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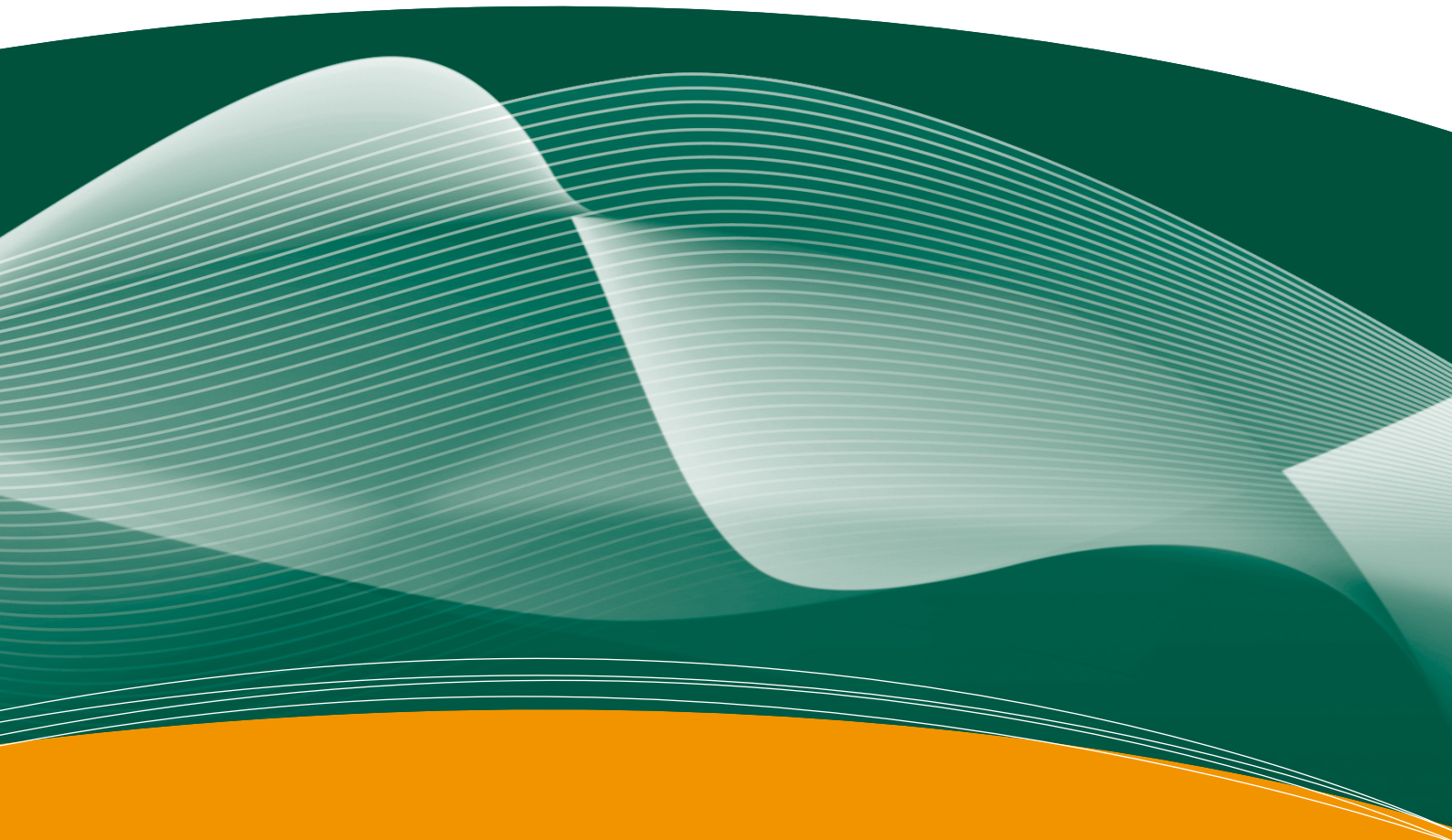
Behind the Moral Curtain:
The Politics of a Charter of Rights

Elise Parham
Edited by Oliver Marc Hartwich



THE CENTRE FOR INDEPENDENT STUDIES

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Contents

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Executive Summary

In September 2009, the National Human Rights Consultation recommended that the federal government draft and enact a charter of rights. Opponents of a federal charter have vehemently argued against the institutional changes that such a law would bring to Australian governance, while supporters have saluted its moral brilliance and ability to improve government provision for the minority of Australians who 'slip through the cracks' of the current system.

The idealism of arguments for a charter does not sit well with political reality. Like other laws, charters would be subject to lobbying, ideology and judicial manipulation. Yet, unlike other laws, a charter would be a policy trump card—a final law that monitors all others. Allowing that kind of charter to dominate Australian governance would be democratic dynamite. Those who fail to get their interests represented in the charter or heard in court will no longer hold the influence over policy that voting implies. Those who cannot see the political reality behind the moralistic claims of supporters will not have the tools to make an informed decision about policy at all.

This report seeks to look beyond theoretical extractions about charters of rights and examine some of the more pragmatic questions surrounding an Australian charter. Who will influence the drafting of the terms? In what way might judges pursue their role at the federal level, in the short run and in the long run? Will the charter be as pervasive as critics suppose?

Just as judges are not philosopher-kings, nor are legislative drafters. The terms of a charter are subject to the influence of lobbyists; the judicial interpretation of charters is subject to manipulation by legal experts; and the pervasiveness of a charter is impossible to avoid.

These are the practical issues the Rudd government will need to consider in determining its response to the National Consultation, which it has promised to outline early in 2010. The time is ripe to piece together the evidence to construct a picture of what a federal charter might look like in practice. This report shows how, like all public instruments, its impact will be determined by the political game. A charter would hinder, not improve, Australian democracy.

Introduction

> *I urge all who agree with me to set aside concerns about the Constitution and concentrate on sending the clear message to the National Consultation on Human Rights that we want Australia to be a country in which human rights matter.*
>
> — Catherine Branson QC, President, Australian Human Rights Commission[1]

Few issues in Australian politics evoke as much passion as the discussion about a potential charter of rights.[2] The debate is dominated by high ideals. Supporters view Australia's lack of a charter as a shameful omission that must be corrected if we are to keep pace with the rest of the world and, indeed, if we are to be taken seriously by the international community. Opponents are concerned about the risks a charter would pose to the success of Australia's rights protection to date by displacing well-established legal and political principles. The occasional high-profile human rights breach, they argue, can and has been resolved by existing processes.[3] To introduce a charter would be to use a sledgehammer to crack open a peanut—and a peanut that should not be cracked, at that.

The heat of the debate has increased significantly since the Rudd government initiated the National Human Rights Consultation (the National Consultation) in December 2008. It was tasked with discovering community views on whether human rights are adequately protected and drafting recommendations for improving their protection. In September 2009, the National Consultation recommended that the government introduce a statutory charter of rights or amend federal laws to achieve the same human rights-centric policymaking effect without a charter.[4] Analysis here is focused on the charter proposal, but includes a short discussion of the proposed legislative changes in the final section, to which many of the same concerns and criticisms apply.[5]

This report moves away from the lofty heights of political and moral principle surrounding the charter debate, which have been heavily discussed to date, and examines the political reality that would affect the operation of a charter in practice. The political risk of introducing a charter of rights is that it hands too much power to a politically savvy few, who can manipulate the terms of charters and the way they are interpreted by judges. Now that the National Consultation has recommended the introduction of such a charter, it is essential to move the debate from haughty statements of ideal to a practical examination of the way charters can be used and have been used in jurisdictions where they have already been introduced.

The pragmatic focus of this report is not intended to deny the moral value of human rights. Indeed, human rights have an essential and long-standing significance to Australian society. Many of the rights present in Australian law today have their origin in the common law of England, which we adopted during British rule. Human rights have shaped our system of governance and civilisation through domestic law passed by our Parliament and international law ratified by the Australian government on our behalf. They form an essential undercurrent to our political and social culture.

However, the risk of standing by and cheering the moral value of human rights is that we will neglect to fully debate its detailed contents and operation. Whatever value human rights have had and continue to hold in Australian democracy, the idiosyncrasies of a charter of rights do not automatically imply enhanced rights protection. As this report argues, even a morally-justifiable charter of rights has to be analysed in the context of the political joust for power and the concomitant ambition to influence our way of life. A charter of rights can easily become a means by which the players who recognise and use that influence set the agenda for those of us who are too busy applauding good intentions.

The idiosyncrasies of a charter of rights do not automatically imply enhanced rights protection.

In order to peek behind the moral curtain that so often clouds debate about the detail of charters of rights, it is necessary to look at the actors who influence its express terms and interpretation. A charter would give extraordinary power to the players who operate largely behind closed doors. In particular, it would create enormous potential for players such as lobbyists, activists, academics,

and lawyers to capture the charter to advance their own causes. Their ambitions would have a pervasive effect first on government and eventually on business and the community.

The first section of this report critically examines the claim that human rights are above politics, using the examples of ideological and interest group influence over the terms of existing charters. This section examines the United Nations' *Universal Declaration of Human Rights 1948* (UDHR), and the charters in the Australian Capital Territory and Victoria: the *Human Rights Act 2004* (*HRA*) and the *Charter of Human Rights and Responsibilities Act 2006* (*Victorian Charter*).

The second section examines the role of judges in determining the meaning of rights and the aim of a group of progressive-thinking intellectuals to make judges take a radical approach to interpretation. Judges might not take a radical approach in the short run because of their tendency towards judicial restraint in the Australian context. Even if that is the case, in the longer run intellectuals may put judges under pressure to take more progressive readings of rights and their role under a charter. That has been the experience of judges in the ACT particularly.

The third section critically examines the myth that the 'dialogue' charter model is a moderate option, which would preserve the power of Parliament. The model does, strictly speaking, allow Parliament the final say on how to address human rights concerns raised in the courts. Practically, however, it would be difficult for politicians to refuse to comply with judicial decisions about rights and oppose the moral pressure from human rights interest groups to always adhere to the rights in the charter.

A federal charter of rights is really a political tool.

A federal charter of rights is really a political tool. That does not deny that human rights are a critical undercurrent in Australian culture and are supported by campaigners who often have good intentions. The problem arises behind the scenes, where the terms of a charter and their interpretation are subject to manipulation and misuse. This is the reality of an Australian charter of rights, where bad intentions stymie the potential it might otherwise offer to engender healthier government and a better society.

Are human rights above politics?

> *This is a claim often made, quite casually, by human rights lawyers and advocates … that the nature of fundamental rights is such that they themselves are essentially 'above politics.'*
>
> — Francesca Klug, *Policy & Politics* Annual Lecture (11 March 2004)[6]

> *Removing certain matters from the public arena to that of the courts or bureaucracy does not mean the elimination of politics. It simply means that the politics takes place among experts, often behind closed doors.*
>
> — Greg Melleuish (17 November 2009)[7]

Charters of rights are laws that defend a morality—a conception of right and wrong. They are often presumed to be superior to the messy world of political struggle, claiming an unadulterated ambition to 'set down our values and our vision for our society.'[8] Their content and judicial interpretation simply express the moral universals on which healthy civilisations depend. A charter of rights is seen as a declaration of truth rather than a political compromise. How could anyone oppose such an idea?

One reason is that this vision is unrealistic. In jurisdictions across Australia and around the world, determining the exact content of charters of rights and the judicial interpretation of their meaning are complex and controversial processes. If that were not the case, existing charters would be worded almost identically and their interpretation would be similar. Sometimes that is true, but in many cases it is not.

Charters of rights in practice are not moral declarations of universal truth, which is especially clear when we move away from moral abstractions to examine their detail. Although it might seem straightforward to declare the right to life, what about the rights of soldiers in battle? British judges recently decided that the right to life under the *Human Rights Act 1998* (UK) holds the government liable for injuries to defence personnel sustained at war.[9]

Although it sounds like a good idea to assert that all humans have dignity, what legal implications will that have once it is enshrined in a law? A case currently before the German Constitutional Court asks whether the right to human dignity assures a new welfare rate for children, determined by judges rather than Parliament.[10]

Although the right to equal protection under the law is axiomatic to Australian government, is it always used for good? Its presence in the US Bill of Rights has been used to stunt Congress' affirmative action program.[11]

This report identifies the influence of special interests as one reason for complexity in defining the detail of rights charters. This section examines public choice theory, that public actors respond to incentives for self-benefit just like private actors. It explores the idea that interest groups, human rights promoters, and ideologues are inextricably involved in the process of creating and negotiating the terms of rights charters. In particular, it examines the creation of the UN's first rights declaration in the UDHR; the way political motivations have infiltrated the Australian Human Rights Commission (AHRC); and the way politics has compromised the drafting of the ACT *HRA* and the *Victorian Charter*. The second section explores public choice theory in relation to the interpretation of rights by courts.

It is important to note that all laws are subject to manipulation by interested parties. The crucial difference in the case of a charter is, as the final section of this report explains, its peculiar pervasiveness. A charter of rights is designed to change the culture of government and, indeed, society by legal force in a way that other laws cannot. The other important difference between a charter and ordinary laws is that a charter has strong moral undertones that hinder public recognition of the interests at play in the formation and manipulation of charter rights. As a result, charters can become subject to *less* scrutiny relative to other laws, despite being more pervasive.

It is essential to recognise the political nature of a charter if we are to understand the implications of adopting one.

Public choice theory

Charters are a public policy tool. They set the boundaries within which government can play the game of governing. Like all policy tools, the content of a charter is pushed and pulled by those who have an interest in the way it operates.

This idea can be described by public choice theory, which uses economic analytical tools to understand the taxing and spending decisions of governments. According to the theory, which was developed by economists James Buchanan and Gordon Tullock in the mid-twentieth century, public actors respond to incentives for personal benefit in the same way as private actors.[12] If private actors see the potential for a financial profit, they will enter the market where the potential exists. If politicians see the potential for an extra vote, they will aim to win it. If interest groups, known by the theory as 'rent-seekers,' can reap a benefit from a particular political outcome, they will invest in attaining that outcome via lobbying. In sum, 'persons do not readily become economic eunuchs as they shift from market to political participation.'[13]

Public actors respond to incentives for personal benefit in the same way as private actors.

Public choice theory does not imply that public actors always have bad intentions or that human rights promoters are mainly driven by self-interest. Indeed, these actors often have good intentions. The problem is that their good intentions are based only on their personal view of morality. For example, progressive groups value social rights that will legalise their program for change; religious groups defend their freedom of belief; social democrats value welfare rights; free-marketeers value property and liberty protections; and humanitarian non-government organisations aim to see all international human rights recognised and launched into mainstream consciousness.

Instead of commenting on these different moralities, public choice theory reveals the incentives that interest groups have to manipulate the terms of a charter. Just because human rights have a moral undertone does not mean they should be free from scrutiny or public choice analysis. Tullock reminds us that 'people differ about what is morally correct.'[14] We should not forget to analyse the behaviour of public actors by moving beyond their moral opinions and looking more closely at their personal motivations.

It is also a mistake to conflate moral motives with moral outcomes. To mean well and to do well are distinct issues. We should query whether the right to social security actually serves the vulnerable or creates a litigation battlefield for ever-increasing welfare payments; and whether the right to education actually improves the existing system of compulsory education or allows for a range of personal interests to distort the system in potentially damaging ways.

Public choice analysis is a good basis for looking more closely at the way human rights and politics closely interplay, as the examples below investigate. It is worth peeking behind the moralistic narrative and asking the simple question *cui bono?*—Who benefits?

Ideology, compromise and the Universal Declaration of Human Rights

History shows the link between self-interested incentives for the protection of certain rights and the enshrinement of those rights in one of the earliest statements of principle from the United Nations—the UDHR. The terms of the UDHR had a remarkably ideological origin, which was exacerbated by the ideological divisions that marked the Cold War. Their content was informed by the dominant, yet competing, post-War ideologies of socialism and freedom. This declaration was not formed in a political vacuum.

The terms of the UDHR had a remarkably ideological origin, which was exacerbated by the ideological divisions that marked the Cold War.

Human rights advocates Geoffrey Robertson QC and Francesca Klug have traced the origins of the UDHR to a group of socialist writers and thinkers in Britain.[15] Author HG Wells stirred the idea at the onset of World War II. He was already celebrated in Britain, and used his popularity to pursue the argument that Britain needed a justification for entering the War. Starting with the Magna Carta, considering the 1689 English Bill of Rights, and adding his own view of fundamental rights, Wells drafted a catalogue of human rights in a letter to *The Times* published in 1939. From there, Klug tells the story:

> Wells called for a great debate on the issue, and the left-wing Daily Herald obliged. It made a page a day available for a month, for a discussion of the articles in the draft Declaration. The final version of the Declaration was published in the Herald in February 1940, with comments by distinguished personalities, including J B Priestley, A A Milne, Kingsley Martin, Barbara Wootton and Clement Attlee, the future Labour prime minister.
>
> The Declaration was translated into 30 languages and sold thousands of copies. A Penguin special, The Rights of Man or What We Are Fighting For by H G Wells, was published with a revised version of the 'Declaration of Rights.' Wells sent a copy to his friend, President Franklin Roosevelt, and on 1 January 1942 the allied powers belatedly included the protection of human rights among their official war aims. After some further lobbying, this goal was reflected in the founding charter of the UN.[16]

Remnants of its socialist origins are evident in the UDHR, which was introduced into the UN General Assembly on 9 December 1948. Its idealistic preamble and rights to welfare and work bear out the socialist manifesto.

Nonetheless, ideology was not the only political principle to influence the terms of the UDHR; so too was compromise. This compromise character was not denied by one of the instrumental negotiators of the UDHR, Eleanor Roosevelt, widow of former President Franklin Roosevelt.[17] On presenting the document to the UN General Assembly, she opened her speech by reminded

the delegates how difficult it had been to find agreement on the wording and content of the document:

> The long and meticulous study and debate of which this Universal Declaration of Human Rights is the product means that it reflects the composite views of the many men and governments who have contributed to its formulation. Not every man nor every government can have what he wants in a document of this kind. There are of course particular provisions in the declaration before us with which we are not fully satisfied.[18]

As one of the earliest agreements between a large number of diverse governments (the United Nations had 58 members by 1948, including the Soviet Union, the United States, Burma, and India[19]), compromise was inevitable. It would be an agreement broaching different political philosophies, priorities and governments.

On top of this, the post-War world was gripped by a major ideological confrontation: the Cold War. Pitched against each other were the communist-totalitarian Soviet Union and its satellites on the one hand and the liberal-democratic Western bloc on the other. They were divided by an ideological and intellectual schism that could not be glossed over by a joint agreement on human rights. In fact, their conceptions of human rights were often incompatible.

The ideological confrontation came to a head in the decision to protect economic and social rights. These are the rights to economic and social provision, including the rights to an adequate standard of living, to education, to the highest attainable standard of health, and to work. They are central to most modern political decisions, as the National Consultation explains: 'In our robust democracy these are the very rights that feature most often in political debate, especially at election time.'[20] In contrast are civil and political rights, which defend the institutions by which politicians can make decisions about social and economic policy but stop short of mandating that policy. They include rights like freedom of speech, association and belief.

The Soviet bloc argued that the absence of social and economic rights in a world declaration would undermine the enjoyment of all other rights.[21] Why would individuals value their right to free speech if they were starving, for example? The Soviets were not satisfied that the final UDHR supported economic and social rights strongly enough, and it abstained from voting for the UDHR in the General Assembly, joined only by the abstentions from South Africa and Saudi Arabia.[22] Apart from its view of social and economic rights, another reason for its abstention was, of course, the totalitarian nature of the Soviet regime. It would not support civil and political rights like freedom of speech or association.

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Hindsight reveals the fundamental importance of civil and political rights: without them, the Soviet Union failed miserably to uphold any semblance of even the social and economic rights it had supported in the United Nations. During the Soviet Union's UN campaign, to mention just one example, its people were suffering the horrific famine of 1946–47 that killed half a million. Rather than attempting to feed its people or lower the obligatory grain harvest collection targets, the Soviet Ministry of Justice ordered a dispatch of cases against cereal and grain theft that landed 53,000 people in prison camps.[23] From the Russian Revolution in 1917 to the terror in Afghanistan in 1989, communism led by the Soviets was responsible for the deaths of 85 million to 100 million people, making it 'the most colossal case of political carnage in history.'[24]

In contrast to the Soviet position, the Western bloc wanted to see civil and political rights enshrined but was wary of extending that declaration to economic and social rights. Many Americans were concerned that economic and social rights would force governments to implement policies like President Roosevelt's New Deal, which had lost favour with many Americans despite its initial popularity as a resolution to the devastation unleashed by the Great Depression.[25] The United States was supported by the governments of developing countries, who were concerned that social and economic rights would impose a financial burden too large for their governments

to bear.[26] Placing the more achievable civil and political rights together with these economic and social rights would mean members had to take all or nothing, and many could only afford to take nothing.

The United Nations cleverly resolved this conflict between the ideologies of the Soviets and the West. First, UN members made the decision to include both sets of rights in the UDHR. Second, because the UDHR is a mere declaration that cannot be enforced against governments, the decision was made to create enforceable treaties that again split the rights. In 1966, members were invited to sign either or both the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR). Australia is signatory to both.

From Wells' ideological ambition to articulate a purpose for joining World War II to the compromise that saw the UDHR split into separate, enforceable treaties, the development of the UDHR has been political.

Ideology, compromise and rent-seeking in Australia

The political nature of the UDHR sets the scene for the human rights developments that ensued in Australia. In the same way that the interests of different countries informed and compromised the UDHR, rent-seekers have informed and compromised the ACT and Victorian charters and informed the rights proposed to the National Consultation for a federal charter. Like the broadly-worded UDHR, which includes civil-political and social-economic rights, part of the inevitable compromise for the Australian charters has been the decision to enshrine a set of broadly-worded human rights that finesse the disagreements.[27] Once those rights are enshrined, their detailed meaning is left to the determination of judges, who decide which interpretation wins.[28]

Rent-seeking

Submissions to the National Consultation make it abundantly clear that interest groups are ready and willing to push for their causes to be enshrined as human rights. Of the 35,014 written submissions to the National Consultation, more than two-thirds came from interest groups, including Amnesty International Australia, GetUp! and the Australian Christian Lobby (ACL). These groups ran targeted campaigns in support of (Amnesty and GetUp!) and against (ACL) the charter. Ultimately, the pro-campaigners won, with the National Consultation reporting: 'of the 29,153 submissions in favour of a Human Rights Act, 26,382 [90%] were campaign submissions.'[29]

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Predictably, Amnesty International argued in its submission for refugee rights.[30] GetUp! argued for the protection of as many rights as possible.[31] ACL lobbied against the creation of a charter of rights because of its potential to inhibit freedom of religion,[32] although accepting the possibility of legislating to protect the basic ICCPR and ICESCR.[33] The Seventh Day Adventist Church submitted for the protection of the freedom to religion and belief.[34] ChilOut (Children Out of Detention) submitted for the enshrinement of the International Covenant on the Rights of the Child and repeal of the mandatory immigration detention laws.[35] The list goes on.

Another rent-seeker in the charter debate is the AHRC itself. In its submission to the National Consultation, the AHRC sought an expanded role for itself and the responsibility for acting as a watchdog over a broader range of human rights. The change would mean that the AHRC would be sought out more often by citizens concerned about rights violations and asked to determine the answer to rights questions more often. The National Consultation supported the proposal[36] despite the fact that the economic analysis it commissioned from the Allen Consulting Group found the proposal had less than average support with stakeholders and above average costs and risks.[37]

Of course, in seeking its own expansion, the AHRC is motivated by a mix of altruism and its less admirable ambition to sustain its own existence. On the altruistic side, Commissioner Graeme Innes justified the ever-expanding role for the AHRC at one of the National Consultation public hearings:

> [A] Human Rights Act will not, alone, magically create a rights-aware, and a rights-respecting, culture. We'll need institutions such as the Human Rights Commission to play an active role in the promotion and protection of human rights.[38]

Taking a less rosy view of the AHRC's growing role, *Sydney Morning Herald* columnist Paul Sheehan wryly noted: 'In the 23 years of the Human Rights Commission's existence, it has managed to spend, in real terms, about $400 million on itself.'[39] On the basis of the Strategic Plan drafted by the AHRC setting out its goals for 2008–11, Sheehan criticises the emphasis on self-perpetuation rather than dispute resolution, saying:

> The commission sees an increase in complaints as a sign of health, justifying its large budget and its incessant quest for influence. Common sense would suggest just the opposite, that a decline in complaints is a sign of social health. But the commission, in its myopia, is more concerned with self-perpetuation.[40]

Despite its myopic vision of human rights progress, the rent-seeking AHRC will be granted significant new powers if the National Consultation recommendations are adopted by government.

Early indications are that the *HRA* and the *Victorian Charter* will also be captured by special interest rent-seekers. In the *HRA*, for example, the right to life applies only after birth to avoid altering abortion laws. Environmentalists, through the ACT Greens Party, wanted an environmental rights overseer as part of the charter arrangement. While they did not manage to get that provision in the original *HRA*, they succeeded in including it as an issue for review after the first year of the *HRA's* operation.[41] Chief Minister Jon Stanhope promised to consider the issue at a later date.[42] The review put off deciding the issue but, by merely postponing the decision, left environmental rights on the agenda.

The *Victorian Charter* also excludes abortion law from the right to life protection. Victorian Attorney-General Rob Hulls introduced section 48, which excludes abortion and child destruction from the reach of the charter, with the explanation that rights reasoning might 'be used as a vehicle to attempt to change the law in relation to abortion.'[43] Trade unions also lobbied for the inclusion of the right to form and join a trade union.[44] This might of course imply the right *not* to join a trade union, as the German Federal Constitutional Court has held in the German context.[45] Nevertheless, unions have shown their ability to influence the terms of a charter.

Progressive rent-seekers in the ACT and Victoria have also lobbied for the inclusion of economic, social and cultural rights. The 'progressive' social agenda of the Greens Party would be served well by social rights. Those rights would assist its platform of promoting a coal-free future, Indigenous separatism, homosexual marriage, and sexual freedom. Although the *HRA* was passed without those rights, the ACT Greens again leveraged their balance of power in the unicameral ACT Parliament to ensure a future review would consider including those rights.[46] That review is underway.[47]

Chief Minister Jon Stanhope introduced the *HRA* with this promise:

> I want to say once again, to those who have been disappointed that economic, social and cultural rights have not found a place in this bill, that the government has not abandoned economic, social and cultural rights as a framework for government policy. The question we had to face was: is this the time to give these rights legal effect? We have explained the reasons for this already, but let me reiterate that we will re-examine this issue when the legislation is reviewed.[48]

Although the *Victorian Charter* has not yet been reviewed, it was introduced in 2006 with an almost identical promise to consider including economic, social and cultural rights by later review. Attorney-General Hulls said:

> Some people would have preferred other human rights to be protected in the bill, including economic, social and cultural rights, and rights specific to particular groups in the community. Victoria's experience of a formal human rights instrument is only

> just beginning. It will be a matter for us as a community to determine, in light of Victoria's experience with this charter, whether further rights should be protected by the charter in the future. These are issues that can be looked at as part of the review of the charter in four years time.[49]

The Victorian government recommended the federal government introduce only civil and political rights at first, then add economic, social and cultural rights after review.

The Victorians submitted the same message to the National Consultation. In its submission, the Victorian government recommended the federal government introduce only civil and political rights at first, then add economic, social and cultural rights after review.[50]

Submissions to the National Consultation as well as the *HRA* and the *Victorian Charter* provide substantial evidence of the rent-seeking mentality that dominates the formation of charters of rights. They suggest that the terms of those charters and the responsibilities of the bodies that administer them—like the AHRC—will continually expand. By no means are these documents above politics.

Morals cloud rent-seeking reality

Submissions to the National Consultation also make clear that rent-seekers will hide the reality of interest-driven politics and draw attention to the moral and universal value of rights instead. This distraction from reality clouds the charter debate, making the issue moral rather than pragmatic.

The moralistic distraction is most apparent in the debate over which rights to include in a federal charter, and particularly whether to include social, economic and cultural rights. Campaigns for including them show the self-serving mentality of charter proponents. As we have seen, economic, social and cultural rights were subject to the lobbying of progressives in ACT and Victoria. Similarly, social progressives want those rights protected in a federal charter.

Instead of arguing for their merit in the Australian context, however, these campaigners have argued that all rights should be included in a federal charter purely because the international community has recognised them. They do not attempt to prove that these values have purpose in Australia but merely recite the mantra that all human rights are universal. Ignoring the ideological battles that marked the introduction of those rights into the UDHR and its enforceable offshoots, these campaigners have put moral pressure on governments to include all international rights.

The National Consultation quoted in part the agreement reached at the 1993 UN World Conference on Human Rights,[51] which reads in full:

> All human rights are universal, indivisible and interdependent and interrelated. The international community must treat human rights globally in a fair and equal manner, on the same footing, and with the same emphasis. While the significance of national and regional particularities and various historical, cultural and religious backgrounds must be borne in mind, it is the duty of States, regardless of their political, economic and cultural systems, to promote and protect all human rights and fundamental freedoms.[52]

The National Consultation recommended that economic, social and cultural rights be considered by governments when they create laws and in an audit of all existing federal legislation.[53] They also concluded that the AHRC, and not courts, should resolve complaints about these rights.[54]

Pro-charter submissions to the National Consultation mirrored the conference's moralistic language. The NSW Charter Group submitted: 'Due to the interdependent relationship of the rights set out in these documents, no particular set of rights, such as political rights or cultural rights, should be favoured over another.'[55] Similarly, the Human Rights Law Resource Centre said: 'The arbitrary division of rights makes no sense to the rights holder and does not respond to the aspirations or needs of people.'[56] Amnesty International Australia took a similar approach, expressing:

> profound disappointment that the Terms of Reference for the consultation invited selection among internationally-recognised human rights as though some

> might warrant protection and others might not, according to popular demand. This contradicts the principle that all human rights are universal, indivisible, interdependent and interrelated.[57]

These submissions completely ignore the Australian context. Education is compulsory here. So is the provision of minimum health care, welfare and housing. If proponents imagine that a legalistic charter will help those who miss out on welfare because they are unable to navigate the Centrelink website, cannot read, or have no set address, their logic is flawed. The debate needs to ask who these provisions are really designed to serve. Who would really be using the charter, and what would be their motivation?

Political shortfall

Moral and universalist arguments for the protection of rights certainly do not improve the public debate about which rights should be protected and how. Indeed, by removing the debate from pragmatics to morals, they deny the very right to participation in public decision making.[58] There are many ways that rights could be defined and protected, and the possible interaction of different rights should be considered and debated amongst both policymakers and voters.

The reality of all rights—including human rights—is that they conflict. Most rights activists accept this and categorise only some rights as non-derogable—those rights that cannot be violated under any circumstances. Yet, it is not this lip service but their practice that tells the true story. When interest groups fight for the protection of only some interests, they infringe on the rights of those who do not have the same ability to get their views represented in a charter. This can affect even those rights classified as non-derogable.

The reality of all rights—including human rights—is that they conflict.

In some cases, it is more readily apparent that a right should be restricted for the greater good, social cohesion, or even moral order. For example, a law that prohibits drink driving also inhibits the right of those drivers who want to drink and drive but averts the risk posed to his or her own safety and that of other drivers and pedestrians.

On the other hand, human rights often conflict and their resolution is unclear. Supporters of abortion argue for the right to liberty and choice, while opponents fight for the right to life. Environmentalists argue for the right of future generations to enjoy a vital, natural environment while opponents argue for their right to enjoy property. Social welfare groups campaign for higher social security payments on the basis of the right to human dignity, to the highest attainable standard of physical and mental health, to adequate housing, or to education. Those paying for welfare through taxes argue for their right to property.

At the instigation of interest groups with competing concerns, the decision about which rights to protect might be made by politicians or—a politically more palatable option—the solution may be to create broadly-worded human rights that leave courts to define the detail.[59]

Defining the detail in Germany: Child welfare

Most taxpayers agree on the need for social security, but it has always been difficult to draw the line on exactly how much. Because rights conflict, courts in different countries have drawn the line differently; indeed, the basis on which it is drawn might be wholly unexpected.

A case before the Federal Constitutional Court in Germany is exploring this question.[60] The court has been asked to determine the minimum level of welfare payments for children, which is currently a proportion of the payment rate for adults. The court is considering whether it should be based instead on the needs of children.

The signals are that the court will abrogate the government's welfare policy—which weighs the burden on the public pocket with the needs of welfare recipients—and create an absolute right to a specific level of support from society.

According to the President of the Court, Hans-Jürgen Papier, the basis for the decision is Article One of the Constitution: the 'right to a minimal provision for a human life in dignity' (*Grundrecht auf Gewährleistung eines menschenwürdigen Existenzminimums*).

Article One of the German constitution, which emphasises the protection of human dignity, was created to prevent a repeat of the atrocities of National Socialism. That one day it would be used to determine child welfare benefits was probably not foreseen by the 'Fathers and Mothers of the German Constitution.'

Defining the detail in the United Kingdom: Freedom of religion

UK barrister Paul Diamond argues that the winner in religious freedom cases is too often the secular side, and certainly never Christians.[61]

In one case, British Airways attempted to 'prevent an employee form wearing a crucifix while permitting other workers to carry Sikh ceremonial knives and wear turbans and Muslim head scarves.'[62]

Another case he worked on concerned a threatened dismissal of an employer for discussing his Christian views. The man charged had told a female colleague who asked about his faith that Christians opposed pre-marital sex and same-sex relations. 'She complained and he was suspended and would have been sacked had we not intervened,' Diamond says.[63]

Irrespective of whether the courts or politicians weigh up conflicting rights, it is essential that the public and charter critics are aware of the way rights interact.

As public choice theory predicts, human rights can be used as a moral guise for the protection of particular interests, which will come at the cost of those who fail to get their interests protected in a charter because rights conflict. As the number and scope of rights expand, those without equivalent protections will lose out.

This reality cannot be overlooked by claims that fundamental rights are above politics, but this is exactly what's happening with the proposed national charter of rights.

Manipulating the interpretation of rights

> *By 2011 we expect to see that we influence courts to develop progressive approaches to human rights.*
>
> — Australian Human Rights Commission Strategic Plan 2008–2011[64]

The content of a charter is not only determined by its express wording but also from what courts say those words mean—that is, from the judicial interpretation of rights. There is an incentive, therefore, for interested parties to manipulate the way judges interpret rights in order to promote their own interests.

One way to achieve that manipulation is through fighting for particular rights interpretations in court battles. Another is to influence the way judges are required to interpret laws by altering the wording of a charter. The latter option has been a key aspect of the debate in Australia through what is known as the 'interpretive provision.' The National Consultation devoted an entire recommendation to the wording of that provision. Interpretive provisions have been a significant area for academic analysis and commentary about the operation of the ACT and Victorian charters.

There is a distinction between the way judicial interpretation can be manipulated in the short term and long term. In the short term, when the meaning of the charters is not well-defined by courts, lawyers will be reticent to bring cases that would require judges to make far-reaching decisions. Australian judges also have a tendency to defer to Parliament when in doubt. This has been the general pattern in the ACT and Victoria, although with some exceptions.

Interpretive provisions have been a significant area for academic analysis and commentary about the operation of the ACT and Victorian charters.

In the longer term, judges would be likely to move towards more radical interpretations—ones that are activist (altering the law in unpredictable ways[65]), rely on international rather than domestic law, and tend to favour judicial readings of rights over the clear meaning they are given by Parliament. That has been the experience in Canada, New Zealand, and the United Kingdom, which have all had more than a decade of charter experience.

Partly, the long-term change would simply be a product of establishing the law more clearly, which would encourage lawyers and judges to rely on charter arguments more often. Long-term change would also occur because of the manipulation of intellectuals, which is evident in the ACT and has been pursued successfully in Victorian courts. The same approach would be pursued by intellectuals in the case of a federal charter: the AHRC Strategic Plan's aim to 'influence courts to develop progressive approaches to human rights' casts out any doubt on that account.

Short term

The idea that judges will be slow to react to charters has been largely vindicated in the ACT and Victoria, where the charters have only been in place for six and four years respectively. Lawyers have not usually relied on charter arguments but argued in the alternative and used precedent rather than new definitions of rights. Judgments show the requisite caution in reasoning, with most decisions turning on precedent rather than the interpretation of rights. Particularly in the ACT, but to an extent also in Victoria, most decisions made under the charters have returned to common law rights and the cases that defined them, using those rights as a basis for understanding the charters.[66]

In a speech on the first year of the *HRA*, the then ACT Director of Public Prosecutions (now an ACT Supreme Court judge) Richard Refshauge noted that lawyers had not been adopting charter arguments enough in litigation:

> The references to the Act are, for the most part, simply that: references to the *Human Rights Act 2004* ... There is no evidence of any awareness and certainly no mining of the rich jurisprudence which courts in Europe, North America and New Zealand have created to identify and explain the rights enacted by the respective legislation.[67]

After five years, analysis of the *HRA* reiterated:

> The legal profession has displayed a relatively low level of interest in the HRA. While there have been some cases where lawyers have put forward detailed submissions under the HRA, there is still reticence amongst the ACT legal profession to invoke the HRA.[68]

There have, however, been exceptions to this cautious approach in the Victorian courts. Judges have altered the existing law according to their own vaguely justified idea of what the

Victorian Charter rights include. In one Victorian Supreme Court decision, *RJE v Secretary to the Department of Justice* (*RJE*),[69] Justice Nettle used the *Charter* to decide what sex offence legislation meant by 'likely to re-offend.' The majority of the court used the common law to decide that 'likely' must mean more probable than not, but Justice Nettle reached the same conclusion by invoking the *Charter*. His Honour followed a UK method of interpretation to encourage judges to use the *Charter* wherever possible in defining rights.

The question now is how far the courts will be willing to take the principle of judicial intervention with Parliament. Justice Nettle's decision in *RJE* opens the way for judges to reinterpret laws that would otherwise be clearly defined by Parliament. It is an affront to the democratic processes we know.[70]

On the other hand, the change is a step in the right direction according to charter proponents like Philip Lynch, Director of the Human Rights Law Resource Centre. Lynch only hopes that future judges will be willing to take an even harder line; 'that interpretation of a statutory provision compatibly with human rights should be considered *in the first instance*, rather than only after some ambiguity or prima facie incompatibility has been identified.'[71]

Another controversial case is *Re An Application Under the Major Crime (Investigative Powers) Act 2004*.[72] The Victorian Supreme Court had to consider the ambit of a law allowing crime investigators to use compelled answers from witnesses to aid their investigations of major crime. The question was whether evidence discovered using compelled answers was admissible in court—or whether such evidence should be excluded along with the answers themselves.

On the basis of the *Victorian Charter's* rights to a fair hearing and against self-incrimination, and Canadian law on similar issues, Chief Justice Warren decided that the law conflicted with the *Charter*. Her Honour concluded that the law must be taken to mean that the evidence could not be used in court, even if the legislation permitted that interpretation, because it would conflict with the *Victorian Charter*.

Despite some controversy in Victoria, these sorts of judgments have been the anomaly, and there have been no such judgments yet in the ACT. This is not surprising given that judges can make decisions only on the particular case before them,[73] yet lawyers are unlikely to risk running arguments that would require judges to suddenly depart from existing law.

It might also be the case that the Australian legal framework puts a cap on the ability for judges to stray far from legal precedent and to make activist decisions. Judges have long had the ability to control the activities of Parliament under the Constitution, although they have exercised that power with restraint.

The Constitution defines the High Court's responsibility as the arbiter on a range of issues.[74] Early in its existence, the High Court decreed axiomatic its ability to invalidate Parliament-made laws.[75] It is debatable where this so-called power of judicial review originates. Some say that the courts must be able to keep Parliament in check in order to protect the individual liberty of Australians.[76] Others say that the courts have control over the federal Parliament only to protect the federal balance—ensuring the federal Parliament does not interfere with the states in a way contrary to the Constitution—but without ramifications for the individual liberty of Australians.[77] Whichever view is correct, High Court judges have long had the power to strike down laws made by Parliament.

This power has also long been limited. Because the power of judicial review is so significant, the High Court has held that the federal judiciary must be 'independent' and 'impartial.'[78] When it independently decides that Parliament has acted unconstitutionally, the justices interfere as little as possible. It is only the High Court that can declare a federal law invalid under the Constitution,[79] and when it does it will preserve whatever it can of the law.[80] Judges can usually achieve this preservation by 'reading down' the meaning of the law so that its ambit is narrowed to whatever is legal, and the illegal part is presumed to be excluded. If reading down cannot be achieved, another option is 'severance' of the words that are unconstitutional and retention of the remainder.

In non-constitutional cases, judges are also constrained by statutory rules and legal tradition. Judges are not freely able to make decisions based on their own views of fairness or justice because they have to provide reasons for their decisions, which are subject to appeal up to the highest court in the jurisdiction. They are bound by the tradition of precedent, where like cases have to

be decided in a like manner, and by the rules for interpreting statutes, which are codified in the *Acts Interpretation Act 1901* (Cth) and its state equivalents.

Like all public actors, judges also have to justify their exercise of power to those they govern, which results in them taking account of public values. The idea of 'judicial legitimacy'—that judges have to give an account of their exercise of power to a 'constituency' of citizens within their jurisdiction—has gained currency in recent times.[81] As law academic Jonathan Crowe says: 'judges, like legislators, face moral pressure to make decisions that accord with social values.'[82] Although federal judges are independent of Parliament and impartial largely by virtue of their separation from the demands of the electorate, they nevertheless have a responsibility to justify their actions to the public and to make decisions that resonate with public values.

This stands alongside the idea that Parliament has primary responsibility for lawmaking in Australia and is designed to keep a check on itself. In a tradition adopted from Britain, government ministers are members of Parliament and subject to the questioning and scrutiny of a hostile opposition. Their departments are subject to examination by Senate estimates committees. Parliamentary committees add another layer of internal review to the activities of the government. The Senate itself is a check on power that is not enjoyed in many other Parliaments across the globe.

The Constitution has preserved this important role for Parliament to the extent that a group of constitutional experts recently agreed that a national charter of rights that allowed judges to override Parliament's purpose in creating a law would be unconstitutional.[83] That is a substantial deviation from some of the more controversial charters overseas, including the *Human Rights Act 1998* (UK), discussed in more depth below.

Because of our strong parliamentary system, judges have developed a tradition of parliamentary deference where the legal answer to a policy question is unclear. Judges realise that, to an extent, Parliament can be trusted because of its ability to self-check, and have taken a conservative approach to interference with Parliament.

Judges have developed a tradition of parliamentary deference where the legal answer to a policy question is unclear.

Nevertheless, sometimes judges are called upon to determine what activities of Parliament are legal. The substantial role given to politicians by the Constitution, as Crowe puts it, 'falls far short of justifying an unqualified hold on government power.'[84] Some of those judicial decisions are unpopular with sections of the commentariat and the public, but in the majority of cases the process for making them has been accepted. In the end, that is what matters. As former High Court Chief Justice Murray Gleeson said in 2003, 'Criticism of particular decisions does not shake confidence in the [High] Court. Criticism of the Court's approach to the exercise of judicial power is another matter.'[85]

Because Australian judges already have the ability to check Parliament and have developed a tradition for exercising that power, a national charter of rights would not automatically create a blank canvas for judges to freely decorate or unleash an overnight judicial tyranny. If a charter of rights were created in a similar manner, with circumscribed power for judges, it is likely that the task of judges in the short term would be predominantly uncontroversial, and certainly not revolutionary.

Long term

Judicial restraint may ease of its own accord in the long term, as charter arguments become more acceptable bases for judicial decisions. After a few decisions have been made clarifying the meaning of the charter, it is likely that lawyers will be more willing to bring bold arguments and judges will be more willing to agree with them.

Yet this is not necessarily so, and may take longer than charter proponents would like. The restraints that inhibit judges in the short term would continue to apply in the longer term, unless judges are pushed by legislators, litigators and legal opinion makers to take a more activist approach. What will have an immediate and defined impact on the behaviour of judges is the exact wording of the interpretive provision, by which the charter directs how judges interpret Parliament-made laws. This has been the key issue of controversy in the United Kingdom, whose experience was addressed by the National Consultation.

Interpretive provisions

Interpretive provisions are the part of a charter that explain how judges have to interpret Parliament-made laws. They thus define when courts have the power to declare that their own understanding of rights overrides the meaning given to legislation by Parliament. In effect, these provisions delimit the court's ability to curb the activities of Parliament. The transfer of power from Parliament to courts is a hugely controversial aspect of charters—who should be the guardian of policy issues?—which is why interpretive provisions are so important.

In modern charters, interpretive provisions often present a compromise between two principles of interpretation. On the one hand is the idea that judges have to interpret laws consistently with human rights, which, remember, they define in practice. This is the *interpretive rule*. On the other hand is the idea that judges have to interpret laws in ways that are consistent with Parliament's purpose in creating the law, thereby limiting the court's free reign on rights interpretation by requiring judges to consider the intention of Parliament. This is the *purposive rule*.

National Consultation and the *Human Rights Act 1998* (UK)

The *Human Rights Act 1998* (UK) has suffered a blow in public opinion thanks to its controversial interpretive provision, which includes only the interpretive rule (as defined above). In 2004, the House of Lords in its capacity as the highest court in the United Kingdom (renamed the Supreme Court in October 2009, bespeaking its new and broad powers) held that the requirement on them to interpret UK law in a way that is consistent with the European Charter of Human Rights meant they could set aside Parliament's intent in favour of their reading of the European Charter. Lord Nicholls famously declared in *Ghaidan v Godin-Mendoza* (*Ghaidan*):

> Even if, construed according to the ordinary principles of interpretation, the meaning of the legislation admits of no doubt, section 3 [the interpretive provision of the UK *Human Rights Act*] may nonetheless require the legislation to be given a different meaning ... Section 3 may require the court to depart from this legislative intention, that is, depart from the intention of the Parliament which enacted the legislation.[86]

It was a more remarkable judicial approach than had been expected in the United Kingdom, where Westminster had long dominated government and judges had never held the power of judicial review that Australian judges enjoy. The House of Lords decision meant that a homosexual partner was granted a right of succession to his deceased partner's house, even though the right in the UK legislation was extended only to spouses, heterosexual de facto couples, and family members.

The National Consultation has shied away from the UK position on interpretive provisions. While the United Kingdom has only an interpretive rule, requiring judicial interpretations of rights to override parliamentary intent, the National Consultation recommended a federal charter include both the interpretive and purposive rules, saying:

> The Committee recommends that any federal Human Rights Act contain an interpretative provision that is more restrictive than the UK provision and that requires federal legislation to be interpreted in a way that is compatible with the human rights expressed in the Act and consistent with parliament's purpose in enacting the legislation.[87]

AHRC President Catherine Branson QC has also said she favours a move away from the British position.[88] According to a panel of constitutional experts she consulted, including former High Court justices and well-known charter critics Sir Anthony Mason and Michael McHugh AC, the absence of a purposive rule could be inconsistent with the Constitution, which would render a charter invalid.[89]

This exclusion of the British option might sound like it answers the problem decisively; since Australia will temper the interpretive rule with the purposive rule, it will not tread the path of judicial unrestraint that has steeped the UK *Human Rights Act* in controversy. Judges will still have to take account of Parliament's intention when interpreting a federal charter.

However, the political reality is not so simple. The evidence emanating from the Victorian and ACT experience shows that the inclusion of both rules is not a recipe for judicial restraint. Both the *HRA* and the *Victorian Charter* have interpretive provisions that include the interpretive as well as purposive rules. Yet the combination of rules in ACT has not held up against attacks from the progressive lobby, who are demanding judges take a more activist approach. The same commentators have noted the ability for certain Victorian courts to reconcile the two interpretive rules with a *Ghaidan*-style approach.

Again, the manipulation of rights by interested parties is apparent in the courts. There is no reason to delude ourselves that the situation would be any different under a federal charter.

The *Human Rights Act 2004* (ACT)

Under the *HRA*, attempts to guide the way judges make decisions have come from academic corridors rather than courts. Although ACT judges, of their own volition, have taken a reserved and cautious approach to dissecting the human rights listed in the *HRA*, they have been pressured from outside to be more activist.

The means by which academics have instigated change to the interpretive approach of judges has been through the *HRA's* review mechanism. Both the *HRA* and the *Victorian Charter* have provisions that require the laws to be reviewed at intervals. The *Victorian Charter* provides for reviews after four and eight years, which have not yet been conducted. The *HRA* initially provided for review after the first year, which recommended another review at five years, and that review recommended ongoing five-yearly reviews.

Under the HRA, attempts to guide the way judges make decisions have come from academic corridors rather than courts.

The initial review requirement in the *HRA* was inserted primarily to allow for later expansion of the law. The review provision was sought by the ACT Greens on the basis that the rights contained in the *HRA* did not go far enough.[90] The 12-month review was conducted by the ACT Department of Justice and Community Safety (the Department Review),[91] and the first five-yearly review by the ACT *Human Rights Act* Research Project at the Australian National University, authored by Professors Hilary Charlesworth (ANU) and Andrew Byrnes (UNSW) (the Charlesworth-Byrnes Review).[92]

The interpretive provision of the *HRA*, section 30, initially incorporated the interpretive and purposive rules but in a way that created a potential conflict. The original section 30 required judges to interpret laws both:

a. consistently with human rights wherever possible (interpretive rule), and

b. in ways that would best achieve the purpose of the law (purposive rule).[93]

Recall that the *Ghaidan* approach, which gives judges power to override Parliament and change the meaning of laws, is based on the existence of an interpretive rule alone.

In a first step in the *Ghaidan* direction, the Department Review recommended the abolition of the existing purposive rule and a clarification 'that a human rights consistent interpretation must prevail unless this would defeat the purpose of the legislation.'[94] The authors of the review expressed concern that the purposive rule would stymie the *HRA* from making real change to the legislative process, concluding: 'There is a good case for removing the express reference to the "purposive test" ... Fears over the potential for judicial activism by way of rewriting existing legislation have proven to be unfounded and the current situation is unlikely to drastically alter.'[95]

The ACT Parliament responded to the Department Review by amending section 30 at the beginning of 2008. The amended section retained a reference to the purpose of the law, thus ostensibly retaining a limit on judges' ability to override parliamentary intent. Yet, according to the explanatory statement for the section 30 amendment, the change draws on the UK experience in *Ghaidan*,[96] suggesting that reference to parliamentary purpose in the new section 30 is a red herring.

Indeed, the ensuing battle between academics and judges suggest that the new section 30 is not at all designed to inhibit the potential activism of judges.

Judges in the ACT have continued to apply section 30 literally, and have expressly refused to follow the *Ghaidan* approach in the two cases that have raised the question.[97] In both these cases, however, the decisions did not turn on the issue, and these judgments are therefore suggestive of the courts' approach but not conclusive.

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On the opposing side are academics who have lamented this judicial 'inactivism.' The Charlesworth-Byrnes Review bemoans the way 'courts have, for the most part, remained a spectator in the HRA dialogue [the interaction between Parliament and the courts].'[98] The review calls for judges to 'grasp their part in the human rights conversation' and play a more progressive role as human rights arbiters, suggesting that ACT judges look to the example of Victoria.

Like the *HRA*, the *Victorian Charter* also includes both the interpretive and purposive rules, ostensibly requiring judges to make decisions that consider the purpose of Parliament. However, Victorian judges have occasionally taken a more *Ghaidan*-style approach to rights interpretation as, for example, in the cases of *RJE* and *Re an Application* discussed above.[99]

The Charlesworth-Byrnes Review's second suggestion is that judges be offered training on how to apply section 30 and on the sources of international human rights law,[100] which can be used to interpret human rights in the ACT by virtue of section 31 in the *HRA*. Rather than a once-off, they recommend that this training 'be ongoing ... and include opportunities for regular refresher courses.'[101]

Although training is a widely-used and accepted means to keep the judiciary up to date with legal developments, the idea that judges can be trained to take a particular interpretive approach has more than a whiff of re-education about it. The suggestion does not sit well with the high standards of impartiality expected in judicial training programs. Programs presented by the National Judicial College of Australia, for example, 'must avoid any hint of "compulsory re-education" or of the deliberate shaping or forming of judicial attitudes on issues that will fall for decision.'[102]

Because legislative change did not have the desired effect of making judges more progressive in their interpretation of rights, the Charlesworth-Byrnes Review has recommended shaping ACT judges into the style of their Victorian counterparts by ongoing training. By this approach, the purposive rule really applies no inhibition on the 'robustness' of judicial decision making. The review authors say:

> It remains to be seen whether the ACT courts will recognise that it is possible for a robust approach to human rights interpretation to be coupled with a clear demarcation of judicial boundaries. If the courts are too timid in their approach to [section] 30, the HRA may have little impact on the quality and application of laws from a human rights standpoint, especially if the courts are also reticent to issue declarations of incompatibility.[103]

It is within the power of these experts to push judges to take an expansive, progressive and activist approach to reading charters of rights in the long run, particularly through review mechanisms and training programs. There is no doubt experts will take the same approach to a federal charter.

It is this trend towards progressive interpretation which makes the introduction of a federal charter dangerous. Those who want a charter, those who will litigate, and those who have the power to conduct reviews recommending change to interpretive provisions will have the view that courts should be able to override Parliament. Even if a federal charter would not have a revolutionary impact in the short run, and even if it appears relatively harmless for the longer term, it may in fact be potent. The ACT and Victorian examples show that the theory about what terms are included in a charter can at times, particularly when it comes to the role of judges, bear little control over the way charters operate in practice.

Under the influence of experts, it is likely that the frequency and reach of activist and policy-centred decisions made in the courts would increase in the long run to the extent that the judicial task becomes politically difficult.

The 'moderate option' myth

> *[The ACT HRA] is merely an Act of the Assembly and can be changed, altered or abolished as the Assembly sees fit.*
>
> — Terence Higgins, Chief Justice, ACT Supreme Court, speaking the day after the *HRA* was passed[104]

Concerns about the power of lobby groups and judges influenced by legal experts might sound exaggerated, especially if the charter itself operates just like any other law and can be 'changed, altered or abolished' by the Parliament if it starts creating problems.

However, the reality is that the 'dialogue' charter model proposed by the National Consultation and adopted in the ACT and Victoria is not like any other law. It has the ability to profoundly change government and, indirectly, business and the community.

Charter proponents argue that the dialogue model is a moderate option because it preserves the power of Parliament. It gives judges the responsibility of alerting Parliament to inconsistencies between its laws and the human rights charter—but Parliament retains the final say about whether and how to heed that advice. Rather than pushing the limits of the judicial power to override it, as the name suggests, the model creates a 'discussion' between judges and politicians, as well as within Parliament and the public service, about possible human rights violations.

The idea that the dialogue model preserves the current political arrangement is partly unrealistic and, worse, partly disingenuous.

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Pragmatic politics

Despite the fact that the dialogue model does not legally bind government, it is unlikely that government would oppose it.

The moral nature of human rights and respect for the role of the judiciary mean that Parliament would be likely to follow judicial advice on those matters. That has been the experience in Canada, where overruling the Supreme Court on questions of compatibility between a Canadian law and the *Charter of Rights and Freedoms* has not been a practical option.[105] It would not be conceivable for Parliament to put itself above human rights legislation and the judiciary, and indeed the Canadian government has never utilised its power to ignore a judicial finding on the charter.

The other reason governments are unlikely to oppose judgments on a charter is that many politicians are happy for judges to take the rap for difficult decisions. When politicians hand decision-making responsibility to the courts, they absolve themselves of criticism for those decisions. Former Prime Minister John Howard has lamented the increasing willingness of politicians to legislate away their own power 'to escape the opprobrium of unpopular decisions.'[106]

To suggest that a dialogue model retains power for Parliament just because the right is there on paper is unrealistic.

Legal hierarchy

Arguing that the dialogue model will not significantly change the current political arrangement is not just unrealistic but disingenuous, as its place in the hierarchy of laws makes clear. Because a charter is designed to bring government processes and actors into conformity with human rights, it is a law that necessarily affects all other laws. A charter must override the operation of other laws if it is to control government action.

Every legal system has a hierarchy of laws. Federally, the highest law is the Constitution, followed by Parliament-made law, case law, regulations, and then other laws made by the executive under authority from Parliament. Federal law prevails over state law. The higher level laws have authority over the lower level laws, so that conflicts are resolved in favour of 'superior' laws. For example, Parliament can legislate to override a judicial decision, except decisions on the Constitution.

The dialogue model is an ordinary statute, not constitutional, so would sit below the Constitution. Its ability to control the activity of government places it above all other laws. In that sense it as close to a constitutional law as possible, which is why James Allan argues that statutory charters are 'virtually as potent as their constitutionalised cousins,'[107] while the Chief Justice of the NSW Supreme Court, James Spigelman, calls them 'quasi-constitutional.'[108]

The idea that a statutory charter is like an ordinary statute is misleading. On the contrary, it is designed to be a legal trump card—subject to the Constitution but overriding all other laws.

Human rights culture

The idea of a moderate dialogue model is also disingenuous because the very purpose behind the creation of a charter is to ensure it is pervasive and will introduce an effective human rights culture.

The primary reason for creating a charter of rights is to affect all levels of government. Human rights proponents also hope it will have an effect on business and the community indirectly, and perhaps directly in the long run. The National Consultation recommended a charter that directly monitors only federal government action. Like the ACT, however, it endorses the creation of culture that reaches beyond that to business and the community. As the Department Review explains of the *HRA*:

> [A] long-term aim of the HRA is to build a human rights culture. This includes two related objectives. The first is to promote cultural change within the executive by ensuring that decision makers work within the internationally agreed framework of human rights standards. The second is to promote awareness within the legal profession, the community sector and the wider community of these human rights standards and the ways in which those standards may be applied effectively.[109]

By influencing the charter, they would be able to set the political and cultural agenda for Australia in a way not otherwise possible.

Being designed to impose this new 'human rights culture' on government and eventually the whole society, statutory charters of rights are designed to have a significant impact.

In a sense, that has to be obvious from the virulence with which proponents pursue a charter. Would they be happy with an Australian declaration of human rights that has no control over Parliament, the executive or society?

A dialogue model charter of rights has a prominent role in our constitutional system. Because of its powerful position, its moral weight and its pervasive affect on the Australian community, the importance of its terms and their interpretation is profound. The hand dealt by a few lobby groups and legal experts is therefore a trump. By influencing the charter, they would be able to set the political and cultural agenda for Australia in a way not otherwise possible.

An alternative

If a charter should not become law—perhaps because of the controversy that the anti-charter lobby have unleashed—the National Consultation has offered an equally pervasive alternative with the same effect. Tucked into the text of the 400-page National Consultation Report is the recommendation that government amend two of its most pervasive federal laws to ensure that all new laws and executive decisions comply with human rights, and those that do not can be pursued by litigation in tribunals and courts.

The idea is that the federal Parliament first create an interim list of human rights, including the rights in the ICCPR and ICESCR, which will be made definitive within two years. That list can be used to prepare statements of human rights compatibility for all future bills.[110]

The National Consultation Report then recommends altering the *Administrative Decisions (Judicial Review) Act 1977* (Cth) 'in such a way as to make the definitive list of Australia's international human rights obligations a relevant consideration in government decision making.'[111] Therefore, if any public servant made a decision that did not consider a right included in the

definitive list, that decision could be challenged in an administrative law tribunal and a court if appealed.

The other federal law the National Consultation Report recommends changing is the *Acts Interpretation Act 1901* (Cth). This is the law by which judges are told how to interpret legislation. Even without a charter asking judges to apply human rights readings to legislation, amending the *Acts Interpretation Act* would achieve exactly the same outcome in effect. The report reads:

> The Committee recommends that, in the absence of a federal Human Rights Act, the *Acts Interpretation Act 1901* (Cth) be amended to require that, as far as it is possible to do so consistently with the legislation's purpose, all federal legislation is to be interpreted consistently with the interim list of rights and, later, the definitive list of Australia's human rights obligations.[112]

The National Consultation Report has thus given the government every opportunity to enact a pervasive human rights culture at the federal level. They have even given the government an option that sidesteps the controversy surrounding the introduction of a human rights charter. Their ambition is anything but moderate.

Conclusion

Charters of rights are another tool in the political game. A national charter of rights would represent a variety of interests and ideologies, like any other law. It would inhibit the rights of some in favour of the rights of others, like any other law. The profoundly important difference to other laws is that a charter would be a legal trump so that its contents would be potent in effect.

The manipulability of a statutory charter makes it a dangerous political tool, particularly in the long run. There is already evidence that a range of interest groups, legal intellectuals, and others are attempting to have their interests and causes preserved by such a law. Once a charter becomes subject to that kind of manipulation, it allows the influence of those few who get their rights sufficient protection to dominate the rights of everyone else.

Although a human rights charter has an important and luring moral undertone, in practice it is not clear that a charter would preserve those moral imperatives as it continues to grow and change through the lobbying of various groups. In a foretelling of the potential for this change, AHRC President Catherine Branson QC told a human rights gala dinner in July 2009:

> [W]e should remember that ensuring the best protection of human rights is an ongoing process … Australia is at an interesting stage in what I believe is a journey towards better rights protection. Tonight there is much to celebrate, but we should also remember that we have a long way to travel yet.[113]

When this journey gets under way, what conglomeration of interests will be dictating the way government, judges and eventually the Australian community will live?

We can only imagine.

Endnotes

1 Catherine Branson, 'Take judges out of human rights process,' *The Australian* (8 May 2009).
2 The terms 'bill of rights' and 'charter of rights' have been used interchangeably in the debate, under the presumption that a bill refers to a constitutional declaration of human rights while a charter refers to a similar statutory declaration. However, that is not a rule. Because the term 'charter' is used more often in the contemporary Australian debate, this report has adopted that term.
3 See for example, Julian Leeser, 'Responding to Some Arguments in Favour of the Bill of Rights' in Julian Leeser and Ryan Haddrick (eds), *Don't Leave Us with the Bill: The Case Against an Australian Bill of Rights* (Canberra: Menzies Research Centre, 2009), 31.
4 National Consultation Report, Part Five: The Way Forward / Chapter 15: The Committee's Findings (2009).
5 See endnotes 110 to 112 and accompanying text.
6 Francesca Klug, 'Human rights: above politics or a creature of politics?' *Policy & Politics* 33:1 (2005), 3, 7.
7 Greg Melleuish, 'Politics is not a dirty word,' *The Australian* (17 November 2009).
8 GetUp! Human Rights Campaign.
9 *Secretary of State for Defence v R* [2009] EWCA Civ 441 (18 May 2009).
10 'Verfassungsrichter bringen Regierung in Erklärungsnot,' *SPIEGEL online* (21 October 2009).
11 Consent decree, *GEOD v New Jersey,* Civil Action No. 01-2656 (SRC) (D.N.J.) (2003).
12 For a summary of the theory and its development, see James M. Buchanan, 'Public Choice: Politics without Romance,' *Policy* (Spring 2003).
13 As above.
14 Gordon Tullock, *The Vote Motive* (London: Institute of Economic Affairs, 2006), 36.
15 Geoffrey Robertson, *Crimes against Humanity: The Struggle for Global Justice* (New York: The New Press, 2000); Francesca Klug, 'In the Footsteps of H G Wells,' *New Statesman* (9 October 2000).
16 Francesca Klug, 'In the Footsteps of H G Wells,' as above.
17 In Eleanor Roosevelt's position as the first chair of the UN Commission on Human Rights, established by the *United Nations Charter* to develop UN human rights policy.
18 Eleanor Roosevelt, *Adoption of the Declaration of Human Rights* (9 December 1948).
19 United Nations, 'Growth in United Nations Membership, 1945–present.'
20 National Consultation Report, Part Five: The Way Forward / Chapter 15: The Committee's Findings (2009), 365.
21 Michael Ignatieff, 'Human Rights as Politics' in Amy Gutmann (ed), *Human Rights as Politics and Idolatry* (Princeton: Princeton University Press, 2001), 19.
22 Frederick Henry Gareau, *The United Nations and other International Institutions: A Critical Analysis* (Chicago: Burnham Inc., 2002), 225.
23 Stéphane Courtois et al., *The Black Book of Communism: Crimes, Terror, Repression* (Paris: Robert Laffont, 1997), 233 (translated from *Le livre noir du Communisme: Crimes, terreur, répression* by Jonathan Murphy and Mark Kramer).
24 Stéphane Courtois et al. as above, x.
25 The White House, President Franklin D. Roosevelt; Frederick Henry Gareau, as above, 225.
26 Frederick Henry Gareau, as above.
27 James Allan, 'What's Wrong about a Statutory Bill of Rights?' in Julian Leeser and Ryan Haddrick (eds), *Don't Leave Us with the Bill: The Case Against an Australian Bill of Rights* (Canberra: Menzies Research Centre, 2009), 83.
28 In the context of rights to freedom of religion, for example, UK barrister Paul Diamond argues that the winner is too often the secular: see Chris Merritt and Nicola Berkovic, 'Rights threat to religious tolerance,' *The Australian* (27 October 2009). This issue is discussed in endnotes 61 to 63 and accompanying text.
29 National Consultation Report, Part Five: The Way Forward / Chapter 15: The Committee's Findings (2009), 362.
30 Amnesty International Australia, Submission to the National Human Rights Consultation (12 June 2009), 5–6.
31 GetUp! Submission to the National Human Rights Consultation (14 June 2009), 11.
32 Australian Christian Lobby, Submission to the National Human Rights Consultation (June 2009).
33 National Consultation Report, Part Two: Rights and Responsibilities in Australia / Chapter 4: Which Rights and Responsibilities? (2009), 75.
34 As above, 77.
35 ChilOut, Submission to the National Human Rights Consultation (2009).

36 National Consultation Report, Part Five: The Way Forward / Chapter 15: The Committee's Findings (2009), 359–360.
37 As above, 351.
38 Graeme Innes, Human Rights Commissioner, 'Developing a Culture of Human Rights: Education, Public Awareness and Active Citizenship,' National Human Rights Consultation Public Hearing (3 July 2009).
39 Paul Sheehan, 'Three cheers for discrimination,' *The Sydney Morning Herald* (31 August 2009).
40 As above.
41 The *HRA* (as it was first passed) explained the issues that should be reviewed after one year of its operation. They included whether environment-related human rights would be better protected if there were statutory oversight of their operation by someone with expertise in environmental protection. See ACT Department of Justice and Community Safety, *Twelve-month Review Report* (June 2006).
42 ACT Chief Minister Jon Stanhope, *Hansard* (2 March 2004), 531.
43 Attorney-General Rob Hulls, *Hansard* (4 May 2006), 1292.
44 Section 16(1) *Victorian Charter*.
45 BVerfGE 50, 290 (367) (Mitbestimmung). The court identified a so-called 'negative Koalitionsfreiheit,' literally meaning the negative freedom to join a coalition or, more straightforwardly, a ban on 'closed shops.'
46 ACT Department of Justice and Community Safety, *Twelve-month Review Report* (June 2006), 5.
47 The Australian National University, ACT Human Rights Act Research Project.
48 ACT Chief Minister Jon Stanhope, *Hansard* (2 March 2004), 531.
49 Attorney-General Rob Hulls, *Hansard* (4 May 2006), 1290.
50 National Consultation Report, Part Two: Rights and responsibilities in Australia / Chapter 4: Which rights and responsibilities? (2009), 76.
51 National Consultation Report, Part One: Introduction / Chapter 3: Rights and Responsibilities (2009), 60.
52 Vienna Declaration and Programme of Action, article 5 A/CONF.157/23 (12 July 1993).
53 National Consultation Report, Part Five: The Way Forward / Chapter 15: The Committee's Findings (2009), 356–357.
54 As above, 366.
55 National Consultation Report, Part Two: Rights and responsibilities in Australia / Chapter 4: Which rights and responsibilities? (2009), 74.
56 Human Rights Law Resource Centre, Submission to the National Human Rights Consultation (May 2009), 21.
57 Amnesty International Australia, Submission to the National Human Rights Consultation (12 June 2009), footnote 1.
58 Jeremy Waldron argues that the idea of innate human rights necessarily implies the right to participation in government, creating a paradox for supporters of a charter: see the brief overview of his argument in James Allan, 'Jeremy Waldron and the Philosopher's Stone' *San Diego Law Review* 45:11 (2008), 133 and the citations therein. The right to public participation is also enshrined in Article 21(1) UDHR.
59 See above endnote 27 and accompanying text.
60 'Grundsatzurteil erwartet,' *Süddeutsche Zeitung* (20 October 2009).
61 See Chris Merritt and Nicola Berkovic, 'Rights threat to religious tolerance,' *The Australian* (27 October 2009).
62 As above.
63 As above.
64 Australian Human Rights Commission, *2008–2011 Strategic Plan*, (2008), 8.
65 See Harry Gibbs, 'Judicial Activism and Judicial Restraint: Where Does the Balance Lie?' Speech to the Constitutional Law Conference (Sydney, University of New South Wales, 20 February 2004). Judicial activism is problematic because it makes the law uncertain, discouraging forward planning and risk taking.
66 See *R v Monaghan* [2009] ACTSC 61 (27 May 2009) and *X v General Television Corp Pty Ltd* [2008] VSC 344 (8 September 2008), which held that the right to a fair trial has always been an important part of criminal law, but is now mandated by the ACT and Victorian charters respectively; *Sabet v Medical Practitioners Board of Victoria* [2008] VSC 346 (12 September 2008), which held that the Victorian charter was not intended to create new causes of action against public authorities additional to those that had been available under administrative law, without the Victorian charter.

67 Richard Refshauge, 'The ACT Human Rights Act and the Criminal Law,' Paper presented at the Conference Assessing the First Year of the ACT *Human Rights Act 2004* (Australian National University, 29 June 2005), citations omitted.
68 ACT Human Rights Act Research Project, *The* Human Rights Act 2004 *(ACT): The First Five Years of Operation,* (Canberra, Australian National University, May 2009). See discussion at text accompanying endnotes 90 to 92.
69 [2008] VSCA 265 (18 December 2008).
70 See Ben Jellis, 'Look but Don't Leap: Lessons from the Victorian Statutory Bill of Rights' in Julian Leeser and Ryan Haddrick (eds), *Don't Leave Us with the Bill: The Case Against an Australian Bill of Rights* (Canberra: Menzies Research Centre, 2009), 319, 322–3.
71 Philip Lynch, *Court of Appeal Considers Obligation to Interpret Legislation Compatibly with Human Rights under Charter*, Human Rights Law Resource Centre (emphasis in original).
72 [2009] VSC 381 (7 September 2009). For a critical view, see James Allan, 'Victoria's bill of rights a bad benchmark for law,' *The Australian* (16 October 2009). For a supporting view, see Jeremy Gans, 'Warren's charter,' Charterblog (8 September 2009).
73 See *Huddart, Parker v Moorehead* (1909) 8 CLR 330.
74 Generally, Chapter III of the Constitution in conjunction with the *Judiciary Act 1903* (Cth).
75 *Australian Communist Party v Commonwealth* (1951) 83 CLR 1, 262–3.
76 See, e.g. George Williams, *Human Rights and the Drafting of the Australian Constitution* (Oxford University Press, 1999), 52.
77 See, e.g. Geoffrey Goldsworthy, 'The Constitutional Protection of Rights in Australia,' in Gregory Craven (ed), *Australian Federation* (1991), 151, 158.
78 See *Kable v Director of Public Prosecutions (NSW)* (1989) 189 CLR 51.
79 Section 30 *Judiciary Act 1903* (Cth).
80 Section 15A *Acts Interpretation Act 1901* (Cth).
81 See Sujit Choudhry, 'Globalization in Search of Justification: Toward a Theory of Comparative Constitutional Interpretation,' *Indiana Law Journal* 74 (1999), 819, 824, arguing that the late twentieth century has seen a renewed emphasis on the link between public authority and public justification; Chief Justice Murray Gleeson, 'Outcome, Process and the Rule of Law' speech delivered at the Administrative Appeals Tribunal 30th Anniversary (Canberra, 2 August 2006): 'The development in the Australian community of a cultural expectation that those in authority are able and willing to justify the exercise of power is one of the most important aspects of modern public life.'
82 Jonathan Crowe, 'What's so bad about judicial review?' *Policy* (Summer 2008–09) 34.
83 Catherine Branson, 'Take judges out of human rights process,' *The Australian* (8 May 2009); Michael Pelly, 'Rights chief backs limits on judges say,' *The Australian* (4 September 2009).
84 Jonathan Crowe, 'What's so bad about judicial review?' as above, 30.
85 *The Centenary of the High Court: Lessons from History* (2003), 6.
86 *Ghaidan v Godin-Mendoza* [2004] UKHL 30 (21 June 2004) at [29]–[30].
87 National Consultation Report, Part Five: The Way Forward / Chapter 15: The Committee's Findings (2009), 373.
88 Michael Pelly, 'Rights chief backs limits on judges say,' *The Australian* (4 September 2009).
89 Catherine Branson, 'Take judges out of human rights process,' *The Australian* (8 May 2009).
90 ACT Department of Justice and Community Safety, *Twelve-month Review Report* (June 2006).
91 As above.
92 ACT Human Rights Act Research Project, *The* Human Rights Act 2004 *(ACT): The First Five Years of Operation,* as above.
93 The interpretive rule is made subject to section 139, *Legislation Act*, which contains the purposive rule.
94 ACT Department of Justice and Community Safety, *Twelve-month Review Report* (June 2006), 3 (Recommendation 5).
95 As above, 32.
96 *Human Rights Amendment Act 2008* (ACT), Explanatory Statement.
97 *Casey v Alcock* [2009] ACTCA 1 (23 January 2009); *R v Fearnside* (2009) 165 ACTR 22.
98 ACT Human Rights Act Research Project, *The* Human Rights Act 2004 *(ACT): The First Five Years of Operation*, as above. For a discussion of the 'dialogue' model, see section below.
99 See endnotes 69 to 72 and accompanying text.
100 ACT Human Rights Act Research Project, *The* Human Rights Act 2004 *(ACT): The First Five Years of Operation*, as above, 49.
101 As above.
102 The Hon John Doyle AC (Chairman of the College Council), 'The National Judicial College of Australia,' *Commonwealth Judicial Journal* 16:1 (2005), 16, 17.

103 ACT Human Rights Act Research Project, *The* Human Rights Act 2004 *(ACT): The First Five Years of Operation*, as above, 57.
104 Chief Justice Terence Higgins, 'Australia's first bill of rights: Testing judicial independence and the human rights imperative,' speech delivered at the National Press Club (3 March 2004).
105 Former Australian Prime Minister John Howard relayed the anecdote from former Canadian Prime Minister Jacques Chrétien in his 2009 Menzies Lecture (26 August 2009), reprinted in *The Australian* (27 August 2009).
106 As above.
107 James Allan, 'What's Wrong about a Statutory Bill of Rights?' as above, 83.
108 James Spigelman, 'The application of quasi-constitutional laws,' Second Lecture in the 2008 McPherson Lecture Series (University of Queensland, 11 March 2008).
109 ACT Department of Justice and Community Safety, *Twelve-month Review Report* (June 2006), 34.
110 National Consultation Report, Part Five: The Way Forward / Chapter 15: The Committee's Findings (2009), 357.
111 As above, 359.
112 As above.
113 Catherine Branson, Keynote speech at the Human Rights Consultation Gala Dinner (Melbourne, 31 July 2009).

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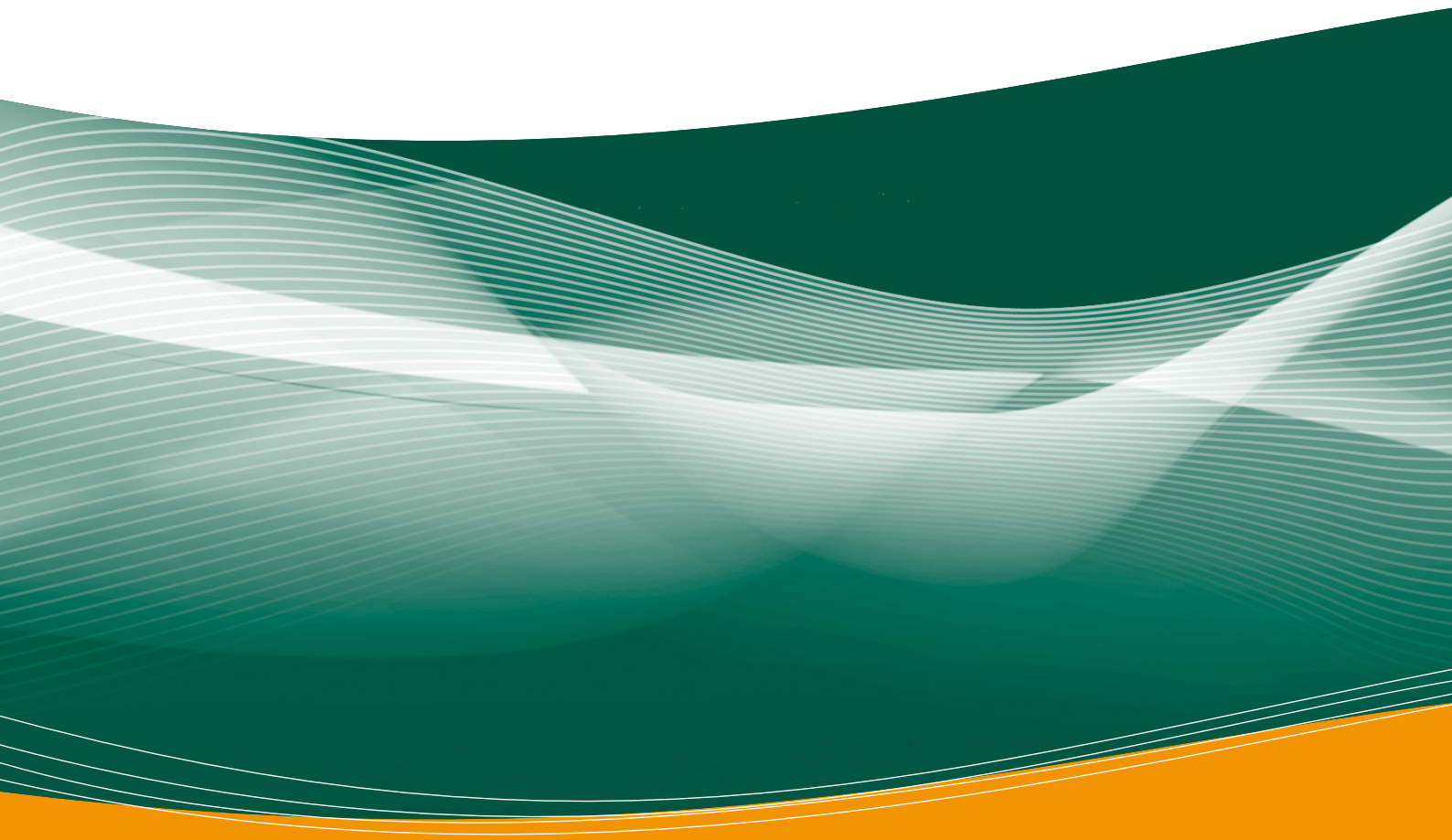

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