

A Charter of Rights for Western Australia

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The State government is asking West Australians whether they want a new law to protect their fundamental rights and freedoms. The process is being chaired by Fred Chaney and will give people a say on their democracy and whether it can be improved.

My view is that the lack of protection for many fundamental freedoms and the major problems with our human rights record present a compelling case for reform. It is past time that Australians in each of the States and territories responded with action to ensure that community values like freedom of speech and the right to vote are woven securely into the fabric of the legal system. Australia is now the only democratic country in the world that does not have some form of national charter or bill of rights. This reflects the views of the framers of the Constitution expressed in the 1890s. They believed that freedoms were adequately protected by the common law and our elected representatives. They also sought to create a system of law that would allow parliaments to pass legislation that discriminated on the basis of race. The White Australia policy and the denial of the vote to Aboriginal people are examples from soon after federation in 1901.

It is long past time that Australia moved on from these views and changed the law to reflect this. Like nations such as Canada, New Zealand and the United Kingdom, we ought to update our legal system to ensure it reflects our current day values. A charter of rights would make a positive contribution by enhancing democracy and expressing the fundamental rights of a diverse people.

In the 1988 referendum, the Australian people voted against including specific new rights in the Constitution. In the nearly two decades since, the federal parliamentary process has been largely silent on a charter of rights. This vacuum is being filled by the states and territories.

In other nations with federal systems, including the United States and Canada, it is common to find charters of rights at each tier of government where elected representatives exercise power on behalf of the people. In Canada, some of the provinces introduced a bill of rights before the national Canadian Charter of Rights and Freedoms was enacted.

Until recently the Australian states and territories had, like federal governments, only made faltering steps towards a charter of rights. The first, failed attempt at a state human rights law was not by a Labor government but by the Nicklin Country Party government in Queensland in 1959. It introduced but did not have enacted the Constitution (Declaration of Rights) Bill. Since then, some states have recognised freedoms on an ad hoc basis, such as the protection for the right of peaceful assembly in Queensland's Peaceful Assembly Act 1992.

The breakthroughs came in the Australian Capital Territory with the Human Rights Act 2004 and then Victoria with its Charter of Human Rights and Responsibilities Act 2006. Other states are also considering reform, including Tasmania whose Law Reform Institute is conducting an inquiry into a charter of rights.

Based on the UK and Victorian precedents, a Western Australian charter would provide the leading role to parliament and the people in the scrutiny of new laws and the protection of rights. The primary role of the courts would be to interpret legislation to be consistent, so far as possible, with the protected human rights. Where this is not possible, the courts would not be given the power to strike down a law. They would only be able to declare that in their view the law is incompatible with the charter and refer the law back to parliament for further consideration.

As an ordinary Act of parliament the charter could be improved over time and would not transfer sovereignty from parliament to the courts, but heighten human rights concerns within the political process. In other words, the charter would strengthen and broaden the scope of our democratic system,

not transfer key decision-making powers to the judiciary. This is in sharp contrast to the US system, whereby their Supreme Court is able to have the last say on issues such as euthanasia and abortion.

The UK Human Rights Act 1998 has been a success without giving rise to the litigation and other problems sometimes associated with the US Bill of Rights. The impact of the UK law on the courts is monitored by the Human Rights Unit of the Department for Constitutional Affairs. The unit has found that the Act has not produced a significant increase in litigation or created a "litigation culture" of rights protection. In its report covering April to June 2001, for example, the department found that in local and magistrates courts, only a "small fraction of the overall case-load" involved human rights issues (the figure of 0.01 per cent of cases is given for the County Court). Not only did few cases involve questions of human rights law, but where such issues were raised they were, in general, "as additional points to existing cases" that could have been lodged "even if the [Human Rights Act] had not been in force."

A charter could make a real difference to the protection of human rights in Western Australia. It would give legal effect to many, usually assumed, basic freedoms for the first time. Like the Universal Declaration of Human rights 1948, it could also have a symbolic force that promotes important values like freedom, community responsibility and tolerance of cultural diversity. In fact, the most important contribution a charter of rights can make is not the benefit it brings to the small number of people who succeed in invoking rights in court. It is how it can help to prevent the making of bad laws and how it can be used to educate, shape attitudes and bring hope and recognition to people who are otherwise powerless.

The impact of a formal statement of rights at the community level was demonstrated by a 2003 study of the Americans with Disabilities Act 1990. Researchers David Engel and Frank Munger interviewed 60 people with disabilities and examined their life histories. They found that the new law was having a profound effect, but not in terms of court actions. Indeed, none of their interviewees had brought such a case. Instead, they found the law affecting "the way people talk and think, usually in social contexts far removed from the courts." In granting basic rights to people with disabilities, the Act "played a crucial role in their lives." They went on: "Rights transformed their self-image, enhanced their career aspirations, and altered the perceptions and assumptions of their employers and co-workers - in effect producing more inclusive institutional arrangements." The study demonstrated how the legal protection of rights enhanced the culture of rights protection at the individual and community levels, with a very positive effect on the day-to-day lives of people with disabilities.

A charter of rights could also have a powerful effect on the making of new laws and on improving the accountability of governments to the people. First, the existence of a charter of rights would make it more likely that human rights concerns would be raised as the law was passed, rather than at some later time. At present, problems can go unnoticed and unreported if an issue is only aired years after the law has come into force, and the impact can be devastating. Costly delays are inevitable where there is nothing within the parliamentary process to require that legislation is examined against human rights standards. The charter would help to prevent these problems occurring by playing a role before each new law is enacted.

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

Third, even if the law were passed, the charter of rights would provide a means for an independent determination of whether the law breaches human rights. In the courts, an affected person could argue for an interpretation of the law that protects rights, or even that the law is incompatible with those rights. In the latter case, a decision by the court to find that a law is incompatible would send the law back to parliament for a second look. With the benefit of hindsight, and perhaps after the initial political debate has cooled, this could provide a crucial second chance to examine the law. This has certainly been the experience in the United Kingdom. Its parliament has in every case moved to fix a human rights problem with a law once it has been identified by a court.

A Western Australian charter of rights would mark an important shift not only in the law but in approaches to politics and the development of policy as they relate to human rights. The focus would be on ensuring that fundamental principles of human rights are taken into account at the earliest stages of the development of law and policy. The charter would recognise that the decisive point in achieving protection for human rights is not in court after a breach has occurred, but in government and parliament in the development of policy and the drafting of law before either come into effect.

This preventative aspect of the charter means that human rights principles will be taken into account not just in courts but throughout government. Indeed, the role of protecting human rights under a charter would be exercised far more frequently by government than the courts. The Police, for example, would have day-to-day responsibility for applying human rights in protecting the community from crime and safeguarding the rights of the accused. In this and other areas, such as mental health, the charter would require that the work of government be undertaken with due regard to our common freedoms.

Of course, governments, parliament and courts already take some account of human rights. The charter would not be inserted into a system in which human rights are ignored. But rights are often only referred to in an ad hoc way because there is no obligation in the law for them to be considered; nor are they set out in a clear instrument enacted by parliament. When they are needed most, human rights can simply be absent from the debate. By contrast, a charter would mean our fundamental freedoms are given a higher status and legitimacy within government. Their protection would be approached more seriously and systematically.

This would not only produce better regard for human rights principles, it would improve the quality of work of public institutions. The charter would be based on the idea that government should be transparent in its treatment of principles like human rights and also accountable to the people by operating fairly and without adverse discrimination.

In many ways the charter proposal is modest. It would not disturb accepted principles of parliamentary sovereignty. Nor would it confer the powers associated with many bills of rights such as the power of courts to have the final say by striking down inconsistent laws. Criticism could be levelled at the charter on the basis that it would not provide everything that might be hoped for from a comprehensive protection for human rights.

But this is to miss the point. Like the ACT and Victorian laws, a Western Australian charter ought only be the beginning of a journey to better protect freedoms in the law. It is a first step that will provide valuable insights for government and the community as to how effective the law can be in protecting human rights. It will also show how any law has its limits, and indeed how the law can, by itself, be ineffective in dealing with some of the most pressing, intractable problems. This will reveal how any strategy for better human rights protection must also pay close attention to political culture and leadership, the media and community attitudes. Without reinforcement from these quarters, the positive impact of the charter will be blunted.

Media references

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