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Reconstituting the Constitution

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

Human Rights Commission in dialogue. We recommended that some civil and political rights be non-derogable and absolute. This means that these rights cannot be suspended or limited, even in times of emergency. These rights include the right to life, precluding the death penalty; protection from slavery, torture, cruel and degrading treatment.

Some will argue that there is no prospect of these rights being infringed in Australia, so why bother to legislate for them? The fact that any infringement of these rights would be indefensible and that most Australians hold such rights as sacrosanct create a strong case, in the opinion of the Committee, for these rights being guaranteed by Commonwealth law.

If in future a Federal Parliament were to legislate to interfere with these rights – as it could in theory, considering that not even these rights are included in the Constitution and put beyond the reach of Parliament – the public would be aware that the rights were being infringed. There could be no argument that the limitation of these rights was reasonably justified in a democratic society.

Most civil and political rights can be limited in the public interest or for the common good or to accommodate the conflicting rights of others. Nowadays the limit on such rights is usually determined by inquiring what is demonstrably justified in a free and democratic society. This would be Parliament's call. Under the dialogue model we have proposed, courts could express a contrary view. But ultimately it would always be Parliament's call. This makes it a very different situation from the United States where under a constitutional model judges have the final say.

Some politicians have been suggesting that they or their colleagues would be too timid to express a view contrary to the judges and thus the judges in effect would have the last word on what limits on rights are demonstrably justified in a free and democratic society. Such timidity is not my experience of Australian politicians. After all, if the contest is about what is justified in a free and democratic society, who is better placed than an elected politician to claim that they know the country's democratic pulse on the legitimate limit on any right?

To elaborate a little more on our model (which is similar to the one adopted in Victoria and the Australian Capital Territory), let me respond to two specific criticisms offered by Senator George Brandis SC when our report was released. On ABC Radio, the Shadow Attorney General referred to one of the derogable rights we list: the right to freedom from forced work. He said:

> [T]hat sounds fair enough, but let us say Australia were at war. Now, in three of the wars that Australia has fought in - the First World War, the Second World War and the Vietnam War - the government of the day introduced military conscription. Now, if Australia were at war once again and the government of the day wanted to introduce military conscription, a person who objected to that might say, well, this is a violation of the prohibition against forced labour. So the decision about whether or not there should be military conscription in wartime would be a decision no longer made by the elected government, no longer made by the Parliament, but made by unelected judges.[18]

[18] Brandis (2009).

With all respect to the learned Senior Counsel, the decision would not rest with unelected judges. I would be horrified if it did. Parliament would pass a law authorising conscription. A disaffected citizen might challenge the law in the courts. The court would be required to interpret the conscription law consistent with its purpose. The Human Rights Act would provide no basis for the court to find that the law was invalid. The court might venture to suggest that the law interferes with the right in an unwarranted way. We are not dealing with a United States court that could strike down the law. The court would be most likely to find that the interference with the right to freedom from forced labour was demonstrably justified in a free and democratic society. There is just no issue here with threatening the sovereignty of Parliament. If a judge were to say the law was unwarranted, though valid, all the politicians need to do is say, "We make the laws; we decide when conscription is needed; we wear the rub at election time; the judge is talking through his wig." The judges would propose no threat to conscription. The court process would however require the government to explain rationally the need for restriction on the right to freedom from forced labour.

Senator Brandis gave one more example[19]:

> Another of the rights that Father Brennan recommends should be included in the Bill of Rights is the right to marry and found a family. Now, these rights obviously have to be enjoyed equally by everyone in Australia. We've been having a debate in this country for a few years now about gay marriage. Wherever you stand on the issue of gay marriage – whether you take a liberal view that there's nothing wrong with it, or a more conservative view that marriage is a relationship that can only really exist between a man and a woman – that is a decision that should be made by people whom the public elect, not by unelected judges.

I agree completely with Senator Brandis. Under the model of Human Rights Act we have proposed that decision would still be made by the people whom the public elect. A gay or lesbian couple disaffected with the Commonwealth marriage law might challenge it in court. But the court would be required to find that a law restricting marriage to a man and a woman was valid. The Human Rights Act would provide no basis for the court to find that the law was invalid. The court might offer an observation about whether that "restriction" on the right to marry and found a family is justified in a free and democratic society. Once again it would be a matter for the parliamentary committee on human rights to decide whether to require the Attorney-General to provide an explanation of the existing law. The law could be changed only by the elected Parliament. This is the virtue of the so called "dialogue model".

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[19] Brandis (2009).

15.6 Three Acute Injustices Encountered During Our Inquiry

I will offer some reflections on three acute injustices which came to our attention during the national consultation, adding the observation that there is no prospect of any of these victims or their families obtaining justice unless there are lawyers prepared both to act pro bono and to advocate politically for justice and transparency, regardless of whether or not there is a Human Rights Act.

First was the inquest in Kalgoorlie into the death of Mr Ward in the back of a prison van in horrendous outback summer conditions. No one has been charged with any offence in relation to his death. I ask: what if he were white? Would his treatment have been any different? And would the treatment of his reckless jailers be any different? The Western Australia authorities have announced that there will be no prosecutions resulting from this death. There will be an ex gratia payment to the family of the deceased.

Second was the follow up to the inquest into the death of five Torres Strait Islanders on the Malu Sara. Once again, no one has been charged or even disciplined in relation to their deaths even though the Queensland coroner stated:

> The people lost when the Malu Sara sunk didn't die because some unforeseeable, freak accident swept them away before anything could be done to save them. Rather, they died because several people dismally failed to do their duty over many months.
>
> When the incident was reported to police and the national search and rescue authority, the danger to the people on the Malu Sara was continually trivialised, and reports of their worsening predicament were disbelieved, ignored and even mocked.
>
> The regional manager and other staff had flown home in helicopters, and were dining with family and friends while two Commonwealth public servants were struggling to get the Department's vessel back to its base. The regional manager failed to take charge of the incident, leaving a junior officer to manage as best he could.[20]

Would the result have been different if even one of the five persons on that boat had been white? Would the government officials have been more responsive? Would government officials have been more attentive to disciplining their subordinates? Will anything be done unless there are lawyers willing to act *pro bono* in civil proceedings for the impecunious family and unless there are lawyers willing to agitate about the lack of transparency in government administration and accountability?

Third, the tragic death of Cameron Doomadgee on Palm Island and the farce of administrative injustice and obfuscation which has followed this death in custody. Three years ago when Sergeant Hurley was acquitted of all charges in relation to the death of Doomadgee, Aboriginal leader Gracelyn Smallwood said: "This has not ended the way we wanted it to, but it has been a win on our slow climb up the Everest of justice."

In July 2010 Lex Wotton who had been convicted of rioting immediately following the death of Doomadgee was released on parole. The Queensland

[20] Barnes (2009), p. 97.

Premier Anna Bligh said, "You will find the conditions for this prisoner very similar to conditions imposed on many prisoners who are being paroled."[21] The Premier was careful not to assert that the conditions for this prisoner are the same as those imposed on all prisoners being paroled. The Corrective Services Act provides:

200 (1) A parole order **must** include conditions requiring the prisoner the subject of the order–
(a) to be under the chief executive's supervision–
(i) until the end of the prisoner's period of imprisonment; or
(ii) if the prisoner is being detained in an institution for a period fixed by a judge under the Criminal Law Amendment Act 1945, part 3–for the period the prisoner was directed to be detained; and
(b) to carry out the chief executive's lawful instructions; and
(c) to give a test sample if required to do so by the chief executive under section 41; and
(d) to report, and receive visits, as directed by the chief executive; and
(e) to notify the chief executive within 48 hours of any change in the prisoner's address or employment during the parole period; and
(f) not to commit an offence.
(2) A parole order granted by a parole board **may** also contain conditions the board **reasonably** considers necessary–
(a) to ensure the prisoner's good conduct; or
(b) to stop the prisoner committing an offence.

The question in this case is whether the restrictions on speaking to the media and attending meetings are conditions which the board could reasonably consider as necessary to ensure Mr Wotton's good conduct and to stop him committing any future offence.

Many concerned citizens have been upset watching the train wreck of Queensland justice these past 6 years as the Queensland Police Service (QPS) and the Police Union have gone to such lengths to protect their own in this case. It is not unreasonable for the Aboriginal community to think that at the outset after the death of Mr Cameron Doomadgee there was an attempted cover up of some of the details of the death by police on Palm Island including Senior Sergeant Chris Hurley. It is not unreasonable for them to think that there was then a second attempted cover up by police including Detective Sergeant Robinson of the first attempted cover up – with the way the investigation was then conducted by police who came across from the mainland. It is not unreasonable for them to think that there was then a third attempted cover up by the QPS Investigation Review Team (IRT) of the second attempted cover up of the first attempted cover up – with the way the internal investigation was run. It is not unreasonable for them to think that there was then a fourth attempted cover up of the third attempted cover up of the second attempted cover up of the first attempted cover up – with the way litigation was then fought in the Supreme Court over the inquiry by the Crime and Misconduct Commission (CMC) – and with Police Commissioner Atkinson being opposed both by the CMC and the offending police officers for apprehended bias in

[21] Bligh (2010), 20 July.

performing any disciplinary tasks. In the end it may never be proved that there has been such a series of cover-ups. But it leaves a bad taste when Mr Doomadgee is dead, Mr Wotton silenced and not one police officer has been disciplined for their role in any of these tawdry matters.

The respected retired Supreme Court Judge Martin Moynihan AO QC who chaired the CMC concluded that "the CMC was not satisfied with the IRT's process, conclusions or recommendations". "The CMC considers that Robinson clearly should not have been involved in the investigation in any way."[22] "In the CMC's view, it was inappropriate for the investigating officers to be associating informally with someone who was most likely to be the subject of the investigation in a matter that could involve homicide."[23]

This is the CMC's description of the behaviour of Senior Sergeant Kitching who provided and withheld information from the Coroner and from the pathologist performing the autopsy which he attended:

> In response to a suggestion from the IRT, Kitching agreed that he only offered to pathologists information that he considered reliable and relevant. This seems in stark contradiction to his inclusion on the Form 1 of hearsay evidence about Mulrunji drinking bleach and his exclusion not only of Bramwell's evidence but also of Penny Sibley's allegation of assault (the credibility of which had not been questioned). In effect, Kitching seems to have informed the pathologist of information adverse to Mulrunji but excluded allegations adverse to Hurley.[24]

The CMC states: "[T]he IRT appear to be simply providing reasons to justify Kitching's failure to make this information available to the pathologist, and Webber's and Williams' failure to check the Form 1."

This is the CMC's description of the initial QPS investigation and the conduct of the officers involved:

> In the CMC's view the investigation into the death of Mulrunji was seriously flawed, its integrity gravely compromised in the eyes of the very community it was meant to serve. The way in which the investigation was conducted destroyed the Palm Island community's confidence that there would be an impartial investigation of the death.
>
> There is evidence to suggest that the investigation was conducted in a manner that paid no heed to QPS' own policies and procedures, let alone its Code of Conduct, and ran counter to the spirit of the RCIADIC recommendations.
>
> The investigation failed the people of Palm Island, the broader Indigenous community, and the public generally. Furthermore, it called into question the reputation of the Service and damaged public confidence in the integrity of the Queensland Police Service and its members.[25]

In these circumstances Palm Islanders and those sympathetic to their plight have good grounds for thinking that there may be political advantage playing a role in the

[22] Crime and Misconduct Commission (2010), p. xvii.

[23] Ibid, p. xviii.

[24] Ibid, p. xx.

[25] Ibid, p. xxiv.

consideration of a parole board thinking that it is reasonable to impose a blanket ban on Mr Wotton's attendance at meetings and talking to the media for the next 4 years. There is definitely plenty of politics at play in the public square with politicians and media outlets maintaining that it is reasonable, appropriate, and ordinary for such a blanket ban to be imposed on such a citizen in such a bizarre circumstance.

There may come a day when the unwarranted interference with Lex Wotton's freedom of expression and freedom of association by a parole board will be subject to judicial oversight through operation of a statute such as the Victorian Charter of Human Rights and Responsibilities Act 2006. But alas even in Victoria, the government has enacted the Charter of Human Rights and Responsibilities (Public Authorities) Regulations 2009 exempting parole boards from the Charter until at least 2013.

15.7 The Proposed National Human Rights Framework

When the Rudd government announced its Human Rights Framework in response to the National Human Rights Consultation, I described it as a welcome though incomplete addition to protection of human rights in Australia. Many human rights activists have been very despairing about the government's response. I am more sanguine. Let me explain.

Our report contained 31 recommendations, 17 of which did not relate to a Human Rights Act. We knew from the beginning that it would be a big ask for a Rudd style government to propose a Human Rights Act. After all, the Coalition was implacably opposed; the government does not control the Senate; and the Labor Party is split on the issue with some of its old warhorses like Bob Carr being relentless in their condemnation of any enhanced judicial review of politicians. Even though most people who participated in the consultation wanted a Human Rights Act and, more to the point, even though the majority of Australians randomly and objectively polled and quizzed favoured an Act, no major political party in the country is yet willing to relinquish unreviewable power in the name of human rights protection. So the 14 recommendations relating only to a Human Rights Act were put to one side.

This does not mean that the government has closed the door of further judicial review of legislation and policies contrary to human rights. Deciding not to open the door within a defined doorway (a Human Rights Act), the government has just left the door swinging. How so?

In accordance with our Recommendation 17, the government is putting in place a rights framework which operates on the assumption that the human rights listed in the seven key international human rights instruments signed voluntarily by Australia (including the International Covenant on Economic, Social and Cultural Rights) will be protected and promoted. In accordance with Recommendations 6 and 7, Parliament will legislate to ensure that each new Bill introduced to

Table 15.1 Most preferred protection option

Option	Most preferred (%)
Parliament to pay attention to human rights when making laws	29
More human rights education	23
More government attention to human rights when developing laws and policies	18
A statement of principles available to everyone	11
Legislation by federal Parliament	10
None of these	8

Parliament, as well as delegated legislation subject to disallowance, is accompanied by a statement of compatibility attesting the extent to which it is compatible with the seven United Nations human rights treaties. Also Parliament will legislate to establish a parliamentary Joint Committee on Human Rights to scrutinise legislation for compliance with the United Nations instruments.

These proposals reflected the priorities of those surveyed in our inquiry (Table 15.1).[26]

So the exectuive and the legislature cannot escape the dialogue about legislation's compliance with United Nations human rights standards. Neither can the courts, because Parliament has already legislated that "in the interpretation of a provision of an Act, if any material not forming part of the Act is capable of assisting in the ascertainment of the meaning of the provision, consideration may be given to that material". Parliament has provided that "the material that may be considered in the interpretation of a provision of an Act" includes "any relevant report of a committee of the Parliament" as well as "any relevant document, that was laid before, or furnished to the members of, either House of the Parliament by a Minister before the time when the provision was enacted" .[27]

When interpreting new legislation impacting on human rights in the light of these relevant documents from the exectuive and from the Parliament, the courts will assuredly follow the course articulated by Chief Justice Murray Gleeson in one of the more controversial refugee cases of the Howard era. Gleeson said, "[W]here legislation has been enacted pursuant to, or in contemplation of, the assumption of international obligations under a treaty or international convention, in cases of ambiguity a court should favour a construction which accords with Australia's obligations."[28] He added, "[C]ourts do not impute to the legislature an intention to abrogate or curtail fundamental rights or freedoms unless such an intention is clearly manifested by unmistakable and unambiguous language. General words will rarely be sufficient for that purpose."[29]

[26] Colmar Brunton Social Research (2009), p. 11.

[27] Acts Interpretation Act 1901, s. 15AB(2)(c), (e).

[28] *Plaintiff S157* v *The Commonwealth* (2003) 211 CLR 476 at p. 492.

[29] Ibid.

So even though there be no Human Rights Act, the courts are now to be drawn into the dialogue with the executive and the Parliament about the justifiable limits of all future Commonwealth legislation in the light of the international human rights obligations set down in the seven key United Nations instruments.

That is not all. The government's human rights framework notes that "the Administrative Decisions (Judicial Review) Act 1977 enables a person aggrieved by most decisions made under federal laws to apply to a federal court for an order to review on various grounds, including that the decision maker failed to take into account a relevant consideration."[30] Retired Federal Court Judge Ron Merkel in his submission to our inquiry pointed out that the High Court has already "recognised the existence of a requirement to treat Australia's international treaty obligations as relevant considerations and, absent statutory or executive indications to the contrary, administrative decision makers are expected to act conformably with Australia's international treaty obligations."[31]

Ultimately Australia will require a Human Rights Act to set workable limits on how far ajar the door of human rights protection should be opened by the judges in dialogue with the politicians. We will have a few years now of the door flapping in the breeze as the public servants decide how much content to put in the statements of compatibility, as the parliamentarians decide how much public transparency to accord the new committee processes, and as the judges feel their way interpreting all laws consistent with the Parliament's intention that all laws be in harmony with Australia's international obligations, including the United Nations human rights instruments, unless expressly stated to the contrary. There is no turning back from the federal dialogue model of human rights protection.

Now that a new Commonwealth Parliament has convened, the Australian government has reintroduced its Human Rights (Parliamentary Scrutiny) Bill 2010 and the Human Rights (Parliamentary Scrutiny) (Consequential Provisions) Bill 2010 as part of its new Human Rights Framework.

15.8 Conclusion

Recommendation 14 of our NHRC report provides:

> The Committee recommends that the Federal government develop and implement a framework for improving access to justice, in consultation with the legal profession and the non-government sector.[32]

Unless this access is improved, cases like the three instances of indigenous disadvantage in the face of the legal system which I have outlined will recur and

[30] Commonwealth of Australia (2010), p. 10.

[31] Merkel and Pound (2009), p. 17.

[32] National Human Rights Consultation (2009), p. xxxiii.

the deficit in Australia's human rights protection will remain. There may come a day when the unwarranted interference with Lex Wotton's freedom of expression and freedom of association by a parole board will be subject to judicial oversight through operation of a statute such as the Victorian Charter of Human Rights and Responsibilities Act 2006.

In the new Australian Parliament in which the government is reliant on Independents to maintain the confidence of the House, two of those Independents, Rob Oakeshott and Andrew Wilkie, could well have an interest in seeing the Labor government revisit the decision not to implement a Commonwealth Human Rights Act. Their interest would be strongly backed by the Greens.

In July 2010, Chief Justice Roberts gave a public lecture in three Australian cities. His topic: the history of the United States bill of rights. Comparing Australia and the United States, he said that Americans "would notice the absence of a distinct enumeration of personal liberties – a bill of rights". He then made these observations:

> That raises the question about whether it is necessary or desirable to enumerate those liberties.
>
> While I am bold enough to ask the question, I am not foolhardy enough to answer it.[33]

He provided a few pointers which are of relevance for us in Australia. Interviewed by *The Australian* after the Chief Justice's lecture, I observed, "[a] bill of rights needs at least a couple of passionate advocates at the cabinet table; last year Robert McClelland (our Attorney-General) was left on his own. In my view, Roberts only confirmed the need for a Madison-like figure in Australia."[34]

In the light of the United States experience, one might opine that a federal human rights Act might emerge once various states have experimented with their own models. Thus the Victorian, Australian Capital Territory and now Tasmanian experiments may impact on the national framework. However, the United States Bill of Rights was part of a larger compromise guaranteeing passage of the Constitution. Last year in Canberra it was a stand-alone proposal, and it fell to the ground. There is one stark contrast. The United States appetite for bills of rights first developed as a reaction to foreign legislators back in the United Kingdom. The people were therefore happy to countenance increased judicial power to rein in the executive and the legislature. In Australia, no major political party nationally is prepared to countenance such limits on their own power, regardless of the community wishes.

This marks the major difference in our histories – a difference which will allow Australian politicians to leave a human rights charter on the long finger. I dare say Chief Justice Roberts left our shores bemused at our contentment without even a statutory charter of rights. Through the processes of our consultation, the people have spoken. But the issue was hardly raised in the 2010 election campaign. For the moment, much of our report sits on the shelf awaiting the Madison moment or the trans-Tasman kick along.

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[33] Roberts (2010).

[34] *The Australian* (2010), 30 July.

References

Barnes M (2009) Queensland Coroner, inquest into the loss of the *Malu Sara*. 12 February

Bligh A (2010) Quoted in the Townsville Daily Bulletin, 20 July

Brandis G (2009) On ABC Radio, 12 October

Colmar Brunton Social Research (2009) Final report, National human rights consultation – community research phase, September, No. 40338

Commonwealth of Australia (2010) Australia's Human Rights Framework. April

Crime and Misconduct Commission (2010) CMC. Review of the Queensland police service's Palm Island review. June

Hirst J (2009) From British rights to human rights. In: Leeser J, Haddrick R (eds) Don't leave us with the bill: the case against an Australian bill of rights. Menzies Research Centre, Canberra

Kelly P (2009) The Weekend Australian, 10 October

Merkel R, Pound A (2009) Submission to the National human rights consultation. Submission AGWW-7T27RL, 15 June

National human rights consultation (2009) Report. September

Roberts Chief Justice JG (2010) International public lecture. University of Melbourne Law School, Melbourne, 28 July

Smith ATH (2010) Inching towards an Australian bill of rights: cousinly comments on the Australian national human rights consultation. University of New South Wales Law Journal 33(1):171–192

The Australian (2010) US Chief Justice's pep talk on bill of rights. 30 July