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The Protection of Human Rights: A Review of Selected Jurisdictions

by

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Legislative Council, Parliament of New South Wales,
Standing Committee on Law and Justice

EXECUTIVE SUMMARY

The purpose of this paper is to present a concise and mostly descriptive account of recent developments in the protection of human rights in selected jurisdictions, notably Canada, New Zealand, South Africa and the United Kingdom. The immediate background to the paper is the reference by the Attorney General on 23 November 1999 to the Legislative Council Standing Committee on Law and Justice to undertake an inquiry and report on the introduction of a 'statutory NSW Bill of Rights and/or whether amendments should be made to the Interpretation Act 1987 to require courts to take into account rights contained in International Conventions…'.

The paper's main findings are as follows:

- most countries have adopted a Bill of Rights in some form or other, either as a constitutionally entrenched document, or by incorporation into domestic law of international and/or regional human rights instruments (page 3);
- it follows that very few countries can be said with any certainty not to have any kind of Bill of Rights. The position in some countries is hard to determine, including those in a state of constitutional flux at present, as in the cases of Pakistan and Indonesia (page 3);
- in some federations, including Canada, Germany and the USA, separate Bills of Rights operate at a national and sub-national level (page 4);
- at present, there does not appear to be an instance of where a Bill of Rights operates at the sub-national but not the national level. Historically, however, at least two examples can be noted: most of the US States had their own Bills of Rights before the US Constitution came into being; in Canada the Province of Saskatchewan enacted the first Bill of Rights in 1947, with a statutory Bill of Rights following at the national level in 1960 (page 4);
- in Australia the common law protection of rights is supplemented by those rights which are expressly or impliedly protected under the Commonwealth Constitution. These are few in number and highly qualified in nature. Express human rights provisions are mostly absent from the constitutions Acts of the States (page 6);
- the US Bill of Rights, which is restricted to traditional civil and political rights and is expressed mostly in 'negative' terms and without qualification, is an 'old' template for the protection of human rights; the *UN Declaration on Human Rights, 1948*, which is expressed in 'positive' terms and includes certain economic and social rights, is a new template, later refined in the *European Convention on Human Rights and Fundamental Freedoms, 1950* (ECHR) and the *International Covenant on Civil and Political Rights, 1966* (ICCPR). Both the latter seek to incorporate 'justified limits' to some of the rights under protection (pages 9-14);

- when the UK *Human Rights Act 1998* comes into effect on 2 October 2000, those ECHR rights 'incorporated' into domestic law by the Act will be enforceable in the UK courts. The Act makes it unlawful for a public authority to act incompatibly with certain ECHR rights and allows for a case to be brought in a UK court or tribunal against the authority if it does so. However, a public authority will not have acted unlawfully under the Act if as a result of a provision of primary legislation it could not have acted differently. The Act also requires that when legislation is introduced into either House for a Second Reading, the Minister responsible must make a written statement that he considers the Bill is compatible with the Convention rights, or that he is unable to make such a statement but wishes Parliament to proceed with the Bill anyway (page 17);

- New Zealand's statutory Bill of Rights Act was introduced in 1990. Unlike its UK counterpart, under the Act the courts can neither invalidate secondary legislation, nor make declarations of incompatibility with respect to primary legislation. The Act provides for the pre-enactment scrutiny of Bills, which in the case of Government Bills occurs in the form of a report by the Attorney General on the introduction of the Bill into parliament (pages 21-22);

- Canada's *Charter of Rights and Freedoms, 1982* is a constitutionally entrenched document. It is reckoned to have made a huge impact upon Canadian law. Its innovations include a general 'justified limits' clause and a legislative override provision under which a federal or provincial parliament is able to 'opt-out' of certain Charter protections. Pre-enactment scrutiny of Bills occurs after a Bill has been introduced into parliament (pages 25-28);

- the British, Canadian and New Zealand models have all attempted in different ways to resolve the conflict between the doctrine of the supremacy of parliament, on one side, and judicial review, on the other: this takes the form of the legislative override clause in Canada; in New Zealand it is the statutory status of the Bill of Rights under which inconsistent legislation cannot be declared invalid; and in the UK half-way-house arrangements are in place, whereby the courts may quash or disapply subordinate legislation, but only make a declaration of incompatibility for primary legislation (page 34);

- South Africa's Constitution of 1996 contains a wide-ranging Bill of Rights designed to protect economic, social and cultural rights, in addition to the traditional civil and political rights (page 32); and

- proposals to adopt a Bill of Rights have been debated in other Australian States in the past, most recently in Queensland and Victoria (page 35).

1.0 INTRODUCTION

The purpose of this paper is to present a concise and mostly descriptive account of recent developments in the protection of human rights in selected jurisdictions, notably Canada, New Zealand, South Africa and the United Kingdom. Mention is also made of the United States experience and of the protection of human rights under international declarations and treaties, including the United Nations Universal Declaration of Human Rights, 1948, the European Convention on Human Rights and Fundamental Freedoms, 1950 and the International Covenant on Civil and Political Rights, 1966 (the '**ICCPR**').

The immediate background is the present debate concerning the introduction of a Bill of Rights in NSW. On 23 November 1999 it was announced that the Legislative Council Standing Committee on Law and Justice had received a reference from the Attorney General, Hon JW Shaw MLC. The Standing Committee's terms of reference, which are set out in full at Appendix A, include to:

> undertake an Inquiry into and report on whether it is appropriate and in the public interest to enact a statutory New South Wales Bill of Rights and/or whether amendments should be made to the Interpretation Act 1987 to require courts to take into account rights contained in International Conventions…[1]

On the same day the Attorney General, in response to a question without notice, explained that there had been 'significant developments' recently in human rights law in the United Kingdom and New Zealand. He commented, too, that the High Court has indicated that 'as a matter of interpretation international treaty obligations ought to be regarded as relevant'. The Attorney General continued:

> So these matters are not as radical as once they might have seemed to be. The Chief Justice of New South Wales, Justice Spigelman, pointed out that the American Bill of Rights jurisprudence is virtually incomprehensible to Australian lawyers. He said that, within a decade, it is quite likely that in substantial areas of the law British and Canadian cases will be equally incomprehensible to Australian lawyers. His Honour pointed out the potential for intellectual isolation that, as he said, many would find disturbing.[2]

Mr Shaw explained in a Media Release that he would like to see:

> …a careful, bi-partisan investigation as to the utility of a legislative statement of fundamental human rights, whether such a statement should be constitutionally entrenched or capable of amendment by

1 *NSWPD*, 23 November 1999, p 3507.

2 *NSWPD*, 23 November 1999, p 3523.

> an ordinary, subsequent statue and whether legislation should require courts to interpret domestic legislation in conformity with Australia's international treaty obligations.[3]

Predictably enough, the suggested introduction of some form of Bill of Rights in NSW has given rise to a variety of responses. The Opposition Leader in the Legislative Council, Hon M Gallacher MLC, is reported to have said that the Coalition 'supported the committee investigating a bill of rights but did not have a position for or against'.[4] On the other hand, Mr Nicholas Cowdery, QC the Director of Public Prosecutions and convener of the NSW Bar Association's Human Rights Committee has supported the proposal,[5] as has the President of the NSW Law Society, Mr John North.[6] Whereas the Premier, Hon RJ Carr, is reportedly opposed to the suggestion, apparently informing the Labor Caucus that the plan 'would not proceed while he was Premier'.[7] The Attorney General has said that he respects 'the position of various people who often have diametrically opposed views on the issue. It certainly involves consideration of the relationship between the courts and the Parliament'.[8] In any event, Mr Shaw also made it clear that his reference of the Bill of Rights question to a parliamentary committee 'was not intended to pre-judge the issue, simply to facilitate a rational discourse…'.[9]

This paper starts by discussing some key questions of a general kind concerning the introduction of a Bill of Rights. Next, this discussion is linked first to a brief commentary on the US Bill of Rights, the original template for human rights law, and secondly to the United Nations Universal Declaration of Human Rights, 1948, the ICCPR, 1966 and the European Convention on Human Rights and Fundamental Freedoms, 1950. As the recent enactment of the *Human Rights Act 1998* in the United Kingdom appears to have been the main spur to the current debate in NSW, the paper then presents an analysis of that Act, followed by a commentary on recent developments in human rights law in New Zealand, Canada and South Africa.[10]

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[3] Hon JW Shaw MLC, Attorney General and Minister for Industrial Relations, 'A NSW Bill of Rights?', *Media Release*, 23 November 1999.

[4] L Doherty, 'Bill of Rights to set NSW apart', *The Sydney Morning Herald*, 24 November 1999.

[5] Ibid.

[6] L Doherty, 'From dogs to driving the nanny State rules', *The Sydney Morning Herald*, 27 January 2000.

[7] D Humphries and M Robinson, 'Carr kills off any hopes for bill of rights', *The Sydney Morning Herald*, 25 November 1999.

[8] *NSWPD*, 25 November 1999, p 3691.

[9] D Humphries and M Robinson, n 7.

[10] For a summary of previous Australian proposals for a Bill of Rights see –Legislative Assembly of Queensland, Legal, Constitutional and Administrative Review Committee, *The preservation and enhancement of individuals' rights and freedoms in Queensland: Should Queensland adopt a Bill of Rights?*, 12 November 1998, pp 12-13.

2.0 KEY QUESTIONS ABOUT THE PROTECTION OF HUMAN RIGHTS

2.1 Which countries do and which do not have a Bill of Rights?

A survey of the constitutions of the world suggests two mutually supportive conclusions. One is that most countries have adopted a Bill of Rights in some form or other, either as a constitutionally entrenched document, which often takes the form of a distinct chapter of the country's constitution, or by the incorporation into domestic law of international and/or regional human rights instruments. Even the most authoritarian regimes often possess a Bill of Rights, a trend which dates back to Stalin's 1936 Soviet Constitution but which has accelerated since the Second World War, after which the articulation of rights (and sometimes duties) has become the norm in constitutional law. A list of countries with a Bill of Rights would include Iraq, the USA, Albania, Zimbabwe, Uruguay and Uzbekistan, Malaysia, Singapore and China. All the countries which were formally part of the Soviet sphere of influence appear to have adopted some kind of Bill of Rights; they are as ubiquitous in Africa and South America as they are in Europe and Asia. It is true that some Bills of Rights are subject to what might be called local peculiarities or variations. In many Islamic countries, of which Iran is one example, such rights as that to freedom of assembly are made subject to the 'fundamental principles of Islam'. Likewise, avowedly socialist countries, such as Vietnam, tend to define rights in the context of a 'socialist republic'. More relevantly for Australia, the constitutional entrenchment of rights is the norm throughout the Commonwealth,[11] as it is in the comparable liberal democracies of the world.

It follows, therefore, that very few countries do not have some kind a Bill of Rights.[12] More importantly, perhaps, it is hard to list with any certainty those countries which fall into that category, in part because the absence of such a document from the constitution does not mean that a statutory Bill of Rights does not exist, or that some international or regional instrument has not been incorporated into domestic law. We know Australia does not have a Bill of Rights. It seems that Afghanistan, where there is no valid constitution and which is ruled by Islamic law, also belongs to that category; as does Burma (Myanmar) where the constitution is suspended. From a survey of their constitutions, Bhutan and Brunei may also belong to the 'no' list; and perhaps Libya should be added to it on the ground that the rights articulated in its constitution are primarily social and economic in nature. Moreover, the position in some countries is hard to determine, including those in a state of constitutional flux at present, as in the cases of Pakistan and Indonesia. The general point to make is that the 'no' list is as short as the 'yes' list is long.

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[11] JS Read, 'The new common law of the Commonwealth: the judicial response to Bill of Rights' (Spring 1999) 25 *Commonwealth Law Bulletin* 31.

[12] Much depends on how a Bill of Rights is defined. To date, an agreed definition has proved to be elusive – P Alston, *Promoting Human Rights Through Bills of Rights: Comparative Perspectives*, Oxford University Press 1999, pp 6-11.

2.2 Are there instances of where a separate Bill of Rights operates at a national and sub-national level within a federation?

Yes. As discussed in a later section of this paper, the USA is one example of where federal and State level Bills of Rights co-exist. In Canada, too, human rights are protected at the provincial level as well as at the national level: nationally, a statutory Bill of Rights was enacted in 1960, followed by the *Canadian Charter of Rights and Freedoms* in 1982; alongside these federal initiatives, and sometimes pre-dating them, all the Provinces have enacted their own human rights codes or charters. A similar position appears to apply in the Federal Republic of Germany where the protection of human rights at the national level is supplemented either by an incorporation of the relevant part of the national constitution into the provincial constitutions or, as in Bavaria, by the inclusion of a detailed enumeration of 'basic rights and obligations' at the provincial level of government.[13]
On the other hand, Austria is an instance of a federation where the protection of human rights is only guaranteed at the national level.[14]

2.3 Are there instances of where a Bill of Rights operates at the sub-national but not the national level within a federation?

As Australia is the only federation without any kind of Bill of Rights, it can be assumed that there are no examples at present of where such a Bill operates at the sub-national level and in the absence of a national counterpart. Historically, however, both the US and the Canadian examples are of interest in this regard.

One reason why the US Constitution did not originally contain a Bill of Rights was because equivalent protections already existed for the most part in the constitutions of the States. Indeed, the first draft of the US Bill of Rights was based on George Mason's 'Declaration of Rights' for Virginia's Constitution of 1776, a sixteen provision document that remains part of Virginia's present Constitution.

More pertinent, if only because it is more recent, is the Canadian experience where the legislative protection of rights was pioneered at the Provincial level. It was, in fact, the Province of Saskatchewan that enacted the first Bill of Rights in 1947 which, in addition to anti-discrimination provisions, also proclaimed such political liberties as the right to vote, freedom of religion, speech and press, assembly and association, as well as freedom from arbitrary arrest and detention. This was to serve in many ways as a prototype for the contemporary provincial human rights codes, the difference being that the anti-discrimination component of the Saskatchewan original lacked an effective enforcement

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13 Telephone advice from the German Embassy. See, for example, Part 2 of the Bavarian Constitution. Advice in writing from the Embassy of Argentina suggests that that country is another example, for various rights are protected in the national and provincial constitutions. The difference being that the rights included in the more modern provincial constitutions are said to be more extensive in nature. Perhaps not everyone would agree that the rather curious collection of rights found in the national constitution would constitute a Bill of Rights.

14 Telephone advice from the Austrian Embassy.

procedure.[15] Not until 1960 was a statutory Bill of Rights introduced at the national level in Canada.

2.4 Is a Bill of Rights undemocratic?

There is little doubt that a Bill of Rights has the capacity to shift power from parliament to the judiciary, from elected representatives to unelected judges. Whether it does, in fact, can depend on a number of factors: one is the legal status of the Bill itself, if it is an entrenched constitutional document or only an ordinary statute; a second is the way the judiciary responds to the invitation implicit in a Bill of Rights to review legislation for breaches of human rights standards. The complex issues involved have been debated on many occasions. For some judicial review is a legitimate part of the checks and balances required in a liberal democracy if the potential threat posed by extreme populist movements to individual liberty is to be held at bay.[16] Others question the legitimacy of judicial review arguing that the attempt to transfer controversial issues relating to rights from the sphere of politics to the seemingly more benign realm of law is mistaken in principle.[17]

As discussed in later sections of this paper, the British, Canadian and New Zealand models have all attempted in different ways to resolve the conflict between the doctrine of the supremacy of parliament, on one side, and judicial review, on the other.

2.5 Are rights already protected under the common law?

The common law does protect the liberty of the individual.[18] However, it treats liberty as a 'negative' right in the sense that every citizen has a right to do what he or she likes 'unless restrained by the common law or by Statute'.[19] Under the common law, therefore, the liberty of the citizen is the 'negative' right of what is 'left over when all the prohibitions have limited the area of lawful conduct'.[20] Where the common law and statute law clash, the doctrine of the 'supremacy' of parliament ensures that the express abrogation of a right by legislation must prevail.[21]

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15 N Holmes, *Human Rights and the Courts in Canada*, Canadian Parliamentary Library, June 1998, p 6.

16 HLA Hart, *Law, Liberty and Morality*, Oxford University Press,1963, p 79.

17 JAG Griffith, 'The political constitution' (1979) 42 *Modern Law Review* 1 at 16.

18 An example is *Dietrich v The Queen* (1992) 177 CLR 292 where the High Court found that a court can order a stay on the ground that an unfair trial would result where an accused is charged with a serious offence and is unable to obtain legal representation.

19 *Attorney General v Guardian Newspapers (No 2)* [1990]1 AC 109 (Lord Donaldson MR).

20 Lord Irvine of Lairg, 'The development of human rights in Britain under an incorporated Convention on Human Rights' (Summer 1998) *Public Law* 221 at 224.

21 For a commentary on the way our system of government, the common law and the judiciary protects rights – Legislative Assembly of Queensland, n 10, pp 20-24.

2.6 Are rights protected under the Australian Constitution?

In Australia the common law regime is supplemented by those rights which are expressly or impliedly protected under the Commonwealth Constitution.[22] These are few in number and highly qualified in nature. Unlike their common law counterparts, however, these rights cannot be abrogated by legislation.

Express human rights provisions are mostly absent from the Constitution Acts of the States. A notable exception is section 46 of the Tasmanian Constitution which provides for the freedoms of conscience and religion. The provision is not entrenched, with the result that it can be amended or repealed by ordinary legislation.

2.7 What are the traditional protections for human rights under the Westminster system of government?

The paradox is that, viewed from the standpoint of concrete legislative safeguards, human rights would seem to be in a very precarious position under the Westminster systems of government; and yet, historically, that system is often thought to have inspired this whole movement. In a deliberate allusion to this, the British Labour Government called its White Paper, *Rights Brought Home*.[23] This is not to claim that the major Westminster-style liberal democracies, Australia included, have perfect human rights records, but that, relative to most other countries, their achievement is considerable.

Without attempting anything like a general explanation of why this is so, the point can be made that that the constitutional system and the human rights enjoyed under it are founded on a combination of the doctrine of parliamentary supremacy, with its democratic majoritarian implications, together with the countervailing principles of the rule of law and the independence of the judiciary upon which the protection of the private rights of the individual under the common law are based. More could be said about the conventions which underpin this system and about what AV Dicey called the ‘external limitations’ on the operation of the ‘sovereignty’ of parliament. For the present, however, it is enough to note this broader dimension to the question of the protection of human rights under the Westminster system. Whether Britain’s experience under the ECHR suggests that the system has been found to be inadequate in this regard is discussed in a later section of this paper.

2.8 In whose favour should the rights and freedoms in a Bill of Rights operate?

There may be no blanket answer to the question of who is to benefit from the proposed rights and freedoms in a Bill of Rights. Some rights may be for the benefit of all legal

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[22] These include the implied freedom of political communication and the express right to trial by jury on the indictment of federal offences (section 80) and the freedom of religion guarantee (section 116). It is clear that the express rights do not apply to limit the power of State governments.

[23] Cm 3782.

persons (including corporations) whereas others may be restricted to natural persons. A corporation may take advantage of a right against unreasonable search and seizure[24] but not, presumably, of the right 'to life, liberty and security of the person'. Whether fundamental rights should only apply as a matter of principle to natural persons is one question to decide; another is whether the question needs to be addressed in an express provision. Further, some rights (for example the right to vote) may be restricted to adult citizens, whereas many can be expressed to apply to 'everyone'.

2.9 Against whom should the rights and freedoms in a Bill of Rights operate?

Less problematic is the question of who is to be bound by a Bill of Rights. Typically, such documents operate only as constraints on the exercise of governmental powers.[25] The British *Human Rights Act 1998*, for instance, is addressed to 'public authorities', a term which refers to courts, tribunals and any person exercising 'functions of a public nature'.[26] Thus, a Bill of Rights is not intended to affect legal relationships between private citizens acting in a private capacity.[27] It is to the legal relationship between citizens and the institutions of the state that a Bill of Rights is addressed, for the purpose of protecting the rights and freedoms of individuals against the ever-increasing powers of governmental authorities. Note that, as in the US, there may be times when the actions of private persons and bodies can be regarded as relevantly actions of the state and therefore subject to the Bill of Rights.[28]

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[24] Section 8 of the Canadian Charter of Rights and Freedoms has been interpreted in this way – M Pilon, *Search, Seizure, Arrest and Detention under the Charter*, Canadian Parliamentary Library, January 1999, p 3.

[25] It is suggested that the Bill of Rights under the South African Constitution of 1996 is not altogether clear in this respect – C Murray, 'One Law for one nation: South Africa's new Constitution' (1997) 8 *Public Law Review* 10 at 11.

[26] Section 6. In a qualification designed to preserve the principle of parliamentary immunity, the term does not apply to 'either House of Parliament or a person exercising functions in connection with proceedings in Parliament'. The freedom of Parliament to legislate, or not, as it chooses is also preserved. This provision can be compared with section 3 of the New Zealand *Bill of Rights Act 1990* and section 32(1) of the *Canadian Charter of Rights and Freedoms*.

[27] However, it has been suggested that, by defining 'courts' as public authorities, the rights protected under the UK *Human Rights Act 1998* may be invoked in what are called 'horizontal' proceedings involving a claim by one private person or body against another – J Coppel, *The Human Rights Act 1998*, John Wiley and Sons, 1999, p 19; JS Read, n 11 at 44; G Phillipson, 'The Human Rights Act, "Horizontal Effect" and the Common Law: a Bang or a Whimper' (1999) 62 *The Modern Law Review* 824.

[28] For a discussion of the complexities involved in drawing a line between private and public action see – *A Bill of Rights for New Zealand: A White Paper*, Government Printer 1985, pp 69-71.

2.10 What rights and freedoms merit protection in a Bill of Rights?

The central issue is whether an inclusive approach should be taken whereby the protected rights extend beyond the classic *political and civil rights* – relating to an individual's right of active participation in society and government and to an individual's right to freedom and protection - to include *economic and social rights*, such as the right to work, as well as *community and cultural rights*, such as those relating to indigenous peoples.[29] Should inherently controversial rights be included, or is there a case for omitting matters upon which there are still legitimate differences of opinion? The latter was the approach taken by the Constitutional Commission in its 1988 report, where the decision was taken not to recommend the constitutional entrenchment of 'an open-ended guarantee of a right to life, or a right to hold and freely dispose of property, a right to freedom of contract, a general right to privacy or family rights'.[30] Another 'criteria for selection' mentioned by the Constitutional Commission was that the rights and freedoms in a Bill of Rights 'should be ones which are apt for judicial enforcement', which would include guarantees establishing minimum standards to be applied in the criminal justice system, but exclude such broadly expressed economic and social rights as 'the right to work' or 'the right to an education'.[31] It is sometimes said that the former set of rights are 'legal rights' in that they are enforceable at law, while the latter are more akin to aspirations, which can only be achieved by active State intervention. However, it is also said that neat distinctions between categories of rights can be hard to maintain in some circumstances:[32] for example, a civil right to legal representation in the criminal legal system will make demands upon the resources of the State in the same way as, say, a social right to a healthy environment.

2.11 Should a Bill of Rights be expressed in positive language?

That is, should a Bill of Rights confer a positive '*right to* freedom of religion', for example, or a negative '*freedom from* discrimination by any public authority on religious grounds'? Should it be in the form of grants of rights and freedoms, on one side, or in the form of limitations on the exercise of governmental power, on the other? For its part, the Constitutional Commission commented that, legally, there is no difference between 'a constitutional provision which prohibits the use of governmental powers in a certain way and one which positively guarantees a right or freedom against impairment by acts of government. Legally, both types of provision place limits on governmental powers'. The Commission added that positive guarantees of rights and freedoms 'do not imply that the

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29 The Standing Committee's terms of reference ask 'whether economic, social and cultural rights, group rights and the rights of indigenous people should be included in a Bill of Rights'.

30 Constitutional Commission, *Final Report of the Constitutional Commission, Volume 1*, AGPS 1988, p 479.

31 Ibid, pp 478-479. Rights of this kind are found in the International Covenant on Economic, Social and Cultural Rights, 1966.

32 G Williams, *Human Rights under the Australian Constitution*, Oxford University Press 1999, pp 4-7.

rights and freedoms guaranteed are, somehow, the gift of government'.[33] In keeping with contemporary practice, its preference was for a positive statement of rights and freedoms – '*Everyone has a right to freedom of expression…*'.

2.12 Should rights and freedoms in a Bill of Rights be expressly subject to 'justified limits'?

Rights and freedoms in a Bill of Rights are usually expressed in absolute terms. However, they are rarely applied in that way by the courts. The question is whether a Bill of Rights should state explicitly that the rights and freedoms are subject to limitations and articulate the standards for adjudging permissible limitations. The European Convention on Human Rights and Fundamental Freedoms and the ICCPR achieve this by adding a series of qualifications specific to particular guarantees. On the other hand, the more contemporary approach is to include a single qualifying provision, as in the case of section 1 of the *Canadian Charter of Rights and Freedoms* and section 5 of the New Zealand *Bill of Rights Act 1990*.[34] Both provide that the rights and freedoms they contain may be 'subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society'. Before 1945 the trend was to express rights in absolute terms and to leave it to the courts to work out any basis for 'justified limits', as in the case of the US Bill of Rights.

3.0 THE UNITED STATES , THE UNITED NATIONS AND EUROPEAN MODELS – OLD AND NEW TEMPLATES

3.1 The US Bill of Rights

The US Bill of Rights consists of a series of amendments to the Constitution which came into force in 1789. The first ten amendments, which are commonly identified with the Bill of Rights, were ratified in 1791, with subsequent amendments including the Civil War amendments of 1865, 1868 and 1870. Originally, the first ten amendments were directed against the Federal Government, whereas the Civil War amendments applied in addition to Sate and local governments. However, the Supreme Court has held that the 'due process' clause of the Fourteenth Amendment 'incorporates' most of the rights protected in the first ten amendments, with the result that now, for all practical purposes, the Bill of Rights 'binds all levels of government in the United States'.[35] For the most part the Bill of Rights is expressed in 'negative' terms and without qualification, with the First Amendment for example beginning '*Congress shall make no law…*'. Further, the rights guaranteed belong to the category of political and civil rights, with the Bill of Rights including the right:

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[33] Constitutional Commission, n 30, p 477.

[34] A further example is section 36 of the South African *Constitution, 1996.*

[35] S Odgers, 'Constitutional protection of rights in the United States', *Individual and Democratic Rights Committee, Working Papers 1-4*, AGPS 1987, p 1.

- against Congress establishing a state religion or prohibiting the free exercise of any religion; or abridging the freedom of speech, or of the press; or the right of peaceable assembly;
- against unreasonable search and seizure;
- against double jeopardy; or the acquisition of private property without just compensation;
- to a speedy and public trial by an impartial jury in all criminal prosecutions;
- to the assistance of counsel in criminal proceedings;
- against excessive bail; or the infliction of cruel and unusual punishment; and
- against the deprivation of a person's life, liberty or property without due process of law; or the denial to any person within its jurisdiction of the equal protection of the laws.

In the first 150 years of the operation of the US Bill of Rights these rights were given little force and effect by the US courts. In the past 50 years or so, however, the US Supreme Court has taken a more 'activist' role in their protection. Upon this basis a vast and complex jurisprudence has developed, much of which is unfamiliar to most Australian lawyers. For instance, the jurisprudence relating to the free speech clause of the First Amendment alone is voluminous and is in many respects unique to the US context. For present purposes a number of general observations can be made about the US Bill of Rights:

- considerable controversy has surrounded the role of the US Supreme Court in interpreting some of the provisions of the Bill of Rights, particularly those concerning rights of free speech and freedom of the press, the right to bear arms, provisions as to search and arrest and freedom of religion;
- although most of the guarantees are expressed in absolute terms, they have been judicially interpreted as being subject to limitations which can be shown to be justifiable (for example, to protect competing rights and freedoms);
- however, the absence of a provision guiding the courts in balancing the various rights and the lack of any provision indicating that the rights may to some extent be qualified in the wider public interest has restricted the degree of flexibility available to the judiciary;
- the unique formulation of much of the Bill of Rights means that the US Supreme Court has not always drawn great assistance from the developing international human rights jurisprudence;
- the Ninth Amendment, ratified in 1791, makes it clear that 'The enumeration in the Constitution, of certain rights shall not be construed to deny or disparage others retained

by the people.' An equivalent provision, preserving existing rights, is found in many other Bills of Rights, including section 26 of the *Canadian Charter of Rights and Freedoms*; and

- many of the Articles, commencing with the Thirteenth Amendment ratified in 1865, include a provision which confers on the US Congress a power to enforce a particular guarantee by appropriate legislation. These clauses have enabled the Congress to adopt extensive legislative measures for the protection and enhancement of civil rights.[36]

3.2 The protection of rights in US State constitutions

It needs to be added that individual rights are also protected under State constitutions in the US. Indeed, one reason why the US Constitution did not at first contain a Bill of Rights was because these were already protected in most cases at the State level. This is also why the Bill of Rights was designed originally to protect individual rights solely against the federal government. As noted, judicial interpretation has since ensured that most of the Bill of Rights also applies to the State governments, although it can also be noted that this has been a slow and selective process.[37] In any event, the role of the State constitutions in the protection of rights is now secondary to that of the US Constitution. Whereas the States cannot offer protections below the 'floor' established federally, they can enforce a right which is above that federal 'floor' of protection. One result is that the State constitutions can and do protect a wider range of rights than their federal counterpart; for example, they all contain provisions relating to education[38] and some State courts have viewed these as creating a fundamental right to education.[39] Moreover, they sometimes protect against private intrusion and not just against governments.

It may be that the significance of these 'State-level rights' should not be over-estimated, but neither should they be omitted from the ledger of laws protecting human rights in the US. Since the 1970s there has been something of a rebirth of State constitutional law and the situation is complicated by the fact that, unlike its Australian equivalent, the US Supreme

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36 Constitutional Commission, n 30 at 452.

37 It began as late as 1925 when the Supreme Court 'incorporated' many of the first eight amendments into the Fourteenth Amendment and thus declared these provisions of the Bill of Rights applicable to the States.

38 'Developments in the law – the interpretation of State constitutional rights' (April 1982) 95 *Harvard Law Review* 1324-1502. According to the article, all but one of the State constitutions 'affirmatively require the legislature to establish and maintain public schools, the exception being the North Dakota Constitution (at 1446).

39 In contrast in *San Antonio Independent School District v Rodriguez* (1973) the Supreme Court rejected arguments that education is a fundamental right – K Hall ed, *The Oxford Companion to the Supreme Court of the United States*, Oxford University Press 1992, p 824.

Court does not have a general appellate jurisdiction in State matters.[40]

3.3 The UN Universal Declaration on Human Rights, 1948 and the International Covenant on Civil and Political Rights, 1966

The UN Declaration was the first word on the protection of rights and freedoms after World War II. It was adopted in 1948 by the UN General Assembly and, although non-binding in nature, it has proved to be a morally and legally significant document, to be viewed as part of customary international law. The Declaration was intended as a first step in the drafting of an international Bill of Rights, an aspiration which soon became bogged down in the hostilities of the Cold War. In fact it was not until 1966 that a broad articulation of human rights was agreed upon under UN auspices and then two separate conventions were drafted, one (the ICCPR) dealing with civil and political rights, to which the Western Bloc was attracted, and another (the International Covenant on Economic, Social, and Cultural Rights), to which the Eastern Bloc was attracted.

Wherever practicable, the rights expressed in the UN Declaration of 1948 are in absolute, universal and positive terms. Further, the rights therein are wide-ranging in scope, covering social and economic rights (to work, to join trade unions, to leisure etc), as well as the more traditional civil and political rights (to life, liberty and security of person, to freedom of thought, to vote etc). Also, as befits a document intended to point the way towards a new order of things in the aftermath of the most calamitous war in history, the Declaration is clearly aspirational in nature. For instance, Article 26(1) declares that ‘Everyone has the right to education…’, to which Article 26(2) adds in part: ‘Education shall be directed to the full development of the human personality and to the strengthening of respect for human rights and fundamental freedoms…’; likewise, Article 28 provides: ‘Everyone is entitled to a social and international order in which the rights and freedoms set forth in this Declaration can be realized’.

Two further features of the Declaration can be noted. One refers to the fact that it includes express mention of individual *responsibilities*, with Article 29(1) providing: ‘Everyone has duties to the community in which alone the free and full development of his personality is possible’. In effect it is a recognition of Aristotle’s proposition that ‘man is a social being’ and with it the understanding that in the broader social sense rights and responsibilities are linked. Secondly, in Article 29(2) the Declaration also contains a ‘justified limits’ provision, defined in terms of limits which are ‘determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society’.

The *ICCPR* was adopted by the UN General Assembly on 16 December 1966, and entered into force on 23 March 1976. Its purpose is to put into a legally binding form many of the civil and political rights proclaimed in the UN Declaration. Part 1 of the ICCPR states the

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40 Legislative Assembly of the Northern Territory, Sessional Committee on Constitutional Development, *Discussion Paper No 8 – A Northern Territory Bill of Rights?*, March 1995, p 15.

right of all peoples to self –determination; Part II describes the obligations which States assume on becoming parties to the ICCPR; and Part III sets out a wide-ranging catalogue of civil and political rights, including:

- right to life (Article 6);
- right to equality under the law and the guarantee of a fair trial (Article 14);
- right of the child to measures of protection (Article 24);
- the right to take part in public affairs, to vote and be elected (Article 25); and
- the right of ethnic, religious or linguistic minorities to enjoy their culture, practise their religion and use their language (Article 27).

The ICCPR does not include a general 'justified limits' provision. Instead, several of the Articles incorporate a separate statement of the justified limits, as in the case of Article 19(3) which formulates the permitted limits to an individual's right to freedom of expression. It can be noted, too, that in Articles 3 and 26 the ICCPR possesses a powerfully worded armoury of 'equality rights' or anti-discrimination provisions. Indeed, the UN Human Rights Committee has commented that Article 3, under which the States Parties to the Covenant undertake to ensure the equal right of men and women to the enjoyment of all the rights guaranteed therein, requires not only measures of protection, but also affirmative action designed to ensure their positive enjoyment.[41]

Part IV of the ICCPR foreshadows the establishment of the Human Rights Committee; whereas the First Optional Protocol recognises that, once ratified by a State, the Committee has the competence to receive and consider communications from individuals alleging that that State has violated provisions of the ICCPR. Australia ratified the ICCPR on 13 August 1980, but the First Optional Protocol did not come into force here until 25 December 1991. The Federal Parliament has not enacted the ICCPR as part of Australian law. Instead, the ICCPR is attached as a schedule to the *Human Rights and Equal Opportunity Commission Act 1986 (Cth).*

3.4 The European Convention on Human Rights and Fundamental Freedoms (ECHR)

The Council of Europe was founded in May 1949 and the focus of its work has been its role in the formulation of treaties, by far the most significant of which is the ECHR. This was agreed in 1950, ratified by the United Kingdom in 1951, and came into force on 3 September 1953. Only in 1966 did the UK government exercise its option to accept the right of individual petition to the European Court of Human Rights and the compulsory jurisdiction of the court.

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[41] Constitutional Commission, n 30, p 542.

The ECHR drew on the UN Declaration of 1948, but the rights expressed were less extensive, relating to such classic civil and political rights as due process rights, freedom of speech, association and assembly, as well as freedom from the discriminatory application of these rights and freedoms. In contrast to the ICCPR, however, it does not specifically include protection of minority group rights, and the protection from discrimination it provides is considerable weaker in its scope.[42] This list has been enhanced by means of additional protocols. These have added a guarantee of protection for the following substantive rights: a right to peaceful enjoyment of one's possessions (Protocol No 1); a right to education (Protocol No 1); a right to enter and leave one's country (Protocol No 4); and the abolition of the death penalty (Protocol No 6). There is no requirement that a state which adheres to the main ECHR should adhere to these additional rights.

The typical approach taken by the ECHR is to state the substantive right it seeks to guarantee in apparently absolute terms in the first paragraph of the relevant article and then in the second paragraph to include several important limitations or qualifications. In addition, there are two general 'exceptions' provisions which can be used by a State to justifiably limit the operation of a right. One is Article 15 which provides that in certain emergency situations a state may derogate from its obligations, but only with respect to certain articles.[43] The second is found in Article 17 which provides that the protections guaranteed in the ECHR may not be used by groups or individuals in such a way as to undermine the liberal democracy which the ECHR seeks to safeguard.

Some rights under the ECHR are in fact absolute in nature, such as the right to protection from torture (Article 3), or the prohibition on slavery (Article 4). Others are limited under explicit and finite circumstances, as in the case of the right to liberty (Article 5). Then there are the qualified rights, such as the right to respect for private and family life (Article 8) and the right to freedom of expression (Article 10), religion (Article 9) assembly and association (Article 11). Although these rights are qualified, it has been held that interference with them is permissible only if what is done: (a) has its basis in law; (b) is necessary in a democratic society, which means it must fulfil a pressing need, pursue a legitimate aim and be proportionate to the aims being pursued; and (c) is related to the permissible aim set our in the relevant Article, for example, the prevention of crime, or the protection of public order or health.

On a procedural point, Article 26 of ECHR provides that neither the European Commission of Human Rights nor the European Court of Human Rights, both of which were established under its auspices, can consider an application for a breach before the applicant has exhausted the domestic remedies available under the state's domestic law.[44]

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42 C McCrudden and G Chambers eds, *Individual Rights and the Law in Britain*, Clarendon Press 1995, p 19.

43 For example, no derogation is permitted with regard to the right to be free from torture.

44 Ibid, p 21.

4.0 THE PROTECTION OF HUMAN RIGHTS IN THE UNITED KINGDOM - THE HUMAN RIGHTS ACT 1998

4.1 The ECHR and the protection of human rights in the UK before 1998

As noted, the UK ratified the ECHR in 1951, but only in 1966 did the UK government exercise its option to accept the right of individual petition to the European Court of Human Rights. However, the ECHR was not incorporated into UK law at this time and this is often put forward as a reason for the large number of cases in which the European Court of Human Rights has found in the UK in breach of the ECHR. As the Lord Chancellor, Lord Irvine of Lairg, said in the debate on the Second Reading of the Human Rights Bill in the House of Lords:

> Our legal system has been unable to protect people in the 50 cases in which the European Court has found a violation by the United Kingdom. That is more than any other country except Italy. The trend has been upwards. Over half the violations have been found since 1990.[45]

While there is debate about the nature of the UK's record in relation to the ECHR, there is no doubt that before 1998 several areas of the law were changed through primary or secondary legislation as a result of adverse findings by the European Court of Human Rights. These included, with the date of the relevant case in brackets:

- the right of a mental patient to have a detention order reviewed (1981);
- corporal punishment in schools (1982);
- prisoners' correspondence (1992);
- telephone tapping (1984);
- access to child care records (1989);
- arrest under the *Northern Ireland Emergency Provisions Acts* (1990);
- procedures for reviewing discretionary life sentences (1990);
- legal aid (1990 and 1994);
- access to legal advice for fine and debt defaulters (1996);
- procedures for review of continued detention of young offenders detained at Her Majesty's pleasure (1996);

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45 HL Deb Vol 582 c. 1228, 3 November 1997.

- procedure of courts-martial (1997).[46]

These and other developments disturbed the long-held view that when the UK ratified the ECHR the rights and freedoms it guaranteed were already, in substance, fully protected in British law. This was acknowledged in the White Paper *Rights Brought Home: The Human Rights Bill* in which the Labour Government went on to argue that 'In the last two decades…there has been a growing awareness that it is not sufficient to rely on the common law and that incorporation [of ECHR] is necessary'.[47] The White Paper added that the UK's traditional approach to the ECHR had 'not stood the test of time' and stated that 'The most obvious proof of this lies in the number of cases in which the European Commission and the Court have found that there have been violations of the Convention rights in the United Kingdom'.[48] For the White Paper one advantage to be gained from the incorporation of the ECHR into UK law was that British judges would be 'enabled to make a distinctively British contribution to the development of the jurisprudence of human rights in Europe'; another was that British people would be able to argue for their rights in the British courts, thereby avoiding 'inordinate delay and cost'.[49]

4.2 The Human Rights Act 1998 – the nature and extent of incorporation[50]

Under the Act the Convention rights do not become part of Britain's substantive domestic law; as such, the Act does not incorporate those rights in the way, say, that the European Communities Act 1972 incorporates the EC Treaty into British law. Instead, certain provisions of the Convention and its protocols enjoy a defined legal status under the Human Rights Act. This is achieved by section 1 of the Act which provides that Articles 2 to 12 of the ECHR, along with Articles 1 to 3 of the First Protocol and Articles 1 and 2 of the Sixth Protocol are to 'have effect for the purposes of this Act subject to any designated derogation or reservation…'. Omitted are Articles 1 and 13 of the Convention. The omission of Article 1, which refers to an inter-state obligation, was uncontroversial. On the other hand, the omission of Article 13, which provides for 'an effective remedy before a national authority' where Convention rights are breached, was deemed to be problematic in some quarters. The

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46 M Baber, *The Human Rights Bill [HL]*, House of Commons Library, Research Paper 98/24, pp 15-16. The latest finding of the European Court against the UK was in *Rowe v Davis v UK* (decision of 16 February 2000) in which it was found that, in a case where two men had been convicted of murder and robbery in 1990 and were now serving life sentences, a fair trial had been denied and Article 6 of the ECHR violated. The court found that through the use of public interest immunity procedures, the prosecution had failed to disclose important evidence to the defence. The case against Rowe and Davis (and a third man) was based almost entirely on the evidence of three suspects who turned prosecution witnesses – M Horsnell, 'M25 pair denied a fair trial, Europe rules', *The Times*, 17 February 2000.

47 *Rights Brought Home: The Human Rights Bill*, Cm 3782, para 1.4.

48 Ibid, paras 1.15 – 1.16.

49 Ibid, para 1.14.

50 The analysis is based on - KD Ewing, 'The Human Rights Act and Parliamentary Democracy' (January 1999) 62 (1) *The Modern Law Review* 79 at 84-85.

Government responded that the Act already contained a scheme to provide remedies for the violation of rights, thus making Article 13 redundant.

4.3 The Human Rights Act 1998 – what it does

When the Act comes into effect on 2 October 2000, those Convention rights 'incorporated' into domestic law by the Act will be enforceable in the UK courts. At its core, therefore, the Act makes it unlawful for a public authority to act incompatibly with the Convention rights and allows for a case to be brought in a UK court or tribunal against the authority if it does so. However, a public authority will not have acted unlawfully under the Act if as a result of a provision of primary legislation it could not have acted differently (section 6).[51] In order to preserve the principle of parliamentary immunity, expressly excluded from the section is 'either House of Parliament or a person exercising functions in connection with proceedings in Parliament'.[52] The freedom of Parliament to legislate, or not, as it chooses is also saved by section 6 (6). Further:

- the Act requires UK courts and tribunals to take account of Convention case law. They will also be bound to develop the common law compatibly with the Convention rights (section 2);
- the Act also requires all legislation to be interpreted and given effect as far as possible compatibly with the Convention rights (section 3);
- where it is possible to do so, a court may quash or disapply subordinate legislation; or if it is a higher court, make a declaration of incompatibility for primary legislation (section 4);
- such a declaration does not affect the continuing validity and enforcement of the primary legislation in question (section 4).
- however, the making of such a declaration allows a Minister to seek parliamentary approval for a remedial order to amend the legislation to bring it into line with the Convention rights. This discretionary power is only used if the Minister is satisfied that there is a compelling reason to do so (section 10 and Schedule 2, Clause 2.);
- the Act requires, in any event, that when legislation is introduced into either House for a Second Reading, the Minister responsible must make a written statement that he

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51 For a discussion of what constitutes a 'public authority' see - KD Ewing, n 50 at 89-91. As noted, it has been suggested that, by defining 'courts' as public authorities, the rights protected under the UK *Human Rights Act 1998* may be invoked in what are called 'horizontal' proceedings involving a claim by one private person or body against another – J Coppel, *The Human Rights Act 1998*, John Wiley and Sons, 1999, p 19; JS Read, n 11 at 44; G Phillipson, 'The Human Rights Act, "Horizontal Effect" and the Common Law: a Bang or a Whimper' (1999) 62 *The Modern Law Review* 824.

52 J Coppel, n 27, p 25; A Sherlock, 'The applicability of the United Kingdom's Human Rights Bill: identifying "public" functions' (1998) 4 *European Public Law* 593 at 598. However, the House of Lords in its judicial capacity is included in the term 'public authority'.

considers the Bill is compatible with the Convention rights, or that he is unable to make such a statement but wishes Parliament to proceed with the Bill anyway (section 19); and

- it is made clear that the Act does not restrict any existing rights an individual may have under UK law, or his right to bring proceedings under existing law (section 11).

Two other features of the Act can also be noted, the first the result of lobbying by the press, notably against a 'back-door' introduction of a right to privacy, the second the outcome of concerns expressed by the churches, notably in connection with their standpoint on such matters as same sex marriages. Section 12, the press provision, contains safeguards concerning court or tribunal orders (particularly injunctions) which might breach the right to freedom of expression. It also requires that in cases which relate to journalistic, literary or artistic merit, the court must have regard to the extent to which (a) the material has or is about to become available to the public, or (b) it would be in the public interest for it to be published. In these cases the court must also have regard to any relevant privacy code, so that the fact that a newspaper has complied with the terms of the Press Complaints Commission code will be weighed in its favour by the courts. However the courts are not bound to abide by the terms of a privacy code if these are found to fall short of acceptable standards. Section 13, the churches provision, provides that if a court's determination of any question arising under the Act might affect the exercise by a religious organisation of the Convention right to freedom of thought, conscience and religion, it must have regard to the importance of that right.[53]

4.4 The Human Rights Act 1998 – comments and issues

In the White Paper the Government said it had decided against giving the courts the power to set aside primary legislation and explained that 'This conclusion arises from the importance which the Government attaches to parliamentary sovereignty'.[54] Elaborating on this theme, the White Paper made reference to the 'democratic mandate' of the parliament to make decisions about important matters of public policy. It was also noted that the UK had decided to follow a model more akin to that found in New Zealand than its Canadian counterpart. In New Zealand the Human Rights Act of 1990 is an 'interpretive' statute which requires past and future legislation to be interpreted as far as possible consistently with the rights contained in the Act, but provides that legislation remains in force if that is impossible. On the other hand, under the Canadian Charter of Rights and Freedoms courts can strike down inconsistent legislation. However, the supremacy of parliament is retained under the Charter by the inclusion of section 33, the 'opt-out' provision, which permits the national and sub-national parliaments to insert an explicit statement in a statute that it is to apply 'notwithstanding' the provisions of the Charter. The British model stands somewhere between these two approaches, giving the courts the power to strike down subordinate legislation while leaving primary legislation securely in parliament's hands.[55]

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53 KD Ewing, n 50 at 93-95.

54 Cm 3782, n 47, para 2.10.

55 For a detailed account of the issues involved see – BK Winetrobe, *The Human Rights Bill*

In fact the scheme which has emerged in the Act is quite different to that proposed in the White Paper and one that lends greater support to the doctrine of parliamentary sovereignty. Originally, the plan was to provide for a 'fast-track' procedure for changing legislation in response either to a declaration of incompatibility by a higher court in Britain or to a finding of a violation of the Convention in Strasbourg.[56] Under this procedure government would have been empowered to amend primary legislation by order, a proposal which was criticised as 'unnecessary and unconstitutional' and led to concerns about 'Henry VIII trampling through the statute book'.[57] The offending clause was amended at the committee stage in the House of Commons and, as noted, section 10 now provides a discretionary power to the relevant Minister to introduce amending legislation, but only if he is satisfied that there are 'compelling reasons' to do so.

The White Paper also discussed whether the UK Human Rights Act 1998 should establish a Parliament Committee on Human Rights, with responsibility to monitor the operation of the new Act and other aspects of the UK's human rights obligations. In the event, the White Paper decided that this was a matter for Parliament itself and not the Executive to decide, although at the same time the Government made it clear that it would support the establishment of such a committee.[58] During the course of the debate at least one British commentator pointed to the arrangements in place in the Australian Parliament as a model in this respect.[59] The upshot is that the UK Parliament is soon to establish a Joint Committee on Human Rights which has been described by another commentator as 'an extraordinarily eclectic beast: part standing committee, part select committee; and part Royal Commission'.[60]

4.5 Prospects

There is no doubt that the *Human Rights Act 1998* constitutes a very significant development in British constitutional law. Already many questions have been raised concerning its potential interpretation and effect.[61] John Griffith, Emeritus Professor of

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[HL], Bill 119 of 1997-98: Some constitutional and legislative aspects, House of Commons Library, Research Paper 98/27.

56 Ibid, pp 17-35.

57 KD Ewing, n 50 at 93.

58 Cm 3782, n 47, para 3.6.

59 R Blackburn, 'Parliament and human rights' in *The Law and Parliament* edited by D Oliver and G Drewry, Butterworths 1998, p 186. Two Senate Standing Committees – one for primary legislation (the Scrutiny of Bills Committee) and one for secondary legislation (the Regulations and Ordinances Committee) – scrutinise legislative proposals for compliance with fundamental rights.

60 D Kinley, 'Human rights scrutiny in parliament: Westminster set to leap ahead' (December 1999) 10 *Public Law Review* 252.

61 On the question of interpretation see – G Marshall, 'Interpreting interpretation in the Human Rights Bill' (Summer 1998) *Public Law* 167.

Public Law in the University of London and long-time opponent of Bills of Rights, has stated: 'Law is politics carried on by other means, and judges, whether they like it or not, are about to face new situations in the perennial conflict with government…The opportunity is there for the judges to become major players on the political stage, with consequences that are largely unpredictable'.[62] A New Zealand commentator, Professor Michael Taggart, has offered another view of the potential implications of the *Human Rights Act 1998*, writing: 'There will be enormous expectations of the Convention as a potent domestic human rights instrument and of the judges to deliver on those expectations. Relatedly, Bill of Rights litigation provides a focal point for certain vociferous constituencies and even creates new ones. One such constituency is lawyers, whose pecuniary and professional interests do not always coalesce with the public interests involved'.[63] According to Lord Irvine of Lairg, on the other hand, who introduced the Human Rights Bill into Parliament, the Act will 'create a more explicitly moral approach to decisions and decision making; will promote both a culture where positive rights and liberties become the focus and concern of legislators, administrators and judges alike, and a culture in judicial decision making where there will be a greater concentration on substance rather than form'.[64]

5.0 THE PROTECTION OF HUMAN RIGHTS IN NEW ZEALAND – THE BILL OF RIGHTS ACT 1990

5.1 The Bill of Rights Act 1990 - background and scope

The New Zealand *Bill of Rights Act 1990* has its origin in a Government White Paper of 1985. To a significant extent this model followed the design of the Canadian Charter of Rights and Freedoms and the ICCPR. In its draft form it included recognition of Maori rights under the Treaty of Waitangi. The White Paper proposed that the Bill of Rights be enacted as an ordinary Act of Parliament, but with a statement that it was the supreme law of New Zealand, such that it overrode any inconsistent law. It was to be entrenched to the extent that any amendment was to require a 75 % majority of the members of Parliament, or a majority of electors at a referendum. According to Professor Michael Taggart, Professor of Law at the University of Auckland, 'This proposal was rejected in the court of elite public opinion, principally because of opposition to judicial review of the validity of legislation'.[65]

When the Bill of Rights Act was enacted in 1990 newspaper editorials labelled it 'emasculated' and a 'thin wishy washy little document'.[66] Omitted was any reference to

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62 JAG Griffith, 'Here come the judges', *Times Literary Supplement*, 18 February 2000, p 14.

63 M Taggart, 'Tugging on Superman's cape: lessons from experience with the New Zealand Bill of Rights Act 1990' (Summer 1998) *Public Law* 266 at 276.

64 Lord Irvine of Lairg, n20 at 236.

65 M Taggart, 63 at 266-267.

66 PA Joseph, 'The New Zealand Bill of Rights' (September 1996) 7 *Public Law Review* 162 at 168.

constitutional entrenchment or to the Act's status as supreme law. Instead, the Act operates only as a statement of preferred interpretation in relation to public legislation and public actions. It cannot override other inconsistent legislation, either expressly or by implication; as well, the Act makes no reference to Maori rights under the Treaty of Waitangi. Suggestions that the Act should include such economic and social rights as the right to work and to an adequate standard of living were rejected by the Government, apparently on the ground that such 'rights' were by nature non-justiciable and therefore best left to the political rather than the judicial process.[67]

5.2 The Bill of Rights Act 1990 – key provisions

The Act is short and divided into three parts: Part 1 is headed 'General Provisions' and sets out the legislation's scope, interpretative status and pre-enactment scrutiny requirements; Part II is headed 'Civil and Political Rights' and enumerates the substantive rights which the Act seeks to protect; and Part III, which is headed 'Miscellaneous Provisions', confirms that any existing rights not included in the Act remain in force, and that the Act is to apply, as far practicable, to all legal persons, natural and corporate. In more detail, the Act provides:

- ***Interpretation*** – at the heart of the New Zealand Bill of Rights is what is called the 'section 4-5-6 puzzle'.[68] The key provision is *section 6* which requires that an interpretation consistent with the Bill of Rights is to be preferred. In other words, in the interpretation of any enactment a court is to prefer a meaning that is consistent with the Bill of Rights to any other meaning. However, this needs to be read alongside *section 4* which provides that no court may 'hold any provision of [an] enactment to be impliedly repealed or revoked, or to be in any way invalid or ineffective' or to 'decline to apply any provision of the enactment' by 'reason only that the provision is inconsistent with any provision of this Bill of Rights'. *Section 5*, the justified limitations clause, which states that the rights protected under the Act may be 'subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society', is then made 'Subject to section 4…'.

- ***Pre-enactment scrutiny*** – under *section 7* the Attorney-General must alert the Parliament to any provision of a Bill 'that appears to be inconsistent' with the Bill of Rights. In the case of Government Bills this must occur on the introduction of the Bill in question, or in any other case as soon as practicable after the Bill's introduction. Under the new Standing Orders of the House of Representatives the Attorney-General must supply the House with reasoned reports as to a Bill's inconsistency or otherwise.[69]

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67 P A Joseph, 'New Zealand's Bill of Rights Experience', n 12, p 289.

68 M Taggart, n 63 at 281.

69 Ibid at 273. Taggart presents a detailed account of New Zealand's pre-enactment scrutiny procedures and compares these with the procedures in place in Canada and the UK.

- ***Scope of application*** – Section 3 makes it clear that the Bill of Rights only applies to the three branches of government - including the 'legislative branch' - and to those performing public functions or duties. No mention is made of its intended effect, if any, on parliamentary privilege. Subsequent developments, however, have confirmed that the power of the House of Representatives to govern its own proceedings is subject to the Bill of Rights, including section 27 granting protection of natural justice.[70]

- ***Civil and political rights protected*** – protected under Part II are three categories of rights. First, there are those rights associated with 'life and security of the person', including the right to refuse to undergo medical treatment. Secondly, democratic and civil rights are protected, which range from electoral rights to freedom from discrimination and the rights of a member of an ethnic, religious or linguistic minority to enjoy, with other members of that minority, 'the culture, and to profess and practise the religion, or to use the language, of that minority'. Thirdly, 'search, arrest and detention' rights are protected, under which the minimum standards of criminal procedure are set out, plus of the rights of any person who is arrested, detained or charged.

Note that, unlike the Fourteenth Amendment of the US Constitution and section 15 of the Canadian Charter of Rights and Freedoms, the New Zealand equality rights or 'freedom from discrimination' provision (*section 19*) does not refer to 'the equal protection of the law', a phrase which, it was thought, would invite the courts to stray into areas of substantive policy.[71] Nor does section 19 of the New Zealand Act include the phrase 'equality before and under the law' which is found in the equivalent section of the Canadian Charter of Rights and Freedoms:[72] the comment was made in the 1985 White Paper that the phrase's 'meaning is elusive and its significance difficult to discern'.[73]

5.3 The Bill of Rights Act 1990 – comments and issues

It is clear from the above that the Act has limited legal effect. Compared with its Canadian counterpart, under which legislation can be declared invalid by the courts, the Act does offer an 'emasculated' version of judicial review. In contrast to the UK *Human Rights Act 1998*, under the New Zealand model the courts can neither invalidate secondary legislation, nor make declarations of incompatibility with respect to primary legislation. In other words it would seem that a different balance has been struck between judicial review and the

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70 PA Joseph, n 66 at 172. Natural justice provisions were incorporated into the new Standing Orders adopted by the House of Representatives in December 1995. For a commentary on the extent to which the *Bill of Rights Act 1990* affects parliamentary privilege see – Explanatory Note, Parliamentary Privilege Bill 1994 (NZ), p 30.

71 The equal protection provision in the US Constitution has been interpreted as giving the courts power to decide whether there is a 'rational basis' for any particular legislative classification or distinction – *A Bill of Rights for New Zealand*, n 28 at 86.

72 Section 15, *Canadian Charter of Rights and Freedoms*.

73 *A Bill of Rights for New Zealand*, n 28 at p 86.

sovereignty of parliament, one that greatly favours the latter.

However, it may also be the case that the limitations of the New Zealand Act should not be overstated. The courts do apply the Act in interpreting statutes and an argument can be made that it even lends itself to being applied in the same way as its UK counterpart. This suggestion has been made by Associate Professor Paul Rishworth of the University of Auckland who writes:

> While it was certainly not designed to have this effect, and nothing was said about it at the time of its enactment, s 5 of the 1990 Bill of Rights can be read so as to authorise (compel, even) a new Zealand Court to reach a conclusion on whether a New Zealand statute is inconsistent (because it violates a right or freedom to an unreasonable degree), and to state that conclusion, even though s 4 requires that the court must nonetheless apply the inconsistent provision.
>
> This happened for the first time, without fanfare, in the judgment of Thomas J in *Quilter v Attorney-General* [1998] 1 NZLR 523. But recently in *Moonen v Film and Literature Board of Review*, 17 December 1999, the Court of Appeal expressly affirmed its entitlement to make these declarations (although adding a qualifying phrase that suggested they would not always do so).[74]

For academic commentators, the question of interpretation found in the 'section 4-5-6 puzzle' has been a major issue of debate. Writing in 1998, Michael Taggart commented, 'there is still no settled view on the correct sequence or methodology to follow in the different types of situations arising under the Bill of Rights'.[75] Again, the *Moonen*[76] case may prove to be a landmark decision in this respect, for there the Court of Appeal formulated a five-step approach to the application of sections 4, 5 and 6 in those situations when it is claimed that the provisions of another statute abrogate or limit the rights affirmed in the Bill of Rights. This approach can be re-constructed as follows: (a) the words of the other Act must be interpreted to discover if there is only one possible meaning, in which case that must be adopted or, alternatively, it must be discovered if more than one meaning is available; (b) if more than one meaning is available, further to section 6 it must be determined which constitutes the least possible limitation on the relevant right or freedom, that being the meaning the Court must adopt; (c) having adopted the appropriate meaning, the Court must then identify the extent, if any, to which that meaning limits the right in question; (d) next, for the purposes of section 5, it must be asked whether the extent of any limitation can be demonstrably justified in a free and democratic society, a question which

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74 P Rishworth, 'The "rights" debate: can we, should we, adopt a written constitution including a Bill of Rights?', *unpublished paper*, February 2000, p 9.

75 Ibid.

76 *Moonen v Film and Literature Board of Review*, (unreported, 17 December 1999, CA42/99).

must be answered by means of an inquiry into the objective of the legislation concerned and into whether the means used to achieve that objective are in reasonable proportion to its importance; and (e) the Court can then indicate whether the limitation is or is not justified – 'If that limitation is not justified, there is an inconsistency with s 5 and the Court *may* declare this to be so, albeit bound to give effect to the limitation in terms of s 4' (emphasis added). In other words, the court may make a declaration of incompatibility, but under section 4 the offending statute must remain in force.

The more general point to make is that, although limited in legal effect, the impact the 1990 Bill of Rights Act has made has surprised many observers. As Philip Joseph, Associate Professor of Law at the University of Canterbury, has observed: 'we hear criticisms today for what the Act *has* achieved, not for what it *has not* achieved'.[77] Taggart has written in this regard of the sheer volume of case law involving the Bill of Rights and of the Court of Appeal's insistence that its terms are to be 'interpreted and applied generously and purposively, rather than narrowly and technically'.[78] He went on to say that 'in a series of early landmark cases, the Court of Appeal "constitutionalized" rights relating to search, arrest and detention'.[79] Indeed, in 1996 Joseph concluded that 'With the benefit of creative lawyering, the Act has acquired "constitutional" standing as a *politically*, if not legally, entrenched document'.[80]

There is little doubt that, to date, the *Bill of Rights Act 1990* has made its greatest impact in respect to those rights associated with criminal law and procedure. As Taggart has explained, in part this is because much of criminal law enforcement takes place under common law powers or broad statutory powers, with the result that in this 'domain of executive action' the provisions of the Bill of Rights 'can be every bit as effective as those in an entrenched document'. It is also because judges have felt no 'lack of expertise or legitimacy in giving full rein to the Bill of Rights in this area', it being the case that the criminal law is looked upon as the special preserve of the judiciary. In any event, Taggart observed that 'the enactment of the Bill of Rights and its subsequent interpretation have had enormous consequences for the day-to-day operations of the police and criminal courts in New Zealand'.[81]

On the other hand, it remains the case that where a statute is in clear conflict with the Bill of Rights Act then no amount of interpretive skill can elevate that Act to a superior law capable of invalidating the offending statute. Taggart offers the example of the *Electoral Act 1956* which disqualifies convicted persons in prison from voting or standing as candidates for election, a provision which conflicts starkly with section 12 of the Bill of Rights Act which provides that every New Zealand citizen over 18 years of age has the

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[77] PA Joseph, n 66 at 168.

[78] M Taggart, n 63 at 274.

[79] Ibid at 275.

[80] PA Joseph, n 66 at 173.

[81] M Taggart, n 63 at 276.

right to vote in genuine periodic parliamentary elections. In *R v Bennett*[82] the High Court had no choice but to give effect to the provisions of the Electoral Act.[83]

6.0 THE PROTECTION OF HUMAN RIGHTS IN CANADA – THE CANADIAN CHARTER OF RIGHTS AND FREEDOMS 1982

6.1 Background

The first general legislation at the national level on human rights in Canada was the Canadian Bill of Rights 1960.[84] This was no more than an ordinary statute and therefore of comparable legal status to the New Zealand *Bill of Rights Act 1990*. It is generally agreed that the impact of the 1960 Canadian Act was slight, not least because of the cautious approach to interpretation adopted by the judiciary. The same cannot be said of the *Canadian Charter of Rights and Freedoms*, which more or less from the date of its enactment in 1982 has had a profound influence on the development of Canadian law. The Charter, which has constitutional force and binds all spheres of government, was championed by Pierre Trudeau, mostly in the face of opposition from the Provincial Premiers who feared that the Charter would 'undermine the power of provincial legislatures to determine their own priorities'.[85] The inclusion of the legislative override or 'notwithstanding' clause in the Charter (section 33) was part and parcel of the political compromise required to ensure the support of most Provinces for the Charter. In the end, Quebec was the only Province to reject the 1982 constitutional amendments.[86] These amendments included the re-naming of the *British North America Act 1867*[87] by the *Constitution Act 1982*, with Part 1 of the latter Act consisting of the *Canadian Charter of Rights and Freedoms*.[88]

6.2 The Canadian Charter of Rights and Freedoms – key provisions

To a large extent the Charter builds upon the ECHR and the ICCPR, using these as models for the protection of human rights. Wherever practicable it affirms rights and freedoms in positive terms, '*Everyone has the right to…*'. There is much that is familiar, therefore, in the Charter. However, alongside the usual civil and political rights – the right to be secure from unreasonable search and seizure, to vote, and to freedom of conscience and religion,

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82 (1993) 2 *Human Rights Reports of New Zealand* 358, HC.

83 M Taggart, n 63 at 284-285.

84 This Act is still in force.

85 JL Hiebert, 'Why must a Bill of Rights be a contest of political and judicial wills? The Canadian alternative' (March 1999) 10 *Public Law Review* 22 at 24.

86 Ibid at 35.

87 It is now called the *Constitution Act 1867*.

88 For a more detailed commentary see – M Eberts, 'The Canadian Charter of Rights and Freedoms: A Feminist Perspective', n 12, pp 242-246.

peaceful assembly and association and so forth – the Charter also includes several provisions which are more distinctive or original in nature. These are as follows:

- ***Justified limits*** – section 1 which guarantees the rights and freedoms set out in the Charter 'subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society' was the first general provision of this kind to be included in a human rights instrument. Before then the norm had been for rights to be accompanied by specific qualifications, as in the ECHR[89] and the ICCPR. As noted, the Canadian example was followed in New Zealand. The leading Canadian case on section 1 is the 1986 *R v Oakes*[90] decision, although subsequent modifications to the jurisprudence on what constitutes a reasonable limit were made in such cases as *R v Chaulk* [91]and *Dagenais v Canadian Broadcasting Corporation.*[92] Further to these cases, the basic components of section 1 justifications require that legislation: (a) pursue an important objective which is 'pressing and substantial' and consistent with democratic values; (b) be rationally connected with the objective; (c) be designed carefully enough to satisfy judicial notions of proportionality, so that it impairs the right as little as reasonably possible; and (d) not use means where the burdens imposed outweigh the salutary effects the objective is intended to serve.[93]

- ***Equality rights*** – section 15,[94] which only came into force in April 1985, is a broadly worded 'equality' or 'anti-discrimination' provision which suggests that the framers of the Charter intended to cover every conceivable operation of the law. Indeed, it combines aspects of the 'due process' clause of the US Bill of Rights with elements of the anti-discrimination legislation in place in all Canadian jurisdictions. Section 15(1) provides: '*Every individual is equal before and under that law and has the right to the equal protection of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability*'. Subsection (2) then provides for affirmative action programs on behalf of 'disadvantaged individuals or groups'. As one would expect, a large and complex body of jurisprudence is developing in relation to section 15, with the first ruling dating back to the 1989 decision in *Andrews v Law Society of British Columbia.*[95] That landmark decision rejected the use of a formal equality test for section

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89 However, the wording of section 1 of the Charter was influenced by the ECHR, with Article 9 of the latter, for instance, referring to 'such limitations as are prescribed by law and are necessary in a democratic society'.

90 [1986] 1 SCR 103.

91 [1990] 3 SCR 1303.

92 [1994] 3 SCR 927.

93 JL Hiebert, n 85 at 35.

94 In addition, section 28 of the Charter further entrenches the equality of men and women.

95 [1989] 1 SCR 143.

15 purposes (that like be treated in a like manner, according to which persons similarly situated were entitled to similar treatment, and different treatment of persons differently situated was justified). In place of that formal equality analysis, the Supreme Court of Canada opted for a substantive equality approach in its interpretation of section 15 and found against the statutory citizenship requirement for entry into the legal profession in British Columbia.[96]

- ***Official languages and minority language educational rights*** – as a reflection of the equal status of English and French in Canada, and the political sensitivities surrounding this whole issue, the Charter contains a lengthy affirmation of the policy of official bilingualism (sections 16 to 23).

- ***Multiculturalism*** – section 27 requires that the Charter be interpreted 'in a manner consistent with the preservation and enhancement of the multicultural heritage of Canadians'.

- ***Scope of application*** – under section 32 the Charter applies 'to the Parliament and government of Canada' as well as 'to the legislature and government of each province': in both cases the application is said to be in respect of all matters within the authority of Parliament or the relevant provincial legislature.[97] As in New Zealand no mention is made of the intended impact, if any, on parliamentary privilege and the power of a legislature to govern its own proceedings. The issue arose in *New Brunswick Broadcasting Co v Nova Scotia (Speaker of the House of Assembly)*[98] where it was considered whether a provincial legislature, or by extension the Canadian Parliament itself, could deny access to the media. On appeal, the Supreme Court upheld the Assembly's contention that members of legislative bodies may continue to limit media access as part of their right to control legislative proceedings. The Court was divided (3-4) as to the extent to which the Charter might in other circumstances apply to members of any Canadian legislature.[99]

- ***Legislative override or 'notwithstanding' provision*** – section 33 is perhaps the most novel aspect of the Charter in that it constitutes an attempt to reconcile the constitutional entrenchment of human rights, and the powers of judicial review this entails, with the doctrine of the supremacy of parliament. In fact, a provision of this sort was not original to the Charter. A similar notwithstanding clause was found in the statutory Canadian *Bill of Rights 1960*,[100] as well as in several provincial human rights

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[96] MC Hurley, *Charter Equality Rights: Interpretation of Section 15 in Supreme Court of Canada Decisions*, Canadian Parliamentary Library, September 1999.

[97] There are indications that the Supreme Court of Canada intends to give 'government' a relatively narrow interpretation – public state-funded universities were omitted from its ambit in *McKinney v University of Guelph* (1990) 76 DLR (4th) 545.

[98] [1993] 1 SCR 319.

[99] K Douglas and M Dunsmuir, *Charter of Rights and Freedoms: Fundamental Freedoms*, Canadian Parliamentary Library, September 1998, p 14.

[100] Section 2.

codes, including the Quebec *Charter of Human Rights and Freedoms 1975*.[101] Nonetheless, from the standpoint of the international and national instruments designed to protect human rights it was certainly an important innovation. Section 33 (1) states: '*Parliament or the legislature of a province may expressly declare in an Act of parliament or of the legislature, as the case may be, that the Act or a provision thereof shall operate notwithstanding a provision included in section 2 or sections 7 to 15 of this Charter*'. Not all sections of the Charter are subject therefore to the override clause.[102] Section 33 (2) then provides: '*An Act or a provision of an Act in respect of which a declaration made under this section is in effect shall have such operation as it would have but for the provision of this Charter referred to in the declaration*'. It is said in this regard that section 33, and especially section 33 (2), 'pierces the wall of constitutional entrenchment and resurrects, in particular circumstances, the sovereignty of parliament or a legislature'.[103] The upshot is that the Charter is a unique combination of rights and freedoms, some of which are fully entrenched, others of which are entrenched unless overridden by Parliament or a legislature. Under section 33 (3) each exercise of the override power has a lifespan of five years or less, after which it expires, unless Parliament or a legislature re-enacts it under section 33 (4) for a further period of five years or less.

Note that, unlike the UK *Human Rights Act 1998* and the New Zealand *Bill of Rights Act 1990*, the Charter does not contain a pre-enactment scrutiny provision under which members of parliament are able to consider whether a Bill violates a Charter guarantee. However, it seems that such scrutiny does take place in Canada, and it does so *after* a Bill has been introduced into parliament (which is closer to the UK than the New Zealand model). These procedures are governed by statute.[104] It has been remarked in this regard that this requirement 'introduces an element of openness into the procedure by having the Bill under scrutiny already in the public area, and provides more time for the scrutiny process as the Attorney General need not report until before the second reading of a Bill'.[105]

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[101] Section 52; D Johansen and P Rosen, *The Notwithstanding Clause of the Charter*, The Canadian Parliamentary Library, September 1997, p 3.

[102] Those rights excluded include: sections 3-5 (Democratic rights); section 6 (Mobility Rights); sections 16-22 (Official Languages of Canada); section 23 (Minority Language Educational Rights); and section 28 (Rights Guaranteed Equally to Both Sexes).

[103] D Johansen and P Rosen, n 101, p 2.

[104] Section 3 of the Canadian *Bill of Rights 1960* and section 4 of the *Department of Justice Act* require the Minister of Justice, who is ex officio Attorney General, to examine every regulation and Bill to ensure consistency with both the Bill of Rights 1960 and the Charter.

[105] P Fitzgerald, 'Section 7 of the New Zealand Bill of Rights Act 1990: a very practical power or a well-intentioned nonsense' (1992) 22 *Victoria University of Wellington Law Review* 135 at 142.

6.3 The Canadian Charter of Rights and Freedoms – comments and issues

There is now a large body of case law on the Charter and the following comments are no more than general observations on the Charter's operation. One such comment is that the legislative override in section 33 has not proved to be the Charter's Achilles Heel to any where near the extent that some commentators might have feared. Admittedly, it got off to a shaky start with the Quebec government including a notwithstanding clause in every piece of legislation put before the National Assembly between 1982 and 1985 (as well in every Quebec law already in force). Since then, however, the override clause has only been resorted to on rare occasions.[106] Of the other Provinces, only Saskatchewan has taken advantage of it and that proved to be unnecessary as the Canadian Supreme Court later held that the law in question did not breach the Charter. The agreed view is that the political price to be paid in invoking the override clause has been too high.[107] It also seems to be agreed that section 33 has served a useful purpose, not least in facilitating what Associate Professor Janet Hiebert describes as an 'ongoing and multi-layered constitutional conversation within Parliament and between elected representatives and judges about the scope and meaning of fundamental human rights and the importance and justification of legislative objectives when these conflict with rights'.[108] She continued:

> Affirming, in a Bill of Rights, the ability of Parliament to override a judicial decision, is not simply the retention of the principle of parliamentary supremacy, unadulterated, as it existed in a previous and less rights-conscious age. To assume that a legislative override renders a Bill of Rights impotent is to dismiss the substantial changes that a judicially reviewable Bill of Rights will introduce into the political culture of the polity.[109]

The second general point to make is that the Canadian judiciary has, in relation to the Charter, adopted a much less cautious approach than when applying the 1960 statutory Bill of Rights. Its interpretation of Charter rights has been mindful of the fact that it is expounding an entrenched constitutional document, which has resulted in a generous, not legalistic method of interpretation, with the Supreme Court of Canada applying the 'purposive' method as the standard model for the elaboration of Charter rights and freedoms. This method has been described by Justice Robert Sharpe, a Judge of the Ontario Court of Justice, as 'a complex, value-laden exercise' that 'calls upon the judge to reflect upon the purpose of and rationale for the Charter right at issue in the light of the overall structure of the Charter, our legal and political tradition, our history, and the changing needs

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106 For example, Quebec applied it in *An Act to Amend the Charter of the French Language 1988* which prohibited the use of the English language on outside commercial signs.

107 G Williams, n 32 at 269.

108 JL Hiebert, n 85 at 22.

109 Ibid at 34.

and demands of modern society'.[110]

As in New Zealand, perhaps the most prolific area of Charter-related litigation is that associated with the criminal law and procedure rights. Police powers are now closely scrutinised under the Charter and significant procedural protections have been imposed. Canadian courts have the power to exclude evidence obtained in violation of a protected right where to admit such evidence would bring the administration of justice into disrepute.[111] The 1992 Supreme Court of Canada decision in *R v Askov*[112] considered what might constitute unreasonable delay with respect to the Charter right 'to be tried within a reasonable period' and held that delay caused by inadequate institutional resources would not necessarily be excused. The decision resulted in 51, 791 charges in the Province of Ontario alone being stayed between October 1990 and November 1991 as a result of 'unreasonable delay'.[113] A different sort of example from the area of criminal law is the case of *R v Smith*[114] where the Supreme Court of Canada had to decide whether the mandatory seven-year sentence for importing narcotics, contrary to the Narcotics Control Act, breached section 12 of the Charter (the right not to be subjected to any cruel and unusual treatment or punishment). The Court, with one dissenting judgment, held that the relevant section of the Act did breach section 12 and was not justified under section 1 as a reasonable limit.[115]

As discussed in the previous section, another instance of the 'generous' approach to the interpretation of Charter rights is the decision not to us a formal equality test in respect to section 15. An example of the approach taken to 'electoral rights' concerns the validity of legislation disqualifying prison inmates from voting. In May 1993 the Supreme Court of Canada confirmed that the federal prohibition against inmate voting was drawn too broadly and failed to meet the proportionality test required by section 1 (the justified limits clause), particularly the test of minimum impairment.[116]

However, the true impact of the Charter cannot be gauged by reference to individual cases, the choice of which must always be somewhat arbitrary in nature. Instead, it is by reference

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110 RJ Sharpe, 'The impact of a Bill of Rights on the role of the judiciary: a Canadian perspective' in n 12, p 437.

111 Ibid, p 439.

112 [1990] 2 SCR 1199.

113 Legislative Assembly of Queensland, n 10, p 39.

114 [1987] 1 SCR 1045.

115 M Pilon, *Criminal Trial and Punishment: Protection of Rights Under the Charter*, Canadian Parliamentary Library, November 1997, p 13. Pilon adds, 'The fact that the purpose of the legislation, to deter the drug trade and punish importers of drugs, was clearly valid did not prevent the Court from ruling on the validity of the section [of the Act]'.

116 JG Robertson, *Electoral Rights: Charter of Rights and Freedoms*, Canadian Parliamentary Library, June 1999, p 8. The paper discusses the ongoing litigation on this issue.

to the impact on Canada's political and legal culture generally that the Charter's significance must be judged. Associate Professor Hiebert has concluded in this regard:

> The Charter's introduction into Canada has forever changed the Canadian political landscape. Pressure on governments to give due consideration to the rights dimensions of political conflicts has come from both courts and the public. Yet this increased focus on rights has not resulted in frequent or destabilising political/judicial conflicts. This is one of the Charter's most significant contributions to the Canadian polity.[117]

Of course that is only one point of view. As Justice Robert Sharpe has observed, some Canadian critics decry what they see as the 'legalization of politics' and contend that the Charter represents an inappropriate shift of power to the unelected judiciary. 'Others', Justice Sharpe remarks, 'contend that the courts have been far too timid and unduly restrained and deferential to legislative judgment'. He would not agree with either viewpoint, stating that, so far, the 'judges have been cautiously positive', mindful of what can be achieved by judicial review in the protection of human rights, but also giving due consideration to the 'inherent limits of the judicial function'.[118] In a spirit of cautious optimism, Justice Sharpe continued: 'I would argue that overall, the Charter has had a beneficial impact upon Canadian law and politics. Fundamental human rights are properly at the forefront of public debate, and the claims of those often forgotten in the cut and thrust of day-to-day politics can no longer be ignored'.[119]

7.0 THE PROTECTION OF HUMAN RIGHTS IN SOUTH AFRICA – CHAPTER 2 OF THE 1996 CONSTITUTION

7.1 Background

The South African Bill of Rights is an integral part of the new, post-apartheid constitution, as adopted originally in May 1996 and in force on 7 February 1997.[120] This followed an inquiry by the South African Law Commission which had recommended strongly in favour of a Bill of Rights,[121] plus the inclusion of such a Bill in the Interim Constitution of 1994.[122]

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117 JL Hiebert, n 85 at 34.

118 RJ Sharpe, n 110, p 451.

119 Ibid, p 452.

120 An amended text was adopted on 11 October 1996, following a decision by the Constitutional Court that not all the provisions of the new constitution were consistent with the principles set forth in the Interim Constitution of 1994. The latter was the product of the Multi-Party Negotiating Process which commenced work in the early 1990s.

121 S Kentridge, 'Bills of Rights – the South African Experience' (1996) 112 *The Law Quarterly Review* 237 at 241.

It has been suggested that the new Constitution can be looked upon as a 'treaty of peace' with the purpose of establishing 'a new legal order as different as possible from the old legal order'.[123] Thus, whereas in Canada, New Zealand or the UK the adoption of a Bill of Rights may be intended largely to affirm and perpetuate existing rights, 'the South African Constitution establishes rights not previously recognised in that country'.[124]

A feature of the South African Bill of Rights is its comprehensiveness, in that it includes traditional political and civil, as well as social, economic and cultural rights, in combination with its own unique elements. James Read, Professor Emeritus of Comparative Public Law in the University of London, has said of it: 'Subjected to a largely public process of consideration and negotiation, during which the many available precedents were closely examined, this represents the most comprehensive and well-considered protection of fundamental rights and freedoms in any national constitution'.[125]

7.2 Chapter 2 of the 1996 Constitution – key provisions

The Constitution is superior law[126] and there is no question that it prevails over legislation which is found to be invalid by the separately constituted Constitutional Court.[127] Parliament (the National Assembly) can have no recourse to a legislative override, or anything of that kind, in this context. To amend chapter 2 of the Constitution, at least a two-thirds majority vote of the National Assembly is required, in addition to the approval of at least six of the nine provincial legislatures.[128]

Typically, the Bill of Rights contained in chapter 2 is said to bind 'the legislature, the executive, the judiciary and all organs of the state'; but less typically it also binds 'a natural or a juristic person', which may mean that it also applies to claims between private persons.[129] Unusually, the chapter contains a right to access to information which, when it is necessary to secure other rights, is held in relation to other private individuals, as well

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[122] For a description of the Interim Constitution and the political events leading to its adoption see – H Corder, 'Towards a South African Constitution' (1994) 57 *Modern Law Review* 491; M Chanock, 'A post-Calvinist catechism or a post-communist manifesto? Intersecting narratives in the South African Bill of Rights debate' in n 12, p 392.

[123] S Kentridge, n 121 at 242.

[124] Ibid.

[125] JS Read, n 11 at 34.

[126] Section 1 (c), 1996 Constitution.

[127] This Court is a specially-constituted final court for constitutional cases.

[128] Section 74 (2).

[129] Section 8. The issue is discussed in C Murray, n 25 at 11.

as in relation to the organs of government.[130] Also included is a right to just administrative action.[131]

Perhaps the single most interesting aspect of the Chapter is its inclusion of certain economic, social and cultural rights in the enforceable Bill of Rights, thus protecting the right to a healthy environment,[132] access to health care, food, water and social security,[133] plus access to adequate housing[134] and to a education,[135] alongside such rights as the right to equality, freedom of expression and a fair trial. Some of these economic, social and cultural rights are given unqualified protection. One example is the right to a healthy environment. Another is the right to 'basic education'. On the other hand, the right 'to further education' is qualified by the proviso, 'which the state, through reasonable measures, must make progressively available and accessible'. Likewise, sections 26 (housing) and 27 (health care, food, water and social security) include subsections providing, 'The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of this right'. Commenting on this feature of the South African Bill of Rights, Christina Murray, Professor of Human Right and Constitutional Law in the University of Cape Town, has said:

> The political wisdom prevailing at the time of drafting this chapter was that these subsections precluded courts from effectively rewriting the budget to secure the rights concerned for litigious individuals. Instead, an individual's demand would be limited to a demand that the state take 'reasonable measures' to secure the rights. Whether this interpretation of the provisions will prevail remains to be seen.[136]

Three further features of chapter 2 can be noted. First, it contains a single, all-purpose justified limits clause, the formulation of which shows the clear influence of the relevant Canadian jurisprudence.[137] Secondly, detailed arrangements are made for the declaration of a state of emergency, including statement of the extent to which certain rights are non-derogable.[138] Thirdly, the Bill of Rights includes an 'interpretation' provision, which

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130 Section 32.

131 Section 33.

132 Section 24.

133 Section 27.

134 Section 26.

135 Section 29.

136 C Murray, n 25 at 11.

137 Section 36.

138 Section 37.

requires a 'purposive' method of interpretation; it also requires courts to promote the underlying values of democratic society and to 'consider international law'. In addition, a court '*may* consider foreign law' (emphasis added).[139]

7.3 Chapter 2 of the 1996 Constitution – comments and issues

One can only speculate about the future of human rights in South Africa. Its Bill of Rights certainly represents a 'a normative and symbolic statement of those rights and values that a society believes ought to be respected in, and by, the polity'.[140] At present, that polity is still under construction, as is South Africa's constitutional identity.[141] In the meantime the early judgments of the Constitutional Court are said to have 'contributed significantly to the re-modelling of the South African legal system…'.[142]

8.0 CONCLUSION

It is not the purpose of this paper to consider whether some kind of Bill of Rights should or should not be adopted in NSW. Instead, it is enough to conclude by making a number of observations of a very general sort. What is abundantly clear is that most countries have decided to adopt a Bill of Rights in some form or other, a point which can also be made about many sub-national polities within the major federations. It is certainly the case that Bills of Rights are the norm throughout the Commonwealth, as well as in the comparable liberal democracies of the world. The Chief Justice of New South Wales, Justice Spigelman has suggested that, without a Bill of Rights, there is a potential for Australian lawyers to become intellectually isolated. Whether that is an appropriate starting point for debating the introduction of such a Bill, the purpose of which would be to serve the broader public interest, is a question which needs to be carefully considered.

A particularly interesting feature of the recent developments in Canada, New Zealand and the UK is the compromise which has been struck between the competing doctrines of parliamentary supremacy, on one side, and judicial review, on the other. Arrangements have been made in all three jurisdictions for this purpose: this takes the form of the legislative override clause in Canada; in New Zealand it is the statutory status of the Bill of Rights under which inconsistent legislation cannot be declared invalid; and in the UK half-way-house arrangements are in place, whereby the courts may quash or disapply subordinate legislation, but only make a declaration of incompatibility for primary legislation. Another feature of these arrangements, again designed to add to the democratic legitimacy of the relevant schemes, is the part played by the various parliaments in the pre-enactment

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139 Section 39.

140 JL Hiebert, n 85 at 24.

141 C Murray, n 25 at 10. There are suggestions that the constitution may be under threat if the African National Congress gets the two-thirds majority in the National Assembly required to amend parts of it – 'A Vendetta in South Africa', *The Guardian Weekly*, 24 February – 1 March 2000.

142 JS Read, n 11 at 35.

scrutiny of Bills for any potential inconsistency with protected rights. Similar arrangements are already in place in the Australian Senate, thus suggesting that such developments are perfectly consistent with the operation of the doctrine of parliamentary democracy in this country.

At the State level in Australia, in 1987 the Legal and Constitutional Committee of the Victorian Parliament advocated the enactment in the Victorian Constitution of a non-enforceable Declaration of Rights and Freedoms, with investigation and report mechanisms by a permanent Parliamentary Committee.[143] A Bill incorporating a Charter of Rights and Freedoms was introduced, but subsequently lapsed. Instead, in 1992 the *Parliamentary Committees Act* was amended to specifically vest in the Scrutiny of Acts and Regulations Committee the function of scrutinising every Bill that affects rights and freedoms.[144] More recently in Queensland the question of adopting a Bill of Rights has been canvassed on at least two occasions. In 1993 the Queensland Electoral and Administrative Review Commission recommended a constitutionally entrenched Bill of Rights in that State.[145] In 1998 that recommendation was reviewed by the Legal, Constitutional and Administrative Review Committee of the Queensland Parliament. In the event, the Committee recommended that a Bill of Rights should not be adopted in Queensland in any form.[146] It is to this background that the current debate in NSW belongs.

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143 *Report on the Desirability or otherwise of Legislation Defining and Protecting Human Rights*, April 1987.

144 For developments and proposals at the Territory level see – A Northern Territory Bill of Rights? n 40, p 10.

145 *Report on Review of the Preservation and Enhancement of Individuals' Rights and Freedoms*, August 1993. The Commission expressly recommended against including a legislative override provision in its proposed Bill of Rights. It also recommended that civil and political rights contained in the proposed Bill of Rights should be enforceable but that economic, social, cultural and community rights be guidelines for government policy and not enforceable.

146 Legislative Assembly of Queensland, n 10.