A CHARTER OF RIGHTS FOR THE NORTHERN TERRITORY

2007 Charles Darwin Symposia – Securing Territorians Rights: Statehood and a Bill of Rights?

Thanks and delighted to be here, especially as I have a long standing interest in any move to statehood by the Northern Territory.

BACKGROUND

Australia is now the only democratic nation without a national Bill of Rights. Some form of protection for and exception about basic rights is seen as an essential component of democratic governance around the world.

I am not aware of any nation that has gained a new Constitution in the last two decades that has not included some form of bill of rights, nor am I aware of any democratic nation that has ever done away with its Bill of Rights.

In other nations with federal systems, including the United States and Canada, it is common to find charters of rights at each tier of government where elected representatives exercise power on behalf of the people.

My view is that Australia should have a national charter of rights to apply to the work of the federal government. However, each State and Territory, such as the North Territory, should also enact their own charter to apply. This would ensure that at every level where politicians exercise power on behalf of the people their power has a check and balance designed to protect our fundamental human rights.

WHY?

Many Australians believe that our system of government already has strong express protection for human rights.

Roy Morgan Research survey in 2006 of 1001 voters: remarkably, 61 per cent said they thought Australia does have such a law, with only 13 per cent indicating no and 26 per cent saying they could not say. It reflected the significant public debate about such matters after 11 September 2001 and the false assumptions about the legal system formed as a result of that debate, as well as assumptions based on references to charters or bills of rights in popular culture like US TV programs.

After informing Australians about the absence of a bill of rights, the survey then asked whether they would support such a law. 69% per cent answered they would be very likely or likely do so.

The reality is that the legal protection we have now is often weak in regard to some of our most important human rights.

Constitutional freedoms are few, and many basic rights receive no protection. A quick comparison between the Australian constitution and any charter of rights in a like nation makes this clear. Where, for example, is our freedom from discrimination on the basis of race or sex or from cruel and unusual punishment or torture? Even where rights are implied into the Constitution the coverage is limited. For example, the right to political speech does not extend to other important types of communication.

As well as failing to protect many basic rights, our legal system fails to guarantee that all Australians are entitled to the few rights it does offer. Several important gaps exist. For example, section 92 only protects “trade, commerce and intercourse among the States,” while section 117 only protects a “resident in any State” where he or she is “subject in any other State to any disability or discrimination.” Territorians also lack the same voting rights as other Australians in referendums, with their votes counted only towards the national vote.

The state and territory also constitutions themselves lack protection, and are almost barren of provisions that expressly protect human rights. There are very few exceptions in a document like the Northern Territory self-government act.

THE CONSEQUENCE OF INADEQUATE PROTECTION SHOWS

Many national examples:

- Children in detention (over the past few years Australia has locked up children in conditions that have caused many of them to become mentally ill).
- Right to vote (and closing of the rolls for young people)
- Freedom of speech (Albert Langer plus Pauline Pantsdown)
- Anti-terror laws – sedition plus ASIO powers.

Northern Territory:

Also many local egs: people suffering mental illness and the homeless

But take the regime of mandatory sentencing introduced in the Northern Territory in March 1997 for minor property crimes.

The new law applied to a wide range of offences, with minimum penalties for each “strike” irrespective of its seriousness. Strike one meant fourteen days in prison, strike two 90 days, and for three strikes or more the minimum prison term was twelve months.

Not surprisingly, the new law led to an alarming rise in the imprisonment rates of Indigenous people, including women and children. One 21-year-old Aboriginal man was sentenced to a year in prison for the theft of $23 worth of cordial and biscuits. Other sentences included fourteen days’ jail for receiving a stolen $2.50 can of beer, one year for stealing a $15 towel and 90 days’ jail for stealing 90 cents from a motor vehicle.

In 2000, the regime became the focus of national attention when a fifteen-year-old Aboriginal boy committed suicide in jail stealing texta colours and a can of spray paint valued at less than $50. Dr William Jonas, the federal Aboriginal and Torres Strait Islander Social Justice Commissioner, described the law as “the antithesis of justice” and “racist” in its impact. The law was also condemned by a former Liberal prime minister, Malcolm Fraser, as well as by former justices and chief justices of the High Court.

A challenge was brought against the mandatory sentencing regime, but the law was upheld by the Supreme Court of the Northern Territory. Special leave to appeal to the High Court was refused on the basis that “the proposed appeal does not enjoy sufficient prospects of success.” Without a charter of rights, there was no rights principle that could be used to defeat the law, despite its severe and disproportionate impact on Aboriginal people.

The Northern Territory law attracted international attention. The United Nations Committee on the Elimination of Racial Discrimination found that it had a "racially discriminatory impact," breaching Australia's international treaty obligations to protect human rights.

In response to such criticism, the chief minister of the Northern Territory, Denis Burke, leader of the Country Liberal Party, told ABC Radio's PM program that the UN's intervention was "designed" to cause embarrassment. "This is designed to shame Australians. And to my mind [this is] an opportunity for Australians to tell them to bugger off." Prime Minister John Howard also rejected any international pressure, saying on Perth radio 6PR that "we are mature enough to make decisions on these matters ourselves, full stop."

The Northern Territory repealed mandatory sentencing in October 2001, but only after the election of a new Labor government led by Clare Martin. Two years later a study of the impact of the law by the Northern Territory Office of Crime Prevention found that 1715 people were, on at least one occasion, subject to a mandatory minimum term of imprisonment. Of these, 73 per cent were Indigenous and 27 per cent non-Indigenous. Of the one-year minimum sentences handed out, 95 per cent were ordered against Indigenous offenders. Indigenous people made up around 29 per cent of the Northern Territory population.

Fixed after the event by NT Parliament and a vindication for our parliamentary processes? Damage then done …

The lack of a charter of rights meant that some Australians searched outside our borders for answers during the debate on mandatory sentencing, turning especially to international treaties and conventions. These have their place, but

they cannot make up for the fact that there is no Australian reference on human rights.

When, for example, mandatory sentencing arose as a political issue, attention turned to the UN Convention on the Rights of the Child. Article 40 requires that children be "dealt with in a manner appropriate to their wellbeing and proportionate both to their circumstances and the offence." Because it does not allow for proportionality between the offence and the sentence, mandatory sentencing is inconsistent with article 40.

Unfortunately, while this convention had an important role to play in the debate, it obscured our own lack of standards on human rights. By telling the United Nations to "bugger off," Chief Minister Burke also rejected the only available source of human rights principles for the debate. The attention given to the convention and the role of the United Nations buried the question of whether the Northern Territory law was inconsistent with the respect Australians have for, among other things, the right to a fair trial and, if convicted, a just sentence.

Our own set of values and even the Australian sense of a "fair go" could have led to the conclusion that mandatory sentencing was unjust and wrong because the punishment did not fit the crime. Unfortunately, our system of law was unable to supply this answer.

These examples demonstrate how in the absence of a legal check our fundamental freedoms are solely dependent on the wisdom and good sense of our elected representatives. Without a charter of rights, many of our basic freedoms can be taken away by federal, state and territory parliaments.

THE MODEL

Should have a Charter, whether a Territory or a State.

Bill (US model) vs Charter (moved away form the US to an ordinary Act of Parliament: NZ 1990, UK 1998)

Debates now in Tasmania and WA.

Done with law in ACT 2004. Victoria Charter of Human Rights and Responsibilities 2006:

- No US style Bill of Rights, but consistent with parliamentary sovereignty and based upon the UK, NZ and ACT.
- Charter of Human Rights *and Responsibilities*, with a values-based preamble.
- Ordinary Act of Parliament – incremental approach based upon what works now.
- ICCPR rights as adapted for Victoria (eg *right to life*): rights that are the most important to an open and free democracy, such as the rights to freedom of expression, to equality before the law and to a fair trial and to vote.
- Rights for all.
- Rights not be absolute: clear that they can be limited, as occurs in other nations, where this can be justified as part of living in a free and democratic society. Our elected representatives can continue to make key decisions about economics and social policy.
- Focus on education and improving government (better cultures, eg respect for law). Happy to talk about how it would work in practice (focus on policy and parliament – improving the political process not giving power to the courts).

How does it work?

- Public servants will take the human rights in the Charter into account in developing new **policies**.
- **Public authorities** like government departments will be required to comply with the Charter.
- Where decisions need to be made about new laws or major policies, submissions to Cabinet will be accompanied by a **Human Rights Impact Statement**.
- When a Bill is introduced into the Victorian Parliament, it will be accompanied by a **Statement of Compatibility** made by the person introducing the Bill setting out with reasons whether the Bill complies with the Charter. 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** will have a special role in examining these Statements of Compatibility. It will advise Parliament on the human rights implications of a Bill.
- Victorian courts and tribunals will be required to **interpret** all legislation, so far as is possible to do so, in a way that is consistent with the Charter. In doing so, they will need to take account of why law passed in the first place.
- Where legislation cannot be interpreted in a way that is consistent with the Charter, the Supreme Court will be able to make a **Declaration of Inconsistent Interpretation**. This will not strike down the law and Parliament could decide to amend the law or to leave it in place without change.
- Where the circumstances justify it, Parliament will be able to pass a law that **overrides** the rights in the Charter. This will prevent a Declaration of

Inconsistent Interpretation being made in respect of the law for five years. The override can be renewed.

WOULD IT MAKE A DIFFERENCE?

A charter could make a real difference to the protection of human rights in the Northern Territory. It would give legal effect to many of our basic freedoms for the first time. While Australians often assume that they have these rights, the charter would turn them into law.

Like the Universal Declaration of Human Rights 1948, a charter could also have a symbolic force that promotes important values like freedom, community responsibility and tolerance of cultural diversity. It is how it can help to prevent the making of bad laws and how it can be used to educate, shape attitudes and bring hope and recognition to people who are otherwise powerless.

The impact of a formal statement of rights at the community level was demonstrated by a 2003 study of the Americans with Disabilities Act 1990. Researchers David Engel and Frank Munger interviewed 60 people with disabilities and examined their life histories.

They found that the new law was having a profound effect, but not in terms of court actions. Indeed, none of their interviewees had brought such a case. Instead, they found the law affecting "the way people talk and think, usually in social contexts far removed from the courts." In granting basic rights to people with disabilities, the Act "played a crucial role in their lives." They went on:

> "Rights transformed their self-image, enhanced their career aspirations, and altered the perceptions and assumptions of their employers and co-workers – in effect producing more inclusive institutional arrangements."

The study demonstrated how the legal protection of rights enhanced the culture of rights protection at the individual and community levels, with a very positive effect on the day-to-day lives of people with disabilities.

A charter of rights could also have a powerful effect on the making of new laws and on improving the accountability of governments to the people. Take the example of Northern Territory mandatory sentencing regime.

First, the existence of a charter of rights would make it more likely that human rights concerns would be raised as the law was passed, rather than at some later time. At present, problems can go unnoticed and unreported if an issue is only aired years after the law has come into force, and the impact can be devastating. After mandatory sentencing was introduced in the Northern Territory in March 1997 the imprisonment rates of Indigenous people rose alarmingly. Yet the issue did not reach the national political agenda until three years later. The charter would help prevent problems by playing a role before law enacted.

Second, a charter of rights would create a reference point against which to examine proposed laws. These laws would be debated in parliament and within the community not only according to how they meet external international standards, but also on the basis of our own developing sense of human rights. This would strengthen the law-making process and, through parliamentary committees, community interaction with the political system.

Third, even if the law were passed, the charter of rights would provide a means for an independent determination of whether the law breaches human rights. In the courts, an affected person could argue for an interpretation of the law that protects rights, or even that the law is incompatible with those rights. In the latter case, a decision by the court to find that a law is incompatible would send the law

back to parliament for a second look. With the benefit of hindsight, and perhaps after the initial political debate has cooled, this could provide a crucial second chance to examine the law. This has certainly been the experience in the United Kingdom. Its parliament has in every case moved to fix a human rights problem with a law once it has been identified by a court.

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Of course, governments, parliament and courts already take some account of human rights. But rights are often only referred in an ad hoc way because there is no obligation in the law for them to be considered; nor are they set out in a clear instrument enacted by parliament. When they are needed most, human rights can simply be absent from the debate. By contrast, a charter would mean our fundamental freedoms are given a higher status and legitimacy within government. Their protection would be approached more seriously and systematically.