

THE ROLE OF PARLIAMENT UNDER AN AUSTRALIAN CHARTER OF HUMAN RIGHTS

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1. BACKGROUND

Australia is now the only democratic nation without a national Bill or Charter of Rights. Some form of protection for basic rights is seen essential component modern democratic governance around the world. No democratic nation that has ever done away with its Bill or Charter of Rights, and over time they have assumed bipartisan support.

Bringing about a national human rights law has been federal ALP policy since 1969, though the first attempt to bring about such a anywhere in Australia was not by the ALP, but by the Nicklin Country Party government in Queensland in 1959. This shows how the issue crosses party lines, and indeed some of the strongest supporters of the reform today fall with the Coalition ranks.

While such a law has now been achieved in the ACT in 2004 and Victoria in 2006, every attempt to achieve the reform at the national level has failed. Now there is again a once in a generation opportunity to achieve this reform.

The Rudd government announced a National Human Rights Consultation on the 60th anniversary of the Universal Declaration of Human Rights on 10 December last year. It comprises Father Frank Brennan (Chairperson), Mary Kostakidis, Mick Palmer, Tammy Williams and Philip Flood (as an alternate when Mick Palmer is unavailable). The deadline for submissions is 15 June 2009. It must report to the Australian Government by 31 August 2009.

I am confident that the process will lead to strong community support for a national human rights law, based upon:

Underlying popular support

- Survey published in 1997 of 1505 citizens that 72 per cent support.
- Reinforced by a survey taken in 2006. Amnesty International Australia commissioned a nationwide poll of 1001 voters by Roy Morgan Research. 69% very likely or likely to support a national bill or charter of rights.

Experience in places like Victoria

- 85% across all political divides wanted human rights to be better protected by the law. Did not want radical change, but reform to strengthen democracy.
- Some wanted their human rights better protected to shield themselves and their families from the potential misuse of government power.
- For even more people, the desire for change reflects their aspiration to live in a society that reflects common values and responsibilities. People want to live in a community based on equality, justice and the idea of a 'fair go' for all.

2. DOES PARLIAMENT NEED A CHARTER OF HUMAN RIGHTS?

I welcome the chance to look beyond the arguments over the pros and cons of Bills of Rights, and to focus on the role of parliament. Indeed, my starting point is that I support a charter of human rights for Australia not because I seek to transfer power to the courts (although I do see better checks and balances in this area as being desirable), but because I see it as a means to improve the workings of Parliament and its deliberations, and especially its scrutiny of executive action.

I believe that we need legal reform that drives parliamentary change when it comes to human rights, and especially the rights of people in Australia who are most marginalised and disadvantaged and whose voices are heard too rarely within Parliament.

My own thinking has changed significantly on this issue. It began when I walked into the High Court building in Canberra in early 1992. I had come straight from law school and was lucky to arrive at the beginning of the most interesting and active year in the court's history. That year the Mabo case and early free-speech cases marked the peak of the Mason court's impact on Australian law and government. It was a year when the court demonstrated it could

play a major role in shaping Australian democracy. As a young graduate, it seemed to me that the court had all the answers and arguments for a leading judicial role.

I no longer believe this, and indeed see the judiciary as having an often minor, largely supporting role, under an Australian charter of rights. Parliament, and also the executive, needs to play the more important role. Why?

- The key aim is to prevent human rights violations occurring in the first place, not merely to provide remedies for their breach (hence, must get laws and policies right at first instance).
- To make the greatest difference to human rights protection, real game is not in the few cases that are reported in the media and might go to court, but in service delivery and day to day decision making by the executive.
- Must navigate the difficult pathways of partisan politics to achieve lasting results (eg, vs native title: a momentous achievement, this has since foundered as new judges were appointed, the court alone could not forge a lasting political settlement.) Lasting reform can often only be won by democratic engagement and political leadership.

That said, does Parliament really need reform when it comes to protecting human rights? Yes, the evidence shows:

Processes

- Inadequate scrutiny, especially when one side of politics controls both houses.
- Human rights not considered in a systemic and effective way. Under Senate Standing Order 24 the Senate Standing Committee for the Scrutiny of Bills is charged with reporting whether Bills and Acts: ‘trespass unduly on personal rights and liberties’. Nothing lists the extent to which government can trespass upon our core rights or what these rights are. Ignored anyway in many key debates, eg, anti-terror laws.
- Human rights arguments can lack legitimacy. In the absence of a charter, human rights language and concepts can lack political and legal legitimacy in parliaments and the community. As a consequence, Australia is an example of a country where people and parliaments do not always take human rights as seriously as they should.
- Problems with the speed and volume at which new laws made. One of the most contentious laws of recent times, the 2007 NT Intervention Legislation, which, for eg,

suspended *Racial Discrimination Act*. It required a robust debate to get the law right (a prime function of Parliament). Instead, *Northern Territory National Emergency Response Bill* introduced into House of Representatives on 7 August 2007 (first viewing that day of package of five Bills of 480 pages!). Debate on Bill commenced at 9:02pm and Bill passed at 9:15pm. Scrutiny was better, but not adequate, in the Senate where 19 pages of debate.

Outcomes

- Detention of children seeking asylum.
- Suspension of *Racial Discrimination Act* twice in last decade.
- Anti-terror laws – 44 (1 every 7 weeks) – consider, for eg:
 - Attorney-General can issue certificate to close court from public view and restrict evidence a defendant can see.
 - Detention of non-suspects by ASIO for intelligence gathering, with up to 5 years jail if do not co-operate and ban on publishing information about the detention for 2 years (inc. for torture).

These can be fixed by Parliament, eg kids in detention, but often only years after the event, and after people have been damaged, or sometimes not fixed at all. A key part of the problem is the lack of a proper check and balance for democratic rights. The only check may be our trust in their wisdom and common sense. This leads to human rights often not being given proper consideration, rights being undermined in an hasty and ill-considered way and the situation being made worse at times of national fear or crisis or when one party controls both houses.

3. PARLIAMENT OR THE COURTS AS A RIGHTS-PROTECTOR?

The reform debate is often reduced to: who best protects rights, parliaments or the courts? For me, the answer is ‘both’. Neither by itself is sufficient.

Hence, aspirational standards for Parliament, such as the *Qld Legislative Standards Act 1992*, are not acceptable. They do not work. After more than 17 years, this Act has had little impact. Unsurprisingly, self-enforcement by parliament of human rights standards is not effective.

I have three reasons why the judiciary and Parliament needs to be involved in the protection of human rights under a national Charter of Rights.

First, the effective protection of human rights requires that a body besides parliament be involved. Parliament, as has often been the case in Australia, has proved unable or unwilling to protect some of the most basic rights and freedoms of members of the Australian community. The record is clear. The number of contemporary human rights concerns that have arisen due to new laws passed by the Federal parliament is, unfortunately, very long indeed.

Such examples demonstrate how Parliament, by itself, can prove ineffective in protecting not only the rights of minorities but also some basic political freedoms. The election of the parliament every three years is no cure for this, especially when the rights of non-voters, such as children, are considered.

At a time of community fear either of terrorism or invasion from outside, there are strong currents that can be taken advantage of that undermine human rights. This is always the case in democratic systems, but a system without a Charter of Rights involving a role for the judiciary is especially vulnerable.

The problem was magnified when a government gains control of both houses of Parliament. The only significant limit that may now come into play is the integrity and good sense of our elected representatives, something that manifests itself in the occasional person crossing the floor or backbench government revolt. At this and other times, more checks and balances are needed.

Second, even when Parliament plays an effective deliberative and scrutiny role, this does not negate the need for judicial involvement. Parliament has many strengths as a deliberative chamber, including its capacity to bring an authoritative resolution to division within the community and through deliberation to enact carefully tailored laws to meet pressing social problems.

However, it also has weaknesses. For example, Parliament can lack the rationality and analytical capacity that judges, especially judges of appeal, can bring to questions of law. Judges also have a particular advantage that parliamentarians do not. Judges usually look at a problem not in the heat of the moment but sometime afterwards and can analyse an issue in light not only of the underlying policy need but also with the benefit of hindsight given how the law has actually operated.

Judges are also able to analyse how the law has impacted on a person at a very specific level, something that can easily be lost in the generalities of lawmaking in Parliament.

My argument is not that the court should replace parliament (or in any way better), only that the courts have something to offer that Parliament does not. It is also not an argument that the courts should have a final say. My view is that the role of the courts can be complementary to that of parliament and that when we are dealing with questions of human rights there is a role for a dispassionate, independent, rational decision-maker who with the benefit of hindsight is able to examine how a law operates on the rights of an individual.

Third, the courts must have a role to bring out the best in Parliament. A lack of any judicial involvement affects the parliamentary process. Self-enforcement by parliament of human rights is not effective. Or, to put it another way, the presence of an external check and balance can have a positive effect on Parliament.

If there is no capacity for human rights principles to be raised in the courts through a Charter or other means, they can fail to receive examination by Parliament. Politicians are pragmatic, and often deal only with issues that are pressing and need attention. Hence, political debate and committee inquiry processes in the federal Parliament are often sparked by concern that legislation may be declared unconstitutional (2005 terror laws example and extra time for debate).

Without the possibility of post-enactment scrutiny by the judiciary on human rights grounds, there may not be an incentive for pre-enactment scrutiny to occur within the legislative process. Hence, a significant advantage of a Charter of Rights is not so much the dialogue that may follow a judicial decision, but the deliberation that begins within the legislative body before any such decision.

4. THE PARLIAMENTARY RIGHTS MODEL

I support a national charter of human rights in the form of a parliamentary rights model, to use the term coined by Canadian Professor Janet Hiebert and others.

This would be based on the NZ Bill of Rights Act 1990, UK Human Rights Act 1998, ACT Human Rights Act 1994 and finally the Victorian Charter of Human Rights and Responsibilities 2006.

The newly enacted Victorian Charter reflects how human rights can be protected by simultaneously providing the judiciary with an important, but limited, function and also retaining parliament sovereignty.

The Charter is not modelled on the United States Bill of Rights. It does not give the final say to the courts, nor does it set down unchangeable rights in the Victorian Constitution. Instead, it is an ordinary Act that can be changed over time by Parliament.

The Charter protects those rights that are the most important to an open and free Victorian democracy, such as the rights to expression, to association, to the protection of families and to vote.

The rights in the Charter are not absolute and can be limited, as occurs in other nations, where this can be justified as part of living in a free and democratic society.

Elected representatives in Victoria continue to make decisions on behalf of the community about matters such as how best to balance rights against each other, protect Victorians from crime, and distribute limited funds amongst competing demands. The Charter even recognises the power of the Victorian Parliament not just to balance such interests but to override the rights listed in the Charter where this is needed for the benefit of the community as a whole.

An important aim of the Charter of Human Rights and Responsibilities is to create a new discussion on human rights between the community and government. A key innovation of the

Charter is that rights and responsibilities are taken into account from the earliest stages of government decision-making to help prevent human rights problems emerging in the first place. The key aspects of this model are:

- Public servants will take the human rights in the Charter into account in developing new **policies**.
- **Public authorities** like government departments are required to comply with the Charter. If they fail to do so, a person who has been adversely affected by a government decision, as is possible now under Victorian law, will be able to have the decision examined in court. There is no right to damages.
- Government departments and other public authorities can undertake **audits** of their programs and policies to check that they comply with the Charter.
- Where decisions need to be made about new laws or major policies, submissions to Cabinet are accompanied by a **Human Rights Impact Statement**.
- When a Bill is introduced into the Victorian Parliament, it is accompanied by a **Statement of Compatibility** made by the person introducing the Bill setting out *with reasons* whether the Bill complies with the Charter. This enhances scrutiny of the executive. Parliament will be able to pass the Bill whether or not it is thought to comply with the Charter.
- Parliament's **Scrutiny of Acts and Regulations Committee** has a special role in examining these Statements of Compatibility. It advises Parliament on the human rights implications of a Bill.
- Victorian courts and tribunals are required to **interpret** all legislation, 'so far as it is possible to do so consistently with their purpose' in a way that is compatible with human rights.
- Where legislation cannot be interpreted in a way that is consistent with the Charter, the Supreme Court may make a **Declaration of Inconsistent Interpretation**. This refers the law back to Parliament, but does not strike it down. Parliament can decide to amend the law or to leave it as is.
- Where the circumstances justify it, Parliament can pass a law that **overrides** the rights in the Charter. This prevents a Declaration of Inconsistent Interpretation being made for five years. The override can be renewed.

5. WHAT DOES THE RECORD SHOW?

UK and Victoria

A Lawyers picnic?

UK: Impact of the UK law on the courts is monitored by the Human Rights Unit of the Department for Constitutional Affairs. Found that Act has not produced a significant increase in litigation or a 'litigation culture' (increase of less than half of one percent). Not only did few cases involve questions of human rights law, but where such issues were raised they were, in general, 'as additional points to existing cases' that could have been lodged 'even if the Act had not been in force.'

In Scotland, a study found that human rights arguments were raised in 'a little over a quarter of 1 per cent of the total criminal courts caseload over the period of the study.' Overall, the authors concluded that 'it seems clear that human rights legislation has had little effect on the volume of business in the courts.'

Victoria: Attorney General Rob Hulls: 'There have been a very small number of Charter arguments raised in Victorian courts. I think about seven. I think each and every one of those has either been withdrawn or dismissed.'

There has now been one successful case invoking Charter. The Victorian Civil and Administrative Tribunal handed down its decision in *Kracke v Mental Health Review Board* in April. The Tribunal found that a mentally ill man's human rights had been breached. He had been forced to undergo drug treatment by the state, but his case had been ignored for years and his human right to a fair hearing had been breached by a 'deplorable' and 'inexcusable' system failure which denied him reviews of his medical treatment in a reasonable time.

Every case litigated under the Charter was also brought on non-Charter grounds. The myth that Charters of Rights create a lawyers' picnic is unsubstantiated. In any event, with almost no exceptions, Charter cases for disadvantaged Victorians are run *pro bono*.

Undermined parliamentary sovereignty?

UK: Far from it. The Human Rights Act has invigorated debate and scrutiny on human rights issues, especially due to the work of the UK Joint Committee on Human Rights (eg as to anti-terror laws). I have spent time in the UK observing the work of that committee, spoken to UK parliamentarians and read their debates. The act has been positive in enhancing both debate on new laws and the scrutiny function of parliament when it comes to the work of the executive.

Victoria: The Charter of Rights has not shifted power to the judiciary. Contentious social policy issues continue to be determined by parliament. Far from threatening democracy, the Victorian Charter entrenches and enhances democratic values.

Made a difference to people's lives?

UK: Yes, eg November 2008 report from the British Institute of Human Rights on the impact of the UK law. The report, marking ten years of the UK Human Rights Act found: 'that the Human Rights Act is protecting vulnerable people from abuse and poor treatment in public services.'

Victoria: Yes, in individual cases:

- Charter prevented the eviction of a single mother and her children from public housing into homelessness.
- 19 year old woman with cerebral palsy relied on the Charter to obtain support services and case management.
- Children with autism were deemed eligible for disability support services after their advocates invoked the Charter. This led to an additional \$2.75 million in support by the Community Services Minister who said, 'this will make a major difference to the lives of many Victorian families facing the challenge of raising a child with an autism spectrum disorder'.
- Assisted an elderly woman with brain injury to access critical medical assistance. The woman required urgent therapy to treat severe contractures of her left hand. They caused considerable pain and suffering and resulted in deterioration of her hand. Although the woman had been waiting for therapy for over three years, she was not considered a

priority because she was aged over 50. If medical services were not provided, radical surgery could have been required, such as severing the tendons in her fingers or even amputation of the hand. Using the Charter, her advocates were able to argue for and gain her medical treatment.

None of these cases went to court.

And leading to systemic change:

Eg, the Victorian Department of Human Services (largest state government department that covers Health, Mental Health, Senior Victorians, Community Services and Housing and directly employs more than 13,000 people and funds organisations such as hospitals, aged care facilities, ambulance services and community service agencies that collectively employ more than 80,000 people) is.

- Revising law and policies on involuntary detention for mental illness in *Mental Health Act 1986* to give more of a say in own treatment.
- Changes to disability housing to change model and culture from directive to participation and personal decision making.

6. CONCLUSION

I support reform in Australia to about a national Charter of Rights. I support this because human rights need better protection in Australia, especially the rights of the marginalised and disadvantaged for whom the existing political process can fail to work.

I also support the change for reasons of institutional design. I believe that a Charter, like that enacted in the UK and Victoria, can provide an important, but limited new role for the judiciary while also improving the performance of Parliament. Indeed, without such a Charter, Parliament is less likely to fulfil its promise.