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Reconstituting the Constitution

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Chapter 15

Involving Civil Society in Constitutional Reform: An Overview of the Australian National Human Rights Consultation and the Proposed National Human Rights Framework

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15.1 Introduction

A year ago I was here learning from you about the operation of your Bill of Rights Act. Your hospitality and generosity of shared insights were of great assistance in the preparation of our trans-Tasman report on the Australian National Human Rights Consultation. I accepted the invitation to this conference, in part to thank you for your generosity and to provide some feedback on how things are looking across the ditch following a very broad ranging community consultation about the effectiveness of Australia's arrangements for the protection of human rights and promotion of corresponding responsibilities.¹

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¹ I am particularly grateful to New Zealand Chief Human Rights Commissioner Rosslyn Noonan and her staff, to Dame Sian Elias, Professor Paul Rishworth, Sylvia Bell, the Hon Margaret Wilson, Jared Mullen, Stuart Beresford, Belinda Clark, Claudia Geiringer, Petra Butler, Andrew Butler, Ben Keith, Dr Claudia Orange, Judge Eddie Durie, Attorney-General Christopher Finlayson and their colleagues for giving so generously of their time when we came to New Zealand in 2009 to study the operation of New Zealand's Bill of Rights Act. Needless to say, none of them bears the slightest responsibility for what Professor Tony Smith has identified as the broad-brush and slightly unnuanced description we gave of the New Zealand experience in our report (see Smith 2010, p. 172).

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15.2 An Overview of the National Human Rights Consultation

I was privileged to chair a committee of very competent individuals who had diverse views about how best to protect human rights in Australia. The other committee members were Mary Kostakidis, a well known national television news presenter and board member of leading humanitarian and cultural organisations, Mick Palmer, retired Northern Territory Police Commissioner and Australian Federal Police Commissioner who had conducted the inquiries for the Howard government into unauthorised immigration detention, and Tammy Williams, an indigenous lawyer whose family has been involved in litigation for the stolen generations and for stolen wages. We were also assisted by Philip Flood, retired head of the Department of Foreign Affairs and retired ambassador who had done the review of the national intelligence services for the Howard government. The Murdoch press was fond of portraying us as a group of likeminded lefties. The diversity of our views ensured the transparency and integrity of our processes, especially given that we did not reach agreement on the recommendations about a Human Rights Act until 5 minutes to midnight.

We utilised the new technology as well as conducting community consultations and receiving tens of thousands of submissions. I ran a Facebook page. We hosted a blog and commissioned academics on opposite sides of the argument to steer the blog debate on a human rights act. We held 3 days of hearings in Parliament House which were broadcast and oft repeated on A-PAC, the new Australian Public Affairs Channel – a C-Span type television station.

During the consultation, groups like GetUp! and Amnesty International ran strong campaigns in favour of a Human Rights Act. However they largely abandoned the field once our report was tabled. The opponents of a Human Rights Act then went into action, including the Australian Christian Lobby and the influential leaders of the Anglican and Catholic Churches in Sydney – Archbishop Philip Jensen and Cardinal George Pell. The chief proponents of a Human Rights Act then seemed to be lawyers – easy targets, being identified as self-interested in generating further litigation.

In providing an overview of the Australian National Human Rights Consultation, I will provide a thumbnail sketch of our findings from the community consultations on the three questions posed by the government²:

- Which human rights (including corresponding responsibilities) should be protected and promoted?;
- Are these human rights currently sufficiently protected and promoted?; and
- How could Australia better protect and promote human rights?

I will address the recommendation of a Human Rights Act and say a word about some of the misperceptions in the critique offered to our report. We engaged

² National Human Rights Consultation (2009), p. 383.

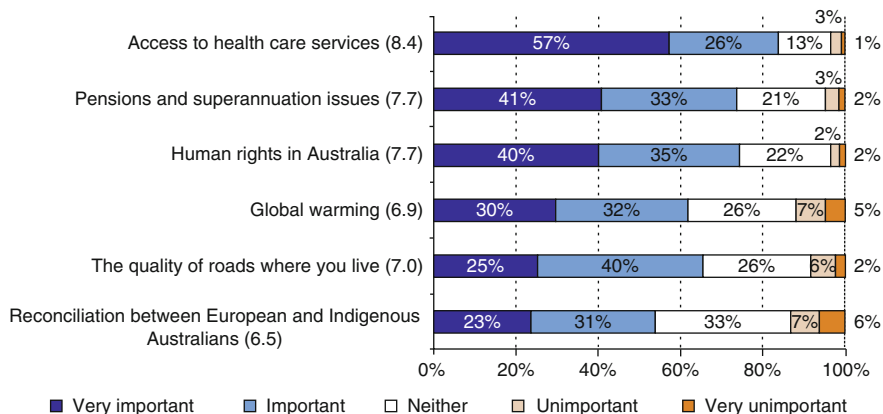


Fig. 15.1 Relative Importance of social issues

a social research firm Colmar Brunton to run focus groups and then to administer a very detailed random telephone poll of 1,200 persons. This poll highlighted the issues of greatest concern to the Australian community (Fig. 15.1).³

15.3 Which Human Rights (Including Corresponding Responsibilities) Should Be Protected and Promoted?

At community roundtables participants were asked what prompted them to attend. Some civic-minded individuals simply wanted the opportunity to attend a genuine exercise in participative democracy; they wanted information just as much as they wanted to share their views. Many participants were people with grievances about government service delivery or particular government policies. Some had suffered at the hands of a government department themselves; most knew someone who had been adversely affected – a homeless person, an aged relative in care, a close family member with mental illness, or a neighbour with disabilities. Others were responding to invitations to involve themselves in campaigns that had developed as a result of the Consultation. Against the backdrop of these campaigns, the Committee heard from many people who claimed no legal or political expertise in relation to the desirability or otherwise of any particular law; they simply wanted to know that Australia would continue to play its role as a valued contributor to the international community while pragmatically dealing with problems at home.

Outside the capital cities and large urban centres the community roundtables tended to focus on local concerns, and there was limited use of “human rights”

³ Colmar Brunton Social Research (2009), p. 17.

language. People were more comfortable talking about the fair go, wanting to know what constitutes fair service delivery for small populations in far-flung places. At Mintabie in outback South Australia, a quarter of the town's population turned out, upset by the recent closure of their health clinic. At Santa Teresa in the red centre, Aboriginal residents asked me how I would feel if the government required that I place a notice banning pornography on the front door of my house. They thought that was the equivalent of the government erecting the "Prescribed Area" sign at the entrance to their community. In Charleville, western Queensland, the local doctor described the financial hardship endured by citizens who need to travel 600 km by bus to Toowoomba for routine specialist care.

The Committee learnt that economic, social and cultural rights are important to the Australian community, and the way they are protected and promoted has a big impact on the lives of many. The most basic economic and social rights – the rights to the highest attainable standard of health, to housing and to education – matter most to Australians, and they matter most because they are the rights at greatest risk, especially for vulnerable groups in the community.

The community roundtables bore out the finding of Colmar Brunton Social Research's 15 focus groups that the community regards the following rights as unconditional and not to be limited:

- The right to basic amenities – water, food, clothing and shelter;
- The right to essential health care;
- The right of equitable access to justice;
- The right to freedom of speech;
- The right to freedom of religious expression;
- The right to freedom from discrimination;
- The right to personal safety; and
- The right to education.

Many of the more detailed submissions presented to the Committee argued that all the rights detailed in the primary international instruments Australia has ratified without reservation should be protected and promoted. Most often mentioned were the International Covenant on Civil and Political Rights 1966 and the International Covenant on Economic, Social and Cultural Rights 1966, which, along with the Universal Declaration of Human Rights 1948, constitute the "International Bill of Rights".

Some submissions also included the International Convention on the Elimination of All Forms of Racial Discrimination 1965, the Convention on the Elimination of All Forms of Discrimination against Women 1979, the Convention against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment 1984, the Convention on the Rights of the Child 1989, and the Convention on the Rights of Persons with Disabilities 2006.

Having ratified these seven important human rights treaties, Australia has voluntarily undertaken to protect and promote the rights listed in them. This was a tension for us in answering Question 1. Many roundtable participants and submission makers spoke from their own experience highlighting those rights

most under threat for them or for those in their circle. Others provided us with a more theoretical approach arguing that all Australia's international human rights obligations should be complied with.

True to what we heard from the grassroots, we singled out three key economic and social rights for immediate enhanced attention by the Australian Human Rights Commission – the rights to health, education, and housing. We think that government departments should be attentive to the progressive realisation of these rights, within the constraints of what is economically deliverable. However, in light of advice received from the Solicitor-General, we did not think the courts could have a role to play in the progressive realisation of these rights.

We recommended that the Federal government operate on the assumption that, unless it has entered a formal reservation in relation to a particular right, any right listed in the seven international human rights treaties should be protected and promoted.

15.4 Are Our Human Rights Currently Sufficiently Protected and Promoted?

Colmar Brunton Social Research found “only 10% of people reported that they had ever had their rights infringed in any way, with another 10% who reported that someone close to them had had their rights infringed”.⁴ Ten per cent is a good figure, but only the most naively patriotic would invoke it as a plea for the complacent status quo. The consultants reported that the bulk of participants in focus groups had very limited knowledge of human rights. Sixty-four per cent of survey respondents agreed that human rights in Australia are adequately protected; only 7% disagreed; the remaining 29% were uncommitted (Fig. 15.2).⁵

The Secretariat was able to assess 8,671 submissions that expressed a view on the adequacy or inadequacy of the present system: of these, 2,551 thought human rights were adequately protected, whereas 6,120 (70%) thought they were not.⁶

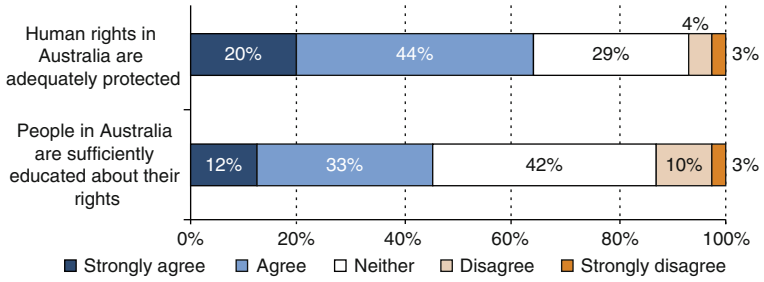
There is enormous diversity in the community when it comes to the understanding of, and perspectives on, rights protection. Though two thirds of those who participated in the random survey thought human rights were adequately protected in Australia, over 70% identified three groups in the community whose rights were in need of greater protection. This was the question put to respondents: “I’m going to read out some groups now. For each, do you feel their human rights need to be given more, less or the same amount of protection as they are currently getting in Australia?” This was the response (Fig. 15.3).⁷

⁴ Colmar Brunton Social Research (2009), p. 2.

⁵ Ibid, p. 6.

⁶ National Human Rights Consultation (2009), p. 349.

⁷ Ibid, p. 386.



Q3. Using a scale of 0-10, where 0 means 'totally disagree' and 10 means 'totally agree', how much do you disagree or agree with the following statements?

Base = Total Sample (Weighted to national distribution by gender and jurisdiction; N=1188-1212)

Fig. 15.2 Perceptions of adequate protection and sufficient education

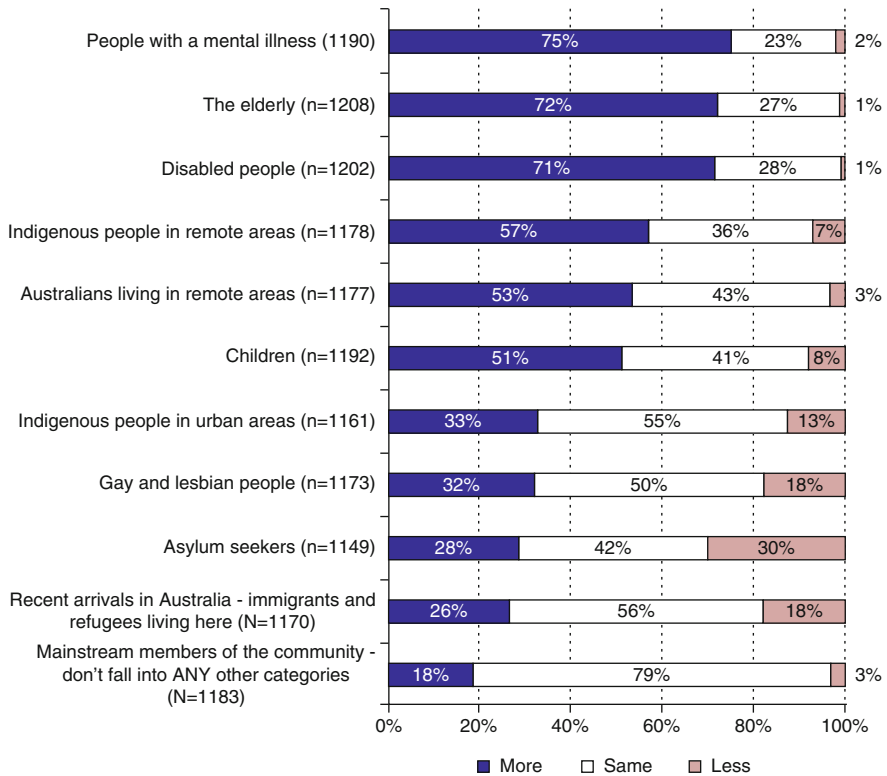


Fig. 15.3 Amount of protection required by groups

The majority of those surveyed also saw a need for better protection of the human rights of those living in remote rural areas. The near division of the survey groups when it comes to the treatment of asylum seekers highlights why the issue recurs at Australian elections.

15.5 How Could Australia Better Protect and Promote Human Rights?

The Committee commissioned The Allen Consulting Group to conduct cost-benefit analyses of a selection of options proposed during the Consultation for the better protection and promotion of human rights in Australia. The consultants developed a set of criteria against which the potential effects of various options were assessed; the report on the outcome of this assessment is presented as an Appendix to the report.⁸ Each option was evaluated against three criteria: benefits to stakeholders, implementation costs and timeliness, and risks. The options evaluated were a Human Rights Act, human rights education, a parliamentary scrutiny committee for human rights, an augmented role for the Australian Human Rights Commission, review and consolidation of anti-discrimination laws, a new National Action Plan for human rights, and maintaining current arrangements (that is, “doing nothing”).

There are three tranches of measures to be considered for further protecting and enhancing human rights. I will deal with them in ascending order of controversy and in descending order of broad community endorsement.

15.5.1 *Education and Culture*

At many community roundtables participants said they did not know what their rights were and did not even know where to find them. When reference was made to the affirmation made by new citizens pledging loyalty to Australia and its people, “whose rights and liberties I respect”, many participants confessed they would be unable to tell the inquiring new citizen what those rights and liberties were and would not even be able to tell them where to look to find out. In the report, we noted the observation of historian John Hirst “that human rights are not enough, that if rights are to be protected there must be a community in which people care about each other’s rights”.⁹ It is necessary to educate the culturally diverse Australian community about the rights all Australians are entitled to enjoy. Eighty-one per cent of people surveyed by Colmar Brunton Social Research said they would support increased human rights education for children and adults as a way of better protecting human rights in Australia.

At community roundtables there were consistent calls for better education. Of the 3,914 submissions that considered specific reform options (other than or in addition to a Human Rights Act), 1,197 dealt with the need for human rights education and the creation of a better human rights culture.¹⁰ This was the most

⁸ National Human Rights Consultation (2009), Appendix D, pp. 397–422.

⁹ Hirst (2009), pp. 215–222.

¹⁰ National Human Rights Consultation (2009), p. 352.

frequent reform option raised in those submissions. While 45% of respondents in the opinion survey agreed that “people in Australia are sufficiently educated about their rights”, Colmar Brunton concluded:

There is strong support for more education and the better promotion of human rights in Australia. It was apparent that few people have any specific understanding of what rights they do have, underlining a real need as well as a perceived need for further education.¹¹

This confirmed the Committee’s experience of the community roundtables.

The Committee’s recommendation that a readily comprehensible list of Australian rights and responsibilities be published and translated into various community languages follows from Colmar Brunton’s finding that there was “generally more support for a document outlining rights than for a formal piece of legislation per se”.¹² There was wide support for this idea in the focus groups, and 72% of those surveyed thought it was important to have access to a document defining their rights. Even more significantly, Colmar Brunton found:

In the devolved consultation phase with vulnerable and marginalised groups there was a very consistent desire to have rights explicitly defined so that they and others would be very clearly aware of what rights they were entitled to receive.¹³

Sixty-one per cent of people surveyed supported “a non-legally binding statement of human rights principles issued by the Federal Parliament and available to all people and organisations in Australia”. We recommended a readily comprehensible list of Australian rights and responsibilities (Fig. 15.4).¹⁴

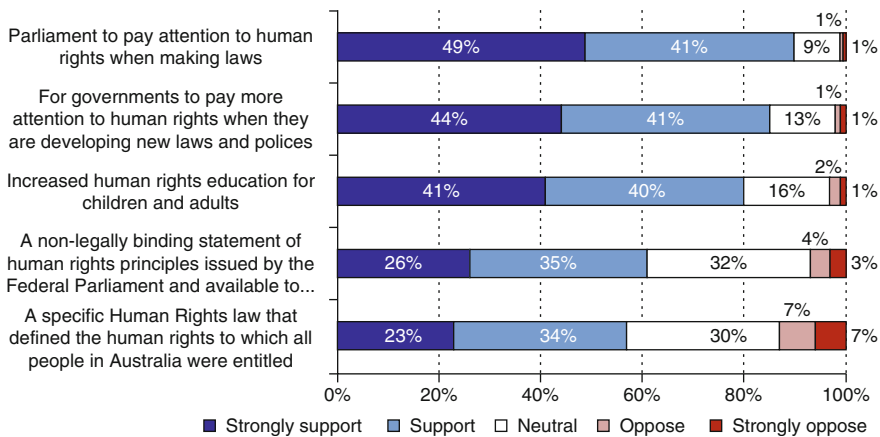


Fig. 15.4 Support levels for various protection options

¹¹ Ibid, p. 352.

¹² Ibid, p. 354.

¹³ Ibid, p. 354.

¹⁴ Colmar Brunton Social Research (2009), p. 10.

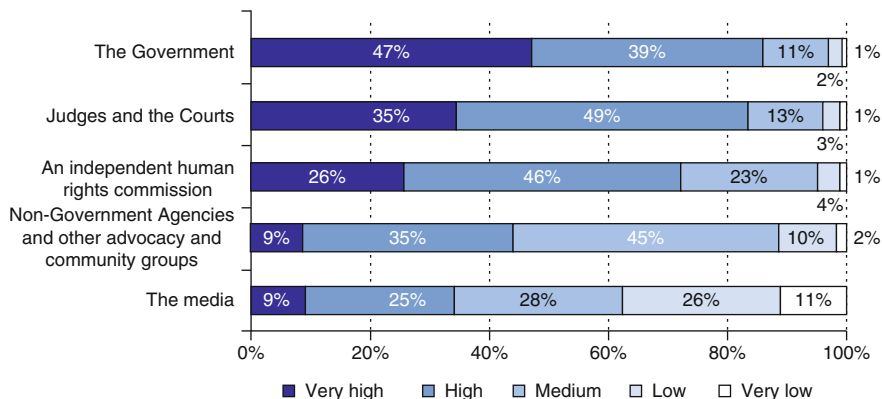


Fig. 15.5 Perceived levels of responsibility for rights protection

Paul Kelly from *The Australian* thought our contempt for the Australian community breathtaking in our call for education of children “so they understand the need to respect ‘the dignity, culture and traditions of other people’.”¹⁵ I make no apology for this call. It is fanciful for commentators like Kelly to suggest that our “report, in effect, seeks the obliteration of the Howard cultural legacy”. I know of no member of my committee who would claim knowledge of such a legacy, let alone a commitment to obliterate it. Such a task was well beyond our terms of reference. It is a figment of Kelly’s patriotic imagination.

The Murdoch press made a strong claim that existing protections for human rights were adequate and that the occasional shortfall could be rectified by the investigative journalism of credible broadsheets such as their masthead *The Australian*. The public did not share this view (Fig. 15.5).¹⁶

15.5.2 Human Rights Compliance in the Bureaucracy and in the Preparation of Legislation

The second tranche of proposals for enhancing human rights protection includes recommendations for ensuring that Commonwealth public authorities are more attentive to human rights when delivering services and for guaranteeing compliance of Commonwealth laws with Australia’s voluntarily assumed human rights obligations. We recommended that the Human Rights Commission have much the same role in hearing complaints of human rights violations by Commonwealth agencies as it presently has in relation to complaints of unlawful discrimination.

¹⁵ Kelly (2009).

¹⁶ Colmar Brunton Social Research (2009), p. 7.

Taking the lead from Senator George Brandis in his submission for the Federal Opposition, we recommended an audit of all past Commonwealth laws so that government might consider introducing amendments to Parliament to ensure human rights compliance. We also recommended that all future Commonwealth bills introduced to Parliament by the executive be accompanied by a statement of human rights compatibility and that there be a parliamentary committee which routinely reviews bills for such compliance. These measures are fully respectful of parliamentary sovereignty. We recommended measures more thorough than the weak model of the Legislation Review Committee in New South Wales where Parliament is able to receive the parliamentary committee report on human rights violations long after the legislation has been passed. We saw no point in window dressing procedures which close the gate only once the horse has bolted.

15.5.3 A Human Rights Act?

The third tranche of recommendations relates to a Human Rights Act.

Many Australians would like to see our national government and Parliament take more notice of human rights as they draft laws and make policies. Ultimately, it is for our elected politicians to decide whether they will voluntarily restrict their powers or impose criteria for law making so as to guarantee fairness for all Australians, including those with the least power and the greatest need.

Our elected leaders could adopt many of the recommendations in our report without deciding to grant judges any additional power to scrutinise the actions of public servants or to interpret laws in a manner consistent with human rights.

The majority of those attending community roundtables favoured a Human Rights Act, and 87.4% of those who presented submissions to the Committee and expressed a view on the question supported such an Act – 29,153 out of 33,356. In the national telephone survey of 1,200 people, 57% expressed support for a Human Rights Act, 30% were neutral, and only 14% were opposed.¹⁷

Our elected politicians could decide to take the extra step, engaging the courts as a guarantee that our politicians and the public service will be kept accountable in respecting, protecting and promoting the human rights of all Australians.

If they do choose to take that extra step, we have set out the way we think this can best be done – faithful to what we heard, respectful of the sovereignty of Parliament, and true to the Australian ideals of dignity and a fair go for all. Our suggestions are confined to the Federal government and the Federal Parliament. The states and territories will continue to make their own decisions about these matters. But we hope they will follow any good new leads given by the Federal government and the Federal Parliament.

¹⁷ National Human Rights Consultation (2009), p. 363.

Part Four of our report deals with the issue of a Human Rights Act. It contains five chapters. First, it sets out previous attempts to legislate for a Human Rights Act in Australia and analyses why those attempts have failed. Second, it gives an overview of the statutory models in New Zealand, the United Kingdom, Victoria and the Australian Capital Territory. Third, it gives a dispassionate statement of the case *for* a Human Rights Act. Fourth, it gives an equally dispassionate statement of the case *against* a Human Rights Act. Fifth, it sets out the range of “bells and whistles” that could be included in any Human Rights Act. This part of the report can stand alone as a useful resource for any citizen or Member of Parliament undecided about the usefulness or desirability of a Human Rights Act. The intended reader is the person who is agnostic about this question, not altogether convinced of the social worth of lawyers, wanting bang for the buck with social inclusion and protection of the vulnerable in society. I suspect few of the commentariat at Murdoch have read this part of the report.

Part Five of the report then contains the recommendations we made as a committee. We recommended a Human Rights Act. Despite sensational headlines in *The Australian*, I do not see any enormous problems with the model we have proposed. It would have no application to the States or the Territories. It would add two significant reforms to those in the first two tranches. Parliament would grant to judges the power to interpret Commonwealth laws consistent with human rights provided that interpretation was always consistent with the purpose of the legislation being interpreted. This power would be more restrictive than the power granted to judges in the United Kingdom. In the United Kingdom, Parliament has been happy to give judges an even stronger power of interpretation because a failed litigant there can always seek relief in Strasbourg before the European Court of Human Rights. Understandably, the English would prefer to have their own judges reach ultimate decisions on these matters, rather than leaving them to European judges. We have no such regional arrangement in Australia. *Suva ain't Strasbourg!*

Second, a person claiming that a Commonwealth agency had breached their human rights would be able to bring an action in court. For example, a citizen disaffected with Centrelink might claim that their right to privacy has been infringed by Centrelink. The court would be required to interpret the relevant Centrelink legislation in accordance with the Human Rights Act. If the court could so interpret the law, it might find that Centrelink was acting beyond its powers, infringing the right to privacy. Alternatively, the court would find that Centrelink was acting lawfully but that the interference with the right to privacy was not justified in a free and democratic society. It would then be a matter for the parliamentary committee on human rights to decide whether to review the law and recommend some amendment. Ultimately, it would be a decision for the responsible minister and the government as to whether the law should be amended. The sovereignty of Parliament would be assured.

Consistent with international human rights law, we acknowledged that economic and social rights such as the rights to health, education and housing are to be progressively realised. Nothing in our recommendations would allow a citizen or non-citizen to go to court claiming a right to health, education or housing. The progressive realisation of these rights would be a matter for the government and the