FOREWORD

BY
PROFESSOR FRANK BRENNAN*

I am honoured to provide this foreword to the 2010 volume of the *University of Notre Dame Australia Law Review* dedicated to a large part to the topic of 'Human Rights'. Having chaired the National Human Rights Consultation for the Rudd Government in 2009, I became convinced that the rhetoric of human rights was helpful and here to stay in the Australian Commonwealth. As elsewhere, there is no agreement in contemporary Australia about the philosophical foundations for human rights. But there is a considerable overlap in the various philosophical traditions which allows us to make sense of human rights language, avoiding the trap of human rights fundamentalism – simply invoking international human rights instruments as if they are tablets of stone given from on high. Australian citizens often invoke human rights language when talking about limits on state power and about the basic requirements for recognition of the human dignity of the person. In the UK, Canada and New Zealand, human rights discourse has allowed the citizenry, and not just lawyers, to articulate more clearly the justified limits on state power and the scope of liberties which ought to be enjoyed by all persons within the jurisdiction, not just citizens. I believe that statutes and judgments framed in human rights language render the law more accessible to citizens not trained in the law. It is a way for ordinary persons to own and know their laws.

For the last 12 years, the Australian judiciary has become more isolated from their judicial colleagues in the UK and elsewhere as all other equivalent jurisdictions now have a Human Rights Act of some description. Such an Act imposes a template on the judiciary for determining conflicts of rights and for delineating limits on rights consistent with the common good or the public interest. Such an Act also requires the Parliament and the Executive to take account of these rights and the limits on same when legislating and when proposing laws or acting on policies. Australian jurisprudence may thrive with another decade of such isolation, but I have my doubts. Of course our judges have available to them an alternative artillery of judicial instruments

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including, a robust view on the scope of judicial power under Chapter III of our *Constitution* and a developing view on the rights implied in the *Constitution.* In the political domain, opponents of a Human Rights Act have a further motivation to keep an eye out for rectifying human rights abuses given that any failures will be trumpeted by proponents of a Human Rights Act as the evidentiary base supporting the need for such an Act.

There is continuing disagreement in the Australian community about the need, utility and desirability of a Human Rights Act. This welcome contribution from the *University of Notre Dame Australia Law Review* includes articles by retired judges and by one serving and two retired politicians. They provide a variety of perspectives cogently argued. Some think my committee was too timid; at least one thinks we went off the track completely. My committee was given a public trust – to report faithfully the views of the Australian community and to propose workable solutions consistent with those views.

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. 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 did not control the Senate; and the Labor Party was 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 who were 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 to 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. In accordance with our Recommendation 17, the government is proposing 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'.[1] 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'.[2]

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 CJ said, 'where 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.'[3] He added, 'courts 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.'[4]

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.

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1 *Acts Interpretation Act 1901* (Cth) s 15AB (1).
2 *Acts Interpretation Act 1901* (Cth) s 15AB(2)(c), (e).
3 *Plaintiff S157 v The Commonwealth* (2003) 211 CLR 476, 492.
4 Ibid.

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.'[5] 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.'[6]

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.

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.

In July 2010, the US Chief Justice Roberts gave a public lecture in three Australian cities. His topic: 'The History of the US Bill of Rights'. Comparing Australia and the US, 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.[7]

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5 Commonwealth of Australia, *Australia's Human Rights Framework*, April 2010, 10.

6 Ron Merkel QC and Alistair Pound, Submission to the National Human Rights Consultation, Submission AGWW-7T27RL, 17.

7 See, US Chief Justice Roberts, International Public Lecture, University of Melbourne Law School, 27 July 2010.

He provided a few pointers which are of relevance for us in Australia. 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.'[8]

In the light of the US experience, one might opine that a federal human rights act might emerge once various states have experimented with their own models. Thus the Victorian, ACT and now Tasmanian experiments may impact on the national framework. However, the US 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 US appetite for bills of rights first developed as a reaction to foreign legislators back in the UK. 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. The new Coalition government in Victoria will be reviewing the *Charter of Human Rights and Responsibilities Act 2006* (Vic). The articles in this year's *University of Notre Dame Australia Law Review* will be of interest to those still undecided whether Australia's isolation from human rights discourse is sustainable.

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8 See Michael Pelly, 'US Chief Justice's Pep Talk on Bill of Rights', *The Australian*, 30 July 2010.