

## RAISING EXPECTATIONS OF DEMOCRATIC PARTICIPATION: AN ANALYSIS OF THE NATIONAL HUMAN RIGHTS CONSULTATION

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### I INTRODUCTION

The National Human Rights Consultation ('NHRC'), a public inquiry initiated by the Australian government in December 2008 to examine the protection and promotion of human rights, claimed that it had 'by far the largest response' ever achieved in such a national inquiry.<sup>1</sup> Commentators in the mainstream media congratulated the National Human Rights Consultation Committee ('NHRCC') for running an exercise of exemplary participatory democracy. The purpose of this article is to take a closer look at these claims about democratic participation.

The practice of public participation has moved forward confidently in the last decade, informed by deliberative democratic theory<sup>2</sup> and a growing list of case studies. We position our analysis with some background about public inquiry and its relationship to some theoretical and practical aspects of democratic participation.

Communities of practice are evolving around the innovative design of engagement processes that variously invite partisan stakeholders and the general

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1 National Human Rights Consultation Committee, *National Human Rights Consultation Report* (2009) 5 ('Report').

2 See generally John S Dryzek, *Deliberative Democracy and Beyond: Liberals, Critics, Contestations* (Oxford University Press, 2000); Simone Chambers, 'Deliberative Democratic Theory' (2003) 6 *Annual Review of Political Science* 307; Nancy Roberts, 'Public Deliberation in an Age of Direct Citizen Participation' (2004) 34 *American Review of Public Administration* 315; Dennis F Thompson, 'Deliberative Democratic Theory and Empirical Political Science' (2008) 11 *Annual Review of Political Science* 497.

public. To guide and evaluate such processes, many principled frameworks have been cast. In this analysis of the NHRC process we apply a particular framework that emerged from a recent collaboration amongst Australian consultation practitioners.

The analysis will show that the NHRCC went well beyond their brief in order to attract public participation. However, the lack of deliberative design hindered the inquiry from reaching a fully representative range of perspectives about the issues of human rights law in Australia.

The focus here is on the *process design* used to involve Australians. It is for others to discuss the recommendations derived from the NHRC, bearing in mind that a different process might have yielded different results.

## II BACKGROUND

Consider the apogee of direct democracy: a national referendum to elect an idea rather than a politician. In Australia, only through referenda can the public control the *design* of governance and its structures. In the typical policy cycle<sup>3</sup> policies and regulations drafted by the executive and bureaucracy at any level of government are rarely presented to the public until they are fully formed with a political commitment to proceed. Furthermore, policy consultation is rarely open-ended enough to accept unexpected input, especially from the public.

Independent public inquiries are commissioned by government to study a specific situation at arms-length, allowing for criticism of government action or inaction that may have fuelled the situation. Royal Commissions are the most formal type of public inquiry, with procedures set in legislation<sup>4</sup> to ensure that they comply with judicial conventions. The scope of their investigation and analysis is strictly limited, but commissioners may apply any methods to gain insight so long as public transparency is maintained.

Many Royal Commissions are established to investigate disaster or malevolence that occurred in the past, with a brief to make recommendations to avert or contain similar events in the future. The search for deleterious causes and the inevitable reticence of some witnesses leads commissioners to approach such inquiries like prosecutors.

More recently, government Ministers have launched *taskforces* and *public consultations* to independently investigate phenomena with less formality and more flexible scope. Rather than investigating failures of the past, these inquiries tend to be forward facing, examining how departmental policy can and should adapt to changing economic, social or international circumstances, for example. The chairperson of a taskforce or consultation establishes the operating

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3 Catherine Althaus, Peter Bridgman and Glyn Davis, *The Australian Policy Handbook* (Allen & Unwin, 4<sup>th</sup> ed, 2007) 32–42.

4 *Royal Commissions Act 1902* (Cth) ('RCA').

procedures, which may be set in stone at the start or evolve as the investigation proceeds and widens.

This nascent adaptability is countered by the Australian Law Reform Commission's ('ALRC') introspective 2009 review of the *RCA*. Perhaps unsurprisingly, it recommends that the second tier of inquiry, 'Official Inquiries', be formalised in statute. The recommendations insist on procedural formality in all inquiries and, amongst other provisions, give formal powers to inquirers to choose who they wish to hear and *who to ignore*.<sup>5</sup>

In an increasingly complex and fast changing world we see many situations where newly introduced legislation or regulation is quickly altered or even repealed due to public outrage or other consequences that were predicted by everyone but the law-makers. Public inquiries often reveal the impracticality, partiality and arbitrariness of certain government policies. If the public and broad-based expertise were drawn in more usefully when policies are drafted, perhaps there would be less call for reparative inquiries that shield governing power from public critique.<sup>6</sup>

The problems of regulatory appropriateness and accountability are made even less transparent by the delegation of authority to agencies which are often referred to as the 'fourth branch' of government.<sup>7</sup> They are at arms-length from the government, and include the Australian Prudential Regulation Authority and the ALRC amongst many others. Significantly, these agencies place normative bounds on corporate and public activity, yet they are not directly accountable to them.

Ethan Leib provides an alternative and evocative vision of a fourth branch of government. Rather than looking outwards to people, industries or institutions to limit their activity, Leib's idea is to look inwards to monitor and support the government itself, and guide it into the future. Leib's proposal is to institutionalise processes of facilitated public deliberation to inform legislators, the executive and even judicial or constitutional framers like the ALRC. Leib is acutely aware that entrenched power would bristle at such a suggestion. But routinely convening public deliberative processes can help sustain a government that must serve a diverse population with evolving and fragmented preferences. Through processes of public deliberation, policy makers can ostensibly cast ownership to the people, while maintaining civil dignity. This is the epitome of an embedded deliberative democracy.<sup>8</sup>

This carrot of constructive public engagement could be integrated with the stick of a fourth 'integrity branch' of government, including the Ombudsman and

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5 Australian Law Reform Commission, *Making Inquiries: A New Statutory Framework*, Report No 111 (2009) 21.

6 This pragmatic justification for deliberative engagement is cited by most theorists, including those mentioned earlier: see above n 2.

7 Especially in the American context, as distinct from the power-separated judicial, legislative and executive branches. In the UK, they are commonly called 'quangos'.

8 Ethan J Leib, *Deliberative Democracy in America: A Proposal for a Popular Branch of Government* (Pennsylvania State University Press, 2004).

commissions which unmask corruption of public officers and support whistleblowers.<sup>9</sup> The entire package is consistent with John Keane's description of a growing 'monitory democracy' in which the public demand for transparency is matched by the structural and technical instruments to achieve it, so that those who govern work in full view of their constituents.<sup>10</sup> The ALRC's report on its review of the *RCA* recommended that all Royal Commissions and official inquiries be administered by an independent department of government existing solely for that purpose.<sup>11</sup> But rather than centrally control inquiry, Leib's advisory branch approach transforms and strengthens the relationship between such a department and the public into a genuinely transparent partnership.

### III THE NHRC

It is with these democratic potentials in mind that the authors examine an important exploratory inquiry, recently concluded in Australia, about a topic that affects the entire population: human rights.

The NHRC was established by the Attorney-General's Department in 2008.<sup>12</sup> It was designed to be less formal than a Royal Commission, but more formal than a taskforce. It was structured like a Commission, and carried out by a committee of eminent Australians knowledgeable about human rights issues but offering different perspectives.<sup>13</sup> Its scope was well defined, with terms of reference that stipulated the extent of public engagement in detail. But the NHRCC could adopt procedures that suited its evolving investigative needs.

In naming the exercise a 'consultation', the terms of reference begin by stating that the main task of the NHRCC was to 'ask the Australian community' three central questions about protecting and promoting human rights in Australia.<sup>14</sup> To 'ask' is elaborated to mean seeking a diversity of views and identifying key issues. The word 'community' is used euphemistically to mean everybody in Australia, regardless of citizenship, with inclusion of rural and regional residents specifically mentioned. The NHRCC was expressly limited to identifying options which 'preserve the sovereignty of the Parliament and [do] not include a constitutionally entrenched bill of rights'.<sup>15</sup> The NHRCC had to

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9 Chief Justice James Spigelman, 'The Integrity Branch of Government' (Paper presented at the National Lecture Series for the Australian Institute of Administrative Law, Sydney, 29 April 2004).

10 John Keane, *The Life and Death of Democracy* (Simon & Schuster, 2009) xxvii, pt 3.

11 Australian Law Reform Commission, above n 5, 14.

12 National Human Rights Consultation Committee (2010) National Human Rights Consultation <[www.humanrightsconsultation.gov.au](http://www.humanrightsconsultation.gov.au)>.

13 Human rights law activist and academic Frank Brennan (Chair); former broadcaster Mary Kostakidis; former Australian Federal Police Commissioner Mick Palmer; barrister Tammy Williams with a special interest in Aboriginal, gender and youth rights; and later former senior public servant and diplomat Phillip Flood as an alternate member to Mick Palmer.

14 National Human Rights Consultation Committee, *Terms of Reference* (2008) National Human Rights Consultation <[www.humanrightsconsultation.gov.au](http://www.humanrightsconsultation.gov.au)>.

15 Ibid.

report the key issues and the advantages, disadvantages and public support level 'for each option it identifies'.<sup>16</sup>

The NHRCC had a small staff ('Secretariat')<sup>17</sup> seconded from the Attorney-General's Department to administer the NHRC and 10 months to complete its work.<sup>18</sup> The NHRC had a significant but not unlimited budget of A\$1.9 million.<sup>19</sup> Due to the NHRCC's determination to reach all corners of Australia, and the overwhelming number of submissions, the NHRC took two months longer than initially planned. They obtained their own internet domain (humanrightsconsultation.gov.au) and established an easy-to-use website as the primary and ongoing channel to communicate with the mainstream media and the public. Activity in the NHRC was taken up in national and regional radio, television and newspaper reporting and commentary, but resources for publicity were limited.

Anybody, whether with a general interest or with special legal expertise, was invited to make a submission through the website or by post.<sup>20</sup> Several categories of rights and responsibilities were suggested, but an 'other' category was also provided. In total, there were over 35 000 submissions.<sup>21</sup> However, the GetUp! and Amnesty International activist groups contributed over 14 600<sup>22</sup> and 10 400<sup>23</sup> submissions respectively, and their overlap is unknown. Online submissions were relatively easy to make and comprised 76 per cent of the total.

We support the use of the web as a primary channel because over 72 per cent of Australian households have internet access,<sup>24</sup> supplemented by free internet access at over 200 public libraries in metropolitan, regional and rural centres across the country.<sup>25</sup> Thus, we believe that internet penetration was sufficient to expect individuals who follow national affairs through mainstream media to at least be able to gain online access through family, friends or community services.

In addition, over 6000 people registered to attend 66 'community roundtable' sessions chaired by a NHRCC member in 52 localities around Australia. GetUp! claims that over two thirds of attendees were its members who were encouraged to participate through their subscriber email campaign.

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16 Ibid.

17 The staff were referred to as a Secretariat, a branch of the Attorney-General's Department.

18 Launched 10 December 2008, consultations started in February 2009 and finished July 2009; Report submitted 30 September 2009.

19 Commonwealth Attorney-General's Department, *Annual Report 2008–2009* (2009) [ch 1.2] <[http://www.ema.gov.au/www/agd/agd.nsf/Page/PublicationsAnnual\\_ReportsAnnual\\_Report\\_2008](http://www.ema.gov.au/www/agd/agd.nsf/Page/PublicationsAnnual_ReportsAnnual_Report_2008)>.

20 Most of the detail in this section is reproduced from National Human Rights Consultation Committee, above n 1, ch 5.

21 Ibid v.

22 GetUp! only claims 10 424 submissions: *GetUp Submission to the National Human Rights Consultation* (2009) [6] <[www.getup.org.au/files/campaigns/getuphumanrightssubmission.pdf](http://www.getup.org.au/files/campaigns/getuphumanrightssubmission.pdf)>.

23 See Amnesty International Australia, 'Over 10,000 People Made the Call' (Press Release, 15 June 2009).

24 Australian Bureau of Statistics, *8146.0 Household Use of Information Technology, Australia, 2008–09* (16 December 2009) <<http://abs.gov.au/ausstats/abs@.nsf/mf/8146.0>>.

25 Australian Library and Information Association, *Internet Access in Public Libraries Survey 2008* (2009) <<http://www.alia.org.au/advocacy/internet.access/internet.access.survey.2008.pdf>>.

An open online forum<sup>26</sup> was active for five weeks, moderated by staff facilitators. The Chair of the NHRCC wrote frequent comments asking questions to expand the topics. Several human rights law experts with differing views were invited by the Chair to write informative responses. This ‘Online Consultation’ attracted approximately 300 comments in five threads<sup>27</sup> most of which were lengthy and articulate. A handful of online participants dominated the postings.

A social research company, Colmar Brunton,<sup>28</sup> was outsourced to conduct 15 focus groups in metropolitan and regional centres ‘in order to cast light on the experiences and opinions of marginalised and vulnerable groups – individuals who are thought to be especially at risk of having their rights threatened or violated’.<sup>29</sup> These people, including homeless, disabled, immigrant and aged, were accessed through the non-government organisations that assist them.

The NHRCC engaged people in other ways too. They commissioned a telephone opinion survey of 1200 randomly selected citizens. They also met with many influential individuals and groups including judges, politicians, public servants and representatives of non-government organisations. The decision to perform this extra research was made midstream to validate qualitative findings and hear voices not heard in submissions and community roundtables.

The NHRC culminated in three days of ‘public hearings’ with invited speakers making speeches, engaging in panel discussion and debate, and answering questions from the NHRCC and what turned out to be a relatively small audience.

Some of these consultation activities were planned, whilst other forms arose during the life of the NHRC (see Table 1).

Table 1: **Engagement Methods Applied by the NHRC**

Method	Initially Planned
Submissions	Y
Community roundtables	Y
Private meetings	N
Online forum	N
Focus groups	N
Telephone survey	N
Public hearings	Y

So, to what extent were the people really engaged?

26 National Human Rights Online Consultation (19 May 2009) <[www.openforum.com.au/NHROC](http://www.openforum.com.au/NHROC)>.

27 The Report recorded 8932 posts: National Human Rights Consultation Committee, above n 1, 459–60. This is inaccurate because 8932 is the number of distinct ‘hits’.

28 Colmar Brunton, *Colmar Brunton – Industry Focused Market Research* <[www.cbr.com.au](http://www.cbr.com.au)>.

29 National Human Rights Consultation Committee, above n 1, 13.

## IV ENGAGING ENGAGEMENT

A pushback has been gaining momentum against the growing, worldwide democratic deficit<sup>30</sup> and general absence of public input into policy and law making. Australian citizens who accept an invitation to dialogue about public policy believe that they can help redirect the country towards democratic surplus.<sup>31</sup> Carmen Malena's observation about poor governance in developing countries is equally relevant for longstanding democracies such as Australia:

There is also growing consensus that *good* – for example, transparent, accountable, effective, and equitable – governance cannot be achieved by governments alone. Good governance requires strong, effective government *and* the active involvement of citizens and civil society organizations.<sup>32</sup>

Consultation, public participation and civic engagement are real-world expressions of democracy. They occur against a theoretical backdrop. The conceptual framework within which they sit includes all theories of democracy but, in particular, participatory or deliberative democracy.<sup>33</sup> Though these theories have a vast literature spanning the 1970s to the present (and with antecedents in Ancient Athens), this paper is less concerned with their historical and conceptual background than with the foreground: the way democratic participation is currently expressed. The authors are especially interested in the decades which followed the 'deliberative turn',<sup>34</sup> and the absence or presence of public deliberation in Australia today.<sup>35</sup>

In its everyday expression, an army of professional consultants has emerged along with professional associations, such as the International Association for Public Participation ('IAP2') which created the Spectrum and Core Values to which we will refer, that monitor and facilitate the public participation

30 A term coined by Bill Dunn, UK Member of the European Parliament, in a 1986 pamphlet about public institutions and governments that fail to live up to expected democratic ideals: Bill Newton Dunn, *The Democratic Deficit* (European Democratic Group, 1986).

31 Lyn Carson, 'Creating Democratic Surplus through Citizens' Assemblies' (2008) 4(1) *Journal of Public Deliberation* <<http://services.bepress.com/jpd/vol4/iss1/art5>>.

32 Carmen Malena, 'Building Political Will for Participatory Governance: An Introduction' in Carmen Malena (ed), *From Political Won't to Political Will: Building Support for Participatory Governance* (Kumarian Press, 2009) 3, 3 (emphasis in original).

33 See generally Nadia Urbinati and Mark E Warren, 'The Concept of Representation in Contemporary Democratic Theory' (2008) 11 *Annual Review of Political Science* 387.

34 A term coined by John Dryzek to describe the shift in thinking, circa 1990, whereby democratic legitimacy is derived from authentic deliberation among those affected by a decision. See, eg, Dryzek, above n 2.

35 See also Lyn Carson and Janette Hartz-Karp, 'Adapting and Combining Deliberative Designs: Juries, Polls and Forums' in John Gastil and Peter Levine (eds), *The Deliberative Democracy Handbook: Strategies for Effective Civic Engagement in the 21st Century* (Jossey-Bass, 2005) 120; Robert E Goodin and John S Dryzek, 'Deliberative Impacts: The Macro-Political Uptake of Mini-Publics' (2006) 34 *Politics & Society* 219; Carolyn M Hendriks, 'Consensus Conferences and Planning Cells: Lay Citizen Deliberations' in John Gastil and Peter Levine (eds), *The Deliberative Democracy Handbook: Strategies for Effective Civic Engagement in the 21st Century* (Jossey-Bass, 2005) 80; Simon Niemeyer, 'Deliberation in the Wilderness: Displacing Symbolic Politics' (2004) 13 *Environmental Politics* 347; John Parkinson, 'Why Deliberate? The Encounter between Deliberation and New Public Managers' (2004) 82 *Public Administration* 377.

community of practice.<sup>36</sup> These professionals have formulated *practice* theories to guide practitioners. In doing so, they have noted that there are many terms for engagement, each holding a different promise about the relationship between citizens and the government. Sometimes more is squeezed out of a word like ‘consultation’ than its literal meaning affords.

Sherry Arnstein’s well-known Ladder,<sup>37</sup> with its eight rungs denoting various levels of public participation – manipulation, therapy, informing, consultation, placation, partnership, delegated power, citizen control – has formed the basis for many newer categorisations. Arnstein saw consultation as mere tokenism and many still hold this discounting view. Hence, the term ‘engagement’ is more commonly used by public participation practitioners today.

The IAP2 defines a spectrum of increasing levels of engagement by the participating public and corresponding levels of ‘public impact’, as shown in Table 2. At the lowest level, to ‘inform’ the public barely acknowledges their existence. At the highest, ‘empowerment’ is a full devolution of control to participants in the decision-making process. Most public engagements about policy setting are manifested somewhere in the middle of the Spectrum.

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36 See Carolyn M Hendriks and Lyn Carson, ‘Can the Market Help the Forum? Negotiating the Commercialization of Deliberative Democracy’ (2008) 41 *Policy Sciences* 293.

37 Sherry R Arnstein, ‘A Ladder of Citizen Participation’ (1969) 35 *Journal of the American Institute of Planners* 216.



Table 2: IAP2 Spectrum of Public Participation<sup>38</sup>**INCREASING LEVELS OF PUBLIC IMPACT**

<b>Inform</b>	<b>Consult</b>	<b>Involve</b>	<b>Collaborate</b>	<b>Empower</b>
Objective:  To provide the public with balanced and objective information to assist them in understanding the problem, alternatives, opportunities and/or solution.	Objective:  To obtain public feedback on analysis, alternatives and/or decision.	Objective:  To work directly with the public throughout the process to ensure that public concerns and aspirations are consistently understood and considered.	Objective:  To partner with the public in each aspect of the decision including the development of alternatives and the identification of the preferred solution.	Objective:  To place final decision-making in the hands of the public.
Promise to the public:  We will keep you informed.	Promise to the public:  We will keep you informed, listen to and acknowledge concerns and aspirations, and provide feedback on how public input influenced the decision.	Promise to the public:  We will work with you to ensure that your concerns and aspirations are directly reflected in the alternatives developed and provide feedback on how public input influenced the decision.	Promise to the public:  We will look to you for direct advice and innovation in formulating solutions and incorporate your advice and recommendations into the decisions to the maximum extent possible.	Promise to the public:  We will implement what you decide.
Example Tools:  Fact sheets Web sites Open houses	Example Tools:  Public comment Focus groups Surveys Public meetings	Example Tools:  Workshops Deliberative polling	Example Tools:  Citizen Advisory Committees Consensus-building Participatory decision-making	Example Tools:  Citizen Juries Ballots Delegated decisions

The IAP2 also sets a normative agenda in outlining seven ‘Core Values’ which lay the foundation for the practice of public participation. These Core Values (Table 3) are intended to guide the design of processes that bring the government together with the people it serves:

38 International Association for Public Participation, *Spectrum of Public Participation* (2007) IAP2 <[http://www.iap2.org/associations/4748/files/IAP2%20Spectrum\\_vertical.pdf](http://www.iap2.org/associations/4748/files/IAP2%20Spectrum_vertical.pdf)>.

Table 3: IAP2 Core Values for the Practice of Public Participation<sup>39</sup>

1. Public participation is based on the belief that those who are affected by a decision have a right to be involved in the decision-making process.
2. Public participation includes the promise that the public's contribution will influence the decision.
3. Public participation promotes sustainable decisions by recognizing and communicating the needs and interests of all participants, including decision makers.
4. Public participation seeks out and facilitates the involvement of those potentially affected by or interested in a decision.
5. Public participation seeks input from participants in designing how they participate.
6. Public participation provides participants with the information they need to participate in a meaningful way.
7. Public participation communicates to participants how their input affected the decision.

Note the reiteration of 'decision' and 'decision-making' in the Core Values. The NHRC had no decision-making power beyond the completion of a report with recommendations to the Attorney-General, so 'decisions' should be seen within that limited context – that is, the extent to which input contributed directly to the Report. The performance of the NHRC can only be analysed in that limited context.

Any public engagement occurs in a particular institutional or policy context, amidst a policy network of bureaucrats, elected representatives, stakeholder groups and a largely ignored public. Efforts to consult are predicated on an understanding that citizens want to have a say in matters which affect them, complemented by the policy makers' quest to legitimate their actions. The result mostly falls short of the public's ideal, with policy makers often ticking the consultation box too late or too inadequately for public input to have made any difference to decisions. Consultation inevitably involves identified experts and is restricted to the relative safety of public hearings or public submissions with an administrator reducing the rich lode of public input to a brief report.

Against this background of consultation as a tokenistic process, there have been hundreds of demonstrations in Australia of consultation processes that do

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39 International Association for Public Participation, *Core Values for the Practice of Public* (2007) IAP2 <<http://www.iap2.org/associations/4748/files/CoreValues.pdf>>.

more than ‘ask’ citizens what they think about a policy option.<sup>40</sup> Instead, they involve citizens in a public deliberation to either prioritise an agenda or make recommendations, some of which have been binding. For example, a citizens’ jury is like its judicial cousin in randomly selecting residents of a community to design, through facilitated deliberation, a solution to a contentious policy problem, such as infrastructure development and its impacts.<sup>41</sup>

The NHRC was broader and more open-ended than is typical, despite excluding the option of a constitutionally entrenched Bill of Rights. The NHRCC also produced an unusually frank report summarising its consultation effort. In their own effort to report the plurality of public opinion and concern about human rights in Australia, and in recommending their dialogue model of human rights embedment in statute, they would surely agree that ‘policy formulation is nearly always an iterative process marked by collective deliberation and political compromise’.<sup>42</sup>

The convening Department and the Secretariat wanted to consult well, and drew upon precedents such as the processes to develop ‘human rights legislation in Victoria, the Australian Capital Territory and overseas – in particular, in the United Kingdom and New Zealand’<sup>43</sup> and other public inquiries.<sup>44</sup> These endeavours defaulted to known mechanisms such as information booklets, public meetings and written public submissions – although consultations on human rights in Australia have also targeted particular constituencies such as young people and Indigenous Australians. The NHRC was able to learn from these experiences and build on them.

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40 See Lyn Carson, *An Inventory of Democratic Deliberative Processes in Australia: Early Finding* (January 2007) Active Democracy <<http://www.activedemocracy.net/articles/engaging%20comm%20summary%20070115.pdf>>. This inventory covers a 30 year period during which 78 examples of deliberative designs were uncovered. These deliberative experiments used random selection to achieve a diverse sample of citizens. The authors know of hundreds more deliberative designs which do not meet the inventory’s strict selection criterion.

41 Lyn Carson and Ron Lubensky, ‘Citizen’s Juries Pave the Way to the Law Courts’ (2008) 33 *Alternative Law Journal* 10.

42 Peter Shergold, ‘Valedictory Lecture’ (Speech delivered at Australian Public Service Commission Secretaries’ Valedictory Lecture, Canberra, 8 February 2008) <<http://www.apsc.gov.au/media/shergold080208.htm>>.

43 National Human Rights Consultation Committee, above n 1, 4.

44 See, eg, Department of Families, Housing, Community Services and Indigenous Affairs, *Report on the Outcomes of the First Phase of Consultation for a National Indigenous Representative Body (NIRB)* (2009) <[http://fahcsia.gov.au/sa/indigenous/progserv/engagement/NIRB/Pages/outcomes\\_first\\_phase.aspx](http://fahcsia.gov.au/sa/indigenous/progserv/engagement/NIRB/Pages/outcomes_first_phase.aspx)>.

## V EVALUATION FRAMEWORK

In 2005, a well attended conference<sup>45</sup> about public participation, convened by the IAP2 and co-sponsored and sanctioned by the United Nations, was held in Brisbane, Australia. Prior to and during the conference, a group of researchers and practitioners (including one of the authors) deliberatively developed a set of ‘best practice’ principles which was then endorsed by the conference delegates. It became known as the ‘Brisbane Declaration’. These principles go well beyond consultation, towards the aspiration of full democratic engagement.

Certainly, a healthy democracy is marked by willing and active public participation. It may end with voting, but the public should also be involved from the start in framing the choice ideas. In addition to attracting interested public participants, evidence is required that the deliberative nature of the engagement is held up to democratic ideals. But, as the conference delegates discovered, this is quite difficult to operationalise and measure.<sup>46</sup>

Under the stewardship of Allison Hendricks, for the IAP2, an evaluation framework was designed, based on the original principles developed by the practitioners at the International Conference on Engaging Communities.<sup>47</sup> The framework also draws on the empirical work on public engagement evaluation by Peavey,<sup>48</sup> and Rowe and Frewer.<sup>49</sup> The framework (see Table 4) is intended to be used as a checklist to analyse the extent to which an engagement process meets those ‘best practice’ principles the practitioners finally set for themselves.

The principles established by the practitioners sit comfortably alongside the normative claims of theorists. Amongst these, the authors would include Jürgen Habermas’ communicative action and discourse ethics,<sup>50</sup> Steven Lukes’ dimensions of power<sup>51</sup> and Bernard Manin’s analysis of the flawed principles of representative democracy.<sup>52</sup> The ‘Brisbane Declaration’ is closely aligned with the empirical ‘turn’ of deliberative theorists mentioned earlier.

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45 International Conference on Engaging Communities Brisbane, Australia, 14–17 August 2005. See International Conference on Engaging Communities (12 August 2005) <<http://www.engagingcommunities2005.org/home.html>>.

46 See David Beetham (ed), *Defining and Measuring Democracy* (Sage, 1994); Lawrence Pratchett, ‘New Fashions in Public Participation: Towards Greater Democracy?’ (1999) 52 *Parliamentary Affairs* 616.

47 The evaluation framework is implemented as a proprietary software package: see Darzin Software, *Darzin Stakeholder Management Software* (2009) <<http://www.darzin.com>>.

48 Fran Peavey, ‘Strategic Questioning: An Approach to Creating Personal and Social Change’ (1995) 40 *In Context* 36 <<http://www.context.org/ICLIB/IC40/Peavey.htm>>.

49 Gene Rowe and Lynn J Frewer, ‘Public Participation Methods: A Framework for Evaluation’ (2000) 25 *Science, Technology & Human Values* 3; Gene Rowe, Roy Marsh and Lynn J Frewer, ‘Evaluation of a Deliberative Conference’ (2004) 29 *Science, Technology & Human Values* 88.

50 Jürgen Habermas, *Moral Consciousness and Communicative Action* (Christian Lenhardt and Shierry Weber Nicholson trans, MIT Press, 1990) [trans of: *Moralbewusstsein und Kommunikatives Handeln* (first published 1983)].

51 Steven Lukes, *Power: A Radical View* (Palgrave MacMillan, 2<sup>nd</sup> ed, 2005).

52 Bernard Manin, *The Principles of Representative Government* (Cambridge University Press, 1997).

Table 4: Evaluation Framework

PRINCIPLE	INDICATOR
Integrity	<ul style="list-style-type: none"> <li>• Openness and honesty about scope and purpose</li> <li>• Appreciate respective roles and responsibilities</li> </ul>
Inclusion	<ul style="list-style-type: none"> <li>• Opportunity for a diverse range of values and perspectives to be freely expressed and heard</li> <li>• Representative of the population</li> <li>• Appropriate and equitable opportunity for all to participate</li> </ul>
Deliberation	<ul style="list-style-type: none"> <li>• Sufficient and credible information for dialogue</li> <li>• Space to weigh options, understand and reframe issues, movement towards developing shared understanding, identifying common ground and shared values</li> </ul>
Influence	<ul style="list-style-type: none"> <li>• People have input in how they participate</li> <li>• Policies and services reflect their involvement, and their impact is apparent</li> </ul>
Capacity	<ul style="list-style-type: none"> <li>• Address barriers</li> <li>• Build capacity and confidence of people to participate meaningfully</li> <li>• Develop confidence in the process and the value of their participation</li> <li>• Engender a shared sense of ownership and commitment to the process and outcome</li> <li>• Adequately resource indigenous peoples and the poor and marginalised to participate meaningfully in the broader community</li> <li>• Ensure that they have a stake in the outcome and benefit equitably as a result of being involved</li> </ul>
Sustainable decisions	<ul style="list-style-type: none"> <li>• Transparency</li> <li>• Subject to evaluation</li> <li>• Recognise and communicate the needs, interests and values of all parties, including decision makers</li> <li>• Decision makers find the output useful and have sufficient confidence to act on the community's recommendations</li> <li>• More cohesive and informed communities and governance result from the process</li> </ul>

## VI EVALUATION OF THE NHRC

The NHRC process will now be analysed in terms of this framework. Each principle is shown with an indication of how a consultation could rate well. Each principle is also related to the relevant IAP2 Core Values.

### A Integrity

To be rated well under this principle, participants in the NHRC had to have a clear sense of the scope of the process and their role in it at all times. Further, they would have had a high degree of trust and a good relationship with those conducting or facilitating the process.

The NHRC presented its scope and intentions to the public in an upfront manner. From the start, it published enough about the process on its website, which was designed to be maximally accessible. The site included detailed profiles of each NHRCC member, showing his or her interests in human rights. The NHRCC members were all well-known with undoubted moral character, ensuring their trustworthiness. The NHRCC members appear to have maintained their public respectability throughout.

During community roundtables and the public hearings, the NHRCC members chaired rather than facilitated proceedings. However, according to the Chair, each in her or his own way applied an empathetic, open and attentive style which encouraged active participation. The only evidence available to the authors is quotes in the Report such as this from a participant: ‘The one thing ... at this forum that I’ve really found uplifting is the right we have to challenge and voice our concerns about things that we feel strongly about’.<sup>53</sup>

The government restricted the scope of the NHRC to options in legislation rather than a constitutional Bill that would require passage by a national referendum. Notably, in most submissions, the issue was not how rights are chartered, but that they are at all. That a constitutional Bill would shift the balance of power in rights determination to the judiciary was not stated in the briefing materials. The NHRCC preferred that this be a matter taken up in submissions. Frank Brennan wrote:

Of course that doesn't mean you shouldn't discuss it, or that we won't refer to your opinions in our final report. I have no doubt that this discussion forum will again highlight passionate advocates of the cases both for and against a constitutional bill of rights, as well as the cases for and against a statutory bill of rights.<sup>54</sup>

Members of the NHRCC were able to contextualise each communication turn, situating each event within the wider consultation.<sup>55</sup> The NHRCC

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53 National Human Rights Consultation Committee, above n 1, 9.

54 Frank Brennan, ‘Should Australia Have a Statutory Bill or Charter of Rights?’ on Frank Brennan, *Frank Brennan's Blog* (19 May 2009) <<http://www.openforum.com.au/NHROC/Bill-of-Rights>>.

55 Based on video recordings of the public hearings found on the NHRC website: see Commonwealth Attorney-General's Department, *Videos of Public Hearings* (2009) National Human Rights Consultation <[http://www.humanrightsconsultation.gov.au/www/nhrcc/nhrcc.nsf/Page/PublicHearings\\_VideosofPublicHearings](http://www.humanrightsconsultation.gov.au/www/nhrcc/nhrcc.nsf/Page/PublicHearings_VideosofPublicHearings)>.

demonstrated an attitude of openness and a willingness to listen. Further, the NHRCC altered the overall process in an ‘organic’<sup>56</sup> way because it had the courage to try alternative methods when deficiencies were detected.

The government clearly considered it important to include on the NHRCC people who were household names to inject gravitas into proceedings, a way to encourage citizens to participate. A robust process in itself is rarely enough to establish a high degree of trust. However, these high profile NHRCC members were not there merely for ‘show’. At least one member reported that the Chair worked tirelessly, relentlessly, ‘24/7’ on this project.

## B Inclusion

To be rated well under the principle of inclusion, participants would strongly reflect relevant characteristics of the population. They would be expressing and discussing a variety of opinions, values and needs. The opportunities for expression and discussion would address the communication needs of these disparate communities and the participation opportunities would be as disparate as the communities they are designed to reach. The diversity would typically be achieved through random selection in order to gather together a microcosm of the whole population (these are sometimes called ‘miniature-publics’).

The terms of reference<sup>57</sup> were unequivocal in the requirement for inclusiveness. But the IAP2 Core Value, that those who are affected by changes to human rights legislation should be involved in the NHRC, is only implied.

The Report states that: ‘The Committee resolved to seek out the views and experiences of the broadest possible range of community members interested in human rights – the mainstream public as well as vulnerable and marginalised groups’.<sup>58</sup>

The community roundtables were designed to capture the diverse views of ordinary people all around the country. The Secretariat worked extremely hard to arrange for the NHRCC to travel to remote areas, beyond locations that Qantas could reach, often requiring convoluted travel arrangements.<sup>59</sup> Local radio interviews and advertisements in local newspapers were scheduled to attract participants. Rural meetings typically attracted two dozen attendees, while the large cities required multiple meetings of up to 250 participants each. Random selection was not applied, and the attendees were not surveyed to establish demographic and attitudinal diversity.

In attempting to consult an inclusive sample of communities, the NHRCC were directly affected by exclusionary practices that were the topic of human rights discussion:

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56 Interview with John Boersig (Telephone Interview, 3 December 2009). We interpret ‘organic’ in this context to mean: in response to perceived needs and adapting to available resources.

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

58 Ibid 4.

59 Interview with Mary Kostakidis (Telephone Interview, 4 December 2009). The original list of locations given to the NHRCC by the Attorney-General’s Department were all serviced by Qantas.

The roundtable was to take place at the Bourke Bowling Club, but a large number of Indigenous residents had been banned from the club and so were not able to attend. An impromptu second consultation was held in a different location, so that Indigenous people could have their say.<sup>60</sup>

Members of some minority groups are difficult for government to reach, especially if they come from non-English speaking backgrounds. Such groups may have been under-represented in the NHRC.<sup>61</sup> While the social research was intended to overcome this problem, it is unlikely that the NHRC reached a statistical cross section of the Australian population. For example, youth are generally difficult to engage. The Department of Education, Employment and Workplace Relations convened ‘online discussion ... [with] younger Australians on the Australian Youth Forum website’,<sup>62</sup> and efforts were made to have a presence on Facebook and MySpace.

Special attention should also be given to how the NHRC engaged with Indigenous persons, in terms of both its engagement practices and the Report. The Report noted that:

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. ... 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>63</sup>

However, the limited response of the Indigenous community alluded to here cannot be said to reflect a lack of inclusiveness. The NHRCC did not have a special brief to examine Indigenous rights, but nevertheless made it clear that they were not closed off to the possibility.<sup>64</sup> Furthermore, the NHRCC made special efforts to visit remote communities, both in the roundtables<sup>65</sup> and in private meetings.

In contrast, political activist groups strongly urged their subscribers to participate. From their subscriber communications it is clear that these groups advocate for particular solutions *en masse*. With GetUp! effectively ‘stacking’ some roundtable meetings, the overall diversity of views would have been reduced.

Perhaps the NHRCC recognised that roundtable discussions and public hearings would attract articulate and confident people rather than those with less capability and opportunity to exercise their rights. The flexible approach by the NHRCC led them to commission the social research that was meant to explore the diverse and often passionate views on rights of the vulnerable and

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60 National Human Rights Consultation Committee, above n 1, 22.

61 Interview with Frank Brennan (Telephone Interview, 14 December 2009).

62 National Human Rights Consultation Committee, above n 1, 5.

63 Ibid 212–13.

64 Frank Brennan, ‘As We Have Travelled around Australia ...’ Frank Brennan, *Fr Frank Brennan’s Blog* (21 May 2009) <<http://www.openforum.com.au/NHROC/1stKeyConsultationQuestion>>.

65 National Human Rights Consultation Committee, above n 1, 457.



marginalised. This meant that random selection of participants to guarantee a cross section of participants did occur, but only through a passive form of consultation: the opinion survey.

The Secretariat deserves much praise for pushing for the inclusion of the widest range of voices in the NHRC. It is with good fortune that the Attorney-General's Department was simultaneously working on a policy for social inclusion, so any less attention to this matter by the Secretariat would have been contradictory.

### C Deliberation

To be rated well here, there would be opportunities for informed deliberation including increased understanding of the issues at hand. There would also be opportunities for movement, towards identifying shared values and common ground. This could include capacity building exercises to enable meaningful participation.

In reference to the IAP2 Spectrum, the NHRC's objective and promise lived up to its name and matched the column, 'consult'.<sup>66</sup> The aim was to obtain public input in relation to alternatives and the commitment was to keep the public informed, to listen and acknowledge concerns and aspirations. The NHRC also employed the sort of tools mentioned in the Spectrum: public comment (through written submissions and online activities), focus groups, surveys and public meetings.

From a variety of perspectives, the NHRC provided background information to citizens about human rights topics. Commentary, including critique of the NHRC, was linked from the NHRC website.

It is perhaps unfair to subject the NHRC to analysis using a framework that is predicated upon moving beyond its own objective: to consult. However, if one reads the next column carefully it could be argued that the NHRC moved further along the Spectrum, increasing the level of public impact, and meeting the objective and promise described as 'involve'.<sup>67</sup> It did not stray into the furthest columns, to 'collaborate' or 'empower'.

In-depth deliberation may not have been a defining feature of the NHRC process, but it was encouraged. At the community roundtables, which lasted two hours each, there were three 20 minute table dialogues. At each table, a scribe was nominated from among the participants to record what was said, without judgment. They also had the extra facilitative role of ensuring that everyone had a say. NHRCC members and Secretariat staff in attendance moved between tables. They answered questions when asked and intervened to provide relevant information about the process and about the topics.<sup>68</sup>

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66 See above Table 2.

67 See above Table 2.

68 The authors thank NHRCC member Mary Kostakidis for clarifying the procedure.

The principles of ‘inclusion’ and ‘deliberation’ are inherently linked. The greater the diversity of a deliberating group, the more powerful the deliberation.<sup>69</sup> When participants self-select, diversity of background and worldview cannot be guaranteed. This is another reason why random selection of a miniature-public offers an approach that can supplement more common forms of self-selecting participation.

The Report claimed that some ‘participants felt they had “learnt a lot” about human rights, and a few said they had changed their minds about the best way to protect human rights’.<sup>70</sup> These are positive markers for deliberation. The vast majority of participants wanted some sort of Bill of Rights. Only a minority (primarily church groups) were strongly opposed. The community roundtables were an opportunity to write on-the-spot submissions. But consensus building was not the objective. There was little effort to bridge the gap between the majority and the vocal minority.

Whilst it was frequently discussed, removing the option of a constitutional Bill removed the prospect of argument over that issue. As a consequence most of the claims in discussion were about the areas where rights and responsibilities should be prescribed in legislation and to what extent. At the community roundtables, participants just had to respond to the main questions and direct their responses to the Chair, even if they were contradictory. There was no prioritisation of ideas or options.

The public hearings were also conducted in typical ‘town hall’ fashion, with a panel of experts at the front of the conference room. Certainly, participants were learning as much as the NHRCC members in attendance. But the audience was given only limited opportunities to express points or ask questions of the panel. Within the constraints of time, the NHRCC members made themselves available for direct dialogue with participants, who asked many questions about the process and the topics.

In the authors’ experience, more vulnerable members of any population are more likely to be attracted into spaces that are comfortably conversational than those which appear too formal. It is unclear how well focus groups were able to attract those vulnerable, previously absent voices. Again this principle overlaps with ‘inclusion’. During the outsourced social research, a focus group would have lacked deliberation because it is effectively a group interview with all conversation flowing through the convenor. Similarly, participants in moderated online consultation were not encouraged to explore ideas in a collaborative manner.

The way the NHRCC divided the workload and met frequently helped it become a single voice. As they were forced to hear similar stories and similar prejudices, the members began to coalesce around a shared position. This is what

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69 See, eg, James Surowiecki, *The Wisdom of Crowds* (Random House, 2004); John Gastil, *Democracy in Small Groups: Participation, Decision Making, and Communication* (New Society, 1993).

70 National Human Rights Consultation Committee, above n 1, 9.

we would expect of a deliberative process. So at least the NHRCC performed deliberatively.

### D Influence

To be rated well under this principle, a strong contract would exist, guaranteeing the enactment of recommendations. The community might also play an active role in deciding how they will participate. There would certainly be a clear demonstration of how participants have influenced the outcomes.

This aspect corresponds to the second IAP2 Core Value: 'Public participation includes the promise that the public's contribution will influence the decision'.<sup>71</sup> Again, the consulted public's contribution influenced the production of the Report. Submissions are cited throughout the Report, including sections where the NHRCC outlines its findings. The Chair made it clear early in the project that the government has the final determination about what to do with the recommendations. During the Consultation, he was upbeat about the prospects of influencing government decisions. But later, he expressed scepticism about its likely impact.<sup>72</sup>

The NHRC certainly energised activist organisations like GetUp! and Amnesty International that protest the systemic lack of rights and promote changing legislation to improve human rights. (Reciprocally, the NHRC served to bolster the activist campaigns.) In addition, several books about human rights in Australia were launched during the NHRC, and op-eds appeared in the newspapers. Consequently, influence on the government comes indirectly through people who are encouraged by the NHRC.

This aspect also corresponds to the IAP2 Core Value that '[p]ublic participation seeks input from participants in designing how they participate'.<sup>73</sup> While the public proceedings of the NHRCC did not stick to strict protocols, they determined the agenda and the structures of various conversations. But quite unusually for a public inquiry, the NHRCC augmented the process in large part due to feedback from participants. Nonetheless, participants found unique ways to participate because of the NHRCC's openness. Young people produced a film that was shown at a public hearing, and a teacher brought an entire class to a community roundtable.<sup>74</sup>

It was only through their openness and reflection that the NHRCC recognised the deficiencies in the process that it initially laid out. An experienced process designer brought on board early could have anticipated difficult-to-reach communities since these challenges are routinely encountered in public participation work. The NHRCC could have factored this into the original plan, to ensure that difficult-to-reach communities were heard.

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71 International Association for Public Participation, above n 39.

72 Interview with Frank Brennan (Telephone Interview, 14 December 2009).

73 International Association for Public Participation, above n 39.

74 Interview with Frank Brennan (Telephone Interview, 14 December 2009).

Finally, this aspect also corresponds to the IAP2's Core Value that '[p]ublic participation communicates to participants how their input affected the decision'.<sup>75</sup> Residents of predominantly Indigenous communities reported that too many consultations had not resulted in substantive change – their patience for consultations was spent.<sup>76</sup> It is not yet known if the government's response<sup>77</sup> to the NHRC will compound or alleviate those frustrations.

The Report is well-crafted and comprehensive. It is written in a way that it can be understood by most people, not just constitutional lawyers. It is available and will remain available on the website, for anybody with internet connectivity. The marginalised groups that were sought out for the NHRC (for example, people with low socioeconomic status and remote dwellers) are not likely to have direct access to the Report due to a lack of access to the internet. For those in rural and regional areas with limited online capability, the local library or school would provide access.<sup>78</sup>

Also, the Report is divided into sections which are lightweight to download. Furthermore, immediately after publishing the Report, the Chair appeared in the broadcast media to inform the public about its main recommendations and availability. In this respect the NHRCC cannot be faulted in the way it has tried to communicate its findings, at least electronically, to the widest possible audience.

The Report comments how difficult it was for the NHRCC and Secretariat staff to get through all the submissions.<sup>79</sup> They had to divide the work amongst themselves. They brought in a 'battalion of new graduates' to read, log and summarise submissions.<sup>80</sup> Staff also applied discourse analysis software to scan for clusters of phrases. For all the openness in gaining submissions of various kinds, the synthesis of them was anything but open. It is not clear from the Report how methodically that reduction was achieved.

One of the hallmarks of the sort of deliberative processes that the IAP2 and the evaluation framework designers encourage is that the participants are, at least in part, engaged to perform that synthesis. With deliberation and the help of real-time presentation software,<sup>81</sup> participants can prioritise the combination of ideas that best represents the diversity of public views. The problem was that the NHRCC did not have a representative audience to return to. Their time and budget were limited too.

But to the credit of the NHRCC, the top level structural recommendations which came from analysis of the submissions were brought to the fore during the

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75 International Association for Public Participation, above n 39.

76 National Human Rights Consultation Committee, above n 1, 25.

77 See Australian Government, *Australia's Human Rights Framework* (2010); Robert McClelland, 'Launch of Australia's Human Rights Framework' (Speech delivered at the National Press Club of Australia, Canberra, 21 April 2010).

78 See Australian Library and Information Association, above n 25.

79 National Human Rights Consultation Committee, above n 1, 6.

80 Interview with Frank Brennan (Telephone Interview, 14 December 2009).

81 See, eg, Lyn Carson and Jesse Blackadder (eds), *Australia's First Citizen's Parliament, February 2009* (newDemocracy Foundation, 2009).

final public hearing. While only inviting limited audience participation in the form of questions and comments to the panel, an opportunity was provided for the kind of open, constructive dialogue rarely seen in an official inquiry, especially in regards to where the NHRCC was heading in its recommendations.

## E Capacity

To be rated well under the principle of capacity, participants would be given adequate information and resources to participate meaningfully. They would have a high degree of confidence in the process and believe that their contribution would have an impact. Participants share a high degree of ownership of the process and its outcomes and they benefit from it equitably.

This aspect is about the respect that is offered to participants. It is reflected in the quality of information provided – presented in a way that is comprehensible while not oversimplified, nor burdened with technical jargon. This relates to the IAP2 Core Value: ‘Public participation provides participants with the information they need to participate in a meaningful way’.<sup>82</sup>

The NHRCC staff provided a great deal of information about human rights legislation through the NHRC website, which remains available. Some were written by Secretariat staff, some by others. Beyond keeping to the topic of the NHRC, no attempt was made to filter this information. It was made clear that in providing those materials, the NHRCC did not necessarily endorse them. It was left to readers to decide where biases lay in those materials.

The introductory notes on the website were clearly written and rendered so that there was no doubt as to what the NHRCC set out to accomplish.<sup>83</sup> A more comprehensive Background Paper was also issued. Over 6000 of the submissions that are in electronic format and approved for public dissemination are available online, organised by topic of concern. Importantly, these submissions were immediately made available to the public, thus providing an ever broadening diversity of public viewpoints as the NHRC unfolded. Broadcasting that the submissions would be immediately published made people accountable for what they wrote. The experts were among the public.

The community roundtables were intended to overcome issues that preclude formal participation, like illiteracy or poverty. Also, rather than the rhetorical argumentation that is prevalent in plenary activities, the roundtables invited conversation that would include storytelling and other communicative actions which allow participants to portray their lived experience to the forum. The NHRCC member in attendance took the time to draw these stories from participants before they worked in small groups, thus modelling the importance of storytelling for democratic engagement.<sup>84</sup>

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82 International Association for Public Participation, above n 39.

83 See, eg, National Human Rights Consultation Committee, *About the Consultation* (2008) National Human Rights Consultation <<http://www.humanrightsconsultation.gov.au>>.

84 See Iris Marion Young, *Inclusion and Democracy* (Oxford University Press, 2002).

Public hearings can be very formal affairs but the tone of the NHRC was markedly different. The Chair describes activities such as the ‘Great Debate’ as giving a ‘fresh shape to public hearings’<sup>85</sup> whilst ensuring that diverse viewpoints could be heard in a respectful space.

## **F Sustainable Decisions**

To be rated well, participants clearly see the impact of their contribution and decisions are understood. Participants are involved in the evaluation process and the project has created social capital through good relationships.

Ultimately, this aspect questions the sensibleness of the participant contributions. Some engagement formats tend to bring out the worst animosity in people. For example, a public meeting with experts on a stage and an audience in rows facing those experts will inevitably muzzle the timid and amplify the incensed and articulate. But it is fair to say that the NHRC attempted to bring out the best. The community roundtables gathered people in civil and respectful conversation, in an environment where participants could learn from each other and the convenors. The numerous extracts from those meetings in the Report demonstrate how relevant and articulate views were expressed, which have lent weight to the NHRCC’s recommendations.

This aspect corresponds to the IAP2’s Core Value: ‘Public participation promotes sustainable decisions by recognizing and communicating the needs and interests of all participants, including decision makers’.<sup>86</sup>

The Report states that:

Outside the capital cities and large urban centres the community roundtables tended to focus on local concerns, and there was limited use of ‘human rights’ language. People were more comfortable talking about the fair go, wanting to know what constitutes fair service delivery for small populations in far-flung places.<sup>87</sup>

The Chair reports that only one instance of abusive behaviour occurred.<sup>88</sup> Considering the passion held by most participants about human rights, this is a testament to the esteem that participants held in the convenors and the process.

Many of the submissions came from experts and stakeholders with an interest in human rights and related legislation. Some of the writers of these submissions, with quite disparate ideas, were invited to be panel speakers at the public hearing.

To a large extent, there was a distinction between submissions which expressed values and beliefs about human rights, especially their inclusion and enforcement, and those which dealt with the legalities and practicalities of human rights legislation. The Report demonstrates that the technical and emotive sides of the NHRC informed each other in ways which had a profound impact on the final recommendations.

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85 Interview with Frank Brennan (Telephone Interview, 14 December 2009).

86 International Association for Public Participation, above n 39.

87 National Human Rights Consultation Committee, above n 1, 344.

88 Frank Brennan, ‘The Findings of the National Human Rights Consultation’ (Speech delivered at the National Press Club of Australia, Canberra, 14 October 2009).

In all the engagement techniques and localities, the NHRCC found that raising awareness and understanding about human rights was a universal desire. This agreement cut across differences, such as whether or not participants wanted some form of a Human Rights Act. Coming together to talk about human rights helped some participants realise their misconceptions and thus support the growing call for improved general education about human rights, which became the NHRCC's number one recommendation.<sup>89</sup>

The Chair reports that people were thrilled to be given the opportunity to speak about such matters. He heard statements such as 'no one has ever listened to me before' on many occasions.<sup>90</sup> Australians were extremely appreciative of the effort made to hear them. He noted a 'great community spirit'.<sup>91</sup> As is always the case in the authors' experience, at the end of each public session, participants said they needed more opportunities like this to be heard and contribute to public policy.<sup>92</sup>

What is not clear is the extent to which participants were able to evaluate the process itself. While the NHRCC and Secretariat were attentive to the needs and comments of participants, a feedback survey was not conducted at the end of each community roundtable. A process designer would have been attuned to the importance of feedback about the process and would have ensured that an evaluation of the process was built in from the start.

## VII CONCLUSION

The evaluation framework – using the principles of integrity, inclusion, deliberation, influence, capacity and sustainable decisions – has provided useful insight into the participatory qualities of the NHRC. We have now frequently made the point that the NHRCC and Secretariat exceeded the benchmarks of most public inquiries. Without question, the *integrity* of the NHRC and its convenors was beyond reproach.

The convenors were determined to obtain representative views and attempted to satisfy the principle of *inclusion*. They augmented their data-gathering when they realised early that they were falling short, and that their community efforts were being distorted (with the best of intentions) by activist groups. They attracted a range of legal and social policy expertise, with a broad variety of views, not all of which aligned.

The NHRCC itself modelled a deliberative approach in the organic development of its work. The community roundtables were opportunities for *deliberation*, but time limits and lack of facilitation hampered the full manifestation of deliberative ideals. The design of the public hearings was more

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89 National Human Rights Consultation Committee, above n 1, 135.

90 Interview with Frank Brennan (Telephone Interview, 14 December 2009).

91 Ibid.

92 The authors thank Mary Kostakidis for pointing out the appreciation expressed by participants.

about the panel and the NHRCC than the audience. Public hearings may have been thought-provoking, but they were hardly deliberative.

The recommendations of the NHRCC can be seen to emanate directly and transparently from the submissions, so contributors should be satisfied that their overall *influence* on the Report has been substantial. The NHRCC could not promise more. The government's formal response<sup>93</sup> to the Consultation did answer the widespread call by participants, as expressed in the Report, to raise public education about human rights and to test new Bills against Australia's international human rights obligations. However, the response would disappoint many participants who will not see the establishment of a Human Rights Act in legislation.

The *capacity* of participants to think about and contribute to discourse was certainly enhanced by the NHRC. The NHRCC and Secretariat should be congratulated for conducting a process which has given many Australians the opportunity to articulate views on human rights issues. This occurred because the NHRC exceeded its brief: it did more than just 'ask'. On the other hand, the unqualified invitation afforded organised activism a larger voice than is ideal for deliberative public engagement.

This leads to the final aspect, *sustainable decisions*, as interpreted in the evaluation framework. Certainly, the NHRC attracted many compelling and sensible submissions and contributions which were reflected in the recommendations of the Report. The authors believe that more deliberation by participants would have helped synthesise the multitude of submissions and made it easier for the NHRCC to reach their recommendations. Allowing the strong activism by GetUp! and Amnesty International to push for a Human Rights Act through the NHRC may have been counter-productive and firmed the government's resolve 'not [to] be served by an approach that is divisive'.<sup>94</sup>

By way of summary, embedded in the terms of reference is an aspiration to 'consult broadly', to 'enhance participation ... by a wide cross section', and a clear suggestion to reflect Australia's 'diverse range of views'.<sup>95</sup> Yet the terms only instructed the NHRCC to 'ask' the public what they think. Opinion polls only *ask* too. The problem with such surface attempts at public engagement is that they tend only to gauge what is popular, informed by the media and talked about in closed circles of family and friends. It has been demonstrated that preceding expressions of preference with facilitated deliberation enhances the depth and interrelatedness of public perspectives. Participants who come with firm commitments to particular stances learn how their positions affect others and recognise alternative approaches that still support their values and beliefs. Consultations need more than public opinion – they need public judgement.

Rolling out a process for finding common ground about a topic as emotive as human rights is challenging enough for the most skilled process designer, let

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93 Australian Government, above n 77.

94 Ibid 1.

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



alone a committee with limited experience in this area. Many a consultation project could be improved by the presence of someone with an eye solely for the process, someone whose expertise involves planning democratic participation. Projects such as the 2009 World Wide Views on Global Warming<sup>96</sup> (involving 38 partner countries in simultaneous public deliberations) and the Australian Citizens' Parliament,<sup>97</sup> owe much of their success in terms of representativeness and deliberation to the dedication of process designers. Nonetheless, the authors applaud the Chair, the NHRCC and Secretariat for venturing into the NHRC with process mindsets which were more transparent, inclusive and deliberative than most previous inquiries.

Would it have been a different NHRC had a process designer been incorporated into the NHRCC? The authors believe so. The random selection that the social research firm applied later to form representative focus groups and opinion polls could have been applied in at least some community meetings. Qualified table facilitators would have drawn participants into deeper dialogue about the challenges of framing public policy that serves all, not just some, Australians.

Skilled process designers can ensure that the best tools are used to reach voices that might otherwise be missed, and to employ participatory processes which provide respectful spaces for those voices to be heard. The more robust the engagement process, the more confidence decision-makers have in the recommendations that emerge from it.

Importantly, deliberative processes invite participants to share in the design of outcomes. Opportunities like the NHRC bring ordinary people who have to interpret laws (for example, about human rights) in their everyday lives, together with experts in the structures and practicalities of lawmaking. Deliberative process design enables each to learn from the other without protracted argument, resulting in a more efficient and less fraught path to policy implementation. Several of the rights and responsibilities endorsed by the NHRCC inherently invite deliberative public participation:

- to serve on a jury when required
- to vote and to ensure to the best of our ability that our vote is informed
- to show respect for diversity and the equal worth, dignity and freedom of others
- to promote peaceful means for the resolution of conflict and just outcomes ...<sup>98</sup>

Had the government taken up the option of implementing human rights legislation, the NHRCC recommended that responsibility for it be assigned to a distinct Minister. This aligns with Leib's and Keane's suggestions for a separate monitorial branch of government to promote and oversee public participation and government accountability in areas like human rights. The authors wonder why

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96 WWViews Alliance, *World Wide Views on Global Warming* <<http://www.wvviews.org>>.

97 See Citizens' Parliament, *Australian Citizens' Parliament* (February 2009) <<http://www.citizensparliament.org.au>>.

98 National Human Rights Consultation Committee, above n 1, xxx.

ongoing participation was not included in the NHRC recommendations as an activity which governments should embed in inquiry procedures. Anecdotal evidence suggests that people wanted more of what they experienced through the NHRC.

The authors hope that in breaking with the tradition of past inquiries to resemble judicial proceedings, the NHRC begins the forging of a new template for future public engagement by the government. New inquiries and taskforces should be announced by government Ministers to provide not only the licence but the imperative to raise the expectations of public participation. A focus on deliberative design would raise the potential for inclusive and robust decision-making that is more influential and less risky for commissioners, legislators and public servants alike.<sup>99</sup>

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99 The authors did not attend the community roundtables or public hearings. That we can write such a paper without having attended the NHRC demonstrates the openness of the NHRC. The authors wish to acknowledge the helpful comments and clarifications on an earlier draft made by members of the NHRCC, and Frank Brennan especially for his generous time in interview. The authors also gratefully acknowledge the detailed and helpful comments by the three anonymous reviewers.