



Talking Point

By rights a surer guardian

WAYNE CRAWFORD

23 September 2006

[Hobart Mercury](#)

Copyright 2006 News Ltd. All Rights Reserved

IF Prime Minister John Howard was serious about the "Australian values" he's been preaching as prerequisites for citizenship, he would support a bill of rights for the country.

What better way to articulate and enshrine the values for which we stand than to set them out as a guaranteed set of rights under law? . . . basic, internationally recognised entitlements, such as the right to freedom of association (mateship?), freedom of speech (thumping your nose at authority?), the right to life, liberty, security, freedom from torture -- values which we take for granted but which have little or no legal protection.

However, the Prime Minister would not support the legislation of these values -- the Liberals have always opposed a bill of rights and in previous decades used their numbers in the Senate to block repeated attempts by Labor governments to introduce one.

Still, things may be changing, at least in Tasmania. The State Labor Government has commissioned the independent, University of Tasmania-based Law Reform Institute to investigate whether we should have a charter of rights and the Liberal Opposition has at least declared itself open to the idea. With the Greens even more enthusiastic than the Government about a bill or charter of rights, there's some chance it might have virtually unanimous approval, at least in the House of Assembly (which would make it very difficult for the Legislative Council to oppose it). It's early days but Tasmania has at least taken the first steps in following the lead set first by the ACT and then Victoria in bypassing the federal intransigence on the issue by introducing territory and state-based bills or charters of rights.

For the country is the only Western nation without a bill or charter to protect what should be inalienable rights. Indeed, as the retired chief justice of the Family Court and outspoken human rights advocate Alastair Nicholson noted in an address in Hobart last year, Australia is now in the company of countries such as Brunei and Burma in refusing to provide its citizens such protection.

The primary argument by conservatives against a charter of rights has been that it's unnecessary here because existing protections are adequate, with the rule of law enforced under a British system of parliamentary democracy which divides power between parliament and an independent judiciary.

Yet in an age when asylum-seekers and Muslims are demonised, politicians from both sides invoke fear of terrorist threats to justify Draconian police powers and judges who intervene to uphold rights are condemned as meddling activists, can we really trust governments to protect our liberties without the introduction of further safeguards on rights?

Former Liberal prime minister Malcolm Fraser -- who in the '70s and '80s was among the Liberals who blocked Labor's attempts to introduce a federal Bill of Rights -- has made an unprecedented reversal of policy, joining a national community-based campaign last year to draft an Australian bill of human rights. He says Australia has moved to the right, making social issues subsidiary to economic and financial ones. Fraser says the common law no longer protects normal rights for us and new anti-terrorism laws threaten liberties that people take for granted.

Now, the state Liberals also seem to be showing signs of coming around. Opposition shadow attorney-general Michael Hodgman, long wary of spelling out human rights in legislation, says he is open to persuasion if it can be demonstrated to him that a charter of rights would give better protection than now exists. There's little doubt he has been influenced by the liberal approach taken by his Leader (and son) Will Hodgman who, Michael acknowledges, "has expressed interest in the proposal" for such a charter and is inclined to support it in principle, depending on the details.

It was the Greens who were first out of the blocks in Tasmania in proposing a bill of rights for the state. Leader Peg Putt introduced legislation last year which would have enshrined rights contained in the International Covenant on Civil and Political Rights -- such as equality before the law; protection from torture or cruel or degrading treatment; protection of privacy and reputation; freedom of movement, thought, conscience, religion and belief, peaceful assembly and association; freedom of expression; the right to liberty, security, a fair trial and compensation for wrong conviction.

THE bill was never debated and it was overtaken by events when former attorney-general Judy Jackson announced the Government had asked the Tasmanian Law Reform Institute to investigate whether a charter of rights was needed and, if so, the best model to suit the state. Since the March election, new Attorney-General Steve Kons has taken on the project, endorsed the Institute's work and implied general in-principle support for a Tasmanian Charter of Rights.

The institute, which operates from the university's law school and also gets some funding help from the State Government, has put together a 55-page discussion paper which is being used as the basis for wide-ranging community consultations with a committee headed by senior lecturer in law and Institute acting director Terese Henning.

Henning says human rights in Tasmania are protected only by "a patchwork of sources" which are fragmented and incomplete, leaving significant gaps and shortcomings in the protection of rights. The current law does not provide a clear statement of basic human rights of Tasmanians or set minimum standards for government and public authorities -- no general yardstick by which to judge legislation and the actions of public bodies. Nor is there any overarching federal protection, given that ours is now the only common-law country without a bill of rights.

Advocates of a bill or charter say ideally it should be a national law but in the absence of any likely movement in that area, states and territories are beginning to go their own way.

The ACT was first to move with its Human Rights Act in 2004. Henning says it has had a major and positive effect, creating a climate in which legislation and the conduct of public authorities are tested against the standards set down in the Act. For example, there had been changes in the way youth detention centres were run as a result of the new law.

Also, when the Federal Government enacted harsh anti-terrorism legislation last year -- in co-operation with state governments, which effectively ceded powers to the Commonwealth -- the ACT alone had stood up against the Draconian measures and, because of its Human Rights Act, had passed a "thinking piece of legislation" which was far less severe than applied in the states.

The only other state to have passed a Charter of Human Rights and Responsibilities is Victoria, which did so last July. It will come into force in January, after which any new legislation introduced into State Parliament will have to be accompanied by a statement indicating it is compatible with the charter; and Victorian courts will be required to interpret legislation in a way that is compatible with the charter (or, where this is not possible, a report must be made to Parliament).

One issue which will need to be addressed by the Law Reform Institute is how to strike a balance between a law which will evolve according to the mores of society and how the courts interpret it, and the supremacy of Parliament. Unlike a national bill of rights incorporated in the Constitution -- and therefore able to be amended only by referendum -- any state charter of rights would be like any ordinary statute which can be amended or repealed at Parliament's discretion, unless special provisions were included to make amendment more difficult.

The Canadians, in their Charter of Rights and Freedoms, have provided that if a court declares a law is inconsistent with the Charter, Parliament retains the power to pass a law overriding the Charter or upholding the Charter and invalidating the offending law. This ensures the supremacy of Parliament is maintained. In New Zealand, the government can enact legislation inconsistent with their Bill of Rights but the Attorney-General must first inform Parliament of the inconsistency.

Henning says the effect on the legal culture in most countries which have introduced bills or charters of rights has been "dramatic".

She describes the Tasmanian project as "really exciting" and says it has the potential to "change the way we think about enacting and interpreting our laws" -- and create a climate encouraging vigorous debate and scrutiny not only of our legislation but also of the conduct of institutions and authorities.

To that extent, the effect of a charter of rights surely can only be healthy. * The issues paper "A Charter of Rights for Tasmania?" can be found at the Tasmanian Law Reform Institute's website www.law .

utas.edu.au/reform. Terese Henning can be contacted about consultation or submissions at Terese.Henning@utas.edu.au. Submissions will be taken until November 30.