



Victorian Aboriginal Legal Service Co-operative Ltd.

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24 August 2005

Ms Michelle Burrell
Human Rights Project
Department of Justice
55 St Andrews Place
East Melbourne VIC 3002

Dear Michelle,

Re: Discussion Paper - 'Have Your Say about Human Rights in Victoria'

Please find enclosed:

- The preliminary comments of the Victorian Aboriginal Legal Service Co-operative Limited (VALS) on the Discussion Paper, 'Have Your Say about Human Rights in Victoria'.
- Minutes of the Indigenous Australian Human Rights Forum held on 10 August 2005.
- A letter, dated 12 August 2005, that VALS sent to Attorney-General Rob Hulls requesting that the Victorian Government immediately appoint an Indigenous Australian person to the Human Rights Consultation Committee.

Please note that the comments provided by VALS are only preliminary as the enclosed submission is the paper that I presented at the Indigenous Australian Human Rights Forum. VALS will send the minutes from the Community Meeting on 7 September 2005 when they become available.

If you have any questions please do not hesitate to contact Greta Jubb on the above number.

Yours Sincerely

Victorian Aboriginal Legal Service Co-operative Limited

Frank E. Guivarra
Chief Executive Officer



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A State Government Charter of Rights - Will it work for Koories?

Presented at Indigenous Australian Human Rights Forum on 10 August 2005

The State Government has made it very clear in its directions to the Human Rights Consultation Committee (“the statement of intent”) that it is primarily interested in establishing an ACT style Bill of Rights. It is good of the Government to lay their cards, or perhaps in this case, CARD on the table. However, it does raise the question – *“Is the Government interested in hearing about any other options?”* The Human Rights Consultation Committee (Committee) are open to hearing what people have to say, whether or not those comments agree with the Government’s preferred model.

The Attorney-General’s Justice Statement in May 2004 took a broader view of the options to protect human rights. We should embrace and encourage a broader view that that offered in the Discussion Paper Have Your Say about Human Rights in Victoria’. We should not assume that the ACT Bill of Rights model is the best model we can formulate.

It is vital that Indigenous Australian organisations press the Government and the Opposition Parties for a more comprehensive approach to rights protection than the ACT Bill of Rights model.

There are some issues that I want to raise today and maybe they will get us thinking about what we should be looking for in the Charter of Rights:-

1. Does it make sense to spilt Civil and Political Rights from Economic, Cultural and Social Rights? What about the other UN Conventions about eliminating racism, eliminating discrimination against women and the rights of the child?
2. What effect do UN Conventions and Covenants have now on the Commonwealth and State Government?
3. Individuals will not be able to take any legal action based on the Charter of Rights and Courts have a very limited role. Why is this so?
4. Will the Charter enhance Indigenous Australian peoples’ access to self-determination?

Human Rights in Australia:

The State Government consultation on a Charter of Rights is a proposal to better link new Victorian legislation to some of the UN Rights Instruments.

Firstly, I want to say something about the United Nations Covenants and Conventions.

Since World War II, the UN has been the only International organisation devoted to trying to unite the efforts of the countries of the world to achieve and preserve peace, deal with war crimes, famines and encourage improved laws and policies on health, education, free speech etc. The UN faces enormous challenges and has limited power and resources to tackle these challenges.

During this time there have been a number of Conventions and Covenants ratified by the countries which make up the membership of the United Nations. These Covenants and Conventions state in general terms what rights people should be able to enjoy.

These include the International Covenant on Civil and Political Rights [ICCPR] (eg voting, free speech and fair trial) and the International Covenant on Economic, Social and Cultural Rights [ICESCR] (rights to housing, education etc)

There are arguments about which one of these two Covenants is more important than the other. Some people argue that food, safety, shelter and community are more fundamental than Civil and Political Rights. Some people argue that the two covenants are so intertwined with each other that they should not really be separated. Both covenants include the following statement:

Recognizing that, in accordance with the Universal Declaration of Human Rights, the ideal of free human beings enjoying civil and political freedom and freedom from fear and want can only be achieved if conditions are created whereby everyone may enjoy his civil and political rights, as well as his economic, social and cultural rights,

As well as these covenants, there are other UN Instruments such as the Convention on the Rights of the Child, the Declaration on the Elimination of all Forms of Racial Discrimination, the Convention on the Elimination of all Forms of Discrimination against Women and the Draft Declaration on the Rights of Indigenous Peoples. It is interesting to note that these are not included in the Government's proposal.

The South African Constitution includes enforceable economic, social and cultural rights as well as civil and political rights. We should seriously question whether it is wise to leave out economic, social and cultural rights.

Conflict between Commonwealth and State Policies:

Part of the rationale for the State Government saying that the Victorian Charter of Rights should not include Economic, Cultural and Social Rights is that these things are partly a Commonwealth responsibility. Surely the way the Commonwealth discharges its responsibilities and the extent of cooperation with States is exactly why there should be an attempt to include Economic, Social and Cultural Rights. Where there are two Governments responsible, there is benefit in attempting to have both Governments taking Economic, Social and Cultural Rights into account.

True, it may well be difficult or unsuccessful to achieve, but it is surely such an important area of resourcing and covers such important basics as health, housing and education. It, in my humble opinion, should immediately be part of the policy framework for the State Government

What affect do Covenants and Conventions have on Rights in Australia?

Last year, the Family Court had a case in which it was decided that children of asylum seekers should not be held in detention. The Minister for Immigration appealed the Decision to the High Court and the Decision was overturned. The High Court said the Family Court did not have power to decide to release children from detention. They also concluded that the UN Convention on the Rights of the Child was not incorporated into domestic law by the Family Law Amendment Act 1995. In other words, Australia has supported this Convention at the UN but did not legislate for it in Australia.

The issue of detention of children has been revisited recently using political means as opposed to legal means. After much intense lobbying by community organisations, a group of Government backbenchers threatened to introduce their own Bill to release children from detention. This led to the Howard Government making some concessions and we have seen children released from detention.

However, as we still have no domestic law, eg, Commonwealth or State Law saying that we support the Convention of the Rights of the Child, we can potentially have the same issue arise again in two years or five years or whenever.

In a similar way, the lack of any clear right to self-determination made it easier for the Commonwealth Government to abolish ATSIC and not replace it with an alternative. It means that Indigenous Australian organisations have to argue the case for representation, for involvement in decision making, for cultural inclusion over and over again.

UN Rights Enforcement role is limited:

Except for exceptional circumstances the UN is generally not the world's policeman. Its role is more focused on getting countries to talk to each other, work together and establish and monitor minimum standards for rights. Where countries are doing the wrong thing, the UN committees can make reports that highlight human rights problems. In serious cases of rights abuse a resolution about a matter might be passed by the UN.

The UN has very limited power to intervene in national Governments in other words it provides guidance and commentary about a Government's adherence to rights and rights protection.

Many of these Covenants and Conventions have had little effect on the ground. In a strict legal sense the UN Covenants and Conventions often have very little impact until they are acted on and owned by the Government, the bureaucracy and the community.

The Commonwealth Government ratified the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights in 1976, which implies that the Government supported them. However there has been no specific legislation stating that it applies to any new laws or to any existing Commonwealth laws or to any appeals from States. In other words, they have not made sure that Australia conforms with these rights by passing legislation which says that our legislation should conform with these rights.

Rights Today:

On paper, what our rights are today is a result of what Governments, Commonwealth and State, and Courts have said in the past. In practice, access to our rights is often influenced by where we were born, our cultural background, wealth and gender. The fact that Indigenous Australians are significantly disadvantaged in almost every category of rights, health, education, child protection and employment is a stark reminder that there is no level playing field in relation to accessing rights. Economic, social and cultural rights are particularly important to people who are lacking access to these rights, such as Indigenous Australian peoples.

The Victorian Government proposal is to enact legislation to better protect civil and political rights. This is one step better than the Commonwealth Government has managed but still ignores the issue of conforming to all of the other UN Instruments.

Individuals will not be able to take any legal action based on the Charter of Rights. Courts will not be able to declare legislation invalid. Why is this?

This is a bit contradictory. You have rights but you don't have any means of enforcing them. So in what sense are those rights protected? The Government tries to justify this by saying prevention is better than cure but does that mean we give up completely on cures? Is this an overreaction to a fear that the Courts will be clogged with lawyers claiming rights breaches? Is it a cost cutting measure?

Canada gives the Courts more power to declare legislation invalid and send it back to the parliament. Individuals can take action through the Courts. Victoria should consider adopting this model

Will the Charter enhance Indigenous Peoples' access to Self-Determination?

The Right to Self-Determination

Both the UN covenants mention the right to Self-Determination. The right to Self-Determination is not mentioned in the list of rights covered by the Civil and Political Rights list in the Committee's discussion paper. For Indigenous peoples throughout the world the right to Self-Determination is extremely important.

Although the UN relies largely on moral authority, the Australian Government has criticised it and implied that it is a threat to the Australian Government. The Australian Government has strongly criticised the inclusion of a right to Self-Determination in the Draft Declaration on the Rights of Indigenous Peoples. The 2002 report of the Aboriginal and Torres Strait Islander Social Justice Commissioner reviewed the Commonwealth Government's approach to Self-Determination. After a detailed analysis the Commissioner identified five main concerns. Let me quote a part of the first concern.

The first is the Government's reliance upon inflammatory, provocative untruths to reject Indigenous self-determination. This is shown by the suggestion, mysteriously made 'by some' but clearly endorsed by the Government's uncritical recitation of it, that self-determination may amount to a unilateral right to secede from Australia..... It is in fact such an absurd suggestion that the only conclusion that can be drawn from the Government's reliance upon it is that it is a deliberate untruth aimed at raising fear and opposition from non-Indigenous people.

Self determination- the freedom to live well (Social Justice Report 2002)

We haven't seen dramatic improvements in Commonwealth Government policy since then. If there is going to be any Government support for progress in recognizing Indigenous Australian Peoples' right to self-determination, it is going to have to come from the States in the short to medium term.

The problems facing Indigenous Australian Peoples and the opportunities are closely bound to continued progress on self-determination.

Apart from legislative recognition of self-determination, there are two other measures that we suggest might assist Indigenous Australian communities. One is a systematic consideration of Indigenous issues at the beginning of the policy and legislation process and the other is funding Indigenous organizations to contribute to a rights policy framework and to input to UN reviews of compliance with the Covenants and Conventions.

Strengthening Community Understanding of and Pride in Rights

Better protection does not come simply from more legislation. It also comes from a more culturally inclusive Government bureaucracy, influencing Commonwealth Government policies and a greater awareness by the community of rights abuse and strategies for addressing them. There needs to be a proposal to provide meaningful community education about rights issues. We need to get the message across that pretending that everyone is equal ignores the reality that, in practice, we are not all equal.

People Have Different Ideas About Rights - The Need For Dialogue.

One of the defining characteristics of the Australian character is the concept of a "fair go" - that is, a real and widespread sense in the community that everyone should be treated equally and fairly.

Therefore it should come as no surprise that the Australian Government is committed to maintaining this Australian tradition of tolerance and respect for diversity, which is the foundation of one of the world's successful multicultural societies.

During a hearing earlier this year in Geneva when the Australian Government was before the examining Committee established pursuant to Convention on Elimination of Racial Discrimination (CERD), Mike Smith the Australian Ambassador said the following:

“It can be truly said, Mr Chairperson, that Native Title - such a contentious and controversial subject in the 1990s - is now a settled, accepted and effective dimension of Australian society and economic life.”

I am sure that this statement would come as a surprise to many people here today. It highlights the different opinions people hold about whether rights exist and it highlights some of the Commonwealth Government's policies.

The UN's CERD Committee raised a number of areas of concern about the Australian Government's performance and the Government is supposed to address these issues prior to the next review.

State Governments could lobby the Commonwealth Government to address these issues and assist Indigenous Australian organisations to develop submissions to UN committee reviews. This material would also support States in their ability to improve rights protection and develop more effective policies. It would also assist the States to negotiate improved policies at a Commonwealth level.

This could be done at a modest cost and it would help keep a Human Rights perspective on Indigenous issues and policy development. If other State Governments also funded Indigenous Australian organizations to do this, there could eventually be a National network of Indigenous Australian organisations involved in this monitoring and advocacy role.

The Australian Political Context

The Commonwealth Government is not just trying to reduce Indigenous Australian Peoples' rights, they have also argued that the United Nations Committee Review System is ineffective and that it takes too much notice of Non-Government Organisations. We should be both alert and alarmed about continuing Commonwealth Government attempts to avoid scrutiny by UN Bodies and undermine the work of NGOs.

Proposals

Broad Goal:

We should be campaigning for the Commonwealth and State Governments to say that their legislation will conform to UN Human Rights Instruments, Covenants and Conventions.

Objectives:

1. That an Independent Human Rights Unit be established with at least the following functions

- i. Check if Legislation conforms to Human Rights Instruments (all conventions and covenants)
- ii. In the event that legislating for all conventions and covenants is rejected, there should be at least some inclusions of Economic, Social and Cultural Rights, eg, Indigenous rights or a sphere of activity such as education should be included as a first step towards future wider policy and legislation commitments.
- iii. In the event that Civil and Political Rights are the only ones legislated, there should be an implementation plan for inclusive policy development and monitoring strategies for Economic, Social and Cultural Rights. This would include a rights based policy framework which could be used in working with the Commonwealth Government.
- iv. Recommend a Community Review Order Eg where there is significant non-conformity with Human Rights there should be a twelve month review period to introduction of the Bill to allow for community comment. If the matter is too urgent to do this there should be a sunset clause to limit how long the act is in force
- v. Promote understanding of Human Rights
- vi. Indigenous rights, governance facilitation and community support team

2. Indigenous Rights Assessment Project:

Indigenous input to Economic, Social and Cultural Rights policy development and input to UN reviews managed by a consortium of Indigenous Australian organisations and funded by the State Governments.

Government Functions and Processes:

This work would often be politically sensitive and would need to be done by Government.

1. Commonwealth - State negotiations and policy development re conforming with the Economic, Social and Cultural Rights Covenant.

2. Indigenous Policy Impact Assessment Team:

This team would advise Government at an early stage of policy or legislative development of possible impacts on Indigenous Australian individuals or communities.

- i. Provide advice regarding the likely impact of policy or law reform on the Indigenous Australian population, at the earliest stage of policy development
- ii. Develop policy protocols, eg, inclusive policy development based on research on best practice

One way to highlight the importance of this issue might be to develop an Indigenous organisations list of suggestions and proposals and try to publicise this widely eg to Government, opposition and mainstream community. Given the limited time that we have that may not be possible but it is worth thinking about.

Appendix:

Here is what Answers.com - a free internet based encyclopedia says about Human Rights in Australia.

[Australia](#) generally has a good [human rights](#) record. State sanctioned [torture](#) is non-existent, and protection of [women](#) and minorities is reasonably good by world standards. There are a number of pieces of legislation to protect certain human rights, however Australia has no [bill of rights](#). The [High Court](#) has found certain implied rights in the [Constitution](#). Australia has been criticised at various times for its immigration policies, treatment of asylum seekers, and treatment of the native population.

Wikipedia information about **Human rights in Australia**

MINUTES

INDIGENOUS AUSTRALIAN HUMAN RIGHTS FORUM

10 August 2005

Aborigines Advancement Leagues

A State Government Charter of Rights - Will it work for Koories?

Frank Guivarra (Chief Executive Officer – Victorian Aboriginal Legal Service Co-operative Limited).

We need a more comprehensive approach to rights protection than the ACT model.

Questions:

5. Does it make sense to spilt Civil and Political Rights from Economic, Cultural and Social Rights? What about the other UN conventions about eliminating racism, eliminating discrimination against women and the rights of the child?

The Victorian Government proposal is to enact legislation to better protect civil and political rights. This is one step better than the Commonwealth Government has managed but still ignores the issue of conforming to all of the other UN Instruments.

Inclusion

UN Instruments included in Government proposal:

- International Covenant on Civil and Political Rights [ICCPR] (eg voting, free speech and fair trial)

Exclusion

UN Instruments left out:

- International Covenant on Economic, Social and Cultural Rights [ICESCR] (rights to housing, education etc).
- Convention on the Rights of the Child.
- Declaration on the Elimination of all Forms of Racial Discrimination.
- Convention on the Elimination of all Forms of Discrimination against Women .
- Draft Declaration on the Rights of Indigenous Peoples.

The South African Constitution includes enforceable economic, social and cultural rights as well as civil and political rights. We should question whether it is wise to leave out economic, social and cultural rights.

Part of the rationale for the State Government saying that the Victorian Charter of Rights should not include Economic, Cultural and Social Rights is that these things are partly a Commonwealth responsibility. Surely the way the Commonwealth discharges its responsibilities and the extent of cooperation with States is exactly why there should be an attempt to include Economic, Social and Cultural Rights. Economic, Social and Cultural Rights should immediately be part of the policy framework for the State Government.

6. Will the Charter enhance Indigenous Australian peoples' access to self-determination?

Indigenous Australians attitude to self determination

For Indigenous peoples throughout the world the right to Self-Determination is extremely important. The problems facing Indigenous Australian Peoples and the opportunities are closely bound to continued progress on self-determination.

Government attitude to self determination

It is disappointing the right to Self-Determination is not mentioned in the list of rights covered by the Civil and Political Rights list in the Committee's discussion paper.

We haven't seen dramatic improvements in Commonwealth Government policy to self determination recently. If there is going to be any Government support for progress in recognizing Indigenous Australian Peoples' right to self-determination, it is going to have to come from the States in the short to medium term.

Other measures:

Apart from legislative recognition of self-determination, there are two other measures that we suggest might assist Indigenous Australian communities:

1. Systematic consideration of Indigenous issues at the beginning of the policy and legislation process
2. Funding Indigenous organizations to contribute to a rights policy framework and to input to UN reviews of compliance with the Covenants and Conventions.

Strengthening Community Understanding of and Pride in Rights

There needs to be a proposal to provide meaningful community education about rights issues. We need to get the message across that pretending that everyone is equal ignores the reality that, in practice, we are not all equal.

People Have Different Ideas About Rights - The Need For Dialogue.

Different ideas

People have different ideas about rights and there is need for dialogue. During a hearing earlier this year in Geneva when the Australian Government was before the examining Committee established pursuant to Convention on Elimination of Racial Discrimination (CERD), Mike Smith the Australian Ambassador said the following: *“It can be truly said, Mr Chairperson, that Native Title - such a contentious and controversial subject in the 1990s - is now a settled, accepted and effective dimension of Australian society and economic life.”* This statement would come as a surprise to many people here today. It highlights the different opinions people hold about whether rights exist.

Dialogue

- State Governments could lobby the Commonwealth Government to address the issues identified in the UN’s CERD Committee Report.
- State Governments could assist Indigenous Australian organisations to develop submissions to UN Committee Reviews. This material would also support States in their ability to improve rights protection and develop more effective policies. It would also assist the States to negotiate improved policies at a Commonwealth level.
- If other State Governments fund Indigenous Australian organizations to do this, and eventually there could be a National network of Indigenous Australian organisations involved in this monitoring and advocacy role.

The Australian Political Context

We should be both alert and alarmed about continuing Commonwealth Government attempts to avoid scrutiny by UN Bodies and undermine the work of NGOs.

PROPOSALS

Broad Goal:

We should be campaigning for the Commonwealth and State Governments to say that their legislation will conform to UN Human Rights Instruments, Covenants and Conventions.

Objectives:

1. That an Independent Human Rights Unit be established with at least the following functions
 - vii. Check if Legislation conforms to Human Rights Instruments (all conventions and covenants).
 - viii. In the event that Civil and Political Rights are the only rights legislated, there should be an implementation plan for inclusive policy development and

monitoring strategies for Economic, Social and Cultural Rights. This would include a rights based policy framework which could be used in working with the Commonwealth Government.

- ix. Recommend a Community Review Order (eg: where there is significant non-conformity with Human Rights there should be a twelve month review period to introduction of the Bill to allow for community comment). If the matter is too urgent to do this there should be a sunset clause to limit how long the Act is in force
- x. Promote understanding of Human Rights.
- xi. Fund an Indigenous rights, governance facilitation and community support team

2. Indigenous Rights Assessment and policy development Project:

Indigenous input to Economic, Social and Cultural Rights policy development in State Government (and eventually Commonwealth) and input to UN reviews managed by a consortium of Indigenous Australian organisations and funded by State Governments.

3. Government Functions and Processes:

Strategic Policy Advice and analysis

This work would often be politically sensitive and would need to be done by a part of government.

- 3. Commonwealth - State negotiations and policy development (re conforming with the Convention on Economic, Social and Cultural Rights).

- 4. Indigenous Policy Impact Assessment Team:

This team would:

- i. Advise Government at an early stage of policy or legislative development of possible impacts on Indigenous Australian individuals or communities.
- ii. Provide advice regarding the likely impact of policy or law reform on the Indigenous Australian population, at the earliest stage of policy development
- iii. Develop policy protocols, eg, inclusive policy development based on research on best practice

3. List of suggestions and proposals

One way to highlight the importance of this issue might be to develop an Indigenous organisations list of suggestions and proposals and try to publicise this widely (eg: to Government, Opposition and mainstream community). Given the limited time that we have that may not be possible but it is worth thinking about.

Protection of Human Rights in the ACT and Canada

Larissa Behrendt (Professor of Law and Indigenous Studies, Director of the Jumbunna Indigenous House of Learning at University of Technology, Sydney and member of the Bill of Rights Australian Capital Territory Consultative Committee).

Krueger v Commonwealth:

In this case Krueger was trying to argue that rights which are mentioned in the Australian constitution such as freedom of religion and freedom of movement had been denied because of stolen generation policies. Krueger was unsuccessful in arguing that human rights apply to Australians in general (ie: right to due process). This highlights how limited existing human rights protection is for things such as due process.

Constitution

Human rights were deliberately kept out of the Constitution by the framers. This is because they wanted a system of Government that enabled Parliament to decide how rights were protected and did not want to put something in place that took away people's right to discriminate.

Mindset

In arguing for a Bill of Rights (BOR) I do not expect it to solve every problem as the answer is more sophisticated and multifaceted. A BOR is only one piece to a broader puzzle. In making an argument for Bill of rights I am not saying that there is no need for a Treaty or self determination as a Treaty goes hand in hand with a BOR.

Arguments against a BOR

- Rights are already protected in separate legislation.
- Australia does not have a terrible human rights record in comparison to other countries
- Why tinker with a system that works well?
- It is up to an elected Parliament to decide how rights are protected rather than the framers of the Constitution.
- A BOR in the Constitution is too inflexible.
- There will be increased litigation.
- It does not work (eg: human rights are still breached in Canada/USA).

Arguments for BOR

- The framers of the Constitution got it wrong. They were influenced by the thinking of the time that was based on racism (ie: White Australia Policy).
- It would bring our legal system up to United Nations Standards.
- It is wrong to compare our track record of human rights with other countries.
- It will protect those who are vulnerable to rights violations (ie: not white middle class).
- Even though a BOR may not include everything that would ideally be included in a Treaty it will protect general rights (ie: right to due process).

- Indigenous Australians are more vulnerable to being abused than non-Indigenous Australians so there should be something specifically about them in the BOR.
- A flow on from a BOR is that it makes community aware of the rights of citizens. Australians do not think of themselves as rights bearing entities whereas Canadians do and this is because they have a BOR. The mentality in Australia in relation to Indigenous Australians claiming Native Title rights is that they want something for nothing. In Canada people never have to argue why they have to have rights before getting to the meat of what the rights are, whereas in Australia we do.

BOR Entrenched in Constitution

The Canadian Constitution makes a blanket statement that Aboriginal rights and Treaty rights are protected.

The arguments against this are:

- Inflexible.
- Is interpreted by Judges and this may cause problems if the judiciary is conservative and does not recognise the rights of Indigenous peoples. The judiciary are not elected so they can not be lobbied by the community.

The arguments for are:

- Indigenous Australian rights would be protected and it would be harder for the Government to ignore such rights.

BOR entrenched in Legislation

The arguments for are:

- Parliamentarians are elected so it is possible to lobby them. This makes for a more communal process to the protection of human rights.

The arguments against are:

- What the Government can give, it can take away.

Experience in ACT

There was antagonism during the BOR consultation process in the ACT by middle class white Australians to the idea of minority rights. The antagonism was a result of:

- meanness of spirit.
- Middle class white Australians having no cause to worry about the protection of their human rights.
- Middle class mentality that if you give rights then you need to give something up (ie: native title rights means lose backyard hysteria).

As the ACT is a Territory the Federal Government has the power to overrule the BOR, although this has not happened to date. There has been no litigation under the BOR one year after its enactment which proves enacting a BOR is not a lawyer's picnic. The BOR

has changed the way of thinking of the bureaucracy (eg: considering human rights implications for building new prison).

Types of Rights

Civil and political rights are easy for Government to meet. Economic, social and cultural rights are harder for the Government to meet. The ACT committee recommended that economic, social and cultural rights be included. The ACT BOR does not include economic, social and cultural rights. This may be revisited as there is a 5 year review clause in the BOR and there is a requirement to specifically consider the impact of the BOR on Indigenous Australians.

An Australian Bill of Rights: Implications for Indigenous Australians and Children

The Honourable Alastair Nicholson QC (former Chief Justice of the Family Court and current Honorary Professorial Fellow at the Department of Criminology, University of Melbourne).

There is a need for a BOR in light of issues such as terrorism, detention of refugees, the vulnerability of children, in particular Indigenous Australian children and those in care.

Children

A BOR should have a specific clause for all children and there is a particular need for it in relation to Indigenous Australian children. The ACT BOR purports to protect children but does not specifically protect the rights of children. Unfortunately, there is a conservative reaction to such arguments. For instance, some do not want to give children too many rights as they wrongly fear it will result in a situation where children can tell their parents what to do.

Courts

If the Mabo case had come before the present judges of the High Court they may not have made the same decision. The present members are unlikely to progress recognition of human rights. If the Commonwealth and State Government legislated to recognize human rights this would increase the chance of the High Court better protecting rights.

Getting 'Rights' Right and Righting the Wrongs: A Rights Framework for Aboriginal and Islander Communities and Their Children

Muriel Bamblett (Chief Executive Officer - Victorian Aboriginal Child Care Agency).

Context

Human rights are important for Aboriginal and Islander peoples because they are something we are looking forward to having in this country one day. Anyone here today over the age of 38 has lived part of their lives effectively as non-citizens.

Self Determination

The Whitlam era and, to a lesser extent, the Fraser era, was a time when human rights were treated seriously, such as land rights and self-determination. Unfortunately, self-determination was poorly resourced and not enough thought was put into building the capacity of Indigenous communities to exercise their self-determination. Self-determination muscles had been unused for decades and we needed the right exercise plan to restrengthen them. Today we find our voices again silenced by a Federal Government who refuses to recognise our rights to self-determination. The opposite of 'mutual obligation' is human rights.

Reasons for self determination:

- Self-determination is good for your health and good for your children. And a comparison of life expectancy statistics shows that Indigenous peoples who have treaties and various self-determining rights have far better health outcomes.
- Self-determination for Aboriginal and Islander peoples is critical. For too long we have had no rights. We have had no say in our future.
- Human rights enables self-determination and self-determination enables our communities to have the capacity to take and action our responsibilities. We want rights not welfare.
- Self-determination is necessary if our children are to have a future. In response to the trauma and injustice caused by the Stolen Generations policies it is important to today recognise our communities' self-determining role in relation to our children. The new proposed *Children's Bill* and accompanying white paper, *Protecting Children: The Next Steps*, released last week are premised on principles of self-determination and capacity building for Aboriginal and Islander communities.
- The BOR should enshrine the right for us to care for our own children.
- Respecting self determination and building capacity are the critical principles which will lead to positive outcomes.

Elimination of Discrimination

Australia's human rights instruments are currently inadequate in their protection for Indigenous peoples against systemic racism. The suspension of the *Racial Discrimination Act* when it comes to Native Title and the ease in which National

Indigenous representation was abolished demonstrate the need to embed human rights in Australian culture and policy.

A Human Rights Bill would greatly strengthen the position of Victoria's Indigenous peoples if it includes measures which address issues of racial discrimination and racial respect. The Human Rights bill should follow the advice of the Committee on the Elimination of Racial Discrimination and

Ensure that members of Indigenous peoples have equal rights in respect of effective participation in public life and that no decisions directly relating to their rights and interests are taken without their informed consent.¹

Children's Rights

International human rights instruments recognise that children have the right to special protection because of their vulnerability.

A child's rights to culture, which acknowledges that protection of culture and identity are in the best interests of the child, should be part of any Victorian Human Rights document. *Convention on the Rights of the Child*, Article 30 of the *Convention on the Rights of the Child* explicitly recognizes the right of indigenous children to enjoy their traditional culture, practice their own religion and use their traditional language.

The Human Rights Bill we want to see

- specific protections for Indigenous communities on the basis of their status as First Peoples and their rights to self-determination.
- Children's rights should be included with a priority given to the protection of children's rights to identity, culture and connection to family and community.
- Measures to prevent discrimination should acknowledge the collective rights of Indigenous communities and the need to prevent measures which are defined as potentially 'genocidal' in accordance to the Genocide Convention.
- practical section which sets out how human rights are enshrined, how they are to become the basis for policy and service delivery, how they are to be implemented and how compliance is to be ensured.
- Strong enforceability of a charter of rights. The Equal Opportunity Commission should be given powers to ensure compliance and be resourced so that it can do an annual 'human rights' audit of state legislation, policy and practice.

By recognising and establishing measures to protect our rights, the proposed human rights law can go a long way in establishing a safe meeting place between our peoples.

¹ Committee on the Elimination of Racial Discrimination, *General Recommendation XXIII – Indigenous people*, 18 August 1997, UN Doc: A/52/18, annex V para 4 (d).

Lets get 'rights' right and right the wrongs. Then we can begin to establish a just relationship between our peoples and secure a future for all our children.

Continue

We need to expand peoples knowledge of and empower communities about their human rights and that is why Forums like this are good. We need to continue the dialogue and not let this be a once off. This is a good starting point but it cannot finish today.

International Standards

Melissa Castan (Associate Director of Castan Centre for Human Rights Law, Monash University).

I approach this topic as a white middle class person who is part of the Western legal system. White middle class people are unable to digest the Indigenous Australian perspective on human rights, such as the right to self determination is indigestible. This is tragic as self determination is a core principle or foundation for the recognition of other human rights. This tragedy is not the fault of the speaker, but is the fault of the listener.

There are some International Standards that white middle class people accept, such as those in the Racial Discrimination Act, based on the Convention on the Elimination of Racial Discrimination.

It is good to fight for the right to self determination. But you should not put all your efforts into it. Do not put all your eggs in the one basket.

DISCUSSION

- Comment: We need self determination and a treaty. There is no point in having a BOR without a treaty.
- Comment: There needs to be a check, such as the Equal Opportunity Commission of Victoria. What is the point in writing a list if it is just aspirational, consequences are required.
- Comment: We need to change the political culture here, just as happened in Canada. Larissa mentioned change of bureaucracy mentality in the ACT.
- Comment: Karen Jackson has been appointed to the EOCV. The EOCV has sent a submission.
- Comment: The treatment of Indigenous peoples in Australia is of a lower standard than the treatment of Indigenous people in New Zealand.
- Comment: The Government operates by weight of public opinion. Water finds its own level. Let's make a big dam. By sheer weight of numbers we can send a message.
- Question: Once again it feels like the horse has bolted and we are trying to catch it. Something needs to be written up, such as a petition in order to get the numbers supporting it. Can VALS do something?

- Answer: There is a strong possibility of a community meeting.
- Comment: This is a disempowering mainstream process, as it is difficult for the Indigenous Australian community to write a submission. We are letting people down if they cannot have a say.
- Question: There is no Aboriginal representation on the Human Rights Consultation Committee. This is a slap in the face for Indigenous Australians. There should be a level playing field. We have been playing catch up for 200 years. Why is there no Aboriginal representation?
- Answer: The Committee is Government appointed.
- Comment: Relevant Reports should be circulated to the community in an appropriate format. For instance, extracts from the Brining Them Home Reports should be made available. In New Zealand there are a lot of Indigenous heroes and it is disgusting that Indigenous heroes in Australia are not recognized.
- Question: What is the Indigenous population in New Zealand.
- Answer: 12%
- Comment: We need to start again. There needs to be representation on the Human Rights Consultation Committee for Indigenous Australians, disabled people etc.
- Comment: We could write a letter to the Premier. There is nothing George Williams can do directly.
- Comment: You may find that at the end of the process Indigenous Australians may be the most consulted group.
- Comment: Indigenous Australians are the first peoples of this land and should be on the Committee.
- Comment: There should be another meeting during the evening. There are not enough Indigenous Australians here. They are at work.



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The Honourable Rob Hulls, MP
Attorney-General
Level 1
55 St Andrews Place
MELBOURNE Victoria 3002

Dear Mr Hulls,

Re: Charter of Rights

I write to you in respect of the Charter of Rights consultation process and in relation to a resolution passed at the Indigenous Australian Human Rights Forum which was held at the Aborigines Advancement League on the 10th of August 2005 and attended by approximately 75 persons comprising of staff from Indigenous Australian organisations, community members, university students and staff from mainstream services.

The Forum was convened by VALS and seven Statewide Indigenous Australian organisations. The Human Rights Consultation Committee provided financial assistance for the Forum, including bringing Professor Larissa Behrendt from Sydney to address the Forum. The Chairperson of the Committee, Professor George Williams, also attended the Forum as an observer, spoke briefly and fielded a number of questions from some of the participants. We enclose herewith the agenda for the Forum and the speakers who presented.

There was enormous interest in the issue of human rights and how best to protect the human rights of Indigenous Australians in Victoria. A number of comments were made about the speed with which the issue of human rights was being dealt with by the Government and the challenge this presented to community members to assess the issues at hand and contribute views. Also, the accessibility of processes put in place for community members to 'have their say' was questioned.

A vast majority of the participants at the Forum agreed to the following:-

"That this Forum requests that the Victorian Government immediately appoint an Indigenous Australian person to the Human Rights Consultation Committee".

There were a range of comments in support of this resolution. Professor Williams made it clear that the Committee was meeting with people around the State and this request is not a criticism of the work being done by the Committee.

VALS urges you to give the request for the inclusion of an Indigenous Australian person on the Committee serious consideration. Inclusion of an Indigenous Australian person on the Committee would be in line with your Department's and the Government's philosophy of seeking to reduce Indigenous Australian disadvantage and provide a greater opportunity for Indigenous Australian communities to take responsibility for matters affecting community members.

The inclusion would be consistent with the Government's interest in reducing systemic discrimination, achieving more inclusive and cohesive work across Departments and in partnership with communities. Such aspirations are expressed in the Aboriginal Justice Agreement, Justice Statement (2004), A Vision for Victoria to 2010 and Beyond: Growing Victoria Together and A Fairer Victoria.

Participants at the Forum expressed strong interest in holding a further Forum at night. This would enable greater Indigenous Australian community participation and facilitate a more robust discussion in this very important matter. VALS will work with other organizations and the Committee to try to achieve this.

I look forward to your earliest response. If you have any questions please do not hesitate to contact me.

Yours Sincerely

Victorian Aboriginal Legal Service Co-operative Limited

Frank E. Guivarra
Chief Executive Officer

12th August 2005

Encl: