

The National Human Rights Consultation report in outline

Background

On 10 December 2008, the Australian Government announced the National Human Rights Consultation. A committee, chaired by Father Frank Brennan AO, was established to conduct the consultation and prepare a report.² The report was delivered to the government on 30 September 2009, and released to the public on 8 October 2009³ accompanied by a response from the government.⁴

The terms of reference stated three broad questions for the committee to address in its report:⁵

- 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?

Although the terms of reference were reasonably broad, the options available for consideration by the committee were limited:⁶

The options identified should preserve the sovereignty of the Parliament and not include a constitutionally entrenched bill of rights.

Criticisms of this limitation focussed on the second part, that the committee not consider a constitutionally entrenched bill of rights.⁷

The report does justice to the general breadth of the terms of reference. It also does justice to the enormous amount of community participation in the consultation. Over 35 000 written submissions were received by the committee,⁸ in addition to public hearings conducted in Canberra and community roundtables conducted around the country. The committee also commissioned social research by way of focus groups and telephone interviews. Phil Lynch has called the consultation an example of 'best practice'.⁹

The recommendations

The committee has made 31 recommendations in the report.¹⁰ In answer to the most common question about the recommendations, Recommendation 18 states:

The Committee recommends that Australia adopt a federal Human Rights Act.

Recommendations 19-31 provide more detail in relation to matters such as which rights should be included, the nature of the judicial powers which should be contained in any Act and its applicability.

However, the content and structure of the report suggest that the recommendations about the Human Rights Act were not



Commonwealth Attorney-General Robert McClelland with Father Frank Brennan.

necessarily seen by the committee as the most important. For example, Recommendation 1:

The Committee recommends that education be the highest priority for improving and promoting human rights in Australia.

It is accompanied by two recommendations which are more specific regarding a program of education about rights and responsibilities in Australia.

These recommendations require only a limited amount of legal change (although the cultural change may be significant), whereas the recommendations regarding the Human Rights Act require a substantial amount of legal change. It is therefore unsurprising that there is an intermediate set of recommendations relating to human rights in existing policy and legislation (in particular, Recommendation 4 recommends that 'an audit of all federal legislation, policies and practices' be conducted) and in practice (which are essentially a more specific set of recommendations relating to policy and legislation).

There are also two recommendations relating specifically to Indigenous Australians. Recommendation 15 relates to legislation concerning Indigenous Australians, and recommends that the government provide a 'statement of impact on Aboriginal and Torres Strait Islander peoples' to the Parliament of Australia when it introduces legislation specifically relating to Aboriginal and Torres Strait Islander peoples.

Recommendation 16 recommends that the government form a partnership with Indigenous Australians to:

develop and implement a framework for self-determination, outlining consultation protocols, roles and responsibilities (so that the communities have meaningful control over their affairs) and strategies for increasing Indigenous Australians' participation in the institutions of democratic government.

Themes

The recommendations made by the committee should be understood in the context of the report as a whole. One important part of that context is the set of themes outlined in Part 2.1 of the report (Chapter 2 summarises the community's views¹¹). Those themes recur throughout the report.

One powerful theme is the focus of many consultation participants on 'survival' rights, such as rights involving freedom from violence, health, food, clothing and water. It was the fact that there are people who 'fall through the cracks' with respect to these rights which appeared to move many who participated in the consultation.¹²

The strength of this theme is reflected in the parts of the report which back up the recommendations generally,¹³ and also specifically in three recommendations: Recommendations 15 and 16, which relate to Indigenous Australians, and Recommendation 22, which recommends specific socio-economic rights be included as non-justiciable rights in any Human Rights Act.

The concern for people who are significantly disadvantaged can be contrasted with the opinion expressed by some that there was no need for further or better protection of human rights in Australia. The committee acknowledged that view, stating:¹⁴

One can assume that this attitude is a natural consequence of the fact that Australia is a country where most people live with a sense that their freedom, equality and dignity are not threatened. ... The majority of people living here feel the system is not broken, and they do not foresee *their* human rights ever being curtailed.

[emphasis added]

The committee went on to comment:¹⁵

Throughout the Consultation, however, the Committee heard from thousands of Australians who are troubled by human rights problems—whether affecting themselves or others. There were reports of deprivation of liberty through police and immigration detention and of routine problems such as lack of access to health care, disability support services, housing and education. All such problems, dramatic or otherwise, can have crippling effects on the people who experience them.

The recommendations relating to education state that people should be educated about rights and responsibilities. This could encompass education which is primarily descriptive. However, the substance of the report suggests that such education could also encompass education about the experiences of Australians who do suffer from breaches of their human rights. This is consistent with one rationale for education: that it would create a human rights culture.¹⁶

The committee described this discrepancy between the opinion of many that their human rights were sufficiently protected and the opinion of many others that the rights of disadvantaged

groups were not sufficiently protected by referring to Australia's protections of human rights as 'a patchwork quilt', commenting in Part 15.2 that:¹⁷

The patchwork quilt of protections needs some mending.

Another theme was the acknowledgement that there is significant controversy surrounding the implementation of human rights protection in Australia. One area of such controversy relates to 'hot button' topics such as same-sex marriage, euthanasia, abortion;¹⁸ another area of controversy relates to the appropriateness of a Human Rights Act in Australia.

The committee made it clear that specific controversial rights are the province of the legislatures.¹⁹ However, the committee concluded its chapter on themes with the following comment:²⁰

A Human Rights Act might help both parliaments and courts in resolving conflicting claims; it might also help communities make decisions on contentious social and moral questions. There is always a risk that groups unhappy with legislative or policy outcomes will claim that a Human Rights Act is applied selectively or ideologically.

Instruments such as a Human Rights Act do not usually provide for rights as specific as those relating to same-sex marriage, euthanasia and abortion. Rather, such issues are covered, if at all, by more generally expressed rights. This is entirely consistent with the committee's comments extracted above.

The attention paid by the committee to the controversy as to the appropriateness of a Human Rights Act in Australia is illustrated by the fact that two chapters are devoted to that topic: Chapter 12²¹ outlines the arguments in favour, and Chapter 13²² outlines the arguments against.

Arguments in favour include '[a] considerable degree of community support',²³ the 'patchwork' nature of current protections, increased protection for marginalised and disadvantaged groups, greater government accountability and service delivery and the contribution of a Human Rights Act to a culture of human rights protection.²⁴

However, the committee also noted 'considerable opposition' to the concept of a Human Rights Act in Australia,²⁵ and arguments against include adequacy of current protections, arguments relating to the role of the judiciary under a Human Rights Act, potentially negative outcomes (for example, where rights conflict), the possibility of an increase in litigation with its associated costs, and other costs associated with a Human Rights Act.²⁶

Final comments

The National Human Rights Consultation report has struck a sensible balance in its recommendations. The most significant controversies and concerns surrounding the protection of human

rights in Australia have been considered, and the primacy given to the recommendations relating to education is a logical and politic way to address those controversies. The practical recommendations and the recommendations relating specifically to Indigenous Australians also seem unlikely to cause much controversy, although it may be possible for the government to cherry-pick at the implementation stage.

However, the recommendations concerning the Human Rights Act constitute a significant portion of the recommendations as a whole and are likely to be controversial for some time to come. In his response, the federal attorney-general remained significantly silent on the topic, making only a non-committal comment that there are 'strong views on the merits of a Human Rights Act' and that 'there are many other ways to protect and promote human rights'.²⁷

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Endnotes

1. LLB (UNSW) BCL MPhil (Oxon).
2. Information about the consultation, including the committee members, terms of reference and the report, can be found at <http://www.humanrightsconsultation.gov.au/>
3. Available at www.humanrightsconsultation.gov.au/www/nhrcc/nhrcc.nsf/Page/Report_NationalHumanRightsConsultationReport-TableofContents
4. The government's response is available at www.ag.gov.au/www/agd/agd.nsf/Page/Publications_NationalHumanRightsConsultationReport
5. National Human Rights Consultation, Terms of Reference, available at www.humanrightsconsultation.gov.au/www/nhrcc/nhrcc.nsf/Page/TermsOfReference_TermsOfReference
6. National Human Rights Consultation, Terms of Reference, available at www.humanrightsconsultation.gov.au/www/nhrcc/nhrcc.nsf/Page/TermsOfReference_TermsOfReference
7. See, for example, address by Associate Professor A Durbach at the Protecting Human Rights Conference, Sydney 2 October 2009, entitled: Perspectives on the National Human Rights Consultation – an academic perspective. Paper to be published at www.gtcentre.unsw.edu.au
8. There has been criticism in the media regarding the large number of submissions which were sent as part of campaigns, often involving standardised text.
9. Address by Phil Lynch, Director, Human Rights Law Resource Centre, at the Protecting Human Rights Conference, Sydney 2 October 2009, entitled: Perspectives on the National Human Rights Consultation – consulting with the community. Paper to be published at www.gtcentre.unsw.edu.au
10. Available at www.humanrightsconsultation.gov.au/www/nhrcc/nhrcc.nsf/Page/Report_NationalHumanRightsConsultationReport-Recommendations
11. Chapter 2 is available at www.humanrightsconsultation.gov.au/www/nhrcc/nhrcc.nsf/Page/Report_NationalHumanRightsConsultationReport-Chapter2
12. See Part 2.2, Chapter 2, available at www.humanrightsconsultation.gov.au/www/nhrcc/nhrcc.nsf/Page/Report_NationalHumanRightsConsultationReport-Chapter2
13. See also Parts 4.1, 5.3, 5.10.
14. Chapter 2, available at www.humanrightsconsultation.gov.au/www/nhrcc/nhrcc.nsf/Page/Report_NationalHumanRightsConsultationReport-Chapter2
15. Chapter 2, available at www.humanrightsconsultation.gov.au/www/nhrcc/nhrcc.nsf/Page/Report_NationalHumanRightsConsultationReport-Chapter2
16. See also the committee's findings in Part 6.2, Chapter 6, available at www.humanrightsconsultation.gov.au/www/nhrcc/nhrcc.nsf/Page/Report_NationalHumanRightsConsultation-Chapter6
17. Chapter 15, available at www.humanrightsconsultation.gov.au/www/nhrcc/nhrcc.nsf/Page/Report_NationalHumanRightsConsultationReport-Chapter15
18. Part 2.4, Chapter 2, available at www.humanrightsconsultation.gov.au/www/nhrcc/nhrcc.nsf/Page/Report_NationalHumanRightsConsultationReport-Chapter2
19. Part 2.4, Chapter 2, available at www.humanrightsconsultation.gov.au/www/nhrcc/nhrcc.nsf/Page/Report_NationalHumanRightsConsultationReport-Chapter2 - cf the non-inclusion of relevant rights in Recommendations 22 and 24.
20. Chapter 2, available at www.humanrightsconsultation.gov.au/www/nhrcc/nhrcc.nsf/Page/Report_NationalHumanRightsConsultationReport-Chapter2
21. Available at www.humanrightsconsultation.gov.au/www/nhrcc/nhrcc.nsf/Page/Report_NationalHumanRightsConsultationReport-Chapter12
22. Available at www.humanrightsconsultation.gov.au/www/nhrcc/nhrcc.nsf/Page/Report_NationalHumanRightsConsultationReport-Chapter13
23. Part 12.1, Chapter 12, available at www.humanrightsconsultation.gov.au/www/nhrcc/nhrcc.nsf/Page/Report_NationalHumanRightsConsultationReport-Chapter12
24. Part 12.2, Chapter 12, available at www.humanrightsconsultation.gov.au/www/nhrcc/nhrcc.nsf/Page/Report_NationalHumanRightsConsultationReport-Chapter12
25. Part 13.1, Chapter 13, available at www.humanrightsconsultation.gov.au/www/nhrcc/nhrcc.nsf/Page/Report_NationalHumanRightsConsultationReport-Chapter13
26. Part 13.2, Chapter 13, available at www.humanrightsconsultation.gov.au/www/nhrcc/nhrcc.nsf/Page/Report_NationalHumanRightsConsultationReport-Chapter13
27. Available at www.ag.gov.au/www/agd/agd.nsf/Page/Publications_NationalHumanRightsConsultationReport (page 4 in .pdf version)