KIRBY LECTURES

HUMAN RIGHTS IN AUSTRALIA: WHAT WOULD A FEDERAL *CHARTER OF RIGHTS* LOOK LIKE?*

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I INTRODUCTION

Justice Michael Kirby is perhaps the only Justice of the current High Court whose legal career has been dominated by an assertion of the significance of human rights, and human rights law, to the administration of justice in Australia. In the inaugural Michael Kirby lecture in this series, delivered last year, Justice Kirby recounted the years in which he had expressed the view that 'international law, especially that relating to human rights, may assist, as a contextual element, in the interpretation of the Constitution, the construction of ambiguous legislation and the filling of gaps in the common law.'[1] The utility of human rights law in the interpretation of the Constitution is something to which Michael Kirby has been especially devoted.[2] In this he has often been proud, but alone.

It is a great privilege and honour to have been invited to present the second lecture in this series, and I thank you for the opportunity. It is a particular delight for me to be able to discuss human rights law in this context. In this lecture, I intend to address some of the considerations which may one day need to be resolved if there is ever to be a human rights law passed as a statutory Bill of Rights by the Commonwealth Parliament.

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1 The Hon Justice Michael Kirby AC CMG, 'Twelve Years in the High Court – Continuity & Change' (Speech delivered at Southern Cross University, Lismore, 30 March 2007) 39.

2 *Newcrest Mining (WA) Ltd v Commonwealth* (1997) 190 CLR 513, 657–8; *Kartinyeri v Commonwealth* (1998) 195 CLR 337, 417–19; *AMS v AIF* (1999) 199 CLR 160, 217–18.

The State of Victoria enacted its *Charter of Human Rights and Responsibilities*[3] (the *Charter*) in 2006 following the passage in the Australian Capital Territory Parliament of the *Human Rights Act 2004* (ACT) in 2004. In 2007 the ACT passed a raft of amendments which brought its Act more into line with the Victorian *Charter*.[4] In October 2007 the Tasmanian Law Reform Institute recommended that a Tasmanian Charter of Human Rights should be enacted.[5] In November 2007 the Western Australian Consultation Committee for a Proposed Human Rights Act recommended that a Human Rights Act should be enacted in Western Australia.[6] Against this background, it is important to consider some of the technical legal issues that may be presented by a proposal one day for a federal *Charter of Rights*.

In particular, I wish to consider some of the constitutional issues a federal *Charter* would raise. Amongst those constitutional issues are matters relating to the source of legislative power that might be available to the Commonwealth Parliament and any constraints that might apply to the content of a federal *Charter*, flowing either from the need for the Commonwealth Parliament to find a suitable head of power or from implications derived from the Constitution.

Let me preface a discussion of these issues with some remarks about the importance of Justice Kirby's presence on the current High Court and the otherwise perhaps less than enthusiastic reception there to international and comparative human rights law.

As a State Solicitor-General, I appear before the High Court regularly. Occasionally there is a temptation to seek to strengthen an argument by reliance upon a judgment decided in another jurisdiction where human rights are protected by legislation or are constitutionally entrenched in a supreme law. Occasionally it appears that there is authority from such a jurisdiction which is precisely on point but I have come to learn that, before the High Court, one raises a human rights issue at one's peril.

If the argument can be made by reference only to the text, or text and structure of the Constitution, or the terms of the legislation construed as a whole, one's prospects of success are likely to be greater than any recourse to human rights,

3 See s 1(1) which provides that the *Charter of Human Rights and Responsibilities Act 2006* (Vic) may be referred to as 'the Charter of Human Rights and Responsibilities'.

4 See the *Human Rights Amendment Act 2007* (ACT) s 4 (inserting s 28(2)); s 5 (substituting a new s 30); s 6 (substituting a new s 34); s 7 (inserting a new Part 5A).

5 Tasmania Law Reform Institute, *A Charter of Rights for Tasmania* (Report No 10, October 2007) Recommendation 2.

6 *Report of the Consultation Committee for a Proposed Western Australian Human Rights Act* (November, 2007) Recommendation 1.

fundamental or otherwise. If one can appeal to the immense analytical ability of the Justices without recourse to doctrines drawn from international law – or, God forbid, from comparative jurisprudence on human rights – one's arguments are likely to be viewed as at least sure-footed. In this context, Michael Kirby stands out as demonstrating that meticulous high-level analysis can go hand in hand with a capacity to be receptive to the doctrines developed in other jurisdictions about human rights.

II Kirby J's Approach to Comparative Human Rights Jurisprudence

Let me give you an example.

In 2006 we assembled at the Bar table in Canberra to face a challenge to the constitutional validity of the appointment of Acting Judges in New South Wales. The case was *Forge v ASIC*.[7] When I say 'we assembled' I mean the Solicitors-General of the Commonwealth, Tasmania, Western Australia, New South Wales, South Australia, Victoria and Queensland with the Northern Territory being represented by Tasmania. It was almost a full contingent. You can only imagine what it is like when we are all together. We tend to refer to each other by our respective jurisdictions and indeed think of each other this way. This has the somewhat comic consequence that when colleagues from one or other State are running late – whether it be late to court or late to a restaurant – the query 'Where's Queensland?' invariably elicits a wry geographical response, 'North of Byron Bay'.

This assemblage took place on one side of the Bar table in support of the corporate regulator, the Australian Securities and Investments Commission (ASIC), represented by Stephen Gageler SC. On the other side Mr Forge was represented by Bob Ellicott QC.

Mr Forge was facing civil penalties, declarations and other orders, in proceedings brought by ASIC. The matter commenced in New South Wales before a former Judge of the Federal Court who had accepted an appointment as an Acting Judge of the Supreme Court of New South Wales.

Mr Forge decided to respond by attacking the validity of the appointment of the trial Judge,[8] or, more precisely, the validity of the section of the New

7 (2006) 228 CLR 45.

8 Mr Forge brought three proceedings to the High Court; the first commenced in the original jurisdiction of the Court; the second proceeding had been commenced in the Supreme Court of New South Wales but had been removed to the High Court pursuant to s 40 of the *Judiciary Act 1903* (Cth); the third proceeding was an application for special leave to appeal to the High Court

South Wales *Supreme Court Act 1970* (NSW) that permitted the appointment of Acting Judges. He did so on the basis that a court capable of exercising the judicial power of the Commonwealth must be, and must be seen to be, an independent and impartial tribunal. The High Court in *NAALAS v Bradley*[9] recognised that this is a defining characteristic of a court under the Commonwealth Constitution. No one sought to dispute this constitutional implication.

Mr Ellicott's basic proposition was that the Supreme Court of New South Wales 'as an institution must be made up of full-time judges with security of tenure'[10] – that there was no other way of giving to the courts the necessary independence.[11] The question for the High Court was thus what was required to ensure the independence and impartiality of State Supreme Courts. For Victoria, we argued that it was a mistake to assume that there is one way, and only one way, of satisfying the requirement for an independent and impartial tribunal; rather, it is a question of the adequacy of the totality of the safeguards present and not simply a question of the duration of the tenure.

Be that as it may, we, among others, sought to introduce a discussion of the jurisprudence from the United Kingdom, which centred around article 6(1) of the *European Convention for the Protection of Human Rights and Fundamental Freedoms* (European Convention), as incorporated into domestic legislation by the *Human Rights Act 1998* (UK).[12] The text of article 6 is not a million miles from the constitutional implication drawn in *NAALAS v Bradley.* It states, *inter alia*, that '[i]n the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.'[13] In Canada, debate on these issues has focused upon s 11(d) of the *Canadian Charter of Rights and Freedoms* (the Canadian Charter), which is in similar terms.[14]

from a judgment of the Court of Appeal of the Supreme Court of New South Wales which had largely dismissed an appeal from the trial Judge, Foster J.

9 *North Australian Legal Aid Service Inc v Bradley* (2004) 218 CLR 146, 163 [29].

10 *Forge v ASIC* (2006) 228 CLR 45, 72 [53] (Gummow, Hayne and Crennan JJ). The basic proposition was not the only submission relied upon.

11 Transcript of Proceedings, *Forge v ASIC* [2006] HCATrans 25 (High Court of Australia, 8 February 2006) 152.

12 See s 1(1)(a) and Schedule 1.

13 See the interpretation placed on article 6 by the House of Lords in *Porter v Magill* [2002] 2 AC 357, 489, citing a decision of the European Court of Human Rights, *Findlay v United Kingdom* (1997) 24 EHRR 221, 244–5. See *North Australian Aboriginal Legal Aid Service v Bradley* (2004) 218 CLR 146, 152 [3] (Gleeson CJ).

14 Section 11 provides that 'Any person charged with an offence has the right … (d) to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal'. See the leading case of *Valente v The Queen* [1985] 2 SCR 673.

In oral submissions, I bravely sought to rely upon a decision of the Constitutional Court of South Africa interpreting South Africa's guarantee of judicial independence and impartiality, s 34 of the *Bill of Rights of the Constitution of the Republic of South Africa 1996*.[15] In this context there was a discussion about the qualities that display a person's suitability to be a judge, including his or her decisiveness, timely delivery of judgments and whether he or she is courteous. This prompted Justice Kirby, sitting with his brethren, playfully to ask for the last quality to be mentioned again.[16]

The difference in the philosophical positions of the Judges on the relevance of comparative human rights law was nothing if not stark. At one end of the spectrum was Justice Heydon who wrote, with respect to 'foreign law', in the following terms:

> Considerable reliance was placed on cases on the European Convention for the Protection of Human Rights and Fundamental Freedoms, Art. 6; the *Canadian Charter of Rights and Freedoms*, s 11(d) and the Bill of Rights of the Constitution of the Republic of South Africa, s 34. These documents all post-dated Ch III. They did not lead to Ch III and they were not based on Ch III. Accordingly, no assistance is to be obtained from cases on these documents in construing Ch III and evaluating its impact on State laws.[17]

One would have to mention parenthetically that Justice Hayne's judgment in *Roach v Electoral Commissioner*,[18] in which he rejected the recognition of a limitation upon legislative power with respect to arbitrary exclusions from the franchise drawn as an incident of representative government,[19] is not far removed from the position of Justice Heydon in ascribing little value to foreign rights jurisprudence set in a different constitutional and statutory context.

In *Forge*, the joint judgment of Justices Gummow, Hayne and Crennan did not include a discussion of comparative human rights law as their Honours preferred to base their reasons on fundamental principles concerning Chapter III and the construction of the New South Wales *Supreme Court Act 1970* (NSW). Given Australia's legal and constitutional history the approach of the joint judgment is reasonable and coherent. Further along the continuum towards an acceptance of the relevance of comparative human rights law was Chief Justice Gleeson,[20] with whose reasoning on these issues Callinan J

15 *Re Certification of the Constitution of the Republic of South Africa* (1996) (4) SA 744 (CC).
16 Transcript of Proceedings, *Forge v ASIC* [2006] HCATrans 25 (High Court of Australia, 8 February 2006) 161.
17 *Forge v ASIC* (2006) 228 CLR 45, 139–40 [250].
18 *Roach v Electoral Commissioner* (2007) 239 ALR 1; 81 ALJR 1830, [163]–[166].
19 By reference to ss 1, 7, 8, 13, 24, 25, 28, 30 and 44 of the Constitution.
20 *Forge v ASIC* (2006) 228 CLR 45, 62–3 [27]–[30].

agreed.[21] But it was Justice Kirby who demonstrated that, within the context of constitutional construction, it is possible, even in the absence of a federal *Charter*, to expound and apply an examination of 'international human rights law as it operates in the contemporary world'.[22] As he said:

> The use of international law is a further advance in the approach to interpretation that has occurred in this Court, and elsewhere, since the early decisions about the features of State courts that would be compatible with the implications of Ch III of the federal Constitution and specifically the vesting of federal jurisdiction in State courts. The process will continue to gather pace, stimulated by access to, and knowledge about, the decisions of national and transnational tribunals applying international law.[23]

After referring to the guarantee of an independent and impartial tribunal under article 14 of the *International Covenant on Civil and Political Rights* (ICCPR), he went on to say:

> The ICCPR is not, as such, part of Australia's municipal law. Still less are its provisions repeated in the federal or State *Constitutions*. Where municipal law is clear, including in the *Constitution*, it is the duty of Australian courts to give effect to it. However, where, as here, the applicable law is in a state of development, especially since *Kable*, and is inescapably concerned with general principles, it is helpful to examine the way in which the rules governing judicial independence and impartiality have been elaborated, both under the ICCPR and elsewhere. In the submissions of the parties and interveners in these proceedings, that elaboration was undertaken – itself a sign of changing practices in legal argument in Australia.[24]

The call for connection with the international legal community is apparent. So too is the source of the inhibition which might explain some of the misgivings of Justice Kirby's brethren in any reliance upon international and comparative human rights law.

The fact remains that the ICCPR is not part of Australia's municipal law.

III The International Covenant on Civil and Political Rights

Let me then say a few words about the ICCPR, as it is the international convention that is most likely to provide the source of the rights a federal *Charter* would seek to protect.

21 *Forge v ASIC* (2006) 228 CLR 45, 136 [238].
22 *Forge v ASIC* (2006) 228 CLR 45, 125–6 [204].
23 *Forge v ASIC* (2006) 228 CLR 45, 126 [207] (footnotes omitted).
24 *Forge v ASIC* (2006) 228 CLR 45, 127–8 [210] (footnotes omitted).

The ICCPR was adopted in 1966 by the United Nations (UN) and grew out of the *Universal Declaration of Human Rights* (Universal Declaration) which had been adopted 18 years earlier, in 1948, by the Third General Assembly of the United Nations. The Universal Declaration spawned another international convention, the *International Covenant on Economic, Social and Cultural Rights* (ICESCR) which was also adopted by the UN in 1966.[25]

These three documents, the Universal Declaration, the ICCPR and the ICESCR are sometimes referred to as the International Bill of Rights.[26]

The ICCPR was ratified by Australia on 13 August 1980. As a nation State, Australia thereby became a party to an international treaty by which it undertook to respect and to ensure to all the individuals within its geographical territory, and subject to its jurisdiction, the rights set out in the Covenant. It did so, as formulated in the Preamble:

> *Considering* that, in accordance with the principles proclaimed in the Charter of the United Nations, recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world,
>
> *Recognising* that these rights derive from the inherent dignity of the human person,
>
> *Recognising* that, in accordance with the Universal Declaration of Human Rights, the ideal of free human beings enjoying civil and political freedom and freedom from fear and want can only be achieved if conditions are created whereby everyone may enjoy his [or her] civil and political rights, as well as his [or her] economic, social and cultural rights,
>
> *Considering* the obligation of States under the Charter of the United Nations to promote universal respect for, and observance of, human rights and freedoms,
>
> *Realising* that the individual, having duties to other individuals and to the community to which he [or she] belongs, is under a responsibility to strive for the promotion and observance of the rights recognised in the present Covenant.

The rights recognised in the ICCPR are those traditionally associated with liberal humanism; the right to liberty and security of the person;[27] the right to freedom of movement;[28] the right to a fair trial including the right to be

25 The ICCPR and ICESCR were both adopted by the UN General Assembly on 16 December 1966.

26 See Francesca Klug, *Values for a Godless Age: The History of the Human Rights Act and its Political and Legal Consequences* (2000) 95. Australia is a party to both conventions. It ratified the ICESCR in 1975.

27 ICCPR, article 9.

28 ICCPR, article 12.

presumed innocent until proved guilty according to law and the right to be tried without undue delay;[29] the right to privacy;[30] the right to freedom of thought, conscience and religion;[31] the right to political liberty including the right to freedom of expression[32] and peaceful assembly[33] and association.[34] It also includes some more substantive rights to political participation including the right to vote and to stand for office at genuine periodic elections held by universal and equal suffrage.[35]

As one commentator has said:[36]

> [These rights] amount to the freedom to contribute to public deliberations and the power to have one's voice taken seriously in public decision-making. These have been the very stuff of rights, at least since 1789.[37]

However, under Australian doctrine, the ratification of an international convention does not have the effect that the legal norms embraced or prescribed by the convention automatically become applicable as domestic Australian law. Unlike the United States and Switzerland, where ratification of international treaties usually has the effect of incorporating the treaty into domestic law, when Australia becomes a party to an international treaty the rights and obligations the treaty provides for have no direct legal effect within Australia unless and until transformed into domestic law by the enactment of a statute.[38]

As Sir Anthony Mason and Justice McHugh of the High Court said in *Dietrich v The Queen*:[39]

> Ratification of the ICCPR as an executive act has no direct legal effect upon domestic law; the rights and obligations contained in the ICCPR are not incorporated into Australian law unless and until specific legislation is passed

29 ICCPR, article 14.
30 ICCPR, article 17.
31 ICCPR, article 18.
32 ICCPR, article 19
33 ICCPR, article 21.
34 ICCPR, article 22.
35 ICCPR, article 25.
36 Jeremy Waldron, 'A Right-Based Critique of Constitutional Rights' (1993) 13 *Oxford Journal of Legal Studies* 18, 37.
37 Ibid, fn 54: article 6 of the 1789 French National Assembly's *Declaration of the Rights of Man and the Citizen*: 'Legislation is the expression of the general will. All citizens have a right to participate in shaping it either in person, or through their representatives.'
38 *Chow Hung Ching v The King* (1949) 77 CLR 449; see also Henry Burmester, 'National Sovereignty, Independence and the Impact of Treaties and International Standards' (1995) 17 *Sydney Law Review* 127; Cheryl Saunders, 'Articles of Faith or Lucky Breaks? The Constitutional Law of International Agreements in Australia' (1995) 17 *Sydney Law Review* 149.
39 (1992) 177 CLR 292, 305.

> implementing the provisions.[40] No such legislation has been passed. This position is not altered by Australia's accession to the First Optional Protocol to the ICCPR, effective as of 25 December 1991, by which Australia recognises the competence of the Human Rights Committee of the United Nations to receive and consider communications from individuals … who claim to be victims of a violation by Australia of their covenanted rights. On one view, it may seem curious that the Executive Government has seen fit to expose Australia to the potential censure of the Human Rights Committee without endeavouring to ensure that the rights enshrined in the ICCPR are incorporated into domestic law, but such an approach is clearly permissible.

However, ratification of the ICCPR by the executive government of the Commonwealth is nevertheless of enormous significance domestically. This is because, in accordance with the doctrine expounded in the *Tasmanian Dam Case*,[41] ratification of an international convention by the executive attracts the external affairs power under s 51(xxix) of the Constitution, providing a basis for the making of legislation by the Commonwealth Parliament to give effect to the convention. The expansive approach has it that the external affairs power serves as a source of power for the carrying into effect of a treaty,[42] including the implementation of treaty obligations,[43] even where the subject-matter of a treaty is independent of any of the heads of power conferred by the Constitution upon the Commonwealth Parliament. As Deane J stated in the *Tasmanian Dam Case*:

> The establishment and protection of the means of conducting international relations, the negotiation, making and honouring (by observing and carrying into effect) of international agreements, and the assertion of rights and the discharge of obligations under both treaties and customary international law lie at the centre of a nation's external affairs and of the power which s 51(xxix) confers.[44]

It follows from the expansive approach to the external affairs power and the ratification of the ICCPR that the Commonwealth Parliament has a well recognised source of legislative power to enact a federal Charter of Rights if it so chose. This resolves the primary and threshold question faced by a Commonwealth Parliament when it considers whether or not to enact any piece of legislation – be it the hapless Work Choices Act[45] which Michael Kirby so powerfully demolished,[46] or any other statute – that is, the question

40 Citing *Bradley v Commonwealth* (1973) 128 CLR 557, 582; *Simsek v MacPhee* (1982) 148 CLR 636, 641–4; *Kioa v West* (1985) 159 CLR 550, 570–1.

41 *Commonwealth v Tasmania* (1983) 158 CLR 1 ('*Tasmanian Dam Case*').

42 *Tasmanian Dam Case* (1983) 158 CLR 1, 131 (Mason J).

43 *Tasmanian Dam Case* (1983) 158 CLR 1, 218–19 (Brennan J).

44 *Tasmanian Dam Case* (1983) 158 CLR 1, 258.

45 *Workplace Relations Amendment (Work Choices) Act 2005* (Cth).

46 *New South Wales v Commonwealth* (2006) 229 CLR 1 ('*Work Choices Case*'), 182–246 [423]–[616] (Kirby J).

of identifying the source of power. It is difficult to see what other source of power could be relied upon by the Commonwealth as the principal source of power for a federal Charter of Rights, except perhaps the implied nationhood power, although enthusiasm for reliance on that power seems to have waned.[47] It is unlikely that the corporations power would play any, or any central, role in supporting a federal Charter of Rights – and none of the other enumerated powers in s 51 of the Constitution would appear to be sufficiently relevant, at least not if there was to be a general law which sought to cover the whole population, and not simply special laws based on race.[48] Nevertheless, the race power may have a role to play if special indigenous rights are recognised. It is not apparent that any of the less celebrated powers would be relevant.

It might seem then that Michael Kirby's well justified call for connection with the international legal community could be sensibly responded to by the Commonwealth Parliament. At the very least, the Commonwealth Parliament has a secure source of power if it were minded to establish or confirm a connection with the international community by the enactment of a federal *Charter of Rights.*

IV The Victorian *Charter of Human Rights and Responsibilities*

In this context, it is worth nothing that the State of Victoria, when deciding to enact the *Charter of Human Rights and Responsibilities* in 2006, did not have to face the threshold issue of identifying a source of power. As the legislative power of the Victorian Parliament is, at least theoretically, plenary and unlimited, there was no need for it to consider the primary issue of the source of power. This meant that the Parliament was free to choose whatever set of rights it considered warranted protection and to formulate them in the way it saw fit. While the rights protected under the Victorian *Charter* are principally drawn from the ICCPR it is not the case that Victoria is discharging any international obligations in giving effect to the ICCPR. This is because the States do not have, and never did have, international legal personality.[49] The Commonwealth executive government has exclusive power to enter and

47 Though the existence of the nationhood power has rarely been questioned, it has not generally been relied upon by the Commonwealth. A discussion of the implied nationhood power is beyond the scope of this paper, but see for instance *Davis v Commonwealth* (1988) 166 CLR 79, and more recently *R v Hughes* (2000) 2002 CLR 535. In *Hughes*, albeit considering a very different context, Kirby J cast doubt on the Commonwealth's reliance on the nationhood power to support a complex and far-reaching legislative scheme (at 583 [119]).

48 Section 51(xxvi).

49 See *New South Wales v Commonwealth* (1975) 135 CLR 337 ('*Seas and Submerged Lands Case*'), 373; Leslie Zines, *The High Court and the Constitution* (4th ed, 1997) 275.

ratify treaties. The requirement to implement treaty obligations thus does not fall on the States as they are not the treaty party.[50] However, of course, the States are free to pass laws that reflect the norms contained in an international treaty and the implementation of Australia's international obligations may be achieved co-operatively.

Before considering what constraints might operate in relation to a federal *Charter of Rights*, let me consider the central features of the Victorian *Charter* and its relationship to the ICCPR.

As I've mentioned, the liberal-democratic rights contained in the ICCPR have provided the principal model for the rights protected under the Victorian *Charter.* However, some of the rights have been modified to account for contemporary understanding of human rights. For example, the right to the equal protection of the law without discrimination has been qualified to allow for affirmative action programs or special measures taken for the purpose of assisting or advancing persons, or groups of persons, disadvantaged because of former discriminatory practices.[51] It is now accepted that within contemporary notions of equality, difference ought be properly recognised. As Mary Gaudron has said, not only should like be treated alike, but unlike should be treated unlike.[52] However, this modern insistence upon the significance of difference is not reflected in, and postdates, the general equality right under the ICCPR.[53]

Victoria has also been free to include the right of a person not to be subjected to medical treatment without his or her full, free and informed consent.[54] The equivalent ICCPR right is limited to protection against medical experimentation.[55]

There are also rights in the ICCPR which have not been included in the *Charter*. In particular, the ICCPR provides for a right to an effective remedy and this is not reflected in the *Charter.* There is no stand-alone simple cause of action against public authorities under the *Charter* as was included in the ACT's *Human Rights Act 2004* (ACT) by way of an amendment effective from 1 January 2009.[56] The absence of any stand-alone cause of action was something to which the Government was committed from the outset, as

50 See Sarah Joseph, Jenny Schultz & Melissa Castan, *The International Covenant on Civil and Political Rights* (2nd ed, 2004), 14 [1.28]. See also Zines, above n 49, 276.
51 *Charter* s 8(4).
52 See, for example, *Street v Queensland Bar Association* (1989) 168 CLR 461, 571 (Gaudron J).
53 ICCPR, article 26.
54 *Charter* s 10(c).
55 ICCPR, article 7.
56 Section 40C.

expressed in its *Statement of Intent*[57] which governed the consultation process.

Against that background, the *Charter* relies on human rights informing existing causes of action, such as judicial review, by imposing new obligations on those who exercise public power. Damages are expressly excluded just as they are also excluded under the ACT's amendments.[58]

Unlike the ICCPR, Victoria's *Charter* includes a general limitations clause which permits an interference with any of the rights providing that the interference is no more than a reasonable limit as can be demonstrably justified in a free and democratic society based on human dignity, equality and freedom.[59] For example, this would allow for laws which seek to prohibit racial or religious vilification, even where the conduct does not amount to incitement, hostility or violence,[60] to be assessed as compatible with the *Charter*. While those laws interfere with, or impinge upon the right to freedom of expression, the extent of that interference can be assessed as proportional to the important objective of protecting cultural and religious diversity and diminishing racial and religious hatred.[61] Similarly, a law which confers a power on authorised officers to demand the name and address of a person who appears to be breaching water restrictions may involve an interference with the right to privacy,[62] but under the general limitations clause the conferral of the coercive power may be justified if it is proportionate and bears a rational connection to a sufficiently important objective, viz the conservation of water in times of a drought.[63]

The use of a general limitations clause like Victoria's is also found in the New Zealand *Bill of Rights Act 1990* (NZ);[64] the *Canadian Charter of Rights and*

57 Government of Victoria, *Human Rights in Victoria Statement of Intent* (May 2005). Under the heading, 'Individual rights of action', the Statement noted: 'Consistent with its focus on dispute resolution, the Government does not wish to create new individual causes of action based on human rights breaches.'

58 *Charter* s 39(3), *Human Rights Act 2004* (ACT) s 40C(4).

59 *Charter* s 7(2). See *Suresh v Minister of Citizenship and Immigration* [2002] 1 SCR 3 for an analysis of the operation of the equivalent limitations clause (s 1 of the *Canadian Charter of Rights and Freedoms)* by the Canadian Supreme Court.

60 See the ICCPR, article 20(2) which expressly provides for State parties to prohibit by law any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence. The *Racial and Religious Tolerance Act 2001* (Vic) seeks to go further than this and to capture conduct which incites severe ridicule of a person on the basis of her race (s 7) or religion (s 8).

61 See the objects of the *Racial and Religious Tolerance Act 2001* (Vic) s 4.

62 *Charter* s 13.

63 *Water Act 1989* (Vic) s 291D.

64 Section 5.

Freedoms;[65] and the ACT *Human Rights Act 2004* (ACT),[66] although Victoria's includes some specific factors to assist with assessing proportionality.[67] A general limitations clause is viewed as the modern approach to recognising that rights may conflict, and that rights may also need to be balanced against other objectives. It provides a significant analytic tool. The general limitations clause requires that any governmental interference with rights must be rationally and publicly justified against the same set of criteria. In this sense, the development of a human rights culture is a 'culture of justification'.[68]

However, this is not the model included within the ICCPR. The ICCPR works on the basis that most of the rights will contain their own specific set of criteria against which any interference can be judged. The criteria differ from right to right. These internal restrictions provide the indicia of what sorts of interferences may be permissible with respect to a particular right. Thus, with respect to the right to freedom of expression, the ICCPR acknowledges that it is not an unlimited or unfettered right and that indeed restrictions may need to be placed on it providing that the lawful restrictions are reasonably necessary to respect the rights or reputations of other persons; or for the protection of national security, public order, public health or public morality.[69] Under the ICCPR any restriction on freedom of expression that does not fall under one or other of those particular categories is, prima facie, not justified, although the particular categories are themselves quite broad.

Similarly, the right to freedom to manifest one's religion under the ICCPR is qualified so as to permit limitations upon the right where necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others.[70] While this may seem a sufficiently broad list to provide the flexibility for, say, a Parliament seeking to restrict the manifestation of religious belief in certain circumstances it judged to be necessary, under the ICCPR it remains the case that it is a matter of finding the appropriate pigeon hole to justify any restriction and not making a more general assessment of

65 Section 1.

66 Section 28.

67 These five factors are drawn from s 36 of South Africa's *Bill of Rights* and are now reproduced in s 28(2) of the *Human Rights Act 2004* (ACT) by reason of the amendments.

68 Murray Hunt, 'The UK Human Rights Act: Key Lessons for Australia' (Paper presented at the Protecting Human Rights Conference, Melbourne, 25 September 2007).

69 The right to freedom of expression under the *Charter* (s 15) includes these internal restrictions (in sub-section (3)) but the general limitations clause (in s 7(2)) still operates. The relationship between them is as follows: the express limitations on the right are in addition to the limitations or interferences with the right which can be justified under s 7(2). If any of the express limitations are satisfied, there is no need to go further: the prima facie interference with the right is justified. If, however, none of the express limitations are satisfied, regard can be had to whether the interference with the right can be justified under the general limitations clause, in s 7(2).

70 ICCPR, article 18(3).

its justification as required under the Victorian *Charter*. Tribunals such as the UN Human Rights Committee and the European Court of Human Rights have at times been called upon to balance competing rights and have at times been forced to 'prioritise' rights, but the advantage of a provision like s 7 of the *Charter*, is that it makes this balancing exercise explicit.

There are some other aspects of the model of human rights law embraced by Victoria's *Charter* that are not present in the ICCPR. Let me mention three of them.

The first is that the *Charter* imposes an obligation on members of the Parliament to prepare and table statements of human rights compatibility with every Bill that is introduced.[71] What is more, these statements must provide reasons demonstrating compatibility[72] – it is not sufficient for an expression of a bald statement by a Minister that a law is compatible with human rights. This requirement for a reasoned explanation of compatibility – an identification of relevant rights and an analysis of the proportionality of any proposed interference with those rights – is, so far as I am aware, the most onerous obligation of its type under human rights law anywhere in the world, certainly more than is currently required in the United Kingdom, or New Zealand, or the ACT.[73] The model supported by the New South Wales Bar Association includes a requirement for reasoned statements of compatibility reflecting the same high standard as Victoria.[74]

This obligation is also perhaps the most important imposed by the Victorian *Charter* because in practice it requires those concerned with the detail of the policy framework of a Bill to modify initial policy positions to take into account human rights, and to look for ways of achieving the policy objectives in a manner that imposes less of an intrusion upon human rights. This obligation places human rights on the radar of policy makers and legislators. It also provides an analytic framework in which rights can be taken seriously. It ought to ensure better legislation.

There is no requirement under the ICCPR for such a measure to be imposed. Given that the ICCPR is an international instrument the absence of that degree of prescription is not surprising. Whether its absence matters is something I will discuss in a moment.

71 *Charter* s 28.

72 Or, if appropriate, state the basis of the incompatibility.

73 The amendments to the *Human Rights Act 2004* (ACT) did not include an obligation for a reasoned statement of compatibility.

74 Anna Katzmann SC, 'Charter of Rights will Make Pollies More Accountable', *The Australian* (Sydney), 14 March 2008, 34.

The second feature of the *Charter* that is not to be found in the ICCPR is the obligation on public authorities to act compatibly with human rights and to give proper consideration to human rights in their decision-making.[75] This comprises a norm of conduct imposed on those who exercise public power. Compliance with that norm is intended to produce better outcomes for individuals in their relationship with agencies of government. Public authorities are defined under the *Charter* to include State Ministers; Heads of State Government departments; Heads of State Administrative Offices such as the Chair of the Victorian Environment Protection Authority and the Chief Executive Officer of the State Services Authority; all employees of the State public service; local councils; Victoria Police; statutory authorities and entities that have functions of a public nature including, for example, private corporations who manage private prisons but do so on behalf of the State. This norm of conduct with which the executive government of the State is expected to comply, and those who perform public functions on behalf of the executive government are expected to comply, is another measure of significance within the *Charter*.

The third feature of the *Charter* which is absent in the ICCPR relates to the exercise of judicial power. We have seen that the obligation to prepare and table compatibility statements is imposed on the legislature, and members of Parliament who make up the legislature, and the obligation to act in compliance with the *Charter* and to give proper consideration to human rights in decision-making is imposed on the executive, and those who exercise public power. The third significant obligation imposed by the *Charter* is that imposed on the judiciary – those who exercise judicial power.

The principal obligation imposed on the judiciary is the interpretive obligation[76] – that is, the obligation to interpret all statutory provisions in a way that is compatible with human rights, so far as it is possible to do so consistently with the purpose of the statutory provisions. This obligation on the way in which judicial power is to be exercised has had far-reaching effects in other jurisdictions. As Michael Kirby would no doubt endorse, it has enabled the House of Lords, in *Ghaidan's case*,[77] to interpret legislation relating to statutory tenancies in the United Kingdom in a manner that avoids discrimination against same sex couples. The Court interpreted beneficial legislation that was intended to protect those who lived in a state analogous to marriage as requiring a construction which was non-discriminatory so as to

75 *Charter* s 38.

76 Under s 32 of the *Charter*.

77 *Ghaidan v Godin-Mendoza* [2004] 2 AC 557 and see Pamela Tate, 'Protecting Human Rights in a Federation' (2007) 33 *Monash University Law Review* 217, 236–7.

extend not only to heterosexual de facto couples but also to same sex couples. The interpretive obligation can thus be far-fetching in its effects.

There are limits on how far the interpretive obligation can extend. When a statutory provision cannot be rendered compatible with human rights, a court may ultimately consider that, under the *Charter*, a 'Declaration of Inconsistent Interpretation' should issue. In the United Kingdom, and the ACT, these are described as 'Declarations of Incompatibility'.

These declarations do not serve to invalidate any Act or any statutory provision to which they are applied but they trigger an accountability mechanism on behalf of the executive government – either the Minister responsible for the Bill (as in Victoria[78] and in the United Kingdom[79]) or the Attorney-General (as in the ACT[80]). The accountability mechanism may vary but in Victoria, the Minister responsible for the statutory provision subject to the declaration must table a written response in Parliament within six months.

In the United Kingdom, the response to a declaration of incompatibility has been, almost invariably, to amend the offending legislation.[81] However, this remains a political decision for the legislative arm of government, thereby nullifying the criticism so often levelled at the United States and Canadian systems that courts are given too much power when human rights are codified.

None of these three important features of Victoria's *Charter* are modelled upon provisions of the ICCPR. Indeed, one would have to say that while the rights protected under Victoria's *Charter* draw upon the ICCPR, the principal mechanisms employed with respect to the manner of operation of the *Charter* are not derived from the ICCPR but are an amalgam of measures drawn from the United Kingdom, Canada, South Africa and New Zealand.[82]

The critical question to be asked, then, is whether any federal *Charter of Rights* could reproduce the mechanisms of operation to be found in the Victorian *Charter*? Given the background I've sketched, this question can be broken into two sub-questions: first, would the Commonwealth Parliament's reliance

78 *Charter* s 37.

79 *Human Rights Act 1998* (UK) s 10.

80 *Human Rights Act 2004* (ACT) s 37.

81 See House of Lords, House of Commons, Joint Committee on Human Rights, *Monitoring the Government's Response to Court Judgements Finding Breaches of Human Rights*, Sixteenth Report of Session 2006–2007 (18 June 2007), 40–52. See also Department of Constitutional Affairs (UK), *Declarations of incompatibility made under section 4 of the Human Rights Act 1998* <http://www.dca.gov.uk/peoples-rights/human-rights/pdf/decl-incompat-tabl.pdf> at 14 March 2008 and *Blackstone's Guide to the Human Rights Act 1988* (2007) 95–6.

82 The same is true of the ACT's *Human Rights Act 2004* (ACT) and the draft Western Australian Human Rights Bill, although the latter extended to the rights protected under the ICESCR.

upon the external affairs power bring with it any significant restrictions on what the Commonwealth could do? Secondly, are there any other constitutional constraints that might impinge on the enactment of a federal *Charter*?

Let me consider each of those two questions in turn.

V Does the Reliance on the External Affairs Power bring with it any Significant Restraints?

As I've mentioned, the external affairs power, s 51(xxix) of the Constitution, includes the power to implement international treaties in domestic legislation.[83] While it is clear that the Commonwealth Parliament could use the external affairs power to enact a federal *Charter of Rights*, the question arises whether the Parliament can selectively implement international human rights treaties, or whether, for instance, it would be obliged to implement the whole of the ICCPR. A related issue is the extent to which the Commonwealth would be constitutionally permitted to depart from the ICCPR in the sense of introducing mechanisms and measures that are not reflected in the ICCPR.

With respect to the partial implementation of international treaties, we can be clear. It has been apparent since the *Tasmanian Dam Case*,[84] that the Commonwealth can implement only part of an international treaty. The laws under attack in the *Tasmanian Dam Case* only partially implemented the World Heritage Convention and yet were upheld as valid.

A leading High Court case broadly to consider the treaty implementation aspect of the external affairs power, was the *Industrial Relations Act Case* in the 1990s.[85] The majority judgment[86] considered the question of partial implementation of treaty obligations and said:[87]

> It would be a tenable proposition that legislation purporting to implement a treaty does not operate upon the subject which is an aspect of external affairs unless the legislation complies with all the obligations assumed under the treaty. ... But the *Tasmanian Dam Case* and later authorities confirm that this is not an essential requirement of validity.

83 See *Tasmanian Dam Case* (1983) 158 CLR 1; *Victoria v Commonwealth* (1996) 187 CLR 416 ('*Industrial Relations Act Case*').

84 *Tasmanian Dam Case* (1983) 158 CLR 1.

85 *Victoria v Commonwealth* (1996) 187 CLR 416 ('*Industrial Relations Act Case*').

86 Comprised of Brennan CJ, Toohey, Gaudron, McHugh and Gummow JJ; Dawson J agreeing in the result.

87 *Industrial Relations Act Case* (1996) 187 CLR 416, 488 (footnotes omitted).

> In the *Tasmanian Dam Case*, the Wilderness Regulations that were under attack implemented only in part the supporting Convention. They were nevertheless upheld. ... Deane J dealt as follows with 'partial' legislative implementation:
>
> > 'It is competent for the Parliament, in a law under s 51(xxix), partly to carry a treaty into effect or partly to discharge treaty obligations leaving it to the States or to other Commonwealth legislative or executive action to carry into effect or discharge the outstanding provisions or obligations or leaving the outstanding provisions or obligations unimplemented or unperformed. On the other hand, if the relevant law "partially" implements the treaty in the sense that it contains provisions which are consistent with the terms of the treaty and also contains significant provisions which are inconsistent with those terms, it would be extremely unlikely that the law could properly be characterised as a law with respect to external affairs on the basis that it was capable of being reasonably considered to be appropriate and adapted to giving effect to the treaty.'

Thus, a valid Commonwealth law need not implement all the obligations in an international agreement providing that it is reasonably capable of being considered appropriate and adapted to implementing the relevant international agreement.[88] There must be a reasonable proportionality between the designated purpose or object of the law, viz the fulfilment of the treaty, and the means which the law embodies for achieving or procuring it.[89]

However, the law will not be supported by s 51(xxix) if the deficiency is so substantial as to deny the law the character of a measure implementing the international agreement because, for example, the law also contained significant provisions which were inconsistent with the terms of the treaty.[90]

This factor points to a crucial consideration in any federal *Charter of Rights*, namely, whether it must include the right to an effective remedy.[91] As noted, this right is not expressly included in the Victorian *Charter*. Would a federal *Charter* that sets out the rights contained in the ICCPR without providing for an effective remedy when those whose rights are violated, be, as Evatt and McTiernan JJ put it in *R v Burgess; ex parte Henry*, 'sufficiently stamped with the purpose of carrying out the terms of the convention'?[92] Or to use the standard test adopted by the High Court since the *Tasmanian Dam Case*, would a federal *Charter* absent a remedy clause, be reasonably capable of being seen as appropriate and adapted to giving effect to the treaty? The words

88 *Industrial Relations Act Case* (1996) 187 CLR 416, 487.
89 See *Tasmanian Dam Case* (1983) 158 CLR 1, 259.
90 *Industrial Relations Act Case* (1996) 187 CLR 416, 488.
91 ICCPR, article 2(3).
92 (1936) 55 CLR 608, 688.

of the test themselves indicate that the Court will give judicial deference[93] to Parliament in choosing the means of implementing treaty obligations, so long as those means remain consistent with the treaty itself.

Applying this test, we must consider how important the right to an effective remedy is in the context of the ICCPR, and therefore whether its omission would render a federal *Charter* invalid. An indicator of its centrality is that it is set out in article 2, following only after article 1 which sets out the rights of peoples to self-determination. Its centrality to the ICCPR was considered in New Zealand. The New Zealand *Bill of Rights Act 1990* (NZ) (BORA) was enacted in 1990 to implement New Zealand's obligations under the ICCPR. It does not expressly provide for any remedy to be given in the event of a breach. The lack of an express remedy clause has been held to leave 'unconstrained' the courts' ability to find suitable remedies for breaches of BORA.[94]

In *Baigent's Case*,[95] the New Zealand Court of Appeal considered the question of the obligations under the ICCPR and the availability of remedies under BORA, and determined that remedies appropriate to each circumstance may be given by the courts. The issue was directly addressed by Sir Robin Cooke, a jurist whom Michael Kirby has recognised as a kindred spirit.[96]

Sir Robin said:

> The New Zealand Act is '… To affirm New Zealand's commitment to the International Covenant on Civil and Political Rights'. By art 2(3) of the Covenant each state party has undertaken inter alia to ensure an effective remedy for violation … and to develop the possibilities of judicial remedy. … we would fail in our duty if we did not give an effective remedy to a person whose legislatively affirmed rights have been infringed.[97]

Justice McKay spoke in a similar fashion:

> One cannot see how rights can be protected and promoted if they are merely affirmed, but there is no remedy for their breach, and no other legal consequence. ... One of the obligations which the International Covenant places on the states parties is to ensure that an effective remedy is given to persons whose rights are violated. ... Parliament was content to leave it to the Courts to provide the remedy. The inclusion of a statement to that effect in the Act was unnecessary.[98]

93 For example, see *Industrial Relations Act Case* (1996) 187 CLR 416, 487; *Tasmanian Dam Case* (1983) 158 CLR 1, 259.

94 See Andrew Butler and Petra Butler, *The New Zealand Bill of Rights Act: A Commentary* (2005) 969 [26.6.1].

95 *Simpson v Attorney-General* [1994] 3 NZLR 667 ('*Baigent's Case*').

96 The Hon Justice Michael Kirby, 'Deep Lying Rights – A Constitutional Conversation Continues' *The Robin Cooke Lecture 2004* (Wellington, New Zealand, 25 November 2004).

97 *Baigent's Case* [1994] 3 NZLR 667, 676 (Cooke P).

98 *Baigent's Case* [1994] 3 NZLR 667, 717–8 (McKay J).

Justice Hardie Boys also referred to the right to an effective remedy under article 2 of the ICCPR and said 'I would be most reluctant to conclude that the Act, *which purports to affirm this commitment*, should be construed other than in a manner that gives effect to it.'[99] His Honour went on to consider jurisprudence from the United Nations Human Rights Committee, the Inter-American Court of Human Rights, the Privy Council, and the courts of India and Ireland, noting in each the centrality of the principle that 'every violation of an international obligation which results in harm creates a duty to make adequate reparation.'[100]

Justice Casey in *Baigent's Case* pointed to the significance of New Zealand's accession to the First Optional Protocol to the ICCPR which enables individuals to have access to the UN Human Rights Committee for violations of rights under the Convention where they have been unable to obtain a domestic remedy. He said, somewhat reflecting the observation made by Sir Anthony Mason and Justice McHugh I mentioned before, 'it would be a strange thing if Parliament... must be taken as contemplating that New Zealand citizens could go to the United Nations Committee in New York for appropriate redress, but could not obtain it from our own Courts.'[101]

In the face of international jurisprudence on the meaning and scope of the rights under the ICCPR, and the obligations imposed on ratifying parties, it seems likely that if a federal *Charter* was silent on the issue of remedies, it might – I say '*might*' and I am by no means categorical about this – but it might be inconsistent with the ICCPR and therefore not something that could reasonably be capable of being considered appropriate and adapted to its implementation. In short, it might be beyond Commonwealth power under s 51(xxix). If a federal *Charter* did contain a stand-alone cause of action with specified forms of relief, Parliament could, of course, maintain control of the range and scope of remedies available by expressly setting them out in the Act. It may well be that the appropriate forms of relief would be public law remedies (as usually favoured in the United Kingdom) rather than damages, which could in any event be capped.[102]

The other four discrepancies I mentioned between the ICCPR and the Victorian *Charter* (the inclusion of a reasonable limitations clause; the obligation on members of the legislature to prepare and table compatibility statements; the obligation of compliance on public authorities; and the conferral of

99 *Baigent's Case* [1994] 3 NZLR 667, 699 (Hardie Boys J) (emphasis added).

100 *Velasquez Rodriguez* (1990) 11 *Human Rights Law Journal* 127, 129, cited in the judgment of Hardie Boys J in *Baigent's Case* [1994] 3 NZLR 667, 699.

101 *Baigent's Case* [1994] 3 NZLR 667, 691 (Casey J).

102 With perhaps special provisions relating to representative proceedings.

power on the judiciary to make Declarations of Inconsistent Interpretation) do not, I think, place a similarly formulated federal *Charter* at any risk of such substantial deviance from the ICCPR as to deny the law the character of a measure implementing the international agreement. Each of those four measures would, I think, be properly viewed as no more than measures taken in good faith to give effect to Australia's international obligations.

However, these measures need to be assessed also against the presence of any specific constitutional constraints.

VI Are there any other Constitutional Constraints on the Enactment of a Federal Charter of Rights?

Might I turn then to the second critical sub-issue, viz whether there are any other constitutional constraints on the enactment of a federal *Charter of Rights* in addition to the limits arising from the need to derive support from a head of power?

I think there may be such additional constraints. One constraint would affect the coverage of a federal *Charter of Rights* and the other would affect the role of the courts.

In *Austin v Commonwealth*,[103] the High Court affirmed the *Melbourne Corporation* doctrine[104] as an implication drawn from the Constitution that the Commonwealth Parliament cannot pass a law which imposes a special burden on a State so as to impair the capacity of a State government to function as an independent polity. The doctrine has not been successfully applied on many occasions to invalidate a Commonwealth law. Nevertheless, were a federal *Charter* to seek to impose the obligation to prepare and table compatibility statements on members of State Parliaments across Australia, it is likely that the doctrine would have been breached. Furthermore, the limitation expressed in the *Melbourne Corporation* doctrine is also likely to have been exceeded were a federal *Charter* to seek to impose on State Ministers and on high level officers within the executive governments of the States an obligation to comply with human rights in their conduct and to take human rights into account in their decision-making.[105]

103 (2003) 215 CLR 185.

104 *Melbourne Corporation v Commonwealth* (1947) 74 CLR 31 ('*Melbourne Corporation*').

105 I am indebted to Ms Janine Pritchard, Senior Assistant State Counsel, State Solicitor's Office, Western Australia (who worked with the Consultation Committee for a Proposed WA Human Rights Act) for this observation.

A federal *Charter* may be limited in its coverage to imposing duties only on members of the Commonwealth Parliament for the making of compatibility statements. A federal *Charter* may also be limited in its coverage to imposing duties of compliance on Commonwealth departments, authorities and agencies.[106] It is an interesting consequence of these deep constraints that arise from federalism that a federal *Charter* would not render State human rights instruments redundant. For complete uniform and universal coverage throughout Australia there would be a need for genuine co-operation between the Commonwealth and the States which one would hope would be forthcoming.[107]

The final constraint is one that might affect the role of the courts. Those jurisdictions, such as the United Kingdom, in which the courts have been given the power to make declarations of incompatibility, are free of any constitutional inhibition about issuing advisory opinions. As I've mentioned, Declarations of Incompatibility – or as they are called under Victoria's *Charter*, Declarations of Inconsistent Interpretation – don't have the effect of invalidating a law but rather of declaring incompatibility by the courts and triggering an accountability mechanism by the executive. Some caution has been expressed that these declarations will be advisory only and not affect the determination of a 'matter'.[108] I have argued elsewhere, in the Monash University *Lucinda Lecture,*[109] that these declarations will only be made when the attempt to find a compatible interpretation – as was found in *Ghaidan's Case* – has been unsuccessful. This will only be where there is a justiciable controversy before the court, as an issue arising out of ordinary proceedings. There should thus be no concern about the absence of a 'matter' in federal jurisdiction.[110] There may, however, be cause for concern about the accountability mechanism triggered by a declaration of incompatibility and the question of which member of which executive – State or Commonwealth – is required to respond. However, these considerations may do no more than point to the confinement of a federal *Charter* to the federal sphere.

No doubt there will be much debate about all of these issues. I offer these comments as no more than food for thought. What perhaps is underscored

106 Ibid.

107 I note that as the problem of incomplete coverage does not stem from a lack of a source of power, it would not be resolved by a referral.

108 See Pamela Tate, 'Protecting Human Rights in a Federation' (2007) 33 *Monash University Law Review* 217, 233.

109 Pamela Tate, 'Protecting Human Rights in a Federation' (2007) 33 *Monash University Law Review* 217 (the Fifteenth Lucinda Lecture delivered at Monash University on 9 October 2007).

110 See *In re Judiciary and Navigation Acts* (1921) 29 CLR 257.

by a consideration of these issues is that an understanding of international and comparative human rights law is an important means of establishing an informed connection with other jurisdictions. As Michael Kirby has said, in reflecting upon his Bangalore conversion to the importance of international human rights norms:

> It is essential that judicial officers at every level of the hierarchy, and lawyers of every rank, should familiarise themselves with the advancing international jurisprudence of human rights; that the source material for that jurisprudence should be spread through curial decisions, professional activity and legal training; and that a culture of human rights should be developed amongst all lawyers and citizens of the Commonwealth. By no means is this a movement alien to the judicial function or the tradition which the judges of Australia and the other countries of the Commonwealth of Nations have inherited from Britain. Instead, it is the expansion throughout the world of basic ideas of justice and fairness which have been expounded with high intelligence and integrity throughout the eight century tradition of the common law to which we are privileged to be heirs.[111]

If there is to be a federal *Charter of Rights* it is a source of great regret that Justice Kirby will have retired from the High Court before he can guide its manner of operation.

111 Justice Michael Kirby, 'The Australian Use of International Human Rights Norms: From Bangalore to Balliol – A View from the Antipodes' (1993) 16 *University of New South Wales Law Journal* 363, 393.