

The Charter of Rights Debate: A Battle of the Models

IRINA KOLODIZNER*

Abstract

Since the Hon Robert McClelland launched the National Human Rights Consultation on 10 December 2008, policy and legislative circles have been abuzz with talk of shoring up Australia's commitment to the protection of human rights and the potential enactment of a Charter of Rights. This article seeks to contribute to the debate by comparing the two dominant models of statutory Charter mechanism that have been on the policy table: the dialogue model, which parallels statutory models adopted in the UK as well as domestically in Victoria and the ACT; and the model based on the Canadian Bill of Rights, proffered by the Hon Michael McHugh AC QC. Ultimately, utilising the issue of asylum seekers as a case in point, it is concluded that while the dialogue model carries greater conceptual weight, the model proffered by the Hon Michael McHugh is a more practical model of redress for individual human rights grievances.

Introduction

Since the enactment of the *Human Rights Act 1998* (UK) ('HRA') in the UK, Australia remains the only common law jurisdiction without a comprehensive system of legislative or constitutional human rights protection.¹ In an effort to redress this state of affairs, on 10 December 2008, Federal Attorney-General Robert McClelland launched the National Human Rights Consultation, signalling the Federal Government's commitment to exploring and addressing the gaps in Australia's human rights protection through a range of measures, including the potential enactment of a federal statutory charter of rights ('Charter'). On 21 April 2009, the Hon Robert McClelland announced the end product of this exploration — the establishment of a National Human Rights Framework, which reiterated the Federal Government's commitment to promoting and protecting human rights, while rejecting the enactment of a legislative Charter. Given the significance of a Charter for Australia and the controversy surrounding its recent rejection from the Australian human rights policy fore, the time is ripe for an evaluation of the two dominant statutory Charter models on the policy table. This analysis seeks to rise to the challenge.

* B Eco Soc Sci (Hons) LLB (Hons) (University of Sydney). I would like to express my thanks to Dr Ben Saul at Sydney Law School and Jonathan Hunyor for their advice and guidance. Any errors or omissions are, of course, my own.

¹ Julie Debeljak, 'Rights Protection Without Judicial Supremacy: A Review of the Canadian and British Models of Bills of Rights' (2002) 26 *Melbourne University Law Review* 285, 285; George Williams, 'A Charter of Rights for Australia' (2008) 27 *Dissent* 10, 12.

After tracing the development of the Charter movement in Australia, this article will compare and contrast the two dominant models of statutory Charter mechanism under consideration — the dialogue model, mirroring the approach adopted in the United Kingdom ('UK'), New Zealand, as well as Victoria and the Australian Capital Territory ('ACT'); and model proffered by the Hon Michael McHugh AC QC (the McHugh model) based on the Canadian Bill of Rights. Focusing pragmatically on the outcomes and remedies effectuated by each model, this article will evaluate the efficacy of the models both conceptually and in practice, by reference to the issue of the mandatory detention of asylum seekers generally and the case of *Al-Kateb v Godwin* ('*Al-Kateb*')² specifically. Ultimately, while the dialogue model carries greater conceptual weight, a re-evaluation of *Al-Kateb* in the light of both models demonstrates that the McHugh model is a more practical mode of redress for individual human rights grievances.

I. The Charter of Rights Movement: State of play

Human rights and the rights protection movement have gained currency since World War II amidst growing concern to curb discrimination against minorities and protect the rights and freedoms of individuals from abuse by State power.³

The picture of rights protection in Australia, however, is hard to pin down.⁴ While the Constitution provides some express rights, these are relatively scarce and obscure.⁵ The High Court has recognised an implied constitutional right to free political communication, which pales in comparison to the broader right of free speech recognised in jurisdictions such as the United States ('US'). Australia is also a party to the two primary international human rights instruments — the *International Covenant on Civil and Political Rights* ('ICCPR')⁶ and the *International Covenant on Economic, Social and Cultural Rights* ('ICESCR'),⁷ as well as the several thematic human rights conventions elaborating on certain rights within these international covenants.⁸ However, the High Court has confirmed many times that entry

² *Al-Kateb v Godwin* (2004) 219 CLR 562.

³ Sir Anthony Mason, *Why Do We Need a Bill of Rights?* (2006) Human Rights Act for Australia <<http://www.humanrightsact.com.au/2008/2006/03/29/mason-why-do-we-need-a-bill-of-rights>>.

⁴ Brook Hely, 'Litigating with Human Rights: The Significance of Human Rights in Australian Litigation in The Absence of a Charter of Rights' in Robert Garbutt (ed), *Activating Human Rights and Peace: Universal Responsibility Conference 2008 Conference Proceedings* (Southern Cross University Centre for Peace and Social Justice: Byron Bay, NSW, 4 July 2008), 183.

⁵ For example, the *Commonwealth Constitution* does not protect fundamental rights and freedoms such as the right to life, freedom from torture, the right to equality before the law, or the right to liberty and security of the person. See George Williams, *Human Rights Under the Australian Constitution* (2002); Law Council of Australia ('LCA'), *Submission to the National Human Rights Consultation*, (6 May 2009), [275].

⁶ Opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976; except art 41, which entered into force 28 March 1979). The ICCPR currently has 164 parties.

⁷ Opened for signature 16 December 1966, 999 UNTS 3 (entered into force 3 January 1976). The ICESCR currently has 160 parties.

⁸ These include, most notably: the *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990); *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, opened for signature 10 December 1984, 1465 UNTS 85 (entered into force 26 June 1987);

into an international treaty is an executive act that does not give rise to domestic rights and obligations until given domestic legislative effect.⁹ Some rights have been recognised directly through legislation, such as the federal anti-discrimination statutes (race, sex, disability and age discrimination acts).¹⁰ Other rights, such as the right to a fair trial or privacy, are protected under a hybrid system of legislation and common law. Thus, some rights enjoy strong protection, with an accompanying right to commence an action in the courts and seek a remedy, while others are not recognised at all. As a result, the primary means for individuals to obtain redress for alleged violations of the majority of their rights under the international covenants is by complaint to United Nations committees whose competence Australia has accepted.¹¹ This brief overview reflects that Australian federal rights protection is ad hoc and piecemeal, or as Hely puts it, ‘uneven’.¹²

This state of affairs has spurred both criticism of Australia’s human rights protections as inadequate and a burgeoning charter of rights movement, the voice of which could be heard as far back as Federation. Since the 1898 Constitutional Convention rejected a proposal for a constitutional Bill of Rights, a number of attempts to implement a legislative Bill have been made: in 1973, 1985, 1988, 2000, and twice in 2001.¹³ None of these have proven successful. In part, the failure of these attempts is attributable to dissenters, who argue that existing constitutional and statutory protections are sufficient and that codification of human rights may freeze their development.¹⁴ Recent developments have, however, muted critics to some extent. Since the enactment of the UK’s *HRA* in 1998, Australia is the only western democracy without a national Charter or Bill of Rights.¹⁵ In light of Canada’s, New Zealand’s and the UK’s enactment of Charters (the first constitutional, the others statutory) in 1960, 1990 and 1998 respectively, as well as the

Convention on the Elimination of All Forms of Discrimination Against Women, opened for signature 18 December 1979, 1249 UNTS 13 (entered into force 3 September 1981); *Convention on the Elimination of All Forms of Racial Discrimination*, opened for signature 7 March 1966, 660 UNTS 195 (entered into force 4 January 1969); *Convention on the Rights of Persons with Disabilities*, GA Res 61/106, UN GAOR, 61st sess, 76th plen mtg, UN Doc A/Res/61/106 (2007); and *Convention Relating to the Status of Refugees*, opened for signature 28 July 1951, 189 UNTS 150 (entered into force 22 April 1954).

⁹ See, for example, *Koonwarta v Bjelke-Petersen* (1982) 153 CLR 168, 193 (Gibbs CJ), 211–12 (Stephen J), 224–5 (Mason J); *Kioa v West* (1985) 159 CLR 550, 570–1 (Gibbs CJ); *Dietrich v The Queen* (1992) 177 CLR 292, 305 (Mason CJ and McHugh J); *Minister for Immigration and Ethnic Affairs v Teob* (1995) 183 CLR 273, 286–7 (Mason CJ and Deane J).

¹⁰ See *Race Discrimination Act 1975* (Cth); *Sex Discrimination Act 1984* (Cth); *Disability Discrimination Act 1992* (Cth); *Age Discrimination Act 2004* (Cth).

¹¹ NSW Bar Association Human Rights Committee (‘NSWBAHRC’), *Options Paper for a Charter of Human Rights for NSW* (1996) NSW Bar Association, [20], <http://www.nswbar.asn.au/docs/resources/publications/human_rights.pdf>.

¹² Hely, above n 4, 184. See also Edward Santow (Gilbert + Tobin Centre of Public Law), *Submission to the National Human Rights Consultation*, (May 2009), 25.

¹³ *History of Charters of Human Rights in Australia* (undated) Gilbert + Tobin Centre of Public Law <<http://www.gtcenre.unsw.edu.au/Resources/cohr/historyChartersofHumanRights.asp>>.

¹⁴ For an overview of these arguments, see NSWBAHRC, above n 11, [96]–[99]; Mason, above n 3.

¹⁵ Debeljak, above n 1, 285; Williams, above n 1, 12.

continued operation of the US Bill of Rights, Australia's common law rights protection tradition has been threatened with intellectual isolation.¹⁶

In recognition of this threat and the possibility for Australia to 'do better'¹⁷, Federal Attorney-General Robert McClelland announced, on 10 December 2008, the establishment of a National Human Rights Consultation ('NHRC') headed by Jesuit priest Father Frank Brennan, which was intended to set the agenda for the development of a federal statutory Charter — a Human Rights Act — in Australia. The NHRC's terms of reference were prefaced by the statement:

The Australian Government is committed to the protection and promotion of human rights ... the protection and promotion of human rights is a question of national importance for all Australians.¹⁸

The move followed the enactment of the *Human Rights Act 2004* (ACT), and the *Charter of Human Rights and Responsibilities Act 2006* (Vic), which were likely to be pertinent legislative models for the Charter.

According to the Law Council of Australia, a Charter would fill the gaps in rights protection currently pervading the system; clearly enunciate a list of protected rights; promote a culture of respect for human rights; hold law and decision-makers accountable for the human rights implications of their determinations; provide a framework for courts to use in the determination of human rights violations; and become a crucial facet of Australia's national and international identity.¹⁹

The key issue before the NHRC was what operational form or model of federal legislation the Charter should reflect. The crux of the controversy the NHRC was required to address was the relationship between the Charter and the courts — specifically, the power of the courts to issue declarations of incompatibility under the 'dialogue model' operating in the ACT and Victoria, and the availability of remedies once claims are brought before federal courts.

On 30 September 2009, the NHRC Committee handed its final report to Federal Attorney-General Robert McClelland. In that report, the NHRC Committee explicitly recommended the adoption of a federal Human Rights Act based on the dialogue model. Of the 31 recommendations made in that report, 13 focused on the content and operation of the Human Rights Act and five addressed elements of the practical application of the dialogue model.

¹⁶ Hon J J Spigelman AC, 'Access to Justice and Human Rights Treaties' (2000) 22 *Sydney Law Review* 141, 150, cited in George Williams, 'Human Rights and the Second Century of the Australian Constitution' (2001) 24 *University of New South Wales Law Journal* 782, 782.

¹⁷ Hon Catherine Branson QC, 'A Human Rights Act for Australia' (Speech delivered at the Dame Roma Mitchell Memorial Address, Law Institute of Victoria, 6 March 2009), <http://www.liv.asn.au/media/speeches/20090304_Address.html>.

¹⁸ NHRC, *Terms of Reference* (2008) 19–20, <http://www.humanrightsconsultation.gov.au/www/nhrcc/nhrcc.nsf/Page/Terms_of_Reference>.

¹⁹ LCA, above n 5, [93].

On 21 April 2010, the Attorney-General announced the culmination and outcome of the process of review undertaken by the NHRC — the launch of a National Human Rights Framework, which primarily contemplated the investment of over A\$12 million in a suite of human rights education initiatives; establishment of a Parliamentary Joint Committee on Human Rights to scrutinise legislative compliance with international human rights obligations and requiring all new Bills to be accompanied by statements of compatibility with international human rights obligations; consolidation of federal anti-discrimination laws into a single Act; and creation of an annual NGO Human Rights Forum.

Despite reaffirming the Federal Government's commitment to human rights and aiming to enhance domestic engagement with and protection of human rights — particularly through the adoption of elements of the dialogue model pertaining to parliamentary scrutiny of bills and requiring statements of compatibility to accompany new Bills — the Framework effectively rejects the NHRC Committee's recommendations regarding the adoption of a Charter, thus sidestepping the controversy surrounding the concept of a Charter and its mode of operation. As a consequence of this sidestepping, the issue is sure to rage on, as will the battle of the models, which has become part and parcel of the Charter debate. To assist in the resolution of these controversies, the two dominant models on the table are worthy of consideration.

2. The two models on the table: Dialogue model v McHugh model

Two models dominate the Charter debate. The first, the dialogue model, which involves the courts drawing the legislature's attention to legislation impermissibly affecting human rights, has been the front running option for a Charter since its adoption in the statutes engineered by Professor George Williams for the ACT and Victoria. On 5 March 2009, former Justice of the High Court, the Hon Michael McHugh AC, speaking at the Australian Human Rights Commission, threw a spanner in the works for dialogue and declarations of incompatibility. The Hon Michael McHugh proposed a counter-model, arguing for formal rights protection based on the less constitutionally contentious domestic enactment of the ICCPR (and possibly ICESCR), to which all statutes (federal and state) would be subject.²⁰

A. The dialogue model

Despite minor divergences in the operation of the dialogue model in each jurisdiction where it has been adopted — the UK, New Zealand, Victoria and the ACT — the dialogue model essentially envisages the following:

²⁰ The Hon Michael McHugh AC QC, 'A Human Rights Act, the Courts and the Constitution' (Paper presented at the Australian Human Rights Commission, Sydney, 5 March 2009), <http://www.humanrights.gov.au/letstalkaboutrights/events/McHugh_2009.html>; Andrew Lynch, 'Judge McHugh, Right on Rights', Legal Affairs, *The Australian* (Sydney), 20 March 2009.

- public authorities (bodies exercising public functions) would be subject to a duty to exercise their powers in accordance with Charter rights and freedoms (in the light of principles of necessity and proportionality as rights could be subject to ‘such reasonable limits as can be demonstrably justified in a free and democratic society’²¹);
- representing the role of the executive, the Attorney-General would be required to prepare statements of compatibility (including reasoning) with Charter rights for all new legislation introduced to Parliament (a declaration of override reflecting intentional incompatibility could accompany the legislation, but must expressly state the provisions to which it would apply);
- representing the role of the legislature, a joint (multi-party) standing committee would be established to inform parliamentary debate upon legislation affecting human rights and undertake pre-legislative scrutiny of key policy documents;
- representing the role of the judiciary, once a claim involving violations of fundamental rights is brought before a federal court, the judiciary’s primary obligation would be to interpret legislation compatibly with human rights (where it is possible to do so consistently with the legislation’s purpose).²² Where it cannot do so, the judiciary would be empowered to issue a declaration of incompatibility putting the government on notice of inconsistency and giving it the option of setting in motion a process of governmental and parliamentary review of the relevant legislation. The final say as to any whether the legislation is amended is vested in Parliament.²³

Drawing on the UK and ACT versions of the dialogue model (rather than Victoria), the model may also provide for an individual right of action against public authorities for infringements of Charter rights (and vest the courts with remedial discretion by reference to an inclusive list of remedies including damages). The model, thus, provides immunities, rather than causes of action per se (with the exception of the possible right of action against public authorities), thereby limiting individual claims before the courts to those established at law, outside of the Charter.²⁴ As highlighted by Debeljak, four elements of the Charter — open-textured articulation of rights, recognition of the non-absolute nature of rights, conferral of limited judicial powers of interpretation and declaration (not invalidation), and establishment of a range of governmental response mechanisms to judicial declarations — operate to create institutional dialogue between the judiciary, executive and legislature regarding rights protection deficiencies, with the machinery

²¹ See s 7(2) of the Victorian Charter and s 28(1), (2) of the *ACT HR Act*.

²² This wording is adopted from s 32 of the Victorian Charter, which diverges from the wording of both the ACT and UK Acts.

²³ The elements of the dialogue model enunciated are drawn from Spencer Zifcak and Susan Ryan (on behalf of the Human Rights for Australia Act Campaign Committee), *Submission to the NHRC*, (2009), 17–21. An example of a dialogue-based charter, the New Matilda Human Rights Bill, is appended to the submission.

²⁴ McHugh, above n 20, 9.

established under the dialogue model focusing on the protection of rights through policy development and administrative practice.²⁵

B. The McHugh model

In the words of Lynch, the Hon Michael McHugh ‘cracked wide open the charter of rights debate’.²⁶ Before proffering an alternative Canadian-based model for the protection of human rights in Australia, the Hon Michael McHugh targeted a credible assault at the dialogue model, arguing for its rejection as a vehicle for human rights protection. In an eight-point critique, the former Justice emphasised such weaknesses of the dialogue model as the dubious constitutionality of the declaration of incompatibility mechanism — a particular point of contention; the limitations of interpretive provisions in protecting human rights exercisable under a Charter; the messy patchwork of state and federal human rights protections that would exist until the states adopted similar human rights statutes; remedial deficit (as the model creates no rights or causes of action except against public authorities); potential executive inertia in the wake of declarations of incompatibility; and increased parliamentary workload ensuing as a result of such declarations.²⁷ Arguably overcoming these difficulties, the McHugh model shuns declarations of incompatibility in favour of a model based on the 1960 Canadian Bill of Rights. The McHugh model focuses on the practicalities of recognising and enforcing human rights. It advocates the domestic enactment of the ICCPR (and possibly ICESCR) in a statutory Bill of Rights and the empowerment of federal courts, via robust interpretive provisions, to read federal legislation, absent express statements to the contrary, subject to the Bill and to strike down inconsistent state and territory legislation. Under this model, individuals would have judicially-enforceable human rights not generally affected by state, territory or federal legislation inconsistent with those rights and immediate judicial remedies for breaches of those rights. Anticipating concerns that the model would undermine parliamentary sovereignty by preventing Parliament from having the final say on human rights, the Hon Michael McHugh provides for a parliamentary override in the form of a ‘notwithstanding clause’ modelled on the Canadian Bill that can be inserted into federal legislation before or after a judicial decision.²⁸

C. The models on balance

Neither model is a panacea or a clear solution to the Charter debate. Each has distinct strengths and weaknesses. The litmus test as to which model is preferable lies with four key

²⁵ Julie Debeljak, ‘Balancing Rights in a Democracy: The Problems with Limitations and Overrides of Rights under the Victorian Charter of Human Rights and Responsibilities Act 2006’ (2008) 32 *Melbourne University Law Review* 422, 429–32.

²⁶ Lynch, above n 20.

²⁷ McHugh, above n 20, 33–6.

²⁸ McHugh above n 20, 35–6; LCA, above n 5, [208]–[212].

criteria: (i) constitutionality; (ii) consistency with parliamentary sovereignty; (iii) promotion of human rights culture and awareness; and (iv) practical efficacy.

(i) Constitutionality

The crux of the Hon Michael McHugh's critique of the dialogue model lies in its unsuitability to a system of government with a constitutionally-entrenched doctrine of separation of powers.²⁹ In his words, 'it would be a tragedy ... if the dialogue model was enacted and the declaration of incompatibility provisions were struck down as unconstitutional'.³⁰ Without engaging with the minutiae of constitutional interpretation — a task which Dalla-Pozza and Williams³¹ and the Hon Michael McHugh more than adequately undertake — the crux of the constitutional controversy³² lies in the potential for declarations of incompatibility to fall short of the constitutional requirements for an exercise of judicial power.³³ Put simply, the arguments are: (i) for courts to merely declare certain legislation to be inconsistent with human rights without being empowered to enforce such declarations or order that the identified inconsistency be redressed (as subsequent action would be at Parliament's discretion) would mean there is no 'matter' before the court — with the court merely issuing an advisory opinion (without having jurisdiction to do so); and (ii) for declarations not to be binding on the parties before the court is a significant departure from the traditional indicia of judicial power.³⁴

Advocates respond to such criticisms by arguing that a 'matter' is established since applications giving rise to declarations of inconsistency involve determination of legislative consistency in the context of an existing dispute between the parties. Moreover, even if declarations are not binding on the parties before the court, it is viable for the Charter to be drafted so as to impose enforceable obligations of response upon the Attorney-General, which would be sufficiently connected to proceedings to satisfy the elements of judicial

²⁹ McHugh, above n 20.

³⁰ McHugh, above n 20, 36.

³¹ Dominique Dalla-Pozza and George Williams, 'The Constitutional Validity of Declarations of Incompatibility in Australian Charters of Rights' (2007) 12 *Deakin Law Review* 1.

³² Other constitutional issues that have been raised, but that have not attracted substantial attention include: (i) the potential for the inability of courts to affect the validity of legislation to constitute an invalid form of privative clause; and (ii) the inconsistency of a broad-based interpretive power with judicial power due to the possibility of it infringing the role of Parliament (and take judges away from law enforcement and into the realm of law-making). See Helen Irving, *Submission to the NHRC* (2009) [12]; McHugh, above n 20, 20–7.

³³ *In re Judiciary and Navigation Acts* (1921) 29 CLR 257, cited in Sir Gerard Brennan AC, 'The Constitution, Good Government and Human Rights' (Paper presented at the Human Rights Law Resource Centre ('HRLRC') Seminar, Melbourne, 12 March 2008), 23, <<http://www.hrlrc.org.au/content/topics/national-human-rights-consultation/sir-gerard-brennan/>>.

³⁴ See James Stellios, 'State/Territory Human Rights Legislation in a Federal Judicial System' (Paper presented at the 2007 Protection of Human Rights Conference, Melbourne Law School, 25 September 2007) <http://actHRA.anu.edu.au/articles/James_Stellios%5B1%5D.pdf>; Pamela Tate, 'Human Rights in Australia: What Would a Federal Charter of Rights Look Like?' (Paper presented to the School of Law & Justice, Southern Cross University, Lismore, New South Wales, 14 March 2008), 24–5; Dalla-Pozza and Williams, above n 31.

power.³⁵ Ultimately, in light of the developing jurisprudence on judicial power, the jury is still out on the constitutional validity of the dialogue model. While Dalla-Pozza and Williams³⁶ argue that the stronger view is that the declaration mechanism is valid, the Hon Michael McHugh, albeit acknowledging the closeness of the margin, emphasises the likelihood of the High Court invalidating the declaration of incompatibility mechanism as unconstitutional. Advocates place their hopes on the ability of the statement of the Constitutional Roundtable (in which the Hon Michael McHugh participated) on 22 April 2009,³⁷ affirming the constitutionality of a number of features of the dialogue model, to settle the dispute. However, given the statement does not include declarations of incompatibility among the list of constitutionally valid features, the unpredictability of judicial sentiment should the model come before the courts, and the centrality of declarations of incompatibility to the dialogue model when compared with the relative freedom of the McHugh model from constitutional criticism, the McHugh model has a definitive comparative advantage on the constitutionality point.

(ii) Parliamentary sovereignty

Parliamentary sovereignty, or the will of the electorate, is both the crux of democracy and the primary weakness of both models. While George Williams emphasises that the courts have a very limited role and Parliament ultimately has the last say (as courts cannot invalidate legislation) under the dialogue model,³⁸ James Allan argues of the same model that '[while] a statutory bill of rights may leave Parliament with the last word in name, it gives judges a steroid enhanced power of interpretation ... in effect, they get a blank cheque'.³⁹ Adding weight to Allan's criticisms are the criticisms of commentators, such as Campbell, who characterise the relationship between the Parliament and the courts as a zero-sum game that declarations of incompatibility push in the judiciary's favour.⁴⁰ There is also the experience of the UK courts, which have used the interpretive power vested in them under s 3 of the *HRA*, arguably, to allow their own values 'free rein' — i.e. to legislate, rather than interpret. This approach is exemplified in the landmark case *Ghaidan v Godin-Mendoza* (*'Ghaidan'*),⁴¹ where both Lords Nicholls and Millett emphasised that s 3

³⁵ See HRLRC, *Submission to the NHRC*, May 2009, [353]–[356]; McHugh, above n 20, 18; LCA, above n 5, [172]–[207].

³⁶ Dalla-Pozza and Williams, above n 31, 38.

³⁷ Participants at the Roundtable included Sir Anthony Mason, the Hon Michael McHugh AC QC, The Hon Catherine Branson QC, Ms Pamela Tate SC, Associate Professor James Stellios, Associate Professor Anne Twomey, Associate Professor Kristen Walker, Professor George Williams, Professor Spencer Zifcak and Mr Bret Walker SC. See AHRC, 'Constitution Poses No Obstacle to National Human Rights Act' (Media Release, 6 May 2009), <http://www.hreoc.gov.au/about/media/media_releases/2009/32_09.html>.

³⁸ George Williams, 'Wisdom of Politicians is Frail Shield For Our Rights', *Sydney Morning Herald* (Sydney), 2 June 2009; George Williams, 'Human Rights Charter Will Save Time and Money', *Daily Telegraph* (Sydney), 13 April 2006.

³⁹ James Allan, 'The Victorian Charter of Human Rights and Responsibilities: Exegesis and Criticism' (2006) 30 *Melbourne University Law Review* 906.

⁴⁰ See Tom Campbell, 'Does Anyone Win under a Bill of Rights? A Response to Hilary Charlesworth's Who Wins Under a Bill of Rights' (2006) 25 *University of Queensland Law Journal* 55.

⁴¹ [2004] 2 AC 557.

may require a court to depart from the unambiguous meaning the legislation would otherwise bear and the intention of the Parliament that enacted the legislation.⁴² Though the Department of Constitutional Affairs,⁴³ in its review of the *HRA*, has argued that the House of Lords' radical approach has since been tempered, on each occasion in which s3 has been applied by UK courts between 2000 and 2006, a degree of interpretive 'creativity' is reflected in each instance. Moreover, even if Australian judges do not venture too far down the *Ghaidan* path, the claim of genuine dialogue only stands where the elected legislature feels itself to be in a position where it can disagree with and overrule the unelected judges.⁴⁴ Parliament is typically inclined to the path of least resistance⁴⁵, as reflected by the UK experience, where each of the 17 declarations issued was met by an affirmative governmental response (in the form of commitment to or actual repeal or amendment).⁴⁶ Significantly, if the dialogue model is guilty of breaching parliamentary sovereignty, the McHugh model — by proffering a more virulent interpretive power and enabling judges to strike down inconsistent legislation — is an even greater culprit in this regard. Critics of the Canadian Charter, on which the model is based, criticise that model for operating as a 'judicial monologue', where judicial interpretation is viewed as the only legitimate interpretation of the protected rights.⁴⁷ Though two counter-arguments to the claim of breaching parliamentary sovereignty are available — one focusing on the tendency of the judiciary to defer to the will of the legislature as expressed in initial compatibility statements,⁴⁸ and the other emphasising the operation of the dialogue model as a potential source of guidelines for tackling the policy issues which the judiciary inherently combats⁴⁹ — neither of these counter-arguments applies to save the McHugh model from criticisms regarding usurpation of parliamentary power. Thus, on the question of democratic deficit, though neither model is free from criticism, the dialogue model ultimately prevails.

(iii) Education and awareness

Part of the impetus for a Charter was to raise awareness about human rights. On this issue, the dialogue model, by requiring Parliament to consider the human rights impacts of laws and government (and decision-makers) to respect human rights when developing and

⁴² *Ghaidan*, [30]–[31], [67].

⁴³ Department of Constitutional Affairs (UK), *Review of the Implementation of the Human Rights Act*, (2006), 12.

⁴⁴ Allan, above n 39.

⁴⁵ Patrick Parkinson, *Submission to the NHRC* (2009), 2.

⁴⁶ See House of Lords/House of Commons Joint Committee on Human Rights, *Monitoring the Government's Response to Court Judgments Finding Breaches of Human Rights*, Sixteenth Report of Session 2006–2007 (18 June 2007), 40–52; Department of Constitutional Affairs (UK), *Declarations of incompatibility made under section 4 of the Human Rights Act 1998*, cited in Tate, above n 34, 17.

⁴⁷ Julie Debeljak, 'The Human Rights Act 1998 (UK): The Preservation of Parliamentary Supremacy in the Context of Rights Protection' (2003) 9 *Australian Journal for Human Rights* 183, 206.

⁴⁸ Debeljak, above n 25.

⁴⁹ Brian Walters SC and Alistair Pound, *Memorandum of Advice in the Matter of a Proposed Federal Charter of Rights* (Advice of Counsel to the HRLRC, 28 October 2008).

applying policy,⁵⁰ clearly trumps the McHugh model. At its core, the dialogue model is a Parliament-led model for the protection of rights through policy development and administrative practice; its goal is the prevention of human rights violations through processes and immunities, rather than the provision of remedies for breach.⁵¹ In the words of Debeljak, the ‘institutional dialogue should promote constructive and educative exchanges ... [and] produce a more complete understanding of the competing values, interests, and concerns at stake’.⁵² This in turn will lead to better public service delivery and bureaucracy.⁵³

(iv) Efficacy

Having elaborated on the more conceptual and technical issues, lastly come the practical. The practical efficacy of each model is perhaps the most important criterion. While the dialogue model’s ‘big picture’ focus on policy and awareness gives it the upper hand on the educative stakes, it also mitigates its pragmatism, in the context of remedies and timely application. At most, the dialogue model would solely provide a stand-alone cause of action against public authorities and, even in that context, remedies such as damages would be discretionary. In all other circumstances, individuals would have to have viable causes of action sourced in law other than the Charter itself to ground a claim before the courts. Moreover, the primary remedial focus is on declarations of incompatibility, which have no effect for the parties and effectively leave the parties without a remedy. Conversely, remedies are the strength of the McHugh model, in that it provides litigants with a legally enforceable cause of action (albeit also subject to discretionary remedies) and provides immediacy of relief (i.e. where conduct is in breach of the ICCPR and possibly the ICESCR, that conduct will be rendered unlawful and at a minimum would be halted). Linked to remedial deficit is the issue of implementation and immediacy — while the McHugh model provides for immediate determination of rights and responsibilities (both regarding individual rights and legislative invalidity), in the case of declarations of incompatibility under the dialogue model, Parliament is only required (under most current models) to respond within six months,⁵⁴ paving the way for parliamentary and executive inertia.⁵⁵ While the practical elements generally favour the McHugh model, one qualification must be made: though the McHugh model provides Parliament with the power to override the relevant human rights statute/Charter expressly, it is unclear whether statutes enacted after the human rights statute/Charter and that do not contain

⁵⁰ Graeme Innes AM, ‘A Human Rights Act for Australia’ (Paper presented to the Queensland Charter Group, Brisbane, 6 March 2009) <http://www.hreoc.gov.au/about/media/speeches/human_rights/2009/20090211_HRA.html>.

⁵¹ Williams, ‘Wisdom of Politicians is Frail Shield for Our Rights’, above n 38; Walters and Pound, above n 49.

⁵² Julie Debeljak, ‘Parliamentary Sovereignty and Dialogue Under the Victorian *Charter of Rights and Responsibilities*: Drawing the Line Between Judicial Interpretation and Judicial Law-Making’ (2007) 33(1) *Monash University Law Review* 9, 35.

⁵³ LCA, above n 5, [151]–[161].

⁵⁴ HRLRC, above n 35, [428].

⁵⁵ Debeljak, above n 47, 209.

such express statements will override the human rights statute/Charter by virtue of implied repeal⁵⁶ (though in light of the unlikelihood of Parliament failing to include such a statement, this is likely to be a mute issue).

On balance, these four criteria reflect the divergent strengths of the two models on the policy table: the big picture progressive orientation of the constitutionally-dubious dialogue model, as contrasted with the practical efficacy and moderately democratically limiting McHugh model. The distinction between the two, as highlighted by Edward Santow, is the distinction between a strong Human Rights Act, granting significant invalidation powers to the courts, and a more moderate one.⁵⁷ While either would be a marked improvement on the status quo, to Santow, the dialogue model strikes the most appropriate balance between protecting fundamental human rights and preserving key constitutional and democratic conventions.⁵⁸ The conceptual balance seems to affirm this conclusion. However, ultimately, the question is whether one should favour the macro over the micro: big picture progress in the human rights arena versus micro-level remedies for aggrieved individuals in the meantime.

3. Macro vs Micro: The case of mandatory asylum seeker detention

To briefly demonstrate this tension in action, the case of *Al-Kateb* and the broader issue of mandatory detention of asylum seekers is an interesting case in point. The decision of the High Court in *Al-Kateb* is the most commonly cited example of the alleged inadequacy of the existing system of rights protection and the efficacy of a Human Rights Act. In *Al-Kateb*, the High Court, by a 4:3 majority, held that despite the lack of any real prospect for his removal to another country, the *Migration Act 1958* (Cth) ('the Act') unambiguously required the indefinite detention of Ahmed Ali Al-Kateb, a stateless man of Palestinian ethnicity born in Kuwait who arrived on Australian shores by fishing boat. While the majority refused to turn to international human rights instruments to interpret the Act (to imply an obligation not to indefinitely detain asylum seekers), arguing that the Act's intention was clear on its face, the minority found that the Act was not unambiguous in its terms and was able to be interpreted compatibly with human rights obligations pursuant to the interpretive principle that Parliament does not intend to abrogate fundamental rights.⁵⁹ Though in the majority, the Hon Michael McHugh (then McHugh J) emphasised the tragic nature of the outcome, decrying Australia's lack of a bill of rights, in the absence of which

⁵⁶ For an analysis of the operation of the doctrine of implied repeal in the Charter context, see Petra Butler, 'Human Rights and Parliamentary Sovereignty in New Zealand', (2004) 35 *Victoria University of Wellington Law Review* 341, 353.

⁵⁷ Santow, above n 12, 58–66.

⁵⁸ Santow, above n 12, 61.

⁵⁹ Hilary Charlesworth, *Australia's First Bill of Rights: The ACT's Human Rights Act* (Undated) Right Now <<http://www.rightnow.org.au/Issues/Issue1/html/charlesworth.html>>; Branson, above n 17. As a postscript, in the wake of the High Court's verdict, Mr Al-Kateb was allowed to remain in the community on a bridging visa and was allowed to remain in Australia indefinitely in 2007.

the justice of the course taken by Parliament was not, in his opinion, examinable by domestic courts.⁶⁰

What could the dialogue model (in retrospect) achieve for Mr Al-Kateb? One possibility is that the High Court would utilise the interpretive obligation to interpret the Act consistently with the rights protected under the Charter (if enacted), which would likely include the rights to liberty, security, and freedom from arbitrary arrest or detention, and the right to humane treatment provided under Articles 7, 9 and 10 of the ICCPR. It would, however, have to do so consistently with the purpose of the Act. It is possible that the minority's reasoning would be adopted as a means to reconcile Mr Al-Kateb's rights with the purpose of the Act. Even then Mr Al-Kateb's release from detention would not be guaranteed and he could merely hope to bring a claim for damages against the Department of Immigration and Citizenship. More likely, in light of the more limited interpretive power that will likely be adopted under an Australian Charter (if enacted) as compared to the UK's, and the Act's treatment of detention of non-citizens as a presumptive norm, is a finding of inconsistency between Mr Al-Kateb's right to freedom from arbitrary detention and the purposes of the Act. Thus, the Court would issue a declaration of incompatibility, alerting Parliament to a breach of rights under the Charter.⁶¹ While this may cause a progressive change in the law for future asylum seekers, it would offer hollow comfort to Mr Al-Kateb — macro over micro gains. As argued by the Hon Michael McHugh, *Al-Kateb* highlights a significant weakness of the dialogue model — if an individual's human rights conflict with the purpose of legislation, they must go unprotected.⁶²

Could the McHugh model do better for Mr Al-Kateb? Most definitely. Mr Al-Kateb would have a guaranteed right to automatic release from detention — in light of the more virulent interpretive power vested in the judiciary — and a cause of action against not only the Department, but also private correctional management and other private individuals who contributed to violations of his fundamental rights. His claim would be recognised immediately.

The distinction between the two models in practice is, thus, stark. While the dialogue model has greater conceptual efficacy at a theoretical level of analysis, the pragmatic efficacy of the McHugh model in offering dispossessed and disadvantaged individuals effective and efficient modes of redress should not be underestimated.

⁶⁰ *Al-Kateb*, [73]; Williams, above n 1; Charlesworth, above n 60.

⁶¹ For an analysis of the possible impacts of a Charter on mandatory detention, see Branson, above n 17, 3–4; Spencer Zifcak, 'No Way Out: The High Court, Asylum Seekers and Human Rights' in Susan Aykut and Jessie Taylor, *Seeking Asylum in Australia: 1995-2005 Experiences and Policies* (Monash University, Melbourne, 27–28 November 2005), 103–8.

⁶² McHugh, above n 20, 33.

Conclusion

With the Attorney-General's announcement of the Federal Government's commitment to a Charter, the issue of a national Human Rights Act had at long last returned to the policy fore. Despite the Federal Government's ultimate failure to commit to the enactment of a Charter in the National Human Rights Framework announced in April of this year, the Charter debate and the battle of models enlivened within that debate linger under the surface. A consideration of the two dominant models on the policy table — the dialogue model and the McHugh model — reveals their different strengths. The dialogue model adopts a big picture approach to human rights protection through the establishment of an educative dialogue between the three arms of government. A more sensitive approach to the issue of parliamentary sovereignty, this model has been subject to challenge not least on the basis of its potential unconstitutionality (in relation to the central feature of judicial declarations of incompatibility) and inability to provide substantive individual redress. Alternatively, though subject to some criticisms regarding judicial usurpation of Parliament's law-making function, the McHugh model is a pragmatic and effective solution which, as demonstrated by the case of *Al-Kateb*, has the capacity to make a real difference for dispossessed and disadvantaged individuals subjected to violations of their fundamental rights. While neither model represents a perfect solution, it is important that the implementation debate continue and that the Hon Michael McHugh's model does not, as he regretfully anticipated, fuel those who oppose any Charter at all.⁶³

⁶³ McHugh, above n 20, 36.