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Evaluating The Human Rights Performance Of Australian Legislatures: A Research Agenda And Methodology

Carolyn Evans and Simon Evans

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I INTRODUCTION

Until recently the political and academic debate about the protection of human rights in Australia has paid insufficient attention to parliaments. With some notable exceptions, the debate has been dominated, on the one hand, by those who point to particular human rights violations and assert that *judicial* enforcement of a Bill of Rights is a necessary corrective and, on the other, by those who point to a generally strong human rights record in Australia and assert that the current institutional arrangements are adequate.

Both views have influential support in the ongoing debate. Proponents of human rights protections argue that Australian parliaments are inclined to ignore the needs of minorities and the marginalised, to pass legislation that undermines important rights, and to allow political advantage more weight than considerations of rights.¹ They have had notable success in the ACT with the enactment of the *Human Rights Act 2004* (ACT). The Victorian and Western Australian Governments have also flagged the possibility of enacting some form of statutory rights protections.² In contrast, the Prime Minister, among other leading figures from both sides of politics, has expressed his strong belief that — given the record of Australia’s democratic institutions — the current combination of constitutional, statutory and common law rights gives sufficient protection to rights.³ Thus, the recently re-issued *National Framework for Human Rights — National Action Plan* states:

Australia’s existing system for protecting human rights is comprehensive, with requirements essential to such protections established and supported by successive governments. The Australian Government recognises that, at a fundamental level, the promotion and protection of human rights is best achieved through strong and robust democratic institutions such as an independent judiciary, responsible and accountable government, the rule of law, well-resourced and respected opposition parties, and a free media.⁴

Parliaments, or so this side of the argument goes, on the whole do a good job at protecting human rights.

Recently, more attention has been paid to the potential role of parliaments, particularly by advocates of statutory or constitutional rights protection. In the last two decades, Canada, New Zealand and the United Kingdom have all adopted rights protection mechanisms that require their Parliaments to assess proposed legislation against human rights norms and that do not give the courts the last word in determining whether legislation complies with those norms. What remains missing from the debate, however, is any serious and systematic attention to the actual

¹ See, eg, ACT Bill Of Rights Consultative Committee, *Towards an ACT Human Rights Act* (2003) 34.

² Department of Justice, Victoria, *Attorney-General’s Justice Statement: New Directions for the Victorian Justice System 2004–2014* (2004) <<http://www.justice.vic.gov.au/CA2569020010922A/page/Resources-Publications-Attorney-General%27s+Justice+Statement>> at 4 July 2005; Department of Justice, Victoria, *Human Rights in Victoria: Statement of Intent, May 2005* (2005) <[http://www.justice.vic.gov.au/CA256902000FE154/Lookup/HR_Consultation_project/\\$file/statement_intent.pdf](http://www.justice.vic.gov.au/CA256902000FE154/Lookup/HR_Consultation_project/$file/statement_intent.pdf)> at 4 July 2005; Jim McGinty, ‘The Future of Reform — The Constitution at Large’ (Paper presented at the Australian Association of Constitutional Law & Constitutional Centre Conference, Perth, 22 March 2003).

³ John Howard, Prime Minister, ‘Address at Ceremonial Sitting to Mark the Centenary of the High Court of Australia’ (Supreme Court of Victoria, Melbourne, 6 October 2003) <<http://www.pm.gov.au/news/speeches/speech514.html>> at 4 July 2005; John Howard, Prime Minister, *Australia Day Address* (25 January 2001) <<http://www.pm.gov.au/news/speeches/2001/speech670.htm>> at 4 July 2005; Daryl Williams, Attorney-General, ‘Writing the Rights — Does Australia Need a Bill of Rights?’ (Speech presented at the National Schools Constitutional Convention, Old Parliament House, Canberra, 28 March 2003); Daryl Williams, Attorney-General, ‘Against Constitutional Cringe: The Protection of Human Rights in Australia’ (Speech presented at the Australian Conference on Bill of Rights, New South Wales Parliament, Sydney, 21 June 2002); Legal and Constitutional Committee, Parliament of Victoria, *Report on the Desirability or Otherwise of Legislation Defining and Protecting Human Rights* (1987) ix.

⁴ Attorney-General’s Department, Commonwealth, *Australia’s National Framework for Human Rights — National Action Plan* (2005) 5.

performance of parliaments in the protection of human rights.⁵ The political debate remains characterised by assertion and counter-assertion about the parliamentary record on human rights. And the academic debate — although immensely valuable in its own terms — remains largely conceptual. There has been remarkably little published empirical analysis of the current role of parliaments in the protection of human rights, notwithstanding the fact that the absence of Australian Bills of Rights mean that Australian Parliaments provide an excellent test case for the international debate about the adequacy of democratic parliamentary processes in the protection of human rights.⁶

This article forms part of an ongoing project that aims to fill this gap in the literature. First it explains our research agenda, why we have chosen to focus on parliaments and human rights and how this project is distinct from the many other inquiries into rights in Australia. It then outlines the four-stage methodology that we have developed to evaluate how effectively Australian Parliaments protect human rights. It concludes by considering the future directions for research in Australia.

II PARLIAMENTS AND THE PROTECTION OF HUMAN RIGHTS: A RESEARCH AGENDA

A *Human Rights Are an Appropriate Standard by which to Evaluate Parliaments*

There is widespread debate about the usefulness of the concept of rights in academic literature,⁷ and in the political realm rights have been attacked by both the conservative parties⁸ and Labor⁹ (though for rather different reasons, except for their shared skepticism about the role of judges). Despite this, the concept of rights remains

⁵ An exception to this with respect to the UK can be found in Anthony Lester, 'Parliamentary Scrutiny of Legislation under the Human Rights Act 1998' (2002) 33 *Victoria University of Wellington Law Review* 1. There is of course an extensive literature that seriously and systematically reviews the practices and performance of Australian legislatures: see, eg, John Uhr, *Deliberative Democracy in Australia: The Changing Place of Parliament* (1998). However, little of that literature focuses on human rights. Again, there are notable exceptions: see, eg, David Kinley, 'Parliamentary Scrutiny of Human Rights: A Duty Neglected?' in Philip Alston (ed), *Promoting Human Rights through Bills of Rights: Comparative Perspectives* (1999); Cheryl Saunders, 'Protecting Rights in Common Law Constitutional Systems: A Framework for a Comparative Study' (2002) 33 *Victoria University of Wellington Law Review* 507; Philip Alston (ed), *Towards an Australian Bill of Rights* (1994); Peter Bayne, 'The Protection of Rights: An Intersection of Judicial, Legislative and Executive Action' (1992) 66 *Australian Law Journal* 844.

⁶ Putting the *Human Rights Act 2004* (ACT) to one side, Australia is one of the few democratic States that does not have either a statutory or constitutional Bill of Rights that allows for judicial review of legislation for its compliance with human rights norms. Australian parliaments can therefore act relatively free from the pressures that may be created by the potential for judicial review of their actions when they consider legislation that may have an effect on rights. See Mark Tushnet, 'Policy Distortion and Democratic Debilitation: Comparative Illumination of the Countermajoritarian Difficulty' (1995) 94 *Michigan Law Review* 245 on the potential for judicial review to debilitate democratic debate about rights issues.

⁷ See, eg, Mark Tushnet, 'An Essay on Rights' (1984) 62 *Texas Law Review* 1363.

⁸ See, eg, Daryl Williams, Attorney-General, 'Writing the Rights — Does Australia Need a Bill of Rights?', above n 3; Daryl Williams, Attorney-General, 'Against Constitutional Cringe: The Protection of Human Rights in Australia', above n 3.

⁹ See, eg, Bob Carr, *Thoughtlines: Reflections of a Public Man* (2002) 260–1.

a powerful one and one to which both the Australian Government and the Australian people have a demonstrated commitment.¹⁰

Whatever concerns the current Commonwealth Government may have about a judicially enforceable Bill of Rights, or about criticism by external bodies of Australia's rights record, it nonetheless regularly identifies human rights as a standard by which both Australia and other nations can be judged. The argument that members of the Government frequently raise against a Bill of Rights is not that rights are irrelevant or wrong-headed. Rather, they argue that our current institutions and laws do a good job of protecting rights already, thus obviating the need for constitutional or further statutory protection.¹¹

The Australian government has signalled its commitment to rights by ratifying numerous international treaties for the protection of human rights, including the two general covenants: the *International Covenant on Civil and Political Rights*¹² and the *International Covenant on Economic, Social and Cultural Rights*.¹³ While there has been some government criticism of the operation of treaty monitoring bodies such as the Committee for Human Rights (created by the *ICCPR*) and the Committee on the Elimination of All Forms of Racial Discrimination (created by the *Covenant on the Elimination of All Forms of Racial Discrimination*),¹⁴ these criticisms have focused on the particular approach taken by the Committees to dealing with complaints against Australia and other democratic countries, rather than the concept of rights in itself or the existence of Australia's international obligations.¹⁵ Even at the lowest point of Australia's relationship with the United Nations human rights system, Australia called only for the reform of the system rather than its elimination.¹⁶

Australia has also continued to argue for the improvement of human rights in other countries — particularly in the Asia-Pacific region — by, for example, acting as a key sponsor of the development of national human rights commissions.¹⁷ Such

¹⁰ As amply demonstrated in Attorney-General's Department, Commonwealth, above n 4.

¹¹ *Ibid* 5.

¹² Opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) ('*ICCPR*').

¹³ Opened for signature 16 December 1966, 993 UNTS 3 (entered into force 3 January 1976) ('*ICESCR*').

¹⁴ Opened for signature 7 March 1966, 660 UNTS 195 (entered into force 4 January 1969).

¹⁵ Daryl Williams, Attorney-General, 'International Law and Responsible Engagement' (Paper presented at the Joint Conference: Australian and New Zealand Society of International Law and the American Society of International Law, Australian National University, Canberra, 29 June 2000); but see David Feldman, 'Can and Should Parliament Protect Human Rights?' (2004) 10 *European Public Law* 635, 639.

¹⁶ Daryl Williams (Attorney-General), Alexander Downer (Minister for Foreign Affairs and Trade) and Philip Ruddock (Minister for Immigration and Multicultural Affairs), 'Australian Initiative to Improve the Effectiveness of the UN Treaty Committees' (Joint Press Release, 5 April 2001) <http://www.ag.gov.au/agd/WWW/attorneygeneralHome.nsf/Page/Media_Releases_2001_April_Australian_initiative_to_improve_the_effectiveness_of_the_UN_treaty_committee> at 4 July 2005.

¹⁷ See the Asia Pacific Forum of National Human Rights Institutions website: <www.asiapacificforum.net> at 4 July 2005. Additionally Prime Minister Howard has welcomed the Bush administration's initiative to establish a Bill of Rights in Iraq: Transcript of Press Conference, John Howard, Prime Minister (Canberra, 14 April 2004) <<http://www.pm.gov.au/news/interviews/Interview794.html>> at 4 July 2005.

commissions regularly use international human rights treaties as the appropriate standard by which to judge human rights.¹⁸

Thus, far from rejecting international human rights as an appropriate standard by which to judge the governance of a country, the Australian Government has repeatedly stressed the importance of adherence to human rights as a part of democratic governance. To judge the performance of the Australian Parliament against human rights criteria is, therefore, to apply a standard that has been accepted by the Australian Government for itself and others.

There is also some evidence that the Australian people accept this standard as appropriate and rate human rights as important values, particularly in the constitutional arena. In one study, respondents were asked to rate the importance of various indicators of what makes a good society. The indicators ranked most highly were the observance of high standards in public life, equal and fair treatment under law and that 'basic human rights of all citizens [are] strongly protected'.¹⁹ When asked what were the most important things that should be in the *Australian Constitution*, the most highly ranked answer was that the Constitution should 'define and guarantee the basic human rights of all Australian citizens'.²⁰ The next most highly ranked responses also focused on rights issues (the right to public health and education and the right to an electoral system in which votes are weighted equally). Human rights are thus also a standard that ordinary Australians believe to be relevant in judging Australian society and its constitutional arrangements.

B *International Rights Instruments Provide the Appropriate Rights Framework for this Evaluation*

In this project we adopt the rights contained in the *ICCPR* and the *ICESCR* as the framework for the evaluation of the rights-performance of Australian Parliaments.²¹

The *ICCPR* has 154 States Parties.²² In ratifying the *ICCPR* Australia has undertaken to 'respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind'.²³ The rights in the *ICCPR* include the rights to life; freedom from torture or cruel, inhuman or degrading treatment or punishment; freedom from slavery; liberty and security; freedom from arbitrary detention; freedom of movement; equality before the law; freedom from arbitrary interference with privacy or family; freedom of religion; freedom of belief; and freedom of expression.²⁴ Some of these rights (such as

¹⁸ Carolyn Evans, 'Human Rights Commissions and Religious Conflict in the Asia-Pacific Region' (2004) 53 *International and Comparative Law Quarterly* 713, 715.

¹⁹ Mike Salvaris, *Community and Social Indicators: How Citizens Can Measure Progress* (2000) Institute for Social Research, 32, 36 <http://web.archive.org/web/20040306083953/http://www.sisr.net/programsp/published/com_socind.PDF> at 4 July 2005 (copy on file with authors).

²⁰ Mike Salvaris, 'Making Our Own Paths to the Future: Strategies for Citizenship, Democracy and Progress in WA' (Paper presented at WA 2029 Conference, Perth, November 2004).

²¹ For most parts of the study, the rights in both *Covenants* will be considered. For the legislative audit, however, only *ICCPR* rights will be considered for the reasons discussed below.

²² Office of Legal Affairs, Treaty Section, United Nations, *Multilateral Treaties Deposited with the Secretary-General* (updated 26 May 2005) ch 4.4 <<http://untreaty.un.org/mate.lib.unimelb.edu.au/ENGLISH/bible/englishinternetbible/partI/chapterIV/treaty6.asp>> at 4 July 2005.

²³ *ICCPR*, above n 12, art 2(1).

²⁴ *ICCPR*, above n 12, arts 2(1), 6–9, 12, 14, and 17–19 respectively.

freedom of expression) can be limited in order to protect public order and the rights and freedoms of others, while some other rights (such as the prohibition on torture) cannot be limited.²⁵

The *ICCPR* was developed, and came into effect, alongside the *ICESCR*. The latter now has 151 States Parties.²⁶ The *ICESCR* commits the Australian Government to ‘take steps ... to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means’.²⁷ The rights recognised in the *ICESCR* include rights to just and favourable conditions of work; the formation of trade unions; adequate food, clothing and housing; the highest attainable standard of physical and mental health; education; participation in cultural life; and enjoyment of the benefits of scientific progress.²⁸ The rights in the *ICCPR* and the *ICESCR* are recognised internationally as equally important and interdependent.²⁹

We adopt the rights set out in these international covenants as the framework for the purposes of this study for several reasons. As discussed above, Australia has ratified both these Covenants and has accepted the standards set out in them as appropriate definitions of human rights. Furthermore, the international community generally has accepted these rights, something that is demonstrated by the high level of ratification of the two Covenants. The Covenants, therefore, provide a standard accepted in both Australia and the international community as the minimum human rights obligations of States. This widespread acceptance had led to an extensive academic literature regarding these Covenants, as well as interpretation of the rights by international bodies such as the Human Rights Committee as to the meaning and application of the rights in the Covenants.³⁰ This makes it easier to determine if the standards in those Covenants have been breached using widely agreed definitions of these core rights.

Finally, if Australia is to adopt a Bill of Rights, it is likely that it would rely heavily on the terms of the Covenants in framing such an instrument.³¹ The Covenants already have some statutory recognition in the *Human Rights and Equal Opportunity Commission Act 1986* (Cth). They form the core of the *Canadian Charter of Rights*

²⁵ *ICCPR*, above n 12, art 4(1). Note that art 4(2) declares certain articles are non-derogable even in times of national emergency, eg the right to life and prohibitions on torture and slavery: see arts 6–7, 8(1)–(2), 11, 15–16, 18. There is also provision under art 4(1) for derogation from the *ICCPR* in times of ‘public emergency which threatens the life of the nation and which is officially proclaimed’ but as no such officially declared state of public emergency has existed in Australia during the time frame under investigation this provision is irrelevant for the purposes of this study.

²⁶ Office of Legal Affairs, Treaty Section, United Nations, above n 22, ch 4.3.

²⁷ *ICESCR*, above n 13, art 2.

²⁸ *ICESCR*, above n 13, arts 7, 8(1), 9, 11, 12, 13, 15(1)(a) and 15(1)(b) respectively.

²⁹ *Vienna Declaration and Programme of Action: Report of the World Conference on Human Rights*, Part I, [5], UN Doc A/CONF.157/23 (1993).

³⁰ For a good overview of the jurisprudence see Sarah Joseph, Jenny Schultz and Melissa Castan, *The International Covenant on Civil and Political Rights: Cases, Materials, and Commentary* (2000) 99–642. For a guide as to how the *ICESCR* is to be interpreted, see *The Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights*, UN Doc E/CN.4/1987/17, Annex (1987).

³¹ The Victorian Government has signalled that the current consultations on a Bill of Rights for Victoria should focus on the rights contained in the *ICCPR*: Department of Justice, Victoria, *Attorney-General’s Justice Statement: New Directions for the Victorian Justice System 2004–2014*, above n 2, 53; Department of Justice, Victoria, *Human Rights in Victoria: Statement of Intent, May 2005*, above n 2, 4.

and Freedoms, the *Bill of Rights Act 1991* (NZ) and the *Human Rights Act 1998* (UK).³² They also influenced the terms of the *Human Rights Act 2004* (ACT) and the Victorian Human Rights Consultation Committee's discussion paper.³³ Moreover, they have had a significant influence on virtually every rights proposal at a Commonwealth level since then Attorney-General Lionel Murphy's Human Rights Bill 1973 (Cth). They are the most widely accepted current statement of basic human rights norms.

C *Parliaments are an Appropriate Subject of Investigation*

Much of the debate on rights protection in Australia has focused on the desirability of courts enforcing rights standards expressed in general terms in Bills of Rights. There are good reasons, however, to at least partially shift the academic focus from the courts to the role of parliaments.

First, the various Parliaments are the primary representative political bodies in Australian politics. The Commonwealth Parliament is constitutionally required to be 'directly chosen by the people'³⁴ and the State Parliaments are in practice democratically elected.³⁵ As the bodies that best (if imperfectly) represent the values of the people who have elected them, they are arguably the most suitable forum in which the difficult weighing and balancing tasks necessary in implementing rights should take place.

Second, unlike courts, parliaments are able to be proactive in seeking to protect rights rather than having to wait for a violation of rights to take place. The best rights protection prevents abuses of rights rather than punishes violations. Parliaments also have a wider range of options open to them in pursuing the protection of rights than do courts. While a court may find that workplace discrimination on the basis of sex is unlawful, it cannot set up an investigation into systemic causes of discrimination against women, nor fund non-discrimination education programmes for employers, nor create advertising campaigns to encourage girls to enter non-traditional employment for women, nor provide for better child-care facilities. The full range of actions necessary for the comprehensive protection of rights can only be achieved by governments and parliaments working with courts and not by courts alone.³⁶

A third reason for the focus on parliaments is pragmatic. A Bill of Rights at Commonwealth level is not likely to occur within the foreseeable future. It has been ruled out by the current Government³⁷ and there was no commitment to it by the

³² Although the more direct source of the rights in that Act is the *European Convention on Human Rights and Fundamental Freedoms*, opened for signature 4 November 1950, 213 UNTS 221 (entered into force 3 September 1953).

³³ Human Rights Consultation Committee, Victoria, *Have Your Say About Human Rights in Victoria: Human Rights Consultation Community Discussion Paper* (2005).

³⁴ *Australian Constitution* ss 7, 24.

³⁵ Although with a great degree of latitude over issues such as the weighting of votes. See *McGinty and Others v The State of Western Australia* (1995) 186 CLR 140, 175, 178 (Brennan CJ); 189 (Dawson J); 229–30, 236–9, 243, 245–50, 254 (McHugh J); 284, 289 (Gummow J).

³⁶ Indeed legislatures frequently take years to implement court rulings, and then often only imperfectly: see, eg, in the US context Gerald Rosenberg, *The Hollow Hope: Can Courts Bring About Social Change?* (1991).

³⁷ John Howard, Prime Minister, 'Address at Ceremonial Sitting to Mark the Centenary of the High Court of Australia', above n 3; Daryl Williams, Attorney-General, 'Writing the Rights — Does Australia Need a Bill of Rights?', above n 3.

Opposition at the last election.³⁸ While the ACT has adopted the fairly weak *Human Rights Act 2004* (ACT),³⁹ and (as noted above) there seem to be some interest in a similar scheme in Victoria⁴⁰ and Western Australia,⁴¹ such developments will take time and are unlikely to comprehensively cover all Australians. New South Wales, for example, relatively recently rejected even a fairly moderate suggestion for increasing rights protection in that State.⁴² Thus, for the time being, parliaments will continue to have a central role in the protection of rights in Australia. Given this, it is important to evaluate how well they perform that role and whether there are improvements that can be made.

D *A Focus on Legislation and the Legislative Role of Parliaments*

In this project we focus primarily on the legislative role of parliaments, rather than, for example, their symbolic, representative, government-formation or accountability roles.

Our focus is therefore on legislative action or inaction. A classical picture of the legislative process might commence with presentation of a Bill to the House of Representatives by the responsible minister, proceed through the various stages of debate in two Chambers and conclude with presentation of the Bill to the Governor-General for assent. That picture has the merits of simplicity. But it conceals more useful information than it reveals. The legislative process is better seen as a particular form of public policy cycle.⁴³ This emphasises three things that are obscured in the classical picture: the role of the executive in setting the terms of legislative agenda and the specific items on that agenda; that legislation is but one mechanism by which

³⁸ Although in July 2004 Shadow Attorney-General Nicola Roxon asserted Labor had 'long advocated legislative protection of rights, and would welcome a debate on any further developments, ideas or form such a bill could take', she subsequently retreated from this position and stated '[Labor doesn't] have a current plan to have a Bill of Rights': see Nicola Roxon, 'Human Rights' (Paper presented at the Human Rights Conference, Canberra, 1 July 2004); cf Nicola Roxon and Philip Ruddock, *Roxon v Ruddock on a Bill of Rights* (2004) <<http://www.lawyersweekly.com.au/articles/e6/0c0278e6.asp>> at 4 July 2005; This failure to guarantee a Bill of Rights was reflected in the Labor Party's platform for 2004. While Chapter 7 of the Platform pledged support for 'a legislative Charter of Citizenship and Aspirations' and asserted the party was open to 'constitutional reform to achieve a comprehensive recognition of the rights enjoyed by all Australians', it fell short of making a commitment to establish a Bill of Rights: Australian Labor Party, *ALP National Platform and Constitution* (2004) ch 7 <<http://www.alp.org.au/platform/>> at 4 July 2005.

³⁹ Carolyn Evans, 'Responsibility for Rights: The Act Human Rights Act' (2004) 32 *Federal Law Review* 291, 291.

⁴⁰ See Department of Justice, Victoria, *Attorney-General's Justice Statement: New Directions for the Victorian Justice System 2004–2014*, above n 2, 53–6; Department of Justice, Victoria, *Human Rights in Victoria: Statement of Intent, May 2005*, above n 2; cf Legal and Constitutional Committee, Parliament of Victoria, above n 3.

⁴¹ See McGinty, above n 2.

⁴² Standing Committee on Law and Justice, Legislative Council, Parliament of New South Wales, *A NSW Bill of Rights*, Parliamentary Paper No 893 (2001) 110. For the New South Wales Government's official response to this report see: *Letter from Bob Carr, Premier of New South Wales, to Michael Egan, Treasurer of New South Wales*, 21 October 2002, <[http://www.parliament.nsw.gov.au/prod/parlament/Committee.nsf/0/8569eddf131da5dbca256ad90082a3d3/\\$FILE/Govt%20response.pdf](http://www.parliament.nsw.gov.au/prod/parlament/Committee.nsf/0/8569eddf131da5dbca256ad90082a3d3/$FILE/Govt%20response.pdf)> at 4 July 2005.

⁴³ See generally Peter Bridgman and Glyn Davis, *The Australian Policy Handbook* (3rd ed, 2004); Peter Bridgman and Glyn Davis, 'What Use Is a Policy Cycle? Plenty, If the Aim Is Clear' (2003) 62(3) *Australian Journal of Public Administration* 98.

the executive may choose to pursue its policy aims; and that the parliamentary role does not end with the enactment of legislation but, through ongoing scrutiny of the operation of legislation, can influence future iterations of the policy cycle.⁴⁴ Our study therefore considers (where relevant) the extent to which human rights are addressed in each of the following stages of the process: policy approval by Cabinet, legislative drafting, parliamentary debate, parliamentary committees, the standing orders and rules of the parliament, and the role of the Governor/Governor-General. It also considers some of the more relevant post-legislative scrutiny processes relevant to the parliament, such as human rights issues being raised in parliamentary question time or by the Ombudsman.

III RESEARCH QUESTIONS

We commented above that one of our principal reasons for focusing on legislatures is that they are the bodies that best (if imperfectly) represent the values of the people who have elected them and arguably are therefore the most suitable forum for the difficult weighing and balancing tasks necessary in implementing rights. In doing so, we are following and complementing an important turn in the debate on the protection of human rights in liberal democracies.

For some time that debate, both in the United States and Australia, has been alive to the anti-democratic implications of judicial review of legislation against rights based standards. There has been much written about rights in Australia and, in particular, whether Australia needs a Bill of Rights in either statutory or constitutional form. Many follow the international debate and argue that one immediate implication of creating a Bill of Rights would be a shift in power from the parliament to the judiciary.⁴⁵ This has led to a focus on the appropriate role of courts in the protection of rights.⁴⁶ This focus intensified in the period when Sir Anthony Mason and Sir Gerard Brennan were Chief Justices of the High Court, during which the appropriate role of judges in the protection of human rights came to the fore through a series of controversial cases.⁴⁷ In the US, the concern with judicial review — identified as the ‘countermajoritarian difficulty’ — generated many distinct responses. Some scholars recommended approaches to judicial decision-making that attenuated the difficulty, for example by requiring considerable judicial deference to legislative judgments.⁴⁸ John Hart Ely proposed that judicial review be focused where there was the greatest

⁴⁴ Bridgman and Davis, *The Australian Policy Handbook*, above n 43, 130–8.

⁴⁵ Carr, above n 9, 260. Cf Robert McClelland, ‘How Is a Bill of Rights Relevant Today?’ (2002) 9(1) *Australian Journal of Human Rights* 11, 19.

⁴⁶ Aileen Kavanagh, ‘Participation and Judicial Review: A Reply to Jeremy Waldron’ (2003) 22 *Law and Philosophy* 451, 454–55, 483; Thomas Christiano, ‘Waldron on Law and Disagreement’ (2000) 19 *Law and Philosophy* 513, 533–8, 542; Christopher Eisgruber, ‘Democracy and Disagreement: A Comment on Jeremy Waldron’s *Law and Disagreement*’ (2002) 6 *Journal of Legislation and Public Policy* 35, 40–5; Richard Posner, ‘Review of Jeremy Waldron, *Law and Disagreement*’ (2000) 100 *Columbia Law Review* 582, 589–90. See generally Larry Alexander, ‘Is Judicial Review Democratic? A Comment on Harel’ (2002) 22 *Law and Philosophy* 277.

⁴⁷ See Peter Connolly QC, ‘The Theory of Universal and Absolute Crown Ownership’ (1994) 18 *University of Queensland Law Journal* 9, 12–14; Michael Adams, ‘Heroes and Heresy: Myth Meets Legal Fundamentalism’ (2004) 78 *Australian Law Journal* 587. See generally John Gava, ‘The Rise of the Hero Judge’ (2001) 24 *University of New South Wales Law Journal* 747.

⁴⁸ James Bradley Thayer, ‘The Origin and Scope of the America Doctrine of Constitutional Law’ (1893) 7 *Harvard Law Review* 129, 143–52; ‘Articles on Thayerian Deference to Legislatures — Constitutional Deference’ (1993–1994) 88 *Northwestern University Law Review*.

risk of legislatures acting in a self interested way.⁴⁹ Some pointed to empirical evidence that the problem was overstated and that the US Supreme Court rarely moved far in advance of majoritarian institutions.⁵⁰ Yet others eschewed these strategies of confession and avoidance and accepted judicial review as a necessary compromise of majoritarian principles in order to protect fundamental human rights,⁵¹ robustly defended the democratic credentials of courts,⁵² or advocated a popular constitutionalism that de-emphasised the role of the Courts.⁵³

More recently, Jeremy Waldron has reshaped the debate by emphasising the role that disagreement plays in modern democratic societies.⁵⁴ He argues that rights are the subject of inevitable and thorough-going disagreement⁵⁵ and that judges are no better placed to resolve these disagreements than legislators.⁵⁶ Indeed, given that rights are concerned with the fundamental equality of individuals and their capacity to make their own decisions, it is better that decisions about controversial rights questions be made by democratic institutions in which the people can participate,⁵⁷ even if that is inevitably through elected representatives.⁵⁸ He writes, '[t]here is a certain dignity in participation and element of insult and dishonour in exclusion that transcends issues of outcome'.⁵⁹

This is the essence of Waldron's 'rights-based objection' to judicially enforceable Bills of Rights. Although his views are influential, they also have attracted critics. In particular, many argue that Waldron's conception of democracy is too thin and pays insufficient attention to the views of minorities.⁶⁰ Posner, for example, argues that Waldron can be criticized for 'lacking a theory of democracy, that is, a theory that would explain what specific rules and institutions relating to voting, districting, legislative procedures, legislators' qualifications, frequency of election, and the like are necessary in order for the legislative product to be deemed

⁴⁹ John Hart Ely, *Democracy and Distrust: A Theory of Judicial Review* (1980) 102–3.

⁵⁰ Barry Friedman, 'Mediated Popular Constitutionalism' (2003) 101 *Michigan Law Review* 2596, 2606–8.

⁵¹ See, eg, Michael Perry, *The Constitution, the Courts, and Human Rights* (1982).

⁵² See, eg, Christopher Eisgruber, *Constitutional Self-Government* (2001) and Christopher Eisgruber, 'Constitutional Self-Government and Judicial Review: A Reply to Five Critics' (2002) 37 *University of San Francisco Law Review* 115.

⁵³ See, eg, Mark Tushnet, *Taking the Constitution Away from the Courts* (1999).

⁵⁴ See generally Jeremy Waldron, *Law and Disagreement* (1999).

⁵⁵ *Ibid* 224–31.

⁵⁶ Jeremy Waldron, 'Moral Truth and Judicial Review' (1998) 43 *American Journal of Jurisprudence* 75, 81–5. In criticising Waldron, Posner points out that courts and judges have strengths that complement legislatures: notably insulation from 'most of the political pressures that beset elected legislatures' which 'sometimes reflect selfish, parochial interests, ugly emotion, ignorance, irrational fears, and prejudice'. He also notes that the 'presence [of some judges] in the overall policy-making apparatus of government may increase both the diversity and stability of the political process': Posner, above n 46, 591.

⁵⁷ Waldron, 'Moral Truth and Judicial Review', above n 56, 77.

⁵⁸ *Ibid*.

⁵⁹ Jeremy Waldron, 'A Rights-Based Critique of Constitutional Rights' (1993) 13 *Oxford Journal of Legal Studies* 18, 40.

⁶⁰ Kavanagh, above n 46, 473–4; 479–80; Christiano, above n 46, 542; Eisgruber, 'Democracy and Disagreement: A Comment on Jeremy Waldron's *Law and Disagreement*', above n 46, 37–8.

democratic'.⁶¹ And Christiano argues that Waldron's argument from the pervasiveness of disagreement is self-defeating, because the disagreement extends to disagreement about the criteria for selecting procedures for resolving that disagreement. Waldron's selection of majority voting as the decision-making procedure does not respect the extent of disagreement about how such procedures should be chosen.⁶²

We do not want to enter into the theoretical debate, either with Waldron or with the US writers about the countermajoritarian difficulty. Rather, our concern is with the assumptions reflected in both the concrete political debate in Australia and in the theoretical writing of authors such as Waldron who value legislative control of controversial decisions. While the tone and sophistication of the political debate differs from that of the theoretical arguments, they are related. As Adrienne Stone has observed, although Waldron's argument is presented as a conceptual one, ultimately it rests on assumptions about the behaviour of legislatures that are capable of empirical verification.⁶³ Stone points out that Waldron's negative view of courts is paired with a 'rosy picture of legislatures'.⁶⁴ Similarly, detractors from the need for a Bill of Rights in Australia tend to paint the judiciary in a negative light and commend the capacity of parliament. While we do not examine the role of the judiciary, we aim to test whether the 'rosy view' of parliaments is something that holds true in the Australian context when it comes to rights debates. We follow many of Waldron's critics⁶⁵ and others⁶⁶ in insisting that the case against judicial review be tested empirically.

What then are the assumptions inherent in the case that defends the role of parliaments as the ultimate protector of rights? Waldron uses examples drawn from real parliamentary debates, for example the reasoned debate over abortion in the

⁶¹ Posner, above n 46, 590 (internal footnote omitted).

⁶² Christiano, above n 46, 519–20. See also Eisgruber, 'Democracy and Disagreement: A Comment on Jeremy Waldron's *Law and Disagreement*', above n 46, 38–9. And it does not account for the people or groups of people are effectively excluded from political life, and are not able to marshal the widespread or powerful support necessary to have their rights taken seriously by the legislature. They might benefit from being able to enforce their rights through judicial review. For them, 'judicial review [could] itself become a valuable channel of political participation, which can supplement and feed into participation in the normal political process': Kavanagh, above n 46, 453. See also Janet Hiebert, *Charter Conflicts: What is Parliament's Role?* (2002) 31; Roland Penner, 'Book Review: *Charter Conflicts: What Is Parliament's Role?*' (2003) 28 *Queens Law Journal* 731.

Nor does Waldron full address the possibility that the value of participation in political decision-making is outweighed by the value that correct decisions be reached on questions (see Kavanagh, above n 46, 459–62; Eisgruber, 'Democracy and Disagreement: A Comment on Jeremy Waldron's *Law and Disagreement*', above n 46, 39–40) and that courts are more likely to reach correct decisions than legislatures. As Kavanagh argues, 'there is no inconsistency in saying that people have the capacity to decide well and sometimes decide badly. In designing institutions, we should put both of these facts into the equation': Kavanagh, above n 46, 476 (footnote omitted).

⁶³ Adrienne Stone, 'Disagreement and an Australian Bill of Rights' (2002) 26 *Melbourne University Law Review* 478, 493–5. Equally, US commentators have pointed out that the legal debate about the countermajoritarian difficulty is often conducted in isolation from the empirical political science literature about the performance and capacity of legislatures and courts in rights protection: Allison Martens, 'Beyond the Countermajoritarian Difficulty: Acknowledging the Real Dangers of Judicial Supremacy and Congressional Abdication' (Paper presented at the annual meeting of the The American Political Science Association, Chicago, 2 September 2004) 6–7.

⁶⁴ Stone, above n 63, 493.

⁶⁵ *Ibid*; Posner, above n 46, 590–2.

⁶⁶ Wojciech Sadurski, 'Judicial Review and the Protection of Constitutional Rights' (2002) 22 *Oxford Journal of Legal Studies* 275, 298–9.

British Parliament in 1966, to argue the case for legislatures.⁶⁷ He commends the processes by which disagreement on an important issue could be treated seriously and with respect for the rights of others in a democratic system. In response to anticipated criticism he concedes that many people will argue that his picture of parliament is unrealistic, but notes that this is but one example of many real debates over crucial public policy issues that have been well handled by the British Parliament. The debates are, he argues,

examples of real legislators proceeding on the basis of those deep principles I mentioned about open debate, respectful disagreement, equal enfranchisement, fair decision-procedures, and dissenting voices being given an opportunity to measure their support. In short, they are examples of legislative integrity — not just the integrity of the legislators who participated so honorably in these proceedings, but also the legislative integrity of the citizens of the United Kingdom, who did not flinch from assigning these issues to a representative forum and whose commitment to democracy did not evaporate the instant they looked like losing a democratic debate.⁶⁸

This reference to parliamentary debate is not limited to those who favour parliaments. In response, critics focus on examples of legislation that have been rushed through parliament or treated to a paltry debate before important rights were significantly attenuated. For instance during the Tampa affair in 2001, '[t]he Prime Minister asked that the [Border Protection Bill 2001 (Cth)] be rushed through all stages'.⁶⁹ Although that particular Bill was ultimately unsuccessful, a rash of legislation concerning the same subject-matter was subsequently passed to which the Opposition largely deferred and even supported. Helen Pringle and Elaine Thompson argue that 'the Government moved to action — and legislation — with an ill-thought out rapidity that could only reasonably have been justified were Australia under a serious, immediate threat of armed invasion'.⁷⁰

Thus both sides of the theoretical and the political debate claim to be grounded in the reality of parliamentary processes and functions. In this project we seek to unpack some of the underlying assumptions inherent in the debate and subject them to the empirical scrutiny that they should withstand if their claims are correct.

As one of the clearest cases for the central role of parliament with respect to the most controversial and important issues (including those that implicate rights) has been made by Waldron, his writing is a useful starting point for the model legislature that is attuned to human rights. In almost all cases, those who focus on the inadequacy of parliaments take the opposing position or one or all of these assumptions. Thus by testing the underlying assumptions in Waldron's model, we test the assumptions of those dubious of the role of parliaments as well. The key features of the Waldron model are as follows:

1. That parliamentarians operate in a political culture in which rights, and the

⁶⁷ Jeremy Waldron, 'Legislating with Integrity' (2003) 72 *Fordham Law Review* 373, 390–1 (footnotes omitted).

⁶⁸ *Ibid* 393–4 (footnotes omitted).

⁶⁹ Helen Pringle and Elaine Thompson, 'The Tampa Affair and the Role of the Australian Parliament' (2002) 13 *Public Law Review* 128, 133. See also George Williams, 'Australian Values and the War against Terrorism' (2003) 26 *University of New South Wales Law Journal* 191, 192–3 with respect to the Communist Party Dissolution Bill 1950 (Cth).

⁷⁰ Pringle and Thompson, above n 69, 142.

idea that there are limits on legitimate political actions, play a part.⁷¹

2. That parliamentarians ‘commit themselves ... to ascertain what those limits are and whether or not they are contravened by the legislative proposals that come before them’.⁷²
3. That they do not act purely with a view to self-interest or with a view to finding agreement on ‘*the truth* about justice, rights and the common good’.⁷³ In other words, the choice is not between pure self interest and an impossible search for moral consensus. Rather, Waldron argues that parliamentarians agree about the importance of rights while disagreeing about what they entail.
4. Although the legislature must necessarily comprise a smaller group than the whole population, ‘it should nevertheless be an institution that is diverse and plural and which, through something like electoral accountability, embodies the spirit of self-government...’.⁷⁴
5. Procedural rules should allow for open debate including dissent.⁷⁵

This brief overview demonstrates that Waldron’s assumptions are of several kinds. There are assumptions about political culture, about the political behaviour of individuals, about the composition of institutions and about the structures and processes of institutions. Our project tests these assumptions in different ways set out in more detail below. We channel our investigation through five questions that place these assumptions into the political context of Australian parliaments:

1. To what extent does a culture of rights operate in Australian legislatures?
2. To what extent are parliamentary processes capable of identifying the rights implications of legislative proposals?
3. To what extent do parliamentary processes lead to deliberation about rights issues?
4. To what extent are diverse conceptions of rights represented in Australian parliaments?
5. How do differences in parliamentary processes affect answers to these questions?

⁷¹ Waldron, *Law and Disagreement*, above n 54, 307.

⁷² *Ibid* 308.

⁷³ *Ibid* 305 (emphasis in original).

⁷⁴ *Ibid* 309.

⁷⁵ Waldron, ‘Legislating with Integrity’, above n 67, 383. See also Jeremy Waldron, ‘Legislation by Assembly’ (2000) 46 *Loyola Law Review* 507, 532.

IV METHODOLOGY

We address these questions using a variety of methodologies. The key stages of the methodology are: a comprehensive compilation and analysis of the rights-oriented elements of each stage of the legislative process; an analysis of the impact of those elements on all of the legislation considered by three representative Australian Parliaments during the period 2001–2003; and analysis of case-studies developed through both analysing the information available on the public record and interviews with parliamentarians.

A *Rights-Oriented Elements of the Legislative Process*

In most Australian parliaments, the legislative process includes some elements that give explicit attention to human rights. For example, five parliaments (Commonwealth, ACT, New South Wales, Queensland and Victoria) have scrutiny committees that are explicitly required to consider whether proposed legislation trespasses unduly on individual rights and freedoms. The first stage of our project aims to present a comprehensive compilation of these elements and an analysis of their common features and differences. It will achieve this in two ways. First by a desk study of how the rights-oriented elements of the legislative process are formally specified in the constitutions, statutes, standing orders, terms of reference, procedure manuals and so on that establish and regulate them. Second by interviews with current and former participants in these processes — politicians and public servants — in order to move beyond the formal specification of the rights-oriented processes in order to understand how those processes operated in practice.

The principal challenge for the desk study is that some of the relevant documents are not publicly available. For example, whereas the Commonwealth Cabinet Handbook is publicly available (indeed, it is published on the internet),⁷⁶ the current Victorian Cabinet Handbook is not.⁷⁷ As a result, while we know that Commonwealth Ministers are required to refer certain legislative proposals that affect rights to the Attorney-General, we do not know what (if anything) is required in Victoria. However, these gaps in the data principally occur in relation to the pre-parliamentary stages of the legislative process, and therefore lie at the border of our study's focus on parliamentary legislative processes.

Even if these materials were all available, the desk study would not allow us to derive a complete understanding of the strengths and weaknesses of the rights-oriented processes. It is important to know how the processes are put into operation and how they interact with other parliamentary and political processes. The simple fact that consideration of rights is required at a particular stage of the legislative process, for example, does not mean that such scrutiny will be carried out in an effective, informed or committed manner. Accordingly, the second part of this stage of the project will involve collecting qualitative information from parliamentarians and public servants. We will use a combination of surveys and interviews to collect this information. There are three categories of information that we are particularly interested in:

⁷⁶ Department of the Prime Minister and Cabinet, Commonwealth, *Cabinet Handbook* (5th ed, 2002) available at <http://www.pmc.gov.au/guidelines/docs/cabinet_handbook.pdf> at 4 July 2005.

⁷⁷ Previous versions of the Victorian Cabinet Handbook have been published; however, neither the 1982 or the 1985 versions contained any references to human rights: see Department of Premier and Cabinet, Victoria, *Cabinet Handbook* (1982) and Department of Premier and Cabinet, Victoria, *Cabinet Handbook* (1985).

- parliamentarians’ understanding of the operation of the rights-oriented elements of the legislative process;
- parliamentarians’ views about the concept of human rights — what human rights are, how important they are relative to other concerns, how they are informed about human rights and how well they are able to identify rights issues; and
- parliamentarians’ views about the overall effectiveness of parliamentary processes for the protection of human rights.

In December 2004, we carried out a trial survey of Victorian parliamentarians.⁷⁸ The survey questions correspond to these categories of information as follows:

Parliamentarians’ understanding of the operation of the rights-oriented elements of the legislative process	<ul style="list-style-type: none"> ▪ Two questions asked respondents to rank the frequency with which rights were raised in particular contexts, such as party room policy debate, parliamentary committees, and parliamentary debate, and to indicate the importance of human rights in each of those contexts.
Parliamentarians’ views about the concept of human rights — what human rights are, how important they are relative to other concerns, how they are informed about human rights, and how well they are able to identify rights issues	<ul style="list-style-type: none"> ▪ Two questions asked each respondent to indicate how important the protection of human rights was in their work as a parliamentarian and the importance of human rights to the people who elected them. ▪ Another question asked about the circumstances in which rights can be limited. ▪ A further question asked respondents to rank the three human rights that they believe are most important.
Parliamentarians’ views about the overall effectiveness of parliamentary processes for the protection of	<ul style="list-style-type: none"> ▪ The survey then asked respondents to quantify the usefulness of various sources of information about rights, such as alerts digests, material from non-

⁷⁸ The survey was sent by mail, despite some of the disadvantages of this course, for reasons of cost and time: see Leonard Bickman and Debra Rog, *Handbook of Applied Social Research Methods* (1998) 399–421. The survey is too long to reproduce here but can be downloaded from <<http://www.law.unimelb.edu.au/cccs/parliamentsandhr>>.

human rights.	<p>government sources, petitions from the public and media reports. It also asked how parliamentary or policy making processes could be improved to 'ensure that appropriate account is taken of human rights'.</p> <ul style="list-style-type: none"> ▪ The last two questions asked respondents what the most significant achievement and failure of parliament have been in the protection of rights during their time in parliament.
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The answers to the last set of questions in particular will assist in selection of case studies and in developing recommendations for improvement of parliamentary processes at the conclusion of the project.

This is not the occasion for a full report on the results of the survey. However, although the response rate was relatively high for a survey (19 responses from 132 surveys sent) and some interesting qualitative results emerged, it was not sufficient to draw meaningful quantitative conclusions. And although members and former members of the Scrutiny of Acts and Regulations Committee were overrepresented in the respondents, the survey did not attempt to get the detailed information about the operation of the scrutiny process that we hope to present in this stage of the project. We therefore do not plan to carry out further surveys of parliamentarians. Instead, we will use data collected in independent surveys to build a bigger picture of the attitudes and understandings of Australian parliamentarians in relation to human rights.⁷⁹

To get a deeper picture of attitudes and understandings of human rights and human rights purposes we will carry out targeted interviews with parliamentarians and public servants. The interviews will enable us to explore the reasons for conclusions expressed in summary form in the surveys and the public record. If, for example, the survey suggests that most parliamentarians find the work of scrutiny committees not to be particularly useful in highlighting rights issues, this might be because the membership of the Committee is not considered credible, the reports themselves are considered to contain insufficient information or analysis, the recommendations in the reports are too ambiguous, the reports are not completed in sufficient time to contribute to debates, or a combination of these factors. The survey can only tell us that there is a problem with the scrutiny committees. The interviews can help to identify what the problem is and whether particular reforms would make the committee more effective in its work.

We interview current and former Members of Parliament with particular responsibility for rights, such as Attorneys-General and their shadows, and members of scrutiny committees. We also interview parliamentary and departmental staff including parliamentary counsel, scrutiny committee legal advisers and secretariats, and parliamentary research staff.

⁷⁹ See, eg, the surveys of candidates and elections carried out following each Commonwealth election: Australian Social Science Data Archive, *Australian Election Studies* and *Australian Candidate Studies* <<http://assda.anu.edu.au/publications.html#aes>> at 4 July 2005.

The interviews will provide an opportunity to deepen our understanding of the practical impact that human rights have on the legislative process. This is particularly important in relation to processes that take place outside the public sphere, such as party room discussions, policy development, and the shaping of views of individual Members of Parliament. These interviews will provide a valuable opportunity to test the theories that we have developed from the public record against the experiences of those who work within the system. It will also allow for a better evaluation of the political prospects for any reform suggestions that are developed in the course of the research. They will also enable us to deepen our understanding of how factors, such as those identified by a number of authors as relevant to the performance and effectiveness of parliamentary committees, affect the capacity of committees and other rights-attentive parliamentary mechanisms to identify and respond to rights issues.

Because of the need to ask follow-up and probe questions, a semi-structured interview format will be used with the topics of discussion structured around a similar set of issues to those set out in the survey.

This stage will also be used to question parliamentarians about the particular factors that affect the relevance of human rights to the parliamentary process. In his analysis of the extent to which the UK Parliament took rights into consideration, for example, the former Legal Adviser to the Joint Committee on Human Rights in the Houses of Parliament, David Feldman, suggested that there were seven factors that made it more likely that human rights would be taken into account by the government and parliament.⁸⁰ These included submissions on human rights being made earlier rather than later in the legislative process,⁸¹ that the criticisms based on rights still allowed the government to achieve its central objective⁸² and the nature and quality of the arguments.⁸³

Similar criteria have been put forward by other commentators. In discussing the performance of the Commonwealth Parliament in protecting rights in Australia, John Uhr proposed five factors that strengthen parliamentary effectiveness in protecting rights, including the assignment of 'real' parliamentary power (ie letting either house disallow regulations), the presence of expert personnel, and active support from central government agencies (such as the Attorney-General's Department).⁸⁴ David Kinley has pointed to the significance of documents such as the *Legislative Scrutiny Manual* in promoting awareness of the role of the scrutiny committees, and also raised the importance of expert advice and alert digests in raising appreciation of rights issues.⁸⁵ Both Kinley and Cheryl Saunders have identified the need for committees to situate terms of reference within articulated rights frameworks and to have effective sanction mechanisms to make them more effective.⁸⁶ Saunders has also drawn attention to the impact of the very existence of

⁸⁰ David Feldman, 'The Impact of Human Rights on the UK Legislative Process' (2004) 25 *Statute Law Review* 91, 105–13.

⁸¹ *Ibid* 107.

⁸² *Ibid* 111.

⁸³ *Ibid* 112.

⁸⁴ John Uhr, 'The Performance of Australian Legislatures in Protecting Rights' (Draft paper prepared for Protecting Human Rights in Australia: Past, Present and Future, Monash University, Melbourne, 10–12 December 2003) 25–9.

⁸⁵ Kinley, 'Parliamentary Scrutiny of Human Rights: A Duty Neglected?', above n 5, 180–1, 183.

⁸⁶ *Ibid* 181, 183; Saunders, above n 5, 532–3.

formal, legal rights instruments such as the *Human Rights Act 1998* (UK) and the *Bill of Rights Act 1991* (NZ) in making rights a priority for Parliaments.⁸⁷

B *The Legislative Audit*

While the views of those directly involved in the parliamentary process can provide a useful insight into the effectiveness of parliamentary procedures, they are insufficient in themselves to determine how well the system is working in practice. Such interviews rely on the perceptions of those involved in the system and such perceptions may be misplaced, ill-informed or conveyed in a deliberately partial way because of the interests of those being interviewed. It is thus important to measure these responses against a more independent evaluation of the legislative record.

In response to this need, we are now undertaking the second stage of the process — the legislative audit. This stage involves considering every bill introduced over a three year period (2001–2003) in three Parliaments: the Commonwealth, Queensland, and Victoria. Defenders of the parliamentary record on human rights tend to point to instances where parliamentary debate on a Bill has included thoughtful discussion of the effects of the Bill on human rights and other interests and sought to balance those effects.⁸⁸ Opponents point to rights violating legislation that has been forced through parliaments without sufficient scrutiny or comment.⁸⁹ The strength of this element of our study, as opposed to drawing conclusions from a couple of prominent examples, is that it gives a better overview of the way in which the system is operating as a whole. Proponents of parliaments as protectors of human rights tend to dismiss the examples of problems as unrepresentative, while those who are critical of parliaments assume that particular examples of problems demonstrate systemic flaws. By comprehensively reviewing the progress of legislation in three parliaments over three years we are in a better position to assess the performance of parliaments in the protection of human rights.

The three parliaments were chosen to reflect the range of approaches to rights protection. The Commonwealth has the longest established scrutiny committee (the Senate Scrutiny of Bills Committee) and a tradition of scrutiny that reaches back to the establishment of the Regulations and Ordinances Committee in 1932. The approaches in the States are, formally at least, quite divergent. At one extreme, Queensland has enacted a Statement of Fundamental Legislative Principles. Although these Principles are not formally binding, all legislation must have ‘sufficient regard’ to them.⁹⁰ This requirement is explicitly addressed in the Explanatory Notes for all proposed legislation and is the primary focus of the scrutiny committee’s responsibilities.⁹¹ Victoria has a parliamentary scrutiny committee (the Scrutiny of Acts and Regulations Committee) that considers legislation in part against broadly

⁸⁷ Saunders, above n 5, 519.

⁸⁸ Waldron, ‘Legislating with Integrity’, above n 67, 390–1.

⁸⁹ Simon Evans, ‘The Rule of Law, Constitutionalism and the MV Tampa’ (2002) 13 *Public Law Review* 94, 101; Pringle and Thompson, above n 69, 133; Williams, above n 69, 192–3. Cf Eric Sidoti, *Australian Democracy: Challenging the Rise of Contemporary Authoritarianism* (Paper presented at a meeting of Catholics in Coalition for Justice and Peace, 17 August 2003).

⁹⁰ *Legislative Standards Act 1992* (Qld) s 4.

⁹¹ *Parliament of Queensland Act 2001* (Qld) s 103(1)(a).

expressed rights criteria that are similar to those of a number of committees in other States.⁹²

Our objective is to identify the extent to which the various parliamentary processes identify and address proposed legislation that raises human rights issues. For each Bill we record:

- its name;
- the house in which it was introduced;
- whether it was a private or Government Bill;
- whether it create a burden on, or enhanced the protection of, the human rights contained in the *ICCPR*;
- whether rights were referred to in the Explanatory Memorandum;
- whether the scrutiny committee (or any other parliamentary committee that took a rights approach) reported on the rights-impact of the Bill;
- if so, whether there was a response to the report by the Minister;
- whether any references were made to rights or the committee reports during the parliamentary debates; and
- whether any amendments to the legislation that might impact on rights were introduced during debate.

Most of this information is objectively ascertainable, for example the existence of a scrutiny committee report or whether amendments were introduced and accepted

⁹² *Parliamentary Committees Act 2003* (Vic) s 17. The functions of the Scrutiny of Acts and Regulations Committee are:

- ‘(a) to consider any Bill introduced into the Council or the Assembly and to report to the Parliament as to whether the Bill directly or indirectly
 - (i) trespasses unduly on rights or freedoms
 - (ii) makes rights, freedoms or obligations dependent on insufficiently defined administrative powers;
 - (iii) makes rights, freedoms or obligations dependent on non-reviewable administrative decisions;
 - (iv) unduly requires or authorises acts or practices that may have an adverse effect on personal privacy within the meaning of the *Information Privacy Act 2000*;
 - (v) unduly requires or authorises acts or practices that may have an adverse effect on privacy of health information within the meaning of the *Health Records Act 2001*;
 - (vi) inappropriately delegates legislative power;
 - (vii) insufficiently subjects the exercise of legislative power to parliamentary scrutiny[.]’

or rejected. One of the more controversial data items that we record is whether rights issues were raised during the parliamentary debates. In order to develop a consistent methodology to deal with this issue, we have simply searched the Hansard record for use of the term rights or human rights. The possible weakness with this approach is that it has the potential to overlook a debate that is in substance about rights issues even though the express language of rights is not used. Nonetheless, we believe this is still an appropriate method. First, it is clear and consistent leading to high inter-coder reliability — different researchers are likely to record the same results. Second, one of the claims that is often made about rights is that the language of rights has become the dominant discourse and threatens to overwhelm or drown out other equally valid concepts of human good.⁹³ If this claim were true, one would expect to see the explicit language of rights used and, if it is not, we must consider the possibility that the discourse of rights is not as dominant as is sometimes claimed. Finally, if the explicit language of rights is not used as the demarcation point for discussions of rights, it is difficult to draw a line between consideration of rights and consideration of other conceptions of human good. For these reasons, at the legislative audit stage, we have restricted our analysis to cases where the language of rights is explicitly used. In the final, case-study stage of the project, a more thorough analysis of parliamentary discourse will be carried out.

An important methodological question here is how we identify whether legislation raises rights issues. Many questions about rights are controversial and essentially contested. If we take this aspect of human rights seriously, we cannot employ a methodology that depends on our subjective judgment about whether or not a parliament has unjustifiably burdened an *ICCPR* right. Accordingly, we ask instead whether proposed legislation burdens or protects rights *without* moving on to consider whether any burden is justified. (For example, the *Racial and Religious Tolerance Act 2001* (Vic) is recorded as burdening rights, as it penalises some forms of expression,⁹⁴ although its proponents and supporters regard it as enhancing the rights of racial and religious minorities. At this stage we do not attempt to assess whether such a burden is justified by concern for the rights and freedoms of others.⁹⁵) The data collected at this stage should therefore not be seen as indicating how often parliaments are

⁹³ Mark Tushnet, 'An Essay on Rights', above n 7, 1384–94; Fleur Johns, 'Human Rights in the High Court of Australia, 1976–2003: The Righting of Australian Law?' (2005) 33 *Federal Law Review* (forthcoming). Cf Mark Nolan and Penelope Oakes, 'Human Rights Concepts in Australian Political Debate' in Tom Campbell, Jeffrey Goldsworthy and Adrienne Stone (eds), *Protecting Human Rights: Instruments and Institutions* (2003) 75, 76.

⁹⁴ For example the *Racial and Religious Tolerance Act 2001* (Vic) ss 7(1) and 8(1) provide persons must not on the grounds of the race or religion of a person or class of persons, 'engage in conduct that incites hatred against, serious contempt for, or revulsion or severe ridicule of, other person or class of persons'.

⁹⁵ *ICCPR*, above n 12, art 19(3).

violating human rights. Rather, a finding that a Bill burdens or promotes human rights is a trigger for analysis of the parliamentary process in relation to that Bill. Once a Bill has been triggered for greater scrutiny because it burdens or benefits rights, the full parliamentary record will be scrutinised to see whether the rights issue involved was perceived and debated as a rights issue and to determine what values parliaments believes justify the burden imposed on human rights in particular situations. Adopting this two stage approach, in which we do not attempt to consider whether a burden on a right is justified, attenuates the subjectivity involved in making an assessment of the rights impact of particular Bills and again enhances inter-coder reliability. Commonly it is easier to secure agreement on whether a right is impinged on than on whether that impingement is justified.⁹⁶ This is amply demonstrated by the rights jurisprudence of the Canadian Supreme Court, the European Court of Human Rights and the Human Rights Committee where the focus of disagreement is most often whether a particular measure is proportional to a legitimate government end, within the enacting State's margin of appreciation or reasonably justified in a free and democratic State.

This stage deals only with *ICCPR* rights and not with those found in the *ICESCR*. While ideally both sets of rights would be covered at this stage, inclusion of *ICESCR* rights adds methodological complications with which we do not have the resources to deal. While some Acts may breach economic, social or cultural rights in a fairly direct manner (for example, by excluding children from a particular racial group from school) other infringements are likely to be more complicated and subtle (for example, changing the formula by which funding is distributed between schools) and will often lead to a complex debate about whether the new allocation of resources will better protect the right to education or not.⁹⁷ The legal standard required at international law is also a matter of greater debate for economic, social and cultural rights whether the standard set out in art 2 only calls for 'achieving progressively the full realization of the rights'⁹⁸ rather than their immediate implementation.⁹⁹

The data recorded in this stage will enable us to identify

⁹⁶ The infringing/violating distinction is drawn by Judith Jarvis Thomson: for a survey and critique see John Oberdiek, 'Lost in Moral Space: On the Infringing/Violating Distinction and Its Place in the Theory of Rights' (2004) 23 *Law and Philosophy* 325.

⁹⁷ See Brendan Nelson, 'Making Schools Better' (Speech delivered at Making Schools Better Conference, The University of Melbourne, 26 August 2004) <<http://www.dest.gov.au/Ministers/Media/Nelson/2004/08/n901260804.asp>> at 4 July 2005; Brendan Nelson, 'New Report Supports Claims Labor Plans to Cut Funding to at Least 127 Independent and Catholic Schools' (Press Release, 1 July 2004) <<http://www.dest.gov.au/Ministers/Media/Nelson/2004/07/n784010704.asp>> at 4 July 2005; Jenny Macklin, 'Howard Government Follows Labor's Lead on School Funding' (Press Release, 25 November 2004) <<http://www.jennymacklin.net/infocentre.asp?data=480F010701044F5851515E587E45555F48454B4E>> at 4 July 2005; Jenny Macklin, 'Labor Amendments Seek Fairer Schools Funding' (Press Release, 30 November 2004) <<http://www.jennymacklin.net/infocentre.asp?data=480F010504014F5851515E587E45555F48454B4E>> at 4 July 2005; Australian Labor Party, *ALP National Platform and Constitution* (2004) <<http://www.alp.org.au/platform>> at 4 July 2005.

⁹⁸ *ICESCR*, above n 13, art 2(1).

⁹⁹ See The Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights, UN Doc E/CN.4/1987/17, Annex (1987) [16]–[34]; Office of the United Nations High Commissioner for Human Rights, *CESCR General Comment No 3: The Nature of States Parties Obligations*, UN Doc E/1991/23 (1990); E V O Dankwa and Cees Flinterman, 'Commentary by the Rapporteurs on the Nature and Scope of States Parties' Obligations' (1987) 9 *Human Rights Quarterly* 136. But see Philip Alston and Gerard Quinn, 'The Nature and Scope of States Parties' Obligations under the *International Covenant on Economic, Social and Cultural Rights*' (1987) 9 *Human Rights Quarterly* 156, 165–81.

- how often Bills raise rights issues, in aggregate and by reference to particular rights;
- how often those issues are *identified* by the various parliamentary processes; and
- how often identification of those issues triggers a response in the course of the parliamentary processes, whether a Ministerial response, a proposed or successful amendment addressing the rights issue, or deliberation about the rights issue in the course of parliamentary debate.

We follow Aldons' work on approaches to measuring the effectiveness of parliamentary committees in regarding how government responds to committee reports as an important measure of the effectiveness of those committees.¹⁰⁰ We extend this approach in two ways. First, we apply it to other parliamentary processes. Second, we look to parliamentary responses as well as government responses. However, we depart from Aldons in not attempting to apply a numerical value to the importance of the committee recommendations or the government response. The measures that we use cannot be purely quantitative, in part because of the general problems with quantitative measurements of human rights discussed below. In the specific case of responses to scrutiny committees, what is important is not the number of amendments introduced in response to an adverse scrutiny report, but their effect on the rights-impact of the Bill. As Lindell has observed, '[a] short single amendment may have much greater significance than a numerous minor amendments'.¹⁰¹ The measures therefore have an inescapably qualitative element. There is no straightforward and reliable way to assign numerical values to these issues. Moreover, and again as Lindell has pointed out, these measures do not give a full picture of the effectiveness of the various parliamentary mechanisms.¹⁰² For these reasons, the legislative audit will be carried out alongside the other two stages of this project to ensure that we capture, and report transparently on, the effectiveness of parliamentary mechanisms and the systemic and long-term effects of the various mechanisms, such as their effect on legislative drafting practices and guidelines.¹⁰³

C Case-Studies

The third stage of the project will involve the selection of several case studies of key Bills that have been introduced in Australian Parliaments. Most will be chosen from the 2001–2003 period covered by the legislative audit.

¹⁰⁰ See Malcolm Aldons, 'Rating the Effectiveness of Committee Reports: Some Examples' (2001) 16 *Australasian Parliamentary Review* 52, 59.

¹⁰¹ Geoff Lindell, 'How (and Whether) to Evaluate Parliamentary Committees – From a Lawyer's Perspective, talk given on 18 November 2004 to a meeting of the *Canberra Evaluation Forum*. [

¹⁰² *Ibid.*

¹⁰³ *Ibid.*

We will consider both Bills that seek to protect human rights to a greater degree and those that potentially place a burden on rights. For those Bills that protect rights we will consider whether they passed (a particularly important issue for such Bills as they are often private members' bills), whether they were promoted by supporters of the Bill in terms of human rights, what form of opposition (if any) was made to the Bill, and the ways in which the Bill could be said to further human rights. It is important that these Bills be included in the case-studies, because to focus solely on the ways in which parliament can act to burden human rights is to give an incomplete picture of its relationship with human rights.

We will also examine several bills that burden rights to assess whether those bills were debated in a manner that reflected the fact that rights were at issue. For example, during debate was the term 'rights' used, or other similar terms such as 'liberties' or related concepts such as the 'rule of law'? We will then assess the selected bills against Australia's domestic and international human rights obligations. In making this assessment we will look to the rights contained in the relevant State or Commonwealth Constitutions and the *ICCPR* and *ICESCR*, as well as the case-law of Australian courts, international courts and committees on human rights. This assessment will be qualitative in nature, assessing a selected number of bills against established criteria. A certain degree of subjectivity comes into this analysis, particularly with respect to whether balancing between rights and other important social values (such as national security or the rights and freedoms of others) has been carried out in an appropriate manner.

Together, the three elements of our methodology allow us to draw robust conclusions about the five questions through which we are channeling our investigation. The methodology that we have adopted utilises a mixture of both quantitative and qualitative methods in order to produce results that are both valid but also information rich. There are a variety of methodologies used by various researchers for evaluating compliance with human rights, but there are significant weaknesses in some of the models sometimes used that have led to us taking the approach that we have described.

V METHODOLOGICAL APPROACHES FOR EVALUATING RIGHTS PERFORMANCE

The methodology that we plan to use to assess the performance of parliaments in the protection of human rights involves a mixture of quantitative and qualitative measurements.¹⁰⁴ The quantitative measurements focus on parliamentary procedure and process in the legislative audit, and measuring of parliamentarians' perceptions of the role and importance of human rights as extracted from the survey and interview phases. When it comes to assessing whether the legislation passed by Australian parliaments protects human rights or offends against Australia's international human rights obligations, we have chosen a qualitative analysis. This is not the only option open to those seeking to evaluate rights performances of countries or institutions. A variety of quantitative measures are increasingly used to rank countries' adherence to human rights standards and to track how they change over time. Such methodologies have an appeal for both researchers and policy makers because they appear to take

¹⁰⁴ For an introduction to some of the methodologies for evaluating rights compliance and some of the limitations of those methodologies see Ian Kapoor, *Indicators for Programming in Human Rights and Democratic Development: A Preliminary Study* (1996) Canadian International Development Agency <[http://www.acdi-cida.gc.ca/INET/IMAGES.NSF/vLUIImages/HRDG/\\$file/INDICENG.pdf](http://www.acdi-cida.gc.ca/INET/IMAGES.NSF/vLUIImages/HRDG/$file/INDICENG.pdf)> at 4 July 2005.

human rights out of the realm of subjectivity and give them a hard, measurable edge. There are, however, good reasons to be cautious about such measurements¹⁰⁵ and there are both theoretical and practical reasons that we decided not to focus our evaluation of parliamentary performance solely around quantitative measurements.

A *Quantitative Measurements*

1) *Direct Measurements*

Direct measurements seek to measure human rights by making a series of measurements of various human rights. These individual measurements are then often aggregated to give a country an overall ‘score’ and ‘ranking’ for their adherence to human rights.

The processes by which these results are achieved are questionable and the rankings/scores that emerge from the process highly controversial. One of the best-known attempts to employ this type of methodology is the annual Freedom House report *Freedom in the World*.¹⁰⁶ The report ranks countries according to two broad categories: political rights and civil liberties. The methodology involves a group of experts drawing on a range of sources (including news reports, non-governmental organisation publications, academic analyses, visits to the region) to give each country a raw score from 0–4 for a set of questions (10 questions for political rights and 15 for civil liberties).¹⁰⁷ 0 represents the ‘smallest degree’ of liberty and 4 the ‘greatest degree of rights or liberties present’.¹⁰⁸

The Freedom House political rights checklist deals with electoral process, political pluralism and functioning of government. It includes questions such as: ‘Is the head of state and/or government ‘elected through free and fair elections?’; ‘Are there fair electoral laws, equal campaigning opportunities, fair polling and honest tabulation of ballots?’; ‘Are the people’s political choices free from domination by the military, foreign powers, totalitarian parties, religious hierarchies, economic oligarchies, or any other powerful group?’; and ‘Is the government accountable to the electorate between elections, and does it operate with openness and transparency?’.¹⁰⁹ The civil liberties checklist includes questions such as: ‘Are there free religious institutions, and is there free private and public religious expression?’; ‘Is there academic freedom, and is the educational system free of extensive political indoctrination?’; ‘Is there an independent judiciary?’; and ‘Is the population treated equally under law?’.¹¹⁰

After the experts have given their score to the questions in each category, the totals in each list are tallied and averaged. On the basis of these averages, countries are ranked as being free, partly free, and not free. Countries are also ranked for

¹⁰⁵ See Michael Kirby, ‘Indicators for the Implementation of Human Rights’ in Janusz Symonides (ed), *Human Rights: International Protection, Monitoring, Enforcement* (2003) 325. Cf Todd Landman, ‘Measuring Human Rights: Principle, Practice, and Policy’ (2004) 26 *Human Rights Quarterly* 906.

¹⁰⁶ See Adrian Karatnycky, Aili Piano and Arch Puddington (eds), *Freedom in the World: The Annual Survey of Political Rights and Civil Liberties 2004* (2004).

¹⁰⁷ Freedom House, *Freedom in the World 2004: Survey Methodology* (2004) <<http://www.freedomhouse.org/research/freeworld/2004/methodology.htm>> at 4 July 2005.

¹⁰⁸ Ibid.

¹⁰⁹ Ibid.

¹¹⁰ Ibid.

political and civil liberties based on their raw score.¹¹¹ Freedom House claims that it does not ‘maintain a culture-bound view of freedom’¹¹² as its standards are drawn from the *Universal Declaration of Human Rights*.¹¹³

In principle, there are several advantages to such an approach to evaluating rights. While the *Freedom in the World* report is a significant undertaking because of the large number of countries examined (192 countries and 18 territories)¹¹⁴ and the difficulties in obtaining information from many of those countries, dealing with the Australian situation only would be far more manageable. The number of questions is limited and using the resultant data does not involve detailed statistical analysis. The free/partly free/not free categorisation is probably useful and broadly accurate. (The more detailed rankings and scores, however, are problematic for reasons discussed below.) Having concrete scores can focus attention on areas of weakness and also allow for measurement over time. It can illustrate the extent to which the human rights situation in a State has improved or deteriorated over time and also give some sense of the degree to which this has happened.

In practice, however, there are real difficulties to using this type of approach to evaluating human rights.

While it is described as a quantitative analysis it in fact relies on the evaluators making a series of highly subjective, qualitative evaluations. Every one of the questions requires the evaluator to make a determination on a non-statistical basis of how well various human rights have been protected in the country in question. Goldstein describes the basis for assigning scores as ‘entirely impressionistic’.¹¹⁵ While some questions are reasonably focussed (eg whether religious groups can practice in public and in private) others are extraordinarily broad. The question of whether all individuals are treated as equal under the law, for example, potentially covers a vast range of issues, some of which may be difficult to assess without making cultural value-judgments of the type that Freedom House insists is absent from its calculations. Thus, while numbers emerge from the process, this is really an attempt to quantify a qualitative evaluation. The results are therefore not as certain as their numerical quantification would suggest.¹¹⁶

This problem is exacerbated by the frequent failure of those constructing quantitative methodologies to sufficiently break-down the rights concepts that they are measuring. As Jackman puts it in a slightly different context, ‘variables are supposed to be unidimensional. While this may seem rudimentary, the literature on comparative politics is replete with umbrella concepts that carry too much baggage to be reducible to a *single* unidimensional variable’.¹¹⁷ The same criticism can be made

¹¹¹ Ibid.

¹¹² Ibid.

¹¹³ GA Res 217A (III), UN GAOR, 3rd sess, 183rd plen mtg, UN Doc A/RES/217A (III) (1948). Cf Raimundo Panikkar, ‘Is the Notion of Human Rights a Western Concept?’ (1982) 120 *Diogenes* 75.

¹¹⁴ Freedom House, above n 107.

¹¹⁵ Robert Goldstein, ‘The Limitations of Using Quantitative Data in Studying Human Rights Abuses’ in Thomas Jabine and Richard Claude (eds), *Human Rights and Statistics: Getting the Record Straight* (1992) 35, 48.

¹¹⁶ For similar criticism of the UNDP’s Human Freedom Index see Lisa Bernt, ‘Measuring Freedom? The UNDP Human Freedom Index’ (1991–1992) 13 *Michigan Journal of International Law* 720, 731–2.

¹¹⁷ Robert Jackman, ‘Cross National Statistical Research and the Study of Comparative Politics’ (1985) 29 *American Journal Of Political Science* 161, 169 (emphasis in original).

of human rights evaluations. As can be seen from some of the Freedom House questions set out above, many of the variables are multidimensional. This is not an inherent problem — better constructed surveys could minimise or maybe even eliminate the issue¹¹⁸ — but demonstrates some of the complexities of developing appropriate methodologies when dealing with abstract and contested concepts such as rights. This is particularly so given the wide variety of conceptions of rights and the need to ensure that both civil/political and economic/social/cultural rights are taken into account when developing a comprehensive evaluation of rights performance.¹¹⁹

Furthermore there is the problem of aggregation of the various factors into a single measure of the ‘freedom’ in a particular country (or, even more broadly in our case, the ‘human rights protection’ in a particular country). The types of phenomena being measured are often incommensurable. And when they are commensurable, there is also the problem of weighting to be given when aggregating scores. Freedom House gives each question equal weighting, as do a number of other, more comprehensive measurements of human rights.¹²⁰ Yet this approach is questionable when determining overall how well a country respects human rights.¹²¹ For example, a government that puts some unreasonable limits on free speech might be marked down to the same extent as it would if it sometimes arbitrarily detained and tortured people. The assumption that all human rights have the same value when calculating respect for human rights overall is questionable.¹²²

The measurements used are not really sophisticated or subtle enough to track the types of changes that occur over time in a generally free State. While they may be capable of picking up a significant change, these types of changes are not terribly likely in stable Western democracies (as compared to countries that may be in transition to or from democratic governance). Since 1973 Freedom House has given Australia rankings of 1 (the highest rating) for political rights and civil rights. What is far more likely in a country such as Australia is small scale changes over time that have some effect (positive or negative) on human rights. The gradations of rights and the necessarily broad questions that this type of analysis requires are simply not suitable for tracking changes in Australia over a limited time period.

This is particularly so given the degree of subjective judgment involved, discussed above. While there may not be too much disagreement that a State that persecutes all believers other than the ones who belong to an official religion has less respect for religious freedom than a State that allows all religious groups to worship and practice openly, the situation in Australia is generally likely to be far more

¹¹⁸ See, eg, David Cingranelli and David Richards, ‘Measuring the Level, Pattern and Sequence of Government Respect for Physical Integrity Rights’ (1999) 43 *International Studies Quarterly* 401, 408, 410–14.

¹¹⁹ Elvis Fraser, ‘Reconciling Conceptual and Measurement Problems in the Comparative Study of Human Rights’ (1994) 35 *International Journal of Comparative Sociology* 1, 1, 3.

¹²⁰ For instance the World Governance Survey (which deals with democratic governance issues as well as rights) gives equal weighting to all factors on the basis that, while some indicators may be more important at a particular time, ‘over time any such differences are neutralized’. No evidence is given for this proposition, with the authors merely stating that weighting would make the analysis ‘more difficult and arbitrary’: Göran Hyden, *The World Governance Survey: Who Should Assess and How?* (2003) 8 <http://www.11iacc.org/download/paper/WS_10.3_Hyden_Final_Paper.doc> at 4 July 2005.

¹²¹ Goldstein, above n 115, 50–1.

¹²² Kirby, above n 105, 325. It should be noted that some authors have attempted to rectify this by using weighted measurements for aggregating scores. While some of these are arbitrary, there has been an attempt to find a more sophisticated basis for weighting.

complex. The Victorian religious vilification laws mentioned above, for example, were opposed by some religious groups as interfering with their religious beliefs by making it difficult for them to speak out about the ‘truth’ of their own religion and the ‘falsity’ of other religions.¹²³ Others argued in favour of such legislation saying that minority religious groups would feel freer and safer to practice if others were not permitted to whip up hatred against them.¹²⁴ When scoring Victoria for religious freedom, it is not clear whether religious hatred laws should lead to a lower or higher mark for religious freedom in the State. And it is certainly not clear why the assessment of a group of ‘experts’ should necessarily be seen as better or more authoritative than that of the democratically elected legislature that has explicitly taken human rights issues into consideration in passing the legislation.

Finally, the direct measurement approach fails to distinguish the effects of legislation from the effects of other governmental and non-governmental actors and influences. Our interest in this study is in the performance of parliaments, rather than the overall protection of rights. The extent to which rights are protected and enjoyed depends on the social, economic and cultural context and the attitudes of officials to the enforcement of the law, as well as on the actual terms of legislation that is (or that is not) enacted by the parliaments. In principle it would be possible to construct direct measures that focus solely on the effects of legislation, but this would be a rather stilted exercise.

We have thus tried to focus our quantitative measurements on the process or perceptions of the process rather than its outcomes. The legislative audit is a way of gathering hard data about the prevalence of bills that affect rights in Australian Parliaments, the processes used to monitor violations of rights and the effectiveness of these processes in leading to alterations of legislation. In assessing the outcomes of these processes, rather than the processes themselves, we move to qualitative analysis (as discussed below).

2) *Indicator Measurements*

The second most commonly used quantitative measurement methodology in the human rights field relies on indicators rather than on asking direct questions about human rights.¹²⁵ ‘Indicator’ is used in a number of senses in the literature, but the central concept is a ‘piece of information [usually a statistical measure] used in measuring the extent to which a legal right is being fulfilled or enjoyed in a given situation’.¹²⁶ Indicators are particularly popular in dealing with economic and social rights (especially as those rights are often being measured in the context of development projects where indicators are commonly used as measures of progress).

¹²³ See, eg, Ruth Limkin, ‘Faith in Open Debate’, *Courier Mail* (Brisbane), 21 December 2004, Features 17; Peter Stokes, Salt Shakers, *Freedom of Speech*, *GONE* (December 2004) <http://www.catchthefire.com.au/courtupdate26_verdict.html> at 4 July 2005.

¹²⁴ See Victoria, *Parliamentary Debates*, Legislative Assembly, 5 June 2001, 1643 (Richard Wynne).

¹²⁵ Hans-Otto Sano and Lone Lindholt, *Human Rights Indicators: Country Data and Methodology 2000* (2000) Danish Institute for Human Rights, 55–63 <<http://www.humanrights.dk/departments/international/PA/Concept/Indicato/Ind2000/>> at 4 July 2005 demonstrates that the concept can become blurred. See also Nancy Thede, *Human Rights and Statistics — Some Reflections on the No-Man’s-Land between Concept and Indicator* (2000) International Centre for Human Rights and Democratic Development <<http://www.ichrdd.ca/english/commdoc/publications/demDev/statisticsIndicators.html>> at 4 July 2005.

¹²⁶ Maria Green, ‘What We Talk About When We Talk About Indicators: Current Approaches to Human Rights Measurement’ (2001) 23 *Human Rights Quarterly* 1062, 1065.

The best known, and probably most sophisticated of these, is that used by the UN Development Programme (UNDP). At present the UNDP does not include direct human rights measurements in its reports,¹²⁷ but it uses indicators to look at a range of issues, particularly those associated with economic and social rights.¹²⁸ This will generally involve looking at a range of indicators for each index.¹²⁹ For example, the gender-related development index takes into account the following indicators: female/male life expectancy, female/male adult literacy rate, female/male education enrolment ratio, and female/male estimated earned income.¹³⁰ This gives a snap-shot of gender equality within a given society. The strength of this approach is that the data that is used is harder and less open to subjective assessment than the data for direct human rights measurements. While there may be some debate about precisely how literacy is measured, it is still a far less complex issue than determining whether a trial has been fair in an objective sense. This also means that comparisons of statistics over time are more likely to be valid. It is easier to demonstrate conclusively by use of statistics that deaths in child-birth have decreased over time than to prove the more general proposition that the position of women is improving.

While indicator methods of measurement are useful in a number of areas where data is available,¹³¹ their use is limited. First, they present statistical information, but any conclusions that can be drawn from them require further information and some degree of subjective judgment. For example, a sharp increase in maternal deaths in childbirth would give rise to questions about whether the right to health and the rights of women were being violated. Yet the rise might be explicable by other factors, such as the outbreak of a new disease that targets pregnant women. The government may have used all its best efforts to combat the disease but not been successful. Alternatively, it could be that the government had taken significant amounts of funding away from maternal health care and that there was an issue of rights violation. The statistics themselves are useful to some extent, particularly in alerting observers to areas of possible concern, but they do not obviate the need for subjective judgments in determining their link to respect for human rights.

Another limitation in this method is that, in developing the indicators themselves, it is impossible to escape the need for value judgments about the appropriate interpretation of rights.¹³² This occurs even in the economic rights/development area. One indicator that UNDP use for developing their poverty index, for example, is percentage of people living below the poverty line. Yet the construction of poverty lines is far from an apolitical exercise and has caused significant controversy in Australia.¹³³ The concept of poverty is also culturally

¹²⁷ For a useful summary of the political criticisms of the index, as well as a critique of the UNDP's methodology, see Bernt, above n 116. The Human Freedom Index was only ever employed in 1991: UNDP, *Human Development Report 2004: Cultural Liberty in Today's Diverse World* (2004) 128.

¹²⁸ See UNDP, above n 127.

¹²⁹ This aggregating assists with some of the problems of interpretation of data discussed below. See Daniel Kaufmann, Aart Kraay and Pablo Zoido-Lobatón, *Aggregating Governance Indicators* (1999) 1–4, but note that the authors acknowledge that aggregating data of governance leads to imprecise outcomes.

¹³⁰ UNDP, above n 127, 217–20.

¹³¹ Goldstein, above n 115, 41–9 gives a useful summary of some of the problems that arise with obtaining reliable data.

¹³² Kirby, above n 105, 325.

¹³³ Dale Daniels, *The Poor in Australia: Who Are They and How Many Are There?* (2002) Parliament of Australia <<http://www.aph.gov.au/library/intguide/SP/poverty.htm>> at 4 July 2005.

constructed to a large degree. For measuring civil and political rights, the issue of indicators becomes even more complex¹³⁴. While there can be some fairly close links drawn between rights such as health and indicators such as life expectancy, infant mortality rate, various disease rates etc, the appropriate indicators for civil and political rights are far less obvious. This has led to some questionable choices for indicators. For example, the use of ratification of human rights treaties has been employed, but also attacked, as a useful indicator for demonstrating commitment of a State to human rights.¹³⁵

Finally, if the use of indicators is to have any validity or usefulness, the collection of the necessary data is very complex, time-consuming and expensive.¹³⁶ This makes it unrealistic for our project.

B *Psychological Assessment*

Another useful quantitative measurement approach does not measure (or even claim to measure) a set of objective circumstances, but rather to measure the subjective sense of the population about their beliefs in regards to how well particular rights are being protected in a given State.¹³⁷ Some preliminary work along these lines has been done in Australia.¹³⁸

This approach gives some sense of the concerns of ordinary people, whereas the other two methodologies outlined require the assessment of 'experts' (for direct measures) or the construction of a framework of relevant indicators (indicator methods).¹³⁹ It may be said, therefore, to appropriately reflect the democratic character of rights. With a sufficiently large sample size it may also allow longitudinal tracking of perception of rights.

People's subjective beliefs about how well human rights are protected, however, are only an indicator of how well those rights are in fact protected. The

¹³⁴ See Kenneth Bollen, 'Political Rights and Political Liberties in Nations: An Evaluation of Human Rights Measures, 1950 to 1984' in Thomas Jabine and Richard Claude (eds), *Human Rights and Statistics* (1992) 188 for a discussion of measuring political rights and freedoms.

¹³⁵ See Oona Hathaway, *The Cost of Commitment* (2003) 102–3 <<http://papers.ssrn.com/abstract=394282>> at 4 July 2005; Oona Hathaway, 'Testing Conventional Wisdom' (2003) 14 *European Journal of International Law* 185; Ryan Goodman and Derek Jinks, *Measuring the Effect of Human Rights Treaties* (2003) <http://ssrn.com/abstract_id=391643> at 4 July 2005.

¹³⁶ See Kirby, above n 105, 328.

¹³⁷ See, eg, René Spogárd and Meril James, 'Governance and Democracy — The People's View' (Paper presented at the United Nations University Millennium Conference, Tokyo, 19 January 2000 – 21 January 2000).

¹³⁸ See Brian Galligan and Ian McCallister, 'Citizen and Elite Attitudes Towards an Australian Bill of Rights' in Brian Galligan and Charles Sampford (eds), *Rethinking Human Rights* (1997) 144.

¹³⁹ See Göran Hydén, Julius Court and Kenneth Mease, *Making Sense of Governance: Empirical Evidence from Sixteen Developing Countries* (2004) 207–8 for further advantages and disadvantages of using surveys as compared to the views of experts. The World Governance Survey, for example, drew on a group of 'Well Informed Persons', or WIPs, for their data: Göran Hydén, Julius Court and Kenneth Mease, *Measuring Governance: Methodological Challenges (World Governance Survey Discussion Paper No 2)* (2002) United Nations University <http://www.odi.org.uk/WGA_Governance/Docs/WGS-discussionPaper2.pdf> at 4 July 2005. Similarly, Freedom House has a panel of experts (led by three people in the latest survey): see Karatnycky, Piano and Puddington, above n 106. Despite the claim that Freedom House makes to cultural neutrality, all the key people responsible for overseeing the project and making assessments of rights were white Americans. This type of possibility (or even perception) of potential bias is eliminated by surveying an appropriate cross-sample of the public.

reason that experts are used to assess States in the other quantitative measures is that some rights concepts are complex and require some degree of technical knowledge (eg fair trials). It is also possible that rights abuses are focussed on a fairly small minority of the population while much of the population is ignorant of those abuses. Victoria's indigenous population, for example, is statistically small and the views of members of that community thus unlikely to influence the overall judgment about the extent to which Victorians feel that their rights are protected. Yet there may be real issues of rights violations specific to the indigenous community that would be caught by other methodologies for assessing rights but glossed over by community surveys where the majority may have little understanding of the position of the most vulnerable minorities.

We will not replicate the work done by others in developing and applying these approaches to studies of the general population. However, through the surveys and interviews of parliamentarians and public servants, we seek to obtain some insight into the subjective state of mind of those who play key roles in the legislative process. These will include gaining an understanding of what parliamentarians and those assisting them understand human rights to mean (as compared with some theoretical or legal definition of the term) and gaining insight into how well parliamentarians perceive parliament to work in relation to human rights. These views can be useful compared to those of the general population to test the understanding of and commitment to human rights expressed by those in the parliamentary system.

C *Qualitative Measurements*

Qualitative approaches attempt to measure how well rights are protected by using descriptive evaluations rather than by attempting to provide numerical valuations or rankings.

There are disadvantages to such approaches, although they are not uncommonly employed.¹⁴⁰ The measures are more difficult to compare over time. They are more overtly subjective than their quantitative counterparts. A lack of hard data may limit the ability of those who are concerned with making real progress on rights and development to do so in a well-founded manner. As argued above, however, it is difficult to get away from some degree of subjectivity when evaluating rights. If any measurement of human rights is to take place it simply has to be recognised that some degree of subjective judgment is inevitable. It is better to deal with this openly and honestly rather than disguising those value judgments with the ostensible veracity of numerical measures. A qualitative analysis that clearly sets out the conception of human rights that it intends to employ and the reason for doing this and that outlines clearly and in some detail the strengths and weaknesses of a State in the area of human rights has the virtue of transparency. To the extent that subjective value judgments have been made, they have been made openly and allow others to engage in debate directly over the relevant issues, such as the extent to which it is permissible to limit civil liberties in order to protect national security rather than debating the appropriateness of indicators or other indirectly relevant issues.

Qualitative measures require more detailed analyses of the issues under exploration than do quantitative measurements and this has two advantages. The first is that it allows for appropriate debate over whether those who have undertaken the

¹⁴⁰ The International Centre for Human Rights and Democratic Development (now 'Rights and Democracy'), an institution established by the Canadian Parliament, is one of many organisations that decided to opt for qualitative rather than quantitative measurements in evaluating rights compliance: see Thede, above n 125, 2.

analysis have done so properly, taking into account the full range of factors that require consideration. Second, it allows for a more precise targeting of the problems (if any) that are identified. A measurement that shows that religious freedom has declined in a State, for example, does not give any indication of why it has declined or how the problem has arisen. A qualitative survey allows for better identification of the issues, eg that permission to build places of worship has been withheld for minorities, or that religious hate crimes are increasing, or that religious clothing had been prohibited in public schools. Each of these cases raises quite different problems that require different responses, possibly by different arms of government. This is a reason that most bodies that do make use of quantitative measurements tend to also use some level of qualitative analysis or description to underpin their statistical conclusions.

In our project, the case-studies will be evaluated using a qualitative analysis. This analysis will evaluate various key proposed legislation in light of their compliance with the obligations set out in the international Covenants. In order to ground the assessment in international experience and expertise, we will draw on the findings of international bodies (such as the UN Human Rights Committee) and the courts of comparable countries (such as the UK, Canada and New Zealand) in determining the scope and application of the rights in question. This qualitative, detailed study of particular legislative proposals will allow us to develop a richer and more complex picture of the role of parliaments in the protection of human rights than simple reliance on quantitative analysis could produce. By analysing cases in which parliament has done poorly and cases in which it has done well, it will be possible to develop more sophisticated conclusions about the possibility for reform of the current system.

VI CONCLUSIONS

Australia is fortunate in having a system of democratic and representative government at both State and federal level. The robust political debate evident in Australian parliaments and the accountability of Members of Parliament to the electorate are said to be an essential element in the protection of rights in this country. Even those who are enthusiastic about a Bill of Rights recognise that Parliament has and will continue to have an important role in ensuring human rights compliance even if the role of judges is increased. This study is, therefore, an important step in both assessing how well the role of Parliament in the protection of human rights is currently carried out and in setting out some ideas for how that role could be strengthened. It will also give some insight into how parliamentarians understand and value human rights compared to ordinary Australians. Our approach also tests the assumptions about Parliament that we identified above as implicated in the view that Parliaments are capable of playing a meaningful role in the overall institutional arrangements for protecting human rights.

This study is not and cannot be a comprehensive analysis of how well rights are protected in Australia. In order to evaluate the overall level of protection for rights Australia it would be necessary at the very least to analyse how legislation is carried into effect. Legislation that appeared oppressive on its face, for example, may rarely or never be used; legislation that is apparently rights-neutral may be implemented in a discriminatory or repressive manner. It would also be necessary to analyse the extent of legislative lacunae, areas in which parliaments have failed to act to protect rights, as well as non-legislative government action that affects rights (for example, how government decides to allocate expenditure).

Our project focuses on a narrower set of questions about the legislative output of Australian Parliaments.

Evaluating the human rights performance of parliaments is far from simple. Both methodological and theoretical complexities combine to create challenges for this project. Yet the debate over the role of parliaments in the protection of human rights is of such importance in both practice and theory that it is essential to begin the work of more comprehensively analysing and evaluating this issue.