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NEXT TIME: A CHARTER OF RIGHTS ON THE CENTENARY OF GALLIPOLI

Graham Wilks Lecture 2010
Effective Living Centre
Adelaide, South Australia
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The Hon. Michael Kirby AC CMG*

A DISSAPOINTING OUTCOME

The announcement by the Federal Government that it has rejected the unanimous recommendation of the Brennan inquiry that Australia should have a national *Charter of Rights* is a great disappointment to many Australians. Whilst the proposals for a new human rights ‘Framework’ are to be welcomed, they are no substitute for the real thing. As Professor George Williams has observed: ‘The people with power don’t want to give it up.’ Self-regulation by politicians when it comes to human rights is ‘the problem, and not the solution’.

So why are Australians so frightened about a *Charter of Rights*? Why would our politicians of different political persuasions join together in opposition of a *Charter* or in silence that allows this desirable idea once again to be put on the backburner? Why do we have to await a braver time when vocal parliamentary champions of the idea emerge, as happened earlier in Britain and New Zealand. Let us be sure of one

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thing: the idea of a human rights *Charter* is not dead in Australia. The idea has not succeeded this time. But succeed it will.

WHAT IS A CHARTER OF RIGHTS?

Australia is one of the few countries in the world 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 Brennan Committee. Its report was delivered in 2009. The Committee examined whether, like other modern, elected democracies, Australia should adopt, at the federal level, a law that sets out a citizen's basic civil rights. It recommended that it should.

The *Charter* suggested by the Brennan Committee proposed certain basic principles. The principles would not be stated in the Australian Constitution but in an ordinary Act of the Federal Parliament. So Parliament could 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 the common law, consistently with the stated rights. If they could not adopt such an interpretation, courts would not have the power to invalidate the inconsistent laws. They would only have the power to call the identified inconsistency to parliament's notice. They would then leave it to parliament to decide whether or not to cure the suggested defects. This was a relatively 'soft' option. However, it would have copied reforms adopted during the past 20 years in New Zealand, Britain, Victoria and the Australian Capital Territory. The aim was to encourage respect for basic rights whilst at the same time upholding the parliamentary form of democracy we have in Australia. Yet even this limited proposal was unacceptable to the people with power.

ISN'T THIS ALIEN TO BRITISH TRADITIONS?

English-speaking people have adopted *Charters of Rights* in the past. They did so in 1215 with the *Magna Carta* signed by King John at Runnymede. This promised due process. They did so again in 1688 in the *Bill of Rights* and other laws of that era that 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 by restricting the powers of the House of Lords to block legislation passed by the democratic lower house of parliament. The *Australian Constitution* of 1901 contains a limited 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.

BUT WON'T IT UNDERMINE PARLIAMENT?

Australia is one of the oldest parliamentary democracies in the world. The proposal for a *Charter*, akin to the laws enacted in Britain, New Zealand, Victoria and the Australian Capital Territory would not have damaged our parliamentary institutions. On the contrary, it would have enhanced 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 have the last word. Far from damaging our democratic institutions, such a development would have strengthened them. It would have encouraged

parliament and all public officials to examine and, where they saw fit, to correct alleged injustices and inequalities that arise in the treatment of anyone, measured against the standard of 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 (especially minorities) unjustly and unequally. Australia's history has been marked with unfortunate illustrations of such injustice:

- Take *Aborigines*. We denied our indigenous people respect for their traditional rights to 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 those 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 direct operation in its own law. The *Charter* would have done this.
- 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 have encouraged 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 in 1966. If there had earlier been a national *Charter*, such discriminatory provisions might have been avoided or 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. Others remain in force. Why did they survive for so long? Long after the scientific knowledge about the 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 as has happened in other countries.

In these and other instances, Australia’s laws have reflected the values of past generations. If we count every individual in Australian democracy as precious, we need effective means to stimulate the correction of injustice and inequality. This is what a *Charter of Rights* would have done.

THE SOVIETS 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 have stimulated 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 sufferings of the Second World War, this was recognised by the adoption by the world community of the UDHR and later treaties. A *Charter* would have added a local mechanism for requiring courts and parliaments to take such rights seriously. A *Charter* would also have helped us to teach children about the rights and duties we hold in common. It would have helped improve governmental practices and public attitudes.

BUT WOULD IT LEAD TO JUDICIAL ACTIVISM?

Some critics of a *Charter* complained that it would lead to excessive ‘judicial activism’. This is like a swear word, intended to frighten the people. But, where there is injustice, inequality and discrimination, a little activism by judges will sometimes be a good and proper thing. Democracies are often effective in protecting majority interests and rights. They are sometimes 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 so many international human rights treaties. The question is whether we take these treaties seriously. And whether we afford effective remedies to our own people at home to make sure that we observe the principles when they are most necessary.

WHY SHOULD WE HAVE TO GO TO 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 that are most similar to our own. The complaint of judicial activism is

unconvincing. Especially because, under the *Charter* model, all that the judges could ultimately do was to draw the suggested inconsistency to the notice of parliament so that it could consider curing the wrong that is drawn to its notice. What is so undemocratic about that?

ARE NOT SOME OF THE COMPLAINTS TRIVIAL?

If a *Charter* had been adopted, courts would have had 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. Yet, 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 disproportionate and 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 for the majority and the popular. It could safely be left to the good sense of the judges to decide if a claim under a *Charter* was justified and warranted remedial orders.

ARE OUR JUDGES INCOMPETENT IN SUCH MATTERS?

Some politicians 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 were 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* would have done was to make the procedure more systematic, principled and transparent.

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 basic 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 a very risky option. 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. 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 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 and ignores the correction of wrongs. When that happens, parliament may need a judicial stimulus to get things 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 a 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 in Australia 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 climbed up the greasy pole of politics or a media mogul who resents the prospect of scrutiny by the law in case it addresses the injustice done by the powerful to the powerless and the vulnerable.

WILL ANYTHING EVER BE DONE?

Finally, it is suggested that we *should not waste our time* on 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 my count, the rejection of the Brennan proposal of 2009 is the fifth time in four decades that such a proposal has been refused.

In my opinion, the time has come for Australians to bring fundamental human rights home to the law of Australia. We have solemnly 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 recognised) is a home-

made mechanism for testing our laws against the standards of fundamental human rights. Beyond dispute, Australian history shows the need for such a process. The high level of public interest in the Brennan inquiry gives an indication of the deep feeling of many Australians on this subject.

A WORTHY GOAL FOR THE CENTENARY OF GALLIPOLI

The Federal Government has included in its new ‘Framework’ for human rights protection a review of its 2010 response to the Brennan Committee’s report. That review would take place in 2014. This would be in time for any action to be decided by the Federal Parliament in 2015. That year will be the centenary of the ANZAC landing at Gallipoli in Turkey in 1915. The Prime Minister has recently announced the creation of a distinguished committee to reflect on the way in which our country should mark that centenary.

The national celebration of ANZAC Day on 25 April 2010 showed once again how our nation yearns for a national occasion when it can honour its war dead and their sacrifices. But it also searches its collective memory and feelings for what are the truly important values that bind us together as Australians. In default of another acceptable occasion, we feel deeply about ANZAC Day. Yet why did the brave young soldiers travel to Gallipoli? Are there valid reasons for memorialising ANZAC today, nearly a century on?

For some, the call to Gallipoli in 1915 was the call to arms and adventure – a very rare chance in those days for ordinary Australians to travel overseas. For some, it was a matter of loyalty to the King, when Britain itself was in danger. For some, it was a realisation that they were

fighting a war amongst Empires on the side of the British Empire – the most benign then and after, which was *our* Empire, to which Australia belonged. At least the British Empire had self-governing dominions (for ‘white’ settlers). It boasted parliamentary democracy and independent courts for people derived from the British Isles. It had long term aspirations of equality for all. Very long term if they were not ‘white’.

If they thought about these things, the young ANZAC soldiers would have realised that Australia’s economic fate was bound up with Britain’s and that a world in which Britannia still ruled the waves was a better and safer world, particularly from Australia’s point of view. Safer by far than a world ruled by the militaristic regimes of Imperial Germany and Austria. Few of the ideas for which Gallipoli was fought in 1915 remain relevant today. For the most part, all that is left is courage by soldiers who went where their government decided they should go. As others did, after them. And as some still do today.

So what are the values that unite Australians today? Surely they would be the values that we should ascribe to the brave soldiers who fought under hellish gunfire, died in muddy trenches and then in the dead of night, retreated from the Dardanelles. And all those who have sacrificed and endangered their lives ever since. I believe that the universal values of basic human rights are the real values of the Australian nation – the nation of a ‘fair go’ for all. A true and noble aspiration that we should ascribe to the valour of the ANZACS. Certainly, we should attribute to them something about values. Something about human dignity and equality. Something positive not just imperial power. Something that binds Australians together today and is affirmative.

For the moment, the hopes of an early Australian *Charter of Rights* have been dashed. For the time being, Australia will remain the only civilized, modern country without a national law of universal rights. But when the review is conducted in 2014, we must hope for a more informed debate than we have had this time in the major political parties, in the Parliament itself and in the wider Australian society. Australia has, after all, had an appalling record in its treatment of minorities: Aboriginals, Asians, people of colours, gays, minority religions, communists, refugee applicants etc. Certainly, this is not a history to justify complacency and self-satisfaction. An opportunity to add genuine equality discourse to our national culture has been lost this time round. Once again, those with political power have refused to share that power with the people, in all of their diversity. Those who feel the injustice of this decision must be better organised on the next attempt. Next time, they must ensure that the idea of a *Charter of Rights* is achieved in Australia. They must have a goal and an aspiration worthy of the subject matter and of the occasion.

On the centenary of Gallipoli, Australians should therefore aspire to shift the national ideals and values of Australia for the century ahead:

- From reverence of an act of war to celebration of an act of law and peace;
- From remembering a military failure to acknowledging a civic success;
- From recalling an imperial adventure, far from Australia, to achieving true citizen empowerment within Australia and on our own soil; and
- From reflecting on courage, death and bloodshed to a proclamation of the equality and dignity of all people in Australia as

an active democracy - a microcosm and example that we are courageous enough to then suggest is a good society, a model for the entire world.
