Submission to: *Queensland Human Rights Bill 2018*

AUSTRALIAN CHRISTIAN LOBBY

acl
australian christian lobby
voice for values

About Australian Christian Lobby

Australian Christian Lobby's vision is to see Christian principles and ethics influencing the way we are governed, do business, and relate to each other as a community. ACL seeks to see a compassionate, just and moral society through having the public contributions of the Christian faith reflected in the political life of the nation.

With more than 125,000 supporters, ACL facilitates professional engagement and dialogue between the Christian constituency and government, allowing the voice of Christians to be heard in the public square. ACL is neither party-partisan nor denominationally aligned. ACL representatives bring a Christian perspective to policy makers in Federal, State and Territory Parliaments.

acl.org.au | Like us on facebook.com/ACLobby | Follow us on twitter.com/ACLobby

Australian Christian Lobby
4 Campion Street
Deakin ACT 2600

t 02 6175 0200
e natoffice@acl.org.au
abn 40 075120 517
acl.org.au

Committee Secretary
Legal Affairs and Community Safety Committee
Parliament House
George Street
Brisbane QLD 4000

26 November 2018

Dear Sir/Madam,

The Australian Christian Lobby welcomes the opportunity to respond to the Inquiry into the Human Rights Bill 2018.

Please find attached our submission on this matter, together with the ACL submission to the National Human Rights Consultation, June 2009, which provides further discussion of the substantive issues.

Yours sincerely,

Wendy Francis
Director | QLD & NT

Introduction and recommendations

1 ACL's position in relation to the Bill is as follows:

- **a** The high level of abstraction of the rights in the Bill and the statutory permission that all the rights can be limited for a wide range of reasons, means that the Bill, while adding to the burden of public entities (as the term is defined in the Bill) and courts, will not seriously beneficially impact the lives of Queenslanders;
- **b** That the Bill does not address the imbalance in human rights law; that the only legislatively enforceable right is the right of non-discrimination, such that there is almost an "absolutist attitude"[1] to that right, which means there is a serious risk that the Bill will further skew human rights law in Queensland away from the unified concept of human rights in the *International Covenant on Civil and Political Rights* (ICCPR) to a hierarchical view of rights with the right of non-discrimination at the top of the pyramid to the detriment of Queenslanders;
- **c** The weak protection given to the fundamental human right of the freedom of thought, conscience and religion, means that the Bill may have a deleterious effect on the rights of the faith communities in Queensland;
- **d** The Bill does not protect the rights of all pre-term babies born alive in Queensland;
- **e** That the Anti-Discrimination Commissioner is to be the Human Rights Commissioner continues the taint of human rights law in Queensland toward one right to the detriment of Queenslanders;
- **f** The Bill should not proceed or at least should be substantially reworked.

1 Professor Patrick Parkinson *Christian Concerns about an Australian Charter of Rights* Chapter 7 in *Freedom of Religion under Bills of Rights* (edited by Associate Professor Paul Babie and Adjunct Professor Neville Rochow SC) University of Adelaide Press at p127

The High Level of Abstraction and the Statutory Permission of Abrogation

2 Properly understood, the rights set out in the Bill are competing moral claims.[2] The Bill, as other human rights instruments usually do, expresses these claims at high levels of abstraction – "Every person has a right to life…"[3], "A person must not be subject to torture…"[4] and so on. The question that the Bill poses is whether the courts or the Anti-Discrimination Tribunal are the best places for these competing moral claims to be resolved. ACL submits that they are not the best places, because any particular case is limited by the evidence presented, which in turn is limited by the resources of the parties to obtain and present such evidence.[5]

3 ACL submits that Parliament remains the best place for discussion and debate on such important moral issues, and it is the best forum for the protection of human rights on a specific issue basis. A more detailed discussion of this issue is to be found in Annexure A to this submission – the ACL Submission to the National Human Rights Consultation June 2009.

4 The weakness caused by the high level of abstraction is magnified by the provisions of clause 13 which provides that "Human rights may be limited"
(1) A human right may be subject under law only to reasonable limits that can be demonstrably justified in a free and democratic society based on human dignity, equality and freedom.
(2) In deciding whether a limit on a human right is reasonable and justifiable as mentioned in subsection (1), the following factors may be relevant—

- **a** (a) the nature of the human right;
- **b** (b) the nature of the purpose of the limitation, including whether it is consistent with a free and democratic society based on human dignity, equality and freedom;
- **c** (c) the relationship between the limitation and its purpose, including whether the limitation helps to achieve the purpose;
- **d** (d) whether there are any less restrictive and reasonably available ways to achieve the purpose;
- **e** (e) the importance of the purpose of the limitation;
- **f** (f) the importance of preserving the human right, taking into account the nature and extent of the limitation on the human right;
- **g** (g) the balance between the matters mentioned in paragraphs (e) and (f).

2 Standing Committee of the Synod of the Anglican Church Diocese of Sydney, *Submission to the National Human Rights Consultation* (2009) [28]-[29].

3 Bill Clause 16,

4 Ibid Clause 17.

5 This is accepting that the Bill only creates "piggy-back" causes of action-Explanatory Notes to the Bill p. 8.

5 This wide limitation provision is fundamentally different to the provisions of the ICCPR which limit the right to derogate from fundamental rights to times of "public emergency which threatens the life of the nation"[6] and even then, rights such as the freedom of thought, conscience and religion are non-derogable.[7]

6 Even the inherent limitation in Article 18 is limited "to such limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others."[8] This is far narrower than clause 13 of the Bill.

7 Putting it colloquially, the Bill is a Clayton's Bill. It purports to protect rights but allows for the derogation of those rights, effectively, whenever parliament really want to so do.

8 However, it is an inevitable consequence of the Bill that public entities will face more claims of breaches of human rights and so add to the burden of the public sector in offering proper services to Queenslanders on limited budgets. ACL notes that no additional budgetary provision has been made of public entities to comply with the provisions of the Bill.[9]

9 Further the experience of Victoria has shown that legislation in the nature of the Bill results in courts having to deliver much longer judgments to address arguments in relation to human rights. This inevitably leads to delays in an already over stressed judicial system.[10]

Therefore, ACL submits that the Bill will not substantially benefit the lives of Queenslanders.

6 Article 4.

7 Ibid.

8 Article 18 (3).

9 Explanatory Note p.10.

10 See *DPP v Kaba* [2014] VSC 52 for example.

Does not address the imbalance in Human Rights law

10 Human Rights law in Australia has focussed on the right of non-discrimination. This is an unassailable proposition which is evidenced by the ubiquity of anti-discrimination statutes in all Australian jurisdictions. It is further clear that the various statutory human rights organisations have perceived their role as furthering the right of non-discrimination and not protection of human rights as a whole.[11]

11 The problem that this creates is that the dominance of non-discrimination forces all other rights into subservience. In an Australian context this is most sharply seen in the conflict between faith based sexual morality and views of personhood and the Marxist based sexual libertarian and gender fluid activism commonly known as the LGBTIQ+ activism and the demand that the so-called exemptions for faith based entities be removed from anti-discrimination law.[12]

12 The Bill enters into this skewed playing field without any recognition of this imbalance.

13 Therefore, in codifying various human rights while acknowledging they can be abrogated for many reasons, and accepting that the only right which may be punitively enforced is the right of non-discrimination, the Bill affirms the view that the right of non-discrimination is pre-eminent among the rights.

14 That view is contrary to the view of the ICCPR and its parent the *Universal Declaration of Human Rights* (UDHR). The preambles of both those documents make it clear that the fundamental human rights which they embody must be viewed as a whole and are not to be cherry picked according to the political mood of the day.

15 The Bill therefore, while purporting to implement the provisions of the UDHR and the ICCPR, may in fact move Queensland on a course away from the heart of those great charters.

16 ACL therefore recommends that before the Bill is enacted, the Queensland Parliament review the operation of the *Anti-Discrimination Act 1991* (**ADA**) to consider how it may be amended to more accurately reflect the aims of the UDHR and the ICCPR.

11 See Parkinson note 1 above at pp. 144-150.

12 Ibid at 145; see also Professor Steven J Smith *Equality, Religion and Nihilism* University of San Diego School of Law Legal Studies Research Paper Series Research Paper No. 14-169 November 2014.

The weak protection given to the fundamental right of freedom of thought, conscience and religion

17 ACL has demonstrated the difference in the protection of the right of freedom of thought, conscience and religion by the Bill and that given to that right by the ICCPR.[13]

18 Two further points need to be made:

- **a** Freedom of religion may justifiably be said to be the "paradigm freedom of conscience"[14] which is "the essence of a free society"[15]. It is therefore arguably the fundamental human right, of greater significance than the right of non-discrimination;
- **b** A person's religion is just as much part of their identity[16] as any sexual orientation or gender identification.[17]

19 It is therefore of fundamental importance that if the Bill is to be passed that the right of freedom of thought, conscience and religion is properly protected.

20 Clause 20 of the Bill currently provides as follows:
Freedom of thought, conscience, religion and belief
(1) Every person has the right to freedom of thought, conscience, religion and belief, including—
(a) the freedom to have or to adopt a religion or belief of the person's choice; and
(b) the freedom to demonstrate the person's religion or belief in worship, observance, practice and teaching, either individually or as part of a community, in public or in private.
(2) A person must not be coerced or restrained in a way that limits the person's freedom to have or adopt a religion or belief.

13 See [7] above.

14 *Church of the New Faith v Commissioner for Pay-Roll Tax* (1983) 57 ALJR 785 at 787, per Mason ACJ and Brennan J).

15 Ibid.

16 *Christian Youth Camps Ltd and Anor v Cobaw Community Health Services Ltd and Anor* [2014] VSCA 75 at [559]-[563].

17 Both of which may change; see *Abboud v Minister for Immigration and Border Protection* [2018] FCA 185; Professor John Whitehall *Gender Dysphoria and Surgical Abuse* Quadrant 15 December 2016 **https://quadrant.org.au/magazine/2016/12/gender-dysphoria-child-surgical-abuse/** accessed 23 November 2018.

21 By contrast Article 18 of the ICCPR provides:
1. Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have or to adopt a religion or belief of his choice, and freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching.
2. No one shall be subject to coercion which would impair his freedom to have or to adopt a religion or belief of his choice.
3. Freedom to manifest one's religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others.
4. The States Parties to the present Covenant undertake to have respect for the liberty of parents and, when applicable, legal guardians to ensure the religious and moral education of their children in conformity with their own convictions.

22 There are two fundamental differences between Clause 20 and Article 18:

- **a** The limitation of the ability to abrogate the right found in Article 18 is to be contrasted with the wide range of factors which may be used to limit the right in Clause 7 (to which Clause 20 is subject);
- **b** The silence in Clause 20 as to the rights of parents or guardians to ensure the religious and moral education of their children is in conformity with their own convictions.

23 ACL submits that Clause 18 should be amended to reflect the provisions of Article 18 in these two fundamental ways.

24 If however the Queensland Parliament does not consider that these changes should be made, it or the Government should transparently explain to the people of Queensland why, for example, it is considered that parents and guardians should not be assured of the right to "ensure the religious and moral education of their children" are "in conformity with their own convictions."

25 Clause 11 is also of concern. It states, *inter alia*, that "Only individuals have human rights."[18] However,
"Corporations have a long history of association with religious activity. Blackstone, in his Commentaries on the Law of England, lists 'advancement of religion' first in the list of purposes that corporations might pursue. Religious institutions have long been organised as corporations at common law and under the King's charter. It has been repeatedly held by European courts, applying article 9 of the European Convention on Human Rights, that entities and associations including corporations, unincorporated associations, institutions and societies are capable of possessing and exercising the right to freedom of religious beliefs and principles (footnotes omitted)."[19]

26 Clause 11 should be amended to reflect this legal reality.

18 Clause 11(2). The Note makes it clear that corporations are excluded.

19 *CYC v Cobaw* at [480].

Protection of the rights of all pre-term babies born alive

27 Clause 16 states that "Every person has the right to life and has the right not to be arbitrarily deprived of life."

28 Between 2005 and 2015 about 200 babies in Queensland have survived termination procedure and been born alive.[20]

29 If clause 16 is to be useful and not a mere motherhood statement, the Bill should make it clear that these smallest and most defenceless Queenslanders are included in its protective umbrella.

30 The dictionary should therefore be amended to include the following definitions:

a "**person** means every infant member of the species homo sapiens who is born alive at any stage of development": and

b "**born alive** means the complete expulsion or extraction from his or her mother of that member, at any stage of development, who after such expulsion or extraction breathes or has a beating heart, pulsation of the umbilical cord, or definite movement of voluntary muscles, regardless of whether the umbilical cord has been cut, and regardless of whether the expulsion or extraction occurs as a result of natural or induced labour, caesarean section, or induced abortion."

31 Again, if such an amendment is not to be made, the Parliament or the Government should explain to the people of Queensland why it is appropriate that the right to life does not extend to such infants.

20 **https://www.parliament.qld.gov.au/documents/tableOffice/questionsAnswers/2016/779-2016.pdf** accessed 23 November 2018.

The issue of the Anti-discrimination Commissioner being the Human Rights Commissioner

32 ACL has already addressed the difficulty of statutory human rights organisations perceiving their role as furthering the right of non-discrimination and not protection of human rights as a whole.[21]

33 Professor Parkinson has persuasively argued that "there is at least a perception that the human rights commissions, both state[22] and federal, are dominated by people of similar persuasions and values who take a very minimalist view of what respect for freedom of religions, belief and conscience entails."[23]

34 With that background, ACL submits that it is inappropriate that the Anti-Discrimination Commission becomes the Human Rights Commission and the Anti-Discrimination Commissioner becomes the Human Rights Commissioner.

35 This is especially the case as the one commission and commissioner retains both the roles of administering the Bill and the ADA.

36 Those dual roles will only continue the skewing of human rights law in Queensland to being a surrogate for anti-discrimination law. They are not the same.

37 ACL submits that the Parliament include in its review of the ADA, the best method of assuring that the Human Rights Commission and Commissioner are directed to advance all human rights and not just the right of non-discrimination. ACL submits it would be most appropriate that the commission and the commissioner be separate from the Anti-Discrimination Commission and Commissioner.

21 See [12] above.

22 In Queensland it is the Anti-Discrimination Commission.

23 See note 1 above at p. 147.

Conclusion

The Bill in its current form should not proceed.

Annexure A: Submission to *National Human Rights Consultation, June 2009*

Submission to the

National Human Rights Consultation

June 2009

ACL National Office

4 Campion Street

Deakin ACT 2600

Telephone: (02) 6259 0431

Fax: (02) 6259 0462

Email: natoffice@acl.org.au

Website: www.acl.org.au

ABN 40 075 120 517

Contents

Executive Summary 1

Human rights 2

Christian concern for human rights 3

The National Consultation – terms of reference 4

Which human rights should be protected? 4

Are these human rights currently sufficiently protected and promoted? 5

How could Australia better protect and promote human rights? 6

The case against a federal bill or charter of rights 6

A bill or charter of rights transfers power from parliamentarians to judges 7

A bill or charter of rights gives unelected judges power over public policy 7

A bill or charter of rights undermines parliamentary sovereignty 8

A bill or charter of rights blurs the separation of powers 9

A bill or charter of rights is invariably too vague and abstract to be safe 10

A bill or charter of rights creates political uncertainty and administrative uncertainty 11

A bill or charter of rights will not guarantee rights for the vulnerable 13

A bill or charter of rights will undermine important freedoms 13

A bill or charter of rights provides leverage for unrepresentative activists 15

Human rights recommendations 16

Major recommendation: Senate Scrutiny of Bills and Acts Committee 16

No bill or charter of rights without a referendum 17

Conclusion 18

Executive Summary

The Australian Christian Lobby (ACL) welcomes the opportunity to make a submission to the National Human Rights Consultation (the Consultation). ACL is committed to the promotion and protection of the fundamental human rights of all persons. It is a large part of our motivation.

Australia is one of the freest countries in the world, and its enviable human rights record is a testament to the values and character of its people, and the strength of its democratic institutions. Australians enjoy a substantial level of personal freedoms and political stability, achieved not through civil war, but through participative democracy.

There is little doubt, however, that Australia can improve its human rights record to better treat its most vulnerable citizens. There is scope for greater transparency and accountability of government decision-making, and more respectful delivery of government services. Both of these things can be achieved, however, without the enactment of a federal bill or charter of human rights, to which ACL is strongly opposed because:

- A bill or charter of rights is simply not needed as rights can, and already are, protected in clear and precise legislation specific to the right in question;
- A bill or charter of rights does not of itself protect against the abuse of state power, or protect the interests of the vulnerable;
- A bill or charter of rights transfers power to make final determinations over issues of policy from elected parliaments to courts, leading to political and bureaucratic uncertainty and the weakening of judicial independence;
- A bill or charter of rights can too easily be used to provide leverage for unrepresentative activists to win contestable 'rights' that could never have been achieved through democratic processes; and,
- A charter or bill of rights effectively legislates selfishness, already too much a feature of modern society, propelling individual rights above rights held in community.

The protection and definition of human rights and the values of Australian society should reside with the people through their elected and accountable parliamentary representatives, and reinforced by effective checks on bureaucratic implementation of executive decisions. ACL therefore proposes that:

1. The Senate Scrutiny of Bills Committee's mandate be strengthened to examine proposed and existing legislation against accepted international human rights instruments and legislated human rights standards;
2. The role of Commonwealth and state ombudsmen to oversee and ensure their rightful access to the full range of entitlements and services be better publicised, and strengthened where necessary;
3. That any shortfalls in human rights coverage identified through the consultation process be remedied by specific legislation targeted at the right in question;
4. That a charter or bill of rights not be enacted; and,
5. That if the Government is determined to pass such legislation, that it not be done without a referendum.

Human rights

Fundamental human rights are one framework by which to ensure the dignity of all human beings in a pluralistic society. The discourse of human rights has proved helpful in securing the participation of women and Indigenous Australians in public life, in preserving the dignity of asylum seekers and refugees, and in protecting people from the ravages of war.

The 1948 *Universal Declaration of Human Rights* is considered the seminal international human rights document that outlines the fundamental human rights owed all people on account of their humanity. It lists the basic minimum conditions for living a dignified and secure life, such as the right to life, liberty and security, freedom from torture and inhumane treatment, equality before the law and freedom of thought, conscience and religion. All of these rights are fundamental human rights owed all people.

ACL is concerned, however, that the intent of the Universal Declaration to secure fundamental human rights has been appropriated, not only by rightly aggrieved individuals and groups, but by those wishing to secure contestable agendas. The language of human rights has been heavily politicised in recent years. An unhelpful modern rights discourse has emerged where the language of rights is invoked far too often to push for social change in areas never envisaged to be considered fundamental human rights.

This exposes a fundamental problem with human rights legislation, which is that unrepresentative activists have had it read as meaning rights are absolute, and there is no hierarchy of rights. This is politically and socially unsustainable. Clearly a person's right to life must trump one's right to freedom of religion, for instance, and where the two clash years of parliamentary democracy have developed laws to resolve the clash in a way that meets community values and priorities for rights.

The mere appeal to rights language, however, does not establish the validity of the claim. An inviolable human right must be grounded in a deeper philosophical principle, such as the inherent dignity of the human being. The source of that dignity, according to the Judeo-Christian worldview, which is the source of the West's concern for human rights, is that all people are made in the image of God. A claim to a human right is, therefore, an appeal to a principle much more fundamental than those debateable claims to political 'rights' so evident in today's individualistic society.

Very few contemporary 'rights' claims ever amount to the denial of an inviolable human right. The Consultation Committee must, therefore, maintain the difference between perceived 'rights' and fundamental human rights, and resist attempts to establish an absolute view of rights as if they were all fundamental human rights, especially those of a contestable nature.

Christian concern for human rights

Christians have for centuries been at the forefront of initiatives that protect the fundamental human rights of all people. Christians were instrumental in ending the slave trade, in winning civil rights for African Americans, and in the early trade union movement. Christians continue to support persecuted believers overseas, champion the right to life of the unborn, and to provide essential social services to the oppressed and marginalised of society.

Christians are strongly committed to human rights as there is a link between core Christian values and the underlying principles of some human rights, such as the right to life. The Christian gospel entreats believers to seek justice for the persecuted, and security for the vulnerable.

The Church also relies upon respect for human rights to fulfil its mission. Preaching the gospel is very much compromised by restrictions on freedom of speech. A society that did not value and protect freedom of religion and freedom of speech would prevent hearers of the gospel from freely responding to it without fear of interference by the state. ACL appreciates the positive value of human rights as a means of protecting human dignity and respect for life.

By no means does ACL believe that a human rights legislative framework is the only way to organise modern societies. Although the Judeo-Christian worldview promotes human dignity, modern conceptions of human rights more closely reflect a secular worldview divorced of the very profound and defining principle that an individual's human dignity is derived from God and them being in the image of God.

This is not the place for a theological treatise, but it is important in establishing the principle that human rights should not be given by Governments as they are beyond governments authority to give or, more importantly, to take away.

By specific rights legislation we therefore hand power over the individual to government, which we should not. Instead we need to ensure, as we have in the West, a strong culture which demands political accountability by the people.

Human rights language is fraught with fallibility as it is beset by the moral relativism of the age, handing rights over to be interpreted and re-interpreted according to the whim of the beholder. As a secular device, the failure to acknowledge God as the source of our dignity as humans has stripped human rights of any solid foundation. Human rights cannot exist in a moral vacuum. We cannot expect that rights will be universal when such rights, existing only on somebody's word, can just as easily be withdrawn. Contemporary human rights theory does not stand on a solid and universally enduring foundation.

The National Consultation – terms of reference

ACL welcomes the opportunity to comment against the Consultation terms of reference, but believes they are skewed towards a pre-determined outcome. The terms of reference ask:

- Which human rights (including corresponding responsibilities) should be protected and promoted?
- Are these human rights currently sufficiently protected and promoted?
- How could Australia better protect and promote human rights?

The second question is rhetorical, as anybody who believes they have had their human rights violated will answer in the negative and share their thoughts with the Committee. On the other hand, those who feel that their rights are adequately protected or are indifferent to the issue are unlikely to contribute to the discussion. This will tilt the sample towards the conclusion that human rights are not sufficiently protected in Australia.

Which human rights should be protected?

The rights, as laid out in the following international human rights instruments that have been ratified by Australia, list comprehensively the essential human rights owed all people:

- *Universal Declaration of Human Rights;*
- *International Covenant on Civil and Political Rights;* and,
- *International Covenant on Economic, Social and Cultural Rights.*

Although there are other international human rights treaties that protect fundamental human rights, such as the *Convention Against Torture*, the three documents listed above outline the most important human rights. Any attempt to deviate beyond the scope of these covenants to recognise an ever increasing array of 'rights' will weaken the fundamental nature of these covenant rights.

Human rights, after all, are meant to be an outline of the minimum standards required to live a secure and dignified life. To encapsulate demands beyond these standards is to make contestable claims to 'rights' that are not fundamental in nature. Recognition of such 'rights' is to weaken the very notion and foundation of essential human rights.

It is therefore vital to recognise and protect the human rights laid out in the important international human rights instruments above. The fundamental nature of these protections is best preserved when rights legislation and rights language remain detached from claims for political change. Any enactment of rights legislation should be restricted to only the most fundamental of human rights and not give force or undue leverage to contestable political agendas.

Are these human rights currently sufficiently protected and promoted?

Australia has ratified the foundational human rights instruments listed above, and many others. Those who support a federal bill or charter of rights point to Australia's failure to enact these conventions directly into domestic law as evidence that human rights are not currently sufficiently protected and promoted. However, there is no automatic obligation on nations that ratify UN treaties to enact each and every international treaty into domestic law in the same way or through a bill or charter of rights.

There is also no direct correlation between human rights abuses and a failure to enact international human rights treaties in domestic law. Australia's excellent human rights record shows that its approach to protecting human rights works well without a bill or charter of rights.

There already exist comprehensive human rights protections in Australian domestic law. There are many laws at both the state and federal levels that protect civil and political, and economic and social rights. Australians have access to state-subsidised healthcare and education, rights to social security entitlements, the right to join a union, privacy protections and anti-discrimination laws, just to name a few rights safeguards.

Furthermore, there are five explicit rights in the Constitution, which are:

- The right to vote (Section 41);
- Protection against acquisition of property on unjust terms (Section 51 (xxxi));
- The right to a trial by jury (Section 80);
- Freedom of religion (Section 116); and,
- Prohibition of discrimination on the basis of State of residency (Section 117).

The High Court has also implied the right to freedom of political communication from the Constitution. Courts are similarly empowered to use international human rights treaties as a guide when interpreting statutory law and when developing common law. A number of rights are protected in the common law such as the right to silence and the right to be presumed innocent until proven guilty, and in criminal law. Administrative bodies such as ombudsmen, auditors-general and the human rights commissions hold considerable moral sway over state powers.

Of course parliament retains the capacity to restrict or remove common law or statutory law rights, and to ignore the intent of international human rights treaties. But under the charter model proposed through the Consultation, parliament would retain this same capacity. The political reality now, as it would be under a charter, is that parliament will not risk international and electoral censure by pursing a rights-abusive agenda. Whenever parliament sees a need to restrict certain rights, as it did with the Northern Territory Intervention, it must justify that its policy meets a pressing social need.

It is therefore wrong to suggest that human rights are not protected in Australia when clearly there are comprehensive and multi-faceted rights protections. The existence of a bill or charter of rights is not a necessary condition of human rights protection. Human rights are already sufficiently protected in Australia because of specific rights legislation and because of a strong and democratic civil society. Open political participation, human rights bodies and advocates, and a free press ensure parliaments are held to account on human rights issues.

How could Australia better protect and promote human rights?

Anecdotal, but nonetheless comprehensive evidence from the community roundtables shows that, rather than celebrating Australia's human rights record, this Consultation has become a forum for people to highlight perceived breaches of human rights and grievances with the delivery of government services. This is an unfortunate but inevitable outcome induced by the terms of reference and the Consultation process.

Given the Consultation is predicated towards attracting complaint, the Committee will likely conclude that the human rights of Australians are presently not sufficiently protected. The outcome of the Consultation, therefore, centres on the suggested strategies to address the perceived deficit in the coverage of human rights.

ACL believes there to be a high level of respect for human rights in Australia. There are no reports of systematic abuse by governments or state authorities and there are few breaches of fundamental human rights. Of course some improvements can be made but to suggest, as some attendees of community roundtables have been led to believe, that a charter of rights will be the panacea for every problem modern Australia faces, is misleading.

Generally speaking, modern Australia has a very good human rights record with only scattered, not widespread, breaches of fundamental human rights. The logical response to such isolated breaches is to strategically target those rights by enacting specific legislation to protect the right in question. ACL further recommends the strengthening of the role of the Senate Scrutiny of Bills Committee and better advertising the role of ombudsmen. The submission will return to consider these proposals in depth later, but will first explain in detail why enacting a federal bill or charter of rights is not the best way of protecting human rights in Australia.

The case against a federal bill or charter of rights

At the outset it is important to clarify that opposition to a federal bill or charter of rights does not equate to opposition to the protection of fundamental human rights. No sensible or right-thinking person is opposed to human rights, but well-meaning people can disagree on the best way to preserve human rights. We're all in favour of human rights, but who should determine them, especially in cases of rights-based disputes?

ACL's strongly held view is that human rights are best preserved by an open and democratic civil society where the direct representatives of the people are responsible for determining decisions of policy and social values. A bill or charter of rights, it is argued, moves authority for making such important decisions from the open and accountable forum of parliament to closed courts, distancing ordinary citizens from political life and deciding their shared values.

The enactment of a bill or charter of rights has serious implications for the Australian way of life and the way we are governed. It throws a massive additional layer of deliberation and consideration atop our existing legal structures and political arrangements. Given that Australia does not have a culture of human rights abuse, it is a response to an isolated number of problems that is not commensurate with the reality of the human rights deficit.

A bill or charter of rights also brings with it a range of unwanted side effects, as detailed below.

A bill or charter of rights transfers power from parliamentarians to judges

Father Frank Brennan stated in an ABC radio interview late last year that: "I think there is no doubt the bill of rights of any form does transfer some power from politicians to judges."[1]

In the interview Father Brennan then posed the question of whether transferring power from parliament to courts was proportionate to meeting the need of protecting human rights, and if the present balance of power needs to be restruck. The question is therefore how much, if any, power should be transferred? Is a charter or bill of rights a proportional response given the state of human rights in Australia?

ACL strongly argues that the present distribution of power serves the Australian people well. Any transfer of power to determine policy from the parliament to the courts will have a detrimental effect on the ability of the executive to govern, the traditional separation of powers, and the independence of the judiciary (see below).

Any notion that power should be moved to the courts because this is a better forum for the protection of human rights is based on a number of false assumptions about parliament and the courts. The first is that parliaments will simply abuse human rights for reasons of political pragmatism. Any proportional response could not reckon this to be the case, as there are inbuilt checks and balances in the Westminster parliamentary system, including bicameralism and strong committee oversight. Parliamentary decisions are also heavily scrutinised by the press.

An even stronger assumption is that judges are somehow more objective than politicians and not at all corrupted by power, when this is far from the truth. Former High Court judge Ian Callinan observed, "Judges are not immune to the narcotic of power".[2]

The greatest assumption underpinning the desire to move human rights decisions from parliaments to courts is the belief that all human rights questions have legislative or judicial remedies. Human rights do not belong solely to the legal domain, and often involve considerations of morality and values, individual autonomy and community. While judges are certainly experts in the law, they are no more experts in morality than any other citizen. Authority for determining moral issues, and the social consequences that follow from them, which are most often highly contentious, should reside with the people and their elected parliamentary representatives.

A bill or charter of rights gives unelected judges power over public policy

One of the greatest pitfalls of a bill or charter of rights is that it falsely turns political or policy issues into 'rights' considerations. As the experience in the United States attests, the deeply controversial issues of same sex marriage and abortion have been largely and finally determined by courts under the guise of human rights.

Same sex marriage and abortion are clearly issues of public policy, as they are nowhere specifically stated as fundamental human rights in international human rights instruments. The right to determine important key social standards such as these should reside with all

[1] Brennan, F. (2008, December 11). Quoted in 'Brennan considers the balance of human rights'. ABC, *AM*. http://www.abc.net.au/am/content/2008/s2443352.htm

[2] Callinan, I. (2009). 'In whom we should trust'. In J. Leeser & R. Haddrick (Eds.), *Don't leave us with the bill: The case against an Australian bill of rights*. Canberra: Menzies Research Centre. (p. 81)

citizens of a democracy, but a bill or charter of rights denies ordinary citizens the right to participate in these key debates.

Staffed by legal, not moral authorities, a court is a closed forum unable and ill-equipped to canvas the full spectrum of issues and their consequences necessary for deciding sound public policy. It is designed to remedy legal disputes between two parties, automatically disqualifying the participation of citizens likely to be affected by policy decisions. Courts are unelected bodies of legal experts who need not be attuned to prevailing social standards or public perceptions. Members of the public have little avenue of recourse to overturn judicial policy determinations.

Parliament, on the other hand, is a purposefully representative and democratic institution, open to debating alternative perspectives. Citizens can lobby politicians, join a political party, appear at committee hearings, and vote in free elections in order to contribute their voices to key policy debates. Parliamentarians are accountable to the electorate as judges are not, which means that power to make policy decisions should reside with parliament.

There should be no doubt that a bill or charter of rights hands judges power over public policy. Speaking on that nation's charter of rights, New Zealand Governor-General the Hon Anand Satyanand revealed, "in many cases, the Court has forced major changes in public policy".[3] This is a frightening encroachment by unelected judges into the realm of democratically accountable governments which should not be replicated in Australia.

A bill or charter of rights undermines parliamentary sovereignty

Under present constitutional arrangements, parliament is rightly sovereign, as it has a mandate from the people obtained through democratic election. As the sovereign law-making institution, it has the final authority to repeal and amend all legislation except the Constitution. A constitutional bill of rights, however, gives judges an overriding power to strike down legislation it deems to be inconsistent with its interpretation of enumerated human rights standards.

ACL understands that advocates of an Australia charter of rights are not supportive of the model giving judges a constitutional power to strike-down legislation. The statutory model proposed for Australia reflects the British, New Zealand and Victorian framework, which empowers judges to declare laws incompatible with judicial human rights interpretation. Parliament, charter advocates declare, would remain sovereign because they technically retain the right to choose to ignore judicial statements of incompatibility, or to amend the offending legislation as they see fit.

However this is not how such models have worked in practice. Under the weight of media scrutiny and vocal activist pressure, the legislature has inevitably succumbed to the judicial declaration and amended the legislation declared to be incompatible with the judiciary's interpretation of human rights. Professor James Allan confirms this fact:

> *In Canada, with its constitutionalised Charter of Rights that nevertheless contains an override that in theory allows the elected parliament to trump the judges, the elected*

[3] Speech by the Hon Anand Satyanand on the History and Role of the Court of Appeal, Government House Wellington, 15 Feb 2008. http://www.gg.govt.nz/node/815

> *federal parliament has not used that override – not one single time – in the 26 years of the Canadian Charter's existence.*[4]

Some will applaud this, particularly those trying to shape public policy to unrepresentative agendas. But it is in effect undemocratic, subordinating popular will to unrepresentative pressure.

Although parliament technically remains the sovereign law-making body under a statutory charter of rights, courts acquire quasi-sovereignty through their new power to declare legislation incompatible. A shift towards judicial sovereignty is an unwanted consequence of a bill or charter of rights. Judicial sovereignty of social policy is an isolated North American cultural construct not suited to Australia. Our nation would do well to avoid the controversies and obvious pitfalls of such a system.

A bill or charter of rights blurs the separation of powers

A clear separation of powers between the law-making bodies of a parliamentary democracy is necessary for the successful operation of that democracy, ensuring that citizens are protected from concentration of power in any one arm of the state. Under the Westminster system, which is enshrined in our constitution, the role of parliament is to enact legislation and the role of the judiciary is to interpret that legislation.

A bill or charter of rights blurs the distinction between the powers of the legislature and judiciary because judges gain the authority to request parliament alter legislation in accordance with their interpretation of human rights. This clearly represents the politicisation of the judiciary.

In 2003 the Ontario Court of Appeal used its power over social policy to decide that the common law definition of marriage as between one man and one woman violated the Canadian charter of rights.[5] *The Globe and Mail* newspaper awarded the "three bold jurists" the title of "Nation Builders of 2003", claiming: "The Court of Appeal ruling was an example of the willingness of the nation's judges to go with speed and precision where politicians only dither."[6]

This is a clear example of how a bill or charter of rights empowers the judiciary with authority of a political nature, forcing social change upon a disenfranchised populace who are unable to respond or repeal the decision.

As the judiciary is politicised the appointment of judges becomes more and more a matter of their politics rather than professional merit. This stands to damage both the parliament and the judiciary.

Maintaining law and order, and dispensing justice remain some of the key tasks of modern democracies. This is achieved by well-resourced and effective law enforcement bodies, and by an independent judiciary. The judiciary remains independent through merit-based appointment of judges. They must therefore be appointed on the basis of competency in the

---

[4] Allan, J. (2008, April 4). 'Siren Songs and Myths in the Bill of Rights Debate'. *Senate Occasional Lecture Series*. http://www.aph.gov.au/SENATE/pubs/occa_lect/transcripts/040408/index.htm

[5] *Halpern v. Canada*, [2003] O.J. No. 2268

[6] Anderssen, E. (2003, December 13). 'Ontario Court of Appeal, 2003'. *The Globe and Mail*. http://www.theglobeandmail.com/servlet/story/RTGAM.20081118.wpnat1212/BNStory/nationbuilder2008/home

law, not because of their ideological sympathy with the government of the day. The public must remain assured that an independent judiciary will deliver justice and maintain confidence in the rule of law.

A bill or charter of rights will give the judiciary an enlarged role in the determination of public policy. Although key judicial appointments involve some political considerations on the part of the executive, a bill or charter of rights makes ideological judicial appointments even more of an imperative for governments, as former High Court Chief Justice Harry Gibbs attests:

> *A bill of rights, particularly one that has constitutional status, would tend to have the result that judges would be appointed not so much for their legal ability as for their political or ideological attitudes. When a court is empowered to give a final decision on important matters of social policy there is a great temptation to appoint judges whose views on those questions of policy are views of which the executive government approves. The circumstances surrounding some judicial appointments in the United States show that it has often been impossible to resist this temptation. Thus one of the essentials of a free society – an independent judiciary – tends to be weakened when the judges are given what virtually amounts to political power.*[7]

The recent nomination of Sonia Sotomayor as the next justice of the United States Supreme Court is an excellent case in point. Due to the enormous political power afforded senior judges in the United States through human rights legislation, her nomination was widely debated. By contrast, the appointment of justices to the Australian High Court rarely draws public controversy because such appointments are mainly based on legal competency, not ideological leanings. To preserve the rule of law, this is how it should remain.

A bill or charter of rights is invariably too vague and abstract to be safe

Due to some rather controversial human rights decisions, the United Kingdom *Human Rights Act* has been derided as the "Villain's Charter". The statutory charter has been applied and interpreted in such a way that many believe it has favoured the rights of criminals over their victims and over the protection of public safety. This has led one judicial expert to state that, "There have been problems with how human rights and the *Human Rights Act* have been interpreted".[8]

Giving judges a list of abstractions by which to make decisions invite unintended, if not strange interpretations. Two of the anomalous outcomes from around the world, where judicial decisions ignore the common good, include:

- In Canada judges struck down legislation requiring cigarette packets to carry health warnings, deeming the requirement a violation of the right to freedom of expression;[9] and,
- In the United States judges struck down legislation that criminalised the transmission of pornography to recipients under 18, deeming this a restriction of free speech.[10]

---

[7] Gibbs, H. (1996). 'Does Australia need a Bill of Rights?' in *Upholding the Constitution*, Volume 6, Proceedings of the Sixth Conference of the Samuel Griffith Society. http://www.samuelgriffith.org.au/papers/html/volume6/v6chap7.htm

[8] Lord Falconer (2007, February 9). Cited in 'Blitz on human rights 'nonsense''. *BBC News*. http://news.bbc.co.uk/2/hi/uk_politics/6345477.stm

[9] *RJR - MacDonald Inc. v. Canada (Attorney General)*, [1995] 3 S.C.R. 199

Of course it is possible to cite examples of decisions based on human rights legislation that have frustrated both social conservatives and liberals. The solution to that political problem, some might argue, is to ensure that judicial appointments match your own values by electing judges. However, acceding to this as the norm only undermines the independence of the judiciary as a principle.

Furthermore, voting for judges will not overcome the legitimacy problems associated with a bill or charter of rights. These show up in cases where judges, empowered by human rights law, have well and truly stepped beyond their mandated bounds of power. Take for instance the New Zealand case where judges reread a remedies clause into that nation's charter.[11] Here the judges granted themselves a power expressly denied them by the elected and accountable representatives of the people in parliament.

A United Kingdom decision is even more troubling in its disregard for the legitimate restrictions placed on judicial power. Here the court manipulated its power, under section 3 of the *Human Rights Act*, to interpret all legislation in a way which is compatible with European Convention rights. Here, Lord Nicholls reasoned:

> *It is now generally accepted that the application of section 3 does not depend upon the presence of ambiguity in the legislation being interpreted. Even if, construed according to the ordinary principles of interpretation, the meaning of the legislation admits of no doubt, section 3 may nonetheless require the legislation to be given a different meaning . . . Section 3 may require the court to depart from . . . the intention of the Parliament which enacted the legislation.*[12]

In other words, UK judges can now ignore the clearly worded intention of the people and their parliamentary representatives to reach a conclusion that is more conducive to their interpretation of a list of vague abstractions on human rights. This is bound to undermine political certainty and judicial consistency.

A bill or charter of rights creates political uncertainty and administrative uncertainty

If courts are empowered to make declarations on issues of public policy, as they would under a bill or charter of rights, then the authority of parliament is inevitably compromised. Legislation that might be challenged or deemed incompatible with an interpretation of human rights would create uncertainty and confusion.

Not only does a bill or charter of rights undermine parliamentary sovereignty, the United Kingdom experience shows that such a document can also be used as an excuse not to act. In the course of examining three controversial human rights cases, the UK Joint Committee on Human Rights discovered that, "the *Human Rights Act* has been used as a convenient scapegoat for unrelated administrative failings within Government."[13]

One of the cases examined by that same Committee involved a murder perpetrated by a serial sex offender just nine months after his mismanaged release from prison. Although the

---

[10] *Reno v. American Civil Liberties Union*, 521 U.S. 844 (1997)

[11] *Simpson v A-G (NZ)* [1994] 3 NZLR 667 ('Baigent's Case')

[12] *Ghaidan v Godin-Mendoza* [2004] 2 AC 557 at [29, 30] per Lord Nicholls

[13] Joint Committee On Human Rights. (2006). *Thirty-Second Report*. http://www.publications.parliament.uk/pa/jt200506/jtselect/jtrights/278/27805.htm

Committee denied any direct link between the Human Rights Act and the unfortunate incident, a report produced by Her Majesty's Chief Inspect of Probation (UK), Andrew Bridges, showed there was a strong indirect association between the crime and the elevation of human rights considerations facilitated by the Act. The report reads:

> *In particular, the human rights aspect is posing increasing levels of challenge to those charged with delivering effective public protection.*
>
> *[T]he people managing this case started to allow its public protection considerations to be undermined by its human rights considerations.*[14]

The United Kingdom statutory charter of rights did not directly cause the murder in question, but the charter was the foundation of the human rights culture that created the administrative uncertainty and bureaucratic failure that set its preconditions. That is why the Police Federation of Australia has identified that a federal charter of rights could create legal uncertainty for its members and expose officers to new legal risks in the enactment of their essential duties.[15]

If a bill or charter of rights is meant to improve the delivery of government services and the administering of justice, as proponents claim, then the experience of police and public servants in the United Kingdom proves otherwise. Hamstrung by fears of human rights actions, the following sometimes absurd cases have emerged:

- Solicitors acting for a school and local council claimed any attempt to ban a convicted paedophile from using a gym at a leisure centre, which was also used by school children, might infringe the man's human rights;[16]
- Police delivered fried chicken to a man engaged in a 20 hour siege on a rooftop, claiming his human rights could have been infringed had they not done so; and,[17]
- A police Chief constable refused to release pictures of two escaped murderers because of fears this might infringe their human rights.[18]

These cases clearly show that, far from improving the accountable delivery of community services, a bill or charter of rights leads to administrative uncertainty and confusion.

---

[14] Bridges, A. (2006). *An independent review of a serious further offence review: Anthony Rice*. HM Inspectorate of Probation (UK). http://inspectorates.homeoffice.gov.uk/hmiprobation/inspect_reports/serious-further-offences/AnthonyRiceReport.pdf?view=Binary (p. 2 & p. 5)

[15] Maley, P. (2009, May 22). 'Rights charter opens police to 'legal risks''. *The Australian*. http://www.theaustralian.news.com.au/story/0,25197,25520164-5013404,00.html

[16] (2006, October 20). 'Fury over paedophile at child gym'. *BBC News*. http://news.bbc.co.uk/2/hi/uk_news/england/gloucestershire/6069964.stm

[17] (2006, October 13). ''Fried chicken' siege man jailed'. *BBC News*. http://news.bbc.co.uk/2/hi/uk_news/england/gloucestershire/6048718.stm

[18] Rayner, G., & Tozer, J. (2007, January 5). 'Wanted: for crimes against common sense'. *Mail Online*. http://www.dailymail.co.uk/news/article-426650/Wanted-crimes-common-sense.html

A bill or charter of rights will not guarantee rights for the vulnerable

Perhaps the greatest misconception in the debate about whether Australia should have a bill or charter of rights is the idea that it will better guarantee the human rights of the vulnerable and less powerful.

Human rights protections in Australia in two contentious policy arenas remain stronger than those in the United Kingdom, despite their statutory charter of rights. Terror suspects in Australia can only be held without charge for seven days under anti-terrorism legislation, whereas suspects in the United Kingdom can be held for 42 days under similar legislation. In the same way, the United Kingdom continues to place children in immigration detention centres,[19] whereas Australians chose to end that practice via the ballot box.

The immigration detention example shows that the majority will of the people through the parliament is able to deliver human rights protections to the vulnerable that far exceed protections available with a bill or charter of rights. The view that judges are needed to protect the populace from the parliament is ill-conceived. These examples show also that a bill or charter of rights is no panacea or "silver-bullet" for all injustices, real or perceived. It is the culture, ethos and values of a nation expressed through its democratic institutions that secure rights for the oppressed and vulnerable.

The fundamental human rights citizens of Zimbabwe, in an even more extreme example, have not been promoted or protected by that nation's bill of rights. Similarly, despite a bill of rights, millions of citizens of the former Soviet Union were murdered by the state and its agents. A bill or charter of rights, therefore, is not an effective mechanism for checking the power of the state.

Even in nations with a democratic heritage, bills or charters of rights have proven incapable of protecting the most vulnerable. The United States bill of rights was unable to prevent the practices of slavery and segregation, and it continues to do little to alleviate the great inequalities of that nation in relation to education, health care and income distribution. Capital punishment remains legal in the United States, and Guantanamo Bay military jail is closing not because of the bill or rights, but because of the political will of elected officials.

A bill or charter of rights will undermine important freedoms

Charters or bills of rights are also static in time and culture, limited by the priorities and values of the drafters at the point in time of their enactment. As even charters of rights effectively gain quasi-constitutional status, becoming difficult to amend, the nature of a bill or charter of rights prevents the legislature from updating the document to better reflect changing community values. The United States right to bear arms, for example, has become an anachronistic impediment to the introduction of modern and effective gun control policy.

An Australian bill of rights at the time of Federation may have enshrined in law the values underpinning the White Australia policy, and would have more than likely limited the rights now enjoyed by women and indigenous Australians. By contrast, the common law and statute law have evolved to changes in social attitudes.

---

[19] Dugan, E. (2009, April 26). 'Inside Yarl's Wood: Britain's shame over child detainees'. *The Independent*. http://www.independent.co.uk/news/uk/home-news/inside-yarls-wood-britains-shame-over-child-detainees-1674380.html

Bills and charters of rights have proven to undermine important freedoms expressly because they run counter to the flexible common law tradition, as Melanie Phillips explains:

> *[T]he very idea of setting down in statute what rights we have runs absolutely counter to the foundational principle of English common law and the unique principle of liberty it enshrines – that everything is permitted unless it is expressly forbidden. Human rights law turns that into 'only what is codified is to be permitted' – which is deeply illiberal.*[20]

The early evidence of the Victorian charter, which came into force in 2007, shows that bills and charters of rights do place at risk important freedoms, particularly where they relate to the guaranteed right to freedom of conscience and freedom of religion, as enshrined in Article 18 of the ICCPR. Despite the charter, doctors in that state who have a conscientious objection to abortion are legally obliged to refer a patient to an abortion-provider, contrary to international human rights treaties.

Within months of the enactment of the *Victorian Charter of Human Rights and Responsibilities Act*, the Government initiated an inquiry to test, against the new charter, essential freedoms, which are expressed as 'exceptions' or in the *Equal Opportunity Act*. These necessary exemptions, which allow faith-based organisations to employ people whose attitude and conduct reflect and share their values and ethos, are now under serious threat because the review committee has proposed options recommending they be weakened and/or removed, especially in areas of 'service-delivery' like hospitals and schools

What is particularly concerning for people of faith is that the Victorian Equal Opportunity Options Paper makes a range of distinctions between 'core' and other, and public and private aspects of faith. It reasons that the right to freedom of religion really only protects 'private' aspects of faith. Couched in a framework of human rights, the inquiry represents a clear challenge to faith-based organisations. But it is an inevitable consequence of creating the ability to decide between rights through a charter.

It is concerning that the same reasoning of the Victorian Options Paper is evident in the push towards 'equality rights' in the United Kingdom. That nation recently introduced the Equality Bill, the explanatory material of which proclaims that churches will be forced to employ homosexual church youth workers or accountants. Effectively churches would have the capacity to employ staff who comply with the values of the organisation only in liturgical or doctrinal positions.[21]

Human rights law has not protected religious groups from the state attempting to impose itself into the internal affairs of faith-based organisations, contrary to accepted international human rights treaties. It is increasingly the conduit to strip faith-based welfare organisations, hospitals and schools of their unique status and purpose.

Churches, their charities and faith-based facilities such as schools, hospitals and nursing homes are not asking for any greater protection from interference by the state than political parties. The Labor party, for example, is permitted to exclude Liberal party members from

---

[20] Phillips, M. (2008, December 9). 'The proper response to the Human Rights Act is to get rid of it.' *Mail Online*. http://www.dailymail.co.uk/debate/article-1092847/The-proper-response-Human-Rights-Act-rid-it.html

[21] Equality Bill 2008-09 (UK), Schedule 9, Work: exceptions, Explanatory Note No. 747 http://www.publications.parliament.uk/pa/cm200809/cmbills/085/09085_iw/09085_iw_en_27.htm

employment. Nor should governments force organisations with a religious ethos to employ or enrol people whose values and conduct would be inconsistent with its distinctives.

A bill or charter of rights will also restrict the ability of ordinary citizens to participate in determining key societal values, as it favours judges and lawyers in the policy-making process. Moving debate on important social issues from parliaments to courts gives judges and lawyers the opportunity to determine policy formation while removing from the polity. Judicial oversight through a bill or charter of rights distances ordinary citizens from the process of determining public policy, thereby weakening democratic participation.

A bill or charter of rights provides leverage for unrepresentative activists

It is little wonder that activists championing contestable agendas are keen supporters of an Australian bill or charter of rights. They see the potential to facilitate change by appeal to favourable courts, which is a great deal less fraught than convincing the electorate to support their agenda at the ballot box.

It is this nature of a bill or charter of rights that makes it so attractive to such activists. Power over public policy-making is shifted from parliaments to courts, which are not sensitive to the electorate or public opinion.

Often against the express will of the people, favourable courts in Canada and in parts of the United States have permitted same sex 'marriage'. This shows that increasingly a bill or charter of rights has very little to do with protecting fundamental human rights, but is more of a means to circumvent democratic processes. Samuel Gregg highlights this point well:

> *The paradox that confronts us is that contemporary rights language seems increasingly predicated towards facilitating the use of political and legal power to sanctify certain ideological tendencies (most notably, various feminist assertions), to undermine core institutions such as the nuclear family in the name of 'diversity', or, as we have seen in more recent times, to attempt to restrict as fundamental a freedom as religious liberty to what occurs during church services.*[22]

This politicisation of human rights law to meet political objectives negates one of the key arguments advanced by charter supporters, who suggest it will "put fundamental human rights above politics".[23] The short history of charters of human rights in Australia shows that social campaigners and politicians will politicise even the most fundamental of human rights. The right to life, for example, is only granted from birth in the ACT charter even though the *UN Declaration of the Rights of the Child* says that the child "needs special safeguards and care, including appropriate legal protection, before as well as after birth".[24]

Even Father Brennan has acknowledged how human rights law has been used to further particular social agendas. Speaking on the failure of the Victorian charter to protect doctors with a conscientious objection to abortion from being forced to refer patients to an abortion provider, Father Brennan argued:

---

[22] Gregg, S. (2001). 'The Crisis of Human Rights'. *Policy*, *Autumn*, p. 39. http://www.cis.org.au/POLICY/aut2001/polaut01-7.pdf

[23] Federation of Community Legal Centres (Vic) (2007). *10 reasons why we need a Bill of Human Rights in Australia*. www.communitylaw.org.au/public_resource_details.php?resource_id=1239

[24] *UN Declaration of the Rights of the Child* (1959). http://www.unhchr.ch/html/menu3/b/25.htm

> *We need to do better if faith communities and minorities are to be assured that a Victorian style charter of rights is anything but a piece of legislative window dressing which rarely changes legislative or policy outcomes, being perceived as a device for the delivery of a soft left sectarian agenda – a device which will be discarded or misconstrued whenever the rights articulated do not comply with that agenda.*[25]

Human rights recommendations

Bills or charters of rights have proven themselves to be ineffective at protecting vulnerable members of society. They have sometimes weakened and trivialised fundamental human rights. A bill or charter of rights would prove ineffective in meeting the Committee's stated aim to better protect and promote human rights in Australia.

The committee will hopefully identify particular areas where human rights are threatened or inadequately safeguarded in Australia. These concerns are most likely best addressed through specific new legislation that targets the identified human rights deficit. Such legislation would be enacted through normal processes of public consultation and parliamentary scrutiny. In some cases problems identified with specific pieces of legislation should be remedied by simple amendment to the law in question.

Anecdotal but nonetheless strong evidence from the Consultation roundtables, and from previous rights inquiries at state level, show that many of the supposed rights violations experienced by Australians actually amount to poor delivery of government services, such as health and education. ACL is very concerned to see inequality in access to identified services remedied, particularly for those without their own economic or political clout. The problem requires an attitude change. In addition, the role and profile of ombudsmen should be strengthened and advertised to ensure their effectiveness in overcoming inequality.

Major recommendation: Senate Scrutiny of Bills and Acts Committee[26]

ACL believes that the safeguarding and clarifying of human rights should reside with the people through their elected and accountable parliamentary representatives. However there is scope for greater parliamentary oversight of legislation to ensure its rights compatibility given government's legislative intent. ACL therefore proposes that the Senate Scrutiny of Bills Committee be strengthened to examine proposed and existing legislation against international human rights instruments.

Under Senate Standing Order 24 the Standing Committee for the Scrutiny of Bills is tasked to examine all bills that come before Parliament and report to the Senate on whether they trespass unduly on personal rights and liberties, amongst other issues. ACL believes that the role of this committee can be strengthened to provide better scrutiny of legislation against existing human rights standards.

---

[25] Brennan, F. (2009, February 26). 'The place of the religious viewpoint in shaping law and policy in a pluralistic democratic society: a case study on rights and conscience'. Speech to the *Values and public policy conference*, Centre for Public Policy, University of Melbourne.

[26] ACL acknowledges the work of Rev Prof the Hon Michael Tate AO for this recommendation.

The name of the committee should be changed to the 'Scrutiny of Bills and Acts Committee' to reflect an increased mandate to examine existing legislation in light of parliament's human rights obligations. The committee should remain composed of members from various parties represented in the Senate and operate in a non-party partisan way, with the Chair being appointed by the Leader of the Opposition in the Senate.

The role of the committee would be clarified by an amendment to Senate Standing Order 24, giving the committee the role of declaring whether proposed or existing legislation trespasses unduly on personal rights and liberties recognised or expressed under the Australian Constitution, in the Common Law, in statutes of the Parliament, or in treaties ratified by the Government and incorporated into law.

This proposal has many benefits and avoids the many pitfalls of enacting a bill or charter of rights, the content of which will likely be subject to endless negotiation. The proposal is uncontroversial because it refers to sources of law with which we are familiar, and is able to encompass changes made by the judiciary through Constitutional and common law, by parliament passing legislation, or by the Government ratifying treaties. It does not set in stone forever, as a bill or charter of rights attempts, the aspirations and values of the nation. It preserves the common law tradition of permitting all that which is not expressly denied.

The proposal is a simple and cost effective strategy that could be implemented quickly, and would more easily gain public and political support. Power over policy would not be transferred from parliament to the courts, and authority for determining rights and responsibilities and for balancing competing claims would continue to reside with democratically elected representatives. In particular cases the Committee might see fit to call witnesses or conduct a public inquiry.

No bill or charter of rights without a referendum

Lord Steyn of the United Kingdom House of Lords said that the UK *Human Rights Act* had "created a new legal order".[27] This new order involves a judiciary empowered to ignore the will of the people and their elected representatives to broadly and inconsistently interpret a list of 'human rights' enunciated in vague abstractions.

If the Committee sees fit to recommend the enactment of a charter of rights in the style of those already existing in the United Kingdom, New Zealand or Victoria, at the very least it should give all Australians the opportunity to democratically decide, via referendum or plebiscite, whether it wishes to adopt this new legal order.

A bill or charter of rights represents such a monumental shift in the way our political and legal systems operate that it should not be foisted on the population without a referendum to properly gauge public opinion.

[27] *Jackson v Attorney General* [2006] 1 AC 262 at [102] per Lord Steyn

Conclusion

ACL is committed to the protection and promotion of the fundamental human rights of all people.

Australia already has an enviable human rights record by international standards. Although there is of course some room for improvement, the human rights of Australians are already well protected by strong democratic institutions, the rule of law, a free press and a culture of respect for the worth and dignity of people. It is disingenuous to suggest that human rights are not protected because there is no bill or charter of rights.

Parliament is the right and proper forum by which to weigh up competing claims to rights of diverse groups in a pluralistic democracy. The consideration of fundamental human rights can be brought to the forefront of parliament by enhancing the function of the Senate Scrutiny of Bills Committee.

The National Human Rights Consultation is the perfect opportunity to audit Australia's existing laws for gaps and inconsistencies. The Committee should recommend that such laws be amended to facilitate improved protection of human rights. Specific new legislation should be enacted to target identified issues.

Drawing lines between competing claims to rights is essentially a question of policy, whether social or moral. Such questions are best answered by politicians, who are elected and accountable to the population. A bill or charter of rights would shift debate of these crucial issues from parliaments to courts, effectively distancing ordinary citizens from public policy debate and weakening democratic participation.

A bill or charter of rights would weaken confidence in the rule of law, politicise the judiciary and weaken its independence, as judges would be appointed more for their political or ideological views rather than legal acuity. It would undermine parliamentary sovereignty and distort the separation of powers. A bill or charter of rights opens up the possibility of varied judicial interpretations, leading to legal, political and administrative uncertainty.

Experience from the United States and the United Kingdom shows that the mere existence of a bill or charter of rights is ineffective in alleviating the plight of the downtrodden. A bill or charter of rights, however, would place at risk important freedoms, especially the right to freedom of religion and conscience. Human rights law have become tools for activists to sidestep democratic processes and stifled legitimate public debate of contentious moral issues. This does not strengthen democracy.

Australia remains the only Western democracy not to have a bill or charter of rights, but the fact alone says nothing about the merits of such a document. It does not discharge the very heavy burden of proving that fundamental human rights are routinely abused in Australia, or that a bill of rights the best or only way to remedy any breaches.

As the enactment of a bill or charter of rights in Australia would represent the imposition of a new legal order, any plan to implement one must be put to referendum. The only way to gauge public support on such an issue is through a referendum.

ACL National Office

June 2009