Chapter One

The Brennan Committee[1]

Hon Christian Porter, MLA[2]

With the commencement of the National Human Rights Consultation chaired by Frank Brennan the debate regarding rights documents in Australia is set for a resurgence.

The content of the arguments forwarded by proponents and opponents of rights documents in Australia is relatively well known. As the debate has historically ebbed and flowed, however, it is apparent that, depending on the circumstances which bring the debate to prominence at any given point in time, the terms and focus of the argument advocating the necessity of such documents shifts in important ways. Indeed, one of the peculiar features of modern advocacy in favour of declaratory rights documents, which has seen them instituted in Victoria[3] and the Australian Capital Territory,[4] is the argument that they do not do terribly much.

Newly central to the argument in favour of declaratory rights documents is the assertion that the merely declaratory nature of rights contained in these documents exhibits the desirable quality of not, in any real or meaningful way, diminishing parliamentary sovereignty. This assertion entails an important advantage for those arguing for rights documents, in that it allows proponents to dismiss perhaps the most powerful argument mounted against such documents; that is, the argument that, by facilitating judicial decision making in respect of issues which are inherently issues of public policy, these documents exhibit strong anti-democratic features. Of course, one of the rhetorical *dis*advantages of the "declarations do not affect parliamentary sovereignty" argument is that it makes mounting the case in favour of rights documents a little more difficult, or at least, considerably more obscure. Arguing in favour of legislation by a suggestion that it deliberately has no efficacy in terms of practical legislative outcomes is, at best, intellectually awkward.

That is not to say, however, that proponents of declaratory rights documents in Australia have been in any way dissuaded from this new task. To circumvent the most powerful argument against a Bill of Rights, proponents have found it necessary to advocate a form of rights document where it can at least be asserted that the document will lack any legislative efficacy. As a result, there appears a tortuous logical gap in the argument for declaratory rights documents. Notably, the present form of the argument in favour of such documents begs the obvious question as to why rights legislation should be instituted at all if it will be of no practical effect? This gap has been papered over by reference to the "soft" and unquantifiable effect of rights documents. This argument claims that, while declaratory rights documents have no power of legislative override which could be characterised by their opponents as diminishing parliamentary sovereignty, they do nevertheless have important educative and cultural effects.

The purpose of this paper is not to restate what are well known arguments for and against rights documents, or to evaluate the relative merits of judicial versus parliamentary decision making. It is doubtless that these arguments and others have been put exhaustively before the Brennan Committee. Rather, this paper seeks to raise two matters which pertain to the nature and conduct of the Brennan Committee's inquiry. They are the dual necessities that the Brennan Committee conduct its inquiry in a realistic and honest manner. This is not to presume that the Committee's inquiry is intended to be anything other than fair-minded. But rather, it reflects a sense that in the repetitious presentation before it of the political arguments for and against the Bill, and in the swim

of an almost endless sea of interest groups who see the potential Bill of Rights as a means to achieve some desired ends, the real limitations of what might be achieved by such a Bill, and what it may actually do in practice, particularly in terms of parliamentary sovereignty, could tend to become obscure even to the Committee itself.

Accordingly, this analysis will seek in Part I to provide some examination of the critical claims that have emerged in the modern Australian rights debate; most notably, that merely declaratory rights documents do not have any, or any substantial, effect on parliamentary sovereignty. The dimensions of this claim will then be tested in Part II by an assessment of some examples relevant to the effect of declaratory bills on parliamentary sovereignty in the context of criminal law.

Part I

Exhorting the Brennan Committee to undertake its consultation in a realistic manner is, in part, an observation that the now popular claim that some great advantage lies in an unmeasurable and amorphous educative power of declaratory rights documents to herald a new and previously lacking governmental culture of respect for rights in Australia, is a claim which requires some scrutiny. Perhaps more fundamentally, a realistic inquiry of the potential benefits of a declaratory bill will require some recognition of the legalist utopianism that tends to fuel many advocates' support of such documents.

Much of the enthusiastic support for a Bill of Rights emanates from segments of the Australian legal profession. This enthusiasm in turn finds its genesis in an unrealistic faith in the imagined infinite powers of legal reasoning. The modern legal philosophy of Rawls and Dworkin proceeds from an assumption that, in a well ordered Constitution under which exhaustive legal consideration can be applied to "apparent" conflicts between rights, there will no longer be agonistic choices between different formulations of conflicting rights. But rather, that there is an infinite capacity of legal reasoning to ensure an optimum mix of rights, rationally agreeable to all citizens.

Too many hubristic lawyers now see all the rights that we value in modern Australian society as pieces of a grand jigsaw puzzle, where the endless application of superior legal reasoning under some constitutional formulation of these rights can do what no society has ever done, which is to make all the pieces fit neatly together in such a way that all rational minds must agree the result is optimum.

In the make-believe world of legal philosophy we do not have to choose which of our liberties we value over the other, or which liberties we will ration to allow others to expand. However, for most purposes, and particularly the purposes of committee inquiry, it is better to be realistic. Rights do not naturally dovetail. Rather, they make competing demands, and legal reasoning cannot change that. If this is accepted, then the question becomes whether it is appropriately and fundamentally the task of government or courts to craft some or other mix that is generally acceptable to its citizens, but which is likely to require constant re-evaluation and be subject to change over time.

If the Brennan Committee accepts the idea that as a society we cannot have all our recognised rights simultaneously, without choice between different mixes and practical manifestations of these rights, then the Committee must confront the questions as to what a declaratory bill of rights would actually mean for the way in which Australian society presently chooses to order and prioritise conflicts between rights.

It is at this point that the Brennan Committee will be challenged to conduct its inquiry in an honest and accurate manner on the central question of what a declaratory bill of rights will actually mean for the future of parliamentary sovereignty in Australia.

As contended above, there appears to exist a substantive reluctance on the part of proponents of Australian rights documents to engage in the obvious and traditional public debate regarding how such documents are likely to affect the operation of Parliament. Examples of this reluctance are not difficult to find.

One such example appears in a recent response to an Op-Ed article by Professor James Allan, in which he argued against Australian rights documents. In responding to the case put by Allan, Stephen Keim, SC made the following comments:

> "I begin to part ways with Allan when he makes the argument that, in interpreting a bill of rights, the courts make unwise, irrational, unwarranted decisions that do not reflect the opinions of the Parliament or the majority of voters. I do not agree with this, although I accept that courts, like all our other democratic institutions, are fallible.
>
> "I strongly disagree with the next step in Allan's argument. He argues that a bill of rights takes too much power from the Parliament and gives it to the courts. This is despite the fact that, under the constitutionally entrenched *Charter of Rights and Freedoms* in Canada, the Parliament has the power to overrule any decision of the court. *Proposals being considered for an Australian* Human Rights Act *also leave the Australian Parliament's powers to legislate wholly unaffected*".[5] (emphasis added)

This passage demonstrates the typical form of what has emerged as a central tenet of the case for Australian rights documents. It reflects the now consistently advanced argument, notably that declaratory rights documents leave the legislative powers of Parliament "wholly unaffected".

This passage, and the general position it reflects, indicate that the contemporary generation of rights documents proponents are content to ignore any detailed or meaningful consideration of the potential effect that these documents may have on the existing dimension of parliamentary sovereignty in Australia. Plausibility is given to the "wholly unaffected" proposition by recourse to the accepted fact that declaratory or statutory rights documents are fundamentally distinct from constitutionally enshrined versions of documents with broadly similar content.

However, even if one were to accept this distinction, it does not necessarily follow that such documents leave parliamentary sovereignty wholly unaffected. The argument that declaratory documents are somehow nothing more than "enfeebled versions of their constitutionalised cousins",[6] correctly acknowledges that their declaratory nature means they do not possess the power of legislative override; but, importantly, fails to recognise the potential of such documents to substantially affect parliamentary sovereignty. This is because the argument gives no consideration to the interpretive clauses of declaratory documents and their potentially considerable effect.

Before examining the evidence that interpretive clauses of declaratory rights documents have a potentially substantive effect upon parliamentary sovereignty, it is instructive to note that it is not merely in the media that advocates of rights documents have exhibited the curious ambition to bypass the most fundamental and meaningful component of the rights debate which pertains to parliamentary sovereignty.

The recent Western Australian experience is testimony to the fact that, whether disingenuous or simply superficial, the restricted terms of the rights debate, as proponents appear content to have it proceed, is not limited to the domain of print media (where perhaps a more cursory or tactical advocacy might be more readily expected). Rather, it appears that the wilful blindness to the full effect of declaratory rights documents is a feature even of those forums which would readily be expected to present a balanced and non-partisan account of the arguments for and against declaratory rights documents.

The Western Australian draft *Human Rights Bill* 2007 is a prime example of a Bill produced by parts of a State government then clearly enthusiastic to adopt a rights document and, moreover, provides an example of a formal consultation process which attempted to formulate the debate in terms that would have it proceed in the absence of any meaningful consideration of the critical issue of the effect that such documents may have and are having on parliamentary sovereignty.

The *Report of the Consultation Committee for a Proposed WA Human Rights Act* ("the WA Report")[7] dealt with the issue of declaratory documents and their effect on parliamentary sovereignty in the following manner:

> "The Committee has given careful consideration to Professor Craven's arguments, which were reflected in a number of the submissions which were opposed to the Government's proposal; however, we find them to be at odds with the actual content of the draft Bill. Arguments about shifts in the balance of power in favour of the courts and the courts being able to 'overrule' Parliament are arguments that have been developed in relation to constitutional Bills of Rights, such as that in the United States. These arguments appear to have simply been transposed into 'dialogue' based Human Rights Acts, despite the fundamental differences between the two models. As noted by the Commonwealth Human Rights and Equal Opportunity Commission, one of the most frequently cited arguments against Human Rights Acts is that they transfer power to an unelected judiciary, however, in the context of a 'dialogue model' of human rights protection, this criticism is misconceived". (Submission 309)

> "It is not correct that the draft Bill would allow judges to "overrule" Parliament. The draft Bill would, if enacted, take the form of an ordinary Act which *would preserve the parliamentary sovereignty*. It would not prevent Parliament from enacting legislation that was incompatible with one or more human rights if it wished to do so. Moreover, it would not give people new substantive rights to challenge the validity of existing laws".

That the WA Report, which extended to in excess of 250 pages, should devote so little time to the issue of parliamentary sovereignty, and apparently exhibit wilful blindness to the international and domestic precedents which demonstrate a potentially substantial effect on the legislative authority of Parliament through declaratory rights documents, is unhelpful. That this deficiency should be exhibited in a formal report, funded by the taxpayer as a means of promoting balanced information on the type of document under consideration, is extraordinary.

What the WA Report omits from its analysis demonstrates the approach adopted by contemporary proponents of rights documents as over-simplistic, in that it fails to consider the potentially substantive effect of the declaratory species of rights documents on parliamentary sovereignty and, as will be examined in Part II, completely ignores recent judicial experience on the point.

To anticipate the conclusion of the first part of this analysis, the claim that sovereignty is left wholly unaffected by declaratory rights documents is either a deliberate technique of advocacy, whereby proponents of rights documents have developed a formulation of argument designed to sidestep what are undoubtedly the strongest features of the argument against such documents; or alternatively, it is an argument which is misconceived, because it ignores the growing body of legal evidence that declaratory rights documents have a substantive, rather than insignificant, effect on the legislative capabilities of Parliaments.

This substantive effect occurs by the operation of several mechanisms established by these documents' operative provisions, but chiefly among them is the power of the "interpretive" provisions contained in such documents.

The efficacy (or "potency") of any rights document ultimately depends on the force of its operative provisions.[8] The operative provisions have elsewhere been summarised as setting out: how the Court is to consider other statutes via the mechanisms available (the "interpretive" or "reading down" mechanism, the "declaration of incompatibility" mechanism and the "override" mechanism); the circumstances in which the Court is permitted to exercise its discretion with respect to the question of whether or not a limitation on rights is reasonable; to whom the Bill of Rights applies; and

the power of the Court to take action following a determined breach.[9] As noted above, the newer declaratory or statutory rights documents purport to be more palatable to notions of parliamentary sovereignty, because such documents do not empower courts to declare legislation unconstitutional and hence invalid (like the US *Bill of Rights* and other constitutionally entrenched versions).[10]

Rather, they empower the Court to do two broad things. Where it is not possible to interpret the subject legislation so as to achieve compatibility with the nominated right, there is a secondary function whereby the Court may issue a declaration that legislation is "inconsistent" or "incompatible" with the rights document. It is correct to concede that this does not invalidate the offending legislation nor render it inoperative, as would be the case under constitutional Bills of Rights. However, proponents go a step further in arguing that declaratory Bills of Rights, for the fact of their mere declaratory function, are (in the context of an importance being ascribed to parliamentary sovereignty) an effectively outcome-neutral and harmless academic exercise – or, as has been advanced more recently, a process which gives rise to a friendly "dialogue" between the Judiciary and the Parliament. In practice, it may well be the case that such declarations create an environment in which Parliaments may be compelled to give effect to a declared right by amending or repealing the relevant law. Importantly, however, before the issue of a need for a declaratory function even arises, the declaratory power is preceded by a wide ranging interpretive power established by such documents.

The first and foremost effect of declaratory rights documents is that they require the courts to exercise an "interpretive function" – that is, to construe (to an extent which at least nominally depends on the specific terms of the relevant interpretive clause of the document), as far as possible, legislation in accordance and in such a way as to achieve compatibility between the legislation considered and the declared rights. The now serially overlooked result is that, in actuality, the effect of interpretive clauses is that, under the guise of statutory interpretation, judges have a greatly enhanced capacity to "remake" legislation, and provide for quite different outcomes to arise from any given legislative provision than those that may have been the intended outcome of the originating Parliament.[11] The purpose of the second part of this analysis is to demonstrate, by example, that the actual effect of interpretive clauses is to go a good way beyond the traditional scope and ambience of the Judiciary's assumed role of statutory interpretation.[12] Indeed, these interpretive clauses require Courts to exercise their discretion on an artificial basis toward a discrete overarching objective. This powerful interpretive function projects courts into a far more active role than that to which they have been previously assigned.[13]

In relation to the operative provisions which provide the mechanisms by which declaratory rights documents, in practice, diminish the legislative authority of Parliament, the WA Report[14] devotes very little text to analysis of such themes. Notably, with respect to the "interpretive" provision (arguably the most potent of the operative clauses), the concept is dealt with in no greater level of detail than that exhibited in the following paragraphs:

> "The draft Bill does require courts to interpret legislation compatibly with human rights. However, the court's power to do so is limited to legislation the ordinary meaning of which is 'ambiguous or obscure' or 'leads to a result that is manifestly absurd or unreasonable' (Clause 34(3) of the draft Bill). In this regard, the draft Bill imposes a higher threshold than other jurisdictions, such as the ACT and Victoria (see chapter 6 of this Report for further discussion). It is difficult to see how it could be said to be inappropriate for courts, when faced with unclear legislation, to prefer an interpretation that better protects human rights.
>
> "The draft Bill also gives power to the Supreme Court (and only the Supreme Court) to make a declaration that legislation coming before it is incompatible with one or more human rights; however, such a declaration takes the form of non-binding 'advice' only. Parliament is entirely free to ignore it".

This passage does, helpfully, identify that the interpretive clause that was proposed for the draft Bill in WA was, ostensibly, of a comparatively more moderate kind than that exhibited in comparable declaratory documents in Australia and internationally.[15] However, it rather unhelpfully is not followed by any meaningful analysis of the effects of such clauses generally by recourse to an examination of international and Australian precedent which has a clear bearing on this issue. Nor does the WA Report provide any analysis directed to substantiate the assertion that what was proposed as the Western Australian interpretive clause would have a less significant effect than other comparative clauses in declaratory rights documents. And, as the analysis that follows will demonstrate, it may well be the case that an interpretive clause which limits a court's power to interpret legislation compatibly with the human rights documents only in circumstances where the ordinary meaning of legislation is "ambiguous or obscure" or "leads to a result that is manifestly absurd or unreasonable" is no less efficacious than comparable clauses in other rights documents.

While some interpretive clauses that will be analysed shortly are arguably more direct and less broad than others (because they do not contain a limiting passage relating to use only in circumstances of legislative ambiguity), the fact remains that however the interpretive clause is drafted, it is meant to be used exclusively in circumstances where the court perceives an ambiguity to exist.

The power that is derived from such interpretive clauses is a power which flows from the fact that ambiguity, in even seemingly simple legislative provisions, is not difficult to find. Such ambiguity has traditionally been resolved by recourse to known and understood legal precedent, rather than fresh consideration of expansively drafted rights.[16]

For example, in Victoria, a linguistic ambiguity which activated the interpretive clause in s. 32 of the *Charter of Human Rights and Responsibilities* 2006 (Vic), arose by virtue of the legislative use of the word "likely". The word is self-evidently a simple one, and one unavoidably used in legislative provisions as it is in everyday speech. Of course, like many other English words and phrases it is open to different meanings and, if used in legislation, potentially different interpretations. To the extent that the legislative use of the word can create legislative ambiguity, it is a type of ambiguity that had been effectively cured by years of developed precedent. The knowledge of such precedent that is possessed by any given Parliament means that, by including the word "likely" in legislation, Parliament relies upon the meaning which contextually relevant precedent had determined for it.

Part II

What will follow in this Part is an assessment of examples bearing upon the accuracy of the claim that declaratory rights documents leave the legislative powers of Parliament "wholly unaffected".

Given the assessment above, that advocates of declaratory rights documents have ignored the growing body of legal evidence that interpretive clauses in declaratory rights documents have a substantive, rather than insignificant, effect on the legislative capabilities of Parliaments, a useful starting point for consideration is to proceed in more detail with respect to the case of *RJE v. Secretary to the Department of Justice & Ors*[17] ("*RJE*").

In *RJE* the Victorian Court of Appeal dealt with an appeal against an order made pursuant to s.11(1) of the *Serious Sex Offenders Monitoring Act* 2005 (VIC) ("the *Monitoring Act*"), which section provided that the appellant could be subject to an extended supervision order for a period of 10 years.

Pursuant to the relevant provisions of the *Monitoring Act*, the Court was empowered to make an extended supervision order only where it was "satisfied to a high degree of probability, that the offender is *likely* to commit a relevant offence".[18] (emphasis added). A live and central issue of the appeal was the meaning of the term "likely to commit" in the context of the *Monitoring Act*. Specifically, whether "likely" to commit meant "more likely than not" (i.e., a greater than 50 per cent chance of an offence being committed), or that the term merely sought to indicate a real possibility

that an offence may be committed (i.e., potentially a less than 50 per cent chance). Importantly, prior to the decision in *RJE*, the latter interpretation had been preferred by the Victorian Supreme Court.[19] However, with recourse to the requirements of the interpretive provision of the *Charter of Human Rights and Responsibilities Act* 2006, the Court unanimously allowed the appeal and overturned the previous position (citing a necessary departure from the formerly preferred interpretation of "likely").

RJE is a particularly important decision for any meaningful consideration of the effect of declaratory bills, via their interpretive clauses, on parliamentary sovereignty.

The *Monitoring Act*, by virtue of s.11(1), clearly provided a mechanism by which the Victorian Parliament intended the court to effect indefinite detention of serious sex offenders in circumstances where it was determined the relevant offender was "likely" to commit a relevant offence. To give practical effect to this intent, Parliament drafted the legislative provision using the simple word "likely". The word "likely" is quite capable of conveying several slightly different meanings as a matter of English expression (and thereby at least capable of being considered linguistically ambiguous), but legally it was a word with a settled and unambiguous meaning in the legislative context in which it was employed, which meaning had previously been settled by significant case law – a meaning established by judicial precedent, on which Parliament relied for the purposes of drafting the relevant provision.

In *RJE* the precedent upon which the Victorian Parliament had relied with respect to the legal meaning of the word "likely" was overturned by the Victorian Court of Appeal, which was effectively required to reconsider the use of the word "likely", due to the existence of the "interpretive clause" mechanism contained in the *Charter of Human Rights and Responsibilities* 2006 (VIC), which required the court to "...construe s.11 of the [*Monitoring*] *Act* (so far as it is possible to do so consistently with the purpose of the section) in a way that is 'compatible with human rights' ".[20]

Through the interpretive clause, a word which had previously been ascribed a legally unambiguous meaning by precedent was at once reclassified as ambiguous, and redefined in a manner quite contrary to parliamentary intent. That the parliamentary intent, as to how the relevant provision should operate, was overridden by recourse to the Charter's interpretive provision, is clear from the terms of the judgment. In deciding the new interpretation of the word "likely", the Court commented that although Parliament's intention had presumably been in line with the previous interpretation of the word, "To adopt now the construction which [the Court] prefer[s] is to accept that the intention has changed. But that appears to be the way in which the Charter was intended to operate".[21]

The breadth and depth of such a change in principles of statutory interpretation should not be underestimated.[22] Where courts previously interpreted legislation by attempting to ascertain the intention of Parliament with respect to the operation of a particular legislative provision, now *all* legislation enacted prior and subsequent to the Charter is subject to reinterpretation in light of the Charter. Apart from creating uncertainty in relation to all laws, such a change requires judicial lawmaking on a grand scale because, by referring interpretation away from established precedent and toward newly legislated rights provisions, such clauses see courts become both the arbiters and creators of ambiguity.

The examples that follow also deal with the recent experience of judicial interpretation of rights documents as they operate in the context of criminal justice. The application of human rights to criminal law is highly illustrative for two main reasons.

First, for the simple reason that the imposition of criminal law is intuitively the most immediate incursion of "the State" on the freedoms of individuals; and secondly, that the potential for oppressive action by the State resulting from the former means that, historically, it is also the area in which inherent protections are already most well entrenched. Common law rules of criminal procedure and evidence have been designed throughout the history of the courts as a final frontier against oppression.[23] In no other context is the imposition of the State so necessary, or already so vehemently guarded against; and, in that sense, it is in the context of criminal justice that the imposition of

general or specific rights have the greatest potential to unravel the collective resolved wisdom of both the electorate, through its parliamentarians' policies, and of the Judiciary in its longstanding common law settled over the course of centuries.[24] Indeed, the present balance between the incursive power of the State upon the freedoms of individuals in the area of criminal justice reflects societal reactions to ongoing events which have found their expression in Australia through the legislative responses of Parliaments, and particularly State Parliaments, over the last century. If this is the case, the precise formulation of this balance has not only changed over time, but can also be expected to continue to change. It may be that what has been detectable in recent legislative responses in criminal law is a shift away from a post-war fixation of political discourse on the fear of the state, giving way to increasing demands by modern populaces for greater efforts on the part of governments to enhance the liberty of their citizens by the provision of greater protection from domestic criminal activity.

Whether this is or is not the case, what can be clearly demonstrated is that through even declaratory rights documents, there is considerable scope for contemporary judicial policy-setting in an area which is already well regulated by delicate and sophisticated interaction between legislative provisions and their progressive judicial interpretation, intersecting with common law rules of criminal procedure and evidence. In short, declaratory rights documents effectively require substantive judicial policy-making (whether the courts like it or not) in areas of significant public sensitivity, and which have traditionally found outcomes being led by the legislative responses of democratically informed State Parliaments. In light of the sensitivity of these areas (and often, the need to make changes quickly in response to changing societal trends), these are areas of public policy making that are appropriately left to Parliaments with democratic mandates, through the means of legislation drafted in the context of well understood judicial meanings of words, phrases and doctrines. This creates certainty of outcome and the flexibility of process which is required for effective governance.

A recent case which demonstrates the practical effect of the interpretive clauses of rights documents is the case of *Perovic v. CW*[25] ("*Perovic*"), an unreported decision of the Children's Court of the Australian Capital Territory.

Perovic involved the criminal prosecution of a child accused of a sexual offence, where there had been significant delay between the time at which the child formally became a suspect in the course of the police investigation, and the matter being subsequently brought to trial. The accused's legal representative submitted that the proceedings should be stayed on the basis that, amongst other things, there had been a breach of s.20(3) of the *Human Rights Act* 2004 (ACT) ("the *ACT Charter*"), which section provides for special rights of children in criminal proceedings, including that "a child must be brought to trial as quickly as possible".

In deciding the issue of delay in the context of the relevant provision of the *ACT Charter*, the presiding Magistrate considered a number of international precedents relevant to the application of various international jurisdictions' embodiments of Article 10 of the *International Covenant on Civil and Political Rights*. The Magistrate found that the child was not brought to trial "as quickly as possible" and that this amounted to a breach of the Charter.

Notwithstanding that the *ACT Charter*, as a declaratory rights document, does not provide specific remedies for breach (a fact acknowledged by the Magistrate), in deciding the case, his Honour relied upon the use of the relevant interpretation clause and his "inherent or implied power to prevent its own [the court's] processes being used to bring about injustice".[26] The Magistrate considered that the injustice which would result from the breach of s.20(3) was such as to make it appropriate to stay the proceedings and, accordingly, ordered that the proceedings be permanently stayed.[27]

While there is no doubt that a court has an inherent jurisdiction to control its own process and stay the proceedings if, to continue them, would be unjust, what is interesting is the manner by which the court, in this case, came to consider precedent regarding the length of time before delay will become oppressive such as to warrant a permanent stay. In this case, by reference to international decisions based on human rights doctrines, the Magistrate was either re-interpreting or simply ignoring

existing Australian precedent regarding length of delay which is acceptable in the ordinary course of proceedings.[28] Restated, had the Magistrate been exercising his court's inherent power in the absence of the *ACT Charter*, and in contemplation only of existing Australian precedent regarding delay in the context of the well established concept of a fair trial, it is highly arguable that the decision by the Magistrate in this case to stay the proceedings permanently would have been incorrect and unsustainable.

Significantly, the outcome of the Magistrate's decision in *Perovic* is that the *ACT Charter* provided the basis for a decision to permanently stay the prosecution of a serious criminal offence, in circumstances where established legal precedent would almost certainly have required a different decision. Interestingly, *Perovic* did not involve an interpretive clause necessitating a determination of "ambiguous" parliamentary legislation. Rather, it involved a re-interpretation of well settled case law relating to permanent stays of proceedings based, presumably, on the notion that some ambiguity now attaches to what were previously well settled common law principles, by virtue of the existence of the *ACT Charter*, and by the existence of international decisions which have been made regarding provisions similar to s.20(3) of the *ACT Charter* and which conflict in outcome and substance with existing Australian precedent on the issue.[29] In effect, the Magistrate placed far greater reliance on international decisions made in reference to other rights relevant to the issue of delay and the concept of a fair trial, than on settled Australian High Court precedent.[30]

While *Perovic* involved the re-interpretation (or perhaps by-passing) of established legal precedent, rather than the interpretation of parliamentary legislation, this process will also have a considerable effect on parliamentary sovereignty. This is because it is a process which ignores or re-defines a range of well known and accepted legal standards developed at common law, and that have direct implications for resource allocation. The consequence is that, by re-interpreting these common law principles to make them compatible with legislated rights, judicial officers now possess a new power to reach decisions which inevitably require parliamentary responses in the allocation of resources required to meet new standards, relating to the performance and timeliness of public investigative and prosecution services. Where these new standards were not planned for, or endorsed or approved by duly elected Parliaments, the effect on parliamentary sovereignty will be significant. In this regard, *Perovic* shows that even declaratory rights documents will have substantial implications for public services which are subject to resource allocation by the government in Parliament. Consequently, cases like *Perovic* demonstrate the way in which declaratory rights documents radically expand what were previously inherent limitations on courts to make policy decisions that impact on existing government services and resource allocation.[31]

The experience of criminal law jurisprudence under the *Human Rights Act* 1998[32] in the United Kingdom has similarly demonstrated the potentially enormous impact of declaratory rights documents on parliamentary sovereignty.

In the *Human Rights Act* 1998 (UK), s.3 sets out the "interpretive function", requiring simply that:

> "So far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with Convention rights".

In the matter of *R v. A*,[33] the UK House of Lords considered the impact of s.3 of the *Human Rights Act* 1998 (UK) on the application of s.41 of the *Youth Justice and Criminal Evidence Act* 1999 (UK), which section intended to place firmer restrictions on the cross-examination of complainants in sexual assault matters about their sexual history generally, or about any previous sexual history with the accused.

The provisions under consideration in *R v. A* are similar to equivalent provisions in the *Evidence Act* 1906 (WA),[34] where the intention is to protect complainants in these cases from being unduly

harassed by counsel and, in doing so, diminish those factors which tend to deter a victim from making a complaint, which would result in offenders escaping prosecution. Further to this, these provisions are intended to avoid the concept being placed before a jury, by relevant questions being led by defence counsel, that a complainant who had engaged in consensual sexual intercourse with the accused, or with some other person in the past, is more likely to give consent to sexual intercourse subsequently, and that the evidence of a promiscuous complainant is less credible.

In *R v. A*, the accused sought to adduce such evidence, arguing that the exclusion of it was incompatible with the right to a fair trial, which right is set out in both the *Human Rights Act* 1998 (UK) and in Article 6 of the *Convention for the Protection of Human Rights and Fundamental Freedoms* ("the *European Convention*"). The case concerned then, a problem of the kind often encountered under human rights legislation, namely, in this case, "whether a restriction in a statute on criminal evidence designed to prevent traumatising cross-examination of complainants in rape cases threatened the fair trial rights of the defendant".[35] The House of Lords was required to consider the inherent conflict between the interests of the complainant and the accused's right to a fair trial – a conflict which the court admitted on this occasion "is more acute since the *Human Rights Act* 1998 came into force".[36] In agreeing that s.41 of the *Youth Justice and Criminal Evidence* Act 1999 was not compliant with the right to a fair trial generally, the House of Lords, by two somewhat creative steps, demonstrated the ambit of interpretive scope permitted by the power of interpretation under s.3 of the *Human Rights Act*.

The House of Lords decided that:

(1) The general right in Article 6 of the *European Convention* to a fair trial included the right to put forward a full and complete defence by advancing truly probative material;

(2) It follows that "the legislature would not, if alerted to the problem, have wished to deny the right to an accused to put forward a full and complete defence by advancing truly probative material"; and that

(3) It was "possible under s.3 [of the *Human Rights Act*] to read section 41... as subject to the implied provision that evidence or questioning which is required to ensure a fair trial under Article 6 of the Convention should not be treated as inadmissible. The result of such a reading would be that sometimes logically relevant sexual experiences between a complainant and an accused may be admitted under s.41(3)(c). On the other hand, there will be cases where previous sexual experience between a complainant and an accused will be irrelevant" having regard to broader considerations of time and circumstances.[37]

Ultimately, the House of Lords used the interpretive function of the *Human Rights Act* 1998 (UK) to restrict the statutory provision, so that it did not exclude evidence which was considered relevant to the issue of consent and which would, if excluded, endanger the fairness of the trial.[38] In effect, under the guise of the "interpretive function", the House of Lords implied an exception into a statutory provision which was aimed at achieving the opposite of what the House of Lords sought to imply. What resulted is that the House of Lords shifted from the natural and ordinary meaning of s.41, and reinstated considerable scope for judicial discretion regarding the circumstances in which the evidence sought to be adduced in trials for offences of this kind, can be so adduced.[39]

In the case of *R v. Lambert* [2001] UKHL 37 ("*Lambert*") the House of Lords was to consider, from a human rights perspective, the legitimacy of the reversal of the burden of proof legislated by s.28 of the *Misuse of Drugs Act* 1971 (UK).

The facts of *Lambert* were that the accused had been caught with two kilograms of cocaine in his duffle bag. He was charged with the offence of possession of a controlled substance with intent to

sell or supply and, in his defence, asserted that he neither knew, nor suspected, nor had reason to suspect, that the drugs were inside his bag. Section 28 provides that this is "a defence for the accused to prove", constituting in effect a reversal of the burden of proof.

A similar provision is enacted in relation to the offence of possession of a prohibited drug with intent to sell or supply under the *Misuse of Drugs Act* 1981 (WA). Section 11(a) of the Act activates a reversal of the burden of proof, in respect of the mental element of intent, where the quantity of drugs the subject of the offence is not less than the quantity prescribed in Schedule V of that Act. In respect of Methylamphetamine, for example, Schedule V provides that where a person is alleged to have been in possession of a quantity of not less than 2.0 grams, the presumption of intent to sell or supply is activated, and the burden of proof is then transferred to the accused to rebut the presumption. Although the presumption is rebuttable, the provision establishes in effect a reversal of the burden of proof (albeit to a lesser standard, on the balance of probabilities) with respect to that element of the offence.

In public policy terms, these provisions are generally a response by the Parliament to particular offending behaviour of concern to the community at large. In practical terms, the provisions are aimed at holding accused people to account in respect of the defence sought to be relied upon. With respect to offences of this kind, implicit in the element of "possession" is the requirement to prove (in addition to physical possession) a mental element, that is, knowledge and intent with respect to possession of the drug. Without provision for the reversal of the burden of proof, the accused is able to assert that he did not know, nor should have been reasonably expected to know, that the drugs were in his possession, and the prosecution would be required to negate this assertion beyond reasonable doubt.

In circumstances where the prosecution is required to prove possession (physical and mental) beyond reasonable doubt, it would be in many cases an impossibly high standard of proof for the State to be able to establish the mental element beyond reasonable doubt. Depending on the circumstances, as a matter of practice in such matters, it will often be the case that, without more, the mere assertion by the defence of a lack of knowledge would almost certainly cause a trier of fact to identify a reasonable doubt as to the accused's guilt based on their (potentially untested) assertion that they didn't know the drugs were in their possession. These provisions, pertaining to the reversal of the onus of proof in particular, have generated human rights based arguments in the context of the right to be presumed innocent and the right to silence associated with that presumption.[40]

In *Lambert,* the House of Lords held that a reversal of the onus of proof was not compatible with Article 6(2) of the *European Convention*, which declares that "everyone charged with a criminal offence shall be presumed innocent until proven guilty according to law". However, rather than making a declaration of incompatibility, the House of Lords utilised the "interpretive function" to impose on the words of the statute a different meaning from that intended by Parliament. The House of Lords considered that the word "prove" in s.28 of the statute could be read as meaning "adduces sufficient evidence", which would require simply that the accused carry the lesser "burden" of adducing sufficient evidence such as to bring the defence into issue such that the prosecution must disprove it beyond reasonable doubt. The effect was that the Court completely negated the Parliament's intention to reverse the onus of proof in such situations.

A further example is the case of *S & Marper v. The United Kingdom*[41] *("S & Marper"),* where an application was brought before the European Court of Human Rights by two British nationals, alleging breaches of Article 8[42] and Article 14[43] of the European Convention.

Specifically, the applicants were seeking the destruction of fingerprints and DNA samples taken by the British police in the course of an investigation which did not result in a successful prosecution. Such retention was permitted in domestic British law.[44]

The applicants submitted that retention of their fingerprints and DNA profiles constituted an interference in their private life in breach of Article 8 of the *European Convention*. After weighing

up: (i) whether the holding of samples constituted an interference in the applicants' private lives; and (ii) whether such interference was justifiable on grounds of the benefits to law enforcement, the European Court of Human Rights ultimately upheld the applicants' appeal, stating:

> "…the Court finds that the blanket and indiscriminate nature of the powers of retention of the fingerprints, cellular samples and DNA profiles of persons suspected but not convicted of offences, as applied in the case of the present applicants, *fails to strike a fair balance between the competing public and private interests* and that the respondent State has overstepped any acceptable margin of appreciation in this regard. Accordingly, the retention at issue constitutes a disproportionate interference with the applicants' right to respect for private life and cannot be regarded as necessary in a domestic society… Accordingly, there has been a violation of Article 8 of the Convention in the present case".[45] (emphasis added)

What is noteworthy about this matter is not the quality of the decision ultimately arrived at, but the degree to which the Court's decision involves public policy, through balancing competing rights under the guise of protection of an apparently absolute right. This case involves two equally valid public policy goals in clear and unavoidable conflict. The first goal might be described as that of securing and enhancing citizen's safety by establishing a robust system of detecting and punishing criminal activity (this might be seen as some species of the genus right to life). The second goal may be described as the end of ensuring a level of non-interference with the lives of citizens which might be prompted, or directly affected, by the storage of personal data relating to citizens (this might be seen as some species of the genus right to liberty).

Modern Western societies place value on both of these goals, and the majority of electors might wish for there to be tighter controls on the storage of data by police than presently exist. In another context, the majority may have given their government a mandate to retain a wider range of samples for the purposes of stronger law enforcement. Democratically produced outcomes in this regard may vary, depending on the community charged with the decision to elect, or the time or under what conditions they are required to take the decision. However, a decision as between the appropriate mix of these competing values is not a decision about a right, in the sense of protecting some single value which rational analysis shows us is neutral, universal and eternal. As the European Court itself acknowledged, it was not performing the task of assessing whether there exists in all circumstances a right not to have samples of this nature held. Instead, the Court arrived at a decision by performing an assessment of whether the decision made by a democratically elected Parliament of a member state "…fail[ed] to strike a fair balance between the competing public and private interests".

Conclusion

Whether a proponent or opponent of rights documents, there appears to exist some agreement or acknowledgement that the strongest arguments against such documents are those which argue for a place of primacy in the making of public policy in liberal democracy with the elected representatives of the Parliament. Or, in other words, that the sovereignty of Parliament is a paramount consideration in determining the desirability of rights documents.

It is for this reason that the critical claim, that will require honest and accurate examination by the Brennan Committee, is of the relatively new argument which has emerged in the modern Australian rights debate as response to parliamentary sovereignty arguments against such bills. Notably, it has been asserted in Part I above that modern rights advocates now centrally argue that merely declaratory documents do not have any, or any substantial, effect on parliamentary sovereignty. The Brennan Committee must as a fundamental priority of its inquiry decide whether or not this argument is inherently misconceived.

Part II of the analysis has presented its own view on this claim, by examining specific examples which demonstrate the ways in which rights documents impact significantly on parliamentary sovereignty; through the direct interpretation of legislative provisions, and also through the re-interpretation of previously settled common law doctrines. What can be said in summary of the examples, is that while it may be difficult to envisage all the ways and areas in which parliamentary sovereignty may potentially be affected by the interpretive provisions of rights documents, what is already evident from the short experience of judicial utilization of declaratory rights documents is, that any proposition that the effect of such documents on parliamentary sovereignty is neutral is unsustainable in the face of the emerging and growing body of evidence to the contrary.

Indeed, whether the declaratory rights document directly and obviously subverts parliamentary sovereignty, by the simple mechanism of re-interpreting what would otherwise be a legislative provision of accepted and unambiguous meaning; or whether there has been a re-interpretation of settled common law concepts and principles upon which legislative drafting and governmental decision making is based – it is already the case that the effect of declaratory documents on Australian State and international Parliaments cannot be ignored.

In these circumstances, it is at least honest that debate on the issue focus once again on whether it is desirable that courts should not only possess the capacity to overrule Parliament, but also be left to make an entirely subjective decision on what is essentially a matter of public policy. At the time of writing this analysis, at least some indication exists that the issue of the critical effect of interpretive clauses is a live one for the Brennan Committee. Some media reporting has demonstrated that Father Brennan has been the subject of submissions from the NSW Chief Justice Spigelman, to the effect that the Committee should not contemplate an interpretive clause along the lines of that which exists in the United Kingdom, because it is too broad and allows the interpretation in the United Kingdom of legislation by the courts in a way never intended, or positively not intended, by the Parliament that generated it.

That such a submission appears to have been received by the Brennan Committee is encouraging. However, it is at the same time concerning that the Chief Justice's view seems to have been accompanied by a view that some form of drafting of an interpretive clause is possible which would not have the negative result on parliamentary sovereignty witnessed in the UK, Victoria and the ACT. If this is the way in which the Brennan Committee intends to approach this issue, it should recognise that there has yet to be any evidence of such a draft of an interpretive clause that has been able to prevent the effects detailed in this paper.

Further, it is being suggested that a clause can be drafted which does no more than formalise the common law principle that, in cases of clear ambiguity, legislative interpretation should favour a position that protects common law rights; the questions begs, why risk the imposition of an untested and potentially faulty interpretive clause that could lead to ever expansive judicial interpretations and change public policy outcomes (outcomes which were meant to be achieved by Act of Parliament) if the *only* advantage of running such a risk is to restate a complex interpretive *status quo* that already operates relatively and predictably well.[46]

If the present policy debate continues to ignore the types of matters raised above, or pretends that some perfect interpretive clause can be divined that will prevent the types of outcomes detailed above, then it is quite possible that documents will be brought into existence which, while promising the contrary, will substantially subvert the purpose and functions of parliamentary democracy, and substitute an executive judiciary for the executive Cabinet in significant public policy areas.

Endnotes:

1. The full title of this paper is: The Brennan Committee, Declaratory Rights and Parliamentary Democracy.

2. Mr Porter's paper acknowledges the assistance of Jennifer Porter, described as an LLM student at the University of Western Australia [Editor's note].

3. The *Charter of Human Rights and Responsibilities* 2006 (Vic) came into operation on 1 January 2007; however, the obligations on public authorities such as police, as well as the powers of the courts arising in the Act, were delayed, to commence on 1 January 2008.

4. The *Human Rights Act* 2004 (ACT) came into operation on 1 July 2004.

5. Stephen Keim, *Bill of rights is ours to decide*, *The Australian*, Legal Affairs, 24 April 2009.

6. Allan, J, *The Victorian Charter of Human Rights and Responsibilities: Exegesis and Criticism*, Melbourne University Law Review, Vol 30, No. 3, May 2007, pp. 906-922 at p.911.

7. *Report of the Consultation Committee for a Proposed WA Human Rights Act*, November 2007, p.52.

8. Allan, J, *op. cit.*, p.908.

9. *Ibid.*.

10. Other examples include the New Zealand *Bill of Rights Act* 1990 (NZ) and the *European Charter of Human Rights*. Despite the common perception that the doctrine of parliamentary sovereignty (perhaps because of its UK origins) applies in Australia, it must be remembered that because of the existence of the Australian Constitution, no Parliament, whether State, Commonwealth or Territory has unlimited or plenary legislative power. That is, legislative power (and hence, parliamentary sovereignty) is limited by the Constitution and, therefore, that limitation of itself protects people's rights. This is the essence (often overlooked) of having a constitutional democracy.

11. Allan, J, *op. cit.*, p.909.

12. *Ibid*..

13. Ashworth, A, *What Have Human Rights Done for Criminal Justice in the UK?*, University of Tasmania Law Review, Vol 23 (No. 2), 2004, p. 161. See also Kavanagh, A, *The Elusive Divide between Interpretation and Legislation under the* Human Rights Act *1998* (2004) 24 Oxford Journal of Legal Studies, 269.

14. *Report of the Consultation Committee for a Proposed WA Human Rights Act*, November 2007, p.52.

15. See Draft *Human Rights Bill* 2007 (WA), s.34; *Human Rights Act* 2004 (ACT), s. 32; *Charter of Human Rights and Responsibilities* 2006 (Vic), s.32(1); *Human Rights Act* 1998 (UK), s.3(1); and *Bill of Rights* 1990 (NZ), s.6.

16. Although Parliament is the pre-eminent source of legislation, it is often the case that, due to either legislative complexity or sometimes doubtful (or multiple) meanings of apparently simple phrases and words, the court has a role in refining and translating Parliament's intention. Irrespective of whether or not there is explicit legislative instruction to do so, the court is bound by general principles of interpretation that hold that the court is unlikely to have recourse to external sources for interpretive guidance where the meaning of the legislation in question is clear. Conversely put, while the proposed Western Australian interpretive clause may have been drafted in slightly different terms from other such clauses, it may not have been any different in the effect that is now becoming discernible from comparative clauses in other rights documents. This is because all the proposed Western Australian clause did was to formalize a principle that was being acted upon in any event; notably, that the courts will not have recourse to a *Human Rights Act* (or any other external source) for the purposes of interpreting the meaning of a clause(s), unless the ordinary meaning of the legislation under consideration is "ambiguous or obscure" or "leads to a result that is manifestly absurd or unreasonable".

17. *RJE v. Secretary to the Department of Justice, Attorney-General for the State of Victoria and Victorian Human Rights and Equal Opportunities Commission* [2008] VSCA 265 (18 December 2008).

18. *Serious Sex Offenders Monitoring Act* 2005 (VIC), s. 11(1).

19. See *TSL v. Secretary to the Department of Justice* (2006) 14 VR 109.

20. *RJE, loc. cit.,* per Nettle JA at 105.

21. *Ibid.*, per Nettle JA, at 114.

22. Lord Woolf CJ, discussing the parallel section of the *Human Rights Act* 1998 (UK); *Poplar Housing and Regeneration Community Association Ltd v. Donoghue* [2002] QB 48.

23. *Rights*, in Miller, D, Coleman, J, Connolly, W, Ryan, A, *The Blackwell Encyclopedia of Political Thought* (Oxford: Blackwell Publishers, 1991), p.103.

24. It was always expected that it would have a major impact on this area, more in respect of criminal procedure than the substantive criminal law or sentencing: Ashworth, A, *op. cit.,* p.170.

25. *Perovic v. CW,* No.CH 05/1046 (Unreported, 1 June 2006), Children's Court ACT.

26. His Honour referred to the decision of *DPP v. Shirvanian* (1998) 102 A Crim R 180, which dealt with the power to stay proceedings.

27. The case goes further than the Supreme Court decisions of *R v. Upton* [2005] ACTSC 52 and *R v. Martiniello* [2005] ACTSC 9, where delay in prosecution of adult defendants was considered to breach the right to be tried without unreasonable delay under s. 22 of the *Human Rights Act*. In those cases, a stay of proceedings was granted, but the proceedings could be re-instated upon payment of the defendant's legal costs by the prosecution, rather than the matter being permanently barred.

28. The factors which need to be taken into account in deciding whether a permanent stay is needed, in order to vindicate the accused's right to be protected against unfairness in the course

of criminal proceedings, cannot be precisely defined in a way which will cover every case. But they will generally include such matters as the length of the delay, the reasons for the delay, the accused's responsibility for asserting his rights and, of course, the prejudice suffered by the accused: *Barker v. Wingo* (1972) 407 US 514; *Bell v. Director of Public Prosecutions* [1985] AC 937, as explained in *Watson*, and *Gorman v. Fitzpatrick* (1987) 32 A Crim R 330. In any event, a permanent stay should be ordered only in an extreme case, and the making of such an order on the basis of delay alone will accordingly be very rare: *Re Cooney* (1987) 31 A Crim R 256 at 263-4.

29. In support of the contention that the Magistrate was substantially ignoring or re-interpreting settled Australian precedent on the issue of what is fair and just in relation to the question of how long a delay can be before it becomes oppressive such that the trial could be deemed unfair, see *Jago v. Director of Public Prosecutions* 87 ALR 577 per Mason CJ and Toohey J's reasons for judgment, which include that the Australian common law does not recognise the existence of a "special right" to a speedy trial. The test of fairness involves a balancing process, for the interests of the accused cannot be considered in isolation without regard to the community's right to expect that persons charged with criminal offences are brought to trial: see Barton (CLR at 102, 106).

30. What constitutes a fair trial in Australia has been relatively well settled by a variety of cases. In short summary, trials must exhibit several fundamental features to be termed fair, and absent those features an appellate court may declare a trial unfair (see *Wilde v. R* (1988) 164 CLR 365 (18 February 1988)).

31. Dunn, J, *The Perils of Judicial Policy Making: The Practical Case for Separation of Powers*, First Principles Series, No. 20, September 23, 2008, The Heritage Foundation.

32. The *Human Rights Act* 1998 (UK) came into operation on 2 October 2000.

33. [2001] UKHL 25.

34. Sections 36 and 36BC.

35. The Right Honourable the Lord Walker of Gestingthorpe, KB, *A United Kingdom Perspective on Human Rights Judging*, (Victoria: The Judicial Review; 8(3)), September 2007, p.297.

36. [2001] UKHL 25, per Lord Slynn at 5.

37. *Ibid.*, at 45.

38. The Right Honourable the Lord Walker of Gestingthorpe, KB, *op. cit*..

39. Ashworth, A, *op. cit.,* p.163.

40. The Right Honourable the Lord Walker of Gestingthorpe, KB, *op. cit*., p.302.

41. *S and Marper v. The United Kingdom* (December 4, 2008) (Application nos. 30562/04 and 30566/04), European Court of Human Rights.

42. Article 8, *Right to respect for private and family life*:

"1. Everyone has the right to respect for his private and family life, his home and his

correspondence.
2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others".

43. Article 14, *Prohibition of discrimination*:

> "The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status".

44. See s.82 of the *Criminal Justice and Police Act* 2001 (UK)

45. *S & Marper v. the United Kingdom*, *loc. cit.*, at [125].

46. Pelly, M, *Don't give judges room on rights: CJ*, *The Australian*, 28 August 2009.