

**SUBMISSION BY THE FEDERAL OPPOSITION TO
THE NATIONAL HUMAN RIGHTS CONSULTATION**

Preamble

On behalf of the Federal Opposition, I welcome the opportunity to present the views of the Liberal and National Parties to the National Human Rights Consultation. The advancement of the rights of the individual citizen must always be a central value in a liberal democracy. As one of the most successful liberal democracies the world has ever known, Australia's record in the advancement of human rights has been a proud one. However, like every society, there have been occasions when our country has fallen short. Any enhancement of the protections we afford to the rights of the individual is to be welcomed, if it genuinely serves that value. I point out that the Liberal Party is the only political party currently represented in the Federal Parliament which was specifically brought into being for the very purpose of advancing the rights of the individual, rather than protecting class or sectional interests. Accordingly, for the political viewpoint which I represent, protection of individual rights is core business.

Human Rights or a Bill of Rights?

The Opposition regrets that – due to no fault on the part of the members of the National Human Rights Consultation (“NHRC”) – the debate about the enhancement of human rights protection in Australia has been dominated, if not monopolized, by the single issue of whether or not Australia should have a statutory bill or “charter” of rights. This is both curious and regrettable. It is curious because it excludes from consideration one of the most

obvious possible mechanisms for the protection of human rights, i.e. the inclusion of a bill of rights in the Australian Constitution. While the Opposition would not favour that option, we nevertheless point out that the removal of a constitutional bill of rights from the NHRC's deliberations by a decision of the Rudd Government¹ means that the discussion which the NHRC has facilitated has been pre-emptively narrowed. A complete national conversation about all of the options for human rights protection would not have been so constrained.

Partly in consequence of this decision, the debate has been largely confined to the question: does one support or oppose a statutory bill of rights? Support for a statutory bill of rights has been, by some, equated with support for enhancing the protection of human rights, while opposition to the proposal has been simplistically equated with lack of commitment to so doing. Rather, in the Opposition's view, the full range of options for human rights protection needs to be considered in a manner which does not privilege a single model. We are hopeful that the NHRC would not allow itself to fall prey to so glib an approach to the complex questions which its terms of reference raise.

A statutory bill of rights is not the best model for advancing human rights

The Opposition has considered the issues posed by the NHRC's terms of reference carefully, and has concluded that a statutory bill of rights is not the best model for advancing human rights in Australia. The arguments both for and against a statutory bill of rights have been well rehearsed both in submissions to the NHRC and in the broader public debate which its hearings have generated. In the Opposition's view, the arguments against such a model are

¹ Senator Wong, Senate Legal and Constitutional Affairs Committee, Consideration of Budget Estimates, *Hansard*, 20 October 2008, pp. L&CA 49-51.

significantly stronger than those in its favour. In particular, the following considerations persuade the Opposition that it is unnecessary, and would be unwise, for the Australian Parliament to adopt such a measure.

1. Lack of community demand, political or professional consensus

It is indisputable that the current bill of rights debate does not arise from a widespread community demand. Although alleged threats to human rights have been the subject of political controversy in recent years (for instance, in debate over the anti-terrorism laws, the “children in detention” issue and the Haneef case), arguments about the desirability of a bill of rights were not a significant feature of those political controversies. The question was plainly not an issue during the 2007 Federal election campaign (nor has it been at any Federal election campaign). It would be delusional to imagine that the issue is today one which the broader community regards as a particularly important one. No survey of the salience of political issues published in the life of the Rudd Government has even mentioned it. The bill of rights debate is an issue which only excites interest among a narrow range of opinion-formers.

There is no political consensus in favour of the proposal. The non-Labor side of politics is virtually united in its opposition to the proposal. The Labor Party is divided. While the Commonwealth Attorney-General, Mr. McClelland, favours the proposal,² it is questionable how representative his point of view is of the Labor side of politics. The New South Wales Government, whose opinion is reflected by the views of that State’s Attorney-General, Mr.

² Interview by Hon Robert McClelland MP with Fran Kelly, 5 December 2007.

Hatzistergos, is strongly opposed.³ In 1998, the Queensland Labor State Government decided, following the recommendations of a lengthy Parliamentary inquiry, not to proceed with such a proposal.⁴ Labor Party opinion leaders, notably the former Premier of New South Wales, Mr. Carr, have been vehement in their opposition.⁵ At the other end of the generational scale, the Young Labor Association is of a similar view.⁶

Of course, if a policy proposal is an intrinsically good one, the absence of either widespread community demand, or of bipartisan political support, would not necessarily matter. But where a proposal would potentially have a very significant effect in altering the existing constitutional structure, the absence of widespread political and community support is itself an independent reason for adopting a cautious approach to embracing it. It is a peculiarity of this debate that the case for a statutory bill of rights is being argued against the backdrop of refusal by the Government to consider a constitutional bill of rights. There is little doubt that this decision is influenced by the consideration that it is most unlikely that the public would be persuaded to make such a sweeping amendment to the existing Constitution. Where there is a reasonably-founded belief that the public would not endorse a constitutional bill of rights, then the argument for caution before embracing a statutory bill of rights is powerful. It is even more powerful in circumstances in which not only does the idea lack bipartisan support,

³ John Hatzistergos, "A Charter of Rights or a Charter of Wrongs?", Speech to the Sydney Institute, 10 April 2008, and Submission to the National Human Rights Consultation, 28 May 2009.

⁴ Parliament of Queensland, Legal, Constitutional and Administrative Review Committee "The Preservation and Enhancement of Individuals' Rights and Freedoms in Queensland: Should Queensland Adopt a Bill of Rights?", Report No. 12, 18 November 1998.

⁵ Bob Carr, "The Rights Trap: How a Bill of Rights Could Undermine Freedom", *Policy*, winter 2001, p. 19.

⁶ "Young Labor votes to reject charter of rights", *Weekend Australian* 7 June 2008.

but it attracts near-to-universal opposition from one side of politics, and significant, strong opposition from within the other.

The absence of a consensus in favour of a statutory bill of rights among political decision-makers – indeed, the apparent plurality among them of opposition to such a proposal – is reflected in the divided views of those who might be considered to have the closest professional involvement in the issue: the judiciary, academic lawyers and political scientists, and the practising legal profession. Many of Australia’s most eminent judges – current and retired – are either outright opponents of a statutory charter of rights, or at least deeply sceptical of its value. They include the current Chief Justices of New South Wales (the Hon. Jim Spigelman)⁷ and Queensland (the Hon. Paul de Jersey)⁸ and the Hon. Patrick Keane of the Queensland Court of Appeal.⁹ Among eminent retired senior judges, opponents and sceptics include Sir Ninian Stephen,¹⁰ the Hon. Ian Callinan¹¹ and the Hon. Kenneth Handley.¹² Although academic lawyers have tended to favour the proposal, that is not universally so: respected opponents or sceptics include Professor Jim Allen – one of the few commentators with direct experience of the operation of statutory bills of rights in Canada

⁷ “The Common Law Bill of Rights”, 2008 McPherson Lecture, The University of Queensland, 10 March 2008.

⁸ “A Reflection on a Bill of Rights” in Leeser & Haddrick (eds.) *Don’t Leave Us with the Bill: The Case Against an Australian Bill of Rights* (Menzie’s Research Centre, 2009) pp. 3-15.

⁹ “In Celebration of the Constitution”, Address to the Australian National Archives Commission, Supreme Court of Queensland, 12 June 2008.

¹⁰ Leeser & Haddrick, *op. cit.*, p. iii.

¹¹ “In Whom We Should Trust”, *ibid.*, pp. 73-82.

¹² “Human Rights: The Question is – Who is the Master?”, *ibid.* pp. 111-115.

and New Zealand,¹³ Professor Michael Crommelin,¹⁴ and Professor John Uhr.¹⁵ Although the Law Council of Australia purported to speak on behalf of Australian legal practitioners in supporting the proposal, it has since emerged that a number of the Law Council's constituent members have serious misgivings, including the Victorian Bar Association and the Western Australian Law Society; or report an absence of consensus among their members on the issue, including the Queensland Bar Association and the Western Australian Bar Association. The initial support of the New South Wales Law Society is, reportedly, being revisited among its members.¹⁶

Of course, the merits of the proposal are not to be determined by a head-count of professional and academic opinion leaders. No doubt proponents of a statutory bill of rights could also marshal an impressive list of eminent supporters. But it serves to underline the point that the lack of community support or political consensus in favour of such a potentially radical change to Australia's constitutional structure is reflected in the lack of a professional consensus among those who might, because of their particular professional or academic familiarity with the issues, be thought to be in a particularly advantageous position to judge its merits.

In fact the proposal, although not entirely without support, appears to be largely friendless, save among a relatively small group of politically activist lawyers and academics who

¹³ "What's Wrong with a Statutory Bill of Rights", *ibid.* pp. 83-95.

¹⁴ Observations at Australian National University Seminar, Parliament House Canberra, 24 April 2009

¹⁵ "Leap into lead on rights path", *Canberra Times* 13 May 2009.

¹⁶ "Turmoil hits drive for a bill of rights", *The Australian*, 12 June 2009.

subscribe to a “left-liberal” point of view. No important change to our constitutional arrangements should be adopted from so narrow an advocacy base.

2. Specific statutory protections are preferable to generalities

It is unclear whether a statutory bill of rights would be a source of new rights, or merely a restatement of pre-existing rights in statutory form. If a bill of rights is merely a restatement of existing rights, it lacks utility. If it is to be a source of new rights, the onus lies upon those who promote the idea to identify those rights which are not recognized, or not adequately protected, by the existing law. Where there is an identified gap – such as, for instance, was revealed by the *Al-Kateb* case¹⁷ in 2004 – the proponents of a bill of rights must explain why such a mechanism is more likely to be effective than political action and specific, targeted law reform.

A statutory bill of rights is essentially a set of declaratory statements about individual rights contained in an Act of Parliament. Such statements are inevitably expressed at such a level of generality that often, they amount to little more than political slogans. In the view of the Opposition, the protection of human rights would be better secured by express statutory words, containing their own specific protections, in a particular statute governing the issue. We favour more thoroughgoing Parliamentary scrutiny of legislation, including a comprehensive audit of existing legislation, to identify and repair gaps in human rights protection under the existing law.

¹⁷ *Al-Kateb –v- Godwin* (2004) 219 CLR 562

An example of the desirability of protecting human rights by specific enactment is afforded by the reform of the law concerning sexuality discrimination. Last year, the Parliament dealt with a suite of bills which amended 84 pre-existing Commonwealth statutes which discriminated against same-sex couples. The legislation had bipartisan support. After detailed consideration by a Senate Committee, the Opposition proposed a number of amendments which were accepted by the Government and welcomed by the gay community. The bills were passed by the Parliament on 26 November.¹⁸ The rights of those affected are on a much surer footing, having those specific and detailed statutory protections, than they would be were their rights merely dependent upon vague, aspirational statements in a bill of rights, unaccompanied by any specific protections or legal remedies.

The problem for those who advocate a statutory (as opposed to a constitutional) bill of rights is this: if the best method of protecting rights is by statutory recognition, then why not have those rights protected by specific statutes which set out detailed rights in particular cases, and are accompanied by enforceable remedies? Is it not better to do that than to leave rights subject to the vagaries of judicial interpretation of words expressed so generally as to be capable of bearing almost any meaning, and which is liable to fluctuate with the judicial fashions of the day?

3. A statutory bill of rights may limit existing rights by definition or omission

These considerations lead to the broader problem of the effectiveness of statutory bills of rights. The effect of bills of rights which are not *sources* of rights, but merely attempts to

¹⁸ *Same-Sex Relationships (Equal Treatment in Commonwealth Laws – Superannuation) Act 2008*; *Same-Sex Relationships (Equal Treatment in Commonwealth Laws – General Law Reform) Act 2008*.

restate existing rights may, paradoxically, be to limit them. That can occur in two ways. First, one may limit rights by defining them. Of course, every judicial decision depends at one level upon the delimitation of categories. By the very exercise of deciding whether or not a particular cause of action applies to a given set of facts, one is defining the boundaries of a right. But one is only defining it in the limited sense of determining its application in a particular case. The inductive process of reasoning by which the common law develops is a very different thing from the establishment of generic categories of abstract rights, which are to be applied *a priori*. In fact, to determine the application of rights by that means is to turn the inductive processes of the common law on their head.

There is a second way in which cataloguing rights may limit them. It may not only limit them by definition; it may just as easily limit them by omission. The point of a bill of rights is that, although necessarily general, it is also intended to be comprehensive. That is the case notwithstanding saving provisions like s. 5 of the Victorian *Charter of Human Rights and Responsibilities 2006* which provides:

A right or freedom not included in this Charter that arises or is recognized under any other law (including international law, the common law, the Constitution of the Commonwealth and a law of the Commonwealth) must not be taken to be abrogated or limited only because the right or freedom is not included in this Charter or is only partly included.

In interpreting such statutes, it is hardly likely that a Court would fail to take cognizance of the fact that some particular rights have been identified, but not others. By the very fact of identifying certain rights (however defined), it declares that those identified rights have a certain status or privilege, which other putative rights, which are not recognized by the bill of rights, do not enjoy.

A good example is the right to private property. Most Australians would be very surprised to learn that the right to own and enjoy property was not a fundamental right. Yet the ACT *Human Rights Act 2004*, while making extensive provision for political and “cultural” rights, contains no provision recognizing the right to own, or enjoy the use of, property, nor any other form of protection of economic relationships – for instance, the right to participate in commerce – whatsoever. The full extent of the protection of property rights by the Victorian *Charter* is that afforded by s. 20, which provides:

A person must not be deprived of his or her property other than in accordance with law.

This would appear to add nothing to the existing law. Yet the ACT *Act* does not even contain so lame a provision – there is no recognition of property rights at all.

It is for these reasons that the Opposition is concerned that, by attempting to codify rights, the proponents of a statutory bill of rights might, perhaps inadvertently and artlessly, actually set back the human rights cause, both by limiting the scope of defined rights, and omitting and thereby apparently devaluing others.

4. The identification and expression of rights is inevitably contestable

The creation of hierarchies of rights, and the omission from the charter of some rights at the expense of others, illustrates a deeper problem. Both the identification and the content of “human rights” or “individual rights” will always be contestable. Furthermore, even among

admitted rights incompatibilities will inevitably arise. Arguments about the respective scope and limits of liberty and equality are as ancient as Plato. In the twentieth century, Isaiah Berlin famously argued that individual rights may be incompatible even within the same system of values. A bill of rights necessarily involves stating conclusions about contestable philosophical values which are as old as political philosophy itself.

Just as they are contestable among philosophers, so they are contestable in the less elegant but more immediately consequential realm of day-to-day political debate. During the Howard Government, Hobbesian views about the importance of state power in protecting the body politic contended with proto-Enlightenment Lockean concerns about the consent of the governed. Recently, the Prime Minister has essayed an influential critique of economic rights, in an attack upon what he calls “neo-liberalism”.¹⁹ In every generation, arguments about not merely the content but the recognition of what are to be regarded as fundamental rights, will frame the political debate.

The identity, content and inter-relationship of human rights is not merely a matter of philosophical controversy. They are also, to an extent, culturally and historically determined. As Justice Keane has argued, had the framers of the Australian Constitution been prescriptive of the fundamental values of their time, rather than limiting themselves to creating the institutional architecture of the new nation, we might still be grappling with the White Australia policy.²⁰ In the United States, the Second Amendment protection of the right of the citizen to bear arms, thought of fundamental importance to a revolutionary government

¹⁹ Kevin Rudd, “The Global Financial Crisis”, *The Monthly*, No. 42, February 2009.

²⁰ Keane, *op. cit.* n. 9.

created in the late eighteenth century, has entrenched a culture of weapon use at variance with the standards of all other modern democracies.

Central to the Opposition's concern about bills of rights is that they inevitably import ideological and cultural agenda. They define a particular hierarchy of political values, which both purports to resolve contestable philosophical issues by favouring certain values over others (e.g. liberty over egalitarianism; communitarianism over private ownership), and universalizes the values of one particular time. In some political traditions, such as the American, where bills of rights are the product of a constitutional upheaval which defines the fundamental public values of the nation – where the bill of rights is one of the “birth certificates” of the nation – this may not be a bad thing. But that is because of its particular historical significance. No such considerations apply to the Australian experience.

5. A bill of rights may prejudice democratic governance and the separation of powers

Considerations of this kind raise an intractable constitutional problem for bills of rights. Bills of rights will ordinarily give rise to justiciable claims. The adjudication of such claims will inevitably involve the courts making decisions among the various contestable values which a bill of rights would enshrine. At present, such decisions are made by the Parliament. The effect of a bill of rights would be to remove such decisions to the courts, where they would be decided by unelected judges who are not accountable to the public. Furthermore, the adjudication of such issues will inevitably remove it from free and open debate, in

Parliament, the media and other public forums, and substitute a litigious model which is, for practical purposes, inaccessible to all but a small caste of lawyers.

In the view of the Opposition, the effect of a justiciable bill of rights may be prejudicial to two of Australia's most fundamental constitutional principles: Parliamentary democracy and the separation of powers. It is potentially prejudicial to Parliamentary democracy because it removes from the Parliament the ultimate power to resolve fundamental questions about political and social values. The Opposition believes that in a democratic system, the privilege of making laws lies with those whom the people elect and may dismiss; not with those whom they do not and cannot. Relocating such powers to an unelected arm of government itself prejudices the fundamental human right, recognized by Art. 21 of the *Universal Declaration of Human Rights* and Art. 25 of the *International Covenant on Civil and Political Rights*, to participate in the conduct of public affairs through freely chosen representatives.

Bills of rights are potentially prejudicial to the separation of powers because, by investing the judicial arm of government with the power to make decisions formerly exercisable by Parliament, it inevitably involves judges deciding political questions. Australian judges are among the most accomplished in the world. What they are accomplished at doing is discharging the judicial function. The experience of the United Kingdom, Canada and New Zealand tells us that the introduction a bill of rights will inevitably involve judges in

resolving controversies which are essentially of a political character, and thus far removed from the orthodox understanding of judicial decision-making.²¹

There are two related vices in transferring the power of resolving political questions from the legislative arm of government to the judiciary. First, it changes the discourse of the argument from an argument about how best to allocate resources to serve the interests of society as a whole, to an argument about the (asserted) rights of a particular individual. It changes arguments about social benefit into an argument about individual claims. And so, it decontextualizes what should be decisions about public policy, in which the claims of all stakeholders are weighed against each other and placed in the context of overall social benefit, and substitutes a litigious process in which all such considerations must yield to a claim of right, once established, and in which there are no – or very limited – opportunities for the voices of other interests to be heard. Secondly, by charging judges to apply the law’s traditional decision-making techniques to what are properly political questions, it risks exposing judges to the complaint that they are acting politically, not judicially, and thus potentially undermines the courts’ reputation for impartiality.

Some have argued that these problems may be overcome by adopting the Victorian expedient of enabling courts to make “declarations of incompatibility” between a statute and the bill of rights, so that the role of the courts is reduced to one of statutory interpretation rather than adjudication of an individual cause. Yet this merely presents the problem in different form:

²¹ See James Allen, “Portia, Bassanio or Dick the Butcher? Constraining Judges in the Twenty-First Century” Inaugural Lecture as Garrick Professor of Law, The University of Queensland, July 2005; “Human Rights – Can we Afford to Leave them to the Judges?” *The Australian* 17 July 2008; and n. 13, *op. cit.*

it still requires judges, interpreting the open-textured and largely rhetorical language of the bill of rights, to make what are essentially political decisions.

The Opposition draws attention to the potential constitutional hurdle posed by a Commonwealth bill of rights. As Professor Helen Irving of the University of Sydney has argued,²² declarations of incompatibility are not properly an exercise of judicial power but advisory opinions, and thus *ultra vires* Chapter III of the Constitution, following the High Court's decision in *re Judiciary and Navigation Acts*.²³

It has been suggested that this problem may be avoided were the judges – presumably acting in an extra-judicial capacity – to draw to the Parliament's attention inconsistencies between legislation and the provisions of a bill of rights. This device does would not avoid – in fact, it would exacerbate – the deeper problem that, when judges make the kinds of decisions which Parliaments have traditionally made, they are inevitably drawn into the political process themselves, their reputation for impartiality potentially compromised, and the separation of powers inevitably prejudiced. The so-called “dialogue model”, which envisages an ongoing dialogue between the political arm of government and the Courts on human rights issues,²⁴ is

²² “Advisory Opinions, the Rule of Law and the Separation of Powers” (2004) 4 *Macquarie Law Journal* 105; Leeser & Haddrick, *op. cit.*, at pp. 179-181; and Submission by Professor Irving to the National Human Rights Consultation.

²³ (1921) 29 CLR 257

²⁴ See in particular Hogg and Bushell, “The *Charter* Dialogue Between Courts and Legislatures” (1997) 35 *Osgoode Hall Law Journal* 75 for the seminal statement of the “dialogue theory”. The ‘dialogue’ metaphor has been the subject of significant academic controversy in Canada: see Manfredi and Kelly, ‘Six Degrees of Dialogue: A Response to Hogg and Bushell’ (1999) 37 *Osgoode Hall Law Journal* 513, and the rejoinder by Hogg and Thornton, ‘Reply to “Six Degrees of Dialogue”’ (1999) 37 *Osgoode Hall Law Journal* 529. The principal Australian article is McDonald, ‘Rights, “Dialogue” and Democratic Objections to Judicial Review’ (2004) 32 *Federal Law Review* 1.

a fundamental misconception of the judicial role. In a constitutional system which enshrines both parliamentary democracy and an independent judiciary, the two political arms of government – the executive and the legislature – are not interlocutors of the third arm of government in relation to the appropriate discharge of their functions. The “dialogue” – in other words, the argument between competing points of view about fundamental public values – occurs *within* the Parliament, in the form of parliamentary debate, and *between* the executive government and the Parliament, as the former defends its policies, and the latter challenges and criticizes them. It is a caricature of the role of an independent and impartial judiciary to suggest that its role in adjudicating disputes is a form of “dialogue” with the political arms of government: if indeed it is part of a dialogue, then it is hardly compatible with impartial adjudication.

Advancing human rights through enhanced Parliamentary scrutiny

For the reasons set out above, the Opposition urges the NHRC to recommend against the adoption of a statutory bill of rights as its preferred model. Instead, the Opposition recommends that expanded Parliamentary scrutiny of legislation from a human rights point of view is a better alternative. The option we propose has the advantage of locating greater emphasis on human rights at the heart of the political system itself, while it is free of the potentially undemocratic consequences of placing unprecedented power to resolve essentially political questions in the hands of the judiciary. The Opposition finds itself in broad agreement with the suggestion of Fr Michael Tate in his submission to the NHRC.²⁵

²⁵ Fr Michael Tate, Submission to the National Human Rights Consultation, 27 January 2009.

Specifically, the Opposition invites the NHRC to consider recommending the establishment of a new Parliamentary Committee (either a Joint Standing Committee or a Standing Committee of the Senate), which would be given the specific task of considering legislation from a human rights point of view. No bill of rights would be necessary to enable the Committee to proceed: it could inquire and report to the Parliament on any possible incompatibilities between a bill before the Parliament and the international human rights instruments, in particular the *Universal Declaration of Human Rights* and the *International Covenant on Civil and Political Rights*, to which Australia is a party. Such legislative scrutiny is not unknown at present: it exists in various forms in the Senate Scrutiny of Bills Committee, the Senate Standing Committee on Regulations and Ordinances, and the Joint Standing Committee on Treaties. By adopting such an expedient, human rights issues would be identified and deliberated upon within the Parliament itself as an ordinary, but more formalized, aspect of its legislative processes; identified concerns could be remedied with specific amendments to particular bills; democratic principles would be respected; and the risk of compromising the separation of powers by drawing the judiciary into the kind of decisions which, in a liberal democracy, are the province of elected and accountable representatives, would be avoided.

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