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15 June 2009

Protecting Human Rights

1. Background

I am an academic lawyer with particular expertise in constitutional and human rights law. I make this submission on my own behalf.

Between 2002 and 2007, I was involved with Associate Professor Carolyn Evans in a major research project that considered the role of Australian Parliaments in the protection of human rights.

In the course of that project, we published a number of articles and books, including a monograph on the operation of the human rights legislation in Victoria and the ACT (Evans & Evans, *Australian Bills of Rights: The Law of the Victorian Charter and the ACT Human Rights Act* (LexisNexis 2008)).

This submission draws on these publications and my ongoing work on mechanisms for the protection of human rights in Australia.

2. Legal protection for human rights: one mechanism among many

The first point to make in addressing the questions raised in the present consultation is that legal protection for human rights is but one mechanism among many mechanisms for the protection of human rights.

Human rights are protected by:

- **political mechanisms**, including a well functioning democratic system and a parliamentary system that includes scrutiny of proposed legislation and of government conduct against human rights standards
- **economic mechanisms**, including a balanced economy in which a regulated free market and a strong social welfare system promote economic welfare and support the vulnerable
- **cultural mechanisms**, including a free press, a vibrant civil society and a shared respect for some rights

Human rights are also protected by legal mechanisms. But overseas experience shows that unless legal mechanisms operate in a society in which the other dimensions of rights protection are effective, the legal mechanisms too likely become ineffective. Legal mechanisms alone are not enough unless they are supported by a wider political economy and public culture that is attentive to rights.

3. Weaknesses in Australian protection of human rights

Recent history reveals weaknesses in the protection of human rights in Australia. It is not necessary to rehearse them all here. The present question is how to respond to them. The first step should be to improve political and cultural mechanisms for protecting human rights, through improved scrutiny and analysis of human rights issues in the processes of government and through a wider public recognition of the place of human rights in public discourse. Legal mechanisms (particularly those that afford courts significant powers) should not be the first step – and there are dangers in treating them as such.

a. Improving political mechanisms for protecting human rights

Scrutiny committees: Most Australian Parliaments (including the national Parliament) already have committees charged with responsibility for scrutinizing proposed legislation against human rights standards. A first and vital step is to improve this scrutiny process. The committees can and should adopt a set of human rights standards against which they scrutinize proposed legislation. At present, the Committees consider whether proposed legislation trespasses unduly on personal rights and liberties. As a result their focus is rather narrow (looking principally to civil liberties rather than the broader range of important human rights and leaving social, economic and cultural rights entirely unexamined).¹

The Committees need resources to make scrutiny effective: a guarantee of adequate time to review and seek responses from government before legislation comes on for debate; research and specialist advisory capacity; and members committed to the task of scrutiny (the last being the hardest to guarantee).²

Policy formation: No matter how much scrutiny is improved, it will still come at the end of the legislative process – after government has publicly committed itself to legislation. Human rights analysis should be integral to the entire policy development process and not a bolt-on at the end of those policy processes that lead to legislative action. Relatively simple mechanisms are available to give effect to this need. They have analogues in the existing Regulatory Impact Statement process for economic and regulatory legislation:

- Human Rights Impact Analysis should be an integral element of the policy development process within agencies and departments.
- Policy proposals that are brought forward for approval (whether at departmental, Ministerial or Cabinet level) should be accompanied by a Human Rights Impact Statement that sets out this analysis.
- An agency (perhaps the AHRC) should be responsible for auditing the quality of these Statements and making commendations and recommendations for improvement where appropriate.

¹ For detailed analysis, see EVANS, C and EVANS, S – ‘Legislative Scrutiny Committees and Parliamentary Conceptions of Human Rights’ [2006] *Public Law* 785-806.

² *Ibid.*

These mechanisms would embed human rights in the bureaucratic process and help contribute to a culture of human rights.³ It is strikingly odd that a process along these lines is required for legislation that has regulatory and economic impacts but not for legislation that has human rights impacts.

Relationship to legal mechanisms: Neither of these mechanisms depends on a Charter of Rights. In particular, neither depends on a Charter that confers functions on the courts. However, a Charter could:

- identify the set of rights against which parliamentary scrutiny and bureaucratic analysis takes place
- define the scope and extent of the functions and powers involved
- signal the commitment of the parliament to the importance of human rights analysis

For reasons articulated further below, such a limited Charter would be an appropriate first step in the legal protection of human rights.

b. Building a culture of human rights

The mechanisms described above have the potential to embed human rights discourse in the bureaucracy and parliament. However, it is doubtful that a human rights culture will really take root in the bureaucracy and parliament without a wider cultural commitment to human rights. Human rights *as such* are not central to Australian public discourse. Key Australian values are *consistent with* human rights or *contribute to* human rights: a fair go; compassion; the rule of law; individual responsibility. But rights themselves (with limited exceptions) are not part of the vernacular. If human rights *as such* are important, then a central element in the protection of human rights must be the effort to build a civic discourse around rights and responsibilities. Such a discourse can then sustain political (and legal) mechanisms for protecting human rights.

4. Legal protection for human rights

a. A paradox

I have just argued against the legal protection of human rights in the absence of a public culture of human rights that can sustain and give content and context to the legal protection of human rights. And yet one of the most effective mechanisms for establishing such a public culture may be the existence of legal protections. The Canadian and UK history of rights protection suggests as much.

b. The limits of legal protection for human rights

However, there are serious risks in proceeding down the legal path – also illustrated by the Canadian and UK history.

The most significant risk is that the legal protections of human rights come to dominate the political, economic and cultural mechanisms for the protection of human rights – the public culture of human rights becomes subsumed within the legal culture, policy development is

³ For a detailed analysis of this proposal, see EVANS, S – ‘Improving Human Rights Analysis In The Legislative And Policy Processes’ (2005) [2006] 29 *Melbourne University Law Review* 665-703.

cowed by the courts' interpretation of human rights, legislatures automatically defer to legal interpretations of human rights.⁴

This would be a tragedy because the legal concept of human rights is just one concept and the legal mechanisms just one set of mechanisms for protecting human rights.⁵ Human rights are above all moral rights – ethical commitments that derive (on various accounts) from human individuality, dignity, equality, autonomy or solidarity. A society may choose to signal and give effect to these commitments in a variety of ways. It may choose to give institutional effect to the ethical commitments through law. But the rights and the ethical commitments come first, not the law or the lawyers' account of rights.

Human rights law can only ever be a partial expression of the ethical commitments inherent in human rights.

c. A way forward?

The risk of legal domination of human rights discourse is likely to increase in line with:

- the width of the powers given to legal institutions under a Charter of Human Rights
- the weakness of the underlying public culture of human rights

That suggests that an Australian Charter of Rights not give significant powers to the courts at this stage. Instead, I would propose for now that any Australian Charter of Rights should focus on increasing political and public discourse around human rights. It should:

- Identify a suite of human rights (including civil and political rights and economic, social and cultural rights)
- Require the preparation of Human Rights Impact Statements for legislative and non-legislative proposals that analyse the impact of policy proposals on the identified human rights
- Establish a mechanism for audit of these statements
- Facilitate parliamentary scrutiny of proposed legislation and of government conduct more generally against the identified human rights
- Strengthen and refocus the mandate (and resources) of institutions such as AHRC to engage in human rights education
- Require review of the Charter at five yearly intervals

⁴ As moral issues, many human rights issues are genuinely controversial – sometimes intractably so. The legal perspective suggests the possibility of a correct answer to rights questions. Sometimes, in fact, the greatest contribution of the human rights perspective is to provide a language for a public debate and not to resolve it one way or the other.

⁵ Absent the concerns expressed in the text, they can be an incredibly valuable mechanism that complement the weaknesses in other mechanisms. The focus on the single case can complement the legislatures' analysis of the wider society; judicial independence facilitates concern for the unpopular minority overlooked in populist processes.

d. Finally: the Constitution is not an obstacle to a Charter of Rights

During the course of the Consultation, various commentators (including Mr Michael McHugh QC AC) have expressed concerns about the constitutional validity of a national Charter that followed the UK or Victorian model. Although I am not arguing here for the adoption of such a model at present, I agree with the scholars (including those involved in the AHRC Roundtable) who subsequently argued that those concerns can all be satisfactorily addressed. Some of the issues are canvassed and addressed in Evans & Evans.

I would be happy to provide copies of any of the articles referred to here or to discuss any aspect of this submission.

Yours sincerely

A handwritten signature in blue ink that reads "Simon Evans". The signature is written in a cursive, slightly slanted style.

Simon Evans