# The Practical Outcomes of the National Human Rights Consultation

***Address to Judicial Conference of Australia Colloquium***

***Fr Frank Brennan SJ AO***

***Sir Stamford at Circular Quay***
***Sydney***

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## I. The committee

I was privileged to chair the 2009 National Human Rights Consultation with a committee - Mary Kostakidis, Mick Palmer and Tammy Williams, assisted by Philip Flood - with diverse views about how best to protect human rights in Australia. The Murdoch press was fond of portraying us as a group of likeminded lefties. The diversity of our views however ensured the transparency and integrity of our processes, especially given that we did not reach agreement on our recommendations about a Human Rights Act until five minutes to midnight.

As chair, I was on the record favouring a modest statutory human rights act. But our individual opinions were irrelevant to the task at hand, which was to conduct a public consultation on three questions posed in our terms of reference:

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

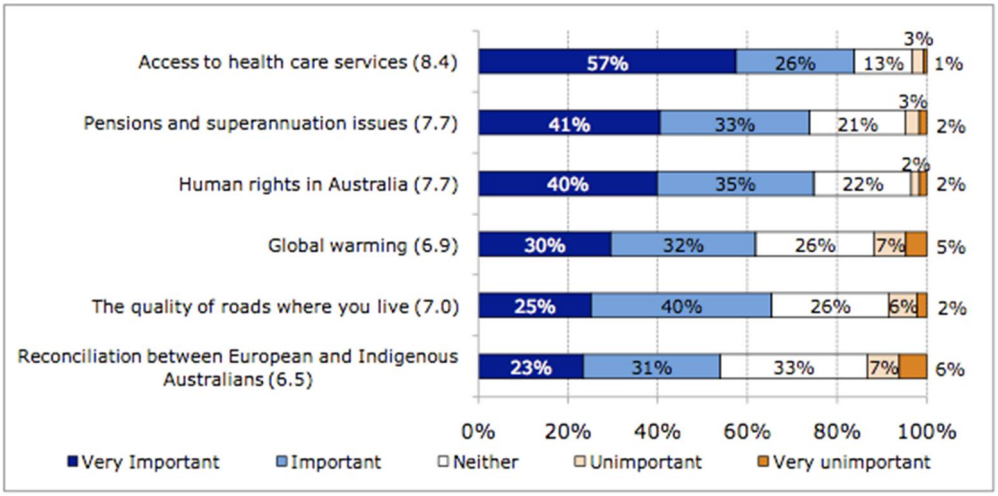
We were asked to identify options which would preserve the sovereignty of Parliament and not include a constitutionally entrenched bill of rights.

## II. The consultation

In seeking the views of the Australian public on these questions, we made use of new technologies, conducted community consultations and received 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. We held three days of hearings which were broadcast on the new Australian Public Affairs Channel. During the course of our consultation, various groups ran campaigns for and against a Human Rights Act in the wake of Australia's ongoing exceptionalism, Australia being the only remaining country in the British common law tradition without some form of Human Rights Act. Groups like GetUp! and Amnesty International ran strong campaigns in favour of a Human Rights Act, accounting for 25,000 of the 35,000 submissions we received. My committee did not see itself as having the competence or authority to distinguish campaign generated submissions from other submissions. We simply decided to publish the figures and let people make their own assessments.

We engaged a social research firm, Colmar Brunton, to run focus groups and administer a detailed random telephone poll of 1200 persons. The poll highlighted the issues of greatest concern to the Australian community:[1]

**Figure 1. Relative Importance of Social Issues**




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 or at least knew someone who had been

[1] Colmar Brunton Social Research, Final Report, National Human Rights Consultation – Community Research Phase, September 2009, 40338, p. 17

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 been instigated when the Consultation was launched. 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' 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 600km 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.

## III. Which rights to protect?

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:

- basic amenities—water, food, clothing and shelter
- essential health care
- equitable access to justice
- freedom of speech
- freedom of religious expression
- freedom from discrimination
- personal safety
- 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 the first question. 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 thought that government departments should be attentive to the progressive realization 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 realization of these rights.

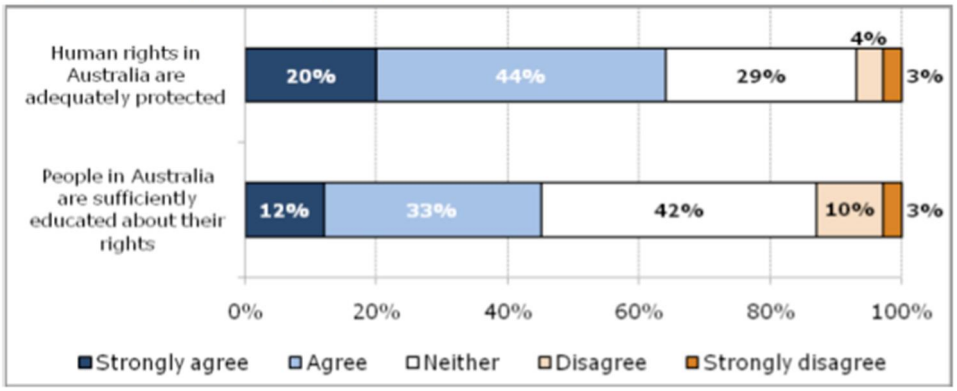
We recommended that the federal government operate on the assumption that, unless it has entered a formal reservation in relation to a particular right, any right listed in the seven international human rights treaties should be protected and promoted.

## IV. Is there sufficient protection now?

Colmar Brunton Social Research found that only 10% of people reported that they had ever had their rights infringed in any way, while another 10% reported that someone close to them had had their rights infringed'. 10% 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. 64% of survey respondents agreed that human rights in Australia are adequately protected; only 7 % disagreed; the remaining 29 % were uncommitted.[2]

**Figure E5. Perceptions of adequate protection and sufficient education**



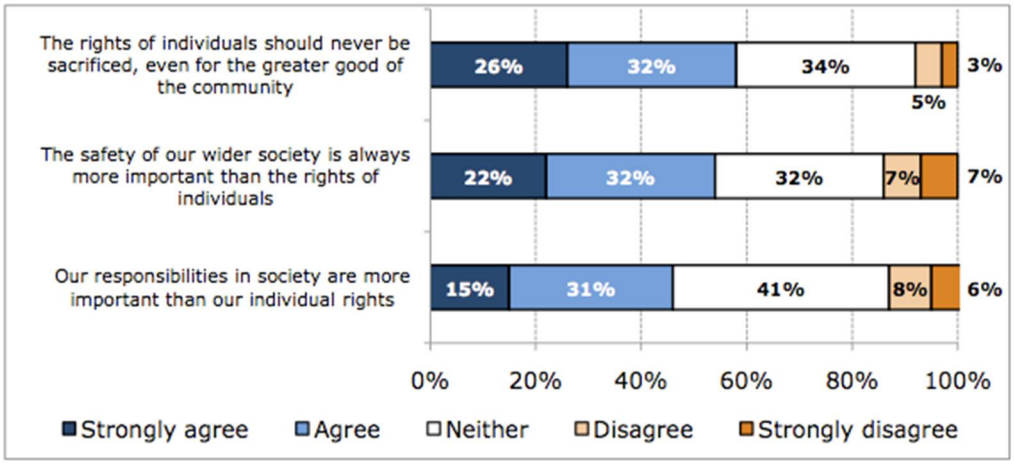

*Q3. Using a scale of 0-10, where 0 means 'totally disagree' and 10 means 'totally agree', how much do you disagree or agree with the following statements?*

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

A total of 8671 submissions expressed a view on the adequacy or inadequacy of the present system. Of these, 2551 thought human rights were adequately protected, whereas 6120 (70%) thought they were not.

One of the challenges in conducting a public consultation is that respondents with limited education in law and jurisprudence might express internally inconsistent views. We found this to be the case when asking people how best to balance individual rights and the public interest. A majority espoused both that the rights of individuals should always prevail and that public safety and security should always prevail.

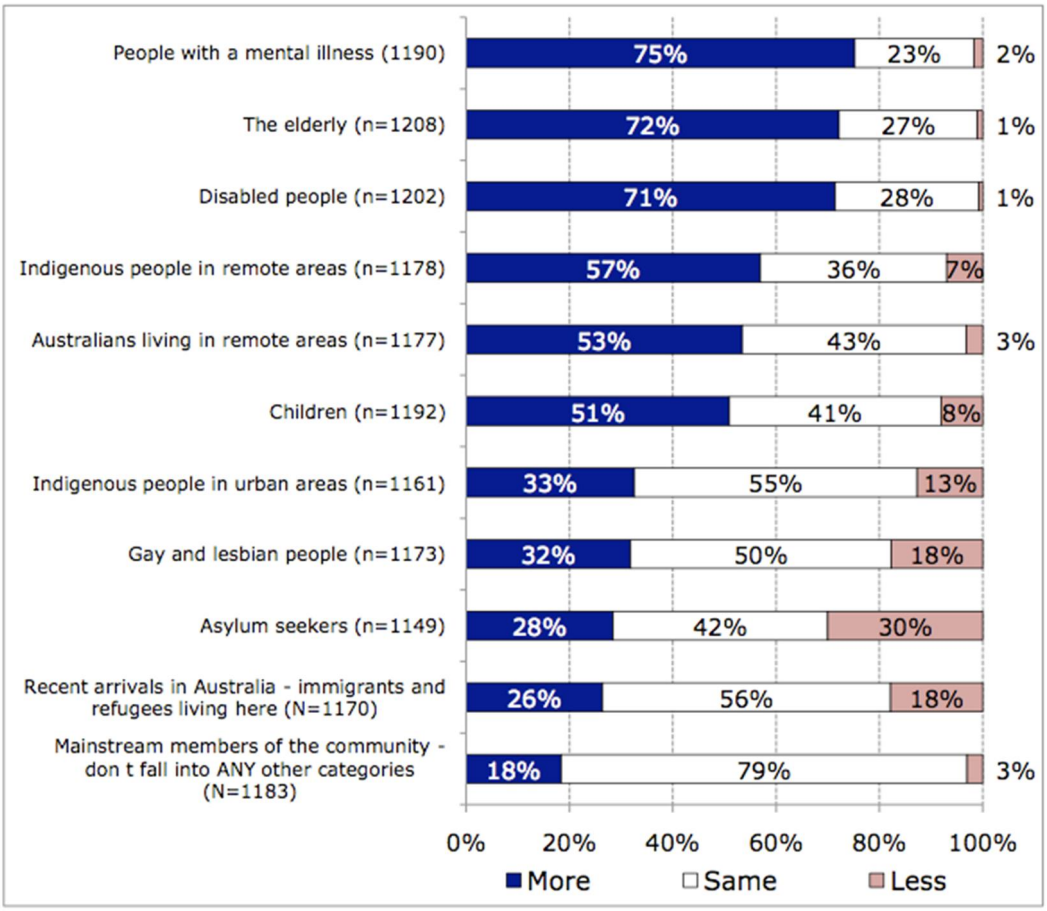
**Figure 7: Preferences for balancing community good and individual rights**




[2] Ibid, p. 6

There is enormous diversity in the community when it comes to understanding of 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.

**Figure E8. 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 this issue recurs at Australian elections.

## V. How can protection and promotion of human rights be improved?

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 three criteria against which the potential effects of various options were assessed —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 the status quo.

This cost-benefit exercise was our most problematic task. Given the 2013 decision of the federal government to drop a proposed consolidation of anti-discrimination laws, it is salutary to revisit the consultancy report's finding:

> The introduction of consolidated anti-discrimination legislation may pose a risk in terms of future resourcing and the potential for an increase in litigation. However, new legislation does not pose a risk to parliamentary sovereignty and is likely to be strongly supported by the community.

We put forward 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. The government ultimately implemented those measures winning the broadest community endorsement while deciding not to enact a Human Rights Act which, though supported by the majority of people consulted, was supported less strongly than other options.

**Table E10. 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%* |

## Education and culture

At many community roundtables, participants said they didn't know what their rights were and didn't 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'. It is necessary to educate the culturally diverse Australian community about the rights all Australians are entitled to enjoy. 81% of people surveyed by Colmar Brunton 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 3914 submissions that considered specific reform options, 1197 dealt with the need for human rights education and the creation of a better human rights culture. This was the most frequent reform option raised. While 45% of respondents in the opinion survey agreed that 'people in Australia are sufficiently educated about their rights', Colmar Brunton concluded:

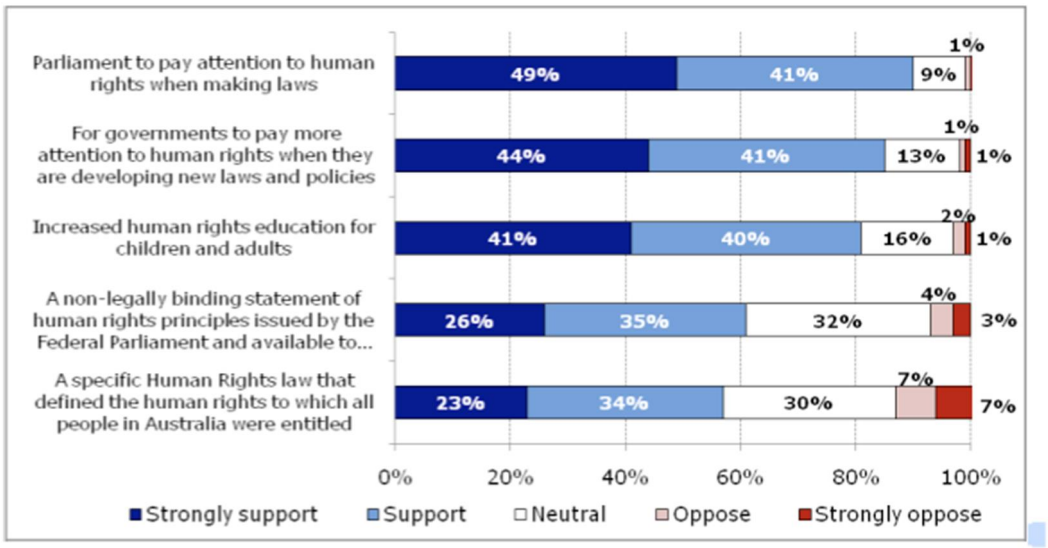
> There is strong support for more education and the better promotion of human rights in Australia. It was apparent that few people have any specific understanding of what rights they do have, underlining a real need as well as a perceived need for further education.

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'. 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. 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.'

61% 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.[3]

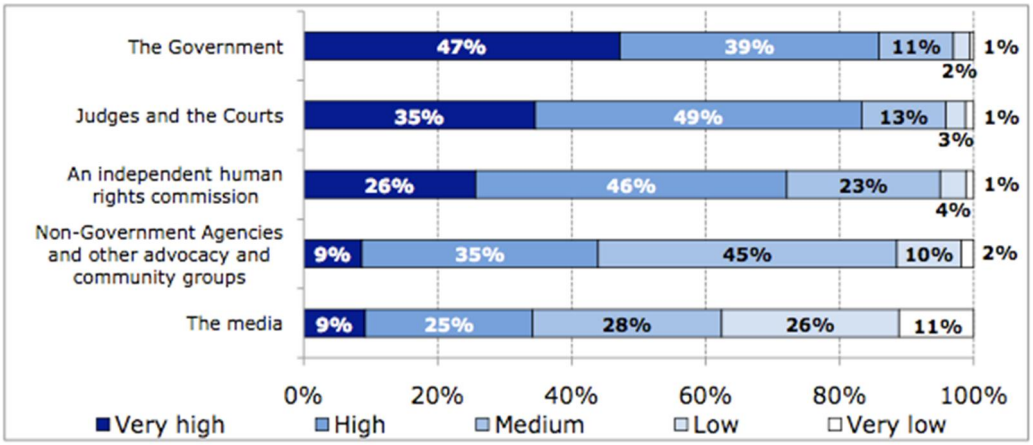
**Figure E9. Support Levels for Various Protection Options**




[3] Colmar Brunton Social Research, Final Report, National Human Rights Consultation – Community Research Phase, September 2009, 40338, p. 10

During the course of our public consultation, 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:[4]

**Figure E7. Perceived Levels of Responsibility for Rights Protection**




## More government attention

The second tranche of proposals for enhancing human rights protection included recommendations for ensuring that Commonwealth public authorities could be 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.

We also recommended an audit of all past Commonwealth laws so that government might consider introducing amendments to Parliament to ensure human rights compliance, that all future Commonwealth bills 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 yet are stronger than other models 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.

## A Human Rights Act?

The third tranche of our recommendations related to a Human Rights Act. Many Australians would like to see national government take more notice of human rights

[4] Colmar Brunton Social Research, Final Report, National Human Rights Consultation – Community Research Phase, September 2009, 40338, p. 7

as they draft laws and make policies. The majority of those attending community roundtables favoured a Human Rights Act, and 87% of those who presented submissions to the Committee and expressed a view on the question supported such an Act. In the national telephone survey, 57% expressed support for a Human Rights Act, 30% were neutral, and only 14% were opposed.

Our committee did recommend a Human Rights Act which would grant 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 where Parliament has been happy to give judges a 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.

An Act would give a person claiming that a Commonwealth agency had breached their human rights the right to bring an action in court. For example, a citizen disaffected with Centrelink might claim that their right to privacy has been infringed. The court would be required to interpret the relevant Centrelink legislation in accordance with the Human Rights Act. The court might find that Centrelink was acting beyond power, infringing the right to privacy or alternatively, 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 acknowledge that economic and social rights such as the rights to health, education and housing are to be progressively realized. 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 realization of these rights would be a matter for government and the Human Rights Commission in dialogue. We recommended that some civil and political rights such as the right to life, precluding the death penalty, protection from slavery, torture and cruel and degrading treatment be non-derogable and absolute, that is they cannot be suspended or limited, even in times of emergency.

Some will argue that there is no prospect of these rights being infringed in Australia, so why bother to legislate for them? The facts 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.

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. Under the dialogue model we 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 US where, under a constitutional model, judges have the final say.

Some politicians have said 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?

One of the complex legal questions my Committee had to face was whether declarations of incompatibility by a court would be constitutional. We did have an opinion from the Solicitor General (published as an appendix in the Report, after some negotiation within the Attorney-General's Department) advising that they would be constitutional, but that was not the end of the matter. After considering all the complications, our recommendation on 'declarations of incompatibility' read: "The Committee recommends that any federal Human Rights Act extend only to the High Court the power to make a declaration of incompatibility. (Should this recommendation prove impractical, the Committee recommends alternatively that any federal Human Rights Act not extend to courts the formal power to make a declaration of incompatibility.)"

In the alternative to court declarations we proposed that "the parties to the proceedings, and perhaps the Australian Human Rights Commission, could be given the power to notify the Joint (Parliamentary) Committee on Human Rights of the outcome of litigation and the court's reasoning indicating non-compliance of a Commonwealth law with the Human Rights Act. It would then be a matter for members of parliament themselves to trigger the processes of the Joint Committee, which could seek the Attorney-General's response."

After the High Court's decision in *Momcilovic*[5], Professor Helen Irving, a long time critic of Human Rights Acts, wrote: "At the heart of (the Brennan Committee's)

[5] *Momcilovic* v *The Queen* [2011] HCA 34

recommendations was the adoption of a Commonwealth Human Rights Act empowering the High Court to make 'declarations of incompatibility' between a law and a right, as in the Victorian Charter….The model proposed by the Brennan committee was unconstitutional." [6] This was a drastic and misleading misrepresentation of our nuanced position. Some of those we consulted during our inquiry warned that a decision such as *Momcilovic* was on the cards.

An Act empowering the High Court to make such declarations was "at the heart" of our recommendations only in the sense that our recommendations could have stood without the body of the Act including the heart of court declarations. In the alternative to court declarations we proposed what Irving would have to class a heartless body: that "the parties to the proceedings, and perhaps the Australian Human Rights Commission, could be given the power to notify the Joint (Parliamentary) Committee on Human Rights of the outcome of litigation and the court's reasoning indicating non-compliance of a Commonwealth law with the Human Rights Act. It would then be a matter for members of parliament themselves to trigger the processes of the Joint Committee, which could seek the Attorney-General's response."

Yes, we followed the Solicitor General's advice on constitutionality of 'declarations of incompatibility'. But we thought they might be so problematic and impractical that it might be wiser to do without them.

## VI. Government response

Our elected leaders were able to 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. In future, they could decide to take the extra step, engaging the courts as a guarantee that politicians and the public service will be kept accountable in respecting, protecting and promoting the human rights of all Australians. Our report sets out how this could 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.

In the section of our report dealing with a Human Rights Act, we set out previous attempts to legislate for an Act in Australia and analysed why those attempts failed. We also give an overview of the statutory models in New Zealand, the UK, Victoria and the ACT. We follow this with a dispassionate statement of the case both for and against an Act. Finally we outline the range of "bells and whistles" that could be

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[6] Helen Irving, "The High Court of Australia kills dialogue model of human rights", *The Australian*, 16 September 2011

included in any Human Rights Act. This part of our report stands alone as a useful resource for anyone 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.

Government decided to put a Human Rights Act on the long finger. But they did legislate to provide for statements of compatibility and for a parliamentary committee on Human Rights, in the *Human Rights (Parliamentary Scrutiny) Act 2011* which came into effect in early 2012. Parliament appointed a ten member Parliamentary Committee on Human Rights which is required to examine bills and legislative instruments "for compatibility with human rights". The Committee may also examine existing Acts and inquire into any matter relating to human rights referred to it by the Attorney-General. "Human rights" are defined to mean "the rights and freedoms recognised or declared" by the seven key international human rights instruments on civil and political rights, economic, social and cultural rights, racial discrimination, torture and other cruel inhuman or degrading treatment, including the Conventions on women, children and persons with disabilities. Anyone introducing a Bill or legislative instrument to Parliament is required to provide "a statement of compatibility" which must include an assessment of whether the Bill (or instrument) is compatible with human rights.

The Parliamentary Joint Committee on Human Rights presented 18 reports to the last Parliament. Professor Andrew Byrnes has been a much valued external consultant to the committee. The committee has conducted some very detailed inquiries into quite controversial legislative areas. For example, the committee did not baulk at conducting a detailed human rights audit of the *Migration Legislation Amendment (Regional Processing and Other Measures) Act 2012* and the *Stronger Futures in the Northern Territory Act 2012.* Speaking for Harry Jenkins, the robust first Chair of the Committee, Senator Ursula Stephens, also a member of the committee explained the committee's role to the 2013 Australian Government and Non-Government Organisations Forum on Human Rights:

A key role of this committee is to assist the Parliament and encourage departments and agencies to consider human rights in a more systematic, rigorous and consistent way. From the beginning, we recognised that this would be an evolutionary process as we all came to grips with the meaning and scope of Australia's human rights obligations and how to apply these obligations in our work.

At the same time we came to appreciate that the committee was not intended to be a quasi-judicial body. The committee recognises that if we are to encourage our fellow parliamentarians, and hundreds of public servants, to become engaged in the consideration of human rights, we must try to interpret rights in a way that makes them real and effective.

At the same time, the committee's deliberations must be underpinned by a sound understanding of the human rights principles engaged by legislation and a robust interpretation of Australia's human rights obligations as expressed in the seven human rights treaties.

By June this year, the committee had considered 272 bills and 1774 legislative instruments, having also sought further information in relation to 111 bills and 54 instruments. The committee sent advisory letters in relation to a further 456 instruments where the statements of compatibility had fallen short of the committee's expectations. These statistics indicate that the committee is a useful addition to the legislative process enhancing the prospect of human rights compliance without the need for judicial intervention.

So at a national level, neither the executive nor the legislature can escape the dialogue about legislation's compliance with UN human rights standards. Neither can the courts, because of the provisions of the *Acts Interpretation Act* which make reports of the Parliamentary Committee on Human Rights and statements of compatibility relevant in court proceedings determining the meaning of new Commonwealth statutes which impinge on internationally recognised human rights and freedoms.

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 now have a few years of the door flapping in the Canberra breeze as public servants decide how much content to put in the statements of compatibility, as parliamentarians decide how much public access and transparency to accord the new committee processes, and as judges feel their way in interpreting the laws. There is no turning back from the federal dialogue model of human rights protection.

Four years on from our report and two years into the operation of the new federal human rights framework, the National Human Rights Consultation is still perceived as a failed attempt to enact a federal Human Rights Act. It was nothing of the sort. The Committee was faithful to its public trust in providing government and the Parliament with accurate information about community perceptions on the protection of human rights. The government responded by adopting the three most popular remedies for enhancing human rights protection: human rights education; statements of compatibility from the Executive; and a parliamentary committee for human rights. The human rights education campaign has now run its course. The new Abbott Government has not indicated any intention to scrap statements of compatibility or the parliamentary committee. There is every indication that most Australians are content with this ongoing Australian exceptionalism. It remains to be seen if the new measures are sufficiently robust.