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The Attorney-General's dilemmas

George Brandis

Armed with an ambitious political and legal agenda, Brandis faces a testing parliamentary term.

George Brandis is one member of the federal government who is showing no sign of struggling to adapt to the challenges of power. On the contrary, the new Attorney-General appears resolute in pursuing the ambitious agenda he outlined in opposition, in which human rights and constitutional reform are prominent. At the same time, he has to deal with a major challenge to the way the Commonwealth does business: a 2012 High Court decision that signalled that hundreds of policy programs directly funded by the federal government may be without constitutional foundation.

Together, these issues present Brandis with a full slate of complex legal and political matters that will test his resolve and effectiveness in very public ways.

That Brandis is not wasting time – and is unafraid of controversy – was made very clear towards the end of last year when he delivered on his promise to have the Australian Law Reform Commission "review Commonwealth legislation to identify provisions that unreasonably encroach upon traditional rights, freedoms and privileges". That is, without a doubt, a massive task. The ascendancy of statute law is both the product and cause of the regulatory state in the Western world. By their very nature, with their imposition of duties, obligations and prohibitions, statutes infringe the liberty of individuals.

But this is just one aspect of Brandis's efforts to reinstate the importance of government respect for "classic liberal democratic rights". To the chagrin of the left, Brandis has also appointed Tim Wilson, formerly of the right-leaning Institute of Public Affairs thinktank, to the Australian Human Rights Commission. While the appointment is unconventional, the Attorney-General has made clear that it is designed to rebalance and broaden the commission's focus.

That Brandis is committed to the commission in an institutional sense, rather than being simply dismissive or neglectful of it, further signals that his stance on rights is an interesting and engaged one. There may well be further controversy to come in this respect – but for now the Law Reform Commission and Wilson have been put on the job. What they come up with, and how Brandis responds, will be the test of how successful and meaningful the Attorney-General's human rights mission turns out to be.

A different part of the Attorney-General's agenda will require rather more time, consultation and less naked chutzpah than his concern with "traditional freedoms". This is the need to settle the terms of a referendum for indigenous recognition in the constitution – a matter very close to Prime Minister Tony Abbott's heart. There is a broad consensus that those parts of the constitution – sections 25 and 51(xxvi) – that allow laws to be made on the basis of "race" should be repealed, ridding the document of the last vestiges of the racially charged history from which it emerged. For some years, that consensus has extended to the view that symbolic constitutional recognition of indigenous people would be a significant step towards reconciliation. The contentious nub of the debate, however, is whether recognition should be more than just "symbolic".

The debate can be broken down into three primary areas of concern. The first is whether recognition should be purely symbolic or offer something more tangible, such as the creation of new constitutional rights. The expert panel on the constitutional recognition of indigenous people commissioned by the Gillard government in December 2010 conducted extensive consultations on this and other issues before delivering its final report in January 2012.

The expert panel recommended that recognition should be substantive to ensure that it enables real and practical change to the lives of indigenous people. The hurdle for Brandis in acting on this recommendation, however, is the scepticism that any new substantive law-making power for the Commonwealth is likely to meet from the broader voting public. Historically, Australians have baulked at changes to the constitution that might expand the powers of the government.

The second major issue in the debate is the question of whether any new Commonwealth power to make laws should be broadly worded or instead limited to the creation only of laws that seek to "advance" or "benefit" indigenous people. The expert panel's recommendation is to draft "introductory language" into the proposed substantive provision that would acknowledge the "need to secure the advancement of Aboriginal and Torres Strait Islander people".

There are two big problems with this approach. First, it is unclear whether such introductory words would even be justiciable – that is, whether they could be relied on in a legal sense. If the words are not justiciable, it is difficult to see a

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reason for including them that would convince Australian voters.

Second, assuming the words are justiciable, how do we decide whether a law actually "advances" indigenous interests? Many people argue the Howard government's Northern Territory intervention policies helped Aboriginal communities by addressing acute issues relating to sexual and substance abuse. But others hold that the paternalism encapsulated in those policies had the effect of significantly degrading the sense of independence and self-worth of Northern Territory Aborigines. In the event of a dispute, the issue will go to the courts. The question for Brandis is whether the Australian voting public is likely to support constitutional change that would essentially leave the question of whether such policies are "beneficial" to the seven unelected members of the High Court.

The final major issue is whether, in addition to a substantive provision enabling the federal government to make laws for Aboriginal people, there should be a broader anti-discrimination provision that limits the powers of all Australian governments to make laws discriminating against any race at all. This is perhaps the most contentious part of the indigenous recognition debate. Although the proposed anti-discrimination provision would recognise the diverse, multicultural character of contemporary Australian society, it would also have the potential to introduce a number of anomalies into the constitution.

Australia's constitution divides and allocates power between the legislative, executive and judicial branches of government and between the Commonwealth and the states. However, with some exceptions, it says very little about an individual's rights and freedoms in relation to the state. An anti-discrimination clause would thus be a broader restriction on legislative power than so far seen in Australia, and for this reason the proposal has been criticised as potentially amounting to a "one-clause bill of rights".

At the other extreme, some would argue that an anti-discrimination clause that stops government discrimination on grounds of race, colour or ethnicity doesn't go far enough and is out of step with the constitutions of most other developed and post-colonial nations. Those constitutions often prohibit discrimination on any grounds, including gender, sexual orientation, age, religion, marital status and disability. Further, an express reference to "race" (rather than to national or ethnic origin) in such a provision has the potential to extend the life of that word in Australian law, running against the longstanding consensus in scientific circles that the idea of "race" has no factual grounding.

But these issues aside, an anti-discrimination provision would seem a critical counterpart to any new substantive provision enabling the federal government to make laws with respect to indigenous people. By its operation, Australian governments would have the power to enact only laws that could be shown to treat everyone equally, regardless of "real, supposed or imputed" race or ethnic origin. In an important exception, however, the provision would not prevent governments from enacting legislation that is reasonable, proportionate and designed to achieve a legitimate purpose or to overcome disadvantage or past discrimination. It is ultimately on this basis that the expert panel has expressed its support for the inclusion of an anti-discrimination provision in a referendum bill.

Added to the complexities of the form of recognition itself are the intricacies of the political backdrop against which any referendum might take place. Abbott's commitment to indigenous affairs is unambiguous and he has already appointed the Prime Minister's indigenous advisory council. The council will meet with Abbott and other senior ministers three times a year to discuss the progress of reform policies, including constitutional recognition. But while this appears to be an important step in achieving substantive improvements in the lives of indigenous Australians, the government is simultaneously committed to dramatic reductions in spending that could have the opposite effect.

In September 2013, the Coalition announced it was slashing $42 million of funding for the indigenous policy reform program. Brandis insists the cuts will not affect the provision of front-line legal services, such as court representation. Nonetheless, the cuts will limit the capacity for community and indigenous legal aid service providers to take part in policy reform – including any referendum campaign – through advocacy.

While Brandis's human rights and indigenous recognition agendas are both high-profile, perhaps the biggest problem the new Attorney-General will need to confront is Commonwealth executive spending. This issue is almost a non-starter in the wider community's consciousness, but it is ripe with direct and inconvenient possibilities for recipients, users and employees of many hundreds of Commonwealth schemes.

The whole area of Commonwealth-funded programs was thrown into uncertainty in June 2012 by the High Court's decision in *Williams v Commonwealth*, in which a longstanding assumption about the scope of Commonwealth's power to spend was overturned. The court held that, subject to certain limited exceptions, the Commonwealth executive could not contract and spend public money without prior authorisation from Federal Parliament. Before the case, it had been assumed that this legislative authorisation was not required.

The decision cast doubt on the legal validity of hundreds of Commonwealth programs supported by direct executive spending but not underpinned by legislation. These programs, representing up to 10 per cent of federal government expenditure, cover the entire spectrum of government activity, from fields as diverse as mental health, overseas development, indigenous housing, cyber security and counterterrorism, through to the home insulation program and the Australian animal welfare strategy. Unsurprisingly, Brandis has described the *Williams* decision as raising "fundamental issues of Commonwealth powers".

Spooked by the decision, the Gillard government rushed through "emergency" legislation in 2012 authorising Commonwealth executive spending in over 400 different areas. But this Band-Aid measure has raised its own problems. The biggest is that it is unclear whether the Parliament even possesses the power to

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authorise Commonwealth executive spending in all of the hundreds of areas listed in the emergency legislation.

Before the election, Brandis himself publicly denounced the emergency legislation. He said the descriptions of the programs listed in the amended act had been abbreviated to such an extent as to render them "utterly obscure". He also expressed "grave doubts" about whether the legislation provided a "sufficient legislative basis to overcome the decision in *Williams*", saying it attempted to assert the existence of a power that the High Court had made clear did not exist.

These comments put the Attorney-General in a curious position. The emergency legislation is now the subject of a fresh High Court challenge, scheduled to be heard early this year, and the Commonwealth must now defend the constitutionality of the same legislation that Brandis has questioned publicly. All things remaining equal, the Commonwealth will have its work cut out forging a judicial victory from the current set of circumstances.

If the legislation doesn't survive, it won't be tenable for the Commonwealth to persevere with the existing breadth of spending in blithe disregard of the High Court's recent reproaches. The critical question for the Attorney-General will be how to restructure Commonwealth expenditure in order to bring it within the bounds of constitutional legitimacy. A couple of options come to mind, neither of them particularly straightforward nor politically expedient. The first is to cut back Commonwealth direct spending to the bare essentials, leaving the gaps to be filled by the states as and when they find the capacity and resources to do so. It is highly unlikely the Commonwealth will want to adopt this course as it will inevitably raise the ire of the electorate, particularly if essential services are affected. Any sudden retraction in federal spending could also have severe consequences for economic growth.

An alternative would be to cut direct Commonwealth spending while negotiating a series of agreements with the states, under which the states will receive funding in exchange for taking over programs abandoned by the Commonwealth. In both political and legal terms, this would be a less perilous option. However, it is still far from optimal. Under current arrangements, the Commonwealth can place significant financial pressure on the states to accept its offers of funding on specified terms and conditions. This imbalance forces the states to act as intermediaries, blindly adopting Commonwealth policy in exchange for funding. It breaks the chain of accountability between the level of government setting policy (the Commonwealth) and the voting public in each state.

Despite the High Court's ambitions for enhancing responsible and representative government, the eventual result might be a system that is no more accountable for public spending than the one we have today.

As well as the unenviable task of dealing with these challenges, Brandis must also devote attention to the panoply of high-profile High Court cases in which judgments were recently handed down. In perhaps the most significant of these, the court made clear late last year that while the ACT's marriage equality laws were unconstitutional, the Commonwealth without a doubt possessed the power to legislate for same-sex marriage. This is likely to focus lobbying efforts at the Commonwealth level, making it increasingly difficult for the federal government to avoid a conscience vote on the issue.

In short, Brandis has a pretty full plate. He has been very candid with the media and public about what he sees as the priorities and challenges facing him in his new job. The former are diverse and the latter substantial. Aside from the pivotal issue of the future of Commonwealth-funded schemes, it is intriguing that so much of the Brandis agenda turns on questions of human rights – their identification and protection. In his work with indigenous organisations and communities on the consequences of constitutional "recognition" and through his focus on preserving "traditional freedoms", Australians will be hearing a lot more from their Attorney-General about the most effective means of protecting human rights in this country.

What seems certain, though, is that this will be a more interesting and less abstract national conversation than that we have held in the past.

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