Charting Opposition to Human Rights Charters: New Arguments or Recycled Objections?

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Abstract

Opposition to Australian human rights charters has gained prominence in recent years with various official reports advocating the introduction of human rights charters, the introduction of statutory charters in the Australian Capital Territory and Victoria and the very recent release of the National Human Rights Consultation Report, which recommends the introduction of a Commonwealth Human Rights Act. This article explores multiple instances of opposition to statutory human rights charters – more general institutional, democracy based, philosophical, political and judicially based objections, as well as a range of more particular and targeted criticisms of rights charters. Common themes, weaknesses and methodologies emerge across these general and particular oppositions to the promotion and protection of human rights through the mechanism of human rights charters. This is to a degree where recycled objections outweigh new oppositional arguments. It is suggested that rights charter opponents need to do more in order to keep faith with a common claim that human rights are important.

Introduction

Opposition to statutory charters of rights at state and federal levels in Australia has recently spanned political divisions and has been expressed through academic, public and media commentary. Such commentary has predictably focused upon considerations of institutional democracy, such as the roles of the legislature and the judiciary, as well as portraying several adverse factors claimed to be associated with the introduction of statutory charters of rights.

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In communicating concerns about the adoption of statutory charters in Australia, the variety of such commentary displays common characteristics and weaknesses. It consistently displays an unwillingness to offer practical remediation of identified deficiencies of statutory charters. It frequently fails to offer real alternatives to strengthen the realization and enjoyment of human rights.

The phrase ‘rights charters’ is used throughout this article to refer to statutory, that is, non entrenched, non constitutional charters, enacted in the form of a standard legislative Act establishing a range of civil and political rights. It is useful and important to identify several key characteristics of statutory rights charters as a preliminary step to charting opposition to Australian human rights charters.¹

Frequently, statutory charters implement in legislative form articles of the International Covenant on Civil and Political Rights.² This is the favoured model in the present, and possible further, introduction of rights charters at Commonwealth and State levels.³ Significantly the statutory basis of these rights charters enables amendment or repeal by an ordinary act of Parliament, in contrast to constitutional charters,⁴ which are usually only able to be amended by a special procedure. In turn, the statutory

¹ For example, a useful brief overview of the Victorian Charter of Rights and Responsibilities is provided by Alice Rolls: Alice Rolls, ‘Avoiding tragedy: Would the decision of the High Court in Al-Kateb have been any different if Australia had a Bill of Rights like Victoria?’ (2007) 18 Public Law Review 119, 123.


³ Examples of statutory charters are the Human Rights Act 2004 (ACT); the Charter of Human Rights and Responsibilities Act 2006 (Vic); the Human Rights Act 1998 (UK) and the New Zealand Bill Of Rights Act 1990 (NZ). See also Appendix B The Draft Bill - Appendix to A WA Human Rights Act Report Of The Consultation Committee For A Proposed WA Human Rights Act (a draft statutory charter) and the recommendations as to the content and format of a statutory charter for Tasmania in Tasmania Law Reform Institute A Charter of Rights for Tasmania Final Report No 10 October 2007, 6-20. See also Terms of Reference National Human Rights consultation in National Human Rights Consultation Background Paper ‘The options identified should preserve the sovereignty of Parliament and not include a constitutionally entrenched bill of rights’ and Attorney-General’s media release 10 December 2008: ‘Rudd Government Announces National Human Rights Consultation’: ‘The consultation does not presuppose any outcome, although the Government has made it clear that any proposal must preserve the sovereignty of Parliament’.

rights charters acknowledge that judicial findings of legislative inconsistency with charter rights do not render the act or legislative instrument invalid, presently or prospectively. These differences have critical implications in charting opposition to rights charters, as much of that opposition is derivative of, and premised upon, the experience of constitutional charters.

The statutory charter model typically includes a mechanism for pre-legislative scrutiny of relevant legislation and a formal ministerial statement in relation to the legislation’s compliance with the statutorily enacted rights. There is also the inclusion in statutory charters of an interpretive mechanism expressing a Parliamentary intention that legislation and legislative instruments be interpreted so far as possible in conformity with the nominated charter rights. There is a further obligation requiring executive authorities to act in a manner compatible with charter rights.

Statutory charters also provide for a judicial declaration of incompatibility or inconsistent interpretation of relevant legislation with charter rights. The statutory foundation of this declaration of incompatible or inconsistent interpretation means that the legislation so declared remains in force both instantly and prospectively. There is a further mechanism providing for a parliamentary and executive response to that declaration.

Both the interpretive mechanism and the declaratory mechanism are intended to promote a dialogic interchange between the judicial,

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5 See, for example, Human Rights Act 2004 (ACT), s 32(3); Charter of Human Rights and Responsibilities Act 2006 (Vic), s 36(5); Human Rights Act 1998 (UK), s 4 and the New Zealand Bill of Rights Act 1990 (NZ) s 4.
6 See, for example, Human Rights Act 2004 (ACT), s 38 and Charter of Human Rights and Responsibilities Act 2006 (Vic), s 30.
executive and legislative branches to enhance awareness and promotion of human rights and so cultivate a human rights culture at various steps in the legal process. Statutory charters may also have a periodic review clause and a statement of the relationship between charter rights and existing causes of legal action. These matters reflect both the relatively recent conception of statutory charters and the need for cautious assessment of their introduction, operation and evolution.

With these considerations in mind, this article commences by considering three important aspects of contemporary context and background which assist in understanding recent Australian opposition to rights charters. Key characteristics of the modus operandi of rights charter opponents are then identified and briefly discussed. Important consideration is given to the legitimating uses of democracy made by rights charter opponents, whilst frequently leaving the concept of democracy undefined as to substance and content. Further examination is made of the use of the work of Jeremy Waldron in support of the democracy claim.

These democracy-based considerations then provide the foundation for looking at two related, principal arguments based on claims of institutional legitimacy in resolving differences about human rights – namely the illegitimacy of that function for the judiciary and the judicial process, and the legitimacy of that function for politicians and the political process. This more general institutional legitimacy argument around political and judicial processes is then contrasted with a critical examination of several more specific and targeted rights charter criticisms. In that way, a variety of negative representations about rights charters are identified and contested.

The article concludes by collating the various arguments opposing rights charters in Australia in recent times. It highlights omissions, weaknesses and consequences for the protection of human rights inherent in that opposition. It suggests that, in the present debate about further adoption of rights charters in Australia, statutory charter opponents need to sharpen and clarify the extent of disagreement with statutory charter proponents. Such development would determine if a compromise of principles might

14 References to Jeremy Waldron’s works are made in the section of the article ‘Claiming important theory of democratic resolution of differences in support of opposition to rights charters’.
be reached, founded in an agreed, common claim that human rights are important.

**Context and background: understanding contemporary Australian opposition to rights charters**

The nature of recent opposition to statutory charters of rights in Australia may be better comprehended through initially considering some contextual and background matters. These matters help explain why such opposition has become both prominent and strident.

First, the legacy of the Howard government years from 1996 to 2007 and controversial erosions of human rights in areas such as immigration detention and counter-terrorism have produced doubts about the efficacy of existing Australian mechanisms for the protection of human rights. It is open to speculation whether legislative content and policy administration under the Howard government might have been more observant of, or moderated towards, human rights, under a rights charter. The judicial branch in reviewing such legislation might also have been more legitimately able to reach decisions more amenable to human rights through the presence of a rights charter.

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16 From 2001, over 40 pieces of legislation were passed by the Howard government relating to terrorism: see *Chronology of Legislative and Other Legal Developments since September 11 2001* (Parliamentary Library) <http://www.aph.gov.au/library/intguide/law/terrorism.htm#terrchron> (accessed 10 August 2009). Controversial measures included ASIO intelligence gathering questioning and detention powers, control orders, preventative detention, sedition reforms, expansion of telecommunications and stored communications interception and access, executive powers to proscribe terrorist organisations and a range of new terrorism offences.


18 See *Al-Kateb v Godwin* (2004) 219 CLR 562, commenting on the possible desirability of an Australian Bill of Rights: at 594 (McHugh J). See also Michael McHugh ‘A Human Rights Act, the courts and the Constitution’ Presentation given at the Australian Human Rights Commission 5 March 2009 at <http://www.hreoc.gov.au/letstalkaboutrights/events/McHugh_2009.html> (accessed 10 August 2009). On the hypothetical influence of an Australian bill of rights on the decision in *Al Kateb*, see Rolls, above n 1. Rolls concludes that ‘Whilst the potential application of s.32 (the interpretive provision) by the High Court in Mr Al-Kateb’s case is necessarily speculative, it is very likely that their Honours’ decision would have been different if Australia had a legislative *Bill of Rights* like the Victorian Charter. The Court’s decision would have been required to be consistent with Parliament’s clear
These historically recent Howard era human rights issues have contributed to calls for human rights charters. An unobserved coincidence of some opponents of rights charters, primarily founded in a belief in traditional parliamentary sovereignty, is their expressed support of the legacy of the Howard government.19 This coincidence of opposition to rights charters and endorsement of the legacy of the Howard government, particularly in its history of concentrating executive power and limiting broader public participation in its legislative agenda, is a factor frequently overlooked in Australian rights charter debates. It is an important factor in understanding contemporary opposition in Australia to rights charters.

This is because rights charters are premised in improving human rights awareness and contributions to legislative processes, as well as creating a dialogic model following on from judicial review of legislation for compliance with rights charter provisions. The focus of opponents of charters of rights upon the institutional assertion of parliamentary sovereignty distracts from the deeper implications of any government’s claim of an elected mandate to legislate as it sees fit. Moreover, that opposition is clearly at odds with opportunities for broader engagement in political debate flowing from the introduction of a rights charter.

A second contextual matter important to understanding recent opposition to rights charters can be seen in the introduction of statutory charters in two Australian jurisdictions,20 the tentative proposal for a statutory direction that all laws be interpreted compatibly with human rights, as far as possible, and with legislative purpose. In following this direction, a decision upholding the indefinite detention of Mr Al-Kateb may have been avoided': Ibid, 134. The example of the more human rights compliant Terrorism (Extraordinary Temporary Powers) Act 2006 (ACT), containing additional safeguards dealing with preventative detention, is a good example of rights charter influence upon legislative processes, when compared to other State and Northern Territory preventative detention legislation enacted after the September 2005 Council of Australian Governments Agreement, as well as the provisions of the Commonwealth law, the Anti-Terrorism Act (No 2) 2005 (Cth).

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chart in a third jurisdiction and an official report supporting a statutory charter in a fourth jurisdiction. Opposition to statutory charters may be constructed around dire predictions of a range of adverse consequences to the political and legal systems after their introduction. The experiential record to date of the ACT and Victorian Charters suggests that such consequences have not eventuated, with some more modest issues, as well as positive outcomes, being generated. This absence of radical transformation of the legal system following the introduction of statutory charters diminishes the credibility of opposing arguments.


21 Tasmania: following on from the report of the Tasmania Law Reform Institute A Charter of Rights for Tasmania Final Report No 10 October 200, which recommended the introduction of a statutory charter of rights in Tasmania. Investigation of a state based bill and recommendations from that review will be taken to the Tasmanian Cabinet if the Federal government does not proceed with a rights charter: 'Plans for a Tasmanian bill on hold' The Mercury 11 December 2008. See also the earlier comments of the Tasmanian Premier David Bartlett in his Speech of 30 October 2008 at <http://www.premier.tas.gov.au/media_room/speeches/social_headland_speech> (accessed 10 August 2009): 'I think an important part of connecting communities through social inclusion is making sure that people have a clear understanding of their rights and responsibilities as members of the Tasmanian community. That is why I flag today that I am interested in looking further at a Bill of Rights for Tasmania. I have asked Deputy Premier and Attorney General, Lara Giddings, to bring forward recommendations to Cabinet about the need for a Bill of Rights, and its potential content. Setting down rights on paper is about empowering people. It gives us a chance as a community to set out some of the political freedoms and social rights that all Tasmanians should have. And social empowerment in turn builds a sense of community'.

22 Western Australia, A WA Human Rights Act Report Of The Consultation Committee For A Proposed WA Human Rights Act (2007). The present Western Australian government is firmly opposed to the introduction of rights charters at both State and Federal levels: see Amanda Banks, ‘Porter vows to fight PM’s rights charter’ The West Australian 12 December 2008; Amanda Banks ‘Rights law ‘puts bikie curbs at risk’’ The West Australian 18 April 2009, 17; inaugural speech to Parliament of Western Australia Legislative Assembly of the then backbencher and now present WA Attorney General Western Australia, Parliamentary Debates Legislative Assembly ,12 March 2008, 744 c-748a (C Christian Porter).

The longer the passage of time and the accumulation of local experience with statutory charters, the more likely that public awareness of their operation will increase, with the additional measures of public accountability being considered as beneficial. Far from support for statutory charters being exaggerated, widespread public ignorance about claimed adverse effects has aided opponents of statutory charters. Accumulated practical experience with statutory charters is likely to consolidate public opinion behind the adoption of charters in additional jurisdictions. The fear of popular acceptance, a slowly expanding public consciousness of rights, with a momentum towards additional adoptions of rights charters, appears to have made more strident the recent opposition to rights charters.

A third contextual matter impacting upon recent opposition to charters of rights arises from the formal consideration at Commonwealth level of a rights charter. This issue emerged initially at the 2020 summit.\textsuperscript{24} Subsequently, a major Commonwealth consultative process was undertaken to explore options to strengthen the protection of human rights in Australia.\textsuperscript{25} The consultation process should have encouraged opponents of rights charters to adapt more abstract existing arguments, from generalized opposition to rights charters and particular opposition to the ACT and Victorian charters, and tailor them in opposition to a Commonwealth statutory charter. Yet some commentary merely


questioned the openness of the consultation process, and in many instances, failed to sufficiently adapt long repeated generic arguments against rights charters to the possibility of a future Commonwealth charter. Such approaches barely advance existing critique against rights charters. They often fail to systematically articulate alternative, revised methods of human rights protection which address the claimed deficiencies of rights charters. They predictably oppose rights charters for traditional reasons of the distribution of power between the legislative and judicial branches.

Establishing the legitimacy of opposition: the modus operandi of opponents of rights charters

Opponents of rights charters may enter the debate by expressing public assurances about the importance of human rights. Such assurances provide legitimacy to their alternative claim, as well as a foundation for commencing their many criticisms of rights charters.

These assurances are a response to the ‘common disparagement of bills of rights critics as being persons who are against human rights.’ The grounds of opposition to rights charters need to be established in terms of method and model, rather than the question whether the concept of human rights is a good or bad idea. Opposition is then formulated in terms of legitimate methods of rights protection, not in outright opposition to the concept that protection of human rights is important.

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26 Nicola Berkovic, ‘Make bill of rights debate open to all’ *The Australian* 25 April 2008; Paul Maley ‘Critics read the rights act over panel’ *The Australian* 11 December 2008; McIntyre, above n 19.


28 See Campbell, above n 27, 57; James Allan ‘Human Rights – Can We Afford To Leave Them To The Judges?’ (2005) 16 *Commonwealth Judicial Journal* 4, 5: ‘Talk of not being able to afford rights seriously distorts where the debate is occurring. The debate is not between some group that says we can afford rights...and some group that says we cannot afford rights’.

29 See Allan, above n 28, 5: ‘...the live and active debate about rights is occurring between, on the one hand, those who seek (or who have successfully sought) to have the interpretation and elaboration of rights and what they do and don’t demand handed over to unelected judges ...and, on the other, those who resist this trend – those who
This preferred model for the protection of human rights, however, raises issues about the efficacy of rights protection and unavoidably, the level of commitment to the substantive realisation of those rights in the first place. It is not as straightforward a matter as to proclaim support for human rights yet oppose statutory charters, when such charters are being advanced as the most prominent contemporary reform model of human rights protection in Australia. Moreover, rights charters may potentially produce a range of positive effects – such as raising human rights awareness and reforming bureaucratic processes – that are quite distinct from principal objections grounded in a transfer of power from the political branch to the judicial branch.

This opposition to rights charters frequently focuses upon a range of perceived negatives about the proper democratically based forums for resolving differences of view, on a presumption of a litigious model applying under a rights charter. It frequently fails to engage with the many non-litigious reformative effects of rights charters. This focus of charter opponents is partly misconceived, for its major criticism is upon the judicial, in place of the legislative mechanism, for resolving contested issues, distorting the debate by defining it almost exclusively within a litigious framework.

Claiming the language of democracy in opposition to rights charters

The language of opponents of statutory charters can appear modest, reasonable and reconciliatory, consistent with the claim that human rights are considered important, except that such rights should be differentially advanced. The core of that claim is that as reasonable people may disagree about the content and meaning of human rights, the best

believe rights are important but that their enumeration and elaboration should rest with the democratically elected representatives of the people'.

See the reports advocating the adoption of statutory charters of rights in four Australian jurisdictions, cited at footnotes 20, 21, and 22 above.

See James Allan 'Oh That I Were Made Judge In The Land' (2002) 30 Federal Law Review 561, 570: 'reasonable, sincere, even nice people disagree'; 574: 'controversial questions of social policy over which sincere, intelligent, well-meaning people disagree'; 576: 'controversial questions of social policy over which sincere, intelligent, well-meaning people disagree'; James Allan ‘Bills of Rights as Centralising Instruments’ (2006) 27 Adelaide Law Review 183, 183: ‘disagreement between smart, reasonable, well-meaning, even nice people who just happen to disagree about where to draw lines’; 195: 'It is almost never the case that sincere, reasonable, smart, well-meaning people all agree about what some right demands down in the quagmire of where bills of rights are litigated and have real, actual effect'; Allan ‘John Howard And The Constitution’, above
method of resolution of that disagreement is to leave such potentially controversial questions to elected representatives within the political forums rather than unelected judges. Opponents of statutory charters are thereby empowered to rhetorically associate their arguments with democracy and democratic resolution of differences of opinion. This provides a platform for the exposition of a democracy based claim and the preferred model of political resolution of rights questions and by contrast, to attack the claimed undemocratic nature of judicial review under a rights charter.

However, the language of this approach belies some important political considerations. First, the idea of leaving a resolution of human rights questions to the political branch must realistically contemplate neglect and inertia on human rights matters, as a deliberate political choice. Accountability for the consequences of that neglect and inertia remains in the political domain – it is not supplemented by any of the additional legal redress mechanisms provided under a rights charter.

Second, the preference for resolving human rights issues through political mechanisms invokes democracy based claims in support which are extrapolated from United States based commentary and the experience of a constitutional bill of rights, including arguments about the democratic legitimacy of judicial review in that context. However, some distinctive issues arise concerning the relevance of democracy based arguments deriving from a constitutional bill of rights, as distinct from a statutory charter of rights. The fact that opponents of statutory charters gloss over these differences in their adoption of arguments against judicial review derived from a constitutional bill of rights to a statutory charter, is relevant in assessing the credibility of those arguments.

n 19, 11 ‘...there are smart, reasonable, well-informed, even nice people who simply disagree about where to draw the line...’


From the premise that disagreement about the content and meaning of human rights is best resolved in the political sphere, several features of the democracy based argument unfold. A starting point for one prolific opponent of statutory charters is to highlight the democratic credentials of the Australian system, and its democratic legitimacy as a vehicle for self-government. This includes linking opposition to statutory charters to an underpinning theory against strong judicial review, as articulated by the academic Jeremy Waldron.

However, the difficulty with this argument is that it takes the meaning of 'democracy' as a given, without properly articulating its content and scope. The argument does not tailor its preference for the political sphere to resolve disputes over human rights as 'democratic', by expounding the particular model or conception of democracy sought or preferred. It fails to integrate its preference for non-charter protections of human rights with recognized models of democracy and their identifying characteristics. In failing to make explicit this connection, it avoids assessing how effectively human rights may be advanced under this

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34 James Allan 'A Defence of the Status Quo' in Campbell, Goldsworthy and Stone (eds), above n 27, 176-181 under the heading 'Notable Features Of the Status Quo'; James Allan 'Paying For the Comfort of Dogma', above n 33, 63, 64-65; James Allan 'John Howard And the Constitution', above n 19, 7-8; James Allan 'Oh That I Were Made Judge in the Land', above n 31, 575: '[F]or those who think that the essence of democracy is self government by the people, then Australia is one of the most democratic countries in the world. From its preferential voting system for lower house elections, to its differently constituted, genuine House of Review second chamber, to its forcing recourse to referenda (and so to all electors) in order to change the Constitution, to its compulsory voting requirement, Australia is a remarkably democratic country'.

35 Meaning a right to participate, reflected in human autonomy and self government: Allan 'Oh That I Were Made Judge in the Land', above n 19, 574. See also Campbell, above n 27, 55-56.

36 See Allan, 'Oh That I Were Made Judge in the Land', above n 31, 573: 'For a sustained, powerful critique of strong judicial review under bills of rights one could not do better than to read the works of Jeremy Waldron'; James Allan 'Human Rights: can we afford to leave them to the judges', above n 28, 4, 5: 'Jeremy Waldron has spent the last decade making the strong argument that rights themselves, or at least strong, non-instrumental understandings of rights, demand that we leave these decisions with elected parliaments...'. The extensive reliance on the writings of Jeremy Waldron will be canvassed in more detail below.

37 As Debeljak observes 'There is a multitude of competing models of democracy. The models range from pure majoritarian, statistical market-based democracy, to procedural democracy, to substantive democracy. The basic differences between each model centre on whether or not the rights of the individual and the minority temper the will of the majority; and if so, whether the rights are intended to protect procedural or substantive notions of democracy': Julie Debeljak, 'Rights and Democracy: A Reconciliation of the Institutional Debate' in Tom Campbell, Jeffrey Goldsworthy and Adrienne Stone (eds), Protecting Human Rights Instruments and Institutions (2003), 135. 136.
preferred method of relying upon the political process for resolving human rights questions.

In particular, it fails to identify under this political process what particular mechanisms exist for addressing instant and individual human rights issues, other than the formal, generally applicable institutional structures and practices of Australian democracy. The reality then of this unstated expectation of the political process model is of a quite narrowly defined, formalist, functional and procedural conception of democracy – a position compatible with the conservative political disposition of many rights charter opponents.

There are several models of more open democracy, with their characteristics reflecting the range of opportunities open to enhancing human rights through a political process. Whilst there is no particular monopoly in the labeling of such models, commonly used terms are the protective, developmental, participatory and pluralist models of

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39 Whilst accepting the principles of the protective model of democracy, the developmental model of democracy additionally emphasises the moral and educational developmental benefits to the individual through participation in the political processes: Kirk, above n 38, 46 and Patmore, above n 38, 101-102. Political involvement is necessary not only for the protection of individual interests, but to create an informed, committed and developing citizenry and is essential to the ‘highest and harmonious’ expansion of individual capacities: Held, above n 38, 102. It is strongly associated with the writings of John Stuart Mill: Held, ibid, 86.

40 The participatory model of democracy derives from some of the rationales of developmental democracy, but goes beyond the quite restricted form of participation advocated by JS Mill: Kirk, above n 38, 46 and Patmore, above n 38, 103. A participatory model of democracy encourages maximisation of citizens to assess the activities of representatives and hold them accountable: Patmore, ibid, 102-103. Participation expands beyond voting and discussion in representative government to include democratisation and politicisation of institutions in which individuals can play a significant role: Patmore, ibid, 104. Involvement and contestation are increased, changing the relationship between representatives and represented and the nature of representation itself.

41 The pluralist model of democracy states that individual interests of the individual are best represented through membership of an interest group which competes on political
democracy. Each model naturally speaks of different characteristics, particularly in the role of the citizen or elector in relation to levels of democratic participation.

Salient characteristics of the narrower model of democracy\(^42\) include the emphasis on a broad executive mandate obtained by periodic elections,\(^43\) the inappropriateness of engaged civic participation influencing changes to proposed legislation,\(^44\) with only elected representatives initiating activity\(^45\) and with those representatives not obliged to form a consultative relationship with their electors.\(^46\) The major form of accountability against improper application of executive power in this model is the capacity to periodically remove offending politicians at elections.\(^47\)

For some critics of statutory charters, it is simply assumed that the formalities and structures of democracy, such as elections and elected representatives participating in legislative and executive processes will produce a clinical, textbook resolution of competing human rights claims. By definition, this approach is consistent with a status quo of political arrangements. Any change to human rights related practices or outcomes is then assumed to be achievable within, and the responsibility of, the operation of the legislative and executive branches.

and policy terms with other groups to influence government. The political objectives of pluralism do not necessarily comprise the interests and values constituting the identity of the community as a whole: Jurgen Habermas, 'Three Normative Models of Democracy' in Seyla Benhabib (ed) *Democracy and Difference Contesting The Boundaries of The Political* (1996), 25. Pluralism asserts basic norms and rules to regulate the contest of competing groups, including the role of the state as a regulator to protect group rights: Paul Hirst *Representative Democracy and Its Limits* (1990), 16. Such a state protective capacity involves a legal order regulating the interaction of groups with lawmaking and enforcement capacity: Hirst, ibid, 17.

\(^{42}\) Sometimes known as a 'restrictive-elite' model of democracy: see Joseph Schumpeter *Capitalism Socialism and Democracy* (1943), 105.

\(^{43}\) For example, see the discussion relating to an electorally acquired mandate to implement all policies, with Senate opposition characterised as illegitimate, in Executive-Senate relations under the Howard government: Harry Evans 'Executive and Parliament' in Chris Aulich and Roger Wettenhall *Howard's Second and Third Governments Australian Commonwealth Administration 1998-2004* (2005), 54

\(^{44}\) This type of civic participation being confined to voting and discussion, so providing for regular functioning of electoral requirements: see Carol Pateman *Participation and Democratic Theory* (1970), 5.

\(^{45}\) Ibid.

\(^{46}\) That is, they are not within a relationship of instruction from, or obligation towards, electors: Held, above n 38, 165.

\(^{47}\) Kirk, above n 38, 47.
Within this framework and its assumptions it is easy to conclude that existing mechanisms for human rights protection are satisfactory. This is because the focus is upon indeterminate, but narrowly defined, democratic processes, rather than the scrutiny of individual issues against standards in rights charters, derived from international human rights instruments. In contrast, a rights charter will create greater participation opportunities\(^{48}\) in both curial and political forums for advancing and reconciling competing human rights issues. The type of democracy contemplated under rights charters is therefore more likely to fall within the broader participatory models referred to above.

The lack of an explicit identification, for comparative purposes, of the preferred form of democracy for resolving human rights differences means that recognition of the potential for rights charters to enhance democratic characteristics from the broader models of democracy, is largely excluded from the arguments advanced by rights charter opponents.

This identification of rights charters as anti-democratic appropriates the word 'democracy' and similarly omits consideration about the range of democratic contributions – for instance, as an educative tool in the community and in shaping bureaucratic policies and practices both prior to and after the introduction of legislation - that a statutory charter may promote. As such, opposition to rights charters is frequently framed with a high level of abstraction – invoking indeterminate conceptions of democracy and similarly, of parliamentary sovereignty. Such conceptions are all too often disconnected from the impact that resolving human rights issues (through the applicable model) can have on the lives of ordinary persons.

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\(^{48}\) Statutorily facilitated examples of opportunities for participation in the political process, in statutory charters (over and above opportunities for ordinary legislation) are: Pre-legislative scrutiny: Human Rights Act 2004 (ACT) s.38 and Charter of Human Rights and Responsibilities Act 2006 (Vic) s.30; Statements of compatibility with human rights: Human Rights Act 2004 (ACT) s.37; Charter of Human Rights and Responsibilities Act 2006 (Vic) s.28; Human Rights Act 1998 (UK) s.19 and New Zealand Bill of Rights Act 1990 (NZ) s.7; Declarations of inconsistent interpretation: Human Rights Act 2004 (ACT) s.32, s.33; Charter of Human Rights and Responsibilities Act 2006 (Vic) s.36, s.37; Human Rights Act 1998 (UK) s.4; and review of statutory charters: Human Rights Act 2004 (ACT) s.44; Charter of Human Rights and Responsibilities Act 2006 (Vic) s 44 (Review of Charter after 4 years of operation) and s.45 (Review of Charter after 8 years of operation); Human Rights Act 1998 (UK) s.17 Periodic review of designated reservations by the United Kingdom to the European Convention for the Protection of Human Rights and Fundamental Freedoms.
The omission of discussion of these considerations by critics of rights charters suggests that their reference point of democracy is of a narrow, formalist kind, but this is not conceded or admitted in their arguments. At best, reference to democratic characteristics is confined to the institutionally derived Australian democratic structures and practices.49 These are considered as exemplary characteristics in democratic systems for the preferred politically based model for the resolution of human rights questions. In being exemplary, no need for change is considered necessary.

Claiming the important theory of democratic resolution of differences in support of opposition to rights charters

The claim that democratic legitimacy in resolving human rights matters resides in a political, rather than judicial process, is supported by rights charter critics through reference to the work of the prominent academic, Jeremy Waldron. Waldron’s earlier works50 focus upon criticizing judicial review under a constitutional bill of rights, particularly in the context of the United States.51 There are several major aspects of that critique which warrant summarizing.

The starting point is that mechanisms are required in any society for the resolution of disagreement amongst its members (including disagreements about rights).52 Where there is such disagreement about rights, it has to be asked in an authoritative sense, ‘who is to have the power to make decisions, or by what processes are decisions to be taken, on the practical issues that the competing theories of justice and rights purport to address?’53 In considering that source of authority for resolving those political disagreements about rights, Waldron observes that ‘People who disagree inter alia about rights will disagree about what that theory of authority requires, and that latter disagreement will be

49 See for example, James Allan ‘A Defence of the Status Quo’, in Campbell, Goldsworthy and Stone (eds), above n 37, 176-181.
50 See, for example, the references to Waldron’s work in James Allan ‘Take Heed Australia – A Statutory Bill of Rights And Its Inflationary Effect’, above n 33, 322 fn 1; James Allan ‘A Defence of the Status Quo’ in Campbell, Goldsworthy and Stone (eds), above n 37, 178-179, fn 6; James Allan ‘The Victorian Charter of Human Rights and Responsibilities: Exegesis and Criticism’ (2006) 30 Melbourne University Law Review 906-907, fn 2; Jeffrey Goldsworthy ‘Judicial Review, Legislative Override and Democracy’ in Campbell, Goldsworthy and Stone (eds) above n 37, 265-269.
51 Goldsworthy, above n 50, 265-266 includes a summary by Waldron of his critique.
52 That is ‘who is to have the power to make decisions, or by what processes are decisions to be taken, on the practical issues that the competing theories of justice and rights purport to address’: Jeremy Waldron ‘A Right- Based Critique of Constitutional Rights’ (1993) 13 Oxford Journal of Legal Studies 18, 32.
53 Ibid.
nothing but a reproduction of the problem about rights which evoked the need for a theory of authority in the first place.  

The reality and inevitability of disagreement about rights leads to the authority related question of how is a society to act when its members disagree? Waldron observes that '[at] least since the seventeenth century, our conception of argument in political philosophy has been guided by the idea that social, political and legal institutions are to be, in principle, explicable and justifiable to all those who have to live under them'. There are some significant implications for rights differences and disagreements amongst persons under a democratic model of consent and social contract. Waldron then observes:

The point is that all interesting modern theories of individual rights do emphasize rights to political participation ... they amount to freedom to contribute to public deliberations and the power to have one's voice taken seriously in public decision making...and we believe that participation in the public realm is a necessary part of a fulfilling human life. To deny people the opportunity for such participation is to deny part of their essence...Participation is also valued as a mode of self-protection: each individual acts, to some extent, as a voice for those of her own interests that ought to be taken seriously in politics ... a rights-theorist should be uneasy about political arrangements that tend to silence such voices or that evince distaste for their clamour in a democratic forum.

Waldron further observes that these aspects

[D]o not amount to a full theory of democracy but they are, I hope, enough to indicate the depth of the connection between the idea of civic participation and the ideas that lie at the heart of modern conception of rights. Both ideas represent people as essential agents and choosers, with interests of their own to protect and, in their dignity and autonomy, as beings who flourish best in conditions that they can understand as self-government.

Other conclusions then follow from these democratic principles of self government and autonomy in relation to authoritative mechanisms for resolving differences of opinion about rights, principally to determine 'who will choose the procedures we will use and what procedures they
will use to choose them. Vesting that decisional power in a small group of judges is one solution; vesting it in the ordinary legislative process is another'.

Consistent with the democratic principles outlined above, Waldron finds that 'we will I think opt to entrust these decisions about procedure to the people and their representatives, figuring that it is an insult to say that the issues are too important or perhaps too formalistic for them (rather than the judges) to decide.' Realization of the democratic criterion of participation points strongly towards the resolution of rights issues through a political, rather than a legal, process.

The formal institutional democratic arrangements at Commonwealth level are considered as amply fulfilling the democracy based objectives of participation, autonomy and self-governance, as articulated by Waldron. It should therefore follow from this argument that the views set out by Waldron would lean against the judicial review component of rights charters as contributing to, or consistent with, democratic principles.

It is striking, however, that references to Waldron’s work are applied in a very general sense without sufficient differentiation for the context of a statutory charter of rights – or indeed, sufficient adaptation to apply to Australian circumstances, including local experience with, and newer proposals for, a Commonwealth statutory charter of rights. Furthermore, critics of statutory charters sometimes

60 Ibid 39.
61 Ibid.
62 Ibid 50: ‘Instead of talking impersonally about “the counter-majoritarian difficulty”, we should distinguish between a court’s deciding things by a majority, and lots and lots of ordinary men and women deciding things by a majority. If we do this, we will see that the question “Who gets to participate?” always has priority over the question “How do they decide, when they disagree?”
63 This point is particularly promoted by Allan: see ‘A Defence of the Status Quo’, above n 49, 176-181; Allan, ‘Oh That I Were Made Judge in the Land’, above n 31, 575: ‘However, for those who think that the essence of democracy is self-government by the people, then Australia is one of the most democratic countries in the world. From its preferential voting system for lower house elections, to its differently constituted, genuine House of Review second chamber, to its forcing recourse to referenda (and so to all the electors) in order to change the Constitution, to its compulsory voting requirement, Australia is a remarkably democratic country’.
dispute any real difference between the consequences and effects of judicial review under constitutional bills of rights as distinct from judicial review under statutory charters. However, there are discernable differences between the two types of instruments. In fact, given that a statutory charter may contribute similarly to democracy based objectives of participation, autonomy and self governance, of the kind identified by Waldron, then such contributions should be openly acknowledged rather than ignored.

This claim of support from Waldron’s work against statutory charters is further undermined by an apparent reluctance of such critics to engage with Waldron’s later work. In fact, that later work does distinguish between the effects of statutory charters and judicial review within democratic systems from the effects of judicial review under a constitutional bill of rights in democratic systems. Indeed, in these later works, Waldron speaks in some positive terms of the impact of a statutory charter on the workings of a democracy, considering that form of review as not inconsistent with the democratic based objectives discussed in earlier works.

First, identifying the role of the judiciary under statutory charters as a weak form of judicial review, the ability of citizens to raise rights issues in a curial forum can be beneficial for legislators and the legislative process itself. This is because it ‘may not always be easy for legislators to see which issues of rights are embedded in a legislative proposal brought before them; it may not always be easy for them to envisage what issues of rights might arise from its subsequent application’. Secondly, in responding to the claim that

‘The options identified should preserve the sovereignty of the Parliament and not include a constitutionally entrenched bill of rights’.

See Allan ‘Oh That I Were Made Judge in the Land’, above n 31, 575: ‘Attempts to find refuge in non-entrenched, statutory models, or in over-ride clauses, fail...There is little evidence that I have seen to show that either of these devices do anything much to curb the power of unelected judges’.


This aspect is highlighted in Byrnes, Charlesworth and McKinnon, above n 20, 62: ‘Some rights sceptics have acknowledged a distinction between the “strong” judicial review required by a constitutional bill of rights and the “weak” judicial review available under a statutory human rights scheme.’

Waldron, ‘The Core of the Case Against Judicial Review’ above n 66, 1370. See also Jeremy Waldron ‘On Judicial Review’, above n 66, 85, similarly stating ‘It may not always be easy for legislators to see what issues of rights are embedded in the legislative proposals brought before them; courts can help see this, particularly if courts are not distracted by issues...about the legitimacy of their own decision making’.
statutory charters facilitate a beneficial dialogue on human rights between the judicial and legislative branches, Waldron does not discount that possibility. In relation to the *New Zealand Bill Of Rights Act 1990* he observes that the use of that charter as a basis of statutory interpretation 'opens at least in imagination a plausible possibility of inter-branch dialogue on matter which each party feels strongly enough to return several times to the issue'. 69 In relation to the UK *Human Rights Act 1998*, Waldron considers the legislation as 'designed to facilitate a situation in which Parliament has an opportunity to rethink its legislation in the light of what the courts say about the fundamental rights of the individual'. 70

Consequently, the disputation that there are any significant differences in the effects of judicial review between bills of rights and statutory charters, including the lack of a revised appraisal of a major critic advanced in support of opposition to a statutory charter, exposes significant weaknesses in the criticism of statutory charters.

In spite of these weaknesses, the criticism based on democracy – focusing upon the whether or not the office bearer of the relevant arm of government is elected 71 - becomes a device to focus upon criticisms of the judicial role in statutory charters, and, in sharp juxtaposition, to vindicate the role of politicians in the political process, as the preferred method for resolving human rights questions.

## The claim of illegitimate functions for the judiciary and judicial process

Opponents of rights charters seek to challenge the legitimacy of the judicial role in human rights protection, to make predictions about adverse shifts in power consequential to an enhanced judicial role under a rights charter, 72 and the emergence of several negative characteristics 73 when the judiciary assumes specific functions under that enhanced role.

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70 Waldron, above n 69, 34

71 See Debeljak, above n 37, 136: 'Giving an elected (and thus electorally unaccountable) arm of government the power to review the decisions of the elected (and thus electorally accountable) arms of government for vague human rights purposes is viewed as anti-democratic'.

72 The lynchpin argument here, from which other observations follow, is the claim of shifting determinative policy making power from the legislative branch to the judicial branch, a function which the judicial branch is not qualified to perform. On the issue of the judiciary not being qualified to perform these functions, see Craven, above n 27, 34;
This claim of a lack of legitimacy disregards the interpretative, law creating role of the judiciary in other areas such as statutory interpretation, as well as failing to appraise the benefits of a further instrument of legal checks and balances in the form of a statutory charter.

The repeated use of derogatory descriptions for the judiciary is used to strengthen this claimed lack of legitimacy, in contradistinction to the legitimacy of elected politicians as arbiters of human rights questions. It involves a sharply contrasting use of complimentary adjectives and legitimating phrases applied for politicians and the political process, and deprecatory adjectives and non-legitimate phrases applied for the judiciary and judicial process. It is an approach based more on abuse than on reason. Alternatively, it fails to consider the detrimental impacts upon judicial and political institutions and processes if, within the selected terms of the argument, the judiciary was to be made ‘democratic’, presumably by popular election.

Hatzistergos, above n 32, 105; see also Allan ‘Human Rights – Can We Afford To Leave Them To The Judges?’; above n 28, 9: ‘these instruments finesse disagreement ...by abdicating it to an unelected judiciary’; 10: ‘It drives resolution of important social issues from the political arena into the courts and gives judges, lawyers and puffed up law professors a say that non lawyers are denied’; Allan, ‘Bills of Rights As Centralising Instruments’, above n 31, ‘the immediate question that arises is why such essentially moral and political line drawing should be translated into pseudo-legal disputes and handed over to unelected judges, rather than treated as political disputes and decided through the democratic process’: at 184.

These include the inevitability of expansive interpretation of charter rights (Allan: ‘Paying For the Comfort of Dogma’, above n 33, 68 :); the futility of legislatively attempting to foreclose how the judiciary will interpret statutory bills of rights (Allan, ‘The Victorian Charter of Human Rights and Responsibilities: Exegesis and Criticism’, above n 50, 921); and an increased role for lawyers and judges in social policy making (Allan, ibid, 921-922).

The descriptions variously include the terms ‘unelected’, ‘unaccountable’ ‘aristocratic’ ‘committees of ex-lawyers’ (Allan); ‘unelected and largely anonymous’ (Brandis); ‘Murphy-type judge’ (Albrechtsen). On the repeated ‘dog whistle’ use of the term ‘unelected judges’ see Chief Justice Robert French ‘In Praise of Unelected Judges’ Address to The John Curtin Institute of Public Policy Public Policy Forum Perth, 1 July 2009 at <http://www.hcourt.gov.au/speeches/frenchcj/frenchcj01July09.pdf> (accessed 10 August 2009). Chief Justice French states ‘It is what might be called in contemporary political discourse a kind of dog whistle signal suggesting a lack of democratic legitimacy in what judges do. And it conveys the not too subtle suggestion that judges see themselves as philosopher kings whose mission in life is to sculpt the nation’s laws according to their own values.’

See French, above n 74, 7-14, highlighting issues relating to independence, impartiality and conflict of interest that arise with judicial election, based upon the United States experience. French mentions ‘There is a significant body of literature which questions the merits of popular judicial elections in the United States’: at 7.
It is also claimed that by giving the judiciary a more specific interpretive role in formulating human rights standards under a rights charter, the community is entrusting the judiciary with the resolution of policy questions.\(^{76}\) This new role will produce a considerable risk of unpredictable interpretation and unintended, potentially dire consequences from such interpretation.\(^{77}\) It is argued that the new judicial role, whilst purporting to be limited, is more expansive than commonly understood.\(^{78}\) It is further asserted that if the community was aware of the claimed likely consequences of judicial discretion and enhanced judicial power following the introduction of a right charter, such reform would become politically difficult to achieve.\(^{79}\)

It is apparent that these arguments opposing statutory charters are conjectural and speculative in the Australian context, relying upon a selective and negative extrapolation from the experience of overseas jurisdictions, such as Canada\(^{80}\) and New Zealand.\(^{81}\) This point of opposition is premised upon judges taking a consistently expansive, rather than cautiously incremental approach, to this new role. Experience in the ACT and in Victoria under those statutory charters suggests that the

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\(^{76}\) Allan, 'Oh That I Were Made Judge In The Land', above n 31, 566, 574; Allan, 'The Victorian Charter of Human Rights and Responsibilities: Exegesis and Criticism', above n 50, 921; Allan and Cullen 'A Bill of Rights Odyssey for Australia: The Sirens are Calling', (1997) 19 University of Queensland Law Journal 171,176; Craven, above n 32, 34; Hatzistergos, above n 32, 105, 108; Carr, above n 32, 19, Williams, above n 32, 4.

\(^{77}\) See Allan 'Paying For the Comfort of Dogma', above n 33, 72; Allan 'Take Heed Australia- A Statutory Bill of Rights And Its Inflationary Effect', above n 33, 322; Carr, above n 32, 20; Mirko Bagaric and Peter Faris 'Charter of Human Rights: More Punch Than Expected?' (2007) 81 Law Institute Journal, 64, 68.

\(^{78}\) Allan 'Paying For the Comfort of Dogma', above n 33, 72.

\(^{79}\) Ibid, 64, 72, 73.

\(^{80}\) Canadian examples are cited in various articles by James Allan: 'Paying For the Comfort of Dogma', above n 33, 69-70; 'The Victorian Charter of Human Rights and Responsibilities: Exegesis and Criticism', above n 50, 913-914, 917-918; 'Human Rights: can we afford to leave them to the judges', above n 28, 8-9; 'A Bill of Rights Odyssey for Australia: The Sirens are Calling', above n 76, 182-184 (with Richard Cullen). See also Hatzistergos, above n 32, 106-107, Pell, above n 32, 28, Carr, above n 32, 20.

\(^{81}\) New Zealand examples are cited in various articles by James Allan: 'Take Heed Australia- A Statutory Bill of Rights and its Inflationary Effect', above n 33, 323-333; 'Paying For the Comfort of Dogma', above n, 33, 68-70; 'Bills of Rights As Centralising Instruments', above n 31, 185; 'Oh That I Were Made Judge In The Land', above n 31, 563-573; 'The Victorian Charter of Human Rights And Responsibilities: Exegesis and Criticism', above n 50, 911, 919-920; 'Human Rights – Can We Afford To Leave Them To The Judges?', above n 28, 6-8. See also Hatzistergos, above n 32, 110, Carr above n 32, 20-21.
latter is more likely, as is public acceptance of statutory charters introduced and interpreted in such a manner. Other factors will influence how the scope of the judicial interpretive role unfolds in relation to rights charters. These factors include the extent of expertise amongst the judiciary and in the legal profession in identifying and articulating rights charter based claims, as well as a possible preference amongst the judiciary to eschew rights charter derived arguments and resolve contested rights issues on the basis of traditional common law interpretive presumptions. The necessary pre-conditions for the uptake of charter based human rights claims – education and familiarity – remain unexplored by charter critics.


83 Human Rights Act 2004 Twelve Month Review - Report, above n 23, 16-17; First Steps Forward above n 23, 36-41; Emerging Change above n 82, 61-67.

84 See, for example, the approach of the joint judgment of French, Branson and Stone JJ of the Full Federal Court in Evans v State of New South Wales [2008] FCAFC 130 (15 July 2008) in finding Clause 7(1)(b) of the World Youth Day Regulation 2008 as invalid as beyond the regulation making power conferred by s 58 of the World Youth day Act 2006 (NSW), to the degree that it purportedly empowered an authorised person to direct a person within a World Youth Day declared area to cease engaging in conduct that causes annoyance to participants in a World Youth Day event. In reviewing the validity of the regulation, the Full Federal Court preferred to apply an interpretive principle of legality, instead of arguments based on the implied freedom of political communication. See further George Williams and Nicola McGarrity ‘A victory only until the next time’ Sydney Morning Herald 16 July 2008. See also the Full Federal Court in Minister for Immigration and Citizenship v Hanefi (2007) 243 ALR 606, [105]-[113].

Supporters of statutory charters dispute the claimed effects of the judicial role made by opponents, or see them as exaggerated. In particular, the interpretive role of judges under a statutory charter is seen as consistent with the modern, widely recognized principle that judges make and develop the law, with a statutory charter providing a framework of rules within which rights may be similarly developed. On the issue of the transfer of sovereignty from an elected parliament to an unelected judiciary, a statutory charter can be seen as consistent with, or reinforcing, parliamentary sovereignty as it improves the integrity and responsiveness of a sovereign legislative process.

In this respect, unwillingness of the legislature to exercise its legislative powers to respond to objectionable judicial interpretation arrived at under an expanded judicial role under a statutory charter is considered 'just as much an exercise of democratic will'. Parliamentary sovereignty is considered as reinforced by increased accountability to its electors, from whom the Parliament derives its ultimate legitimacy, that is, consent to be governed. It is also argued that the schismatic division of democratic legitimacy applied by charter critics to the roles of the legislature and judiciary fails to comprehend the contributory roles of each institution to the operation of a democratic system. The mere absence of election for the judiciary, contrary to

This identification by charter opponents of the role of the judiciary with various negative attributions is contrasted to the positive appraisal of politicians and the political process, the preferred method for the protection of human rights. It is to this strategically crafted presentation of politicians and the political process that our attention must now turn.

87 Ibid 142.
88 Jeremy Webber, ‘A Modest (but Robust) Defence of Statutory Bill of Rights’ in Campbell, Goldsworthy and Stone (eds), above n 27, 274. See also Jeffrey Goldsworthy ‘Judicial Review, Legislative Override and Democracy’ in Campbell, Goldsworthy and Stone (eds), above n 37, 263.
89 Stanton, above n 86, 142
91 Warren, above n 90, 12-13.
The claim of legitimate functions for politicians and for the political process

Complementary to the criticism of an enhanced role for the judicial function under a rights charter, opponents of rights charters also assert positive characteristics of leaving the resolution of contested human rights values and issues to the political process.

Politicians and the political process are presented as the legitimate agents and mechanism for the resolution of human rights issues, in contrast to the illegitimacy of a statutory charter. This is a simplistic, almost monochromatic view of human rights. As a forum for contestation and resolution of human rights issues, reliance upon the political process assumes equal capacity to access that system and advocate the human rights outcomes sought. It assumes that politicians will take those claims seriously, reflect the resolution of those claims in timely legislative and executive responses and be conscious of a real parliamentary and electoral accountability on the same issues, through direct personal and party political consequences.

This argument necessarily ignores a range of self-interested characteristics in the political process, which work against the fulfillment of human rights, and which partly explain why some politicians might be sceptical about, or averse to, the introduction of a rights charter. Such self interested characteristics arise because rights charters provide a further accountability instrument over politicians. They circumscribe the range and exercise of political discretions available in responding to human rights issues.

Two immediate effects upon political responses under a statutory charter are apparent. First, a public response must be made in relation to declarations of incompatibility. This means that public attention may be drawn to an issue that may be politically undesirable or disadvantageous, forcing political capital to be expended. Political time and space may be occupied which any government would prefer to focus upon more politically advantageous issues. Second, the formal pre-legislative

92 As Lynch observes, ‘the benefit of a charter is not so much the expanded role it gives the judiciary but the responsibility it places upon the political arms of government...The existence of a legal instrument articulating citizen’s rights compels politicians to lift their game’: Andrew Lynch ‘Bill of rights will help the hoi polloi’ The Australian 25 April 2008.

93 For statutory provisions regarding declarations of incompatibility see Human Rights Act 2004 (ACT) ss 32 and 33; Charter of Human Rights and Responsibilities Act 2006 (Vic) ss 36 and 37 (declaration of inconsistent interpretation) and Human Rights Act 1998 (UK) ss 4 and 5.
requirements of a statutory charter and the public discourse generated by it potentially limit opportunities for electoral populism expressed in disproportionate legislative and executive responses to unpopular groups, and in law and order issues. This contraction of political options is unlikely to find favour with many pragmatic politicians.

The argument favouring the political process also ignores the positive contributions in a non-litigious context that statutory charters may make, including the influence of judicial interpretation generating broader contributions to the realisation of human rights. These contributions may take the form of education, public awareness, government policy development and government service delivery as well as legislative drafting, parliamentary debate and parliamentary review. These factors make the legislative process more sophisticated and nuanced – something not necessarily welcomed by politicians. The self-interest of politicians pursued in opposing statutory charters, and so preserving and concentrating political power, provides a strong impetus that resolving differences over human rights be achieved within narrowly conceived functional and formalist democratic arrangements.94 In turn, political discretion is maximized whilst accountability standards are weaker than they might be with the presence of a rights charter.

A more benign explanation of the difficulties of the political process argument for resolving human rights contests is found in the expertise and priorities of legislators. It may be the case that parliamentarians are 'under-resourced, too time poor, too unsure about rights and too under the control of the executive to play the role in scrutinizing legislation for breaches of human rights that is attributed to it by bills of rights opponents'.95 Alternatively, there may be a range of practical legislative impediments to an optimal realization of human rights brought about by focusing on a specific policy aim in legislation rather than the larger human rights considerations.96 In that instance, the formal steps in the legislative process introduced by a statutory charter help to re-focus on

94 See for example Carr, above n 32, 21: ‘Parliaments are elected to make laws. In doing so, they make judgments about how rights and interests of the public should be balanced. Views will differ in any given case about whether the judgment is correct. However, if the decision is unacceptable, the community can make its views known at regular elections. This is our political tradition’.


96 See Webber, above n 88, 281.
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the human rights aspect, thereby both affirming legislative responsibility and fostering democratic accountability. 97

These applied claims about democratic legitimacy in relation to the judicial and political branches oversimplify the role of each branch of government under a system of parliamentary democracy and representative government. That oversimplification is both deliberate and attractive to statutory charter opponents. It allows the oppositional message to remain uncomplicated and easily assimilated to public debate and political response. However, the judicial and legislative institutions and roles so described take on an unworldly quality, increasingly disconnected to the issue of how competing human rights claims are practically resolved and the enjoyment of human rights advanced. This disconnection demands that more specific and focused objections to rights charters be made.

**Further and better particulars: charting a range of negative representations about rights charters**

Significantly, a range of more targeted criticisms of rights charters are made by opponents, highlighting various other adverse characteristics claimed to be associated with, or to arise from, rights charters. These further assertions deserve exposition as frequently they also provide incomplete analysis and reasons. The intention or effect of such assertions may be to cumulatively produce in public debate attrition or wariness towards the adoption of rights charters. Some of these objections, communicated to influence the same political process said to be the proper forum for the resolution of human rights questions, appear crafted to appeal to sentiment and prejudice.

**Caricaturing arguments in favour of rights charters**

One assumption from critics of rights charters is that such charters are proposed as a comprehensive solution to the resolution of contested human rights issues, that is, an all or nothing argument. 98 Statutory charters are not approached merely as an important human rights measure, supplementing existing legislation, law, policy and practices and working coherently and compatibly with those measures.

97 Ibid 281, 282.

98 See the extracts in Allan ‘Human Rights – Can We Afford To Leave Them To The Judges?’ above n 28, 5, positing the ‘live and active debate about rights’ as between two contrasting groups.
The opposing views are framed on these assumptions and when the less than perfect consequences of statutory charters are argued, this is seen as a conclusive reason against their adoption. Essentially, this approach caricatures the arguments supporting a statutory charter. Instead of considering potential benefits of making accessible in public debate the language of human rights, reforming bureaucratic culture and service delivery conforming to human rights, providing a mechanism for assessing legislation both before and after enactment for human rights compliance – alerting, remedial and advisory roles closely allied to the legislative role – rights charters are set up for failure because they cannot deliver perfection and predictability in all functions at all times.

Embedded in this argument is that the status quo is preferable, so that any deficiencies in the realization of human rights under the existing framework are omitted, glossed over, or explained away by reference to the preferred general position of resolving differences regarding human rights through political means. The enhanced ability of a citizen to access that same political system, armed with statutory charter arguments and determinations, and with the benefit of accumulated professional charter expertise for the purpose of resolving human rights differences, is not properly considered.

**Constructing a mythology of bad examples and effects of rights charters**

Opposition to rights charters can also be articulated by the mention of extreme, incomplete and distorting examples of the legal and practical implications of rights charters. These examples are sometimes labeled as the creation of urban myths, intended to discredit rights charters by linking them with ridiculous outcomes.99

Characteristic of these examples are a distorting incompleteness of factual information, a focus upon simple, sensationalist material, and a lack of

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99 See Carr, above n 32, 21: Carr mentions examples involving litigation concerning 'naked strollers, vegetarian menus and new ways to avoid losing your licence for drink driving'; Richard Ackland 'Horror stories unfairly bedevil charter of rights' *Sydney Morning Herald* 9 May 2008 citing Bob Carr's assertion that a right to property would frustrate environmental initiatives; David Marr 'Labor mimics US conservative spiel' *Sydney Morning Herald* 17 April 2008; Hannes Schoombee 'The WA Human Rights Bill: for Although Kentucky Fried Chicken would not be guaranteed' December 2007 *Brief* 35, 37; Byrnes, Charlesworth and McKinnon, above n 20, 68 citing urban myth examples from the UK Department of Constitutional Affairs (UK) *Review of the Implementation of the Human Rights Act* (2006), 4 and observing that 'These myths can exert a powerful influence on the bill of rights debate, and present a real challenge for proponents of rights charters'.

follow up of subsequent events showing the cited example with proper context, explanation and remediation.\textsuperscript{100} The apparent point is simply to inflict damage upon the argument for rights charters, by demonstrating an outrageous claimed outcome as factually correct and a probable consequence of the introduction of a rights charter. If such an outcome does occur, the capacity for it to be corrected on appeal to a higher court or by legislative amendment is omitted or downplayed. The simple and sensationalist qualities of this mode of opposition are media friendly, creating real difficulties for proponents of statutory charters to rebut these myths in a timely and effective manner.\textsuperscript{101}

**Rights charters advantaging unpopular minorities and professional elites, whilst promoting a culture of litigation**

Rights charters are also seen as an instrument synonymous with advancing the interests of unpopular minorities, or exaggerating the influence of such minorities in the political process.\textsuperscript{102} Advocacy of rights charters is implicitly discredited by associations with such unpopular minorities. This aspect extends to claimed effects on the legal system which will advance the interests of criminals.\textsuperscript{103} The inclusion of criminality provides an additional imputation of illegal and threatening behaviour as flowing from the introduction of rights charters.

It is difficult to see how this objection can be sustained in the context of specific concerns about the risks of pure majoritarian democracy\textsuperscript{104} and

\textsuperscript{100} Four examples of claimed excesses arising from the application of rights charters (two cited by James Allan, two cited by Bob Carr) purporting ‘to demonstrate the dangers of a rampant judiciary operating under a Charter of Rights’, are highlighted by McGarrity, who discovers a range of factual and legal errors in these examples used to oppose a charter of rights: Nicola McGarrity ‘Errors In The Anti-Charter Campaign The need for public education about human rights’ (2009) 34 Alternative Law Journal 11, 12, and subsequent analysis of the four cases at 12-14.

\textsuperscript{101} A factual rebuttal of sensationalist reports usually will fail to attract the spontaneous, focused attention that the original report did. For one attempt to rebut a series of urban myths relating to statutory charters, see Geoffrey Robertson *The Statute of Liberty* (2009), 163-170.

\textsuperscript{102} See Pell, above n 32, 25, speaking of the ‘disproportionate influence that organized minorities can have over the political process’.

\textsuperscript{103} See Allan ‘Bills of Rights As Centralising Instruments’, above n 31, 188: ‘A justiciable bill of rights inevitably has some influence on how criminals are required to be investigated, processed and tried...’; Janet Albrechtsen ‘Crusaders for rights charter rely on lies’ The Australian 8 April 2009, 12 and Banks, above n 23, 17, with reference to the potential influence of statutory charters on laws to outlaw bikie gangs; Lynch, above n 92, stating that ‘opponents of charters regularly portray them as the refuge of criminals and ratbags’.

\textsuperscript{104} Pell contests the application of majoritarian democracy in Australia: ‘Since the late 1960s talk of ‘the tyranny of the majority’ has become fanciful in Australia. Social and legal reform during this time has been driven overwhelmingly by minority agendas.
the need to ensure protections for vulnerable (non criminal) minorities under such a system. Similarly, the criticisms of unfair or disproportionate advantage being created for minority groups through rights charters confuses differences of opinion over discrete political issues between critics and minorities, with the outcomes of interest group pluralism.

That pluralism, including political advocacy of unpopular minorities, is an inherent part of modern democratic systems, at least in those broader forms of participatory democracy. The commentary by critics about disproportionate influence of such minority interests is really a larger statement about participation in democratic processes generally. If such groups have no rights or limited rights to participate in democratic processes to advance their own interests, then which groups are to be so enfranchised? In particular, opposition framed in these terms to rights charters is indicative of the type of democracy preferred - a narrow, formalist conception of democracy, with elected representatives, empowered with a mandate, under no obligation or practice to communicate with electors between periodic elections.

Building upon the idea of rights charters advantaging unpopular groups and minorities, opposition to statutory charters is also levied by identifying their introduction with so-called "elite", unpopular professional groups, in particular lawyers and legal academics. This is a populist stratagem intended to disconnect community support from a legal reform measure potentially providing both non-litigious and litigious advantages to the general community. It appropriates the language and nuances of egalitarian democracy to that opposition.

The argument advanced is that such professional groups supporting statutory charters do so inevitably out of unabashed self-interest - as they will create a litigation culture for the resolution of human rights issues, or

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105 See, for example, Pell, above n 32, 28: ‘the elitism of privileged reformers – not all of whom are lawyers’; Hatzistergos, above n 32, 105: ‘professional lobbyists and law school elites’; Craven, above n 27, 33, 34; Allan, ‘Human Rights Can We Afford To Leave Them To The Judges’, above n 28, 4: ‘self-styled human rights advocates-lawyers, legal academics, NGO officials, judges, what have you’ and ‘committees of ex-lawyers’; Allan, ‘The Victorian Charter of Human Rights and Responsibilities: Exegesis and Criticism’, above n 50, 921: ‘an increased role for lawyers and judges’; Campbell, above n 27, 58 ‘the statistically significant higher preponderance of bills of rights advocates within law schools, particularly amongst constitutional and international lawyers…it is perhaps too easy for legal academics to overemphasise the efficacy and importance of legal solutions to political problems’.

Even the election of seriously conservative governments with large majority mandates has done little more than slow this trend down here and there’: Pell, above n 32, 25.
otherwise increase legal employment opportunities, selfishly advancing their own financial and occupational interests. This approach is also nihilistic, in that it assumes that occupational groups with particular expertise to contribute to public debate and legal reform have no element of altruism or public mindedness in their motives, nor are they disposed to making any objectively beneficial contributions on human rights matters.

It is difficult to discern what separates this aspect of public policy — a statutory charter of rights — from other aspects of public policy such as health, education, transport, immigration or other topics — in terms of deprecating contributions to public debate on such topics from those with particular professional expertise. The underlying message of statutory charter opponents in decrying the motives of statutory charter proponents is twofold, namely that the public debate needs to be more circumscribed, and the value of those contributions treated sceptically due to the alleged self interest involved. This again exposes that the democratic and political model preferred by charter opponents for the resolution of human rights differences leans towards a narrow, formalist democratic system.

**Rights charters synonymous with nations that are notorious human rights offenders**

Critics also seek to discredit rights charters by mentioning various examples of the egregious breaches of human rights in nations possessing formal constitutional protections of rights. This technique is used to highlight the claim that rights charters are ineffective in protecting human rights. It is also suggestive that the adoption of a rights charter may induce, in a presently stable democratic system, a destabilizing array of human rights abuses of the type associated with the notoriously offending states.

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106 See Pell, above n 28, 24: ‘It is instructive on this point to note that Zimbabwe has a constitutional bill of rights’; Hatzistergos, above n 32, 110 ‘Nazi Germany had what purported to be an excellent Bill of Rights that provided for a “dignified existence for all people”, as did the Soviet Union under Joseph Stalin. Since 1973 Pakistan has had constitutionally entrenched fundamental rights.’; see also Shadow Attorney General George Brandis cited in Glen Milne ‘Libs aim to wedge Labor on rights bill’ *The Australian* 11 August 2008: ‘the Nazi bill of rights (which guaranteed the “dignified existence of all people”), the Soviet constitution, and the bill of rights of modern Zimbabwe’ and ‘Brandis makes case against bill of rights’ above n 26, 8.

107 As per footnote 106 above, common contemporary examples include the abuse of rights in bills of rights states by the Robert Mugabe regime in Zimbabwe and the Pervez Musharaf regime in Pakistan, whilst common historical examples include the Nazi regime in Germany and the Stalin regime in the USSR.
No differentiation is made between contemporary Australian political and economic circumstances and the often dire political, historical and economic circumstances of the comparator nations, against which the rights charter comparison is being made. Attention is similarly not drawn to the fact that the content of rights charters, frequently derived from international human rights instruments, is used to highlight the gap with international human rights standards and to pursue international responses under the United Nations human rights system.

Founded in a claim of illusion and worthlessness of rights charters, this argument again assumes that statutory charters are advanced as a comprehensive solution to the resolution of human rights claims. This focus upon human rights abuses in states with a rights charter distracts attention from successes in common law states with a statutory charter of rights, which are more traditional comparators with Australia. What can be learnt from the statutory charter experience from those more comparable jurisdictions in promoting a human rights culture, including increased education and tolerance, is necessarily excluded from this argument.

**Rights charters claimed to threaten existing, long standing rights and to freeze rights in time**

A not infrequent, but spurious argument raised by opponents of rights charters is that the specific nomination and inclusion of rights in a charter document by implication or definition excludes all contrary or other pre-existing rights from a variety of other legal sources. This argument relies upon a fear of supplanting, rather than supplementing, human rights mechanisms by the introduction of a rights charter.

This approach misleadingly exaggerates the scope of reform involved in the adoption of a rights charter, by incorrectly implying that one, much

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108 Such as the *Universal Declaration of Human Rights*, the *International Covenant of Civil and Political Rights* and the *International Covenant on Economic, Cultural and Social Rights*.

109 Such as pursuing the matter through the procedures of the Charter based institutions, such as the Office of the High Commissioner for Human Rights and the Human Rights Council; and through the treaty based institutions where the relevant state is a party to a human rights convention and its states party reporting and individual communications procedures, such as are available under the *International Covenant on Civil and Political Rights*, the *Convention on the Elimination of Racial Discrimination*, the *Convention Against Torture*, the *Convention on the Elimination of Discrimination Against Women* and the *Convention on the Rights of Persons with Disabilities*.

110 See Shadow Attorney-General George Brandis cited in Glenn Milne above n 106: 'If we are to enumerate those abstract rights which we value today as the most popular or favourable, then what of the rights that exist but are omitted'.
criticised, system for the protection of human rights is to supplant tried and proven mechanisms, such as statutes and common law interpretative presumptions. Simply put, human rights charters and instruments commonly and comprehensively include a clause that existing rights outside the charter or instrument are preserved. 111

A variation upon this claim of exclusion of existing rights is the further claim by critics that charter protection of rights freezes rights in time, 112 producing a potential rigid set of rights which will be unacceptable to future generations.

It is difficult to see how this argument can be sustained in relation to a statutory charter, which allows amendment in the normal legislative manner. This argument amounts to a real opposition, first of all, to have any rights enumerated in a formal document and furthermore, to have those rights judicially articulated and substantiated over time – with such judicial contributions then having to be responded to in any legislative process used to re-formulate those statutory rights. This appears more to be an objection to the addition of a further, potentially complicating, factor (a judicial interpretation or articulation of the right acting as a check and balance) in the mixture of political considerations as to whether to amend or qualify the charter right or add new rights at some future time. Ironically, the argument fails to engage with the proposition that the methodology of rights protection favoured by opponents of rights

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111 See Article 5 (2) of the International Covenant on Civil and Political Rights ‘There shall be no restriction upon or derogation from any of the fundamental human rights recognised or existing in any State Party to the present Covenant pursuant to law, conventions, regulations or custom on the pretext that the present Covenant does not recognise such rights or that it recognizes them to a lesser extent’. See also s 5 of the Charter of Human Rights and Responsibilities Act 2006 (Vic): ‘A right or freedom not included in this Charter that arises or is recognised under any other law (including international law, the common law, the Constitution of the Commonwealth and a law of the Commonwealth) must not be taken to be abrogated or limited only because the right or freedom is not included in this Charter or is only partly excluded’; s 7 of the Human Rights Act 2004 (ACT): ‘This Act is not exhaustive of the rights an individual may have under domestic or international law’; s 11 of the Human Rights Act 1998 (UK) ‘A person’s reliance on a Convention right does not restrict – (a) any other right or freedom conferred on him by or under any law having effect in any part of the United Kingdom; or (b) his right to make any claim or bring any proceedings which he could make or bring apart from sections 7 to 9’ and New Zealand Bill of Rights Act 1990 (NZ) s 28: ‘An existing right or freedom shall not be held to be abrogated or restricted by reason only that the right or freedom is not included in this Bill of Rights or is included only in part’.

112 Carr, above n 32, 20 claiming that non-entrenched rights, for political reasons, are almost impossible to amend; Hatzistergos, above n 32, 106 claiming that the reality of statutory charters is that rights become ‘semi-rigid, a process akin to constitutionalisation’.
charters, is itself arguably frozen in time, is no longer able by itself to satisfactorily address modern human rights issues.

**Instituting human responsibilities, not chartering human rights**

This argument invokes a claimed lack of balance in the construction of rights charters – in that these charters provide a new mechanism for pursuing individual human rights claims, with no balancing component ensuring recognition of the responsibilities owed to the community or to those with competing human rights claims. This aspect may also be an extrapolation of the argument about the disproportionate advancing by statutory charters of the interests of unpopular minority groups, as previously discussed.114

The history of claims for countervailing responsibilities in rights charters is somewhat opaque. The inclusion of the language and content of responsibilities was raised by only a tiny minority of submissions to the Human Rights Consultation Committee in the development of the Victorian Charter of Rights and Responsibilities. Responsibilities as a counterbalance or alternative perspective on the statement and practice of human rights have been a controversial issue in international forums, often associated with the development of rights charters in more communally orientated cultures, such as in Africa and Asia.

Experience also suggests that the concept of responsibilities – frequently in a community rights context – has been invoked by regimes of an authoritarian or totalitarian character, contrary to Western orientation

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113 See Pell, above n 32, 25.
114 See the discussion above under the heading ‘Rights charters advantaging unpopular minorities and professional elites, and promoting a litigation culture’, above.
115 Rights Responsibilities and Respect, above n 20, 30, with “Approximately 1 Per cent of all submissions said that a Charter should specify a statement of enforceable responsibilities”.
116 The concept of responsibilities was eventually included in the Preamble to the Charter of Human Rights and Responsibilities Act 2006 (Vic): ‘human rights come with responsibilities and must be exercised in a way that respects the human rights of others’.
117 See the African Charter on Human and Peoples Rights Chapter II- Duties, Articles 27-29.
towards the rights of individuals. The inclusion of list of enforceable or interpretive human responsibilities in a statutory charter would create a risk of the reduction of rights by judicial interpretation. Ironically, this is the very type of adverse unintended consequence of giving judges determinative power over policy questions which elsewhere is of concern to rights charter opponents. This risk, and the authoritarian potentiality of legislated responsibilities, appears to have escaped the attention of rights charter opponents.

Invoking patriotism in opposing rights charters and associating cultural cringe with the support of rights charters

Commentators on rights charters have pointed out that Australia is now one of the few democracies without a formal document protecting human rights.\(^{119}\) That point has been responded to by exceptionalist arguments of human rights charter critics, with those responses making a virtue of such omission.\(^ {120}\) In this vein, claims have also been made that advocacy of rights charters represents a form of cultural cringe.\(^ {121}\)

The issue of the isolation of the development of Australian jurisprudence from the influence of international human rights law developed through rights charters in other common law jurisdictions is not sufficiently addressed. Similarly, the capacity to be denied to Australian judges to contribute to and influence the development of international human rights jurisprudence through the interpretation of charter provisions implementing or replicating articles of international human rights conventions\(^ {122}\) is not sufficiently considered.

\(^ {119}\) See Jeffrey Goldsworthy ‘Introduction’ in Campbell, Goldsworthy and Stone (eds), above n 27, 1 and Brian Galligan and F.L. Morton ‘Australian Exceptionalism: Rights Protection Without a Bill Of Rights’ in Campbell, Goldsworthy and Stone (eds), above n 27, 17.

\(^ {120}\) See Hatzistergos, above n 32, 108-109; Brandis cited in Milne, above n 106, responding to the argument that other Western nations have bills of rights, why not Australia [that] ‘Australia does not have a bill of rights because it has never felt the need for one. That fact alone demonstrates the strength of our protection of rights and liberties, not its weakness’; Allan, ‘Oh That I Were Made Judge In The Land’, above n 31, 575-576; Allan and Cullen, above n 76, 171.

\(^ {121}\) Williams, above n 32, 6: ‘It is true that the UK, New Zealand and Canada each have their own particular version of a Bill of Rights... It is a bizarre kind of cultural cringe to say that Australia should have a bill of rights simply because our common law cousins have them’.

\(^ {122}\) Indeed, Hatzistergos dismisses this need, claiming (in comparison to the relationship of the British courts to the European Court of Human Rights) that ‘there is no comparable international court to which Australian laws are tied and therefore no need for a similar human rights instrument to keep Australian courts in control of our laws’.
It is noteworthy that this particular objection to a human rights charter emerged strongly alongside the Howard government’s review of interactions with the United Nations human rights treaty system, in response to the activities of certain United Nations treaty committees. In this context, Australia’s state party reporting obligations and individual communications access to the United Nations Human Rights Committee under the *International Covenant on Civil and Political Rights* and the First Optional Protocol are important, as the *ICCPR* articles are incorporated into many statutory charters. The rhetoric of present objections to a human rights charter is very similar – accordingly, criticism of the Howard government’s relationship with the United Nations human rights treaty system provides some reference points in understanding this point of opposition.

Related to this cultural cringe argument are two other distinctive arguments similarly framed to contrast with the existing Australian legal system. These are adverse examples sourced from common law jurisdictions with human rights charters, and the claimed deficiencies of the international human rights jurisprudence and institutions.

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Hatzistergos, above n 32, 110. This narrow focus excludes the potentially influential role of the various United Nations human rights instruments to which Australia is a party, their individual communication mechanisms, General Comments on articles and States Parties reporting mechanisms, let alone the internationally derived human rights jurisprudence of the premier courts of other common law nations.


Opponents of rights charters also use selected examples from overseas jurisprudence to discredit characteristics of statutory charters. These examples are particularly used to contest differences in effects between different models of human rights protection based upon judicial interpretation and review, namely statutory charters and constitutional charters.

Two observations may be made. The first is that the examples are used negatively, to deter the adoption of a rights charter, rather than constructively, to learn of the experience from interpretation under a charter, so as to construct mechanisms or make amendments to prevent a re-occurrence of the claimed improper judicial interpretation under that charter. Frequently, no further concrete alternative proposals to enhance human rights protections are then advanced. Instead, opposition is framed firmly as an endorsement of the status quo, of leaving the political processes to produce any new forms of human rights protection or to resolve any contestation of human rights issues.

The second observation is that the overseas jurisprudence is cited as a warning against the adoption of statutory charters. This is instead of advancing an opportunity for the Australian judiciary to participate in developing and articulating human rights provisions based on the articles of international human rights conventions. That opportunity would involve a constructive judicial engagement rather than isolation from international human rights development in the domestic jurisdictions of other common law states. Likewise, the risk of Australian common law becoming increasingly out of step with developments in other common law jurisdictions, rendering case law from those jurisdictions increasingly

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125 On this point see Allan ‘Paying For The Comfort of Dogma’, above n 33, 68-69 (on New Zealand cases under the New Zealand Bill of Rights Act); Allan ‘Bills of Rights As Centralising Instruments’, above n 31, 184-186 (on UK cases under the Human Rights Act 1998 (UK) and cases under the New Zealand Bill of Rights Act); Allan ‘Human Rights – Can We Afford To Leave Them To The Judges?’, above n 28, 7-9 on cases under the New Zealand Bill of Rights Act, the Human Rights Act 1998 (UK) and the Canadian Charter of Rights and Freedoms; Carr, above n 32, 20 on litigation under the New Zealand Bill of Rights Act and the Canadian Charter of Rights and Freedoms.

difficult to be considered for precedent and interpretive purposes, is a
problem that rights charter critics shy away from addressing.

The shock of the new – constraining the influence of international human rights law in rights charters

Opposition to rights charters can also be seen as grounded in unfamiliarity with, and the need to engage international human rights law and international law for interpretive purposes. Disparagement of the mechanisms and forums of international human rights law is a method of undermining the credibility of rights charters and creating doubts about why such jurisprudence should be afforded a legal basis for application in Australia.

Statutory charters derive the content of their articles from international human rights instruments, which have in turn generated significant, specialist jurisprudence at both international and national levels. It is an emergent area of knowledge which generations educated under earlier law school curricula are largely unfamiliar with. That familiarity can only be acquired by study, practice, or subsequent postgraduate or professional education. To acquire an adequate familiarity with international law and international human rights law is a demanding task, one competing with a range of other busy work demands in an academic or legal professional environment. It is something that might well be considered burdensome and irritating for some, but not all, rights charter opponents.

Opposition to statutory charters can be expressed through attacking the institutions and jurisprudence of international law. From an academic career perspective, recognition and progression, as well as citation, can be leveraged by published articles and opinion editorial pieces, cultivating the mantle of the informed expert, warning the community of what is not considered to be in its interests.


The risk of prompting broader reform: the standing of constitutional arguments against rights charters

Some significant constitutional arguments, relating to a perceived unconstitutionality of judicial declarations of incompatibility of legislation with Chapter III judicial power under the Commonwealth Constitution, have been raised by various commentators with specific reference to any proposed adoption of an Australian statutory charter of rights, including recent commentary by former High Court justice Michael McHugh. Declarations of incompatibility are characteristic, but not essential, features of statutory charters of rights. The inclusion of a power within a Commonwealth statutory charter of rights for a court to declare a particular legislative provision incompatible (but still legislatively binding) with that charter may render the charter vulnerable to a constitutional challenge as offending Chapter III of the Commonwealth Constitution, which separates Chapter III judicial power from legislative and executive power under the Commonwealth Constitution. In response to these constitutional issues, a revised model to ensure constitutional validity has been proposed by the Australian Human Rights Commission, following the convening of a roundtable meeting of constitutional experts.


Interestingly, the constitutional arguments have rarely been raised by persons philosophically opposed to rights charters, that is, those who have criticized statutory charters on the range of grounds canvassed above. This fact is confirmatory of the dominance of policy orientated and philosophically grounded approaches by charter opponents, pre-occupied with identifying claimed adverse effects of increasing judicial involvement in human rights questions. It also suggests a preference for charter opponents to communicate simple claims in the public arena, over the necessarily detailed, clinical exposition of constitutional questions.

The reason why constitutional issues have not really been raised until much later in the debate by charter opponents is open to conjecture. Constitutional arguments are less emotive, and fuel less populist driven opposition. They demand technical legal analysis and are ultimately capable of remediation by adapting the statutory rights charter model to accommodate the constitutional issues. Suitable drafting changes are able to forestall post-enactment challenges to the constitutional validity. These factors may also explain why statutory charter critics initially did not raise, nor subsequently have given much prominence to some constitutional arguments based around a separation of powers, in their opposition to statutory charters.

A further risk is that the highlighting of these constitutional issues might broaden debate about an entrenched constitutional bill of rights enacted through a section 128 Commonwealth Constitution referendum, or even wider constitutional reform. Alternatively, it could focus attention on the plausible alternative of enacting a Commonwealth statutory interpretive charter of rights by domestically implementing the International Covenant on Civil and Political Rights supported by the s.51 (xxix) external affairs power in the Commonwealth Constitution. Such

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132 One notable exception is Helen Irving: see ‘Off the Charter’ Australian Literary Review 1 April 2009, 10-11.
133 Of the type canvassed by the Australian Human Rights Commission, above n 131.
134 This would be an expansion by the Commonwealth of the present more limited domestic implementation of international human rights conventions in the form of the Racial Discrimination Act 1975 (Cth) (Convention on the Elimination of Racial Discrimination, the Sex Discrimination Act 1984 (Cth) (Convention on the Elimination of Discrimination Against Women) and the Disability Discrimination Act 1992 (Cth) (Convention on The Rights Of Persons with Disabilities). A Commonwealth statutory charter relying upon domestic implementation of the articles of the International
broader legislative or constitutional developments would be unwelcome to the many rights charter critics of a conservative political disposition, whilst the invocation of the s.51 (xxxix) external affairs power would raise states rights issues.

Conclusion

Opposition to rights charters in Australian in recent times has been based on a variety of arguments, many of which are ultimately grounded in comparative claims around the democratic legitimacy of the legislative and judicial functions. Careful scrutiny of these oppositional claims reveals various weaknesses, distortions and exaggerations in the arguments advanced against rights charters. One purpose of this article has been to draw out such characteristics, particularly as opposition to rights charters is conveyed with a high degree of certainty, reflected in the repetitive and conclusive nature of the arguments made. Such arguments appear directed to a collective erosion of confidence in the human rights improving capacity of rights charters, as well as to deter, by a process of slow attrition, further introduction of such charters, particularly at Commonwealth level.

The emphasis by rights charter opponents on the foundational democratic claim that differences of opinion in human rights matters are best and legitimately settled through the political process, has meant that several significant contrary or competing aspects more supportive of rights charters have been insufficiently addressed. This consequence has been arrived at partly because charter opponents have not sufficiently adapted and nuanced arguments against constitutional bills of rights to the different content, judicial role and operating circumstances of statutory bills of rights. This aspect is notable for its persistence and repetition, as well as the assertion that for practical binding authority and an aggrandized judicial role, no difference exists between constitutional bills and statutory charters. The latter are then labeled as quasi-constitutional instruments.

A second somewhat misguided approach, traceable to rights charter opponents identifying their opposition with enhancing the judicial function, is the very strong emphasis upon the litigation associated aspects of statutory charters, rather than the extra-litigious reformative impact that rights charters may generate. This emphasis enables the

Covenant of Civil and Political Rights under the s.51(xxix) External affairs power in the Commonwealth Constitution would potentially create a s.109 Commonwealth Constitution inconsistency with the laws of the states, in which case the Commonwealth law would prevail to the extent of the inconsistency.
democratic legitimacy argument between parliamentary and judicial branches to dominate, overshadowing deeper analysis of how statutory charters can work to strengthen parliamentary processes and accountability and actually reinforce parliamentary sovereignty. It means that criticism of rights charters fails to provide a starting point for refinement and improvement, instead leading to an outright rejection of their proposed introduction. A more constructive approach might also include modifications to proposed statutory charters to emphasise the centrality of the parliamentary law making function,\(^{135}\) to ensure that no new or separate causes of action can arise based on charter rights,\(^{136}\) and to ensure that litigation supported by a charter provision can only be invoked after preliminary, non litigious stages have been completed.\(^{137}\)

A corollary of this emphasis upon the litigious aspects of rights charters is that the existing performance of the preferred parliamentary model for the resolution of differences over human rights – and indeed their protection – is assumed to be largely satisfactory. It further assumes that the existing non charter arrangements for the protection of human rights are also satisfactory. Three important points emerge from this aspect. First, the oppositional emphasis upon litigation provides strong, indirect support for the status quo of parliamentary arrangements. That is, it underpins the

\(^{135}\) Such as through Parliamentary human rights committees to engage in pre-legislative scrutiny, post declaration of incompatibility examination, and periodic reviews of the rights charter mandated by the charter itself. For pre-legislative scrutiny see the role of the Scrutiny of Acts and Regulations Committee under s 30 of the Charter of Rights and Responsibilities Act 2006 (Vic) and the role of the relevant standing committee of the ACT Legislative Assembly under s 38 of the Human Rights Act 2004 (ACT).

\(^{136}\) See Charter of Human Rights and Responsibilities Act 2006 (Vic) s.39(1) –(4) which preserves existing causes of action whilst ensuring that a person is not entitled to be awarded any damages because of a breach of the Charter; see also Human Rights Act 2004 (ACT) s 40C allowing a person claiming that a public authority has acted in contravention of the obligation to act consistently with human rights to commence a proceeding against the public authority or to rely on rights under the Human Rights Act in other legal proceedings. In each instance, the Supreme Court may grant the relief it considers appropriate except damages: s 40C(4) of the Human Rights Act 2004 (ACT).

\(^{137}\) See A WA Human Rights Act Report Of the Consultation Committee For A Proposed WA Human Rights Act, above n 22, (Recommendation 61) which recommended a multi-layered, sequential approach for responding to breaches of human rights being (a) internal processes within government agencies and contractors for trying to resolve human rights complaints; (b) a conciliation process run by an independent agency; and (c) limited rights to take legal action against government agencies in court and tribunals for a breach of human rights. See also Draft Bill to A WA Human Rights Act Report of the Consultation Committee For A Proposed WA Human Rights Act s 29 (2): ‘A breach of a human right does not create any enforceable right or any cause of action, except to the extent provided by section 41’. Section 41(2) states that ‘A person is not entitled to damages or any other pecuniary remedy in respect of any injury or loss suffered as a result of an act or decision of a government agency that is unlawful because of section 40’.
view that there is adequate existing protection of human rights, as no further avenue to aid the litigation of those rights should be introduced. Second, it also means that attention is largely focused on institutional parliamentary and judicial benefits and detriments, meaning that the question of effective practical realization and protection of human rights is subsumed under the primary question of institutional roles, boundaries and proprieties. Third, by defining the preferred model narrowly, questions such as the human rights performance of the bureaucracy, how informed is human rights discourse in the community and the extent of community human rights education, all factors likely to be prompted by a statutory charter, are excluded from the debate. By claiming the mantel of popular democratic support in opposition to rights charters, practical development of measures to facilitate more direct democratic participation in the resolution of human rights questions is curtailed.

From this multi-faceted criticism of rights charters and an assertion of the political process as the preferred method for resolving rights claims, it follows that many opponents of rights charters fail to advocate or develop adequate alternatives and reforms to strengthen the realization and enjoyment of human rights, within that preferred political model. It is this aspect which reveals the effective commitment of many rights charter opponents to narrow conceptions of democracy, in the place of instituting greater participation both in the resolution of competing claims about human rights and in opportunities to realize and enjoy such rights. This is a politically conservative approach, but such affiliation remains undeclared by many rights charter opponents.

The point can be more generally made that opposition to rights charters is often put simplistically in variations of the parliamentary – judicial contest for the resolution of rights matters, without assessing the preconditions essential for substantive and fair participation in that political contest over human rights. This omission is linked to the previously discussed deficiency to develop constructive, parliamentary based alternatives. Simplicity can be found in the apparent assumption by opponents that rights charters are being advanced as a conclusive, determinative reform instrument, rather than a supplementary and remedial measure to make existing processes and institutions function more effectively in the protection and promotion of human rights. Simplicity and a preference for the status quo are further found in that part of objection to rights charters grounded in the need to engage international human rights law, including comparative jurisprudence dealing with such law, in the interpretation of charter articles. The consequences of that proposition, namely to increasingly disconnect the
development of large segments of Australian law from the influences of international human rights law, is strikingly isolationist in terms of jurisprudential development.

It is not unreasonable that many rights charter opponents should respond with greater dexterity and subtlety to the claim that statutory rights charters be further introduced and developed in Australia, particularly if that proposal is based on cautious and reviewable principles, engaging both positive and negative aspects of charter experience within Australia and overseas. It has been too easy to lose sight of the claimed agreement amongst opponents and proponents that human rights are important and that disagreement is really about methods of resolution of competing claims and protection of rights, rather than the significance and substance of those rights.

If the substance of opposition to rights charters is grounded in a fear of enlarging democratic participation and influence in policy making and legislative processes relating to human rights, then that is a legitimate view, but it should be candidly stated. This would clarify the terms of the disagreement and make sharper whether any accommodation of a statutory charter, subject to pre-conditions responding to parliamentary sovereignty issues, is possible. Alternatively, it may re-orientate debate clearly along methodological lines to provide real, non statutory charter alternatives with the objective of strengthening human rights, an objective always said to be shared between both sides.