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Mr. David Blunt
Committee Director
Standing Committee on Law and Justice
Legislative Council
Parliament House
Macquarie St.,
Sydney NSW 2000

Dear Mr. Blunt,

Re: NSW Bill of Rights Inquiry

The NSW Parliament should seriously consider passing a legislative Bill of Rights. A legislative Bill of Rights has the advantage of not requiring amendment to the NSW Constitution but would introduce recognized international human rights standards into our domestic jurisprudence.

The International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights

The substance of the International Covenant on Civil and Political Rights (ICCPR) would offer a guide to some of the rights appropriate for inclusion in such legislation. The ICCPR contains:

- the "right to life" (Art.6),
- "right to liberty and security of person" (Art. 9),
- "freedom of movement" (Art.12),
- the right to due process before the Courts (Art. 14),
- rights to privacy (Art. 17),
- "freedom of thought, conscience and religion" (Art. 18),
- "freedom of expression" (Art. 19),
- right of peaceful assembly (Art. 21),
- "freedom of association (Art. 22),
- equality before the law (Art. 26),
- minority rights to participate in their own culture, practice their own religion and use their own language (Art. 27).

Rights in the ICCPR are vested in the individual. Only Articles 1 (the right to "self-determination" and 27 concern rights that have communal aspects to them.

The International Covenant on Economic, Social and Cultural Rights (ICESCR) should also be considered for inclusion but it must be remembered that, unlike the ICCPR, the ICESCR contains references to economic and cultural rights rather than

recognized civil and political rights. Inclusion of its subject matter into a domestic bill may be more contentious and harder to define. For example:

- the right to work (Art. 6),
- the enjoyment of just and favorable conditions of work (Art. 7),
- the right to form trade unions (Art. 8),
- the right to social security (Art. 9),
- the right to an "adequate standard of living" (Art. 11),
- the right to the "highest attainable standard of physical and mental health" (Art. 12)
- the right to education (Art.13)

The approach that I would recommend the Committee consider is to treat the contents of the ICCPR as 'core' rights and the substance of the ICESCR as rights to be considered in the interpretation of those 'core' rights.

This approach also recognizes that some individual rights can only be protected by mechanisms that protect the community or a minority group as a whole. For instance, the right to enjoy one's culture may vest in the individual but is empty in substance unless some recognition is given to the communal aspect of that individual right.

An "Equality" Provision – "Substantive", Not "Formal" Equality

Most important for the protection of the rights of vulnerable minorities, such as indigenous Australians, is the inclusion within a legislative Bill of Rights of an "equality" or "non-discrimination" clause. However, if such a clause is included, the legislation

must offer clear guidelines on how such clauses should be interpreted. Inequities that place indigenous peoples at the lowest level of Australia's socioeconomic ladder have developed and been perpetuated under an application of "one law for all." The *Final Report* of the Royal Commission into Aboriginal Deaths in Custody noted how inequalities had occurred within the criminal justice system by the supposed application of the "same rules" to different sectors of the Australian community. To avoid the further entrenchment of systemic racism under the guise of "equal application of law" direction needs to be given on the goal of a legislative Bill of Rights that would inform interpretation of its provisions. Emphasis must be made on the *achievement of equality as a result* of the application of rules, not just in the process of applying them. This means that the Bill of Rights must have a goal of achieving "substantive equality" rather than "formal equality".

Enforceability of a Legislative Bill of Rights

A legislative Bill of Rights offering protection of fundamental human rights should be of overriding importance and should not be derogated from easily. If it is simple for the Legislature to sidestep the provisions of such legislation it would give the impression that the Bill of Rights is merely symbolic, even farcical. Yet mechanisms must remain in place to ensure that, in extreme instances where anomalies in interpretation have given rise to undesired effects, there is some mechanism to ensure the legislation achieves its intended results. This may be done, for instance, by allowing the legislative Bill of Rights only to be overridden when the intention is explicitly stated in other legislation or the derogation is approved by Parliament through a special procedure.

The Culture of a Legislative Bill of Rights

One important advantage of a legislative Bill of Rights is that it leaves the creation and development of rights in the hands of the elected representatives of the people. The development of such legislation would encourage public debate on rights issues, facilitating a greater consciousness within the general populace of the importance of individual rights protections.

Please find attached as part of my submission an article published in *Arena Magazine* (Vol.45 Feb.-Mar. 2000) in which I highlight the benefits of a legislative Bill of Rights to indigenous Australians.

Thank you for inviting me to contribute to your Inquiry. I wish you all the best in your consideration of this important subject matter.

Yours sincerely,

Dr. Larissa Behrendt

Post-Doctoral Fellow

Bringing Australia up to Par: Indigenous Rights Protections and a Bill of Rights.

Dr. Larissa Behrendt[1]

Like most people leaving their country for the first time, when I first left Australia I began to romanticize about my homeland. I had never seen so many homeless people in my life as I saw on my first walk from Harvard Law School to Harvard Square (with four out of five being black). It amazed me that within the walls of Ivy League academia race (as it pertained to African Americans) was so much a part of the critical rhetoric but issues of class seemed to be completely overlooked in this elite environment that assumed that every *man* could be President.

Filled with nationalist sentiment towards "the battler", I would gain great pleasure from telling Americans about Australia's workers rights, strong union tradition and safety-net welfare. But these things I held so dearly and ideally about Australia eroded with the change over from the Keating to the Howard government. When I finally returned to Australia six years later, it was a country with more shareholders than union members.

Nowhere was my opinion more changed than in relation to rights protection in Australia. I had always thought that the legislative frameworks of the *Racial Discrimination Act 1975 (Cth)* and the *Sex Discrimination Act 1984 (Cth)* would provide adequate protection against discrimination and so it was unnecessary to have the entrenched constitutional protections like those within the United States Constitution. The precarious nature of this legislative framework was revealed to me as I watched developments in Australia surrounding the recognition of native title. The political

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debates surrounding judicial pronouncements on native title included calls for the repeal of the *Racial Discrimination Act 1975 (Cth)* to prevent its protection of indigenous property interests. This vulnerability was further highlighted in the passing of legislation in 1997 that precluded the application of the Act to various aspects of native title interests.

As constitutional lawyer George Williams notes in his book *Human Rights under the Australian Constitution* (OUP, 1999), the framers of the Australian Constitution intended to create a framework that would discriminate on the basis of race. They wanted to maintain the ability to discriminate on the basis of race both in relation to indigenous people (who were to be confined to missions and reserves) and potential immigrants (who were to be kept out if they were not white). At the dawn of the twentieth century, it was assumed that Aborigines were a dying race and predominant views about Aboriginal people were racist, whether benevolently or malevolently so; Aboriginal status under law was that of ward rather than citizen. Australia is still burdened by its lack of rights protections. This burden falls hardest on indigenous Australians.

The High Court in *Kruger v. Commonwealth* (1997) 190 CLR 1 noted that the Australian Constitution is not a document that guarantees equality. The *Kruger case* was a claim by, *inter alia*, five members of the stolen generation for compensation based on their removal from their families under government legislation that was part of a race-based assimilation policy. In his judgement, Justice Dawson stated that "…the plain matter of fact is that the common law has never required as a necessary outcome the equal, or non-discriminatory, operation of laws."

The Constitution with its intended racial difference has left Australian in a human rights wasteland. Unlike Canada, the United States, South Africa, New Zealand and the United Kingdom, there is no Bill of Rights in Australia, constitutionally or legislatively. Aboriginal rights remain vulnerable to legislative extinguishment and we have seen, especially in relation to the *Native Title Amendment Act 1997 (Cth)*, that the government can be precisely so inclined to exert such a power to the detriment of Aboriginal people.

With this concern for the vulnerability of indigenous rights in Australia, I was interested to explore indigenous rights protections in Canada. In the United States, the political agenda and rights protections of Native Americans seemed eclipsed in national debates by the more politically organized and more visible African Americans, but in Canada there was more attention paid to indigenous rights within national political debates. There is constitutional, legislative, judicial and political recognition of the rights of Aboriginal people in Canada, namely:

- A specific constitutional protection of "Aboriginal and treaty rights" in s.35 of the Constitution Act, 1985.
- A recognized inherent right to self-government which forms the basis of government policy in relation to Aboriginal people.
- A common law fiduciary obligation owed by the government to indigenous peoples in relation to certain dealings and legislative acts.

The judicial developments within Canada have also given rise to duties owed by the Canadian government to negotiate and consult with Aboriginal peoples who may have their rights infringed by legislative action. All of these rights have the constitutional protection of s.35 of the *Constitution Act, 1985*.

It is important to note that these strong protections of indigenous rights have not led to an indigenous utopia. Socioeconomic statistics are on par with those of Australian Aborigines and there are First Nations communities that have no running water and one needs only to look at the Royal Commission on Aboriginal Peoples to see the disparity between Aboriginal peoples in Canada and all other Canadians. The violent backlash to a recent Supreme Court determination on fishing rights (*R v. Marshall*, unreported; November 5, 1999) illustrates the extent of societal conflict and antagonism towards indigenous rights.

Despite the imperfections of the Canadian system, it offers several possible routes in which indigenous rights may be better protected in Australia. What the experience in the *Kruger case* and the overriding of the *Racial Discrimination Act 1975 (Cth)* provisions in the *Native Title Amendment Act 1999 (Cth)* shows is that legislative whims to infringe on indigenous rights need to be tempered. The best way to do this is with a specific constitutional protection like the one provided in s.35 of the Canadian *Constitution Act, 1985*. The result of the recent Republic and Preamble Referendum shows the problem for constitutional protection of specific rights for pragmatists. The Australian electorate is traditionally resistant to constitutional amendments, rarely voting to pass them. And indigenous rights are a contentious political subject matter that would have trouble gaining the broad support needed. This was evident in the proposed Preamble where relation of indigenous peoples to their lands was described by the inoffensive, legally neutral term ‘kinship’. This term, so minimal as to be mere rhetoric, was given the added impotence of being specifically excluded from use as an interpretive tool when deciphering the content of the Constitution. The Preamble would not have

assisted in countering the pervasive racism and lack of equality principles running through the document. And even this minimal, merely symbolic approach was not achievable.

While I believe that a constitutional protection is desirable and the best possible protection of indigenous rights in Australia, I concede that it is politically unachievable, and, at least in the short term, remains merely an aspirational goal. Similarly, a Statement of Indigenous Rights, developed by the indigenous community, could give political direction to governments, indigenous leaders, and rights activists even though it is unlikely, given the current political climate, that such a statement could gain legal weight.

The Republic Referendum showed that there would be an uphill battle for any proponents of constitutional change. A first step, to avoid the probably unachievable goal of a constitutional Bill of Rights would be a Bill of Rights in legislative form, as has been adopted in New Zealand and the United Kingdom. Not only does this have the advantage of being a minimalist approach, it also has the added attraction of being a process that could engage the public in the content of the Bill, giving Australians a greater interest and feeling of association with and ownership of the outcome. This would help to create a culture of rights protection in the Australian psyche and perhaps help to shift some popular misconceptions about Aboriginal rights being special rights. The ability of a legislative Bill of Rights to engage broad political participation from the Australian public has been emphasized by George Williams in his book *A Bill of Rights for Australia* (UNSW Press, 2000).

A legislative Bill of Rights offers a minimalist, more flexible and achievable political goal. A general equality clause applying to all Australians would greatly favour

indigenous Australians without the need to argue for specific rights protections. Institutional entrenchment, ideally, in the long term, constitutional entrenchment, of a Bill of Rights would benefit Aboriginal people to the greatest extent.

It is unacceptable at the end of the twentieth century that we see Australia in the lowest standard of rights protection. The challenge of the twenty-first century will be to change this and to bring Australia up to world standards in the protection of human rights, especially those of Australia's indigenous people. A legislative Bill of Rights would be a positive place to start.