

# Let There be Light on Human Rights, Religion and the Law

Concannon Oration  
University of Southern Queensland  
Toowoomba  
7 September 2010

Fr Frank Brennan SJ AO

## *1. Introduction*

Bishop William Morris, Mr Patrick Nunan, President of the Concannon College Council, Members of the Concannon College Council, Ladies and Gentlemen:

It is a great honour for me to accept the invitation to deliver the 2010 Concannon Oration, especially on the day when three country independents have delivered parliamentary reforms while also determining the future government of the country, one of them being Bob Katter one of the more robust country Catholics to adorn the green leather of two of the nation's parliamentary chambers. I was back here in Toowoomba just a couple of months ago for the iconic Downlands-Grammar game, marking the 40<sup>th</sup> anniversary of my Year 12 at Downlands. It is a propitious year, given that Downlands won the game in the closing minute. It is nostalgic to be here at the invitation of Pat Nunan who was the school captain when I was an impressionable lad in Year 8.

“Let there be light” forms the leitmotif of every Concannon Oration. The website for the oration states: “The wider our horizons become, the broader our knowledge, the more the fog of ignorance will dissipate, allowing truth to shine in all its glory. And Truth, with a capital ‘T’ is our common goal.” So tonight without fear, let us seek the light of truth on our deliberations about some very contested issues.

This oration commemorates four remarkable brothers all of whom were priests of the Toowoomba diocese – Tom, Jim, John and Eddie. Eddie was the real character

amongst them. He was a great host and a voracious reader being able to recite Chesterton and Belloc by heart. He had a realistic awareness of grace being the action of God in the world and in our lives. He loved to argue and fight with the clergy to whom he was closest. His great mate, Fr Barney McLoughlin, gave him a *Macquarie Dictionary* which he inscribed: "Take this and read it. It just might help your impoverished conversation." Eddie was a master of the English language. Many of his homilies are preserved here in the diocesan archives. Tonight we salute those four brother priests and their present day companions, especially those dedicated to learning, who minister tirelessly the length and breadth of this country in regional dioceses.

One of the great delights for me tonight is that I am in the electorate of my grandfather Frank Tenison Brennan after whom I am named. He first came to Toowoomba as a solicitor and practised from 1913-20 in the firm which is now Cleary & Lee of which Patrick Nunan is the senior partner. My grandfather was the Labor member for Toowoomba in the Queensland Parliament from 1918-1925. He was Minister for Public Instruction at the end of his parliamentary career, prior to his appointment to the Supreme Court bench.

Many Australians are now becoming aware of the connection between Mary Mackillop and Julian Tenison Woods. I am overjoyed that Mary Mackillop is to be canonised in the near future, and I have every hope of being in Rome for the occasion. She did much to educate and liberate the poor Irish Catholics who migrated here. My own Irish forebears owe much to Mary's co-founder Julian Tenison Woods who eventually fell out with her, thinking in part that the Jesuits had infected her mind permitting her to loosen up too much on their original shared vision of poverty and obedience for the sisters. It just happened that Woods on one of his scientific expeditions turned up in Maryborough where my widowed great great grandmother Annie Brennan had arrived in 1862 with her five children – a courageous move by any reckoning. Family legend has it that Woods got my great grandfather Martin off the grog and back to church. So his next son, my grandfather, was named Frank Tenison Brennan, as am I. Even putting aside the family connection to Tenison Woods, the story of Woods and Mackillop will be of increasing interest to many Australians (especially Catholics) in the wake of Mary's forthcoming canonisation.

One of the good things about a canonisation is that ordinary events and ordinary connections in life take on a graced dimension. Our history becomes holy.

As priest and lawyer, I am delighted to have the opportunity within the diocese of Toowoomba to reflect on human rights, religion and the law. For the long term good of the Church's mission in contemporary Australia, there are five prerequisites for the Church to play its proper role in the public square as we wrestle with the inter-relationship of human rights, religion, and the law:

1. absolute respect for the formed and informed conscience;
2. the need for the civil law at all levels to respect and protect the right to freedom of conscience, religion and belief (without leaving it simply to arrangement between Executive government and leaders of major churches);
3. the need for transparency before parliaments of any exemptions granted churches from compliance with general laws including antidiscrimination laws;
4. the need for church leaders to be more united in their public utterances about such issues
5. the need for respectful, open dialogue within the Church. A Eucharistic people should be the exemplars of civic conversation.

Citizens of good will who are members of church communities might make different prudential judgments about the utility of these five prerequisites and how best to achieve them, but enhanced dialogue within the church community could only be of assistance. In this spirit, I am delighted to have the opportunity to deliver the 2010 Concannon Lecture.

Let me say a further word about prerequisites 1 and 5 – conscience and the need for conversation. I am one of those Catholics who was delighted to read the speech by Kristina Keneally to the NSW Parliament last week when she was explaining why she would support legislation allowing same sex couples to adopt children when such an adoption is judged to be in the best interests of the child, while at the same time allowing Church adoption agencies to opt out of any arrangements facilitating

adoptions by same sex couples. Explaining why she was allowing her party a conscience vote on the issue, she told Parliament: “This bill is not ordinary business. It goes to core beliefs about how families form and how children are raised. It requires us to consider views that will either be in conflict or in congruence with our values and beliefs, which are formed by our personal experiences and therefore deeply held. For many of us it raises issues of faith.” She concluded her speech with these words:<sup>1</sup>

I recognise that these issues are complex and nuanced and they demand respectful attention. Particularly to those who share my faith, I say that in my mind the Gospel message is one of acceptance. Jesus was not a man of judgement but rather a man of love. When I look at this issue about the adoption of children who are vulnerable, children who would know no other love and acceptance, and I see people offering up that unselfish love to a child, it is something that I, not just as a Christian and a Catholic but as the Leader of this State, want to support. In considering my decision, I have sought to form my conscience fully. I have considered the Gospel, and particularly Jesus' teaching that all laws of the Church should be based on the commandment to love God and to love one another. I have observed how same-sex parents show us examples of that love in how they sublimate their needs for the children in their care. Perhaps most compellingly I have reflected my own experience of such love, first as a child and now as a parent. I am fully appreciative of the empowerment a child receives when love and stability is provided in their life. In considering all of that, I must, in my conscience, support this legislation.

Not every Catholic would reach the same conclusion. But we can be proud that a civic leader has been prepared to give an account of herself having formed and informed her conscience by praying the scriptures and reflecting on Church teaching and then acting on that conscience. On Sunday Cardinal Pell, clearly displeased with the approach taken by Catholics like Premier Keneally and Barry O’Farrell, Leader of the Opposition<sup>2</sup>, claimed that this law “represents bad social engineering” being just “a re-election stunt to seek the votes of minority groups, (having) little to do with extending even mistaken notions of human rights (same-sex parenting orders are already available) and clearly subordinat(ing) the rights of the child to those of an adopting adult.”<sup>3</sup> I read Mrs Keneally as being on about much more than that, and

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<sup>1</sup> New South Wales, Legislative Assembly, *Hansard*, 1 September 2010

<sup>2</sup> Mr O’Farrell told Parliament: “I support this measure today ... for the sake of children but also because I don't believe our society should exclude because of gender, sexuality, faith, background or some other factor, people who have a contribution they can make...That's not the free and confident society I seek.”

<sup>3</sup> His Eminence Cardinal George Pell, *Sunday Telegraph*, 5 September 2010

very nobly so. And I did not read Mr O'Farrell as just playing catch-up with Mrs Keneally.

In relation to prerequisite 5 (the need for respectful and open conversation): This is the first formal address I have delivered in the Toowoomba diocese since the Vatican visitation by US Archbishop Chaput from Denver following upon Bishop Morris's courageous and very pastoral Advent letter of 2006. I salute Bishop Morris and the presbyterate and faithful of this diocese who have stood by him so resolutely in recent times.

In that pastoral letter, your bishop pointed out that you would have just 19 active priests by 2014. Most would be old men, and they would be spending much of their time on the road. He outlined a list of pastoral responses to this decline in priests including: the third rite of reconciliation; the ordination of women and married men; welcoming former priests, married or single, back to active ministry; and recognising Anglican, Lutheran and Uniting Church orders. He indicated his willingness to pursue any option which Rome would allow.

I was very troubled last year to read the account by Fr Jeff Scully in the Spring issue of *The Swag*, the national priests' newsletter, in which he noted:

How can a respected leader of a local church be investigated without ever finding the content of the report based on these investigations? Is this not unthinkable in this age of transparency and accountability? I kid you not, Archbishop Chaput's visit did nothing to increase respect for the way Rome's officials do business. After the Chaput visit, not many Toowoomba people were expecting to find in their mailboxes a wee note from Denver, Colorado, saying how much he enjoyed his visit to our part of the world, how enriching the experience had been for him, and how much he had learnt. Learning did not seem to be part of the exercise.

As far as we all know, the investigation is ongoing. Is it not time for the open conversation to commence? Is it not time for all of us learn new pastoral ways of being Church before new generations in country areas of Australia are completely denied access to the sacraments?

## ***2. An Overview of the National Human Rights Consultation***

In 2009, I was privileged to chair a committee of very competent individuals who had diverse views about how best to protect human rights in Australia. The other committee members were Mary Kostakidis, a well known national television news presenter and board member of leading humanitarian and cultural organizations, Mick Palmer, retired Northern Territory Police Commissioner and Australian Federal Police Commissioner who had conducted the inquiries for the Howard government into unauthorized immigration detention, and Tammy Williams an indigenous lawyer whose family has been involved in litigation for the stolen generations and for stolen wages. We were also assisted by Philip Flood retired head of the Department of Foreign Affairs and retired ambassador who had done the review of the national intelligence services for the Howard government. The Murdoch press was fond of portraying us as a group of likeminded lefties. The diversity of our views ensured the transparency and integrity of our processes, especially given that we did not reach agreement on the recommendations about a Human Rights Act until five minutes to midnight.

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

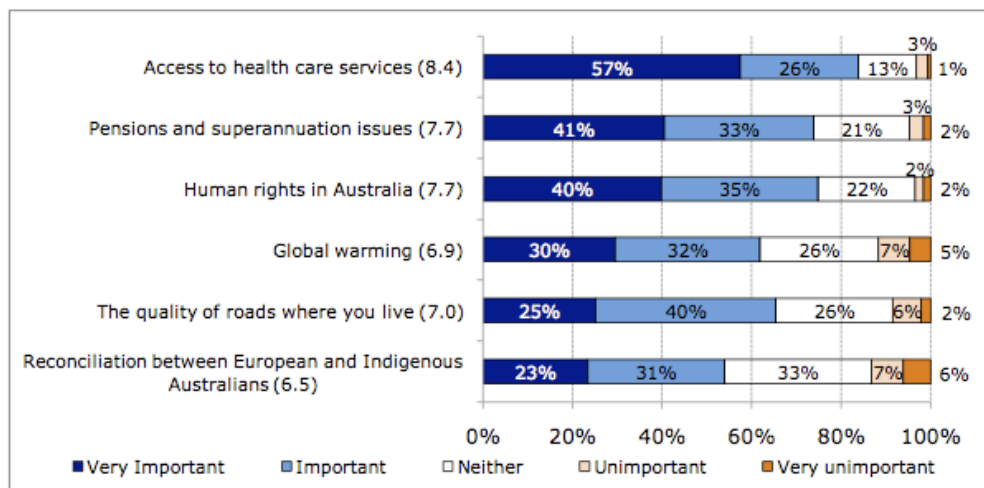
During the consultation, groups like GetUp! and Amnesty International ran strong campaigns in favour of a Human Rights Act. However they largely abandoned the field once our report was tabled. The opponents of a Human Rights Act then came into play, including the Australian Christian Lobby and the influential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

In providing an overview of the 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. We engaged a social research firm Colmar Brunton to run focus groups and then to administer a very detailed random telephone poll of 1200 persons. This poll highlighted the issues of greatest concern to the Australian community:

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



**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. At Charleville, 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

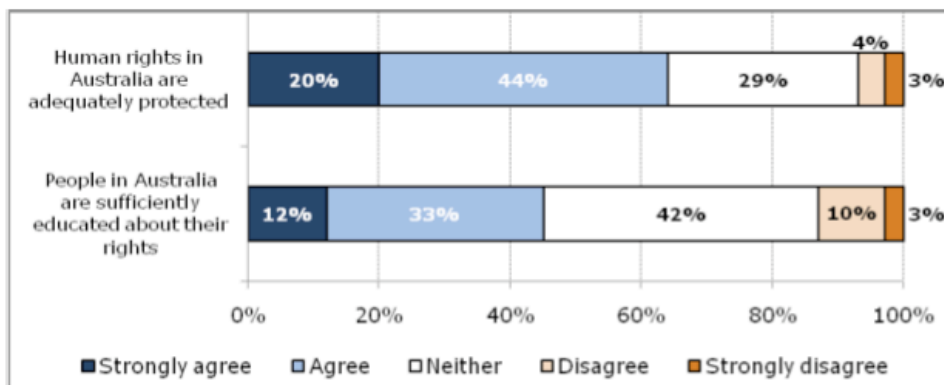
departments should be attentive to the progressive realization of these rights, within the constraints of what is economically deliverable. However, in light of advice received from the Solicitor-General, we did not think the courts could have a role to play in the progressive realization of these rights.

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.

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



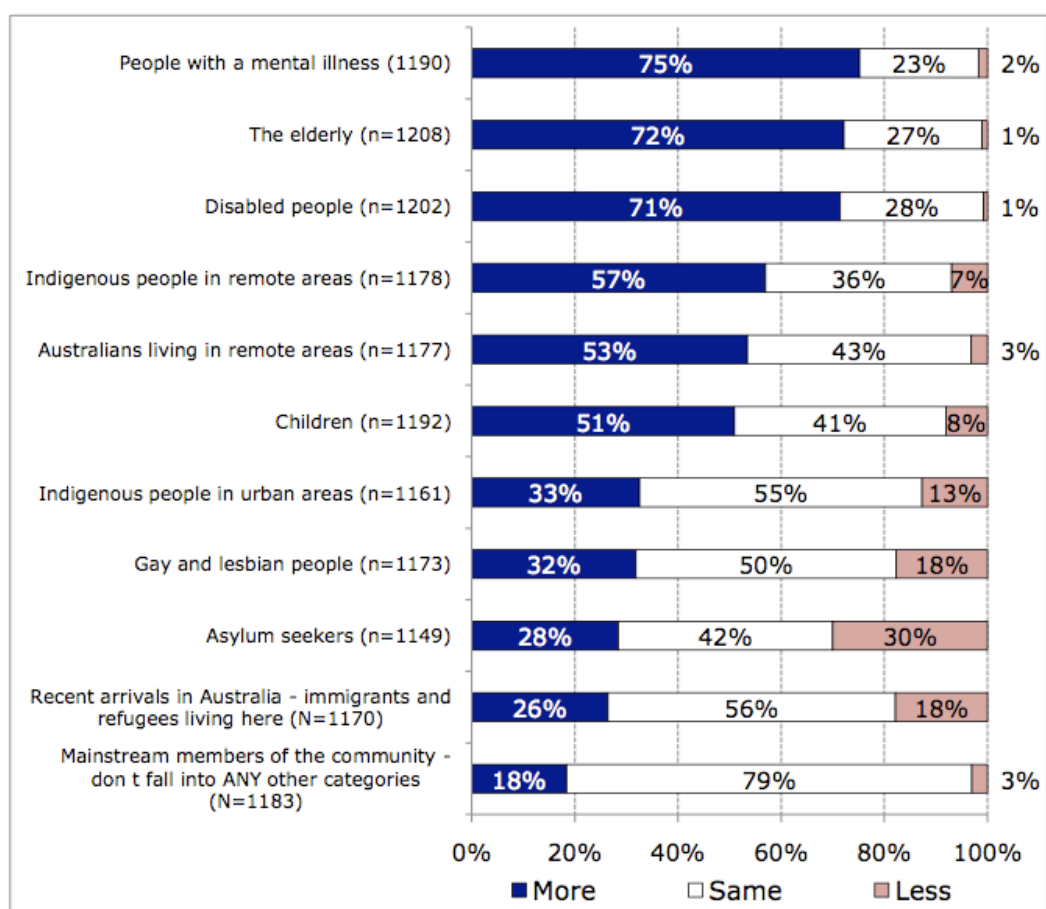
Q3. Using a scale of 0-10, where 0 means 'totally disagree' and 10 means 'totally agree', how much do you disagree or agree with the following statements?

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

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

**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 the issue recurs at Australian elections.

**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.

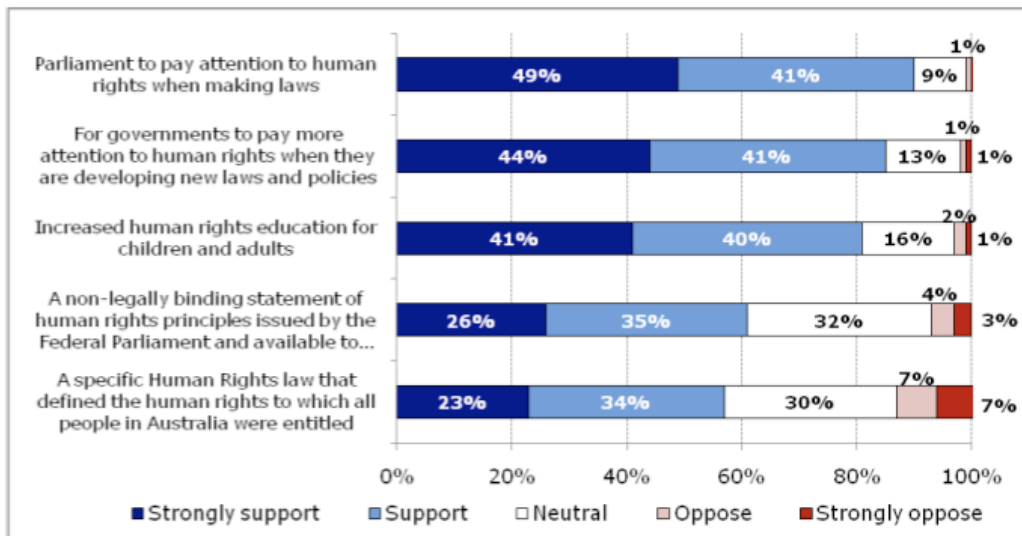
This confirmed the Committee’s experience of the community roundtables.

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.

Figure E9. Support Levels for Various Protection Options

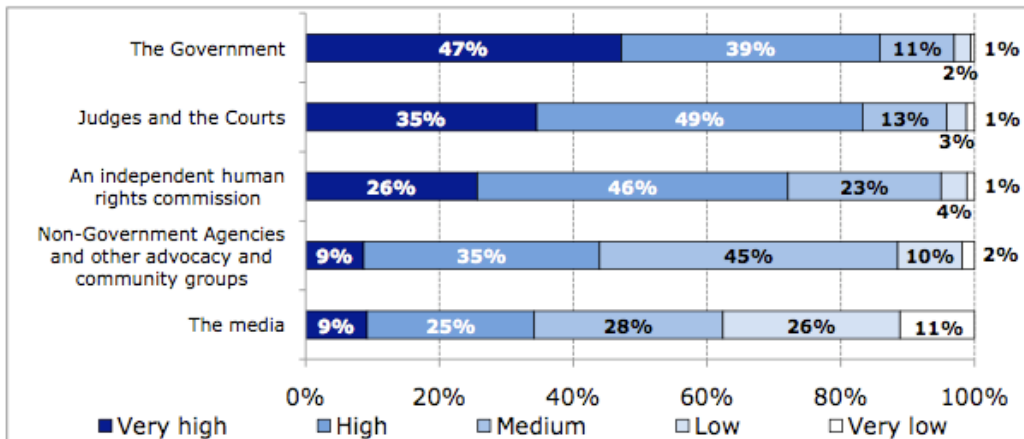


Paul Kelly from *The Australian* thought our contempt for the Australian community breathtaking in our call for education of children ‘so they understand the need to respect “the dignity, culture and traditions of other people”.’<sup>4</sup> I make no apology for this call. It is fanciful for commentators like Kelly to suggest that our “report, in effect, seeks the obliteration of the Howard cultural legacy”. I know of no member of my committee who would claim knowledge of such a legacy, let alone a commitment to obliterate it. Such a task was well beyond our terms of reference. It is a figment of Kelly’s patriotic imagination.

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

<sup>4</sup> *The Weekend Australian*, 10 October 2009

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



*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.

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

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. After all if the contest is about what is justified in a free and democratic society, who is better placed than an elected politician to claim that they know the country's democratic pulse on the legitimate limit on any right?

To elaborate a little more on our model (which is similar to the one adopted in Victoria and the 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***

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

First was the inquest in Kalgoorlie into the death of Mr Ward in the back of a prison van in horrendous outback summer conditions. No one has been charged with any offence in relation to his death. I ask: what if he were white? Would his treatment have been any different? And would the treatment of his reckless jailers be any different? The 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:<sup>5</sup>

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

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<sup>5</sup> Michael Barnes, Queensland Coroner, Inquest into the loss of the *Malu Sara* , 12 February 2009, p. 97

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 accountability?

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 convicted of rioting immediately following the death of Doomadgee was released on parole. The Queensland Premier 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 two weeks 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.”<sup>6</sup> “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.”<sup>7</sup>

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.”<sup>8</sup> The CMC states: “[T]he IRT appear to be simply providing reasons to justify Kitching’s failure to make this information available to the

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<sup>6</sup> Crime and Misconduct Commission, *CMC Review of the Queensland Police Service’s Palm Island Review*, June 2010 p. xvii

<sup>7</sup> *Ibid*, p. xviii

<sup>8</sup> *Ibid*, p. xx

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:<sup>9</sup>

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 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."

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<sup>9</sup> Ibid, p. xxiv

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 Peter 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. The Proposed National Human Rights Framework***

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

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

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

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

These proposals reflected the priorities of those surveyed in our inquiry:

**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%
<i>None of these</i>	8%

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.

### ***5. Church Concerns about a Human Rights Act***

During the course of our inquiry, we heard strong church concerns about three issues which people thought to impact unduly on religious freedom: (1) the religious vilification laws in Victoria; (2) the compulsory referral clause in the Victorian Abortion bill; and (3) the exemptions for church bodies from the discrimination laws.

So the appropriate issues for inquiry were: do these three laws and policies unduly limit the right to freedom of religion? If so, would a Charter of rights help or hinder the protection and enhancement of the right and the due setting of limits on the right? In each instance, I concluded that there was an attempt to unduly limit the enjoyment of the right, but that a Charter in each instance would have helped or would have been

irrelevant. I could not see the Charter itself and its faithful implementation working any harm to the freedom of religion. Given that some church leaders thought the Charter contributed to an undermining of the freedom of religion in these cases, it is worth considering them in some detail. Note: I am not putting the case for or against a Charter. Our report does that even handedly in Chapters 12 and 13. I am just wanting to test the key anti-Charter arguments put by the Churches, to see whether freedom of religion could be enhanced or undermined by the enactment of a Charter.

### **Religious Vilification**

Since 11 September 2001, Australians have displayed an increased sensitivity to the demands of Muslim Australians that their perspective on pressing social and political questions be heeded. There has been spirited debate in the Australian community about the need for religious vilification laws to protect Muslims from uninformed attack by Christian fundamentalists. At some of our community consultations, we heard individuals, even church leaders, expressing concern that a national charter of rights might entail a national religious vilification law similar to that in Victoria. The Victorian laws (enacted before the Charter and therefore without the benefit of a statement of compatibility) provides<sup>10</sup>

A person must not, on the ground of the religious belief or activity of another person or class of persons, engage in conduct that incites hatred against, serious contempt for, or revulsion or severe ridicule of, that other person or class of persons.

In my view, the application of the Victorian religious vilification law has hindered rather than helped religious and social harmony. The *Catch the Fires* litigation in Victoria has placed a permanent cloud over the utility of all religious vilification laws in Australia. These laws cannot be administered with sufficient transparency and neutrality. Even if one were to accept the utility and desirability of **racial** vilification laws, there is a strong case for stopping short of **religious** vilification laws or for at least enacting such laws only for criminal prosecution at the behest of the Attorney General. While it is inherently racist for a person to claim membership of the best race, it is no bad thing for a religious person to claim membership of the one true

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<sup>10</sup> s 8(1), *Racial and Religious Tolerance Act 2001 (Vic)*

religion. That is the very point of religious belief. That is what religious people do. Within the great religious traditions, there are strands which urge universal respect and love for all persons regardless of their religious affiliation. But the State overreaches itself when it adapts laws prohibiting vilification on the grounds of a physical characteristic premised on absolute equality of all persons regardless of that physical characteristic to laws prohibiting vilification on the grounds of religious belief when there is no necessary presumption by believers that all religions are equally good and true. How are officers of the State to distinguish between the religious belief which might be robustly criticised and some of whose fanatical practitioners might be rightly reviled or ridiculed from those other practitioners who are to be respected regardless of the errancy of their beliefs or the potential of their beliefs to be misconstrued by others for destructive purposes?

Even if there be strong religious tensions in a multicultural society, those tensions will not be resolved and the adverse effects of the tensions will not be avoided by laws which can be administered by the State arranging for religious practitioners to report on each other, with State tribunals then attempting to arbitrate what is a reasonable portrayal of one religion by the believers of another. There are some places the law should not tread. At the very least there is room for credible argument that religious vilification laws unduly interfere with the right to freedom of expression and the right to freedom of conscience, religion and belief – and well beyond what can be demonstrably justified in a free and democratic society. It is very doubtful that the broad Victorian religious vilification law permitting *Catch the Fires* type litigation would be passed by a Parliament constrained by a legislative human rights act.

While there are citizens of diverse religious beliefs in a democratic state, there will always be a place for diverse religious arguments and positions in the public forum. Like their fellow citizens they should be free to advocate peacefully their preferred policy positions as competently or foolishly as they are able or as they wish. They should have confidence that the separation of powers ensures that their own legitimate interests are not overridden by local populist pressures. They should expect to gain little from seeking application of overbroad religious vilification laws which may turn out to be counterproductive. In time they will win the same acceptance and security

within the nation state as my Irish Catholic forbears came to enjoy in what many still consider the most godless place under heaven.

### **Compulsory referral for abortion**

Prior to my appointment to chair the National Human Rights Consultation Committee, I had some involvement in the Victorian debate about clause 8 of the *Victorian Abortion Law Reform Bill 2008* to force a conscientiously objecting doctor to refer a patient seeking an abortion to another doctor who did not share the same conscientious objection. I thought such a provision was in flagrant breach of right to freedom of conscience, religion and belief, could not be justified, and would not pass muster if the bill to Parliament was accompanied by a statement of compatibility as required by the Victorian Charter.

When Lord Joffe's *Assisted Dying for the Terminally Ill Bill* was first drafted in the United Kingdom it contained two clauses similar to section 8 of the *Victorian Abortion Law Reform Act 2008*. Clauses 7(2) and (3) of the original Joffe Bill imposed a duty on physicians who invoked their right to conscientiously object, to "take appropriate steps to ensure that the patient is referred without delay to a physician who does not have such a conscientious objection". The Westminster Parliament's Joint Committee on Human Rights remarked:

3.14 We consider that imposing such a duty on a physician who invokes the right to conscientiously object is an interference with that physician's right to freedom of conscience under the first sentence of Article 9(1), because it requires the physician to participate in a process to which he or she has a conscientious objection. That right is absolute: interferences with it are not capable of justification under Article 9(2).

3.15 We consider that this problem with the Bill could be remedied, for example by recasting it in terms of a right vested in the patient to have access to a physician who does not have a conscientious objection, or an obligation on the relevant public authority to make such a physician available. What must be avoided, in our view, is the imposition of any duty on an individual physician with a conscientious objection, requiring him or her to facilitate the actions contemplated by the Act to which they have such an objection.

3.16 In the absence of such a provision, however, we draw to the attention of each House the fact that clauses 7(2) and (3) give rise in our view to a significant risk of a violation of Article 9(1) ECHR.

The UK bill was accordingly amended to provide that “No person shall be under any duty to refer a patient to any other source for obtaining information or advice pertaining to assistance to die, or to refer a patient to any other person for assistance to die under the provisions of this Act” (cl. 7(3)). Under the revised UK provision, the doctor with a conscientious objection would have no additional legal duty other than “immediately, on receipt of a request to do so, transfer the patient’s medical records to the new physician”. (cl. 7(6))

When confronted with cl 8 of the Abortion Law Reform Bill, it was not surprising that the Victorian Scrutiny of Acts and Regulations Committee saw a need to provide parliament with a compatibility statement and drew attention to the equivalent attempted provision in the UK, the response by the UK Committee, and the amendment proposed in the UK Parliament. The Victorian committee noted:

Clause 8 sets out the obligations of health practitioners who hold a conscientious objection to abortion, including (in clause 8(1)(a)) an obligation to refer women who request an abortion to another practitioner who has no conscientious objection. The Committee observes that some practitioners may hold a belief that abortion is murder and may regard a referral to a doctor who will perform an abortion as complicity in murder. The Committee therefore considers that clause 8(1)(a) may engage the Charter right of such practitioners to freedom of belief.

The Committee rightly observed that the compatibility of this clause with the Charter “depends on its satisfaction of the test in Charter s. 7(2), including whether or not there are less restrictive means available to achieve the purpose of the clause”.<sup>11</sup> The Committee then very properly referred two questions to Parliament for its consideration:

1. Whether or not clause 8(1)(a), by requiring practitioners to refer patients to doctors who hold no conscientious objection to abortion, limits those practitioners’ freedom to believe that abortion is murder?
2. If so, whether or not clause 8(1)(a) is a reasonable limit on freedom of belief according to the test set out in Charter s. 7(2) and, in particular, whether or not there are any less restrictive means available to ensure that women receive appropriate health care?

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<sup>11</sup> Scrutiny of Acts and Regulations Committee, Alert Digest No 11 of 2008, p. 6

No credible answers were provided by Parliament. The questions could only have been answered, Yes to the first and No to the second.

Victoria is the first Australian state to have legislated a Charter of Human Rights and Responsibilities Act. It reproduces many of the rights in the ICCPR including the freedom of thought, conscience, religion and belief (s.14). Unlike the ICCPR, the Victorian Charter does not specify that any rights are non-derogable. And all rights can be restricted for reasons other than the need “to protect public safety, order, health, or morals or the fundamental rights and freedoms of others”.<sup>12</sup> Section 7(2) specifies the justified limits on rights:

A human right may be subject under law only to such reasonable limits as can be demonstrably justified in a free and democratic society based on human dignity, equality and freedom, and taking into account all relevant factors including—

- (a) the nature of the right; and
- (b) the importance of the purpose of the limitation; and
- (c) the nature and extent of the limitation; and
- (d) the relationship between the limitation and its purpose; and
- (e) any less restrictive means reasonably available to achieve the purpose that the limitation seeks to achieve.

Helen Szoke, Chief Conciliator/CEO, Victorian Equal Opportunity and Human Rights Commission purported to answer the questions posed by the Scrutiny of Bills committee when she wrote to *The Australian* on 1 October 2008 stating:

The purpose of the charter is to provide a framework to help us balance competing rights and responsibilities. Freedom of conscience is not the only issue at stake here, and to suggest so is to simplify an extremely complex issue. In this case, a doctor's right to freedom of conscience needs to be balanced with competing considerations such as a patient's right to make a free and informed choice. Sometimes limits on human rights are necessary in a democratic society that respects the human dignity of each individual.

Suffice to say that this simple solution is in stark contrast to the reasoning and conclusion reached by the UK Parliament in its consideration of a similar clause.

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<sup>12</sup> Article 18(3), ICCPR

Thankfully, the Victorian Equal Opportunity and Human Rights Commission has now stated, “[SARC’s] interpretation of the Charter is preferable and ... the bill should have been accompanied by a statement of compatibility”.<sup>13</sup>

The offensive s.8 would never have been adopted by Parliament had a statement of compatibility been required. To this day, no one has been able to draft a coherent statement of compatibility for this clause. The strong advocates for a national Human Rights Act modeled on the Victorian law would do themselves an enormous favour were they to convince the Victorian Attorney General Robert Hulls to repeal s. 8 or were they to try and produce a statement of compatibility. While s.8 remains on the statutes books, religious critics of a federal human rights Act will remain convinced that such a human rights regime is applied only selectively and ideologically, impairing the fundamental rights of religious persons. If the Victorian Charter distinguished between derogable and non-derogable rights (one of which is freedom from coercion or restraint in relation to religion and belief) opponents of s.8 would have been able to claim that the provision was a flagrant breach of a non-derogable right, causing Parliament to reject such a provision.

### **Exemptions from employment laws**

Church groups in Victoria went through a grueling two year campaign to maintain justifiable exemptions from the provisions of the Victorian *Equal Opportunity Act 1995*. A similar issue has arisen in the UK motivating Pope Benedict XVI to say to UK bishops on their *ad limina* visit and in preparation for his forthcoming visit to the UK:<sup>14</sup>

Your country is well known for its firm commitment to equality of opportunity for all members of society. Yet as you have rightly pointed out, the effect of some of the legislation designed to achieve this goal has been to impose unjust limitations on the freedom of religious communities to act in accordance with their beliefs. In some respects it actually violates the natural law upon which the equality of all human beings is grounded and by which it is guaranteed. I urge you as Pastors to ensure that the Church’s moral teaching be always presented in its entirety and convincingly defended.

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<sup>13</sup> Victorian Equal Opportunity & Human Rights Commission, *The 2008 Report on the Operation of the Charter of Human Rights and Responsibilities* (2008) 103.

<sup>14</sup> Address Of His Holiness Benedict XVI to the Bishops of the Episcopal Conference of England and Wales on their "Ad Limina" Visit, Consistory Hall, 1 February 2010

Fidelity to the Gospel in no way restricts the freedom of others – on the contrary, it serves their freedom by offering them the truth. Continue to insist upon your right to participate in national debate through respectful dialogue with other elements in society. In doing so, you are not only maintaining long-standing British traditions of freedom of expression and honest exchange of opinion, but you are actually giving voice to the convictions of many people who lack the means to express them: when so many of the population claim to be Christian, how could anyone dispute the Gospel’s right to be heard?

A week before the Pope spoke, the House of Lords had already acted and voted by 216-178 to reject parts of the UK Equality Bill which would have lifted the exemption for churches in employment. The crucial amendment reinstating the church freedom in employment was proposed by the Anglican Conservative peer, Baroness O’Cathain who told the House of Lords, “Organisations that are based on deeply held beliefs must be free to choose their staff on the basis of whether they share those beliefs.” She added that Churches must be allowed to “discriminate on the grounds of sex, sexual orientation and marital status when making appointments to key religious posts. An exemption along these lines has existed for more than 30 years.”<sup>15</sup> When foreshadowing amendments in the House of Lords back on 15 December 2009, Baroness O’Cathain had expressed concern about the 2007 sexual orientation regulations which had led to church agencies terminating their adoption services because they believed that the limited number of children available for adoption should, in their best interests, be placed with family units including an adult male and an adult female. She asked, “Why are Christians being increasingly marginalized in Britain in 2009? Poring over the evidence, I have no doubt that the equality and diversity agenda lies near the heart of the problem.”<sup>16</sup> She said, “I believe that equality is morphing into an ideology hostile to the Christian faith.”<sup>17</sup> Supporting her, Baroness Cumberledge said, “Anti-discrimination law, protecting religious beliefs as much as other characteristics, should not be framed in such a way that it prevents those very beliefs being put into practice, but that, I fear, is exactly where the Bill takes us.”<sup>18</sup> Baroness Cumberledge urged the House of Lords that “in a number of significant posts, it is right for the religious employer to require that their lives are not

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<sup>15</sup> *The Tablet*, 30 January 2010,

<sup>16</sup> Hansard, House of Lords, 15 December 2009, Column 1439

<sup>17</sup> *Ibid*, Column 1441

<sup>18</sup> *Ibid*, Column 1442

manifestly in opposition to the teachings of the religion and the beliefs of its followers. Is that too much to ask?”<sup>19</sup>

The exemptions now maintained in the UK are quite consistent with the recognition and protection of the human rights of all persons, including religious people who want to associate as religious groups and organizations for the purpose of contributing to the common good of the society of which they are a part and which they serve.

While there may be strong agreement about the need to maintain a Church’s right to employ in certain positions only persons who live in conformity with Church teaching, there is plenty of room for disagreement as to how most prudently and charitably to exercise that right. It is not only secularist, anti-Church people who think that Church organisations and leaders would be displaying homophobia by singling out only gays and lesbians for exclusion from employment in some key positions when heterosexual persons are also living in what the Church might formally regard as irregular situations.

In Victoria, the Scrutiny of Acts and Regulations Committee of the Parliament conducted a lengthy review into the exceptions and exemptions to the *Equal Opportunity Act 1995*. As in the UK, many church personnel here presumed that the Charter (or Human Rights Act) was instrumental in calling into question the existing exemptions. That was not the case. They are quite separate statutes. A case can be made that a Charter espousing the key rights to religious freedom and conscience could assist in setting the appropriate limits on State intervention with Church organisations wanting to employ persons whose lifestyles (hopefully not just sexual) are consistent with church teaching.

Government and Opposition members of the Victorian committee actually decided that the Charter provisions had no role to play in determining the appropriate exemptions to be provided to the churches. Even the government members of the committee decided not to recommend that the exemptions for Churches be put through the Charter test. They observed “that whilst such a test would allow the

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<sup>19</sup> Ibid, Column 1473

balancing of the non-discrimination right against right to freedom of the religion in each specific case, there is a more compelling need for clarity in the law in an area where many charitable and volunteer based organizations operate.”<sup>20</sup> The Catholic Church ran a strong campaign to retain the existing exemptions (with some minor exceptions in relation to discrimination on the grounds of race, impairment, physical features or age which could never be justified as being consistent with Church teaching). The government responded to the Church pressure with the Attorney General publicly guaranteeing the retention of the key exemptions two months before the parliamentary committee reported. The Attorney General Rob Hulls was able to tell the public, “These proposed changes follow consultation with religious bodies and have the support of the Catholic Church.”<sup>21</sup> Definitely no adverse impact of the Charter in this case! Basically the politicians agreed with the evidence of Bishop Prowse to the parliamentary committee that “the exemptions and exceptions which are an integral part of the existing legislation provide the right balance between freedom of religion and freedom from discrimination.”<sup>22</sup>

Given that churches and church organizations (many of which are members of Catholic Social Services Australia) are now in receipt of substantial public funds with commitments to deliver services to the general community and not just church members, there may in accordance with Vatican II be some limits on the freedom enjoyed by those organizations when ordering their affairs for the delivery of those government funded services. On the other hand, as Francis Moore, the business manager for the Catholic Archdiocese of Melbourne told the parliamentary committee, “The popularity of the services we provide, whether in education, health or welfare, are testament to the value the community attaches to the manner and way in which we deliver our services.”<sup>23</sup> Those citizens who choose not to espouse Catholic values can presumably find employment elsewhere. Were the Church to have a virtual monopoly on some sector of service delivery with government funding, there may be a need for the Church, in justice, to provide employment opportunities for some persons not espousing Church values. But there is no instance of this presently.

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<sup>20</sup> SARC, Final Report, Exceptions and Exemptions to the Equal Opportunity Act 1995, p. 61

<sup>21</sup> Rob Hulls, Media Release, 27 September 2009

<sup>22</sup> C Prowse, Evidence to the SARC, 5 August 2009, p. 3

<sup>23</sup> Ibid, p. 5

I agree with Dennis Fitzgerald, Executive Director of Catholic Social Services Victoria who told the Victorian parliamentary inquiry:<sup>24</sup>

In order to effectively carry out this work, our mission on behalf of the church, Catholic organisations need to be able to adopt employment practices that will reflect the religious nature of our organisations.

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That does not mean that all of our senior people need to be Catholic — some of our distinguished leaders in the sector are not Catholic — but it does mean that we need a critical mass within the leadership group of the organisation to retain affiliation with the Catholic Church.

During our public inquiry, Bob Carr told a conference convened by the Australian Christian Lobby and the Archdiocese of Melbourne that one of the chief advantages of not having a Charter was that church leaders could deal directly with government. He told the story of the two Archbishops of Sydney coming to see him as premier when there was discussion about a proposed Bill to restrict the freedom of Churches to employ only those persons living consistently with Church teachings. He was able to give them an immediate assurance that their interests would be protected. Once again it is a matter for prudential political assessment. But I think those days have gone. It is a good thing for society that elected political leaders and church leaders are able to meet and talk confidentially. Whatever the situation in the past, it is now not only necessary but also desirable for church leaders to give a public account of themselves when seeking protection of freedom of religion within appropriate limits, especially when they are in receipt of large government funds for the provision of services to the general community, and not just to Church members. Church special exemptions regarding employment are all the more defensible when church personnel including bishops and those with the hands-on directing of church agencies are prepared to appear before a parliamentary committee and provide a coherent rationale for those exemptions, rather than simply cutting a deal behind closed doors with the premier or prime minister of the day.

My committee decided not to buy into the ongoing contemporary dispute about the desirability of an Equality Act over against a harmonisation of existing, diverse discrimination laws. In our report, we outlined the pros and cons of both sides of that

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<sup>24</sup> Evidence, SARC, 5 August 2009, p.2

argument.<sup>25</sup> Thus we did not think it appropriate to include a general non-discrimination right in a Human Rights Act (which would amount to a de-facto one clause Equality Act within a Human Rights Act). The absence of such a right made the recommendation of a discrete cause of action for breach of a specified right by a Commonwealth public authority all the more tenable. Thus the concern of Victorian churches about exemptions from discrimination laws is completely irrelevant to any consideration of a federal Human Rights Act in the terms in which we proposed it. Some Church leaders may have overlooked this point in their criticism of our proposed federal charter. For example, Cardinal Pell has said, “There is no doubt that if Australia gets a charter of rights, upfront or by stealth, it will be used against religious schools, hospitals and charities by other people who don’t like religious freedom and think it shouldn’t be a human right. The target will be the protection in anti-discrimination laws that allow religious schools to exercise a preference in employment for people who share their faith.” That is an issue for resolution when it comes to determining how best to revise federal discrimination laws - whether there should be an Equality Act or better harmonization of existing discrimination laws - an issue on which my committee expressed no view. If the recent UK and Victorian experiences are anything to go by, a Human Rights Act will be useful when it comes to invoking the existence and importance of the right and irrelevant when it comes to setting the limits on freedom of religion and belief.

## ***6. 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 instances of indigenous disadvantage in the face of the legal system which I have outlined will recur and the deficit in Australia’s human rights protection will remain. There may come a day when the unwarranted interference with Lex Wotton’s freedom of expression and freedom of association by a parole board will be subject to judicial oversight through operation of a statute such as the Victorian *Charter of Human Rights and*

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<sup>25</sup> National Human Rights Consultation Report, pp. 157-60

*Responsibilities Act 2006*. But alas even in Victoria, the government has enacted the *Charter of Human Rights and Responsibilities (Public Authorities) Regulations 2009* exempting parole boards from the Charter until at least 2013.

While the nation awaits the formation of a new government, the future of the proposed National Human Rights Framework is in the balance. 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, though they would go ahead with the proposed joint parliamentary committee on human rights. 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.

Last month, 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.

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

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 election campaign. For the moment, much of our report sits on the shelf awaiting the Madison moment. Let's continue the civic conversation about how best to protect the rights of all persons including the most marginalized and how best to enhance the common good and the public interest, including appropriate protection of religious freedom for all. As Church we need to be forever vigilant to protect our individual and collective rights from state intrusion and to promote the more transparent enjoyment of human rights within the Church community.