



SG No. 40 of 2009

**IN THE MATTER OF CONSTITUTIONAL ISSUES CONCERNING A**

**CHARTER OF RIGHTS**

**OPINION**

**INTRODUCTION**

1. We are asked to advise whether Ch III of the Australian Constitution would prevent the Commonwealth Parliament from enacting a statutory charter of rights along the lines of the “dialogue” model contained in the Victorian *Charter of Rights and Responsibilities Act 2006* (**Charter**) and the Australian Capital Territory *Human Rights Act 2004* (**HRA**).
2. A key feature of the Charter and the HRA is that they provide the Victorian and Australian Capital Territory Supreme Courts with the power to make a “declaration of inconsistent interpretation” (s 36 of the Charter) or a “declaration of incompatibility” (s 32 of the HRA). The policy intent is to create a “dialogue” between the three arms of

government by providing a mechanism for the court to alert the executive and the legislature that it has identified an incompatibility between a human right protected by the Charter or the HRA and another statute. The declaration imposes obligations on the Attorney-General in each jurisdiction to prepare a response and to ensure that the declaration and the response are presented to the Parliament. The declaration does not bind the parties to the proceeding, give rise to any legal right or cause of action, or affect the validity, operation or enforcement of the law in question.

3. There are differing opinions among academic and other commentators as to the constitutional validity of this mechanism, principally in relation to the issue of its compatibility with the exercise of federal jurisdiction under Chapter III of the Constitution. There is a question as to whether the making of a declaration would constitute an exercise of judicial power. If the making of a declaration would not constitute an exercise of judicial power, there are further questions as to whether the declaration-making powers contained in the Charter and the HRA would apply to proceedings in the exercise of federal jurisdiction and as to whether it would be possible to appeal to the High Court from a declaration made in the exercise of State or Territory jurisdiction.
4. While the Australian Government has not produced a draft national human rights charter for the purposes of the consultation, the group “New Matilda” has drafted a Bill that provides an example of the kind of “declaration of incompatibility” provision that might be included in any national human rights charter. This New Matilda Bill provides that a court exercising jurisdiction in any “cause or matter” may make a declaration of incompatibility if satisfied that a Commonwealth law is incompatible with a right or freedom set out in the Bill (cl 51). It provides that the court would be required to provide a copy of the declaration to the Attorney-General, and that the Attorney-General would be required to present a copy of the declaration to the House of

Representatives and provide a written response to the House within 6 months (cl 52). As with the Charter and the HRA, the declaration would not bind the parties to the cause or matter, or affect the validity, operation or enforcement of the law in question.

5. Because the power of the Commonwealth Parliament to confer functions on a court is limited by Ch III of the Constitution to the conferral of “judicial power” with respect to “matters” and to the conferral of functions incidental to the exercise of judicial power, the central issue that inevitably arises is whether or not the making of a declaration of incompatibility would be, or would be incidental to, an exercise of judicial power.
6. Thus, questions have been raised as to whether cl 51 of the New Matilda Bill conforms with the generally accepted indications of an exercise of judicial power, including that “legal standards” (rather than policy criteria) are used to make the declaration of incompatibility, that binding and enforceable obligations flow from it, and that it is made in the context of a “matter” involving an actual controversy as to some immediate right, duty or liability to be established by the determination of the court (rather than an abstract question not involving a right or duty or liability or one that is hypothetical in the sense of being unrelated to any actual controversy between the parties).
7. The arguments advanced to support the proposition that the making of a declaration does not amount to an exercise of judicial power include that the declaration mechanism set out in the New Matilda Bill would not, of itself, determine any right, duty or liability and that no binding and enforceable obligation would flow from it. There is also an argument that even if the declaration were considered to be a remedy, it could not be seen as determinative of, or as providing relief in relation to, a right, duty or liability alleged by a party.

8. The contrary view has also been expressed. It has been suggested that the making of a declaration involves the exercise of judicial power for various reasons. These include that the requisite “legal standards” by which compatibility with human rights can be judged are sufficiently set out in the Bill, that this assessment is made in the context of an existing controversy between parties, and that binding obligations are created by the requirement for the court to provide a copy of the declaration to the Attorney-General who is in turn required to present the court’s declaration to the House of Representatives and to provide a written response to the House.

## QUESTIONS

9. We are asked:
- (1) Would provision for the making of a declaration of incompatibility under any national charter of human rights along the lines of cl 51 of the New Matilda Bill be valid?
  - (2) In particular, would provision for the making of a declaration of incompatibility under any national charter of human rights along the lines of cl 51 of the New Matilda Bill be regarded as ancillary or incidental to the exercise of a judicial power?
  - (3) What further provisions would be necessary or desirable in relation to the making of declarations in order to support validity?
  - (4) Are there any other related constitutional concerns that arise, and that we consider should be addressed?

**SHORT ANSWERS**

10. Our short answers are as follows:

- (1) Yes.
- (2) The making of a declaration of incompatibility would itself be an exercise of judicial power.
- (3) The following provisions would be desirable to support validity:
  - (a) the requirement that Commonwealth laws be interpreted so far as possible to be compatible with human rights should be qualified to require consistency with statutory purpose (see para 13 below);
  - (b) a declaration of incompatibility should bind the parties to the proceeding in which it is made and the Attorney-General should be joined as a party before it is made (see paras 20 and 21 below)
- (4) There would be related constitutional issues if any of the rights on which a court might be required to adjudicate were not capable of being judicially determined. These issues are likely to arise if the charter were to include economic and social rights in addition to more traditional civil and political rights.

## CONSIDERATION

### Context of declaration

11. Before turning to the constitutional validity of enacting the particular mechanism at issue, it is useful to consider the context in which a court would come to consider the making of a declaration of incompatibility under the terms of the New Matilda Bill. Two elements of the context are, in our view, critical.
12. The first is that a declaration of incompatibility could be made only in proceedings for some other relief or remedy: there would need to be an existing cause or matter. It is not envisaged that a party would be able to seek a declaration of incompatibility divorced from a specific situation involving an application of some other law to the determination of a dispute as to the rights, duties or liabilities of the parties before it. In our view, this will ensure that there is always a “matter” before the court in any proceedings where a declaration may be sought.
13. The second is that a declaration of incompatibility could be made only if a court were satisfied that a Commonwealth law is incompatible with a right or freedom set out in the Bill. This requirement is very closely linked to way in which Commonwealth laws applicable to the matter before the court are to be required to be interpreted. The New Matilda Bill provides in cl 49 that “[s]o far as it is possible to do so” all such laws “must be read and given effect in a way which is compatible with human rights”. It has been suggested that a provision like this may raise constitutional problems in that it invites courts to rewrite legislation in a way that is not compatible with the exercise of judicial power. Constitutional issues might well arise if courts in Australia were expected to redraft legislation in the way that courts in the United Kingdom have been willing to do in light of similar language in the *Human Rights Act 1998* (Cth): see generally *Ghaidan v*

*Hodin-Mendoza* [2004] 2 AC 557 and *Sheldrake v Director of Public Prosecutions, Attorney-General's Reference (No 4 of 2002)* [2005] 1 AC 264 discussed in Spigelman, *Statutory Interpretation and Human Rights* (2008) at pp 62-86. However, concerns in this regard could, in our view, be addressed by using language like that in the Victorian Charter which requires a court to read a statute consistently with human rights only in so far as that is consistent with the statute's purpose (s 32). We consider that such an interpretation provision would avoid the extremes of the United Kingdom approach and would be compatible with the exercise of judicial power as traditionally understood in Australia.

14. The consequence is that it would only be where a court could not interpret a Commonwealth law applicable to the matter before it in a way that is consistent with the relevant human right that the making of a declaration of incompatibility arises. In order to get to the stage of considering making such a declaration, a court would therefore need to have:
  - (a) identified the Commonwealth law as bearing upon the determination of the matter before it;
  - (b) ascertained what the relevant human right requires; and
  - (c) formed an opinion as to whether, and, if so, to what extent, the Commonwealth law is compatible with that requirement.
15. If the Commonwealth law were able to be interpreted compatibly with the relevant human right, the court would apply the law as so interpreted to determine the matter compatibly with the relevant human right. If the Commonwealth law were not able to be interpreted as consistent with the relevant human right, the court would still be

required to apply the law as so interpreted to determine the matter incompatibly with the relevant human right. In either event, the court would have formed an opinion as to the compatibility of the legislation with the human right as an integral step in making a decision that determines a dispute as to the rights, duties or liabilities of the parties before the court. It is just that, in the latter event, the court would be empowered to go on expressly to translate the opinion it had formed in reaching that decision into a formal declaration. The declaration would in this way flow out of an integral part of the court's determination of the matter.

16. In the Charter, the court is empowered to make a "declaration of inconsistent interpretation" rather than to make a declaration of incompatibility. We do not consider the different nomenclature to be constitutionally significant. The circumstance in which the declaration can be made is essentially the same. That circumstance in our opinion involves nothing antithetical to the exercise of judicial power. The declaration flows directly out of the resolution of a specific controversy.

### **Consequences of Declaration**

17. The more critical issue from a constitutional perspective is whether the limited consequences of making a declaration of incompatibility would mean that what is otherwise apparently judicial cannot be properly regarded as such.
18. Among the commentators, it is the lack of any consequences directly for the parties as a result of the making of a declaration that is a principal concern in terms of possible constitutional risk.
19. A feature of the New Matilda Bill, as well as the Charter and the HRA, is that the declaration of incompatibility does not bind the parties to the dispute. The only

consequences of such a declaration is the imposition of obligations on the Attorney-General.

20. We consider that the prospects of constitutional validity would be enhanced if the declaration were binding as between the parties. If this were the case, it would give the losing party a clearer basis to appeal against the declaration. It would also strengthen an argument that a party could enforce the obligations imposed on the Attorney-General by the making of a declaration, obligations that might otherwise be seen as essentially matters for parliamentary, rather than judicial, enforcement. Making a declaration binding on the parties could still be accompanied by a provision that makes clear that a declaration does not give rise to any civil remedy other than against the Attorney-General to compel compliance with the express obligations imposed on him or her. We understand that the concern to avoid any such remedy is the principal reason for inclusion of the non-binding provision.
21. We also think that the prospects of validity would be enhanced if there were a requirement for the Attorney-General to be joined as a party to a proceeding in order for a declaration to be made. This would give the Attorney-General an opportunity to put argument on the issue and would avoid a situation whereby a duty is imposed on a non-party.
22. Even so, we recognize that the underlying issue remains that any declaration does not change the rights or remedies of a party *vis à vis* the other party to the dispute. No reputation is protected and no positive result would necessarily ensue other than a “dialogue” between the court, the Attorney-General and Parliament.
23. We recognize that, absent any express provision for the making of a declaration with these consequences, a court would be unlikely to make one.

24. However, that is a long way from saying that the making of such a declaration would be constitutionally impossible. In *Ainsworth v Criminal Justice Commission* (1992) 175 CLR 564 at 582, the High Court noted that the discretionary power to grant a declaration was “confined by the considerations which mark out the boundaries of judicial power”. One of those considerations was identified by reference to *Gardner v Dairy Industry Authority* (NSW) (1977) 52 ALJR 180 at 188 as being that a declaration would not be made if the Court’s declaration “will produce no foreseeable consequences for the parties”. Yet such a statement cannot be taken too far. The actual decision in *Gardner* concerned proceedings for a bare declaration relating to past events in respect of which the plaintiffs claimed no existing rights. All that was suggested in support of the making of the declaration was “that the Executive might in some undefined way initiate administrative or legislative action which would improve the lot” of the plaintiffs. There are cases which illustrate that a foreseeable practical consequence may be sufficient and that a declaration need not produce some immediate legal consequence for the parties: eg *Aussie Airlines Pty Ltd v Australian Airlines Ltd* (1996) 68 FCR 406.
25. Here, as we have already explained, a declaration of incompatibility would in any event have an immediate legal consequence in that it would impose an obligation on the Attorney-General. We have already suggested that the obligation should expressly be enforceable at the instance of a party.
26. More fundamentally, a declaration of incompatibility would not give an answer to a hypothetical or abstract question but would arise out of a particular dispute between parties about existing rights, duties or liabilities and would give formal expression to a finding that was integral to the judicial determination of that dispute. The reasoning in each of *O’Toole v Charles David Pty Ltd* (1991) 171 CLR 232 (characterising as an exercise of judicial power the giving of answers to questions reserved by a trial judge), in *Mellifont v Attorney-General (Qld)* (1991) 173 CLR 289 (upholding as an exercise of judicial power

the determination of a question of law referred to a Court of Criminal Appeal by an Attorney-General following the acquittal of an accused at trial) and in *Attorney-General v Alinta Ltd* (2008) 233 CLR 542 (allowing an appeal from a decision notwithstanding that the decision on appeal had no effect on any immediate right, duty or liability of any of the parties) strongly supports the view that those characteristics are sufficient to allow the making of a declaration of incompatibility to be characterised as an exercise of judicial power and that the fact that the rights of neither party would be directly altered or affected by the declaration is of no consequence.

27. The decision in *Mellifont* is of particular significance. The reasoning of the majority involved a rejection of a specific argument (recorded at 293) that the determination of a question of law referred to the Court of Criminal Appeal by the Attorney-General was “not in substance a judicial decision because it does not have a binding effect on the parties” (the premise of the argument being that an exercise of judicial power “must be directed to the determination as between specific parties of rights or obligations which must be affected by the determination”). It also involved a rejection of an alternative argument that the determination (even if it involved an exercise of judicial power) was invalid because it was “not in a matter” given that the “matter had terminated”. What was said by the plurality in *Mellifont* at 305 to be sufficient for the determination of a question of law referred by the Attorney-General to constitute an exercise of judicial power was that the determination “was made with respect to a ‘matter’ which was the subject-matter of the legal proceedings” (even though the matter had already terminated in acquittal) and that the determination “was not divorced from the ordinary administration of the law”.
28. Likewise, a declaration of incompatibility would be made with respect to a matter and would be closely allied to the “ordinary administration of the law” involved in the determination of that matter. It would flow directly out of the court’s determination of

the matter and would be a formal statement of a finding reached by the court in making that determination.

29. In this regard, we do not think the proper way to approach the issue is to characterize the making of a declaration as incidental or ancillary to the exercise of judicial power. Rather, for the reasons given, we consider it to be itself an exercise of judicial power and for that reason likely to be held constitutional.

### **Other issues**

30. The one other consideration that may have a bearing on the validity of what is proposed is whether particular human rights that a court could be called to adjudicate upon are susceptible to the application of “legal standards”. This issue is likely to arise if the charter were to include economic or social rights (such as a right to adequate housing) in addition to more traditional civil rights. In the absence of knowing what rights may be included, we do no more than mention the issue. It may mean that the declaration of incompatibility could only be available in relation to certain of the rights included in a charter. It may be, however, that the need for an existing dispute, and hence a matter, provides sufficient protection for the courts from being required to adjudicate in relation to rights not traditionally regarded as judicially manageable. We can advise further on this issue if necessary once it is clearer what rights might be included in any charter.
31. We mention, finally, that we have not in this Opinion canvassed constitutional issues relating to the enactment by the Commonwealth Parliament of a statutory charter of rights other than those pertaining specifically to Ch III of the Constitution. In particular, we have not addressed the interrelated issues of the source of power to enact the statutory charter and the scope of its coverage. Nor have we addressed issues of inconsistency with State and Territory laws.

Dated: 15 June, 2009

**STEPHEN GAGELER SC**

**HENRY BURMESTER QC**

**IN THE MATTER OF  
CONSTITUTIONAL ISSUES  
CONCERNING A CHARTER OF  
RIGHTS**

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**OPINION**

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Attorney-General's Department  
Social Inclusion Division  
Human Rights Branch

Attn: Mr John Boersig  
Assistant Secretary

**SG No. 40 of 2009**



SG No. 68 of 2009

**IN THE MATTER OF CONSTITUTIONAL ISSUES CONCERNING A****CHARTER OF RIGHTS****SUPPLEMENTARY OPINION****INTRODUCTION**

32. Following from our Opinion of 15 June 2009 (SG No. 40 of 2009) (**Opinion**), we are asked to provide further advice concerning the constitutional capacity of the Commonwealth Parliament to enact a statutory charter of rights specifically along the lines of the *Charter of Human Rights and Responsibilities Act 2006* (Vic) (**Victorian Charter**) so as to implement part of the International Covenant on Civil and Political Rights (**ICCPR**) and possibly also to implement part of the International Covenant on Economic, Social and Cultural Rights (**ICESCR**).

33. For this purpose, we are asked to assume that a statutory charter of rights enacted by the Commonwealth Parliament would:

- (5) define “human rights” along the lines of the rights set out in Pt 2 of the Victorian Charter, which are in turn based on those set out in Pt II of the ICCPR;
- (6) require a Member of the House of Representatives who proposes to introduce a Bill into the House of Representatives, or a Senator who proposes to introduce a Bill into the Senate, to cause a statement of compatibility to be prepared in respect of the Bill, stating whether the Bill is compatible with human rights, along the lines of s 28 of the Victorian Charter;
- (7) require a Committee of the House of Representatives or of the Senate or a Joint Committee to consider any Bill introduced into the Commonwealth Parliament and report on whether the Bill is incompatible with human rights, along the lines of s 30 of the Victorian Charter;
- (8) provide that “it is unlawful for a public authority to act in a way that is incompatible with a human right or, in making a decision, to fail to give proper consideration to a relevant human right”, along the lines of s 38(1) of the Victorian Charter;
- (9) define “public authority” for this purpose to encompass Commonwealth officers and entities whose functions are or include functions of a public nature when they are exercising those functions on behalf of the Commonwealth, along the lines of s 4 of the Victorian Charter;

- (10) provide that “so far as it is possible to do so consistently with their purpose, all statutory provisions must be interpreted in a way that is compatible with human rights”, along the lines of s 32(1) of the Victorian Charter;
  - (11) define “statutory provisions” for this purpose to encompass provisions of Commonwealth laws and subordinate legislation;
  - (12) provide that a court may make a declaration that a statutory provision cannot be interpreted consistently with a human right, along the lines of s 36(2) of the Victorian Charter; and
  - (13) require the Minister responsible for the statutory provision the subject of the declaration to prepare a written response to the declaration and cause it to be laid before each House of Parliament, along the lines of s 37 of the Victorian Charter.
34. We are also asked to make the additional assumption that, either in the statutory charter of rights or in another enactment, the Commonwealth Parliament would enact the following six absolute and non-derogable rights with the intention that any State legislation inconsistent with those rights would be rendered inoperative by virtue of s 109 of the Constitution and that it would be unlawful for anyone, including Commonwealth, State and Territory governments and agencies, to infringe those rights:
- (1) a right to life (along the lines of s 9 of the Victorian Charter and Art 6 of the ICCPR, but going further in respect of the death penalty in reliance on the Second Optional Protocol to the ICCPR) framed as follows:
    - “1. Every person has the right to life and has the right not to be arbitrarily deprived of life.

- i. The death penalty may not be imposed for any offence.”

- (2) a right to protection from torture and cruel, inhuman or degrading treatment (along the lines of s 10 of the Victorian Charter and Art 7 of the ICCPR) framed as follows:

“A person must not be:

- a) subjected to torture; or
- b) treated or punished in a cruel, inhuman or degrading way; or
- c) subjected to medical or scientific experimentation or treatment without his or her full, free and informed consent.”

- (3) a right to freedom from forced work (along the lines of s 11 of the Victorian Charter and Art 8 of the ICCPR) framed as follows:

“A person must not be held in slavery or servitude.”

- (4) a right to freedom from retrospective criminal laws (along the lines of s 27 of the Victorian Charter and Art 15 of the ICCPR) framed as follows:

- “1. A person must not be found guilty of a criminal offence because of conduct that was not a criminal offence when it was engaged in.
- 2. A penalty must not be imposed on any person for a criminal offence that is greater than the penalty that applied to the offence when it was committed.
- 3. If a penalty for an offence is reduced after a person committed the offence but before the person is sentenced for that offence, that person is eligible for the reduced penalty.
- 4. Nothing in this section affects the trial or punishment of any person for any act or omission which was a criminal offence under international law at the time it was done or omitted to be done.”

- (5) a right to freedom from imprisonment for inability to fulfil a contractual obligation (along the lines of Art 11 of the ICCPR) framed as follows:

“A person must not be imprisoned on the ground of inability to fulfil a contractual obligation.”

- (6) a right to freedom from coercion or restraint in relation to religion and belief (along the lines of s 14 Victorian Charter and Art 18 of the ICCPR) framed as follows:

“A person must not be coerced or restrained in a way that limits his or her freedom to have or adopt a religion or belief in worship, observance, practice or teaching.”

## QUESTIONS

35. We are asked:

- a. Would the enactment of the statutory charter of rights be supported by the external affairs power?
- b. Would it make a difference if the statutory charter of rights implemented only some of the obligations in the ICCPR or the ICESCR?
- c. If the “human rights” set out in the statutory Victorian Charter of rights were expressed in the form “*every person* has the right to X”, could that inadvertently give rise to a claim against State public authorities or affect the interpretation of State legislation?
- d. What would be the effect of s 109 of the Constitution on State legislation inconsistent with the rights set out in the statutory Victorian Charter of rights? What would be the effect of a provision stating that the statutory charter of

rights did not intend to “cover the field” of human rights and was intended to operate concurrently with State legislation?

- e. What sort of State agencies could the definition of “public authorities”, as set out in assumption (5), encompass? For example, could it encompass State police engaged in joint operations with the AFP, or State prisons housing prisoners convicted of Commonwealth offences?
- f. Could the statutory charter of rights validly bind the Crown in right of the States with respect to the six absolute and non-derogable rights?
- g. If “human rights” were defined to include both those rights in Pt 2 of the Victorian Charter and certain rights from the ICESCR – in particular the right to the enjoyment of just and favourable conditions of work (Art 7), the right to adequate housing (Art 11), the right to health (Art 12), the right to education (Art 13) – would it constitute a valid exercise of judicial power for a court to:
  - d) interpret a provision of Commonwealth legislation consistently with those rights or make a declaration of incompatibility?
  - e) determine that a public authority had acted incompatibly with those rights?
- h. For the purposes of Question (7), does it matter whether (a) or (b) is done in the course of proceedings for some other relief or remedy (ie there is some other existing cause or matter)?

- i. Could the statutory charter of rights validly impose on Members or Senators an obligation to prepare a “statement of compatibility” for each Bill introduced into Parliament as set out in assumption (2)?
- j. Could the statutory charter of rights validly require a Parliamentary Committee to scrutinise a Bill for compatibility with human rights as set out in assumption (3)?
- k. What would be the effect of non-compliance with the requirements set out in assumptions (2) or (3)? Specifically, if the statutory charter of rights did not provide that non-compliance had no effect on the validity of a Commonwealth law along the lines of s 29 of the Victorian Charter, would there be any effect on the validity of the legislation?
- l. Could the statutory charter of rights require a Minister to respond to a declaration of incompatibility issued by a court as set out in assumption (9)? Could such an obligation be imposed if no formal “declaration of incompatibility” was issued by the court, but the court merely held, in the course of its reasoning, that it could not interpret the legislation consistently with human rights and some other mechanism was used to draw the holding to the Minister’s attention?
- m. If the obligations set out in assumption (2) or assumption (9) were imposed on the Attorney-General or relevant Minister, would an action lie under s 75(v) of the Constitution to compel performance of that obligation? Who would have standing to bring such an action?

## SHORT ANSWERS

36. Our short answers are as follows:
- a. Yes, in so far as the statutory charter of rights would - in accordance with assumption (1) - enact rights set out in the ICCPR. Reliance on the external affairs power to enact rights set out in the ICESCR would be more problematic.
  - b. No.
  - c. The statutory charter of rights could be drafted to avoid this consequence. An express provision indicating what the statutory charter of rights does not do, as well as a provision clearly stating what it does do, may be desirable for this purpose.
  - d. Section 109 of the Constitution would make State laws inoperative to the extent of any inconsistency. A provision stating that the statutory charter of rights was not intended to cover the field would reduce the circumstances in which inconsistency would arise: only State laws directly inconsistent would be inoperative.
  - e. The extent, if at all, to which State agencies would fall within the definition of “public authorities” is essentially a drafting issue. There is no constitutional reason why the statutory charter of rights could not be made to apply both to State police engaged in joint operations with the AFP and to State prisons housing prisoners convicted of Commonwealth offences. It is a policy question whether the Commonwealth Parliament wishes to impose its law on State prisons in relation to only some prisoners, thus introducing a form of discrimination, when State prisons remain for all intents under State control.

- f. Yes.
- g. Probably no, in relation to the general rights in Arts 7, 11, 12 and 13 of the ICESCR. Yes, in relation to the rights in Pt 2 of the Victorian Charter.
- h. For the reasons set out in our Opinion, it would matter for the making of a declaration of incompatibility in relation to the rights in Pt 2 of the Victorian Charter that it be done in the course of proceedings for some other relief or remedy.
- i. Yes, although this may be something that is best left to the standing orders of each House, or a direction to Ministers from Cabinet.
- j. Yes.
- k. In the absence of an express provision like s 29 of the Victorian Charter, the effect of non compliance with statutorily prescribed parliamentary procedures would probably not be an issue that a court would inquire into, given it relates to the internal workings of the Parliament. However, there is room for argument, and a provision like s 29 of the Victorian Charter would be desirable.
- l. Yes, in both situations.
- m. In respect of the obligation set out in assumption (2), no action would lie. In respect of the obligation set out in assumption (9) an action would lie. As indicated in our Opinion, it would be desirable for judicial power reasons expressly to confer a right on the parties to a proceeding in which a declaration

of incompatibility was made to seek enforcement. Any other person would be likely to have standing if the statutory charter of rights expressly so provided.

## CONSIDERATION

### Sources of power: Questions (1) and (2)

37. We consider that the external affairs power in s 51(xxix) of the Constitution would support the enactment by the Commonwealth Parliament of a statutory charter of rights implementing rights set out in the ICCPR along the lines of the Victorian Charter. The statutory charter of rights could be drafted in a way that would enable a court to conclude that it was “reasonably capable of being considered appropriate and adapted to [implementing the ICCPR]”: *Victoria v Commonwealth (Industrial Relations Act Case)* (1996) 187 CLR 416 at 487.
38. We do not think it matters for this purpose whether or not the statutory charter of rights might:
- (1) enact only some of the rights in the ICCPR (assumption (1));
  - (2) have application only in respect of Commonwealth public authorities (assumptions (3) and (4)) and Commonwealth legislation (assumptions (5) and (6)); or
  - (3) have wider and general application only in respect of the six absolute and non-derogable rights (additional assumption (1) to (6)).

39. The *Industrial Relations Case* makes clear at 489 that it is not essential to validity under the external affairs power that a law implement all the obligations under an international convention. Partial implementation of an international convention is permissible so long as that partial implementation is itself consistent with the convention and the law by which that partial implementation is achieved remains reasonably capable of being considered appropriate and adapted to its implementation. Although questions of degree would be involved, we consider that the statutory charter of rights would remain consistent with the ICCPR and could be drafted in a way that would be able to remain reasonably capable of being considered appropriate and adapted to the implementation of the ICCPR notwithstanding that its implementation of the ICCPR might only be incomplete in any one or more of the three ways we have mentioned. We note, in particular concerning the wider and general application in respect of the six absolute and non-derogable rights, that Art 50 of the ICCPR extends its provisions “to all parts of federal States without any limitations or exceptions” and that the particular rights identified in additional assumptions (1) to (6) all fall within those from which Art 4 of the ICCPR says there is to be “no derogation” even in a time of national emergency.
40. The position with the ICESCR is more problematic. Many of the rights set out in that convention are expressed in very general terms: in particular, the right to the enjoyment of just and favourable conditions of work (Art 7), the right to adequate housing (Art 11), the right to health (Art 12) and the right to education (Art 13). We think that the prescription in the ICESCR of rights of that nature – which might be sought to be achieved through any one or more of a range of measures – would be likely to be regarded by the High Court as lacking “sufficient specificity” to support the making of a law under the external affairs power: *Industrial Relations Case* at 486. In any event, any law enacted in reliance on the external affairs power must be compatible with Ch III of the Constitution. For reasons we give in relation to Questions (7) and (8), we consider

that any general provision for enforcement of rights of that nature would not be compatible with Ch III of the Constitution.

41. We mention that we do not think it necessary to rely on the external affairs power to the extent that the statutory charter of rights would do no more than bind Commonwealth public authorities and affect the interpretation of Commonwealth legislation. The express incidental power in s 51(xxxix) of the Constitution and the incidental power that accompanies each of the substantive grants of power in ss 51 and 52 of the Constitution undoubtedly would extend to the prescription of rules governing whether, and if so to what extent, Commonwealth legislation is to be interpreted consistently with human rights. The same powers also undoubtedly extend to “the regulation and supervision of the [Commonwealth’s] own activities” including by compelling observance of human rights: *State Chamber of Commerce and Industry v Commonwealth* (1987) 163 CLR 329 at 357; *Carter v Egg and Egg Pulp Marketing Board (Vic)* (1942) 66 CLR 557 at 571. Quite independently of the external affairs power, the combination of those other legislative powers would therefore be sufficient to support the application of the statutory charter of rights to Commonwealth legislation and executive action.

**Effect on the States: Questions (3) to (6)**

42. Subject to the implied constitutional limitation protecting the capacity of States to function as governments, a law made by the Commonwealth Parliament in reliance on the external affairs power is capable of being made so as to bind the executive governments of the States and their agencies and, by force of s 109 of the Constitution, will prevail over any State law to the extent of any inconsistency.
43. We have already indicated that we consider it possible under the external affairs power to give general application to the six absolute and non-derogable rights identified in

additional assumptions (1) to (6). We consider that binding the executive governments of the States and their agencies in relation to those rights would be valid under the external affairs power and would involve no infringement of the implied constitutional limitation protecting the capacity of States to function as governments. There would be no “singling out” of the States for some “differential treatment” or “special burden” (cf *Clarke v Commissioner of Taxation* [2009] HCA 33 at [34], [65]-[66]) and such burden as would be imposed on the exercise of State executive power or powers conferred by State legislation would be wholly incidental to the nature of the rights protected (cf *Western Australia v Commonwealth* (1995) 183 CLR 373 at 476-82).

44. The extent, if at all, to which a statutory charter of rights designed to apply in respect of Commonwealth public authorities (assumptions (3) and (4)) and Commonwealth legislation (assumptions (5) and (6)) might incidentally be made binding on State agencies is essentially a matter for the Commonwealth Parliament. In particular, the extent, if at all, to which State agencies might fall within the definition of “public authorities” is essentially a drafting issue. There is no constitutional reason why the statutory charter of rights could not be made to apply, for example, to State police when exercising powers under Commonwealth laws and to State prison authorities in relation to Commonwealth prisoners.
  
45. Similarly, the extent to which a statutory charter of rights designed to apply in respect of Commonwealth public authorities and Commonwealth legislation might impact on State legislation through the operation of s 109 of the Constitution is essentially a matter for the Commonwealth Parliament in that it would turn in large measure on the terms in which the Commonwealth Parliament chooses to express the rights it enacts. The expression of a right in terms that “every person has the right to X” could easily be subjected to an express qualification so as make clear that the right has only the limited operation for which the statutory charter of rights is designed. As we have suggested in

our short answer to Question (3), an express provision indicating what the statutory charter of rights does not do, as well as a provision clearly stating what it does do, may be desirable for this purpose.

46. Express qualification of the rights protected by the statutory charter of rights could easily be combined with a provision making clear that the statutory charter of rights does not cover the field and is intended to operate concurrently with State law. The result would be effectively to limit situations of inconsistency under s 109 of the Constitution to cases of direct inconsistency: where the State law in its legal or practical operation would otherwise operate to alter, detract from or impair the limited operation given to the right by the statutory charter of rights: cf *APLA Ltd v Legal Services Commissioner (NSW)* (2005) 224 CLR 322 at [205]-[208]. In a case of direct inconsistency, the State law would be invalid to the extent, but only to the extent, of the direct inconsistency.

**Justiciability of rights: Questions (7) and (8)**

47. We do not consider there to be any doubt about the ability of a court in the exercise of judicial power to interpret and enforce the rights set out in Pt 2 of the Victorian Charter. For the reasons, and subject to the qualifications, set out in our Opinion, we consider that a court would validly exercise judicial power in making declarations of incompatibility in respect of those rights.
48. In contrast, we do consider there to be considerable difficulty concerning the ability of a court in the exercise of judicial power to interpret and enforce the rights set out in Arts 7, 11, 12 and 13 of the ICESCR. The problem stems from the requirement for the exercise of judicial power under Ch III of the Constitution always to involve the application of criteria or standards that are sufficiently definite.

49. An examination of the content of those rights as set out in the ICESCR demonstrates a general absence of what would traditionally be regarded as judicially manageable standards. Given the issues of resource allocation that are necessarily involved, how is a court to assess, for instance, whether or not a person is being denied “just and favorable conditions of work” (Art 7), “an adequate standard of living” (Art 11) or “the enjoyment of the highest attainable standard of physical and mental health” (Art 12)?
50. We note, however, that the elaboration in Arts 7 and 13 of the “right[s] of everyone” to “the enjoyment of just and favourable conditions of work” and “education” includes some more specific rights that may represent judicially manageable standards: eg the obligation in Art 7(a)(i) for equal pay for equal work; in Art 7(d) for remuneration for public holidays; and in Art 13(2)(a) for free and compulsory primary education.
51. Allowing for the possibility of these limited exceptions we therefore consider that any general provision for enforcement of the rights set out in Arts 7, 11, 12 and 13 of the ICESCR would be unlikely to be held to involve the exercise of judicial power within the meaning of Ch III of the Constitution. The position would be the same whether or not an issue concerning those rights arose in the course of proceedings for some other relief or remedy.

**Parliamentary processes: Questions (9) to (13)**

52. In our opinion, the power of the Commonwealth Parliament to enact legislation having the characteristics in assumptions (2), (3) and (9) is to be found in that aspect of the express incidental power in s 51(xxxix) of the Constitution which allows the Parliament to make laws with respect to “matters incidental to the execution of any power vested by this Constitution in the Parliament”. Alternatively, the power could be found in s 51(xxxvi) of the Constitution insofar as it allows for making of laws with respect to that

part of the subject matter of s 49 of the Constitution that encompasses “powers ... of the Senate and of the House of Representatives, and of the members and the committees of Each House”. Although s 50 of the Constitution allows each House of the Parliament to make rules and orders with respect to the mode in which its powers are to be exercised and as to the order and conduct of its business, the High Court in *The Queen v Richards; Ex parte Fitzpatrick and Browne* (1955) 92 CLR 157 at 169 unanimously rejected an argument that s 50 thereby subtracts part of the subject matter of s 49 and deals with it separately: rather s 50 was described as conferring a “mere power” and as being “ancillary” to s 49.

53. Even in the absence of an express provision along the lines of s 29 of the Victorian Charter, a court would not interpret the statutory charter of rights as making compliance with the procedures set out in assumptions (2) and (3) a precondition to the validity of a Commonwealth law. A statutory requirement imposed on the parliamentary process of legislating would not in the absence of very strong language be regarded as a matter for judicial enforcement but rather as “a matter ... outside the ordinary scope of inquiry by the courts”: *Clayton v Heffron* (1960) 105 CLR 214 at 246-7. However, a provision along the lines of s 29 of the Victorian Charter would be desirable to put the matter beyond all question.
54. We indicated in our Opinion that it would be possible to impose an obligation on a Minister to respond to a declaration of incompatibility and to make that enforceable by a party to the legal action. In addition, we see no reason why a similar obligation could not be imposed on a Minister where a court merely held, in the course of its reasoning, that it could not interpret the legislation consistently with human rights and where some other mechanism was used to draw that holding to the Minister’s attention. In either case, an action would lie under s 75(v) of the Constitution to enforce the obligation.

Unless the Commonwealth Parliament conferred standing on a broader range of persons, only parties to the court case would be likely to have standing.

Dated: 7 September, 2009

**STEPHEN GAGELER SC**

**HENRY BURMESTER QC**

**IN THE MATTER OF  
CONSTITUTIONAL ISSUES  
CONCERNING A CHARTER OF  
RIGHTS**

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**SUPPLEMENTARY OPINION**

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Attorney-General's Department  
Social Inclusion Division  
Human Rights Branch

Attn: Mr John Boersig  
Assistant Secretary

**SG No. 68 of 2009**