ERRORS IN THE ANTI-CHARTER CAMPAIGN

The need for public education about human rights

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In July 2006 Amnesty International Australia commissioned a survey about Australians' knowledge of human rights. Fifty-eight per cent of respondents claimed to have a 'moderate' level of knowledge. However, 61 per cent erroneously believed that Australia *already* has a Charter of Rights that protects their human rights.[1] These statistics highlight the primary deficiency of the human rights debate in Australia thus far. 'Ordinary' Australians have been prevented by their lack of knowledge from directly and individually participating in the debate. The debate has therefore become the province of academics and politicians. Recognition of this situation has in turn generated a perception among Australians that 'human rights' are an academic concept that is irrelevant to daily life, thereby discouraging them from seeking to remedy their lack of knowledge about human rights protection.

Urgent attention needs to be directed to this problem to ensure that Australians are not permanently excluded from the human rights debate. The Rudd government's announcement on 10 December 2008 of a national inquiry into human rights protection in Australia provides a unique opportunity for remedying the lack of knowledge of Australians about their human rights. The Commonwealth Attorney-General, Robert McClelland, has recognised the importance of educating the public:

> Providing basic, factual information about human rights will be critical to the success of the consultation across Australia — in cities, the bush and regional locations.[2]

Any such information that is provided to members of the public must be sufficiently impartial to enable them to reach independent conclusions about whether human rights protection in Australia is satisfactory and, if not, which option for reform would deliver the appropriate level of protection. The effectiveness of the human rights debate in Australia is dependent on the public being informed of the arguments both for and against additional human rights protection in Australia and being given the tools to evaluate the strengths and weaknesses of these arguments for themselves. It is only then that it is possible to have 'broad community debate on a range of human rights issues'.[3]

The question whether Australia should adopt a 'Charter of Rights' is central to the human rights debate. For two reasons, Australians have largely been prevented from discussing this question. First, as discussed above, there is an erroneous belief that Australia already has a Charter of Rights. Second, there is a lack of knowledge about what a Charter of Rights is and what impact it would have on the respective roles of the branches of government. To remedy these problems, it is important that the public be provided with impartial information about the differences between the various Charter of Rights models.[4] The model to which anti-Charter campaigners chiefly refer in describing a Charter of Rights as 'undemocratic'[5] is the United States Bill of Rights. This document is entrenched in the United States Constitution, and it gives the United States courts a broad power to interpret the rights set out in the Bill of Rights and to declare legislation inconsistent with these rights to be invalid. Thus the courts are purportedly able to overrule the will of the democratically elected United States legislature. However, these arguments about democracy are not applicable to statutory Charters of Rights such as those in the Australian Capital Territory (ACT) and Victoria. Under the ACT and Victorian Charters, judges can make a public declaration that a law does not comply with human rights standards but they cannot invalidate the law.[6]

Unfortunately, attempts to educate the public about these issues have been undermined by the 'campaign of misinformation' conducted by a few anti-Charter campaigners, the most prominent of whom are James Allan, Professor of Law at the University of Queensland, and the Honourable Bob Carr, former Premier of New South Wales.[7] My present concern about the arguments of Allan and Carr is not an ideological one. While I disagree with their opposition to a Charter of Rights, I clearly must recognise that they have a right to, at least in principle, hold that view. Rather I am concerned that in their fervent opposition to a Charter of Rights, they have forgotten (or even deliberately ignored) the need to present the public with factually correct and clearly reasoned arguments to enable it to comprehend the real issues in the Charter of Rights debate and the human rights debate more broadly.

This situation is not unique to Australia. A report of the United Kingdom Department for Constitutional Affairs in 2006 highlighted the myths and misperceptions surrounding the *Human Rights Act 1998* (UK).[8] One cause identified by the Department for the existence of these myths and misperceptions was the partial reporting of cases, which 'leave[s] the impression in the public mind that a wide range of claims are successful when in fact they are not — and have often effectively been laughed out of court'.[9] Such myths and

REFERENCES

1. Amnesty International Australia (survey prepared by Roy Morgan Research), 'Anti-Terrorism Legislation Community Survey', August 2006 <http://acthra.anu.edu.au/articles/Anti-terror%20community%20survey%20report.pdf> at 13 February 2009.

2. Robert McClelland, 'Opening Address' (Protecting Human Rights Conference, University of Melbourne, 3 October 2008) [55]–[56].

3. *Ibid* [52].

4. See Simon Rice, 'The "Feral Judge" Furphy in the Human Rights Debate', (2008) 5 June *Online Opinion*, <onlineopinion.com.au/view.asp?article=7459> at 13 February 2009.

5. See, eg, 'A Bill to Dodge', *The Australian* (Sydney), 3 October 2008; Bob Carr, 'Lawyers are Already Drunk with Power', *The Australian*, 24 April 2008; Ross Lightfoot, 'Australians' Rights are Already Protected', *Online Opinion*, 15 November 2000; Australian Broadcasting Corporation, Radio National, *The Law Report*, 'Charter of Rights: Different Views from Across the North and South of the Murray', 10 June 2008; Janet Albrechtsen, 'Conservatives Must Join Rights Talks', *The Australian*, 5 December 2007.

6. Rice, above n 4.

7. See also Phillip Ruddock, 'Bills of Rights do not Protect Freedoms', *Sydney Morning Herald*, 31 August 2007.

8. Department for Constitutional Affairs, *Review of the Implementation of the Human Rights Act*, July 2006.

9. Ibid 30.

misperceptions were described by the Department as 'extremely damaging' because they 'corrode public confidence in the importance of our human rights'.[10] The Department went on to examine in detail several of these myths and misconceptions and to identify the correct factual and legal position.

The arguments of Allan and Carr are supported by examples of cases from the United Kingdom (which has a statutory Charter of Rights — the *Human Rights Act 1998*) and Canada (which, like the United States, has a constitutionally entrenched Charter of Rights — the *Canadian Charter of Rights and Freedoms*). These examples purport to demonstrate the dangers of a rampant judiciary operating under a Charter of Rights. However, many of these examples do not in fact provide any support for this argument. This article adopts a similar methodology to the United Kingdom Department of Constitutional Affairs, unpacking four of the examples used by Allan and Carr to support the anti-Charter case.

'Siren Songs and Myths'[11] in the Anti-Charter Campaign

Example one

In June 2008 Allan wrote about a decision of the Quebec Superior Court in *Droit de la famille*.[12] The case was concerned with a father's decision to discipline his daughter (the applicant) by refusing to allow her to attend an end-of-year school camp. Allan writes:

> What does the daughter do? She calls a lawyer. The lawyer goes to a judge and, relying on the bill of rights, challenges the girl's punishment in court ... the judge ... ruled that the father's punishment was too harsh. It infringed the girl's fundamental rights.[13]

Allan describes the court's decision as 'judicial lunacy':

> My point isn't that this judge, or rather one with a brain in his or her head, should have laughed this thing out of court, though of course I do think that. The point is that once you hand over society's moral and political line-drawing decisions to a coterie of unelected ex-lawyers, which is precisely and unavoidably what a bill of rights does, then you have no idea where things will go in future. All you know for sure is that it will be the judges' personal values — not those of the majority of citizens — that will prevail.[14]

The problem with Allan's argument is that at no point does the court refer to the Canadian Charter of Rights and Freedoms or the 'fundamental rights' of the daughter. The basis of the court's decision is the concept of 'joint parental authority' under the Quebec Civil Code. To understand the relevance of this concept, it is necessary to fill in some of the gaps in Allan's account of the facts of the case. First, the daughter's parents were separated. Second, at the time of the court's decision, she was under the care of her mother who believed that she should be allowed to go on the school camp.[15] Third, the daughter's school would not allow her to go on the camp without the permission of both parents. Therefore, a stalemate arose.

In reality, this case involves a dispute between the girl's parents as to the appropriate punishment to impose.[16] The Quebec Civil Code provides a mechanism for resolving such disputes. Section 604 provides that, in the event of a dispute regarding the exercise of parental authority (which includes disciplinary decisions), the dispute may be referred to the courts to determine according to 'the interest of the child'.[17] The court in this case was simply following the procedure established by the Canadian legislature in respect of the family law of that country (although it accepted that it was an 'exceptional'[18] case in which it would interfere in disciplinary decisions). It was not engaging in 'moral and political line-drawing', except to the extent that the legislature required the court to examine the best interests of the child. The case had nothing to do with Canada's Charter of Rights or the application of that Charter by a member of the judiciary, whether with or without a brain. Therefore, if the case of *Droit de la famille* demonstrates any 'lunacy', it appears to lie with the elected politicians who enacted this legislation, not the judiciary.

Example two

Another case Allan has relied on is *RJR MacDonald Inc v Canada (Attorney-General) ('RJR')*.[19] This case, according to Allan, found that 'tobacco companies could advertise outside of primary schools'[20] and 'free speech concerns trump health and safety concerns in the context of tobacco and commercial advertising'.[21] It purportedly demonstrates the dangers of judges determining the meaning of vague phrases such as the 'right to free speech'.[22] Allan, however, makes at least four errors about both the factual and legal findings of the Supreme Court of Canada and the implications of a Charter of Rights for legislative bans on tobacco advertising.

First, not all Charters of Rights give rights to corporations. For example, this decision would not have been possible under the *Charter of Human Rights and Responsibilities Act 2006* (Vic), which does not give rights to corporations.[23]

Second, the Supreme Court did not find that freedom of expression in s 2 of the Canadian Charter of Rights and Freedoms will always 'trump health and safety concerns in the context of tobacco ... advertising'. RJR Macdonald Inc conceded that the public health objectives of the legislation[24] were 'pressing and substantial'.[25] However, by a majority of five judges to four, the Court found that there was no proportionality between certain provisions of the Canadian *Tobacco Products Control Act*, SC 1988, c 20, and these objectives. The relevant provisions:

- prohibited *all* advertising of tobacco products, making no distinction between 'brand preference' advertising and 'lifestyle' advertising (that is, advertising whereby a link between a tobacco product and a way of life is constructed in promotional materials)[26]
- required tobacco companies to include health warnings on their products but would not permit them to attribute these warnings to the Canadian government.[27]

10. Ibid.

11. This refers to the title of an article by James Allan: 'Siren Songs and Myths in the Bill of Rights Debate' 49 *Papers on Parliament* 25.

12. 081485 [2008] QCCS 2709. James Allan, 'Don't entrust liberty to madcap judges', *The Australian*, 17 July 2008.

13. Ibid.

14. Ibid.

15. *Droit de la famille* 081485 [2008] QCCS 2709 [7].

16. The mother supported the daughter's challenge to the father's punishment: ibid [6].

17. Ibid [8].

18. Ibid [16].

19. (1995) 3 SCR 199 ('RJR').

20. Australian Broadcasting Corporation (ABC), Radio National, *National Interest*, 'Labor's Poisoned Charter', 29 April 2007.

21. Allan, above n 11, 34.

22. ABC, above n 20 (James Allan).

23. *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 6(1).

24. *Tobacco Products Control Act*, SC 1988, s 20, s 3.

25. *RJR MacDonald Inc v Canada (Attorney-General)* ('*RJR*') (1995) 3 SCR 199 [61] (La Forrest , L'Heureux-Dube and Gonthier JJ).

26. *Tobacco Products Control Act*, SC 1988, c 20, s 4.

27. *Tobacco Products Control Act*, SC 1988, s 9.

... there is a lack of knowledge about what a Charter of Rights is and what impact it would have on the respective roles of the branches of government.

Three members of the Court found that there was no 'rational connection' between the advertising and the public health objectives of the legislation[28] and two other members of the Court found that, although there was a 'rational connection' the legislation did not satisfy the 'minimal impairment' test in s 1 of the Canadian Charter of Rights and Freedoms.[29] Therefore, these provisions were invalid. In reaching its conclusion, the majority noted that the Canadian government had contributed to the failure of its arguments by making a strategic decision 'to withhold from the factual record evidence related to the options it had considered as alternatives to the total ban it chose to put in place'.[30]

Third, in 2007 the Supreme Court upheld the bans on tobacco advertising contained in the *Tobacco Act 1997*, SC 1997, c 13, and *Tobacco Products Information Regulations*, SOR/2000-272.[31] This legislation was enacted in response to *RJR* and was less restrictive than the *Tobacco Products Control Act 1988*. It allowed for brand preference and information advertising,[32] as required by the decision in *RJR*, but prohibited:

- tobacco manufacturers from paying for the inclusion of a specific brand in a commercial scientific work targeted at consumers (although they were allowed to publish their own legitimate, funded, scientific works)[33]
- 'false, misleading or deceptive' promotion as well as promotion 'likely to create an erroneous impression about the characteristics, health effects or health hazard of the tobacco product or its emissions'[34]
- advertising appealing to young persons and 'lifestyle' advertising[35]
- the use of corporate names in sponsorship promotion and on cultural and sports facilities.[36]

The Supreme Court found that the legislation does burden the freedom of expression but, unlike the *Tobacco Products Control Act 1988*, the burden is proportionate to the health and safety objectives of the legislation and was therefore valid. McLachlin CJ states:

> On the one hand, the objective [of informing the public of the health risks associated with tobacco addiction and to prevent people from developing tobacco addiction] is of great importance, nothing less than a matter of life or death for millions of people who could be affected ... On the other hand, the expression at stake is of low value – the right to invite consumers to draw an erroneous inference as to the healthfulness of a product that, on the evidence, will almost certainly harm them. On balance, the effect of the ban is proportional.[37]

This indicates that, in applying the freedom of expression, the Supreme Court will apply a proportionality test. It is incorrect to say, as Allan does, that freedom of expression 'trump[s]' health and safety concerns.

Finally, Allan fails to acknowledge that total or near-total bans on tobacco advertising exist in many other countries with Charters of Rights. Courts in some of these countries have held that such bans are justifiable infringements of the freedom of expression.[38] The question whether bans on tobacco advertising are consistent with the freedom of expression in Article 10 of the *European Convention on the Protection of Human Rights and Freedoms* has also been decided in the affirmative by both domestic courts[39] and the European Court of Justice.[40] Therefore, Allan's implicit conclusion that a Charter of Rights will necessarily lead to bans on tobacco advertising being struck down is patently false.

Example three

Writing in *The Australian* in April 2008, Bob Carr described a Charter of Rights as 'elitism':

> I and others will take issue with any attempt by a group of zealots to arrogate to themselves the power to define, codify and nail down their definition at this time of what they think ought to be our rights.[41]

His argument about the undemocratic nature of a Charter of Rights gets its strength from a long list of examples. The first of these examples is from the Canadian province of British Columbia. Carr writes:

> British Columbia came up with a scheme to encourage doctors to practise there, with a finely tuned system of incentives. The provincial Supreme Court struck it down, citing section 6 ('mobility rights') and section 7 (the 'right to life, liberty and security') of the Canadian Charter of Rights and Freedoms. Canada's rural population is still under-served by doctors, thanks to judges who want to write society's rules.[42]

It is true that, in 1988, the British Columbia Court of Appeal struck down regulations that sought to restrict the types and geographical locations of doctors' practices.[43] The Court found that 'denying doctors the opportunity to pursue their profession falls within the rubric of 'liberty' as that word is used in s 7 [of the Canadian Charter of Rights and Freedoms]'.[44] However, a number of subsequent cases have found that the right to liberty in s 7 does not give doctors a right to provide health care services without restraint.[45]

The later case of *Waldman* concerned post-*Wilson* billing restrictions introduced by the British Columbia Medical Services Commission in 1994. As a general

28. *RJR*, above n 24, [159] (McLachlin CJ, with whom Sopinka and Major JJ agree).

29. Ibid [187] (Lacbucci J, with whom Lamer CJ agrees).

30. Ibid [186] (Lacobucci J, with whom Lamer CJ agrees). See also [152], [166]–[167] (McLachlin CJ, with whom Sopinka and Major JJ agree).

31. *Canada (Attorney-General) v JTI-MacDonald Corp* (2007) SCC 30.

32. *Tobacco Act 1997*, SC 1997, c 13, s 22(2)

33. *Tobacco Act 1997*, SC 1997, ss 18–19.

34. *Tobacco Act 1997*, SC 1997, s 20.

35. *Tobacco Act 1997*, SC 1997, s 22(3).

36. *Tobacco Act 1997*, SC 1997, ss 24–25.

37. *Canada (Attorney-General) v JTI-MacDonald Corp* (2007) SCC 30 [68].

38. These countries include: Belgium (Cour de Cassation, Journal des Tribunaux, 19 February 1983); Iceland (*JT International SA et al v State of Iceland*, 6 April 2006, Iceland Supreme Court No. 220/2005); France (Conseil constitutionnel, Decision 90-283 DC, du 8 janvier 1991); Slovenia (Constitutional Court, *Official Journal of the Republic of Slovenia*, No 104, p 10954, 22 November 2001); Finland (Constitutional Committee, Parliament of Finland, Report No 4, 27 April 1976).

39. This finding has been made by courts in France (*Comite national contre le tabagisme c La Societe British American Tobacco Europe BV et al*, Arret 2508, du 3 mai 2006, Cour de Cassation, Chambre criminelle) and Iceland (*JT International SA et al v State of Iceland*, 6 April 2006, Iceland Supreme Court No 220/2005).

40. C 380/03 *Germany v European Parliament* [2006] ECR I-11573.

41. Carr, above n 5. See also ABC, above n 5.

42. Carr, above n 5.

43. *Wilson v British Columbia (Medical Services Commission)* (1988) 53 DLR (4th) 171 ('*Wilson*').

44. *Wilson* (1988) 53 DLR (4th) 171 at 189.

45. See, eg, *Waldman v British Columbia (Medical Services Commission)* (1997) 150 DLR (4th) 405 (on appeal, *Waldman v British Columbia (Medical Services Commission)* (1999) 177 DLR (4th) 321) ('*Waldman*').

rule, doctors were only entitled to be reimbursed 50 per cent of their fees. Exemptions existed for doctors:

- practising as locums or in a community that demonstrated a medical need for services
- engaged in a residency program when the measures were enacted, or
- who had been trained in British Columbia.

The Professional Association of Residents of British Columbia challenged the restrictions on the basis that they violated the Canadian Charter of Rights and Freedoms. The British Columbia Court of Appeal found that, as a general principle, it is permissible to set variable fees for over-serviced and under-serviced areas.[46] It overturned the finding in *Wilson* that this would violate the right to liberty in s 7 of the Charter.[47] The only provisions of the legislation that violated the Charter were those giving preferential treatment to British Columbian graduates and people who were in training as of a certain date. These provisions were inconsistent with individual mobility rights as enshrined in s 6 of the Charter because they distinguished between doctors on the basis of their present or past province of residence.[48]

The decision of the British Columbia Court of Appeal is therefore far more restricted in its scope than Carr suggests. Indeed, if the case had arisen in Australia, a similar decision is likely to have been reached by the High Court applying s 117 of the Commonwealth Constitution. This section prohibits discrimination on the basis of a person's state of residence. Therefore, as Gans states, 'Carr's BC example isn't an argument against the Charter; it's an argument against the Commonwealth Constitution'.[49]

Example four

In the same article, Carr also refers to a case in which '[j]udges … determined that failed asylum-seekers in Britain could have access to the National Health Scheme, again something that should be a matter for elected politicians'.[50]

This case concerned a Palestinian man, A, who arrived in Great Britain in 2005. His claim for asylum was refused but he nonetheless remained in Great Britain because of the situation in the West Bank and problems with his documentation. A, who suffered from chronic liver failure, was refused treatment by the West Middlesex University Hospital National Health Service (NHS) Trust. The *National Health Service Act 1997* provides that regulations may require patients who are not 'ordinarily resident' in Great Britain to pay charges for NHS services.[51] The National Health Service (Charges to Overseas Visitors) Regulations 1989 so require. A 2004 Guidance issued by the Department of Health explained that this includes individuals who have been refused asylum in Great Britain.

A challenged the Guidance in the High Court. In April 2008, his challenge was upheld. The High Court's decision was not based on an interpretation of A's human rights (as Carr implicitly suggests). In fact, the Court expressly rejected such an argument by A's lawyers.[52] Instead, the decision was based on statutory construction. The Court found that the narrow definition of 'ordinarily resident' in the Guidance (which excluded failed asylum-seekers) did not accord with the meaning of that phrase in the Act and Regulations.[53] A person who claims asylum on entry into Great Britain (that is, he or she has not entered Great Britain unlawfully) may become 'ordinarily resident' in England if it has become his or her abode 'for settled purposes as part of the regular order of his life for the time being, whether of short or of long duration'.[54] A failed asylum-seeker who has lived in Great Britain for a significant period and wishes to remain, such as A, will be deemed ordinarily resident and entitled to receive NHS treatment without charge.[55]

The High Court in *Re A* did not substitute its interpretation of human rights for the will of the elected Parliament — rather it *applied* the will of the elected Parliament. The Court invalidated the Guidance issued by the Department of Health on the basis that it did not accord with the intention of the Parliament as set out in the Act and the Regulations.

Conclusion

Education of the Australian public about human rights protection is long overdue. Without a basic level of knowledge of Australia's existing human rights framework — including the few rights contained in the Commonwealth Constitution and the relevant laws at the Commonwealth and state/territory levels — Australians will continue to be unable to participate in the debate about human rights protection. This will inevitably have a detrimental effect on the quality of that debate, which is dependent on the range of ideas thrown up by the diverse Australian community.

In highlighting the factual and legal errors in the examples used by Allan and Carr, the purpose of this article has not been to present the case for a Charter of Rights. Instead, it seeks to demonstrate the need for a genuine debate about human rights protection in Australia, in which all members of the public are able to participate. It also encourages the public to question the arguments put forward by *all* sides of the Charter of Rights debate, and to come to an independent conclusion about whether there is a need for additional human rights protection in Australia.

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The author thanks Jonathan Swil and George Williams for their comments on earlier drafts of this article.

46. *Waldman v British Columbia (Medical Services Commission)* (1999) 177 DLR (4th) 321 [49] (Hall J, with whom Rowles and Prowse JJ agree).

47. Ibid [52] (Hall J, with whom Rowles and Prowse JJ agree). A similar conclusion was reached in *Rombaut v New Brunswick (Minister of Health and Community Services)* [2001] NBJ 243.

48. Ibid [49]–[50] (Hall J, with whom Rowles and Prowse JJ agree).

49. Jeremy Gans, *Charterblog: Analysis of Victoria's Charter of Human Rights*, 'Bob Carr vs the Constitution', 10 June 2008 <http://charterblog.wordpress.com/2008/06/10/bob-carr-vs-the-constitution/> at 13 February 2009.

50. *Re A v West Middlesex University Hospital NHS Trust* [2008] EWHC 855 (Admin) ('*Re A*').

51. *National Health Service Act 1997* (UK) s 121.

52. *Re A v West Middlesex University Hospital NHS Trust* [2008] EWHC 855 (Admin) [30]–[33] (Mitting J).

53. Ibid [27] (Mitting J).

54. Ibid [22] (Mitting J), quoting *R v Barnet London Borough Council ex parte Shah* [1983] 2 AC 309, 343 (Lord Scarman).

55. Ibid [25] (Mitting J).