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RIGHTS PROTECTION: THE BILL OF RIGHTS DEBATE AND RIGHTS PROTECTION IN AUSTRALIA'S STATES & TERRITORIES

ABSTRACT

Australia is distinguished among common law countries by the fact it does not have a federal bill of rights. We consider the factors contributing to the increasingly vocal call for a national bill of rights, and which help explain the successful move to introduce rights legislation in the ACT and Victoria. As well as charting the history of bill of rights initiatives at federal, state and territory levels, we review some of the parliamentary forms of rights protection currently in place in the states and territories.

I INTRODUCTION

Without a national bill of rights, Australia is an anomaly among comparable common law countries. But at least until the 1960s, Australia's refusal to adopt a bill of rights had many high profile defenders, including eminent jurists such as Sir Owen Dixon, and political leaders like Sir Robert Menzies. In 1944, Dixon pointed out to the American Bar Association that the framers of the Australian constitution, although otherwise considering the American constitution 'an incomparable model', were not prepared 'to place fetters upon legislative action, except and in so far as it might be necessary for the purpose of distributing between the States and the central Government the full content of legislative power'. This was due to a 'steadfast faith in responsible government and in plenary legislative powers distributed, but not controlled'.[1] In a series of public lectures he gave at the University of Virginia in 1967, Menzies went further in embellishing our faith in responsible government which, he claimed, 'is regarded by us as the ultimate guarantee of justice and individual rights'. Menzies boasted that under our system of responsible government and the common law, he could say 'without hesitation' that 'the rights

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1 Sir Owen Dixon, 'Two Constitutions Compared' in Judge Woinarski (ed), *Jesting Pilate and Other Papers and Addresses* (1965) 101-2.

of individuals in Australia are as adequately protected as they are in any other country in the world'.[2]

In the decades since then there have been notable initiatives in rights protection. At the Commonwealth level, for example, the administrative law regime introduced in the 1970s[3] after the influential Kerr Committee report[4] has helped ensure that public officials make reasonable decisions, and gives those affected a right of review.[5] Federal, state and territory governments have also introduced wide-ranging anti-discrimination legislation, and since the mid 1980s the Human Rights and Equal Opportunity Commission has played a high profile role as anti-discrimination and rights advocate. Nevertheless, Australians today are less confident 'in legislative powers distributed, but not controlled', and many have lost faith in the efficacy of responsible government and the common law for protecting rights. This can be seen in a significant change of heart in favour of legislative bills of rights, in particular in the states and territories, but also manifested in growing support for the federal bill of rights campaign currently spearheaded by on-line magazine, *New Matilda*.[6] Yet it remains an open question whether bills of rights make much difference, especially in the long term, to the quality of rights protection in the context of otherwise hostile political cultures.[7] Clearly, bills of rights will not alone ensure sturdy and broad based rights protection.[8] Thus while we consider here the reasons for the current ferment around bills of rights, and review a range of bill of rights initiatives, we also survey some of the mechanisms for protecting rights which currently exist in the states and territories. These are mechanisms whose efficacy Australians have

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2 Sir Robert Menzies *Central Power in the Australian Commonwealth* (1967) 52, 54.

3 Through the *Administrative Decisions (Judicial Review) Act 1977* (Cth).

4 Commonwealth Administrative Review Committee, *Commonwealth Administrative Review Committee Report* (1971).

5 Recently, Professor Robin Creyke concluded 'Australia is blessed with a system of administrative law which is well equipped to protect the rights and interests of concern to its citizens'. ('The Performance of Administrative Law in Protecting Rights', in Tom Campbell, Jeffrey Goldsworthy and Adrienne Stone (eds) *Protecting Rights Without a Bill of Rights* (2006) 101, 131.)

6 <http://www.humanrightsact.com.au> at 21 September 2007.

7 Our broader project, 'The politics of rights' takes Australia's anomalous status among common law countries as the starting point for a comparative analysis which considers the influence of parliamentary and political rights protection mechanisms, and also the relative influence of bills of rights in countries such as Britain, Canada, New Zealand, and the US. Our research to date remains inconclusive concerning the important empirical question of the influence of bills of rights, but demonstrates the continuing importance of parliamentary and political forms of protection, even in bill of rights countries.

8 Nevertheless, campaigns for bills of rights may in themselves play a valuable role — educating the public about rights issues and the institutional arrangements, including rights legislation, which can affect rights. If the community is well educated about rights, it is likely to contribute to a political culture generally which is more respectful of rights.

cause to be concerned about, but which are in danger of being ignored by the current focus on bills of rights.[9]

II BILLS OF RIGHTS

A *Recent successes, future hurdles: the bill of rights campaign*

The reasons for the marked shift we are witnessing in favour of bills of rights are complex, but certain factors have played a particularly significant role. In an 'age of rights', in which diverse claims for recognition and social justice, and for redress of grievances large and small, are all couched in the language of rights, countries without bills of rights seem perversely out of touch with the spirit of the times. Since New Zealand (in 1990) and Britain (in 1998) joined Canada in adopting national human rights legislation, Australia has been isolated by its continued reliance on traditional parliamentary rights protection. Legal practitioners and members of the judiciary who deal in rights protection have changed their minds on the bill of rights issue, as Sir Anthony Mason famously did in 1988, observing that Australia was going against the international trend and out of step with comparable countries like Canada.[10] Now a new generation of academic lawyers are leading the drive for bills of rights.

They are doing so in the context of widespread scepticism about parliamentary democracy in Australia. Harry Evans, Clerk of the Senate and leading proponent of federalism and bicameralism, warned in 2006 of the dangerous 'tendency to power concentration and one-person government' that 'has proceeded further in Australia than in its sister countries in the so-called Westminster world'.[11] According to Evans, not only has Australia 'the weakest parliament of all comparable countries', but the concentration of power in Australia has led to 'the virtual destruction of federalism'.[12] Evans' opinion seems to have been forcefully confirmed by the High Court's decision upholding the Howard government's industrial relations

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9 Although notable, this tendency to focus on bills of rights is not without exception. Carolyn Evans, Simon Evans, and Kris Walker, for example, are currently collaborating on an Australian Research Council funded project on Australian Parliaments and Human Rights. See Simon Evans, 'Improving Human Rights Analysis in the Legislative and Policy Processes', (2005) 1 *Melbourne University Law Review* 665.

10 'A bill of rights for Australia?' (1989) 5 *Australian Bar Review* 79. For a more recent account of Mason's position, see Gareth Griffith, *A NSW Charter of Rights? The Continuing Debate*, NSW Parliamentary Library Research Service, Briefing Paper No 5 (2006) 5, 7-8.

11 Harry Evans, 'Monarchical and Parliamentary Government in Australia', Insurance Council of Australia Conference, Canberra, 10 August 2006, 2. Available on the Australian parliamentary website < http://www.aph.gov.au/senate/pubs/index.htm> at 21 September 2007.

12 Ibid.

legislation.[13] The decision has implications for states' rights and the future of federalism well beyond the arena of industrial relations,[14] and prompted well known constitutional commentator Greg Craven to call the day on which judgment was handed down, 'a black day for federalism.'[15] Finally, concern about the health of Australia's democratic institutions has been heightened over the past few years by the aggressive use of executive power in the arena of refugee policy, and by the extraordinary measures adopted under the rubric of the 'war against terrorism'.[16]

Suddenly it has become much more difficult to find eminent defenders of Australia's bill of rights isolationism, and much easier to find outspoken supporters of rights legislation. Among the latter is Malcolm Fraser, senior statesman and Liberal prime minister from 1975 to 1983, who was highly critical of the Howard government's security measures and its treatment of refugees (both areas in which some of the most significant developments received bipartisan support), and who sees a bill of rights as an important avenue of redress.[17] The role of individual politicians and academics is significant: among them Jon Stanhope in the ACT, Rob Hulls in Victoria, Professor Hilary Charlesworth at ANU, and Professor George Williams at UNSW. They have been assisted by the support of law schools and many in the legal fraternity, as well as by an increasingly determined grass roots campaign in which the involvement of the churches has been notable. Support from individuals and groups such as the churches and *New Matilda* also appears to be closely associated with concern over Australia's treatment of asylum seekers, and the impact on civil liberties of anti-terrorism and other legislation enacted since September 11, 2001.[18] Public support more generally appears to reflect the level of

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13 *New South Wales v Commonwealth of Australia* (2006) 231 ALR 1.

14 George Williams, 'Goodbye to states' rights', *The Age* (Melbourne), 15 November 2006, 17.

15 Quoted in Kenneth Nguyen, 'A weapon that may return to skewer the Liberals, conservatives warn', *The Age* (Melbourne), 15 November 2006, 2.

16 Griffith, above n 10, 4-7.

17 With Julian Burnside, Robert Manne, and Hugh Evans, among others, Fraser founded 'The Justice Project' in 2004. According to the Project's website, it 'arose out of concerns regarding the violation of the basic human rights of refugees, asylum seekers and others needing humanitarian protection', and aims, among other things, 'to facilitate the adoption of a Charter or Bill of Rights in as many States and Territories as possible, leading to a Federal Charter or Bill of Rights.' The website adds, 'It is our strong view that Human Rights legislation in every Australian jurisdiction is more necessary than ever as a safeguard against excessive or inappropriate use of executive authority. The recently introduced anti-terrorism and industrial relations legislative changes cause us particular concerns in this regard.' Fraser launched *New Matilda*'s draft Human Rights Bill in Sydney in October 2005. <http://www.thejusticeproject.com.au/overview.htm> at 15 November 2006; the website has subsequently been updated: <http://www.thejusticeproject.com.au> at 5 October 2007.

18 See Susan Ryan, 'The *New Matilda* Human Rights Act Campaign' (Paper presented at the conference, 'Australian Bills of Rights: The ACT and Beyond', ANU, Canberra, 21 June 2006); George Williams, 'The Victorian Charter of Rights and

education in the community about rights — thus the effort (which we discuss below) the Charlesworth and Williams Consultative Committees invested in engaging the community was rewarded by strong backing in the ACT and in Victoria for bills of rights.

Among the political parties, the Greens and the Democrats have historically provided consistent support for bills of rights, while Labor has generally been more supportive than the Liberal party,[19] though not necessarily an active advocate. The Labor party's stance on this issue has changed in some cases at the territory and state level, and the federal party is also increasingly supportive. This is an area which provides Labor with an opportunity to differentiate itself from the Liberal party, an issue which was until recently particularly important for the state and territory Labor leaders, who not only supported the Howard government's anti-terrorism initiatives (ACT Chief Minister Jon Stanhope is the exception here; although even his resistance has been limited), but in many cases outstripped them. While Prime Minister Kevin Rudd has refused to commit to a bill of rights, Robert McClelland has promised to engage the community in consultation over the issue. Politicians on both sides of the political divide have expressed support for a bill of rights, including Liberal senators Brandis and Mason.

John Howard, on the other hand, consistently stated his 'resolute opposition' to a federal bill of rights. In 2003, for example, he said

> there is a frequent debate as to whether or not this nation should endeavour to in some way entrench formally in its law a Bill of Rights. I belong to that group of Australians who is resolutely opposed to such a course of action. It is my view that this nation has three great pillars of its democratic life. A vigorous Parliamentary system, robustly Australian, responsible for the making of laws; a strong, independent and incorruptible judiciary; and a free and sceptical media.[20]

More recently, in his 2006 Australia Day address, the then Prime Minister argued that adopting a rights bill,

> would be a big mistake for our democracy … No matter how skilfully crafted, a Bill of Rights always embodies the potential for misinterpretation, un-intended consequences or accidental exclusion. History is replete with

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Responsibilities' (Paper presented at the conference, 'Australian Bills of Rights: The ACT and Beyond', ANU, Canberra, 21 June 2006).

19 Brian Galligan & Ian McAllister, 'Citizen and Elite Attitudes towards an Australian Bill of Rights' in Brian Galligan & Charles Sampford (eds), *Rethinking Human Rights* (1997) 144-153.

20 John Howard, Address at Ceremonial Sitting to Mark the Centenary of the High Court of Australia, Supreme Court of Victoria, Melbourne, 6 October 2003. Available at <http://www.pm.gov.au/media/Speech/2003/speech514.cfm> at 21 September 2007.

> examples of where grand charters and lyric phrases have failed to protect the basis rights and freedoms of a nation's citizens[21]

He went on to claim that the 'strength and vitality of Australian democracy rests on [the] three great institutional pillars' to which his earlier, 2003 address referred.[22] It is not surprising, then, that his Government has reacted with hostility to moves by the states and territories to introduce rights legislation. Howard promised to 'fight the [states'] campaigns fiercely'.[23] Attorney-General Philip Ruddock said the introduction of a range of different rights instruments in the states and territories would lead to inconsistency.[24] He suggested instead that the federal Human Rights and Equal Opportunity Commission ('HREOC') might play a role, if requested to do so by premiers, in checking state and territory legislation for consistency with international human rights instruments. In emphasising the 'undemocratic' impact of bills of rights, Ruddock said the European Human Rights Convention had impeded Britain's ability to legislate freely in relation to immigration and security.[25] HREOC Commissioner Graeme Innes responded to Ruddock's comments by pointing out there is very little incentive for governments to act on the Commission's non-binding findings, and its reports and submissions had in fact been repeatedly ignored by the Howard Government.[26]

Concern with rights protection and a bill of rights in Australia historically focused mainly on the Commonwealth. But confronted until recently by the Howard Cabinet's implacable opposition to a bill of rights, attention shifted to the states and territories. As noted already, while state and territory governments have also adopted extraordinary anti-terrorism legislation, they have been politically more amenable to the adoption of bills of rights. Before examining rights protection in the states and territories in more detail, we outline briefly the cycles of interest in a Commonwealth bill of rights.

B *Federal Bill of Rights Initiatives*

The debate over whether Australia should adopt a bill of rights has captured public attention intermittently, and slipped on and off the political agenda, ever since the original Constitutional Conventions. In 1929 a commonwealth parliamentary

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21 John Howard, 'A sense of balance: The Australian Achievement in 2006', Address to the National Press Club, Parliament House, Canberra, 25 January 2006. Available at http://www.pm.gov.au/media/Speech/2006/speech1754.cfm at 21 September 2007,

22 Ibid,

23 Malcolm Farr, 'State rights push wrong — Ruddock slams campaign', *The Daily Telegraph* (Sydney), 7 April 2006, 17.

24 Ibid.

25 Ibid.

26 Graeme Innes, 'The Human Rights and Equal Opportunity Commission and the Protection of Human Rights at the Federal Level' (Paper presented at the conference, 'Australian Bills of Rights: The ACT and Beyond', Canberra, 21 June 06).

enquiry rejected a bill of rights proposal,[27] while the 1944 Constitution Alteration (Post-war Reconstruction and Democratic Rights) Bill proposed by Labor Attorney-General H V Evatt was defeated in a national referendum.[28] In 1959 the Commonwealth *Joint Committee on Constitutional Review* rejected a proposal to entrench rights, but did recommend a constitutional amendment relating to voting in order to strengthen 'democratic processes'. The Committee commented that '[t]he absence of constitutional guarantees in the Commonwealth Constitution had not prevented the rule of law from characterizing the Australian way of life.' It also considered that, 'as long as governments are democratically elected and there is full parliamentary responsibility to the electors, the protection of personal rights will, in practice, be secure in Australia.'[29]

The Human Rights Bill introduced to the Senate by Labor Attorney-General Lionel Murphy in 1973 would have implemented Australia's obligations under the *International Covenant on Civil and Political Rights* ('ICCPR'),[30] and bound both states and commonwealth. It lapsed, however, when Federal Parliament was dissolved in 1974.[31] In 1984 Gareth Evans, then Attorney-General in the Hawke Labor government, had a bill of rights drafted that, while also based on the ICCPR, was a weaker version of the Murphy Bill, providing — he said — 'a shield rather than a sword'.[32] The Bill, which Evans did not intend to be publicly debated until after that year's election, was attacked by Queensland Premier Joh Bjelke-Peterson, who had obtained a copy, and was abandoned by the Hawke government when it won the election. Subsequent Labor Attorney-General, Lionel Bowen, tried again with the Australian Bill of Rights Bill 1985, also modelled on the ICCPR, but in more restricted form. The Bill was passed in the House of Representatives and debated extensively in the Senate, but ultimately withdrawn by the Government.[33] In 1988 the Constitutional Commission recommended the adoption of an extensive bill of rights, along the lines of Canada's *Charter*, which would be entrenched in a new chapter of the *Constitution*.[34] Prior to the release of the Commission's final report, however, the Hawke government had already put four proposals for change

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27 David Malcolm, 'Does Australia Need a Bill of Rights?' (1998) 5(3) *E Law - Murdoch University Electronic Journal of Law* [1] <http://www.murdoch.edu.au/elaw/indices/issue/v5n3.html> at 15 November 2006.

28 Constitutional Commission, Commonwealth, *Final Report of the Constitutional Commission*, Volume One (1988) 456.

29 (1959) 47, 328, quoted by the Constitutional Commission, ibid.

30 *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976).

31 Constitutional Commission, above n 28, 456.

32 'The Australian Bill of Rights Bill: Explanatory Material' (20 June 1984) 16 <http://www.aph.gov.au/library/intguide/law/rights1984em.pdf> at 15 November 2006.

33 Constitutional Commission, above n 28, 456-458.

34 Ibid 476-637.

to a referendum.[35] Two of these had direct rights implications. One sought to include an express right to vote in the *Constitution*, and to guarantee 'one vote one value', while the other sought to strengthen three existing constitutional rights protections by guaranteeing trial by jury for offences carrying jail terms of more than two years; ensuring 'just terms' in the acquisition of property by the states or territories, as well as the commonwealth; and guaranteeing religious freedom under state or territory as well as commonwealth laws. The proposals were overwhelmingly rejected.[36] As a result, no attempt was made to implement the Constitutional Commission's report.

In the 1990s, the bill of rights debate was revived in the lead up to the constitutional centenary celebrations in 2001.[37] While the main focus of discussions surrounding the centenary celebrations concerned whether Australia should become a republic, in 1998 the then Chief Justice of Western Australia, David Malcolm claimed 'a Bill of Rights has begun to loom large as one of the component parts of an overall package of recommended reforms.'[38] According to Malcolm, a series of conferences organised around constitutional centenary landmarks in the 1990s generated support for the entrenchment of basic rights.[39] The bill of rights campaign seems to have been gathering momentum ever since this time.

C *Territory and State Bill of Rights Initiatives*

One of the advantages of a federal system is that it provides multiple centres of government and allows experimentation to occur in one or other jurisdiction. Other jurisdictions can learn from experience elsewhere: copying successful innovations, modifying others to correct problems or tailoring them to suit their purposes; or rejecting them. Moreover, a federal system provides multiple entry points for activists and citizens to influence policy: if one arena is uncongenial or their entry blocked, people and groups can shift their attention and action to another sphere of government. Environmentalists did this in the 1980s by extending their campaign to the mainland and securing support from the incoming Hawke government to prevent the Franklin River from being damned by the Tasmanian government. And bill of rights activists have done this in recent years by switching attention back to the states and territories. The focus on achieving rights legislation at the state and territory level has paid off, with the ACT adopting its *Human Rights Act* in 2004,

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35 The proposals were contained in the Constitution Alteration (Rights and Freedoms) Bill 1988 (Cth), and the referendum was held on 3 September 1988. Australian Parliamentary Library, *Attempts at a federal Bill of Rights* <http://www.aph.gov.au/library/intguide/law/civlaw.htm#bill> at 27 February 2006.

36 Ibid.

37 Malcolm, above n 27, 1. See also the report of the Sessional Committee on Constitutional Development, Legislative Assembly of the Northern Territory, *A Northern Territory Bill of Rights?* (1995) 10.

38 Malcolm, above n 27, 1.

39 Ibid.

and Victoria introducing the *Charter of Human Rights and Responsibilities Act 2006* (Vic). In the following, we review the various state and territory regimes.

1 *Australian Capital Territory*

In 2004 the Australian Capital Territory became the first Australian jurisdiction to succeed in enacting a bill of rights. The *Human Rights Act 2004* (ACT) was preceded by an exhaustive process of community engagement, beginning in 2002 with the Stanhope Labor Government's appointment of a Bill of Rights Consultative Committee, headed by Hilary Charlesworth.[40] The Committee sent a pamphlet about its inquiry to every household in the ACT, published and distributed an Issues Paper, convened a number of public meetings, met with a wide range of community groups, sponsored a series of seminars on the issues relating to Bills of Rights, and conducted a deliberative poll of 200 randomly selected ACT residents. It received 145 written submissions. Of all those consulted, 60 per cent favoured a Bill of Rights.[41] In its May 2003 Report the Committee recommended the adoption of a Bill of Rights and presented its draft Human Rights Act.[42] The *Human Rights Act 2004* (ACT) diverges from the Consultative Committee's draft Act in that rights protection is limited to civil and political rights (largely those contained in the ICCPR) — the Government declined to adopt the Committee's recommendation that rights protection extend to economic, social and cultural rights.

The *Human Rights Act 2004* (ACT) is in many respects similar to the *Human Rights Act 1998* (UK). Both are ordinary pieces of legislation which can be amended or repealed. Both protect civil and political, but not economic, social, or cultural rights. Both require courts to interpret other legislation in a manner which is 'as far as possible' consistent with the rights they cover, and both allow courts to make a 'declaration of incompatibility' in cases in which conflicts arise. These declarations do not, however, affect the enforceability of the inconsistent legislation. Parliament may choose, but is not required, to amend legislation which is the subject of a declaration. Section 28 of the ACT Act states that the rights it protects are not absolute, although it requires that any limits on rights are reasonable and 'can be demonstrably justified in a free and democratic society', a formula borrowed from the *Canadian Charter of Rights and Freedoms*. Like the UK *Human Rights Act*, the ACT Act imposes scrutiny requirements on new legislation (to determine if the proposed legislation is consistent with protected rights), but unlike the UK Act it

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40 A decade earlier, the ACT's Attorney-General's department has circulated an Issues paper, *A bill of rights for the ACT?* (1993) inviting submissions in relation to various bill of rights models. The following year, 'a bill in the form of an exposure draft for an ACT Bill of Rights was circulated.' Sessional Committee on Constitutional Development, Legislative Assembly of the Northern Territory, above n 37.

41 ACT Bill of Rights Consultative Committee, *Towards an ACT Human Rights Act* (2003).

42 Ibid.

does not provide individual rights of action or remedies. During its first years of operation the Act has not had a significant impact in the courts, where it has been raised only infrequently.[43] Its influence has been felt primarily in relation to parliamentary processes, and in particular in the drafting of new legislation.[44]

The ACT's Chief Minister Jon Stanhope points out that where critics of the *Human Rights Act* originally prophesied general doom as a consequence of the Act's introduction (suggesting, for example, the ACT would become a magnet for the nation's criminals), they now tend to focus on the claim the Act has had little discernable effect.[45]

2 *Northern Territory*

In the Northern Territory, attention has focused mainly on extending self-government through the achievement of full statehood, with consideration of a bill of rights a part of this process. In its 1987 report, *Discussion Paper on a Proposed New Constitution for the Northern Territory*,[46] the Territory's Select Committee on Constitutional Development raised the issue of whether a new constitution should contain human rights provisions, and considered the arguments for and against bills of rights, but did not make any recommendations in this regard.[47] The majority of respondents to the *Discussion Paper* subsequently expressed support for an entrenched bill of rights.[48] The Select Committee's successor, the Sessional Committee on Constitutional Development, considered the bill of rights question directly in its 1995 discussion paper, *A Northern Territory Bill of Rights?*, but did not reach a conclusion concerning the need for a bill of rights. While the Sessional Committee's Final Draft Constitution for the Northern Territory, tabled in 1996, did not include a bill of rights as such, it provided that Territorians should not

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43 Gabrielle McKinnon, 'The ACT Human Rights Act—The Second Year' (Paper presented at the conference, 'Australian Bills of Rights: The ACT and Beyond', Canberra, 21 June 2006); Gabrielle McKinnon, 'The ACT *Human Rights Act 2004*—The First Year' (Paper presented at the conference, 'Assessing the First Year of the ACT *Human Rights Act*', Canberra, 29 June 2005).

44 Ibid; see also Renee Leon, 'The ACT Human Rights Act—The Second Year' (Paper presented at the conference, 'Australian Bills of Rights: The ACT and Beyond', Canberra, 21 June 2006).

45 'Australian Bills of Rights — The ACT and Beyond' (Speech delivered at the conference, 'Australian Bills of Rights: The ACT and Beyond', Canberra, 21 June 2006).

46 Select Committee on Constitutional Development, Legislative Assembly of the Northern Territory, *Discussion Paper on A Proposed New Constitution for the Northern Territory* (1987).

47 See the report of the Sessional Committee on Constitutional Development, Legislative Assembly of the Northern Territory, above n 37, 5-7, discussing the earlier report.

48 Ibid 7.

'unreasonably' be denied language, social, cultural, and religious rights.[49] Other sections relevant to rights protection included those relating to the institutions of representative democracy, the independence of the Supreme Court,[50] some Aboriginal rights, including the right to self-determination 'in daily life',[51] and a section requiring just terms in the acquisition of property.[52] The Sessional Committee was not reconvened after 1997's Legislative Assembly elections.[53]

In 1998 a Constitutional Convention (the 'Statehood Convention') was convened, and tabled another draft constitution.[54] The Statehood Constitution also provided limited protection for social, cultural, and religious freedoms, subject to 'reasonable regulation…in the public interest'.[55] And it provided for the incorporation, through a process of negotiation, of aspects of Aboriginal customary law into the State's laws, with the aim of 'harmonising' customary and State law.[56] In the same year, however, an indicative referendum on statehood for the Territory was held and statehood was voted down.[57] In 2003 the Territory's Labor Government announced a renewed push for statehood based on community engagement and education over a number of years.[58] The Statehood Steering Committee was established in 2005 to assist in securing public support for statehood and a new constitution, but its terms of reference make no mention of the bill of rights issue.[59] The Territory plans to hold another referendum on statehood in 2008, coinciding with the 30th anniversary of self-government in the Territory.[60]

3 *Victoria*

Victoria is the first state to break ranks and adopt a bill of rights, and its experiment will be closely watched by the other states. Victoria's move follows decades of public discussion of rights protection and debate around the need for a bill of rights.

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49 Sessional Committee on Constitutional Development, Legislative Assembly of the Northern Territory, *Final Draft Constitution for the Northern Territory* (1996) pt 8.

50 Ibid s 6.2.

51 Ibid ss 2.1.1, 7.1, 7.2, 7.3 and 11.2.

52 Ibid s 3.1(3).

53 Standing Committee on Legal and Constitutional Affairs, Legislative Assembly of the Northern Territory, *Milestones in the Constitutional History of the Northern Territory 1824-2005*.

54 Legislative Assembly of the Northern Territory, Draft Constitution for the State of the Northern Territory (1998).

55 Ibid (1998) pt 7.

56 Ibid s 6.3.

57 Standing Committee on Legal and Constitutional Affairs, above n 53.

58 Ibid.

59 Standing Committee on Legal and Constitutional Affairs, Legislative Assembly of the Northern Territory, *Terms of Reference — Northern Territory Statehood Steering Committee* (2004, amended 2005).

60 Standing Committee on Legal and Constitutional Affairs, above n 53.

Victoria's Legal and Constitutional Committee, established in 1985, released its *Report on The Desirability or Otherwise of Legislation Defining and Protecting Human Rights* in 1987. While the Committee concluded that 'Parliament and the Courts were simply unable to adequately discharge their obligations as the protectors of human rights', it was unable to reach consensus on the appropriate response to this situation. Some members argued in favour of 'an entrenched and judicially enforceable Bill of Rights, subject to an override clause of the Canadian type; but other members were opposed to a system that entailed judicial enforcement.'[61] Ultimately the Committee supported the inclusion of a non-binding declaration of rights and freedoms in the *Constitution Act 1975* (Vic), and recommended the establishment of additional parliamentary review mechanisms.[62] The proposed declaration was introduced into Parliament but never became law. The Committee's Report did, however, result in the creation in 1992 of the Scrutiny of Acts and Regulations Committee.[63]

In 2001 the Constitution Commission was established to consider constitutional reform that might improve governance in the state, and particularly the ability of the Legislative Council to act 'as a genuine House of Review.'[64] The Commission engaged in extensive community consultations throughout Victoria, and received over 150 written submissions.[65] The Commission's final report, *A House for Our Future* was released in June 2002 and recommended changes to the state's electoral system including the introduction of proportional representation in the Upper House. It also recommended that the Legislative Council's committee system be strengthened. In addition, it recommended that a number of core provisions in the Constitution be entrenched, and that human rights be adopted as 'guiding principles' in the Constitution.[66] The Commission's human rights recommendations were not adopted, but some of its other recommendations were subsequently acted upon with the passage of the *Constitution (Parliamentary Reform) Act 2003* (Vic), part of the Bracks Labor government's reform of the electoral system for the Legislative Council.[67]

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61 Constitutional Commission, above n 28, 460.

62 Ibid.

63 Human Rights Consultation Committee, Victoria, *Have your say about human rights in Victoria: Human rights consultation community discussion paper* (2005) 27.

64 Constitution Commission Victoria, *Final Report: A House for Our Future*, *'Terms of Reference'* (2002) 5 Victorian Department of Premier and Cabinet <http://www.dpc.vic.gov.au/CA256D8000265E1A/page/Listing-Publications-Constitution+Commission+Publications> at 15 November 2006.

65 Victorian Department of Premier and Cabinet, *Constitution Commission Publications* (2002) <http://www.dpc.vic.gov.au/CA256D8000265E1A/page/Listing-Publications-Constitution+Commission+Publications> at 15 November 2006.

66 Constitution Commission Victoria, above n 64.

67 Victorian Department of Premier and Cabinet, *Constitution (Parliamentary Reform) Act 2003*,

In 2005 the Bracks government announced its provisional commitment to the introduction of human rights legislation, subject to significant public support. It established a Human Rights Consultation Committee, headed by George Williams, 'to make recommendations on a suitable framework for human rights in Victoria'.[68] It noted, however, that it was 'concerned to ensure that the sovereignty of Parliament is preserved in any new approaches that might be adopted to human rights', and also expressed its desire that any Charter or Bill of Rights be restricted to civil and political rights.[69] The 'Visions for Victoria' coalition, a joint initiative of the Victorian Council of Social Service, Victorian Trades Hall Council, the Victorian Council of Churches, and the Ethnic Communities Council of Victoria, expressed its dissatisfaction with the proposed consultative process, saying the Government had illegitimately limited the scope of the consultation by specifying its intention to limit legislative protection of rights to civil and political rights.[70] Nevertheless, it supported the introduction of rights legislation while advocating strongly for the inclusion of economic, social, and cultural rights. The Consultation Committee held 55 public meetings across the state and received just over 2,500 submissions, mostly from individuals. 84 per cent of submissions favoured the introduction of some form of legislation to protect human rights in Victoria. In its November 2005 report, *Rights, Responsibilities and Respect*, the Committee recommended the adoption of a legislative Charter to protect civil and political rights (largely those contained in the ICCPR).

The *Charter of Human Rights and Responsibilities Act 2006* (Vic) became law on 25 July 2006 and took effect on 1 January, 2007.[71] Like the ACT's *Human Rights Act*, the Charter is not entrenched in any way. Under the Charter all new legislation must include statements of human rights compatibility,[72] or alternatively, an express declaration that the legislation is to have effect despite being incompatible with Charter rights (an 'override declaration').[73] The Charter requires courts to interpret legislation in a manner compatible with protected rights, in so far as it is possible to do so consistently with the purpose of the legislation.[74] The Supreme Court may make a declaration of inconsistent interpretation in cases in which legislative provisions are found to be inconsistent with the Charter.[75] The declaration is given

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<http://www.dpc.vic.gov.au/CA256D8000265E1A/page/Listing-Publications-Constitution+(Parliamentary+Reform)+Act+2003> at 15 November 2006.

68 Department of Justice, Victoria, *Human Rights in Victoria: Statement of Intent* (2005).

69 Ibid.

70 Fergus Shiel, 'State accused of reneging on human rights charter', *The Age* (Melbourne), 20 June 2005, 5.

71 Except Divisions 3 and 4 of Part 3, which came into operation on 1 January 2008; *Charter of Human Rights and Responsibilities Act 2006* (Vic) s2(2).

72 *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 28.

73 Ibid s 31.

74 Ibid s 32.

75 Ibid s 36.

to the Attorney-General[76] who must then give a copy to the Minister responsible for administering the legislation which is the subject of the declaration.[77] The Minister must then prepare a written response to the declaration, and present the response and the declaration to Parliament,[78] but Parliament is not obliged to act on it, and declarations of inconsistent interpretation do not invalidate the subject legislation.[79] Charter rights are expressed to be subject 'only to such reasonable limitations as can be demonstrably justified in a free and democratic society based on human dignity, equality and freedom'.[80] The Charter requires all public authorities, including private bodies performing public functions, to comply with its provisions.[81] Courts may make a declaration that a public authority has acted unlawfully under the Charter, and may issue an injunction to prevent further unlawful conduct,[82] but there is no entitlement to individual damages.[83]

When the Government announced its intention to introduce the *Charter of Rights and Responsibilities Act*, the shadow Attorney General Andrew McIntosh ridiculed it as absurd because 'it was not enforceable by the courts and could be changed or ignored if it suited the Government's political imperative.'[84] Outrage was widespread among conservative commentators.[85] In one notable case, the *Herald Sun* published an article under the headline 'Lawyers warn of killer MP's', concerning the possibility that former prisoners, including those convicted of rape or murder, would be entitled to run for parliament as a result of the Charter's protection of the right to take part in public life.[86]

The Charter was preceded in Victoria by the Hume City Council's 'Inaugural Citizens' Bill of Rights', adopted as council policy in March 2004. The Bill is the first of its kind at the level of local government in Australia. While it does not have

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76 Ibid s 36(6).
77 Ibid s 36(7).
78 Ibid s 37.
79 Ibid s 36(5)(a).
80 Ibid s 7.
81 Ibid s 38.
82 Simon Evans, 'The Victorian Charter of Rights and Responsibilities and the ACT Human Rights Act: Four Key Differences and their Implications for Victoria' (Paper presented at the conference, 'Australian Bills of Rights: The ACT and Beyond', Canberra, 21 June 2006) 12-13.
83 *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 39(3).
84 Fergus Shiel, 'Victoria to get human rights charter', *The Age* (Melbourne), 21 December 2005, 9.
85 Williams, above, n 18.
86 Jacqueline Freegard, 'Lawyers warn of killer MPs', *Herald Sun* (Melbourne), 31 May 2006, 31; cited by Williams, ibid. The right to take part in public life is protected by s 18 of the Charter.

the status of a by-law, it expresses the council's commitment to democratic rights, including the right to vote and to political representation.[87]

4 *New South Wales*

In New South Wales, the Standing Committee on Law and Justice established by then Labor Premier Bob Carr — himself a vocal opponent of bills of rights — counselled against the adoption of a bill of rights in its 2001 report, recommending instead the establishment of a parliamentary committee to scrutinise new legislation for human rights compliance.[88] While the Committee recognised the need to improve rights protections in NSW, it argued the protections provided by a bill of rights were likely to be marginal, and achieved at the cost of

> a fundamental change in the relationship between representative democracy, through an elected Parliament, and the judicial system. The independence of the Judiciary and the supremacy of Parliament are the foundations of the current system; both begin to alter under a Bill of Rights.[89]

The Committee also appeared to accept the view of many bill of rights opponents that a bill of rights encourages excessive litigation. It quoted Premier Carr's claim that the New Zealand *Human Rights Act (1993)* had given 'lawyers a new source of technicalities to allow the guilty (including those who have confessed or were found with large quantities of drugs in their possession) to go free',[90] and his rhetorical challenge to bill of rights advocates: 'While the Courts are swamped with thousands of Bill of Rights cases, where will the ordinary person go for justice?'.[91] Carr's faith in 'community values' was also quoted

> In reality, it is not a 'bill of rights' which protects rights. Nor can the courts alone adequately protect rights. The protection of rights lies in the good sense, tolerance and fairness of the community. If we have this, then rights will be respected by individuals and governments, because this is expected behaviour and breaches will be considered unacceptable. A bill of rights will only have the effect of turning community values into legal battlefields, eventually undermining the strength of those values.[92]

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87 Gilbert + Tobin Centre of Public Law, *Bills of Rights at the Local Government Level* (2006) <http://www.gtcentre.unsw.edu.au/Resources/bor/localGovernmentLevel.asp> at 1 February 2006.

88 Standing Committee on Law and Justice, NSW Legislative Council, *A NSW Bill of Rights* (2001).

89 Ibid 110.

90 Ibid 98.

91 Ibid 99.

92 Ibid 86.

The Committee's conclusions were, however, at odds with the response to its public inquiry, with 68 per cent of submissions supporting a bill of rights for NSW.[93]

In March 2006, Labor Attorney-General Bob Debus announced his support for a Charter of Rights based on the ACT's *Human Rights Act*. He said there was a need for a Charter given the passage by Government of extraordinary security legislation directed at terrorism. While he claimed this legislation was justified, and that it had the support of the community, he also said a Charter of Rights would enable the community to tell Parliament the values and rights it should protect.[94] He also commented on the need to encourage tolerance in the aftermath of the December 2005 Cronulla riots saying, '[a] charter [will] hopefully help to remind the community that all people in society have equal rights.'[95] While Premier Morris Iemma said he did not support a 'full-blown bill of rights', he said he would consider the Charter proposal. The Liberal Opposition's legal affairs spokesman, Chris Hartcher, expressed his opposition to both bills and charters of rights. He was reported as saying an 'ACT-style charter of rights' would only serve to 'drag out court cases while not actually achieving anything.'[96]

5 *Queensland*

Surprisingly, in view of its subsequent record under Premier Joh Bjelke-Petersen, Queensland's then Country Party/Liberal coalition was the first in Australia to introduce a Bill of Rights into parliament.[97] In 1959 Country Party Premier, G.F.R. Nicklin, introduced The Constitution (Declaration of Rights) Bill. The Bill provided protection for a range of civil and political rights, guaranteed the independence of the judiciary, and ensured just terms in most property acquisitions. The Labor Opposition lobbied energetically against the Bill, which was eventually abandoned.

In 1989 the Fitzgerald inquiry released its report into police corruption in Queensland. The report raised concerns 'about abuse of power by Executive government'[98] and the vulnerability of individual liberties in Queensland by comparison to the other states.[99] The Electoral and Administrative Review Commission (EARC) was established in response to the Fitzgerald inquiry, and among its other duties it was asked to consider whether Queensland should adopt a

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93 Peter Breen MLC, 'Dissenting Report', ibid, appendix 9, 9.

94 Jonathan Pearlman, 'Charter of rights plan to be put to cabinet', *Sydney Morning Herald* (Sydney), 20 March 2006.

95 Ibid.

96 'NSW: Iemma willing to consider charter of rights proposal', *Australian Associated Press*, 20 March 2006, available on the website: *Australia's First Bill of Rights* Australian National University <http://acthra.anu.edu.au/news/> at 15 November 2006.

97 Breen, above n 93, 1.

98 Standing Committee on Law and Justice, above n 88, 119.

99 Ibid 21.

bill of rights. After conducting an extensive public inquiry, EARC produced its *Report on Review of the Preservation and Enhancement of Individuals' Rights and Freedoms* in 1993. The Report advocated the adoption of a Queensland bill of rights, and included a detailed draft bill providing protection for civil and political rights. While it recommended against enforceable protection of economic, social, and cultural rights, it encouraged government and community respect for these rights.[100]

Instead of adopting EARC's bill of rights proposal, the Goss Labor government passed the *Parliamentary Committees Act 1995* (Qld), which established a Scrutiny of Legislation Committee and a Legal, Constitutional and Administrative Review Committee (LCAR Committee).[101] The LCAR Committee began considering EARC's bill of rights proposal in late 1995, and produced its findings in 1998—having travelled, in the course of its inquiry, to Canada to consider the impact of the Canadian *Charter*.[102] The Committee's findings included a booklet, *Queenslanders' Basic Rights*, outlining rights protections under existing Queensland law, and its main report, *The Preservation and Enhancement of Individuals' Rights and Freedoms in Queensland: Should Queensland adopt a bill of rights?*, which recommended against adopting a bill of rights.[103]

6 *South Australia*

The Australian Democrats first ever Member of Parliament, Robin Millhouse, introduced a Private Member's Bill for a South Australian bill of rights in 1972. The bill required legislative conformity with the rights and liberties it protected, but allowed for parliamentary override of protected rights through an express declaration of the intention to override. Similar Bills were introduced in 1973-4 and 1974-5 but were not enacted.[104] In 2004, another Democrats Member, Sandra Kanck, introduced a Human Rights Bill, based on the ACT's *Human Rights Act 2004*, to the South Australian Legislative Council. The Bill did not, however, receive the support of South Australia's Labor Government, and it was vigorously opposed by the Liberal Opposition.[105]

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100 Ibid 21-22; Legal, Constitutional and Administrative Review Committee, Legislative Assembly of Queensland, *The Preservation and Enhancement of Individuals' Rights and Freedoms in Queensland: Should Queensland adopt a bill of rights?* (1998) iii.

101 Standing Committee on Law and Justice, above n 88, 22.

102 Ibid.

103 Ibid; Legal, Constitutional and Administrative Review Committee, above n 100.

104 Constitutional Commission, above n 28, 459.

105 South Australia, *Parliamentary Debates*, Legislative Council, 15 September 2004; 16 February 2005, 28 November 2005.

7 *Tasmania*

In 2005, Tasmanian Greens Leader Peg Putt tabled the Tasmanian Bill of Rights in the state's House of Assembly. The Greens sought public feedback on the Bill prior to formal parliamentary debate.[106] The following year, then Labor Attorney-General Judy Jackson announced the government would examine options for improving rights protection, including the possibility of legislative protection in a Human Rights Act.[107] Jackson was considered a strong bill of rights advocate who also recognized, on the basis of the ACT and Victorian experience, that community consultation and engagement is crucial to garnering support for rights legislation.[108] The terms of reference provided by the Government to its Human Rights Consultation Committee (established under the auspices of the Tasmanian Law Reform Institute) were relatively broad, with the only restriction calling for the preservation of the sovereignty of Parliament and Tasmania's constitutional framework.[109] The Consultation Committee released an issues paper, *A Charter of Rights for Tasmania?* in August 2006, and was due to provide its final report in October 2007. Current Labor Attorney-General Steven Kons has expressed his support for a bill of rights, but unlike Jackson, he is not widely considered a 'bill of rights champion', and the general attitude towards adopting a bill of rights among Tasmanian MPs appears to be relatively cool. Terese Henning, chair of the Consultation Committee, also believed at the start of the consultation process that the level of understanding in the Tasmanian community about rights was very low, and attitudes towards a bill of rights had been influenced by the Howard Government's opposition to bills of rights.[110] On the other hand, she pointed to significant support among legal academics, and among senior members of the Tasmanian judiciary, some of whom viewed a bill of rights as 'both necessary and inevitable'.[111] In Henning's view, this support reflected concern over the raft of anti-terror legislation introduced since 2001, and in particular the ASIO legislation allowing for the detention of non-suspects. According to Henning, this legislation was seen by the judiciary as a major incursion on common law and some statutory rights — and an incursion made more troubling by the fact it failed to evoke a significant public outcry.[112]

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106 Peg Putt MHA, 'Labor Takes Soft Option on Human Rights Protection' (Media Release, 9 February 2006).

107 Judy Jackson MHA, 'Human Rights Reference to Law Reform Institute' (Media Release, 9 February 2006).

108 Terese Henning (Chair, Tasmanian Human Rights Community Consultation Committee), 'Tasmania's Human Rights Consultation Project' Paper presented at the conference, 'Australian Bills of Rights: The ACT and Beyond', Canberra, 21 June 2006.

109 Tasmania Law Reform Institute, *A Charter of Rights for Tasmania?*, Issues Paper No 11 (2006).

110 Henning, above n 108, .

111 Ibid.

112 Ibid (comments to audience).

8 *Western Australia*

In April 2006, Western Australia's Labor Attorney-General Jim McGinty said he was giving 'serious consideration' to a human rights charter allowing courts to declare state legislation inconsistent with protected rights, but preserving the sovereignty of parliament.[113] According to media reports, McGinty claimed he 'wanted WA to be part of an emerging Australian model to protect human rights'.[114] He said recent legislation directed at terrorism was in part responsible for sparking a national bill of rights debate, and he described a bill of rights as a means of 'bring[ing] balance to the new terror laws'.[115] McGinty's announcement is consistent with the West Australian Labor Party's policy platform, which since 2003 has included a commitment to the introduction of human rights legislation 'similar in scope and ambit' to the *Human Rights Act 1998* (UK).[116]

Sections of Western Australia's legal community, and the West Australian Greens and Democrats have for some time been outspoken supporters of a bill of rights for the state.[117] In 1998 Western Australia's then Chief Justice David Malcolm also called for debate on a federal bill of rights, intimating his support for the introduction of an Australian bill of rights.[118]

III PARLIAMENTARY RIGHTS PROTECTION IN THE STATES & TERRITORIES

Despite such recent bill of rights initiatives, rights protection in the states and territories relies primarily on traditional parliamentary and common law methods. These are imbedded in self-governing systems based upon principles of responsible government in which democratic control and accountability — to the degree they exist — provide the ultimate check. The state constitutions and Self-Government Acts in the territories, in addition to a range of other legislation (such as the *Parliament of Queensland Act 2001*), establish an institutional basis for responsible government in each jurisdiction.

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113 Ben Spencer, 'McGinty considers Bill of rights', *The West Australian* (Western Australia), 1 April 2006.

114 Ibid.

115 Ibid.

116 Australian Labor Party, Western Australian Branch, *Party Platform* (amended November, 2005) 21 <www.wa.alp.org.au/dl/platform2003/Platform.pdf> at 15 November 2006.

117 See, for example, Giz Watson, 'Why the WA Community needs a Bill of Rights' (Paper presented at the Western Australian Society of Labor Lawyers 'Bill of Rights Forum', University of Western Australia, 2 August 2003 <http://wa.greens.org.au/policy/bill-of-rights/> at 21 January 2006.

118 Malcolm, above n 27.

In addition, the ACT, New South Wales, Queensland, and Victoria, (as well as the Commonwealth) all have parliamentary committees with a rights related scrutiny of bills function. The ACT's Standing Committee on Legal Affairs was established in December 2004 to scrutinise bills and subordinate legislation for, among other things, conformity with civil liberties and human rights. Under Part 5 of the *Human Rights Act 2004* (ACT), the Attorney-General must provide human rights compatibility statements in respect of new legislation, and a parliamentary standing committee (either the Standing Committee on Legal Affairs or another committee) must report to the Legislative Assembly on human rights issues raised by bills. NSW's Legislation Review Committee was established in 2003 under the *Legislation Review Act 1987* (NSW), as amended by the *Legislation Review Amendment Act 2002* (NSW). It took over the work of the Regulation Review Committee (established in 1987) and also adopted a scrutiny of bills function. The Committee was established by the Carr Government in response to the 2001 recommendations of the Legislative Council's Standing Committee on Law and Justice in its report recommending against the adoption of a bill of rights.[119] Queensland's Scrutiny of Legislation Committee was established under the *Parliament of Queensland Act 2001* (Qld). It took over the work of the Scrutiny of Legislation Committee established in 1995 by the *Parliamentary Committees Act 1995* (Qld) in response to the report of the Fitzgerald inquiry into police corruption, and that report's indictment of unchecked executive power.[120] Established in 1992, the Victorian Scrutiny of Acts and Regulations Committee now functions under the provisions of the *Parliamentary Committees Act 2003* (Vic). It reviews all bills and statutory rules, as well as a range of other subordinate instruments.

In addition to the scrutiny of primary legislation which occurs in the ACT, NSW, Queensland, and Victoria, all the states and territories have bodies dedicated to scrutinising subordinate legislation.[121] Queensland also has a procedure for ensuring that individual rights and liberties, as well as more general democratic principles, are taken into account in the early stages of legislative and policy development. The *Legislative Standards Act 1992* (Qld) (LSA) establishes the Office of the Queensland Parliamentary Counsel and invests it with responsibility for drafting legislation. The Office is also required to provide advice to members of parliament on 'alternative ways of achieving policy objectives' and 'the application of

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119 Griffith, above n 10, 2**;** NSW Parliament, Legislation Review Committee <http://www.parliament.nsw.gov.au/prod/parlment/committee.nsf/> at 8 November 2006; Standing Committee on Law and Justice, above n 88.

120 Standing Committee on Law and Justice, above n 88, 119.

121 The Standing Committee on Legal Affairs in the ACT; the Legislation Review Committee in NSW; the Subordinate Legislation and Publications Committee in the Northern Territory; the Scrutiny of Legislation Committee in Queensland; the Legislative Review Committee in South Australia; the Subordinate Legislation Committee in Tasmania; the Scrutiny of Acts and Regulations Committee in Victoria; and the Joint Standing Committee on Delegated Legislation in Western Australia.

fundamental legislative principles'.[122] 'Fundamental legislative principles' are defined by the Act as those principles underlying 'a parliamentary democracy based on the rule of law',[123] and they include a requirement that 'legislation has sufficient regard to rights and liberties of individuals'.[124] The Act requires explanatory notes to be tabled with all bills and significant subordinate legislation. Among other things, these notes must provide an assessment of the legislation's consistency with fundamental legislative principles, and reasons in cases of inconsistency.[125]

As Bryan Horrigan pointed out recently in an extensive review,

> [l]egislative scrutiny of proposed bills according to human rights yardsticks and other benchmarks for good legislation is an important and often undervalued … form of institutional rights protection.[126]

In the course of discussing the importance for rights protection of legislative scrutiny, Griffith suggests it is 'ironic' 'that, in the case of legislation committees at least, these scrutiny mechanisms were pioneered in Australia, in what might be called a bill of rights free zone.'[127] But as Griffith acknowledges, the fact that Australia has been a 'bill of rights free zone' has at least in part contributed to the search for and development of alternative rights protection mechanisms. Often these mechanisms have been adopted in explicit preference to the enactment of bills or charters of rights. New South Wales' Legislative Review Committee was, for example, 'deliberately created as an alternative to a bill of rights',[128] as was the parliamentary committee system established by Queensland's Goss Labor government in 1995.

All the states and territories have anti-discrimination legislation,[129] and bodies established to administer that legislation.[130] In addition, the states and the ACT (as

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122 *Legislative Standards Act 1992* (Qld) s 7.

123 *Legislative Standards Act 1992* (Qld) s 4(1).

124 *Legislative Standards Act 1992* (Qld) s 4(2)(a).

125 *Legislative Standards Act 1992* (Qld) ss 22, 23, & 24.

126 Bryan Horrigan, 'Improving Legislative Scrutiny of Proposed Laws to Enhance Basic Rights, Parliament Democracy, and the Quality of Law-Making', in Tom Campbell, Jeffrey Goldsworth and Adrienne Stone (eds) above n 5, 61.

127 Griffith, above n 10, 69.

128 Ibid 70.

129 *Discrimination Act 1991* (ACT); *Anti-Discrimination Act 1977* (NSW); *Northern Territory Anti-Discrimination Act 1992* (NT); *Anti-Discrimination Act 1991* (Qld); *Equal Opportunity Act 1984* (SA); *Tasmanian Anti-Discrimination Act 1998* (Tas), *Equal Opportunity Act 1995* (Vic), *Equal Opportunity Act 1984* (WA).

130 Human Rights Office, and Discrimination Tribunal (ACT) (the Human Rights and Discrimination Commissioner in the ACT administers both the Territory's discrimination and human rights legislation); Anti-Discrimination Board (NSW), Anti-Discrimination Commission (NT), Anti-Discrimination Commission, and Anti-Discrimination Tribunal (Qld), Equal Opportunity Commission of South Australia,

well as the Commonwealth) have legislation directed at racial vilification.[131] Religious vilification laws have also been enacted in Tasmania, Victoria, and Queensland,[132] and the definition of race in the NSW provisions prohibiting racial vilification includes 'ethno-religious … origin'.[133]

Privacy and freedom of information are protected by state and territory (as well as federal) legislation or guidelines.[134] NSW, Queensland, and Victoria have law reform commissions (as does the Commonwealth).[135] A range of other bodies also play a role in the states and territories in advancing and protecting rights, including the courts (through the common law and under a range of legislative provisions, primarily relating to criminal law and procedure); the various equal opportunity and discrimination commissions; administrative review tribunals; offices of the public advocate; and ombudsmans' offices.

The crucial question of the efficacy of these mechanisms for protecting rights is, however, extremely difficult to answer. To take just one example, the impact for rights protection of the drafting principles contained in Queensland's LSA is far from clear, with contemporary critics arguing there remains a dangerous lack of accountability and transparency surrounding the development of legislation and policy in Queensland. Janet Ransley, former research director of the Parliamentary Committee for Electoral and Administrative Reform, also argues that Queensland's parliamentary committee system has failed to restrain executive excesses, or produce greater accountability in government.[136] Other critics point to 'a lack of

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Office of the Anti-Discrimination Commissioner, Department of Justice (Tas), Equal Opportunity Commission, and Victorian Civil and Administrative Tribunal (Vic), Equal Opportunity Commission (WA).

131 *Discrimination Act 1991* (ACT) ss 66 & 67; *Anti-Discrimination Act 1977* (NSW) ss 20C & 20D; *Anti-Discrimination Act 1991* (Qld) s 124A; *Racial Vilification Act 1996* (SA); *Anti-Discrimination Act 1998* (Tas) s 19; *Racial and Religious Tolerance Act 2001* (Vic); *Criminal Code Act 1913* (WA) pt II div XI.

132 *Anti-Discrimination Act 1991* (Qld) s 124A; *Anti-Discrimination Act 1998* (Tas) s 19; *Racial and Religious Tolerance Act 2001* (Vic).

133 *Anti-Discrimination Act 1977* (NSW) s 4.

134 See, for example: *Freedom of Information Act 1989* (ACT); *Privacy and Personal Information Act* 1998 (NSW); *Freedom of Information Act* 1989 (NSW); *Information Act 2003* (NT); *Freedom of Information Act 1992* (Qld); *Freedom of Information Act 1991* (SA); *Freedom of Information Act 1991* (Tas); *Personal Information Protection Act 2004* (Tas); *Freedom of Information Act 1982* (Vic); *Information Privacy Act 2000* (Vic); *Freedom of Information Act 1992* (WA).

135 Marcia Neave, 'The Ethics of Law Reform' (2004) 13(2) *Res Publica* (Melbourne) 2.

136 'Parliamentary Committees: Promise Unfulfilled?' (Paper presented at the conference 'Improving Government Accountability in Queensland: The Upper House Solution', Brisbane, 21 April 2006); cited by Lesley Clark (MP), 'Parliamentary Committees in Queensland: Retrospect and Prospects 15 Years On' (Paper presented to the Australasian Study of Parliament Group (Queensland Chapter), Brisbane, 27 March 2006) 3.

ministerial responsibility, political party dominance in public service appointments and secrecy in decision making' in Queensland.[137] In the opinion of Aroney and Prasser, these problems have been exacerbated by the fact Queensland's parliament does not have an Upper House.[138] As Ransley points out, however, the failure of parliamentary committees to effectively restrain executive action is not a problem confined to Queensland. Taking up Ransley's point, former Queensland Labor MP Lesley Clark suggests,

> the idealised Westminster model is a 19th century model that no longer operates in real life in any modern democracy where strong party discipline determines outcomes and … gives the executive enormous powers.[139]

Interestingly, Clark extends her judgement that 'democracy as it is practised today is in trouble'[140] to the US, Canada, and the UK.[141] The fact she does so provides an important reminder that the protection of rights is not automatically guaranteed by the existence of dedicated rights legislation.

IV TRIBUTE TO JUSTICE SELWAY

Rights protection in the states and territories provides an appropriate means to pay tribute to Brad Selway. A committed federalist, schooled in state government legislative initiatives and practiced in state legal advocacy, Selway could appreciate the significance of state and territory initiatives and would have welcomed the increased attention to state regimes for rights protection. A veteran of intergovernmental jousting and ongoing intergovernmental arrangements and adjustments, Selway might have relished the playing out of diverse views on rights protection in various jurisdictions. A prominent constitutionalist and Federal court judge, and likely choice for a future position on the High Court, Selway would have made a major contribution to the ongoing debate surrounding rights protection in Australia.

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137 Nicholas Aroney and Scott Prasser, 'Balancing the power: Queensland needs an upper house' (2006) *On Line Opinion* <http://www.onlineopinion.com.au/print.asp?article=4399> at 7 November 2006.

138 Ibid.

139 Above, n 136.

140 Ibid, 3-4.

141 Although she said the public's 'loss of confidence and trust in elected government' had been 'more rigorously' analysed in these countries than it has yet been here. Ibid, 4.