

Submission to the National Human Rights Consultation by the Mornington Peninsula Human Rights Group

Introduction

The Mornington Peninsula Human Rights Group is a small grass-roots organisation committed to promoting in our municipality and beyond understanding of and respect for human rights through programs of community education. We began as a group of friends, who gathered together in November 2005 to make a submission to the Victorian Human Rights Consultation. With support from the Mornington Peninsula Shire, we organised in May 2006 a Forum for the general public to hear and respond to the Report of the Consultation Committee. Hadden Storey QC, a member of the Committee, presented the Report and answered questions from the almost 300 people in attendance. Two days later the Victorian Attorney-General introduced a bill to State Parliament which became the Victorian *Charter of Human Rights and Responsibilities*. Hoping that the Victorian action would lead to a National Charter, we sought to prepare ourselves by holding a seminar in November 2006 led by Professor Spencer Zifcak to examine the draft bill he and others had prepared for a National Human Rights Act. In February 2007, we wrote to all Victorian Senators urging them to support the introduction of the Zifcak draft as a private member's bill so that it could be referred to a senate committee for examination and report. Only four of Victoria's twelve Senators replied to our letter. We were encouraged by the Commonwealth Attorney-General's commitment in August 2008 to hold a National Consultation and, following its formal announcement on Human Rights Day, 10 December 2008, we committed ourselves to making a submission.

During the three years since our formation, we have tackled a range of human rights issues including: the scandal of torture, the prolonged detention without trial and harsh remand conditions of the Barwon 13, reforming Federal indigenous affairs policies, refugees and asylum seekers at the Baxter detention centre and issues relating to the conduct of war and initiatives for peace.

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We currently have 15 financial members, twice that number have worked on our various projects, and we email our bi-monthly newsletter, CONNECT, to over 160 people. Members of our group have experience in a range of occupations including education, health, business, finance, the media, academia, ordained ministry.

1. Which Human Rights (including Corresponding Responsibilities) should be Protected and Promoted?

We believe in the inherent dignity of the human person and therefore that all people have certain fundamental human rights.

What are these rights? The *Universal Declaration of Human Rights*, proclaimed by the United Nations in 1948, is the classic statement of them. It is not for us to try to re-invent the wheel, but to accept and honour this list which has given rise to much national and international human rights law during the last six decades. Following a public reading of the Declaration at one of our meetings, members of our Group spontaneously remarked on the inspiring and compelling nature of its sentiments and propositions, even though most had read and studied them previously. We consider that these are the rights that should be protected and promoted by Australian law.

Rights have corresponding responsibilities. For instance, the right to life implies, negatively, the responsibility not to deprive another of life and, positively, to do all in one's power to preserve a life against threats to it. When protecting and promoting rights by legislation, their corresponding responsibilities should also be protected and promoted.

Protection

The protection of human rights is principally a legal matter. Absolute rights, such as freedom from servitude and freedom from torture, can be effectively protected by law. Conditional rights, such as the right to work and the right to an adequate standard of living, cannot be guaranteed by law but are dependent upon the resources available. Such rights are to be progressively realised. However, the protection of all rights in a particular society is dependent upon the climate of opinion in that society. Protection, therefore, requires both legislation and community education and action. The one reinforces the other. Good human rights law encourages the development of a "human rights culture": a widespread human rights culture makes possible the enactment of human rights law.

Promotion

The promotion of human rights is directed at creating a human rights culture in the general community and in the institutions of government and public administration.

Examples, which we have studied, of significant human rights legislation at the international level include the *International Covenant on Civil and Political Rights* and the *International Covenant on Economic, Social and Cultural Rights*. We are aware of other United Nations treaties, and in 2007 we made a submission to the national enquiry into the optional protocol to the *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*. All these treaties have had a profound influence on the protection and promotion of human rights. At the national level, we are aware of the constitutional bills of rights of the United States of America, Canada and South Africa and of the human rights Acts passed by the governments of the United Kingdom, New Zealand and the Australian Capital Territory and we have studied the Victorian *Charter of Human Rights and Responsibilities*. The reports of the Victorian Equal Opportunity and Human Rights Commission and a lecture given in October 2008 in Melbourne by Lord Bingham, then recently retired as Senior Law Lord of the United Kingdom, strongly suggest that national legislation has been effective in protecting and promoting human rights.

2. Are These Rights Currently Sufficiently Protected and Promoted?

The protection of human rights by the Australian Constitution, Commonwealth and State and Territory legislation, and the common law is limited and piecemeal. Rights which many Australians take for granted are not protected. We give two examples to illustrate how our legal system has proved unable to protect certain human rights. The first example shows that under Australian law the

right to liberty can be lost and the second that the rights to freedom of speech and freedom of movement can be suspended.

Al-Kateb v Godwin (2004)

Ahmed Al-Kateb arrived in Australia without a visa, and was later found to be a stateless person. He was taken into immigration detention, and applied for a visa. His application failed. He then wrote to the Minister requesting to be removed. Removal did not take place, because attempts to obtain the necessary international co-operation were unsuccessful. There was no possibility of re-settlement in Palestine, his country of birth, nor in the surrounding Middle Eastern countries. There was no real likelihood or prospect of removal in the reasonably foreseeable future. He faced indefinite detention in Australia. There is no dispute that any Government has the right to use administrative detention in instances of a non-visa holder for the purpose of processing and removal. It is the position of statelessness that renders the purpose of non-judicial detention unclear in the absence of the possibility of re-settlement. Al-Kateb's matter came before the High Court which found in a four to three decision that there was nothing in the Australian Constitution to invalidate the mandatory detention required in the case by the Immigration Act. An international human rights perspective was not taken into account even though Australia had signed, but not incorporated in domestic law, a number of relevant treaties. Clearly Al-Kateb's right to liberty was being breached, and his right to a nationality had previously been taken away. It is noteworthy that following the High Court decision, Justice McHugh who voted for the Court's majority decision, publicly indicated that if Australia had a Federal Charter of Human Rights a different outcome could have been achieved.

Evans v State of New South Wales (2008)

The Catholic Church's World Youth Day was held in Sydney in 2008. Its week-long celebrations and events were attended by the Pope and many thousands of young people from around the world. Regulations gazetted under the authority of the World Youth Day Act 2006 (NSW) enabled officers to order a person within a declared area to cease engaging in conduct causing annoyance or inconvenience to participants. The validity of this regulation was challenged in the Federal Court by Rachel Evans, a member of an organisation known as the No to Pope Coalition, an unincorporated association of persons and groups opposed to the teachings of the Catholic Church on sexuality, contraception and reproductive rights. Evans proposed to wear a t-shirt bearing the slogan "The Pope was Wrong - Put a Condom On!" and to distribute leaflets, flyers, stickers and condoms to participants and the general public. The Court upheld her challenge despite the annoyance her actions would cause. It argued that an Act of Parliament must be interpreted so as to uphold common law rights and freedoms, unless the Act clearly intends to over-rule them. The World Youth Day Act 2006 did not seek to over-rule freedom of speech and freedom of movement, therefore the regulation banning conduct causing annoyance in a particular area was invalid. Evans may have won, but the result of this case is that freedom of speech and freedom of movement can be cancelled or limited in the future, as long as Parliament makes clear its intention to do so. Common law rights and freedoms are too susceptible to being over-ruled by parliaments when public emotions are running high. A National Human Rights Act, while it could be over-ruled by the National Parliament, would be politically more difficult to over-rule. This would be especially so if the Act included a requirement for a "compatibility statement" from the Attorney-General (see below).

The following brief summary of Australia's human rights laws further illustrates their limited and piecemeal nature..

The *Australian Constitution* guarantees the right to vote, proper compensation when property is acquired, trial by jury for indictable offences, no establishment of a religion by law or legal prohibition of the free exercise of religion, and no discrimination on the basis of the state of residence. In addition, decisions of the High Court have indicated that there are some implied rights. The Constitution's provision for elected parliaments is held to imply free speech and communication on matters concerning politics and government. There is, however, no list in our Constitution of personal rights or freedoms which may be enforced in the courts.

Commonwealth Legislation includes the *Racial Discrimination Act 1975*, the *Sex Discrimination Act 1984*, the *Disability Discrimination Act 1992* and the *Age Discrimination Act 2004*, but these do not comprehensively enact the provisions of the United Nations treaties which Australia has signed. The Human Rights Commission, set up by Commonwealth law, can investigate and report to Parliament, but cannot enforce legal remedies.

The *Common Law* includes such things as the right against self incrimination and the standard of proof in criminal cases as “beyond reasonable doubt”. Common Law rights are limited in scope and can be over-ruled by legislation (see comments on *Evans v NSW* above).

State Constitutions and Legislation establish parliaments and courts and provide complementary anti-discrimination legislation.

International Law: Australia has signed many international treaties but, as already noted, has not comprehensively incorporated them in domestic law. They include: the *International Covenant on Civil and Political Rights*, the *International Covenant on Economic, Social and Cultural Rights*, the *Convention on the Rights of the Child*, the *Convention on the Elimination of all forms of Discrimination against Women*. Various United Nations committees set up under these treaties can investigate and report, but their findings are not binding in Australia, and our governments often reject or ignore their reports and recommendations.

Australia's record in recent years includes many instances of human rights failures, e.g., mandatory, indefinite immigration detention, indefinite detention of asylum seekers including the long-term detention of children, the treatment of Dr Mohammed Haneef and David Hicks by our anti-terrorism laws, turning a blind eye to the rendition and torture of Mamdoub Habib, the suspension of anti-discrimination law for the Northern Territory Intervention, 100,000 homeless people many of whom are turned away each night from refuges, a 17 year life-expectancy gap between Aboriginal and non-Aboriginal Australians.

Australia is the only western nation without a Charter of Human Rights.

3. How could Australia Better Protect and Promote Human Rights?

(a) By a Charter of Human Rights

Our view is that Australia needs a Charter of Human Rights. We urge the Australian Government to introduce a bill for a Human Rights Act along the lines of the draft bill prepared by the team led by Professor Spencer Zifcak (www.humanrightsact.com.au/ahrg/ and go to Human Rights Act for Australia - Model Bill). This draft is a natural outcome of the *Universal Declaration of Human Rights* and of the various international treaties and national laws which have flowed from it. We think that this would be the single most important step that could be taken to better protect and promote human rights in Australia.

The following discussion examines the nature and consequences of a Human Rights Act based on the Zifcak draft bill. Such an Act would:

1. identify the specific rights and responsibilities which our nation believes should be respected, protected and promoted by law
2. require all legislation being brought to the Federal Parliament to include a statement of compatibility with the human rights identified in the Act

3. require courts, government departments and public authorities to administer the law and make administrative decisions in conformity with these protected human rights
4. enable those whose human rights have been breached by a public authority to bring proceedings against the authority in a court.

The advantages of such an Act (one based on the Zifcak draft bill) would include the following:

1. By bringing together in one place those rights and responsibilities to be respected, protected and promoted in our society, such a Human Rights Act would provide a standard for our community to judge public actions, behaviour, relationships and aspirations.
2. By clearly identifying those human rights to be honoured and protected by law in our society, it would contribute to the development of a human rights culture among legislators, judges, lawyers, civil servants, police and those who work in municipal councils, public schools, public hospitals, other public authorities like Centrelink and Medicare, and in the general public. Administrative decision-making would become more consistent with a growing expectation for human rights.
3. By the noble sentiments in its preamble and by the plain English of its list of rights and responsibilities, it would serve an important educative function. Hopefully it would become a document Australians were proud of, as Americans are proud of their Bill of Rights.
4. By being in the form of an Act of Parliament, rather than a Section of the Constitution, Parliament would remain sovereign. In special circumstances, Parliament could change or suspend particular rights or add to them, but it would have to do so openly.
5. By requiring the Attorney-General to provide a "compatibility statement" for each bill presented to Parliament, by requiring a Parliamentary Joint Standing Committee to review these and other human rights matters concerning the Parliament, and by requiring Courts to report to Parliament provisions in legislation that cannot be interpreted in accord with the Act, it would improve government policy-making and strengthen the protection of human rights in Australian law. However, a statement of incompatibility would not invalidate legislation or proposed legislation. It would be for Parliament to make the final decision.
6. By affirming that the human rights in the Act are exerciseable by everyone within Australia's jurisdiction, it would help protect the rights of minorities and the powerless.
7. By requiring regular reviews, it would keep the Act open to revision in the light of experience and changing community understandings of human rights.
8. By strengthening the powers and functions of the Human Rights Commission, it would encourage education, discussion and good practice in matters concerning human rights and responsibilities.
9. By expressly excluding existing abortion laws from the operation of the proposed Act, it would not seek to determine a matter on which the Australian community is deeply divided.

Opposition to a Human Rights Act for Australia

While it is right that the proposal for a Human Rights Act should be thoroughly tested in public debate, it is also right that the arguments of opponents should be likewise tested. Many of the latter do not stand up when applied to the Zifcak draft bill.

Power to unelected judges: It is frequently claimed that a Human Rights Act would be undemocratic by giving unelected judges the power to override the judgment of Parliament, indeed that such an Act would be alien to our tradition of Parliamentary sovereignty. When it is pointed out that a statutory Human Rights Act does not diminish the sovereignty of Parliament, the ground is shifted. The claim then becomes that unelected judges would have the power to interpret the words of the Act and so override the intention of the Parliament. Interpreting the words of acts is the constant task of judges. Should an interpretation not reflect the wishes of Parliament, Parliament always has the power to amend the words. In this regard, it is also claimed that a Human Rights Act would politicise the judiciary. The answer is, No more than is already the case.

Increased litigation: Another claim is that a Human Rights Act would be very expensive given the amount of litigation it would generate. In his Melbourne lecture last year, Lord Bingham stated that after ten years experience of the United Kingdom's Human Rights Act 1998 there had been no significant or unreasonable increase in litigation under it. The Zifcak draft bill is modelled on the United Kingdom Act.

Ineffectiveness: It is further claimed that rights listed in a Human Rights Act actually make little or no difference in protecting rights. Lord Bingham quoted a number of cases to illustrate the effectiveness of the United Kingdom human rights legislation. More significant, but more difficult to measure, is the gradual development of a human rights culture, which such an Act would encourage. A related claim is that such an Act would actually restrict rights, because to define a right is to limit it. Should a judicial definition unduly limit the scope of a right, it is for Parliament to correct it. Significantly, the Zifcak draft bill includes a clause which states that "an existing right or freedom shall not be held to be abrogated or restricted by reason only that the right or freedom is not included in this Act or is included only in part".

Political action: A very general claim is that our political system itself is the best protection of rights in Australia and that a Human Rights Act is therefore unnecessary. While it is true that political action has sometimes resulted in correcting breaches of the rights of individuals, the process is slow and uncertain and, even when successful, does not always result in permanent corrections. David Hicks was held in harsh detention at Guantánamo Bay without trial for five years before public opinion persuaded the Government to seek his release. Children were held in detention at Baxter and other centres for long periods before public outrage led to their release, but no change was made to the law under which they were detained.

Undue power to minority groups: A disturbing claim is that a Human Rights Act would give disproportionate power to minority groups. Frequently the groups referred to by those who make this complaint are unpopular as well as politically powerless, and they are often characterised as being unworthy of human rights: so Aborigines are labelled as drunken child molesters, asylum seekers as illegal immigrants, Muslims as violent Jihadists, bikies as murderers, the unemployed as dole bludgers. Human rights are not earned but inhere in all human beings. Generally the rights of the majority are safe. It is the rights of the weak and the unpopular that are most at risk. A Human Rights Act needs to protect such people, even if it seems that they are receiving special consideration. This does not mean that those who break the law are to be protected from the consequences of their actions.

Possible Addition to the Zifcak Model

The list of rights identified in the Zifcak draft bill are those in the *International Covenant on Civil and Political Rights* and the *International Covenant on Economic, Social and Cultural Rights*. We suggest that rights and responsibilities associated with the environment might appropriately be added given today's concerns. Perhaps the following might be added as clause 2 to Article 41 of the Zifcak draft:

- (2) Everyone has the right to a safe and healthy environment.

While we do not wish to suggest that a National Human Rights Act would solve all Australia's human rights problems, we believe that an Act along the lines we have described would be an important and necessary step towards securing the human rights of all Australians.

(b) By Other Initiatives

Education

The enactment of a Charter of Human Rights needs to be accompanied by a major education campaign to prepare not only those involved in the institutions of government and public administration but also members of the general public. This would be a major responsibility of the Human Rights Commission, and it would need adequate resourcing to meet this demand.

A Declaration of Human Responsibilities

A special educational project could be the development of a list of human responsibilities corresponding to the list of human rights. It should be seen as an expansion and development of paragraph 6 of the Preamble to the Zifcak draft. We recommend the establishment of a National Consultation to receive submissions and conduct roundtables in order to prepare a Declaration of Human Responsibilities. It would include mandatory responsibilities like the legal requirements to vote and to obey the road rules, but also responsibilities that are essentially ambitions or ideals like a parent's responsibility to adequately care for his or her children and a citizen's responsibility to protect the environment and to avoid reckless behaviour. Such a Declaration would be a valuable educational tool and its preparation would in itself be a significant educational event.

An Australian Rights Council of Retired Judges

This idea, originally proposed by the late George Winterton (1946-2008), Professor of Constitutional Law at the University of Sydney, was floated by Frank Brennan in an article published in *The Age* on 6 April 2009. The proposal is that Parliamentarians could refer suspect legislation to such a Council for a human rights audit. Public representations would be permitted. The sovereignty of Parliament would be retained "while providing realistic, independent scrutiny and a brake on intemperate or ill-considered law making". The human rights of minorities and the marginalised are most at risk from rash government action when the public is alarmed by real or imagined threats, such as, being invaded by boat people or murdered by bikies. We support this proposal, but not as a substitute for or in place of a Human Rights Act.

Conclusion

Overwhelmingly, we whose signatures are appended below believe that a Human Rights Act along the lines of the Zifcak draft bill supported by an adequately resourced education campaign would lead to the better protection and promotion of human rights and the advancement of democracy in Australia.

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