

## NATIONAL CHARTER CONSULTATION

### SUBMISSION

#### Julian Burnside

1. I support the idea of a legislative Charter of Rights. I will seek to avoid repetition and concentrate instead on some of the less common aspects of the debate. I adopt the views of the Victorian Bar's Human Rights Committee submission, to which I contributed. I also adopt the views of the Australian Human Rights Group.
2. In making this submission I wish to make a couple of preliminary points. First, I think a Charter based on the Victorian/ACT model is to be preferred. This is not to suggest that the model is incapable of improvement. However in a Federation which has not got a developed human rights history, it is desirable for the jurisprudence to grow from a single root. If there were several different models of human rights it is easy to see that a deal of time and effort would be spent on arid debate about the different effect of differently expressed approaches to rights protection.
3. Second, my thinking on the subject of a Charter was stimulated by the Howard Government's treatment of asylum seekers generally, and in particular two High Court decisions: *Al Kateb v. Godwin* 219 CLR 562 (which is mentioned in many submissions) and *Behrooz v. Secretary of the Department* 219 CLR 486. This should not be taken as an attack on the Howard government. Rather it should be seen as a marker of what is possible in a community when political advantage can be gained by ignoring or overriding the basic rights of an unpopular minority. Unconscionable conduct is not the exclusive province of any political group; but a Charter of Rights can act as the conscience of a nation.

#### *Al-Kateb*

4. In my opinion, *al-Kateb* would likely have been decided differently if the Commonwealth had had a Charter of Rights equivalent to the Victorian Charter. The question in *al-Kateb* was the proper meaning of section 196 of the Migration Act:
  - “(1) An unlawful non-citizen detained under section 189 must be kept in immigration detention until he or she is:
    - (a) removed from Australia ...; or
    - (b) deported ...; or
    - (c) granted a visa.”
5. The Victorian Charter contains provisions governing statutory interpretation:

“32 (1) So far as it is possible to do so consistently with their purpose, all statutory provisions must be interpreted in a way that is compatible with human rights.

(2) International law and the judgments of domestic, foreign and international courts and tribunals relevant to a human right may be considered in interpreting a statutory provision”

6. The Victorian Charter identifies as a basic human right the right to liberty:

“21 Right to liberty and security of person

(1) Every person has the right to liberty and security.

(2) A person must not be subjected to arbitrary arrest or detention ...”

7. It is reasonable to suppose that section 196 could and would have been read down by reference to such provisions. Apart from other considerations, indefinite detention under the Migration Act has been held by the UN Human Rights Committee to be in breach of Article 9 of the ICCPR.

8. Importantly, a Charter would have made it possible to argue the case by reference to human rights standards. As it was, the argument in the case did not refer to human rights, because human rights are legally irrelevant in a jurisdiction without formal human rights protection embedded in the law.

### *Behrooz*

9. *Behrooz* was argued at the same time as *al-Kateb*, and was decided on the same day. The question in *Behrooz* was whether conditions in immigration detention might invalidate the detention. For constitutional reasons, the Parliament cannot directly impose a punishment<sup>1</sup>. While Parliament can prescribe penalties for breach of the law, only a court can impose a penalty. People in immigration detention have not committed an offence. Their detention is justified constitutionally as being “reasonably ancillary” to the administrative process of assessing a claim for asylum. Accordingly, since the decision in *Lim’s* case 176 CLR 1 detention which is reasonably ancillary to an administrative purpose is administrative in character rather than punitive, and therefore does not breach the separation of powers. The question in *Behrooz* was: If conditions in immigration detention are as harsh as human ingenuity can devise, would that fact take it beyond the scope of what is reasonably ancillary to the administrative purpose of visa processing. The argument was that if conditions were unreasonably harsh, then it was no longer “immigration detention” of a sort which Parliament could validly impose, and therefore to escape from it was not to escape from “immigration detention”. By a majority of six to one, the High Court held that conditions in immigration detention made no difference to its validity.

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<sup>1</sup> This is the separation of powers doctrine. Punishment is part of the judicial power. The executive arm and the legislative arm are not constitutionally able to impose punishment directly on a person.

10. If a Charter of Rights could have been invoked, it would have been possible to argue the case within the human rights framework, by reference to various rights such as Protection from torture and cruel, inhuman or degrading treatment<sup>2</sup> and Humane treatment when deprived of liberty<sup>3</sup>
11. More importantly, a Charter obligation on public authorities<sup>4</sup> (officers of the Department of Immigration and its agents who run the detention centres) would have enabled plausible arguments to be made at an administrative level to remedy the clear human rights abuses which characterized the detention centres from the mid-1990's to about 2005 and (in an attenuated way) to the present time.
12. The management of detention centres is unregulated. Solitary confinement is used, also without any regulation. Human rights abuses occurred on a massive scale and no legal or administrative remedy was available. A Charter of Rights would undoubtedly have made a difference.

#### The human realities

13. It is easy to suppose that human rights are well respected in Australia. For the most part they are. Among the disadvantaged or unpopular, things are otherwise. Over the past decade I have been involved in trying to deal with instances abuses of human rights which, and for which neither legal nor administrative solutions were available. I set out below a few examples. They all relate to the treatment of refugees, but that is because my focus has been largely limited to refugees during recent years. Only an optimist would imagine that human rights problems were limited to refugees.
14. There are three things to note. First, most of these things cause no noticeable concern in the wider community. Second, administrative remedy was available because the Immigration Department appeared to be complicit in the government's programme of treating boat people harshly. Third, no legal remedy was available, because notions of human rights do not provide a foundation for a legal remedy unless those rights are recognised in law.
  - a. Woomera opened in December 1999. It was closed in September 2002. At its peak, it accommodated nearly three times as many people as it was designed to hold. Conditions in Woomera – physically and psychologically – were shocking. Until public pressure forced some measure of improvement, a woman having her period would have to queue for sanitary pads. Children held in Woomera typically developed enuresis: a colleague of mine described the haunting image of a 12 year old Afghan girl wandering around aimlessly in the dust at Woomera, wearing a nappy. On enquiry, it emerged that the child was incontinent from the stress of detention. Desperate acts of self-harm were common, among children as well as adults. A detailed report into Woomera by Justice P. N. Bhagwati was delivered in 2002. The report included the following passages:

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<sup>2</sup> Victorian Charter, s. 10

<sup>3</sup> Victorian Charter, s. 22

<sup>4</sup> Victorian Charter, s. 38

“20. Justice Bhagwati was considerably distressed by what he saw and heard in Woomera IRPC. He met men, women and children who had been in detention for several months, some of them even for one or two years. They were prisoners without having committed any offence. Their only fault was that they had left their native home and sought to find refuge or a better life on the Australian soil. In virtual prison-like conditions in the detention centre, they lived initially in the hope that soon their incarceration will come to an end but with the passage of time, the hope gave way to despair. When Justice Bhagwati met the detainees, some of them broke down. ... He felt that he was in front of a great human tragedy.”

“49. The issue of family unity and family life ... is of particular concern. Families in detention are sometimes separated (e.g. in the Woomera family housing project, where wife and children are living in Woomera town, while the husband is detained in the centre), which, instead of providing adequate care to families, in fact appears to introduce another element of distress. ...”

“52. From a human rights point of view, the detention of children in the context of immigration procedures is certainly contrary to international standards. But even from a practical point of view this would be undesirable as the children would be growing up in a detention centre enclosed by spiked iron bars in surroundings hardly conducive to the healthy growth of a child. ... In Woomera, Justice Bhagwati spoke to several children who had spent several months, sometimes years in detention. Most children appeared seriously traumatized, and severely affected by a culture of self-harm (e.g. slicing of wrists and suicide threats) out of a sense of desperation. With regard to education services, while children are in fact given access to education to some extent, it would appear that, at least in Woomera detention centre, the education services are at best wholly inadequate.”

“62. As noted above, the International Covenant on Civil and Political Rights (Article 7) and the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, explicitly prohibit torture and all cruel, inhuman and degrading treatment and punishment. The human rights situation which Justice Bhagwati found in Woomera IRPC could, in many ways, be considered inhuman and degrading.”

- b. In December 2002 a working group of the United Nations Human Rights Committee reported on Australia’s detention system. Its report would shock most Australians. The working group, headed by Justice Louis Joinet, said:

“At the end of its visit, the delegation of the Working Group had the clear impression that the conditions of detention are in many ways similar to prison conditions: detention centres are surrounded by impenetrable and closely guarded razor wire; detainees are under permanent supervision; if escorted outside the centre they are, as a rule,

handcuffed; escape from a centre constitutes a criminal offence under the law and the escapee is prosecuted. During talks with government officials it became obvious that one of the goals of the system of mandatory detention and the way it is implemented is to discourage would-be immigrants from entering Australia without a valid visa.

The authorities stressed that these practices have the support of most sectors of public opinion.”

- c. A family arrived in this country from Iran in early 2001. They were members of a religious minority who have been traditionally oppressed. This group is regarded as unclean by the religious majority.

The family fled after a shocking episode in which one of their daughters suffered grievously and the authorities offered no help whatever. They arrived in Australia and ended up in Woomera. There, over the next 14 months, the condition of the family deteriorated inexorably.

The condition of the eleven-year-old daughter deteriorated very significantly, and the Child and Adolescent Mental Health Service became aware of the problem. They sent a psychiatrist to speak to the family. He wrote a report in which, among other things, they said of this girl:

She refuses to engage in self-care activities such as brushing her teeth. She has problems with sleeping; tosses and turns at night; grinds her teeth; suffers from nightmares. She has been scratching herself constantly. She doesn't eat her breakfast and other meals and throws her food in the bin. She is preoccupied constantly with death, saying 'do not bury me here in the camp. Bury me back in Iran with grandmother and grandfather'.

She carried a cloth doll, the face of which she had coloured in blue pencil. When asked in the interview if she'd like to draw a picture, she drew a picture of a bird in a cage with tears falling and a padlock on the door. She said she was the bird.

After a number of pages to similar effect he noted:

It is my professional opinion that to delay action on this matter will only result in further harm to this child and her family. The trauma and personal suffering already endured by them has been beyond the capacity of any human being.

The report urged that the family be transferred from Woomera to a metropolitan detention centre where they could get proper clinical attention for the eleven-year-old girl. No action was taken, and a month later the psychologist wrote another report, trenchantly criticising ACM and DIMIA for keeping the family in the desert instead of somewhere where they could get appropriate help.

The department relented and the family was moved to Maribyrnong detention centre in Melbourne. Over the next several weeks, no-one came to see the girl to offer the clinical help she needed. On a Sunday night in May 2002, while

the mother, father and younger sister were in the mess hall having their dinner, the eleven-year-old took a bed sheet and hanged herself.

She had not tied the knot properly and was still strangling when they found her. She then tried to swallow shampoo, as she had seen adults kill themselves that way in Woomera.

She and her mother were taken to the emergency ward of the local hospital where she was put into intensive care. The lawyer who had been looking after their refugee application heard about this and went to the hospital at about 9.00pm that night. He spoke to the ACM guard who was there. He asked to see the mother to see if there was anything he could do to help. He was refused permission to speak to her, on the footing that "Lawyers' visiting hours are nine to five".

- d. Mr M arrived in Australia in March 2001 with his daughter Alia (not her real name). She was then 5 years old. They were held in Curtin, then in Baxter.

On the 14th of July 2003, 3 ACM guards entered Mr M's room and ordered him to strip. He refused, because, apart from it being deeply humiliating for a Muslim man to be naked in front of others, his daughter (by then a 7-year old) was in the room. When he refused to strip, the guards beat him up, handcuffed him, and took him to the "Management Unit".

The Management Unit is a series of solitary confinement cells.

Officially, solitary confinement is not used in Australia's detention system. Officially, recalcitrant detainees are placed in the Management Unit. The truth is that the Management Unit at Baxter is solitary confinement bordering on total sensory deprivation. I have viewed a video tape of one of the Management Unit cells. It shows a cell about 3 ½ metres square, with a mattress on the floor. There is no other furniture; the walls are bare. A doorway, with no door, leads into a tiny bathroom. The cell has no view outside; it is never dark. The occupant has nothing to read, no writing materials, no TV or radio; no company yet no privacy because a video camera observes and records everything, 24 hours a day. The detainee is kept in the cell 23 ½ hours a day. For half an hour a day he is allowed into a small exercise area where he can see the sky.

No court has found him guilty of any offence; no court has ordered that he be held this way. The government insists that no court has power to interfere in the manner of detention.

There he stayed from 14 July until 23 July: each 24 hours relieved only by a half-hour visit from his daughter. But on 23 July she did not come. It was explained to him that she had been taken shopping in Port Augusta.

The next day, 24 July, she did not arrive for her visit: the manager came and explained that Alia was back in Tehran. She had been removed from Australia under cover of a lie, without giving Mr M the chance to say goodbye to her.

Mr M remained in solitary confinement for another 8 weeks. It took 3 applications in court to get him released from solitary confinement, even though the Department's psychiatric evidence as to the effect that the experience was damaging him. The government did not contradict the facts, or try to explain why they had removed Alia from the country: they argued simply that the court had no power to dictate how a person would be treated in detention.

- e. Mr B. came from Iran. He had been in Maribyrnong detention centre for about 3 years. During that time, met a young woman who lived in Frankston and visited Maribyrnong 3 or 4 times a week. They fell in love. They got married, inside the detention centre. She continued to visit him each day. About a month after they were married, Mr B was moved to Curtin detention centre, on the North West coast of Western Australia. There was no prior warning of the move, and no explanation.

Mr B eventually received a visa. He received a bill for his time in detention (see section 209 of the Migration Act: all people in detention are liable for the costs of their detention). He began repaying the debt at the rate of \$100 per month, and calculated that it would take him 175 years to pay it off.

- f. Fatimeh (not her real name) arrived in Australia from Iran in mid-1999. She converted to Christianity in early 2000, and began preaching against Islam. She was baptized in August 2000, after the Department of Immigration lifted its ban on baptism in detention. In late August, Hussein (not his real name) an Iranian man held in the same detention camp, left Australia voluntarily and returned to Iran. Hussein informed on Fatimeh. Her family in Iran contacted her to tell her she was in great danger if she returned to Iran. Preaching against Islam is a serious offence in Iran. If she returned she faced the prospect of being stoned to death.

A central fact in Fatima's claim for asylum was that Hussein had returned to Iran and informed on her. Five witnesses gave evidence that Hussein had been in the camp at the relevant time, and that he had taken some of Fatima's writings with him when he returned to Iran. No witness contradicted that evidence. Fatimeh told the RRT Hussein's camp number and his boat number. She asked the RRT to check on Hussein to dispel any doubt about this part of her claim.

The RRT found, as a fact, that Hussein did not exist. The tribunal member found, as a fact, that Hussein's existence had been fabricated by Fatimeh and her witnesses in order to fortify her claim for asylum.

When the case came to be reviewed in Court, a subpoena to the Department produced documents which showed not only that Hussein existed, but that he had been in the camp exactly when Fatimeh said he had, and that he left for Iran exactly when she said he had.

The tribunal member had not even bothered to ask the Department whether they had a record of Hussein. That casual indifference would very likely have

led to Fatima's death. When the decision came on for review in court, the Department argued that the decision should not be overturned. It appeared not to trouble the RRT or the Department that, if Fatimeh were returned to Iran, she would almost certainly be stoned to death.

- g. Mr C. was an Iranian, whose claim for asylum had been rejected. He lived in fear of being returned to Iran, for fear of being tortured or killed. The Department rejected his claim for protection and gave notice that it intended to remove him from Australia and send him back to Iran. He applied to the court for orders preventing the Government from returning him to Iran.

The case theory was simple: the power to remove a person from Australia was undoubted, but did not go so far as allowing the Government to send him to a place where he faced torture or death. The Government sought to strike out the claim without a trial on the facts. They invited the Court to assume that the man would be tortured or killed, but argued that those facts had no legal consequences. Their argument was that it did not matter that Mr C would be tortured or killed when he was returned to Iran. The courts upheld the government's argument.

- h. Mr D had been held in Maribyrnong detention centre for about 4 years. His only pastime was sketching. His physical condition had deteriorated progressively during his time in detention. By the time in question, he used a crutch to help him walk.

One day he wanted to take his sketchbook into the visitors' section of the detention centre, to show a sketch to one of his visitors. The guard in charge of the visitors' area, Ms F, told him he could not take the sketch book into the visitors' area unless he had given 24 hours' notice. He lost his temper and hit a window with one of his crutches; it cracked the window but did not break it.

Several hours later he was sitting in a room when several guards told him to go and see Ms F. He was still upset that she had refused to let him show his sketch book to his visitor. He refused to go. He was grabbed by the guards and was dragged down the hall. His trousers came off as he was dragged. He was put in solitary confinement. He was later charged with criminal damage because he had cracked the window.

When the case came to Court, Ms F gave evidence. In cross-examination she said that there was nothing in the sketch book which made it inappropriate to take it into the visitors' area; if Mr C had asked permission in writing 24 hours ahead of time, he would have been allowed to. He was refused permission because of the rule requiring application in writing 24 hours ahead of time. When asked to identify the "rule", she admitted that there was no such rule.

When asked whether Mr C had become depressed during his time in detention, she said she had not noticed. When asked whether she had noticed that people in detention tended to become depressed after several years, she said it was not her job to notice such things.

## Spirit of Community

15. I think Australians are generally in favour of the idea of human rights in the abstract, but as a nation our thinking on the subject is not very developed. This might be in part because we have never had to fight to secure our human rights. Many Australians appear to be concerned about their own rights, but less concerned about the rights of those they fear or hate. Although Australians are generally in favour of human rights, it is plain to see that many were untroubled about the plight of David Hicks, or the stolen generations (or the plight of aborigines generally) or asylum seekers in detention centres. To tolerate these things with unconcern (or to be actively in favour of them) while believing in the importance of human rights, is cognitive dissonance of a high order. It rests on an unconscious division of people into human beings like us (whose rights matter) and others (whose rights do not matter). This division of humanity into several classes is probably unconscious, but no less insidious for that.
16. Accordingly, it is important to consider the intangible influence of legislative recognition of human rights, as well as the legal and administrative possibilities a Charter would offer.
17. Experience in New Zealand and Britain suggests that community attitudes to human rights develop and become more sophisticated with the introduction of human rights legislation. The same phenomenon has been seen in Australia in the wake of equal opportunity legislation, as attitudes to women, the disabled and (to some extent) homosexuals have shifted.
18. It is easy to forget that, as recently as 40 years ago, there were no female tram drivers in Melbourne. Women could not drive trams. It was apparently so obvious that a woman could not drive a tram that no debate was needed. Equal opportunity legislation has had an important gravitational effect on public attitudes. It would be difficult to find anyone now who would argue that women should not be allowed to drive trams. Examples can be multiplied. The essential point is that legislation which embodies norms of conduct amounts to a public declaration of acceptable community standards. Those who reject community standards are much less likely to be applauded or tolerated when the standards are embodied in legislation.
19. In short, recognition in law of the existence of human rights is likely to change the spirit of the community. Parliament can, and should, lead the way.

## Would a Charter work?

20. One of the arguments put against a Charter of Rights is that it won't work. The argument goes something like this: "the USSR had a Bill of Rights, and so does Zimbabwe, but look what has happened in those countries". There is a valid point in this, of course, but it is not a point about a Bill of Rights: it is a point about the rule of law. No Constitution, or Bill of Rights, or statute, or other document, can protect rights unless the rule of law is strong. If the political opposition is weak or absent, if the media are cowed or complacent, if the courts are not fearlessly independent, the promises contained on bits of paper will achieve nothing.

21. That is not our problem in Australia. Our Judges are competent, hard-working and independent of the other arms of government. While I have disagreed with many judgments in Australian courts, I have never doubted the honesty or integrity of our judges. The same could not be said of the USSR or Zimbabwe.

Advisory opinions

22. A view has been expressed that one aspect of a proposed Charter may be unconstitutional. It concerns the interpretation provision. The argument I think is predicated on the assumption that the Federal Parliament might adopt the Victorian Human Rights Charter as a model.
23. Australian courts, in particular Chapter III Courts, do not give advisory opinions. The foundation for this is that Chapter III Courts can only deal with a “matter”.<sup>5</sup> In my opinion, a Charter on the Victorian model will only ever involve “matters” properly so called. A question in the matter may be whether a legislative provision can be read in a way which conforms to Charter rights. If not, then the court may make a declaration to that effect.
24. The Victorian Charter provides in section 36:
  - “(1) ...
  - (2) Subject to any relevant override declaration, if in a proceeding the Supreme Court is of the opinion that a statutory provision cannot be interpreted consistently with a human right, the Court may make a declaration to that effect in accordance with this section.
  - (3) If the Supreme Court is considering making a declaration of inconsistent interpretation, it must ensure that notice in the prescribed form of that fact is given to the Attorney-General and the Commission.
  - (4) The Supreme Court must not make a declaration of inconsistent interpretation unless the Court is satisfied that—
    - (a) notice in the prescribed form has been given to the Attorney-General and the Commission under subsection (3); and
    - (b) a reasonable opportunity has been given to the Attorney-General and the Commission to intervene in the proceeding or to make submissions in respect of the proposed declaration of inconsistent interpretation.
  - (5) A declaration of inconsistent interpretation does not—
    - (a) affect in any way the validity, operation or enforcement of the statutory provision in respect of which the declaration was made; or

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<sup>5</sup> *In Re Judiciary Act and Navigation Act* 1923 32 CLR 455.

(b) create in any person any legal right or give rise to any civil cause of action...”

25. In my opinion, the form of relief available on one possible outcome of the case does not mean that the case was not a “matter” for constitutional purposes. This view is reinforced by the fact that a Victorian style Charter does not give rise to an independent cause of action. In my opinion the powers given by section 36 do not involve dealing with something which is not a ‘matter’. It is qualitatively similar to a declaration that a provision of an Act is invalid, or has a particular meaning. Court regularly make declarations of that sort.