

# LIMITATIONS OF A CHARTER OF RIGHTS IN THE AGE OF COUNTER-TERRORISM

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[A central claim made by Australian proponents of a charter of rights like the Charter of Human Rights and Responsibilities Act 2006 (Vic) ('Victorian Charter') is that it will improve the protection of human rights in the field of counter-terrorism. This article provides a critique of this claim by identifying the risk that the Victorian Charter will take a court-centred trajectory — a course that may undermine the protection of human rights. It further argues that comparative arguments, especially those based on the Human Rights Act 1998 (UK) c 42, are problematic. The article concludes by sketching out an alternative to a court-centred approach to the Victorian Charter by drawing upon the idea of a community-based charter of rights.]

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## I INTRODUCTION

Since the 11 September 2001 attacks in the United States, the Australian Parliament has enacted a far-reaching set of counter-terrorism laws.<sup>1</sup> These laws brought into existence a range of 'terrorism offences'<sup>2</sup> which may result in conviction even when there is no violent intention or intention to cause damage.

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<sup>1</sup> For an up-to-date account of these laws: see Andrew Lynch and George Williams, *What Price Security? Taking Stock of Australia's Anti-Terror Laws* (2006).

<sup>2</sup> Before the 11 September 2001 attacks, Commonwealth laws did not criminalise 'terrorism' as such. See generally Ben Golder and George Williams, 'What Is "Terrorism"?' Problems of Legal Definition' (2004) 27 *University of New South Wales Law Journal* 270, 271.

Broad powers have been conferred upon Commonwealth Ministers to proscribe 'terrorist' groups. Groups can now be listed by virtue of a decision of the Foreign Minister with the effect that it is illegal to use or deal with the assets of the listed person or entity.<sup>3</sup> It will also be an offence directly or indirectly to provide assets to a listed person or entity.<sup>4</sup> Regulations can also be passed under the *Criminal Code Act 1995* (Cth) sch 1 ('*Criminal Code*') listing an organisation as a 'terrorist organisation'.<sup>5</sup> Once listed, a particularly broad set of 'terrorism offences' will apply to the organisation, which essentially impose criminal liability upon the entire group and persons who engage in certain forms of association.<sup>6</sup>

Unprecedented powers have also been conferred upon security and police organisations. Since mid-2003, the Australian Security Intelligence Organisation ('ASIO') has had powers to compulsorily question and detain persons *suspected of having information* related to a 'terrorism offence'.<sup>7</sup> Such persons can be detained for up to a week in largely incommunicado circumstances.<sup>8</sup> With the passage of the *Anti-Terrorism Act [No 2] 2005* (Cth), the Australian Federal Police ('AFP') acquired the ability to secure preventative detention orders<sup>9</sup> and control orders.<sup>10</sup> Both types of order can be issued in some situations against persons not suspected of any crime.<sup>11</sup>

The brunt of these laws has been felt most severely by Arab and Muslim Australians. All persons charged so far under 'terrorism offences' have been Mus-

<sup>3</sup> *Charter of the United Nations Act 1945* (Cth) s 15; *Charter of the United Nations (Terrorism and Dealings with Assets) Regulations 2002* (Cth) reg 6(1). For an analysis of the constitutional issues relating to this proscription power: see Joo-Cheong Tham, 'Possible Constitutional Objections to the Powers to Ban "Terrorist" Organisations' (2004) 27 *University of New South Wales Law Journal* 482, 509–21.

<sup>4</sup> Such conduct is not illegal if authorised by the Foreign Minister: *Charter of the United Nations Act 1945* (Cth) ss 20–2.

<sup>5</sup> *Criminal Code* s 102.1(2)(a). This power was conferred by the *Criminal Code Amendment (Terrorist Organisations) Act 2004* (Cth). For an analysis of the constitutional issues relating to this proscription power: see Tham, above n 3, 484–509.

<sup>6</sup> For a discussion of these offences: see Miriam Gani and Gregor Urbas, 'Alert or Alarmed? Recent Legislative Reforms Directed at Terrorist Organisations and Persons Supporting or Assisting Terrorist Acts' (2004) 8 *Newcastle Law Review* 23, 31–6. See also Aidan Ricketts, 'Freedom of Association or Guilt by Association: Australia's New Anti-Terrorism Laws and the Retreat of Political Liberty' (2002) 6 *Southern Cross University Law Review* 133.

<sup>7</sup> *Australian Security Intelligence Organisation Act 1979* (Cth) pt 3 div 3 ('*ASIO Act*').

<sup>8</sup> *ASIO Act* pt 3 div 3. The Parliamentary Joint Committee on ASIO, ASIS and DSD ('PJCAAD') has recently analysed these powers: PJCAAD, Parliament of Australia, *ASIO's Questioning and Detention Powers: Review of the Operation, Effectiveness and Implications of Division 3 of Part III in the Australian Security Intelligence Organisation Act 1979* (2005). For an analysis of the constitutional issues relating to these powers: see Greg Carne, 'Detaining Questions or Compromising Constitutionality? The *ASIO Legislation Amendment (Terrorism) Act 2003* (Cth)' (2004) 27 *University of New South Wales Law Journal* 524.

<sup>9</sup> *Anti-Terrorism Act [No 2] 2005* (Cth) sch 4. For a thorough review of the Anti-Terrorism Bill [No 2] 2005 (Cth): see Sue Harris Rimmer et al, *Bills Digest No 64 2005–06: Anti-Terrorism Bill (No 2) 2005*.

<sup>10</sup> *Anti-Terrorism Act (No 2) 2005* (Cth) sch 4.

<sup>11</sup> Control orders can be issued when the making of the order would substantially assist in preventing a 'terrorist act', even though a person is not suspected of engaging in the 'terrorist act': *Criminal Code* ss 104.4(1)(c)(i), 104.14(7). Preventative control orders can be issued for the purpose of preserving evidence in relation to a 'terrorist act' that has occurred in the last 28 days: *Criminal Code* s 105.4(6).

lim,<sup>12</sup> and all but one of the groups banned as ‘terrorist organisations’ under the *Criminal Code* are self-identified Muslim organisations.<sup>13</sup> Not surprisingly, a recent review of Australia’s counter-terrorism laws found that they have contributed to Muslim citizens experiencing ‘a considerable increase in fear, a growing sense of alienation from the wider community and an increase in distrust of authority’.<sup>14</sup>

The radical changes effected by these laws<sup>15</sup> and their impact upon Muslim communities have increased calls for a bill of rights. Members of the Gilbert + Tobin Centre for Public Law, for instance, have argued that ‘due to the lack of a national Bill of Rights ... the “balancing” process is far from transparent and the dynamic between security and rights is rather one-sided.’<sup>16</sup> More importantly for the purposes of this article, the enactment of the Victorian bill of rights, the *Charter of Human Rights and Responsibilities Act 2006* (Vic) (‘*Victorian Charter*’)<sup>17</sup> in July 2006 was partly justified on the basis that it would increase the protection of human rights in the ‘War on Terror’.<sup>18</sup>

As a means of improving the protection of human rights in the area of counter-terrorism, a bill of rights like the *Victorian Charter* is simply one out of a menu of strategies. Neither a commitment to human rights nor a belief that Australia’s counter-terrorism laws are unjust necessarily translates into support for a bill of rights. As Jeremy Waldron has pointed out, a proponent of human rights could quite reasonably come to the view that human rights should *not* be

<sup>12</sup> For some details of those charged: see Brendan Nicholson, ‘A Man of Terror, or a Terrorised Man?’, *The Age* (Melbourne), 19 February 2005, Insight 5; Editorial, ‘The Nine Charged in Melbourne’, *The Age* (Melbourne), 11 November 2005, 2; Farah Faroque and Gary Tippet, ‘What Went Wrong?’, *The Age* (Melbourne), 12 November 2005, Insight 1, 5.

<sup>13</sup> See *Criminal Code Regulations 2002* (Cth) pt 2. The exception is the Kurdistan Workers’ Party.

<sup>14</sup> Security Legislation Review Committee, Parliament of Australia, *Report of the Security Legislation Review Committee* (2006) 5 (‘*Sheller Report*’). For similar findings: see Human Rights and Equal Opportunity Commission, *Isma — Listen: National Consultations on Eliminating Prejudice against Arab and Muslim Australians* (2004) 67–9; Parliamentary Joint Committee on Intelligence and Security, Parliament of Australia, *Review of Security and Counter Terrorism Legislation* (2006) ch 3.

<sup>15</sup> For critiques of these laws: see, eg, Michael Head, ‘“Counter-Terrorism” Laws: A Threat to Political Freedom, Civil Liberties and Constitutional Rights’ (2002) 26 *Melbourne University Law Review* 666; George Williams, ‘Australian Values and the War against Terrorism’ (2003) 26 *University of New South Wales Law Journal* 191; George Williams, ‘National Security, Terrorism and Bills of Rights’ (2003) 9 *Australian Journal of Human Rights* 263; Jenny Hocking, *Terror Laws: ASIO, Counter-Terrorism and the Threat to Democracy* (2004) chs 11–13; Joo-Cheong Tham, ‘Casualties of the Domestic “War on Terror”: A Review of Recent Counter-Terrorism Laws’ (2004) 28 *Melbourne University Law Review* 512; Ian Barker, ‘Human Rights in an Age of Counter-Terrorism’ (2005) 26 *Australian Bar Review* 267.

<sup>16</sup> Submission to United Nations Study on Human Rights Compliance while Countering Terrorism (Australia), 13 March 2006, 2 (Andrew Lynch, Ben Saul and George Williams). The main Australian text arguing for the need for a bill of rights in the War on Terror is George Williams, *The Case for an Australian Bill of Rights: Freedom in the War on Terror* (2004).

<sup>17</sup> Like the *Human Rights Act 2004* (ACT), this Act was preceded by a process of public consultation and a report recommending the enactment of a bill of rights: see Human Rights Consultation Committee, *Rights, Responsibilities and Respect: The Report of the Human Rights Consultation Committee* (2005). For a discussion of the document that set up this committee, namely, Department of Justice, *Human Rights in Victoria: Statement of Intent* (May 2005) Department of Justice, Victoria <<http://www.justice.vic.gov.au>>: see Dan Meagher, ‘Taking Parliamentary Sovereignty Seriously within a Bill of Rights Framework’ (2005) 10 *Deakin Law Review* 686.

<sup>18</sup> See below nn 37–51 and accompanying text.

legally codified.<sup>19</sup> They could be of the view that legal strategies like a bill of rights are inferior compared with political strategies of mobilisation. Even if there was a preference for legal strategies, this does not necessarily lead one to support a bill of rights. For instance, opponents of counter-terrorism laws could simply insist that these laws be repealed.<sup>20</sup> One can very well agree with George Williams' observation that 'we do need better formal legal protection for human rights'<sup>21</sup> and yet not endorse his preference for a charter of rights.

There is then no necessary reason why those campaigning against draconian counter-terrorism laws should support a charter of rights. Indeed, close scrutiny of key arguments made by proponents invites scepticism. A central claim by proponents is that a charter of rights will improve the protection of human rights in the field of counter-terrorism.

This claim, however, often rests upon suspect comparative arguments. Proponents of a charter of rights also typically neglect the dangers of a court-centred Charter. When a charter of rights takes this trajectory, courts and judges are seen as *the only* protectors of human rights. Several consequences will follow from this assumption: legal decisions become the key material in interpreting and articulating human rights, and legal expertise will be seen as necessary for human rights literacy. Such a trajectory threatens to impair the protection of human rights in the War on Terror. With a bill of rights like the *Victorian Charter*, the prescribed cure might very well worsen the disease.

It is the principal aim of this article to highlight the limitations of the *Victorian Charter* in protecting human rights in the area of counter-terrorism. It does so by, first, providing an overview of the *Victorian Charter*. The following Part then sets out the arguments that such an instrument would lead to greater protection of human rights in the War on Terror.

Most of the article is devoted to a critique of these arguments. This critique begins by spelling out some of the difficulties with the notion of a 'dialogue'; a notion that is central to arguments for the *Victorian Charter*. It then identifies the risk that the *Victorian Charter* will take a court-centred trajectory and goes on to explain why such a course may undermine the protection of human rights. The article explains how the *Victorian Charter* potentially marginalises other more effective mechanisms for protecting human rights, notably, parliamentary methods of protection. Moreover, deference by the courts to the executive on questions of national security may legitimise excessive counter-terrorism laws. A court-centred trajectory will also likely result in an increased legalisation of human rights politics.

The last part of this critique details how comparative arguments, especially those based on the *Human Rights Act 1998* (UK) c 42, are problematic. By way

<sup>19</sup> Jeremy Waldron, *Law and Disagreement* (1999) ch 10. See also Jeremy Waldron, 'A Right-Based Critique of Constitutional Rights' (1993) 13 *Oxford Journal of Legal Studies* 18, 23–5. For similar sentiments: see Amartya Sen, 'Work and Rights' (2000) 139 *International Labour Review* 119, 123.

<sup>20</sup> As was recommended by the *Sheller Report* in relation to certain aspects of these laws: see *Sheller Report*, above n 14, 5–17.

<sup>21</sup> George Williams, 'Victoria's Charter of Rights and Responsibilities: Lessons for the National Debate' in Kay Walsh (ed), Department of Senate, *Images, Colours and Reflections: Lectures in the Senate Occasional Lecture Series 2005–2006* (2006) 81, 82.

of conclusion, the article sketches an alternative to a court-centred approach to the charter of rights by drawing upon the idea of a community-based charter of rights.

Some final remarks should be made by way of introduction. This article is focused on the *Victorian Charter* and arguments made in support of its enactment. This choice has been made because of the significance that the *Victorian Charter* will have in debates on whether there should be a bill of rights at a national<sup>22</sup> or state level. Since the *Victorian Charter* is the first state bill of rights in Australia,<sup>23</sup> Williams, its main architect, is correct to state that the *Victorian Charter* ‘sets a very clear path for the nation’.<sup>24</sup> The question is whether this is a path that Australia should take.

## II OVERVIEW OF THE *VICTORIAN CHARTER*

Most fundamentally, the *Victorian Charter* is a *legal* instrument. This instrument is limited in terms of entities bound, with its scope generally confined to governmental bodies, notably, the Victorian Parliament, courts and ‘public authorities’.<sup>25</sup> It is also confined to civil and political rights.<sup>26</sup> Importantly, the legal *recognition* of these rights is accompanied by the ability to *limit* these rights. The title of s 7 of the *Victorian Charter*, ‘Human Rights — What They Are and when They May Be Limited’, neatly captures this point.

The *Victorian Charter* relies upon a range of institutional mechanisms to protect human rights. Parliamentary mechanisms are integral, as a statement of compatibility or incompatibility with the rights recognised in the *Victorian Charter* is mandatory whenever a Bill is introduced into the Victorian Parliament.<sup>27</sup> Further, the Scrutiny of Acts and Regulations Committee is required to consider any Bill and report on its compatibility with these rights.<sup>28</sup>

While judges will not be able to strike down laws that they view as incompatible with rights codified in the *Victorian Charter*, courts will have a key role in its

<sup>22</sup> See, eg, NewMatilda.com, *A Human Rights Act for Australia* (2007) <www.humanrightsact.com.au>. Amnesty International is also supporting the enactment of such a statute at the federal level: see *New Matilda Update about a Human Rights Act for Australia* (3 April 2007) Amnesty International Australia <[http://www.amnesty.org.au/Act\\_now/campaigns/human\\_rights\\_and\\_security/features/new\\_matilda\\_update\\_about\\_a\\_human\\_rights\\_act\\_for\\_australia](http://www.amnesty.org.au/Act_now/campaigns/human_rights_and_security/features/new_matilda_update_about_a_human_rights_act_for_australia)>.

<sup>23</sup> The first Australian bill of rights was, in fact, the *Human Rights Act 2004* (ACT). Prior to the enactment of this Act, a consultative committee recommended the enactment of a statutory bill of rights similar to the *Human Rights Act 1998* (UK) c 42: see ACT Bill of Rights Consultative Committee, Parliament of the ACT, *Towards an ACT Human Rights Act* (2003). For comment: see Leighton McDonald, ‘New Directions in the Australian Bill of Rights Debate’ [2004] *Public Law* 22. For analyses of the Australian Capital Territory statute: see Carolyn Evans, ‘Responsibility for Rights: The ACT *Human Rights Act*’ (2004) 32 *Federal Law Review* 291.

<sup>24</sup> George Williams, quoted in Kenneth Nguyen, ‘Independent Charter’, *The Age* (Melbourne), 28 July 2006, 15.

<sup>25</sup> For the definition of ‘public authority’: see *Victorian Charter* s 4.

<sup>26</sup> *Victorian Charter* s 3, which defines human rights as ‘the civil and political rights set out in Part 2’. See also Explanatory Memorandum, Charter of Human Rights and Responsibilities Bill 2006 (Vic) 1: ‘The human rights protected by the Charter are civil and political rights’.

<sup>27</sup> *Victorian Charter* s 28.

<sup>28</sup> *Victorian Charter* s 30.

implementation.<sup>29</sup> Once the *Victorian Charter* comes into full effect (many of its provisions are not operative until 2008), Victorian courts will be required to interpret statutes in a way which is compatible with the rights provisions of the *Victorian Charter* as far as possible consistently with the purpose of the statutes.<sup>30</sup> If unable to interpret a statute in a manner compatible with these provisions, the Victorian Supreme Court is empowered to make a 'declaration of inconsistent interpretation'. This declaration has no effect on the validity of a statute, but the relevant Minister is obliged to provide a written response within six months of receiving the declaration.<sup>31</sup>

Courts will also be involved in enforcing the prohibition against a 'public authority' engaging in action incompatible with the rights recognised in the *Victorian Charter* or failing to give proper consideration to a relevant human right, unless it could not reasonably have acted differently under the statute.<sup>32</sup> Breach of this prohibition does not in itself give rise to a cause of action. However, individuals who are entitled to seek judicial review under either the *Administrative Law Act 1978* (Vic) or the general law may do so on the ground that this prohibition has been breached.<sup>33</sup> None of the above requirements applies if Parliament makes an 'override' declaration that a statute has effect despite being incompatible with the provisions of the *Victorian Charter*.<sup>34</sup> Such declarations are intended to be made only in 'exceptional circumstances'<sup>35</sup> and will sunset after five years.<sup>36</sup>

### III ARGUMENTS FOR A CHARTER OF RIGHTS IN THE AGE OF COUNTER-TERRORISM

According to the Victorian Human Rights Consultation Committee, the *Victorian Charter* could improve the public debate surrounding counter-terrorism laws. In its words, the *Victorian Charter* would 'institutionalise the checks and balances that Parliament should apply in its consideration of any further anti-terrorism laws.'<sup>37</sup> It may also, according to the Committee, 'introduce a

<sup>29</sup> On legal remedies under the *Victorian Charter*: see generally Simon Evans and Carolyn Evans, 'Legal Redress under the *Victorian Charter of Human Rights and Responsibilities*' (2006) 17 *Public Law Review* 264.

<sup>30</sup> *Victorian Charter* s 32.

<sup>31</sup> *Victorian Charter* ss 36–7.

<sup>32</sup> *Victorian Charter* s 38.

<sup>33</sup> *Victorian Charter* s 39. Reviews of the practices of 'public authorities' are contemplated and can be carried out by the Equal Opportunity and Human Rights Commission if requested by the 'public authority': *Victorian Charter* s 41(c). The Commission also has the role of monitoring the impact of the *Victorian Charter* and providing community education in relation to it: *Victorian Charter* s 41(a), (d).

<sup>34</sup> *Victorian Charter* s 31(6).

<sup>35</sup> *Victorian Charter* s 31(4).

<sup>36</sup> *Victorian Charter* s 31(7).

<sup>37</sup> Human Rights Consultation Committee, above n 17, 11. While most Australian counter-terrorism laws passed since the 11 September 2001 attacks are federal statutes, the power of the Commonwealth Parliament to enact such laws is drawn partly from the referrals of power made by the states pursuant to s 51(xxxvii) of the *Australian Constitution*: see, eg, *Terrorism (Commonwealth Powers) Act 2003* (Vic). Victoria has also enacted its own counter-terrorism laws: *Terrorism (Community Protection) Act 2003* (Vic).

sense of proportionality to the debate'<sup>38</sup> and 'provide comfort to particular communities that they are not being singled out on racial or religious grounds.'<sup>39</sup>

The Committee appears to envisage that such a beneficial impact on public debate would result from the *Victorian Charter* building 'a human rights culture — a culture that creates an understanding of and respect for our basic rights and responsibilities across the entire Victorian community.'<sup>40</sup> Central to this culture is 'a new dialogue on human rights between the community and government.'<sup>41</sup> Echoing the sentiments of the Committee, the Victorian Attorney-General, Rob Hulls, has also emphasised that the *Victorian Charter* institutes a

dialogue model of human rights that seeks to address human rights issues through a formal dialogue between the three branches of government while recognising the ultimate sovereignty of Parliament to make laws for the good government of the people of Victoria.<sup>42</sup>

These arguments have also been made more generally. George Williams, Chair of the Victorian Human Rights Consultation Committee has, for instance, argued for a bill of rights on the ground that it would enhance the quality of public debate concerning counter-terrorism laws. This was because '[w]ithout an Australian statement of rights that has political acceptance and legal force, we lack the tool required to navigate our way through the current War on Terror while maintaining our basic rights.'<sup>43</sup>

Similarly, Sir Anthony Mason, former Chief Justice of the High Court of Australia, on the other hand, envisaged public debate being improved through the involvement of courts. For Mason, a statutory bill of rights with judicial review would mean, in relation to counter-terrorism laws, that 'principled judicial decision-making would replace political compromise'.<sup>44</sup>

Arguments based on the beneficial impact a human rights legal instrument like the *Victorian Charter* would have on public debate of counter-terrorism laws are increasingly accompanied by comparisons with the *Human Rights Act 1998* (UK) c 42. The Victorian Human Rights Consultation Committee, for instance, claimed that:

<sup>38</sup> Human Rights Consultation Committee, above n 17, 12.

<sup>39</sup> *Ibid.* This argument was also made by Luke Cornelius, Victoria Police Ethical Standards Assistant Commissioner: see Selma Milovanovic, 'Top Policeman Backs Rights Bill', *The Age* (Melbourne), 20 April 2006, 9.

<sup>40</sup> Human Rights Consultation Committee, above n 17, 92.

<sup>41</sup> *Ibid.* iii.

<sup>42</sup> Victoria, *Parliamentary Debates*, Legislative Assembly, 4 May 2006, 1293 (Rob Hulls, Attorney-General). The Attorney-General also stated that '[t]his bill promotes a dialogue between the three arms of government — the Parliament, the executive and the courts — while giving the Parliament the final say': at 1290.

<sup>43</sup> Williams, *The Case for an Australian Bill of Rights*, above n 16, 37.

<sup>44</sup> Sir Anthony Mason, *Why Do We Need a Bill of Rights?* (29 March 2006) NewMatilda.com <<http://www.newmatilda.com/policytoolkit/policydetail.asp?policyID=346>>.

The United Kingdom[’s] ... *Human Rights Act 1998* has been a success without giving rise to the litigation and other problems sometimes associated with the United States Bill of Rights. Its law has ... proved effective in balancing issues such as a need to fight terrorism with the democratic and other principles required for a free society.<sup>45</sup>

Spencer Zifcak, the primary drafter of NewMatilda.com’s Human Rights Bill, has also observed in relation to the framework enacted by the *Human Rights Act 1998* (UK) c 42 that: ‘The system is a good one ... because it creates a constructive dialogue between the courts, the parliament and the people in relation to the observance of people’s fundamental rights.’<sup>46</sup> These are influential arguments as demonstrated by an observation in the Senate Legal and Constitutional Legislation Committee’s report into the Anti-Terrorism Bill [No 2] 2005 (Cth):

Many witnesses also noted that, unlike other western democratic common law countries, the Bill’s operation will not be tempered by a Bill of Rights. That is, the absence of a constitutional or statutory Bill of Rights in Australia means that Australian judges do not have a coherent statement of minimum human rights standards against which to interpret law[s] that *prima facie* infringe civil rights and fundamental freedoms [in contrast to] ... the UK *Human Rights Act 1998*.<sup>47</sup>

Other comparative arguments simply highlight the fact that Australia does not have a statutory bill of rights while other comparable countries do. For example, Victorian Attorney-General, Rob Hulls, in his second reading speech for the Victorian Charter of Rights and Responsibilities Bill 2006 (Vic), stated that:

Australia is the last major common law-based country that does not have a comprehensive human rights instrument that ensures that fundamental human rights are observed and that corresponding obligations and responsibilities are recognised.<sup>48</sup>

This is said to have resulted in a poorer protection of human rights. Williams, for instance, has argued that:

Unlike in other every other western nation, the issue in Australia is purely political ... The only check on the power of parliaments or governments derives from political debate and the goodwill of our political leadership. This is not a safeguard that is regarded as acceptable or sufficient in other comparable nations.<sup>49</sup>

The absence of a bill of rights has, according to Williams, particular significance in relation to counter-terrorism laws because ‘[w]ithout a Bill of Rights, Australia is alone among western nations in lacking both a list of protected rights and a

<sup>45</sup> Human Rights Consultation Committee, above n 17, ii.

<sup>46</sup> Spencer Zifcak, *A Charter of Rights? Take the UK Example for a Start* (16 February 2005) NewMatilda.com <<http://www.newmatilda.com/policytoolkit/policydetail.asp?policyID=51>>.

<sup>47</sup> Senate Legal and Constitutional Legislation Committee, Parliament of Australia, *Provisions of the Anti-Terrorism Bill [No 2] 2005* (2005) 11.

<sup>48</sup> Victoria, *Parliamentary Debates*, Legislative Assembly, 4 May 2006, 1293 (Rob Hulls, Attorney-General). For similar sentiments: see also Brian Walters, ‘Going the Wrong Way on Rights’, *The Age* (Melbourne), 20 July 2006, 17.

<sup>49</sup> Williams, *The Case for an Australian Bill of Rights*, above n 16, 37. See also Lynch and Williams, above n 1, 92.

formal process for determining whether rights have been unduly infringed by laws passed during the war on terrorism.<sup>50</sup> Thus, '[t]he absence of such a check is one reason why, in some respects, Australian law after 11 September 2001 has restricted individual rights more than the equivalent regimes in Canada, the United Kingdom and the United States.'<sup>51</sup>

In summary, there are two types of argument contending that a human rights legal instrument like the *Victorian Charter* would improve the protection of human rights in relation to counter-terrorism laws. The first draws on the 'dialogue' that would be promoted by such an instrument, while the second is comparative, with a focus on the supposed impact of the *Human Rights Act 1998* (UK) c 42 on United Kingdom counter-terrorism laws. As the next Part will argue, these arguments are beset with difficulties.

#### IV CRITIQUE

##### *A Difficulties with the Notion of a 'Dialogue'*

Leighton McDonald has cogently argued that '[t]he notion of "dialogue" provides an overly cerebral and abstract account of the phenomenon under description.'<sup>52</sup> More importantly perhaps, the use of this notion tends to favour changes championed under the 'dialogue' metaphor. As McDonald observed, "'dialogue" is a good example of a value-laden word; it is unlikely we would use it if our attitude was one of disapproval.'<sup>53</sup> The positive connotations associated with dialogue obscure the fact that the forms of dialogue generated by the *Victorian Charter* will not necessarily lead to improved protection of human rights.

At the outset, it should be noted that there is some circularity with the dialogue justification. Assuming some degree of implementation, the *Victorian Charter* will necessarily increase the amount of 'rights' talk, especially within and between the Victorian Parliament, government departments and courts. If such talk is what amounts to a 'formal dialogue between the three branches of government',<sup>54</sup> then the *Victorian Charter* is in effect self-validating: it is a good thing because its implementation is a good thing.

Problems of logic aside, the self-validating aspect of the dialogue justification may very well lead to an excessive focus on the formal processes of implementation, as it is these processes that give rise to the dialogue. This can give rise to a technocratic approach that views effective rights-protection under the *Victorian*

<sup>50</sup> Williams, *The Case for an Australian Bill of Rights*, above n 16, 36.

<sup>51</sup> *Ibid* 28.

<sup>52</sup> Leighton McDonald, 'Rights, "Dialogue" and Democratic Objections to Judicial Review' (2004) 32 *Federal Law Review* 1, 26.

<sup>53</sup> McDonald, 'New Directions', above n 23, 30. To a lesser extent, similar criticisms can be laid against the use of the term 'human rights culture' without careful elaboration. For a discussion of the interaction and tension between prevailing UK legal culture and the 'human rights culture' to be ushered in by the *Human Rights Act 1998* (UK) c 42: see Murray Hunt, 'The *Human Rights Act* and Legal Culture: The Judiciary and the Legal Profession' (1999) 26 *Journal of Law and Society* 86.

<sup>54</sup> Victoria, *Parliamentary Debates*, Legislative Assembly, 4 May 2006, 1293 (Rob Hulls, Attorney-General). See also above n 42 and accompanying text.

*Charter* solely or largely in terms of putting in place internal procedures and having human rights ‘expertise’. With such an approach, the increase in activity of bureaucrats and human rights lawyers, regardless of their actual impact upon the human rights of Victorians, becomes the key indicator of effective rights protection.<sup>55</sup>

There are other significant difficulties with the notion of a dialogue. Interpretations of human rights principles are invariably contested. For example, there will be interminable disagreement as to what constitutes human rights and when human rights can be limited.<sup>56</sup> While the inevitability of such disagreement is sometimes occluded by what Tom Campbell has dubbed the ‘torture paradigm’, that is, ‘a shared perception of totally unacceptable evils which are never justified’,<sup>57</sup> it is clear that the overwhelming majority of human rights issues, especially in the area of counter-terrorism laws, are not such ‘bright-line’ questions.

Debates relating to these laws vividly illustrate how there is a ‘culture of controversy’ regarding human rights.<sup>58</sup> Opponents of these laws who invoke human rights principles have no monopoly over such discourse. The federal government itself has justified these far-reaching laws by clothing them in the language of human rights. These laws, according to Prime Minister John Howard, protect human rights by securing ‘the greatest human right of all ... the right to live.’<sup>59</sup> Hence, for the government, these laws do not prioritise security over human rights and justice. Rather, the ‘legislation is directed towards the twin goals of security and justice ... these goals are not separate ideals’.<sup>60</sup>

The notion of a dialogue not only fails to fully capture the inevitability of such disagreements, but also the nature of such disagreements. Disagreements about human rights are conducted as contests or, put more plainly, power struggles between various groups. These are often unequal contests, with the poor and the disadvantaged confronted with wealthier and more powerful adversaries, whether in courts, parliamentary forums or the offices of Ministers.

Lastly, at the heart of the dialogue justification is the ‘hybrid-approach’ adopted by the *Victorian Charter*.<sup>61</sup> In contrast to the US model that relies upon

<sup>55</sup> See also below nn 232–3 and accompanying text.

<sup>56</sup> Such disagreement was, in fact, reflected in the process of enacting the *Victorian Charter* itself through debates over whether social and economic rights should be included: see Human Rights Consultation Committee, above n 17, 27–9.

<sup>57</sup> Tom Campbell, ‘Human Rights: A Culture of Controversy’ (1999) 26 *Journal of Law and Society* 6, 18.

<sup>58</sup> *Ibid* 26.

<sup>59</sup> John Howard, ‘Address to the ASPI Global Forces 2006 Conference —Australia’s Security Agenda’ (Speech delivered at the ASPI Global Forces 2006 Conference, Canberra, 26 September 2006).

<sup>60</sup> Philip Ruddock, ‘A Safe and Secure Australia: An Update on Counter-Terrorism’ (Speech delivered at Manly Pacific Hotel, Sydney, 21 January 2006). For a critique of the government’s approach to human rights in the War on Terror: see Dianne Otto and Joo-Cheong Tham, ‘Deconstructing the Logic of Responding to One Threat with Another: The Perils of Countering Terrorism by Eroding Human Rights’ in Marius Smith (ed), *Human Rights 2006: The Year in Review* (2007).

<sup>61</sup> Janet L Hiebert, ‘A Hybrid-Approach to Protect Rights? An Argument in Favour of Supplementing Canadian Judicial Review with Australia’s Model of Parliamentary Scrutiny’ (1998) 26 *Federal Law Review* 115.

judicial review as a key mechanism for protecting rights, this approach relies upon both the judicial and political arms of government to protect rights.<sup>62</sup> Because legislatures rather than the courts have the ‘final say’<sup>63</sup> on questions of human rights, Janet L Hiebert has described this approach as a ‘parliamentary rights’ model<sup>64</sup> or ‘parliamentary bills of rights’.<sup>65</sup>

For Hiebert, this description highlights the institutional character of this type of bill of rights: it is not solely dependent upon ‘after-the-fact external judicial evaluation’ but also executive and parliamentary rights review. More importantly perhaps, Hiebert draws attention to the prospect that these bills of rights will facilitate diverse judgements on human rights questions, thereby allowing ‘critical examination of the relative merits of legislation from a broader spectrum of institutional actors, and in a more reflective manner than is normally associated with a Bill of Rights.’<sup>66</sup>

However, as Hiebert’s own work demonstrates, the last outcome cannot be simply read off the institutional design of a bill of rights.<sup>67</sup> A hybrid approach to rights protection involving all three branches of government does not necessarily mean that there will be a vibrant culture of human rights with diverse views from the whole range of governmental bodies. The extent to which the Parliament and the executive engage in independent rights review will be shaped by how judges, parliamentarians, Ministers and government officials view the relative legitimacy of political, as distinct from judicial, perspectives on rights. Such attitudes will profoundly shape the trajectory of the *Victorian Charter*. As Hiebert has argued, ‘[a]rguably, the most serious barrier to legislative rights review is *not structural* but *attitudinal*; the assumption that respecting rights is only, or primarily, a judicial responsibility.’<sup>68</sup> Accordingly, ‘[t]he conceptual differences between this parliamentary model and the American approach are muted by pervasive doubts about the legitimacy of political rights judgments that differ from judicial perspectives.’<sup>69</sup>

<sup>62</sup> This approach has also been dubbed the ‘Commonwealth Model’ of bills of rights: Stephen Gardbaum, ‘The New Commonwealth Model of Constitutionalism’ (2001) 49 *American Journal of Comparative Law* 707, 710.

<sup>63</sup> Victoria, *Parliamentary Debates*, Legislative Assembly, 4 May 2006, 1290 (Rob Hulls, Attorney-General).

<sup>64</sup> Janet L Hiebert, ‘New Constitutional Ideas: Can New Parliamentary Models Resist Judicial Dominance when Interpreting Rights?’ (2004) 82 *Texas Law Review* 1963.

<sup>65</sup> Janet L Hiebert, ‘Parliamentary Bills of Rights: An Alternative Model?’ (2006) 69 *Modern Law Review* 7.

<sup>66</sup> Hiebert, ‘New Constitutional Ideas’, above n 64, 1979–80. See also *ibid* 9.

<sup>67</sup> In relation to the *Canadian Charter of Rights and Freedoms*, for instance, Hiebert has argued that ‘one of the purported benefits of the new parliamentary rights model — the attempt to broaden the influence of judgments about rights — appears to be having the opposite effect to that intended’: Hiebert, ‘Parliamentary Bills of Rights’, above n 65, 27.

<sup>68</sup> Janet L Hiebert, ‘Interpreting a Bill of Rights: The Importance of Legislative Rights Review’ (2005) 35 *British Journal of Political Science* 235, 244 (emphasis added).

<sup>69</sup> Hiebert, ‘New Constitutional Ideas’, above n 64, 1980. See also Hiebert, ‘Parliamentary Bills of Rights’, above n 65, 18. In a similar vein, Gardbaum, above n 62, 756, has observed that ‘the formal, legal balance contained in the various bills of rights may not be the most important variable in determining whether and how much balance between the two values [that is, traditional judicial protection of fundamental rights and democracy] is achieved in practice.’

All this highlights the difficulty with the institutional focus of some understandings of ‘dialogue’. Institutions, of course, matter greatly but the point is that institutional design is not and cannot be decisive. A so-called ‘parliamentary rights’ model like the *Victorian Charter* may very well produce a court-centred process of rights protection if judicial views of human rights are seen as superior to judgements reached by the political arms of government.

### B *Dangers of a Court-Centred Charter*

As noted earlier, Mason has argued for a bill of rights on the basis that, under such a statute, ‘principled judicial decision-making would replace political compromise’.<sup>70</sup> He has further argued that:

The experience in other countries also confirms the lesson of history — that the rights of individuals are better protected by judges than by politicians. Politicians and administrators are primarily concerned with the exercise of government power and policy. Judges are primarily concerned with the rights of individuals.<sup>71</sup>

While not expressly advocating a bill of rights,<sup>72</sup> High Court Justice Michael Kirby has similarly argued that in the political context after the 11 September 2001 attacks:

the last line of defence for human rights, fundamental freedoms and individual liberty tends to be the courts. In a contemporary democracy, in the matter of anti-terrorist legislation, the usual protections and balances may not always be available, either in the legislative process or by executive enforcement.<sup>73</sup>

In a similar vein, Williams has characterised the protection afforded by parliamentary processes as ‘purely political’ and dependent on ‘the goodwill of our political leadership.’<sup>74</sup>

By characterising judicial perceptions of human rights as ‘principled’ and legislative judgement as a matter of ‘compromise’ or dependent upon ‘good will’, these views imply that the opinions of judges on questions of human rights are superior to those of parliamentarians. If these or similar views significantly influence the implementation of the *Victorian Charter*, there is a grave risk of a court-centred *Victorian Charter*.

‘Judicial dominance’<sup>75</sup> of human rights questions will likely mean that court processes will be seen as the principal method of protecting human rights under the *Victorian Charter*. Court decisions will become the authoritative source of

<sup>70</sup> Mason, above n 44.

<sup>71</sup> *Ibid.*

<sup>72</sup> See *Coleman v Power* (2004) 220 CLR 1, 60–1 (Kirby J).

<sup>73</sup> Justice Michael Kirby, ‘Terrorism and the Democratic Response: A Tribute to the European Court of Human Rights’ (Speech delivered as the Robert Schuman Lecture, Canberra, 11 November 2004) 7.

<sup>74</sup> Williams, *The Case for an Australian Bill of Rights*, above n 16, 37. See also Lynch and Williams, above n 1, 92, who, after noting the lack of a bill of rights at the federal level, argue that ‘[t]he only check on the power of parliament or government to abrogate human rights depends on the quality of political debate and the goodwill of our political leaders.’

<sup>75</sup> Hiebert, ‘New Constitutional Ideas’, above n 64, 1963.

human rights judgements even when bodies like government departments, parliamentary committees and community organisations are engaging in rights review of laws and executive action. Legal training, and in particular, knowledge of what is considered human rights law, will be seen as a prerequisite for human rights literacy.

This trajectory threatens to *impair* the protection of human rights for several reasons. In this scenario, the capacity of courts to protect human rights is overestimated while the role of Parliaments is not sufficiently recognised. A court-centred *Victorian Charter* may also result in draconian counter-terrorism laws being sanctioned by courts. Lastly, such a trajectory will result in the increased legalisation of human rights politics.

### 1 *Valorising Courts and Denigrating Parliaments in the Protection of Human Rights*

For Ronald Dworkin, courts are the ‘forum of principle’.<sup>76</sup> Similarly, for Mason, one of the main reasons why courts are best suited to protect human rights under a charter of rights is because they engage in ‘principled judicial decision-making’.<sup>77</sup>

There are, however, well-known difficulties with this position. It appears to rest upon two problematic assumptions: first, that ‘human rights may be captured in relatively pellucid and simple rules’;<sup>78</sup> and secondly, that judges are best positioned to reach the correct answers on questions of human rights.

The first assumption belies the fact of deep disagreement about rights. As Waldron has persuasively argued, people disagree on fundamental questions regarding rights: what does it mean to call something a right? What rights are there? What do rights imply in specific contexts? What trade-offs should there be between various rights?<sup>79</sup> Such disagreements reflect the fact that human rights *politics* are simply that, and ‘disagreement (including disagreement about principles) is one of the basic circumstances of political life’.<sup>80</sup>

Such disagreement is clearly evident in debates surrounding Australian counter-terrorism laws. Such debates should not be characterised solely as situations where opponents of the laws care about human rights, while proponents are demonstrating reckless disregard for human rights. As shown earlier, the federal government has resorted to the language of human rights in order to justify its counter-terrorism laws.<sup>81</sup>

Disagreement regarding human rights in the War on Terror is also apparent when specific laws are subjected to human rights analysis. For instance, the

<sup>76</sup> Ronald Dworkin, *A Matter of Principle* (1985) 33.

<sup>77</sup> Mason, above n 44.

<sup>78</sup> Tom Campbell, ‘Democracy, Human Rights and Positive Law’ (1994) 16 *Sydney Law Review* 195, 200.

<sup>79</sup> Waldron, *Law and Disagreement*, above n 19, 11–12. For reviews of *Law and Disagreement*: see, eg, Christopher L Eisgruber, ‘Democracy and Disagreement: A Comment on Jeremy Waldron’s *Law and Disagreement*’ (2002) 6 *Legislation and Public Policy* 35; Adrienne Stone, ‘Disagreement and an Australian Bill of Rights’ (2002) 26 *Melbourne University Law Review* 478.

<sup>80</sup> Waldron, *Law and Disagreement*, above n 19, 246.

<sup>81</sup> See above nn 59–60 and accompanying text.

Security Legislation Review Committee, after noting that the ‘effect of the [counter-terrorism] legislation upon human rights’ will be central to its review of these laws, stated that it would adopt:

As a guiding principle ... whether the legislation was a reasonably proportionate means of achieving the intended object of protecting the security of people living in Australia and Australians living overseas, including protecting them from threats to their lives.<sup>82</sup>

It proceeded to observe, however, that ‘[t]hese are difficult questions and the submissions made [to the review] differed widely in their response.’<sup>83</sup>

Even if we accept the first assumption that questions of human rights yield clear answers, the second assumption does not follow. There is nothing distinctly legal about these questions. Commenting upon the experience with the *Canadian Charter of Rights and Freedoms*, Hiebert has, for example, argued that the task of determining whether a limitation of freedom imposed by a law is proportionate to its aim(s) is ‘akin to policy analysis’.<sup>84</sup> If so, the proportionality analysis is best carried out by those who have experience and knowledge in the area subject to rights review. Judges, however well-qualified as lawyers, do not (and cannot be expected to) have expertise in the various areas engaged by questions of human rights.

Commentators with a rosy view of the capacity of the courts to protect human rights often have a dim view of Parliaments as institutions where human rights principles are upheld. For Mason, parliamentarians are ‘primarily concerned with the exercise of government power and policy’ and not questions of human rights.<sup>85</sup> Williams, on the other hand, has described the parliamentary protection of human rights as a matter of ‘the goodwill of our political leadership’.<sup>86</sup>

These sentiments are somewhat odd. To be sure, the limitations of parliamentary protection of human rights need to be recognised, not least those resulting from executive dominance and party discipline.<sup>87</sup> At the same time, there are clear occasions where it is parliamentary action that has protected human rights against regressive common law principles. For instance, employment protection measures under anti-discrimination statutes were enacted in response to the judge-developed rule that employers could dismiss their workers ‘at any time and for any reason or for none’, including discriminatory grounds, so long as proper notice or compensation was given.<sup>88</sup>

<sup>82</sup> *Sheller Report*, above n 14, 3.

<sup>83</sup> *Ibid.*

<sup>84</sup> Hiebert, ‘A Hybrid-Approach to Protect Rights?’, above n 61, 121. See also Janet Hiebert, ‘Parliament and Rights’ in Tom Campbell, Jeffrey Goldsworthy and Adrienne Stone (eds), *Protecting Human Rights: Instruments and Institutions* (2003) 231, 233–4; Hiebert, ‘Interpreting a Bill of Rights’, above n 68, 238–9.

<sup>85</sup> Mason, above n 44.

<sup>86</sup> Williams, *The Case for an Australian Bill of Rights*, above n 16, 37. See also above n 74.

<sup>87</sup> See generally David Kinley, *The European Convention on Human Rights: Compliance without Incorporation* (1993) pts 1–2; Hiebert, ‘A Hybrid-Approach to Protect Rights?’, above n 61, 125–9; Hiebert, ‘Parliament and Rights’, above n 84, 241–5.

<sup>88</sup> *Ridge v Baldwin* [1964] AC 40, 65 (Lord Reid).

More generally, as a mechanism for protecting human rights, Parliaments enjoy distinct advantages over courts.<sup>89</sup> Instead of being dependent upon litigation as the vehicle for rights review, Parliaments can engage in pre-legislative scrutiny and, therefore, be ‘prophylactic’<sup>90</sup> and preventive.<sup>91</sup> Rather than the parameters of human rights debates being cramped into legal questions, parliamentarians are free to grapple with human rights issues by drawing upon legal as well as other perspectives.

One retort would be to point to the spectre of a tyranny of the majority where Parliaments trample upon the rights of unpopular minorities.<sup>92</sup> Waldron was surely correct when he observed that such views are often connected to a view of ‘ordinary legislative activity as deal-making, horse-trading, log-rolling, interest-pandering, and pork-barrelling — as anything, indeed, except principled political decision-making.’<sup>93</sup> If legislators are agents acting for particular interests then we should not be surprised that the rights of unpopular minorities are traded away for the interests of the majority.

Yet this view of the legislature fails to do justice to parliamentary processes of decision-making where there is a jostling of partisan interest and political principles. In particular, it fails to recognise that ‘the fact that a particular preference or ideal is espoused by the majority ... does not necessarily mean that it is antithetical to minority interests.’<sup>94</sup>

More specifically, it ignores the clear evidence of Australian Parliaments paying attention to the rights of minorities, in particular, those of Australian Arabs and Muslims.<sup>95</sup> In its review of ASIO’s detention and compulsory questioning powers, PJCAAD devoted an entire chapter to implications of these powers for Muslim communities.<sup>96</sup> More recently, its successor, the Parliamentary Joint Committee on Intelligence and Security, handed down a report on Australia’s counter-terrorism laws which again had a chapter examining the ‘[i]mpact on Arab and Muslim Australians’.<sup>97</sup>

The emphasis that these committees have placed upon the disproportionate impact of counter-terrorism laws on Australian Muslims is connected to their

<sup>89</sup> See Simon Evans, ‘Australian Parliaments and the Protection of Human Rights’ (Speech delivered as a Senate Occasional Lecture, Canberra, 17 November 2006) 7.

<sup>90</sup> Michael Ryle, ‘Pre-Legislative Scrutiny: A Prophylactic Approach to Protection of Human Rights’ [1994] *Public Law* 192.

<sup>91</sup> For advantages of parliamentary protection of human rights: see generally David Kinley, ‘Parliamentary Scrutiny of Human Rights: A Duty Neglected?’ in Philip Alston (ed), *Promoting Human Rights through Bills of Rights: Comparative Perspectives* (1999) 158. See also David Kinley, ‘Human Rights Scrutiny in Parliament: Westminster Set to Leap Ahead’ (1999) 10 *Public Law Review* 252.

<sup>92</sup> See generally Wojciech Sadurski, ‘Judicial Review and the Protection of Constitutional Rights’ (2002) 22 *Oxford Journal of Legal Studies* 275, 291–3.

<sup>93</sup> Jeremy Waldron, *The Dignity of Legislation* (1999) 2, ch 2; Jeremy Waldron, ‘Legislating with Integrity’ (2003) 72 *Fordham Law Review* 373.

<sup>94</sup> Sadurski, above n 92, 292.

<sup>95</sup> See also Senate Standing Committee on Legal and Constitutional Affairs, Parliament of Australia, *Anti-Money Laundering and Counter-Terrorism Financing Bill 2006 and Anti-Money Laundering and Counter-Terrorism Financing (Transitional Provisions and Consequential Amendments) Bill 2006* (2006) 29–31, 41–2.

<sup>96</sup> PJCAAD, *ASIO’s Questioning and Detention Powers*, above n 8, ch 4.

<sup>97</sup> Parliamentary Joint Committee on Intelligence and Security, above n 14, ch 3.

ability to allow much broader participation than courts. For instance, parliamentary reviews of these laws were accompanied by a process of public consultation where anyone could make a submission. It is the relative accessibility of such processes that enabled Muslim representative groups to appear before *all* the parliamentary committees conducting the major inquiries into the counter-terrorism laws.<sup>98</sup> Moreover, a closer look at the record of parliamentary committees in reviewing Australian counter-terrorism laws suggests that their work has improved the protection of human rights in relation to these laws.

**Table 1: Appearance of Muslim Representative Groups before Parliamentary Committees Inquiring into Counter-Terrorism Laws**

Parliamentary Inquiry	Muslim Representative Groups Appearing in Public Hearings
Senate Legal and Constitutional Committee's inquiry into the Security Legislation Amendment (Terrorism) Bill 2002 (Cth) etc	Islamic Council of Victoria <sup>99</sup>
PJCAAD's inquiry into the Australian Security Intelligence Organisation Legislation Amendment (Terrorism) Bill 2002 (Cth)	Supreme Islamic Council of New South Wales, Islamic Council of Victoria <sup>100</sup>
Senate Legal and Constitutional References Committee's inquiry into the Australian Security Intelligence Organisation Legislation Amendment (Terrorism) Bill 2002 (Cth)	Islamic Council of Victoria, Australian Federation of Islamic Councils, Islamic Council of New South Wales <sup>101</sup>
PJCAAD's inquiry into ASIO's detention and compulsory questioning powers	Islamic Council of New South Wales, Australian Muslim Civil Rights Advocacy Network, Islamic Council of Victoria <sup>102</sup>
Senate Legal and Constitutional Legislation Committee's inquiry into the Anti-Terrorism Bill [No 2] 2005 (Cth)	Australian Muslim Civil Rights Advocacy Network, Australian Federation of Islamic Councils <sup>103</sup>

Since the 11 September 2001 attacks, large chunks of counter-terrorism legislation have been enacted in Australia after each subsequent major overseas

<sup>98</sup> See below Table 1.

<sup>99</sup> Senate Legal and Constitutional Legislation Committee, Parliament of Australia, *Consideration of Legislation Referred to the Committee: Security Legislation Amendment (Terrorism) Bill 2002 [No 2]* (2002) app 2.

<sup>100</sup> PJCAAD, Parliament of Australia, *An Advisory Report on the Australian Security Intelligence Organisation Legislation Amendment (Terrorism) Bill 2002* (2002) app D.

<sup>101</sup> Senate Legal and Constitutional References Committee, Parliament of Australia, *Australian Security Intelligence Organisation Legislation Amendment (Terrorism) Bill 2002 and Related Matters* (2002) app 2.

<sup>102</sup> PJCAAD, *ASIO's Questioning and Detention Powers*, above n 8, app B.

<sup>103</sup> Senate Legal and Constitutional Legislation Committee, *Provisions of the Anti-Terrorism Bill [No 2] 2005*, above n 47, app 2.

attack. In this dangerous ‘cycle of attacks followed by new laws’,<sup>104</sup> many laws have been passed with undue haste.<sup>105</sup> Nevertheless, all of these laws have been subject to parliamentary inquiries. With the first tranche of legislation passed in 2002 and 2003, there were three major parliamentary inquiries.<sup>106</sup> Even with a government-controlled Senate, the *Anti-Terrorism Act [No 2] 2005* (Cth) which, among others, introduced control and preventative detention orders, was subject to review by the Senate Legal and Constitutional Legislation Committee prior to its enactment.<sup>107</sup> In 2006, the *Anti-Money Laundering and Counter-Terrorism Financing Act 2006* (Cth), which introduced an expansive regime of financial reporting, was reviewed by the same Committee.<sup>108</sup>

The reports handed down by these parliamentary committees have examined various issues including those that can be easily characterised as human rights questions. For instance, reports examining ASIO’s detention and compulsory questioning powers have considered the following issues as they applied to these powers:

- the ability to be legally represented;<sup>109</sup>
- the right to silence and privilege against self-incrimination;<sup>110</sup>
- implications arising from international human rights standards;<sup>111</sup>
- safeguards, including the availability of judicial review;<sup>112</sup>
- issues arising from children being subject to these powers;<sup>113</sup> and
- implications for democratic processes.<sup>114</sup>

Significantly, these reports, including their discussion of human rights issues, have fed into the parliamentary process and resulted in important changes to

<sup>104</sup> Lynch and Williams, above n 1, 87.

<sup>105</sup> See Tham, ‘Casualties of the Domestic “War on Terror”’, above n 15, 520–3; Lynch and Williams, above n 1, 87–90.

<sup>106</sup> Senate Legal and Constitutional Legislation Committee, *Security Legislation Amendment (Terrorism) Bill 2002 [No 2]*, above n 99; PJCAAD, *An Advisory Report*, above n 100; Senate Legal and Constitutional References Committee, above n 101.

<sup>107</sup> Senate Legal and Constitutional Legislation Committee, *Provisions of the Anti-Terrorism Bill [No 2] 2005*, above n 47.

<sup>108</sup> Senate Legal and Constitutional Legislation Committee, Parliament of Australia, *Exposure Draft of the Anti-Money Laundering and Counter-Terrorism Financing Bill 2005* (2006); Senate Standing Committee on Legal and Constitutional Affairs, Parliament of Australia, *Anti-Money Laundering and Counter-Terrorism Financing Bill 2006 [Provisions]: Anti-Money Laundering and Counter-Terrorism Financing (Transitional Provisions and Consequential Amendments) Bill 2006 [Provisions]* (2006).

<sup>109</sup> PJCAAD, *An Advisory Report*, above n 100, 33–5; Senate Legal and Constitutional References Committee, above n 101, 50–4; PJCAAD, *ASIO’s Questioning and Detention Powers*, above n 8, 45–54.

<sup>110</sup> PJCAAD, *An Advisory Report*, above n 100, 40–5; Senate Legal and Constitutional References Committee, above n 101, 58–65.

<sup>111</sup> Senate Legal and Constitutional References Committee, above n 101, 79–80; PJCAAD, *ASIO’s Questioning and Detention Powers*, above n 8, 28–9.

<sup>112</sup> PJCAAD, *An Advisory Report*, above n 100, ch 4; Senate Legal and Constitutional References Committee, above n 101, 121–5; PJCAAD, *ASIO’s Questioning and Detention Powers*, above n 8, 55–68.

<sup>113</sup> PJCAAD, *An Advisory Report*, above n 100, 48–50; Senate Legal and Constitutional References Committee, above n 101, 129–36.

<sup>114</sup> PJCAAD, *ASIO’s Questioning and Detention Powers*, above n 8, ch 5.

counter-terrorism laws.<sup>115</sup> Table 2 sets out how the original Bill, various parliamentary committee reports and the final statute dealt with certain key matters in relation to ASIO's detention and questioning powers. The Table shows how the parliamentary processes failed by increasing the maximum period of detention. On the other hand, greater protection was clearly secured in terms of the seniority of the official issuing the detention warrant, the detention of children and the ability to choose legal representation.

<sup>115</sup> See also below nn 122–7 and accompanying text.

**Table 2: Changes to ASIO's Detention and Questioning Powers through Parliamentary Processes**

	Original Bill <sup>116</sup>	PJCAAD's Report <sup>117</sup>	Senate Legal and Constitutional References Report <sup>118</sup>	Enacted Provisions <sup>119</sup>
<b>Official Issuing Detention Warrant</b>	'Prescribed authority' who is either a federal magistrate or a legally qualified member of the Administrative Appeals Tribunal	Federal magistrates generally to issue warrants, with federal judges issuing warrants authorising detention exceeding 96 hours	'Issuing authority' who is a retired federal or state judge	'Issuing authority' who is a retired federal or state judge, senior Administrative Appeals Tribunal member, or persons member of a class declared by regulations
<b>Detention of Children, That Is, Persons under 18 Years</b>	Yes	Not permitted	Not permitted	Not permitted for those under 16 years with special rules for those aged 17–18 years
<b>Maximum Period of Detention</b>	48 hours maximum per warrant, which can be renewed to a maximum of seven days	Seven-day maximum	48 hours maximum per warrant with strict restrictions on consecutive warrants	Seven days per warrant with no ban on multiple warrants
<b>Entitlement to Legal Representation</b>	No	Yes, through panel of security-cleared senior lawyers	Entitled to lawyer of choice	Entitled to lawyer of choice

While these amendments were made when the Australian Labor Party Opposition controlled the Senate, changes increasing the protection of human rights under counter-terrorism laws have also occurred under a government-controlled

<sup>116</sup> Australian Security Intelligence Organisation Legislation Amendment (Terrorism) Bill 2002 (Cth).

<sup>117</sup> See the list of recommendations in PJCAAD, *An Advisory Report*, above n 100, xiii–xvi.

<sup>118</sup> See the list of recommendations in Senate Legal and Constitutional References Committee, above n 101, ch 11.

<sup>119</sup> *Australian Security Intelligence Organisation Legislation Amendment (Terrorism) Act 2003* (Cth).

Senate. Take, for example, the provisions relating to control orders. When a draft Bill was posted by Australian Capital Territory Chief Minister Jon Stanhope on 14 October 2005, control orders could be issued by a court in *ex parte* hearings.<sup>120</sup> When the Bill was tabled in federal Parliament the following month, the position had significantly changed due to lobbying by Liberal Party backbenchers.<sup>121</sup> Interim control orders could be issued in *ex parte* court proceedings but had to be subsequently confirmed in *inter partes* court hearings. The Bill was, however, silent on when this confirmation hearing should occur.<sup>122</sup> In response to this, the Senate Legal and Constitutional Legislation Committee recommended that the Act require that the confirmation hearing be held as soon as reasonably practicable after the interim control order is issued;<sup>123</sup> a recommendation that was largely incorporated into the final provisions.<sup>124</sup>

The fact that increased protection of human rights was secured through the parliamentary processes in relation to control orders and ASIO's detention and questioning powers does *not*, of course, mean that such protection was adequate. Nor does it mean that a similar story can be told in relation to other counter-terrorism laws. But this fact does refute any assumption that parliamentary institutions have little concern for the protection of human rights.

Indeed, in *some* situations, parliamentary institutions will take a more robust view of human rights than courts. For example, the Senate Legal and Constitutional Legislation Committee in its report on the Anti-Terrorism Bill [No 2] 2005 (Cth) recommended that sedition offences which severely curbed freedom of political expression be removed in their entirety in order to protect freedom of political expression.<sup>125</sup> It is not easy to see a court reviewing such offences under the *Victorian Charter* to adopt such a position given the ability to limit freedom of speech on grounds of 'national security'.<sup>126</sup>

Moreover, some parliamentary committees will be more able and willing than courts to contest governmental assessments of the threat of 'terrorism' and arguments made by security agencies on the grounds of 'national security'. For instance, when ASIO refused to publicly disclose the nature of the charges laid as a result of the exercise of its compulsory questioning powers in the first two years of their operation, this refusal was criticised by the PJCAAD on the basis that it 'did not accept that the information ... constituted a national security

<sup>120</sup> See Joo-Cheong Tham, *Provisions of Anti-Terrorism Bill (Cth) Dealing with Control and Preventive Detention Orders: The Failure to Provide Effective Judicial Oversight* (2005) 8.

<sup>121</sup> See, eg, Michelle Grattan and Brendan Nicholson, 'Georgiou Urges Changes to Terror Bill', *The Age* (Melbourne), 11 November 2005, 5.

<sup>122</sup> See Senate Legal and Constitutional Legislation Committee, *Provisions of the Anti-Terrorism Bill [No 2] 2005*, above n 47, 66.

<sup>123</sup> *Ibid* 71.

<sup>124</sup> *Criminal Code* s 104.5(1A).

<sup>125</sup> Senate Legal and Constitutional Legislation Committee, *Provisions of the Anti-Terrorism Bill [No 2] 2005*, above n 47, 115. For accounts of the debate surrounding the sedition offences: see, eg, Michelle Grattan and Brendan Nicholson, 'Bill's Sedition Offences to be Reviewed', *The Age* (Melbourne), 4 November 2005, 2; Michelle Grattan, 'The Treachery of Words', *The Age* (Melbourne), 6 November 2005, 15.

<sup>126</sup> *Victorian Charter* s 15(3).

concern or was prejudicial to prospective trials'.<sup>127</sup> Similarly, in its review of the banning of 'terrorist organisations' under the *Criminal Code*, PJCAAD has enquired into the nature of the threat posed to Australian interests by the banned 'terrorist organisation' and the extent to which this is a threat to domestic and/or overseas Australian interests.<sup>128</sup>

To sum up, a court-centred *Victorian Charter* will likely rest upon a problematic understanding of the respective capacities of courts and the legislature to protect human rights. The view that courts are best suited to protect human rights stands on weak premises. Conversely, a dim view of parliamentary protection of human rights fits badly with the record of parliamentary committees in reviewing and influencing Australia's counter-terrorism laws. The remainder of this Part turns to the other dangers that a court-centred *Victorian Charter* poses for the protection of human rights in the War on Terror: the legitimisation of draconian counter-terrorism laws as human rights compliant and an increased legalisation of human rights politics.

## 2 *Danger of Legitimising Draconian Counter-Terrorism Laws*

Under the *Victorian Charter*, the Victorian government will have significant ability to limit rights and freedoms in the War on Terror through s 7, which states that: 'A human right may be subject under law only to such reasonable limits as can be demonstrably justified in a free and democratic society based on human dignity, equality and freedom, and taking into account all relevant factors.'<sup>129</sup> It can also limit freedom of expression through s 15(3) which states that such freedom may be 'subject to lawful restrictions reasonably necessary ... for the protection of national security'.<sup>130</sup>

These provisions clearly provide for open-textured 'internal' and 'external' limitations on rights<sup>131</sup> through terms like 'reasonable limits' and 'free and democratic society'. The concept of 'national security', in particular, is notorious for its vagueness (and perhaps also 'its intrinsic tendency to be productive of, or

<sup>127</sup> PJCAAD, *ASIO's Questioning and Detention Powers*, above n 8, [1.72]. See Brendan Nicholson, 'ASIO Censorship Riles MPs', *The Age* (Melbourne), 1 December 2005, 3. There was clearly a limit as to how far the Committee was willing to go in rebuking ASIO, as it failed to compel ASIO to disclose information relating to the charges.

<sup>128</sup> PJCAAD, Parliament of Australia, *Review of Listing of the Palestinian Islamic Jihad (PIJ) as a Terrorist Organisation under the Criminal Code Amendment Act 2004* (2004); PJCAAD, Parliament of Australia, *Review of the Listing of Six Terrorist Organisations* (2005); PJCAAD, Parliament of Australia, *Review of the Listing of Tanzim Qa'idat al-Jihad fi Bilad al-Rafidayn (the Al-Zarqawi Network) as a Terrorist Organisation* (2005); PJCAAD, Parliament of Australia, *Review of the Listing of Seven Terrorist Organisations* (2005); PJCAAD, Parliament of Australia, *Review of the Listing of Four Terrorist Organisations* (2005); Parliamentary Joint Committee on Intelligence and Security, Parliament of Australia, *Review of the Listing of the Kurdistan Workers' Party (PKK)* (2006).

<sup>129</sup> Section 7 enumerates various relevant factors including the nature of the right, the importance of the purpose in limiting the right, the nature and extent of the limitation, and whether any less restrictive means were available to achieve the purpose in limiting the right: *Victorian Charter* s 7(2)(a)–(e).

<sup>130</sup> *Victorian Charter* s 15(3).

<sup>131</sup> Julie Debeljak, 'Rights Protection without Judicial Supremacy: A Review of the Canadian and British Models of Bill of Rights' (2002) 26 *Melbourne University Law Review* 285, 306–16.

to serve as a justification for some inanities’).<sup>132</sup> With such open-textured provisions, it is not surprising that the Victorian Attorney-General underlined that the *Victorian Charter* ‘will not stop the government from taking strong action to protect the community from terrorist threats’.<sup>133</sup>

Under the *Victorian Charter*, the government will, of course, need to explain how a particular Bill is compatible with these provisions. This, however, might not be very difficult to do given the breadth of these limitations.<sup>134</sup> Moreover, the task of doing so in the context of counter-terrorism laws might be even easier before the courts for various reasons. Courts constitute a costly forum of review with effective participation dependent on the ability to secure expert legal advice. This barrier to participation will invariably affect marginalised groups to a greater extent. As Luke Clements has observed in relation to the *Human Rights Act 1998* (UK) c 42, ‘[n]ew rights may be open to all — like the doors of the Savoy hotel — but in practice they prove more accommodating to the rich than the poor.’<sup>135</sup> Participation in court reviews of counter-terrorism laws under a human rights instrument like the *Victorian Charter* is, thus, severely limited. Diminished participation may very well mean a lesser burden of justification for the government.

There is another reason why this burden of justification will be alleviated in the courts. Courts have traditionally deferred to the executive on questions of ‘national security’. As Lord Atkin observed in dissent, in times of ‘emergency’, the judiciary, ‘when face to face with claims involving the liberty of the subject, [can] show themselves more executive-minded than the executive.’<sup>136</sup> In the leading text on Australian national security law, H P Lee, P J Hanks and V Morabito have gone even further to observe that ‘courts sometimes allow this judicial deference attitude to slide into one of “judicial subservience”’.<sup>137</sup>

If this practice continues under the *Victorian Charter* then half the game of protecting human rights in relation to counter-terrorism laws has been given away. If, as Dworkin argues, ‘freedoms cannot be abridged except to prevent a

<sup>132</sup> Editorial, ‘Scope and Content of Concept of “National Security”’ (1984) 58 *Australian Law Journal* 67, 68. See generally H P Lee, P J Hanks and V Morabito, *In the Name of National Security: The Legal Dimensions* (1995) ch 2.

<sup>133</sup> Victoria, *Parliamentary Debates*, Legislative Assembly, 4 May 2006, 1291 (Rob Hulls, Attorney-General).

<sup>134</sup> Relevantly, Conor Gearty has argued in relation to the *Human Rights Act 1998* (UK) c 42, that ‘right from the start the human rights standard set by the Act in the field of anti-terrorism law has been a relatively low one, with the consequence that only a rather undemanding jump by the executive brings its repressive practices within the zone of human rights compliance’: Conor Gearty, ‘11 September 2001, Counter-Terrorism, and the *Human Rights Act*’ (2005) 32 *Journal of Law and Society* 18, 22. Much the same applies to the *Victorian Charter*.

<sup>135</sup> Luke Clements, ‘Winners and Losers’ (2005) 32 *Journal of Law and Society* 34, 35. One, of course, is reminded of Anatole France’s ironic reference to the ‘majestic egalitarianism of the law, which forbids the rich and poor alike to sleep under bridges, to beg in the streets, and to steal the bread’: quoted in Stephen Bottomley and Simon Bronitt, *Law in Context* (3<sup>rd</sup> ed, 2003) 32.

<sup>136</sup> *Liversidge v Anderson* [1941] 3 All ER 338, 361.

<sup>137</sup> Lee, Hanks and Morabito, above n 132, 182. Those commentators have also observed that ‘the judicial forum does not really provide an effective and broad supervision of the activities of the security agencies. Other accountability mechanisms are required’: at 229.

clear and serious danger',<sup>138</sup> then protection of human rights requires that governmental assessments of the nature and level of threat posed by 'terrorism' be vigorously contested and questioned. In light of their longstanding deference to the executive on issues of 'national security', courts are very unlikely to provide a forum for 'adversarial justification' of these assessments.<sup>139</sup> Instead of 'more democratic scrutiny'<sup>140</sup> where governments are required to provide adequate information for their threat assessments and expose such information to debate and criticism, judicial deference to the executive on this matter implicitly sanctions the virtual monopoly that the executive has on these assessments.<sup>141</sup>

In the context of such a monopoly, those seeking to protect human rights will be doing so with one hand tied behind their back. Having to accept governmental assessment of the nature and extent of a threat, they are then left with a limited arsenal of arguments centring on whether counter-terrorism laws abridging rights constitute 'reasonable limits' and are 'proportionate'.<sup>142</sup> They will not be in a position to seriously contest 'the importance of the purpose of the limitation'.<sup>143</sup>

If judicial deference to the executive extends even further to accepting *secret* government assessments of the threat of 'terrorism' and its judgement of what is the appropriate response to such a threat, even arguments that counter-terrorism laws are not 'proportionate' and the like will seem quite weak. How can one cogently argue that a law is disproportionate when one is not adequately apprised of the reason for the law?

If the *Victorian Charter* becomes court-centred, all these dangers are exacerbated. The protection of human rights will be put at risk by the possibility that excessive counter-terrorism laws will be determined by the courts to be consistent with the human rights legal instrument and, *by implication*, treated as if they were compatible with the protection of human rights. As Gearty has argued, rather than being seen as 'infringing human rights, the repression is [treated as] (fully) compatible with them ... [s]o internment, censorship, proscription, and the like are [seen as] *consistent with* rather than *departures from* human rights standards'.<sup>144</sup> If such a situation eventuates, the position in relation to the protection of human rights under counter-terrorism laws will be worse than it was prior to the enactment of the *Victorian Charter*. Back then, excessive laws were recognised as such. Now they will be labelled as human rights-friendly.

### 3 *Danger of Increased Legalisation of Politics*

The legalisation of the politics surrounding counter-terrorism laws is already a serious issue. For instance, many non-governmental groups campaigning around

<sup>138</sup> Ronald Dworkin, *A Bill of Rights for Britain* (1990) 10.

<sup>139</sup> Michael Ignatieff, *The Lesser Evil: Political Ethics in an Age of Terror* (2005) xv.

<sup>140</sup> *Ibid.*

<sup>141</sup> Somewhat ominously, this seems to be the UK experience to date: see below nn 200–1 and accompanying text.

<sup>142</sup> *Victorian Charter* s 7(2)(c)–(e) requires an enquiry into the proportionality of the limitation.

<sup>143</sup> *Victorian Charter* s 7(2)(b).

<sup>144</sup> Conor Gearty, 'Reflections on Civil Liberties in an Age of Counterterrorism' (2003) 41 *Osgoode Hall Law Journal* 185, 205 (emphasis in original).

these laws are legal associations. As an illustration, of the 15 non-governmental groups and persons who appeared before the Senate Legal and Constitutional Legislation Committee's inquiry into the Anti-Terrorism Bill [No 2] 2005 (Cth), nine were associations of lawyers, organisations predominantly staffed by lawyers, or individual lawyers.<sup>145</sup>

By codifying human rights in legal form, the enactment of the *Victorian Charter* in itself will bring about an increased legalisation of human rights politics. Human rights arguments will tend to be couched in terms of statutory provisions and the like. Moreover, if the *Victorian Charter* takes a court-centred trajectory, this problem becomes even more acute. In these circumstances, court decisions will be seen as the repository of wisdom on questions of human rights. As a consequence, human rights debates in Victoria will increasingly privilege legal material and expertise.

The result will be greater barriers to political participation. By privileging legal expertise, there is a grave risk that a Queen's Counsel opinion will become a pre-requisite for making effective human rights arguments. If so, the terrain of public debate will be further tilted in favour of lawyers and those groups wealthy enough to afford expensive legal opinions, such as governmental bodies.

In other words, the legalisation of human rights debates brings about 'democratic debilitation' of a particular kind,<sup>146</sup> with reduced participation by citizens and legislators in such debates. Such debilitation will likely weaken the protection of human rights. Because human rights literacy will be seen as the preserve of lawyers, the burden of ensuring compliance with human rights principles will fall upon a narrow stratum of society. With popular participation in human rights debates, on the other hand, these principles will not only be owned by the public but also will be enforced by a multitude of monitors.

Moreover, increased legalisation of human rights politics will invariably mean a preference for legal strategies in protecting human rights and, in particular, litigation. With a focus on individuals and forensic analysis of specific circumstances, legal proceedings do, of course, have some benefits for protecting human rights. These very same features, however, also mean that legal proceedings cannot properly capture systemic effects of counter-terrorism laws. For instance, it is hard to attribute the impact of such laws on the human rights of Arab and Muslim Australians to a *specific* law or governmental action. This very real impact is nevertheless a consequence of these laws as a *whole*.<sup>147</sup>

<sup>145</sup> They were: Public Interest Advocacy Centre; Australian Lawyers for Human Rights; Castan Centre for Human Rights Law; Gilbert + Tobin Centre for Public Law; Amnesty International; Law Council of Australia; Mr Chris Connolly, Faculty of Law, The University of New South Wales; NSW Council of Civil Liberties; and Bret Walker SC. The non-legal bodies appearing before the Committee were: Australian Press Council; Arts and Creative Industries of Australia; Australian Bankers Association; Association of Superannuation Funds Australia; Australian Muslim Civil Rights Advocacy Network; and Australian Federation of Islamic Councils: Senate Legal and Constitutional Legislation Committee, above n 47, app 2.

<sup>146</sup> For another form of democratic debilitation: see generally Mark Tushnet, 'Policy Distortion and Democratic Debilitation: Comparative Illumination of the Counter-majoritarian Difficulty' (1995) 94 *Michigan Law Review* 245, 247.

<sup>147</sup> See Parliamentary Joint Committee on Intelligence and Security, above n 14, ch 3. See also *Sheller Report*, above n 14, 5–6.

Increased legalisation of human rights politics is also likely to result in human rights analysis being reduced to legal analysis. This runs the risk of missing crucial issues in the protection of human rights. So much is apparent when the content of two reports handed down last year on Australian counter-terrorism laws is compared. In December 2006, the United Nations Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms while Countering Terrorism, Martin Scheinin, delivered his report on Australian counter-terrorism laws. This report is a careful evaluation of whether Australian counter-terrorism laws comply with UN conventions and resolutions. There is, however, a striking omission in the report: there is no systematic discussion of the impact of such laws on the human rights of Australian Muslims.<sup>148</sup> Compare this with the report of the Parliamentary Joint Committee on Intelligence and Security which was handed down in the same month with a chapter entitled 'Effectiveness and Implications: Impact on Arab and Muslim Australians'.<sup>149</sup> The chapter traversed the complex series of legal and social factors that contributed to the fear and alienation experienced by these Australians in the War on Terror.<sup>150</sup>

What explains this difference? It is not unreasonable to suggest that the legal method adopted by the UN Special Rapporteur contributed to his failure to adequately examine the impact of Australia's counter-terrorism laws on Australian Arabs and Muslims. This method was one where specific laws were evaluated against UN conventions and resolutions. Splintering the analysis of the laws, however, meant that the systemic effect of the laws on Arab and Muslim Australians was obscured. Confining the analysis to laws and legal benchmarks resulted in the neglect of the social context of the War on Terror; a context that profoundly affects the human rights of these Australians. This type of analysis, however, becomes more likely with the increased legalisation of human rights politics. The protection of human rights then becomes imperilled by partial understandings of the problem at hand.

There is another reason why an increased legalisation of human rights politics risks missing the key issues in the protection of human rights in the Australian War on Terror. Perhaps the real battle is combating the Australian public's exaggerated fear of terrorism. The federal government's own National Counter-Terrorism Alert Level has remained unchanged at 'medium' since before the 11 September 2001 attacks, meaning that the government believes that a 'terrorist attack *could* occur' in Australia. It does not mean that a 'terrorist attack is *likely*' ('high' level of threat) or that a 'terrorist attack is *imminent* or *has occurred*' ('extreme' level of threat).<sup>151</sup> On the other hand, recent polls have

<sup>148</sup> There is a handful of references to the risk of racial profiling with border security measures: Martin Scheinin, UN Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms while Countering Terrorism, *Australia: Study on Human Rights Compliance while Countering Terrorism*, UN Doc A/HRC/4/2/6/Add.3 (2006) [52], [72]. There is also mention of the risk of discriminatory application in the report's discussion of the Anti-Money Laundering and Counter-Terrorism Financing Bill 2006: at [33].

<sup>149</sup> Parliamentary Joint Committee on Intelligence and Security, above n 14, ch 3.

<sup>150</sup> *Ibid.*

<sup>151</sup> See Australian Government, *Australian National Security* <<http://www.nationalsecurity.gov.au>> (emphasis added).

found that more than two-thirds of survey respondents think that a terrorist attack is imminent.<sup>152</sup> There is then a striking disjuncture between the government's own threat assessment and public perceptions. Litigation and judicial review, however, poorly address the challenges posed by this disjuncture. What is required instead is a complex array of political strategies aimed at ensuring that as much information as possible is available to the public on the threat of 'terrorism' faced by Australia<sup>153</sup> and countering the causes of the public's exaggerated fear of 'terrorism'.

### C Problematic Comparative Arguments

As noted in Part III above, some proponents of the *Victorian Charter* draw heavily from the UK experience with the *Human Rights Act 1998* (UK) c 42.<sup>154</sup> When unpacked, there appear to be two premises underlying the comparative argument for the *Victorian Charter*. First, it is said that the *Human Rights Act 1998* (UK) c 42, by virtue of the dialogue it created, has resulted in UK counter-terrorism laws exhibiting greater respect for human rights than they would have in the absence of the Act. Secondly, the absence of a bill of rights like the *Human Rights Act 1998* (UK) c 42 has meant that Australian counter-terrorism laws have undermined human rights to a greater extent than UK counter-terrorism laws. Given these premises, it is then said that the *Victorian Charter* should be enacted so that there will be increased protection of human rights under Australian counter-terrorism laws.

It is convenient to first deal with the argument that Australian counter-terrorism laws have undermined human rights to a greater extent than UK counter-terrorism laws. Full evaluation of this claim requires a comprehensive analysis of both UK<sup>155</sup> and Australian counter-terrorism laws. In the absence of such an analysis, there is no good reason to accept this claim. On the contrary, when one compares the UK and Australian control order provisions — the measures that are perhaps the most comparable — it is arguable that the UK counter-terrorism laws undermine human rights to a greater degree than the Australian laws.

<sup>152</sup> According to a poll taken by *The Sydney Morning Herald* in April 2004, 68 per cent of survey respondents expected a terrorist attack before too long: 'Australians Expect Terrorist Strike', *The Sydney Morning Herald* (Sydney), 21 April 2004, 1.

<sup>153</sup> For similar sentiments: see Ben Golder and George Williams, 'Balancing National Security and Human Rights: Assessing the Legal Response of Common Law Nations to the Threat of Terrorism' (2006) 8 *Journal of Comparative Policy Analysis* 43, 56–7.

<sup>154</sup> For discussion of the *Human Rights Act 1998* (UK) c 42 and its relationship to British constitutional principles: see K D Ewing, 'The *Human Rights Act* and Parliamentary Democracy' (1999) 62 *Modern Law Review* 79; David Feldman, 'The *Human Rights Act 1998* and Constitutional Principles' (1999) 19 *Legal Studies* 165.

<sup>155</sup> For analysis of UK counter-terrorism laws: see Adam Tomkins, 'Legislating against Terror: The *Anti-Terrorism, Crime and Security Act 2001*' [2002] *Public Law* 205; Helen Fenwick, 'The *Anti-Terrorism, Crime and Security Act 2001*: A Proportionate Response to 11 September?' (2002) 65 *Modern Law Review* 724; Clive Walker, 'Terrorism and Criminal Justice: Past, Present and Future' [2004] *Criminal Law Review* 311.

Table 3 sets out the key features of the UK control order provisions which were enacted by the *Prevention of Terrorism Act 2005* (UK) c 2<sup>156</sup> and Table 4 details the Australian control order provisions enacted by the *Anti-Terrorism Act [No 2] 2005* (Cth). In one respect, the Australian control order provisions do go further than the corresponding UK provisions — the Australian provisions sunset after 10 years of operation while the UK provisions must be renewed annually.<sup>157</sup> In other important respects, however, the Australian control order provisions are far more protective of personal liberty. In Australia, a control order has to be issued by a court whereas a non-derogating control order in the UK in some circumstances can be issued by the Secretary of State subject to ex post facto court supervision.<sup>158</sup>

Moreover, the grounds for issuing a control order in the UK are generally broader than the Australian provisions because such an order can be issued in relation to ‘terrorism-related activity’. This concept allows control orders to be issued in the UK in situations where they are prohibited in Australia. For example, conduct giving encouragement to the commission of ‘terrorism’ can be sufficient reason for issuing a UK control order while that alone will not be sufficient in Australia unless such conduct amounts to the provision of training to a ‘terrorist organisation’.<sup>159</sup>

In one sense, however, the grounds for issuing UK control orders are more stringent. With derogating control orders, that is, control orders that are incompatible with the right to liberty set out in art 5 of the *Convention for the Protection of Human Rights and Fundamental Freedoms* (‘*European Convention on Human Rights*’),<sup>160</sup> there are additional requirements that need to be met before such an order is issued. These requirements, which are directed to ensuring that the derogating control order falls within the scope of the relevant derogation (which has not been made), do not have a counterpart in the Australian provisions.

Another way in which Australian control orders are more protective of individual liberty when compared with the UK provisions relates to the appeal mechanisms. A person subject to an Australian control order can appeal to a court to revoke or vary the order, arguing that the grounds for issuing the order are not satisfied.<sup>161</sup> In other words, they can lodge an appeal on the merits. In the UK, on the other hand, the grounds for appeal are more confined, being limited to arguing that the order was flawed in the case of non-derogating control orders, and questions of law in the case of derogating control orders.<sup>162</sup>

<sup>156</sup> For an account of parliamentary review of the Prevention of Terrorism Bill 2005 (UK): see Janet L Hiebert, ‘Parliamentary Review of Terrorism Measures’ (2005) 68 *Modern Law Review* 676.

<sup>157</sup> See below nn 178 (UK), 188 (Australia).

<sup>158</sup> See below nn 163–4 (UK), 179 (Australia).

<sup>159</sup> See below nn 169–70 (UK), 181–3 (Australia).

<sup>160</sup> Opened for signature 4 November 1950, 213 UNTS 221 (entered into force 3 September 1953).

<sup>161</sup> See below nn 186–7 (Australia).

<sup>162</sup> See below nn 176–7 (UK).

**Table 3: UK Control Order Provisions**

	<b>Non-Derogating Orders</b>	<b>Derogating Orders</b>
<b>Issuing Authority</b>	Secretary of State: <sup>163</sup> <ul style="list-style-type: none"> <li>Secretary of State generally needs to apply to the High Court for permission;</li> <li>High Court to grant permission unless grounds for making order obviously flawed; and</li> <li>Permission can be given in ex parte hearings.<sup>164</sup></li> </ul>	High Court in England, Wales and Northern Ireland; Outer House of Court of Session in Scotland on application by the Secretary of State: <sup>165</sup> <ul style="list-style-type: none"> <li>Order can be issued in ex parte preliminary hearing; and</li> <li>Order to be confirmed in full hearing.<sup>166</sup></li> </ul>
<b>Grounds for Issuing Control Orders</b>	Secretary of State: <ul style="list-style-type: none"> <li>has reasonable grounds for suspecting that individual to be subject to control order is involved in 'terrorism-related activity'; and</li> <li>considers it necessary to issue control order for the purposes of protecting the public from a risk of 'terrorism'.<sup>167</sup></li> </ul> <p>'Terrorism-related activity' includes commission etc of 'terrorism', conduct giving encouragement to commission etc of 'terrorism' and conduct giving support or assistance to individuals who are known to be involved in 'terrorism-related activity'.<sup>169</sup> 'Terrorism' means action involving serious harm etc designed to influence the government or intimidate the public or a section of the public and made for the purpose of advancing a political, ideological or religious cause.<sup>170</sup></p>	Court can confirm order if: <ul style="list-style-type: none"> <li>satisfied on balance of probabilities that person subject to control order is or has been involved in 'terrorism-related activity';</li> <li>considers it necessary to issue control order for the purposes of protecting the public from a risk of 'terrorism';</li> <li>above risk is one arising out of or associated with a public emergency in respect of which there is a derogation from art 5 of the <i>European Convention on Human Rights</i>; and</li> <li>obligations in control order fall within scope of derogation.<sup>168</sup></li> </ul>
<b>Obligations under Order</b>	Range of obligations may be imposed including restrictions on use of specified articles and services, employment, associa-	Obligations that are incompatible with the right to liberty under art 5 of the <i>European Convention on</i>

<sup>163</sup> *Prevention of Terrorism Act 2005* (UK) c 2, s 1(2)(a).

<sup>164</sup> *Prevention of Terrorism Act 2005* (UK) c 2, s 3.

<sup>165</sup> *Prevention of Terrorism Act 2005* (UK) c 2, s 1(2)(b). See also the definition of 'court': at s 15.

<sup>166</sup> *Prevention of Terrorism Act 2005* (UK) c 2, s 4(1)–(5).

<sup>167</sup> *Prevention of Terrorism Act 2005* (UK) c 2, s 2(1).

<sup>168</sup> *Prevention of Terrorism Act 2005* (UK) c 2, s 4(7).

<sup>169</sup> *Prevention of Terrorism Act 2005* (UK) c 2, s 1(9).

<sup>170</sup> Section 15(1) of the *Prevention of Terrorism Act 2005* (UK) c 2 defines 'terrorism' as having the same meaning as 'terrorism' under s 1 of the *Terrorism Act 2000* (UK) c 11.

	tion and movement but not including obligations incompatible with the right to liberty under art 5 of the <i>European Convention on Human Rights</i> . <sup>171</sup>	<i>Human Rights</i> . <sup>172</sup>
<b>Maximum Period of Order</b>	12 months (renewable) <sup>173</sup>	Six months (renewable) <sup>174</sup> and while derogation is in force <sup>175</sup>
<b>Appeal Mechanism</b>	Control orders must be considered by the High Court, and appeal lies to the High Court against a refusal by the Secretary of State to revoke an order <sup>176</sup>	Person subject to control order can appeal on a question of law to the Court of Appeal <sup>177</sup>
<b>Sunset Clause</b>	Provisions expire 12 months after enactment <sup>178</sup>	

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<sup>171</sup> *Prevention of Terrorism Act 2005* (UK) c 2, s 1(4).

<sup>172</sup> *Prevention of Terrorism Act 2005* (UK) c 2, s 1(4). See also the definition of ‘derogating obligations’: at s 1(10).

<sup>173</sup> *Prevention of Terrorism Act 2005* (UK) c 2, s 2(4)–(8).

<sup>174</sup> *Prevention of Terrorism Act 2005* (UK) c 2, s 4(8)–(9).

<sup>175</sup> *Prevention of Terrorism Act 2005* (UK) c 2, s 6.

<sup>176</sup> *Prevention of Terrorism Act 2005* (UK) c 2, ss 3, 10.

<sup>177</sup> *Prevention of Terrorism Act 2005* (UK) c 2, s 11.

<sup>178</sup> *Prevention of Terrorism Act 2005* (UK) c 2, s 13.

**Table 4: Australian Control Order Provisions**

<b>Issuing Authority</b>	With interim control order, federal court in ex parte hearing upon application by a senior Australian Federal Police officer. <sup>179</sup> Interim order to be confirmed as soon as reasonably practicable by court in inter partes hearing. <sup>180</sup>
<b>Grounds for Issuing Order</b>	<ul style="list-style-type: none"> <li>• Order will substantially assist in preventing a ‘terrorist act’ or person subject to order has provided training to or received training from a ‘terrorist organisation’; and</li> <li>• Obligations etc imposed by order are reasonably necessary and appropriate and adapted for the purpose of protecting the public from a ‘terrorist act’.<sup>181</sup></li> </ul> <p>‘Terrorist act’ means an action causing serious harm etc or threat of such action made with the intention of advancing a political, religious or ideological cause and made with the intention of:</p> <ul style="list-style-type: none"> <li>• coercing, or influencing by intimidation, the government of the Commonwealth or a state, territory or foreign country, or of part of a state, territory or foreign country; or</li> <li>• intimidating the public or a section of the public, excluding advocacy, protest, dissent or industrial action that is not intended to cause serious harm etc.<sup>182</sup></li> </ul> <p>‘Terrorist organisation’ means an organisation that is directly or indirectly engaged in, preparing, planning, assisting in or fostering the doing of a ‘terrorist act’ (whether or not a terrorist act occurs) or an organisation listed as a ‘terrorist organisation’ by regulations.<sup>183</sup></p>
<b>Obligations under Order</b>	Range of obligations including restrictions on use of specified articles and services, employment, association and movement, and house arrest. <sup>184</sup>
<b>Maximum Period of Order</b>	12 months <sup>185</sup>
<b>Appeal Mechanism</b>	<ul style="list-style-type: none"> <li>• Person subject to control order can appeal to federal court,<sup>186</sup> and</li> <li>• Court can revoke or vary control order if not satisfied of grounds for order.<sup>187</sup></li> </ul>
<b>Sunset Clause</b>	10 years after enactment of provisions. <sup>188</sup>

There is then good reason to be suspicious of claims that Australian counter-terrorism laws have undermined human rights to a greater degree than UK counter-terrorism laws. But even if they did do so, this says very little about the desirability or otherwise of a bill of rights in the age of counter-terrorism.

<sup>179</sup> *Criminal Code* ss 104.3–104.4.

<sup>180</sup> *Criminal Code* ss 104.5(1)(a), (e), 104.14.

<sup>181</sup> *Criminal Code* ss 104.4, 104.14.

<sup>182</sup> *Criminal Code* s 100.1.

<sup>183</sup> *Criminal Code* s 102.1.

<sup>184</sup> *Criminal Code* ss 104.5, 104.16.

<sup>185</sup> *Criminal Code* ss 104.5(1)(f), 104.16(1)(d).

<sup>186</sup> *Criminal Code* s 104.18.

<sup>187</sup> *Criminal Code* s 104.20.

<sup>188</sup> *Criminal Code* s 104.32.

The fact that a country with a bill of rights has fewer (or more) egregious counter-terrorism laws says very little of the impact of the bill of rights. In particular, Tables 3 and 4 tell us nothing as to the impact of the *Human Rights Act 1998* (UK) c 42 on the UK control order provisions. The question of impact can only be addressed by a close analysis of the interaction between the *Human Rights Act 1998* (UK) c 42 and the content of the UK counter-terrorism laws.

With a closer look, we should, at the very least, be sceptical of arguments that the *Human Rights Act 1998* (UK) c 42 has resulted in greater protection of human rights in relation to counter-terrorism laws. The question whether this Act has resulted in improved protection of human rights has yielded different answers. Some are cautiously optimistic like Stephen Sedley who, with respect to the direction of the *Human Rights Act 1998* (UK) c 42, stated that, while 'it's too soon to draw up a balance sheet', 'headway' was being made under the Act.<sup>189</sup> Others are more damning. For example, Ruth Costigan and Philip A Thomas have argued that: 'hopes that the *Human Rights Act* would redress the balance of rights for individuals has [sic] not been borne out. It has raised new intellectual debates for lawyers but whether it makes much difference [...] is debatable.'<sup>190</sup> They are joined by Clements who has contended that 'people with physical or mental disabilities or chronic health problems; together with their carers; people with poor skills or no qualifications; and people from some ethnic minority groups' have been 'excluded from the benefits of the *Human Rights Act*'.<sup>191</sup>

The specific issue of whether this Act has resulted in greater protection of human rights in relation to UK counter-terrorism laws is similarly contested. This can be seen, in particular, in academic debates regarding the House of Lords' decision in *A v Secretary of State for the Home Department*.<sup>192</sup> This case involved foreign nationals detained under s 23 of the *Anti-Terrorism, Crime and Security Act 2001* (UK) c 24, which allowed the indefinite detention of persons designated by the Home Secretary as 'international suspected terrorists', and was passed shortly after the 11 September 2001 attacks together with a derogation order issued by the British Government under art 15 of the *European Convention on Human Rights*. This order, which acknowledged that s 23 may be in breach of art 5 of the *European Convention on Human Rights*, was issued on the basis that there was a 'public emergency threatening the life of the nation'.<sup>193</sup>

By an 8:1 majority, the House of Lords quashed the derogation order and declared under s 4 of the *Human Rights Act 1998* (UK) c 42 that s 23 of the

<sup>189</sup> Stephen Sedley, 'The Rocks or the Open Sea: Where Is the *Human Rights Act* Heading?' (2005) 32 *Journal of Law and Society* 3, 4, 17.

<sup>190</sup> Ruth Costigan and Philip A Thomas, 'The *Human Rights Act*: A View from Below' (2005) 32 *Journal of Law and Society* 51, 66, citing Richard Stein, 'Comment' (16 April 2004) *Law Society Gazette*.

<sup>191</sup> Clements, above n 135, 49. For other analyses of the impact of the *Human Rights Act 1998* (UK) c 42: see, eg, David Bonner, Helen Fenwick and Sonia Harris-Short, 'Judicial Approaches to the *Human Rights Act*' (2003) 52 *International and Comparative Law Quarterly* 549; Roger Smith, 'Constitutional Reform, the Lord Chancellor, and Human Rights: The Battle of Form and Substance' (2005) 32 *Journal of Law and Society* 187.

<sup>192</sup> [2005] 2 AC 68.

<sup>193</sup> For the background to *A v Home Secretary*: see *ibid* 20–2 (Lord Bingham).

*Anti-Terrorism, Crime and Security Act 2001* (UK) c 24 was incompatible with arts 5 and 14 of the *European Convention on Human Rights*. While accepting the executive's opinion that there was a public emergency threatening the life of the nation,<sup>194</sup> the majority of the Law Lords found that the derogation order was not strictly required by the exigencies of the situation because it was disproportionate<sup>195</sup> and discriminatory,<sup>196</sup> principally because it applied only to foreign nationals and not to British nationals who might also pose a risk of 'terrorism'.

Some have welcomed this decision as demonstrating the utility of the *Human Rights Act 1998* (UK) c 42 in protecting human rights.<sup>197</sup> Others have argued that this decision marks 'a radically different turn' from 'a judicial posture of de facto total acquiescence'.<sup>198</sup> However, by accepting that there is a national security threat on the most gentle standards of review,<sup>199</sup> the House of Lords has given the green light to legislation almost as offensive to human rights as that which was declared incompatible with the *European Convention on Human Rights*, in the form of control orders.

This opens up a new dimension of futility: this is the rebound in the sense that an apparently progressive decision may contain the seeds of further restriction. Although control orders cannot be regarded as in any way equivalent to indefinite imprisonment without trial, they are nevertheless a major and multiple infringement of human rights. What is less intrusive in terms of the depth of its violation of *Convention* rights is more than matched by its breadth.<sup>200</sup>

Court decisions to date lend force to this point. They have, first, dealt with a challenge by six individuals subject to non-derogating control orders on the basis that these orders were ultra vires because the obligations imposed by the order were much too tight and incompatible with art 5 of the *European Convention on Human Rights* and, therefore, could only be imposed (if at all) through a derogating control order issued by the High Court. This challenge was successful before Sullivan J in the High Court<sup>201</sup> and was upheld by the Court of Appeal.<sup>202</sup>

<sup>194</sup> Ibid 102 (Lord Bingham). Lords Scott and Carswell agreed with Lord Bingham: at 144 (Lord Scott), 175 (Lord Carswell). See also at 136–8 (Lord Hope), 152–3 (Lord Rodger), 166 (Lord Walker), 129 (Lord Nicholls), 170 (Baroness Hale). *Contra* at 132 (Lord Hoffmann).

<sup>195</sup> Ibid 111–12 (Lord Bingham), 144 (Lord Scott), 175 (Lord Carswell), 142 (Lord Hope), 160 (Lord Rodger). Lord Nicholls generally agreed with Lords Bingham, Hope and Rodger: at 129. Baroness Hale generally agreed with Lords Bingham, Nicholls, Hope, Scott and Rodger: at 170. *Contra* at 166–7 (Lord Walker).

<sup>196</sup> Ibid 124 (Lord Bingham). Lords Scott and Carswell agreed with Lord Bingham: at 144 (Lord Scott), 175 (Lord Carswell). See also at 144 (Lord Hope), 150 (Lord Scott), 160 (Lord Rodger). Lord Nicholls generally agreed with Lords Bingham, Hope and Rodger: at 129. Baroness Hale generally agreed with Lords Bingham, Nicholls, Hope, Scott and Rodger: at 170. *Contra* at 167 (Lord Walker).

<sup>197</sup> Anthony Lester, 'The Utility of the *Human Rights Act*: A Reply to Keith Ewing' [2005] *Public Law* 249, 253–5.

<sup>198</sup> Gearty, '11 September 2001', above n 134, 29.

<sup>199</sup> For a similar interpretation on this point: see Adam Tomkins, 'Readings of *A v Secretary of State for the Home Department*' [2005] *Public Law* 259, 264–6.

<sup>200</sup> K D Ewing, 'The Futility of the *Human Rights Act* — A Long Footnote' (2005) 37 *Bracton Law Journal* 41, 47. See also K D Ewing, 'The Futility of the *Human Rights Act*' [2004] *Public Law* 829.

<sup>201</sup> *Secretary of State for the Home Department v JJ* [2006] EWHC 1623 (Admin) (Unreported, Sullivan J, 28 June 2006).

<sup>202</sup> *Secretary of State for the Home Department v JJ* [2006] 3 WLR 866.

The court proceedings have also involved the question of whether the supervision by the High Court of non-derogating control orders is incompatible with the right to a fair hearing under art 6(1) of the *European Convention on Human Rights*. Sullivan J in the High Court resolved this question in favour of the controlled persons and then made a declaration of incompatibility pursuant to s 4(2) of the *Human Rights Act 1998* (UK) c 42.<sup>203</sup> Upon appeal to the Court of Appeal, however, this declaration was set aside by the Court which held that such court supervision was, in fact, compatible with art 6(1).<sup>204</sup>

In short, while persons subject to control orders have secured some success in litigation, the control order provisions of the *Prevention of Terrorism Act 2005* (UK) c 2 have *not* been tempered by any declaration that they are incompatible with the *Human Rights Act 1998* (UK) c 42. Although a House of Lords decision on the compatibility of control orders with the *Human Rights Act 1998* (UK) c 42 is pending at the time of writing,<sup>205</sup> the government has also found other ways to deal with terrorist suspects, relying as well on immigration powers to detain people without trial indefinitely, pending their removal to countries which give an undertaking not to engage in torture or mistreatment.

It remains to consider arguments for a bill of rights on the basis that ‘Australia is the only western country without a national human rights act or equivalent’.<sup>206</sup> When compared with Canada, New Zealand, the UK and the US, Australia is also the only country to have compulsory voting<sup>207</sup> and an award system based on compulsory arbitration of industrial disputes.<sup>208</sup> So if the argument is that Australia should adopt a bill of rights to bring itself into line with other western countries then it might as well abolish the award system and compulsory voting in the process. This highlights the fundamental difficulty with arguments that simply refer to the existence of bills of rights in other countries: they do not tell us whether these instruments have enhanced the welfare of these countries or, for that matter, improved the protection of the human rights of their citizens.

The other major difficulty with such arguments is that they are highly decontextualised. Even if a particular bill of rights did, in fact, result in progressive change, these arguments are silent on the specific causes of such change. For instance, even if it is the case that the *Human Rights Act 1998* (UK) c 42 has

<sup>203</sup> *Secretary of State for the Home Department v MB* [2006] EWHC 1000 (Admin) (Unreported, Sullivan J, 12 April 2006).

<sup>204</sup> *Secretary of State for the Home Department v MB* [2007] QB 415.

<sup>205</sup> Clare Dyer, ‘Battle over Control Orders Goes to Lords’, *The Guardian* (London), 6 July 2007, 11.

<sup>206</sup> This is the header to the New Matilda’s homepage for its campaign for a national bill of rights: see NewMatilda.com, *A Human Rights Act for Australia* (2007) <www.humanrightsact.com.au>.

<sup>207</sup> See Scott Bennett, ‘Compulsory Voting in Australian National Elections’ (Research Brief No 6, Parliamentary Library, Parliament of Australia, 2005) 6; Lisa Hill, ‘“A Great Leveller”: Compulsory Voting’ in Marian Sawer (ed), *Elections: Full, Free and Fair* (2001) 129, 129–30.

<sup>208</sup> The use of compulsory arbitration in labour law is an antipodean phenomenon: see Stuart Macintyre and Richard Mitchell (eds), *Foundations of Arbitration: The Origins and Effects of State Compulsory Arbitration 1890–1914* (1989). With the abolition of the New Zealand award system in 1991 by the *Employment Contracts Act 1991* (NZ), Australia has become the only country with a compulsory arbitration system. For a discussion of the *Employment Contracts Act 1991* (NZ): see Gordon Anderson, ‘Individualising the Employment Relationship in New Zealand: An Analysis of Legal Developments’ in Stephen Deery and Richard Mitchell (eds), *Employment Relations: Individualisation and Union Exclusion: An International Study* (1999) 204.

improved the protection of human rights in Britain, we need to know why this was the case. Moreover, we need to determine whether these causes can be replicated in Australia. Comparative observations are thus useful only to the extent that they are accompanied by detailed contextual analysis. Otherwise, they are simply calls for mimicry.

#### V CONCLUDING THOUGHTS: THE ALTERNATIVE OF A COMMUNITY-BASED CHARTER OF RIGHTS

Support for a bill of rights like the *Victorian Charter* cannot be understood without appreciating the loss of faith in parliamentary government and, in particular, a party system dominated by the Liberal-National Coalition and the Australian Labor Party. There is, in fact, good reason for this loss of faith. Direct links between parties and citizens are increasingly tenuous with membership of parties at an all-time low of around two per cent of the population. Moreover, political parties, supposedly the vehicles of popular participation, do not always conduct their internal affairs in a democratic fashion.<sup>209</sup> Worse, the funding of Australian political parties is characterised by secrecy and skewed towards the major parties.<sup>210</sup> All in all, there is much to be said for the view that Australia's democratic system is being increasingly suffocated by a cartel constituted by the major parties.<sup>211</sup>

Such 'inner decay of representative government'<sup>212</sup> means that opposition to bills of rights on the ground that there is protection of human rights through 'a successful parliamentary democracy'<sup>213</sup> sounds rather hollow. In this, there is much to be said for Williams' observation that 'when it comes to the protection of our fundamental freedoms, our system of government is broken and we do need to fix it'.<sup>214</sup>

Some advocates of a bill of rights like the *Victorian Charter* have, however, overreached themselves by making suspect comparative arguments. Their position is also weakened by views that valorise the capacity of courts to protect human rights and denigrate parliamentary protection of human rights.

There is also an ironic twist to these partial views of courts and legislatures. Proponents of bills of rights often characterise these instruments as defences against populism or, in the words of Mason, laws to 'temper the will of the majority'.<sup>215</sup> Yet the arguments of many proponents are often populist in that

<sup>209</sup> Dean Jaensch, Peter Brent and Brett Bowden, *Australian Political Parties in the Spotlight: Democratic Audit of Australia Report No 4* (2004).

<sup>210</sup> Sally Young and Joo-Cheong Tham, *Political Finance in Australia: A Skewed and Secret System: Democratic Audit of Australia Report No 7* (2006).

<sup>211</sup> See generally Ian Marsh (ed), *Political Parties in Transition?* (2006). See also Clive Hamilton, 'What's Left? The Death of Social Democracy' (2006) 21 *Quarterly Essay* 1.

<sup>212</sup> John Keane, 'Democracies in Name, but Not in the Real Game', *The Sydney Morning Herald* (Sydney), 24 July 2006, 11.

<sup>213</sup> John Roskam, Executive Director of Institute of Public Affairs, quoted in Kenneth Nguyen, 'Independent Charter', *The Age* (Melbourne), 28 July 2006, 15.

<sup>214</sup> Williams, 'Victoria's *Charter of Rights and Responsibilities*', above n 21, 82.

<sup>215</sup> Mason, above n 44.

they seek to tap into public distrust of ‘politicians’.<sup>216</sup> The use of the term, ‘politicians’<sup>217</sup> as opposed to ‘elected representatives’ does not seem coincidental. The former implies an unsavoury cluster of attributes, for instance, opportunism and lack of principle, while the latter would underline the democratic functions of parliamentarians.

This points to another irony. For many proponents of a bill of rights, the populism that such a law is especially directed to staving off is populism driven by a particular politics of fear.<sup>218</sup> Mason, for instance, has argued that: ‘Politicians have a powerful survival instinct. They are anxious to keep on side with popular sentiment, even more so when popular sentiment has been fanned by media-fuelled anxiety about threats to security.’<sup>219</sup> Opposition to this type of politics of fear is, however, replaced by a different politics of fear, this time directed at ‘politicians’ who would trample upon our rights in their continued search for electoral advantage.

This double irony heightens the risk of a court-centred *Victorian Charter* where courts are seen as the key mechanism for protecting rights. With this trajectory, court decisions will be treated as the authoritative source of human rights material, and legal training as necessary for human rights literacy. In the process, other more effective mechanisms of rights-protection, whether by the Parliament or the executive, become marginalised and those without legal training are consigned to the periphery of human rights debates. As has been argued in this article, this trajectory poses serious dangers to the protection of human rights in the War on Terror.

It is imperative then that an alternative to a court-centred *Victorian Charter* be developed. A promising notion is what Williams has described as a ‘community-based’ charter.<sup>220</sup> This approach, which emphasises the ‘role of community in the rights-protection process’,<sup>221</sup> draws an important connection between popular participation and the protection of human rights. As Williams argues, ‘[t]he role of the community is ... important because a necessary condition of an effective rights regime is popular support and understanding.’<sup>222</sup>

For such popular support and understanding to be forthcoming, there needs to be participation in the process of articulating and protecting human rights. A bare

<sup>216</sup> See generally Sally Young, ‘Why Australians Hate Politicians: Exploring the New Public Discontent’ in Dennis Glover and Glenn Patmore (eds), *For the People: Reclaiming Our Government: Labor Essays 2001* (2000) 171; Pippa Norris, ‘Confidence in Australian Democracy’ in Marian Sawyer (ed), *Elections: Full, Free and Fair* (2001) 202; Scott Brenton, ‘Public Confidence in Australian Democracy’ (Audit Paper, Democratic Audit of Australia, 2005) <<http://www.democraticaudit.anu.edu.au>>.

<sup>217</sup> *Ibid.* See also Williams, *The Case for an Australian Bill of Rights*, above n 16, 37.

<sup>218</sup> For discussion of such politics in the Australian War on Terror: see Carmen Lawrence, *Fear and Politics* (2006). In relation to the counter-terrorism laws: see Joo-Cheong Tham, ‘Fear Politics Yet Again on New Terror Laws’, *The Sydney Morning Herald* (Sydney), 30 March 2004, Web Diary <<http://smh.com.au/articles/2004/03/30/1080544481409.html>>.

<sup>219</sup> Mason, above n 44.

<sup>220</sup> George Williams, ‘Constructing a Community-Based Bill of Rights’ in Tom Campbell, Jeffrey Goldsworthy and Adrienne Stone (eds), *Protecting Human Rights: Instruments and Institutions* (2003) 247, 247–62.

<sup>221</sup> *Ibid.* 249.

<sup>222</sup> *Ibid.* 253.

commitment to human rights is too abstract to be meaningful — it is only through participation in the process of particularising and balancing human rights that this commitment becomes real.<sup>223</sup>

Under a community-based *Victorian Charter*, there is another connection between popular participation and effective protection of human rights. Because questions of human rights are necessarily contested and subject to disagreement amongst citizens, an effective rights regime is one that enlivens a ‘culture of controversy’ on questions of human rights.<sup>224</sup> Such a culture is unlikely to be sustained unless the right to political participation, that ‘right of rights’,<sup>225</sup> is secured in relation to the workings of the *Victorian Charter*.

While it is beyond the scope of this article to fully spell out the implications of this approach for the *Victorian Charter*, some preliminary remarks can be made. Emphasis should be placed on developing forums that allow for broad participation by citizens and community groups. Steps should be taken to ensure that parliamentary forums like parliamentary committees are accessible to the public.<sup>226</sup> Rather than focusing on courts, it would be preferable to devote energy to strengthening parliamentary mechanisms like the Scrutiny of Acts and Regulations Committee by ensuring that they are properly-resourced open forums that allow for broad community input on questions of human rights.<sup>227</sup>

A community-based *Victorian Charter* also implies adequate community consultation by government departments on questions of human rights. For Victoria Police, the main body in Victoria responsible for counter-terrorism policing, this will mean developing its ‘community policing’ approach to incorporate questions of human rights.<sup>228</sup> The Victorian Equal Opportunity and

<sup>223</sup> For similar sentiments: see Campbell, ‘Democracy, Human Rights and Positive Law’, above n 78, 201.

<sup>224</sup> Campbell, ‘Human Rights: A Culture of Controversy’, above n 57.

<sup>225</sup> Waldron, *Law and Disagreement*, above n 19, ch 11.

<sup>226</sup> Williams, ‘Constructing a Community-Based Bill of Rights’, above n 220, 247–62. Despite the frequency of review by parliamentary committees of Australian counter-terrorism laws, the role of these committees in protecting human rights is not well-understood since very little research has been conducted in this area. For brief accounts: see Evans and Evans, above n 29. Cf discussions of the UK Joint Committee on Human Rights: David Feldman, ‘Parliamentary Scrutiny of Legislation and Human Rights’ [2002] *Public Law* 323; David Feldman, ‘The Impact of Human Rights on the UK Legislative Process’ (2004) 25 *Statute Law Review* 91. For recommendations on how to enhance the role of parliamentary committees in protecting rights: see Kinley, ‘Parliamentary Scrutiny of Human Rights’, above n 91, 181–4; Hiebert, ‘Interpreting a Bill of Rights’, above n 68, 254–5.

<sup>227</sup> *Victorian Charter* s 30. See also *Parliamentary Committees Act 2003* (Vic) s 17. On the importance of adequate resources for scrutiny committees monitoring the protection of human rights: see Evans, ‘Australian Parliaments and the Protection of Human Rights’, above n 89, 14–15. There does not appear to have been any additional funding provided to the Scrutiny of Acts and Regulations Committee for the purpose of performing its duties under the *Victorian Charter*: see Department of Justice, *2006–07 Victorian Budget: Victoria Leads the Way on Human Rights* (May 2006) Department of Justice, Victoria <<http://www.justice.vic.gov.au/wps/wcm/connect/DOJ+Internet/Find/Publications/>>.

<sup>228</sup> See Victoria Police, *The Way Ahead: Strategic Plan 2003–2008* (2003) Victoria Police <[http://www.police.vic.gov.au/files/documents/352\\_The-Way-Ahead-Strategic-Plan-2003-2008.pdf](http://www.police.vic.gov.au/files/documents/352_The-Way-Ahead-Strategic-Plan-2003-2008.pdf)> 14–15; Victoria Police, *Business Plan 2006/07: Delivering a Safer Victoria* (2006) Victoria Police <[http://www.police.vic.gov.au/content.asp?a=internetBridgingPage&Media\\_ID=7990](http://www.police.vic.gov.au/content.asp?a=internetBridgingPage&Media_ID=7990)> 3.

Human Rights Commission also plays an important role in facilitating community input into the workings of the *Victorian Charter*.<sup>229</sup>

An important principle that should govern a community-based approach to the *Victorian Charter* is that of political equality or, as Harrison Moore puts it, the principle that citizens have ‘each a share, and an equal share, in political power’.<sup>230</sup> This means ensuring that disadvantaged and marginalised groups have a voice in forums conducting rights review. It is perhaps unlikely that equal political participation in human rights debates will be achieved unless political participation is attained more generally. After all, there is no realm of human rights that is sequestered from politics. Issues of human rights are political. To this extent then, the effectiveness of rights protection cannot be disentangled from broader questions of democratic reform.

A ‘culture of controversy’ regarding human rights requires equal political participation. It may also be the case that equal political participation in human rights debates can only be sustained by a culture of controversy. The ability of citizens to participate in human rights debates clearly depends upon their ability to articulate arguments based on human rights principles. This, in turn, will probably be sustained on a widespread basis if there are diverse conceptions of human rights. If so, the need to avoid a technocratic approach to the implementation of the *Victorian Charter* becomes all the more necessary. The emphasis such an approach places upon bureaucratic procedures and specialisation<sup>231</sup> is inimical to ‘a democratic style of human rights regime’.<sup>232</sup>

To conclude, a community-based charter of rights is premised upon the notion of popular participation in the process of rights protection. Such an agenda should also provide a way of protecting human rights that relies upon and nourishes ‘the constructive genius of ordinary men and women’.<sup>233</sup>

<sup>229</sup> Such input could, for instance, feed into the annual reports on the operation of the *Victorian Charter* that the Commission is required to present to the Attorney-General: *Victorian Charter* s 41(a)(i).

<sup>230</sup> Harrison Moore, *The Constitution of the Commonwealth of Australia* (1<sup>st</sup> ed, 1902) 392. According to Moore, this was the method chosen by the framers of the *Australian Constitution* to protect citizens’ rights.

<sup>231</sup> See above n 56 and accompanying text.

<sup>232</sup> Campbell, ‘Human Rights: A Culture of Controversy’, above n 57, 26. It should be noted that the argument is that democratic participation in the rights protection process is a *necessary* condition for its effectiveness. This is not the same as saying that it is a *sufficient* condition for its effectiveness.

<sup>233</sup> Roberto Mangabeira Unger, *What Should the Left Propose?* (2005) 168.