

Submission to the Australian Human Rights Consultation Committee

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I divide this submission into three parts.

The first part, relates to the current status of Human Rights in Australia.

1. The Current Status Of Human Rights In Australia

On the Human Rights Consultation Committee web page at http://humanrightsconsultation.gov.au/www/nhrcc/nhrcc.nsf/Page/Frequently_Asked_Questions#Q9 (that is a single URL that goes over two lines, because it is far too long), is the text

"Which international human rights instruments does Australia uphold?

Australia has agreed to uphold the human rights standards set out in a number of international treaties and declarations, including:

- * the International Covenant on Civil and Political Rights (ICCPR)
- * the International Covenant on Economic, Social and Cultural Rights (ICESCR)
- * the Convention on the Rights of the Child (CRC)
- * the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW)
- * the Convention on the Elimination of All Forms of Racial Discrimination (CERD)
- * the Universal Declaration of Human Rights (UDHR)
- * the Convention Against Torture (CAT), and
- * the Convention on the Rights of Persons with Disabilities (CRPD).

This means that Australia is obliged to give effect to the human rights obligations contained in these documents.

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However, on the web site of the High Court Of Australia, is the web page at http://www.hcourt.gov.au/speeches/kirbyj/kirbyj_inthrts.htm , which is the text of a speech given by Michael Kirby, former judge of the High Court Of Australia, which includes the text

"INCORPORATED INTERNATIONAL LAW

In Australia, to use the categories mentioned by Dame Rosalyn Higgins [1] in her most recent book, we have followed the dualist theory of the relationship between international and national law. Until now, there have been two essentially different legal systems, existing

side by side, within different spheres of action - the international plane and the domestic plane [2] . In 1982 Justice Mason succinctly described the common law principle applicable in Australia thus [3] :

"It is a well-settled principle of the common law that a treaty not terminating a state of war has no legal effect upon the rights and duties of Australian citizens and is not incorporated into Australian law on its ratification by Australia. ... In this respect Australian law differs from that of the United States where treaties are self-executing and create rights and liabilities without the need of legislation by Congress. ... As Barwick CJ and Gibbs J observed in *Bradley v The Commonwealth* [4] , the approval by the Commonwealth Parliament of the Charter of the United Nations in the Charter of the United Nations Act 1945 (Cth) did not incorporate the provisions of the Charter into Australian law. To achieve this result the provisions have to be enacted as part of our domestic law, whether by Commonwealth or State statute. Section 51(xxix) [the external affairs power] arms the Commonwealth Parliament ... to legislate so as to incorporate into our law the provisions of [international conventions]."

It is my understanding, despite what is published on the NHRCC web site, that the High Court Of Australia has ruled that no international treaty to which Australia is party, even to the extent of such a treaty "having entered into force in Australia", as with the UN International Covenant On Civil And Political Rights ("entered into force in Australia" in 1980 , see <http://www.austlii.edu.au/au/journals/BondLRev/2000/15.html> and <http://www.mjil.law.unimelb.edu.au/issues/archive/2000/2000-11Dalton.pdf>), is legally binding (and therefore, is of any effect) in Australia, unless explicitly enacted into law.

Thus, it is my understanding that no civil rights exist in Australia, apart from what are explicitly legislated, scattered through miscellaneous particular Acts.

Certainly, such "rights", in Australia, as "freedom of speech", and, "the right to bear arms", and, therefore, the right to unrestricted ownership of firearms, are not more than figments of people's imaginations, due most likely, to confusion with rights implemented elsewhere, such as in the USA, the laws of which, are commonly confusedly regarded as applying in Australia.

A very good example of the lack of freedom of speech in Australia, is the case of the man who was imprisoned during the course of a federal election, for simply advising people of their voting rights in the election; he advised that a means was legally available for people to vote using the "first past the post" method of voting, in the federal election, so he was imprisoned, to silence him, until the election was over, and, the "loophole" subsequently closed, to prevent people from voting using the "first past the post" method of voting. He did not tell people to vote that way; he only told them that they could vote that way.

Thus also, it has occurred in Australia, that the reward for informing people of their rights, is that it is an imprisonable offence.

That desperately needs to be changed - it is and should be, the duty of each level of government, to fully inform people of their rights.

Thus, also, it should be a mandatory part of education, for students to be informed of their rights and obligations, at least insofar as any and all human rights legislation is concerned.

And, all people in the country, should be issued with information as to their rights and obligations, at least insofar as human rights are concerned, as, at present, what exists in Australia, in terms of human rights awareness, is misinformation and confusion.

2. An Appropriate Human Rights Model For Australia

In the absence of an explicit and dedicated statement of human rights in Australia, and, with many variations existing at different levels, internationally, the best option is a simple, fair, and, binding model, that is absolute, is required.

A movie exists, with the title "This Land Is Mine" (see <http://www.imdb.com/title/tt0036431/>), starring Charles Laughton. I strongly recommend that film. It alerted me to the existence of a particularly good declaration of human rights.

That declaration of human rights, is 220 years old, and dates from the French Revolution.

It is the "Declaration of the Rights of Man and of the Citizen", August 1789 (see <http://www.historyguide.org/intellect/declaration.html> and http://en.wikisource.org/wiki/Declaration_of_the_Rights_of_Man_and_of_the_Citizen and http://en.wikipedia.org/wiki/Declaration_of_the_Rights_of_Man_and_of_the_Citizen).

It is interesting that the NHRCC is due to deliver its findings, in August this year, 220 years to the month, from when that Declaration is regarded as having been adopted "by the National Constituent Assembly (Assemblée nationale constituante), during the period of the French Revolution, as the first step toward writing a constitution for France." - http://en.wikipedia.org/wiki/Declaration_of_the_Rights_of_Man_and_of_the_Citizen.

It sets out basic human rights, and, does it well. Perhaps, the only shortcoming, is the use of the male gender, rather than being gender-neutral, but that is easily overcome, and, is common in law, where such references are usually prefaced with a statement such as "All references to males, include both genders, and are not limited to males", or, words to that effect.

On the third of those web pages, is the part;

"Effect today

According to the preamble of the Constitution of the French Fifth Republic (adopted on 4 October 1958, and the current constitution), the principles set forth in the Declaration have constitutional value. Many laws and regulations have been canceled because they did not comply with those principles as interpreted by the Conseil Constitutionnel ("Constitutional Council of France") or the Conseil d'État ("Council of State").

Many of the principles in the 1789 declaration have far-reaching implications nowadays:

- * Taxation legislation or practices that seem to make some unwarranted difference between citizens are struck down as unconstitutional.

- * Suggestions of positive discrimination on ethnic grounds are rejected because they infringe on the principle of equality, since they would establish categories of people that would, by birth, enjoy greater rights.

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The constitution of the Fifth Republic Of France, is subject to that declaration, and must comply with it.

And, importantly, as noted above, all people are equal, as opposed to what Australia does, which is along the lines of George Orwell's Animal Farm; "All animals are equal, and some animals are more equal than others".

Either equality exists, or, it does not. It is that simple.

Once, when I was seeking employment, here in Western Australia, I could not obtain employment, because I was not of the race that was required for eligibility for employment in the work for which I was otherwise eligible. That was less than twenty years ago, when the Commonwealth Employment Service was the major employment agency, and, that was relating to positions advertised within the CES.

Also, one of the major Australian political parties, apparently regards females as being so inferior, that they cannot win positions on their merit, and so, has a policy that, for a fixed percentage of positions, the successful candidate must be female, regardless of whether they are suitable for the positions.

Whilst separatism and segregation, are applied and enforced, in Australia, as they are currently applied, equality will never be achieved. Increasing resentment and conflict, will be achieved, and failure, where decisions are made on the basis of criteria that do not involve merit.

All people should have equal chance, regardless of race or gender, regardless of political belief, and, regardless of religion (unless it is a threat to others (Article 4 of the Declaration; "Liberty consists of the power to do anything that does not injure others")).

Either we have equality, where all are equal, or, we have Animal Farm, where "All animals are equal, and some animals are more equal than others". It is that simple.

The French have a very good thing, with the Declaration Of The Rights Of Man And The Citizen, and that the Constitution of the French Fifth Republic, and thence, all French law, is subject to that Declaration.

I believe and suggest, that we could not do better than adopting that Declaration, and, making the Australian Constitution, and, thence, all Australian law, subject to that Declaration, other than prefacing the Articles of the Declaration, with the provision that "All references to the male gender, include all people, irrespective of gender.", other than the addition as mentioned two paragraphs below, and, adapting the Preamble to refer to Australia instead of France.

I believe and suggest that that Declaration is far superior to any other existing declaration or instrument of human rights, so long as it is the foundation of all law, including the Constitution.

I believe that also should be included in the Declaration of Human Rights in Australia, to which all laws within the country, including the Australian Constitution, should be subject, is the text of Articles 14 and 15 of the International Covenant On Civil And Political Rights, as included at the end of this submission.

3. How a Declaration of Rights should be implemented

A Declaration Of Rights should be implemented in Australia, as the absolute authority, to which all laws, at every level of government; federal government, governments of states and territories, and, local governments, should be subject.

At present, such instruments as the federal Human Rights And Equal Opportunities Act, are not applicable to states and to state law, such Acts are applicable only to federal government departments, and to federal laws. Thus, they are a waste of time, as they are only part-time Acts.

Thus, a Declaration Of Rights should be the absolute law in the country, with all else, being subject to it.

I am aware, that to make such a change, would require a federal referendum, of the nature of changing the federal constitution, as what I suggest, and, what I contend is necessary, is for all laws in Australia, including the Australian Constitution, to be made subject to the Australian Declaration of Human Rights as I have suggested.

I suggest that the "Declaration Of The Rights Of Man And The Citizen (August 1789)", be adapted and adopted for Australia, incorporating the addition of the provisions of Articles 14 and 15 of the International Covenant On Civil And Political Rights (appended to the Declaration, and the Articles 14 and 15 of the International Covenant, numbered 18 and 19, respectively, and, with the Title and Preamble of the Declaration changed to;

"Australian Declaration of Human Rights (May 2009)

The People of Australia, in consideration of the "Declaration Of The Rights Of Man And The Citizen (August 1789)", from France, and the United Nations International Covenant On Civil And Political Rights, and, considering that ignorance, forgetfulness, or contempt of the rights of man are significant causes of public miseries and the corruption of governments, have resolved to set forth in a solemn declaration the natural, inalienable, and sacred rights of humans, so that this declaration, being ever present to all the members of the social body, may unceasingly remind them of their rights and duties; in order that the acts of the legislative power, and those of the executive power, may at each moment be compared with the aim and of every political institution and thereby may be more respected; and in order that the demands of the citizens, grounded henceforth upon simple and incontestable principles, may always take the direction of maintaining the constitution and welfare of all.

In consequence, the People of Australia recognize and declare, the following rights of humans, where references to males, shall be taken to refer to all humans:"

"Declaration of the Rights of Man and the Citizen (August 1789) (from <http://www.historyguide.org/intellect/declaration.html>)

The Representatives of the French people, organized in National Assembly, considering that ignorance, forgetfulness, or contempt of the rights of man are the sole causes of public miseries and the corruption of governments, have resolved to set forth in a solemn declaration the natural, inalienable, and sacred rights of man, so that this declaration, being ever present to all the members of the social body, may unceasingly remind them of their rights and duties; in order that the acts of the legislative power, and those of the executive power, may at each moment be compared with the aim and of every political institution and thereby may be more respected; and in order that the demands of the citizens, grounded henceforth upon simple and incontestable principles, may always take the direction of maintaining the constitution and welfare of all.

In consequence, the National Assembly recognizes and declares, in the presence and under the auspices of the Supreme Being, the following rights of man and citizen:

Articles:

1. Men are born free and remain free and equal in rights. Social distinctions can be based only on public utility.

2. The aim of every political association is the preservation of the natural and imprescriptible rights of man. These rights are liberty, property, security, and resistance to oppression.

3. The sources of all sovereignty resides essentially in the nation; no body, no individual can exercise authority that does not proceed from it in plain terms.

4. Liberty consists in the power to do anything that does not injure others; accordingly, the exercise of the rights of each man has no limits except those that secure the enjoyment of these same rights to the other members of society. These limits can be determined only by law.

5. The law has only the rights to forbid such actions as are injurious to society. Nothing can be forbidden that is not interdicted by the law, and no one can be constrained to do that which it does not order.

6. Law is the expression of the general will. All citizens have the right to take part personally, or by their representatives, and its formation. It must be the same for all, whether it protects or punishes. All citizens, being equal in its eyes, are equally eligible to all public dignities, places, and employments, according to their capacities, and without other distinction than that of their virtues and talents.

7. No man can be accused, arrested, or detained, except in the cases determined by the law and according to the forms it has prescribed. Those who procure, expedite, execute, or cause arbitrary orders to be executed, ought to be punished: but every citizen summoned were seized in virtue of the law ought to render instant obedience; he makes himself guilty by resistance.

8. The law ought only to establish penalties that are strict and obviously necessary, and no one can be punished except in virtue of a law established and promulgated prior to the offense and legally applied.

9. Every man being presumed innocent until he has been pronounced guilty, if it is thought indispensable to arrest him, all severity that may not be necessary to secure his person ought to be strictly suppressed by law.

10. No one should be disturbed on account of his opinions, even religious, provided their manifestation does not upset the public order established by law.

11. The free communication of ideas and opinions is one of the most precious of the rights of man; every citizen can then freely speak, write, and print, subject to responsibility for the abuse of this freedom in the cases is determined by law.

12. The guarantee of the rights of man and citizen requires a public force; this force then is instituted for the advantage of all and not for the personal benefit of those to whom it is entrusted.

13. A general tax is indispensable for the maintenance of the public force and for the expenses of administration; it ought to be equally apportioned among all citizens according to their means.

14. All the citizens have a right to ascertain, by themselves or by their representatives, the necessity of the public tax, to consent to it freely, to follow the employment of it, and to determine the quota, the assessment, the collection, and the duration of it.

15. Society has the right to call for an account of his administration by every public agent.

16. Any society in which the guarantee of the rights is not secured, or the separation of powers not determined, has no constitution at all.

17. Property being a sacred to and inviolable right, no one can be deprived of it, unless illegally established public necessity evidently demands it, under the condition of a just and prior indemnity.

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From the International Covenant On Civil And Political Rights;

from http://www.unhchr.ch/html/menu3/b/a_ccpr.htm,

Articles 14 and 15

"Article 14

1. All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law. The press and the public may be excluded from all or part of a trial for reasons of morals, public order (ordre public) or national security in a democratic society, or when the interest of the private lives of the parties so requires, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice; but any judgement rendered in a criminal case or in a suit at law shall be made public except where the interest of juvenile persons otherwise requires or the proceedings concern matrimonial disputes or the guardianship of children.

2. Everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law.

3. In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality:

(a) To be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him;

(b) To have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing;

(c) To be tried without undue delay;

(d) To be tried in his presence, and to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it;

(e) To examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;

(f) To have the free assistance of an interpreter if he cannot understand or speak the language used in court;

(g) Not to be compelled to testify against himself or to confess guilt.

4. In the case of juvenile persons, the procedure shall be such as will take account of their age and the desirability of promoting their rehabilitation.

5. Everyone convicted of a crime shall have the right to his conviction and sentence being reviewed by a higher tribunal according to law.

6. When a person has by a final decision been convicted of a criminal offence and when subsequently his conviction has been reversed or he has been pardoned on the ground that a new or newly discovered fact shows conclusively that there has been a miscarriage of justice, the person who has suffered punishment as a result of such conviction shall be compensated according to law, unless it is proved that the non-disclosure of the unknown fact in time is wholly or partly attributable to him.

7. No one shall be liable to be tried or punished again for an offence for which he has already been finally convicted or acquitted in accordance with the law and penal procedure of each country.

Article 15

1. No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under national or international law, at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time when the criminal offence was committed. If, subsequent to the commission of the offence, provision is made by law for the imposition of the lighter penalty, the offender shall benefit thereby.

2. Nothing in this article shall prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognized by the community of nations.

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