

# THE PLACE OF INDIGENOUS RIGHTS IN THE BILL OF RIGHTS DEBATE: A RAWLSIAN JUSTIFICATION

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## I Introduction

On 10 December 2008 – International Human Rights Day – the Commonwealth Attorney-General announced the establishment of the Federal Government's National Human Rights Consultation ('NHRC').<sup>1</sup> According to the Consultation's terms of reference, its purpose was to consult widely with the public and to ascertain its views on the following questions:

- 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?<sup>2</sup>

The NHRC delivered its report on 30 September 2009.<sup>3</sup> The purpose of this article is to offer general comment on the protection of human rights in Australia, using John Rawls's theory of justice as the theoretical basis for the protection of rights, with specific focus on the rights of Indigenous people. Therefore, while the article refers to, and critiques, many of the findings in the NHRC report, its purpose is not to offer a general response to the report, but rather to address the particular question of its approach to the rights of Indigenous people.

Part II of the article examines the jurisprudential basis of the obligation to protect human rights. This Part discusses how Rawls's theory of justice offers an objective argument justifying the protection of human rights in general. I then move on to examine how his theory can be used to justify the rights of Indigenous peoples in particular. Part III examines the extent to which human rights are protected

in Australia, identifying the inadequacies of the current regime and examining possible models for human rights protection. In this section I also address objections that have been raised to enhanced protection of human rights and how the recommendations in the report by the NHRC address these issues. Part IV focuses specifically on Indigenous rights, identifying the vulnerability of Indigenous rights in Australia, examining the strategies that have been proposed for the protection of Indigenous rights and why inclusion in a bill of rights offers the best protection for such rights. This is followed by an examination of five key areas in which a bill of rights would need to make specific provision for the rights of Indigenous people – property rights, the rights of children, the right to culture, criminal procedural rights and the right to self-determination. In this Part, I also comment on the approach taken to Indigenous rights by the NHRC. The article ends with a conclusion in Part V.

## II Asking the Jurisprudential Question

A striking feature of the public debate on whether human rights should be protected in Australia is the relative absence of any consideration of the issue from a jurisprudential position. Proponents of both statutory and constitutional<sup>4</sup> protection of human rights have based their respective cases primarily on pragmatic arguments, such as the need to restrain the 'elective dictatorships' which it is (correctly) argued that governments have become in the absence of effective parliamentary control, or on the need to address specific human rights abuses, particularly those that have occurred in relation to migration law.<sup>5</sup> Valid as these arguments are, they fail to address the fundamental philosophical question that needs to be resolved, which is, 'Why are people entitled to the legal protection of human rights?' Similarly, opponents of increased protection for human rights confine their

arguments to pragmatics, such as the question of whether increased protection of human rights would alter the balance between the legislature and the judiciary. Yet surely valid answers on the question of whether human rights are adequately protected can be reached only if participants in the debate understand the rationale for human rights protection in the first place. Indeed, once that is achieved, pragmatic questions, such as what constitutional structures are required to give effect to that rationale, are far more easily answered.

### A The Jurisprudential Basis of Human Rights

Contemporary human rights philosophy is based on the rejection of positivism in the wake of atrocities committed by totalitarian regimes during World War II. The refusal of the Nuremberg and other war crimes tribunals to accept obedience to the existing legal order as a defence to these crimes under international law<sup>6</sup> and, even more significantly, the rejection by post-war German courts of the same defence in relation to obedience to domestic law,<sup>7</sup> signalled the acceptance of the view that Kelsenian notions of effectiveness did not provide a sufficient basis for the validity of law, and that to be valid, law had to be consistent with some (necessarily supra-legal) value system.

The problem of how to determine the content of such a supra-legal value system was answered through the adoption by the international community of documents such as the 1948 *Universal Declaration of Human Rights*,<sup>8</sup> the 1966 *International Covenant on Civil and Political Rights* ('ICCPR')<sup>9</sup> and the 1966 *International Covenant on Economic, Social and Cultural Rights* ('ICESCR').<sup>10</sup> These all form what might be termed an international *ius commune* defining the fundamental rights to which the individual is entitled as an incident of their human dignity. The key principle underlying rights as a product of human dignity is that rights are an innate entitlement of every human being – their existence is not dependent upon the democratic will, nor can the democratic will deprive an individual of his or her rights. Indeed, one of the lessons learned from the ascent of the Nazis to power in Germany was that majority opinion within a community cannot be the touchstone of moral values, given that German voters had overwhelmingly approved measures taken by Hitler, including the suppression of political dissent, in the referendum of August 1934. Despite the evidence of international consensus contained in the human rights treaties, some argue that the international human rights

instruments should be seen simply as embodying a Western, individualist concept of human dignity, rather than as being derived from some universal truth.<sup>11</sup> What is therefore needed is a culturally neutral technique for ascertaining and justifying human rights.

### B Rawls's Theory of Justice as a Basis for Human Rights

The argument advanced in this paper is that Rawls's theory of justice, although not originally conceived of as a human rights theory, offers a solution to the problem of universality in so far as it provides a technique for determining fundamental human needs irrespective of cultural factors. I also argue that the theory can provide a justification for the specific rights claims of Indigenous people.

Rawls's theory of justice is both simple and elegant. He identified the key problem that participants in debates on the existence and content of justice inevitably take positions determined by their own prejudices and/or self-interest, which makes agreement on a universal concept of justice impossible. His solution was to postulate a hypothetical set of circumstances in which a set of basic norms (to which positive law would be subject) would be agreed upon by people in what he called the 'original position'.<sup>12</sup> This involved a hypothetical group of people being called upon to develop a set of fundamental rules behind a 'veil of ignorance' – that is, unaware of both the identity they would have in society and the particular circumstances of the society whose rules they were creating.<sup>13</sup> This would enable them to devise rules that they would be satisfied with irrespective of what gender, race, religion, sexual orientation, socio-economic status, et cetera, they might have in society. In other words, the rules would be devised free from personal and cultural bias. Rawls's conclusion was that this rational process would lead to the adoption of two key principles: (i) that each person should have an equal right to the most extensive scheme of equal basic liberties compatible with a similar scheme of liberties for others; and (ii) that social and economic inequalities should be arranged in such a way as to be of the greatest benefit to the least-advantaged members of society.<sup>14</sup>

Although, as stated above, Rawls's theory was not specifically directed towards providing a justification for human rights, it is clear that implementation of the first principle (requiring 'the most extensive scheme of equal basic liberties') cannot be realised without the recognition of civil and political rights,

while the second (requiring redress of social and economic inequalities so as to benefit the most disadvantaged) requires the recognition of social and economic rights. Thus, in later writings, Rawls asserted that respect for human rights ought to act as a limit on the internal autonomy of a regime and that human rights set 'a necessary, though not sufficient, standard for the decency of domestic political and social institutions'.<sup>15</sup> Similarly he stated that:

Throughout the history of democratic thought the focus has been on achieving certain specific liberties and constitutional guarantees, as found, for example, in various bills of rights and declarations of the rights of man. The account [in *A Theory of Justice*] of the basic liberties follows this tradition.<sup>16</sup>

He also asserted that if governments do not respect human rights they can even be subject to external intervention by the international community.<sup>17</sup>

In expanding on what he meant by 'human rights', Rawls stated that his concept of justice

secures for all persons at least certain minimum rights to means of subsistence and security (the right to life), to liberty (freedom from slavery, serfdom and forced occupations) and (personal) property, as well as to formal equality as expressed by the rules of natural justice ...<sup>18</sup>

Although this statement of rights is brief, it captures the core of the ICCPR, and, in so far as it refers to the right to subsistence, reflects the fundamental value underlying the ICESCR. More importantly, however, it is a not-unreasonable extrapolation of the Rawlsian theory of justice to say that people in the original position would rationally seek to ensure that the full range of rights necessary for the maintenance of human dignity would be protected, and that Rawls's theory can therefore certainly support a claim to the range of rights familiar to the major international human rights documents – even if Rawls himself did not address the rights contained in those texts. Thus, as observed by Martin, individuals in a Rawlsian society would have a legitimate expectation that personal and political rights would form part of the basic structure of that society.<sup>19</sup> Similarly, Kukathas and Pettit concluded that in their practical implementation Rawls's principles require the limitation of government power through devices such as the separation of powers, the rule of law and a bill of rights enforced through judicial review.<sup>20</sup>

The key reason why Rawls's theory offers an advantage over other rights theories is that, in contrast to theories which are founded upon supra-legal *values* – which, as stated above, are vulnerable to charges of cultural bias – his theory, being based on a non-culturally specific rational *technique* in which the framers of norms have no identity other than 'human', is able to provide a justification for rights that is indeed universal in character. Thus Rawls stated that human rights

are a special class of rights of universal application and hardly controversial in their general intention. They are part of the reasonable law of peoples and specify limits on the domestic institutions required of all peoples by that law. In this sense they specify the outer boundary of admissible domestic law of societies in good standing in a just society of peoples.<sup>21</sup>

## C Rawlsian Theory and Indigenous Rights

The analysis above has focused on the question of whether Rawls's theory can be used as the foundation for human rights in general. I have argued that the framing of norms by people in the original position would lead to an outcome where, not knowing what their status will be in society, those people would choose a set of norms in which fundamental civil liberties and socio-economic rights are protected. To this extent, Rawls's theory can be used as a justification for the range of individual rights claimed both by Indigenous and non-Indigenous people.

However, whereas the focus of civil liberties and socio-economic rights is the protection of the *individual*, what of claims to *collective* rights – such as the key right to autonomy – which are of particular importance to Indigenous peoples? Does Rawls's theory offer a justification for that type of claim? Would Indigenous autonomy be recognised as an incident of justice if one applies Rawls's hypothesis of the original position? Unlike individual rights, which are accommodated without difficulty in a system which contains just one political community, the claim to autonomy depends upon taking the further step of accepting that there is a need to recognise *separate communities* as bearers of rights. Thus the acknowledgement of communal autonomy rights – in this case, Indigenous rights – depends upon finding that people in the original position would rationally come to the conclusion that their society will have Indigenous communities, that such communities have

claims as rights-bearers and that, if they were a member of such a community, they would want to enjoy autonomy.

The initial problem that has to be addressed arises from the fact that people in the original position are aware neither of the nature of the society they will inhabit nor their position in it. That being the case, would they consider it necessary to take Indigenous rights into account when framing their fundamental rules? On the one hand, people in the original position might feel that, if it turned out that they were members of a minority community – particularly a minority community with a history of dispossession and attempts at cultural extinguishment – they would want the security of some degree of political autonomy. On the other hand, there may be a range of factors, not the least of which are cost and administrative inconvenience, that may lead those in the original position to say, '[a]s long as society protects our civil liberties and socio-economic rights, we do not need communal self-determination'. The problem here is that the rational decision those in the original position would make on the issue of communal autonomy would be affected by circumstantial factors in a way that decisions on individual rights would not be. If, for example, people in the original position knew that the society they were going to live in would *not* have distinct ethnic minorities, they would probably not concern themselves with the issue at all. If, alternatively, the society was going to consist of a *multitude* of identifiable ethnic communities – say 50 of them – people in the original position might rationally conclude that the administrative burden outweighed the advantages of granting autonomy. If, however, they knew that the society was going to contain one or two well-defined ethnic minorities, they would probably include autonomy as a right. However, as noted above, it is precisely this sort of information that people in the original position do not have.

There are two solutions to this problem, one relating to risk-analysis by people in the original position, the other on Rawls's own development of his theory.

First, even in the absence of knowledge about the structure of society, people in the original position might hedge their bets on the issue of communal autonomy and agree that among the norms accepted for their society would be one providing for a constitutional mechanism which will not apply automatically but will be able to be actuated by minority communities, such as Indigenous people, (i) if, when the veil of ignorance is removed, it turns out that such

communities exist, (ii) if the communities felt the need for communal autonomy, and (iii) if it is practical to give effect to that wish – practicality here meaning if a community meets certain criteria relating to population numbers, common language, identity and geographic location. Where there are identifiable communities in identifiable locations, thus making community autonomy practically achievable, the mechanism will provide for self-government in relation to commonly identified community affairs such as education, health, welfare and policing. If, however, the society is one in which communal groups either do not feel the need to actuate the constitutional mechanism, or community autonomy is not practically achievable, the right to autonomy will not be available. In other words, even when applying Rawls's original position to those in the original position, it is at least arguable that they will put in place a mechanism allowing for communal autonomy in the circumstances outlined.

The second solution to the problem of the veil of ignorance is provided by Rawls's own development of his idea of the original position. As is stated by Patton:

Rawls argues that the device of the original position can be re-applied in four successive stages: decision on basic principles of justice, constitutional convention, legislation under the constitution and, finally, judicial review.<sup>22</sup>

In other words, Rawls envisaged that, after agreeing on their fundamental principles, people in the original position would move on to the drafting of their constitution, at which point they would be given more information about the specifics of their society, including its historical context.<sup>23</sup> At that juncture, although still ignorant of their social position individuals would know

the relevant general facts about their society, that is, its natural circumstances and resources, its level of political advance and political culture and so on. They are no longer limited to the information implicit in the circumstances of justice. Given their theoretical knowledge and the appropriate general facts about their society, they are to choose the most effective just constitution.<sup>24</sup>

At this point it is reasonable to assume that, in the context of Australia, the drafters of the *Constitution* would be aware of the historical and contemporary circumstances of the country, including the fact that some of its inhabitants are Indigenous people with a history of disadvantage

and dispossession. The drafters of the *Constitution*, not being aware of whether they would be among that group, would make sure that the rights of such communities were protected. The paradox inherent in Rawls's approach is that by appealing to the rights-drafters' self-interest it ensures that their rule-making would in fact be strongly affected by empathy and altruism for the concerns of the widest possible range of societal groups.

Such a conclusion is also consistent with what Rawls wrote in *The Law of Peoples*, in which he transposed his theory of justice from the domestic to the international sphere, and applied his theory of justice to 'peoples' – by which he meant groups with a 'common language, history, and political culture, with a shared historical consciousness'<sup>25</sup> (it being clear that 'peoples' were distinct from the sovereign states that they happened to live in).<sup>26</sup> Rawls said that, if one applied the hypothesis of the original position to a group of peoples (rather than individuals) behind a veil of ignorance, which prevented them from knowing the relative strength that each people would have within the geographic state they would inhabit, that group of peoples would rationally devise a system in which each people was accorded equal respect and entitlements as a people.<sup>27</sup> Furthermore, and most important for the purposes of this debate, among the rights that peoples would rationally seek to protect would be the right to self-determination.<sup>28</sup> This then provides the second reason why Rawls's theory of justice can be used in support of an argument for communal self-determination.

## D Critiques of Communal Rights

Supporters of Rawls's theory are divided on the question of whether his particular brand of liberalism supports a claim to communal rights. Kymlicka argues that a distinction should be made between 'national minorities' (Indigenous First Nations who were absorbed into a state unwillingly) and other 'ethnic groups' who migrated to the state voluntarily, but who might also wish to maintain their cultural identity.<sup>29</sup> He argues that the different historical experiences of these groups (in particular First Nations' status as dispossessed and conquered peoples)<sup>30</sup> means that Indigenous peoples have a legitimate entitlement to self-government, by which he means the devolution of power to a 'political unit substantially controlled by the members of the national minority, and substantially corresponding to their homeland or territory'.<sup>31</sup> Thus he observes:

we should aim at ensuring that all national groups have the opportunity to maintain themselves as a distinct culture, if they so choose ... [and that] group differentiated self-government rights compensate for unequal circumstances which put the members of the minority culture at a systemic disadvantage in the cultural market-place, regardless of their personal choices in life.<sup>32</sup>

Kymlicka further argues that this position is supported by the liberal value that individuals should be free to identify with their own particular societal culture. Kymlicka explicitly links these communal rights to Rawls's concept of justice, stating that group-differentiated rights and territorial autonomy are justified 'within a liberal egalitarian theory, such as Rawls's and Dworkin's, which emphasises the importance of rectifying unchosen inequalities'.<sup>33</sup> Furthermore, he points out that, since Rawlsian liberal theory is based on the assumption that individuals voluntarily associate to form a state, coerced membership of the state (which was the historical experience of many Indigenous peoples) is obviously incompatible with that underlying assumption.<sup>34</sup> Self-government, which seeks to address the problem by facilitating a degree of Indigenous *dissociation*, is thus consistent with Rawlsian notions of justice.

By contrast Kukathas, also writing from a position sympathetic to Rawlsian liberalism, rejects the claim that groups, as distinct from individuals, are entitled to claim rights within the liberal model.<sup>35</sup> According to Kukathas, rights ought to be determined without reference to the composition of a particular state (which he sees as an artificial and transient entity), and should rather be determined solely by reference to individuals without concern, for example, for the fact that they are members of a group which finds itself in the minority within a particular state. Thus for Kukathas rights should not serve the function of mediating power relationships between groups.<sup>36</sup>

However, the problem with Kukathas's argument is that it encounters the inevitable consequence of what Kymlicka has referred to as 'benign neglect'<sup>37</sup> – that is, the consigning of minority cultures to the mercy of forces which inevitably lead to majority dominance.<sup>38</sup> This outcome is clearly at odds with liberal notions of justice, and in particular with Rawls's concept of justice and fairness, upon which his principle of 'greatest benefit to the most disadvantaged' is based. In short, and contrary to Kukathas, state institutions cannot avoid addressing power relationships between groups if

society is to be based on fairness, as is required by Rawls's theory. The conclusion therefore is that the protection of the group rights of Indigenous people is indeed consistent with Rawls's theory.

### III The Inadequacy of Human Rights Protection in Australia

Human rights protection in Australia is haphazard and limited in scope. Although some argue that the common law protects human rights, this is true only in relation to some rights.<sup>39</sup> Moreover, the fundamental weakness of so-called common law rights is that they can be overridden by statute. Some protection of human rights is afforded by Commonwealth, State and Territory anti-discrimination laws. However, these laws essentially protect only one right – that to equality – and are subject to legislative override by subsequent inconsistent legislation. Even s 10(1) of the *Racial Discrimination Act 1975* (Cth), which states that all legislation, including subsequent legislation, is invalid to the extent that it is inconsistent with the Act, can itself be overridden, as ss 1, 23, 40 and 51 of the *Constitution* prevent the Commonwealth Parliament from placing restraints, either procedural or substantive, on its own legislative power. Override of s 10(1) of the *Racial Discrimination Act 1975* (Cth) occurred most recently in the context of the Northern Territory 'intervention'.<sup>40</sup>

Apart from anti-discrimination laws, Victoria and the ACT have enacted broader human rights legislation – the *Human Rights Act 2004* (ACT) and the *Charter of Human Rights and Responsibilities Act 2006* (Vic). These Acts are considered in more detail below. Here it suffices to say that they both expressly state that legislation that cannot be interpreted consistently with them must nonetheless be applied by the courts.<sup>41</sup>

Finally, the *Commonwealth Constitution* protects a handful of express and implied rights. The express rights to a jury trial for indictable Commonwealth offences (s 80), to freedom of inter-State trade, commerce and intercourse (s 92), to freedom of religion under Commonwealth law (s 116), to non-discrimination on grounds of residence in a State (s 117) and to just terms compensation when property is acquired (s 51(xxxi)), all reflect particular social and political concerns at the time of federation. They were obviously not an attempt to draft a full bill of rights. Apart from these express rights, the High Court has recognised an implied

freedom of political communication,<sup>42</sup> an implied right to vote<sup>43</sup> and, arguably, a right not to be deprived of personal liberty without due process.<sup>44</sup>

In light of the above I would argue that one must inevitably conclude that human rights are not adequately protected in Australia, and that the real issue is what should be done to remedy this deficiency. This was indeed the finding of the NHRC, which, after analysing current mechanisms for the protection of human rights, concluded:

there is a patchwork of human rights protection in Australia. The patchwork is fragmented and incomplete, and its inadequacies are felt most keenly by the marginalised and the vulnerable. ... Australia has agreed to 'respect, protect and fulfil' a range of human rights at the international level, but the current legal and institutional framework falls short of this commitment.<sup>45</sup>

### A Possible Models of Human Rights Protection and the NHRC's Approach

Perhaps the most important issue that the NHRC was required to address is how protection of human rights could be improved in Australia. From a purely legal perspective (that is, leaving aside worthy initiatives such as increased human rights education and the fostering of a human rights culture), the key factors that determine the effectiveness of a document protecting human rights are its legislative status (that is, whether it would be constitutionally entrenched and unable to be amended except by special procedure, or whether it would take the form of ordinary legislation) and its justiciability (that is, whether the courts would have the power to invalidate legislation which is inconsistent with it, sometimes referred to as the conferral of a testing right on the courts). Although the terms of reference of the NHRC specifically stated that the recommendations it produced 'should preserve the sovereignty of the Parliament and not include a constitutionally entrenched bill of rights',<sup>46</sup> it is nevertheless useful, before discussing the options further, to arrange bills of rights into four categories along a spectrum from strongest to weakest:

- a) Strongest of all are those documents which are both entrenched (because they are either in a constitution which requires a special procedure for amendment or are in a statute which is entrenched) and also justiciable – that is, they permit the courts to invalidate legislation

which is inconsistent with the bill of rights. Examples of these are the United States *Bill of Rights*<sup>47</sup> and the South African *Bill of Rights*.<sup>48</sup>

- b) Next are those documents which are entrenched and justiciable but which can be expressly overridden. The Canadian *Charter of Rights and Freedoms* is of this type. It is part of the *Canadian Constitution*, which is entrenched.<sup>49</sup> It is justiciable, in that the courts may invalidate legislation that is inconsistent with its terms.<sup>50</sup> However, the *Charter* permits the federal or provincial legislatures to expressly exempt legislation from its operation<sup>51</sup> (an option which has been used only once).<sup>52</sup>
- c) Next are documents which are not entrenched but which require express legislation to the contrary in order to be overridden, and which are justiciable. An example of these is the *Canadian Bill of Rights 1960*, precursor to the *Charter of Rights and Freedoms*.<sup>53</sup> The *Canadian Bill of Rights* is not entrenched, however s 2 states in part:

Every law of Canada shall, unless it is expressly declared by an Act of the Parliament of Canada that it shall operate notwithstanding the *Canadian Bill of Rights*, be so construed and applied as not to abrogate, abridge or infringe or to authorize the abrogation, abridgment or infringement of any of the rights or freedoms herein recognized and declared.

Section 2 was interpreted in *R v Drybones*<sup>54</sup> as allowing the courts to declare legislation inoperative if it is inconsistent with the *Bill* (that is, as making the *Bill* justiciable), subject to the ability of Parliament to declare that the *Bill* is not applicable to the legislation concerned.

- d) The fourth and final type of human rights document is that which is neither entrenched nor justiciable. There are many examples of this, including the *New Zealand Bill of Rights Act 1990* (NZ), the *Human Rights Act 1989* (UK), the *Human Rights Act 2004* (ACT) and the *Charter of Human Rights and Responsibilities Act 2006* (Vic). In essence, these documents are an interpretive aid, requiring the courts to interpret legislation consistently with the document where possible,<sup>55</sup> expressly providing that where rights-consistent interpretation is not possible the legislation must be

applied,<sup>56</sup> and allowing the courts to make declarations of incompatibility where legislation is rights-inconsistent.<sup>57</sup> Damages for breaches of rights by public authorities are awardable under the *Human Rights Act 1989* (UK),<sup>58</sup> and the ability of courts to award damages has been implied by the courts in New Zealand.<sup>59</sup> The ACT and Victorian Acts specifically exclude the right to recover damages.<sup>60</sup>

As stated above, the terms of reference of the NHRC expressly excluded a constitutionally entrenched bill of rights. Strictly speaking, the Commonwealth Parliament is not sovereign, at least in the way that the State parliaments are, because its legislative capacity is restricted to those legislative topics allocated to it by the *Constitution* and is subject to the express and implied rights protected by the *Constitution*. It is, however, true that subjecting Parliament to any new rights and freedoms would require constitutional amendment, as ss 1, 23 and 40 of the *Constitution* prevent the Commonwealth Parliament from placing restraints, either procedural or substantive, on its own legislative power.<sup>61</sup> Thus, what the NHRC's terms of reference did was restrict the process from recommending any method of rights protection which would require constitutional amendment.

This did nevertheless leave open a range of options, the best of which, from a human rights perspective, would have been one modelled on the *Canadian Bill of Rights*. As discussed above, the *Canadian Bill of Rights* is not entrenched and is ultimately subject to legislative override, but, where such override is not availed of, the courts may declare inoperative legislation which is inconsistent with its terms.

It is open to debate whether a provision such as that contained in s 2 of the *Canadian Bill of Rights* would be effective in restraining the Commonwealth Parliament from legislating contrary to its terms unless the subsequent inconsistent legislation expressly stated that the provisions of the earlier Act did not apply. Provisions of this type appeared in clauses 5(2) and 5(3) of the abortive Human Rights Bill 1973 (Cth), which would have required Parliament to expressly state that legislation inconsistent with the Human Rights Act was exempt from its operation, failing which, the courts would have been able to declare that legislation inoperative.

Currently there is no provision of this type in Australian law, however it can be argued that express override of inconsistent legislation is, at least by implication, required by s 10(1) of the

*Racial Discrimination Act 1975* (Cth). In its essence, that section states that if any law of the Commonwealth, the States or the Territories deprives people of rights on grounds of race, such a law will, by virtue of s 10(1), be ineffective to the extent that it deprives people of those rights. In other words, s 10(1) requires that all other legislation be read subject to its terms. While s 10(1) cannot deprive the Commonwealth Parliament of legislative capacity, it is arguable that by enacting s 10(1), the Commonwealth Parliament subjected later legislation to an interpretive rule, and that if Parliament wishes to evade that rule, it must expressly state that it is doing so. In this regard it should be noted that Australian governments have typically operated on the assumption that legislation which is inconsistent with s 10(1) of the *Racial Discrimination Act 1975* (Cth) must contain a provision expressly stating that s 10(1) does not apply – the most recent example being s 132 of the *Northern Territory National Emergency Response Act 2007* (Cth).

Some commentators state that the doctrine of implied repeal would simply override an earlier inconsistent Act, even if that Act required that a later Parliament expressly state that it was overriding the earlier Act.<sup>62</sup> Others argue that such provisions are effective in restraining future Parliaments, on the ground that it lies within the power of Parliament to enact manner and form provisions (subject to the requirements of ss 23 and 40 of the *Constitution*), and that such requirements would be effective in allowing the courts to declare inoperative any inconsistent legislation not expressly exempted from the legislation containing the manner and form requirement, whether enacted before or after it.<sup>63</sup> Although the question has never been decided by the High Court in relation to the *Commonwealth Constitution*, as noted above there is authority from Canada to the effect that subsequent Parliaments must comply with such provisions, and legislation not enacted in conformity with an express override provision will be inoperative.<sup>64</sup>

Although this device ultimately cannot prevent majoritarian override of rights, it has the strength of requiring politicians to risk the opprobrium that would accompany the required admission that the legislation they are enacting denies fundamental human rights.

It was therefore unfortunate that the NHRC, having examined various theoretical bases for human rights (including Rawls's theory),<sup>65</sup> and having noted the implementation requirements imposed by international human rights

treaties,<sup>66</sup> did not choose the strongest option available to it, but instead recommended the adoption of a Human Rights Act based on those in force in the ACT, Victorian, New Zealand and United Kingdom. This follows the so-called 'dialogue model',<sup>67</sup> where the bill of rights is not justiciable, and the courts are limited to issuing a declaration that legislation is incompatible with the bill of rights. In so doing, the NHRC was influenced by the public polling done as part of the consultation process. Among the questions put to respondents was one in which they were asked to express support or disagreement for a number of measures to protect human rights: parliament paying attention to human rights when enacting laws, government paying attention to human rights when developing policies, increased human rights education, a non-binding statement of human rights issued by the government and, finally, an enacted human rights law. Among these options, a human rights law attracted the least support, although support was still significant, with 57 per cent of respondents either supporting or strongly supporting such a measure.<sup>68</sup> Crucially, however, the respondents were not asked to express a preference *as between different types* of human rights law, which means that one simply does not know what public opinion would have been had the various models been explained and respondents asked to choose between them. More fundamentally, having acknowledged international human rights treaties – which base human rights on the inherent dignity of the individual rather than on the democratic will – as a source of Australia's obligation to protect human rights, the NHRC deferred to majority views in determining how rights should be protected. This would be the equivalent of asking the public, before the enactment of the *Racial Discrimination Act 1975* (Cth), whether they thought Australians had a right to racial equality, and making the enactment of the Act contingent on the response. From the perspective of international human rights law, the question is irrelevant, because by virtue of their human dignity people have a right not to be discriminated against on the basis of race, irrespective of what a majority of their fellow citizens may have to say on the matter. Thus, in framing its recommendations, the NHRC unfortunately chose to follow, rather than to lead, public opinion – even though it acknowledged that, in general, public opinion is formed in the context of little understanding of what human rights are.<sup>69</sup>

## B Reasonable Limitations on Rights

A crucial provision that would need to be included in a bill of rights is a limitations clause. No right is absolute: rights

must be balanced against competing social interests served by legislation and by executive policy. Rights also need to be balanced against each other when they conflict. In some jurisdictions, balancing is not expressly mentioned, and the courts have had to develop a balancing test of their own.<sup>70</sup> In other jurisdictions, there is an express test, which has been interpreted by the courts. Thus s 1 of the *Canadian Charter of Rights and Freedoms* states:

The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

This has been interpreted in *R v Oakes*<sup>71</sup> as requiring the application of a balancing test in terms of which, once it has been shown that a right has been infringed, the party arguing in favour of the limitation has to discharge the burden of proving: that the infringement is in pursuit of a significant social objective, that the degree of infringement of the right is proportionate to the limitation, and that the infringement goes no further than is required to achieve the social objective.

Section 36(1) of the South African *Bill of Rights* is more explicit, expressly mandating a balancing test which includes among the criteria that the courts have to take into account, whether there were available to the legislature in achieving its purpose any means that were less restrictive of rights.<sup>72</sup>

It is notable that in Australia the High Court has failed to include this 'least restrictive of rights' criterion in framing the proportionality test that it uses to determine whether limits on implied freedoms are reasonable. All that is required under the test (as most recently formulated in *Coleman v Power*)<sup>73</sup> is to show that the limitation is

reasonably appropriate and adapted to serve a legitimate end in a manner which is compatible with the maintenance of the constitutionally prescribed system of representative and responsible government and the procedure prescribed by s 128 for submitting a proposed amendment of the Constitution to the informed decision of the people.<sup>74</sup>

The result is that restrictions on rights need only be within the bounds of reasonableness rather than be the least invasive possible.

Clearly it is preferable that an express balancing test, and in particular the requirement that the least restrictive means be used in achieving the competing objective, be put into the bill of rights. A test that allows legislation to survive judicial review merely if it is reasonable is obviously less protective of human rights than one which requires that legislation be as least restrictive of human rights as possible. I would therefore argue that the limitations clause included in an Australian bill of rights should contain provisions similar to those found in s 36 of the *South African Constitution*.

## C Addressing Arguments Against Human Rights Protection

It is self-evident that the rights theories described in Part II above require a subordination of positive law to human rights norms. Furthermore, it makes no difference whether positive law is produced by democratic processes: rights do not depend on the will of the majority for their validity – under both international law and Rawls's theory, rights have an objective existence based on reason. It follows then that the will of the majority does not provide a justification for the denial of rights. The most that can be said for democratic government is that it is *less likely* to lead to denials of rights than undemocratic systems, but democratic constitutions are not exempt from the obligation to respect human rights. The relative lack of discussion of human rights theory in Australia has meant that the debate has been conducted in a normative vacuum, with purely technical and pragmatic questions being debated in the absence of consideration of the fundamental principles at stake. Most significantly, those who are opposed to further legal protection for rights base their arguments on the proposition that protection of our rights ultimately rests on democracy and that therefore the democratic will should not be subject to control by a bill of rights. Not only is this to misunderstand the nature of rights, but it also exposes a misunderstanding of democracy: characterising democracy as the supreme value in the legal system logically depends on a more fundamental claim that people have a 'right' to be governed democratically. But what is the source of that right? Obviously, it has to derive from a rights theory superior to democracy itself. In other words, those who claim that democracy is superior to human rights are sawing off the branch upon which their argument hangs. If one does not accept the primacy of rights, then one has no touchstone to which to refer in order to justify why oligarchy, aristocracy, or dictatorship should be rejected as forms of government. In short, democracy

depends on the protection of freedom rather than freedom depending on democracy.

Various other arguments have been raised in opposition to enhanced protection of human rights. Principal among these is the claim that, by protecting the full range of human rights, excessive power would be given to an unelected judiciary over the elected parliament and thus, by extension, over the people.<sup>75</sup> The flaw in this argument is that it rests upon the assumption that democracy, rather than freedom, is the fundamental value that should underpin the *Constitution*. This is inconsistent both with international human rights documents which bind all nations irrespective of political system, and with logic, given that democracy itself depends upon a claim to rights. The argument also falsely portrays the power relationship established by a bill of rights as one which vests power in the judiciary to override the will of the people as represented by the legislature. In reality, what a bill of rights would do is vest in the individual the power to challenge the majority as represented by the legislature, with the courts acting as neutral umpire between the individual and the majority.

Often stated in conjunction with the above argument is that which says that human rights abuses can be remedied through the political process. This is either naïve or cynical. Of what use is it to a victim of legislatively authorised human rights abuses to be told, 'There is an election in three years time – your remedy is to campaign to have the law changed, and, if there is a change in government, and if this issue is a plank in the new government's programme, perhaps the law will be changed'? The very utility of a bill of rights is that it provides the individual with an instant weapon vis-à-vis the government – the ability to go to court to have the infringement of rights remedied, rather than making an entitlement to fundamental rights contingent on the vagaries of party politics.

The next argument is that enhancing human rights protection would require the courts to balance competing social interests, which they are ill equipped to do. This ignores the fact that courts apply such tests in many areas of law – for example, in the law of torts – as a matter of course. In other words, the balancing of social interests has been a core function of the judiciary throughout the history of the common law. Furthermore, such tests have also been applied by Australian courts in the specific context of human rights since *Adelaide Company of Jehovah's Witnesses v Commonwealth*,<sup>76</sup> decided in

1943. In that case, Starke J explicitly stated that, given that the rights protected by the *Constitution* are not absolute, courts must inevitably balance them against countervailing legislation.<sup>77</sup> Such is the case in relation to each of the express and implied freedoms contained in the *Constitution*.

This leads to the final argument against a bill of rights, which is that it would vest the courts with extensive new powers to strike down laws. Manifestly this cannot be correct in view of the fact that Parliament was born subject to the provisions of the *Constitution*, and has thus always been subject to the power of the courts to declare unconstitutional legislation invalid, including legislation which disproportionately limits the express and implied freedoms. At most, what a bill of rights would do is increase the *scope*, but certainly not the *nature*, of the functions discharged by the judicial branch.

#### IV Indigenous Rights

Turning now to Indigenous rights, there has been a growing awareness over the past 40 years or so that Indigenous people are entitled to rights which are specific to their situation, which in most jurisdictions is one of vulnerability to having their rights infringed by a numerically dominant non-Indigenous population. In the international arena, this culminated in the adoption of the United Nations *Declaration on the Rights of Indigenous Peoples*.<sup>78</sup> Although Australia endorsed the Declaration in April 2009, the Government emphasised that this would have no effect on domestic law.<sup>79</sup> By contrast, Indigenous Australian spokespersons and academic commentators have pointed to the need for Australian human rights protection to include protection for the rights of Indigenous people.<sup>80</sup>

The vulnerability of human rights to majoritarian override is of particular relevance to Indigenous people. This fact is made clear by the following exchange in the High Court concerning the 'races power' in s 51(xxvi) of the *Constitution*. The exchange took place between Kirby J and counsel for the Commonwealth when the High Court heard the appeal in *Kartinyeri v Commonwealth*.<sup>81</sup>

KIRBY J: How would you apply that distinction to the case of Nuremberg-type laws which, after all, were race laws or to land area laws such as were enacted in South Africa? Would they be permissible under [the race] power?

MR GRIFFITH: Your Honour, they may well be. The

racism power is an inherently a discriminatory law [sic] ... One might say one stands back and adopts a different approach as to power as from the issue of whether or not it is objectionable per se that a law under the racism power which to be valid must discriminate on the basis of race may validly discriminate in a way which operates adversely rather than generally beneficially with respect to its subject matter.<sup>82</sup>

One can also point to the following part of the transcript from later in the case:

KIRBY J: Can I just get clear in my mind, is the Commonwealth's submission that it is entirely and exclusively for the Parliament to determine the matter upon which special laws are deemed necessary or whatever the words say or is there a point at which there is a justiciable question for the Court? I mean, it seems unthinkable that a law such as the Nazi race laws could be enacted under the race power and that this Court could do nothing about it.

MR GRIFFITH: Your Honour, if there was a reason why the Court could do something about it, a Nazi law, it would, in our submission, be for a reason external to the racism power.<sup>83</sup>

Kirby J was putting to counsel for the Commonwealth the extreme proposition that Parliament is free to legislate as unjustly as it pleases (so long as it stays within the heads of power conferred by the *Constitution*), thereby illustrating the morally unacceptable implication of the argument that nothing in the *Constitution* impeded Parliament from enacting racist laws. In so doing Kirby J may have been hoping to secure from counsel a withdrawal of the argument. Yet no withdrawal was forthcoming, and for good reason, because, as the law stands, counsel for the Commonwealth was arguably correct in arguing as he did. Furthermore, there is nothing anywhere else in the *Constitution* which would invalidate such a law. Although one might find that result abhorrent, the case does at least focus attention on the vulnerability of Indigenous rights.

## A Strategies for Protecting Indigenous Rights

Much debate has taken place among Indigenous people and others on the question of how best to secure recognition of, and protection for, Indigenous rights.<sup>84</sup> One suggestion is that this objective would best be secured by means of a treaty

entered into between the Crown and Australia's Indigenous peoples. That strategy is attractive from a symbolic point of view, in that it would arguably involve recognition of the sovereignty of Indigenous peoples.<sup>85</sup> Yet, there are significant legal difficulties in taking this approach. In *Coe v Commonwealth (No 2)*,<sup>86</sup> *Walker v New South Wales*<sup>87</sup> and *Thorpe v Commonwealth (No 3)*,<sup>88</sup> the High Court affirmed that no Indigenous sovereignty survived colonisation. The implication of this is that, even if the Commonwealth Government were to agree to enter into a treaty with Indigenous peoples, it could be argued that it would have to be a treaty between the Commonwealth and peoples to whom the Commonwealth had itself (re)ceded sovereignty. In other words, recognition of Indigenous sovereignty would be to some extent artificial, in so far as that sovereignty would first have to be re-created under Australian law. The second difficulty with the treaty argument is that it would be unclear which individuals would enjoy rights under a treaty. Assuming that the treaty was entered into with identifiable Indigenous *peoples*, what of those people of Indigenous descent who are not part of an Indigenous community? Would they enjoy rights under the treaty? Finally, and most importantly, a treaty is a political, not a legal, document. Implementation of the treaty, and actualisation of any rights conferred by it, would require legislation. Yet, as discussed above, it is the vulnerability of human rights to legislative override that is the central problem that needs to be addressed.<sup>89</sup>

For this reason, other proponents of Indigenous rights have advocated acceptance of the position of Indigenous people as members of the sovereign Australian state, arguing that working within that framework offers a greater likelihood that Indigenous rights will be protected.<sup>90</sup> Among supporters of this approach are those who have recommended the strategy of having Indigenous rights included in a bill of rights to which Parliament is subject.<sup>91</sup> This is far more attractive from a constitutional law perspective, as the subjection of Parliament to a bill of rights offers a degree of security that a treaty implemented by ordinary legislation cannot.<sup>92</sup>

As stated above, only two jurisdictions in Australia have bills of rights (although neither of these is entrenched or justiciable in the sense of allowing the courts to invalidate inconsistent legislation). They reflect varying degrees of attention to the issue of Indigenous rights: the *Human Rights Act 2004* (ACT) does not enshrine any Indigenous-specific rights,<sup>93</sup> although

s 27 of the Act protects the cultural, linguistic and religious rights of minorities. Victoria's *Charter of Human Rights and Responsibilities 2006* (Vic) does include a specific reference to Aboriginal people in s 19,<sup>94</sup> which provides as follows:

- (1) All persons with a particular cultural, religious, racial or linguistic background must not be denied the right, in community with other persons of that background, to enjoy his or her culture, to declare and practise his or her religion and to use his or her language.
- (2) Aboriginal persons hold distinct cultural rights and must not be denied the right, with other members of their community:
  - (a) to enjoy their identity and culture; and
  - (b) to maintain and use their language; and
  - (c) to maintain their kinship ties; and
  - (d) to maintain their distinctive spiritual, material and economic relationship with the land and waters and other resources with which they have a connection under traditional laws and customs.

Although the recognition in the Victorian statute that there are specific rights claimed by Indigenous people is welcome, it is clear that the *Charter* omits much that ought to be included, such as criminal procedural rights, rights pertaining to the recognition of Indigenous law, and the key right to self-determination.

If a bill of rights is to be used as the vehicle for protecting Indigenous rights, it would clearly be preferable that this be done as part of a national bill of rights applying to all jurisdictions, rather than being dealt with piecemeal by the States and Territories. I would also argue that Rawls's theory provides a valuable pointer as to the tactic which is most conducive to gaining broad public support for the recognition of Indigenous rights. Rather than allowing the debate to be cast as one on which a special minority pleads with the majority for recognition (which is the way in which opponents of rights would wish to characterise it), the argument in favour of Indigenous rights could more profitably be cast as the question, 'How would you feel if you were Indigenous, and felt that your culture was under threat?' Such an argument, which puts the respondent behind Rawls's veil of ignorance, relies on empathy for its persuasive force and therefore, I would argue, maximises the chances of Indigenous rights achieving recognition.

## B Unpacking the Content of 'Indigenous Rights'

Assuming it is accepted that Indigenous rights warrant protection, it is necessary to explore what the contents of 'Indigenous rights' might be in the Australian context.<sup>95</sup> Here again, I would argue that Rawls's theory offers a useful approach. This is because the theory involves those in the original position imagining themselves not only, or even primarily, as having another *identity*, but more fundamentally as being placed in the *circumstances* of those with another identity. In other words, in determining what aspects of the human condition must be protected in drafting fundamental norms, people in the original position are called upon to decide not only what being a woman, a disabled person, a Catholic, a poor person, a person who espouses an unpopular idea or an imprisoned person means in itself, but also what the *consequences* of having such attributes or identities are. This in turn logically leads to the conclusion that, in order to address those consequences, it is necessary to protect rights such as freedom from discrimination on grounds of gender and disability, freedom of religion, socio-economic rights, freedom of expression and the right not to be subjected to inhuman punishment. So too, in the case of Indigenous rights, it is not so much having Indigenous identity that requires protecting – after all, that is an attribute which a person objectively either does or does not have – rather, it is the freedom to do the things an Indigenous person would reasonably wish to do that requires protecting.

It is of course true that most of the attributes of human existence that Indigenous persons may claim will be identical to those claimed by non-Indigenous people. However, there will be some claims that are unique to the circumstance of being Indigenous. Or, to put it differently, there are aspects of the Indigenous experience that highlight the need for specific rights to be protected. The remainder of this part highlights five rights in relation to which special provision needs to be made: the right to property, children's rights, criminal procedural rights, the right to culture and the right to self-determination.

## C Property

Inclusion of property rights in a bill of rights would likely be uncontroversial given that the right to just terms compensation for acquisition of property already features in the *Constitution*. However, it would be important from the Indigenous perspective that the concept of 'property' was

defined sufficiently broadly to include types of property rights claimed by Indigenous people, which often fall short of ownership or possession as usually understood, and may include such episodic, yet culturally vitally important types of use, such as transit across land in order to visit sacred sites.<sup>96</sup>

This raises another issue regarding the conceptualisation of property rights and their acquisition. The issue is that, in contrast to those property rights (held by both Indigenous and non-Indigenous people) which have commercial value, compensation for which is therefore easily calculated, some Indigenous property rights are often of essentially spiritual value, for which monetary compensation would be a poor substitute, even if it could be calculated. I would therefore argue that adequate protection of Indigenous property rights requires that the law set the condition for acquisition of property rights higher than simply payment of compensation. Obviously it will sometimes be the case that, when balancing broader societal needs against a right, the right will have to give way. However, if the threshold for acquisition is not only payment of just terms compensation, but also a requirement that there must have been no other way of achieving the societal objective, there will be fewer circumstances in which Indigenous (and indeed other) property rights will be acquired. The point is, however, that this will be of particular benefit to Indigenous people, because it is they who are most likely to want to resist acquisition of property rights for which monetary compensation (although still required) does not fully address the nature of the loss.

How should this requirement be included? Much will depend on how the general limitations clause in the bill of rights was drafted. If it contained an explicit test similar to that contained in s 36(1) of the South African *Bill of Rights* (discussed above) then the requirement would be met by the limb of the test requiring that any limitations of rights be the least invasive possible. If, however, the bill of rights was silent on the test to be used for determining whether limitations were reasonable, it would be necessary to include in the formulation of the right to property the additional requirement that the right to property includes the right not to have property taken unless there is no other means of achieving the countervailing objective for which it is being acquired.

## D Children's Rights

Children's rights, normally unproblematic, are particularly contentious in the context of Indigenous communities in

Australia. First, there is the legacy of the Stolen Generations, the product of a systematic policy to separate Indigenous children from their parents.<sup>97</sup> More recently, there have been the findings of the report into child abuse in certain Indigenous communities, which was in part the spur for the Howard Government's Northern Territory Intervention.<sup>98</sup> The inevitable politicisation of both these reports must not obscure the key insights offered by them, which are that children have a right to a secure and safe family life in which they can be raised in accordance with their culture, but that these rights may be placed in jeopardy from harms emanating both from outside and within Indigenous communities. Indigenous children thus form a doubly disadvantaged population, both because of their situation as members of an Indigenous minority and their inherently vulnerable status as children.

International human rights law makes the best interests of children a primary, and in some cases paramount, consideration in matters affecting them.<sup>99</sup> The principle of paramountcy is also evident in the bills of rights of other jurisdictions, for example, that of South Africa, which states:

A child's best interests are of paramount importance in every matter concerning the child.<sup>100</sup>

The implications of this for drafting a bill of rights for Australia are that such a document should acknowledge the paramountcy of the interests of the child, and then affirm the right of the child to enjoy family life within his or her community. The latter provision would ensure that, where a child is a member of an Indigenous community, the courts would have to take that fact into account in giving effect to the child's right to family life.

## E Criminal Procedural Rights

It is a matter of notoriety that Indigenous people are overrepresented in the criminal justice system.<sup>101</sup> Many writers have referred to the need for criminal procedure to afford Indigenous people sufficient culturally appropriate support in presenting their defence.<sup>102</sup> The same applies in relation to the taking into consideration of all the circumstances of the offender when passing sentence – a right which ought, of course, to be protected in the case of all offenders, but which would require the taking into account of different considerations in the case of offenders of Indigenous background.<sup>103</sup>

Rights pertaining to criminal process and sentencing are traditionally categorised as a subset of the right to individual liberty. However, rather than the courts having to determine what is contained within that broad right, it would be far preferable if an Australian bill of rights were to comprehensively specify what rights a person had upon arrest and upon being charged, tried and sentenced, as does the South African *Bill of Rights*.<sup>104</sup> Protection of Indigenous rights could include provisions such as a right to be advised by a support person from the accused's Indigenous community, and to have the cultural circumstances of the accused (including input from the accused's community where relevant) taken into account during sentencing.

## F Cultural Rights

Although the right to culture is usually characterised as a civil and political right which, along with other civil and political rights, is assumed to be vindicated simply by the state not interfering in its exercise,<sup>105</sup> this is an oversimplification. The fact that Indigenous culture, particularly where it is a minority culture, is at risk of being overwhelmed by the dominant culture, means that effective protection of cultural rights requires positive support by the state. In other words, the right to free exercise of culture has an aspect to it which is similar to socio-economic rights. Because socio-economic rights are resource-dependent, they cannot be stated as absolute entitlements – their holders are only entitled to the state taking reasonable steps towards their realisation. This means that the state must distribute such resources as it has to devote to the right in an equitable manner, but it cannot be called upon to provide resources it does not have.<sup>106</sup>

The implication for legislative drafting is that, where a bill of rights affirms the rights of Indigenous people to practice and develop their culture, this must include some reference to an obligation on the part of the state to give equal support to Indigenous culture, having regard to overall resources allocated by the state to cultural matters. This would mean that in order to vindicate the right the onus would rest on the applicant to prove that the state had not allocated resources in a reasonably equitable manner. The right thus does not confer a benefit on Indigenous people that others do not have, but does provide a mechanism for ensuring that equal support is given to the culture of Indigenous people as a distinctive societal group. In the case of Indigenous Australians, it might, for example, provide a mechanism for ensuring that, in equitably funding education, the Commonwealth, State

and Territory governments took into account the minority status of Indigenous peoples, the additional expense required to provide infrastructure (due to the fact that Indigenous people often live in remote communities) and the fact that Indigenous people are often disadvantaged in relation to health and other social indicators, which in turn impacts on their ability to access education.

## G Self-Determination

Undoubtedly the most important Indigenous right that might be claimed (and also the one most likely to be controversial) is that to communal autonomy, or self-determination. The right of Indigenous peoples to autonomy is recognised in international human rights documents. Art 1 of the ICCPR<sup>107</sup> and of the ICESCR<sup>108</sup> both recognise the right of peoples to self-determination, while art 27 of the ICCPR, which protects the cultural rights of minorities,<sup>109</sup> has also been seen by Indigenous peoples as supporting their claims of self-determination. The most significant recognition of a collective Indigenous right to self-determination was the adoption by the UN General Assembly in 2007 of the *Declaration on the Rights of Indigenous Peoples*.<sup>110</sup> Art 3 of the Declaration explicitly affirms the right to self-determination, while art 4 states that Indigenous peoples have 'the right to autonomy or self-government in matters relating to their internal and local affairs, as well as ways and means for financing autonomous functions'.

No doubt claims to a right to Indigenous communal autonomy are likely to be met by the argument that all Australians, both Indigenous and non-Indigenous, already enjoy autonomy insofar as they participate in the democratic process. However, as stated above, the application of Rawls's theory of justice to a society which contains Indigenous peoples is likely to lead to the conclusion that the right to communal autonomy for Indigenous peoples would be protected by those situated in the original position.

What model self-determination would take would depend on consultation between the Government and Indigenous communities, taking into account factors such as geography, population distribution, communal identity, et cetera. This is the process anticipated by the *Declaration of the Rights of Indigenous Peoples*, insofar as art 18 affirms the right of Indigenous peoples 'to develop and maintain their own indigenous decision making institutions' while art 19 states that governments must engage in consultation with

Indigenous people with the aim of obtaining their 'free, prior and informed consent before adopting or implementing legislative or administrative measures that may affect them'. A negotiated process leading to a variety of forms of self-determination for Indigenous communities would not be entirely unfamiliar in the Australian context. In Queensland, s 42 of the *Community Services (Aborigines) Act 1984* (Qld) and s 40 of the *Community Services (Torres Strait) Act 1984* (Qld) provide for self-government in that they authorise Aboriginal and Torres Strait Islander councils to make by-laws applying to any person within their communities.

The implications of this for an Australian bill of rights are that the document should contain a reference to a right of communal self-determination, subject to that being reasonably practicable. This would leave Parliament a degree of flexibility in drafting legislation to give effect to the right.

## H The NHRC's Approach to Indigenous Rights

The NHRC devoted a chapter to the issue of the protection of Indigenous rights. The report addressed the question of whether there are rights which are specifically 'Indigenous', as distinct from the general body of human rights to which all people are entitled:

Throughout the Consultation – especially at those community roundtables with a large number of Indigenous participants – there was a clear expression of the specific Indigenous rights that needed further protection. People were, however, less forthcoming about the detail of how these rights should be protected. The Committee received a number of submissions, from both Indigenous and non-Indigenous people, recommending the recognition of Indigenous-specific rights in various legal instruments.<sup>111</sup>

The report also noted that some participants in focus groups said that the same rights should apply to everyone, and resisted the idea of specific rights for Indigenous people. Despite this, in public surveys conducted by Colmar Brunton, 53 per cent of respondents agreed that Indigenous people in remote areas needed additional protection for their rights, although this fell to 33 per cent when asked about Indigenous people in urban areas.<sup>112</sup>

In light of the above, the NHRC's conclusion on the issue of Indigenous rights is puzzling, and arguably inconsistent with the evidence it received:

Despite over 35 000 written submissions being received and the thousands of people who participated in the community roundtables, Indigenous Australians did not put forward a significant number of recommendations about which specific Indigenous rights should be recognised and within what type of legal instrument. Colmar Brunton reported that participants in the survey and focus groups were cautious, if not resentful, about Indigenous-specific rights, offering only minimal support for their recognition in a legal instrument such as a Human Rights Act. ... In view of the lack of support from the broader Australian community for different rights for different people, and the limited response from the Indigenous community on this point, the Committee is unable to recommend that specific Indigenous rights be recognised in a Human Rights Act, treaty or other legal instrument.<sup>113</sup>

Surely the fact that Indigenous people who spoke at community roundtables gave 'a clear expression of the specific Indigenous rights that needed further protection' was of greater importance than the fact that they were not specific on what means such protection should take. Furthermore, how could the clear opinion in favour of protection of rights lead to the conclusion that there was a 'limited response from Indigenous people' on that point? Finally, did the evidence of the public survey *really* support the conclusion that there was resentment at the idea of recognition of Indigenous rights – at least insofar as they applied to Indigenous people in remote communities? The dissonance between what the NHRC heard and what it concluded is disappointing, and leaves the report open to the criticism that it failed to take a proactive stance on the question.

More encouraging, however, were the NHRC's recommendations that a statement of impact on Indigenous people should be prepared and Indigenous communities be consulted before the races power in s 51(xxvi) of the *Constitution* is used to enact legislation that is detrimental to Indigenous people or before the *Racial Discrimination Act 1975* (Cth) is suspended.<sup>114</sup> Other worthwhile recommendations included that the symbolically important step should be taken of statutorily recognising the status of Indigenous people as the first inhabitants of the country,<sup>115</sup> and that principles of statutory interpretation should be broadened to include Indigenous cultural principles – for example in relation to family law.<sup>116</sup> Most significant, however, was the NHRC's recommendation that the principle of self-determination, as embodied in the *Declaration on the Rights*

of *Indigenous Peoples* (that is, self-determination within the context of the existing sovereignty of the nation-state), should be recognised, and that the Commonwealth should develop, in partnership with Indigenous communities, a framework for self-determination so that Indigenous people can have control over their affairs.<sup>117</sup> This was a step that was positive, and perhaps surprising, in light of the NHRC's dismissal of protection for other aspects of Indigenous rights.

## V Conclusion

Instead of considering the fundamental jurisprudential question of what claims the individual has vis-à-vis the rest of society, the debate on a bill of rights in Australia has focused on pragmatic questions relating to the balance of power between the judiciary and parliament. Yet it is clear that only if the rationale for a bill of rights is properly understood can the correct institutional model be designed. International human rights documents state that the inherent dignity of the human being gives rise to fundamental rights, which all people are entitled to claim against their governments. Apart from the international instruments, justification for human rights protection is provided by Rawls's rights theory, which provides a strong argument supporting the idea that protection of rights is an objective good. Current protection of human rights in Australia is inadequate: it is neither comprehensive nor (except for the few express and implied freedoms contained in the *Commonwealth Constitution*) effective in restraining legislative derogation of those rights that are protected.

There is a risk that, in the heat of the debate on the future of human rights protection in Australia, sight will be lost of the claims of Indigenous people. Despite the fact that Rawls's theory of justice is most often used to justify rights theories in the abstract, or at least without specific reference to societies with Indigenous populations, the paradoxical reliance his theory places on empathy and self-interest makes it an excellent vehicle for illustrating why the concerns of Indigenous people should be taken into account in framing a system of rights-protection. Turning to the specific claims that Indigenous people in Australia might make in relation to human rights, I have illustrated how there are aspects of property rights, the rights of children, criminal procedural rights and cultural rights which are under particular threat as they apply to Indigenous Australians, and that those aspects would therefore require specific formulation in an Australian bill of rights. This is also so in the case of the right to self-

determination, which is a reasonable claim both in terms of international human rights documents and Rawlsian theory.

The NHRC report contains both positives and negatives for the enhanced protection of general human rights and the specific rights of Indigenous people. Its recommendation that, if a Human Rights Act is adopted, it should be along the lines of those currently in force in the ACT, Victoria, New Zealand and the United Kingdom, gives insufficient weight to the jurisprudential basis of human rights. Insofar as Indigenous rights are concerned, it is disappointing that the report recommended against the recognition of specific rights for Indigenous people in a bill of rights. Yet the recommendation that alternative strategies be pursued to protect Indigenous peoples' right to self-determination is a welcome development.

The NHRC process was but one step along the difficult road towards realisation of adequate human rights protection in Australia, a road that will be even more fraught in the case of Indigenous Australians. The introduction into Parliament of any Human Rights Act would no doubt be preceded by examination by a parliamentary committee, which will provide further opportunity for input into the debate. I would argue that by taking a principled approach – that is, one which recognises the need to address theory before mechanisms – an outcome which protects all Australians, while recognising the specific claims that arise out of the Indigenous experience, can be achieved.

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  - 1 See the NHRC website at <<http://www.humanrightsconsultation.gov.au/>>.
  - 2 NHRC, *Terms of Reference* <[http://www.humanrightsconsultation.gov.au/www/nhrcc/nhrcc.nsf/Page/Terms\\_of\\_Reference](http://www.humanrightsconsultation.gov.au/www/nhrcc/nhrcc.nsf/Page/Terms_of_Reference)> at 22 January 2010.
  - 3 NHRC, *Report* (2009) <[http://www.humanrightsconsultation.gov.au/www/nhrcc/nhrcc.nsf/Page/Report\\_NationalHumanRightsConsultationReportDownloads](http://www.humanrightsconsultation.gov.au/www/nhrcc/nhrcc.nsf/Page/Report_NationalHumanRightsConsultationReportDownloads)> at 22 January 2010.
  - 4 It should be noted that the NHRC's terms of reference specifically exclude the option of a 'constitutionally entrenched bill of rights': see NHRC, *Terms of Reference*, above n 2. This issue is discussed further below.

- 5 For example, the cases of Vivian Alvarez Solon (deported from Australia by administrative process) and Cornelia Rau (held in immigration detention, again through executive action without any statutory requirement of judicial approval) highlighted the need for the better protection of procedural rights when a person is deprived of liberty.
- 6 For a discussion of the case put by the prosecutors at the Nuremberg trials see United States Chief Counsel for the Prosecution of Axis Criminality, *Nazi Conspiracy and Aggression*, Government Publications Office (1946).
- 7 The German cases which found that Nazi laws were invalid are discussed in Lon Fuller, 'Positivism and Fidelity to Law – A Reply to Professor Hart' (1957–58) 71 *Harvard Law Review* 630 and Thomas Mertens, 'Nazism, Legal Positivism and Radbruch's Thesis on Statutory Injustice' (2003) 14(3) *Law and Critique* 277.
- 8 *Universal Declaration of Human Rights*, GA Res 217A (III), UN Doc A/810 at 71 (1948).
- 9 *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976).
- 10 *International Covenant on Economic, Social and Cultural Rights*, opened for signature 16 December 1966, 993 UNTS 3 (entered into force 3 January 1976).
- 11 For a discussion of the issue of cultural relativism and references to more detailed works see Darren O'Byrne, *Human Rights: An Introduction* (2003) 41–4.
- 12 John Rawls, *A Theory of Justice* (1972) 17–22.
- 13 Ibid 136–42.
- 14 John Rawls, *Political Liberalism* (1993) 5–7.
- 15 John Rawls, *The Law of Peoples* (1999) 80.
- 16 John Rawls, 'The Basic Liberties and their Priority' in Sterling McMurrin (ed), *The Tanner Lectures on Human Values* (1982) 1, 6.
- 17 Rawls, *A Theory of Justice*, above n 12, 136–42.
- 18 John Rawls, *Collected Papers* (Samuel Freeman, ed) (1999) 546–7.
- 19 Rex Martin, *Rawls and Rights* (1985) 24.
- 20 Chandran Kukathas and Philip Pettit, *Rawls - A Theory of Justice and its Critics* (1990) 50.
- 21 Rawls, *Collected Papers*, above n 18, 554.
- 22 Paul Patton, 'Rawls and the Legitimacy of Australian Government' (2009) (unpublished, copy on file with author) 14. A revised version of this paper is published in this edition of the *Australian Indigenous Law Review*: Paul Patton, 'Rawls and the Legitimacy of Australian Government' (2009) 13(2) *Australian Indigenous Law Review*. I am indebted to Professor Patton for his having granted me access to a pre-publication draft of his paper.
- 23 Rawls, *A Theory of Justice*, above n 12, 195–201. See also *ibid*.
- 24 Rawls, *A Theory of Justice*, above n 12, 173. See also Patton, above n 22, 15.
- 25 Rawls, *The Law of Peoples*, above n 15, 24.
- 26 Ibid 27.
- 27 Ibid 30–5.
- 28 Ibid 37–8.
- 29 Will Kymlicka, *Multicultural Citizenship* (1995) 10–11.
- 30 Ibid 79.
- 31 Ibid 30.
- 32 Ibid 113.
- 33 Ibid 109.
- 34 Ibid 124–6; 181–6.
- 35 Chandran Kukathas, *The Liberal Archipelago: A Theory of Diversity and Freedom* (2003) 5, 216–17.
- 36 Ibid 15.
- 37 Kymlicka, above n 29, 111–13.
- 38 Ibid 51–2.
- 39 Freedom of religion, for example, is not protected by the common law – see *Grace Bible Church v Reedman* (1984) 36 SASR 376.
- 40 *Northern Territory National Emergency Response Act 2007* (Cth), s 132.
- 41 *Human Rights Act 2004* (ACT), s 32(3); *Charter of Human Rights and Responsibilities Act 2006* (Vic), s 36(5).
- 42 *Australian Capital Television v Commonwealth* (No 2) (1992) 177 CLR 106.
- 43 *Roach v Electoral Commissioner* [2007] HCA 43.
- 44 Derived from s 75(v) of the Constitution, as interpreted in *Chu Kheng Lim v Minister for Immigration and Multicultural Affairs* (1992) 176 CLR 1.
- 45 NHRC, *Report*, above n 3, 127.
- 46 NHRC, *Terms of Reference*, above n 2.
- 47 As it is part of the *Constitution*, the *Bill of Rights* can be amended only by means of the procedure mandated by Article V. The justiciability of the *Constitution* was established by implication in *Marbury v Madison*, 5 US (1 Cranch) 137 (1803).
- 48 The *Charter* is part of the *Constitution*, and so can be amended only in accordance with s 74. The *Charter* is made justiciable by ss 8 and 38.
- 49 *Constitution Act 1982*, being Schedule B to the *Canada Act 1982* (UK) c 11, s 38.
- 50 *Canadian Charter of Rights and Freedoms*, s 24.
- 51 *Canadian Charter of Rights and Freedoms*, s 33(1).
- 52 Section 33(1) has never been used by the Federal Government. There is only one instance where a law that was otherwise *intra vires* the power of a Provincial Parliament and which was inconsistent with the *Charter* was exempt from its operation, relating to a Quebec statute requiring that exterior signs on businesses be in the French language only – see the discussion of s 33(1) at Jay Makarenko, *The Notwithstanding Clause*:

- Section 33 of the Charter (2006) Mapleleafweb <<http://www.mapleleafweb.com/features/notwithstanding-clause-section-33-charter>> at 22 January 2010.
- 53 The *Canadian Bill of Rights 1960*, RSC 1970, App II remains in force, notwithstanding the enactment of the *Charter of Rights and Freedoms*.
- 54 [1970] SCR 282.
- 55 *New Zealand Bill of Rights Act 1990* (NZ), s 6; *Human Rights Act 1998* (UK) c 42, s 3(1); *Human Rights Act 2004* (ACT), s 30; *Charter of Human Rights and Responsibilities Act 2006* (Vic), s 32(1).
- 56 *New Zealand Bill of Rights Act 1990* (NZ), s 4; *Human Rights Act 1998* (UK) c 42, s 3(2); *Human Rights Act 2004* (ACT), s 32(3); *Charter of Human Rights and Responsibilities Act 2006* (Vic), ss 32(3), 36(5).
- 57 *Human Rights Act 1998* (UK) c 42, s 4; *Human Rights Act 2004* (ACT), s 32(2); *Charter of Human Rights and Responsibilities Act 2006* (Vic), s 36. The New Zealand legislation does not make formal provision for declarations of incompatibility by the courts, but courts will naturally state that legislation is incompatible with the Act where they find it impossible to interpret legislation in a manner consistent with it.
- 58 *Human Rights Act 1989* (UK) c 42, s 8.
- 59 *Simpson v Attorney-General* [1994] 3 NZLR 667 (CA) ('Baigent's Case').
- 60 *Human Rights Act 2004* (ACT), s 40C(4); *Charter of Human Rights and Responsibilities Act 2006* (Vic), s 39(3).
- 61 Section 1 of the *Constitution* confers legislative power on the Commonwealth Parliament, while ss 23 and 40 state that questions are decided on the basis of a majority vote in the Senate and House of Representatives respectively. This means that it would be inconsistent with the *Constitution* to require Parliament to comply with additional procedures – for example, special majorities in either house – when enacting legislation.
- 62 See, eg, Neil Rees, Katherine Lindsay and Simon Rice, *Australian Anti-Discrimination Law: Text, Cases and Materials* (2008) 201, who state, without arguing the point, that s 10(1) would be overridden by virtue of the doctrine of implied repeal and D C Pearce and R S Geddes, *Statutory Interpretation in Australia* (2006) 256–7. The analysis by Pearce and Geddes relies on the authority of *South-Eastern Drainage Board (SA) v Savings Bank of South Australia* (1939) 62 CLR 603. However, it should be noted that the efficacy of the express override provision dealt with in that case was decided on the basis of whether s 5 of the *Colonial Laws Validity Act 1865* (UK) permitted States to subject non-constitutional legislation to manner and form requirements. The majority did not determine the general question of whether such provisions are in and of themselves valid.
- 63 See George Winterton, 'Can the Commonwealth Enact "Manner and Form" Legislation?' (1980) 11 *Federal Law Review* 167, 183–8, 201; Julie Taylor, 'Human Rights Protection in Australia: Interpretative Provisions and Parliamentary Supremacy' (2004) 32 *Federal Law Review* 57, 63–4, 68; Gerard Carney, *The Constitutional Systems of the Australian States and Territories* (2006) 156–7.
- 64 *R v Drybones* [1970] SCR 282. See also the South African case of *Cowburn v Nasopie (Edms) Bpk* 1980 (2) SA 547 (NC).
- 65 NHRC, *Report*, above n 3, 54.
- 66 *Ibid* 100–4, 127–8.
- 67 *Ibid* 299–300.
- 68 *Ibid*, Appendix B: Summary, 7.
- 69 *Ibid* 133–5, 149.
- 70 The *Bill of Rights* in the *United States Constitution* contains no limitations clause, however the courts have developed a test which states that limitations of rights will be permissible if they can be shown to be both necessary and narrowly tailored to serve a compelling governmental interest – see for example *Griswold v Connecticut*, 381 US 479 (1965), 496–8.
- 71 (1986) 26 DLR (4<sup>th</sup>) 200.
- 72 Similar balancing tests, listing factors which must be taken into account in determining whether limitations are reasonable, appear in s 28 of the *Human Rights Act 2004* (ACT) and s 7(2) of the *Charter of Human Rights and Responsibilities Act 2006* (Vic). Note, however, that as these bills of rights are not entrenched and are not justiciable, the courts must give effect to legislation even if it unreasonably limits rights.
- 73 *Coleman v Power* (2004) 220 CLR 1, 49–51 (McHugh J).
- 74 *Ibid*.
- 75 See, eg, Greg Craven, *Conversations with the Constitution: Not Just a Piece of Paper* (2004) 181–8. For frequent criticism of bills of rights in the press, see articles by Janet Albrechtsen: for example, Janet Albrechtsen, 'Wary of a World Where New High Priests Hold Sway', *The Australian* (Sydney), 30 June 2004, 15; Janet Albrechtsen, 'Crusade for Rights Charter Relies on Lies', *The Australian* (Sydney), 8 April 2009, 12.
- 76 (1943) 67 CLR 116.
- 77 *Ibid* 155.
- 78 *Declaration on the Rights of Indigenous Peoples*, GA Res 61/295, UN GAOR, 61<sup>st</sup> sess, UN Doc A/RES/47/1 (2007).
- 79 See Jenny Macklin, Minister for Indigenous Affairs, 'Statement on the United Nations Declaration on the Rights of Indigenous Peoples – Parliament House, Canberra' (Press Release, 3 April 2009) <[http://www.jennymacklin.fahcsia.gov.au/internet/jennymacklin.nsf/content/un\\_declaration\\_03apr09.htm](http://www.jennymacklin.fahcsia.gov.au/internet/jennymacklin.nsf/content/un_declaration_03apr09.htm)> at 22 January 2010.
- 80 For a collection of commentary on this issue, see the resources

collected at Jumbunna Indigenous House of Learning, *Public Law – Bill of Rights* <<http://www.jumbunna.uts.edu.au/research/public3.html>> at 22 January 2010.

(1998) 195 CLR 337.

The exchange is quoted in George Williams, *A Bill of Rights for Australia* (2000) 8.

Ibid.

For a summary of the positions see Heather McRae et al, *Indigenous Legal Issues: Commentary and Materials* (4<sup>th</sup> ed, 2009) 147–64.

However, note Sean Brennan, Brenda Gunn and George Williams, ‘“Sovereignty” and its Relevance to Treaty-Making Between Indigenous Peoples and Australian Governments’ (2004) 26 *Sydney Law Review* 307, who argue that a treaty between the Crown and Indigenous peoples is not necessarily incompatible with the sovereignty of the Australian state.

(1993) 118 ALR 193.

(1994) 182 CLR 45.

(1997) 71 ALJR 767.

For a discussion of both the strengths and weaknesses of the treaty argument see McRae et al, above n 84, 699–700.

See Noel Pearson, ‘Reconciliation: To Be Or Not To Be – Nationhood, Self Determination or Self Government’ (1993) 3(61) *Aboriginal Law Bulletin* 14.

McRae et al, above n 84, 195.

See the arguments in favour of a bill of rights in Larissa Behrendt, Chris Cunneen and Terri Libesman, *Indigenous Legal Relations in Australia* (2009) 269–71.

The Preamble to the Act recognises the ‘special significance’ of human rights for Indigenous people.

See also the Preamble to the Act, recognising the ‘special importance’ of human rights for Aboriginal Victorians.

For a comprehensive discussion of Indigenous rights see Andrew Lokan, ‘From Recognition to Reconciliation: The Functions of Aboriginal Rights Law’ (1999) 23 *Melbourne University of Law Review* 65.

See, eg, Kado Muir, *‘This Earth has an Aboriginal Culture Inside’: Recognising the Cultural Value of Country*, Native Title Research Unit, AIATSIS, ‘Land, Rights, Law: Issues of Native Title’ Issues Paper No 23 (1998).

See National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from their Families, Bringing Them Home: Report of the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from their Families, Human Rights and Equal Opportunity Commission (1997).

See Northern Territory Board of Inquiry into the Protection of Aboriginal Children from Sexual Abuse, Ampe Akelyernemane Meke Mekarle – ‘Little Children are Sacred’ Report of the Northern

Territory Board of Inquiry into the Protection of Aboriginal Children from Sexual Abuse (2007).

99 *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990) arts 3, 21.

100 *Constitution of the Republic of South Africa Act 1996*, s 28(2).

101 The Australian Bureau of Statistics reports that Indigenous people are 13 times more likely to be imprisoned than are non-Indigenous people: Australian Bureau of Statistics, 4722.0.55.003 – *Law and justice statistics – Aboriginal and Torres Strait Islander People: A Snapshot, 2006* <<http://www.abs.gov.au/AUSSTATS/abs@.nsf/Lookup/4722.0.55.003Main+Features12006?OpenDocument>> at 22 January 2010.

102 These issues are extensively canvassed in Australian Law Reform Commission, *The Recognition of Aboriginal Customary Laws*, Report No 31 (1986), [573], [579], [585], [599]–[600]. For academic comment, see Dean Mildren, ‘Redressing the Imbalance Against Aboriginals in the Criminal Justice System’ (1997) 21 *Criminal Law Journal* 7.

103 For a discussion of the issues see Elena Marchetti and Kathleen Daly, ‘Indigenous Sentencing Courts: Towards a Theoretical and Jurisprudential Model’ (2007) 29 *Sydney Law Review* 415.

104 *Constitution of the Republic of South Africa Act 1996*, s 35.

105 Although the characterisation of civil and political rights as casting only a negative obligation on the state is longstanding, the validity of this equation is open to doubt. To take two simple examples, the right to personal liberty may impose a positive obligation on the state to provide indigent defendants in criminal trials with publicly funded legal representation so as to ensure that convictions resulting in imprisonment are not unsafe. Similarly, the right of prisoners not to be subject to cruel and inhumane treatment may require that the state build sufficiently large prisons and of reasonable standard so as to avoid overcrowding.

106 On the relative nature of socio-economic rights see ss 26–29 of the South African *Bill of Rights*, which protect rights to housing, health care, food, water and social security, the social rights of children and education. In each case, the obligation cast on the state is to take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of the relevant right. What this means in practice was determined by the *Constitutional Court in Government of the Republic of South Africa v Grootboom* 2000 (11) BCLR 1169 (CC) and *Soobramoney v Minister of Health, Kwa-Zulu Natal* 1997 (12) BCLR 1696 (CC).

107 *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976).

108 *International Covenant on Economic, Social and Cultural Rights*,

opened for signature 16 December 1966, 993 UNTS 3 (entered into force 3 January 1976).

- 109 Article 27 confers upon minorities 'the right, in community with other members of their group, to enjoy their own culture, to profess and practise their own religion, [and] to use their own language'.
- 110 *Declaration on the Rights of Indigenous Peoples*, GA Res 61/295, UN GAOR, 61<sup>st</sup> sess, UN Doc A/RES/47/1 (2007).
- 111 NHRC, *Report*, above n 3, 211.
- 112 *Ibid*, Appendix B: Summary, 3.
- 113 *Ibid* 212–13.
- 114 *Ibid* 216.
- 115 *Ibid* 220.
- 116 *Ibid* 221.
- 117 *Ibid* 218–19.