

June 14, 2009

Dear Consultation Committee,

Submission to National Human Rights Consultation 2009

As an Australian lawyer and academic who lives in the US, but who has a longstanding interest in the protection of rights in Australia, I greatly welcome this opportunity to contribute to the Consultation process.

The question I wish to address in my submission is, in turn, the third question in your terms of reference: namely, “how Australia [might] better protect and promote human rights”, consistent with maintaining our commitment to “the sovereignty of Parliament”, and to this end, I am enclosing (in draft form) an article I have recently written on this question.

The basic argument the article makes is that, if it comes choosing between a statutory charter of rights modelled on either the UK *Human Rights Act* 1998 (UK HRA) and the largely equivalent state statutory charters in the ACT and Victoria, or on the Canadian *Bill of Rights* 1960 (CBOR), Australian would do much better to adopt the CBOR model. While, by limiting courts to “weak” declaratory remedies, a UK-style rights charter *purports* to give Parliament greater authority than the CBOR to contribute to the process of rights dialogue, it in fact tends to distort courts’ approach to statutory interpretation in civil and criminal cases, in a way which severely undermines rather than promotes ordinary legislative dialogue. This has not necessarily been fully appreciated in the academic literature, even in the UK, but becomes clear once one re-examines the pattern of cases decided under the UK HRA, by reference to their civil and criminal character. The danger of statutory distortion created by a UK-style charter is also likely, the article argues, to be even greater in Australia, than in the UK or (say) Victoria, given the constraints imposed by Ch III of the *Constitution*. While, in my view, Ch III of the Constitution does not, in my view, ultimately create any serious obstacle to the adoption of a UK-style rights charter in Australia, there is clearly room for reasonable disagreement – and therefore uncertainty – on this question. By itself, uncertainty of this kind also has a clear potential, in the crucial early years of a charter’s operation, to distort the approach of lower courts to the grant of weak declaratory remedies.

There are many other important issues of constitutional design that you will need to address, as part of your report, but this strikes me as perhaps the most central and difficult one, and is therefore with great interest and anticipation that I await your Final Report on this question.

Yours sincerely,

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