TRANS-TASMAN HUMAN RIGHTS CONFERENCE, AUGUST 2024

HUMAN RIGHTS PROTECTION IN AUSTRALIA: AN OVERVIEW

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INTRODUCTION

1 This paper, at the request of the conference organisers, provides an introduction to human rights protection in Australia, in order to set the scene for the more detailed papers that will follow throughout the conference. The topic is very broad. This paper will canvas, briefly, some of the key features of the Australian constitutional landscape, before turning to some of the specific rights protections that are in place in Australia. It will be largely descriptive, but we will endeavour to throw in a little commentary here and there.

THE CONSTITUTIONAL LANDSCAPE

(1) A written Constitution – and its consequences

2 We start by briefly explaining the Australian constitutional system, with particular focus on how Australia differs from New Zealand.

3 Most obvious, of course, is the fact that Australia has a written Constitution, and New Zealand does not. The Constitution is entrenched – that is, it can only be changed by a referendum, which must achieve a majority of votes across the country, and a majority of votes in a majority of States. This is a difficult threshold to meet, and of 45 referenda, only eight have passed.[3] Of those, all but one had bipartisan support.[4]

4 Furthermore, our written Constitution is enforceable in the Courts, with the consequence that the courts can strike down — ie declare invalid — Acts of Parliament. Thus although we in Australia often still talk about Parliamentary sovereignty, in truth

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3 Australian Electoral Commission, 'Referendum Dates and Results', available at <https://www.aec.gov.au/elections/referendums/referendum_dates_and_results.htm>. There have been five occasions where a proposed constitutional amendment achieved a majority of votes nationally, but not a majority of States.

4 It is often said that no referendum has passed without bipartisan support. However, Professor Murray Goot has pointed out that the 1946 referendum (concerning social security payments) was passed without the support of the Opposition, which remained neutral on the issue: see Casey Briggs, 'With the Voice Referendum Resoundingly Defeated, Will Australia Ever Again Change the Constitution?', *ABC News* (online, 29 October 2023) <https://www.abc.net.au/news/2023-10-29/voice-referendum-defeat-will-australia-ever-change-constitution/103018686>.

Parliament is not sovereign — it is subject to the ultimate supervision of the Courts. In that sense we resemble the United States.

5 You might think that that gives a great deal of power to the courts; and indeed it does. But it probably gives the courts less power than you might imagine, because the Constitution is relatively modest in what it requires.

6 In broad terms, and relevantly for present purposes, the Australian Constitution does the following:

(a) It establishes the three branches of government, making provision for how the members of those organs are chosen, and for how long they serve.

(i) Ch I establishes the Parliament, which has a three year term. Members of Parliament and Senators are chosen by the people.

(ii) Ch II establishes the executive. Ministers are appointed by the Governor-General and can be removed by the Governor-General (who, by convention, acts on the advice of the Prime Minister for such appointments). Ministers must sit in Parliament.

(iii) Ch III establishes the judicial branch, with the High Court at its apex. Judges of federal courts are appointed by the executive, and their tenure and remuneration are protected. (State judges are not expressly governed by these protections.)

(b) By establishing the three branches of government, the Constitution impliedly embodies a separation of powers, between the legislative, executive and judicial branches. As we will explain later, the separation of powers has been particularly important in the constitutional protection of human rights in Australia.

(c) Section 77 of the Constitution (in Ch III) also permits the Commonwealth Parliament to confer jurisdiction on State courts to exercise federal jurisdiction. As we explain later, this has had some significance in relation to the protection of human rights at the State level.

(d) The Constitution establishes a federal system, recognising the continued existence of the States alongside the new federal government. It confers limited powers on the Federal Parliament, but it makes State legislation subordinate to Commonwealth legislation. This, too, has been significant in the constitutional protection of rights in Australia.

7 We also note that each State has its own legislative Constitution. These constitutions have little impact on rights protection and we will not say any more about them.

(2) No Treaty with First Nations

8 Importantly, the Constitution does not contain any treaty with First Nations peoples, nor is there any such national treaty outside the Constitution. That is, there is no Australian equivalent of the Treaty of Waitangi.

9 There are some agreements at the State level that, although not labelled 'treaty', operate in some respects rather like a treaty. One example is the South West Native Title Settlement between the Noongar people and the Western Australian government, which is the largest native title settlement in Australia's history, and has been called 'Australia's first treaty' by some.[5] The Noongar Agreement provides, among other things, for the transfer of 320,000 hectares of land, access to certain other Crown lands for customary activities, and the payment of compensation.[6] The land rights, financial compensation and other benefits provided under the Agreement are meant to compensate the Noongar people 'for the loss, surrender, diminution, impairment and other effects on their native title rights and interests of all acts that have been done in relation to those areas'.[7] Pursuant to the Agreement the Western Australian Parliament has also enacted legislation, which is partly in the Noongar language, recognising the Noongar people as the traditional owners of the Noongar lands.[8] Another example is

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5 See Harry Hobbs and George Williams, 'The Noongar Settlement: Australia's First Treaty' (2018) 40(1) *Sydney Law Review* 1.

6 Ibid 31–3. See also *Wagyl Kaip and Southern Noongar Indigenous Land Use Agreement* (2015), sch 10 ('South West Settlement Terms') available at <https://www.wa.gov.au/government/publications/south-west-native-title-settlement-indigenous-land-use-agreements>.

7 *Land Administration (South West Native Title Settlement) Act 2016* (WA) preamble.

8 *Noongar (Koorah, Nitja, Boordahwan) (Past, Present, Future) Recognition Act 2016* (WA) s 5(1).

the Recognition and Settlement Agreement between the Dja Dja Wurrung people and the State of Victoria,[9] made under the *Traditional Owner Settlement Act 2010* (Vic).

10 Various States are actively exploring the possibilities for treaties with local Indigenous peoples, although many of these processes lost bipartisan support following the failed federal 'Voice to Parliament' referendum in 2023.

(a) The treaty process is currently most advanced in Victoria. The Victorian Parliament passed the first treaty legislation in Australia in 2018,[10] and the First Peoples' Assembly of Victoria (a body elected by First Nations communities) was appointed as the body responsible for working with government to establish the treaty negotiation process.[11] A Treaty Negotiation Framework was concluded in October 2022, a Self-Determination Fund has been established to provide financial resources for First Peoples in the negotiations, and a Treaty Authority has been appointed to act as 'independent umpire' for the negotiating process.[12] The negotiations are expected to begin this year.

A Royal Commission, known as the Yoorrook Justice Commission, has also been established to create an official public record of First Peoples' experiences of colonisation, to make recommendations for law and policy reform, and to support the treaty negotiations.[13] This is a form of truth-telling, akin to a truth and reconciliation commission.

(b) South Australia first committed to a treaty in 2016, but the process was subsequently abandoned. Following an election in 2022 the government pledged support once again. In 2023, the South Australian Parliament passed a law creating Australia's first 'Voice to Parliament'.[14] The first Voice representatives were elected in March 2024. The South Australian government has also

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9 *Dja Dja Wurrung Recognition and Settlement Agreement* (2013) available at <https://www.firstpeoplesrelations.vic.gov.au/dja-dja-wurrung-recognition-and-settlement-agreement>.

10 See *Advancing the Treaty Process with Aboriginal Victorians Act 2018* (Vic).

11 See generally Victorian Government, 'Pathway to Treaty' at <https://www.firstpeoplesrelations.vic.gov.au/treaty-process>.

12 See generally *Advancing the Treaty Process with Aboriginal Victorians Act 2018* (Vic) ss 27–37. See also *Treaty Authority and Other Treaty Elements Act 2022* (Vic).

13 Victoria, *Gazette*, No S 217, 14 May 2021.

14 *First Nations Voice Act 2023* (SA).

committed to each of the other elements of the 'Uluru Statement from the Heart', including the negotiation of a treaty.[15]

(c) Queensland enacted treaty legislation in 2023, following several years of work since an initial commitment in 2019.[16] The legislation establishes a First Nations Treaty Institute to develop a treaty-making framework, and also establishes a Truth-Telling and Healing Inquiry.[17] However, following the federal 'Voice to Parliament' referendum in 2023, the State opposition pledged to repeal the legislation and abandon the process if successful in the State elections in October this year.

(d) The Northern Territory government entered into a memorandum of understanding with the four statutory Land Councils in the Northern Territory in 2018 to provide for the development of a treaty-negotiation framework.[18] A Treaty Commission was subsequently established to provide advice to the government on the treaty process. The Commission's final report was presented to the government in 2022.[19] The government did not act initially on the report's recommendations, but in early 2024 announced that it would revive the process.[20]

11 Some other jurisdictions have made more limited steps towards the negotiation of a treaty. The Tasmanian government has commissioned a report on a treaty process.[21] New South Wales ('NSW') committed earlier this year to a twelve-month consultation process with First Nations communities on their aspirations for a treaty, led by three

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15 See Premier of South Australia, 'Next Steps in Implementing the Uluru Statement' (Media Release, 4 July 2022) <https://www.premier.sa.gov.au/media-releases/news-items/next-steps-in-implementing-the-uluru-statement>.

16 *Path to Treaty Act 2023* (Qld).

17 *Path to Treaty Act 2023* (Qld) ss 5, 13.

18 See *The Barunga Agreement* (8 June 2018) available at <https://aboriginalaffairs.nt.gov.au/__data/assets/pdf_file/0011/983369/barunga-muo-treaty.pdf>.

19 Northern Territory Treaty Commission, *Final Report* (29 June 2022).

20 See Matt Garrick, 'NT Government to Revive Plans for Treaty, Six Years after It Was First Promised by Territory Labor', *ABC News* (online, 19 January 2024) <https://www.abc.net.au/news/2024-01-19/nt-government-revive-plans-treaty-voice-referendum/103364638> .

21 See Kate Warner, Tim McCormack and Fauve Kurnadi, *Pathway to Truth-Telling and Treaty* (Report to Premier Peter Gutwein, November 2021).

Treaty Commissioners.[22] The Australian Capital Territory ('ACT') government has indicated its support for a treaty, but without much additional progress at this stage.

(3) No constitutional bill of rights

12 Most strikingly, the Australian Constitution does not contain a bill of rights, unlike most written constitutions throughout the world.

13 Proposals for more extensive rights protections in the Constitution were made at the time of the drafting of the Constitution in the 1890s, but were defeated. A majority of the framers appears to have considered that the system of representative and responsible government established by the Constitution was sufficient to safeguard rights.[23] At least some of the framers were also concerned about the impact of any bill of rights upon the Commonwealth's and States' ability to maintain race-based distinctions in their laws.[24]

14 As Dawson J observed in *Kruger v The Commonwealth*:

> The framers preferred to place their faith in the democratic process for the protection of individual rights and saw constitutional guarantees as restricting that process. Thus the Constitution contains no general guarantee of the due process of law. The few provisions contained in the Constitution which afford protection against governmental action in disregard of individual rights do not amount to such a general guarantee.[25]

15 A number of proposals have been made to amend the Constitution to include additional rights' protections, including several attempts by governments to adopt a bill of rights in the 1970s and 1980s (around the time of Australia's ratification of the *International*

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22 See NSW Government, 'Treaty' at <https://www.aboriginalaffairs.nsw.gov.au/policy-reform/treaty/>.

23 See Scott Stephenson, 'Rights' in Cheryl Saunders and Adrienne Stone (eds), *The Oxford Handbook of the Australian Constitution* (Oxford University Press, 2018) 905, 909–11. See also *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106, 136 (Mason CJ): ' … the prevailing sentiment of the framers [was] that there was no need to incorporate a comprehensive Bill of Rights in order to protect the rights and freedoms of citizens. That sentiment was one of the unexpressed assumptions on which the Constitution was drafted'.

24 See George Williams, 'Australia's Constitutional Design and the Protection of Human Rights' in Matthew Groves, Janina Boughey and Dan Meagher (eds), *The Legal Protection of Rights in Australia* (Bloomsbury, 2019) 17, 19.

25 (1997) 190 CLR 1, 61 (McHugh J agreeing at 141–2).

Covenant on Civil and Political Rights ('*ICCPR*')[26] and the *International Covenant on Economic, Social and Cultural Rights* ('*ICESCR*')[27]), but none has been successful.[28]

16 However, there are certain rights that find protection in the Constitution, either expressly or impliedly.

(4) Express constitutional protections of rights

17 In terms of express rights, there are various provisions in the Constitution that, although they do not use the language of 'rights', operate in a manner similar to rights.

18 The first is a right to **trial by jury**, conferred in effect by s 80, which provides that 'the trial on indictment of any offence against any law of the Commonwealth shall be by jury'. There are two important limits to this provision.

(a) First, it does not apply to State offences. There is no right to trial by jury at State level.

(b) Secondly, s 80 applies only to offences prosecuted on indictment; it does not apply to summary offences. The High Court has held that whether an offence is triable on indictment is a decision for the legislature, and rejected any suggestion that s 80 requires all 'serious offences' to be tried by jury.[29] The Commonwealth thus could, in theory, circumvent s 80 by designating a serious offence summary in nature, rather than indictable. However, it has never sought to circumvent s 80 in that way, to our knowledge.

19 We also note that an individual cannot waive the operation of s 80. Indeed, it has been said that s 80 does not protect the individual's right to trial by jury but, rather, protects the Commonwealth's ability to decide whether its offences, when tried in State courts,

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26 *International Covenant on Civil and Political Rights*, opened for signature 19 December 1966, 999 UNTS 171 (entered into force 23 March 1976).

27 *International Covenant on Economic, Social and Cultural Rights*, opened for signature 16 December 1966, 993 UNTS 3 (entered into force 3 January 1976).

28 Stephenson (n 23) 908–9.

29 See *Kingswell v The Queen* (1985) 159 CLR 264, 276–7 (Gibbs CJ, Wilson and Dawson JJ), 282 (Mason J); *Cheng v The Queen* (2000) 203 CLR 248, 268–70 [49]–[58] (Gleeson CJ, Gummow and Hayne JJ), 291–5 [126]–[143] (McHugh J), 344 [283] (Callinan J).

will be tried by a jury or not.[30] That is, there is a federal purpose to s 80, not (or not only) a rights-protective purpose.

20 The second express right concerns the **right to private property**. Section 51(xxxi) of the Constitution confers upon the federal Parliament a power to make laws for the acquisition of property, but only on just terms. In other words, the government can take your property, but it must pay you for it.

21 This right, again, does not apply to the States: they can take a person's property without paying for it (although they do not usually do that and most States have legislation setting out the terms on which they will acquire land[31]).

22 The third express right concerns **freedom of religion**. Section 116 of the Constitution prohibits the Commonwealth from making any law for establishing any religion, imposing any religious observance, or prohibiting the free exercise of any religion. In effect, this provides a limited right to religious freedom. However, in the relatively few cases that the High Court has decided on this provision, it has generally adopted a narrow view of the kinds of laws that will be disallowed — although it has adopted a broad view of the definition of 'religion'.[32]

23 As with the previous two provisions, s 116 applies only to the Commonwealth, not to the States.[33]

24 There is also a limited **right to freedom of movement** between the States, found in s 92 of the Constitution, which provides that trade, commerce and intercourse between the States shall be 'absolutely free'. This does not affect movement within a State. Furthermore, notwithstanding the absolute nature of the language in s 92, the High

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30 See, eg, James Stellios, 'The Constitutional Jury — "A Bulwark of Liberty"?' (2005) 27(1) *Sydney Law Review* 113.

31 See, eg, *Land Acquisition (Just Terms Compensation) Act 1991* (NSW); *Land Acquisition and Compensation Act 1986* (Vic); *Acquisition of Land Act 1967* (Qld).

32 See *Adelaide Company of Jehovah's Witnesses Inc v Commonwealth* (1943) 67 CLR 116, 148 (Rich J). For examples of laws that have been considered consistent with s 116, see *Adelaide Company of Jehovah's Witnesses Inc v Commonwealth* (1943) 67 CLR 116; *Krygger v Williams* (1912) 15 CLR 366. For comments on the broad definition of 'religion' (made in a different context, but stated to be relevant to the interpretation of s 116) see *Church of the New Faith v Commissioner for Pay-Roll Tax (Vic)* (1983) 154 CLR 120, 130–6 (Mason ACJ and Brennan J), 151 (Murphy J), 173–4 (Wilson and Deane JJ).

33 Cheryl Saunders, *The Constitution of Australia: A Contextual Analysis* (Hart, 2011) 281.

Court has held that legislative limitations on movement are permitted, where such limitations serve a legitimate purpose and are proportionate to achieving that purpose.

25 Thus, for example, movement between the States of Australia was limited during the Spanish flu outbreak in 1918 and, of course, more recently during the Covid-19 pandemic. During the Covid-19 pandemic Western Australia effectively closed its border with the rest of Australia for an extended period of time and other States also implemented interstate border restrictions. Interstate border movement was also restricted during World War II. The WWII restriction was struck down because it lacked a legitimate connection to the conduct of the war.[34] But the Western Australian Covid-19 restrictions were upheld by the High Court as valid.[35] Victoria's public health orders, which limited freedom of movement to a five kilometre radius during the pandemic, were also upheld by the High Court.[36]

26 Finally, s 117 of the Constitution contains a very limited non-discrimination right: people are not to be discriminated against on the basis of their State of residence.

(5) Implied protections of rights

27 In addition to the above express constitutional rights, Australia also has a range of implied constitutional rights. (Strictly speaking, we are not meant to call them *rights* — conceptually they are limitations on legislative power, and often described as 'freedoms'.[37] But they are generally experienced as rights and we will use that language.)

28 One of the most fundamental rights in a democracy, the **right to vote**, is not expressly protected in our Constitution.[38] Indeed, at the time of federation, women could only

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34 *Gratwick v Johnson* (1945) 70 CLR 1.

35 *Palmer v Western Australia* (2021) 272 CLR 505.

36 *Gerner v Victoria* (2020) 270 CLR 412.

37 See, eg, *McCloy v New South Wales* (2015) 257 CLR 178, 215 [73] (French CJ, Kiefel, Bell and Keane JJ) ('*McCloy*').

38 Section 41 of the Constitution, entitled 'right of electors of states', on its face appears to confer a right to vote in Commonwealth elections on persons who can vote in State elections, but it is regarded as spent — it operated only in relation to persons who in fact already had a right to vote at State elections prior to federation: *R v Pearson; Ex parte Sipka* (1983) 152 CLR 254, 260 (Gibbs CJ, Mason and Wilson JJ), 279–80 (Brennan, Deane and Dawson JJ). See, for a different analysis, Jonathan Crowe and Peta Stephenson, 'An Express Right Constitutional Right to Vote? The Case for Reviving Section 41' (2014) 36(2) *Sydney Law Review* 205.

vote in two States (South Australia and Western Australia)[39] and Indigenous people were excluded from voting in many States.[40] Some States also imposed property or educational qualifications.[41] Notwithstanding that history, the High Court has over time recognised that the Constitution embodies universal adult suffrage, and that the franchise could not now be removed from women or denied on the basis of race, property or educational qualification.[42] However, the principle of 'one vote, one value' is not constitutionally protected, and thus Australia's rural electorates generally contain significantly fewer electors than the urban electorates.[43] We also have no distinct Indigenous representation, unlike New Zealand.

29 The limitation on the power of the Parliament to restrict the right to vote stems from the terms of ss 7 and 24 of the Constitution, which provide that the members of the houses of Parliament shall be 'directly chosen by the people'. The High Court has held that these sections prevent the Parliament from restricting the franchise other than for a substantial reason. Thus a law that disqualified from voting any person serving a term of imprisonment (regardless of length) on the day of the election was struck down in *Roach v Electoral Commissioner*.[44] However, the Court held that the Parliament was permitted to exclude prisoners serving a sentence of three years or more, because such a sentence reflected serious offending and thus a temporary unfitness to participate in the electoral process.

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39 Women in South Australia and Western Australia could vote in those States at the time of federation, and as a consequence had a right to vote at Commonwealth elections, by reason of s 41, referred to above: see *R v Pearson; Ex parte Sipka* (1983) 152 CLR 254, 262 (Gibbs CJ, Mason and Wilson JJ). But women in other States did not have a right to vote. Some women were given the right to vote at the federal level by the *Commonwealth Franchise Act 1902* (Cth), but s 4 expressly excluded 'aboriginal native[s] of Australia Asia Africa and the Islands of the Pacific except New Zealand' from the franchise, unless they were entitled to vote under s 41 of the Constitution.

40 Indigenous people were not granted the right to vote in at the federal level until the enactment of the *Commonwealth Electoral Act 1962* (Cth).

41 See Anthony Gray, 'The Guaranteed Right to Vote in Australia' (2007) 7(2) *Queensland University of Technology Law and Justice Journal* 178, 178–9.

42 See *Rowe v Electoral Commissioner* (2010) 243 CLR 1, 18–19 [18]–[22] (French CJ), 51–52 [132]–[133], 57 [154], 58 [157] (Gummow and Bell JJ), 73 [213] (Hayne J), 116–17 [366]–[368] (Crennan J) ('*Rowe*'); *Murphy v Electoral Commissioner* (2016) 261 CLR 28, 106–7 [244] (Nettle J), 114 [264] (Gordon J); *Attorney-General (Cth); Ex Rel McKinlay v Commonwealth* (1975) 135 CLR 1, 36 (McTiernan and Jacobs JJ); *McGinty v Western Australia* (1996) 186 CLR 140, 166–7 (Brennan CJ), 222 (Gaudron J), 286–7 (Gummow J) ('*McGinty*'); *Roach v Electoral Commissioner* (2007) 233 CLR 162, 173–4 [6] (Gleeson CJ).

43 *Attorney-General (Cth); Ex Rel McKinlay v Commonwealth* (1975) 135 CLR 1; likewise for State elections: *McGinty* (1996) 186 CLR 140.

44 (2007) 233 CLR 162.

30 The High Court also struck down legislation that prevented applications for inclusion or change of details on the Commonwealth electoral roll from being accepted after the day that writs were issued.[45] This replaced a previous seven day grace period. By reason of the High Court's decision, in the 2010 election around 100,000 people were able to vote who would otherwise have been excluded.[46]

31 From the phrase 'directly chosen by the people', the High Court has also implied into the Constitution a **freedom of political communication**. In short summary, the implied freedom of political communication protects free communication between people on matters of politics and government which enables them to exercise a free and informed choice as electors.[47] The implied freedom operates as a limitation on the legislative and executive power of the Commonwealth, and of the States.[48]

32 However, the implied freedom is not absolute: it is 'limited to what is necessary for the effective operation of that system of representative and responsible government provided for by the Constitution'.[49] This requires an assessment of whether a measure that burdens freedom of communication about government or political matters is 'reasonably appropriate and adapted' to serve a legitimate end.[50] In recent cases on the implied freedom, the Court has introduced a 'structured proportionality' analysis into this assessment,[51] requiring attention to suitability, necessity and whether the law is adequate in its balance — a familiar inquiry for human rights lawyers, although still the

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45 *Rowe* (2010) 243 CLR 1.

46 See *Rowe* (2010) 243 CLR 1, 66 [69] (French CJ).

47 *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520, 560 (Brennan CJ, Dawson, Toohey, Gaudron, McHugh, Gummow and Kirby JJ) ('*Lange*'). And see generally Adrienne Stone, 'Rights, Personal Rights and Freedoms: The Nature of the Freedom of Political Communication' (2001) 25(2) *Melbourne University Law Review* 374.

48 *Lange* (1997) 189 CLR 520, 560 (Brennan CJ, Dawson, Toohey, Gaudron, McHugh, Gummow and Kirby JJ). On its application to the States, see *Unions NSW v New South Wales* (2013) 252 CLR 530, 548–551 [17]–[26] (French CJ, Hayne, Crennan, Kiefel and Bell JJ).

49 *Lange* (1997) 189 CLR 520, 561 (Brennan CJ, Dawson, Toohey, Gaudron, McHugh, Gummow and Kirby JJ).

50 *Lange* (1997) 189 CLR 520, 567–8 (Brennan CJ, Dawson, Toohey, Gaudron, McHugh, Gummow and Kirby JJ).

51 See *McCloy* (2015) 257 CLR 178, 194–5 [2] (French CJ, Kiefel, Bell and Keane JJ); *Clubb v Edwards* (2019) 267 CLR 171, 186 [6] (Kiefel CJ, Bell and Keane JJ), 264 [266] (Nettle J), 311 [408] (Edelman J). The members of the Court who have adopted structured proportionality have placed considerable weight on the book by Aharon Barak, *Proportionality: Constitutional Rights and Their Limitations* (Cambridge University Press, 2012).

subject of some controversy within the High Court, the composition of which has changed significantly in recent times.

33 As mentioned above, the Constitution also contains a strong **separation of judicial power** at the federal level. This has resulted in some rights-protecting decisions.

(a) In *NZYQ v Minister for Immigration, Citizenship and Multicultural Affairs*[52] the High Court held that the separation of powers precludes executive punishment, and that indefinite detention of non-citizens not capable of being removed from Australia constitutes a form of executive punishment and is thus invalid. It built on the Court's earlier jurisprudence in *Lim v Minister for Immigration, Local Government and Ethnic Affairs*[53] and overruled the 2004 decision in *Al-Kateb v Godwin*,[54] in which a majority of the High Court had upheld the validity of indefinite detention of such persons.

(b) The Court has also held that removing a person's Australian citizenship on the basis of their activities or criminal conviction is a form of punishment that could only be imposed by a Court as part of the adjudgment and punishment of criminal guilt.[55]

34 However, the High Court has upheld Commonwealth laws that permit the making of control orders that severely restrict the liberty of a person who has served their sentence for terrorism offences, if they pose a serious risk to the community.[56] Similarly, the Court has upheld laws that authorise the continued detention of such a person in custody after they have served their sentence, again if they pose a serious risk to the community.[57] In both cases, the orders in question are made by a court. Gleeson CJ observed in *Thomas v Mowbray* (the case concerning control orders) that, assuming some branch of government is permitted to make orders of this kind, 'the exercise of

52 (2023) 97 ALJR 1005.
53 (1992) 176 CLR 1.
54 (2004) 219 CLR 562.
55 *Alexander v Minister for Home Affairs* (2022) 276 CLR 336; *Benbrika v Minister for Home Affairs* (2023) 97 ALJR 899.
56 *Thomas v Mowbray* (2007) 233 CLR 307.
57 *Minister for Home Affairs v Benbrika* (2021) 273 CLR 68.

[such] powers, independently, impartially and judicially … would ordinarily be regarded as a good thing, not something to be avoided'.[58]

35 Although there is no strict separation of powers at the State level, the States are by implication subject to a weakened form of separation of powers, because they are required to be appropriate repositories of federal judicial power. They must therefore have the essential characteristics of a court, including being impartial and independent of the other branches of government. This is known as the '*Kable* doctrine', and has been used to strike down some State laws that require Courts to act in ways that are not compatible with judicial power, including, for example, an *ad hominem* law that conferred on a court the power to order the detention of a named individual after he had served his sentence.[59] However, other *ad hominem* laws have been upheld (in particular, laws strictly curtailing parole for named individuals[60]).

36 More general State laws permitting the continued detention of a person in custody after they have served their sentence, if they pose a risk to the community, have also been upheld. Initially such laws applied to persons who had committed sexual offences against children;[61] however, more recently laws that apply to persons who have been convicted of much more minor offences, such as robbery, have been upheld — albeit by a narrow margin.[62] As under the Commonwealth laws discussed above, the function of determining whether a person is to be so detained is reposed in a court under the relevant legislation. This is understood to provide some degree of protection for the persons affected, by having an independent and impartial body make the decision, rather than the executive.

(6) Pre-eminence of Commonwealth laws: s 109

37 Finally, it is appropriate to mention the effect of s 109 of the Constitution in the protection of rights in Australia. That section provides that, where a law of the State is inconsistent with a law of the Commonwealth, the Commonwealth law will prevail. The

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58 (2007) 233 CLR 307, 329 [17].

59 *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51.

60 See, eg, *Knight v Victoria* (2017) 261 CLR 306; *Minogue v Victoria* (2019) 268 CLR 1. See also *Mineralogy Pty Ltd v Western Australia* (2021) 274 CLR 219, 281–2 [159] (Edelman J).

61 *Fardon v Attorney-General (Qld)* (2004) 223 CLR 575.

62 *Garlett v Western Australia* (2022) 96 ALJR 888.

Commonwealth has used this provision to override State laws that are inconsistent with or fail to protect human rights. A State law so overridden is invalid to the extent of the inconsistency.[63]

38 One example relates to the first individual complaint made against Australia to the United Nations Human Rights Committee following Australia's ratification of the *First Optional Protocol* to the *ICCPR*.[64] Nick Toonen alleged in the complaint that provisions of Tasmania's Criminal Code that criminalised sexual contact between men constituted an arbitrary interference with his privacy, contrary to article 17 of the *ICCPR*. The Human Rights Committee agreed.[65] When Tasmania failed to repeal the law, the Commonwealth enacted legislation giving effect to the Human Rights Committee's ruling; and that legislation was designed to override the inconsistent Tasmanian legislation.[66] A High Court case brought by Rodney Croome to enforce the Commonwealth law was ultimately resolved by Tasmania conceding the law was invalid and repealing it.[67]

39 A number of s 109 cases have concerned the inconsistency of State laws with the *Racial Discrimination Act 1975* (Cth).[68] One particularly significant example was *Mabo v Queensland* (*Mabo (No 1)),*[69] in which the High Court considered the status of Queensland legislation that purported to extinguish the native title rights of Eddie Mabo and other members of the Meriam people before those rights could be assessed and adjudicated on by the courts. The Court held that the legislation was inconsistent with the *Racial Discrimination Act 1975* (Cth). This paved the way for the Court's judgment on the substance of the claimants' native title rights in *Mabo (No 2)*.[70]

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63 In this context, invalid means 'inoperative', so that if the Commonwealth law is ever amended or repealed, the State law can spring back into action: *Western Australia v Commonwealth* (1995) 183 CLR 373, 465 (Mason CJ, Brennan, Deane, Toohey, Gaudron and McHugh JJ).

64 *Optional Protocol to the International Covenant on Civil and Political Rights*, opened for signature 19 December 1966, 999 UNTS 171 (entered into force 23 March 1976).

65 Human Rights Committee, *Views: Communication No 488/1992*, 50th sess, UN Doc CCPR/C/50/D/488/1992 (31 March 1994) ('*Toonen v Australia*').

66 *Human Rights (Sexual Conduct) Act 1994* (Cth).

67 *Croome v Tasmania* (1997) 191 CLR 119.

68 For other cases concerning the consistency of State laws with the *Racial Discrimination Act 1975* (Cth), see, eg, *Western Australia v Commonwealth* (1995) 183 CLR 373; *Gerhardy v Brown* (1985) 159 CLR 70.

69 *Mabo v Queensland* (1988) 166 CLR 186.

70 *Mabo v Queensland (No 2)* (1992) 175 CLR 1.

40 A recent example in which State legislation was found to be inconsistent with the *Racial Discrimination Act 1975* (Cth), and thus invalid, was *Athwal v Queensland*.[71] The Queensland Court of Appeal found that a provision of the *Weapons Act 1990* (Qld) that prohibited the possession of knives in schools was discriminatory because, in its effect, it was particularly directed to Sikhs. The law qualified the general prohibition on the carrying of knives with certain exceptions, but provided that religious purposes were not a reasonable excuse for the possession of a knife. As there was no evidence that the practices of any other religious group involved the possession of a knife, the practical operation of the provision was to limit the freedom of religion of Sikhs relative to other religious groups. The State law was thus inconsistent with the Commonwealth *Racial Discrimination Act* and invalid in its discriminatory operation (but not generally invalid).[72]

INTERNATIONAL HUMAN RIGHTS AND AUSTRALIAN LAW

41 Australia has signed and ratified all of the major international human rights treaties:

(a) the *ICCPR*;

(b) the *ICESCR*;

(c) the *Convention against Torture*;[73]

(d) the *Convention on the Elimination of All Forms of Discrimination against Women*;[74]

(e) the *International Convention on the Elimination of All Forms of Racial Discrimination*;[75]

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71 (2023) 379 FLR 92, 117–20 [113]–[122] (Mitchell AJA, Mullins P and Dalton JA agreeing) (‘*Athwal*’).

72 *Athwal* (2023) 379 FLR 92, 117–20 [113]–[122] (Mitchell AJA, Mullins P and Dalton JA agreeing).

73 *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, opened for signature 10 December 1984, 1465 UNTS 85 (entered into force 26 June 1987).

74 *Convention on the Elimination of All Forms of Discrimination against Women*, opened for signature 18 December 1979, 1249 UNTS 13 (entered into force 3 September 1981).

75 *International Convention on the Elimination of All Forms of Racial Discrimination*, opened for signature 21 December 1965, 660 UNTS 195 (entered into force 4 January 1969).

(f) the *Convention on the Rights of the Child*;[76] and

(g) the *Convention on the Rights of Persons with Disabilities*.[77]

42 The reports of the relevant treaty bodies identify both positive aspects of Australia's performance of its obligations under the treaties and matters of concern. With respect to the latter, general matters of ongoing concern include gaps in the domestic implementation of the treaties, the limitations of existing scrutiny mechanisms (such as Parliamentary Committees, which we discuss further below) and a failure to implement views adopted by relevant UN committees determining complaints made against Australia.[78]

43 A subcommittee of the UN Committee against Torture has recently expressed quite pointed criticism of Australia for its failure to implement the *Optional Protocol to the Convention against Torture*, which is intended to ensure compliance with the *Convention against Torture* in places of detention.[79] That failure has federal dimensions — the Commonwealth is relying partly on the States to implement the treaty,[80] which a number have not yet done, ostensibly due to disagreement with the Commonwealth over funding.[81]

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76 *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990).

77 *Convention on the Rights of Persons with Disabilities*, opened for signature 13 December 2006, 2515 UNTS 3 (entered into force 3 May 2008).

78 See, eg, Human Rights Committee, *Concluding Observations on the Sixth Periodic Report of Australia*, 121st sess, UN Doc CCPR/C/AUS/CO/6 (1 December 2017), [5]–[6], [9]–[12]; Committee on the Elimination of All Forms of Discrimination against Women, *Concluding Observations on the Eighth Periodic Report of Australia*, 70th sess, UN Doc CEDAW/C/AUS/CO/8 (25 July 2018), [11]–[12]; Committee on Economic, Social and Cultural Rights, *Concluding Observations on the Fifth Periodic Report of Australia*, 61st sess, UN Doc E/C.12/AUS/CO/5 (11 July 2017), [5]–[6]; Committee on the Elimination of Racial Discrimination, *Concluding Observations on the Eighteenth to Twentieth Periodic Reports of Australia*, 94th sess, UN Doc CERD/C/AUS/CO/18-20 (26 December 2017), [5]–[8]; Committee on the Rights of Persons with Disabilities, *Concluding Observations on the Combined Second and Third Periodic Reports of Australia*, 22nd sess, UN Doc CRPD/C/AUS/CO/2-3 (15 October 2019), [6]; Committee on the Rights of the Child, *Concluding Observations on the Combined Fifth and Sixth Periodic Reports of Australia*, 82nd sess, UN Doc CRC/C/AUS/CO/5-6 (1 November 2019), [7].

79 United Nations Office of the High Commissioner for Human Rights, 'UN Torture Prevention Body Terminates Visit to Australia, Confirms Missions to South Africa, Kazakhstan, Madagascar, Croatia, Georgia, Guatemala, Palestine, and the Philippines' (Press Release, 20 February 2023) <https://www.ohchr.org/en/press-releases/2023/02/un-torture-prevention-body-terminates-visit-australia-confirms-missions>.

80 See generally Ben Buckland and Audrey Olivier-Muralt, 'OPCAT in Federal States: Towards a Better Understanding of NPM Models and Challenges' (2019) 25(1) *Australian Journal of Human Rights* 23.

81 Australian Human Rights Commission, *Roadmap to OPCAT Compliance* (Report, 2022) <https://humanrights.gov.au/sites/default/files/opcat_road_map_0.pdf> 12.

44 Another avenue by which Australia's compliance with these treaties can be tested at the international level is the 'individual complaints mechanism' under each treaty. Australia has accepted the individual complaints mechanism under each of these treaties, except the *ICESCR* and the *Convention on the Rights of the Child*. A relatively high number of complaints has been made against Australia using these mechanisms — for example, as at 2016, Australia was the fifth-most complained about state under the *ICCPR* — although it is difficult to draw conclusions about Australia's human rights compliance from these figures alone.[82] That said, of the complaints made against Australia under the *ICCPR* up until 2016 and assessed on their merits, about 80 per cent were upheld.[83]

45 One recent and notable example of a decision concerning Australia's international human rights obligations was *Billy v Australia*, in which the UN Human Rights Committee found that Australia had violated the human rights of the Torres Strait Islander complainants by failing to adequately protect them against the impacts of climate change.[84] The Committee found violations of the complainants' rights to privacy and to culture under the *ICCPR*, requiring Australia to provide compensation to the complainants and to implement measures necessary to secure their communities' continued existence.[85]

46 Nonetheless, it is well-established that the provisions of a treaty to which Australia is a party at international law do not form part of Australian domestic law unless implemented by statute.[86] (The status of customary international law in Australian law is less settled. Some judicial decisions suggest that rules of custom can have direct effect

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82 See Madelaine Chiam, 'International Human Rights Treaties and Institutions in the Protection of Human Rights in Australia', in Matthew Groves, Janina Boughey and Dan Meagher (eds), *The Legal Protection of Rights in Australia* (Bloomsbury, 2019) 229, 238. In particular, these complaints may be ruled admissible, or not upheld on the merits.

83 Ibid 240.

84 Human Rights Committee, *Views: Communication No 3624/2019*, 135th sess, UN Doc CCPR/C/135/D/3624/2019 (22 September 2022) ('*Billy v Australia*').

85 Ibid [9]–[11].

86 See, eg, *Victoria v The Commonwealth* (1996) 187 CLR 416, 480 (Brennan CJ, Toohey, Gaudron, McHugh and Gummow JJ); *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273, 286–7 (Mason CJ and Deane J). See also Kristen Walker, 'The Intersection Of International Law and Australian Constitutional Law' in John MacMillan and Judith S Jones (eds), *Public Law Intersections* (Centre for International and Public Law, 2003) 97.

in Australian law,[87] but others favour the view that rules of customary international law must also be incorporated by statute to operate as a source of rights and obligations in domestic law.[88] However, customary international law has had limited influence on the protection of human rights in Australia.)

47 As a consequence of Australia's dualist approach to international treaties, each of the human rights treaties mentioned above only has direct effect in Australia to the extent that a Commonwealth or State law gives it such effect. Some of the legislation discussed below, such as anti-discrimination laws and the State human rights Acts, expressly implement provisions of these treaties, in at least some jurisdictions. However, some human rights treaties by which Australia is bound at international law have not been fully implemented domestically. For example, Australia does not have legislation fully implementing either the *ICCPR* or the *ICESCR*, at least at the federal level. The Commonwealth generally maintains that the rights enshrined in those instruments are adequately protected through the Constitution, the common law, and other statutes.[89]

48 International human rights law can also influence Australian law as a consequence of the common law rule of statutory interpretation that laws should be interpreted, so far as their language permits, in a manner consistent with Australia's international obligations.[90] This rule of statutory interpretation is based on the presumption that Parliament intends to legislate in a manner consistent with Australia's international

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87 See *Chow Hung Ching v The King* (1948) 77 CLR 449, 462 (Latham CJ); *Polites v The Commonwealth* (1945) 70 CLR 60, 80–1 (Williams J). See also Kristen Walker and Andrew D Mitchell, 'A Stronger Role for Customary International Law in Domestic Law?' in Hilary Charlesworth et al (eds), *The Fluid State: International Law and National Legal Systems* (Federation Press, 2005) 110.

88 See, eg, *Nulyarrima v Thompson* (1999) 165 ALR 621. A number of these decisions express the view that customary international law, while not having direct effect in Australian law, is a source that might nonetheless influence the development of the common law: see *Chow Hung Ching v The King* (1948) 77 CLR 449, 477 (Dixon J); *Western Australia v The Commonwealth* (1995) 183 CLR 373, 486 (Mason CJ, Brennan, Deane, Toohey, Gaudron and McHugh JJ).

89 Committee on Economic, Social and Cultural Rights, *List of Issues in Relation to the Fifth Periodic Report of Australia: Replies of Australia*, UN Doc E/C.12/AUS/Q/5/Add.1 (17 March 2017) 2 [1]; Human Rights Committee, *Sixth Periodic Report of States Parties: Australia*, UN Doc CCPR/C/AUS/6 (1 December 2017) 2 [5].

90 *Jumbunna Coal Mine NL v Victoria Coal Miners' Association* (1908) 6 CLR 309, 363 (O'Connor J); *Polites v The Commonwealth* (1945) 70 CLR 60, 68–9 (Latham CJ), 74 (Rich J), 79 (McTiernan J); *Chu Kheng Lim v Minister for Immigration* (1992) 176 CLR 1, 38 (Brennan, Deane and Dawson JJ). See also Kristen Walker, 'Treaties and the Internationalisation of Australian Law' in Cheryl Saunders (ed), *Courts of Final Jurisdiction: The Mason Court in Australia* (Federation Press, 1996) 204.

obligations.[91] The rule can operate even where an obligation has not been expressly implemented in Australian law.[92]

49 However, this common law rule of interpretation gives international human rights law only limited influence in Australian law. It is merely a presumption to be applied in the process of statutory interpretation. It does not give international law independent effect in Australian law,[93] and it cannot override the plain meaning of a statute, even where that statute is contrary to Australia's international obligations.[94]

50 The three State human rights Acts, which we discuss below, give international law a more substantial role in the interpretation and application of laws in each of those jurisdictions. All three contain a provision requiring statutes to be interpreted in a way that is compatible with the human rights protected in each Act.[95] In performing the interpretive task, courts may have regard to international law and to the judgments of foreign and international courts and tribunals.[96] As French CJ said in *Momcilovic v The Queen*, these provisions do not authorise courts to do anything that they cannot already do.[97] However, they might be designed to act as a 'reinforcement' of that capacity.[98] In practice, courts in all three jurisdictions do refer to foreign and international materials when making decisions under the Acts.[99]

51 However, it is worth noting that French CJ in *Momcilovic* also said that international and foreign judgments should be 'consulted with discrimination and care', given that they are made in the context of different legal systems.[100] Those comments have been

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91 *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273, 287 (Mason CJ and Deane J).

92 See, eg, *Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex Parte Lam* (2003) 214 CLR 1, 33 [100] (McHugh and Gummow JJ).

93 *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273, 287–8 (Mason CJ and Deane J).

94 See, eg, *Koowarta v Bjelke–Petersen* (1982) 153 CLR 168, 204 (Gibbs CJ); *Polites v Commonwealth* (1945) 70 CLR 60, 69 (Latham CJ).

95 *Human Rights Act 2004* (ACT) s 30 ('ACT *HRA*'); *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 32(1) ('Victorian *Charter*); *Human Rights Act 2019* (Qld) s 48(1) ('Qld *HRA*').

96 ACT *HRA* s 31(1); Victorian *Charter* s 32(2); Qld *HRA* s 48(3).

97 *Momcilovic v The Queen* (2011) 245 CLR 1, 36–7 [18] ('*Momcilovic*').

98 *Owen-D'Arcy v Chief Executive, Queensland Corrective Services* (2021) 9 QR 250, 293–4 [114] (Martin J).

99 See, eg, *Davidson v Director-General, Justice and Community Safety Directorate* (2021) 18 ACTLR 1, 44–5 [211]–[215] (Loukas-Karlsson J); *PBU v Mental Health Tribunal* (2018) 56 VR 141, 163–4 [83], 165–6 [89]–[90] (Bell J).

100 *Momcilovic v The Queen* (2011) 245 CLR 1, 37–8 [19].

applied by courts deciding cases under the State human rights Acts in all three jurisdictions.[101]

52 There has been suggestion in the past that a treaty that has not been implemented in domestic law might form the basis for a legitimate expectation that an administrative decision-maker will act consistently with the treaty. In *Minister for Immigration and Ethnic Affairs v Teoh*, a majority of the High Court held that a visa applicant was entitled to a legitimate expectation that the decision-maker would act consistently with relevant international law — in that case, the *Convention on the Rights of the Child* — in making the visa decision.[102] The Court found that the applicant had been denied procedural fairness because he had not been given the opportunity to make submissions on the decision-maker's intention to act contrary to that expectation.[103] That decision was consistent with the New Zealand approach to treaties reflected in *Tavita v Minister for Immigration*.[104]

53 The government (and subsequent governments) responded strongly to the decision in *Teoh*. They released statements making clear their position that entering into a treaty does not raise an expectation that executive decision-makers will act in accordance with that treaty if the relevant provisions of that treaty have not been enacted in Australian law.[105] The statements, and a series of Bills subsequently introduced into the Parliament, were intended as 'statutory or executive indications to the contrary' that could displace any such expectation in future cases.[106] The Bills never became law, and it was unclear that the statements had the intended effect.[107] In any case, however, while the decision in *Teoh* has never been formally overturned, the High Court has since

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101 *Deng v Australian Capital Territory (No 3)* (2022) 372 FLR 227, 265 [240] (Loukas-Karlsson J); *Bare v Independent Broad-Based Anti-Corruption Commission* (2015) 48 VR 129, 197–8 [213] (Warren CJ), 254 [387] (Tate JA), 383 [485] (Santamaria JA); *Waratah Coal Pty Ltd v Youth Verdict Ltd (No 6)* [2022] QLC 21, [81] (Kingham P) ('*Waratah Coal*').

102 *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273 ('*Teoh*').

103 *Teoh* (1995) 183 CLR 273, 290–2 (Mason CJ and Deane J), 301–3 (Toohey J), 304–5 (Gaudron J). See also Kristen Walker, 'Who's The Boss? The Judiciary, the Executive, the Parliament and the Protection of Human Rights' (1995) 25(2) *University of Western Australia Law Review* 238.

104 [1994] 2 NZLR 257.

105 Gareth Evans (Minister for Foreign Affairs) and Michael Lavarch (Attorney-General), 'International Treaties and the High Court Decision in Teoh' (Joint Statement, 10 May 1995); Alexander Downer (Minister for Foreign Affairs) and Daryl Williams (Minister for Justice), 'The Effect of Treaties in Administrative Decision-Making' (Joint Statement, 25 February 1997).

106 See *Teoh* (1995) 183 CLR 273, 291 (Mason CJ and Deane J).

107 See Gavan Griffith and Carolyn Evans, '*Teoh* and Visions of International Law' (2001) 21(1) *Australian Yearbook of International Law* 75, 77–8.

rejected the utility of a concept of 'legitimate expectation' distinct from the general doctrine of procedural fairness.[108]

STATUTORY HUMAN RIGHTS PROTECTIONS

(1) Statutory Charters of Rights

54 While there is no federal bill or charter of human rights, three States do have broad human rights legislation. Those are the ACT, Victoria, and Queensland, and their laws were enacted in 2004, 2006 and 2019 respectively. These Acts are broadly similar to the New Zealand *Bill of Rights Act*.

55 Each of the three Australian human rights laws adopts a similar approach to the protection of human rights. None of them enables a court to strike down or invalidate legislation on the basis that it is inconsistent with human rights. Rather, the laws allow courts to issue non-binding declarations that a law is incompatible with human rights.[109] Additionally, the laws require the preparation of 'statements of compatibility' with human rights for any new legislation,[110] and they require 'public authorities' or 'public entities' to act in a manner consistent with human rights unless another law says otherwise.[111] A remedy will generally be available if a public authority breaches this requirement.

56 The human rights laws also require that statutes be interpreted in a manner compatible with human rights, to the extent that it is possible to do so consistently with their purpose.[112] The operation of the interpretive provision in the Victorian *Charter* was considered by the High Court in *Momcilovic*. The Court held that the interpretive provision of the *Charter*[113] is constitutionally valid. It also held that the provision

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108 See *Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex Parte Lam* (2003) 214 CLR 1, 20 [61]–[63], 27–8 [81]–[83] (McHugh and Gummow JJ), 36–8 [116]–[121] (Hayne J), 45–8 [140]–[148]; *Plaintiff S10/2011 v Minister for Immigration and Citizenship* (2912) 246 CLR 636, 658 [65] (Gummow, Hayne, Crennan and Bell JJ).

109 ACT *HRA* s 32; Victorian *Charter* s 36; Qld *HRA* ss 53–4.

110 ACT *HRA* ss 37–9; Victorian *Charter* s 28; Qld *HRA* s 38.

111 ACT *HRA* ss 40–40D; Victorian *Charter* s 38; Qld *HRA* s 58.

112 ACT *HRA* s 30; Victorian *Charter* s 32; Qld *HRA* s 48.

113 *Momcilovic* (2011) 245 CLR 1, 48 [46], 50 [50]–[51] (French CJ); 92–3 [171] (Gummow J); 123 [280] (Hayne J); 217 [566], 227 [600] (Crennan and Kiefel JJ); [684] (Bell J).

allowing a State court to issue a declaration of incompatibility[114] is constitutionally valid. However, the Court held that the power to issue a declaration of incompatibility cannot be conferred on a federal court, because it does not involve the exercise of judicial power[115] nor is it incidental to judicial power.[116] It is also questionable whether a State court can validly issue a declaration of incompatibility when it is exercising federal jurisdiction.[117]

57 *Momcilovic* is also understood as having confirmed that the interpretive provision operates in the same way as the principle of legality (albeit with respect to a wider range of human rights), rather than creating some 'stronger' rule of construction akin to that adopted in the United Kingdom.[118] However, Pamela Tate has challenged this reading, arguing that s 32 of the *Charter* has a more complex operation that the common law principle of legality.[119]

58 However, the decision also created some uncertainty about the interaction of the interpretive provision with s 7(2) of the *Charter*, which sets out the circumstances in which a right may be justifiably limited. Four judges accepted that the balancing exercise under s 7(2) was to be undertaken as part of the task of interpretation in the course of seeking to arrive at a human rights-compatible meaning; but one of those judges was in dissent, thus this conclusion is not part of the ratio of the case.[120] The other three judges expressly rejected the proposition that s 7(2) has any role to play in

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114 *Momcilovic* (2011) 245 CLR 1, 31 [6], 44 [36], 68 [97] (French CJ); 228–9 [603]–[605] (Crennan and Kiefel JJ); 241 [661] (Bell J).

115 *Momcilovic* (2011) 245 CLR 1, 65 [89] (French CJ), 94-5 [178]–[179] (Gummow J), 123 [280] (Hayne J), 223 [589], 222 [584] (Crennan and Kiefel JJ), 241 [661] (Bell J).

116 *Momcilovic* (2011) 245 CLR 1, 65–6 [90]–[91] (French CJ), 96–7 [187] (Gummow J), 123 [280] (Hayne J), 241 [661] (Bell J).

117 *Momcilovic* (2011) 245 CLR 1, 70 [100] (French CJ), 86 [146] (viii) (Gummow J), 123 [280] (Hayne J), 241 [661] (Bell J).

118 *Momcilovic* (2011) 245 CLR 1, 50 [50]–[51] (French CJ); 92 [170] (Gummow J); 123 [280] (Hayne J); 217 [565] (Crennan and Kiefel JJ); 250 [684] (Bell J). See also *Nigro v Secretary to the Department of Justice* (2013) 41 VR 359, 383 [85] (Redlich, Osborn and Priest JJA) ('*Nigro*').

119 Pamela Tate, 'Statutory Interpretive Techniques under the Charter: Three Stages of the *Charter of Human Rights and Responsibilities 2006* — Has the Original Conception and Early Technique Survived the Twists of the High Court's Reasoning in *Momcilovic*?' (Conference Paper, Human Rights under the *Charter*: The Development of Human Rights Law in Victoria, 8 August 2014).

120 *Momcilovic* (2011) 245 CLR 1, 92 [168] (Gummow J); 123 [280] (Hayne J); 164 [409] (Heydon J, dissenting); 249 [683] (Bell J).

relation to the application of the interpretive provision.[121] That issue remains unresolved in Victoria.[122]

59 The human rights protected in each law are generally similar. They are primarily civil and political rights drawn from the *ICCPR*. The ACT and Queensland laws also protect some rights drawn from the *ICESCR*, such as a right to education (in the case of the ACT and Queensland),[123] a right to health services (in the case of Queensland),[124] and a right to work (in the case of the ACT).[125] As of June 2024, the ACT also proposes to amend its law to incorporate a right to a healthy environment.

60 Although the introduction of the *Charter* in Victoria was anticipated by some to bring a flood of litigation and be a 'lawyers' picnic', in fact the Charter has had relatively limited effect. There have been some notable successes — such as the challenge to the detention of children in an adult prison.[126] But often the *Charter* is simply not referred to by the parties, leaving the courts with little capacity to engage with it. By way of an example, earlier this year the Victorian Court of Appeal decided a case concerning whether a young man's sentence ought to be reduced because he had spent almost three years in solitary confinement, after he assaulted three prison guards and was involved in a further incident in the prison.[127] The Court held that his three years in solitary confinement was a relevant matter, and reduced his sentence; but no reference was made in argument to the *Charter* right to humane treatment when deprived of liberty.[128]

61 The Queensland *HRA* is the most recently enacted of the three laws. Since its enactment in 2019, there have been several decisions of interest. In particular:

(a) In *Waratah Coal Pty Ltd v Youth Verdict Ltd (No 6)*,[129] decided in 2022, the Land Court of Queensland was required to make recommendations to the Minister for Resources and the Chief Executive of the Department of Science

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121 *Momcilovic* (2011) 245 CLR 1, 44 [35] (French CJ); 220 [575] (Crennan and Kiefel JJ).
122 See, eg, *Nigro* (2013) 41 VR 359, 383–4 [87]–[88] (Redlich, Osborn and Priest JJA); *Victoria Police Toll Enforcement v Taha* (2013) 49 VR 1, 72–3 [214] (Tate JA).
123 ACT *HRA* s 27A; Qld *HRA* s 36.
124 Qld *HRA* s 37.
125 ACT *HRA* s 27B.
126 *Certain Children v Minister for Families and Children (No 2)* (2017) 52 VR 441 (John Dixon J).
127 *Yat v The King* [2024] VSCA 93 ('*Yat*').
128 See *Yat* [2024] VSCA 93, [80] (Walker and Boyce JJA).
129 [2022] QLC 21.

and the Environment about the approval of a new coal mine in the Galilee Basin. The Court was acting in an administrative capacity and was thus a 'public entity' within the meaning of the *HRA*.[130] It was therefore required to have regard to relevant human rights in making its decision.[131] That required the Court to consider whether a recommendation to approve the mine would unjustifiably limit any human rights.

Youth Verdict argued that the adverse consequences of the greenhouse gas emissions generated by the new mine would unjustifiably limit the enjoyment of several human rights, being:

(i) the right to life of people in Queensland;

(ii) the rights of First Nations Peoples;

(iii) the rights of children;

(iv) the right to property of people in Queensland; and

(v) the right of certain groups to enjoy human rights without discrimination.

The Court found that there was sufficient causal nexus between any recommendation to approve the mine and the harm that would be caused by the emissions when the coal was burned to conclude that the rights would be limited should such a recommendation be made.[132] The Court further found that the limitation on each right was unjustifiable, when considered by reference to s 13 of the *HRA*.[133] The Court ultimately recommended, having regard to all relevant factors, that the applications be refused.[134]

(b) In *Johnston v Carroll (Commissioner of the Queensland Police Service*),[135] decided in 2024, the Supreme Court of Queensland found that directions made by the Queensland Police Commissioner requiring police officers and staff to be

130 Qld *HRA* s 9(4)(b).
131 Qld *HRA* s 58.
132 *Waratah Coal* [2022] QLC 21, [1298]–[1382].
133 The Court also found that the right to privacy would be unjustifiably limited, even though Youth Verdict had not made arguments about that right specifically: [1295], [1655].
134 *Waratah Coal* [2022] QLC 21, [1809], [1941].
135 [2024] QSC 2 ('*Johnston*').

vaccinated against Covid-19, and by the Director-General of the Department of Health requiring the same of ambulance staff, were unlawful under s 58 of the *HRA*. Section 58 provides that it is unlawful for a public entity to act or make a decision in a way that is not compatible with human rights (the substantive limb),[136] or, in making a decision, to fail to give proper consideration to a human right relevant to the decision (the procedural limb).[137]

With respect to the substantive limb, Martin SJA rejected arguments that the directions limited a number of human rights, including the rights to be protected from discrimination and to enjoy human rights without discrimination; the right to freedom of thought, conscience, religion and belief; and the right to privacy.[138] His Honour found that the direction limited the right not to be subjected to medical treatment without full, free and informed consent,[139] but found that such limitation was justified.[140] His Honour also found that the Commissioner had failed to give proper consideration to relevant human rights in making the police directions, and thus also breached the procedural limb of s 58.[141]

(2) Anti-discrimination and other similar laws

62 There is also a narrower set of human rights legislation in Australia comprised of anti-discrimination legislation at both State and Commonwealth level.

63 At the Commonwealth level, the four main pieces of legislation are the *Racial Discrimination Act 1975* (Cth); the *Sex Discrimination Act 1984* (Cth) (which provides protection against discrimination on the basis of relationship status, sexual orientation, gender identity and pregnancy or family responsibilities); the *Disability Discrimination Act 1992* (Cth); and the *Age Discrimination Act 2004* (Cth). In addition, each State has its own anti-discrimination laws covering broadly the same areas.

64 The Australian Human Rights Commission can investigate complaints of discrimination contrary to Commonwealth laws. Those complaints are resolved through

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136 Qld *HRA* s 58(1)(a).
137 Qld *HRA* s 58(1)(b).
138 *Johnston* [2024] QSC 2, [299], [307], [353].
139 See Qld *HRA* s 17(c).
140 *Johnston* [2024] QSC 2, [308]–[333], [429]–[459].
141 Contrary to s 58(1)(b). See *Johnston* [2024] QSC 2, [136]–[139].

a process of conciliation.[142] The States have their own bodies that perform a similar function.

65 The *Racial Discrimination Act 1975* (Cth) includes provisions prohibiting hate speech or racial vilification. Section 18C of that Act provides that 'it is unlawful for a person to do an act … if the act is reasonably likely, in all the circumstances, to offend, insult, humiliate or intimidate another person or a group of people' and if the act is done 'because of the race, colour or national or ethnic origin' of the person or people concerned.[143] That section has been the subject of several high-profile judicial decisions,[144] and repeated political controversy.[145] Some States have their own laws prohibiting vilification or hate speech, which are generally not confined to racial vilification.[146] As already noted, the *Racial Discrimination Act 1975* (Cth) has had a significant impact on the States' ability to enact racially discriminatory laws, by reason of s 109 of the Constitution.

66 Another subject of recent political debate has been the need for legislation specifically addressing religious discrimination, and protecting religious freedoms. An inquiry into religious freedom in Australia conducted after the legalisation of same-sex marriage in 2017 recommended both the enactment of Commonwealth legislation prohibiting religious discrimination and some changes to Commonwealth law to better protect religious freedoms, such as the right for religious schools to discriminate in relation to staff and students.[147] The Commonwealth government then introduced several Bills broadly giving effect to each of these recommendations,[148] but they never passed. The proposed laws raised interesting questions about the interaction of Commonwealth and State anti-discrimination laws, as some State laws prevent religious institutions from discriminating on the basis of matters such as sexual orientation.[149] In 2023, the

142 See generally *Australian Human Rights Commission Act 1986* (Cth) ss 46P–46PN.

143 Section 18D provides certain exemptions to this prohibition.

144 See, eg, *Eatock v Bolt* (2011) 197 FCR 261; *Toben v Jones* (2003) 129 FCR 515.

145 See, eg, Parliamentary Joint Committee on Human Rights, Parliament of Australia, *Inquiry into the Operation of Part IIA of the Racial Discrimination Act 1975 (Cth) and Related Procedures under the Australian Human Rights Commission Act 1986 (Cth)* (Report, 28 February 2017).

146 See *Crimes Act 1990* (NSW) s 93Z; *Anti-Discrimination Act 1991* (ACT) s 67A; *Anti-Discrimination Act 1991* (Qld) s 124A; *Anti-Discrimination Act 1998* (Tas) s 19; *Racial and Religious Tolerance Act 2001* (Vic) ss 7–8.

147 See Philip Ruddock et al, *Religious Freedom Review: Report of the Expert Panel* (May 2018) 1–7, 8 [1.3].

148 See, eg, Religious Discrimination Bill 2022 (Cth).

149 See, eg, *Equal Opportunity (Religious Exceptions) Amendment Act 2021* (Vic).

Australian Law Reform Commission completed an inquiry into religious educational institutions and anti-discrimination law (referred to it by the Commonwealth government after the 2022 federal election), recommending that the ability of such institutions to discriminate in relation to staff and students should be curtailed.[150]

NON-JUDICIAL SCRUTINY MECHANISMS

67 The Commonwealth Parliamentary Joint Committee on Human Rights was established in 2012.[151] The Committee's main function is to examine all Bills and legislative instruments for compatibility with the human rights recognised or declared in the seven human rights treaties listed above.[152] It publishes regular reports on its review of these Bills and instruments. It also conducts inquiries into matters referred to it by the Attorney-General. The Committee has recently concluded an 'Inquiry into Australia's Human Rights Framework', which recommended, among other things, the enactment of a federal Human Rights Act.[153]

68 The same 2012 reforms also require the Member of Parliament responsible for introducing a Bill or making a legislative instrument to prepare a statement of compatibility with human rights.[154]

69 The three States with human rights Acts have similar mechanisms for the scrutiny of proposed legislation.

(a) The ACT Attorney-General must prepare a statement of compatibility with human rights for each Bill presented to the Parliament.[155] The Standing Committee on Justice and Community Safety is responsible for reviewing Bills and legislative instruments for human rights issues.[156]

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150 Australian Law Reform Commission, *Maximising the Realisation of Human Rights: Religious Educational Institutions and Anti-Discrimination Laws* (Final Report, ALRC Report No 142, December 2023).

151 See *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth).

152 *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth) s 7(a).

153 Parliamentary Joint Committee on Human Rights, Parliament of Australia, *Inquiry into Australia's Human Rights Framework* (Report, May 2024).

154 *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth) ss 8–9.

155 ACT *HRA* s 37.

156 ACT *HRA* s 38.

(b) In Victoria, statements of compatibility with human rights must be prepared for all Bills,[157] and human rights certificates must be prepared for all legislative instruments and statutory rules.[158] The Scrutiny of Acts and Regulations Committee is responsible for reviewing all Bills, legislative instruments and statutory rules and reporting to the Parliament as to whether they raise human rights issues, including whether they are incompatible with the rights set out in the *Charter*.[159]

(c) The Queensland *Human Rights Act* requires the preparation of statements of compatibility for Bills,[160] and human rights certificates for subordinate legislation,[161] for tabling in Parliament. It also provides that the portfolio committee responsible for examining a Bill must consider the statement of compatibility and report to the Parliament as to whether the Bill is not compatible with human rights.[162]

70 It is worth noting that a failure to comply with the requirements for the preparation of statements of compatibility and human rights certificates does not affect the validity of the relevant law or legislative instrument.[163]

71 A number of other States have mechanisms for the review of proposed legislation and/or legislative instruments that require, among other things, consideration of any impact on personal rights and liberties.[164]

72 Finally, the existence of the *Charter* in Victoria — and, we would anticipate, analogous legislation in other States — means that, prior to legislation being enacted, advice will

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157 Victorian *Charter* s 28.

158 *Subordinate Legislation Act 1994* (Vic) ss 12A, 12D.

159 *Parliamentary Committees Act 2003* (Vic) s 17; *Subordinate Legislation Act 1994* (Vic) ss 21, 25A.

160 Qld *HRA* s 38.

161 Qld *HRA* s 41.

162 Qld *HRA* s 39.

163 *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth) ss 8(5), 9(4); ACT *HRA* s 39; Victorian *Charter* s 29; Qld *HRA* s 42.

164 See, eg, *Subordinate Legislation Committee Act 1969* (Tas) s 8; *Legislation Review Act 1987* (NSW) ss 8A, 9; Legislative Assembly of the Northern Territory, *Standing Orders* (in force as of 21 April 2016) Standing Order 176. The Standing Committee on Legislation in the Western Australian Parliament reviews referred Bills by reference to certain 'fundamental legal principles', which are not legislated but are used by the Committee as an informal framework. Those principles include that the Bill should have sufficient regard for the rights and liberties of individuals.

generally be sought on whether the Bill in question is *Charter* compliant. Experience suggests that advice of that kind is generally heeded by government.
