

Australian Parliaments and the Protection of Human Rights*

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This lecture draws on a research project, funded by the Australian Research Council, that we have been jointly engaged in since early 2004.¹ This is a work in progress and some of our conclusions are tentative. One aspect of the work is a series of interviews with parliamentarians, legislative drafters, committee staff and advisers to identify aspects of the existing processes that are not apparent from the public record. These interviews are ongoing and we would very much welcome the opportunity to talk with anyone who is able to contribute to this process. We anticipate publishing the further results of the project during 2007.

1.1 Two Problem Cases

Our topic today is Australian parliaments and the protection of human rights. We want to start by giving two examples of legislation passed by Australian state parliaments in the last two years that illustrate some of the limits of the parliamentary contribution to the protection of human rights.

Serious Sex Offenders Monitoring (Amendment) Act 2006 (Vic)

The *Serious Sex Offenders Monitoring (Amendment) Act 2006* (debated and passed by the Victorian Parliament in October 2006) amends legislation which was passed by

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the Victorian Parliament in 2005, to establish ‘a scheme for the extended post-sentence supervision of high-risk child-sex offenders in the community.’² The 2005 legislation empowers courts to make extended supervision orders, enabling strict monitoring of the location and behaviour of sex-offenders by the Secretary of the Department of Justice and the adult parole board for a period of up to 15 years after they have completed their sentence. Among its powers under the Act, the parole board can direct where a convicted offender is to reside.³

The 2006 amending legislation was prompted by the Supreme Court’s decision that it was unlawful for the adult parole board to direct Robin Fletcher (a convicted paedophile) to live within the grounds of the Ararat prison after he had completed his sentence. The purpose of the amendment was to ‘clarify that the adult parole board may impose residence requirements under an extended supervision order to direct an offender to reside at a place that is located within the perimeter of a prison, whether inside or outside the prison wall, but does not form part of the prison.’⁴

The amendment was ‘pushed through’ both houses of Parliament in a single day in the last sitting week before the 2006 election.⁵ The bill was characterised as an expression of the Parliament’s true intentions in drafting the 2005 legislation: ‘it restores the situation the government and all of the community wants to see exist.’⁶ During the course of the debate, the bill was not opposed by any speaker in either house, although some members argued for more drastic measures.⁷ The arguments presented in favour of the bill focused on the high rate of recidivism among sexual offenders,⁸ the need to protect the community,⁹ and, somewhat surprisingly, the rehabilitation of offenders.¹⁰

² *Victorian Parliamentary Debates*, Legislative Assembly, 3 October 2006, 3465 (Tim Holding, Minister for Corrections).

³ Section 16(3)(A).

⁴ *Victorian Parliamentary Debates*, Legislative Assembly, 3 October 2006, 3465 (Tim Holding, Minister for Corrections).

⁵ *Victorian Parliamentary Debates*, Legislative Council, 3 October 2006, 3801 (Peter Hall).

⁶ *Victorian Parliamentary Debates*, Legislative Council, 3 October 2006, 3801 (Chris Strong).

⁷ See e.g. *Victorian Parliamentary Debates*, Legislative Council, 3 October 2006, 3805 (Dianne Hadden): ‘This is another knee-jerk, half-baked bill, and it does not go all the way to protecting the community, which is the primary purpose of the Serious Sex Offenders Monitoring Act.’

⁸ ‘The changes in this bill are a reaffirmation of the Bracks government’s commitment to ensuring the highest levels of safety for Victorians while minimising the risk of recidivism by serious sex offenders.’ *Victorian Parliamentary Debates*, Legislative Council, 3 October 2006, 3803 (Jenny Mikakos); ‘I understand there is a high rate of recidivism amongst paedophiles. That is probably one of the more revolting offences that one can think of and is the reason we are moved to pass this sort of draconian legislation.’ *Victorian Parliamentary Debates*, Legislative Assembly, 3 October 2006, 3594 (Andrew McIntosh).

⁹ ‘... if the only practical solution to protect the community was to keep an offender in the precincts of a jail, then so be it, that should be the position.’ *Victorian Parliamentary Debates*, Legislative Assembly, 3 October 2006, 3594 (Andrew McIntosh).

¹⁰ ‘These purposes are to protect the community and promote the offender’s rehabilitation, care and treatment.’ *Victorian Parliamentary Debates*, Legislative Assembly, 3 October 2006, 3465 (Tim Holding, Minister for Corrections); ‘It will ensure that offenders who are subject to extended supervision orders can be properly rehabilitated and receive the treatment and supervision they require to allow them someday to re-enter society.’ *Victorian Parliamentary Debates*, Legislative Council, 3 October 2006, 3803 (Jenny Mikakos).

Some speakers referred to the rights of children and victims of sexual assault. The only substantial mention of the rights of the offender was offered by the Shadow Attorney-General, Mr McIntosh, who expressed concerns about the retrospective effect of the law, particularly in reversing the court's decision on the legality of the order made in relation to Mr Fletcher.¹¹ Notwithstanding his concerns, Mr McIntosh concluded that the amendment was necessary 'to effect what the community expected was going to be the case.'¹² The Minister for Corrections attempted to sidestep the retrospectivity issue by reference to the fact that the amendment was merely an expression of the law that Parliament had originally intended to enact—though that law could itself be seen as authorising a retrospective increase of the sentence imposed by a court.¹³

The Act may well be an appropriate response to a real risk. But what is striking is how it was debated in Parliament with scant attention to human rights issues. International human rights treaties recognise a right not to have a heavier penalty imposed than applied at the time that the offence was committed.¹⁴ That right is also recognised in the Victorian Charter of Human Rights and Responsibilities which comes into force on 1 January 2007.¹⁵ Only one member mentioned this issue, asserting that in the circumstances of Mr Fletcher, the extended supervision order did not constitute an additional penalty.¹⁶ The human rights of offenders, particularly notorious offenders, will always struggle for traction in political debate—particularly in the run-up to an election. But a commitment to human rights requires attention to the human rights of all—*especially* the unpopular and the marginalised. Explaining how and why this Bill was a justified limitation of human rights is as important in demonstrating a commitment to human rights as enacting a human rights Charter.

Law Enforcement Legislation Amendment (Public Safety) Act 2005 (NSW)

The Law Enforcement Legislation Amendment (Public Safety) Act 2005 (NSW) was debated and passed by the NSW Parliament as a response to the violence of the

¹¹ *Victorian Parliamentary Debates*, Legislative Assembly, 3 October 2006, 3595 (Andrew McIntosh):

Have no doubt what we are doing here. If a person has been to court, no matter if it happens to be someone as reprehensible as Mr Fletcher, that person has been to court and has had his rights declared, just as it is the right of any citizen to go to court to have those rights vindicated or declared by the court.

Notwithstanding that right being declared, we are introducing a piece of legislation that will deliberately quash those rights that have been declared by a court. It is a significant step and should not go without some sort of comment today.

¹² *Victorian Parliamentary Debates*, Legislative Assembly, 3 October 2006, 3595 (Andrew McIntosh).

¹³ *Victorian Parliamentary Debates*, Legislative Assembly, 3 October 2006, 3596 (Tim Holding, Minister for Corrections):

In a sense the legislation does not so much deprive someone of a previously existing right, although it deprives them of a right as declared by the Supreme Court, as assert the legal situation that the government thought existed anyway—that is, the right of the adult parole board to validly enact that as a condition of an extended supervision order. That is the reason why we have made this retrospective.

¹⁴ ICCPR Article 15; ECHR Article 7.

¹⁵ Section 27(2).

¹⁶ *Victorian Parliamentary Debates*, Legislative Assembly, 3 October 2006, 3595 (Jude Perera).

Cronulla riots.¹⁷ It was said to be necessary to increase police powers to enable them to ‘prevent or defuse a large-scale public disorder’.¹⁸ The bill contained provisions that gave the police powers to institute roadblocks and lockdowns.¹⁹ It also authorised police officers to impose emergency closures of licensed premises,²⁰ established emergency alcohol-free zones,²¹ increased the maximum penalties for the offences of assault,²² riot²³ and affray²⁴ and created presumptions against bail for a number of public disorder offences.²⁵

There was virtually no opposition to the passage of this legislation, particularly in the Legislative Assembly. Indeed, the majority of opposition MPs seemed to think that the bill did not go far enough.²⁶ The measures recommended by the opposition included: boosting police numbers to deal with ethnic crimes,²⁷ requiring everyone in a special zone to produce their identity upon demand by the police, the introduction of standard non-parole periods for riot and affray and laws targeting gang leaders.²⁸

Some dissent was voiced by minority parties in the Legislative Council. The Greens voiced concerns regarding both the speed at which the bill was being passed and its extension of police powers: ‘The bill is an ill-conceived and knee-jerk response. It is more about public relations than reality.’²⁹ The Democrats also questioned the necessity of the bill.³⁰

There was very little discussion of the rights impact of this bill. Although the police minister, Carl Scully, did acknowledge potential civil liberties concerns in general terms, he argued that the bill struck the appropriate balance between civil liberties and the protection of the community. He referred to oversight by the Ombudsman, the

¹⁷ See, e.g., *New South Wales Parliamentary Debates*, Legislative Assembly, 15 December 2005, 20632–3 (Barry Collier); 20621 (Morris Iemma); 20628 (Frank Sartor); 20622 (Morris Iemma); and 20626 (Carl Scully); *New South Wales Parliamentary Debates*, Legislative Council, 15 December 2005, 20582 (John Della Bosca).

¹⁸ *New South Wales Parliamentary Debates*, Legislative Assembly, 15 December 2005, 20621 (Morris Iemma). See also *New South Wales Parliamentary Debates*, Legislative Council, 15 December 2005, 20582–3 (John Della Bosca); 20584 (Duncan Gay); 20589 (Fred Nile); *New South Wales Parliamentary Debates*, Legislative Assembly, 15 December 2005, 20626 (Carl Scully); 20621–2 (Morris Iemma); 20625 (Carl Scully).

¹⁹ Law Enforcement Legislation Amendment (Public Safety) Bill 2005 (NSW) sch 1, ss 87I–87L.

²⁰ *Ibid.* sch 1, s 87B(1).

²¹ *Ibid.* sch 1, s 87C(1).

²² *Ibid.* sch 2, s 59A.

²³ *Ibid.* sch 2, s 93B.

²⁴ *Ibid.* sch 2, s 93C.

²⁵ sch 3, s 8D.

²⁶ *New South Wales Parliamentary Debates*, Legislative Assembly, 15 December 2005, 20623 (Peter Debnam); 20630 (Andrew Stoner).

²⁷ *New South Wales Parliamentary Debates*, Legislative Assembly, 15 December 2005, 20623–4 (Peter Debnam).

²⁸ *New South Wales Parliamentary Debates*, Legislative Assembly, 15 December 2005, 20626–7 (Andrew Tink).

²⁹ *New South Wales Parliamentary Debates*, Legislative Council, 15 December 2005, 20586 (Lee Rhiannon).

³⁰ *New South Wales Parliamentary Debates*, Legislative Council, 15 December 2005, 20591 (Dr Arthur Chesterfield-Evans).

bill's sunset provision and the limitation on the number of police that can exercise these powers, as elements of this balance.³¹ Democrats member, Dr Arthur Chesterfield-Evans noted the potential of the enhanced police powers to violate civil liberties, however, he did not discuss the rights impact of these provisions in any detail.³² Greens member, Ian Cohen, was the only member to identify specific human rights that would be (or might be) infringed by the bill.³³

As with the Victorian Act, this Act may well be an appropriate response to a real problem. But again, the attention given to human rights issues does not appear to be proportionate in its specificity and depth to the seriousness of those issues.

1.2 Australian Parliaments and the Protection of Human Rights

Is that something we should expect? Why should proportionate attention to human rights be something that we expect of Australian Parliaments?

Human Rights Matter to Australians

Human rights are a standard that ordinary Australians believe to be relevant in judging Australian society and its constitutional arrangements.

In one study carried out by Mike Salvaris, respondents were asked to rate the importance of various indicators of what makes a good society. The indicators ranked most highly were the observance of high standards in public life, equal and fair treatment under law and that 'basic human rights of all citizens [are] strongly protected.'³⁴ When asked what were the most important things that should be in the *Australian Constitution*, the most highly ranked answer was that the *Constitution* should 'define and guarantee the basic human rights of all Australian citizens.'³⁵ They also thought that the *Constitution* should protect right to public health and education and the right to an electoral system in which votes are weighted equally.

A survey conducted by Brian Galligan and Ian McAllister in 1991 (some years ago now) also found strong popular support for an Australian bill of rights entrenched in the *Constitution*. This support was associated with a significant degree of popular concern that rights are not well protected in Australia.³⁶ This survey also found a sharp divergence between the popular views and those held by legal and political elites. Fifty-four per cent of Australians felt that their rights *were not* well protected

³¹ *New South Wales Parliamentary Debates*, Legislative Assembly, 15 December 2005, 20626 (Carl Scully).

³² *New South Wales Parliamentary Debates*, Legislative Council, 15 December 2005, 20593 (Dr Arthur Chesterfield-Evans).

³³ *New South Wales Parliamentary Debates*, Legislative Council, 15 December 2005, 20602 (Ian Cohen).

³⁴ Mike Salvaris, 'Community and Social Indicators: How Citizens Can Measure Progress' (2000) Institute for Social Research, 32, 36
<http://web.archive.org/web/20040306083953/http://www.sisr.net/programcsp/published/com_socind.PDF> at 4 July 2005 (copy on file with authors).

³⁵ Mike Salvaris, 'Making Our Own Paths to the Future: Strategies for Citizenship, Democracy and Progress in WA' (Paper presented at WA 2029 Conference, Perth, November 2004).

³⁶ Brian Galligan and Ian McAllister, 'Citizen and Elite Attitudes Towards an Australian Bill of Rights' in Brian Galligan and Charles Sampford (eds), *Rethinking Human Rights*. Leichhardt, NSW, Federation Press, 1997, pp. 144–145.

against unfair government action whereas significant proportions of lawyers and legislators felt that rights *were* well protected (65 and 79 per cent respectively).³⁷ A majority of legislators also believed that parliament, rather than the courts, should retain responsibility for rights protection.³⁸

A recent survey conducted by Amnesty International revealed that Australians greatly value human rights but have a poor understanding of the extent to which their rights are protected under Australian law. Ninety-five per cent of those surveyed stated they considered rights to be important or very important.³⁹ (61 per cent mistakenly believed Australia has a Bill or Charter of Rights.)

Parliaments Are Important to the Overall Protection of Human Rights

How then should Australian institutions give effect to this desire to protect human rights?

- We already have a rich suite of institutions and mechanisms for protecting human rights. These include:
- Independent and impartial courts that uphold the rule of law
- Anti-discrimination legislation enforced by equal opportunity commissions and tribunals at national, state and territory levels
- Freedom of information legislation that ensures that citizens and others have access to information about government conduct that breaches human rights
- Ombudsmen
- A free press and active civil society.

None of these mechanisms is perfect; all can be improved. But today our focus is on Australian Parliaments.

Legislatures perform several distinct functions:

- They are representative bodies providing a mechanism by which citizens participate in public affairs and government
- They are forums in which governments can be held accountable for their conduct
- They debate, amend and enact legislative proposals that become laws.

In discharging each of these functions they can affect the enjoyment of human rights. Our particular focus is on this last, law-making, function. This is because of its significant and direct effect on human rights. The laws that Australian Parliaments enact are regularly enforced and its human rights impact is felt by citizens and others. Moreover, unlike other institutions, legislatures are able to be proactive in seeking to protect rights rather than having to wait for a violation of rights to take place. The best rights-protection *prevents* abuses of rights rather than redresses, annuls or punishes violations.

³⁷ Ibid. p. 147.

³⁸ Ibid. pp. 145–7.

³⁹ Roy Morgan Research, 'Anti-Terrorism Legislation Community Survey' (Paper prepared for Amnesty International, Queensland, 10 August 2006), p. 5.

Parliaments also have a wider range of options open to them in pursuing the protection of rights than do courts. While a court or tribunal may find that workplace discrimination on the basis of sex is unlawful, it cannot set up an investigation into systemic causes of discrimination against women, nor fund non-discrimination education programmes for employers, nor create advertising campaigns to encourage girls to enter non-traditional employment for women, nor provide for better child-care facilities.

There is another reason to focus on legislatures when considering human rights.⁴⁰ Human rights are inherently controversial. Everyone has a stake in that controversy and an equal right to participate in it. Human rights should therefore be the subject of democratic deliberation in legislatures rather than legal-technocratic assessment by courts. Take freedom of speech for example. Almost all Australians would agree that freedom of speech is a good thing and a basic right in a democratic country. Almost all would agree that parliaments should not unreasonably limit freedom of speech. And yet there is intense disagreement about how that principle should be applied. One recent example is legislation prohibiting religious vilification.⁴¹ Proponents of such legislation, including the Victorian government, regard it as entirely consistent with freedom of speech – a limitation of the right that is justified by the need to protect freedom of religion and the right of victims of vilification to participate on equal terms in society. Opponents, including many religious groups, are equally strongly of the view that the legislation is harmful and unjustified.

Some of these disagreements reflect factual disagreements: for example, about the *effects* of vilification. Others reflect disagreements about *values*: how important religious freedom is, for example. And these disagreements extend right across the domain of human rights, even in relation to rights that some people regard as absolute and that are identified as such in international law—some people argue that torture is never justified and is always a breach of human rights; others argue that it can sometimes be justified.

It is quite possible that in each case there is no fact of the matter, no single right answer, or at least no right answer that we can identify unequivocally. Disagreement is an inevitable part of life and politics; consensus is rare. It is best that disagreements be resolved by institutions that represent (however imperfectly) the people rather than by non-representative institutions (such as courts) when we have no reason to believe that those institutions would be any better at identifying the right answer to these disagreements.

⁴⁰ These arguments are developed, for example, in Jeremy Waldron, 'A rights-based critique of constitutional rights' (1993) 13 *Oxford Journal of Legal Studies* 18.

⁴¹ For an analysis of how such legislation was debated in an Australian parliament, see Simon Evans and Carolyn Evans, 'Parliamentary Deliberation about Religious Vilification Legislation' in Katherine Gelber and Adrienne Stone (eds), *Hate Speech and Freedom of Speech in Australia* (forthcoming 2007).

1.3 How the Legislative Process Considers the Human Rights Implications of Legislative Proposals

It is therefore important to know how parliaments consider human rights issues and how often parliaments enact laws that affect human rights. Is the parliamentary treatment of the two acts that we described at the beginning of this lecture typical?

Pre-Legislative Scrutiny

First we need to take a step back and look at how legislation comes to the parliament.⁴² Most often, of course, policy is developed in government departments, put in legislative form by the Office of Parliamentary Counsel and its analogues, approved by cabinet at the policy and/or legislation stage, and then introduced into the parliament by the government.

At present in Australia, there are very few mechanisms that enable systematic consideration of human rights issues during the policy development and approval process. Only in a handful of jurisdictions is there any legislative requirement that officials or ministers consider rights issues at the policy formation or approval stages, at least in relation to primary legislation.⁴³

For example, at commonwealth level, cabinet approval *is* required for any significant policy proposal that is politically sensitive or involves significant expenditure or revenue changes.⁴⁴ But policy proposals that have a human rights impact are *not* singled out for detailed Cabinet consideration. Outside the ACT, and from 1 January 2007 Victoria, and to some limited extent Queensland there is no human rights parallel to the Regulatory Impact Statement process required for laws affecting competition and business.

At Commonwealth level again, there are limited requirements for consultation within government (not publicly), on rights issues at the legislative drafting stage; but not at the earlier policy formation stage when it would be more useful.⁴⁵ For example, the *Commonwealth Legislation Handbook* requires that the Attorney-General's Department 'be consulted on proposed provisions that may be inconsistent with, or contrary to, an international instrument relating to human rights' and notes

⁴² For more detail, see Simon Evans, 'Improving human rights analysis in the legislative and policy processes' (2005) [2006] 29 *Melbourne University Law Review* 665.

⁴³ In relation to secondary legislation, drafters in some states are required to take rights issues into account: see, e.g., *Subordinate Legislation Act 1994* (Vic) ss 21(1)(f)–(g). Cf *Legislative Instruments Act 2003* (Cth) ss 16–17.

⁴⁴ Department of the Prime Minister and Cabinet, *Commonwealth Legislation Handbook* (1999, updated as of May 2000) [4.5].

⁴⁵ The government rejected Democrat amendments to the Legislative Instruments Bill 2003 (Cth) that would have required rule-makers to undertake appropriate consultations with experts and affected persons when proposed delegated legislation would affect human rights, civil liberties, the environment and other interests of the community: *Commonwealth Parliamentary Debates*, House of Representatives, 3 December 2003, 23 647–9 (Philip Ruddock, Attorney-General). *The Legislative Instruments Act 2003* (Cth) as enacted does not require consultation but only recommends it; second, it only does so when delegated legislation would affect business or restrict competition: see *Legislative Instruments Act 2003* (Cth) ss 17–19.

specifically the *International Covenant on Civil and Political Rights* (ICCPR)⁴⁶ and the ‘instruments dealing with discrimination on the ground of sex, race or national or ethnic origin’ as set out in the Schedules to domestic legislation.⁴⁷ But as is clear from this description, the requirement is limited in scope and does not erect a formal human rights hurdle that all legislative proposals must clear.

Ministers can ask HREOC to examine bills to ascertain whether they would be inconsistent with human rights but this intervention is ad hoc and requires the initiative of government. (HREOC can, of course within the limits of its resources, make submissions to government and parliament about bills.)

In short, as a New South Wales Parliamentary Committee observed, ‘Legislation is prepared within bureaucracies without any measurement against human rights standards.’⁴⁸

Legislative Scrutiny

When bills reach the Parliament there is some human rights scrutiny but it is ad hoc and unsystematic and as a result is highly variable in its scope and intensity.

As part of our project, research fellow Leanne McKay analysed the human rights profile of the bills introduced into several Australian parliaments over a three year period (2001–2003). Here we sketch some results of our initial analysis of the data for the Commonwealth Parliament (figure 1).

First, it is important to note that the overwhelming majority of the bills introduced in each of these years did not limit rights contained in the ICCPR and did not set out to protect rights contained in the ICCPR (We did not attempt to judge whether the limits were justified—just whether the rights were engaged or protected). Around 10 to 15 per cent of bills in any year burdened ICCPR rights; about the same number protected ICCPR rights. Some bills of course limited some rights and protected others (e.g. the Racial and Religious Hatred Bill 2003 and the Sexuality Anti-Vilification Bill 2003).

Figure 1

	bills considered	Burden human rights		Protect human rights		Burden and protect human rights	
		considered	enacted	considered	enacted	considered	enacted
2001 ⁴⁹	179	15	10	13	2	9	7
2002	259	24	19	17	13	6	6
2003	184	24	15	14	2	8	3

⁴⁶ Opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) (‘ICCPR’).

⁴⁷ Department of the Prime Minister and Cabinet, above note 44, [6.34].

⁴⁸ Standing Committee on Law and Justice, Legislative Council, Parliament of New South Wales, *A NSW Bill of Rights*. 2001, p. 115.

⁴⁹ The figures in this table are indicative—we have yet to review the data and finalise the figures.

What one would hope for is that:

1. legislators accept that human rights constrain legitimate political action
2. legislators consider a broad range of rights implications of legislative proposals—not just a narrow set of human rights
3. legislators consider the rights implications of the specific provisions of legislative proposals—not just the rights implications of the broad legislative policy
4. legislators consider the evidence that is relevant to deciding whether limitations on rights are justified and in short give attention to human rights issues that is proportionate to the gravity of those issues. It would be a mistake to expect this of any one aspect of the parliamentary process. But it seems a reasonable thing to expect of the process as a whole.

Our study has revealed that human rights issues are considered to some extent by Explanatory Memoranda, Scrutiny Committee Reports and parliamentary debate in one-half to two-thirds of the cases in which legislative proposals burden ICCPR rights:

Figure 2

	Bills that burden human rights—issue noted in:			
	Explanatory memorandum	Scrutiny committee report	Minister's response to scrutiny report	Parliamentary debate
2001 (24)	14	16	0	10
2002 (30)	20	19	3	17
2003 (32)	15	17	1	23

Parliamentary Committees

The Senate Scrutiny of Bills Committee is the prototype for several Australian state parliamentary committees that consider some rights implications of legislative proposals. It considers (among other things) whether bills trespass unduly on personal rights and liberties. It comments on one-half to two-thirds of the ICCPR issues raised by legislative proposals. It, and to an even greater extent its counterpart delegated legislation committee, are sometimes able to secure amendments to legislation to better secure protection of some rights and liberties.⁵⁰ But its approach is narrowly focussed on civil liberties issues and its coverage is far from complete. Consider two examples from 2003.

⁵⁰ As a Senate *Procedural Information Bulletin* recently noted: 'The contribution of committees to amending bills is not always acknowledged, particularly when amendments are made in the House of Representatives, and is not always obvious. Often amendments arise from committee reports without the precise wording recommended by the committees being adopted.' (No. 206 for the Sitting Period 9–19 October 2006, 20 October 2006.)

The Protection of Australian Flags (Desecration of the Flag) Bill 2003 was introduced by Mrs Draper as a private member's bill. The Scrutiny of Bills Committee summarized the effects of this bill: 'The bill applies criminal sanctions against a person who desecrates or otherwise dishonours or, without legal authority, burns, mutilates or otherwise destroys the Australian National Flag or an Australian Ensign.' The bill clearly engages the right to freedom of expression and there is room to debate whether it is a justified limit on that right. Similar debates have taken place in other countries, including the USA and New Zealand. But the Scrutiny of Bills committee expressly declined to comment on the bill.⁵¹

Now, there might have been good reasons for not reporting on this bill. The Committee has limited resources, both time and human capital. It might make a strategic decision not to report at length on a private member's bill that has limited chances of obtaining time for debate and more limited chances of being passed. Nonetheless, it is striking that there isn't even a one sentence report of the kind commonly made, drawing the restriction on freedom of expression to the attention of the Senate for its consideration.

Another striking example is the ASIO Legislation Amendment Bill 2003 which (among other things) required persons in relation to whom a questioning warrant under s 34D of the *Australian Security Intelligence Organisation Act 1979* (Cth) was issued to surrender their passport and prohibited them from leaving Australia.⁵² This engages the right to freedom of movement under international human rights law. The Scrutiny of Bills Committee commented on a strict liability provision in the Bill but did not mention the freedom of movement issue.⁵³ Government and Opposition speakers addressed a discrimination issue (potentially longer questioning periods when an interpreter was used)⁵⁴ but only a Greens member noted the freedom of movement issue, relying on published comments by an international law academic.⁵⁵ The Committee's analysis of civil liberties and parliamentary and judicial control of administration is a strength; but it leaves significant gaps in coverage of even civil and political rights, let alone economic, social and cultural human rights.

Sometimes rights issues are engaged at multiple stages in the parliamentary process. The Australian Protective Service Amendment Bill 2003 burdens several ICCPR rights (including arts 17, 9(1), 10(1) and 21) in the course conferring additional powers on protective service officers (to request personal identification details and information; to stop, detain and search certain persons for security purposes, and to seize things found during such a search). The Explanatory Memorandum argued that the burdens were justified as striking the appropriate balance between security and

⁵¹ *Alert Digest* Number 10 of 2003.

⁵² ASIO Legislation Amendment Bill 2003 (Cth) s 34JD(1).

⁵³ *Alert Digest* No. 16 of 2003.

⁵⁴ *Commonwealth Parliamentary Debates*, House of Representatives, 2 December 2003, 23484 (Philip Ruddock); 23464–6 (Robert McClelland).

⁵⁵ *Commonwealth Parliamentary Debates*, House of Representatives, 2 December 2003, 23470–1 (Michael Organ), referring to the statements made by Associate Professor Donald Rothwell in Cynthia Banham, 'ASIO grillings will breach civil rights, warns expert', *Sydney Morning Herald* 27 November 2003.

rights and freedoms. The Scrutiny Committee's *Alert Digest* noted issues about the search and seizure provisions and asked the Minister whether the its guidelines had been taken into account. The Minister responded that those guidelines had been taken into account. The Committee later reported on amendments made in the House of Representatives that removed limitations on the APS powers and narrowed the grounds on which a person could assert that they had a reasonable excuse for failing to provide information to an APS Officer. The Senate Legal and Constitutional Legislation Committee considered the extent of the powers conferred by the bill fairly closely and concluded that they were justified. The Parliamentary Library's *Bills Digest* noted the lack of limits on length of detention for purposes of a search and the absence of a limit on detention times. There was substantial discussion of rights implications of the bill in the course of parliamentary debate.

The progress of the bills discussed here present useful illustrations of the strengths and weaknesses of parliamentary human rights scrutiny. Parliament has a rich set of existing processes for considering human rights issues—committees, correspondence with Ministers, parliamentary deliberation and so on. However, as we have already noted, each of these processes has shortcomings.

Although the scrutiny committees, can act expeditiously, even in response to amendments, to provide an initial assessment of some rights-impacts of bills, their approach is relatively narrowly self-defined and relatively low-key. They focus on a particular set of civil liberty issues, especially those in which they have developed their own standards (including search and seizure). They rarely express a concluded view on bills—instead referring matters to their parliament or chamber for consideration and not expressing a clear position as to whether a bill trespasses unduly on rights and freedoms. It seems that this limited approach, both to scope and recommendations, is necessary to preserve the committees' capacity to reach agreement on bills and to report in a timely fashion. Moreover, the impact of scrutiny—though often asserted—can be hard to identify. Recall the Victorian bill that we outlined at the outset of this lecture, the Victorian Serious Offenders Monitoring Bill. It was the subject of an excellent report by the existing parliamentary scrutiny committee in that jurisdiction⁵⁶ that identified the serious human rights issues with the bill. The Victorian report was a remarkable achievement given the limited time available—the Committee managed to complete it and have it tabled in time for debate in the Legislative Council. However, it was not mentioned in debate, even by the members of the Committee (The NSW Committee was not able to report until after the Bill was passed).

The Legal and Constitutional Legislation Committee's approach to bills appears to be influenced by the number and tenor of the submissions it receives. Human rights oriented submissions inflect the reports it makes. But even when the Committee receives numerous substantial submissions examining human rights issues, which it

⁵⁶ See Legislation Review Committee, Parliament of New South Wales, *Legislation Review Digest* No. 1 of 2006 [29] and Scrutiny of Acts and Regulations Committee, Parliament of Victoria, *Alert Digest* No. 12 of 2006, Wednesday, 4 October 2006. Full disclosure: I made a brief submission to the Victorian Committee but the Committee's report is far more wide-ranging than that submission.

faithfully recounts in its report, the Committee rarely expresses its own reasoning and conclusions *in the language of human rights*.⁵⁷

In short, just as human rights issues are considered in a largely unsystematic fashion at early stages of the policy process in most Australian jurisdictions, presenting the risk that decisions about how to pursue policy objectives are taken without adequate analysis of their human rights implications, parliamentary analysis is also largely unsystematic, with sporadic and limited contributions by scrutiny committees and specialised committees like the Senate Legal and Constitutional Committee.

1.4 Reform

Fortunately, there is a great deal that can be done to improve the capacity of Australian parliaments to protect human rights. Today we highlight five initiatives that have already been taken in the UK and the ACT and that will commence in Victoria from 1 January 2007. Parliaments can:

- agree and articulate a set of rights
- identify a clear and robust role for scrutiny committees
- provide adequate resources for scrutiny committees
- require government to prepare pre-legislative human rights impact analysis
- require ministers to provide reasoned statements about the human rights impact of legislation.

These initiatives retain the Australian parliamentary tradition and ensure that rights issues are first addressed by democratic institutions. They should be adopted by all Australian parliaments.

Agree and Articulate a Set of Rights

The first, and perhaps most important step, is for the Parliament to agree on a set of human rights against which it wishes to assess legislation. This need not involve enacting a Human Rights Act or Charter of Human Rights and Responsibilities. The Parliament, its houses jointly or separately or even a single committee could agree on such a list. The Senate Regulations and Ordinances Committee and Scrutiny of Bills Committee have gone a small way towards this position. They already flesh out their generic mandate to consider whether delegated legislation and bills ‘trespass unduly on personal rights and liberties’ by publishing lists of issues that they focus on in applying that mandate. They could go further and shift away from a relatively narrow ‘civil liberties’ conception of rights and liberties.⁵⁸ In principle, they could decide to base their scrutiny on the rights contained in the ICCPR, the ICESCR, the CERD and so on, or any subset of these. The advantage of doing so would be threefold.

First, such a list of rights would allow for *systematic* analysis of rights issues. The current approach, although immensely valuable on its own terms, is rather unfocussed and ad hoc.

⁵⁷ The Senate Legal and Constitutional Legislation Committee’s 2005 report on the *Provisions of the Anti-Terrorism Bill (No. 2)*, November 2005 provides a useful illustration.

⁵⁸ See Carolyn Evans and Simon Evans, ‘Scrutiny committees and parliamentary conceptions of human rights’ [2006] *Public Law* 785.

Secondly, it would allow for a *broader-ranging* analysis of rights issues. The current approach, which emphasises civil liberties and parliamentary control of administration, focuses on a very narrow range of human rights issues.

Thirdly, it would give the committees an *external reference point* in the international and overseas comparative jurisprudence on the treaties and national rights instruments based on those treaties.

Resources for Scrutiny Committees

If scrutiny committees are to take on a human rights scrutiny role that is broader than their current role, they will need more resources, including appropriate (internal or external) expert advisers.

Our interviews with scrutiny committee members reveal that the resource that they find hardest to secure already is time. Effective scrutiny requires time for analysis and deliberation. It also requires that the results of scrutiny be available to the Parliament for the substantive debate on the bill. Particularly in state parliaments, legislation is introduced into the Parliament and comes on for debate after a short adjournment with only the most limited opportunity for the Committee's secretariat and advisers to analyse the bill, for the Committee to deliberate and finalise its report.⁵⁹

Identify a Clear and Robust Role for Scrutiny Committees

It would be important for scrutiny committees to retain their focus on informing parliament about rights issues. One of the risks of committee scrutiny under human rights acts (and even under non-statutory lists of rights) is that the process becomes over-legalised, such that the committee in effect gives its prediction of what the courts would do if they had the power to consider whether legislation breaches human rights. Parliament should be informed about how courts might react. But Parliament should retain an autonomous role to make its own assessment about the scope of human rights and what limitations on human rights are justified. Although some legislation breaches human rights clearly and beyond any dispute, and other legislation does not, most legislation that engages human rights raises contestable human rights issues on which minds may legitimately differ. For the reasons we gave earlier, Parliament should have at least a coordinate role in resolving these issues.

The example of the UK Parliament's Joint Committee on Human Rights (JCHR), about which we will say more later, shows that it is possible for a scrutiny committee operating within a human rights framework to be more robust in its comments on Bills than the current Australian scrutiny committee practice. At least until recently—and it should be acknowledged that there have been changes recently—the JCHR was able to operate in a largely non-partisan fashion, presenting unanimous reports on legislation *even where it went beyond commenting on the likely response of the Strasbourg court to bills*. Its recent report on the Armed Services Bill opens:

⁵⁹ Some committees have been hamstrung by restrictions on meeting during sitting hours and restrictions on reporting after a bill has been enacted. For the most part, these restrictions have been lifted.

For a major Government Bill with a number of provisions which engage human rights, in relation to some of which there is relevant and recent Strasbourg case-law, we find it unacceptable that we are once again in the position of having to criticise the wholly inadequate consideration of human rights matters contained in a set of Explanatory Notes. We have no doubt that the human rights compatibility of the Bill's provisions has been under extended and detailed consideration within the Government, and the unwillingness of the Government to provide any explanation of this consideration in support of its statement of compatibility makes our task of scrutinising the legislation on behalf of both Houses of Parliament considerably more protracted. This weakens the ability of Parliament to call the Executive to account in a timely way during the passage of the Bill.

Its comments on the Asylum and Immigration (Treatment of Claimants, etc.) Bill identified clauses that it regarded as being unjustified limitations on human rights and clauses that it was not persuaded constituted justified limitations on human rights.⁶⁰ These positive statements about human rights compatibility run the risk of replacing coordinate human rights scrutiny with legal crystal ball gazing but they have the considerable merit of identifying a clear framework for the Parliament as a whole to consider legislation: does the bill limit human rights in a manner that is justified as an effective and proportionate means of achieving the bill's substantive objectives?

Pre-legislative Human Rights Impact Analysis

The executive government should integrate analysis of the human rights impact of proposals into its policy and legislative development framework in the same way that it (attempts) to integrate analysis of economic and competition impacts of proposals. This could have two positive effects. Government proposals would be developed within a human rights framework, rather than shoe-horned or spun into compliance when the proposal comes to Parliament. And the Parliament would have the benefit of a considered (albeit government-centered) analysis of the human rights impact of proposals to inform its deliberations.

These processes are most developed in the Australian Capital Territory Act (although the Queensland processes under the *Legislative Standards Act 1992* (Qld) are worth noting) but as with parliamentary scrutiny it is important to ensure that the analysis goes beyond vetting by legal officers and also incorporates serious attention to the policy dimension and the possibility of the non-judicial branches of government disagreeing with judicial interpretations of rights.

Require Ministers to Provide Reasoned Statements about the Human Rights Impact of Legislation

Ministers should be required to take responsibility for the human rights impact of their legislative proposals by making a reasoned statement as to why their legislation is consistent with human rights or why any inconsistency is justified. Ministers are already required to give some such statements in the UK, New Zealand and the ACT;

⁶⁰ In its *Fifth Report* of Session 2003–04.

from 1 January 2007 Victorian Ministers must provide *reasoned* statements.⁶¹ These statements are a basic element of ministerial responsibility in a human rights framework.

Case Study: The UK JCHR on Anti-Terrorism Legislation

Most of these institutional reforms have already been adopted and tested in the UK under the *Human Rights Act 1998* (UK).

As in most Western countries, a great deal of anti-terrorism legislation has been enacted in the UK since 11 September 2001, starting with the Anti-Terrorism, Crime and Security Bill 2001 which was introduced on 12 November 2001. Four days later, the Joint Committee on Human Rights presented its first report on the bill. It commented that fulfilling its mandate required that it give priority to the protection of human rights in circumstances where they are most likely to come under pressure from (state and public) demands to address security concerns.⁶² The JCHR found that ‘the balance between freedom and security in the Bill ... [had] not always been struck in the right place’ despite the government’s best attempts.⁶³ It recommended against using the threat of terrorism to increase the powers of the state in a manner that compromised the rights and liberties of individuals.⁶⁴

It presented a second report on the bill on 5 December 2001 while it was being considered by the House of Lords. It again commended the willingness of the government to engage in a dialogue regarding the human rights implications of the bill but expressed concern about the speed at which the legislation was being passed.⁶⁵ It concluded that the bill was likely to have a significant impact on rights and although it praised the improvements that had been made (or promised) to safeguard human rights, it argued that several provisions in the bill had not been adequately justified,⁶⁶ including derogation from art 5 of the ECHR;⁶⁷ possibility of indefinite detention incompatible with art 5(4) of the ECHR;⁶⁸ disclosure of information between agencies in possible violation of art 8 of ECHR.⁶⁹ The bill was eventually enacted, but with significant amendments including the introduction of a sunset clause over the provisions concerned with indefinite detention,⁷⁰ the creation of a committee of Privy Councillors to review the legislation two years it was enacted⁷¹ and a narrower definition of what constitutes a terrorist suspect.⁷²

⁶¹ *Human Rights Act 1998* (UK) s 19; *Bill of Rights Act 1990* (NZ) 2 7; *Human Rights Act 2004* (ACT) s 37; *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 28.

⁶² JCHR, Second Report of the 2001–02 Session, *Anti-Terrorism, Crime and Security Bill*, HL37/HC372, [2].

⁶³ *Ibid.* [78] (emphasis removed).

⁶⁴ *Ibid.* [5], [76].

⁶⁵ JCHR, Fifth Report of the 2001–02 Session, *Anti-Terrorism, Crime and Security Bill*, HL51/HC420, [2].

⁶⁶ *Ibid.* [32].

⁶⁷ *Ibid.* [4]–[6].

⁶⁸ *Ibid.* [15].

⁶⁹ *Ibid.* [24].

⁷⁰ *Anti Terrorism, Crime and Security Act 2001* (UK) s 29(1).

⁷¹ *Ibid.* s 122.

⁷² *Ibid.* s 21.

In 2004, the JCHR reported on the large body of anti-terrorism legislation which had been enacted by then. It noted that long term derogations from human rights obligations have a corrosive effect on the culture of respect for human rights and recommended that, if the threat from international terrorism was to continue for the foreseeable future, an alternative way must be found to deal with that threat.⁷³ It argued that the public and parliamentary debate about terrorism should take place within a human rights framework and that human rights law provides the framework within which the balance between the right to security and right to liberty must be struck. In particular, it invited government to consider ways it could increase the independent democratic scrutiny of its claims about the level of the threat from international terrorism so as to enable Parliament to reach a better-informed assessment of whether the measures were strictly required by the exigencies of the situation. Finally, it noted its concern about provisions of the 2001 Act that targeted only non-nationals and the disproportionate impact of the use of Terrorism Act powers on the Muslim community.

These concerns were brought home by the decision of the House of Lords in the *Belmarsh Prisoners* case.⁷⁴ This landmark case was brought by nine non-nationals who had been indefinitely detained under section 23 of the *Anti Terrorism, Crime and Security Act 2001* (UK) for being suspected terrorists. The non-nationals argued that the indefinite detention permitted by section 23 of the Act represented an impermissible derogation from article 5 of the European convention on Human rights (ECHR) and a contravention of the non-derogable, non-discrimination principle in article 14 of the ECHR. The House of Lords concluded that the derogation from the ECHR was not shown to be justified and that the provisions authorising their detention discriminated against non-UK nationals in a way that was not compatible with the ECHR.⁷⁵

The government's response again demonstrated the capacity of the JCHR to make a difference to parliamentary consideration of human rights. In January 2005, Baroness Scotland of Asthal, the Minister of State, Home Affairs made a statement about the government's intentions.⁷⁶ The government proposed to replace the powers in Part 4 of the *Anti-Terrorism, Crime and Security Act 2001* with a new scheme of orders applicable to all suspected terrorists, irrespective of whether they are British or foreign nationals. The bill would be designed to meet the Law Lords' criticism that the previous legislation was both disproportionate and discriminatory. In outlining the

⁷³ Eighteenth Report of the 2003-04 Session, *Review of Counter-terrorism Powers*, HL 158/HC 713.

⁷⁴ *A(FC) and others v Secretary of State for the Home Department* [2005] 2 AC 68. See the symposium edition *Modern Law Review* vol. 68, no. 4, 2005: p. 654, 'A v Secretary of State for Home Department: Introduction'; p. 658, Tom R. Hickman, 'Between human rights and the rule of law: indefinite detention and derogation model of constitutionalism'; p. 668, Stephen Tierney, 'Determining the state of exception: what role for parliament and the courts?'; p. 673, David Dyzenhaus, 'An unfortunate outburst of Anglo-Saxon parochialism'; p. 676, Janet L. Hiebert, 'Parliamentary review of terrorism measures'.

⁷⁵ *A(FC) and others v Secretary of State for the Home Department* [2005] 2 AC 68 [43], [68] (Lord Bingham).

⁷⁶ *United Kingdom Parliamentary Debates*, House of Lords, 26 January 2005, col. 1267-1271.

government's proposal, Baroness Scotland of Asthal paid respect to the work the JCHR had done on reviewing the provisions in Part 4.⁷⁷

The Prevention of Terrorism Bill 2005 was introduced on 22 February 2005. The orders under which the Belmarsh Detainees were held would expire on 14 March 2005 so there was some urgency in passing the bill.⁷⁸ Once again the JCHR reported very quickly on an extremely complex piece of legislation. Its first report was tabled on 25 February 2005. It observed that in light of the tight time frame the report was intended to 'provide a first indication for Members of human rights issues arising at the earliest opportunity.'⁷⁹ It welcomed some of the initiatives in the bill but remained concerned about the human rights implications of some of the measures: the necessity for 'derogating control orders'; the lack of prior judicial involvement in orders depriving individuals of liberty; the use of a special advocate procedure in deprivation of liberty cases; the limited judicial control of non derogating control orders; and the open ended discretion to impose obligations on persons subject to control orders.⁸⁰ The JCHR indicated that it envisaged that 'more detailed scrutiny of the Bill's provisions [would] follow in a further report, to be published in time to inform debate before the Bill ha[d] completed its passage through Parliament.'⁸¹

This initial report clearly informed debate in the Lords. Several members referred to the comments of the Committee.⁸² The government tabled amendments addressing some of the JCHR's concerns on 2 March 2005. Again, the JCHR reported in a matter of days, on 4 March 2005.⁸³ And once again the JCHR commented on '[t]he rapid progress of the Bill through Parliament' which 'has made it impossible for us to scrutinise the Bill comprehensively for human rights compatibility in time to inform debate in Parliament.'⁸⁴ The Lords applied some 42 amendments to the bill to give effect to the JCHR's recommendations, including a provision that the judiciary, not the Secretary of State, possess the power to make control orders, a provision raising the standard of proof required to obtain a control order to the civil standard of proof and the inclusion of a sunset clause. The Commons rejected the majority of these amendments, made significant modifications to those they did accept and insisted on other amendments; the Lords did likewise. Eventually the Bill was passed on 10 March 2005 after the House of Commons agreed to a 12 month sunset clause.⁸⁵

⁷⁷ Ibid.

⁷⁸ Janet L. Hiebert, 'Parliamentary review of terrorism measures' (2005) 68(4) *Modern Law Review* 676, 678.

⁷⁹ JCHR, *Ninth Report of Session 2004–05, Prevention of Terrorism Bill: Preliminary Report*, HL 61/HC 389, 3.

⁸⁰ Ibid. pp. 3–7.

⁸¹ Ibid. p. 3.

⁸² See, e.g. *United Kingdom Parliamentary Debates*, House of Lords, 1 March 2005: col 131 (Lord Thomas of Gresford); col 134 (The Lord Bishop of Worcester); col 143, 146, 454 (Lord Plant of Highfield); col 158 (Baroness Falkner of Margravine); col 184 (Lord Clinton-Davis).

⁸³ JCHR, *Tenth Report of the 2004–05 Session, Prevention of Terrorism Bill: Preliminary Report*, HL68/HC334.

⁸⁴ Ibid. p. 3.

⁸⁵ *Prevention of Terrorism Act 2005* (UK) s 13.

Conclusions

Clearly the UK Human Rights Act process is no panacea and its Australian analogues will be no different. Governments will still insist that their legislation is urgent and that scrutiny must be truncated to ensure passage of the legislation. It will still be difficult to gain traction for the human rights of the most disadvantaged and reviled. Human rights analysis will demand time of members who are already hard-pressed to meet their existing legislative, committee, party and constituency responsibilities. It will also demand resources for expert advisers and committee staff. And a government with the numbers can push through legislation or threaten, as the UK government did, to repeal parts of the Human Rights Act.⁸⁶

As the UK case study shows, a parliament human rights process structured around a human rights act *can* provide a framework of analysis that is developed and applied consistently over a number of years and provide a moral and political reference point to argue for human rights respecting legislation. But more is required. A human rights act does not of itself create a culture of human rights—an attitude among legislators, commentators and citizens that the range of legitimate political action is constrained by human rights. This is obviously true in overseas jurisdictions that have had human rights legislation or constitutional provisions for many years. It is no less true in Australian jurisdictions that have adopted human rights acts. Recall the example that we gave at the outset—the Victorian *Serious Sex Offenders Monitoring (Amendment) Act 2006*. Of course it was debated in October 2006 before the Victorian Charter was to come formally into effect on 1 January 2007. But there was precious little evidence of culture of human rights, or even an atmosphere conducive to the development of a culture of human rights, in that debate.

The struggle to achieve human rights is not won with the passage of a human rights act. Ultimately the success a human rights act depends on parliamentarians and governments taking rights seriously as a constraint on government action; on governments providing the resources that are necessary for timely and effective scrutiny; and on parliaments resisting the instinct to defer to the courts as the sole authoritative interpreters of human rights. In other words, the success of these Act depends on their human rights values becoming part of political culture. Legislators are politicians and respond to the issues that their constituents regard as important. While human rights are not a widespread concern of constituents, human rights impact statements, scrutiny committee reports and Ministerial statements of compatibility are ‘just another [set of] inputs to juggle’. The challenge of human rights will remain a challenge for all of us.



⁸⁶ Prime Minister’s News Conference, 5 August 2005, <http://www.pm.gov.uk/output/Page8041.asp>; BBC News, ‘Blair “to amend human rights law”’, 16 May 2006, http://news.bbc.co.uk/2/hi/uk_news/4770231.stm.

Question — One of the previous speakers, Greg Craven, spoke on the constitutional arrangements in terms of states' rights. The very next day after he talked about states' rights, John Stanhope put up on his website legislation that in my view was very challenging to human rights, that the government had been trying to hide and that they were going to put off for a number of weeks.

The question I have is: human rights are often most trampled upon when the society is at its most hysterical. Think about your example of sexual molestation. None of us are going to stand here and defend sexual molesters of children. But molesters do have rights. When we have a sense of hysteria about security, wherever it comes from, we are at our most unwilling to defend people's human rights. I am thankful that your proposal doesn't go to a bill of rights because I'm not sure that is all that helpful, but how do we set up protections for human rights so that they are more publicly there when we as a society are at our most hysterical?

Simon Evans — Two issues come out of your comment about the terrorism legislation which John Stanhope published on the website. The first is, the kind of co-operative legislation that is proposed by usually the commonwealth government seeking the assistance of state parliaments in enacting complementary laws to have a national scheme presents some of the most difficult challenges for Australian parliamentary processes generally and relation to human rights in particular. Very often the results of those negotiations between government are presented to the state parliaments on a take it or leave it basis: here is the legislative text to sign up to and enact it as quickly as possible, because the deal's already been done. State parliament is cut out of the loop.

The terrorism example is instructive because John Stanhope didn't play ball and publish the legislation on the website at the draft stage. That may or may not be a good thing, because sometimes policy development does have to happen behind closed doors. Sometimes it's impossible to develop sensible policy in the public eye because of the very hysteria you talked about in the second part of your question. In this instance what he was able to do was publish legislation and then solicit advice on the human rights implication of that legislation, which was also published on the website. So there was advice from Hilary Charlesworth and Steven Gagler and others published on the website measuring the legislation against the Constitution and against the ACT Human Rights Act and against our international treaty obligations. So what that Human Rights Act framework did was give a basis for scrutiny that was very useful in negotiating a better result for that legislative package.

On what to do about legislation in times of hysteria—I don't know that there are a lot of guarantees that you can put in place, regardless of what institutions you erect. It will be staffed by human beings who are responsive to the reality of the situation that they face, but also responsive to psychological pressures. The United States has had a Bill of Rights that has been held up by some as a paragon of human rights protection for two centuries now, and yet the record of the United States Supreme Court in times of war and terror has been mixed in the extent to which human rights are protected. Parliamentarians are even more sensitive to public pressures or public hysteria, as you put it.

My answer to what you do is two-fold. One, you don't rely on any single institution to protect human rights at the best of times and especially at the worst of times. You want multiple sites for deliberation about human rights, and about all issues. Two, you don't rely just on governmental institutions. One of the strengths of our society as a free western liberal society is that it has an active civil society. There are a lot of people in this audience today who care about human rights and have no government affiliation. They are citizens who care about human rights—citizens who come together in Amnesty International and human rights organisations, lawyers groups for human rights, non-lawyers groups for human rights, and that activity of the civil society that puts submissions into parliamentary committees and whose inputs are reflected in the consideration of those committees are an important part of maintaining human rights, even at the worst of times.

Question — Before the speaker began, the chairman drew us to this reality: don't expect too much from any government.

Simon Evans — The point you make about not trusting government to protect human rights is absolutely right. In part, governments do act to threaten human rights and human rights laws and institutions are an important part about limiting overreaching by government. But government is also vital to protecting human rights. Our human rights would not be effectively protected if government did not set up the Australian Electoral Commission, if it did not pass an effective electoral law. If we did not have laws protecting free speech, social welfare law, health insurance law and so on, laws protecting the right to property, our human rights would not be adequately protected either. So I think the contribution of government appears on both sides of the ledger in protecting human rights. We need to bear that in mind.

Question — It wasn't quite clear to me what you meant by human rights in that your first example was failure to respect the rule of law, which is certainly something that bothers me very much in Australia, but doesn't seem to me to be quite the same as human rights. I can only go to the preamble of the American Constitution: we hold certain things to be inalienable. The implications there are that these things have to be respected whether or not the majority of people, indeed any people, recognise it.

You seem to be a little dismissive of the role of the courts and law. It seems to me that while it's imperfect, something like an American bill of rights and the role of the court is necessary if you see human rights as being something fundamental, which is regarded as existing in a person whether or not the government or society exists. Sure the US record has been mixed, but they have after all thrown out the Guantanamo Bay commissions as being unconstitutional under the American act, something which would not I think have happened here in any circumstance. So my question is: why do you not feel that something like an American bill of rights would be a step forward in protecting human rights?

Simon Evans — I'm sorry if I appeared dismissive of courts. I think that courts can play an important role in protecting human rights, in building a culture of human rights, but the mistake would be to see them as the sole, exclusive, or even primary agency for protecting human rights. There were two reasons for this. The first is that the courts are reactive rather than proactive, and the second is that human rights are controversial and judges have no particular expertise in the moral questions that

human rights raise. They do have some advantages. They can respond to particular situations. They can respond to situations that legislatures have overlooked. They can act against temporary hysterical majorities in some situations, but we shouldn't place all of our eggs in the one basket. As I said in response to an earlier question, I think the best protection of human rights comes from a development of the existing Australian approach, which is to have a number of different sites for protecting human rights, which may include the courts but shouldn't be limited to the courts, which may include the parliament, but shouldn't be limited to the parliament.

Question — I'd like to raise a couple of concrete cases to show you just how limited human rights can sometimes be in this country. I'll mention the case of Mr Scott Parkin. Mr Parkin was descended upon by five federal police in Melbourne and he was thrown into what amounted to a prison. Now the first thing that you, I, or anyone else in this room would say is: 'Well, what have I done?' The police said: 'We're not going to tell you what you're in here for.' Now that seems to me to be a pretty fundamental breach of human rights. Mr Scott Parkin had come to this country on a lecture tour. At the end of five days, the federal police escorted him onto a plane. The federal police stood on the plane and took him to Los Angeles airport. At the end of the flight they said 'Scott, here is a bill for \$11 700. Don't come back to Australia for three years. If you do, you pay the bill for \$11 700, the cost of your incarceration and the cost of your airfare.'

Another case regarded a gentleman who worked in the then Department of Trade here in the mid 1970s. He applied for a job. The department said he couldn't have the job and he asked why, and they said he was a security risk. He asked in what way. They said, well, we're not going to tell you. So he took the Australian Security Intelligence Organisation to court and it came out in the process that he was a member of the Communist Party of Australia, perfectly legal, and he was selling a newspaper called the *Tribune* on the streets of Canberra.

On the question of freedom of speech, I mention the case of a Mr Lance Sharkey. Mr Sharkey was thrown into prison for three years for making a seditious utterance. I am wondering if you can tell us what you understand by sedition and also can you tell us something more about this anti-terrorism legislation, because as I understand it, you can be thrown into prison for two weeks and then possibly longer without communication with lawyers or anything.

Simon Evans — I can't in the time available say anything more about the terrorism legislation and it's not my specific focus today. I wouldn't want to pretend that Australia's human rights record is perfect—I don't think that of any country is. There are some aspects in which it is far from good, and what I was arguing for today was changes in the processes of protecting human rights in Australia that might assist in ensuring that legislation does not authorise some of the situations that you described in your question.

Question — We have difficulties trying to integrate the stuff of human rights into our culture, although I think the vast majority of Australians support a wide bill of rights. We always seem to be put down by people who say this is not right, and we can't have this, and we are in danger, but I think that is the minority. Can you tell us something about the Canadian Charter of Rights that seems to have gone so well with

the people over there and they seem to have taken to it like ducks to water. I wonder whether we can learn something from them to start preparing the ground here.

Simon Evans — I should say that I'm ambivalent about human rights acts. I think there are reasons to be concerned about them, particularly if they lead to domination of governments, and the policy agenda by courts have very deleterious effects. I think that's why I've been focussing on the parliamentary aspect rather than on bills of rights per se. The Canadian example is an interesting one because although in many ways the Charter has shaped Canadian political consciousness for the last quarter century. It is also deeply controversial precisely because of the influence the Supreme Court has had on shaping the political agenda, and that politics has been sidelined to a large extent in quite a number of policy areas. American legal philosopher Jeremy Waldron (who is a New Zealander by birth) describes the American Supreme Court as 'nine black-robed celebrities' who have no reason to particularly care what they say about human rights except that they are celebrities in black robes. The Canadian Supreme Court wear red robes, but the story is much the same. The Charter has done good stuff, but it's also had a deleterious effect on political culture and the range of things that governments can do. So I wouldn't leap with great enthusiasm to the Canadian model as one for Australia.