FOREWORD

STEPHEN GAGELER SC*

The National Human Rights Consultation ('NHRC'), the Report it produced[1] and the Human Rights Framework announced by the Australian government in response to that Report[2] together comprise the latest iteration in our community's collective consideration of human rights and the institutions and instruments of their protection.

The place of human rights in the structure of our nation's institutions has been debated from the very beginning: the third session of the Australasian Federal Convention, held in Melbourne in 1898, witnessed a vigorous argument over the necessity and desirability of incorporating rights protections into the emerging Bill for a federal constitution. More than a century later, some of the views expressed in that debate would be repudiated universally; in other respects, some of the arguments for and against the constitutional protection of rights retain their same basic structure. In the intervening years since that formative decade, different Parliaments have ventured forward in the further legal protection of human rights. All points on the spectrum of ordinary statutes, overarching human rights legislation and constitutional reform have been pursued at different times. Those pursuits have varied in their scope, their character and in their degree of success.

The NHRC and its outcomes must be appreciated in the context of this on-going, intergenerational conversation about the protection of human rights. This moment is not the first, and will not be the last, contribution to that conversation. Nor should it be overlooked that the periodic 'human rights' moments punctuate a continuing practical commitment by our legal institutions to respecting and developing the dignity of the individual through the administration and adjudication of statute and common law. But to observe these facts is not to marginalise the significance of the moment. The editors of this thematic issue of the *University of New South Wales Law Journal* are to be commended for recognising this important event and for their timely publication of a collection of reflections that are both thoughtful and thought-provoking.

Academic analysis and criticism play a vital role in our robust legal and political processes. The recognition of human rights education as a priority in the

* Solicitor-General of Australia.

1 National Human Rights Consultation Committee, *National Human Rights Consultation Report* (2009).

2 Australian Government, *Australia's Human Rights Framework* (2010).

Human Rights Framework underscores the importance of the role that scholars and teachers can play. Those who author journal articles are situated to contribute to public understanding in a way that other participants in the wider system may not be. It is neither a superior nor inferior position they occupy; but it is qualitatively different. For example, the considerable time dedicated to study of a particular subject matter enables authors to develop and articulate deep and nuanced perspectives that may not always be possible in the mainstream media where immediacy and brevity constrain communication. Another instance of the unique character of journal articles is recognised in their expressive function: an academic author may, quite properly, develop a normative position to which to seek to persuade others. In that respect, the academic author differs from the legal technician who is asked to provide advice rather than a position. In the constitutional sphere, the legal technician's advice will probably take the form, at least implicitly, of a prediction as to the views of the High Court as they may be ascertained at that point in time. Legal advice states the law as it is thought to be, not necessarily as it ought to be. It must do so in a straightforward manner, sensitive to the probable reliance upon the advice. And it is addressed to a client, for whom the overall evaluation of the position is more immediately important than a detailed, academic consideration of possibilities.

The contributors to this volume fulfil the distinctive academic role with aplomb. One seeking scholarly analysis of the NHRC will be well served by the collection, as will one interested in the normative debates that surround the politics of human rights protection. Though united thematically by their shared attention to the NHRC, the articles represent an admirably diverse set of perspectives and concerns.

Lyn Carson and Ron Lubensky put to one side the product of the NHRC in order to analyse the process of consultation itself. They highlight one of the unique features of this particular moment in the human rights conversation. Unlike the debates at Federation, the NHRC was not a convention of statesmen, but of a much wider public. Unlike previous proposals for legislative or constitutional reform, the public were engaged *before* a political commitment had been made to one path or another. The questions put to the people did not admit of a 'Yes' or 'No' answer. The authors' assessment of the consultation process not only offers a useful resource for understanding the mechanics of the consultation; it highlights the intrinsic, rather than purely instrumental, value in public participation and constitutes the NHRC as a rough model for future public engagement by governments.

The other contributions focus squarely on the product of the NHRC and, in particular, the recommendation that Australia adopt a federal Human Rights Act. Only Edward Santow focuses in any large degree on the other recommendations made, and that is as a counterpoint to the Human Rights Act proposal, which he defends with evident passion. His comparison of a Human Rights Act with alternative measures sympathetically draws out some of the unique features of an overarching human rights statute, while also reminding us of the broader ambit of the NHRC.

The remaining six pieces are concerned primarily with the recommended Human Rights Act. A reader will find both retrospective and prospective insights into the proposed Act, as well as analyses of its technical aspects. Retrospective insights are found in Helen Watchirs' and Gabrielle McKinnon's review of the operation of the *Human Rights Act 2004* (ACT) and A T H Smith's overseas perspective from New Zealand and the United Kingdom. Both of those articles have the virtue of being based on concrete experience, rather than hypothesis. They remind us that despite the intense focus in some quarters upon advocating for or against a federal Human Rights Act, such legislation cannot be an end in itself. Should Parliament enact one, it will spawn new legal questions, puzzles and choices. Those questions, puzzles and choices have been confronted by others elsewhere. The historical lessons from those other jurisdictions are helpfully explored in these articles.

Justin Gleeson and H P Lee, on the other hand, look prospectively at some of the potential consequences for the *Australian Constitution* of a Human Rights Act. Although the terms of reference set for the NHRC Committee expressly excluded consideration of constitutionally entrenched human rights protections,[3] both Gleeson and Lee recognise the small-c constitutional changes that 'ordinary' legislation can effect. The *Australian Constitution* is dominated by the structural pillars of federation and the separation of powers, rather than individual rights or direct regulation of the relationship between the government and the governed. But Gleeson and Lee show us the effect that human rights legislation may have on those constitutional structures. Gleeson teases out the potentially limiting effects of a federal Act on the constitutional powers of the states and does so with sensitivity to practical political considerations as well as the strict legal position. Lee considers how a Human Rights Act will catalyse change in the methods of the High Court. He foresees a court grappling with concepts of proportionality, balancing and deference and turning increasingly to the resources of foreign jurisprudence. Both articles show foresight and are likely to provoke closer consideration of other ways in which human rights legislation may alter constitutional orthodoxies.

Each of the contributions from Helen Irving and Andrew Byrnes considers the NHRC and its recommendations in considerable depth along a usefully confined axis. For Irving, that axis is the constitutional imperatives of Chapter III of the *Constitution*; for Byrnes, it is the status of economic and social rights. Interestingly, the pieces highlight the divergence of views that surround proposals for human rights reform. Irving's cautious analysis doubts the constitutional validity of the dialogue model and the remedy of the declaration of incompatibility. Byrnes expresses disappointment at the recommendations not going even further to bring within the purview of the courts economic and social rights on an equal footing with civil and political rights.

No one could complain about the currency of the articles in this volume. All have taken account of the Human Rights Framework announced in April. Yet the

3 National Human Rights Consultation Committee, above n 1, 383.

collective focus on a Human Rights Act may strike the reader as puzzling, given that the Framework did not embrace that recommendation. To the puzzled reader, let me say that the scholarship recorded within these pages will continue to inform the Human Rights Act debate for some years to come. Equally importantly, this volume captures a significant moment in time. The collection in a single volume of the reactions of leading commentators to the NHRC, the Report and Framework is a most valuable resource. When its contemporary significance wanes, its historical value will remain.