FOREWORD

PERRY HERZFELD SC*

In his article in this Issue, Bruce Chen notes that, in March 2021, the Senate Standing Committee for the Scrutiny of Delegated Legislation said: 'The response to the COVID-19 pandemic brought into strong relief the fact the Parliament may not always be aware of the implications that might follow from all the legislation it passes.'[1] While the terms of the *Public Health and Wellbeing Act 2008* (Vic) are broad, it is hard to think that – when it was enacted in 2008 – anyone would have envisaged the extensive and extended 'lockdowns' to which residents of Victoria were subjected by orders made under that Act. In the wake of the pandemic, it is timely and important that the *University of New South Wales Law Journal* has dedicated the thematic articles in this Issue to the topic of rights, freedoms and accountability.

The first two thematic articles are addressed to human rights legislation. When debating questions concerning our rights and freedoms, the potential benefits and potential problems of human rights legislation, and the precise form of any such legislation, must inevitably be a focus of attention in a country like Australia without a constitutional bill of rights.

Chen summarises and analyses the recent recommendation of the Australian Human Rights Commission in favour of the enactment of a federal Human Rights Act. As the author notes, the Commission's work prompted a referral on 15 March 2023 by the Commonwealth Attorney-General to the Parliamentary Joint Committee on Human Rights of a number of matters for inquiry and report. They included whether the Commonwealth Parliament should enact a federal Human Rights Act. The Committee's report, tabled on 30 May 2024, supported the enactment of a federal Human Rights Act – over the dissent of Coalition members.[2] Chen's analysis of the Commission's proposed model contributes to the debate which will no doubt follow the Committee's report.

---

* Barrister, Eleven Wentworth Chambers.

1 Senate Standing Committee for the Scrutiny of Delegated Legislation, Parliament of Australia, *Inquiry into the Exemption of Delegated Legislation from Parliamentary Oversight* (Final Report, 16 March 2021) 102 [7.21] <https://www.aph.gov.au/-/media/Committees/Senate/committee/regord_ctte/Exemptfromoversight/Final_Report_-_Exemption__of_delegated_legislation_from_Parliamentary_oversight.pdf?la=en&hash=C34048F510CDCA9575EA8B71C89F2CD751998E94>, quoted in Bruce Chen, 'If at First You Don't Succeed… A Critique of the Australian Human Rights Act Proposal and the Inquiry into Australia's Human Rights Framework' (2024) 47(2) *University of New South Wales Law Journal* 355, 365.

2 Parliamentary Joint Committee on Human Rights, Parliament of Australia, *Inquiry into Australia's Human Rights Framework* (Report, May 2024).

Tamara Walsh and Dominique Allen's focus is on the first Australian Human Rights Act, the *Human Rights Act 2004* (ACT) ('*ACT HRA*'). They seek to investigate the impact and influence of the *ACT HRA* in its first 20 years of operation, by empirical research based on interviews with 29 participants. The participants comprised barristers and solicitors who typically represent complainants, respondents or both in human rights matters, as well as members of the Australian Capital Territory ('ACT') public service who work in human rights-related roles either in policy areas and complaints management or at the ACT Human Rights Commission. This is an important analysis of the 'on-the-ground' application of the *ACT HRA*. Among other things, it reveals perceptions amongst those interviewed that the Act has had a substantial influence upon development of legislation and policies in the ACT, and in the early resolution of disputes concerning administrative decisions. Whether these are perceptions shared by equivalent groups in Victoria and, more recently, Queensland is deserving of further research as part of the debate about a possible federal Human Rights Act.

The third thematic article, by Yee-Fui Ng and Stephen Gray, focuses most directly on the third aspect of the topic for the thematic component of this Issue: accountability. They situate the recently created National Anti-corruption Commission in the context of the historical evolution of anti-corruption commissions overseas and in Australia. They chart the waxing and waning of the powers of these bodies in different Australian jurisdictions, usually in response to political factors – noting the resilience of the New South Wales Independent Commission Against Corruption in maintaining its broad jurisdiction and powers, even in the face of the High Court of Australia's decision in *Independent Commission Against Corruption v Cunneen*.[3] Yet, despite their role in seeking to ensure government accountability, extra-judicial anti-corruption commissions also raise issues connected with the first two aspects of the thematic component of this Issue. Insofar as these kinds of bodies have coercive powers to compel the attendance of witnesses, hold public hearings that may besmirch reputations and adversely name people in public reports, their capacity to infringe individual rights and freedoms is apparent. Indeed, for that reason, as the authors note, it is necessary to monitor the accountability of these very bodies. 'Who watches the watchmen?'[4]

The next three thematic articles in this Issue explore rights, freedoms and accountability in more specific circumstances.

Frances Simmons and Chantal Bostock seek to answer a question posed in the Issues Paper delivered by the Attorney-General's Department in connection with the design of a replacement for the Administrative Appeals Tribunal: how can the new body enhance access for 'vulnerable applicants'? Their focus is on what is a large component of the workload of the existing Tribunal and will inevitably be a large component of the workload of the new Tribunal, namely refugee applicants. They examine how the identification of an asylum seeker as a 'vulnerable person' under

3 (2015) 256 CLR 1.

4 '*[Q]uis custodiet ipsos custodes*?': Juvenal, *Saturae*, ed J D Duff (Cambridge University Press, 1932) 36.

the *Guidelines on Vulnerable Persons* ('*Guidelines*') published by the Tribunal can impact on the process of merits review. The *Guidelines* recognise that, in cases involving applicants 'whose ability to understand and effectively present their case or fully participate in the review process may be impaired or not developed' – including because of age, physical or psychological abuse, torture and other traumatic experiences – the Tribunal may need to adjust its procedures.[5] The detailed analysis by Simmons and Bostock of the operation of the *Guidelines* with reference to previous Tribunal decisions will be a valuable resource when addressing this issue in the new Tribunal. Their recommendation that the new Tribunal be given power to refer applicants in refugee cases to a pro bono lawyer or legal aid would, if adopted, place the Tribunal in the same position as the Federal Court of Australia and the Federal Circuit and Family Court of Australia in this regard.

Penelope Weller et al argue that tort law is an inadequate vehicle of accountability in the provision of mental health care. The first part of their article is an analysis of the key Australian cases and legislation addressing the principles of negligence in the circumstances of mental health care. The second part of the article is a 'discourse analysis' of the way in which the concept of a 'duty of care' is used in policy and practice: the former based upon 197 relevant policies sourced online, including from government websites; and the latter based upon submissions and witness statements from the Royal Commission into Victoria's Mental Health System. The authors' findings reveal uses of the concept of a 'duty of care' far removed from the meaning it would have to any lawyer and the responsibilities actually imposed by the common law and statute. Indeed, the authors' conclusion is that there has been an unexpected consequence associated with the limitation of civil liability for those providing mental health care: an increased reliance on the notion of a duty to detain and treat.

To round off the thematic component of this Issue, Carmel O'Sullivan tackles a quite different form of accountability: the international law notion of 'command responsibility', by which military commanders are criminally liable for their subordinates' crimes when they knew or should have known of the crimes and failed to prevent or punish them.[6] Focusing on the findings of the *Inspector-General of the Australian Defence Force Afghanistan Inquiry Report* ('*Brereton Report*'), that there was credible information that members of the Australian Special Forces committed war crimes in Afghanistan,[7] O'Sullivan assesses the conclusion in the *Brereton Report* that no commander above patrol level bore any criminal responsibility. This article reminds us that accountability is not merely about the accountability of governmental institutions. It is also about the accountability of individuals for their actions, including in the difficult context of

5 Administrative Appeals Tribunal, Migration and Refugee Division, *Guidelines on Vulnerable Persons* (Guideline, November 2018) 3 [6].

6 *Rome Statute of the International Criminal Court*, opened for signature 17 July 1998, 2187 UNTS 90 (entered into force 1 July 2002) art 28.

7 See also *Roberts-Smith v Fairfax Media Publications Pty Ltd [No 41]* [2023] FCA 555.

military operations. Our system of law does not embrace Cicero's aphorism that in times of war, the law falls silent.[8]

The other articles in this Issue are not, strictly, thematic articles. But in various ways they also connect with the theme of rights, freedoms and accountability.

Harry Hobbs surveys the present landscape across Australia concerning an Indigenous treaty or treaties. Hobbs' aim is to provide a clear and simple outline of the current 'state of play' across the nation. Following a comprehensive summary of the position, he explores five key issues which he argues the various treaty processes will need to manage: a lack of public knowledge; the need to maintain community support; difficulties with a process led by Indigenous Australians; the role of international law; and the relationship of state and territory processes to any future Commonwealth process. Hobbs concludes that one of the difficulties facing the treaty-making process is the absence of any history in Australia of 'recognising the collective rights of Indigenous peoples'.[9]

Laura Griffin's focus is on both accountability and individual rights of Indigenous people: the role of civil liability in addressing Indigenous harms in custody. Torts of battery, assault, false imprisonment, negligence, breach of statutory duty, malicious prosecution and misfeasance in public office are all considered as possible avenues of liability for both injured persons and, where a person has died in custody, their family members. Griffin surveys the potential hurdles with these causes of action but also the potential remedies that might be awarded, including how in the various Australian jurisdictions liability can be brought home to the state.

Julia Tolmie, Rachel Smith and Denise Wilson describe a legal innovation in New Zealand in the case of a woman charged with the murder of her abusive partner. Expert evidence was given at trial and on sentence from a non-mental health professional explaining 'intimate partner violence' in terms of the social context the defendant was navigating: both the abuse of her partner and the inadequacy of the family violence safety system. According to the authors, this is the first time expert evidence on 'intimate partner violence entrapment' has been introduced in a formal and sustained manner at trial either in New Zealand or Australia. Developments like these may be the subject of consideration by the Australian Law Reform Commission in its open inquiry *Justice Responses to Sexual Violence*. It is presently due to report to the Attorney-General by 22 January 2025. One of the questions on which submissions have been invited is: 'What are your ideas for ensuring victim survivors' rights are identified and respected by the criminal justice system?'[10]

---

8 '*Silent enim leges inter arma*': Cicero, *Pro Milone*, ed A B Poynton (Clarendon Press, 2nd ed, 1902) 4. This has usually been rephrased as *inter arma enim silent leges*. In the High Court of Australia: see, eg, *R v Snow* (1915) 20 CLR 315, 327 (Griffith CJ); *Aktas v Westpac Banking Corporation Ltd* (2010) 241 CLR 79, [60] n 60 (Heydon J).

9 Harry Hobbs, 'Taking Stock of Indigenous-State Treaty-Making in Australia: Opportunities and Challenges' (2024) 47(2) *University of New South Wales Law Journal* 548, 588.

10 Australian Law Reform Commission, *Justice Responses to Sexual Violence* (Issues Paper No 49, April 2024) 28.

Finally, Lucinda O'Brien, Ian Ramsay and Paul Ali turn to a quite different area from the other articles: the effect on low income consumers of 'buy now pay later'. This is a financial product that allows consumers to buy and receive goods or services immediately but pay for them over time, usually in four equal instalments. According to the authors, in the financial year ending in June 2022, the value of Australian buy now pay later transactions increased 37% to $16 billion, equivalent to 2% of the value of all Australian credit and debit card purchases. The authors present the first academic empirical study of buy now pay later to focus specifically on the experiences of low income consumers. While the study provides evidence that the product causes harm to some vulnerable consumers, it also indicates that it is less harmful than other widely available credit products, such as payday loans, and is valued by many low income consumers. The authors support the Commonwealth Government's proposal to increase regulation of providers while preserving access to this source of credit. This follows the general model of modern Australian commercial regulation, ultimately giving freedom to consumers rather than embracing government prohibitions.

'Rights, freedoms and accountability' may not have quite the rhetorical ring of '*liberté, égalité, fraternité*'. But perhaps it is best that the rhetoric of the French Revolution not be looked to as an ideal, given its descent into tyranny and eventual dictatorship. The variety of coverage and depth of scholarship of the articles in this Issue demonstrate the relevance of thinking about rights, freedoms and accountability for modern Australian law and policy.

THEMATIC
DEVELOPMENTS IN RIGHTS, FREEDOMS AND ACCOUNTABILITY

Artwork by Jaimee Waine