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Hon Justice Jenny Blokland

A Commonwealth Human Rights Act – Not an Option

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Recent months have seen quite a deal of political noise at the Federal level. The proposed re-structuring of hospital funding based on greater Commonwealth Government control of taxes that currently form the basis of state and territory discretionary funding is one example of this noise. So too is the recently proposed Mining "Super" Profits Tax. This new tax will apparently incorporate mining royalties currently imposed by the states and territories and based on those entities, ownership of the resources in question. The proposal and the reaction to it from the mining industry has consumed many "column inches" of media news time.

In the area of legal affairs also there has been much noise. The proposed National Legal Profession Reforms and Commonwealth Government funding of legal aid organisations have occupied much of the attention of individuals and organisations, such as the Law Council of Australia, involved in national legal politics. With so much activity (if not action) taking place it is barely surprising that a significant but "soft" matter seems to have disappeared after having barely made its presence felt.

That matter is the outcome of the Brennan Human Rights Consultation and the Commonwealth Government's response to it. In an effort to ensure that this topic doesn't slip completely from view I thought it would form good subject matter for this column.

The topic probably needs some introduction for most so I will commence by describing the processes and outcomes of the Human Rights consultation before making some commentary on the response to it.

National Human Rights Consultation

The National Human Rights Consultation was launched by the Commonwealth Attorney-General, Robert McClelland in December 2008.

The Consultation was managed by a Committee headed by Father Frank Brennan. The Committee consisted of a number of the great and the good, such as Phillip Flood and Mary Kostakidis.

The Terms of Reference given to the Consultation Committee were (in summary):

- To ask which human rights and responsibilities should be protected and promoted and how this should be done;
- To consult broadly with the community to identify key issues in relation to the protection and promotion of rights; and,
- To report on issues and options by 30 September 2009.

The Consultation Committee was diligent in its undertaking of its tasks. 35,014 written responses were received, including those from the Northern Territory Law Society and the Law Council of Australia. 6000 individuals attended community roundtables held at over 50 locations around Australia. Focus group research and telephone surveys were commissioned and undertaken. Economic analysis of recommended options was prepared and public hearings were held.

While not going to the main topic under consideration in this column, aspects of the submissions of Australians to the consultation are interesting reading.

In general, the rights and responsibilities identified as in need of protection and promotion were suggested as those which constituted Australia's obligations under International Human Rights Law. While opinion was mixed, the most common suggestion was that political and civil rights should be specifically protected and that economic and social rights should be enunciated. Access to justice and the "right" to a clean environment were frequently identified.

Three current policy debates were most commonly identified as posing a threat to the preservation of human rights:

- The Commonwealth's Northern Territory Emergency Response;
- The treatment of asylum seekers; and,
- The growth of national security legislation.

> *The recommendations relating to Indigenous Human Rights are not mentioned. The Framework rejects the recommendations relating to a Human Rights Act.*

Euthanasia, abortion, religious freedom and same sex marriage were frequently identified "current issues".

The Consultations Committee's final (lengthy) report was produced in September 2009 and includes 31 recommendations running to six pages (so I won't reproduce them in full).

In summary though the Consultation Committee's recommendations went to:

Education and promotion

That education be the highest priority for improving and promoting human rights, and that the Commonwealth Government develop a comprehensive framework for human rights education.

Existing Legislation and Policy

That the Commonwealth Government review existing legislation to ensure compliance with the key international human rights instruments[1] and amend such legislation accordingly; that the Commonwealth Government introduce a compatibility (i.e. with the key human rights instruments) statement for all new legislation and statutory instruments; and, that the Commonwealth Parliament establish a parliamentary Human Rights Committee to review new legislation.

Indigenous Human rights

That a statement of impact be prepared for all Commonwealth legislation dealing exclusively with Indigenous peoples, amending the *Racial Discrimination Act* or introducing "Special Measures" under that Act.

Human Rights Act

The introduction of a Commonwealth Human Rights Act incorporating the rights protected under the key international human rights instruments, but with economic and social rights as non-justiciable rights, and imposing obligations only on Commonwealth authorities and officials.

The Commonwealth's response was announced in April 2010. That response took the form of "Australia's [read Commonwealth's] Human Rights Framework".

The Commonwealth's Framework largely adopts the Consultation Committee's recommendations in relation to Education and Review of Existing Legislation and Policy (including support for "nationally harmonised" anti-discrimination laws). The recommendations relating to Indigenous Human Rights are not mentioned. The Framework rejects the recommendations relating to a Human Rights Act.

While noting that the key international human rights instruments "reflect" international agreement about the fundamental values that make up 'human rights' the notion of a Human Rights Act is rejected by Attorney-General McClelland on the basis that:

> *While there is overwhelming support for human rights in our community, many Australians remain concerned about the possible consequences of such an Act.*
>
> *The Government believes that the enhancement of human rights should be done in a way that as far as possible unites, rather than divides, our community.*
>
> *The Government is committed to positive and practical change to promote and protect human rights.*
>
> *Advancing the cause of human rights in Australia would not be served by an approach that is divisive or creates an atmosphere of uncertainty or suspicion in the community.*

Thus, to the Commonwealth, while there is international agreement and overwhelming community support for human rights, a Human Rights Act ensuring that Commonwealth agencies and officials respect these human rights would be divisive, negative and impractical. It would create an atmosphere of uncertainty and suspicion. However, education aimed at making the community

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more informed about the rights they overwhelmingly support but which they cannot enforce against the Commonwealth overcomes these difficulties.

In a media release issued when the Commonwealth announced its framework, The Law Council of Australia, while welcoming aspects of the framework, expressed its "disappointment" at the rejection of the Commonwealth Human Rights Act recommendations and noted the matter would be considered further. No statement has been made on the issue since that media release in April.

In the debates about Australian Human Rights instruments there are usually three identified positions:

- Support for a "hard" Bill of Rights – that is a constitutionally entrenched justiciable Bill of Rights;
- Support for a soft Bill of rights, a legislative, justiciable Human Rights Act;
- And those that believe International Human rights instruments are best recognised in Australia through a process of statutory interpretation (essentially - "in conformity with the principles of international law") and government policy.

Now let me be quite clear about my position. I support the passage of a Commonwealth Human Rights Act – the so called "soft" Bill of Rights option. However, this has not always been the case.

In my younger days I was an enthusiastic supporter of a constitutional Bill of Rights. The failure of the 1988 referendum diminished my enthusiasm for constitutional amendment as a practical course to such an extent that over the course of my legal studies I shifted to the view that the "genius of the common law" in combination with the safeguards in the constitution provided adequate protection (this *was* in the days of the Mason Court).

I was rudely shocked out of my complacency however as a result of my involvement in *Kruger v The Commonwealth*.[2]

In that case the plaintiffs argued that removal of Aboriginal children under the *Aborigines Ordinance 1918* was unconstitutional because (inter alia) it offended an implied constitutional guarantee against genocide. All the members of the Court found that the Ordinance did not violate the asserted freedom or immunity because the words of the Ordinance did not display the necessary intent.[3] Justice Dawson went further though, finding that the provisions of s 122 of the Constitution were broad enough to support the Ordinance even if it *did* authorise genocide.[4]

This somewhat shocking revelation started a shift in my thinking on the issue.

If constitutional amendment wasn't possible and the genius of the common law could not protect us even from genocide then at least legislation should be passed. I supported the Human Rights Commission's recommendation[5] in favour of incorporating the Genocide Convention into domestic law.

The other major factor shaping my current thinking is the Intervention. The Intervention has shown me that while clearly the Commonwealth Government can, in legislation, override operation of legislation such as the *Racial Discrimination Act* it does so at a significant political cost. The operation of legislation provides some protection, if only political.

However, my personal support for a Commonwealth Human Rights Act is irrelevant to the point I want to make in this column. I am not writing in order to garner support for my position but rather to draw attention to the implications of the Government's refusal to do so. This refusal must be seen in the context of existing Commonwealth human rights legislation.

This is generally seen as comprising:

- The *Australian Human Rights Commission Act 1986,*
- The *Racial Discrimination Act 1975,*
- The *Sex Discrimination Act 1984,*
- The *Disability Discrimination Act 1992* and
- The *Age Discrimination Act 2004;*

> *In essence, that compliance by the Commonwealth Executive Government with the key international human rights instruments is optional.*

but arguably should also be seen as including institutions such as the Ombudsman and Administrative Appeals Tribunal.

This legislation makes unlawful discrimination that would offend:

- *The Convention on the Elimination of All Forms of Racial Discrimination;*
- The *Convention on the Elimination of All Forms of Discrimination Against Women;* and,
- The *Convention on the Rights of Persons with Disabilities.*

The proposed Commonwealth Human Rights Act would have made it unlawful for Commonwealth authorities and officials to engage in conduct that offended these instruments and also:

- The *International Covenant on Civil and Political Rights*;
- The *Declaration of the Rights of Indigenous Peoples*,
- The *Convention Against Torture...; and*
- The *Convention on the Rights of the Child.*[6]

This does go to my central point - in refusing the Consultation Committee's recommendation relating to a Commonwealth Human Rights Act, what the Commonwealth has implicitly done is suggest that there may be times where it is appropriate for the Commonwealth Executive Government to offend (for example) the *International Covenant on Civil and Political Rights* and to do so without the explicit legislative sanction of the Parliament. In essence, that compliance by the Commonwealth Executive Government with the key international human rights instruments is optional.

In case this conclusion seems overly dramatic I would draw attention to two matters.

The first is the recent (and continuing) over-riding of the *Racial Discrimination Act* under the Intervention (although admittedly done with Parliamentary approval).

The second is the statements made by successive Commonwealth Governments in the wake of *Teoh's* case[7] to the effect that Australians should not have any expectation that Australian ratification of international instruments would necessarily mean that the Australian Government would abide by the terms of that instrument.

When it suits the Commonwealth it will ignore the terms of the key international human rights instruments.

The refusal to introduce a Commonwealth Human Rights Act suggests that the Commonwealth may choose to do so without Parliamentary sanction. Faced with this suggestion the Commonwealth's endorsement of the Consultation Committee's proposed human rights education program becomes a matter of "do as I say, not what I [may] do".

It is perhaps in this context that I also view suggestions that the National Legal Services Board, which is proposed to regulate the legal profession, will comprise a majority of members appointed by Executive Government and be subject to government policy direction. If compliance with human rights is optional for the Commonwealth Government, what then of an independent legal profession?

Footnotes:

1. *These are generally recognised as being: The International Covenant on Civil and Political Rights;*
2. *(1997) 190 CLR 1, [1997] HCA 27.*
3. *See per Dawson J at 43-44, Toohey J at 64, Gaudron J at 89, McHugh J at 133, Gummow J at 152. Brennan CJ at 9. For my views on this conclusion see Kruger v The Commonwealth: Does Genocide Require Malice? (1998) 21 UNSWLJ 224.*
4. *See per Dawson J at 43-44.*
5. *Made in the 1998 Bringing Them Home Report.*
6. *It was not proposed that conducting offending the International Covenant on Economic, Social and Cultural Rights would be unlawful.*
7. *Minister for Immigration and Ethnic Affairs v Teoh (1995) 183 CLR 273*