

# Australian Rights Protection

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While Australia is exceptional in being the last English-speaking democracy without a judicially-enforceable bill or charter of rights<sup>1</sup>, it has experienced some judicial development of civil rights and liberties in the absence of a written bill of rights, akin to Charles Epp's 'rights revolutions' in the United States and Canada.<sup>2</sup> The key element in Epp's theory – a 'support structure for legal mobilization' (SSLM) – exists in Australia, albeit in a relatively weak and underdeveloped form. The Mason Court era of the early 1990s is analogous to Britain's pre-1998 'partial rights revolution' prior to adoption of its Human Rights Act.

The paper is exploratory in opening up the topic, and reports initial investigation of the support structures for legal mobilization (SSLM) in Australia. It summarizes the limited scope for judicial innovation in human rights protection allowed by the Australian constitution that does not include a bill of rights, and examines briefly the High Court's foray into implied constitutional rights and its more substantial transformation of native title law in the 1990s. These two elements – limited scope for judicial activism and relatively weak SSLM – explain Australia's limited rights revolution by judicial means, although, as the final section suggests, this is only part of the Australian rights story.

### **Judicial Protection of Rights**

Despite having no bill of rights, Australia has had a range of judicial developments in rights protection during the last couple of decades. The Australian experience shows that sympathetic judges can advance rights protection in innovative ways, but it also shows the limitations of such advances without a bill of rights.

The Australian constitution is not entirely bereft of rights protection clauses. There are three express rights guarantees: section 80 that guarantees jury trial for indictable offences under Commonwealth law; section 116 that guarantees freedom of religion; and section 117 that prohibits discrimination against those from another state. In addition there is the requirement of 'just terms' in the Commonwealth's acquisition power under section 51 (xxxix). The three explicit guarantees have provided limited rights protection, although the just terms provision has been quite robust. Least significant of all has been the jury trial provision that was gutted early on when the Court held that the Commonwealth government could decide to have offences tried summarily rather than on indictment.

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<sup>1</sup> Acknowledgment is made of the University of Melbourne's support through a Visiting Collaborative Fellowship for Ted Morton in 2002, and the formative input of our colleague Winsome Roberts in coming to grips with Australia's exceptionalism in rights protection.

<sup>2</sup> Charles Epp, *The Rights Revolution: Lawyers, Activists, and Supreme Courts in Comparative Perspective*, University of Chicago Press, Chicago, 1998.

The most significant guarantee is that of freedom of religion which was closely copied from the American constitution. It was added to the Australian constitution after the invocation 'humbly relying on the blessing of Almighty God' was added to the preamble. This invocation was adopted because of a ground swell of support from God-fearing people, but this in turn sparked concern among non-conformists that was addressed by also adopting the guarantee of religious freedom. The wording of the section is clear and comprehensive:

The Commonwealth shall not make any law for establishing any religion, or for imposing any religious observance, or for prohibiting the free exercise of any religion, and no religious test shall be required as a qualification for any office or public trust under the Commonwealth.

The High Court has interpreted it literally and narrowly, rejecting the proposal of the Defence of Government Schools (DOGS) lobby to read in the American doctrine of strict separation of church and state so as to deny government provision of state-aid to Catholic schools. Justice Lionel Murphy, a leading rights activist as a judge and previously as Attorney-General in the Whitlam Labor government, was the only dissenting judge to support the DOGS claim.<sup>3</sup>

The section 117 prohibition of discrimination based on state residence fared better with a differently constituted Court in *Street v Queensland Bar Association*<sup>4</sup>. The decision barred professional associations from restricting out-of-state practitioners, in this case a prominent Sydney barrister from becoming a member of the Queensland bar. Section 117, however, was narrowly drafted by the constitutional founders to prevent only discrimination against residents of other states. The original proposal for a broader American style fourteenth amendment banning state discrimination against citizens per se was rejected. Overall, these specific guarantees have provided limited scope for rights protection and have not been broadly embellished by judicial review. This result has been more or less as the Australian founders intended and anticipated: they preferred to leave rights protection mainly to parliamentary democratic processes and designed the constitution accordingly.

Until the foray into implied rights by the Mason Court in the early 1990s, the most significant rights implication that the High Court drew from the constitution was that of an individual right to freedom of interstate trade. Despite the misgivings of some, the founders incorporated the popular commercial slogan of 'absolute freedom' of interstate trade in section 92 of the constitution. This became one of the most litigated sections – not least because it conflicted with the Commonwealth's designated power over interstate trade and commerce – and was variously interpreted by changing coalitions of

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<sup>3</sup> *A-G (Vic); Ex rel Black v Commonwealth (DOGS Case)* 146 CLR 559.

<sup>4</sup> *Street v Queensland Bar Association* (1989) 168 CLR 461.

High Court judges. That section 92 protected the right of individual traders to engage in interstate trade was suggested by Dixon during the 1930s and adopted by the Privy Council in confirming the High Court's landmark decision declaring bank nationalisation by the Chifley Labor government unconstitutional in 1949. The individual right theory of section 92 was dominant for the Dixon and Barwick Courts, and was finally discarded by the Mason Court in 1988. In *Cole v Whitfield*<sup>5</sup> the Court returned to a restricted reading that allowed government regulation of interstate trade and only prevented discriminatory burdens of a protectionist kind. Significantly, it was the rights activist Murphy who proposed an even more restrictive interpretation of section 92 as preventing only fiscal burdens that resembled customs duties.

If the Australian constitution was an unpromising instrument for rights protection, the Australian judiciary was generally unsympathetic to expansive rights claims. Judges were typically appointed from the elite ranks of leading barristers from the Sydney, Melbourne and, to a lesser extent, Brisbane bars and the Supreme Courts of those states. Notable exceptions were the leading founders, Griffith, Barton, O'Connor, Isaacs and Higgins, appointed to the High Court in the first series of appointments in 1903 and 1905, and the controversial appointments of Labor politicians Evatt and McTiernan in 1930 and Murphy in 1975. Until Murphy, however, rights enhancement was not on the Court's agenda that was predominantly focused on the federal division of powers and the limits of Commonwealth jurisdiction. After the passing of the early founders, the public rhetoric of the Court, as expressed by its leading exponent Sir Owen Dixon, was 'strict and complete legalism'. If this was not always adhered to in practice, as was evident in Dixon's individual rights interpretation of section 92 and the Court's overturning of a raft of Labor government legislative initiatives for greater regulation, centralisation and socialisation, the Court favoured old-style liberal economic and property rights. Not until Murphy's appointment in 1975 was there much attention to the 'new rights' with which Epp is concerned, and not until the late 1980s was there a majority of sympathetic judges on the Court. The Court's complexion was changed through judicial appointments by the Hawke Labor government: Mason replaced the more conservative Gibbs as Chief Justice in 1987; while Toohey and Gaudron (the first woman ever on the High Court) were appointed at the same time to replace Gibbs who retired and Murphy who had died. Along with Brennan and Deane who had been appointed earlier by the Fraser Liberal Coalition government in 1981 and 1982, there was now a majority of High Court judges with varying degrees of sympathy for new rights protection. Labor made a further appointment, that of McHugh who replaced Wilson in 1989.

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<sup>5</sup> *Cole v Whitfield* (1988) 165 CLR 360.

The implied rights foray of the Court in the early 1990s was a product of sympathetic judges being presented with test cases and novel rights arguments by a growing band of advocacy groups and legal counsel dedicated to rights enhancement. The most notable advance was in finding that a right to freedom of political speech was implied by sections of the constitution implementing representative and responsible government. The requirement that the two houses of parliament be composed of senators and members 'directly chosen by the people', specified in sections 7 and 24, provided the main constitutional basis for such an implication. This was established in a pair of cases in 1992, *Nationwide News v Wills* and *Australian Capital Television v Commonwealth*.<sup>6</sup> Legislation banning the criticism of Commonwealth industrial relations commissioners was struck down in the former case, and Commonwealth restrictions on radio and television advertising during election campaigns that purported to also bind the states and territories in the latter case.

These cases sparked an exciting period of judicial review when counsel made more ambitious claims to expand implied constitutional rights and a minority of judges responded sympathetically. One avenue was to incorporate criminal procedure rights into judicial power. For some time the High Court has made strong assertions about the separation of judicial power in the constitution, the overarching role of the High Court as the authoritative interpreter of the constitution, and the exclusive right of courts to exercise judicial power. In a minority position in *Dietrich v The Queen*<sup>7</sup>, Deane and Gaudron sought to extend this by holding that certain features of the criminal law procedure are constitutionally entrenched, being inherent in the notion of judicial power. In a controversial public address, Toohey argued in favour of basic common law principles being implied by the constitution. In *Leeth v Commonwealth*<sup>8</sup>, he and Deane claimed there was an implied right of equality between citizens derived from the agreement of the people to unite into a federal polity, as evidenced in the preamble declaration. These more ambitious claims never attracted more than a minority of judges.

The implied rights adventure was played out mainly in clarifying the implied right to freedom of communication. In *Theophanous v Herald and Weekly Times*<sup>9</sup> and *Stephens v WA Newspapers*<sup>10</sup>, the Court was divided over whether the implied right to political communication provided a constitutional defence supplanting the established law of defamation. Australian defamation law was notoriously restrictive on criticism of public

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<sup>6</sup> *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1; *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106.

<sup>7</sup> *Dietrich v The Queen* (1992) 177 CLR 292.

<sup>8</sup> *Leeth v Commonwealth* (1992) 174 CLR 455.

<sup>9</sup> *Theophanous v Herald & Weekly Times Ltd* (1994) 182 CLR 104.

<sup>10</sup> *Stephens v West Australian Newspapers Ltd* (1994) 182 CLR 211.

figures and the newspapers were keen to have it replaced by a more liberal constitutional regime. Theophanous was a federal politician and Stephens a Western Australian politician, and both sued newspapers for publishing criticisms of their political activities. In a subsequent case, *Lange v ABC*<sup>11</sup>, the Court forged a new unanimity in affirming a modified freedom of political communication, not as an individual right but a restriction on the legislative power of government. While this distinction is of arguable validity, the Court ruled that individual redress should be based on development of the common law defence of qualified privilege rather than any constitutional implication. In other works, the constitutional implication of freedom of political speech turned out not to advance individual rights protection, except as a limitation on government powers. There was no judicial consensus for going beyond this modest bridgehead; indeed in the *Lange* case the Court regrouped by retreating somewhat from its earlier diffuse advance.

Nevertheless, the break out on freedom of speech was sufficient catalyst for further implied rights claims. In *Kruger v Commonwealth*<sup>12</sup> lawyers for the 'Stolen Generation', Aboriginal people who as children in the Northern Territory had been forcibly removed from their mothers and put in government custody, claimed their implied constitutional right to freedom of movement had been infringed by involuntary detention. The Court did not accept this or other claims that freedom of religion had been breached by the policy. In dissent, Gaudron and Toohey affirmed an implied right to freedom of movement that had been infringed. Gaudron, Toohey and McHugh all thought there was an implied right to freedom of movement incidental to the implied freedom of political communication, although McHugh was stricter in limiting this to movement associated with political communication. In *Levy v Victoria*<sup>13</sup> the Court rejected claims that a Victorian regulation banning protestors from duck hunting areas at the beginning of the shooting season breached the protestors' implied right to freedom of political speech.

### **Native Title**

More significant than implied rights was a second novel front that the Court opened up with decisions on racial discrimination and native title in *Mabo (No 1)*<sup>14</sup> and *Mabo (No 2)*<sup>15</sup>, and in the subsequent *Wik*<sup>16</sup> decision. *Mabo* was an ambitious test case brought by dedicated human rights lawyers from Melbourne, Ron Casten and Bryan Keon-Cohen, to recognise the traditional title to land of indigenous people and overturn two hundred

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<sup>11</sup> *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520.

<sup>12</sup> *Kruger v Commonwealth* (1997) 190 CLR 1.

<sup>13</sup> *Levy v Victoria* (1997) 189 CLR 579.

<sup>14</sup> *Mabo v Queensland (No 1)* (1988) 166 CLR 186.

<sup>15</sup> *Mabo v Queensland (No 2)* (1992) 175 CLR 1.

<sup>16</sup> *Wik Peoples v Queensland* (1996) 187 CLR 1.

years of common law doctrine of terra nullius that had denied any such title. In *Mabo (No 1)*, the High Court ruled that Queensland's pre-emptive attempt to extinguish any residual native title by legislation was invalid on the ground of inconsistency with the Commonwealth's Racial Discrimination Act. In the earlier *Koowarta* case<sup>17</sup>, the High Court had upheld the validity of the Racial Discrimination Act as a legitimate exercise of the Commonwealth's section 51 (xxvi) external affairs power in implementing the International Convention on Elimination of All Forms of Racial Discrimination to which Australia had become a party. In *Mabo (No 2)*, the Court overturned terra nullius and upheld the native title claims of the Meriam people to the Murray Islands in Torres Strait. Brennan wrote the leading opinion and relied upon international human rights norms in overturning common law doctrine that was discriminatory. In *Wik*, the Court extended the principle of native title to pastoral leases in Queensland, and by implication to pastoral leases that cover much of northern and western Australia. This was a more contentious decision, with Brennan dissenting as Chief Justice.

*Wik* sparked unprecedented criticism of the Court from the states, mainly Queensland and Western Australia that were most affected, the pastoral and mining industries and the Liberal and National parties in federal opposition. National party leader, Tim Fischer, accused the Court of delaying publication of its *Wik* judgment and threatened when in government to appoint a capital 'C' conservative judge. Brennan's private letter of complaint to Fisher was published in the press and Fisher apologized. Nevertheless, the resolve of the Liberal-National party coalition to use judicial appointments to change the direction of the Court was clear, and it was in a position to do so after winning office in 1996. In theory the Howard-Fisher government might have overturned *Wik* by passing legislation that in effect amended the Racial Discrimination Act, but in practice that was not politically feasible. It retained the Native Title legislation passed by the Keating Labor government to provide orderly procedures for dealing with native title claims.

Given the political circumstances of a major backlash from its native title decisions and the change of federal government, it was not surprising that the Court effectively closed down its foray into implied constitutional rights in the series of 1997 decisions – *Lange*, *Kruger* and *Levy* referred to earlier. There were obvious technical difficulties in maintaining a plausible constitutional jurisprudence without a bill of rights. As well, the composition of the Court was changing even before Labor lost federal office. Mason retired in 1995 and was replaced by Gummow, a Sydney barrister, with Brennan being appointed Chief Justice. The leading proponent of implied rights, William Deane, was appointed Governor-General later in 1995. Although he was replaced by Kirby, a prominent champion of human rights, the Court became more subdued. After the

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<sup>17</sup> *Koowarta v Bjelke-Petersen* (1982) 153 CLR 168.

change of government in 1996, the Liberal Coalition was able to make three appointments in 1997-98: Callinan, Hayne and Murray Gleeson as Chief Justice. The additional appointment of Dyson Heydon, a champion of Dixonian legalism, in 2002 to replace Gaudron has consolidated a traditional and rather more conservative Court, with Kirby the notable exception as a champion of rights protection by judicial means and the leading dissenter on the Court.

Overall, the contribution of the judiciary to furthering new rights protection has been significant, but mainly through other means than implied constitutional rights. In transforming the common law to allow native title, the Court confirmed a limited and residual right that is subject to legislative override by parliaments. That leaves the matter in the political realm of federal politics, with the Commonwealth able to preserve native title as it has done and the states constrained by the Commonwealth's anti-discrimination law. Constitutionally, the Court's contribution has been through its traditional federal adjudication in giving broad and plenary scope to Commonwealth powers. Again, that leaves the running on rights protection mainly to the legislatures with the Commonwealth able to trump the states in any of the vast array of matters that come within its expansive powers. Through generous interpretation of the external affairs power, the Court has opened up for the Commonwealth a potential super highway for introducing international human rights norms, including a statutory bill of rights, into domestic law. Such legislation takes precedence over that of the states, as established in the challenge to the Racial Discrimination Act. Thus, the effect is to leave human rights protection mainly to parliaments and the political process.

### **Support Structure for Legal Mobilization**

According to Charles Epp, rights revolutions occur only where there is an extensive 'support structure for legal mobilization' (SSLM). This SSLM requires dedicated material resources and organizational structures that provide expert legal advice, develop and coordinate legal research, plan and sustain the launching of strategic cases, and provide publicity and communication networks to spread ideas. Such support structures form independently of judicial politics and provide the stimulus and support for the processes of the rights revolution. To sum up, Epp's thesis is that without a sufficient SSLM, the other components of constitutional provisions, judicial politics and popular culture are insufficient. In his words: 'If the *support-structure* explanation is correct, we should find that rights revolutions have occurred only where and when and on those issues for which material supports for rights litigation—rights-advocacy organizations, supportive lawyers, and non-membership sources of financing—have developed.'<sup>18</sup>

We can use Epp's framework to examine Australia's experience with court-based rights protection. This includes the three usual explanatory components used by constitutional scholars—a bill of rights, sympathetic judges and a supportive popular culture—plus Epp's fourth essential requirement of support structures for legal mobilization. Our review finds a moderate but fluctuating degree of judicial support for rights, some evidence of a strong supportive popular culture, and a thin but vocal support structure for legal mobilization. The absence of a bill of rights is no doubt crucial in explaining the latter's weakness: why mobilize to litigate rights if there are no justiciable rights? Nevertheless, the High Court has recognized certain 'implied rights' in the constitution, as noted above, while deciding test cases brought by rights advocacy groups and dedicated human rights activists. Such judicial developments in Australian rights protection have been significant but limited. There has not been a court-based rights revolution, or sufficient support for adopting a bill of rights despite periodic agitation and several attempts to implement a statutory bill of rights in the 1970s and 1980s.

There are a large number of rights-protection organizations in Australia—within government, in the NGO world and in academia. Most do not use 'test case' litigation as a strategy for advancing their rights goals. This is due in part to lack of resources, and in part to the courts' unreceptive stance toward interveners and *amicus curiae* participation by advocacy groups of any kind. The legal community's support for rights advocacy organizations is mixed. Australian lawyers appear to be evenly divided on whether parliaments or courts should have the final say on rights issues. A growing number of lawyers volunteer time for public interest litigation, and recent growth in larger law firms has created more opportunities for *pro bono* litigation. In the law schools

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<sup>18</sup> C. Epp, *The Rights Revolution: Lawyers, Activists, and Supreme Courts in Comparative Perspective*, 23, emphasis in original.

there is stronger support evidenced in the recent creation of several human rights research institutes, the leading public role of law professors in the bill of rights' debate, and the increasing number of human rights courses being offered to students.

The weak-link in Australia's support structure for legal mobilisation (SSLM), however, is funding with few of the non-government rights-advocacy organizations receiving public or private foundation funding. There is no dedicated test-case funding program as in Canada. Legal aid programs exist in all states, but budget constraints and strict government guidelines discourage, if not preclude, funding potentially policy-salient cases beyond the first appeal. To the extent that Australia has a SSLM, it is much weaker than those currently found in the U.S. or Canada, but perhaps on par with what Epp reports for the U.K. prior to 1998 and the incorporation of the European Convention for the Protection of Human Rights into British domestic law.

Although Epp did not include Australia in his comparative study, we can use his framework for assessing its SSLM. According to Epp, a robust 'support structure for legal mobilization' is a necessary condition for a successful rights revolution because this provides the resources to enable sustained and strategic appellate litigation. The three central elements are: one, the existence of rights advocacy groups; two, that these enjoy significant support among lawyers; and three, that they can depend on stable non-membership funding, either from private foundations or governments. The Australian case shows there are many rights advocacy groups, these have support from some lawyers, but that they lack significant funding.

#### *Rights advocacy organizations*

There are a large number of organizations in Australia that define their mission, in whole or in part, as the protection and promotion of rights. These groups are found within government agencies and in the NGO realm. As early as 1981, the Human Rights Bureau identified 18 organizations within the Commonwealth government with responsibilities in the human rights field.<sup>19</sup> Today, at the federal and state level, there are scores of public institutions that monitor government legislation and administration for compliance with rights norms. These include ombudsmen; parliamentary committees that scrutinize proposed legislation; government agencies/commissions that promote and conciliate on human rights issues; welfare agencies; administrative tribunals; judicial enforcement of human rights norms that are found in international and common law.<sup>20</sup> The 1981 study identified 34 NGOs that worked to protect and promote human rights.<sup>21</sup> By 1992, Cohen identified 462 organizations that indicated a

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<sup>19</sup> Human Rights Bureau, Commonwealth of Australia, *National Human Rights Organizations in Australia*, 1981.

<sup>20</sup> Adapted from C. Sampford, 'The Four Dimensions of Rights', 1997..

<sup>21</sup> *National Human Rights Organizations in Australia*, 1981. These included 6 international organizations, 4 women's organizations, 3 religious organizations, 3 disabled organizations, 3 youth and children organizations, 1 general

primary concern with the protection of 'civil liberties'.<sup>22</sup> Most of these date from the 1980s or more recently and their policy objectives cover a broad (and often conflicting) range of rights issues. We briefly review some of the major ones.

There is a Civil Liberties Council (CLC) in each state. While the level of organizational activity varies from state to state, and from year to year within each state, most report having several hundred active, dues-paying members. All maintain websites; all publish annual or bi-annual newsletters; and most have a list-serve capacity to send out policy alerts and copies of news releases to their membership. Interviews and anecdotal evidence suggests that state CLCs regularly inject rights concerns into public policy debates at the state level on issues ranging from asylum seekers, anti-terrorism laws, peaceful assembly legislation, involuntary taking of DNA samples from suspects, and police access to telephone records. Most also participate in national policy development but to a lesser extent. This is the responsibility of their national umbrella organizations, the Australian Council for Civil Liberties.

One of the most active rights advocacy organizations is the Public Interest Advocacy Centre (PIAC) based in Sydney and founded in 1982 by Terry Purcell, an activist lawyer. Purcell envisioned a role for PIAC that fits Epp's model of a modern rights advocacy organization: a policy-oriented litigator that can bring 'test cases' and is funded from non-membership sources. Since 1982, its salaried staff has grown from 4 to 18, and its budget for 2002 was approximately \$1 million dollars. Almost all of this funding comes from governments and law society trust funds. Over the years, PIAC has succeeded in building a significant stable of lawyers willing to do pro bono work under the auspices of PILCH, one of PIAC's projects.<sup>23</sup> Law firms, especially large metropolitan ones, are an important source of PIAC support, providing pro bono lawyers and contributions, as well as hosting luncheons, guest speakers and fund PIAC's Indigenous Lawyer program.

In its twenty years of operation, PIAC has been involved in rights litigation both as a party to test cases and as an intervener. PIAC usually tries to go to court as part of a coalition, and tries to bring to the judges a perspective not available from litigants. Recently, it has experienced some of the High Court's unwillingness to allow third party participants in its proceedings. In its earlier years PIAC focused primarily on race and sex discrimination issues. More recently PIAC has expanded its focus to include discrimination against the disabled. PIAC has also been involved in many cases raising 'access to justice' issues such as standing, assignment of costs, and participation of

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welfare organization, 2 legal organizations, 2 refugee organizations, 2 employer-employee relations organizations, 2 gay rights organizations and 6 miscellaneous organizations.

<sup>22</sup> S. Cohen, *Australian Civil Liberties Organizations*, 1992.

<sup>23</sup>In 2002, the PILCH program included approximately forty barristers, ten barristers' chambers and fifty law firms.

interveners. In recent years, PIAC has shifted its focus away from civil and political rights toward social and economic rights, especially for Aboriginal people. With this shift in focus has come a shift in tactics away from straight litigation to an integrated approach to public interest advocacy that combines litigation, policy development and education and training.

Another major rights advocacy organization is The Human Rights and Equal Opportunity Commission (HREOC). HREOC differs from PIAC in that it is an independent statutory organization that reports to the Commonwealth government through the Attorney-General. It thus enjoys relatively stable public funding and need not seek financial support in the private sector. HREOC's broad mandate includes hearing and resolving discrimination complaints arising under a variety of federal anti-discrimination statutes,<sup>24</sup> human rights compliance with international human rights instruments that Australia has joined,<sup>25</sup> public education and policy development. HREOC can also initiate investigations of suspected public and private sector discrimination or rights violations. It may seek to facilitate a voluntary resolution among the parties involved. If this fails, HREOC may submit a report to Parliament describing the problem and recommending government action to solve it.

HREOC is frequently in the courts as either an amicus curiae or intervener. HREOC enjoys statutory authority to participate in cases arising under human rights statutes and treaties, so has not experienced the same barriers to the courtroom as PIAC and other rights advocacy groups. However, it is barred by statute from initiating test cases on its own. HREOC has a separate legal section that originally adjudicated discrimination complaints that could not be resolved through conciliation. After HREOC had this jurisdiction removed in 1994 by the High Court ruling in *Brandy v. HREOC*, the six to seven lawyers in the Commission have focused most of their resources on intervention and amicus curiae briefs in rights cases. HREOC occasionally also benefits from pro bono representation by high profile private sector lawyers (such as Bret Walker in the *Yorta Yorta* case).

HREOC's primary objective in intervener/amicus curiae participation in discrimination cases is policy reform rather than dispute resolution. Continuity in personnel and specialization gives HREOC the advantages of a 'repeat players' in rights litigation. In recent years HREOC has intervened in court cases involving family law, child

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<sup>24</sup> HREOC is responsible for administration and enforcement of Racial Discrimination Act, 1975; Sex Discrimination Act 1984; Disability Discrimination Act 1992; Human Rights and Equal Opportunity Commission Act 1986. HREOC also has administrative responsibilities under the Native Title Act 1993 and the Workplace Relations Act 1996

<sup>25</sup> International Covenant on Civil and Political Rights; Convention Concerning Discrimination in Respect of Employment and Occupation (ILO 111); Convention on the Rights of the Child; Declaration on the Rights of the Child; Declaration on the Rights of Disabled Persons; Declaration on the Rights of Mentally Retarded Persons; Declaration on the Elimination of All Forms of Intolerance and of Discrimination based on Religion or Belief.

abduction, refugees and asylum seekers, sex and marital discrimination, and native title. Some of the more high profile cases in which HREOC participated include the 2001 *Tampa* Case in the Federal Court, and the *Lesbian IVF* case and the 2002 *Yorta Yorta* land rights case in the High Court. The Commission's political independence is demonstrated by the fact it intervened on the opposing side to the Commonwealth Attorney-General in the *IVF* case.

Another rights advocacy organization that has gained some prominence in New South Wales in recent years is the Australian Lawyers for Human Rights (ALHR). Established in 1993 and incorporated in 1998, it works in conjunction with groups like PIAC and the various state Civil Liberties Councils. ALHR has sent representatives to several international rights conferences; publicly advocated the adoption of bills of rights for both the Commonwealth and New South Wales; and comments in the media on rights issues and incidents. However, its annual budgets are modest—less than \$10,000—and depend heavily on members' dues and contributions. While some of its members have done pro bono litigation on rights issues, the ALHR has not.

Other law-related groups step forward on a more ad hoc and sporadic basis to voice various rights concerns. In Melbourne, the Public Interest Law Clearing House (PILCH) coordinates a network of volunteer lawyers who do public interest litigation, often with a rights dimension. PILCH's lack a stable source of non-membership funding has made its activities somewhat sporadic. The International Commission of Jurists (ICJ) (Australian Branch) unsuccessfully sought leave to appear as amicus curiae in the *Kruger* case involving the removal of aboriginal children.<sup>26</sup> The Law Council of Australia made a submission to the Senate Law and Constitutional Affairs Committee raising civil liberties concerns about the Commonwealth's proposed new anti-terrorism laws. Most of these groups, however, do not rely on litigation to advance their rights agendas, preferring to use a range of conventional means of public advocacy and political representation including submissions and testimony to parliamentary committees, lobbying elected politicians and non-elected senior bureaucrats, issuing press releases, writing guest opinion columns for newspapers, and giving media interviews.

Indeed, high profile cases involving rights advocacy groups—Aboriginal land rights cases, *Mabo*, *Wik* and *Yorta Yorta*, the *Tampa* case, the *Lesbian IVF* case, and the earlier DOGS challenge to public funding of Catholic schools—are clearly the exception not the rule. Evidence of the more common form of advocacy group participation in appellate litigation as amicus curiae or intervener is also sparse. While the number of NGO amici/interveners in the High Court increased substantially from the 1980s (11) to the

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<sup>26</sup> *Kruger v. Commonwealth* (1997) 190 CLR 1.

1990s (36), it is far below comparable figures for Canada (431 during the 1990s).<sup>27</sup> A final and telling piece of evidence is the complete absence of any reference to 'advocacy groups, interest groups, pressure groups, public interest advocacy groups, rights advocacy groups, test case or systematic litigation' in the comprehensive 2002 *Oxford Companion to the High Court of Australia*.

Advocacy groups' choice not to use strategic litigation to advance rights claims is due in part to lack of resources (see below), but also to the courts' unreceptive stance toward interveners and amicus curiae participation by rights advocacy groups. Canadian experience shows that intervener/amicus curiae is the preferred method of advocacy group participation in appellate litigation because it is much less expensive than direct sponsorship of test cases.<sup>28</sup> In Australia, however, Williams has demonstrated that the High Court has virtually closed the door to third-party participation in its deliberations.<sup>29</sup> While the number of NGO that intervener/amicus curiae in the High Court has increased (see above), the Court has turned down many applications and refused to set out any clear guidelines as to its criteria. For example, two of Australia's best established rights advocacy groups, the International Commission of Jurists (Australian Branch) and the Public Interest Advocacy Group (PIAC), have recently had their petitions to intervene rejected by the High Court, without any reasons being given.<sup>30</sup> Perhaps not surprisingly, these groups are staunch advocates of a bill of rights.

#### *Lawyers' Support*

The legal community's support for rights advocacy organizations is mixed. A 1991 public opinion survey found Australian lawyers (n=477) evenly divided (45% v. 55%) on whether parliaments or courts should have "the final say" on rights issues. This was less than non-lawyers (41% v. 59%) but more than elected legislators (76% v. 24%).<sup>31</sup>

A growing number of lawyers volunteer time for public interest litigation, and recent growth in larger law firms creates more opportunities for such pro bono litigation. Large law firms can afford to 'loan' lawyers to do pro bono public interest work in a way that small firms and sole practitioners cannot. This pattern is evident in the workings of both two of the most active rights advocacy groups, PILCH and PIAC. Both rely on a network of volunteer lawyers drawn largely (but not exclusively) from larger law firms. Lawyers are also disproportionately represented in the memberships of the various state Civil Liberties Councils, but many of these appear to come from smaller law firms and sole practitioners.

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<sup>27</sup> G. Williams, 'The Amicus Curiae and Intervener in the High Court of Australia: A Comparative Analysis', 2000.

<sup>28</sup> I. Brodie, *Friends of the Court: The Privileging of Interest Group Litigants in Canada*, 2002.

<sup>29</sup> G. Williams, 'The Amicus Curiae and Intervener in the High Court of Australia: A Comparative Analysis', 382.

<sup>30</sup> *Ibid.* 382.

<sup>31</sup> B.Galligan & I. McAllister, 'Citizen and Elite Attitudes towards an Australian Bill of Rights', 1997.

In the law schools there is stronger support for rights advocacy and increased judicialisation of rights protection evidenced by the recent creation of several human rights/public law research institutes, the leading public role of law professors in the bill of rights debate, and the increasing number of human rights courses being offered to students. The last decade has witnessed the creation of three new human rights/public law institutes in leading law schools. The Castan Centre for Human Rights Law at Monash University, named after the lead counsel in the celebrated *Mabo* case, the late Ron Casten, is headed by David Kinley, a well known human rights scholar and advocate.<sup>32</sup>

Launched in October, 2000, its mandate is to bring together national and international human rights scholars, practitioners and advocates in order to promote and protect human rights through teaching, scholarly publications, public education, applied research, collaboration and advice work, consultancies and advocacy. The recently founded Gilbert and Tobin Centre of Public Law at the University of New South Wales has a similar brief, with special attention to the bill of rights debate, indigenous law, international human rights law and human rights. This reflects in part the interests of the Centre's founding Director, George Williams, a prominent advocate of a bill of rights.<sup>33</sup> The largest and best-funded centre is the Centre for International Public Law (CIPL) at the Australian National University in Canberra. While its mandate is much broader than human rights, its Director, Hilary Charlesworth, is best known as a human rights scholar and advocate whose recent book *Writing in Rights* (2002), is an impassioned plea for adding a bill of rights to Australia's constitution.

Legal academics schools are generally supportive of the need for a bill of rights and human rights concerns more generally, although there are still sharp divisions. Critics of the bill of rights movement have identified legal academics as some of the strongest supporters. According to political scientist David Tucker: 'British-Australian legal culture is under threat by. . . the uncritical manner in which the legal intellectuals in Australia are being influenced by US theories. . . . Despite Australia's own longstanding parliamentary traditions, many Australian intellectuals are now encouraging its judges to emulate the Warren [Court] activists, trying to recast Australia in the image of the United States two or three decades ago.'<sup>34</sup>

In sum, while the legal profession is fairly evenly divided on the desirability of a bill of rights for Australia, prominent university law professors are supportive. The most vocal and articulate advocates for a bill of rights are almost all academic lawyers. This pattern

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<sup>32</sup> See D. Kinley, ed., *Human Rights in Australian Law*, 1998.

<sup>33</sup> G. Williams, *The Case for an Australia Bill of Rights*. 2004.

<sup>34</sup> D.F.B. Tucker, 'Natural Law or Common Law: Human Rights in Australia', 1997: 121, 122.

of support and opposition amongst lawyers is not unique to Australia, but similar to what existed in Canada prior to the adoption of the Charter of Rights in 1982 and in the U.K. today.

#### *Adequate Funding*

The weak-link in Australia's support structure for legal mobilisation is funding. Stephen Cohen, author of the 1992 study, *Australian Civil Liberties Organizations*, observed that most groups were 'institutionally weak', in part because they were 'really badly funded'. Cohen estimated that most depended on donations and perhaps 90 percent had budgets of less than \$500/year. Even the better known Australian Lawyers' for Human Rights' annual budgets were less than \$10,000, and depended heavily on members' dues and contributions. Few rights-advocacy organizations receive significant and or sustained public or private foundation funding. The only two exception are PIAC and HREOC discussed above. There is no dedicated test-case funding program as in Canada. Legal aid programs exist in all states, but most have an informal policy of limiting funding to one appeal, thus precluding test cases.

In sum, the 'support structure for legal mobilization' that we find in Australia is much weaker than in the U.S. or Canada, but perhaps on par with what Epp found in the U.K. prior to 1998. In the same manner in which the British SSLM supported a partial 'rights revolution' in the UK prior to 1998, so the current Australian SSLM probably contributed to the brief period of rights activism associated with the Mason court in the early 1990s. For instance, without rights activists like Ron Casten, cases like *Mabo* would not have come before the High Court. Nor would the High Court have been encouraged to take novel and precedent-setting stands on rights issues, or been defended for having taken them. Australia's weak SSLM is also reminiscent of what one found in Canada prior to 1982.

#### **Rights Protection by Other Means**

The story of rights protection by judicial means in Australia is a comparatively thin one, in terms of both High Court achievements and support structure for legal mobilization. Australia is the only English-speaking democracy not to have a judicially enforceable bill of rights, either constitutional or statutory. Such exceptionalism is lamented by bill-of-rights advocates, and used as evidence of grave deficiency in rights protection.<sup>35</sup> They call for an Australian bill of rights to remedy the supposed deficiency.

Australia is an exception, however, in continuing to rely upon parliamentary and political means, with a complementary judicial contribution. Moreover, it is probably

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<sup>35</sup> H. Charlesworth, *Writing in Rights: Australia and the Protection of Human Rights*, 2002; G. Williams, *The Case for a Bill of Rights for Australia*, 2004.

just as successful in achieving a rights revolution comparable to that of bill-of rights countries. This of course needs to be shown and so far has not been. But to simply look at judicial achievements and gaps in legal protection of rights as most bill-of-rights advocates do is to see only part of the picture.

We might hypothesize that Australia has experienced a 'rights revolution' in Epp's terms broadly comparable to that of other countries, but mainly through parliamentary and political means. If so, we might expect to find that Australia has been more concerned with broad political rights such as voting and substantive equality matters such as wage levels and employment practices that have widespread appeal. Whether it is a laggard in more selective individual and group rights, to do with personal privacy and alternative lifestyles, will depend on the strength of the support structure for political mobilization. Investigation of these issues is beyond the scope of this paper and requires further empirical research. If Australia has experienced a rights revolution by mainly political means, the relative weakness of support for a bill of rights and the limited scope of judicial developments in rights protection without a bill of rights is to be expected.

Once we allow that a rights revolution can be achieved by political as well as judicial means, Australian exceptionalism becomes comparatively and theoretically more significant. If Australia's rights protection is based primarily upon legislative and administrative measures with complementary, but secondary, judicial involvement, this is significant for correcting the dominant judicial paradigm of rights protection favoured by Epp and others. While the political protection of rights remains the dominant mode in Australia, it is also significant for bill-of-rights countries. Claims of Australian exceptionalism in rights protection would need to be qualified.

We might further speculate that alternative methods of rights protection—whether judicial or political—have important consequences. Institutions do matter in privileging certain groups and favouring particular outcomes. As is well known, adopting a bill of rights shifts primary responsibility for making decisions about rights claims from legislatures to courts. A secondary effect, we would argue, is to privilege different societal interests because the resources required for pursuing rights claims in the different institutional settings are not evenly distributed. Legislative decision-making is more susceptible to being influenced by interests with large or mass memberships that can influence electoral outcomes with votes and financial contributions. Judicial decision-making is more susceptible to influence by special interests who can marshal resources and employ lawyers or whose policy objectives and social values are shared by elite groups. Which forums—and which societal interests—will be more supportive of particular rights will vary over time and over which rights—and whose rights—are in play.

It might be that rights victories attributed to judges and constitutional courts in other countries have been achieved in Australia through legislative and administrative decision making supplemented in significant ways by judicial decision making. If so, such a finding would challenge the case of the bill of rights advocates, mainly lawyers, who have been looking in the wrong direction for evidence of Australian rights protection. Contrary to Epp's judicial paradigm of rights protection, Australia would provide comparative evidence that a more political model of rights protection is possible and effective. Such a finding would vindicate the theoretical argument of Jeremy Waldron that human rights protection can be achieved without excessive reliance upon a bill of rights or judicial activism.<sup>36</sup>

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<sup>36</sup> J. Waldron, 'A Rights-Based Critique of Constitutional Rights' 1993.

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