youth affairs network qld

Submission to the National Human Rights Consultation Committee

June 2009

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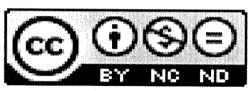

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About YANQ

The Youth Affairs Network of Queensland Inc. (YANQ) is the peak community youth affairs organisation in Queensland. YANQ represents young people and youth organisations across the State of Queensland. YANQ advocates on behalf of young people in Queensland, especially disadvantaged young people, to government and the community. The interests and well being of young people across the state are promoted by YANQ in the following ways:

- disseminating information to members, the youth sector, and the broader community
- undertaking campaigns and lobbying
- making representations to government and other influential bodies
- resourcing regional and issues-based networks
- consulting and liaising with members and the field
- linking with key state and national bodies
- initiating projects
- hosting forums and conferences
- input into policy development
- enhancing the professional development of the youth sector

Introduction

YANQ welcomes the establishment of a National Human Right Consultation which provides an opportunity for the community to share their views on human rights and how they should be promoted and protected in Australia. As an organisation that believes in the universality of human rights, YANQ advocates strongly for governments to do more to ensure the basic rights of all human beings are met in a modern society where inequalities are still prevalent. While the National Human Rights Consultation Committee's commitment to promote human rights is admirable, YANQ believes the limited terms of reference that restricts the human rights debate to the promotion of options that preserve the sovereignty of Parliament and excludes the possibility of a constitutionally entrenched Bill of Rights is not the best method to achieve the genuine protection of human rights in Australia. It is for this reason that YANQ has ignored the undue restrictions imposed by the terms of reference and has submitted a proposal that addresses the basic problems with a Federal Human Rights Act that aims to preserve parliamentary sovereignty by adopting a dialogue between the legislature and the judiciary currently enshrined in legislation in the United Kingdom, Victoria and the Australian Capital Territory (ACT). YANQ advocates an alternative model for the protection of human rights at a Federal level that overcomes the constitutional problems of a dialogue model and provides more a comprehensive protection of human rights in Australia.

Executive Summary

1. The adoption of a Human Rights Act based on a dialogue model in order to preserve parliamentary sovereignty is not the most comprehensive or effective method for protecting human rights in Australia.

2. Before any discussion can be proceed on the adoption of a Human Rights Act for Australia, there must be a willingness from government to take steps to initiate amendments to the Commonwealth Constitution to recognise the sovereign rights of Indigenous peoples to address past injustices and encourage reconciliation, which is a necessary first step towards effectively protecting human rights of the original inhabitants of this country.

3. Section 51(xxvi) of the Commonwealth Constitution must also be repealed and replaced by a non-discrimination and equality provision consistent with the purpose of a Human Rights Act.

4. All human rights listed within the International Covenant on Civil and Political Rights (IPCCR), the International Covenant on Economic, Social and Cultural Rights (ICESCR) and the Convention on the Rights of the Child (CROC) must be given legal effect within a Human Rights Act.

5. YANQ advocates protections for young people be provided in a Human Rights Act such as the non-compulsory right to vote and abolition of wage discrimination by requiring employers to pay the minimum wage regardless of age to give young people financial means to enable them to more fully participate in decisions that affect their lives as well recognise their value as equal citizens.

6. A Human Rights Act based on a dialogue model that empowers the High Court to make declarations of incompatibility between a law and a protected right is likely to be unconstitutional.

7. The doctrine of the separation of powers outlined in the Commonwealth Constitution limits the scope of the courts to interpret legislation under the dialogue model which may often result in a failure to protect human rights.

8. Apart from the abovementioned constitutional problems a Human Rights Act that does not give courts the power to invalidate legislation inconsistent with protected rights creates no remedies for aggrieved parties and as such is a deficient protection of human rights.

9. The preferred model for the protection of human rights is an amendment to the Commonwealth Constitution to enact a Bill of Rights encompassing all rights outlined in the IPCCR, ICESCR and CROC consistent with YANQ's advocacy of rights for young people

10. If there is a reasonable probability that a constitutional amendment to enact a Bill of Rights cannot be approved by referendum it is submitted that a Human Rights Act be enacted that empowers the court to hold that legislation inconsistent with human rights is invalid as the best available protection of human rights, dismissing a dialogue model for the protection of human rights that relies on the declaration of incompatibility mechanism

11. The effectiveness of a Human Rights Act is limited without a change in the political culture whereby human rights becomes an accepted norm in society so that the idea of infringing the basic rights of individuals is so abhorrent that governments and other organisations would not even consider enacting laws and policies that deviate from these protected values.

Full Submission

1. Proposed Human Rights Charter

1.1 YANQ believes the adoption of a Human Rights Act based on a dialogue model in order to preserve parliamentary sovereignty is not the most comprehensive or effective method for protecting human rights in Australia. We envisage a number of issues and deficiencies with the dialogue model currently utilised in the United Kingdom and in state legislation in Victoria and the ACT if adopted at Federal level that must be addressed to ensure the genuine protection of human rights in Australia.

2. Indigenous Rights

2.1 Before any discussion can proceed on the adoption of a Human Rights Act for Australia, there must be a willingness from Federal Government to take steps to initiate amendments to the Commonwealth Constitution to recognise the sovereign rights of Indigenous peoples to address past injustices and encourage reconciliation, which is a necessary first step towards effectively protecting human rights to provide justice to the original inhabitants of this country.

2.2 Ending the discrimination encountered by Indigenous peoples to allow them to be citizens on an equal footing with other Australians while preserving the distinctive ways of life for Aboriginal and Torres Strait Islander peoples cannot be achieved solely through the enactment of a Human Rights Act for Australia. While a commitment to protect Indigenous rights must be outlined in any Human Rights Act for Australia which would be a significant advance on the recognition of the rights of Aboriginal and Torres Strait Islander peoples, this alone is insufficient. A necessary step in the reconciliation process is to address the injustices of colonisation which was a violation of the rights of Indigenous peoples. The colonial occupation of this country based on the theory of *terra nullius* was illegal and the sovereign authority of the Australian Government was imposed on Indigenous peoples without their consent. To begin to make amends for this past injustice the rights of Indigenous peoples as the original inhabitants of this land must be recognised and celebrated.

2.3 One proposed method to protect Indigenous rights is through a constitutional amendment to the preamble. A supplement to the preamble that supports the sovereign rights of Indigenous peoples by explicitly stating the existence of the prior occupation and recognition of Aboriginal and Islander laws would be a significant first step towards reconciliation. Rather than dividing the nation as some critics have maintained a well-crafted addition to the preamble would provide a framework for establishing the basis of shared sovereignty to create a more unified nation built on respect. While amendment to the preamble has no legal effect and does not influence the interpretation of constitutional provisions it is an important symbolic step in the right direction towards creating a discussion on Indigenous rights within the community.

2.4 An amendment to the body of Commonwealth Constitution is also necessary to dispel the last remnants of the myth of *terra nullius* and entrench the foundations of Indigenous rights as currently recognised at common law. The landmark *Mabo* case rejected the principle of *terra nullius,* on the basis that Indigenous inhabitants were "too low in the scale of social organisation to be acknowledged as possessing rights and interests in land".[1] The Crown was deemed to have acquired radical title to regions of Australia but this did not constitute absolute beneficial ownership of the land, as the rights of the Indigenous peoples were not

1 *Mabo v Queensland (No 2)* [1992] 107 ALR 1, Brennan J pp 26-27

extinguished.[2] While the High Court did not decide to discuss the issue of sovereignty in the *Mabo* decision, the recognition of native title rights lends support to the claim that Indigenous peoples were sovereign at the time of settlement. An amendment to the Commonwealth Constitution is necessary to give effect to the change in common law in relation to *terra nullius* that entrenches native title rights and gives recognition of Indigenous sovereignty.

2.5 The approach taken by the Canadian Government with respect to the recognition of Indigenous rights provides a guide to what steps can be taken in Australia to better protect native title rights. The Canadian Government has taken a constructive and proactive approach to the preservation of Indigenous rights. At the end of the 1970's the Canadian Government invited Indigenous groups and associations to be part of a consultative process to implement constitutional reform resulting in amendments to Constitution to recognise Aboriginal rights.[3] The Constitution Act was passed in 1982 with section 35(1) stating that "the existing aboriginal and treaty rights of Aboriginal peoples of Canada are hereby recognised and affirmed".[4] A similar approach should be adopted in Australia to entrench indigenous rights in the Commonwealth Constitution.

2.6 While the situation in Australia differs from Canada because there is no existing treaty outlining Indigenous rights this does not preclude the possibility of some formal agreement being entered into between the Commonwealth and representatives of the Aboriginal and Torres Strait Islander peoples to establish future relations and rights. The Rudd Government has expressed its intention to establish a National Indigenous Representative Body which is a welcome step towards giving Indigenous peoples the power to negotiate with Federal Government over issues which affect their human rights. Once an appropriately funded and representative body for Indigenous peoples is established it is hoped that discussions could then focus on formulating a treaty or agreement with the Commonwealth over Indigenous rights that can be protected through constitutional amendment. A similar provision to that of section 35(1) of the Constitution Act in Canada could then be passed by referendum to give effect to the negotiated agreement and existing common law rights.

3. Section 51(xxvi) – races power

3.1 Section 51(xxvi) of the Commonwealth Constitution must also be repealed and replaced by a non-discrimination and equality provision consistent with the purpose of a Human Rights Act

3.2 Section 51(xxvi) is often known as the race powers as it allows Parliament to make laws with respect to "people of any race for whom it is deemed necessary to make special laws".[5] The original provision excluded the Aboriginal race from this power with the phrase "other than the Aboriginal race in any State" as Indigenous peoples were viewed as a dying race and of no importance to the Commonwealth.[6] This phrase was repealed by referendum in 1967 with 90.77% of the vote with the intention of empowering the Federal Government to make laws that would "secure the widest measure of agreement with respect to Aboriginal advancement".[7] While the intention of Parliament is admirable the provision itself is ambiguous as it does not require that special laws passed by the Federal Government must be beneficial to Indigenous rights. In fact, the ambiguity means that a government may decide that it is necessary to enact special laws for the Aboriginal race that are detrimental to their

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2 Ibid, Brennan J p 48

3 Scott, J, "A Political Dreaming: Our Place. Indigenous Aspirations for Constitutional Law Reform", Office of the Board of Studies NSW (http://www.abc.net.au/civics/teach/articles/jscott/scotthome.htm)

4 Constitution Act, 1982 (http://laws.justice.gc.ca/en/const/annex_e.html)

5 Commonwealth of Australia Constitution Act, section 51 (xxvi) (http://www.comlaw.gov.au/comlaw/comlaw.nsf/440c19285821b109ca256f3a001d59b7/57dea3835d797364ca256f9d0078c087/$FILE/ConstitutionAct.pdf)

6 Gardiner-Garden, J, Background paper 11 1996-97, The Origin of the Commonwealth Involvement in Indigenous Affairs and the 1967 Referendum (http://www.aph.gov.au/library/pubs/bp/1996-97/97bp11.htm)

7 Ibid

human rights. A more compelling argument for the repeal of section 51(xxvi) is that it is unacceptable for a modern liberal democracy to have a races power enshrined in its constitution especially in light of proposals to implement human rights protections in Australia.

3.3 It is recommended that the repealed section 51(xxvi) is replaced by a non-discriminatory or equality provision in the Commonwealth Constitution in line with the purpose of a Human Rights Act to allow all human beings equal entitlement to protected rights without discrimination of any kind. A constitutional provision which emphasises non-discrimination would more than likely succeed at a referendum due to the universal appeal of a national commitment to equality in line with Australia's egalitarian tradition.[8]

4. Human Rights protections

4.1 All human rights listed within the International Covenant on Civil and Political Rights (IPCCR), the International Covenant on Economic, Social and Cultural Rights (ICESCR), and the Convention on the Rights of the Child (CROC) must be given legal effect within a Human Rights Act.

4.2 As a signatory to the IPCCR, ICESCR, and CROC Australia has an international obligation to ensure all the rights within these agreements are enacted into law. YANQ does not prioritise certain human rights over others and believes that the protection of all political, economic, social and cultural rights are necessary in modern progressive societies like Australia. The implementation of a Human Rights Act that brings these covenants into legal effect will ultimately improve Australia's international standing as a country committed to decency and respect of all human beings as well as providing much needed protection for those without a voice, especially young people who are often denied the opporutnity to participate in decisions that affect their lives.

5. Additional rights for young people

5.1 YANQ advocates protections for young people be provided in a Human Rights Act such as the non-compulsory right to vote and abolition of wage discrimination by requiring employers to pay the minimum wage regardless of age to give young people financial means to enable them to more fully participate in decisions that affect their lives as well recognise their value as equal citizens.

5.2 Under Articles 12 and 13 of CROC the state "shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child" through freedom of expression which includes the "freedom to seek, receive and impart information and ideas of all kinds" giving impetus for a provision in the Human Rights Act to allow for the non-compulsory right to vote for 16 and 17 year olds[9]. The human rights of young people cannot be adequately protected without the Federal Government providing young people an opportunity to express their own political voice on issues that affect their everyday lives as well as their future The belief by older Australians that youth are apathetic to politics is misguided and it is anticipated that many young people would choose to assert their power at the ballot box if given the option.

5.3 For young people to be regarded as equal citizens within Australian society, the practice of wage discrimination must be abolished. If a talented and enthusiastic young person can

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8 Davis, M, "Indigenous Rights and the Constitution: Making the Case for Constitutional Reform", Indigenous Law Bulletin, June/July 2008, vol 7, p 8

9 Article 12 & 13 of Convention on the Rights of a Child (http://www.unhchr.ch/html/menu3/b/k2crc.htm)

perform a certain role to the same standard as an older employee there is no legitimate reason for paying them a lesser wage. Article 32 of the CROC compels states to "recognise the right of the child to be protected from economic exploitation", therefore it is important that the principle of "same wage, for same work" is protected in the Human Rights Act.[10] To ensure young people are not taken advantage of as a form of cheap labour, YANQ compels the Federal Government to enact legislation to abolish awards based on age discrimination to guarantee all young people are paid the set minimum wage, a right that must be enshrined in the Human Rights Act.

6. Constitutional Problems

6.1 A Human Rights Act based on a dialogue model that empowers the High Court to make declarations of incompatibility between a law and a protected right is likely to be unconstitutional.

6.2 There are possible constitutional problems surrounding a Human Rights Act for Australia which grants courts the power to issue declarations of incompatibility. The National Human Rights Consultation Committee emphasises the necessity of maintaining parliamentary sovereignty, rather than allowing courts to invalidate legislation which requires courts to make declarations of incompatibility between laws and protected rights, based on a 'dialogue' model for the protection of human rights found in the United Kingdom Human Rights Act 1998, the ACT Human Rights Act 2004 and the Victorian Charter of Human Rights and Responsibilities 2006. An issue over the constitutional validity of this provision arises for the proposed Commonwealth Charter of human rights that is not relevant for the state and territory legislation.

6.3 The Commonwealth Constitution incorporates the political doctrine of the separation of powers through the creation of three arms of government – the Parliament, the Executive and the Judiciary. Under Chapter III of the Commonwealth Constitution, the High Court is invested with judicial power over a range of what are known as "matters"[11]. A Commonwealth Human Rights Act which permits courts to issue a declaration of incompatibility to create a dialogue between the judiciary and legislative arms of government may be constitutionally invalid as it invests the High Court with non-judicial power. It is also debatable whether issues that arise under a Human Rights Act would constitute a "matter" as prescribed under Chapter III of the Constitution.

6.4 While there is no exhaustive definition of what constitutes judicial power under Chapter III of the Constitution, the High Court has found the "power to give a binding and an authoritative decision" to be a strong indication of judicial power.[12] A declaration of incompatibility currently used under the dialogue model in other countries is not binding on the parties to the proceeding and therefore does not appear to meet the requirements of a judicial power. As the High Court is prohibited from exercising non-judicial power under Chapter III of the Constitution, as part of the doctrine of separation of powers, the proposed declaratory mechanism would be unconstitutional.

6.5 The inability of the court to invalidate legislation incompatible with protected rights under a Human Rights Act also raises the question of whether these types of issues would constitute a "matter" within the meaning of Chapter III of the Constitution. The High Court has ruled that a "matter" does not extend to the offering of advice or opinion without "some immediate right, duty or liability to be established by the determination of the Court".[13] The issue of a

10 Article 32 of the Convention on the Rights of a Child (http://www.unhchr.ch/html/menu3/b/k2crc.htm)
11 Section 71, section 75 and section 76 of the Commonwealth of Australia Constitution Act (http://www.austlii.edu.au/au/legis/cth/consol_act/coaca430/s51.html)
12 *Huddart, Parker and Co Pty Ltd v Moorehead* (1909) 8 CLR 330 at 357
13 *In Re Judiciary and Navigation Acts* (1921) 29 CLR 257 at 265-266

declaration of incompatibility has the characteristics of an advisory opinion to government over the inconsistency of legislation with protected rights as it does not create any rights for litigants. If the making of a declaration of incompatibility constitutes an advisory opinion it does not fall within the definition of a "matter" under Chapter III of the Commonwealth Constitution, and the High Court therefore cannot be vested with the power to issue these declarations.

6.6 It has been argued by some commentators that a declaration of incompatibility is an exercise of judicial power as it creates binding obligations upon the Attorney-General and also meets the definition of a "matter" because it resembles declaratory relief where courts make judgments on whether State legislation is inconsistent with Federal laws.[14] Although these are valid arguments it is difficult to predict how the High Court would rule on the constitutional validity of declarations of incompatibility. It would be an unfortunate blow to the protection of human rights if a Human Rights Act was rendered impotent because a declaration of incompatibility provision is struck down as unconstitutional. Even if a declaration of incompatibility provision is upheld, a Human Rights Act consistent with the dialogue model fails to provide the fullest scope of protection for human rights in Australia.

7. Separation of Powers Problems

7.1 The doctrine of the separation of powers outlined in the Commonwealth Constitution limits the scope of the courts to interpret legislation under the dialogue model which may often result in a failure to protect human rights.

7.2 The strict separation of powers outlined in the Commonwealth Constitution places restrictions on the three arms of government by creating a system of checks and balances in the exercise of political power. The decision of our founding fathers to disperse power through the political process is instrumental to maintaining a robust democratic and accountable system of government but place limits on the courts not faced by countries without a written constitution such as the United Kingdom when interpreting legislation to protect human rights under the dialogue model.

7.3 The current Victorian and ACT human rights legislation requires that statutory provisions be interpreted in way that is compatible with human rights but is also consistent with the purpose of the legislation.[15] A Human Rights Act for Australia that attempts to provide a more comprehensive protection of human rights through a provision similar to section 3(1) of the Human Rights Act (UK) which gives courts the power to interpret legislative provisions "so far as it is possible to do so" in accordance with human rights, raises questions over the meaning of what is considered to be a "possible" interpretation of legislation within the power of the courts[16]. It can be argued that this phrase proscribes on the courts a far more radical power of interpretation which is a matter of constitutional significance for the doctrine of the separation of powers.

7.4 In the United Kingdom, section 3(1) has been criticised as being "dangerously seductive, for there is bound to be a temptation to apply the section beyond its proper scope and trespass upon the prerogative of Parliament in what will invariably be a good cause".[17] This is due to the ambiguity in the term "possible", which fails to outline the limits of the courts power in interpreting whether legislation is compatible with human rights creating a fine line between proper judicial review and improper legislative law-making. A review of judicial decisions

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14 Dominique Dalla-Pozza and George Williams, "The Constitutional Validity of Declarations of Incompatibility in Australian Charter of Rights" (2007) 12 *Deakin Law Review* 1-39

15 Section 32(1) Victorian Charter of Human Rights and Responsibilities 2007 and section 30 ACT Human Rights Act 2004

16 Charlesworth, H "Human Rights and Statutory Interpretation" in *Statutory Interpretation: Australian Approaches* (Federation Press), p 105

17 Debeljak, J "Parliamentary Sovereignty and the Dialogue Model under the Victorian Charter of Human Rights and Responsibilities: Drawing the line between Judicial Interpretation and Judicial Law-making", Monash Law Review, vol 33, no 1, p 32

involving application of the Human Rights Act in the United Kingdom shows that after an initial reluctance to give a broad definition to the word "possible" under section 3(1) of the legislation, the courts have become considerably more activist in determining human rights consistent legislation that blurs the boundaries between judicial and legislative powers.

7.5 In the case *R v A (No 2),* Lord Steyn stated that in applying section 3(1) of the Human Rights Act (UK) "it will sometimes be necessary to adopt an interpretation which linguistically may appear strained" which means that it may be necessary to read down legislative provisions or read in words to achieve compatibility with human rights.[18] This view was further supported in *Ghaidan v Gadin-Mendoza* [2004] 3 WLR 113 where Lord Nicholls stressed the judicial duty under section 3 of the Human Rights Act sometimes required the court to depart from the legislative intention of parliament as the insertion of the word "possible" into the provision required a "court to read in words which change the meaning of the enacted legislation" so that it was compliant with human rights.[19] In this case, Mr Gadin-Mendoza claimed a provision of the *Rent Act 1977* (UK) which allowed the "spouse" defined "as a person living with the original tenant as his or her wife or husband" to succeed the tenancy on the death of the original tenant was in breach of his human rights as it discriminated against same-sex couples.[20] The court had to determine whether the word "spouse" in the *Rent Act 1977* (UK) could be interpreted to include same-sex partners to allow it to be compatible with the Human Rights Act (UK) or whether a declaration of incompatibility should be issued. The House of Lords held that an "ordinary reading" of the term "spouse" covered only heterosexual couples but did not issue a declaration of incompatibility, stating that section 3 of the Human Rights Act allowed the court to read in additional words to make the legislation compliant with human rights so that the definition of "spouse" became "as *if they were* his or her wife or husband".[21]

7.6 The success of the dialogue model in the United Kingdom has been the courts willingness to assign a broad interpretation to what is deemed "possible" under section 3 of the Human Rights Act (UK) to hold parts of the legislation invalid and to reinterpret provisions to give effect to human rights. The English courts generally regard the making of a declaration of incompatibility as exceptional as demonstrated by the fact that in the first four years since the introduction of the Human Rights Act (UK) only 15 declarations have been issued.[22] It is debatable whether the High Court of Australia would be willing to take a similar approach in defining the term "possible" under a Human Rights Act that alters the plain-meaning of legislative provisions to give effect to human rights. This type of interpretation blurs the distinction between legislative and judicial powers and is unlikely to be applied in Australia which has a written constitution that explicitly outlines a strict separation of powers. The High Court would more likely limit their interpretation to that which is not inconsistent with the purpose of the legislation as outlined in the current human rights acts in Victoria and the ACT. This does not create a problem when the High Court can rule that the interpretation of legislation is compatible with human rights. The problem arises where the purpose of the statutory provision is incompatible with human rights. The High Court would have no option under the dialogue model but to issue a declaration of incompatibility as the Constitution prevents the courts from undertaking a more activist approach to the interpretation of human rights. The introduction of a dialogue model in Australia at a federal level would fail to provide the same level of protection of human rights as displayed in other countries such as the United Kingdom.

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18 Debeljak, "Parliamentary Sovereignty and the Dialogue Model under the Victorian Charter of Human Rights and Responsibilities: Drawing the line between Judicial Interpretation and Judicial Law-making", p 33

19 Charlesworth, H "Human Rights and Statutory Interpretation" in *Statutory Interpretation: Australian Approaches* (Federation Press), p 112

20 Debeljack, "Parliamentary Sovereignty and the Dialogue Model under the Victorian Charter of Human Rights and Responsibilities: Drawing the line between Judicial Interpretation and Judicial Law-making" p 36

21 Ibid, p 36

22 Ibid, p 61

7.7 The failure of the dialogue model is demonstrated when we examine a recent asylum seeker case to see whether the introduction of a Human Rights Act would have produced a result more favourable to the protection of human rights. In the case, *Al Kateb v Godwin* (2004) 219 CLR 562, the applicant was denied a protection visa by theCommonwealth as an asylum seeker and was subsequently imprisoned under the *Migration Act* 1958 which provides that "unlawful 'non citizens, will remain in detention until the occurrence of either one of three events – release from detention upon the grant of a visa, deportation or removal from Australia at their own request or upon rejection of their attempts to secure a visa".[23] When his visa application was denied and no country would agree to receive Al Kateb the case was brought to the High Court to object to his indefinite mandatory detention using the weight of international law to argue the protection of personal liberty was a fundamental freedom that prohibited arbitrary detention.[24] The High Court ruled that the consideration of international law was not relevant to this case as the statutory construction of the legislation clearly and lawfully permits indefinite detention until the applicant was removed from the country.[25]

7.8 It has been argued by many advocates of human rights that if the proposed Act had been enacted the outcome of this case would have been decided differently with the High Court required to interpret the issues consistently with human rights[26]. This proposition is open to debate as the strict separation of powers in the Constitution would more than likely restrict the High Court to an interpretation that was not inconsistent with the purpose of the legislation. It would be difficult to argue that the release of Al Kateb was consistent with the purpose of the *Migration Act* 1958 that explicitly authorises detention over allowing the applicant to live within the community until they are deported.

7.9 Even if the High Court did determine indefinite detention under the *Migration Act* 1958 was inconsistent with the Human Rights Act, if the court is only invested with the power to issue a declaration of incompatibility, this does not guarantee the applicant's release. A declaration of incompatibility would only require Federal Parliament to reconsider the provisions of the *Migration Act* 1958 inconsistent with human rights. Whether the Federal Government decides to amend the legislation to ensure it is consistent with human rights is completely within their control and unfortunately the history of the Howard Government's stance on human rights with respect to asylum seekers suggests that no changes would have been made to the detention policy even if accompanied by considerable public pressure. This case demonstrates a dialogue model for the protection of human rights in practice offers no further protection than currently provided by the law. This case is a prime example of the weakness of the proposed dialogue model of human rights, as the strict separation of powers outlined in the Constitution inhibits the courts ability to exercise legislative power like their United Kingdom counterparts, to reinterpret legislation to comply with human rights.

8. Additional problems with the proposed Human Rights Charter

8.1 Apart from the abovementioned constitutional problems a Human Rights Act that does not give courts the power to invalidated legislation inconsistent with protected rights creates no remedies for aggrieved parties and as such is a deficient protection of human rights.

8.2 If the court does not have the ability to strike down legislation inconsistent with human rights, the only possible remedy to the aggrieved party is an enforceable right to compel the Attorney-General to undertake his obligation to present the declaration to the Parliament and provide a written response as outlined in the dialogue model in the United Kingdom. There is

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23 Curtin, Juliet "'Never Say Never': Al-Kateb v Godwin, 2005, Sydney Law Review (http://www.austlii.edu.au/au/journals/SydLRev/2005/16.html)
24 Ibid
25 Ibid
26 Branson, Catherine Hon QC, "A Human Rights Act for Australia", 4 March 2009 (http://www.hreoc.gov.au/about/media/speeches/speeches_president/2009/20090304_HRA.html)

no right for the aggrieved party to obtain an injunction to stop a breach of their human rights with their fate at the behest of Parliament

8.3 The adoption of a Human Rights Act that fails to offer a remedy to an aggrieved party is in breach of Article 2(3)(a) of the ICCPR which provides that Australia as a signatory to the covenant must undertake "to ensure that any person whose rights or freedoms as herein recognised are violated shall have an effective remedy"[27] The declaration of incompatibility mechanism may often fail to provide any remedy, let alone an effective one.

8.4 It is anticipated that due to the separation of powers restrictions on the High Court in reinterpreting legislation consistent with human rights that a higher number of declarations of incompatibility will be issued than in the United Kingdom, which will impact on the legislative workload of Parliament. While the dialogue model for the protection of human rights in the United Kingdom places a strict time frame on the obligation of the Attorney-General to provide a written response to the declaration to the Parliament there is no mention of when the legislature is required to act on this response. The issue of human rights may be pushed to the back of the legislative agenda as a low priority which would result in lengthy and unreasonable delays for applicants awaiting some form of resolution.

8.5 Even in cases where declarations of incompatibility does result in Parliament amending certain legislation to bring it in line with rights under the dialogue model, this amendment does not offer a remedy to a person whose human rights have already been violated by provisions inconsistent with human rights, as the aggrieved person has no action to claim damages.

9. Constitutional Bill of Rights

9.1 The preferred model for the protection of human rights is an amendment to the Commonwealth Constitution to enact a Bill of Rights encompassing all rights outlined in the IPCCR, ICESCR and CROC consistent with YANQ's advocacy of rights for young people

9.2 A constitutional amendment to include a Bill of Rights is the preferred model to enshrine the protection of fundamental rights so that they cannot be amended arbitrarily by the government of the day. The protection of human rights should not be consigned in the same category of other types of legislation as human rights are not a privilege bestowed on citizens by Parliament but a right inherent in all people based on their virtue of being human, therefore it is imperative these rights be afforded the highest level of protection in Australia as possible through a constitutional Bill of Rights.

9.3 It is acknowledged that amendments to the Constitution are extremely difficult to achieve as it must be approved by an absolute majority in both Houses of Parliament as well as approval by referendum by a majority of electors nationwide in a majority of states[28]. In Australia's history only 8 out of 44 proposals have been approved but in recent times international developments may have changed the populations perspective about the need for comprehensive protection of human rights which would make constitutional amendment a viable option. In the wake of *September 11*, with the introduction of anti-terrorism laws people's awareness has been raised regarding the power of government to legislate to restrict the actions of ordinary citizens which may stimulate an urge for greater protection of human rights. There are still certain groups within Australian society however who seem determined to conduct a "scare campaign" over the protection of human rights by raising scenarios from United States involving the "right to bear arms" and other issues that would have little applicability to Australia's bid to protect human rights. These problems must be

27 Article 2(3)(a), International Covenant on Civil and Political Rights (http://www.unhchr.ch/html/menu3/b/a_ccpr.htm)
28 Chapter VIII, section 128 of the Commonwealth of Australia Constitution Act (http://www.austlii.edu.au/au/legis/cth/consol_act/coaca430/s51.html)

acknowledged however as they impact on the likelihood of a referendum being approved in Australia to constitutionally entrench a Bill of Rights.

10. Proposed model for human rights protection

10.1 If there is a reasonable probability that a constitutional amendment to enact a Bill of Rights cannot be approved by referendum it is submitted that a Human Rights Act be enacted that empowers the courts to hold that legislation inconsistent with human rights is invalid as the best available protection of human rights, dismissing a dialogue model for the protection of human rights that relies on the declaration of incompatibility mechanism.

10.2 Removing the declaration of incompatibility mechanism from a Human Rights Act for Australia would resolve the constitutional debate over the validity of the legislation and would also provide better protection of human rights within the limits of the doctrine of the separation of powers. Allowing the High Court to strike down legislation that is inconsistent with protected human rights gives citizens an immediate judicial remedy when their rights are infringed upon forcing the guilty party to act immediately to resolve the injustice.

10.3 A Human Rights Act of this nature will have a minimal impact on parliamentary sovereignty as it would comply with the intended purpose of the doctrine of the separation of powers which allows certain limitations of legislative actions as a necessary "check and balance" to prevent any arm of government from holding absolute and unrestrained power.

10.4 It is anticipated that a Human Rights Act, whilst not possessing the weight of a constitutionally enacted Bill of Rights, will over time become entrenched within the mindset of Australian society that no political party would risk amending or repealing the legislation for fear of a public backlash.

11. Effective long-term protection of human rights

11.1 The effectiveness of a Human Rights Act is limited without a change in the political culture whereby human rights becomes an accepted norm in society so that the idea of infringing the basic rights of individuals is so abhorrent that government's and other organisations would not even consider enacting laws and policies that deviate from these protected values.

11.2 To bring about a long-term change in the political culture amenable to the protection of human rights, the government must initiate a widespread education campaign starting in schools and extending throughout the community to provide information on the importance of human rights. Only through a commitment by both sides of government to supporting human rights and active steps to educate the public on the necessity of protecting fundamental rights will the basic dignity of all humans be celebrated within a tolerant, multicultural country like Australia.

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