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NSW Bill of Rights Inquiry

I write in response to the letter of invitation from the Hon Ron Dyer MLC, Chair of the Committee, to make a submission to the current inquiry. I happen to be Chairperson of the Advisory Committee of the Indigenous Law Centre at the University of NSW, and a similar letter was sent to Dr Mick Dodson from the Centre. Dr Dodson has been away, and it has not been possible to prepare a separate submission for approval by the Centre's Management Committee. So comments on Indigenous issues should be regarded as my own personal comments rather than being attributed to the Centre.

In addition, I have been able to prepare this submission only very close to the closing date, and it is not as detailed as I would have preferred it to be.

I turn now to the terms of reference for the Inquiry.

In the first place, I favour the enactment of a statutory Bill of Rights for NSW as being appropriate and in the public interest. I would not favour, at this stage, an entrenched Constitutional Bill of Rights. The experience of Canada leads me to believe that it is better to commence with a statutory document and only after a number of years to consider moving towards any more rigid arrangement. Canada adopted, at the national level, a statutory Bill of Rights in 1960 and only after some 22 years was a Charter of Rights written into the 1982 Constitution. That period allowed Canadians time to become accustomed to the idea. It also allowed the original provisions to be interpreted and tested in the courts and elsewhere as a sort of trial run for the later rewrite.

In addition, or in the alternative, the *Interpretation Act 1987* could usefully be amended to require courts to take into account human rights standards in international instruments, at least those which have been ratified or otherwise accepted by Australia. The Court of Appeal of NSW, and the High Court of Australia, have in a number of cases indicated that it is permissible to refer to such material in resolving ambiguities in the meaning of legislation or in developing the common law. It would be valuable to incorporate this principle, at least, into the *Interpretation Act 1987.*

On the particular questions:

a) whether the rights declared in the International Covenant on Civil and Political Rights should be incorporated into domestic law by such a Bill of Rights.

The ICCPR has been ratified by Australia, as has the Optional Protocol to the Covenant, permitting Australians to communicate to the Human Rights Committee. This was noted by Justice Brennan in his judgment in *Mabo v Queensland* (1992) 175 CLR 1. Australia has not enacted specific legislation implementing Covenant obligations in Australian law, in contrast with the enactment of the *Racial Discrimination Act 1975* (Cth) which implemented in Australian law most of the obligations Australia accepted when it ratified the International Convention on the Elimination of All Forms of Racial Discrimination. But the Australian Parliament has scheduled the ICCPR to its *Human Rights and Equal Opportunity Commission Act 1989* (Cth). It is also incorporated by reference in the legislation establishing the Australian Law Reform Commission. Thus the ICCPR is a primary claimant for incorporation in a State Bill of Rights, particularly as its provisions so closely reflect Australian traditions and Australian law.

b) whether economic, social and cultural rights, group rights and the rights of indigenous peoples should be included in a bill of rights.

Australia has ratified the International Covenant on Economic, Social and Cultural Rights. The 1993 Vienna World Conference on Human Rights resolved that the two "sets" of rights are indivisible and interdependent. The major distinction is that Australia is less accustomed to the idea that some of those rights should be "justiciable" in terms of court enforcement, though some of them clearly are, such as rights in the area of industrial relations. However the Australian Parliament has not scheduled this Covenant to the *Human Rights and Equal Opportunity Act 1989* (Cth).

Personally, I would favour associating both "sets" of rights within the one document. At the international level, this had been done in 1948 in the *Universal Declaration of Human Rights.*But it might be safer to commence with the less controversial step of confining attention to the rights under the ICCPR.

Similarly, it would probably be wise to avoid any substantial recognition of group rights at the outset, beyond those which are already acknowledged in the ICCPR such as freedom of association, freedom of religion, and so on.

Recognition of rights in the ICCPR would go a long way to addressing significant needs of Aboriginal people and Torres Strait Islanders in NSW. In particular, the ICCPR Article 2 contains an important statement of the principle of non-discrimination on the basis of (*inter alia)* race.

However, Indigenous Australians argue forcefully that their separate and collective rights as the First Peoples should be acknowledged. Such rights would include land rights and rights related to culture. The 1982 Canadian Constitution recognises and affirms existing aboriginal (and treaty) rights. I would support specific recognition of such rights. It can be done in three or four simple provisions. Something similar was proposed for the

Northern Territory in the report of the Sessional Committee on constitutional development.

c) whether individual responsibilities as distinct from rights should be included in a Bill of Rights.

This notion has become popular in some circles, but I have yet to be persuaded that it can be done in a way that justifies the exercise and that adds anything useful to the process. So, again, at this stage, I would not favour the proposal.

d) the consequences for Australian comon law of Bills of Rights in the United Kingdom, Canada and New Zealand.

Australia is beginning to look like the odd man out in being one of the last of the lands settled by the British not to have moved in this direction. Judicial decisions in these other jurisdictions may help to inform decisions in this country and, thus, to influence the common law within the scope left available by legislation in this country.

e) in what circumstances Parliament might exercise its ultimate authority to override basic rights declared in a Bill of Rights and what procedures need to be put in place to ensure that any such overriding legislation complies with the Bill of Rights.

Such overriding legislation would comply with the Bill of Rights only to the extent that the Bill of Rights would authorise it. There are gradations of override provisions available. At the lowest level, if the Bill of Rights simply declares rights, it can be overridden by a later statute which is expressly or impliedly inconsistent with it. At a slightly higher level (as under the 1960 Canadian statute) the Bill of Rights could attempt to require courts and others to interpret any subsequent legislation consistently with the Bill of Rights. At a higher level still, there could be a special procedure entrenched in the Bill of Rights requiring a particular majority or a particular process to override the Bill of Rights.

At this stage I would propose that the Bill of Rights provide that, if a court should rule that particular legislation or governmental action is inconsistent with the Bill of Rights, then it should be invalid unless the NSW Parliament, within, say, three months, expressly affirms that action.

g) the extent and manner in which the rights declared in a Bill of Rights should be enforceable.

My response follows from my response to e). The rights declared in the Bill of Rights would be legal rights enforceable by the usual processes of the law, including potential invalidity (subject to the override power). It may also be useful to consider establishment of a body such as a human rights commission to conduct inquiries, attempt conciliation, etc. There might be a case for vesting some such commission functions in existing

entities such as the Anti-Discrimination Board, or to build a new commission around existing entities.

h) whether a Bill of Rights should be subject to any reasonable limits prescribed by law that are demostrably justifiable in a free and democratic society.

I agree with the proposal. Rights should not be seen as absolute. Rights declared in the ICCPR are subject to specific classes of exemptions. The phrase suggested has acquired some meaning over a number of years of jurisprudence, particularly in Canada.

i) whether there should be a legislative requirement on courts to construe legislation in a manner which is compatible with international human rights instruments.

In principle I support a provision along these lines, as I indicated at the beginning of this submission. It would need careful drafting.

Again, I apologise for the sketchiness of this submission. If the Committee wishes, I could attempt to provide it with fuller supportive information and material.

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