

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

Re: submission to the National Human Rights Inquiry

Dear Secretariat,

Please find below, a personal submission to the National Human Rights Consultation. This submission is a speech I gave at the Sydney University of Technology on October 25<sup>th</sup> 2002 about bills of rights .

The address was framed around the question "do lesbian, gay, bisexual and transgender people need a Bill of Rights". In part, it is a rebuttal to the case against a Bill of Rights.

Best wishes,  
Rodney Croome.

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Sydney University of Technology on Lesbian, Gay, Bisexual and Transgender (LGBT) People and a Bill of Rights, October 25<sup>th</sup> 2002

#### DO LGBT PEOPLE NEED A BILL OF RIGHTS?

Sometimes under great stress or in moments of deep disillusionment we can say the most pathetic and futile things. In 1988 the Hobart City Council banned the Tasmanian Gay Law Reform Group's stall from Salamanca Market. In the Council's eyes our card tables strewn with petitions and information about law reform had no place in their "family market". We defied the ban and the Council responded by calling in the police and having us all arrested for trespass. Over seven consecutive Saturday mornings a total of 130 people were arrested defending our stall while hundreds more protested from the Market's grassy verges. It was the largest act of LGBT civil disobedience in Australian history.

Imagine the scene, Salamanca Market is a sea of protest placards. The Hobart City Council has ordered the arrest of anyone found with copies of our petition, or with placards displaying the words "gay" or "lesbian" or the pink triangle, so hundreds of protesters have turned up with petitions, and with banners that proudly display just these words and symbols. Television cameras crowd around as the police approach and arrest yet another protester, imposing on them a life-time ban from the market before they are bundled into a waiting van to be taken to the station, threatened with gaol if they return to the Market and detained, sometimes for up to a day, before they are released.

A burly sergeant approaches me: "under the authority of the Hobart City Council, as manager of this market, I ask that you leave the market at once. If you refuse you will be placed under arrest". I refuse and as he arrests me he grabs the gay law reform petition in my hand. He looks down the list of signatories and then rips the sheet into tiny pieces. Recalling some long forgotten British mediaeval history lecture all I could think to say to this gross act of provocation was, "The Magna Carta says

that no representative of the Crown has the right to interfere with a petition to Parliament." He looks at me like I am a Martian and pushes me into a waiting van.

It may sound silly now for me to have appealed to a 750 year old document most people have never heard of. But at the time it seemed as if there was nothing else. There was no state or federal law which protected us from discrimination on the grounds of sexuality, and more pertinently there were no statutory or constitutional guarantees at a state or federal level for the fundamental human rights which the Council and the Police were violating, rights to such things as freedom of assembly and freedom of expression. In meeting after meeting Human Rights Commissioners, lawyers and MPs shrugged their shoulders and said "the law is entirely on their side, there's nothing we can do". At the tender age of 23 my introduction to gay and lesbian activism on Hobart's angrily contested streets was also my introduction to the desperate need for a Bill of Rights.

History records that we eventually won the right to have our stall at Salamanca Market. On December 9<sup>th</sup> 1988, the day before the 45<sup>th</sup> anniversary of the Universal Declaration of Human Rights, the City Council conceded and dropped all charges against us. What was it, in the absence of a Bill of Rights, or, for that matter, any respect for Magna Carta, that saved us from defeat and possible imprisonment? Put simply it was the bravery of those ordinary Tasmanians, gay and straight, whose numbers swelled each week in defence of gay and lesbian human rights. The tide of protest against the Council brimmed the Market's boundaries and flowed across the state, through the nation and around the world. It was a tide the Council and the Police eventually realised no amount of heavy-handed intimidation could turn back. The truth, then, that our victory at Salamanca revealed to us was two-fold. On the one hand we came to realise that a great deal of anguish can be avoided when nations subscribe to a written human rights code. On the other hand we learnt that that as important as human rights laws may be, the ultimate guarantor of our rights lies not on paper, but in our own hearts, in our ability and our resolve to defend our human dignity no matter what the cost.

This was not to be our last experience with gross acts of official discrimination, acts which, in the absence of relevant human rights laws, we ourselves were compelled to battle armed with nothing but courage and wit. But Tasmania's many stories of anti-gay persecution and defiance of that persecution add little to my argument today, except to underline the point that while Bills of Rights can help push open the door to our emancipation, only our own strength as LGBT people can first unlock it.

The story which is worth re-telling is that single story which involves the only written guarantee of human rights to which we were able to appeal. This story stands out, not only because it was central to the gay law reform campaign which grew out of the Salamanca arrests, but because it reveals so much about the relationship between Bills of Rights and the recognition of LGBT human rights.

On December 25<sup>th</sup> 1991 Australia acceded to the First Optional Protocol of the International Covenant on Civil and Political Rights (or ICCPR). It was now possible for individual Australians to allege violations of their human rights directly to the UN Human Rights Committee (UNHRC). Only months before the Tasmanian Upper House had angrily and overwhelmingly rejected legislation repealing the state's blanket ban on homosexual sex. It was clear it would be years before the unrepresentative Upper House would heed public opinion and change the law. Our complaint to the Human Rights Committee was the first from Australia across the Committee's desk.

As most of you are aware the UNHRC eventually upheld our case. It's finding that the Tasmanian laws violated articles of the ICCPR was the first time that that document had been officially interpreted to include a proscription against sexuality discrimination, setting a precedent which activists and courts around the world still cite. In Australia the decision was the basis for the passage of federal legislation entrenching the right of sexual privacy for all adult Australians; the first time a right from the ICCPR had been imported into our legal system. This, in turn, prompted an appeal to the High Court asking the court to find that the Tasmanian laws were invalidated by the new federal law. Within months of the Court deciding to hear our case, again a ground-breaking decision that has had ramifications far beyond LGBT rights, resistance to reform in the Tasmanian Parliament had collapsed and our offensive laws were finally repealed.

Is this proof that a Bill of Rights can guarantee LGBT rights? Sadly, no. It's wrong to assess the value of our UN case in the light of subsequent events, or in isolation from the social and political environment in which it took place.

It was far from certain that the UN would decide in our favour. Many eminent lawyers believed our appeal was hopeless. The case took two and a half years and absorbed a great deal of our time and resources to compile. The final decision set exciting new precedents, but it also re-inforced old stereotypes and preconceptions by relying heavily on privacy rights. More importantly the decision was not enforceable. The Federal Government only acted because gay law reform in Tasmania had already become a major national social justice issue, and when it did act, its response was too weak to directly over ride the Tasmanian laws, requiring us to take a High Court case. It was uncertain whether the Court would even want to hear our case, and we were very lucky it did. Meanwhile in Tasmania, a combination of grass roots campaigning, community education, direct action, high media visibility and embarrassment over the international exposure of our dismal human rights record had made reform inevitable by swinging the population behind change long before the High Court signalled our case would succeed. The Court's decision to hear our case was simply the excuse state legislators needed to bring to a close a debate which should have ended several years earlier but which could just as easily gone on for several years more.

In short our appeal to the UNHRC was unpredictable, difficult and largely meaningless outside the context of a much broader campaign for legal and social change. However despite these difficulties and within this context the UN appeal did have an important role to play in bringing public and parliamentary attention to an important social justice grievance, and in ultimately resolving a bitter debate which may otherwise have dragged on.

If Australia had its own domestic Bill of Rights, instead of relying on the de facto Bill of Rights that is the ICCPR, many of the problems we faced might not have occurred. For one thing the findings of the tribunal charged with overseeing a Bill of Rights would be enforceable. For another the appeal process and the decision would probably be viewed as more legitimate by those Australians who are wary of international institutions. A domestic Bill of Rights could also entrench those economic, social and cultural rights which are not covered by the ICCPR, but which are so often not respected for LGBT people.

But whether written guarantees of human rights are domestic or international, the complex relationship between these charters and the recognition of LGBT rights, as illustrated by our UN case, remains essentially the same.

Statutory and constitutional human rights protections can be unwieldy and clumsy, they are only as effective as the courts which interpret them and the advocates who go before them, they only work if the society they umpire respects them, and if the disadvantaged and the dispossessed are able and willing to take advantage of them. For LGBT people human rights charters can also have the disadvantage of not accurately encapsulating or representing our deepest needs and aspirations. How can a young gay man's self loathing, or the pain of a young lesbian's rejection by her family ever be meaningfully expressed in the language of human rights? Most importantly, as we discovered both at Salamanca Market and during our subsequent gay law reform campaign Bills of Rights are not necessary for minorities to make a successful claim on justice, and even when they do exist, are no substitute for the courage and hard work that minorities need to lift themselves and their societies out of the mire of prejudice. It is perilous for LGBT people to rely entirely on a Bill of Rights, as it is perilous for us to rely on anything other than ourselves and each other. But having said all that, at key moments, on key issues, Bills of Rights can be one useful part of a larger campaign. At their best, appeals under Bills of Rights can even lead public debate on over-turning unfair laws and remedying unjust deeds. On balance it is better that we have them than not.

That there are strict limits on the usefulness of Bills of Rights in the movement for LGBT emancipation, but that they have their uses nonetheless, is borne out by the experience of LGBT communities in other countries.

As its Bill of Rights is a prototype for the constitutional human rights guarantees of many other nations, the US is often looked to as the prime example of how useful a Bill of Rights can be. This is probably a mistake. Commentators like Gore Vidal argue that the US is no longer a republic governed by the lofty ideals of its Founding Fathers, but a National Security State run by corporations which have shredded the Bill of Rights because it is an impediment on the exercise of their power. We don't have to agree with Vidal's analysis to accept, as I've already said, that a Bill of Rights is only as effective as the political system in which it operates. In a society as deeply divided as the US is on gay and lesbian rights it's almost inevitable that the Bill of Rights will sometimes prove less than useless. Certainly the Supreme Court's unfavourable decisions on gay privacy rights, and gay scouts, have sent out the very destructive message that our rights are not human rights. But even in a polarised political climate the US Supreme Court has done good, it's ruling against Colorado's homophobic Amendment 2 being an obvious example. The historic decisions of the US Supreme Court on de-segregation and abortion, as well favourable decisions on gay and lesbian rights by State Supreme Courts, show that as dispiriting as the US Supreme Court's decisions are now, there is good reason to hope for a brighter future.

Beyond the US, Bills of Rights have repeatedly proven their utility for LGBT people. Canada and South Africa are good examples of where laws and policies which discriminate against lesbians and gay men have been over-turned by appeals to constitutionally guaranteed human rights. South Africa's constitution has famously been invoked to strike down that country's laws against gay sex, as well as laws restricting immigration rights to same sex couples, while in most Canadian jurisdictions, most advances toward legal equality for same sex couples have

involved favourable Supreme Court interpretations of the Canadian Charter of Rights and Freedoms.

If my thesis is correct and Bills of Rights can have an important role to play in advancing the cause of LGBT equality, countries which lack modern Bills of Rights like Australia and, until its very recent adoption of a domestic legislative Bill of Rights, Britain, should be falling behind comparable jurisdictions. Unfortunately, this has been the case. Like Australians, Britons have had to rely on an international human rights agreement, in their case the European Convention on Human Rights. And like the ICCPR for Australia, the ECHR is a distant, less effective and less politically legitimate mechanism than a domestic Bill of Rights. The result is that Britain's record on our rights has routinely lagged behind other Western European countries. Australia too is falling behind other western countries. We have no effective national sexuality laws, virtually no recognition of same sex relationships at a national level, and no domestic avenues for contesting discriminatory criminal, censorship or fertility laws. Having a Bill of Rights would not guarantee that we could fill the deep gaps in our LGBT human rights record, but it would help.

The fact that gays and lesbians in Britain and Australia have taken many of their grievances to the international human rights tribunals to which they have access shows there is a clear need for powerful mechanisms to adjudicate human rights disputes. The decriminalisation of homosexuality, equalising ages of consent, allowing gays and lesbians in the military, and recognition of same sex couples in government pensions; these are all issues which it was impossible for each country to resolve domestically. Given the need for some adjudication procedure, wouldn't it have been better for the litigants, the defendants and for the legitimacy of human rights if those grievances could have been resolved domestically? Why do we need to air our dirty human rights linen in Geneva when we could more effectively and legitimately wash it in Canberra?

I'd like to finish today with two criticisms of Bills of Rights, one from the left and one from the right.

From the left comes the argument that a Bill of Rights, particularly if it is entrenched in a constitution, is necessarily slow to adapt to changing patterns of persecution and abuse. It snap freezes one generation's ideals to the detriment of the aspirations of subsequent generations. The US Constitution's guarantee of the right to bear arms is a good example. My response to this critique is that Bills of Rights can be open ended. The powerful people who wrote the ICCPR cared little for the rights of homosexuals. But they knew times change, so, in their lists of grounds upon which discrimination is prohibited, they included a key phrase "and other status". Thirty years later that phrase was interpreted to include sexual orientation. This is perhaps the most we can expect from what is after all just another fallible human institution.

From the right – from critics like Attorney-General, Daryl Williams and NSW Premier, Bob Carr – comes the argument that Bills of Rights take power away from elected representatives and hand it to unelected judges. The answer, of course, is "yes it does" and that that is a good thing. From a purely pragmatic point of view judges generally have a much better record than legislators in defending the rights of minorities. But more important is the point of principle. In any polity, fracturing, division and decentralisation of power is healthy. Decentralisation of power not only gives minorities more avenues for redress and places of refuge, but it helps prevent the abuses which inevitably flow from the concentration of power in the hands of

tyrannical majorities or over-bearing governments. A Bill of Rights is important for no other reason than it is one more check on power.

When LGBT people fall through the cracks in our democratic system, as we did on the streets of Salamanca fourteen years ago, a Bill of Rights can help to soften that fall. When we aspire to move forward to greater freedom, as we do today with equality for same sex couples, a Bill of Rights can help carry us aloft. At those moments in history when fear, anger and deep insecurity infect everything and human rights are threatened by heavy-handed governments, a Bill of Rights is more important than ever. It's time Australia joined other law-respecting nations in having a statutory or constitutional guarantee of human dignity. It's time for a Bill of Rights.

Rodney Croome  
October 2002