

AN AUSTRALIAN HUMAN RIGHTS ACT: QUIXOTIC IMPOSSIBLE DREAM OR INEVITABLE NATURAL PROGRESSION?*

THE HON JUSTICE MARGARET MCMURDO AC**

I INTRODUCTION

Chancellor – the Hon John Dowd AO; Vice-Chancellor – Professor Peter Lee; Pro Vice-Chancellor – Professor Peter Croll; The Hon Michael Kirby AC, CMG; other distinguished guests, as you all are.

I commence tonight’s human rights discussion by acknowledging that we are on the traditional lands of the Bundjalung people and, in particular, the Widjabal group. For tens of thousands of years before European contact, they lived and prospered here. No doubt they held meetings with visitors from away to explore the best means of organising their community, in essence not so very different from tonight’s lecture. And no doubt they had feasts with their visitors, not unlike the dinner many of us will share later this evening. I acknowledge their Elders, past and present.

Speaking of elders, I acknowledge with pleasure the great elder of the Australian and international community in whose honour this lecture series is named: Michael Kirby. His life has been one of community service since his first appointment as a judicial officer in 1975. As Law Reform Commissioner and judge, ultimately a judge of the High Court of Australia, he has made a magnificent contribution to Australia’s jurisprudence. His judgments, in the progressive tradition of the Mason court, including his learned dissents, will ensure this contribution continues for many post-retirement decades. Michael has also been a prodigious worker extra-judicially, championing human rights, including the rights of women and gays. His most recent honours include his appointment to the Commonwealth Eminent Persons Group and his naming as the first Australian recipient of the prestigious Gruber Justice Prize, which will be presented next month in the USA. It is fitting that this fine institution, Southern Cross University, has honoured Michael’s life work with an annual human rights lecture. I am privileged to present the 2010 lecture and delighted to be with you all this evening.

* The 2010 Michael Kirby Lecture at Southern Cross University, delivered on 3 September 2010.

** The Hon Justice Margaret McMurdo AC, President, Queensland Court of Appeal. I gratefully acknowledge the research and editing assistance of my associate, Katie Allan, and the patience and additional editing assistance of my executive assistant, Andrea Suthers.

Tonight I raise with you whether an Australian Human Rights Act is a quixotic impossible dream. I refer of course to the 16th century Spanish writer, Miguel de Cervantes' masterpiece of a novel, *Don Quixote de la Mancha*, and the song from the 20th century musical *Man of La Mancha*, immortalised for us oldies by Jim Nabors, a.k.a Private Gomer Pyle. Cervantes' novel describes the adventures of the ageing Don Quixote, driven mad by misreading popular fiction. Don Quixote decides to live out the fantasies he has read about. He sets out with his illiterate but canny peasant neighbour, Sancho Panza.

In the course of their encounters with all sorts of folk, Cervantes offers his readers a generous sprinkling of wit and traditional wisdom, some of which I will draw on tonight.¹

Our great nation was formed on 1 January 1901 under the umbrella of the *Commonwealth of Australia Constitution Act*. The Constitution has served us well over the last 110 years, as have the effective democratic institutions of governance it established: the federal parliament, judiciary and executive.

The Constitution is a practical working document of compromise. It succeeded in bringing together into a federal structure a group of British antipodean colonies in the last days of Queen Victoria's reign. But, apart from ensuring that acquisition of property for the purposes of the Commonwealth must be on just terms;² that trials on indictment for Commonwealth offences are by jury;³ that the Commonwealth must not legislate in respect of religion;⁴ and prohibiting discrimination on the basis of residence in Australia's different states,⁵ the Constitution says little directly about human rights. No doubt to the surprise of the drafters of the Constitution, some human rights protection has been provided under the power conferred on the federal parliament to make laws in respect of external affairs.⁶ This power has allowed the federal parliament to enact legislation dealing with human rights based on international human rights treaties and courts have construed that legislation.⁷

In the drafting of the Constitution, and ever since, Australians have debated whether our nation should have a charter or bill of rights and, if so, what form it should take. In 1973, and again in 1983, Human Rights Bills were

1 Henry Sieber (ed), *The Wit and Wisdom of Don Quixote de la Mancha* (2004).

2 *Constitution* s 51(xxxi).

3 *Constitution* s 80.

4 *Constitution* s 116.

5 *Constitution* s 117.

6 *Constitution* s 51(xxix).

7 For example, *Koowarta v Bjelke-Peterson* (1982) 153 CLR 168; *Gerhardy v Brown* (1985) 159 CLR 70 and more recently *Wurridjal v The Commonwealth of Australia* [1995] HCA 2. Compare *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273.

introduced into the federal parliament but never enacted.⁸ Australia is now the only western democratic nation without a national bill of rights. Little wonder, then, that this question remains of intense interest to lawyers, policy makers, and indeed all Australians.

And little wonder that it was one of the issues raised at the historic 2020 summit held in Parliament House, Canberra in April 2008. The summit brought together 1,000 participants from across the nation. It aimed to harness the best ideas for building a modern Australia able to meet 21st century challenges. The final report of the summit included, as one of the five big ideas of the section on the future of Australian governance, that Australia adopt a federal bill of rights.⁹

In response, the federal government set up the National Human Rights Consultation (NHRC) launched on 10 December 2008, to ‘initiate a public enquiry about how best to recognise and protect the human rights and freedoms to be enjoyed by all Australians’ and to ‘establish a process of consultation which will ensure that all Australians will be given a chance to have their say on this important question for our democracy.’ The consultation was conducted by a committee chaired by academic, lawyer, and human rights advocate, Professor Frank Brennan SJ, AO, and also comprising SBS broadcaster, Mary Kostakides; former Australian Federal Police commissioner, Mick Palmer AO, APM; and Indigenous barrister, Tammy Williams.

The committee consulted the Australian community on three key questions:

- Which human rights and corresponding responsibilities should be protected and promoted?
- Are these human rights currently sufficiently protected and promoted?
- How could Australia better protect and promote human rights?

When the NHRC was established, as the 2020 summit demonstrated, there was certainly strong community support for the idea that Australia should adopt a bill of rights. But there was also vocal community opposition. In commencing its consultation, the committee must have felt a bit like Don Quixote and Sancho Panza setting off on their adventures. They might well have found solace in Don Quixote’s advice, ‘It is one thing to undertake, but another to finish’.¹⁰ Over seven months, the committee met with thousands of Australians in public hearings throughout Australia, including roundtable

8 The Hon Justice Michael Kirby, ‘A Bill of Rights for Australia but do we need it?’ *Presented at the Queensland Chapter Young Presidents Association*, Brisbane, 14 December 1997.

9 Department of Prime Minister and Cabinet, *Australia 2020 Summit Final Report* (May 2008) <http://www.australia2020.gov.au/docs/final_report/2020_summit_report_full.doc>.

10 *Don Quixote de la Mancha*, Miguel de Cervantes, II, i, 15; DQ II, 15.

meetings here in Lismore.¹¹ In addition, it received more than 35,000 written submissions.¹² The integrity of the NHRC and its committee, and its determination to be inclusive in its consultation, has since been acknowledged in academic research.¹³

The NHRC committee delivered its report on 30 September 2009.

The report is a genuine attempt to construct a pathway to the better protection of human rights in Australia. It seems to me to do so in a way which is broadly acceptable to the majority whilst meeting most of the concerns raised by a significant minority of those engaged in the consultation. The report appears to be a thorough discussion of the relevant issues and competing arguments and views. It contains a comprehensive list of contents and begins with a summary and recommendations. It is user-friendly and is available online.¹⁴

It deserves, in my view, much more consideration from Australians than it has presently received. I will briefly discuss how the report dealt with the three key questions.

II WHICH HUMAN RIGHTS INCLUDING CORRESPONDING RESPONSIBILITIES SHOULD BE PROTECTED AND PROMOTED?

The report recommended that the federal government should immediately compile an interim list of rights for protection and promotion, namely, the rights listed in the following seven international human rights treaties, unless the government had entered a formal reservation in relation to a particular right:

- the *International Covenant on Civil and Political Rights* (ICCPR);
- the *International Covenant on Economic, Social and Cultural Rights*;
- the *Convention on the Elimination of all Forms of Racial Discrimination*;
- the *Convention on the Elimination of all Forms of Discrimination Against Women*;
- the *Convention against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment*;

11 National Human Rights Consultation Committee, National Human Rights Consultation Report (September 2009) <<http://www.humanrightsconsultation.gov.au>> (NHRC Report) Appendix G, 457.

12 Ibid, Foreword, v.

13 See Lyn Carson and Ron Lubensky, 'Raising Expectations of Democratic Participation: An analysis of the National Human Rights Consultation' (2010) Thematic Issue: The Future of Human Rights in Australia 33(1) *University of New South Wales Law Journal* 34, especially at 56-9.

14 See <<http://www.humanrightsconsultation.gov.au>> and <<http://www.ag.gov.au>>.

- the *Convention on the Rights of the Child*;
- the *Convention on the Rights of Persons with Disabilities*.

The report recommended that the government should replace this list with a definitive list of Australia's international human rights obligations within two years of publishing the interim list.¹⁵

The report made the following observations as to which human rights should be protected. Most involved in the consultation supported legislative protection of civil and political rights. Many argued that economic, social and cultural rights should also be legislatively protected, but this was controversial. Some believed that questions of social and fiscal policy must remain matters for the judgment of parliament.¹⁶ Economic, social and cultural rights were, however, amongst those rights many Australians considered at the essence of the Aussie mantra of a fair go for all: the right to basic amenities of food, water, shelter, clothing, essential health care and education.¹⁷

III ARE THESE HUMAN RIGHTS CURRENTLY SUFFICIENTLY PROTECTED AND PROMOTED?

The report made the following observations as to whether human rights were presently sufficiently protected. Australia has made commitments to a range of obligations under international human rights law, but these obligations are enforceable in Australia only if implemented in domestic legislation.¹⁸ Australians are fortunate to have strong democratic institutions. These include our representative democracy within a federal system; the separation of powers, including an independent judiciary and legal profession; responsible government; bi-cameral parliaments (other than in Queensland); parliamentary committees and a free media.

Even so, these strong democratic institutions do not always ensure that human rights of minorities receive sufficient consideration.

Most participants in the roundtable discussions and most of those who made written submissions to the NHRC apprehended that more needed to be done to protect and promote human rights. The report concluded that more should be done in Australia to protect and promote human rights.¹⁹

15 NHRC Report, above n 11, 356-7.

16 Ibid, Summary, xv; 78-82.

17 Ibid 96; Colmar Brunton Social Research, *National Human Rights Consultation – Community Research Report* (2009) (Colmar Brunton Social Research Report) Summary, 4 (Appendix B to the NHRC Report, 384).

18 NHRC Report, above n 11, 349.

19 Ibid 350.

IV HOW COULD AUSTRALIA BETTER PROTECT AND PROMOTE HUMAN RIGHTS?

The NHRC Report focused on the following reform options:

- Creating a human rights culture in Australia.
- Protecting human rights in Australian policy and legislation (other than in a Human Rights Act).
- Protecting human rights in practice, for example, through executive action plans, public sector reforms and best practice guides.
- Creating a Human Rights Act.
- The report dedicated a chapter to options for better protection and promotion of human rights for Indigenous Australians.²⁰

Supported by the majority of submissions to the NHRC, the report favoured a Human Rights Act of the kind adopted in recent years in New Zealand,²¹ the United Kingdom,²² Victoria²³ and the ACT.²⁴ This model is frequently referred to as a ‘dialogue’ model of human rights protection.²⁵

It is based on the three arms of democratic government, the executive, the parliament and the judiciary, prompting responses (dialogues) from each other when a proposed law or policy may be inconsistent with human rights.²⁶ It works on the understanding that the executive will operate in a manner consistent with human rights by reporting to a democratically elected parliament. Both the executive and parliament will be held accountable by the courts. The parliament, elected by the people, has the final power to pass laws, even laws overriding human rights. Together with the executive, parliament scrutinises bills for human rights compliance before they become law. The judiciary interprets legislation in a manner consistent with human rights, provides remedies if the executive has acted inconsistently with human rights, and has power to declare parliament’s legislation incompatible with human rights. But a central aspect of the dialogue model is that courts do not have power to declare legislation invalid or inoperable. That power remains with parliament which is answerable only to the people.

The majority of those attending NHRC community roundtables favoured a Human Rights Act and 87.4 per cent of those who made submissions to

20 Ibid ch 9.

21 *New Zealand Bill of Rights Act 1990* (NZ).

22 *Human Rights Act 1998* (UK).

23 *Charter of Human Rights and Responsibilities Act 2006* (Vic).

24 *Human Rights Act 2004* (ACT).

25 NHRC Report, above n 11, 303.

26 Ibid 242.

the NHRC supported it. The NHRC committee commissioned the Colmar Brunton Social Research Report, which consisted of 15 focus groups and a 1,200 random person telephone survey: 57 per cent expressed support for a Human Rights Act, 30 per cent were neutral and only 14 per cent were opposed.²⁷ The NHRC Report noted, however, with its customary even-handedness, that there was no community or parliamentary consensus on the question of whether Australia should have a Human Rights Act.

V THE RESPONSE TO THE NHRC REPORT

The response in the media to the NHRC Report appeared polarised, but not on party political lines. On the one hand, the merits of a Human Rights Act were recognised and promoted by those like Human Rights Commission President, Catherine Branson QC; peak lawyers groups; and Amnesty International, although some thought the proposed dialogue model did not go far enough. Some were critical of the NHRC committee for not recommending that economic, social and cultural rights were also protected.²⁸ There were loud and powerful voices in opposition to any form of Human Rights Act, including those of Shadow Attorney-General, Senator George Brandis SC; former New South Wales Premier, Bob Carr; and New South Wales Attorney-General, John Hatzistigios.²⁹

Some of the media attacks on the NHRC committee, particularly its chair, appeared to me to be ungenerous.³⁰ At this time, the committee might have again benefited from the wisdom of *Don Quixote*: ‘There is no road so smooth but you’ll meet with ruts and hollows in it.’³¹ The committee probably felt a little like Don Quixote jousting with the Knight of the Mirrors.

27 Ibid 362-3.

28 See, for example, Andrew Byrnes, ‘*Second-Class Rights Yet Again?* Economic, Social and Cultural Rights in the Report of the National Human Rights Consultation’ (2010) Thematic Issue: The Future of Human Rights in Australia 33(1) *University of New South Wales Law Journal* 193.

29 See Michael Pelly, ‘Battle looming on human rights as committee backs new Act, role for courts’ *The Australian* (online), 9 October 2009 <<http://www.theaustralian.com.au/business/legal-affairs/battle-looming-on-human-rights-as-committee-backs-new-act-role-for-courts/story-e6frg97x-1225784569794>> accessed 27 August 2010.

30 See Chris Merritt, ‘Proposed rights charter’s has ‘hint of Sunday sermon’ *The Australian* (online) 26 March 2010 <<http://www.theaustralian.com.au/business/legal-affairs/proposed-rights-charters-hashint-of-a-sunday-sermon/story-e6frg97x-1225845531814>> accessed 31 August 2010; Jim Wallace, ‘Rights overkill isn’t majority view’ *The Australian* (online) 13 October 2009 <<http://www.theaustralian.com.au/news/rights-overkill-isnt-majority-view/story-e6frg6q6-1225786025400>> accessed 31 August 2010; Paul Kelly, ‘Back to Practical Tasks’ *The Australian* (online) 24 April 2010 <<http://www.theaustralian.com.au/news/opinion/back-to-practical-tasks/story-e6frg6zo-1225857623205>> accessed 31 August 2010.

31 *Don Quixote de la Mancha*, Miguel de Cervantes, II, i, 13; DQ II, 13.

But the committee made little attempt to promote their report, content for it to be its own advocate.

VI FEDERAL GOVERNMENT'S RESPONSE TO THE NHRC REPORT

The federal government responded to the NHRC Report with its April 2010 *Australia's Human Rights Framework*.

The framework:

- Re-affirmed a commitment to promoting awareness and understanding of human rights in Australia, with respect for the seven core United Nations (UN) human rights treaties to which Australia is a party.
- Would deliver, through non-government organisations (NGOs), and the Australian Human Rights Commission, a human rights educative role in schools.
- Recognised the need for Commonwealth public servants to respect human rights in policy making.
- Established an advisory group to develop a comprehensive blueprint for public service reform and the Australian public service code of conduct.
- Undertook to engage with the international community to improve the protection and promotion of human rights within Australia, our region and the world.
- Will develop a new national action plan and bring together and host NGO forums to provide a comprehensive consultation mechanism for discussion about domestic and international human rights issues.
- Undertook to establish a parliamentary joint committee on human rights to provide greater scrutiny of legislation for compliance with Australia's international human rights obligations under the seven core UN human rights treaties to which Australia is a party.
- Would introduce legislation requiring that every Bill and delegated legislation subject to disallowance be accompanied by a statement which assesses its compatibility with the seven core UN human rights treaties. To this end, on 2 June 2010, the federal Attorney-General introduced the Human Rights (Parliamentary Scrutiny) Bill 2010 (now lapsed).
- Undertook to review legislative policies and practices for compliance with the seven core UN human rights treaties and to develop exposure draft legislation harmonising and consolidating Commonwealth anti-discrimination laws to remove unnecessary regulatory overlap, address inconsistencies, and make the human rights system more user-friendly.

- Determined to include the President of the Australian Human Rights Commission as a permanent member of the Administrative Review Council.
- Established the National Anti-Discrimination Information Gateway to assist individuals and business find information on anti-discrimination laws providing an overview of all Commonwealth, State and Territory anti-discrimination systems, with links to other useful information.³²
- Emphasised that, since 2008, it has ratified the *Convention on the Rights of Persons with Disabilities*; acceded to the *Optional Protocol to the Convention on the Elimination of all Forms of Discrimination against Women*; announced support for the UN *Declaration on the Rights of Indigenous Peoples*; and passed legislation consistent with its obligations under the *Convention against Torture*.

All good stuff! But the framework did not provide for any form of Human Rights Act. Our friends Don Quixote and Sancho Panza might have offered some further words of comfort to the NHRC committee and their supporters: ‘The more I seek, the further I am from finding it.’³³ The advocates for an Australian Human Rights Act at this point must have felt rather like Don Quixote, defeated by the windmills.

They were not, however, vanquished for long. The federal government’s failure to introduce a Human Rights Act was much criticised, including by the Law Council of Australia,³⁴ the Australian Human Rights Commission,³⁵ and the United Nations Committee on the Elimination of Discrimination against Women.³⁶ The most recent report by the United Nations Committee on the Elimination of Racial Discrimination also noted the recommendations of the NHRC Report and the ‘significant community support for a federal Human Rights Act to thoroughly address the gaps in the existing model of human rights protection.’³⁷

32 See <<http://www.antidiscrimination.gov.au>>.

33 *Don Quixote de la Mancha*, Miguel de Cervantes, II, 3, iv; DQ II, 36.

34 Law Council of Australia, *Government overlooks key rights recommendations* (21 April 2010) <<http://www.lawcouncil.asn.au/media/news-article.cfm?article=1E8261FD-1E4F-17FA-D2FB-933B523E9078>>. The Law Council also suggested that the Government’s decision not to enact a Bill of Rights should be included in the National Report to the United Nations: See Law Council of Australia, *United Nations Universal Periodic Review of Australia – Australian Government’s National Report* (April 2010) <http://www.lawcouncil.asn.au/shadomx/apps/fms/fmsdownload.cfm?file_uuid=3C707FE2-1E4F-17FA-D2E4-54F5998E2C95&siteName=lca>.

35 See Australian Human Rights Commission, *Let’s talk about rights – Human Rights Act for Australia* (April 2010) <<http://www.humanrights.gov.au/letstalkaboutrights/>>.

36 Committee on the Elimination of Discrimination Against Women, *Concluding Observations: Australia* (July 2010) UN Doc CEDAW/C/Aus/CO/7 <<http://www2.ohchr.org/english/bodies/cedaw/docs/co/CEDAW-C-AUS-CO-7.pdf>>.

37 Committee on the Elimination of Racial Discrimination, *Concluding Observations: Australia* (August 2010) UN Doc CERD/C/AUS/C/15-17 <http://www2.ohchr.org/english/bodies/cerd/docs/co/CERD-C-AUS-CO-15_17.doc>.

VII THE ARGUMENTS AGAINST A HUMAN RIGHTS ACT

Why is a significant minority of Australians so passionately opposed to a Human Rights Act? The arguments are fairly and comprehensively set out in the NHRC Report³⁸ and have been well aired in the media in recent times, especially in *The Australian* newspaper.³⁹ They include the following.

One argument is that a dialogue model, as recommended by the NHRC, with declarations by courts as to incompatibility of legislation, would be unconstitutional and inconsistent with the exercise of judicial power. But that argument was confidently dismissed during the consultation. The Commonwealth Solicitor-General, Stephen Gageler SC, advised that a Human Rights Act could be drafted consistent with the exercise of judicial power under Chapter III of the Constitution. If even more persuasive authority is needed, Michael Kirby expressed that view well before the NHRC commenced.⁴⁰ Even so, some journalists and academics still question whether an Australian Human Rights Act can be introduced without offending the Constitution.⁴¹

A second argument against a Human Rights Act is that Australia's democratic institutions and legal framework already offer sound protection and can deal with any serious allegations of human rights violations. Australia has one of the best records of all nations. Its citizens enjoy better protection of their human rights than many countries with a charter of rights. In other words: '*if it ain't broke, it don't need fixin*'. That one is not a quote from *Don Quixote*!

A third argument is that a Human Rights Act would undermine Australia's parliamentary sovereignty. The people speak through their democratically elected parliament which is answerable to the community through the electoral process. A Human Rights Act would effectively require unelected judges to make policy decisions. It would politicise the judiciary with a transfer of legislative power to unelected judges. The parliament could abdicate its responsibilities for difficult policy questions, leaving those matters for the courts to decide.

38 NHRC Report, above n 11, ch 13, 281-99.

39 See above, n 30.

40 The Hon Justice Michael Kirby, 'The National Debate About a Charter of Rights & Responsibilities – Answering Some of the Critics' *Presented at the President's Luncheon*, Law Institute Victoria, Melbourne, 21 August 2008, 6.

41 Helen Irving, 'The Dilemmas in Dialogue: A Constitutional Analysis of the NHRC's Proposed Human Rights Act' (2010) Thematic Issue: The Future of Human Rights in Australia 33(1) *University of New South Wales Law Journal* 60; Paul Kelly, 'Human Rights report poisoned chalice' *The Australian* (online) 10 October 2009 <<http://www.theaustralian.com.au/news/opinion/human-rights-report-poisoned-chalice/story-e6frg74x-1225785180379>>.

A fourth argument is that a Human Rights Act, in defining human rights, may limit rather than broaden human rights. Rights can become outdated. Defining rights also creates a potential for competing rights to be pitted against each other in costly litigation, to the detriment of the individuals involved. For example, it is suggested that extreme religious groups could rely on the right to freedom of religion to discriminate against minorities or women.⁴²

A fifth argument is that a Human Rights Act could result in a windfall for lawyers in a litigation focused culture with ordinary citizens footing the bill through increased taxes. Others argue that a Human Rights Act could create legal uncertainty as laws are challenged in courts.

Finally, those against a Human Right Act often argue that rights are best protected through a strong civil society, healthy democratic institutions, and a positive human rights community culture. A Human Rights Act is in any case ineffective to protect a community against tyrants. Some of the worst abuses of human rights occur in countries like Zimbabwe and the former Soviet Union which have charters of rights.

VIII THE CASE FOR A HUMAN RIGHTS ACT

But the competing arguments in favour of a Human Rights Act, which ultimately won over the committee, were as follows.

First, there is community support for a federal Human Rights Act. Of the 35,000 or so submissions made to the NHRC, almost 28,000 were in favour of a Human Rights Act and only about 4,000 against. Of the 1,200 people randomly surveyed in the Colmar Brunton Social Research Report, 72 per cent considered that ‘it was important to have human rights explicitly defined rather than relying on a set of general principles’⁴³ and 57 per cent supported or strongly supported ‘a specific human rights law that defined the human rights to which all people in Australia were entitled’.⁴⁴

True it is that other surveys conducted by lobby groups have reached contrary results. We all know that survey results may depend on the make-up of the group surveyed and how the question is framed. But the Colmar Brunton survey appears genuinely random. And the integrity of the NHRC research has been established.⁴⁵ In combination with the NHRC experience, the Colmar Brunton survey provides convincing evidence that a majority of Australians are in favour of an Australian Human Rights Act.

42 NHRC Report, above n 11, 289-91.

43 Colmar Brunton Social Research Report, above n 17, 6.

44 Ibid 66.

45 See Carson and Lubensky, above n 13.

Second, Australia is the only western democracy not to have a bill of rights. A Human Rights Act would provide a symbolic statement of Australian values and an opportunity to define those freedoms central to the Australian story.⁴⁶ This is increasingly important in modern Australia, an infinitely more diffuse multicultural country than the monocultural British Australia at federation in 1901.

Third, whilst Australia's fine democratic institutions have served us well over the last 110 years, those minorities who might need the protection of a Human Rights Act are not the mainstream Australian majority. They are the marginalised, the disadvantaged and the disempowered. A Human Rights Act would give these people hope. It would help them identify their rights and empower them with the knowledge to enforce those rights. The UK experience has been that their Human Rights Act has been effective in ensuring that the rights of disempowered minorities are considered when developing law and policy.⁴⁷

Fourth, the dialogue model of Human Rights Act proposed in the NHRC Report would encourage public debate and interaction between branches of government, improving human rights policy, legislation and jurisprudence. The quality and accountability of all arms of government would improve, as a culture of respect for human rights developed.

Fifth, it is significant that Australia's unique absence of any national Human Rights Act makes it liable to international criticism for non-compliance with human rights. The passing of a Human Rights Act would provide Australia with much greater credibility when commenting on human rights abuses in other jurisdictions and in taking a leadership role in this area in the Asia Pacific region.

Sixth, the experiences in Victoria and the ACT, to which I shall refer presently, suggest that human rights legislation does not result in excessive cost to the community. Indeed, for reasons which I shall soon explain, a Human Rights Act is likely to be to Australia's economic advantage.

The final point is that, traditionally, Australian common law has developed with close assistance from the common law in the United Kingdom and, to a lesser extent, in New Zealand, Canada and the United States of America, all of which now have charters of human rights. Australian jurisprudence is

46 See Geoffrey Robertson, *The Statute of Liberty* (2009) 92.

47 Human Rights Law Resource Centre, Submission to the NHRC; Department for Constitutional Affairs (UK), *Review of the implementation of the Human Rights Act* (2006) <http://www.dca.gov.uk/peoples-rights/human-rights/pdf/full_review.pdf> at 4.

likely to become intellectually isolated and internationally out of touch.⁴⁸ More, too, of this later.

IX THE VICTORIAN AND ACT EXPERIENCES

Let me turn briefly to the Victorian and ACT experiences.

In 2004, the *Human Rights Act 2004* (ACT) was Australia's first bill of rights. It provided a model for the 2006 Victorian *Charter of Human Rights and Responsibilities Act 2006* (Vic). Tasmania seems likely to enact similar human rights legislation in mid-2011. The ACT and Victorian statutes are dialogue models, like the Human Rights Act proposed in the NHRC Report and like those in the UK and New Zealand. They generally contain the rights adumbrated in the ICCPR.⁴⁹ The ACT and Victorian Supreme Courts may issue declarations of incompatibility where legislation cannot be interpreted consistently with human rights.

In May 2009, an Australian National University research project reviewed the first five years of the Human Rights Act's operation.⁵⁰ The project found the impact on policy making and legislative processes was extensive and more important than its impact in the courts. It improved the quality of law making in the ACT by ensuring human rights were given due attention. It had created a 'fledgling human rights culture'.

48 The Hon Chief Justice Spigelman, 'Access to Justice and Human Rights Treaties' *Presented at the National Conference of the Australian Plaintiff Lawyers Association*, Sydney, 22 October 1999 <<http://www.lawlink.nsw.gov.au/lawlink/supremecourt/>>.

49 With the exception of the right to self-determination (The Explanatory Memorandum for the Bill stated that including the right to self-determination in the Human Rights Act was not appropriate because the right to self-determination is a collective right under international law (not an individual right) and internal and external self-determination under international law is still an evolving area of law: See Explanatory Memorandum, Human Rights Bill 2003 (ACT), available directly at <<http://acthra.anu.edu.au/articles/hra%20explan%20memo.pdf>>. Unlike the Victorian Consultative Committee however, the ACT Consultative Committee recommended that the right to self-determination in the Human Rights Act would provide particular protection to Indigenous people); the prohibition of propaganda for war and national racial or religious hatred (ACT vilification provisions already covered this area); and the right to form trade unions (This matter falls to the Commonwealth to regulate).

50 The ACT Human Rights Act Research Project, The Australian National University, 'The HRA 2004 (ACT): The first five years of operation' Prepared for the ACT Department of Justice and Community Safety (May 2008) <http://acthra.anu.edu.au/ACTHRA%20project_final%20report.pdf>.

Dr Helen Watchirs, the ACT Human Rights Commissioner, recently stated that the ACT Human Rights Act has generated, across ACT government agencies and between the executive and legislature, a genuine human rights dialogue.⁵¹

The Victorian Charter has been in operation since 2006 but only became justiciable in January 2008. Only a handful of cases have been determined under it.⁵² The Victorian Equal Opportunity and Human Rights Commission reviewed the Charter in 2009, noting that it has ‘continued to evolve as a strong and positive force in making laws and policies, improving the delivery of services and developing a human rights culture in Victoria. There has been no avalanche of litigation. The Charter has been most effective in furthering debate and discussion about, and a culture of, human rights manifested in increased awareness of human rights issues and a reflection of human rights in the delivery of public services.’⁵³

The Victorian Bar has supported the Charter and lawyers increasingly refer to it when advising clients.⁵⁴

In summary, the ACT and Victorian experiences have been positive and without the predicted dire financial consequences. A human rights jurisprudence is gradually developing. Tasmania is keen to follow. Returning for a moment to the wisdom of *Don Quixote*: perhaps ‘the proof of the pudding is in the eating of it’.⁵⁵

X A PERSONAL VIEW

Personally, I support in principle a charter of rights for Australia, generally of the kind recommended in the NHRC Report. I was not always of that view, once fearing its only contribution might be to line lawyers’ pockets. Like Don Quixote, or perhaps in my case more like his food and wine loving peasant companion, Sancho Panza, I have become wiser – as well as rounder – on my life journey! I consider an Australian Human Rights Act could make a positive difference to the protection of human rights.

51 Helen Watchirs and Gabrielle McKinnon, ‘Five Years Experience of the Human Rights Act 2004 (ACT)’ (2010) Thematic Issue: The Future of Human Rights in Australia 33(1) *University of New South Wales Law Journal* 135, 170.

52 Michael Pelly, ‘Rights charter becoming part of legal arsenal’, *The Australian* (online) 30 October 2009 <<http://www.news.com.au/rights-charter-becoming-part-of-legal-arsenal/story-e6frg97x-1225792615488>>.

53 Victorian Equal Opportunity and Human Rights Commission, *3rd Annual Report on the Charter of Human Rights and Responsibilities Act 2006* (Vic) (2009) <<http://www.humanrightscmission.vic.gov.au/publications/charter%20reports/>>.

54 Pelly, above n 52.

55 *Don Quixote de la Mancha*, Miguel de Cervantes, I, iv, 10; DQ I, 37.

Prominent New Zealand legal academic, A T H Smith, was, like me, once a charter of rights sceptic. But after experiencing the New Zealand bill of rights, he has determined that, on balance, a bill of rights has been a positive development in his country and in the UK.⁵⁶ The Victorian and ACT experiences have also been positive.

I no longer want Australia to be the only democratic nation in the world without such a charter. I am concerned that its absence will increasingly isolate Australia's jurisprudence. I am not alone. Former Australian Chief Justice, The Hon Sir Anthony Mason, noted: '... the High Court's jurisprudence is to be contrasted with that of other jurisdictions whose jurisprudence is influenced by the interpretation of entrenched or statutory bills of rights. This difference may affect the court's use of comparative precedents and judicial reasoning.'⁵⁷ Michael Kirby also noted that the enactment of the UK Human Rights Act, 'makes the invocation of English judicial case law more problematic, because of the new and different starting point now provided by this important legal development.'⁵⁸

I fear that Australia's persistent failure to adopt a Human Rights Act will have a detrimental impact on the international standing of Australian jurisprudence, not only in a human rights context but more broadly.

If I am right, there could be detrimental economic fallout for Australia. The continued absence of a federal Human Rights Act has the potential to undermine the reputation Australia is presently fostering as a desirable centre in the Asia-Pacific region for international commercial dispute resolution, including international arbitration.

Further, tertiary education of foreign fee-paying students is a thriving Australian business. As the practice of law becomes more globalised, these students are of increasing economic importance, as well as adding to the academic and cultural strength of our law faculties. If Australian jurisprudence is sidelined because it has no human rights perspective, Australian law schools may cease to be popular with our international students. And Australian lawyers may not be able to participate in the growing trend towards reciprocal international admission. If we are not seen as a desirable centre of dispute resolution or legal education, and if Australian-trained lawyers are ineligible for reciprocal international admission, our economy will suffer.

56 A T H Smith, 'Inching Towards an Australian Bill of Rights: Cousinly Comments on the Australian National Human Rights Consultation Report' (2010) Thematic Issue: The Future of Human Rights in Australia 33(1) *University of New South Wales Law Journal* 171, 191-2.

57 The Hon Sir Anthony Mason AC KBE, 'The High Court of Australia: A Personal Impression of its First 100 years' [2003] *Melbourne University Law Review* 33.

58 The Hon Justice Michael Kirby, 'Precedent Law, Practice and Trends in Australia' (2007) 28 *Australian Bar Review* 243, 244.

By contrast, if we do adopt a Human Rights Act, this will result in a higher degree of comparative constitutional jurisprudence in Australian law, especially from Europe and Canada. Professor H P Lee predicts that this ‘will bring excitement back into the Australian constitutional arena, which has fallen into a comatose state.’⁵⁹ It is likely to also be an economic advantage.

The attitude of some mainstream Australians, that life is sweet and ‘I’m alright, Jack’, is no reason to ignore the pursuit of a Human Rights Act. Australians must consider whether a Human Rights Act is warranted, not from their personal perspective, but from the perspective of disadvantaged, vulnerable Australian minorities.

Most second or third generation Australians have some Irish ancestry. In Michael Kirby’s case, it is mainly northern Irish Protestant. I am more of a mongrel, with a good dash of southern Irish Catholic as well! Once, Australians of Irish Catholic descent considered themselves a disempowered minority. Let me give a colourful local example. Here in Lismore in October 1886, sectarian rioting erupted. The cause was a speaking tour by Edith O’Gorman, world-renowned as the ‘Escaped Nun’. She was travelling with her husband, Professor Orphrey, a former Papal secretary at The Vatican. Their tour was organised by the ultra-Protestant Loyal Orange Lodge so I infer Edith and the professor were said to have escaped from the Roman Catholic Church. Blood flowed freely in the streets as Protestants and Catholics fought enthusiastically with clubs, whips and chairs. Lismore was in tense uproar for over a week as 150 police patrolled the town. Forty rioters were summoned, 20 were tried. But only the Irish Catholics were punished!⁶⁰

I tell this story for three reasons. First, to let you know how brave I am in venturing to Lismore! Second, things change over time and today’s oppressed minority can be tomorrow’s mainstream, prosperous majority. Conversely, today’s comfortable mainstream majority can become tomorrow’s cultural minority. The ‘I’m alright, Jack’ view may not be prudent. Third, a clear, lawful path to the public enforcement of human rights encourages the peaceful resolution of grievances. If the Lismore Irish Catholics of 1886 had the opportunity to enforce their human rights lawfully, the ‘Escaped Nun’s’ speaking tour may not have ended in a riot.

Today the disadvantaged Australian minorities who would benefit from a Human Rights Act include many Indigenous citizens, the mentally ill, the

59 H P Lee, ‘A Federal Human Rights Act and the Reshaping of Australian Constitutional Law’ (2010) Thematic Issue: The Future of Human Rights in Australia 33(1) *University of New South Wales Law Journal* 88, 108.

60 Raymond Evans and Carol Ferrier, *Radical Brisbane: An Unruly History* (2004) 118.

frail elderly and those with disabilities. In arguing the case for a bill of rights, Professor George Williams referred to a US study of people with disabilities. They found that a formal statement of rights had a profound impact on their lives, not because they went to court but simply in the way they interacted socially: 'Rights transformed their self image, enhanced their career aspirations and altered the perceptions and assumptions of their employers and co-workers.'⁶¹

If disadvantaged Australian minorities can be better protected through a Human Rights Act, why wouldn't we have one, unless there were sound reasons against it. But it seems to me the arguments are all the other way. Let me summarise my view.

First, there is powerful legal opinion that a Human Rights Act can be drafted in a form which will meet constitutional requirements.

Second, whilst the federal government's non-legislative response to the NHRC Report will help develop a rights-based culture within the public service and broader community, this would be more effectively and comprehensively achieved with the additional assistance of a Human Rights Act.

Third, a dialogue model Human Rights Act would not disturb accepted principles of parliamentary sovereignty: courts would not strike down legislation which offends human rights but would refer it back to parliament. The parliament alone would have the power to repeal impugned legislation and would continue to be answerable only to the electors.

Fourth, a Human Rights Act would improve the transparency and accountability of government in its treatment of human rights principles. Over time, a Human Rights Act, in conjunction with the other recommendations of the NHRC Report, would contribute to increasing respect and tolerance within the Australian community. A healthy, vibrant human rights culture within the three arms of government (the legislature, the executive and the judiciary) is unlikely, in my view, to result in a Human Rights Act limiting rather than broadening human rights.

Fifth, the ACT and Victorian experiences do not suggest that a Human Rights Act is a prohibitively expensive exercise. The cost of implementing it will be a modest price for Australia strengthening its place in the international community. Indeed, for the reasons I have explained, it is likely to bring economic benefits.

61 George Williams, *A Charter of Rights for Australia* (2007) 91.

Sixth, a Human Rights Act will lead to more work for lawyers and judges, but the Victorian and ACT experiences do not suggest there will be a litigation explosion. In any case, as our community becomes larger, more complex and more culturally diverse, the work of lawyers grows in complexity and quantity, as does the work of all professionals. And this increased cost is counter-balanced by the corresponding benefits, including economic benefits.

Seventh, in determining litigation under a Human Rights Act, courts will be fulfilling a centuries-old role: developing the common law; interpreting legislation passed by parliament; and exercising judicial discretions. A Human Rights Act will not lead to any greater politicisation of the judiciary and nor will it result in courts taking on a greater number of the tasks which parliament finds electorally unpopular. Judges are already determining whether legislation offends human rights principles such as those contained in the *Racial Discrimination Act 1975* (Cth). If it be necessary for courts to make determinations between competing human rights, that is a core function which the judiciary is well-used to fulfilling. Any uncertainty in the law as the jurisprudence develops under an Australian Human Rights Act, is a minor temporary inconvenience whilst Australia develops an internationally consistent and respected human rights jurisprudence.

Finally, true it is that some rogue nations with fine human rights charters have shown disdain and disrespect for human rights. True it is that if those who make up a nation's governing institutions (the parliamentarians, the executive and the judiciary) are determined to trammel on human rights, then a charter of rights will be of little use to their victims. But that is no reason not to have a human rights charter. A Human Rights Act is, nevertheless, another layer of protection for disempowered minorities at least in a democracy like Australia.

The NHRC Report provides a useful starting point in drafting an Australian Human Rights Act. But it does not provide a draft bill and there are issues that require clarification. The report proposes that only the High Court of Australia, and not the federal or state Supreme Courts, will have the power to make declarations of incompatibility. I am uncertain if this is workable. Fine tuning and further consultation will be needed before an Australian Human Rights Act can become law.

Despite the NHRC Report's recommendations and my personal view, it does not seem that the quest for a federal Human Rights Act is about to be realised any time soon. But nor is it the impossible dream of the Man of La Mancha.

The debate has been enlivened in unexpected quarters. The Chief Justice of the United States Supreme Court, Justice John Roberts, recently visited

Australia. The Chief Justice was appointed by Republican President George W Bush and is no 'red ragger'. Although careful to avoid local controversy, the Chief Justice noted in his lectures on the history of the US Bill of Rights that the debate about an Australian bill of rights was a worthy one.⁶²

And a week is a long time in Australian politics. According to a recent article in *The Age* newspaper,⁶³ some of our newly powerful federal country independent members, Mr Oakeshott and Mr Windsor, are deeply concerned about human rights issues.

So, where to now? I urge you, your families and friends to review the NHRC Report which I remind you is available online. It is balanced and thoughtful. If you want an academic, legal critique, the University of New South Wales Law Journal recently dedicated an entire volume to the future of human rights in Australia.⁶⁴ I commend it to you. Make up your own minds and encourage your family and friends to do likewise.

If, like those at the 2020 summit, the majority of contributors to the NHRC and the NHRC committee, you consider Australia should have a Human Rights Act, do your bit to ensure that it becomes an inevitable, natural progression as Australia moves further into the 21st century in the context of a shrinking, globalised world. But if Australians do not actively pursue an Australian Human Rights Act, it will remain a quixotic impossible dream. It is up to you all. Gain heart from a few more of the wise pearls of *Don Quixote*: 'There is no human history that does not contain reverses of fortune'⁶⁵ and 'While there is life, there is hope.'⁶⁶

I am optimistic that, before too long, a federal Human Rights Act will be part of the law of this great nation. If I am right, the NHRC committee, and their many fellow travellers who have championed it, will at last be able to enjoy the sweet rest of the victorious, rather like Don Quixote and Sancho Panza at the end of their epic journey.

62 Chief Justice John Roberts, 'The Origin of the Bill of Rights of the United States Constitution' *Presentation at University of Melbourne, University of Sydney and the Queensland Supreme Court*, Australia, 27, 28 and 29 July 2010. Audio recording of the lecture available at <<http://www.abc.net.au/rn/bigideas/stories/2010/2992759.htm>>

63 Anthony Burke, 'Independents should put human rights first' *The Age* (online) 31 August 2010 <<http://www.theage.com.au/opinion/contributors/independents-should-put-human-rights-first-20100830-145mi.html>>.

64 Thematic Issue: The Future of Human Rights in Australia (2010) 33(1) *University of New South Wales Law Journal*.

65 *Don Quixote de la Mancha*, Miguel de Cervantes, II, i, 3; DQ II, 3.

66 *Don Quixote de la Mancha*, Miguel de Cervantes, II, 3, vii; DQ II, 39.

