

## HUMAN RIGHTS PROTECTIONS: NEED WE BE AFRAID OF THE UNELECTED JUDICIARY?

### I INTRODUCTION

On 14 December 2018, the Australian Human Rights Commission announced a new major project titled *Free and Equal: An Australian Conversation on Human Rights*.<sup>1</sup> The project asks the community ‘what makes an effective system of human rights protection for 21<sup>st</sup> century Australia?’<sup>2</sup> It seems inevitable that this project will reopen debate on whether the Commonwealth Parliament should enact a Human Rights Act.

We last had this debate 10 years ago when the then Commonwealth Government established a committee (‘Consultation Committee’) to conduct a nationwide consultation on human rights.<sup>3</sup> Issues on which the Consultation Committee sought public views included whether human rights were sufficiently protected and promoted in Australia and how we could better protect and promote human rights.

As President of the Commission at the time, along with Commission staff, I spent considerable time assisting members of the public whose voices are rarely influential

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<sup>1</sup> Australian Human Rights Commission, *Free and Equal: An Australian Conversation on Human Rights* (Issues Paper, April 2019) 1 <<https://www.humanrights.gov.au/sites/default/files/document/publication/19.04.02%20Free%20and%20equal%20in%20dignity%20and%20rights%20-%20FINAL%20for%20web.pdf>>.

<sup>2</sup> Ibid.

<sup>3</sup> National Human Rights Consultation Secretariat, *National Human Rights Consultation Report* (Report, September 2009) 3 <[http://www.humanrightsconsultation.gov.au/www/nhrcc/nhrcc.nsf/Page/Report\\_NationalHumanRightsConsultationReportDownloads](http://www.humanrightsconsultation.gov.au/www/nhrcc/nhrcc.nsf/Page/Report_NationalHumanRightsConsultationReportDownloads)>, archived at <[http://webarchive.nla.gov.au/gov/20091020122944/http://www.humanrightsconsultation.gov.au/www/nhrcc/nhrcc.nsf/Page/Report\\_NationalHumanRightsConsultationReportDownloads](http://webarchive.nla.gov.au/gov/20091020122944/http://www.humanrightsconsultation.gov.au/www/nhrcc/nhrcc.nsf/Page/Report_NationalHumanRightsConsultationReportDownloads)> (*NHRC Report*). On 10 December 2008, Robert McClelland, the then Commonwealth Attorney-General, appointed Father Frank Brennan, Mary Kostakidis, Tammy Williams and Mick Palmer to undertake an Australia-wide community consultation on issues regarding the protection and promotion of human rights, and corresponding responsibilities. The Consultation Committee’s terms of reference are contained at appendix A to the *NHRC Report*.

in public debate to express their views to the Consultation Committee. These people included Aboriginal and Torres Strait Islander people, the homeless, the elderly, individuals with disability, those whose first language was not English, and women who had experienced domestic violence. Listening to their experiences persuaded me that greater legal protections for human rights in Australia are vital if we are to achieve our ambition of a ‘fair go’ for all.

While the work of the Consultation Committee led to a number of important changes, such as the Parliamentary Joint Committee on Human Rights, it did not lead to greater legal protections of human rights in Australia. The objections to such legal protections came primarily from parliamentary and legal circles, and the majority of their concerns related to the role of the judiciary under a proposed Human Rights Act.<sup>4</sup>

This article critically examines the strength of those objections, particularly in light of more recent experience. It argues that the focus on the views of opponents from parliamentary and legal circles meant that excessive weight was attached to theoretical difficulties of limited practical significance. It contends that experiences elsewhere have shown that the roles of the executive and the legislature in the protection of human rights are significantly more important than the role of the judiciary. Finally, it suggests that the capacity of a Human Rights Act to make the Australian community and all branches of our government more sensitive to the rights and needs of individuals in important practical ways was downplayed.

## II RECOMMENDATIONS OF THE NATIONAL HUMAN RIGHTS CONSULTATION REPORT

The *National Human Rights Consultation Report* (‘NHRC Report’), published in September 2009, contained 31 recommendations to improve the protection and promotion of human rights in Australia.<sup>5</sup> Many of those recommendations were accepted by the government, but none of the recommendations for greater legal protection were accepted. In particular, the recommendation that Australia adopt a Human Rights Act was rejected.<sup>6</sup>

### A *The Proposed Human Rights Act*

The Consultation Committee was not authorised to recommend a constitutionally entrenched bill of rights.<sup>7</sup> Its recommendation in favour of a Commonwealth Human

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<sup>4</sup> See especially *ibid* 281–95.

<sup>5</sup> *Ibid* xxix.

<sup>6</sup> Attorney-General’s Department (Cth), *Australia’s Human Rights Framework* (Report, April 2010) <<https://www.ag.gov.au/Consultations/Documents/Publicsubmissionsonthedraftbaselinestudy/AustraliasHumanRightsFramework.pdf>> (‘*Australia’s Human Rights Framework*’).

<sup>7</sup> *NHRC Report* (n 3) 383.

Rights Act was necessarily for an ordinary statute of the Commonwealth Parliament.<sup>8</sup> Such an Act would not have superior status to other Commonwealth legislation. It would be able to be repealed or amended (explicitly or impliedly) in the same way as other legislation. It could not be seen as a bill of rights constitutionally imposed on the legislature as in the case of the United States,<sup>9</sup> or imposed by a superior legislature as could be seen to be the case in Canada.<sup>10</sup>

The Consultation Committee recommended that Australia adopt a Commonwealth Human Rights Act based on the ‘dialogue model’<sup>11</sup> — a term used to describe the kind of human rights Acts adopted in New Zealand, the United Kingdom, the Australian Capital Territory and Victoria.<sup>12</sup> Under this model, the legislative branch of government (Parliament), while required to consider whether proposed legislation would comply with human rights standards, retains the final say on the content of laws and may therefore pass laws that override human rights. Under this model, the judiciary is required to interpret legislation in a manner consistent with human rights if such an interpretation is available. It is ordinarily allowed to make declarations of incompatibility if such an interpretation is not available. Such a declaration does not affect the validity of the legislation but signals to Parliament that it might consider amending the legislation.

Importantly, under the model recommended for Australia by the Consultation Committee, only the High Court of Australia would have the power to make a declaration of incompatibility.<sup>13</sup> Should giving such a power to the High Court have proved impractical, the Consultation Committee’s recommendation was that no court be given the formal power to make a declaration of incompatibility.<sup>14</sup> Subsequently the High Court has indicated that it is unlikely that the *Constitution* vests in it the power to make such declarations.<sup>15</sup>

It is also significant that the Consultation Committee recommended that only civil and political rights be justiciable under a Commonwealth Human Rights Act.<sup>16</sup> That is, it did not recommend that the proposed Act give the courts power to adjudicate disputes concerning economic, social and cultural rights.

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<sup>8</sup> Ibid xxxiv.

<sup>9</sup> *United States Constitution* amends I–X.

<sup>10</sup> *Canada Act 1982* (UK) c 11, sch B pt I (‘*Canadian Charter of Rights and Freedoms*’).

<sup>11</sup> *NHRC Report* (n 3) xxxiv.

<sup>12</sup> *New Zealand Bill of Rights Act 1990* (NZ); *Human Rights Act 1998* (UK); *Human Rights Act 2004* (ACT); *Charter of Human Rights and Responsibilities Act 2006* (Vic).

<sup>13</sup> *NHRC Report* (n 3) xxxvii.

<sup>14</sup> Ibid.

<sup>15</sup> *Momcilovic v The Queen* (2011) 245 CLR 1, 70 [101] (French CJ), 241 [661] (Bell J) (‘*Momcilovic*’).

<sup>16</sup> *NHRC Report* (n 3) xxxv.

The Consultation Committee recommended that the Act include a general limitation clause modelled on clauses included in the comparable Australian Capital Territory and Victorian legislation.<sup>17</sup> Each of these clauses recognises that, generally speaking, rights are not absolute and must be balanced against one another, and against other competing private and public interests.

### B *Support for a Human Rights Act*

The Consultation Committee reported that ‘the clearest division of opinion at all stages of the [c]onsultation was over the question of an Australian Human Rights Act’.<sup>18</sup> Nonetheless, a majority of parties and persons consulted expressed support for such an Act. More than half of those who attended community roundtables favoured a Human Rights Act, as did 87.4% of those who presented submissions to the Consultation Committee. In a national telephone survey of 1,200 people, 57% expressed support for a Human Rights Act and only 14% were opposed.<sup>19</sup>

## III REASONS FOR THE REJECTION OF A HUMAN RIGHTS ACT

In justifying the decision to reject the recommendation for a Human Rights Act the then Commonwealth Attorney-General, Robert McClelland, said:

The [g]overnment believes that the enhancement of human rights should be done in a way that as far as possible unites, rather than divides, our community.<sup>20</sup>

What were the views that were so strongly held by those who opposed a Human Rights Act, that the adoption of such an Act was thought likely to divide our community?

One of the main arguments against a Human Rights Act was that human rights were already adequately protected in Australia.<sup>21</sup> Putting that argument aside for the moment, the *NHRC Report* reveals that at the heart of the majority of the arguments against a Commonwealth Human Rights Act were concerns about a change in the relationship between, on the one hand, the popularly elected legislature and on the other, the unelected judiciary.<sup>22</sup> More specifically, fear was expressed that power would be transferred ‘from the [P]arliament (which is answerable to the community through the electoral process) to the judiciary (which is not)’.<sup>23</sup> There was concern that a Human Rights Act would require judges to make decisions about ‘vague, open-ended and

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<sup>17</sup> Ibid.

<sup>18</sup> Ibid 361.

<sup>19</sup> Ibid 362.

<sup>20</sup> See *Australia’s Human Rights Framework* (n 6) 1.

<sup>21</sup> *NHRC Report* (n 3) 281

<sup>22</sup> Ibid 284–7.

<sup>23</sup> Ibid 284.

abstract propositions',<sup>24</sup> and that the requirement for courts to interpret legislation in a manner consistent with human rights standards would 'fundamentally change the way courts interpret legislation'<sup>25</sup> and transfer power to unelected judges.<sup>26</sup> The then Attorney-General of New South Wales went so far as to submit that

[p]arliaments would face unacceptable political pressure from the judiciary. By declaring incompatibility with human rights, even when such a *violation* is entirely practical, reasonable and necessary, or by invoking the interpretation division, democratically elected representatives are branded human rights abusers and held accountable to unelected appointees.<sup>27</sup>

#### *A Are Existing Protections Adequate?*

One of the primary arguments put forward against a Human Rights Act was that it was unnecessary because Australia already offers adequate protections of human rights through democratic institutions, constitutional provisions, specific pieces of legislation and the common law.<sup>28</sup>

In this area, as in many others, *necessity* is an inherently subjective criterion. While many from legal and parliamentary circles judged further human rights protections to be unnecessary, the Consultation Committee, which received 35,000 submissions and consulted extensively around Australia, held the opposing view. It concluded that insufficient attention is paid to human rights by the Commonwealth government and Parliament when formulating policy and legislation.<sup>29</sup> It further concluded that instilling a human rights culture in the Commonwealth public sector is integral to the enhanced protection and promotion of human rights in Australia.<sup>30</sup>

The Consultation Committee's conclusions, based on what was almost certainly the most extensive public consultation ever undertaken in Australia, deserve respect. The conclusion reached by the Consultation Committee was consistent with what I heard when speaking with individuals vulnerable to breaches of their human rights — that is, those intended to benefit most from a Human Rights Act. It might also be seen as consistent with recent tragic revelations of serious human rights abuses against

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<sup>24</sup> Ibid 285.

<sup>25</sup> Ibid 286.

<sup>26</sup> Ibid 287.

<sup>27</sup> Ibid 286 (emphasis in original).

<sup>28</sup> See generally Greg Carne, 'Is Near Enough Good Enough? Implementing Australia's International Human Rights Torture Criminalisation and Prohibition Obligations in the *Criminal Code* (Cth)' (2012) 33(1) *Adelaide Law Review* 229.

<sup>29</sup> *NHRC Report* (n 3) 355.

<sup>30</sup> Ibid 358. See generally Alice Tay, 'Human Rights and Human Wrongs' (1999) 21(1) *Adelaide Law Review* 1, 12–13.

members of vulnerable groups in our communities including children, elderly individuals suffering dementia and people with disability.<sup>31</sup>

### B *Relationship between the Legislature and the Judiciary*

The proposed Commonwealth Human Rights Act, if enacted, would not have constitutional force. That is, it would not have superior status to other Commonwealth legislation. It would in no way diminish the legislative powers of the Parliament. The Parliament would retain the same powers as it has now to pass laws incompatible with the full enjoyment of human rights. The judiciary would not be given any increased powers to strike down laws of the Parliament.

The contention that the requirement for courts to interpret legislation in a manner consistent with human rights would ‘fundamentally change the way courts interpret legislation’<sup>32</sup> appears to overlook well-established principles of statutory construction and, as appears below, has since been contradicted by the High Court of Australia.

A longstanding principle of statutory construction, sometimes described as the principle of legality,<sup>33</sup> is that parliaments should be presumed to legislate in accordance with — not contrary to — fundamental rights and freedoms, unless such an intention is clearly manifest in unambiguous statutory language. Another well-established principle of statutory construction is that where legislation is ambiguous, courts should favour an interpretation that accords with Australia’s international obligations.<sup>34</sup> Among Australia’s international obligations are those arising from its ratification of the major human rights conventions, including the *International Covenant on Civil and Political Rights* (‘ICCPR’).<sup>35</sup>

The reasoning behind the first of the above principles of statutory construction (legality) was clearly articulated by the High Court in *Coco v The Queen*:

The insistence on express authorisation of an abrogation or curtailment of a fundamental right, freedom or immunity must be understood as a requirement for some manifestation or indication that the legislature has not only directed its attention to the question of the abrogation or curtailment of such basic rights, freedoms or immunities but has also determined upon abrogation or curtailment

<sup>31</sup> See, eg, *Royal Commission into the Protection and Detention of Children in the Northern Territory* (Final Report, 17 November 2017) vol 1; *Royal Commission into Aged Care Quality and Safety* (Letters Patent, 6 December 2018); *Royal Commission into Violence, Abuse and Neglect and Exploitation of People with Disability* (Letters Patent, 4 April 2019).

<sup>32</sup> *NHRC Report* (n 3) 286.

<sup>33</sup> *Momcilovic* (n 15) 46–7 [43] (French CJ).

<sup>34</sup> *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1, 38 (Brennan, Deane and Dawson JJ).

<sup>35</sup> *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) (‘ICCPR’).

of them. The courts should not impute to the legislature an intention to interfere with fundamental rights. Such an intention must be clearly manifest by unmistakable and unambiguous language. General words will rarely be sufficient for that purpose if they do not specifically deal with the question because, in the context in which they appear, they will often be ambiguous on the aspect of interference with fundamental rights.<sup>36</sup>

Chief Justice French more recently highlighted a possible link between the above two principles, stating in *Momcilovic* that

[t]he principle of legality has been applied on many occasions by this Court. It is expressed as a presumption that Parliament does not intend to interfere with common law rights and freedoms except by clear and unequivocal language for which Parliament may be accountable to the electorate. It requires that statutes be construed, where constructional choices are open, to avoid or minimise their encroachment upon rights and freedoms at common law. ... [T]he principle is a powerful one. ... It has also been suggested that it may be linked to a presumption of consistency between statute law and international law and obligations.<sup>37</sup>

Having regard to the above principles of statutory construction, it is perhaps unsurprising that Crennan and Kiefel JJ, in *Momcilovic*, stated that s 32 of the *Charter of Human Rights and Responsibilities Act 2006* (Vic) — which requires that, so far as possible, statutory provisions be interpreted in a way that is compatible with human rights standards — ‘does not state a test of construction which differs from the approach ordinarily undertaken by courts towards statutes’.<sup>38</sup>

### C *Judicial Decisions on ‘Vague, Open-Ended and Abstract Propositions’*

It may be assumed that those who expressed concern about judges being asked to make decisions on ‘vague, open-ended and abstract propositions’<sup>39</sup> were thinking principally of decisions concerning economic, social and cultural rights. Few of the rights intended to be the subject of litigation under the proposed Commonwealth Human Rights Act (ie, civil and political rights) can be argued to be of this character. Where such rights are expressed in terms of abstract propositions, such as the right to freedom of expression<sup>40</sup> or the right to privacy and reputation,<sup>41</sup> they have a content broadly understood by the community and by the Australian judiciary.

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<sup>36</sup> (1994) 179 CLR 427, 437 (Mason CJ, Brennan, Gaudron and McHugh JJ).

<sup>37</sup> *Momcilovic* (n 15) 46–7 [43].

<sup>38</sup> *Ibid* 217 [565]. According to French CJ, ‘there is ... nothing in its text or context to suggest that the interpretation which it requires departs from established understandings of that process’: at 50 [50].

<sup>39</sup> *NHRC Report* (n 3) 285.

<sup>40</sup> *ICCPR* (n 35) art 19.2.

<sup>41</sup> *Ibid* art 17.

In any event, Australian courts are regularly required to construe provisions that might be thought to fit the description of ‘vague, open-ended and abstract’. The *Constitution* itself contains a number of provisions that can fairly be described in this way.<sup>42</sup> Yet the courts, and in particular the High Court, have been able to adjudicate constitutional disputes in an effective and broadly acceptable manner.

Perhaps more relevantly, there are many examples of Acts passed by the Commonwealth Parliament containing terms which can be fairly characterised as ‘vague, open-ended and abstract’. Examples include legislation under which courts are asked to determine whether particular conduct is ‘unconscionable’,<sup>43</sup> ‘unfair’,<sup>44</sup> or ‘reasonable’,<sup>45</sup> or whether a payment is ‘equitable’.<sup>46</sup> Australian judges have proved capable of giving practical content to expressions of this character in ways that have ensured the sensible operation of the legislation. Indeed, it might be considered a core feature of the common law system that judges are asked to make judgements of this kind.

#### D Sources of Guidance

Importantly, Australian judges would not be working in isolation were they to be asked to construe a Commonwealth Human Rights Act. As French CJ confirmed in *Momcilovic*,

[c]ourts may, without express statutory authority, refer to the judgments of international and foreign domestic courts which have logical or analogical relevance to the interpretation of a statutory provision.<sup>47</sup>

Australia is the only common law liberal democracy without overarching legislative protections of human rights. This means that Australian judges would be able to look to comparable jurisdictions such as the United Kingdom, New Zealand, Canada and South Africa to see how their judiciaries have construed and applied such legislative protections. They would also be able to look to decisions from the two other Australian jurisdictions (the Australian Capital Territory and Victoria) that have already adopted legislation to protect civil and political rights. Additionally, they would be able to draw guidance from international jurisprudence, including that of the United Nations Human Rights Committee (‘UNHRC’).

<sup>42</sup> See, eg, *Constitution* ss 52 (xxix) (‘external affairs power’), (xxxi) (‘acquisition of property on just terms’), (xxxix) (‘incidental power’) and ss 92 (‘trade within the Commonwealth to be free’), 100 (‘Commonwealth not to abridge right to use water’).

<sup>43</sup> *Competition and Consumer Act 2010* (Cth) sch 2 pt 2-2.

<sup>44</sup> *Ibid* pt 2-3.

<sup>45</sup> *Corporations Act 2001* (Cth) s 588X.

<sup>46</sup> *Copyright Act 1968* (Cth) ss 135ZZZK, 135ZZZN.

<sup>47</sup> *Momcilovic* (n 15) 36–7 [18].



The rights that the Consultation Committee recommended be justiciable under a Commonwealth Human Rights Act are rights recognised by the *ICCPR*.<sup>48</sup> It is a principle of Australian law that where a provision of a treaty is transposed into a statute, the assumption is that the language of the statute should carry the same meaning as in the treaty.<sup>49</sup> For this reason, international human rights jurisprudence touching on the proper interpretation of the *ICCPR* would be a primary source of assistance — although crucially non-binding — for any Australian judge seeking to understand the intended content of such rights and how they might be balanced against each other when required. A principal source of such jurisprudence is the UNHRC. This is the body of international experts responsible for monitoring the implementation and observance of the *ICCPR* by state parties. It does so in three distinct ways: by issuing ‘general comments’ on particular articles of the *ICCPR*; by its rulings on individual complaints made to the UN under the *ICCPR*; and by its ‘concluding observations’ on the mandatory reports submitted by state parties.<sup>50</sup>

### E ‘Necessary Violations’

When giving evidence to the Consultation Committee, the then Attorney-General of New South Wales spoke of unacceptable political pressure from the judiciary, concerning human rights violations that were ‘entirely practical, reasonable and necessary’.<sup>51</sup> The notion of a human rights violation that is ‘practical, reasonable and necessary’ but would nonetheless attract judicial criticism appears to overlook an important aspect of international human rights law. This is the principle of proportionality.<sup>52</sup> The Consultation Committee recommended that this principle be incorporated into the proposed Commonwealth Human Rights Act.<sup>53</sup>

The *ICCPR* recognises few absolute rights or freedoms. Those that it does not allow to be restricted by governments are known as non-derogable rights and freedoms.<sup>54</sup>

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<sup>48</sup> *NHRC Report* (n 3) xxxiv–v.

<sup>49</sup> *Applicant A v Minister for Immigration and Ethnic Affairs* (1997) 190 CLR 225, 230–1 (Brennan CJ).

<sup>50</sup> The jurisprudence of the UNHRC is readily available on the website of the Office of the United Nations High Commissioner for Human Rights. See ‘Jurisprudence’, *Office of the United Nations High Commissioner for Human Rights* (Database, 2019) <<http://juris.ohchr.org>>.

<sup>51</sup> *NHRC Report* (n 3) 286.

<sup>52</sup> This article does not engage in the debate on whether a ‘proportionate’ measure is a legitimate departure from human rights standards or no departure at all. See, eg, Julie Debeljak, ‘Proportionality, Rights-Consistent Interpretation and Declarations under the *Victorian Charter of Human Rights and Responsibilities: The Momcilovic Litigation and Beyond*’ (2014) 40(2) *Monash University Law Review* 340.

<sup>53</sup> See *NHRC Report* (n 3) xxxv.

<sup>54</sup> *ICCPR* (n 35) art 4.2.

These are: freedom from being arbitrarily deprived of life;<sup>55</sup> freedom from torture;<sup>56</sup> freedom from slavery;<sup>57</sup> freedom from imprisonment for inability to fulfil a contractual obligation;<sup>58</sup> freedom from conviction under a retrospective criminal law;<sup>59</sup> the right to recognition as a person before the law;<sup>60</sup> and freedom of thought, conscience and religion.<sup>61</sup> It ought to be unthinkable that any Australian government would regard a violation of any of these freedoms as ‘practical, reasonable and necessary’. Other than in respect of the arbitrary detention of refugees and asylum seekers, and possibly other matters encompassed by our national security laws, it is almost unthinkable.

As to the other rights and freedoms recognised by the *ICCPR*, although they do not expressly include a proportionality test, international law recognises that civil and political rights may be restricted by governments within defined boundaries, with the aim of protecting competing interests. Objectives capable of justifying a restriction on a right or freedom include the protection of public safety or security, the protection of public order, and the protection of the rights and freedoms of others.<sup>62</sup>

The Consultation Committee recommended that the Commonwealth Human Rights Act contain an express limitation clause for derogable civil and political rights similar to that contained in the *Human Rights Act 2004* (ACT) and the *Charter of Human Rights and Responsibilities Act 2006* (Vic).<sup>63</sup> Both of these Acts allow rights to be subject to ‘such reasonable limits as can be demonstrably justified in a free and democratic society’.<sup>64</sup> These provisions embody what is known as the ‘proportionality test’.<sup>65</sup> The European Court of Human Rights has implied a similar qualification into the *European Convention on Human Rights* (‘*ECHR*’),<sup>66</sup> and the proportion-

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<sup>55</sup> Ibid art 6.

<sup>56</sup> Ibid art 7.

<sup>57</sup> Ibid arts 8.1–2.

<sup>58</sup> Ibid art 11.

<sup>59</sup> Ibid art 15.

<sup>60</sup> Ibid art 16.

<sup>61</sup> Ibid art 18.

<sup>62</sup> See Manfred Nowak, *UN Covenant on Civil and Political Rights: CCPR Commentary* (NP Engel, 2<sup>nd</sup> rev ed, 2005). See also Meredith Wilkie and Kate Eastman, ‘Human Rights Brief No 4: Lawful Limits on Fundamental Freedoms’, *Australian Human Rights Commission* (Web Page, April 2001) <<https://www.humanrights.gov.au/publications/human-rights-brief-no-4>>.

<sup>63</sup> *NHRC Report* (n 3) xxxv.

<sup>64</sup> *Human Rights Act 2004* (ACT) s 28(1); *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 7(2).

<sup>65</sup> *Momcilovic* (n 15) 39 [22] (French CJ), quoting Victoria, *Parliamentary Debates*, Legislative Assembly, 4 May 2006, 1291 (Rob Hulls, Attorney-General).

<sup>66</sup> *Convention for the Protection of Human Rights and Fundamental Freedoms*, opened for signature 4 November 1950, 213 UNTS 221 (entered into force 3 September 1953), as amended by *Protocol 11 to the Convention for the Protection of Human Rights and Fundamental Freedoms*, opened for signature 11 May 1994, ETS No 155 (entered into force 1 November 1998).

ality test has been adopted in the *Human Rights Act 1998* (UK).<sup>67</sup> It is therefore instructive to look at the jurisprudence of United Kingdom courts in considering and applying this Act.

The Act gives domestic effect to rights and freedoms guaranteed under the *ECHR*. In decisions under the *Human Rights Act*, United Kingdom courts have consistently called for the rights of individuals to be balanced against the general interests of the community.

This approach is well illustrated by Lord Bingham's statement in *Attorney-General's Reference (No 2 of 2001)*:

In the exercise of individual human rights due regard must be paid to the rights of others, and the society of which each individual forms part itself has interests deserving of respect.<sup>68</sup>

It is further illustrated by the comment of Lord Steyn in *Brown v Stott* that '[t]he fundamental rights of individuals are of supreme importance but those rights are not unlimited: we live in communities of individuals who also have rights'.<sup>69</sup> His Lordship also observed in *R (McCann) v Crown Court at Manchester* that the relevant 'starting point is ... an initial scepticism of an outcome which would deprive communities of *their* fundamental rights'.<sup>70</sup>

To similar effect, in *Wilson v First County Trust Ltd (No 2)*, Lord Rodger stated that

[i]t is well recognised ... that Convention rights are to be seen as an expression of fundamental principles rather than a set of mere rules. In applying the principles the courts must balance competing interests.<sup>71</sup>

A good illustration of the practical application of the above approach is found in the speeches of the Law Lords in *R (SB) v Governors of Denbigh High School*.<sup>72</sup> In that case, a female Muslim high school student claimed that her school had excluded her and unjustifiably limited her right to manifest her religion or belief. She expressed the wish to wear a jilbab (a long, coat-like garment) to school, but the school would not permit this breach of its uniform policy. After wide consultation, including with parents and Islamic leaders, the school had earlier approved a uniform option that was widely regarded as satisfying the requirement of modest dress for Muslim girls, but it had not approved the jilbab. In the particular circumstances of that case, a majority

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<sup>67</sup> *Momcilovic* (n 15) 39 [22] (French CJ), citing *Sheldrake v DPP* [2005] 1 AC 264, 297 [21] (Lord Bingham); *Janosevic v Sweden* (2002) 38 EHRR 473.

<sup>68</sup> [2004] 2 AC 72, 84 [9].

<sup>69</sup> [2003] 1 AC 681, 707.

<sup>70</sup> [2003] 1 AC 787, 806 [18] (emphasis in original).

<sup>71</sup> [2004] 1 AC 816, 875 [181].

<sup>72</sup> [2007] 1 AC 100.

of the Law Lords concluded that there had not been an infringement of the student's right to manifest her religion or belief. However, even those who did conclude that her right had been infringed joined with their colleagues in determining that the school was justified in acting as it had. Their Lordships noted that Parliament had intended to allow individual schools to make their own decisions about uniforms and that this was something that the courts should accept.<sup>73</sup> Their Lordships further noted that Denbigh High School legitimately wished to avoid clothes that were perceived by some as signifying adherence to an extreme version of the Muslim religion and to protect girls against external pressures to wear such clothes. The majority of their Lordships expressed agreement with Lord Hoffman that '[t]hese are matters which the school itself was in the best position to weigh and consider'.<sup>74</sup>

The Supreme Court of Canada has also emphasised that the principle of proportionality 'should be applied flexibly, so as to achieve a proper balance between individual rights and community needs'.<sup>75</sup> A similar approach has been adopted by the Supreme Court of New Zealand<sup>76</sup> and by the Constitutional Court of South Africa.<sup>77</sup>

As these authorities demonstrate, an unlawful violation of a human right under the *ICCPR* that is 'entirely practical, reasonable and necessary' amounts to a contradiction in terms. To the extent that there are legislators who think otherwise, it would surely be in the public interest for them to be required at least to turn their minds to the standards from which they propose to depart, and to justify that departure.

#### IV PRACTICAL BENEFITS OF A HUMAN RIGHTS ACT

Australia has signalled its commitment to the human rights recognised in international law by ratifying all of the major United Nations declarations and conventions on human rights. It has asserted a particular commitment to the rights contained in the *ICCPR* by empowering the Australian Human Rights Commission to enquire into alleged breaches of such rights.<sup>78</sup>

A Commonwealth Human Rights Act would help to ensure that the protection of human rights is a cooperative enterprise, with responsibility shared by each of the three branches of government. As Dame Sian Elias (the former Chief Justice of New Zealand) recently said:

<sup>73</sup> Ibid 125 [64] (Lord Hoffmann, Lord Nicholls agreeing at 119 [41], Lord Scott agreeing at 132 [91], Baroness Hale agreeing at 135 [99]).

<sup>74</sup> Ibid 125 [65].

<sup>75</sup> *Ross v New Brunswick School District No 15* [1996] 1 SCR 825, 872 [78] (La Forest J).

<sup>76</sup> *R v Hansen* [2007] 3 NZLR 1, 28 [64] (Blanchard J).

<sup>77</sup> *S v Makwanyane* [1995] ZACC 3, 87 [134] (Chaskalson P).

<sup>78</sup> See, eg, *Australian Human Rights Commission Act 1986* (Cth) s 11(1)(f)(i).

Human rights resonate in law because they are rights. But it would be a big mistake to see human rights simply as rules. Statements of right are points of reference for all society. They provide organising principles of practical help to decision-makers in ensuring equality of treatment and in promoting the values of the rule of law. ...

And in the increasingly pluralist societies in which we live today adherence to values that are shared also seems good policy because we need all the common ground we can find.<sup>79</sup>

While it is for the legislature to set human rights standards in legislation, and for the judiciary to interpret such legislation when it is in dispute, the delivery of human rights in practice is very much the responsibility of the executive.<sup>80</sup> It is the executive that is responsible for the protection of the vulnerable in a day-to-day sense — through the delivery and oversight of services including aged care, health, education and social services. Thus, it is principally through the executive that we in Australia can make our democracy more sensitive to people's rights in concrete and practical ways.

A Commonwealth Human Rights Act would provide a shared and accessible framework within which all public decision-making could be justified. The publication of logical reasons for decisions is no longer a responsibility of the judiciary alone. The modern climate of openness, freedom of information and accountability, facilitated by social media, requires all institutions of government to be able to justify their decisions. Again adopting the words of Dame Sian Elias,

[s]ecuring human rights, like securing the rule of law, is inevitably a whole of government responsibility and the work of many hands. A preoccupation with the role of the judiciary seems ... to miss the point.<sup>81</sup>

The use of human rights as standards for good public administration would be entirely consistent with our existing legal framework. As noted above, the Australian Human Rights Commission is already responsible for conducting inquiries into acts or practices that may be inconsistent with or contrary to any human right recognised by the *ICCPR*.<sup>82</sup> A former Commonwealth Ombudsman has acknowledged that human rights claims are always present, overtly or subtly, in the work of the Ombudsman's

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<sup>79</sup> Dame Sian Elias, 'Human Rights in Middle Age' (Catherine Branson Lecture Series, Flinders University, 5 April 2018) 4–5 <[www.courtsofnz.govt.nz/speechpapers/1CBLT.pdf](http://www.courtsofnz.govt.nz/speechpapers/1CBLT.pdf)>.

<sup>80</sup> See, eg, Devika Hovell, 'Lifting the Executive Veil: Australia's Accession to the First Optional Protocol to the International Covenant on Civil and Political Rights' (2003) 24(2) *Adelaide Law Review* 187.

<sup>81</sup> Dame Sian Elias (n 79) 6.

<sup>82</sup> *Australian Human Rights Commission Act 1986* (Cth) s 11(1)(f)(i).

office and that ‘complaint handling and administrative investigation is a practical and effective way of protecting people’s rights’.<sup>83</sup>

Efforts to protect individuals’ rights would be enhanced by the legal enforceability of rights recognised by Australian domestic law. A Human Rights Act would give both the legislature and the executive, but particularly the executive, the explicit benefit of what has been described as ‘a set of navigation lights’ to ensure that they respect human rights.<sup>84</sup>

The judiciary, which already regularly draws on human rights standards, would also benefit from such standards being recognised in legislation. While fundamental human rights standards are immanent in the common law, their content is contestable and judges invoking them are presently at risk of being charged with judicial overreach.

In short, a Commonwealth Human Rights Act should ensure that all branches of government — the legislature, the executive and the judiciary — demonstrate the application of human rights in practice. This should result in the following outcomes: legislation that is more respectful of rights (particularly the rights of minorities); public administration that is more respectful of individuals and their inherent dignity; and judicial decision-making guided by values that are explicitly endorsed by national legislation.

Of course, at the end of the day, whether human rights are observed will depend on whether they are valued and understood by the wider community. Their statement in an ordinary Act of the Commonwealth Parliament would make them readily accessible to Australians in a way that international conventions, even those which Australia has chosen to ratify, are not. Such an Act would play an important educative role and could be expected to lead to cultural change of the kind that followed the enactment of Australia’s anti-discrimination legislation.

## V CONCLUSION

Across the world, public confidence in democracy is diminishing.<sup>85</sup> In our own country, political power increasingly appears to lie with Prime Ministers, political parties with limited membership, or even with factions sometimes controlled from outside Parliament. Traditional safeguards against the misuse of public power such

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<sup>83</sup> John McMillan, ‘The Ombudsman’s Role in Human Rights Protection: An Australian Perspective’ (Conference Paper, Asian Ombudsman Association Conference, 2–5 November 2009) 7.

<sup>84</sup> KJ Keith, ‘The New Zealand Bill of Rights Experience: Lessons for Australia’ (2003) 9(1) *Australian Journal of Human Rights* 119, 122.

<sup>85</sup> Keith Breene, ‘Millennials are Rapidly Losing Interest in Democracy’, *World Economic Forum* (Web Article, 8 June 2017) <<https://www.weforum.org/agenda/2017/06/millennials-are-rapidly-losing-interest-in-democracy/>>.

as the sense of fair play of Ministers, the professional integrity of public servants, the influence of a free and vigorous press and a well-informed public opinion no longer seem adequate to support public confidence in our system of government.

On the other hand, as reports of the most vulnerable members of our society being treated in wholly unacceptable ways become more common, there is increasing public recognition of the need for basic human rights to be recognised and protected.

I am persuaded that we can improve our national institutions — that we can make them more sensitive to people's rights and needs and limit the number and severity of occasions when human dignity is disregarded.

The time is right for Australia to abandon its exceptionalism with respect to human rights protections. We should join other comparable western liberal democracies by ensuring their legal enforceability.

