



Human rights in Commonwealth policy development and decision-making

This briefing provides an overview of important human rights issues for Commonwealth policy development and decision-making. It begins by focusing on the recent *Human Rights (Parliamentary Scrutiny) Act 2011* (Human Rights Scrutiny Act) but then considers the broader human rights context within which that Act operates, and within which Commonwealth ministers, office holders, public servants and lawyers work.



Robert Orr PSM QC
Chief General Counsel
T 02 6253 7129
M 0409 922 437
robert.orr@ags.gov.au



Genevieve Ebbeck
Senior General Counsel
T 02 6253 7080
genevieve.ebbeck@ags.gov.au



Robyn Briese
Senior General Counsel
T 02 6253 7569
robyn.briese@ags.gov.au



Andrew Yuile
Senior Lawyer
T 02 6253 7237
andrewyuile@ags.gov.au

1 Introduction

1.1 Since Federation, human rights issues have been relevant to Commonwealth policy development and decision-making – at the beginning, this was because of some provisions of the Constitution and the common law, especially the common law of statutory interpretation. Throughout the 20th century, international human rights law and the statute law that implements it have grown in importance within the Australian legal landscape. This domestic law has had to be interpreted and applied by decision-makers, tribunals and courts. As Sir Gerard Brennan said:¹

Although the introduction of broad international standards of human rights into domestic legislation raises difficulties of interpretation, it nevertheless offers opportunities for the judicial development of new principles which can eliminate instances of long-standing injustice.

1.2 On 21 April 2010 the Attorney-General announced Australia's Human Rights Framework (the Framework). The Framework is the Government's response to the recommendations contained in the *National Human Rights Consultation Report*,² which was released on 8 October 2009. A key part of the Framework is the Human Rights Scrutiny Act, which gives additional focus to the consideration of human rights issues in Commonwealth law-making. This incorporation of human rights principles into Commonwealth law-making represents a new chapter in the development of Australian human rights law.

1 Brennan, G 'Human Rights, International Standards and the Protection of Minorities', in Cane, P (ed) 2004, *Centenary Essays for the High Court of Australia*, p 355.

2 National Human Rights Consultation Committee 2009, *National Human Rights Consultation Report*, available at http://152.91.15.57/www/nhrcc/nhrcc.nsf/Page/Report_NationalHumanRightsConsultationReportDownloads.

- 1.3 Another key part of the Framework will be the consolidation of existing Commonwealth anti-discrimination laws (which are considered in Part 7 below) into a single Act. On 20 November 2012 the Attorney-General released an exposure draft of the Human Rights and Anti-Discrimination Bill 2012.³ The Senate Standing Committee on Legal and Constitutional Affairs issued its report on the draft Bill on 21 February 2013 and the Attorney-General is considering the recommendations.⁴ The government, however, decided to proceed immediately with one element of the reforms: the *Sex Discrimination Amendment (Sexual Orientation, Gender Identity and Intersex Status) Act 2013* (see paragraph 7.4).

2 Outline

- 2.1 This briefing considers the following issues:
- the operation of the Human Rights Scrutiny Act (in Part 3):
 - its definition of ‘human rights’
 - the role of the Parliamentary Joint Committee on Human Rights
 - the requirements for statements of compatibility
 - international human rights obligations, which form the foundation for much Australian domestic legislation on human rights – in particular, the Human Rights Scrutiny Act (in Part 4)
 - the relevance of international human rights directly for decision-making arising from *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273 (*Teoh*) (in Part 5)
 - constitutional human rights (in Part 6)
 - other Commonwealth human rights legislation (in Part 7), namely:
 - the *Racial Discrimination Act 1975*
 - the *Sex Discrimination Act 1984*
 - the *Disability Discrimination Act 1992*
 - the *Age Discrimination Act 2004*
 - the *Australian Human Rights Commission Act 1986*
 - statutory interpretation and human rights (in Part 8)
 - State and Territory human rights legislation and the Commonwealth (in Part 9).
- 2.2 We also provide summary checklists to assist Commonwealth agencies that need to consider human rights issues when developing legislation, making decisions and taking actions (in Part 10).

3 Available at <http://www.ag.gov.au/Humanrightsandantidiscrimination/Australiahumanrightsframework/Documents/Human%20Rights%20and%20Anti-Discrimination%20Bill%202012%20-%20Exposure%20Draft%202.pdf>.

4 Available at http://www.aph.gov.au/Parliamentary_Business/Committees/Senate_Committees?url=legcon_ctte/completed_inquiries/2010-13/anti_discrimination_2012/report/index.htm.

3 The Human Rights Scrutiny Act

3.1 The Human Rights Scrutiny Act commenced operation on 4 January 2012. It is ‘designed to improve parliamentary scrutiny of new laws for consistency with Australia’s human rights obligations and to encourage early and ongoing consideration of human rights issues in policy and legislative development’.⁵

3.2 The Human Rights Scrutiny Act adopts a ‘dialogue’ model of human rights protection – encouraging discussions between the executive, the Parliament and the public about human rights protection and appropriate limitations on human rights – rather than a Bill of Rights model, under which courts can invalidate legislation that breaches protected rights.⁶

3.3 The Human Rights Scrutiny Act has 2 key aspects: it provides for the establishment of a Parliamentary Joint Committee on Human Rights (see paragraphs 3.8–3.13 below); and it requires all new Bills and disallowable legislative instruments presented to the Parliament to be accompanied by a statement that assesses the legislation’s compatibility with human rights (see paragraphs 3.14–3.33 below).

Human rights covered by the Human Rights Scrutiny Act

3.4 The human rights that the Human Rights Scrutiny Act is concerned with are the rights and freedoms recognised or declared by the 7 core international human rights instruments to which Australia is a party (s 3(1)):

- the *International Covenant on Civil and Political Rights* [1980] ATS 23 (New York, 16 December 1966) (ICCPR)
- the *International Covenant on Economic, Social and Cultural Rights* [1976] ATS 5 (New York, 16 December 1966) (ICESCR)
- the *International Convention on the Elimination of all Forms of Racial Discrimination* [1975] ATS 40 (New York, 21 December 1965) (CERD)
- the *Convention on the Elimination of All Forms of Discrimination Against Women* [1983] ATS 9 (New York, 18 December 1979) (CEDAW)
- the *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* [1989] ATS 21 (New York, 10 December 1984) (CAT)
- the *Convention on the Rights of the Child* [1991] ATS 4 (New York, 20 November 1989) (CRC)
- the *Convention on the Rights of Persons with Disabilities* [2008] ATS 12 (New York, 13 December 2006) (CRPD).

‘...designed to improve parliamentary scrutiny of new laws for consistency with Australia’s human rights obligations...’

3.5 The scope, purpose and operation of these human rights instruments are outlined below in Part 4 (‘International human rights’, paragraphs 4.1–4.13).

3.6 The definition of ‘human rights’ in the Human Rights Scrutiny Act is broader than that contained in other ‘dialogue’ models for rights protection – in Victoria, the Australian Capital Territory (ACT), New Zealand and the United Kingdom⁷ – which are generally limited to civil and political rights, such as the rights to freedom of movement,

5 Commonwealth, *Parliamentary Debates*, House of Representatives, 30 September 2010, 271 (Robert McClelland, Attorney-General).

6 Ibid.

7 *Charter of Human Rights and Responsibilities Act 2006* (Vic); *Human Rights Act 2004* (ACT); *New Zealand Bill of Rights Act 1990* (NZ); *Human Rights Act 1998* (UK).

expression, opinion, association, religion and beliefs and the right to a fair trial. By contrast, human rights under the Human Rights Scrutiny Act extend to economic, social and cultural rights under the ICESCR, such as the rights to health, education, social security, housing and an adequate standard of living.

- 3.7 It is important to bear in mind when considering economic, social and cultural rights that, in light of the frequent need for positive state action to guarantee such rights and the potential public resource implications of such rights, international law generally requires only their progressive realisation.⁸ Scrutiny of legislation for compatibility with economic, social and cultural rights will therefore require a somewhat different approach than in the case of civil and political rights, which are rights of ‘immediate effect’, the realisation of which may require the state to abstain from doing something rather than to take positive action.

Parliamentary Joint Committee on Human Rights

- 3.8 Section 5 of the Human Rights Scrutiny Act provides for the establishment of a 10-person Parliamentary Joint Committee on Human Rights (the Committee). The Committee is made up of 5 members from each House of Parliament (s 5(1)) and has 3 functions (s 7):

- to examine Bills and legislative instruments coming before the Parliament for compatibility with human rights
- to examine current Acts for compatibility with human rights
- to inquire into any matter relating to human rights that is referred to the Committee by the Attorney-General.

‘...human rights under the Human Rights Scrutiny Act extend to economic, social and cultural rights under the ICESCR...’

- 3.9 In all cases, the Committee must report its findings to both Houses of Parliament (s 7).

- 3.10 As well as performing a traditional scrutiny function with a human rights focus in respect of Bills and legislative instruments coming before the Parliament, the Committee is able to inquire more thoroughly into Bills and legislative instruments. It can also inquire into existing Acts and other matters referred by the Attorney-General. It may call for submissions, hold public hearings and call for witnesses to attend and documents to be produced when it considers this appropriate.⁹ In his second reading speech, the Attorney-General noted that one of the roles of the Committee would be to ‘establish a dialogue between the Parliament and its citizens whereby the members of the Committee can canvass the views of the public, including affected groups, as to how they will be affected by proposed legislation’.¹⁰

- 3.11 The first Committee was established by resolution of the House of Representatives on 1 March 2012 and the Senate on 13 March 2012.¹¹ On 20 June 2012, the first Chair of the Committee made a statement to the House of Representatives indicating that:¹²

8 ICESCR, art 2. Note, however, that the ICESCR also contains some obligations of immediate effect, such as non-discrimination.

9 Explanatory Memorandum, Human Rights (Parliamentary Scrutiny) Bill 2010, p 4; *Resolution to establish the Parliamentary Joint Committee on Human Rights*, para (1)(i): Commonwealth, *Parliamentary Debates*, House of Representatives, 1 March 2012, 2450 (Stephen Smith); Commonwealth, *Parliamentary Debates*, Senate, 13 March 2012, 1601 (David Feeney); also available at www.aph.gov.au/Parliamentary_Business/Committees/Senate_Committees?url=humanrights_ctte/ctte_info/index.htm.

10 Commonwealth, *Parliamentary Debates*, House of Representatives, 30 September 2010, 271 (Robert McClelland, Attorney-General).

11 See the *Resolution to establish the Parliamentary Joint Committee on Human Rights* Commonwealth, *Parliamentary Debates*, House of Representatives, 1 March 2012, 2450 (Stephen Smith); Commonwealth, *Parliamentary Debates*, Senate, 13 March 2012, 1601 (David Feeney); also available at www.aph.gov.au/Parliamentary_Business/Committees/Senate_Committees?url=humanrights_ctte/ctte_info/index.htm.

12 Commonwealth, *Parliamentary Debates*, House of Representatives, 20 June 2012, 7176–7177 (Harry Jenkins); also available at www.aph.gov.au/Parliamentary_Business/Committees/Senate_Committees?url=humanrights_ctte/index.htm.

- The Committee intends to develop a triage process to prioritise its consideration of Bills and legislative instruments. In particular, in deciding whether to consider a Bill or disallowable legislative instrument, the Committee will have regard to the work of other parliamentary committees – such as the Senate Standing Committees for the Scrutiny of Bills and on Regulations and Ordinances.¹³ The Committee will also consider any correspondence received from members, senators or key stakeholders.
- The Committee will appoint a specialist legal advisor to assist it in its work.
- In some cases, the Committee will decide in the first instance to write to the relevant minister seeking further detail in relation to a Bill before deciding upon any further action. The Committee may ask the minister's department to provide the Committee with a briefing. In some circumstances the Committee will take evidence in public and may call for written public submissions. The Committee will then report its conclusions to the Parliament and publish these reports on its website.

3.12 Since its creation the Committee has tabled 18 reports examining Bills and legislative instruments introduced or registered between 18 June 2012 and 6 June 2013.¹⁴ More extensive scrutiny has also been given by the Committee, including in some cases by way of public hearings and/or seeking further information from the responsible minister, to the following legislation:

- the Australian Sports Anti-Doping Authority Amendment Bill 2013¹⁵
- the Social Security Legislation Amendment (Fair Incentives to Work) Bill 2012¹⁶ (the further scrutiny in this case was triggered by a request from the Australian Council of Social Security and 14 other signatories)
- the *Migration Legislation Amendment (Regional Processing and Other Measures) Act 2012* and related Bills and instruments¹⁷
- the *Stronger Futures in the Northern Territory Act 2012* and related legislation.¹⁸ (This legislation was introduced prior to the commencement of the Human Rights Scrutiny Act. As a result, a statement of compatibility was not required for the Bill and the Committee did not scrutinise the Bill prior to its passage through the Parliament. Instead, the Committee reviewed the Act once it had been passed (pursuant to s 7(b) of the Human Rights Scrutiny Act.)

3.13 The Committee has also issued Practice Note 1, which outlines its approach to human rights scrutiny.¹⁹ Practice Note 1 states that the Committee:

- views its human rights scrutiny task as primarily preventative in nature and directed at minimising the risk of new legislation giving rise to breaches of human rights in practice
- will test legislation for its potential to be inconsistent with human rights rather than consider whether particular legislative provisions could be open to a human rights compatible interpretation

13 Note that, since the Human Rights Scrutiny Act commenced, and while the Committee was finalising its procedures, the Senate Standing Committee for the Scrutiny of Bills and the Senate Standing Committee on Regulations and Ordinances had taken on the role of scrutinising statements of compatibility.

14 All of the Committee's reports are available from http://www.aph.gov.au/Parliamentary_Business/Committees/Senate_Committees?url=humanrights_ctte/reports/index.htm.

15 The final report was tabled on 13 February 2013.

16 The final report was tabled on 20 March 2013.

17 The final report was tabled on 19 June 2013.

18 The final report was tabled on 26 June 2013.

19 Parliamentary Joint Committee on Human Rights, Parliament of Australia, *Practice Note 1*, available at www.aph.gov.au/Parliamentary_Business/Committees/Senate_Committees?url=humanrights_ctte/practice_notes/index.htm.

- considers that the inclusion of adequate human rights safeguards in legislation will often be essential to the development of human rights compatible legislation.

In addition, the Committee recently issued Practice Note 2 (interim) specifically regarding human rights issues raised by civil penalty provisions.²⁰

Statements of compatibility

- 3.14 A statement of compatibility must include an assessment of whether the Bill or legislative instrument is compatible with human rights (ss 8(3) and 9(2)). It is intended to be ‘an expression of opinion by the relevant minister or sponsor of the Bill or by the rule-maker in the case of legislative instruments about the instrument’s compatibility with human rights.’²¹ It is, in a sense, the initiating document for the dialogue between the Government and the Parliament on relevant human rights issues.
- 3.15 The Human Rights Scrutiny Act requires any member of Parliament who proposes to introduce a Bill into a House of Parliament to prepare a statement of compatibility for that Bill (s 8(1)). In practice, statements of compatibility have formed part of the explanatory memorandum to the relevant Bill.²² Statements must also be prepared for any disallowable legislative instrument (s 9) and must be included in the explanatory statement.²³ In practice, for Government Bills and legislative instruments, the agency developing the Bill or legislative instrument will draft a statement of compatibility for the approval of the responsible minister or rule-maker.

Content of statements

- 3.16 The Human Rights Scrutiny Act does not prescribe any requirements for the content or form of a statement of compatibility, other than that the statement must include an assessment of whether the Bill or legislative instrument is compatible with human rights. However, the explanatory memorandum to the Human Rights Scrutiny Act states that:²⁴
- Statements are intended to be succinct assessments aimed at informing Parliamentary debate and containing a level of analysis that is proportionate to the impact of the proposed legislation on human rights.
- 3.17 The emphasis on succinctness and proportionality arises out of the experience to date with statements of compatibility under the Victorian *Charter of Human Rights and Responsibilities Act 2006* (Victorian Charter Act), which have sometimes been criticised for being ‘overly technical and lengthy’ and have dealt extensively with minor issues.²⁵ The opposite has been true of the ACT *Human Rights Act 2004* (ACT Human Rights Act): statements of compatibility under that Act have sometimes been criticised for being just that – statements without reasons.²⁶
- 3.18 In his 20 June 2012 statement to the House of Representatives, the Chair of the Committee emphasised that statements of compatibility should include an actual ‘assessment’ of whether the Bill or disallowable legislative instrument is compatible with human rights – as opposed to, for example, a single sentence asserting that the

20 Available at http://www.aph.gov.au/Parliamentary_Business/Committees/Senate_Committees?url=humanrights_ctte/practice_notes/index.htm.

21 See Attorney-General’s Department, *Frequently Asked Questions – Parliamentary Scrutiny*, available at www.ag.gov.au/Humanrightsandantidiscrimination/Pages/FrequentlyAskedQuestionsParliamentaryScrutiny.aspx.

22 This accords with expectations: see Explanatory Memorandum, Human Rights (Parliamentary Scrutiny) Bill 2010, p 4.

23 *Legislative Instruments Act 2003*, s 26(1A)(f).

24 Explanatory Memorandum, Human Rights (Parliamentary Scrutiny) Bill 2010, p 4.

25 See Scrutiny of Acts and Regulations Committee, Parliament of Victoria, *Review of the Charter of Human Rights and Responsibilities Act 2006* (57th Parliament, 2010–11), [389]–[402].

26 See ACT Human Rights Act Research Project, Australian National University May 2009, *The Human Rights Act 2004* (ACT): The first five years of operation, report to the ACT Department of Justice and Community Safety, pp 35–37.

Bill or disallowable legislative instrument is compatible.²⁷ This was restated in Practice Note 1, which indicates that the Committee expects statements of compatibility to read as stand-alone documents that provide information about the purpose and effect of the proposed legislation, the operation of its individual provisions and how these may impact on human rights.²⁸

3.19 The Attorney-General's Department has published a package of materials, as well as templates, to help agencies to develop policy that is compatible with human rights from the outset and to prepare statements of compatibility.²⁹ In particular, these materials seek to help policy makers to identify the rights engaged by the legislation they are working on. Rights under the ICCPR and the ICESCR will require careful consideration in all cases. Rights under the CAT will need to be considered whenever legislation provides public officials with powers over people; affects the conditions under which people may be questioned, investigated, or detained; affects existing restrictions on the admissibility of evidence obtained as a result of treatment prohibited by the CAT; or restricts rights to complain about conduct by public officials. Rights under the other 4 international human rights treaties will require detailed consideration where the legislation may impact on the groups that they seek to protect (that is, racial groups, women, children and people with disabilities).

3.20 General comments, concluding observations, and decisions of the various committees established under the 7 core human rights conventions (discussed below at paragraphs 4.7–4.13) can also be of assistance in interpreting the scope of a right and, hence, drafting statements of compatibility.³⁰

3.21 Generally, statements of compatibility should identify:

- the policy objectives of the Bill or legislative instrument
- whether the Bill or legislative instrument engages with, promotes or limits any human rights
- if no rights are engaged, reasons to support that conclusion
- if a right is promoted, an outline of how this is achieved
- if a right is limited:
 - the reasons for any limitation
 - whether and how the limitation is aimed at achieving a legitimate objective
 - whether and how the limitation is reasonable, necessary and proportionate to the objective
- an overall conclusion about the compatibility of the Bill or legislative instrument with human rights.

3.22 In determining whether rights are being limited, it will be important to look at possible limitations in practice as well as those that are visible on the face of the legislation. In other words, the task is 'to ask whether the application of the government policy, as

'...statements of compatibility [should] read as stand-alone documents that provide information about the purpose and effect of the proposed legislation, the operation of its individual provisions and how these may impact on human rights.'

27 Commonwealth, *Parliamentary Debates*, House of Representatives, 20 June 2012, 7177 (Harry Jenkins); available at www.aph.gov.au/Parliamentary_Business/Committees/Senate_Committees?url=humanrights_ctte/index.htm.

28 Parliamentary Joint Committee on Human Rights, Parliament of Australia, Practice Note 1, available at www.aph.gov.au/Parliamentary_Business/Committees/Senate_Committees?url=humanrights_ctte/practice_notes/index.htm.

29 Available at www.ag.gov.au/www/agd/agd.nsf/Page/Humanrightsandanti-discrimination_Humanrightsandthepublicsector_Toolforassessinghumanrightscapability.

30 Parliamentary Joint Committee on Human Rights, Parliament of Australia, Practice Note 1, available at www.aph.gov.au/Parliamentary_Business/Committees/Senate_Committees?url=humanrights_ctte/practice_notes/index.htm.

expressed by legislative provisions, may result in a breach of rights for hypothetical victims'.³¹

- 3.23 In undertaking this task, consideration may need to be given to potential inconsistencies with human rights under worst-case scenarios.³² A particular area of focus in this context should be the potential for limitations on human rights to occur as a result of the exercise of discretion under a Bill or legislative instrument.
- 3.24 If a Bill or legislative instrument is identified as limiting a human right, the first question to ask is whether any limitation on the right is in fact permissible under international law. Some human rights are absolute and cannot be limited under the international instruments. These are the freedom from torture and other cruel, inhuman or degrading treatment or punishment (ICCPR, art 7), the freedom from slavery and servitude (ICCPR, arts 8(1), 8(2)), freedom from imprisonment for inability to fulfil a contractual obligation (ICCPR, art 11), the prohibition against the retrospective operation of criminal laws (ICCPR, art 15), and the right to recognition before the law (ICCPR, art 16).
- 3.25 In the case of non-absolute rights, it will be necessary to consider whether the limitation contained in the Bill or legislative instrument is permissible under international law. Permissible limitations under the international instruments differ according to the human right under consideration and may be explicit or implicit. Therefore, this issue will require careful consideration and in many cases legal advice. For example, certain rights can only be limited for prescribed purposes (such as freedom of movement in art 12(3) of the ICCPR, which can only be limited where necessary for the protection of national security, public order, public health, public morals or the rights and freedoms of others). Generally speaking, a limitation will not be permissible unless it has a clear legal basis, pursues a legitimate objective and is reasonable, necessary and proportionate to that objective.
- 3.26 Evidence, including empirical data, and assessments of the effect of the limitation in practice may be required in order to demonstrate a legitimate objective and the reasonableness, necessity and proportionality of a measure.
- 3.27 Further, consideration should be given to the existence or inclusion of safeguards that ameliorate the limitation on rights (for example, circumscribing the exercise of a discretionary power). Such safeguards could be included either in the Bill or legislative instrument under consideration or in other Commonwealth legislation.
- 3.28 Experience of the ACT Human Rights Act and the Victorian Charter Act to date has shown that certain types of rights issues tend to be engaged by legislation more frequently than others. For instance, in the context of the right to a fair trial, issues relating to the presumption of innocence and justifications for reversing the evidential and legal burdens of proof, the inclusion of strict liability offences and the removal of the privilege against self-incrimination frequently arise.³³ As we note below (at paragraphs 6.6 and 6.9–6.11) Ch III of the Constitution is often also relevant in this area.

31 Davidson, J, 'The role and impact of the government lawyer in pre-legislative scrutiny', paper presented at the *Legislatures and the Protection of Human Rights Conference*, Melbourne Law School, 20–22 July 2006.

32 Ibid.

33 See ACT Human Rights Act Research Project, Australian National University May 2009, *The Human Rights Act 2004 (ACT): The first five years of operation*, report to the ACT Department of Justice and Community Safety, pp 30–31; Scrutiny of Acts and Regulations Committee, Parliament of Victoria, Practice Note No 3, available at www.parliament.vic.gov.au/sarc/article/1050#no_3.

3.29 Another example is the right to privacy, which frequently arises in the context of powers of search and entry, telecommunications interception, defamation law and laws regulating the handling of personal information. It will be important in the Commonwealth context to be aware that compliance with the *Privacy Act 1988* (Privacy Act) will not necessarily be sufficient to ensure compatibility with privacy and reputation-related human rights. This is because the scope of the right to privacy in art 17 of the ICCPR is significantly broader than the scope of the Privacy Act – the ICCPR provides for the right of every person to be protected against arbitrary or unlawful interference with their privacy, family, home or correspondence as well as against unlawful attacks on their honour and reputation.

Effect of statements

3.30 The primary function of the statement of compatibility is to assist the Committee when it considers relevant human rights issues and to inform parliamentary consideration and debate. The statement of compatibility is an important document to which the Committee will have regard when examining Bills and legislative instruments for compatibility with human rights, but it does not limit the ability of the Committee or the Parliament to consider additional issues or express a different view.

3.31 The statements are not binding on any court or tribunal (ss 8(4) and 9(3) of the Human Rights Scrutiny Act). However, both a statement of compatibility and a report of the Committee will be extrinsic material that can be considered in some circumstances to interpret the legislation.³⁴ Decision-makers, courts and tribunals, therefore, will be able to refer to these documents to confirm the meaning of a provision or to assist in determining the meaning of a provision in the event of ambiguity.³⁵ In this manner, statements of compatibility may affect the subsequent interpretation of legislation by decision-makers, courts and tribunals.

3.32 A failure to prepare a statement will not affect the validity, operation or enforcement of the Act or legislative instrument when made (ss 8(5) and 9(4)). Failure to provide a statement will be a matter for the Committee and the Parliament to respond to. Further, a statement that reveals, explicitly or implicitly, that the Act or legislative instrument is in breach of one of the international human rights instruments, or may give rise to a decision or action that is in breach, will not of itself affect the validity, operation or enforcement of the Act or legislative instrument. In the first instance this will also be a matter for the Committee or Parliament. In due course it may give rise to other remedies discussed below under 'International human rights' (Part 4) and 'Other Commonwealth human rights legislation' (Part 7).

3.33 A statement of compatibility is not legal advice and there is no requirement for a statement to be cleared by legal advisors, the Attorney-General's Department or AGS. In practice, however, the drafting of statements may often be informed by legal advice. Further, where legal advice is sought in relation to how legislation engages, promotes or limits human rights (whether for the purposes of policy development or at the statement of compatibility stage) it is important to be aware that legal work must be carried out by AGS and the Office of International Law in the Attorney-General's Department under the *Legal Service Directions 2005*, because it involves the interpretation of Australia's international law obligations.

34 See *Acts Interpretation Act 1901*, ss 15AB(2)(c), (d). See also Explanatory Memorandum, Human Rights (Parliamentary Scrutiny) Bill 2010, p 5.

35 *Acts Interpretation Act 1901*, s 15AB(1).

What the Human Rights Scrutiny Act does not do

- 3.34 Some dialogue models provide for legislation to be interpreted, so far as possible, consistently with human rights³⁶ and allow courts to make declarations that a statutory provision cannot be interpreted consistently with human rights.³⁷ But neither the Human Rights Scrutiny Act, nor other general Commonwealth legislation does this, though s 10 of the *Racial Discrimination Act 1975* (RD Act) can affect the operation of Commonwealth legislation, as discussed at paragraph 7.27 below. Also, some dialogue models provide for judicial review of administrative decisions on the basis of human rights.³⁸ The Commonwealth Acts discussed in Part 7 provide a right to complain about discrimination, which complaints may proceed to a court. But neither the Human Rights Scrutiny Act, nor other Commonwealth legislation provides for general judicial review based on human rights.

4 International human rights

- 4.1 The Human Rights Scrutiny Act draws extensively on international human rights instruments. So does a range of other Commonwealth legislation (discussed in Part 7), and State and Territory legislation (discussed in Part 9, paragraphs 9.1–9.5).

- 4.2 The last 60 years or so has seen considerable development of a wide range of internationally recognised human rights, especially from the inception of the United Nations and the General Assembly's adoption of the *Universal Declaration of Human Rights*³⁹ in 1948. The intention of this part of the Briefing is to give a broad idea of the scope of these instruments, some of the rights they cover, the international treaty bodies created by them and the complaints and review processes that Australia is subject to as a party to them.

Scope – what do the treaties cover?

- 4.3 As will be apparent from their titles, some of the treaties (for example, the CAT) deal with specific subject matters. Some target more vulnerable persons within our society, such as children (CRC), women (CEDAW), persons with disabilities (CRPD) or racial groups (CERD), and provide protection against activities of particular concern, such as discrimination.
- 4.4 In addition to the conventions covering more specific topics, the ICCPR and the ICESCR recognise a range of more general political, civil, economic, social and cultural rights, which have their place within many parts of everyday life. These rights derive from 'the inherent dignity of and the equal and inalienable rights of all members of the human family [which] is the foundation of freedom, justice and peace in the world'.⁴⁰
- 4.5 Parties to the treaties must recognise the rights set out in the treaties for all individuals in their territory or under their jurisdiction, and must take steps to give effect in domestic law to those rights.⁴¹ The Attorney-General's Department describes this as

36 *Charter of Human Rights and Responsibilities Act 2006* (Vic), s 32(1); *Human Rights Act 2004* (ACT), s 30; *New Zealand Bill of Rights Act 1990* (NZ), s 6; *Human Rights Act 1998* (UK), s 3. See also Part 8 (paragraphs 8.1–8.13) below about statutory interpretation and the principle of legality, and also paragraphs 9.3 and 9.9.

37 *Charter of Human Rights and Responsibilities Act 2006* (Vic), s 36; *Human Rights Act 2004* (ACT), s 32; *Human Rights Act 1998* (UK), s 4. See also paragraphs 9.3 and 9.9 below.

38 *Charter of Human Rights and Responsibilities Act 2006* (Vic), ss 38, 39; *Human Rights Act 2004* (ACT), ss 40B, 40C; *Human Rights Act 1998* (UK), ss 6, 7, 8.

39 GA Res 217A(III) at 71, UN GAOR, 3rd sess, UN Doc A/810 (12 December 1948).

40 ICCPR, preamble.

41 See, for example, ICCPR, art 2; ICESCR, art 2; CERD, art 2; CEDAW, art 3; CAT, arts 3, 4; CRC, arts 2, 4; CRPD, art 4.

‘an obligation to respect, protect and fulfil human rights’.⁴² This may be done through legislative and/or administrative actions. As an example, the RD Act implements Australia’s obligations under the CERD, and the RD Act reflects, and is interpreted having regard to, Australia’s obligations under the CERD.⁴³

4.6 It is not the purpose of this Briefing to discuss in detail all of the rights covered by the 7 core human rights conventions to which Australia is a party. However, some of the rights that might arise in the everyday work of Commonwealth public servants and lawyers include:

- a right to liberty and security of person⁴⁴
- a right to humane treatment in detention⁴⁵
- rights to equality before courts and tribunals and equality before the law⁴⁶
- a right to freedom from arbitrary and unlawful interference with privacy⁴⁷
- rights to freedom of expression, opinion, association, thought, conscience and religion⁴⁸
- rights to a fair and public hearing by an impartial tribunal of the determination of any criminal charge or rights and obligations in a suit at law, presumption of innocence and the prohibition of retrospective criminal laws⁴⁹
- rights to vote and to have access to public service⁵⁰
- a right to an adequate standard of living, including food, water and housing⁵¹
- a right to the highest attainable standard of physical and mental health⁵²
- a right to work and rights in work⁵³
- a right to social security (and a right to benefit from social security)⁵⁴
- a right to education⁵⁵
- a right not to be discriminated against on the basis of race,⁵⁶ sex,⁵⁷ disability⁵⁸ and other grounds.⁵⁹

International human rights bodies and the complaints and review procedures

4.7 An important part of the international human rights machinery is the group of international bodies created by the conventions. Each of the conventions establishes

42 Attorney-General’s Department 2011, *In our hands: a guide to human rights for Australian public servants*, available from www.ag.gov.au/www/agd/agd.nsf/Page/Humanrightsandanti-discrimination_Humanrightsandanti-discrimination.

43 See *Gerhardy v Brown* (1985) 159 CLR 70, 95–99 (Mason J); *Koowarta v Bjelke-Petersen* (1982) 153 CLR 168; and *Maloney v The Queen* [2013] HCA 28, [7], [61], [144], [201], [278] and [299].

44 ICCPR, art 9(1); CERD, art 5(b); CRC, art 19; CRPD, art 14.

45 ICCPR, art 10.

46 ICCPR, arts 14, 26; CERD, art 5(a); CEDAW, art 15; CRPD, art 12.

47 ICCPR, art 17; CRC, art 16; CRPD, art 22.

48 ICCPR, arts 18, 19; CERD, art 5(d)(vii)–(viii); CRC, art 14; CRPD, art 21.

49 ICCPR, arts 14(1)–(3), 15; CRC, art 40.

50 ICCPR, art 25.

51 ICESCR, art 11; CERD, art 5(e)(iii); CRC, art 27; CRPD, art 28.

52 ICESCR, art 12; CEDAW, art 12; CRC, art 24; CRPD, art 25.

53 ICESCR, arts 6, 7; CERD, art 5(e)(i); CEDAW, art 11; CRPD, art 27.

54 ICESCR, art 9; CERD, art 5(e)(iv); CEDAW, arts 11(1)(e), 14(c); CRC, art 26.

55 ICESCR, art 13; CERD, art 5(e)(v); CEDAW, art 10; CRC, arts 28, 29; CRPD, art 24.

56 CERD, arts 2–7.

57 CEDAW, arts 2–4.

58 CRPD, art 5.

59 ICCPR, art 2(1); ICESCR, art 2(2).

a committee⁶⁰ that is generally composed of international experts with relevant experience in the subject matter of the convention. These committees can fulfil a range of functions:

- Committees produce documents designed to guide and assist states in fulfilling their obligations. They set out the committee's view about how a particular right should be interpreted or given effect to. These are called 'General Comments' or 'General Recommendations' or similar.
- States parties are periodically required to submit reports to committees on the progress being made to implement the relevant treaty.⁶¹ The committees then produce their own reports (often known as 'concluding observations'), which outline the committees' views about the state's progress, including matters of concern.
- States may in some cases go to the committee to complain that another state party is not fulfilling its obligations.⁶²
- In some cases, a committee may receive complaints directly from individuals alleging failures on the part of the individual's state to adhere to the rights in the relevant treaty (discussed further below at paragraphs 4.10–4.13).

4.8 The 'General Comments' or 'General Recommendations' produced by committees are not binding at international law (or domestic law). However, as well as giving useful general guidance, they grant important insights into the committee's views on the operation of the relevant convention and how it should be applied. This can become important in the reporting and complaints processes in particular.

4.9 Committees continually review reports and issue their observations. They operate to a schedule that gradually works through all states parties and then begins again. The procedures for the production of reports are now quite formal,⁶³ although they do differ for each committee. Generally, a party is required to address the way it is implementing its obligations under the convention, any obligations not yet implemented, steps taken by the party since it last reported, planned initiatives to further implement the treaty and so on. The relevant committee generally considers the report submitted by the party and examines the party on matters contained in the report. The committee will indicate its views on the party's actions and report through its concluding observations. The party generally has an opportunity to reply to these observations. It is important to note that the committee reporting processes are public.

4.10 As noted, under some conventions individuals are also able to complain directly to a committee. The availability of this remedy, as well as the circumstances in which it can be utilised, are set out in the conventions themselves or in additional protocols dealing specifically with individual complaints.⁶⁴

4.11 For example, under the *First Optional Protocol to the International Convention on Civil and Political Rights*, states parties recognise the competence of the Human Rights Committee set up under art 28 of the ICCPR to 'receive and consider communications

60 See ICCPR, art 28; ICESCR, art 16 (in conjunction with ECOSOC Res 1985/17, UN ESCOR, 1st sess, 22nd mtg, UN Doc E/RES/1985/17 (May 28 1985)); CERD, art 8; CEDAW, art 17; CAT, art 17; CRC, art 43; CRPD, art 34.

61 See ICCPR, art 40; ICESCR, art 16; CERD, art 9; CEDAW, art 18; CAT, art 19; CRC, art 44; CRPD, art 35.

62 See, for example, ICCPR, art 41; CERD, art 11; CAT, art 21.

63 See, for example, Committee on the Elimination of Racial Discrimination, Guidelines for the CERD-Specific Document to be Submitted by States Parties Under Article 9, Paragraph 1 of the Convention, UN Doc CERD/C/2007/1 (13 June 2008).

64 See CERD, art 14; CAT, art 22; *First Optional Protocol to the International Convention on Civil and Political Rights* [1991] ATS 39 (New York, 19 December 1966); *Optional Protocol to the Convention on the Elimination of Discrimination Against Women* [2009] ATS 5 (New York, 6 October 1999); *Optional Protocol to the Convention on the Rights of Persons with Disabilities* [2009] ATS 19 (New York, 13 December 2006).

from individuals ... who claim to be victims of a violation by that state party of any of the rights set forth in the [ICCPR].⁶⁵ The Committee will not consider a complaint where the same matter is 'being examined under another procedure of international investigation or settlement' (art 5(2)(a)). In addition, the individual must have 'exhausted all available domestic remedies' before the Committee will consider the complaint (art 5(2)(b)). Similar restrictions apply under the individual complaints mechanisms of the other conventions. It is therefore still necessary for an individual to pursue a remedy for any alleged human rights breach through Australian domestic processes – for example, by making a complaint to the Australian Human Rights Commission (AHRC) (see ss 20(1)(b) and 11(1)(f) of the *Australian Human Rights Commission Act 1986* (AHRC Act), discussed in Part 7 below) or by pursuing a claim through the courts, if possible.

- 4.12 If the individual complaint avenue is available, however, the person concerned may write to the relevant committee with their complaint. The state concerned has an opportunity to comment and make submissions on the admissibility and merits of the case and the complainant has an opportunity to reply. If the complaint is admissible, the committee considers it and delivers a final decision on it.⁶⁶ Where no breach of the convention is found, that will be the end of the matter. Where a breach is found, the consequences will depend on the convention under which the decision has been made. For example, under the ICCPR, the Human Rights Committee will often indicate what it considers to be an appropriate response, and the state will be invited to inform the Committee of the steps it has taken to give effect to the Committee's decision. This happens within 3 months. If appropriate steps are not taken, the matter is referred to the Special Rapporteur on Follow-up of Views, who considers what further steps the Committee could take – for example, issuing specific requests or meeting with the state to discuss actions taken.⁶⁷
- 4.13 Australia has been the subject of such complaints in the past, and the individual complaints mechanism can therefore provide a remedy in some cases.⁶⁸ The Human Rights Scrutiny Act provides simply one more reason to be aware of Australia's international law obligations. As we have noted, the statement of compatibility must address compliance by a Bill or legislative instrument with the international human rights instruments. However, the requirement for such a statement is in addition to, not in substitution for, the operation of these instruments in international law.

5 Relevance of international human rights law for decision-making

- 5.1 The human rights treaties are not of themselves part of the domestic law of Australia and cannot be directly enforced in Australian courts and tribunals. The human rights treaties have been picked up by the Human Rights Scrutiny Act and some have also been incorporated into Australian domestic law by Commonwealth legislation

65 *First Optional Protocol to the International Convention on Civil and Political Rights* [1991] ATS 39 (New York, 19 December 1966), art 1.

66 See Office of the United Nations High Commissioner for Human Rights, *23 FAQ about Treaty Body complaints procedures*, available at www2.ohchr.org/english/bodies/petitions/individual.htm.

67 *Ibid.*

68 See, for example, *Toonen v Australia* Communication No 488/1992, UN Doc CCPR/C/50/D/488/1992 (4 April 1994) in which the Human Rights Committee found that a Tasmanian law proscribing consensual, private male homosexual activity breached art 17(1) of the ICCPR (right to privacy). The Commonwealth passed legislation in response: the *Human Rights (Sexual Conduct) Act 1994*.

(discussed below in Part 7) and by State and Territory legislation (which can be relevant to the Commonwealth, as we discuss below in Part 9). In addition, legislation may need to be interpreted in light of international human rights instruments (discussed below in Part 8, paragraph 8.12).

- 5.2 But we consider now the extent to which international law should be taken into account in decision-making generally. An administrative law obligation to take into account international law was put at its highest in *Teoh*. In that case, the High Court considered the effect, if any, of Australia's ratification of the CRC on a decision to refuse Mr Teoh's application for resident status and to deport him.
- 5.3 Chief Justice Mason and Justice Deane stated that 'the fact that the [CRC] has not been incorporated into Australian law does not mean that its ratification holds no significance for Australian law' (at 287). Their Honours held that the ratification of a convention was a 'positive statement' by the executive that it and its agencies would 'act in accordance with the convention' (at 291). For the purposes of administrative law, that 'positive statement' could found a 'legitimate expectation' that decision-makers would act in accordance with the convention.⁶⁹ Such a 'legitimate expectation' did not compel a decision-maker to act in a particular way but meant that the decision-maker was required to inform the subject of the decision if he or she intended to act in a manner inconsistent with that expectation. A legitimate expectation therefore raised an additional procedural fairness obligation.
- 5.4 In an attempt to limit its effect, the Commonwealth Government responded to the *Teoh* decision within a month of it being handed down. A joint statement from the Minister for Foreign Affairs and the Attorney-General stated that:
- entering into an international treaty is not reason for raising any expectation that government decision-makers will act in accordance with the treaty if the relevant provisions of that treaty have not been enacted into domestic Australian law. It is not legitimate, for the purpose of applying Australian law, to expect that the provisions of a treaty not incorporated by legislation should be applied by decision-makers. Any expectation that may arise does not provide a ground for review of a decision. This is so, both for existing treaties and for future treaties that Australia may join.⁷⁰
- 5.5 In addition, the Government attempted to legislate to reinforce that statement, introducing the Administrative Decisions (Effect of International Instruments) Bill in 1995. Despite a number of attempts, in different forms, the Bill was never passed.⁷¹
- 5.6 In *Teoh*, McHugh J dissented forcefully, holding (at 316) that the ratification of the CRC was a statement to the international, not the national, community, and ratification could not constitute an undertaking to the country's citizens. Subsequent judgments suggest continuing uncertainty about the content and usefulness of the doctrine of legitimate expectation⁷² and pointed comments about the correctness of *Teoh*, the role

69 Justice Toohey (at 301) agreed with the proposition that ratification of the Convention could give rise to a legitimate expectation to act in accordance with the obligations under the Convention. Justice Gaudron (at 304) considered that the Convention was only of subsidiary importance in that particular case, as it was implicit that 'any reasonable person who considered the matter would ... assume that the best interests of the child would be a primary consideration' in an administrative decision of the kind at issue.

70 See *Joint Statement by the Minister for Foreign Affairs, Senator Gareth Evans, and the Attorney-General, Michael Lavarch, International Treaties and the High Court Decision in Teoh* (10 May 1995), available at www.foreignminister.gov.au/releases/1995/m44.html.

71 See Griffith, G and Evans, C 2000 'Teoh and Visions of International Law' 21 *Australian Yearbook of International Law* 75, pp 76–79.

72 See, for example, *Applicant NAFF of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs* (2004) 221 CLR 1, [66]–[69] (Kirby J); *Re Refugee Review Tribunal; Ex parte Aala* (2000) 204 CLR 82, [213]–[214] (Callinan J); *Muin v Refugee Review Tribunal* (2002) 190 ALR 601, [308] (Callinan J); *Sanders v Snell* (1998) 196 CLR 329, [45] (Gleeson CJ, Gaudron, Kirby and Hayne JJ); *Plaintiff S10-2011 v Minister for Immigration and Citizenship* (2012) 290 ALR 616, [65] (Gummow, Hayne, Crennan and Bell JJ).

- 5.7 of international law and legitimate expectations were made by the High Court in *Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Lam* (2003) 214 CLR 1 (*Lam*).
- 5.8 In *Lam*, McHugh and Gummow JJ stated that if it was to have any continued significance, then ‘further attention will be required to the basis upon which *Teoh* rests’ (at [98]). Their Honours pointed out (at [101]–[102]) that Mason CJ and Deane J in *Teoh* had accepted the established proposition that international obligations could not be mandatory relevant considerations in making an administrative decision. Nonetheless, Mason CJ and Deane J seemed to accept that such obligations *could* be mandatory considerations where procedural fairness and legitimate expectation were concerned. Justices McHugh and Gummow concluded that the reasoning that would sustain this ‘erratic’ application of doctrine ‘remains for analysis and decision’. Both Hayne J (who agreed that further consideration would need to be given to the consequences of *Teoh*) and Callinan J (who pointed out reasons why the Parliament might not wish to enact a treaty into domestic law and expressed concerns about the role of the executive in the *Teoh* approach) were also critical of *Teoh*.
- 5.9 The High Court has not dealt again with the precise question of whether a treaty ratified by Australia but not incorporated into domestic law can result in a legitimate expectation for administrative law purposes. This might reflect the acceptance of an expanded notion of the ‘interests’ that attract procedural fairness, resulting in the redundancy of ‘legitimate expectation’ as a means of protecting procedural fairness.⁷³ The most recent comments of the High Court support that interpretation and confirm the recession of the *Teoh* view. In particular, Gummow, Hayne, Crennan and Bell JJ in *Plaintiff S10-2011 v Minister for Immigration and Citizenship* (2012) 290 ALR 616 said that the phrase ‘legitimate expectation’ ‘either adds nothing or poses more questions than it answers.’ It was therefore an ‘unfortunate expression which should be disregarded’ (at [65]). Given those comments and the comments of the High Court in *Lam*, there is significant doubt about whether a future High Court would uphold the doctrine of legitimate expectation so far as it relates to treaties ratified but not implemented into domestic legislation.

6 Constitutional human rights

- 6.1 Until relatively recently, the conventional view was that the Constitution said little about those basic human rights and freedoms that are often included in other constitutions. Most of the framers of the Constitution believed that such rights were best left to the protection of the common law and Parliament, and few thought that these rights extended fully to Australia’s Indigenous peoples, women or Asian migrants. Accordingly, the Constitution has no Bill of Rights equivalent to that found in the United States Constitution.⁷⁴
- 6.2 Despite this, constitutional rights and freedoms have recently begun to assume more importance. Some provisions of the Constitution do protect key human rights and the High Court has drawn some significant implications from the Constitution which also protect human rights.

⁷³ See Cane, P and McDonald, L 2008, *Principles of Administrative Law*, p 131. See also *Applicant NAFF of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs* (2004) 221 CLR 1, [68] (Kirby J).

⁷⁴ Aitken, G and Orr, R 2002, *Sawyer’s The Australian Constitution* 3rd edn, AGS Canberra, pp 131–132; Williams, G 1999, *Human Rights under the Australian Constitution*, pp 33–45.

- 6.3 It is only possible to mention the key provisions and implications in this context and some recent decisions in relation to them.

Express freedoms

No acquisition of property except on just terms

- 6.4 Section 51(xxxi) of the Constitution in effect means that a Commonwealth law with respect to the ‘acquisition of property’ must provide ‘just terms’ for the acquisition. While this is a grant of power to the Commonwealth, this grant has been interpreted by the High Court as also limiting the ability of the Commonwealth to acquire property other than on just terms.
- 6.5 Until recently, cases on acquisition of property have principally involved challenges to Commonwealth legislation that is alleged to acquire property on unjust terms. However, in *ICM Agriculture Pty Ltd v Commonwealth* (2009) 240 CLR 140 and *Arnold v Minister Administering the Water Management Act* (2010) 240 CLR 242, the challenging parties, who held NSW water entitlements that were reduced, argued that a funding agreement (and related legislation) under which the Commonwealth had paid financial assistance to NSW in relation to these reductions was invalid by operation of s 51(xxxi). This argument was rejected by the High Court.⁷⁵ However, in doing so, the Court held that a grant under s 96 cannot be made on terms and conditions that may require a State to acquire property on other than just terms.⁷⁶ Justices Hayne, Kiefel and Bell noted that a law may contravene s 51(xxxi) ‘directly or indirectly, explicitly or implicitly’.⁷⁷ Further, French CJ and Gummow and Crennan JJ indicated that the limitation in s 51(xxxi) may extend to executive action.⁷⁸

Trial by jury

- 6.6 Section 80 of the Constitution provides that ‘the trial on indictment of any offence against any law of the Commonwealth shall be by jury’. To some extent the operation of this provision is limited because of the view of the High Court that the Parliament can decide when a crime is triable on indictment, and it is only when it does so that s 80 operates to require a jury.⁷⁹ However, where s 80 does apply, it can impose significant requirements, such as a unanimous verdict.⁸⁰

Free exercise of religion

- 6.7 Section 116 of the Constitution provides that the Commonwealth ‘shall not make any law for establishing any religion, or for imposing any religious observance, or for prohibiting the free exercise of any religion, and no religious test shall be required as a qualification for any office or public trust under the Commonwealth’. Recently in *Williams v The Commonwealth* (2012) 86 ALJR 713 the High Court rejected a challenge to the funding of the National Schools Chaplaincy Program on the basis of the last requirement in s 116, although it upheld the challenge on other bases.

75 *ICM Agriculture Pty Ltd v Commonwealth* (2009) 240 CLR 140, [84] (French CJ, Gummow and Crennan JJ), [154] (Hayne, Kiefel and Bell JJ); *Arnold v Minister Administering the Water Management Act* (2010) 240 CLR 242, [3], [11] (French CJ), [48]–[49] (Gummow and Crennan JJ), [72] (Hayne, Kiefel and Bell JJ); see also Lewis, D and Fisher, A, ‘Water entitlement reductions valid: acquisition of property and abridgment of rights to water’ AGS Litigation Notes No 20, 15 December 2010, 1.

76 *ICM Agriculture Pty Ltd v Commonwealth* (2009) 240 CLR 140, [46] (French CJ, Gummow and Crennan JJ), [174] (Heydon JJ); see also [138]–[141] (Hayne, Kiefel and Bell JJ).

77 *Ibid.*, [139].

78 *Ibid.*, [29] (French CJ, Gummow and Crennan JJ).

79 *R v Archdall* (1928) 41 CLR 128.

80 *Cheatle v The Queen* (1993) 177 CLR 541.

Implied freedoms

- 6.8 In addition to the express rights and freedoms, the High Court has also recognised a number of important implications relevant to human rights, derived mainly from the fundamental principles of government underlying the Constitution.

Separation of powers – ‘right to fair trial’

- 6.9 Importantly, because of the separation of powers effected by Ch III of the Constitution, only a court may exercise the judicial power of the Commonwealth. The High Court’s ongoing approach to this principle has led some commentators to suggest that it has used it to impose significant human rights limitations on the Commonwealth Parliament and more recently State parliaments.⁸¹ While not using the language of human rights, the Court’s decisions in this area often lead to results consistent with the right to a fair trial in art 14 of the ICCPR (see above paragraph 4.6, footnote 49). Indeed, Justice Sackville has recently written:⁸²

Much of the debate in Australia about the virtues and drawbacks of a national statutory charter of rights has missed the point. While the debate has raged, the High Court has carried on uninterrupted and largely unnoticed by the general community the process of interpreting Ch III of the Constitution to entrench a constitutional bill of rights.

- 6.10 In *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51 (*Kable*) the High Court held that a State parliament cannot give functions to a State court that are inconsistent with its status as a repository of federal jurisdiction. In 3 recent cases the High Court has held State legislation invalid on this basis.⁸³ For example, in *Wainohu v New South Wales* (2011) 243 CLR 181 the Court by a 6:1 majority held invalid the *Crimes (Criminal Organisation Control) Act 2009* (NSW), which conferred on an ‘eligible judge’ the power to declare an organisation a criminal organisation if the judge was satisfied that members of the organisation associated for the purpose of organising serious criminal activity and the organisation represented a risk to public safety and order. The majority held that the absence of a requirement to give reasons for such a decision gave rise to the possibility of arbitrary decision-making that could not be assessed according to its own terms. This in turn gave rise to an appearance of an unacceptable relationship between the judiciary and other branches of government – one that was incompatible with the institutional integrity of the Supreme Court of which the eligible judge was a member.

- 6.11 Although these cases concerned State laws, they are relevant to the Commonwealth because, if such State laws are invalid, Commonwealth laws to a similar effect will also be invalid. However, the reverse is not necessarily the case; there are greater restrictions at the federal level. As we discuss below at paragraph 9.9, in *Momcilovic v The Queen* (2011) 245 CLR 1 (*Momcilovic*) the High Court considered s 32(1) of the Victorian Charter Act, which allowed the Victorian Supreme Court to make a declaration of inconsistent interpretation. A 4:3 majority held that the declaration of inconsistent interpretation

81 Zines, L 1994, ‘A judicially created bill of rights?’ 16 *Sydney Law Review* 166; Winterton, G ‘Separation of judicial power as an implied bill of rights’ in Lindell, G (ed) 1994, *Future Directions in Australian Constitution Law*, p 185; Wheeler, F 2000, ‘The rise and rise of judicial power under Chapter III of the Constitution: A decade in overview’ 20 *Australian Bar Review* 282; McHugh, M 2001 ‘Does Chapter III of the Constitution protect substantive as well as procedural rights?’ 21 *Australian Bar Review* 235; Sackville, R 2011, ‘Bill of rights: Chapter III of the Constitution and State charters’ 18 *Australian Journal of Administrative Law* 67.

82 Sackville, R 2011, ‘Bill of rights: Chapter III of the Constitution and State charters’ 18 *Australian Journal of Administrative Law* 67, p 79.

83 *International Finance Trust Company Limited v NSW Crime Commission* (2009) 240 CLR 319, discussed in Bennett, D ‘Application of the Kable principle’ AGS Litigation Notes No 20, 15 December 2010, 15; *South Australia v Totani* (2010) 242 CLR 1, discussed in Lewis, D and Fisher, A ‘South Australian criminal organisation control order provision invalid’ AGS Litigation Notes No 20, 15 December 2010, 18; *Wainohu v New South Wales* (2011) 243 CLR 181, discussed in Lewis, D and Bennett, D ‘NSW criminal organisations control law invalid’ AGS Litigation Notes No 21, 2 November 2011, 21.

provision was valid in relation to the exercise of State judicial power, but a 5:2 majority held that such a declaration could not be made in exercise of federal judicial power.

Freedom of political communication

6.12 Another example of how implications drawn from the text and structure of the Constitution can restrict Commonwealth legislative power was provided in 1992 when the High Court declared invalid a Commonwealth law that attempted to restrict the broadcasting of political advertising.⁸⁴ The Court decided that the restrictions imposed by that law were inconsistent with the form of representative government entrenched by the text and structure of the Constitution – specifically, an implied right to freedom of communication on political matters. This has some similarities to the right to freedom of expression in art 19 of the ICCPR (see above paragraph 4.6, footnote 48).

6.13 Recently, in *Hogan v Hinch* (2011) 243 CLR 506, the High Court held that the implied freedom was not infringed by s 42 of the *Serious Sex Offenders Monitoring Act 2005* (Vic), which conferred on the Supreme Court and County Court of Victoria power to make a suppression order in proceedings under the Act. The Act provided for courts to make orders for the ongoing supervision of certain sexual offenders after their release from prison. The suppression orders that had been contravened in this case ‘prohibited publication of any information that might enable the identification of certain persons, convicted of sex offences, who were the subject of post-custodial extended supervision orders under the Act’ (at [1]). The power to make suppression orders was found to burden political communication but to be appropriate and adapted to serve the legitimate end of ‘the protection of the community and the rehabilitation of serious sex offenders who are at risk of re-offending after they have completed their sentences’.⁸⁵

Parliament directly chosen by the people – ‘right to vote’

6.14 Sections 7 and 24 of the Constitution provide that the Senate and House of Representatives shall be ‘directly chosen by the people’. Recently, in *Roach v Electoral Commissioner* (2007) 233 CLR 162 (*Roach*) and *Rowe v Electoral Commissioner* (2010) 243 CLR 1 (*Rowe*), the High Court held invalid amendments to the *Commonwealth Electoral Act 1918*. The amendments in *Roach* had the effect of disqualifying as voters all persons who were serving sentences of imprisonment, whatever the duration, and in *Rowe* they prevented new enrolments from 8 pm on the date of the writ for the election rather than from 8 pm 7 days after the date of the writ. The Court held that restrictions on the ‘right to vote’ had to be for a legitimate end and proportionate to achieving that legitimate end. The restrictions in question in these cases were not. This is an analysis similar to that engaged in under international human rights law (see paragraph 3.25 above) – in particular, in relation to the right to vote in art 25 of the ICCPR (see above paragraph 4.6, footnote 50). In *Rowe*, the legitimate end was fair elections without fraud, but the amendments had the practical effect of preventing some 100,000 people from enrolling. Chief Justice French stated (at [78]):

84 *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106.

85 *Hogan v Hinch* (2011) 243 CLR 506, French CJ [50]. See also Bennett, D and Fisher, A ‘Validity of power to make “suppression orders” upheld’ AGS Litigation Notes No 21, 2 November 2011, 18. See also *Wotton v State of Queensland* (2012) 246 CLR 1; and Buckland, A and Thornton, S ‘Queensland prisoner legislation does not infringe the implied freedom of political communication’ AGS Litigation Notes No 22, 10 December 2012, 20.

In my opinion, the heavy price imposed by the Amendment Act in terms of its immediate practical impact upon the fulfilment of the constitutional mandate was disproportionate to the benefits of the smoother and more efficient electoral system to which the amendments were directed.⁸⁶

Relevance of constitutional rights

6.15 The constitutional requirements described above are relevant in the context of policy development and law-making; laws made beyond power are invalid. This will often require consideration within the policy development process of whether the practical effect of the law interferes with these constitutional principles and, if so, whether it has a legitimate purpose and is proportionate to that purpose. The constitutional provisions are also relevant in decision-making under such laws, since legislation needs to be interpreted in light of them. Section 15A of the *Acts Interpretation Act 1901* (Acts Interpretation Act) provides:

15A Construction of Acts to be subject to Constitution

Every Act shall be read and construed subject to the Constitution, and so as not to exceed the legislative power of the Commonwealth, to the intent that where any enactment thereof would, but for this section, have been construed as being in excess of that power, it shall nevertheless be a valid enactment to the extent to which it is not in excess of that power.

Therefore, Commonwealth legislation will only operate within constitutional limitations, and will generally be read down, where necessary, in light of those limitations.

7 Other Commonwealth human rights legislation

7.1 As stated above, human rights set out in treaties to which Australia is a party are not as such part of Australian domestic law and cannot be directly enforced in Australian courts and tribunals. To be enforceable in Australian courts and tribunals, such rights must be incorporated into Australian law. As discussed elsewhere in this Briefing, some human rights are protected by constitutional principles (Part 6 above) and by common law principles (Part 8 below). But the most substantial laws with respect to human rights are the Commonwealth, State and Territory laws that specifically seek to implement certain international human rights treaties and to provide appropriate remedies for their breach. We discuss the relevance of State and Territory legislation to the Commonwealth in Part 9 ('State and Territory human rights laws and the Commonwealth').

Commonwealth Discrimination Acts

7.2 The Commonwealth Acts we will discuss in this part of the Briefing are:

- the *Racial Discrimination Act 1975* (RD Act)
- the *Sex Discrimination Act 1984* (SD Act)
- the *Disability Discrimination Act 1992* (DD Act)
- the *Age Discrimination Act 2004* (AD Act).

We will refer to these collectively as the Discrimination Acts.

'All of the Discrimination Acts are potentially highly relevant to the actions of Commonwealth public servants.'

⁸⁶ See generally Lenagh-Maguire, N and Lewis, D 'Provisions closing the federal electoral roll early invalid' AGS Litigation Notes No 21, 21 November 2011, 25; Lewis, D and Bennett, D 'Prisoners voting in federal elections' AGS Litigation Notes No 15, 20 November 2008, 13.

- 7.3 The RD Act gives effect to the CERD and the SD Act to the CEDAW. Although the DD Act was enacted before the conclusion of the CRPD, its provisions now give effect to the CRPD. The AD Act is not based on a particular treaty.⁸⁷
- 7.4 One of the key components of Australia's Human Rights Framework mentioned earlier in this Briefing is the consolidation of existing Commonwealth anti-discrimination law into a single Act. A discussion paper on this policy was released in September 2011.⁸⁸ On 20 November 2012 the Attorney-General released an exposure draft of a Human Rights and Anti-Discrimination Bill 2012.⁸⁹ The Senate Standing Committee on Legal and Constitutional Affairs issued its report on the draft Bill on 21 February 2013⁹⁰ and the Attorney-General is considering the recommendations. The Government has, however, decided to proceed immediately with one element of the reforms: the *Sex Discrimination Amendment (Sexual Orientation, Gender Identity and Intersex Status) Act 2013*. That Act inserts new protections from discrimination on the basis of sexual orientation, gender identity and intersex status, and extends the ground of marital status to marital or relationship status. The Act received royal assent on 28 June 2013. The changes it makes to the SD Act commenced on 1 August 2013.
- 7.5 This Briefing will discuss the Discrimination Acts as they stand at present. All of them are potentially highly relevant to the actions of Commonwealth public servants. It should be emphasised that each of the Discrimination Acts contains complicated provisions and there are differences between them. What follows is a very brief overview of the Discrimination Acts and the general principles that can be drawn from them.

When do the Discrimination Acts apply?

- 7.6 The RD Act makes all discrimination on the grounds of race, colour, descent or national or ethnic origin unlawful in all areas of activity.⁹¹
- 7.7 In contrast, the SD Act, DD Act and AD Act make discrimination unlawful in specified areas, most relevantly for the Commonwealth in:
- employment
 - education
 - access to premises
 - provision of goods, services and facilities
 - administration of Commonwealth laws and programs.⁹²
- 7.8 In relation to Commonwealth programs and laws, the SD Act, DD Act and AD Act specifically provide that it is unlawful for a person who:
- performs any functions or exercises any power under a Commonwealth law or for the purposes of a Commonwealth program

'The prohibition on discrimination will apply to both the design of the program and its administration.'

87 The full references for these treaties are set out in paragraph 3.4.

88 Attorney-General's Department September 2011, *Consolidation of Commonwealth anti-discrimination laws: discussion paper*, available from www.ag.gov.au/Humanrightsandantidiscrimination/Australiahumanrightsframework/Pages/ConsolidationofCommonwealthantidiscriminationlaws.aspx.

89 Available at <http://www.ag.gov.au/Humanrightsandantidiscrimination/Australiahumanrightsframework/Documents/Human%20Rights%20and%20Anti-Discrimination%20Bill%202012%20-%20Exposure%20Draft%202.pdf>.

90 Available at http://www.aph.gov.au/Parliamentary_Business/Committees/Senate_Committees?url=legcon_ctte/completed_inquiries/2010-13/anti_discrimination_2012/report/index.htm.

91 RD Act, s 9. There are also specific provisions in the RD Act about access to places and facilities (s 11); land, housing and other accommodation (s 12); provision of goods and services (s 13); right to join trade unions (s 14); employment (s 15); and advertisements (s 16).

92 SD Act, Pt II Divs 1–2; DD Act, Pt II Divs 1–2; AD Act, Pt 4 Divs 2–3.

- has any other responsibility for the administration of a Commonwealth law or the conduct of a Commonwealth program

to discriminate against another person on a prohibited ground (such as sex, disability or age) in the performance of that function, the exercise of that power or the fulfilment of that responsibility.⁹³ The RD Act will also apply in these circumstances.⁹⁴

7.9 'Commonwealth program' means a program conducted by or on behalf of the Commonwealth.⁹⁵ It does not have to be a legislative program. The prohibition on discrimination will apply to both the design of the program and its administration.

Prohibited grounds of discrimination

7.10 The Discrimination Acts do not prohibit discrimination in general but discrimination on particular grounds. These grounds are defined in each of the Discrimination Acts.

- The RD Act makes it unlawful to discriminate on the basis of race, colour, descent or national or ethnic origin.⁹⁶
- The SD Act makes it unlawful (in specified areas) to discriminate against a person on the ground of the person's sex, sexual orientation, gender identity, intersex status, marital or relationship status, pregnancy or potential pregnancy, breastfeeding or family responsibilities.⁹⁷
- The AD Act makes it unlawful (in specified areas) to discriminate on the ground of age (which is defined to include age group).⁹⁸
- The DD Act makes it unlawful (in specified areas) to discriminate against a person on the basis of a person's disability⁹⁹ and on the basis that a person has a carer, assistant, assistance animal or disability aid.¹⁰⁰ It also makes it unlawful to discriminate against a person on the ground of disability of any of the person's associates (such as relatives).¹⁰¹

Types of discrimination

7.11 There are 2 types of discrimination – direct discrimination and indirect discrimination. These are defined in the SD Act, DD Act and AD Act. The RD Act, which was the earliest of the Discrimination Acts, defines discrimination somewhat differently, but it also encompasses both direct and indirect discrimination. In *Waters v Public Transport Corporation* (1992) 173 CLR 349 (*Waters*), on the distinction between direct and indirect discrimination, Dawson and Toohey JJ said (at 392):

93 SD Act, s 26; DD Act, s 29; AD Act, s 31.

94 RD Act, s 9.

95 SD Act, s 4; DD Act, s 4; AD Act, s 31(2).

96 RD Act, s 9.

97 SD Act, ss 5-7A, Pt II Divs 1-2. This list incorporates the amendments to the SD Act made by the *Sex Discrimination Amendment (Sexual Orientation, Gender Identity and Intersex Status) Act 2013* discussed above at paragraph 7.4.

98 AD Act, s 5, Pt 4 Divs 2-3.

99 DD Act, s 4, Pt 2 Divs 1-2. The definition of 'disability' (DD Act, s 4) includes: total or partial loss of bodily or mental functions or of a part of the body; presence in the body of organisms causing or capable of causing disease or illness; malfunction, malformation or disfigurement; disorder or malfunction that results in the person learning differently; a disorder, illness or disease that affects a person's thought processes, perception of reality, emotions or judgment or that results in disturbed behaviour. It includes a disability that presently exists, previously existed but no longer exists or may exist in the future (including because of a genetic predisposition to that disability) or is imputed to a person. It includes behaviour that is a symptom or manifestation of the disability.

100 DD Act, s 8.

101 DD Act, s 7.

Both direct and indirect discrimination ... entail one person being treated less favourably than another person. The major difference is that in the case of direct discrimination the treatment is on its face less favourable, whereas in the case of indirect discrimination the treatment is on its face neutral but the impact of the treatment on one person when compared with another is less favourable.

7.12 In each of the Discrimination Acts, an act includes a refusal or failure to do an act.¹⁰²

Direct discrimination

7.13 A person (the discriminator) directly discriminates against another person (the aggrieved person) with a particular characteristic if, because of that characteristic, the discriminator treats the aggrieved person less favourably than they would a person without that characteristic in circumstances that are the same or are not materially different.¹⁰³

7.14 In general terms, this means that there is direct discrimination where a person is treated less favourably than others because the person has a disability or is of a particular age or age group, sex or race. Less favourable treatment is identified by comparing the treatment of the person with the particular characteristic to the treatment of a person without that characteristic in materially similar circumstances.

7.15 Making this comparison in the case of persons with disability can raise particular issues. The DD Act provides that the circumstances in which a person treats or would treat a person with a disability less favourably are not materially different because of the fact that a person with a disability requires adjustments.¹⁰⁴ In other words, circumstances are not 'materially different' just because the person with a disability needs aids, facilities or services that a person without the disability would not need (for example, in the education context, course materials provided in Braille or delivered in sign language).

Reasons and motivations for direct discrimination irrelevant

7.16 It is important to note that direct discrimination (unlike indirect discrimination) cannot be justified by reasonableness. The courts have said that the motive, reasons or suggested justifications of the detriment are irrelevant.¹⁰⁵ In *Waters*, concerning direct discrimination under the *Equal Opportunity Act 1984* (Vic), Mason CJ and Gaudron J (Deane J agreeing) said that, if the forbidden ground is the basis on which less favourable treatment is accorded, there does not need to be an intention or motive to discriminate.¹⁰⁶

Indirect discrimination

7.17 A person (the discriminator) indirectly discriminates against another person (the aggrieved person) with a particular characteristic if:

- the discriminator imposes a condition or requirement
- with which the aggrieved person does not or cannot comply (in DD Act and RD Act only)

102 RD Act, s 3(3); SD Act, s 4(2); DD Act, s 4(2); AD Act, s 7.

103 RD Act, s 9(1); SD Act, s 5; DD Act, s 5; AD Act, s 14.

104 DD Act, s 5(3).

105 *Haines v Leves* (1987) 8 NSWLR 442, 471 (Kirby P).

106 *Waters* (1992) 173 CLR 349, 359–360; see also *Australian Iron & Steel Pty Ltd v Banovic* (1989) 168 CLR 165, 175 (Deane and Gaudron JJ).

- that has or is likely to have the effect of disadvantaging persons with that characteristic, and
- that is not reasonable in the circumstances.¹⁰⁷

7.18 So, for example, a condition that a particular education program is available only to persons who speak English to a high standard is likely to disadvantage persons of certain ethnic origins or nationalities, and there will be indirect discrimination unless the condition is reasonable in the circumstances (for example, if good spoken English is necessary to benefit from the program).

7.19 The term ‘requirement or condition’ is interpreted very broadly as including any form of qualification or prerequisite.¹⁰⁸ A requirement or condition can be implicit rather than explicitly imposed.¹⁰⁹ In *Catholic Education Office v Clarke* (2004) 138 FCR 121 the Full Federal Court held that there was indirect discrimination against a profoundly deaf student by a school that did not provide him with sign language interpreting services, since the school was imposing an implicit requirement or condition that the student participate and receive the instruction without the assistance of an interpreter. The deaf student could not comply with that condition but students who were not deaf could. The condition or requirement was not held to be reasonable in the circumstances.

No indirect discrimination if condition or requirement reasonable

7.20 There is no indirect discrimination if the condition or requirement is reasonable in the circumstances. The accepted test of ‘reasonableness’ has been described by Bowen CJ and Gummow J in *Secretary, Department of Foreign Affairs and Trade v Styles* (1989) 23 FCR 251 at 263 (in relation to the SD Act) as:

less demanding than one of necessity, but more demanding than a test of convenience ... The criterion is an objective one, which requires the court to weigh the nature and extent of the discriminatory effect, on the one hand, against the reasons advanced in favour of the requirement or condition on the other. All the circumstances of the case must be taken into account.

7.21 This formulation of the test was approved by the High Court in *Waters*.¹¹⁰

DD Act: obligation to make reasonable adjustments

7.22 An obligation to make reasonable adjustments is embedded into the definitions of both direct discrimination and indirect discrimination under the DD Act.¹¹¹ Reasonable adjustments are those required to ensure that a person with a disability receives equal treatment – for example, special equipment, sign language services, wheelchair ramps, flexible leave arrangements and so on. The failure to make reasonable adjustments for a person with a disability, with the effect that the person is disadvantaged, is unlawful discrimination under the DD Act. An adjustment is a ‘reasonable adjustment’ unless making the adjustment would impose an unjustifiable hardship on the person making it (see paragraph 7.31).¹¹²

107 RD Act, s 9(1A); SD Act, ss 5(2), 7B; DD Act, s 6; AD Act, s 15.

108 *Waters* (1992) 173 CLR 349, 393 (Dawson and Toohey JJ), 406 (McHugh J); *Catholic Education Office v Clarke* (2004) 138 FCR 121, 143; *Daghlian v Australian Postal Corporation* [2003] FCA 759, [110]; *Hinchliffe v University of Sydney* (2004) 186 FLR 376, 395.

109 *Waters* (1992) 173 CLR 349; *Australian Iron & Steel Pty Ltd v Banovic* (1989) 168 CLR 165.

110 *Waters* (1992) 173 CLR 349, 395 (Dawson and Toohey JJ).

111 DD Act, ss 5(2), 6(2).

112 DD Act, s 4.

Exceptions and exemptions

7.23 There are situations in which unequal treatment is not unlawful discrimination.

Special measures and positive discrimination

7.24 Most significantly, the Discrimination Acts allow for:

- special measures to ensure substantive equality¹¹³
- positive discrimination.¹¹⁴

7.25 In considering whether Commonwealth programs involve unlawful discrimination, a common legal issue is whether they can be characterised as special measures or positive discrimination. Examples of differential treatment which would not be unlawful discrimination in this context include special training programs for disadvantaged Indigenous communities or persons with particular disabilities, or provision of welfare services to homeless young people. The High Court recently dealt with the criteria for and requirements of special measures under the RD Act in *Maloney v The Queen* [2013] HCA 28. In that case, the Court upheld Queensland laws imposing alcohol restrictions on Palm Island, a community made up almost entirely of Aboriginal persons, as special measures under s 8 of the RD Act.

Acts done under statutory authority

7.26 Another exception highly relevant to Commonwealth agencies is that in the SD Act, DD Act and AD Act for acts done under statutory authority¹¹⁵ – that is, acts done in direct compliance with particular laws, court orders and industrial instruments. If, for example, an Act provides that a certain payment can only be made to persons in a certain age group, the public servant making the payment would not be engaging in unlawful discrimination under the AD Act. However, it is not enough that the action is carried out pursuant to a statutory power. The discrimination must be required by the legislation. If it is possible to comply with the legislation in a non-discriminatory way, choosing to comply in a discriminatory way is likely to be unlawful discrimination.

7.27 The RD Act does not contain an exception for acts done under statutory authority; however, generally only discretionary decisions can be unlawful discrimination subject to s 9. In addition, s 10 of the RD Act specifically adjusts the operation of statutes and provides that if, by reason of a law of the Commonwealth, a State or a Territory, persons of a particular race do not enjoy a right that is enjoyed by others, or enjoy it to a more limited extent, then those persons by force of s 10 enjoy that right to the same extent.

Other specific exemptions

7.28 Most of the Discrimination Acts also contain exemptions in relation to specific areas, most relevantly for the Commonwealth in:

- insurance and superannuation¹¹⁶
- combat and peacekeeping duties.¹¹⁷

7.29 Some exemptions apply only to discrimination on particular grounds.¹¹⁸

113 RD Act, s 8(1); SD Act, s 7D; DD Act, s 45.

114 AD Act, s 33.

115 SD Act, s 40; DD Act, ss 47, 51(2); AD Act, ss 38, 39, 40, 41.

116 SD Act, ss 41, 41A, 41B; DD Act, s 46; AD Act, s 37.

117 SD Act, s 43; DD Act, ss 53, 54.

118 See, for example, SD Act, ss 30, 31, 34.

7.30 The SD Act, DD Act and AD Act also allow the AHRC to grant temporary exemptions on application.¹¹⁹

Unjustifiable hardship

7.31 There is an exception, available only in the DD Act, if avoiding discrimination would impose an unjustifiable hardship on the discriminator.¹²⁰ Assessing whether an unjustifiable hardship would be imposed requires account to be taken of a range of factors, including financial considerations.¹²¹ Generally speaking, a Commonwealth agency is unlikely to be able to establish unjustifiable hardship on the basis of financial cost, unless this would be extreme.

Consequences of unlawful discrimination

7.32 The Discrimination Acts provide that certain discrimination is ‘unlawful’, but this does not mean that it is an offence¹²² nor does it necessarily found a civil liability.¹²³ However, complaints of unlawful discrimination can be brought to the AHRC, and proceed to a court, as discussed below.

The AHRC Act

7.33 The AHRC Act, previously called the *Human Rights and Equal Opportunity Commission Act 1986*, establishes the AHRC. This body has a key role in relation to the Commonwealth Discrimination Acts, and this part of the Briefing gives an overview of the AHRC’s:

- complaint-handling powers
- inquiry power
- reporting powers.

Complaints of unlawful discrimination

7.34 Complaints alleging unlawful discrimination under the Discrimination Acts can be brought to the AHRC.¹²⁴ The AHRC will investigate the complaint and seek to achieve a resolution through conciliation.

7.35 Legal proceedings cannot be instituted with respect to an alleged act of unlawful discrimination unless the complaint is first brought to the AHRC. If the AHRC terminates the complaint (including if conciliation is unlikely to succeed), proceedings can be initiated in the Federal Court or the Federal Magistrates Court.¹²⁵ If the court is satisfied that there has been unlawful discrimination, it may make orders such as declarations, orders for redress and damages.¹²⁶

Inquiry power

7.36 The AHRC also has other human rights functions. Of particular relevance to Commonwealth agencies is the AHRC’s power to inquire into, conciliate and report on any act or practice:

119 SD Act, s 44; DD Act, s 55; AD Act, s 44.

120 DD Act, ss 21B, 29A.

121 DD Act, s 11.

122 SD Act, s 85; DD Act, s 41; AD Act, s 49.

123 SD Act, s 110; DD Act, s 125; AD Act, s 59.

124 AHRC Act, s 46P.

125 AHRC Act, s 46PO(1).

126 AHRC Act, s 46PO(4).

- by or on behalf of the Commonwealth or under Commonwealth or Territory legislation, or in a Territory
- that may be inconsistent with or contrary to any human right.¹²⁷

7.37 The AHRC is to undertake those functions when requested to do so by the minister, when a complaint is received from a person aggrieved by a relevant act or practice, or where the AHRC considers it desirable to do so.¹²⁸

7.38 Human rights in this context means the rights and freedoms found in international instruments including the ICCPR, the CRC, the CRPD and International Labour Organisation Convention 111,¹²⁹ which concerns equal opportunity in employment.¹³⁰ The AHRC does not have explicit jurisdiction in respect of the ICESCR or the CAT.

7.39 The AHRC investigates and attempts to resolve by conciliation individual complaints involving the consistency of Commonwealth acts or practices with human rights in much the same way that it deals with complaints of unlawful discrimination. The primary difference is that, if the AHRC cannot conciliate the matter, court proceedings cannot be brought. The only remedy is to prepare a report to the minister concerning the complaint and to table the report in Parliament.¹³¹

Reporting powers

7.40 The AHRC also has broad powers to report to the minister on:

- whether Commonwealth or Territory legislation, or proposed legislation, is inconsistent with human rights¹³²
- laws that should be made and action the Commonwealth should take regarding human rights¹³³
- action needed in order to comply with international human rights instruments.¹³⁴

Judicial review of decisions on the basis of the Discrimination Acts

7.41 There are ongoing issues as to whether the Discrimination Acts have an effect beyond allowing a claim to be made to the AHRC and then to the courts. In *Re East; Ex parte Nguyen* (1998) 196 CLR 354 the High Court held that the RD Act provided its own exclusive regime for remedying contraventions: ‘the only right that the Act creates is a right to engage the processes prescribed by it and the duties or liabilities that are created are correlative to that right’ (at [32], Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ). *Re East; Ex parte Nguyen* has been followed by the High Court in *Western Australia v Ward* (2002) 213 CLR 1 (at [102]). In *Charles v Fuji Xerox Australia Pty Ltd* (2000) 105 FCR 573 at [37]–[43] and [45], the Federal Court concluded that there was no jurisdiction to hear an allegation of unlawful discrimination under the RD Act unless it had been the subject of a terminated complaint to the Human Rights and Equal

127 AHRC Act, s 13(1) read with s 11(1)(f).

128 AHRC Act, s 20(1).

129 *ILO Convention (No III) Concerning Discrimination in Respect of Employment and Occupation* [1974] ATS 12 (Geneva, 25 June 1958).

130 AHRC Act, s 3.

131 AHRC Act, ss 29, 46.

132 AHRC Act, ss 11(1)(e), 29.

133 AHRC Act, s 11(1)(j).

134 AHRC Act, s 11(1)(k).

Opportunity Commission (now the AHRC). The reasoning in this case has been applied in a number of other Federal Court decisions.¹³⁵

7.42 The Discrimination Acts can in some cases be indirectly relevant in judicial review proceedings.¹³⁶ Recently, in *Shi v Minister for Immigration and Citizenship* [2011] FCA 935, the Federal Court quashed a decision of the Administrative Appeals Tribunal (AAT) affirming the respondent Minister's decision to cancel Mr Shi's visa. The AAT had accepted that Mr Shi had links to the Australian community and a Direction by the Minister indicated that establishment of linkages to the Australian community should be given favourable consideration. But the AAT had downplayed them because his associations were with other persons of his own ethnicity. Justice Perram held that the relevant legislative provisions should not be interpreted so that those who chose to socialise with Australians of their own ethnicity would be of greater risk of visa cancellation than if they socialised with Australians of a different ethnicity. The effect of s 10(1) of the RD Act, which is summarised at paragraph 7.27 above, is to require a court to construe legislation 'as not permitting decision-making processes in which ethnicity is an integer' (at [19]). Further it would require express words to enable delegated legislation – in this case, the Minister's Direction – to in effect operate inconsistently with the RD Act. Justice Perram went on to hold that Mr Shi's ethnicity was an irrelevant consideration that the AAT had impermissibly taken into account.

7.43 However, as noted above, apart from the Discrimination Acts and AHRC Act mechanism there is no general provision at the Commonwealth level that specifically provides for judicial review of administrative decisions on the basis that they breach human rights.¹³⁷

8 Statutory interpretation and human rights

8.1 Most Commonwealth decisions are made under legislation. To make these decisions there must be a correct interpretation of that legislation. This interpretation needs to be undertaken in accordance with common law and statutory principles.

The principle of legality

8.2 The presumption that legislation does not interfere with fundamental rights is an important common law principle of statutory interpretation. In the recent case of *Momcilovic* (at [43]) French CJ described this principle as:

a presumption that Parliament does not intend to interfere with common law rights and freedoms except by clear and unequivocal language for which Parliament may be accountable to the electorate.

8.3 He went on to say (at [43]) that the principle:

requires that statutes be construed, where constructional choices are open, to avoid or minimise their encroachment upon rights and freedoms at common law.

8.4 Many modern Australian considerations of this principle go back to the decision of O'Connor J in *Potter v Minahan* (1908) 7 CLR 277, which concerned in part the meaning

¹³⁵ See *Bahonko v Royal Melbourne Institute of Technology* [2006] FCA 1325 at [68]; *Maghiar v Western Australia* [2002] FCA 262, [28]; and *Stanislawa Bahonko v Royal Melbourne Institute of Technology* [2006] FCA 1492, [4]. In the early decision of *Styles v Secretary, Department of Foreign Affairs and Trade* (1988) 84 ALR 408, the Federal Court (Wilcox J) set aside an appointment decision on the basis that it was contrary to the SD Act and ordered the respondent to reconsider who should be appointed according to law. It is doubtful, however, that this decision remains good law following *Re East; Ex parte Nguyen* (1998) 196 CLR 354 (discussed above).

¹³⁶ *Nguyen v Refugee Review Tribunal* (1997) 50 ALD 35; *Sahak v Minister for Immigration and Multicultural Affairs* (2002) 123 FCR 514.

¹³⁷ In contrast to some other dialogue models, see *Charter of Human Rights and Responsibilities Act 2006* (Vic), ss 38, 39; *Human Rights Act 2004* (ACT), ss 40B, 40C; *Human Rights Act 1998* (UK), ss 6, 7, 8.

of the word 'immigration', in the context of a prohibition on immigration if various conditions were not met, including if there was failure to pass the dictation test. When discussing this issue, O'Connor J quoted from the 4th edition (1905) of *Maxwell on Statutes*, which noted the presumption 'that the legislature does not intend to make any alteration in the law beyond what it explicitly declares', and then stated (at 304):

It is in the last degree improbable that the legislature would overthrow fundamental principles, infringe rights, or depart from the general system of law, without expressing its intention with irresistible clearness; and to give any such effect to general words, simply because they have that meaning in their widest, or usual, or natural sense, would be to give them a meaning in which they were not really used.

- 8.5 Justice O'Connor used this principle to reach the conclusion that the 'legislature did not intend to deprive any Australian-born member of the Australian community of the right ... to re-enter Australia unless it has so enacted by express terms or necessary implication' (at 305). Use of the term 'immigration' did not do so.
- 8.6 More recently, the High Court applied the principle of legality in relation to the natural justice hearing rule in *Saeed v Minister for Immigration* (2010) 241 CLR 252. In the interpretative process, the joint judgment emphasised that the principles of natural justice could be excluded only by 'plain words of necessary intendment' (at [14]).¹³⁸ The Court also downplayed the relevance of explanatory materials for the legislation in this regard, noting that, however clear or emphatic they are, they 'cannot overcome the need to carefully consider the words of the statute to ascertain its meaning' (at [31]).
- 8.7 NSW Chief Justice Spigelman attempted to set out the relevant common law rights and freedoms in his lectures on *Statutory Interpretation and Human Rights*;¹³⁹ Heydon J usefully developed the list in *Momcilovic* (at [444]). They include presumptions that the Parliament does not intend to:
- interfere with freedom of speech (see also arts 18 and 19 of the ICCPR, noted at paragraph 4.6, footnote 48 and paragraphs 6.12–6.13 above and 8.11 below)
 - alter criminal law practices based on the principle of a fair trial (see also art 14 of the ICCPR, noted at paragraph 4.6, footnote 49; and paragraphs 6.9–6.11 above)
 - deny procedural fairness to persons affected by the exercise of public power (see paragraph 8.6 above)
 - retrospectively change rights and obligations (see paragraph 8.9 below).
- 8.8 It is not possible in this Briefing to consider in detail all the relevant 'fundamental rights' and the specific presumptions of interpretation that protect these. However, the rights extracted above should make it clear that the principle of legality overlaps significantly with the human rights specified in international human rights instruments (although there do remain some significant differences, notably in the field of economic, social and cultural rights). We do, however, briefly comment on two of these presumptions – the presumption against retrospectivity and the presumption that parliament does not intend to interfere with freedom of speech.

Presumption against retrospectivity

- 8.9 An important common law presumption is that legislation does not retrospectively change rights and obligations. This common law presumption is now also given some

¹³⁸ Drawing on *Annetts v McCann* (1990) 170 CLR 596, 598 (Mason CJ, Deane and McHugh JJ).

¹³⁹ Spigelman, *J Statutory Interpretation and Human Rights*, McPherson Lecture Series Volume 3 (2008), pp 26–29.

statutory effect by provisions in interpretation legislation. Section 7(2) of the Acts Interpretation Act provides in part that if an Act repeals or amends an earlier Act then the repeal or amendment does not:

(c) affect any right, privilege, obligation or liability acquired, accrued or incurred under the affected Act; ...

- 8.10 This presumption also applies to legislative instruments (s 13(1) of the *Legislative Instruments Act 2003*). It is always subject to a contrary intention (s 2(2) of the Acts Interpretation Act).

Freedom of speech

- 8.11 The presumption that the Parliament does not intend to interfere with freedom of speech was applied in *Evans v NSW* (2008) 168 FCR 576, where the Federal Court held invalid NSW regulations for World Youth Day to the extent that they gave police officers and authorised persons the power to direct people to cease engaging in conduct that caused annoyance to participants in a World Youth Day event.

Legislation is to be interpreted consistently with international law

- 8.12 There is also a general rule that a statute is to be interpreted and applied, so far as its language permits, so that it is in conformity, and not in conflict, with established rules of international law.¹⁴⁰ This was recently referred to by Kiefel J in *Plaintiff M70/2011 v Minister for Immigration and Citizenship* (2011) 244 CLR 144 (the *Malaysian Declaration case*) at [247], and has been generally accepted in cases including *Polites v Commonwealth* (1945) 70 CLR 60 and *Teoh* (at 287). As the decision in the *Malaysian Declaration case* illustrates, this presumption is particularly strong in the context of Acts that give effect to an international agreement. This presumption draws into the statutory interpretation equation the human rights treaties to which Australia is a party.

No general statutory requirement

- 8.13 As we have noted, there is no general statutory requirement at the Commonwealth level for legislation to be interpreted consistently with human rights,¹⁴¹ nor does legislation seek to provide for a role for the courts to make declarations that a statutory provision cannot be interpreted consistently with human rights.¹⁴²

9 State and Territory human rights laws and the Commonwealth

State and Territory anti-discrimination laws

- 9.1 Each of the States and Territories has general human rights legislation¹⁴³ similar to the Commonwealth Discrimination Acts considered above. Difficult issues arise as to

¹⁴⁰ *Jumbunna Coal Mine NL v Victorian Coal Miners' Association* (1908) 6 CLR 309, 363.

¹⁴¹ In contrast to some other dialogue models, see *Charter of Human Rights and Responsibilities Act 2006* (Vic), s 32(1); *Human Rights Act 2004* (ACT), s 30; *New Zealand Bill of Rights Act 1990* (NZ), s 6; *Human Rights Act 1998* (UK), s 3. See also paragraphs 9.3 and 9.9 below. We have noted the effect of the RD Act on legislation at paragraph 7.27.

¹⁴² In contrast to some other dialogue models, see *Charter of Human Rights and Responsibilities Act 2006* (Vic), s 36; *Human Rights Act 2004* (ACT), s 32; *Human Rights Act 1998* (UK), s 4. See also paragraphs 9.3 and 9.9 below.

¹⁴³ *Anti-Discrimination Act 1977* (NSW); *Equal Opportunity Act 2010* (Vic); *Anti-Discrimination Act 1991* (Qld); *Equal Opportunity Act 1984* (SA); *Equal Opportunity Act 1984* (WA); *Anti-Discrimination Act 1998* (Tas); *Discrimination Act 1991* (ACT); *Anti-Discrimination Act 1996* (NT).

‘There is also a general rule that a statute is to be interpreted and applied ... so that it is in conformity, and not in conflict, with established rules of international law.’

whether this legislation applies to the Commonwealth and Commonwealth officials. Whilst it is not possible to consider this issue in detail here, to resolve it requires consideration of the following questions in relation to State laws:

- Does the State law intend to bind the Commonwealth as a matter of statutory construction? This issue will often be partially resolved by a provision in the State legislation itself. For example, s 4 of the *Anti-Discrimination Act 1998* (Tas) provides:
This Act binds the Crown in right of Tasmania and, so far as the legislative power of the Parliament permits, in all its other capacities.
However, such a provision is not of itself determinative and courts will have regard to the text and purpose of the particular statute as well.¹⁴⁴
- Is the State body that hears and determines complaints (generally a tribunal) under the State anti-discrimination legislation a court of a State capable of exercising federal jurisdiction within the meaning of ss 71 and 77(iii) of the Constitution? Matters in which the Commonwealth, or a person suing or being sued on behalf of the Commonwealth, is a party are matters falling within the judicial power of the Commonwealth (see s 75 of the Constitution). Such matters can only be heard by courts invested with federal jurisdiction under s 39 of the *Judiciary Act 1903*. In the case of *Commonwealth v Wood* (2006) 148 FCR 276, Heerey J held that the Tasmanian Anti-Discrimination Tribunal was a court of the State of Tasmania for the purposes of receipt of federal jurisdiction. In reaching this conclusion, his Honour was heavily influenced by the fact that:
 - appeals on both law and fact were available from the Tribunal to the Supreme Court of Tasmania. The Tribunal was thus integrated into the Tasmanian judicial system (at [62]–[63])
 - in the way it operated, the Tribunal was and appeared to be independent from the other branches of the Tasmanian government (noting that full separation of judicial power is not required at the State level) (at [69]–[77]).
- Is there a s 109 inconsistency between the State anti-discrimination law and any Commonwealth law? If there is such an inconsistency, the Commonwealth law will prevail and the State law will be invalid to the extent of the inconsistency.¹⁴⁵
- Does the Commonwealth's implied constitutional immunity prevent the application of the State Act to the Commonwealth?¹⁴⁶

Similar, but not identical, questions arise in relation to Territory laws.

State and Territory human rights Acts

9.2

As noted above, both the ACT and Victoria have enacted human rights legislation that, similarly to the Commonwealth Human Rights Scrutiny Act, includes a requirement for statements of compatibility and scrutiny of Bills for consistency with human rights by parliamentary committees. In Victoria, these requirements also apply to delegated legislation.¹⁴⁷ However, the ACT Human Rights Act and the Victorian Charter Act differ from the Human Rights Scrutiny Act in a number of respects. In particular, the human rights that the legislation covers, derived principally from the ICCPR, are specified in

¹⁴⁴ See *Telstra Corp Ltd v Worthing* (1999) 197 CLR 61, in which the *Workers Compensation Act 1987* (NSW) was found not to bind the Commonwealth – despite a provision stating that it bound the Crown in all of its capacities – in light of its central penal provisions. A criminal penalty is presumed not to apply to the Crown in the absence of a clear indication of legislative purpose.

¹⁴⁵ For a case where a s 109 inconsistency was found, see *Dao v Australian Postal Commission* (1987) 162 CLR 317; for a case where no s 109 inconsistency was found, see *Commonwealth v Wood* (2006) 148 FCR 276.

¹⁴⁶ *Re Residential Tenancies Tribunal* (NSW); *ex parte Defence Housing Authority* (1997) 190 CLR 410.

¹⁴⁷ See *Subordinate Legislation Act 1994* (Vic), ss 12A, 21(ha).

the legislation itself rather than by reference to the international human rights treaties to which Australia is a party. Further, instead of including rights-specific limitation clauses, as is the case in the 7 core human rights treaties, the Acts provide for a general limitation clause that allows all rights to be subject to reasonable limits that can be demonstrably justified in a free and democratic society.¹⁴⁸

9.3

The ACT and Victorian Acts also include three additional elements that do not have a parallel in the Commonwealth Human Rights Scrutiny Act or other general Commonwealth legislation.¹⁴⁹ These are:

- an interpretative provision that requires courts, so far as possible consistently with the purpose of an enactment, to interpret ACT and Victorian legislation consistently with the human rights set out in the ACT Human Rights Act and Victorian Charter Act respectively¹⁵⁰
- the conferral of a power on the Supreme Courts of the respective jurisdictions to declare that a statutory provision cannot be interpreted consistently with a human right.¹⁵¹ Such a declaration does not affect the validity, operation or enforcement of the legislation.¹⁵² However, declarations must be tabled in Parliament. In the ACT, a declaration obliges the Attorney-General to provide a written response to the Parliament within 6 months.¹⁵³ In Victoria, the minister administering the statutory provision must respond within the same time frame.¹⁵⁴ It is then up to the Parliament (in the case of Acts) or the executive (in the case of delegated legislation) to make changes to the legislation if it wishes to amend the aspects of the legislation that make it incompatible with human rights
- an obligation imposed on ACT and Victorian public authorities to act consistently with, and in making a decision to give proper consideration to, human rights. Conduct contrary to this obligation is unlawful.¹⁵⁵ In both the ACT and Victoria, proceedings can be brought against public authorities that contravene this obligation and breaches of this obligation can also be raised in other legal proceedings. Damages are not available. However, the court has the power to grant other appropriate

148 A number of factors relevant to determining this issue are set out: the nature of the right, the importance of the purposes of the limitation, the nature and extent of the limitation, the relationship between the limitation and its purpose, and any less restrictive means reasonably available to achieve the purpose that the limitation seeks to achieve: see *Human Rights Act 2004* (ACT), s 28; *Charter of Human Rights and Responsibilities Act 2006* (Vic), s 7(2).

149 The *Charter of Human Rights and Responsibilities Act 2006* (Vic) also includes a fourth element – s 31 provides for the making of an override declaration. This allows the Victorian Parliament to expressly declare in an Act that the Act or a part of the Act has effect despite being incompatible with one or more human rights. If an override declaration is made, the Charter has no application to the provisions it covers. Such a declaration is only intended to be made in exceptional circumstances.

150 See *Human Rights Act 2004* (ACT), s 30; *Charter of Human Rights and Responsibilities Act 2006* (Vic), s 32.

151 In the ACT, this is called a declaration of incompatibility (see s 32 of the *Human Rights Act 2004* (ACT)). In Victoria, it is called a declaration of inconsistent interpretation (see s 36 of the *Charter of Human Rights and Responsibilities 2006* (Vic)). Both the ACT and Victorian Acts require the Supreme Court to give notice to the Attorney-General if it is considering making a declaration of incompatibility / inconsistent interpretation and require the court not to make the declaration unless satisfied that the Attorney-General has had a reasonable opportunity to intervene or make submissions in respect of the proposed declaration.

152 *Human Rights Act 2004* (ACT), s 32(3); *Charter of Human Rights and Responsibilities Act 2006* (Vic), s 36(5).

153 *Human Rights Act 2004* (ACT), s 33.

154 *Charter of Human Rights and Responsibilities Act 2006* (Vic), s 37.

155 *Human Rights Act 2004* (ACT), s 40B; *Charter of Human Rights and Responsibilities Act 2006* (Vic), s 38. However, s 40B(2) of the *Human Rights Act 2004* (ACT) provides that conduct will not be unlawful if the act or decision is made under a law in force in the Territory and the law expressly requires the act to be done or decision made in a particular way and that way is inconsistent with a human right, or the law cannot be interpreted in a way that is consistent with a human right. Section 38(2) of the *Charter of Human Rights and Responsibilities Act 2006* (Vic) similarly provides that conduct will not be unlawful if, as a result of a statutory provision or provision made under a Commonwealth Act or otherwise under law, the public authority could not reasonably have acted differently or made a different decision.

relief, such as declaring a decision invalid.¹⁵⁶ Further, the concept of ‘failing to give proper consideration to a human right’ may well expand the scope of judicial review concerning relevant considerations. Indeed, it invites the courts to determine questions of weight in administrative decisions.¹⁵⁷

- 9.4 A Human Rights Charter following the ACT and Victoria models is currently under consideration in Tasmania. The Tasmanian Attorney-General announced a project to examine a model for such a charter in June 2010 and released a consultation paper in October 2010.¹⁵⁸ The Western Australian government also undertook community consultation in 2007 that resulted in recommendations for the adoption of a Human Rights Act. However, this process was put on hold when the Commonwealth government announced its National Human Rights Consultation in 2007.¹⁵⁹ No further action has been taken since then.
- 9.5 Queensland has enacted the *Legislative Standards Act 1992*. This Act sets out certain ‘fundamental legislative principles’ that protect certain rights and liberties (s 4). The Office of the Queensland Parliamentary Counsel has the function of advising instructors on the application of fundamental legislative principles (ss 7 and 9), and explanatory notes for Bills and subordinate legislation must include a brief assessment of consistency with fundamental legislative principles and reasons for any inconsistency (ss 23 and 24).

The High Court on the Victorian Charter Act

- 9.6 In the recent case of *Momcilovic* the High Court examined the ‘interpretative’ provision and ‘declaration of inconsistent interpretation’ provision in the Victorian Charter Act.
- 9.7 The case involved an appeal by Ms Momcilovic against a drug trafficking conviction. Section 5 of the *Drugs, Poisons and Controlled Substances Act 1981* (Vic) (Drugs Act) deemed a person to be in possession of a prohibited substance if it was found on premises occupied by that person, unless the person was able to satisfy the court to the contrary. In this case, Ms Momcilovic claimed that her boyfriend had left the drugs in her apartment without her knowledge.
- 9.8 Ms Momcilovic argued that the interpretative principle in the Victorian Charter Act required s 5 to be interpreted, consistently with the right to the presumption of innocence in the Charter, as imposing only an evidential and not a legal burden. The Victorian Court of Appeal held that such an interpretation was not open even in light of the Charter and made a declaration that s 5 of the Drugs Act could not be interpreted consistently with Ms Momcilovic’s right to be presumed innocent.
- 9.9 A more detailed discussion of the background to *Momcilovic* and the High Court’s analysis of the Charter provisions can be found in AGS *Litigation Notes* No 21 (2 November 2011),¹⁶⁰ but in essence the Court found as follows:
- A 6:1 majority (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ) held that the interpretative provision, which requires that ‘[s]o far as it is possible to do so consistently with the purpose, all statutory provisions must be interpreted in a way

156 *Human Rights Act 2004* (ACT), s 40C; *Charter of Human Rights and Responsibilities Act 2006* (Vic), s 39.

157 See Del Villar, G ‘A Bill of Rights by the Backdoor? Implications of State and Territory Bills of Rights for the Commonwealth’, paper presented at the AGS Constitutional Law Forum 2007 and The Future of Federalism Conference 2008 (Law Council of Australia / CPICL University of Queensland); Evans, S and Evans, C 2006, ‘Legal Redress under the Victorian Charter of Human Rights and Responsibilities’ (2006) 17 *Public Law Review* 264, 278.

158 See Department of Justice (Tas) 2010, *A charter of human rights & responsibilities for Tasmania* (2010), available at www.justice.tas.gov.au/corporateinfo/projects/human_rights_charter.

159 See Attorney-General (WA) 20 December 2007, *Human rights report completed*, media release.

160 Bennett, D and Lewis, D ‘Inconsistency of Commonwealth Laws and State Laws; Validity and Operation of Victorian *Charter of Human Rights*’, AGS *Litigation Notes* No 21, 2 November 2011, 1.

that is compatible with human rights', was valid.¹⁶¹ It was construed to require no more than an ordinary judicial task of statutory interpretation – by reference to the terms, context and purpose of a provision – with the human rights in the Charter forming part of that context. It did not confer on the courts a legislative power to rewrite a provision to give effect to the Charter rights. Chief Justice French likened the operation of the interpretative provision to the common law principle of legality (discussed above at paragraphs 8.2–8.11) but with a wider field of application than that covered by common law rights and freedoms (at [51]).

- A 4:3 majority (French CJ and Bell, Crennan and Kiefel JJ) held that the declaration of inconsistent interpretation provision, which provides that the Supreme Court may declare that 'a statutory provision cannot be interpreted consistently with a human right', was valid in relation to the exercise of State judicial power.¹⁶² In particular, the majority held that it was not invalidated by the principle associated with *Kable*. Under the *Kable* principle, as developed in recent cases noted above (at paragraphs 6.10–6.11), a State parliament may not enact a law that would be inconsistent with the defining characteristics of the courts of the State or, in particular, that would substantially impair their institutional integrity. Chief Justice French and Justice Bell held that a declaration was not an exercise of judicial power, or incidental to it (at [88]–[89] (French CJ); [661] (Bell J, agreeing)). However, they noted that the *Kable* principle allows State courts to undertake under State laws some non-judicial functions that did not impair the institutional integrity of the State court, and that this was such a function (at [92]–[97] (French CJ)). Justices Crennan and Kiefel held that this function was incidental to judicial power, although its exercise was inappropriate in relation to a criminal conviction such as this case (at [589]–[605]).
- However, a 5:2 majority (French CJ and Bell, Gummow, Hayne and Heydon JJ) held that such a declaration could not be made in exercise of federal judicial power. Chief Justice French (at [84]) indicated that novelty itself was no objection to characterisation of a power as judicial, but in this case the power did not affect the rights or liabilities of the parties and did not have any legal effect on the statutory provisions.

Implications for the Commonwealth

9.10

The outcome in *Momcilovic* concerning the Victorian Charter Act's interpretative provision means that all Australian courts (exercising federal, State or Territory jurisdiction) can apply the interpretative provision to read Victorian statutory provisions, so far as possible, consistently with the human rights set out in the Victorian Charter. This in turn can have broader implications for the Commonwealth in a number of ways:

- First, and perhaps most obviously, it will impact on the Commonwealth where it is bound by legislation of a State or Territory where such an interpretative provision exists (currently Victoria and the ACT). This legislation may now be interpreted in a more human rights compatible way.
- A second situation is where the State or Territory law is picked up and applied by Commonwealth law.
- The third situation is in the context of Commonwealth–State cooperative schemes.

These second 2 points warrant some further consideration.

¹⁶¹ *Momcilovic*, [46], [50]–[51] (French CJ); [146 (vi)], [171] (Gummow J); [280] (Hayne J); [565]–[566], [600] (Crennan and Kiefel JJ); [684] (Bell J); [439] (Heydon J, dissenting).

¹⁶² *Ibid.*, [95]–[97], [101] (French CJ); [603]–[605] (Crennan and Kiefel JJ); [661] (Bell J); [172], [188] (Gummow J, dissenting); [280] (Hayne J, dissenting); [457] (Heydon J, dissenting).

Commonwealth laws applying State and Territory law

- 9.11 State and Territory law is picked up by Commonwealth law in a range of different circumstances.¹⁶³ However, the 3 main situations where this occurs are:
- under s 4(1) of the *Commonwealth Places (Application of Laws) Act 1970*, which provides for State laws to apply in Commonwealth places
 - under s 68 of the *Judiciary Act 1903*, which places ‘the administration of the criminal law of the Commonwealth in each State upon the same footing as that of the State’ and avoids ‘the establishment of two independent systems of criminal justice’¹⁶⁴ by providing that the laws of a State or Territory respecting the arrest and custody of offenders or persons charged with offences and the procedures for summary conviction, examination and commitment for trial on indictment, trial and conviction on indictment, the hearing and determination of appeals and for holding accused persons on bail shall apply to persons charged with offences against the laws of the Commonwealth
 - under s 79 of the *Judiciary Act 1903*, which provides that the laws of each State or Territory, including the laws relating to procedure, evidence and the competency of witnesses, shall, except as otherwise provided by the Constitution or the laws of the Commonwealth, be binding on all courts exercising federal jurisdiction¹⁶⁵ in that State or Territory in all cases to which they are applicable.
- 9.12 In all of these situations, in jurisdictions where it exists, the interpretative provision will also be picked up and must therefore be applied in interpreting the relevant State or Territory legislation in its application to Commonwealth places, to criminal proceedings in relation to federal offences and to all cases in federal jurisdiction. In respect of the applied laws of the ACT and Victoria, and any other State or Territory that adopts an equivalent Human Rights Act, this may lead to powers upon which Commonwealth officers and bodies rely being given a more restricted human rights consistent interpretation than would otherwise be the case.¹⁶⁶

Cooperative schemes

- 9.13 Cooperative schemes are schemes ‘in which each participating jurisdiction promulgates legislation to facilitate the application of a standard set of legislative provisions in that jurisdiction to regulate a matter of common concern’.¹⁶⁷ There are 4 main types of Commonwealth–State cooperative schemes:¹⁶⁸

163 See, eg, s 15A of the *Crimes Act 1914*, which applies State and Territory laws for enforcing or recovering a fine to a person convicted of a Commonwealth offence, subject to modifications; s 9(1)(c) of the *Australian Federal Police Act 1979*, which provides that a member of the AFP investigating a State offence with a federal aspect has the same powers and duties conferred in the place in which the member is acting by State and Territory legislation on a constable or police officer; and s 13AB of the *Mutual Assistance in Criminal Matters Act 1987*, which applies State and Territory laws compelling a person to attend and give evidence in circumstances where a request has been made by a foreign country.

164 *Williams v The King* [No 2] (1934) 50 CLR 551, 560 (Dixon J).

165 Federal jurisdiction means the jurisdiction of courts over the matters listed in ss 75 and 76 of the Constitution. In addition to matters between States, between residents of different States or between a State and a resident of another State, the most frequently encountered types of matters in federal jurisdiction include all matters in which the Commonwealth is a party, matters in which a writ of mandamus or prohibition or an injunction is sought against an officer of the Commonwealth, matters arising under laws made by the Commonwealth Parliament or matters involving a constitutional issue.

166 Del Villar, G ‘A Bill of Rights by the Backdoor? Implications of State and Territory Bills of Rights for the Commonwealth’, paper presented at the AGS Constitutional Law Forum 2007 and The Future of Federalism Conference 2008 (Law Council of Australia / CPICL University of Queensland); *R v PJ* [2006] ACTSC 37, [11]–[12].

167 Ledda, J ‘The Drafter’s Guide to Cooperative Schemes’, paper presented at Drafting Forum 2001, Melbourne.

168 See Farnan, M ‘Commonwealth–State Cooperative Schemes – Issues for Drafters’, paper presented at the 4th Australian Drafting Conference, Sydney, 3–5 August 2005; Australian Law Reform Commission, National Classification Scheme Review, ALRC, Issues Paper No 40 (2011).

- referral of power to the Commonwealth under s 51(xxxvii) of the Constitution. The States have referred a number of matters to the Commonwealth, including corporations and counter-terrorism
- mirror legislation – a scheme where one jurisdiction enacts a law that is enacted in similar terms by other jurisdictions. Under such a scheme there is generally no central body to administer the legislation, but it is also possible to have mirror legislation with a central administering body. One example of mirror legislation is the uniform Evidence Acts
- complementary ‘applied law’ schemes, which involve one jurisdiction enacting a law on a topic that is then applied by other jurisdictions. Some examples of ‘applied law’ schemes are the Agricultural and Veterinary Chemicals scheme and the Australian Consumer Law
- complementary ‘non-applied law’ schemes – one jurisdiction enacts a law on a topic and other jurisdictions enact laws that give effect to the first law. An existing example of a complementary ‘non-applied law’ scheme is the framework for the classification of media content in Australia. The *Classification (Publications, Films and Computer Games) Act 1995* provides for the classification of publications, films and computer games. Controls and penalties are imposed under State and Territory legislation.

Application of the interpretative provision

- 9.14 In any cooperative scheme that involves the participation of a State or Territory with a Human Rights Act containing an interpretative provision, a question arises as to what effect that interpretative provision has on the interpretation of provisions giving effect to the cooperative scheme in that jurisdiction.¹⁶⁹ If applicable, it could result in certain provisions of cooperative schemes (particularly enforcement provisions) being given a more restrictive – human rights consistent – interpretation in States or Territories with an interpretative provision than in those States or Territories without one.
- 9.15 This may have a direct impact on Commonwealth bodies or officers that exercise powers conferred by State or Territory legislation as part of a cooperative scheme, such as investigative or enforcement functions. These powers may limit rights such as the right to privacy or the right to liberty and security of the person, amongst others. The application of the interpretative provision could lead to Commonwealth officers having less extensive powers in jurisdictions that have a Human Rights Act with an interpretative provision than those of the Commonwealth and States and Territories that do not.
- 9.16 Having said this, the interpretative provision – as it exists in the ACT and Victoria – is limited to requiring interpretations compatible with human rights *so far as it is possible to do so consistently with the purpose* of the legislation under consideration. In light of the fact that it is an important (and sometimes expressly stated) purpose of cooperative schemes to achieve uniformity of regulation across Australia, there appears to be a strong argument that the interpretative provision cannot be applied to create disconformity between jurisdictions.

¹⁶⁹ The Scrutiny of Acts and Regulations Parliamentary Committee in Victoria has expressly raised concerns in this respect: ‘The Victorian Parliament often considers Bills that apply non-Victorian laws or refer powers to non-Victorian bodies. Such Bills raise a number of concerns for scrutiny, including that the non-Victorian laws or powers may not be subject to the protections in the Charter. While the passage of national co-operative laws is a matter for Parliament, the Committee considers that the explanatory material to Bills creating or enhancing such schemes should fully explain their human rights impact’. See Scrutiny of Acts and Regulations Committee, Parliament of Victoria, Practice Note No 3, available at www.parliament.vic.gov.au/sarc/article/1050#no_3.

- 9.17 In the context of referrals of power, the central purpose of uniform federal legislation is clearest, and it seems unlikely that a court would attempt to interpret the State law referring power differently as a result of the interpretative provision. The Commonwealth law made in reliance on the referral would not be subject to the Victorian interpretative provision because the application of this provision is limited to Victorian legislation.¹⁷⁰
- 9.18 In the context of applied laws, the evident purpose of uniformity would also seem to militate against the interpretative provision being applied to interpret particular provisions as they apply in the ACT or Victoria more restrictively than they would be interpreted in other jurisdictions.¹⁷¹
- 9.19 The argument is not as strong in the context of mirror legislation, particularly if, although uniform at the time it was enacted, it has diverged over time as some States or Territories, or the Commonwealth, pass amendments and others do not. The argument is also perhaps not as strong in complementary ‘non-applied’ schemes, particularly if the legislation enacted by the various States and Territories and the Commonwealth was never entirely uniform.¹⁷²

Obligation to act consistently with human rights

- 9.20 A second, and perhaps more significant, impact on the Commonwealth is that it is possible that in some circumstances a Commonwealth officer exercising functions under ACT and Victorian legislation pursuant to a cooperative scheme will be a ‘public authority’ subject to the obligation to act consistently with, and in making a decision to give proper consideration to, human rights. This is because in both the ACT and Victoria the definition of ‘public authority’ extends to ‘an entity whose functions are or include functions of a public nature, when it is exercising those functions on behalf of’ the State or Territory, or public authority.¹⁷³

170 See the Minister’s Response to the Victorian Scrutiny of Acts and Regulations Committee’s comments on the Personal Property Securities (Commonwealth Powers) Bill 2009: Scrutiny of Acts and Regulations Committee, Parliament of Victoria, *Alert Digest*, No 12 of 2009, 13 October 2009, 30–33. This Response also notes that provisions for making declarations of inconsistent interpretation and the obligations on public authorities will not apply in the context of referrals of power.

171 The Victorian Government has taken the position that the interpretative provision in s 32 of the Victorian Charter Act does not in fact apply in the context of applied laws, as they are not statutory provisions passed by the Parliament of Victoria (see the Minister’s Response to the Victorian Scrutiny of Acts and Regulations Committee’s comments on the Associations Incorporation Amendment Bill 2010: Scrutiny of Acts and Regulations Committee, Parliament of Victoria, *Alert Digest*, No 14 of 2010, 5 October 2010, 7–10. This Response also notes that provisions for making declarations of inconsistent interpretation will not apply in the context of applied laws. However, the obligations on public authorities will apply).

172 See, eg, *Anti-Terrorism Act (No 2) 2005* (Cth); *Terrorism (Extraordinary Temporary Powers) Act 2006* (ACT); *Terrorism (Police Powers) Amendment (Preventative Detention) Act 2005* (NSW).

173 *Human Rights Act 2004* (ACT), s 40; *Charter of Human Rights and Responsibilities Act 2006* (Vic), s 4.

10 Summary checklists

10.1 We provide the following summary key points for the development of Commonwealth policies and legislation.

Key points for the development of Commonwealth policies and legislation

In developing policy and legislation, the human rights implications should be considered and addressed.

All Bills and disallowable legislative instruments will require a statement of compatibility.

This will need to address the following questions:

- Does the Bill or instrument have any implications for the human rights set out in the 7 core international human rights instruments?
- Does it promote human rights?
- Does it limit a human right either on the face of the legislation or potentially in the implementation of the legislation?
- Do the international instruments allow for this limitation?
- Is the limitation reasonable, necessary and proportionate and, if so, why and on the basis of what evidence?

All Bills and legislative instruments will also need to comply with the Constitution.

The following questions will often need to be addressed:

- Does the Bill or instrument purport to acquire property on other than just terms (s 51(xxxi) of the Constitution)?
- Does the Bill or instrument interfere with the free exercise of religion (s 116 of the Constitution)?
- Does the Bill or instrument infringe the separation of powers principles and, in particular, does it ask a federal court, or another court exercising federal jurisdiction, to act in a way that is inconsistent with Ch III of the Constitution and impairs their institutional integrity? Does it give to an administrative body a function that can only be exercised by a court?
- Does the Bill or instrument infringe the implied freedom of political communication or the 'right to vote'?

If a Bill or legislative instrument intends to override common law rights, it must do so clearly to have this effect.

The Bill will also need to operate within the context of the Commonwealth Discrimination Acts, and possibly State and Territory human rights legislation.

10.2 We provide the following summary key points for making decisions or taking actions.

Key points for making decisions or taking actions

It will be necessary to interpret the legislation under which the decision is made or action taken.

This will require regard to:

- the principle of legality
- the principle that legislation is to be interpreted in light of international agreements
- s 15A of the Acts Interpretation Act, which provides for legislation to be read subject to the Constitution
- s 10 of the RD Act.

It may also be necessary to have regard to the statement of compatibility when interpreting the legislation.

It will be necessary to have regard to the operation of the Commonwealth Discrimination Acts and in particular whether the decision or action discriminates, directly or indirectly, on the basis of:

- race, colour, descent or national or ethnic origin
- in specified areas, on the ground of the person's sex, sexual orientation, gender identity, intersex status, marital or relationship status, pregnancy or potential pregnancy, breastfeeding or family responsibilities
- in specified areas, on the ground of age
- in specified areas, on the basis of a person's disability or on the basis that a person has a carer, assistant, assistance animal or disability aid.

It will be necessary to have regard to whether the decision or action is contrary to any human right under the AHRC Act.

It may be necessary to ask whether State or Territory human rights legislation, or State or Territory legislation subject to a human rights interpretative provision, is relevant to the decision or act.

This briefing was prepared by Robert Orr, Susan Reye, Robyn Briese, Andrew Yuile, Grace Ng and Kim Pham.

Robert Orr PSM QC is AGS's Chief General Counsel and advises Commonwealth departments and agencies on significant public law issues, in particular on Australia's constitutional arrangements, the policy development and law-making process, machinery of government, statutory interpretation, administrative decision-making and Indigenous law and human rights issues.

He has played a leading role in developing many major policies and laws, including native title, the Water Act 2007, reform of the national energy market, environmental and migration law. He advises on significant and difficult statutory interpretation and decision-making issues, assisting the Government to manage its compliance with the complex legal environment in which it operates. He appears for the Commonwealth as an advocate in courts and tribunals.

Dr Susan Reye is an expert on international law, statutory interpretation, administrative law, environment law and constitutional law. As Senior General Counsel she has been advising the Commonwealth on these topics since 1995.

Susan has extensive experience in providing advice on policy, legislative development and statutory interpretation across subjects as diverse as education, health, environment, energy, agriculture, climate change, science and technology.

Susan has also contributed to several academic publications and regularly presents on the topic of international law.

Robyn Briese has been working in the Office of General Counsel since 2004. She advises a range of government clients on constitutional law, administrative law, international law and statutory interpretation. She has particular expertise in human rights and discrimination issues, water and environmental law and fisheries law.

She had a substantial involvement in the development and implementation of the Water Act 2007 and the Water Amendment Act 2008 and is experienced in providing legal advice to assist with policy development and the creation of legislative frameworks. More recently, she has provided significant advice to Independent Review of Commonwealth Fisheries: Legislation, Policy and Management.

Robyn also has considerable experience in the conduct of constitutional cases in the High Court, the Federal Court and other State courts and has advised on constitutional issues raised by notices given under s 78B of the Judiciary Act 1903. Robyn has been an associate to the Chief Justice of the Federal Court and Judges of the International Court of Justice.

Andrew Yuile is a Senior Lawyer in the Constitutional Litigation Unit (CLU) within the Office of General Counsel. In that capacity he conducts litigation on behalf of the government, principally in the High Court, defending the validity of Commonwealth laws and intervening in cases where constitutional issues are raised. In addition, he provides advice on matters of international law, constitutional law, federal jurisdiction, statutory interpretation and other matters.

He joined AGS in 2010 from the private sector, where he worked principally to government. He provided advice and litigation services to government clients, acted as an advocate in the Federal Magistrates and Federal Courts, and worked closely with department legal and policy areas.

*Since joining AGS, Andrew has advised a wide range of clients on matters involving international law, constitutional law, federal jurisdiction, human rights and discrimination law, statutory construction and others. As a member of the CLU, he has had responsibility for a number of significant High Court matters, including the defence of the Mineral Resources Rent Tax Act 2012 (Fortescue Metals Group v Commonwealth) and the Attorney-General's intervention in *Maloney v The Queen*, which raised significant issues relating to the Racial Discrimination Act 1975.*

AGS contacts

For further information on the article in this issue, please contact the authors or any of the lawyers listed below.

Office of General Counsel

Andrew Buckland	02 6253 7024	CANBERRA
Grace Ng	02 6253 7291	
Kim Pham	02 6253 7473	

AGS Dispute Resolution

Andras Markus	02 9581 7472	SYDNEY
Damien O'Donovan	02 6253 7116	CANBERRA
Paul Vermeesch	02 6253 7428	
Craig Rawson	03 9242 1248	MELBOURNE

The material in this briefing is provided to AGS clients for general information only and should not be relied upon for the purpose of a particular matter. Please contact AGS before any action or decision is taken on the basis of any of the material in this briefing.
© AGS All rights reserved

Offices

Canberra	50 Blackall Street, Barton ACT 2600
Sydney	Level 42, 19 Martin Place, Sydney NSW 2000
Melbourne	Level 21, 200 Queen Street, Melbourne VIC 3000
Brisbane	Level 12, 340 Adelaide Street, Brisbane QLD 4000
Perth	Level 19, 2 The Esplanade, Perth WA 6000
Adelaide	Level 18, 25 Grenfell Street, Adelaide SA 5000
Hobart	Level 8, 188 Collins Street, Hobart TAS 7000
Darwin	Level 3, 9–11 Cavenagh Street, Darwin NT 0800

www.ag.gov.au

Electronic versions of AGS newsletters are available for clients who prefer to receive issues in this form.

For enquiries regarding supply of issues, change of address details:
T 02 6253 7052 **F** 02 6253 7313
E ags@ags.gov.au

ISSN 1448-4803
Approved Postage PP 233744/00042