

Response to Interview Questions

Background

There are three important features of Australian constitutionalism that must be emphasised by way of background. They provide important context to the responses that follow.

First, Australia, unlike most developed nations, has neither a comprehensive constitutional bill of rights¹ nor a statutory national charter of rights.² When the Constitution was drafted in the late-19th century, the decision was taken to follow the British model of rights protection, under which rights were protected by the common law and through the electoral process.³ The Constitution does, however, contain a limited set of express rights as well as some ‘implied rights’, which Australia’s constitutional court, the High Court of Australia, has derived from the text and structure of the Constitution.⁴ The rights expressly mentioned include the right to trial by jury for indictable federal offences;⁵ the right to free exercise of religion;⁶ the right not to have the federal government establish a religion;⁷ the right, where the Commonwealth acquires one’s property, to receive compensation on ‘just terms’;⁸ and a right not to be discriminated against based on one’s state of residence.⁹ The implied rights include the implied freedom of political communication,¹⁰ derived from the Constitution’s establishment of a system of representative and responsible government; the dual requirements that (i) the judicial power of the Commonwealth be exercised only by courts mentioned in s 71 of the Constitution and (ii) those courts *only* exercise the judicial power of the Commonwealth;¹¹ and the right to vote in federal

¹ But see Rosalind Dixon, ‘An Australian (Partial) Bill of Rights’ (2016) 14 *International Journal of Constitutional Law* 80.

² Cf New Zealand and the United Kingdom, each of which has a human rights statute.

³ See Cheryl Saunders and Adrienne Stone, ‘The High Court of Australia’ in András Jakab, Arthur Dyevre and Giulio Itzcovich (eds), *Comparative Constitutional Reasoning* (Cambridge University Press, 2017) 36, 37.

⁴ See generally Adrienne Stone, ‘Australia’s Constitutional Rights and the Problem of Interpretive Disagreement’ (2005) 27 *Sydney Law Review* 29, 31–6.

⁵ Constitution s 80. On one view, the ‘right’ to trial by jury is not a right at all, but rather a federalism provision that circumscribes how federal judicial power may be exercised in matters concerning offences against federal law: see James Stellios, ‘The Constitutional Jury — “A Bulwark of Liberty”?’ (2005) 27 *Sydney Law Review* 113. See also *Alqudsi v The Queen* (2016) 258 CLR 203.

⁶ *Ibid* s 116.

⁷ *Ibid*.

⁸ *Ibid* s 51(xxxi).

⁹ *Ibid* s 117.

¹⁰ See especially *Lange v Australian Broadcasting Corporation* (1992) 189 CLR 520; *McCloy v New South Wales* (2015) 257 CLR 178.

¹¹ See especially *R v Kirby; Ex parte Boilermakers’ Society of Australia* (1956) 94 CLR 254; *Kable v DPP (NSW)* (1996) 189 CLR 51.

elections limited, except where limitation of that right is ‘appropriate and adapted’ to a substantial reason.¹²

Next, it is important to appreciate that the High Court’s dominant modalities of constitutional interpretation are text, structure, history and precedent,¹³ with ‘extrinsic’ modalities, such as arguments based on moral, sociological or economic considerations, bearing comparatively little weight in constitutional argument.¹⁴ A consequence of this approach to interpretation, typically described as ‘legalism’,¹⁵ lending themselves to such an approach. The dominance of the legalist mode of constitutional interpretation has meant that the Australian Constitution provides fairly weak rights protection, because in most cases the existence of a constitutional right is undermined by one of the four modalities, mentioned above, that are central to legalist methods of interpretation.¹⁶

A final important feature of Australian constitutionalism is the fact that Australia is a federation, comprising six states and two self-governing territories. Each of these subnational units also has the power to enact laws that protect human rights, provided that such laws are not inconsistent with federal law.¹⁷ Thus, in the absence of a national charter of rights, three subnational jurisdictions have enacted statutory charters of rights.¹⁸ And each of the eight subnational jurisdictions has its own human rights laws and its own agencies charged with the protection and promotion of human rights.

Question 2(a): Protection of subconstitutional rights

Rights that are not mentioned in the Constitution are protected in a variety of ways.

Interpretive presumptions

Fundamental common law rights are protected through an interpretive presumption known as the principle of legality. This presumption holds that legislation will be interpreted so as not to derogate from common law rights except where the law manifests a clear intention to do so.¹⁹ Further, as

¹² See especially *Roach v Electoral Commissioner* (2007) 233 CLR 162; *Rowe v Electoral Commissioner* (2010) 243 CLR 1.

¹³ See Saunders and Stone, above n 3, 49.

¹⁴ *Ibid* 57–9.

¹⁵ The term is traced to a speech by Sir Owen Dixon upon his swearing-in as Chief Justice of the High Court: ‘Address upon Taking the Oath of Office in Sydney as Chief Justice of the High Court of Australia on 21st April, 1952’ in Judge Woinarski (ed), *Jesting Pilate and Other Papers and Addresses* (Law Book, 1965) 245, 247.

¹⁶ Stone, above n 4, 39–46.

¹⁷ Constitution s 109.

¹⁸ *Human Rights Act 2004* (ACT); *Charter of Human Rights and Responsibilities Act 2006* (Vic); *Human Rights Act 2019* (Qld).

¹⁹ See, eg, *Coco v The Queen* (1994) 179 CLR 427, 437.

mentioned above, the statutory charters of rights impose a requirement that courts, as far as possible, interpret legislation consistently with human rights.²⁰ Finally, there is a presumption that legislation is to be interpreted consistently with rules of international law, at least in circumstances of ambiguity.²¹ This gives international human rights law a role to play in statutory interpretation, even where a statute does not purport directly to incorporate international human rights law.

Judicial and executive enforcement

The federal and state legislatures have enacted statutes that protect various human rights. Some of these statutes give either executive agencies or the courts a role in enforcing these rights. For instance, the *Racial Discrimination Act 1975* (Cth) renders certain acts unlawful, and its commands may be enforced through conciliation by the Australian Human Rights Commission²² and the federal courts.²³ Similar regimes exist at the state and territory level.

Parliamentary scrutiny regimes

At both the national level, human rights are protected through the parliamentary process. At the nation level as well as in the three subnational jurisdictions with statutory bills of rights, bills introduced into Parliament must be accompanied by a statement that assesses the law's compatibility with human rights.²⁴ Further, in those jurisdictions and in New South Wales, parliamentary committees are required to scrutinise bills for their compatibility with specified human rights.²⁵

Question 2(b): Conflict between constitutional and subconstitutional rights

Section 109 of the Australian Constitution provides that Commonwealth law prevails over state law in circumstances of inconsistency. Likewise, the Constitution is supreme over inconsistent federal law. Thus, constitutional rights will prevail over sub-constitutional rights where they come into conflict.

Question 3: Relevance of international human rights law

²⁰ *Human Rights Act 2004* (ACT) s 30; *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 32(1); *Human Rights Act 2019* (Qld) s 48(1).

²¹ *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273, 273.

²² *Australian Human Rights Commission Act 1986* (Cth) pt IIB div 1.

²³ *Ibid* pt IIB div 2. See, eg, *Eatock v Bolt* (2011) 197 FCR 261.

²⁴ *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth) s 8; *Human Rights Act 2004* (ACT) s 37; *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 28; *Human Rights Act 2019* (Qld) s 38. The ACT law limits the requirement to bills introduced by the government.

²⁵ *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth) s 7; *Human Rights Act 2004* (ACT) s 38; *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 30; *Human Rights Act 2019* (Qld) s 39; *Legislation Review Act 1987* (NSW) s 8A. See also Laura Grenfell, 'An Australian Spectrum of Political Rights Scrutiny: "Continuing to Lead by Example?"' (2015) 26 *Public Law Review* 19.

Australia is a dualist system, so international law does not have direct effect in Australian domestic law. Rather, international law only has domestic effect if Parliament passes a statute incorporating international law into domestic law.²⁶ Accordingly, as a matter of domestic law the government is required to comply with international human rights norms only to the extent that those norms have been enacted into Australian law. Australia has enacted several statutes that purport to give effect to international human rights standards.²⁷ Conversely, however, the federal Parliament also has power to enact laws that violate international law,²⁸ a tool that it has used, in recent times, in response to judicial decisions that interpret the law in ways that it deems undesirable. For example, a provision of the *Migration Act 1958* (Cth) states that '[f]or the purposes of section 198, it is irrelevant whether Australia has non-refoulement obligations in respect of an unlawful non-citizen'.²⁹

But international human rights law does play an important subsidiary role: as mentioned above, there is a presumption that statutes must be interpreted in accordance with the rules of international law. This rule of interpretation has been very important in the context of refugee litigation, where it has been used in a series of cases to produce implied restrictions on power conferred on the government by statute with respect to asylum seekers.³⁰

Question 8: Horizontal Effect

Some human rights statutes do have a direct horizontal effect: they require private persons not to infringe the human rights of others. For example, the *Racial Discrimination Act 1975* (Cth), mentioned above, applies to the conduct of private individuals. The constitutional rights protections do not have a direct horizontal effect, but instead operate as restrictions on the legislative power of the federal Parliament.

Further, some other human rights norms have an indirect horizontal effect. The High Court of Australia has said that the common law may be influenced by the requirements of the Constitution. Accordingly, the Court has modified the common law of defamation so that it conforms to the implied freedom of political communication, which is a constitutional right.³¹ Further, the requirement in statutory charters of rights that laws be interpreted consistently with human rights may lead to the conclusion that statutes will

²⁶ See *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273, 286–7.

²⁷ See, eg, *Racial Discrimination Act 1975* (Cth); *Sex Discrimination Act 1984* (Cth).

²⁸ *Horta v Commonwealth* (1994) 181 CLR 183, 195.

²⁹ *Migration Act 1958* (Cth) s 197C. The provision was inserted in response to *Plaintiff M70/2011 v Minister for Immigration and Citizenship* (2011) 244 CLR 144.

³⁰ See generally Stephen Donaghue, 'International Law' in Cheryl Saunders and Adrienne Stone (eds), *The Oxford Handbook of the Australian Constitution* (Oxford University Press) 237, 255–7.

³¹ *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520.

be interpreted in a way that limits the scope of private rights in order that such private conduct does not infringe human rights.³²

Question 4: The government's role in advancing human rights

Australian governments, both national and subnational, are involved in advancing human rights in several ways. First, Parliaments can advance human rights by enacting rights-protective legislation. Examples include the three state- and territory-level statutory charters of rights and the federal legislation requiring scrutiny of bills against international human rights treaties.

Secondly, the national government and each state or territory government has a human rights commission, whose functions include promoting public understanding and acceptance of human rights.³³

Finally, the national government plays a role in promoting human rights at international forums. For instance, Australia was recently elected to serve on the United Nations Human Rights Council from 2018–2020. But this is not to say that Australia has always agreed with the views of international human rights treaty bodies, nor that Australia has fully implemented international human rights standards in its domestic law.³⁴

Question 9: Existence of minority groups

Australia is a multicultural nation whose citizens reflect a range of distinct ethnic, religious and linguistic traditions. Special mention must be made of Australia's indigenous peoples, the Aboriginal and Torres Strait Islander peoples. Aboriginal and Torres Strait Island peoples are the world's oldest continuing civilisation. They are also the ethnic group that suffers from the highest rate of incarceration in the world.

Despite their long history of occupation of the land, Aboriginal and Torres Strait Islanders are not recognised in the Australian Constitution. A movement to obtain constitutional recognition for Aboriginal and Torres Strait Islanders, making provision for a 'Voice to Parliament' under which Indigenous Australians would be consulted in respect of proposed legislation

³² Dan Meagher, 'Taking Parliamentary Sovereignty Seriously within a Bill of Rights Framework' (2005) 10 *Deakin Law Review* 686, 694.

³³ *Australian Human Rights Commission Act 1986* (Cth) s 11(1)(g); *Anti-Discrimination Act 1977* (NSW) s 119(1)(b); *Anti-Discrimination Act 1991* (Qld) s 235(d); *Equal Opportunity Act 1984* (SA) ss 11(1)–(2); *Anti-Discrimination Act 1998* (Tas) ss 6(b), 6(e); *Equal Opportunity Act 2010* (Vic) ss 155(1)(a), 156; *Equal Opportunity Act 1984* (WA) s 80(b); *Human Rights Commission Act 2005* (ACT) ss 18(1)(i), 23(2), 25(2)(a), 27(2)(a); *Anti-Discrimination Act 1992* (NT) s 13(1).

³⁴ Hilary Charlesworth, 'Australia in the International Order' in Cheryl Saunders and Adrienne Stone (eds), *The Oxford Handbook of the Australian Constitution* (Oxford University Press) 425, 440–1, 444.

that would affect them, is currently on foot. Other forms of recognition, such as treaty arrangements, are currently under consideration in several of the states and territories.

For most of Australia's history, the land rights of Aboriginal and Torres Strait Islander groups were widely regarded as having been extinguished upon British settlement, on the theory that the land was *terra nullius* (land belonging to no one).³⁵ But this assumption was exploded by a decision of the High Court of Australia in 1992 that recognised the existence of a *sui generis* property right, 'native title', possessed by Indigenous Australians.³⁶ Native title rights are now enshrined in, and regulated by, a federal statute.³⁷

Questions 5–7, 10–12: Challenges to human rights protection in Australia

There are a range of challenges to the protection of human rights in Australia. The issues mentioned below are some of the most pressing, but the list is by no means exhaustive.

Lack of a national bill of rights

As mentioned earlier, Australia lacks a comprehensive statutory or constitutional bill of rights. In this respect, it stands in contrast to the nations with which it is often compared. While there has been intermittent support for the idea — for example, in 2009 the National Human Rights Consultation Committee published a report recommending the enactment of a national bill of rights³⁸ — a bill of rights is not a current political priority. The lack of such an instrument means that the courts' ability to occupy a central role in rights protection is limited.

Rights of Indigenous Australians

The constitutional recognition of Indigenous Australians is the principal constitutional reform movement currently on the political agenda. The proposed constitutional amendment has two elements: (1) an Indigenous Voice to Parliament, directed to ensuring that Indigenous Australians have a voice in laws that would affect them, and (2) a Makarrata Commission, which is intended to facilitate treaty-making and to permit truth and reconciliation.³⁹

³⁵ See, eg, *Milirrpum v Nabalco Pty Ltd* (1971) 17 FLR 141.

³⁶ *Mabo v Queensland [No 2]* (1992) 175 CLR 1.

³⁷ *Native Title Act 1993* (Cth).

³⁸ National Human Rights Consultation Committee, *Report* (2009).

³⁹ See *Uluru Statement from the Heart* (2017).

Indigenous Australians are subject to various forms of discrimination. As mentioned, they are the most incarcerated racial group in the world. Further, their outcomes lag far behind national averages: the national government's most recent 'Closing the Gap' report states that Indigenous child mortality rates, school attendance rates, life expectancy, literacy and numeracy, and employment rates remain well behind national standards.⁴⁰

People seeking asylum

Australia has some of the world's strictest immigration laws. In particular, the Australian Human Rights Commission argues that Australia's immigration detention regime breaches the right to be free from arbitrary detention because it fails to 'provide a robust and transparent individual assessment mechanism to determine whether the immigration detention of each person is necessary, reasonable or proportionate'.⁴¹

Australia detains many people seeking asylum offshore, on Manus Island, Papua New Guinea and until recently in Nauru, under memoranda of understanding with the Papua New Guinea and Nauru governments. Australia's treatment of these detainees has been harshly scrutinised by international organisations.⁴²

LGBTQI rights

The national Parliament passed legislation permitting same-sex marriage in 2017.⁴³ But there remain several issues in relation to the treatment of LGBTQI Australians. One such issue is the ability of people to change their legal sex. In most Australian jurisdictions, a person may change their sex in the birth register without having undergone any surgical interventions. Other states are currently considering whether to follow suit, or instead to require sex reassignment surgery as a prerequisite to changing one's sex for legal purposes.⁴⁴ Another issue is the position of transgender and gender-diverse people to participate in sports together with the gender with which they identify. In one high-profile case, a women's professional sports league denied a trans woman the right to participate in the competition.⁴⁵

⁴⁰ Department of Prime Minister and Cabinet, *Closing the Gap: Report 2019* (2019) 10.

⁴¹ Australian Human Rights Commission, 'Immigration Detention and Human Rights' (2016) <<https://www.humanrights.gov.au/our-work/asylum-seekers-and-refugees/projects/immigration-detention-and-human-rights>>.

⁴² See, eg, 'Helen Davidson and Saba Vasefi, 'UN Body Says Australia Breached Human Rights Laws and Needs to Review *Migration Act*', *The Guardian* (online), 16 October 2018 <<https://www.theguardian.com/australia-news/2018/oct/16/un-body-says-australia-breached-human-rights-laws-and-needs-to-review-migration-act>>.

⁴³ *Marriage Amendment (Definition and Religious Freedoms) Act 2017* (Cth).

⁴⁴ See, eg, Births, Deaths, and Marriages Registration Amendment Bill 2019 (Vic).

⁴⁵ 'Transgender Footballer Hannah Mouncey Ruled Ineligible for 2018 AFLW Draft', *ABC News* (online), 18 October 2017 <<https://www.abc.net.au/news/2017-10-17/transgender-footballer-ruled-ineligible-for-aflw-draft/9059108>>.

Freedom of speech and religion

There is considerable debate regarding whether Australian law unduly abridges the rights to free speech and free exercise of religion. One object of concern is the *Racial Discrimination Act 1975* (Cth)'s prohibition on acts that are reasonably likely to 'offend, insult, humiliate or intimidate' another.⁴⁶ Free speech advocates have suggested that the provision goes too far insofar as it denies the right to speak in a manner that might be regarded as merely offensive and no more.⁴⁷ More recently, the termination of a prominent Christian rugby player's contract after he published material on Instagram that was derogatory to the gay and lesbian community has given rise to arguments about the extent to which employers should be able to control their employees expression of opinions, religious and otherwise.⁴⁸ Following this controversy, the national government announced that it would introduce a religious discrimination bill into Parliament.⁴⁹

⁴⁶ *Racial Discrimination Act 1975* (Cth) s 18C.

⁴⁷ See, eg, Institute of Public Affairs, Submission No 58 to Parliamentary Joint Committee on Human Rights, *Inquiry into Freedom of Speech in Australia*, December 2016.

⁴⁸ See, eg, Gillian Triggs, 'Are You For Israel Folau or Against? We Love a Simple Answer but This Is Not a Binary Case', *The Guardian* (online), 1 July 2019 <<https://www.theguardian.com/sport/commentisfree/2019/jul/01/are-you-for-israel-folau-or-against-we-love-a-simple-answer-but-this-is-not-a-binary-case>>.

⁴⁹ Sarah Martin, 'Religious Discrimination Bill Will Safeguard People of Faith, Says Attorney General', *The Guardian* (online), 8 July 2019 <<https://www.theguardian.com/world/2019/jul/08/religious-discrimination-bill-will-safeguard-people-of-faith-says-attorney-general>>.