

National Human Rights Consultation Secretariat  
Attorney-General's Department  
Central Office  
Robert Garran Offices  
National Circuit  
BARTON ACT 2600

15 June 2009

Dear Members of the National Human Rights Consultation Committee

Please accept this brief submission in **support of a National Charter of Human Rights** for Australia. I apologise for failing to provide you with a detailed and comprehensive submission. This was not due to lack of interest in this important matter but simply the burden of family commitments. Despite the brevity of my submission I hope that it will be of some assistance given that my comments are informed by over ten years of experience in the field of human rights and significant experience in the operation of the Victorian Charter. It is on the basis of this experience that I make the following observations which are elaborated upon in the remainder of my submission:

1. An evidence based approach should be adopted with respect to the consideration and development of all social policy including the question of whether to adopt a National Charter of Rights;
2. The first question presented for consideration as part of the National Consultation, 'which rights should be protected in Australia', is problematic as it assumes there is an understanding with the Australian public as to meaning of the term 'human rights';
3. With respect to the question which rights should be protected in Australia, such protection must extend to those rights that are protected in the international treaties to which Australia is a party;
4. With respect to the question of whether these human rights are sufficiently protected and promoted, the evidence suggests that this is patently not the case;
5. If it is accepted that human rights should be protected in Australia, the evidence suggests that an appropriately drafted National Charter would *contribute* to this objective;

6. A National Charter must be complemented by a comprehensive human rights education program and a supportive institutional structure;
7. Unlike the Victorian Charter, a National Charter must include *select* economic, social and cultural rights and civil political rights. It must also include an independent remedy for individuals to allege a violation of their human rights.

### **THE NEED FOR AN EVIDENCE BASED APPROACH**

An evidence based approach should be adopted with respect to the consideration and development of all social policy including the question of whether to adopt a National Charter of Rights. As a consequence many of the arguments that have characterised the debate thus far can be readily dismissed. For example, the argument that Australia is one of the few countries in the world not to adopt a Charter is largely an irrelevant consideration as there is simply no nexus between the existence of a Bill or Charter of Rights and the protection of rights. Moreover several of the arguments raised in opposition to the Charter are without an empirical basis and rely on assumptions that are undermined by the experience in other jurisdictions both abroad and within the ACT and Victoria. So for example, there is simply no evidence to support the claims that a National Charter will be a lawyer's picnic. Nor will it undermine democracy and Parliamentary sovereignty by the transfer of power to the judiciary. These are convenient arguments framed to resonate with public distrust of lawyers and fears about the dangers of an unelected judiciary. However they are without foundation given the exceptionally weak model of judicial review that the Government is prepared to entertain.

### **THE PROBLEMATIC NATURE OF THE CONSULTATION QUESTIONS**

The first question presented for consideration as part of the National Consultation, 'which rights should be protected in Australia', is problematic as it assumes there is an understanding with the Australian public as to meaning of the term 'human rights'.

My professional and personal experience suggests that there is a very poor understanding as to nature, scope and content of human rights in Australia. This is a reflection of the almost complete absence of any effective human rights education within Australian schools. This lack of understanding as to meaning of human rights is likely to have a profound impact on the identification of which rights should be protected under a National Charter. It is difficult to provide an effective response to this answer when an individual does not know what human rights he or she is entitled to claim. Thus it would have been preferable had the National Consultation been preceded by a deliberate and concerted campaign to raise awareness of human rights.

### **THE NEED TO PROTECT INTERNATIONAL HUMAN RIGHTS**

With respect to the question which rights should be protected in Australia, my position is informed by a definition of human rights that is consistent with the obligations Australia has assumed under international law. Measures must therefore be taken to ensure the effective protection of the rights within each of the treaties to which Australia is a party. Unlike the current models in the ACT and Victoria, there should be no distinction between civil and political rights and economic, social and cultural rights. These sets of rights are indivisible and as other submissions, such as those of the Human Rights Law Resource Centre have demonstrated, the assumptions relied upon by commentators to maintain a distinction between the two sets of rights are without foundation.

### **THE CURRENT SYSTEM FAILS TO PROVIDE ADEQUATE PROTECTION OF HUMAN RIGHTS**

With respect to the question of whether these human rights are sufficiently protected and promoted, again the evidence suggests that this is patently not the case. I note that other submissions have provided extensive documentation with respect to this issue which I need not repeat here. Suffice to say that whether it is the treatment of asylum seekers, indigenous people, mentally ill or homeless, the Australian legal system has failed to provide effective protection of human rights. Indeed the statement of Justice McHugh in *Al Kateb v Godwin* (2004) 219 CLR 562, 595 provides no better illustration of the current failure of our federal legal system to provide protection of human rights:

It is not for the courts exercising federal jurisdiction to determine whether the course taken by Parliament is unjust or contrary to human rights. The function of the courts in this context is simply to determine whether the law of the Parliament is within the powers conferred on it by the Constitution.

A legal system that is not guided and informed by human rights cannot claim to provide effective protection of such rights. I would therefore urge the Committee to consider carefully the background and personal circumstances of those who argue that the current system for the protection of human rights in Australia is adequate.

Individuals who enjoy positions of power and privilege may express this view but those who are marginalized, live in poverty and remain subject to discrimination on the basis of their sexual orientation, race, gender, age, disability are likely to express a very different position.

#### **A NATIONAL CHARTER COULD *CONTRIBUTE* TO THE PROTECTION OF HUMAN RIGHTS**

If it accepted that human rights should be protected in Australia the evidence suggests that an appropriately drafted National Charter would *contribute* to this objective.

#### **The limits of the common law**

The first point to stress is that despite the faith of Robert Menzies and so many others in the capacity of the common law to protect human rights, the evidence demonstrates that the common law is no longer an adequate form of protection against a Parliament determined to undermine rights. Again it is not necessary to look beyond the case of *Al Kateb* where a majority of the High Court held that there was a clear intention on the part of Parliament to abrogate the common law presumption in favour of liberty to allow for the indefinite detention of an asylum seeker. It is actually worth noting the irony within the anti Charter movement which invariably embraces the capacity of the judiciary to provide effective protection of rights via the development of the common law yet resists the adoption of a Charter because of a fear that it will imbue judges with too much power. The key point here however is that in a modern Parliamentary democracy like Australia the common law is an extremely weak and precarious mechanism for the protection of human rights.

## **The Limits of Parliamentary Democracy**

Moreover, the system of Parliamentary democracy itself is by definition incapable of guaranteeing the effective protection of human rights. A system in which the rights of minorities always remain subject to the will of the majority is not an effective system for the protection of human rights. The real issue therefore is how to create a system which ameliorates the dangers associated with a Parliamentary democracy.

Such a model demands an internalisation of human rights, that is, a process by which the Australian Parliament and Australian's themselves are persuaded as to the benefits of making a genuine commitment to the values and beliefs that underlie human rights into all facets of Government whether it be service delivery, policy design or the development of legislation. It is under such conditions that a genuine culture of respect for human rights can be created. At present Australia is some distance from achieving this objective. For example, the Federal Government may be prepared to affirm the United Nations Declaration on the Rights of Indigenous Peoples but references to the rights of indigenous people remain conspicuously absent from Government policy. A similar theme can be seen in policies concerning housing, education and health. Moreover Australian society too often locates debates about human rights within the law. Such a narrow conception is toxic to the effective implementation of human rights. If health, education and other sectors within society are not engaged with and contributing to an understanding of what it means to embrace a human rights culture, then the human rights enterprise will remain extremely narrow.

### **MEASURES REQUIRED FOR A CULTURE OF HUMAN RIGHTS**

Three general measures would assist in creating a culture of respect for human rights in Australia.

#### **(a) Education**

First, the provision of a genuine and comprehensive education program integrated into primary and secondary school education. Such a program would have to avoid the missionary zeal that all too often accompanies human rights education.

Instead a critical and reflective approach to human rights education should be developed in which the difficulties in resolving tensions between competing rights should be explored and discussed. Attention would need to be focused on both the entitlements and burdens that attach to all individuals under a model of human rights that was grounded in the international standards.

### **(b) Appropriate Institutional Structure**

Second, a comprehensive, adequately resourced and independent institutional structure would need to be developed to support the delivery of the education program, undertake inquiries and raise awareness within the general public and Parliament as to the nature of the obligations assumed by Australia under international law. The most obvious institution to perform such a function would be a revamped version of the Australian Human Rights Commission with Commissioners that reflected the discrete areas in which Australia has accepted obligations under international law such as women's rights, children's rights, indigenous rights, the rights of persons with disabilities etc.

### **(c) National Charter**

The evidence suggests that the final element of a system required to provide for the effective protection of human rights would be the adoption of a National Charter of Human Rights. It is important to stress that a National Charter would not guarantee the protection of human rights. No single legal instrument has the capacity to achieve this end. Indeed it is salient to observe that despite the robust and progressive nature of the South African Constitution, it remains one of the ten worst places in the world for a child to live. This should not be taken to mean that a National Charter of Rights in Australia would be ineffective. The reference to the South African Constitution merely serves to affirm the point that the process of creating a culture of human rights protection takes significant time and although legal instruments may be able to contribute to this process but they are unable to guarantee its realisation.

If anything the experience in Victoria should be of greater concern to those who advocate for the adoption of a National Charter than those who oppose such an

initiative. To date there has been no significant litigation in which the Victorian Charter has been used to reveal a violation of human rights. Moreover it is questionable whether several acts adopted by the Victorian Parliament are consistent with international human rights. The legislation dealing with abortion, graffiti, superannuation for same sex couples and transport concessions are notable in this regard. Thus it is legitimate to consider the extent to which the Victorian Charter has actually made an effective contribution to the protection of human rights and Parliamentary debates in which human rights considerations have been raised.

On balance however there are several indications that the Charter is actually contributing, albeit slowly, to a more robust and informed approach to the development of policy and service delivery within Victoria. This is confirmed by the findings of the Victorian Equal Opportunity and Human Rights Commission in its 2008 Annual Report on the Victorian Charter and findings of the Human Rights Law Resource Centre as to the practical impact of the Charter on the lives of ordinary Victorians. These developments are not seismic in the sense of requiring a radical change to current practices adopted by public authorities. They are however significant and the slow seepage of the values and standards that underpin human rights into the workings of Government in Victoria is itself sufficient reason to justify the adoption of a National Charter. At the core of this process is the requirement under the Victorian Charter that public authorities must first consider whether their activities impact on a right and if so, whether such an interference is justified. My experience suggests that this requirement has served two important functions: first, it has legitimized recourse to human rights by public servants and/or individuals challenging the actions of public authorities whose concerns were previously dismissed or minimized; and second, it has led to the adoption of internal systems and processes that consider more closely the human rights implications of Government action. This is not to say that we have achieved a culture of human rights protection within Victoria or that human rights are always adequately protected. It does indicate however, that human rights are becoming an increasingly important factor in the delivery of services and the development of public policy. The experience of other jurisdictions, especially

the United Kingdom, suggests that this development if it continues has the potential to contribute to the effective protection of human rights.

### FEATURES OF THE CHARTER

The critical issue of course is the form a National Charter should take. Time does not permit a detailed elaboration of the features of this model and it is sufficient to make the following points:

- (a) Unlike the Victorian Charter and ACT Human Rights Act, *the rights to be protected should include civil and political rights and economic social and cultural rights*. However caution should be given when considering the rights to be included and the formulations in which they should be expressed. It would not be necessary or appropriate to import all the rights under the international treaties to which Australia is a party. Thus for example, rather than automatically incorporate the formulation of the right to health under the ICESCR, it may be more prudent to adopt a circumscribed version of this right. This is certainly the approach adopted under the South African Constitution where for example the right to health is limited to a progressive right to access health care and an immediate right to emergency treatment. This contrasts with the approach provided under article 12 of the ICESCR which provides a right to the highest attainable standard of health and several specific obligations which States are required to undertake. At a minimum however it is suggested that a National Charter include formulations akin to those under the South African Constitution with respect to the rights to health, housing and education.
- (b) In addition to the current procedures for securing the implementation of human rights under the Victorian Charter, *a provision should be made for some form of direct remedy by which an individual can allege a violation of his or her rights*. Under the current model in Victoria the absence of such a remedy creates a problem for the legitimacy of the Charter. The granting of rights invariably creates an expectation within the public that this will be accompanied by a remedy. The failure to provide this remedy creates an expectation deficit which in turn creates a level of hostility towards the Charter and a crisis for its legitimacy. In turn this leads to disengagement

which undermines the capacity of the Charter to facilitate a culture of human rights.

- (c) The issues concerning the constitutionality of a declaration of inconsistent interpretation have been canvassed elsewhere and I add nothing further than to support the observation of George Williams and others that the issue can be overcome.

Should you wish to discuss any of these matters in further detail please contact me on (03) 9497 3925 or via email at: [j.tobin@unimelb.edu.au](mailto:j.tobin@unimelb.edu.au)

Yours faithfully

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*By way of background I have been teaching subjects in the area of human rights at Melbourne Law School since 2001. I have a LLM from the University of London in which I specialised in human rights and a PhD from the University of Melbourne in which I examined the meaning of the right to health. I have been a Visiting Professor at the Law School at New York University and the Academy for Human Rights and Humanitarian Law, Washington College of Law, American University. I am Chairperson of the Advisory Committee for the Human Rights Law Resource Centre; was a member of the Victoria Police Technical Advisory Committee on Human Rights; and was a member of the Children and Young Persons Advisory Committee for the Victorian Equal Opportunity and Human Rights Committee. I have provided training and presentations on the Victorian Charter for the Judicial College of Victoria, County Court of Victoria, Victorian Civil and Administrative Appeals Tribunal, Victorian Equal Opportunity and Human Rights Commission, Human Rights Law Resource Centre, Mental Health Review Board, Victoria Police, Department of Human Services and Law Institute of Victoria.*