# Submission of the

NEW SOUTH WALES COUNCIL FOR CIVIL LIBERTIES

# to

# New Matilda's Public Consultation on the

# Human Rights Bill 2006

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# 1. Do you support the Human Rights Bill prepared by New Matilda?

1. The New South Wales Council for Civil Liberties ('CCL') congratulates New Matilda on the success so far of this important federal initiative. A federal Bill of Rights is long overdue. CCL commends the community-based and transparent manner in which New Matilda has run its campaign. New Matilda's campaign has set a new benchmark in non-government organisation advocacy in Australia. CCL wishes New Matilda further success over the coming months.
2. CCL supports the general thrust of New Matilda's Human Rights Bill 2006 ('the HRB'). The substantive rights guaranteed by the Bill are, by and large, well drafted and comprehensive. In our answer to Question 2, CCL only offers some minor suggestions for improvements.
3. CCL has only two major criticisms of the HRB. The first criticism relates to New Matilda's choice of the weak UK and New Zealand dialogue model. In our answer to Question 3, CCL argues that the HRB would be vastly improved by adopting the more egalitarian and democratic Canadian dialogue model (from the pre-Charter statutory *Canadian Bill of Rights*).
4. CCL's second criticism is that the HRB does not assert extraterritorial jurisdiction. Given the universal nature of human rights, CCL does not believe that Australia's international human rights obligations stop at Australia's borders.
5. In our answer to Question 4, CCL also suggest that the HRB can be improved by adopting the approach of the Human Rights Bill from 1973, which bound the States and offered a much broader cause of action against both public *and private* violators of rights.

## 1.1 major recommendations

**8. CCL strongly recommends that New Matilda abandon the weak 'declaration of incompatibility' dialogue model.**

**9. CCL strongly recommends the adoption of the Canadian model of permitting courts to invalidate legislation, while providing Parliament with the ultimate 'trump card' of a time-limited notwithstanding clause. This dialogue model respects parliamentary sovereignty, but importantly strikes a more egalitarian and democratic balance between the individual and Parliament.** **(see pages 8-11)**

**13. CCL strongly recommends that the Human Rights Bill should have extraterritorial effect.** **(see page 12)**

# 2. Does the Bill protect the appropriate mix of rights?

6. CCL believes that, by and large, the HRB's mix of rights is appropriate, well-drafted and comprehensive. CCL offers comment below on the rights to marry, to freedom from association and to a passport. CCL also offers some suggestions for additional civil rights that have been recognised after the *International Covenant on Civil and Political Rights* was written.

## 2.1 economic, social and cultural rights

7. CCL does not profess any expertise in economic, social and cultural rights. CCL notes the arguments that these rights usually involve decisions about resource allocation which are more appropriately left to governments. However, CCL acknowledges the success of the constitutional entrenchment of these rights in South Africa. CCL notes with interest the sensitive approach adopted by the South African courts when adjudicating upon the reasonableness of government policies relating to these rights:[1]

> A court considering reasonableness will not enquire whether other or more desirable or favourable measures could have been adopted, or whether public money could have been better spent. …It is necessary to recognise that a wide range of possible measures could be adopted by the state to meet its obligations. Many of these would meet the test of reasonableness.

## 2.2 section 25: right to marry

8. Section 25 of the HRB follows the text of the ICCPR in stating that "All men and women" have the right to marry and to found a family.[2] CCL notes that the UN Human Rights Committee has interpreted the phrase "all men and women" to limit marriage to opposite-sex couples.[3] The Committee reasoned that everywhere else in the ICCPR the more inclusive pronoun "everyone" is used, while this clause uses the more specific phrase "men and women", thereby limiting this right to heterosexuals.

**1. CCL recommends that subsection 25(1) be redrafted to read "Everyone of marriageable age has the right to marry and to found a family".**

9. This recommendation will ensure that Australian courts will not be unreasonably restricted to a narrow definition of marriage. This will also accord with the jurisprudence of leading human rights jurisdictions which have recognised same sex marriage on the grounds that an exclusively heterosexual definition of marriage is discriminatory and unjustifiable in a free and democratic society.[4]

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[1] *South Africa v Grootboom* [2001] 1 SA 46, [41] (Yacoob J).
[2] ICCPR article 23(2).
[3] *Joslin v New Zealand* (2002) UN Doc CCPR/C/75/D/902/1999, [8.2].
[4] e.g. *Reference re: same-sex marriage* [2004] 3 SCR 698 (Supreme Court of Canada); *Minister of Home Affairs v Fourie & Bonthuys* 2005 (1 Dec 05) (South African Constitutional Court). See also: NSW Council for Civil Liberties, "Why the moral panic?", <http://www.nswccl.org.au/issues/glbt.php#moral_panic>.

## 2.3 section 29: freedom of association

10. CCL notes that the HRB adopts *verbatim* the ACT Human Rights Act's re-draft of article 22 of the ICCPR, guaranteeing freedom of association.[5] CCL also notes that this rights is included in the *Universal Declaration of Human Rights* ('UDHR'):

> **Article 20**
> 1. Everyone has the right to freedom of peaceful assembly and association.
> 2. No one may be compelled to belong to an association.

11. CCL observes that paragraph 20(2) of the UDHR guarantees freedom *from* association. The ICCPR does not include such a guarantee, though some members of the UN Human Rights Committee have implied a guarantee that 'no one may be forced by the State to join an association'.[6]

**2. CCL suggests that the HRB be modified to also recognise an express right to freedom *from* association.**

## 2.4 section 31: freedom of movement

12. CCL notes that in this section the HRB adapts the ACT's simplified draft of article 12 of the ICCPR.[7] CCL endorses the comments of the UN Human Rights Committee that:[8]

> Since international travel usually requires appropriate documents, in particular a passport, the right to leave a country must include the right to obtain the necessary travel documents. The issuing of passports is normally incumbent on the State of nationality of the individual.

13. CCL notes that constitutional courts in the United States,[9] Ireland[10] and India[11] have implied the right to a passport deriving from the right to liberty. CCL also notes that the European Court of Human Rights[12] and Nigerian Supreme Court[13] have derived the right to a passport from the right to freedom of movement. However, CCL commends the innovation in the South African Bill of Rights of expressly guaranteeing that "Every citizen has the right to a passport".[14]

**3. CCL recommends that the HRB be modified to recognise an express civil right to a passport.**

14. It should be noted that such an express right is derogable (section 44) and would still be subject to the limitations clause (section 10).

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[5] *Human Rights Act 2004* (ACT) s.15.
[6] *Gauthier v Canada* (1999) UN Doc. CCPR/C/65/D/633/1995 (dissenting opinion of Lord Colville, Elizabeth Evatt, Ms Cecilia Medina Quiroga and Mr Hipólito Solari Yrigoyen).
[7] *Human Rights Act 2004* (ACT) s.13.
[8] UN Human Rights Committee, *General Comment 27* (1999) UN Doc. CCPR/C/21/Rev.1/Add.9, [9].
[9] *Kent v Dulles* (1958) 357 US 116.
[10] *The State (KM & RD) v AG* [1979] IT 73.
[11] *Satwant Singh Sawhney v D. Ramarathnam, Assistant Passport Officer* (1967) 2 SCR 525.
[12] *Napijalo v Croatia* [2003] ECHR 66485/01 (23 October 2003).
[13] *Director of State Security Service v Agbakoba* [1999] ICHRL 30 ( 5 March 1999).
[14] article 21(4).

## 2.5 rights that are missing

15. CCL notes that contemporary Bills of Rights have recognised a range of rights that do not appear in the ICCPR. CCL brings two important civil and political rights to the attention of New Matilda.

### *2.5.1 civil right of access to information*

16. The *Charter of Fundamental Rights of the European Union* ('European Charter') was proclaimed in December 2000.[15] It recognises a right of access to government documents:

> **Article 42**
> Any citizen of the Union, and any natural or legal person residing or having its registered office in a Member State, has a right of access to European Parliament, Council and Commission documents.

17. The South African *Bill of Rights*, which came into force in 1997, also recognises this right, but in addition recognises a right to access information in the possession of *anyone* where that information is 'required for the exercise or protection of any rights'. The right is also balanced by a recognition of public resource constraints:

> **Article 32**
> 1. Everyone has the right of access to-
> (a) any information held by the state; and
> (b) any information that is held by another person and that is required for the exercise or protection of any rights.
>
> 2. National legislation must be enacted to give effect to this right, and may provide for reasonable measures to alleviate the administrative and financial burden on the state.

18. CCL submits that this right is already recognised in all Australian jurisdictions in the form of the various Freedom of Information Acts and other similar legislation. This important civil right ensures that electors can engage in *informed* public debate, which is an essential prerequisite for the healthy functioning of a representative democracy. It also ensures that people have a right to view and correct personal information held by others.

**4. CCL suggests that the HRB be amended to guarantee the right of everyone to access information, in terms similar to the South African *Bill of Rights*.**

[15] see <http://www.europarl.eu.int/charter/default_en.htm>.

### *2.5.2 civil right of just administration*

19. Article 41 of the European Charter recognises a right to just administration. It is expressed in terms of the rights Australians expect from administrative law.

20. The South African *Bill of Rights* recognises this right to just administration in these terms:

> **Article 33**
>
> 1. Everyone has the right to administrative action that is lawful, reasonable and procedurally fair.
>
> 2. Everyone whose rights have been adversely affected by administrative action has the right to be given written reasons.

21. CCL submits that this right is already recognised in the body of Australian administrative law. This important civil right protects everyone from the excesses of government. Its significance should be acknowledged by including it in any contemporary Bill of Rights.

**5. CCL suggests that the HRB be amended to guarantee the right of everyone of just administration, in terms similar to the South African *Bill of Rights*.**

# 3. Does the Bill provide adequate protection?

22. CCL welcomes the adoption of the processes of compatibility statements, the interpretation clause and the limitation clause, and the institution of the Joint Standing Committee on Human Rights. These measures will help to provide important protections for human rights in Australia.

23. However, the HRB's greatest weakness is its adoption of the UK and New Zealand dialogue model. This is not the only statutory dialogue model. There is in fact an older, more robust and tried-and-true model: the pre-Charter dialogue model of the *Canadian Bill of Rights* (1960).

24. CCL acknowledges the political reality that, in a Westminster-style democracy, parliamentary sovereignty should be respected by a statutory Bill of Rights. But this does not mean that individual rights should not also be privileged wherever possible. The Canadian dialogue model offers the advantage of championing individual rights whenever Parliament chooses to do nothing about a law that violates rights. In the weaker UK model, if Parliament chooses to do nothing about an incompatible law, then the law remains in force.

25. CCL also makes comment on the process of derogation and on the operation of section 47 of the HRB.

## 3.1 Section 44: public emergency and derogation

26. CCL notes with approval that the prohibition on derogation to section 23 (recognition and equality before the law) improves upon the more limited prohibition in the ICCPR, which only covers discrimination 'on the ground of race, colour, sex, language, religion or social origin'.[16] The HRB prohibits derogation being based on 'discrimination on any ground'.[17]

27. CCL also notes with approval that the prohibition on derogation from section 11 (right to life) incorporates the non-derogability of the individual right not to be executed. This implements Australia's international obligations under article 6(2) of the Second Optional Protocol.[18]

28. CCL observes that, while there is provision for derogation in the Bill, there is no mechanism specified. Derogating from the civil and political rights of the individual as guaranteed in a Bill of Rights is a significant process and requires more than the passing of legislation in the normal way.

**6. CCL suggests that New Matilda consider including a mechanism in the HRB for derogation that signals the serious nature of derogating from fundamental rights. Perhaps an official notification should be sent to the UN, as the ICCPR requires;[19] or perhaps a two-thirds majority vote of a joint sitting of Parliament could approve derogation.**

[16] ICCPR article 4(1).
[17] HRB s.23(2).
[18] *Second Optional Protocol to the International Covenant on Civil and Political Rights aiming at the abolition of the death penalty* [1991] ATS 19 (entered into force 11 July 1991).
[19] ICCPR article 4(3).

## 3.2 Part 4: scrutiny of proposed Commonwealth laws

29. CCL welcomes the HRB's requirement that the federal Attorney-General issue a 'statement of compatibility' with human rights for each piece of proposed legislation.[20] This will help to foster a human rights culture at critical stages of policy formulation and legislative drafting.

30. CCL welcomes the HRB's creation of a Joint Standing Committee on Human Rights ('Joint Committee').[21] The Joint Committee's role of reviewing compatibility statements and Bills[22] will help to reduce litigation, because non-complying legislation will be identified before it is enacted. It will also help to foster a human rights culture among parliamentarians, policy makers and the bureaucracy. The process of committee scrutiny is important because it is more transparent, consultative and democratic than the process of compatibility statements.

31. However, CCL is concerned that section 47 undermines the utility of compatibility statements and the review of Bills by the Joint Committee. Except in extreme situations, every Bill should require a report from the Joint Committee *before* it can be passed by Parliament. The Joint Committee should be required to consult with the community, at the very least by inviting written submissions. These simple rules are very important, if the HRB is to avoid the disastrous experience of New South Wales.

32. In 2001, after torpedoing a Bill of Rights for New South Wales, the Carr government declared that rights would be best protected by Parliament, overseen only by a parliamentary legislative review committee. In New South Wales the Legislation Review Committee scrutinises every Bill brought before Parliament and reports on whether the legislation 'trespasses unduly on personal rights and liberties'.[23] The experiment has been an abysmal failure. Not only is the community completely excluded from the process, because there is no provision for public submissions to the committee, but Parliament simply ignores adverse decisions of the committee – often without comment. The process is farcical when one considers that legislation can receive Royal Assent even before the committee has published its report on a Bill.[24]

33. CCL recognises that there will be emergency situations in which there will be no time for the formalities of compatibility statements and committee scrutiny. However, the default process should be that a law will not be valid until it has undergone these important processes. This will help to reinforce the importance of respect for human rights.

**7. CCL suggests that section 47 be strengthened to operate only when a Bill is declared urgent by a majority vote of both Houses of Parliament.**

[20] HRB s.45.
[21] HRB s.46.
[22] HRB s.46(3)(b).
[23] *Legislation Review Act 1987* (NSW) s.8A.
[24] *Legislation Review Act 1987* (NSW) s.8A(2).

## 3.3 Section 52: declarations of incompatibility

34. When a court finds that legislation violates a right guaranteed by a Bill of Rights, then it is up to Parliament to respond as it sees fit. This 'dialogue' between the judicial and legislative arms of government is a feature of the Bills of Rights of Westminster-style democracies. There are two main dialogue models. The first, oldest and most democratic is the Canadian model. The second model has been adopted by the British Parliament[25] and the New Zealand courts[26] ('the UK model').

35. CCL is very disappointed by the level of debate in Australia about the Canadian dialogue model. Many commentators mistakenly believe that there is only one dialogue model: the UK model. Other commentators state that the UK dialogue model is the only model appropriate for Westminster-style democracies, ignoring the fact that Canada too is a Westminster-style democracy. Still other commentators dismiss the Canadian model as being inappropriate because it is constitutionally entrenched, seemingly oblivious to the fact that this model served Canada well for over two decades in the statutory *Canadian Bill of Rights* (1960).[27] So it is factually wrong to state that there is only one dialogue model, and to dismiss the Canadian model as inappropriate for a statutory Bill of Rights or a Westminster-style democracy like Australia.

**8. CCL strongly recommends that New Matilda abandon the weak 'declaration of incompatibility' dialogue model.**

**9. CCL strongly recommends the adoption of the Canadian model of permitting courts to invalidate legislation, while providing Parliament with the ultimate 'trump card' of a time-limited notwithstanding clause. This dialogue model respects parliamentary sovereignty, but importantly strikes a more egalitarian and democratic balance between the individual and Parliament.**

[25] *Human Rights Act 1999* (UK).
[26] *Moonen v Film and Literature Board of Review* [2000] 2 NZLR 9.
[27] *Canadian Bill of Rights* (1960). In fact, this Act remains in force: <http://www.canlii.org/ca/sta/c-12.3/>.

### *3.3.1 Canadian dialogue model*

36. The Canadian dialogue model has been working well for almost fifty years. It was introduced in the statutory *Canadian Bill of Rights* (1960) and entrenched in the 1982 Constitution as the *Charter of Rights and Freedoms*. The model permits the courts to invalidate legislation, but provides Parliament with the ultimate 'trump card' of a 'notwithstanding clause'.[28] By inserting a notwithstanding clause in a piece of legislation, Parliament overrides the courts and the legislation remains in force.

37. The statutory *Canadian Bill of Rights* did not expressly override other statutes. However, in *R v Drybones*[29] the Canadian Supreme Court ruled that the Bill of Rights did in fact override inconsistent federal Acts.[30] This was possible because of a provision in the Bill of Rights stating that all the laws of Canada should be construed by courts in a fashion that did not violate the rights and freedoms listed in the Bill of Rights, unless there was a notwithstanding clause in the legislation.[31]

38. The Canadian model *forces* Parliament to respond to a violation of human rights. When a court finds that legislation violates individual rights, then Parliament can choose to do nothing, in which case the legislation ceases to be law. Alternatively, Parliament can choose to assert its sovereignty by inserting into the legislation a clause stating that the law is valid despite the fact that it violates fundamental rights. This 'notwithstanding clause' overrides the court's view, preserving parliamentary sovereignty.

**10. CCL recommends that a 'notwithstanding clause' mechanism be inserted into the HRB.**

**11. CCL recommends that subsections 50(2)(b) and (c) be removed from the HRB, because they inhibit the courts from invalidating pre-existing legislation where it violates fundamental rights.**

39. As a matter of historical interest, prior to the constitutional entrenchment of the *Charter* in 1982, the Canadian notwithstanding clause was only used once. The *Public Order (Temporary Measures) Act 1970* (Canada) was introduced in response to a violent uprising in Quebec in October 1970.[32] The Act only remained in force for five months.[33]

### *3.3.2 UK dialogue model*

40. In the weaker UK model, when a court finds that an Act violates human rights, the court issues a 'declaration of incompatibility'. The only legal response required is that the Attorney-General prepare for, and table a report in, Parliament.[34] Parliament can choose to ignore the report and the original finding of the court.

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[28] *Canadian Bill of Rights Act* (1960) s.2.
[29] [1970] SCR 282.
[30] Tarnopolsky & Beaudoin, *Canadian Charter of Rights and Freedoms: Commentary* (1982) 5.
[31] *Canadian Bill of Rights Act* (1960) s.2.
[32] see <http://www2.marianopolis.edu/quebechistory/docs/october/regsnov.htm>.
[33] Tarnopolsky & Beaudoin, *Canadian Charter of Rights and Freedoms: Commentary* (1982) 72.
[34] e.g. HRB s.53.

41. It is also extremely important to understand that if a British court issues a declaration of incompatibility and Parliament chooses to do nothing about it, then an aggrieved citizen can take the matter to the European Court of Human Rights. An Australian citizen has no such recourse. The most she or he can do is to take a complaint to the non-binding UN Human Rights Committee.[35]

42. The Australian government has a proven track record of ignoring the conclusions of the UN Human Rights Committee[36] and of criticising Australian court decisions, so there is no reason to think that declarations of incompatibility will be dealt with appropriately by the federal Australian parliament. Consequently, a law that violates the rights of unpopular minorities could remain on the statute books.

### *3.3.3 why the Canadian model is more egalitarian and democratic*

43. The crucial difference between the Canadian and British models is highlighted by what happens if Parliament chooses to do nothing. One commentator has put it this way:[37]

> In terms of the benefit of legislative inertia, the [Canadian] Charter favours the individual whose rights have been violated over the Parliament, whereas the [UK Human Rights Act] favours the Parliament over the individual. There are many reasons why, in the face of a judicial invalidation or declaration of incompatibility, the Parliament does not respond. There may be no clear mandate [...]; the legislative timetable may not allow; the Parliament may not want to create an election issue out of human rights; and more disturbingly, inertia may be motivated by a mean-spirited refusal to acknowledge the violation of the rights of the unpopular or a minority. Whatever the reason for inertia, a society committed to minimum human rights standards should prefer the individual to benefit from inertia, rather then the Parliament. The power imbalance between the individual and the Parliament alone dictates this. Moreover, preferring the individual does not threaten the underlying themes of the [UK Human Rights Act]. Preferring the individual shows a commitment to the respect of human rights without undermining parliamentary sovereignty, as [the notwithstanding clause] of the Charter ensures. In addition, preferring the individual does not compromise the dialogue model of rights protection, as is illustrated by the differently constituted dialogue model of the Charter.

44. Both dialogue models respect parliamentary sovereignty, but the Canadian model more successfully protects the individual. Despite the ACT and Victoria choosing the weaker UK model, a federal Bill of Rights should adopt the stronger, more democratic and egalitarian Canadian model.

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[35] under the *First Optional Protocol to the ICCPR* [1991] ATS 39 (entry into force 25 December 1991).
[36] see NSW Council for Civil Liberties, *Does Australia Violate Human Rights?*, <http://www.nswccl.org.au/issues/hr_violations.php>.
[37] Julie Debeljak, 'The Human Rights Act 1998 (UK): the preservation of parliamentary supremacy in the context of rights protection' (2003) 9(1) *Australian Journal of Human Rights* 183, 226-7.

### *3.3.4 improving the Canadian dialogue model*

45. The pre-Charter *Canadian Bill of Rights*' notwithstanding clause was not subject to any time limit. A law with a notwithstanding clause remained on the statute books indefinitely. After working with the Bill of Rights for over two decades, the Canadians decided that there was room for improvement. A 'sunset clause' was included in the *Charter of Rights and Freedoms*. The sunset clause ensures that a notwithstanding clause is only valid for five years. Parliament can, if it chooses, continually re-enact the law every five years. If Parliament chooses not to re-enact the law, then the legislation that violates fundamental rights ceases to be law.

46. This 'sunset clause' mechanism is important because it recognises that in a free and democratic society fundamental rights should only be curtailed by an explicit act of Parliament. It also acknowledges that such curtailments of fundamental rights and freedoms should be subject to regular review by Parliament, rather than remaining forever on the statute books. If it is no longer necessary to curtail a right or freedom, then Parliament simply lets the declaration lapse and does not need to expressly repeal the curtailing legislation.

47. There is no reason why this sunset-clause improvement cannot be adopted into a statutory Bill of Rights. CCL recommends this approach.

**12. CCL recommends that a notwithstanding clause be time-limited by a five year sunset clause. This will ensure that laws that violate human rights do not remain on the statute books indefinitely.**

# 4. Are the remedies appropriate?

## 4.1 jurisdictional issues

### *4.1.1 the Bill should have extraterritorial effect*

48. CCL notes that the HRB does not necessarily bind Commonwealth officials operating in foreign jurisdictions. This means that Australian officials stationed overseas could, for example, torture people with immunity from this law. CCL has been concerned for some time that Australian Federal Police operate in South East Asia without adverting to Australia's international human rights obligations with respect to the abolition of capital punishment. This was the case with the Bali Nine and is also the case with Huu Trinh in Vietnam.[38]

49. Given the universal nature of human rights, CCL strongly believes that Australia's international human rights obligations do not stop at Australia's borders. CCL recommends that the HRB should have extraterritorial effect, binding Australian officials in foreign jurisdictions.

**13. CCL strongly recommends that the HRB should have extraterritorial effect.**

50. Following the express approach taken in the *Death Penalty Abolition Act* and several other federal Acts, this extraterritorial jurisdiction can be achieved by simply inserting a section along these lines:[39]

> This Act applies within and outside Australia and extends to all the Territories.

### *4.1.2 the Bill should bind the States*

51. CCL also notes that the HRB is expressed only to bind the Commonwealth. Given that the stated objects of this Bill are to ensure that "the law of Australia better conforms with Australia's obligations", it is disappointing that it does not bind the States. The Murphy Bill of 1973 clearly stated that "this Act binds Australia and each State".[40] Such legislation is constitutional under the head of the external affairs power.

**14. CCL suggests that New Matilda consider making the HRB bind the States as well as the Commonwealth.**

[38] Tom Hyland , 'AFP under fire over Vietnam drug arrest', *Sun Herald* (Sydney) 19 February 2006, <http://www.smh.com.au/news/national/afp-under-fire-over-vietnam-drug-arrest/2006/02/18/1140151850921.html>.
[39] *Death Penalty Abolition Act 1973* (Cth) s.3. See also: *Australian Radiation Protection and Nuclear Safety Act 1998* (Cth) s.6; *Maternity Leave (Commonwealth Employees) Act 1973* (Cth) s.1; and, *Superannuation Benefits (Supervisory Mechanisms) Act 1990* (Cth) s.1.
[40] Human Rights Bill 1973 (Cth) s.5(1).

## 4.2 Section 55: cause of action

52. CCL notes that the HRB only provides an individual with a cause of action against public authorities. This seems unnecessarily restrictive, given that the rights of individuals can also be violated by private organisations and individuals.

53. In 1973 the Attorney-General Lionel Murphy introduced into federal parliament the Human Rights Bill 1973 ('the Murphy Bill'). The Murphy Bill provided a much broader cause of action, including both public and private violations:

> **Section 40 (Civil Proceedings)**
> …
> (2) A person aggrieved by an act that he considers to be a contravention of [the rights in this Act] may institute a proceeding against the person who did the act by way of a civil action in the Australian Industrial Court for a declaration that the act is a contravention of [a right in this Act] and for any one or more of the remedies specified in sub-section (3).

54. With the obvious modifications, such as substituting 'the appropriate court' for 'the Australian Industrial Court', the Murphy Bill provides a much better cause of action than New Matilda's HRB.

**15. CCL suggests that the HRB provide for civil proceedings against private as well as public violators of human rights.**

## 4.3 Sections 59 and 60: intervenors

55. CCL notes with approval that the intervention rights, by leave of the court, of HREOC and third parties are provided for in the HRB.

# 5. Other comments

## 5.1 Section 3: objects

56. Listing the international human rights treaties to which Australia is a party in subsection 3(b) is not necessarily a good idea. It might be interpreted to limit the effect of the HRB. For example, the list fails to include the *Second Optional Protocol to the International Covenant on Civil and Political Rights aiming at the abolition of the death penalty*.[41] That Protocol reflects the substantive right in section 11(2) of the HRB. It also reflects Australia's international obligations under article 1 of the Second Optional Protocol.

**16. CCL suggests that the list of international human rights treaties in the objects clause of the HRB be replaced with a more flexible phrase such as "Australia's international human rights obligations". Alternatively, the Second Optional Protocol to the ICCPR should be added to the list of international treaties in the objects clause.**

## 5.2 Sections 62 and 63: review of the HRB

57. CCL encourages New Matilda to modify the review provisions of the HRB to provide for a review *every* 5 years, not just once. CCL recommends something similar to the New Zealand innovation of a human rights action plan that is reviewed every five years. Such a process could be useful in monitoring the effectiveness of the HRB and levels of public awareness of human rights issues. Such a review could include statistics on litigation arising from the Act.

**17. CCL suggests that the HRB provide for a review and report to parliament every five years.**

[41] [1991] ATS 19 (entered into force 11 July 1991).