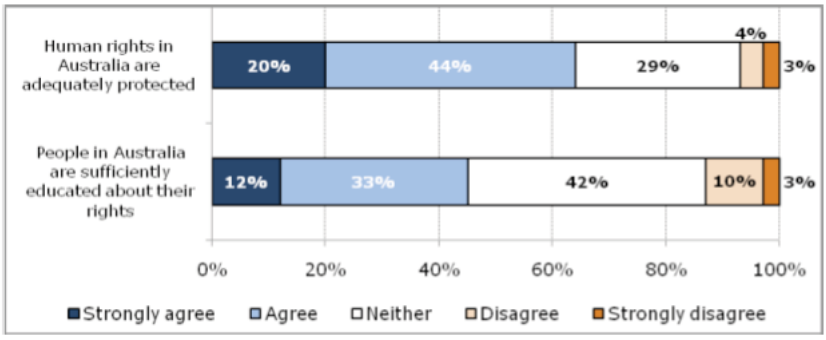
Human Rights and Access to Justice

National Access to Justice and Pro Bono Conference

Fr Frank Brennan SJ AO

Brisbane
27 August 2010

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)

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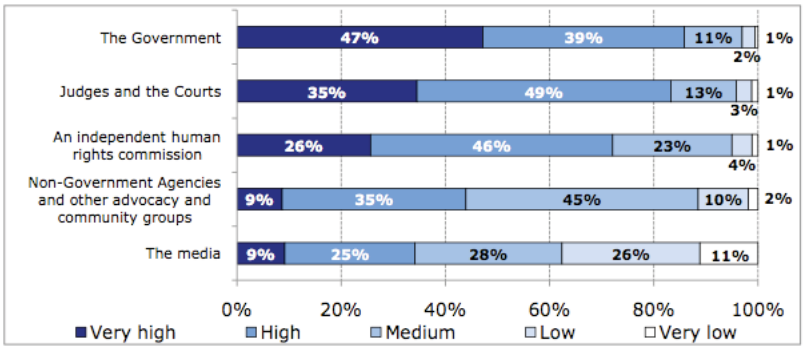
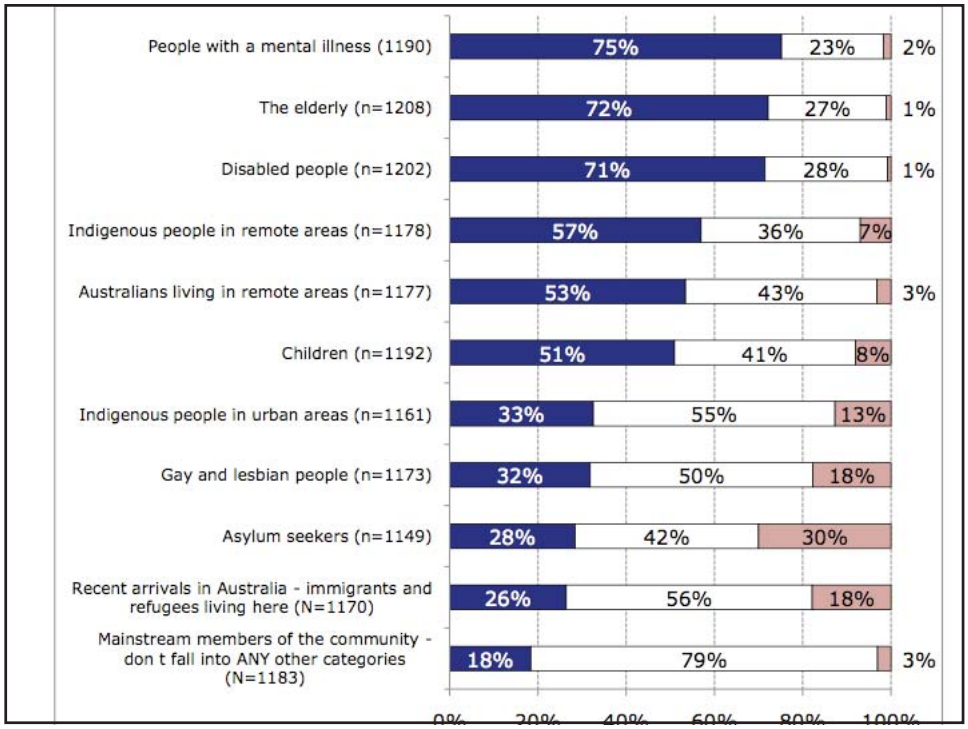
Figure E7. Perceived Levels of Responsibility for Rights Protection



- 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?



Recommendation 14

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.

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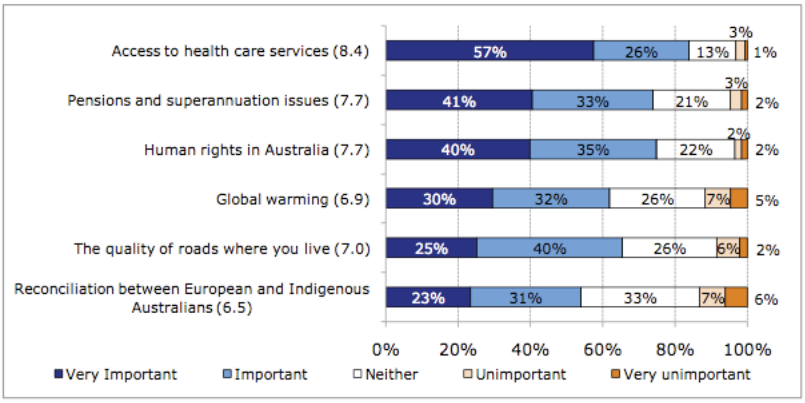
Figure 1. Relative Importance of Social Issues



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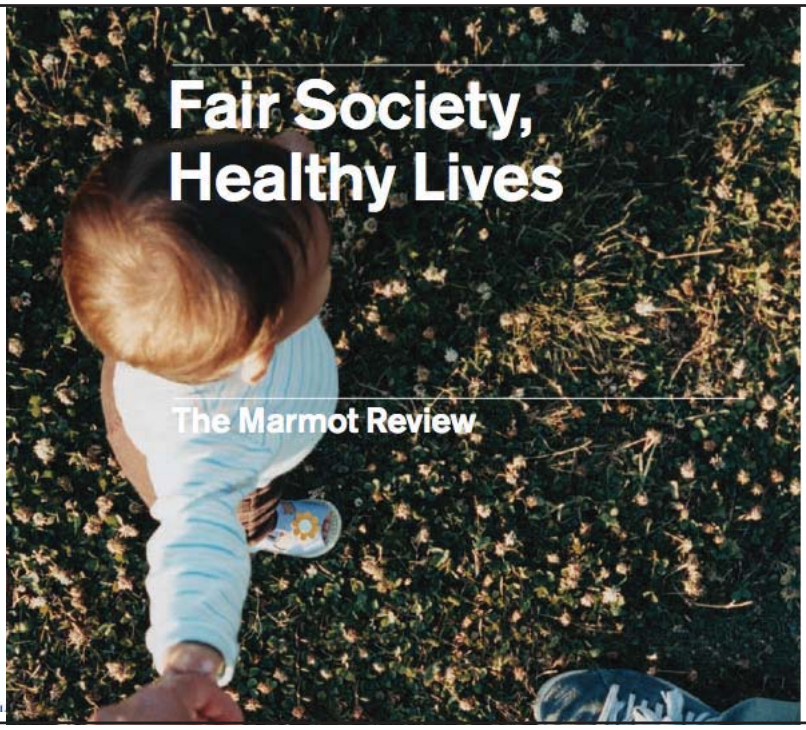

Marmot Review

Life expectancy and disability-free life expectancy (DFLE) at birth, persons by neighbourhood income level, England, 1999–2003

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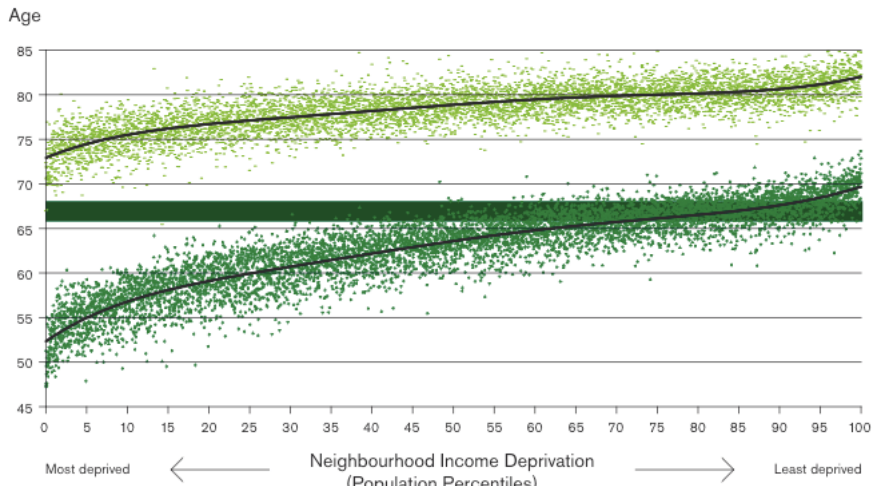

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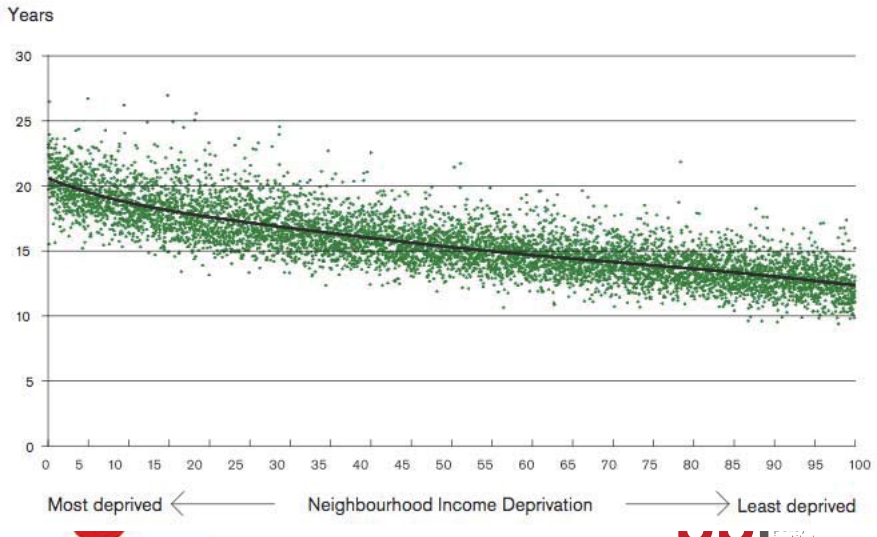
Figure 2.8 Number of years from birth spent with disability, persons by neighbourhood income level, England, 2001



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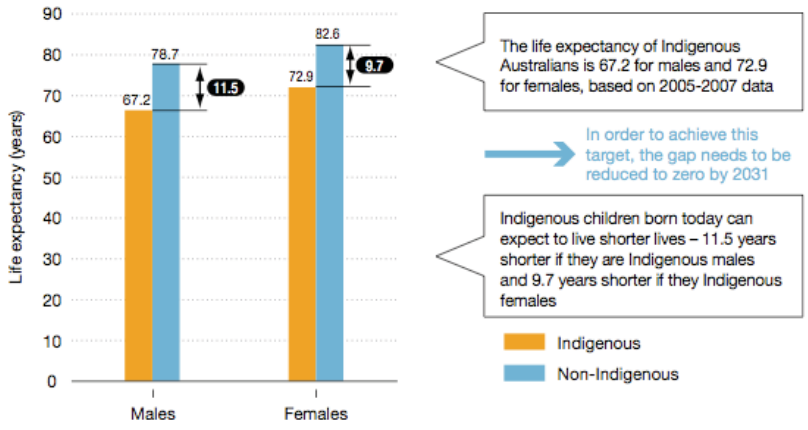
In 2005-7, the Indigenous Life Expectancy gap was 11.5 years for males and 9.7 years for females



Source: Australian Bureau of Statistics 3302.0 Deaths, 2008

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Figure E9. Support Levels for Various Protection Options

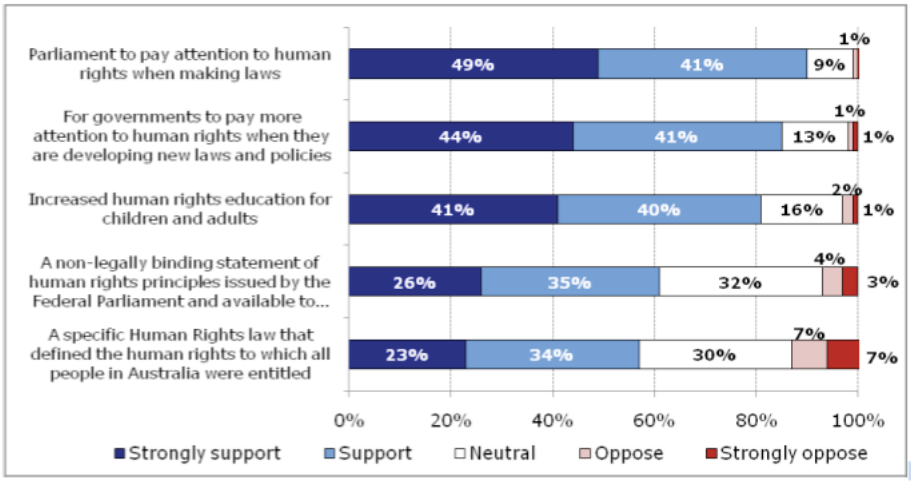

Table E10. Most preferred protection option

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%*

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Description	Total
Submissions	
Total submissions	35 014
Submitted electronically	26 650
Submitted via post	8 364
Campaign submissions	27 112
GetUp!	14 604
Amnesty International Australia	10 488
Other campaigns	2 020
Individuals and other organisations	7 902
Human Rights Act	
For	27 888
Against	4 203

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The Case for Funding from a Human Rights Perspective

3rd National Access to Justice Pro Bono Conference
Law Council of Australia
Brisbane
27 August 2010

Professor Frank Brennan SJ AO

1. 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. Afterall, 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 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 UN human rights treaties. Also Parliament will legislate to establish a parliamentary Joint Committee on Human Rights to scrutinise legislation for compliance with the UN instruments.

So the Executive and the Legislature cannot escape the dialogue about legislation's compliance with UN 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".

When interpreting new legislation impacting on human rights in the light of these relevant documents from the Executive 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." 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."

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 UN instruments.

That's 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." Retired Federal Court Judge Ron Merkel in his submission to our inquiry pointed out that the High Court has already "recognized 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."

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 UN human rights instruments, unless expressly stated to the contrary. There is no turning back from the federal dialogue model of human rights protection.

In its submission to the Senate's Legal and Constitutional Committee on the now lapsed *Human Rights (Parliamentary Scrutiny) Bill 2010* and the *Human Rights (Parliamentary Scrutiny) (Consequential Provisions) Bill 2010* the Law Council recommended making the following amendments to the bills:

(a) clarify the proposed definition of 'human rights', for example by:

(i) articulating a consolidated list of human rights protected in Australia; or

(ii) referring to a consolidated list of human rights to be contained in the Regulations.

(b) include a non-exhaustive list of general powers available to the Human Rights Committee based on those currently available under Chapter 16 of the House of Representatives Standing Orders;

(c) authorise the Human Rights Committee to inquire into any matter relating to human rights and to monitor Australia's compliance with UN human rights treaties;

(d) ensure that the Human Rights Committee has appropriate time to consider and if necessary conduct an inquiry into a Bill, and the power to request and obtain relevant information from Ministers and government departments in a timely manner;

(e) ensure that the Human Rights Committee is permitted to enquire into the policy underpinning the proposed legislation; and

(f) require reasons to be given in Statements of Compatibility.

2. An Overview of the National Human Rights Consultation

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

- Which human rights (including corresponding responsibilities) should be protected and promoted?
- Are these human rights currently sufficiently protected and promoted?
- 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. I will then make some observations about church involvement in the consultation and a couple of the less sustainable church arguments put against our recommendations.

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' 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.

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
- 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 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.

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'. 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. Sixty-four per cent of survey respondents agreed that human rights in Australia are adequately protected; only 7 per cent disagreed; the remaining 29 per cent were uncommitted. The Secretariat was able to assess 8671 submissions that expressed a view on the adequacy or inadequacy of the present system: of these, 2551 thought human rights were adequately protected, whereas 6120 (70 per cent) thought they were not.

There is enormous diversity in the community when it comes to understanding of and perspectives on rights protection.

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. 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.

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. 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 3914 submissions that considered specific reform options (other than or in addition to a Human Rights Act), 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 in those submissions. While 45 per cent 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.

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'. There was wide support for this idea in the focus groups, and 72 per cent 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.'

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.

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".'[1] 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.

[1] *The Weekend Australian*, 10 October 2009

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.

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.

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 per cent 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 1200 people, 57 per cent expressed support for a Human Rights Act, 30 per cent were neutral, and only 14 per cent were opposed.

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.

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 UK, Victoria and the ACT. 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 UK, 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 power, 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

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 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 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.

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 US 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. Afterall 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 ACT), 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.

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 authorizing 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 US 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:

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'.

3. Three Acute Injustices Encountered During Our Inquiry

Today I want to offer some reflections on three acute injustices which came to our attention, 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.

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 WA 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:[2]

> 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.

No one has been charged or disciplined for these deaths. Once again I ask, 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 accountabililty?

Third, is 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 this year Lex Wotton who had been convicting of rioting immediately following the death of Doomadgee was released on bail. The Queensland Premier

[2] p. 97

Anna Bligh was quoted in the *Townsville Daily Bulletin* on 20 July 2010, saying, "You will find the conditions for this prisoner very similar to conditions imposed on many prisoners who are being paroled."

Note the premier was careful not to assert that the conditions for this prisoner are the same as those imposed on all prisoners being paroled. Let's have a look at the *Corrective Services Act*. Section 200 provides:

(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.

So the question in this case is whether the restrictions on speaking to the media and attending meetings including a church sponsored meeting like one I attended in Townsville ten days ago 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. Having been privileged to meet with Mr Wotton a couple of times on my recent visit to Townsville, I can attest what an exemplary citizen and leader of his people he is. What a further injustice and taunt to the Palm Island community that one of their leaders is banned from attending even a Church sponsored meeting when so many concerned citizens have been upset watching the train wreck of Queensland

justice these past six years as the Queensland Police Service and Union have gone to such lengths to protect their own.

Let's ask what is the Aboriginal perception of what has occurred. It is not unreasonable for them 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 Queensland Police Service 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 is now being fought in the Supreme Court over the CMC inquiry – and with Police Commissioner Atkinson being opposed both by the CMC and the offending police officers for apprehended bias in 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 and Mr Wotton silenced and not one police officer has been disciplined for their role in any of these tawdry matters.

Let's remember that it was the respected retired Supreme Court Judge Martin Moynihan AO QC who chaired the Crime and Misconduct Commission (CMC) concluding 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."[3] "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."[4]

[3] Crime and Misconduct Commission, CMC *Review of the Queensland Police Service's Palm Island Review*, June 2010 p. xvii
[4] Ibid, p. xviii

Here 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."[5] 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."

Here is the CMC's description of the initial QPS investigation and the conduct of the officers involved:[6]

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.

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 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 four years. There is definitely plenty of politics at play in the public square with

[5] Ibid, p. xx
[6] Ibid, p. xxiv

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.

After the shames of the IRT inquiry, the exposures by the CMC and the ongoing fighting in the Supreme Court, I am not able to be as confident as I was three years ago claiming "the family and their supporters will further guarantee that never again will the police engage in such a tainted investigation of a death in custody. Such an investigation serves no one's interests any longer. It works injustice on those detained and their loved ones, and it creates havoc and public odium for the police, especially those suspected of an excessive application of force in making an arrest."

Ex-Queensland Senator Andrew Bartlett said at the time Lex Wotton was convicted, "I believe Lex is a good man with leadership ability, who clearly wants a better future for his people and has put effort into helping others in making that happen." I respectfully concur with that judgment.

Why should there be a blanket ban on Lex Wotton being attending meetings to discuss the death of Cameron Doomadgee when there is still no resolution of the following CMC recommendations:

- The CMC recommends that consideration be given to commencing disciplinary proceedings for misconduct against Webber.

- The CMC recommends that consideration be given to commencing disciplinary proceedings for misconduct against Kitching.

- The CMC recommends that consideration be given to commencing disciplinary proceedings for misconduct against Robinson.

- The CMC recommends that the QPS give consideration to commencing disciplinary proceedings for misconduct against Williams.

- The CMC recommends that the QPS initiate management action to address the performance of Webber, Kitching, Williams and Robinson.

- The CMC recommends that the QPS give consideration to disciplinary proceedings against the members of the IRT.

- The CMC looks to the Commissioner of Police to acknowledge the unacceptable conduct of the members of the initial QPS investigation team and the flawed *Palm Island Review* and now take appropriate action to restore the confidence of the public, and of its own members, in the Service.

Time is running out for the Queensland Police Service on this one. Now that Justice Lyons has delivered his decision in the Supreme Court in the stand off between the CMC and the police, it is imperative for the good of all Queenslanders that there be prompt disciplinary proceedings against those officers who have engaged in activities which quite reasonably are perceived by many Palm Islanders and others as cover ups seeking to protect their own even in the face of an Aboriginal death in custody on their watch, and perhaps at the hands of one of their own. I regret the absence of Mr Lex Wotton from my recent Townsville and Palm Island meetings and I look forward to being able to read his account of things in the media in the not too distant future – for the good of us all, including the Queensland Police Service which needs to conduct itself under the light of day.

4. 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.

Unless this access is improved, cases like the three I have outlined will recur and the deficit in Australia's human rights protection will remain. While the nation awaits the formation of a new government, the future of the proposed National Human Rights Framework is in the balance. And who knows, independents like Rob Oakeshott and Andrew Wilkie could well have an interest in seeing a future Labor Government revisit the decision not to implement a Commonwealth Human Rights Act. Their interest would be strongly backed by the Greens. Then again, an Abbott government would put the whole framework out to pasture. Whether or not there be an Act or

even a framework, there will be a continuing need for pro bono and community lawyers able to assist those impecunious Australians who continue to suffer human rights abuses.