

## Submission to the National Human Rights Consultation Committee

### Introduction

The Human Rights industry in Australia is seen by many to be using this enquiry as a means push their agenda for a Commonwealth charter of rights (COR). I consider this perception is correct and feel that their needs to be more balance so this COR support does not become the overriding factor in this enquiry, if it hasn't already.

For this reason, this submission outlines another view, and opposes the creation of such a COR.

### Aim

The aim of this submission is to oppose the creation of a COR in Australia

### Discussion

It would seem to be de rigeur for those pushing for a COR to make a large issue of the fact Australia is one of the very few democracies without one. They neglect to point out Australia is National Human Rights Consultation Committeevoting; that few have a form of bicameralism with an elected, genuine house of review Upper House; and many don't have federalism. It would be ridiculous to support that we change all or any of these on the sole ground we are different, so the contention we should have a COR equivalent because all the other democracies do, does not hold water.

The real question is not whether we should follow others but whether a COR is a good idea in its own right and would having one deliver better human rights outcomes than we achieve without one? Retired Chief Justice of the High Court, Sir Harry Gibbs, put it succinctly when he observed 'Does Australia lack something which is essential to modern democracy, or have we simply resisted the temptation to follow fashion for fashion's sake'

I believe the answer to the above question is a COR would not achieve better human rights outcomes for Austrians. The followings reasons are not exhaustive but support my contention:

- Any sort of bill or charter of rights enumerates a list of vague, amorphous – but emotively appealing – moral entitlements in the language of rights.
- It operates at a sufficient level of abstraction that it is able to get around most disagreement. Who could possibly argue against 'freedom of expression' or 'freedom of religion' or a 'right to life'? This is where a COR is currently being argued to Austrians by its proponents.
- What is clear is this is not where a COR would have any effect. Nobody will be spending thousands of dollars going to court to oppose the abstack notion of 'freedom from persecution'. This simply does not happen in democracies with a bill of rights such as Canada, the United States or in the United Kingdom.

- COR will have an actual effect down at the level of social-policy decision-making where there is no consensus or agreement across society at all about what these indeterminate entitlements mean.
- What is the case is that people simply disagree about where to draw the line when it comes to campaign finance rules or hate speech provisions or defamation regimes or whether Muslim girls can or cannot wear veils to school or whether to sanction gay marriage and so much more.
- What a COR does is to take contentious political issues – issues over which there is reasonable disagreement between reasonable people – and it turns them into pseudo-legal issues which have to be treated as though there were eternal, timeless right answers. Even where the top judges break 5-4 or 4-3 on these issues, the judges' majority view is treated as *the view* that is in accord with fundamental human rights. The irony of the fact that judges resolve *their* disagreements in these cases by voting is generally missed.
- COR backers repeatedly how such an instrument 'protects fundamental human rights', as though they were self-defining and self-enforcing. What they actually do is transfer the power to define what counts as, say, a reasonable limit on free speech over to committees of ex-lawyers. Why we would believe they know more about moral and political issues than anyone else? What we do know is they are immune from being removed by the voters for the decisions they reach.
- In Australia proponents who formerly championed some sort of American or Canadian-style constitutional bill of rights that would allow judges to strike down legislation now say that they favour only statutory versions which leave the last word with elected politicians. This has come only after repeated failures to get Australian electors to agree to the constitutional model.
- There is little change as these statutory versions are virtually as potent as the constitutional version and they still shift too much power to the unelected judiciary.
- So far in Australia there has been no call for a COR from the ordinary person. The demand appears to come primarily from judicial and social activists and from some vocal minority groups.
- Any COR is about imposing an aristocratic or anti-democratic element into government. It hands line-drawing powers as regards numerous highly contentious moral and political issues to committees of ex-lawyers, who will resolve their disagreements on these issues by themselves voting, the only difference being the size of the franchise.
- Democratic decision-making, despite its faults, is still the best form of government going. It is certainly better than what you if you added an undemocratic element of judicial oversight.

## Conclusion

The emotional submissions to this enquiry which will be in the Olympian heights of amorphous moral abstractions have a certain attraction in some quarters. However we

need to identify such attraction is superficial, vacuous and at odds with giving each Australian an equal as possible say in how we are all governed.

Vic Adams

31 March 2009

Attachments : Some relevant comments

**Comments on an Australian Bill of Rights by Rt Hon Sir Harry Gibbs, GCMG, AC, KBE, ex-Chief Justice of the High Court of Australia**

1. 'Does Australia lack something which is essential to modern democracy, or have we simply resisted the temptation to follow fashion for fashion's sake'
2. 'It would be unduly optimistic to think that a bill of rights necessarily provide the protection for which it advocates hope, and it would be foolish to ignore that the enactment of a bill of rights entails disadvantages which may well outweigh the benefits''
3. 'the enactment of a bill of rights as an ordinary statute of the Commonwealth parliament would be as effective against the States as a constitutional amendment and would further tip the federal balance in Australia against the States.'
4. 'The existence of a bill of rights requires the judges to decide questions of policy which in a democracy should be decided by the parliament.'
5. 'There is a real danger that the provisions of a bill of rights that may seem appropriate today may prove harmful tomorrow.'
6. There can be no doubt that if we were to adopt a bill of rights in Australia there would be strong pressure to include provisions which would give effect to opinions which are fashionable today but which in future may be rejected as mistaken. ... in spite of the committed views which some persons hold today it is impossible to say whether the same beliefs will be held in fifty years.'

**The Human Rights industry in Britain - UK Daily Mail 12 Dec 2008**

- There are now over 1000 lawyers, many of them handsomely paid, who are members of this industry.
- That is the number of solicitors and barristers who specialise in human rights cases.
- As at 12 Dec 2008, there are 72 individual barristers in England and Wales, 804 solicitors firms in England, 27 in Wales, 173 Scottish firms and 60 Scottish advocates.

- There is no breakdown of how much money lawyers have made , but matrix Chambers, founded by Cherie Blair to specialise in human rights cases, turned over 13.4 million UK pounds in 2008 – 28<sup>th</sup> in highest earning barrister’s chambers.

### **Bill of Rights in Canada**

- Has had a bill of rights since 1960.
- Its implementation was widely described as a shambles as parts of it were in conflict with existing statutes and it was enacted without constitutional amendment.
- More recently, Canadian legislators introduced a charter of rights and freedoms, again without constitutional amendment.
- It has also struck problems, for while it enshrines freedom of expression, it makes no mention of freedom of speech.
- In this example, the line between the two is now examined in excruciating detail and pushed to and fro by a group of unelected quasi-experts on tribunals and by the lawyers who are members of the Canadian human rights industry.
- It does demonstrate that with such noble concepts like charters of rights, they never stand up to their Himalayan ideals.
- The Canadian experience has shown that the devil is always in the detail, the mind numbing minutiae of legalese, the lawyer’s picnic of procedural and legislative confusion.