

NATIONAL HUMAN RIGHTS CONSULTATION

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SUMMARY

This submission focuses on just one of the questions with which the Consultation is concerned – how to best protect human rights and specifically, whether the Government should do so by enacting a legislative Charter of Rights of the kind that exists in Victoria and the ACT, and similar approaches in other jurisdictions.

I am focusing on this paper on the Victorian model, while noting former High Court judge Michael McHugh's doubts about its constitutionality, because this is the model being most widely advocated and is the weakest form of rights protection. The arguments in this paper apply, a fortiori, to a constitutional Bill of Rights.

I consider that the Government should not enact a Charter of Rights, whether along the lines of the model in Victoria or some other similar model, because:

- a) Parliament is likely to be very reluctant to go against the decisions of the Courts.
- b) The process of judicial decision-making which this contemplates is not an appropriate means of dealing with complex issues of public policy and balancing the conflicting rights of Australian citizens
- c) Charters of Rights cannot easily deal with conflicts between rights and responsibilities
- d) General and abstract principles are not a better way of determining public policy than specific legislation
- e) The approach to human rights issues of relying upon judges to make the decisions rather than Parliament is largely derived from a culturally specific North American practice even though a constitutionally entrenched Bill of Rights is not being proposed for Australia.
- f) The Australian legal system will lose some autonomy because judges will be likely to follow overseas' precedents which may be inconsistent with Australian values and Parliament is likely to be reluctant to go against a judicial decision about inconsistency.
- g) Overall, a Charter of Rights will damage, rather than enhance, respect for human rights in this country and the social cohesion that such respect is designed to promote.

While for these reasons I oppose a Charter of Rights, the National Human Rights Consultation is likely to identify particular areas where human rights are threatened or inadequately safeguarded in Australia. In some cases, federal legislation will be appropriate to counterbalance or override state and territory laws that are inconsistent with fundamental rights protected by the ICCPR. These issues are best dealt with through specific legislation

targeted at identified areas where law reform is needed, following the normal processes of public consultation.

1. REASONS FOR NOT ENACTING A CHARTER OF RIGHTS

a) Parliament is likely to be very reluctant to go against the decisions of the courts

On the Victorian model, and similar models elsewhere, a judicial declaration of inconsistent interpretation, where the Supreme Court is of the opinion that a statutory provision cannot be interpreted consistently with a human right (s36), is not binding. It will ultimately be up to Parliament to decide whether to change the law. This is different from the USA where because the Bill of Rights is constitutionally entrenched, judicial decisions have direct effect in striking down inconsistent laws.

Advocates for the Charter of Rights use this fundamental distinction to say that there is nothing to be feared about a Charter. Parliament has the final say.

True. However, on many issues, Federal Parliament is likely to take the path of least resistance and will be reluctant to go against the judges. Furthermore, when human rights are at issue in the interpretation of legislation in the ordinary course of proceedings, the court's interpretation will be binding and will need Parliament to reverse their impact.

No-one likes to be 'against' human rights any more than they like being against motherhood. Declaring something to be a 'human right' carries great moral force, however idiosyncratic or lacking in cogent reasoning the judicial decision may be.

Furthermore most decisions of the judges will be supported by some influential segment of the community, such as academic human rights lawyers or some newspaper columnists. Particular decisions may well be opposed by others, or excite indignation in the popular media, but the fact that there is a controversy favours supporting the judges. Politicians often avoid controversial issues where the community is deeply split. If a position has been taken by some neutral decision-maker, that makes it easier to deflect the controversy. I mean no disrespect to politicians when I say that the political exigencies of the day may well lead politicians to avoid taking a position, or deferring to the neutral decision-maker, on the hard issues – especially in an election year.

Of course, there are some issues on which the Government of the day will have a clear position. An example is the Howard Government's policies and practices concerning illegal immigrants which might have been subject to challenge on human rights' grounds. On many issues, however, the Government of the day will not have a strong position, or at least not one on which it is greatly invested politically. These are the issues on which it is most likely to amend the law in the face of an inconsistency declaration.

b) Judicial decision-making cannot deal with complex public policy issues

Rights claims often involve conflicts between rights of equal status

Human rights issues arise where there are competing claims of rights. The freedom to do something is often in conflict with freedom from something. In other respects also, two rights which have equal standing may be in apparently irreconcilable conflict.

An example of this from one of my areas of expertise is the pressing problem of parental relocation. One parent, almost invariably the mother, wants to relocate to another part of the country or the world, taking the children with her. Sometimes her reasons for doing so will be compelling; sometimes not. The father opposes the relocation because he is unable to move as well and the move will, he believes, have a seriously detrimental effect on his relationship with his children. Arguing such a case in terms of rights just restates the problem. It does nothing much to resolve it. The mother may claim a right of freedom of movement (insisting that this also gives her the right to move the children who are in her primary care). She might also claim gender discrimination because of the gendered nature of this issue. The father says that she can move wherever she wants as long as the children do not move with her, and asserts his right to family life to oppose her taking the children.

If this human rights contest were to be heard in the Family Court of Australia both parties would, in all probability, seek remedies based on charter rights.

Human rights cases involve value judgments

We fool ourselves if we do not acknowledge that there is a large element of value judgment in the application of human rights norms to particular cases. This is particularly so where the case involves a conflict between rights claims. Indeed, two judges with chambers and courtrooms side by side might well come to opposite conclusions given the same factual matrix.

At the moment, the relocation issue outlined above would be resolved by reference to Parliament's stated values and criteria for decision-making. The trial judge would resolve this dispute in terms of what he or she considers to be in the best interests of the children, as interpreted through the principles and statutory considerations given in the *Family Law Act 1975*. That is an individual determination, from which appeal can be taken, which resolves only this matter. It sets no precedent.

If a Charter of Rights were to be legislated, the position may well be different, and the judge's own value judgments would assume much greater importance. While the Court could refuse to issue a declaration of inconsistency to either parent, a judge with strong views on the relocation issue generally may well decide to make a determination one way or the other.

That places judges in the position of determining very significant and controversial issues of public policy, subject to the overriding determination of Parliament. The individual judge or

bench of appeal judges may well make a determination on the competing human rights claims with which other judges in the same Court profoundly disagree.

Yet depending on the judge or bench of judges allocated to a case, opposite conclusions on the issue of inconsistency could be reached. One bench of judges might say that there must be compelling reasons to prevent the mother from relocating with the children. Another bench of judges might say that there must be compelling reasons for allowing her to do so, if the move would significantly impact upon the father's ability to be involved in the lives of his children. Both might justify their positions in the name of human rights.

So it may well be serendipity which judge, or bench of judges, gets to put their value position first in their decision making. This is not an orderly or reasonable way of determining such difficult issues of public policy. There can be some middle ground between these two irreconcilable claims of right with carefully drafted legislation.

Judges tend to see issues through the lens of the case before them

Legal cases involve the application of general principles to specific contexts. Those principles, whether laid down by statute or the common law, need to be applied in the context of a particular dispute often involving conflicts about the substratum of facts to which those principles need to be applied.

Judges are naturally and appropriately influenced, in their evaluation of the evidence as well as the application of the law, by their general assessment of the merits of the case. This often involves an intuitive moral judgment. Does the plaintiff in this case deserve to succeed or should the defendant win? Is this a just claim or an unmeritorious one?

We accept the reality of those intuitive moral judgments in individual cases as part of the life of the law, just as we accept that juries will from time to time bring in verdicts against the weight of the evidence but which accord with their good sense and with community values about the matter.

However, what if the case being decided also has implications for a great many other disputes which are not before that court?

A case in which the merits favour one result may be a poor vehicle for determining how those rights should be resolved in cases where the merits of the case might lead to a quite different conclusion. The saying that 'hard cases make bad law' is particularly apposite for competing human rights claims.

Private litigation may not allow all the arguments to be heard

Private litigation is a poor vehicle for resolving complex issues of conflicts of rights and the balance between different interests, for a number of reasons.

First, there is no guarantee that the case will be well argued and that there will be a reasonable level of equality between the parties. The well-resourced individual or organization may be able to afford the best of representation. The person on the other side of the argument may only be able to afford the kind of small-time lawyer immortalized in *The Castle*, poorly prepared and able only to appeal to the law's 'vibe'. The quality of representation matters in legal proceedings, particularly when complex arguments need to be put to the Court involving significant legal research.

Second, not all the parties with conflicting interests will be before the Court. This is illustrated by the example of criminal proceedings. The Crown represents the public interest in general terms, but the victims of the alleged crime do not have their own representation and nor do members of the community who may be concerned about their safety, or the safety of their children, if an alleged criminal goes free. If arguments occur concerning the application of human rights norms to the criminal process, the Court may not have the benefit of hearing a well-argued case on all sides of the argument from all the stakeholders in the matter. Parliament, by way of contrast, has processes by which all the interested parties may be heard. There are no doubt many other such examples where the interest groups who would like to have a say in the political process would not all be involved in a judicial process canvassing an issue.

Thirdly, legal rules may prevent certain arguments being heard. The Court will only deal with matters relevant to the proceedings; but 'relevance' may be narrowly defined. When two parties have competing claims of right in a Charter case, it may well be that both will be heard. However, there may be other people whose interests are very much affected by the outcome of the case but whose interests do not have legal relevance for the purposes of decision-making.

For these reasons, complex issues of public policy and conflicts between rights should not be dealt with in the context of individual cases. Of course, advocates of a Charter would respond that everyone will be able to have their say in the political process following a declaration of inconsistency or in the aftermath of some controversy arising in day to day judicial determination of charter rights. This is true, but resistance to change will be formidable, supported by the powerful moral rhetoric of 'human rights'; those advocating a different position may well find it an uphill struggle to win the argument. The view that the Charter is unthreatening because Parliament has the final say rests on a belief that Parliaments will always engage with the merits of the public policy issue and will not duck the hard issues.

c) Charters of Rights cannot easily deal with conflicts between rights and responsibilities

Rights are all very well, but what if there is a conflict between a person's rights and his or her responsibilities? Imagine that a Commonwealth Charter were to enact a right to freedom of movement around Australia, similar to the Victorian Charter. An unemployed man wants to move from Sydney to a small beachside town in Queensland. He is much keener on surfing than on working. The Queensland town has some casual tourist employment in the school holidays, but otherwise the man has poor employment prospects there. Centrelink tells him

that if he moves there he will suffer a loss of benefits because he is moving to a place where his employment prospects are significantly weaker than in Sydney. A human rights advocacy centre brings a Charter case on his behalf against Centrelink.

A Charter of Rights says nothing about responsibilities. The public may think, as evidently does the Government, that this man has a responsibility to get off welfare if he is able-bodied and able to work and that his choice of where he lives should not be such as to diminish his chances of obtaining work.

The judge must apply the law. Rights are subject to some limitations, such as not interfering with the fundamental rights and freedoms of others. However, none of the standard limitations that are likely to be enshrined in legislation will apply. There is no balancing test in standard Charters between rights and responsibilities.

d) General and abstract principles are not a better way of determining public policy than specific legislation

Why do we need abstract principles when we have already worked out most of those principles in considerable detail over many years? What does it add to the body of the law - except confusion - to say that people have a right to a fair trial, as the law of Victoria does? The meaning of a 'fair' trial has been worked out through the years in myriad ways. There are rules about judicial bias, rules about procedural fairness, rules about the admissibility or otherwise of evidence, rules about judges' summing up to juries and countless other such matters. If Parliament now passes a law saying that people have a right to a fair trial, does it give judges a licence to take a different view of what the requirements of a fair trial are by reference to the abstract 'right'? If not, what is the point of enumerating such a right?

Another example is the 'right' to non-discrimination which has been discussed in the media as an obvious right to include in the Charter. Such a right is all well and good but what would it add? Both state and federal Parliaments have passed extensive legislation dealing with discrimination issues. These Acts of Parliament are in many cases substantial in their length, because the simple principle needs to be worked out in detail through more specific provisions. There are situations where, quite properly, groups are exempt from the application of aspects of the discrimination law. In some situations discrimination in favour of someone with a particular characteristic is entirely appropriate. The Pope ought to be Catholic, after all. Anti-discrimination law works through all these conflicting rights and claims, norms and exceptions - sometimes well, sometimes less well, but certainly in detail.

What value is there then in proclaiming an abstract right? First it is clearly not needed given the plethora of laws already on the books. Secondly, it could cause significant harm to that body of law. Does the Charter enunciation of the right mean that the statutory exceptions so carefully worked out through the years, are now to be subject to strict scrutiny, with a judge able to make his or her call on the balance between conflicting claims rather than Parliament? What about the exemptions granted by Anti-Discrimination Boards or their equivalent?

There is scarcely a right in the Victorian Charter that is not the subject of a specific body of law somewhere or another, or which represents a freedom on which there is not any encroachment or likelihood of encroachment.

e) The approach to human rights issues of relying upon judges to make the decisions rather than Parliament is largely derived from North American practice

The notion that major issues of public policy should be resolved by judges, applying broad and vague principles, is a North American phenomenon. There is a tradition in both the US and Canada that major issues of public policy will be worked out by the courts over time, applying general principles. The development of anti-discrimination law in these countries is an example of this.

By way of contrast, the Australian way has been to rely on detailed statutes, developed through the governmental and parliamentary process. There are strengths of both traditions of course, but the weaknesses in a system that relies on litigation to develop a body of law over time are obvious. It is very expensive for the parties; people need to rely on specialist lawyers who understand the ever-changing case law, rather than being able to read a statute; the body of law takes time to develop, leaving significant areas of uncertainty in the early years; judges are the philosopher-kings to whom is entrusted the work of public policy. These are significant weaknesses.

Perhaps because of this tradition of judicial law-making, North American judges are not renowned for their restraint. Maybe it is possible to have a Bill of Rights which works because the judges show enormous restraint and only declare laws to be in conflict with the Bill of Rights in circumstances where the infringement of the right is serious and indefensible. However, that has not been the North American way. Judges have been involved in the minutiae of public policy through constant adjudication on rights claims. It would be common ground amongst constitutional law scholars in the US that the current interpretations of various rights bear little relationship to the intent at the time they were introduced into the Constitution. The only argument is whether the original intent matters.

Canadian judges have followed their counterparts in taking a very activist role in public policy, authorized by the Charter. There is really no reason to believe that if Australia follows America and Canada in adopting a Charter of Rights, Australian judges will show restraint and only make Charter contravention declarations in the most egregious cases.

American culture is undoubtedly evangelistic, and it has been very successful in its extraterritorial reach. It has converted much of the world to aspects of its culture. The USA is entitled to choose the judicial review method of protecting human rights, but this should not blind us to the culturally specific approach that is involved. There are other ways of giving effect to our international commitments under the ICCPR.

f) The Australian legal system will lose some autonomy because judges will follow overseas' precedents which may be inconsistent with Australian values

Judges have to decide cases according to law. Their judgments, while undoubtedly influenced by their personal values, must follow a train of reasoning which is legal in nature. The standard form of legal reasoning is to follow precedent - that is, to examine how similar issues have been decided by other courts. In the early years, there will not be a body of Australian precedent (since the Charter will be entirely new), and so judges will have to look to precedents from other countries which have Charters of Rights or their equivalent. They will also look, no doubt, at decisions of the European Court of Human Rights.

As a consequence, Australian law will lose some of its autonomy and be carried along by the public policy fashions of North America and Europe, as interpreted by judges. Australia will not be able to have different values concerning family life, freedom of speech or freedom of religion – to name a few examples. The culturally specific interpretations of human rights in other countries will become our own by default, subject to the overriding power of Parliament to decide to ignore a judicial declaration of inconsistency.

g) Overall, a Charter of Rights will damage rather than enhance, respect for human rights in this country and the social cohesion that such respect is designed to promote

Precisely because some judges are unlikely to show restraint, and because they will be impelled by overseas' precedents not to do so, the Charter of Rights will, in course of time, lead to some very controversial decisions. 'Human rights' will become associated in the popular mind with the controversial decisions. The uncontroversial ones, and those controversial ones which do not excite much popular interest, will not influence public perceptions about human rights. Public perceptions flow from what is deemed newsworthy.

That will in turn damage the cause of human rights. 'Human right' will become associated with criminals receiving get out of jail free cards, controversial interpretations of individual freedoms at the expense of the public interest, and decisions about conflicts of rights that people consider to be unfair. This can only devalue the currency. Parliament will be on the defensive again and again.

As the Charter becomes more and more controversial (and this is its inevitable trajectory) there will be a deleterious impact on respect for the rule of law. Placing judges in the position of having to decide controversial issues of public policy inevitably politicizes them – look at the USA for the paradigm example.

The rule of law is one of the most fundamental pillars of a democratic society. It should not be jeopardized when it is so difficult to point to any positive advantages of a Charter.

2. SPECIFIC REFORMS TO PROTECT HUMAN RIGHTS

The national consultation on human rights will be well utilized if, as a consequence of the issues and concerns raised in the consultation process, the federal government moves to give greater protection to human rights in specific areas, particularly in situations where they are threatened as a consequence of state laws.

No doubt, the national consultation will reveal a number of different areas of concern – some which clearly require action, others which merely represent the grievances of those who disagree with particular government policies and would like to see a different balance struck between their rights and the rights of others. Not every grievance will justify reform, and the Committee will need to be careful not to rush in to one side of a public policy debate waving the flag of human rights without a careful examination of all the opposing arguments and alternative legitimate positions. The language of human rights has for too long been employed by advocates for particular causes wanting to co-opt the international community to their point of view.

That said, there will be clear cases where reform is justified. One area, in my view, is the need to provide much stronger support for freedom of religion, and with it, support for cultural identity. The main encroachment on religious freedom is, in my view, from a well-meaning source – anti-discrimination law. The dominant moral code in public life in Australia seems to be that one should not discriminate against anyone. Rarely do politicians or law reform bodies refer to any other moral values as informing the life of the community. There is much rhetoric about human rights, but on analysis, the translation into public policy of concerns about human rights is very often just in terms of anti-discrimination policy.

Non-discrimination is a very important social value, and a very important aspect of human rights. However, it is not an end in itself, and in international law is balanced by other considerations.

The problem is that in various parts of the country, the exemptions for faith-based organisations and schools are gradually being whittled away, or are under threat of being removed, limiting the capacity of Christian schools and other such bodies to advertise for and employ staff who are committed Christians.

People get confused between discrimination *against* someone with a particular characteristic and discrimination *in favour of* someone with a particular characteristic. The former seems inherently objectionable, but the latter is not, as long as the employment prospects of all those who do not have that characteristic are not significantly reduced. Why shouldn't a social club for a particular national grouping (for example, a Ukrainian or Vietnamese club), be allowed to give preference in employment to those for whom the club exists? Why shouldn't a Thai restaurant be allowed to advertise for only Thai staff? Why shouldn't the Labor Party employ only Labor supporters? There is no harm to the wider community from such modest limitations on who is eligible to apply.

So it is with faith-based schools, charities and other such organizations. Why shouldn't a Christian school or a Christian charity be able to advertise for committed Christian employees? Faith-based organizations need a right of positive selection in order to continue to exist as communities defined by that faith. This is particularly important for religious schools. It is true that Catholic schools do not insist that all their employees be practising Catholics. However, many other faith-based schools do believe that it is important for all the staff, both teaching and administrative, to be practising Christians with an active Church involvement. Most schools are nonetheless eclectic in terms of the church affiliations of their staff.

There are also issues about whether religious organizations can insist on and apply their codes of conduct and beliefs in relation to sexual morality given the anti-discrimination laws in some jurisdictions. Freedom of religion requires that faith-based organizations be able to adhere to their own understanding of right and wrong without strict scrutiny from the State.

Governments are required by Article 18 to give an expansive reach to religious freedom, including in such matters as the education of children. The freedom of people of faith to form religious communities for the purposes of education and charitable work, is undermined in some States and Territories by a fundamentalist and dogmatic approach to anti-discrimination that insists that freedom of religion should have as minimal a scope as is possible, rather than the maximum freedom consistent with the rights and freedoms of others as enshrined in Article 18. This minimalist approach to religious liberty is usually expressed in terms of a narrow reading of what are seen as the "inherent" requirements of a position in a faith-based organization, to the detriment of faith-based organizations, which will gradually cease to be faith-based if these trends continue.

This is an issue the Committee may wish to look at. There is an Australian Human Rights Commission inquiry into religious freedom at the present time, and people will await with interest the findings of that inquiry. However, in my view there is reason to be concerned, based upon that Commission's track record, that the AHRC will be able to see clearly the issues raised by those making submissions to it about the expansive scope that ought to be given to Article 18. It has in the past been wedded to the expansion of anti-discrimination laws in a manner which would inherently diminish freedom of religion in Australia.

CONCLUSION

For the reasons given above, a Charter of Rights would be a backward step for human rights in Australia. We live in a democracy governed by the rule of law, to be sure, but that does not mean it has to be run by lawyers. Nonetheless, there are some issues concerning specific areas where human rights are being infringed. The Committee should report back to the Government on those areas and urge it to take legislative action to make amends.