The *Australia Together* Podcast

Transcript of Episodes 37, 38 & 39.

Insights into Human Rights and Democracy in Australia

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The Australia Together Podcast

Insights into Human Rights and Democracy in Australia

Episode 37: Bronwyn Kelly answers Questions on Notice from Senator Lidia Thorpe in the federal Parliamentary Inquiry into Australia's Human Rights Framework – Transcript of Part 1

Hi, my name's Bronwyn Kelly. I'm the Founder of Australian Community Futures Planning or ACFP and this is the Australia Together Podcast. Click here for the audio of Episode 37.

Today we're providing the first of three podcast episodes in our series on **Insights into Human Rights and Democracy in Australia**. In this series I'll be providing my answers to some questions I received from the Indigenous independent Senator Lidia Thorpe in association with my appearance as a witness on 28 September 2023 in the federal parliament's current inquiry into Australia's Human Rights Framework.

In my witness statement I made a case in support of a federal Human Rights Act as had been recommended by the Australian Human Rights Commission. But I but stated that even if the parliament enacts human rights legislation, the Constitution will still be a barrier to ***security*** of the human rights of Australians. **I advocated for the need to ensure human rights are enshrined for all in the Constitution, not just in legislation.**

In noting that testimony, Senator Thorpe later asked me two important questions. In the first she suggested that the Australian Human Rights Commission's proposal for a Human Rights Act was weaker than constitutional enshrinement of human rights and asked me to confirm whether it is indeed correct that – and this is her words –

> unless a Bill or Charter of rights is constitutionally enshrined, there is no domestic legal way to hold the executive government accountable for passing laws that abuse human rights beyond the government of the day choosing how they are held accountable for breaches.

In her second question Senator Thorpe asked,

> What is the biggest danger in pursuing the weaker Australian Human Rights Commission proposal as opposed to the constitutional model?

In my appearance at the hearing I did indeed suggest that a Human Rights Act was a weaker proposal than constitutional enshrinement of rights, at least from the point of view that legislation can confer rights on Australians but unfortunately it won't *secure* them. Without constitutional enshrinement of rights Australians will still be vulnerable to abuse or loss of their rights by executive government decisions when it is neither necessary nor just.

However, I did not suggest that the solution would be a bill or charter of rights in the Constitution. We need to do something new in the Constitution, but it isn't a bill or charter. Quite a different form of constitutional enshrinement of human rights is required if we are to build a human rights framework that safely and equitably secures rights for Australians in democracy. In my recent book, *The People's Constitution*, I have suggested that the necessary form of constitutional law on human

rights is a National Agreement between all enfranchised Australians on Human Rights and Obligations. This is a different form of constitutional law to a charter or bill of rights. It is a form of lawmaking consistent with the sovereign will of a nation's people rather than the arbitrary will of a government or parliament or monarch.

This is not something that was discussed in my appearance before the parliamentary committee. So I'm going to provide my answers to Senator Thorpe's questions in full in this and the next two episodes of the Australia Together Podcast. They're really great questions and the answers go to the heart of how we should understand:

- the very limited form of democracy we have in Australia,
- how that is impacting our human rights, and most importantly
- **what we can do to make Australia's Constitution fit for a 21st century democracy – one where everyone has political equality and is secure in all the human rights they need.**

These answers have been published and are available on the federal parliamentary website at https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Human_Rights/HumanRightsFramework/Additional_Documents

In her first question Senator Thorpe stated to me as follows:

1. You say the AHRC proposal does not go far enough and unless human rights are constitutionally enshrined abuse of human rights will continue and we will see government enabled climate change, new stolen generations, state sanctioned violence, homelessness, poverty, health issues, pollution, corporate exploitation, and war. We look around and see this all currently happening and worst of all for First Peoples on our own land.

Consequently Senator Thorpe then asked me:

> Can you confirm your submission that unless a Bill or Charter of rights is constitutionally enshrined, there is no domestic legal way to hold the executive government accountable for passing laws that abuse human rights beyond the government of the day choosing how they are held accountable for breaches?

My response to this question from Senator Thorpe was provided in two parts. Here's the first part:

In relation to whether in the absence of constitutionally enshrined rights there is no domestic legal way to hold the executive government accountable for passing laws that abuse human rights

I responded as follows:

I refer the PJCHR to my previous evidence, namely that the High Court has in effect already confirmed that unless human rights are enshrined in the Constitution it is not possible for the courts to hold executive governments or parliaments to account for passing laws that abuse or revoke human rights. **The rights of humans in this country can be lawfully abused by Australian governments because there is nothing in the Constitution that says they can't be.** It is almost entirely silent on human rights and fully silent on any attendant government obligations to uphold and protect those rights. As such, the Constitution gives the courts no basis to restrain abuses of human rights by executive governments or parliaments, either in law-making, policy development or

administration. In *The People's Constitution* I cite no fewer than five major High Court judgements upon which I base this view. They are:

- Al-Kateb vs Godwin, 2004,[1]
- Minister for Immigration and Ethnic Affairs vs Ah Hin Teoh, 1995,[2]
- Kartinyeri vs the Commonwealth, 1998,[3]
- Comcare vs Banerji, 2019,[4] and
- Maloney vs the Queen, 2013.[5]

In relation to this question from Senator Thorpe, the judgement in Al-Kateb vs Godwin gives the clearest and most direct answer. In this judgement the High Court was forced to determine that amendments to the Migration Act did lawfully allow indefinite detention of people who had not been charged with a crime, and that the Act was not unconstitutional. As John Von Doussa, former president of the Human Rights and Equal Opportunity Commission observed, this ruling pertained,

> even though the detention was recognised as arbitrary, [and] contrary to Article 9 of the International Covenant on Civil and Political Rights. … The Court held Parliament had sufficiently expressed its intention that children could be detained, notwithstanding that their detention ran foul of human rights principles.[6]

It is an indictment of Australia's Constitution that such horrible laws can be made under it. But the Al-Kateb vs Godwin case is also a landmark result for another reason. It clarifies the significantly diminished status of the courts in their judicial power relative to the parliaments in their legislative power (and, for that matter, relative to executive governments in their administrative power). Justice McHugh was forced to proclaim in Al-Kateb that **when it comes to human rights:**

> **the justice or wisdom of the course taken by Parliament is not examinable in this or any other domestic court.** … The function of the courts in this [human rights] context is simply to determine whether the law of the Parliament is within the powers conferred on it by the Constitution.[7]

And so, in confirming that the contested amendments to the Migration Act were within the powers conferred on parliament by the Constitution, the High Court also confirmed that Australian courts have lost any power they might have had to determine the justice of any laws made about human rights in Australia, and they have lost this power because of the Constitution's silence on rights. In further support of this I must repeat here part of an extract from *The People's Constitution* that was supplied in ACFP's main submission to this inquiry into Australia's Human Rights Framework: In that extract I stated that:

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[1] Al-Kateb v Godwin [2004] HCA 37, (2004) 219 CLR 562, High Court (Australia).

[2] AustLII, Australian Journal of Human Rights, Roberts, Susan --- "Teoh v Minister for Immigration: The High Court Decision and the Government's Reaction to it" [1995] AUJlHRights 10; (1995) 2(1) Australian Journal of Human Rights 13.

[3] Kartinyeri v Commonwealth (1998) 195 CLR 337, summarised in the Agreements, Treaties and Negotiated Settlements Project, ATNS.

[4] High Court of Australia, Comcare vs Banerji at https://jade.io/article/657141?at.hl=Banerji

[5] High Court of Australia, Maloney vs the Queen, [2013] HCA 28; 252 CLR 168; 87 ALJR 755; 298 ALR 308.

[6] John von Doussa QC, President, Human Rights and Equal Opportunity Commission, "Why We Need An Australian Bill of Rights – a joint forum", University of South Australia, 7 December 2005 accessible at https://www.humanrights.gov.au/about/news/speeches/why-we-need-australian-bill-rights-joint-forum

[7] Al-Kateb v Godwin [2004] HCA 37, (2004) 219 CLR 562, High Court (Australia).

Lawmakers and judges alike are well used to interpreting whether parliaments are behaving justly in relation to human rights treaties. And yet judges have felt the need for specific incorporation of treaties into domestic law – or rather, into the actual Constitution – before they will exercise the full measure of their judicial power in relation to rights under these treaties. In the Al-Kateb case, Justice McHugh shed some light on why. He said:

> Eminent lawyers who have studied the question firmly believe that the Australian Constitution should contain a Bill of Rights which substantially adopts the rules found in the most important of the international human rights instruments. It is an enduring – and many would say a just – criticism of Australia that it is now one of the few countries in the Western world that does not have a Bill of Rights. But, desirable as a Bill of Rights may be, it is not to be inserted into our Constitution by judicial decisions drawing on international instruments that are not even part of the law of this country. It would be absurd to suggest that the meaning of a grant of power in s 51 of the Constitution can be elucidated by the enactments of the Parliament. Yet those who propose that the Constitution should be read so as to conform with the rules of international law are forced to argue that rules contained in treaties made by the executive government are relevant in interpreting the Constitution. It is hard to accept, for example, that the meaning of the trade and commerce power [in the Constitution] can be affected by the Australian government entering into multilateral trade agreements. It is even more difficult [then] to accept that the Constitution's meaning is affected by rules created by the agreements and practices of other countries. If that were the case, judges would have to have a "loose-leaf" copy of the Constitution. If Australia is to have a Bill of Rights, it must be done in the constitutional way – hard though its achievement may be – by persuading the people to amend the Constitution by inserting such a Bill.

This is a logical or at least understandable reason for the reluctance of judges to determine "whether the course taken by a parliament is unjust or contrary to basic human rights" when there is no specific rendering of any human rights treaties in the Constitution itself. And it is a plea from the judiciary to the people to take the chains off the courts that prevent them from protecting people against abuses of power and rights by governments. It is also a clear statement to the effect that mere legislation is not sufficient to protect human rights. It must be done in the Constitution. Otherwise there is no balance of power that can be achieved. No balance of power is possible if one of the powers (in this case the High Court) has no power at all under the only instrument that can give it power – the Constitution. The Court's lesson is that only the people can solve this problem, via a long overdue referendum to insert human rights into the Constitution.[8]

In the next episode of this podcast, I will answer the second part of Senator Thorpe's question about whether a bill or charter of rights in the Constitution is the best way of holding governments accountable for breaches of human rights. As I've already stated, a bill or charter will help but it is not the best way to go about validly, fairly and safely enshrining the rights of Australians in their democracy.

My name's Bronwyn Kelly and this has been the Australia Together Podcast brought to you by Australian Community Futures Planning. To become involved in planning and building a better future for Australia, subscribe to ACFP at www.austcfp.com.au. Everyone is welcome to become involved.

[8] Bronwyn Kelly, *The People's Constitution: the path to empowerment of Australians in a 21st century democracy*, Chapter 6 – The Constitution as a barrier to human rights. ACFP Publications, 2023.

The Australia Together Podcast
Insights into Human Rights and Democracy in Australia

Episode 38: Bronwyn Kelly answers Questions on Notice from Senator Lidia Thorpe in the federal Parliamentary Inquiry into Australia's Human Rights Framework – Transcript of Part 2

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In my witness statement I made a case in support of a federal Human Rights Act as had been recommended by the Australian Human Rights Commission. But I but stated that even if the parliament enacts human rights legislation, the Constitution will still be a barrier to ***security*** of the human rights of Australians. **I advocated for the need to ensure human rights are enshrined for all in the Constitution, not just in legislation.**

In noting that testimony, Senator Thorpe later asked me two important questions, the first of which was:

> Can you confirm your submission that unless a Bill or Charter of rights is constitutionally enshrined, there is no domestic legal way to hold the executive government accountable for passing laws that abuse human rights beyond the government of the day choosing how they are held accountable for breaches?

In Episode 37, I provided the first part of my answer to this question. I confirmed my view that unless human rights are constitutionally enshrined there is no domestic legal way to hold the executive government or parliament accountable for passing laws that abuse human rights. I cited High Court judgements in support of this view.

Today I'm providing the second part of my answer. This relates to the utility of a bill or charter of rights in the Constitution in holding governments accountable for breaches or reductions of human rights. In my submissions to the Inquiry I didn't actually say that a "bill or charter of rights" would be an appropriate form of constitutional enshrinement of rights in a democracy. Here I will set out why, and I'll suggest an alternative. This alternative would offer Australians *security* of their rights. The necessary level of security of rights would not be available with a bill or charter in the Constitution and it certainly would not be available if rights are merely legislated. Here's my answer.

In relation to the utility of a Bill or Charter of Rights in the Constitution in holding governments accountable for breaches of human rights

I responded as follows:

The solution to the problem of executive abuse of human rights is not necessarily insertion of "a Bill or Charter of rights" into the Constitution.

Enshrinement of rights in the form of a bill or charter would be an improvement, inasmuch as it would (depending on how it is drafted) create at least some limits to the power of governments or parliaments to force through laws that abuse or remove human rights. However, in my recent book, *The People's Constitution*, I argue that human rights are not the fiat or gift of governments and that this is confirmed by official government policy, which states that rights are inherent and inalienable – i.e., they cannot be given up or taken away – and they are an indivisible whole. A charter or bill of rights is a concept or model of law-making that assumes that human rights are divisible and can be narrowed down to a selective list of rights a government is prepared to let people have. As such, bills and charters support the notion that rights are not inherent, inalienable and indivisible, and more, that arbitrary executive government decisions to deny those rights are permissible, regardless of the genuine needs or will of either parliaments or the people.

Therefore, although a bill or charter of rights in the Constitution could (again, depending on how it is framed) restore a more reasonable balance of power between the parliament, executive governments and the courts in relation to human rights policies and decisions, we are nevertheless unlikely to experience the full measure of the benefit that may be experienced by this restoration of a reasonable share of power for the courts if a bill or charter is drafted in a manner that is:

a) selective of rights, and/or
b) makes it lawful for a government to arbitrarily suspend any human rights laws, and/or
c) does not simultaneously enshrine the obligations of governments and parliaments to protect and honour the rights of Australians.

Should such a bill or charter, for example, leave the way open for governments to continue making executive decisions or statements which adversely affect or detract from rights in law, then the gains made through a bill or charter in the Constitution will be lawfully (albeit unjustly and undemocratically) reversible.

A bill or charter of human rights in the Constitution would reduce the potential for executive abuses of rights in one way, because it would help the courts to defend us from abuse more than they can now. But it will re-introduce the possibility of abuse by a different means because it would increase the potential for divisibility of what in policy is acknowledged to be indivisible. In other words it is likely to unjustifiably reduce access to certain rights (perhaps on a permanent basis, even though that would be contrary to international law), and it is likely to allow governments to escape obligations to protect human rights and to refrain from restricting access to rights when it is not necessary (eg., when a restriction is not vital to "the interests of national security or public order [or public health] or for the protection of the rights and freedoms of others."[9]).

The executive government's ability to escape obligations under international human rights law will persist particularly if the bill or charter confers rights on Australians but does not simultaneously confer the attendant obligations on governments to uphold those rights. For a list of the obligations of governments that are State Parties to international human rights treaties – and the Australian government is a State Party to these treaties – see Appendix 3 of *The People's Constitution,*

[9] Articles 12, 19, 21 and 22 of the International Covenant on Civil and Political Rights- external site and Article 8 of the International Covenant on Economic, Social and Cultural Rights- external site.

accessible as an extract here. Commitment to observe these obligations is essential for any State Party if human rights are to be protected.

It should be noted that, contrary to their own policies, Australia's commonwealth governments have uniformly displayed a tendency to assume that an arrangement where rights are permitted only by government fiat (i.e., graciously conferred by a bill or charter) is an appropriate way to make laws about human rights in a democracy. The PJCHR's Chair, Mr Josh Burns MP, made an assertion to this effect in his question to me at the hearing on 28 September 2023. He said:

> No member of the committee is a member of the executive but, in your submission and your opening statement, you talk about how a member of the committee would feel if a future executive were to make contrary decisions. I would put to you that *absolutely* they should have the right to; that any future government should have the right to completely disband any piece of legislation or make changes, as they see fit, and there shouldn't be a restriction on any future government making decisions as the government of the day. You speak about protecting the democratic rights of Australians, and to not have that would be a gross violation of the democratic rights of Australians, wouldn't it? [My emphasis and Mr Burns'.]

I must assert in reply to Mr Burns that if it is indeed proper that *governments* should not be subject to restrictions and should be able to change any law "as they see fit", then this is a description of autocratic rule, not democracy. It assumes and attempts to enshrine arbitrariness into our governance system. A government which is subject to no restriction at all on what it may rightly do is licensing itself to be arbitrary and, moreover, is evading its constitutional responsibility to parliament. This level of executive overreach by a government is essentially undemocratic. This difference of opinion with Mr Burns' assertion about the rights of executive governments in a democracy is central to my answer to Senator Thorpe's question.

To explain that – and to show how big a problem this executive government overreach has now become in Australia's democratic arrangements – I will state that since the High Court decision in Ah Hin Teoh in 1995, successive governments have arrogated to themselves much of the legislative power of the parliament. They have achieved this by means of executive statements and other avoidances of parliamentary process (eg., by reducing sitting days and refusing to allow the bills of non-government members to come forward for debate). It is this insistence on what Mr Burns called the "absolute" right of *governments* to sideline the parliament in this way that has the potential to cause and actually is causing violations the democratic and human rights of Australians and anyone who comes to this country. See Chapter 6 of *The People's Constitution* for Australia's record of abuse of human rights since the 1990s. Australia has become a serial abuser of human rights and I suggest that is because executive overreach has been made possible by a Constitution which is silent on rights.

I also contend that in a democracy there should indeed be restrictions on any government's ability to "completely disband" legislation on human rights. Human rights is the one area of law where executives and parliaments should not "make changes, as they see fit". Any changes must be as the people see fit, if only because human rights are their inherent and inalienable property, not the parliament's, and certainly not the government's. In my submission I provided reasons for this argument, summarised as follows:

> To the extent that the concept of parliamentary sovereignty [as it is described by the Australian Human Rights Commission] gives parliaments the right to "make or unmake any

law",[10] it embeds the possibility of unjust laws and arbitrary suspension of just laws. It is fundamental that if human rights are inalienable and if we are to be protected from the potential for injustice by an arbitrary sovereign (parliamentary or monarchical) then we need a system of law and law-making which will prevent parliaments and governments from overriding the rights that the government otherwise declares to be universal and inalienable.

ACFP therefore submits that the government should consider working towards a human rights framework in which it is a key principle that the people of Australia (not the parliaments or the executive governments or the judicature) are to be accorded sovereignty in this particular area of law and that this sovereignty can only be protected by constitutional enshrinement of all rights and obligations in the international human rights treaties and declarations to which Australia is already a State Party. This offers a safe course for both the people of Australia and elected parliaments inasmuch as instruments of international human rights law to which Australia is a signatory (and that in most cases the parliament has long since ratified) already set out the conditions on which the human rights in the treaties may be legitimately limited or temporarily suspended in the interests of the safety of the nation.

The Committee should note that in *The People's Constitution* I therefore proposed that rather than enshrining rights in the Constitution via a bill or charter, the valid and safe way is to create a process by which Australians may freely grant all rights to themselves and each other as equals and impose all necessary obligations on themselves and their governments to uphold these rights. This may be done efficiently and fairly through a referendum to enshrine in the Constitution a National Agreement on Human Rights and Obligations. A starting draft of a possible National Agreement on Human Rights and Obligations is available here for use in community engagement.

Chapter 6 of *The People's Constitution* also contains a proposal for a democratic process that will allow Australians to at last enshrine whatever human rights and obligations they wish in Australia's Constitution by making a free Agreement as equals. The proposed democratic process is called "Prospect 2". It is premised on the principle that human rights are the inherent property of all humans from birth and therefore cannot be bestowed by governments. Instead, if we are to have them at all, they must be what we freely give to each other as equals.

Prospect 2 reverses the way laws on human rights are currently made. In the reversal, *all* the human rights available in any treaty or international instrument of law signed by an Australian government are automatically incorporated into the Constitution (even before ratification by the parliament) and the government must argue for permission from the people to remove a human right in law and/or be exonerated from its obligations under the treaties. Such permission must be sought by a referendum. Some may argue that this will expose Australia to risk in an emergency. But this is wrong because the international treaties already set out the conditions on which the human rights in the treaties may be legitimately limited or temporarily suspended without the need for a referendum (for instance, in an emergency that threatens the life of the nation or public health). As such, there is no risk to the nation from Prospect 2. Parliaments will still be able to lawfully limit rights in an emergency for as long as that emergency lasts, and they will be able to do so without the need for a referendum.

[10] Australian Human Rights Commission, Free & Equal, Position paper: A Human Rights Act for Australia, 2022, page 71: *The principle of parliamentary sovereignty as explained by Dicey guarantees Parliament, as the democratically elected body, the right to 'make or unmake any law' and obliges courts to 'uphold and enforce it'.*

Prospect 2 also contemplates the need for an "inception referendum" to establish that this Agreement between equals is indeed the means by which Australians wish to at last inaugurate enshrinement of their rights in domestic law. An option for a straightforward question for this inception referendum may be as follows:

> Do you support an alteration to the Constitution that will allow the people of Australia to make a National Agreement on Human Rights and Obligations wherein the full set of human rights and obligations that are established in international instruments of law to which Australia is a signatory, or of which it is a supporter, will form the basis of The Agreement and will be maintained as the minimum of human rights and obligations under Australian law until such time as Australian enfranchised electors seek in a duly constituted referendum to vary The Agreement?

The Committee will note that the current method for making laws on human rights (I call this "Prospect 1" in *The People's Constitution*) is one where governments start with a limited list of whatever rights they might be prepared to confer and they then let the parliament decide which items on the list might be allowed into law. Prospect 2, by contrast, starts with the full menu of possible rights and obligations in international law, taking them as a given (because they are inherent), and then lets the electors delete what they truly don't want or need – on the proviso that if they delete a right they must delete it for everyone and if they delete an obligation, the deletion will not adversely impact any particular group compared to others.

In effect, invocation of Prospect 2 would transfer ratification powers on human rights away from parliaments and to the people. It would give the people the first and last word on their rights, which is as it should be. This would amount to a transfer of sovereignty away from the parliament (or from away the executive government if it has usurped parliamentary sovereignty) and move it to the people themselves but only in the area of human rights. It would not transfer *legislative* power away from parliament on human rights or any other area of law. It would simply provide limits to the use of power, preventing arbitrary decisions on human rights. At the same time it would clarify how truly legitimate lawmaking may occur in a democracy – lawmaking that is consistent with the sovereign will of the people.

Prospect 2 runs entirely counter to Mr Burns' rendering of "democratic" arrangements which suppose that the executive and executive governments have "absolute" rights to "completely disband" any piece of legislation. But this rendering is invalid both under Australia's Constitution and in democracy. As explained above, executive power of the magnitude assumed in Mr Burns' rendering is autocratic, not democratic. It disregards parliamentary sovereignty, arrogating it to the executive government.

Among other things, this is inconsistent with the principle of responsible government which underlies Australia's Constitution and which, according to the High Court is mandated by the Constitution.[11] Mr Burns' rendering of democracy is inconsistent with that principle for the reason that in the current Constitution the executive government is responsible to the parliament, not the other way around. As the Australian Government Solicitor has stated, under the principle of responsible government:

[11] Paragraph 20, Comcare v Banerji [2019] HCA 23, 7 August 2019, Comcare v Banerji [2019] HCA 23 - BarNet Jade - BarNet Jade

> the Crown (represented by the Governor-General) acts on the advice of its Ministers who are in turn members of, and responsible to, the Parliament. It is for this reason that section 64 of the Constitution requires Ministers to be, or become, members of Parliament.[12]

In Australia's constitutional arrangements executive governments are not meant to be able to overturn legislation. That is the preserve of the parliament. Therefore the Committee Chair's assertion that

> absolutely … any future government should have the right to completely disband any piece of legislation or make changes, as they see fit, and there shouldn't be a restriction on any future government making decisions as the government of the day,

equates to an assertion of absolute power for the executive and a refutation of parliamentary sovereignty. This may be the preferred interpretation of a hierarchy among those already empowered by the Constitution and it may well suit the current government's preferences when it comes to decisions particularly on war, a power which the current government has recently refused autocratically to share with the parliament.[13] But it is not an interpretation that implies a government acceptance of the need to act responsibly, as mandated by the Constitution. It implies defiance of that principle and a preference to disregard parliamentary sovereignty and the democratic rights of Australians.

This issue is likely to be one that may take decades to resolve, but while that is occurring risks associated with current forms of lawmaking about human rights – forms which imply the executive government should have absolute power to legislate – should at least be avoided. The safest way to avoid them is to establish a program of respectful nation-wide community engagement and genuine collaboration with Australians to establish a Constitution fit for a 21st century democracy whose members are political equals. The Committee was provided with a copy of a possible seven-step program for this purpose. That program is repeated here in Attachment A.

In the next episode of this podcast, I will answer Senator Thorpe's second question about what is the biggest danger in pursuing the weaker AHRC proposal as opposed to the constitutional model? I'll provide a list of five big risks but the biggest of these probably arises from the executive overreach I have described above. This overreach has the potential both to eliminate the democratic rights of Australians, and expand the abuse of human rights by Australian governments that is already on the record.

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[12] Australian Government Solicitor, Canberra, Australia's Constitution with overview and notes by the Australian Government Solicitor, November 2022, page iv.
[13] Parliament of Australia, Inquiry Into International Armed Conflict Decision Making, March 2023.

The Australia Together Podcast
Insights into Human Rights and Democracy in Australia

Episode 39: Bronwyn Kelly answers Questions on Notice from Senator Lidia Thorpe in the federal Parliamentary Inquiry into Australia's Human Rights Framework – Transcript of Part 3

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In my witness statement I made a case in support of a federal Human Rights Act as had been recommended by the Australian Human Rights Commission. But I but stated that even if the parliament enacts human rights legislation, the Constitution will still be a barrier to ***security*** of the human rights of Australians. **I advocated for the need to ensure human rights are enshrined for all in the Constitution, not just in legislation.**

In noting that testimony, Senator Thorpe later asked me two important questions. My answer to the first of these can be heard in Episodes 37 and 38 of the Australia Together Podcast. In today's episode I'll answer Senator Thorpe's second question. This relates to a suggestion that in proposing a Human Rights Act, rather than constitutional enshrinement of rights, the Australian Human Rights Commission is pursuing a "weaker" form of lawmaking for human rights. Pursuant to that Senator Thorpe asked:

> What is the biggest danger in pursuing the weaker AHRC proposal as opposed to the constitutional model?

Here's my answer.

Question 2 – Senator Thorpe: On the dangers of relying on legislation rather than constitutional enshrinement of human rights.

The dangers of relying merely on legislation to protect and secure the human rights of Australians have been outlined in ACFP's submission and in my answer to Question 1 from Senator Thorpe. They include:

- Danger #1: Division of the indivisible whole of human rights that has been accepted by Australian governments in the seven core treaties and in the United Nations Declaration on the Rights of Indigenous Peoples. This division of rights will lead to loss of some or perhaps all rights at the will of an arbitrary government.

- Danger #2: Continued neutering of the courts in their capacity to justly protect people from abuse or reduction of human rights by a government. A Human Rights Act may increase the

chance of governments or others being held to account for breaches of legislated rights – but only those rights that have actually been legislated.

- Danger #3: Continued diminution or possible negation of the power of Australians in their own democracy relative to any increase in arbitrary decisions that may occur from a government's disregard of the principle of responsible government.

Perhaps the biggest of these dangers is the risk of executive overreach, which has the potential both to:

1. eliminate the democratic rights of Australians, and
2. expand the governmental abuse of rights already on the record.

In my answer to Senator Thorpe's first question I stated that Australia had become a serial abuser of human rights. That abuse has increased in parallel with the apparent move of Australian governments towards executive overreach since 2002. If it persists, that overreach will, among other things, create an exposure for Australians to unnecessary wars, inasmuch there will be no potential to rightly moderate executive power in decision-making. This overreach needs to be called out for what it is – autocracy. It should not be disguised as democracy.

Apart from these risks, I have provided the Parliamentary Joint Committee with a list of some other risks associated with reliance on legislation instead of constitutional enshrinement of human rights and obligations. I have also provided information on some key benefits of constitutional enshrinement.

There are at least five substantial reasons why Australians must have human rights in the Constitution. In no particular order they are:

1. A stable treaty with First Nations will not be possible unless human rights are first assured for all Australians equally in the Constitution.
2. Future referendums for constitutional amendment are unlikely to succeed unless Australians are first assured that human rights are the property of all as equals.
3. Australians would trust both parliaments and legislation more if they knew that laws were being made consistent with their stated rights and interests.
4. Unless Australians have rights in the Constitution, we cannot have responsible government.
5. Unless Australians have rights in the Constitution, we cannot restore a proper balance of power between the parliament, the executive government, and the courts.

In my submission I substantiated these claims as follows:

Five reasons why Australians must all have human rights in the Constitution.

1. In support of my assertion that a stable treaty with First Nations will not be possible unless human rights are first assured in the Constitution for all Australians equally, I testified that:

A stable treaty between First Nations people, non-Indigenous Australians and the Australian State can only be achieved in a democracy if it has been made freely by a nation where all people are first confident of their status as political equals. The people of a nation can only be confident that they

are both free and equal by declaring in law that rights are the equal property of all and that this cannot be negated by governments without the express permission of the people. Until they declare that, non-Indigenous Australians will not be confident that a treaty with First Nations people will not disadvantage them, relative to Indigenes. Nor will Indigenes be confident that the treaty is fair and just and that they have been acknowledged as equal.

Enshrinement of all human rights in the Constitution as the property of all people equally is therefore a condition precedent to any treaty with First Nations that all will agree is just and fair and will not result in disadvantage to any of the parties.

Development of a treaty without first enshrining all human rights in the Constitution will ensure no treaty is ever really viable. Human rights are the primordial treaty we must make with each other before we can make other treaties and laws that can be regarded as just and fair.

For more information in support of this see Chapter 6 of *The People's Constitution* in the section headed "Enabling orderly coexistence of sovereignties by agreement on human rights and obligations."

2. In support of my assertion that future referendums for constitutional amendment are unlikely to succeed unless Australians are first assured that human rights are the property of all as equals, I testified that:

Constitutional change requires trust in the parliament proposing the change. The fact that Australians have rejected every constitutional change put to them since 1977 is core testimony that the majority of Australians have lost trust in those they elect to parliament.

Therefore if parliaments of the future wish to facilitate constitutional change that Australians as a majority will agree is good, they must first establish transparent terms of trust with the Australian electors. These terms of trust must be capable of assuring the electors that the power they are handing over in each election and referendum will not be abused by parliaments or executive governments and that those they elect will always act in the public interest.

Human rights and obligations in the international human rights treaties to which Australia is a party come closer than any other statement in law to describing what the public interest actually is. They do not define the whole of the national interest but they are fundamental to the interests of any and all individuals who seek to be members of a democracy – since a state is not a democracy if its citizens have no rights.

Security of human rights must therefore be established before any population in a democracy will have the necessary confidence in a parliament to give assent to proposals for change to the Constitution. In effect, confidence in proposals for constitutional change can only be built if the Constitution itself stipulates the rights that shall not be lost by the proposed change.

It is very likely that Australians will hesitate in referendums about an Indigenous Voice and a republic if they are asked to give assent to changes in the absence of these terms of trust. They are very likely to keep saying No if parliamentarians do not offer to respect their rights. This respect must be paid to Australians by a genuinely democratic process which enables them as free and equal people to make a National Agreement on Human Rights and Obligations. In *The People's Constitution* I have suggested a process by which this may be done.

For more information on how establishing a National Agreement on Human Rights and Obligations in the Constitution can create confidence in Australians to build a Constitution fit for a 21st century democracy where everyone has political equality, see Chapters 6 and 7 of *The People's Constitution*.

3. In support of my assertion that Australians would trust both parliaments and legislation more if they knew that laws were being made consistent with their stated interests, I testified that:

Australians are increasingly sceptical that laws are being made in their interest. This is especially the case in relation to legislation on national security, war powers, defence, natural resource use, environmental protection, and Indigenous wellbeing.

However, if we could be assured that laws were being framed consistent with a set of stated values and rights (including a right to express a voice about our preferred future), confidence could be restored that laws

(a) are being made in the public interest,
(b) are not undermining political equality, and
(c) are consistent with what Australians consider to be good for their society.

In short, it would create confidence in the rule of good laws, rather than the rule of bad laws.

4. In support of my assertion that unless Australians have rights in the Constitution, we cannot have responsible government, I testified that:

Australia's Constitution establishes a system of representative government and we are told that this system also creates a basis for *responsible* government because it is structured so that "the Crown (represented by the Governor-General) acts on the advice of its Ministers who are in turn members of, and responsible to, the Parliament."[14] However, "responsible government" is merely a concept imputed to the Constitution by decades of interpretations and, in the absence of a specification of what the elected are responsible *for*, it is not likely to result in a system in which Australians can be confident that those they elect can be held accountable for being *irresponsible*.

Human rights are one of two key statements that should be included in any list of vital things that governments have a responsibility for. The other key statement is about their responsibility to uphold the nation's particular values. Unless values and rights are specified in the one law that cannot be changed by anyone other than the people themselves (i.e., the Constitution), we will not have responsible government for the simple reason that none of the elected can know what they are responsible for.

As I said in *The People's Constitution*:

> Values and human rights must be enshrined in the Constitution as the bottom line of the people's tolerance of their consenting to be governed. Values and human rights provide the list of the powers of Australians that may not be abused by those they elect.
>
> Chapter 7 – *The People's Constitution*

[14] Australian Government Solicitor, *Australia's Constitution with Overview and Notes by the Australian Government Solicitor*, page v. foi-2021-017.pdf (pmc.gov.au)

5. In support of my assertion that unless Australians have rights in the Constitution, we cannot restore a proper balance of power between the parliament, the executive government, and the courts, I testified that:

High court rulings in various cases have culminated in a reluctance by federal judges to determine "whether the course taken by Parliament is unjust or contrary to basic human rights".[15] This reluctance has grown into outright refusal by the courts because there is no specific rendering of any human rights treaties in the Constitution itself.

Australians might expect that we have a system of governance based on a well-balanced separation of powers that will allow each of the three main parties empowered under the Constitution (the parliament, the executive government, and the judicature) to moderate potential abuses of power by one or more of those parties. However, because fundamental human rights are not accorded to the people in the Constitution, one of those parties – the judicature – has lost all capacity to moderate abuses of power by the other two. The federal courts cannot now protect Australians from complete loss of their rights.

Until human rights are specified in the Constitution, the courts will be unable to exercise their rightful, well-balanced share of power to protect Australians, and citizens will be vulnerable to loss of rights, even those they might currently assume they have – such as freedom of religion or freedom not to be discriminated against on the grounds of race.

As I said in *The People's Constitution*:

> Over the decades since 1901 the Constitution has been easily undermined by a series of laws and court cases that have left it seriously weakened in terms of the protections it should provide against abuse of power. I have recorded in earlier chapters no less than five major High Court rulings where it has become apparent that the judicature – which is supposed to be able to ensure that the parliaments and executive governments operate in accordance with the Constitution and do not abuse their powers – has found itself unable to protect Australians from racism, human rights abuses, breaches of international law, and political exclusion, particularly by federal governments that have been able to force through laws that legitimise their power to behave in a manner most 21st century Australians would consider to be abhorrent. In short, the Constitution allows the making of laws which undermine political equality in our democracy. As such Australia does not have a structure in its polity capable of controlling the abuse of power. Nor does it have a democracy capable of supporting Australians as they attempt to chart a safe course to a better future.
>
> Chapter 10 – *The People's Constitution*

> [The Al-Kateb judgement] is a plea from the judiciary to the people to take the chains off the courts that prevent them from protecting people against abuses of power and rights by governments. It is also a clear statement to the effect that mere legislation is not sufficient to protect human rights. It must be done in the Constitution. Otherwise there is no balance of power that can be achieved. No balance of power is possible if one of the powers (in this case the High Court) has no power at all under the only instrument that can give it power – the Constitution. The Court's lesson is that only the people can solve this problem, via a long overdue referendum to insert human rights into the Constitution.
>
> Chapter 6 – *The People's Constitution*

[15] Al-Kateb v Godwin [2004] HCA 37, (2004) 219 CLR 562, High Court (Australia).

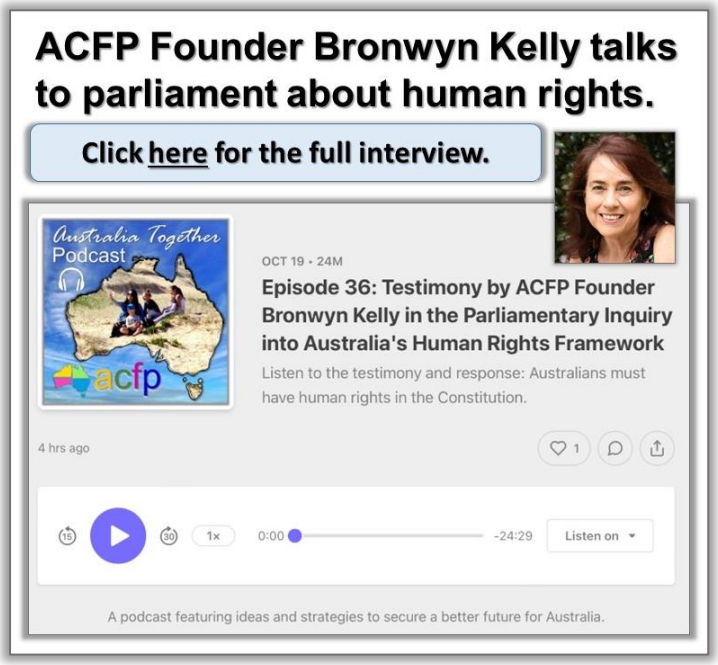
A full transcript of these answers is available at ACFP's website at www.austcfp.com.au/supporting-activities.

My name's Bronwyn Kelly and this has been the Australia Together Podcast brought to you by Australian Community Futures Planning. To become involved in planning and building a better future for Australia, subscribe to ACFP at www.austcfp.com.au. Everyone is welcome to become involved.

Listen to more about **human rights and democracy in Australia** in The Australia Together Podcast.

Further questions may be forwarded to ACFP at info@austcfp.com.au.

These answers have been published and are available on the ACFP website here and on the federal parliamentary website at https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Human_Rights/HumanRightsFramework/Additional_Documents



Listen to the audio recording of Bronwyn Kelly's testimony to the Parliamentary Joint Committee on Human Rights.

This interview prompted the above questions from Senator Thorpe.

Attachment A – A seven-step program to safely enshrine the rights of Australians in a Constitution fit for a 21st century democracy.

Chapter 9 of *The People's Constitution* outlines a program of community engagement and collaboration with Australians to establish a Constitution fit for 21st century Australia. This is a Constitution which gives all citizens a rightful but not overweening share of power in their own democracy without diminishing the rightful powers of the parliament, the executive government and the judicature.

The program envisages an orderly and well-informed collaboration that will allow Australians to freely express their sovereign will for the Commonwealth they wish to form and to build a Constitution containing all the things they need to realise their preferred future as a nation.

This new type of Constitution may be viewed not as a replacement or radical overthrow of the powers of the parliament, the executive government or the judicature, but rather as an augmentation of the sphere of power, achieving order by inclusion rather than exclusion, and transforming the current representative democracy to a participatory democracy in which all Australians have agency as political equals. This new type of Constitution also legitimises – for the first time – the current powers of the parliament, the executive government, and the courts, because it makes it clear that they are consistent with the sovereign will of the people.

For more about the principles of a constitution which makes a place for the people in their own governance and clarifies the rights and powers of all parties in that system, read *The People's Constitution: the path to empowerment of Australians in a 21st century democracy* by Bronwyn Kelly at www.austcfp.com.au/publications

Seven steps to build a Constitution fit for a democracy with equal rights for all its members.	

Step 1:	• Establish a Joint Parliamentary or a Senate Committee (with representation from the government, the opposition, independents and all other parties on the cross-bench) to commission development of a **National Collaborative Process for Development of a New Australian Constitution**.
	• Issue instructions to ensure the Process is designed to achieve the maximum inclusion of (and therefore the confidence of) the Australian people – recognising that:
	  ○ the Constitution is for their nation and is therefore theirs to design collaboratively; and that
	  ○ Australians value fairness and equality and must be given sufficient agency to collaborate on a Constitution that will ensure fairness for all.
	• Issue a charter to a group of suitably independent facilitators of the National Collaborative Process and appoint an independent person responsible for chairing the Process and providing reports on the progress of deliberations to parliament.
	• Ensure that the charter protects the complete independence of the facilitators to prevent the politicisation and corporate or interest group capture of the Collaborative Process.
	• Ensure fully adequate funding, based on an expectation that this Process of nation-wide engagement and collaborative design may take up to five years.

Step 2:	• Charge the appointed independent facilitators of the Process with development of a White Paper informing Australians about:
	  ○ issues for consideration in a holistic review of the Constitution;
	  ○ the need for open-ended objectives of a program of reform to ensure the Constitution is fit for a 21st century democracy and will be something all Australians wish to own; and

Seven steps to build a Constitution fit for a democracy with equal rights for all its members.	
	○ initial details of a proposed program of nation-wide community engagement for collaborative development of the new Constitution. • Ensure this paper plus suitable summaries (in both written and video format) are distributed to every household in Australia.
Step 3:	• Allow for feedback on the White Paper, taking care to ensure that overarching objectives can be designed for a new Constitution that will as a minimum: ○ not cause exclusion of or discrimination against any particular group from a place in the Commonwealth of Australia; and ○ will ensure capacity for formation of a strong democracy whose members are political equals.
Step 4:	• Depending on feedback from Step 3, charge the independent facilitation group with development of the essential components (chapter headings and sub-headings) of a new constitution that would accord with the essential objectives. • If necessary, modify the originally proposed nation-wide community engagement program to schedule successive rounds of collaboration on the components – one at a time in a logical order.
Step 5:	• Commence the sequence of the nation-wide community engagement and collaboration program. • Report to the joint parliamentary (or senate) committee at the end of each phase of collaboration on the results for that component.
Step 6:	• As the optimal content of any proposed component of the new Constitution becomes more obvious, ensure that the option remains open for the conduct of non-binding plebiscites and/or opinion polling to canvass the support of the Australian people for the component. For example: ○ if Australians have signalled that they want human rights in the Constitution, conduct a non-binding plebiscite to assess the level of support; or ○ if they have collaborated in a sub-group to design a new preamble to the Constitution which includes, say, a statement of Australian values, conduct any necessary community engagement, surveys or polling to assess the probable level of support; or ○ if the collaboration has resulted in the design of a Constitution which would imply that Australia should become a republic of some sort, scope out any necessary surveys and polling (perhaps with options) to assess preferences; or ○ if there is evident support for a Constitution capable of establishing a peaceful coexistence of sovereignties or treaty with First Nations, consider the most appropriate method of canvassing the views of Australians on feasible forms of fair and stable treaty capable of benefitting all parties.
Step 7:	• Based on the results of the collaborative process and any plebiscites, surveys or polling, charge the joint parliamentary (or senate) committee with design of an agenda for referendums for amendment of the Constitution.

Note: The above program assumes that it will not be necessary to revoke the entirety of the current Constitution and that many parts of it will be unaffected. This assumption may prove incorrect, although that is unlikely. Nevertheless, a program for bringing a new constitution into law by means of:

- a collaborative design process,
- a series of surveys of public opinion and plebiscites, and
- a logical sequence of referendums for individual amendments that will make sense to Australians (because they can see how they are part of a holistic reform that fits their objectives)

is more likely than any other engagement process to lead to development of a Constitution fit for 21st century Australian democracy.