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6 May 2009

National Human Rights Consultation Committee
Attorney-General's Department
Robert Garran Offices
National Circuit
BARTON ACT 2600

Dear Committee Secretary

Submission to National Human Rights Consultation

I am writing this submission in my capacity as Foundation Director at the Gilbert + Tobin Centre of Public Law at the Faculty of Law, University of New South Wales. I am solely responsible for the views and content in this submission.

Australia should enact a new national human rights law by following the 'parliamentary rights model' (as coined by Canadian Professor Janet Hiebert) like that enacted in the United Kingdom in 1998 and adapted to Australia by the ACT in 2004 and in Victoria in 2006. My views on the subject are already well known and rather than simply repeat them I refer the Committee to my book *A Charter of Rights for Australia* (UNSW Press, 2007). It sets out the case for an Australian charter of human rights and how such a law might operate at the federal level. I include at the conclusion of this submission a recent article adapted from that book which may also be of assistance. Further information can also be gained from the following report of the committee that I chaired: Victorian Human Rights Consultation Committee, *Rights, Responsibilities and Respect: the Report of the Human Rights Consultation Committee* (Victoria, 2005).

I support this change for Australia because I believe that a new law is necessary to redress a number of serious human rights problems. I recognise that Australia has much to be proud of, and has many significant achievements in the area of political freedom and has achieved a very high standard of living for many of its citizens. However, there are also too many instances where the most vulnerable people in the community have not had their most basic human rights respected. Rather than these examples being only well known cases in areas such as the detention of children seeking asylum or restrictions on freedom of speech through anti-terror laws, the greater body of them actually fall in the area of service delivery in areas like aged care, the treatment of people with mental health problems or the day to day difficulties faced by too many of Australia's Indigenous people.

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I support a national human rights law because I think it is a necessary step in beginning to systemically redress many of these problems. It is needed to improve human rights protection for all Australians. However, I do not see a national human rights law as by itself providing a solution. It would provide an important catalyst for change and also bring new rigour and transparency to the operation of parliament and the executive, but it must also be supported by improvements in human rights education and funding of government for training and for the community sector to ensure that it can advocate on behalf of people whose rights are being violated.

Indeed, I see the issue of education as being central to the case for a national charter of rights. Survey evidence has demonstrated now for many years that Australians falsely assume that most of their basic rights are already protected in the law. One major advantage of a charter of rights is it would provide the instrument necessary to begin a process of effective education in schools and elsewhere about human rights protection. The absence of such an instrument is a major hurdle to providing such education, whether it be for Australians or new citizens. I have seen first hand the difficulties of educating Australians about their human rights and the human rights of others in the absence of a clear Australian statement of those rights.

The evidence over many years demonstrates that bills and charters of rights can make a major difference in protecting human rights. That is one of the reasons why such instruments tend to have very wide community support in nations where they are adopted and why no such instrument has ever been removed once it has been put into place in a democratic nation. This evidence is set out in persuasive detail in the United Kingdom in publications such as the second edition of *Changing Lives* launched in November 2008 by the British Institute of Human Rights. There is also persuasive evidence now from the newer jurisdictions of Victoria and the ACT, which I understand will be elaborated upon by submissions from those jurisdictions, especially from their respective human rights commissions. I accept that advocates for a national human rights law not only need to demonstrate that there is a problem of law that needs to be fixed, but that a national charter of human rights would provide an adequate solution. I believe the evidence from these jurisdictions clearly demonstrates this.

I also make the following points in regard to issues raised by this consultation:

- **Which rights?:** Australia's national human rights law should provide protection not only for civil and political rights but also for economic, social and cultural rights (and as a minimum for health, housing and education rights). I note that education as a right is already protected in the equivalent United Kingdom instrument. If the committee is not prepared to recommend equivalent protection for both sets of rights, the latter set of rights should at the very least be included in a way that attracts all of the protections and procedures of the national human rights law with the exception that they do not form part of the material upon which courts may exercise their functions.
- **Federalism:** I favour a national human rights law that applies to all federal laws and agencies. I do not favour the law overriding, by virtue of section 109 of the Constitution, State laws and also directing the activities of State agencies. This would be counter-productive in jurisdictions that already have such a law and would also prevent the development of such laws in further jurisdictions, such as Tasmania where its Premier has announced that the State will move to enact such a law. The national law should provide an 'opt in' mechanism by which any State can pass legislation adopting the national law and its procedures within the State. Voluntary acceptance of the national law is the appropriate way forward, and the national law should provide the mechanism for this. This has the advantage of enabling the full range of procedures enacted at the national level to apply at the State level through consent and State legislation. This would not be possible through an overriding federal law due to the constitutional doctrine of the implied immunity of the States from certain federal laws. This immunity may well mean that, for example, it would not be possible to force States to adopt statements of compatibility within their parliament.
- **Responsibilities:** I favour the use of this terminology within the national human rights law. It sends an important signal that the law is not simply about vindicating individual rights but also about recognising important communitarian concerns (for example, not only that there is a right

to vote but also that citizens have a responsibility to cast a ballot as part of a system of compulsory voting). Responsibilities might be reflected in the title to the instrument and also the preamble. The use of responsibilities also sends an important signal to parliamentarians that the law is not simply about judicial interpretation but has a core focus on parliamentary debate and indeed that Parliament has the primary role of balancing competing rights and determining human rights outcomes.

- **Chapter III of the Constitution and Declarations of Incompatibility:** I believe that a suitably drafted declaration would be valid under the Constitution (see Dominique Dalla-Pozza and George Williams, 'The Constitutional Validity of Declarations of Incompatibility in Australian Charters of Rights' (2007) 12 *Deakin Law Review* 1). However, I recognise that this issue cannot finally be resolved until a High Court determination. So long as an appropriate severance clause applies (as provided by the *Acts Interpretation Act*), the only risk should be that the specific declaration mechanism could be struck down. If the committee is not prepared to bear this risk, I note the submission from the Australian Human Rights Commission from the roundtable of constitutional lawyers, of whom I was one, identifying a mechanism to achieve the key goals in this area without possibility of constitutional disallowance. I support that mechanism as an alternative.
- **Review:** A national human rights law in the form of an ordinary act of parliament has a major advantage in being able to be amended over time (as has already occurred, for example, in regard to the ACT law). This should be recognised by building into the federal statute a requirement for its regular review. Review initially at two, four yearly intervals would be appropriate to ensure not only that the successes and failures of the instrument are monitored, but that there is a recognised process for ensuring that the legislation is kept up to date and in the best possible working order. As part of any such review, the Australian Human Rights Commission should be charged with making an annual report to Parliament on the working of the law to ensure transparency in its operation and to contribute to ongoing debate about its operation and to education of the wider community about human rights issues.

I do not claim that a national human rights law would fix all of Australia's human rights problems. However, I do see a national human rights law as an important and necessary step forward for Australia. It would make a positive contribution to solving many problems and, in combination with a range of complementary strategies, give the human rights of everyone in Australia the prominence and systematic protection that they deserve.

Yours sincerely

A handwritten signature in black ink that reads "George Williams". The signature is written in a cursive, slightly slanted style.

George Williams

George Williams, 'A Charter of Rights for Australia' *Debate* (Issue 4, March 2009), 6

Australia is now the only democratic nation in the world without a national charter or bill of rights. It is long past time that we redressed this and modernised our system of government by introducing an Australia-wide human rights law. We should provide the best possible protection for vulnerable groups like children and the elderly and for important values like freedom of speech.

Until recently, no Australian government had achieved a charter of rights. The first, failed attempt was not by a Labor government but by the Nicklin Country Party government in Queensland in 1959. The breakthroughs came in the Australian Capital Territory with the Human Rights Act 2004 and Victoria with its Charter of Human Rights and Responsibilities Act 2006. Other States may also be on the way, including Tasmania and Western Australia where recent inquiries have recommended change.

But is there a need for national reform? After all, there is rightly much to be proud of in our political freedoms and democratic institutions. The problem is that while our system of government generally works well for most Australians there are too many examples of it failing to protect the rights of the most vulnerable and disadvantaged in the community. We possess problems of law and accountability that range from restrictions on freedom of speech under sedition law to the removal of Aboriginal people as part of the Stolen Generations to the treatment of people with mental illness. Despite the many good things about our democracy, Australian law still routinely permits the mistreatment of people in ways that are unjust and infringe the dignity, respect and freedom to which all human beings are entitled. We should aspire to do better.

A large part of the problem lies in how human rights in Australia are uniquely dependent on the wisdom and good sense of our elected representatives. This can be an especially frail shield when any one party controls both houses of the federal or any other parliament. Without a charter of rights, freedoms can be ignored or taken away too easily. As Australians we like to assume that we have our rights, but as a matter of law we do so for only so long as they have not been taken away. While the legal system has many checks and balances to temper public power, we have no law that ensures respect for our basic freedoms.

One example of the problem from recent years is how Australia locked up children in conditions that caused many of them to become mentally ill. It seems unthinkable that this could have occurred, yet it did. The problem was the law, which said that the detention of people seeking asylum in Australia was mandatory. That law was applied without exception, even to unaccompanied children already suffering trauma.

One of these children was five-year-old Shayan, who arrived in Australia in March 2000.¹ Along with other members of his family he was taken to the Woomera detention centre, a facility ringed by desert in South Australia. While in detention, Shayan witnessed hunger strikes and riots, saw authorities responding with tear gas and water cannons, and watched as adult detainees harmed themselves. By December that year, the detention centre's medical records reveal that Shayan was experiencing nightmares, sleep disturbance, bed wetting and anxiety. He would wake in the night, gripping his chest and saying, 'They are going to kill us.' He also drew pictures of fences containing himself and his family.

Three times during that year the detention centre managers strongly recommended to the government that Shayan be moved from Woomera. Despite further recommendations and psychological assessments reporting high levels of anxiety and distress, it was several months before he and his family were moved to Villawood detention centre in Sydney.

At this time, Shayan was diagnosed with post-traumatic stress disorder. During the next few months he was admitted to hospital eight times for acute trauma and, because he refused to drink, dehydration. He

¹ Shayan's story is set out in Human Rights and Equal Opportunity Commission, *A Last Resort? National Inquiry into Children in Immigration Detention* (2004) 343-348.

also became more withdrawn. Medical staff consistently recommended that he should be removed from detention and drew a direct link between Shayan's trauma and his experiences in detention. However, it was not until August 2001 that the government transferred him into foster care. In doing so, he was separated from his parents and sister until they were released in January 2002.

Shayan was one child among many. The statistics make for grim reading. The Human Rights and Equal Opportunity Commission found that the number of children in immigration detention peaked at 1,923 in 2000–01.² By the end of 2003, a child placed in detention was kept there for an average of one year, eight months and eleven days. Some children were detained for more than three years. Almost all of the detained children were found to be refugees and so were eventually released into the community.

The detention of children like Shayan occurred under an Australian law introduced in 1992 by the Keating government and continued after John Howard became Prime Minister. In other nations, it would have been counter-balanced by law, called a bill of rights, charter of rights or human rights act, setting out and protecting people's fundamental human rights. In Shayan's case, this might have included the rights of children and more general rights such as freedom from arbitrary detention. By contrast, the Australian immigration law was unchecked. In fact, when it was challenged in the courts it was held to be legally unobjectionable.

The High Court of Australia ruled on the detention of children in 2004.³ Held in the Baxter detention centre near Port Augusta in South Australia, four children sought a court order for their release, arguing that the mandatory detention regime in the Migration Act did not apply to children. This was unanimously rejected on the basis that the Act was expressed in clear terms, with no exceptions made for children. According to Chief Justice Murray Gleeson: 'It is hardly likely that parliament overlooked the fact that some of the persons covered ... would be children. Human reproduction, and the existence of families, cannot have escaped notice.' It was also argued on behalf of the children that the law breached the Australian Constitution. This too was unanimously rejected on the basis that the Constitution does not guarantee their freedom from involuntary detention.

Another High Court case that year went further, finding that detention remains lawful even where the conditions are harsh or inhumane.⁴ A final High Court decision in 2004 added that the detention could be indefinite.⁵ Ahmed Al-Kateb arrived in Australia by boat in December 2000 without a passport or visa. Taken into detention under the Migration Act, he sought refugee status but was refused. In June 2002, Al-Kateb indicated that he wanted to leave Australia for 'Kuwait, and if you cannot please send me to Gaza'. In August he stated, 'I wish voluntarily to depart Australia, and ask the minister to remove me from Australia as soon as reasonably practicable.'

Al-Kateb was born in Kuwait in 1976 of parents of Palestinian origin. Simply being born in Kuwait did not confer Kuwaiti citizenship, and the absence of a Palestinian nation left him 'stateless'. The Commonwealth sought unsuccessfully to remove him to Egypt, Jordan, Kuwait and Syria as well as to Palestinian territories (which required the cooperation of Israel). Faced with this stalemate and no foreseeable end to his detention, Al-Kateb applied to the courts for his release. In nations like the United Kingdom and the United States, judges have found that the law does not permit indefinite detention. But the Australian High Court found by four to three that the Migration Act and the Constitution permit unlimited detention. Al-Kateb could be held in detention until his removal from Australia, which in turn might have lasted until an independent state of Palestine was created.

² These statistics can be found in Human Rights and Equal Opportunity Commission, *A Last Resort? National Inquiry into Children in Immigration Detention* (2004).

³ *Re Woolley; Ex parte Applicants M276/2003* (2004) 225 Commonwealth Law Reports 1.

⁴ *Behrooz v Secretary, Department of Immigration and Multicultural and Indigenous Affairs* (2004) 219 Commonwealth Law Reports 486.

⁵ *Al-Kateb v Godwin* (2004) 219 Commonwealth Law Reports 562.

One of the majority judges, Justice Michael McHugh, conceded that Al-Kateb's situation was 'tragic'. He also noted that 'Eminent lawyers who have studied the question firmly believe that the Australian Constitution should contain a Bill of Rights.' But in the absence of such a law he found that 'the justice or wisdom of the course taken by the parliament is not examinable in this or any other domestic court' since 'it is not for courts ... to determine whether the course taken by Parliament is unjust or contrary to basic human rights.' With these words, McHugh spelt out what it means for Australia not to have a charter or bill of rights. Without such an instrument, there may be no check on laws that violate even the most basic of human rights.

Australian law is at odds with the fundamental rights of humankind set down in the Universal Declaration of Human Rights, adopted in 1948 by the General Assembly of the newly formed United Nations. After recognising the 'inherent dignity and... the equal and inalienable rights of all members of the human family,' the declaration sets out our basic rights as 'a common standard of achievement for all peoples and all nations.' These rights are described in a straightforward way and include that 'Everyone has the right to life, liberty and security of person' and that 'No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment'.

Since the Universal Declaration was adopted, other treaties and conventions have set out in more detail the basic rights of all people. The two most important are the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights. These entered into force internationally in 1976 and were ratified for Australia by the Fraser government.

Many nations around the world have brought about a charter or bill of rights based upon these international instruments. Even though their introduction was often contested, these laws now receive broad political support. This is certainly the case in the United Kingdom, where the Labor government and the Conservative opposition even agree on the need to strengthen their Human Rights Act 1998. An August 2008 cross-party report by the parliamentary Joint Committee on Human Rights⁶ found that British law should go further by providing better protection for children and generally for the rights to health, housing and education.

When Australia ratified the two international human rights covenants we agreed to make them part of our domestic law. While there has been action in a few areas, such as in regard to privacy and racial discrimination, the covenants have not been enacted in full by the federal parliament. This leaves us in breach of international law.

The best way to bring about an Australia charter of rights would be to honour our international commitments by passing an act through the federal Parliament to make the covenants part of law. No change to the Constitution would be required, and there would thus be no need for a referendum. As an ordinary act of parliament, the charter could be changed over time

In taking this step this we should follow the United Kingdom precedent by enacting a charter that provides the leading role to parliament and not to the courts. The courts should be able to interpret legislation to be consistent, so far as possible, with the protected human rights (a role they already play using international human rights standards⁷). Where this is not possible, the courts should not be given the power to strike down a law. They should only be able to declare that in their view the law is incompatible with the charter and that the law should be referred back to parliament for further consideration.

As an ordinary Act of parliament the charter would not transfer sovereignty from parliament to the courts, but heighten human rights concerns within the political process. In other words, the charter would strengthen and broaden the scope of our democratic system, not transfer key decision-making powers to the judiciary. This is in sharp contrast to the United States and Canada, where their Supreme

⁶ Joint Committee on Human Rights, *A Bill of Rights for the United Kingdom?* (August 2008).

⁷ *Coco v R* (1994) 179 Commonwealth Law Reports 427.

Courts have the final say on issues such as abortion. Indeed, Victoria's Charter has even been drafted so that it does not disturb existing law as it relates to abortion.

Proof of the limited role that can be given to the courts can be found in the record of other nations. The impact of the United Kingdom law is monitored by the Department for Constitutional Affairs, which has found that the Act has not produced a significant increase in litigation or created a 'litigation culture' of rights protection.⁸ Where it has been applied in the courts, the Human Rights Act has proved useful in balancing issues like the need to fight terrorism with the democratic principles required for a free society.⁹ In its report for April to June 2001, the Department found that in local and magistrates courts only a 'small fraction of the overall case-load' involved human rights issues (the figure of 0.01 per cent of cases is given for the County Court). Not only did few cases involve questions of human rights law, but where such issues were raised they were, in general, 'as additional points to existing cases' that could have been lodged 'even if the [Human Rights Act] had not been in force.' The evidence that the United Kingdom law has been anything but a 'lawyers' picnic' has been affirmed by a further, independent academic study. It found that in the Scottish courts between May 1999 and August 2003 human rights arguments were raised in 'a little over a quarter of 1 per cent of the total criminal courts caseload.'¹⁰

While an Australian charter of human rights would not give the courts major new powers, it would still make a difference to the protection of human rights by giving effect to many, usually assumed, freedoms for the first time. Like the Universal Declaration of Human Rights, a charter could also have a symbolic force that promotes important values like human rights, community responsibility and respect for cultural diversity. In fact, the most important contribution a charter of rights can make is not the benefit it brings to the small number of people who succeed in invoking rights in court. 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 is demonstrated by a 2003 study¹¹ of the Americans with Disabilities Act 1990. Researchers David Engel and Frank Munger interviewed 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 action. 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 would also have a powerful effect on the making of new laws and on improving the accountability of government to the Australian people. It would do so in three ways. First, the existence of a charter would make it more likely that human rights concerns are raised when a law was passed, rather than at some later time after damage has been done. At present, many problems go unnoticed and unreported in the media until they reach crisis point. The charter would help to short circuit this by ensuring that human rights are considered before each new law is enacted.

⁸ Department for Constitutional Affairs, United Kingdom, *Human Rights Act 1998: A Statistical Update* (November 2001) <<http://www.dca.gov.uk/humanrights/hrimpact.htm>>.

⁹ See, for example, *A v Secretary of State for the Home Department [No 2]* [2006] 2 Appeal Cases 221 on the use of evidence obtained through torture.

¹⁰ Tom Mullen et al, 'Human Rights in the Scottish Courts' (2005) 32 *Journal of Law and Society* 148, 152.

¹¹ David Engel and Frank Munger, *Rights of Inclusion: Law and Identity in the Life Stories of Americans with Disabilities* (University of Chicago Press, 2003).

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

Third, for any law already on the books the charter of rights would allow an independent determination of whether it breaches human rights. In the courts, an affected person could argue for an interpretation of the law so that it protects rights or that the law be sent back to parliament for a second look. With the benefit of hindsight, this could provide a crucial second chance to get the law right. This has certainly been effective in the United Kingdom whenever Parliament has moved to fix every human rights problem referred to it by a court.

An Australian charter of rights would mark an important shift not only in the law but in how we approach politics and government policy. The focus would be on ensuring that basic freedoms and human dignity are taken into account at the earliest stages of the development of law and policy. The charter would recognise that the decisive point in protecting human rights is not in court after damage has been done, but in government and parliament before a law or policy comes into effect.

This key, preventative aspect of a charter means that the role of protecting human rights would be exercised most frequently by government departments and agencies that interact with the public. The Police, for example, would have day-to-day responsibility for applying human rights in protecting the community from crime and safeguarding the rights of the accused. In this and other areas like mental health the charter would require that the work of government be undertaken with due regard to our common freedoms.

Of course, governments, parliament and courts already take some account of human rights. The charter would not be inserted into a system in which human rights are always ignored. But rights are now usually only referred in an ad hoc way because there is no obligation in the law for them to be considered. 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.

An Australian charter of human rights would better protect our freedoms in the law. It would provide valuable insights for government and the community on as to how effective the law can be in protecting human rights. In doing so it will show how any law has its limits, and indeed how the law can, by itself, not fix some of the most intractable problems. This will reveal how any strategy for better human rights protection must also pay close attention to political and other forms of leadership and to community attitudes. Without reinforcement from these quarters, the positive impact of a charter will be blunted.