

THE BILL OF RIGHTS

do we need uniform laws to protect human rights in australia?

In February this year the ALRC joined with the Law Council of Australia and the Human Rights and Equal Opportunity Commission to host the Australian Rights Congress. The Congress discussed the protection and promotion in Australia of human rights and fundamental freedoms and issued a Final Communique which called for the adoption of a constitutional Bill of Rights.

Is a national Bill of Rights necessary to protect human rights in Australia? **Igor Mescher** argues that it is.

Igor Mescher is a Sydney Barrister who has been involved in the drafting of the Bill of Rights.

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Australia is one country and one nation. When an Australian resident travels from one State or Territory to another State or Territory he does not enter a foreign jurisdiction. (Breavington v Godleman (1988) 169 CLR 41 at 78 per Mason CJ)

If each Australian State or Territory was to enact substantially different human rights legislation then Australian residents would truly be entering foreign jurisdictions upon crossing State and Territory borders throughout Australia.

Human rights legislation is of such a fundamental character and assumes such a significant degree of legal and political importance that the existence of substantial non-uniformity may itself be a powerful reason for not enacting any human rights legislation at all. A few examples will suffice.

All States except State A enact human rights legislation which gives to every person a guarantee of the right to life. Depending on the interpretation to be given to the word 'person' it is

arguable that in all States, except State A, abortion would be illegal. The consequence of such a finding by relevant State Courts would be clear — all legal abortions (if they were strictly prosecuted in other States) would be carried out only in State A with a corresponding disproportionate influx into State A of both women desiring abortions and gynaecologists performing them.

In these circumstances, the guarantee of the right to life (as interpreted by the relevant State courts) in those States which decide to enact the right, becomes meaningless and is easily evaded. Precisely the same consequence could apply to a variety of other rights which are enacted in some States only and not in others.

In our second example, State A decides to entrench its Bill of Rights legislation by introducing it as a new part of its Constitution Act capable of amendment only via a referendum whilst all other States decide to implement the Bill of Rights via an ordinary Act of Parliament capable of repeal or amendment by majority vote of both Houses of Parliament.

Assuming the legislation is initially uniform, non-uniformity could easily be achieved in the near future via the failure of any future amendments either passing a referendum in State A or passing the relevant Houses of Parliament in other States. Although this may constitute a problem for any subject of legislation for which national uniformity is desired, it becomes more pertinent in the area of human rights because of the perceived need that such legislation should preferably be entrenched.

Accordingly, not only substantive rights but also the method for repeal and amendment of human rights legislation should also be uniform.

Third, some States decide to enact justified limitation provisions and remedial provisions in their human rights legislation whilst others do not. A justified limitation provision is one which provides that the rights and freedoms contained in human rights legislation are subject only to such reasonable limits prescribed by law as can be

demonstrably justified in a free and democratic society. A remedial provision confers express power on Courts to grant such remedies as they consider appropriate to persons whose rights, as guaranteed by the Charter, have been infringed or denied.

In such circumstances, totally different interpretations could easily be given to precisely identical rights by different State Courts making a mockery of this significant legislation.

For these reasons uniformity of laws would be more than merely preferable in the area of human rights. In recent times, Queensland, the Australian Capital Territory and New South Wales have debated the desirability of enacting comprehensive State human rights legislation but no concrete steps have yet been taken in that direction, although the ACT has produced a Bill of Rights Act 1994 for public discussion.

In any case, the effectiveness of such State legislation would need to be doubted if there was no corresponding support from the Federal government and its constitutional validity, in light of s 109 of the Constitution, would certainly be doubtful if inconsistent legislation was enacted by the Federal government.

Any debate on the need for uniformity in the area of human rights would become academic if the Federal government decided to pass an Australian Bill of Rights. There would be little, if any, doubt concerning the validity of such legislation as Australia is a part to a significant number of international human rights instruments — in particular, the International Covenant on Civil and Political Rights.

In such circumstances, so long as the legislation implemented the rights contained in these human rights instruments, it would be a valid exercise of the external affairs power.

Australian Charter of Rights and Freedoms

A draft Australian Charter of Rights of Freedoms has recently been prepared by the Human Rights Working Group of the Law Council of Australia in the form of a federal statute. This was published in the May 1995 edition of *Australian Lawyer*.

After receiving public comments, the Charter was amended by the Working Group in July of this year and will be considered by the Executive of the Law Council in the near future. The Charter is drafted as an ordinary federal statute with the intention that it should become a constitutional amendment in the near further — thereby becoming entrenched.

The rights contained in the Charter are divided into three parts: non-derogable rights, derogable rights and directive principles.

All laws inconsistent with non-derogable rights are invalid. Derogable rights can be overridden by other laws but these laws must expressly provide that they are to operate notwithstanding a derogable right or freedom. No law can be held to be invalid by reason only of its inconsistency with a directive principles.

Examples of non-derogable rights in the Charter include criminal procedure rights (eg right to remain silent, presumed innocent until proven guilty, right to trial by jury for serious offences, right to free legal assistance), right to life, freedom of conscience and religion, right to vote, right to equality before the law and rights of indigenous people.

Examples of derogable rights include right to privacy, freedom of expression, freedom of peaceful assembly, freedom of movement, right to liberty and security and right to property. Examples of directive principles include right to social welfare, right to employment, right to adequate standard of living, right to rest and leisure, right to education and a right to clear environment.

Any persons interested in obtaining a copy of the draft Charter can contact Melissa McKerihan of the Law Council of Australia on (06) 247 3788.