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The Human Rights Act 1998: The UK 'Dialogue' Model of Human Rights Protection

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I. Introduction

The aim of this paper is to evaluate briefly the impact of the Human Rights Act (HRA) – sometimes understood as the United Kingdom’s Bill of Rights (Klug 2007) - on the UK laws and society, in the hope of contributing to the present debates on the desirability and the best form of any bills of rights in Australia, both at the federal and state levels.

The UK engagement with human rights instruments dates back at least to the drafting of the European Convention on Human Rights (ECHR), at which the English lawyers played a substantial role. The UK was the first state to ratify ECHR in 1951 although express incorporation of the ECHR into its domestic law occurred only with the passage of the HRA in 1998, which came into force in 2000.

The aim of the HRA was to ‘bring human rights home’. As the White Paper noted, its aim is to:

give people in the UK opportunities to enforce their rights under the European Convention in British courts rather than having to incur the cost and delay of taking a case to the European Human Rights...Court in Strasbourg (UK Government 1997: 1).

The HRA may initially seem of marginal relevance to Australia, which of course has no regional binding human rights instrument and no regional court of human rights to which its citizens can take a case. Australia is however a party to the International Covenant on Civil and Political Rights (ICCPR), and International Covenant on Economic, Social and Cultural Rights (ICESCR): In relation to the former, there is an individual right of citizens to petition the Human Rights Committee.

There is currently a robust debate regarding the need for an Australian bill of rights, and a weighing up of the various strengths of different approaches. In December 2008, the Australian Attorney-General Robert McClelland appointed Father Frank Brennan - a lawyer - to chair the national human rights consultation committee. The committee is conducting nationwide consultations ahead of delivering a report by September 30, 2009. Its terms of reference specifically exclude a constitutionally entrenched Bill of Rights.

The HRA is instructive in the sense that it provides one model, a so-called 'dialogue model' of human rights protection, in which the executive, legislature and judiciary are effectively engaged in a dialogue about the nature of human rights and how they should be applied. That model has been also adopted in New Zealand, the ACT and Victoria; and has been urged by the Tasmanian Law Commission for adoption in Tasmania and by the Human Rights and Equal Opportunity Commission (HREOC, now the Human Rights Commission) for adoption in Western Australia. As the HREOC points out, the key features of this model are as follows:

Parliament has to consider whether new laws are compatible with human rights; public authorities have to take into account human rights in their decision-making; superior courts have the power to identify laws that are incompatible or inconsistent with human rights; and Parliaments have to consider whether laws identified by the Courts as incompatible with human rights should be changed (HREOC 2007).

There are of course other models of Bills of Human Rights. In the US model, the Supreme Court has the power to strike down legislation on grounds of its incompatibility with its Bill of Rights. In Canada, with its 'notwithstanding' clause, Parliament can override the provisions of the Charter of Fundamental Rights and Freedoms by indicating that the proposed statutory provision is to apply 'notwithstanding' the provisions of the Charter. While both the US and the Canadian models embraced constitutionally entrenched Bills of Rights, they could arguably be replicated in a statutory Bill of Rights.

Indeed, Canada had a Bill of Rights protected through an ordinary federal statute for twenty years before it constitutionally entrenched the Charter in 1982, which occurred at the same time that the Constitution was repatriated from the UK to the Canadian Parliament. Even within the UK there is an ongoing debate over whether or not they require a 'proper' Bill of Rights independent of the ECHR or the HRA (Joint Committee on Human Rights 2007-08).

When considering the merits of the different models, it is important to note that not all Bills of Rights have to be justiciable or, in the words of distinguished legal theorist Tom Campbell, 'court-centred' (Campbell 2006). Indeed, Campbell is in favour of a 'democratic bill of rights' for Australia. As he says: 'signing up to international 'human rights' treaties and adopting a court-centred bill of rights are possible ways of promoting of human rights, but...there are other ways of protecting and furthering the interests at stake' (Campbell 2006: 6). A 'democratic bill of rights' would, instead, be a declaration affirming 'the basic interests that set down social, political and economic goals, against which the performance of governments and other organisations could be assessed' (Campbell 2006: 3), not by judges, but by Parliament itself. In particular, a Joint Committee on Human Rights:

could be created not only to scrutinise draft legislation, but also to hold inquiries, and bring forward proposed reforms that contribute to a comprehensive set of human rights legislation with an enhanced legal status that would be respected and enforced by Australian courts (Campbell 2006: 3).

In other words, this declaratory model for a Bill of Rights would serve as an important guide to the framing of domestic laws to respect specific rights, an approach which is reflected in the Universal Declaration of Human Rights (UDHR) and the EU's Charter of Fundamental Rights. Under this model, it is for domestic legislatures to enact specific legislation implementing each right; and only then would the rights under such legislation be justiciable.

II. The European Convention on Human Rights (ECHR)

The legal foundation of the HRA is provided by the ECHR. The ECHR was adopted under the auspices of the Council of Europe in 1950 to protect human rights and fundamental freedoms in Europe.ⁱⁱ All 47 Council of Europe member states are party to the Convention and new members are expected to ratify the convention at the earliest opportunity.

The ECHR covers civil and political (CP) rights.ⁱⁱⁱ Economic, social and civil (ESC) rights are contained in a separate document called the European Social Charter of which not all the provisions are binding. It is interesting to note that the Joint Committee on Human Rights (2008) advocates inclusion of socio-economic rights (as well as some other rights) in their suggested Bill of Rights for the UK.

There are 3 types of rights in the ECHR:

Absolute rights. This type of right may never be interfered with, not even in times of war or national emergency. Examples are Article 3 (the prohibition of torture, inhuman and degrading treatment) and Article 4(1) (the prohibition of slavery and forced labour).

Limited rights. These are not absolute, but may be limited in certain strictly defined circumstances which are contained in the Article itself. An example is Article 5 (the right to liberty and security), which may be limited in circumstances including where someone has committed a crime or where someone is suffering from serious mental health problems.

Qualified rights. These are also not absolute. They may be interfered with so long as the interference is: lawful, i.e. has a basis in law; done to secure a permissible aim set out in the relevant Article, for example for the prevention of crime, or for the protection of public order or health; and necessary in a democratic society.

The latter is the so-called test of necessity, and it has been interpreted by the ECtHR to mean that an interference must (i) fulfil a pressing social need; (ii) pursue a legitimate aim; and (iii) be proportionate to the aims being pursued. This also means that the impact on the individual in question must in particular be taken into account. Applying blanket policies without proper regard to the particular situation or consequences may lead to decisions that are disproportionate and therefore a breach of human rights.

Examples of qualified rights include Article 8 (the right to respect for private and family life), Article 9 (freedom of thought, conscience and religion); Article 10 (freedom of expression), and Article 11 (freedom of assembly and association). Article 10 was proclaimed as 'the touchstone of all human rights' at the first meeting of the UN General Assembly in London in 1946, 'the primary right' in a democracy; a right without which effective rule of law is not possible.

Another important article is Article 15, which allows for derogations from some of the rights conferred by the ECHR in times of war or other public emergencies threatening the life of the nation. But of course no derogation is permitted from absolute rights, such as the right to be free from torture.

Importantly, the ECHR has been interpreted by the Court as placing on the state both positive and negative duties. For example, Article 2(1) places on the state both a positive duty to safeguard the lives of those within its jurisdiction (by, say, putting in place effective criminal law provisions to deter the commission of offences against a person) and a negative duty to refrain from the intentional and unlawful taking of life (see e.g. *L.C.B. v. the United Kingdom*, para 36). However, the scope of this positive obligation must be interpreted in a way which does not impose an impossible or disproportionate burden on the authorities, 'bearing in mind the difficulties in policing modern societies, the unpredictability of human conduct and the operational choices which must be made in terms of priorities and resources' (*Kilic v Turkey*, para 63).

This positive dimension of the ECHR articles - i.e. the fact that the government has the obligation not only to refrain from violating Convention rights, but also to protect citizens against infringements of these rights by others - together with the requirement based on Article 13 of the Convention of effective national legal protection, leads to what is called 'horizontal'. Rights set out in the Convention and its subsequent protocols may be enforceable not just against public authorities ('verticality'), but also between individuals or other private bodies to ensure, say, proper respect for the claimant's privacy or home, or their right to life.

Another very important conceptual tool used by the ECtHR is the doctrine of the margin of appreciation. The margin of appreciation refers to the discretion given to national authorities in balancing competing interests, thus allowing states to interpret the ECHR in different ways. The Court believes that this balancing exercise is best undertaken by national authorities, especially in the area of morality as well as national security and social and economic policies. In all these areas the national authorities have a broad margin of appreciation. By definition, the margin cannot apply to absolute rights of Articles 3 and 4(1).

III. Impact of the ECHR on UK Laws and Society

1. Before the HRA

Similarly to Australia, the UK is a dualist state. This means that international conventions or treaties are not part of its law until incorporated into it through an Act of Parliament. As an instrument of international law, the ECHR was hence not directly part of UK law until it was incorporated into it via the HRA 1998. Nevertheless, the ECHR affected UK law in a number of ways prior to the HRA coming into force in 2000.

First, the ECHR provided a spur to legislation. Since 1965, when the UK applicants were granted access to the ECtHR, the UK government has had to attempt to secure legislative reform whenever it was found to be in breach, in order to comply with its obligations

under the ECHR. And, as Lester and Pannick point out, '[i]n all, there have been some 130 judgments in UK cases finding breaches of Convention rights, many of them controversial and far-reaching' (2004: 1.30). These included inadequate safeguards against telephone tapping by the police; the inhuman treatment of suspected terrorists in Northern Ireland; and criminal sanctions against private consensual homosexual conduct (ibid). There is in fact 'hardly an area of state regulation untouched by standards which have emerged from the application of Convention provisions to situations presented by individual applicants' (ibid). This is in spite of the fact that the ECHR had been applied by the ECtHR with a significant respect for national authorities (as exemplified by its margin of appreciation doctrine discussed above).

Secondly, the UK courts developed a rule of statutory interpretation that Parliament does not intend to legislate contrary to UK international law obligations (Dixon 2000: 97). As a consequence, the courts would usually take account of the ECHR and its jurisprudence to resolve any ambiguity in the statute. Similarly, the courts could take account of the ECHR and the jurisprudence to help develop the common law where it was uncertain or absent (e.g. *Derbyshire CC v Times Newspapers*: the common law should be interpreted and applied, wherever possible, in a manner consistent with international obligations).

Finally, the ECHR also operated indirectly, through the medium of European Community law. Although the Treaty of Rome contained no human rights competences, the European Court of Justice had regular recourse to the ECHR to develop its doctrine of fundamental rights. Over the past 30 years, this doctrine has come to directly influence the interpretation of EC laws, which in turn have been applicable in the UK (von Bogdany 2000).

2. After the HRA

The HRA 1998 is an Act of Parliament of the UK which received Royal Assent on 9 November 1998, and came into force on 2 October 2000. As stated above, its aim is to 'give further effect' in UK law to the rights contained in the ECHR. The Act makes

available in UK courts a remedy for breach of a Convention right, without the need to institute costly proceedings, both in terms of time and money, before the ECtHR in Strasbourg. In particular, the Act makes it unlawful for any public body to act in a way which is incompatible with the ECHR, unless the wording of an Act of Parliament means it has no other choice. It also requires UK courts to take account of decisions of the ECtHR in Strasbourg (s.2).^{iv}

The Act further requires the UK courts to interpret legislation, as far as possible, in a way that is compatible with the Convention (s.3). However, if it is not possible to interpret an Act of Parliament so as to make it compatible with the Convention, the judges are not allowed to override it as they can only override subordinate legislation, (s.3:2). What higher courts can do is to issue a 'declaration of incompatibility' (s.4). This declaration neither affects the validity of the Act of Parliament, nor does it prevent Parliament from legislating in a way that is incompatible with Convention rights. It simply triggers a new power allowing (not requiring) a Minister to make a remedial order to amend the legislation to bring it into line with the Convention rights (s.10 and Schedule 2). In that way, the Human Rights Act seeks to maintain the principle of Parliamentary sovereignty.

IV. What Difference Did The HRA Make?

As the 2006 *Review of the Implementation of the Human Rights Act* ('the Review') by the UK Department for Constitutional Affairs (now Ministry of Justice) found with respect to the courts of England and Wales, there is no settled consensus as to the impact of the HRA on their decisions (Department of Constitutional Affairs 2006: 10).

For example, over a period of nearly six years since the Act came into force, only about 2% of the total number of cases determined by appellate courts involved a substantial discussion of issues under the HRA, while the corresponding figure for the House of Lords cases was about 1/3 (ibid). Of the latter, the HRA could be said to have substantially affected the result in only about one-tenth of cases (ibid), i.e. a total of 3%.

There are a number of reasons for the relatively limited impact of the HRA, some of which are suggested in the *Review*. Primarily, ECHR rights may not be relevant on the facts of the particular case. For example, Diane Pretty was unsuccessful in her challenge to the Director of Public Prosecution's refusal to provide an undertaking not to prosecute her husband if he assisted her to commit suicide, because there is no implied right to euthanasia in the ECHR (*Pretty v DPP*). And, even if the rights are relevant, the court may hold that interference with such rights is justified.

More controversially, the HRA may not include many principles different from those embodied in the common law. As Lord Browne-Wilkinson noted, the ECHR is, '[i]n large part...a code of the moral principles which underlie the common law' (quoted in Klug: 2006, 3.8). Some human rights have been slowly absorbed into the common law even before the HRA came into force, with increasing reference to the ECHR's case law by the UK courts. As the *Review* states: '[t]his "development" of the common law in the direction of "fundamental rights" is evident in a number of areas...law of libel...procedural rights...The courts have increasingly been prepared to recognise "common law constitutional rights" similar in content to those found in the ECHR but independent of it' (Department of Constitutional Affairs 2006: 11). Interestingly, the *Review* points out that the House of Lords' controversial conclusion in *A (No.2) v Home Secretary* that the UK courts could not receive evidence obtained by torture was based not on the HRA, but on the common law, reinforced by international Conventions (ibid). It is hence highly unlikely that the result of this case would have been any different before the HRA was enacted.

On that view, the HRA can be seen as simply spelling out or declaring what our existing rights and freedoms are and which, firstly, the courts are now obliged to take into account in cases before them, rather than rely on common law precedents, and secondly, the law makers have to consider explicitly before passing legislation.

1. The principle of proportionality

What has changed to a greater extent under the HRA is the application of the principle of proportionality to cases before the courts. The principle of proportionality (i.e. in its most general sense the principle that an interference must be proportionate to the aims being pursued) gives qualified rights - such as right to family life, or right to freedom of expression or religion - a much higher protected status than that which they enjoyed prior to the HRA. Until the HRA, significant 1990s case law had denied proportionality as a 'freestanding' principle in English law; and judicial review in the UK was typically a challenge in which a judge reviewed only the lawfulness of a decision or action made by a public body.

The usual standard for reviewing official action was the so-called *Wednesbury* test (*Associated Provincial Houses v Wednesbury Corporation*). According to the test, official action would only be reviewable if so unreasonable that no reasonable decision-maker would have taken it. As Lord Diplock said in the case *Council of Civil Service Unions v Minister for the Civil Service*, official action had to be 'so outrageous in its defiance of accepted moral standards that no sensible person who had applied his mind to it could have arrived at it'. The example given was that of a red-haired teacher, dismissed because she had red hair. It is only in such unreasonable cases that the court could overrule the decision, but not simply because it disagrees with the officials decision.

In certain cases, such as those involving human rights of refugees, courts also recognised the need to employ 'anxious' or 'heightened' scrutiny of the reasonableness of decisions (*Bugdaycay v Home Secretary*). This meant, as explained by Lord Phillips of Worth Matravers MR:

[w]hen anxiously scrutinising an executive decision that interferes with human rights, the court will ask the question, applying an objective test, whether the decision-maker could reasonably have concluded that the interference was necessary to achieve one or more of the legitimate aims recognised by the Convention (*Mahmood v Home Secretary*, p 857, para 40)

In *Smith and Grady v. the UK*, a case concerning a ban on gays and lesbians serving in the British armed forces, the ECtHR held however that even with 'anxious scrutiny' judicial review did not provide an effective remedy as required by Article 13 of the Convention because it effectively excluded any consideration by the domestic courts of the question of whether the interference with the applicants' rights answered a pressing social need or was proportionate to the national security and public order aims pursued.

The oft-cited case to illustrate how the HRA changed the approach to proportionality is that of *Brind and others v Home Secretary* [1991] 1 AC 696. In that case, the House of Lords ruled (amazingly from today's point of view) that the Home Secretary was not legally obliged to consider the Convention right of freedom of expression when imposing restrictions on television and radio interviews with people connected with a terrorist organisation.

Today, as Lord Steyn stated in *Daly v Home Secretary*, para 27 (emphasis added):

the doctrine of proportionality may require the reviewing court to assess the *balance* which the decision maker has struck, not merely whether it is within the range of rational or reasonable decisions...[Furthermore,] it may require attention to be directed to the relative weight accorded to interests and considerations.

Two recent cases, both in the immigration area, demonstrate the judicial acceptance of the ECHR since the implementation of the HRA and a willingness to apply the principle of proportionality. These cases follow the landmark decision in *Huang v Home Secretary* which clarified the role of a judge in a human rights case where the interests of immigration control have to be balanced against the interference with the family life of the appellant facing removal (this is potentially quite relevant for Australia). The House of Lords found in *Huang* that the role of the appellate immigration authority, particularly when viewed in the light of the relevant statutory machinery (the HRA and the immigration legislation) is *not* a secondary, reviewing function. The Immigration Judges must decide for themselves whether the decision is compatible with Convention rights i.e.

whether it constitutes a proportionate interference with family life (Beatson et al: 2008 points out that *Huang* thus expanded on the proportionality test adopted by the Privy Council in *De Freitas v Permanent Secretary*).

The first of the two recent cases revealing the judicial sea-change in relation to ECHR is *Beoku-Betts and Home Secretary*. In this case, the appeal raised an issue relating to the scope of Article 8 and specifically the right to family life. The issue was whether only the impact of removal of the appellant to Sierra Leone on the appellant's right to respect for his family life should be considered, or whether the impact on other members of the appellant's family should also be relevant in the assessment of proportionality. The applicant was a young adult whose mother and two sister were settled in the UK when he applied to stay in Britain himself on asylum and human rights grounds. The leave was refused by the Secretary of State and a series of appeals and counter-appeals followed, all the way to the House of Lords. The House of Lords found for the appellant, adopting the wider construction for the proportionality test: i.e. that the impact on other members of the appellant's family should also play a role in its assessment. As Baroness Hale of Richmond said:

the central point about family life...is that the whole is greater than the sum of its individual parts. The right to respect for the family life of one necessarily encompasses the right to respect for the family life of others, normally a spouse or minor children, with whom that family life is enjoyed.

The other case is that of *Chikwamba and Home Secretary*. The case concerned a failed asylum-seeker from Zimbabwe who married a Zimbabwean man with refugee status in the UK, gave birth to their daughter, and then refused to return to Zimbabwe to apply for a settlement visa as a spouse, arguing that she should be able to do this within the UK. She fought her way through the courts until the Law Lords ruled in her favour in June 2008, holding that an appeal based on Article 8 of the ECHR against refusal of asylum and leave to enter should not be routinely dismissed on the ground that it would be proportionate and more appropriate for the applicant to return to her home country to

apply for leave to enter. Indeed, in this case the Secretary of State's Asylum Policy Instruction on Article 8 had required the claimant to be separated from her husband and her child from its father for a 'limited period of time' and regarded that 'temporary' interference with her family life as 'proportionate'. However, as reported in the press following this case, the UK's immigration policy of forcing spouses whose partners have legal stay to return home and apply for stay in their home countries, could be a thing of the past.

In other areas of UK policy, such as national security and economic policy, the courts have however accorded a very different respect for Parliament's policy decisions. These are the areas of judgment – the so-called 'discretionary areas of judgment' - within which the judiciary defer, on democratic grounds, to the considered opinion of the legislature or the executive. This doctrine of deference is equivalent, at the UK domestic level, to the doctrine of 'the margin of appreciation' used by the ECtHR with respect to the decisions of national authorities. In spite of this doctrine, in the House of Lords decision in *A v Secretary of State for the Home Department* [2004] UKHL 56 for example it was held that s.23 of the Anti-Terrorism, Crime and Security Act 2001 (ATCSA 2001) was incompatible with Articles 5 and 14 of the ECHR insofar as it was disproportionate, permitting detention of suspected international terrorists in a way that discriminated on the ground of nationality or immigration status. In this case, clearly, the Law Lords decided that the view of the government as to what national security required – indefinite detention of foreign, but not national, suspected terrorists – was wrong.

2. The evolution of a Human Rights 'culture' in public bodies

Cases like the ones above show the gradual and undeniable impact of the HRA on some of UK laws via litigation in the courts. That said, some lawyers are despondent at the slow progress. As Lester notes, for example: 'English libel law continues unnecessarily to interfere with free expression', and 'there are continuing problems in protecting the enjoyment of artistic expression against bigotry and intolerance' (2009: 7-8).

Whatever the view of the legal impact of the HRA, its greatest achievements appear to be elsewhere, outside the realms of the courts and litigation. As a human rights NGO in the UK, the British Institute of Human Rights, says in its publication *The HRA - Changing Lives* (emphasis added): ‘the HRA has its greatest impact *in the wider community*, especially in the hands of those who provide public services and those who use them.’ This is because the Act creates a number of positive obligations for public authorities.

In particular there are two notable developments: Firstly, the Government is now required to make a statement of compatibility with the HRA relating to all proposed legislation. Since 2000 therefore, human rights have become an integral and statutory consideration of all legislation. Every law passed since then will have been 'human rights proofed', or vetted for compliance with the HRA. The effect of this measure has been to force policy makers to consider human rights in the development of that policy. The HRA hopefully leads thus to better laws in the first place.

Secondly, the Act also places an obligation on all public bodies to not breach the Act in developing policy. Many believe this is actually the greatest impact of the Act: the impact on the decision making process of public bodies. Quoting Lord Falconer again (2007): 'the positive onus to consider rights before acting is a significant one. It prompts the decision maker to think first, to consider what the effect of the decision might be. On individuals and on society. Far better to prevent the violation than merely give redress afterwards'.

The HRA is thus not just about lawyers and courts. Through local authorities in particular, reviewing their policies to make sure they are human rights compatible, the Human Rights Act protects human rights often without the need for costly court cases. *The HRA - Changing Lives* provides a number of practical examples, ranging from residential care homes to provision of school transport for children with special educational needs.

The final possible benefit of the HRA is that British judges have been able to contribute to the development of European human rights jurisprudence. As Lord Falconer says (2007), this means that:

Through increased dialogue human rights jurisprudence has noticeably improved. It has also allowed the UK to be able to assert [sic] itself squarely into the debate internationally about Human Rights. Being able as we now are as a country to point to effective and comprehensive Human Rights legislation enhances our credibility as we seek to promote it internationally.^v

This impact on international or regional human rights jurisprudence may be an additional reason for any country to have its own - 'court-centred' - domestic bill of rights; that is, if one believes (as the author does) that it is desirable for one's country's legal system to participate in building a global human rights regime.

V. Conclusion

The main impact of the HRA on UK laws and society can be summarised as follows (British Institute of Human Rights 2007; Department of Constitutional Affairs 2006; and in particular Singh 2007):

Impact on the Court system: The floodgates of litigation have not been open following the enactment of the HRA – there have only been a few damages claims – and there has been little impact on criminal courts, except for sentencing cases.^{vi} The greatest impact seems to have been on judicial review and at appellate level around issues such as rights of same sex partners and extra-territorial application of the HRA.^{vii}

Impact on the common law: Courts are now included as public authorities and have positive obligations under the Act.

Impact on the Executive: There have been no significant impediment to its action, the main exception are cases following *Chahal v the UK*, an ECtHR case not allowing the deportation of non-UK nationals to a country where they could be subject to torture or inhuman or degrading treatment contrary to Art 3 ECHR. The executive now issues statements of compatibility with human rights of primary legislation, and voluntary statements for secondary legislation.

Impact on Parliament: Legislative supremacy of Parliament has been preserved; and the Joint Committee on Human Rights (JCHR) has been scrutinising legislation for its compatibility with human rights.

Declarations of incompatibility: The Government has complied with such declarations to date (even with the most controversial one in the Belmarsh case, *A (FC) and others (FC) v. Home Secretary*), usually by Act of Parliament (though remedial orders are, as mentioned above, possible).

Impact on the policy making of public authorities: Arguably the main achievement of the HRA is allowing 'ordinary' people to benefit from their rights without having recourse to court action. The impact may be even greater now, since the creation in 2007 of the Equality and Human Rights Commission that has the mandate to further explain, and encourage compliance with, the HRA.

In conclusion: what may be the implications of this study of the HRA to the discussion of an Australian Bill of Rights? It seems to me that three main observations can be made.

Firstly, as Klug (2006) points out, the role of the legislature in the protection of human rights could be improved. Out of 500 Bills scrutinised by the Joint Committee on Human Rights, only around 16 government bills and two private bills were amended as a consequence of their reports, plus two draft Bills and one remedial order (ibid: 9.8). Klug indicates that the Committee could be far more influential if it were to intervene at an earlier stage in the policy process and scrutinise green or white papers or draft bills (ibid:

13.8). She also suggests that the Committee ought to work to help Parliament to 'find its own voice', independently of the government (ibid: 12.7); and also independently of the judiciary. It should hence not 'second guess the courts', but instead evaluate 'policy itself within a human rights framework' (ibid: 12.7).

Secondly, an effective public communications strategy is vital. As a recent poll showed, 96% of the British public believes that it is important that there is a law that protects rights and freedoms in Britain, but only 13% remember ever seeing or receiving any information from the government explaining the HRA legislation (Liberty 2008). One reason for this is the lukewarm support for the HRA from the government itself. The Lord Chancellor's (Jack Straw) attack on the Act late last year, and his claim that it was due for a radical overhaul (Brogan 2008), is one of many such attacks on the Act in recent years by the government, let alone the opposition or the tabloid media. Lester and Pannick (2004: 1.64) concluded, already five years ago, that 'six years after the Blair government was elected, it seems clear that it would not now have enacted the HRA if it were considering whether to do so afresh'.

Finally, any future Bill of Rights ought to be 'bottom-up not top-down'. There was no public debate, nor consultation, in the lead up to the HRA. It is little wonder the British public knows so little about it. An important lesson from the HRA experience, for both Australia and the UK, may hence be that '[a]ny move to introduce a ...[new or different] Bill of Rights must start with a comprehensive public education campaign and a major consultation process' (Justice: 2007). Hopefully, this is what is taking place in Australia right now (see National Human Rights Consultation website, <http://www.humanrightsconsultation.gov.au/>)

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ⁱⁱ The Council of Europe, the ECHR and the European Court of Human Rights (ECtHR), based in Strasbourg, should not be confused with the European Union (EU) or the highest court in the EU, the European Court of Justice (ECJ), based in Luxembourg. There is a connection between the two however. As part of the so-called Copenhagen criteria, the members of the EU need to have signed up to the ECHR; and, if a member is in persistent breach of its obligations, membership of the EU can be suspended (a rather theoretical power).

ⁱⁱⁱ When the Convention was adopted in 1950, there were several outstanding provisions on which final agreement could not be reached. Hence Protocols containing additional provisions were adopted: 11 since 1952. Examples of such provisions include rights to property and education and the obligation to hold free elections (Protocol 1 of 1952). Acceptance of each Protocol is optional.

^{iv} For a debate on what this means in practice, see *Ullah v Special Adjudicator; Al Skeini v Defence Secretary*; Hale: 2008, pp3-4; Arden: 2007.

^v For example, in *Z v UK*, the European Court of Human Rights refused 'to follow its own decision in *Osman v UK* in relation to negligence claims against the police, following consideration of the discussion of *Osman* by the House of Lords in *Barrett v London Borough of Enfield*' (Department for Constitutional Affairs, 2006: p.11).

^{vi} Following an ECtHR case *Stafford v UK*, the House of Lords held in *Hammond v Home Secretary* that when setting or resetting the minimum term for a mandatory lifer, the High Court must have the discretion to hold an oral hearing where necessary to comply with Article 6(1). Accordingly, the legislation which prevented an oral hearing from taking place was in breach of Article 6(1) and the legislation had to be re-read so as to allow the court to convene an oral hearing where necessary.

^{vii} Main cases: *Amin v Home Secretary*, on duty to investigate death in custody; *Ghaidan v Godin-Mendoza*, on rights of same sex partners; *A v Home Secretary* (the Belmarsh case), on detention without trial; *Limbuela v Home Secretary* on asylum support; *Al-Skeini v Defence Secretary*, on extra-territorial application of the HRA).