

National Human Rights Consultation Submission

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Submission Text:

While it is essential for individuals and minorities to be protected from arbitrary and capricious government action, care is needed when seeking to determine possible rights for inclusion under a statutory charter of rights. For instance, while some rights may be regarded as timeless (such as the right to vote and the right to participate and freely speak in the political system) others are more time-bound (as illustrated by the right to bear arms which exists under the American constitutional arrangements) and should not be enshrined.

Another problem with seeking to codify rights is that there could be some rights which should be recognised but which may inadvertently be omitted. Furthermore, the way rights are delineated in statute could inadvertently circumscribe the way they are subsequently interpreted and enjoyed. For example, if the “right to participate in the political system” was codified in this particular form it might be interpreted that there was no right to engage outside of the already established, institutionalised political structures. A further problem with codifying particular rights is that doing so could adversely impact on the rights of others. For example, enshrining the “right to practise freely the religion of one’s own choosing” could result in members of some religions offending those of other religions as a result of them insisting on their right to engage in their particular rites and observances. In such situations, social cohesion could adversely be affected.

It is particularly important to ensure that any codified rights do not have unintended future consequences of an adverse nature. The importance in this regard is illustrated by the following examples. The 1988 final report of the Constitutional Commission recommended that the Commonwealth Constitution be amended to include the prohibition against double jeopardy. At that time the advances in DNA technology known today were not anticipated. However, science has progressed to the point where DNA technology can now be used to identify criminals even if they had been previously acquitted by the courts. As a result, a number of Australian States (South Australia, New South Wales, Queensland) have introduced legal reforms since 2002 to allow the retrial in certain situations of persons who have previously been acquitted where DNA evidence establishes the need for such action. Such reforms would not have been possible had the recommendations of the 1988 Constitutional Commission been supported all the way through to constitutional change. Another example which highlights the importance of care being taken to ensure any codified rights do not have unintended consequences is the right to bear arms which exists under America’s constitutional arrangements. While such a right may have been appropriate in the context of early American life, it is questionable whether it continues to be relevant in modern society particularly given the high incidence of gun-related violence in that country. These two examples demonstrate the need to ensure that codification of any particular rights do not have unintended future consequences.

Finally, while there is an emphasis on “rights” there needs to be a corresponding emphasis on “responsibilities”. Australian society is already highly individualistic and the “rights emphasis” only entrenches such a culture. An equal emphasis on “responsibilities” will help to bring some balance to this situation by fostering a sense of community and mutual obligation.

I trust these comments will be useful in your deliberations.

Yours faithfully
Don Willis