INDIGENOUS RIGHTS UNDER THE *HUMAN RIGHTS ACT 2004* (ACT) AND THE *CHARTER OF HUMAN RIGHTS AND RESPONSIBILITIES ACT 2006* (VIC)

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We need a nation built on real rights for all and, as indigenous academic Larissa Behrendt says, if you acknowledge the rights of Aboriginal people you don't take away from other individuals, in fact you increase the rights pie for everyone.

For this country, Aboriginal rights to voice, land and culture will be like yeast. We can be a nation built on respect for Aboriginal people and the heritage of the land. A nation built on honour instead of the spoils of invasion.[1]

I Introduction

Australia is the only democratic country in the world without a national bill or charter of rights in some form.[2] As demonstrated by the recent 'intervention' into Indigenous communities in the Northern Territory,[3] there are few restraints upon the ability of governments to erode the rights of Indigenous Australians. Indeed, the 'races power' contained in section 51(xxvi) of the *Constitution* may in fact empower federal government to make laws to the detriment of Indigenous Australians,[4] further contributing to the 'spoils of invasion'.

Despite the absence of a bill of rights at a federal level, legislative bills of rights are now in force in the Australian Capital Territory ('ACT') and in Victoria. The *Human Rights Act 2004* (ACT) ('*HRA*') has been in operation since 1 July 2004, while most provisions of the *Charter of Human Rights and Responsibilities Act 2006* (Vic) ('*Charter*') commenced on 1 January 2007.[5] Both instruments were products of extensive community consultation and the recommendations of consultative committees, which included experts in constitutional, human rights and Indigenous law.

Neither the *HRA* nor the *Charter* empowers courts to strike down legislation. Rather, the *HRA* and the *Charter* adopt a model of rights protection in which the branches of government enter into a 'dialogue', subjecting the impact of government action on human rights to public scrutiny. A key element of this dialogue is the interpretation of legislation and subordinate instruments. To the extent that it is consistent with their purpose, all legislation and subordinate instruments are to be interpreted in a way that is compatible with the human rights set out in the *Charter* or *HRA*.[6] International law, along with the judgments of relevant courts and tribunals, can guide this interpretive process.[7]

Focusing on the rights and the interpretive method set out in the *HRA* and the *Charter*, this article analyses the ways in which these instruments address the rights of Indigenous Australians. While the *HRA* and the *Charter* predominantly each favour a universal human rights model over the specific protection of Indigenous rights, both recognise the significance of a general human rights regime to Indigenous Australians. This article argues that the ability to use international law in the interpretative process has the potential to imbue these general human rights regimes with an understanding of international developments regarding the rights of Indigenous peoples.

However, both the *HRA* and the *Charter* contain significant limitations with respect to the recognition, protection and promotion of the rights of Indigenous Australians. Most importantly, the neither instrument encompasses collective rights. Furthermore, neither the *HRA* nor the *Charter* contain the right to self-determination or the economic, social or cultural rights sourced in the *International Covenant on Economic, Social and Cultural Rights* ('*ICESCR*').[8] Addressing these limitations provides important future directions for the ACT and Victorian governments to consider in upcoming reviews of the *HRA* and *Charter*.

This article first surveys the dialogue model established by the *HRA* and the *Charter* and explores the role of international law in the interpretive process. Secondly, the article examines the ways in which the *HRA* and the *Charter* can protect the rights

of Indigenous Australians through the non-discriminatory application of universal, civil and political rights and, in particular, through the protection of cultural rights. The article then considers the manner in which international legal developments regarding the rights of Indigenous peoples can elaborate upon these rights. However, it is noted that the emphasis of the *HRA* and the *Charter* on individual rights may limit this process. Finally, this article considers future directions for the *HRA* and the *Charter*, specifically the inclusion of socio-economic rights and self-determination. The *HRA* and the *Charter* thus present valuable opportunities to develop a dialogue on the rights of Indigenous Australians. However, the 'rights pie' must continue to expand.

II The *HRA* and the *Charter*: An Overview[9]

A The Dialogue Model

As the Victorian Attorney-General emphasised, the *Charter* 'is nothing like the United States Bill of Rights'. The *Charter*, like the *HRA*, promotes 'a dialogue between the three arms of the government – the Parliament, the executive and the courts – while giving Parliament the final say'.[10] This dialogue around human rights is designed to permeate public life, from the creation of laws and policies through to their implementation and interpretation. The human rights dialogue encompasses the following key elements.

(i) The development of policies and legislation

The *Charter* and the *HRA* each mandate that a Bill introduced into Parliament must be accompanied by a statement of 'compatibility'. This statement is to contain an assessment of the Bill's consistency with the human rights set out in the *Charter* or the *HRA*.[11] A similar 'human rights certificate' must be prepared in relation to proposed statutory rules in Victoria.[12] In each jurisdiction a parliamentary committee must scrutinise Bills introduced in Parliament and report on any human rights issues to Parliament.[13]

Human rights may only be subject under law to 'such reasonable limits as can be demonstrably justified in a free and democratic society'.[14] However, neither the *HRA* nor the *Charter* directly limits their respective Parliament's abilities to enact laws that violate human rights. A failure to issue a compatibility statement does not affect the validity, operation or enforcement of any legislation or subordinate instrument.[15] Furthermore, the Victorian Parliament may expressly override a human right set out in the *Charter* such that the *Charter* does not apply to an Act or a provision of an Act (or any subordinate instruments made under it) in respect of which an override declaration has been made.[16] While a member of the Victorian Parliament introducing an override declaration must explain to Parliament the exceptional circumstances that justify it, a failure to do so does not affect the validity, operation or enforcement of any statutory provision.[17]

(ii) Statutory interpretation

As far as possible, legislation and subordinate instruments are to be interpreted in a way that is compatible with the human rights set out in the *Charter*.[18] Similarly, an interpretation that is consistent with the human rights set out in the *HRA* is to 'be preferred'.[19] However, a 'purposive test' restrains this technique. In the ACT, the interpretation that best achieves the purpose of a law is to be preferred above any other.[20] Similarly, the *Charter* mandates that statutory provisions be interpreted in a manner compatible with human rights 'so far as it is possible to do so consistently with their purpose'.[21]

In interpreting a human right set out in the *HRA* courts, tribunals and others may have regard to 'international law' and the judgments of foreign and international courts and tribunals relevant to the right.[22] Courts and tribunals interpreting statutory provisions pursuant to the *Charter* may also consider these sources and additionally may look to relevant decisions of domestic courts and tribunals.[23]

The materials that constitute 'international law' for the purpose of this interpretive technique are broad. The *HRA* defines 'international law' to include the *International Covenant on Civil and Political Rights*[24] ('*ICCPR*') and other human rights treaties to which Australia is a party, general comments and views of the United Nations ('UN') human rights treaty monitoring bodies, along with declarations and standards adopted by the UN General Assembly that are relevant to human rights.[25] Reflecting article 38 of the *Statute of the International Court of Justice*, the explanatory material to both the Human Rights Bill 2003 (ACT) and the Charter of Human Rights and Responsibilities Bill 2006 (Vic) indicate that the following sources of international law can be considered: international conventions; international custom as evidence of a general practice accepted as law; the general principles of law recognised by civilised nations; and, as a subsidiary means, judicial decisions and the teachings of the most highly qualified publicists of the various nations.[26]

The judgments of a wide range of foreign and international tribunals can also guide the application of the *HRA* and *Charter*. The Explanatory Statement to the Human Rights Bill 2003 (ACT) states that the 'opinions, decisions, views and judgments of the UN Human Rights Committee and European Court of Human Rights are particularly relevant'.[27] The Explanatory Memorandum to the Charter of Human Rights and Responsibilities Bill 2006 (Vic) adds decisions of the International Court of Justice, the Inter-American Court of Human Rights ('Inter-American Court') and other UN treaty monitoring bodies to this list.[28] Decisions of courts from jurisdictions that have incorporated international human rights standards into domestic law (including the ACT, Canada, South Africa, New Zealand and the United Kingdom) may also be relevant in applying the *Charter*.[29]

These sources are to 'operate as a guide'[30] and neither the *Charter* nor the *HRA* 'bind those interpreting the law to have recourse to these materials or make the interpretations of international or foreign courts or tribunals binding'.[31] Furthermore, the *HRA* indicates the desirability of being able to rely on the ordinary meaning of the *HRA* (having regard to its purpose and provisions, read in the context of the *HRA* as a whole); and the undesirability of prolonging proceedings without compensating advantage; it also mandates the accessibility of the material to the public is to be taken into account when deciding whether to consider international material, and the weight to be given to such material.[32] However, the ACT Parliament has stressed that its 'clear intention' is that 'the interpretation of human rights is to be as coherent with internationally accepted standards as possible'.[33]

(iii) The role of courts and tribunals

While neither the *HRA* nor the *Charter* create independent causes of action or rights to damages, a human rights dialogue can develop through existing judicial and tribunal processes. In the ACT, the Supreme Court may consider whether an Act or statutory instrument is consistent with a human right if the issue is raised in proceedings being heard by the court.[34] In Victoria, questions of law regarding the interpretation of a statutory provision in accordance with the *Charter*, or the application of the *Charter*, that are raised in a proceeding before a court or tribunal may be referred to the Supreme Court.[35] The Victorian Supreme Court and the Court of Appeal may also consider the compatibility of an Act or statutory instrument with the Charter, or the application of the *Charter*, in proceedings heard by them.[36]

If a court is satisfied that a statute or a subordinate instrument is not consistent with a human right,[37] or cannot be interpreted consistently with a human right,[38] it may issue a declaration to this effect. These declarations do not invalidate or affect the operation of legislation.[39] Rather, they form key elements in the dialogue between courts and Parliament. The court must provide the Attorney-General with a copy of the declaration. The declaration, along with a written response by the Attorney General (in the ACT) or the responsible Minister (in Victoria), must be presented to Parliament.[40]

The making of a declaration does not create legal rights or obligations or give rise to any civil cause of action.[41] Nor does it guarantee that the government in question will remedy the human rights violation. However, if a government chooses not to act in response to a declaration of incompatibility/inconsistency, it risks public scrutiny and, as the ACT Consultative Committee observed, the 'elected representatives deal with the consequences of public opinion'.[42]

(iv) Public authorities and other decision-makers

Public authorities and other decision-makers must promote, and act consistently with, human rights.[43] The *Charter* states that it is unlawful for a public authority[44] to act in a way that is incompatible with a human right, or to fail to give a relevant human right proper consideration in decision-making.[45] While breach of the *Charter* does not entitle a person to damages,[46] existing causes of action (for example, administrative and judicial review proceedings) and remedies (such as an injunction) can be utilised.[47]

The *HRA* does not elaborate upon its application to administrative decision-makers. However, the ACT Government has indicated that the failure by a decision-maker to interpret a 'law by reference to human rights may result in an error of law, be otherwise contrary to law [or] a failure to take account of a relevant consideration', attracting remedies under the *Administrative Decisions (Judicial Review) Act 1989* (ACT).[48]

B Creating a Culture of Rights

The *HRA* and the *Charter* are minimalist instruments, designed as 'step-by-step'[49] approaches to rights protection. Both respect parliamentary sovereignty insofar as the power of the courts is limited and governments are not directly restrained. The limited remedies and powers of courts to

combat human rights abuses under the *HRA* and *Charter* have led to criticisms that these instruments are weak forms of rights protection.[50] Indeed, the Committee on the Elimination of Racial Discrimination ('CERD') has recently expressed concern that the *New Zealand Bill of Rights Act 1990* (NZ) (also a legislative bill of rights) does 'not enjoy protected status and that enactment of legislation contrary to the provisions of that Act is therefore possible'.[51]

However, as the ACT Consultation Committee stated '[w]hile a bill of rights has legal significance, its primary purpose should be to encourage the development of a human rights-respecting culture in ACT public life and in the community generally'.[52] The ultimate aim of each instrument is to promote a public discourse on human rights, such that the electorate will become aware of the human rights implications of government action and vote accordingly. The model thus envisages shared 'roles and responsibilities for parliaments, courts and communities'[53] in the rights dialogue.

A legislative bill of rights can also have strategic and pragmatic benefits. While constitutional entrenchment of a bill of rights may benefit Indigenous Australians to the greatest extent, it is politically unachievable in the short term.[54] Constitutional reform is notoriously difficult to achieve – only eight reform proposals have succeeded at referendum.[55] Yet, as the Victorian Consultation Committee observed, a legislative bill of right can allay public suspicion 'about giving too much power to unelected judges by preserving the sovereignty of Parliament, while encouraging better government'.[56] It could even be a 'first step in working towards constitutional protection'.[57]

The focus of this article, however, is not upon the merits of the legislative, dialogue model of rights protection. Rather, this article is concerned with the ways the *HRA* and *Charter* can create a space for the promotion and protection of Indigenous rights within this dialogue. Importantly, the interpretive principle set out in the *HRA* and the *Charter* can enable international legal developments regarding the rights of Indigenous peoples to guide understandings of the rights contained in these instruments.

III Protecting the Rights of Indigenous Australians

The *HRA* and the *Charter* each set out the human rights that they specifically seek to promote and protect. The *ICCPR* is the primary source of these rights.[58] Within this civil and political rights framework, the *HRA* and the *Charter* predominantly seek to protect Indigenous rights through the non-discriminatory application of general human rights to all. However, the provisions that encompass the cultural integrity norm, inspired by the protection of minority cultural rights in article 27 of the *ICCPR*, can be particularly significant for Indigenous Australians.

Interpreted in the context of international human rights law, the rights set out in the *Charter* and the *HRA* can encompass the rights of Indigenous Australians. However, this promise may be limited by virtue of the emphasis in the *HRA* and the *Charter* on individual rights, which may mean that they are unresponsive to collective Indigenous rights.

A 'General' and 'Indigenous' Rights

Mick Dodson argues that Indigenous Australians are entitled to two broad categories of rights. The first category comprises citizenship rights, 'those rights that are due of all people in a society'.[59] This includes the general human rights set out in the *ICCPR*, 'to which everyone is entitled'.[60] The second category consists of distinct Indigenous rights, that is, the 'pre-existing inherent rights' possessed 'by virtue of being the first, the Indigenous peoples'.[61]

Traditionally, general human rights have been regarded as individual rights.[62] However, Indigenous rights encompass collective rights, the rights of peoples.[63] The perceived individualistic scope of general human rights standards has led to the inadequate protection of the collective aspects of Indigenous rights. This has contributed to a 'protection gap' between such standards and their application to Indigenous peoples.[64]

The UN *Declaration on the Rights of Indigenous Peoples* ('*Declaration*')[65] seeks to bridge this gap by contextualising 'human rights with attention to the patterns of indigenous group identity and association that constitute them as peoples'.[66] As article 1 of the *Declaration* affirms, 'Indigenous peoples have the right to the full enjoyment, *as a collective or as individuals*, of all human rights and fundamental freedoms as recognized in the Charter of the United Nations, the Universal Declaration of Human Rights and international human rights law'.[67] The rights recognised in the *Declaration* 'constitute the minimum standards for the survival, dignity and well-being of the indigenous peoples of the world'.[68] Yet, as the Indigenous Peoples Caucus asserts, the *Declaration*

does not 'create new rights' but 'elaborates upon existing international human rights norms and principles as they apply to Indigenous peoples' to promote 'equality and non-discrimination for all'.[69]

Neither the *HRA* nor the *Charter* contains 'distinct' Indigenous rights, such as the recognition and affirmation of Aboriginal rights found in section 35 of the Canadian *Constitution Act 1982*. Nor, with the exception of specific references in the *Charter* to the cultural rights of Indigenous individuals, do the *HRA* or *Charter* explicitly articulate the ways in which general rights apply to Indigenous Australians. Instead, both instruments draw upon the *ICCPR* to articulate a set of general, universal rights.

The decision to avoid articulating distinct 'Indigenous rights' has practical benefits – it potentially avoids the general public's suspicion of such rights as being somehow 'special' rights that other Australians are not entitled to. Indeed, Larissa Behrendt (a member of the ACT Consultative Committee) encountered feedback from ACT residents such as 'if a Bill of Rights includes the protection of Indigenous people, it will not be for the benefit of all Canberrans'.[70] Behrendt attributes these attitudes to a 'meanness of spirit' and a misplaced concern that the protection of the rights of the most disadvantaged people in Australia would erode the benefits and position of the majority.[71] A lesson from the failure of previous efforts to extend rights protection in Australia is that strong community support must undergird a bill of rights in order for it to be legitimate.[72] As a result, only those 'human rights that had very strong, certainly at least majority, community support'[73] were included in the *Charter*. Many submissions to the ACT Consultative Committee and the Victorian Consultation Committee urged that specific Indigenous rights be included.[74] However, other submissions to the ACT Consultative Committee recognised that the inclusion of specific Indigenous rights had the potential to 'derail' or 'sink' a bill of rights given the public's attitude towards such rights.[75] In the context of this 'meanness of spirit', eschewing 'distinct' Indigenous rights in favour of general rights protection may have been necessary to prevent the human rights dialogue from stalling before it had even begun.

The decision to favour a general human rights scheme over specific 'Indigenous' rights thus in part reflected a pragmatic desire to unite the public behind the *HRA* and *Charter*, while avoiding the controversy that could attend the inclusion of Indigenous-specific rights. Importantly, encompassing Indigenous rights within a general rights framework could 'help to shift some popular misconceptions about Aboriginal rights being special rights'.[76] However, it also reflected a belief that, of all Australians, Indigenous Australians will particularly benefit from a general human rights framework, underpinned by non-discrimination and equality provisions,'without the need to argue for specific rights protections'.[77]

B The Significance of Universal Human Rights and Non-Discrimination

The fundamental principle of equality and non-discrimination, sourced in articles 1 and 2 of the *Universal Declaration of Human Rights*[78] and article 1 of the *Charter of the United Nations*, informs the general human rights regime found in instruments such as the *ICCPR*.[79] The principle 'has entered the realm of *jus cogens*'. [80]

The importance of the non-discrimination norm to both the *Charter* and the *HRA* is evident in the fact that 'recognition and equality before the law' heads the list of rights recognised in both instruments. Both the *HRA* and *Charter* protect:

- the right to recognition as a person before the law;
- the right to enjoy human rights without distinction or discrimination;
- equality before the law and entitlement to protection of the law without discrimination; and
- the right to equal and effective protection against discrimination on any ground.[81]

The language of universality frames other rights contained within the *Charter* and *HRA*, such as 'everyone has the right to hold opinions without interference';[82] 'everyone has the right of peaceful assembly';[83] and 'no-one may be tortured'.[84] The focus of both the *HRA* and the *Charter* is thus on the 'democratic rights that apply equally to everyone'.[85] However, both instruments contemplate the particular need to protect the rights of Indigenous Australians. The Preamble to the *HRA* states:

> Although human rights belong to all individuals, they have special significance for Indigenous people – the first owners of this land, members of its most enduring cultures, and individuals for whom the issue of rights protection has great and continuing importance.[86]

Similarly, one of the foundation principles of the *Charter* is:

> Human rights have a special importance for the Aboriginal people of Victoria, as descendants of Australia's first people, with their diverse spiritual, social, cultural and economic relationship with their traditional lands and waters.[87]

Both of these statements acknowledge the special 'significance' and 'importance' of human rights protection for Indigenous Australians. This significance is attributable to the fact that Indigenous Australians have been, and continue to be, denied basic human rights. Ideally, a universal framework that extends rights to all without discrimination will have the most benefit for those individuals who have historically had the least access to such rights.[88]

Importantly for Indigenous Australians, the *Charter* accommodates substantive equality. The *Charter* states that 'measures taken for the purpose of assisting or advancing persons or groups of persons disadvantaged because of discrimination do not constitute discrimination'.[89] Similarly, the ACT Consultative Committee envisaged that the purpose of the *HRA*'s preamble would be to acknowledge 'that the equal protection of rights … requires considering special needs of Indigenous people'.[90] The general human rights structure can thus represent 'a non-contentious way in which to ensure some Indigenous rights protection'.[91]

The ability to use international law to guide the application of the *HRA* and *Charter* has the potential to increase the significance of these general rights regimes for Indigenous Australians. In theory, respect for the non-discrimination norm within a universal human rights regime that is responsive to international human rights law could go some way to obviating the need to articulate 'specific' Indigenous rights. As S James Anaya argues, claims to Indigenous group rights 'posited as moral imperatives and justified by reference to human rights principles that are already part, or becoming part, of international law'[92] have begun to meet with international success. Recent developments in international law have illustrated that general human rights instruments (although ostensibly drafted, and conventionally understood, to protect individuals) can protect the rights of Indigenous peoples when interpreted in a non-discriminatory manner, informed by wider international developments. A leading example is the interpretation of the right to property by the Inter-American Commission on Human Rights ('Inter-American Commission') and the Inter-American Court ('Inter-American Court').

While both the *American Declaration of the Rights and Duties of Man* ('*American Declaration*') and the *American Convention on Human Rights* ('*American Convention*') contain general property rights,[93] neither explicitly refer to Indigenous communal property rights. As Jo M Pasqualucci observes, the *American Convention* 'generally sets forth only individual rights and does not directly address the corresponding rights of peoples'.[94]

However, the Inter-American Court and the Inter-American Commission have interpreted the *American Declaration* and the *American Convention* as 'live instruments whose interpretation must adapt to the evolution of the times'.[95] Anaya has described this as a 'realist' approach to the interpretation of human rights instruments, which adopts 'a broad, contextual reading' of the instrument in light of its purposes and values, and of evolving understandings in international law.[96]

The Inter-American Court and the Inter-American Commission have, pursuant to this approach, drawn upon international standards contained in human rights instruments (such as the then UN Draft Declaration on the Rights of Indigenous Peoples, the Proposed American Declaration on the Rights of Indigenous Peoples[97] and the International Labour Organisation's *Indigenous and Tribal Peoples Convention, 1989* (No 169)[98]) to hold that the right to property in the *American Declaration and the American Convention protects collective property rights* sourced in Indigenous traditions and customary law.[99] As Judge Sergio García Ramírez affirmed in his concurring opinion in *The Case Of The Mayagna (Sumo) Awas Tingni Community v Nicaragua*,[100] 'the individual rights of indigenous persons and the collective rights of their peoples fit into the regime created by the more general instruments on human rights that apply to all persons'.[101]

The application of the non-discrimination norm to these general human rights regimes has been vital to the protection of Indigenous communal property rights in the Inter-American system. For instance, in the *Case of Maya Indigenous Communities of the Toledo District v Belize*[102] the Inter-American Commission found that 'respect for and protection of the private property of indigenous peoples on their territories is equivalent in importance to non-indigenous property, and … is mandated by the fundamental principle of non-discrimination'.[103] In other words, the principle of non-discrimination ensures that property rights grounded in

Indigenous customary law are entitled to protection under general human rights instruments equal to that afforded to property rights grounded in other, non-Indigenous legal regimes.[104]

The ability to consider international law invites such a 'realist' approach to the interpretation of the general rights contained within the *HRA* and *Charter*, guided by developments in international law and the non-discrimination norm.

C Interpreting 'General Rights'

As noted above, a range of international sources may be considered as guides to interpreting and applying the *HRA* and the *Charter*. The following developments are indicative of the ways that international law can shape understandings of the general rights contained in the *HRA* and *Charter*.

(i) Human rights treaty monitoring bodies

As the *ICCPR* is the primary source of the rights set out in the *HRA* and the *Charter*, the decisions and comments of the Human Rights Committee ('HRC') in interpreting the *ICCPR* will be particularly relevant to the *HRA* and *Charter*'s interpretive method. The HRC has interpreted rights in the *ICCPR* 'consistently with an indigenous peoples' perspective'.[105] For instance, with respect to the right to family, the *HRA* has stated that 'cultural traditions should be taken into account when defining the term "family" in a specific situation'.[106] This approach could guide the protection of the family pursuant to the *HRA* and the *Charter*.[107] The HRC's expansive approach to cultural rights is discussed below.

The *International Convention on the Elimination of All Forms of Racial Discrimination* ('*ICERD*')[108] also provides important guidance. The *ICERD* elaborates upon the non-discrimination norm with respect to the prohibition of racial discrimination. The CERD reaffirmed in General Recommendation XXIII[109] that the *ICERD* protects Indigenous peoples and emphasised their rights 'to own, develop, control and use their communal lands, territories and resources'.[110] The rights of Indigenous peoples are at the core of decisions of the CERD under its 'Early Warning and Urgent Action' procedure[111] in relation to states such as Australia,[112] New Zealand[113] and the United States,[114] and feature in its observations regarding state periodic reports.[115]

(ii) The *Declaration* and customary international law

The standards elaborated by the *Declaration* should play a prominent role in the interpretive process. The *HRA* includes declarations of the UN General Assembly within its definition of 'international law' for the purposes of interpreting human rights set out in the *HRA*.[116] Similarly, the Chief Executive of the Victorian Equal Opportunity and Human Rights Commission has stated that the mandate to consider international law in applying the *Charter* includes the *Declaration*, such that it will 'prove an invaluable resource in understanding how the rights of indigenous people can be best served under the Charter'.[117]

As noted above, the *Declaration* elaborates general human rights standards as they apply to Indigenous peoples. For instance, the *Declaration* states:

> Indigenous peoples have the right to manifest, practise, develop and teach their spiritual and religious traditions, customs and ceremonies; the right to maintain, protect, and have access in privacy to their religious and cultural sites; the right to the use and control of their ceremonial objects; and the right to the repatriation of their human remains.[118]

Both the *Charter* and the *HRA* contain 'freedom of religion' clauses that may be interpreted and applied in light of this provision.[119] In this way, the minimum standards contained in the *Declaration* can inform the application of the *HRA* and the *Charter*. The provisions of the *Declaration* may be applicable in a further respect – as powerful contributions to customary international law regarding the rights of Indigenous peoples.[120] Australia voted against the *Declaration* in the UN General Assembly, objecting to specific aspects of the *Declaration* and claiming that it 'cannot be cited as evidence of the evolution of customary international law'.[121] However, it is arguable that the *Declaration* reaffirms core principles of customary international law regarding the rights of Indigenous peoples that 'formed long before this vote occurred'.[122] Rights to culture, land and identity have even been supported by Australia's internal practice.[123] The status of the *Declaration* will be further strengthened if the newly-elected Rudd Government honours its pre-election commitment to 'endorse' the *Declaration* and 'be guided by its benchmarks and standards'.[124]

(iii) Inter-American system

Adopting a 'realist' approach to interpreting human rights instruments, the Inter-American Court and the Inter-American Commission are 'at the forefront of the progressive development of international indigenous rights'.[125] Along with the right to property,[126] the Inter-American system has applied general standards such as the right to life;[127] the right to effective judicial protections;[128] non-discrimination and the right to equality before the law;[129] freedom of religion;[130] and the right to participate in government (including the right to vote)[131] to the specific situations of Indigenous communities and individuals.

For instance, the Inter-American Court has held in recent decisions that the right to life is not simply a negative right, but that states are obliged to adopt 'all appropriate measures to protect and preserve the right to life (positive obligation)'.[132] The Inter-American Court considers that the right to life includes the right to live a 'decent life', obliging the state to generate 'minimum living conditions that are compatible with the dignity of the human person.[133] This is particularly the case when dealing with persons who are vulnerable and at risk.

The Inter-American Court has held that Paraguay violated the right to life by failing to address the extreme poverty of Indigenous communities. This included Paraguay's failure to adopt adequate and efficient procedures to return ancestral lands to Indigenous communities.[134] The Inter-American Court linked the right to life to the right to property by finding that, upon their ancestral lands, the Sawhoyamaxa community 'could have used and enjoyed their natural resources, which resources are directly related to their survival capacity and the preservation of their ways of life'.[135] Such positive dimensions should be part of any dialogue on the right to life of Indigenous peoples in Australia,[136] including the right to life contained in the *HRA* and *Charter*.[137]

(iv) Foreign courts

The decisions of courts of other jurisdictions that have incorporated international human rights standards into domestic law may also be considered in interpreting the *HRA* and *Charter*. This should include the recent decision of the Supreme Court of Belize regarding the rights of Mayan communities.

Influenced by *Mabo v State of Queensland (No 2)*,[138] the Supreme Court of Belize held in *Cal v Belize*; *Coy v Belize*[139] that the claimants held property rights based on customary Mayan land tenure which had survived the acquisition of sovereignty. The failure by the Government of Belize to recognise, respect and protect these land rights (for instance, by issuing concessions to third parties to permit natural resource extraction) violated the claimant's rights to property, equality, life, liberty and security of the person and equal protection of the law, as guaranteed by the *Constitution of Belize*. Importantly, the Supreme Court of Belize looked to international law – including decisions of the Inter-American system, the *Declaration*, the *ICCPR* and the *ICERD* – to guide its interpretation of these constitutional rights.

Like the Inter-American Court, the Supreme Court of Belize linked the right to life to the right to property, finding that 'without the legal protection of [the claimant's] rights to and interests in their customary land, the enjoyment of the right to life and their very lifestyle and well-being would be seriously compromised and be in jeopardy'.[140] This interpretation may be significant for the *HRA* and the *Charter*, given that the *HRA* does not contain a right to property and the *Charter*'s property right is limited.[141]

These examples illustrate the ways in which developments in international human rights law regarding Indigenous peoples can be used to guide interpretations of the general rights contained in the *HRA* and *Charter*. International law can be especially important in shaping the specific rights to culture contained within the *HRA* and *Charter*.

D Cultural Integrity

The cultural rights recognised by the *Declaration* should provide valuable guidance in applying the cultural rights contained within the *HRA* and *Charter*.[142] However, since both the *HRA* and the *Charter* draw upon the model of minority cultural protection articulated in article 27 of the *ICCPR*, decisions of the HRC regarding this article are particularly relevant.

(i) Cultural rights under the *HRA*

Mirroring article 27 of the *ICCPR*, section 27 of the *HRA* states that:

> Anyone who belongs to an ethnic, religious or linguistic minority must not be denied the right, with other members of the minority, to enjoy his or her culture, to declare and practise his or her religion, or use his or her language.[143]

Although not mentioning Indigenous peoples specifically, article 27 of the *ICCPR* entitles Indigenous groups to protection where they are in a 'minority situation'.[144] Like section 27 of the *HRA*, article 27 of the *ICCPR* is framed as an individual right (that is, it protects 'persons belonging' to minority groups rather than the groups themselves).[145] However, cultural rights depend upon the ability of a minority or Indigenous group to maintain its culture, language or religion,[146] and are to be enjoyed 'in community with' other members of that group. The HRC has taken an 'expansive' view of culture, particularly in relation to Indigenous peoples,[147] such that 'in its practical application article 27 protects group as well as individual interests in cultural integrity'.[148]

Along with aspects of culture such as language and religion, the HRC has interpreted article 27 of the *ICCPR* as extending to the protection of the relationship of Indigenous peoples to, and their use of, land as an integral part of their cultures. In *Ominayak v Canada*,[149] the HRC linked the survival of the Lubicon Lake Band of Cree as a distinct cultural group to its relationship with the land, such that the granting of leases for oil and gas exploration within the Band's Aboriginal territory violated Canada's obligations under article 27 of the *ICCPR*. The HRC affirmed this approach in its *General Comment 23*, observing that

> culture manifests itself in many forms, including a particular way of life associated with the use of land resources, especially in the case of indigenous peoples. That right may include such traditional activities as fishing or hunting and the right to live in reserves protected by law.[150]

Furthermore, the HRC has held that article 27 can encompass an economic activity that is 'an essential element of the culture of a community'.[151] This protection is not limited to traditional means of livelihood, but can encompass 'adaptation of those means to the modern way of life and ensuing technology'.[152] The ability for Indigenous communities to continue to benefit from their traditional economy is one factor the HRC considers in determining whether the state has violated article 27.[153]

Importantly, in determining whether a violation has occurred, the HRC questions whether the state has consulted members of the Indigenous group or afforded them the opportunity to participate in decision-making processes concerning measures that may potentially violate article 27.[154] This is particularly relevant to the issue of whether any limitation imposed by the measure is justified. The article thus does not only prohibit interferences with cultural rights, but requires the state to adopt positive legal measures of protection and 'to ensure the effective participation of members of minority communities in decisions which affect them'.[155]

Using international legal developments with respect to article 27 of the *ICCPR* to interpret section 27 of the *HRA* can therefore have important implications for Indigenous Australians. The potential for section 27 to extend certain protections to customary title and land use is especially important in the absence of a general property right in the *HRA*. Similarly, the rights to consultation and participation in decision-making processes are particularly significant given that the *HRA* does not include the right to self-determination.

However, the HRC has displayed a 'substantial measure of deference' to efforts by states to consider Indigenous claims and to engage in some degree of consultation.[156] These limited consultation requirements cannot be regarded as a substitute for the recognition of the right to self-determination.[157] Furthermore, the protection under article 27 is not absolute, such that 'measures that have a certain limited impact on the way of life of persons belonging to a minority will not necessarily amount to a denial of the right under article 27'.[158]

Despite the potential for article 27 of the *HRA* to offer some measure of protection to the cultural rights of Indigenous Australians, relying upon the minority claims model to frame Indigenous rights is problematic. To Mick Dodson, conflating Indigenous peoples with minority groups is akin to creating a 'deeply offensive and de-humanising' category of 'Other'.[159] Indigenous peoples have frequently resisted being classified as 'minorities', and have sought to establish separate regimes which recognise their distinct status as Indigenous peoples.[160] Minority rights 'are formulated as the rights of individuals to preserve and develop their separate group identity within the process of integration'.[161] Indigenous peoples have argued that this is incompatible with their right to self-determination.[162]

The ACT Government is aware of the significance of the HRC's interpretation of article 27 of the *ICCPR* for Indigenous

Australians. Based on *General Comment 23*, guidelines instruct ACT government departments to consider section 27 if they are 'developing legislation or policy that … limits the ability of indigenous or other ethnic groups to continue to take part in distinct cultural practices'.[163] Thomas Poole argues that 'the primary aim of this provision [section 27 of the HRA] is to protect the rights of Aborigines'.[164] Rather than grouping Indigenous rights within the rubric of 'minority rights', a specific reference to the cultural rights of Indigenous Australians would have been more in keeping with this aim and should be considered in future reviews of the *HRA*.

(ii) Cultural rights under the *Charter*

The *Charter* goes beyond the HRA in recognising cultural rights. Section 19 of the *Charter* states:

1. All persons with a particular cultural, religious, racial or linguistic background must not be denied the right, in community with other persons of that background, to enjoy his or her culture, to declare and practise his or her religion and to use his or her language.
2. Aboriginal persons hold distinct cultural rights and must not be denied the right, with other members of their community—
   (a) to enjoy their identity and culture; and
   (b) to maintain and use their language; and
   (c) to maintain their kinship ties; and
   (d) to maintain their distinctive spiritual, material and economic relationship with the land and waters and other resources with which they have a connection under traditional laws and customs.[165]

This section differs from section 27 of the *HRA* in two key respects. First, section 19(1) of the *Charter* is not limited to the protection of 'minority' cultures. It is therefore more general than the *HRA*, and even appears to go beyond the terms of article 27 of the *ICCPR* by protecting the cultural rights of 'all persons'. Secondly, the *Charter* recognises the distinct cultures of Indigenous Australians, including their relationship with land. The protection of Indigenous cultural rights under the *Charter* provides an example of the articulation of Indigenous rights in the context of a general human rights instrument. Section 19(1) is broad enough to recognise and protect the culture of all persons within Victoria. Yet, section 19(2) frames the right to culture in a manner that reflects Indigenous difference. It therefore resists the categorisation of Indigenous peoples as part of an 'Other' within a minority cultural rights regime.

The section is particularly important with respect to the protection of traditional lands and resources. The Victorian Consultation Committee recommended that the *Charter* specifically protect Indigenous cultural rights, in part to ensure consistency with the HRC's interpretation of article 27 of the *ICCPR* as 'extending to cultural rights of Indigenous peoples, such as the relationship of Indigenous peoples to their lands and waters'.[166]

The Explanatory Memorandum to the *Charter* indicates that section 19(2) was also modelled on article 25 of the then UN Draft Declaration on the Rights of Indigenous Peoples.[167] Article 25 of the *Declaration* recognises the right of Indigenous peoples to 'maintain and strengthen their distinctive spiritual relationship with their traditionally owned or otherwise occupied and used lands, territories, waters and coastal seas and other resources'.[168] The reference to article 25 of the *Declaration* further supports the argument that Victorian branches of government should look to the *Declaration* when interpreting legislation and subordinate instruments to determine compatibility with the *Charter* – at the very least, in relation to section 19.

While section 20 of the *Charter* states that 'a person must not be deprived of his or her property other than in accordance with the law',[169] legislative interference with the 'distinctive spiritual, material and economic relationship' of Indigenous peoples to their traditional lands, waters and resources could violate section 19. The decisions of the HRC regarding article 27 indicate that this finding is open, at least when the interference is substantial and in the absence of consultation or participation by the affected community in the decision-making process.

E Bridging the 'Protection Gap'

The interpretive principle thus opens the way for courts and tribunals to embrace international developments regarding the rights of Indigenous peoples when considering whether legislation is consistent with the human rights set out in the *HRA* and *Charter*. If a court cannot interpret legislation in a manner consistent or compatible with these human rights, as elaborated upon by international law, the court can issue a declaration and make Parliament aware of the impact of the legislation upon the rights of Indigenous Australians.

In this way, international law can shape the general rights contained within the *HRA* and *Charter* in a manner responsive to Indigenous rights, without encountering the public's 'meanness of spirit' that may challenge the inclusion of distinct Indigenous rights.

However, the emphasis in the *Charter* and the *HRA* on individual rights may limit this potential. Section 6 of the *HRA* asserts that 'only individuals have human rights' for the purpose of the legislation. Similarly, section 6 of the *Charter* states that 'only persons have human rights' as set out in the *Charter*, with a 'person' defined as a 'human being'.[170] According to the Explanatory Memorandum, '[t]his clause clarifies that the Charter does not confer any rights on other legal entities apart from individuals'.[171] These provisions prevent entities such as corporations from asserting human rights. However, they also represent a preference for individual rights. The Victorian Consultation Committee was clear in its rejection of collective rights, stating that

> [g]roup rights provide a new way of looking at rights to which very few western-style human rights laws have responded ... Although the Committee recognises that many people see their rights as having a communal aspect, we note that generally human rights are seen as attached to individuals.[172]

Indeed, the omission of the right to self-determination reflects the narrow focus of the *HRA* and *Charter* on 'individual rights'. According to the ACT Department of Justice and Community Safety, 'the right to self-determination is not recognised in ACT law because it is a collective right of peoples under international law rather than an individual human right'.[173]

The result is that the *Charter* and the *HRA* are explicitly 'western-style' and individualistic, ignoring the growing importance of concepts of collective rights in the articulation of human rights norms.[174] A realist approach to the *HRA* and *Charter*, taking into account international legal developments and the non-discrimination norm, could compel courts, tribunals, legislators, government departments, public authorities and decision-makers to consider the impact of laws and policies upon the rights of Indigenous groups within the general human rights framework. Indeed, the explanatory material to both the *HRA* and the *Charter* indicates that 'groups of individuals' are not precluded from having a question relating to the human rights set out in the instruments dealt with before a court or tribunal.[175] However, there is a risk that the emphasis on individual rights within the *HRA* and *Charter* may impose barriers to the use of international developments regarding the rights of Indigenous *peoples* to give context to the rights contained in the *HRA* and *Charter*. These instruments therefore risk perpetuating the traditional failure of general human rights regimes to respond to collective Indigenous demands, creating a 'protection gap'.

To better reflect the minimum standards contained within the *Declaration*, the preambles to the *HRA* and the *Charter* could affirm (echoing article 1 of the *Declaration*) that 'indigenous peoples have the right to the full enjoyment, as a collective or as individuals, of all human rights and fundamental freedoms as set out in' the *HRA* or *Charter*. Restrictive provisions, such as section 6 of the *HRA*, could be removed. Alternatively, such provisions could be clarified by a further provision to the effect that references to 'individuals' or 'persons' do not prejudice or discriminate against the ability of Indigenous Australians to enjoy, as collectives or as individuals, the human rights set out in the *HRA* or *Charter*, consistent with the *Declaration*.

Such an amendment will likely be controversial. Arguably, it may generate familiar 'disquiet about potential conflicts between individuals' human rights and collective indigenous peoples' rights'[176] that is best avoided given that these legislative bills of rights are still in their infancy. Indeed, for instruments portrayed as first steps towards rights protection, the recognition of collective rights may be too giant a leap at this stage. However, this represents an important future direction to ensure consistency with international standards, particularly the minimum standards contained in the *Declaration*. Importantly, these amendments are required to help ensure that the rights of Indigenous Australians do not 'slip through the cracks' because they cannot be framed as individual rights for the purposes of protection under the *HRA* and *Charter*. Anything less would be inconsistent with the non-discrimination norm that lies at the heart of the *HRA* and *Charter*.

The rights of Indigenous Australians do not only need to be better protected within the existing standards contained in the *HRA* and the *Charter* – the 'rights pie' needs to be expanded to accommodate economic, cultural and social rights, and the right to self-determination.

IV Increasing the 'Rights Pie'

In advising against the inclusion of specific 'Indigenous rights', the ACT Consultative Committee stated that 'at this stage the general human rights framework proposed in the *Human Rights Act, especially the right to self-determination, and the economic, social and cultural rights* contained in it, will offer particular protection to Indigenous people'.[177] Ironically, the rights emphasised by the Consultative Committee in this statement – self-determination, and economic, social and cultural rights (sourced in the *ICESCR*) – were not included in the final *HRA*. Nor were they included in the *Charter*. The failure to include these rights is a significant shortcoming of these instruments.

Both the *HRA* and the *Charter* contain mechanisms for review. The ACT Government accepted the Consultative Committee's recommendation to evaluate the protection of Indigenous rights within the general human rights regime as part of the five-year review of the *HRA*.[178] This review is also to consider whether other civil and political or economic, cultural and social rights should be included within the *HRA*.[179] Similarly, the *Charter* requires consideration of whether the *Charter* should include the right to self-determination and rights sourced in the *ICESCR* as part of a review of the first four years of its operation.[180] These upcoming reviews present the Victorian and ACT Governments with the chance to truly treat the *Charter* and the *HRA* as living, evolving documents.

A Economic, Social and Cultural Rights

While the inclusion of civil and political rights in the *HRA* and *Charter* is undoubtedly important, economic, social and cultural rights sourced in the *ICESCR* have particular significance for Indigenous Australians. According to Mick Dodson:

> the most urgent and pressing concerns of Indigenous peoples cluster around our social and economic rights; our rights to a decent standard of health, housing, water, education – our subsistence rights. The rights which most Australians probably overlook because they can take them for granted. We do not have that privilege.[181]

The omission of these rights means that the *HRA* and *Charter* do not adequately take into account the 'most urgent and pressing concerns' of Indigenous Australians.

The ACT and Victorian Governments, along with the Victorian Consultation Committee, offered a range for reasons for deciding not to include rights sourced in the *ICESCR* in the *HRA* or *Charter*. These included: concerns about the budgetary and resource allocation implications of such rights; potential court interference in Parliament's ability to make social and fiscal policy; a lack of experience in the incorporation of economic, social and cultural rights in bills of rights in similar jurisdictions; the uncertain effect of including these rights and difficulties in developing an 'objective indicator' of when such rights are achieved.[182]

The omission of rights sourced in the *ICESCR* is regrettable. As stated above, due to the deprivation of rights suffered by Indigenous Australians, theoretically they will benefit the most from the recognition, protection and promotion of universal civil and political rights.[183] However, the socio-economic position of Indigenous Australians indicates that of all Australians, they are likely to be the most adversely affected by a lack of recognition of basic economic and social rights. Indeed, George Williams (Chair of the Victorian Consultation Committee) has recognised that the failure to include economic, social and cultural rights in the *HRA* would limit its ability to protect those 'among the most vulnerable members of the community'.[184]

Unlike the *Constitution of the Republic of South Africa, 1996*, economic, social and cultural rights have not been directly incorporated in the *HRA* or *Charter*. Nor are they included as 'directive principles', as in the *Constitution of India*. However, the *ICESCR* may still be relevant to the *HRA* and the *Charter*, although indirectly, though the interpretive technique. The ACT Chief Minister, Jon Stanhope, claimed that the *ICESCR* should inform the interpretation of the rights set out in the *HRA*, particularly the right to equality.[185] However, the *ICESCR* is not included in the ACT Legislation Register of 'Human Rights Materials' that are deemed 'accessible to the public' for the purposes of interpreting rights in the *HRA*.[186] At the very least, the register should include the *ICESCR* to signal that courts, tribunals and others can consider economic, cultural and social rights when interpreting the rights contained in the *HRA*.

In any event, international experience suggests that direct incorporation of these rights may be necessary. For instance, the Canadian *Charter of Rights and Freedoms* does not directly incorporate social and economic rights, and Canadian 'courts have generally been reluctant to invest civil and political rights

with much social [or] economic …content'.[187] Future reviews should revisit the recommendations of the ACT Consultative Committee as a model for the direct incorporation of economic, cultural and social rights within a bill of rights. The ACT Consultative Committee recommended that economic, social and cultural rights be included within the proposed Human Rights Bill, arguing that civil and political rights and economic, social and cultural rights are indivisible.[188] Rather than dividing rights according to their origin in the *ICCPR* or *ICESCR*, the Committee's Draft Human Rights Bill ('Draft HRB') grouped civil and political rights and economic, social and cultural rights into relevant interests. For instance, the committee grouped the right to life (contained in article 6 of the *ICCPR*) and the rights to be free from hunger and to an adequate standard of living (from article 11 of the *ICESCR*) together.[189]

The ACT Consultative Committee offered two alternatives to enable the ACT Government to limit such rights. Under the first approach, the Draft HRB recognised that rights sourced in the *ICESCR* are subject to 'progressive realisation'. In any proceeding that raises the application or operation of a right solely sourced in the *ICESCR*, a court would be required to consider relevant factors, including the financial resources necessary for a public authority to act in a manner compatible with the right.[190] The second alternative, preferred by the Consultative Committee,[191] recognised the indivisibility of rights. All rights would be subject to the same general limitation – that is, rights could be limited only 'to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors'.[192] The resource and budgetary implications of a right sourced in the *ICESCR* could be one such relevant factor. The Draft HRB addressed concerns that rights sourced in the *ICESCR* would impose undue financial burdens on governments by enabling Parliament to enact legislation that authorises a practice or policy in breach of an economic, social or cultural right.[193]

The proposals by the ACT Consultative Committee are constructive responses to concerns about resource allocation surrounding the inclusion of economic, social and cultural rights. The ability to limit these rights, along with the general power of Parliament to enact legislation incompatible with human rights, also addresses concerns about parliamentary sovereignty and fears of judicial interference in the setting of financial policy.

In explaining its reasons for omitting rights sourced in the *ICESCR* from the *HRA*, the ACT Chief Minister stated that the Government had asked itself 'is this the time to give these rights legal effect?'.[194] Apparently, the right time had not arrived after the *HRA* had been in operation for a year – the ACT Government again rejected calls for the inclusion of rights sourced in the *ICESCR* in its 12 month review of the *HRA*. A key reason for this rejection was that it was 'still the case that the inclusion of these rights would have an unclear effect'.[195] Yet, as Patrick Macklem observes, 'a rights' clarity and precision is a function of repeated application and enforcement'.[196]

The life expectancy of Indigenous Australians is approximately 20 years less than that of the non-Indigenous population.[197] Indigenous Australians cannot wait any longer for the 'right time' for the protection of their economic, social and cultural rights. It is imperative that rights sourced in the *ICESCR* become part of any dialogue on the human rights implications of policy and legislation across Australia. Including such rights in the *HRA* and the *Charter* would be a promising start.

B Self-Determination

The ACT Consultative Committee also recommended that the right to self-determination be included in the *HRA*. Echoing common article 1 of the *ICCPR* and *ICESCR*, the Committee's Draft HRB stated that 'all peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development'.[198] The Committee envisaged that this right would have 'particular significance' for Indigenous Australians.[199]

The ACT Government rejected the ACT Consultative Committee's recommendation. The rejection in part reflected the focus on individual rights in the *HRA*.[200] In explaining its decision, the ACT Government observed that, as a group right, self-determination is not 'justiciable' before the HRC.[201] However, Anaya argues that the non-justiciability of self-determination amounts to a limitation of form for admissibility purposes that has not prevented the HRC from adjudicating 'what amount to issues of self-determination and group rights' when considering other rights (particularly article 27 of the *ICCPR*, discussed above). Nor has it prevented the HRC from considering the right to self-determination in evaluating periodic reports submitted by states.[202] This

concern also appears anomalous in the context of the *HRA*, given its emphasis on inspiring a rights-based dialogue and culture rather than creating new opportunities for litigation. As Melissa Castan and David Yarrow argue with respect to the *Charter*, the 'very mild protection' provided by the dialogue model does not set an 'onerous standard for compliance', making the omission of a right to self-determination 'all the more perplexing'.[203]

The Victorian Consultation Committee acknowledged that self-determination has particular significance for Indigenous communities and even sought 'to ensure that any self-determination provision contains some detail about its intended scope and reflects Indigenous communities' understanding of the term'.[204] The Committee therefore appears to have envisaged that a right to self-determination should specifically refer to Indigenous Australians. Ultimately, the Committee rejected the inclusion of such a right, stating that the *Charter* 'must be general in its terms and operate across all of the varied communities in Victoria'.[205] However, including self-determination as a general right of all peoples, as the ACT Consultative Committee recommended, could address this issue.

The Victorian Consultation Committee also expressed concern about the right's perceived uncertain scope and definition, and a lack of domestic and international consensus regarding understandings of the right 'beyond the idea that it involves participation in decision-making'.[206] While aware of the evolution of understandings of self-determination in international law, the Victorian Consultation Committee feared the potential for 'unintended consequences' due to 'the absence of settled precedent about the content of the right as it pertains to Indigenous peoples'.[207] Similarly, the ACT Government stated that self-determination 'has both external and internal aspects and is still evolving in international law'.[208]

As Castan and Yarrow demonstrate, these concerns are not justified – extensive literature and jurisprudence clarifies the right.[209] Indeed, international law has settled this debate,[210] with the *Declaration* confirming 'Indigenous peoples have the right to self-determination'.[211] Certainly, confusion and fears about so-called 'external' implications are misplaced. Rather than breaking the right into 'external' and 'internal' aspects, Anaya argues that the substance of self-determination comprises two normative strains. The first, a 'constitutive' aspect, requires the governing institutional order to be 'substantially the creation of processes guided by the will of the people, or peoples, governed'.[212] The second, an 'ongoing' aspect, independently requires that the governing institutional order 'be one under which people may live and develop freely on a continuous basis'.[213] Grounded in the core values of freedom and equality, self-determination demands that peoples 'are to be full and equal participants in the construction and functioning of governing institutions under which they live at all levels'.[214]

These substantive aspects are distinct from the remedies that may be available upon violation of the right. Secession, as one remedy, is likely to be appropriate only in extreme, limited contexts, for instance in a situation of military oppression.[215] In other situations, the right to self-determination can entail remedies of self-government[216] and in particular demands '"belated state-building" through negotiation or other appropriate peaceful procedures involving meaningful participation by indigenous groups'.[217] Including self-determination in the *HRA* and *Charter* could promote this process of relationship building in Victoria and the ACT.

In the short-term, common article 1 of the *ICCPR* and *ICESCR* should be used to interpret the rights contained in the *HRA* and *Charter*, just as the HRC has accepted that the provisions of article 1 may be relevant in interpreting other rights protected by the *ICCPR*.[218] Indeed, the Victorian Consultation Committee considered that the reference to the rights of Indigenous Australians in the *Charter*'s preamble could mean that the principles of self-determination underpin policy decisions relating to Indigenous peoples.[219] This approach could also assist to promote further consideration about the collective aspects of Indigenous rights despite the emphasis in the *HRA* and *Charter* on individual rights.

However, there is a need for wider consideration of the right to self-determination. If the *HRA* and the *Charter* aim to create a dialogue on rights protection, including a right to self-determination could promote honest discussion on the scope of the right in an Australian context.[220] Encouraging such dialogue (even at the State and Territory level) is especially important considering that debate on self-determination was 'stymied'[221] by the Howard Government. Internationally, Robert Hill (Australian Ambassador to the UN) explained to the UN General Assembly that Australia was 'dissatisfied' with references to self-determination in the *Declaration* because it does 'not support a concept that could be construed as encouraging action that would impair, even in part, the

territorial and political integrity of a State with a system of democratic representative Government'.[222] Domestically, the Howard Government declared in 2000 that it could not:

> endorse the term 'self-determination' (which implies the possibility of a separate Indigenous state or states) although it unequivocally supports the principle of Indigenous people having opportunities to exercise control over aspects of their affairs (as reflected in the establishment and operation of ATSIC for example).[223]

The Howard Government later abolished ATSIC. It also failed to consult or engage with Indigenous Australians on further dramatic policy and legislative changes, including the Northern Territory 'intervention'.[224] It remains to be seen whether the newly-elected Rudd Government will respect this fundamental right.

In order to shift the debate on self-determination, Behrendt has argued that 'Indigenous people need to be given the space to allow the expression and articulation of their needs and political aspirations. There is need for self-reflection on both sides and the need for improved dialogue between Indigenous and non-Indigenous people'.[225] A bill of rights that recognises the right to self-determination could assist to create such a space.

However, Indigenous Australians also need to be careful that a bill of rights does not itself usurp this space. The interplay between a bill of rights and Indigenous governance and rights requires further consideration. For instance, could an Indigenous organisation be subject to the terms of a bill of rights without consultation and without their free, prior and informed consent, for instance, by being caught within the definition of a 'public authority' under the *Charter*?[226] If so, should the Victorian Government make regulations to declare that such entities are not 'public authorities'?[227]

These issues indicate a need for self-determination to be placed directly within any dialogue on human rights. The ACT and Victorian Governments should strive for greater engagement with Indigenous Australians within the human rights dialogue if they are truly serious about respecting the special significance that human rights have for Indigenous peoples. Recognition of the right to self-determination is essential to this. The normative force of the *Declaration*'s provisions on self-determination could assist Indigenous Australians to persuade the Victorian and ACT Governments to recognise the right in upcoming periodic reviews of the *HRA* and *Charter*. If the right to self-determination is indeed 'evolving',[228] the next reviews of the *HRA* and *Charter* give the ACT and Victorian Governments the chance to take a progressive role in this evolution.

V Conclusion

The *HRA* and the *Charter* represent minimalist, incremental approaches to rights protection. Nevertheless, through their interpretive technique, they provide an opportunity to infuse law and policy in Victoria and the ACT with developments in international human rights law regarding Indigenous peoples. As the peoples for whom rights deprivation has been the most pronounced in Australia, the general human rights approach favoured by the *HRA* and *Charter* will theoretically have special significance for Indigenous Australians, particularly when interpreted in the context of the non-discrimination norm and international human rights law. This is especially important with respect to developments in the cultural integrity norm as it applies to Indigenous peoples. Limitations to this potential, such as the omission of collective rights, rights sourced in the *ICESCR* and self-determination, ought to receive serious consideration in upcoming reviews of the *HRA* and *Charter*.

However, it must be borne in mind that the incorporation of such standards into a bill of rights will not alone lead to the better protection of the rights of Indigenous Australians. In drafting human rights instruments, Anaya cautions advocates of the rights of Indigenous peoples against 'utopian faith' and overestimating 'the impact that will actually result from the words and abstract rules of a human rights text alone'.[229] Even when a comprehensive bill of rights is in place, we must always be careful to avoid an 'implementation gap'[230] between such standards and reality. As Megan Davis observes, 'whether Australian politicians will feel much restrained in legislating against fundamental rights by a newly educated Australian populace well versed in the discourse of rights remains to be seen'.[231]

As the first State and Territory bills of rights in Australia, the *HRA* and the *Charter* are potentially groundbreaking instruments. This will be particularly the case if courts, tribunals, public authorities and decision-makers can adopt a 'realist' approach to the interpretation of the rights contained in the *HRA* and *Charter*. However, the true test of these instruments will be whether they can inspire a

culture that respects the rights of Indigenous Australians. In reflecting international human rights standards, the *HRA* and the *Charter* can become important parts of the process of forging a 'nation built on honour instead of the spoils of invasion',[232] provided they truly are the first steps towards rights protection, and not the last.

Endnotes

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1 Muriel Bamblett, 'A Reminder of a People Left Behind' *The Age* (Melbourne), 23 March 2007 <http://www.theage.com.au/articles/2007/03/22/1174153251509.html> at 11 November 2007.

2 George Williams, *A Charter of Rights for Australia* (2007) 16. For an analysis of the limited express and implied rights contained within the *Australian Constitution* see George Williams, *Human Rights under the Australian Constitution* (2002).

3 *Northern Territory National Emergency Response Act 2007* (Cth). See, eg, Human Rights and Equal Opportunity Commission, 'Racial Discrimination Act is a Vital Human Rights Safeguard' (Press Release, 8 August 2007) <http://www.humanrights.gov.au/about/media/media_releases/2007/53_07.html> at 11 November 2007; Mick Dodson, 'Abuse is no Solution to Abuse' (2007) *Crikey* <http://www.crikey.com.au/Politics/20070808-Mick-Dodson-racial-discrimination-is-never-justified.html> at 11 November 2007.

4 *Kartinyeri v Commonwealth* (1998) 195 CLR 337.

5 Provisions regarding the interpretation of laws and the obligations on public authorities under the *Charter* commence on 1 January 2008: *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 2.

6 *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 32(1). In the *Human Rights Act 2004* (ACT) such an interpretation is to be 'preferred': s 30.

7 *Human Rights Act 2004* (ACT) s 31(1); *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 32(2).

8 Opened for signature 16 December 1966, 993 UNTS 3 (entered into force 3 January 1976).

9 For a more detailed review, see, eg, Julie Debeljak, 'The *Human Rights Act 2004* (ACT): A Significant, yet Incomplete, Step Towards the Domestic Protection and Promotion of Human Rights' (2004) 15 *Public Law Review* 169; Thomas Poole, 'Bills of Rights in Australia' (2004) 4(2) *Oxford University Commonwealth Law Journal* 197; Peter Bayne, 'The *Human Rights Act 2004* (ACT) – Developments in 2004' (2004) 8 *Canberra Law Review* 137; Carolyn Evans, 'Responsibility for Rights: The ACT *Human Rights Act*' (2004) 32 *Federal Law Review* 291; Gabrielle McKinnon, 'The ACT *Human Rights Act 2004* – The First Year' (Sept 2005) *Ethos* 11; Tom Mosby and Udara Jayasinghe, 'A Charter of Human Rights and Responsibilities: Applications and Implications in Victoria' (2006) 50 *AIAL Forum* 23; George Williams, 'The Victorian *Charter of Human Rights and Responsibilities*: Origin and Scope' (2006) 30 *Melbourne University Law Review* 880; Williams, *A Charter of Rights for Australia*, above n 2, 69.

10 Victoria, *Parliamentary Debates*, Legislative Assembly, 4 May 2006, 1290 (Rob Hulls, Attorney-General).

11 *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 28. The *Human Rights Act 2004* (ACT) limits this requirement to Bills introduced by a Minister: s 37.

12 *Subordinate Legislation Act 1994* (Vic) s 12A.

13 *Human Rights Act 2004* (ACT) s 38; *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 30. In Victoria, the Scrutiny of Acts and Regulations Committee must also review all statutory rules and report to Parliament if it considers a statutory rule to be incompatible with human rights: *Subordinate Legislation Act 1994* (Vic) s 21.

14 *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 7; *Human Rights Act 2004* (ACT) s 28. However, the ACT Government has indicated that certain rights may not be subject to any limitation, such as the right not to be subject to torture or cruel, inhuman or degrading treatment or punishment. The Government does not intend that a right contained in the HRA will be subject to any greater limitation beyond those expressed in the *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976)): Explanatory Statement, Human Rights Bill 2003 (ACT) 4.

15 *Human Rights Act 2004* (ACT) s 39; *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 29.

16 *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 31.

17 *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 31(9).

18 *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 32; Explanatory Memorandum, Charter of Human Rights and Responsibilities Bill 2006 (Vic) 23.

19 *Human Rights Act 2004* (ACT) s 30.

20 *Human Rights Act 2004* (ACT) s 30(2); *Legislation Act 2001* (ACT) s 139; Explanatory Statement, Human Rights Bill 2003 (ACT) 5. For perspectives on the interaction of the 'purposive'

test and the interpretive technique contained in the *HRA*, see Hilary Charlesworth, 'Human Rights and Statutory Interpretation' in Suzanne Corcoran and Stephen Bottomley (eds), *Interpreting Statutes* (2005) 100; ACT Department of Justice and Community Safety, *Human Rights Act 2004*: *Twelve-Month Review – Report* (2006) 25.

21 *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 32(1); Explanatory Memorandum, Charter of Human Rights and Responsibilities Bill 2006 (Vic) 23. Section 35(a) of the *Interpretation of Legislation Act 1984* (Vic) also states that a construction that would promote the purpose or object underlying an Act or subordinate instrument shall be preferred to a construction that would not.

22 *Human Rights Act 2004* (ACT) s 31(1); Explanatory Statement, Human Rights Bill 2003 (ACT) 5.

23 *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 32(2).

24 Opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976).

25 *Human Rights Act 2004* (ACT) Dictionary.

26 Explanatory Statement, Human Rights Bill 2003 (ACT) 5; Explanatory Memorandum, Charter of Human Rights and Responsibilities Bill 2006 (Vic) 23.

27 Explanatory Statement, Human Rights Bill 2003 (ACT) 5.

28 Explanatory Memorandum, Charter of Human Rights and Responsibilities Bill 2006 (Vic) 23.

29 Explanatory Memorandum, Charter of Human Rights and Responsibilities Bill 2006 (Vic) 23-24. The ACT Department of Justice and Community Safety states that the *HRA* also 'actively invites recourse to the judgments of other national courts such as the House of Lords and the New Zealand Court of Appeal': ACT Department of Justice and Community Safety, 'Overview of the ACT Human Rights Act 2004' (2004) 4.

30 Explanatory Memorandum, Charter of Human Rights and Responsibilities Bill 2006 (Vic) 23.

31 Explanatory Statement, Human Rights Bill 2003 (ACT) 5.

32 *Human Rights Act 2004* (ACT) s 31(2). These considerations reflect s 141(2) of the *Legislation Act 2001* (ACT). Materials contained in the ACT Legislative Register are taken to be accessible to the public: *Human Rights Act 2004* (ACT) s 31(3). The Register lists the following 'Human Rights Materials': *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); *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 Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990); *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976); *International 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) <http://www.legislation.act.gov au/updates/humanrights/humanrights.asp> at 11 November 2007.

33 Explanatory Statement, Human Rights Bill 2003 (ACT) 6.

34 *Human Rights Act 2004* (ACT) s 32.

35 *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 33.

36 *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 36.

37 *Human Rights Act 2004* (ACT) s 32(2).

38 *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 36(2).

39 *Human Rights Act 2004* (ACT) s 32(3); *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 36(5). However, subordinate legislation that is incompatible with human rights may be invalid if its parent legislation does not authorise this incompatibility: *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 32(3)(b); Explanatory Memorandum, Charter of Human Rights and Responsibilities Bill 2006 (Vic) 24.

40 *Human Rights Act 2004* (ACT) s 33; *Charter of Human Rights and Responsibilities Act 2006* (Vic) ss 36(6), 36(7), 37.

41 *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 36(5)(b); *Human Rights Act 2004* (ACT) s 32(3)(b).

42 ACT Bill of Rights Consultative Committee, *Towards an ACT* Human Rights Act: *Report of the ACT Bill of Rights Consultative Committee* (2003) 68.

43 *Public Administration Act 2004* (Vic) s 7(1)(g); Explanatory Statement, Human Rights Bill 2003 (ACT) 5.

44 The definition of a 'public authority' captures government and private bodies when they are exercising public power on behalf of the state: Williams, *A Charter of Rights for Australia*, above n 2, 83; *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 4.

45 *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 38(1). However, a public authority will not be caught by this section if, for example, it is acting to give effect to a statutory provision that is incompatible with a human right: *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 38(2).

46 *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 39(3).

47 *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 39(2); Williams, *A Charter of Rights for Australia*, above n 2, 84.

48 ACT Department of Justice and Community Safety, above n 29, 4.

49 Australian Capital Territory, *Parliamentary Debates*, Legislative Assembly, 2 March 2004, 533 (Jon Stanhope, Chief Minister,

Attorney-General, Minister for the Environment and Minister for Community Affairs).

50 See, eg, Simon Evans and Carolyn Evans, 'Legal Redress under the Victorian Charter of Human Rights and Responsibilities' (2006) 17 *Public Law Review* 264; Steven Hausfeld, 'ACT Human Rights: A Plea for Inalienability' (September 2005) *Ethos* 7; Anthony Burke and Katharine Gelber, 'Can Human Rights Save Us?' (Dec – Jan 2005-06) 80 *Arena Magazine* 43, 44-45.

51 Committee on the Elimination of Racial Discrimination, 'Consideration of Reports Submitted by State Parties under Article 9 of the Convention: Concluding Observations of the Committee on the Elimination of Racial Discrimination – New Zealand', UN Doc CERD/C/NZL/CO/17 (2007) [12].

52 ACT Bill of Rights Consultative Committee, above n 42, 41.

53 George Williams, 'Constructing a Community-Based Bill of Rights' in Tom Campbell, Jeffrey Goldsworthy and Adrienne Stone (eds), *Protecting Human Rights: Instruments and Institutions* (2003) 247, 249.

54 Larissa Behrendt, 'Righting Australia: At a Time of Increasing Inequality is a Bill of Rights the Answer?' (Feb – Mar 2000) 45 *Arena Magazine* 24, 26.

55 Tony Blackshield and George Williams, *Australian Constitutional Law and Theory* (4th 2006 ed) 1382.

56 Human Rights Consultation Committee, *Rights, Responsibilities and Respect: The Report of the Human Rights Consultation Committee* (2005) 22.

57 Larissa Behrendt, *Achieving Social Justice: Indigenous Rights and Australia's Future* (2003) 145.

58 See Explanatory Memorandum, Charter of Human Rights and Responsibilities Bill 2006 (Vic) 1; *Human Rights Act 2004* (ACT) s 5. Schedule 1 to the *Human Rights Act 2004* (ACT) contains a table that lists the rights in the Act alongside their corresponding 'source' articles in the *ICCPR*.

59 Michael Dodson, 'The Unique Nature of the Australian Indigenous Experience' (1996) 9 *Without Prejudice* 3, 5. See also Council for Aboriginal Reconciliation, *Going Forward: Social Justice for the First Australians – A Submission to the Commonwealth Government* (1995) <http://www.austlii.edu.au/au/special/rsjproject/rsjlibrary/car/going_forward/12.html> at 11 November 2007.

60 Asbjørn Eide and Erica-Irene Daes, *Working Paper on the Relationship and Distinction between the Rights of Persons belonging to Minorities and those of Indigenous Peoples*, Paper by Asbjørn Eide, UN Doc. E/CN.4/Sub.2/2000/10 (2000) [2].

61 Dodson, above n 59, 5.

62 Ibid 4; Eide and Daes, above n 60, paper by Eide [2].

63 Eide and Daes, above n 60, paper by Eide [2]; Dodson, above n 59, 6.

64 Aboriginal and Torres Strait Islander Social Justice Commissioner, *Social Justice Report 2006* (2007) 227; Dodson, above n 59, 6.

65 *United Nations Declaration on the Rights of Indigenous Peoples*, GA Res 61/295, UN GOAR, 61st sess, 107th plen mtg, UN Doc A/RES/61/295, Annex (2007).

66 S James Anaya, 'Why There Should Not Have to be a Declaration on the Rights of Indigenous Peoples' (Speech delivered at the 53rd International Congress of Americanists, Sevilla, Summer 2006) 13.

67 *United Nations Declaration on the Rights of Indigenous Peoples*, GA Res 61/295, UN GOAR, 61st sess, 107th plen mtg, UN Doc A/RES/61/295, Annex (2007) art 1 (emphasis added).

68 *United Nations Declaration on the Rights of Indigenous Peoples*, GA Res 61/295, UN GOAR, 61st sess, 107th plen mtg, UN Doc A/RES/61/295 (2007) art 43.

69 Indigenous Peoples' Caucus, 'Support the Declaration' (Information Paper No 1, October 2006) <http://www.ipcaucus.net/IK_1.html> at 1 December 2007; Les Malezer, 'Statement by the Chairman, Global Indigenous Caucus' (Speech delivered to the United Nations General Assembly, New York, 13 September 2007); Anaya, above n 66, 13.

70 Larissa Behrendt, 'From the Periphery to the Centre: A New Role for Indigenous Rights' (Summer 2003/2004) *Bar News: Journal of the NSW Bar Association* 16, 16.

71 Ibid.

72 Williams, above n 53, 251-55.

73 Williams, *A Charter of Rights for Australia*, above n 2, 81.

74 ACT Bill of Rights Consultative Committee, above n 42, 102-104; Human Rights Consultation Committee, above n 56, 37.

75 ACT Bill of Rights Consultative Committee, above n 42, 101-102.

76 Behrendt, above n 54, 26.

77 Ibid.

78 GA Res 217A, UN GAOR, 3rd sess, 183rd plen mtg, UN Doc A/810 (1948).

79 Eide and Daes, above n 60, paper by Eide, [3].

80 *Yatama v Nicaragua* (2005) Inter-Am Court HR (ser C, no 127) [184].

81 *Human Rights Act 2004* (ACT) s 8; *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 8.

82 *Human Rights Act 2004* (ACT) s 16(1); *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 15(1).

83 *Human Rights Act 2004* (ACT) s 15(1); *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 16(1).

84 *Human Rights Act 2004* (ACT) s 10(1)(a); *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 10(1)(a).

85 Human Rights Consultation Committee, above n 56, iii.

86 *Human Rights Act 2004* (ACT) Preamble.

87 *Charter of Human Rights and Responsibilities Act 2006* (Vic) Preamble.

88 George Williams, *The Case for an Australian Bill of Rights: Freedom in the War on Terror* (2004) 71.

89 *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 8(4).

90 ACT Bill of Rights Consultative Committee, above n 42, 105.

91 Behrendt, above n 57, 158.

92 S James Anaya, 'Divergent Discourses about International Law, Indigenous Peoples, and Rights over Lands and Natural Resources: Toward a Realist Trend' (2005) 16 *Colorado Journal of International Environmental Law and Policy* 237, 241.

93 *American Declaration of the Rights and Duties of Man*, adopted by the Ninth International Conference of American States (30 March – 2 May 1948), OAS Res XXX, reprinted in Basic Documents Pertaining to Human Rights in the Inter-American System, OAS/Ser.L/V/I.4 Rev 9 (2003) art XXIII; *American Convention on Human Rights*, opened for signature 22 November 1969, OASTS 36, 1144 UNTS 123 (entered into force 18 July 1978) art 21.

94 Jo M Pasqualucci, 'The Evolution of International Indigenous Rights in the Inter-American Human Rights System' (2006) 6(2) *Human Rights Law Review* 281, 283.

95 *Case of the Mayagna (Sumo) Awas Tingni Community v Nicaragua* (2001) Inter-Am Court HR (ser C, no 79) [146] ('*Awas Tingni*').

96 See Anaya, above n 92.

97 OEA/Ser/L/V/.II.95, Doc 6 (1997).

98 Opened for signature 27 June 1989, ILO Official Bulletin vol 72, ser A, no 2 (entered into force 5 September 1991).

99 See, eg, *Awas Tingni* (2001) Inter-Am Court HR (ser C, no 79); *Maya Indigenous Communities of the Toledo District v Belize* ('*Maya*') (2004) Inter-Am Commission HR (case no 12.053, report no 40/04); *Mary and Carrie Dann v United States* (2002) Inter-Am Commission HR (case no 11.140, report no 75/02) ('*Dann*').

100 *Awas Tingni* (2001) Inter-Am Court HR (ser C, no 79).

101 Ibid [6] (Sergio García Ramirez J).

102 *Maya* (2004) Inter-Am Commission HR (case no 12.053, report no 40/04).

103 Ibid [119].

104 Similar reasoning has been employed domestically. The non-discrimination norm – specifically the prohibition of racial discrimination – was integral to the judicial recognition of native title. In *Mabo v Queensland (No 1)* (1988) 166 CLR 186 ('*Mabo (No 1)*'), the High Court found that the *Racial Discrimination Act 1975* (Cth) ('*RDA*') prevented Queensland from retrospectively extinguishing traditional rights over the Murray Islands. According to the majority, the attempted retrospective extinguishment abrogated the Meriam people's immunity from arbitrary deprivation of legal rights, in a manner which did not apply to those whose rights in and over the Murray Islands were not derived from the traditional laws and customs of the Meriam people. Queensland was thus acting in a racially discriminatory manner in violation of the federal *RDA*: at 218.

105 Claire Charters, 'Indigenous Peoples and International Law and Policy' (2007) 18 *Public Law Review* 22, 39.

106 *Hopu & Bessart v France*, Communication No 549/1993, UN Doc CCPR/C/60/D/549/1993/Rev.1(1997) [10.3].

107 *Charter of Human Rights and Responsibilities Act 2006* (Vic) ss 13, 17; *Human Rights Act 2004* (ACT) ss 11(1), 12.

108 Opened for signature 7 March 1966, 660 UNTS 195 (entered into force 4 January 1969).

109 Committee on the Elimination of Racial Discrimination, 'General Recommendation XXIII, Rights of Indigenous Peoples', UN Doc A/52/18, annex V, 122 (1997).

110 Ibid [5].

111 CERD has adopted these procedures as part of its monitoring authority to 'address or prevent the escalation of specific situations of conflict stemming from racial discrimination': S James Anaya, *Indigenous Peoples in International Law* (2nd ed, 2004) 231.

112 Committee on the Elimination of Racial Discrimination, 'Decision 1(53): Australia', UN Doc A/53/18.para IIB1 (1998); Committee on the Elimination of Racial Discrimination 'Decision 2(54) on Australia: Australia', UN Doc CERD/C/54/18, para 21(2) (1999); Committee on the Elimination of Racial Discrimination 'Decision 2(55) on Australia: Australia', UN Doc CERD A/54/18,para 23(2) (1999).

113 Committee on the Elimination of Racial Discrimination, 'Decision 1(66): New Zealand', UN Doc CERD/C/DEC/NZL/1 (2005).

114 Committee on the Elimination of Racial Discrimination, 'Decision 1(68): United States of America', UN Doc CERD/C/USA/DEC/1 (2006).

115 See, eg, Committee on the Elimination of Racial Discrimination, 'Consideration of Reports Submitted by States Parties under Article 9 of the Convention, Concluding Observations of the Committee on the Elimination of Racial Discrimination: Australia', UN Doc CERD/C/AUS/CO/14 (2005).

116 *Human Rights Act 2004* (ACT) Dictionary.

117 Helen Szoke, 'Indigenous Rights Need to be Included in Victorian Charter', *The Age* (Melbourne), 26 September 2007, 15.

118 *United Nations Declaration on the Rights of Indigenous Peoples*, GA Res 61/295, UN GOAR, 61st sess, 107th plen mtg, UN Doc A/RES/61/295, Annex (2007) art 12(1).

119 *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 14, *Human Rights Act 2004* (ACT) s 14.

120 Charters, above n 105, 34; Anaya, above n 111, 61-72.

121 Robert Hill, UN GOAR, 61st sess, 107th plen mtg, UN Doc A/61/PV.107 (2007) 12.

122 S James Anaya and Siegfried Wiessner, 'The UN Declaration on the Rights of Indigenous Peoples: Towards Re-empowerment', *Jurist* (3 October 2007) <http://jurist.law.pitt.edu/forumy/2007/10/un-declaration-on-rights-of-indigenous.php> at 11 November 2007.

123 Ibid.

124 Australian Labor Party, *National Platform and Constitution 2007* (2007) 212.

125 Pasqualucci, above n 94, 320.

126 See eg, *Awas Tingni* (2001) Inter-Am Court HR (ser C, no 79); *Dann* (2002) Inter-Am Commission HR (case no 11.140, Report No 75/02); *Maya* (2004) Inter-Am Commission HR (case no 12.053, report no 40/04); *Case of the Sawhoyamaxa Indigenous Community v Paraguay* (2006) Inter-Am Court HR (ser C, no 146) ('*Sawhoyamaxa*'); *Case of the Yakye Axa Indigenous Community v Paraguay* (2005) Inter-Am Court HR (ser C, no 125) ('*Yakye Axa*').

127 See, eg, *Sawhoyamaxa* (2006) Inter-Am Court HR (ser C, no 146).

128 See, eg, *Dann* (2002) Inter-Am Commission HR (case no 11.140, report no 75/02); *Sawhoyamaxa* (2006) Inter-Am Court HR (ser C, no 146).

129 See, eg, *Maya* (2004) Inter-Am Commission HR (case No 12.053, report no 40/04).

130 Pasqualucci, above n 94, 309 and the cases cited therein.

131 See, eg, *Yatama v Nicaragua* (2005) Inter-Am Court HR (ser C, no 127).

132 *Sawhoyamaxa* (2006) Inter-Am Court HR (ser C, no 146) [152].

133 *Yakye Axa* (2005) Inter-Am Court HR (ser C, no 125) [162].

134 *Sawhoyamaxa* (2006) Inter-Am Court HR (ser C, no 146); *Yakye Axa* (2005) Inter-Am Court HR (ser C, no 125).

135 *Sawhoyamaxa* (2006) Inter-Am Court HR (ser C, no 146) [164].

136 The obligation upon states to adopt positive measures for the protection of the right to life has also been noted by the HRC in interpreting art 6 of the *ICCPR*: HRC, *General Comment 6: The right to life (Article 6)*, UN Doc HRI/GEN/1/Rev.1, 6 (1994) [5].

137 *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 9; *Human Rights Act 2004* (ACT) s 9. The right to life contained in the *Charter* and the *HRA* differs from the corresponding right in the *American Convention* in a key respect. The right to life in the *American Convention* applies from the 'moment of conception' (art 4(1)), whereas s 9 of the *HRA* applies 'from the time of birth' and nothing in the *Charter* affects any law applicable to abortion (s 48). However, each instrument contains core provisions recognising the right to life and the right not to be arbitrarily deprived of life.

138 (1992) 175 CLR 1.

139 (Unreported, Supreme Court of Belize, Conteh CJ, 18 October 2007).

140 Ibid [117].

141 *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 20. See below at Pt III(D)(ii).

142 See, eg, *United Nations Declaration on the Rights of Indigenous Peoples*, GA Res 61/295, UN GOAR, 61st sess, 107th plen mtg, UN DocA/RES/61/295, Annex (2007) arts 11–13.

143 *Human Rights Act 2004* (ACT) s 27.

144 Martin Scheinin, 'What are Indigenous Peoples?' in Nazila Ghanea and Alexandra Xanthaki (eds), *Minorities, Peoples and Self-Determination* (2005) 3, 6.

145 Human Rights Committee, *General Comment 23: The Rights of Minorities (Art 27)*, UN Doc CCPR/C/21/Rev.1/Add.5 (1994) [3.1] ('*General Comment 23*').

146 Ibid [6.2]; Hurst Hannum, 'The Rights of Persons Belonging to Minorities' extracted in Richard B Lillich (et al), *International Human Rights: Problems of Law, Policy and Practice* (4th ed, 2006) 189.

147 Patrick Thornberry, *Indigenous Peoples and Human Rights* (2002) 163.

148 Anaya, above n 111, 135.

149 Communication No 167/1984, UN Doc CCPR/C/38/D/167/1984(1990) ('*Ominayak*').

150 *General Comment 23*, above n 145, [7].

151 *Apirana Mahuika v New Zealand*, Communication No 547/1993, UN Doc CCPR/C/70/D/547/1993 (2000) [9.3] ('*Mahuika*') citing *Kitok v Sweden*, Communication No 197/1985, UN Doc CCPR/C/33/D/197/1985 (1988) [9.2]; *Länsman v Finland*, Communication No 511/1992, UN Doc CCPR/C/52/D/511/1992 (1994) and *Länsman v Finland*, Communication No 671/1995, UN Doc CCPR/C/58/D/671/1995 (1996).

152 *Mahuika*, Communication No 547/1993, UN Doc CCPR/C/70/D/547/1993 (2000) [9.4].

153 *Mahuika*, Communication No 547/1993, UN Doc CCPR/C/70/D/547/1993 (2000) [9.5] citing *Länsman v Finland*, Communication No 511/1992, UN Doc CCPR/C/52/D/511/1992 (1994) [9.6], [9.8].

154 Ibid.

155 *General Comment 23*, above n 145, [7], [6.1].

156 Anaya, above n 111, 257. See *Mahuika*, Communication No 547/1993, UN Doc CCPR/C/70/D/547/1993 (2000) [9.6] – [9.8]; *Länsman v Finland*, Communication No 511/1992, UN Doc CCPR/C/52/D/511/1992 (1994) [9.6].

157 For instance, Claire Charters notes that in *Mahuika* (in which the HRC found that New Zealand had consulted with Maori regarding a fisheries settlement, such that no violation of art 27 of the *ICCPR* had occurred) '[t]he HRC was satisfied that slim majority Maori consent' to a fisheries rights settlement 'was sufficient

without appreciating that in many Maori iwi and hapu a greater level of consensus is required before a decision can be made and action taken': Claire Charters, 'The Relationship Between the Treaty of Waitangi and Human Rights: A Preliminary Analysis of the Domestic and International Human Rights Dimension' (Presentation delivered at the Treaty and Human Rights Symposium, Rotorua, 12 November 2003) 8.

158 *Länsman v Finland*, Communication No 511/1992, Human Rights Committee, UN Doc CCPR/C/52/D/511/1992 (1994) [9.4].

159 Dodson above n 59, 6.

160 Benedict Kingsbury, 'Reconciling Five Competing Conceptual Structures of Indigenous Peoples' Claims in International and Comparative Law' (2001) 34 *NYU Journal of International Law and Politics* 189, 204; Anaya, above n 111, 133.

161 Eide and Daes, above n 60, paper by Eide, [23]; paper by Daes, [43].

162 Sarah Pritchard, 'The International Covenant on Civil and Political Rights and Indigenous Peoples' in Sarah Pritchard (ed), *Indigenous Peoples, the United Nations and Human Rights* (1998) 196.

163 Bill of Rights Unit, Policy and Regulatory Division, Department of Justice and Community Safety, *The* Human Rights Act 2004: *Guidelines for ACT Departments: Developing Legislation and Policy*, 107 <http://www.jcs.act.gov.au/HumanRightsAct/publicationsbor.htm> at 11 November 2007.

164 Poole, above n 9, 209.

165 *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 19.

166 Human Rights Consultation Committee, above n 56, 41.

167 Explanatory Memorandum, Charter of Human Rights and Responsibilities Bill 2006 (Vic) 15.

168 *United Nations Declaration on the Rights of Indigenous Peoples*, GA Res 61/295, UN GOAR, 61st sess, 107th plen mtg, UN Doc A/RES/61/295, Annex (2007) art 25.

169 *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 20.

170 *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 3.

171 Explanatory Memorandum, Charter of Human Rights and Responsibilities Bill 2006 (Vic) 7.

172 Human Rights Consultation Committee, above n 56, 51.

173 ACT Department of Justice and Community Safety, above n 29, 2; Explanatory Statement, Human Rights Bill 2003 (ACT) 3.

174 Anaya, above n 111, 52-53.

175 Explanatory Statement, Human Rights Bill 2003 (ACT) 3; Explanatory Memorandum, Charter of Human Rights and Responsibilities Bill 2006 (Vic) 7.

176 Charters, above n 105, 26. Fears of these potential conflicts were raised in debates surrounding the *Declaration*: see, eg, United States Mission to the United Nations, 'Explanation of Vote by Robert Hagen, US Advisor, on the Declaration on the Rights of Indigenous Peoples, to the UN General Assembly, September 13, 2007' (Press Release, 13 September 2007) <http://www.usunnewyork.usmission.gov/press_releases/20070913_204.html> at 11 November 2007.

177 ACT Bill of Rights Consultative Committee, above n 42, 6 (emphasis added).

178 Ibid 109; ACT Department of Justice and Community Safety, above n 20, 6.

179 ACT Department of Justice and Community Safety, above n 20, 6.

180 *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 44.

181 Dodson, above n 59, 4.

182 See, eg, ACT Department of Justice and Community Safety, above n 20, 40-41; Chief Minister Jon Stanhope (Speech delivered at the ACT Human Rights Community Forum, Canberra, 1 May 2006) 1; Department of Justice, Victoria 'Human Rights in Victoria: Statement of Intent May 2005'<http://www.justice.vic.gov.au/wps/wcm/connect/DOJ+Internet/resources/file/eb561a076297c44/statement_intent.pdf > at 11 November 2007; Human Rights Consultation Committee, above n 56, 29.

183 See above at Pt III(B).

184 Williams, above n 88, 70. However, the omission of rights contained in the *ICESCR* in the *Charter* is consistent with Professor Williams' previously-expressed view that such rights should not be included in a bill of rights due to the 'difficulty of formulating these to avoid intruding into the role of governments in determining resource and policy issues': George Williams, quoted in Standing Committee on Law and Justice, Legislative Council, *A NSW Bill of Rights* (2001) 43.

185 Stanhope, above n 182, 8.

186 See above n 32.

187 Patrick Macklem, *Indigenous Difference and the Constitution of Canada* (2002) 243; Andrew Byrnes, Hilary Charlesworth and Gabrielle McKinnon quoted in ACT Department of Justice and Community Safety, above n 20, 48.

188 ACT Bill of Rights Consultative Committee, above n 42, 95-100.

189 Ibid App 4, 15.

190 Ibid App 4, 23.

191 Ibid 100.

192 These factors include the nature of the right, the importance of the purpose of the limitation, the nature and extent of the limitation, the relationship between the limit and its purpose and any less restrictive means to achieve the limitation's purpose: ibid App 4, 23.

193 Ibid 100.

194 Australian Capital Territory, *Parliamentary Debates*, Legislative Assembly, 2 March 2004, 531 (Jon Stanhope, Chief Minister, Attorney-General, Minister for Environment and Minister for Community Affairs).

195 ACT Department of Justice and Community Safety, above n 20, 49.

196 Macklem, above n 187, 262.

197 National Aboriginal Community Controlled Health Organisation and Oxfam Australia, *Close the Gap: Solutions to the Indigenous Health Crisis facing Australia* (2007) 5.

198 ACT Bill of Rights Consultative Committee, above n 42, App 4, 22.

199 Ibid 104.

200 See above Part III(E).

201 Explanatory Statement, Human Rights Bill 2003 (ACT) 3. Under the Optional Protocol to the *ICCPR* , only individuals can petition the HRC: *Optional Protocol to the International Covenant on Civil and Political Rights,* opened for signature 16 December 1966, 999 UNTS 302 (entered into force 23 March 1976), art 2. The HRC has recognised that the right to self-determination, as 'a right belonging to peoples' is not cognisable under the Optional Protocol: *General Comment 23*, above n 145, [3.1].

202 Anaya, above n 111, 254.

203 Melissa Castan and David Yarrow, 'A Charter of (Some) Rights … for Some?' (2006) 31(3) *Alternative Law Journal* 132, 135.

204 Human Rights Consultation Committee, above n 56, 39.

205 Ibid.

206 Ibid.

207 Ibid.

208 Explanatory Statement, Human Rights Bill 2003 (ACT) 3.

209 Castan and Yarrow, above n 203, 133.

210 Charters, above n 105, 25.

211 *United Nations Declaration on the Rights of Indigenous Peoples*, GA Res 61/295, UN GOAR, 61st sess, 107th plen mtg, UN Doc A/RES/61/295, Annex (2007) art 3.

212 Anaya, above n 111, 105.

213 Ibid.

214 Anaya, above n 66, 9.

215 Anaya, above n 111, 109; James Crawford, 'The Right of Self-Determination in International Law: Its Development and Future' in Philip Alston (ed), *Peoples' Rights* (2001) 7, 60; Scheinin above n 144, 6-9; Charters, above n 105, 25.

216 Crawford, above n 215, 65.

217 Erica-Irene Daes, quoted in Anaya, above n 66, 10.

218 *Mahuika*, Communication No 547/1993, UN Doc CCPR/C/70/D/547/1993 (2000) [9.2].

219 Human Rights Consultation Committee, above n 56, 39.

220 Castan and Yarrow provide one such vision of the content of self-determination in Australia, following Anaya's framework of the elements that constitute the right: Castan and Yarrow, above n 203, 134-35.

221 Behrendt, above n 57, 115.

222 Robert Hill, UN GOAR, 61st sess, 107th plen mtg, 11, UN Doc A/61/PV.107 (2007) 11. However, the *Declaration* cannot be 'construed as authorizing or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States': *United Nations Declaration on the Rights of Indigenous Peoples*, GA Res 61/295, UN GOAR, 61st sess, 107th plen mtg, UN Doc A/RES/61/295, Annex (2007) art 46. Yet, as Les Malezer states, '"territorial integrity" in fact obligates every State to promote realization of the principle of equal rights and self-determination of peoples': Malezer, above n 69, 3. See also *Declaration on Principles of International Law Concerning Friendly Relations and Cooperation Among States in Accordance with the Charter of the United Nations*, GA Res 2625(XXV) Annex, UN GOAR, 25th sess, 1883rd plen mtg, supp 28, UN Doc A/5217, 121; *Vienna Declaration and Programme of Action*, UN Doc A/CONF.157/24 (Part I), chap III (1993).

223 Commonwealth, *Commonwealth Government Response to the Council for Aboriginal Reconciliation Final Report "Reconciliation: Australia's Challenge",* reprinted in (2002) 7 *Australian Indigenous Law Reporter* 66 <http://www.austlii.edu.au/au/journals/AILR/2002/66.html#Heading321> at 11 November 2007.

224 *Northern Territory National Emergency Response Act 2007* (Cth). See, eg, Human Rights and Equal Opportunity Commission, above n 3; Patrick Dodson, 'An Entire Culture is at Stake', *The Age* (Melbourne) 14 July 2007, 9; Tom Calma, 'Dealing with a National Tragedy - Failure is not an Option' (2007) *On Line Opinion* <http://www.onlineopinion.com.au/view.asp?article=6294> at 11 November 2007.

225 Behrendt, above n 57, 115.

226 This concern has been expressed with respect to Maori organisations and the operation of the *New Zealand Bill of Rights Act 1990* (NZ): Claire Charters, 'Maori, Beware the Bill of Rights Act!' (2003) *The New Zealand Law Journal* 401; Claire Charters, 'BORA and Maori: The Fundamental Issues' (2003) *The New Zealand Law Journal* 459.

227 Pursuant to *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 4(1)(k).

228 Explanatory Statement, Human Rights Bill 2003 (ACT) 3.

229 Anaya, above n 92, 248-49.

230 See, eg, Economic and Social Council, 'Report of the Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous People', UN Doc E/CN.4/2006/78 (2006) [83].

231 Megan Davis, 'Book Review: Nick O'Neill, Simon Rice, Roger Douglas: "Retreat from Injustice – Human Rights Law in Australia"' (2006) 8 *Balayi* 106, 109.

232 Bamblett, above n 1.