13 The case against a Human Rights Act

Chapter 12 outlines the main arguments in favour of a Human Rights Act; this chapter outlines the main arguments against such an Act.

Again, the term 'Human Rights Act' is used to refer to the most commonly advocated model, which is loosely based on the human rights Acts adopted in the United Kingdom, the Australian Capital Territory and Victoria. A Human Rights Act of this kind would require that law makers and parliament consider how proposed legislation might affect rights, require government and public authorities to comply with human rights, and require courts to interpret legislation in accordance with human rights or issue a declaration of incompatibility if such an interpretation was not possible.

13.1 The level of community support

Considerable opposition to a federal Human Rights Act was apparent during the Committee's Consultation. It was expressed in community roundtables and submissions and is evident in the results of independent research the Committee commissioned. As noted in Chapter 12, of the 35 014 submissions the Committee received, 33 356 (95 per cent) discussed the option of enacting a charter of rights or a Human Rights Act. Of these, 29 153 (87.4 per cent) were in favour of this option, leaving 4203 (12.6 per cent) opposed to it.

The Hon. Bob Carr puts the case against an Australian Human Rights Act.

13.2 Arguments against a Human Rights Act

The adequacy of current human rights protections in Australia

One of the main arguments put forward against a Human Rights Act is that it is not necessary because Australia already offers adequate protection of human rights through democratic institutions, constitutional protections, specific legislation and the common law.

Consultation participants who were opposed to a Human Rights Act often emphasised their support for human rights protections in general.[1] For example, one participant in a community roundtable noted that it is quite possible to support human rights but be against the introduction of a Human Rights Act.[2] Senator George Brandis SC, the Shadow Attorney-General, made the same point at the public hearings.

Those who support this argument note that Australia has a historical tradition that differs from that in most countries that have introduced charters or bills of rights. For example, our nation was created without civil conflict.[3] Peter Heerey QC submitted, 'A striking feature of the Australian civic achievement is that, compared with most other countries, in our domestic polity very little blood has stained the wattle'.[4] This distinguishes Australia from countries in which democracy came about through wars of independence or dramatic constitutional upheaval: for them, a bill or charter of rights was an important reflection of new values and a new constitutional order. The main human rights–related victories in Australia have been achieved primarily through legislative and administrative decision making.[5] The Hon. Greg Donnelly MLC submitted:

> The human rights that are currently enjoyed by Australians have developed over time taking into account the country's unique history and a number of important influences including the common law, a comprehensive electoral system, local state and federal levels of government, an independent judiciary, operation of the separation of powers principle and a free press, just to name a few.[6]

This argument has it that the Australian legal framework contains adequate mechanisms for protecting human rights.[7] Australia's system of government—entailing representative democracy, federalism, the separation of powers and responsible government—functions to protect rights. Democratic institutions such as the Australian Human Rights Commission, the Commonwealth Ombudsman, the Privacy Commissioner, the Auditor-General and various tribunals, are charged with safeguarding human rights.[8] Australia's system of administrative law is well

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1 Al Tonking, Submission.
2 Melbourne (2), Community Roundtable.
3 G Brandis, 'The debate we didn't have to have: the proposal for an Australian bill of rights' in J Leeser and R Haddrick (eds), *Don't Leave Us with the Bill: the case against an Australian bill of rights* (2009), Submission, 17.
4 P Heerey, Submission.
5 B Galligan and T Moreton, 'Australian exceptionalism: rights protection without a bill of rights' in T Campbell, J Goldsworthy and A Stone (eds), *Protecting Rights Without a Bill of Rights* (2006) 19.
6 G Donnelly, Submission.
7 For example, J Hatzistergos, Submission; Australian Christian Lobby, Submission; Australian Chamber of Commerce and Industry, Submission; H Irving, Submission; F Costa, Submission; A Ewers, Submission; D Gates, Submission; D Hernandez, Submission; C Rodgers, Submission; P Cluff, Submission; see also Chapter 5.
8 See J Leeser, 'Responding to some arguments in favour of a bill of rights' in J Leeser and R Haddrick (eds), *Don't Leave Us with the Bill: the case against an Australian bill of rights* (2009), Submission, 55; H Irving, Submission.

equipped to protect rights[9], and a broad range of legislation (including anti-discrimination legislation operating at the federal and state and territory levels) promotes and protects human rights.[10] These rights are also protected by the Constitution and by the various common law presumptions that apply when interpreting legislation that might impinge on rights.[11]

The Australian Christian Lobby submitted, 'Australia's excellent human rights record shows that its approach to protecting human rights works well without a bill or charter of rights'.[12] Timothy Watson submitted, 'Human rights are very well safeguarded in Australia through our democratic system of government, independent judicial system, independent media and Human Rights Commission'.[13] The Shop, Distributive and Allied Employees' Association submitted, 'Australia, without a Charter of rights, enjoys the highest standard of freedom throughout the world'[14]; on this basis, the submission argued, 'Why should we risk a system that works effectively and where human rights are not breached?'[15]

At the public hearings the Commonwealth Ombudsman, Professor John McMillan, emphasised that Australia has a more comprehensive system of executive oversight than applies in most Western nations. He noted that in his experience the problems in government that result in human rights concerns are generally a consequence of wrongful administration of laws and policy—as opposed to bad laws and policy in the first place.

Submissions emphasised that there is little evidence of significant human rights abuses in Australia[16] and that 'ordinary Australians already enjoy rights and privileges equal to, or better than, countries with a Bill of Rights'.[17] It was argued that, in the few cases where there have been allegations of serious human rights violations, ordinary legal and parliamentary processes have produced a good result while ensuring flexibility for policy makers.[18]

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9 See J Leeser, 'Responding to some arguments in favour of a bill of rights' in *Don't Leave Us with the Bill*, Submission, 55–6; see also R Creyke, 'The performance of administrative law in protecting rights' in T Campbell, J Goldsworthy and A Stone (eds), *Protecting Rights Without a Bill of Rights* (2006) 101.

10 H Irving, 'A legal perspective on bills of rights' in *Don't Leave Us with the Bill*, Submission, 171–2.

11 See, generally, P de Jersey, 'A reflection on a bill of rights' in *Don't Leave Us with the Bill*, Submission, 10–13; H Irving, Submission.

12 Australian Christian Lobby, Submission.

13 T Watson, Submission.

14 Shop, Distributive and Allied Employees' Association, Submission.

15 ibid.

16 For example, C Schafer, Submission; R Mackie, Submission.

17 L Cook, Submission. See also K Budge, Submission; D King, Submission; A McGregor, Submission; R Moore, Submission; J Calvert, Submission; P Lucas, Submission.

18 J Leeser, 'Responding to some arguments in favour of a bill of rights' in *Don't Leave Us with the Bill*, Submission, 38; E Micklethwaite, Submission.

For example, Mohamed Al-Kateb was ultimately granted a visa, notwithstanding the High Court's decision.[19] Full, transparent and independent inquiries were held into the cases of Cornelia Rau, Vivian Solon and Dr Mohamed Haneef, and compensation was provided as appropriate.[20] Moreover, it is argued, there is no guarantee that a Human Rights Act would have prevented such incidents or offered a better outcome for those concerned.[21] Ian Tonking SC submitted, 'Many perceived wrongs occur because of ignorance or incompetence or neglect rather than as a result of any structural impediments to the exercise of "rights"'.[22] In his submission on behalf of the Federal Opposition, Senator George Brandis SC referred to these incidents, commenting:

> Although alleged threats to human rights have been the subject of political controversy in recent years (for instance, in debate over the anti-terrorism laws, the 'children in detention' issue and the Haneef case), arguments about the desirability of a bill of rights were not a significant feature of those political controversies.[23]

Similar views were expressed in community roundtables. One participant noted, 'I am tired of hearing Australians do nothing right. We do a lot right. We could learn and do more but we need recognition for what we do'.[24] Another roundtable participant said, 'We are one of the very few countries without [a Human Rights Act] and, compared to those that have one, we're doing very well. There are other countries that still have slavery, even though they have a bill of rights'.[25] Finally, it was observed in several community roundtables and many submissions that our rights are already sufficiently protected: 'If it ain't broke, don't fix it'.[26]

Undermining our tradition of parliamentary sovereignty

One prominent concern expressed was that a Human Rights Act would result in an unacceptable change in the relationship between the legislature and the judiciary, transferring power from the parliament (which is answerable to the community through the electoral process) to the judiciary (which is not).

The Hon. Greg Donnelly MLC submitted that a Human Rights Act would 'fundamentally alter the democratic dynamic that, while not perfect, has served this

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19 J Leeser, 'Responding to some arguments in favour of a bill of rights' in *Don't Leave Us with the Bill*, Submission, 37–8.

20 ibid. 39.

21 P Heerey, Submission; G Brandis, 'The debate we didn't have to have: the proposal for an Australian bill of rights' in *Don't Leave Us With the Bill*, Submission, 21.

22 AI Tonking, Submission.

23 G Brandis, Submission.

24 Brisbane (2), Community Roundtable.

25 Cronulla (1), Community Roundtable.

26 For example, Katherine, Community Roundtable; Bendigo, Community Roundtable; Melbourne (1), Community Roundtable; A Prentice, Submission; B Chant, Submission; S Jenkinson, Submission; A Hodge, Submission; J Goss, Submission; T Edwards, Submission; D Hernandez, Submission; A Laughton, Submission.

country well'.[27] Professor Tom Campbell and Dr Nicholas Barry emphasised the unrepresentative nature of judges, who are 'drawn from a narrow section of society and … do not represent the diverse range of reasonable views about human rights that exist in Australia'.[28] Colin Grant submitted:

> Our democratic political system seeks to ensure that the engine room of this country's values, freedoms and rights is the lounge room of the Australian home as citizens exercise their responsibility to think and decide, as a majority, on the shape and freedoms of this country. To adopt a Bill of Rights would radically shift the engine room from the lounge room to the courtroom, from the majority of Australians to the minority of a single judge.[29]

Requiring judges to make policy decisions

It is argued that the human rights set out in human rights Acts tend to be expressed in general terms, allowing greater scope for interpretation. 'Human rights' encapsulates a set of broad moral values, and, the argument goes, a Human Rights Act would require courts to make decisions about vague, open-ended and abstract propositions.[30] Many human rights, such as reproductive rights, sexual orientation rights and the right to life, rest on highly contentious values. A Human Rights Act would engage courts in the difficult exercise of balancing different rights.[31]

The contention is that the problem with a Human Rights Act lies in the very nature of what it asks judges to do.[32] The Hon. Malcolm McLelland QC described rights in a Human Rights Act as 'broad statements of abstract social values treated as rules of law' that tend to be couched in vague and general language.[33] Senator George Brandis SC, on behalf of the Federal Opposition, commented:

> Central to the Opposition's concern about bills of rights is that they inevitably import ideological and cultural agenda. [They] define a particular hierarchy of political values, which both purports to resolve contestable philosophical issues by favouring certain values over others (eg liberty over egalitarianism; communitarianism over private ownership), and universalizes the values of one particular time.[34]

The submission from Professor Tom Campbell and Dr Nicholas Barry also outlined some of the problems that arise from the abstract nature of rights: 'When judges apply these rights to complex cases, difficult and contestable decisions will have to

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27 G Donnelly, Submission.
28 T Campbell and N Barry, Submission.
29 C Grant, Submission.
30 For example, P Parkinson, Submission; M McLelland, Submission; G Brandis, Submission; T Campbell and N Barry, Submission; Seventh Day Adventist Church, Submission; Al Tonking, Submission.
31 P Heerey, Submission; Police Federation of Australia, Submission.
32 H Irving, 'A legal perspective on bills of rights' in *Don't Leave Us with the Bill*, Submission, 171.
33 M McLelland, Submission.
34 G Brandis, Submission.

be made about what specific rights should mean in practice, and how they are to be weighed against each other and other competing moral principles'.[35]

A particular concern arises in the case of courts being asked to make decisions about economic and social rights. Associate Professor Anne Twomey argued that this requires a court to make judgments about the value and effectiveness of government policy and the allocation of resources. She concluded that it is 'not [the court's] place to make a budget decision about whether to give priority to that particular cost above and beyond any number of other government priorities'.[36]

Transferring legislative power to unelected judges

Concern has been expressed that an obligation for courts to interpret legislation consistently with human rights will fundamentally change the way courts interpret legislation. Professor Tom Campbell and Dr Nicholas Barry argued that courts 'will assume that all Acts of Parliament are intended to be consistent with the bill of rights, and as a result, they will depart from their literal meaning, adopting creative interpretations to ensure that they cohere with the court's understanding of the bill of rights ...'[37] At the extreme, this could result in courts 'rewriting' legislation and usurping a role that should be left to parliament.[38] Ultimately, 'courts will steadily undermine the separation of powers by adopting the radical interpretive practices that arise from reading down provisions'.[39]

There was also concern that courts' declarations of incompatibility would convey the impression that governments are rights violators and courts are rights protectors, when the government might simply have a different interpretation of what rights mean in a particular context. Although a Human Rights Act might not technically undermine parliamentary sovereignty, parliament could be reluctant to exercise its authority when a declaration of incompatibility is issued.[40] New South Wales Attorney General the Hon. John Hatzistergos MLC submitted:

> Parliaments would face unacceptable political pressure from the judiciary. By declaring incompatibility with human rights, even when such a 'violation' is entirely practical, reasonable and necessary, or by invoking the interpretation division, democratically elected representatives are branded human rights abusers and held accountable to unelected appointees.[41]

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[35] T Campbell and N Barry, Submission.
[36] A Twomey, Submission.
[37] T Campbell and N Barry, Submission.
[38] J Allan, 'What's wrong about a statutory bill of rights' in *Don't Leave Us with the Bill*, Submission, 87. See also J Hatzistergos, Submission.
[39] T Campbell and N Barry, Submission.
[40] T Campbell and N Barry, Submission.
[41] J Hatzistergos, Submission.

A number of people who participated in community roundtables were anxious about the possible transfer of power to unelected judges.[42] One participant noted that—unlike politicians—'the judiciary is accountable to no one'.[43]

Politicising the judiciary

A further concern is that the open-ended and abstract nature of rights set out in a Human Rights Act would mean that judges were called on to make broad-ranging decisions in areas of social and economic policy. This would lead to politicisation of the judiciary, undermining public confidence in the independence of the courts.[44] In the words of Ryan Haddrick:

> The damage done to the judicial function of government, and the reputation of judges, by asking the courts to give meaning to the prevalent moral and political theories does nothing to protect human rights in the long run. The rule of law necessitates the protection of the separation of powers and, in particular, the judicial function.[45]

There was also concern that judges are unqualified to determine matters of economic and social policy and have no reliable way of gauging 'the will of the people'.[46] The Hon. Malcolm McLelland QC commented:

> Any increasing tendency for judicial decisions to be, or to be perceived to be, determined by judges' views on social policy, would result in a corresponding increase in pressure to select as judges those whose views on policy questions reflect the views of the selectors.[47]

No better human rights protections

It is argued that a Human Rights Act is an ineffective way to protect a community against government tyranny. Many submissions pointed to particular countries that have had a charter or bill of rights—including Zimbabwe and the former Soviet Union—and noted that these instruments failed to protect the population against human rights violations.[48]

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42 For example, Perth (2), Community Roundtable; Kalgoorlie, Community Roundtable; Melbourne (1), Community Roundtable.

43 Kalgoorlie, Community Roundtable.

44 J Howard, 'Don't risk what we have' in *Don't Leave Us with the Bill*, Submission, 67. See also M Tate, Submission; A Tonkin, Submission; H Irving, Submission; C Southwell, Submission; A Stone, Submission; R Mews, Submission; Australian Christian Lobby, Submission; D Pix, Submission; K Bartel, Submission.

45 R Haddrick, 'The judicature, bills of rights, and Chapter III' *Don't Leave Us with the Bill*, Submission, 168.

46 P de Jersey, 'A reflection on a bill of rights' in *Don't Leave Us with the Bill*, Submission, 8.

47 M McLelland, Submission.

48 For example, G Brandis, Submission; Australian Christian Lobby, Submission; Australian Chamber of Commerce and Industry, Submission; E Micklethwaite, Submission; A Ewers, Submission; J Ridd, Submission; M Court, Submission; S Smith, Submission; A Green, Submission; T Overheu, Submission.

In addition, there is concern that a Human Rights Act would not result in better laws. Rather than being motivated by good outcomes, parliament would become preoccupied with pre-empting negative judicial consequences or 'charter-proofing' legislation. Professor Tom Campbell and Dr Nicholas Barry submitted:

> The political review mechanisms will also become less effective, as governments focus on heading off criticism from the courts when formulating legislation. Instead of developing and defending their own approach to human rights, which may clash with judicial interpretations, the government will rely on advice from lawyers to anticipate how the courts are likely to interpret the bill of rights, and ensure that their legislation is in keeping with this.[49]

Alternatively, a Human Rights Act could allow parliament to abdicate its duty in relation to difficult policy questions, leaving these for the courts to decide.[50] This could lead to less legislative scrutiny and a weakening of the parliamentary role in protecting rights. Professor Patrick Parkinson submitted:

> Politicians often avoid controversial issues where the community is deeply split. If a position has been taken by some neutral decision-maker, that makes it easier to deflect the controversy. I mean no disrespect to politicians when I say that the political exigencies of the day may well lead politicians to avoid taking a position, or deferring to the neutral decision-maker, on the hard issues—especially in an election year.[51]

Senator the Hon. George Brandis SC puts the Opposition's case against an Australian Human Rights Act.

It is also argued that a Human Rights Act would not result in better government services and policies. Sir James Gobbo noted that the most obvious place to direct complaints about service delivery is to the provider of the service. Relevant case studies from the United Kingdom at best show that when unjust or unfair situations are brought to the attention of those in authority the response is generally positive.[52] There is a risk that a Human Rights Act would impose further costs on government agencies, which would be obliged to ensure that policies, programs and

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49 T Campbell and N Barry, Submission.

50 J Howard, 'Don't risk what we have' in *Don't Leave Us with the Bill*, Submission, 71; I Callinan, 'In whom we should trust' in *Don't Leave Us with the Bill*, Submission, 74.

51 P Parkinson, Submission.

52 J Gobbo, Submission; British Institute of Human Rights, *The Human Rights Act—changing lives*, 2nd edn, (2008).

actions were consistent with human rights[53] and to deal with costly claims about alleged violations of rights.[54]

It is argued that ordinary Australians would not benefit greatly from a Human Rights Act.[55] The South Australian Commissioner of Police submitted:

> It is inevitably the case that these instruments are devised to the advantage of perpetrators of crime, not the victims, and rarely does one see anything remotely like a right for people not to be the victim of crime or the right to be free from the criminal acts of others.[56]

Many submissions contended that a Human Rights Act would place an unwarranted focus on the rights of minority groups.[57] For example, Helen Louden submitted that a Human Rights Act is 'primarily a way for fringe groups to obtain power to promote their ideology'.[58] On the other hand, 'The only people to gain from a Charter of Rights will be lawyers'[59], who would profit from the fees it generates.

Finally, a Human Rights Act could create a false expectation on the part of the community that their individual grievances could be simply redressed through access to the courts and that their claims of denial or breach of rights would invariably be vindicated.[60]

Potentially negative outcomes for human rights

There is an argument that a Human Rights Act might actually limit human rights or lead to other negative outcomes for human rights protection.

First, it is said, the process of defining rights and including them in a Human Rights Act might limit rights. Exclusion of particular rights from the Act might leave those rights outside the reach of the Australian community or imply that they are not worthy of protection.[61] Senator George Brandis SC, on behalf of the Federal Opposition, submitted that, by identifying specific rights, a Human Rights Act 'declares that those identified rights have a certain status or privilege, which other putative rights, which are not recognized by the bill of rights, do not enjoy'.[62] A

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53 J Hatzistergos, Submission.
54 H Irving, Submission.
55 Human Rights Consultation Committee, *Rights, Responsibilities and Respect: the report of the Human Rights Consultation Committee (Victoria)*, (2005) 14–15.
56 Police Commissioner, South Australia, Submission.
57 For example, R Patterson, Submission; K Smith, Submission; H Newby, Submission; L Bagnall, Submission; R Mead, Submission; D Bernard, Submission; D Bell, Submission; E Nnadigwe, Submission; Z Wigmore, Submission.
58 H Louden, Submission.
59 P Uren, Submission.
60 H Irving, Submission.
61 P de Jersey, 'A reflection on a bill of rights' in *Don't Leave Us with the Bill*, Submission, 14; G Brandis, 'The debate we didn't have to have: the proposal for an Australian bill of rights' in *Don't Leave Us With the Bill*, Submission, 23.
62 G Brandis, Submission.

participant in a community roundtable expressed concern that some rights might be compromised by the express recognition of others.[63] In addition to this, it is argued that the very attempt to define human rights in a Human Rights Act could in fact limit the rights.[64]

The Hon. John Hatzistergos MLC argues against an Australian Human Rights Act.

A related consideration is that the human rights that are considered important today might not be important to future generations.[65] Ian Tonking SC submitted that a charter or bill of rights adopted at Federation would probably have included the White Australia Policy and excluded Indigenous Australians from participation in politics.[66] It has further been suggested that a static Human Rights Act could fail to embrace new, but equally fundamental, rights such as those relating to biotechnology and the human genome project.[67]

Second, there is concern that unintended or adverse consequences could flow from the protection of particular rights. For example, the Hon. Bob Carr, former Premier of New South Wales, has suggested that a right to property, combined with a conservative court, could prevent a government from stopping the clearing of native vegetation on farms or pockets of rainforest on private land.[68] The Shop, Distributive and Allied Employees' Association's submission expressed concern about the potential impact of a Human Rights Act on the activities of trade unions, stating it 'may very well promote a new set of standards where trade union activity is pitted against the right to privacy, or the right to free movement or the right to assembly'.[69]

A number of submissions identified apparently perverse court decisions resulting from the interpretation of human rights Acts in other jurisdictions. For example, it

63 Newcastle, Community Roundtable.

64 G Brandis, 'The debate we didn't have to have: the proposal for an Australian bill of rights' in *Don't Leave Us With the Bill*, Submission, 22.

65 P de Jersey, 'A reflection on a bill of rights' in *Don't Leave Us with the Bill*, Submission, 8–9; see also J Hatzistergos, Submission.

66 AI Tonking, Submission.

67 P de Jersey, 'A reflection on a bill of rights' in *Don't Leave Us with the Bill*, Submission, 8.

68 B Carr, 'Bill of rights is the wrong call', *The Australian*, 9 May 2009.

69 Shop, Distributive and Allied Employees' Association, Submission.

was noted that the Supreme Court of Canada has interpreted the right of freedom of expression as permitting tobacco advertising.[70]

One submission stated that a Human Rights Act has the potential to be exploited by religious groups wishing to introduce practices that discriminate against minorities or women.[71] For example, the Canadian Charter of Rights and Freedoms was recently relied on by a defendant to a charge of polygamy.[72]

Dr Gary Johns has suggested that a Human Rights Act could have negative implications for Indigenous Australians. In his view, such an Act, aided by international instruments, 'will undo the policy gains made in recent years in the Aboriginal policy area because the charter focuses the debate on processes not outcomes and on rights not on responsibilities'.[73]

Finally, it was suggested that, if courts are reluctant to issue declarations of incompatibility, a Human Rights Act could actually facilitate the violation of human rights. For example, if courts are 'too weak to stand up to governments on important issues such as national security … [that] may in fact undermine human rights by adding legitimacy to morally dubious policies'.[74]

Excessive and costly litigation

Opponents of a Human Rights Act say such an Act would result in a 'lawyers' picnic', in which the legal profession becomes the main beneficiary as a result of increased litigation, and would have an adverse impact on the court system.

First, introduction of the Act could lead to excessive litigation as a consequence of individuals and public interest groups seeking to challenge various forms of legislation and government policy as well as individual government decisions.[75] Alternatively, additional litigation could be generated by a desire to clarify the meaning and content of the general rights outlined in the Act or by people seeking to pursue what are essentially political agendas.[76] The additional litigation could lead to extra costs for government in responding to the various challenges and in administering the courts and could lead to delays in completing cases. The Hon.

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70 For example, H Irving, Submission; K Fong, Submission; P Campion, Submission; H Keech, Submission; D Jessen, Submission; S Potter, Submission. A subsequent amendment to the legislation, again restricting tobacco advertising, was upheld by the Supreme Court as constituting a reasonable limitation on the right to freedom of expression—NSW Bar Association, Submission.

71 Confidential, Submission.

72 B Hutchinson, 'Polygamy and the legal wrangling that surrounds it', *National Post*, 9 January 2009.

73 G Johns, 'A charter of rights will harm Aboriginal prospects' in *Don't Leave Us with the Bill*, Submission, 191.

74 T Campbell and N Barry, Submission.

75 For example, A Anderson, 'Solomon's heirs? Dissecting the campaign for judicial rule in Australia' in *Don't Leave Us with the Bill*, Submission, 108; M McLelland, Submission; W Hall, Submission; T Minchin, Submission; P Horton, Submission; T Edwards, Submission.

76 M McLelland, Submission.

John Hatzistergos MLC noted that, although the Victorian and ACT human rights Acts have not resulted in a flood of litigation, 'It is more difficult to quantify the court time dedicated to human rights arguments, which are very often used as auxiliary arguments, causing court cases to be prolonged'.[77]

A participant in one of the community roundtables asked, 'What type of society do we want to be? Do we want to be as litigious as the US? Or do we want to consider alternative systems of dispute resolution?'[78] Several participants were worried about the creation of a 'human rights industry'[79]; another was worried that a Human Rights Act would 'become a lawyers' picnic at great cost to the community'.[80] In the online forum John Smuts commented, 'The only group of people who will ultimately benefit if this bill were to be introduced would be lawyers'.[81]

Second, opponents foresee that a Human Rights Act could create uncertainty in the law, which would increase the difficulty and expense of obtaining legal advice, reduce the reliability of such advice, and increase the likelihood, volume, complexity and length of litigation. The Hon. Malcolm McLelland QC submitted, 'Legislation against which a bill of rights challenge might conceivably be mounted could never be treated as certain law unless and until such a challenge was actually made'.[82] In relation to workplace rights, the Shop, Distributive and Allied Employees' Association submitted that a Human Rights Act 'would most likely introduce a new layer of laws that would compromise and confuse existing laws and entitlements'.[83]

Third, if a Human Rights Act increases the time and cost of litigation, this could affect access to justice. Professor Helen Irving submitted that under a Human Rights Act 'the cost of litigation is commonly borne by the very individuals who are already disadvantaged, and whose expectation of success is (statistically at least) unlikely to be matched by reality'.[84] One participant in a community roundtable noted, 'It wouldn't help to have a right to go to court: we couldn't afford legal representation'.[85]

Finally, there was concern that a Human Rights Act could lead to an individualistic, litigation-focused culture. Donald McLellan submitted:

> The problem with such an emphasis on individual rights … is that the cultural balance shifts from the good of society as a whole, which may require the individual

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77 J Hatzistergos, Submission.
78 Sydney (1), Community Roundtable.
79 For example, Brisbane (2), Community Roundtable; Melbourne (3), Community Roundtable.
80 Melbourne (3), Community Roundtable.
81 J Smuts, Online forum.
82 M McLelland, Submission.
83 Shop, Distributive and Allied Employees' Association, Submission.
84 H Irving, Submission.
85 Mintabie, Community Roundtable.

> to accept a certain level of discomfort, to the good of the individual, which may be to the detriment of society generally.[86]

Democratic processes and institutions offer better protection of rights

It is argued that if any measures are needed to improve human rights protection in Australia they can and should be introduced through democratic processes and institutions and without the creation of a Human Rights Act.

The argument maintains that rights are best protected through a healthy democracy, a strong civil society and strong democratic institutions[87], and it is the customs, attitudes and culture of a people, as expressed through their institutions, that determine the strength of commitment to democratic values.[88] Parliaments are institutions designed for consultation and discussion about difficult policy matters, so any 'dialogue' about rights should ultimately be between elected representatives and their constituents.

Samantha Bryan submitted, 'Our elected politicians are the people to make decisions regarding the protection of human rights. We are able to change those politicians if we are not happy with their decisions'.[89] The Police Federation of Australia submitted, 'Striking the delicate balance between competing rights and responsibilities is something that should be the responsibility of democratically elected members of our Parliaments, not judges'.[90]

Any additional protection of rights should strengthen rather than undermine Australia's democratic institutions, it is said. There are many ways of doing this that do not involve the creation of a Human Rights Act. For example, Australia's existing human rights legislation could be evaluated in order to identify any gaps[91]; better targeted legislation dealing with human rights could be developed[92]; additional scrutiny of proposed legislation could be implemented[93]; better coordinated approaches to human rights protection could be achieved through the Standing Committee of Attorneys-General[94]; and the *Acts Interpretation Act 1901* (Cth) could be amended to require courts to interpret legislation in the light of specified rights.[95]

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86 D McLellan, Submission.
87 T Campbell and N Barry, Submission.
88 J Howard, 'Don't risk what we have' in *Don't Leave Us with the Bill*, Submission, 70.
89 S Bryan, Submission.
90 Police Federation of Australia, Submission.
91 J Leeser, 'Responding to some arguments in favour of a bill of rights' in *Don't Leave Us with the Bill*, Submission, 56–63.
92 J Hatzistergos, Submission; D Bayliss, Submission.
93 T Campbell and N Barry, Submission.
94 Law Institute of Victoria, Submission.
95 H Irving, Submission.

Finally, it was suggested that many claims of human rights abuse in Australia are to do with failures in bureaucratic processes, which can be redressed without a Human Rights Act. For example, in submissions and community roundtables concern was often expressed about the efficiency and effectiveness of government service delivery. Those opposed to a Human Rights Act contend that improvements in government services are best achieved through political leadership and attitudinal change on the part of those responsible for service delivery.[96] Ultimately, concerns about a government's performance in delivering services can be expressed at the ballot box. As Dr David van Gend submitted, 'It is up to the public to be energetic in holding MPs to account when they fail to do [justice] in their legislation (and so, through Australian history, unjust laws have been found wanting and duly rejected)'.[97]

A major economic cost

It is asserted that the economic costs of introducing a Human Rights Act would outweigh any particular benefits the Act might have to offer. The Hon. John Hatzistergos MLC submitted, 'The cost of this project to tax-payers is unacceptably high' and went on to cite some of the 'obvious costs':

> … research and formulation of the legislation and consequential amendments; administration costs (including funding and resources for organisations); compliance costs (training and monitoring public bodies subject to the Act); training for lawyers and judges; education for the public to avoid the misperceptions that plague the UK Act; and legal costs.[98]

The Victorian Government's submission provided some information about the costs of that state's human rights Act. In 2006–07, the government allocated $6.5 million for human rights initiatives over four years, to cover agencies such as Victoria Police, Corrections Victoria, the Department of Human Services, the Department of Justice and the Equal Opportunity & Human Rights Commission.[99] The government noted that under its devolved model the costs of meeting the charter obligations are spread across government.

As discussed in Chapter 1, the Committee commissioned The Allen Consulting Group to prepare a draft that would assist in evaluating the various options in terms of, among other things, their potential costs and benefits. The report noted that

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96 J Leeser, 'Responding to some arguments in favour of a bill of rights' in *Don't Leave Us with the Bill*, Submission, 33.
97 D van Gend, Submission.
98 J Hatzistergos, Submission
99 Victorian Government, Submission.

implementation of a Human Rights Act would generate specific transition costs as well as ongoing costs associated with new obligations.[100]

Unnecessarily legalised human rights

A number of commentators have expressed concerned that a Human Rights Act would 'take social and political questions and transform them into legal ones'.[101]

At the public hearings Professor Adrienne Stone pointed out that human rights are moral concepts about which we disagree and that, although a Human Rights Act would draw attention to the protection of rights, it would detract from healthy dialogue about rights. In particular, it would turn moral debates about rights into technical debates about statutory interpretation, undermining the potential for cultural change. A Human Rights Act would privilege a legal discourse about human rights.

The Commonwealth Ombudsman, Professor John McMillan, expressed similar concern. He noted that with a Human Rights Act the interpretation of rights becomes a task for lawyers and that, although lawyers can bring useful skills to human rights considerations, in his experience most human rights complaints can be resolved without the assistance of lawyers.

Associate Professor Simon Evans submitted that the greatest risk associated with a Human Rights Act:

> … is that the legal protections of human rights come to dominate the political, economic and cultural mechanisms for the protection of human rights—the public culture of human rights becomes subsumed within the legal culture, policy development is cowed by the courts' interpretation of human rights, legislatures automatically defer to legal interpretations of human rights. This would be a tragedy because the legal concept of human rights is just one concept and the legal mechanisms just one set of mechanisms for protecting human rights.[102]

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[100] The Allen Consulting Group, *Analysis of Options Identified during the National Human Rights Consultation* (2009).
[101] G Donnelly, Submission.
[102] S Evans, Submission.

13.3 Countering the arguments

Chapter 12 presents the case in favour of a Human Rights Act. A number of the arguments against such an Act, as just outlined, are, however, countered here in the following paragraphs.

First, in relation to the claim that a Human Rights Act would undermine parliamentary sovereignty by transferring power from the legislature to the judiciary, it is argued that this claim is particularly weak in the case of a legislative (as opposed to constitutional) charter of rights. In addition, the separation of powers under the Australian Constitution is designed specifically to allow the sharing of sovereignty, recognising the limits of majoritarian democracy and the benefits of an independent judiciary.[103] It is further contended that a Human Rights Act is not only consistent with democracy but 'should in fact strengthen democracy through the different and complementary roles played by the different arms of Government'.[104]

Additionally, under a Human Rights Act parliament can ignore or override decisions by courts and retains the power to amend the Act itself.[105] It is argued that executive governments and parliaments are unlikely merely to accept judicial decisions they consider to be untenable. Moreover, there is no evidence to suggest that the introduction of human rights Acts in the United Kingdom, the ACT and Victoria has resulted in politicisation of the judiciary.

Second, in relation to the claim that a Human Rights Act is ineffective against tyranny, it is argued that the strength of the rule of law and existing democratic institutions in Australia distinguish this nation from nations such as Zimbabwe and the former Soviet Union. No Human Rights Act—or constitution, for that matter—can protect rights if democratic institutions and the rule of law are not strong.[106] It is the breakdown of democratic institutions and the rule of law, rather than the failure of human rights instruments themselves, that results in violations of human rights. Proponents of a human rights Act acknowledge that such an Act alone will not solve all human rights problems, but they contend that it could build on existing protections—in particular, an apolitical, impartial and independent judiciary—and lead to improved government accountability.[107]

Third, in relation to the claim that a Human Rights Act would give privilege to some rights over others and would not be susceptible to change over time, it is argued that a Human Rights Act would be sufficiently flexible to adapt to emerging

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103 B Saul, Submission; C Brennan, Submission.
104 Australian Association of Women Judges, Submission.
105 Castan Centre for Human Rights Law, Submission.
106 J Burnside, Submission.
107 Australian Human Rights Commission, Submission; Victorian Equal Opportunity & Human Rights Commission, Submission.

needs.[108] A Human Rights Act would constitute an ordinary piece of legislation, so parliament could amend it at any time to incorporate new rights or remove existing rights. The Act could expressly state that the list of rights included in the Act is not exhaustive.[109]

Finally, in relation to the claim that a Human Rights Act would lead to excessive litigation, experience in the United Kingdom, the ACT and Victoria shows that the impact of such an Act on litigation is likely to be minimal.[110] The United States might not provide a useful comparison in this respect: it is an 'excessively litigious' society, that litigiousness being promoted by factors other than its constitutional Bill of Rights—such as large damages awards.[111] Over time, it is argued, a legislative Human Rights Act should in fact limit litigation because it helps to ensure that laws and policies comply with human rights in the first place.[112]

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108 Law Council of Australia, Submission; Australian Human Rights Commission, Submission; Human Rights Legal Resource Centre, Submission; Oxford Pro Bono Publico, Submission.

109 Australian Human Rights Commission, Submission.

110 H Charlesworth, A Byrne and R Thilagaratnam, Submission; Castan Centre for Human Rights Law, Submission; Human Rights Legal Resource Centre (Human Rights Act for All Australians), Submission; Oxford Pro Bono Publico, Submission; Liberty Victoria, Submission.

111 Castan Centre for Human Rights Law, Submission.

112 Human Rights Law Resource Centre (Human Rights Act for All Australians), Submission.