Submission to the Senate Legal and Constitutional Affairs Committee: Inquiry into the Human Rights (Parliamentary Scrutiny) Bill 2010

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Introduction:

I would like to thank the Committee for the opportunity your consultation has provided. At the outset I would like to state that I welcome the Australian Government's Human Rights Framework and the legislation arising. The effective promotion of rights requires more than just a rights respecting culture. Such a culture is necessary but on its own it is open to atavistic challenges in moments of national crisis as witnessed by the US response to 9/11. A legislative framework which requires a form of scrutiny can act as a brake and provide for greater consideration and, hopefully, such consideration can help all states to avoid potential rights abuse.

This submission is the result of me and the 'Comment is Free'(CiF) website. CiF is part of *The Guardian* newspaper website in the UK. It posts opinion pieces and welcomes comments form members of the public.

On 7 July I posted an article on the CiF website entitled "Our chance to influence Australian Law". The article, reproduced in the Appendix 1 to this submission, briefly outlined the proposal contained within the Human Rights Framework and sought to differentiate that from the UK Human Rights Act, 1998 (UKHRA). The aim of this was illicit a response from a UK readership, familiar with the UKHRA and see if they had any useful comments to make on the model of scrutiny proposed in Australia.

As part of this consultation Ashlea Maher of the Australian Times, UK posted a link to one of that sites articles reporting on the University of Salford's Human Rights conference which was addressed by former High Court Judge, Justice Kirby (see Appendix 2). Elements of that article have also been incorporated.

We hope you find the contribution to be of interest.

Popular democratic scrutiny of human rights compliance

As an academic I have consistently argued in favour of popular democratic controls over executive power in the defence of civil liberties. In order to achieve that end I have argued against a process of juridification – that is "the replacing of politics with the formality of law and legal decisions".[1] As a result I have argued that the defence of civil liberties requires parliament and the people to exercise a strong supervisory function and not rely *solely* on the courts to uphold our freedoms. Parliamentarians must

[1] F. Davis, "The Human Rights Act and Juridification: saving democracy from law" 30(2) (2010) *POLITICS* pp 91-7

be willing to defend civil liberties through back bench revolts[2] and committees such as the proposed Parliamentary Joint Committee on Human Rights must be willing to robustly review executive compliance with human rights norms. Ultimately, however, any system which relies upon parliamentary measures to defend civil liberties rests upon the willingness of the people to support 'rights'.

As a result of my strong support for parliamentary mechanisms to scrutinize human rights compliance I am largely supportive of the Human Rights (Parliamentary Scrutiny) Bill, with some reservations.

The rights of the 'other'

A key theme which emerged through the responses to the article on CiF was that parliamentary scrutiny would be unable to defend the rights of "groups who lack meaningful political voices". As GavinAcademic pointed out:

> The trouble with the 'democratic citizenship' approach to protecting rights is that, unsurprisingly, it doesn't work too well at protecting non-citizens and other small and unpopular groups within society.

By its nature parliament can be an ineffective means to securing rights for such groups. This point is further emphasised when consideration is given to those groups without a voice in the parliamentary system – one contributor was a British permanent resident of Australia for 25 years, being unable to vote such an individual might feel parliamentary mechanisms alone would be insufficient to secure their rights. Another contributor was UK based and seeking a shift in Australian immigration policy and yet another was concerned with digital privacy, an issue which might not attract widespread popular interest.[3]

This point was re-inforced by Justice Kirby in the Australian Times article where he commented that

> "Australia cannot claim that their parliamentary system works so perfectly that it does not occasionally need the stimulus of reminders that the law sometimes treats people (usually minorities) unjustly and unequally."[4]

As a result of these concerns I agree with the submission from Amnesty International that it is disappointing that the government rejected the National Human Rights Consultation Committee recommendation to adopt a Human Rights Act based upon the dialogue model.

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[2] F. de Londras & F. Davis, "Controlling the Executive in Times of Terrorism: competing perspectives on effective oversight mechanisms" 30(1) (2010) *Oxford Journal of Legal Studies* pp 19-47, at p32

[3] Comment taken from CiF available at http://www.guardian.co.uk/commentisfree/libertycentral/2010/jul/07/australia-human-rights-judicial-review#start-of-comments accessed 8 July 2010

[4] http://www.australiantimes.co.uk/news/Our-human-rights-shame accessed 8 July 2010

This is because the dialogue model recommended respects the role of parliament while allowing the judiciary to perform an alarm raising function – a judicial declaration of incompatibility under s.4 of the UKHRA does not invalidate that legislation but it does raise an alarm for parliament and the public alerting them to potential abuse and can provide a point around which campaigners can rally.

The Parliamentary Scrutiny model

Given these concerns about the absence of a judicial alarm raising function the proposed Joint Committee will have to ensure that it performs such a function robustly. There is a necessity to "recover the democratic dimension to human rights and this may well involve some 'grass roots' engagement".[5] To that end this current Committees use of open calls for submissions should be adopted by the new proposed Joint Committee.

My own use of CiF was designed to broaden the range of participants in the submission so as part of my belief in democratizing human rights. As I state in the article I believe that we need to draw on the writings of Hayek on the dispersed nature of knowledge in our legislative system. Committees, such as your own and the proposed Joint Committee, ought to utilize the web to bring in the broadest range of opinion – and I commend this Committee for its good work in that regard.

Other submissions to this Committee have noted that the proposed Joint Committee must be given adequate time to conduct its reviews on compatibility. The CiF contributor andyv123 raised the point that courts respond to complaints. The envisaged Joint Committee can only investigate matters before legislation is passed or when a matter is referred by the Attorney general. In the absence of judicial control the power of initiative is even more important. [6]

Like others I favour an amendment to s. 7(c) to allow the Committee to either exercise a power of initiative to investigate matters without referral by the Attorney General or if such a power was felt to be overly broad it could be limited to matters referred to the Joint Committee in accordance with some specified procedure – for example only matters referred by a certain number of Senators or Members of Parliament.

Further issues to consider were raised by Prof Mark Tushnet of Harvard Law School who commented that for parliamentary Scrutiny to work effectively "the body certainly has to have substantial representation from parties not in the government coalition, and maybe more -- a chair from the

[5] Prof Conor Gearty, London School of Economics, the UK, in correspondence with the author in response to the article on CiF

[6] Comment taken from CiF available at http://www.guardian.co.uk/commentisfree/libertycentral/2010/jul/07/australia-human-rights-judicial-review#start-of-comments accessed 8 July 2010

opposition, or even a majority from the opposition" and perhaps counter-intuitively any Committee should avoid a preponderance of lawyers and ex-judges as these will tend to 'juridify' the proceedings.[7]

Future review

I note that the Australian Human Rights Commission has already stated that the 2014 review of the Human Rights Framework should revisit the question of a Human Rights Act for Australia.[8] Rather than seeking to revisit that question from the outset I think we ought to carefully scrutinize the workings of the proposed Joint Committee and in particular focus on its ability to speak up for those groups without a traditional voice within politics – non-citizens, immigrants, asylum seekers etc. We should seek to strengthen the Committee through broadening its remit under s.7 of the Act and seek to support it in the work it conducts. If it is seen to be underperforming due to the lack of judicial fire alarm then we ought to revisit that point.

Thanks

I would to thank the Committee for its open process of inviting submissions which is a welcome measure in support of democratic citizenship.

Thanks are also due to the Natalie Hanman at *The Guardian* Comment is Free & the contributors to CiF and the australiantimes.co.uk for their input.

[7] Prof Mark Tushnet, Harvard law School, in correspondence with the author in response to the article on CiF
[8] http://www.humanrights.gov.au/about/media/media_releases/2010/34_10.html accessed 8 July 2010

Appendix 1:

Published at

http://www.guardian.co.uk/commentisfree/libertycentral/2010/jul/07/australia-human-rights-judicial-review#start-of-comments Accessed on 8 July 2010.

Our chance to influence Australian law

I believe people should have a central constitutional role – let's have our say on Australia's human rights bill

- Fergal Davis
- guardian.co.uk, Wednesday 7 July 2010 08.00 BST

I am a judicial review sceptic – I do not trust courts to effectively secure our freedoms. In my view, rights are political – to secure them we must place them at the centre of politics and not rely on the judicial elite to keep us free from tyranny. As a result, I have argued that:

> The unintended consequence of support for the Human Rights Act (HRA) is that it perpetuates the process of juridification – leaving rights as an issue to be dealt with by the judiciary, and marginalising the people from any active role in the defence of liberty. But placing the people at the centre of government and re-asserting our constitutional role ensures a proper institutional balance.

For this to be effective, parliament and the public must actively seek to restrain the executive – to hold it to account for any real or potential abuses of civil liberties.

Jimmy Wales, one of the founders of Wikipedia, was inspired by Friedrich Hayek's argument that, since knowledge is dispersed, central planners can never take account of all relevant factors: for Wales this meant that rather than centralising the pursuit of knowledge in the hands of a small number of editors, he should open his encyclopedia to be edited by everyone.

I think we ought to do something similar with the defence of civil liberties through the inclusion of the broadest range of public opinion in the parliamentary process. It just so happens that such an opportunity has presented itself, and I would like your help.

The Australian government recently published its Human Rights Framework. The framework is a grand statement on the promotion of rights in Australia and makes a number of welcome statements. The government has set about implementing the framework and has introduced the human rights (parliamentary scrutiny) bill to give legislative effect to it.

The most striking feature of the bill is that it does not provide for judicial review. The National Human Rights Consultation had recommended the adoption of the Human Rights Act similar to the UK. This was described as the "dialogue model" of HRA. Despite this, the government opted for parliamentary scrutiny of proposed legislation to ensure compliance with seven international human rights documents: the international covenant on civil and political rights; the international covenant on economic, social and cultural rights; the convention on the elimination of all forms of racial discrimination; the convention on the elimination of all forms of discrimination against women; the convention against torture and other cruel, inhuman and degrading treatment or punishment; the convention on the rights of the child; the convention on the rights of persons with disabilities.

On the one hand this proposal is broader than the UK HRA, in that it seeks to ensure legislative compliance with a range of human rights norms. On the other hand, the UK HRA incorporates not just the (majority of) rights contained within the European convention on human rights but also the jurisprudence of the European court of human rights. Furthermore, it empowers the UK judiciary to interpret legislation, where possible, so that it complies with the UK HRA or to declare legislation to be incompatible with the UK HRA.

The legal and constitutional affairs committee of the Australian Senate is currently conducting an inquiry into this legislation and individuals are free to make a submission to the inquiry. Accepted submissions are considered by the committee when conducting its inquiry and issuing its report. Hopefully the report will influence the parliamentary debate and may result in amendments to the bill.

Having argued that the people should be given a role at the centre of our constitution – upholding liberty and restraining executive power – it seemed appropriate to invoke the people in preparing a submission for the inquiry.

I believe that as an interested public, familiar with the UK HRA, our collective views will be of interest to the inquiry – so, I would like your comments and opinions on the bill.

In particular you might have a view on: the use of parliamentary scrutiny rather than judicial review; how parliamentary scrutiny might be made to work effectively; specific weaknesses in the proposal which could be avoided; or any other matter arising from the bill.

I will endeavour to follow your comments and incorporate them into a submission for the inquiry. The final submission will be posted on liberty central and may be published on the committee website – if and when that happens liberty central will let you know.

Together, perhaps, we can produce something worthwhile.

Appendix 2:

Published at http://www.australiantimes.co.uk/news/Our-human-rights-shame Accessed on 8 July 2010

Our human rights shame

31 May 2010 17:00

Australia's "shameful" stance on human rights has set the nation at a divisive 'crossroads'. Australian human rights lawyer Geoffrey Robertson, and former High Court Justice Michael Kirby are bringing their push for an Australian bill of rights to the UK this week.

By Ashlea Maher

Campaigners for a bill of human rights for Australians say the nation needs to reprimand the continual abuse of minority groups and asylum seekers, with the current political climate making political leaders more intensely responsible for abuses than ever before.

Stalwart campaigner and founder of the British Bill Of Rights Act, world leading Australian human rights lawyer Geoffrey Robertson, and former High Court Justice Michael Kirby are bringing their push for such a policy to the UK this week in a timely turn of events.

To mark the 10th anniversary of the British act's instatement, the pair are rallying for support in the UK for an Australian equivalent, which follows a recent slate by Amnesty International on the state of human rights in Australia and the rejection of such an idea by the Federal Government.

The two legal dignitaries are hosting a joint lecture in London this week in partnership with Mr Robertson's legal firm Doughty Street Chambers and the Royal Commonwealth Society (RCS), with Mr Kirby to further raise the case for an Australian Bill Of Rights at the University of Salford's 2010 Human Rights Conference in Manchester on the weekend, where he will compare the British situation with Australia.

Their campaign comes after the Rudd government rejected the recommendation of its national

consultation committee for a human rights act, putting the issue off until 2014 – despite promising at the last election to consider a charter.
The major drive for such legislation is the continual discrimination of minority groups – on terms of sex, race, age, disability, health condition or religion – and the plight of asylum seekers.

Further, advocates of the bill say such legislation would mean an end to the type of abuses suffered by innocent men such as Dr Mohammed Haneef, Mamdouh Habib, and David Hicks who were framed on terrorism charges.
Since retiring, Mr Kirby been steadfastly campaigning for such a policy, saying Australia's stance on human rights is based on a 19th Century model.

According to Mr Kirby, Examples from history which indicate a "poor record of protection of fundamental rights" include the 150-year Parliamentary failure to acknowledge Indigenous people's traditional right to land, the White Australia Policy which discriminated against Asian migrants and long-standing criminal laws which discriminated against homosexuals.

"To be blunt about it, it is shameful that Australia is the only western democracy without a national human rights law," he told the audience at the inaugural Michael D. Kirby Human Rights Forum last year.

"Sadly, Australia cannot claim that their parliamentary system works so perfectly that it does not occasionally need the stimulus of reminders that the law sometimes treats people (usually minorities) unjustly and unequally."

Calls for a bill of rights were also backed up this week by Amnesty International who released a report slamming the state of human rights in Australia.

By freezing the processing of asylum applications from violent conflicts, the political charity organisation says the Australia government is making the plight of refugees fleeing war zones worse and putting politics ahead of human rights.

The report also accuses Australia of continuing to allow racial discrimination in the Northern Territory under the government's intervention program, with 45,000 Aboriginal people still reportedly subjected to racially discriminatory measures as a result of the policy introduced in 2007 by the former Howard government.

Ahead of this week's events, spokesman for Mr Robertson - Pan-Commonwealth Youth Caucus Chairperson Matthew Albert – told Australian Times the evaluation of the UK Bill Of Rights offers important lessons for Australia.

He said a bill of rights should be instated as the country's reputation as a leading nation is extremely important in the next 18 months.
As announced on May 20, Australia is to host the next Commonwealth Heads of Government Meeting (COHGM) in Perth next October.

With further meetings of the key officials from the Commonwealths' law, citizenship, business and youth bodies also to be held Down Under, Mr Albert said Australia will be seen as a leading country within the 54 nations which make up the Commonwealth.

If Australia is to look favourable in the eyes of the Commonwealth, Mr Albert said leaders should change their stance on human rights.
"Australia has a very important role to play as the host and will have a heavy input in the decisions that are made at the conference," Mr Albert said.

"There is room for Australia to move in regards to human rights and it is very disappointing that the human rights act has been turned down yet again. It's a shame for Australians."

Mr Albert said the issue of the rights of homosexuals is set to be a further topic to be raised by Mr Kirby - who is openly gay - while he is in the UK.