

# ARGUMENTS FOR AN AUSTRALIAN CHARTER OF RIGHTS

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### What is a charter of rights?

Australia is one of the few countries without a constitutional, or even an enacted, statement of the general rights of the citizens. The biggest consultation ever held on such a subject was initiated over the past year by the federal government. It is due to report later in 2009. It is examining whether, like all other modern, elected democracies, Australia should adopt, at the federal level, a law that sets out our basic civil rights.

An idea that has predominated in the consultation is that we *should* adopt a charter of rights. This would contain basic principles. They would not be stated in the Constitution but in an ordinary Act of the Federal Parliament. So Parliament could readily amend or override the stated rights if it saw fit. In cases coming before the courts, judges would be encouraged, so far as possible, to interpret federal laws and common law consistently with the stated rights. If they could not adopt such an interpretation, courts would not have the power to overrule the inconsistent laws. They would only have the power to call the inconsistency to parliament's notice. They would then leave it to

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parliament to decide whether or not to cure the suggested defects in the law. This would be a relatively 'soft' option. However, it would copy reforms adopted during the past 20 years in New Zealand and Britain. The aim would be to encourage respect for basic rights whilst at the same time accepting the parliamentary form of democracy we have in Australia.

### Isn't this alien to British 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 which promised judicial tenure and independence and basic rights for the people. In America in 1776, they did so when the 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 UN 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.

### But won't it undermine parliament?

Australia is one of the most mature parliamentary democracies in the world. The proposal for a charter, akin to the laws enacted 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. Although courts would have a function to examine suggested departures from those rights, parliament 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 and inequalities that arise in the treatment of persons, measured against the charter.

### 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*. We denied our indigenous people respect for 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). It 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.
- 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 charter would encourage courts to cure such instances or to draw them to the attention of parliament.

- Take also *Asian immigrants*. For more than a century, the White Australia policy excluded and discriminated against Asian immigrants. They were made to feel second-class. Eventually, the laws were amended by parliament after 1966. If there had earlier been a national charter, such discriminatory provisions might have been avoided or certainly cured more quickly.
- Take also *homosexuals*. Criminal laws and much unequal treatment have marked the lives of gay citizens. Some of these have only recently been corrected in more than 100 statutes corrected in 2008. Why did they exist for so long? Long after the scientific knowledge about diversity of human sexuality was well known to parliament? Previous governments did not treat the reforms as a priority. Had a charter existed, it might have quickened the pace of reform.

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. This is what a charter of rights can do.

Yet the Soviet and Zimbabwe had such rights

It is true that unjust societies can have ostensibly perfect laws. A charter alone will not cure inequalities or right wrongs. However, in functioning democracies, like Australia, a charter could 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 charter. After the terrible sufferings of the Second World War, this was recognised by the adoption of the UDHR by the world community. All that a charter would add would be a local mechanism for requiring courts and parliaments to take such rights seriously. A charter would also help us to teach children about the rights and duties we hold in common. It would help improve governmental practices and public attitudes.

#### But would it lead to judicial activism?

Some critics of a charter complain that it would lead to excessive judicial activism. This is like a swear word, designed to frighten the people. Where there is injustice, a little judicial activism will sometimes be a good thing. Democracies are often effective in protecting majority interests and rights. They are less effective in protecting vulnerable 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 many international human rights treaties. The question is whether we take these treaties seriously. 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 led to the reforms in Britain and New Zealand, adopting the charter model. These are two countries with legal systems

closest to our own. The complaint of judicial activism is unconvincing. Especially because, under the charter model, all that the judges can ultimately do is to draw the 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 charter is adopted, courts have to deal with the cases brought to them. For example, some critics dislike the idea that prisoners might use a charter to complain about their treatment. However, 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 Court affirmed, in part, the prisoners' complaints. Prisoners are human beings and, as citizens and individuals, have rights. The law is there for everyone. Not just the majority and the popular. It can be left to the good sense of courts to decide if a claim under a charter is justified and warrants remedial orders.

#### 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. This would be a more convincing argument if it were not 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. 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 judicial decisions in particular cases. As well, in some matters, common law principles already encourage judicial intervention. All that a charter of rights does is to make the procedure more systematic, principled, modern and transparent. Indeed, having a charter of rights actually operates in advance of judicial decisions. Those who draft laws for enactment by parliament are required to ensure that those laws conform to the charter. 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 and people join political parties, leaving everything to MPs is a very risky choice. We all know that politicians are sometimes out of touch with ordinary people. Occasionally, they play on prejudice to get elected. Sometimes they neglect minority interests. They are arrogant and prejudiced, as Australia's record shows. And in any case, a three yearly visit to the ballot box hardly involves writing a blank cheque for everything that politicians do, once elected. The wise, calm voice of the courts can occasionally be required 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 charter model 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 simply decide real cases brought between contesting parties. I have no doubt that any federal charter in Australia could be drawn to avoid this problem. 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 charter. Anyone who knows Australian history will deny such perfection, unless he is a starry-eyed politician who has come up the greasy pole of politics or a media mogul who resents the scrutiny of the law in case it addresses the injustice done by the powerful to the powerless and the vulnerable.

### But will anything be done?

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

On the other hand, the consultation on the charter in 2009 has been the biggest enterprise of its kind in Australia's national history. The time has come to bring fundamental human rights home to the law of Australia. We have signed up to so 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 consultation is itself an insurance against neglect or indifference to its outcome. I hope that the outcome of the consultation will be the

recommendation for the adoption of a federal charter or statute or 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.

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