Why prosecutors should support a charter of rights

Anna Katzmann SC presented the following paper at the Crown Prosecutors Conference at Terrigal in March 2008

The fact is that a democracy's response to the threat of terrorism cannot simply be more stringent laws, more police and more intelligence personnel. The point was well made by European Commissioner for Justice, Freedom and Security, Franco Frattini, when he said:

> [O]ur citizens entrust us with the task of protecting them against crime and terrorist attacks; however, at the same, they entrust us with safeguarding their fundamental rights . . .
>
> [T]he necessary steps we take to enforce security must always be accompanied by adequate safeguards to ensure scrutiny . . .
>
> The challenge of protecting security without undermining fundamental rights requires constant vigilance. But the reality is that the machinery of vigilance in Australia is deficient.[1]

Introduction

At first blush this might seem an odd subject for a paper at an occasion such as this. Some people might think that crown prosecutors have no interest in charters of rights or are bound to oppose them; that this is an issue with which only defence counsel are concerned.

However, defence counsel do not have a monopoly over the high moral ground. Nor are they alone interested in the protection of basic civil rights. With judges, crown prosecutors are the custodians of the right to a fair trial. Moreover, crown prosecutors have a vested interest in securing a fair trial. After all, a conviction achieved after a fair trial is a secure conviction.

Ten years ago the NSW chief justice, the Hon J J Spigelman, argued that state legislation incorporating human rights protections was 'an option worthy of consideration' and looked to the model of the UK Human Rights Act.[2]

Since that time, Victoria and the ACT have introduced legislation protecting basic human rights ('rights legislation'). Rights legislation gives statutory recognition to certain rights, the subject of international instruments Australia ratified years ago. The legislation follows the models in New Zealand and the United Kingdom. Unlike the US and Canadian laws they are not constitutionally entrenched. For this reason they are more flexible. They can respond to contemporary concerns. They pose no threat to parliamentary sovereignty. They can be amended or even repealed, without the need for a referendum. The Bar Council supports legislation of this kind. Crown prosecutors have nothing to fear from it.

What is a charter of rights?

A charter of rights is a statute which gives effect to our international obligation to introduce into municipal law the protection for fundamental human rights which Australia at various times has undertaken to provide. It is a legislative statement about the kind of society in which we want to live. The statutory, non-entrenched model adopted in NZ, the UK, the ACT and Victoria, has a number of important features:

- Enactment by statute and maintenance of parliamentary sovereignty.
- Conferral of a power on the courts to issue declarations of inconsistent interpretation in the event that a statute contravenes or allows for contravention of a human right but with no power to invalidate the statute.
- Requirement that a declaration of inconsistent interpretation be communicated to the attorney-general to be laid before the parliament.
- Obligation on a member introducing a bill to deliver a reasoned statement to parliament about whether the bill is compatible with human rights or not.
- Requirement of public authorities and those who exercise a public power to act in accordance with human rights unless obliged by statute to act otherwise.
- Requirement of a court to interpret legislation in accordance with human rights as far as it is possible to do so consistently with the legislative purpose.

The latest legislation to incorporate these principles is the *Victorian Charter of Rights and Responsibilities Act 2006* which came into full effect at the beginning of this year. The Victorian Charter:

> '[C]reates a system of checks and balances addressing the protection of human rights in relation to the interpretation of all existing Victorian legislation, . . . the drafting of new legislation and the decision making processes of Victorian public authorities. Although the charter's ambit is wide, the mechanisms introduced therein are not internationally novel and the rights have been the subject of considerable international jurisprudence.'[3]

Modern rights legislation grew out of the 1948 Universal Declaration of Human Rights and a number of international conventions, the most important of which are the International Covenant on Civil and Political Rights ('ICCPR'), the International Covenant on Economic, Social and Cultural Rights, the European Convention for the Protection of Human Rights and Fundamental Freedoms, the 1951 Convention relating to the Status of Refugees as amended by the 1967 Protocol relating to the Status of Refugees ('the Refugee Convention'), the International Convention on the Elimination of All Forms of Racial Discrimination and the Convention on the Rights of the Child. These international treaties in turn owe much to the the principles of the Enlightenment and liberalism.

Australia has ratified all of these international treaties. In doing so the various Australian governments undertook to 'adopt such legislative or other measures as may be necessary to give effect to the rights'.[4] In Australia, unless the protections guaranteed by the international treaties are incorporated into municipal law, however, they form no part of it.[5]

The crown prosecutor as the guardian of human rights

The role of the criminal justice system is to maintain the rule of law. Its main objectives are to detect and prosecute crimes, to convict and punish the guilty and to discharge and free the innocent. Crown

prosecutors do not operate on their own behalf, nor on behalf of the political authority that appointed them, but on behalf of the community. For this reason, they are obliged to observe two essential requirements: to uphold the effectiveness of the criminal justice system and to safeguard the rights of the individual.[6]

A prosecutor's work is intimately connected with a number of basic rights recognised in the ICCPR but which, in the absence of a domestic statute making them part of our law, are vulnerable to interference from the executive. Those rights include:

- the right to life (Article 6 of the ICCPR),
- the right not to be subjected to torture or to cruel, inhuman or degrading treatment or punishment (Article 7 of the ICCPR),
- the right to liberty and security and the right not to be subjected to arbitrary arrest or detention (Article 9 of the ICCPR),
- the right to a speedy trial (Articles 9 and 14 of the ICCPR),
- the right to a fair and public hearing by a competent, independent and impartial tribunal (Article 14 of the ICCPR).

In addition, in the performance of his or her work a prosecutor may be exposed to considerable public scrutiny and his or her privacy (Article 17 of the ICCPR), not to mention security, may be invaded.[7]

Prosecutors, too, have a right to freedom of expression, belief (Articles 18 and 19 of the ICCPR), assembly (Article 21 of the ICCPR) and association (Article 22 of the ICCPR).

At common law prosecutors are regarded as guardians of the right to a fair trial. This view of prosecutors is reflected in statements of the higher courts, the ethical rules to which prosecutor advocates are bound and the *Prosecution Policy and Guidelines* issued by the Office of the Director of Public Prosecutions and which apply to all those exercising prosecutorial responsibilities.

The duty of a prosecutor is to act as 'a minister of justice'.[8] It is central to the crown prosecutor's duty to present the crown case with fairness towards the accused,[9] to assist in the attainment of justice, not the procurement of a conviction.[10] Except in the rarest of cases, a prosecutor must call all material witnesses even if their evidence does not assist the case the prosecutor seeks to make.[11] A prosecutor is not permitted to secure a conviction at all costs.[12]

The duty of a prosecutor 'to act fairly and impartially to exhibit all the facts to the jury'[13] is an incident of the fair trial.[14] In *Whitehorn v The Queen* (1983) 152 CLR 657 at 663–4 the High Court held that the failure of a prosecutor to act with fairness and detachment:

> may so affect or permeate a trial as to warrant the conclusion that the accused has actually been denied his fundamental right to a fair trial. As a general proposition, that will, of itself, mean that there has been a serious miscarriage of justice with the consequence that any conviction of the accused should be quashed and, where appropriate, a new trial ordered.

APPLICATION FOR MEMBERSHIP

Please circle: Mr / Mrs / Ms / Miss / Dr / Other .....

Given Names .....

Surname .....O M O F

Please tick preferred mailing address:

O Residential Address (compulsory) .....

..... P/code .....

O PO Box Address .....

..... P/code .....

Company Name/Defence Association .....

O Business Address .....

..... P/code .....

Home ( ) ..... Mobile ( ).....

Bus. ( ) ..... Fax ( ) .....

Email .....

D.O.B ..... Occupation .....

Please tick: I am interested in:

O Athletic Club O Opera O Theatre O Sport

O Wine O Networking O Other.....

Membership Category is based on your residential address:

Tick	Category	Joining Fee	Prepaid Min. Spend	Annual Subscriptions	Max. to pay on Application
	Town (Sydney Residents)	$250	$360	$790	$1400
	Country (NSW Country and ACT)	$250	$360	$525	$1135
	Interstate or Overseas	$250	N/A	$525	$775
	Defence (Active/Reserves /Retired)	N/A	$360	$395	$755
	Associate (Partner of Member)	N/A	N/A	$395	$395
	Young Executive (18 – 29 years)	N/A	$360	$515	$875

Corporate Membership is available to Companies and Associations with a minimum of five Applicants:

Tick	Category	Joining Fee	Prepaid Min. Spend	Annual Subscriptions	Min. to pay on Application
	Corporate (5 + Members)	N/A	$360pp	$560pp	$920pp

You may wish to enter a contract to pay your subscription by four quarterly installments on a direct debit basis from your credit card. Please tick the box below and return this form with your joining fee and minimum spend and we will send you the paperwork for your quarterly payment.

O Direct Debit O Cheque enclosed for $ .....

O Visa O Mastercard O AMEX

Card No .....

Expiry___/___

I certify that the above particulars are correct, and hereby apply to be admitted to Membership of the Royal Automobile Club of Australia, if elected, I agree to be bound by its Constitution, Rules and By-Laws.

Signature of Applicant .....

Date.....

Doesn't the common law adequately protect our rights?

It can be seen, then, that the common law provides certain protections for some of the rights contained in the ICCPR. Courts in this country are zealous to protect an accused's right to a fair trial. There are also other ways in which the common law acts in defence of fundamental rights. At common law a court 'will not impute to the legislature an intention to abrogate or curtail fundamental rights or freedoms unless such an intention is clearly manifested by unmistakable and unambiguous language'.[15]

The chief justice of NSW listed these fundamental rights in a recent speech. They include the right to a fair trial, but also the right to personal liberty through habeas corpus, the presumption against retrospectivity, the privilege against self-incrimination, the rule against double jeopardy and the right to procedural fairness.[16]

Moreover, as Brennan J said in *Church of Scientology Inc v Woodward* (1982) 154 CLR 25 at 70:

> Judicial review is neither more nor less than the enforcement of the rule of law over executive action; it is the means by which executive action is prevented from exceeding the powers and functions assigned to the executive by law and the interests of the individual are protected accordingly.

So why bother legislating?

Why do we need a charter of rights?

The answer lies (at least in part) in history. Throughout the world, under the guise of protecting national security, governments of different political colours have introduced legislation that, at best, pays lip service to human rights and, at worst, ignores them altogether. In the common law world the presumption that the parliament did not intend to abrogate or curtail fundamental rights is rebuttable. Clear words – 'unmistakable language' – are all that is required to disturb it.[17]

There is nothing new about this. As Lord Walker said in his judgment in *A v Secretary of State for the Home Department* [2005] 2 AC 68 at [193]:

> [A] portentous but nonspecific appeal to the interests of national security can be used as a cloak for arbitrary and oppressive action on the part of government. Whether or not patriotism is the last refuge of the scoundrel, national security can be the last refuge of the tyrant. It is sufficient to refer (leaving aside more recent and probably more controversial examples) to the show trial and repression which followed the Reichstag fire in Berlin and the terror associated with the show trials of Zinoviev, Bukharin and others in Moscow during the 1930s.
>
> But we thought we had learned from the horrors of the 1930s. It was from that experience that the Declaration of Human Rights, the European Convention and the other international covenants sprang. Australia was at the forefront of international human rights advocacy after the Second World War. Now we have fallen far behind many other countries in the level of protection we offer. Australia is now the only democratic nation without rights legislation.[18]

Rights protected by international treaties such as freedom from arbitrary detention and the unlawful deprivation of liberty, the right to privacy, freedom of expression and association, freedom of movement and the right to a fair hearing, which we all accept as fundamental rights, have no legislative basis in this country except in the ACT and Victoria where rights legislation has been enacted.[19]

In Australia, most of us take our basic rights for granted.[20] However, increasingly state and federal governments (both Labor and Liberal) have interfered with many of these rights in legislation said to be necessary to safeguard the security of the state. Mandatory detention of asylum seekers, introduced by the Keating government in 1992, possibly unique to Australia,[21] probably violates our international treaty obligations. Yet, the High Court held it was constitutionally valid.[22] In *Re Woolley* the High Court also upheld the continued detention of children of asylum seekers.[23] As the chief justice explained in that case, unless the statutory language were ambiguous, which it found it was not, the court was not entitled to give the Migration Act 'a fair interpretation' consistent with Australia's international obligations under the Convention on the Rights of the Child.[24] A majority of the High Court also held that the lawfulness of detention is not affected by conditions that could be fairly categorised as harsh, even inhumane.[25] Indefinite detention of 'unlawful non-citizens' is also legal in this country[26] although it also probably offends Australia's international treaty obligations. As the Hon Michael McHugh QC has observed, a number of decisions of the High Court in the areas of immigration, race relations and indefinite detention for habitual criminals illustrate 'current deficiencies in the protecton of human rights within Australia' and underscores the need for rights legislation.[27]

Simarly, in the last few years criminal law reform has involved a steady erosion of fundamental rights.

After the attacks on the twin towers in September 2001 federal and state governments rushed to introduce legislation to protect us from terrorist attacks. Since then we have had what Ian Barker QC described in 2005 as an avalanche of new laws.[28] That legislation includes the *Terrorism (Police Powers) Act 2002*, amendments to the Commonwealth Criminal Code to ban various organisations, legislation giving ASIO sweeping new powers to interrogate and detain suspects, the *Anti-Terrorism Act (No 2) 2005* (Cth) introducing preventative detention and control orders and the *Terrorism (Police Powers) Amendment (Preventative Detention) Act 2005* (NSW) authorising detention of a suspect for up to 14 days without notice, let alone a hearing.

Legislation has not been confined to counter terrorist measures. In the name of child protection the NSW Government has introduced legislation prohibiting convicted sex offenders from engaging in otherwise lawful conduct even after they have served their sentences.[29] It has also passed laws enabling it to apply to the Supreme Court for the continued detention of serious sex offenders after their sentences have expired.[30] The constitutional vaidity of similar legislation in Queensland was upheld in the High Court.[31]

After the Cronulla race riots the New South Wales Parliament passed the *Law Enforcement Legislation Amendment (Public Safety) Act 2005* (NSW) ('the Cronulla legislation') which, amongst other things, provided for significant curtailment of freedom of movement, facilitating cordons and roadblocks and the closure of licensed premises. It also conferred on police sweeping new powers of search and seizure. The legislation had a sunset clause of two years but late last year, and for no good reason, the sunset clause was lifted. The ombudsman recommended that parliament consider whether further safeguards were required to provide an assurance of the right to peaceful assembly. The government rejected that recommendation and the attorney told the parliament that 'no legislative requirement is required to guarantee the right of peaceful assembly because the Act was not concerned with peaceful assemblies'.[32] Simple really.

Now the government has announced that it is considering the permanent introduction of the police powers conferred by the *APEC Meeting (Police Powers) Act 2007* ('the APEC legislation') despite the emphatic assurance given by the police minister when the Act was presented to the parliament that 'the Bill will apply only to this APEC meeting and will then terminate automatically'.[33] Like the Cronulla legislation, the APEC legislation gave police broad powers to close off streets, to stop and search people and cars and to seize and detain property without a warrant. It removed the presumpton in favour of bail for any offence committed within the APEC security area that involved malicious damage, assault of a police officer or throwing a missile at a police officer. The Act also limited the free movement of individuals included at the discretion of the commissioner for police on an 'excluded persons list'.

Some of the most iniquitous provisions in the Act were the power to put people on the 'excluded persons' list and to forcibly remove them if they were found in the APEC area. At least on the face of the legislation there was no requirement to give people notice that they were on the list, let alone to give them a right to be heard about whether they should be on it. During oral argument in the Supreme Court during an unsuccessful challenge to the Act on constitutional grounds, the commissioner of police maintained that there was no requirement to accord procedural fairness to people on the list. Interpreted literally the Act would allow the police to forcibly remove a person on the list from the APEC area without that person knowing that he or she was ever on the list. Yet, resisting such a forcible removal would probably amount to a criminal offence (s546C of the Crimes Act). This is truly Kafka-esque.

Restrictions on individual movement, unfettered powers of search and seizure and the reversal of presumptions in favour of bail for certain offences are extraordinary measures which conflict with some of our most basic democratic freedoms.

It was Winston Churchill, who said:

> Extraordinary powers assumed by the executive with the consent of Parliament in emergencies should be yielded up, when and as, the emergency declines . . . This is really the test of civilisation.[34]

The problem in NSW, according to the shadow attorney-general, speaking at the time of the proposal to extend the powers ostensibly conferred to quell the Cronulla riots, is that the government is allowing the police to do what they like.[35]

The troubling feature of much of this legislation is that many of the lawmakers appear to have lost sight of what they are seeking to protect. As Lord Hoffman said of the detention powers conferred on suspected international terrorists (but not on British nationals) by the *Anti-terrorism, Crime and Security Act 2001* (UK):

> The real threat to the life of the nation, in the sense of a people living in accordance with its traditional laws and political values, comes not from terrorism but from laws such as these. That is the true measure of what terrorism may achieve. It is for parliament to decide whether to give the terrorists such a victory.[36]

These words echo those of the Australian prime minister, Robert Menzies, when he introduced the National Security Bill into parliament just after World War II had broken out:

> Whatever may be the extent of the power that may be taken to govern, to direct and to control by regulation, there must be as little interference with individual rights as is consistent with concerted national effort . . . the greatest tragedy that could overcome a country would be for it to fight a successful war in defence of liberty and to lose its own liberty in the process.[37]

We need the protection of a charter of rights to inhibit the excesses of executive government. The existence of rights legislation does not prevent the passage of counter-terrorism laws – even far-reaching ones – as experience in Britain and elsewhere has shown. It merely requires that the legislature pays due regard to fundamental rights, overriding them only where strictly necessary to protect other rights. A charter of rights would operate as a restraint on government,[38] provide an 'ethical framework' for judges, lawmakers and individuals,[39] increase public accountability, raise public awareness about human rights,[40] 'inform the national conversation',[41] act as a constant reminder of the need to respect human rights wherever possible and nurture a culture of respect for human rights.[42]

In the ACT, for example, the existence of rights legislation did not preclude the ACT's agreement to introduce counter-terrorism measures but it ensured that there was a proper community debate about the Commonwealth's proposals and it prevented some of the more draconian initiatives being introduced in the ACT and even NSW.

There are significant differences between the ACT and the Commonwealth anti-terrorism laws. For instance:

- In the ACT only the Supreme Court can make preventative detention orders (PDOs) whereas the Commonwealth allowed senior AFP officers to grant interim orders.
- In the ACT the full application and the reasons for it have to be provided to the person affected, whereas the Commonwealth is only obliged to provide a summary of the grounds and there is an exception permitting the exclusion of information on national security grounds.
- In the ACT a PDO can be made only if it is 'the least restrictive means to prevent a terrorist act or the only effective way to preserve evidence', whereas under the Commonwealth legislation an order can be made where it would 'substantially assist in preventing a terrorist act, or is necessary to preserve evidence'.
- In the ACT children are not to be subjected to PDOs but under the Commonwealth law children 16 and above are caught.
- There are limitations in the ACT legislation on the monitoring of lawyer client communications but not under the Commonwealth scheme.
- The ACT has an explicit requirement for Legal Aid to help a person find legal representation but there is no such requirement under the Commonwealth regime.
- In the ACT a detainee can tell his or her family of the fact and place of detention while under the Commonwealth legislation he or she may only inform the family that he or she is 'safe' and unable to be contacted for the time being.
- Unlike the Commonwealth scheme, there are no 'disclosure offences' in the ACT. Under the Commonwealth legislation it is an offence attracting a maximum of five years' imprisonment to tell someone that you are detained under a PDO. There is no comparable provision in the ACT.

But doesn't a charter of rights threaten the sovereignty of parliament?

Our state attorney and other critics of a legislative charter of rights have argued that charters of rights undermine the democratic process, erecting a Trojan horse of interventionist judges creating social policy and threatening the sovereignty of parliament.

The argument, in my view, is specious.

First, it ignores the fact that, by legislating for a charter, parliament has authorised the judiciary to speak about these questions. Secondly, it fails to appreciate that over the last 50 years a body of international law has developed which defines the scope and limits of the rights. Thirdly, it overlooks the history of political appointments to judicial office. Fourthly, it wrongly presumes that judicial decisions in other respects do not have political implications. In his judgment in *Fardon v Attorney General for the State of Queensland* Gleeson CJ, speaking of *The Dangerous Prisoners (Sexual Offenders) Act 2003* (Qld) said:

> It cannot be a serious objection to the validity of the Act that the law which the Supreme Court of Queesland is required to administer relates to a subject that is, or may be, politically divisive or sensitive. Many laws enacted by parliaments and administered by courts are the outcome of political controversy, and reflect controversial political opinions. The political process is the mechanism by which representative democracy functions. It does not compromise the integrity of courts to give effect to valid legislation. That is their duty. Courts do not operate in a politically sterile environment. They administer the law, and much law is the outcome of political action.[43]

In its 2005 review of the UK Human Rights Act the Department of Constitutional Affairs found that the argument that that Act had significantly altered the consitutional balance between parliament, the executive and the judicary had been 'signficantly exaggerated'.[44]

In a recent speech Jack Straw, British lord chancellor and secretary of state for justice, told an American audience that in the case of his country's Human Rights Act:

> [W]e have remained faithful to the principle of parliamentary sovereignty – whereby no power is preeminent to parliament, where any law can be made and unmade. The Swiss constitutionalist, Jean-Louis de Lolme described this in practice: 'parliament can do anything but change men into women and women into men'.[45]

Opponents of a charter seem to want a sterile debate. A statutory charter will not empower the courts to strike down legislation passed by parliament. Far from derogating from parliamentary sovereignty, it will promote dialogue between the branches of government. It would put a brake on knee-jerk law making. It would require politicians to justify any new incursion into human rights.

As Rob Hulls, then Victorian attorney-general, explained in his second reading speech on the Victorian Charter:

> The charter will make sure that there is a proper debate about whether proposed measures strike the right balance between the rights of Victorians and what limits can be justified in a free and democratic society.

When governments legislate in haste and fail to consult widely on the impact of their new laws, a charter of rights would force them to consider the impact of legislation on fundamental rights and to explain why the legislation is needed. That is precisely what happened at the time of the counter-terrorist legislation as a direct result of the ACT Human Rights Act.

In any case, surely there is a proper role for the judiciary where parliament takes away rights without sufficient justification or when it undermines the rule of law. Speaking of the UK *Human Rights Act in 2002* Lord Woolf, the former master of the rolls, said:

> What is the primary concern of the HRA is not so much rights in the ordinary common law sense, but values. These are the values which are increasingly being recognised around the developed world as being at the heart of the rule of law. They are the values which the Nazis ignored. Hitler may have obtained power as a result of a democratic process, but he forfeited the right to be regarded as a democratic leader of his people because he treated the rule of law with contempt. The recognition of the need to adhere to the rule of law by protecting human rights is essential to the proper functioning of democracy. The observance of human rights is a hallmark of a democratic society because it demonstrates that that society values each member as an individual. Just as it is of the essence of democracy that every individual has an equal right to vote, so each individual has the right to expect that a democratically elected government will regard it as its responsibility to protect his or her human rights. [46]

Democracy (at least liberal democracy) is not simply about majority rule. Even the US State Department recognises (at least in theory) that majority rule is 'not just another road to oppression' and no majority should take away the rights and freedoms of individuals or minority groups.[47]

In the words of Thomas Jefferson:

> Though the will of the majority is in all cases to prevail, that will to be rightful must be reasonable . . . the minority possess their equal rights, which equal law must protect, and to violate would be oppression.[48]

This, of course, was the foundation of the US system of government.

Charters of rights provide some protection of minorities from the tyranny of the majority. This is important. Lawyers have traditionally spoken out in the interests of such minorities, for if we do not, there is often no-one else who will.

As Kirby J reminded us in Fardon, 'protection of the legal and constitutional rights of minorities in a representative democracy' is sometimes unpopular.[49] Politicians seeking re-election crave majority support. They are not usually interested in minorities.

Political background

As most of you will be aware, in March 2006, the then attorney-general for NSW, Bob Debus, expressed his support for a charter of rights. Flush with optimism, he foreshadowed a Cabinet submission and further public consultation on the rights and values that should be enshrined in such a charter.[50]

What became of Mr Debus's submission in the Cabinet Office labyrinth, I cannot say. Quite possibly, he couldn't either. What I do know is that on 4 May 2006 the Bar Council resolved to support his informal notice of motion and directed the association's Human Rights Committee to prepare an options paper on the available models.

Consultations with members of the Bar

In 2007 that committee, of which the NSW director of public prosecutions is a member, submitted an options paper to Bar Council with a recommendation that a statutory charter of rights be enacted in New South Wales. Council resolved that it was disposed to support the idea but was concerned to consult the membership before a final decision was reached.

To assist members to reach an informed opinion, two forums were held, addressed by the retired High Court justice, the Hon Michael McHugh QC, Professor Hilary Charlesworth, professor of international law and human rights at the Australian National University, and Noel Hutley SC of the New South Wales Bar.

Ironically, at the same time as the Bar was moving towards a charter, the Australian Labor Party, which had formerly supported a bill of rights, removed that plank from its platform, substituting for it a promise to launch a public inquiry and support for public consultation.[51]

A new attorney-general

Then, in March 2007, after Bob Debus left state parliament to try his luck in the forthcoming federal election, a new attorney-general, John Hatzistergos MLC, took office and the political terrain shifted. Mr

Hatzistergos has made it clear that he opposes rights legislation. He made the subject the focus of his speech at the Law Society's Law Term Dinner and an opinion piece for *The Australian* newspaper and is shortly expected to speak against it at the Sydney Institute.[52] In his speech at the opening of Law Term, Mr Hatzistergos, not generally driven to hyperbole, stated his unequivocal opposition to a charter, which, he said, would:

> seek to transform the relationship between our institutions of governance, make the courts a social laboratory, and make it impossible for ordinary citizens to rely on the individual instruments of the parliament they have democratically elected.

As will be obvious, I do not accept the validity of this argument.

The committee reports

Soon after the attorney spoke at the opening of Law Term, the Bar Association's Human Rights Committee reported to Bar Council on the outcome of the consultation process.

A substantial majority of those barristers who submitted the committee's views supported the recommendations of the committee. The gist of its report is that 'human rights are poorly protected in New South Wales in an unduly limited and ad hoc combination of the common law and statute'. The committee cited the passage in recent years of laws that infringe human rights with insufficient safeguards or public discussion of civil and political rights.

Other salient points of the Human Rights Committee's report include that:

- NSW has fallen behind the common law world by not enacting specific provisions for the protection of human rights;
- Victoria and the ACT already have legislative protection of human rights;
- Human rights have been ignored or overridden in specific cases such as Hicks, Haneef and the NT Aboriginal intervention; and
- The requirement for public authorities to act in accordance with human rights will improve government decision making and increase protection of human rights without litigation.

Importantly, the committee found that the legislative model proposed allows for a 'dialogue' to occur between the judiciary and the legislature without threatening the sovereignty of parliament.

The council resolved to recommend the adoption of a charter of rights for NSW with the following features:

(a) Maintenance of the sovereignty of the NSW Parliament;

(b) Enactment by statute;

(c) Protection of the following rights (taken from the Victorian Charter adapted in accordance with NSW law): equality before the law, right to life, protection from torture or cruel, inhuman and degrading treatment, freedom from forced work (slavery, servitude or compulsory labour), freedom of movement, protection of privacy and reputation, freedom of thought, conscience, religion, belief, expression, peaceful assembly and freedom of association, protection of families and children, right to take part in public life, cultural and property rights, right to liberty and security of the person, right to humane treatment when deprived of liberty, right to a fair hearing, rights in criminal proceedings, right not to be tried or punished more than once, rights in relation to retrospectivity of criminal laws ('human rights');

(d) Public authorities and those exercising a public power be required to act in accordance with human rights unless required by statute to act otherwise;

(e) Requiring a member introducing a Bill to deliver a reasoned statement to parliament as to whether the Bill is compatible with human rights or not; and

(f) Incorporating a review mechanism no later than five years after commencement to ascertain whether rights in the charter should be reviewed, whether human rights might more adequately be enforced and whether a right to damages should be added to the charter.

What would a charter mean for crown prosecutors?

A charter of rights would affect prosecutors. Under a charter it would be unlawful for any public authority to act in a way that is incompatible with a protected human right. The ODPP would be considered a public authority and would therefore be bound to apply the principles contained in the charter. But this would make no practical difference to the role of the prosecution service or to the work of the crown prosecutors. I have already referred to the prosecutor's duty to safeguard the fairness and integrity of a trial. In addition, the code of conduct published by the ODPP emphasises honesty, integrity, consistency and independence in decision-making, all incidents of a fair trial.

If the UK experience is anything to go by, there would be no significant increase in litigation as a result of the introduction here of rights legislation. This appears to be the experience in the ACT, too. In Britain, the Department of Constitutional Affairs reported that the Human Rights Act has had a greater effect on the operation of government departments and a negligible effect on criminal law. Earlier statistics revealed that the Act was raised in less than 0.5 per cent of criminal cases in the Crown Court. In the first 14 months of its operation the Act was relied on in 2997 cases and arguments based on the Act upheld in 56.[53]

As the senior crown prosecutor has noted in his *History of New South Wales Crown Prosecutors 1830-1901*, other, conflicting pressures have been part and parcel of the crown prosecutor's lot in New South Wales since the very beginning of the service.

Even in the days before Productivity Commission reports, audits and court performance monitoring, prosecutors have been expected to assist the courts in the expeditious disposal of court cases.

In these modern times of median delays and performance reviews, time and resource pressures can weigh even more heavily on the prosecutor.

A charter of rights can play a significant role in reinforcing the need for an independent and fearless prosecutor for whom the process is as important as the outcome (if not more so).

In a speech delivered in January last year, the head of the Crown Prosecution Service of England and Wales, Ken Macdonald QC, said that the prosecutors' embrace of the Human Rights Act was central to the public's confidence in the criminal justice system. Everyone has an interest in safe convictions for criminal offences.

> [E]very time a conviction is achieved, it can only be sustained and built upon by ensuring that it is fair – and therefore safe from being overturned on appeal. Equally that it enjoys the widest public confidence. People must be able to trust the decisions of the courts.[54]

Nowhere could this be more important than in the fight against terrorism. The purpose of fighting terrorism is to secure freedom. As one British commentator has written, 'freedom cannot be delivered by legislation which substantially diminishes civil, political, economic or social life'.[55]

A charter of rights would enhance our security by entrenching a culture of respect for rights. In the UK there is a growing recognition that national security, or 'maintenance of the Queen's peace', requires that attention be given to relations between the state and sections of the community that may be susceptible to terrorist 'grooming' and whose assistance is vital in combating religious extremism. Ken McDonald QC noted:

> Terrorism is designed to put pressure on some of our most cherished beliefs and institutions. So it demands a proactive and comprehensive response on the part of law enforcement agencies. But this should be a response whose fundamental effect is to protect those beliefs and institutions. Not to undermine them.
>
> . . .
>
> We wouldn't get far in promoting a civilising culture of respect for rights amongst and between citizens if we set about undermining fair trials in the simple pursuit of greater numbers of inevitably less safe convictions.
>
> [The Human Rights Act] makes it more likely that investigations will comply with the rules and that abuses of the process are avoided. Equally it will make it less likely that the state brings cases which shouldn't be brought and which are not justified by any sufficient evidence.
>
> And I believe that in terrorism cases in particular, where there can be huge community sensitivities, this provides massive re-assurance.

In Philip Noyce's recent movie, *Catch a Fire*, about South Africa under apartheid, Patrick Chamusso is accused of being complicit in an ANC attack on a strategically vital oil refinery. There is one scene that illustrates how law without justice, otherwise known as the rule by law, simply exacerbates the conditions that are so conducive to terrorism.

The police investigator, Nic Vos, realising that he doesn't have sufficient evidence to charge Chamusso, releases him. His fellow investigators are incensed:

> 'He confessed on tape,' said one of them.
>
> 'Confessed? To what? That he cut a hole in the fence? They got in with a key. You know that', said Vos.
>
> 'He said he did it. Okay? That's good enough for me.'
>
> 'So we lie to get a conviction,' replied Vos.
>
> 'We hang him.'
>
> Vos: 'We lock him in jail for the rest of his life for something he didn't do. In the meantime, there's a terrorist loose on the ground. What the hell is the point in that? Our job is to find the terrorists.'

Conclusion

A charter of rights offers a framework for balancing the rights against competing public interests at a time when governments are under increasing pressure to legislate in response to constantly changing threats to the peace and security of our community. In short, it provides certainty and confidence.

By offering support for a charter of rights crown prosecutors can make a statement that in a time of terrorism, the rule of law need not be sacrificed in order to gain an expedient conviction.

A charter of rights is not a panacea for all social or political ills. No-one has suggested as much. However, it would be a step in the right direction. It would represent a reaffirmation of the values we share and we expect our leaders to respect. If our politicians could always be trusted to protect our rights we would have no need of a charter. Regrettably, the reality is otherwise.

Endnotes

1. Petro Georgiou, MP for Kooyong, House of Representatives, 17 March 2008, p 76.
2. Address by Hon JJ Spigelman, chief Justice of New South Wales, at the 50th Anniversary of the Universal Declaration of Human Rights National Conference, Human Rights and Equal Opportunity Commission, Sydney 10 December 1998, entitled: Rule of Law – Human Rights Protection.
3. Brian Walters SC and Simon McGregor The Charter of Human Rights and Responsibilities: a practitioenr's guide 15 February 2008, p. 6.
4. See, for example, article 2 of the ICCPR.
5. *Al-Kateb v Godwin* (2004) 219 CLR 562 at [179].
6. E Myjer et al (eds) *Human Rights Manual for Prosecutors International Association of Prosecutors*, 2003.

7. Witness the publication in the *Daily Telegraph* of photographs of the home of a leading member of the private bar when he was counsel assisting in the AWB inquiry and when he had been previously been threatened as a result of a prosecution he had conducted.

8. *Randall v R* [2002] 1 WLR 2237 at 2241 citing *R v Puddick* (1865) 4 F & F 497 at 499 [176 ER 662 at 663] and *R v Banks* [1916] 2 KB 621 at 623.

9. *Libke v R* (2007) 235 ALR 517; [2007] HCA 30 at [71] per Hayne J.

10. *R v McCullough* (1982) Tas R 43: (1982) 6 A Crim R 274 (at 285).

11. The exceptional case the prosecutor will still be obliged to call the witness so that he or she may be cross-examined by the defence: The *Queen v Apostilides* (1984) 154 CLR 563.

12. See, for exampe, *Whitehorn v The Queen* (1983) 152 CLR 657 at 682 per Dawson J.

13. *R v McCullough* (1982) Tas R 43 at 57-8.

14. Cf. *Subramaniam v The Queen* (2004) 211 ALR 1 at [54].

15. *Plaintiff S157/2002 v The Commonwealth* (2003) 211 CLR 476 at 492[30].

16. JJ Spigelman AC, 'The Common Law Bill of Rights: First Lecture in the 2008 McPherson Lectures Statutory Interpretation & Human Rights', 10 March 2008.

17. See e.g. *R v Secretary of State to the Home Department; Ex parte Pierson* (1998) AC 539 at 587.

18. George Williams, *A Charter of Rights for Australia*, 3rd edition, 2007, p 51.

19. *Thomas v Mowbray* (2007) 237 ALR 194; [2007] HCA 33 at [379]-[380] per Kirby J.

20. The consultations conducted in other states have shown that many Australians, doubtless affected by a surfeit of American culture, mistakenly believe there are legislative guarantees.

21. Adrienne Millbank, 'The Detention of Boat People', 27 February 2001, http://www.aph.gov.au/library/pubs/CIB/2000-01/01cib08.htm

22. *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1.

23. *Re: Wooley* (2004) 225 CLR 1.

24. ibid., at [11].

25. *Behrooz v Secretary, Department of Immigration & Multicultural Affairs* (2004) 219 CLR 486.

26. *Al Kateb v Godwin* (2004) 219 CLR 562; *Minister of Immigration and Multicultural and Indigenous Affairs v Al Khafaji* (2004) 219 CLR 664.

27. MH McHugh AO QC, 'Does Australia Need a Bill of Rights?', A paper delivered to the NSW Bar on 8 August 2007.

28. Ian Barker QC, 'Human rights in an age of counter terrorism' (2005) 26 ABR 267.

29. *Child Protection (Offenders Prohibition Orders) Act 2004.*

30. *Crimes (Serious Sex Offenders) Act 2006.*

31. *Fardon v Attorney-General for the State of Queensland* (2004) 223 CLR 575.

32. Hansard, Legislative Council, 28 November 2007.

33. Hansard, Legislative Assembly, 7 June 2007.

34. Letter from Winston Churchill to the Home Secretary 21 November 1943 arguing for the release of Sir Oswald and Lady Moseley published in *W Churchill The Second World War Volume 5: Closing the Ring*, Houghton Mifflin (1986).

35. According to a report by David Marr published on 'Live Leak: redefining the media'.

36. *A v Secretary of State for the Home Department* [2005] 2 AC 68 at

37. Commonwealth of Australia, Parliamentary Debates, House of Representatives, 7 September 1939, p 164 (Robert Menzies, Prime Minister) cited in *What Price Security? Taking Stock of Australia's Anti-Terror Laws* by A Lynch and G Williams, UNSW Press, 2006 and MH McHugh AO QC, 'Terrorism Legislation and the Constitution' (2006) 28 ABR 117.

38. See the exhortation by the Rt Hon Malcolm Fraser for a federal bill of rights in 'Finding Security in Terrorism's Shadow: The importance of the rule of law', Inaugural professorial lecture, Asia Pacific Centre for Military Law, The University of Melbourne, 25 October 2007.

39. Lord Lester, *The Human Rights Act – Five years On*, 2003.

40. Home Office, Rights Brought Home: The Human Rights Bill (Cm 3782) (London, TSO, 1997).

41. Lord Lester, *The Human Rights Act – Five years On*, 2003 p 9.

42. Merris Amos, *Human Rights Law*, Hart Publishing, 2006, p 8.

43. (2004) 223 CLR 575 at [21].

44. Review of the Implementation of the Human Rights Act p 4.

45. 'Modernising the Magna Carta', a speech delivered at George Washington University by the Rt Hon Jack Straw MP, lord chancellor and secretary of state for justice, 13 February 2008.

46. http://www.britishacademy.ac.uk/pubs/src/tob02/woolf.html

47. http://usinfo.state.gov/products/pubs/principles/majority.htm

48. In this first inaugural address (4 March 1801) as quoted by Baroness Hale in *A v Secretary of State for the Home Office* at [237].

49. (2004) 233 CLR 575 at 628 [143].

50. Pearlman, Jonathan, 'Charter of rights plan to be put to cabinet', *Sydney Morning Herald*, 20 March 2006.

51. 2007 National ALP Platform chapter 13.

52. 'A Charter of Rights or a Charter of Wrongs?' – 10th April 2008.

53. *Human Rights Act 1998: Impact on Court Workloads*, Department of Constitutional Affairs, 14 November 2005.

54. Ken Macdonald QC, 'Security and Rights', 23 January 2007, http://www.cps.gov.uk/news/nationalnews/security_rights.html

55. Professor Clive Walker 'The United Kingdom's Anti-terrorism Laws' in Andrew Lynch & ors (ed) *Law and Liberty in the War on Terror*, Federation Press, 2007, p 192.