Rights, reform and the Australian Constitution: A reflection on the Human Rights Consultation and Report

Centre for Comparative Constitutional Studies Conference
Melbourne, 27 November 2009

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A HRA and the Constitution

• Constitutional **rules** v’s constitutional **visions**.

• Fitting within a constitutional vision of the separation of powers:
  – Judicial interpretation of HR interpretation as legislation?
  – Judicial interpretation of ESC rights.
  – Declarations of incompatibility.
National Human Rights Consultation: the Brennan Committee

Consultation website: www.humanrightsconsultation.gov.au

Philip Flood AO (‘alternate member’)
Key findings

• Inadequacies in existing legal regime for HR protection.
• Consequence: the human rights of vulnerable people insufficiently protected.
• These findings paved the way for the substantive recommendations, especially a Human Rights Act (HRA).
Recommendation for a HRA

• Not constitutionally entrenched (cf ToR).
• Rights protected in HRA:
  – ICCPR rights (derogable v’s non-derogable rights).
  – ICESCR rights listed but not justiciable.
• Pre-legislative scrutiny of new Bills.
• Limited interpretive provision.
• ‘Declarations of incompatibility’.
• Cth public authorities must comply with HRA.
Support for a HRA in submissions

- Support: 83% (29,153)
- Oppose: 12% (4,203)
- No view: 5% (1,658)
Official opinion polling on a HRA

Net support for a HRA

- Neutral: 30%
- Net support: 57%
- Net opposed: 14%

- Strongly support
- Support
- Neutral
- Oppose
- Strongly oppose
Alternative: a Human Rights Act ‘lite’?

• Parliamentary scrutiny of Bills against HR standards (Rec’s 6-7).
• Amend *Acts Interpretation Act* to require that, as far as possible consistently with legislative purpose, all Cth legislation should be interpreted consistently with HR list (Rec 12).
• Amend ADJR Act to include advertence to HR list as a “relevant consideration” (Rec 11).
The interpretive provision

“[A]ny federal Human Rights Act [should] contain an interpretative provision ... that requires federal legislation to be interpreted in a way that is compatible with the human rights expressed in the Act and consistent with parliament’s purpose in enacting the legislation.” (Rec 28)

• Key limitation: parliamentary purpose.
• Differs from UK’s HRA, but consistent with Victorian and ACT legislation.
• Designed to avoid House of Lords decision in *Ghaidan*?
Interpretation of human rights

• Concern about justiciability of HR per se: eg, Federal Opposition submission to NHRC.

But:

• Few real (as distinct from hypothetical) examples of judges overstepping the mark.
• In-built limitations on courts.
• Similar standards applied in other contexts.
ESC rights: the problem

A tension in the Brennan Report:

• ESC rights are “important to the community” (p96).

• Sec 51(xxix) allows Cth to legislate for ICCPR rights, but some ICESCR rights lack “sufficient specificity” (p303). ESC rights should not be justiciable in a HRA.
ESC rights: controlling judicial discretion

• More detailed legislative articulation of the content of ESC rights.

• Judicial interpretation:
  – Progressive realisation principle.
  – Reasonable proportionality principle.

• Reliance on parliamentary scrutiny.
Conclusion

• Competing visions: separation of powers and individual rights protection.
• Dialogue model of HRA as a vehicle for reconciling those competing visions.