Submission by the

Australian Plaintiff Lawyers Association

NSW Branch

to the

NSW Legislative Council

Standing Committee on Law and Justice

Inquiry into a

Statutory New South Wales Bill of Rights

Executive Summary

The NSW Branch of the Australian Plaintiff Lawyers Association supports a Bill of Rights for NSW. The protection and promotion of human rights and fundamental freedoms is the hallmark of a civilised society. Any democratic country under the rule of law should have nothing to fear from protecting rights, whether by statutory or *constitutional* Bill of Rights. Bills of Rights confirm for us what kind of society we are and aspire to be.

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

Yes. It is most sensible to incorporate the text of the International Covenant on Civil and Political Rights into Australia's domestic law, given that it is a modern human rights document and that it already applies to Australia in the international human rights regime.

Judicial review under a Bill of Rights ensures that the most fundamental issues of political morality will finally be set out and debated as issues of principle and not political power alone.

B) Whether economic, social and cultural rights, groups rights and the rights of indigenous peoples should be included in a Bill of Rights.

Yes. These rights are interdependent and indivisible, and each generation of rights is the necessary prerequisite for the enjoyment of the other.

c) Whether individual responsibilities as distinct from rights should be included in a Bill of Rights.

Yes. Rights will be more valuable if certain responsibilities are imposed. Responsibilities can be used to articulate the limits of rights and will make it easier for rights-holders to establish violations.

D) The consequences for the Australian common law of Bills of Rights in the United Kingdom, Canada and New Zealand

The jurisprudential isolation that the Australian courts will increasingly suffer as other common law countries adopt domestic rights instruments should not be underestimated.

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.

A provision allowing an override of the basic rights declared in a Bill of Rights by definition is inconsistent with the rights embodied in a Bill of Rights. Consequently, such overriding legislation cannot comply with a 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

As private individuals and bodies gain greater economic and political power and as governments privatise services, massive amounts of power are transferred from the public to the private domain. Consequently individuals must be bound by a Bill of Rights.

G) The extent and manner in which the rights declared in a Bill of Rights should be enforceable

Rights declared in a Bill of Rights should be fully enforceable in the courts. Without enforceability, rights are limited to an educative role and cannot actually protect.

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.

The test for deciding whether a limit to a right is demonstrably justifiable in a free and democratic society should be objective and suited to judicial review. Such limitations are necessary under any rights regime as clashes between competing individual rights do occur, as do clashes between individual rights and the greater community good.

I) Whether there should be a legislative requirement on courts to construe legislation in a manner which is compatible with international human rights instruments

Courts should be required to ***take into account*** the way international human rights instruments are construed when interpreting legislation and individuals should retain the ability to complain about violations of their human rights to international tribunals and bodies which are set up under international human rights instruments that Australia is a party to.

Introduction

The Standing Committee on Law and Justice is undertaking an inquiry into whether it is appropriate and in the public interest to enact a *statutory* Bill of Rights for New South Wales ("NSW"), and/or whether amendments should be made to the *Interpretation Act 1987* (NSW) to require courts to take into accounts rights contained in International Conventions.

The NSW Branch of the Australian Plaintiff Lawyers Association ("APLA") supports *at the very least* a statutory Bill of Rights for NSW.

The protection and promotion of human rights and fundamental freedoms is the hallmark of a civilised society. Any democratic country under the rule of law should have nothing to fear from protecting rights, whether by statutory or *constitutional* Bill of Rights. Bills of Rights confirm for us what kind of society we are and aspire to be.

The need for domestic protection of human rights is brutally highlighted by the current Federal Government's attitude toward various international tribunals.

Under various international treaties that Australia has ratified, various international committees can scrutinise the human rights record of Australia. The basis of the scrutiny is manifold: the Australia Government has certain reporting obligations, other State can make complaints against Australia if human rights are being violated, and individual Australians can also make complaints.

The International Convention on the Elimination of All Forms of Racial Discrimination 1966 ("ICERD") is one such treaty. The Australian Government must submit a report to the Committee on the Elimination of Discrimination ("CERD"). The legitimacy and effectiveness of CERD has undermined on numerous occasions when the Australian Government refused to accept CERD's evaluation of the Australian Government's human rights record.

In August 1998, CERD issued a "please explain" request to Australia in relation to its amendments to the *Native Title Act 1993* , the consultation process preceding the amendments and the changes in the function of the Aboriginal and Torres Strait Islander Social Justice Commissioner.[1] Australia submitted an extensive report.[2]

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[1] CERD Dec 1(53) on Australia, 11 August 1998 (A/53/18, para 22).

After considering Australia's report, CERD expressed concern over the compatibility of the amended *Native Title Act* with Australia's obligations under the ICERD.[3] It also expressed concern over the lack of effective participation by indigenous communities in the formulation of the amendments which potentially violate Australia's obligations under Article 5(c) of ICERD.[4]

CERD called on Australia to address these concerns as a matter of utmost urgency, sought the suspension of the amendments, and requested that discussions with Aboriginal and Torres Strait Islanders peoples be re-opened.[5]

The Australian Government rejected the view of CERD in the most emphatic terms. It stated that the comments were "an insult" and were "unbalanced".[6] It alleged that a critical assessment by CERD was expected because some committee members had pre-judged the issue.

The Australian Government refused to issue an invitation to CERD to visit Australia in order to further analyse the issue, despite its request. The most striking part of this whole exchange is the esteem in which the Australian Government held CERD:

> *[CERD] is not a court, and does not give binding decisions or judgements. It provides views and opinions, and it is up to countries to decide whether they agree with those views and how they will respond to them.*

The Australian Government, when faced with criticism, chose to discount the opinions of CERD as being partial and thus irrelevant.

Again, recently the Australian Government has been dismissive of international official criticism in relation to the Northern Territory and Western Australian mandatory sentencing laws.

Not only has it been revealed that pressure was brought to bear on those preparing the report so as to ensure certain damning statements were omitted from the report, but the Australian Government's response has been appalling.

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[2] Commonwealth of Australia's response (CERD/C/347).
[3] CERD Dec in its fifty-fourth session, 1-19 March 1999, para 6-8 (CERD/C/54/Misc.40/Rev.2, 18 March 1999, unedited version).
[4] Id para 9.
[5] Id para 11.
[6] Attorney-General, The Hon. Daryl Williams AM QC MP, News Release No. 541, 19 March 1999.

It has ignored the findings of the United Nations Office of the High Commissioner for Human Rights with the most parochial of arguments, using cultural relativism to argue that human rights are not universal and that account must be made for the special circumstances that exist in the Northern Territory and Western Australia.

Moreover, it has further defied the authority of the relevant international tribunals by ordering a general review of all of the international monitoring/reporting obligations of Australia under human rights treaties.

Are the human rights of Australian citizens adequately protected under the current law? With this type of attitude to the findings of the international community, the answer is clearly no. If our human rights are to be beyond doubt and illusion, a Bill of Rights must be adopted in Australia. New South Wales could lead the way.'

In recent years, there has been a wider realisation in contemporary Australian society of the value of a Bill of Rights.[7]

Each of the Inquiry's Terms of Reference is addressed turn.

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

This query raises two main issues. Why international human rights should be incorporated into our domestic law and, if they should, which form of rights instrument should be adopted?

There is a multitude of reasons why domestic protection of human rights is imperative for a properly functioning modern democracy. Let us begin with the concept of "democracy" itself.

In modern society, democracy is viewed as more than the rule of the majority. The crude measure of majority public opinion must be tempered. In the words of Kirby J:

> *The modern notion of democracy is more subtle than the primitive idea of according full power to the transient majorities of Parliament by a transient vote in a periodic election, accompanied by media jingles and superficial electoral slogans. Democracy now requires*

[7] This was a central finding of the Australian Rights Project survey conducted by Brian Galligan and Ian McAllister: see 'Citizen and Elite Attitudes Towards a Bill of Rights', *Rethinking Human Rights* (B. Galligan and C. Sampford (eds.), Federation Press, Sydney, 1997) 144-153.

respect for minorities and protection of basic constitutional principles such as the rule of law, the independence of the judiciary, and regard for fundamental human rights.[8]

This is the basis for the *Canadian Charter of Rights and Freedoms* (the "Charter"):

> *A true democracy is surely one in which the exercise of power by the many is conditional on respect for the rights of the few. Our history shows lamentable departures from responsibility for individual dignity and conscience. The Charter provides a check on such excesses and provides … minorities the voice denied to them in the political process.*[9]

Thus the debate has centred not on *whether* human rights should be protected but rather *how* they should be protected.

Limited protection for human rights currently exists in Australia. A handful of human rights are guaranteed by the Commonwealth Constitution, whether by express words or implication[10] and limited protection also exists in ordinary legislation.[11]

In addition to this, statutory interpretation now has an element of human rights awareness. Where legislation is ambiguous, the High Court has made it clear that one should adopt a meaning which conforms to the principles of international human rights law rather than an interpretation which would involve a departure from such rights.[12] By no means do these measures secure for Australian citizens' comprehensive protection of fundamental human rights.

In introducing discussion on *how* a Bill of Rights may improve on the current situation, we should consider *why* a Bill of Rights was not part of our original constitutional settlement.

The Commonwealth Constitution was designed so that the structures and doctrines upon which it rests would ensure the respect for and protection of human rights. In

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[8] The Hon Justice Michael Kirby, 'The Bill of Rights Debate', (1994) 29 *Australian Lawyer* 16.

[9] Robert J Sharpe, 'The Impact of a Bill of Rights on the Role of the Judiciary', delivered at a seminar.

[10] For example, voting rights (sections 41 and 24); the right to trial by jury (section 80); the right to just compensation if the Commonwealth compulsorily acquire your land (section 51(xxxix); religious freedoms (section 116); non-discrimination between residents of different States (section 117); the right to legal representation as an element of a fair trial (*Dietrich v R* (1992) 177 CLR 292); the implied right to political free speech (*Lange v ABC* (1997) 145 ALR 96).

[11] For example, the *Racial Discrimination Act 1975* (Cth); *Sex Discrimination Act 1984* (Cth).

[12] See *Mabo v Queensland (No 2)* (1992) 175 CLR 1; *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273; *Newcrest Mining (WA) Ltd v Commonwealth* (1997) 147 ALR 42, 147-51.

particular, the concept of responsible government was supposed to adequately protect rights.[13]

Unfortunately, the structures of government and the doctrines underlying our Constitution no longer function in such a manner as to protect and promote our human rights. Our Constitutional and parliamentary system of government has been distorted such that a Bill of Rights is necessary.

Responsible government

Take, for example, the notion of responsible government. Responsible government assumes that the legislature will have an interest in calling a minister to answer for questionable executive action. However, because of the party system, the exercise of our democratic rights results in 'the election of a majoritarian autocracy'[14] or an elected dictatorship.[15]

This perverts responsible government. The legislature no longer operates as a check on the executive because the executive controls the legislature. The executive, rather than being ultimately responsible to the people via the legislature, is responsible to the dictates of Cabinet.

Further, with the advent of party politics, individual members of parliament are responsible to their party and severely reprimanded when the party line is breached.

Moreover, in stark contrast to the situation at the turn of the century, there has been an increase in the complexity of government and an equivalent explosion in the bureaucracy. The huge increase in the role of the executive in regulating society (via delegated legislation) has made it too difficult for parliament to monitor whether or not fundamental rights are being respected.

How can the executive be genuinely responsible if its actions are not amenable to scrutiny? Even when wrongdoing is uncovered, the sheer size of ministerial portfolios and of the measure of delegation within the public service required for government to function excuses Ministers from taking full responsibility for their portfolios. Clearly,

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[13] H Charlesworth, 'The Australian Reluctance About Rights' in *Towards an Australian Bill of Rights* (P Alston (ed.)) Centre for Intl and Public Law, 1994; G Williams, *Human Rights under the Australian Constitution*, Oxford University Press, Melbourne, 1999.
[14] Kirby, op cit (fn 8).
[15] P. Alston, 'An Australian Bill of Rights: By design or Default?' in *Towards an Australian Bill of Rights* (P Alston (ed.)), Centre for International and Public Law, 1994.

responsible government in the modern bureaucratic state cannot successfully secure the protection of human rights.

Responsible government also relies on the electorate holding the legislature accountable for undesirable legislation. It is altruistic to believe that the majority is likely to disapprove of action adversely affecting only a minority.

Political protection of rights alone subverts the purpose of recognising individual rights, which is to guard against the tyranny of the majority.

Involvement of the judiciary

Human rights must be given legal status to isolate them from the vagaries of politics. The involvement of the independent, impartial judiciary in rights protection will foster apolitical solutions.

Politics, especially strict party-politics, is too expedient to resolve contentious issues. Governments and parliaments can and do ignore politically controversial issues.

As a result, pressing issues are left unanswered or citizens are forced to look outside the political process for solutions. Most often the other forum is court. Courts must be given the power to solve these issues.

A Bill of Rights will not only legitimise the role the courts are being forced to take but it will also place limits on and provide guidance to the courts when addressing rights issues. McHugh J emphasizes this, while highlighting that democracy is actually enhanced under a Bill of Rights:

> *[J]udges have much to contribute to democracy. The courts can protect individuals and groups denied real access to the political process. Judges enjoy immunity from political pressures ... Judicial law-making is surely not as undemocratic as legislative inaction which fails to meet the need for law reform. In certain situations, invoking democratic rhetoric to legitimate the refusal to deliver justice is itself undemocratic, particularly when legislative reform is unlikely. When a legislature fails to recognise and address a problem of law reform, the use of democratic rhetoric to deprive the courts of an opportunity to contribute to the development of the law and the doing of justice is highly*

questionable. The courts, as much as the legislatures, are in continuous contact with the concrete needs of the community.[16]

Thus, judicial review under a Bill of Rights ensures that the most fundamental issues of political morality will finally be set out and debated as issues of principle and not political power alone. This cannot fully succeed within the legislature alone.[17]

Democracy and Bills of Rights

Bills of Rights are often attacked on the basis that they are anti-democratic in that responsibility for fundamental issues concerning society are removed from the control of the elected arms of government, in favour of the unelected, unaccountable arm of government.

There are many flaws in this argument. As already discussed, democracy in the modern state is not a case of decision making by crude number crunching. The well-being and interests of minority groups must moderate the will of the majority.

The very purpose of rights protection is to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts.

The role of the courts in interpreting and applying a Bill of Rights is not an affront to democracy nor parliamentary sovereignty. It is not an "us" (the parliament and the executive) versus "them" (the judiciary) situation.[18]

Parliament has the role of passing the Bill of Rights and retains the power to amend it provided the restrictive procedures on their legislative capacity are followed. All the judiciary does is interpret the Bill of Rights.

Judicial interpretation and judicial review are roles the judiciary already has and does not abuse. Judges already engage in the formulation of legal principle by reference to

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[16] The Hon Justice Michael McHugh, 'The Law-making Function of the Judicial Process - Pt II' 62 *Australian Law Journal* 116, 123-4. See also A. Hutchinson and P. Monahan, 'Democracy and the Rule of Law' in *The Rule of Law: Ideal or Ideology*, (A. Hutchinson and P. Monahan (eds.)) Carswell, Toronto, 1987: 'Whether by design or default, the courts have been proclaimed by many theorists as a proxy for a genuine democratic debate… No longer seen as a means of constraining democratic debate and argument, courts act as elite forums for the enactment and resolution of this dialogue. Judicial review celebrates the triumph of detached philosophical deliberation over heated political haggling.'

[17] R. Dworkin, *Taking Rights Seriously*, 1997; P. Bailey, 'Australia – How are you going, Mate, without a Bill of Rights? Or Righting the Constitution', [1993] 5 *Canterbury Law Review* 251.

[18] P. Alston, op cit (fn 15).

values and political considerations, and weigh the public interest in the balance of competing interests.[19]

The days of the myth of strict legalism are gone and society accepts that judges can and must make law through the process of interpreting legislation and applying the common law.

A Bill of Rights merely strikes up a dialogue between the arms of government that may not have otherwise occurred. As Dworkin illustrates, judicial review of legislative and executive action actually enhances democratic debate:

> *[After a court ruling] a sustained national debate begins, in newspapers and other media, in law schools and classrooms, in public meetings and around dinner tables. That debate matches in principle [the] conception of republican government, in its emphasis on matters of principle, than almost anything the legislative process on its own is likely to produce.*[20]

Democratic legitimacy of the legislature and executive

In responding to the anti-democratic criticism of Bills of Rights, one must also consider the democratic legitimacy of the competing arms of government.[21]

We should not overstate the democratic legitimacy of the legislature. As discussed above, responsible government no longer functions to protect citizens from encroachments on civil liberties.

The institutional procedures and practices of the legislature threaten democracy: the increase in legislative regulation has grown to such an extent that it is the staff in the office of the legislator whom wield power; committees dealing with legislation have broad mandates and an existence separate to the individual members of parliament. These institutions can hardly be described as democratic.

Further, money and the media have a great influence on politics, undermining the legitimacy of true representative democracy.

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[19] A. Mason, 'Human Rights and Australian Judges', Law and Policy Paper No 3, *Centre for International and Public Law*, 1996.
[20] R. Dworkin, *Taking Rights Seriously*, 1977. See also J. Waldron, 'Judicial Review and the Conditions of Democracy', *The Journal of Political Philosophy*.
[21] See generally Redlich, 'Judges as Instruments of Democracy', in *The Role of Courts in Society*, (Shetreet (ed.), Matinus Nijhoff Publishers, Dordrecht) 1988, Chapter 11.

It is also imperative not to overstate the democratic legitimacy of the executive. The staff of the executive arm exercise great power. The public has a minimal role in policy formulation, but executive action is dressed up as embodying the majority viewpoint.

In overturning executive or administrative acts, the courts are acting according to the majority will in the sense they are ensuring executive and administrative action conforms to legislative intent.

Human Rights in Britain

The United Kingdom has decided to "bring their rights home". As of 1 September 2000, the European Convention on Human Rights (1951) ("ECHR") will be enforceable in the domestic courts of Britain, under the *Human Rights Act* 1998 (UK) ("HRA"). This major readjustment of the constitutional arrangement of the United Kingdom has both judicial and political support.[22]

Prior to the HRA coming into force, British citizens could only complain about violations of their human rights (as such) to the European Court of Human Rights (the "European Court").

The judiciary was becoming increasingly frustrated by the inability of the common law to measure up to the concept of rights under the ECHR, as illustrated by the many cases in which the British law was found to violate the ECHR.[23]

Further, British violations of human rights were aired publicly throughout Europe.

Essentially, the judiciary wanted to repatriate Convention rights so it was empowered to implement and interpret them. Enforcement by the European Court had led to a perception that human rights were no longer British. Incorporation meant not only that British judges will be able to contribute to rights jurisprudence but that rights would be brought more fully and appropriately into British jurisprudence. European

[22] See generally White Paper, *Rights Brought Home: The Human Rights Bill*, October 1997, Cm. 3782; A. Lester and D. Oliver, *Constitutional Law and Human Rights*, 1997, p 93-196; I Hare and C. Forsyth (eds.), *Constitutional Reform in the United Kingdom*, 1998; D. Kinley, *The European Convention on Human Rights: Compliance Without Incorporation*, 1993; J. Laws, 'Limitation of Human Rights', [1998] *Public Law* 254; Lord Lester, 'First Steps Towards a Constitutional Bill of Rights' [1997] 2 *EHRLR* 194; Lord Irvine, 'Constitutional Reform and a Bill of Rights' [1997] 5 *EHRLR* 483; Lord Irvine, 'The Development of Human Rights in Britain under an Incorporated Convention on Human Rights [1998] *Public Law* 221; and J. Wadham, 'Bringing Rights Half-way Home' [1997] 2 EHRLR 141.

[23] Some examples include: *Sunday Time v UK* (1970) EHRR 245; *Dudgeon v UK* (1982) EHRR 149; *Sutherland v UK* (1997) 24 EHRLR CD 22; *McCann v UK* (1996); *Welch v UK* (1995) EHRR 247; *Benham v UK* (1996) 22 EHRR 293; *Saunders v UK (*1996) 23 EHRR 313; *Bowman v UK* (Feb 1998).

Court judgements simply did not command the same confidence in British citizens as British judgements would.

Incorporation of the ECHR would lead to a more socially responsive judiciary who would base their decisions on rights and freedoms.

Of course there were many practical reasons as well. The European Court has over 40 judges. Thus the perception was that it was becoming too bureaucratic, diverse and broad. With the increase in the size of the European Court came fears that judges may not be of the highest calibre. There was much conjecture about the moral and intellectual distinction of the judges, resulting in the observation that the European Court jurisprudence may become weaker.

In the political camp, there was recognition that comprehensive domestic rights protection would quell the dictatorial power of the modern parliament controlled by a party majority. There was also an increasing political awareness that rights and freedoms under the ECHR were not sufficiently protected under the common law.

Further, in the context of the United Kingdom devolving centralised political power, the need to establish centralised fundamental rights was clear. The huge backlog and delay in getting rights cases to the European Court, with the concomitant cost to and stress on complainants, made incorporation more appealing. Enforcing rights in the European Court was taking up to 5 years and, after exhausting domestic remedies, was costing approximately £30,000.

Relevance of the British experience to Australia

This British experience is relevant to Australia, since in Australia too the only forum in which the human rights of our citizens are truly enforceable is at the international level.

Under the First Optional Protocol to the International Covenant on Civil and Political Rights (the "ICCPR"), Australian citizens can lodge complaints of human rights violations with the Human Rights Committee ("HRC").

This method of rights protection is not a sufficient Bill of Rights for Australian citizens for reasons including, but going beyond, those relevant to the British situation.

In addition to the reasons motivating Britain, Australians cannot directly enforce the decisions of the HRC. The Australian parliament and government, rather than being

legally forced to abide by decisions of the HRC, simply have to contend with the political flack an adverse decision generates within Australia.

The law of executive practice may not change despite an adverse finding at an international forum. Again, one cannot rely on the majority of citizens getting politically active over an issue touching only a minority group.

In addition, many cases are not eligible to be heard by the HRC because the admissibility criteria (standing if you like) of the HRC are not met.[24] The HRC, being an international body, operates to some extent on a principle of the lowest common denominator, resulting in somewhat lesser protection than may be expected in a domestic court.

Finally, the HRC is only empowered to consider violations of civil and political rights, not second and third generation rights, which again limits its ability to enforce the human rights of Australian citizens.

Justice Spigelman, in an address to the National Conference of the Australian Plaintiff Lawyers in October 1999, pointed out:

> *The incorporation by the Human Rights Act 1998 of the European Convention into English law gives rise to a radically different approach to the influence of international human rights instruments on the development of the common law. It is in this respect, more than any other, that Australian common law and that of England will progressively diverge….*
>
> *The Australian common law tradition is threatened with a degree of intellectual isolation that many would find disturbing.*

<u>What type of Bill of Rights should Australia adopt</u>

The final matter to consider is what type of Bill of Rights Australia should adopt.

It is most sensible to incorporate the text of the ICCPR into Australia's domestic law, given that it is a modern human rights document and that it already applies to Australia in the international human rights regime.

Certain additions may be made to this document to account for matters such as expanding the Bill of Rights to incorporate some economic, social and cultural rights

and extending the operation of the Bill of Rights to cover a wider range of entities that wield substantial power in society.

On a more philosophical level, the protection of human rights is aimed at the support and furtherance of the enduring values of a society. Human rights should be respected merely because of the value of human dignity and the value of the political equality of all citizens.

A Bill of Rights will ensure that human rights issues pervade the daily business of government, rather than protected only those individuals that come before courts, as is the current situation.

B) Whether economic, social and cultural rights, groups rights and the rights of indigenous peoples should be included in a Bill of Rights.

Economic, social and cultural rights

Human rights span political, civil, economic, social and cultural rights.

Historically, at the international level, these rights were separated into civil and political rights that were considered to be first generation rights, and economic, social and cultural, which were considered second generation rights.

Emerging rights, which are more collective in nature, such as the right to a clean environment and the right to development, are considered third generation rights.

The first and second generation rights were embodied in separate rights instruments, the International Covenant on Civil and Political Rights ("ICCPR"), and the International Covenant on Economic, Social and Cultural Rights ("ICESCR") respectively.

A number of political divisions explain the separation of first and second generation rights into separate Covenants.[25]

The East-West divide resulted in the East focussing attention on second generation rights at the expense of first generation rights; whereas the West argues that once first generation rights are secured, second generation rights should fall into place. The

[24] Only 3 out of 18 complaints submitted to the HRC have passed the admissibility criteria.
[25] P. Hunt, 'Reclaiming Economic, Social and Cultural Rights', (1993) 1 *Waikato Law Review* 141

divide between the developing and developed countries led to a similar divide, the developing countries focussing on the need to fulfil second generation rights before they can begin to contemplate first generation rights.

Many countries that deny or violate human rights generally emphasise their inability to meet second generation rights as some sort of justification for denying the first generation rights.

The point is that there was no legal reason for separating first generation from second generation rights. These rights are interdependent and indivisible, and each generation of rights is the necessary prerequisite for the enjoyment of the other. No human right can be fully realised without the realisation of all other rights. How can someone exercise their civil right to vote if their second generation right to education is not fulfilled? How can someone exercise their right to live if they are denied their health?

Given the interdependency of all human rights, an Australian Bill of Rights must include economic, social and cultural rights.

The ability to use a Bill of Rights as a sword requires substantive access to justice, and this cannot be realised without recognition of second and third generation rights. Australia needs to think more broadly about the evolving needs of our already egalitarian community and of the importance of enforcing the new generations of rights.[26]

Economic, social and cultural rights include rights such as the right to an adequate standard of living, the highest possible standards of mental and physical health, social security, minimum standards of employment conditions, the right to form trade unions and to strike, the right to education, and the right to take part in cultural life.

Enforceability of second generation rights

Many commentators deny that such rights are legally enforceable, but these arguments fail to stand up to critical scrutiny.[27]

[26] P. Bailey, op cit (fn 17).
[27] Hughes, 'An Australian Bill of Rights: Some key issues', in *Towards an Australian Bill of Rights*, (Alston (ed.), Centre for International and Public Law) 1994.

One argument relates to the fact that these rights do not really result in immediate obligations on governments; rather they are aspirations that states should progressively attain according to their level of development.

It is true that the ICESCR imposes a duty to take steps to implement, to the maximum of available resources, the *progressive* full realisation of economic, social and cultural rights, but this does not mean that no immediate obligation exists.

The concept of progressive realisation constitutes a recognition of the fact that full realisation of all economic, social and cultural rights will generally not be able to be achieved in a short period of time.

On the one hand it is a necessary flexible device, reflecting the realities of the real world and the difficulties involved for any country in ensuring full realisation of economic, social and cultural rights. On the other hand, the phrase imposes an obligation to move as expeditiously and effectively as possible towards that goal. Any deliberately retrogressive measures in attaining these rights require the most careful consideration and would need to be justified.[28]

Moreover, governments have a minimum core obligation to provide the minimum essential levels of each of the ICESCR rights. For example, a State party in which any significant number of individuals is deprived of essential foodstuffs, of essential primary health care, of basic shelter and housing, or of the most basic forms of education is, *prima facie*, failing to discharge their minimum obligations.[29] Thus, the argument that obligations do not arise out of instruments that protect second generation rights is incorrect.

Measuring compliance with second generation rights

Another argument against the realisation of second generation rights is the impossibility of measuring a government's compliance with its obligations. This argument fails to account for the many methods available to measure the progressive obligation to use the maximum available resources to guarantee economic, social and cultural rights.

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[28] Committee on Economic, Social and Cultural Rights, General Comment 3, "The nature of States parties obligations', 1990, para 9.
[29] Id para 10.

Many resources could be used for measuring the enjoyment of economic, social and cultural rights. These include: the money or financial resources of the State; natural resources such as minerals, land, environment; human resources[30]; adequate information resources which allow governments to set out appropriately targeted policies; and the amount of available technology. The idea is to measure the total available resources and compare this to the proportion being utilised to secure second generation rights.

Another classic argument against the legal recognition of second generation rights is their supposed non-justiciable nature. Economic, social and cultural rights have traditionally been regarded as non-justiciable, mostly because the actual rights and the duties imposed to secure these rights are considered to be positive, resource intensive, progressive, vague and complex.

Contrast this evaluation of second generation rights with first generation rights, which are considered to be negative, cost-free, immediate, precise and manageable.

This view of the generations of rights is distorted. The open-ended, vague language used in the specification of second generation *rights* and *duties* is no worse than the language used for some civil and political rights. Further, the Committee on Economic, Social and Cultural Rights is refining the language through their role of reviewing States reports and generating General Comments.

Positive and negative rights

The perception that second generation rights require positive commitments of resources, whereas first generation rights are relatively cost-free must be critically analysed. Consider the right to legal aid or the right to an interpreter in criminal trials.[31] Both of these rights required positive state action, and even expenditure of public money for their realisation.

Secondly, most if not all of the ICCPR rights have been interpreted broadly by the HRC so as to impose positive obligations on the State. For instance,. where structural discrimination exists, the HRC has called on States to adopt affirmative actions

[30] For example, the number of trained doctors that can guarantee the right to adequate health care.

[31] Articles 14(3)(d) and (a) of the ICCPR respectively.

measures designed to eradicate the discrimination. This requirement of affirmative action imposes positive obligations on the State.

Further, the application of the principle of non-discrimination contained in Article 26[32] is not limited to those rights that are provided for in the ICCPR.[33] In *Zwaan-de-Vries v netherlands*[34], the HRC held that the denial of equal rights to married women and men under social security law, on the basis that men are the primary breadwinners, breached Article 26. It was impermissible discrimination on the basis of sex, despite the fact that the legislation concerned a social/economic right. Thus, discrimination under Article 26 extends to the so-called positive, second generation rights.

As regards to freedom from torture, the Committee on Torture has mandated that States must provide adequate training to relevant personnel, such as police and prison guards, to discourage them from using torture, and inhuman or degrading tactics. Such training is a positive obligation on States.'

In contrast, some second generation rights contained negative rights. Article 8 of the ICESCR guarantees the right to form trade unions. That could be interpreted as a negative obligation on the State, that is, a guarantee that a State cannot interfere with the right of people to form trade unions.

The right to health could be invoked in a negative way, say by forcing a government to stop engaging in policies which threaten health, rather than the classic claim on government to do something to ensure one becomes well. Instances of this include requests of government to stop polluting waterways, or to stop discriminating between access to free health services. The main point is that it is too simplistic to describe one set of rights as positive and one as negative.

Other classic dichotomies between first and second generation rights can be similarly undermined. Some concepts under the ICCPR are very complex. For example, consider the interpretation of Article 26 (the discrimination clause).[35] Some concepts under the ICCPR are very vague. Consider the test of validity for limits that are placed on rights - the limits must be "reasonable" and "objective".

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[32] Article 26 states: 'All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as … sex…'

[33] HRC General Comment 18, of 1989, para 12 (IHRR, Vol 1, No. 2 (1994)).

[34] HRC decision 182/1984. See also, to the same effect, *Broeks v Netherland* (172/1984).

On a more theoretical level, the argument that second generation rights and duties only possess non-justiciable qualities and that civil and political rights and duties only possess justiciable qualities cannot hold true.

Duties to respect, protect and fulfil

The Maastricht Principles[36] should be referred to. They develop the idea that all human rights should be seen to correlate to a tripartite set of duties: the duties to respect, protect and fulfil.

The duty to respect requires States to refrain from interfering with the enjoyment of a human right, and can be regarded as negative duties, which are themselves usually regarded as immediate, cost-free and simple.

The duty to protect requires States to prevent violations of human rights by third parties, and can be regarded as positive duties, which are themselves usually regarded as progressive, resource-intensive and complex.

The duty to fulfil requires States to take appropriate legislative, administrative, budgetary, judicial and other measures towards the full realisation of human rights.

Consequently, if all rights correlate to duties of this tripartite structure, then they all have qualities that are to some extent justiciable and to some extent non-justiciable.

'In the case of civil and political rights, the interpretation of the right to freedom of expression manifests this tripartite structure. States have duties to respect the right to freedom of expression which are largely comprised of negative duties, such as the duty not to imprison people for expressing their opinions.

States also have the duties to protect the right to freedom of expression which are largely the partly negative/partly positive duties to regulate society so as to, for example, diminish the risk of inciting racial hatred through speech, or to regulate media ownership to ensure everyone access to the media so they may seek, impart and receive information.

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[35] *Oulajin & Kaiss v The Netherlands; Cavalcanti Araujo-Jongens v The Netherlands.*
[36] Maastricht Guidelines on Violations on Economic, Social and Cultural Rights, 1997. This document is the result of a meeting of 30 experts from 22-26 January 1997 at Maastricht University, The Netherlands. The guidelines reflect the evolution of international law with respect to second generation rights since 1986.

Finally, States have duties to fulfil the right to freedom of expression which are largely comprised of positive duties, such as the duty to ensure the literacy of its citizens.

In the case of economic, social and cultural rights, the elaboration of the right to adequate housing also manifests this tripartite structure. States have duties to respect the right to adequate housing which are largely the negative duties, such as the duty not to forcibly evict people.

States also have duties to protect the right to adequate housing which are the partly negative/partly positive duties, such as the duty to regulate evictions by third parties (such as landlords and developers).

Finally, States have duties to fulfil the right to adequate housing which are largely positive duties, such as the duty to house the homeless and ensure a sufficient supply affordable housing.

Overall, viewed in this manner, first and second generation rights are as justiciable or as non-justiciable as each other. Why allow the enforceability of first generation rights only?

In conclusion, the arguments against the enforceability of economic, social and cultural rights are not convincing. Economic, social and cultural rights are not impossible of attainment.

The major impediment to realisation of economic, social and cultural rights is lack of political will.[37] Given the interdependency and indivisibility of human rights, NSW should include economic, social and cultural rights in a Bill of Rights.[38]

Group rights

Historically, human rights have been conceived of as individual rights, that is rights belonging to individuals. This concept of human interactions is not complete as individuals live in communities, and collectives are viewed as being more than merely a sum of their parts. This has led to calls for the recognition of collective or group rights.

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[37] Charles Dlamini, 'Culture, Education and Religion', in *Rights and Constitutionalism: The New South African Legal Order*, (van Wyk, Dugard, de Villiers and Davis (eds.), Claredon Press, Oxford) 1995, p573.

[38] See generally D. Kinley, 'The Legal Dimension of Human Rights', in *Human Rights in Australian Law*, (David Kinley (ed.), Federation Press, Sydney) 1998.

A Bill of Rights for NSW should recognise group rights where relevant. A rights instrument that fails to account for the actual functioning of society will, to that extent, be illegitimate.

The value of group rights is best illustrated by way of example. The Canadian Supreme Court has interpreted references to "person" or "everyone" under the Charter to include corporations, so that corporations benefit from Charter rights.

This should be contrasted with the treatment of unions, 'the corporation's organisational analogue on the labour side of business'[39] Unions have not been given any separate legal status under the Charter. The benefits for unions under the Charter are indirect. A union can only benefit from those rights that are directly held by others, for example, its individual members.

Moreover, the courts under the Charter have insisted that the rights of assembly are individual, not *collective*, and cannot be exercised by associations. The courts have also held that the freedom of association does not include the right to strike or to bargain *collectively*, as this would confer more extensive rights on associations than those possessed by individuals.[40]

This highlights anomalies that can flow from a failure to recognise group rights. Recognising rights for corporations under the Charter but not for unions places unions at a distinct disadvantage.

The relative power and influence of the union suffer, which means the relative power and influence of individual employees also suffer. Further unions, as a collective, are not protected against legislation that undermines their ability to operate, even legislation that threatens their very existence. Hutchinson warns that the implications of recognising rights for corporations and not unions are enormous:

> *It ignores the exercise of power by corporations over citizens and, in denying workers counter-balancing constitutional rights, fails to provide any effective means by which citizens can constitutionally challenge that power in the name of democratic justice.*[41]

[39] A. Hutchinson, "Supreme Court Inc: The Business of Democracy and Rights", in *Rights and Democracy: Essays in UK-Canadian Constitutionalism* (Gavin W. Anderson (ed.) Blackstone Press Ltd, Great Britain, 1999), p38.
[40] Ibid.
[41] A. Hutchinson, op cit (fn 39) at 39.

Dabscheck paints a rather gloomy picture. Industrial relations is a clash between individual rights and collective rights. Firms who discourage employees joining trade unions, and common law judges who regard strikes as torts support the notion of individual rights.

In the 19th and 20th Centuries, governments introduced legislation to protect trade unions but governments are now winding back such protection of the collective. Dabscheck fears that 'with increased globalisation and the associated genuflection at the altar of the market it is likely that industrial relations dimensions of human rights will worsen.'[42]

He argues that in advanced economies, deregulation and associated cutbacks in the welfare state reduce the ability of nations to pursue or continue initiatives associated with the industrial relations dimensions of human rights. The result: 'Trade unions will be dismissed as relics from the past, a luxury and impediment to the operation of market forces.'[43]

Certain rights are collective in nature and should be recognised as such. Not all rights are reducible to belonging to individuals. The advantages that flow from recognition of collective rights are manifold: it ensures that all members of the group benefit from any claims of violation of the rights; solidarity within the group can bring about greater pressure to ensure the rights are fully respected; a group will often have a louder voice than an individual fighting alone.

c) Whether individual responsibilities as distinct from rights should be included in a Bill of Rights.

The essence of this question is the efficacy of rights if concomitant responsibilities are not imposed. Guaranteed rights will continue to be enforced regardless of whether express responsibilities are imposed. However, rights may be more valuable if certain responsibilities are imposed.

This may manifest itself in two ways. Firstly, certain rights-holders may have to exercise their rights in a manner that also accounts for the responsibilities they also

[42] B. Dabscheck, 'Human Rights and Industrial Relations', in *Globalisation, Human Rights and Civil Society*, (Melinda Jones and Peter Kriesler (eds.), Prospect Media, Pty Ltd, St Leonards, NSW, 1998) 46.
[43] Ibid.

have. And secondly, rights-holders may be able to show their rights have been violated more easily if responsibilities are also imposed.

Rights are not absolute.[44] Certain limits are placed on rights to ensure the proper functioning of a free and democratic society. Limits may also be imposed on certain rights in order to settle a conflict between competing sets of rights.

Responsibilities of those with power

However, we believe that a third limitation should be placed on certain rights-holders. Certain rights-holders wield great economic and political power in the modern state. Such rights-holders should also have certain responsibilities.

The media

Take the media for example. In a democracy, the media has an imperative role in receiving and disseminating information and ideas. The right to freedom of expression is invaluable in this respect.

However, it is equally as clear that the media also have a great deal of power and influence. The media chooses what stories to report on, whether to selectively report an issue, what political, economic, philosophical and/or ideological angle to take, whether to sensationalise a story, the list goes on.

Sully talks about the "infotainment" era of the media.[45] He argues that the media have a stranglehold on information dissemination, and that those who do not comply with the ideological slant of the medium on an issue can expect no platform at all or to be misreported. Given their power to influence public opinion and the unfettered ability to abuse this power, the media should have a duty to exercise their right to freedom of expression responsibly.

The best example for the need for such responsibility is the recent vitriolic attacks on the judiciary. Genuine criticism and the freedom to express an opinion about the judiciary are imperative in a free and democratic society. But much of the criticism of the judiciary is ill-informed and unnecessarily scathing.

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[44] Except the rights to be free from torture and genocide.
[45] B. Sully, 'Judicial Independence under a Charter of Rights: Australian Snapshot - Canadian Camera', (1997) 1 *Macquarie Law Review* 1

Under our system of government, the judiciary must be and must be perceived to be impartial and independent of the other arms of government. If society loses confidence in the judiciary, they will also lose confidence in the rule of law, and our constitutional system will fall apart.

The media has the power to influence the confidence of the public in this way. The media have to be aware of their ability to mould perceptions, and must make sure reports relating to the judiciary are informed and balanced.

Corporations

Another example is the treatment of corporations under human rights instruments. As mentioned above, the Canadian courts have interpreted references to "person" or "everyone" under the Charter to include corporations, so that corporations benefit from Charter rights. Corporations, having the necessary resources and the commercial incentives to exploit the Charter, have won many rights, including the right to commercial free speech.

According to Hutchinson, under the Charter

> *Neither traditional minorities nor the usual majority are the principle beneficiaries of Canada's shift to a constitutionalised rights-talk. The primary winners in the Charter game have been the elite minority of corporate stake-holders who not only dominate that nation's economic life, but now have a choke hold on its constitutional conversation.*[46]

Thus in Canada corporations have rights under the Charter but have no obligations, and this is so despite the fact that corporations are powerful and influential. Hutchinson alerts us to the potential danger of recognising rights of corporations without recognising concomitant duties:

> *[W]hile corporations can and do challenge government attempts at democratic regulation, they are immune from a Charter challenge to their own exercise of power…. [T]he courts have placed private bodies outside the Charter's [obligatory] domain."*[47]

If we are serious about rights protection, we need to identify *which* responsibilities need to be imposed, and upon *whom* they should be imposed. A Bill of Rights for NSW should include responsibilities as well as rights.

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[46] A. Hutchinson, op cit (fn 39) 33.

D) The consequences for the Australian common law of Bills of Rights in the United Kingdom, Canada and New Zealand

The Australian common law has received much guidance and inspiration from other common law jurisdictions, such as the United Kingdom, Canada and New Zealand. However, the guidance the Australian courts once received from these countries will increasingly diminish as the jurisprudence generated by these countries becomes increasingly rights focussed. I will consider each jurisdiction in turn.

New Zealand

The New Zealand *Bill of Rights Act* 1990 merely imposes standards of interpretation. The judiciary has no power to strike down legislation. The Bill requires that 'whenever an enactment can be given a meaning which is consistent with' the Bill of Rights, 'that meaning shall be preferred to any other meaning.' Thus it is a tool for interpreting ambiguous legislation.

This rule is not dissimilar to the rule of interpretation which the Australian High Court adopts with respect to ambiguous legislation. In many cases, the High Court has noted that international law is a valid influence on domestic law, and should be used to resolve ambiguities in domestic law.[48]

Accordingly, the jurisprudence generated by New Zealand courts will retain some relevance for Australian courts.

This position is to be contrasted with the jurisprudence of Canadian and British courts. The concepts and principles that the Canadian and British courts will be interpreting and applying will render their decisions much less relevant, if not totally irrelevant, for Australian courts.

Canada

The Canadian courts have been applying their Charter since 1982. The decrease in influence of their decisions is already noticeable in Australian law reports. Canadian law is being shaped by the concepts embodied in the Charter, and these concepts have no equivalent in Australian law.

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[47] A. Hutchinson, op cit (fn 39) 39.
[48] Op Cit (fn 12).

For example, the rights contained in the Charter are 'subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.'[49] The test for determining this was set out in the decision of *Oakes v R.*

First, the objective of the legislation must relate to concerns which are pressing and substantial in a free and democratic society.

Second, the means chosen to attain the objective must be proportional to the objective. To assess this, the court considers whether the means are rationally connected to the objective, whether the means impair individual rights as little as possible, and whether there is proportionality between the effects of the means and the objective.

A brief overview of recent Australian constitutional and administrative law cases highlights that these types of issues are considered unsuitable for Australian courts to consider. Proportionality as a ground for administrative review has been rejected in Australia for a number of reasons, including its closeness to merits review.[50]

The idea that the courts would query whether legislative or executive action was the least intrusive on rights is also foreign. There is no similar requirement that all laws in Australia be subject to such restrictions.

In a similar manner, the jurisprudence of the British courts will become less relevant for Australian courts. A number of the Convention rights may be subject to limitations that are 'prescribed by law and are necessary in a democratic society…'[51]

In the same way the Canadian jurisprudence was estranged from Australian needs, so British jurisprudence will become.

Divergence over privacy

Another example of divergence will be with privacy. At the moment, both jurisdictions protect privacy rights via a mixture of the common law[52] and statutory measures.[53] Once the HRA comes into operation, Article 8 of the ECHR will apply in the United

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[49] Article 1 of the Charter.
[50] M. Aronson and B. Dyer, *Judicial Review of Administrative Action*, (LBC Information Services, 1996) 375-79; *R v Secretary of State for the Home Department; Ex Parte Brind* [1991] 1 AC 696.
[51] Article 8 (right to respect for private and family life); Article 9 (Freedom of thought, conscience and religion); Article 10 (Freedom of expression), Article 13 (Freedom of assembly and association).
[52] Breach of confidence, the torts of trespass, nuisance, defamation, and malicious falsehood, and copyright.
[53] In Australia, the *Privacy Act* (Cth); in the United Kingdom see the *Data Protection Act* 1984, *Access to Personal Files Act* 1987, *Access to Medical Reports act* 1988, and *Access to Health Records Act* 1990.

Kingdom. Article 8 guarantees everybody the right to respect for their private and family life, their home and their correspondence.

This right can be interfered with only as prescribed by law and if necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

Clearly the sorts of considerations that influence the growth of the common law in respect of privacy in the United Kingdom will be of less (if any) relevance to Australian courts.

Mandatory sentencing

A current example of where a bill of rights would protect the citizens of Australia is the mandatory sentencing laws of Western Australia and the Northern Territory. These laws breach numerous human rights. The laws discriminate against Aboriginal and Torres Strait Islanders on the basis of their race in violation of Articles 2(1), 3 and 26 of the ICCPR.[54] In particular, Article 26:

> *…prohibits discrimination in law or in fact in any field regulated and protected by public authorities. Article 26 is therefore concerned with the obligation imposed on states parties … Thus, when legislation is adopted by a State party, it must comply with the requirement of Article 26 that its content not be discriminatory.*[55]

The guarantee of equal protection of the law guarantees *de jure* equality, so that the law itself dispenses rights and benefits equally to all. This can not be said of the mandatory sentencing laws, given that research shows that the laws have an inordinate impact on indigenous, as opposed to non-indigenous, Australians.

The guarantee of equality before the law secures *de facto* equality, so that the law is applied correctly and consistently no matter whom the parties may be. Research has shown that these laws are not necessarily applied to non-indigenous Australians.

Moreover, these laws breach the rights to liberty and a fair trial under the ICCPR. If, to impose the same sentence on offenders irrespective of their individual circumstances

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[54] The uneven application of these laws to indigenous peoples

[55] HRC General Comment 18 of 1989 (IHRR, Vol 1, No. 2 (1994)).

and needs, is considered arbitrary, such a detention is not lawful under Article 9 of the ICCPR.

Further, the independence and impartially of the court, which is guaranteed under Article 14, is violated by mandatory sentencing. The court is no longer free to decide upon the facts what sentence should be given, nor can the court be said to be independent of the legislature in sentencing.

Article 14(4) guarantees that the procedures pertaining to juvenile offenders must account for the desirability of promoting their rehabilitation, which mandatory sentencing clearly breaches. Article 14(5) guarantees that anyone convicted of a crime has the right to have their conviction an sentence reviewed by a higher tribunal. Mandatory sentencing again breaches this article.

And this is not to mention the breaches of other international conventions, such as the International Convention on the Elimination of All Forms of Racial Discrimination (1966) and the Convention on the Rights of the Child (1989).'

The jurisprudential isolation that the Australian courts will increasingly suffer as other common law countries adopt domestic rights instruments should not be underestimated. The age-old tradition of building on the common law, case-by-case, will become more difficult for the Australian courts without guidance from other common law systems.

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.

Very few rights instruments contain override clauses for Parliament. All international and regional human rights instruments do not allow for legislative override of the rights contained therein,[56] nor do many domestic rights instruments.[57] This is because of the very nature of rights. Human rights are universal, indivisible and fundamental.

[56] The ICCPR, the ICESCR, the ECHR, the American Convention on Human Rights (1969), and the African Charter on Human and Peoples' Rights (1981).
[57] For example, the United States Bill of rights, the South African Bill of Rights, the *Basic Law of 1990* in Hong Kong, and the Italian Bill of Rights.

The capacity to override a Bill of Rights upon convenience denies the universality, indivisibility and fundamental nature of human rights.

The Canadian Charter contains an override clause. Section 33 empowers the Canadian Parliament or a provincial legislature to expressly declare that legislation shall operate notwithstanding the provisions in the Charter. This power is subject to a number of limits. First, legislation subject to such a declaration must be re-enacted every five years. Secondly, an override declaration cannot be applied retrospectively. And finally, the high political controversy associated with a declaration constrains the use of the mechanism by legislatures.[58]

According to Russell, the override clause:

> *is a product of the true genius of Canadian statescraft… [W]e have a means through which we may exercise our civic responsibility when we are not persuaded by the reasons of the judges.*[59]

Such reasoning is dangerous. If society agrees certain matters are beyond the reach of the majority will, to then allow override of this when judicial reasoning does not persuade the majority is absurd.

Russell supports the override clause on the basis of parliamentary sovereignty and simple majoritarian rule. With respect to substantive outcomes of decision making, he argues that the override clause is 'an "elegant compromise" between the requirements of democratic governance and constitutionalism in deciding the outer limits of core values.'[60]

In theory this may sound convincing, but in practice the override clause will not be used to take rights away from majority interests. The override clause can only ever politically be used against minorities.

Where does this leave the notion that the concept of democracy is the will of the majority tempered by minority interests? The notion of constitutionalism, the idea of entrenching certain values in our society, is also undermined by the allowing legislation to override the supposedly entrenched rights.

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[58] I. Molinaro, 'The Charter and Quebec: Exploring the Limits of Constl Authority', in *Rights and Democracy: Essays in UK-Canadian Constitutionalism* (Gavin W. Anderson (ed.), Blackstone Press Ltd, Great Britain, 1999).
[59] P. H. Russell, 'TheParadox of Judicial Power', [1987] 12 *Queen's Law Journal* 421.
[60] I. Molinaro, op cit (fn 58).

The possibility of unjust decisions

Russell admits that the override could result in unjust decisions being made. However, he discounts this concern as the override procedure allows for the:

> *possibility for wider public discussion and participation on issues of social and political justice and thus contributes to an important democratic ideal, that of government by discussion and responsibility, active citizenship.*[61]

Molinaro sums up the concern Australia should have with this analysis:

> *the use of s33 can allow the people to discover for themselves the reasonableness of their actions and commitments. This will not however reassure those who seek ironclad guarantees or clear-cut solutions to the problem of competing goods.*[62] [my emphasis]

In the process of discovering for ourselves whether our actions have been reasonable, unjust decisions will be made. Rights are not absolute.[63] Rights are restricted already. They are restricted when the courts define and refine them. Also, most contain an internal mechanism allowing limits to be placed on the exercise of the right, for example, in the national interest.

Finally, rights can be limited if the limitation is demonstrably justified in a free and democratic society. This provides legislatures with sufficient flexibility to regulate society. There is no need to expand the legislature's ability to restrict rights beyond this by giving them an override clause.

The idea behind rights protection is this: if those who exercise power choose to deny one of the bedrock values of our democratic tradition, they must be prepared to justify their action by evidence and reasoned argument. If they are unable to do this, they should not be given the additional power of crushing our rights anyway.

The second question put 'what procedures need to be put in place to ensure that any such overriding legislation complies with the Bill of Rights' appears nonsensical. A provision allowing an override of the basic rights declared in a Bill of Rights by definition is inconsistent with the rights embodied in a Bill of Rights. Consequently, such overriding legislation cannot comply with a Bill of Rights.

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[61] Ibid.
[62] Ibid.
[63] Rights to be free from genocide and torture tend to be absolute.

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

A Bill of Rights should be binding on certain non-state actors.[64] A Bill of Rights must place binding obligations on private providers of essential public services and private actors with enormous economic/political power, whether they are individuals, corporations or institutions.

As private individuals and bodies gain greater economic and political power and as governments privatise services, massive amounts of power are transferred from the public to the private domain. This impacts on our traditional system of accounting for power.

Historically, democracy has developed controls over parliament and government and the activities for which they are responsible. Transfers of responsibility to private interests disconnect these controls and diminish the community's ability to exert influence over the activities through processes of government.

Lacking the usual avenues, people will seek redress elsewhere, especially in the courts. The courts will have to protect citizens from abuse of governmental power, whether private or public, as well as abuse from economic and media power. To perform these mammoth tasks, the courts will have to maintain their integrity, independence and competence.[65] To achieve this, a Bill of Rights that binds non-state actors will be necessary.

Traditional rights instruments focus on the responsibility of the State only. They impose obligations on the State to adopt constitutional, legislative, judicial, administrative, and other measures to ensure that human rights within are protected, regardless of whom the perpetrator of violations is.

This approach is ineffective where a State is unwilling or unable to take these measures due to the possible effect on investment by globalised economic institutions,

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[64] P. Bailey, op cit (fn 16).

[65] R. McGarvie, 'The Courts and the Future: New Stump Ploughs to Cultivate old Paddocks', Opening Address, Third Annual Colloquium on the Courts and the Future, Judicial Conference of Australia, Gold coast, 7 November 1998.

transnational corporations or powerful national corporations and individuals. This unwillingness or inability is usually motivated by a fear of retaliation. Such non-State actors can and do withdraw investment from States when legal protections for individuals or when the imposition of duties on themselves affect their profit margins.[66]

Dealing with non-State actors

In order to deal with the increased privatisation of essential services and to deal with economically powerful individuals and bodies, we need to change our vision of responsibility under rights instruments.

Two rights instruments provide guidance in this respect. In relation to the increased privatisation of essential services, the HRA is instructive. Under section 6(1) of the HRA, it is unlawful for a "public authority" to act in a manner incompatible with ECHR rights.[67] Under section 6(3), "public authority" is defined to include courts and tribunals, and any person with functions of a public nature, excluding parliament.

The Government's White Paper noted that the term includes central government, executive agencies, local government, police, immigration officers, prisons, courts and tribunals and privatised utilities to the extent they exercise public functions.

The express reference to ' privatised utilities to the extent they exercise public functions' is encouraging, but some commentators argue it does not go far enough.

Wade is concerned that only the citizen-state relationship is regulated under the HRA, not the citizen-citizen relationship. This is of concern because non-governmental bodies are capable of violating the right to private and family life, rights to freedom of expression and association, the prohibition against discrimination, and the right to education.

Further, Wade warns that the public law distinction of "public authority" is fraught with problems and that, without a workable definition of the term, the same will

[66] See generally R. McCorquodale and R. Fairbrother, 'Globalization and Human Rights', (1999) 21 *Human Rights Quarterly* 735; S. Joseph, 'Taming the Leviathans: Multinational Enterprises and Human Rights', (1999) *Netherlands International Law Review* 171.

[67] This does not apply if primary legislation prevents the public authority acting differently, or the public authority was giving effect to provisions of primary legislation that could not be read or given effect in a way compatibly with the ECHR rights (s 6(2)). This is a serious qualification.

happen under the HRA.[68] In the NSW context, a clearer, yet flexible, definition of "public authority" should be adopted.

In relation to private actors with massive economic/political power, the ECHR provides guidance. Article 1 of the ECHR provides that the State parties must secure to everyone within their jurisdiction the rights and freedom contained within the ECHR.

The European Court has interpreted Article 1 broadly so as to place responsibilities on corporations, trade unions, and private individuals. The European Court has held the State indirectly responsible for the actions of such entities.[69]

<u>Indirect responsibilities of States</u>

Whether we should rely solely on judicial interpretation to bring about this result is questionable. We should learn from the ECHR experience, which was drafted in 1951, and expressly provide in a Bill of Rights that States can be indirectly responsible for the actions of corporations, trade unions, and private individuals.

In New Zealand, the courts have gone one step further. No express remedy clause was included in the New Zealand Bill of Rights. However, in *Baigent's* case,[70] the Court of Appeal held that the Bill of Rights implied that effective remedies should be available for its breach.

In this case, the police had obtained a search warrant, but it was clear before entering the property that the property was not linked to the suspect. The police searched the property anyway, finding no incriminating evidence. Baigent, the owner of the property, commenced civil proceedings for damages on a number of grounds, including breach of the Bill of Rights in making an unreasonable search contrary to s21.

The main remedy awarded for breaches of rights hitherto was the exclusion of evidence. This was due to the fact that most cases concerned evidence obtained unlawfully, and exclusion was the most effective redress and ample to do justice. However, the majority found that:

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[68] Sir W. Wade, *The United Kingdom's Bill of Rights*, 1998.
[69] See *Plattform "Arzte fur das Lebed" v Austria* (1988) *Costello-Roberts v UK* (1993) and *Gustafsson v Sweden* (1996) and *A v UK* (1998). Also refer to D. Kinley, 'Rights, Responsibilities and Public Interest Advocacy', *Courting the Public Interest*, PIAC Conference on the Practice of Public Interest Law, Sydney, 28 April 1999.
[70] *Simpson v Attorney-General* [1994] 3 NZLR 667. See especially the judgment of Cooke P, 675-678.

> *[I]n a case such as the present the only effective remedy is compensation. A mere declaration would be toothless. In other cases a mandatory remedy such as injunction or an order for the return of property might be appropriate.*[71]

The claim for compensation/damages under the Bill of Rights is not a private law action in the nature of a tort claim for which the State was indirectly/vicariously liable. Rather, it is a public law action directly against the State for which the State has primary responsibility. The notion of direct responsibility under the New Zealand Bill of rights is stronger than the notion of indirect responsibility under the ECHR and should be expressly included in a Bill of Rights for NSW.

Regulating powerful individuals

To highlight the importance of the need to regulate powerful individuals, corporations and institutions under rights instruments, the case of *RJR-MacDonald Inc. v Canada*[72] should be discussed.

The Canadian *Tobacco Products Control Act* prohibited the advertising, promotion and sale of all tobacco products unless their packaging included prescribed unattributed health warnings and a list of toxic materials. The legislation also prescribed that the packaging could not display any other writing except the name of the product, the brand name and the trademark.

A tobacco company challenged this legislation. The Supreme Court of Canada held unanimously that the legislation infringed the freedom of expression.

There were two bases for this: first, this freedom included the right to say nothing, the obligation to include unattributed health warnings infringing this; and second, prescribing exactly what could be included on the packaging infringed freedom of expression.

Under section 1 of the Charter, rights can be subject to reasonable limits prescribed by law that are demonstrably justified in a free and democratic society. To satisfy section 1, the government had to prove that the legislation addresses a pressing and substantial objective, that there was proportionality between the objective and the seriousness of

[71] Id 676.
[72] *RJR-MacDonald Inc. v Canada (Attorney General)* (1995) 3 SCR 199.

the infringement, and that the legislation was the least intrusive means available to achieve the objective.

The Supreme Court was split 5:4 on this issue. The majority held that the means chosen by Parliament were not the least intrusive method available to achieve its objectives. The Parliament had adduced no evidence that something less than an outright ban on advertising, promotion and sales of tobacco was necessary to achieve its objectives, and that attributed health warnings would not be as effective as unattributed warnings on tobacco products. Thus the legislation failed.

The minority held that there was a gap in understanding of the link between the health effects of tobacco and the causes of tobacco consumption. However, they held that it would be unjustified and unrealistic to limit Parliament's legislative power to make social policy legislation until definitive social science conclusions were available.

On balance, the objective of reducing the number of direct inducements to consume tobacco products outweighed the limitation placed on tobacco companies to advertise inherently dangerous products for profit. The minority distinguished between different types of expression:

> *In cases, where the expression in question is farther from the "core" of freedom of expression values, this court has applied a lower standard of justification… The harm engendered by tobacco and the profit motive underlying its promotion place this form of expression as far from the "core" of freedom of expression values as prostitution, hate-mongering and pornography… Its sole purpose is to promote the use of a product that is harmful and often fatal to the consumers who use it… The large sums these companies spend on advertising allow them to employ the most advanced advertising and social psychology techniques to convince potential buyers to buy their products… An attenuated level of s. 1 justification is appropriate.*[73]

The decision of the majority can be criticised for many reasons. Hutchinson offers the following:

> *Although the Supreme Court struck down the legislation for want of compelling evidence on the causal connection between advertising and consumption, the Court itself refused to allow the admission of such up-to-date and available evidence… Only a few*

[73] Id as per La Forest J, 281-4.

years ago, the Supreme Court upheld a criminal ban on advertising of prostitution (a legal activity, less harmful than smoking). It did so without requiring the government to prove definitively that there was a casual link between advertising and consumption (as it insisted on in this decision) and on the basis that solicitation was a nuisance (a far cry from the death and ill health caused by tobacco). Finally, the implications of this decision are as massive as they are frightening – does it now mean that advertising restrictions on liquor, prescription drugs, firearms and the like are vulnerable to constitutional challenge? Or that warning labels cannot be mandated on household products?[74]

Hutchinson concludes by highlighting the perverse way in which instruments, which are aimed at protecting the rights of individuals, can often be used to their detriment:

The solicitude for corporate speech over the need to protect threats to people's health from addictive products is an insult to the Charter's claim to enhance ordinary Canadians' rights and freedoms… When the Supreme Court places the value of private advertising to sell deadly products above that of public regulation to preserve people's health, the constitutional die has been perversely cast. Contrary to the majority's opinion, commercial speech is more about commerce than speech and more about profits than people: a country's health is not something to be traded for the corporate freedom to seduce more addicts… The crucial issue is who is to regulate and monitor such activity – the citizenry and consumers at large, through various legislative measures and regulative agencies, or the commercial sector of the economy in the name of the market?[75]

This case serves to illustrate that any rights instrument should be as clear as possible in relation to *whom* has rights and obligations under it, and what the scope of each individual right includes. If corporations have obligations as well as rights, a more satisfactory outcome may have been reached by the Supreme Court.

G) The extent and manner in which the rights declared in a Bill of Rights should be enforceable

Rights declared in a Bill of Rights should be fully enforceable in the courts. What is the value of a right is if you cannot enforce it? What is the value of a right if there is no available remedy?

[74] A. Hutchinson, op cit (fn 39) 41-42.

The experience of the New Zealand Bill of Rights highlights this. It will be recalled that no express remedy clause was included in the New Zealand Bill of Rights.

However, *Baigent's* case (above) confirmed that effective remedies must be available under rights instruments. Stating again the words of Cooke P:

> *[I]n a case such as the present the only effective remedy is compensation. A mere declaration would be toothless. In other cases a mandatory remedy such as injunction or an order for the return of property might be appropriate.*[76] [emphasis added]

The Court held that the question of the appropriate remedy was "naturally a responsibility of a Judge", the issue "clearly" not lending itself to determination by a jury.[77] Cooke P stated:

> *As to the level of compensation, … in addition to any physical damage, intangible harm such as distress and injured feelings may be compensated for; the gravity of the breach and the need to emphasise the importance of the affirmed rights and to deter breaches are also proper considerations; but extravagant awards are to be avoided.*[78]

This decision highlights the futility of rights protection without an effective remedy. It highlights the court's willingness to introduce new causes of action to ensure the victim of a violation can obtain a remedy, that is the public law action for breach of the Bill of Rights. And it illustrates the kind of factors that should influence the award of remedies. This is all necessary if the vindication of rights is to be taken seriously.

The Canadian Charter contains an express provision regarding enforcement. Section 24 guarantees that 'anyone whose rights or freedoms … have been infringed or denied may apply to a court … to obtain such remedy as the court considers appropriate and just in the circumstances.' Such express provision puts beyond doubt an individual's ability to enforce their rights and should be included in the NSW Bill of Rights.

The situation in the United Kingdom is not as satisfactory. The remedial powers given to the courts under the HRA are most unique.

Under section 4, the courts are empowered to make a declaration of incompatibility if provisions of primary or subordinate legislation are incompatible with Convention

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[75] A. Hutchinson, op cit (fn 39) 42-43.
[76] *Simpson v Attorney-General*, op cit (fn 70) p 676.
[77] Id 677.
[78] Id 678.

rights.[79] A declaration of incompatibility does not affect the validity, continuing operation or enforcement of the provision, and is not binding on the parties.

The effect of a declaration is outlined in section 10 and schedule 2. Under section 10, the relevant Minister *may* take remedial action if a declaration of incompatibility is made.[80] If the Minister considers that there are compelling reasons for proceeding, the Minister *may,* by order, make such amendments to the legislation as is considered necessary to remove the incompatibility.[81] Remedial action *may* be retrospective.[82]

Article 13 of the ECHR was omitted from the HRA. Article 13 states that 'everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority.' Article 13 reflects the normal procedure for a court if a Convention right is infringed — that is, for the court to give judgment in favour of the victim and award a just and appropriate remedy.

However, the United Kingdom Parliament rejected this in favour of empowering the courts to make declarations of incompatibility in relation to primary and subordinate legislation, and extending a limited power to award relief under section 8.

Under section 8, if a public authority acts unlawfully,[83] the court may 'grant such relief, remedy or order within its jurisdiction as it considers just and appropriate.' The words 'within its jurisdiction' indicate that no new causes of action may be tailored and no new remedies may be awarded.

Section 8 also states that damages may be awarded only by a court that has power to award damages or to order payment of compensation in civil proceedings. Further, no

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[79] The *HRA* guarantees all the rights and freedoms guaranteed under the ECHR and are referred to under the *HRA* as "Convention rights".

[80] Remedial action may also be taken if it appears to a Minister that, having regard to the finding of the European Court of Human rights, the legislation is incompatible with convention rights (section 10(1)).

[81] In the case of subordinate legislation, the Minister may amend the relevant primary legislation in order to remove any incompatibility (section 10(3)). Further, remedial orders may contain incidental, supplemental, consequential and transitional provisions, including the power to amend or repeal primary legislation, including primary legislation other than that which contains the incompatible provision (Schedule 2, cl 1). This also applied to subordinate legislation (Schedule 2, cl 1(2)(b)).

[82] Except where retrospective operation would render a person guilty of an offence. Under schedule 2, no remedial order may be made unless it is approved by resolution of both houses of parliament, which cannot be given until 60 days after the draft order is laid before parliament. However, if the Minister declares the matter urgent, parliamentary approval is not required for the order to become operative. Under this fast-track procedure the Minister need only present the order to both houses of parliament 'after it is made.' (See Schedule 2, clause 4(1).) If both houses of parliament do not approve the order within 120 days of the order being made, the order ceases to have effect. The order ceasing to have effect does not affect anything previously done under the remedial order or the power to make a fresh remedial order (Schedule 2, clause 4(4)).

award of damages should be made unless the court is satisfied that the award is necessary to afford just satisfaction to the person in whose favour it is made.

In the financial memorandum to the HRA, it was estimated that awards would tend to be between £5,000-15,000, and *not* made just because of a violation of a Convention right.

Arguably, these provisions are incapable of giving an "effective remedy" to all victims of rights abuses. In relation to violations that lead to declarations of incompatibility, victims will have to rely on a Minister exercising his/her discretion to take remedial action of a retrospective nature or hope that their situation falls within an existing category of action for which damages or compensation may be awarded.

The courts will be forced to say to some victims: 'yes, your rights have been unlawfully infringed, but we cannot give you a remedy; you must accept the violation unless, and until, the relevant Minister makes a retrospective remedial order in your favour.'[84]

The problem is obvious: you need a remedy to vindicate your rights. In relation to section 8, some violations of Convention rights may not be remedied simply by relief, remedies or orders within the court existing jurisdiction.

Article 13 was omitted as the HRA itself is considered the "effective remedy". In the second reading speech, the Lord Chancellor explained that were Article 13 to be included, '[t]he courts would be bound to ask themselves what was intended beyond the existing scheme of remedies set out in the Bill,' and this might 'lead them to fashion remedies other that the clause 8 remedies' which the government regarded as 'sufficient and clear'.[85] This would, in the government's view, result in judges inappropriately acting as the legislature.

Lord Lester of Herne Hill gave an alternative explanation.[86] Many commentators argued that if the courts, as public authorities, were bound to give effect to Convention rights to privacy, the courts may be able to fashion new actions, new rights and

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[83] Under section 6, it is "unlawful" for a public authority to act in a way that is incompatible with a Convention right. "Public authority" includes a court or tribunal, or any person whose functions are functions of a public nature, but does not include either house of Parliament (section 6(3)).

[84] Under prerogative powers, the executive may award *ex gratia* payments, such that a victim may be compensated.

[85] HL Deb vol 583 col 475, 18 November 1997. See also K. Ewing, "The Human Rights Act and Parliamentary Democracy", (1999) 62 *Modern Law Review* 79 at 85.

[86] Lord Lester of Herne Hill, speech delivered at the Lauterpacht Institute for International Law, University of Cambridge, June 1998.

obligations. The media were concerned about a new right to privacy. Lester argues that this concern will not eventuate, as the HRA will work through the existing law, not around it. The courts will begin with the existing common law and statute, then intertwine rights through these, rather than plucking new actions from thin air.

The example given by Lester is where police abuse a search warrant by inviting a television company to film the search. The causes of action against the television company, being common law trespass and breach of confidence, would be developed in accordance with the guaranteed right to privacy, rather than the creation of a free standing right to privacy.

The HRA raises the question: what is the value of a right without a concomitant remedy?

From the lawyer's perspective, would it be sound to advise an individual to seek a declaration of incompatibility when there was no remedy available? The concept of a declaration of incompatibility does protect the sovereignty of parliament, but may not enhance the protection of human rights of individuals. Would it be sound to advise an individual to enforce their Convention rights if there is no relief, remedy or order within the court's jurisdiction? The capacity of the judiciary to fashion new rights and obligations where necessary is indispensable under rights instruments.

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.

This question is related to the earlier question of: 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.

There are a number of ways to give parliament legislative flexibility under a Bill of Rights.

The first relates to the broad language in which our rights are protected. The legislature has the capacity to mould the breadth of the rights via legislating and argument in court.

The second way to achieve flexibility is to recognise that rights are not absolute. This is motivated by the understanding that rights may and do clash. Your right to privacy clashes with my freedom of expression. Your right to liberty clashes with my right to security of the person. Your right to a fair trial clashes with my right to freedom of expression.

It is also motivated by the fact that we do live in a society where broader community interests may clash with individual interests. Your individual interests may threaten national security and public safety, public health and public morals, or may lead to disorder and crime. The way to recognise that rights are not absolute is to place limitations on the individual rights.

Under the ECHR, a number of rights are expressly 'subject to such limitations as are prescribed by law and are necessary in a democratic society in the interests of national security and public safety, for the prevention of disorder or crime, for the protection of public order, health or morals, or for the protection on the rights and freedoms of others.'[87]

Some rights are subject to each of these limits, others to only some. Thus, these limits will also become part of the United Kingdom's domestic law under the HRA.

The Canadian Charter also contains express limits. Rather than outlining for each individual right what limitations are justifiable, the Charter rather guarantees that 'the right and freedoms set out in [the Charter are] subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.' Under the ICCPR, various rights are limited, but there is no need to prove that the limitation is justifiable in a democratic society.

Reference to the test in *Oakes v R* (referred to above) is needed here. The test for deciding whether a limit to a right is demonstrably justifiable in a free and democratic society is objective and suited to judicial review.

In the first place, courts will rarely question the objective of the legislation. It would be most unusual for a court to second guess the legislature and decide that the objective of the limit was not press and substantial.

[87] Articles 8, 9, 10 and 11.

Second, the method of assessing whether the means to achieve the objective are proportional is far from merit review. Rational connection between the means and the objective, the minimum impairment test, and proportionality between the effects of the means and the objective, are quite objective, scientific factors.

Thus not only are the limits required within a rights system but the application of the test is workable under our existing constitutional arrangement.

Such limitations are necessary under any rights regime as clashes between competing individual rights do occur, as do clashes between individual rights and the greater community good. The form such limitations have taken under the ECHR and the Charter should be used for the NSW Bill of Rights.

The limits expressly account for the needs of a democratic society, and the courts have utilised objective tests when deciding whether the legislative limitations are justified.

The second way of giving legislative flexibility to parliament is to enact an override clause, as discussed above. For the reasons given above, this is not the preferred option. If the legislation cannot be demonstrably justified in a free and democratic society, they should not be valid. The override clause allows parliaments to confer legitimacy on legislation that cannot be demonstrably justified in a free and democratic society, totally undermining the idea of entrenched constitutional rights and freedoms.

I) Whether there should be a legislative requirement on courts to construe legislation in a manner which is compatible with international human rights instruments

This is a difficult issue. The dilemma is that once we have a domestic Bill of Rights, should we still impose a legislative requirement on the courts to construe legislation in a way that is compatible with international human rights instruments.

To an extent, this restricts the freedom of the Australian judiciary to make its own mark on human rights jurisprudence, to take into account local needs, and to reject jurisprudence it regards as insufficient to protect rights.

However, human rights are universal, indivisible, fundamental, and inhere in the individual as a human being. To absolve domestic courts from following jurisprudence at the international level compromises these notions.

If Australian judges can ignore certain rulings, it suggests that human rights are not universal, indivisible and fundamental, nor do they inhere in individuals as human because some humans do not benefit from them.

On balance, it seems that the compromise should be somewhere in the middle. Courts should be required to ***take into account*** the way international human rights instruments are construed when interpreting legislation and individuals should retain the ability to complain about violations of their human rights to international tribunals and bodies which are set up under international human rights instruments that Australia is a party to.

Conclusion

Bills of Rights are not the panacea for all social and political woes. An awareness of this will guard against the total legalisation of politics, and hopefully inspire people to continue to fight against rights violations in all public arenas. However, they are a necessary piece of armour in the shield against abuses of fundamental freedoms and human rights.

As Sir Anthony Mason said, '[t]here is an element of hypocrisy in subscribing to an international Covenant, especially one dealing with human rights, and then failing to enact its provisions as domestic law.'[88]

We need to recognise this and confidently assert our modern notion of democracy by enacting a Bill of Rights.

A Bill of Rights will assign to the courts the role of refereeing our democracy, providing a mechanism to ensure that the claims of those without political and economic clout and influence must be listened to

[88] The Hon Sir Anthony Mason, 'Defining the Framework of Government: Judicial Deference versus Human Rights and Due Process', *The Changing Role of the Judiciary*, The Centre for Public Policy Workshop, Melbourne University, 7 June 1996.