

The Australian Constitution and Human Rights: A Centenary View

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Introduction

Over the course of a century, Australia has developed into a prosperous nation and one of the oldest continuous democracies in the world. The Australian Constitution has played an important role in this. Since 1901, it has withstood crises and the passage of time to produce an effective foundation for economic, social and cultural development and has fostered a stable democracy responsive to and representative of the people. The important role played by the Constitution is perhaps only apparent when our experience as a nation is compared to that of other nations, such as Fiji, where the lack of a stable legal system has led to social and economic discord.

A century is a remarkably long time for any framework of government to endure largely unchanged. This achievement actually says more about the character and cultural values of the Australian people than it does about the text of the Constitution itself. Despite a long standing distrust of and alienation from politicians and politics, Australians generally continue to demonstrate a high degree of respect for their public institutions, such as the High Court, and for the rule of law.

Public support for the constitutional structure should not be taken for granted. It requires an ongoing political commitment to ensuring that the Constitution enables and remains relevant to the realisation of national aspirations and goals. One hundred years ago, the drafters of the Constitution recognised this. They included in the Constitution a mechanism that would enable the Australian people, in partnership with the Federal Parliament, to reform and update the Constitution.

The idea of constitutional reform is thus one that is entirely consistent with the original conception of the Constitution. Under section 128 of the Constitution, an amendment to the Constitution must be:

passed by an absolute majority of both Houses of the Federal Parliament, or by one House twice; and

at a referendum, passed by a majority of the people as a whole, and by a majority of the people in a majority of the states.

This process has been invoked 44 times, with only eight proposals succeeding at a referendum.

None of the eight changes was a major revision of the text of the Constitution. Some of the changes have, however, been of political importance. Two stand out. The 1928 referendum added a new section 105A to the Constitution, which is economically significant in enabling the Commonwealth to make agreements with the States to take over their debts. The 1967 referendum extended the federal Parliament's powers to Indigenous peoples and deleted the discriminatory section 127. None of the amendments since 1967 were of any great importance. In 1977, the Constitution amended to, amongst other things, set a retirement age of 70 years for High Court judges.

The Constitution has not been amended according to the vision of its founders to reflect contemporary needs. Hence, it stands much as it did when it came into force in 1901 and continues to reflect the aspirations and values of the framers who drafted it in the 1890s.

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In the Beginning

The Australian Constitution was drafted at two Conventions held in the 1890s.¹ The main issues at the Conventions were financial and trade issues, and how best to weigh the interests of the small states against the interests of the more populous states in the new federal Parliament. The first Convention was held in Sydney in 1891 and was attended by representatives of the colonial Parliaments. The Convention did not include any women, nor representatives of Australia's Indigenous peoples and ethnic communities. The second Convention met in Adelaide and Sydney in 1897, and in Melbourne in 1898. Popularly elected representatives were sent by New South Wales, South Australia, Tasmania, and Victoria. Queensland was not represented, and Western Australia sent parliamentary representatives rather than popularly elected delegates. As in 1891, there were no women² or Aboriginal delegates: 'It was for the most part the big men of the established political and economic order, the men of property or their trusted allies, who moulded the federal Constitution Bill.'³

Under the Leadership of Edmund Barton, later Australia's first Prime Minister and one of the first members of the High Court, the 1897-1898 Convention produced a draft Constitution. This was put to the people of New South Wales, South Australia, Tasmania, and Victoria. No referendum was held in Queensland or Western Australia. The draft Constitution received majority support in each of the four colonies holding referendums, but was nevertheless unsuccessful in New South Wales because the number of people that voted for the draft did not reach the 80,000 threshold required for success by the New South Wales Parliament. The draft Constitution was then amended at a conference in 1899 attended by the Premiers of all six colonies. In 1899 and 1900, it was again put to the voters in the colonies, this time also in Queensland and Western Australia. At the referendums of 1899 and 1900, the draft Constitution was supported by a majority of voters in each colony. Voting was voluntary, with only 60 per cent of the people eligible to vote at the referendums doing so.⁴ Large sections of the community were also excluded from voting, including most women and many of Australia's Aboriginal people. Women were able to vote only in South Australia and Western Australia, and Aboriginal people in New South Wales, South Australia, Tasmania, and Victoria. Overall, only a small percentage of Australians actually cast a vote in favour of the draft Constitution. In New South Wales, Queensland, and Tasmania, the figure was below 10 per cent.⁵

After the referendums of 1899 and 1900, a delegation representing the Australian colonies was sent to London to have the draft Constitution enacted by the British Parliament. However, the British Colonial Office and the Secretary of State for the Colonies, Joseph Chamberlain, were not prepared to have the Imperial Parliament pass the draft Constitution in the form presented by the Australian colonies. Concern centred on clause 74, which restricted

¹ See generally on the making of the Australian Constitution: JA La Nauze, *The Making of the Australian Constitution* (1972); J Quick and R Garran, *The Annotated Constitution of the Australian Commonwealth* (1901).

² Catherine Helen Spence stood for election as a South Australian delegate to the 1897-1898 Convention. She was unsuccessful.

³ LF Crisp, *Australian National Government*, (4th ed, 1978) at 14. Compare H Irving, 'Fair Federalists and Founding Mothers' in H Irving, ed, *A Woman's Constitution?: Gender & History in the Australian Commonwealth* (1996), 1.

⁴ LF Crisp, *Australian National Government* (4th ed 1978) at 12.

⁵ A Twomey, *The Constitution—19th Century Colonial Office Document or a People's Constitution?* (Background Paper 15, Parliamentary Research Service, Commonwealth Parliament, 1994) at 31.

appeals from the proposed High Court to the Privy Council. Following Colonial Office changes to clause 74 to allow greater scope for appeals, the draft Constitution was introduced into the House of Commons. The Bill completed its passage through the Parliament on July 5, 1900, was given assent by the Queen on July 9, 1900, and came into force on January 1, 1901. Entitled the *Commonwealth of Australia Constitution Act 1900* (63 & 64 Vict Ch 12), s 9 of the Act reads ‘The Constitution of the Commonwealth shall be as follows:’ and thereafter contains the entire text of the Australian Constitution.

The Constitution as Enacted

The framers of the Australian Constitution were deeply influenced by their British heritage and assumed that the new system would be steeped in the Westminster tradition of responsible government (under which the executive is answerable to Parliament which is in turn elected by the people). However, the Westminster tradition was inadequate as a model for a federation created by a written constitution. The drafters accordingly looked more widely afield. In the 1890s, the obvious comparative models were the written constitutions of Switzerland, Canada, and the United States. The Canadian Constitution might at first have appeared to be the appropriate model given its creation of a federal structure under the British Crown. However, it was rejected because it was believed to give too much power to the central government.

The Constitution that came into force in 1901 was not a people’s Constitution, but ‘a treaty between States’.⁶ Customs duties and tariffs, and the capacity of the upper house of the federal Parliament to veto money bills, were of far greater concern than the protection of human rights. According to one historian, the drafters ‘wanted a constitution that would make capitalist society hum’.⁷ The framers were certainly not prepared to insert a Bill of Rights. The Constitution contains few express rights. The main ones are:

s 41 – the right to vote;

s 51(xxxi) – the right not to have the Commonwealth acquire property, except on just terms;

s 80 – the right to trial by jury;

s 92 – the right that ‘trade, commerce, and intercourse among the States, whether by means of internal carriage or ocean navigation, shall be absolutely free’;

s 116 – the right to freedom of religion; and

s 117 – the right to freedom from disabilities or discrimination on the basis of State residence.

The drafting of these provisions is in most cases problematic and restrictive. Section 41, for example, only guarantees the right to vote where a person ‘has or acquires a right to vote at elections for the more numerous House of the Parliament of a State’, while s 80 only provides for a jury trial where, confusingly, the ‘the trial [is] on indictment’. Even given such limitations, the High Court’s approach to the civil and political rights in the above list (that is, excluding ss 51(xxxi) and 92) has been extremely narrow, with each of these rights being interpreted almost out of existence.⁸ In fact, 1989 was the first time that a plaintiff was successfully able to invoke an express guarantee of a civil and political right in the High Court, in that case, s 117.

The High Court has, however, found that the Constitution does embody a range of

⁶ JA La Nauze, *The Making of the Australian Constitution* (1972) at 190.

⁷ M Clark, ‘The People and the Constitution’ in S Encel, D Horne & E Thompson, eds, *Change the Rules! Towards a Democratic Constitution* (1977), 9 at 18.

⁸ See generally G Williams, *Human Rights under the Australian Constitution* (1999) at 96-128.

implied freedoms. From the entrenchment of a system of representative government in ss 7 and 24 of the Constitution, which require, respectively, that the members of the Senate and the House of Representatives be ‘directly chosen by the people’, the High Court in *Australian Capital Television Pty Ltd v Commonwealth*⁹ implied a freedom of political communication. The Court has also explored the possibility that rights can be implied from the separation of judicial power achieved by Chapter III of the Constitution. The Court has held that this separation of federal judicial power prevents the legislature or executive from imposing involuntary detention of a penal or punitive character¹⁰ and that the Constitution requires due process under the law, at least of a procedural kind.¹¹

Instead of a Bill of Rights, the framers sought to give the new federal Parliament the power to pass racially discriminatory laws.¹² This is clearly demonstrated by the drafting of certain provisions. For example, the Constitution, as drafted in 1901, said little about Indigenous peoples, but what it did say was entirely negative. Section 51(xxvi) enabled the federal Parliament to make laws with respect to ‘[t]he people of any race, other than the aboriginal race in any State, for whom it is deemed necessary to make special laws’, while under s 127 ‘aboriginal natives shall not be counted’ in taking the census.

Section 51(xxvi), the races power, was inserted into the Constitution to allow the Commonwealth to take away the liberty and rights of sections of the community on account of their race. Barton stated at the 1898 Convention in Melbourne that the power was necessary to enable the Commonwealth to ‘regulate the affairs of the people of coloured or inferior races who are in the Commonwealth.’¹³ One framer, Andrew Inglis Clark, the Tasmanian Attorney-General, supported a provision taken from the United States Constitution requiring the ‘equal protection of the laws’.¹⁴ This clause might have prevented the federal and state Parliaments from discriminating on the basis of race, and the framers were concerned that Clark’s clause would override Western Australian laws under which ‘no Asiatic or African alien can get a miner’s right or go mining on a gold-field.’¹⁵ Clark’s provision was rejected by the framers who instead inserted s 117 of the Constitution, which merely prevents discrimination on the basis of state residence. In formulating the words of s 117, Henry Higgins, one of the early members of the High Court, argued that it ‘would allow Sir John Forrest [the Premier of Western Australia]...to have his law with regard to Asiatics not being able to obtain miners’ rights in Western Australia. There is no discrimination there based on residence or citizenship; it is simply based upon colour and race.’¹⁶

The Constitution and Human Rights

In many countries with a written constitution, constitutional development in the second half of the 20th century was dominated by concepts of human rights. For example,

⁹ (1992) 177 CLR 106.

¹⁰ *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1.

¹¹ *Ibid.*

¹² G Williams, *Human Rights under the Australian Constitution* (1999) at 33-45.

¹³ *Official Record of the Debates of the Australasian Federal Convention, 1891-1898* (1986), vol 4, Melbourne 1898, at 228-29.

¹⁴ *Ibid.*, vol 1, Sydney 1891, at 962.

¹⁵ *Ibid.*, vol 4, Melbourne 1898, at 665.

¹⁶ *Ibid.*, vol 5, Melbourne 1898, at 1801.

Canada and South Africa gained Bills of Rights¹⁷ while the United States saw an existing Bill of Rights expanded through judicial interpretation. In other nations, international norms and the proliferation of treaties and conventions acted as a catalyst for the examination of domestic human rights concerns. In countries without a written constitution, such as New Zealand and the United Kingdom, international human rights standards were incorporated into domestic law through statutory Bills of Rights.¹⁸

Australia stands apart from these developments. As a result, according to Spigelman CJ of the Supreme Court of New South Wales, within a decade, British and Canadian court decisions in many areas of the law may become ‘incomprehensible to Australian lawyers’. He has warned that the ‘Australian common law tradition is threatened with a degree of intellectual isolation that many would find disturbing’.¹⁹ While federal and State Parliaments have enacted important human rights legislation, particularly in the form of anti-discrimination statutes,²⁰ they have not brought about a constitutional or statutory Bill of Rights. Australia is alone amongst comparable nations in not having a domestic Bill of Rights in some form. This is surprising given that international human rights law has had a significant political and legal impact in Australia. Politically, international law has been widely invoked in debates on issues such as euthanasia, mandatory sentencing and the rights of children. Legally, international law is applied by judges in the construction of statutes,²¹ the development of the common law,²² administrative decision-making,²³ and, to a lesser extent, constitutional interpretation.²⁴

The lack of a domestic Bill of Rights might reflect the fact that Australia’s human rights record is comparatively strong and that such an instrument is accordingly not needed. On 18 February 2000, Prime Minister John Howard, in discussing mandatory sentencing on the ABC’s *AM* program, stated that ‘Australia’s human rights reputation compared with the rest of the world is quite magnificent’. While Australia undoubtedly has a better human rights record than many other nations, any implication that our record could not be significantly improved is not consistent with the historical record. As Brian Burdekin, a former Australian Human Rights Commissioner, commented in 1994: ‘It is beyond question that our current legal system is seriously inadequate in protecting many of the rights of the most vulnerable

¹⁷ See *Canadian Bill of Rights 1960* (Canada); *Canadian Charter of Rights and Freedoms 1982* (Canada); *Constitution of the Republic of South Africa 1997* (South Africa), Ch 2.

¹⁸ See *New Zealand Bill of Rights Act 1990* (NZ); *Human Rights Act 1998* (UK).

¹⁹ JJ Spigelman, ‘Access to Justice and Human Rights Treaties’ (2000) 22 *Sydney Law Review* 141 at 150.

²⁰ See, at the federal level: *Racial Discrimination Act 1975* (Cth); *Sex Discrimination Act 1984* (Cth); *Disability Discrimination Act 1992* (Cth).

²¹ See, for example, *Chu Kheng Lim v Minister for Immigration* (1992) 176 CLR 1 at 38 (Brennan, Deane and Dawson JJ).

²² See, for example, *Mabo v Queensland [No 2]* (1992) 175 CLR 1 at 42 (Brennan J).

²³ See *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273.

²⁴ See, for example, *Newcrest Mining (WA) Ltd v Commonwealth* (1997) 190 CLR 513 at 657-8 (Kirby J). His Honour said: ‘To the full extent that its text permits, Australia’s Constitution, as the fundamental law of government in this country, accommodates itself to international law, including in so far as that law expresses basic rights’. See generally Amelia Simpson and George Williams, ‘International Law and Constitutional Interpretation’ (2000) 11 *Public Law Review* 205.

and disadvantaged groups in our community’.²⁵

Most Australians are secure in the knowledge that their basic rights are well protected and that the rule of law is firmly entrenched in our political culture. However, while middle class white Australia has little to fear from oppressive laws, this is not the correct indicator. What matters is how we treat the vulnerable in the community, such as the poor with little or no economic power, or people living in rural areas with dwindling access to basic services. Examined from this perspective, our human rights record is not strong. There have been many instances since federation, including up to the present day, in which minority groups in the Australian community have suffered violations of their fundamental rights due to action by Australian governments.

For example, over most of the 20th century, Aboriginal children (the ‘Stolen Generations’) were forcibly taken from their family for adoption or to be placed into institutions. In the 1997 report of the Human Rights and Equal Opportunity Commission, *Bringing Them Home*,²⁶ it was found that: ‘Nationally we can conclude with confidence that between one in three and one in ten Indigenous children were forcibly removed from their families and communities in the period from approximately 1910 until 1970’. It is possible to point to many other examples, such as the White Australia policy that governed Australian immigration practices, where human rights have been violated due to racist or otherwise inappropriate policies.

Several contemporary controversies also reveal that our human rights record needs improvement. For example, our treatment and detention of refugees, themselves escaping persecution, torture or even execution for political or other reasons, is hardly humane or consistent with commonly held views about human dignity. Also relevant are mandatory sentencing laws under which people, a disproportionate number of whom are Indigenous, are being sent to prison for extended periods without a judge being able to take account of the actual circumstances of their offence. The now repealed regime of mandatory minimum sentencing for minor property offences operating since March 1997 in the Northern Territory²⁷ meant that the imprisonment rates of Indigenous women and children have risen alarmingly, including imprisonment for offences such as the stealing of a packet of biscuits valued at \$3.00. The legislation imposed a ‘three strikes and you’re in’ policy under which a third minor property offence will lead to automatic imprisonment of not less than 12 months. Such legislation is inconsistent with the right to a fair trial and, if convicted, to have a just sentence fixed by a judge possessing the discretion to tailor the penalty to fit the crime.

Even today, political agitators can find themselves faced with jail. In 1996, Albert Langer was imprisoned for 10 weeks for distributing leaflets encouraging voters to put the candidates of the Australian Labor Party and the Coalition equal last. Even though section 240 of the *Commonwealth Electoral Act 1918* (Cth) stated that ‘a person shall mark his or her vote’ by numbering every square ‘1, 2, 3, 4 ...’, the vote advocated by Langer was an alternate, legally acceptable method of voting. Section 270 provided that a ballot paper ‘shall not be informal’ if it includes a sequence of consecutive numbers beginning with ‘1’, even if numbers are duplicated. Thus, a paper numbered ‘1, 2, 3, 3 ...’ would be counted as indicating a preference for candidates ‘1’ and ‘2’. Langer sought to make voters aware of this option, but

²⁵ B Burdekin, ‘Foreword’ in Philip Alston (ed), *Towards an Australian Bill of Rights* (1994), v at v.

²⁶ Human Rights and Equal Opportunity Commission, *Bringing Them Home: Report of the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from their Families* (1997) 37.

²⁷ *Sentencing Act 1995* (NT), as amended by the *Sentencing Act (No 2) 1996* (NT) and the *Sentencing Amendment Act 1998* (NT).

the Act, in section 329A, made it an offence to ‘print, publish or distribute ... any matter or thing with the intention of encouraging persons ... to fill in a ballot paper otherwise than in accordance with’ section 240. Langer challenged this section in the High Court, but failed.²⁸ In a strong dissent, Dawson J described section 329A as ‘a law which is designed to keep from voters information which is required by them to enable them to exercise an informed choice’.²⁹ After the High Court finding, Amnesty International released a statement describing Langer as ‘the first prisoner of conscience in the country for over 20 years’.

Paths Forward

Australia’s record of human rights concerns is not unlike that of other comparable nations, including in the treatment of Indigenous peoples. However, unlike those other nations, Australia has not responded with a Bill of Rights or other like measures. In such circumstances, past and continuing human rights concerns in Australia present a strong case for reform. The Australian legal system ought to offer better protection for human rights and should contribute to the development of a political and community-based culture of rights. The legal system currently fails to achieve this – it does not protect many of our basic rights. Even the right to vote, and freedom from discrimination on the basis of race or sex, exist only so long as Parliament continues to respect them. In the past, this respect has had its limits.

The Australian legal and political system would be stronger for the infusion of human rights concepts. It might prevent some of the human rights violations of the first century of our federation from being repeated. The next century of the Australian Constitution should be about making up for lost time. Developments in other nations in the field of human rights have largely passed us by. We should actively work towards a constitutional system that directly addresses basic human rights issues. This could deepen the roots of our democratic processes by developing a better understanding of the relationship between Australians and their government.

This would require a very different vision of Australian constitutionalism to that of the first century of our federation. Even from the time of the framing of the Constitution in the 1890s,³⁰ our system of government has been dominated by the view of English constitutional theorist AV Dicey that civil liberties are adequately protected through the common law and political processes without the incorporation of guarantees of rights in a written constitution.³¹ It has been said of the delegates to the Conventions that drafted the Constitution that, ‘[l]ike anyone else within the English tradition, they must have felt that the protections to individual rights provided by the traditions of acting as honourable men were quite sufficient for a civilised society’.³²

This view is still strongly asserted in Australia as part of the argument that a Bill of Rights is not necessary because rights are well protected by the system of responsible government. By contrast, other common law nations that once accepted this view have since enacted Bills of Rights. Even the British Parliament has enacted a Bill of Rights in the form of the *Human Rights Act* 1998 (UK). Nations such as the UK have recognised that a modern pluralistic democracy requires more than just faith in the people’s elected representatives and that explicit legal protection is required for minorities from majoritarian action, and even for

²⁸ *Langer v Commonwealth* (1996) 186 CLR 302.

²⁹ *Ibid* at 325.

³⁰ G Williams, *Human Rights under the Australian Constitution* (1999) at 39-40.

³¹ AV Dicey, *Introduction to the Study of the Law of the Constitution* (first published 1885, 10th ed, 1959) 195-202.

³² RCL Moffat, ‘Philosophical Foundations of the Australian Constitutional Tradition’ (1965) 5 *Sydney Law Review* 59 at 85-6.

the community at large.

In Australia today, two steps are needed. First, the few express and implied rights in the Constitution should be given a more robust interpretation consistent with the protection of individual liberty. The countervailing principle of parliamentary sovereignty has great weight, but it should not uniformly tip the scales in favour of the executive and Parliament. It should also be recognised that this first step is insufficient to bring about an adequate level of rights protection in Australia. Despite the ‘discovery’ of a wide range of constitutional rights by Murphy J,³³ the Constitution is not capable of giving rise to an implied Bill of Rights. To interpret the spare text of the instrument in this way would inevitably compromise the legitimacy of, and public support for, the High Court of Australia as the final interpreter of the Constitution.

Second, statute law and the common law, and in time the Constitution, should be reformed by the enactment of a domestic Bill of Rights. This is necessary because the current legal framework is incapable of giving rise to a satisfactory level of rights protection. This second step would focus attention upon parliaments and communities, and offers the chance to involve both in a drafting and consultation process that would also contribute to a stronger culture of rights protection. Such a culture would involve a tolerance and respect for rights built upon the values held and accepted by the Australian people.

An Australian Bill of Rights

Only so much can be achieved by broader interpretation of the express rights in the Constitution and by the derivation and development of implied rights. The text of the Constitution is severely limited in its capacity to give rise to the comprehensive rights protection found in other national constitutions. There are also significant institutional constraints, including perceptions of the ‘proper’ role of the Court in the eyes of the Australian community and the fact that the Court is limited to the cases that come before it, that restrict the capacity of the High Court to shape the Constitution to better protect human rights. Hence, even with the infusion of ideas and concepts from international law, it should be impossible for the High Court to fashion an implied Bill of Rights.

Legislative, and not judicial, innovation is required to bring about a Bill of Rights. Hence, judicial protection of human rights must be accompanied by legal reform initiated by the political system. This is necessary not only because of the limitations imposed by the existing law and the Constitution, but because the people’s representatives must be involved in order to ground stronger rights protection in the popular will and bestow upon it democratic legitimacy. Without the support of the people through their representatives, the ultimate effectiveness of any Bill of Rights or like instrument is doubtful. It may possess a level of legal effectiveness, but it would be unlikely to play the more important roles of influencing community and political attitudes and of bringing about a culture of rights protection.

These objectives might be met through a Bill or Bills of Rights at the federal and State levels. Although I believe that better constitutional protection of some rights is warranted, I do not argue that we should immediately move to a referendum that would insert a Bill of Rights into the Constitution. As I have argued elsewhere,³⁴ a gradual and incremental approach to better rights protection is both more pragmatic and more appropriate.

In the first instance, any Bill of Rights ought to be in the form of a statute. This instrument would not be constitutionally entrenched and would protect only a narrow range of rights about which there is a general community consensus, such as the need for freedom

³³ See G Williams, ‘Lionel Murphy and Democracy and Rights’ in M Coper and G Williams (eds), *Justice Lionel Murphy – Influential or Merely Prescient?* (1997), 50.

³⁴ G Williams, *A Bill of Rights for Australia* (2000).

from racial discrimination. The Bill of Rights should be drafted by Parliaments in consultation with the Australian people, such as through the formation of an open inquiry body constituted by members of Parliament and the community. As an Act of Parliament, the Bill of Rights could be developed and refined over time, perhaps through a provision that mandated review of the Bill every five years. New rights might be added and established rights redrafted for greater effectiveness. The Act could also be amended to enable Parliament to respond to judicial interpretations of the listed rights. Parliaments would interact with the rights listed in the Bill on an ongoing basis through the creation of a Joint Parliamentary Committee that would assess legislation for compliance with the Bill.

The role of the courts under the Bill of Rights would be an important but carefully limited one in what would be primarily a Parliament and community centred model. The courts ought to be given the power to interpret statutes and the common law in accordance with the Bill, as occurs under the New Zealand model, and to find that statutes are incompatible with the rights listed in the instrument, as in the UK model. Ideally, courts would also have the power to declare legislation to be ineffective where it breaches the listed rights, although this would not be strictly necessary and the UK model of a declaration of incompatibility would be a satisfactory starting point.

As community understanding of the rights protection process deepens and as courts develop a more sophisticated approach to such issues, it may be appropriate to insert some or all of the rights in the statutory Bill of Rights into the Constitution. In any event, it is only at this stage that it is possible to imagine that the Australian people would support such entrenchment at a referendum. The failure of the 1988 referendum, in which nationally only 30.33 per cent of voters registered a 'yes' vote, on a very narrow and limited set of rights issues, strongly suggests that considerable work remains to be undertaken at the political and community level before another referendum is held upon human rights issues.

A possible exception to this is in regard to freedom from racial discrimination. Protection of this kind has existed in the *Racial Discrimination Act 1975* (Cth) for many years and its use in political discourse and on a number of occasions by Australian courts means that it would be an appropriate topic for a referendum in the short term. The discriminatory treatment of Australia's Indigenous peoples under the Constitution as enacted in 1901, and since the 1967 referendum, the silence in the Constitution on their status and history, would make such a referendum an important part of any reconciliation process.³⁵

Conclusion

There are many unexplored opportunities for better rights protection as part of the Constitution. Refinement and development of the High Court's interpretive methodology could enable the growth of a more sophisticated human rights jurisprudence, enriched by developments in comparative jurisdictions and by international human rights norms. This would be a very desirable development over the second century of the Constitution. However, constitutional development should not only focus upon the judicial sphere but should also involve significant reform initiated by the legislative sphere in partnership with the community.

³⁵ G Williams, 'Race and the Australian Constitution: From Federation to Reconciliation' (2000) 38 *Osgoode Hall Law Journal* 639.