Explaining and Confronting Australia’s Refusal To Adopt a National Bill of Rights

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Explaining and Confronting Australia’s Refusal To Adopt a National Bill of Rights.

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I am the creator of all the work of this thesis and that where reference is made to the work of others, due acknowledgement is given.

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ABSTRACT

Australia’s legal arrangements for the protection of human rights have been described by rights activists as an ‘intricate patch work’. Ironically, the most noteworthy feature of this ‘patchwork’ is not what it contains, but what it lacks, a bill of rights (BOR). The failure of national governments over decades to remedy this situation is the focus of this thesis. This thesis argues that, until a bill of rights is enacted, the capacity of all Australians to enjoy their human rights will remain diminished.

This thesis aims to contribute to overcoming Australia’s entrenched impasse about a BOR in two ways. First, it explains why despite periodic ‘movements’ during periods of Australian Labor Party governments since the 1970’s, no bill of rights campaign has come to fruition. The chief explanation for these rejections is that a bill of rights would threaten the sovereignty and supremacy of the Australian Parliament.

Second, by comparative examination of the experience of New Zealand, which enacted a ‘Commonwealth model’ statutory bill of rights in 1990, this thesis challenges the veracity of this dominant view in Australian politics.

This thesis concludes, that the enactment of a Human Rights Act that is, a statutory bill of rights, that does not diminish parliamentary supremacy, is a necessary next step in fulfillment of Australia’s obligation to respect the human rights of all Australians.
ACRONYMS USED IN THIS THESIS

ACOSS-Australian Council of Social Services

AG- Attorney-General

BOR- Bill of Rights

BORA- Bill of Rights Act

CAT- Convention against Torture and other Cruel, Inhuman and Degrading Treatment

CEDAW- Convention on the Elimination of All Forms of Discrimination against Women

CRC- Convention on the Rights of the Child

CRPD- Convention on the Rights of Persons with Disabilities

EU- European Union

HRA- Human Rights Act

ICCPR- International Covenant on Civil and Political Rights

ICESCR- International Covenant on Economic Social and Cultural Rights

ICERD- Convention on the Elimination of All Forms of Racial Discrimination

LLM (LP) Master of Laws (Legal Practice)

LNP-Liberal National Parties

NGO- Non-Government Organisation

OECD- Organisation for Economic Co-operation and Development

UNOHCHR-United Nations Office of the High Commissioner for Refugees

PJCHR- Parliamentary Joint Committee on Human Rights

SOC- Statement of Compatibility
DEDICATION

To all my fellow Australians past and present, who have suffered or are suffering today, abuse of their human rights. This thesis aims to provide informed information to help all citizens (including politicians) to appreciate the human rights improvements that a bill of rights can improve. This knowledge will overtime lead to acceptance of the view by the majority of our society, that a Bill of Rights (BOR) will assist the nation to become a more socially cohesive, and lawful society, which is respectful of the human rights of every citizen of whatever age, gender, or heritage.

With thanks for the opportunity provided to me by the University of Wollongong to complete this thesis, to my Supervisor Professor Luke McNamara and for the encouragement given to me by my wife Denise and family and by my friend from youth, David Lawrence.

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CHAPTER 1

INTRODUCTION

1.1 Motivation

This thesis takes issue with conservative political opponents and their supporters who have raised barriers for decades to prevent the enactment of a national Bill of Rights (BOR), a human rights position which has left Australia’s underprivileged people, exposed to significant and ongoing abuses, both to individuals and to significant minority groups such as our Indigenous people. While opponents to a national BOR are implacably opposed to it, they fail to accept that there are glaring weaknesses in the human rights provisions for those on the fringes of Australian society. Since World War Two, under the auspices and initiatives of the United Nations Organisation, there has been enormous spread of human rights provisions to many nations, and virtually all western democratic nations have adopted a bill of rights in one form or another, except Australia.

Tourist visits to Europe across the last decade revealed starkly the terrible World War Two human rights abuses of committed against the citizens in many countries throughout Europe. My appreciation of the importance of human rights to everyone, everywhere was raised to a new level. Visits to Mauthausen Concentration Camp, located near the village of the same name, some 20 kilometres east of the Austrian city of Linz, Ravensbruck Concentration Camp for Women, near Furstenberg North Germany, and the Topography of Terrors museum at Niederkirchenerstrasse Berlin, the site of the Gestapo and Schutzstaffel (SS) former headquarters, revealed the scale human rights abuses committed by the Nazi regime across Europe. The human cost of millions of innocent lives resulted from the total collapse of civilised behaviour and human rights emanating from Germany and Austria.
The memory of those experiences remained with me on return home, and motivated me to find out why we the Australian people were without the protection of a national Bill of Rights. That is not to say that I felt Australia had poor human rights generally, but in the period of my teaching and observation of life here, I came to realise that while I had never been mistreated by authority, a significant number of minority groups and individuals have been.

Research for a Master of Laws (Legal Practice) degree at the Australian National University laid the foundation from which a more serious focus upon Australia’s national human rights could be undertaken. The LLM (LP) project sought to highlight and assess differences in human rights law and practice between Australia and the European Union. The assumption in the research was that the EU’s human rights benchmarks would assist in the task of evaluating the effectiveness of Australian human rights laws.

My research there, revealed a strong body of opinion that Australia’s system of national human rights law and policy was limited and that parliaments, both State and Federal, were able to easily circumscribe fundamental rights and freedoms. It was argued by some that Australia did not have a robust human rights culture and that this reflected racist popular and political attitudes which still resonate today.

By comparison the EU’s human rights regime involved an extensive overlay of human rights observance with legal obligations imposed on member states and enforced by a well-established human rights judicature in the form of the European Court of Human Rights.1

The LLM (LP) findings have also prompted my pursuit for a more sustained and critical investigation of human rights law and policy in

contemporary Australia. In particular this thesis asks: why has Australia failed the human rights of a significant number of its citizens over decades: why has Australia failed to do what all comparable democratic countries have done and enact some form of bill of rights to indicate to government and its agencies that the prevention abuse of citizen’s human rights must be an essential on-going task? Australian’s must have a national bill of rights, which they understand and which protects their basic human rights against abuse.

This thesis has been written as a contribution to scholarship to again highlight the unsatisfactory provision of human rights law and practice of the successive Australia’s national governments, focusing specifically on the many omissions which affect the human rights of our underprivileged citizens. More broadly, this thesis also considers that Australia’s national human rights inadequacies also reduce the wider community’s right to more effective and comprehensive human rights found across modern western advanced societies such as New Zealand and the United Kingdom.

Every Australian citizen is important, yet many slip through the human rights net. One such Australian died in 2007 because his human rights rights were ignored by our authorities. Indigenous elder Mr. Ward died from heat stroke in Western Australia, while being transported in the uncooled back of a police van, on a 42 degree day. He collapsed onto the van’s metal floor, the temperature of which was estimated to have reached 56 degrees celsius. Mr Ward ‘cooked’ to death (Coroner’s description), another aboriginal death in custody.\(^2\)

Gaps in our human rights across decades in many cases, reflect a common lack of action against abuse by governments and their agencies and similar failures by private organisations, to protect the human rights of significant minority groups of Australia’s citizens, Indigenous and non-

Indigenous. Apologies have been made and are still being made for failures to protect many groups of citizens from human rights abuse. It is instructive to appreciate the extent of the of our human rights failures, whether by federal, state or territory governments, their agencies and private bodies.

1. Abused Children.

Such groups include many children: abuse sexual, physical and psychological, in homes for children such as Barnardo’s: in schools and religious dormitories: in homes for girls ‘judged’ delinquent (including the now infamous Parramatta Girls School): in many church denominations.

Evidence is emerging it seems in many of our towns and cities of large scale, long-term sexual abuse of children by pedophile priests—ministers and in some cases by pedophile church members. Such was the case at the Anglican Cathedral at Newcastle New South Wales, where church whistle-blowers uncovered sexual abuse of children by both groups. Their disclosures were supported by the Bishop who revealed the situation to the media and to the police and state authorities. Likewise, the Hunter Valley’s Maitland Catholic Church is under investigation there and in Newcastle, by the New South Wales Child Abuse Enquiry and now also the National Royal Commission into Child Abuse.

This thesis believes that the problem of youth abuse in Australia, of children and young trainees is a problem ignored by our governments for decades. One improvement should be a permanent National Youth Protection Commission, with power to investigate and bring offenders to court, when and where ever offences are found. Of course the abuse problem widens when the focus upon the abuse of the young moves to adults to include many other human rights abuses.

On another scale child abuse intensifies as evidenced by a headline in the Sydney Morning Herald: ‘Rescue mission Stop the Clock Campaign’ launches. The scope of the needed rescue mission is outlined below:
In a room on the second floor of the Children’s Hospital Westmead is a team of specialised staff weighted down by a collective consciousness, burdened by countless horrific cases of child abuse. The hospital’s child protection unit has treated infants just days old, toddlers, school children and adolescents for brutal physical injuries, sexual abuse and neglect inflicted by adults who should have protected and nurtured them.

We see children, babies who come in in a state of starvation because they haven’t received the food that they need to survive, senior social worker Calli Goninan said.

We see children who have not been given the medicine they need. We have children living in terror every day...where there is domestic violence...living in long-term shame and guilt because they have been[sexually] abused. It is likely that Australia’s rising problem of rising child abuse will be found also in other cities and towns to a greater or lesser extent.

2. Indigenous Australians.

The Indigenous people continue to suffer: the lingering terrible abuse of the ‘Stolen Generation,’ with an apology, a national apology by then Prime Minister Kevin Rudd for it and all past human rights failures and wrongs committed against our Indigenous people. Still today the incredible incarceration rates of aboriginals also persist together with widespread appalling health: previously they struggled post-Mabo to achieve land rights against the legislation created by the incumbent Howard government, which sought to restrict traditional native ownership.

Australia is still failing to close those gaps between Indigenous and non-Indigenous citizens.

3. The Military.

The human rights failings of our military forces have persisted for decades, embedded in a culture where abuse of recruits in the military,

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army, navy and airforce was largely ignored, whether against males or females. Following the national revelations of church abuse the military has collectively made significant attempts to remove offending abuse.


There is serious on-going violence against women and children in domestic situations which still plagues the nation, producing violence and deaths to partners and children, as well as mental distress.

5. Anti-Terrorism Laws.

There is on-going discussion about national over-reach of our anti-terrorism laws. More will be said about these laws in Chapter Seven.

6. The ‘Boat People’.

The abuse of refugee ‘Boat people’ where families, men, women and children suffer indefinite detention on Manus island and Nauru suffer mental and physical abuse in the isolation and heat because they tried to seek refuge.

7. Abuse of other powerless Australians.

The Australian Council of Social Services Reports which follow below in this chapter, indicate a widespread Australian social and political reality of unacceptable neglect of the mentally ill, the disadvantaged, the poor, and the homeless by governments.

8. Bullying.

There is persistent media commentary highlighting national racism and widespread bullying online and in institutions like schools and workplaces.


Just recently the New South Wales Government has also decided to offer an apology for the discrimination and mistreatment that gay activists
suffered in 1978. This recognition of past abuse to gays may spread to other states who likewise are recognising past human rights failures. 4

All of this failure to protect the human rights of our citizens from mental and physical harm must be faced and repaired.

The point was reached where the persistence and accumulation of human rights abuses in Australia, examples of which will be further addressed in this thesis, and which are still being uncovered, has also generated this thesis as a contribution towards improving the wider community’s human rights needs, to highlight and raise through research, their need for human rights action to assist in reducing expressed human rights weaknesses.

The most recent human rights failure revealed in July 2016, once again has shocked the nation, shamed by the failure to prevent unbelievably vile abuse of children at Darwin’s youth detention centre. Strapping hooded children to chairs justified because some spit at attendants: the use of tear gas on children, then hosing them from their rooms with high pressure water after forcing them to lie on the courtyard concrete: large heavy men brutally throwing children across rooms and then stripping them by sitting on the much smaller children and leaving them naked in cells—all of this on CCTV as almost unbelievable to TV viewers of the footage.

Following the release of the TV program Four Corner’s abuse footage, what has followed from has been denials from responsible Territory Ministers. As well the news media has been scathing about this abuse of children.5 A Northern Territory Royal Commission has followed, a which many demanded, which is independent from the Northern Territory

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government’s desire to make it a joint operation, risking damaging the need for an independent finding.

As a concerned citizen, I made the decision to present this thesis as a statement of claim for a national bill of rights to achieve better human rights for all our citizens in Australia. The basis of this claim is that a national bill of rights will assist over time to reduce and remove the source of many human rights failures Australia has experienced and still suffers. Such a bill will reflect, ‘the values of human dignity and worth, will help Australians resolve the moral, ethical and legal dilemmas presented in such[rights] debates’. 6 Because human rights are important for everyone I recommend its goals to all citizens.

Outwardly at least, the majority have little to fear or complain about their human rights, but that is not the case for a significant minority. At any time, without more effective rights protections, it is possible to imagine that Australian community could also find itself faced with even more extreme oppressive authority by government and its agencies. A party in government could emerge whose ideology encourages it to make decisions to seriously further restrict freedoms and rights which are now an entitlement of all citizens in democratic Australia. There has been concern in legal circles about the over-reach of federal ‘terrorism legislation’ by observers who have argued that the draconian measures introduced are unnecessary, given comprehensive national laws previously existing, and that the people of Australia are facing serious legal inroads to their traditional democratic rights. 7

The treatment of the human rights of refugees who seek safety in this country has begun to take a very oppressive character, with a federal government program which justifies indefinite imprisonment without an offence, in oppressive camps in third world countries. Australian citizen’s

6 Julie Debeljak, ‘Does Australia Need a Bill of Rights?’: Paula Gerber and Melissa Castan (eds.), 
Contemporary Perspectives on Human Rights Law in Australia, (Law Book Co. 2013), 70.

are denied information and visitation by journalists and rights workers, a strategy by government which seeks to reduce the impact of the community’s real understanding of that abuse, mental and physical that these unfortunate refugees and their children endure.

For many Australians, the inadequate human rights policies of Australia’s national government and its agencies have created important social, cultural and economic problems for many. Consider the following data:

Australian Council of Social Services Annual Reports. (ACOSS)

There is evidence on this record which reflects the inadequacy of our national human rights provisions. The Council estimated that in 2012, 2,265,000 (12.8% of all people) Australians were living in poverty. 8 ACOSS figures use the poverty line percentage of the Organisation for Economic Co-Operation and Development (OECD), and the poverty line is calculated as income which is below 50% of median income for a single person, ($358 per week) and a couple with two children is ($752) per week. Of those in poverty 575,000 were children (17.3% of all children). Homelessness in Australia was estimated at 105,237 up by 17% from the 2006 census. 9

The 2014 ACOSS Report figures were higher: 2,550,000 (13.3% of all people) and 731,000 (17.4% of all children) lived in households below the 50% line. If the less austere but low 60% poverty line is used (as in Britain) 22% of the population or 4 million people were in poverty living on incomes of $480 a week or less (for a single adult), after adjusting for housing costs or $1009 for a couple with two children. 10 In Population terms, the 2014 report indicated that 2.99 million people were living in


9 Ibid.

poverty in 2014 (mentioning in footnote 2 page 7, that; population figures are not comparable with previous reports due to changes in methodology, due to the inclusion of self-employed households).

These figures have been followed by media reports of the current steady widening gap between the ‘haves and the have-not’s in Australia.\textsuperscript{11}

1.2 What is a Bill of Rights?

A bill of rights is essentially a collection of human rights expressed in legal form.\textsuperscript{12} They contain rights that are considered to be inherent to all human beings whatever their nationality, place of residence, gender, religion, language or any other status, and they are all considered to be inalienable, interrelated interdependent and indivisible.\textsuperscript{13}

In this thesis the acronym BOR is used in this thesis for a ‘bill of rights’. A BOR is also frequently described as a Human Rights Act (HRA), such as in the UK. Some countries also use the acronym ‘BORA’ when referring specifically to their bill of rights created by statute, such as New Zealand’s BORA.

Human rights are conveniently classified in the literature as having developed in three waves or generations.

(a) Human rights of the first generation are those concerning civil and political rights, sometimes called negative human rights. Not granted but rather protected by the state, examples include a citizen’s right to vote, have equality before the law, the right to privacy, freedom from


\textsuperscript{12} Peter Bailey,\textit{ The Human Rights Enterprise in Australia and Internationally}, (Lexis-Nexis Butterworths, 2009) 134.

discrimination, the rights to safety, the right to be treated with dignity. These rights have their origins in the Enlightenment and the development of liberal political philosophy.\(^{14}\)

(b) Second generation human rights are concerned with economic, social and cultural rights, described as positive rights because they require a much more positive role by the state to implement them.\(^{15}\)

(c) Third generation rights emerged in the last three decades of the 20\(^{th}\) century and involve broad-scale rights such as benefits to the nation from world trade, economic development, environmental protection to provide clean air, clean water and the protection of natural environments and the right to live in a harmonious and cohesive society.\(^{16}\)

Rights contained a bill of rights are typically derived from rights contained in international human rights treaties, conventions, covenants, and declarations, which comprise current customary and international human rights law (although not yet formally for third generation rights). All states have ratified at least one and 80 per cent of states have ratified four or more of the core human rights treaties which impose obligations on their signatories to promote and protect human rights guaranteed in those treaties.\(^{17}\)

Domestic implementation of international human rights treaty obligations has generated bills of rights in many countries and in all western democracies. However the nature of the types of rights contained in international instruments and those adopted in national bills of rights are not always identical. The adoption of these rights into national or local


\(^{15}\) Ibid, 46.

\(^{16}\) Ibid, 47.

\(^{17}\) Office of the UNHCHR, above n 13.
law and practice in many countries including in Australia, has been problematic.

1.3 Australia’s Urgent Need for a National Bill of Rights.

The starting proposition of this thesis is that Australia must have national Human Rights Act which will provide the nation with a statutory bill of rights that is similar in character to those found in New Zealand, the United Kingdom, the Australian Capital Territory and Victoria. These rights instruments have been described by lineage as the ‘Commonwealth’ model.

A key feature of the Commonwealth model is that it does not empower the judiciary to invalidate legislation, reflecting the Westminster tradition of Parliament having the final say on political decision-making. Rather, the courts are vested with an obligation to interpret domestic law wherever possible, in a manner that renders it compatible with the bill of rights. Where this is not possible, the courts may be empowered to make a statement of incompatibility or inconsistency, for example in Great Britain.

1.4 Why is this thesis Important?

This thesis identifies weaknesses in Australia’s legal arrangements for the protection of human rights, which have been described as an ‘intricate patchwork’. One accepts that this ‘patchwork’ has provided and still provides Australia with reasonably good human rights protection for the majority of citizens. However Australia’s ‘patchwork’ of rights has gaps, is unstructured in form, and is legally complex, which has led to a

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weak community awareness and understanding of their rights. This is a situation which could be improved significantly by adding a legally binding national statement of citizen’s human rights in Australia.

Importantly, the failure of national government policies to protect the human rights of the poor, has led to social consequences of poverty and all that deprivation involves, from poor mental and physical health, to homelessness, family violence and in some cases anti-social behaviour and crime. Children in such homes suffer the flow-on effects of family poverty.

Australia has had an unusual history of several unsuccessful attempts to enact a bill of rights. This history will be outlined in more detail in chapter three, but for present purposes, the point is that a history of failure means that the problem of Australia’s inadequate fulfillment of its human rights obligations remains unresolved.

This thesis is being undertaken because, despite Australia’s adherence to the rule of law and a democratic system of government, it has a number of significant human rights flaws. It is not the mere absence of a national bill of rights that is the problem; it is that Australia’s human rights provisions are imperfect and not adequately understood and respected by the Australian people. This position runs counter to the belief shown by all other contemporary western democracies (including those in the Commonwealth of Nations), the advantages that the national adoption of a formal human rights bill achieves for their societies.

The Commonwealth statutory bill of rights model is seen as breaking away from two foundation values of the Westminster constitutional model: (a) the recognition and protection of certain fundamental human rights, and (b) a proper distribution of power between courts and elected branches of government including appropriate limits on both:\footnote{21 Gardbaum, above n 19, 171.}
However vague and indeterminate a bill of rights may be (which is one of the reasons for not granting judicial supremacy), as a form of human rights legislation it is far less vague and indeterminate than law the primary common liberties of the Westminster-based parliamentary sovereignty model. 22

More will be said in this thesis about the human rights benefits which will flow from the enactment of a ‘Commonwealth’ style bill of rights for Australian. The thesis will highlight human rights improvements that will follow the achievements of such a bill of rights, especially for the human rights of minority groups. The assertion of this thesis is that ultimately over time, the growth of a rights culture in Australia will lead to a more cohesive and just society, cultivated by the presence of a national bill of rights

It is not assumed that the Australian Parliament will readily change its culture in order suddenly to enable the adoption of a national human rights act. It is recognized that we must confront and understand the history of attempts and failures and interrogate the human rights exceptionalism,23 to which the majority of our coalition federal politicians and their supporters (and some ALP members) have subscribed to. The hurdle presented by Federal Parliament’s structure and practices will also be addressed.

Janet Hiebert raised serious doubts in the case of the United Kingdom’s human rights, whether the introduction of legislative rights review (for example by bodies such as Joint Parliamentary Human Rights Committees), would fundamentally reorient political behaviour and legislative decision-making in a manner commensurate with this conception of proactive rights protection any time soon. Executive dominance of the House of Commons and the centrality of disciplined political parties are the persuasive characteristics of how Westminster parliamentary government operates and together they function in a

22 Ibid.

23 Author’s emphasis added. The term has special national significance in relation to who gets which human rights provisions in Australia.
manner that undermines the capacity of the House of Commons to become an effective venue for legislative rights review.  

While she has outlined the matter as it pertains to the United Kingdom experience, Stephen Gardbaum offers a less pessimistic assessment of rights protection by a Commonwealth model, noting that in the United Kingdom the *Human Rights Act 1998* (UK) has created, ‘greater rights consciousness than before the HRA, among citizens, courts, Parliament and government, and the rights that exist are generally better known and understood [by the community].’

1.5.1 Evidence of Australia’s Human Rights Failings: Feedback from the United Nation’s.

Feedback from the United Nation’s provides confirmation that Australia’s national human rights provision is currently inadequate. Two examples will be discussed here: first, comments from the Office of the High Commissioner for Human Rights on Australia’s 2011 National Human Rights Action Plan: Baseline Study, and second, recommendations from

\[\text{Footnotes:}\]

24 Janet Hiebert ‘Protecting Rights and the Westminster Challenge’ 2, (Paper presented at the University of NSW Gilbert-Tobin Centre’s Staff Seminar/Master Classes, Tuesday 15 October, 2013, as visiting Professor). (Copy on file with the writer).

25 Gardbaum, above n 19, 198.

\[\text{References:}\]

the UN Human Rights Council arising out of Australia’s participation in the Universal Periodic Review (UPR) process in 2011.\(^{27}\)

In 2010 the Australian announced a new National Human Rights Action Plan (that did not include a Bill of Rights). In 2011 the Department of Attorney-General completed a baseline study to determine the quality of Australia’s human rights provision at that time, and include consideration of existing and previous programs. The extensive review drew upon the Report of the National Human Rights Consultation 2009\(^{28}\) parliamentary enquiries, papers and reports from the Australian Human Rights Commission and various United Nations Bodies, the report created under the Universal Periodic Review of Australia’s data sets from the Bureau of Statistics and other research institutions and non-government organisations.

The Draft Baseline was reviewed by the UN Office of the High Commissioner for Human Rights. In the Comments on the Draft, the OHCHR utilized material from various United Nations bodies and committees associated with human rights convention and treaties to which Australia is a signatory, comparing the Draft with these texts and the concerns previously expressed by treaty monitoring bodies about deficiencies in Australia’s compliance with its international human rights law obligations. The comments by the OHCHR noted generally that, ‘throughout the Draft there is reference to the treaty body concerns.


However, there is insufficient inclusion of the recommendations made by the treaty bodies’. 29

The OHCHR put forward for inclusion in the National Action Plan some 27 recommendations, including that Australia should:

- Enact ‘comprehensive legislation’ to effect domestic incorporation of the *International Covenant On Civil and Political Rights* (ICCPR).
- Review national anti-discrimination legislation, fill all protection gaps and provide comprehensive protection to the rights of equality and non-discrimination (in accordance with the ICCPR and the *International Convention on the Elimination of All forms of Racial Discrimination* (ICERD).
- As a matter of priority, legislative and other steps be taken to ensure full respect for the principle of *non-refoulement*, including that no one is extradited to a country where they risk the death penalty or risk torture or ill-treatment.
- Abolish the system of mandatory detention of refugees.
- Take firm measures to eradicate the excessive use of force, (such as the improper use of tasers, including the establishment of a mechanism to carry out independent investigations into complaints concerning excessive use of force by law enforcement officials against groups such as Indigenous people, racial minorities, people with disabilities as well as young people.
- Make adequate national reparation and compensation to the victims of the ‘Stolen Generation Policies’.
- Improve the operation of the native title system and remove obstacles to the realisation of the right to land of Indigenous peoples.

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29 UNHRC, above, n 27, 1-2.
- Establish an anti-racism strategy including education programs for combating discrimination and prejudice and sensitisation campaigns regarding stereotypes that associate certain groups with terrorism.

- Allocate sufficient resources for mental health services in line with United Nation’s principles for the protection of persons with mental illness and the Improvement of Mental Health Care.\(^{30}\)

Australia participated in the UN Human Rights Council’s Universal Periodic Review process which had produced 145 recommendations.\(^{31}\) Many of the recommendations echoed those previously made by UN treaty monitoring bodies and the OHCHR:

- Bringing international human rights obligations into Australia’s domestic human rights law (17-22).

- Implementing legislation to protect women and children from violence (74-81).

- Eliminating of police use of excessive force (88-91).

- Undertaking reforms to better recognise and protect the rights of indigenous people (101-120).

- Honouring all obligations under the UN Refugee Convention (121-134).

- Review all anti-terrorism legislation to ensure it meets Australia’s international human rights legislation.

\(^{30}\) Ibid.

The fact is that UN bodies continue to highlight multiple ways in which Australia is failing to meet its international human rights domestic obligations, confirming that existing arrangements for human rights protection in this country are inadequate.

One further comment about our failure to observe external international human rights comes from the opening statement of Zeid Ra’ad Al Hussein United Nations High Commissioner for Human Rights at the Human Rights Council 27th Session at Geneva, 8 September, 2014.

He identified a number of countries where violation of human rights are occurring including: in Syria by the Syrian Arab Republic (ISIL);

- Persistent discrimination and impunity in the Israel-Palestine conflict through the wide range daily human rights infringements that are generated by military occupation, illegal settlements, excessive use of force, home demolitions and the wall constructed across occupied Palestinian territory;
- Multiple armed groups in Libya are indiscriminately killing of civilians in the fighting which continues;
- Fighting between Ukraine and (pro-Russian) armed groups has caused the deaths of thousands of civilians;
- Violations occur across the Central African Republic; fighting continues in South Sudan;
- The Democratic People’s Republic of North Korea continues to have reports of human rights violations;
- In Sri Lanka incitement and violence against Muslim and Christian minorities has emerged;
- Ill treatment of homeless migrants at national borders have been common in both southern and eastern European states.

Remarkably Australia’s policy of off-shore detention comes in for his criticism in this speech also:

“[the policy]leading to a chain of human rights violations, including arbitrary detention and possible torture following return to home countries...[and] the resettlement of
migrants in countries [New Guinea, Cambodia and Nauru] that are not adequately equipped”\(^32\).

Australia’s inclusion in this list of human rights abusers is a telling commentary on a country which frequently lauds its human rights practices as world class. More aspects of the human rights failings by Australia will be outlined in following chapters of this thesis.

1.5.2 Australia’s Universal Periodic Report 2015:


Conclusion 137 of the report notes that the 290 recommendations contained in the report, reflect positions held by submitting country delegations and should not be construed as endorsed by the Working Group Committee as a whole. However the large number of delegations who participated by lodging reports with the Working Party indicates that Australia’s human rights are seriously being watched by many countries.

Of the 290 human rights recommendations to the 2015 Report on Australia’s human rights, four major recommendations follow from this list.

Section 3.16 Grouped recommendations made by participating delegations.

3-29: Ratify the Optional Protocol to the Instrument Against Torture.

34-35: Ratify the Optional Protocol on the Rights of the Child.

36-49: Ratify the Convention on the protection of the Rights of all Migrant Workers and their member families.


116-139: Strengthen Anti-Discrimination in Australia.
141-152 Improve gender equality.
153-179: Improve protection of women and children from family violence.
185-198: Improve Disability protection.
200-206: Improve prison conditions including incarceration of indigenous people.
220-225: Provide for same-sex marriage rights.
230-234: Improve campaigns against human trafficking.
237-290: Review existing migration policies affecting asylum seekers, migrants and refugees.  

The recommendations to improve Australia’s human rights expressed by the 104 delegation’s submissions to Australia’s UPR, fall into four major concerns:

1. The human rights failings of Australia’s migration policies affecting asylum seekers, migrants and refugees. (55)

2. Improvement needed to the human rights of our Indigenous people. (34)

3. The need to ratify the *Optional Protocol to the Convention Against Torture* and improvement is needed in the protection of women and children against family violence. (34)

4. Improvement to anti-discrimination practices. (23)

   Australia’s immigration policy was clearly the most significant concern raised by delegations followed by the concerns for improved human rights for our indigenous people. It is significant also to note the submission of a considerable number delegations considered Australia should ratify the *Optional Protocol to the Convention Against Torture*. There is a message here of international concern about our human rights,

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in specific areas such as the treatment of asylum-seekers in detention and the large percentage of aboriginal adults and children in gaol.


1.6 This Thesis’s Significance.

This thesis contributes positively to the need for positive on-going political and community debate as to why Australia should adopt a national BOR. Fundamental to this debate is the assertion of this thesis that adoption and legal recognition of a national BOR is an effective human rights addition to protect and provide rights to supplement the inadequacy of the current traditional ‘patchwork’ of rights approach.

Another of the important assertions of this thesis, is that a BOR will establish a more comprehensive and effective human rights regime for all Australian citizens, rather than for just the majority under the current human rights provisions. Coupled closely to that assertion, is the need nationally to improve the awareness of Australians that their human rights will be improved by the formalising and unifying effect that a BOR can achieve by raising the ‘culture of human rights’ for the nation.

This thesis sees the significance of a national BOR or charter of rights for Australia as being beyond party-political lines. It is a non-party issue because the lack of a more comprehensive national BOR effectively creates a sub-culture human rights vacuum for those individuals and groups without adequate human rights protections. It is not politically acceptable that the national governments continues to ignore or to reject those rights weaknesses outlined above in this chapter and by the UN’s Human Rights Committees, because they have a duty and the wealth to improve the quality of life for all Australians through better human rights provisions.
This research will seek to provide a balanced outline of the major party-political views (past and present) about a bill of rights but will nevertheless be quite definite about what should be done politically to lift Australia’s human rights to a point where they really become a source of admiration for the community and a benchmark for the world community.

1.7 Research Questions.

This thesis will answer three interrelated questions:

1. Why, to date, have all attempts to enact a national bill of rights in Australia failed?

2. Why is the argument largely from conservative coalition governments and their supporters, that a bill of rights will threaten parliamentary supremacy not compelling?

3. Why a bill of rights is necessary if Australia is to achieve the goal of being a nation that strongly supports the protection of the human rights of its citizens.

Given the advance of human rights provisions in all advanced western communities in the early 21st century, it is unacceptable that major political parties in the Australian Parliament refuse to adopt a national BOR for their citizens, especially for the marginalised. The following assessment of the BOR impasse comes from 2004, and is applicable today as when written.

It is clear that there is unlikely ever to be a comprehensive guarantee of enforceable human rights in Australia without national action, whether by constitutional amendment or ordinary legislation. Such action is unlikely in the foreseeable future. It is not part of current conservative Coalition government’s policy nor is it an explicit part of the policy of the principle party in opposition, the Australian Labor Party.  

1.8 Focus on Federal Parliament: Constitutional and Legal Structure.

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The executive of the National Parliament is empowered by section 61 of the Australian Constitution, to enter into treaties, as a necessary part of its international dealings. This head of power and the federal legislative over-ride power of section 109, against inconsistent State legislation in the same area, puts the national executive and Parliament in a position of primacy in ratifying human rights treaties, and incorporating them into domestic law as seen necessary.

Because of this political reality the focus of this research will be upon the federal Parliament and its ability to enact human rights law flowing from international human rights treaties. It is an assumption in this research that the national Parliament has the greatest power to influence the future development of human rights law including legislation for a BOR in Australia, even though Victoria and the Australian Capital Territory each has already enacted their own bill of rights.

The federal parliament can of course always put a proposal to enact a BOR to a national referendum or plebiscite, although the success rate of voter approvals for such proposals is generally low. Major parties can also put human rights policies such as for a BOR, forward as an election issue.

1.9 Methodology.

Answers to the questions posed above will be developed on the basis of:

1. A detailed review of primary sources and secondary literature on the history of bill of rights campaigns in Australia:
2. Analysis of normative argument that a bill of rights is an unjustifiable constraint on the supremacy of the Australian Parliament:
3. Empirical analysis of the ‘threat to supremacy’ argument, via a study of New Zealand under the Bill of Rights Act 1990 (NZ):
4. Collection and analysis of qualitative data collected from 20 stakeholders and experts on the Australian bill of rights question and Australia’s performance, including politicians and human rights advocates.
Further details on the interview component of the methodology are provided in Chapter 8.

1.10 Outline of Chapters.

This thesis will provide chapter by chapter research which provides support to Chapter One’s evidence outlining weaknesses of Australia’s current human rights provisions for many situations. The main purpose of this thesis is to prove with evidence that Australia needs a national BOR urgently. Chapters Two to Nine are briefly outlined below.

Chapter 2 considers it important to explain the rights background which initiated philosophical and ideological beliefs underpinning human rights and their relationship to bills of rights. It will outline that connection and the human rights impacts of conservative political ideology in Australia, which put up a parliamentary barrier against a national BOR across decades. The negative impact of conservative political ideologies on Australia’s will be assessed against Australia’s present national human rights needs.

Chapter 3 also considers it important to understand the background of political events which tell the story of Australia’s history of unsuccessful bill of rights campaigns. It continues a major task for this thesis, the process of uncovering the political and other ideologies which have provided the motivation for party opposition to a national BOR.

Chapter 4 examines the dominant argument against a bill of rights: the threat to parliamentary democracy and will point to the weakness of those assertions. This chapter will make also examine briefly aspects of how the ‘Commonwealth’ Bill of Rights Act 1998 (UK) operates to show especially, how it has not damaged the UK’s legislative-judicial systems.

Chapter 5 presents a case study of the operation of New Zealand’s BORA to examine how the operation of its Commonwealth ‘Bill of Rights Act 1990(NZ) archives a power balance between the nation’s legislature and the judiciary. Conclusions will be drawn from local political, legal, administrative and academic views as to the human rights success of
NZBORA and whether its success in New Zealand, signals that it is a useable BOR model for Australia to consider modifying and adopting at least significant sections of it.

Chapter 6 considers Australia’s most recent bill of rights initiative: The National Human Rights Consultation 2009. Why was the ALP’s political opportunity to accept the Committee’s s18 and s19 recommendations for adoption of a national BOR not taken up, after its previous attempts for one?

Chapter 7 evaluates Australia’s Human Rights Framework, the alternative pathway pursued following the then Rudd Government’s decision not to proceed with a bill of rights, focusing instead on the creation of the Parliamentary Joint Committee on Human Rights. What has transpired since, and what effect has this initiative had upon federal parliament’s subsequent legislation touching on human rights?

Chapter 8 reports on the lengthy findings of interviews conducted with 20 stakeholders and experts about human rights generally and a national Australian BOR specifically. This chapter accepts that although a small group, the opinions of interviewed citizens should be included with others having views about our national human rights. Their views are compiled, analysed and discussed to provide their positions on a need for a national BOR.

Chapter 9 summarises the main findings and conclusions of this thesis.
CHAPTER 2

PHILOSOPHICAL UNDERPINNINGS OF BILLS OF RIGHTS

Bills of Rights are instruments of critical importance exerting at least within advanced democracies, a systematic influence over the entire constitutional order. Legally they define the basic rights of the individual or citizen. Politically they demarcate the power and discretion of the State. Ideologically they symbolize a society’s commitment to, and understanding of, some of its most important values.35

2.1. Introduction

This chapter considers that it is important at the beginning of this research, to consider the fundamental links between political and human rights values that need to be reviewed by this research. It is necessary to appreciate throughout this and other chapters, the important role that philosophical beliefs and ideology play in political decision-making especially for Australia’s bill of rights story. As such these beliefs and values provide a guide to observers as to why negative conservative party political barriers have been erected for decades to reject a national Australian bill of rights, or as has been in the case of the Australian Labor Party, held originally as a firm policy plank and later after BOR failures, put on the ‘back-burner’.

Philosophy is any system of belief, values, or tenets, while ideology is more specifically, a body of ideas that reflects the views of a political class. Key beliefs of ideology can explain party opposition to or support for a bill of rights. This means that the relevant political ideology has to be uncovered, that ideology held by key political players and their party

regarding the issue of human rights generally and of a BOR specifically. Of course such beliefs are influenced also from inside and outside the party, from powerful supporters and as well, a major shift in electoral support will influence a party’s ideological position. These philosophical and ideological issues around human rights in Australia will first be discussed within the wider background global framework.

The achievement of adequate human right in the world community is a ‘work in progress’. Crimes against humanity and its human rights are still with us. Major crimes against humanity have not yet been eliminated post-World War II despite the best efforts of governments, human rights agencies and prosecutions by the International Criminal Court (ICC) since 2002.

It is necessary to trace the history of philosophical views about human rights as a background to understand today, the resultant political support for or opposition to issues such as the universal applicability of international human rights instruments.36

Human rights today are understood to be the rights that everyone is entitled to simply because one is human. They are characterised as, ‘equal rights...inalienable rights...held universally...by all human beings’.37 Jack Donnelly describes modern growth in support for human rights as, ‘ideologically hegemonic’38...the most effective response yet devised to a

36 This author of this thesis supports the view that Human Rights should be considered by all nations as universal, while acknowledging that this position is contested by many of them. However it seems logical to this writer that all humanity needs to be under a global human rights umbrella, if the world is to achieve a much more effective human rights regime for individuals in what-ever nation they belong to.


38 Ibid.
wide range of standard threats to human dignity that market economies and bureaucratic states have made nearly universal across the world’. 39

Suri Ratnapala asserts that most functioning democracies have charters of rights as part of the constitution or as a special statute and that these instruments are generally accepted as valued constitutional features, despite local debates about their scope and application. 40 There has been a surge in human rights endeavour following World War II, especially by the United Nations Organisation (UNO) and its agencies and by the work of a multiplicity of human rights non government organisations (NGO’s), having international reach.

This growth of human rights has been described by Langley as, ‘the most potent moral force in the contemporary world’. 41 It has followed international abhorrence at the crimes against humanity committed during World War II and the desire of western democracies (particularly led by the United States of America) to construct a body which could be a force to prevent the abuse of human rights. The United Nations Organisation was created with its headquarters in New York as a successor to the League of Nations.

Given that while writers such as those above who support the universality of human rights, others question universality of human rights ‘[a]s a politically neutral category’ 42...they mean different things to different people. 43 Despite the reality of opposition to the belief that human rights are universal by nations around the world, the on-going


43 Ibid.
rights work of United Nations and NGO agencies continues around the world. People suffer or suffered a range of human rights abuses: the Rwanda genocide, Cambodia’s killing fields, massacres such as that at Srebrenica in the breakup of Yugoslavia, the military torture and killing of civilians after putsch in Argentina and Chile, and military slavery enforced for decades in Myanmar. Conflicts with their resultant damage to human rights play out almost daily in the mass-media to a world-wide audience.

‘Hot spots’ contesting issues that produce human rights abuse flare-up regularly, and reflect a refusal to solve at least initially, conflicts by negotiation. There are complex over-lapping factors behind these conflicts which result in degraded human rights. Some of these factors include political oppression and corruption, struggles for cultural identity, religious intolerance and economic issues such as poor living standards and disputes over resources. In 2016 the most serious of these conflicts are afflicting massive human rights abuse in Syria, and Yemen, Iraq, and Afghanistan and to a lesser extent Pakistan.

Longer term conflicts affect human rights in Tibet, Nigeria, Sudan, Somalia, the Democratic Republic of Congo, Zimbabwe, Iran, Myanmar, West Irian, China and Colombia and Kashmir. This is not to forget the numerous nations where internal minority rights are abused, including the Romany people of Europe, Indigenous tribes of Brazil’s Amazon Basin, Egypt’s Coptic Christians, China’s largest minority, the Uyghurs,(pronounced ‘Wigar’ in the West), and Australia’s Indigenous people.

In short our world may have moved a very considerable way forward in respect of the recognition of human rights since the end of World War II but it has a long way to go before millions of people can enjoy greater human rights through effective rights observance and practice. Human rights have to fit within the complex dynamic of human affairs which have produced widely divergent rights practices across time.

Despite the events outlined above human rights NGO’s like Human Rights Watch offers positive advice to those who seek better human
rights. In its’ Report 2013’, offers guidance to all who struggle for better human rights:

- Avoid Majoritarian Hubris (when taking over political office after winning an election).
- Defend Women’s Rights.
- Protect Freedom of Speech.
- Respect Minority Rights - The case of Burma.
- Bolster Weak States that lack the Rule of Law: The Case of Libya.
- Address the atrocities in Syria.

Human Rights watch puts forward a prescription for the International Community to follow in the international struggle for better human rights:

- Exert significant help.
- Don’t forget justice.
- Speak to the people.
- Respect rights yourself.
- Help ‘Spring time’ wherever it occurs. 44

There are considerations of the agreement needed about the content of charters or bills of rights as the key domestic human rights instruments in each state, constructed from international human rights treaties. There are other questions which must be appreciated as to whether such an instrument will be enacted into a country’s law. Among those are questions are: ‘What legal status or relationship to other laws will the bill of rights have?‘: ‘What range of rights or scope should it have?’: ‘How

easily can the bill be amended or repealed, that is, what is its legal rigidity? 45


There was a long period in history when rights language developed slowly in western political philosophy. That philosophy ranged through an objective moral order conceptualised as ‘natural law’, where people had duties to one another and to God,46 to development of specific conceptions of society, including conceptions of individuality, freedom, liberty, government, and religion. These ideas, appearing in political documents in the final decades of the 1700’s were known as ‘Rights Declarations’. 47

These ideas culminated in the Enlightenment where new philosophies replaced those of earlier rights through natural law. Bentham (1748-1832) held that there are no such things as natural rights. He wrote that: ‘Natural rights is simple nonsense, natural and imprescriptible rights, rhetorical nonsense, nonsense upon stilts’, (‘Anarchial Fallacies’): ‘Being an Examination of the Declaration of Rights issued during the French Revolution ‘(1843)48: Edmund Bourke (1727–97) considered: ‘that there was ‘civil society man and no other’, status were rights derived and were then found in ‘convention’, (Reflections on the Revolution Franc1790)49: Immanuel Kant (1724–1804) distinguishes only one innate right, freedom:‘...by virtue of his humanity, which encompasses the rights of equality, communication and to be one’s own master’, (Metaphysics of


47 Ibid.

48 Ibid 15.

49 Ibid.
Morals (Die Metaphysik der Sitten, 1797). This Kantian formulation of right reintroduced within rights-based liberalism, the important moral dimension of autonomy and dignity.

Concepts and entitlements which flow to humanity from this Kantian morality include: the primacy of human morality and hence our infinite value as human beings. This morality has come to dominate the articulation of rights, the right to equal concern and respect, which has made possible for rights-based liberalism to develop notions of social and economic rights, rights to self-esteem, as well as group rights.

Radicals saw the liberal formulations of rights as being the rights of bourgeois man and that the economic well-being of the masses would remain of little concern. Karl Marx (1818-1883) sought to formulate rights which would emancipate the proletariat or wage workers. In his view the capitalist system with its domination by the holders of capital and the means of production, stood in the way of equality and well-being of the mass of people and required revolution to redress that inequality. That formulation ultimately failed in practice because of the human rights abuses which emerged from that philosophy in communist political systems.

There are many variants of liberal political human rights theory which have emerged from western society. All are fundamentally linked by regard for the human person as of equal worth and standing. In summary, some contemporary philosophical approaches to the justification of people’s rights include:

(a) People have rights because of the basic dignity of the human person.


51 Ibid.

(b) Humans are rationally purposive and are entitled to well-being and freedom to express that capacity.
(c) Autonomy and choice are fundamental to be able to achieve a valuable life.
(d) Equality provides the basis for an individual’s right to goods and opportunities in society as each individual has equal moral worth.
(e) The universality of needs and the fulfillment of them can be seen as basic rights, which can be assisted by freedoms.
(f) Living a life of dignity is a fundamental normative basis upon which rights must rest.
(g) Consensus is the pragmatic approach where legitimate rights flow from agreement within diverse societies.\(^53\)

2.3. Modern Human Rights.

Earlier views about human rights were changed by the horrors of World War II (1939-1945),\(^54\) and the response which followed it, including the establishment of the United Nations and its agencies,\(^55\) and ratification of the *Universal Declaration of Human Rights* by the UN General Assembly. There was a profound determination by the western democracies to establish binding principles of international law to be enforced by the world community after the war.\(^56\)

The universality of internationally recognised human rights does not extend to United Nation’s implementation and enforcement, (armed humanitarian intervention against genocide authorised by the Security

\(^{53}\) Langlois, above, n 46, 14–15.

\(^{54}\) Ibid.

\(^{55}\) Ibid.

Council is an exception). Given the great differences in national historical, political, legal and cultural backgrounds, international law provides for national implementation of human rights treaties. Sovereign states including Australia have reserved the rights to implement human rights treaties largely as they see fit. As such, the ratification of a treaty binds a state to be bound by the provisions of the treaty, but it is the state that that elects whether those provisions may or may not be legally enforced in its domestic law.

*Minister for Immigration and Ethnic Affairs v Teoh* [1995] HCA 20 (1995) 183 CLR 273 is a case in point, where the High Court’s finding that an unincorporated treaty could create, ‘legitimate expectations’ by individuals seeking judicial review of administrative action, that such administrative officials would normally act in accordance with the terms of the *Convention,* The Rights of the Child. In a subsequent judgment, *Minister for Immigration and Ethnic Affairs v; Lam* [2003] HCA 6 (2003) 214 CLR 1, the High Court strongly doubted *Teoh* and the doctrine of ‘legitimate expectations’ that underpinned it. Thus the doctrine despite several legal attempts by the executive to nullify it remains in legal limbo.

Ratifying sovereign states generally allow an extensive system of official (UN), and unofficial NGO monitoring of the implementation of a treaty on a regular basis, with published reports as to findings. This provides some persuasive basis to ensure that a treaty’s principles are observed within the country, and more particularly that they are not ignored or abused. As well as monitoring the adoption of treaty principles, it encourages states to formally legislate treaty provisions into domestic law.

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However, as Donnelly notes, practice often falls short of profession,\textsuperscript{58} ‘sovereignty’ still ultimately, ‘trumps’ rights.\textsuperscript{59} This lack of universal enforcement makes the implementation of universally held human rights extremely relative, and enjoyment of them is largely a function of where one has the (good or bad) fortune to live.\textsuperscript{60}

2.4. The International Legal Universality of Human Rights Today.

It should be remembered that the post-World War II international human rights movement has been largely drawn from normative western political traditions. In the contemporary world where norm creation has been internationalised, there is still disputation of the applicability of normative western human rights traditions to other traditions found in other societies with different historical, cultural, legal, and especially, political backgrounds. This on-going opposition has been described as ‘cultural relativism,’\textsuperscript{61} that is the argument from several cultural positions

\textsuperscript{58} Ibid, 1.
\textsuperscript{59} Donnelly, above n 37, 293.
\textsuperscript{60} Donnelley, above n 57, 2.
\textsuperscript{61} Franz Boas, ‘Museums of Ethnology and their Classification’, (1887) 9 Science, Vol. 9, Issue 228, 587–589:
that current international human rights are themselves culturally
determined and do not ‘fit’ many non-western values. Therefore, in a
considerable number of nations, traditional political power structures are
inhospitable to and resist the rights espoused by the new universal
international norms of human rights, such as a just social environment or
accepting a BOR.

The current internal struggle for democracy in Syria provides an
illustration of the long and bitter struggle which can occur with differing
human rights norms within the borders of a country. In the Syrian cultural
mix of competing factions, where the Christian community are fearful of
and resist what they see as militant Islamic threats.

This raises the question of whether human rights, whether they
espoused in a treaty or bill of rights, can express universality for all
societies. Donnelly defends what he calls ‘functional international legal
and overlapping consensus universality’. 62 His argument is that the moral
equality of all human beings is strongly endorsed by most leading
comprehensive doctrines in all regions of the world, a convergence both
within and between civilizations. This process is providing the foundation
for a convergence on the rights of the Universal Declaration. In practice,
human rights are rapidly becoming the preferred option in a process.

People when given a chance, usually (in the contemporary world) choose
human rights, irrespective of region, religion or culture. 63 The transnational

62 Donnelley, above n 37, 289.
63 Ibid, 292.
consensus on the *Universal Declaration* is largely voluntary...arising from the decisions of people, states and other political actors, that human rights are essential to protecting their visions of a life of dignity. Therefore we talk more of the relative universality of human rights rather than their relative universality.64

The issue arises as to what position proponents of current international norms of human rights should take when countries seeking overlapping consensus, present serious argument justifying deviation from international norms, such as cultural or historical reasons of great significance to a group, or the society in general. For Donnelly, ‘if the resulting set of human rights remain generally consistent with the structure and overarching values of the *Universal Declaration*, we should be relatively tolerant of particular values’.65 Otherwise his answer to the issue is that without authoritative international human rights standards, how will people’s rights be protected against incursion, in the national international and transnational struggle for social justice and human dignity?

2.5. Philosophical Underpinnings of Bills of Rights as Human Rights Instruments.

The human rights justifications in this review follow a consistent theme which is declared in the *International Bill of Rights* (IBR) that is, that the protection of the individual largely from abuse by the state, but also from others in certain situations of rights. The IBR comprises three instruments: the *Universal Declaration of Human Rights* (UDHR), and its two implementing conventions the *International Convention on Economic Social and Cultural Rights* (ICESCR) and the *International Convention on Civil and Political Rights* and the (ICCPR). The basis of this protection has been outlined above as a universal moral one based upon our special state as humans (UDHR Article 1).

64 Ibid, 291
65 Ibid, 300.
Fabre asserts that rights to protect people’s autonomy should be entrenched in the constitution of a democratic state.⁶⁶ The basis for this claim is a philosophical one that rights entrenchment is morally required in that: (1) people have a fundamental interest in autonomy; (2) people have rights that their interest in autonomy and the interests to which it gives rise, should be protected and promoted; (3) people’s respective interests must be respected equally. Fabre argues that, ‘…the democratic majority should be legally forced to respect individual autonomy,’ ⁶⁷ (and the subsequent rights that arise from it). She concludes that, ‘citizens and their representatives should be legally forced to do so by way of a bill of rights’. ⁶⁸

Fabre’s claim is supported by the UDHR which requires in Article 7 that individuals be protected by equal protection before the law and in Article 8 by competent national legal tribunals. The ICCPR and ICESCR express this in detail for implementation into national law by member states.

It is a logical moral and legal given that if human rights provisions are to succeed and protect an individual’s human rights from damage that he or she has suffered, whether from government or citizenry, that such rights must be non-discriminatory and enforceable and that protection would have to be created by the power of the state and by the acceptance by all citizens of that state, as an integral part of the rule of law.

In Australia, supporting the morality of the adoption of a Bill of Rights to protect rights, Charlesworth does not support, the human rights views of western utilitarian philosophers who:

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⁶⁷ Ibid 78.

⁶⁸ Ibid 98.
typically reject the idea of individuals as bearers of rights because this implies that individual or minority interests may on occasion take precedence over those of the majority. The skeptical, utilitarian, democratic objection to an Australian bill of rights understands democracy as essentially majority rule. 69

A major weakness of this approach is that it is not interested where democracy delivers injustice, when the interests of the minority are not taken into account, where cases do not impinge upon the community understood as the majority, and which are unlikely to cause a political backlash: ... human rights and democracy have a symbiotic relationship ...’ On that basis I would argue that democracy depends upon the protection of human rights and [conversely], the protection of human rights depends upon democracy...a bill of rights can help us achieve this. 70


Stammers rejects both individualism and collectivism as human rights methodologies, epistemologies and ontologies and attempts to link human rights and power from a social constructionist perspective. 71 He seeks social democratic approaches to human rights 72:

Given the voluminous literature from proponents of human rights and the centrality of the concepts of power and human rights to both philosophical and political debate it seems remarkable that there is no recent work which focuses on the relationship between them.


70 Ibid.


72 Ibid.
Stammers poses two ideas: challenging or sustaining power relations are important elements of the historical role of human rights in social practice, and they bring rights talk into the actual world we live in. Such power can be exercised consciously by individuals or collective social actors and structurally through social systems.

Individuals are autonomous subjects set in concrete social relations who develop by a process of continual interaction with the rest of society, are perpetually re-constituted through social practices. This provides a social constructionist perspective from which to consider human rights far more based in the real world than...the fictional dichotomy between the public and private realm and try to ground theories in timeless and abstract universals.

Stammers examines historical power relationships including:

1. The Liberal tradition which recognised the threat of state power and challenged it with the doctrine, ‘natural rights of the individual’. For Stammers the doctrine was a fiction because it bore no relation to history or social reality. It came to sustain highly unequal power relationships. Inherent in developing capitalistic societies and its ideological role was to impede change and buttress prevailing relations of economic power.

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73 Ibid 72.
74 Ibid 75.
75 Stammers above n 71, 77.
2. Socialism and Marxism challenged economic power then sustained state power by rejecting natural rights and liberal philosophy. State power excesses resulted despite the absence of private enterprise.\textsuperscript{76}

3. Challenging Imperialism, the struggle for the right to self-determination, is largely seen as national in character and was frequently detrimental to the group rights of indigenous minorities.\textsuperscript{77}

4. [In] other spheres, power can be exercised systematically to disadvantage individuals such as women, the poor ethnic minorities, lesbians, gay men refugees, the disabled, the mentally ill, immigrants, unemployed and indigenous people. Demands for positive discrimination to reduce such discrimination are challenging these power structures and practices.\textsuperscript{78}

In summary Stammers suggests the need for a philosophical movement towards a power analysis of human rights.

2.7. Australia’s National Political Human Rights Philosophies?

A BOR typically contains rights from the two key international human rights conventions created from the UDHR, the ICESCR and the

\textsuperscript{76} Ibid.

\textsuperscript{77} Ibid

\textsuperscript{78} Ibid.
ICCPR. Australia has ratified both the ICESCR and ICCPR, but has not enacted them into domestic law in a formal document such as a BOR, despite a number of United Nation’s requests to do so. It has ratified what is generally referred to as the ‘seven key treaties’ and has enacted existing domestic human rights law largely from the ICCPR, with a stress upon anti-discrimination.

The seven treaties are:

The *International Covenant on Civil and Political Rights* (ICCPR),

The *International Covenant on Economic, Social and Cultural Rights* (ICESCR),

The *Convention on the Rights of the Child* (CRC),

The *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment of Punishment* (CAT),

The *Convention on the Elimination of All Forms of Racial Discrimination* (CERD),

The *Convention on the Elimination of All Forms of Discrimination against Women* (CEDAW)

The *Convention on the Rights of Persons with Disabilities* (CRPD).

Human rights activists make the point that the inadequacy of these treaties in Australian law, are reflected in systemic human rights weaknesses in the law for significant groups in the community. Chapter one has outlined requests by the UNHRC for Australia to enact both ICESCR and ICCPR into the national law to improve its national human rights law.79

Stammers has pointed to the role of power relations in the question of who gets what in human rights. ‘Claims for positive discrimination are rooted in a view that power is exercised systemically to the detriment of particular social categories.’80 While it is beyond the scope of this chapter

79 UNHCR Council, Recommendations Australia’s Universal Periodic Review 2011.

80 Stammers, above n 71, 80.
to offer a more detailed examination of the question of a link between the enactment of human rights and power relations and ideologies in Australia, it is important to consider the politically linked effects that ideology can have on political policy and what those policy effects mean for human rights observance by the national government. It is arguably a very important question which will be also discussed regularly in the context of BOR events in following chapters.

Can the issue of the role of political ideology–philosophy explain the history of BOR rejection by Australia’s Parliament? Parkin and Hardcastle have reviewed ties between power groups. 81 They refer to Lukes’s three-dimensional interpretative model of the exercise of power, 82 where:

[A]n overarching, more structurally entrenched third dimension of power... encompasses the way in which certain interests are promoted by the structured patterns of advantage embedded within the system. This structural power of the business sector ... is a systemic bias within the system that seems to need to operate if it is going to be sustainable in the overall interests of a favourable business climate.

Hill provides a wider power perspective:

The classical elitist thesis maintains that political elites achieve their position in a number of ways: through revolutionary overthrow, military conquest, the control of water power...or the command of economic resources. 83

The issue then is to establish that the federal Coalition’s national political objectives constitutionally are allied to or ‘fit’ the following model of power: ‘looking primarily to the encouragement of individual initiative and


enterprise in which primary secondary and dynamic force of progress,’ \(^{84}\) and ‘tertiary industries are promoted.’ \(^{85}\)

Parker and Hardcastle make this point about the strong links between the political parties and business:

A more forensic analysis might want to step back a little from this contestation [various claims made in this political debate], in order to deconstruct the agenda-setting process and to infer from the kinds of issues seemingly kept off the agenda, which interests are predominant in shaping the limits and the trajectory of everyday politics. \(^{86}\)

Jim Ife more to the point considers that the power exerted by the national and to a more limited extent, state conservative political parties in Australia exercise a limiting impact upon [wider] human rights:

Notice how Australia defines human rights largely as first-order that is being civil and political rights. The Liberal Party of Australia sees its political role as encouraging individual effort and much less on government directed aid, for example Medicare (Public) especially. This makes their acceptance of second-order rights as much more difficult to develop. \(^{87}\)

Senator Scott Ryan was interviewed about the views of the Liberal Party and Australia’s need for a national BOR. This interview will be outlined in more detail in chapter eight’s research, however it does confirm Jim Ife’s views above.

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\(^{85}\) Ibid, 2(f).

\(^{86}\) Parkin and Hardcastle, above n 81. 361.

\(^{87}\) Ife, above n 13, 44.
The second issue that I have with bills of rights [concerns positive and negative rights]. The Victorian Charter of Rights, the European Charter, they have got all of those so-called positive freedoms which represent claims on the rights and resources of others. A right to housing or education is in effect a claim on the resources of you, on the economic resources of you, the community.\(^88\)

This thesis believes that this political ideology of the two conservative Coalition parties who absolutely reject the extension of Australia’s human rights BOR reach into the community, are the main impediment towards determining the response of the national Parliament to a more comprehensive and effective human rights act to meet Australia’s human rights needs. Towards a wider community perspective of that end, chapter eight will be the focus of research input from 20 interviewees to obtain their answers to questions concerning Australia’s need for a national BOR. These responses comes from present and former politicians, as well as from a group of interviewees whose occupations such as law, public service, academia, journalism, education and NGO employment brought them knowledge about BOR’s.

The BOR barrier points to the fact that federal Coalition Party opposition to a national BOR is the financial emphasis they give to boost business economic activity and power. More simply it is that some in our national political parties can be seen to reject a BOR because of the need to support business interests and economic elites who feel that they operate to best advantage in a society without a BOR. Examples of political focus for business support include providing an economic environment through the budget to assist trading profitability, power and control over the workforce, of having a supportive media, taxation concessions and in some cases direct business subsidies.\(^89\)

A national BOR for Australia has been rejected largely because of the political view that a BOR would burden increased business and other economic interests, with

\(^88\) Interview with Senator Scott Ryan, Liberal Party of Victoria, Parliament House Canberra, 18 June, 2012.

\(^89\) Gareth Hutchens,’ Labor Senator Sam Dastyari claims 10 companies have taken control of Australian politics…to the point where it has stifled proper democratic and economic progress’, *Sydney Morning Herald*, 5 February, 2016. At this time of writing, some weeks until the 2016 federal election on 2 July, the Coalition’s May 2016 budget attempt to provide significant tax relief to the business sector,(some A$50 billion over 10 years), is meeting considerable political opposition and critical media input from the community).
operational costs and difficulties. The trade-off that virtually all contemporary democratic and advanced societies have made on that question is that the addition of a BOR has the capacity to improve the fabric of society by developing a culture of rights, to increase opportunity for minorities particularly, and make society fairer and more just. That dynamic business enterprise can exist successfully with a national BOR has been shown in those contemporary democracies.

Unfortunately, as being shown in this thesis, Australia’s conservative political forces have consistently rejected a BOR for the nation, resulting in a culture and legal system that by-passes the human rights of significant minorities and more generally ignores and downplays the significance and value of human rights instruments such as a BOR to lift human rights awareness and acceptance in the community. It is significant that Australia’s national human rights regime still labours under human rights weaknesses including under the descriptor of being a ‘racist country’ (a recent comment from visiting former Prime Minister Rudd).

2.8. Conclusion

This chapter has traced the international development of human rights through time, to provide perspective about past and present understanding the nature of human rights, and published declarations of rights. As such however, it should not be forgotten that international ‘human rights’ are largely a 19th and 20th century term, really only since the 1940’s.

Rights declarations have ultimately been put to paper whether in times of revolution such as in France, and the creation of a new national entity as in the founding of the United States of America. Likewise after periods of social upheaval such as war and revolution or at the establishment or re-establishment of statehood they have been expressed in constitutions, such as in post-apartheid South Africa, or (to a much more limited extent), in the new Commonwealth of Australia.

There is today, an on-going international debate about the nature of human rights, which have over time largely been expressed by a western Liberal tradition. One human rights sticking point for many modern human rights theorists in both the developed and developing world, is the issue of their universal applicability in a diverse human world. Further, as expressed by writers like Stammers, traditional liberal human rights theory is inadequate because it fails to give proper recognition to
the reality of power relations upon human rights. Professor Makau Matua offers the opinion from a wider African critique, that the universality of human rights is seen by the developing world as strongly culturally relative.\textsuperscript{90}

The attempt to shift the debate and to anchor it in the social reality of human rights by reference to power relations\textsuperscript{91} resonates in the wider human domain today. Rather than theories which have traditionally referenced human rights to state power, it may be much more useful to narrow the focus to the role of political actors and their party-political ideologies as prime impacts upon human rights in both the advanced and developing world.

This perspective is one this thesis will be outlined in following chapters, to understand the political barriers to a national BOR and therefore why Australia is yet to enact a national BOR.

While the on-going debate about philosophical human rights debate continues, Langlois provides a concluding perspective:

\begin{quote}

The language of human rights is fundamentally a normative or ethical language, one that emerges out of the political liberalism of the Enlightenment, and one that leads to a very distinctive form of political engagement. In our modern period, the \textit{Universal Declaration of Human Rights} is the defining text of the human rights movement, but behind the rights that are declared in that document are layers of history and philosophy... understanding the history and philosophy of human rights is essential to being able to navigate the complex political debates surrounding the desireability and normative content of human rights reform in the international system.\textsuperscript{92}
\end{quote}

\textsuperscript{90} Makau Matua, \textit{Human Rights: A Political & Cultural Critique}, (University of Pennsylvania Press, 2002). Former SUNY Distinguished Professor University of Buffalo Law School, State University of New York.

\textsuperscript{91} Stammers above n 71, 82.

\textsuperscript{92} Langlois, above n 46, 24.
CHAPTER 3

NO BILL OF RIGHTS FOR AUSTRALIA: ATTEMPTS TO ENACT A NATIONAL BILL OF RIGHTS.

3.1 Introduction.

It should be noted at the beginning of this chapter, that it is a narrative with explanations, as to the course of events around the political struggle for the adoption of a national BOR by Australia. With respect to that, the review attempts to widen understanding of not only what played out politically across the period from Federation to the present, but why. For a claim that would affect all Australians, the enactment of a BOR involves a very broad consideration of not just human rights but also of the ripple effect that it would have politically, legally, economically and socially, throughout the nation.

The review of the struggle will concentrate on the political events, in order to keep the research focused upon the role that our Australian politicians have played and continue to play, in advancing or rejecting a BOR. Only then will sufficient depth of understanding be achieved, as to how the political processes have operated to block a national BOR to the present day.

Australia can claim limited success at the sub-national level of government with the enactment of an enforceable and reasonably comprehensive BOR by the Australian Capital Territory and Victoria. At the national level of government, the federal parliament has blocked several attempts to achieve one. As the result of decades of attempts and failures to enact a national BOR, Australia remains the only contemporary western parliamentary democracy with a Westminster constitutional heritage, without one. This is a situation described by Charlesworth as, ‘one aspect of

Australian political and legal life where time seems to have stood still over the last century.\textsuperscript{94}

The explanations for refusals by the Federal Parliament to enact a national BOR for citizens are numerous on both sides of the debate. There are many social, political, economic and legal reasons given to explain in the continued impasse, across this history of BOR rejection. The principal political arguments of this contest, involving party policy will be outlined in this chapter.\textsuperscript{95} The thesis considers that its historical background, the story of Australia’s political approach towards human rights, is essential to unravel and understand the differing views of political contestants about a BOR and why attempts for one kept failing.

Michael Goodhart views human rights issues as being inherently political; ‘they are values, claims, and they are embraced or contested to the extent that those doing the embracing or contesting approve of or benefit from what they embrace’.\textsuperscript{96} Chappell, Chesterman and Hill consider that the formal recognition of human rights involved legal processes as well, drafting, interpretation and enforcement of international and domestic laws which need to be acknowledged: ‘When Parliaments determine the extent to which they will articulate human rights into Australian statutes, that is a political process which that will shape the freedoms and entitlements of ordinary Australians’.\textsuperscript{97}

3.2. Australia’s National Human Rights.

This chapter looks back to Chapter two and the importance that advanced western nations place on domestic human rights generally and upon their BOR in

\textsuperscript{94} Hilary Charlesworth, Writing in Rights-Australia and the Protection of Rights, (UNSW Press, 2002), 14.


\textsuperscript{96} Michael Goodhart (ed), Human Rights-Politics & Practice, (Oxford University Press, 2009) 5.

particular, contrasted against the continuing failure of our federal politicians to accept a BOR. At this point, however, a look forward to present human rights provisions in Australia, reminds us that while this thesis argues for the benefits of a national BOR, it does not suggest that Australia’s Parliamentary exceptionalism towards one, has produced a dire national human rights situation. Certainly for deprived individuals and groups however, their lack of human rights protections has resulted in many dire situations examples of which are being illustrated.

Australia’s Parliament has not been hostile to our human rights generally, but to a BOR specifically. Having said that however, being hostile to a BOR has removed the human rights benefits that it would bring to many in the Australian community—symbolically to lift the nation’s culture of rights, and practically, to improve the cover of the current patchwork of rights as outlined in Chapter 1, to provide a more comprehensive protection for all citizens.

In the chapters which follow, review of Australia’s current national human rights laws will receive extensive coverage. This coverage will include statutory protections which flow from our ratification and implementation of ‘seven’ key international treaties, constitutional rights express and implied, responsible government, common law, international law and the structures which administer them.

The discussion focus and direction will be at all times that the enactment of a national BOR is a much needed addition to our human rights regime. The benefits of a BOR will raise our rights provisions from good to very good, perhaps even world’s best practice, and bring our human rights forward to join with the human rights practiced by contemporary democracies.

3.3 Federation: A Constitution and a Bill of Rights?

If the beginnings of an independent United States of America are considered, the ‘Founding Fathers’ there incorporated a Bill of Rights as the first 10 Amendments of their Constitution in 1791. When Australia’s founders gathered at the Conventions to draw up Australia’s Constitution in the late 1800’s, they drew heavily from it. James Bryce’s *The American Commonwealth* lay on the parliamentary table.
throughout the proceedings.\textsuperscript{98} What they did not do, is follow the American example of including a bill of rights in the Constitution.

This rejection of a bill of rights for the soon to be created Commonwealth of Australia, was a critical first step in what has become a political mantra for opponents of such a bill in the decades which have followed: ‘Australia does not need a bill of rights’. In answer to that view, human rights advocates today say that it does, and point to a ‘Commonwealth’ BOR or Human Rights Act as an instrument which can be adopted without damage to the traditional functioning of Australia’s constitutional structure.\textsuperscript{99}

It is important to plumb the views of the delegates to the Constitutional Convention of 1898 at Melbourne, to establish why they refused as an important human rights step to adopt the American Constitution’s 14\textsuperscript{th} Amendment, which was a provision protecting citizen’s legal rights.

David Marr examined the events and speakers at the Melbourne Constitutional Convention.\textsuperscript{100} He focused upon the events of Tuesday 8 February 1898 and the debate about clause 110, a proposal for inclusion of a BOR in the Constitution. Moved by Tasmania’s Attorney-General Andrew Inglis Clark, the clause read:

A state shall not make or enforce any law abridging any privilege or immunity of citizens of other states of the Commonwealth, nor shall a state deny any person within its jurisdiction the equal protection of the law.\textsuperscript{101}

The first section of the clause did find its way into Australia’s Constitution as Section 117 Rights of Residents in States. It reads:

A subject of the Queen, resident in any State shall not be subject in any other State to any disability or discrimination which would not be equally applicable to him if he were a subject of the Queen,

\textsuperscript{98} Marr, above n 95.

\textsuperscript{99} Chapter 4 will examine more this assertion in detail.

\textsuperscript{100} Marr, above n 95.

resident in such other state.\(^{102}\)

The ‘equal protection’ second portion of the clause was a result of Clark’s admiration of the fundamental legal human rights protection, which the 14\(^{th}\) Amendment of the USA’s Constitution provided to its citizens. Clause 110’s ‘equal protection’ had been copied from it almost word for word.

Some more can be said about the 14\(^{th}\) Amendment’s ‘Equal Protection Section 1. It reads in full:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, all citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process, nor deny to any person within its jurisdiction the equal protection of the laws.\(^{103}\)

Significantly, this clause today addresses many aspects of citizenship and the rights of United States citizens. Most commonly used and frequently litigated is the phrase in the amendment ‘equal protection of the laws’, which figures prominently in a wide variety of landmark cases including:


*Roe v Wade* 410 US 113 (1973),


*Bush v Gore* 531 US 98 (2000),


*Reed v Reed* 404 US 71 (No. 70-74) (1971),


*University of California v Blakke*, 488 US 265 (1978),


\(^{103}\) *United States Constitution*, 14\(^{th}\) Amendment, s 1.
What the United States adoption of Amendment 14 s 1 meant for human rights can be seen from a sample of cases above. What it really meant for citizens then and now, is firm constitutionally based law protecting fundamental citizen’s rights. Together with the 10 Amendments to the U.S. Constitution, (leaving aside some contentious elements such as entitlement gun rights), citizens had then and now, considerable human rights protections. Consider the disregard for citizen’s human rights which ultimately followed here at Australia’s Federation.

The Conference record shows that the delegates debated the ‘equal protection of the law’ proposal. The debate record reveals motivations of the opposing delegates:

Mr. Isaacs: ‘That is a very dangerous proposal that the Supreme Court should control the legislatures of the states within their own jurisdiction.’  

Dr Cockburn:

The words owe their introduction into the Constitution of the United States to circumstances of a purely adventitious character, which can never be expected to occur in Australia... simply as a punishment to the South States for their attitude during the Civil War.

Mr. Isaacs: ‘No, to effectuate the result of the war’.  

The amendment...confers by necessary implication a positive immunity or right most valuable to persons of the coloured race, to exemption from the unfriendly legislation against them distinctly as coloured exemptions from discrimination imposed by public authority...’.

Mr. Higgins: ‘It protects Chinamen too I suppose as well as Negroes’?

Mr. Isaacs: ‘It would protect Chinamen in the same way’.

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106 Ibid 685.

107 Ibid 687.

108 Ibid.
I put one simple statement before honourable members and would ask them how they can expect to get for this Constitution the support of the workers of this colony if they are told that all our factory legislation is to be null and void and that no such legislation is to be possible in the future?

Mr. Kingston: That is the special clause relating to the Chinese?’

Mr. Isaacs: Yes. ¹⁰⁹

Mr. Cockburn: ‘People would say pretty things these States of Australia, they have to be prevented by a provision in the Constitution from doing the grossest injustice’. ¹¹⁰

The speakers were alluding to the fact that the colonial governments prior to this time legislated work restrictions, discriminating against coloured people especially the Chinese. While there were some Chinese who worked in the community without disturbance, riots on the goldfields would have added weight to Mr Isaac’s assertion of the intolerance of white workers to competition from coloured labour in the goldfields and workplaces elsewhere.

The vote on clause 110’s ‘equal protection’ provision was defeated by 23 votes to 19. The most visionary view about the benefits of the ‘equal protection’ clause came from Mr. Richard O’Connor:

We are making a Constitution which is to endure practically speaking for all time. We do not know when some wave of popular feeling may lead a majority in the Parliament of a State to commit an injustice by passing a law that would deprive citizens of life, liberty or property without due process of law... it is only right that this protection should be given to every citizen of the Commonwealth. ¹¹¹

Marr’s view of the rejection is that it resulted in the birth of a white man’s Federation: ‘We chose between race and rights’. ¹¹² Bailey notes that at that time many Australian politicians were acutely aware of the political dangers of preventing discrimination on the grounds of race and promoting equality. ¹¹³

¹⁰⁹ Ibid.

¹¹⁰ Ibid.

¹¹¹ Ibid, 688. Richard O’Connor was a delegate to the 1898 Australasian Conference and later a founding member of the High Court of Australia.


¹¹³ Peter Bailey, The Human Rights Enterprise, above n 12,142.
These are the background events which formed or perhaps conditioned the political attitudes of delegates to the Congress who voted against clause 110. White racist attitudes towards coloured persons had been a part of the Australian colonies since settlement to varying degrees, commencing in regard to Indigenous Australians and then the Chinese when the Gold Rushes began in the early 1850’s. Violent riots occurred against the Chinese, who were seen initially as oddities, later rivals, and finally threats to ‘White Australia’.

Serious riots occurred at Turon (1853), Meroo (1854), Rocky River (1856), Tambaroora (1858), Lambing Flat, Kiandra and Nundle (1860-61) and on the Tinga tin field (1870). They were generated by white miners who objected to competition at the diggings from indentured Chinese miners.

Sir John Forrest, in the 8 February 1898 Convention debate, acknowledged the white racist character of the new Australian settlements in these terms:

It is no use for us to shut our eyes to the fact that there is a great feeling all over Australia against the introduction of coloured persons. It goes without saying that we do not like to talk about it, but still it is so.

Patapan’s explanation of the reasons for the constitutional rejection of equal protection of all citizens before the law differ from the interpretation put by Marr. He saw the rejection as being: ‘a continuation of English constitutionalism’. This explanation, he suggests, goes part of the way to explaining why the constitutional


delegates balked at also providing an Australian version of the USA’s 14th constitutional amendment.

The result was ‘merely attitudes and political decision-making that followed from the plenary powers given to colonial governments, where there was no rights based limitations on the exercise of this power, the colonial constitution had no entrenched Bill of Rights or general limitations.’

Patapan argued that the founder’s rejection of entrenched rights was based on the rights derived from English constitutionalism, where Parliament was the protector of individual rights by means of responsible government. He concluded: ‘that the founder’s vision encompassed parliamentarianism, the common law and traditional or prescriptive rights’, and he maintained that these, ‘continue to exercise a persistent and powerful influence on Australian constitutionalism’.

His views do offer a plausible reason for the failure of delegates to include a powerful human right protection such as that offered by the USA’s 14th amendment. That position can be understood as an acceptance by a majority of colonial political and leaders at the Convention, that inherited constitutionalism made the adoption of such a right and indeed any idea of a bill of rights, unnecessary.

Moffat’s view of the omission largely supports that outlined by Patapan. His reasons why the majority of delegates thought that Clause 14 and its like were unnecessary included:

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117 Ibid, 501.

118 Ibid, 503.

119 Ibid 505.
That of historical circumstances... no recent memory of bitter struggle... and an uncritical reliance on the English tradition... where delegates felt that protection of individual rights provided by the tradition of acting as honourable men were sufficient protection.  

In an interesting parallel to this question of human rights and its constitutional protection by Australia’s founders, SBS Television Service screened a three-part series ‘Immigrant Nation’ in the period from 9 to 23 January 2010, (now on DVD). The episode on the 23 January was entitled ‘White Australia Begins, 23 December 1901’. It described the first laws to be passed by the new Commonwealth Parliament: the *Pacific Islanders Labourers’ Act 1901* (Cth) to provide for deportation of Pacific Islanders by 1906 and the *Immigration Restrictions Act 1901* (Cth). The latter Act introduced a dictation test which was utilised as a device that sought to prevent all non-whites from entering Australia as immigrants and ultimately become citizens, as it involved fifty words in a European language (with that language selected by the immigration officer). Effectively these Acts formalised and created a national policy in place of the colonial immigration policies which existed prior to Federation.  

What this review of the Bill of Rights prior to and at Federation reveals, is that delegates refused to apply a basic and fundamental human rights provision in the Constitution for, ‘equal protection before the law for all in Australia’s jurisdiction’. The debate transcript above shows that a factor in this rejection was support for Isaac’s view (later Justice Isaacs) that the Constitution would not gain the vote of workers if coloured persons (such as the Chinese) achieved this protection.  

Sir John Forrest’s statement in the debate of that day 8th February 1898 was more to the point. There was a strong racist feeling in the community against the introduction of coloured people into the Australian colonies which made unacceptable the adoption of a constitutional right for all including coloured persons. As in much political policy decision-making, that position must be understood because of important and relevant cultural, political and economic factors prevailing at that time. The narrative transcript of the debate highlights the confluence of political pressures upon the decision of delegates and the racism derived from

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workplace rivalry. Of those influences, racism became a major barrier to the provision of a bill of rights.

This state of politics in Australia was influenced by heritage and the isolation of the settlers who were a white Anglo-Irish outpost of the mother country Britain and relatively close to Asia. That culture brought with it attitudes of race which reflected both a confidence in matters British, based on the demonstrated success of British parliamentary constitutionalism, democratically elected parliaments, advanced industrial progress, innovation, Anglo-Celtic culture and capitalist endeavour. The rights of citizens were considered to be best protected by elected and responsible Parliaments supported by an independent judiciary, the common law and the rule of law.

During the gold rushes, Australia’s population had boomed from 430,000 in 1851 to 1.7 million in 1871 with miners arriving from throughout the western World, (370,000 immigrants arrived in 1852 alone).\(^{122}\) Significantly large numbers of Chinese joined the rush and racial attitudes hardened as described above. Chinese immigrants represented 3.3 per cent of the colony’s population in 1861 for example with the vast majority male 38,337, just 11 were women and almost all were working under contract in exchange for their for their passage money.\(^{123}\)

Coupled to the system of indentured Pacific Islanders who had been encouraged or pressed into service as labour for the Queensland sugar industry, the colonial legislatures placed racial work restrictions upon coloured people culminating in the exclusions that were embodied in the ‘White Australia’ policy produced by the newly created Australian Parliament. Given the interaction of the existing cultural, geographic, political and economic factors, the nation’s founders were not prepared to share the country with the ‘coloured’ nations nearby. Underlying that view, no doubt was the fear of a large Asian population influx and a fear of losing held economic advantages.

What the failure to provide a basic statement of fundamental human rights protection in the Constitution did produce in Australia for decades to come, was a


\(^{123}\) Ibid, Net Chinese immigration for the period 1852–1859, however, was only 4682 for the period: id.
political and legal culture which rejected the protection of a citizen’s fundamental human rights by a bill of rights included in the Constitution. The politicians of the day and those in the decades which lasted to the late 1960’s, kept responsibility for human rights with the legislatures. ‘White Australia’ was the racist buttress which kept foreign coloured people from settling or working in Australia with minor exceptions and which prevented minorities such as Australian’s Indigenous, non-Indigenous groups, and individuals from benefitting from a fundamental statement of human rights, expressed through a bill of rights.

In so doing, Australia became locked into a parliamentary human rights regime which has been described as satisfactory for the white majority, but one which allowed significant minority groups to fall outside those protections. To improve this unacceptable human rights situation, the adoption of a comprehensive human rights instrument is needed to help Australia resolve: ‘moral, ethical and legal dilemmas,’ such as those outlined in chapter one, now and into the future.

3.4. Federation to the Creation of the United Nations.

The establishment of the United Nations marked the beginning of the post-war advancement of international human rights. That it has today moved to the forefront of global politics has been remarkable. In contemporary western parliamentary democracies BOR’s and human rights protections have become the norm providing citizens with statements of civil and political rights and in some jurisdictions, economic social and cultural rights.

In 1942, Australia joined this advancement (albeit in a very modest way), of what was a growing international concern especially in western democracies about human rights abuses in World War II. A war-time Constitutional Convention in Canberra initiated by the Labor government, sought powers for the Commonwealth to make laws with respect to post-war reconstruction and to guarantee certain freedoms. The issues that went to the people in a referendum in 1944 were contained in 14 proposals for new ‘heads-of-power,’ over post-war reconstruction, and sought to insert into the Constitution guarantees of free speech and expression,

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125 Goodhart, above n 96.
as well as extend the guarantee of religious freedom under s 116 of the Constitution to the States.  

The referendum was lost despite the fact that the reconstruction powers sought had a life of only five years. Bailey notes that the ‘No Campaign’ focused on the fear of socialism and over-controlling governments and that there were substantial misrepresentations of the [government’s] position. He adds that for the next three decades no further initiatives were taken at Commonwealth level in relation to rights-style provision.

3.5. Events of the 1970’s.

In terms of a more comprehensive recognition of human rights in Australia in the form of a national BOR, action did not commence until Attorney-General Murphy introduced a Human Rights Bill in 1973. A brief outline the struggle for formal human rights provisions over this period, will be followed by discussion about what happened and why.

(a) This Bill sought to implement provisions of the ICCPR. Introduced into the Senate on November 21 1973, and was withdrawn the next day.


(c) Only the Racial Discrimination Bill was reintroduced, and enacted just before the November 1975 dissolution of Parliament, along with appointment of Al Grassby as Commissioner for Community Relations.

The Human Rights Bill was never reintroduced, but the Racial Discrimination Act 1975 remained.

(d) The next human rights steps were made by the Fraser government in 1975 ratifying the ICESCR in 1975 and then when Attorney-General Ellicott introduced a Human Rights Commission Bill. It was furiously rejected by the States, as Murphy’s

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127 Bailey, Human Rights Enterprise 2009, above n 12, 144.

128 Ibid.

129 Ibid.
1973 Human Rights Bill had been. Upon the resignation of Ellicott on other issues, the new A-G Durak resumed the efforts of the government to achieve a modified HRC Bill.

(e) Illustrating the difficulty of obtaining any human rights legislation and after another election in 1980, Durak reintroduced the previously opposed modified HRC Bill, this time with strong support from Prime Minister Fraser. After lengthy negotiations with States and Commonwealth, ratification of ICCPR was finally achieved (ICESCR had earlier been ratified by the Fraser government in 1975). Success was then achieved with Human Rights Commission Act (1981), which came into force 10 December 1981.

It was a significant victory for human rights and the AHRC remains as a memorial to Prime Minister Fraser’s support for human rights, although it is still criticised today by some on the right of politics who consider it unnecessary.

Murphy’s Human Rights Bill: Why did it Fail?

Provisions.

(a) Its application was national.

The Australian Human Rights Commission (then yet to be established) could initiate investigations of human rights breaches by any person and conciliate or proceed in the Federal Industrial Court.

Individuals could also initiate court proceedings which provided for remedies such as injunctions and damages.

Inconsistent legislation, federal or territory, would be inoperative to the extent of the inconsistency while such State legislation would also fail under s 109 of the Constitution.  

(b) The Bill lapsed in a period when the Coalition’s majority in the Senate allowed blocking of legislation to intensify, which ultimately resulted in a double-dissolution and second election in 1974. The States played a role in the Bill’s rejection on the

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basis of claims of its intrusion into State power, and doubt about the legal legitimacy of the Bill, as the ICCPR had not been ratified.\(^\text{131}\)

(c) Senator Murphy’s second reading of the Bill in 1973 (which was never read) reveal his views about the state of human rights in Australia at the time:

> Despite our supposed commitment to freedom, we cannot be self-satisfied about what is happening in Australia ... those who are poor, who are socially disadvantaged, are denied the basic human rights of a full and satisfying life. There are too many in our community who fall into these categories for us to be complacent about the state of liberty in Australia. The aged, the chronically ill, the migrant groups, and the Aborigines, do not enjoy the full measure of human rights and dignity.\(^\text{132}\)

Senator Murphy’s Second Reading Speech also noted that: ‘the main concern of this Bill is to implement the *International Covenant on Civil and Political Rights*’.\(^\text{133}\)

(d) The Bill launched a return to the political debate about the protection of national human rights by a BOR and was initiated by the Australian Labor Party. Their platform had been amended in 1967 to include a commitment to a constitutional amendment that would protect fundamental civil rights and liberties.\(^\text{134}\) In 1969 the platform was rewritten to provide policy detail as to the nature of the constitutional amendment, Commonwealth and State human rights legislation and implementation of international human rights treaties.\(^\text{135}\)

In the 1972 election campaign Labor had promised to become a party to the ICESCR and the ICCPR. Following the 1972 election the new Whitlam Government signed both treaties and the *Human Rights Bill 1973* (Cth) in order to fulfill the obligations undertaken by the ICCPR’s signing.

However, the 1973 BOR as noted above lapsed on dissolution of the Parliament in 1974. Having passed the House of Representatives, for the Senate to pass the Bill

\(^{131}\) Ibid, 232.


\(^{133}\) Ibid, see paragraph 5.


\(^{135}\) Ibid.
the government was five votes short. The Liberal-National Coalition controlled Senate, was determined to reject as much government legislation as it could, especially a national Human Rights Bill. Partisan politics were raging in attempts to unseat the fledgling Whitlam government and events moved to a double dissolution, which ended this particular Bill of Rights attempt.


The Coalition returned to power in 1975 and was to remain until the Hawke-led Labor Party was able to form government after the 1983 election. The Fraser Government enacted the *Human Rights Commission Act 1981* (Cth) on Human Rights Day 10 December 1981 as outlined above, which provided administrative remedies for violations of the ICCPR and three international declarations of rights.

The Commission had a five year life, which was a reflection of the controversy associated with the establishment of a human rights agency. The government’s commitment to the Commission was, as Prime Minister Fraser stated on inauguration day, ‘... a commitment to human rights which is more profound, relevant and effective than any alternate measure...’

In 1979 Attorney-General Senator Durack had introduced a modified form of the earlier Ellicott *Human Rights Commission Bill of 1977*. In his speech of 25th September 1979, Senator Durack argued that a Human Rights Act was inappropriate in the Australian context because:

It would have serious implications for our federal system of government and would be contrary to our long-established constitutional traditions according to which authority for our basic human rights is primarily derived from the parliamentary and elective processes.

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137 Ibid, 351, Inauguration of the Human Rights Commission, Statement of Prime Minister Fraser, at the ceremony in the Senate, 10 December 1981.


What Senator Durack and the Fraser government were publicly re-stating was the acceptance and continuation of the doctrine of English liberal constitutionalism, as the justification for rejection of a national BOR. Implicit in the assertion again was the view that Parliament and its agencies, such as a Human Rights Commission, were the best providers of human rights. In the decades which followed to the present day that view of the Coalition has remained a political constant.

With the advent of the Hawke Government one of its initiatives was the *Human Rights and Equal Opportunity Commission Act 1986* (Cth) to replace the expiring Fraser Government’s Commission. The government’s motive was to ensure that Australia could fulfill its obligations under UN treaties that it had ratified. 139 The Commission at that time had statutory responsibilities with respect to the *Racial Discrimination Act 1975* (Cth) and *Sex Discrimination Act 1984* (Cth). It had no power to enforce human rights findings, merely the power to report to the government on matters such as racist violence, homeless children, mental illness and Indigenous issues.

In July 1983 the government announced that it would introduce a BOR in 1984 containing rights drawn from the ICCPR. Article 1 of the Bill outlined this aim. The Bill’s features were similar to the Murphy Bill of 1973:

- It would apply at federal State and Territory level.
- Unlike the previous Bill neither the Human Rights Commission nor individuals could initiate court action for breaches of human rights (clause 19).
- The effect of inconsistent legislation followed the provisions of the earlier Bill, requiring legislation at any level to be interpreted in a manner that was consistent with the bill or that furthered the bill’s objects. (clause 10) 140

With an election looming on 1 December 1984, Attorney-General Evans released the draft Bill to the States and others. A notation attached to the Bill indicated that it was not to be made public until after the election. 141 Unsurprisingly,

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140 Ibid.

Queensland Premier Bjerke-Petersen used the material in the draft to attack the government as a proposal by a power hungry Commonwealth, trying to destroy the States and to create a socialist republic. The Bill lapsed upon the 1984 election.

Senator Evans had been criticised for allowing the draft Bill to be released prior to an election giving political ammunition to the Opposition. Senator Evans must have been aware of the Opposition’s deep and vehement antagonism to such a Bill. Galligan notes that Senator Evans at that time, been described as, ‘a political accident which is just waiting to happen’.  

In his policy speech of 13 November 1984 Prime Minister Hawke made no further mention of a BOR and concentrated on sharing economic recovery and growth. In the second last sentence of the speech however he did declare that, ‘there was for all Australians an entitlement for all to fairness justice tolerance dignity and security’.

The second attempt by a Labor Government to achieve a national BOR thus failed and in the election speech of the Prime Minister, it was not mentioned as a promise for the new Parliament. However the 1985 Ministry saw Evans removed from the Attorney-General’s position and replaced by Lionel Bowen. He commenced a third attempt to achieve a national BOR. The carefully redrafted *Australian Bill of Rights 1985* (Cth) passed rapidly through the House and included the following features:

The role of the Human Rights and Equal Opportunity Commission (HREOC) remained as conciliating human rights complaints reporting to the Minister and Parliament. Powers were to be granted to the Commission to enforce fines for non-attendance at compulsory conciliation conferences, s 35 (i) (ii), giving false or misleading information, (s 37) or obstruction of the Commission’s inquiries, (s 38).

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144 Ibid
The BOR at Schedule 1 detailed the provisions contained in the ICCPR, which the Bill was seeking to provide for. Significantly there was recourse only for rights violations by governments. It did not apply to the States. It would make any laws offending the Commonwealth law inoperative only after five years.

In his second reading speech the Attorney-General noted that the Bill was designed to protect individuals against violations of their rights by the impact of laws or by the actions of government institutions.\textsuperscript{145} The government agreed on a\textit{cognate} debate on this Bill and with two Bills concerning HREOC. As well as these Bills proceeding together through the legislative stages, speakers could discuss any aspect of the Bills. The House completed debate in one day, and the Bills moved to the Senate again in\textit{cognate} debate on 2 December 1985.

Upon return from the Christmas break, the Senate debated the Bill for nine days completing only a small portion of its clauses and effectively destroying the Bill by filibuster. The legislation lapsed in March and the government concentrated thereafter in getting the HREOC Bill though. This it managed to do just in time in December 1986. The question of poor parliamentary tactical skill can again be raised to explain the failure of this BOR. Perhaps as been suggested by some commentators, it failed because that the Attorney-General was not really politically committed to a BOR: The Bill of Rights cause was taken up without much enthusiasm by the Attorney-General, A-G Bowen had first opposed the Bill of Rights but complied with the Labor Party’s commitment after pressure from the Caucus Legal and Administrative Committee.\textsuperscript{146}

In another aspect of the failure of the Bowen BOR, the Senate had asked its Standing Committee on Constitutional and Legal Affairs (SCCLA) in April 1985, to enquire into the desireability and feasibility of a national BOR for Australia and into its possible content. The SCCLA produced an Interim Report in November of that year but its final deliberations were overtaken by the Attorney-General’s revised Bill.\textsuperscript{147} The Attorney-General had pressed ahead with his Bill rather than waiting for a final report from the Standing Committee.

\textsuperscript{145} A-G Bowen, Second reading, \textit{Australian Bill of Rights} 1985.

\textsuperscript{146} Galligan, Above n 142, 30.

\textsuperscript{147} Byrnes, Charlesworth and McKinnon, \textit{Bills of Rights in Australia}, 2009, 32.
The Labor Government in 1985 also set up a constitutional Commission to report on a revision of the Australian Constitution. An advisory committee on ‘Individual and Democratic Rights’ assisted the Commission. Of the interim recommendations of the Commission of 1987, the government decided upon a 1988 referendum to put four proposals to the people. This was described as a hasty and politically clumsy bid to achieve constitutional change in the Bicentenary year.\(^{148}\)

The *Constitutional Alteration (Rights and Freedoms ) Act 1988* (Cth) sought to:

- Extend to the States, guarantees of trial by jury, acquisition on just terms and religious freedom.
- Provide four year terms for Federal Parliament.
- Provide for a ten per cent maximum variation for Commonwealth electorates and provide a right to vote.
- Establish local government as part of the Constitution.

The referendum was defeated in all States, effectively putting the political parliamentary initiative for a BOR and constitutional provision of rights once more into suspension.

3.7. The 1990’s to the 21st Century.

Besides the attempts of the Labor Party to achieve a Bill of Rights in the federal Parliament, there have been a number of other attempts:

1. The *Human Rights Bill 1982*—introduced as a private member’s Bill by Australian Democrat Senator Janine Haines and modelled on the 1973 Murphy Bill.\(^{149}\)

2. Michael Organ, Greens Party Member for Cunningham in the House of Representatives, 2002–2004, presented a Bill of Rights to Parliament on 27 February 2004 which contained 32 fundamental rights and freedoms. There was no second and the Bill lapsed.\(^{150}\)

3. Senator Meg Lees, Australian Democrats, introduced to the Parliamentary *Charter of Rights and Freedoms Bill 2001* which was based on the ICCPR and the Bowen

\(^{148}\) Ibid, 33.

\(^{149}\) Interview with former Senator, Natasha Stott-Despoya, at Sydney, 10 October 2012.

\(^{150}\) Interview with Mr. Michael Organ, at the University of Wollongong, 7 August 2011.
Australian Bill of Rights (1985). The Bill was re-introduced unsuccessfully by the Democrats in 2005 and 2008.

4. The Independent MHR for Caldwell, Dr Andrew Theophanous, introduced the Australian Bill of Rights Bill 2001 (Cth) which did not reach a second reading.

The ability of minority parties such as the Democrats and Greens and Independents to gather enough support for their BOR in parliament was clearly very limited. Support from the major parties was not forthcoming.

There has been other BORs proposed outside Parliament by human rights advocates. There are a number of these groups continuing to support a national BOR, perhaps the best known of these is the Human Rights Bill of 2006, drawn up under the leadership of former federal Minister Susan Ryan AO and sponsored by New Matilda. From 2008, that campaign re-launched as the ‘Human Rights Act for Australia Campaign’, without New Matilda’s sponsorship.

3.8 Political Parties and Policies from 2006.

In the run-up to the 2007 federal election the ALP amended its platform, from an unqualified endorsement of a BOR to an undertaking to conduct a public inquiry into how best to recognise and protect human rights and freedoms enjoyed by all Australians. The Rudd Government’s ‘2020 Summit’ of April 2008 created further media debate about a possible National Charter of Rights, and three of the Summit’s working groups recommended a national Charter of Rights.

Prime Minister Rudd reaffirmed Labor’s commitment to a consultation on a Charter of Rights and the National Human Rights Consultation chaired by Father Frank Brennan was launched on 10 December 2008. In an impressive Australia-wide consultation involving 35,014 submissions, the Consultation recommended that the government establish a federal Human Rights Act (Recommendations 18 and 19)

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151 See Appendix I for an outline of New Matilda’s Bill 2006 provisions.

152 A. Byrnes, H. Charlesworth, G. McKinnon, above n 20, 147.

The Labor Government decided before the 2010 election not to proceed with a Human Rights Act for the nation.\textsuperscript{154} Attorney-General McClelland proposed instead: ‘positive and practical measures to improve human rights’ which included: ‘the creation of a new parliamentary committee to scrutinise laws for compliance with international human rights obligations (namely the seven key human rights treaties), a requirement that new Bills be accompanied by a statement of compatibility with human rights and $12 million for improving education on human rights’.

The BOR failure was assessed by Ben Saul:

Despite the fanfare around Frank Brennan’s human rights consultation and its recommendation for a human rights act, the government’s response was one of the greatest fizzers in human rights history; funding will be provided to educate Australians about rights they cannot enforce by law; a parliamentary committee will examine impacts of bills on rights, which happens already through Senate committees that governments routinely ignore; the government will meet non-government organisations more often and send a human rights plan to Geneva. One could faint with the ambition of it all.\textsuperscript{155}

The ALP has indicated that its quest for a national BOR was not completely off their human rights agenda. Mention of actively seeking a national BORA does not appear in the party’s platform adopted at their 2011 National Conference. However, Clause 28, Human Rights, did provide for a review of whether the party would consider another BOR attempt.

Labor indicated a review of its Human Rights framework in 2014 and that review would consider whether the Human Rights Framework could be enhanced through a statutory charter of human rights or similar instrument. Nothing has emerged from the ALP since (at least publically) in relation to any future adoption of a BOR.

Are there any of the other parties in the Federal Parliament with a policy for the establishment of a BOR? The answer is one—the Greens who have a policy to enact


an Australian Bill of Rights. The Liberal and National Party policy documents make no reference to a Bill of Rights.

The party policy indicators of the ALP appeared to show at least the possibility of a new political initiative for a BOR in 2014. It is worth noting that had the ALP maintained its political commitment to a BOR, it might have been able to gather sufficient support in Parliament during the period 2011 -2013.

The July 1 2011 introduction of the new term Green Senators, could have seen that Party negotiate a deal with Labor but that did not happen. The Senate numbers then were ALP 31 Senators, plus the Greens nine Senators, that is, 40 in all. The Coalition had 34 Senators plus 2 independents, the latter could not be guaranteed to vote for either major party.

In the House of Representatives the Rudd/Gillard government held a majority of 2, with 76 seats from which then Prime Minister Gillard had the support of 1 Green and 3 Independents Wilkie, Oakshott, and Windsor. It is politically ironic given the history of Upper House resistance, that the ALP had the numbers to pass a BOR through the Senate after the 1st July 2011, but even if it had been prepared to make a fourth BOR attempt at the bidding of the Greens, it is questionable whether the minority government could have secured sufficient support in the House of Representatives.

In any event the ALP Government concentrated on other major policies and obviously considered a BOR as too divisive. In the words of the Attorney-General at the National Press Club in Canberra in 2010:

> A legislative charter of rights was not included in the Framework as the government believed that the enhancement of human rights should be done in a way that, as far as possible, unites rather than divides our community.\(^{157}\)


The blocking role of the Senate has been a major factor in preventing the adoption of a national BOR when proposed by ALP Governments. The Liberal-National Party Coalition with Independents used their numbers in the Senate to


\(^{156}\)The Australian, above n 155.
consistently block the adoption of a national BOR. It must be accepted that the main of the reason for the success of that strategy has been the practice of the Australian electorate to generally cast their votes in such a way that they can rely on the Senate to keep the power of government of the day in check.

The Opposition’s Senate tactics have been assisted by the ALP which has fluctuated in its BOR campaigns between political incompetence and political reluctance by some Ministers. At key points in time the ALP’s Attorneys-General had been unable to manage the legislative process to achieve a national BOR. Senator Murphy showed a real ideological commitment for a BOR.\(^\text{158}\) He had to cope with an exceptionally hostile Senate determined to bring the new Labor government down.

Senator Evans’ attempt failed, it is said, because he was too politically inexperienced to manage the achievement of his BOR.\(^\text{159}\) The issue of lack of support for a BOR from within the ALP is addressed by Byrnes. He pointed out:

> that despite Kevin Rudd’s post 2020 Summit comments re-affirming ... a consultation on a legislative charter; he thought at that time:... within the broader ALP community, there remains considerable divergence of views on the desirability of a Bill of Rights.\(^\text{160}\)

Galligan expressed the view that :

> It needs to be recognised that the position favouring a Bill of Rights is a partisan one...the Labor Party and reformist critics favouring a BOR, while the Liberals together with more conservative commentators opposed. That in itself has been enough to ensure that public opinion is divided and constitutional entrenchment by referendum foreclosed. Even the more modest attempts of federal Labor governments to introduce statutory Bill of Rights have been stymied by partisanship and blocked by the Senate.\(^\text{161}\)

### 3.10 Conclusions:

What this chapter reveals is that the conservative side of politics in the Australian Parliament has maintained a consistent ideological opposition to a national BOR in the face of three ALP attempts to achieve one. While the conservative parties

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\(^{158}\) Murphy above n 129.

\(^{159}\) Galligan, above n 142, 24.

\(^{160}\) Byrnes, Charlesworth and McKinnon, above n 20,147.

have been the main buttress to a national BOR, there are ALP issues questioning the support of some MP’s for a BOR which need further examination and which will be considered in chapter five. A number of conclusions arise from this chapter’s account of our national political BOR rejections and the politics behind them.

The 1898 Congress final vote defeating a human rights provision in the new constitution one was relatively close. There may have been an understanding to follow the British constitutional model by most delegates that the tradition of English Liberal constitutionalism outlined in the chapter three, was the constitutional model to follow.

What should be remembered however is that at the 1898 Convention, key conference members pointed out to the other delegates, the strong popular feeling of electors against Asian gold miners (especially the Chinese). In short they saw that the greater political imperative was to respond to that situation by excluding human rights from the draft constitution not only to exclude Asians, but at the cost of removing any such provisions for their citizens also.

Widespread community white anti-Asian feelings fused racism into the decision of the delegates in constructing a constitution without basic human rights protections. In the first few years of the new Australian Parliament, this political racism formally introduced statutes which created ‘White Australia’. It is the belief of this thesis that ‘White Australia’ initially was the mechanism which denied non-white citizens entry to Australia and kept alive the political rejection of a formal human rights BOR for citizens. Conservative politicians Liberal and National (and their earlier political identities) continue this same opposition today based upon more recent economic politically advantageous parameters.

The emergence of the United Nations Organisation post-World War II as a response to the terrible human rights abuses in the war resulted in a new belief in many countries that human rights must be given greater attention by government. It was in 1970’s that Australia which had played a significant role in establishing and supporting the establishment of the UNO, saw human rights movements which ended ‘White Australia’ and its first attempt by the Whitlam government to establish a national BOR which was rejected by conservative political forces at state and national level.

Despite the growing world movement for better human rights, our federal conservative politicians refuse (as previously expressed by Senator Durak and Prime Minister Fraser) to move from their long held BOR rejection position. It is interesting
that even the United Kingdom the home of ‘English liberal conservatism,’ has seen fit to establish a Commonwealth BOR, yet our national conservative Coalition parties still reject one. To be politically balanced, some on the Labor side of politics also refuse to provide their citizens with what is a universal human rights mechanism across the contemporary nations of the western world.

This position brings forward in this thesis the view expressed also in Chapter Two, that conservative political party ideology today is hiding opposition to a national BOR when in fact other newer political aims are the real BOR reasons for rejection. The BOR barrier is a mechanism for the federal Coalition parties to gain political power rather than just opposition to a political policy based upon its own merits or faults. This political power argument must obviously rest upon political support within the Australian electorate, from party members and more importantly powerful party supporters, the source of the latter which is broadly known.

Most electoral support comes from business large and small, from some of the churches, and from citizens generally who agree with the ideology expressed in the Liberal Party of Australia’s platform which expresses the importance of individual independence and free enterprise. At the time of this writing in 2016 and a pending July election, much discussion was generated by political criticism of the current Coalition government’s policies which favour ‘the big end of town,’ including a A$50 billion tax write-off for business (over ten years) at the cost of myriad financial cuts for those further down the economy.

Reasons for the failure of the ALP to manage the legislative process effectively to achieve success in what has been their political objective for four decades has also been a contributing factor in the BOR failures. The ALP’s party platform supporting a national BOR for the 2010 federal election, was ultimately rejected by the party, where considerable internal ALP party division became evident at ministerial level. Since then the party’s earlier commitments to a BOR have been quietly reduced in their platform to broad mention of better human rights. Chapter six will provide more detail of the ALP’s pre-2010 election failure to support a BOR in its election plan.
CHAPTER 4.

OPPONENT’S KEY ARGUMENTS: DAMAGE TO THE TRADITIONAL WESTMINSTER LEGISLATIVE-JUDICIAL POWER BALANCE.

4.1 Introduction.

The aim of this chapter is to refute the view of our national conservative politicians who continue to insist that Australia’s traditional separation of power between the legislature and the judiciary will be unacceptably damaged by the enactment of a national BOR. While this argument is not the only one opponents offer against the idea of enacting a BOR for Australia, it appears to be the anticipated outcome most feared by them. The essence of this claim is that judges will gain political and legal power at the expense of legislators, that this constitutional disturbance to the functions of Parliament is an unacceptable risk to Australia’s parliamentary democracy.

The origin of this fear lies in the character of the Westminster constitutional structure which colonial Australia adopted in its federal Parliament as outlined in the previous chapter. The view accepted then and now, asserts that citizen’s rights are best protected by elected and responsible Parliaments supported by an independent judiciary, the common law and the rule of law.\textsuperscript{162}

This chapter will review the nations’ federal legal and judicial system in some detail in order to test the legal reality of BOR opponent’s claims. It will also illustrate the unwillingness of conservative politicians and their supporters to discuss the character of the ‘Commonwealth’ BOR, nor to appreciate Australia’s human rights weaknesses which have resulted from their persistence with a policy of BOR rejection. Opponents are satisfied that Australia’s current national human rights are adequate. They ignore the reality of a BOR’s capacity to assist the development of more comprehensive human rights improvements and increased human rights

\textsuperscript{162} The origins and character of the nation’s government, separation of powers and responsibilities between the legislature and the judiciary has been outlined in the previous chapter. These powers will now be examined in greater detail.
awareness, such as has been established,(Gardbaum 2010) in such Commonwealth BOR’s such as in the UK and New Zealand.

This chapter will focus upon the validity of those two issues which are the keystones of BOR rejection by ideologically driven conservative Coalition politicians, who appear to universally reject a national BOR as a policy which is sacrosanct. Charlesworth has expressed the view that the present parliamentary impasse flows from the views of earlier politicians who thought:

that the inclusion of some forms of human rights protection in the Constitution...would too greatly disturb the fabric of colonial society ... politicians today echo those fears, arguing that Australia today is a world leader in upholding its population’s human rights and that establishing a general system to redress breaches of human rights would undermine Australia’s democracy. 163

Chapter three has reviewed the history of attempts to enact a national BOR and of opposition to it. Today, what do BOR supporters answer to conservative political claims that the national parliament is the best protector of Australia’s human rights?

Julie Debeljak’s reply to these claims that responsible government adequately protects human rights is, ‘it cannot be sustained in either theory or practice’. 164 She goes further, ‘Parliamentary sovereignty and responsible government does not adequately protect human rights today and it is doubtful if it ever could’. 165 The present human rights structure will be assessed in this chapter, where traditional constitutional beliefs of opponents to a BOR are challenged by this thesis and by BOR supporters who consider that the claim is over-stated and must be rejected by the Australian community.

4.2 Opponents to a National Bill of Rights.

Opposition to a national BOR has come from the views of a number of groups who see such a development as either constitutionally, politically and financially...
dangerous (the conservative parties, large and small a business interests) or impinging upon religious administrative practices (varying from smaller Protestant churches to the Roman Catholic church). Indeed in the list of BORA opponents in the publication outlined below by the Menzies Research Centre at Canberra, even Cardinal Pell former Catholic Primate of Australia in chapter 18 of the publication, strongly opposes a national BORA. It may seem somewhat counter-productive to the church’s professed role in spreading the human rights message, that a BOR is in some way a threat to their primary Christian religious role.

This point was taken up by Anna Crab in her University of Melbourne honours paper, ‘Invoking Religion in Australian Politics’:

As religious engagement in the Australian population continues to decline, the apparent increased prominence of religion in Australian politics is puzzling. Since the 1950s the levels of religious affiliation and church attendance have steadily declined. Despite this decline, religious influences persist in the nation’s parliamentary protocol, through church leaders’ lobbying of politicians and (to a lesser extent) via the presence of church-based political parties.166

In that same critical vein other opponents to a national BORA include judges, academics, public servants, politicians, and authors and the Murdoch press. Not all of the 25 contributors to the Menzies Research Centre’s book have been included, but a selection follows to illustrate a social and political range of arguments of key opponents.

The views of opponents to a national BOR are outlined in Don’t Leave Us with the Bill: The Case Against an Australian Bill of Rights, published in 2009.167 This publication was a substantial effort to provide a comprehensive case against a national BOR from 25 ‘skeptical’ contributors offering a range of arguments, many of which include the issue of damage to the legislative-judicial power balance.168

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167 Julian Leeser and Ryan Haddrick (eds.) Don’t Leave Us With the Bill-The Case Against an Australian Bill of Rights, (Menzies Research Centre.2009).The Menzies Research Centre was named after leading conservative politician, Sir Robert Menzies, who was Prime Minister from 1939-1941 and 1949-1966.

168 Ibid, ix.
The book emerged prior to the 2010 federal election as a response to the Rudd government’s discussions at the time, about their possible support for a national BOR in the upcoming election. This review of arguments advanced in the book, show opponent’s fears about a BOR. The most prominent of these is the fear of damage to our traditional Westminster constitutional power balance between the Parliament and the judiciary. A selection of the most common views follows.

Alan Anderson lawyer, and former senior adviser to Treasurer Peter Costello and Attorney-General Philip Ruddock, expressed the view that a Charter of Rights would: ‘undermine Australia’s democratic sovereignty; it would alter the democratic nature of our system of government by moving legislative power from the people’s elected representatives into the hands of judges’. 169

This is the strongest and most frequent theme expressed in these comments and as mentioned above, throughout the publication.

Then Queensland Chief Justice Paul de Jersey was concerned that there was a risk in requiring judges to adjudicate in matters of human rights: ‘the prospect of investing non-elected judges with a broad socially-based jurisdiction which they would be ill-equipped [for]’. He noted that the law which judges apply should be predictable in application, whereas the law involving BOR’s does not fit that pattern. 170


170 Paul De Jersey, ‘A Reflection on a Bill of Rights’, Don’t Leave us With the Bill: The Case Against an Australian Bill of Rights (Menzies Research Centre Ltd. 2009), 15.
Senator George Brandis now the federal Attorney-General, considered that parliaments are the proper institutions under our system to decide what rights should be further developed or qualified by competing interests. 171

Two questions flow from this statement. First, does it mean the federal Parliament should have sole control over the provision of our national rights, without judicial oversight as appears to be the case currently? Secondly, given the widespread abuse of human rights described in chapter one, there is evidence which questions the capacity of Parliament to do this task effectively. These questions will be discussed in more detail in following chapters.

Co-Editor Julian Leeser, Menzies Centre Director, lawyer, ministerial adviser and Harvard Visiting Fellow, made a plea for rights to stay in their traditional framework:

Instead of adopting a bill of rights which would sit at odds with Australia’s history, traditions and institutions and would cause a shift in the locus of power on some issues from the Parliament to the judiciary, the Brennan Committee should give serious consideration to more specific measures it could use to address the concerns people have with government. 172

171 George Brandis, ‘The Debate We Didn’t have to have: The Proposal for an Australian Bill of Rights’, Don’t Leave Us with the Bill: The Case Against an Australian Bill of Rights, (Menzies Research Centre Ltd), 20.

172 Julian Lesser, ‘Responding to Some Arguments in Favour of the Bill of Rights,’ Don’t Leave Us with the Bill: The Case Against an Australian Bill of Rights, (Menzies Research Centre Ltd 2009), 56.
The specific targeting of rights by statute has been the preferred option of federal governments over time. Questioned in the research component of this thesis about whether enacting convention specific rights that we have ratified, would improve the culture of rights in Australia, contributor Jim Crawford offered support for this approach:

Yes, I think it [Australia’s human rights culture] is being changed by adopting certain convention specific rights, as these become established in the minds of the people, yes. The reason why they appear more successful than general legislation is that they are focusing on known troubles. Sometimes the more specific you get, tackling particular issues rather than a whole swag of issues, you have a bigger impact. 173

This incremental method of rights provision for many rights advocates of a BOR however is seen as a ‘patchwork’, which has a much lower social and cultural impact compared to what could be achieved through the promotion of a national comprehensive rights statement.

Professor James Allen, University of Queensland, discussed the issue of judicial interpretation if a BOR is achieved: Put differently, reading down provisions...throw open the possibility of ‘Alice in Wonderland’ judicial interpretations, they confer an ‘interpretation on steroids’ power on the elected judges. 174 This criticism appears frequently by opponents in this book without mention however of the experience in contemporary countries with ‘Commonwealth’ BOR’s, where there has been successful accommodations between human rights provisions and the judiciary.

Dr David Bennett, Commonwealth Solicitor-General 1998-2008:

What I have sought to do is to add one significant argument against bills of rights ... the argument that there is no universal truth that the principle should always override the exception. I have also discussed briefly one specific objection to entrenched bills of rights... entrenched bills of rights makes future generations slaves to the morality of the time...one

173 Interview with Jim Crawford, former lawyer and senior public servant, Sydney, 4 April 2013

method of avoiding the constitutional problem [is] with a non-compulsory ‘statute of rights’. 175

Dr Bennett also commented on the role of principle and exception in rights and possible constitutional objections to declarations of incompatibility (see also similar comments from Ryan Haddrick below).

Felicity McMahon lawyer:

The HRA legislative model does not preserve parliamentary sovereignty. The operation of the HRA in Britain has shown that it is a severe blow to the sovereignty of Parliament. The interpretation obligation rather than the power to issue a declaration of incompatibility, results in parliamentary intention and the object of the legislation being perverted. 176

This assertion will also be addressed later in this chapter, in a discussion of the United Kingdom’s Human Rights Act 1998.

Jim Wallace Retired Military Officer:

The fourth objection to a bill of rights is that it is a ‘trojan horse’ for ideological campaigners. The transfer of power from a representative Parliament to an unelected judiciary is one of the key reasons why those championing minority agendas are so keen to have an Australian bill of rights. 177

Paul De Jersey: A substantial argument against a bill of rights fastens on the adequacy of current human rights protections under the common law, statutes and the Constitution. 178

Ryan Haddrick, Legal Practitioner, Ministerial adviser:


177 Jim Wallace, ‘Why Should Christians be Concerned about a Bill of Rights,’ Julian Lesser and Ryan Haddrick (eds.) ‘Don’t Leave Us with the Bill: The Case Against an Australian Bill of Rights’, (Menzies Research Centre Ltd. 2009), 259.

178 Paul De Jersey, above n 162, 10.
It is the express and implied requirements of the Commonwealth Constitution that provide reason to doubt the ability of the Commonwealth Parliament to enact a statutory BOR that utilises declarations of incompatibility.\textsuperscript{179}

Statements by Ryan Haddrick and Dr. Bennett regarding declarations of compatibility do raise an important issue which require review, namely the High Court decision in \textit{Momcilovic v The Queen} (2011) 245 CLR 1. This question has important implications for the future possibility of a bill of rights by statute and will receive discussion later in this chapter.

As these extracts above illustrate, a number of the contributors in \textit{Do Not Leave us with the Bill}, argued that a reduction of Parliament’s power is highly undesirable because the Australian people are best protected by an elected accountable Parliament, with sovereign power and an independent judiciary. In order to further evaluate that claim it is necessary to look at the structure and operations of these institutions.

4.3 Supporters for a National BOR.

While it is not necessary to list comments of every supporting body or person for a BOR, as has been made for BOR opponents above, some outline is provided as to who previously has agreed that we need a national BOR. This information was compiled from 1992 to gauge support for a national Bill or Charter of Rights.\textsuperscript{180} Supporters are grouped by year, from the legal community, universities, judges, and politicians.

\begin{center}
\textbf{Year and Indicated Activity in Support .}
\end{center}

\begin{center}
1992
\end{center}


\begin{center}
2000
\end{center}

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\textsuperscript{179} Ryan Haddrick , ‘The Judicature, Bills of Rights and Chapter III,’ \textit{Don’t Leave Us with the Bill: The Case Against an Australian Bill of Rights}, (Menzies Research Centre Ltd. 2009), 148.
\end{flushright}

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\end{flushright}

Interview ‘The National Interest’, 27 August 2000, Former Prime Minister Malcolm Fraser: Calls for a BOR.


2001


2006


2007


Michael McHugh former High Court judge: ‘The Need for Agitators : the risk of stagnation’.

Sev Ozdowski, Human Rights Commissioner: ‘Why we need a BOR now’.

2008


John Doussa, former President of the Australian Human Rights Commission (AHRC): ‘A Bill of Rights is essential to best serve human rights’.

Professor and former Attorney-General Michael Lavarch: ‘Towards an Australian BOR’.

Associate Professor Andrew Lynch, UNSW: ‘A Bill of Rights will help the hoi polloi, not just the haughty torty’.

Law Council of Australia: Puts forward policy documents supporting a BOR.

OPINE: Susan Ryan, former ALP Senator and Minister: ‘The Case for a Bill of Rights’.
Ron Dyer, former NSW Minister: ‘Anti-terror laws mean we need a Bill of Rights’.

Anna Katzman, Barrister: ‘Charter of Rights will make pollies more accountable’.

2009

Law Council of Australia: NHRCC submission.

Francine Johnson & Edward Santow, UNSW. ‘Would an Australian Charter of Rights be good for business?’

Michael McHugh, former High Court judge: ‘A Human Rights Act, the Courts and the Constitution’; argued that some proposals are constitutionally unworkable and called for the legislative implementation of the ICCPR.

Comment.

This outline reveals the following aspects regarding support for a national BOR.

The supporters, as in the case of BOR opponents above, are organisations and individuals largely form the legal professions and academia. The Law Council of Australia and AHRC are two significant bodies offering support, while individuals Shadow Attorney-General Robert McClelland, and former Prime Minister Malcolm Fraser in 2000 offer political national BOR support.

The list shows the increasing push for a national BOR, in especially 2008 and 2009, after the 2007 election of the Rudd Labor Government and widespread anticipation that finally the ALP, driven by its very dynamic and popular Prime Minister Kevin Rudd, would finally move to establish a national BOR.

An accompanying chart with the table of BOR activists above, contains also a summary of arguments for a BOR, compiled from Professor George Williams’s book, A Charter of Rights for Australia, (University of NSW Press, Sydney 2007). Fundamental human rights benefits listed and needs that a national BOR would provide Australia:

- Australian law does not protect fundamental freedoms (17,33,41).
- A Bill of Rights would give power of action to Australians who are otherwise powerless (12).
o A Bill of Rights would bring Australia into line with the rest of the world (16-17).

o A Bill of Rights would enhance Australian democracy by protecting the rights of minorities (55)

o A bill of Rights would put rights above politics and arbitrary government action (34).

o A Bill of Rights would improve government policy-making and administrative decision-making (69,92,93)

o A Bill of Rights would serve an important educative function (91,94)

o A Bill of Rights would promote tolerance and understanding in the community (91, 94)

Further detail of why the ALP government failed to proceed to a national BOR will be outlined in detail in chapter six.


As mentioned above the structure of the federal government has to be examined to understand how a statutory BOR would operate within that structure. It is not a simple case of how its adoption might affect the Parliament but also how it might impact upon other federal bodies such as the judiciary, federal courts and State governments and Territories.

The system of national government formally adopted in 1901 is a ‘hybrid’ containing most of the elements of the unitary British Westminster system of responsible government and some of the elements of the United States’ federal system. The Westminster system provided the core of the Australian national and State systems including such elements as the elected majority party in the Lower House forming government.

The new constitution of the nation included three key elements from the United States, including: a Senate representing State electors, a division of powers between the national and state governments, and judicial review.

4.4.1 Commonwealth Parliament.

The Parliament practices the western tradition of democratic responsible, liberal government. That tradition encompasses democratic values, meaning that the people have ultimate political power through the electoral process. The House of
Representatives is the ‘Peoples House’ while the Senate was and still is seen as the ‘States House’. The Senate is described in s 53 of the Constitution as having, ‘equal power with the House of Representatives in respect to all proposed laws... except those appropriating revenue or moneys or imposing taxation.’

4.4.2. The High Court’s Constitutional Powers and Jurisdictions.

Adopted in the Australian Constitution from the American system is the provision of judicial review.\(^181\) As with the U.S. Supreme Court, the High Court of Australia is the guardian of our Constitution under the provisions in Chapter III of the document.

Judicial power is the power to adjudicate on legal matters in dispute while jurisdiction refers to the authority of the court to exercise that power in a particular case. Judicial power is vested in the High Court by s 71 of the Constitution, as follows:

Original jurisdiction, in matters which are adjudicated under the High Court is provided under s 75;

- matters arising from treaties representatives from other countries;
- litigation or writs against the Commonwealth;
- matters between states, or between the residents of different states, or between a state and the resident of another state, and in matters in which actions are taken against the Commonwealth.

Section 76 authorises the Parliament to make laws;

- conferring jurisdiction on matters concerning the Constitution,
- Federal Parliament’s laws;
- admiralty and maritime jurisdiction;
- different State laws involving the same subject matter.\(^182\)

As well, s 73 of the Constitution the High Court’s appellate jurisdiction, makes it the final Court of Appeal in Australia upon the decisions of both Federal, State and Territory Courts and thus upon those laws.\(^183\) The Parliament may make laws defining

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the jurisdiction of federal courts (other than the High Court, s77 section1), Federal and Family Courts and Federal Circuit Courts.

4.4.3 Federal and State Division and Separation of Powers.

In the Australian system of governments, power and functions are divided between two tiers of government, State and Federal. As well as this division of power, there is a separation power in both tiers, between the legislature and the judiciary. The Constitution in Chapters I II and III respectively, sets out the terms of the legislative-judicial balance for the Parliament, executive and judiciary. While the ‘sovereignty’ of parliament is an essential feature of the Westminster system, the Australian ‘hybrid’ constitution places power with the High Court to interpret and thus apply the law of Australia together with the Parliament, and also conduct judicial review of matters in dispute involving constitutional provisions, common law and appeals from Federal State and Territory Courts. 184

What impact would a national BOR have upon the federal ‘separation of powers principle’ in the day-to-day workings of the legislature and judiciary? The Federal Parliament is the exclusive national law-maker, a power some describe as ‘sovereign’185. The other power, interpreting and applying the resulting law is the sole responsibility of the judiciary.

4.4.4 Legislative and Judicial Power Sharing.

It is necessary to appreciate that this neat separation of powers is not quite as clear-cut as it appears. While the basic principle is supported as an important and essential feature of Australian government, in practice the powers merge. The courts in their role as interpreters of the Parliament’s laws in fact create law also and the High Court has been described as: ‘a profoundly political institution’. 186 Galligan supports this view, ‘Australian judges...have persisted with a public rhetoric of

184 Parkin, Summers and Woodward, above n 181,161.

185 It is arguable that sovereign power rests ultimately with all the people of Australia, at the election booth.

186 Parkin, Summers and Woodward, above n 178, 160.
liberalism and legalism that barely recognises the real policy dimension of the role that they currently play.’\textsuperscript{187}

There is an unavoidable, on-going tension in judicial interpretation involving both established and recent law. This has been described as ranging from a conservative very narrow reading of an Act’s wording termed ‘legalism’, to controversial decisions where the High Court gives an expansive interpretation of parliament’s laws, commonly described as ‘judicial activism’.

Given the very broad nature of and importance of many areas of law that the High Court considers especially constitutional issues, many decisions have major political consequences, especially if that decision impinges upon an important policy of the government. If a government is unhappy with a specific High Court decision about a statute which unacceptably changes a desired policy outcome, it may resubmit a statute albeit with another approach to the issue which avoids any constitutional conflict involved in that High Court decision.

4.4.5 Judicial Activism v Judicial Conservatism.

One of the major challenges that the High Court has to consider is where to position itself with regard to the increasing importance of human rights in international law. Against a background of executive insistence upon the Parliament as the best protector of human rights (rather than the courts) and challenges by human rights activists to governmental human rights policies, the court became more judicially active towards the recognition of individual rights and freedoms especially under the leadership of Chief Justice Mason during the period 1987–1995.

This ‘activism’ included the finding of an implied right to freedom of political communication. It was initially outlined in 1992 when the Commonwealth sought to criminalise the writing of a newspaper report about the actions of members of an industrial tribunal.\textsuperscript{188} The second case, where the Political Disclosures Act 1992 (Cth) was struck down by the Court, confirmed the implied right.\textsuperscript{189}


\textsuperscript{188} Nationwide News P L v Wills (1992) 177 CLR 1.

\textsuperscript{189} Australian Capital Television P L v Commonwealth (1992) 177, 106.
Of even greater impact was where the Court in a landmark ruling held that Native Title to land existed and that the doctrine of *Terra Nullius* was void.\(^{190}\) The High Court has retreated from the more judicially active position taken around human rights previously. Human rights activists consider that this *status quo* is unacceptable, and work towards a new BOR provision to enhance human rights protection in Australia.

4.4.6 Legal Procedures: Presumptions and Judicial Interpretation.

Another aspect of judicial interpretation to appreciate is the use of presumptions. Presumptions can be applied when interpreting a statute in the absence of contrary words in a statute. One interpretive presumption for example is that the Parliament does not intend to invade fundamental rights freedoms and immunities.\(^{191}\) Chief Justice Spiegelman, in a speech to the NSW Bar Association, described the term, ‘the principle of legality’ as a concept adopted from the British courts to identify the higher purpose of the use of presumptions in the interpretation of statutes. *Coco v The Queen* (1994) 179 CLR 415 is the classic Australian High Court case involving presumption.

He referred to two English cases; the first where Lord Steyn described the effect of the principle in interpreting United Kingdom legislation, ‘Parliament legislates for a European liberal democracy founded on the principles and traditions of the common law. And the courts may approach legislation on this initial assumption’. \(^{192}\)

The second case established ‘the principle of legality’ as a unifying principle in English law. Lord Hoffman said in that case, in a passage subsequently approved by Australia’s High Court by Gleeson CJ \(^{193}\) and by Kirby J \(^{194}\): ‘The principle means that

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\(^{192}\) *R v Secretary of State to the Home Department* (1998) AC 539, 587.


\(^{194}\) *Daniels Corporation v ACCC* (2002) 213 CLR 543, 582.
the Parliament must squarely confront what it is doing and accept the political costs. Fundamental rights cannot be overridden by general or ambiguous words.\textsuperscript{195}

The Australian system of government at Federal, State and Territory level was designed to provide a separation in missions between the legislative and judicial arms of government. Where the Parliament spells out its intention in a statute in clear and unmistakable language, the courts will enforce those provisions providing they are lawful, that is they do not offend any provisions of the Constitution. At issue in dispute is whether the introduction of a BOR is possible within existing legislative-judicial structures and procedures.

5.1 An Australian Bill of Rights in Statutory Form (A Human Rights Act).

The kind of bill of rights that would best fit Australia nationally Bailey argues is a bill that would implement human rights in an international and Australian context that is drawing in human rights from international instruments as well as meeting appropriate national human rights needs.\textsuperscript{196} The Bill would have the following features:

(a) Fundamental universal human rights drawn particularly from the
\textit{International Bill of Human Rights} (IBHR).

(b) A prolonged period of community consultation and education so that Australians accept its values.

(c) Reflect Australian conditions and values.

(d) Transcend party-political values.

(e) Be incorporated into Australia law.

(f) A construction that is globally related but domestically orientated.

(g) Would be legislated into law as a HRA, the Commonwealth Parliament would be able to draw upon its external affairs, discrimination and corporations powers, to create a national Bill.\textsuperscript{197}

\textsuperscript{195} \textit{R v Secretary of State for Home Department ex Parte Simms} (2002) 2 AC 115 at 131.

\textsuperscript{196} Bailey, above n 12, 227.

\textsuperscript{197} Ibid, 209.
(h) Contain special clauses of rights provision in the new HRA for our Indigenous people.

(i) Recognise the right of minority groups to enjoy their cultures together with mainstream culture.

(j) Would create a ‘rebalancing of the three arms of Government.’

Designed as a statutory creation of Parliament, the rights provisions contained in a BOR can be over-ridden by Parliament, thus maintaining its legislative sovereignty. A feature of this ‘Commonwealth’ genre of human rights instruments, is the ability of a senior court to be able to issue a ‘declaration of incompatibility’ when another statute’s aims clash with rights in the HRA. The Australian Capital Territory, Victoria and a number of countries overseas including New Zealand (subsequently) and United Kingdom have adopted this ‘Commonwealth’ model BOR of this genre.

While it is possible to adopt a BOR in Australia by a referendum and have it embedded in the Constitution, it is unlikely that this will happen. Of the 44 past issues put before the people at referenda since federation, only eight have succeeded. It is reasonable to conclude, proponents suggest, that the most realistic BOR to enact is the ‘Commonwealth’ model, created by a regular statute.

A BOR if adopted federally by statute, would stand with other standard Acts of Parliament: become part of Australia’s common law; have applied interpretative clauses; bind the government and its public service; empower senior courts to issue declarations of incompatibility against statutes which offend the HRA’s provisions, (though note that in the case of New Zealand’s

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198 Ibid. 215–217. Bailey sees the growth of federal executive power as distorting the tradition power sharing exercised by the executive, legislature and judiciary. A Bill of Rights would provide a uniform set of standards with which to judge executive and administrative actions.

199 Ibid, 179.

200 Ibid 181.

BORA, this power was not included initially, and has since accepted some specific declarations of incompatibility.\textsuperscript{202}

A defining feature of the statutory ‘Commonwealth’ model BOR is that parliament retains its sovereign power to legislate largely unfettered by the provisions of the BOR. If however, a statute or other law is inconsistent with the BOR contains provision for ‘declarations of incompatibility,’ higher courts may then send the declaration to the Parliament to consider.

5.2 Australia’s High Court: Statements of Incompatibility \textit{Momcilovic v The Queen} (2001) 245 CLR 1.

A brief summary of the issues in this case follows;


(a) The Victorian Supreme Court of Appeal had upheld appellant Ms Momcilovic’s conviction for drug trafficking under the \textit{Drugs, Poisons and Controlled Substances Act} 1981(Vic) and reduced the sentence.

(b) It also declared that the ‘reverse onus’ of s 5 of the \textit{Drugs Act} could not be interpreted consistently with the presumption of innocence under the \textit{Charter}, and issued a s 36 (2) declaration of incompatibility by advice to and then formally lodged with the Victorian Attorney General.

(c) A declaration of incompatibility is a court mechanism which informs the Attorney General that there is a legal conflict between Bills or Statutes, in this case, between the \textit{Drugs Act} and the \textit{Victorian Charter of Rights and Responsibilities Act} 2006, s 5. It is for the Attorney General and Parliament to decide whether to make amendments to the court’s declaration of incompatibility. Note that here, the Victorian Court of Appeal accepted the role of declarations of incompatibility.

(d) The High Court’s appeal judgment by a six to one majority, found the s 32 of the \textit{Charter} was valid, that all statutory provisions must be interpreted: ‘in a way that is compatible with human rights’.\textsuperscript{203} This decision secured the Charter’s continuing validity.


(e) Section 36 of the Charter was also found to be valid by a four to three majority, two judges Crennan and Kiefel that found s 36 was an exercise of power incidental to judicial power. Justices French and Bell found that s36 was valid as an exercise of non-judicial that could permissibly be conferred by State courts. Justices Gummow, Hayne and Heydon dissented, finding that s 36 (2) invalid because the impermissibility of the declaration of incompatibility was not an exercise of judicial power, nor was it incidental to that, which impaired the constitutional integrity of the court.204

(f) However the court decided finally 5 to 2 that if [any] s 36 declaration was not an exercise of judicial power nor incidental to it, no appeal can be made to the High Court because it would conflict with the separation of powers principle established in the Australian Constitution.

(g) What are the implications for this decision? Victoria’s Government Solicitor’s Office noted that while the validity of s 36(2) was upheld (4:3), the declaration made by the Court of Appeal in this proceeding was set aside and other comments made by the court raise very real uncertainties as to how the declaration might operate in future cases.205

(h) There is therefore no definitive answer to the High Court decisions on appeals from (State or Territory) bills of rights at this stage. It is possible they might treat any enacted federal BOR as a valid statute (as the Victorian Appeals Court have done in the case of Victoria’s Charter’s, s 5) in effect no different to other statutes of the Australian Parliament. Tully believes however that in that case, the legal effect will mean that where the interpretative provisions of a Charter (or BOR) clash with principles of statutory construction, statutory provisions will remain unchanged while the Charter (or BOR) will yield.206

This leaves the question of the possible operation of a national ‘Commonwealth’ BOR and its role in improving human rights at least for the present in legal and political limbo. That is not to say that a satisfactory solution cannot be

204 Ibid 67-8 [95],70 [101] [French CJ,241 [667] (Bell J0.


found for this issue which can ultimately be removed politically or by a subsequent High Court decision.

6. Other Legal Issues Impinging upon Australia’s National Human Rights.

6.1 Substantive Law Weaknesses.

Substantive law is that part of the law that creates, defines and regulates rights under the law, the body of law that determines the rights and obligations of individuals and collective groups. Various legal rules govern the process for determining the rights of parties. Criticism in Australia has surrounded this aspect of substantive justice when rules are formalised and inflexible, and do not meet the needs of ordinary citizens whose rights (as considered in this thesis) require legal redress such as might be found in a national BOR.

Bailey notes that within the common law system substantive equality before the law, courts recognise changes in society by:

> often delicate and progressive extension of precedent. In terms of formal equality, the process of applying substantive quality means treating unequal’s as if they were substantially equal and therefore differently from the (formal) way they have been treated and characterised in the past. 207

(a) Daniel v Belton (1968) 12 FLR 101 is described by Bailey as the classic case which illustrates this process. Dexter Daniel was a Northern Territory Aboriginal leader convicted in 1968 of having insufficient visible means of support. What Blackburn J did in quashing Daniel’s conviction was that the court should take note of Daniel’s ‘actual standard of existence and address itself to the means that he has for support at that standard’ (p 104). He treated Daniel’s standard of living for the purpose of the vagrancy law as not being equal to that of a white European citizen. Recognising that Daniel was a member of an underprivileged group, he determined the application of the law accordingly and overturned the conviction.208

Substantive law is not always applied flexibly by the courts, indeed some startling cases across time have revealed that just how unjust the legal system has been in
judgments involving individuals and minorities in Australia, examples of which include:

(b) Davidson and Spegele point to the legalistic reasoning in 1989 in the *Airlines* case, *Ansett Transport Industries (Operations) Pty Ltd, Australian Airlines Limited, East West Airline, (Operations) Pty Ltd and Mayne Nickless Ltd (trading as IPEC (Aviation)) v Australian Federation of Air Pilots* [1989] Aust Torts Rep 69,314. The subsequent judgment by the Supreme Court of Victoria against the unions involved a declaration that unions and their leaders were personally responsible for economic loss, in a strike to obtain better conditions from the airlines. This effectively ended the right to strike in that state at that time. 209

(c) The High Court considered the question of genocide involved in the taking of children from their parents in the Northern Territory, the ‘Stolen Generation’. The ‘Going Home’ conference in Darwin in 1994 was organised by Aboriginal activist Barbara Cummings to suggest legal action for Aboriginals who were taken from their families under the direction of the Northern Territory Chief protector and Director of Native Affairs. From that initiative attended by Alec Kruger (taken in the late 1920’s aged two) and George Bray (taken in the 1930’s aged nine), the decision was made to launch a legal action against the Commonwealth government.

(d) The case *Kruger v Commonwealth: Bray v Commonwealth* (1997) 190 CLR 1 followed and was commenced as the constitutional test case of the Stolen Generation: whether *Northern Territory Aboriginal Ordinance* 1918 was valid constitutional law; whether an implied right to substantive legal equality vested in the court to support the claims of the two appellants and several other witnesses with similar experiences of being taken from their parents; whether the Commonwealth had the power to make such laws for the Territory; that the ordinance was contrary to an implied constitutional right to any law that authorized the crime of genocide. 210

In July 1997, the full bench of the High Court unanimously rejected all claims. With regard to the genocide claim, five judges commented specifically commented upon the genocide claim in the negative, that the ordinance was not punitive towards


Aboriginals. It is very unlikely that a similar ordinance with similar terms and directives applied to European Australians would have lasted very long either politically or legally.

However, the International Criminal Court (Consequential Amendments) Act 2002 (Cth) had made genocide a Commonwealth offence, (Criminal Code 1995 (Cth) Division 268 Subdivision B, sections 268(3)–(7). This Act provided the legal mechanisms to send by request, those accused of genocide to the ICC, but at the same time in s 268.1(3) not affecting the primacy of Australia’s right to exercise its jurisdiction with respect to offences created by the division, that are also crimes within the jurisdiction of the ICC. This latter clause would apply to Australian military personnel for example which effectively retain Australia’s legal right to determine the nature those offences.

(e) In another genocide case Nulyarimma and Others v Thompson (A5 1999: Buzzacout v Minister for the Environment and others (s23 of 1999) on appeal to the Full Court of the Federal Court. The findings of that case were briefly that while Australia is obliged under the Convention on the Prevention and Punishment of the Crime of Genocide, a non-derogating international obligation to the entire international community, it has not enacted Australian law to enforce it. Thus accordingly while it is obliged to return offenders of this crime to countries where it occurred, genocide is not a breach of any Australian law.

6.2 Human Rights and the Australian Constitution.

At a symposium on ‘Australian Constitutionalism’ Elisa Arcioni and Adrienne Stone addressed, ‘the disinclination of Australians to treat their Constitution as a source of shared values or aspirations.’ They searched the Constitution and commented: ‘We show that there is a surprisingly rich body of constitutional law that can be understood as defining the Australian people and their political values.’

211 Ibid
They noted the differences in character of more modern constitutions such as Germany, and India where their constitutions are understood as transformative documents and constitutional values as the shared or aspired to values of the citizenry. They also point to Bickel’s praise of the much earlier United States’ constitution in terms of: ‘the majestic generalities of its rights provisions, form a kind of secular religion for the American republic’. 

The authors of this paper indicate that their main interest is the place of the Constitution in public discussion and note that even where constitutional argument is available as a framework for public debate, appeals to the Constitution are rarely made (such as would be the case in most ‘modern’ constitutions). Their review then moves across areas seeking to identify possible and actual constitutional change of constitutional culture, including:

The constitutional people of Australia in the States, and their roles in the government established by the Constitution, are at the core of the Australian constitutional community. The people of the State [s] in s7, are the electors of the Senators for each State, people of the Commonwealth in s 24, elect the members of the House of Representatives.

As well, a continuing element of the constitutional definition of people contained an ethnic or racial component. Aboriginal people were excluded from the Commonwealth’s general power with respect to race, which meant that their lives were controlled by the States. The Federal Parliament was given power over immigration and aliens in order to exclude Asians from permanent residence in Australia. They note that, ‘the history of race and the Constitution is not happy and there has been disturbingly little in the way of formal [Constitutional] change’.

In the cases Roach v Electoral Commissioner and Rowe v Electoral Commissioner, ‘every member of the Court accepted that directly chosen by the people,’ was

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216 Ibid, 5.
217 Ibid, 10.
constitutional bedrock’ and has come to create a presumption of universal adult franchise.

They see signs of a slow change in the nature of political participation in Australian constitutional law, addressing issues which reflect shared values and aspiration, such as freedom of political communication (Coleman V Power (2004)220 CLR 1). They raise the possibility that the Australian Republic movement and the recognition of Australia’s First People in the Constitution, may as important political issues ultimately alter the Constitution and shift its locus towards consideration of substantive laws involving Australia’s shared values and aspirations.

The Republican movement and the Recognition movement, are two important constitutional movements of the last two decades, which are connected by a belief that the Constitution speaks to them and should therefore be more aligned with Australian political values.

This constitutional seminar discussion raised by Dr Arcioni and Professor Stone does point to human rights problems created by Australia’s outdated constitution. There is also much literature devoted to the inadequacy of its human rights provisions and this discussion at the University of Melbourne was obviously probing for answers. While the High Court is the Constitution’s protector and rightly so, it remains for the Parliament and the Australian people to initiate the constitutional and or political update by referendum or Statute to allow the High Court to properly join legislatures around the advanced world which have developed their human rights judicatures.

It is possible to see the benefit of such constitutional change as a significant and important improvement to the repair and growth of human rights in Australia.

7.1 Bill of Rights: Fear by Australia’s Conservative Political Opponents: Australian Courts and Determination at Law.

The common law is typically applied by clear direction from the wording of the statute. The question of judicial interpretation is another central to opponent’s claims
of damage to the legislative-judicial balance of power. Opponents to a BOR express fears that in interpreting cases in which a party asserts that a BOR-protected human rights is affected, judges will be able to re-write offending statutes by reading down any section which is not ‘consistent with its purpose’.\(^\text{220}\)

This fear of increased power of judges in effect to ‘rewrite’\(^\text{221}\) legislation contrary to Parliament’s intention is the next most important fear of opponents in the BOR debate. There is evidence in following reviews from other countries with ‘Commonwealth’ Bills of Rights that this fear is overstated by opponents to a BOR.

7.2 The Literal Approach to Judicial Determination:

In the *Engineers Case*, Higgins J defined the fundamental rule of interpretation:

The fundamental rule of interpretation, to which all others are subordinate is that the statute is to be expounded according to the intent of the Parliament that made it; and that intention has to found by an examination of the language used in the statute as a whole ... what does the language mean in the ordinary and natural sense.\(^\text{222}\)

This approach was amended to where: ‘The natural and ordinary meaning of what was actually said in the Act must be the starting point.’\(^\text{223}\) The so-called ‘golden rule’ took the literal approach further, where Lord Wensleydale said, ‘the grammatical and ordinary sense...must be adhered to unless... some absurdity or some repugnance or inconsistency...the words may be modified so as to avoid absurdity and inconsistency, but no further’.\(^\text{224}\)

7.3 The Purposive Approach to Judicial Determination by the Courts.

Lonnquist has outlined a shift in approach in determination in Australia in the last few decades from literal to purposive. Coupled to the Commonwealth’s amendment to the *Acts Interpretation Act* 1904 s15AA, which prefers Parliaments

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\(^{220}\) Leeser & Haddrick, above n ix; Allen above n 170; McMahon n 172, ( declarations of incompatibility).

\(^{221}\) Ibid.

\(^{222}\) *Amalgamated Society of Engineers v Adelaide Steamship Co Ltd* (1920) 28 CLR 129 at 161-2.

\(^{223}\) *Reid v Reid* [1987] 1 NZLR 572 at 549, Cooke J.

\(^{224}\) *Grey v Pearson* (1857) 6HL CAS 61 at 106; 10 ER 1216, 1234.
legislation to be read with the purposive approach, he describes that determination to be, ‘set in concrete’.225

He considered that the purposive approach posed: ‘a serious threat to the separation of powers as the judicial arm would be able to read words into legislation as they see fit’. He gives an example of this concern by quoting Kirby J’s comments supporting a purposive approach to statutory interpretation,226 ‘even to the point of reading words into the legislation in proper cases, to carry into effect an apparent legislative purpose.’227

It is fact that courts in Australia have long had a supervisory role over government Bills and Statutes, that is to say they have to correct obvious aspects of statutes the meaning of parts of which are not logical to the main purpose of Bill or Act.

In the case of BOR’s they do have interpretative clauses at their core.228 The BOR’s clauses cannot be used to strike down other statutes ‘at large’, but in separate and justifiable proceedings concerning a human rights issue, the court can interpret legislation or administrative action under challenge so that it conforms to the human right. If it does not, then a ‘declaration of incompatibility’ may be issued but the offending statute stands nevertheless.229 Courts typically have no role in declaring legislation invalid on the basis of breach of a ‘Commonwealth’ BOR and:[this] ‘represent a distinctly cautious and fairly narrow common law approach to the provision of human rights’.230 Further to the Momcilovic decision above, Professor Bailey’s view, will require clarification from the High Court or a referendum.

It must be said that the real weakness of BOR opponent’s arguments around judges usurping legislative power, rests upon their refusal to accept that ‘Commonwealth’ BOR’s provide that judges cannot declare any legislation invalid

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228 Bailey, above n 12, 179.
229 Ibid.
with respect BOR issues in conflict with other established law. The courts are restricted to advising the legislature by a declaration of incompatibility, that such a finding has been made.

It then remains a matter entirely within the Parliament as to what action it will take. By provision of advice accompanying a Bill that the legislature acknowledges the conflict, but considers it necessary and important to do so for reasons attached, then the matter rests in a legal sense. Whether the matter will stand the test of time politically, is a matter between human rights advocates inside and outside government, the latter who may make the political cost of such action problematic.

Many BOR’s contain provisions outlining when it appropriate to overrule its rights. A brief review of the Bill of Rights Act 1998 (UK) below illustrates that the argument by BOR opponents about the dangers judicial override of BOR rights is quite overstated.

8.1 Political Process and a Bill of Rights?

Another matter to be considered in the debate about whether to adopt a BOR involves what can be called political dynamics. This political process comprises a number of sub-elements including: interaction between the public service the politicians, their parties and party administrative machines. As well the parties create policy which ultimately is used to create or oppose legislation.

In order to further understand the fears in federal Parliament about a BOR and the preference for a narrower ‘modular’ approach to human rights provision in Australia, some consideration should be given to changes to party functioning. Do any of the trends provide additional explanation as to why political barriers still remain to a BOR?

Considering the modus operandi of the parties in the Federal Parliament today one marked change appears to be the concentration of power and decision-making, both at the parliamentary and extra-parliamentary level. This concentration of power to the executive has increased their control over party members and can be argued has played a role in resistance to a BOR?

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Nicholson, formerly Chief Justice of the Family Court of Australia, thought that, ‘The introduction of such a bill is anathema to conservatives largely because it has the potential to interfere with their exercise of power when in government.’

In the lecture entitled ‘Human rights Fundamentalisms’, Kinley commented on the way in which our current national human rights are applied in the community:

As privileges or optional extras that can be bestowed or denied as circumstances demand... or the worthy (or at least powerful), human rights are more assured because they are seldom violated. The consequence of such partiality is that there is now a cleavage within our political social and legal orders and between the fundamental origins, nature utility and legitimacy of human rights and their current application in practice. This disconnect is a threat to the transcendental, fundamentalism of human rights.

In examining Australia’s failed attempts to establish a BOR, it is recognised that Australia has made modest national provision for the legal protection of human rights, particularly in discrimination law, even if it still lacks the fundamental comprehensive coverage of contemporary human rights that a BOR would provide to our community.

8.2 The Long and Winding Road.

Charlesworth’s appropriation of this phrase provides a good metaphor to describe the inability of successive national governments, over some six decades, to provide a national BOR. This inability sits oddly against the ready interaction of Australians at all levels of our society with the new globalised world. Yet the Australian community is locked out of BOR rights protections by the will of its Parliament, especially on the conservative side of politics.

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234 Australia’s National Human Rights Action Plan 2012 outlined the range of initiatives being undertaken in response to the 2011 Universal Periodic Review by the UN Human Rights Committee’s Report 2012. This involved 77 initiatives in answer to the Review. Australia undertook its latest Periodic Review in 2016 where an account of its progress in the recommended areas were provided.

In this chapter evidence was presented that the power balances Australian government has shifted. This was expressed as an on-going concentration of power of the executive. The power-shift has been described in these terms;

[t]he Ministers of the Crown...the Prime Minister and Cabinet are at the centre of political and administrative power, the repository of legitimate political authority, able to control and direct the administrative apparatus of the state...who sit at the apex of the executive branch within our system of parliamentary democracy

The pinnacle of executive power rests with Cabinet. Keating and Weller suggest that its growth and dominance reflect the growing pressures of government, some of which are: the increasing span and complexity of government including, media pressures encouraging a shift to a ‘presidential’ style of government, the shortening time-frame for decision-making, expectations on government exceeding its capacity to deal with an increasing range of ‘seemingly intractable problems’. The response of key members of the political executive to this environment has been to assert greater control over the decision-making process, and this concentration of political power to a few key Ministers accords with a view that decision-making then becomes more secretive and with an accompanying diminution of democracy.

Given these political power changes discussed what are the implications for future prospects of a more robust legal regime for the protection of human rights being established in Australia? The answer appears to be: National Party of Australia, Liberal Party of Australia, the BOR barrier remains: Green Party yes to a BOR: Australian Labor Party problematic and unlikely without the arrival of a leader who is prepared to risk political capital and become BOR human rights ‘champion’. The

237 Ibid, 103.
238 Ibid.
239 No mention of a BOR was outlined in the ALP national Conference 2015. Their National Constitution, Part B (5) The Party’s Objectives did outline a number of what are human rights (e) private property, (f) the right of labour to organize, healthy and humane working conditions, workplace decision sharing, (k) social justice and equality for individuals and the family and groups, (l) equal access and rights to employment, education, housing, health and welfare services, and law, (n) Fundamental political and civil rights, freedom of expression, the press, assembly, association, conscience and religion; t he right to privacy, freedom from oppression by the state and democratic reform of the Australian legal system.
Greens have a clearly expressed policy platform regarding a national BORA commitment to the enactment of one in their Policy Statement.  

Australia’s Human Rights Framework initiatives are small improvements to Australian human rights but not the new start that supporters for a BOR want. Chairperson Father Brennan post-Human Rights Consultation view about the prospects for a national BORA into the future was positive, despite the ALP’s rejection of the Consultation’s recommendation that a BOR be enacted. He suggested that ’The Human Rights Act door is still swinging’.  


This brief review will show the power balance between the UK’s legislature and judiciary and upon the effect of declarations of incompatibility upon its legislation. The UK’s Commonwealth BOR model has successfully traversed the two key issues which remain barriers to an Australian national BOR. It is useful in the context of a British approach to human rights provisions, to examine how its BOR operates.  

As well, currently an interesting human rights development there is a political movement to replace the *Human Rights Act* 1998 (UK), which seeks to free the British Parliament from compulsory legal enactments from the *European Court of Human Rights* and the *European Convention on Human Rights*. Suffice to say that Brexit has created a new political and legal situation vis-à-vis British desire to break away legally from the European Union.  

9.2 The *Existing Human Rights Act* 1998 (UK).  

The UK legal principles which lie to support this question of balance between legislators and judges are outlined by Tom Hickman.  

1. *[The Human Rights Act* 1998 (UK)]* accelerated the configuration of public law so that modern civil and political rights and freedoms, as set out in post-war international instruments,  

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240 Greens above n, 153.  
are at their core and radiate even into areas seemingly distant from human rights concerns, such as planning disputes, taxation and hunting with hounds to name but a few.\footnote{Ibid.}

2. The reception of human rights principles is part of an adjustment of not only the surface architecture of public law itself, and the relationship between law and politics.\footnote{Ibid.}

3. It has always been the function of courts to determine what the law is and what rights people have...it falls to the courts to uphold the requirements of principle...while the constitutional system quite properly allows the Parliament to have the last word.

4. This is not so that Parliament can redefine the scope of fundamental principles, but allow Parliament to depart from them. Rights-defying legislation cannot be struck down. This enables expediency to trump rights, but politicians must face up to the injustice and bear the political cost.\footnote{Ibid.}

What Hickman has reaffirmed in this extract is his belief and support for a current system of balance between human rights legislation and legal adjudication of that legislation. However the current viability of Human Rights Act 1998 (UK) remains a live issue and will obviously change.

9.3 The United Kingdom’s Legislative-Judicial Power Balance and Declarations of Incompatibility.

The human rights standards of the UK’s Human Rights Act 1998 is described in the Preamble as an Act to give, ‘further effect to rights and freedoms guaranteed
under the *European Convention on Human Rights*’. This provision reflected the legal connection the United Kingdom made upon joining the European Community and thus that British human rights law was no longer just local in origin.

Before 2 October 2000, a citizen who wanted to challenge the UK government for non-compliance with the *European Convention on Human Rights* generally had to go to the European Court of Human Rights at Strasbourg, and could only do so after showing that there was no remedy in the UK courts. Time and cost made that a poor option.

The *Human Rights Act* 1998 (UK) incorporated rights under the Convention and:

(a) Required all legislation be interpreted and given effect as far as possible compatibly with the *Convention* rights (s 3).

(b) Made it unlawful for a public authority to act incompatibly with the *Convention* and allowing for a case to be brought in a UK court or tribunal against the authority (s 6).

(c) Where that is not possible a court can quash or disallow subordinate legislation, or in a higher court, grant a declaration of incompatibility triggering a new power allowing a Minister to amend the legislation (s 4).

(d) The new Statute and any accompanying Regulations stand in any case if Parliament leaves the matter unaltered (s 4b).

(e) Require Ministers when introducing a new Bill to include a statement of compatibility with Convention rights, or a statement justifying, why in a democratic society, a Bill incompatible with such rights should stand.$^\text{246}$

One of the UK’s leading human rights advocates, Professor Francesca Klug supports the current structure of the UK’s *Human Rights Act*, if under s 3 (Interpreting legislation) and s 4 (Declarations of Incompatibility) are correctly applied, there is no need for a further doctrine of judicial deference to the legislature. Essentially there should be no legislation which the court excluding themselves from declaring incompatible simply because they consider the subject matter to fall within

Parliament’s responsibility. Such reticence is unnecessary given that under a ‘Commonwealth’ model BOR, the Parliament will always have the final say.\textsuperscript{247}

The outline above, points to the fact that United Kingdom’s ‘Commonwealth’ Human Rights Act has been functioning successfully to accommodate a balance between the legislature and the judiciary. Neither does the issue of declarations of incompatibility by senior judges appear to create any serious threat to impede the proper functioning of the Parliament. As to the question as to whether the legal system will operate after Brexit, one can suggest that the question of legal breakup from the EU, will probably not alter the current legal system where legal review between the Parliament and their BOR occurs. What will change is the need for the British legal system to follow the decisions of EU human rights.

However if this is so, what problems may occur around the internal removal or amendment to UK’s Human Rights Act? It is beyond the scope of this thesis to consider this question in great depth. However are there issues which threaten the ‘viability of the ‘Commonwealth’ BOR model?

9.3 Will the UK Replace its HRA (1998)?

Contributions by a number of commentators on this issue include:

(a) Professor George Williams who notes that:

The UK law has been widely attacked in parts of the Press, is poorly understood by the public and has been slated for repeal by the Cameron government, which proposes to replace it with a British BOR. It is the policy of the UK government to break the link between British courts and the European Court of Human Rights and make the [UK] Supreme Court the ultimate arbiter of human rights matters in the UK.\textsuperscript{248}

(b) The Constitution Unit outlines the views of Dr Jeff King Senior lecturer at University College London’s Faculty of Law about the impending replacement of


\textsuperscript{248}George Williams.’The UK Human Rights Act Debate’, UNSW Law, <http://www.law.unsw.edu.au/news/2016/04/uk-human-rights--act-debate>. It is interesting here to note that Professor Williams considers that the British people have a poor understanding of their BOR. Gardbaum’s view in Chapter 1 is contrary to that.
the UK HRA on 7 March 2016. Reporter Laetitia Nakache makes the following introductory comments:

The Conservative party had pledged in their 2015 manifesto to abolish the HRA and replace it with a British bill of rights...since then the government’s plan to scrap the HRA has been delayed a number of times with the consultation on the proposed British bill of rights not now likely to be published until after the EU referendum. 249

Dr King made the following comments about the UK’s HRA 1998:

When the HRA had been passed, the first concern was that the courts would be swamped. According to Varda Bundy’s early study, ‘The Impact of the Human Rights Act on Judicial Review: An Empirical Study’; ‘there is little evidence that the introduction of the introduction of the Human rights Act has led to a significant increase in the use of judicial review.’

Authors Sangeeta Shah and Thomas Poole of ‘The Impact of the Human Rights Act on the House of Lords’, underlined the low win rate for human rights cases. Only one in three cases win in the House of Lords (now the Supreme Court). Yet the data presented by Shah and Poole show that the caseload of the Supreme Court has shifted substantially towards hearing human rights cases in the first ten years.

From another perspective, the impact of the HRA regime of judicial rights review on Parliament has been fairly light. The number of statutes declared unconstitutional or incompatible on rights-based grounds in all courts 2000 to 2012, the rate is quite low compared to France, Canada or Germany. 250

Human Rights Watch indicated that it was deeply concerned that the UK government’s plan to scrap the Human Rights Act and limit the role of the European
Court of Human Rights in the UK, or failing that even to withdraw from the European Convention on Human Rights.\textsuperscript{251} That fear has eventuated.

Tom Hickman writing in 2010 noted that the UK BOR replacement issue was a political pledge of David Cameron at that early stage: ‘it must enshrine fundamental British liberties, such as jury trial, while also setting out the fundamental duties and responsibilities of people living in this country both as citizens and foreign nationals’.\textsuperscript{252}

Hickman finally makes some suggestions of what a human rights elements, a replacement Human Rights Act should contain;

1. There should be provision for Parliament to have the final word and override any judicial determination. This should require Parliament to make a positive response to an enactment and not merely an ability as under section 4 of the Human Rights Act, for Parliament and the government to ignore a declaration of incompatibility.
2. There should be a power for courts to provide an effective remedy where primary legislation conflicts with Convention rights.
3. The Bill of Rights should not inhibit common law development.
4. Any domestic Bill of Rights that establishes fundamental domestic rights should not be subject to executive curtailment where the government enters into incompatible international obligations or where the UN Security Council requires measures to be taken which are incompatible with protected rights.\textsuperscript{253}

10. Conclusion.

The evidence outlined above regarding the United Kingdom operating for the present with Human Rights Act (1998) demonstrates that since its creation, a legislative and judicial balance has been achieved with the adoption of ‘Commonwealth’ BOR. British courts have not challenged the ultimate supremacy of


\textsuperscript{252} Hickman, above n 243, 5, Quoting David Cameron, ‘Balancing Freedom and Security – A Modern British Bill of Rights’, (Speech at the Centre for Policy Studies, 31 July 2006).

\textsuperscript{253} Ibid, 7.
Parliament. For their part, the Parliament of the United Kingdom has generally shown legislative accommodation, to enable their human rights statute to offer substantive protection to citizens’ human rights from excessive public powers.

The constitutional sticking point with adoption of law from the European Union is a matter that post-Brexit, will not likely result in the disappearance of a UK Human Rights Act completely, but rather a redesigned one supporting British constitutional views about human rights.

A strong case has been made in this chapter to reject two major constitutional fears of political opponents of a national Bill of Rights in Australia. Those two arguments, such as damage to the UK government’s human rights legislative programs and sovereignty, secondly the rewriting of Parliament’s statutes by judges, are not evident within their legislative and judicial dealings. Judges cannot declare legislation invalid while parliament for its part has allowed the courts to indicate HRA rights problems through declarations of incompatibility.

Australia’s failure to adopt similar human rights accommodation between legislature and judiciary as demonstrated in Britain, cannot be supported as acceptable political policy for Australian human rights needs in the 21st century. It is significant that Australia’s politicians have not been prepared to follow the example of any of our contemporaries with Westminster constitutional traditions and who have adopted ‘Commonwealth’ bills of rights. They have continued to place a barrier in the path of Australia’s BOR campaigns. The case that Australia’s legislative and judicial institutions would be unable to make accommodation for a BOR, similar to those made in the United Kingdom, is not convincing even allowing for the present Momcilovic delay.

It is the view of this thesis that federal Coalition politicians and their supporters publicly articulate rejection of ‘Commonwealth’ BOR because the legislative versus judicial power balance fear, provides them with a convenient constitutional rationale for blocking the enactment of an Australian BOR. Opposition to a national BOR, with judicial human rights oversight by a senior court, as an external advice to parliament on the operation of human rights by government in Australia, can be described as political human rights abuse to those who struggle for better human rights. Simply put, this thesis argues that all Australia’s human rights needs come before outdated and deceptive human rights political ideology of any party, of conservative ideology or otherwise.
This chapter thus has outlined the major reasons why political conservatism in Australia still vehemently opposes a national BOR. It is perhaps the vehemence and strength of that resistance that has moved this thesis to the view that the principles of English Liberal Constitutionalism held by parliamentarians as the bulwark of protection for our national Parliament, is not a valid nor a rational argument against a national BOR for present day Australia.

The answer as to why the Coalition parliamentarians reject a BOR rest within their party ideology, where they their fears discussed above, hide political advantage. That advantage is explained in this thesis as gaining political power from the electoral support of Australian business, and some church groups in return for a political barrier against a BOR. A BOR is an accepted human rights entitlement in all other contemporary advanced nations.

There has been much discussion in the media and in the community generally about the current Coalition government’s management of the Australian economy. Much hostility has been raised at the application of their traditional approach to budget difficulties with cutbacks to the most vulnerable in the community, such as the unemployed, especially school leavers and pensioners. This has been tied to their vision of small government with significant federal public service reductions and health and education cutbacks.

Matched against that has been an electoral promise to pass on to businesses $50 billion dollars over the next 10 years via income tax reductions, spend billions on 12 new submarines and 72 new aircraft from the USA, in a display of budget overreach. As well it has consistently refused to challenge the unsatisfactory financial dealings with customers of the four major banks and financial institutions, nor to gain better percentage taxes for underpriced resources such as iron ore. The issue of overseas transfer of wealth to low tax off-shore havens appears to be put into the too hard basket. Many companies in Australia pay minimal tax including overseas firms. The view of many in the community is that the conservative government is largely interested in ‘the big end of town’.

The action of providing a Constitution without a BOR was originally generated largely by racism, and ‘White Australia’, the latter ultimately abandoned in the 1970’s, through the human rights activism of former Premier of South Australia Don Dunstan. Still today the Australian Parliament will not provide the nation with a formal statement of its basic rights and aspirations. Taking the important basic right
to privacy as one example, former High Court Judge Michael Kirby put the current status quo for that right in these terms: he said that proposals for privacy law reform, ‘had been before the Federal and State parliaments many times, at least four major considerations in the past 30 years. Its now become a laughing stock.’

The national Parliament still today refuses even to allow the judiciary to play any part in the consideration of human rights, reserving that right solely one for Parliament. Following chapters will further support the propositions put forward in this conclusion that the political stranglehold which Coalition politicians hold over a national BOR, must be brought into the political light as damaging to the nation, if the struggle for better human rights in Australia is to succeed.

The declaration of incompatibility question remains to be settled after Momcilovic and it may take some further High Court deliberation to come to a final clear determination. However a ‘Commonwealth’ BOR clearly provides a simple mechanism to deal with such declarations. They are an effective non-threatening way of indicating to the Parliament that particular Bills and Statutes are in conflict with one or more fundamental human rights, as well as providing the consistency and expertise of judicial review.

The courts defer to the Parliament as the final arbiter. Yet conservative political ideology still attempts to maintain the argument that such human rights acts damage the power of the elected Parliament. Perhaps they should visit Victoria’s Parliament to learn about the successful operation of the Charter of Rights and Responsibilities Act (Vic) 2006 and in the home of the Federal Parliament, Australian Capital Territory’s Bill of Rights 2004. Within the operation of three arms of the federal government and their interaction with citizens at all levels, a national BOR would add immensely to the need for improved human rights for all Australians.

\[254\] Michael Kirby ‘Privacy Laws A Laughing Stock,’ (Sydney Morning Herald, 2 May, 2016).
CHAPTER 5.

ASSESSING HUMAN RIGHTS OUTCOMES IN NEW ZEALAND: BILL OF RIGHTS ACT 1990. (NZBORA)

5.1 Introduction

This chapter examines NZBORA to press the view of this thesis that the two core constitutional arguments of opponents use in Australia against a Commonwealth BOR are not rationally sustainable. Having presented a short review of aspects of the UK’s BOR in the previous chapter, this chapter will present a more detailed examination of the structure, functioning and opinions about the success of New Zealand’s Bill of Rights 1990, operating now for some 26 years. Both Australia and New Zealand inherited a similar Westminster tradition of constitutional government which featured the division of power between Parliament and the judiciary.

Constitutional differences between the two countries are significant, New Zealand not having an Upper House, nor does it have an entrenched constitution as Australia does. Reference has already been made in chapter four to a constitutional BOR problem for Australia which has emerged from the High Court’s decision in Momcilovic, which has determined in the case that it cannot hear declarations of incompatibility involving State BOR’s (in this instance Victoria’s), as that process is beyond its constitutional powers vis-à-vis federal and state power sharing. A wider range of views about this development will be discussed next in chapters.

This chapter will examine the NZBORA to see what impact it has had upon the country’s human rights policy and law-making. How successfully does NZBORA function across the three arms of government? How has the power balance between Parliament and the judiciary been managed? What are the perceived human rights benefits that their public service agencies and commentators report in New Zealand benefits that their public service agencies and commentators report in New Zealand?

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255 The High Court considered that the making of a declaration of inconsistency in this case s 36, was not a function that a Federal Court can exercise. It was neither the exercise of judicial power or incidental to it [146] (viii), French CJ,Gummow, Hayne, Heydon, and Bel JJ. A Commonwealth law could not provide for a federal Court to make a declaration of inconsistent interpretation having the characteristics of that made under s 36([100],[146] (viii)). Text of the decision available at:<http://www.austlii.edu.au/cases/cth/HCA/2011/34.www.ags.gov.publications-notes/in 21.pdf>.
and have the human rights aims that prompted the adoption of the NZBORA been met?

This thesis believes that evidence will show that a New Zealand style statutory Commonwealth NZBORA model could be successfully adapted in Australia, noting that two human rights acts of ‘Commonwealth’ genre are already operating in Australia at sub-national level?

The NZBORA model will be examined to establish the extent it could fit successfully into Australia’s constitutional and parliamentary structure, given that the Momcilovic SOC issue is settled. As such is chosen here as the best model for comparative analysis which will bring into focus similarities and contrasts of human rights issues and mechanisms which are found between the two countries. The issue to establish is the hypothesis that most of the New Zealand model would work within Australia’s constitutional structure. Indeed with sufficient political and community support, a federal Human Rights Act would likely settle the constitutional barriers within federal law. Note also that when there is an inconsistency between state and federal law on the same issue, s 109 of the constitution means that the federal law prevails.

Over time a number of BOR parliamentary supporters have attempted and failed to obtain the federal parliament’s support. New Matilda’s Draft Human Rights Bill in the Appendix, is one where its formation was largely community based under the leadership of former Minister and Senator Susan Ryan under the sponsorship at that time of New Matilda

Comparison between the legal structures and political structures of New Zealand and Australia, in this chapter will test the hypothesis. This chapter seeks to assess the bill of rights experience of New Zealand to provide insights to show that there has not been a significant shift of power from New Zealand’s Parliament to the judiciary or significant court action, in issuing statements of incompatibility against offending legislation that has disrupted desired political policies.

One other aspect of the arrival of NZBORA which will be considered in this chapter is a brief outline of the nature of events which produced it. Bills of Rights frequently have different paths as to how and why they emerge and this thesis considers that such background information from the NZBORA experience can have useful educational information for BOR advocates in Australia. That information can give Australian advocates a wider appreciation of the importance as to which NZBORA political and community strategies were supported.

On 25 August 1990, New Zealand’s Parliament enacted the New Zealand’s Bill of Rights Act 1990 (NZBORA). The Bill introduced into the House by the Labour Party’s Attorney-General Geoffrey Palmer, was carried along party lines 36 to 28, the National Party voting against the Bill.

The NZBORA Commonwealth model has been followed by others of the same genre including the Human Rights Act 1998 (UK), Human Rights Act 2004 (ACT), and Charter of Rights and Responsibilities Act 2006 (Vic). All four bills of rights have a similar legal framework. They use international standards of human rights largely from the International Covenant on Civil and Political Rights (ICCPR). They operate in a common law system which traditionally has recognised the supremacy of Parliament in the tradition of Westminster government. With the adoption of a BOR that supremacy has been reshaped by creating a human rights ‘dialogue’, between the three branches of government-executive, judiciary and legislature. 257

Proposed Bills which contain human rights require each branch of government to consider and address the human rights implications of a Bill, from the drafting stage through the legislative process to interpretation of the statute by the courts. They bind the administration to comply with the provisions of the BOR, across all levels of government, unless otherwise provided in the statute.

They use interpretative clauses, where courts consider whether particular legislation, administrative decisions or legal and justice issues are consistent with the BOR. With limited application in the case of New Zealand (Appeals and

257 Bailey, above n 12, 177.
Discrimination), superior courts may send an incompatibility statement to the relevant Minister or Attorney-General, indicating the legislation before the court is inconsistent with one or more human rights of the NZBORA. What Parliament decides to do with that incompatibility statement can vary including amending the offending legislation to remove the incompatible provision, withdraw the Bill or let the offending provision remain in the statute.

The issue of statements of incompatibility of bills is a core concern of this review of NZBORA. However it is raised by opponents of a national BOR in Australia as a problem for Parliament’s sovereignty, where it is claimed, that the judiciary can usurp power from the legislature by requiring legislation to be altered to solve its finding of human rights incompatibility. The implications of findings of an earlier conference on the issue under the patronage of the Australian Human Rights Commission (AHRC) will be discussed in the chapter six, in view of Australia’s Momcilovic current legal uncertainty.

That Australian issue aside for the present, this chapter’s task is to consider what effect NZBORA’s has had with judicial incompatibility. Have senior courts altered significantly Parliament’s legislative power. Additional information about this question is provided in the Appendix, listing examples of New Zealand’s recent experience of statement’s of incompatibility issued by the judiciary. What political effects DOC’s had upon New Zealand’s parliamentary legislative sovereignty will be reviewed.


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258 Haddrick, above n 179; McMahon above n 176.
The NZBORA had its roots in national political disturbances of earlier decades, the first of these being the National Party’s abolition of the Legislative Council in 1951, which changed the country’s parliamentary structure to a unicameral one. New Zealand like the United Kingdom has no formal written constitutional document. The result of the detachment of the Parliament from British legal oversight by the Statute of Westminster 1947 (UK), and the New Zealand Constitutional Amendment Act 1947 (UK), mean that New Zealand’s House of Representatives became the sole repository of political power.

There was concern in New Zealand society about the concentration of political power in the House of Representatives. In 1981 the Labour Party adopted a policy supporting the establishment of a NZBORA under the guiding direction of Geoffrey Palmer who was the Secretary of Labour’s Policy Council. They began the process of implementing this policy after their 1984 election win, by presenting the Parliament and the country in 1985, with a White Paper which proposed a constitutionally entrenched bill.

In 1988 the Parliamentary Justice & Law Reform Committee rejected the White Paper proposal, but put forward a recommendation for a statutory NZBORA. Extended hearings before the Committee had revealed a high level of opposition to the constitutionally entrenched proposal: ‘... as undemocratic, as transferring political power to unelected judges and as introducing unacceptable uncertainty into the law’.  

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The bill of rights proposal was redrafted by the government and sent back to the Parliamentary Justice & Law Reform Committee which supported it, and in 1990 the NZBORA became law. There were a number of social forces in New Zealand which contributed to the enactment of the NZBORA. Background elements described as central in shaping the NZBORA, included social and economic developments in the post-Second World War period. These developments weakened social ties and identities and encouraged the post-materialist growth of a left-liberal human rights constituency, concerned to advance human rights and self-expression.

5.3 Commentary Past and Present as to the emergence of NZBORA (1990).

5.3.1 David Erdos.

His explanation as to why NZBORA was enacted as being ‘an electoral threat’ paradigm where BORA’s are promoted by electorally endangered politicians and interests seeking to entrench their preferences as a defence against majoritarian threat. He described this development as the ‘aversive’ reaction of Labour Party elites to negative political experiences of life under a unicameral Parliament coupled to the difficult and authoritarian government of Prime Minister Muldoon’s National Party which held power from 1975-1984. This political ‘aversion’ produced a new outlook in the Labour party in favour of greater checks and balances upon the political system in New Zealand, which together with the key constitutional entrepreneurship of rights ‘champion’ Geoffrey Palmer, resulted in the enactment of the NZBORA.

Erdos’s presented additional elements about the genesis of the NZBORA in his Post-Materialist Trigger thesis, providing further conditions which will produce deliberate adoption of a bill of rights in stable advanced democracies such as New Zealand. New Zealand’s constituency supporting the adoption of a human rights act for the country comprised critical citizens interested in personal growth and social justice, who were influenced in part by transnational human rights developments.

The International Covenant on Civil and Political Rights came into effect

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263 Ibid, 345.

internationally in 1976 and was ratified by New Zealand in 1978. The government subsequently was criticised by the United Nations Human Rights Committee for not providing remedies for breaches of the human rights outlined in the ICCPR’s rights provisions. 265

A key element in the PMT thesis which must be present to achieve the adoption of a bill of rights is a concrete trigger providing a clear and specific political rationale and impetus. 266 Erdos’s Post-Materialist Trigger proposal is that is this trigger which determines the precise timing of any particular BOR. As well, elite political actors must support reform if it is to succeed. Support comes from the emergence of newly energized political elite who have emerged from political aversion, pushing the Bill through policy stage to enactment in the Parliament. In New Zealand Labour’s Attorney-General Geoffrey Palmer became the main political guiding force in this process.

The relevance of Erdos’s PMT to the national Australian political scene could become relevant if the national politics of Australia became sufficiently toxic. Note that a recent article about this very point was raised by Professor George Williams in the Sydney Morning Herald. Further details in this article appear below.

The likelihood of Australian political events and political responses to them occurring as such as those outlined by Erdos is problematic. Extremely damaging political actions to the nation’s social and or political fabric by a major party controlling both houses of parliament could provide a ‘trigger’ and leadership by a national political ‘champion’. Considering the size and ethnic diversity of Australia’s states, backup assistants would be needed to achieve an effective national bill of rights campaign which would merge that campaign with other election campaign issues.

To achieve a bill of rights any constitutional entrepreneur in Australia would have to overcome the history of reluctance by politicians and citizens of a nation such as Australia, which like New Zealand has a long Westminster constitutional heritage, to protect the sovereignty of parliament. Having understood that background, one of the interviewees in this thesis thought that a further weakening political concern for

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266 Ibid, 5.
human rights could ultimately be produced by serious right wing conservative political extremism:

I think sadly that we are going to see the worst before we get a ground swell of more broad support again,...let us say there is a landslide win to the Coalition—there are a significant number of the members who hold a very right-wing view, and they get the Senate. It could get very ugly and that could be the only way for the broader population to find out how fragile their rights are.  

What the Australian electorate have however generally done, on a number of occasions to governments which have failed to perform to the community’s satisfaction is remove them from office at a general election. If a national BOR campaign was to be included in an election campaign, a new progressive government could reasonably claim that they have an election mandate to proceed with implementation of their policies which would include a national BOR.

5.3.2 Fault Lines: Human Rights in New Zealand.

This impressive work of three years moves from NZBORA beginnings, to a very comprehensive examination of the current state of New Zealand’s human rights. Essentially it seeks to discover and outline current human rights weaknesses of the current human rights regime. Interestingly however they do consider early aspects of NZBORA’s evolution.

The legislation represented a campaign by human rights advocates since the 1960’s...two points need to be made—the influence of developments in other jurisdictions, particularly Canada, and the importance of key individuals who drove both the policy formation process through an influential White paper and a political process which was highly contested and reflected the dominance of the notion of parliamentary sovereignty and reluctance to give decision-making power to the courts.

5.3.3 Kenneth Keith.

Keith noted that NZBORA’s resulted:

267 Interview with Dr Sandra Goldie, CEO of ACOSS, Sydney, 16 April, 2013.


269 Ibid, 16
after five years of debates similar to the earlier ones, the 1990 Act was passed. But while the debates were similar to the earlier ones, at best they were not the same. They were not put in such sharp earlier either/or terms – especially not either parliamentarians or judges. They also gave greater emphasis that before to our international obligations – as is reflected in the title of the Act.  

What Kenneth Keith wrote then, and which still today carries two important human rights messages to the Australia Parliament: that a BOR can be achieved without unnecessary fear of a judicial and legislative damage (in the BOR debate), and provide greater emphasis than before to our international obligations. One of the features of Australia’s human rights obligations for some decades is that while federal governments point to its adoption of ‘seven key UN Conventions, they have consistently rejected enacting any of them into domestic legislation but for a relatively small section of ICCPR involving discrimination.

Further, Australian governments, especially by the conservative side of politics have frequently taken hostile attitudes to reject UN international conventions as outlined in chapter one. An example of this was illustrated by the ‘Children Overboard’ affair, which involved the Howard government refusal to observe the International Law of the Sea which would have allowed a ship’s captain to enter Australian waters to land rescued refugees on the mainland. Using elite commandos to board the ship they forced refugees to Christmas Island (excised from Australian territory).

During this time a Liberal Party Minister Philip Ruddock, Minister for Immigration on 7 October 2001 falsely claimed that, ‘a number children overboard from a boat’, which was named Suspected Illegal Entry Vessel (SIEV) 4, which the navy had intercepted (Senate select Committee 2002, xxxi). This claim was repeated by a number of members of the Howard Government, including the Prime Minister. Minister Reith claimed that a video existed of the incident and that: ‘its an absolute fact, children were thrown into the water’. These events show that Australian governments will not allow human rights issues to succeed where they are not enacted into Australian law.

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271 Ibid.

The most recent human rights failure at the time of this writing by Australia 
government followed a new request by the United Nations to the government on 13 
August 2016, to address the UN’s repeated complaints about the on-going human 
rights abuse of indefinite imprisonment of refugees on Manus Island (and Nauru). 
This human rights abuse of the innocent refugees is based upon a mix of racism 
and political advantage.

This policy was introduced by a briefly re-elected Prime Minister Kevin Rudd as 
pre-election policy for the federal election in September 2013. It has since been 
supported by the incumbent Liberal-National government who regained power in the 
2013 federal election. They have maintained almost complete lack of political 
openness about the physical and emotional damage inflicted upon the refugees 
incarcerated who suffer and yet have committed no crime. This has been achieved by 
a combination of secrecy and oppressive legislation, one example of the latter 
providing for two years imprisonment for any Doctor who reveals the state of refugee 
health details on the islands.

Despite that risk medical reports have been released recently to the 
community by medical supervisors and the media, who have revealed what a human 
rights failures these centres have become. A recent media exposure, of more than 
2000 leaked incident reports running to more than 8000 pages, revealed a regime of 
routine disfunction and cruelty, showing widespread sexual and physical cruelty to 
men, women and children. It also showed massive rates of self-harm and suicide 
attempts among those detainees and harsh living conditions in indefinite 
detention.274

Australia must join those countries in the world who respect the human rights their 
citizens and displaced refugees.

5.4. New Zealand BORA in Operation.

5.4.1 NZBORA’s Impact on the Parliament.

on computer screen as a news breaking item, <http://The Guardian.com/Australian-news/2016/August/13/United-
Nations-reiterates-demand-for-Australia-to-close-dire-detention-centres>.

274 Ibid.
What impact has the BORA had upon the legislative-judicial balance? Has this changed over time since the introduction of the New Zealand BORA 1990? The interaction of the NZBORA and Parliament is the key issue to be addressed to understand what success the NZBORA has had in bringing human rights to the centre of New Zealand policy and law.

There are a number of steps in New Zealand’s human rights legislative process:

1. Drafting of Bills consistent with the NZBORA.
2. Cabinet’s consideration of proposals guided by the Cabinet Manual requirements.\(^\text{275}\)
3. The three-stage passage of the bill through Parliament.
4. Assent to the bill by the Executive Council.
5. Actions by a Minister to put the bill into operation by the Public Service at departmental level.

External to Parliament are questions of the compatibility of enactments with the NZBORA, which will result in judicial interaction between the courts and the Parliament.

5.4.2. Impact on the Executive.

When developing policy proposals, the executive must give consideration to their consistency with the *New Zealand Bill of Rights Act* 1990 and the *Human Rights Act* 1993. Details of these considerations must be included in the Cabinet paper forwarded by Ministers for approval to Cabinet together with the proposed Bill. These changes to policy development and legislative processes applied from May 2003.\(^\text{276}\)

The aim of this requirement is to provide Ministers with relevant information on the implications of any inconsistency with the above Acts before proposals reach

\(^{275}\) The New Zealand Cabinet Manual 2008, established by convention rather than law (5.2): Cabinet’s role, powers and membership (5.2-5.5): Cabinet principles of decision making including consultation, confidentiality, and collective responsibility 5.11-5.35.

legislative or implementation stage. It also prompts departments to consider human
rights issues in terms broader than the avoidance of discrimination.

Cabinet papers such as Bills should provide a paragraph concerning consistency
with the NZBORA, providing details of the inconsistency or a positive statement that
there is no inconsistency. Where inconsistency is present in the proposal details must
be outlined of any steps to be taken together with justification for the inconsistency.

At the drafting stage departments should consult the Ministry of Justice (for
human rights policy) and the Crown Law Office (for legal advice), where clarification
on issues about the BORA and inconsistency are required.277 Gender and disability
implications, a review of the application of any principles of the Treaty of Waitangi,
the NZ Privacy Act 1993 and international obligations 278 must also be considered
before departments sign off on the bill to the Minister.

5.4.3. Impact on Legislators.

The issue for any legislation is whether, at the introduced bill stage, it still
infringes upon the NZBORA. As has been indicated above there is an obligation upon
the Attorney-General under s 7 of the NZBORA to report inconsistencies between it
and bills introduced into the House. Consistency and inconsistency are therefore
central to the BORA. They set a standard against which legislation and state conduct
is measured. The NZBOR imposes a standard that is either met or not met.
Rishworth’s view on this process is that: ‘A finding of inconsistency with the NZBORA
is to be reached only after application of the reasonable limits standard expressed in s
5’. 279

Butler, describes s 5 as, ‘a key provision’ of NZBORA,280 and outlines five
purposes of this section as:

277 Ibid.
278 Cab Guide, Cabinet Manual 2008, p 95, s.7.60, ‘Compliance with Legal Principles and Obligations’,

NZBORA, s 5 reads: Justifiable limitations: Subject to s 4, the rights and freedoms contained in this Bill of Rights may be
subject only to such reasonable limits prescribed by law as can be justified in a free and democratic society.
a) Affirming that rights are not absolute;

(b) Creating a two-stage process; the scope and purpose of the civil and political rights in Part II of the NZBORA are to be determined, consideration is then given as to what the reasonableness of the limits on those rights;

(c) Allocating the burden of proof, in that a party seeking to uphold limits on a right must bear the burden of proof;

(d) Affirming the NZBORA’s intention to create a culture of ‘justification’. Section 3a and 3b of the Act binds the government legislature, executive and the judiciary together with persons or bodies acting for the government to observe the Act and it must provide ‘justification’ if the Act is breached;

(e) Establishing a standard of justification that rights must be ‘reasonable’ by, ‘demonstrable justification in a free and democratic society’. 281

Section 7 transfers any inconsistency issue to the judgment of the Attorney-General, who may wish to do nothing, or raise the matter in the House, which may in turn do nothing. In this case, the incompatible provision overrides the NZBORA right or rights in question. Rishworth is critical of the legislature when it ignores NZBORA inconsistency:

It should never be appropriate to promote legislation or implement a policy that is inconsistent with the NZBORA. It must always be remembered that Inconsistency with the NZBORA necessarily means that relevant law or policy limits fundamental rights in a manner that cannot be justified in a free and democratic society. 282

This statement raises the fact that New Zealand’s Commonwealth BORA will not allow the courts to declare statutes invalid, an issue which will require further discussion in the next section. Parliament will of course allow the Attorney-General present declarations of incompatibility at Bill and statutory level, which it will consider. The parliament may in the final consideration, do nothing and it frequently does just that.

What the parliament may find afterwards public and profession level critical at varying levels. Ultimately the ‘Constitutional model NZBOR requires parliament to

281 Ibid, 540-541.
282 Rishworth, above n 280, 31.
have the last say. For its part parliament must consider the political capital cost of its actions towards Bills and Statutes. Certainly the UK system of legal supervision and sending SOC’s to Parliament seems to be one external step from a judiciary skilled in legal interpretation and in that process offering another review to protecting human rights, rather than simply referring these Bills and Statutes directly back to the government.

The operation of s7 will be considered further below (S 5.4.5).

The New Zealand Government amended the 1990 NZBORA by the Human Rights Amendment Act 2001. It provides that all human rights complaints regarding government activities will be tested under the anti-discrimination standard of the New Zealand Bill of Rights Act (1990). This standard allows the government to discriminate under s 19 if it can be; ‘demonstrably justified in a free and democratic society’.

This change addressed the 31 December 2001 expiry of the current government exemption from the Human Rights Act (1990).

5.4.4 NZBORA’s Impact on New Zealand’s Human Rights Commission.

The government by the provisions contained in the Bill of Rights Act (1990) (NZ) and the Human Rights Act (1993) (NZ), expanded the structure and operation of the Human Rights Commission, especially around the discrimination dispute resolution process. If the mediation offered by the Commission is not successful, a complaint may take their case to the Human Rights Review Tribunal. There may also be assistance on a merits basis for free legal representation.

The Tribunal hears cases with respect to unlawful discrimination, sexual harassment, and racial harassment under the Human Rights Act. It will also hear cases involving infringement of the principles or codes of the Privacy Act, and breaches of the Code of Patient’s Rights under the Health and Disability (Code of Health and Disability Services Consumer Rights) Regulations 1996.

Remedies include declarations, restraining orders, monetary compensation for damages, or an order for actions to redress loss or damage. Significantly, in the case of legislation, a declaration can be made that there has been an inconsistency with a right to freedom from discrimination affirmed in the Bill of Rights 1990 (Part 1A of the Act in relation to a public sector agency).
Where a declaration of inconsistency is made, the declaration must be drawn to the attention of Parliament by the Minister in whose portfolio the discrimination has been found along with the government’s response to that declaration.\textsuperscript{283}

The Human Rights Commission has been required under its charter to review every statute and regulation policy and practice of the government.\textsuperscript{284} The project called ‘Consistency 2000’ has a huge task of a whole-of-government review of legislation and regulation consistency to conform to the provisions of the NZBORA. The completed database has been updated and monitored from that period onwards by the Commission.

The Commission also has the power to report to the Prime Minister directly on the following matters affecting human rights: the desirability of legislative, administrative, or other action to give better protection to human rights and to ensure better compliance with standards laid down in international instruments on human rights; the desirability of New Zealand becoming bound by any international instrument on human rights; the implications of any proposed legislation (including subordinate legislation) or proposed policy of the Government that the Commission considers may affect human rights.\textsuperscript{285}

The Commission may in the public interest or in the interests of a person department or organisation, publish reports relating generally to the exercise of its functions under this Act or to a particular inquiry by it under this Act, whether or not the matters to be dealt with in a report of that kind have been the subject of a report to the Minister or the Prime Minister.\textsuperscript{286}

A number of things are noteworthy about the Commission’s human rights role. It has by statutory enactment, independence from the government and has on occasions commented adversely on government policies and practices.\textsuperscript{287} The size of


\textsuperscript{285} \textit{Human Rights Act} 1993 (NZ), Functions and Powers of the Commission, s 5(2) (k).

\textsuperscript{286} Ibid, s 5(3).

\textsuperscript{287} Rishworth, above n 285, 8.
its human rights responsibilities are enormous including those created by the now completed ‘Consistency 2000’. Amendment has completed a large number of other Acts through Consistency 2000 to align them with the government’s human rights policy, to remove terminology and policy which involved disability gender relationship status and age practices which were not aligned.\(^{288}\)

All of these powers make the Commission the leading and most authoritative voice for human rights in New Zealand. The government need not of course follow its suggestions or criticisms but the institution’s views carry enormous moral weight and most governments would have to think carefully about the political wisdom of rejecting them. Ultimately the government could be drawn to defend any policy or practice which breached the lawful provision of the NZBORA against a complaint of unlawful discrimination before the Complaints Review Tribunal. \(^{289}\)

5.4.5 Legislative Override of NZBORA-Inconsistency.

The section 7 reporting process will now be examined in more detail to see how the process operates before and after a bill arrives on the floor of the Parliament. As noted above, the Attorney-General has instituted the practice that all new Bills must be reviewed by the Ministry of Justice or when the Bill originates within the Ministry of Justice, by the Crown Law Office. The Cabinet Manual gives similar advice to the executive. At the second reading stage, bills go to the relevant Standing Committee where they undergo further scrutiny, including for human rights implications.

The vetting process of checking bills for inconsistency with the NZBORA is thorough and the scrutiny involves several stages and bodies:

The Ministry of Justice must be consulted on all Bills, for consistency with the NZBORA;

The Legislative Advisory Committee will comment on issues of public law; reference to caucuses will be made to check their support and for them to raise any [rights] changes with the Minister;


\(^{289}\) Ibid, 7.
Consultation by the bill-mover with non-government parliamentary parties and independents before bills are presented;

The Cabinet Legislation Committee examines all draft bills before they are referred to Cabinet;

Cabinet makes its own assessment and approval; once brought to the Parliament, bills face further examination by the appropriate Select Committee, where amendments may be made;

If after all these checks a bill still is found to be inconsistent with the NZBORA, the Attorney-General generally presents a Section 7 Notice of Incompatibility to Parliament.  

Until 2003 the Attorney-General only presented s 7 Reports to Parliament when a Bill was considered in violation of the NZBORA. Since that time the notice also includes the issue of NZBORA’s s 5 ‘reasonable limitation’ provision. In the last instance, the House of Representatives decides whether an inconsistency with legislation being debated on the floor of the Parliament is left unchanged or is remediated by amendment or deletion.

Kelly considers that while the Attorney-General has the clear legal task of identifying whether legislation infringes a right, for the second issue, ‘reasonable limitation’ s/he does not:

[...]he consideration of reasonableness is a policy function that should not be monopolized by the Attorney-General as Parliament and the Select Committees are well placed to determine whether the proposed policy is both pressing and substantial and can be demonstrably justified to support the rights violation despite the Attorney-General’s assessment.  

Kelly argues that the benefit that comes with this process is the substantive policy work that Select Committees engage in, which is an important counterweight to Cabinet and a challenge to Executive domination of the Parliament.

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292 Ibid.
5.4.6 NZBORA’s Impact on the Courts.

To exert political power when a fundamental human right is to be over-ruled brings into play political consequences which may make such a decision politically unwise for a government. However Elliot questions whether the NZBORA’s s 7 reporting system is as effective as the inconsistency protection processes described above in sections 5.4.1, 5.4.2, 5.4.3, and 5.4.5 might suggest, and examples the case of Hansen.

The Hansen case²⁹³ involved the issue of whether s 6 (6) of the Misuse of Drugs Act 1975 imposed an legal, as opposed to evidential burden on a person found possessing a controlled drug for a prescribed purpose. The court rejected the argument holding the view that interpreting the legislation as imposing a legal burden was not a reasonable and demonstrably justified limit within the meaning of s 5 of the NZBORA upon the right to be presumed innocent contained in s 25 (c).²⁹⁴ Despite the Supreme Court’s finding, the reverse onus provision remains on the statute book that is, even though the government’s statute was in breach of the NZBORA.²⁹⁵

Geddis considers that Parliament’s willingness to ‘rubber-stamp’ the government’s approach, ‘represents an inexcusably complete abdication of responsibility for the rights consequences of their decisions’.²⁹⁶ Rishworth’s view of the Parliament’s willingness to press ahead in spite of s 7 Reports is that:

the sheer number may suggest a certain casualness within government about whether here is any political price to pay for not meeting the [s 7 report] standard‘,..., ‘political judgments about justifiability of legislation are seen as somehow different from and more important than, a purely legal judgment essayed by the Attorney-General.

Butler–Butler have offered another perspective about this question: that while law-making processes have been adapted to accommodate the s 7 reporting obligation of the NZBORA, and ensure a broader consideration of human rights

²⁹³ Hansen v Queen NZSC 58, 2005.
²⁹⁵ Ibid.
implications by Cabinet, has the NZBORA succeeded in providing a ‘navigation light’ for government in a substantive sense? Their answer to this is:

policy analysts and legal advisers with government are now aware that to the extent that a Section 7 Report might imperil the passage of a legislative proposal dear to their Minister, ministry or department, then it is best to formulate policy legislative proposals and draft legislation in such a way as to avoid NZBORA inconsistency. Notwithstanding... there has been a large number of section 7 reports tabled by the Attorney-General 36 in approximately 15 years of the BORA’s operation... 18 have involved government bills.297

It is the ‘notwithstanding’ comment of Butler above that opens the need for further examination of the important issue of inconsistency. Mechanisms put in place by the executive and legislature to avoid inconsistency, are discussed above. Where these checks do not prevent an offending bill becoming a statute the new statute overrides whatever particular BORA right or rights involved.

The data for inconsistency has been provided by the NZ Ministry of Justice, refer to Appendix. 298 The table of inconsistent bills was initially provided in 2012, and contained detail as to the origin and effect of inconsistency on NZ Parliament’s legislation to 2010. A further update for the period 2011–2014 from the Ministry has since been added. However the last and most relevant figures are for 2016.

When the limits place upon rights in s 5 are not consistent with the NZBORA that then animates other operative sections 4, 6 and 7.299 Section 4 prevents the court from making any kind of invalidity statement about the offending provision, and requires that the court must apply the provision nevertheless.

Section 6 provides the court with the opportunity to interpret whether legislation before it, is consistent with any of the rights and freedoms contained in the NZBORA. Essentially it provides a mandate to avoid an inconsistency finding and adopt an alternate finding. Much of the interpretation of the NZBORA occurs in


298 NZ Ministry of Justice, see details in the Appendix III.

299 Rishworth, above n 280, 27.
courts, and when delivered, generally become authority in the legal system by precedent.\textsuperscript{300}

Where discrimination issues are before the court, under s 19 of the NZBORA, the Court may decide upon a finding of inconsistency in relation to the legislation under consideration, which offends one or more of such rights in the NZBORA. This finding by the court must be brought to the attention of the House by the Attorney-General, along with the executive’s response to the court’s declaration of inconsistency. New Zealand’s courts have power only to declare legislation concerning discrimination, which is inconsistent with NZBORA rights at this time.

The further amendment to the NZBORA was enacted to enable the Human Rights Review Tribunal and Appeal Courts to issue declarations of inconsistency for s19 discrimination.\textsuperscript{301} The government came to the conclusion that discrimination was of such human rights importance that agencies and courts dealing with discrimination should indicate to Parliament changes required in existing legislation. With regard to inconsistency, two decisions of the New Zealand Courts can be noted:

In Moonen, the court held,\textsuperscript{302} that in considering whether an enactment limited a right, s 5 of the BORA, allows only such limits as can be reasonably justified in a free and democratic society...if the limitation cannot be justified, there is an inconsistency with the NZBORA...but by dint of s 4, [the prohibition on court’s revoking or repealing a statute which is inconsistent with the NZBORA], nevertheless stands and must be given effect’.\textsuperscript{303}

The New Zealand Appeals Court\textsuperscript{304} decision in Porta was significant because the NZBORA’s s 6 [interpretation consistent with the Bill of Rights preferred] was equated with: ‘the introduction of a general principle of legality into New Zealand

\begin{flushleft}
\textsuperscript{300} Ibid, 36.
\textsuperscript{301} Human Rights Amendment Act (2001) NZ.
\textsuperscript{302} Moonen v Film Literature Board of Review [2000] 2NZLR 9 18.
\textsuperscript{304} R v Porta [2001] 2NZLR 37 (CA).
\end{flushleft}
law, whereby anything impacting on fundamental rights must be sufficiently certain for the courts to give effect to it’.305

These two cases show that the courts will accept and apply legislation that is inconsistent with the NZBORA if ‘sufficiently certain’ for the courts to apply, that is, if it shows a clear intent by the Parliament to infringe a NZBORA right.

In this way, a balance of sorts is struck between the judiciary and the legislature. In the context of the United Kingdom’s similar BORA regime, Lord Irving has said:

The overriding theme that emerges is balance, balance between scrutiny and deference, between the individual and the community and between interpretation and declarations of incompatibility. The balance between intense judicial scrutiny and reasonable deference to elected decision-makers is a delicate one to strike. But the judiciary have struck it well’. 306

In suggesting that Lord Irvine’s comments are equally relevant to New Zealand, Richardson adds another balance that the courts must consider, ‘reconciliation of the inevitable tension between the democratic right of the majority to exercise power and the democratic need of individuals and minorities to have their human rights secured.’307

In assessing the overall impact of the NZORa upon judicial thinking, Butler and Butler comment that:

Our overall impression is that the NZBORA has had an impact on judicial thinking in that awareness of rights matters is perhaps higher than it was prior to NZBORA’s enactment. Judges have become familiar and largely comfortable with rights issues, at least as far as they concern matters that are not socially or politically controversial’. 308

Butler and Butler conclude that the impact of legislative inertia for the current Section 4 declarations of inconsistency remedy provides a barrier to civil litigation that challenges enactments. A simple override mechanism such as Canada’s ‘notwithstanding clause,’ would then remove the incompatibility block upon judicial


306 Richardson, above n 262, 261.

307 Ibid.

308 Andrew and Petra Butler, above n 298, 1113.
review of civil cases, and provide an incentive to allow proceedings against a statute, and ultimately allow judicial-legislative dialogue.\textsuperscript{309}

5.4.7. Judicial Remedies for NZBORA Breaches: Excessive Judicial Activism?

This issue considers whether the role of the New Zealand’s superior courts in providing remedies for individuals whose human rights have been breached by the government or its agencies, has amounted to excessive judicial activism. As noted above in \textsuperscript{(s 5.4.4)}, the Human Rights Review Tribunal can award compensation for amongst other matters, unlawful discrimination, under Part 2 Section 21A under the Human Rights Act 1993(NZ). As well, the court’s have at times have awarded compensation.

\textit{Baigent’s} case, provided a remedy against the police’s breach of s 21, unreasonable search and seizure, the court taking the view that it could grant appropriate effective remedies.\textsuperscript{310} \textit{Moonen’s} consideration of inconsistency found that it had the power to make a declaration of inconsistency where a right in the NZBORA was breached.\textsuperscript{311} This was confirmed in \textit{Poumako},\textsuperscript{312} where the Appeals Court took the view that such a declaration did not invalidate the statute nor infringe upon parliamentary sovereignty.

The government’s advice from the New Zealand Law Commission’s endorsement of \textit{Baigent} compensation, has meant that it leaves compensation to the courts. Butler’s view is that the activist label given to the Appeals court is true only in a limited sense as it created remedies as part of its judicial function.

5.4.8 Statutory Interpretation by the Courts.

In \textit{Quilter}, the Court of Appeal rejected a claim relying on s 19 of the NZBORA that the Marriage Act (1955) also applied to same-sex couples. It considered this determination was one for the Parliament to make.\textsuperscript{313}

\textsuperscript{309} Ibid, 1114.

\textsuperscript{310} Simpson v Attorney-General (1994) 1HRNZ 42 (CA).

\textsuperscript{311} Moonen v Film and Literature Board of Review, (1999)

\textsuperscript{312} R v Poumako (2000) 5 HRNZ, 652,683 (CA).

\textsuperscript{313} Quilter v Attorney-General (197) 4 HRNZ 170 (CA), 178, Gault J: 223, Tipping J.
The case of Moonen involved the contentious problem of child pornography. On appeal the court quashed the earlier finding of the Board of Film & Literature Review’s of ‘objectionable’ finding of publications, held by Mr Moonen.\textsuperscript{314} A Select Committee of the government subsequently inquiring into the operation of the Board’s empowering Act agreed that the court’s decision, ‘adequately carried out the intent of Parliament’ in that it took account of s 14 of NZBORA.\textsuperscript{315}

The Doctrine of Implied Repeal was considered in Poumako. The issue was the retrospective application of the 1999 increase length of sentence over the shorter provision under the Crimes Act 1961 (NZ). The court held that that it was not necessary to rule on the applicability of the new mandatory non-parole period.\textsuperscript{316}

A similar case concerned retrospective legislation in Pora. The court divided three to three on that issue of whether a fundamental right can be impliedly repealed by later legislation and hence the later 1999 amendment of the Criminal Justice Act 1985 (NZ) applied. The court held that the interpretation was a serious breach of a fundamental rule of the legal system and the country’s international obligations.\textsuperscript{317}

Butler’s conclusion about these leading cases is that they show that Parliament has not been deprived of its sovereignty by the courts. ‘Generally the judges in New Zealand are very aware that they are not to tread into Parliament’s arena.’\textsuperscript{318}

5.5 Has a Human Rights Dialogue emerged between the Parliament and the Judiciary in New Zealand?

Butler’s answer to this question is positive:

The parliamentary bill of rights system seems to readily lend itself to a dialogue model: after all Parliament by enacting the bill of rights not only makes it clear that it supports human

\textsuperscript{314} Moonen v Film and Literature Board of Review, above n 312.

\textsuperscript{315} Government Administration Committee finding re Moonen, March 2003, 25–27.

\textsuperscript{316} R v Poumako, above n 315, 664–665.


rights but also states that it wants the courts to be a forum in which human rights issues can be considered.319

In answer to the question does this dialogue actually occur, Butler believes that the New Zealand experience shows that a genuine dialogue can exist where Parliament can and has disagreed with the court’s BORA decisions and has reacted by over-ruling a particular judgment. Equally on other occasions, the political arm has accepted judicial outcomes even if only after a robust debate. The cases discussed above illustrate the to and fro of judicial advice and the response Parliament chooses to accept.320

5.6. Emerging Growth in New Zealand’s Human Rights Culture?

Butler sees the BORA bringing together in a visible single, simply expressed statute a number of the most fundamental rights enjoyed in New Zealand and has assisted in growing public awareness of specific legislative measures which seek to protect and promote some of their rights.321

Many other views of course offer opinions about the changes that NZBORA has to the observance of human rights in the country: The NZ Human Rights Commission’s 2010 Report summary at page 13 offers some positive and critical comments:

New Zealand has a good record of ratification of and compliance with its international obligations. It has demonstrated some commitment to considering further constitutional protection of human rights. There has also been strengthened engagement in the treaty body reporting process and growing input from civil society. However New Zealand’s human rights obligations are not reflected in a single entrenched constitutional instrument but simply remain part of the ordinary statutory scheme and the common law. Parliament is able to disregard them and they are therefore much less secure than they should be.322

The Commission’s Annual Report 2015 indicated an on-going vigorous support for New Zealand’s human rights including some innovative approaches to provide human rights information to the community:

319 Ibid, 22.
320 Ibid, 23.
321 Ibid, 27.
This year we have seen significant improvements in the way we monitor our human rights performance as a nation with the online publication of ‘New Zealand’s Human Rights Plan of Action’ (NPA). The NPA sets out our government’s actions in response to New Zealand’s second Universal periodic review (UPR).

Publishing the NPA as an interactive, easily updateable, online tool is an innovative way of demonstrating how our government is doing when it comes to improving human rights for all New Zealanders. The Commission continued to implement its communications and engagement strategy by using data visualizations to make our reports more accessible.

Violence and abuse in our communities, particularly family and sexual violence and bullying in schools, is a major human rights issue facing thousands of New Zealanders and we are continuing to advocate for positive change across a range of initiatives.  

Comparison of the two reports indicates that the Commission is continuing to show a powerful drive to improve the community’s human rights yet recognising that serious violence and abuse is still an on-going problem to be reduced.

Stephen Gardbaum offered his support for NZBORA’s progress. ‘An attempt has been made to create institutional balance, joint responsibility, and deliberate dialogue between courts and legislature in the enforcement of fundamental rights that these countries[Canada and New Zealand] believe the legitimate core claims of parliamentary sovereignty require.\(^\text{324}\) Petra and Andrew Butler describe the on-going judicial-parliamentary interaction around human rights issues as an example of: ‘how various branches of government co-exist’, [in dealing with human rights issues].\(^\text{325}\)

Based on an assessment of the first 15 years of NZBORA’s operation, Petra Butler concludes that New Zealand, law making processes have been adapted to accommodate the section 7 reporting obligation and ensure a broader consideration of human rights implications by Cabinet.\(^\text{326}\) Butler accepts that as the NZBORA is a statute, governments can introduce and the Parliament can approve bills that might be NZBORA inconsistent, and by implication that the sovereign Parliament can


\(^{325}\) Petra and Andrew Butler, above n 298, 2, 3.

\(^{326}\) P. Butler, above, n 319, 23.
override the rights provided in that Bill of Rights—and the data provided in the Appendix at the end of this thesis, confirms that this has happened on a number of occasions.

Varuhas supports this position, and argues that Parliament should retain the final authority to determine rights issues. His view is that majority decision-making in large representative legislative assemblies is the fairest most respectful and most egalitarian way for society to settle its disagreements about rights issues. 327 He also accepts: ‘that there will always be some risk of minority rights issues not being given due consideration in any system, no matter how robust the system.’ 328 and examples, ‘... at times Maori rights issues’. 329

5.7 Conclusion: The New Zealand Human Rights model and an Australian national BOR.

Given the human rights legislative checks and balances discussed above in this chapter, it is evident that New Zealand has made significant policy and procedural changes at parliamentary and Human Rights Commission level to overcome the problem of minority and individual human rights neglect by government. On the question of whether power has been unduly shifted to the judiciary, the record shows little evidence of excessive judicial activism.

The Appendix data provides assessment by the NZ Ministry of Justice as to the significance of its vetting program and its views as to its human rights implications upon the executive, the Parliament and the public service.

The main questions to be answered in concluding this examination of the New Zealand’s Human Rights Act (1990) is: firstly, how effective is it in protecting human rights within New Zealand?; and secondly is it realistic to suggest that a BORA similar to the NZBORA could be safely enacted in the Australia’s Parliament without risk to its sovereignty?


328 Ibid, 504

329 Ibid.
As noted in Chapter 4, the potential for a BORA to ‘empower’ the judiciary is the chief complaint of opponents of bill of rights. Their argument turns on the claimed detrimental effect of allowing non-elected judges to make final decisions about human rights issues, rather than of members of parliament, who have been elected by the community to responsibly perform that task. When those parliamentary members do not perform the task to the satisfaction of the electorate, they are removed from office, something judges do not face.

The Westminster system of government has traditionally rested upon the pillars of the supremacy of Parliament, and the separation of power between the branches of government, legislature, judiciary and executive. Opponents of bills of rights hold a conviction that the ‘Westminster’ model of responsible, accountable parliamentary government is the most effective instrument to determine a nation’s human rights.

It is not possible to assert that Australia’s adoption of a BOR would follow seamlessly by simply making it a copy of what New Zealand has adopted. However this research does show that their ‘Commonwealth’ BORA has not caused significant disruption to the legislative process in New Zealand, nor has it create serious conflict with the final policy decision-maker with the Courts (remembering that there are entrenched powers of the High Court in Australia’s constitutional structure). Indeed if there is any pattern that shows through in constitutional power balance between legislature and judiciary in the operation of NZBORA and the UKHRA, it is how they have both made accommodations using slightly different structures to achieve a fairly similar constitutional result.

That is to say that neither country has damaged their power balance except perhaps to have Parliaments give up some of the legislative power from time to time when the Parliament sees that is reasonable. In both cases the evidence shows that the courts appreciate that it is their role to point out and advise the government of the fine points of law at issue around human rights infringement, but then to hand the matter over to Parliament to make the final decision.

A New Zealand human rights benefit has also been that the public service and members of parliament are aware of the significance of that constitutional balance in relation to the NZBORA and so the human rights dialogue has involved the entire government. The human rights awareness across government has to be considered a significant gain for the New Zealand community. New Zealand’s human rights are
demonstrated in a single concise document, providing a national standard for all in the community to be aware of and to support.

Parliament can and has over-ridden NZBORA provisions on a number of occasions and this is not remarkable given that the NZBORA is statutory in character. It does however pose the question of why legislators would want to formalise human rights if they can be so simply put aside.

What can be said about the significance of data concerning section 7 Inconsistency and parliamentary override of the NZBORA? Clearly the Parliament will override NZBORA rights as it sees fit, and merely takes the Attorney-General’s section 7 report as advice only. Some further conclusions can be drawn about the effectiveness the Justice Department’s vetting responsibilities to advise legislators as to the inconsistency of their Bills against NZBORA rights.

Measured against the substantially far greater number of enactments across his period 1991 to 2014, the 28 government statutes which initially at least overrode the NZBORA are described by the report as small in number and relatively limited in effect. Further the NZ Ministry of Justice vetting section indicate that in some cases subsequent enactments removed the offending provisions and that social change across time, also made some offending enactments less controversial.

Of course any BORA override offends human rights supporters. Given its status as a statute with constitutional effects rather than a formal supreme constitutional instrument, New Zealand BORA is a model which has been described as a weak protector of human rights.330

One can point to assessments of the NZBORA as a weak human rights model compared to others found elsewhere. However given the constitutional heritage of the Westminster system in New Zealand and the strong support for the tradition of parliamentary supremacy, the NZBORA at least was the beginning of a more human rights aware national regime by government in New Zealand in enacting a ‘Commonwealth’ model BORA.

It also led to significant changes to the government’s legislative and administrative processes around the human rights of its citizens, which have resulted

in a human rights dialogue between the executive, parliamentary and the judicial arms of government. The success of this change in the culture of human rights has been indicated in this chapter by commentators and by the fact that the NZBORA remains after 26 years in operation.

The research ‘Fault Lines: Human Rights in New Zealand’, by Judy McGregor, Sylvia Bell, Margaret Wilson and their support team, has produced a detailed review of the effect of ratification of the major human rights treaties on the implementation of human rights in New Zealand. Their research concludes that the human rights landscape in New Zealand has significant fault lines. What stands out in ‘Fault Lines’ is the dedication that these researchers applied to that task, seeking to outline the human rights weaknesses and their concerns for improvements to New Zealand’s human rights landscape.

It is useful to outline some of the key suggestions for change and improvement they made in 10.1 Conclusions:’ The Paradox of New Zealand’s human rights profile’. These comments are referenced by page numbers.

1. New Zealand is poor at promoting the human rights treaties domestically, and scant media coverage is paid to the reporting process. This invisibility is affirmed and compounded by the absence of scrutiny of human rights bodies...or significantly, about accountability for implementation in the domestic context.
2. The government has consistently rejected the idea of a parliamentary select committee for human rights since 2010...the government advances the idea that the scope of human rights is so far reaching that debate could span the content of all the existing human rights committees. On this latter point Australia’s federal parliament has established a Joint Parliamentary Committee on Human Rights, and chapter six reviews the work and assesses its value in lieu of a BOR.
3. The report suggests nevertheless that their survey of treaty body reports, legislative reform domestically, lifting if treaty body reservations and accompanying changes in policy and practice, suggests there has been a positive impact on human rights in New Zealand. (Page 176).
4. Their research concerning human rights in practice from available data, points to’ fault lines’ especially in the area of economic, social and cultural rights. They point to the example of the Atkinson case. The Court of Appeal in Ministry of Health v Atkinson [2012] 3 NZLR 456 CA, found that a policy of not paying family care givers
for their work was unlawful because it unjustifiably discriminated against them on the basis of their family status (non-family members were paid for their work). The government responded with legislation (the New Zealand Public Health and Disability Bill (no 2) that allowed some family members to be paid, but also sought to stop any further legal change to this policy.  

New Zealand Herald in 2014 report indicated at that time only 121 people qualified to receive support and only 97 families were actually receiving it. The authors assert that in answer to this problem is that people must be able to challenge the inadequacies of government through individual cases where there are perceived abuses of human rights such as the Atkinson case. (P 177)

5. Another ‘fault line’ addressed is the consistent and continuing structural discrimination and inequalities of the Maori people, in health, education, disproportionate rates of incarceration and higher rates of domestic violence and particularly the poor living standards of Maori children because of welfare programs that depend on recipients being employed. The authors call for transparent and readily available data that is needed to assess the realization of social and economic rights for Maori along with an understanding (by government) of the importance of self-determination for New Zealand’s first people. (Page 178).

6. The authors point to a renaissance of civil society activism is evident in participation in monitoring mechanisms for disability rights, the Universal Periodic Review and greater coordination among NGOs. (Page 179).

7. The authors believe that a central national archive of human rights treaty body reporting is required to hold the government accountable for implementation of the treaty body recommendations for the purpose of scholarship, research, training and informing civil society and structural change is necessary. The agency to take this role is suggested as the Ministry of Justice. Coupled to that change is the view that news reporting should be overhauled to improve the public debate on proposed human rights changes.

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331 Andrew Geddis, ‘There’s none so deaf as they that will not hear’, (Pundit, January 10, 2017), <http://www.pundit.co.nz/content there’s-none-so-deaf-as-they-that-will-not-hear>.

8. The *Human Rights Act* 1993 (HRA) is seen to be overdue for comprehensive review, requiring substantive and structural changes. (Page 182). Neither it nor the NZBORA are entrenched and both have problems; the NZBORA does not include all the rights in ICCPR, despite affirming all the rights in it. It does not provide a remedy, and cannot strike down inconsistent human rights legislation which can pass into law. There is mention of the *Public health and Disability Act* 2013, where the inconsistent Bill was passed into law under urgency in a single day, by-passing the select committee scrutiny, and denying public participation or informed debate.

As well, the NZBORA does not allow the courts to issue a declaration of incompatibility by reference to ss 4, 5 and 6, and the Attorney-General must vote for such a Bill even when bringing a SOC before the parliament. (Pages 181, 183, and 183).

10.2 Recommendations on pages 183/4 specify four institutional mechanisms, four legislative improvements and five policy changes which the Fault Lines Committee consider as necessary to remove existing ‘faults’ in New Zealand’s human rights regime.

What is both a refreshing and impressive in is this comprehensive effort to make New Zealand’s regime of human rights more effective. That is a rights gain for the people of New Zealand as seen by a neighbour who lives in a much larger society than New Zealand, but with a much less universal approach to improve national human rights. The Australian federal parliament has consistently refused to provide a BOR which would assist to improve Australia’s human rights inadequacies as expressed throughout this thesis.

Fault Lines would be a valuable model for any incipient national BOR in Australia which will appear in the future, to adopt many of its methods and research systems to improve its effective human rights functioning.
CHAPTER 6.

REJECTION OF THE NATIONAL HUMAN RIGHTS CONSULTATION COMMITTEES’ BILL OF RIGHTS RECOMMENDATIONS.

6.1 Introduction.

This chapter examines division in the ALP Government’s human rights policy where initially it established the National Human Rights Consultation (NHRC) to test Australia-wide community support for a national BOR. Subsequently, after receiving the NHRC’s report that it should indeed proceed to adopt a national BOR on the basis of its findings, the Rudd Government rejected the committee’s recommendations. In the face of widespread community support for a national BOR, the ALP rejected it as socially divisive and proceeded instead to develop Australia’s National Human Rights Framework (NHRF) without a BOR.

The purpose of this chapter is to show that Australia’s federal national BOR rejection is not just anti-BOR policy which has been rigidly applied by the conservative side of politics for decades, but includes elements within the Australian Labor Party which are negative towards the adoption of one, as shown the run-up to the 2010 election and in ALP national Conferences since that time. This chapter seeks to bring to light the decline in the Labor Party policy which has sought over time to enact a national BOR. As a major federal party, considering itself as the progressive party in the parliament, the BOR political interests supporting fracture in that policy should be revealed in terms of which members oppose a BOR and why they have been prepared to leave Australia without BOR human rights benefits to the community.

The chapter will explain why Australia once again halted at the political BOR hurdle. The first task will be to trace this government’s BOR decision in the context of community expectations and pragmatic political responses. The second task will be to emphasise the lost opportunity that the Consultation’s BOR recommendations would have provided to ameliorate Australia’s weak human rights provisions, both symbolically for citizens and practically for those minority groups and individuals who suffer rights disadvantages. As William’s points out, ‘legal protection of human rights
in Australia is significantly weaker in Australia, than in a lot of other democratic countries’. 333

The chapter will outline the latest instances of ALP political human rights policy paralysis preventing the adoption of a national BOR. It will assess the implications for the enactment of a national BOR in Australia into the future.

6.2. The National Human Rights Consultation.

On 10 December 2008 the Rudd Government’s Attorney-General McClelland announced a National Human Rights Consultation (NHRC) on: ‘whether more needs to be done to protect fundamental freedoms in Australia’. 334 The Attorney-General noted on the 60th anniversary of the Universal Declaration of Human Rights, that: ‘we look forward as to how we want to best recognise and protect human rights in Australia and into the future’. 335 Pressed to give his view about whether Australia needed a bill of rights his response was: ‘I’m being very careful not to express my view, in many ways its irrelevant, I think its probably unhelpful at this stage to air my views’. 336

Despite this latter non-committal support from the government’s most senior law officer and the Consultation’s mover, many others welcomed the Consultation. The Australian Human Rights Commission’s (AHRC), then President Catherine Bransen QC, considered that the Consultation:

Was an important opportunity for Australians to consider what these rights mean to them and whether their rights are adequately protected. Our daily work at the Commission reveals laws and policies that inadequately protect rights and every day we hear from individuals who feel that their rights have been breached. 337

Australian Human Rights Commission Disability Commissioner at that time Graeme Innes also congratulated the government on this watershed consultation

334 Interview with Professor George Williams, Law Faculty, University of New South Wales, 27 November 2011.
335 Ibid.
336 Ibid.
about human rights. Following the Consultation’s announcement, on 22 April 2009 the AHRC convened a meeting of Australian constitutional and human rights lawyers to discuss the constitutional implications of an Australian Human Rights Act. This was a planning strategy by the AHRC to marshal constitutional law to support the establishment of a BOR, should one emerge from the Consultation’s efforts.

The unanimous view of the meeting was that a human rights act for Australia could be drafted that would be constitutionally valid. Amongst that legal gathering of experts included two former High Court judges, one the former Chief Justice, the Solicitor-General of Victoria, the President of the AHRC, two members of the Bar, a member of the Law Council of Australia, five professors and a representative of the Gilbert+Tobin Centre of Public Law. This roundtable followed the AHRC ‘s ‘Lets Talk About Human Rights’ sponsored series of seminars in major cities in 2008 and 2009.

The Gilbert +Tobin Center of Public Law noted that the genesis of the Consultation’s initiative was a commitment made by the ALP during the 2007 election campaign, to conduct a public consultation on how best to recognise and protect the human rights and freedoms enjoyed by all Australians. The Consultation which emerged was conducted by an independent Consultation Committee, chaired by Father Frank Brennan, a law professor, together with committee members Mary Kostakidis (former SBS news reader), Mick Palmer (former Australian Police Commissioner) and Indigenous barrister, Tammy Williams.

The Committee’s terms of reference stated three questions:

(a) Which human rights (including corresponding responsibilities) should be protected and promoted?

(b) Are human rights currently sufficiently protected and promoted?

338 Ibid.


(c) How could Australia better protect and promote human rights?\textsuperscript{342}

The activities and findings of the Consultation were widely reported:

(a) 35,000 submissions and 6,000 attendees at more than 60 community roundtable discussions across the country.

(b) Of the 35,000 who sent submissions, 87 per cent of the 33,356 who expressed a view about a Human Rights Act, were in support.

(c) The overwhelming majority of those who attended a community roundtable supported such an Act, as did 57 per cent of the 1200 people surveyed during an independent telephone survey.\textsuperscript{343}

The Consultation Committee was very even-handed in its presentation of views received from supporter’s and opponent’s submissions and provided comprehensive explanation of the operation and effectiveness of existing statutory BOR models in the United Kingdom, New Zealand, Victoria and Australian Capital Territory. It made 31 recommendations, among them the adoption of a federal Human Rights Act and that any such Act should be based on the ‘dialogue model’ (Recommendations 17 and 18).\textsuperscript{344}


Following the presentation of the report to the government on 3 September 2009, a Sydney Morning Herald article of April 19 2010 reported: ‘Human Rights Act Canned as Election Looms’.\textsuperscript{345} On 21 April the Attorney-General’s response to the Committee’s report was to launch ‘Australia’s Human Rights Framework’. The Framework included:

(a) A new Parliamentary Joint Committee on Human Rights, which would examine all new Bills before Parliament for compatibility with Australia’s human rights commitments.


\textsuperscript{343} Ibid.

\textsuperscript{344} National Human Rights Consultation, above n 344, Recommendations, xxxiv.

\textsuperscript{345} Joel Gibson, ‘Human Rights Act canned as election looms’, \textit{Sydney Morning Herald}, 19 April 2010.)
(b) A new requirement that Bills introduced into Parliament must be accompanied by a ‘statement of compatibility’, (SOC) which is to include an assessment of whether the Bill is compatible with human rights.

(c) A failure to meet the ‘compatibility’ test was to have no affect on the Bill’s subsequent legal status as a statute, nor bind any court or tribunal: Human Rights (Parliamentary Scrutiny) Act 2011 (Cth), which commenced 4 January 2012.346

(d) The Human Rights (Parliamentary Scrutiny) (Consequential Provisions) Act 2011 (Cth) provides that the President of the Australian Human Rights Commission becomes a member of the Administrative Review Council ex officio.347

(e) Investment of over $12 million in a comprehensive suite of education initiatives to promote a greater understanding of human rights across the community

(f) Combining federal anti-discrimination laws into a single Act to remove unnecessary regulatory overlap and make the system more user-friendly.

(g) Creating an annual NGO Human Rights Forum to enable comprehensive engagement with non-government organisations on human rights matters.

The Attorney-General’s web page indicated that: ‘These changes are designed to have broad effect and will enhance the understanding of, and respect for, human rights across the Australian community’.348

6.4. Other Responses.

Given that the NHRC committee had made such a comprehensive, widespread consultation with the Australian community to plumb their support for a BOR, which received considerable media coverage, community expectations grew especially among human rights bodies and activists that some form of national BOR would likely emerge following the positive acceptance of the need for a national BOR by the


347 Ibid.

committee. The adoption of a Human Rights Framework instead, came as a great disappointment to many.

The Chair of the Consultation, Father Brennan criticised the government’s rejection of the bill along with others. Human Rights and Discrimination Commissioner Helen Watchirs described the refusal as: ‘very disappointing’, noting also that: ‘ignoring the major recommendation from the national consultation process is in contravention of Australia’s wishes. Conservative groups have consistently said that Australian’s don’t want a Human Rights Act if you look at the figures of the Brennan consultation that’s not the case’.\footnote{Helen Watchirs, ‘Government ‘Ignoring Australian’s wishes on human rights’, \textit{ABC Premium News} (Sydney), 22 April 2010.} Writing in The Australian on 18 June 2010, Ben Saul fired a sarcastic salvo at the response of the Attorney-General and his government to the Consultation.\footnote{Ben Saul, above n 155.}

6.5. The Politics of Rejection.

As explained in Chapter 3, the provision of a national BOR had been on the political agenda of the ALP since 1973. Political action by the ALP to enact a BOR occurred in 1973–4, 1983, and 1985. Key political reasons for the failure of each of these initiatives, was a consistent policy refusal by the Coalition parties in the Parliament to support a national BOR; weak support from elements of the ALP; and the absence of a strong ‘champion’ Attorney-General. The Coalition parties were able to block any BOR proposal in opposition, when they held the balance of power in the Senate. When the Coalition has been in Government, a BOR has never been on the mainstream political agenda.

Three major political thrusts for a national BOR came from ALP Governments in the late twentieth century and each of these attempts has failed. In 2008 the Rudd Government contemplated a fourth attempt, setting the groundwork for it by establishing the ‘Brennan’ Consultation in 2009, but then abandoned the BOR, preferring to introduce Australia’s Human Rights Framework. The ALP has thus been unable to achieve what has been their avowed political objective over some decades. As explained in Chapter 3, explanations for these failures include political
management problems, internal division in the party towards a BOR and failure to have the numbers in the Senate to enact one.

Why was such an important and comprehensive survey of public opinion, such as the National Consultation, which revealed strong support from attendees and from those surveyed for a BOR, abandoned? Chris Merritt, Legal Affairs Editor of The Australian in 2010 offered his assessment of the 2010 rejection as, ‘a revolt inside the Labor Party’.\(^\text{351}\) This bald comment about responses within the party to the issue at that point is probably an exaggeration. A more likely response was indifference to one from key Ministers and the Prime Minister, in the light of other pre-election policy priorities.

When interviewed for this research project, the former Attorney-General McClelland, made this revealing statement,

> I can say now, that I never put to the Cabinet the legislation for a Bill of Rights. I had taken a straw poll if you like in independent discussions I had over matters of significance with individual Cabinet Ministers.\(^\text{352}\)

Robert McClelland’s comment suggests that the decision not to proceed with a BOR was the end result of a political decision-making process which involved balancing other pressing pre-election issues such as climate change, asylum seekers and funding of child care. Zifcak has concluded that the Rudd Government, ‘had no appetite for a fight for human rights. The word had always been that, in the end the Prime Minister would decide the issue. He did. He wasn’t having an Act.’\(^\text{353}\)

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\(^\text{352}\) Interview with Robert McClelland, former Attorney-General, at his Sydney Electorate Office, 28 March, 2012.

By rejecting the core recommendations of the Brennan Report, the Government aimed to explicitly take off the table an issue—the prospect of a BOR—that was perceived as an election risk.\(^{354}\)

Professor George Williams considers that the role pressure groups played in opposing the BOR recommendation by the Consultation Committee and in the Rudd Government’s subsequent BOR backdown, was very important:\(^{355}\)

They were extremely active in the Brennan Inquiry, the Australian Christian Society, the Menzies Institute. Those groups are very important because they give politicians the idea of whether they can get away with matters like this. Are they going to be supported or will there be a strong community backlash. In this case [the Rudd Government] felt that they didn’t want the Christian right downside especially the Australian Christian lobby and they felt safe in keeping the people on the left. Its essentially an electoral calculation and that is what you do when you are not doing it as a personal commitment. Any form of legal reform unless it’s a personal commitment is very hard to justify.’

Professor Williams identifies two causes of the government’s failure to move on the Consultation’s BOR recommendations: fear of community electoral backlash generated by political and religious pressure groups and a weak party commitment to the case for a national BOR.

In 2008 the Government had begun the process of developing a new National Human Rights Action Plan. Having decided not to pursue a BOR, this initiative became ‘Plan B’ for the Government, as it struggled to find safer political ground on human rights ahead of the upcoming election, even though a Plan without a BOR fell well short of the expectations of many following the progress of the National Human Rights Consultation. In switching to ‘Plan B’, Attorney-General McClelland described the new approach, the Government believes that the enhancement of human rights should be done in a way that, as far as possible, unites rather than divides our community.\(^{356}\)

His stated reason appeared to ignore the extent of support for a BOR expressed by the community, and the work of Consultation Committee, and won the

\(^{354}\) Ibid.

\(^{355}\) Williams above n 334.

\(^{356}\) McClelland, above n 349.
Government few friends, at least on the left of politics. Attorney-General McClelland’s comment above on Cabinet’s divided position for the BOR to be included in the upcoming election campaign reflected a pragmatic if disappointed acceptance of the facts that: ‘the numbers’ were not there’, and that it was politically less damaging for himself and the Party to abandon this recommendation of the Human Rights Consultation.


David Erdos has offered one explanation about Australia’s BOR reluctance. Erdos examined the question of why the nation remains the only country in the Westminster world not to have a BOR in some form. He poses two questions: firstly, can it be because of a lack of popular support, or are there certain elite political forces that have prevented the move to a BOR?

On the first question Erdos offers evidence that casts doubt on the validity of the lack of social support claim. Public opinion surveys in the 1980’s and the 1990’s about attitudes towards a BOR revealed that the Senate Standing Committee on Legal & Constitutional Affairs in 1985 focused on a broad-based BOR drawn from ICCPR rights, ‘constitutionally unentrenched’ but supreme in law, resulting in support from approximately 40% of 129 submissions. However 80% of the civil liberty submissions, and 100% of the social equity submissions in the inquiry were in support.

Erdos considers that this latter group has emerged from what he describes as the ‘post-materialist’ process resulting from increased economic development and a growing sizeable migrant community in Australia resulting in the growth in such social rights-supporting groups. Surveys conducted in 1991-92 in Australia suggested that this process led to a growth approximately 72% of those questioned supporting the


358 Ibid 2.

359 Ibid 8.

360 Ibid.

361 Ibid 9.
idea of a BOR. Even more striking in 2009, was the 87.4% of relevant submissions to
the Human Rights Consultation supported a bill or charter of rights while 12.6% were
opposed (n=33,356).362

Based on a comparison of Australian support figures with those from in the
United Kingdom and New Zealand, for the equivalent periods, Erdos’s conclusion is
that there is little comparative evidence that social support for a BOR has been lower
in Australia than in the UK, or most particularly, New Zealand. Therefore, the lack of
social support argument cannot explain Australia’s failure to enact a limited statutory
BOR along the lines of the NZBORA.363 The level of support for a BOR revealed by the
National Consultation, also offers a further level of support to Erdos’s conclusion.

On the second question the role of ‘elite political factors’, Erdos offers an ‘elite
political blockage thesis’.364 This thesis contains a number of elements including the
role of Parliament in providing a BOR by statute or by constitutional amendment.
According to Erdos, elite political institutions today:

are to a ‘significant’ extent ‘autonomous’ from the social base. This is especially so with the
growth in executive power relative to the Parliament365 and with the strong party system in
Australia, ‘...where members of Parliament today owe their primary allegiance to the party
that selected them.366

The thesis thus encompasses the politicians who control Parliament and can
vary in political ‘fragmentation’, that is, in the way in which they operate politically.
Aside from particular social interests, they represent elite political actors who have
distinct interests and priorities which may influence policy outcomes. Given their
dominance, political elites will ordinarily respond warily towards projects such as a
BOR, and this wariness is only likely to be transformed when a ‘trigger dynamic’
provides elites with a clear rationale and impetus for human rights reform.367 Erdos’s

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363 Erdos, above n 360.
364 Ibid.
365 Ibid 12
96.
367 Erdos, above n 360.
assessment is that the ‘trigger dynamic’ in controversial or crucial periods in Australian political history has been lacking.

Additionally, the ‘trigger’ may require sustained advocacy to succeed if crises overcome the rights political agenda. The failure to achieve that sustained advocacy was well illustrated when Attorney-General Murphy moved to enact the first of Labor’s aborted attempts to enact a BOR. In the face of sustained Opposition attack across the ALP’s period in government and two elections, the Whitlam Government could not sustain the attempt.

Two other elite political factors are identified by Erdos as having blocked the enactment of a BOR in Australia. The first of these is the institutional structure of political power at national level which has made constitutional reform to enact a BOR extremely difficult. Constitutional referenda including rights proposals, have a long of history of rejection by the electorate, particularly where one of the major parties opposes the question.

Secondly, the Senate has proved to be a significant block upon rights proposals where the Labor government of the day has not had controlled the Upper House, including the government led by Gough Whitlam (1972-75), Bob Hawke (1983-93), and Paul Keating (1993-96). Neither did Kevin Rudd’s government until the Prime Minister’s overthrow and the subsequent election of the Gillard government in 2010. The Gillard government had the ability to pass legislation in the Senate with the support of the Greens, but this did not occur.

Erdos concludes that a wealth of archival statistical and survey evidence indicates that inherent support for a BOR in Australia has not been lower than other Westminster countries such as New Zealand and the United Kingdom where a Bill of Rights has been forthcoming. The alternate ‘elite’ political blockage thesis is preferred as the explanation.


The adequacy of Australia’s current national human rights provisions without the need for a Bill of Rights is lauded by supporters in the Menzies Research Centre’s publication. The selection of their comments has been outlined before in the

\[368\] Don’t Leave us With the Bill: The Case against an Australian Bill of Rights (Menzies Research Centre, 2009).
Introduction to Chapter 4 from ‘No Bill’ contributors. They expressed largely fears held by about perceived risks to parliament’s sovereignty posed by the adoption of a national BOR.

With respect to this chapter’s focus on the Human Rights Consultation’s Report and ultimate recommendations for a BORA, the following comments from the same contributor’s to the Menzies Centre publication, give an additional perspective as to their views as to the adequacy of Australia’s *broad* human rights provision,(author’s emphasis).

1. Australian’s arguably enjoy more secure rights protection than citizens of many countries.\textsuperscript{369}

2. Our legal system, in one way or another already provides a full range of civil and political rights.\textsuperscript{370}

3. By comparison with most other nations, Australia has a very good human rights record.\textsuperscript{371}

4. We have a well developed domestic sense of human rights.\textsuperscript{372}

5. Currently we have a robust, complex system of rights protection.\textsuperscript{373}

6. Real human rights abuses have been and can continue to be presented using existing mechanisms of our legal and political system.\textsuperscript{374}

7. The majority is not so large that minority rights or interests are disregarded.\textsuperscript{375}

8. Australia is a fortunate country in that the rights of its citizens have been well protected by the strengths and integrity of its citizens.\textsuperscript{376}

\textsuperscript{369} Ibid, De Jersey  9.

\textsuperscript{370} Ibid, Brandis  20.

\textsuperscript{371} Ibid, Lessor  56.

\textsuperscript{372} Ibid, Howard  71.

\textsuperscript{373} Ibid, Inving  182.

\textsuperscript{374} Ibid, Wallace  261.

\textsuperscript{375} Ibid, McMahon  285.
9. It is well documented that Australia’s history is littered with denial of rights for Aboriginal & Torres Strait Islander (ATSI) people. 377

The publication did provide one indigenous dissenter (Dr Gordon) from what was otherwise generally a common position in the publication that our current system of national human rights provisions is good to very good and we do not require a national Bill of Rights. Other writers focused more on perceived legal problems of actually enacting national a human rights statute.


The genesis of a National Human Rights Consultation to survey the Australian public’s views as to whether the nation’s human rights were satisfactory, occurred during Labor’s 2007 election campaign. Thereafter the Rudd government launched the Consultation in December 2008 ostensibly as part of its commitment to a reformist program and following its Australia 2020 Summit, which looked at future policy directions.

Such an independent inquiry put the human rights issues at arm’s length and gained political capital from proponents for a BOR and from supporters of the view that such consultations public participation and civic engagement are real-world expressions of democracy. 378 Whether the government felt that it really needed information from the Consultation in order to launch a BOR is doubtful. The lack of numbers in the Senate meant blockage to any such attempt.

Proponents of a BOR in the Rudd government would have been aware of the significant community support for it in past surveys and also by the considerable number of activist bodies calling for the national adoption of a BOR. The Howard government’s period of office had seen such international human rights breaches such as Tampa, the children overboard affair, new extreme anti-terrorism laws and often trenchant opposition and challenge to United Nations criticism of such human rights practices.

376 Ibid, Jellis 328.
Between December 1991 and January 2007 for example, the UN Human Rights Committee found one in thirty of its human rights violations concerned Australia.\textsuperscript{379} The authors conclude that with a national BOR, these complaints would have been taken care of domestically rather than having to be referred to the United Nations body.\textsuperscript{380} Indeed the absence of a rights charter in Australia has been the subject of constant criticism from every one of the UN’s human rights treaty bodies.\textsuperscript{381}

We are left with the question of why the BOR recommendations of the National Human Rights Consultation were abandoned by the Rudd government.

The former Attorney-General above in interview with the writer indicated that lack of support for the recommendations by individual Cabinet Ministers meant that the recommendations were never put to Cabinet.\textsuperscript{382} This is despite the fact that there was considerable support in the Labor Caucus.\textsuperscript{383}

Key party members and party union affiliates are on record as actively opposing a BOR. These include the former NSW Premier Bob Carr and Attorney-General John Hatzistergos, and long-term leader Joe de Bruyn of the influential Shop, Distributive and Allied Employees Associations (SDA). The party has long had many Catholic parliamentarians and members and it has been suggested that some oppose a national BOR on religious grounds.\textsuperscript{384} The senior Catholic prelate of Australia Cardinal Pell outlined his opposition to a BOR in the Menzies Centre’s publication Don’t Leave Us With the Bill.

It is also very likely that Prime Minister Rudd also had a deciding say in this decision, since it was reasonably certain any BOR would fail to pass the Senate, and the government had other matters of more pressing importance in the run-up to the election. As well the Attorney-General’s ‘Plan B’ Australia’s Human Rights Framework

\textsuperscript{379} Byrnes Charlesworth and McKinnon, above n 20, Foreword, x.

\textsuperscript{380} Ibid.

\textsuperscript{381} Zifcak, above n 353.

\textsuperscript{382} McClelland, interview with the writer.

\textsuperscript{383} Zifcak, above n 353.

\textsuperscript{384} Interview with Antony Loewenstein, Sydney Journalist, 31 January, 2013. His more detailed views on this question follow in Chapter Eight.
could well have been thought by the government to be a reasonable strategy to achieve better national human rights, until a BORA eventually was enacted.

The provision of national human rights remained with the national Parliament. The Gillard government pressed ahead with human rights reform though the Framework. This has become expressed as Australia’s National Human Rights Action Plan. The incumbent Gillard Government made effort to fix a number of gaps in our human rights provisions as outlined by its response to the UN Human Rights Council.

The opposition conservative parties were implacably opposed to the idea of a BOR in the run-up to the Consultation and they were supported in their opposition by an active Murdoch press. Their opposing arguments have been reviewed and remain largely as they have been for many years. They will accept no disturbance to the fabric of Australia’s constitutional order.

This writer and other supporters for a national Bill of Rights, consider that these arguments of the conservative parties are overblown and do not show understanding of the actual experience of other similar advanced Westminster democracies such as New Zealand and Great Britain which have adopted the Commonwealth model BOR.

The National Human Rights Consultation findings indicated that many in the nation were ready to accept a BOR. The Australian Parliament has since decided that it will remain the arbiter of human rights for the nation. Evidence is pointing to the reality that while it may seek to produce a strong comprehensive and effective human rights for all Australians that is unlikely to occur.

To paraphrase Chief Justice Robert French, what is important for Australia is to develop a stronger culture of respect for human rights and the debate is to what extent such a culture may be supported nurtured and protected by law. As mentioned above, the enactment of a BOR has been adopted by other nations such as the United Kingdom, New Zealand, and by Canada (their initial statutory bill of rights model, later adopting one entrenched constitutionally). The key blockage point to such a move in Australia, political opposition, will be examined more closely in the chapters which follow to understand the scope and dimension of that barrier.

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CHAPTER 7.

WILL THE PARLIAMENT’S BILL OF RIGHTS ALTERNATIVE BE ABLE TO ACHIEVE SIGNIFICANT HUMAN RIGHTS IMPROVEMENTS NATIONALLY?

7.1 Introduction.

Having overseen four failed attempts to achieve a better human rights outcome for Australians in the form of a bill or charter of rights in 2010, the Australian Labor Party initiated a new pathway to improve Australia’s patchwork of rights provisions. The pathway was Australia’s Human Rights Framework and at its introduction, the Government agreed with the subsequent National Human Rights Consultation Report that, ‘some people’s rights could be better acknowledged and protected, there is a need to ensure that all Australians, including those without a strong voice, can be heard’. 386

Debeljak assessment of Australia’s human rights provisions pinpoints the weaknesses:

Statutory [human rights] regimes are inadequate: the scope of right’s provisions are much narrower than protections by international human rights law: The Commonwealth has not introduced domestic legislation in full, for each of the international human rights treaties it has ratified: There is a lack of uniformity of standards and protections across Australia’s jurisdictions. 387

Any express or implied parliamentary indication circumventing rights prevents judicial rights-based determination thereby reinforcing the executive and parliamentary monopoly over human rights. Such concentration of power in the executive is an on-going challenge to the functioning of representative democracy, and the more concentrated monopoly amplifies the threat to effective protection of human rights. 388


387 Julie Debeljak, above n 164, 42–43.

388 Ibid, 48.
Although the ALP lost office in 2013, since the Liberal-National Coalition Government was elected, key aspects of the Framework remain in place, and will be examined in this chapter. In particular, this chapter will focus on the work of the Parliamentary Joint Committee on Human Rights (PJCHR) and the requirement that all new bill and legislative instruments be accompanied by Statements of Compatibility (SOCs).

This thesis will seek to test the following assertions:

(a) The current Liberal-National government will be unlikely to be able to mold Australia’s current patchwork of rights protections into a coherent and comprehensive statement of national human rights using PJCHR.

(b) This model will be unable to provide human rights protections comparable to those in countries where ‘Commonwealth’ model BOR’s are law, such as can be found in the UK and New Zealand, Victoria or the Australian Capital Territory.

(c) Parliament alone without judicial participation, will not be able to inject a robust national human rights culture in Australia’s policy formation and law-making processes.


When introducing Australia’s new National Human Rights Framework, then Attorney-General McClelland identified the Framework’s national objectives: 1. Reaffirm; 2. Educate; 3. Engage; 4. Protect; and 5. Respect; human rights. It is instructive to carefully note the language used in outlining this plan as a guide to its scope and likely ability to create significant improvement in the quality of human rights provision in Australia.

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389 McClelland, NHRF introduction.
1. The Government reaffirms its commitment to promoting awareness and understanding of human rights and respecting the seven core UN Treaties to which Australia is a party.

2. Human Rights Education funding: $2 million over four years to NGOs for human rights education programs: $6.6 million to the Australian Human Rights Commission on similar terms as the NGOs:

3. $3.8 for human rights in-service and guidance materials to the Public Service:

4. Human Rights Engagement within Australia, the region and the world, with NGO participation. 390

5. Protection of human rights will be buttressed by the Joint Parliamentary Human Rights Committee to provide greater scrutiny of legislation for compliance with our obligations under the seven core UN Human Rights treaties.

6. The process will include statements of compatibility to accompany each new Bill and delegated legislation subject to disallowance. 391

390 Ibid.

391 Ibid.
7. Respect for human rights, the government will harmonise and consolidate Australian human rights anti-discrimination law and review legislation, policies and practices to ensure that they appropriately reflect human rights.\textsuperscript{392}


The Consultation then helped the Government develop and release the Human Rights Framework last year, a Framework that seeks to protect and promote human rights in our country to make our a fairer and a more just society. Importantly the Framework has been carefully considered to facilitate incremental improvements in human rights and already the Government has achieved some early wins, we have established the PJCHR, Statements of Compatibility, they ensure that the Government of the day and each Minister is focused on ensuring that key principles of freedom, respect, equality, dignity and a fair go for all Australians, are considered in everything that the Commonwealth does.\textsuperscript{393}

7.3. The Parliamentary Joint Committee on Human Rights (JPCHR).

\textsuperscript{392} Ibid.

\textsuperscript{393} Nicola Roxon \ (Speech presented to the Australian Government Forum on Human Rights, Parliament House, Canberra, 14 August 2012), \textlt<http://www.attorney-general.gov.au/Speeches/Pages/2012/Third%20Quarter/14August>\gt.
The Framework proposed the establishment of the PJCHR to provide greater scrutiny of legislation for compliance with Australia’s human rights obligations under the seven core UN human rights treaties to which Australia is a party. The Committee’s functions are outlined as, ‘scrutinising the statement of compatibility that will accompany each Bill and Legislative Instrument, and as such, a key mechanism for bringing human rights issues to the fore in parliamentary consideration of legislation’. It is also empowered to make enquiries regarding legislation consistency with Australia’s seven treaty obligations and to conduct broader human rights inquiries for the Parliament.

The Human Rights (Parliamentary Scrutiny) Act 2011 came into effect on 7 December 2011. The Act defined human rights as the rights and freedoms recognised or declared by the seven core United Nations human rights treaties as they apply to Australia. Professor Kinley and Christine Ernst observed that:

> The significance of this definition cannot be overstated. Its practical effect is to require lawmakers to assess human rights compatibility by reference not to a closed list of rights but to well over 100 rights and freedoms contained in the seven treaties listed.

The Function of PJCHR (s 7) and (s 6).

The seven treaties which are the Committee’s touchstone for human rights scrutiny are as listed above.

The SOC’s requirements for a Bill are that:

(a) S 8(1) requires that a member, or in s 8(2), another member acting on his or her behalf, must prepare a SOC in respect of any Bill to be presented into a House of the Parliament.

(b) S 8(3) provides that a SOC must include an assessment of whether the Bill is compatible with human rights.

(c) S 8(4) indicates that a SOC is not binding on any court or tribunal.

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Section 8(4) of the Human Rights Parliamentary Scrutiny Act 2011, expressly excludes recourse to the courts, while s 8 (5) indicates that a bill’s failure to comply with SOC’s requirements does not affect the subsequent legality of any Act. Williams and Burton predicted that SOC compliance will, in practice, be legally optional.

They also consider that s 8(4) of the Act is: The key weakness of the parliamentary scrutiny regime is that it provides no external check and balance on the operation of the scheme and parliament’s compliance with it’. They feel that the

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397 The writer’s emphasis.


400 Ibid, 27.
absence of judicial scrutiny of assessments of compatibility removes the skills of judges to rationally and analytically solve issues of law and human rights, and by considering problems in hindsight, judges are able to consider policy principles, how the law has operated, and how it has impacted at specific levels.  

The multi-party Committee was established on 13 March 2012 with ten members, five from each House.

7.4. Operations: The Committee’s Work.

The Committee’s Reports to the Parliament include both Bills and legislative instruments. This review will focus its review of two important bills only, during the Committee’s first two years. The Committee’s Secretariat indicated to the writer on 11 July 2014, by phone, that on average 250 new bills are before the Parliament each year, and that the JPCHR will review every new Bill [writer’s emphasis].

The Committee scrutinises each new bill as to whether it raises human rights issues from Australia’s obligations to the seven key human rights treaties above. It codes its responses as follows: NC-No Comment; RR-Response Required (from the Minister or Member of Parliament introducing the bill); NRR-No response required, matters raised on an advice only basis; D-Committee defers its consideration to a subsequent report. At intervals, the Committee Chair reports to Parliament with an outline of its review of new bills, on the basis of these codes.

As the Committees work is on-going, its reporting is available in the published reports presented to Parliament. At the commencement of its work, the Committee issued a number of Practice Notes as guidelines for Ministers, departments and members of Parliament preparing bills.

Practice Note 1:

The Committee has indicated its underlying scrutiny principles as:

1. Primarily preventative to minimize risk of legislation generating human rights breaches.

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401 Ibid.

402 Writer’s phone discussion with the JPCHR Secretariat, Canberra on that date.
2. The test on proposed and standing legislation is its potential in application to be incompatible with human rights.

3. Human rights safeguards will often be essential in bills to ensure human rights in practice.

4. Where relevant the views of human rights treaty bodies and international and comparative human rights jurisprudence can be useful sources to understand the nature and scope of human rights defined in the *Human Rights (Parliamentary Scrutiny) Act 2011*.403

The Joint Parliamentary Committee on Human Rights Expectations for SOCs.

(a) Statements of Compatibility are the starting point of the legislative process.

(b) They are stand alone documents showing the purpose and effect of the legislation, the operation of individual provisions and how these affect human rights. They recommend Attorney-General’s department templates as guides.

(c) They should contain an assessment of whether the proposed legislation is compatible with human rights. They point to the A/G’s assessment tool flowchart for guidance where three criteria are provided:

1. Whether and how the limitation is aimed at achieving a legitimate objective.

2. Whether and how there is a rational connection between the limitation and the objective.

3. Whether and how the limitation is proportionate to that objective.404

7.5 Two Examples of JPCHR’s Bill Reporting.

(a) Fifth Report 2012: *Social Security Legislation Amendment (Fair Incentives to Work) Bill 2012*.

This Bill raised a great deal of attention in the community, because of the impact that it had in proposing reduced social service payments for some groups, such as working parents with children, and particularly single working mothers. The appendix attached to the Fifth Report, outlined the public hearings of 21 June 2012,

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403 Parliamentary Joint Committee on Human Rights, ‘Practice Note’ 1, 1.

404 Ibid, 2-3.
attended by representatives from: National Council for Single Mothers and their Children; National Council of St. Vincent De Paul Society; Australian Human Rights Centre; Faculty of Law; UNSW; Department of Education, Employment and Workplace Relations (Income Support: and Remote Service Implementation Group); Australian Council for Social Services (ACOSS); Social Policy Research Centre, UNSW.

The hearing received a considerable volume of submissions from these witnesses which had to be considered. The Committee received a written request on 15 June 2012 from the Australian Council of Social Services (ACOSS) to examine the Social Security Legislation Amendment (Fair Incentives to Work) Bill of 2012. Following further oral evidence presented at the Committee hearing on 21 June 2012 at Parliament House, ACOSS raised a number of human rights issues in the proposed legislation including the removal of a benefit which would impact significantly against poor single mothers which offends CEDAW Article 11(1) (e) the right to social security for contingencies such as sickness, old age and unemployment. 405

The submission also raised impacts upon other groups human rights and the conventions involved including CRC Article 26 (the bills impact upon social security for children); 406 ICESCR Article 3( equal rights of all economic social and cultural rights and questions about the changes upon education benefits; 407 the submission that there is a strong presumption where a person’s basic rights are affected retrogressive income measures by States are prohibited; the funding of elimination of barriers to women’s workforce participation is needed before placing them on a reduced New Start Allowance. 408 Finally the submission called for an inquiry into the Bill, in that the SOC does not address the human rights of those whose support will be reduced by the Bill. ACOSS called for the Parliament not to proceed with the bill until a proper inquiry into the human rights implications of the Bill was conducted. 409


406 Ibid, 5.


408 Ibid, 6, 8.

409 Ibid, 11.
At an interview on 16 April 2013, ACOSS CEO Dr. Goldie made the following comment to the writer about the results of their submission to the Committee:

We were the first group to engage with them—we were very pleased with both the interim and final report of the Committee—they did a very good job. I think they applied the international jurisprudence appropriately. I was pleasantly surprised at how thorough the Committee was considering the issues before it and therefore it was bitterly disappointing that the Prime Minister [Gillard] disregarded immediately their report out of hand. 410

The Committee also invited a response from the Department of Education, Employment and Workplace Relations who provided a lengthy submission which held that the Bill is consistent with Australia’s human rights obligations:

Specifically affected parents will still have the rights to social security. People are supported through the income support safety net as well as family payments and a range of programs and other services provided by Commonwealth and State governments such as education and housing. 411

The Committee’s dissenting assessment of the human rights adequacy of this Bill, was delivered to the Parliament in its Fifth Report of 20 March 2013:

The Committee considers that the government has not provided the necessary evidence to demonstrate that the total support package available to individuals who are subject to these measures is sufficient to satisfy minimum essential levels of social security as guaranteed in article 9 of the ICESCR and the right to an adequate standard of living in Australia as guaranteed in article 11 of the ICESCR. Nor has it indicated the basis on which it makes that assessment. In the absence of this information, the committee is unable to conclude that these measures are compatible with human rights. 412

Comment on the JPCHR’s assessment of this bill, is that it demonstrates a thorough, non-partisan approach to its work, and that it was prepared to make a dissenting report on the government’s Bill, which was considered as not compatible with Australia’s human rights treaty obligations.

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410 Interview Transcript at 6, Recorded Interview with Dr. Goldie and the writer, Sydney, 16 April, 2013.


On 23 November 2011, the Stronger Futures package of Bills was introduced into Parliament by the Minister for Families, Community Services and Indigenous Affairs, Jenny Macklin. The bills passed the House of Representatives on 27 February 2012, and the Senate on 29 June 2012. On 15 June 2012, while the Bills were before the Senate, a submission to PJCHR was received from the National Congress of Australia’s First Peoples, about the *Stronger Futures in the Northern Territory Bills* (2011).

Their submission raised human rights concerns about lack of consultation, and about free prior and informed consent before adopting and implementing legislative or administrative measures that may affect them. The submission, supported by reference to CERD ICESCR and ICCPR, requested that the JPCHR require a SOC for this package of bills. The Committee as a first step, decided to write to that Minister for Families, Community Services and Indigenous Affairs requesting advice on the compatibility of the bills with human rights.

Minister Macklin in response to the Committee’s request of 20 June 2012, forwarded to the Committee, the Department for Families Communities and Indigenous Affairs submission on 27 June 2012. The submission claim was that the Government conducted extensive and genuine consultations with the indigenous people of the Northern Territory and that in developing the legislation above careful consideration was given to CERD, ICCPR, ICESCR, CEDAW and CRC.

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414 Ibid.

415 Joint Parliamentary Human Rights Committee, ‘11th Report, Introduction’, p 2. The Bills were introduced into Parliament before the requirement under the *Human Rights (Parliamentary Scrutiny)* Act 2011 to provide a statement of compatibility with human rights took effect, the Bills were not accompanied by an independent and detailed statement explaining how the bills engaged the human rights set out in the relevant human rights instruments.
Professor Desmond Manderson in his article ‘Crocodile Tears: The Intervention and the Obligation to Consult’, offered a different view about Minister Macklin’s consultation claims: ‘As a genuine consultation with Aboriginal people on measures that will profoundly affect their lives, the government orchestrated an elaborate charade.’ 416

On 6 July 2012, the Committee received a letter from the then Attorney-General in response to a request 28 May 2012 from Senator Siewert, to refer the Stronger Futures package to JPCHR. The Attorney-General declined, noting that the bills had already been the subject of a major inquiry [over 400 submissions were received by the Senate Community Affairs Legislation Committee], and that various amendments would be proposed as a result.417 The Attorney General considered that the legislation was consistent with the Racial Discrimination Act (RDA) and advised that it would be possible for JPCHR under its mandate, to review the operation of the legislation, once it had been enacted.418

The Committee received over 20 written submissions requesting it to carry out an examination of the legislation, a number of which provided detailed analyses of significant human rights issues involved in the legislation. However considering that the Senate Community Affairs Legislation Committee undertook a detailed inquiry into the legislation, the JPCHR decided not to undertake a formal inquiry. It decided to review the material before it and relevant developments since mid-2012. The Committee’s considered that it should highlight specific concerns and matters of principle.419

The committee has underlined that the onus is on the government to clearly demonstrate that these measures involve not just the pursuit of an important social objective, but that there is a rational connection between the measures and the achievement of the goal, and


419 Ibid, 1.16.
that the measures adopted are reasonable and proportionate to the achievement of that goal.\footnote{Ibid, 1.277.}

Having made those comments, they suggested to the government that regular checks be made to evaluate the measures that they have undertaken, on a 12 monthly time frame.

7.6 Comment on the Examples.

The work of the Committee, in relation to the two examples outlined, is quite impressive in terms of its initial approach to fulfilling aims for it, contained in the \textit{Human Rights Parliamentary Scrutiny Act 2011}. The Committee’s deliberations at that stage raise human rights awareness and consideration in the proposer’s bills being put forward in the Parliament.

Will this awareness over time grow in the consciousness of back-bench members of Parliament, the Executive, Ministers and their departments and public servants? Indeed, it has been proposed that in New Zealand’s Parliament, the great benefit of their SOC (NZBORA’s S 7 Reporting) process has been the growth and broader consideration of human rights awareness by Cabinet.\footnote{A & P Butler, above n 298, 1105.}

Further than that reach, a dialogue about human rights appears to be establishing between the PJCHR the Ministers, members of Parliament proposing Bills and the public service. This is a promising development for a better culture of human rights in government. It is to be hoped that this growth encompasses all parties involved and results in more effective human rights decisions by our national Parliament.

That having been said, there are a number of limitations to the JPCHR’s ability to ensure that human rights will be considered seriously by government.

Note that in the case of the first example, \textit{Social Security Legislation (Fair Incentives to Work) Amendment Bill 2012}, despite the JPCHR’s dissenting report, the publicity around the proposals, the significant bodies making submissions, the Gillard Government of the day, bluntly refused to alter the income changes.
In the second example, *Stronger Futures in the Northern Territory Bills 2011*, issues arose, which limited JPCHR’s human rights role. As indicated above, the Bill was actually reviewed by the Senate Community Affairs Committee, and the Attorney-General refused to allow JPCHR to formally scrutinise the Bill, (but not the subsequent Act). That was despite the fact that the *Human Rights Parliamentary Scrutiny Act 2011* s 8(1) provision requiring all Bills to have a SOC was in force and could have provided an opportunity for the legislation to receive a JPCHR formal examination, as outlined in their Practice Note 1 outlined above, and subsequent further notes.

As well, their developing expertise in the human rights scrutiny, applying Australia’s seven major human rights treaty obligations, meant that they could call upon a greater knowledge of human rights than the Attorney-General’s satisfaction with application of the provisions of the *Racial Discrimination Act 1975 (Cth)*. Without suggesting incompetence on the part of the then Attorney-General Minister or Minister Macklin in their decisions, it is instructive to note the human rights that JPCHR raised in their review that it believed were engaged by *Stronger Futures in Northern Territory Bills 2013*. 422

- UN Declaration of the Rights of Indigenous People- used as human rights guidance rather than applying established domestic law [1.56-1.62];
- The Right to Self-Determination; Equal Protection before the Law and Non-Discrimination on the basis of race or ethnic origin [1.63];
- the Right to Participate in Decision-making; states shall consult and co-operate in good faith with indigenous people through their own representatives; social security; adequate standard of living [1.67];
- The Right to Equality and non-Discrimination [1.68];
- Right not to have one’s privacy, home or family unlawfully interfered with [1.74];
- Special measures–provisions in the legislation cannot be justified if they are implemented without the consent of the group to whom they apply [1.76].

The Minister and the Attorney-General’s failure to appreciate the significance of the breadth of human rights issues for Indigenous people affected by the legislation package, and an obviously inadequate and rushed consultation, could have been improved by seeking advice from JPCHR. That missed opportunity has played

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422 The JPCHR’s Report Sections are bracketed.
out to the detriment of the *Stronger Futures* initiative, in terms of its rightly poor reception by our Indigenous people, considerable criticism of it from human rights bodies and law groups, and weaker policy outcomes. For many involved, Stronger Futures was simply the Howard Government’s *Northern Territory Intervention, Mark II*.

7.7.1 **Difficulties Ahead?**

In early 2012, Williams and Burton’s raised a number of doubts about the ability of Parliament and the PJCHR to be able to provide a more effective human rights regime for the nation:

> In practice, the volume of law-making carried out by Parliament makes it impossible for individual parliamentarians to assess the potential impact of new laws and legislative instruments,\(^{423}\) [there were for example] in 2011, 238 Bills of 7368 pages of which 190 were enacted and 286 legislative instruments of thousands of more pages.\(^{424}\)

Williams and Burton go on to note, that in theory, the PJHRC has the power to conduct rigorous scrutiny of new and existing legislation. They think that in practice JPCHR will be unlikely to reduce the political cost to a government, of ignoring or neglecting those standards, because of the inability of the Committee to find the time to scrutinise the volume of legislative proposals.

They point to the relatively low-level of acceptance among parliamentarians of international human rights standards as a legitimate yardstick against which to measure the suitability of legislation.\(^{425}\) As well the rigid party-political system which means that committee members from the government side will be unlikely to make decisions which run counter to the policies and programs of their party. Some members of the committee who are in opposition or another party may take contrary decisions which governments frequently ignore.

The authors pointed to three case studies which demonstrate: ‘where rights issues are those of unpopular minorities or the politically powerless or in events of

\(^{423}\) Williams and Burton, above n 400, 3.

\(^{424}\) Ibid, Source: Department of the House of Representatives, *Work of the 43rd Parliament: 1st Session* (2011) 1, 4. The Senate would have dealt with the 190 Bills enacted into law.

\(^{425}\) Ibid, 19.
real or claimed emergency, reveal circumstances in which the ordinary if weak rights-respecting culture of Parliament can fail’.\textsuperscript{426}

They outlined the Northern Territory Intervention, (five new Acts including the \textit{Northern Territory National Emergency Response Act 2007 (Cth)}, \textsuperscript{427} Australia’s Anti-Terrorism Laws (some 48 new pieces of legislation including a “Special Powers Regime”, \textit{ASIO Legislation Amendment (Terrorism) Act 2003 (Cth)} \textsuperscript{428}and restrictions on Voting Rights by prisoners and electoral roll closing date \textit{(Electoral and Referendum Amendment (Electoral Integrity and Other Measures) Act 2006 (Cth)}.\textsuperscript{429}

The first of these the Northern Territory Intervention was initiated in the run up to an election while the Anti-Terrorism laws developed from a genuine global emergency following 9/11, but expanded to damage many of the fundamental legal protections and rights in what can be described as a period of hyper-legislation.\textsuperscript{430} The third Act created a blanket ban policy on prisoner voting could have been motivated by examples of it in the USA.

Given the discussion above in 7.4.1, it seems that Williams and Burton’s doubts about the ability of the JPCHR to cope with their bills workload may be over-stated. However their doubts do have application at times, such as at pre-election time or in an emergency where sudden government measures could present temporary workload difficulties, or where important policy Bills fit with party electoral promises.

The question they raised of party bias affecting negatively JPCHR member’s ability to provide the Parliament with non party-political human rights assessments and guidance for new Bills has not been evident in these early examination of their reports. Of course, it is not uncommon and relatively normal committee practice that if that does occur, majority and minority reports are presented. What the real political significance of JPCHR can mean is its ability over time to educate the

\textsuperscript{426} Ibid, 5.

\textsuperscript{427} Ibid.

\textsuperscript{428} Ibid, 7.

\textsuperscript{429} Ibid 10.

Parliament about the extent of, and human rights impact, in their bills and subsequent legislation.

7.7.2 Comment from Others.

This new approach to human rights protection by the Parliament raised considerable comment. A selection of these includes:

(a) S. Joseph: ‘The Official Blog’, Castan Centre for Human Rights,

The author considers that the Human Rights (Parliamentary Scrutiny) legislation: ‘an important but second best development, the legislation is welcome, increasing the visibility of human rights in new and existing laws and accountability of the federal government, but it is a second best option’, [instead of a Charter of Rights].


Community bodies like the Australian Human Rights group hope that once in place these scrutiny and education measures will strengthen our legislators’ awareness of human rights and the Commonwealth’s responsibilities to individuals. They will improve national focus on human rights problems and lead to better formulated laws. The only organised opposition [to reform] has come from Christian groups more concerned with stopping gay marriage and legal abortion than with the needs of the homeless, disabled, mentally ill and other vulnerable individuals who can and do get badly treated by the Commonwealth and its agents.

(c) A New federal Scheme for the Protection of Rights.

Sparke Helmore Lawyers, comment upon legal ramifications of the Act and interpretation by the judiciary, tribunals and legal advisors:

If provisions have been assessed by the executive and the legislature as consistent with human rights and enacted on that basis, then interpretations consistent with those

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provisions may well be required by the courts….it is fair to assume that exercises of power by executive officers under those provisions will have to be consistent with human rights.433

(d) LA PIPER Lawyers-Parliamentary Scrutiny of Human Rights.

In the Victorian experience, evidence from the operation of the Victorian Charter to date demonstrates that these scrutiny procedures play an important role in increasing parliamentary dialogue about human rights, as well as enhancing transparency and accountability in policy making and legislative development.434

(e) Law Council of Australia.

While many Australians enjoy a high standard of living and security that comes from living in a stable democracy, there are others who regularly experience fear, hunger, homelessness, powerlessness and discrimination. For these people, lack of adequate human rights protection affects their ability to be free from arbitrary detention, to be treated equally before the law and to be treated with dignity and respect in the community. The Law Council is of the view that a Human Rights Act is the most effective way to ensure that rights of all Australians are adequately protected. However the Law Council welcomes the positive initiatives contained in the Human Rights Framework.435

7.7.2 How effective have the JPCHR’s operations been four years since its inception?

Professor George Williams has kept a watching brief on this question and he lodged a second report ending January 2016, four years after the commencement of


the JPCHR, providing a second assessment as to how the Committee and its work has progressed. 436 He asked four questions of the Committee’s operations:

1. Does the regime improve engagement and debate among parliamentarians about the human rights issues raised by proposed laws-the deliberative impact?
2. Is their improvement in the quality of legislation from a human rights perspective, such as producing legislative amendments or retractions of rights-infringing Bills-the legislative impact?
3. Does it not give rise to additional legislation in respect of human rights (the judicial impact)?
4. Do its activities promote broader community awareness and understanding of human rights issues in regard to proposed laws (the media impact)? 437

Without seeking to enter the extensive details in his paper, his conclusions about the success of JPCHR to meet its goals are less than positive.

5. Our analysis has exposed significant shortcomings in both the design and practice of the Committee’s regime and that is having a limited impact by way of achieving its goals:

(i) Loss of clarity on the face of Committee reports as to which legislative instruments have been assessed.

(ii) The delay of the Committee in delivering reports.

(iii) Inappropriate procedures in the event of Committee disagreement.

(iv) Low deliberative impact.

(v) Low legislative impact.


437 Ibid.
(vi) Low public awareness.\textsuperscript{438}

They conclude with the following observation (this review is four years after JPCHR commenced operations).

There is evidence that recent years have each seen extraordinarily high number of rights infringing bills passed into law.\textsuperscript{439}

7.7.4 The Coalition Returns to Government- Issues with the \textit{Human Rights (Parliamentary Scrutiny) Act 2011}.

Many consider human rights issues to be largely a non-partisan political issue because rights apply to all Australians. That is certainly true of the broad rights expressed in conventions such as freedom of speech, the right to vote and so on. However some rights which apply to minorities, becomes a sticking point for those who are affected by them, for example religious attitudes to the employment gay people in catholic schools, gay marriage rights and reproductive rights. The opposition of religions can be significant in blocking minority rights proposals as has been expressed by Crabb.\textsuperscript{440}

1. Rights.

The Liberal-National Coalition, (and on some occasions, elements of the ALP), have been consistent opponents of a national BORA for decades, preferring an incremental approach to human rights provisions. The ALP’s human rights attempts have been outlined above in detail, and it has been the initiator of the Human Rights Framework’s JPCHR and SOCs as an alternate way to improve the nation’s human rights incrementally. Without revisiting ALP history, it is necessary for this thesis to now focus on the Coalition’s expressed views below to emasculate the National Human Rights Framework.

What this search seeks to understand is, why in the face of Commonwealth and other style BOR’s in contemporary Commonwealth democracies, such as New

\textsuperscript{438} Ibid.
\textsuperscript{439} Ibid, 506.
\textsuperscript{440} Crabb, above n 166.
Zealand, the UK, and Canada, Australia’s Liberal-National Coalition steadfastly refuses to acknowledge the human rights gains such BOR’s bring to their societies. The Dialogue model BOR recommended by the Consultation, and its expression as the Commonwealth model BOR, has been rejected by the Coalition politicians, in what can be described as ideological lock-out. The political reasons for their BOR ideology, needs to be further examined, to test the validity of its application in a modern democracy such as Australia.

Coalition party web pages have no entry for Bills or Charters of Rights, although press releases do indicate views expressed by individual Coalition’s members. 441 Prime Minister Howard’s 2009 Menzies Lecture, ‘Proposed Charter of Rights’ at the University of Western Australia, 442 and Senator Brandis’s address to James Cook University Law School on 14 August 2008, The Debate We Didn’t Have to Have: The Proposal for an Australian Bill of Rights, 443 do give detailed personal quasi-party objections to the Bill of Rights.

When the Gillard Government was moving the Human Rights (Parliamentary Scrutiny) Bill 2011 through Parliament at the Senate committee stage, arguments were outlined to it by the Coalition Senators Barnett Trood, Boswell, Parry, Brandis and McGauran. 444 Their Dissenting Report on the Bill contained the following positions on the question of whether the Human Rights (Parliamentary Scrutiny) Act 2011 was necessary or desirable:

(a) If we wish to elevate the importance attached to the consideration of human rights aspects of legislation, and the opposition does wish to do so, it is appropriate that that function be made more central to the legislative process that is currently the case. 445


442 Copy sent by the former Prime Minister Howard sent to the writer.

443 G. Brandis ‘The Debate We Didn’t Have to Have: The Proposal for an Australian Bill of Rights, 2; J. Lesser and R. Haddrick, Don’t leave us With the Bill: The Case Against an Australian Bill of Rights.


445 Ibid, We support human rights as central to the legislative process.
(b) Expanding human rights scrutiny across the whole parliament is itself
desirable.\textsuperscript{446}

(c) Shining a light on the human rights implications of legislation is a key concern of
the Opposition.\textsuperscript{447}

(d) Opposition Senators support parts of the Bill, which constitutes the PJCHR.\textsuperscript{448}

2. Defining Rights.

(a) Clause 3 of the Bill defines human rights exclusively by reference to seven listed
international convention. Opposition Senators strenuously oppose this approach
to the definition for several reasons through sections 1.11 to 1.23.

(b) The definition of human rights ignores the human rights Australians enjoy under
our domestic law s 1.11.

(c) Incorporating in their entirety a series of instruments some of the provisions of
which are already reflected in Australian law, and some of which are not, nor
should be. S 1.13.

(d) ‘The human rights of Australians are already largely protected by the three
principal sources of the law the Constitution, the common law and the statutes of
both the Commonwealth and State Parliaments. S 1.14.

(e) It is undesireable to recognise international instruments as the exclusive or even
main source of rights; it is fraught with danger to attempt to codify rights at all.
1.18.

(f) The more effective procedure, is to use Standing Order 24 of the Scrutiny of Bills
Committee as to whether Bills or Acts by express words or otherwise trespass
unduly on rights or liberties;

(g) Make rights, liberties or obligations unduly dependent upon insufficiently defined
administrative powers.

(h) Make rights, liberties or obligations unduly dependent on non-reviewable
decisions.

\textsuperscript{446} Ibid, Expansion of human rights consideration across the whole parliament.

\textsuperscript{447} Ibid, Making human rights as a key part of legislation scrutiny.

\textsuperscript{448} Ibid, Part of the Bill concerning JPCHR is supported.
(i) Inappropriately delegate legislative powers on insufficiently subject the exercise of legislative power to parliamentary power.


Coalition Senators do not see the need for Statements of Compatibility:

it is merely the expression of the executive government. The whole point of enhancing Parliament’s ability to scrutinize the human rights impact of legislation is to empower the Parliament rather than the executive. (s1.23.)

4. Their Recommendations.

The definition of human rights in clause 3 of the Bill be amended and replaced by a generic and non-prescriptive source-based definition along the lines set out in sections 1.21-1.22.

The Bill be amended to omit Part 3.\(^{449}\)

Part 2 of the Bill is supported.

Clearly the Coalition parties prefer the current Australian fragmented presentation of human rights which they describe in s 1.12, and that adequate protection is the issue; rather than jurisprudential uniformity.

8. Conclusions.

This chapter sought to examine about how the Framework has functioned and what effect its operations have had upon the Parliament’s human rights considerations when legislating.

Question 1.

Does the Framework improve Australia’s current patchwork of rights protections, if so, how?

Chapter Seven’ research finding is that while the Framework appears to be a valuable process to bring greater human rights awareness across all sectors of

\(^{449}\) Their dissenting conclusions rejecting significant aspects of the Human Rights (Parliamentary Scrutiny) Act 2011, and the JPCHR is summarised , 4.Recommendations above.
government, it does not achieve what a BOR does. The essence of a BOR is that it stands as a clear and comprehensive statement before the community of their human rights. As discussed in Chapter Six, the Consultation’s research found that many of its participants were unsure of what their rights were. It is proposition of this thesis is that our current national patchwork of human rights provisions, while providing considerable numbers of human rights safeguards in constitutional, statutory and common law, fail the test of public awareness and public understanding of their human rights, in that complex of human rights already established.

Added to that awareness weakness, the lack of a clear public standard of human rights provisions has led to human rights neglect of significant minorities in our community across decades. Parliament’s majoritarian approach to rights legislation has not served powerless groups well. There is an on-going political blockage in the Federal Parliament to a BOR, where opponents of it, neither appreciate nor accept the human rights benefits that a BOR signals to all in society, and as such, has been accepted in comparable democracies such as New Zealand and the United Kingdom.

Question 2.

Will the parliamentary model of human rights protection provide comparable rights to citizens as those where Commonwealth model BORAs can be found such as New Zealand and the UK?

It has been stated a number of times in this thesis, that political opposition to a national BOR has not meant that the opponents in Australia to BOR are opposed to human rights as such. The public support for human rights of Coalition Senators expressed in part of the Dissenting Report above, is encouraging given their long opposition to a BOR. It would be doing them an injustice to say that the Coalition has been completely anti-human rights, rather very conservative and backward-looking in the way that they should be expressed.

The view held by BOR supporters, is that while Australia’s human rights provisions are good, they are not good enough. The importance of a national BOR

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450 National Human Rights Consultation: Community Research Phase: ‘Colmar Brunton Social Research Report’, Final Summary 2.1, Common Ground: ‘Most are happy with their experience, but lack detailed knowledge’.

451 Chapter 7, Quote from Professor Williams at the interview 27 September 2011.
is that its human rights provisions belong to every member of our community. A BOR projects to citizens *their* human rights entitlements. In response to that human rights entitlement, the national culture of human rights improves, given that rights are important protections for everyone. Bills of Human Rights can readily be identified, as can abuses or restrictions imposed by government and its agencies.

What the Coalition parties do however when they consider it politically necessary, is to constrict or suspend important human rights, (as will the ALP, but usually they are more supportive of the idea of BOR protections). The Howard Government’s relatively recent negative record on human rights included trenchant rejection of the UN Human Rights Committee, criticisms of Australia’s human rights in areas such as ‘Tampa’, off-shore refugee processing, ‘refoulement’ of refugees. As well, their wind-back of ‘Native Title’, procedures designed to make it more difficult for indigenous applicants to obtain ‘Native Title’ to land, the excesses of anti-terrorism law, and weaknesses in ICESCR rights notably for the mental, dental, housing and earlier, disability rights. Australia’s on-going mistreatment of refugees on the high seas and on Manus and Nauru islands are examples of our government ignoring provisions of the *Refugee Treaty* 1950, to which we are a signatory.

This thesis’s BOR story questions and challenges the Coalition’s long and on-going position, that Parliament is the only place for human rights determination, and that it is the only suitable mechanism to provide an adequate national regime of rights protection. In their Senate Dissenting Report, the Coalition Senators argue that the Constitution, the common law and the statutes Commonwealth and State, largely protect Australian’s human rights and offer no criticism of the ‘patchwork’ that results.  

They reject the idea of a BOR of codified rights, as ‘fraught with danger’.

The idea that it is best to corral rights to the exclusive determination by Parliament appears to fly in the face of the weak public awareness human rights which we have. There has also been much criticism over time from human rights advocates of those provisions, which have been seen as lacking in scope and insufficiently embedded in our national law. Parliament remains unwilling to enact a plain language modest Bill or Charter of Rights which would reflect Australian values, as was found to be the case in New Zealand’s experience with their BORA.

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452 Senators Dissenting Report above n 445.

453 Ibid, s 1.18.
Review in Chapter Seven of the operations of JPCHR, indicate that its initial aims are not being met in work output, nor in committee unity. In short members of the JPCHR appear at least in the Liberal/National party appear to have moved away. Crucially in New Zealand, there was agreement that their BORA resulted in a three-fold benefit to human rights growth in human rights, an administrative ‘dialogue’ between legislators, the executive, and the public service which raised human rights consciousness in government. Secondly, assessments agreed that this NZBORA consciousness at government level, increased public awareness of their human rights.

The question also arises as to whether the Coalition will alter the Human Rights Parliamentary Scrutiny Act 2011, or elements of it, such as the JPCHR or SOC’s. There is a real possibility that they will attempt to implement their recommendations 1 and 2 discussed above, at a later stage of office. That is to say, they would narrow the definition of human rights to exclude non-domestic law sources of human rights and delete the operation of SOC’s, providing they controlled both Houses.

It is desireable to have the JPCHR and SOC operating successfully in the absence of a BOR, but even that human rights advance in Australia cannot be guaranteed into the future in the light of the dissenting report of the Coalition’s Senators. While those Senators expressed their support for human rights consideration by Parliament, they also sought considerable amendment to the Human Rights (Parliamentary Scrutiny) Act 2011 which would greatly reduce the scope of the rights to be considered and remove SOCs from the process. Effectively these changes would significantly reduce the profile of human rights consideration by the executive, Parliament and the public service. Emasculation of the current arrangements would push human rights onto the backburner again.

Parliament’s ability to remain committed to the benefits of these human rights changes is problematic. Can MP’s, the executive and the public service, see sufficient merit in the Human Rights (Parliamentary Scrutiny) Act 2011 and the PJCHR’s work by adopting to and fully co-operating with the changes and seriously accommodate the Committee’s compatibility requests on human rights of Bills and Acts. Opinion above, suggested that there is a low acceptance by Australia’s federal parliamentarians to use international human rights as templates and as legitimate yardsticks to measure
the suitability of legislation for Australia. The JPCHR in its deliberations at least, accepts that it can use international human rights treaties as guidance. Question 3.

Can Parliament alone without judicial participation, inject a robust human rights culture in Australia’s policy formation and law-making processes?

In answer to this question, one needs to assess whether Australia’s Human Rights Framework is a suitable alternative to a national Bill of Rights. The Human Rights (Parliamentary Scrutiny) Act 2011 is a very reasonable attempt to make an incremental improvement in the attitudes and practices of our politicians towards the importance of human rights. It does not however, meet the real human rights needs of the nation in a number of respects.

The current Australian Parliament its members and party structures now assume they have the right to have sole decision-making about human rights, despite the largest human rights inquiry in Australia’s history, and findings that a clear majority of participants wanted a national BOR. As its chairperson said afterwards, the will of the Australian people was ignored.

It is the position of this research’s findings that a modest Commonwealth BOR would be the most effective way to redress these inequalities by projecting human rights principles into our human rights culture and law, which would clearly acknowledge that all Australians are entitled to have their fundamental rights protected. Australian would have a BOR which would be visible to all, relatively easy to understand. It would link Australian human rights jurisprudence to the current international human rights network.

Human rights are actively promoted by the UN and its agencies and this thesis believes that Australian’s fearful rejection of a BOR has contributed to past and present human rights failures. A weak national expression of human rights by

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454 Williams & Burton, above n 428.


Australian governments, has led to a low understanding of citizens as to their human rights. A Commonwealth BOR would confirm to the constitutional fearful, as evidence has shown in Chapter Five of this thesis, that the New Zealand courts only effectively offer selected judgments to the government on inconsistent Bills and Acts, leaving the final decision to Parliament.

In the UK, senior courts provide human rights jurisprudence, where they deal with human rights disputation against the government. They also can where necessary send the government a statement of incompatibility in relation to its legislation. The government can decide to alter the offending item or leave it stand.

The New Zealand experience differs from the UK in that generally the courts can not declare legislation incompatible with their NZBORA. However in the case of discrimination issues under s19 of their Bill of Rights Act 1990 (NZ), they can.

One should be mindful however that even though the Commonwealth BOR defers to the Parliament having the last word, any unreasonable departure from what is reasonable government policy towards human rights in a free and democratic state, will bring with it political damage, the more unreasonable, the greater the damage. So the BOR while not legally more powerful than the Parliament, requires it to be able to justify departures from what human rights holders feel is reasonable. Having a national BOR means that citizens know what their human rights are.

It is unnecessary, even administratively damaging to Australia, given the above experiences of the UK and New Zealand, to believe that the courts should be removed from their traditional role of assisting the Parliament to help solve problems arising from their legislation.
CHAPTER 8.

STAKEHOLDER PERSPECTIVES.

8.1 Introduction.

This thesis considers it a necessary and valid addition in this thesis to have input from citizens who freely express their views on core questions raised. The research in this chapter seeks to understand what their thoughts were about questions of whether Australia needs a national BOR. This chapter’s BOR research has not been undertaken so that their views can be projected as statistically significant nationally on the BOR question, but to establish what each of the interviewees thought about those questions they were able to discuss.

The views expressed by these citizens, academics, parliamentarians, an NGO employee and the media, help to provide this thesis and its readership with some real opinions about Australia’s need or otherwise for BOR. To do this investigation, selected interviewees provided their views on one or more of the following five research themes or questions:

1. Why has Australia not adopted a national BOR?
2. What barriers do you see to a national BOR?
3. What are your views as to arguments for and or against a BOR?
4. Do you think that there any BOR strategies that work?
5. Are our current national provision of human rights adequate?

8.2 Methodology.

This chapter compiled the views of 20 of the interviewees with a semi-structured interview for each, at varying locations in New South Wales (ultimately selecting 15 interviewee answers to these questions. Each interview was transcribed, followed by a selection of those views thought most relevant and significant to the five questions posed to them above. The interviewees fall into two groups, firstly current and former politicians and secondly, individuals whose views about human
rights and a BOR have been gleaned from experiences in non-political occupations, such as law, public service, academia, journalism, education and NGO employment.

As such this interview sample has been compiled to provide a window for readers to see what these interviewees from differing backgrounds thought about the need for a national BOR. Given that some had direct political experience which involved the BOR issue it, it does give the thesis exposure to views from those backgrounds which gives some weight to their opinions.

These interviewees together offer perspectives about a BOR for Australia from those who are or were within the political process, and the other from citizens whose human rights views have been shaped at least in part from a variety of occupations. While in a number of chapters of this thesis, it has been suggested that a national BOR will only come when both major parties come to an agreement to support one, what citizens can add to the debate is also adds another dimension. Clearly a national BOR is about their rights and they have a stake in the debate and their voices should be heard.

The data from this chapter will be used to compare interviewee opinions with central arguments that have been advanced in this thesis. This particular investigative research is based on observation and communication with interviewees, a process in which the interviewer can draw thematic inferences from what the interviewees have said. At the end of the selected views expressed in each transcribed interview, the writer will add comments as to the BOR inferences thought to flow from each interviewee’s comments.

8.3 The Interview Process.

The key interviewee themes which emerged from this research add to comments made in previous chapters. While it is not necessary to promote interviewee views about these five themes into the foreground of this thesis’s research, they do provide views which are independently given and relatively recent. They also provide guidance as to how these interviewees felt about Australia’s human rights provisions, and more particularly as they relate to the issue of a national BOR and this research’s findings.

The interviews were an interesting if lengthy undertaking to secure their opinions. The interviewees offered open and generally clear answers to questions to which they had opinions. Answers provided by a number of the non-political
participants, also revealed quite extensive backgrounds knowledge about our national human rights, particularly from those from public service, journalism, academia, and from human rights agencies.

8.3 Lack of Conservative Political Interview Participation.

There appear to be a number of reasons for the small number of current political participants in the interviews, (especially Liberal-National Parties, but including the Greens and some ALP members). At the time of the interviews, (the minority Gillard government was struggling with the help of independents), federal Parliament was effectively locked in an intense political struggle, and all but one Coalition MP contacted were unable or unwilling in that climate to provide time for this policy discussion. It was disappointing however, that not more MP’s felt that they had a public duty to discuss BOR policy which would affect the rights of voters in their own electorate, the nation’s federal electorates and the wider community.

What of the almost complete lack of response for an interview by Coalition MP’s does point to most directly is the Coalition’s a refusal to engage, which has been posited with evidence in the chapters by this thesis as a political position based upon their ideological party policy which rejects debate on BOR questions.

It was therefore appreciated that following a request for an interview, former Prime Minister Howard did assist this inquiry by sending a hard copy of his 2009 Menzies’s Lecture ‘Proposed Charter of Rights,’ delivered at the University of Western Australia on 26 August of that year. The 30 page speech contains a detailed rebuttal by the Mr. Howard of the need for a BOR in Australia, which it is assumed by the failure of current Coalition MP’s to engage with the interview requests, is still Coalition policy, writ large on the issue.

On the same theme, anti-bill advocate Senator and Attorney-General George Brandis delivered a speech entitled ‘The Debate We Didn’t Have to Have: The Proposal for an Australian Bill of Rights’, at James Cook University on 14 August 2008. Both speeches were delivered in anticipation of the Rudd Government’s commissioning of the National Human Rights Consultation and its possible BOR recommendation.

Short extracts of each speech, although not part of the following interview process, are included to at least widen the perspective of the conservative political arguments against a national BOR, which the interview process was unable to obtain
from interview. These speeches are presented therefore from two key Coalition’s figures, who were and still are, standard bearers for the Liberal-National Coalition parties opposition to a national BOR.

4. Extracts of Howard and Brandis National BOR Rejection.

8.4.1 Former Prime Minister Howard’s Speech.

It is not necessary to conduct an exhaustive review of Mr. Howard’s speech, given detail in Chapters Three, which traced the history of conservative opposition to a national BOR, however a selection of what are considered his key arguments are appropriate to obtain deeper understanding of views on the opposing side of the debate. The views politician’s hold, ultimately refine down to conceptions of political ideology and policy grounded in their personal experiences while in office. Mr. Howard’s long history of service to the nation entitles his political vision around a BOR to be respected and outlined, but it does not entitle him or any other active or former politician to consider their views about a national BOR are beyond questions for the nation.

1. The essence of my objection to a Bill of Rights is that contrary to its very description it reduces the rights of citizens to determine matters over which they should continue to exercise control. It does this by transferring decision-making authority to unelected judges accountable to no one except in the barest theoretical sense.\(^{457}\)

2. I have always held the classical view that the public elect members of Parliament who pass laws, hopefully in the public interest and those laws in are in turn interpreted and enforced by the courts. That sentiment is at the heart of my objection to a Bill of Rights.\(^{458}\)

3. In the Australian context the adoption of a Charter or Bill of Rights would represent the final triumph of elitism in Australian politics, the notion that typical citizens elected by ordinary Australians cannot be trusted to resolve great issues of public

\(^{457}\) J. Howard, ‘Proposed Charter of Rights’ Copy of Speech sent to the writer, 26 August 2009, at University of Western Australia.

\(^{458}\) Ibid.
policy, and that the really important decisions should be taken out of their hands and
given to judges who after all have a superior capacity to determine these matters.459

4. Our parliamentary system has many flaws but ultimately it sets the tone of the
national debate and ought to be the ultimate decision-maker because it is the
identifiable and collective representation of public opinion460

5. If adopted it must further weaken the role of Parliament and therefore, in a very
basic way, the quality of our democracy.461

6. If Parliament wishes to alter the law then it will proceed to do so.462 Of all the
arguments I hear advance in favour of a bill of rights, none is more offensive to me as
an Australian than the constant references to this nation’s international
obligations[to treaties and conventions 463

8.4.2 Senator George Brandis( current federal Attorney-General).

1. I want to explain why in the view of the Opposition Australia does not need a bill or
charter of rights, and why we consider that any attempt to impose one upon us
would be, at best wholly unnecessary and may result in unintended and potentially
very dangerous consequences.464

2. The debate about a bill of rights is about means not ends. In particular, it is about
two things: first whether the protection of rights which our citizens undoubtedly have
would be better served by the enactment of a bill of rights than they are under the
existing law and secondly, whether the debate on the question of what substantive
rights Australians should enjoy takes place in the open forum of elected and

459 Ibid, 8.
460 Ibid, 16.
461 Ibid, 17–18.
462 Ibid, 23.
463 Ibid, 27.
464 G. Brandis 'The Debate We Didn’t Have to Have: The Proposal for an Australian Bill of Rights', Reproduced in J Lesser
& R Haddrick, (eds.) 'Don’t Leave us with the Bill: The Case Against an Australian Bill of Rights, (ch) 2,18, (Menzies
Research Centre 2009),(Address to James Cook University, 14 August 2008).
accountable parliaments or is determined by unelected and largely anonymous judges in cloistered environs of the courts.\textsuperscript{465}

3. The common law also enshrines important presumptions which protect substantive rights through the canons of statutory interpretation...the presumption that Parliament did not unless expressly stated intend to limit personal liberty or freedom of speech.\textsuperscript{466}

4. It is therefore the view of the Opposition there is no case for the enactment of a bill or charter of rights, in the absence of any demonstrable need for one.\textsuperscript{467}

These speeches follow in large part those discussed by opponents to a national BOR in Chapter Four, that is, the fear of damage to our constitutional structure and to the power balance between parliament and the judiciary.\textsuperscript{468} Their opposition is basically legal and political and while that is fundamental to the government of the nation, they seldom seem to involve any specific perspectives or appreciation about the needs for social, economic, or cultural rights in the nation.

The extract of significant views above of former Prime Minister Howard, fails to offer any real debate which contesting the claimed advantages that the ‘Commonwealth’ BOR model of human rights might make for a more effective human rights provision for government: between executive legislature and judiciary, for citizens; to adopt some of the changes from international human rights jurisprudence decisions in other democracies. Changes such as the further growth of economic social and cultural rights from the ICESCR, particularly as promoted in the European Community are apparently from his comments, regarded as ‘offensive’.

Senator Brandis’s speech expressed fears that the consequences of enacting a BOR, may result in unintended and potentially dangerous consequences. This view appeared later in similar vein in Senate committee discussions around the introduction of the \textit{Human Rights (Parliamentary Scrutiny) Bill 2011} in Chapter Seven. The dissenting report there of Coalition Senators in s 1.18 considered: ‘it is fraught

\textsuperscript{465} Ibid, 19.
\textsuperscript{466} Ibid,10.
\textsuperscript{467} Ibid, 23.
\textsuperscript{468} Above Chapter 4, n 145.
with danger to attempt to codify rights at all’. Like Prime Minister Howard, he also appears to avoid any actual examination of the possible merits that a BOR might be able to achieve for citizens.

It is fair to say that each of the above speeches reflect unwavering conservatism for the BOR constitutional status quo and almost nothing about human rights needs in Australia. The possibility of change outlined in this thesis appears to be so threatening to the constitutional fabric of Australia, that they do not even have a desire to discuss alternatives to the present system. Such ideologically driven political rigidity raises suspicion that there are other unspoken factors that are driving their agendas.

8.5 Selecting Themes.

Note that a chosen questions may be relevant to more than one theme and that an interviewee’s views will appear in varying numbers of these themes. For example a view about a lack of BOR community education, could be just as relevant to the theme, ‘a BOR Strategy that works’. The comments of the interviewees are written in italicised calibri script, to distinguish them from the interviewer’s comments. The themes as mentioned, are those selected as the most substantive interviewee comments.

Not all of the interviewee’s opinions have been included in this chapter, because their comments were not sufficiently substantive to the issues in each theme.

The following summary sets out Interviewee and questions commented on. In each of the five question interviewees are alphabetically listed in order, lower case.

Senator Scott Ryan: 1,5.

Robert McClelland: 1,3,4,5.

Natasha Stott-Despoya: 1,3,4,5.

Jim Crawford: 1,2,3,4,5.

Robert Oakshott: 1,3,4.
Cassandra Goldie: 1,2,4,5.
Meridith Burgman: 1,5.
Antony Loewenstein: 1,3,5.
Simon Corbell: 2.
Cameron Murphy: 2,4.
Peter Bailey: 2.
Katie Wood: 2,4,5.

Gillian Triggs: 4.
George Williams: 4.
David Shoebridge: 4.

8.5.1 Selected Themes.

1. Why has Australia not adopted a national BOR?

   The history of entrenched opposition of successive Australian governments to a national BOR over decades, has been discussed in detail in Chapter Three. Research there revealed that there were number of reasons across time for BOR opposition including:

   (i) a reluctance by the founding father’s to provide a bill of rights in the constitution for all citizens and others in the community.
   (ii) a belief in the adequacy of Parliament to protect human rights based on its foundation principles of English liberal constitutionalism.
   (iii) the inability of the ALP to manage and fully support its avowed goal to have a national BOR.
   (iv) the difficulty for the ALP to gain control the people’s house the Senate, to enact a BOR, many of the states being suspicious of and unwilling to support the human rights impacts on their power such a BOR might entail.
v) the issue expressed at the conclusion of Chapter Three, that when in opposition, the political successors of earlier conservative parties, the Liberal-National Party Coalition simply opposed a BOR for pure political gain rather than for sound political policy.

Most interviewees discussed the issue of ‘no national BOR’ in the context of present or recent times, rather than across the past decades that opposition to a BOR has occurred. The following interviewee contributions to the first theme follow, with the author’s comments about what can be inferred from those views. The issue of ‘No BOR’ was discussed to see what opinions they had about Australia’s BOR exceptionalism, where barriers persist to block a BOR.

(a) Scott Ryan, Liberal Party Senator, Victoria thought that there were a number reasons why we have no BOR.

\[\text{Why Australia has not adopted a bill of rights has been a very conscious decision in the Convention Debates not to have one. There was a conscious decision not to have one and when you add that to what some may call Australia’s constitutional conservativism, or in fact I view it in a much more positive light, only people can amend the Constitution, our politicians and people, neither can amend on their own, the consent of both is required. I view it as double consent.}^{470}\]

\[\text{My personal view is that I don’t think that we need one and I have got a lot of challenge about the effectiveness and I’ll tell you anything that is along the Canadian or Victorian model that allows parliamentary override, I am vehemently opposed to.}^{470}\]

\[\text{The second issue that I have with bills of rights[concerns positive and negative rights]. The American Bill of Rights is the classic bill in definition of negative liberty, the government will not, Congress will not and that is for someone like me, a proud classical Liberal. The Victorian Charter of Rights, the European Charter, they have got all of those so-called positive freedoms which represent claims on the rights and resources of others. A right to housing or education is in effect a claim on the resources of you, on the economic resources of you, the community. Whereas the freedom of speech is not, it is simply saying absent of incitement to violence, genuine}\]

\[\text{\footnotesize{470 Interview with Senator Scott Ryan, Liberal Party, Victoria, Parliament House Canberra, 18 June, 2012.}}\]
common interest or a common threat that we don’t have, my speech does not hurt you.

Comment 1.

Senator Ryan was one interviewee who did refer back to the past history of human rights in Australia, and his view that an important reason why we do not have a BOR is that the Constitutional Convention did not adopt one. His point on this historical fact however seems to leave out contemporary need for better human rights since that time, and more particularly in a rapidly changing Australian community. Additionally at this interview Senator Ryan believed by inference his fellow parliamentarian that their party also rejected that they should have the adoption of international human rights protections and jurisprudence found other contemporary countries similar to Australia.

His most significant justification for our nation’s failure to enact a BOR however, is his rejection of government’s providing positive ESC human rights, as a cost to the individual and a financial burden on others (which one can infer, includes their supporters in business). By implication, he appears to think that such positive rights need barrier against provision of a national BOR.

The statement of a being a, ‘proud classical Liberal’ reflects one important, perhaps the most important, philosophical reason why Australia’s conservative politicians and supporters reject a national BORA. In short, for Liberal-National party politicians, government spending should not crowd-out investment needed by the business sector, nor should taxes be levied for public spending on business, which hinder satisfactory returns for individual effort and enterprise.

The neo-conservative movement generally recognised this dictum and conservative politicians in countries such as the USA and the UK, under leaders President Reagan and Margaret Thatcher, successfully sought to reduce public spending and lift the wealth of individual and corporate enterprise, with lower taxes. At the same time they both waged an ideological war against trade unions, to further assist business profitability.
Senator Ryan expressed the view of conservative politicians in Australia who adopt that position for their supporters in business, and it appears to be an important if not the major underlying driver of resistance to a national BOR by them. Senator Ryan’s view, ‘that we don’t need one’, runs counter to this thesis’s view expressed in s 3.3 of Chapter Three, which is critical of the 1898 Constitutional Convention decision not to have a basic statement of human rights in the new Australian Constitution. That refusal contributed to a weak national human rights culture, which a BOR proclamation of every citizen’s fundamental rights would have ameliorated.

(b) Robert McClelland, MHR for Barton. (Then retiring Attorney-General).

The former federal Attorney-General answered Theme 1 question, from the perspective of the ALP’s rejection of the 2009 Australian Human Rights Consultation recommendation to them, for a national BOR.

Yes for a couple of reasons, one is that we weren’t going to get an entrenched bill of rights set up. The second reason is that with the Bill of Rights there is no doubt it was controversial, and my sense of the attitude of caucus and cabinet colleagues obviously with some exception, is that at this point of time they were not prepared to have a legislative bill of rights.

Specifically I thought that the community needed time to be educated, if you like, about the significance of rights and for all those reasons we elected to proceed with the statement of compatibility by Ministers and the enhanced scrutiny of legislation with the Joint Parliamentary Committee on Human Rights. I can say now that I never put to Cabinet the legislation for a bill of rights. I had taken a straw poll, if you like in independent discussions I had over matters of significance with individual ministers.

Comment 2.

As former Attorney-General McClelland indicates, he could not get sufficient support from Caucus and Ministers to take the BOR question to Cabinet, and

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472 Interview with former Attorney-General Robert McClelland, Sydney Electorate Office, 28 March 2012.
pragmatically he was forced to present Australia’s Human Rights Framework as the alternative and put as much political gloss on that policy as he could. As a long serving and loyal Labor politician his experience meant that he had to move to a compromise as a way forward.

This issue has been discussed at some length in Chapter 6.3, the National Human Rights Consultation. I have a sense that Robert McClelland was in effect saying for the record, ‘Don’t blame me that the Brennan Committee recommendation for a national BOR did not get Cabinet approval, not enough Ministers would back it’. In effect he was putting out on public display, disunity within the ALP for a national BOR. Another reason for rejection was the need for more community BOR education is a valid one, mentioned by other interviewees.

His removal from the Attorney-General’s portfolio possibly encouraged him to speak out about the negative response of enough Ministers and crucially then Prime Minister Rudd, to sink the proposal, rather than his doing. Effectively, he and the ALP by-passed the option for a BOR and substituted the National Framework. While this thesis supports the improvements made by the Framework, it does not consider them any more than incremental gains, compared to the national impact that a BOR would have to protect all Australian’s human rights.

(c) Natasha Stott-Despoya, former Senator, SA, Australian Democrats, Party Leader and member.

Senator Stott-Despoya provided a political retrospective of how she saw the absence of a national BOR initially politically and then how her views changed.

There are some positive reasons arguably, why we haven’t had one and that is a complacency, based on the fact that Australia has a reasonably good human rights record. We have got parliamentary and judicial traditions that set us in good stead. We have been remarkably progressive with certain aspects of human rights and equal opportunity law, race discrimination legislation. So there has been a sense that the Parliament and the processes of the legislature, as well of as course the whole separation of powers—there has been almost comfortableness that we didn’t need any added layers. We didn’t need that sovereignty of Parliament arguably undermined or

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473 Professor Zifcak’, above n 353.
complicated by another level-be it at a constitutional or through statutory enactment. So I think there has been a healthy tradition.

Five years strengthened remarkably my views during the Howard era, understandably that was the period when I was in politics. I entered at the end of the Keating Prime Ministership, I was there for the beginning of Prime Minister Howard and then I was there for the beginning of the Rudd era- he got in in 2007 and I finished in June 2008. So I think there was a noticeable difference in human rights protection or maybe some of our vulnerabilities were exposed during that time through parliamentary changes. Whether it was attempts or otherwise to undermine things like the Racial Discrimination Act or to see the impact of changes to anti-terrorism laws for example and that particular impact I perceived as human rights. There was this sort of combined impact that made us realise that it was time to have, instead of that patchwork approach to human rights in Australia, something, not that mishmash, but a more consolidated framework be it through the constitution or more likely through the adoption in the form of legislation.\(^{474}\)

Comment 3.

Natasha’s stimulating and extended interview reveals her human rights knowledge and experiences as a former politician. She has been as this interview indicates, a strong supporter in Parliament for a national BOR, where in a minority party, she and colleagues were rebuffed by the major parties.

She outlined the human rights positives in Australia, and reveals how her political desire for a BOR was crystallised by actions of the Howard government whose policies, she perceived to be serious infringements on our human rights. As such her views are similar to many human rights activists then and now. These human rights infringements demonstrated by the the Howard government were discussed above.\(^{475}\) As well they resonate to elements of factors which can trigger a BOR and outlined by David Erdos in s 5.3 of Chapter 5.

(d) Jim Crawford, former Public Servant/Lawyer.

\(^{474}\) Interview with Natasha Stott-Despoya, Sydney, 10/10/2012.

\(^{475}\) See Chapter 7, p 211, Conclusion. Question 2.
Jim thought that Australia did not need a BOR because we have never had the social or political disruption, which often produces the need for one.

_It seems to me the highest point when you can get a bill of rights is when you have got trouble and World War Two I would class as real trouble and that led to the UN Declaration and the Europeans have built an interest in human rights. I assume the Canadian minority issue was alive and well when it came through, so the Canadian thing, you had a particular bloke Trudeau running the show in a time of trouble—now we haven’t had trouble here. Really we haven’t had the problem it it seems to me, we haven’t had to face up to some of the hard issues._

_There is no coherent case being put forward for a bill of rights, you have got certain constitutional lawyers pushing it from time to time, every now and again it gets a run but there are no on-going issues being championed by various people. Of course I think people here are a bit suspicious of it here in this country, we would be uncertain of what benefits would come—we don’t even know what rights. The rights that they are talking about are basic rights and have always been protected in one way or another in this country._  

Comment 4.

Jim Crawford presented his ideas incisively and with an apparent significant public service background of having considered this issue. His comment on ‘trouble’ needed to produce a BOR has been discussed in the Chapter Five, the New Zealand BORA experience where academic Erdos discusses needed BORA ‘triggers’.  

The trigger there was claimed as the impetus for the NZBORA produced partly by the perceived undemocratic rule of Prime Minister Muldoon.

Jim mentions another reason why Australia does not have a BOR, as the absence of an available ‘champion’ to push the case for one. More discussion on that issue follows shortly. His claim that all basic rights are protected in Australia however does not in this writers view, stand the test of current evidence. There is evidence

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476 Interview with Jim Crawford, Sydney, 4 April, 2013.
477 Erdos, at Chapter 5, Section 5.3.
that citizen’s rights can and are abused by politicians in Australia where they feel it appropriate to do so. Chapter Seven outlines critical comment in that regard by Williams and Burton, where the Northern Territory which had been in need of government assistance for its problems, became the Northern Territory Intervention in a distinct pre-election process.  

Jim sees no coherent case being put forward by activists at the moment, and this is not to say that activists have given up nor that they are not active groups based around universities and unions who are interested in a future campaign. The lull is not an end to the struggle.  

(e) Robert Oakshott NSW MHR Independent, Port Macquarie.  

Robert put forward some of the constitutional difficulties which prevent BOR acceptance by the Parliament.  

Separating policy from politics in a policy sense, there is a concern as to how a BOR would fit alongside existing Australian Constitutions, current Bills and current jurisprudence, that’s the policy rightly or wrongly. It does not feel settled on that front, the case of how a BOR would contribute rather than potentially being in conflict with existing structures. I actually think that it is a bit of a trojan horse for the politics.  

Comment 5.  

Interviewer. If you read the British HRA and the New Zealand BORA, in fact in practice that constitutional conflict is not what happens.  

Yes, I think in short from any of the corridor gossip after having participated actively in the last round, I think it is just straight out politics, there has been a reluctance to engage.  

Robert made a very interesting observation in relation to the politics of BOR rejection. Note his concluding comment, that the arguments of a BOR as causing conflict with existing structures, is a political construct, a ‘trojan horse’ hiding the real reasons why the Coalition reject it. This resonates with a view which has been forming across the course of this thesis, that the Coalition arguments of

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479 Williams interview comment.  
constitutional damage with BOR are overblown, and from New Zealand’s experience under their ‘Commonwealth’ BORA, not proven.481

(f) Dr Cassandra Goldie CEO of the Australian Council of Social Services.

Dr Goldie proved to be quite dynamic in her assessment of Australia’s BOR reluctance.

The Labor Party itself is a broad church, the influence of the church is alive and well within the Labor Party—as you know some of the foundations of the Labor Party are embedded in the Catholic ethos. I think also that in the chaos quite frankly of the Rudd Government, we were unfortunate in that we had an Attorney who understood the merits of the case, but was unable to succeed in Cabinet in the light of ambivalence around the table and the trade-offs—of which battles are we prepared to take on? Just to come back again to the Labor Party, because it is founded in the idea of collectivism, the idea of individual rights trumping the group is not its natural way of understanding of how to assert power. So the idea of through collective action you will asserts the rights of people rather than individualised claims—but it’s a kind of warfare paradigm you know, Labor against business, employers together we stand united we fall. Whereas the BOR recognises that even within small groups, there can be individuals who are seriously unrecognised.482

Comment 6.

Dr Goldie’s analysis of the question focuses on the most recent rejection of a BOR by the ALP before the 2010 election. She points to the internal weaknesses of the ALP to cohesively act on the issue of a national BOR because of member loyalties their to church particularly the Catholic church. She implies that ALP division of loyalties is one of the reasons why surges failed.

Allied to that issue she points to another party policy barrier to acceptance of a BOR as being rooted in the ALP’s collectivist conceptions of power, with the result that party policy is and has been focussed in the directions which largely involved group rights rather than individual claims.

This thesis is attracted to her reasoning about ALP’s failure to achieve a national BOR as a significant insight, which goes part of the way to explain also

481 Chapter 5, Conclusions. Section 6, Assessing a NZ style BOR for Australia.

482 Interview with Dr Cassandra Goldie, CEO ACOSS, Sydney, 16 April, 2013.
While Chapter Three advance assessments of why the ALP BOR campaigns never succeeded, now Dr Goldie’s concept of ALP having ‘collectivist conceptions of power’ is another reasonable additional factor to consider in the failures. This would align with the thesis’s mention of Meredith Burgman.

(g) Meredith Burgman. Sydney City Council, former ALP Chairperson of the NSW Legislative Council. Sydney

Councillor Bergman (at that time), thought that interest in a BOR by activists has declined.

*I think that the people who think that a BOR is a good idea are not seeing that as their sole or intense interest—they would have other interests they see as more important like reconciliation or anti-war or something like that. It would not be front and centre for the activists who would be pushing for it. There are opponents of a BOR inside the Labor Party and there are supporters of it.*

Comment 7.

Meredith felt that other human rights issues have taken rights activists away from the national BOR. Human rights problems do play out over a wide range of human activities and at different times from natural disasters to human activities such as conflict. As well, she mentions NSW ALP party division over a state and national BOR, dominated by the personality of Premier Carr.

(h) Antony Loewenstein, Independent Journalist, Sydney,

Antony saw the BOR question in contemporary terms.

*There is no definitive answer of course, I guess I would say a few things. Why it has not happened here is for a few reasons. You have a very strong conservative press, you have the most highly concentrated media in the western world—70 percent of the print media is owned by Rupert Murdoch. There is not necessarily a uniform view of every person who writes for those publications, but editorially speaking, there has been a decision that this kind of policy, [a national BOR] is not to be supported in Australia, and of course you have a range of people who come out as you know to*
criticise, say it is inappropriate etc, mainly from the conservative side, but also from the Labor right as well, Bob Carr as well as others. That’s one strong reason.

This is an issue which doesn’t really affect 95% of the population. There is [in Australia] a ferocious cultural war going on and [it] has been going on for many, many years, well before the Howard years. I think what Howard did very cleverly, not that I agree with it, but what he did from his perspective politically, was to give a sense that there are two groups in society—there are the elites and everybody else, and the idea of instituting a HRA is framed by its critics as not allowing Australians to have their own view, not being able to be critical of different groups in society, not a belief that Australia is in fact is a generous country, —the idea that somehow lawyers and left-wing journalist and others see Australia as not just born in sin, but living and behaving in sin. In other words its policies whether it is done by Labor or Liberal are fundamentally flawed and politicians cannot be trusted to treat people humanely.

These are the main reasons why it hasn’t happened—putting aside the legal argument which of course are made against it.

Comment 8.

Antony raises issues which are found in Australia and many other societies, where an on-going economic and political struggle takes place between elite groups and their supporters, who seek to protect their wealth generated by enterprise, where on the other hand, human rights advocates seek to achieve a more equitable measure of national income and opportunity, especially for the poor and disadvantaged. The argument about unequal income distribution in a community of course, revolves on the extent or degree of income inequality in a particular country.

This issue of economic class struggle will also be discussed in further detail in the concluding Chapter Nine, where a final restatement of the thesis’s finding will be thesis will be outlined.

Summary Theme 1.

Theme 1 ‘Why No BOR’ responses reveal a number of reasons why the nation has ailed to achieve one, across the long and short term. Robert McClelland’s human rights initiative was to by-pass the idea of national BOR, through an achievable

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484 Interview with Antony Loewenstein, Sydney, 31 January 2013.
mechanism for human rights improvements, the Australian Human Rights Framework. His view clearly was that a national BOR was politically unachievable by the Labor party under current political circumstances at that time, although he personally would have been happy to introduce one. He indicated that his Department had the same desire to achieve one.

Chapter Six traced the inability of then Attorney-General McClelland, to convince key Ministers in his party to try for another national BOR attempt. Chapter Seven examined the operation of the Framework and its associated legislation, which aims at raising the human rights awareness of Parliament and its public authorities.

Senator Scott Ryan attributed the action of the 1898 Federation Convention in rejecting human rights provisions in the Constitution was an important to maintain; that liberal party ideology objected to especially to many positive human rights that take wealth away from some to give to others.

Jim Crawford thought that a BOR is unnecessary because our national human rights have not been challenged by serious disruption; that our civil rights have been adequately protected; that there in no coherent call for a national BOR, no champion in sight.

Robert Oakshott felt that a BOR was being held back because of Coalition anti-BOR political ideology being used as a trojan horse to block it: he was also uncertain as to its fit into Australia’s constitutional structure.

Dr Goldie considered that the ALP had political division over the BOR issue based on a number of influences: its tradition of power through collectivism: a warfare paradigm where its primary role has been the struggle for workers against business, with lower concerns about individuals and small groups: strong roots with the Catholic church which has issues with human rights which affect its operation of schools in particular.

Meredith Burgman thought that rights activists has moved to other issues than a BOR: that both New South Wales ALP Premier and Treasurer had run strong anti-BOR campaigns in the state, and that a strong civic structure in the State had protected many human rights.

Antony Loewenstein considered that a long-term ‘culture war’ (read an ideologically driven economic class war) has been raging in Australia between the
wealth sector backed by the conservative press and human rights advocates and groups such as unions, being focused on rights issues.

8.5.2 Theme 2.

**Current Barriers to a National BORA.**

What are the perceived barriers at present which prevent the adoption of a national BORA in Australia? The first of these raised is lack of BOR Community Education in Australia.

(a) Attorney-General, ACT, Simon Corbell’s view was:

*I think that perhaps also there has not been sufficient explanation as to how it operates, to a broad range of people, particularly to those who are opposed to a BOR. It is very difficult to engage the community in these types of debates because we are necessarily dealing with fairly abstract legal principles which a lot of people find quite alien.*

Comment 1.

Simon’s statement agrees with evidence, expressed in Chapter Six, where the the National Human Rights Consultation’s ‘Colmar Brunton Report’ found that most people surveyed in their research had very limited knowledge about their rights or how they are protected.486 A number of interviewees expressed views about this barrier, the failure of BOR advocates, political and other organisations, to advance a significant BOR community education program.

(b) Cameron Murphy, President Council of Civil Liberties, lawyer, NSW.

Cameron expressed the same idea as above, from his past experiences.

Yes look there are two problems I see that have led to it, one is the education issue, where anecdotally you talk to people and also look at published polling in the area and I think that many people now believe that we have a bill of rights. You simply talk to people and believe that from the influence of American TV and other popular culture, they believe that one is already in place.

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485 Interview with ACT Attorney-General Simon Corbell, Canberra, 18 June 2012.

Secondly when you explain to people that you don’t actually have these rights and that governments provide them and take them away at will, then people have a tendency to object to a bill of rights because they see the in nations like the USA, where there is a right to bear arms.487

Comment 2.

Cameron’s recognition of inadequate public BOR education comes from his wide contact with people through his role with the NSW Council of Civil Liberties. He is the son of Senator Lionel Murphy and is an obviously passionate about human rights. Here he indicates that not only has there been weak community education about human rights, but that it leads on to a weak culture of human rights within the Australian community.

(c) Professor Peter Bailey, Australian National University, gave comments about his university’s survey in Canberra, prior to the adoption of their BOR in the ACT.

The ANU did a survey in the early 1990’s about people’s attitudes to a bill of rights and it came out at about 75 percent, but when they came down to such such things as would you support a right to life, freedom of assemble,and so on, the ratings went down to more like 50 percent to 40percent. So there is something there about the peculiarity of human rights statements that frightens people. I think it is so easy to see, if you are in a minority.488

Comment 3.

Peter’s comment touches on educating Australian’s about human rights and this can be complex and difficult given the limited culture of national human rights. One of its key elements relates to educating the public to understand that individuals and minorities have rights as well as the majority of the community. He did make the following comments about the necessary approach to the community prior to the BORA being enacted:

487 Interview with Cameron Murphy, Sydney, 27 July 2012.

488 Interview with Professor Peter Bailey, ANU, 5 October, 2011.
We have got one in the ACT, a small community, a lot of ‘consultation’ (read community education’). What we found in the ACT was that the people came in with one-third not knowing, one-third for and one-third against. It ended up 60% or more saying yes, we think that a bill of rights would be a good idea, and the no’s were down to 20%, the rest ambivalent. It was the same experience George [Williams] had in Victoria (where he assisted in the discussions and achievement of a BOR for them).

(c) Dr. Cassandra Goldie, CEO, ACOSS (NSW).

She thought that the political spectrum of the Coalition Parties has moved further to the right and the present political ideology of conservative parliamentarians means that the barrier to a BOR has become stronger.

On the right I think that you would find that within the Liberal Party historically there were the ‘wets’ who would have been quite open an amenable to the idea[of a BOR], would have been supportive of it within the party, but with the shift to the right and again with the power of the churches within the Liberal Party they are both strong influences. On the one hand the churches are opposed for reasons of self-interest-parts of the churches and I think on the right of the Liberal party you have got a very neo-liberal commitment to the belief that it is through market mechanisms that people’s welfare is looked after—there is an instinctive lack of enthusiasm to give away power and control.489

Comment 4.

Dr Goldie’s comments consider the role of changes to party policy over time. Her statements indicates a belief that there has been significant shift in Liberal Party policy to the political right which rejects a national BOR as perhaps, an impediment to business operations in the market economy, coupled to rejection pressure from elements of church supporters. This would seem to be a significant part of the policy projected at the present (2014) budget policy of the Abbott government, where proposed large cut-backs to key areas such as health, education and the elderly appear to fit that market economy paradigm.

Her final comment pointed to the wider political network blocking a BOR.

489 Goldie Interview.
It is not in the interests of the rich and powerful to have a BOR from churches through to politicians and through to business.

(a) Katie Wood, Legal officer with Amnesty International.

‘If it ain’t broke, don’t fix it’—the ones who say that are not experiencing discrimination, whilst the ones who do think that we need human rights protections happen to be the people who are experiencing discrimination on a daily basis.\textsuperscript{490}

Comment 5.

While not speaking directly on behalf of Amnest International Australia, her views are a reflection obviously from her extensive NGO work and experiences here and overseas, are critical of the the view of opponents to a BOR.

(b) Jim Crawford, was asked by the interviewer as to whether a human rights education program could assist in removing a major barrier to acceptance of a national BORA by the community.

No. I think they would buy it if they needed it. If someone could persuade them that this bill of rights would fix the problem they were in. Part of the problem is that anyone will have with a big national change like this would be that the country is so big and diverse in its attitudes and cultures that getting to a lot of people is going to be quite tricky. So you are going to have champions in various communities as well as some overall champion.

We have an enormous number of conventions that we have adopted-some of them deal with human rights issues—but one way of getting this [BOR] thing established is to make much greater use of international conventions.\textsuperscript{491}

Comment 6.

The last idea may have been discussed at public service level, as a strategic possibility when Jim was in public service, before the government moved on it, through the Australian Human Rights Framework. However it does show that despite present objections to a BOR, that he does see there are possibilities which might overcome present barriers to one. The Gillard ALP government and its adoption of

\textsuperscript{490} Interview with Katie Wood, Lawyer at Amnesty International Australia, Sydney, 22 February 2013.

\textsuperscript{491} Jim Crawford Interview above.
the Human Rights (Parliamentary Scrutiny) Act 2011 and the JPCHR has moved ‘incrementally’ in this direction, where from Australia’s seven key Conventions, over 100 human rights can be raised.

Summary Theme Two.

Statements from Simon Corbell, Cameron Murphy and Professor Bailey pointed to previous BOR failures because of insufficient consultation with the community, which has led to poor community understanding of their rights. Professor Bailey pointed to the extensive consultation undertaken by rights supporters in Canberra, which assisted significantly in the enactment of their BOR, which was steered through the Legislative Assembly by ‘champion’ Chief Minister John Stanhope. As well, he pointed to Victoria’s quest for a BOR by Chairperson Professor George Williams, where their ‘champion’ was Attorney-General Rob Hulls.

Jim Crawford though that the barrier would not be removed without a BOR champion, or at least the barrier could be by-passed by adopting specific rights from treaties. Conservative political ideology, tied to support groups such as the church interests, who also oppose a BOR, was seen as a major barrier by Dr Goldie, coupled to the ALP’s tradition of majoritarian government.

The strengthening conviction of this thesis, is that the single largest barrier to a BOR is the political opposition of the Liberal-National Party Coalition and their supporters to one, together with some ALP party division on the question. Dr Goldie has also pointed to their ideological political BOR opposition as deriving from a belief that the needs of the market driven economy are the most effective way to care for the welfare of people.

This thesis began to consider the question of the support given by our conservative parties to business and commercial interests in Chapter Two s2.7, where it looked at party-political ideology and its relationship to the question of national human rights provisions. The BOR rejections of the Coalition were traversed

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492 Attorney-General Roxon, Speech on page 173.

493 French, above n 335.
in some detail in Chapter Three, where political blocking tactics and party pronouncements clearly demonstrated their absolute opposition to a national BOR.\textsuperscript{494}

8.5.3 Theme 3.

**View about Opposition to a National BOR.**

**(a) Robert McClelland.**

Interviewer: Have you ever read ‘Don’t Leave Us with the Bill’ A Menzies Centre production, a catalogue of criticisms some of it narrowly focussed, but a lot of it was [about] the big issue of taking the Parliament’s power away.

Robert McClelland. *No I have not. Can’t happen. They naively assume that politicians are driven by pure motives and they are not.*

What is your opinion about the stance of conservatives and the Bill of Rights? It seems that they do not want to take up the issue, a lot do not want to touch it.

*That is quite true- a lot of anxiety in both political parties. Is it that they see bills of rights as giving resources to lawyers to represent people who are not particularly popular in the community - a very narrow and skewed and inappropriate line of life to take.*

**Comment 1.**

Two important issues are raised here by Robert McClelland. Firstly he points out a flaw in the claim of that all of those in Parliament have purely unselfish interest in solving the communities (human rights) needs. It follows therefore that the claim of parliamentary exclusivity to effectively solve human rights issues for all Australians, is problematic.

The second issue is the defence of human rights by people who are not ‘popular’. This term I think is code for people such the indigenous and other groups in the community who some think should not have any or rather special human rights. Refugees, criminal and the mentally ill also spring to mind.

**(b) Antony Loewenstein. Independent Journalist**

\textsuperscript{494}Durak , above n 114.
Antony focused on political opposition to a BOR that Liberal-National Parties and their supporters constitute.

*Obviously apart from the Liberal Party of course. There are certainly some conservative think tanks the Institute of Public Affairs—IPA—a very influential think tank on ABC all the time, they are certainly very much opposed to it. Certain elements of the Catholic church—I wouldn’t say its uniform of course—I’m pretty sure Pell has been coming out against it. The reason for churches campaigning against it is fairly transparent—they are essentially worried that their power is diminished and also that they will not be able to discriminate any more. Not on issues of religion but on issues of sexuality and of course gay rights—something some churches are dealing with and managing and respecting and frankly some churches like the Catholic church put their head in the sand. Some HRA is going to make it illegal potentially to discriminate as they do now against certain groups such as gay men and women.*

**Comment.2**

Antony gives reasons why some church bodies in Australia reject a bill of rights. At this point in time the community seem prepared to accept this discrimination. The question Antony leaves open is how long can they continue to receive support from political parties for this perceived discriminations, in the light of changing social attitudes.

(c) Natasha Stott-Despoya.

Natasha points to the paradox in Australia of human rights need in the community and the success of opponents, especially key political opponents to block a national BOR.

*So why isn’t the Bill of Rights successful for the population generally and the people least powerful, people in aged care, mentally ill, indigenous people and migrants, they would most benefit. You keep thinking why, and once again the loudest voices who*
might have an interest in conserving the current system are successful. As well there is the factual misrepresentation about the impact of a human rights act. Every time someone is a victim in those gaps and holes in our human rights protections–laserings, aged care, illegal deportations, women(classical example), rights of children. If someone was there to say that this would not have happened if we had a human rights act–its not part of the dialogue–certainly not part of our cultural discussion in he main-stream media.

Comment 3.

Natasha points out the success of strident objections with factual misrepresentations about enacting a bill of rights raised by conservative politicians and commentators who want to maintain the national human rights status quo. Victims of poor human rights in this country, pay for the failure to fill those human rights gaps.

(d) Robert Oakshott.

Interviewer: Question to Robert: It, [a national BOR] is not a vote winner?

There is a strong political argument, which turns the whole concept into, there is not a lot of votes in it, and it’s the politics in the end, that’s the killer in this stuff.

Comment 4.

This statement raises the question again-why do opponents of a BOR think that it is political poison? Elements of the ALP appear to oppose one because they are influenced at least by some Ministers and by supporter from the Catholic church particularly.\(^\text{496}\) The most politically significant barrier to a national BOR is by the Liberal-National Coalition parties expressed in detail in Chapter Three above.

(e) Jim Crawford.

Interviewer. Can you think of parties opposed to a bill of rights?

No I don’t outside the legal parties. I am surprised to hear that there is church opposition to a bill of rights because the Islamists consider it as a western philosophy-

\(^{496}\) Loewenstein, above, n 484.
they don’t like it at all—it conflicts with Sharia law. One would think that if the churches are opposed to it you have no hope of getting one.

Comment 5.

Jim’s assertion of resistance of Australia’s Muslims to a national BOR, runs counter to the the activities undertaken by the Coalition of 100 NGO’s across Australia’s. Its submission in June 2010 to the UN Committee on the Elimination of Racial Discrimination (CERD), ‘Freedom Respect Equality and Dignity: Action’, was a 163 page document and presented long outline of the weak legal human rights protection for Australia’s many minorities including Muslims. The submission sought help from the Committee to improve their equality and non-discrimination protections.497

One would assume that mainstream Islamists, represented by their Australian Federation of Islamic Councils, ‘Muslims Australia’ and the Islamic Women’s Welfare Council of Australia, who participated in the writing of the document as part of the high level NGO strategic group, would welcome a national BOR to assist in the achieving their protections.

Summary Theme 3.

Views about opponents to a national BOR include: a view that there is only weak support among MP’s in the Parliament, that some church groups are determined opponents to preserve perceived important religious rights advantages, a lack of concern, perhaps indifference in mainstream Australia to the concerns of minority rights.

8.5.4 Theme 4.

A BOR Strategy that Works.

This theme was important because the interviewee’s offered views about a strategy or strategies which might work to lift both community and MP’s awareness of the benefits that a national BOR can bring to Australia’s human rights.

Discussion Starter question: Do you have any thoughts about a political strategy which could work to achieve a national BOR?

(a) Robert Oakshott.

A bill of rights issue could be personalised, localised and made as building a case that the Bill of Rights is not one for lawyers but one for the people. I think it has gotten lost as not to be a benefit for the common man, when it is the complete opposite. We can always do better.

Comment 1.

Robert feels that it would pass the Parliament with a free vote, given a successful education program to remove community and MP’s fear about change a BOR would produce around the courts, the constitution and other statutes. Robert’s statement here about ‘personalising’, ‘localising’ and presenting the ‘people’s BOR’ is an important and effective strategy for rights advocates to include in any new BOR strategy, and is one often overlooked by advocates. Essentially he calls for them to include in their strategy focus, the nature and importance of individuals to have human rights protections against overreach by governments and their agencies. He also thinks that a human rights education program is necessary for both the community and MP’s to lift any fears about what BOR would entail to Australia’s human rights.

(b) Professor Gillian Triggs, University of Sydney.

Professor Triggs also pointed to importance of a BOR education program.

There needs to be an on-going education process to inform the Australian people of rights issues, areas and expression of national human rights values. The new Human Rights Joint Parliamentary Committee will help raise awareness by media reporting its activities including where public submissions are called over issues.498

Comment 2.

Professor Triggs, currently President of the Australian Human Rights Commission, is well placed to further her view of the importance of education of the Australian

498 Interview with Professor Gillian Trigg at Sydney University, 2 May 2012.
people to understand their human rights and the national Parliament’s responsibilities in that area.

(c) Robert McClelland.

In May 2010 when I gave the Human Rights Framework, I said our goal was to have human rights at the start of and at the heart of the preparation of our policy decision-making and legislative drafting. Significantly, the way our legislation is structured, [the Human Rights (Parliamentary Scrutiny) Act 2011], it has regard not only to civil and political rights but also has regard to economic social and cultural rights, there is a discussion of a whole range of economic and social rights, that will over time, and particularly as this committee process takes place, and receives public evidence, and have that dialogue with the community about a broader range of not only political and procedural rights, criminal rights and also the impact on education, the impact on entitlement, social security, health care and so forth.

Comment 3.

Former Attorney McClelland has aimed the Human Rights Framework at the federal Parliament legislative process, where the work of Joint Parliamentary Committee on Human Rights provides dialogue and education about human rights between it and the community, the executive, its public service and the legislature. In one sense he is saying that this back-door improvement with the Committee being able to consider the seven major human rights conventions Australia has ratified is an important step towards recognising those treaties in our domestic law.

Without agreeing that the Framework is a satisfactory replacement for a national BOR, it may become a valuable tool to lift government awareness of human rights when Bills are being drafted and put before JPCHR. One should hark back to Chapter One of the thesis and its cautionary paper by Professor Janet Hiebert, which assessed the likelihood of change by the UK’s Westminster Parliament towards human rights issues, and by implication, other Commonwealth Parliaments such as Australia’s.

How this current provision will stand in its entirety, following the election of the Liberal-National Party Coalition government is problematic, for reasons expressed
in Chapter Seven of the thesis.\footnote{In Chapter 7 s 7.6 ‘The Coalition Returns to Government’, note antagonistic discussion by Coalition Senators about the need for changes to significant elements of the Human Rights (Parliamentary Scrutiny) Act 2011.} The issue of emasculation of the Human Rights (Parliamentary Scrutiny) Act 2011 is conjectural, but nevertheless quite possible, given that the Coalition must realise that in fact the human rights reach of our seven key treaties extends to over 100 human rights and freedom provisions. Their comments of concern are reflected in a desire to seriously prune many of those rights.\footnote{See Opposition Senator’s comments, Chapter 7 s 7.6, 4. Conclusion.}

(d) Natasha Stott-Despoya.

Natasha Stott-Despoya’s suggestion as to the need for a ‘champion’ was also raised by a number of other interview’s. Although seemingly obvious, the past history of BOR attempts by the ALP has reflected largely action by ALP politicians. A future BOR campaign would need to be politically driven by a government of the day, if largely so because of cost, but the addition of groups of advocates would need to be integrated into that campaign, to achieve more grassroot campaigning in which a number of non-political ‘champions’ should emerge such as exampled by George Williams in the Victoria’s ‘Charter of Rights and Responsibilities Campaign.’\footnote{Bailey, above n 12, 437, when discussing the ACT and Victorian bill of rights campaign leadership.}

Natasha adds to that discussion:

What you must have someone to pursue it. I am a big believer in ‘champions’ in the parliamentary sense. One of the greatest effects that you can have is a citizen who can champion a human rights act because they can demonstrate how it would have assisted them. That is where an ordinary Australian citizen understanding and demonstrating and showing that there is one way of enhancing and protecting their rights to counteract that very strong assertion that somehow it leads to people who will be more litigious, constitutionally damaging, politicising the judiciary and so on.

Comment 4.

The political constitutional mover often charismatic and personable, does appear to play a vital educating role in political change. People will often follow a political
'champion’ who has knowledge, conviction and presentation before them, on a matter of public policy.

(e) Katie Wood.

In her comment on this theme, notes that during his visit to Australia, a speech given by Chief Justice Roberts of the U.S.A’s Supreme Court, explained that they had a ‘champion,’ a real ‘champion’ who brought the task of getting their bill of rights together. That champion she feels we have never had in Australia [nationally].

USA’s Supreme Court Chief Justice Roberts came out and did a keynote speech at a conference in Brisbane about two years ago. He walked through how they got a Bill of Rights and one of the key things that came out of that conversation was that they had a champion, back in the days when they were trying to get their bill of rights incorporated into their constitution. They had a real champion who brought that all together, that is something that we have never had in Australia.

(f) Jim Crawford.

Comment 5.

Jim also identified the importance of the ‘champion’ in achieving a BOR quoting the example of Canada’s Pierre Trudeau. Trudeau used his charisma and political power as Prime Minister to push the Canada’s Charter of Rights and Freedoms to heal ‘political trouble’ as Jim describes it, the issue of rights for the French-speaking province of Quebec. Australia would perhaps need champions at both state territory and national level in a major campaign for a national BOR.

(g) Dr. Cassandra Goldie.

Doctor Goldie rthought that for any BOR campaign to be effective obviously here has to be a national grounswell of support, sufficient to drive successful political BOR enactment. She, along with other interviewees are not at all confident

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when this will occur soon. Neither were a number of the interviewees. Most saw the current BOR situation as stalled and as Natasha put it, it is very hard to regenerate a campaign once it is lost. As such Dr Goldie’s comments follow these views.

*I think that sadly we are going to see the worst before we get a groundswell of more broad support again, –let’s say there is a landslide win to the Coalition–there are a significant number of the members who hold a very right-wing view, and they get the Senate. It could get very ugly and that could be the only way for the broader population to find out how fragile their rights are.*

**Interviewer.** Would a parliamentary ground swell of support work for a BOR?

*Yes it could if there was a ground swell that gets back on the agenda as a major issue in the same way as same-sex marriage. I think that unfortunately the rights agenda in Australia is seen in that context–rather than universal and inalienable, it’s more the special interest group campaign. So I think that is where we would end up.*

**Comment 6.**

This statement is not so much a suggested strategy for a human rights act but a prediction of what might follow after election of an extreme government, which is prepared to further damage the community’s human rights. At this time (September 2014), the action of the current Conservative government to prevent the next national superannuation increase, which affects the future retirement prospects of millions of employed workers, is a good example of government overreach against a rights issue like workplace saving.

The rights agenda runs into barriers in the community and the Parliament. It is a reasonable argument that Australia’s parliamentary majoritarian social and political practices diminish the universality of individual human rights. I think this is also Dr Goldie’s latent meaning here, referring to among other things to her criticism of the current abuse of the human rights of refugees.

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503 From each interviewee’s transcripts: Professor George Williams (p 3); Professor Bailey (p 2); Michael Organ (p 9); Stephen Jones MHR (p 3); David Shoebridge NSW MLC (p 3); Sharon Bird, Minister for Higher Education & Skills (p 4); Dr Michael Kennedy University of Western Sydney (p 5); and Natasha Stott-Despoja (p 6).
(h) **Professor Williams.** University of New South Wales Law Faculty and human rights advocate.

**Interviewer:** Do you have any thoughts about a BOR strategy?

*One of them would be to get these things[a BOR] done at the state and territory level-the impediments are often less.*

**Interviewer.** Incrementally?

*Yes, get it done in these places, then done nationally. It requires a good inquiry and popular support demonstrated at community level. Unless you have politicians who are willing to spend their political capital on it, I can’t see a significant change until there is a change of people in parliament. If they (the ALP) won an election with a big majority it may be on the agenda again, that looks very unlikely, the debate as it has in the past, will move to the state and territory level.*

**Comment 7.**

A number of other interviewees also thought that State BOR adoption was the best way to achieve a BOR. These included:

(i)**David Shoebridge MLC Green Party member, NSW parliament.**

David said that:

*I think that the way we are going to develop a Bill of Rights, and I think that will happen, is for the states developing a Bill of Rights. That being seen to work in practice over a period of time, and a culture of human rights developing, which will ultimately pressure the federal government to move.*

(J)**Cameron Murphy.**

*The discussions I have had with church leaders, is that they fear that it will just be used as a tool against them, the Charter floodgates will open and allow gay marriage and so on. Probably ultimately, the Australian population will end up supporting gay marriage and that will remove a significant barrier. The Charter would change that, their exemption will over time change and become a circuit breaker. The only other way that the Charter of Rights is going to move anywhere nationally, will be if the states and*

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territories progressively adopt Charters of Rights. If it in the majority of states, then likely a national charter would follow.

Comment 8.

Cameron agrees that a charter of rights progressively adopted by the states will be the likely mechanism to achieve a BOR.

8.5.5 Theme 5.

Is Australia’s Current national provision of Human Rights Adequate?

(a) Senator Scott Ryan.

Interviewer: What do you think about our current provision of national human rights—are they adequate?

Yes and again putting aside the debate about what constitutes them, I am a person who believes in Berlin’s negatives, you know—I think we are pretty good—no one is perfect. But I still view the main threat to liberty and freedom and autonomy of the individual, the main threat to that comes from the state. So I think we have had a very practical and what I would call a non-ideological approach to rights, it’s not perfect but it has served us relatively well.

I think the Senator’s views reflect an ideological perspective which seems to want to omit the problems of human rights inadequacy in Australia. The fact is that Australia has a history of rights abuse by institutions and governments appears in the current public arena regularly as well. He continues:

The historic character of human rights in Australia is losing its historic ground in practicality. We now have debates that really are about competing claims upon resources or priorities These are being debated and described as rights because they get a headline—human rights are being thrown around in such a way as being completely devalued I think historically we have had a pretty good balance—not perfect but pretty good.

Comment 1.

Senator Ryan’s general view is that we are doing well in human rights provisions but that we must be on guard to threats to our civil liberties from the state. As he said before, he is a classical Liberal, and considering that in this interview
process, Liberal–National politicians, all but himself, ignored this writer’s numerous attempts to discuss it with them. It is difficult to accept his view that his Coalition colleagues view human rights non-ideologically.

Certainly the writer agrees with Senator Ryan about the need for protection of civil liberties from the state, but that is one dimension of human protections needed, albeit an important one.

His views do bring up the theme he mentioned earlier–negative rights are acceptable, while positive rights are a drain on taxpayers to support others. This perspective draws in again the question of conservative political opposition to economic, social and cultural rights as contained in the ICESCR. Chapter One of this thesis outlined requests from United Nations bodies for Australia to fully implement ICCPR and ICESCR.

Andrew Byrnes’s views although not formally part of the research, makes some interesting comments in ‘Contemporary Perspectives on Human Rights Law in Australia’. His conclusions about Australia’s ESC rights and the positive rights which come with them are:

Although the general level of respect for and the enjoyment of ESC rights in Australia is high, there are a number of areas in which the current levels of protection fall short of international standards. The lack of explicit general guarantees of ESC rights that apply throughout the country, whether as part of national or State and Territory charter of rights, is the most obvious failure of legal protection, as are the failure of anti-discrimination legislation to cover all the grounds of impermissible discrimination required to be addressed by the ICESCR. The situation of Indigenous Australians and of persons with disabilities, the extent of homelessness, the incidence of poverty, continuing violence against women, the inadequacy of mental health policies and services, are among other areas that have been identified by the CESCR as requiring concerted and targeted action.

(b) Antony Loewenstein.

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505 Above n 13, 14.
507 Ibid, 151.
Antony holds strong views about the inadequacy of Australia’s national human rights provisions:

There is no question of that and a lot of my work as a journalist over the years has not only been focussed on Australia but overseas as well, on individuals or groups who are shunned or marginalised for whatever reason. The effect of our policies on refugees—because of the political realities, there should be a human rights act to mitigate that cruelty. The refugees are one of the reasons why I would support it as indeed are our indigenous communities. [They have] become beyond marginalisation, they are invisible to most Australians, they don’t exist.

The rates of incarceration, violence and suicide, it’s off the charts. There are certain diseases, trichoma, which I believe is affecting the indigenous populations in the Northern Territory, doesn’t even exist in other western parts of the world. Most people don’t even realise this. Things are so bad its beyond making us like a third world country, some of them are comparable of what it was like with imprisonment of the blacks with apartheid in South Africa.

If the argument is, that having a human rights act is going to improve that or mitigate it, then I say, bring it on.

Comment 2.

Anthony’s career as an independent investigate journalist has taken him to parts of the world where people’s human rights are very poor. These experiences have made him appreciate the need to improve the areas of poor human rights in Australia, his homeland. He could have no doubt, discussed other areas of human rights weakness in Australia, but the two above are enough for him to argue for a national BOR.

(c) Natasha Stott-Despoya.

I would like a human rights act—everytime someone is a victim in those gaps and holes in our human rights protection—laser, aged care, illegal deportation, women (classical example), rights of children, if someone was there to say this would not have happened, if we had a human rights act. It’s not part of the dialogue, certainly not part of our cultural discussion in the mainstream media.

Comment 3.
Natasha calls for a human rights act.

(d) Robert McClelland.

Interviewer. What do you think about this question of a bill of rights improving the rights of the marginalised in Australia? Would it do it in fact any better than what the Parliament does?

Robert McClelland: Yes, look I do, politicians aren’t always honourable people. I mean I remember Paul Kelly being outraged that I had written that history, which is littered with examples of where the will of the majority have been equally oppressive as tyrants—now politicians. If they are in strife in particular, they will always look at a place to hammer in the wedge and if they can win over the majority off a minority, which unfortunately they will and I think once you start to wedge people off, they become disengaged then you will be more likely to see crime.

You are most certainly if they are influenced by grievances from their home country for instance, then they are more inclined to embark on terrorism. I think the role that I had the responsibilities with respect to counter-terrorism, convinced me that you need to ensure that all elements of the community feel that their rights are preserved.

Interviewer: Would a national BOR help raise the culture of human rights in Australia?

Dialogue with the community even with journalists many of them are ambivalent. Once they see dialogue happening they will be more enthused progressively. I think that people particularly in country Australia when the see how it does impact on them and it is important to people in the country, they suffer more than probably everyone else, mental care, a lawyer, dentistry, medical care, drug and alcohol counselling, time before release when locked up before seeing a magistrate. Once people in the broader Australian community see how the dialogue with rights is an enhancement of the quality of life or has the potential to improve quality of life—I think that we will over time build on that support base.

Comment 4.

The term ‘dialogue’ is the catch-cry of many human rights advocates. It is an appropriate term to describe the rights process with a human rights act between the three organs of government, as well as the engagement and education program
needed with the community about the improvement which will occur to the nation’s culture of rights with such an Act. I think it is fair comment in that there are holes in the nation’s rights fabric which is Robert considers are overdue for repair.

Robert’s extensive experience in the political process provides insights from behind the public face of Parliament. He indicates that the struggle for political power can easily mean that minority rights can and do get sacrificed for majority priorities and political gain. He is quite cynical about the process and he feels in this statement that it is more important to ensure that all the community feel that their rights are preserved than to give in to short term political gain.

(e) Jim Crawford:

Question. Should we enact convention specific rights we have ratified?

I think it [Australia’s human rights culture] is being changed by adopting certain convention’s specific rights and as these become established in the minds of the people, yes. The reason why they appear to be more successful than general legislation is that they are focussing on known troubles. Sometimes the more specific you get, tackling particular issues rather than the whole swag of issues you have a bigger impact.

Comment 5.

Certainly Jim’s ‘convention’ strategy (mentioned earlier), has real merit and is being attempted in the federal Parliament though the work of the JPCHR under the power of the Human Rights (Parliamentary Scrutiny) Act 2011.

(f) Dr. Goldie.

Interviewer: Are Australia’s human rights inadequate? For the marginalised?

Definitely, absolutely, you don’t get a more marginalised person today than a person seeking asylum who is released on a bridging visa and not allowed to work. If you had a bill of rights in Australia like the Human Rights Charter in the U.K. or the ECHR, I think you would find that the jurisprudence would make it clear that it would be found to be in breach of the Convention on Cruel and Inhumane Treatment.

Comment 6.
Comparison abroad of other democratic human rights regimes with bills of rights proves the point for Dr Goldie.

(g) Meredith Burgman.

Question. What do you think about our human rights, are they adequate?

I think if looked at it in a world context we would be seen as having a strong civil society and a strong separation of powers. Therefore in general terms of civil rights globally we come out well, then, individual groups can be very marginalised, the indigenous community. I think that the human rights record of a country has nothing to do with whether they have a BOR or not. The strength of their institutions and current civil society is the important determinant.

I believe in prescriptive legislation—I believe that if you say to people you must not incite to violence against homosexuals that in itself is a good thing because you are saying something that the rest of Australia doesn’t accept.

Comment 7.

Prescriptive or focused legislation is the system that has largely been applied in Australia in the provision of national human rights. Meridith sees the way forward with human rights protections, is to continue with strong public institutions such as Parliament and its agencies. This implies that our national human rights protections do not require a BOR and are better protected by the present public institutions.

(h) Katie Wood.

Amnesty’s lawyer was scathing about the human rights policies of both major parties in government.

There are two areas here, one relates to the mandatory detention of asylum seekers and essentially what is arbitrary detention and siphoning off what are our international obligations. It is a clear area, if we did have a human rights act, protections that provision of arbitrary detention would at least have to be talked about a lot more than it is currently the case. So you are not leaving it up to a technical part of the Migration Act which has been overlooked, but for judges to find some ability to treat asylum seekers with some consistency with human rights law.

Indigenous rights is another one, particularly in relation to economic, social and cultural rights and frankly the passage of anti-terrorism legislation. There was nothing,
all it took was fear, a big noisy fear-factoring government and, that is it. The thing which has infuriated me most is that they passed all these heinous terrorism laws in 2005, before we put any procedures in place in airports or anything like that.

The thing that bamboozles me is that no one learnt from history, one person’s freedom fighter is another person’s terrorist. They were creating a scenario where, there were quite a few surveys at the time, where certain proportions of the population mainly those who were Muslim, even dark hair or dark eyes or otherwise, were starting to feel targeted and picked on. What does that foment? A sense of injustice, creating a culture and those riots in Cronulla were disgusting. I was ashamed.

Comment 7.

Katie’s views here point to an on-going problem that minorities in Australia have, ‘certain proportions of the population’ as she puts it, of inadequate human rights protections against extreme government policy. She examples asylum seekers, Indigenous Australians and the Muslim community, the latter who now as a group of nearly 500,000 are feeling once more targeted by the government for the possible actions of a very small number of Islamic radicals. Once more the current government is pushing the community’s ‘fear button’ with suggestions of additional anti-terrorism laws, which are, without further addition, a seriously infringement on all citizen’s human rights to legal process.

This final theme about the present provision and culture of human rights in Australia, interviewees opinions vary from acceptance of the status quo, to providing the current Framework alternative human rights system, to the need for a national BOR.

8.6 Assessing the findings of this Research.

This research has outlined the major five questions posed to the interviewees and from which they provided answers which were recorded and transcribed. The number of questions each interviewee answered varied as listed above. Not all of the twenty interviews have been included in this chapter for a number of reasons, including being too similar in character. Most of those other interviewees have their comment in the body of the thesis. This researcher thanks all interviewees who participated in this research for their time and effort, and perhaps most of all for their open, friendly, and candid comments.
The five major themes which emerged from interviewee comment contained both support for and opposition to a national BORA. The major outline of their views contributed has been detailed from their transcriptions. A summarised table following provides the key points of what each participant thought about the questions they answered so that the reader can more readily understand what each contributed to the research.

**Interviewee. Code: Question:Views Expressed For and Against a BOR.**

Each interviewee’s answers are condensed to core ideas, grouped as indicated above in order, 1 through 5.

**Scott Ryan. a1.q1.**

1. My personal view is that I don’t think that we need one and I have got a lot of challenge about the effectiveness [of one].

2. The second issue that I have with bills of rights [concerns positive and negative rights]. The American bill of rights is a classical bill in definition of negative liberty—that is for someone like me, a proud classical Liberal.

3. Yes [our human rights are adequate], I am a person who believes in Berlin’s negatives—the Congress will not. The main threat to liberty and freedom and the autonomy of the individual comes from the State. We have what I would call a non-ideological approach to rights, it is not perfect but it has served us relatively well.

4. The historic character of human rights in Australia is losing its historic ground in in character. We now have debates that are really about competing claims upon resources or priorities. Human rights are being thrown around in such a way as being completely devalued historically. We have a pretty good [rights] balance—not perfect but pretty good.

**Robert McClelland. b1.q1.**

1. There was Ministerial opposition to a BOR in the run-up to the 2010 election. More community education about a BOR was needed and that was a factor in not proceeding with it.

2. [A BOR will take power from the parliament]. Can’t happen. People naively assume that politician’s are driven by pure motives and they are not.

3. [Conservatives BOR refusal]. There is a lot of anxiety in both parties about this. They see a BOR as giving resources to lawyers to represent people who are not particularly popular in the community—a very skewed and inappropriate time of life to take.
4. When I gave the Human Rights Framework, I said our goal was to have human rights at the start and heart of our policy decision-making and legislative drafting.

5. The Human Rights (Parliamentary Scrutiny) Act 2011, has regard for not only civil and cultural rights but also economic and cultural rights.

6. Over time the JPCHR will have dialogue with the community over the broad range of political and procedural rights, criminal rights and impact upon education entitlement, social security, health care and so forth.

7. Yes look I do [see a BOR improve rights], History is littered with examples where the will of the majority have been equally oppressive as tyrants.

8. My responsibilities with respect to counter-terrorism, convinced me that you need to ensure that all elements of the community feel that their rights are protected.

9. Once the people in the broader Australian community see how dialogue with rights is an enhancement of the quality of life, or has the potential to improve the quality of life- I think that we will over time, build on that support base.

**Natasha Stott-Despoja.**

1. I thought that we had a reasonably good human rights record, gracial discrimination protections, our parliamentary and judicial traditions which provided progressive human rights in areas such as equal opportunity and racial discrimination protections.


3. Why are our loudest voices conserving the current system?

   .There is much factual misrepresentation about the impact of a BOR.

5. Someone should be there when someone is a victim to the gaps and holes in human rights protections— if we had a HRA.

6. That is certainly not part of the dialogue—certainly in the media.

7. You must have someone to pursue a BOR, ‘a champion’.

8. The champion can demonstrate how a BOR would assist them[the citizens].

9. The ordinary Australian citizen needs to be shown the way a BOR enhances and protects their rights, which counteract views that it leads to people more litigious, is constitutionally damaging, politicising the judiciary and so on.
10. I would like a national Human Rights Act.

Jim Crawford.

1. We haven’t had [human rights] trouble here.
2. There is no coherent case being put forward for a BOR–no on-going champion.
3. People would be uncertain of the benefits of a BOR–our basic rights have always been protected in one way or another.
4. No, a human rights program would not [help], they would buy it if they needed it.
5. If someone could persuade them that this BOR would fix the problem they were in. That process would be tricky, given the size of Australia.
6. An overall champion and a champion in various communities would be needed.
7. A better way of getting human rights improvements is to make use of international conventions.
8. [Knowledge about opposition groups?], No I don’t outside political parties.
9. I’m surprised that there is church opposition to BOR.
10. One would think that if the churches oppose, you have no hope of getting one.
11. Canada’s Pierre Trudeau was a very important champion for Canada’s BOR.
12. He used his charisma and power to push Canada’s Charter of Rights and freedoms to heal ‘political troubles’.
13. Australia [similarly] would need champions state and federal.
14. I think Australia’s culture is being changed by adopting certain convention rights as they become established in the minds of the people, yes. They focus on known troubles.
15. Sometimes the more specific you get, tackling particular issues rather than a whole swag of issues, you have bigger impact.

Robert Oakshott.
1. I have concerns about how a BOR would fit alongside the existing Australian Constitution, current Bills and current jurisprudence.

2. How would a BOR contribute rather be in conflict with the existing structure. But it is a bit of a trojan horse for the politics[of it].

3. I think the rejection is just strait out politics–a reluctance to engage.

4. There is a strong political argument which turns the whole concept into,’there is not a lot of votes in it’.

5. Its the politics in the end,that’s the killer in this stuff.

6. A BOR could be personalised,localised and made s a case that a BOR is not one for lawyers, but one for people.

7. It has gotten lost in that it is not for the benefit of the common man, when it is the complete opposite.

Dr Cassandra Goldie.  

1. The ALP has within it embedded aspects of Catholic ethos.

2. The Rudd government’s rejection of a BOR involved political ambivalence around the [Cabinet] table and other trade-offs–which battles to take on.

3. Again, the Alp is a party founded on collectivism–the idea of individual rights trumping the group is not the way they assert power–collective rights rather than individualised one.

4. The [national] spectrum has moved further to the right and a BOR barrier becomes stronger, because of the present political ideology of conservative parliamentarians.

5. The power of the churches to maintain the BOR barrier and the current liberal Party are both strong negative influences.

6. I think sadly that we are going to see the worst before we get a ground-swell of support again.

7. Lets say a landslide win to the Coalition–there are a significant number of members who hold a very right wing view and they get the Senate.
8. It could get very ugly and could be the only way for the broader community to find out how fragile their rights are. The people tend to see a BOR as a special interest group issue.

9. [Human rights adequacy? The marginalised?]

Definitely, absolutely, you don’t get a more marginalised person today than a person seeking asylum, who is released on a bridging visa and not allowed to work.

10. If Australia has a BOR like the UK or the European Court of Human Rights (ECHR), you would find that jurisprudence would be found to be in breach of the Convention on Cruel and Inhumane Treatment.

**Meredith Burgman.**

1. A BOR is not seen by activists as important currently, as against issues like war, and Indigenous recognition.

2. As well, there are anti-BOR activists in the NSW ALP, which includes [then], Premier Carr.

**Antony Leowenstein.**

1. The strong anti-BOR media which will not support one.

2. There is a ferocious culture war going on, political and economic, in the country which includes opposition to a BOR.

3. They offer objection to a HRA including the view that this will not allow Australians to have their own human rights views.

4. Politicians can not be trusted to create a BOR which would treat people humanely.

5. Obviously the Liberal Party, conservative groups such as the Institute of Public Affairs (IPA), certain elements of the Catholic Church (not all), because they will not be able to discriminate against gay men and women, where a BOR operates.
6. A lot of my work in Australia and overseas involves individuals or groups or who are shunned or marginalised for whatever reason.

7. Our policy on refugees—because of the political realities there should be a HRA to mitigate that cruelty. Refugees are one of the reasons why I would support a BOR.

8. Indigenous health is so bad it is beyond making us look like a third world country, with incarceration levels like the apartheid imprisonment of blacks in South Africa.

9. If the argument is, that having a HRA is going to improve that or subjugate it, I say bring it on.

Simon Corbell. a2q2.

1. There has not been sufficient explanation about a BOR to a broad range of people.

2. The community find a BOR difficult because of abstract legal principles which a lot of people find quite alien.

Cameron Murphy. b2q2.

1. There are two problems, first is that many people now think that we actually have a national BOR.

2. The second is that people look at the USA’s BOR and object to one fearful that the right to bear arms would be in it, like the USA.

b4q4.

3. The Charter of Rights will over time become a circuit breaker.

4. The only way that the Charter of Rights is going to move anywhere nationally, will be if the states and territories progressively adopt a Charter of Rights [first]

Professor Peter Bailey. c2q2.

1. There is something about the peculiarity of human rights statements that frightens people. That is so easy to see if you are in a minority.

2. For the ACT the educative program produced 60% or more agreeing to one, no’s 29%, and the rest ambivalent.

Professor Gillian Triggs. b4q4.

1. There needs to be an on-going process to inform the Australian people of rights issues, areas and expressions of national human rights values.

2. The new JPCHR will help raise awareness by media reporting its activities when public submissions are called over issues.
Katie Wood.  
1. There are opponents to a BOR who say, it [human rights] are not broken, so don’t fix it.  
2. Supporters happen to be the people who are experiencing discrimination on a daily basis.  

George Williams.  
1. [A BOR strategy?] One would be to get these things done at state and territory level—the impediments are often less.  
2. Get it done at these places, then nationally.  
3. It requires a good inquiry and popular support demonstrated at community level.  
4. Unless you have politicians willing to spend their political capital on it, I can’t see a significant change until there is a change of people in parliament.  

David Shoebridge.  
1. The way we are going to develop a national BOR, and I think that will happen, is for the states to develop BOR’s.  
2. That being so as a work in progress over a period of time, and a culture of human rights develops, which will ultimately pressure the Federal Government to move.  

Research Assessment Conclusions.  

The BOR beliefs of the interviewees fall into three groups: 1. Opposed to a BOR; 2. Support a BOR; and; 3. Have suggestions or explanation as to how one will or can be achieved.  

Group 1.  
(a) Sole conservative political Interviewee Senator Scott Ryan.
Scott offered clear rejection reasons which also reflect a general LNP political ideology evidenced throughout this thesis.

(b) Robert McClelland and the ALP.

The ALP has been for some period divided over support for a national BOR. The Human Rights Framework structure that then Attorney-General adopted was an alternative process to improve human rights but only made an incremental improvement to the broader human rights problems which are current in Australia.

(c) Jim Crawford.

Jim saw no need for a BOR, nor a community push for one, and generally was satisfied with present national human rights provisions. He did understand that if the community support was to be developed a champion or champions would be needed along with the adoption of convention human rights.

(d) Meredith Burgman.

Meredith while admitting that individual groups in Australia can be very marginalised, she remains skeptical of the value of a BOR and prefers the current human regime with its its stress upon a strong civil society and a strong separations of powers. indeed that the human rights record of countries has nothing to do with BOR’s.

Group 2.

1. Natasha Stott-Despoya.

Natasha has reflected inside and outside parliament, a firm support for a BOR starting with the Howard government’s policies, which exposed important human rights weaknesses.

2. Robert Oakshott.

Parliamentary experience meant that while Robert had doubts about how a BOR might fit into the Australian political structure, he thought that the LNP were maintaining a BOR barrier for political advantage rather than sound political policy for the nation. His opinion was that a BOR could pass the Parliament if properly introduced for the common man.

3. Dr Cassandra Goldie.

As the CEO of ACOSS Australia Cassandra quite clearly works to help Australia’s underprivileged and that she would like see a national BOR emerge to improve their rights. Her assessment that likelihood will happen soon is negative and that current LNP policies now and into the future may become even more right-wing and restrict human rights further.
4. Antony Loewenstein.

Antony is a widely travelled writer in support of better human rights for the underprivileged. He is appalled at his country’s current national human rights. His focus is upon the cruel treatment incarceration of refugees who simply try to gain refuge in Australia. As well he regards the state of health of our indigenous people as third world and a national disgrace, along with incarceration rates which are reminiscent of apartheid South Africa. His words; If a bill of rights can overcome these disgraceful human rights failures, I say bring it on.

Group 3.

1. Simon Corbell.

Simon considers of key importance is that a better BOR explanation to a broad range of people, who find the some of the language involved in a BOR is quite alien to many.

2. Cameron Murphy.

Cameron takes the common point of this group that a national BOR will not proceed until the States and the remaining Northern Territory, adopt BOR’s.

3. Professor Peter Bailey.

Peter’s ACT experience with their BOR rested upon the importance of providing a sound educational program for their community.

4. Professor Gillian Triggs.

Once again the advice for success is an on-going education BOR program for the community.

5. Katie Wood.

A lawyer with Amnesty Australia, NSW, Katie presses for a champion who steer a BOR to enactment. She has working experience which draws upon the weakness of human rights for asylum seekers, Indigenous rights and Australians subject to racism such as Muslim citizens.

6. Professor George Williams.

Professor Williams sees state adoption of a BOR as necessary before the parliament will follow. An effective education program is needed for the growth of popular support, and politicians must be prepared to spend their political capital to achieve one.
7. David Shoebridge.

David supports the view that the States should pioneer BOR’s and that then the growth of human rights culture will pressure the Federal Government.

Assessment now moves to an overall consideration of what can be inferred from responses in the research task. What assessment can be made as to the most significant message or messages which emerged from the interviews?

That is, what insights emerged from the five themes about questions put to the participating interviewees? This thesis’s research’s interviewee statements showed a number of key reasons why Australia’s quest for a national BOR has failed. These include:

- Persistent ideological conservative political opposition to one, by the Liberal and National Party Coalition, together with their supporters.
- Failed attempts of the ALP because of poor BOR leadership, party division on the issue, the difficulty of overcoming Senate opposition. A lack of effective community BOR education for the community.
- A resultant weak regime of human rights protections for Australians, critically so for most marginalised groups.

This thesis takes the view that the most important of these issues has been the political barrier to a national BOR held by conservative politicians, their parties and supporters. This view will now be discussed at some length.

8.5 Political Ideology, Power and a National BOR.

The political-power issue suggests the key reason why a BOR has been rejected so vehemently and consistently across time by especially, Coalition conservative parties. In one sense it is understandable that elites have utilise the political shield of the Liberal-National Party to protect their interests and advantages. The political-power-balance argument then shifts to a question: to what extent does favourable business protection by Coalition governments on their behalf, impinges excessively upon the rights of workers and well-being of the community and economy generally?

Australia has a political tradition of power exercised almost exclusively between the two major political groups in the House.They see-saw into and out of
power depending upon political leadership and policies. In the periods when ALP has been in power and has attempted to enact a BOR, the Coalition parties have been in control of the Senate most of the time, often with support from independent Senators. The minority Gillard Labor government operated with the support of Independents during the 43rd Parliament and was able to pass legislation in the Senate with the added co-operation of the Greens.

Both major party groups during the Gillard government moved to the political right, and voters rightly resented their lack of policy difference. It will be interesting over time, to see what changes to human rights policies will emerge after the Abbott and Turnbull governments. Antony Loewenstein feels that a battle in that direction is already currently operating: ‘...there is a ferocious cultural war going on...’

Political power is an important issue to help understand how Australia at national level became so exceptional in not enacting a BOR. A point worth restating is that Coalition governments have been in power significantly longer than the ALP since Federation and have held majority control of the Senate for most of the time Labor have been in power in the House of Representatives.

Two questions flow from the political BOR barrier. The first is the issue of how the Coalition’s BOR rejection limits human rights generally in Australia and the question of how that political blockage can be removed into the future? A view about these questions will also follow in the conclusions of this thesis.

8.8 How Political Philosophy and Ideology Affect BOR Policy.

Political parties express political action in terms of policy. However policy operates under a guiding set of political principles known as ideology and it is that ideology which drives much of the political debate. Fenner outlines the dominant stream of political ideology in Australia (and the capitalist world) as being ‘liberalism’.

Classical liberalism the original liberalism is the central ideology of wealth creation in a capitalistic society. It emphasises the practical and moral value of individual freedom and

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508 Interview with Antony Loewenstein, Journalist 31 January 2013.

responsibility...public interest generated as the outcome of market incentives ... condones only the minimally necessary degree of government intervention in the economy. In contrast both liberalism and social democracy are ideologies whose focus is upon the distribution of wealth and opportunities in a capitalistic society. They promote an active role for government in rectifying social and economic inequalities.\textsuperscript{510}

It is probably a truism in Australian political parties both at state and federal level when in government tend to follow broadly similar policies and that the election debate comes back to who is the best manager of programs. Having said that there is a clear difference between the ideology of the Coalition parties and those of social democratic parties such as the Greens, the ALP and the now defunct Australian Democrats, in Australia’s federal politics.

This thesis has outlined much conservative opposition to a BOR in legal or constitutional power terms. It is a strong argument that there are deeper ideological reasons based on the belief that individual freedom and wealth creation is what makes for a modern society, whereas the spread and growth of enforceable rights especially economic, social and cultural rights, is seen by opponents of a BOR as an impediment to enterprise, growth of wealth for business and commerce generally.

This conservative ideology runs counter-intuitively when other contemporary democratic societies such as the U.K. and New Zealand have similar economic structures, with business enterprise and a modest BOR operating successfully together. As well, the two BOR’s which are presently operating at state level in Australia, are not causing disruption to their governing bodies, nor to business.

In Australia there is a widening gap between the have’s and the have-not’s.\textsuperscript{511} It is true that the mere possession of a BOR does not guarantee satisfactory human rights for citizens. Some societies have established a BOR which is effectively non-functional due to factors such as poverty or corruption or political ideology. A by-product of inadequate human rights is frequently accompanied by wealthy elites, vastly unequal income distribution, neglect of the poor, social discontent and breakdown.

\textsuperscript{510} Ibid.

The ultimate benefit of an effective BOR can be the growth in human rights awareness at both government and community levels bringing with it an improved social fabric and social inclusiveness. It can also mean that there is a lower expectation by society that wealth creation will be seen politically just as an individual’s benefit but something that can be taxed to allow income re-distribution can help reduce gross inequality of incomes. The test of a fair society can be measured by just how well the problems of those in the community who are worst off can be assisted.

Conservative political ideology in Australia’s national body politic appears from the evidence of this research, to yet to fully grasp this idea of social benefit that will flow from a BOR. Mentioned above by Loewenstein a fierce ideologically driven political struggle in Australia around this and other issues continues. 512

Indeed a clear example of differing ideologies at policy level in Australian politics can be seen in the Gonski issue of equitable distribution of education funding for schools. That funding has been skewed to favour school children from private schools for some decades and the latest political events show how the Coalition government would like to revert to that formula. Health, university funding into the future, under a Turnbull government are on the same ideological pathway.

The reason why Liberal National Coalition (LNP) supporters want continued opposition to a BOR varies to what they feel they would lose under one. Interviewee Antony Loewenstein is specific for example as to the the reasons why some of the churches oppose a national BOR: ‘... The reason for church’s campaigns is fairly transparent of course they are essentially worried that their power is diminished and also that they will not to be able to discriminate any more on issues of sexuality and of course gay rights’.

The strength513 of church influence in Australian politics is surprising in a country where church attendance is small. While 8.8 per cent of Australia’s population attend weekly church, yet that relatively small number of the church

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512 Interview with Antony Loewenstein 31 January 2013, Transcription p, 1.

513 Anna Crabb above n 166.
supporters have provided politically significant and persuasive support for the two mainstream parties. 514

Some of this church influence has been mentioned above, but consider some other aspects of church political influence: the allocation of over A$500 million to support chaplains in schools by the Howard, Labor, Abbott and Turnbull governments 515: opposition by some church groups to the introduction of civics and ethics courses for students and the Coalition’s pledge to remove funding support as it has provided for ethics school lessons: the long term imbalance of Commonwealth funding of private and public schools, approximately two-thirds to one-third respectively based on reversed school populations numbers: the removal of anti-discrimination laws in religious schools relating to the employment rights of teachers whose sexuality or gay rights conflict with religious views: religions campaigning actively against a BOR.

The Gonski Report could remove much of past funding inequalities provided that the new government does not reduce agreed funding into the future which on present indications that hope appears problematic.

Perhaps most revealing issue relating to the special political influence that has been the extended to religions and their resistance to a BOR has been and their human rights abuse of young people. The extent of the cover-ups by church hierarchy and the yet to be fully proven allegations continues under a federal Royal Commission. To be balanced, churches have not been alone in this abuse, many other institutions private and governmental are also at fault, and are being examined by the Commission.

The persistence of such abuses indicates that Australia must do more to reduce our human rights failings and the make our nation more human rights focussed. With respect to Coalition politicians like former Prime Minister Tony Abbott, who say our human rights do not require a national BOR, the evidence shown in this thesis indicates otherwise. Australia has been failing to meet the rights of its vulnerable citizens, with a rights culture that largely has ignored serious systemic human rights

514 Ibid.

failings for years. This thesis believes that it is time to join the other contemporary democracies, by enacting a national human rights act.

One political development rests in hope, which is see the federal ALP regain interest n a BOR. There are also stirrings by some human rights activists for a new push for a national BOR but when and how that will develop is yet to be seen. 516

9. Conclusion.

From supporters interviewed, a coherent BOR case needs to be constructed for the community to appreciate BOR human rights issues. Described as ‘out-strategised’ by Robert Oakshott by their opponents, supporters in political and community actions for a national BOR, will need to create more carefully crafted literature and community advocacy to overcome much of the hyperbole typically expressed by opponents in this thesis such as outlined by Senator Brandis’s speech 517. Any draft or proposed BOR will need to be a readable and explicit document along with supporting media material including information countering the arguments of opponents.

Policy revitalisation and party unity into the future is needed along with BOR co-operation from supporters. It is obvious from the earlier evidence presented that with an unknown number of ALP politicians not in favour of a national BOR and with the Coalition parties opposed to one, that the national parliamentary gate is still firmly closed to a national BOR. The ALP indicated after the national Human Rights Consultation was rejected that it would look at the issue again, but has not regained the political will for BOR yet.

The understanding of Coalition’s ideology, power structure and electoral support base is important knowledge for BOR supporters. Any new initiative would need to be aware of the history of political opposition to a national BOR and create a campaign strategy which would take account of the traditional arguments opposed to a BOR.

516 Discussion at Politics in the Pub, a regular political discussion venue in Sydney.

517 Brandis Speech, above n 444.
Brian Galligan’s article ‘No Bill of Rights for Australia’ makes a detailed review of the BOR attempts across time. These extracts are taken from that paper: ‘A more enlightened public debate over the adequacy of Australia’s established institutions for protecting rights would need to reconise the erosion of parliament and its subversion by party responsible government’.  

This thesis has progressively revealed the consistent reactive BOR political stance by the conservative parties and their political supporters both in the federal Parliament and outside of it. What was reasonably inferred from it? In order to offer a clear pointer to understanding the current parliamentary BOR stand-off nationally, the conclusions in Chapter Nine will point to the barriers politically and socially.

Perhaps at present the most useful current human rights message in this chapter was from Robert McClelland who provided the opinion that while the nation was denied a national BOR by the Rudd Government, the provision of the National Human Rights Framework together with its accompanying, the *Human Rights (Parliamentary Scrutiny) Act* 2011 and the PJCHR will in effect provide a backdoor or de facto human rights system. This will over time, be able to apply a wider range appropriate positive rights recommendations in parliament which will expand our positive human rights provisions to the gaps currently found.

Given the earlier review in Chapter Seven of that system and the questions raised there about that Act’s inherent legal weakness and vulnerability to a new conservative government’s ideological objections to it, unfortunately this new rights system risks emasculation by the Coalition parties. If the current Framework does suffer this political dismantling it will simply emphasise the need for a national human rights act. Once enacted a BOR carries with it a quasi-constitutional character which carries with it, the will of the people.

Chapter Nine will now discuss the issues which have been revealed by this thesis’s research effort.

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518 B. Galligan, ‘No Bill of Rights for Australia’, *(Papers in Parliament No.4, July 1989)*, Published and Printed by the Department of the Senate.

519 Ibid, 8.
CHAPTER 9.

CONCLUSIONS.

9.1 Why Australia must have a National BOR.

The questions to be answered by this thesis were outlined in the Abstract and Chapter One. This thesis’s key themes to investigate were outlined as:

1. Why have national governments past and present, failed to enact a BOR?
2. Despite past attempts to achieve one, the dominant reason held by political opponents and supporters is that a BOR would threaten the sovereignty and supremacy of the Australian Parliament.
3. A comparative review of New Zealand’s ‘Commonwealth’ Bill of Rights, challenges the veracity of that view.
4. A statutory ‘Commonwealth’ bill of rights does not diminish Parliament’s sovereignty and will when enacted, allow Australia to fulfill its obligation to respect the rights of all Australians.

This chapter reviews how the thesis has addressed those national human rights issues.

Chapter One of this thesis provides an introductory perspective about the weak nature of Australia’s human rights provisions nationally.\(^{520}\) The UN’s Human Rights Committees offer concerns about the human rights weaknesses. That exposure can be contrasted with the current level of political acceptance of the human rights status quo which can be seen as complacent, particularly from the conservative and some ALP politicians and supporters.

For example Australia has ratified ICESCR and ICCPR yet not all of the rights expressed in them are expressed in domestic law, indeed none of our seven key human rights have been fully enacted into national law. Flowing from that Australia’s judiciary exercise very little domestic case law involving international human rights,

\(^{520}\) George Williams Interview.
nor apply in their other judgments developments in international human rights law, such as jurisprudence practice in the courts in the UK and Western Europe. As well opponents to a national BOR, (including former Prime Ministers, John Howard and Tony Abbott), reject the proposition that Australian human rights law should involve following international human rights jurisprudence.

The effect of this has been to limit the extent and nature of our human rights with current international rights developments by ignoring human rights that other democratic nations adopt. Dr Goldie at interview expressed this weakness clearly.⁵²¹

The UN Committee’s made recommendations to be added to the National Human Rights Action Plan, for action to better protect the rights of women and children: to reduce police use of excessive force: reforms to better protect the rights of indigenous people: honouring the Refugee Convention and the need to review excessive anti-terrorism legislation.

These issues and others outlined in Chapter One pointed to a human rights system in need of overhaul. To be fair the Gillard government was moved to fix a number of these rights problems via the JPCHR, but many human rights abuses have existed for decades and reflect aspects of human rights culture of a bye-gone era, not a modern human rights focussed nation.

9.2 Why Is this Thesis Important?

This thesis’s outlined is a further contribution to needed scholarship on the human rights problems still largely needing solution in Australia. Those problems particularly damage underprivileged Australians but also extend into to the wider community. This thesis has outlined many of the human rights weaknesses and proposes that a vital contribution to the solution of the shortcomings current in our national human rights provisions is the need for a national BOR. Now, at the

⁵²¹ Interview with Dr Goldie 16 April 2013: There is no doubt about it at the moment—we don’t have any formal way within Australia to incorporate international developments or comparative law do we? It’s still an open question whether conventions are a legitimate source of law—it’s a tragedy I know and a frustration for judges that do have a relationship with the global community—its pretty embarrassing. My optimistic view is that it inevitably is going to be increasingly broken down.’
conclusion of this thesis, it asserts that it has clearly pointed to the deficiencies in our national human rights provisions at a number of levels and that there is a pressing need for a national BOR.

The National Consultation at Chapter Six demonstrated that participants not only thought that their human rights were very important in their lives, but also that they also supported the enactment of a HRA. The figures were quite unequivocal:

Submissions to the NHRC 33,356- 87 percent support.

Community round tables 6000-an overwhelming majority.

Independent telephone survey-57 percent.\(^{522}\)

Rights advocates were delighted with these findings an expectation grew that the Rudd Government would move to place a national BOR on the ALP’s election platform. The events of rejection and the reasons for that response are examined in detail in Chapters Six and Seven.

Both before the Consultation and after it, no BOR opponents, the Liberal-National Party Coalition, their supporters, and the Murdoch press, offered any degree of acceptance of the views of the community participants, whose BOR support was revealed by the Consultation Committee. Opponents continued to pursue the view, that a national BOR was anathema to the constitutional structure of the nation.

Thus the final comment here, about the important of this research is that the position of conservative politicians in the BOR opposition parties, and more than a few key ALP’s Ministers, were prepared to oppose the views of the largest survey of its kind in Australian history. The revelation of such large scale public support for better human rights, balanced against the continuing neglect of minority human rights in Australia, justified this research which is needed to understand and oppose why conservative politics in the national parliament has placed what appears to be a permanent barrier against a national BOR.

Other advanced countries adopt provisions of international human rights establised by the UN into their law, which are still being scrutinised and improved in countries such as the UK and New Zealand. There is still little political regard for that

\(^{522}\) NHRC Recommendations, xxxiv, Chapter 6, 162.
process to be adopted significantly in Australia, while other countries ensure that all citizens have nationally accepted human rights, especially in those with Commonwealth style Human Rights Acts.

9.3 The Literature Reviews: Chapters Two to Seven.

The first task was to decide what literature research would be done which was relevant to the thesis’s primary questions and associated questions which flowed from that. It was thought necessary to look at the history of the philosophy of human rights and what bills of rights sought to protect. Of course philosophy changes across time from society in the Middle Ages to the Enlightenment to Post-World War Two, from Declarations of Rights to Bills of Rights applied today.

This thesis has sought to outline the current weakness of Australia’s human rights and indicate that a new political and social thrust should be recommenced to overcome it. The Australian people should push their political leaders in anger that they have the right to a BOR which protects their basic rights against excessive power by government and its agencies.

It is worth remembering that the struggle for legislation to protect rights is not new. From a historical perspective things can and do change, this existing national human rights order in Australia is not somehow ‘natural’ and ‘immutable’. 523

It is easy for those concerned with progressive social change to become disheartened at a system of inequality and disadvantage that seems intractable; to accept the conservative argument that the way things are is the ‘natural’ order of things that cannot be altered; and hence believe that the way people behave in the modern world is ‘human nature’ and therefore unchangeable.

A historical perspective suggests otherwise. The study of history can be seen as the struggle for human rights, which gives an extra immediacy to the human rights issues of the present. 524

Sir Hersch Lauterpacht’s ‘An International Bill of the Rights of Man’ published in 1945, 525 was described in the Introduction by Philippe Sands as:

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524 Ibid.
One of the transformative legal works of the twentieth century. It posited a new legal order, adopting Winston Churchill’s commitment to, ‘the enthronement of the rights of man’, and placing the protection of the individual human at the centre of the legal landscape, a means to bring an end to the omnipotence of the state.⁵²⁶

Stephane Hessel published ‘Indignez-Vous’⁵²⁷ to express his passionate support for human rights, as one who after surviving the Buchenwald and Dora concentration camps, subsequently helped draft the United Nations Universal Declaration of Human Rights.⁵²⁸ He explains that the the National Council of Resistance’s collection of principles and values for (human rights) that were proclaimed on 15 March 1944 during German occupation,’still provides the foundation of our country’s modern democracy’.⁵²⁹

We can he says, identify two great new challenges:

1. The immense gap between the very poor and the very rich, which never ceases to expand. This is an innovation of the twentieth and twenty-first centuries. We cannot let this gap grow even wider. This alone should arouse our commitment.⁵³⁰

2. Human Rights and the state of the planet. The real issue at the end of the Second World War was to free ourselves from the threats that totalitarianism held over mankind’s head; and to do so, the member states of the UN had to commit to respecting universal rights. That is

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⁵²⁵ Hersch Lauterpacht, ‘An International Bill of Rights of Man, (Oxford University Press), First Ed.1945, This Ed. Published 2013.


⁵²⁹ Ibid, 1.

⁵³⁰ Ibid, 8

⁵³¹ Ibid, 9.
how to forestall the argument for full sovereignty that a state likes to make when it is carrying out crimes against humanity on its soil.\textsuperscript{531}

The rights set forth in the Universal Declaration of Human Rights in 1948 are indeed universal. When you encounter someone who lacks those rights, have sympathy and help him or her to achieve them.\textsuperscript{532}


His article compares the responses the USA is making through their BOR to the human rights attacks upon Americans, compared to what Australian’s could do, if we had a prime minister and cabinet seeking to follow Trump’s lead. The short answer is that we may not fare so well. In Trumps’s case he faces a formidable obstacle in the US Bill of Rights’.\textsuperscript{533}

He describes our rights position as having; a few scattered rights protections; These occasionally prevent government action but in other cases are ineffectual or impose procedures that can be worked around; These weaknesses are exacerbated by extraordinary powers given to federal ministers in areas such as immigration and national security.\textsuperscript{534}

Professor Williams examples the Attorney-General’s power to permit Australia Security and Intelligence organisation (ASIO), which to operate outside the law by conducting a special intelligence operation. A Journalist who discloses wrongdoing or that the power has been used illegitimately may be gaolled for up to ten years.

Since the September 11 attacks, the Federal Parliament has enacted 66 anti-terrorism laws, a figure unrivalled in any comparable nation. These laws have transferred enormous authority to the executive government. They are the sorts of powers that one would expect to find in a police state in which people [and journalists] can be detained without trial.

\textsuperscript{532} Ibid, 5.


\textsuperscript{534} Ibid, columns 3 & 4.
The government’s national security monitor Roger Gyles, reported last Wednesday, Australia has laws that contain the ‘potential for oppression’.

The election of Trump should be a wake-up call. Australia is ill-prepared for a like-leader.535

Professor Williams should be congratulated for his outline of the human rights risks that Australian’s face because they do not have a Bill of Rights. His comments are joined above to the comments of Fenner (2006), Lauterpach (1945) and Hessel (2010), who place the same value on BOR’s which protect citizen’s against excessive power by governments and their agencies. All proclaim very important human rights wake-up calls.

Call for better Australian human rights has come from Professr Triggs, AHRC president which has enraged federal conservative politicians. She has had to endure vicious attacks by members of the current LNP government, who see her as intruding into their policy domain. Their response stands in stark difference to the freedom of expression that the New Zealand’s Human Rights Commission has achieved, from its parliament.

Professor Triggs’s 2016 public lecture entitled ‘Human Rights across the Tasman : a widening Gulf,’ concludes :

The NZ Bill of Rights Act is acknowledged as having a positive and significant on statutory interpretation and protection of human rights. Australia should actively reconsider the adoption of a similar suite of rights and freedoms to ensure that the rule of law is protected by the courts and respected by governments. I suggest that many Australian laws would not withstand legal scrutiny by the courts were they to have a form of Bill of Rights as benchmark. In the absence of a human rights perspective, Australia continues to drift towards isolation from the fundamental principles of law that our two countries have shared for so many decades.536

Chapter Two. Post- World War Two Human Rights.

This period has seen an amazing growth in the spread of human rights provisions. This writer became interested in the reality of the human rights philosophy that political power relations as expressed by Neil Stammers, rather than

535 Ibid, columns 6-7.

the universal rights philosophy commonly expressed, as the new driving force which
determines the process of human rights whether for or against a BOR. This thesis
considers that using Stammer’s ‘power relations concepts’, the view can be taken
that Australia’s national human rights BOR impasse is a reflection of elite
conservative political philosophy and its resultant policy, which has rejected the gain
that the community would achieve from a BOR, leaving their political power
untouched by the human rights that a BOR would bring, and which might be
disadvantageous to their supporters, especially business and the churches.

That was the starting point of a search from that point for facts that could
explain Australia’s conservative human rights exceptionalism, justified by evidence. At
the conclusion of the Chapter Two, questions were posited that required further
answers to the nature of the LNP BOR opposition. What proof could be put forward
by these BOR opponents, what clear sound constitutional reasons could justify the
barrier or as the research pointed to, that they support a BOR barrier purely for
party—political gain. Additionally, what information could be found to confirm that
the ALP’s BOR attempts failed, because of lack of sufficient support from its MP’s and
or from its supporters.

Chapter Three: The History of Bills of Right: Politics and Law in Australia since
Federation.

What was revealed in this literature search was the origins of the resistance to
a national BOR at Federation and the accompanying racist ‘White Australia’ policy
which prevailed for several decades. Since that time conservative politics in Australia
has maintained a belief in the concept of English Liberal Constitutionalism expressed
frequently since Federation, namely that the sovereign Parliament should be the
protector of our rights and that any diminution of this constitutional structure should
be the resisted, as dangerous to the will of the people and democracy in general.

It is not necessary to examine in detail here of the failed struggle to enact a
national BOR since the 1960’s, except to understand that the ALP and other minor
parties have not been able to overcome this conservative BOR resistance. The
philosophical and policy position of conservative politics in Australia required a
literature review to test its validy and applicability to a 21st century Australia which
has undertaken massive social change since the end of World War Two.

Chapter Four:
The next important literature review concerned of the key opposition argument against a Bill of Rights for Australia: that it would cause serious constitutional damage to the legislature by transferring power to the courts. This task required a detailed review of Australia’s constitutional structure involving the Parliament’s powers and its relationship with the judiciary. The interaction of political and legal spheres in Australia need to be understood in terms of structure, functions and power before a reasonable assessment could be made.

What did this research discover regarding opponents fear of damage to the Parliament’s powers if a BOR was enacted? A comparative review of the UK’s Commonwealth HRA showed clearly in its operation that their Parliament had not suffered loss of legislative power to the superior courts. The superior courts, under the provisions of their Human Rights Act 1998, are not permitted to invalidate legislation. They do have the right to find incompatibility in a rights hearing and forward this to the Attorney-General to advise the Parliament, so that it may decide what to do about the provision. Action may range from alteration of the Bill, withdrawing it, to letting it stand unchanged.

It seems clear that if Australia were to enact a similar Commonwealth BOR there seems no reason to fear that the UK’s legal and political power result would not follow here. A flow-on in the UK from their HRA has been the growth of human rights awareness in ‘dialogue’ though the three arms of government legislature, the judiciary, the executive, and the public service.

It is interesting that in public political discourse in Australia, politicians opposed to a BOR do not seem to want to discuss the Commonwealth model BOR with its accommodations protecting parliamentary sovereignty. The High Court’s powers would remain protecting the Constitution and other legality, but beyond that, respecting the sovereignty of the national Parliament would remain unchallenged. It can be argued that our traditional power balance between the Parliament and the court would not be damaged with a Commonwealth BOR. Appropriate parliamentary action following widespread community BOR information, could be applied to achieve a way past the last High Court Momcilovic objections to SOC’s, whether by Statute and or referendum.

The chapter concludes by raising the questions again of the political power equation in opposing a BOR, especially with the view outlined that Parliament’s internal power structure has changed. It is a given that Australia’s political parties
maintain tight party control over MP’s, such that they now owe allegiance to the party first and the people second and that the executive dominate the party-political process. It has been established in this thesis that the current Coalition government follows strict policy which around a national BOR, benefits the party first, their supporters, and the human rights of the nation after that.

Chapter 5.

This chapter takes an even more detailed examination of political and legal processes of New Zealand’s BORA. It is largely a stage by stage review, showing how their legislature, public service and legal system co-operate under a Commonwealth BOR. It also makes a detailed examination of the SOC process to remove fears also raised by opponents, that the court’s seriously weaken parliament’s power by forcing the legislature to repair many statues, thus weakening their sovereignty.

This has not happened in New Zealand and in the Appendix of this thesis, graphs and Bill coverage shows that Section 7 Reports (really a statement of inconsistency) have had a relatively low impact on their legislative process. Note that the Ministry of Justice provides information about government departments advice upon the human rights issues in their Bills to be presented, and the Crown Law Office provides legal advice. As well the Bill passes to Cabinet which consults its Cabinet Notes, which also check for inconsistency.

The superior courts have been empowered, subsequent to the BORA’s commencement, to issue SOC’s in the case of inconsistencey involving discrimination law.

I would suggest to any readers of this thesis to read the appendix notes of this chapter to understand the three-way administrative, political and legal system has operated to avoid submitting inconsistent Bills. However if they do arrive in the Parliament, and they do regularly, it debates and decides as in the UK, whether to alter or leave them stand.

I would make a brief note of thanks here to the New Zealand Ministry of Justice for their assistance regarding Section 7 notices.

The final comment about this chapter’s research is, that it is a more detailed and convincing rebuttal to the assertion and fears of opponents of an Australian
Commonwealth BOR, that Parliament’s power will be diminished by the enactment of it nationally.

Chapter 6. The Rudd Government’s BOR Rejection.

This chapter sought to answer the question of why the Rudd Government rejected the recommendations of the National Human Rights Consultation. Essentially the chapter looked at the political processes running before and after the rejection and the decision, which revealed division within the ALP for a BOR at ministerial level, as well as political opposition within the ranks of the party by supporters elsewhere. The summary of that process was provided Professor Williams who considered that the decision was basically decided on the pre-election ‘numbers’ which is what happens to policy where there is no ideological commitment to want a policy.

When considering that rejection, it did create a view that BOR political enactment by itself would be helped by a much earlier and larger policy political commitment. As one of the interviewees put it: ‘At the end of the day you can’t lead by legislation. You have to take the population along with you.’

The question of BOR community education was discussed in detail from the research in Chapter Eight.

The ALP moved to adopt a second, fall-back position called the National Human Rights Framework. The subsequent Gillard government began a program of incremental human rights improvements under that policy.

Overall the National Human Rights Consultation was by any standards a tremendous effort and unfortunately tied to a politically prevaricating government. It deserved a better fate but it did however remove the view that Australia’s were not interested in their human rights or that they would not support a BOR.


The adoption of this policy was a political-fix Plan B, for a party in pre-election mode with a weak commitment for a national BOR. That is not to say that all its initiatives were uninspiring such as the Human Rights (Parliamentary Scrutiny) Act 2011 and its JPCHR. The work of the Committee has been significant at least initially. The application of the ‘seven treaties’ ratified by Australia was quite unexpected.

537 Interview with Sharon Bird MHR, ALP Member for Cunningham, Minister for Higher Education and Skills, at her Wollongong Electorate Office, 2 May 2012.
thereby applying over 100 human rights to the rights they can consult to their review of Bills. They are still however constrained ultimately by the need to follow Australian law.

The then opposition Senators now in government, indicated the need to remove significant portions of the Act and functions of the JPCHR. It remains to be seen if they will move against this legislation in the current Parliament but that is likely to come if they are ever re-elected with a Senate majority.

Another issue raised by this legislation is that national human rights are placed under the exclusive control of the Parliament. Discussion in this chapter by Hiebert in Chapter One regarding the history of weak parliamentary structures and procedures in the UK Parliament towards human rights issues, can be applied to the our current federal Parliament as well.

Perhaps the most important issue in this chapter, has been the removal of human rights issues away from the people to the politicians. It was certainly what this writer thought at the commencement of this thesis, that any national BOR would come from the Parliament. However, if the ALP experience in the run up to the 2010 election is a guide, there will have to be much more involvement of the community as well, which will have to come from political and supporter-driven education about the BOR.

9.4 Chapter 8. The Research Interviews.

This fieldwork involved a substantial part of this thesis’s time largely because of time lost in rejection by many politicians who would not enter into policy debate. The views of the final group of 20 interviewee’s was reduced to those who were considered to have the most substantive views about the BOR questions.

What issues did they reveal which are new and important information?

(a) Human Rights education of the Australian people was clearly a major issue which emerged from the supporters interviews. Without listing all those views, a much better community education process was considered a key necessity if a national BOR was to be achieved. Such education will need to be able to neutralise conservative propaganda and misrepresentation.
(b) A number thought that implementation of the program would require a political champion to take that education to the people. That obviously requires a politician with a high ideological commitment.

(c) Another important point which was indirectly expressed was that the ALP had to unify on the issue if it wanted to see a BOR eventuate. It will be interesting to see if the ALP will in some future term in office, will be willing to take up the BOR cause again as previously indicated, or whether it has lost its BOR commitment.

(d) The National Human Rights Framework was supported as a back-door Bill of Rights. Perhaps this should be considered as somewhat of an exaggeration when compared to the community visibility and community awareness created by a functioning BOR, as shown in previous chapters. Advocates considered it a second best human rights option to a national BOR.

(e) The awareness of the political power issue and a BOR was raised in that the Coalition parties were seen reject a BOR for politically driven ideological right-wing reasons, that involve being more concerned about guarding against BOR rights which would be detrimental to the interests of their supporters, such as big business and some church groups.

9.5.1 Conclusions which emerge from this thesis.

Firstly, this thesis has revealed that the primary fear of constitutional damage proposed by opponents to a national BOR is fallacious and can not to be shown to be true in practice in nations with a Commonwealth BOR and with a similar Westminster heritage as Australia.

Secondly, opponents to a national BOR incorrectly assume that Australia’s civil society and institutions have in fact produced a strong national human rights regime, which evidence in this thesis shows it has not. It is a human rights patchwork with a low rights provision, limited community awareness and understanding of their human rights. The resultant human rights damage being exposed in our community currently, is proof of the weakness of opponents satisfied human rights claims.

Because of this record of weakness and omission in our national human rights provisions particularly but not exclusively shown by UN Human Rights Committees in this thesis, we are failing to protect our most vulnerable. The ACOSS data gives some indication of the extent of the vulnerability. The belief that our national human rights provisions allow self-congratulation must be reconsidered.
9.5.2 The Power of Political Elites Who refuse Australia a National BOR.

This is the element which emerges most strongly as a result of this thesis’s research. It comes from reflection following all of the ideas and views which have flowed around the question of a national BOR in this thesis. It provides an understanding to the prime question of this thesis, that is, why Australia does not have a national Bill of Rights.

This thesis establishes clearly the main barrier against a national BOR in Australia. The credo of politicians in the LNP Coalition and their supporters are arguments they have developed against a national BOR, which have been described by one politician interviewee a ‘trojan horse’ to hide a more important political ideology.

That ideology, is to offer political support to elements of the business and corporate section of our community and to selected support groups such as some churches, by maintaining a fixed and unified opposition against a national BOR. That political barrier is obviously convenient for some because it can preserve advantage in the case of business whether that be economic or trade, and support for religious doctrine which infringes human rights.

It would be doing many if not most in Australia’s business sector a great disservice to suggest that all business would be interested in some kind of on-going agreement with conservative government that they must have government providing them with special advantages, including as being opposed to a national BOR. However, Sydney Herald reported a pre-budget call from the Business Council of Australia to the government, that on the one hand they should lower the tax rate to 25 per cent from 30 percent over 10 years,(an Australian $50 billion outlay) and additionally, that government spending must be reduced. The Gratten Institute considers that such a plan would need to cut spending and that risked reducing living standards.


The amount of public taxes that should be passed on to the business sector has fallen on considerable opposition and discussion, given that tax paid in the business sector has fallen for many firms.

One other short comparative illustration of one specific area of human rights improvements in the workforce, shows how improvements can flow from a legally enforceable national BOR. This example harks back to earlier research about EU human rights. It is possible that the improved worker’s employment rights there, would cause some in business here, to see comparable rights as a serious threat to profits.

In Europe the European Social Charter of 1965 (Additional Protocol), provided workers with the right to take part in determining and improving their working conditions and working environment. Since then, the EU Charter of Fundamental Rights based on fundamental rights and freedoms of the European Convention on Human Rights, the constitutional traditions of the EU member states, the Council of Europe’s Social Charter, Community Charter of Fundamental Social Rights of Workers, and other international conventions to which the EU or its members have ratified, has strengthened rights generally as well as for workers.

At Chapter IV Solidarity, workers have the right to information and consultation within the undertaking, the right to collective bargaining and action, the right of access to placement services, protection in the event of unjustified dismissal, fair and just working conditions, prohibition of child labour, the protection of young people at work, and family and professional life social security/social assistance.

Opposition to such positive rights expressed in the EU human rights charters, is likely one important driver behind the Coalition’s BOR rejection that some business supporters are seeking to avoid. The legal workplace discrimination in religious schools is also one part of that support.

The conclusion that follows from this possibility is that this elite political support comes at the BOR rejection cost of not providing the community generally, and minorities specifically, with a more effective and comprehensive human rights regime, as a bipartisan issue. Some groups who are the Coalition’s supporters wish to

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541 Ibid.
retain their advantages whereas BOR human rights would be a business disadvantage.542

It is remarkable that given the international spread of and adoption of human rights instruments in democratic societies that Australian conservative politicians have been prepared to continue this political policy. The ALP’s human rights credential can also be criticised as not being able to act decisively and cohesively to achieve a BOR. This nation’s politicians can do much better than unenlightened elites in many parts of the world who follow a political strategy which restricts many citizen’s human rights so that elites benefit.

The Australian national BOR rejection by the conservative parties cuts clearly across perceived benefits of a BOR that contemporary democracies have accepted. That acceptance in these countries sees flourishing enterprise as well as a functioning BOR. The message is that you can have both, and a fairer community which is enriched with better human rights.

It is beyond the reach of this thesis’s research which is a broad review of the need for an Australian BOR, to dig more deeply for additional facts as to why the Coalition MP’s generally and some ALP opponents specifically in the federal parliament, are so negative towards a BOR, other than what has already been provided in the thesis. That list has been outlined in some detail in Chapter One as well as in Chapters Seven. Only two Coalition members were prepared to discuss the LNP’s party position on a BOR, with the writer, none from Coalition partner the National Party of Australia.

It will need political action and community education by supporters, given that conservative politics in Australia, offers such extreme resistance to a national BOR. The apparent conservative vision at the political level, that the market economy can not operate successfully with a BOR, is one that should be exposed and opposed.

This thesis considers that conservative political dependence and defence of constitutional principles appears not to stand the real world test of rational argument. Neither would it agree with the concept that a free enterprise, market economy must deny its citizens the right to those benefits expressed internationally as Bills or Charters of Rights. Both can function side by side with mutual benefit the result.

‘The struggle to achieve human rights is not won with the passage of a human rights act. The success of these Act... depends upon human rights becoming part of political culture’.

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APPENDIX:

I NEW MATILDA’S DRAFT HUMAN RIGHTS BILL 2006 SUMMARY.

What rights does the draft Bill seek to protect?

The draft Bill contains the following categories of human rights:

1. Civil and Political rights including: protection from torture and cruel and inhuman or degrading treatment; right to liberty and security of the person; freedom of thought, conscience, religion and belief; the right to peaceful assembly and freedom of speech; rights of indigenous people; right to a fair trial

2. Economic and Social rights including: education work an adequate standard of living physical wellbeing and health social security

3. Reasonable limits may be placed on these rights where they are justified in a free and democratic society. There is also a provision that allows certain rights to be limited in the event of a public emergency.

4. How does the draft Bill protect these rights?

(a) Through the Government specifically the Attorney-General, who has obligations to the Parliament to examine legislation and report on its compatibility with human rights.

(b) Through the Parliament specifically through a Parliamentary Joint Standing Committee who must review compatibility statements made by the Attorney-General, who in turn has had to consider declarations of incompatibility made by Courts (see below). The JPCHR then reports on the matters it has considered to the Parliament and to the responsible Minister.

(c) Through the Courts which must so far as it is possible read legislation in a way which is compatible with human rights and may make declarations of incompatibility which are then reported to the parliament. They may invalidate secondary legislation (regulations).
(d) Through the members of the public, who may bring proceedings in the Courts against any public authority which has acted (or proposes to act) in a way which is incompatible with human rights.

Note that courts are not empowered to invalidate legislation; this important power is retained by the Parliament.

II. CHARTER OF FUNDAMENTAL RIGHTS OF THE EUROPEAN COMMUNITY.

PREAMBLE

The peoples of Europe, in creating an ever closer union among them, are resolved to share a peaceful future based on common values.

Conscious of its spiritual and moral heritage, the Union is founded on the indivisible, universal values of human dignity, freedom, equality and solidarity; it is based on the principles of democracy and the rule of law. It places the individual at the heart of its activities, by establishing the citizenship of the Union and by creating an area of freedom, security and justice.

The Union contributes to the preservation and to the development of these common values while respecting the diversity of the cultures and traditions of the peoples of Europe as well as the national identities of the Member States and the organisation of their public authorities at national, regional and local levels; it seeks to promote balanced and sustainable development and ensures free movement of persons, goods, services and capital, and the freedom of establishment.

To this end, it is necessary to strengthen the protection of fundamental rights in the light of changes in society, social progress and scientific and technological developments by making those rights more visible in a Charter.

This Charter reaffirms, with due regard for the powers and tasks of the Community and the Union and the principle of subsidiarity, the rights as they result, in particular, from the constitutional traditions and international obligations common to the Member States, the Treaty on European Union, the Community Treaties, the European Convention for the Protection of Human Rights and Fundamental Freedoms, the Social Charters adopted by the Community and by the Council of Europe and the case-law of the Court of Justice of the European Communities and of the European Court of Human Rights.

Enjoyment of these rights entails responsibilities and duties with regard to other persons, to the human community and to future generations.

The Union therefore recognises the rights, freedoms and principles set out hereafter.
CHAPTER I

DIGNITY

Article 1

Human dignity

Human dignity is inviolable. It must be respected and protected.

Article 2

Right to life

1. Everyone has the right to life.

2. No one shall be condemned to the death penalty, or executed.

Article 3

Right to the integrity of the person

1. Everyone has the right to respect for his or her physical and mental integrity.

2. In the fields of medicine and biology, the following must be respected in particular:
   - the free and informed consent of the person concerned, according to the procedures laid down by law,
   - the prohibition of eugenic practices, in particular those aiming at the selection of persons,
   - the prohibition on making the human body and its parts as such a source of financial gain,
   - the prohibition of the reproductive cloning of human beings.

Article 4

Prohibition of torture and inhuman or degrading treatment or punishment

No one shall be subjected to torture or to inhuman or degrading treatment or punishment.

Article 5

Prohibition of slavery and forced labour

1. No one shall be held in slavery or servitude.

2. No one shall be required to perform forced or compulsory labour.

3. Trafficking in human beings is prohibited.
CHAPTER 2. FREEDOMS

Article 6
Right to liberty and security

Everyone has the right to liberty and security of person.

Article 7
Respect for private and family life

Everyone has the right to respect for his or her private and family life, home and communications.

Article 8
Protection of personal data

1. Everyone has the right to the protection of personal data concerning him or her.

2. Such data must be processed fairly for specified purposes and on the basis of the consent of the person concerned or some other legitimate basis laid down by law. Everyone has the right of access to data which has been collected concerning him or her, and the right to have it rectified.

3. Compliance with these rules shall be subject to control by an independent authority.

Article 9
Right to marry and right to found a family

The right to marry and the right to found a family shall be guaranteed in accordance with the national laws governing the exercise of these rights.

Article 10
Freedom of thought, conscience and religion

1. Everyone has the right to freedom of thought, conscience and religion. This right includes freedom to change religion or belief and freedom, either alone or in community with others and in public or in private, to manifest religion or belief, in worship, teaching, practice and observance.

2. The right to conscientious objection is recognised, in accordance with the national laws governing the exercise of this right.
Article 11
Freedom of expression and information
1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers.

2. The freedom and pluralism of the media shall be respected.

Article 12
Freedom of assembly and of association
1. Everyone has the right to freedom of peaceful assembly and to freedom of association at all levels, in particular in political, trade union and civic matters, which implies the right of everyone to form and to join trade unions for the protection of his or her interests.

2. Political parties at Union level contribute to expressing the political will of the citizens of the Union.

Article 13
Freedom of the arts and sciences
The arts and scientific research shall be free of constraint. Academic freedom shall be respected.

Article 14
Right to education
1. Everyone has the right to education and to have access to vocational and continuing training.

2. This right includes the possibility to receive free compulsory education.

3. The freedom to found educational establishments with due respect for democratic principles and the right of parents to ensure the education and teaching of their children in conformity with their religious, philosophical and pedagogical convictions shall be respected, in accordance with the national laws governing the exercise of such freedom and right.

Article 15
Freedom to choose an occupation and right to engage in work
1. Everyone has the right to engage in work and to pursue a freely chosen or accepted occupation.

2. Every citizen of the Union has the freedom to seek employment, to work, to exercise the right of establishment and to provide services in any Member State.
3. Nationals of third countries who are authorised to work in the territories of the Member States are entitled to working conditions equivalent to those of citizens of the Union.

**Article 16**

Freedom to conduct a business

The freedom to conduct a business in accordance with Community law and national laws and practices is recognised.

**Article 17**

Right to property

1. Everyone has the right to own, use, dispose of and bequeath his or her lawfully acquired possessions. No one may be deprived of his or her possessions, except in the public interest and in the cases and under the conditions provided for by law, subject to fair compensation being paid in good time for their loss. The use of property may be regulated by law in so far as is necessary for the general interest.

2. Intellectual property shall be protected.

**Article 18**

Right to asylum

The right to asylum shall be guaranteed with due respect for the rules of the Geneva Convention of 28 July 1951 and the Protocol of 31 January 1967 relating to the status of refugees and in accordance with the Treaty establishing the European Community.

**Article 19**

Protection in the event of removal, expulsion or extradition

1. Collective expulsions are prohibited.

2. No one may be removed, expelled or extradited to a State where there is a serious risk that he or she would be subjected to the death penalty, torture or other inhuman or degrading treatment or punishment.
CHAPTER III
EQUALITY

Article 20
Equality before the law
Everyone is equal before the law.

Article 21
Non-discrimination
Any discrimination based on any ground such as sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation shall be prohibited.

III. INCONSISTENCY GRAPHS, SECTION 7 REPORTS, AND TABLES.

It is useful to provide information which illustrates and answers criticism of the risks to parliamentary sovereignty by NZ BORA incompatibility, in this case, the scale of and effect of New Zealand’s BORA Section 7 Reports on the Parliament’s legislative program. The statistical information applies to 2014.

Note that Government Bills are those implementing government policies. Non-government Bills cover a number of diverse areas outside the government’s national legislative program.
Statistical information

*Reports under section 7 of the Bill of Rights Act - sorted by type of Bill*
Reports under section 7 of the Bill of Rights Act - sorted by right

Reports under section 7 relating to s19 Bill of Rights Act – sorted by non-discrimination ground

- Age: 7 cases
- Disability: 6 cases
- Family status: 3 cases
- Marital status: 3 cases
- Race, colour and ethnic origin: 6 cases
- Gender: 2 cases
- Sexual orientation: 3 cases
Source. New Zealand Ministry of Justice.

Section 7 Reports.

1. Thirty two government and twenty seven non-government s 7 reports by are included in this percentage breakdown of rights. The Ministry of Justice in New Zealand describes these non-government Bills as local Bills, private member’s Bills portfolio and legislative amendments, proposed by other than members of Parliament. As might be expected they form only a small proportion of the Bills presented to the House for consideration.

2. Section 19 (discrimination) rights reports are the largest rights with incompatibility issues, followed by s14 (freedom of expression).

3. Specific s19 rights are shown on the pie graph, seeking non-discrimination in those areas.

4. For the period up to 2014 shown above government and non-government, 59 Bills were subject to a report under section 7 of the New Zealand Bill of Rights Act 1990:

5. 20 Bills were not enacted (meaning they were either defeated or withdrawn);

6. 24 Bills were enacted with the relevant provision being ‘substantially unchanged’;

7. 10 Bills were ‘subject to amendments’ designed to address inconsistency (although in two cases, ‘only partly’).

(a) Government Bills.

- 28 Bills have been subject to a report under section 7 of the Bill of Rights Act.
- 22 Bills were enacted with the relevant provision being ‘substantially unchanged’.
- Some recent Bills are still before the House.

(b) Non-Government Bills.

- 21 Bills were not enacted.
- Bills were enacted with the relevant provision being ‘substantially unchanged’.545

Since 1970, 70 Section 7 reports concerning NZBORA have been tabled as of March 2016.

(c) NZ Ministry of Justice Constraints on the information provided.

1. It does not attempt to analyse the deliberations in the House or why a Bill was or was not changed.

2. It is fair to say that societal attitudes towards issues have changed and that subsequent Bills on the same topic have not been subject to report.

3. The final s 7 vetting decisions are frequently supported by several pages of legal reasoning prepared by the vetting section of the Ministry of Justice and where necessary for Ministry of Justice bills, by the Crown Law Office.

545 Report from the NZ Ministry of Justice, Senior Vetting Officer’s report received at brianmwal@yahoo.com, 28/2/2012, updated 26/6/2014.
Erdos provides a four point scale to measure the strength of a bill of rights’s ‘institutionalisation’, which he describes as the measure of the impact that a bill of rights has on its legal and political system. There are three dimension the bill of rights should be measured against: its status, (as against other laws), its rigidity, (how easily it can be amended or repealed), and its scope (the range of rights it protects).

His table based on these variables (current at 2006) gives the following comparative examples of the NZBORA’s impact upon its legal and political strength compared to the bills of some other democracies.

<table>
<thead>
<tr>
<th>Country</th>
<th>Overall Score</th>
<th>Status</th>
<th>Rigidity</th>
<th>Scope</th>
</tr>
</thead>
<tbody>
<tr>
<td>Germany</td>
<td>3.42</td>
<td>4</td>
<td>4</td>
<td>2.25</td>
</tr>
<tr>
<td>United Kingdom</td>
<td>1.5</td>
<td>2</td>
<td>1</td>
<td>1.5</td>
</tr>
<tr>
<td>Canada</td>
<td>3.00</td>
<td>3</td>
<td>4</td>
<td>2</td>
</tr>
<tr>
<td>New Zealand</td>
<td>1.17</td>
<td>1</td>
<td>1</td>
<td>1.5</td>
</tr>
</tbody>
</table>

Of the 35 countries in the sample, the NZBORA has the second lowest institutionalization score follow
Royal commission into child sexual abuse: 1,880 alleged perpetrators identified in Catholic Church

By Philippa McDonald and Riley Stuart

Updated about an hour ago Tue 7 Feb 2017, 12:23pm ABC News.

More than 20 per cent of the members of some Catholic religious orders — including Marist Brothers and Christian Brothers — were allegedly involved in child sexual abuse, a royal commission hearing in Sydney has been told.

Nearly 2,000 Catholic Church figures, including priests, religious brothers and sisters, and employees, were identified as alleged perpetrators in a report released by the Royal Commission into Institutional Responses to Child Sexual Abuse.

If you or anyone you know needs help:
- Lifeline on 13 11 14
- Kids Helpline on 1800 551 800
- Mens Line Australia on 1300 789 978
- Suicide Call Back Service on 1300 659 467
- Beyond Blue on 1300 22 46 36
- Headspace on 1800 650 890

The hearing is examining the current policies and procedures of the church's authorities in Australia relating to child protection and child safety standards, as well as their response to allegations of abuse.
In her opening address, Gail Furness SC said a survey revealed 4,444 allegations of incidents of abuse between January 1980 and February 2015 were made to Catholic Church authorities.

Ms Furness said 60 per cent of all abuse survivors attending private royal commission sessions reported sexual abuse at faith-based institutions.

Proportion of non-ordained religious order members who were alleged perpetrators

<table>
<thead>
<tr>
<th>Religious institute</th>
<th>Percentage</th>
</tr>
</thead>
<tbody>
<tr>
<td>Brothers of St John of God</td>
<td>40.4</td>
</tr>
<tr>
<td>Christian Brothers</td>
<td>22.0</td>
</tr>
<tr>
<td>Salesians of Don Bosco</td>
<td>21.9</td>
</tr>
<tr>
<td>Marist Brothers</td>
<td>20.4</td>
</tr>
<tr>
<td>De La Salle Brothers</td>
<td>13.8</td>
</tr>
<tr>
<td>Patrician Brothers</td>
<td>12.4</td>
</tr>
<tr>
<td>Society of Jesus</td>
<td>4.8</td>
</tr>
<tr>
<td>Missionaries of the Sacred Heart</td>
<td>3.3</td>
</tr>
<tr>
<td>Sisters of St Joseph of the Sacred Heart</td>
<td>0.6</td>
</tr>
<tr>
<td>Sisters of Mercy (Brisbane)</td>
<td>0.3</td>
</tr>
</tbody>
</table>

*Weighted figures for 1950 - 2010. Source: Royal Commission into Institutional Responses to Child Sexual Abuse

Of those, almost two-thirds reported abuse in Catholic institutions.

The royal commission's report found of the 1,880 alleged perpetrators from within the Catholic Church, 572 were priests.

Ms Furness described the victims' accounts as "depressingly similar".

Who are the Brothers of St John of God?

Forty per cent of the members of the Brothers of St John of God had allegations of abuse made against them from 1950-2010.
"Children were ignored or worse, punished," she said.

"Allegations were not investigated. Priests and religious [figures] were moved. The parishes or communities to which they were moved knew nothing of their past.

"Documents were not kept, or they were destroyed. Secrecy prevailed as did cover-ups."

The average age of the victims at the time they were allegedly abused was 10 for girls and 11 for boys.

Religious orders were in the firing line with the data suggesting that between 1950 and 2010, more than 20 per cent of Marist Brothers, Salesians of the Don Bosco and Christian Brothers had allegations of child sexual abuse against them.

For the Brothers of St John of God, that number was 40.4 per cent.

It is the first time the data has been released.

'They give God a bad name'

Two daughters of Anthony and Chrissie Foster were abused. One

"The Catholic priesthood give God a bad name. They're a disgrace. They are unremorseful," she said.

"For so long this has been the way they acted to hide perpetrators, to move them on, with no regard for children whatsoever, that other children have become victims, and suffered this terrible fate.

"They have shown no mercy, no remorse. Nothing."

One of the Catholic Church's most senior figures choked up as he acknowledged the abuse during the hearing.
Francis Sullivan from the church's Truth, Justice and Healing Council described the number as "shocking".

"They are tragic and they are indefensible," he said.

"Each entry in this data, for the most part represents a child who suffered at the hands of someone who should have cared for, and protected them."

The Archbishops of Sydney, Perth, Brisbane, Adelaide, Melbourne and Canberra-Goulburn have congregated in Sydney to give evidence as part of the three-week public hearing.

Questions are expected to focus on the extent of child abuse over almost seven decades and what church leaders are doing to protect children.

This is the 50th public hearing of the four-year-long royal commission and it is the 16th dealing with abuse in the Catholic Church.

The royal commission has investigated how institutions across the country, including schools, churches, sports clubs and government organisations, have responded to allegations and instances of abuse.

vi Alphabetical list of Interviewees.

List 1. Participant’s Comments in Chapter Eight BOR Research (15).

List 2. Other participants comments used in foot notes of thesis chapters (5).

1. Professor Peter Bailey.
2. Meredith Burgman.
5. Dr Sandra Goldie.
6. Antony Loewenstein.
7. Robert McClelland.
8. Cameron Murphy.
10. Senator Scott Ryan.
11. Natasha Stott-Despoya.
VII. Extract of ACOSS 2016 Poverty Report: Foreword Dr Cassandra Goldie-Chief Executive Officer, ACOSS.

The latest Poverty Report 2016 finds that Australia has failed to reduce the level of overall poverty in our community over the 10 years to 2014, with 13.3% of the population (2.99 million people) living below the poverty line in 2013-14. Alarmingly, there has in fact been a 2 percentage point rise in the number of children living in poverty in the period, now 17.4% (731,300).
