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HUMAN RIGHTS PROTECTION IN AUSTRALIA: WHY NOT?

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Michael D. Kirby Annual Human Rights Forum

Kim Beazley Lecture Theatre,
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**MURDOCH UNIVERSITY
PERTH, WESTERN AUSTRALIA**

MICHAEL D. KIRBY ANNUAL HUMAN RIGHTS FORUM

**KIM BEAZLEY LECTURE THEATRE
WEDNESDAY 21 OCTOBER 2009**

**HUMAN RIGHTS PROTECTION IN AUSTRALIA:
WHY NOT?
KEEP YOUR EYES ON THE PRIZE**

The Hon. Michael Kirby AC CMG Hon LLD (Murdoch)

IN PRAISE OF MURDOCH

I thank Murdoch University for inaugurating this Human Rights Forum as an annual event. And for naming the Forum after me. I am proud to be associated with the University in this tangible way. Over the years, I have visited Murdoch, generally on an annual basis. I have met generations of students and staff. I have addressed graduations; launched books; and received the highly prized honour of an honorary doctorate. It is a special pleasure for me that this Forum bears my name. For personal and professional reasons, I have a strong commitment to the protection of fundamental human rights. This should be precious to all lawyers and indeed all citizens. But, perhaps, one has to be on the receiving end of human rights deprivation to appreciate fully how important effective protection of fundamental rights is.

Over the years, Murdoch University has repeatedly stood out for its commitment to social justice and human rights. Sir Ronald Wilson, High

Court Justice and later Human Rights Commissioner, was Chancellor of this University. He inculcated in it a knowledge and appreciation of human rights law. Murdoch has received national recognition for this commitment as when SCALES (Southern Communities Advocacy Legal & Education Service) was awarded the national human rights award in law by the Australian Human Rights & Equal Opportunity Commission. The *Asia-Pacific Journal on Human Rights and the Law* is edited here. In 2010, the School of Law will be offering an international human rights programme in Geneva. The very successful Kulbardi Aboriginal Tertiary Entrance Course is offered by Murdoch to better equip Aboriginal students for university studies. These are but some reasons why this Forum is well positioned at Murdoch University.

As to the timing, what better occasion could there be for consideration of the future of human rights protection in Australia than now? The recently published conclusion of the National Human Rights Consultation and the delivery of its report to the federal Attorney-General present Australia with an important opportunity and a challenge. This Forum is an occasion to consider the conclusions of the National Consultation and what should follow. Will it be yet another well-intentioned and scholarly exercise whose report is pigeon-holed? Or will the proposals be followed up by federal legislation and administrative action? The answer to these questions is up to us, the citizens of Australia.

THE NATIONAL CONSULTATION

Three decades ago, in the Australian Law Reform Commission (ALRC), we initiated an unprecedented procedure of consultation with lawyers, interested parties and the community generally. This was the way in

which we devised proposals for law reform that enjoyed a high record of success with successive Australian governments and parliaments. Only last week, the federal government announced its acceptance of a recent major report by the ALRC on privacy protection. Overwhelmingly, the recommendations of the Commission were adopted and will form the basis of proposed laws for introduction next year into the Federal Parliament. Thorough consultation ensures that those who recommend laws are aware of the issues they must address; the problems they must tackle; and the inertia they must overcome. Consultation is also an insurance against inertia. It builds up expectations for action.

The National Human Rights Consultation, led by Professor Frank Brennan, received submissions from an unprecedented number of Australian citizens. Over 35,000 of them expressed their views in a consultation programme that went far beyond our earlier efforts in the ALRC. Over 85% of those who made submissions called for the adoption of human rights legislation to strengthen and protect human rights in this country.

To be blunt about it, it is shameful that Australia is the only western democracy without a national human rights law. Of course, we may be the only country in step. Everything in Australia may be perfect. We may have nothing to learn from other countries, or from the great universal principles of human rights or from the defects of our own record. But a glance at the history of Australia (including recently) shows that we are far from perfect. In some respects, we have had a poor record in the protection of fundamental rights. Especially for vulnerable and unpopular minorities amongst our citizens. Sadly, some

of the most vehement opposition to the adoption of new legislation comes from sources which, it has to be said, are suspect:

- * Some party politicians, on both sides, asserting that politics is the best way to fix human rights defects. Yet we all know that political parties today are scrambling to muster a quorum. Our citizens are staying away from political parties in droves. The broad base of political movements has eroded or disappeared. Australians are increasingly cynical about politics and disillusioned about the loss of idealism. Politics, urged on by some media, has become too much about personalities, gung-ho infotainment, wedges and ‘dog whistles’. Pretending that political parties reflect community values in an age where power is increasingly concentrated in relatively few often unaccountable hands is unconvincing;
- * Then some politicians urge that parliament will always fix up human rights defects. Sometimes it does. Yet, unfortunately, where the people involved are minorities (especially unpopular minorities) parliament all too often fails. No votes in it. No soothing headlines in it. Sure to offend the monthly opinion polls that now drive politics in Australia. We had 150 years of elected parliaments in Australia that did not recognise native title in our Aboriginal people. It took a court decision to do this – by the High Court in the *Mabo* Case. Prisoners, gays, women, refugees are often the victims of ill-conceived or discriminatory laws. Those who have scrambled up the slippery pole of politics may not want a diversity of voices speaking up for human rights. But they should not pretend that parliament fixes everything up. Occasionally, in John Lennon’s immortal words, parliaments need “a little help from their friends” in the courts; and

- * Most extreme and hysterical has been the opposition of certain media houses in Australia. You do not need me to name them. They are all too well known. They sing the same tune in Britain. They peddle a party line that would no credit to Molotov and Beria. They will not tolerate diverse voices. Only tiny exceptions are permitted and they are cut down in size. Just measure the column inches devoted to attacking the idea of a human rights law. Then you will know how far we have travelled in Australia to opinion manipulation masquerading as news journalism. Truly, this is a defect of the “old proprietor media” tradition. If you are not obliged presently by law to respect and effectively protect human rights to privacy, honour and reputation, it is hardly surprising that you would muster all your powers to attack a proposal designed to strengthen protections for those values by those who need them.

Apart from these defects in our human rights law and an uniquely vulnerable position in the community of nations, we in Australia need to face the fact that the international treaties that we have ourselves adopted and ratified impose on Australia an obligation to provide legal protections for human rights in this country. This is what Article 2 of the *International Covenant on Civil and Political Rights* states. There is a reason for this requirement. Having human rights protection in a simple document helps schools and teachers to convey these ideas to future citizens and to encourage a society that respects and honours fundamental rights. This is a point that the National Consultation report has underlined. We must enshrine our basic civic freedoms not only to keep faith with the international community and to restore Australia’s name as a leading member of that community and as a good example to

the world. More fundamentally, we must do this for the fulfilment of our international obligations to our own people.

In the debate that will follow the National Consultation report, remember the rallying cry of the civil rights movement in the United States in the 1970s. *Keep your eye on the prize!* Keep your eye on the essential points. Answer the critics. Do not be needlessly distracted by detail and mechanics. There is a fundamental institutional question which Australia now has the opportunity to answer. And do not be fooled by the suggestion that our nation, alone, of the parliamentary democracies of the world, has no need for general human rights legislation. As the National Consultation that thoroughly reviewed our laws and practices in Australia concluded:

“The Australian Constitution was not designed to protect individual rights. It contains a few rights but they are limited in scope and have been interpreted narrowly by the courts. Federal, state and territory legislation protects some human rights, but the legislation can always be amended or suspended to limit or remove that protection. Further, the legislative framework is inconsistent between jurisdictions and difficult to understand and apply.”

Something more and better is needed. If we fail to secure it on this occasion, after such an unprecedented consultation and the involvement of so many thousands of our fellow citizens, the opportunity is unlikely to return in our lifetimes.

ANSWERING THE CRITICS

So let me address some of the arguments that the critics of the National Consultation report have advanced to suggest that the adoption of a new federal human rights law in Australia is unnecessary or undesirable:

Isn't this alien to our British legal traditions?

No, it is not. The English-speaking people have adopted charters of rights in the past. They did so in 1215 with the *Magna Carta* signed by King John. This promised due process. They did so again in 1688 in the *Bill of Rights* and other laws at that time that promised judicial tenure and independence and basic rights for the people. In America in 1776, they did so when the American settlers decided that the British parliament was denying them the basic rights of Englishmen. They did so in 1911 in England in restricting the powers of the House of Lords to block legislation passed by the lower house of parliament. The *Australian Constitution* of 1901 contains a number of guaranteed rights.

Most English-speaking democracies, including Australia, have subscribed to the great United Nations treaties that have given effect to basic rights, re-stated in 1948 in the *Universal Declaration of Human Rights* (UDHR). So there is nothing alien to our legal tradition in embracing a charter of rights that defines our fundamental rights and duties. In any case, traditions need to be updated. The experience of every other modern democracy gives us a good reason to modernise and update our laws by adopting a law stating human rights and providing for new ways to protect them.

But won't it undermine parliament?

Australia is one of the most mature parliamentary democracies in the world. The proposal for a new law, akin to the laws enacted over the past two decades in Britain and New Zealand, does not damage our parliamentary institutions. On the contrary, it enhances them. It is parliament that would state the fundamental rights of the Australian

people in a human rights law. It would do so after an unprecedented public consultation. Although courts would have a function to examine suggested departures from those rights, it is parliament that would retain the last word. Far from damaging our democratic institutions, such a development would strengthen them. It would encourage parliament and all public officials to examine and, where they saw fit, to correct alleged injustices, discrimination and inequalities that arise in the treatment of persons, measured against the new law. It would stimulate parliament to respond to concerns of the little people brought to the courts for consideration. All too often today parliaments are effectively controlled by the executive government or orchestrated by media, opinion polls and other powerful lobby interests, far from the concerns of the ordinary citizens.

But is there a need for it?

Sadly, Australians cannot claim that their parliamentary system works so perfectly that it does not occasionally need the stimulus of reminders that the law sometimes treats people (usually minorities) unjustly and unequally. Australia's history has been repeatedly marked with unfortunate illustrations of such injustice:

- Take *Aboriginals*. As I have said, we long denied our indigenous people respect for their traditional rights to their land. A century and a half of parliamentary government in Australia did not cure that great wrong. It required a decision of the High Court of Australia, based on a re-expression of the common law, to overturn the unjust and discriminatory laws. This step was taken in the *Mabo* decision (1992). In doing so, the High Court had to rely, not on an Australian

charter of rights, but on provisions of the *International Covenant on Civil and Political Rights* (ICCPR). This is a treaty that Australia has ratified but not yet brought into domestic operation. Its principles and those of other human rights treaties forbid denying Aboriginals basic legal rights as citizens, solely on the basis of their race. To those who assert that our Parliaments always reject wrongs, I ask: how come they failed to do so for 150 years in the matter of native title?

- Take also *women*. There are many discriminatory provisions in our laws based on the sex or gender of individuals. Some of these have been corrected by parliament. But others remain relics of earlier times and attitudes. A new human rights law would encourage courts to cure such instances where they could or to draw them, where they could not, to the attention of parliament.
- Take also *Asian immigrants*. For more than a century, the White Australia policy excluded and discriminated against Asian immigrants. If they got in, they were made to feel second-class. Eventually, the laws were amended by parliament after 1966. If there had earlier been a national human rights law, such discriminatory provisions might have been avoided or certainly questioned and cured more quickly.
- Take also *homosexuals*. Criminal laws and much unequal treatment have marked the lives of gay citizens in Australia.

I knew this because I have felt the pain of discrimination for most of my life. Some of these integral laws have only recently been corrected when more than 100 federal statutes were amended in 2008. So why did they exist for so long? Why did the earlier governments say it was “not a priority” only to discover that when in the end the laws were introduced to parliament there was virtually no opposition at all? Why did this happen sixty year after the scientific knowledge about diversity of human sexuality was well known to parliament? Previous governments did not treat the reforms seriously. Had a human rights law proclaiming citizens equality, it might have quickened the pace of reform. It might have stimulated Parliament to see the ‘priority’ and the injustice that others felt.

- Take also *prisoners* and *refugees*. Parliaments have sometimes been all too willing to deprive these and other groups of people of basic rights and dignity. The recurrent law and order auction in Parliament, especially around election times, needs a counterpoise to make us remember and protect the basic rights of unpopular minorities. At least to occasionally oblige our elected representatives to think again before they deny prisoners, refugees and others of their basic rights of humanity and citizenship.

In these and other instances, Australia’s laws have sometimes reflected the values of past generations. If we count every citizen as precious in Australia’s democracy, we need effective means to stimulate the correction of injustice and inequality where it is identified in the law.

Otherwise the forces of inertia and indifference overwhelm the calls for action. This is what a human rights law can do.

Yet didn't the Soviet Union and Zimbabwe have such rights

It is true that unjust societies can have ostensibly perfect laws. A human rights law alone will not cure inequalities or right wrongs. However, in functioning democracies, like Australia, such a law could sometimes stimulate the removal of unjust discrimination. The fact that more than a piece of paper is required is no reason for withholding a statement of fundamental rights in the form of a human rights statute.

After the terrible sufferings of the Second World War, this was recognised by the adoption of the UDHR by the world community. All that an Australian human rights law would do would be to add a local mechanism for requiring courts and parliaments to take such rights seriously. To be reminded about fundamental rights. To overcome neglect through oversight, inertia or temporary passions. A human rights law would also help us to teach children about the rights and duties we hold in common in Australian society. It would help improve governmental practices and public attitudes. In Europe, ninety percent of complaints of human rights wrongs are settled by agreement, instead of having to go to court.

But would it lead to 'judicial activism'?

Some critics of a human rights law complain that such a law would lead to excessive 'judicial activism'. This is like using a swear word, designed to frighten the people. Where there is injustice, a measure of judicial activism will sometimes be a good thing. Democracies are sometimes effective in protecting majority interests and rights. They tend to be less

effective in protecting vulnerable, unknown or and unpopular minorities. Yet all human beings have basic rights that must be respected, simply because they are human. Australia has accepted this principle by ratifying several international human rights treaties. As a nation, we are bound in law to ensure that such rights are protected. The question is whether we take these treaties seriously. Or are they mere window-dressing? And whether we will afford effective remedies to our own citizens at home to make sure that we observe and enforce such principles.

Why should we have to go to the Human Rights Committee in Geneva?

It was this thought that eventually led to the reforms in Britain and New Zealand, adopting the human rights model now proposed for Australia by the National Consultation. These are two countries with legal systems closest to our own. The complaint of 'judicial activism' is unconvincing. Especially because, under the model proposed by the National Consultation, all that the judges can ultimately do is to draw suggested inequality or injustice to the notice of parliament so that it can consider curing the wrongs that are drawn to its notice.

Are not some of the complaints trivial?

Once a human rights law is adopted, courts have to deal with the cases brought before them. For example, some critics dislike the idea that prisoners might use a charter to complain about their treatment. But, recently, the High Court of Australia, in *Roach's Case* (2006), upheld a complaint by prisoners that a law denying every Australian prisoner the right to vote in the last federal election was unconstitutional. In that case, the High Court affirmed, in part, the prisoners' complaints.

Prisoners are human beings and, as citizens and individuals, have rights. The law is there for everyone. In Australia, it is not just there for the majority, the powerful and the popular. This is the test of our country's civilization. It can be left to the good sense of courts to decide if a claim under a human rights law is justified and warrants remedial orders. In most cases of such complaints, unlike *Roach*, there are no Australian constitutional provisions to which the vulnerable minorities can appeal. The aim of a human rights law is to afford a non-statutory criterion to enliven debate and to ensure modest legal protections

Are the judges incompetent in such matters?

Some politicians, full of a high opinion about their own wisdom, complain that judges have no business scrutinizing legislation by reference to fundamental rights. They suggest that judges have no special expertise in such matters and should butt out. Some learned judges have agreed with this view. It would be a more convincing argument if it were not for the fact that, in most countries of the world, judges are already entrusted with upholding the basic rights of citizens expressed in bills or charters of rights. In virtually all western democracies the judges have been doing this for years, even decades. The suggestion that Australian judges are somehow incompetent to do this is completely false. There is now a large and growing body of law, in national courts and transnational bodies, like the European Court of Human Rights, to guide Australian judicial decisions in particular cases. As well, in some matters, common law principles already encourage judicial intervention. All that a human rights law does is to make the procedure more systematic, principled, modern and transparent.

Indeed, having a human rights law actually operates in advance of judicial decisions. Those who draft laws for enactment by parliament or administrative rules are necessarily required to ensure that those laws conform to the basic human rights of the citizens. This imports, throughout the law, important standards of respect for fundamental rights. It prevents laws overriding citizens' rights by oversight or neglect. In today's world, where fewer and fewer people join political parties, leaving everything to MPs is regrettably a very risky choice. We all know that politicians are sometimes out of touch with ordinary people. Often they are effectively controlled by their party whips and electoral imperatives, not fundamental principles. Occasionally, they play on prejudice to get elected. Sometimes they neglect minority interests. Occasionally, they are arrogant and prejudiced, as Australia's record with Aboriginals, White Australia and so forth shows. And in any case, a three yearly visit by citizens to the ballot box hardly involves writing a blank cheque for everything that politicians do, once they get elected. The wise, calm voice of the courts can occasionally be useful to help identify, and sometimes cure, unjust laws. Anyone who has been on the receiving end of unjust laws will know that parliament sometimes gets things wrong. When that happens, parliament needs judicial and other stimulus to get it right.

Is a charter constitutionally impossible?

Some commentators have suggested that the model such as that now proposed by the National Consultation is impossible in Australia because it would involve the judiciary in giving advisory opinions. Under our Constitution, it has been held that judges cannot do this, but must decide real cases brought between contesting parties. I have no doubt that a federal law on this subject in Australia could be drawn to avoid this

problem. The National Consultation quotes two advices of the Solicitor-General of Australia, the highest non political law officer in the nation, saying so much. Recent decisions of the High Court too have upheld assignments permitting the sensible resolution of important legal questions where the issue was presented to a court by contesting parties with the interest and ability to present the question for the decision of the court: See *Attorney-General (Cth) v Alinta Ltd* (2008) 233 CLR 542 at 550 [1], 552 [8]-[9], 558-9 [32]-[33], 578 [96], 580 [104], 584 [124].

Our country is now virtually alone in the world in failing to provide effective national laws for upholding the fundamental rights contained in international law. This does not necessarily mean that we are wrong. But it certainly raises the question as to whether our legal system has been so perfect that we do not need the occasional stimulus of a national human rights law. Then that question is addressed, it permits only one answer.

But will anything be done?

Finally, it is suggested that we should not waste our time on this question because nothing will, in the end, be done. It is true that we are good in Australia in talking about ideas such as a human rights law, but often slow in delivering the machinery of justice.

On the other hand, the National Consultation in 2009 has been the biggest enterprise of its kind in Australia's history. The time has come to bring fundamental human rights home to the law of Australia. Our country since 1945 has signed up to many treaties containing such rights. We have allowed our citizens and others to take their complaints

to the United Nations in Geneva and New York. What we now need (as the British and New Zealanders, the Canadians, South Africans and others have found) is a home-made mechanism for testing our laws against the standards of fundamental human rights. Beyond dispute, our history shows the need for such a process.

The high level of interest in the National Consultation is itself an insurance against neglect or indifference to its outcome. I hope that the outcome of the Consultation will be the adoption of a federal charter or statute of rights, actionable in the nation's independent courts. We can trust Australia's courts and judges to get such decisions right, to learn from the judges of other countries and to use their role to strengthen our parliamentary democracy by making it truly attentive to equal justice under law for all Australians.

Keep your eye on the prize!
