECHANISMS USED IN OTHER JURISDICTIONS

3.1 US Bill of Rights

For the most part, the US Bill of Rights, and the US Constitution generally, do not contain express enforcement mechanisms. The thirteenth, fourteenth and fifteen amendments, and only confer upon Congress the power to enforce those amendments by "appropriate legislation". [29] Thus the US Bill of

[29] For example, the thirteenth amendment provides:

Rights relies on a court-based enforcement mechanism although, as discussed below, the courts' enforcement powers are limited.

In the landmark decision of *Marbury v Madison* the US Supreme Court implied into the US Constitution the power of judicial review, concluding that the US Supreme Court had the power to determine whether legislation was unconstitutional, and if it was, to declare it void and to no effect.[30] In Bill of Rights terms, this means that the courts have the power to declare Federal legislation (and State legislation in so far as the Bill of Rights applies) void if it breaches the rights enumerated in the Bill of Rights.

With the exceptions of actions against municipalities, no cause of action lies directly against either the Federal or State governments for violation of the US Bill of Rights. This is largely a consequence of the doctrine of sovereign immunity. However, as a product of judicial implication at the Federal level, and legislative enactment at the State level, victims of Bill of Rights violations have a limited cause of action (resulting primarily in damages) against State officials. These causes of action are limited further by the courts holding that government will not be held vicariously liable for the acts of their officials.

At the Federal level, in the case of *Bivens v Six Unknown Named Federal Narcotic Agents*, the US Supreme Court implied from the US Bill of Rights a cause of action against federal officials who violated constitutionally guaranteed rights.[31] A *Bivens* actions lies against individual officials but in limited circumstances, where the *Federal Torts claims Act* 1946 applies, the State will be held vicariously liable.[32] The US Supreme Court has held that a *Bivens* action cannot be maintained against a federal agency.

Actions against state officials for US Bill of Rights violations are founded on 42 USC Section 1983. Section 1983 relevantly provides:

> Every person who, under colour of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected,

---

Section 1. Neither slavery nor involuntary servitude, except as punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.

Section 2. Congress shall have the power to enforce this article by appropriate legislation.

[30] *Marbury v Madison*, 5 US (1 Cranch) 137 (1803).

[31] In *Bivens v Six Unknown Named Federal Narcotic Agents*, 403 US 388 (1971), the majority of the US Supreme Court held that damages was an appropriate remedy for violation of the plaintiff's Fourth Amendment rights (prevention of unreasonable search and seizure)..

[32] The *Federal Tort Claims Act* 1946 (**FTCA**) effects a limited waiver of federal sovereign immunity, making the US vicariously liable for personal injury, death, or property damage caused by the "negligent or wrongful act or omission" of any federal employee acting within the scope of his or her employment. A judgment against the US bars and further action against the individual federal employee. The FTCA is qualified with numerous exceptions which, according to Schuck, "deny…relief for much, perhaps most, governmental misconduct." (See P H Schuck, *Suing Government: Citizen Remedies For Official Wrongs* (New Haven: Yale University Press, 1983) at 41).

> any citizen of the United States or any other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suite in equity, or other proper proceedings for redress.

3.2 Canadian Charter of Rights and Freedoms 1982

The Canadian Charter of Rights and Freedoms (the Canadian Charter) relies on a court-based enforcement mechanism, although the courts' enforcement powers are broader than those of its US counterparts. Like the US Bill of Rights, the Canadian Charter is constitutionalised, and the courts can invalidate any Federal or Provincial legislation that they find contravenes the Charter. The *Constitution Act* 1982 empowers the courts to make a declaration of invalidity.

Section 24 of the Canadian Charter is a remedial provision which confers a cause of action upon victims of Charter rights violations in civil matters, and which makes provision for the exclusion of evidence where it has been obtained in breach of Charter rights. It provides that:

> (1) Anyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances.
>
> (2) Where, in proceedings under subsection (1), a court concludes that evidence was obtained in a manner that infringed or denied any rights or freedoms guaranteed by this Charter, the evidence shall be excluded if it is established that, having regard to all the circumstances, the admission of it in the proceedings would bring the administration of justice into disrepute.

Section 24(1) confers remedial discretion upon the courts in the widest of terms. Its outer limits are yet to be tested, but the courts have confirmed that it does facilitate damages remedies,[33] as well as declaratory and injunctive relief. Determining which remedy is "appropriate and just" will depend on the nature of the Charter rights violation at issue.

The Canadian courts have indicated that what is "appropriate" involves consider of a number of factors distinct from those involved in determining what is "just". They also suggest that "appropriateness" is a narrower field of inquiry than "justness". For instance, in *Kodellas v Saskatchewan Human Rights Commission*, Bayda CJS said:

> Appropriateness connotes efficaciousness and suitability from the standpoint of the violation itself – a remedy 'to fit the offence' as it were. It suggests a remedy that, from

[33] See *Schacter v Canada*, [1992] 2 SCR 679.

> the perspective of the person whose right was violated, will effectively redress the grievance bought about by the violation. The quality of justness, on the other hand, has a broader scope of operation. It must fulfil a more extensive set of criteria than the quality of appropriateness. To be just a remedy must be fair to all who are affected by it.[34]

3.3 New Zealand Bill of Rights Act 1990

The *New Zealand Bill of Rights Act* 1990 is a legislative Bill of Rights and has no constitutional status. Accordingly, the courts do not have the power to declare legislation which is inconsistent with the Bill of Rights invalid. The express terms of the NZ Bill of Rights indicate that an interpretive approach to enforcement is to be applied. Section 6 provides:

> Wherever an enactment can be given a meaning that is consistent with the rights and freedoms contained in this Bill of Rights, that meaning shall be preferred to any other meaning.

Section 7 provides:

> Where any Bill is introduced into the House of Representatives, the Attorney-General shall,---
>
> (a) In the case of a Government Bill, on the introduction of that; or
>
> (b) In any other case, as soon as practicable after the introduction of the Bill,---
>
> bring to the attention of the House of Representatives any provision in the Bill that appears to be inconsistent with any of the rights and freedoms contained in this Bill of Rights.

The NZ Bill of Rights contains no other express enforcement provision. However, judicial interpretation of the Act has extended the mechanisms available to enforce the NZ Bill of Rights, and has thereby broadened out the enforcement mechanisms of the NZ Bill of Rights to include a limited court-based enforcement approach. This occurred in the landmark case of *Simpson v Attorney-General [Baigent's Case]* [35] in which the NZ Court of Appeal implied a remedy into the NZ Bill of Rights, recognising a cause of action directly against the State for damages for breach of the Act.[36] This has some parallels to the *Bivens* and section 1983 actions available in the US, although it is directly against the State and cannot properly be described as a "constitutional tort".

---

[34] *Kodellas v Saskatchewan Human Rights Commission*, [1989] 5 WWR 1 (Sask. CA).
[35] *Simpson v Attorney-General [Baigent's Case]*, [1994] 3 NZLR 667.
[36] In *Simpson v Attorney-General [Baigent's Case]*, [1994] 3 NZLR 667, the police violated section 21 of the *New Zealand Bill of Rights Act* 1990 (right to be free of unreasonable search and seizure) by entering the plaintiff's house with an invalid search warrant.

Because the *Baigent* action is directly against the Crown, the complex immunity doctrines which dominate the US jurisprudence on constitutional tort actions have no role to play.

3.4 South African Bill of Rights

As the Bill of Rights is part of the South African Constitution, it may be enforced by the Constitutional Court. The Constitutional Court has power to declare Acts and amendments to the constitution unconstitutional and make a declaration of invalidity. Section 2 provides:

> This Constitution is the supreme law of the Republic; law or conduct inconsistent with it is invalid, and the duties imposed by it must be performed.

Section 172 sets out the powers of courts in constitutional matters and provides:

> (1) When deciding a constitutional matter within its power, a court -
>
> (a) must declare that any law or conduct that is inconsistent with the Constitution is invalid to the extent of its inconsistency; and
>
> (b) may make any order that is just and equitable, including -
>
> (i) an order limiting the retrospective effect of the declaration of invalidity; and
>
> (ii) an order suspending the declaration of invalidity for any period and on any conditions, to allow the competent authority to correct the defect.

The South African Bill of Rights is also enforced through a court-based enforcement model as the Constitution confers a cause of action where the Bill of Rights has been violated. The Bill of Rights also contemplates an interpretive approach be taken to enforcement; section 39(2) provides:

> When interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport, and objects of the Bill of Rights.

3.5 UK Bill of Rights Act 1998

In so far as the UK *Human Rights Act* applies against the legislature, the Act employs an interpretive enforcement model. As the Act applies to public authorities, it employs a limited court-based enforcement model.

In relation to legislation which breaches the Act, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with the European Convention rights. The

courts are empowered to make a "declaration of incompatability" when they find that legislation contravenes the Act; section 4(6) provides that a declaration of invalidity:

(a) does not affect the validity, continuing operation or enforcement of the provision in respect of which it is given; and

(b) is not binding on the parties to the proceedings in which it is made.

Consequently the interpretive approach is of limited practical consequence, as courts are limited to making a declaration that legislation is inconsistent with the *UK Human Rights Act*. The courts have no power to order the legislation void and invalid, and inconsistent legislation continues to operate until such time as the legislature may choose to do something about it.

When public authorities are found in breach of the *UK Human Rights Act*, the Act takes a limited court-based approach to enforcement. There is a cause of action against the public authority, and the usual rules of standing apply. A court may grant such relief or remedy, or make such order as are within its powers and which it considers just and appropriate. There is a very broad remedial discretion in the courts, similar to that in Canada, although a complainant's right to damages appears to be more limited than in Canada.

4 ALHR SUBMISSION ON ENFORCEMENT AND REMEDIES

ALHR submits that the interpretive approach simply represents the *status quo*, and accordingly, is not a satisfactory method by which to enforce the NSW Bill of Rights. There is already a range of common law principles to the effect that laws must be applied in a way which preserves and protects human rights. There is a presumption that legislation should be construed to prevent breaches of human rights,[37] and another that the Legislature intended to legislate in accordance with its international human rights obligations and legislation should be construed accordingly.[38] History shows us that this type of approach is simply not effective enough.

ALHR submits that the most effective enforcement approach is one that combines the watchdog and court-based approaches.

A body exclusively dedicated to the implementation, supervision, promotion and enforcement of the Bill of Rights provides the most effective way of introducing the Bill. Such a body could be resource intensive, but a workable accommodation of effectiveness and budgetary limitations would be

[37] See *Re Bolton; ex parte Beane* (1987) 162 CLR 514 at 523; *Bropho v State of Western Australia* (1990) 171 CLR 1 at 17-18; *Coco v The Queen* (1994) 179 CLR 427 at 436-438; *Commissioner of Taxation (Cth) v Citibank Ltd* (1989) 20 FCR 403 at 433; and *Taciak v Commissioner of the Australian Federal Police* (1995) 131 ALR 319 at 330-333.

[38] *Dietrich v The Queen* (1992) 177 CLR 292 at 306, 438-349; *Minister of State for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273 at 287, 301-302, 315; *Newcrest Mining (WA) Limited v Commonwealth of Australia* (1997) 147 ALR 42 at 147; *Kable v DPP* (1995) 36 NSWLR 374 at 395.

achieved by giving existing watchdog bodies, such as the NSW Ombudsman's Office, with various Bill of Rights implementational, supervisory, promotional and enforcement functions.

Quite apart from the watchdog approach, ALHR strongly submits that the NSW Bill of Rights be supported by a complaints-based enforcement model. This does not require the creation of any new infrastructure, but puts teeth into the Bill of Rights by creating a cause of action which gives wronged individuals the opportunity to vindicate their rights and seek appropriate redress.

There are two main criticisms levelled against the court-based approach: that complaints-based enforcement is too individualistic, and that court-sponsored remedies are too limited. In the final Part of this Section, ALHR proposes simple changes to court and tribunal procedures and processes which would answer these concerns.

5 IMPLICATIONS OF ADOPTING A COMPLAINTS-BASED APPROACH TO ENFORCEMENT

5.1 Overview

One of the most common criticisms of the complaints-based approach to Bill of Rights enforcement is that it is too individualistic: enforcement is dependent on the individual deciding to pursue an action, and the remedy ordered will usually only benefit the individual applicant concerned.[39] While it is true that the complaints-based approach is complaint driven, the so-called individualistic focus can be mitigated by altering the courts' standing rules, and by encouraging the courts to use the full range of remedial techniques open to them.

5.2 Widening the rules of standing

In both the Federal and NSW courts the laws of standing remain unclear.

Neither the Federal Court Rules nor the NSW Supreme Court Rules expressly set out rules of standing. Certain pieces of legislation confer standing on particular designated entities or individuals. Generally, however, standing is regulated by the common law where the general rule has been that a person may only institute proceedings either where their rights or interests are personally affected, or in the "public interest" provided that they has a "special interest" in the case.

[39] For instance, in the United States, this argument has been advanced in G N Rosenberg, *The Hollow Hope: Can Courts Bring About Social Change?* (Chicago: University of Chicago, 1991). In Canada, this argument has been advanced in W A Bogart, *Courts and Country: The Limits of Litigation and the Social and Political Life of Canada* (Toronto: Oxford University Press, 1994) and J Bakan, *Just Words: Constitutional Rights and Social Wrongs* (Toronto: University of Toronto Press, 1997).

While the precise meaning of "special interest" remains uncertain and varies according to the circumstances of the particular case, it must at least go beyond the interests of ordinary members of the public.[40] It is not sufficient for a potential applicant to say only that they have a genuine concern about enforcing a law; they must also be able to demonstrate a special connection with the subject matter of the case.[41] The "special interest" requirement has narrowed the category of people who may commence an action.

The complaints-based approach can be made less individualistic if the Bill of Rights adopts a wider approach to standing.

There are recent indications that the courts are willing to broaden the laws of standing when it comes to protecting the public interest. In the recent High Court case *Truth Against Motorways v Macquarie Infrastructure Investment Management*, the majority held that an applicant could seek a remedy under the *Trade Practices Act* 1974 (Cth) notwithstanding that its private rights were not affected and it did not have a "special interest" in the subject matter of the proceedings.[42]

To ensure that the courts adopt a wider approach to standing when enforcing the Bill of Rights, ALHR submits that the NSW Bill of Rights contain a provision similar in terms to that contained in the South African Bill of Rights:

> Anyone listed in this section has the right to approach a competent court, alleging that a right in the Bill of Rights has been infringed or threatened, and the court may grant appropriate relief, including a declaration of rights. The persons who may approach a court are -
>
> (a) anyone acting in their own interest;
>
> (b) anyone acting on behalf of another person who cannot act in their own name;
>
> (c) anyone acting as a member of, or in the interest of, a group or a class of persons;
>
> (d) anyone acting in the public interest; and
>
> (e) an association acting in the interest of its members.

[40] For a discussion of what constitutes a "special interest" for the purposes of standing law, see *Onus v Alcoa of Australia Limited* (1981) 149 CLR 7 and *Australian Conservation Foundation v The Commonwealth* (1980) 146 CLR 493. For a survey of the laws of standing in the federal jurisdiction, see Australian Law Reform Commission, *Beyond the Doorkeeper: Standing to Sue for Public Remedies*, Report No 78 (1996) at 87-97 (Appendix C).

[41] Generally the "special interest" does not necessarily have to be a legal interest or involve property or possessory rights: *Onus v Alcoa of Australia Limited* (1981) 149 CLR 7 at 42 and 44. However, it has to be more than a "mere intellectual or emotional concern": *Australian Conservation Foundation v The Commonwealth* (1980) 146 CLR 493 at 530.

[42] *Truth Against Motorways v Macquarie Infrastructure Investment Management* [2000] HCA 11 (9 March 2000)

5.3 Widening court-sponsored remedies

A criticism of complaints-based enforcement of Bills of Rights is that courts generally order one-off, negative remedies. Courts do not therefore effectively respond to rights violations which:

- affect a large number of people;
- are ongoing; or
- which are the result of some failure to take action where action is required.

The perception that the courts can offer only limited remedial responses is largely due to two assumptions: first, that rights violations are discrete or "one-off"; and second, that rights violations occur only where a body or an individual positively acts.

ALHR challenges both of these assumptions. Rights violations are often pervasive and ongoing, and affect a large number of individuals. Many rights violations are a result of inaction – of the failure to take action when action is required to properly protect human rights.

One of the key weaknesses of the common law in protecting individual rights and freedoms is the traditional reliance on negative remedies such as prohibitive injunctions or declarations of invalidity. ALHR submits the NSW Bill of Rights should contain an express remedial provision which confirms that the courts can order both negative and positive remedies.

This is not a controversial proposition. Courts already have the power to order positive remedies in a variety of situations. Damages, mandatory injunctions, and equitable receiverships are simply a few everyday examples.

Over the last three decades many jurisdictions have acknowledged that rights violations can often be the product of pervasive and ongoing practices rather than discrete, and one-off events or omissions. For example, a 1972 United States Senate Committee observed that:

> Employment discrimination as viewed today is a far more complex and pervasive phenomenon. Experts familiar with the subject now generally describe the problem in terms of 'systems' and 'effects' rather than simply intentional wrongs, and the literature on the subject is replete with discussions of, for example, the mechanics of seniority and lines of progression, perpetuation of the present effect of [past] discriminatory practices through various institutional devices and testing and validation requirements.[43]

[43] *Legislative History of the Equal Employment Opportunity Act of 1972* (House of Representatives 1746, P.L. 92-261). Amending Title VII of the *Civil Rights Act* 1964 (Washington, DC: GPO, November 1972) at 414.

In Canada, similar recognition has come in employment,[44] and in the context of racism in the criminal justice system.[45]. The courts in both countries have been prepared to recognise that rights violations can be ongoing and pervasive (ie systemic) rather than discrete and intentional.[46]

Systemic rights violations "require systemic remedies".[47] In a leading Canadian systemic discrimination judgment, Dickson CJ said "the prevention of systemic discrimination will reasonably be thought to require systemic remedies."[48] . Courts in NSW already have to power to order systemic relief in appropriate situations, such as the equitable receivership in private law.

ALHR submits that the courts and tribunals be specifically authorised to order systemic relief in response to Bill of Rights violations where it is appropriate to do so.

Systemic relief can be achieved through the use of ongoing and positive remedies such as 'structural injunctions'. Structural injunctions are an extension of mandatory injunctions, and have been used in the United States to desegregate schools (which were in breach of the fourteenth amendment), and to reform prisons (which were in violation of the eighth and fourteenth amendments).[49] They are similar in effect to the private law remedy of equitable receivership.[50] They are effective remedial responses to systemic rights violations because they transform the underlying structures of organisations or arrangements to eliminate the causes of rights violations.

To ensure that the courts do use the full gamut of remedial options open to them, ALHR submits that an express remedial provision be included in the NSW Bill of Rights. The NSW Bill of Rights could take as its starting point section 24(1) of the Canadian Charter which makes it clear that the courts have both negative and positive remedial powers.

In addition, however, ALHR submits that it the remedial provision must expressly authorise the courts to order systemic relief where appropriate. Such a provision would be along the lines that:

---

[44] Judge R S Abella, *Report of the Commission on Equality in Employment* (Ottawa: Canadian Government Publishing Centre, 1984). See also W W Black, *Employment Equality: A Systemic Approach* (Ottawa: University of Ottawa Human Rights Research and Education Centre, 1985).

[45] Ontario Commission on Systemic Racism in the Ontario Criminal Justice System, *The Report of the Commission on Systemic Racism in the Ontario Criminal Justice System* (Toronto: Queen's Printer, December 1995).

[46] Leading US cases which have recognised systemic rights violations include *Griggs v Duke Power Co*., 401 US 424 (1971) (employment discrimination can be systemic); *Brown v Board of Education (Brown I)*, 347 US 483 (1954) (school segregation is systemic discrimination); *Hutto v Finney*, 437 US 678 (1978) (the violation of prisoner's eighth and fourteenth amendments rights are systemic); and *Action Travail des Femmes v CNR* [1987] 1 SCR 1114 (employment discrimination can be systemic).

[47] Abella s*upra* note 44 at 9.

[48] *Action Travail des Femmes v CNR* [1987] 1 SCR 1114 at 1145 quoting from MacGuigan J of the court below.

[49] The literature on structural injunctions is vast. For a general overview, see O M Fiss, *The Civil Rights Injunction* (Inidianpolis: Indiana University Press, 1979); P Schuck, *Suing Government: Citizen Remedies for Official Wrongs* (New Haven: University Press, 1983); and Special Project, "The Remedial Process in Institutional Reform Litigation" (1978) 78 *Columbia University Law Review* 784.

[50] See T Eisenberg and S C Yeazell, "The Ordinary and the Extraordinary in Institutional Litigation" (1980) 93 *Harvard Law Review* 465 and J Z Johnson, "Equitable Remedies: An Analysis of Judicial Utilisation of Neoreceiverships to Implement Large Scale Institutional Change" [1976] *Wisconsin Law Review* 1161.

(1) Anyone whose rights or freedoms, as guaranteed by this Bill of Rights, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances;

(2) These remedies available in subsection (1) include, but are not limited to, declarations, damages, prohibitive injunctions, mandatory injunctions, structural injunctions, and other forms of systemic relief.

5.4 Eliminating crown immunity

Crown immunities pose one of the biggest obstacles to effectively enforcing the Bill of Rights. Complex crown immunity doctrines in the United States have regularly denied individuals relief where they have suffered Bill of Right violations.

To ensure that crown immunity does not prevent vindication and enforcement of the NSW Bill of Rights, ALHR submits that the Bill of Rights include a provision similar in terms to section 27(3) of the *New Zealand Bill of Rights Act* 1990:

> Every person has the right to bring civil proceedings against, and to defend civil proceedings brought by, the crown, and have those proceedings heard, according to law, in the same way as civil proceedings between individuals.

6 SUMMARY OF SPECIFIC AND WORKABLE PROVISIONS FOR IMPLEMENTATION AND ENFORCEMENT OF THE NSW BILL OF RIGHTS

ALHR submits that these manageable and affordable steps can be taken to ensure that the NSW Bill of Rights is effectively implemented and enforced:

(a) The NSW Bill of Rights should be legally enforceable and to that end, should adopt a mixed "watchdog and complaints-based enforcement model:

The "watchdog" component can be implemented by amending the legislation governing existing watchdogs, including the NSW Ombudsman's Office, and investing these offices with supervisory, promotional and educative functions in relation to the NSW Bill of Rights.

The complaints-based approach can be implemented by including a provision in the NSW Bill of Rights which creates a cause of action which can be heard in the NSW Administrative Decisions Tribunal (ADT) and in the NSW courts when the Bill of Rights has been breached.

(b) To facilitate complaints-based enforcement, the NSW Bill of Rights should contain a provision similar to section 38 of the South African Constitution, which would widen the rules of

standing in the ADT and the NSW courts in cases where Bill of Rights actions are heard. Section 38 provides:

> Anyone listed in this section has the right to approach a competent court, alleging that a right in the Bill of Rights has been infringed or threatened, and the court may grant appropriate relief, including a declaration of rights. The persons who may approach a court are -
>
> (a) anyone acting in their own interest;
>
> (b) anyone acting on behalf of another person who cannot act in their own name;
>
> (c) anyone acting as a member of, or in the interest of, a group or a class of persons;
>
> (d) anyone acting in the public interest; and
>
> (e) an association acting in the interest of its members.

(c) To facilitate complaints-based enforcement, the NSW Bill of Rights should contain the following provision which facilitates appropriate remedial relief for NSW Bill of Rights violations and which authorises the ADT and the NSW courts to use their remedial powers to order positive and systemic relief in just and appropriate instances:

> (1) Anyone whose rights or freedoms, as guaranteed by this Bill of Rights, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances;
>
> (2) These remedies available in subsection (1) include, but are not limited to, declarations, damages, prohibitive injunctions, mandatory injunctions, structural injunctions, and other forms of systemic relief.

(d) To facilitate complaints-based enforcement, the NSW Bill of Rights should contain a provision similar in terms to section 27(3) of the *New Zealand Bill of Rights Act* 1990, which eliminates crown immunity in instances where the State has violated the NSW Bill of Rights. Section 27(3) provides:

> Every person has the right to bring civil proceedings against, and to defend civil proceedings brought by, the crown, and have those proceedings heard, according to law, in the same way as civil proceedings between individuals.