

## EDITORIAL

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Rights and freedoms possess a long, yet distinguished, history. Their recognition and protection in legal documents extend as far back as the 18<sup>th</sup> century BCE, if not further.<sup>1</sup> The place of rights and freedoms within Australia's institutional structures had been a point of contention before Federation itself. At the third session of the 1898 Australasian Federal Convention held in Melbourne, the constitutional framers engaged in rigorous debate over the necessity of incorporating fundamental rights and freedoms within the *Constitution* in order to protect citizens against encroachments upon their civil liberties.<sup>2</sup> Ultimately unsympathetic to this idea,<sup>3</sup> the framers were content to rely on the common law as a source of rights and freedoms,<sup>4</sup> and to leave their protection to the Parliament and 'the processes of responsible government'.<sup>5</sup> Responsible government has a variety of meanings,<sup>6</sup> but its 'very essence' is a singular word: accountability.<sup>7</sup> Accountability has been recognised as 'a cornerstone of ... human rights [and freedoms]'.<sup>8</sup> It requires that those in power remain answerable for their actions and that they discharge their obligations in a manner consistent with identified standards of behaviour, facing sanctions for failing to do so.<sup>9</sup> In Australia, accountability is what ensures that the executive government and its agencies are responsible to Parliament – the

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\* Editor, Issue 47(2).

- 1 See Paul Gordon Lauren, 'The Foundations of Justice and Human Rights in Early Legal Texts and Thought' in Dinah Shelton (ed), *The Oxford Handbook of International Human Rights Law* (Oxford University Press, 2013) 163, 164 <<https://doi.org/10.1093/law/9780199640133.003.0008>>.
- 2 See, eg, *Official Record of the Debates of the Australasian Federal Convention*, Melbourne, 8 February 1898, 688–90.
- 3 *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106, 136 (Mason CJ).
- 4 *Kruger v Commonwealth* (1997) 190 CLR 1, 61 (Dawson J). See also *Momcilovic v The Queen* (2011) 245 CLR 1, 46 [42] (French CJ).
- 5 Chief Justice Robert French, 'The *Constitution* and the Protection of Human Rights' (Vice Chancellor's Oration, Edith Cowan University, 20 November 2009) 9.
- 6 Malcolm Aldons, 'Responsible, Representative and Accountable Government' (2001) 60(1) *Australian Journal of Public Administration* 34, 35.
- 7 *Egan v Willis* (1998) 195 CLR 424, 451 [42] (Gaudron, Gummow and Hayne JJ), quoting Electoral and Administrative Review Commission, Parliament of Queensland, *Report on Review of Parliamentary Committees* (Report, October 1992) vol 1, 15 [2.23] <<https://documents.parliament.qld.gov.au/tableOffice/TabledPapers/1992/4792T367.pdf>>.
- 8 United Nations High Commissioner for Human Rights, *Who Will Be Accountable? Human Rights and the Post-2015 Development Agenda* (Report, 2013) ix.
- 9 Ruth W Grant and Robert O Keohane, 'Accountability and Abuses of Power in World Politics' (2005) 99(1) *American Political Science Review* 29, 29–30 <<https://doi.org/10.1017/S0003055405051476>>.

custodian of rights and freedoms – which itself is accountable to the electorate.<sup>10</sup> Without it, rights and freedoms cannot truly be guaranteed.

Issue 47(2) of the *University of New South Wales Law Journal* ('*Journal*') is published at a time when rights, freedoms and accountability are undergoing constant developments. In November 2023, the High Court of Australia delivered its landmark ruling in *NZYQ v Minister for Immigration, Citizenship and Multicultural Affairs*,<sup>11</sup> overturning a 20-year precedent that recognised the indefinite detention of non-citizens with no prospects of removal from Australia in the foreseeable future as constitutionally permissible.<sup>12</sup> The decision has been celebrated as 'historic ... in terms of human rights', entitling those currently facing involuntary indefinite detention to their liberty.<sup>13</sup> Internationally, investigations into alleged war crimes and crimes against humanity committed during ongoing conflicts continue to be conducted by the Prosecutor of the International Criminal Court.<sup>14</sup> The Prosecutor's actions in doing so have been championed as an important step in safeguarding the rights of victims and ensuring accountability.<sup>15</sup> But as highly politicised matters that are also vulnerable to mistreatment by those in power, it would perhaps be naïve to suppose that all developments in rights, freedoms and accountability involve some process of 'evolution, growth [or] expansion'.<sup>16</sup> For instance, in the last two years alone, Indigenous Australians have been denied constitutional recognition at a referendum for an Indigenous Voice to Parliament. Australia has also seen its system of accountability be 'fundamentally undermined' by (now former) Prime Minister Scott Morrison in failing to disclose his appointment to several ministries publicly.<sup>17</sup>

Issue 47(2) clearly seeks to undertake a mammoth task. How can the Issue, in the span of 10 articles, comprised of 6 within its thematic component – 'Developments in Rights, Freedoms and Accountability' – and 4 within its general counterpart, exhaustively capture every recent development that has occurred in these ever-changing areas? The reality is, it cannot. But it can deliver a (small) snapshot of

10 See, eg, Jacqueline Lipton, 'Responsible Government, Representative Democracy and the Senate: Options for Reform' (1997) 19(2) *University of Queensland Law Journal* 194, 194–5; Charles Lawson, 'The Legal Structures of Responsible Government and Ministerial Responsibility' (2011) 35(3) *Melbourne University Law Review* 1005, 1009.

11 (2023) 415 ALR 254.

12 *Al-Kateb v Godwin* (2004) 219 CLR 562.

13 Australian Human Rights Commission, 'Commission Commends High Court Ruling on Indefinite Immigration Detention' (Media Release, 9 November 2023) <<https://humanrights.gov.au/about/news/media-releases/commission-commends-high-court-ruling-indefinite-immigration-detention>>.

14 'Situations under Investigation', *International Criminal Court* (Web Page) <<https://www.icc-cpi.int/situations-under-investigations>>.

15 See, eg, Amnesty International, 'Myanmar: ICC Decision to Investigate Rohingya Atrocities an Important Step towards Justice' (Press Release, 14 November 2019); Human Rights Watch, *World Report 2023: Events of 2022* (Report, 2023) 4; Human Rights Watch, 'Israel/Palestine: ICC Prosecutor Requests Arrest Warrants' (News Release, 20 May 2024) <<https://www.hrw.org/news/2024/05/20/israel/palestine-icc-prosecutor-requests-arrest-warrants>>.

16 *Macquarie Dictionary* (6<sup>th</sup> ed, 2013) 'development' (def 3).

17 Stephen Donaghue, *In the Matter of the Validity of the Appointment of Mr Morrison to Administer the Department of Industry, Science, Energy and Resources* (Opinion SG No 12, 22 August 2022) 23 [46] <<https://www.pmc.gov.au/sites/default/files/media-releases/sg-no-12-of-2022.pdf>>.

them. And I profess with little bias that each article in Issue 47(2) will be just as informative as the next for those who open its pages.

The Issue's thematic component kickstarts by reviving a ghost from the *Journal's* past: an examination of Australian human rights legislation.<sup>18</sup> Bruce Chen offers a critique of the Australian Human Rights Commission's recently proposed model for a federal Human Rights Act. As the only liberal democracy without a constitutional bill of rights or a national human rights statute, Chen argues in favour of the model's espousal, subject to certain proposed amendments that seek to strengthen the protection of rights under it. Tamara Walsh and Dominique Allen contrastingly scrutinise, via empirical research, the effectiveness of the *Human Rights Act 2004* (ACT) – the trailblazer of human rights Acts in Australia – as it enters its 20<sup>th</sup> year of operation. They find that while the Act has been influential, significant barriers to rights protection under it persist to this day. It is evident that meaningful developments in statutory human rights protections have been, or are (potentially) being, made. Yet it is equally as clear that there is still a long way to go. One can only begin to imagine what statutory (or even constitutional) human rights protections will look like in Australia in the next 20 or so years.

Accountability bodies also continue to undergo significant developments, evidenced by the establishment of the National Anti-corruption Commission and the impending replacement of the Administrative Appeals Tribunal ('AAT'). Yee-Fui Ng and Stephen Gray conduct a historical study of the evolution of anti-corruption commissions throughout Australia, exposing the politicisation that these bodies and their powers often suffer from at the hands of those whom they seek to hold accountable. Ng and Gray emphasise the need for relentless monitoring of such bodies and their ability to deliver accountability. Frances Simmons and Chantal Bostock, on the other hand, examine the application of the AAT's *Guidelines on Vulnerable Persons* with respect to refugee applicants as well as the importance of legal representation for vulnerable persons in complex matters, providing recommendations for how the AAT replacement body can adequately protect the rights of these applicants.

An Issue on developments in rights, freedoms and accountability could not truly be so without investigating the private and international spheres. Penelope Weller et al interrogate the shortfall of accountability in tort law and mental health care, decrying the increased reliance on the concept of 'duty of care' as a sufficient basis for the non-consensual detention and treatment of individuals in a manner contrary to legislation. Carmel O'Sullivan explores the *Brereton Report* and its finding that no military commander above patrol level bore criminal responsibility for war crimes committed by Australian soldiers in Afghanistan, questioning whether Australia's adoption of it complies with the country's international obligations and the international law doctrine of command responsibility. Considering the country's ongoing mental health crisis<sup>19</sup> and the recent sentencing

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18 See the thematic issue titled 'The Future of Human Rights in Australia': (2010) 33(1) *University of New South Wales Law Journal* 1.

19 See, eg, Patrick D McGorry, David Coghill and Michael Berk, 'Mental Health of Young Australians: Dealing with a Public Health Crisis' (2023) 219(6) *Medical Journal of Australia* 246 <<https://doi.org/10.5694/mja2.52047>>.

of a whistleblower as the first individual to be imprisoned in relation to Australian war crimes in Afghanistan,<sup>20</sup> the pertinence of these articles cannot be overstated.

It would be remiss of me to suggest that Issue 47(2)'s general component does not itself partake in scholarly discourse on developments in rights, freedoms and accountability. Harry Hobbs meticulously summarises the status of Indigenous treaty-making in Australia and the progress towards realising the right to self-determination for its Indigenous population. Similarly, Laura Griffin considers the role of civil liability as an efficient mechanism for holding prison officials and police officers accountable for harms suffered by Indigenous peoples under their supervision in custody. Julia Tolmie, Rachel Smith and Denise Wilson draw on experiences from Aotearoa New Zealand to urge Australia to accept expert testimony on intimate partner violence entrapment by individuals other than psychologists or psychiatrists as a means of assisting victim-survivors in successfully raising self-defence in criminal proceedings. To round off the Issue, Lucinda O'Brien, Ian Ramsay and Paul Ali empirically investigate the impact of buy now pay later on low income consumers and explore proposals by the Commonwealth Government to implement stricter regulations within the industry, supporting the move as a means of enhancing consumer protections and freedoms. Perhaps it is thus more apt to describe Issue 47(2) as consisting entirely of a thematic component. But at the risk of engendering a *Journal* constitutional crisis, I merely toy with the idea and leave the final say in the hands of the Issue's readers.

The diverse range of developments in rights, freedoms and accountability that fill the pages of Issue 47(2) could not be made possible without the countless hours of scrupulous research and writing undertaken by its 21 authors. I am beyond grateful for your ongoing cooperation and warmth throughout the editing process. I hope the *Journal* has done justice to your thought-provoking work. My sincere thanks must also go to the anonymous peer reviewers for generously offering your time and wisdom to provide insightful feedback on the submissions that have become the articles of this Issue.

I am indebted to Perry Herzfeld SC, an eminent practitioner whose work often involves advocating for developments in rights, freedoms and accountability, for enthusiastically undertaking the task of penning Issue 47(2)'s Foreword and for delivering what will undoubtedly be an insightful yet witty keynote address. The *Journal* is privileged to have someone of his calibre introduce, and fuel discussion about, the ideas raised in this Issue. I also personally thank Perry for his constant wisdom, inspiration and mentorship throughout my law school journey. I additionally thank Jaimee Waine for the marvellous artwork that opens this Issue's thematic component. The artwork truly embodies the aphorism that a picture is worth a thousand words.

One cannot forget that the *Journal* is slowly creeping into its 50<sup>th</sup> year. Its tenacity is, of course, a product of the hard work and dedication of the voluntary student Editorial Board. As my time on the Editorial Board soon comes to an end, I wish to thank the editors that I have met throughout my time on the *Journal* for

your collegiality and kind-heartedness. To the current members of the Editorial Board, thank you for your diligence, enthusiasm and resolve for the *Journal* and in furthering its reputation as one of Australia's leading law journals. It has been a pleasure to have shared so many fond memories with you all, including the various engagements in fruitful debates about the accurate citation of sources that do not fittingly coincide with a rule in the *Australian Guide to Legal Citation* or the *Journal's Additions*. I additionally thank Lucas Weil Ruggeri and Elizabeth Parsons for taking up temporary roles to facilitate the functioning of the *Journal* in times of need.

The longevity of the *Journal* would not be possible without the ongoing support of its premier sponsors – Allens, Corrs Chambers Westgarth, Herbert Smith Freehills and King & Wood Mallesons. Thank you for your continued investment and commitment to advancing academic legal scholarship. I am especially grateful to Corrs Chambers Westgarth for kindly hosting the launch of Issue 47(2).

As a student-run body, the *Journal* could not adequately function without the faithful backing of the University of New South Wales Faculty of Law & Justice. I wish to particularly thank the Faculty's Dean, Professor Andrew Lynch, for continuously being a strong proponent of the *Journal* and its independence. I also extend my profound gratitude to him for his friendship and steadfast support outside of the *Journal*. Moreover, I am considerably grateful to the *Journal's* Faculty Advisers – Professors Rosalind Dixon and Gary Edmond – for their learned advice and cool-headedness during situations that often felt like the end of the world for the Executive Committee.

Many thanks must also go to Kerry Cooke, our typesetter, and John Hewitt, our cover designer. Without your strenuous efforts behind the scenes, the publication of Issue 47(2) could not occur.

Issue 47(2) could not come to fruition without the members of the Executive Committee, past and present. To the Executive Committee of Volume 46 – Matilda Grimm, Enrico Mainas, Hayden Clift, Ella Davidson, Anna Ho, Jack Zhou and Zhong Guan – thank you for your love, laughter, support and, more importantly, friendship. Words cannot describe the admiration I hold for each of you. Special mention must go to my predecessor, Hayden. A thank you is not enough for your tenacious assistance, encouragement and guidance throughout my tenure. To the current Executive Committee, I could not think of a better group of people with whom to complete my journey. To the Executive Editor – Sharanya Murthy – thank you for your leadership and desire to strengthen the *Journal's* sense of community. The *Journal* is in good hands with you at its helm. To Marcella De Torres and Rachel Luo – the passion and energy you both put into your respective roles as *Forum* Editor and Digital Editor is inspiring. My fellow 'Submissionaries' – Issue Editors Jessie Liu, Jak Yasuda, Rowan Gray and Fiona Shah – it has been a privilege to undertake this journey with you. Thank you for your tireless efforts, camaraderie and generosity throughout my tenure. You each made the long days and nights of editing worth it.

Above all, I offer my deepest gratitude to my friends and family. To my dearest friends – the 'side characters' – thank you for your interest in my *Journal* journey and your unrelenting comfort and warmth, especially when times were tough. To

my parents and siblings, thank you for your unwavering love, care and support throughout my tenure and my time on the Editorial Board. I would not be where I am today without you.

As a significant chapter in my life comes to a close, I cannot help but reminisce on the developments that the *Journal* has undergone in the span of a few years. I am honoured and proud to have been part of it. But as this chapter closes, a new one opens – one where I watch and cheer on the *Journal* from the sidelines. And much like developments in rights, freedoms and accountability, I cannot wait to see the many more developments of the *Journal* to come.