

# The British Bill of Rights Debate: Lessons from Australia<sup>1</sup>

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☞ Australian Capital Territory; Bill of Rights; Comparative law; Human rights; Victoria

For several years, the Human Rights Act 1998 (HRA) has been embroiled in a crisis that threatens its very existence. The statute is beset by a number of problems. It has been widely attacked in parts of the press, is poorly understood by the public and has been slated for repeal by the Cameron Conservative Government, which proposes to replace it with a British Bill of Rights (BBOR). Whatever its successes, all this points to the fact that the HRA has failed to attain the same level of acceptance as like instruments in other democratic nations.

In conservative circles, and possibly beyond them, the HRA has given rise to a number of deep-seated concerns. The first is that the Act compromises the sovereignty of Parliament by conferring undue powers upon the judiciary. Legislation must be read compatibly with the European Convention on Human Rights and Fundamental Freedoms (ECHR) “[s]o far as it is possible to do so”.<sup>2</sup> The Conservatives criticise this aspect of the HRA for allowing the courts to go “to artificial lengths to change the meaning of legislation ... even if this is inconsistent with Parliament’s intention when enacting the relevant legislation.”<sup>3</sup>

Secondly, the HRA is said to provide a means by which domestic laws and policies may be unduly directed by the Strasbourg Court.<sup>4</sup> Domestic courts are directed to “take into account” relevant Strasbourg jurisprudence,<sup>5</sup> but the argument is that they are unduly tied to it. It has also been said that Strasbourg has generated “mission creep” as it interprets and reinterprets the ECHR in the light of evolving

<sup>1</sup> The authors thank Helen Fenwick and the anonymous reviewer for helpful comments on an earlier draft. The usual disclaimer applies.

<sup>2</sup> HRA s.3(1).

<sup>3</sup> Conservatives, *Protecting Human Rights in the UK: The Conservatives’ Proposals for Changing Britain’s Human Rights Laws* (2014), p.4, [https://www.conservatives.com/~media/files/downloadable%20Files/human\\_rights.pdf](https://www.conservatives.com/~media/files/downloadable%20Files/human_rights.pdf) [Accessed 27 April 2016].

<sup>4</sup> The Supreme Court has recently reasserted the common law’s primacy over the ECHR as a system for safeguarding basic rights: e.g. *R. (on the application of Osborn) v Parole Board* [2013] UKSC 61; [2014] A.C. 1115; [2014] H.R.L.R. 1; *Kennedy v Information Commissioner* [2014] UKSC 20; [2015] A.C. 455; [2014] E.M.L.R. 19. See also Roger Masterman and Se-shauna Wheatle, “A Common Law Resurgence in Rights Protection?” [2015] E.H.R.L.R. 57.

<sup>5</sup> HRA s.2(1).

context and “expand[s] Convention rights into new areas, and certainly beyond what the framers of the Convention had in mind when they signed up to it.”<sup>6</sup> In this regard the Conservatives direct particular criticism at Strasbourg decisions concerning the disenfranchisement of prisoners<sup>7</sup> and the expulsion of foreign criminals and suspected terrorists.<sup>8</sup>

Thirdly, it is argued that the HRA has generated outcomes antithetical to British values and the policies of British governments. The complaint is that domestic courts have improperly engaged in “essentially political evaluation of different policy considerations” through the Strasbourg-imported proportionality doctrine,<sup>9</sup> and that “in many areas the interpretation given to Convention rights has not struck the appropriate balance between individual rights and responsibilities to others”.<sup>10</sup> For example, the Conservatives criticise the notion that a foreign national convicted of murder should be able to resist deportation by relying on the qualified right to respect for private and family life under art.8 ECHR.<sup>11</sup>

The first two of these concerns have in particular been contested,<sup>12</sup> and indeed it is debatable whether they accurately portray the HRA’s operation and effect. For example, the notion that domestic courts pay undue deference to Strasbourg’s interpretation of the ECHR has been questioned in a recent analysis emphasising that the courts have been making increasing use of the discretion given to them by s.2 HRA to depart from Strasbourg jurisprudence.<sup>13</sup>

Whether or not these concerns can be substantiated, it is evident that they have undermined support for the Act on the part of the Conservatives (and also in parts of the Labour party) and within the populace generally. This has produced policies on the part of the Conservative government that will spell the HRA’s demise if implemented. Hence, the pledge of the Conservative party at the 2015 general election was to “scrap the Human Rights Act, and introduce a British Bill of Rights”.<sup>14</sup> It is also the policy of the UK Government to “break the formal link between British courts and the European Court of Human Rights, and make the Supreme Court the ultimate arbiter of human rights matters in the UK”.<sup>15</sup>

The aim of this paper is not to analyse whether criticisms of the HRA are justified. Nor is it to analyse whether such reforms are achievable given the UK’s ties to Europe and the ECHR’s integration into the UK’s internal constitutional arrangements through the devolution settlements in Scotland, Wales and Northern Ireland. Rather, our purpose is to assess whether the debate over replacement of

<sup>6</sup> Conservatives, *Protecting Human Rights in the UK* (2014), p.3. The ECHR is said by Strasbourg to be “a living instrument which ... must be interpreted in the light of present-day conditions”: *Tyrer v United Kingdom* (1979–80) 2 E.H.R.R. 1 at [31].

<sup>7</sup> *Hirst v United Kingdom* (No.2) (2006) 42 E.H.R.R. 41; 19 B.H.R.C. 546.

<sup>8</sup> *Chahal v United Kingdom* (1997) 23 E.H.R.R. 413; 1 B.H.R.C. 405; *Othman v United Kingdom* (2012) 55 E.H.R.R. 1; 32 B.H.R.C. 62.

<sup>9</sup> Conservatives, *Protecting Human Rights in the UK* (2014), p. 4.

<sup>10</sup> Conservatives, *Protecting Human Rights in the UK* (2014), p.4.

<sup>11</sup> Conservatives, *Protecting Human Rights in the UK* (2014), p.6.

<sup>12</sup> See Dominic Grieve, “Can a Bill of Rights do better than the Human Rights Act?” [2016] P.L. 223; Steven Greer and Rosie Slowe, “The Conservatives’ Proposals for a British Bill of Rights: mired in muddle, misconception and misrepresentation?” [2015] E.H.R.L.R. 372; Alison Young, “HRA Howlers: The Conservative Party and Reform of the Human Rights Act 1998”, U.K. Const. L. Blog, 7 October 2014.

<sup>13</sup> Roger Masterman, *Supreme, Symbiotic or Submissive? United Kingdom Courts and the European Court of Human Rights* (2015), Report of the UCL Constitution Unit, <https://www.ucl.ac.uk/constitution-unit/publications/tabs/unit-publications/166.pdf> [Accessed 27 April 2016].

<sup>14</sup> Conservative Party, “Manifesto” (2015), <https://www.conservatives.com/manifesto> [Accessed 27 April 2016].

<sup>15</sup> Conservative Party, “Manifesto” (2015).

the Act might be usefully informed by the development of analogous instruments in Australia.

Two sub-national jurisdictions in Australia have enacted adoptions of the HRA. The first was the Australian Capital Territory's Human Rights Act 2004 (ACT Human Rights Act); the second was Victoria's Charter of Human Rights and Responsibilities Act 2006 (Victorian Charter). These laws are significant because they were drafted in a way that responds to the concerns surrounding the HRA. As a result, they contain a number of novel design features, including an enhanced role for Parliament, a revised interpretive function for the courts and domestic adaptations of particular human rights.

In the next section we explain the background to these Australian instruments, and the adaptations made to the HRA. In doing so, our focus is upon the Victorian Charter. As the second of these enactments, it was in some respects a more refined model. To a greater extent, it was also drafted in light of the UK experience.<sup>16</sup> In the following section, we assess the lessons that might be drawn from these adaptations, and whether they can serve as a model to address long-standing concerns about the HRA during the design of a new BBOR to replace it.

## Australian adaptations of the HRA

Australia has gone through a number of debates about whether to bring about a Bill of Rights or Human Rights Act.<sup>17</sup> Legislation for such reform was introduced into the Australian Parliament in the 1970s and early 1980s, on both occasions failing to be passed. A national referendum was then put unsuccessfully in 1988 to introduce new provisions into the Australian Constitution protective of human rights. Similar debates have also occurred in Australia's states and territories.

The first, and to date only, occasions on which an Australian jurisdiction has enacted a comprehensive human rights law came with the enactment of the ACT Human Rights Act and the Victorian Charter. The timing of these enactments, in coming soon after the passage of the HRA, was not a coincidence. The UK law had a very significant impact upon the Australian debate. If nothing else, it removed a central argument against any such Act in Australia: that if the UK saw no need for such a law, then neither should Australia. The HRA was also deeply influential because Australia's system of Government owes much to the UK. The common law was received into Australia upon British settlement in 1788, and Australia's parliamentary institutions are modelled upon the Westminster system. As a result, arguments around such instruments, such as in regard to the role of the judiciary and parliamentary sovereignty, were naturally influenced by the way in which such questions were resolved in the UK in favour of the HRA.

The HRA was also influential—in a way that the New Zealand Bill of Rights Act 1990 was not—in shifting the Australian debate away from the notion that improved human rights protection should proceed by way of an amendment to the Australian Constitution. This might have produced a Bill of Rights in the American style, including a capacity for courts to declare legislation invalid. By contrast,

<sup>16</sup> The chair of the consultative process (the second author to this article) that led to the enactment of the Victorian Charter spent a significant period of time in the UK while the Charter was being drafted: Department of Justice, *Rights, Responsibilities and Respect: The Report of the Human Rights Consultation Committee* (2005), p.147.

<sup>17</sup> See George Williams, *A Charter of Rights for Australia* (UNSW Press, 2007), pp.51–72.

the British model provided an influential counterpoint, demonstrating how human rights protection could be integrated into a Westminster system in a way that did not provide the judiciary with a final say over contentious laws and government policies.

These factors explain why, soon after the enactment of the HRA, Australian jurisdictions moved to enact their own, like instruments. This though only tells part of the story. The HRA was certainly a catalyst for the Australian reforms, but not only in response to the perceived strengths of that instrument. Also significant was the view that developed in Australia that the HRA suffered from weaknesses of design.

When Australia re-engaged with questions of human rights protection early in the last decade, the HRA had been in operation for some years. By then, a number of problems had arisen. Political support for the instrument in the Blair Labour government was waning, particularly when the courts began to impugn the government's anti-terror legislation in high-profile judgments like *Belmarsh*<sup>18</sup> in the years following 9/11. Popular support for the instrument also appeared to ebb, and the view emerged that the HRA gave insufficient regard to the sovereignty of the UK Parliament. The task then for Australian policymakers influenced by such concerns, but seeking to bring about an instrument in a like form, was to develop an adaption to the HRA that would ameliorate these problems.

One early reaction to the HRA was that any Australian law should be brought about by a different process. The UK instrument was enacted through a means that focused almost exclusively upon Parliament, and so tended only to engage parliamentarians and experts. The HRA was a core feature of Labour's manifesto pledge at the 1997 general election, and a central plank of its broader constitutional reform agenda that grew to encompass also devolution, freedom of information, House of Lords reform and creation of the UK Supreme Court. The promise of a domestic human rights instrument was a response to the erosion of civil liberties during the prior 18 years of Conservative rule. After Labour's landslide victory, a bill of rights in some form or another was therefore a *fait accompli*, the only remaining questions being the more technical, esoteric ones of how to draft the legislation in a way that protected the ECHR while preserving parliamentary sovereignty as the UK's foundational constitutional principle. By that point in the process, the general public no longer had a role to play in the HRA's creation. No attempt was made to educate society about the new instrument, for example in civic lessons in schools.

This process of enacting the HRA was explicable in light of the political and legal circumstances of the time, but failed to account for the special nature of comprehensive human rights statutes designed to resolve contentious and highly-politicised questions of law and policy. Such laws are vulnerable to misrepresentation and political attack. The process by which they are enacted may well be important in producing a level of political support and popular ownership capable of buttressing the law and enhancing its legitimacy during times of adverse political reaction and controversy.

<sup>18</sup> *A v Secretary of State for the Home Department* [2004] UKHL 56; [2005] 2 A.C. 68; [2005] H.R.L.R. 1 (*Belmarsh*). See also *A v United Kingdom* (2009) 49 E.H.R.R. 29; 26 B.H.R.C. 1.

The Australian jurisdictions followed a different path. In particular, it was decided that no Bill of Rights should be introduced into Parliament until the reform had been widely canvassed by way of a broad-ranging community consultation. Governments in the Australian Capital Territory,<sup>19</sup> Victoria,<sup>20</sup> Tasmania<sup>21</sup> and Western Australia<sup>22</sup> adopted this approach. Each consultation involved high levels of public engagement, and produced strong community support in favour of legislative reform. Of these, the processes in the first two jurisdictions led to legislation, with the Western Australian and Tasmanian governments losing office before following suit.

In the case of Victoria, its Charter was preceded by a public consultation process conducted over the second half of 2005 by the Victorian Human Rights Consultation Committee, an independent panel appointed by the State Labor Government. The Committee took part in 55 community forums and had 75 other meetings with government and community bodies. It received 2,524 written submissions, of which 84 per cent (or 94 per cent if petitions and group submissions are included) were in favour of reform.<sup>23</sup> The Committee reported that the community was overwhelmingly wanted change, and recommended that the Victorian Parliament enact a new human rights law adapted from the UK HRA. The Victorian Parliament did so in 2006.

These state and territory consultations culminated in a national debate. In 2008, the Rudd Labor Government established an independent National Human Rights Consultation. It established a national record for the number of people engaged in such a process. It received 35,014 written submissions, and held 66 community roundtables in 52 locations around Australia that were attended by more than 6,000 people. Of the submissions, 87 per cent were in favour of a national Human Rights Act.<sup>24</sup> The Committee made 31 recommendations, including that “Australia adopt a federal Human Rights Act” based on the model in force in the ACT and Victoria.<sup>25</sup> In the midst of leadership turmoil, the Rudd Government rejected most of these recommendations. In particular, it decided not to support a Human Rights Act, saying that this would be “divisive”.<sup>26</sup> Instead, it announced that it would implement a new “Human Rights Framework”, the centrepiece of which is the Human Rights (Parliamentary Scrutiny) Act 2011 (Cth). This Act provides for enhanced processes of parliamentary scrutiny on human rights grounds, without providing additional powers to the courts.<sup>27</sup>

The effect of such processes was to imbue the resulting legislative reforms in the ACT and Victoria with a sense of legitimacy and community ownership. This

<sup>19</sup> Department of Justice and Community Safety, *Towards an ACT Human Rights Act: Report of the ACT Bill of Rights Consultative Committee* (2003).

<sup>20</sup> Department of Justice, *Rights, Responsibilities and Respect: The Report of the Human Rights Consultation Committee* (2005).

<sup>21</sup> Tasmanian Law Reform Institute, *A Charter of Rights for Tasmania*, Report No.10 (October 2007).

<sup>22</sup> Consultation Committee on a Human Rights Act for Western Australia, *A WA Human Rights Act: Report of the Consultation Committee for a Proposed WA Human Rights Act* (Department of the Attorney General, 2007).

<sup>23</sup> Department of Justice, *Rights, Responsibilities and Respect: The Report of the Human Rights Consultation Committee* (2005), p.v.

<sup>24</sup> *National Human Rights Consultation Report* (2009), p.264.

<sup>25</sup> *National Human Rights Consultation Report* (2009), p.378.

<sup>26</sup> Robert McClelland, “Address to the National Press Club of Australia — Launch of Australia’s Human Rights Framework”, Speech delivered at the National Press Club of Australia, Canberra, 21 April 2010.

<sup>27</sup> See George Williams and Lisa Burton, “Australia’s Exclusive Model of Parliamentary Rights Protection” (2013) 34 *Statute Law Review* 58.

has undoubtedly been important, especially in Victoria. In 2006, the (conservative) Liberal Party opposition voted against the Bill for the Victorian Charter. In 2010 they won office, with their Attorney General Robert Clark a vocal critic of the Charter, and proposing its repeal.<sup>28</sup> The plan for repeal faltered when it received little community or media support. It instead provoked a counter-reaction<sup>29</sup> from civil society organisations that marshalled evidence demonstrating how the Charter had operated at a low cost, and had on numerous instances improved the quality of people's lives.<sup>30</sup> After an inconclusive parliamentary inquiry<sup>31</sup> that failed to build momentum for repeal, the government shelved its plans and accepted that the Charter would remain in force.<sup>32</sup> Since that time, no further proposal has been made to repeal or otherwise weaken the Charter.

Community consultation also had an impact upon how the Victorian Charter was drafted. This reflected the fact that the aim of the consultation was not merely to determine whether sufficient support existed to enact such a law, but to ensure that any resulting law reflected the community's aspirations for human rights protection. This extended to incorporating language within the instrument reflective of community values, as shown for example in the use of "responsibilities" in the title.<sup>33</sup> More generally, the Charter was framed not as a lawyers' instrument, but as something that "could be used in schools and for broader community education, such as for new migrants to Victoria".<sup>34</sup>

The contrast in this respect between the Victorian Charter and the HRA is stark. The latter opens with an introductory text that reads:

"An Act to give further effect to rights and freedoms guaranteed under the European Convention on Human Rights; to make provision with respect to holders of certain judicial offices who become judges of the European Court of Human Rights; and for connected purposes."

On the other hand, the Victorian Charter (like the ACT Human Rights Act before it) begins with a preamble written in a form that might be posted upon the wall of a schoolroom:

"On behalf of the people of Victoria the Parliament enacts this Charter, recognising that all people are born free and equal in dignity and rights.

This Charter is founded on the following principles—

- human rights are essential in a democratic and inclusive society that respects the rule of law, human dignity, equality and freedom;

<sup>28</sup> See, for example, Robert Clark, "Human Rights Charter Wide Open to Abuse", Media Release, 18 January 2009.

<sup>29</sup> For example, a coalition of over 70 human rights NGOs, community organisations, corporations and religious groups called instead for the Charter to be strengthened: Human Rights Law Centre, "Victorian Attorney-General Should Commit to Strengthen Charter and Protection of Human Rights" (13 December 2010), <http://hrlc.org.au/attorney-general-should-strengthen-charter-and-protection-of-human-rights> [Accessed 27 April 2016].

<sup>30</sup> See the 101 case studies collated in Human Rights Law Centre, *Victoria's Charter of Human Rights and Responsibilities in Action: Case Studies from the First Five Years of Operation* (March 2012).

<sup>31</sup> Scrutiny of Acts and Regulations Committee, *Review of the Charter of Human Rights and Responsibilities Act 2006* (2011).

<sup>32</sup> For the response of the Victorian government to the parliamentary inquiry, see: Parliament of Victoria, Scrutiny of Acts and Regulations Committee, *Review of the Charter of Human Rights and Responsibilities Act 2006, Government Response* (14 March 2012), [http://www.parliament.vic.gov.au/file\\_uploads/VPARL2010-14No69GovtResponse\\_s91CRV24.pdf](http://www.parliament.vic.gov.au/file_uploads/VPARL2010-14No69GovtResponse_s91CRV24.pdf) [Accessed 27 April 2016].

<sup>33</sup> Department of Justice, *Rights, Responsibilities and Respect: The Report of the Human Rights Consultation Committee* (2005), p.30.

<sup>34</sup> Department of Justice, *Rights, Responsibilities and Respect: The Report of the Human Rights Consultation Committee* (2005), p.ii.

- human rights belong to all people without discrimination, and the diversity of the people of Victoria enhances our community;
- human rights come with responsibilities and must be exercised in a way that respects the human rights of others;
- human rights have a special importance for the Aboriginal people of Victoria, as descendants of Australia's first people, with their diverse spiritual, social, cultural and economic relationship with their traditional lands and waters."

The Charter therefore uses terminology reminiscent of the French Declaration of the Rights of Man, or US Constitution, designed to instil a sense of civic pride in the instrument. Throughout the text of the Charter that follows, though it must be said not always successfully,<sup>35</sup> human rights and legal directives are spelt out as far as possible in "clear language".<sup>36</sup> For example, in introducing the protected rights, the Charter begins in s.7 with a provision headed "Human rights—what they are and when they may be limited". That section provides that: "A human right may be subject under law only to such reasonable limits as can be demonstrably justified in a free and democratic society based on human dignity, equality and freedom, and taking into account all relevant factors", including "the nature of the right" and "the importance of the purpose of the limitation". In doing this, the legislation specifies the test of justification to be applied in determining whether a right has been breached, rather than leaving this wholly to judicial development.

In keeping with the notion of popular ownership, the rights protected by the Australian instruments are not expressed to be derivative upon international sources, but are set down directly in the legislation. Hence, each instrument has been grounded purposefully in the notion that they express Australian conceptions of human rights. As a result, none of the rights are dependent upon conventions or other international documents (and so are not referred to as arts 6, 7 or 8, etc. rights, as is the case with the HRA).

The rights listed in the ACT law and the Victorian Charter are adapted from the International Covenant on Civil and Political Rights<sup>37</sup> (ICCPR), to which Australia has been a party since 1980. Australia is obligated under international law to observe these rights, and is also subject to a complaints procedure. In 1991, Australia acceded to the First Optional Protocol to the Covenant, which provides under art.2 that "individuals who claim that any of their rights enumerated in the Covenant have been violated and who have exhausted all available domestic remedies" may submit a written complaint to the Human Rights Committee of the United Nations. If, after considering the response of the national government concerned, the Human Rights Committee is satisfied that the complaint is made out, art.5(4) provides that "[t]he Committee shall forward its views to the State Party concerned and to the individual". It is then left to the national government

<sup>35</sup> An exception is the convoluted language of s.39, which deals with legal proceedings. It reflects the preference expressed by the Victorian Government that it 'does not wish to create new individual causes of action based on human rights breaches': Department of Justice, *Victoria, Human Rights in Victoria: Statement of Intent* (2005). See Jeremy Gans, "The Charter's Irremediable Remedies Provision" (2009) 33 *Melbourne University Law Review* 105.

<sup>36</sup> Department of Justice, *Rights, Responsibilities and Respect: The Report of the Human Rights Consultation Committee* (2005), p.ii.

<sup>37</sup> Opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976).

to indicate whether or how it will respond to those views. Most often, Australian governments have not acted in response to a finding that the ICCPR has been breached, preferring instead to maintain existing laws and policies.<sup>38</sup>

Rights from the ICCPR have not simply been copied into the ACT and Victorian laws. Instead, the rights have on occasion been modified so that they are set out in a form that is more in keeping with Australian legal and community norms, or have been updated for new developments or technologies since the drafting of the covenant in 1966. For example, among the 20 rights set out in the Victorian Charter, the rights of the accused in criminal proceedings conferred by s.25 incorporates references to the provision of legal aid in Victoria and states that an accused shall “have the free assistance of assistants and specialised communication tools and technology if he or she has communication or speech difficulties that require such assistance”. The Victorian Charter also includes in s.20 a person’s right “not be deprived of his or her property other than in accordance with law”, even though there is no reference to such a right in the ICCPR. Both the ACT and Victorian instruments also modify the right to life so as to maintain the status quo as regards the law on abortion.<sup>39</sup> This reflected the fact that the community consultations that led to these instruments did not produce a consensual view on the subject.

In adopting this approach, the ACT and Victoria accepted the premise that underlay the enactment of the HRA (that is, of “bringing rights home”),<sup>40</sup> but sought to achieve this by giving greater emphasis to notions of domestic political authority. In this context, international law and comparative sources are certainly relevant to interpreting the protected rights, but they are not directive or determinative. Hence, in contrast to the more directive approach of s.2(1) HRA (“must take into account”), s.32(2) of the Victorian Charter states:

“International law and the judgments of domestic, foreign and international courts and tribunals relevant to a human right may be considered in interpreting a statutory provision.”

Another important distinction between the Australian instruments and the HRA relates to the role of Parliament. While the UK law reads as an instrument directed almost exclusively to the courts, the ACT and Victorian statutes are drafted to give explicit regard to, and to emphasise, the centrality of Parliament in the rights-protection process. The object here is not to limit the role of courts in rights protection, but to enhance the role of Parliament. The problem to be solved is thus not one of so-called “judicial activism”, but of insufficient attention being paid to the contribution that Parliament can properly make to rights protection.

The Australian instruments place greater emphasis upon the role of Parliament in a number of ways. First, in regard to statements of compatibility, the Victorian Charter goes further than the HRA in requiring the person introducing a bill to provide a justification as to why it is compatible with the protected human rights

<sup>38</sup> Since 1994, UN bodies have found that Australia has breached its international human rights obligations at least 40 times. Full redress has been provided in only 15% of cases: <http://remedy.org.au/> [Accessed 27 April 2016].

<sup>39</sup> Section 48 of the Charter states: “Nothing in this Charter affects any law applicable to abortion or child destruction”.

<sup>40</sup> Secretary of State for the Home Department, *Rights Brought Home: The Human Rights Bill* (October 1997).

or, if it is incompatible, an explanation of the nature and extent of incompatibility.<sup>41</sup> These reasons are important in establishing a clear parliamentary position not only on compatibility, but on the appropriate interpretation of human rights in the context of the legislation. It is important that Parliament be a place for setting such matters out upfront if there is to be greater judicial deference to its position.

Secondly, the interpretive function of the courts is limited by a requirement that any reading given to a statute must pay heed to the legislative intent underlying the enactment. Hence, the interpretive function conferred upon the courts by the HRA is modified in Victoria by the addition of the following words in italics in s.32(1):

“So far as it is possible to do so *consistently with their purpose*, all statutory provisions must be interpreted in a way that is compatible with human rights.”

This interpretive obligation was altered to indicate that Australian courts should not go so far as to follow the approach taken in the UK in cases such as *Ghaidan v Godin-Mendoza*.<sup>42</sup> On the other hand, it was intended that this provision enable courts to go beyond existing Australian interpretive methods so as to ensure greater consistency between Victorian statutes and human rights standards.

To date, this modified clause has not produced a clear approach to the interpretation of legislation. This is a result of confusion produced by the High Court’s decision in *Momcilovic v The Queen*.<sup>43</sup> The court suggested two potential approaches to s.32(1): one which treated the interpretation clause as akin to the common law principle of legality, and another which treated it as encouraging a more flexible approach to interpretation.<sup>44</sup> Rather than resolving this, the court split without producing a majority. In the absence of a further High Court decision, uncertainty remains about the approach to be applied.

Thirdly, when a court finds that a law cannot be interpreted consistently with human rights, it is empowered to issue a declaration of inconsistent *interpretation*, rather than what the HRA describes as a declaration of *incompatibility*. The use of the word “interpretation” emphasises that the court has reached a different interpretation than Parliament, rather than it delivering a definitive finding that human rights have been breached. While the essential function of the declaration mechanism is retained, the use of different language is significant in describing the respective roles of Parliament and the courts in a way that gives greater regard to the role of the former.

Fourthly, in the case of the Victorian Charter, though not in respect of the ACT law, Parliament is empowered by s.31 to make an override declaration, by which it may determine that a law “has effect despite being incompatible with one or more of the human rights or despite anything else set out in this Charter”. The person introducing a bill containing such a declaration must make a statement to Parliament “explaining the exceptional circumstances that justify the inclusion of the override declaration”. The provision to which the declaration relates expires after five years, though Parliament may re-enact the override.

<sup>41</sup> Victorian Charter s.28.

<sup>42</sup> *Ghaidan v Godin-Mendoza* [2004] UKHL 30; [2004] 2 A.C. 557; [2004] H.R.L.R. 31.

<sup>43</sup> *Momcilovic v The Queen* (2011) 245 CLR 1.

<sup>44</sup> Similar to the approach of the High Court to statutory interpretation in *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355.

This override mechanism serves no apparent legal purpose given Parliament's power to amend or suspend the Charter. Nonetheless, it has an important political function.<sup>45</sup> It emphasises the ongoing sovereignty of Parliament, and provides a means for this to be exercised within the terms of the Charter. This provides an escape valve for political pressure in the event of a fundamental disagreement between Parliament and the courts as to the interpretation and application of human rights. The override presents a pragmatic approach to such disagreements designed to preserve the integrity of the instrument (such as in the event that a controversy arose like that in the UK over prisoners voting). In such a case, the Charter makes it clear that Parliament may act to resolve the matter, at least in the short-term.

Another pragmatic recognition within the Australian instruments relates to the role of the executive. Both laws were drafted with the goal in mind of improving the human rights of vulnerable people through the most effective means possible. It was accepted that the courts would not normally provide such a means, even if they were necessary and important in particular cases. Instead, the most effective protector in a day to day sense would usually be the executive through its provision of services (in areas such as aged care, health and education). It was also recognised that the HRA had not been as effective as it might have been in instilling a culture of human rights protection within government departments and service providers. For example, a 2003 report by the UK Audit Commission found that "a human rights culture takes time to develop. Our current findings show that progress is slow and in danger of stalling".<sup>46</sup>

To facilitate a different outcome, the enactment of the Charter in Victoria was preceded by extensive engagement with the executive so as to build ownership and respect for the instrument among public servants.<sup>47</sup> Charter consultations were held with every department, and the drafting of the Charter was supported by an interdepartmental committee representative of the entire public service. This led to a number of innovations, including changing practices within departments to apply the Charter, and new cabinet processes to ensure that Charter rights were considered at the highest levels of executive decision-making.<sup>48</sup> Upon its enactment, the Victorian Charter was accompanied by training and other measures for government employees.

The Charter has also been integrated into a range of performance and other measures within departments. For example, the Victorian Department of Human Services access and diversity framework states that including reference to the Charter "in staff Performance, Progression and Development Plans (PPD)" has "played an important role in raising awareness of staff's human rights obligations".<sup>49</sup>

<sup>45</sup> It may be that in the case of the Victorian Charter this function has been exhausted. The most recent review of the Charter has recommended the repeal of this provision: Michael Brett Young, *From Commitment to Culture: The 2015 Review of the Victorian Charter of Human Rights and Responsibilities Act 2006* (2015), pp.196–200.

<sup>46</sup> Audit Commission, UK, *Human Rights: Improving Public Service Delivery* (2003), p.16.

<sup>47</sup> See George Williams, "The Victorian Charter of Human Rights and Responsibilities: Origins and Scope" (2006) 30 *Melbourne University Law Review* 880, 890.

<sup>48</sup> Department of Justice, *Rights, Responsibilities and Respect: The Report of the Human Rights Consultation Committee* (2005), p.71 ("For legislative changes and policy and other decisions, the responsible Minister should ensure that a Human Rights Impact Statement is included in Cabinet submissions. The requirement for and details of such a Statement should be set out in the Cabinet Handbook." See Victoria State Government, *The Cabinet Handbook* (September 2015), [http://www.dpc.vic.gov.au/images/Cabinet\\_Handbook\\_September\\_2015.pdf](http://www.dpc.vic.gov.au/images/Cabinet_Handbook_September_2015.pdf) [Accessed 27 April 2016].

<sup>49</sup> *Delivering for All: Department of Human Services' Access and Equity Framework 2013–17*, [http://www.dhs.vic.gov.au/\\_data/assets/word\\_doc/0010/765343/Access-and-Equity-Policy.doc](http://www.dhs.vic.gov.au/_data/assets/word_doc/0010/765343/Access-and-Equity-Policy.doc) [Accessed 27 April 2016].

This and other initiatives, including designating people within departments as “Charter champions”, has produced change in many areas of policy and practice, such as by improving the provision of disability services and conditions for the detention of people with a mental illness.<sup>50</sup>

Finally, each Australian instrument was enacted with a view to it being the first, and not the final, step in the path to an appropriate model of rights protection. This is demonstrated most clearly by the fact that the ACT and Victorian laws are subject to a regular cycle of review.<sup>51</sup> This provides a regular opportunity for assessing whether the instruments are meeting their goals, and for enabling the community and Parliament to play an ongoing role in designing the mechanism of rights protection. As a consequence, these instruments are not left to the courts alone through their ongoing role of interpretation and application. In the case of the ACT, for example, reviews have led to a number of significant changes, including to extend its Human Rights Act to public authorities and to provide protection for an economic, social and cultural right in the form of the right to education.<sup>52</sup>

In the case of Victoria, reviews are mandated by the Charter to occur four and eight years after its enactment. These are supplemented by an annual independent assessment of the operation of the Charter, and the steps taken by government and other public authorities to meet their responsibilities under it, by the Victorian Equal Opportunity and Human Rights Commission. This annual report is presented to the Attorney General and tabled in Parliament, and is designed to present an ongoing record of the operation of the Charter that will assist with the four yearly reviews.

The second of these reviews, conducted by an independent reviewer outside of the government, was delivered in 2015. The report notes that the Charter “was introduced as a commitment between the Parliament and the people of Victoria ... designed to improve the lives of individuals and the life of the community as a whole”.<sup>53</sup> In this spirit, the review team “travelled in excess of 3,000 kilometres across Victoria in the effort to meet with as many interested parties face to face” and received written submissions from 109 individuals and organisations. The reviewer concluded that

“it is clear to me that the Charter has helped to promote and protect human rights in Victoria. However, there is more work to be done in making the Charter as practical as it could be, in demystifying it and bringing it with the reach of all Victorians.”

The 267 page report made 52 recommendations for enhancing the instrument. Many of these were directed to further developing a culture of human rights protection within government, the private sector and the community. Other recommendations propose that sections of the Charter be rewritten for greater

<sup>50</sup> See the examples provided in Human Rights Law Centre, *Victoria's Charter of Human Rights and Responsibilities in Action: Case Studies from the First Five Years of Operation* (March 2012).

<sup>51</sup> ACT Human Rights Act ss.41, 43; Victorian Charter ss.44, 45.

<sup>52</sup> As effected by Human Rights Amendment Act 2012 (ACT).

<sup>53</sup> Michael Brett Young, *From Commitment to Culture: The 2015 Review of the Victorian Charter of Human Rights and Responsibilities Act 2006* (2015), p.iii.

clarity and effect, such as the interpretive clause in s.32(1).<sup>54</sup> It was also recommended that a further review be held four years after the commencement of proposed complaints and remedies provisions.<sup>55</sup>

## Lessons for the HRA debate?

The ACT Human Rights Act and Victorian Charter offer a range of alternate design possibilities for the UK debate regarding the nature of the BBOR. It is clear that a number of these are not directly transplantable into the UK context. In particular, it is doubtful that much would be gained by redrafting the interpretative obligation in the HRA along the lines of s.32(1) of the Victorian Charter, so that statutes must be interpreted compatibly with human rights “*consistently with their purpose*”.<sup>56</sup> For one, the Conservatives have signalled their intention to dispense with the interpretative obligation in the BBOR altogether: “In future, the UK courts will interpret legislation based upon its normal meaning and the clear intention of Parliament”.<sup>57</sup> The Victorian formulation, as applied by the High Court, has also caused confusion, even though the additional words were inserted with the aim of improving on the HRA position by preventing the Victorian courts from interpreting statutes as boldly as their UK counterparts in cases like *Ghaidan*.<sup>58</sup>

In any event, it is difficult to see what the words “consistently with their purpose” would add beyond merely making explicit what the UK courts have already inferred from the existing formulation under s.3 HRA, notably in *Ghaidan* itself: that ECHR-compatible interpretations will not be “possible” unless they “go with the grain of”<sup>59</sup> and are “compatible with the underlying thrust of the legislation being construed”.<sup>60</sup> It is also unclear that the scope of the interpretative obligation could be rendered any more precise by amending its wording. Although the interpretative obligation is a powerful tool, it nevertheless remains an *interpretative* one, and necessarily leaves the underlying distinction between the respective roles of courts and Parliament untouched.

As Lord Nicholls has observed, the courts must remain “ever mindful” of the outer-limits to their powers: s.3 HRA “maintains the constitutional boundary. Interpretation of statutes is a matter for the courts; the enactment of statutes, and the amendment of statutes, are matters for Parliament”.<sup>61</sup> The difficulty is that these outer-limits have never been especially clear. They are rooted in deep-seated constitutional norms such as parliamentary sovereignty, the rule of law, democracy and the separation of powers,<sup>62</sup> none of which are sufficiently hard-edged to provide the courts with concrete guidance as to how to act. Whether under the HRA, Victorian Charter or a BBOR, the inherent uncertainty in the very task of

<sup>54</sup> Michael Brett Young, *From Commitment to Culture: The 2015 Review of the Victorian Charter of Human Rights and Responsibilities Act 2006* (2015), p.148.

<sup>55</sup> Michael Brett Young, *From Commitment to Culture: The 2015 Review of the Victorian Charter of Human Rights and Responsibilities Act 2006* (2015), p.234.

<sup>56</sup> Emphasis added.

<sup>57</sup> Conservatives, *Protecting Human Rights in the UK* (2014), p.6.

<sup>58</sup> *Ghaidan* [2004] UKHL 30; [2004] 2 A.C. 557; [2004] H.R.L.R. 31.

<sup>59</sup> *Ghaidan* [2004] UKHL 30; [2004] 2 A.C. 557; [2004] H.R.L.R. 31 at [121] (Lord Rodger).

<sup>60</sup> *Ghaidan* [2004] UKHL 30; [2004] 2 A.C. 557; [2004] H.R.L.R. 31 at [33] (Lord Nicholls).

<sup>61</sup> *Re S (Care Order)* [2002] UKHL 10; [2002] 2 A.C. 291; [2002] H.R.L.R. 26 at [39].

<sup>62</sup> See Aileen Kavanagh, “The Elusive Divide between Interpretation and Legislation under the Human Rights Act 1998” (2004) O.J.L.S. 259.

interpretation will muddy the waters whatever the finer wording of the interpretative obligation itself.

It is also doubtful that any reformulation of the HRA, or the enactment of the BBOR, could be preceded by an extensive consultation processes as in Australia. Any such notion is something of a pipe dream in the present political climate. Instead, the government has already announced a different process, including an intention on the part of the Justice Secretary to “fast track” the Bill into domestic law. Precisely how this will manifest itself remains to be seen, but it seems that a proposal will be released for public consultation for a short 12-week period before the government bypasses both Green and White Paper stages and introduces the Bill directly into the House of Commons.<sup>63</sup>

Like the HRA, the BBOR is the direct product of a manifesto pledge to reform the UK’s law on human rights, and at present it would seem doubtful that the public will be any more significantly involved in the design and enactment of the new legislation than it was in the enactment of the HRA. This represents a missed opportunity given the Australian experience, which demonstrates the benefits of building domestic human rights law on a platform of widespread public support, rather than on the relatively unstable foundations of party politics. Such a platform is important in terms of ensuring that the instrument enjoys cross-party support, which can be a vital ingredient in ensuring the effectiveness of a constitutional statute of this kind. The government’s process also represents a failure to address one of the more significant problems identified by the Coalition-appointed Commission on a Bill of Rights: that “there is a lack of public understanding and “ownership” of the Human Rights Act” within the UK. For the majority of Commission members, this was “the most powerful argument for a new constitutional instrument” to replace it.<sup>64</sup>

Other aspects of the Australian experience may be of greater use in the drafting of a BBOR. We analyse these possibilities below.

### *Preamble and responsibilities*

There are good reasons why a new BBOR might be given a preamble like that contained in the Australian instruments. Whatever the BBOR’s eventual form, it is clear that the aim is to reform the domestic system of ECHR protection in a way that adds a distinctively “British” twist that transcends the simple preservation of parliamentary sovereignty by the HRA. The BBOR will be the product of a number of years’ political discourse; of compromise between Left and Right, between Conservative-dominated England and the differently politically-constituted devolved nations, and between the demands of domestic and international law. Its purpose in protecting human rights in domestic courts will not *just* be “to give further effect to the rights and freedoms” under the ECHR, as the HRA’s preamble

<sup>63</sup> Mark Leftly, “British Bill of Rights to be fast-tracked into law by next summer”, *The Independent*, 17 October 2015. The Justice Secretary reiterated the basic plan in his evidence to the Select Committee on the Constitution. Select Committee on the Constitution, *Oral Evidence Session with the Rt Hon. Michael Gove MP, Lord Chancellor and Secretary Of State For Justice* (Wednesday 2 December 2015), Parliament.uk, <https://www.parliament.uk/documents/lords-committees/constitution/AnnualOralEvidence2014-15/CC021215-LC.pdf>, p.2 [Accessed 27 April 2016].

<sup>64</sup> Commission on a Bill of Rights, *A UK Bill of Rights? The Choice Before Us*, Vol.1, para.80.

states, but to bring these “British” values to the fore in a way that a new preamble needs to capture.

In this regard the Australian adaptations are useful models for emphasising that the impetus for protecting rights in municipal courts comes from domestic political and legal traditions—democracy, dignity, equality, freedom, the rule of law and the like—and not from an international instrument alone, as the HRA’s barer preamble suggests. Respect for basic rights is not an exclusively European ideal, after all: domestic common law has long evinced a basic concern to safeguard civil liberties, and it has been stressed that “the UK had a great influence on the drafting of the Convention, and was the first nation to ratify it”.<sup>65</sup> Greater reference to the British values that are said to demand domestic rights protection is therefore necessary if the government’s purpose in designing a BBOR to replace the HRA is to be correctly captured. Along these lines we would recommend referencing the same core values—the rule of law, dignity, democracy, and so on—referenced by the Victorian Charter. These concepts should be expressed in straightforward terms in order to make them, and the preamble, accessible to as wide an audience as possible.

We would also recommend that the preamble follows the Charter’s lead in making reference to the notion that human rights are bounded by *responsibilities*. The public perception of the HRA as a simple charter for the self-advancement of criminals and terrorists is misguided but nevertheless dangerously prevalent, particularly in the tabloid media.<sup>66</sup> Long-term public acceptance of the BBOR depends heavily on this myth being dispelled. There are a number of ways to do this, but an obvious starting point would be to make the true legal position clear: that in domestic law human rights—even unqualified rights—have never been unbounded, being inherently open to legislative limitations. For the avoidance of doubt, the authors are not recommending any of the substantive proposals for rebalancing rights and responsibilities that have previously been mooted elsewhere. We do not for instance recommend that the rights themselves be re-drafted as conditional upon the beneficiary being law-abiding, or a British citizen.<sup>67</sup>

Our argument is simpler and far less controversial: that the preamble to the BBOR should acknowledge the reality, that in a system with a sovereign Parliament there is no such thing as a truly unqualified right, and that as a matter of domestic law the exercise of human rights will always be subject to whatever constraints—including responsibilities to others—Parliament decides to impose. This is of course foursquare with domestic common-law tradition, which recognises basic rights but enforces them as interpretative presumptions of non-interference that can be defeated by the use of clear statutory language by a sovereign legislature.<sup>68</sup> It is further reflected in the HRA, by provisions that recognise Parliament’s continuing sovereignty,<sup>69</sup> and to a large extent is also reflected on the

<sup>65</sup> Conservatives, *Protecting Human Rights in the UK: The Conservatives’ Proposals for Changing Britain’s Human Rights Laws* (2014), p.2.

<sup>66</sup> On 3 October 2014 the *Daily Mail* and *Daily Express* responded enthusiastically to the Conservative BBOR proposals with the respective front-page headlines “End of Human Rights Farce” and “Human Rights Madness to End”.

<sup>67</sup> See for instance the draft BBOR of Martin Howe QC, of the Coalition-appointed Commission. Commission on a Bill of Rights, *A UK Bill of Rights? The Choice Before Us* (2014), Vol.1, p.214.

<sup>68</sup> In, e.g. *R v Secretary of State for the Home Department Ex p. Simms* [2000] 2 AC 115; [1999] E.M.L.R. 689 HL.

<sup>69</sup> Especially ss.3(2), 4(6), 6(2), 6(3) and 6(6).

international plane by the ECHR itself, through the notion that in many circumstances a fair balance must be struck, such that the rights may yield to other, weightier, considerations: Articles 8–11 are generally qualified and therefore permit proportionate interference by the state for a variety of aims including the protection of the rights and freedoms of others, and art.15 allows the state to derogate from the majority of substantive ECHR rights during times of war or other public emergency threatening the life of the nation. In our view the BBOR would benefit from setting out the true position: that individuals *do* already owe myriad legal responsibilities to each other in domestic law; and that their responsibilities can trump even unqualified human rights if Parliament so chooses, and makes its intentions clear. Of course, this is not to say that redrafting the preamble would generate any substantive change to the courts' interpretive approach to legislation. The point is simply that it would yield important politically symbolic benefits, through adopting a form of words that connects the legislation to enduring legal and community values.

### *Substantive rights*

In the previous section we observed that the Victorian Charter contains “domestic” variations of international rights, in that certain of the rights given by the ICCPR are redrafted to take account of Australian needs and traditions. Their domestic status is further emphasised by including them in individual sections of the legislation: the Victorian Charter departs from the HRA’s practice of reproducing the international rights verbatim in a schedule. In these respects there are lessons to be learned from Australia, not least that international rights can be domesticated for the purpose of *enhancing* as well as reducing protection. In this regard, the Justice Secretary has suggested that the BBOR might add to the ECHR’s catalogue of rights by including “British” rights such as trial by jury.<sup>70</sup>

Redrawing rights “downwards” remains a possibility, however. The Conservatives see nothing wrong with the ECHR itself, which in their view represents “an entirely sensible statement of the principles which should underpin any modern democratic nation”.<sup>71</sup> The complaint is rather with Strasbourg’s interpretation of it, in particular the “mission creep” said to be present in cases like *Chahal v United Kingdom*,<sup>72</sup> which held that it represents a breach of art.3 ECHR for the state to expel foreign nationals if there are substantial grounds for believing that they face a real risk of art.3-incompatible treatment in the receiving country. The Conservatives intend the BBOR to

“clarify what the test should be [for the application of Art 3 in expulsion cases], in line with our commitment to prevent torture and in keeping with the approach taken by other developed nations”.<sup>73</sup>

<sup>70</sup> Select Committee on the Constitution, *Oral Evidence Session with the Rt Hon. Michael Gove MP, Lord Chancellor and Secretary Of State For Justice* (Wednesday 2 December 2015), Parliament.uk, <https://www.parliament.uk/documents/lords-committees/constitution/AnnualOralEvidence2014-15/CC021215-LC.pdf>, p.2 [Accessed 27 April 2016].

<sup>71</sup> Conservatives, *Protecting Human Rights in the UK: The Conservatives’ Proposals for Changing Britain’s Human Rights Laws* (2014), p.2.

<sup>72</sup> *Chahal v United Kingdom* (1997) 23 E.H.R.R. 413; 1 B.H.R.C. 405.

<sup>73</sup> Conservatives, *Protecting Human Rights in the UK: The Conservatives’ Proposals for Changing Britain’s Human Rights Laws* (2014), p.6. Grieve is sceptical of this claim, arguing that the government’s intention “is unmistakably

Naturally, it falls within the power of a sovereign Parliament to follow Australia's lead by redrawing ECHR rights to take account of domestic considerations. Nevertheless, we would sound two notes of caution. First, it is crucial not to overreact to what may be seen as expansive Strasbourg decisions. Disagreements over the scope of an unqualified right should not simply be resolved by excising the relevant decision from domestic law. Taking the *Chahal* example, it would be overkill simply to exclude expulsion from art.3. On this reading, art.3 would leave the government free to expel foreign nationals at will, whatever the risk that they would face torture or inhuman and degrading treatment abroad. The better alternative would be to qualify such cases using a limited doctrine of proportionality, so that expulsion remains within the scope of art.3 but is permitted if the government satisfies the courts of the strict necessity to expel for a narrow list of defined aims: national security and the prevention of crime, for example.<sup>74</sup> In all other circumstances art.3 would remain unqualified in domestic law and its scope materially identical to that in Strasbourg.

As for the second note of caution, the government must remain mindful of its international obligations, both in Strasbourg and generally.<sup>75</sup> It would be inappropriate for the UK to follow the Victorian Charter's lead of importing a general proportionality-style qualification into all of the rights.<sup>76</sup> On the international plane, the ICCPR lacks the binding political force of the ECHR, which operates as a very significant constraint on the UK's activities. However much the government may wish to recast the ECHR rights for domestic purposes, Strasbourg's interpretation of the ECHR will continue to prevail in international law for as long as the UK remains a signatory to the treaty. In other words the practical need to "bring rights home", by providing domestic remedies for ECHR violations actionable in Strasbourg, will remain under the current plans. Once again, moderation is crucial here: any deviations from Strasbourg's interpretation of the ECHR in the new BBOR should be kept to a minimum, and preferably within the margin of appreciation given to the UK by Strasbourg itself. For this reason we would also caution against any radical redrafting of s.2 HRA, which provides that the courts "must take into account" Strasbourg jurisprudence when interpreting ECHR rights. The strong gravitational pull towards Strasbourg's interpretation of the ECHR does not derive from s.2 HRA alone, and the legal and practical realities of European integration are such that the existing wording remains broadly appropriate. To the extent that there is a perceived need to weaken the formal link between Strasbourg and domestic courts, however, we would recommend adopting the Victorian Charter's formulation:<sup>77</sup> relevant Strasbourg judgments *may* be considered.

to enable a UK government to ignore Convention rights, when it deems them not to be in the public interest.' Dominic Grieve, 'Can a Bill of Rights do better than the Human Rights Act?' [2016] P.L. 223.

<sup>74</sup> Strasbourg rejected a similar argument in *Chahal* (1997) 23 E.H.R.R. 413; 1 B.H.R.C. 405 at [75]–[82].

<sup>75</sup> The "non-refoulement" principle embraced in *Chahal* is also reflected in art.3 of the United Nations Convention Against Torture 1984, which the UK has signed and ratified.

<sup>76</sup> See Victorian Charter s.7(2).

<sup>77</sup> Victorian Charter s.32(2).

### *Enhancing Parliament's role*

In several respects the UK can learn from the Australian experience in enhancing Parliament's role in protecting human rights. First, and as the Joint Committee on Human Rights (JCHR) has recommended,<sup>78</sup> the BBOR should contain a requirement that pre-enactment statements of compatibility be accompanied by reasons. As it stands, the only obligation under s.19 of the HRA is to make a statement either way, and a requirement to give reasons in all cases would be an obvious means of enhancing Parliament's power to hold the executive to account for its treatment of human rights. Section 19 statements of *incompatibility* have only been made a handful of times,<sup>79</sup> yet the courts have found a great many more ECHR-incompatibilities in legislation that was passed with a positive statement—including the flagrantly discriminatory measures contained in the Anti-Terrorism, Crime and Security Act 2001 that were later impugned both domestically and by Strasbourg in *Belmarsh*.<sup>80</sup> Ministers arguably need to be encouraged to take their s.19 obligations more seriously, and requiring them to face frontline political fire by giving reasons would be a positive step in that direction.

Secondly, the BBOR should follow Victoria by restyling the declaration of “incompatibility” under s.4 HRA a declaration of “inconsistent interpretation”. As we observed above, there is a general benefit in doing so, because it emphasises Parliament's role in the rights-protection process by removing the stigma of a definitive judicial finding by the courts that a given provision is “incompatible” with rights. Instead, the declaration signifies that courts and Parliament have taken different views as to the requirements of a particular right in the circumstances.

In our view the BBOR should incorporate a restyled declaration provision, especially given that the BBOR is likely to follow Victoria's practice of “domesticating” certain of the international rights given by the ECHR. There is a need for declarations of incompatibility under the HRA because the Act closely ties the judges to Strasbourg's interpretation of the ECHR's requirements. Within the HRA framework, there is also a pressing practical need for a definitive ruling on the compatibility of a piece of legislation with the ECHR, because the government needs to be formally notified of potential UK liability in Strasbourg. Under a BBOR, the position would be different because Strasbourg's interpretation of the ECHR will lack the same importance, the aim being that it should yield more frequently to the competing domestic formulations of Parliament and the UK courts. This reflects the fact that the purpose of the BBOR would not simply be to give further effect to rights and freedoms recognised by the Strasbourg Court.

Thirdly, the BBOR would benefit from including an override declaration like that in s.31 of the Victorian Charter. One of the most curious features of the BBOR debate over the last 10 years or so is the extent of the polarisation of opinion that seems apparent between lawyers and Conservative politicians. The Conservatives claim that the HRA unduly fetters Parliament's sovereignty by tying domestic law to Strasbourg's interpretation of the ECHR; lawyers respond that this misrepresents

<sup>78</sup> Joint Committee on Human Rights, *A Bill of Rights for the UK*, Twenty-Ninth Report of Session 2007–08 (London: TSO, 2008), HL Paper No.165-I, HC Paper No.150-I, paras 224–226.

<sup>79</sup> With what became, e.g. the Local Government Act 2000 and Communications Act 2003.

<sup>80</sup> *Belmarsh* [2004] UKHL 56 [2005] 2 A.C. 68; [2005] H.R.L.R. 1.

the legal position, especially the distinction between domestic and international law, and that nothing in the HRA prevents a sovereign Parliament from enacting whatever legislation it pleases.

The authors wonder whether lawyers and politicians might be talking across each other. *Legally* Parliament can override ECHR rights if it pleases in domestic law, and a number of provisions emphasise that Parliament remains sovereign.<sup>81</sup> But the HRA contains nothing explicit to indicate that overriding ECHR rights may be *politically* permissible. Section 14 of the HRA references the power of the UK to derogate from ECHR rights under the ECHR itself, but art.15 of the ECHR limits the power to derogate to certain rights: arts 3, 4 and 7, for instance, are non-derogable. In our view a general override clause like that contained in s.31 of the Victorian Charter would usefully supplement the pre-existing legal position—that Parliament remains sovereign—by explicitly recognising that sometimes, albeit in extreme circumstances, overriding ECHR rights may also be the *politically* expedient thing to do. As one commentator has put it, the override clause represents “a tool of constitutional politics; an indication that certain legislative decisions taken from time to time should ... be placed outside the courts’ range of review”.<sup>82</sup>

Significant questions of course arise. The first concerns the relationship between the override clause under the BBOR, and the ECHR. Since a sovereign Parliament’s legal power to override ECHR rights is unfettered, there would be no need to couch the override clause in terms of art.15 of the ECHR. In fact it would merely serve to confuse if the clause were drafted in this way, because the implication would be that Parliament is legally unable to do anything that the UK Government could not do in Strasbourg under art.15. By implication, the courts might be empowered to strike offending statutes down, and parliamentary sovereignty would be curtailed.

The override clause therefore needs to be couched in terms reflecting Parliament’s limitless power to enact ECHR-incompatible legislation, as the JCHR suggested when it recommended that the BBOR should emphasise Parliament’s existing power to declare that legislation shall operate notwithstanding fundamental rights.<sup>83</sup> But the difficulty in including such an open-ended override clause is the political message that it risks communicating: that in political terms, breaching ECHR rights is always fair game. Even if breaching ECHR rights may *sometimes* be required as a matter of political necessity, over-emphasising Parliament’s legal power to do so in the BBOR would be unwise. For that reason the override clause must be accompanied by procedural obligations that enhance Parliament’s ability to hold the executive to account when the override power is used. As under the Victorian Charter the emphasis should therefore be on the *exceptional* circumstances that justify an override, and the minister responsible for the Bill should be required to report these circumstances to Parliament. The provision to which the override relates should also expire after a fixed period unless the override is re-enacted: the five-year period specified by the Victorian Charter would seem sensibly transplantable into the UK context given that it mirrors the life of Parliament under the Fixed-term Parliaments Act 2011.

<sup>81</sup> See HRA provisions ss.3(2), 4(6), 6(2), 6(3) and 6(6).

<sup>82</sup> Roger Masterman, “Interpretations, declarations and dialogue: rights protection under the Human Rights Act and Victorian Charter of Rights and Responsibilities” [2009] P.L. 112, 126.

<sup>83</sup> Joint Committee on Human Rights, *A Bill of Rights for the UK?* (2008), para.223.

The second question with an override clause is this: since Parliament's sovereignty exists independently of the override clause, which can only *recognise* the legislature's pre-existing legislative power, what is the legal consequence if Parliament chooses to override rights without resorting to the clause? Presumably the courts would need to apply the legislation regardless: unlike under the Canadian Charter of Human Rights and Freedoms, there would be no room for saying that the courts could strike the legislation down. The conundrum is a difficult one to resolve, and we do not attempt to do so fully here. Parliament is not *legally* required to make use of the override clause when breaching human rights, but it is important from the perspective of political accountability that it does so, in order that the procedural obligations under the override clause are triggered. But the more exacting those procedural obligations become, the more inclined Parliament will surely be to bypass the override in favour of its general constitutional power as a sovereign legislature to enact whatever legislation it pleases. Ultimately the best resolution is therefore to call for balance: to ensure that the override clause contains enhanced procedural obligations beyond the standard methods of political accountability provided for elsewhere in the legislation, but to avoid those procedural obligations becoming so burdensome that they are never used.

The final lesson from Australia for enhancing Parliament's role is to provide for regular review of the BBOR by an independent panel,<sup>84</sup> preferably the JCHR. The Bill seems likely to be "fast-tracked" in the manner mentioned above, without the extensive Victorian-style public consultation process to precede it. It is therefore important that the legislation be seen for what it is: not as the final say on how to protect human rights in domestic law, but as phase two of a broader iterative process that seeks to arrive at a rights-protection framework that strikes an appropriate balance between European and British demands. Providing for five-year review in the next parliament would also seem sensible here, as would following the Victorian Charter's lead by specifying the terms of that review. Given that one of the BBOR's central aims is to weaken the ties between domestic courts and Strasbourg jurisprudence, each review should at least consider whether to strengthen those ties again in the light of any developments in Strasbourg's jurisprudence.

## Conclusion

The long-running debate over the future of the HRA reflects a number of underlying concerns, namely that the Act pays insufficient regard to parliamentary sovereignty, places undue weight upon Strasbourg's interpretation of the ECHR and has led to inappropriate outcomes in specific cases. Our purpose has not been to assess the correctness of these claims, which have produced a policy on the part of the Conservative Government to repeal the HRA and replace it with a BBOR. Instead, we have analysed whether any such move might be informed by Australia's enactment of modified versions of the HRA.

The ACT Human Rights Act and the Victorian Charter are apposite in a number of respects. The Victorian Charter in particular contains a number of design features that respond directly to the perceived problems with the HRA. Significantly, it responds in a way that seeks to enhance the protection afforded to human rights.

<sup>84</sup> As the JCHR recognised: Joint Committee on Human Rights, *A Bill of Rights for the UK?* (2008), para.232.

It does so by providing a better base for education and community engagement about rights, and also a greater capacity for Parliament to play a role in the protection process. This has enabled the instrument to operate effectively, ultimately also with cross-party support.

It is crucial that the UK also attains a model of human rights protection with broad political and community support. Years of debilitating debate have demonstrated the problems of having a statute of such constitutional significance as the HRA subject to frequent media attack and ongoing criticism from one side of politics. A BBOR offers an opportunity by which to move beyond this problem. It could be a means to achieve a more effective and sustainable human rights law. In aiming for this goal, the Australian experience is useful. In particular, a BBOR might incorporate an accessible preamble setting out the values that underlie the need for human rights protection, mechanisms for an enhanced parliamentary role and a requirement for ongoing review. Such changes offer not only a way to resolve some of the key questions besetting the HRA, but also the potential for achieving a more enduring model of human rights protection for the UK.