Perspectives on the National Human Rights Consultation

In a speech delivered to a forum in Sydney in November 2008 entitled Human Rights under a Rudd Labor Government – What will be different?¹, Attorney-General Robert McClelland announced the establishment of the National Consultation. He stated that:

The Rudd Government’s view is that how best to protect and recognise human rights and responsibilities is a question of such importance that it’s appropriate that we first seek the views of the Australian people.

And he concluded by saying: “Our consultation will have no outcome pre-supposed”.

While perhaps no pre-supposed outcome was anticipated last November, the Government’s subsequent terms of reference for the committee specifically refused contemplation of a constitutionally

 entrenched bill of rights or any form of rights protection which failed to ‘preserve the sovereignty of the Parliament’. It is ironic’, writes Geoffrey Robertson in his book *The Statute of Liberty*, “that a ‘national consultation’ should from the outset refuse to consider the one system that demonstrably works. …The most successful method of promoting human rights was not placed on (the Committee’s) agenda.”

Five years ago in the case of *Al Kateb v Godwin*, Justice Michael McHugh said that “(i)f Australia is to have a Bill of Rights it must be done in the constitutional way – hard though its achievement may be – by persuading the people to amend the Constitution by inserting such a Bill.”

If indeed the recognition of human rights is, according to the Rudd Labor Government of such importance, why is it that a nation which led the world in shaping the most important universal commitment to human rights over 60 years ago – hard though that achievement may have been - and is today seeking to lead again on issues of critical importance to the security of humanity and the global protection of human rights, is so reticent to persuade and lead its own people.

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4 [2004] HCA 37 at para 73
towards an acceptance of the most successful and significant method of promoting human rights?

What is it about our nation, a nation apparently built on principles of egalitarianism and tolerance and the famous ‘fair go’, a nation that can afford to be generous and move beyond the mean insularity endemic to the Howard era, that pulls us back to an ambivalent timidity at best, and a base antagonism, at worst, which ultimately reject a comprehensive and enduring declaration of rights protection for Australia. Why has our response to the idea of a bill of rights been the insidious thinning and cropping of bold options which would offer an entrenched guarantee against rights incursions, to a pre-determined, narrow possibility of rights consideration, which if adopted, would prioritise parliamentary sovereignty over rights protection and expansion.

The consultation arose at a time when various contemporary models of rights protection in Canada, New Zealand, Hong Kong, the United Kingdom and South Africa – and domestically, in the ACT and Victoria – are sufficiently tested to illustrate lessons upon which to build an effective response to our own failures and rights deficiencies. Yet what the consultation pre-supposes is a model which falls behind rights developments in the democratic world and which stops short of the opportunity to stamp our vision for Australia onto our country’s primary instrument of governance, our key contract between generations.
In structuring the consultation as a qualified invitation – rather than as a timely commitment to renewing and rewriting the relationship between the private and the public realm - much of the debate about a bill of rights for Australia (academic and otherwise) has been reduced to a focus on the ‘dialogue’ model, its detailed permutations and its questionable constitutionality and on the myth that unelected judges would usurp the role of elected politicians – a focus to the regrettable exclusion, in the main, of the ideas and imagination which might shape our contribution to rebuilding a unique constitutional settlement for our generation and beyond. This, in the words of former South African constitutional court judge, Albie Sachs, has had the effect of turning the debate on a bill of rights inside out. The chance for our nation to take a confident stride towards implementing a magnanimous act has been suspended and turned inward to serve political expediency and conservative claims.

The national consultation process was neither greeted nor has it been cultivated by our Prime Minister. Hesitant rights punters might argue that it is correct that the Prime Minister let the people speak without any undue influence from his office. But the formulation and subsequent execution of the consultation process was exactly the time that influence from our leader was due. It was a time when our nation was emerging from a period of damaging and far-reaching erosion of rights and contamination of institutions, a critical moment in our nations’ history.

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when a Bill of Rights, again to quote Albie Sachs, should have been “considered necessary”\(^7\), and when civic support and momentum could have been garnered to design a product of our history for our future, which sought to expand our rights rather than confine their sphere to a rote exchange between two often antagonistic arms of government.

To its credit and that of its warriors, the consultation, as we have heard, attracted tens of thousands of submissions, including some international contributions and a cache of postcards. Many of these pointed to inadequacies in the present system and offered proposals for remedy. This investment from civil society is significant and it signals to Government a respectable degree of readiness to engage in the negotiation of our nation’s most fundamental expression of our core principles, values and democratic aspirations. But the starting point for the negotiation has meant that the opportunity to develop an authentic bill of rights was undermined by executive stipulation and inevitably any document that emerges from this process will be unrepresentative (in all senses) and burdened by compromise and short-term arrangements, a ‘deal document’ which overwhelmingly panders to pragmatism. Such a process will risk an outcome which is procedurally clumsy and wanting in substance.

If the Rudd Government is to differentiate itself from its predecessors, it could do well to rise above the politics of gesture and take seriously the development of our rights dispensation. Its failure to trust the nation with

\(^7\) ibid at p 30
an open mandate and to simultaneously prepare the ground and lead us towards the mature evolution of our democracy, has regrettably placed the legitimacy of the process at risk. To return to the promise from our Attorney-General: what could be different about human rights under a Rudd Labor Government, is that its deliberations about the national manifestation of rights, currently stuck in an abstracted legal clench, are expanded and imbued with the historical and moral considerations necessary to create the rich fabric with which to line our contemporary, authentic and enduring Great Charter.

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