My background

My background includes: practice at the private Bar, chairmanship of the NSW Law reform Commission, ten years as Solicitor-General of this State, eleven years as president of the Court of Appeal, a term of office on the Supreme Court of Fiji.

My experiences have informed and undoubtedly coloured the views I am about to express.

I have nevertheless surprised myself that, as a reputed judicial “leftie”, I am presently opposed to one major, although not essential, aspect of the proposed federal Charter of Human Rights scheme.

My thesis

I am happy to see Parliament adopting a Charter and using it as a basis for reviewing past and future legislation.

I am happy to see the Executive being directed to have regard to stipulated HR norms.

I am happy to see the Human Rights Commission armed with powers to conduct broad-ranging inquiries about the consistency of existing laws and practices with HR norms.

I am, however, opposed to involving the courts in the enterprise, even or especially in the so-called dialogue model. In my view they should not be required or empowered to reinterpret statutes in light of HR norms or to make non-binding declarations of incompatibility on a similar basis.

Unique aspects of the Australian polity

By way of background to my thesis I wish to make the general point that the Australian polity has several unique features that go some way towards explaining why we are fairly unique in not having the sort of Charter that is now being pressed.

1. The Australian Constitution addresses and protects a number of rights (including voting rights, the acquisition of property on just terms, trial by jury, freedom of religion, freedom of political speech, judicial review [s75(5)], and the separation of judicial powers).
2. Our Constitutional model divides political power federally and bicamerally but otherwise vests uncontrolled legislative power in parliament and excludes the courts from law-making functions.

3. The well-known constitutional problems with the proposed dialogue model that have been identified by Michael McHugh and others represent more than a technical hitch to be got over by some means or another: any conferral on courts of power to massage and amend statutes entails a change to our polity by means other than constitutional amendment.

4. We have a healthy tradition of freedom of speech and of political accountability [White Australia, Pacific Solution, Kirby pension].

5. We have been spared the culture wars of the United States in which issues such as church and state and right to life have been fought out through the courts and have hijacked the judicial selection process.

6. We do not have a tradition of politicians respecting the utterances of judges as distinct from their decisions [Mabo, Wik]

**Types of issues likely to be presented to courts**

Presumably we would all want a Charter to be effective, not just a window-dressing.

Accordingly, discussion about the pros and cons of a Charter need to keep focussed on the situations that are truly likely to present themselves. Those situations will almost certainly involve issues that are contentious and which will remain contentious even when they have been addressed through the mechanisms offered.

Charter rights tend to be:
- expressed in broad terms
- subject to expressed or unexpressed qualifications
- value-laden
- capable of conflicting in their potential applications

Charter cases presenting to courts are likely to be in areas where a balance has already been struck by parliament, usually intentionally, but where a litigant wants to push matters further in a particular direction and/or escape the complex net chosen by parliament.

For example:
- \( R v A \) (No 2) [2002] 1 AC 45 (rape shield)
- Is it contempt of court or a denial of the right to a fair trial to allow a journalist to refuse to answer a relevant question because that would reveal his or her source of information?
- Is an accused person’s right to a fair trial impeded by the particular level of legal aid offered under the existing legislative framework?

Under the dialogue proposal courts would be armed with powers to reinterpret existing statutes to render them “compatible with human rights” and/or to indicate to parliament in some non-binding way that the statute is not up to the mark.
These processes, and the situations in which they would come to be exercised, are
different in kind to what is involved in those exceptional cases where a court is asked to
strike down a law because it is invalid. Under a HR Act the courts are being asked to
rewrite the statute and/or to tell parliament that it is not good enough.

Judges have no particular competencies in the type of law reform exercises involved; they
will inevitably bring their personal values to bear; and the procedures of courts are not
well fitted to gathering and weighing the types of information requiring to be sorted and balanced.

In the first situation (where the judge is asked to use the HR Act to place a different
meaning on the statute than the one it bore when originally passed), the court’s
reinterpretation of the statute becomes binding law.

In the second situation (where the judge is asked to issue a declaration of incompatibility),
the Executive is free to appeal the matter to a higher court and/or to disregard the court’s
opinion. The Mabo/Wik experience suggests that, if the stakes are high enough, the courts
involved will be attacked and one or both sides of politics will make mental notes to keep
the matter in mind when the next court vacancy comes to be filled.

If, as appears likely, the proposed way around the constitutional shoals associated with the
dialogue model is to permit but not require judges to express their views about the rights-
compliance of statutes, we run a significant risk that some judges will weigh in with their views and others will not. At best, this will limit the problems I foresee. At worst, it will exacerbate them, if only because judges who choose to put in their two-bob’s worth may find themselves attacked for their judicial method as well as for the content of their views.

My objections in a nutshell

(1) A “dialogue model” or a model containing strong interpretative powers are likely to
be held unconstitutional

(2) Any such model undermines the relationship between Parliament and the courts
that was deliberately embedded in the Australian Constitution and which has
worked effectively for over a hundred years

(3) Courts exercising their traditional processes are not suited to the types of inquiry
that a Charter would throw up

(4) Apart from a handful of judges with political or law reform experience, Australian
judges have not been trained as law-makers. No doubt they could learn, but they
have no special competency in this novel role

(5) The effectiveness of a dialogue model in Australia is highly doubtful. History
teaches that Australian politicians, shock-jocks, journalists and others exercise little
restraint in attacking unpopular judicial decisions both on their merits and by way
of ad hominem attacks. At present, the court’s will must be and is obeyed and
accordingly both the rule of law and accountability for public conduct are served.
But when the judges’ officially stated opinions on politically contentious issues
become no more than opinions the risks for the standing of the courts are
significant.
Fiji, on whose Supreme Court I served for a number of years has a wonderful Bill of Rights. But the rule of law has been abandoned in that country. Courts alone are not responsible for the rule of law or for the protection and advancement of human rights. But anything that affects the standing of our courts needs to show that greater good will ensue.

I believe that a Charter that involved the courts in the manner currently proposed will divert our judges from their core functions and will, over time, undermine their capacity to be operate as the frontline guardians of the rule of law in this country.